
MODERNIZING DIVORCE JURISDICTION: SAME-SEX COUPLES AND MINIMUM CONTACTS

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There are tens of thousands of same-sex married couples in the United States. A significant number of these couples, however, cannot divorce. First, many same-sex spouses cannot divorce in their home states because the relevant state law precludes recognition of same-sex marriages. Second, an anomalous jurisdictional rule makes it difficult for these spouses to divorce elsewhere. In contrast to the rules governing other civil actions, one of the spouses must be domiciled in the forum for a court to have jurisdiction over a divorce.

This Article considers the second hurdle – the domicile rule. Previously, divorce jurisdiction was a subject of intense interest to the Court and to legal

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scholars. But despite an ever-increasing disjunction between divorce jurisdiction and general principles of state court jurisdiction, critical examination of the domicile rule has largely disappeared.

This Article responds to recent calls to challenge the myth of family law exceptionalism by critically analyzing the domicile rule. After considering the domicile requirement in the context of state court jurisdiction doctrine more generally, this Article contends that the time has come to abandon the domicile rule. Abandonment of the rule alone, however, does not fully resolve the problem. Accordingly, this Article advances a set of normative proposals to ensure that all spouses have a forum in which to divorce.

INTRODUCTION

The story begins unexceptionally. In 2006, John and his spouse lawfully married in Massachusetts, where the couple then resided.¹ Two years later, the couple moved to Texas.² Shortly thereafter, John and his spouse decided to end their relationship.³ The parties filed for divorce in Texas, their new home state.⁴ At this point, the story took an unusual course. Although Texas allows no-fault divorce,⁵ the appellate court concluded that Texas courts lacked jurisdiction to entertain the divorce action.⁶ Texas courts lacked jurisdiction, the court reasoned, because Texas law prohibits the state from recognizing – for any purpose – a marriage between two persons of the same sex.⁷ While that conclusion certainly created an obstacle for the couple, one might ask the question: Can't they simply go to some other jurisdiction to get divorced? In particular, can't they go back to Massachusetts, where they married, and get divorced there? If divorce actions were governed by the personal jurisdiction rules applicable to other civil actions, the answer likely would be yes.⁸ Unfortunately for John and Henry, however, typical personal jurisdiction rules do not apply to actions to dissolve a marital relationship.⁹

¹ *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010). The court refers to the parties to the action by their initials. Throughout this Article, I refer to "J.B." as John and "H.B." as Henry for ease of reference.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ TEX. FAM. CODE ANN. § 6.001 (West 2007).

"No-fault divorce" means that a divorce can be obtained solely on the basis of the breakdown of the marital relationship without a showing of fault or misconduct. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 5 (1987).

⁶ *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 667.

⁷ *Id.* ("We conclude that Texas courts have no subject-matter jurisdiction to adjudicate a divorce petition in the context of a same-sex marriage.").

⁸ See *infra* Part IV.A.

⁹ See, e.g., IRA MARK ELLMAN, ET AL., FAMILY LAW: CASES, TEXTS, PROBLEMS 759 (5th

Thousands of same-sex couples find themselves like John and his spouse¹⁰ – “wedlocked.”¹¹ They are in marriages considered valid in some jurisdictions in the U.S.¹² but, as a practical matter, are unable to obtain a divorce. This result is produced by the concurrence of two factors. First, like Texas, the vast majority of jurisdictions in the United States have statutory and, increasingly, constitutional provisions stating that the jurisdiction will not recognize marriages between two people of the same sex.¹³ A number of courts have

ed. 2010) (“The idea that termination of a marriage may have special jurisdictional rules has a long history.”); *Developments in the Law – State-Court Jurisdiction*, 73 HARV. L. REV. 911 (1960) [hereinafter *State-Court Jurisdiction*] (“With respect to divorce particularly the courts have consistently adhered to a jurisdictional standard – based exclusively on the domicile of at least one of the parties – which differs fundamentally from the tests applied to other types of actions.”); Linda Silberman, *Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?*, 82 TUL. L. REV. 1999, 2008 (2008) (“[F]or the most part, divorce in the United States is not treated as an ordinary transitory action. Jurisdiction in divorce cases is not based on the defendant’s relationship to the forum, which is critical to the exercise of personal jurisdiction in an ordinary case. Rather, the marriage is to some degree treated as the res, and ... the domicile of either party will suffice for jurisdiction.”); Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 1 (1997) (“The jurisdictional rules that apply in divorce cases are the precise opposite of those that apply in all other cases.”).

¹⁰ As discussed in more detail herein, a large percentage of the married same-sex couples in the United States live in jurisdictions that do not recognize their marriages. See *infra* note 54 and accompanying text.

¹¹ I borrow this term from Mary Patricia Byrn and Morgan Holcomb, *Wedlocked*, FAM. CT. REV. (forthcoming 2011).

¹² As of September 2011, seven jurisdictions – Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and the District of Columbia – permit same-sex couples to marry. See HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS [hereinafter RELATIONSHIP RECOGNITION LAWS], http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf. In addition, a number of other states appear to recognize same-sex marriages entered into in other jurisdictions even though they do not permit same-sex couples to marry within the jurisdiction. See, e.g., *id.* (stating that Maryland recognizes marriages between same-sex couples entered into in other jurisdictions); see also *Are Same-Sex Marriages Performed in Other Jurisdictions Valid in New Mexico?*, N.M. Att’y Gen. Op. No. 11-01 (January 4, 2011), available at <http://www.nmag.gov/Opinions/Opinion.aspx?OpID=1131> (concluding that “a same-sex marriage that is valid under the laws of the country or state where it was consummated would likewise be found valid in New Mexico”).

¹³ See, e.g., Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265 (2007) (examining the effects of state or mini-DOMAs); *Statewide Marriage Prohibitions*, HUM. RTS. CAMPAIGN (last updated Jan. 13, 2010), http://www.hrc.org/documents/marriage_prohibitions_2009.pdf [hereinafter *Marriage Prohibition Laws*]. Many of these provisions address not just marriage recognition but also recognition of other legal statuses, such as domestic partnerships and civil unions. See, e.g., *id.* (explaining that as of January 13, 2010, eighteen states had statutory or constitutional provisions that included language that “does, or may, affect other legal relationships, such as

concluded that these provisions similarly preclude a court from granting a divorce to a same-sex spouse.¹⁴ Second, long before there were any legal disputes regarding same-sex married couples, courts developed an anomalous rule governing jurisdiction for divorce actions.¹⁵ In other civil actions, state courts have personal jurisdiction so long as there is a sufficient connection between the defendant, the claim, and the forum.¹⁶ By contrast, although the issue has never been definitively decided by the Supreme Court,¹⁷ it is widely understood that for a court to have such power over a divorce action, one of the spouses must be domiciled in the forum;¹⁸ no consideration is given to the connection or lack thereof between the defendant and the forum.¹⁹ As Rhonda

civil unions or domestic partnerships”).

¹⁴ See *infra* Part I.

¹⁵ See *supra* note 9. I thank Katherine Franke (and, by extension, Carol Sanger) for pointing out that while anomalous, the domicile rule is not unique. The Indian Child Welfare Act (ICWA) statutorily premises jurisdiction on, among other things, domicile. 25 U.S.C. § 1911(a) (2006).

¹⁶ See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

¹⁷ HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 13:2, at 724 (2d ed. 1987) (“The United States Supreme Court has not squarely held that domicile is the only possible basis for divorce jurisdiction, but its opinions have contained *dicta* to that effect.” (footnote omitted)); see also *infra* note 35.

Although the issue has never been definitively resolved by the Supreme Court, many scholars and jurists understand domicile to be a jurisdictional prerequisite and the divorce laws in almost all fifty states are premised on this understanding. Accordingly, I refer throughout this Article to the “domicile rule” or the “domicile requirement.”

¹⁸ See, e.g., Wasserman, *supra* note 9, at 2 (“In divorce cases . . . as long as the petitioning spouse is domiciled in the rendering state, the decree is valid there and enforceable elsewhere, even if the court lacked *in personam* jurisdiction over the defending spouse.”); see also JOHN DE WITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* 245 (3d ed. 2005).

¹⁹ Although some scholars and courts have described it otherwise, the divorce jurisdiction rule is properly understood as relating to the court’s power over the parties or the thing that is the subject of the action; it is not a rule limiting the court’s subject matter jurisdiction. This understanding is confirmed by the Supreme Court’s own explication of the domicile rule as an exception to the usual rules of personal jurisdiction. For example, as discussed in more detail in note 164 *infra*, in explicating the standard for evaluating personal jurisdiction, the Court in *Pennoyer v. Neff* stated that these usual rules were not intended to affect the distinct rules governing jurisdiction in status cases, such as divorce. 95 U.S. 714 (1878). Likewise, when the Court more recently refined these rules in *Shaffer v. Heitner*, the Court again emphasized that its refinements to the usual rules of personal jurisdiction were not meant to alter the “particularized rules governing adjudications of status.” 433 U.S. 186, 208 n.30 (1977). This conclusion is further supported by courts’ attempts to rationalize or make sense of the domicile rule by describing divorce actions as “in rem” actions. See *supra* notes 152-157 and accompanying text. Accordingly, unless stated otherwise, when I refer to jurisdiction in this Article, I am referring to the court’s power over the parties or the thing that is the subject of the litigation, and not to subject

Wasserman has explained, not only are the jurisdictional rules “inverted,” but the “choice of law approach taken in [divorce] cases is unusual too.”²⁰ In other actions, courts apply general choice-of-law principles to determine which law applies. In an action to terminate the marital relationship, however, courts “eschew choice-of-law analysis and instead always apply their own divorce law.”²¹ These rules are examples of “family law exceptionalism” – the notion or myth that family law “rejects what the law otherwise does; and does what the law otherwise rejects.”²²

The plight of these wedlocked same-sex couples presents a number of legal issues that could be addressed. One could examine the constitutionality of state statutes or state constitutional provisions purporting to deny recognition to same-sex marriages, or one could consider whether the failure to provide reasonable access to divorce violates the substantive due process rights of the members of the couple.²³ One also could argue that even if the state does not

matter jurisdiction.

As discussed above, however, some scholars and courts have described the domicile rule as relating to or limiting the *subject matter* jurisdiction of a court adjudicating a divorce action. See, e.g., CLARK, *supra* note 17, § 13:2, at 704.

²⁰ Wasserman, *supra* note 9, at 2; see also Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Conflict of Laws*, 32 CREIGHTON L. REV. 1085, 1102 (1999) (“[Under a jurisdictional rule based on domicile], it was justifiably taken for granted that the forum state would apply its own substantive law of divorce. Thus, unknowingly or understandably, the choice-of-law question had been merged into the jurisdictional question.”).

²¹ Wasserman, *supra* note 9, at 2.

²² JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED: RECASTING THE CANON* 4 (forthcoming) (on file with author); see also *id.* at 8 (observing that “family law can be thought of as a system of exemptions from the everyday rules that would apply to interactions among people in a non-family law context”) (citing Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207 (1999)); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 753 (2010) (introducing an issue of the journal devoted to “‘family law exceptionalism’: the myriad ways in which the family and its law are deemed, either descriptively or normatively, to be special”).

²³ For further discussion of these issues, see, for example, Byrn & Holcomb, *supra* note 11, and Colleen McNichols Ramais, Note, *'Til Death Do You Part . . . And This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013. Although the Supreme Court has never decided whether individuals have a fundamental right to divorce, a number of scholars have argued that such a right exists. See, e.g., *Developments in the Law – Rights Associated with Divorce and Child Custody Relationships*, 93 HARV. L. REV. 1308, 1310 (1980) (arguing that infringements of the “[t]he substantive right to obtain a divorce” should be subjected to something higher than rational basis review); J. Harvie Wilkinson & Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 574-75 (1977).

recognize the couple's marital status for all purposes, it should nonetheless recognize particular incidents of the marriage, including divorce.²⁴

Although interesting, these avenues of inquiry are not addressed in this Article. Instead, this Article focuses on the second hurdle – the domicile rule. In contrast to the other legal issues described above, critical examination of the domicile rule has been almost entirely omitted from contemporary family law and jurisdiction scholarship.²⁵ For the most part, contemporary legal scholarship has failed to subject the rule to serious consideration and critique. Instead, the rule generally is simply accepted as another example of “family law’s exceptionalism.”²⁶ The plight of same-sex spouses provides an important and long overdue impetus to push back against this trend of exempting family law rules from rigorous theoretical analysis.²⁷ In so doing, this Article responds to recent calls to “challeng[e] the exceptionalism of family law.”²⁸

At one time, divorce jurisdiction was a subject of intense interest to the Court and to legal scholars.²⁹ As one commentator wrote in the early to mid-twentieth century, “[t]he recognition of divorce decrees has perhaps created more concern in the United States than any other legal issue.”³⁰ At the time, there was significant variation between the states with respect to the

²⁴ See, e.g., Herma Hill Kay, *Same-Sex Divorce in the Conflict of Laws*, 15 KING'S C. L.J. 63, 71 (2004) (arguing that a California court could recognize a marriage between two people of the same sex for the “limited incidental purpose of dissolving it”).

²⁵ A few notable exceptions to this statement are Helen Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 502 (1980); Wasserman, *supra* note 9; Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813 [hereinafter Wasserman, *Parents, Partners*].

²⁶ HASDAY, *supra* note 22, at 3.

²⁷ *Id.* at 4 (stating that “the presumption of family law’s exceptionalism may help account for the lack of scholarly focus on family law’s canon”).

²⁸ Ann Shalleck, *What is the Global Family? Family Law in Decolonization, Modernization and Globalization*, 19 AM. U. J. GENDER SOC. POL’Y & L. 449, 451 (2011).

²⁹ See, e.g., John R. McDonough, Jr., *Mr. Justice Jackson and Full Faith and Credit to Divorce Decrees: A Critique*, 56 COLUM. L. REV. 860, 860 (1956) (“From October 1941 to October 1954, the Court decided ten cases which shaped the present law with respect to recognition of sister-state divorce decrees.” (footnote omitted)). In addition to the relatively large number of relevant Supreme Court cases decided during this period, thousands of law review pages were devoted to examining these questions. See, e.g., Herbert F. Goodrich, *Divorce Problems in the Conflict of Laws*, 2 TEX. L. REV. 1, 3-4 (1923); Erwin N. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees – A Comparative Study*, 65 HARV. L. REV. 193 (1951); Ernest G. Lorenzen, *Extraterritorial Divorce – Williams v. North Carolina II*, 54 YALE L.J. 799 (1945); Thomas Reed Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930 (1945).

³⁰ James D. Sumner, Jr., *Full Faith and Credit for Divorce Decrees – Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 1 (1955).

substantive and procedural requirements for divorce.³¹ States with stricter divorce requirements wanted to protect their laws and related policy judgments from what they perceived as inappropriate encroachment by other jurisdictions. Tying divorce jurisdiction to domicile, which all but one state did,³² made it more difficult for people to evade the divorce requirements of their home states. If a spouse wanted to obtain a divorce in another state – presumably a state with less demanding requirements – he or she needed to pick up and move to that other state.³³

In the *Williams* cases³⁴ in the 1940s, the Supreme Court appeared to agree with earlier state court holdings that the domicile of at least one spouse was important to a state's power to issue a divorce decree,³⁵ or at least important to a state court's power to issue a divorce decree entitled to full faith and credit in other states.³⁶ And, certainly, many courts and commentators read the *Williams* cases as endorsing the principle that a court has jurisdiction to grant a divorce only if at least one of the parties is domiciled in the forum.³⁷

³¹ See *infra* notes 123-137 and accompanying text.

³² Michael M. O'Hear, Note, "Some of the Most Embarrassing Questions": *Extraterritorial Divorces and the Problem of Jurisdiction Before Pennoyer*, 104 YALE L.J. 1507, 1529 (1995) ("With the sole exception of South Carolina . . . all states tied divorce jurisdiction to domiciles . . ."); see also Garfield, *supra* note 25, at 502.

³³ See, e.g., Wasserman, *supra* note 9, at 26 ("States attempted to retain sovereign power over their domiciliaries' marital status" by developing a jurisdictional rule that permitted courts of each state to "assert[] jurisdiction only over divorce actions filed by its own domiciliaries.").

³⁴ *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945); *Williams v. North Carolina (Williams I)*, 317 U.S. 287 (1942).

³⁵ The Supreme Court has never directly addressed the circumstances under which a court has jurisdiction to enter a divorce decree in the first instance. The Court has, however, decided a number of cases that considered whether and to what extent divorce decrees are entitled to full faith and credit in other states. In the course of addressing the interstate recognition question the Court included language suggesting that domicile is key *not only* to ensuring recognition of the divorce decree in other states but also to the decree court's jurisdiction in the first instance. For example, in his opinion for the Court in *Williams II*, Justice Frankfurter stated, "Under our system of law, judicial power to grant a divorce – jurisdiction, strictly speaking – is founded on domicil [sic]." *Williams II*, 325 U.S. at 229 (citation omitted). The Court reaffirmed this language from *Williams II* in *Sosna v. Iowa*, 419 U.S. 393 (1975) ("[T]his court has often stated that judicial power to grant a divorce – jurisdiction, strictly speaking – is founded on domicile." (citation omitted) (internal quotation marks omitted)).

³⁶ *Williams I*, 317 U.S. at 297-98 ("Domicil [sic] of the plaintiff, immaterial to jurisdiction in a personal action, is recognized in the Haddock case and elsewhere (Beale, Conflict of Laws, § 110.1) as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance.").

³⁷ See, e.g., *In re Marriage of Kimura*, 471 N.W.2d 869, 874-75 (Iowa 1991) ("This court too has deemed domicile as essential to dissolution of marriage jurisdiction."); 24 AM. JUR.

Over time, however, it has become increasingly difficult to square the domicile rule with contemporary principles of personal jurisdiction, as well as with modern understandings of divorce law. Historically, state court power was understood to be limited territorially.³⁸ Today, the rules regarding the outer scope of a state court's power clearly provide for much more flexibility. Contemporary judicial jurisdiction analysis also involves consideration of fairness to the defendant.³⁹ The domicile rule is not reflective of either principle.⁴⁰

Furthermore, the position that divorce "is different" is increasingly difficult to maintain. The traditional explanation for the divorce exception is that the state's interest in divorce is significantly greater than its interest in (all) other civil matters. A number of developments – including the shift to no-fault divorce,⁴¹ the recognition of the important liberty interests individuals have in their marital status, and the Supreme Court's establishment of the divisible divorce doctrine pursuant to which the financial issues incident to a divorce are governed by the usual principles of state court jurisdiction⁴² – dramatically undercut the persuasiveness of this position.

2D DIVORCE & SEPARATION § 238, at 336 (1983) ("It is commonly held that an essential element of the judicial power to grant a divorce, or jurisdiction, is domicile."); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 543 (4th ed. 2010) ("To terminate a marriage, the plaintiff must be domiciled in the forum state.").

³⁸ For more discussion of this issue, see *infra* Part III.

³⁹ See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that, in the absence of consent or personal service, a court can exercise personal jurisdiction only if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'").

⁴⁰ See, e.g., Wasserman, *supra* note 9, at 2.

⁴¹ See Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2010-11 (2010).

It is often stated that no-fault divorce has been available in all fifty states since 1985. See, e.g., Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 661 (1994). Until this year, however, one could dispute whether it was accurate to describe New York as permitting no-fault divorce. In 2010, New York amended its divorce laws and is now clearly characterized as a no-fault divorce state. See Nancy Dooling, *Tier Attorneys Welcome No-Fault Divorce*, PRESS & SUN-BULL., Aug. 17, 2010, at A1.

⁴² The Supreme Court introduced the so-called "divisible divorce doctrine" in *Estin v. Estin*, 334 U.S. 541, 549 (1948). Under the divisible divorce doctrine, "the court has jurisdiction to grant a divorce to one domiciled in the state but no jurisdiction to adjudicate the incidents of the marriage, for example, alimony and property division," if the court lacks personal jurisdiction over the defendant spouse. *In re Marriage of Kimura*, 471 N.W.2d 869, 875 (Iowa 1991).

Another set of jurisdictional rules applies to child custody issues, including those arising out of or connected to a divorce proceeding. The primary jurisdictional basis in a child custody action is the so-called "home state" of the child, without regard to the connection or lack thereof between the defendant and the forum. See, e.g., Ann Laquer Estin, *Families*

As discussed above, there was considerable debate about the correctness of the domicile rule during the first half of the twentieth century. Today, by contrast, despite a lively current debate on the basis for, and outer limits of, state court jurisdiction,⁴³ there is remarkably little critical scholarly engagement with the domicile rule.⁴⁴ Recent developments, however, provide an important incentive to reexamine, and finally put to rest, the domicile rule.⁴⁵

This Article is not the first to advocate for the abandonment of the domicile rule.⁴⁶ It is, however, the first to reconsider the domicile rule in light of the very real problems it inflicts on same-sex spouses. Thus, the initial contribution of this Article is to offer one point of resistance to the myth of family law exceptionalism by critically evaluating the domicile rule. After analyzing the domicile rule in light of developments regarding state court jurisdiction and divorce law, this Article argues that it is time to abandon the domicile rule. Abandonment of the domicile rule alone, however, is not sufficient to resolve the identified problem. Accordingly, this Article also advances a set of normative jurisdictional and choice of law proposals to ensure that all spouses have at least one forum in which to divorce.

Part I provides an overview of a number of recent cases in which courts held they lacked jurisdiction to adjudicate divorce petitions filed by a same-sex spouses. Part II then describes why this matters. At first blush, one may think that if the couples' marriages are not recognized, it should be of no consequence that they may not be able to obtain a divorce. This, however, is not the case. If they are unable to dissolve their relationship, these parties remain in marriages considered valid in a small but growing number of jurisdictions in the United States. Accordingly, as each day passes, they keep

Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States, 62 FLA. L. REV. 47, 96 n.267 (2010). As is true with the domicile rule, the jurisdictional rules applicable to child custody actions may also create problems for married same-sex couples. While interesting, and somewhat overlapping with the issues presented in this piece, this problem is not addressed here.

⁴³ See *infra* Part IV.A.

⁴⁴ CLARK, *supra* note 17, § 13:2, at 724 ("Divorce jurisdiction is . . . rapidly becoming little more than a subject for historical study.").

⁴⁵ As discussed in more detail *infra* notes 209-210 and accompanying text, the domicile requirement also creates difficulties for some different-sex couples. In particular, although different-sex couples in all states can divorce solely upon a showing that the parties want to get divorced, some states impose quite significant waiting periods on contested no-fault divorces. See, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Looking at Interjurisdictional Recognition*, 43 FAM. L.Q. 923, 976 (2010) (listing the waiting periods in all fifty states and the District of Columbia). For example, if the parties are not in agreement, in some states the petitioning spouse must wait upwards of two years to obtain a no-fault divorce. See *infra* note 210.

⁴⁶ For other contemporary critiques of the domicile rule, see, for example, Garfield, *supra* note 25, Wasserman, *supra* note 9, and Wasserman, *Parents, Partners*, *supra* note 25.

on accruing rights and obligations by virtue of the legal status that is recognized as valid in a number of U.S. jurisdictions and foreign countries.

Part III provides an historical overview of the domicile rule, how it came to be, and its current legal status. Part IV then reconsiders the domicile rule in light of a number of modern developments. In particular, this Part addresses whether it is possible to reconcile the domicile rule with general principles of state court jurisdiction. Ultimately, it answers this inquiry in the negative and urges the abandonment of the domicile rule. Finally, Part V considers what this would mean for married same-sex couples. Although abandonment of the domicile rule would certainly increase the number of same-sex couples with forums in which to divorce, there may be some couples left unassisted by this solution alone. Accordingly, this Part advances a set of normative proposals to better ensure that *all* married couples have a forum in which to divorce.

I. SAME-SEX COUPLES: MARRIED WITH NOWHERE TO DIVORCE

As of September 2011, same-sex couples can marry in seven U.S. jurisdictions.⁴⁷ Because states do not have residency or domicile requirements for marriage,⁴⁸ out-of-state same-sex couples generally can travel to one of these jurisdictions and enter into valid marriages, regardless of their domicile or intent to remain in the forum.⁴⁹ Thus, entrance into marriage is possible for many, if not most, same-sex couples in the United States. Although accurate statistics are not yet available, published data suggest that there are now over 100,000 of married same-sex couples in the United States.⁵⁰ What is also becoming clear, however, is that it may be very difficult for many of these couples to dissolve their relationships.

⁴⁷ See *supra* note 12.

⁴⁸ See, e.g., Kay, *supra* note 24, at 65-66.

⁴⁹ Relying on its reverse evasion statute, MASS. GEN. LAWS ch. 207, § 11 (2006) (repealed 2008), Massachusetts initially did not permit most non-resident same-sex couples to marry in the state. See, e.g., Jennifer L. Levi, *Marriage Equality for Same-Sex Couples: Where We Are and Where We Are Going*, 22 J. AM. ACAD. MATRIMONIAL L. 55, 76-77 (2009). In the summer of 2008, however, this statute was repealed. Myrna Felder, *Recognition of Same-Sex Marriage*, 241 N.Y. L.J. 3, 7 (2009).

Same-sex couples who reside in a small minority of jurisdictions, however, may violate their home state's criminal evasion statute by traveling elsewhere to marry. See, e.g., LAMBDA LEGAL, LEGAL RECOGNITION OF SAME-SEX COUPLES' MARRIAGES, CIVIL UNIONS & DOMESTIC PARTNERSHIPS: SOME DEVELOPMENTS IN STATE LAW 4-5 (2008), available at http://data.lamdalegal.org/publications/downloads/fs_legal-recognition-same-sex%20couples.pdf.

⁵⁰ See, e.g., Press Release, U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011), available at http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html ("According to revised estimates from the 2010 Census, there were 131,729 same-sex married households . . . in the United States.").

It is generally understood that for a court to have jurisdiction over a divorce action at least one of the parties must be domiciled in the forum.⁵¹ Consistent with this understanding, almost every state has enacted divorce residency requirements to guarantee that at least one of the parties is domiciled in the forum.⁵² While the residency requirements vary in length, the average requirement is six months.⁵³ This means that an individual generally has to file for divorce in his or her home state. Available statistics suggest, however, that a significant portion of married same-sex couples live in states that do not recognize their marriages. The Williams Institute estimates that more than forty percent of same-sex couples who are married or in a civil union or domestic partnership live in states that do not recognize that status.⁵⁴ Not only do these states generally not recognize the marriage for purpose of according benefits, responsibilities, and protections during the intact relationship, but many of them also will not grant a divorce to a same-sex spouse.⁵⁵ A number of state courts have reasoned that to do so would result in recognition of the marriage, a result prohibited by their laws.⁵⁶

Thus, the only way for many of these couples to divorce is for at least one of the parties to move to a jurisdiction that does recognize their marriage. This is easier said than done. Most people have strong ties to their current community, with close friends and family members nearby. These support systems frequently are important to people's day-to-day lives. If the family

⁵¹ See, e.g., *In re Marriage of Kimura*, 471 N.W.2d 869, 874 (Iowa 1991) ("This court too has deemed domicile as essential to dissolution of marriage jurisdiction."); WEISBERG & APPLETON, *supra* note 37, at 543 ("To terminate a marriage, the plaintiff must be domiciled in the forum state.").

⁵² ELLMAN, *supra* note 9, at 760 ("[S]tates have fashioned their laws on the assumption that divorce jurisdiction requires domicile and state courts routinely interpret statutes as if domicile of at least one party is a constitutional necessity."); see also Elrod & Spector, *supra* note 45, at 976; Wasserman, *supra* note 9, at 14 ("[L]egislators designed residency requirements to ensure that the decrees issued would be recognized in other states.").

As Helen Garfield and Rhonda Wasserman explain, some states have attempted to create limited exceptions to these residency requirements for members of the military. See, e.g., Garfield, *supra* note 25, at 527-28; Wasserman, *supra* note 9, at 21. As Garfield explains, however, contrary to the intent of the enacting legislatures, many courts have interpreted these military personnel statutes as requiring domicile. Garfield, *supra* note 25, at 528-29.

⁵³ Garfield, *supra* note 25; see also CLARK, *supra* note 17, § 13.2, at 703; GREGORY ET AL., *supra* note 18, at 245.

⁵⁴ Gary J. Gates, *Same-sex Couples in US Census Bureau Data: Who Gets Counted and Why*

4-5, http://www.law.ucla.edu/WilliamsInstitute/pdf/WhoGetsCounted_FORMATTED1.pdf ("In total, more than 40% of same-sex couples who were married or had a civil union or [Registered Domestic Partnership] lived in states that did not legally recognize those statuses.").

⁵⁵ See *infra* notes 69-83 and accompanying text.

⁵⁶ See *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 666 (Tex. App. 2010).

has children, these friends and family members may form a crucial part of their childcare structure. In any event, moving away from friends and family can be emotionally difficult. The challenges of moving to a different jurisdiction have become particularly acute during this period of significant economic challenge. Finding a job in the new jurisdiction can be particularly difficult.⁵⁷ Those people who do obtain job offers in a new jurisdiction may nevertheless be unable to relocate, due to an inability to sell their current homes without incurring substantial losses.⁵⁸

Admittedly, pursuant to *Sherrer v. Sherrer* and its progeny,⁵⁹ in a divorce action in which both parties participate (a so-called “bilateral divorce”),⁶⁰ the parties⁶¹ and those in privity with them⁶² are thereafter precluded from

⁵⁷ In August 2011, the unemployment rate was 9.1%. U.S. BUREAU OF LABOR STATISTICS, UDL-11-1277, EMPLOYMENT SITUATION SUMMARY (Aug. 2011), available at <http://www.bls.gov/news.release/empstat.nr0.htm>.

⁵⁸ For example, in 2010, Morgan Stanley issued a report finding that about one in four homeowners is trapped in their house because they owe more than the house is worth, so they can’t move to take another job – until they sell or walk away. Unlike in the Depression, when homeownership was less prevalent, negative equity among a nation of homeowners leads to substantially lower mobility rates. MORGAN STANLEY, U.S. ECONOMICS: WHY IS U.S. EMPLOYMENT SO WEAK? 4 (2010) available at http://www.morganstanley.com/im/emailers/retail/pdf/wr_ria_20100730_USEcon_WhyIsUSEmployWeak.pdf.

⁵⁹ See, e.g., *Sherrer v. Sherrer*, 334 U.S. 343, 351-52 (1948); *Coe v. Coe*, 334 U.S. 378, 383 (1948).

⁶⁰ Some scholars define a bilateral divorce as an action in which both parties are subject to the personal jurisdiction of the court. See, e.g., WEISBERG & APPLETON, *supra* note 37, at 543 (“In another line of cases, the Supreme Court has indicated that, when the forum has personal jurisdiction over both spouses in a migratory divorce, the principles of full faith and credit forbid collateral attack.”). Contrary to this broad definition, however, in the relevant Supreme Court cases addressing the circumstances under which a party is precluded from later challenging the jurisdiction of the original divorce decree court, the Court stressed the fact that the parties in question participated in the action. Thus, it remains unclear whether and to what extent the *Sherrer* preclusion rule applies when the defendant spouse is subject to the personal jurisdiction of the original divorce court but does not participate in the action. See, e.g., CLARK, *supra* note 17, § 13.2, at 726 (“Both *Cook* . . . and *Johnson* . . . contain language indicating that personal service is enough, although the cases do not directly present the issue. The theory of the *Sherrer* doctrine is that since the defendant had one opportunity to litigate the jurisdictional question and failed to take advantage of it, he should not have another. Whether he has as much of an opportunity when he is personally served within the jurisdiction as when he appears is an open question.”).

⁶¹ See *supra* note 59 and accompanying text.

⁶² See, e.g., *Johnson v. Muelberger*, 340 U.S. 581, 589 (1951) (holding that the daughter of the spouses was barred from collaterally attacking the jurisdictional basis of the divorce decree where both spouses participated in the original divorce action); *Cook v. Cook*, 342 U.S. 126, 127-28 (1951) (holding that the wife’s second husband was barred from

challenging the decree court's finding of domicile. While this rule mitigates the hurdles created by the domicile rule, it does not eliminate them. First, in almost all states, the parties must comply with residency requirements.⁶³ As noted above, states adopted these requirements to better ensure that their divorce decrees are premised on domicile and, therefore, clearly valid within the state and entitled to full faith and credit elsewhere.⁶⁴ Thus, unless the spouses engage in active fraud on the court, in the vast majority of cases, even when both parties participate in the action, at least one spouse will need to move to the divorce state for a significant period of time.⁶⁵ Moreover, while there is an argument to the contrary,⁶⁶ a number of cases hold that the rule protecting bilateral divorce decrees from collateral attack on the grounds of lack of domicile does not apply when both parties perpetrate active fraud on the court on that issue.⁶⁷ Finally, unfortunately, many divorcing spouses do not cooperate with one another. Refusing to participate in the divorce proceeding may serve as leverage for a spouse. In other words, a spouse might challenge the divorce court's jurisdiction as a means of extracting a more favorable property division or custody settlement.

The upshot is that there are now thousands of same-sex spouses in marriages that they would like to exit but, as a practical matter, cannot. For example, a Texas appellate court recently held that it lacked jurisdiction⁶⁸ to entertain a divorce petition filed by a Texas man, John,⁶⁹ seeking a divorce from his male

collaterally attacking the jurisdictional basis for the divorce decree where both spouses participated in the original divorce action).

⁶³ See, e.g., Elrod & Spector, *supra* note 45, at 976.

⁶⁴ See *supra* note 52 and accompanying text.

⁶⁵ The fact that the parties may have a way out of the problem identified in this Article by engaging in active fraud on the court is not an adequate solution to the problem identified in this piece.

⁶⁶ See, e.g., CLARK, *supra* note 17, § 13.2, at 727 ("The *Sherrer* doctrine also leads to the question whether its benefits are available to the spouses who plainly engage in a collusive attempt to take advantage of the liberal divorce laws of a state other than their domicile. Justice Frankfurter's dissent in the *Sherrer* case suggests that its benefits are available in such circumstances.").

⁶⁷ See, e.g., Staedler v. Staedler, 78 A.2d 896, 901 (1951); see also CLARK, *supra* note 17, § 13.2, at 727 (identifying a number of state court decisions holding that the *Sherrer* rule does not apply under such circumstances); E.H. Schopler, Annotation, *Recognition as to Marital Status of Foreign Divorce Decree Attacked on Ground of Lack of Domicile, Since Williams Decision*, 28 A.L.R.2d 1303, § 8.5[a] (1953). But see, e.g., *In re Estate of Day*, 131 N.E.2d 50, 52 (Ill. 1955) (holding that Nevada divorce decree was entitled to Full Faith and Credit despite evidence of collusion between spouses with respect to domicile); *Chittick v. Chittick*, 126 N.E.2d 495, 497-98 (Mass. 1955) (reporting the same result with respect to a Virgin Islands decree).

⁶⁸ For an argument critiquing the conclusion that state DOMAs deprive courts of subject matter jurisdiction, see Byrn & Holcomb, *supra* note 11.

⁶⁹ As noted, because the parties in the case are identified only by their initials, J.B. and

spouse, Henry.⁷⁰ In 2006, John and Henry validly married in Massachusetts.⁷¹ Two years later, the couple moved to Texas, and shortly thereafter, John filed for divorce.⁷² Although Henry did not contest the action,⁷³ “[a] few days after [John] filed suit, the State intervened in the action” for the purpose of arguing that Texas courts lacked jurisdiction to consider the petition.⁷⁴ The Attorney General argued that the Texas statutory⁷⁵ and constitutional⁷⁶ provisions providing that Texas does not recognize marriages between two people of the same sex “strip Texas trial courts of jurisdiction in same-sex divorce cases because adjudicating the merits of such a case would recognize or ‘give effect to . . . a right or claim’ based on a same-sex marriage.”⁷⁷ The appellate court agreed with the Attorney General, holding that “a divorce proceeding would ‘give effect’ to a same-sex marriage” – something that Texas law precluded courts from doing.⁷⁸

Although there are some contrary opinions,⁷⁹ several courts have reached similar conclusions.⁸⁰ Indeed, the Rhode Island Supreme Court concluded that

H.B., I am using the names John and Henry throughout this Article for ease of reference.

⁷⁰ *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 658-59 (Tex. App. 2010).

⁷¹ *Id.* at 659.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ TEX. FAM. CODE ANN. § 6.204 (West 2007) (“(b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state. (c) The state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.”).

⁷⁶ TEX. CONST. art I, § 32 (“(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”).

⁷⁷ *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 664.

⁷⁸ *Id.* at 666.

⁷⁹ See, e.g., *Christiansen v. Christiansen*, 253 P.3d 153, 157 (Wyo. 2011) (holding that Wyoming trial courts have subject matter jurisdiction to entertain a same-sex divorce action). Before New York recognized same-sex marriages, a number of New York courts concluded that they have jurisdiction to entertain divorce actions between same-sex spouses, at least one of whom is a New York domicile. See, e.g., *C.M. v. C.C.*, 867 N.Y.S.2d 884, 889 (N.Y. App. Div. 2008). Unlike the vast majority of states, however, New York did not have a statutory or constitutional provision barring recognition of such marriages. MARRIAGE PROHIBITION LAWS, *supra* note 13; see also *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 742 (N.Y. App. Div. 2008).

In a more recent Texas case, an appellate court held that the Attorney General did not have standing to appeal the grant of a divorce to a same-sex couple. The court’s holding, however, turned on the fact that the Attorney General did not seek to intervene in a timely

it was barred from hearing a divorce petition brought by a same-sex couple validly married in another state, despite the absence of a statutory or constitutional DOMA in the jurisdiction.⁸¹ The question was whether a Rhode Island family court could “properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state.”⁸² The court concluded that Rhode Island family courts are “without jurisdiction” over actions seeking to dissolve a marriage between two persons of the same sex.⁸³

The fact that a court in the parties’ home state may refuse to grant a divorce to a same-sex spouse would not necessarily create a significant problem if there was somewhere else the parties could readily go to obtain that relief. Because of the domicile requirement, however, there often is no such jurisdiction.

II. WHY IT MATTERS

One might wonder, if the parties’ marriage is not recognized in their home state(s), what differences does it make that they cannot get a divorce? It turns out that it does matter. The marriage is valid in a small but significant number of jurisdictions in the United States.⁸⁴ Moreover, there is a very real possibility that their home state will recognize the marriage within the spouses’ lifetimes. During the time they remain married – because they cannot get divorced – the spouses likely will continue to accrue rights and responsibilities vis-à-vis each other by virtue of their status as spouses.

First, since other states recognize the couple’s marriage, if one or both of the parties later travel through or move to one of these jurisdictions, the couple

fashion; it did not address the merits of the case. *State v. Naylor*, 330 S.W.3d 434, 444 (Tex. App. 2011) (holding that the state lacked standing to appeal because it was not a party to the case).

⁸⁰ See, e.g., PETER HAY, ET AL., CONFLICT OF LAWS § 15:14, at 710 (“Decisions in Virginia, Indiana, Oklahoma, and Rhode Island have also denied divorces to same-sex couples who had been married in other jurisdictions.” (citing *Jenkins v. Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006)); see also *Chism v. Ranzy*, No. 49D12-0903-DR-014654 (Ind. Super. Ct. Sept. 4, 2009), <http://www.scribd.com/doc/20720679/Order-on-Petition-for-Dissolution-of-Marriage-in-Re-Marriage-of-Tara-Ranzy-and-Larissa-Chism>; *O’Darling v. O’Darling*, 188 P.3d 137, 137 (Okla. 2008); *Chambers v. Ormiston*, 935 A.2d 956, 956 (R.I. 2007).

⁸¹ *Chambers*, 935 A.2d at 963 (concluding that the term “marriage” at the time of the statute’s enactment defined the union as between a man and a woman and thus precludes the court from entertaining a divorce petition by a same-sex couple).

⁸² *Id.* at 958.

⁸³ *Id.* at 967. Cf. *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002) (holding, at a time when Connecticut did not permit same-sex couples to enter into civil unions, that Connecticut courts lacked jurisdiction to entertain action seeking dissolution of a civil union).

⁸⁴ See *supra* note 12 and accompanying text.

will be treated as validly married even when one or both parties sought to end the relationship years earlier. Second, given the very fluid nature of this issue, even if the parties' home state did not recognize their marriage at the time they initially sought a divorce, that situation could change within the parties' lifetime. *Rosengarten v. Downes*,⁸⁵ one of the only published appellate decisions involving a related issue – the dissolution of a civil union – illustrates this possibility.⁸⁶ In the case, the couple traveled to Vermont to enter into a civil union.⁸⁷ The parties' relationship later broke down, and one of the men sought dissolution of the union in his home state of Connecticut.⁸⁸ At the time, Connecticut did not permit same-sex couples to enter into civil unions.⁸⁹ An intermediate appellate court eventually held that it lacked jurisdiction to dissolve the parties' civil union.⁹⁰ Although Mr. Rosengarten died shortly thereafter,⁹¹ within three years of the decision the law in Connecticut had changed; in 2005, Connecticut began permitting same-sex couples to enter into civil unions.⁹² If both parties had still been alive in 2005, presumably they would have been in a valid civil union, despite the earlier attempt to dissolve the relationship.

The possibility that a state that currently does not recognize marriages (or other comprehensive legal relationships) between same-sex couples may do so within the next five, ten, or fifteen years is not farfetched. In 2004, only one state in the U.S. permitted same-sex couples to marry.⁹³ In just over half a decade, that number has increased to six⁹⁴ (or seven if you include California,

⁸⁵ 802 A.2d 170 (Conn. App. Ct. 2002).

⁸⁶ *Id.* at 182.

⁸⁷ *Id.* at 172.

⁸⁸ *Id.* at 182. One of the reasons Mr. Rosengarten wanted to secure the dissolution of his civil union prior to his death was to ensure that his spouse would not be entitled to a forced share of his estate upon his death; he wanted his estate to go solely to his children. Debra Rosenberg & Pat Wingert, *Breaking Up Is Hard to Do*, NEWSWEEK, July 7, 2003, at 44. Mr. Rosengarten was the founder and president of The Food Emporium, Inc. Lindsay Faber, *Plaintiff's Estate May Be Insolvent*, GREENWICH TIMES, Mar. 3, 2008, at A.

⁸⁹ Gregory B. Hladky, *Wedding Bells Toll in Conn. for Gay Couples*, BOSTON GLOBE, Nov. 13, 2008, at 1 ("Connecticut legalized civil unions in 2005.").

⁹⁰ *Rosengarten*, 802 A.2d at 184 ("[A] civil union is not a family relations matter and, therefore, the [trial] court was correct in determining that it had no subject matter jurisdiction to dissolve the civil union.").

⁹¹ See, e.g., Susan Price-Livingston, *Update on Connecticut Cases Involving Same-Sex Partners*, CONN. GEN'L ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH (Dec. 6, 2002), <http://www.cga.ct.gov/2002/olrdata/jud/rpt/2002-R-0952.htm>.

⁹² Hladky, *supra* note 89, at 1.

⁹³ RELATIONSHIP RECOGNITION LAWS, *supra* note 12 (showing that in 2004, Massachusetts became the first state to permit same-sex couples to marry).

⁹⁴ *Id.* (reporting that as of July 2011, Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont issue marriage licenses to same-sex couples).

which allowed same-sex couples to marry for a period of about six months).⁹⁵ In addition, two other states, while not permitting same-sex couples to marry, appear to recognize marriages between same-sex couples entered into in other jurisdictions.⁹⁶ Nine states and the District of Columbia permit or soon will permit same-sex couples to enter into some form of alternative status that extends all or almost all of the state conferred rights and responsibilities of marriage.⁹⁷ This has led some scholars to conclude that “[t]he legal landscape for same-sex couples seeking to marry has shifted dramatically in [recent] years.”⁹⁸ Furthermore, polling data⁹⁹ and demographic trends¹⁰⁰ portend that more and more states will extend comprehensive protections to same-sex couples in the near future.

During the interim (when they would have been divorced if they could have been), the parties amass rights and responsibilities vis-à-vis each other. For example, the parties may be accruing rights with respect to property acquired during the relationship.¹⁰¹ Absent an enforceable pre- or post-marital

⁹⁵ In *Strauss v. Horton*, the California Supreme Court held that the approximately 18,000 same-sex marriages that were entered into in California between November 4, 2008 and June 16, 2009 “remain valid in all respects.” 207 P.3d 48, 122 (Cal. 2009).

⁹⁶ RELATIONSHIP RECOGNITION LAWS, *supra* note 12 (reporting that Maryland recognizes marriages between same-sex couples entered into in other states and that in January 2011, the New Mexico attorney general issued an opinion stating that New Mexico can recognize marriages between same-sex couples entered into in other states).

⁹⁷ *Id.* (reporting that California, Delaware, the District of Columbia, Hawaii, Illinois, New Jersey, Nevada, Oregon, Rhode Island, and Washington provide or soon will provide the equivalent of state-level spousal rights to same-sex couples).

⁹⁸ Levi, *supra* note 49, at 55.

⁹⁹ For example, Nate Silver of FiveThirtyEight.com stated in April 2009 that a review of polling data indicated that “gay marriage has gained about 8 points of support since November 2003, while civil unions have gained about 13 points of ground.” Nate Silver, *Fact and Fiction About Gay Marriage Polling*, FIVETHIRTYEIGHT.COM (April 9, 2009, 7:11 AM), <http://www.fivethirtyeight.com/2009/04/gay-marriage-by-numbers.html> [hereinafter Silver, *Fact and Fiction*].

Again using polling data, Nate Silver has predicted that “by 2012, almost half of the 50 states would vote against a marriage ban, including several states that had previously voted to ban it.” Nate Silver, *Will Iowans Uphold Gay Marriage*, FIVETHIRTYEIGHT.COM (April 3, 2009, 7:18 AM), <http://www.fivethirtyeight.com/2009/04/will-iowans-uphold-gay-marriage.html>.

¹⁰⁰ Nate Silver also explains that

[s]upport for gay marriage . . . is strongly generational. In a CBS news poll conducted [in March 2009], 64 percent of voters aged 18-45 supported either gay marriage or civil unions, but only 45 percent of voters aged 65 and up did. Civil unions have already achieved the support of an outright majority of Americans, and as those older voters are replaced by younger ones, the smart money is that gay marriage will reach majority status too at some point in the 2010’s.

Nate Silver, *Fact and Fiction*, *supra* note 99.

¹⁰¹ Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L.

agreement, all states distribute the available property either equitably or equally upon divorce.¹⁰² The available property generally includes the property accumulated during the marriage by virtue of community efforts and, in some states, may include other property as well.¹⁰³ If a person remains married, in many if not most states the pool of community or marital property available for distribution upon divorce will grow even when one or both of the parties unsuccessfully sought to divorce years earlier.¹⁰⁴ One commentator illustrated this issue as follows:

Suppose that, ten years after the couple splits up, Adam[, one member of a same-sex marriage] wins the Rhode Island lottery and buys a house in Cambridge, Massachusetts. Since he was unable to get a divorce, he is still legally married to Brad[, his same-sex spouse]. Brad could, theoretically, sue for divorce once Adam has established domicile in Massachusetts, and he may be entitled to share in Adam's lottery winnings and his property in Cambridge.¹⁰⁵

Similarly, in the event that one of the spouses dies prior to obtaining a divorce, the surviving spouse in almost every state will be entitled to a share of the deceased's estate.¹⁰⁶ In many states, a surviving spouse is entitled to an

REV. 1227, 1230 ("Although variations exist among the states, every state's default approach is now designed to effectuate an equal or equitable division of all property accumulated from wages during marriage, regardless of the title of that property." (footnotes omitted)).

¹⁰² *Id.*

¹⁰³ See, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: "Same-Sex" Marriage Issues Dominates Headlines*, 38 FAM. L.Q. 777, 803-05 (2005) (discussing how a number of states do not limit property distribution to marital or community property).

¹⁰⁴ For example, in North Dakota, "[a]ssets accumulated after separation but prior to the divorce are included in the marital estate" and therefore are available for distribution upon divorce. *Lynnes v. Lynnes*, 747 N.W.2d 93, 99 (N.D. 2008); see also *O'Neal v. O'Neal*, 929 S.W.2d 725, 726 (Ark. Ct. App. 1996) ("[A]ssets acquired after separation and prior to divorce are marital property."). In other states, however, the accumulation of property available for distribution upon divorce ends at the time of separation. See, e.g., N.C. GEN. STAT. § 50-20(b)(1) (2008) (providing that "all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property."); CAL. FAM. CODE § 771 (2008) (providing that assets accumulated while living separate and apart are "the separate property of the spouse").

¹⁰⁵ Ramais, *supra* note 23, at 1036. This commentator noted that this hypothetical is not farfetched, citing an Illinois case in which a court held that the spouse was entitled to distribution of the lottery winnings because, despite their many years of separation, the parties had never obtained a divorce. *Id.* at 1036 n.169 (citing *In re Marriage of Morris*, 640 N.E.2d 344, 347 (Ill. App. Ct. 1994)).

¹⁰⁶ Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 160 (2008) ("With the exception of Georgia, every American state limits the ability of a testator to disinherit a surviving spouse."); see also Terry L. Turnipseed, *Why*

“elective” or forced share of the deceased estate, even if the deceased tried to disinherit the surviving spouse.¹⁰⁷ In community property states, the surviving spouse would be entitled to his or her share of the community property.¹⁰⁸ Thus, using the same lottery example, if Adam died before the parties divorced, in most states Brad would be entitled to a share of the winnings.

As a general rule, married spouses also are jointly responsible for debt accumulated during the relationship.¹⁰⁹ Again, if debt is accumulated by one of the spouses after the parties tried but failed to divorce, in many states that debt would be considered community or marital debt burdening both parties.¹¹⁰ The issue of spousal liability for debt is a very real one today. There have been a number of recent lawsuits by creditors seeking reimbursement from individuals for the medical expenses incurred by their spouses after the relationship had ended but prior to a formal divorce.¹¹¹ As one court

Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (or How I Learned to Stop Worrying and Start Loving the French), 44 BRANDEIS L.J. 737, 739 (2006).

¹⁰⁷ See Rosenbury, *supra* note 101, at 1246 (reporting that forty of the forty-one separate property states have elective share provisions); Turnipseed, *supra* note 106, at 748 (“Every separate property jurisdiction except Georgia gives a surviving spouse an elective share or forced share of the decedent-spouse’s property.” (footnote omitted)).

¹⁰⁸ Rosenbury, *supra* note 101, at 1234 & n.21 (noting that community property states distribute community property equally or equitably upon divorce). What is considered community property available for distribution, of course, can be limited by a valid pre- or post-marital agreement. See, e.g., Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 832.

¹⁰⁹ WEISBERG & APPLETON, *supra* note 37, at 566.

¹¹⁰ Very few states have statutes specifically addressing the allocation of marital debts. See, e.g., Margaret M. Mahoney, *Debts, Divorce, and Disarray in Bankruptcy*, 73 UMKC L. REV. 83, 86 (2004). Accordingly, in most situations, it is up to the court to decide whether to allocate debts incurred after separation. In some states, however, the law provides that community or marital debt stops accumulating at the time of separation. See, e.g., CAL. FAM. CODE § 910 (2008) (providing that the non-debtor spouse will not be liable for debt incurred by the other spouse after separation).

¹¹¹ See, e.g., *Queen’s Medical Ctr. v. Kagawa*, 967 P.2d 686, 699-700 (Haw. Ct. App. 1998) (holding that the wife was liable for the husband’s hospital expenses incurred prior to divorce, even though the husband and wife had completed divorce papers and had lived “separate lives” and their marriage was “not viable”); *St. Mary of Nazareth Hosp. v. Kuczaj*, 528 N.E.2d 290, 294 (Ill. App. Ct. 1988) (holding that the husband was liable for his wife’s medical expenses incurred after separation but prior to a final dissolution of marriage); *Bartrom v. Adjustment Bureau, Inc.* 618 N.E.2d 1, 9 (Ind. 1993) (holding that a “spouse may look to the other for support pending the final dissolution of the marriage”); *St. Luke’s Medical Ctr. v. Rosengartner*, 231 N.W.2d 601, 602 (Iowa 1975) (holding a husband liable for his wife’s medical expenses, even though the expenses were incurred after they began living apart by agreement). But see *National Account Sys. v. Mercado*, 481 A.2d 835, 837 (N.J. Super. Ct. App. Div. 1984) (holding that wife was not liable for husband’s medical expenses where the couple had been separated for four years and were not supporting one

explained, in many states “[s]pousal liability does not cease to exist when the parties declare that it no longer exists. Marriage is also an economic partnership, and the duties and obligations of the parties terminate when the partnership legally terminates.”¹¹²

A married person is presumed to be the legal parent of a child born to his spouse.¹¹³ Thus, if the parties remain married, a child may be considered or at least presumed to be the child of the spouse, even when the parties long have been estranged.¹¹⁴ In addition, in the absence of a valid divorce, the parties cannot remarry, or if they do, they risk violating civil and criminal bigamy provisions.¹¹⁵ This notion is not without precedent. Although arising under different circumstances, in the famous *Williams* cases decided by the Supreme Court, two people were tried and convicted of bigamy despite their attempts to obtain divorces prior to their remarriages.¹¹⁶ In the case of a same-sex couple, even though the state of Texas, for example, did not recognize the first marriage and, therefore, refused to grant the parties a divorce, the state of Massachusetts might and could view a subsequent marriage of one of the spouses to be bigamous.

To be sure, the parties can take steps to minimize some of the risks described above. For example, the parties could enter into a post-nuptial or post-marital agreement to stop the continued accumulation of property available for distribution upon their eventual divorce (assuming they are able to do this at some point).¹¹⁷ For some of the issues described above, however,

another at the time of the hospitalizations).

¹¹² *Queen’s Medical Ctr.*, 967 P.2d at 699.

¹¹³ See, e.g., UNIF. PARENTAGE ACT, § 204(a)(1) (amended 2002), 9B U.L.A. 23 (Supp. 2010) (“A man is presumed to be the father of a child if he and the mother of the child are married to each other and the child is born during the marriage.”).

¹¹⁴ In some jurisdictions, the marital presumption does not apply if the parties were living separate and apart at the time of the child’s conception. See, e.g., *Steven W. v. Matthew S.*, 33 Cal. Rptr. 2d 1108, 1115 (Cal. Ct. App. 1995) (holding that California’s conclusive marital presumption does not apply where the husband and wife were not cohabitating at the time of conception). In addition, some parenting presumptions are rebuttable. See, e.g., UNIF. PARENTAGE ACT, § 204(b) (amended 2002), 9B U.L.A. 24 (Supp. 2010) (providing that the parentage presumptions established under this section may be rebutted under certain circumstances). That said, it is possible that a court would consider the spouse to be the child’s legal parent, particularly if there were no other available second parent.

¹¹⁵ Forty-nine states statutorily prohibit polygamy. Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 290 n.51 (2004).

¹¹⁶ *Williams II*, 325 U.S. 226, 238 (1945). The Supreme Court affirmed the bigamy convictions despite the parties’ belief that their prior marriages had been terminated. Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 776 (2002).

¹¹⁷ *Williams*, *supra* note 108, at 828 (“A postnuptial agreement, like a prenuptial agreement, is an agreement that determines a couple’s rights and obligations upon divorce.

there is nothing the parties can do to eliminate the financial or other responsibilities automatically imposed on them by virtue of their marital status. For example, as noted above, most states have statutes providing that a surviving spouse is entitled to a share of the deceased estate, even if the deceased tried to disinherit the surviving spouse.¹¹⁸ In many states, regardless of any private agreement to the contrary, a person would be liable for the necessary expenses incurred by her spouse after marriage but before divorce.¹¹⁹ Similarly, a court may impose parentage rights and obligations on a spouse, even if the parties entered into an oral agreement to the contrary.¹²⁰

In sum, thousands of same-sex couples are in a situation similar to that of John and Henry. They cannot dissolve a marriage that they want ended.¹²¹ This legal reality imposes real, significant consequences for the parties involved.

III. THE DOMICILE RULE: A HISTORY

Parts I and II explained that there is a new and growing class of lesbian and gay people who, for all practical purposes, are unable to obtain a divorce. This

As its name suggests, however, a postnuptial agreement is entered into after a couple weds but before they separate.”). As Sean Williams points out, however, there is no uniform standard governing the validity of postnuptial agreements. *Id.* at 839.

¹¹⁸ See Rosenbury, *supra* note 101, at 1246; Turnipseed, *supra* note 106, at 748.

¹¹⁹ See *supra* notes 109-111 and accompanying text.

¹²⁰ See, e.g., Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 7 n.22 (2004) (“Contractual agreements limiting child support are subject to judicial scrutiny to ensure that children’s interests are being served.”) (citing *Budnick v. Silverman*, 805 So.2d 1112 (Fla. Dist. Ct. App. 2002); *Gerhardt v. Estate of Moore*, 441 N.W.2d 734, 738 (Wis. 1989)).

¹²¹ In its decision, the Texas court in John and Henry’s case suggested that the parties could file an action in Texas to declare the marriage void. *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 667 (Tex. App. 2010). As a preliminary matter, it is unclear whether it would be legally correct for a Texas court to declare their marriage to be void. In the late 1950s, Professor Frederick P. Storke conducted a comprehensive analysis of annulment cases, that is cases seeking a determination that the marriage was void. Frederic P. Storke, *Annulment in the Conflict of Laws*, 43 MINN. L. REV. 849, 867 (1959). Professor Storke was unable to find any annulment case involving a change of domicile in which the court failed to follow the accepted rule that the court “should look to the law of the state of celebration” to determine “whether there ever was a valid marriage.” *Id.* at 867; see also William A. Reppy, Jr., *The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages*, 3 AVE MARIA L. REV. 393, 470-71 (2005) (arguing that a court in an annulment action should apply the law of the state of marriage). Under this rule, Henry and John would not be entitled to judgment declaring the marriage void because their marriage is valid in the state of celebration.

Moreover, even if they could obtain such a determination, this would not be an adequate or appropriate solution to the problem identified in this Article. The parties should not be required to ask the court to declare that their marriage that *was validly entered into* never existed in order to end their legal relationship to each other.

reality is due, in part, to the domicile requirement,¹²² which makes it difficult for the couples to obtain a divorce in a state other than their home state(s). This Part provides an historical overview of the domicile rule, explaining why it arose and how it came to govern divorce jurisdiction.

The current debate about same-sex marriage is not the first time in our history in which there has been a significant patchwork with regard to access to divorce. At an earlier time in our history, there was a patchwork of a different kind – a patchwork with regard to the substantive grounds on which states would grant a divorce. Even prior to Independence, the colonies held divergent positions about the ease by which a marriage could be dissolved.¹²³ Some colonies permitted divorce on a variety of different substantive grounds;¹²⁴ others permitted divorce only in cases involving adultery;¹²⁵ and still others did not permit divorce under any circumstances.¹²⁶ Over time, regional trends developed. The New England states tended to “provide relatively liberal grounds for divorce.”¹²⁷ Southern states generally were “on the opposite end of the spectrum.”¹²⁸ South Carolina was the strictest; during most of its history, it did not permit divorce at all.¹²⁹ “The Mid-Atlantic states followed a middle path.”¹³⁰ The Midwestern and Western states tended to adopt more liberal standards.¹³¹ For a period of time in the mid-nineteenth century, Indiana came to be viewed as the “divorce mill” of choice due to its many substantive grounds for divorce and its short residency requirement.¹³²

¹²² See *supra* note 17.

¹²³ See, e.g., NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 34-47 (1962).

¹²⁴ See, e.g., *id.* at 38 (observing that in 1667, Connecticut recognized four grounds for divorce: “adultery, fraudulent contract, willful dissention [sic] for three years ‘with total neglect of duty,’ or seven years’ absence of one party without being heard of after due inquiry had been made”).

¹²⁵ See, e.g., *id.* at 39 (observing that in 1650, the only grounds upon which a divorce could be obtained in Rhode Island was adultery).

¹²⁶ See, e.g., *id.* at 41 (reporting that in many of the Southern colonies, “there was no provision made for divorce”).

¹²⁷ O’Hear, *supra* note 32, at 1511.

¹²⁸ *Id.*

¹²⁹ *Id.*; see also GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 156-57 (1997) (reporting that South Carolina did not permit divorce between 1878 and 1949).

¹³⁰ O’Hear, *supra* note 32, at 1511.

¹³¹ *Id.* (“[A]s trans-Appalachian states joined the Union, they tended to follow the New England model, granting judicial divorces for a relatively large number of reasons.”).

¹³² See, e.g., NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 51 (2000); LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 37-38 (2004) (stating that Indiana, South Dakota, and North Dakota were “so-called divorce mills”); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 14 (2000); RILEY, *supra* note 129, at 14; Val Nolan, Jr., *Indiana: Birthplace of Migratory Divorce*, 26 IND. L.J. 515, 515 (1951).

Indiana later lost this title to a number of Western states and territories, including Utah,¹³³ the Dakotas,¹³⁴ Oklahoma,¹³⁵ and Nevada, which all adopted less stringent divorce requirements and became magnets for divorce seekers.¹³⁶ The significant differences among state divorce practices persisted throughout the nineteenth¹³⁷ and through at least the first half of the twentieth century.

These regional variations created situations in which a spouse, unable to divorce in his or her home state, sometimes sought a divorce in a state with more lenient divorce requirements.¹³⁸ There was little that states could do physically to prevent their residents from leaving the state to obtain a divorce elsewhere. Yet, there was a means by which they could deter such action – namely, by refusing to recognize the divorce when the party returned home.¹³⁹ Although state courts characterized the bases for their refusals in different ways, the majority state rule was that courts could refuse to recognize divorce decrees issued by the courts of other states when neither party was domiciled in the decree state at the time the judgment was issued.¹⁴⁰

Eventually, this rule regarding interstate recognition of divorces became incorporated into states' understandings of a court's power to issue a divorce at all. Accordingly, domicile became the dominant basis for divorce jurisdiction.¹⁴¹ Thus, "by the mid-nineteenth century, many American states

¹³³ RILEY, *supra* note 129, at 95.

¹³⁴ *Id.* at 98; *see also* BLAKE, *supra* note 123, at 123 (observing that North and South Dakota "each retained the short [three-month] residency requirement and each attracted a growing number of out-of-state divorce seekers").

¹³⁵ RILEY, *supra* note 129, at 103 (reporting that in the late 1800s "divorce-seekers streamed into Oklahoma by the hundreds to take advantage of quick and easy probate divorces").

¹³⁶ BLAKE, *supra* note 123, at 152; Riley, *supra* note 129, at 135 (observing that "Nevada was the most highly publicized destination for divorce-seekers" and had a short, six-month residency requirement to "accommodate the needs of a highly mobile population of miners and entrepreneurs"); *see also id.* at 85 ("Western states and territories soon gained notoriety for their broadminded or, as some said, decadent divorce laws.").

¹³⁷ *See, e.g.*, BLAKE, *supra* note 123, at 63 ("If by 1860 the states of the Old Northwest were the most liberal in the nation in their divorce policy, South Carolina and New York were the most conservative.").

¹³⁸ *See, e.g.*, O'Hear, *supra* note 32, at 1511.

¹³⁹ *See, e.g.*, *Uniformity and the Recognition of Ex Parte Divorces*, 44 YALE L.J. 488, 489 (1935) ("Divorces . . . are generally recognized by other states. But a few states, either because of different findings of fact, more rigorous moral standards or other reasons, sometimes refuse to recognize a divorce rendered by a sister state." (footnote omitted)).

¹⁴⁰ *Id.* at 493 ("The majority of the states, following a rule approved by early treatises and in *Atherton v. Atherton*, [181 U.S. 155 (1901)], recognize as valid the ex parte decrees of sister states provided only that the plaintiff was domiciled in the state granting the divorce." (footnotes omitted)).

¹⁴¹ This rule, however, was not uniformly adopted. *See, e.g.*, Wasserman, *supra* note 9, at 14 n.65 (noting that "[f]our states – New York, Pennsylvania, North Carolina, and South

had statutes authorizing divorce jurisdiction if either spouse were domiciled or residing in the forum state.”¹⁴² Limiting the power to grant a divorce to a court in the state in which a spouse was domiciled allegedly rested on the policy justification of “the paramount interests of the state of the petitioning spouse’s domicile”¹⁴³ and “prevent[ing] overreaching by the laws of other states.”¹⁴⁴ As the Rhode Island Supreme Court stated in 1856, a state court lacked the power to entertain a divorce petition if neither party had an “*actual bona fide* domicil [sic] within its territory.”¹⁴⁵ This result, the court continued, was a corollary of “the right of every nation or state to determine the *status* of its own domiciled citizens or subjects, without interference by foreign tribunals in a matter with which they have no concern.”¹⁴⁶ Michael O’Hear sums up the case law as follows:

In the divorce cases, courts adopted and designed jurisdictional tests specifically to protect the territorial integrity of substantive divorce laws: Courts insisted that the state to which a marriage belonged had an exclusive right to apply its laws to end the marriage; divorces granted by other states (those lacking “jurisdiction”) represented a territorial overreaching by the laws of the decreeing state.¹⁴⁷

The domicile requirement became an axiom, appearing in the writings of influential commentators of the times. For example, Justice Story stated in the

Carolina – refused to recognize *ex parte* divorces granted by other states even if one of the parties was domiciled in the rendering state” (citing BLAKE, *supra* note 123, at 175)).

¹⁴² Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369, 380 (1991) (citing RANSOM H. TYLER, COMMENTARIES ON THE LAW OF INFANCY, INCLUDING GUARDIANSHIP AND CUSTODY OF INFANTS, AND THE LAW OF COVERTURE, EMBRACING DOWER MARRIAGE AND DIVORCE, AND THE STATUTORY POLICY OF THE SEVERAL STATES IN RESPECT TO HUSBAND AND WIFE 900-01 (1868)); *see also* HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS 397 (3d ed. 1949).

¹⁴³ Atwood, *supra* note 142, at 381; *see also, e.g.*, Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 385-86 (2007) (contending that the domicile rule “had the advantage of preventing married couples who wished to divorce from evading restrictive state divorce laws by consenting to jurisdiction in a state with a more liberal view of divorce”).

¹⁴⁴ O’Hear, *supra* note 32, at 1536; *see also id.* (“In lieu of the Constitution, courts adopted the framework of international law to resolve the divorce recognition problem, basing their analysis on the concept of comity and the Huber/Story/Field principles of territorial sovereignty. . . . Jurisdictional limitations in these cases were not just a ‘maxim,’ but an explicit effort by forum courts to protect territorial sovereignty.”).

¹⁴⁵ *Ditson v. Ditson*, 4 R.I. 87, 93 (1856).

¹⁴⁶ *Id.* at 93-94 (citing JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 721 (2d ed. 1856)).

¹⁴⁷ O’Hear, *supra* note 32, at 1510; *see also* Neal R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119, 121 (1990) (“Preserving local control over marriage and divorce remained the only discernible policy behind several leading decisions.”).

Commentaries on the Conflict of Laws that “the doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual bona fide domicil [sic] of the parties gives jurisdiction to the proper courts to decree a divorce.”¹⁴⁸

This rule, providing for jurisdiction so long as one of the parties was domiciled in the forum, departed from generally understood jurisdictional rules applicable to other civil actions. The understanding at the time was that courts had jurisdiction over civil matters only if the defendant voluntarily appeared before the court or had been served in the state.¹⁴⁹ Courts and commentators reasoned, however, that divorce actions should be exempt from the usual rules. Application of general jurisdiction principles would allow the parties to evade the divorce requirements of the state that properly had the right to control the matter.¹⁵⁰ While such evasion was permitted in other types of civil actions, this result was simply unacceptable in the context of divorce given the states’ overriding interests in the marital status of their citizens.¹⁵¹

To rationalize this departure from the usual jurisdictional rules, some courts conceptualized the domicile rule as an application of what is called “in rem” jurisdiction,¹⁵² with the res being the marriage.¹⁵³ As one court explained, “So

¹⁴⁸ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 230a (8th ed. 1883).

¹⁴⁹ For further discussion of this issue, see *infra* note 185 and accompanying text.

¹⁵⁰ *Ditson*, 4 R.I. at 103 (“To say that the general law inexorably demands . . . that all parties interested in a relation or in property subject to a jurisdiction should be physically within that jurisdiction, is . . . to make the execution of laws dependent not upon the claims of justice, but upon the chance locality, or, what is worse, upon the will of those most interested to defeat it.”).

¹⁵¹ Interestingly, this type of reasoning was expressed much more recently by the Third Circuit in the early 1950s. In *Alton v. Alton*, the court struck down as unconstitutional a divorce statute that permitted a Virgin Islands court to adjudicate a divorce petition even if no party was domiciled in the jurisdiction. 207 F.2d 667, 677 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954). In concluding that domicile was a constitutional requirement for divorce jurisdiction, the Third Circuit explained that “adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens.” *Id.* at 676.

The Supreme Court agreed to review this decision, *Alton v. Alton*, 347 U.S. 911 (1954) (granting certiorari), but the judgment was later vacated and the appeal was dismissed as moot after the husband obtained a divorce in another jurisdiction. *Alton v. Alton*, 347 U.S. 610, 610-11 (1954). Later, the Supreme Court in *Granville-Smith* considered the statute at issue in this case. *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 3-4 (1955). The Supreme Court ultimately struck down the statute on other grounds, finding that the Virgin Islands legislature lacked delegated authority to pass the statute. *Id.* at 16.

¹⁵² True *in rem* jurisdiction enables a court to adjudicate the interests of “all persons, known or unknown,” in property. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.8, at 118 (4th ed. 2005). Because the action is conceptualized as being an action against the property itself, and not the adjudication of the rights of the parties, a court does not need personal jurisdiction over the parties. *Id.* at 116. Rather, a court has *in rem* jurisdiction so long as the property is located within the forum and the forum has established dominion

deeply has it been thought that the responsibility for divorce was that of the domicile, that divorce litigation has been called an action in rem, the res being the marital relationship between the parties.”¹⁵⁴

Eventually, the Supreme Court weighed in on issues related to divorce jurisdiction.¹⁵⁵ Just as many state courts had concluded previously,¹⁵⁶ a majority of the Court believed that divorce cases were not run-of-the-mill civil actions. According to the Court, states had a much stronger interest in the subject matter of divorce than they did with regard to the subject matter of other civil actions.¹⁵⁷ Writing for the Court in *Williams I*, Justice Douglas declared,

Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the

over the property. *Id.*

¹⁵³ See, e.g., *State-Court Jurisdiction*, *supra* note 9, at 969 (“The courts of a sister state in which the couple was physically present could assume jurisdiction to decide tort or property claims between husband and wife, or to determine any other matters except the validity of the marriage relation itself. However, because only a state having a substantial contact with or interest in dissolving the marriage was regarded as having control of the marital *res*, and because control of the *res* was considered an absolute constitutional prerequisite, a state in which neither party was domiciled could not sever the marriage relation.”).

¹⁵⁴ *Alton*, 207 F.2d at 674.

¹⁵⁵ As explained in note 35 *supra*, the Supreme Court has never directly spoken on the circumstances under which a court has jurisdiction to enter a divorce decree in the first instance. Instead, the Court’s pronouncements related to this issue have been made in cases considering when divorce decrees are entitled to full faith and credit in other states.

¹⁵⁶ See, e.g., *Harrison v. Harrison*, 20 Ala. 629, 644-45 (1852) (“Now, it is most unquestionably true, that no independent State could for a moment tolerate any interference on the part of a foreign tribunal with [the marriages of its citizens], the most sacred and important of all the domestic relations which obtain among its citizens. It is a relation, the intermeddling with which involves consequences most usually reaching far beyond the immediate parties to it, as it lies at the very basis of civilized society, and becomes so interwoven with its very framework, as to render it the peculiar object of exclusive control, by the laws and tribunals where it exists.”).

¹⁵⁷ See, e.g., *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 297 (1942) (“[A divorce proceeding] is not a mere *in personam* action. Domicil [sic] of the plaintiff, immaterial to jurisdiction in a personal action, is recognized in the *Haddock* case and elsewhere (Beal, *Conflict of Laws*, § 110.1) as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance.”).

marriage status of the spouse domiciled there, even though the other spouse is absent.¹⁵⁸

Similarly, Justice Frankfurter's dissent in *Sherrer* reflected the position shared by others that, unlike the rules governing other actions, the parties to a divorce action should not be permitted to undermine these important state interests by consenting to the jurisdiction of another state:

If the marriage contract were no different from a contract to sell an automobile, the parties thereto might well be permitted to bargain away all interests involved, in or out of court. But the State has an interest in the family relations of its citizens vastly different from the interest it has in an ordinary commercial transaction. That interest cannot be bartered or bargained away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a State to which the parties are strangers.¹⁵⁹

Allowing the parties to consent to jurisdiction, Frankfurter and others opined, would make it much easier for the parties to evade the stricter divorce requirements of their home state.

In the end, the Court appeared to endorse the domicile rule for divorce jurisdiction.¹⁶⁰ As noted above, although the Supreme Court never directly answered the question,¹⁶¹ in a number of cases the Court has suggested that domicile is a jurisdictional prerequisite for divorce actions.¹⁶² Under this view,

¹⁵⁸ *Id.* at 298-99.

¹⁵⁹ *Id.* at 358 (Frankfurter, J., dissenting). Justice Murphy expressed a similar sentiment in his dissent in *Williams I*. 317 U.S. at 309 (Murphy, J., dissenting) (reasoning that different rules were necessary in the area of divorce in order "to preserve and protect state policies in matters of vital public concern").

¹⁶⁰ See, e.g., CLARK, *supra* note 17, § 13.2, at 724 ("The United States Supreme Court has not squarely held that domicile is the only possible basis for divorce jurisdiction, but its opinions have contained dicta to that effect.").

¹⁶¹ As explained in note 35 *supra*, most of the Supreme Court decisions related to divorce jurisdiction directly address the question of interstate recognition of divorce decrees and not the circumstances under which a court can exercise jurisdiction over a divorce action in the first instance. With respect to other types of actions, it is clear that these inquiries are identical. That is, with respect to other types of actions, a judgment is entitled to interstate recognition if the initial decree court properly exercised jurisdiction. See, e.g., Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 571 (2009).

¹⁶² See, e.g., *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229 (1945) ("[J]udicial power to grant a divorce . . . is founded on domicil [sic]."). This language was repeated in the Court's more recent *Sosna* case. *Sosna v. Iowa*, 419 U.S. 393, 407 (1975); see also HAY ET AL., *supra* note 80, § 15.7, at 698 (stating that while it is debatable whether the Court has held that domicile is a constitutionally necessary jurisdictional requirement for divorce and, if so, whether such a conclusion is correct, that "whether dictum or not, both the majority and one of the dissents [in *Sosna*] (a total of eight Justices) assumed that domicile is a jurisdiction requirement.").

in divorce actions, as opposed to other civil actions, there must be a stronger connection between the parties and the state for the court to have power to issue a decree, or at least a decree entitled to recognition by other states.¹⁶³ Moreover, both before and after it seemingly endorsed the domicile rule for divorce, the Court embraced the position that divorce is different and exempt from the jurisdictional principles that applied to most other types of cases.¹⁶⁴

Although the Court has created exceptions to these rules for bilateral divorces, the understanding that domicile is key to jurisdiction in divorce actions remains largely untouched over a half a century later. As Helen Garfield states, because any departure from these rules risks undermining the validity of the decree, or at least the guarantee of interstate recognition, “experimentation [by states] with alternative bases of jurisdiction is effectively discouraged.”¹⁶⁵ Instead, states generally “have fashioned their [divorce] laws on the assumption that divorce jurisdiction requires domicile, and state courts routinely interpret statutes as if domicile of at least one party is a constitutional necessity.”¹⁶⁶

¹⁶³ See, e.g., Wasserman, *supra* note 9, at 2 (“In all other cases, as long as the rendering court has *in personam* jurisdiction over the defendant and provides adequate notice, the court acts consistently with the Due Process Clause, and its judgment is enforceable elsewhere under the Full Faith and Credit Clause. In divorce cases, however, even if the court has *in personam* jurisdiction over both spouses, the decree violates due process and is not entitled to full faith and credit unless one of the spouses is domiciled in the rendering state.” (footnotes omitted)); *State-Court Jurisdiction*, *supra* note 9, at 969 (“The substantial difference between the jurisdictional treatment of [other types] of personal-relationship action[s] and the treatment of a divorce suit seems to be explainable only in terms of the much greater interest of a domiciliary state in preventing the hasty dissolution of marriage relations than of employment contracts, or, indeed, of any other form of personal relationship.”).

¹⁶⁴ For example, although the issue was not before the Court in the case, the Supreme Court adopted this understanding that divorce is different in its 1877 decision in *Pennoy v. Neff*, 95 U.S. 714 (1877). Specifically, in *Pennoy*, the Court famously declared that, generally speaking, the persons whose rights are at issue both need to be before the court or have consented to the court’s jurisdiction for the court to have authority to adjudicate the matter. *Id.* at 722. In stating these general rules, however, the Court took pains to clarify that these rules were not meant in any way to alter or displace the rules that then applied to divorce – rules that allowed a court to adjudicate a divorce even in the absence of the defendant. *Id.* at 734 (“To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory.”).

¹⁶⁵ Garfield, *supra* note 25, at 503.

¹⁶⁶ ELLMAN ET AL., *supra* note 9, at 760; see also, e.g., GREGORY ET AL., *supra* note 18, at

IV. THE DOMICILE RULE: RECONSIDERED

The domicile rule is anomalous. Premising jurisdiction on the domicile of the petitioning spouse, without consideration of the defendant's actions or location, "is fundamentally different from the treatment accorded actions to sever or dissolve other types of personal relationships."¹⁶⁷ While some scholars and jurists pointed out this inconsistency and urged the abandonment of the divorce exception decades ago,¹⁶⁸ subsequent developments with respect to general principles of state court jurisdiction and the substantive law of divorce have made it even more difficult to justify the domicile rule.¹⁶⁹

Law reviews and federal and state reporters devoted many pages in the mid-twentieth century to in-depth consideration of issues related to divorce jurisdiction.¹⁷⁰ More recently, however, interest in the issue has waned dramatically. Even among the modern commentators who note the theoretical weaknesses of the domicile rule, many suggest that there is no pressing need to reevaluate the rule since, they conclude, it does not cause actual prejudice to parties.¹⁷¹ There is no prejudice, they argue, because, with the advent of no-fault divorce, the petitioner spouse generally can obtain a divorce based solely on a desire to end the relationship. As demonstrated in Parts I and II, however, even if this assertion of lack of prejudice once largely (although not completely) held true,¹⁷² this claim is no longer accurate with respect to a large and growing class of people. The rule does cause serious prejudice; its

243-45.

¹⁶⁷ *State-Court Jurisdiction*, *supra* note 9, at 969.

¹⁶⁸ *See, e.g., State-Court Jurisdiction*, *supra* note 9, at 975; *see also infra* notes 173-175. For contemporary arguments questioning the continued use of the domicile rule, *see, for example*, Garfield, *supra* note 25; Wasserman, *supra* note 9.

¹⁶⁹ *See, e.g., Estin*, *supra* note 143, at 429 ("Shorn of its original logic, the sharp distinction that remains today between marital disputes and other private civil litigation serves principally to reflect the lingering power of marital status norms."); Wasserman, *supra* note 9, at 24.

¹⁷⁰ *See supra* note 29.

¹⁷¹ *See, e.g., CLARK*, *supra* note 17, § 13.2, at 724 (explaining that the shift to no fault divorce has "minimized the need of the unhappily married to seek relief in the divorce mill states," thereby rendering consideration of the domicile requirement "little more than a subject for historical study"); *see also id.* at § 13.4, 769; HAY, ET AL., *supra* note 80, § 15.14, at 708.

Others simply accept the disparity between divorce jurisdiction and general rules of state court jurisdiction and use the disparity as a basis for supporting various theories of jurisdiction. *See, e.g., James Weinstein, The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 242-50 (2004) (arguing that the domicile rule, along with other anomalous jurisdictional rules, supports a theory of jurisdiction that is not "generated exclusively by the Due Process Clause").

¹⁷² As stated *infra* in notes 209-210 and accompanying text, the domicile rule can present practical difficulties for different-sex couples in that it may result in a different-sex couple being required to comply with a longer waiting period.

continued implementation is a barrier to access to divorce for thousands of same-sex couples.

Even at the time of the *Williams* decisions in the 1940s, a number of prominent scholars and jurists called for the abandonment of the domicile rule. For example, in 1954 Abe Fortas argued in briefing to the Supreme Court¹⁷³ that, even if once justified, the domicile rule had run its course. He contended that, at least where both parties voluntarily appear before the court and where there was a sufficient connection between the parties and the action, a court's adjudication of a divorce action involving two non-domiciliaries violated no constitutional provision.¹⁷⁴

¹⁷³ Fortas made this argument in his brief to the Supreme Court in the *Granville-Smith* case. *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 2 (1955). *Granville-Smith* involved a challenge to the constitutionality of a Virgin Islands statute that, among other things, permitted a Virgin Islands court to adjudicate a divorce proceeding in which one party has resided in the jurisdiction for at least six weeks when the other party was personally served within the forum or entered a general appearance regardless of the domicile of the parties. *Id.* at 8. Although both parties consented to jurisdiction, the trial court dismissed the action on the ground that the wife was not domiciled in the jurisdiction. *Id.* at 3-4. This holding was affirmed by the Third Circuit, which held that the statute was unconstitutional to the extent it permitted a court to adjudicate a divorce in the absence of a party domiciled in the Virgin Islands. *Id.* at 4. Fortas represented the wife before the Supreme Court. As stated by Fortas, the question presented by the case was "whether, in a case where the defendant appears generally, the Constitution deprives a legislature of power to provide for jurisdiction in divorce cases unless it requires affirmative evidentiary proof of domiciliary intent." Brief for Petitioner at 15, *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955) (No. 54-261). The Supreme Court avoided ruling on the constitutional question by holding that the Virgin Islands legislature lacked the authority to pass the statute. *Id.* at 2.

Because no party was challenging the statute's constitutionality, Erwin Griswold, then dean of Harvard Law School, was appointed by the Court to file an amicus brief and to argue the case. See, e.g., Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amicus Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 916-17 (2011).

¹⁷⁴ Brief for Petitioner, *supra* note 173, at 28-30 (arguing that the statute did not violate the Due Process Clause); *id.* at 42-50 (arguing that the statute did not violate the Full Faith and Credit Clause). Fortas also argued that the domicile rule was vague, *id.* at 36, and did not necessarily ensure that the state with the greatest interest in the matter would have jurisdiction to adjudicate a divorce. *Id.* at 40.

Modern commentators have offered additional explanations as to why the domicile rule, at least as interpreted and applied by Supreme Court case law, simply cannot be a requirement imposed by the Due Process Clause. For example, in their *Conflicts of Laws* treatise, Professors Hay, Borchers, and Symeonides argue that language in various Supreme Court cases cannot be reconciled with a conclusion that domicile is a constitutional jurisdictional prerequisite. Specifically, they point out that the Court has stated in various opinions that "neither the Fourteenth Amendment nor the Full Faith and Credit Clause . . . requires uniformity in the decisions of the courts of different states as to the place of domicil [sic]." HAY, ET AL., *supra* note 80, § 15.6, at 696 (internal quotation marks omitted). "Yet, if domicile is a constitutional requirement derived from due-process considerations," they

A number of state¹⁷⁵ and federal judges came to similar conclusions. For example, in a dissent from a case striking down a Virgin Islands statute permitting courts to adjudicate divorce even if no party was domiciled in the state, Third Circuit Judge Hastie stated, "I can find nothing in the history of the present judge-made rule which entitles [the domicile requirement] to Constitutional sanction."¹⁷⁶

Thus, even in the mid-twentieth century, strong arguments were advanced urging the abandonment of the domicile rule. Since that time, however, important developments make it even more difficult to justify the continued use of the domicile rule. The domicile rule is premised on a strict territorial theory of jurisdiction. In 1945, the same year that the Supreme Court arguably sealed the understanding that domicile is essential for divorce jurisdiction, the Court replaced *Pennoyer's* strict territorial theory of jurisdiction with a more flexible test. Under this more flexible understanding of state court jurisdiction, a court properly has jurisdiction over an action so long as the defendant has "certain minimum contacts" with the forum such that jurisdiction does "not offend traditional notions of fair play and substantial justice."¹⁷⁷ More recently, the Court has asserted that the same constitutional framework governs all forms of jurisdiction, blurring the distinctions between the traditional jurisdictional categories.¹⁷⁸ Finally, developments with respect to the law of divorce significantly undermine the claim that states have a uniquely strong interest in the marital status of their citizens. Despite the ever-increasing inconsistency between the domicile rule and the jurisdictional rules applicable

continue, "it does seem that a *federal* standard should prevail." *Id.*; see also *id.* § 15.7, at 697 ("In contrast, if domicile is the constitutionally *required* basis for jurisdiction, the *constitutional standard* should not be left to differing definition by the various state courts.").

¹⁷⁵ See, e.g., *Wheat v. Wheat*, 318 S.W.2d 793, 796 (Ark. 1958) ("We have studied the majority opinion in the *Alton* case [concluding that domicile is a constitutionally required jurisdictional prerequisite for divorce jurisdiction] with much care but we do not find it convincing."). Cf. *Viernes v. District Court*, 509 P.2d 306, 308 (Colo. 1973) ("A traditional analysis could perhaps end here and simply declare that without domicile of at least one of the parties, no jurisdiction to dissolve a marriage can exist. Jurisdictional theory, however, is not frozen, and the law has developed along with the needs of society. In place of mechanistic rules to determine jurisdiction, an analysis of the interests and the contacts involved in a controversy more effectively and fairly serves the needs of society.").

¹⁷⁶ *Alton v. Alton*, 207 F.2d 667, 692 (3d Cir. 1953) (Hastie, J., dissenting). The statute at issue in the *Alton* case was the same statute that was at issue in *Granville-Smith*. *Granville-Smith*, 349 U.S. at 1. An appeal was filed in the *Alton* case, but the case was later dismissed as moot after the husband obtained a divorce in Connecticut. *Alton*, 347 U.S. at 610-11.

¹⁷⁷ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

¹⁷⁸ HAY ET AL., *supra* note 80, § 5.4, at 349 ("[T]he Supreme Court [has] moved towards ending the practical significance of the distinction between in personam and in rem actions.").

to other civil actions, the Court has continued to cling to the notion that “divorce is different” with little substantive engagement.

A. *State Court Jurisdiction: From Territoriality to Minimum Contacts*

The domicile rule remains rooted in a strict territorial theory of jurisdiction. The rule bases jurisdiction *not* on consideration of the degree of connection between the jurisdiction and the defendant, but instead confines jurisdiction to the state in which the marriage is claimed to be located – the domicile of at least one of the parties. Using the fiction of the marital res, the domicile rule is premised on the notion that only the state in which the res (the marriage) is truly located¹⁷⁹ – the state of domicile of at least one of the parties – has jurisdiction to dissolve the res. In most other areas, however, the Supreme Court has supplanted a strict territorial theory of jurisdiction with a more flexible approach examining the degree of connection between the forum and the defendant.¹⁸⁰

The starting point for modern principles of state court jurisdiction is the Court’s 1877 decision *Pennoyer v. Neff*.¹⁸¹ *Pennoyer* involved a challenge to an Oregon state court judgment purporting to transfer the title to property previously owned by Neff.¹⁸² In ruling that the state court lacked jurisdiction over Neff, and therefore voiding the judgment, the Supreme Court laid out the following principles: “[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”¹⁸³ Concomitantly, “no State can exercise direct jurisdiction and authority over persons or property without its territory.”¹⁸⁴ Thus, the rules enunciated in *Pennoyer* were premised on the principle that for a court to have the power to adjudicate the action, the persons or things at issue needed to be within its borders – that is, he needed to be personally served within the state or voluntarily appear before the court.¹⁸⁵

¹⁷⁹ Cf. Wasserman, *supra* note 9, at 26 (“Jurisdiction became tied to domicile as opposed to residence because courts perceived domicile to be a more permanent, enduring connection.”).

¹⁸⁰ George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 348 (stating that the Supreme Court “displaced the entire conceptual structure of the strict territorial theory” in its famous *International Shoe* decision); see also *id.* at 363 (“*International Shoe* . . . rejected the formal territorial theory of jurisdiction found in the First Restatement.”).

¹⁸¹ 95 U.S. 714 (1877).

¹⁸² *Id.* at 719 (“The defendant claims to have acquired the premises under a sheriff’s deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the State.”).

¹⁸³ *Id.* at 722.

¹⁸⁴ *Id.*

¹⁸⁵ FRIEDENTHAL ET AL., *supra* note 152, § 3.1, at 99; Rutherglen, *supra* note 180, at 348; see also Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1064 (2009).

As one scholar recently put it, at the time of *Pennoyer*, “[t]he lawful jurisdiction of the state . . . was territorially limited.”¹⁸⁶

The domicile rule is solidly grounded on a strict territorial theory of state court jurisdiction. Under the domicile rule, only the state which is the situs of the fictional res (the marriage) has the power to dissolve the marriage. In other words, even states that clearly have a significant connection to the underlying cause of action do not have the power to adjudicate a divorce action if the thing – the marriage – is not understood to be physically present in the state at the time of the divorce action.

In 1945, Justice Frankfurter stated in *Williams II* that “judicial power to grant a divorce . . . is founded on domicil [sic].”¹⁸⁷ That same year, the Court also issued its groundbreaking *International Shoe v. Washington*¹⁸⁸ opinion, now understood to have radically changed the rules governing the limits of state court power. In *International Shoe*, the Supreme Court jettisoned *Pennoyer*’s “strict territorial model of jurisdiction.”¹⁸⁹ It replaced *Pennoyer*’s strict territorial theory of jurisdiction “with a single overriding principle: that a state court can exercise personal jurisdiction over a defendant if he has ‘certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’”¹⁹⁰ “This principle eventually displaced the entire conceptual structure of the strict territorial theory, and with it, most of the legal rules derived from that theory.”¹⁹¹

In the years immediately following *International Shoe*, there were some principled bases for claiming that the decision was inapposite to questions of divorce jurisdiction. Initially, many jurists and scholars viewed *International Shoe* as relevant only to cases involving corporate defendants.¹⁹² In addition,

¹⁸⁶ Sarah H. Cleveland, Essay, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 235 (2010); see also John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1016 (1983) (“The Court in *Pennoyer* reaffirmed the analogy of states to autonomous sovereigns and applied international law of jurisdiction . . .”).

¹⁸⁷ *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229 (1945).

¹⁸⁸ 326 U.S. 310 (1945).

¹⁸⁹ Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 12-13 (2006); see also *id.* at 13; Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2516 (2005).

¹⁹⁰ Rutherglen, *supra* note 180, at 348 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); see also *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (“Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.”).

¹⁹¹ Rutherglen, *supra* note 180, at 348; see also FRIEDENTHAL ET AL., *supra* note 152, at 121.

¹⁹² See, e.g., Rutherglen, *supra* note 180, at 351 (stating that in the Field and Kaplan Civil Procedure casebook issued in 1953, *International Shoe* was discussed in the section on “Jurisdiction over Corporations”); see also *id.* at 358-59.

although the Court had already questioned the usefulness of the *in rem* characterization of divorce jurisdiction,¹⁹³ for a period of time *International Shoe* was understood to have left principles of *in rem*¹⁹⁴ and *quasi in rem*¹⁹⁵ jurisdiction untouched.¹⁹⁶ Over time, however, the strength of both of these explanations eroded. First, it is now clear that *International Shoe* applies to all *in personam* actions, not just those involving corporate defendants.¹⁹⁷ Second, the Court has since held that the same due process framework governs all actions, regardless of their traditional characterization.¹⁹⁸

¹⁹³ *Williams v. North Carolina (Williams II)*, 325 U.S. 266, 232 (1945) (“Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as was recently pointed out, to label divorce proceedings as actions in rem.” (citing *Williams v. North Carolina (Williams I)*, 317 U.S. 310, 297 (1945))); see also *Williams I*, 317 U.S. at 297.

¹⁹⁴ See *supra* note 152 for an overview of true *in rem* jurisdiction.

¹⁹⁵ There are two basic types of *quasi in rem* jurisdiction. The first type is very similar to *in rem* jurisdiction, in that such claims relate directly to specific property. The difference between this type of *quasi in rem* jurisdiction and true *in rem* jurisdiction is that “*quasi in rem* judgment affects only the interests in designated property of known persons who are parties to the proceeding.” FRIEDENTHAL ET AL., *supra* note 152, at 118 (footnote omitted). The second type of *quasi in rem* jurisdiction uses property simply as a means of obtaining jurisdiction; the underlying claim is unrelated to the property. *Id.* at 119.

¹⁹⁶ See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 205 (1977) (“No equally dramatic change has occurred in the law governing jurisdiction in rem. There have, however, been intimations that the collapse of the in personam wing of *Pennoyer* has not left that decision unweakened as a foundation for in rem jurisdiction.”).

¹⁹⁷ *Rutherglen*, *supra* note 180, at 360.

¹⁹⁸ See, e.g., FRIEDENTHAL ET AL., *supra* note 152, at 158-59 (“It was not until 1977 that the Supreme Court finally ruled in *Shaffer v. Heitner* that the *International Shoe* standard should be applied to the assertion of all forms of jurisdiction . . . [Shaffer] abolishes the discrepancy that existed in the constitutional test used for each category.” (footnote omitted)).

Some have argued, however, that *Shaffer* did not abolish the discrepancies existing between different types of actions. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (Scalia, J., plurality opinion) (asserting that *Shaffer* simply held “that *quasi in rem* jurisdiction, that fictional ‘ancient form,’ and *in personam* jurisdiction, are really one and the same and must be treated alike”); *Rush v. Savchuk*, 444 U.S. 320, 328 (1980).

While the Court has suggested that the minimum contacts test applies to all forms of jurisdiction, or at least to all *in personam* and most *quasi in rem* actions, it has left intact important exceptions to this rule, particularly the rule of so-called “tag jurisdiction” or jurisdiction based on transitory presence. *Burnham*, 495 U.S. at 604. Prior to the Court’s decision in *Burnham*, many scholars believed that the minimum contacts test also applied in cases involving transitory presence within the forum. See, e.g., FRIEDENTHAL ET AL., *supra* note 152, at 170 (explaining that the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS took this position).

In *Shaffer v. Heitner*,¹⁹⁹ the Court turned to the impact, if any, *International Shoe* had on forms of jurisdiction other than *in personam*. In its decision, the Court began by recognizing that “[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.”²⁰⁰ This line of reasoning, the Court continued, “leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising ‘jurisdiction over the interests of persons in a thing.’”²⁰¹

Yet the Supreme Court has continued to promote the myth of family law exceptionalism by adhering to the position that divorce jurisdiction is different,²⁰² untouched by these developments with respect to general principles of state court jurisdiction.²⁰³ For instance, in *Shaffer*, a decision which arguably held that the *International Shoe* standard applies to all cases regardless of their characterization, the Court asserted in a footnote that its opinion did not affect the historic exception for divorce and other status cases.²⁰⁴ In neither *Shaffer* nor in any subsequent case, however, did the Court offer any sustained explanation as to why divorce should be exempted from these general principles of state court authority.

One possible rejoinder is that the Court is correct that divorce is different; the particularly strong state interest in divorce justifies treating it differently from other civil actions. While it may be the case that some family law rules should depart from the rules that apply in other contexts, it is important to reach such a conclusion through a considered analysis, rather than through a presumption of family law’s exceptionalism.²⁰⁵ When one subjects the

¹⁹⁹ 433 U.S. 186 (1977).

²⁰⁰ *Id.* at 212; see also *id.* at 207 (“The phrase, ‘judicial jurisdiction over a thing,’ is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.” (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 56, Introductory Note (1971))).

²⁰¹ *Id.* at 207; see also *Quill Corp. v. N.D.*, 504 U.S. 298, 307 (1992) (“In [*Shaffer*] the Court extended the flexible approach that *International Shoe* had prescribed for purposes of *in personam* jurisdiction to *in rem* jurisdiction, concluding that ‘all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.’” (quoting *Shaffer*, 433 U.S. at 212)).

²⁰² *Estin*, *supra* note 143, at 429 (“Since *Pennoyer v. Neff*, the Court has treated divorce as exceptional, not subject to the same due process norms that apply to other litigation.”).

²⁰³ See, e.g., *State-Court Jurisdiction*, *supra* note 9, at 966.

²⁰⁴ *Shaffer*, 433 U.S. at 208 n.30 (“We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standards of fairness.”); see also, e.g., Walter W. Heiser, A “Minimum Interest” Approach To Personal Jurisdiction, 35 WAKE FOREST L. REV. 915, 966 (2000).

²⁰⁵ My point is not that family law should always adopt or be consistent with the rules governing other areas of law. Rather, my point is to resist the trend of reflectively assuming

domicile rule to such an examination, there is no persuasive justification for exempting divorce from the usual rules of jurisdiction.

First, developments in the substantive law of divorce make it difficult to assert credibly that the state's interest in a couple's marital status is so great that it must be protected from the overreaching of other states and even from infringement by spouses themselves. This, of course, was a primary justification for the domicile requirement.²⁰⁶ Today all fifty states permit no-fault divorce.²⁰⁷ This means that in all fifty states, spouses can obtain divorces simply because they want them; spouses no longer are required to prove marital misconduct. As Jana Singer explains, "With the adoption of no-fault divorce statutes, the state[s] ceded to the spouses themselves – and often to one spouse acting unilaterally – the authority to make this judgment" to end the marriage.²⁰⁸

The fact that the all states now give spouses the option of no-fault divorce does not mean that states no longer have any interest in the matter. To the contrary, not only do all states continue to care about the marital status of their citizens, but also a significant number of states still make it relatively difficult to obtain a no-fault divorce.²⁰⁹ For example, in Pennsylvania, to get a no-fault divorce in a contested or unilateral action, the parties must live separate and apart for at least two years.²¹⁰ This is no small hurdle. Moreover, the majority of states, while not requiring a showing of fault, still permit fault-based divorce.²¹¹ A review of the various divorce provisions that exist in this country demonstrates that some states still wish to make divorce difficult. But while some real hurdles to divorce continue to exist, ultimately the decision is one that is left to the spouses. Thus, "[t]he shift to no-fault divorce [suggests] that individuals, not the state, should have control over their most intimate family relationships."²¹²

Moreover, the fact that states continue to have some interest in whether its citizens remain married does not justify the maintenance of an anomalous jurisdictional rule for divorce actions. States have interests in a wide array of

that the rules governing family law should be different with no critical consideration or explanation of why this should be so. By so doing, scholars can contribute to enhanced theorizing about and understanding of family law.

²⁰⁶ See *supra* Part III; see also Estin, *supra* note 143, at 385-86; O'Hear, *supra* note 32, at 1536.

²⁰⁷ See *supra* note 41.

²⁰⁸ Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1471.

²⁰⁹ See, e.g., Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 854 n.98 (1998) (noting that a number of states "require waiting periods of two years or longer to obtain a no-fault divorce").

²¹⁰ 23 PA. CONST. STAT. § 3301 (2007); see also 750 ILL. COMP. STAT. ANN. 5/401 (West 2008); MD. CODE ANN., FAM. LAW § 7-103 (2007); MO. ANN. STAT. § 452.320 (2006); R.I. GEN. LAWS § 15-5-3 (2006).

²¹¹ See, e.g., ELLMAN, *supra* note 9, at 271.

²¹² Wasserman, *supra* note 9, at 27-28.

actions involving their citizens, including wrongful death claims, employment discrimination claims, and consumer tort actions. But with respect to these other cases – again, cases about which states often have strong interests – the usual personal jurisdiction rules apply. Thus, the argument is not that states no longer care about the marital status of their citizens; the argument is simply that the shift to no-fault divorce makes it difficult to claim credibly that states have an interest in divorce that is *significantly* greater than their interests in all other civil actions involving their citizens *and* significantly greater than the interests of the spouses themselves.

Second, this profound change in the substantive law of divorce and the implicit shift with respect to the balance of interests is consistent with modern Supreme Court decisions indicating that *individuals* have important constitutional liberty interests in marriage and in their marital status.²¹³ In the last fifty years “the Supreme Court has recognized that the right to marry, to marital privacy, and to bear and raise children are constitutionally protected interests.”²¹⁴ As Professor Helen Garfield explains, these developments likewise make it “increasingly difficult to continue assuming that the state’s interest in marriage overrides the interest of the individuals directly concerned.”²¹⁵

Third, the problem of the poor, abandoned wife that existed under the old territorial theory of jurisdiction no longer exists. When the domicile rule was initially developed, there was a concern that if the usual territorially-based rules of personal jurisdiction were applied to divorce, an abandoned wife who was unable to locate and personally serve her husband would be unable to get a divorce.²¹⁶ It is significantly less likely today that a person would be unable to

²¹³ See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating policy that limited the right of incarcerated persons to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down state statute that prohibited persons with outstanding child support obligations from marrying); *Boddie v. Conn.*, 401 U.S. 371 (1971) (holding unconstitutional application of filing fee requirements to indigent divorce petitioners); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state anti-miscegenation statute).

²¹⁴ Wasserman, *supra* note 9, at 27-28 (footnotes omitted); see also Garfield, *supra* note 25, at 517 (stating that it is clear that there is protection of “individual liberty in the context of marriage”).

²¹⁵ Garfield, *supra* note 25, at 516; see also *id.* at 503; Wasserman, *supra* note 9, at 27 (“As persuasive as the state sovereignty rationale may have been in a bygone era, it lost much of its force with the advent of no-fault divorce in the 1960s and 1970s.”).

Glenda Riley has made a similar argument, claiming that divorce has been transformed from an action of vital interest to the state and over which the state should have a large degree of control, to one that is understood to be a decision between two individuals. RILEY, *supra* note 129, at 6 (“Gradually, proponents of divorce began to maintain that divorce was a citizen’s right in a democratic America: a civil liberty rather than a social ill.”).

²¹⁶ Wasserman, *Parents, Partners*, *supra* note 25, at 832 (discussing courts’ historic concern for the abandoned, economically dependent wife).

locate his or her former spouse.²¹⁷ Moreover, even if that were true, an action could be filed against that person under the usual rules of personal jurisdiction so long as the action was filed in a state with which she had sufficient minimum contacts.²¹⁸

Fourth, developments with respect to the jurisdictional rules applicable to other aspects of divorce further undercut the claim that a different and unique jurisdictional rule should apply to actions to dissolve one's marital status. Given that all states permit no-fault divorce, to the extent there are disputed issues in a divorce action, such issues are not whether the parties are going to get divorced. Instead, any contested issues almost always involve money or children. States, of course, have important interests in these matters partly because the denial of sufficient property or support could result in leaving various family members destitute. In the middle of the last century, however, the Supreme Court established the so-called "divisible divorce doctrine," pursuant to which the financial aspects of the divorce action are governed by traditional jurisdictional rules.²¹⁹ Hence, for a court to have jurisdiction to adjudicate a claim for spousal or child support or property division, the court must have personal jurisdiction over the defendant spouse.²²⁰ It seems peculiar at best to maintain the position that states need more protection from encroachment from other states with respect to the divorce – an issue over which all states have essentially said spouses basically get what they want – when the Supreme Court has declared that this special protection is not required with respect to the truly contested issues in a divorce proceeding. In addition, the divisible divorce doctrine undercuts the claim that the general topic of divorce is so fundamentally different from all other types of relationships or agreements that it must be held to an entirely different jurisdictional regime.

Finally, it remains unclear whether consideration of state sovereignty concerns or interests plays any independent role in determining the boundaries of state court jurisdiction. Currently, there is a lively debate among

²¹⁷ A simple Internet search reveals hundreds of websites and services designed to help locate missing people.

²¹⁸ This would be true in states that have long-arm statutes that extend to the limits of the Constitution. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").

States with more limited long-arm statutes often permit a court in the state to take jurisdiction if, for example, the absent spouse resided there as husband or wife. *See, e.g.*, D.C. CODE § 13-423(7) (providing that D.C. courts have jurisdiction over a "marital" action if D.C. "was the matrimonial domicile of the parties immediately prior to their separation").

²¹⁹ *See* CLARK, *supra* note 17, at 767 ("The effect of this doctrine is sometimes characterized as making divorce 'divisible,' meaning that a court may, under the Williams cases, have jurisdiction to terminate the marital relationship, but may not have jurisdiction to terminate the financial incidents of the relationship.").

²²⁰ *See, e.g., id.* at 756.

jurisdiction scholars over whether due process concerns are the sole considerations relevant to assessing the boundaries of state court jurisdiction, or whether state sovereignty concerns are also pertinent. Some scholars are of the mind that questions of state court jurisdiction require only analysis of due process concerns.²²¹ For example, John Drobak asserts, “Federalism has no role in the decision of personal jurisdiction issues.”²²² Those, like Drobak, who argue that sovereignty concerns are no longer relevant, point to language in recent Supreme Court decisions stating as much.²²³ For example, in *Insurance Corp. of Ireland, Ltd. v. Campagne des Bauxites de Guinee*, the Supreme Court declared, “The restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.”²²⁴

Other commentators disagree. For example, James Weinstein counters that a jurisdiction framework that is based solely on due process concerns would “unnecessarily deny the Court the flexibility to formulate optimal jurisdictional rules.”²²⁵ Similarly, A. Benjamin Spencer states, “[N]otions of state sovereignty and interstate federalism . . . are central to determining adjudicatory jurisdiction.”²²⁶ Allan Erbsen likewise contends that “[c]onceptualizing constitutional limits on personal jurisdiction as a manifestation of horizontal federalism can substantially reform and refine modern doctrine.”²²⁷

One need not resolve this debate, however, to conclude that the historic sovereignty rationale is no longer a credible justification for the differential treatment of divorce. First, even among scholars who argue that sovereignty

²²¹ See, e.g., Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 570 (2007) (“A careful examination of the parallel development of both substantive due process and personal jurisdiction doctrine across the eras of American law reveals that personal jurisdiction is merely an application of substantive due process principles.”).

²²² See, e.g., Drobak, *supra* note 186, at 1016.

²²³ See, e.g., A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 623-24 (2006) (“Regarding the relationship between state sovereignty, interstate federalism, and personal jurisdiction doctrine, the Court has vacillated between endorsement and rejection of the relevance of these two concepts, giving varying degrees of weight or no weight to sovereignty and federalism as legitimate underpinnings of the law of personal jurisdiction. The most recent major jurisdictional decision of the Court seems to treat due process as the exclusive source of limitations on state court jurisdiction. However, as discussed below, state sovereignty authority plays a vital role in limiting the scope of a state’s adjudicatory jurisdiction.” (footnotes omitted)).

²²⁴ 456 U.S. 694, 703 n.10 (1982).

²²⁵ Weinstein, *supra* note 171, at 174-75. Cf. Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 101 (1990).

²²⁶ Spencer, *supra* note 223, at 620.

²²⁷ Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 7 (2010).

concerns independently should be a relevant consideration in defining the limits of state court power, few take the position that due process concerns regarding the defendant should be removed entirely from the jurisdictional inquiry.²²⁸ That, of course, is precisely what is done in the context of divorce. So long as the petitioner is domiciled in the forum, the court can adjudicate that divorce regardless of the connection between the defendant, her actions, and the forum.

In sum, while always debatable, the domicile rule has become increasingly out-of-step with general principles of state court jurisdiction. The original justification for exempting divorce from the normal rules is no longer persuasive in light of changes in the substantive law of divorce.

B. *Divorce Jurisdiction: Waning Interest Despite Increasing Disjunction*

As discussed above, in the 1940s and 1950s, divorce jurisdiction was a hotly debated issue. As Professor James Sumner wrote in 1955 – likely to the surprise of many legal scholars today – “The recognition of divorce decrees has perhaps created more concern in the United States than any other legal issue.”²²⁹ In the years since Sumner’s writing, however, there has been remarkably little judicial or academic reconsideration of the domicile rule. There has been little engagement with the domicile rule by family law scholars.²³⁰ Likewise, although consideration of the general principles of personal jurisdiction is a subject of considerable contemporary debate,²³¹ jurisdictional scholars generally decline to engage seriously with issues related to divorce jurisdiction. Given the intense historic interest in the issue, and the increasing disjunction between the domicile rule and general principles of state court jurisdiction, why did litigation and scholarly engagement markedly drop off? And why have courts not attempted to reconcile the domicile requirement with the jurisdictional developments discussed above?

Three developments that roughly coincided lessened litigants’ concern about divorce jurisdiction rules. First, all fifty states now have some form of no-fault

²²⁸ For example, although Allan Erbsen argues that principles of horizontal federalism should guide personal jurisdiction analysis, he explicitly states that his “approach does not deny that individuals may have a constitutionally protected interest in avoiding some assertions of personal jurisdiction.” Erbsen, *supra* note 227, at 66-67. Similarly, while arguing that personal jurisdiction analysis should be guided by principles of state sovereignty and interstate federalism, A. Benjamin Spencer nonetheless clarifies that he “do[es] not go so far as to repudiate any further jurisdictional role for the Due Process Clause beyond requiring personal jurisdiction and notice that protects the opportunity to be heard.” Spencer, *supra* note 223, at 634.

²²⁹ Sumner, *supra* note 30, at 1.

²³⁰ There are a few notable exceptions to this statement. See, e.g., Wasserman, *supra* note 9; Wasserman, *Parents, Partners*, *supra* note 25; Garfield, *supra* note 25.

²³¹ See, e.g., Drobak, *supra* note 186, at 1015; Erbsen, *supra* note 227, at 1; Spencer, *supra* note 224, at 617.

divorce.²³² As a result, it generally was “unnecessary for the unhappily married to leave home in order to obtain a divorce.”²³³ In other words, because the original reason that parties ordinarily sought divorces in states other than their home state had largely disappeared, the domicile rule was considered a theoretical rather than a practical problem.

Second, to the extent the parties needed or wanted to seek a divorce in a state other than their home state, the creation of loopholes or exceptions to the domicile requirement also reduced the need to reanalyze the correctness of the domicile requirement. In a series of cases, the Supreme Court held that if both parties participated in the divorce action, they, as well as their privies, were precluded from later attacking the initial decree court’s finding of domicile, thereby mandating interstate recognition of the decree.²³⁴

Third, intervening Supreme Court decisions mitigated concerns about potential unfairness of the domicile rule on defendant spouses. Unlike general rules of state court jurisdiction, the domicile rule does not permit any consideration of the conduct of, or the forum’s connections with, the defendant spouse. To the extent the domicile rule initially raised concerns about unfairness to the defendant, these concerns were allayed by the divisible divorce doctrine which requires that actions involving the financial aspects of divorce – property distribution and spousal support – be brought in states that have personal jurisdiction over the defendant spouse.²³⁵ Because most parties do not want to file multiple actions in multiple states to resolve issues related to their divorce, *Estin* and its progeny increase the likelihood that the action seeking a dissolution of the marital relationship will be brought in a court with personal jurisdiction over the defendant spouse. These developments reduced the need for parties to press the Court to explain why divorce should be subjected to an entirely distinct jurisdictional rule. On the academic side, save a handful of articles written over the last thirty years,²³⁶ most modern commentators largely accept the domicile rule. For example, in his foundational treatise on family law, while Homer Clark questions the correctness of the domicile rule,²³⁷ he goes on to say that the domicile rule is

²³² See *supra* note 41.

²³³ CLARK, *supra* note 17, at 699 (footnote omitted).

²³⁴ See *supra* notes 59-62.

²³⁵ See, e.g., *Estin v. Estin*, 334 U.S. 541, 548-49 (1948).

The divisible divorce doctrine does not, however, eliminate the domicile requirement. It simply provides that *other aspects* of the divorce proceeding are governed by general principles of state court jurisdiction. Thus, the rule increases the possibility that a divorce action will be brought in a state that fulfills *both* the domicile requirement and usual principles of personal jurisdiction.

²³⁶ See, e.g., Wasserman, *supra* note 9; Wasserman, *Parents, Partners*, *supra* note 25; Garfield, *supra* note 25.

²³⁷ CLARK, *supra* note 17, at 768-69 (stating that it is strange to describe an alimony action as a personal action governed by the usual in personam rules while claiming that an action to terminate a marriage does not involve a “personal” right).

justifiable, and more specifically, that the absence of a requirement of personal jurisdiction over the defendant spouse imposes no prejudice.²³⁸ With the advent of no-fault divorce, Clark argues, there is nothing that the defendant spouse could do or say to prevent the court from granting a divorce.²³⁹ Similarly, although scholarly consideration of the outer bounds of state court jurisdiction continues to be lively, few contemporary academics have engaged in any sustained analysis of the domicile rule. These scholars likely have accepted the myth of family law's exceptionalism and have concluded that there is no need to attempt to reconcile family law rules with the rules that govern other types of actions because family law is simply different.

As illustrated in Parts I and II, however, the domicile rule causes serious prejudice to many same-sex married spouses. Moreover, from a theoretical perspective, it is important to resist the myth of family law exceptionalism and instead subject family law rules to the same theoretical rigor that is applied to other areas of law.

In sum, given the rule's theoretical vulnerabilities and the newly emerging practical problems it is imposing, the time has come to abandon the domicile rule. The Supreme Court should finally and squarely dispose of the domicile rule and hold that the same rules that apply to claims for spousal support and property division to the claim for the divorce itself.²⁴⁰ That is, the Court

²³⁸ See *supra* notes 209-210 and accompanying text for a discussion of how the domicile rule causes prejudice to some heterosexual spouses.

²³⁹ CLARK, *supra* note 17, at 768-69.

²⁴⁰ Although abandonment of the domicile rule unquestionably would result in changes (some substantial) to the practice of divorce law, see *infra* Part V, I advocate its full-scale abandonment in the context of divorce rather than a proposal that would create an exemption to the domicile rule when it erects obstacles or barriers to divorce. See Nick Tarasen, Note, *Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration*, U. CHI. L. REV. (forthcoming) (arguing that an exception to the domicile rule should be created for "same-sex couples who validly marry in their home state and later move to another state that refuses to recognize their marriage").

First, as demonstrated above, there is no persuasive justification other than tradition and convenience to exempt divorce from the jurisdictional rules that apply to other civil actions. In a number of areas, family law rules have been permitted to diverge from the rules applicable to other civil actions and these exceptions have been allowed to persist without sustained analysis or consideration. As Jill Hasday has argued, this undertheorization can "distort the arguments that lawyers and commentators make, and the judgments that courts and lawmakers reach." HASDAY, *supra* note 22, at 2. Thus, it is important to resist uncritical acceptance of the myth that family law rules need not conform to or be consistent with other established bodies of law.

Second, a proposal that creates an entirely different set of jurisdictional rules for a delineated subset of families would add a new layer of jurisdictional intricacy to an area of law that is already remarkably complex. Moreover, it would be difficult to construct a rule that clearly delineates who would be exempted from the jurisdictional rules that apply to all other divorce cases. Would the exemption apply only to same-sex couples? Only to same-sex couples who did not enter into a migratory marriage? Would the same-sex couples have

should declare that state courts have adjudicatory power to grant a divorce so long as the court has personal jurisdiction over both parties *and* that any divorce judgment issued by a court with adjudicatory jurisdiction is entitled to exacting full faith and credit in other states.²⁴¹ As demonstrated above, there are no longer any persuasive justifications for exempting a claim for divorce from the rules that apply to other civil actions. Furthermore, states should abandon their divorce residency requirements that were designed, in large part, to ensure compliance with the domicile requirement.

V. DIVORCE WITHOUT DOMICILE: SAME-SEX COUPLES RECONSIDERED

This Part considers how abandonment of the domicile rule in favor of the usual rules of personal jurisdiction would impact same-sex divorce actions. Under a regime based on the usual personal jurisdiction rules, many more same-sex married spouses would have at least one forum in which to divorce. This is true because, for most couples, there will be a strong argument that a court in the state of marriage – a state that clearly recognizes the marriage – would have specific jurisdiction over a subsequent action to dissolve that marriage. Under some factual scenarios, however, it is possible that no state that recognizes the marriage would have personal jurisdiction over both spouses.

Another potential hurdle for these spouses is a choice-of-law issue. Under the current domicile rule, the forum generally applies its own substantive divorce law to the action.²⁴² As Rhonda Wasserman has explained,

Not only are the jurisdictional rules that apply in divorce cases inverted, but the choice-of-law approach taken in these cases is unusual too. In all other interstate cases, the forum state applies its own choice-of-law law to determine which state's substantive law should govern the controversy. In divorce cases, however, the courts eschew choice-of-law analysis and instead always apply their own divorce law. The *choice-of-law corollary*

to seek and be denied a divorce in their domicile to claim protection of the exception? Would the exemption also cover couples who could divorce in their state of domicile *only after* complying with a two year living apart requirement but could divorce immediately in the state of marriage?

²⁴¹ The Supreme Court has made clear that the usual rule is that the judgment of one state is “conclusive upon the merits in a court of another state” so long as “the court in the first State had power to pass on the merits – had jurisdiction, that is, to render the judgment.” *Underwriters Nat. Assur. Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704 (1982) (quoting *Durfee v. Duke*, 375 U.S. 106, 110 (1963)).

²⁴² See, e.g., Silberman, *supra* note 9, at 2008; Sumner, *supra* note 30, at 19 (“It is now well settled in this country that the rule of jurisdiction and the rule of reference in divorce actions are the same. Because of the fact that jurisdiction to divorce is based on domicil [sic] and the fact that the place of domicil [sic] provides the law to be applied, the courts talk about the rule of reference in terms of jurisdiction. In other words, the law of the forum reigns supreme in these suits.”).

to the domicile rule thus ensures application of the divorce law of one of the spouses' domiciliary state.²⁴³

If the domicile rule is replaced with traditional jurisdictional rules, however, courts in some actions to dissolve a marriage will have to grapple with choice-of-law questions. As described in Part I, application of the law of the parties' home state could present a problem for many same-sex married spouses. Accordingly, this Part concludes with several normative jurisdictional and choice of law proposals designed to ensure that all spouses would be entitled to divorce in a court in the state of marriage. This Article is intended to reinvigorate scholarly engagement with the jurisdictional rules governing divorce; it is not intended to and does not consider all issues related to divorce jurisdiction. In particular, an in-depth analysis of the effects of replacing the domicile rule with the usual rules of personal jurisdiction on the practice of divorce law is a project for another piece. That said, such a jurisdictional change would impact divorce practice. Currently, actions to dissolve the marital relationship must be filed in the domicile of one of the spouses. For many couples, replacing the domicile rule with the usual rules of personal jurisdiction would mean that there would be a number of states in which the divorce action could be filed. Not only might the petitioning spouse be forced to file the divorce action in a state other than her current domicile, there undoubtedly would be more forum shopping than currently occurs under the jurisdictional regime based on domicile. Divorce courts also would be faced with new choice-of-law inquiries.

While these concerns are certainly real, these issues – inconvenience to the parties, forum shopping, and choice of law questions – are not unknown to the current practice of divorce law. Currently, not only might the action be filed in a forum that is inconvenient to one of the spouses, but the existing domicile regime also does not even consider or take into account any such inconvenience.²⁴⁴ Forum shopping is possible and occurs under the domicile rule.²⁴⁵ Although courts currently do not have to grapple with complex choice-of-law questions with regard to the divorce itself, they do often have to do so with respect to property division.²⁴⁶ Finally, some of the forum shopping and

²⁴³ Wasserman, *supra* note 9, at 2; *see also* Spaht & Symeonides, *supra* note 20, at 1102 (“[Under a jurisdictional rule based on domicile], it was justifiably taken for granted that the forum state would apply its own substantive law of divorce. Thus, unknowingly or understandably, the choice-of-law question had been merged into the jurisdictional question.”).

²⁴⁴ Wasserman, *supra* note 9, at 1 (stating that, under the domicile rule, the court does not need personal jurisdiction over the defendant spouse).

²⁴⁵ The *Williams* cases themselves are examples, ultimately unsuccessful ones, of this phenomenon.

²⁴⁶ J. Thomas Oldham, *What if the Beckhams Move to L.A. and Divorce? Marital Property Rights of Mobile Spouses When they Divorce in the United States*, 42 FAM. L.Q. 263, 280 (2008) (explaining that “U.S. courts do not agree about how to choose the law that

choice-of-law concerns can be minimized by proposals such as the ones outlined below.

A. *Minimum Contacts Analysis*

Under usual rules of state court jurisdiction, if both spouses consent at the time of divorce to jurisdiction of the forum, a court of that state will be able to entertain the action.²⁴⁷ Thus, in situations in which the parties are in agreement, they would be able to return to the state of marriage (or any other state that recognizes their marriage) and obtain a divorce there. Thus, the remainder of this section is devoted to considering the permissibility of jurisdiction when the defendant spouse will not consent to jurisdiction at the time of the divorce action.

When the defendant spouse will not consent to the jurisdiction of the forum at the time of the divorce action, the jurisdictional inquiry is more complicated. Generally speaking, when the defendant will not consent to the jurisdiction of the forum and has not been served within the forum, a state court applies a two-part test to determine whether it properly has jurisdiction over the matter. First, the court considers the defendant's contacts with the forum – the so-called minimum contacts test. Second, the court “assess[es] the overall fairness or reasonableness of exercise jurisdiction.”²⁴⁸ The Supreme Court has made clear that under the minimum contacts test there is a distinction between specific and general jurisdiction.²⁴⁹ If a defendant has “continuous and systematic” contacts with the forum, the court has general jurisdiction and can adjudicate any claim against the defendant, even when the claim is unrelated to the defendant's contacts with the forum.²⁵⁰ By contrast, when a state court exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising specific jurisdiction over the defendant.²⁵¹ Where the cause of action “arises out of or [is] connected with”²⁵² the defendant's contacts with the forum in the forum state, “far less substantial activities might give rise to jurisdiction.”²⁵³ Moreover, when deciding whether it has specific jurisdiction in a particular case, a court should consider whether the defendant has “purposefully avail[ed] itself of the privilege of conducting activities within

will govern the division of the spouses' property at divorce”).

²⁴⁷ See, e.g., FRIEDENTHAL ET AL., *supra* note 152, at 106.

²⁴⁸ William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. L. REV. 599, 612 (1993).

²⁴⁹ See, e.g., *id.* at 613-15; see also Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

²⁵⁰ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

²⁵¹ *Id.* at 414 n.8 (citing von Mehren & Trautman, *supra* note 249, at 1144-64).

²⁵² *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

²⁵³ HAY, ET AL., *supra* note 80, at 359.

the forum State, thus invoking the benefits and protections of its laws.”²⁵⁴ Ultimately, regardless of whether the court is exercising specific or general jurisdiction, after assessing the level and nature of the defendant’s contacts with the forum, the court must also ask whether it would be reasonable to exercise jurisdiction.

The strongest cases for the exercise of divorce jurisdiction in the state of marriage are presented when the couple resided in the state as a married couple for an extended period of time and only recently left the state. Under such circumstances, one could argue not only that the cause of action – the divorce action – arises out of or is related to the defendant’s contacts with the state, but also that the defendant has significant contacts with the forum.²⁵⁵ By deliberately choosing to marry in the forum and deciding to remain in the forum, the defendant spouse “purposefully avail[ed]”²⁵⁶ himself of the “benefits and protections”²⁵⁷ of the forum. Finally, there is a very strong argument that it would be fair and reasonable under these circumstances for a court in the state in which they married and lived for a period of time as a married couple to adjudicate their divorce proceeding. Thus, for couples like John and Henry, who not only married in the forum but also resided in the forum for a period of time as a married couple, under current jurisdiction rules governing civil actions that state should be able to adjudicate the divorce action even over the objection of the defendant spouse.

Whether the court in the state of marriage could properly exercise jurisdiction over a divorce action would be less clear, however, for those couples who never resided in the forum but simply traveled to the forum to marry and had no other contacts with the forum. Even under these circumstances, however, there is a strong argument that a court in the state of marriage would have specific jurisdiction over a subsequent divorce action. The cause of action arguably arises directly out of or is related to the defendant’s contact with the forum. While there is no consensus for determining what is a “related” contact, the contacts here are related under any of the prevailing tests.²⁵⁸ For example, one could argue that the divorce action

²⁵⁴ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

²⁵⁵ There is a substantial confusion among the lower courts “with respect to the amount of contact necessary to support general jurisdiction[.]” Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 109 (2010). There is no need, however, to argue that a court would have general jurisdiction in such a case, as it would be very clear that a court in the state of marriage would have specific jurisdiction over a subsequent divorce action under those circumstances.

²⁵⁶ *Hanson*, 357 U.S. at 253.

²⁵⁷ *Id.*

²⁵⁸ Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 636 (2009) (“Over time, absent any guidance from the highest court and in their search for a satisfactory introductory step in the analytical framework, courts have devised roughly three different tests in interpreting whether or not a claim ‘arises out of or relate[s] to’ the defendant’s contacts with the forum: (1) a ‘but for’ test, (2) a ‘substantial connection’ test,

would not have arisen “but for” the parties’ marriage, which occurred in the forum.²⁵⁹ Applying the other prevailing tests, the marriage is the “proximate cause” or has “substantive relevance” to the subsequent divorce action.²⁶⁰

Moreover, there is a strong argument that the exercise of jurisdiction by a court in the state of marriage under those circumstances would be reasonable. As the Supreme Court explained,

This “purposeful availment” requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of “random,” “fortuitous,” or “attenuated” contacts . . . or of the “unilateral activity of another party or third person” Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a “substantial connection” with the forum State.²⁶¹

Under the circumstances described above, the defendant will be required to litigate in the state of marriage not as the result of random contacts or the actions of third parties. Instead, the defendant will be required to litigate the divorce action in the state of marriage because the defendant purposefully and intentionally chose to marry in that state.²⁶²

Still there may be some circumstances under which it will be questionable as to whether a court in the state of marriage could properly adjudicate a subsequent divorce action between the spouses. This might be the case if, for example, the couple married in the state fifty years ago and neither individual has had contact with the state since that time.²⁶³

B. *Jurisdictional Proposals*

To address the subset of cases in which it would be questionable whether a court would have personal jurisdiction to adjudicate a subsequent divorce decree arising out of a marriage entered into in the forum, this Article proposes two normative actions a state could implement to ensure that a court in the

and (3) a ‘proximate cause’ test.”).

²⁵⁹ See, e.g., Mark M. Maloney, Note, *Specific Jurisdiction and the ‘Arise from or Relate to’ Requirement . . . What Does it Mean?*, 50 WASH. & LEE L. REV. 1265, 1277-82 (1993); Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The ‘But For’ Test*, 82 CAL. L. REV. 1545 (1994).

²⁶⁰ See, e.g., Maloney, *supra* note 259, at 1282; see also Ressler, *supra* note 258, at 636.

²⁶¹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-80 (1985).

²⁶² It is true that in the *Kulko* case, the Court suggested that marriage in the forum would not be sufficient to confer specific jurisdiction in that case. *Kulko v. Superior Court*, 436 U.S. 93, 98 (1978). In *Kulko*, however, the cause of action did not arise directly out of the parties’ marriage; it was not a divorce action. Instead, the action was one for child support. *Id.* In contrast to the circumstances in *Kulko*, one could credibly argue that here the cause of action for divorce arises directly out of the parties’ intentional in-state conduct.

²⁶³ See, e.g., Peterson, *supra* note 255, at 132 (stating that lower courts have been given remarkably little guidance about the appropriate time frame for assessing whether the party has minimum contacts with the forum).

state of marriage will have jurisdiction over a subsequent divorce. First, states could amend their long-arm statutes to provide that by marrying in the state, a party is submitting to jurisdiction for a cause of action seeking to dissolve or annul a marriage entered into in the forum.²⁶⁴ Such an amendment would be similar to provisions currently included in state long-arm statutes. For example, every state²⁶⁵ has a provision stating that a party submits to jurisdiction within the state for any cause of action arising out of an act of sexual intercourse within the state with respect to any child that results from that sexual intercourse.²⁶⁶ The principle is the same. But for the intentional conduct in the forum, there would be no need for the subsequent action arising out of that conduct. Including such a provision to the state's long-arm statute would bolster a claim that it is "foreseeable," and therefore reasonable and fair, for a subsequent divorce action to be brought in a court in the state of marriage.²⁶⁷

In addition, to strengthen further the case for exercising jurisdiction based solely on marriage in the state, the state could require parties marrying within the state to consent to jurisdiction in the state for purposes of a subsequent

²⁶⁴ Although this Article focuses on the issue of jurisdiction for purposes of dissolving the status of marriage, if a state wanted to better ensure that its courts would have jurisdiction to adjudicate not only the issue of divorce, but also the financial issues incident to the divorce, the state could broaden the language of the provision to include these issues.

²⁶⁵ UNIF. INTERSTATE FAMILY SUPPORT ACT § 201(a)(6) (2001), 9 U.L.A. 185 (2005) [hereinafter UIFSA] (providing that in an action to establish or enforce a child support order or to establish parentage, a court may exercise personal jurisdiction over the defendant where the defendant "engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse"). All fifty states have adopted UIFSA.

²⁶⁶ See, e.g., WASH. REV. CODE § 4.28.185 (2011) (providing that a person submits to personal jurisdiction as to any cause of action arising out of "[t]he act of sexual intercourse within this state with respect to which a child may have been conceived").

A number of courts have concluded it is constitutional to exercise personal jurisdiction over a defendant under such circumstances. See, e.g., *County of Humboldt v. Harris*, 254 Cal. Rptr. 49, 51-52 (Cal. Ct. App. 1988); *Lake v. Butcher*, 679 P.2d 409, 412 (Wash. Ct. App. 1984) ("[I]t does not offend traditional notions of fair play or substantial justice to hold that a man who fathers a child in this state has established sufficient contacts with the state to support the assertion of personal jurisdiction over him in an action concerning that child.").

²⁶⁷ As the Supreme Court stated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." Justice Kennedy's recent plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicaastro*, 131 S. Ct. 2780 (2011), contains language that could be read as suggesting that foreseeability is no longer a relevant criterion. *Id.* at 2790 (plurality opinion) ("If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town."). A more plausible reading of Justice Kennedy's opinion, however, is simply that foreseeability without purposeful availment is not sufficient to establish personal jurisdiction.

divorce of that marriage.²⁶⁸ This idea is not without precedent. In the distinct but related area of domestic partnerships, California requires a similar type of pre-litigation consent. Currently, when parties register as domestic partners in California, each party must “state that he or she consents to the jurisdiction of the Superior Courts of California for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership.”²⁶⁹ Therefore, California courts have jurisdiction²⁷⁰ to dissolve a California domestic partnership even if neither party is domiciled, and has never been domiciled, in the state. Consent continues to be a permissible ground upon which to exercise personal jurisdiction.²⁷¹ Supreme Court case law also teaches that this consent can be given long before the litigation is initiated.²⁷²

While some scholars argue that state-extracted consent to jurisdiction²⁷³ must be subjected to a due process analysis, this proposal is likely to pass constitutional muster even under such a standard.²⁷⁴ First, unlike many corporate registration statutes, the proposed consent would explicitly refer to

²⁶⁸ As stated in note 264 *supra*, the focus of this Article is jurisdiction to dissolve the status of being married. That said, if it chose to do so, the state could broaden the prior consent language to include consent to jurisdiction over the financial issues incident to the divorce action.

²⁶⁹ CAL. FAM. CODE § 298(c)(3) (West 2009); *see also* 750 ILL. COMP. STAT. 75/45 (2011) (“Any person who enters into a civil union in Illinois consents to the jurisdiction of the courts of Illinois for the purpose of any action relating to a civil union even if one or both parties cease to reside in this State . . .”). The Illinois provision is broader than California’s (and broader than what I am proposing here); it purports to establish jurisdiction in Illinois for “any action relating to a civil union.” *Id.* This could include, for example, a wrongful death action that depends upon the plaintiff’s status as a civil union spouse. Such an action would, of course, be governed by the constitutional limitations on state court jurisdiction.

²⁷⁰ As far as I am aware, there have been no published opinions examining the constitutionality of this provision.

²⁷¹ *See, e.g.,* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982); Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 144-45. Although some scholars have argued that such consent is subject to a due process analysis, even these scholars recognize that the bar is very low. Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,”* 58 SMU L. REV. 1313, 1364 (2005).

²⁷² *See, e.g.,* FRIEDENTHAL ET AL., *supra* note 152, at 106; Lee Scott Taylor, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1187 (2003).

²⁷³ Andrews, *supra* note 271, at 1364.

²⁷⁴ Although the right to marry is considered a fundamental right under the Due Process Clause, this is not the type of regulation that would trigger strict constitutional scrutiny. The Supreme Court has declared that reasonable regulations of marriage are permissible. It is only when the law imposes a direct and substantial barrier to the right to marry that strict constitutional scrutiny is triggered. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

jurisdiction. Second, the consent would not be consent to general jurisdiction. Rather, the consent would be simply for the purpose of allowing a court in the forum to adjudicate claims arising directly out of the party's in-state conduct – the deliberate act of marrying in the forum.

In short, in all cases, the parties would have deliberately chosen to marry in the forum, the forum's law at the time of marriage would expressly provide that marrying in the state constituted submission to jurisdiction for purposes of a subsequent divorce action, and the parties would have expressly consented to jurisdiction for purposes of divorce at the time of marriage. Under such circumstances, it would be constitutional under existing doctrine for the court of the state of marriage to entertain a divorce action.

C. *Choice of Law Proposals*

If the domicile rule is replaced with traditional jurisdictional rules, a court will have to consider choice-of-law questions and may apply a law other than the law of the forum. This could be a problem for these same-sex couples. If, for example, a Massachusetts court adjudicates Henry and John's divorce action, but applies Texas law to the action, they are still in a bind. Texas law provides that a court cannot recognize or give effect to a marriage between two persons of the same sex. Accordingly, the Massachusetts court may conclude that, under Texas law, there is no marriage to dissolve. Under usual choice-of-law principles, a court might apply the law of another state if, for example, the couple lived in that other state for the duration of their forty year marriage and one of the spouses continues to reside there.

To address this problem, a state could require the parties who marry in the state to consent not only to jurisdiction for purposes of divorce but also to application of the forum's law to the issue of the termination of the marital relationship should the action be brought in the forum.²⁷⁵ Modern choice-of-law doctrine recognizes that a state can constitutionally apply its own laws to an action so long as the chosen law has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."²⁷⁶ As Katherine Florey has explained, the constitutional standard "is hardly a rigorous one."²⁷⁷

²⁷⁵ Others have argued in favor of permitting parties to choose the law that applies to their divorce proceeding. See, e.g., Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L.Q. 255 (2001).

As is true with respect to the jurisdictional proposals, this Article directly addresses only the issue of the termination of the marital relationship. The state could, however, choose to broaden the provision to include the financial incidents of the divorce as well.

²⁷⁶ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion).

²⁷⁷ Florey, *supra* note 185, at 1077; see also *id.* at 1077-78 (stating that if the court properly has jurisdiction, then it likely can constitutionally apply its own law); Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 903 (2006).

Consistent with this conclusion, courts generally allow the parties wide latitude with regard to choice of law provisions.²⁷⁸ In many if not most cases, enforcement of such a choice of law provision would be constitutional. In all cases, there would be a strong nexus to the forum; the parties deliberately chose to marry in the state and the divorce action arises directly out of a legal relationship created in the forum.

This proposal is not completely unprecedented. Although it has yet to be tested in a published decision, Louisiana has a similar (albeit significantly more far-reaching) provision with regard to covenant marriages. Louisiana is one of three states permitting covenant marriages.²⁷⁹ Covenant marriage restricts the grounds for divorce to fault-based grounds, or to two years living separate and apart.²⁸⁰ Because only three states permit couples to enter into covenant marriages, the concerns that led to the domicile rule's creation are applicable in the context of covenant marriage. Persons in a covenant marriage who subsequently wish to avoid the strict covenant marriage divorce requirements may try to obtain a divorce in a different jurisdiction that does not provide for covenant divorces. Louisiana attempted to guard against such attempts by enacting a choice-of-law provision. The provision reads, "With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages"²⁸¹

The choice-of-law rule proposed here is much more limited and much more likely to be enforceable. The proposal simply requires couples who marry in a state to agree that if the divorce action is later brought in the state of marriage, the law of the state of marriage applies to the action. Thus, unlike the Louisiana provision, the provision would not purport to require another state to apply the law of the state of marriage. As previously explained, the Constitution sets a very low bar for assessing the propriety of a state applying its own law to a particular action. Application of the forum's law to an action is constitutionally permissible so long as the application "is neither arbitrary nor fundamentally unfair."²⁸² It is neither arbitrary nor unfair to apply the law of the forum when the parties deliberately married in the forum, obtained benefits and protections because of their conduct in the forum, and consented to jurisdiction in – and to application of – the forum's law to the termination of

²⁷⁸ See, e.g., Spaht & Symeonides, *supra* note 20, at 1112 (stating that in contract cases, "the degree of deference given by American courts to party autonomy has increased at least ten-fold since the time of *Williams I*" (footnote omitted)).

²⁷⁹ See, e.g., Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 605 (2005) (stating that Arizona, Arkansas, and Louisiana permit couples to enter into covenant marriages).

²⁸⁰ *Id.* at 612-13.

²⁸¹ LA. REV. STAT. § 9:273(A)(1) (2000) (internal quotation marks omitted). For an in-depth discussion of when and under what circumstances it would be permissible to enforce this conflict of law provision, see Spaht & Symeonides, *supra* note 20.

²⁸² *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion).

the marital relationship should one of the parties choose to divorce in the forum.

In many cases, this proposal would give the parties more control over, and clearer expectations about, any subsequent divorce proceeding. Under the proposal, a party would know at the time they married that a subsequent divorce action could be filed in the state of marriage and that if this occurred, the law of the state of marriage would apply to the dissolution of the relationship. Under the current domicile rule, neither party has any way of predicting at the time of marriage in what state a subsequent divorce could be filed and, therefore, what law would apply. Requiring the parties to consent to application of the forum law also would promote judicial efficiency. This is so because, at least to the extent the divorce court is a court in the state of marriage, the court would be applying its own laws rather than the law of some other jurisdiction. It would also likely benefit the parties, as it would eliminate potentially complex choice-of-law issues that could be raised by one or both parties.²⁸³

States also (or alternatively) could enact statutes providing that forum law is applicable to any divorce proceeding brought in the state. This proposal is similar to how many states currently handle actions to determine a child's legal parentage.²⁸⁴ Specifically, a number of states have statutes providing that the forum's law applies to any parentage action brought in the state.²⁸⁵ In addition to eliminating potentially vexing choice-of-law questions that otherwise could arise in divorce actions governed by the usual rules of personal jurisdiction, this proposal also has the benefit of harmonizing the practice of divorce under the new jurisdictional regime with practice under the current regime. Under both systems, courts would apply the law of the forum.

While this alternative is not based on the consent of the parties, nonetheless it is likely constitutional, as it would be "neither arbitrary nor fundamentally unfair"²⁸⁶ to apply the substantive law of a state that has personal jurisdiction over both parties. Like the first choice-of-law proposal, such statutes would promote judicial efficiency by ensuring that the divorce court is applying the forum law to the action.

²⁸³ See, e.g., Oldham, *supra* note 246, at 284 (stating that a general rule permitting the parties to agree to choice of law provisions regarding property division might result in the court applying laws other than the law of the forum and that such a result would result in the parties "incur[ring] the expense of having experts to explain the law, and the court, therefore, . . . hav[ing to] apply[] (or being aware of) the law chosen").

²⁸⁴ See, e.g., Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 41-42 (2010); see also COURTNEY G. JOSLIN & SHANNON P. MINTER, *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW* § 6:14 (2010 ed.).

²⁸⁵ JOSLIN & MINTER, *supra* note 284.

²⁸⁶ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion).

CONCLUSION

Today there are thousands of same-sex spouses who, as a practical matter, are unable to divorce if and when the need arises. A significant number of same-sex married spouses cannot divorce in their home states because their state does not recognize their marriage; they cannot divorce elsewhere because of the domicile rule. The plight of these same-sex couples poses a number of different legal issues that could be addressed. This Article considers the second hurdle – the domicile rule. In contrast to the other legal issues raised by the plight of these couples, critical examination of the domicile rule largely has been omitted from contemporary family law and jurisdiction scholarship. The plight of same-sex spouses provides an important and long overdue impetus to reexamine this anomalous rule.

This Article accomplishes two goals. First, this Article offers a point of resistance to the myth of family law exceptionalism. The myth of family law exceptionalism allows scholars to avoid serious engagement with the rules of family law by presuming, without explanation or analysis, that such rules fail to follow those of other bodies of law. This Article responds to recent calls to resist this myth by critically examining the domicile rule, and whether and how it can be reconciled with contemporary law. Ultimately, this Article argues the domicile rule should be abandoned. Abandonment of the rule alone, however, is not sufficient to resolve the identified problem. Accordingly, the second contribution of the Article is to offer a set of normative proposals to ensure that all spouses have a forum in which to divorce.