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UNBREAKABLE VOWS: SAME-SEX MARRIAGE AND THE  
FUNDAMENTAL RIGHT TO DIVORCE

MEG PENROSE\*

First comes love, then comes marriage.  
Then comes divorce.<sup>1</sup>

I. INTRODUCTION—LOVE AND MARRIAGE

A 155. C668. To many readers these are mere numbers. But, to same-sex couples that have waited years to solemnize their relationships, these simple numbers have opened up a variety of rights and obligations. Finally, same-sex couples can stand in line in New York, pull a number, and for all intents and purposes be just like every other consenting, non-incestuous couple in love.<sup>2</sup> These couples can now legally wed and, in states like New York, tap into many of the benefits that marriage affords.<sup>3</sup> Marriage, after all, affords well over 1,100 federal rights.<sup>4</sup> Marriage like-

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\* Professor of Law, Texas Wesleyan School of Law. Professor Penrose dedicates this Article to her wonderful spouse whom she prays never utters the “D” word. She also thanks James Mitchell and the “Great State of New York” for its forward thinking approach toward marriage. While any errors in form or substance are the author’s alone, this Article has greatly benefitted from thoughtful comments provided by Professor Mark Tushnet, Professor Herma Hill Kay, Professor Bernie James, Professor Judith Stinson, Professor Morgan L. Holcomb, Professor Robert Spector, and Karen Stevens, as well as exceptional research assistance from wonderful librarians, including Kris Helge and Laura McKinnon. Professor Eugene Volokh, Professor Michael Dorf, and Dean Erwin Chemerinsky also contributed early guidance that helped shape the piece. Special credit also goes to my colleagues, Professors Sahar Aziz, Michael Green, Peter Reilly, and Timothy Mulvaney. Finally, this piece is a direct result of Dean Frederic White’s loyal support of the Texas Wesleyan summer grant program.

1. Stevenson Swanson, *Gays’ Breakups Raise Legal Conflicts: Custody, Visitation, Assets Are Issues*, CHI. TRIB., June 21, 2004, at 9.

2. Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 (A. 8354) (McKinney), codified at N.Y. DOM. REL. LAW § 10-A (McKinney 2011) (codifying ability of same sex couples to enter marriage).

3. See Kate Taylor, *Over 10,000 Licenses Issued in First Year of Gay Marriage*, N.Y. TIMES, July 25, 2012, at A22 (remarking that number of same-sex couples marrying might actually be higher because applicants are not required to report their sex on marriage applications). As many as 42% of total same-sex marriages performed in New York during the first year of legalized marriage came from outside New York. *Id.* Approximately 35% of these couples returned home to other states in the U.S. *Id.*

4. See Letter from the GAO to Senator Bill Frist (Jan. 23, 2004) (identifying total of 1,138 federal marital benefits as of December 31, 2003). An earlier GAO Letter to Representative Henry Hyde had identified 1,049 federal laws where benefits were tied to legal marriage. See Letter from the GAO to the Honorable Henry J. Hyde (Jan. 31, 1997). These rights include federal tax benefits, social security benefits, employment benefits, medical benefits, death benefits, housing benefits,

wise provides numerous state rights and benefits.<sup>5</sup> But one right that remains elusive to most same-sex couples is the right to divorce.<sup>6</sup>

For those that travel to partake of the right to marry in states like New York or Massachusetts, returning home does not afford the same rights of marriage dissolution that other non-gay couples enjoy.<sup>7</sup> Ironically, in states like Texas and Rhode Island, gay couples that are legally married outside the state return home to be forever legally bound by their out-of-state marriage, something non-gay couples never fear . . . or face.<sup>8</sup>

This Article considers whether there is a fundamental constitutional right, through the liberty component of substantive due process, to divorce.<sup>9</sup> This right to divorce becomes particularly important for same-sex couples whose marital rights are incomplete, at best.<sup>10</sup> Surely, if divorce were outlawed by any state, the masses would rise up against such tyranny with cries that divorce must be constitutionally protected.<sup>11</sup> But place di-

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and other legal benefits and protections including the right to sue for wrongful death, the right to claim marital privilege under evidentiary rules, and protections afforded for domestic crimes and violence. *Id.*

5. See Jessica Bakeman, *Same-Sex Marriage Legal for One Year—Watershed Moment Celebrated in NY*, STAR GAZETTE, July 24, 2012 (highlighting words of New York Governor Cuomo referring to, “thousands of benefits and protections” gay couples were previously denied under state law, “including health care and hospital visitation rights, pension benefits, property ownership, inheritance rights and safeguards against loss or injury of a spouse”).

6. See Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RES. L. REV. 447 (2012).

7. See H.R. REP. NO. 104-664, at 8 (1996) (noting “[t]he general rule for determining the validity of a marriage is *lex celebrationis*—that is, a marriage is valid if it is valid according to the law of the place where it was celebrated.”).

8. See Stinson, *supra* note 6, at 448 (“[T]he vast majority of married couples in the United States can exit their marriage with relative ease. Yet divorce is often impossible to obtain in a growing number of cases—those where the two parties involved in the divorce are of the same gender.”).

9. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognized as seminal case establishing constitutional right to privacy).

10. Curiously, the United States House of Representatives found that securing traditional marriage against the rising tide of divorce was less imperative than protecting marriage against same-sex infiltration. See H.R. REP. 104-664, at 14 (1996). In summarizing the governmental interests necessitating DOMA, the House Committee acknowledged that “it will be objected that there are greater threats to marriage and families than the one posed by same-sex ‘marriage,’ the most prominent of which is divorce. There is great force in this argument . . .” *Id.*

11. See, e.g., GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 32 (1991) (tracing history of divorce in early American life and culture). Americans, as early as the 1700s, “maintained that one party could flee from another if their union lacked fulfillment and happiness. Divorce-seekers also employed such terms as ‘tyranny,’ ‘misrule,’ ‘injustice,’ and ‘happiness of the individual,’ while espousing revolution against unjust rule by a spouse.” *Id.* Early sentiments toward divorce often aligned with the revolutionary spirit found in the Declaration of Independence. *Id.* at 31. Professor Riley explains that Thomas Jefferson “related the concepts of independence and happiness with divorce some years before he presented a similar argument for terminating America’s connection with England in the Declaration of Independence.” *Id.*

voiced in the context of same-sex marriage and the response is predictably more tepid. “Those” marriages are not legal anyway, so what harm is there in excluding them from divorce?<sup>12</sup> States that refuse to recognize same-sex marriage, for benefits purposes, can arguably refuse to recognize such marriage even for the limited purpose of divorce—which requires, as a predicate, a lawful marriage.<sup>13</sup> This approach fails to appreciate the integral nature of divorce to marriage.

When marriages fail, as they have since the founding of our nation,<sup>14</sup> people exercise their right to divorce and move on to new, healthier, happier relationships.<sup>15</sup> Nearly 5,000 divorces are granted daily in the United States.<sup>16</sup> The reality remains that many Americans are married more than once in their lives.<sup>17</sup> Many individuals seize this opportunity on multiple occasions,<sup>18</sup> perhaps growing more convinced in their forever vows with each subsequent marriage.<sup>19</sup> But, can a state outlaw divorce and hold in-

12. See *id.* at 79 (analogizing marriages involving African Americans in stating that because African Americans were not permitted to marry in many states, their divorces—if any—were likely granted through the church rather than under “white law”).

13. See Stinson, *supra* note 6, at 454 (appreciating that “divorce is fundamentally different from marriage in that it terminates the familial relationship rather than creates one, [thus.] states ought to grant same-sex divorces despite their interest in refusing to grant or generally recognize same-sex marriages”).

14. RILEY, *supra* note 11, at 12 (analyzing history of divorce in early American culture). The first divorce was granted in Massachusetts Bay Colony to James Luxford and his wife. *Id.* Shortly thereafter, in 1643, Anne Clarke obtained a divorce from her husband, Dennis. *Id.* “Thus, divorce has been developing and growing in what is today the United States for over three hundred and fifty years.” *Id.* at 4.

15. See *id.* at 11. It was the Puritans, ironically, that brought divorce to the United States. *Id.* The Puritans believed “that divorce would ultimately preserve the institution of the family.” *Id.* Puritans appreciated that unhappy marriages could corrupt the social order and community. As such, they permitted divorce as a “safety-value.” *Id.*

16. Stinson, *supra* note 6, at 448.

17. See RILEY, *supra* note 11, at 173. Professor Riley notes that many famous Americans have had multiple marriages. For example, Rita Hayworth, Richard Pryor, Jane Wymann, and Tammy Wynette all had five marriages. *Id.* Muhammad Ali, Glen Campbell, Johnny Carson, Joan Collins, Doris Day, Kenny Rogers, and Frank Sinatra were all married four times. And, Dick Clark and Mary Tyler Moore had three marriages apiece. *Id.*

18. See *Unander v. Unander*, 506 P.2d 719, 720 (Or. 1973) (upholding prenuptial agreement between “middle-aged” spouses both of whom had been married before). The marriage approvingly dissolved under the terms of the antenuptial agreement in *Unander* lasted “about nine months.” *Id.*

19. See, e.g., Wynonna Judd Marries for Third Time in Leiper’s Fork, THE TENNESSEAN (June 20, 2012), <http://blogs.tennessean.com/tunein/2012/06/20/wynonna-judd-marries-for-third-time-in-leipers-fork/>. In describing her third marriage ceremony Ms. Judd indicated she “felt a joy that hasn’t been there before.” See also RILEY, *supra* note 11, at 172 (noting that “most people about to remarry believed their new marriages would last a lifetime. Bridal consultants reported that brides entering a third, fourth, or fifth marriage glowed with happiness and optimism, and often insisted on a white wedding gown”).

dividuals to their initial promise to the state and each other to be legally bound ‘til death do they part? Or, does the United States Constitution afford relief from marriage for changed circumstances, including the simple desire to remarry someone else?

Numerous cases suggest there is a fundamental right to divorce.<sup>20</sup> And, from a logical perspective, divorce appears to be an essential corollary of marriage.<sup>21</sup> Surely the state cannot force individuals to remain legally bound, regardless of the words uttered during marriage ceremonies.<sup>22</sup> Marriage, and its bundle of rights, must assuredly include not only an entrance, but also an exit.<sup>23</sup> For many same-sex couples, this traditional exit has been sealed, withheld, or otherwise thwarted.<sup>24</sup> Accordingly, same-sex couples must convince courts that divorce is a fundamental right—not a right that states can withhold from discrete or unpopular minorities. The fundamental right to divorce provides the only shelter from imposing unbreakable vows.

Section II of this Article briefly discusses the similarities between interracial and same-sex marriage. Section III exposes the uncertain status of same-sex marriage in relation to divorce. Section IV analyzes how courts define fundamental rights under substantive due process. Finally, Section V applies this analytical framework to conclude divorce is a fundamental right.

States currently have the right to decide whether to sanction gay marriage for purposes relating to marriage and marital benefits. States retain the right to limit marriage within their borders. But, under no circumstances, can any state require a legally married individual to remain mar-

20. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (reminding that “[w]ithout those peripheral rights the specific rights would be less secure”); see also *Zablocki v. Redhail*, 434 U.S. 374 (1978) (securing as fundamental the right to marry, and possibly remarry); *Sosna v. Iowa*, 419 U.S. 393 (1975); *United States v. Kras*, 409 U.S. 434, 444–45 (1973) (distinguishing the divorce from bankruptcy, particularly noting that “[t]he *Boddie* appellants’ inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities.”); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

21. See, e.g., *Estin v. Estin*, 334 U.S. 541, 546 (1948) (citing *Williams v. North Carolina*, 317 U.S. 287 (1942)) (explaining that “[m]arital status involves the regularity and integrity of the marriage relation. It affects the legitimacy of the offspring of marriage. It is the basis of criminal laws, as the bigamy prosecution in *Williams v. North Carolina* dramatically illustrates. The State has a considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized”).

22. See *Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970) (“We know of no community or society in which the public policy that condemned a husband and wife to a lifetime of misery as an alternative to the opprobrium of divorce still exists.”).

23. See, e.g., *United States v. Kras*, 409 U.S. 434, 443–44 (1973) (“The denial of access to the judicial forum [for divorce] in *Boddie* touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship.” (emphasis added)).

24. See generally, *Stinson*, *supra* note 6.

ried.<sup>25</sup> States cannot do so because divorce is qualitatively different from marriage. American divorce dates back to 1639 and has continued unabated, in varying forms and fashions, to provide relief from wedding vows.<sup>26</sup> This right cannot be withheld from same-sex couples while generously granted to all others.<sup>27</sup> Such disparate treatment is not only unconscionable, it is—this author believes—unconstitutional.

## II. UNNATURAL UNIONS

“What therefore God hath joined together, let not man put asunder.”<sup>28</sup>

This common edict, one repeated during many marriage ceremonies, contains the words of Jesus not Jefferson.<sup>29</sup> Jefferson, it turns out, was an early and ardent supporter of divorce.<sup>30</sup> Many of his colleagues, including Alexander Hamilton, proposed divorce legislation and supported the right for early Americans to exit marriage.<sup>31</sup> Hamilton’s 1787 proposed New York statute allowing divorce solely on grounds of adultery remained New York’s law until 1966.<sup>32</sup> Early Americans became convinced “that divorce was a citizen’s right in a democratic country dedicated to principles of freedom and happiness.”<sup>33</sup>

In contrast, marital rights have often been withheld from certain, unpopular groups. Unlike divorce, the fundamental right to marry is of relatively recent origin. The fundamental right to marry, protecting most men marrying most women,<sup>34</sup> was not considered enshrined in our fed-

25. *Cf.* *Sosna v. Iowa*, 419 U.S. 393, 426–27 (1975) (upholding as constitutional durational residency requirements to seek divorce).

26. *See* RILEY, *supra* note 11, at 12 (explaining that while variations for divorce-seekers may have required some Americans to obtain legislative divorces while others sought judicial divorces, divorce has been steadily consumed since the founding of our nation).

27. *See* Stinson, *supra* note 6, at 458 (noting that “[i]n the last two decades, some courts have granted divorces in cases where they would not have permitted the marriage in the first place, including common-law marriages [which are not recognized as legal in every state] and marriages of first cousins”).

28. *Mark* 10:9 (King James).

29. *See* RILEY, *supra* note 11, at 31.

30. *Id.* Jefferson was a staunch supporter of divorce maintaining that to refuse divorce is “to chain a man to misery till death.” *Id.* He further noted that “liberty of divorce prevents and cures domestic quarrels” and “restores to women their natural right of equality.” *Id.* Thus, while history credits Jesus with vigorously opposing divorce, the words of Jefferson demonstrate a much more liberated view. *Id.*

31. *See id.* at 157.

32. *Id.*

33. *Id.* at 34.

34. Throughout this Article, the author wants to make clear that when describing marriage and its fundamental right, the author intends to mean those legal marriages that are entered by two (and only two) consenting persons of appropriate age, lacking in close or incestuous relation. The United States Supreme Court upheld a bigamy conviction against First Amendment challenge as far back as 1878. *See Reynolds v. United States*, 98 U.S. 145, 161–68 (1878). Polygamy, the

eral Constitution until 1967.<sup>35</sup> Its “sacred” pedigree in this country is a mere forty-five years old.<sup>36</sup> Compared to divorce, which began in earnest during the colonial period, the right to marry is in its infancy.<sup>37</sup> Prior to 1967, states could and, in fact, did prevent many men from marrying many women.<sup>38</sup> In particular, interracial marriage was illegal,<sup>39</sup> often punished by either prison<sup>40</sup> or banishment,<sup>41</sup> and deemed void by many of the indi-

Court noted, “has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.” *Id.* at 164. The Court continued, “we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society . . . .” *Id.* at 165. While marriage rights and regulations vary from state to state and from generation to generation, there has not been any variation, or diminishment, in the certitude that marriages to multiple partners at one time (bigamy and polygamy) or marriages between close relatives is universally condemned. *Id.*

35. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967). While *Loving* invalidated state statutes and proscriptions against interracial marriages, the Supreme Court did not strike down other exclusions against marriage including incest, bigamy, polygamy, and same-sex marriage. Additionally, all states continue to place legislative limitations on marriage relating to age. Prior to *Loving*, the United States Supreme Court had actually upheld anti-miscegenation statutes against Equal Protection challenges, refusing to overturn the convictions of a black man and white woman for living together in adultery and fornication. See *Pace v. Alabama*, 106 U.S. 583, 585 (1883), *overruled by* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

36. Although the first case to strike down miscegenation laws as violating Equal Protection was decided nearly twenty years before *Loving*, its holding emanated from the Supreme Court of California, which only bound California. *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

37. See RILEY, *supra* note 11, at 3 (“American divorce has a long and venerable history: Puritan settlers first introduced it in the American colonies during the early 1600s. The resulting institution of American divorce was vital, and growing, long before late twentieth-century Americans carried it to its current state.”).

38. *Loving*, 388 U.S. at 6–7 & n.5 (listing sixteen states that had miscegenation statutes in effect when *Loving* was decided as: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia). The Court indicated also that Maryland repealed its miscegenation statute after *Loving* was initiated. *Id.* at 6 n.5. The Court also listed fourteen states that had repealed their miscegenation statutes within fifteen years prior to *Loving*, including Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. *Id.*

39. See Kimberly A.C. Wilson, *Some See Parallels in Gay Marriage Debate*, BALTIMORE SUN, Feb. 25, 2004, at 5B (noting that Maryland is credited with first miscegenation law in 1664). “In the earliest days of Maryland history, the person who performed a black-white wedding ceremony could be fined. White servants who married slaves and free Africans who married white servants were enslaved.” *Id.*

40. Jason Thomas, *Love Divided, Reunited: Woman Who Gave Up Family to Marry a Black Man Rejoices in Reconnecting with the Sister She’d Left Behind*, INDIANAPOLIS STAR, Aug. 25, 2005, at A1. Indiana, which became a state in 1816, began outlawing interracial marriage two years later in 1818. *Id.* In the early 1900s, the law in Indiana provided that individuals violating the anti-miscegenation laws would be “fined not less than \$100 nor more than \$1,000 and imprisoned not less than one year nor more than 10 years.” *Id.*

41. In fact, the Lovings were essentially banished by Virginia when the state trial judge suspended their one-year sentence for twenty-five years on the condi-

vidual states.<sup>42</sup> Such unions were deemed “unnatural,”<sup>43</sup> among other things.<sup>44</sup> From 1871<sup>45</sup> to 1928<sup>46</sup> there were three Joint Resolutions to add a constitutional amendment to prevent interracial marriage.<sup>47</sup> All three failed but set the stage for later federal attempts, including a failed constitutional amendment, for taking plenary control over marriage and divorce.<sup>48</sup>

Just as interracial marriage was deemed “unnatural” by courts and legislators, the same emotive arguments are advanced to deny martial equality to same-sex couples.<sup>49</sup> Several members of Congress have explained

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tion that they “leave the State and not return to Virginia together for 25 years.” *Loving*, 388 U.S. at 3.

42. *Id.* at 4–5 n.3 (noting that Virginia statute at issue in *Loving* established all “marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process”).

43. Representative Seaborn Roddenbery asserted on the Capitol floor that such interracial marriages were “revolting” “villainous” and “atrocious.” *See* 49 CONG. REC. 502 (1912); *see also* *State v. Ross*, 76 N.C. 242, 245 (N.C. 1877) (noting further argument “that a marriage between persons of different races is as unnatural and as revolting as an incestuous one”); *Eggers v. Olson*, 231 P. 483, 484 (Okla. 1924) (“Statutes forbidding intermarriage by the white and black races were without doubt dictated by wise statesmanship, and have a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but is always productive of deplorable results.”).

44. Brian Powell, *Marriage and the Court of Public Opinion*, L.A. TIMES, Dec. 5, 2010, at 37. Mr. Powell, a sociologist at Indiana University, indicates that “[t]he justifications now used to renounce same-sex marriage—that it is unnatural and ungodly, that children from such unions will be irrevocably harmed, and that such marriages degrade ‘real’ marriage—mirror objections to interracial marriages . . . .”

45. *See* H.R.J. Res. 368, 62nd Cong. (1912). The Joint Resolution was proffered by Georgia Representative Roddenbery as follows:

Intermarriage between negroes or persons of color and Caucasians or any other character of persons within the United States or any Territory under their jurisdiction is forever prohibited, and the term “negroes” or “persons of color” as here employed shall be held to mean any and all persons of African descent or having any trace of African or negro blood.

*Id.*

46. *See* S.J. Res. 65, 70th Cong. (1928). Senator Blease introduced the following Joint Resolution:

The marriage of a white person with a negro or mulatto shall be unlawful and void. Congress shall provide by law for the punishment of parties attempting to contract such marriage, and for the punishment of the officer of the law, or minister or any other person qualified to perform the marriage ceremony, who shall attempt to or perform such ceremony.

*Id.*

47. *Id.* All three Amendments failed to reach a vote in Congress.

48. *See, e.g.*, S.J. Res. 1707, 70th Cong. (1927) which provided a very detailed description of marriage and divorce, including five permissible grounds for divorce: adultery; cruel and inhuman treatment; abandonment or failure to provide for a period of one year or more; incurable insanity; and conviction of an infamous crime.

49. *See, e.g.*, Tim Craig, *Competing Md. Measures Would Focus on Gay Rights*, WASH. POST., Nov. 20, 2003, at B01 (discussing Maryland legislators’ views on same-

their reasons for opposing same-sex marriage in terms, and tones, similar to those raised during the anti-miscegenation period. For example, Representative Thomas Coburn remarked that he opposed gay marriage because it was “based on perversion,” and “unnatural.”<sup>50</sup> Additionally, Representative Stephen Buyer underscored that same-sex marriages are “an attack upon God’s principles.”<sup>51</sup> Senator Jesse Helms likewise exclaimed that “at the heart of this debate is the moral and spiritual survival of this Nation.”<sup>52</sup> Similar to the interracial couples that preceded them, same-sex couples find themselves regularly targeted for constitutional amendments to, once again, protect the sanctity of marriage from “unnatural” influences.<sup>53</sup>

The Supreme Court of Hawaii addressed these vestiges of bigotry in a very direct manner in its 1993 groundbreaking opinion, *Baehr v. Lewin*:<sup>54</sup>

[T]he Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the “custom” of the state to recognize mixed marriages, marriage “always” having been construed to presuppose a different configuration. With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.<sup>55</sup>

While this Article does not intend to primarily focus on whether there is a constitutional right for same-sex couples to marry, the fact that the foundational arguments against gay marriage are eerily familiar to those

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sex marriage). As one Democratic state representative noted, “I don’t want to live next door to people who have a same-sex relationship and have children and have my children playing with them.” *Id.*

50. 142 CONG. REC. 16,972, 17,074, 17,082 (1996) (quoting Representatives Buyer, Coburn, and Smith).

51. 142 CONG. REC. 17,074 (1996) (quoting Representative Buyer opposing same-sex marriage legislation, describing it as inconsistent with traditional union of “one man and one woman”).

52. 142 CONG. REC. 22,334 (1996).

53. One Supreme Court Justice, the Honorable Antonin Scalia, has explained that being exposed to homosexuals can be uncomfortable for many people. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves . . . from a lifestyle that they believe to be immoral and destructive.”).

54. 852 P.2d 44 (Haw. 1993). This one opinion, which served as the gateway to subsequent same-sex marriage cases, served as the impetus for DOMA. The House Committee drafting DOMA explained that DOMA “is a response to a very particular development in the State of Hawaii.” H.R. REP. NO. 104-664, at 2 (1996).

55. *Baehr*, 852 P.2d at 63 (internal citation omitted).

opposing miscegenation should be evaluated in assessing state actions withholding marital rights—including, as this Article challenges—the correlative, fundamental right to divorce.<sup>56</sup>

For states whose legislatures eradicated their anti-miscegenation laws prior to *Loving v. Virginia*,<sup>57</sup> there remained the thorny issue of whether such interracial marriages would be recognized in neighboring states outlawing such marriages.<sup>58</sup> What happened when those interracial marriages, generally void under state miscegenation statutes, broke down? Could states that outlawed interracial marriage still force such individuals to remain married despite their deep desires to end the union?

Same-sex couples marrying today are facing the same dilemma. Same-sex couples, legally married in one state, may return home to a faltering marriage and an inhospitable court system.<sup>59</sup> State courts are beginning to struggle in earnest with the question—both jurisdictional and substantive—of whether they have the power to award same-sex divorce.<sup>60</sup> The Defense of Marriage Act (DOMA) is silent on this issue.<sup>61</sup> While DOMA precludes recognition of same-sex marriages, it does not outlaw or otherwise delimit the right to petition for divorce.<sup>62</sup> And, as this Article contends, neither DOMA nor any state law could do so without running afoul of the fundamental right of all persons to access the courts for dissolution of a legal marriage.

Curiously, though admittedly not identically, history has a way of repeating itself. For those gay couples that find themselves legally married

56. Powell, *supra* note 44 (reminding that “[e]ven in 1967, when the [Supreme Court] issued its decision [in *Loving v. Virginia*], only one-fifth of Americans approved of interracial marriage. Yet public opinion soon changed, in large part as a result of the [C]ourt[’s] decision.”).

57. 388 U.S. 1 (1967).

58. Mildred Jeter and Richard Loving remain the best example of not only the refusal to recognize interracial marriage during the 1960s, but also the fact that such unions were criminally prosecuted. See *Loving*, 388 U.S. at 1. The State of Virginia sentenced the Lovings to one year in jail but suspended their respective sentences on the condition that they leave Virginia for a twenty-five year period. *Id.* at 2–3.

59. See Stinson, *supra* note 6, at 460–61 (discussing difficulties of same-sex couples in obtaining proper forum for divorce).

60. See *id.*

61. 28 U.S.C. § 1738C (1996) (“No State, territory, or possession of the United States . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . .”).

62. *Id.* In fact, the impetus behind DOMA was to prevent Hawaii from setting a national requirement to recognize same-sex marriages as marriages for benefit purposes under the Full Faith and Credit Clause. See BACKGROUND AND NEED FOR LEGISLATION, DEFENSE OF MARRIAGE ACT (“DOMA”), H.R. REP. NO. 104-664, at 2 (1996) (acknowledging that DOMA “is a response to a very particular development in the State of Hawaii”). The Defense of Marriage Act does not speak either explicitly or implicitly to divorce. *Id.* And, historically speaking, this is the first federal piece of legislation directed at marriage.

in New York, what happens when they travel home to Texas? Just as racial minorities experienced prior to *Loving*, the answer is not entirely clear and the reasoning hardly consistent. Now, in the twenty-first century, the Supreme Court has the inescapable opportunity to firmly declare divorce is a fundamental right.

### III. UNCERTAIN STATUS

If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals. In a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude.<sup>63</sup>

Most individuals debating the gay marriage issue fail to appreciate that marriage is only part of the equation. Far too often marriage involves not just the "coming together for better or for worse, hopefully enduring," but also the dissolution of the marriage endeavor.<sup>64</sup> While marriage is usually a joyful occasion, divorce can be life-changing and financially ruinous.<sup>65</sup> Divorce is not always mutual and frequently not amicable.<sup>66</sup> It is the rending apart of a union, one that state courts alone can undo.<sup>67</sup> If this power is withheld, individuals remain married despite changed circumstances and, often, changed addresses.

So how do states treat individuals that leave the state to participate in a destination wedding? Can they return home from Canada, New York, Hawaii, etc., to the protection of divorce, if needed? Without the state sanction of divorce, individuals would remain married to another—at least in certain states and countries where their marriage is deemed lawful—'til death do they part. But, this dilemma only faces some individuals: the

63. *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

64. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (referring to marriage as "an association for as noble a purpose as any involved in our prior decisions").

65. See, e.g., *Estin*, 334 U.S. at 542–50 (rendering New York separation agreement protecting abandoned wife with monthly maintenance and support "divisible" from husband's *ex parte* Nevada divorce).

66. See *B.S. v. F.B.*, 883 N.Y.S.2d 458, 458–59 (Sup. Ct. 2009) (involving one member of civil union serving other member with eviction notice).

67. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971).

same-sex couples that are quickly becoming the Mildred Jeter and Richard Loving of the twenty-first century.<sup>68</sup>

Despite the belief that homosexuals desire marriage equality from purely a status perspective, many gay and lesbian individuals desire marriage for its opposite protection—divorce. If a state refuses to recognize a marital relationship for the limited purpose of divorce, the parties to that relationship have no legal recourse when the feelings fade and the marital framework falls apart.<sup>69</sup> Marriage provides security precisely because there is protection proffered, in the form of divorce, when that relationship fails. When you get right down to it, the push for marriage is not about marriage at all. It is about divorce. Thus, the dialogue regarding a marital equivalent, such as civil unions, is legally unacceptable.<sup>70</sup> Without marriage, many courts have found there can be no divorce.<sup>71</sup> And, divorce is a time-honored American tradition that ensures each party is protected when the union fails.<sup>72</sup>

#### A. *Uncivil Unions*

Gay couples that sought out and obtained legal “civil unions” under Vermont state law learned very quickly that those unions could not be easily dissolved.<sup>73</sup>

Individuals are now bringing these migrating marriages and civil unions to court. They seek divorces, dissolution and . . . benefits. The dissolution cases present the classic conflict-of-laws problem. Parties from a jurisdiction that offers civil unions, [sic] are now domiciled in another state and want to dissolve the relationship.<sup>74</sup>

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68. See generally, Stinson, *supra* note 6; see also *Loving v. Virginia*, 388 U.S. 1 (1967).

69. Stinson, *supra* note 6, at 455 (reminding that “State action is required in order for a couple to lawfully terminate their marriage. Despite the existence [in some states] of common law marriage, there is no corresponding common law divorce.” (footnotes omitted)).

70. See, e.g., *B.S.*, 883 N.Y.S.2d at 458–59.

71. *Id.* See also *Austin v. Austin*, 75 Va. Cir. 240 (Va. Cir. Ct. 2008) (finding Vermont civil union “void” for Virginia purposes only).

72. See *Maynard v. Hill*, 125 U.S. 190, 206 (1888) (providing detailed history of divorce dating back to country’s founding).

73. See *Saluccio v. Alldredge*, 17 Mass. L. Rptr. 498, \*4 (Super. Ct. 2004) (providing equitable dissolution of civil union upon recognizing that “the parties are in need of a judicial remedy to dissolve their legal relationship” but are not entitled to traditional divorce); *B.S.*, 883 N.Y.S.2d at 463; *O’Darling v. O’Darling*, 2008 OK 71, 188 P.3d 137 (noting same result for Canadian marriage ceremony); *Austin*, 75 Va. Cir. at \*2 (finding Vermont civil union “void” for Virginia purposes only).

74. *B.S.*, 883 N.Y.S.2d at 463.

As two scholars aptly noted, these couples are “wedlocked.”<sup>75</sup> The Supreme Court of New York for Westchester County, a state trial court, found that while “New York courts have recognized same sex [marital] unions celebrated in a sister state or foreign country by application of the principal [sic] of full faith and credit,” “the essential predicate for each judicial determination is the existence of a valid marriage.”<sup>76</sup> Thus, the New York court, like many other courts dealing with civil unions—which are not marriage relationships—found that it lacked subject matter jurisdiction, or statutory power, to render any dissolution.<sup>77</sup> Simply put, the couple could not divorce.

During the late 1800s and early 1900s, interracial couples faced a similar problem. Their situation, however, was exacerbated by the virulent nature of racial prejudice. Interracial couples were not only disallowed the marital bond,<sup>78</sup> they were often subjected to criminal prosecution,<sup>79</sup> and extra-judicial punishments, for participating in such unions.<sup>80</sup> Intemperate invectives<sup>81</sup> and rousing language<sup>82</sup> were, and still are, cast about to ensure that the majoritarian view will hold tightly to its purported God-

75. See Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, U. MIAMI L. REV. 1 (2012).

76. *B.S.*, 883 N.Y.S.2d at 465–66 (internal citations omitted).

77. *Id.* at 463–67 (finding dissolution of civil union impossible).

78. See, e.g., *Eggers v. Olson*, 231 P. 483 (Okla. 1924) (taking land from grantees who obtained it from black husband of Choctaw Indian who had obtained land after her death). The Supreme Court of Oklahoma upheld not only the loss of land by the grantees of the husband, but also required payment of money damages because the purchaser should have known the husband had no rights to convey. *Id.* at 487.

79. *Kinney v. Commonwealth*, 71 Va. 858 (Va. 1878) (affirming Virginia trial court’s conviction of black man for lewdly associating and cohabitating with white woman despite couple’s legal marriage in neighboring D.C.). The defendant was fined \$500, a rather significant sum in 1877. *Id.*

80. *Eggers*, 231 P. at 485 (“The marriage was unlawful and prohibited under penalty of committing a felony, and, although contracted and sanctioned under the laws of an adjoining state, it was void, and possessed none of the rights of marriage under the laws of this state, and, this being the case, it was subject to be passed on by a court of equity in a suit to quiet title . . .”).

81. See 49 CONG. REC. 503 (1912) (supporting Representative Roddenbery’s constitutional amendment against interracial marriage while using most strident, intolerable language toward black Americans). Representative Roddenbery spoke of fearing the intermarriage of any “pure American girl . . . corrupted by a strain of kinky-headed blood.” *Id.* He preached, “your protection against the damning blight of [Negro] blood in the veins of your descendants.” *Id.*

82. See *id.* Rep. Roddenbery continued:

Intermarriage between whites and blacks is repulsive and averse to every sentiment of pure American spirit. It is abhorrent and repugnant to the very principles of a pure Saxon government. It is subversive of social peace. It is destructive of moral supremacy, and ultimately this slavery of white women to black beasts will bring this Nation to a conflict as fatal and bloody as ever reddened the soil of Virginia or crimsoned the mountain paths of Pennsylvania.

*Id.*

given monopoly on marriage, dismissing any right the “black-skinned, thick-lipped, bull-necked brutal hearted African,”<sup>83</sup> or the faggot<sup>84</sup> and queer<sup>85</sup> might possess.<sup>86</sup> All the while, those pushing most aggressively for the exclusive heterosexual right to marriage based on sanctity of marriage principles often have themselves enjoyed the privilege, protection, and comfort of legalized divorce.<sup>87</sup>

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83. *Id.* Rep. Roddenbery further challenged “any man of wisdom and insight into the future to assert that my language portends a more calamitous culmination than a far-seeing statesman would prophesy. Let us uproot and exterminate now this debasing, ultrademoralizing un-American, and inhuman leprosy.” *Id.*

84. Matthew Biedlingmaier, *Coulter: “I Don’t Think There’s Anything Offensive About Any Variation of Faggy, Faggotry, Faggot, Fag”*, MEDIA MATTERS FOR AMERICA (Mar. 7, 2007, 7:02 PM), <http://mediamatters.org/research/2007/03/07/coulter-i-dont-think-theres-anything-offensive/138230>. Ann Coulter, a conservative pundit unapologetically confirmed that she does not “think there’s anything offensive about any variation of faggy, faggotry, faggot, fag”. Ms. Coulter explained that her earlier comments suggesting that “you have to go into rehab if you use the word faggot” in relation to former Senator John Edwards were meant to be humorous. *Id.* She further indicated that the word, “faggot,” one she agrees is “a schoolyard taunt,” is “a totally excellent word.” *Id.*

85. See John Peragine, *Thousands Protest Pastor Charles Worley Who Preached Putting Gays and Lesbians in Electrified Pen*, HUFFINGTON POST (May 27, 2012, 4:39 PM), [http://www.huffingtonpost.com/2012/05/27/protesters-denounce-minis\\_n\\_1549339.html](http://www.huffingtonpost.com/2012/05/27/protesters-denounce-minis_n_1549339.html). A North Carolina Baptist minister presented a sermon wherein he called for homosexuals to be fenced in. The minister preached:

Build a great big large fence 50 or 100 miles long . . . . Put all the lesbians in there. Fly over and drop some food. Do the same thing with the queers and the homosexuals. Have that fence electrified so they can’t get out. You know what, in a few years, they’ll die out. You know why? They can’t reproduce.

*Id.*

86. See, e.g., 142 CONG. REC. E1320-21 (1996). Representative Cardiss Collins, whose personal explanation regarding her “no” vote to the Defense of Marriage Act harkened back to the days of miscegenation: “As I walk past the Republican side of the aisle, I expect to hear something similar to an old joke from the civil rights era: ‘Some of my good friends are gay, I just wouldn’t want my son or daughter to marry one.’”

87. Many famous politicians and actors have both multiple divorces and multiple marriages. Tom Cruise, an actor, has three marriages and three divorces. Oddly, all three divorces were filed when his respective wives turned 33. See Elana Grogan, *Tom Cruise Divorced All 3 Wives When They Were 33*, SOFTPEDIA (June 30, 2012, 4:51 PM), <http://news.softpedia.com/news/Tom-Cruise-Divorced-All-3-Wives-When-They-Were-33-278444.shtml>. Newt Gingrich, a national politician, has had multiple marriages and multiple divorces. See Keith Ablow, *Newt Gingrich’s Three Marriages Mean He Might Make a Strong President—Really*, FOXNEWS.COM (Jan. 20, 2012), <http://www.foxnews.com/opinion/2012/01/20/newt-gingrichs-three-marriages-mean-might-make-strong-president-really/>. Likewise, Rush Limbaugh, a radio talk show host has had multiple marriages (four) and multiple divorces (three). See William J. Doherty, *Rush Limbaugh’s Wedding Ends a Bad Week for Marriage*, PSYCHOL. TODAY (June 6, 2010), <http://www.psychologytoday.com/blog/marriage-and-parenting-in-todays-culture/201006/rush-limbaugh-s-wedding-ends-bad-week-marriage>. Al Gore, a politician, has been married to his wife Tipper for 40 years but will soon be divorced. See Bonnie Miller Rubin & Rex W. Huppke, *Al Gore and Tipper Separate After 40 Years*, CHI. TRIB. (June 1, 2010), <http://articles>.

B. *The Queer Issue of Same-Sex Divorce*

In contrast to interracial struggles, perilously bound by criminal decrees and prosecutions, homosexual unions find disdain only at a visceral or religious level.<sup>88</sup> Since 2003, same-sex couples have enjoyed a constitutionally-protected right to sexual intimacy. Still, same-sex marriage is repulsive to many and the rights relating to traditional marriage, including divorce, are deemed to belong solely and exclusively to the heterosexual community. The public policy rhetoric denouncing same-sex marriage does not explain why individuals, once legally married, should be denied divorce.<sup>89</sup> Whether the attempted suppression of same-sex divorce is based on the refusal of sister states to provide comity or the DOMA's negation of Full Faith and Credit, same-sex couples find themselves in an untenable position: hopelessly and unyieldingly married for all time. Same-sex couples alone face the realization that their promises of "I do" are unbreakable vows.

The Supreme Court of Wyoming appreciated this dilemma in permitting a same-sex female couple to access divorce despite the lower court's finding that it lacked subject matter jurisdiction over the controversy.<sup>90</sup> The court explained the critical distinctions between recognizing same-sex marriage in the divorce context and more generally embracing homosexual unions:

Specifically, Paula and Victoria are not seeking to live in Wyoming as a married couple. They are not seeking to enforce any right incident to the status of being married. In fact, it is quite the opposite. They are seeking to dissolve a legal relationship entered into under the laws of Canada. Respecting the law of Canada . . . for the limited purpose of accepting the existence of a condition precedent to granting a divorce, is not tantamount to state recognition of an ongoing same-sex marriage. Thus, the policy of this state against the creation of same-sex marriages is not violated.<sup>91</sup>

State courts throughout the country are struggling, as Wyoming did, to apply their divorce paradigm to same-sex marriages. The problem with waiting for states to interpret their divorce laws in this burgeoning arena is that, in the interim, same-sex couples are forced to remain legally wed, thereby denying them the right to re-marry that their heterosexual neighbors enjoy. These couples are denied, *forever*, their right to access the state

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chicagotribune.com/2010-06-01/news/ct-met-long-marriage-ends-20100601\_1\_tip-per-gore-al-gore-divorce-and-separation.

88. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

89. *See, e.g.*, Christiansen v. Christiansen, 2011 WY 90, ¶¶ 8–15, 253 P.3d 153, 156-57 (Wyo. 2011).

90. *Id.*

91. *Id.* at ¶ 13.

court system—a scenario former Chief Justice Rehnquist noted may pose a constitutional violation.<sup>92</sup>

State court decisions confronting same-sex divorce are not uniform nationally, or even within a single state.<sup>93</sup> Some states, like Texas, have issued decisions finding that marriage and divorce are legally inseparable, essentially finding that divorce is a component of marriage.<sup>94</sup> And, since same-sex marriage is unlawful in Texas, and void as against public policy, divorcing such individuals is impermissible.<sup>95</sup> Other states, such as Rhode Island, have found that the laws outlining divorce, predicated as they are on the State's marriage laws, "had in mind only marriages between people of different sexes," and thus the state can completely close its doors to same-sex couples seeking marital dissolution.<sup>96</sup> Finally, a Pennsylvania Court denied access to divorce for a same-sex couple, noting that (1) same-sex marriage is not a fundamental right; and, (2) that these individuals can petition to have their marriage deemed "void"—an inequitable result that is not equivalent to, or engrained with the same protections, as divorce.<sup>97</sup> These conflicting approaches, particularly the Pennsylvania court's refusal to consider the appropriate fundamental right at stake—divorce, *not* marriage—merely reinforce the need for consideration of divorce as a fundamental right.<sup>98</sup>

The most recent state court opinion on same-sex divorce is *Port v. Cowan*<sup>99</sup> from the Court of Appeals of Maryland. The Maryland court found that same-sex divorce is not repugnant to the State's public policy.<sup>100</sup> The court found that based on the doctrine of comity, "long applied in our State, Maryland courts 'will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but

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92. See *Sosna v. Iowa*, 419 U.S. 393, 410 (1975) (recognizing potential issue when individuals face "total deprivation" to access courts for divorce).

93. *State v. Naylor*, 330 S.W.3d 434 (Tex. Ct. App. 2011) (dismissing appeal of state's challenge to granting of same-sex divorce because state lacked standing); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. Ct. App. 2010) (finding no Equal Protection violation for same-sex couple denied divorce). Apparently, there are some locations in Texas where same-sex couples can access divorce and others where they cannot.

94. *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 665 (finding that if Texas courts were to give recognition to same-sex divorce petitions, rather than deny them completely based on lack of subject matter jurisdiction, "it would give that petition some legal effect in violation of" state law).

95. *Id.* But see *Byrn & Holcomb*, *supra* note 75, at 21–22 (describing numerous instances—outside context of same-sex marriage—where state courts have recognized void marriages for divorce purposes).

96. *Chambers v. Ormiston*, 935 A.2d 956, 966 (R.I. 2007).

97. *Kern v. Taney*, 11 Pa. D. & C.5th 558 (Pa. Ct. Com. Pl. 2010).

98. See *Byrn & Holcomb*, *supra* note 75, at 14 (arguing that courts claiming lack of subject-matter jurisdiction "over same-sex divorce because divorce is statutory is . . . historically inaccurate").

99. 44 A.3d 970 (Md. 2012).

100. *Id.*

out of deference and respect.’”<sup>101</sup> The decision is instructive in noting the many instances where state courts recognize marriages performed outside their boundaries for divorce purposes that are not legal inside state boundaries, such as common law marriages<sup>102</sup> and even certain incestuous marriages.<sup>103</sup>

The comity argument, limited as it is to judicial discretion as to whether a particular marriage violates public policy, is an insufficient protection for same-sex couples needing divorce.<sup>104</sup> This approach exposes gay couples to the same uncertainties faced by interracial couples before *Loving*: am I married when I travel or move to another state? More importantly, can I re-marry if I travel or move? The uncertain status of same-sex marriage, being legal in Connecticut, the District of Columbia, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington, is how these legally married individuals will be received in other states, such as Pennsylvania, Rhode Island, Texas, and Wyoming.<sup>105</sup> From what the cases currently reveal, a same-sex couple married in New York could divorce in Wyoming but not Texas.<sup>106</sup> And a couple legally married in Iowa can dissolve that union in Maryland, but not Pennsylvania. This is precisely the scenario that plagued interracial couples for years. It is the very scenario that underscores the importance of the Full Faith and Credit Clause and casts a potential constitutional shadow over DOMA.<sup>107</sup>

In each of these instances, the State’s refusal to provide access to divorce for same-sex couples implicates that person’s subsequent right to marry (or re-marry depending on whether the same-sex union would be recognized) under *Loving* and *Zablocki v. Redhail*.<sup>108</sup> Imagine, for exam-

101. *Id.* at 975 (quoting Wash. Suburban Sanitary Comm’n v. CAE-Link Corp., 622 A.2d 745, 757 (1993)).

102. *Id.* at 976 (noting that while Maryland law prohibits common law marriage, it recognizes such out-of-state marriages “if valid where formed”).

103. *Id.* at 977 (recognizing “for domestic law purposes a Rhode Island marriage between an uncle and a niece”).

104. Compare *id.* (noting Maryland’s liberal recognition of valid foreign marriages), with *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. Ct. App. 2010).

105. But see Byrn & Holcomb, *supra* note 75, at 17 (explaining that “[f]orty-nine states have subject matter jurisdiction over same-sex divorce”). Thus, the authors continue, “state courts cannot [legitimately] refuse to hear same-sex divorce petitions by asserting that they lack subject-matter jurisdiction.” *Id.*

106. In the heterosexual context, a similar scenario occurred in *Haddock v. Haddock*, 201 U.S. 562 (1906). *Haddock* has since been overruled by the United States Supreme Court. *Williams v. North Carolina*, 317 U.S. 287 (1942).

107. See Byrn & Holcomb, *supra* note 75, at 5 (“[R]efusing to allow same-sex couples to divorce violates long-standing principles of equity and violates rights guaranteed by the federal Constitution.”).

108. 434 U.S.374 (1978). See also Byrn & Holcomb, *supra* note 75, at 38 (arguing that “the right to marry implicitly entails a right to remarry that is not limited to persons currently in opposite-sex marriages. The right to divorce established in *Boddie* is not only about ending the current marriage, but about enabling the parties to marry again in the future” (footnote omitted)).

ple, a female who legally married another female in New Hampshire (legal, at least under the laws of New Hampshire) and desires to leave this marriage and enter a new marriage with a male partner in Texas. Her right to marry that male partner is impaired by the State of Texas's refusal to grant her divorce.<sup>109</sup> And, while Texas would gladly "void" the first marriage, such declarations of voidness do not share the full spectrum of rights and privileges as traditional divorce proceedings.<sup>110</sup> In the truest sense, voidness declarations are separate but far from equal.<sup>111</sup> Following *Romer v. Evans*,<sup>112</sup> such disparate treatment may not only be unwise, it is arguably unconstitutional.<sup>113</sup>

Make no mistake: one vital reason for securing State court recognition of gay marriage is to secure its dissolution. These divorce-seeking same-sex couples are not asking for the State to extend benefits or uphold their union for marriage purposes. On the contrary, same-sex married couples vying for divorce merely need the state, the only entity capable of dissolving the union,<sup>114</sup> to recognize that in some other place a marriage legally took place, that the receiving state—one where domicile and personal jurisdiction exist—has the power to dissolve. No valid reason, especially under comity, exists to deny the existence of a same-sex marriage for divorce purposes.<sup>115</sup> In fact, it would seem the public policy arguments levied against same-sex unions provide the exact support for encouraging and sanctioning its dissolution. Yet, recalcitrant state courts continue to withhold their blessing of divorce, thinking that the matter is one of statutory, rather than constitutional, dimension.<sup>116</sup> This author believes state courts can no longer do so without violating the fundamental right to divorce.

#### IV. ORDERED LIBERTY, PRIVATE CHAOS—HOW COURTS DEFINE FUNDAMENTAL RIGHTS

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later

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109. *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 654.

110. *Id.* at 667.

111. The continuing problem with the treatment of gays and lesbians in the marriage/divorce arena is the desire to give lesser names to their relationships ("civil unions" versus marriage and "voidness declaration" versus divorce) while ignoring that the stigmatic effect of such inferior amalgamations are only half as damaging as the substantive distinctions.

112. 517 U.S. 620 (1996).

113. *See id.*

114. *See* *Maynard v. Hill*, 125 U.S. 190, 210–12 (1888).

115. *See generally* Byrn & Holcomb, *supra* note 75.

116. *See, e.g., In re Marriage of J.B. & H.B.*, 326 S.W.3d at 654.

generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>117</sup>

If the “sanctity of marriage”—a phrase often invoked to exclude those whom God and nature purportedly deem unfit for marriage—is the real basis for excluding unrelated consenting adults from entering monogamous marriages, what are we to make of society’s firmly established right to divorce and the attendant right to remarry?<sup>118</sup> Why is it that we do not hear calls for a constitutional amendment banning divorce, in furthering the sanctity of marriage?<sup>119</sup>

One possible answer is that ours is a government based on legislative and constitutional pronouncements, not Biblical proclamations,<sup>120</sup> thus allowing millions of Americans, even pious ones, to celebrate their fundamental right to marry, divorce and, for many, remarry.<sup>121</sup> In the United States there is no limit to the number of marital partners an individual can have, provided that the marriages are isolated and occur one at a time.<sup>122</sup>

117. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

118. *Cf. Posner v. Posner*, 233 So. 2d 381, 384 (Fla. 1970) (noting “There can be no doubt that the institution of marriage is the foundation of the familial and social structure of our Nation and, as such, continues to be of vital interest to the State; but we cannot blind ourselves to the fact that the concept of the ‘sanctity’ of a marriage—as being practically indissoluble, once entered into—held by our ancestors only a few generations ago, has been greatly eroded in the last several decades. This court can take judicial notice of the fact that the ratio of marriages to divorces has reached a disturbing rate in many states; and that a new concept of divorce—in which there is no ‘guilty’ party—is being advocated by many groups and has been adopted by the State of California . . . . With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling their property rights upon the death of either, might want to consider and discuss . . . the disposition of their property . . . in the event their marriage, despite their best efforts, should fail.”).

119. Committee Members during the DOMA presentation simply shrugged off divorce by noting that “the fact that marriage is embattled is surely no argument for opening a new front in the [divorce] war.” *See* H.R. REP. NO. 104-664, at 15 (1996).

120. *See Trickey v. Trickey*, 642 S.W.2d 47, 48 (Tex. Ct. App. 1982) (permitting state-sanctioned divorce against wife’s wishes and her Biblical objections that church marriage “‘according to God’s Holy Word’ . . . cannot be terminated by a court or anything else but must exist until death”).

121. *See, e.g., Newman v. Newman*, 653 P.2d 728, 731 (Colo. 1982) (en banc) (“Undeniably, some marriages would not come about if antenuptial agreements were not available. This may be increasingly true due to the frequency of marriage dissolutions in our society, and the fact that many people marry more than once.”).

122. In contrast to the modern antipathy toward same-sex marriages, proscriptions against polygamy and bigamy have a much more solid and lengthy history. State laws banning polygamy and bigamy as void marriages predate same-sex proscriptions by hundreds of years. *Compare Davis v. Beason*, 133 U.S. 333, 341 (1890) (“And on this point there can be no serious discussion or difference of

The fundamental right to divorce thus secures both the right to exit a marriage and, equally important, the right to re-enter another.<sup>123</sup>

In contrast to the recent origin of the fundamental right to marry, a pedigree spanning less than fifty years, the Supreme Court has been discussing divorce for over a hundred and fifty years.<sup>124</sup> In 1888, the Court explained:

[W]hile marriage is often termed by text writers and in decisions of courts a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.<sup>125</sup>

This quotation underscores the critical nature of state action in allowing the parties to be released from the marital contract. The nineteenth century Supreme Court clearly appreciated that parties to a marriage could not simply modify their relationship without state sanc-

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opinion. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries.”), *abrogated by* *Romer v. Evans*, 517 U.S. 620 (1996), *with* *Lawrence v. Texas*, 539 U.S. 558, 570 (2003) (“It was not until the 1970’s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.”). While many modern opponents of same-sex unions speak to the foundational nature of marriage as between one man and one woman, the truth of this statement is more numeric (one and one) than it is gendered. Legal prohibitions against same-sex marriage are recent inventions, not traditional legal proclamations like those against polygamy and bigamy whose history are as strong as incest. *See* *Davis*, 133 U.S. at 341; *Lawrence*, 539 U.S. at 570. Thus, politicians and jurists who suggest that same-sex proscriptions are identical to those of polygamy, bigamy, and incest are simply historically incorrect.

123. *See* *Loughran v. Loughran*, 292 U.S. 216 (1934) (upholding woman’s subsequent marriage as valid after receiving divorce based on her adultery—divorce which, at time, required her to refrain from remarriage). Criminal adultery laws were not the only penalty for, and protection against, adulterous conduct. The statute involved in *Loughran* was the District of Columbia’s ban on remarriage because, while divorce based on adultery was permitted, “in such case the innocent party only may remarry.” *Id.* at 221–22.

124. *See* *Cheever v. Wilson*, 76 U.S. 108 (1869) (affording full faith and credit to Indiana divorce).

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

tion.<sup>126</sup> From the beginning of our country's history, the State has held a monopoly on an individual's right to divorce.<sup>127</sup>

Despite the commonness of divorce in Supreme Court opinions, usually discussing the issue of divorce on the margins, the Court has never squarely held that divorce is a fundamental right.<sup>128</sup> The relatively few marriage cases seem to focus on marital proscriptions such as polygamy and miscegenation.<sup>129</sup> Divorce related issues, including inheritance and property disputes, on the other hand, have been commonly recognized and resolved by the Supreme Court since the late 1800s—often in the Full Faith and Credit context.<sup>130</sup> Indeed, the divorce vernacular has been more prevalent in the Supreme Court's history than cases addressing marriage. From a constitutional perspective, divorce—more so than marriage—seems historically demonstrated to have been “implicit in the concept of ordered liberty”<sup>131</sup> such “that neither liberty nor justice would exist”<sup>132</sup> if divorce were withheld from all. And, while it is universally deemed true that marriage is exclusively within the states' province, the Court has been deciding rights tangentially relating to marital dissolution for much of its history.

126. See *id.* at 211. In citing a Maine case, the Court continued to focus on the integral role of the state in marital dissolution:

When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state . . . . Their rights . . . are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they make.

*Id.* (citing *Adams v. Palmer*, 51 Me. 481–83 (1863)).

127. See *Boddie v. Connecticut*, 401 U.S. 371, 376–77 (1971).

128. *But see id.* at 380–81 (holding that refusing indigent's access to courts to secure divorce violates Constitution due, largely, to state's stranglehold on marital dissolution).

129. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (holding Virginia's miscegenation statutes violate Equal Protection and Due Process clauses of Fourteenth Amendment); *Davis v. Beason*, 133 U.S. 333 (1890) (holding district court of territory of Idaho had jurisdiction over crimes of bigamy and polygamy); *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding Alabama's miscegenation statute); *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding indictment for bigamy in territory of Utah).

130. See, e.g., *Maynard v. Hill*, 125 U.S. 190 (1888) (upholding divorce granted by Territory of Washington to husband who settled land and sought divorce there after abandoning wife in Ohio); *Cheever v. Wilson*, 76 U.S. 108 (1869); *Barber v. Barber*, 62 U.S. 582 (1858) (holding that wife divorced *mensa et thoro* in New York can sue for unpaid alimony in Wisconsin, where former husband fled).

131. *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977) (recognizing “the view that some personal rights ‘implicit in the concept of ordered liberty,’ are so ‘fundamental’ that an undefined penumbra may provide them with an independent source of constitutional protection.” (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969))).

132. *Palko*, 302 U.S. at 326.

In the seminal personal jurisdiction case, *Pennoyer v. Neff*,<sup>133</sup> the Court reminded that the state “has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”<sup>134</sup> Thus, *Pennoyer* recognized that the right of marriage implicitly includes its correlative opposite, the right to divorce.<sup>135</sup> A mere ten years later, the Supreme Court again addressed the issue of marital dissolution in *Maynard v. Hill*.<sup>136</sup> *Maynard* involved a wife’s equitable challenge to a Washington State divorce issued in favor of the husband despite his having abandoned her and their children without support in Ohio.<sup>137</sup> The Court gave a seemingly timeless explanation as to why couples seek divorce:

Many causes may arise, physical, moral, and intellectual, such as the contracting by one of the parties of an incurable disease . . . or confirmed insanity, or hopeless idiocy, or a conviction of a felony, which would render the continuance of the marriage relation intolerable to the other party, and productive of no possible benefit to society.<sup>138</sup>

And, in this particular case, the divorce was apparently brought on by the husband’s very modern desire to simply marry another.<sup>139</sup>

Long before the Supreme Court recognized the importance of marital privacy and the sacrosanct nature of intimate decisions between consenting adults, the Court was already appreciating that the indispensable synchronous right of marriage is divorce.<sup>140</sup> The State, at least in America, has always provided *both* an entrance into and an exit from marriage. The Puritans recognized that divorce fostered community harmony because “[m]arriages had to be sound if the community was to be sound.”<sup>141</sup> The Puritans understood that “irremediable cases should be eliminated by divorce.”<sup>142</sup> While few Americans celebrate the idea of divorce, we certainly appreciate the safety valve divorce provides. It is like seeing a lifeboat on a cruise ship. Your hope is you never need it, but it is

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133. 95 U.S. 714 (1877).

134. *Id.* at 734–35.

135. *Cf.* *Loughran v. Loughran*, 292 U.S. 216 (1934) (upholding re-marriage after female had been divorced due to her adultery).

136. 125 U.S. 190 (1888).

137. *Id.* at 191–93.

138. *Id.* at 205.

139. *Id.* at 210 (noting “loose morals and shameless conduct of the husband”).

140. *See* *Byrn & Holcomb*, *supra* note 75, at 1 (“For as long as marriage has existed in the United States, divorce has been its necessary opposite.”).

141. *RILEY*, *supra* note 11, at 11.

142. *Id.*

comforting to have it in sight. And, since the first American divorce in 1639, that lifeboat has been omnipresent in our society.<sup>143</sup>

So, how does one successfully assert that divorce qualifies as a fundamental right under the Court's substantive due process cases protecting liberty and privacy interests with fundamental right status? This author believes that while the journey is not entirely linear, disjointed journeys are often what have quilted together the Court's fluid demarcation of all fundamental rights.

While most scholars correctly assert that the personal right to privacy, under substantive due process, originated with *Griswold v. Connecticut*,<sup>144</sup> the language supporting *Griswold* and its progeny goes back much further.<sup>145</sup> The fundamental right to "liberty" and, ultimately, "privacy," owe their heritage to a string of decisions evaluating whether to fully incorporate, under the Fourteenth Amendment, the Bill of Rights protections against the States.<sup>146</sup> These cases generally assessed criminal procedure issues, such as double jeopardy and the right to be free from coerced confessions.<sup>147</sup> The quintessential language in determining whether a right qualifies as a fundamental right under the Constitution stems from cases as far back as the Court's 1937 decision in *Palko v. Connecticut*.<sup>148</sup>

143. See *id.* at 12 (discussing first known American divorce between James Luxford and his unnamed wife). While "divorce" properly did not exist in every colony or every state, some form of marital dissolution was available in every colony and every state since our country's founding. *Id.* at 1–61.

144. 381 U.S. 479 (1965).

145. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 536–41 (1942) (describing procreation rights of person convicted for stealing chickens and of two separate robberies as "human rights"). *Skinner*, an Equal Protection case, found that Oklahoma's law permitting sterilization of persons convicted as "habitual criminals" violated "one of the basic civil rights of man." *Id.* at 541. *Skinner* found that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.* Thus, in one short sentence, the Court began the process of elevating the marital and procreative rights of Americans to fundamental status—albeit, under the Equal Protection rubric at first.

146. See *Palko v. Connecticut*, 302 U.S. 319, 324–26 (1937) (referencing *Twinning v. New Jersey*, 211 U.S. 78 (1908); *Hebert v. Louisiana*, 272 U.S. 312 (1926); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); and *Brown v. Mississippi*, 297 U.S. 278 (1936) all as helping to create the test for rights deemed "the very essence of a scheme of ordered liberty"). *Palko*, 302 U.S. at 323–26. While these cases most certainly cannot be credited with creating the modern "privacy" doctrine, as such, their heritage is clear as the language of these cases has been cited in numerous modern substantive due process cases ranging from *Griswold* to *Roe*.

147. For a further discussion of these cases, see *supra* note 146.

148. 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969). *Palko* held that the right to be free from double jeopardy was not a right of fundamental character. *Id.* at 328. The Court asked, "[d]oes [the right to be free from double jeopardy] violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?'" *Id.* (quoting *Hebert*, 272 U.S. at 316). Finding the answer to "surely" be no, the *Palko* Court refused to incorporate the Fifth Amendment's proscription against double jeopardy to apply to the States through the Fourteenth Amendment. *Id.* See also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (noting Justice

*Palko* instructs that there are certain inalienable rights that are so vital as to be “the very essence of a scheme of ordered liberty.”<sup>149</sup> To abolish these rights, would “violate a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”<sup>150</sup> The *Palko* inquiry—“[d]oes [denying a particular right] violate those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?’”—has amazingly withstood the test of time, though many of the decisions employing the *Palko* or *Griswold* tests early on, including *Palko* itself, have not.<sup>151</sup> Because the Supreme Court has not directly addressed whether divorce qualifies as a fundamental right, arguments in favor or against its application must carefully consider the right to divorce under the *Palko/Griswold* paradigm.<sup>152</sup>

*Griswold* remains a staple in every introductory Constitutional Law course.<sup>153</sup> *Griswold* established a fundamental right to privacy, “emanat[ing]” from the penumbral rights of the Fourteenth Amendment.<sup>154</sup> The Court, in distinguishing its decision regarding issues relating to marital privacy from those touching mere economic problems, found:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parent’s choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights. . . . The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought,

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O’Connor’s statement that “for at least 105 years, . . . the [Fourteenth Amendment] has been understood to contain a substantive component”).

149. *Palko*, 302 U.S. at 325.

150. *Id.* (citing *Brown*, 297 U.S. at 285; *Snyder*, 291 U.S. at 105; *Hebert*, 272 U.S. at 316).

151. *Id.* at 328 (citing *Hebert*, 272 U.S. at 316). Ultimately, *Palko*’s holding regarding incorporation of the double jeopardy clause was reversed by *Benton v. Maryland*, 395 U.S. 784 (1969).

152. *But see* *Washington v. Glucksberg*, 521 U.S. 702, 720–22 (1997) (suggesting modern approach to “rein in” substantive due process). Despite *Glucksberg*’s seemingly restrictive language, the Court nonetheless references *Snyder v. Massachusetts* and *Palko v. Connecticut* to outline the proper methodology for discerning whether a particular right qualifies for “fundamental right” status under the Constitution. *Id.* at 720–21. This author believes that while *Glucksberg* appears to constrict the Court’s power to articulate “fundamental rights,” divorce, due to its firm grounding in our country’s history and tradition, meets the exacting test still analyzed under *Palko* and its progeny.

153. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

154. *Id.* at 484. The famous concurring opinion of Justice Goldberg would have, instead, entrenched the right to privacy in the Ninth Amendment. *Id.* at 486–87 (Goldberg, J., concurring).

and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.<sup>155</sup>

*Griswold* recognized, after canvassing the history of First Amendment cases, that when combining the penumbral rights of the First, Third, Fourth, and Fifth Amendments, one arrives at a legitimate “right of privacy.”<sup>156</sup> While this First, Third, Fourth, and Fifth combination may be scrutinized, and the concept of what truly emanates from the penumbras remains subject to fair criticism, there can be no denying that marital privacy is “a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. . . . [I]t is an association for as noble a purpose as any involved in [the Court’s] prior decisions.”<sup>157</sup>

Interestingly, the *Griswold* majority refrained from any reference to earlier cases that utilized the traditional fundamental-rights-making language. The concurring opinions, however, buttressed their decisions by focusing on whether the traditions and collective conscience of our people indicated a principle that was so deeply rooted therein as to be ranked fundamental.<sup>158</sup> Focusing on marital liberties, Justice Goldberg reminded that liberty gains content from both the emanations of specific constitutional guarantees and “‘from experience with the requirements of a free society.’”<sup>159</sup> “The inquiry is whether a right involved ‘is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’”<sup>160</sup> Under this analysis, it is hard to deny that considering the experience and requirements of a free society, divorce—much like procreative freedoms—qualifies as a fundamental right. Divorce is, in fact, of such an important character that its access cannot be denied without violating the fundamental principles of liberty and justice which we all depend upon in making life’s most intimate decisions.<sup>161</sup>

*Roe v. Wade*,<sup>162</sup> which established a woman’s qualified right to access abortion, fortifies the notion that divorce qualifies as a fundamental constitutional right.<sup>163</sup> While the Constitution fails to explicitly mention “any right of privacy,” the Court, “[i]n a line of decisions . . . going back per-

155. *Id.* at 482–83 (majority opinion) (internal citations omitted).

156. *Id.* at 482–85 (citations omitted).

157. *Id.* at 486.

158. *Id.* at 493 (Goldberg, J., concurring) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

159. *Id.* at 493–94 (quoting *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting)).

160. *Id.* at 493 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

161. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding law cannot deny ability to divorce solely because of inability to pay).

162. 410 U.S. 113 (1973).

163. *See id.* at 169.

haps as far as” 1891 has recognized and supported such a right.<sup>164</sup> These decisions “make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.”<sup>165</sup> “They also make it clear that the right has some extension to activities *relating to marriage*.”<sup>166</sup> This author believes that divorce, much like procreation, contraception and child-rearing decisions, is a right uniquely related to, but distinguishable from, marriage.

Divorce, much like the decision whether to abort a pregnancy, involves a choice that has far-reaching physical and mental health considerations.<sup>167</sup> Such choice, if withheld by the State may “force upon the [individual] a distressful life and future.”<sup>168</sup> “Psychological harm may be imminent.”<sup>169</sup> “Mental and physical health may be taxed” by being forced to carry a child to term or, similarly, by being forced to remain in an unhappy marriage.<sup>170</sup>

The Supreme Court has consistently focused on the fundamental nature of intimate decisions, particularly those affecting family relations.<sup>171</sup> In reaffirming the essential holding of *Roe, Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>172</sup> renewed the “promise of the Constitution that there is a realm of personal liberty which the government may not enter.”<sup>173</sup> Marriage and rights corresponding to marriage were specifically referenced as underscoring this point.<sup>174</sup> *Casey* specifically notes that “[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>175</sup> In summarizing the Court’s approach regarding fundamental rights, Justice O’Connor notes:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these mat-

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164. *Id.* at 152 (citation omitted).  
 165. *Id.* (citation omitted).  
 166. *Id.* (emphasis added).  
 167. *Id.* at 153.  
 168. *Id.*  
 169. *Id.*  
 170. *Id.*  
 171. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–49 (1992).  
 172. 505 U.S. 833 (1992).  
 173. *Id.* at 847.  
 174. *Id.* at 847–48.  
 175. *Id.* at 851.

ters could not define the attributes of personhood were they formed under compulsion of the State.<sup>176</sup>

The State, and the State alone, has the power to dissolve marital unions.<sup>177</sup> Unlike other contracts and family arrangements, the imprimatur of the State upon a wedding license seals the exits for married couples until, and unless, the State opens the emergency door leading to divorce. Using the framework set out above, courts are left to ascertain through “reasoned judgment” whether the right to divorce qualifies for fundamental protection.<sup>178</sup> This author, considering the most recent Supreme Court decisions at the intersection of life, love, and divorce, believes that case law supports a positive answer to the query.

#### V. LIFE, LOVE, AND DIVORCE—THE ESSENTIAL AND FUNDAMENTAL NATURE OF DIVORCE

People aren’t coming out to celebrate the right to divorce. . . . But it may turn out that the right to divorce is as important to celebrate as the right to marry.<sup>179</sup>

The Supreme Court, starting in earnest with *Griswold*, has demarcated a particular line in the constitutional sand—marriage and the corresponding bundle of martial rights are fundamentally protected under the Fourteenth Amendment.<sup>180</sup> Cases that may be only tangentially related to marriage, such as the right to choose how to educate your children, fall squarely within the bundle.<sup>181</sup> Likewise, the decision to engage in sexual intimacy for the sheer sake of enjoyment has been included.<sup>182</sup> And, so too, has the decision whether to live with nuclear family members.<sup>183</sup> Di-

176. *Id.*

177. See Stinson, *supra* note 6, at 9.

178. *Casey*, 505 U.S. at 849. Justice O’Connor majestically writes: The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts have always exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.

*Id.*

179. Kathleen Burge, *For Gays, Divorce May Soon Be a Useful Right*, BOS. GLOBE, Dec. 3, 2003, at B1 (quoting Professor Suzanne Goldberg of Rutgers School of Law in Newark).

180. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing marriage-related rights cases such as *Loving*, *Meyer*, *Pierce*, *Griswold*, and *Casey*).

181. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

182. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

183. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

voice seems to be similar to these rights from both a qualitative, and constitutional, perspective.

#### A. *Love*

In a very real sense, the Supreme Court has given broader protection to our ability to love whom we choose within the last fifteen years.<sup>184</sup> Beginning with *Romer v. Evans* in 1996, the Court held that a Colorado constitutional amendment singling out gay and lesbian individuals for differential treatment, including potential access to housing, employment and state courts, was irrational and constitutionally unacceptable.<sup>185</sup> Using Equal Protection, *Romer* struck down the amendment because it singled out a particular class of persons, homosexuals, and “impose[d] a special disability upon those persons alone.”<sup>186</sup> Colorado was unable to provide sufficient justification for its classification, prompting Justice Kennedy to remark “that the amendment seems inexplicable by anything but animus toward the class it affects.”<sup>187</sup> Colorado sought to justify its exclusionary amendment on the grounds that it respects “other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”<sup>188</sup> This reasoning harkens back to the anti-miscegenation period where hotel operators and restaurants could exclude persons based on their race alone.<sup>189</sup> Just as many state laws during anti-miscegenation times found support in White Supremacy and contempt for racial minorities, the Colorado statute seemed to be based on similar notions of hegemony and disdain.<sup>190</sup>

*Romer*, even limited as it was to preventing states from singling out discrete minority groups for maltreatment and ostracism, fortifies the argument that divorce is a fundamental right that cannot be denied based solely on a person’s minority classification. Surely if states were to outlaw

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184. Two areas where the Court has not varied its limitation on even consensual intimate conduct are incestuous relationships and polygamous relationships.

185. *Romer v. Evans*, 517 U.S. 620 (1996).

186. *Id.* at 631.

187. *Id.* at 632. Justice Kennedy and the six-member majority were willing to apply rational basis to the classification. But, Colorado was unable to meet even this miniscule standard. The Court found “[t]he breadth of the amendment is so far removed from [the state’s proffered interests] that we find it impossible to credit them.” *Id.* at 635. “We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective.” *Id.*

188. *Id.*

189. See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding, under Commerce Clause, that restaurant could not exclude blacks from its interior seating); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (requiring, on basis of Commerce Clause, motel operator to allow blacks access to their motel).

190. See *Romer*, 517 U.S. at 635 (“We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.”).

divorce solely for the mentally or physically handicapped, there would be outrage. And, case authority suggests that such a law would be struck down as failing even the minimal rational basis test.<sup>191</sup> But, this author believes that the right to divorce is stronger than merely an Equal Protection claim. Instead, the right, like the right relating to all marital-issues, should find shelter under the substantive due process cases granting the protection of strict scrutiny review to fundamental rights.

Following the Supreme Court's decision in *Lawrence*, no longer can same-sex couples be prosecuted for their consensual intimate acts.<sup>192</sup> *Lawrence* was to sodomy laws what *McLaughlin v. Florida*<sup>193</sup> was to anti-miscegenation laws.<sup>194</sup> Sexual intimacy is first protected. Then, those relationships where sexual intimacy naturally occurs receive protection. In this manner, interracial couples first received protection for sexual intimacy in *McLaughlin*. Shortly thereafter, in *Loving*, interracial couples received the constitutional right to marry.<sup>195</sup>

The tide has clearly turned and the modern trend that Justice Kennedy relies upon in *Lawrence* suggests that acts of sexual intimacy are increasingly becoming part of the intimate associational rights protected under the Constitution. While a strong argument can be made that the right to divorce stems from our constitutionally-protected rights to sexual autonomy or our associational rights, this Article is more narrowly focused. Divorce is, or should be, a free-standing fundamental right, much like the opposing right to marry.

It is unclear whether *Lawrence* elevates same-sex intimate conduct to fundamental right status.<sup>196</sup> In fact, it is hard to appreciate how the law is

191. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding in unanimity to strike down city's attempt to withhold special use permit from home for mentally handicapped after finding decision was based on irrational prejudice).

192. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003). Interestingly, the Justices that were in the majority in *Romer* were the same Justices that participated in the majority opinion of *Lawrence*. Likewise, the three dissenting Justices in *Romer*, Justices Scalia, Chief Justice Rehnquist, and Justice Thomas, also dissented in *Lawrence*. See *id.* at 586.

193. 379 U.S. 184 (1964).

194. *Lawrence*, 539 U.S. at 564. To be clear, *Lawrence* considered the right to sexual intimacy under substantive Due Process grounds while *McLaughlin* was an Equal Protection case. Despite this salient difference, the two cases both eradicate criminal prosecutions for consensual acts of sexual intimacy where the lone "illegal" criteria was either race or sexual orientation.

195. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). While some scholars suggest that marriage and domestic relations have always been the province of state courts and legislatures, *Loving* assuredly proves this is not the case. *Loving* demonstrates the federal government's plenary power over marriage—particularly when states attempt to withhold marital rights from couples deemed unfit for marriage by the majority.

196. *Lawrence*, 539 U.S. at 578 (deciding in case which involves "two adults who, with full and mutual consent from each other, engaged in a sexual practices common to a homosexual lifestyle. . . . Their right to liberty under the Due Pro-

invalidated or what level of constitutional scrutiny is actually being applied.<sup>197</sup> Justice Scalia issued a scathing dissent, more vigorous than his *Romer* dissent,<sup>198</sup> in which he claims now that laws outlawing fornication, masturbation, and bestiality will be subject to legal challenge.<sup>199</sup> And, while Justice Scalia fails to cite a single authority supporting the existence of any statute criminalizing masturbation, his point that the Court has now extended constitutional protection to all consensual, adult and non-incestuous sexually intimate conduct is well-taken.<sup>200</sup>

Justice Scalia presciently suggests that *Lawrence* opens the door to legalizing gay marriage.<sup>201</sup> Justice Scalia is undoubtedly viewing the evolutionary trajectory of *Romer* and *Lawrence*<sup>202</sup> through the prism of *McLaughlin*<sup>203</sup> and *Loving*.<sup>204</sup> The first step to achieving a constitutional right to interracial marriage was to eradicate the underlying criminal con-

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cess Clause gives them the full right to engage in their conduct without intervention of the government.”).

197. While Justice Kennedy and the majority rely on substantive due process, Justice O'Connor's concurring opinion would find an Equal Protection violation, similar to *McLaughlin*. *Id.* at 579–80 (O'Connor, J., concurring). But, despite analyzing the case under the right to liberty, and seemingly finding such right to exist, Justice Kennedy and the majority never apply the exacting strict scrutiny analysis familiarly associated with fundamental rights. Justice Scalia in his *Lawrence* dissent correctly notes the ambiguity of the majority's opinion. *Id.* at 594 (Scalia, J., dissenting) (noting that “[n]ot once does [the majority] describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest,’ nor does it subject the Texas statute to strict scrutiny”).

198. *See Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (noting that, rather than respectfully dissenting as so many Justices have historically done, Justice Scalia stated: “I vigorously dissent”).

199. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . called into question by today's decision”).

200. Justice Scalia's *Lawrence* dissent is rich in irony. In *Romer* he criticized Justice Kennedy's majority opinion for being “so long on emotive utterance and so short on relevant legal citation.” *Romer*, 517 U.S. at 639 (Scalia, J., dissenting). Yet, in *Lawrence*, Justice Scalia speaks of the vulnerability of fornication, masturbation, and bestiality laws without offering a single statute or case application where masturbation (performed in private) has been criminally condemned and prosecuted. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

201. *Lawrence*, 539 U.S. at 601–02 (Scalia, J., dissenting) (arguing Court's “reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples”). In supporting his argument that same-sex marriage laws are now vulnerable, Justice Scalia notes that societal feelings that certain conduct is immoral and unacceptable “is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for examples, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.” *Id.* at 600.

202. *See id.* at 604 (“Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).

203. *McLaughlin v. Florida*, 379 U.S. 184, 185 n.1 (1964) (striking down state statute criminalizing the “occupying same room” at nighttime or living together of interracial couples).

204. *Loving v. Virginia*, 388 U.S. 1 (1967).

duct often relied upon by states to support its proscription.<sup>205</sup> The syllogism was simple: interracial sex is criminal, sex is part of marriage; hence, interracial marriage must also be criminal. With that syllogism fatally wounded in *McLaughlin* and eventually struck down entirely in *Loving*, the predicate has indeed been drawn for same-sex marriage. Scalia fears, perhaps not altogether unjustified, that the proverbial slippery slope toward gay marriage has been fully lodged open by *Lawrence*.<sup>206</sup>

For purposes of this Article, however, the importance of both *Romer* and *Lawrence* is the fact that these decisions grant same-sex individuals some measure of protection before the law.<sup>207</sup> In *Romer*, the protection is grounded in Equal Protection.<sup>208</sup> In *Lawrence*, the protection is more enigmatic, though excepting the failure to apply strict scrutiny analysis, Justice Kennedy gives strong indication that consensual sodomy is now a protected “liberty” interest under substantive due process.<sup>209</sup> Homosexuals, contrary to the querulous urgings of Justice Scalia, are not the same as bigamists or polygamists. For literally centuries the Supreme Court has drawn a clear distinction between those desiring to marry multiple partners and those desiring consensual intimate privacy.<sup>210</sup>

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205. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting). In a very telling paragraph, Justice Scalia compares the Court’s direction with our northern neighbors, Canada.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada . . . .

*Id.*

206. *See id.* at 599 (asserting that *Lawrence* “effectively decrees the end of all morals legislation” (emphasis added)). Justice Scalia further faults the majority for signing “on to the so-called homosexual agenda . . . .” *Id.* at 602.

207. Despite Justice Scalia’s virulent dissents containing inflammatory language in both cases, these cases do indeed exempt same-sex individuals from their previous “affiliation” or grouping with incestuous and polygamous relationships.

208. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (“Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”).

209. *Lawrence*, 539 U.S. at 578 (couching protected right as right to liberty under Due Process Clause).

210. *See Davis v. Beason*, 133 U.S. 333, 341–42 (1890) (stating “[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind”).

Despite the rhetoric<sup>211</sup> and false analogies,<sup>212</sup> including those proffered by Justice Scalia,<sup>213</sup> homosexuals are no longer in the same legal position as incestuous and polygamous couples. Nothing that occurred in either *Romer* or *Lawrence* overturned the Supreme Court's decisions in *Reynolds v. United States*<sup>214</sup> or *Davis v. Beason*<sup>215</sup> finding state laws banning bigamy and polygamy constitutional. Putting to the side the hyperbolic analogies drawn by Justice Scalia, the rights of gays and lesbians to partake in most fundamental rights relating to associational intimacy are now constitutionally stronger. Strong enough, one wonders, to include divorce?

### B. *Life*

To qualify a "right" as fundamental, various elements must be satisfied. In 1997, when the Supreme Court addressed whether assisted suicide was constitutionally protected, many scholars believed the Court had finally retreated from its liberal treatment of fundamental rights that began with *Griswold*.<sup>216</sup> Because the Court's decision in *Washington v. Glucksberg*<sup>217</sup> suggests a shift in direction, consideration of this case becomes imperative in discussing any potential fundamental right.<sup>218</sup> While assisted suicide might not, at first glance, have much to do with divorce, the common thread is whether certain intimate behavior qualifies for fundamental right status.

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211. See *Lawrence*, 539 U.S. at 597 (Scalia, J., dissenting) ("I do not know what 'acting in private' means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage.").

212. See *id.* at 599 (arguing that "the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" underlie decisions to criminalize intimate conduct of private, consenting adults). These comparisons are poorly supported, completely lacking citation or case authority, and are, respectfully, equally lacking in logic. States prohibit bestiality to protect animals, as animals can never consent to such conduct. States prohibit adultery to preserve the sanctity of marriage, a viable state interest completely removed from same-sex intimate conduct. Likewise, states prohibit bigamy to protect the sanctity of marriage and secure inheritance and other marriage-related rights. These categories, which are convenient to group together, do not share the similarities that Justice Scalia, without citing any authority, represents. See *id.* And, ironically, Justice Scalia engages in precisely the same approach he condemned in *Romer*, drafting an opinion with "heavy reliance upon principles of righteousness rather than judicial holdings." *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

213. See *Romer*, 517 U.S. at 644 (Scalia, J., dissenting) (comparing laws relating to homosexuality as similar to other reprehensible conduct—such as murder, polygamy, and cruelty to animals); *Lawrence*, 539 U.S. at 590 (analogizing homosexual conduct to bigamy, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity).

214. 98 U.S. 145 (1878).

215. 133 U.S. 333 (1890), *abrogated by* *Romer v. Evans*, 517 U.S. 620 (1996).

216. See *Washington v. Glucksberg*, 521 U.S. 702, 735–36 (1997).

217. 521 U.S. 702 (1997)

218. *Id.*

In contrast to sexual intimacy issues, the Supreme Court has held that individuals do not have a liberty interest in assisted suicide.<sup>219</sup> In *Glucksberg*, the Court began by evaluating whether the right to assisted suicide “has any place in our Nation’s traditions.”<sup>220</sup> Even at this starting point, courts can easily distinguish the right to assisted suicide from divorce. Contrary to divorce, countries have long proscribed and condemned suicide.<sup>221</sup> “Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, [society has] not retreated from this prohibition.”<sup>222</sup> It was against this historical backdrop, considering tradition and practice, that the Supreme Court refused to extend any liberty interest to assisted suicide.<sup>223</sup> Unlike divorce, the *Glucksberg* Court was:

[C]onfronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.<sup>224</sup>

Divorce, in numerous variations, is available in all fifty states.<sup>225</sup> In fact, historically only one state, South Carolina, has ever proscribed divorce and, even then, the ban was temporary.<sup>226</sup> Divorce has been widely available to most Americans since the 1960s, when Ronald Reagan, then California Governor, signed the Nation’s first no-fault divorce bill into

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219. *See id.* at 735–36 (rejecting claim that assisted suicide provides liberty interest capable of declaring Washington law prohibiting practice unconstitutional).

220. *Id.* at 723.

221. *See id.* at 719.

222. *Id.*

223. *See id.*

224. *Id.* at 723.

225. *See* RILEY, *supra* note 11, at 156 (noting that “[b]y 1970, every state in the union permitted divorce”).

226. *See id.* at 69–70 (pointing out that while South Carolina did not permit divorce during nineteenth century, South Carolina law did permit husbands to leave up to one fourth of their estates to mistresses); *see also id.* at 156–57 (describing how South Carolina began permitting divorce through South Carolina Divorce Act in 1949—nearly two decades before United States Supreme Court recognized marriage as fundamental right).

law.<sup>227</sup> Since that time, divorce has been readily and easily available.<sup>228</sup> Prior to that time, divorce may have required proof of cause, but that proof was generally easy to provide and equally easy to achieve.<sup>229</sup> Divorce has the near opposite pedigree of assisted suicide. While assisted suicide has been universally condemned, divorce has been regularly offered and voraciously utilized.<sup>230</sup> While assisted suicide has been outlawed, divorce has been a legal part of American existence since the country's founding.<sup>231</sup> In this regard, divorce stands on much firmer constitutional footing than assisted suicide.<sup>232</sup>

Many scholars agree that *Glucksberg* constricted the Court's ability to establish "fundamental rights" under substantive due process.<sup>233</sup> Yet, the Court's language is tempered by its actual decision-making process in both *Glucksberg* and, subsequently, in *Lawrence*. Both opinions focus almost singularly on the historical practices of our country.<sup>234</sup> Thus, courts analyzing the character of an asserted fundamental right to divorce must begin, like *Glucksberg*, by considering "whether this asserted right has any place in

227. See Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 406 (2007) (noting that "[m]ost writers date the transformation of divorce law in the United States to the 1960s, when New York revised its antiquated divorce statute and California adopted the nation's first pure no-fault divorce law"). See also RILEY, *supra* note 11, at 163 (remarking that by 1977, a mere three years after California introduced no-fault divorce, all but three states had adopted the non-adversarial system).

228. See RILEY, *supra* note 11, at 156 (noting that after California introduced no-fault divorce law, many other states followed suit). "By the early 1980s, one out of two marriages ended in divorce. By the end of the decade, Americans divorced at the rate of over one million divorces a year—one every 13 seconds." *Id.*

229. See *id.*

230. See *id.* at 9 (noting that "divorce gained a firm foothold in the several parts of America by the outbreak of the Revolution in 1776"); see also *id.* at 34 ("[D]uring the early 1830s, divorce was already widespread"). A German commentator labeled the United States "the leading divorce country of the Western World" in 1956. *Id.* at 184. Thereafter, "in 1971, an American historian prophesied that 'divorce in the land of the free will continue to be as American as apple pie.'" *Id.*

231. See *id.* at 3–4. Ironically it was the devout Puritan settlers that established the first divorce laws and decrees in America in the early 1600s. *Id.* at 3.

232. See *id.* at 55. Professor Riley, while tracing divorce back to the Puritan settlers, appreciated that by the middle of the nineteenth century, "it was clear that the time-honored pledge of 'true & faithful until death' had little long-term value to many people who had recited to their spouses on their wedding days." *Id.* In fact, by 1850, "[d]ivorce was now firmly entrenched in the laws of most states and territories. Also, growing numbers of Americans had accepted the concept of divorce as a right: that people suffering abuse or tyranny at the hands of mates were justified in seeking their personal freedom." *Id.* at 61.

233. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (admonishing Supreme Court must show caution and exercise restraint in rendering new fundamental rights "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [m]embers of this Court").

234. *Id.* at 720–23; *Lawrence v. Texas*, 539 U.S. 558, 568–71 (2003) ("At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.").

our Nation's traditions."<sup>235</sup> In the case of divorce, our nation's traditions provide unequivocal support for fundamental right status.<sup>236</sup>

### C. Divorce

Couples marry. Couples divorce. As tragic as it sounds, this is the American love story.<sup>237</sup> Or, at least this is the American love story for millions and millions of Americans dating back to our country's earliest days.<sup>238</sup>

The Supreme Court has, however, never directly held that divorce is a fundamental right.<sup>239</sup> Most of the Supreme Court's decisions relating to divorce continue to both recognize and uphold the right of divorce with an almost conspiratorial appreciation that the right exists—as a “right.” The Court has regularly rendered decisions impacting, upholding, and otherwise protecting divorce as a viable institution.<sup>240</sup> The Court's two most recent decisions implicating divorce are *Boddie v. Connecticut*<sup>241</sup> and *Sosna v. Iowa*.<sup>242</sup>

*Boddie* can be considered either an access to the courts case or a case protecting indigents, much like *Zablocki* in the marital realm. In 1971, the Court concluded that divorce is far too important to relegate, wholly, to individual state control.<sup>243</sup> Writing for the majority, Justice Harlan explained the Court's reasoning in striking down a Connecticut filing fee in divorce cases:

235. *Id.* at 723.

236. See RILEY, *supra* note 11, at 3–8. Even the great Alexander Hamilton sponsored a divorce statute in 1787. *Id.* at 157.

237. See *id.* at 5 (observing that “Americans, a people who love weddings, romance, and living happily ever after, [have] generated the highest divorce rate[s] in the world”).

238. *Id.* at 11 (“Before migrating to the colonies in 1620, many Separatists embraced Martin Luther's and John Calvin's belief that marriage and divorce were civil concerns.”). The first American divorce involved a Puritan couple in Massachusetts in 1639. *Id.* at 12. Shortly thereafter, in 1641, the first alimony statute appeared—also in Massachusetts. *Id.* at 15.

239. See Leonard P. Strickman, *Marriage, Divorce and the Constitution*, 22 B.C. L. REV. 935, 978–83 (1981) (focusing, as this author does, on states' monopolization of divorce process in suggesting that divorce is fundamental right). “A state's categorical refusal to grant divorces would, of course, be tantamount to both a denial of procedural access and a substantive legal right.” *Id.* at 983. Professor Strickman argues that a state's “categorical refusal to do so is a restriction on liberty of a magnitude which demands strict scrutiny.” *Id.*

240. See generally Estin, *supra* note 227. Professor Estin notes that while *Boddie* does not establish, conclusively, a fundamental right to divorce, “it linked divorce to other familial rights protected by the Constitution and described divorce proceedings as ‘the adjustment of a fundamental human relationship.’” *Id.* at 427 (footnote omitted) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376, 386 (1971)).

241. 401 U.S. 371 (1971).

242. 419 U.S. 393 (1975).

243. See *Boddie*, 401 U.S. at 374.

Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.<sup>244</sup>

Despite the language focusing on an individual's ability to pay, the bulk of the opinion focuses on the due process right of *all* individuals to access the courts.<sup>245</sup> Such access becomes increasingly important in the situation of divorce because state courts provide "the only avenue to dissolution" of marriage.<sup>246</sup> This monopoly of power evokes due process concerns—certainly procedural, but also, this author believes, substantive in nature.<sup>247</sup>

The *Boddie* Court admitted unawareness "of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval."<sup>248</sup>

Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.<sup>249</sup>

Thus, divorce is qualitatively unique and mandates some added measure of due process protection for *all* individuals seeking access to divorce.<sup>250</sup> *Boddie* goes only as far as necessary to decide the issue directly before the Court, but the reasoning and language suggest that any individual seeking divorce must, at a minimum, "be given a meaningful opportunity to be heard."<sup>251</sup> Precluding access to the only doors available to dissolve a legal marriage undoubtedly implicates due process concerns.<sup>252</sup> *Boddie* intimates, without holding, that states cannot foreclose an entire

244. *Id.*

245. *Id.* at 375–82.

246. *Id.* at 376.

247. *See id.* at 377 (noting that for all persons divorce process "is not only the paramount dispute-settlement technique, but, in fact, the only available one").

248. *Id.* at 376.

249. *Id.*

250. *See* Stinson, *supra* note 6, at 22 ("Very little is required to marry; a simple application and certification from the state will suffice. But judicial intervention is required to divorce, and the state should not eliminate the ability of people to access that judicial process." (footnotes omitted)).

251. *Boddie*, 401 U.S. at 377.

252. *See id.* at 379 (explaining that "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause").

group, based either on economics or orientation, from accessing divorce.<sup>253</sup>

The opinion's final paragraph provides the strongest rationale for finding that divorce is a fundamental right protected not only by procedural due process but, also, by substantive due process:

The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.<sup>254</sup>

The Court's use of the phrase "all citizens" is telling. A generous reading of *Boddie* requires acknowledgement that the States' monopoly on divorce impacts federal concerns. In resolving divorce requests, states do not operate entirely outside constitutional restraint. Some federal limits, it appears, are acceptable in the realm of divorce.

*Sosna* is not inapposite. *Sosna* upheld a one-year durational residency requirement prior to petitioning for divorce. Iowa's one-year residency requirement is easily distinguishable from other right to travel cases because the state's interest in divorce requires that individuals be "genuinely attached to the State."<sup>255</sup> This attachment helps "insulate divorce decrees from the likelihood of collateral attack."<sup>256</sup> A durational waiting period, however, is vastly distinct from the exclusion—for all time—from the state's divorce courts.<sup>257</sup>

Justice Rehnquist, writing for the Court, clarified the constitutional distinction between *Sosna* and *Boddie*:

[T]he gravamen of appellant *Sosna*'s claim is not total deprivation, as in *Boddie*, but only delay. The operation of the filing fee in *Boddie* served to exclude forever a certain segment of the population from obtaining a divorce in the courts of Connecticut. No similar total deprivation is present in appellant's case, and the delay which attends the enforcement of the one-year durational residency requirement is . . . [therefore] consistent with the provisions of the United States Constitution.<sup>258</sup>

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253. *Id.* at 380–81 (“[T]he State’s refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages . . .”).

254. *Id.* at 383.

255. *Sosna v. Iowa*, 419 U.S. 393, 409 (1975).

256. *Id.*

257. *See id.* at 410.

258. *Id.*

Thus, were a state to *forever* exclude “a certain segment of the population” from accessing divorce, it is unlikely the Court would turn a blind eye to such deprivation.<sup>259</sup> Rather, the Court’s language suggests that this right is subject to delay, but not complete denial.

When these cases are considered together, in light of the settled criteria for recognizing fundamental rights, a viable argument can be made that divorce qualifies as a liberty right under substantive due process. No more important rights attend to marriage than the rights to both enter and exit the relationship. Divorce is an unfortunate, but necessary, prerogative in our American society.<sup>260</sup> People treasure their right to enter a legally binding marriage union. In fact, gays and lesbians continue to battle for marital equality at both the state and federal level. While that struggle is important for a myriad of reasons, the battle for divorce is equally important—lest homosexuals win the battle only to realize they have lost the war.

#### VI. YOU’VE MADE YOUR BED—THE INESCAPABILITY OF GAY MARRIAGE

The framers of the Constitution knew, and we should not forget today, that there is no more effective guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose on a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>261</sup>

Is divorce a component of marriage, or merely a corollary? Will the Supreme Court consider divorce as part of the rights associated with marriage? The answers to these questions are critical, especially to the gay community that has a very limited, regional right to legally marry.<sup>262</sup> If divorce is a corollary to marriage, if divorce is part of the bundle of marital

259. *Id.* (emphasis added).

260. See generally RILEY, *supra* note 11, at 185 (“A life-long marriage can be held as a societal ideal, a goal, a standard to be worked toward, while divorce provisions can end disintegrating marriages incapable of achieving the ideal.”).

261. *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

262. Ironically, the regional nature of this right mirrors quite closely the interracial struggle for marital equality. Southern politicians urged protection, even national protection at times, against interracial marriage. One of the more disturbing portrayals of the southern viewpoint was presented on the House Floor by Georgia Representative Seaborn Roddenbery:

No brutality, no infamy, no degradation in all the years of southern slavery possessed such villainous character and such atrocious qualities as the provision of the laws of Illinois, New York, Massachusetts, and other

rights, then their marital rights are as portable as the couple is. But, if divorce is a component of marriage, state courts may continue to treat gay marriage, and its component right to divorce, as beyond their subject matter jurisdiction. For these same-sex couples, the right to marry, once exercised, becomes the most final act possible, taking on a sense of permanency and inescapability that non-gay couples never contemplate.<sup>263</sup>

Much to the consternation of the straight community, it appears that when it comes to love, marriage, and divorce the heterosexual and homosexual communities have much in common. Both appear to desire lasting, committed relationships sanctioned by the state covenant of marriage. Both appear to recognize that when marriages fail, it is the state—and the state alone—that provides the opportunity to be released from this commitment via divorce.<sup>264</sup> And, both communities appear to appreciate that while love and marriage are the ideal, divorce is all too often the reality. Justice Jackson's 1949 comments serve as a harbinger to the gay rights struggle regarding divorce.<sup>265</sup> If divorce is wrong for some, it must be wrong for all.<sup>266</sup> And, conversely, if the right to end a martial union exists—constitutionally speaking—for some, it should exist for all.<sup>267</sup>

Divorce should exist for all, not merely because Justice Jackson's cries for justness demand equality. Divorce should exist for all because divorce is a fundamental right protected under the liberty and privacy doctrines of substantive due process. Divorce has existed since the founding of our nation and is undoubtedly "implicit in the concept of ordered liberty."<sup>268</sup>

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States which allow the marriage of the negro Jack Johnson to a woman of the Caucasian strain. [Applause.]

.....

Gentlemen, you may Africanize this great country by continuing in Northern and Western States to sacrifice white women on the altar of the negroes lustful fires, but thank God, there are yet 13 States beneath cerulean skies that turn with yearning heart and willing hands to help you strike it down ere it curse you, and in cursing you curse us all forever [applause], and, in cursing you, lest it destroy you and destroy us altogether.

49 CONG. REC. 502-03 (1912).

263. See, e.g., *Trickey v. Trickey*, 642 S.W.2d 47, 50 (Tex. Ct. App. 1982) (protecting individuals from cruel and unusual punishment that remaining in bad marriage entails).

264. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (basing its decision, in part, on state's monopoly over marital dissolution).

265. *Ry. Express Agency*, 336 U.S. at 112-13 (Jackson, J., concurring).

266. See *Byrn & Holcomb*, *supra* note 75. The authors sagely comment: "Indeed, divorce is an unfortunate result of a failed marriage, not a boon offered only to those who are legally wed." *Id.* at 25.

267. Cf. *Sosna v. Iowa*, 419 U.S. 393, 410 (1975) (distinguishing delay from deprivation).

268. *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (2008) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

Divorce is such that “neither liberty nor justice would exist”<sup>269</sup> without its presence.<sup>270</sup> Imagine, if you can, a world where people once married are forever married. Forever. Would Americans really enter into unbreakable vows?

Marriage, littered with limitations dating back to our country’s founding, is not the proper prism through which to evaluate divorce. Rather, to the extent that divorce is a corollary of marriage, it is more akin to the privacy rights of contraception and abortion—they both exist as independent rights—though their connection is indisputable.<sup>271</sup> Women have a right to seek to avoid pregnancy through resort to contraception.<sup>272</sup> And, when that attempt either fails or was improperly utilized, the Constitution provides a qualified fundamental right to abortion to end that pregnancy.<sup>273</sup>

Similarly, while the states have the right to qualify the fundamental right of marriage, the only qualification to divorce that appears constitutional is the limited residency requirements that states can impose.<sup>274</sup> Beyond residency and domicile, there have not been any constitutionally recognized limits to divorce as a fundamental right.<sup>275</sup> In fact, there are vastly more limitations placed on marriage (similar to abortion) than there have been on divorce (similar to contraception).<sup>276</sup> These two rights, both fundamental constitutionally speaking, exist separate and distinct from each other. Without marriage there is no need for divorce. But, divorce provides a fundamental right that is both separate and severable from marriage. Divorce, in the eyes of the Constitution, stands independently.

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269. *Palko*, 302 U.S. at 326.

270. See RILEY, *supra* note 11, at 185 (“If we accept the lesson of the historical record—marriage and divorce exist in virtually all societies—we can also accept the idea that divorce is here to stay. We need not encourage divorce, but we can accept and aid divorce when it occurs.”).

271. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (noting that “[i]t should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception . . .”). Justice O’Connor, writing in *Casey*, explained that the contraception and abortion decisions both relate to “the woman’s liberty because they involve decisions concerning not only the meaning of procreation but also human responsibility and respect for it.” *Id.* at 853.

272. See *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

273. See *Casey*, 505 U.S. at 833; *Roe v. Wade*, 410 U.S. 113 (1973).

274. See *Sosna v. Iowa*, 419 U.S. 393 (1975).

275. This is not to suggest that states do not have the right to determine upon what grounds (such as cruelty, adultery, desertion, or no-fault) divorce may be granted. Rather, this simply notes that there have been no other constitutionally recognized limits placed upon the grounds for divorce.

276. See RILEY, *supra* note 11, at 163.

Divorce, it seems, is more American than the many rights enveloped in the Constitution since the 1960s.<sup>277</sup> Although contraception could be and was proscribed completely prior to *Griswold*, divorce was not.<sup>278</sup> Although abortion could be outlawed and criminally punished prior to *Roe*, divorce was not. And, although marriage and adultery—particularly of the interracial variety—could be prosecuted, and were prior to *Loving*, divorce was not.

The foundational nature of divorce as a fundamental right is unquestionable. Divorce came to our shores with the early colonists and remains an American tradition more sacred, historically, and perhaps more ardently heralded, than the freedom to marry.<sup>279</sup> As one Texas court noted, “[w]e think that such a law or policy [denying divorce] . . . would constitute cruel and unusual punishment and actually place one of the spouses, in effect, in a prison from which there was no parole.”<sup>280</sup> Divorce ensures that individuals can dissolve unions that are damaging, stale, unfaithful, or, modernly at least, in any matter unsatisfying. No-fault divorce has a pedigree as solid and enduring as the constitutional right to access contraceptives, sexual intimacy, abortions, and interracial marriages.<sup>281</sup> President Ronald Reagan famously noted that the only vote he regretted was his decision to approve “no-fault” divorce.<sup>282</sup> But approve it he did.<sup>283</sup>

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277. *Id.* at 9–25. The first divorce in Massachusetts occurred in 1639. *Id.* at 12. The first divorce petition in Rhode Island was filed in 1644. *Id.* at 22. The first divorce in Connecticut occurred in 1655. *Id.* at 18. The first New Jersey divorce occurred in 1669. *Id.* at 24. The first New York divorce was granted in 1672. *Id.* The first divorce petition heard in New Hampshire was in 1681. *Id.* at 23. “Bills of Divorcement” were considered proper penalties for adultery in Pennsylvania as early as 1681. *Id.* at 25. “[B]y the early 1770s, a century-long trend was in force: the gradual broadening of American divorce attitudes and practices . . . .” *Id.* at 32. As Professor Riley notes, by “the early 1830s, divorce was already widespread.” *Id.* at 34.

278. *See, e.g.,* *Loughran v. Loughran*, 292 U.S. 216 (1934) (permitting both divorce and remarriage, despite female recipient of her dower and alimony in equitable proceeding having improperly committed adultery under District of Columbia’s divorce and remarriage proscriptions).

279. *See* RILEY, *supra* note 11, at 33 (“[T]he increasing use of divorce to end difficult marriages [during the colonial period] established an important trend. The growth of colonial divorce was a mere prelude to the proliferation of divorce in the newly established United States.”).

280. *Trickey v. Trickey*, 642 S.W.2d 47, 50 (Tex. Ct. App. 1982).

281. *See* RILEY, *supra* note 11, at 163–65. “By August 1977, only three states retained the adversary system of divorce.” *Id.* at 163. Following California’s lead in 1970, when the no-fault law went into effect, nearly all states moved toward a non-adversarial form of marital dissolution. *Id.*

282. W. Bradford Wilcox, *The Evolution of Divorce*, NAT’L AFF., Fall 2009, at 81, 81.

283. *See* RILEY, *supra* note 11, at 163. Then-Governor Reagan signed California’s no-fault divorce law on September 5, 1969. *Id.* The law took effect on January 1, 1970. *Id.*

And many states followed his lead.<sup>284</sup> Even today, Reagan remains our only divorced, and remarried, President.<sup>285</sup>

American society could not continue without the fundamental right to marry, divorce, and remarry. Divorce, for better or worse, is as much a part of marriage as rings, bridesmaids, and wedding cakes. Just ask your straight neighbor or co-worker. Chances are they have exercised their long cherished right to say, “I do. I did. But, I don’t anymore.”

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284. *See id.* Iowa, in 1971, became the next state to follow California’s no-fault approach to divorce. *Id.* But, as Professor Riley notes, nearly all the States followed with some form of no-fault divorce. *Id.*

285. *But see id.* at 61. While President Reagan remains our only divorced and remarried President, President Andrew Jackson in the 1820s married a divorced woman, Rachel Robarbs. *Id.* Professor Riley suggests the fact that Andrew Jackson was elected President even after marrying a divorced woman signaled a shift in ideas toward marriage and divorce. *Id.*





(ii)