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DIVORCE AND DOMICILE: TIME TO SEVER THE KNOT

RHONDA WASSERMAN*

[T]he law of migratory divorce inhabits a looking-glass world in which the usual conflicts principles are distorted beyond recognition. Jurisdiction over the defendant seems to be neither necessary nor sufficient to empower a court to hear a divorce case.¹

INTRODUCTION

The jurisdictional rules that apply in divorce cases are the precise opposite of those that apply in all other cases. In virtually all cases, a state court judgment rendered without jurisdiction over the defendant is void in the rendering state under the Due Process Clause² and not entitled to full faith and credit else-

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1. David P. Currie, *Suitcase Divorce in the Conflict of Laws*: Simons, Rosenstiel, and Borax, 34 U. CHI. L. REV. 26, 26 (1966).

2. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 608-09 (1990) (noting that the judgment of a court lacking jurisdiction is void); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978).

where.³ In divorce cases, however, as long as the petitioning spouse is domiciled in the rendering state, the decree is valid there and enforceable elsewhere, even if the court lacked *in personam* jurisdiction over the defending spouse.⁴ According to the *status exception* for divorce cases, jurisdiction over the defending spouse is not necessary.

Nor is jurisdiction over the defending spouse sufficient in divorce cases. In all other cases, as long as the rendering court has *in personam* jurisdiction over the defendant and provides adequate notice, the court acts consistently with the Due Process Clause, and its judgment is enforceable elsewhere under the Full Faith and Credit Clause.⁵ In divorce cases, however, even if the court has *in personam* jurisdiction over *both* spouses, the decree violates due process⁶ and is not entitled to full faith and credit unless one of the spouses is domiciled in the rendering state.⁷ The *domicile rule* thus means that jurisdiction over the defending spouse is not sufficient either.

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

3. See *World-Wide Volkswagen*, 444 U.S. at 291; *Griffin v. Griffin*, 327 U.S. 220, 228-29 (1946); *Pennoy v. Neff*, 95 U.S. 714, 732-33 (1877); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 104 (1971).

4. See, e.g., *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 298-99 (1942); *Kulaka v. Fire Dep't Article 1 Pension Fund*, 535 N.Y.S.2d 750, 751 (App. Div. 1988).

5. See, e.g., *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704-05 (1982); *World-Wide Volkswagen*, 444 U.S. at 291; *Durfee v. Duke*, 375 U.S. 106, 110-11 (1963).

6. See *Granville-Smith v. Granville-Smith*, 214 F.2d 820 (3d Cir. 1954) (per curiam), *aff'd*, 349 U.S. 1 (1955); *Alton v. Alton*, 207 F.2d 667, 677 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954) (per curiam).

7. See, e.g., *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 236-37 (1945).

A case decided by the Alaska Supreme Court in 1988, *Perito v. Perito*,⁸ illustrates the bizarre consequences of the unique conflicts principles that presently govern divorce cases. The Peritos' marriage lasted for approximately twenty-five years.⁹ They lived in New York for their entire married life.¹⁰ A New York court denied Ruth Perito's first petition for divorce because she did not prove the requisite grounds for divorce.¹¹ After this denial, Ruth contacted lawyers in Nevada and Alaska to inquire into the requirements for divorce in those states. Following those conversations, Ruth flew to Alaska with a friend, knowing no one there except the lawyer with whom she had spoken.¹² Within a few hours of her arrival, Ruth told the friend "that she felt sure this was the place she wanted to be."¹³ The next day, she filed for divorce in the Superior Court of Alaska.¹⁴ Her husband, Tom Perito, who never had been to Alaska, moved to dismiss for lack of jurisdiction, claiming that Ruth was not an Alaska domiciliary.¹⁵ The court denied the motion and granted a divorce.

On appeal, the Alaska Supreme Court affirmed. Because Ruth was domiciled in Alaska at the time she filed her petition—she was physically present and intended to remain permanently in Alaska—the court had jurisdiction to grant a divorce.¹⁶ Tom's

8. 756 P.2d 895 (Alaska 1988).

9. See *id.* at 896.

10. See *id.*

11. See *id.* At the time, the New York divorce law permitted divorce on the following grounds: (1) cruel and inhuman treatment; (2) abandonment; (3) confinement of the defendant in prison for three consecutive years; (4) adultery; (5) living apart pursuant to a judgment of separation for one or more years; (6) living apart pursuant to a written agreement of separation for one or more years. See N.Y. DOM. REL. LAW § 170 C170:1 (McKinney 1988).

12. See *Perito*, 756 P.2d at 896.

13. *Id.*

14. Alaska repealed its one-year durational residency requirement in 1975. See Act effective Sept. 28, 1975, ch. 208, § 5, 1975 Alaska Sess. Laws 2, cited in *Perito*, 756 P.2d at 897.

15. If ever there was a good case for challenging the constitutionality of the status exception for divorce, *Perito* was it. In my view, Mr. Perito should have claimed that an assertion of jurisdiction over him by an Alaska court would violate the Due Process Clause of the Fourteenth Amendment. Apparently, he did not do so.

16. See *Perito*, 756 P.2d at 897 (noting that "the Supreme Court [of the United States] found domicile to be an adequate basis for jurisdiction under the United

lack of contacts with Alaska was irrelevant. The couple's twenty-five years in New York were irrelevant. The New York court's previous denial of a divorce was irrelevant. What was relevant—indeed controlling—was that one of the spouses was domiciled in Alaska.¹⁷

All three of the conflicts doctrines at play in divorce cases—the status exception, the domicile rule, and the choice-of-law corollary—are subject to substantial criticism. The status exception compels respondents in divorce cases either to defend in states with which they have no meaningful connection or to forfeit their right to stay married. Put more concretely, it is the status exception that compelled Tom Perito to defend in Alaska, a state with which he had no contacts whatsoever. The domicile rule results in inefficiency, inconvenience, and delay for couples that lack substantial connection to their state of domicile. Furthermore, it invites perjury by requiring litigants to swear that they are domiciled in their chosen forum state. It was the domicile rule that forced Ruth Perito to profess an undying attachment to Alaska in order to sue for divorce there. Finally, the choice-of-law corollary purports to authorize states to apply their divorce laws to marriages with which they have no real connection. In other words, Alaska applied its law to sever a marriage with an enduring connection to New York simply because Ruth Perito announced her intention to stay on the day she arrived in Alaska. Such an elusive and malleable construct as domicile should not have such force.

In a previous article, I advocated the rejection of the status exception because it denies defending spouses a liberty interest without due process of law.¹⁸ This Article addresses the domicile rule and its choice-of-law corollary. States adopted these principles to serve three public policies: the preservation of state sovereignty; the promotion of convenience of the parties; and the ease of judicial administration. Yet, as this Article demonstrates, neither the domicile rule nor its corollary actually furthers any

States Constitution").

17. See *id.*

18. See Rhonda Wasserman, *Parents, Partners and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 831-54.

of these policies. Given their inefficacy and the criticisms to which they are subject, why have the states not rejected the domicile rule and its corollary? Case law suggests that the federal Constitution actually *compels* the states to retain the domicile rule and its choice-of-law corollary to ensure the validity and interstate recognition of divorce decrees.¹⁹ Could it be that even though the domicile rule and its choice-of-law corollary no longer serve the public policies underlying them, and even though they cause inefficiency, inconvenience, and delay, that the states must retain them to satisfy due process concerns or the Full Faith and Credit Clause?

Part I of this Article will clarify the important differences between residence and domicile. Part II will trace the history of the domicile rule and its choice-of-law corollary. Part III will explore and critique the three public policy rationales offered in defense of the rule and its corollary. After demonstrating in Part III that none of these policy rationales justify retention of the domicile rule or its corollary, Part IV will then consider whether the Constitution actually compels the states to retain them. Finally, Part V proposes a creative solution that attempts to avoid these constitutional problems while nevertheless permitting the states to abolish the domicile rule and its choice-of-law corollary.

Under this proposal, a state could grant a divorce after meeting one requirement: the forum state must have *in personam* jurisdiction over the defending spouse. As in all other civil cases, the petitioner would not have to be domiciled in the forum state or satisfy a durational residency requirement, nor would courts guarantee the application of forum law. Instead, under standard choice-of-law principles, the court would select the divorce law of the state most interested in the couple. This proposal would permit couples to litigate divorce actions in the state most convenient for both parties, but subject to the law of the state with the greatest interest in their marital status.

19. See, e.g., *Perito*, 756 P.2d at 896-97.

I. RESIDENCE AND DOMICILE DISTINGUISHED

The term "residence" is a common, everyday word that refers to "the place, esp. the house, in which a person lives or resides; dwelling place; home."²⁰ A person therefore resides in the state in which she lives. If the state in which a person resides is in controversy, i.e., homes in several states, then a court may determine residence by considering objective evidence such as the amount of time spent in each state, where the person pays taxes, where the person can vote, where the person sees the doctor, where the person registers her car, and the like.²¹

"Domicile," on the other hand, is a technical, legal term that often turns on the subjective intent of the person. Every person has a domicile of origin, assigned at birth, which derives from the domicile of one's parents.²² Once a person is legally capable of choosing a domicile of her own, she may do so by being physically present in the new state with the "inten[t] to make that place [her] home for the time at least."²³ According to the comments to the *Restatement (Second) of Conflict of Laws*, "[f]requently, this intention is expressed in terms of the durability of the intended stay, as, for example, that one must intend to reside indefinitely in the place"²⁴ A person's "feelings toward the place" are also relevant in determining domicile.²⁵ If the state of a person's domicile is in controversy, then the outcome invariably turns on the requisite state of mind.²⁶ In such cases, a person's own testimony about her subjective intentions, and her formal and informal declarations, as well as her acts, will be considered as evidence.²⁷

20. RANDOM HOUSE UNABRIDGED DICTIONARY 1638 (2d ed. 1993).

21. For a general discussion of the term "residence," see Robert C. Farrell, *Classifications that Disadvantage Newcomers and the Problem of Equality*, 26 U. RICH. L. REV. 547, 573-80 (1994).

22. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 14 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 14 (1971).

23. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 (1971).

24. *Id.* § 18 cmt. c.

25. *Id.* § 18 cmt. b.

26. See *id.* § 20 (Special Note on Evidence for Establishment of a Domicil of Choice).

27. See *id.*

Some people actually reside in one state for years, while maintaining a formal domicile in a different state. For example, undergraduate students who live away from home for four or five years often retain domicile in the state of their parents' home.²⁸ Likewise, workers on "temporary" assignment away from home—even for years—retain their original domicile.²⁹ Similarly, members of the military, if ordered to a station and assigned living quarters there, do not acquire a domicile in that state because "[a] person does not acquire a domicil of choice by his presence in a place under physical or legal compulsion."³⁰

Yet, the domicile rule vests exclusive divorce jurisdiction in the state in which one of the partners is domiciled. This means that a state in which neither spouse currently resides may be the *only* state with jurisdiction to divorce them. Why is divorce jurisdiction tied to the often elusive, subjectively determined domicile, rather than residence? More generally, why is divorce jurisdiction not available in any state with which the responding spouse has minimum contacts? Let us begin by examining the history of the domicile rule and its choice-of-law corollary for clues to these important questions.

II. THE HISTORY OF THE DOMICILE RULE AND ITS CHOICE-OF-LAW COROLLARY

A. *The Domicile Rule in England*

The domicile rule had no role in divorce jurisdiction at common law. In fact, the royal courts lacked authority to render divorce decrees. From the middle of the twelfth century until 1858, only the ecclesiastical courts had authority to grant divorces *a mensa et thoro*,³¹ divorces from bed and board, which effected a legal separation,³² and later only Parliament exercised

28. See *id.* § 18 cmt. c, illus. 4.

29. See *id.* § 18 cmt. f, illus. 7.

30. *Id.* § 17; see *infra* text accompanying note 87.

31. See, e.g., *Ditson v. Ditson*, 4 R.I. 87, 97-98 (1856); 1 WILLIAM BLACKSTONE, COMMENTARIES *440-41; 3 BLACKSTONE, *supra*, at *94-95; 13 HALSBURY'S LAWS OF ENGLAND ¶ 501 (4th ed. 1974) [hereinafter HALSBURY]; RANSOM H. TYLER, COMMENTARIES ON THE LAW OF INFANCY § 665 (1868).

32. See 2 JOEL P. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DI-

authority to grant divorces *a vinculo matrimonii*, absolute divorces.³³ The jurisdiction of the ecclesiastical courts extended beyond domiciliaries of England, for "[t]he jurisdiction of the Court Christian was a jurisdiction over Christians The church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties"³⁴ Even in 1858, when Parliament established matrimonial courts and granted them "exclusive jurisdiction in matters matrimonial in England,"³⁵ the Court of Appeal held that nothing in the 1858 legislation expressly or impliedly limited the courts' jurisdiction to divorces between domiciliaries of England.³⁶

VORCE § 225 (4th ed. 1864); 1 BLACKSTONE, *supra* note 31, at *440-41; JOHN PROFFATT, WOMAN BEFORE THE LAW 120-21 (1874); TYLER, *supra* note 31, § 671.

33. See *supra* note 31; see also Maynard v. Hill, 125 U.S. 190, 206 (1888) (discussing how colonial legislatures adopted the practice of granting legislative divorces from the English Parliament); NELSON MANFRED BLAKE, THE ROAD TO RENO 31 (1962) (noting that Parliament first granted an absolute divorce in 1669); 2 GEORGE E. HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 102-03 (1904) (stating that "[t]he practice originated in the last years of the seventeenth century"); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *104-05 (noting the English practice of allowing Parliament to grant divorces). For a thorough treatment of the development of divorce law in England, see LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987 (1990).

34. Niboyet v. Niboyet, 4 P.D. 1, 4-5 (1878) (James, L.J.) (noting that "[r]esidence, as distinct from casual presence . . . , no doubt was an important element"); see also *id.* at 22 (Cotton, L.J.) (stating that the right to sue and be sued in the Court of Divorce should not be limited to persons domiciled in England); Ditson, 4 R.I. at 97 (noting that the jurisdiction of the ecclesiastical courts was limited to those individuals "domiciled, or at least present within the diocese") (emphasis added); *id.* at 98 (stating that "the peculiar jurisdiction of these courts does not depend upon the domicile of the libellant"); WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 457 (1942) (stating that "this jurisdiction of the ecclesiastical courts was not limited to cases in which the spouses were domiciled in the county; 'residence' which was not merely casual was sufficient").

35. Matrimonial Causes Act, 1857, 20 & 21 Vict., ch. 85 (Eng.).

36. See Niboyet, 4 P.D. at 9 (James, L.J.) (stating that "I find myself unable to arrive at the conclusion that the domicile of the complaining party ought to determine the existence of the limits of the jurisdiction given by the English statute to the English Court").

Once established, the matrimonial courts invariably applied English divorce law. See, e.g., 20 & 21 Vict., ch. 85, § 22 (stating that "[i]n all suits and proceedings . . . , the said court shall proceed . . . on principles . . . as nearly as may be conformable to the principles . . . on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained") (emphasis added); Niboyet, 4 P.D. at 9 (concluding that "English jurisdiction exists and the

It was not until 1895, after the establishment of the domicile rule in the United States,³⁷ that the Privy Council decided *Le Mesurier v. Le Mesurier*,³⁸ and England adopted the domicile rule. *Le Mesurier* involved an English man who married a French woman in England.³⁹ They lived their entire married life together in Ceylon, where he was a member of the Ceylon Civil Service.⁴⁰ When he sued her for a divorce *a vinculo matrimonii* in Ceylon after nine years of marriage, she challenged the court's jurisdiction on the theory that he was still an English domiciliary.⁴¹ Although the trial court granted the husband a divorce, the Supreme Court of Ceylon reversed the order, finding that the "Courts of Ceylon had no jurisdiction to dissolve a marriage between British or European spouses resident in the island."⁴² On appeal, the Privy Council recommended affirmance, holding that "according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."⁴³ Although technically decided under the Roman Dutch law of Ceylon, "this decision of the Privy Council was later treated as if it had determined a question of jurisdiction of English courts under the Act of 1857."⁴⁴ Even though the divorce laws of both England and Ceylon had similar grounds for divorce, and even though both spouses had resided in Ceylon for close to a decade, the couple had to travel

English law ought to be applied"); *Wilson v. Wilson*, 2 L.R.-P. & D. 435, 442 (1872) (stating that "the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and *dealt with by the tribunals which alone can administer those laws*") (emphasis added).

37. See *infra* notes 72-80 and accompanying text.

38. 1895 App. Cas. 517 (P.C.) (appeal taken from Ceylon).

39. See *id.*

40. See *id.*

41. See *id.* at 518.

42. *Id.* at 524.

43. *Id.* at 540 (quoting with approval *Wilson v. Wilson*, 2 L.R.-P. & D. 435, 442 (1872)) (stating that "the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled").

44. COOK, *supra* note 34, at 458-59; Walter Wheeler Cook, *Is Haddock v. Haddock Overruled?*, 18 IND. L.J. 165, 169 (1943); Erwin N. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, 195 (1951) (noting that *Le Mesurier* "has been widely regarded as establishing the common law on this question").

thousands of miles, at great expense and inconvenience, to seek a divorce in the courts of their domicile, England.⁴⁵

Once established, the English domicile rule did not last long because it resulted in grave unfairness to women in its application. Because the courts declared a married woman's domicile to be the same as her husband's even if they lived apart, an English woman whose husband deserted her, and established domicile elsewhere, could not sue for divorce in England even though she always had lived there.⁴⁶ Yet, her husband could sue for divorce in the courts of his new home. To alleviate this inequity, the Matrimonial Causes Act of 1937 permitted the court to entertain suits in which a husband domiciled in England immediately before deserting his wife changed his domicile after the desertion.⁴⁷ The legislation thus abrogated the domicile rule in a narrow set of cases by granting divorce jurisdiction even though neither spouse was domiciled in England upon commencement of the proceeding.

Parliament further enlarged the disjuncture between domicile and English divorce jurisdiction in 1949 by granting the courts jurisdiction even if the husband, and therefore the wife, was domiciled outside the United Kingdom, as long as "the wife [was] resident in England and ha[d] been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings."⁴⁸ Thus, as long as the wife had a sufficiently enduring connection to England to justify application of

45. See Griswold, *supra* note 44, at 195 (using the *Le Mesurier* case to illustrate the difficulties with the domicile requirement).

46. See *id.* at 195-96.

47. See Matrimonial Causes Act, 1937, 1 Edw. 8 & 1 Geo. 6, ch. 57, § 13 (Eng.). The section also permitted jurisdiction when the state deported the husband, and he changed his domicile following deportation. See also 13 HALSBURY, *supra* note 31, ¶ 502 (discussing English divorce law after 1857, including the Act of 1937). For a more thorough discussion of the English legislation, see Griswold, *supra* note 44, at 197-200. The Griswold article also discusses jurisdictional legislation for divorce actions in Canada, Australia, and New Zealand. See *id.* at 200-08.

48. Law Reform (Miscellaneous Provisions) Act, 1949, 12, 13 & 14 Geo. 6, ch. 100, § 1(1)(a) (Eng.). The foregoing provision applied as long as the husband was not domiciled elsewhere in the United Kingdom, the Channel Islands, or the Isle of Man. See *id.* § 1(1)(b). Similar jurisdiction was available in proceedings for annulment; see *id.* § 1(2); see also 13 HALSBURY, *supra* note 31, ¶ 502 (discussing the Matrimonial Causes Act of 1937).

English divorce law to her marriage, she could sue there irrespective of her technical domicile.⁴⁹

Even after Parliament allowed married English women to establish domiciles independent of their husbands', thereby eliminating the initial impetus for rejecting the domicile rule, England did nothing to resurrect the domicile rule.⁵⁰ Rather, the same legislation that permitted married women to establish domiciles of their own granted the English courts jurisdiction to entertain divorce actions if either spouse was habitually resident⁵¹ in England for at least one year preceding commencement of the action.⁵² This law, which governs divorce jurisdiction in England today,⁵³ bases jurisdiction, and the choice of English divorce law, not on domicile *per se*, but on an enduring connection to the country.⁵⁴

49. English courts always apply English divorce law. See 8(1) HALSBURY, *supra* note 31, ¶ 752 (4th ed. 1974).

50. See Domicile and Matrimonial Proceedings Act, 1973, ch. 45, § 1(1) (Eng.).

51. Habitual residence is "a regular physical presence, enduring for some time." 8(1) HALSBURY, *supra* note 31, ¶ 705.

52. See Domicile and Matrimonial Proceedings Act, 1973, ch. 45, § 5 (Eng.). The statute also authorized jurisdiction if either spouse was domiciled in England when the proceedings began. See *id.*; see also 8(1) HALSBURY, *supra* note 31, ¶ 741 (discussing jurisdiction in English divorce cases).

Parliament has enacted similar rules to govern the recognition of foreign divorces. The United Kingdom recognizes an overseas divorce if it is effective under the law of the country granting the divorce and if either spouse was a domiciliary of, habitually resident in, or was a national of, the country granting the divorce at the time the action began. See The Family Law Act, 1986, ch. 55, §§ 45-46 (Eng.); see also *Berkovits v. Grinberg*, 1995 Fam. 142 (Eng.) (applying the Family Law Act to a Jewish "get" divorce); *D v. D*, [1994] 1 F.L.R. 38 (Eng. Fam.) (applying the Act to a decree of the customary arbitration tribunal in Ghana).

53. See, e.g., *R v. R*, [1994] 2 F.L.R. 1036 (Eng. Fam.) (denying a stay under § 9, sch. 1 of the Domicile and Matrimonial Proceedings Act, 1973).

54. England thus has rejected a technical domicile requirement, but it continues to view divorce as a local action. Jurisdiction cannot be conferred upon the court by consent of the parties. See 13 HALSBURY, *supra* note 31, ¶ 503 (citing *De Reneville v. De Reneville*, 1948 P. 100, 113 (Eng. C.A. 1947) (Lord Greene, M.R.) (stating that if jurisdiction is lacking, it "could not be created by the fact . . . that the [husband] had not protested"); *Addison (otherwise McAllister) v. Addison*, 1955 N. Ir. 1, 13 (Q.B.) (Lord MacDermott, L.C.J.) (doubting "very much if an unqualified appearance would to-day suffice of itself to confer jurisdiction").

B. The Domicile Rule and the Choice-of-Law Corollary in Early America

The American colonists did not establish ecclesiastical courts,⁵⁵ but the colonial legislative assemblies followed the example set by Parliament and "treated the subject [of divorce] as one within their province."⁵⁶ When enacting divorce bills, the legislatures' jurisdiction was not formally circumscribed. But given the general bar on "extraterritorial" legislation⁵⁷ and given that the divorce process typically began when a constituent approached his representative in the legislature,⁵⁸ it is likely that the colonial legislatures granted divorces only on behalf of citizens of the colony or state.

In the late eighteenth century and early nineteenth century, the sheer volume of divorce petitions compelled many state legislatures to authorize their courts to grant divorces to residents of the state.⁵⁹ Given that settlers in different parts of the coun-

55. See, e.g., 1 LEON C. MARSHALL & GEOFFREY MAY, *THE DIVORCE COURT* 19 (1932).

56. *Maynard v. Hill*, 125 U.S. 190, 206 (1888); see also BLAKE, *supra* note 33, at 34-47 (describing various vehicles for divorce in the colonies, including legislative divorce, judicial divorce, and divorce by the governor); RICHARD H. CHUSED, *PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW* 21 (1994) (noting that early divorce practice in Maryland "partially mirrored English practice"); 2 HOWARD, *supra* note 33, at 349 (noting that the popular assemblies of some of the New England colonies exercised divorce jurisdiction "concurrently with the law tribunals"); RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 134-43, 242 (1988) (describing a variety of colonial divorce-granting institutions, including courts, governors, councils, and legislatures); Neal R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119, 122 n.19 (1990). For a thorough social history of the shift from legislative to judicial divorce in Maryland, see CHUSED, *supra*, at 26-28.

57. See, e.g., *Rose v. Himely*, 8 U.S. 241, 279 (1808) (Marshall, C.J.) (noting "that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens"); Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 245 (1923) (stating that "a sovereign has in general no power or jurisdiction outside his own territory; and he can confer upon his legislature no greater power than he himself possesses").

58. See CHUSED, *supra* note 56, at 7-8. Before 1805, men obtained all of the legislative divorces granted in Maryland. See *id.* at 8.

59. See, e.g., Act of Mar. 16, 1786, ch. 31, 1786 Mass. Acts 423; Act of Nov. 7, 1805, ch. 93, § 2, 1805 Vt. Acts & Resolves 164. The legislatures often retained concurrent jurisdiction. See BLAKE, *supra* note 33, at 54-56; PHILLIPS, *supra* note 56, at 156-57, 440, 442; Feigenson, *supra* note 56, at 122 n.19; cf. CHUSED, *supra* note 56,

try had different religious backgrounds, the grounds available for divorce varied significantly from state to state.⁶⁰ With substantial variation among the states' divorce laws and with increasing mobility, migratory divorce began to rear its ugly head—unhappily married persons who could not obtain divorces at home began going to states with more permissive laws and seeking divorces there.⁶¹ This was possible because the American divorce courts adopted the choice-of-law corollary and always applied their own divorce laws.⁶²

In response to the influx of nonresidents seeking easy divorces, states with more liberal divorce laws began to adopt durational residency requirements, which required the petitioning spouse to live in the forum state for a specified period of time before filing suit.⁶³ The residency requirements were designed to serve two purposes. First, legislators enacted them to prevent

at 48 (describing unsuccessful efforts to pass general divorce bills in Maryland in the early nineteenth century).

It was not until the mid-to-late nineteenth century that the states began to amend their constitutions to prohibit legislative divorces. *See Maynard*, 125 U.S. at 208; *BLAKE*, *supra* note 33, at 56, 75 (noting that "[b]y 1867, at least 33 of the then 37 states had prohibited legislative divorce"); *CHUSED*, *supra* note 56, at 138-39 (noting that the 1851 constitutional ban on legislative divorce in Maryland had a detrimental effect on women in violent relationships because cruelty was not a ground for absolute judicial divorce); 1 *MARSHALL & MAY*, *supra* note 55, at 109; *PHILLIPS*, *supra* note 56, at 157, 445-46, 449; *Feigenson*, *supra* note 56, at 122 n.19.

60. *See PHILLIPS*, *supra* note 56, at 134-49.

61. The actual extent of migratory divorce is uncertain. A study conducted by Carroll D. Wright, the Commissioner of Labor, in 1887 found that 20% of divorced couples obtained a divorce in a state other than the one in which they were married, but 22% of native-born Americans were living in states other than the one in which they were born. *See BLAKE*, *supra* note 33, at 135-36 (quoting A REPORT ON MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867-1886 197 (Carroll D. Wright, ed., rev. ed., Washington, Gov't Printing Office, 1891)). "In other words," Wright concluded, "the migration shown by the divorce tables . . . is not as great as that of the population at large." *Id.*

62. *See, e.g.*, JOEL P. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 141 (4th ed. 1864); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 230a (2d ed. 1841) [hereinafter STORY (2d ed.)].

63. *See PHILLIPS*, *supra* note 56, at 156; *see also BLAKE*, *supra* note 33, at 57 (describing a three year Connecticut residency requirement). *See, e.g.*, Act of Sept. 19, 1785, ch. 234 § 9, 1785 Pa. Laws 664, 667-68 (stating that "no person shall be entitled to a divorce from the bond of matrimony, by virtue of this Act, who is not a citizen of this State, and who has not resided therein at least one whole year previous to the filing his or her petition or libel").

the courts from becoming overrun with divorce petitions from citizens of states with more restrictive divorce laws. In other words, they attempted to prevent the states from becoming "divorce havens."⁶⁴ Second, legislators designed residency requirements to ensure that the decrees issued would be recognized in other states.⁶⁵ The longer the petitioner resided in the rendering state before filing her petition, the stronger her claim to sever the marriage in accordance with the state's law and the greater the likelihood that other states would respect the decree.

Many of the residency requirements for divorce were quite lengthy: all of the eastern states required at least one year's

64. PHILLIPS, *supra* note 56, at 156; *see also id.* at 441 (noting that Connecticut enacted a three year residency requirement to prevent Connecticut from becoming a divorce haven after New York enacted a very restrictive divorce law); *id.* at 445 (noting that "[b]y the mid-nineteenth century migratory divorce was being discouraged in many states by the imposition of minimum residency requirements"); N.Y. DOM. REL. LAW § 230 practice commentary C230:1 (McKinney 1986) (explaining that New York added a durational residency requirement "to assure that New York, with its expanded grounds for divorce, would not become a 'divorce mill'").

In a number of states, conservative forces lobbied effectively for lengthier residency requirements after their states developed reputations as "divorce mills." BLAKE, *supra* note 33, at 152. For example, when Indiana revised its divorce statute in 1852, the only residency requirement included in the statute was that the petitioner be a *bona fide* resident of the county at the time of filing the petition, and that condition could be sufficiently established by the petitioner's own affidavit. *See id.* at 121; PHILLIPS, *supra* note 56, at 453. When, as a result of the lack of a durational residency requirement, Indiana became a "divorce mill," the legislature enacted a one-year residency requirement and some additional safeguards in 1859. *See* BLAKE, *supra* note 33, at 120; PHILLIPS, *supra* note 56, at 474. When those changes did not forestall the influx of nonresidents seeking divorces, Indiana amended the statute again in 1873, requiring residence for two years and adequate proof thereof. *See* BLAKE, *supra* note 33, at 121.

Utah's history is similar. Its divorce statute of 1852 required only that the plaintiff "[be] a resident of the Territory, or wish[] to become one." BLAKE, *supra* note 33, at 122; 3 HOWARD, *supra* note 33, at 131; PHILLIPS, *supra* note 56, at 455. When the transcontinental railroad made Utah's liberal divorce law accessible to wealthy easterners, the territorial legislature enacted a one-year residency requirement. *See* BLAKE, *supra* note 33, at 122-23.

Nevada was the first state in which the tourist industry prevailed over opponents of "quickie divorce" and successfully lobbied for an even shorter residency requirement. *See* BLAKE, *supra* note 33, at 152-58.

65. *See* PHILLIPS, *supra* note 56, at 156, 477. Four states—New York, Pennsylvania, North Carolina, and South Carolina—refused to recognize *ex parte* divorces granted by other states even if one of the parties was domiciled in the rendering state. *See* BLAKE, *supra* note 33, at 175.

residence and Connecticut required three.⁶⁶ The residency requirements were much shorter in the Midwest and western states because they mirrored the short residency requirements for voting and citizenship enacted to meet the needs of the early mining population.⁶⁷ Even lengthy residency requirements did not deter many who needed relief from unhappy or intolerable marriages and who could not satisfy the stringent divorce laws of their home states.⁶⁸ Either they actually satisfied the residency requirements or they lied. By the mid-1800s, New York City lawyers arranged approximately one-fourth of all divorces issued in Illinois, where the state divorce law was much more liberal than New York's.⁶⁹

New York, Massachusetts, and other states with conservative divorce laws began to realize that they could not rely on other states' residency requirements to deter migratory divorce. For these states, which perceived their strict divorce laws as necessary to maintain moral standards and social stability, the immediate legal issue was whether and under what circumstances to recognize the divorce decrees of other states granted to their citizens.⁷⁰ Although the states were neither unanimous nor consistent in their approach,⁷¹ the growing consensus was that a

66. See BLAKE, *supra* note 33, at 117; see also Act of Mar. 7, 1844, Md. Laws, ch. 287, § 1 (providing that if the cause for divorce occurred "without the jurisdiction of this State," then divorce would be permitted only if "the person so applying shall have resided in this State, for two years next preceding his or her application"); 3 HOWARD, *supra* note 33, at 22-25, 84-88, 152-57 (describing residency requirements); PHILLIPS, *supra* note 56, at 441-42 (describing residency requirement in Connecticut). By the middle of the nineteenth century, Massachusetts had a five year residency requirement, with some statutory exceptions. MASS. GEN. STAT. ch. 107, §§ 11-12 (1860).

67. See BLAKE, *supra* note 33, at 122, 152; PHILLIPS, *supra* note 56, at 451-52, 455 (noting that the "minimal residency requirements [of the Western territories and states] seemed to invite migratory divorce"). The Dakota Territory required only three months for residency. See BLAKE, *supra* note 33, at 123.

68. See BLAKE, *supra* note 33, at 117.

69. See *id.* at 119; see also *infra* note 120 (discussing ethical constraints on attorneys in such cases).

70. See PHILLIPS, *supra* note 56, at 476-77.

71. According to the Rhode Island Supreme Court in *Ditson v. Ditson*, 4 R.I. 87 (1856):

legislation vesting jurisdiction for divorce in their courts has followed no principle of general law in this respect whatsoever; some statutes making

decree had to be recognized only if one of the spouses was domiciled in the rendering state.⁷² If neither spouse was domiciled

the jurisdiction, or supposing it, to depend upon the place of the *contract*, some upon the place of the *delictum*, and some . . . and as they should do, upon the *domicil* of the wronged and petitioning party. . . . [B]y some courts marriage is treated as a species of continuing executory contract between the parties, the obligations of which, and the causes and even modes of dissolving which, are fixed by the law of the place of contract. So sacredly loyal is it, in the view of some, that it cannot be dissolved but by the courts of the country in which it was formed. . . . Some treat breaches of the contract of every degree as *quasi* crimes, to be punished only in the place in which they were committed, provided the parties be then there domiciled; and others, again, qualify this, by an exception in favor of the tribunals of the place of contract; since *there* the *delicta* can be treated as breaches of the contract if such be the law of the place of contract.

Id. at 103, 105. *See, e.g.*, 1851 Mass. Acts ch. 82, § 2 (providing that the "supreme judicial court, at any law term held for two or more counties, shall have jurisdiction of libels for divorce arising in either of such counties") (emphasis added); *Harding v. Alden*, 9 Me. 140, 147 (1832) (construing statutes of Massachusetts and Maine as granting jurisdiction "where the party injured lives at the time of the adultery"); *Carter v. Carter*, 6 Mass. (5 Tyng) 263 (1810) (declaring that the court lacked jurisdiction when the adultery occurred in another state even though husband had since moved to Massachusetts); *Hopkins v. Hopkins*, 3 Mass. (2 Tyng) 158, 158-59 (1807) (holding that the court lacked jurisdiction when the couple lived in another state at the time the adultery occurred); *Dorsey v. Dorsey*, 7 Watts 349, 349 (Pa. 1838) (stating in the syllabus that "[t]he law of the actual domicile at the time and place of the injury, is the rule in cases of divorce") (emphasis added); *Hull v. Hull*, 21 S.C. Eq. (2 Strob. Eq.) 174, 178 (1848) (*Dunkin, Ch.*) (stating that a marriage "can only be dissolved by the law under which it was formed"); *see also* *Crownover v. Crownover*, 274 P.2d 127, 138 (N.M. 1954) (*McGhee, C.J., concurring*) (describing the contract, penal, and status theories of divorce jurisdiction); 2 KENT, *supra* note 33, at *100, *117-18 (discussing a contractual theory of divorce jurisdiction); Feigenson, *supra* note 56, at 128-61 (describing the contract, penal, and status theories of divorce jurisdiction); Mark De Wolfe Howe, *The Recognition of Foreign Divorce Decrees in New York State*, 40 COLUM. L. REV. 373, 390-95 (1940) (discussing contractual and penal theories of divorce jurisdiction).

72. *See, e.g.*, *Tolen v. Tolen*, 2 Blackf. 407, 411 (Ind. 1831) (stating that "the *lex domicilii* must govern the marriage contract, and that the laws of the country wherever the parties may be domiciled, must be applied to their domestic relations" and entitling the wife, who had established a domicile in the state, to the benefit of its divorce laws notwithstanding the husband's lack of connection to the state); *Sewall v. Sewall*, 122 Mass. 156, 161 (1877) (stating that a state has the power to void a divorce obtained in another state when the spouse obtaining the divorce did not have domicile in the other state); *Lyon v. Lyon*, 68 Mass. (2 Gray) 367, 369-70 (1854) (voiding a Rhode Island divorce granted to a woman who deserted her husband in Massachusetts and moved to Rhode Island but retained her Massachusetts domicile); *Barber v. Root*, 10 Mass. (10 Tyng) 260, 264-65 (1813) (noting that the

there, then other states reasoned that the rendering state lacked jurisdiction to grant the divorce and refused to enforce its decree. States invoked the domicile rule to protect the right to regulate the domestic affairs of their citizens.

Although states with restrictive divorce laws invoked the domicile rule to avoid recognizing foreign divorce decrees, states attempting to justify giving citizens the *benefit* of local divorce law also invoked the domicile rule. Professor Walter Wheeler Cook, who traced the domicile rule to the 1834 publication of Joseph Story's treatise on conflict of laws, analyzed the Massachusetts cases cited in the treatise to demonstrate this alternate function of the domicile rule.⁷³ According to Professor Cook's analysis, Story relied upon a few early cases decided in Massachusetts under a statute enacted in 1786.⁷⁴ The statute removed authority to grant divorces from the Governor and his council and vested it in the courts of the county "where the parties live."⁷⁵ In the statute's preamble, the legislature recognized

law of the place of domicile, not the law of the location of the marriage, governs the conduct of married persons); *Jackson v. Jackson*, 1 Johns. 424, 432 (N.Y. Sup. Ct. 1806) (refusing to enforce a Vermont divorce decree awarded to a New York domiciliary whose husband also was domiciled in New York at the time the court granted the decree notwithstanding his appearance in the Vermont proceeding); *Ditson*, 4 R.I. at 93; *cf. Pawling v. Willson*, 13 Johns. 192, 208-09 (N.Y. 1816) (declining to decide the effect in New York of a Connecticut divorce decree awarded to New York domiciliaries who got married in Connecticut).

73. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 228-30 (1834), discussed in COOK, *supra* note 34, at 461; Cook, *supra* note 44, at 166; Griswold, *supra* note 44, at 229. In fact, it was not until the publication of the second edition in 1841 that Story conclusively stated:

Upon the whole, the doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual *bona fide* domicil of the parties gives jurisdiction to the proper courts to decree a divorce for any cause, allowed by the local law without any reference to the law of the place of the original marriage, or the place, where the offence, for which the divorce is allowed, was committed.

STORY, *supra* note 62, § 230a (2d ed.); accord TYLER, *supra* note 31, § 683. But see Howe, *supra* note 71, at 392-93 (noting that later editions of Story's treatise stated that the domicile rule should "be not extended beyond transactions occurring while the parties had a fixed and permanent domicil within that forum," reading this qualification as suggesting that "the only state which has jurisdiction to award a valid divorce is the state in which the parties were domiciled at the time when the wrongful acts were done").

74. See Cook, *supra* note 44, at 166; see also Griswold, *supra* note 44, at 229 (discussing Cook's analysis).

75. Act of Mar. 16, 1786, ch. 31, 1786 Mass. Acts 423. Actually two of the cases

that "it is a great expense to the people of this State to be obliged to attend at Boston upon all questions of divorce, when the same might be done within the counties where the parties live."⁷⁶ One of the purposes of the statute therefore was to make divorce litigation more convenient for the parties.⁷⁷

The legislature apparently did not contemplate the possibility that the spouses might not be living in the same county, however, or even in the same state, when the divorce action commenced. When confronted with cases in which a deserted wife sought a divorce from her husband who was no longer living in the same county,⁷⁸ the Massachusetts courts began to assert divorce jurisdiction (and to apply Massachusetts divorce law) as long as the couple had been domiciled in the state previously and the wife continued to be domiciled there.⁷⁹ Thus, the courts

cited in the first edition of Story's treatise, *Hopkins v. Hopkins*, 3 Mass. (2 Tyng) 158 (1807), and *Carter v. Carter*, 6 Mass. (5 Tyng) 263 (1810), stand for the proposition that jurisdiction is not available when the parties lived in another state at the time of the commission of adultery. The other two Massachusetts cases cited in the first edition of Story's treatise both applied the domicile rule to determine the validity of Vermont divorces granted to couples with Massachusetts connections. See STORY, *supra* note 73, §§ 228 n.1, 229 n.1 (citing *Hanover v. Turner*, 14 Mass. (13 Tyng) 227, 230-31 (1817) (refusing to recognize a Vermont divorce granted when both petitioner and respondent were domiciled in Massachusetts) and *Barber v. Root*, 10 Mass. (9 Tyng) 260, 264-66 (1813) (recognizing a Vermont divorce granted when both spouses were domiciled in Vermont)).

76. 1786 Mass. Acts 423, *quoted in* Griswold, *supra* note 44, at 229 n.114.

77. See *Harteau v. Harteau*, 31 Mass. (14 Pick.) 181, 184 (1833). The two reasons offered for trying the action in the county in which the couple resided were to save expense and to facilitate the discovery of the truth. See *id.*

78. According to one scholar, "the mobility afforded by the colonial context was exploited more by married men than by married women . . . Men took advantage of their geographical mobility not only to desert but to commit adultery." PHILLIPS, *supra* note 56, at 253.

79. See, e.g., *Harteau*, 31 Mass. (14 Pick.) at 183, 184-85 (construing the word "live" to mean "where the parties have their domicile," and stating that divorce jurisdiction would be exercised in the county in which the wife lived even if the husband had left the state and changed his domicile), *cited in* STORY, *supra* note 62, § 229a n.1 (2d ed.); Cook, *supra* note 44, at 166 n.9; see also *Lane v. Lane*, 2 Mass. (1 Tyng) 167, 168 (1806) (granting a divorce when the couple moved around the state without any permanent place of residence, the husband deserted the wife and left the state, and the wife, who continually lived in Massachusetts, "returned to her father's family"). But see *Richardson v. Richardson*, 2 Mass. (1 Tyng) 153 (1806) (holding that the court lacked jurisdiction even though both spouses were domiciled in the state: "where the party complaining has only changed his residence, and the other party continues at the place of her former dwelling, the libel ought not to be

invoked the domicile rule not only to avoid recognizing foreign divorce decrees awarded on grounds unavailable under local law, but also to benefit sympathetic local women deserted in the state.⁸⁰ As Part III illustrates, states continue to invoke the twin historical rationales—state sovereignty and convenience of the parties—to justify reliance upon the domicile rule today.

C. The Domicile Rule and the Choice-of-Law Corollary in Present-day America

By the time of the adoption of the *Restatement (First) of Conflict of Laws* in 1934, the domicile rule⁸¹ and the choice-of-law corollary⁸² were well established in American jurisprudence. Notwithstanding trenchant criticism of the domicile rule by scholars⁸³ and its excision from the *Restatement (Second) of*

sustained in the county where the former resides”).

80. Pennsylvania, too, adapted its jurisdictional rules to benefit deserted women living within its borders. Although it granted divorces only to “citizens,” it created a legislative presumption in 1843 that anyone meeting the one year residency requirement would be deemed a citizen. Act of May 8, 1854, No. 629 § 2, 1854 Pa. Laws 644 (stating that the word “citizen” in the divorce law “shall not be so construed as to exclude any party who shall, for one year, have had a bona fide residence within this Commonwealth, previous to the filing of his or her petition or libel”); 1843 Pa. Laws No. 161, § 1; Act of Mar. 13, 1815, ch. 109, § 11, 1815 Pa. Laws 150, 153 (declaring that “no person shall be entitled to a divorce from the bond of matrimony . . . who is not a citizen of this state, and who shall not have resided therein at least one whole year previous to the filing his or her petition or libel”). Presumably, Pennsylvania adopted this law to benefit local married women who filed for divorce while living apart from their husbands. See *Hollister v. Hollister*, 6 Pa. 449, 452 (1847) (concluding that even though at common law the wife’s domicile was in Ohio with her husband, jurisdiction existed because the wife resided in Pennsylvania for at least one year prior to bringing suit for divorce).

81. See *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* § 110 (1934) (declaring that “[a] state can exercise through its courts jurisdiction to dissolve the marriage of spouses both domiciled in the state”); *id.* § 111 (“A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state”).

82. See *id.* § 8(2) (“All questions concerning the validity of a decree of divorce are decided in accordance with the law of the domicil of the parties, including the Conflict of Laws rules of that state”).

83. See, e.g., Currie, *supra* note 1, at 48; Helen Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 503-04 (1980); Griswold, *supra* note 44, at 195, 229; William H. Rodgers, Jr. & Linda A. Rodgers, *The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife*, 67 COLUM. L. REV. 1385, 1388-89 (1967); Edward S. Stimson, *Juris-*

Conflict of Laws,⁸⁴ both the domicile rule⁸⁵ and its corollary⁸⁶ continue to be widely followed today. In fact, with the exception of military personnel statutes—adopted in many states to permit military personnel to obtain divorces in states in which they are stationed, but with which they lack a domiciliary connection—only *three* states authorize their courts to assert divorce jurisdiction in the absence of a domiciliary connection to the state.

1. *The Military Personnel Statutes*

Because military personnel often must move from one base to another, courts have held that such personnel are not domiciled in the state in which they live because they lack the requisite subjective intent.⁸⁷ To ensure that military personnel would not

diction in Divorce Cases: The Unsoundness of the Domiciliary Theory, 42 A.B.A. J. 222 (1956); James D. Sumner, Jr., *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 14-17 (1955); Russell J. Weintraub, *An Inquiry into the Utility of "Domicile" as a Concept in Conflicts Analysis*, 63 MICH. L. REV. 961, 982 (1965); Mary M. Wills, Comment, *Conflict of Law in Divorce Litigation: A Looking-Glass World?*, 10 CAMPBELL L. REV. 145, 151-53 (1987).

84. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 72 (1971) ("A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses, neither of whom is domiciled in the state, if either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage"); *cf. id.* §§ 70, 71 (providing states with the authority to dissolve a marriage when one or both of the spouses is domiciled in the state). The *Restatement (Second) of Conflict of Laws* retains the choice-of-law corollary. *See id.* § 285 (stating that "[t]he local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce"); *see also id.* cmt. d (querying "whether it would be appropriate for the courts of a state where neither spouse is domiciled . . . to apply their own local law in determining whether a divorce should be granted").

85. The Uniform Marriage and Divorce Act, approved by the National Conference of Commissioners on Uniform Laws in 1970, embodies the domicile rule. UNIF. MARRIAGE AND DIVORCE ACT § 302(a)(1), 9A U.L.A. 181 (1987). The Act incorporates an exception from the domicile rule for military personnel.

86. *See, e.g.,* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 13.1 at 497 (2d ed. 1988) (noting that "[t]he rule is well established that it is the divorce statute of the forum which governs the granting of a divorce") (footnote omitted); ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 222 (4th ed. 1986) (stating that "the standard choice-of-law rule calls for a forum state to apply its own substantive divorce law"); *see also supra* note 84 (quoting the *Restatement (Second) of Conflict of Laws* section that retains the choice-of-law corollary).

87. *See, e.g.,* Wilson v. Wilson, 10 Alaska 616, 624 (1945); Lorange v. Lorange, 119 S.E.2d 342, 343 (Ga. 1961); Beasley v. Beasley, 43 A.2d 154, 154-55 (N.H. 1945);

be required to initiate divorce litigation in their state of domicile, many states adopted statutes permitting military personnel stationed in the state for a specified period of time to commence divorce litigation in their courts even absent a domiciliary connection.⁸⁸ In enacting these statutes, the states have recognized that people may form enduring connections to states other than the state of their domicile. They also have recognized the inconvenience that some people would suffer if required to return to the state of their domicile to obtain a divorce.⁸⁹ These concerns are understandable. What is less readily understandable is why so few states have expressed these concerns in legislation beyond the military personnel context.

2. The "Outlaw" States

Many state statutes vest divorce jurisdiction in their courts if one or both parties to the marriage "reside"⁹⁰ in the state and

Volmer v. Volmer, 371 P.2d 70, 72-73 (Or. 1962); accord RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 cmt. d (1971) (noting that "[a] soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, will probably not acquire a domicile there"); see also *supra* note 30 and accompanying text.

88. See, e.g., ALA. CODE § 6-7-20 (1993); FLA. STAT. ANN. § 47.081 (West 1994); GA. CODE ANN. § 19-5-2 (1991); TEX. FAMILY CODE ANN. § 3.23 (West 1993); VA. CODE ANN. § 20-97 (Michie 1996). Often, states adopted the military personnel statutes as amendments to the durational residency requirement, substituting a requirement that the person be stationed in the state for a specified period of time in lieu of a domicile requirement.

89. Some courts, however, have interpreted the military personnel statutes very restrictively. For instance, some courts have reaffirmed the domicile requirement for divorce jurisdiction and have interpreted the military personnel statute as providing only that a member of the military may establish a domicile in the state after being stationed therein for the requisite period of time. See, e.g., *Viernes v. District Court*, 509 P.2d 306, 310 (Colo. 1973); *Martin v. Martin*, 118 S.E.2d 29, 33 (N.C. 1961); see also *Darbie v. Darbie*, 25 S.E.2d 685, 686 (Ga. 1943) (declaring the Georgia military personnel statute unconstitutional); cf. *Crownover v. Crownover*, 274 P.2d 127, 132-34 (N.M. 1954) (requiring both residence and domicile for jurisdiction but upholding statutory presumption of domicile for military personnel stationed continuously in the state for one year). Other courts have read the military personnel statutes as dispensing with the domicile rule and have nevertheless upheld their constitutionality. See, e.g., *Lauterbach v. Lauterbach*, 392 P.2d 24, 27 (Alaska 1964); *Wallace v. Wallace*, 320 P.2d 20, 1022-24 (N.M. 1958); *Wood v. Wood*, 320 S.W.2d 807, 809-12 (Tex. 1959). For a more thorough discussion of the constitutional issues, see *infra* Part IV.

90. See, e.g., CAL. FAM. CODE § 2320 (West 1994) (providing that "[a] judgment of

thus these states *appear* to reject the domicile rule, but, in fact, courts have interpreted virtually all of them to require domicile.⁹¹ Only three "outlaw" states actually have rejected the domicile rule, and with respect to two of them, the evidence that they have done so is equivocal.⁹²

Arkansas law requires that the plaintiff prove that one of the spouses *resided* in the state for sixty days before commencement of the action and for three full months before entry of the final judgment.⁹³ Although the Arkansas Supreme Court has interpreted the statute as requiring only residence and not domicile,⁹⁴ the statute provides that upon proof of such residence,

dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months"); OR. REV. STAT. § 107.075 (1990) (vesting divorce jurisdiction if "either party is a resident of or domiciled in the state"); 23 PA. CONS. STAT. ANN. § 3104(b) (West 1991) (requiring that "at least one of the parties has been a bona fide resident in this Commonwealth for at least six months"); *see also* HAW. REV. STAT. § 580-1 (1985) (vesting divorce jurisdiction in "family court of the circuit in which the applicant has been domiciled or has been physically present for a continuous period of at least three months").

91. *See, e.g., In re Marriage of Dick*, 18 Cal. Rptr. 2d 743, 746 (Ct. App. 1993) (stating that "for purposes of [the jurisdictional statute] residency is synonymous with domicile"); *Whitehead v. Whitehead*, 492 P.2d 939, 942-43 (Haw. 1972) (explaining that durational residency requirements attempt to ensure that divorce litigants are domiciled in the state and noting that the state "has jurisdiction when one of the parties to the action is domiciled therein"); *In re Marriage of Pirouzkar*, 626 P.2d 380, 382 (Or. Ct. App. 1981) (stating that the divorce jurisdiction statute uses the term "resident of" to mean "domiciled in" and holding that "resident of is not an independent basis for jurisdiction under ORS 107.075"); *Zinn v. Zinn*, 475 A.2d 132, 133 (Pa. Super. Ct. 1984) (stating that "[b]ona fide residence' means domicile").

92. A fourth state, Minnesota, requires that one of the parties have resided in, or been a domiciliary of, the state for at least 180 days immediately preceding commencement of the action. *See* MINN. STAT. ANN. § 518.07 (West 1990). Although the use of the disjunctive "or" would appear to suggest rejection of the domicile rule, another section defines "residence" to mean "the place where a party has established a permanent home from which the party has no present intention of moving"—in other words, domicile. *Id.* § 518.003(2).

In a 1945 amendment to its divorce statute, the Alabama legislature purported to grant divorce jurisdiction as long as both parties were subject to the court's jurisdiction. *See* ALA. CODE tit. 34, § 29 (1945). The Alabama Supreme Court invalidated the legislation because it purported "to act on a status which is beyond the boundaries of the state. That it cannot do." *Jennings v. Jennings*, 36 So. 2d 236, 238 (Ala. 1948). The current Alabama statute excludes the section disapproved in *Jennings*. *See* ALA. CODE § 30-2-5 (1989).

93. *See* ARK. CODE ANN. § 9-12-307 (Michie 1993).

94. *See* *Wheat v. Wheat*, 318 S.W.2d 793, 794-95 (Ark. 1958). *Wheat* upheld the

"the party alleging and offering the proof shall be considered domiciled in the state, and this is declared to be the legislative intent and public policy of the State of Arkansas."⁹⁵ This statutory presumption of domicile upon proof of residence renders Arkansas's repudiation of the domicile rule somewhat equivocal.

Similarly, Illinois requires only residency within the state for a specified period of time.⁹⁶ The legislature made this change in 1981 when it substituted the words "resident of" for the words "domiciled in," which were in the predecessor statute.⁹⁷ Although the Appellate Court of Illinois, after the 1981 amendment, stated that "[t]he term 'residence' . . . is not synonymous with domicile,"⁹⁸ it then confusingly defined "residence" in such a way as to make it appear synonymous with "domicile": "the term 'residence' . . . denotes a 'permanent abode' or the place one considers as home. Of greatest significance in determining whether a place is one's residence is that person's intent to make the place his permanent home."⁹⁹ Thus, although the Illinois legislature apparently intended to repudiate the domicile rule, the court's construction of the statute undermined that intent and restored the domicile rule.

Finally, the State of New York requires one of the parties to the marriage to be a resident of the state but does not require either party to be domiciled in the state.¹⁰⁰ The legislative history of the 1976 amendments to the statute reveals that the legislature intended to require residence only, not domicile, and

constitutionality of the statute as construed. Louisiana granted full faith and credit to a divorce decree granted under the Arkansas statute on the theory that the husband, who had appeared in the Arkansas action, could not collaterally attack the decree for lack of jurisdiction. *See Reeves v. Reeves*, 209 So. 2d 554, 556 (La. Ct. App. 1968), *writ refused*, 209 So. 2d 741 (La. 1968); *infra* notes 121-22 and accompanying text.

95. § 9-12-307(b).

96. *See* 750 ILL. COMP. STAT. 5/401 (West 1993).

97. *See* Ill. Pub. Act 82-716 (certified Nov. 12, 1981). The floor debates on the bill are unilluminating. *See* Illinois House of Representatives, Transcripts of Debate, 82nd General Assembly (May 5, May 14, and Oct. 15, 1981); Illinois Senate, Transcripts of Debate, 82nd General Assembly (June 23 and Oct. 29, 1981) (on file with the author).

98. *In re Marriage of Passiales*, 494 N.E.2d 541, 546 (Ill. App. Ct. 1986).

99. *Id.* (citation omitted).

100. *See Unanue v. Unanue*, 532 N.Y.S.2d 769, 773 (App. Div. 1988).

two departments of the Appellate Division have interpreted the statute in this way.¹⁰¹

Even these "outlaw" states continue to treat divorce as a local action and apply forum law to all divorce actions filed in their courts. Thus, changes have been quite modest. Why have these three states proceeded so cautiously? More important, why have so few states even considered rejecting the domicile rule, especially when it is in such sharp contrast with the jurisdictional principles that govern all other civil cases? Do the twin historical rationales of state sovereignty and convenience continue to justify the domicile rule and its choice-of-law corollary? Do the states have other good reasons for requiring some domiciliary connection in all divorce cases? We now turn to these questions.

III. THE PUBLIC POLICY RATIONALES AND A CRITIQUE

Three public policy rationales underlie the domicile rule and its choice-of-law corollary. For centuries, states relied upon two of them—state sovereignty and the convenience of the parties; the third—ease of judicial administration—is more contemporary. As will be seen, none of the public policy rationales lends any genuine support to the domicile rule or its choice-of-law corollary today.

A. *State Sovereignty Rationale*

Perhaps the most enduring argument in favor of the domicile rule and its corollary is each state's concern for its sovereignty. In a classic statement of the state sovereignty rationale, the Rhode Island Supreme Court in *Ditson v. Ditson*¹⁰² declared:

[E]very nation and state has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the persons domiciled within that territory

101. See *Capdevilla v. Capdevilla*, 539 N.Y.S.2d 365 (App. Div. 1989); *Unanue*, 532 N.Y.S.2d at 773; see also *David-Zieseniss v. Zieseniss*, 129 N.Y.S.2d 649, 660 (Sup. Ct. 1954) (interpreting the prior statute as granting divorce jurisdiction in adultery cases as long as the parties' marriage occurred in the state).

102. 4 R.I. 87 (1856).

...
 ... [A] state cannot be deprived, directly or indirectly, of its sovereign power to regulate the *status* of its *own* domiciled subjects and citizens.¹⁰³

Because marriage is obviously a question of status, states have assumed the exclusive right to sever the marriages of their citizens or domiciliaries.

One of the primary vehicles by which states have regulated the status of their domiciliaries is by application of their own divorce laws to them. Until late in the twentieth century, divorce laws varied dramatically. Through these laws, states made powerful statements regarding the importance of preserving marriages, on the one hand, and the need to promote personal autonomy and happiness, on the other. It was only by exercising the *exclusive* right to apply their divorce laws to their citizens that states could retain control over the social fabric of their communities. Thus, states with strict divorce laws—states that granted divorce only upon proof of adultery, for instance—needed *exclusive* power to grant their citizens divorces. If other states, with more liberal divorce laws, could grant di-

103. *Id.* at 101, 106 (1856); see also *Alton v. Alton*, 207 F.2d 667, 676 (3d Cir. 1953) (stating that "adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens"), *vacated as moot*, 347 U.S. 610 (1954) (per curiam); *Hanover v. Turner*, 14 Mass. (13 Tyng) 227, 231 (1817) (declining to recognize a Vermont divorce decree issued to a husband who was still a Massachusetts domiciliary; stating that "if we were to give effect to this decree, we should permit another state to govern our citizens, in direct contravention of our own statutes"); *Ditson*, 4 R.I. at 93-94 (stating that the domicile rule "necessarily results from the right of every nation or state to determine the *status* of its own domiciled citizens or subjects, without interference by foreign tribunals in a matter with which they have no concern") (emphasis in original) (citation omitted); Michael M. O'Hear, "Some of the Most Embarrassing Questions": *Extraterritorial Divorces and the Problem of Jurisdiction Before Pennoyer*, 104 YALE L.J. 1507, 1510 (1995) (stating that "courts adopted and designed jurisdictional tests specifically to protect the territorial integrity of substantive divorce laws").

It is a well established principle in American jurisprudence, that each state has the right to establish the matrimonial status of her citizens, and to exercise exclusive jurisdiction over divorce cases between them. And, as has been well said, "the appropriate law by which dissolubility of a marriage is to be determined, is that of the actual domicile."

L.S. FAIRBANKS, *THE DIVORCE LAWS OF MASSACHUSETTS* 40 (1877).

vorces to citizens domiciled in the strict divorce state, then the strict divorce state would lose all ability to regulate the status of its citizens. It would therefore lose a critical sovereign power. Put more concretely, New York, which permitted divorce only upon proof of adultery, would lose all control over the married lives of its citizens if Nevada, with a more relaxed divorce law, could grant New Yorkers a divorce under Nevada law.

Jurisdiction became tied to domicile as opposed to residence because courts perceived domicile to be a more permanent, enduring connection. A person could reside anywhere for a short period of time, but she maintained a domicile in, and was a citizen of, the state of her permanent home. The state in which a person was domiciled had the greatest interest in controlling her marital status.

States attempted to retain sovereign power over their domiciliaries' marital status by employing a three-part strategy. First, in accordance with the choice-of-law corollary, state courts always applied the divorce law of the forum state to sever the marriages of litigants before them, rather than the law of another potentially interested state.¹⁰⁴ Second, each state asserted jurisdiction only over divorce actions filed by its own domiciliaries.¹⁰⁵ Each state thus asserted exclusive jurisdiction over the status of its citizenry by applying its own divorce law to sever the marriages of its own domiciliaries. Third, states would recognize divorces granted in other states only if one of the parties to the marriage was a domiciliary of the rendering state.¹⁰⁶ Both the domicile rule and its corollary were—and are—central

104. See *supra* notes 82, 86.

105. See *supra* note 81.

106. For example, the law in Massachusetts in 1836 declared that divorces granted to Massachusetts citizens by other states for grounds that would not have been recognized in Massachusetts were "of no force or effect in [Massachusetts]." MASS. REV. STAT. ch. 76, § 39 (1836). According to *Chase v. Chase*, 72 Mass. (6 Gray) 157, 161 (1856), the result was no different even if the defending spouse appeared in the out-of-state proceeding:

The express provision of the statute, declaring that such divorce shall be of no force or effect in this state, is not made for the benefit of a party . . . ; but it is made upon high considerations of general public policy and public interest, the provisions of which cannot be waived.

to states' efforts to control the circumstances in which their citizens may divorce.

As persuasive as the state sovereignty rationale may have been in a bygone era, it lost much of its force with the advent of no-fault divorce in the 1960s and 1970s. Although differences do exist,¹⁰⁷ all states now permit divorce in the absence of proof of fault.¹⁰⁸ States no longer depend upon their divorce laws to preserve morals and to police personal conduct. Likewise, unhappily married people no longer have reason to evade their home state's divorce law. Because the problem of migratory divorce is remote, states no longer need the domicile rule to deter evasion of their laws and to justify nonrecognition of foreign divorce decrees.

Furthermore, an irreconcilable tension exists between state interest in, and control over, the marital status of its citizens, on the one hand, and the constitutional rights of those citizens, on the other.¹⁰⁹ In the last thirty years, the Supreme Court has recognized that the right to marry,¹¹⁰ to marital privacy,¹¹¹

107. For a discussion of statutory differences regarding the availability of a no-fault divorce without the consent of both spouses, see Wasserman, *supra* note 18, at 852-53.

108. See, e.g., HERBERT JACOB, *SILENT REVOLUTION* 80 (1988) (indicating the nationwide acceptance of no-fault divorce); Adriaen M. Morse, Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 614 (1996) (stating that "[s]ince 1985, some form of no-fault divorce has been available in all fifty states"). In the last few years, a number of states, including Michigan and Iowa, have drafted or introduced legislation to revoke the no-fault option in contested divorce cases and require a showing of fault. See, e.g., Deborah L. Rhode, *To Fault or Not to Fault*, NAT'L L.J., May 13, 1996, at A19; Dirk Johnson, *Attacking No-Fault Notion, Conservatives Try to Put Blame Back in Divorce*, N.Y. TIMES, Feb. 12, 1996, at A10. See generally Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 807-08 (1996) (concluding that the functions served by assigning fault to one of the parties to a marriage are better served by tort and criminal law than divorce law). Louisiana has passed a law that requires engaged couples "to choose between the standard marriage contract, which permits so-called no-fault divorce, and 'covenant marriage,' which could be dissolved only by a mutually agreed upon two year-separation or proof of fault on a few narrowly defined grounds" Katha Pollitt, *What's Right About Divorce*, N.Y. TIMES, June 27, 1997, at A29.

109. See Garfield, *supra* note 83, at 517-20.

110. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (stating that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").

111. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (holding that mari-

and to bear and raise children¹¹² are constitutionally protected interests. The shift to no-fault divorce is consistent with this recognition by the Court that individuals, not the state, should have control over their most intimate family relationships. The state sovereignty rationale, on the other hand, conflicts with this contemporary constitutional jurisprudence.

Even before the advent of no-fault divorce and before the recognition of a right to marital privacy, however, the state sovereignty rationale failed to justify the domicile rule and its corollary in a variety of common situations. Consider, for example, the many instances in which the couple has separated, and the spouses are domiciled in different states. If each state has authority to grant its own domiciliary a divorce, then each has authority to apply its divorce law to sever a marriage to which a *nondomiciliary* also is a party.¹¹³ Neither state, therefore, has the desired power to control the circumstances in which their citizens can divorce. Instead, it is a "mere race of diligence between the parties in seeking different forums in other States or the celerity by which in such States judgments of divorce might be procured"¹¹⁴

Nor do the domicile rule and its corollary assure that the state having the most enduring and significant relationship with the couple can exercise jurisdiction and apply its own divorce law. Rather, the state of domicile often is a poor proxy for the state with the strongest connection to the couple or even the petitioner. As the *Perito* case demonstrates,¹¹⁵ a couple can live together for decades in a state, and then one of the spouses can go to another

tal privacy is constitutionally protected).

112. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (recognizing an unwed father's constitutionally protected "interest in personal contact with his child"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing the "fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (discussing the "interest of a parent in the companionship, care, custody, and management of his or her children").

113. See *Alton v. Alton*, 207 F.2d 667, 682 (3d Cir. 1953) (Hastie, J., dissenting) (noting that the domicile rule "presupposes a stable and intimate attachment of both spouses to a single community"), *vacated as moot*, 347 U.S. 610 (1954) (per curiam); Wasserman, *supra* note 18, at 839-40.

114. *Haddock v. Haddock*, 201 U.S. 562, 580-81 (1906).

115. 756 P.2d 895 (Alaska 1988).

state and in the twinkling of an eye, change her domicile.¹¹⁶ It strains credulity to suggest that the state of her new domicile has a greater interest in the marriage than the state in which she and her spouse lived for decades. Yet, application of the domicile rule and its choice-of-law corollary yields the selection of the divorce law of the state of the new domicile, which has virtually no connection whatsoever to the marriage.¹¹⁷

Similarly, soldiers, students, and others who live for long periods of time in a state in which they are not domiciled are not able to sue for divorce at home under the domicile rule and cannot obtain a divorce subject to the law of the state that is most interested in them.¹¹⁸ In these and other situations, the domicile rule and its corollary actually frustrate the sovereignty of the state that cares most about the couple involved.

The domicile rule and its corollary frustrate state sovereignty not only when the couple lives in a state other than their domicile or when one of the spouses becomes domiciled in a new state shortly before filing for divorce, but also when one of the partners *purports* to become domiciled elsewhere. Perhaps the most galling consequence of the domicile rule and the corollary from the states' perspective, at least until the advent of no-fault divorce, was the propensity of people to perjure themselves in order to obtain divorces on grounds not available in their home state.¹¹⁹ To evade the divorce law of his or her home state, a

116. See also *Williams v. North Carolina*, 325 U.S. 226, 245 (1945) (Rutledge, J., dissenting) (criticizing reliance on a concept "as variable and amorphous as 'domicil'"); *Alton*, 207 F.2d at 682-83 (Hastie, J., dissenting) (noting elusiveness and unsatisfactoriness of domicile concept); Griswold, *supra* note 44, at 195 (calling domicile a "highly artificial concept").

117. Application of the "most significant relationship" test or governmental interest analysis in the divorce context would reduce the number of cases in which the law of a state with which neither party has any substantial connection would apply. See *infra* notes 161-63 and accompanying text. Rejection of the choice-of-law corollary and adoption of standard choice-of-law rules in the divorce context, thus, might actually further state sovereignty.

118. Many states have addressed their concerns regarding soldiers in the military personnel statutes discussed *supra* Part II (C) (1). See also *COOK*, *supra* note 34, at 465-66; Currie, *supra* note 1, at 48; Griswold, *supra* note 44, at 194-95 (discussing the *LeMesurier* case); *supra* notes 28-30 and accompanying text.

119. See, e.g., Currie, *supra* note 1, at 26 & n.3; W. Barton Leach, *Divorce by Plane-Ticket in the Affluent Society—With a Side-Order of Jurisprudence*, 14 KAN. L. REV. 549, 554-56 (1966) (describing the "perjury mill" of divorce practice).

person merely had to find a state with a more permissive law, a short residency requirement, and a loose definition of domicile. Then she had to do only two things to obtain a divorce on grounds not available at home: travel to the permissive state and stay there for the required residency period; and swear that she intended to make the state her home, whether she so intended or not.¹²⁰ In essence, a six-week stay coupled with perjured testimony was all that was necessary to circumvent the home state's strict divorce law and to make a mockery of state sovereignty.

The home state was free to determine whether the petitioning spouse was in fact a *bona fide* domiciliary of the rendering state notwithstanding the Full Faith and Credit Clause,¹²¹ but preclusion principles barred it from doing so if the defending spouse had appeared in the divorce action, regardless of whether she contested jurisdiction.¹²² Thus, as long as both partners to the marriage wanted a divorce on grounds not available in their

120. A possible hindrance was locating counsel willing to assist in obtaining a divorce under these circumstances. "[I]t was . . . unethical for a lawyer to assist his client to obtain a divorce by fabricating grounds or to obtain a divorce by collusion. This sort of conduct was considered to constitute a fraud on the court and was not infrequently the subject of disciplinary proceedings." CLARK, *supra* note 86, § 14.7 at 566-67; see also Henry S. Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443, 458 (1953) (discussing the ABA Ethics Committee's opinion that such advice constituted a fraud on the court). Many lawyers, however, did not hesitate to advise clients to move to Nevada for six weeks and to aver an intent to remain indefinitely. See Drinker, *supra*, at 462-63.

121. See, e.g., *Williams*, 325 U.S. at 234-35; *Esenwein v. Pennsylvania ex rel. Esenwein*, 325 U.S. 279, 280-81 (1945); see also *infra* Part IV.

122. See, e.g., *Johnson v. Muhlenberg*, 340 U.S. 581 (1951) (barring collateral attack by a third party when the defending spouse had appeared in rendering court); *Sherrer v. Sherrer*, 334 U.S. 343, 348-52 (1948) (barring collateral attack by a defending spouse when he had contested jurisdiction and domicile in rendering court); *Coe v. Coe*, 334 U.S. 378, 384 (1948) (barring collateral attack by a defending spouse when she had appeared but had not contested jurisdiction in rendering court). Some read *Sherrer* to bar a collateral attack even if the party obtained the divorce through collusion or perjury. See, e.g., *Sherrer*, 334 U.S. at 367 (Frankfurter, J., dissenting); Monrad G. Paulsen, *Divorce Jurisdiction by Consent of the Parties—Developments since "Sherrer v. Sherrer,"* 26 IND. L.J. 380, 383 (1951). Furthermore, principles of estoppel bar a person who obtained a divorce, or accepted benefits (such as alimony) under a divorce, from later attacking it. See, e.g., CLARK, *supra* note 86, § 12.3 at 436-37.

home state, they could obtain one under the laws of a more permissive state, which would be unassailable in their home state.

Apart from the dismal failure of the domicile rule and its corollary to preserve state sovereignty in a variety of common circumstances, the sovereignty rationale is itself internally inconsistent. States profess an overriding interest in the married lives of their citizens and the need to regulate them by asserting exclusive jurisdiction over divorce actions between them. Yet, they express no similar interest in applying their *marriage* laws to their citizenry. All states have laws that regulate the circumstances in which a couple may marry—imposing age and license requirements, specifying the persons authorized to solemnize marriages, mandating blood tests, and the like.¹²³ One might think that a state concerned about the civil status of its citizens would attempt to assert exclusive authority to perform marriages between its domiciliaries and would apply its marriage law to all such marriages. In fact, *no* state requires its citizens to marry pursuant to its laws. Instead, all states recognize heterosexual marriages performed in other states.¹²⁴ The state's interest

123. See, e.g., CAL. FAM. CODE §§ 301-04, 350-56, 400-02 (West 1994 & Supp. 1997); FLA. STAT. ANN. §§ 741.01 to .211 (West 1986 & Supp. 1996); 750 ILL. COMP. STAT. §§ 5/201-214 (West 1994); N.Y. DOM. REL. LAW §§ 10-25 (McKinney 1988 & Supp. 1997); 23 PA. CONS. STAT. ANN. §§ 1301-10, 1503 (West 1991 & Supp. 1997).

124. See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 & cmt. a (1934) (stating that subject to exceptions for polygamous, incestuous, and abhorrent marriages, "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (stating that "[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage"). The public policy exception does afford the domiciliary state some room to assert its interest in its domiciliaries and the policies underlying its marriage laws. *But see* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1966 (1997) (arguing that "the public policy doctrine ought to be deemed unconstitutional").

Now that Hawaii has determined that gay men and lesbians can legally marry, *see* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), some states will invoke the public policy exception and/or alter their longstanding practice of recognizing marriages celebrated elsewhere. See, e.g., ALASKA STAT. § 25.05.013(b) (Michie 1996) (stating that "[a] same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage"); CONN. GEN. STAT. ANN. § 46a-81r (West 1995) (stating that the Code does not authorize

in regulating the domestic status of its citizens, which is so strong in the divorce context as to purport to justify the ironclad domicile rule and its choice-of-law corollary, is thus quite weak in the marriage context.¹²⁵

In sum, the domicile rule is no longer necessary to preserve state sovereignty because state divorce laws no longer vary as dramatically as they once did.¹²⁶ Even when divorce laws required fault, however, the sovereignty rationale failed to justify the domicile rule in the many cases in which the partners lived apart or when they resided in a state other than their state of domicile.¹²⁷

B. Convenience of the Parties Rationale

The domicile rule (together with the status exception)¹²⁸ supposedly assures the parties' convenience by guaranteeing the petitioning spouse an opportunity to sue for divorce in her home state. Without the domicile rule and the status exception, abandoned spouses would have had to travel to the deserting spouses' new home state to obtain jurisdiction over them, at least until the Supreme Court's decision in *International Shoe*.¹²⁹ Today, states possess wide latitude to assert *in personam* jurisdiction

"marriage between persons of the same sex"); 750 ILL. COMP. STAT. ANN. 5/213.1 (West Supp. 1996) (declaring same-sex marriages "contrary to the public policy of this State"); see also Defense of Marriage Act of 1996, 28 U.S.C.S. § 1738C (Law. Co-op. Supp. 1997) (stating that no state "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"); *infra* text accompanying notes 255-56.

125. See Stimson, *supra* note 83, at 294; Brief for the Petitioner at 42, *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955) (No. 261) (noting that a couple may be married in a state whose laws contradict those of their domicile). The explanation for this seeming inconsistency may lie in the pro-marriage policy of all states. Application of other states' marriage laws often will result in the validation of marriages performed elsewhere; however, application of other states' more permissive divorce laws can result only in the dissolution of marriages.

126. See *supra* notes 107-08 and accompanying text.

127. See *supra* notes 113-22 and accompanying text.

128. See *supra* notes 2-4 and accompanying text; Wasserman, *supra* note 18, at 823-54 (arguing that the status exception for divorce violates the Due Process Clause of the Fourteenth Amendment because it permits a state to exercise divorce jurisdiction over a defending spouse who has no connection to the state).

129. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

and many states have enacted special long-arm provisions for matrimonial litigation.¹³⁰ Therefore, the status exception and the domicile rule are no longer necessary to ensure that spouses abandoned in a state will have recourse to its divorce courts.¹³¹ Petitioning spouses simply can invoke long-arm jurisdiction over the deserting spouses and sue at home *irrespective* of domicile. Put differently, because the deserting spouse typically will have minimum contacts with the state in which the couple lived together, the abandoned spouse can sue at home, relying upon standard minimum contacts analysis.¹³² The assurance of a convenient forum requires neither the status exception nor the domicile rule.

Moreover, if the state of domicile were truly a convenient forum, the petitioner would choose to sue there voluntarily. Rather, the domicile rule, which vests *exclusive* divorce jurisdiction in the domiciliary states, can cause inconvenience or inefficiency in a variety of factual settings. Three examples will illustrate.

First, a woman from the Slovak Republic entered the United States on a three-year work visa with the possibility of an additional three-year extension.¹³³ Her husband and daughter joined her in Ohio several months later.¹³⁴ Nineteen months after her arrival, the woman filed for divorce in an Ohio court.¹³⁵ The court held that she was not domiciled there, even though she worked, rented an apartment, obtained a driver's li-

130. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (upholding an assertion of jurisdiction over a Michigan person with business contacts in Florida); *Calder v. Jones*, 465 U.S. 783 (1984) (upholding California's jurisdiction over Florida defendants based on defendant publication's circulation in California); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (finding jurisdiction over foreign corporation based on insurance contract with resident).

131. See, e.g., ALASKA STAT. § 09.05.015(a)(12) (Michie 1996); KY. REV. STAT. ANN. § 454.220 (Michie Supp. 1996); MASS. GEN. LAWS ANN. ch. 223A, § 3(g) (West 1985 & Supp. 1996); MICH. COMP. LAWS ANN. § 600.705(7) (West 1996); N.Y. C.P.L.R. 302(b) (McKinney 1990 & Supp. 1997).

132. See Wasserman, *supra* note 18, at 834 (noting that "[i]n many cases, if the petitioner sues for divorce at home, the defending spouse will have sufficient contacts with the forum state—contacts made during the course of the marriage or since the separation").

133. See *Polakova v. Polak*, 669 N.E.2d 498, 498 (Ohio Ct. App. 1995).

134. See *id.*

135. See *id.* at 499.

cense, and paid taxes in Ohio.¹³⁶ The court denied her the opportunity to obtain a divorce in the state most convenient to both her and her spouse.¹³⁷ She and her spouse could have resolved child custody matters there.¹³⁸ If they had been able to obtain a divorce in Ohio, then they also could have resolved the associated financial issues there.¹³⁹ But they could not obtain a divorce in Ohio, the state in which they both were living, because neither spouse was domiciled there.¹⁴⁰

Second, a Vermont woman and her son moved to Georgia, where she found temporary employment.¹⁴¹ Because she did not intend to remain indefinitely in Georgia, she retained her Vermont domicile. Her husband, too, moved temporarily to Georgia, but returned to Vermont when it appeared the marriage would not succeed. After having lived with her son in Georgia

136. *See id.* at 499-500.

137. *See id.*; *see also* *Stephenson v. Stephenson*, 134 A.2d 105 (D.C. 1957) (refusing to find jurisdiction over husband of one year who departed jurisdiction one and a half months prior to suit).

138. Under section 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA), § 3(a)(1), 9 U.L.A. 143 (1988), and subsection (c)(2)(A) of the Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. § 1738A(c)(2)(A) (1994), a court will have jurisdiction to decide child custody matters if it is the child's "home state." If there is no home state or if the child and her family have equally strong or stronger ties to another state, then the state with which they have a "significant connection" will have jurisdiction. *See* UCCJA, § 3(a)(2), 9 U.L.A. 143-44 (1988). Under the PKPA, "significant connection" jurisdiction is available only if there is no home state. *See* 28 U.S.C. § 1738A(c)(2)(B) (1994). Under the UCCJA, jurisdiction to resolve the custody issues will exist even if the court lacks *in personam* jurisdiction over the defending parent and even if neither parent is domiciled there. *See* UCCJA, § 12 cmt., 9 U.L.A. 274 (1988). I have argued previously that the Due Process Clause requires *in personam* jurisdiction over the defending parent. *See* Wasserman, *supra* note 18, at 854-91.

139. A court will have jurisdiction to resolve financial issues, such as alimony, maintenance, distribution of marital assets, and child support, only if it has *in personam* jurisdiction over the defending spouse. *See, e.g., Kulko v. Superior Court of San Francisco*, 436 U.S. 84, 91 (1978) (noting the long-standing rule "that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant"); *Estin v. Estin*, 334 U.S. 541, 548-49 (1948) (holding that a wife could not be deprived of her claim for alimony unless she was subject to *in personam* jurisdiction).

140. *See Polakova*, 669 N.E.2d at 499-500; *see also supra* notes 38-45 and accompanying text (discussing the inconvenience of the domicile rule in the context of the *Le Mesurier* case).

141. This hypothetical example is loosely based upon the facts of *Duval v. Duval*, 546 A.2d 1357 (Vt. 1988).

for six months; the woman sued her husband for child custody there because the Uniform Child Custody Jurisdiction Act deemed it to be the child's "home state."¹⁴² The court rejected the woman's efforts to sue her husband for divorce in Georgia because she was not domiciled there. She then had to bring a second suit for divorce in Vermont, the state of her domicile. Although her husband may have preferred a forum in Vermont rather than Georgia, surely one Georgia suit, addressing both divorce and child custody, would have been more convenient for *both* spouses than two separate suits in two states.

Third, recall the *Perito* case discussed in the introduction, where Ruth moved from New York to Alaska and established a domicile there immediately upon her arrival.¹⁴³ The court permitted her to sue her spouse Tom for divorce in Alaska, invoking the status exception, even though he had no connection whatsoever to Alaska and the choice of forum was terribly inconvenient for him.¹⁴⁴ Alaska had jurisdiction to grant a divorce,¹⁴⁵ but it lacked jurisdiction to resolve any financial issues between the spouses.¹⁴⁶ Again, two suits were necessary to resolve all of the couple's domestic relations disputes. Such would be the case whenever a spouse moves to a new state, establishes domicile, and sues for divorce there, unless the defending spouse happens to be subject to *in personam* jurisdiction in the petitioner's new home state.

142. UCCJA § 3(a)(1), 9 U.L.A. 143; *see also* PKPA, 28 U.S.C. § 1738A(c)(2)(A)(i); *Thompson v. Thompson*, 484 U.S. 174, 176-77 (1988) (explaining and applying 28 U.S.C. § 1738A(c)(2)).

143. *See Perito v. Perito*, 756 P.2d 895 (Alaska 1988); *see also supra* notes 8-17 and accompanying text.

144. *See Perito*, 756 P.2d at 898; *see also In re Marriage of Hudson*, 434 N.E.2d 107 (Ind. Ct. App. 1982) (allowing wife to divorce in an Indiana court eight months after arrival in state); *Fox v. Fox*, 559 S.W.2d 407 (Tex. Civ. App. 1977) (finding jurisdiction to dissolve marriage despite wife's complete lack of contacts with state).

145. I believe an assertion of jurisdiction would violate due process in the absence of some meaningful connection between the defending spouse and the forum. *See Wasserman, supra* note 18, at 821-23.

146. *See Kulko v. Superior Court of San Francisco*, 436 U.S. 84, 91 (1978) (noting the requirement of personal jurisdiction over defendant to impose an obligation in favor of plaintiff). Inexplicably, the court upheld an award of attorneys' fees against Tom. *See Perito*, 756 P.2d at 899.

Additional efficiency concerns arise because some states require that the *petitioner* be domiciled in the state for a specified period of time before filing suit ("petitioner-domiciliary" states).¹⁴⁷ If the spouses live apart and the defending spouse lives in a "petitioner-domiciliary" state, then the petitioner cannot sue for divorce and alimony or child support in the same state. She cannot sue her spouse for divorce in the state in which he is living even though he is subject to *in personam* jurisdiction because she is not domiciled there. She can sue him for divorce in her state of domicile; but she cannot sue him for alimony or child support there unless he has minimum contacts with that state. Again, two suits in two states would be necessary.

In short, the convenience rationale for the domicile rule rests upon two assumptions, neither one of which is universally true: (1) that it will be convenient for a person to sue in the state in which she is domiciled; (2) that it will be convenient for her spouse to defend in that state. Because these assumptions are often incorrect—whenever a person lives outside the state of her domicile and whenever the spouses live in different states—domicile is a poor proxy for the convenience of the parties.

Not only does the domicile rule fail to ensure the convenience of the parties; it and the choice-of-law corollary often result in unnecessary delay. Commitment to the domicile rule and its corollary has caused virtually all states to adopt durational residency requirements that require at least one of the parties to the marriage to reside in the state for a specified period of time before commencing a divorce action.¹⁴⁸ Such residency re-

147. See, e.g., OHIO REV. CODE ANN. § 3105.03 (Banks-Baldwin 1995) ("The plaintiff in actions for divorce and annulment shall have been a resident of the state at least six months immediately before filing the complaint"); cf. OHIO REV. CODE ANN. § 3105.62 (Banks-Baldwin 1995) ("One of the spouses in an action for dissolution of marriage shall have been a resident of the state for at least six months immediately before filing the petition").

148. As of 1975, 48 of the 50 states had durational residency requirements. See *Sosna v. Iowa*, 419 U.S. 393, 404-05 (1975); cf. LA. CODE CIV. PROC. ANN. art. 10A(7) & 10B (West Supp. 1997) (authorizing jurisdiction in an action for divorce if one or both of the spouses are domiciled in the state and creating a rebuttable presumption of domicile if a spouse has a residence in a parish of the state for six months); WASH. REV. CODE ANN. § 26.09.030 (West 1997) (requiring only that petitioner be a "resident of this state"). It appears that since 1975, at least two other states, Alaska and South Dakota, have repealed their durational residency re-

quirements bolster the domicile rule and its corollary in two ways. First, they ensure that people who profess to be domiciled in a new state actually stay there for a period of time before claiming the benefit of that state's divorce law.¹⁴⁹ Second, they help ensure that the decree will be recognized in other states by providing some objective evidence of the intent necessary to establish domicile.¹⁵⁰

Although arguably useful in a jurisdictional scheme predicated on domicile, the durational residency requirements in fact cause hardship to those who move interstate by precluding them from suing for divorce for a potentially lengthy period of time. If the nonpetitioning spouse's state of domicile requires that *the petitioner* be domiciled in the state, then the prospective petitioner cannot sue for divorce *anywhere* until she satisfies the residency requirement of her new home state. In addition to the obvious psychological and emotional distress that this delay may cause, there may be economic consequences. The longer the petitioner remains married to her spouse, the longer she continues to be responsible for his debts,¹⁵¹ the longer she cannot change the beneficiary on her pension,¹⁵² and the longer she will be

quirements. See ALASKA STAT. § 25.24.080 (Michie 1996) (reflecting the absence of any durational residency requirement); S.D. CODIFIED LAWS § 25-4-30 (Michie 1992) (requiring that the "plaintiff in an action for divorce . . . be a resident of this state" and that such "residence . . . be maintained until the decree is entered").

149. See *supra* note 64 and accompanying text; see also *Sosna*, 419 U.S. at 407 (noting that "[w]ith consequences of such moment riding on a divorce decree issued by its courts, Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required here" and stating that "[a] state such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there [a very short time]").

150. See *supra* note 65 and accompanying text. In *Sosna*, the Supreme Court upheld a one-year residency requirement from constitutional attack, citing the state's interest in "minimizing the susceptibility of its own divorce decrees to collateral attack" as a sufficient justification for the line drawn between residents and nonresidents. *Id.* at 407; see also *id.* at 408 (stating that "this requirement . . . provides a greater safeguard against successful collateral attack than would a requirement of bona fide residence alone").

151. See, e.g., *Jersey Shore Med. Center-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1005 (N.J. 1980) (holding that "both spouses are liable for necessary expenses incurred by either spouse in the course of the marriage"); *Landmark Medical Center v. Gauthier*, 635 A.2d 1145, 1154 (R.I. 1994) (holding that "the necessities doctrine should be expanded to impose a mutual obligation on both husbands and wives").

152. The Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001

treated as married for federal income tax purposes.¹⁵³ The domicile rule and the choice-of-law corollary, therefore, not only fail to serve the convenience of the parties in many cases, but they often result in inconvenience, delay, and aggravation.

C. *Ease of Judicial Administration Rationale*

In addition to ostensibly serving the historical rationales, the domicile rule and its choice-of-law corollary supposedly ease judicial administration, especially with respect to the forum's choice of law. In the absence of the domicile rule, married couples could sue one another for divorce in any state in which the defending spouse was subject to *in personam* jurisdiction.¹⁵⁴ If, however, the state also rejected the choice-of-law corollary, then how would its courts choose the divorce law to apply?¹⁵⁵ If the spouses lived apart, then would the court be required to select the divorce law of one of the litigants' home states? Could it select the law of the place where the couple last lived together? Consistent application of the domicile rule and its choice-of-law corollary renders these and other difficult questions inapposite.

In addition to shielding state courts from the difficulty of *choosing* the law to govern transient divorce actions, the choice-of-law corollary spares courts the challenge of *applying* another state's law. In many interstate cases outside the divorce context, courts apply the law of another state to govern the controversy.

(1994), requires that pension plans provide automatic survivor benefits to surviving spouses of vested participants who die before retirement. *See id.* § 1055(a). This mandatory death benefit to surviving spouses is automatic unless the participant waives such coverage *and* the spouse consents in writing. *See id.* §§ 1055(c)(1)(A)(i), 1055(c)(2)(A).

153. *See* I.R.C. § 7703 (1994). "Even when living apart from his or her spouse, an individual will be considered married unless legally separated under a decree of divorce or separate maintenance." *Wagner v. Commissioner*, 58 T.C.M. (CCH) 1239, 1241 (1990). *But see* I.R.C. § 7703(b)(2) (treating as unmarried certain married persons with children living apart).

154. *See supra* note 5 and accompanying text.

155. *See* Reply Brief for Petitioner at 44, *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955) (No. 261); *see also* *Alton v. Alton*, 207 F.2d 667, 685 (3d Cir. 1953) (Hastie, J., dissenting) (raising the choice-of-law issue in the context of the Virgin Islands legislation that asserted jurisdiction as long as the petitioner resided in the territory for six weeks and the court had jurisdiction over her partner), *vacated as moot*, 347 U.S. 610 (1954) (per curiam).

This difficult task would be greatly exacerbated in the family law context, because many states' divorce laws require the parties to participate in counseling or mediation and constrain the courts to cooperate with local social service agencies.¹⁵⁶ The domicile rule and the choice-of-law corollary not only shield judges from the onerous task of administering the unfamiliar, potentially complex divorce laws of other states, but at the same time, they assure that sympathetic judges familiar with the policies underlying the states' divorce laws apply them.¹⁵⁷ The application of divorce law by judges familiar with state policy is especially important in the divorce context given that courts sometimes view the state itself as a third party to the divorce proceeding.¹⁵⁸

Although persuasive on its face, the ease of judicial administration rationale fails for several reasons. Most obviously, it *always* will be easier for courts to select their own state's law than to have to engage in a choice-of-law analysis.¹⁵⁹ Yet, in all other areas of the law, we require judges to do just that—to develop and apply choice-of-law rules to select the law to govern the controversy. Granted, it may be difficult to determine which state's divorce law should govern in some cases, especially when the parties are living apart. It also is difficult, however, to select

156. See, e.g., ALASKA STAT. § 25.24.060 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-381.01-24 (West 1991); CAL. FAM. CODE §§ 2554, 3190 (West 1994 & Supp. 1997); CONN. GEN. STAT. ANN. §§ 46b-10, 46b-53 (1995); FLA. STAT. ANN. § 61.052 (West 1985 & Supp. 1996); IND. CODE ANN. §§ 31-1-11.5-19, 31-1-23-1 to -24-29 (Michie 1987 & Supp. 1996); NEB. REV. STAT. §§ 42-360, 42-801 to -823 (1993); N.H. REV. STAT. ANN. § 167-B:1 to -B:5 (1994 & Supp. 1996); OHIO REV. CODE ANN. §§ 3105.091, 3109.052, 3117.01-08 (Banks-Baldwin 1995); 23 PA. CONS. STAT. ANN. § 3302 (West 1991); TEX. FAM. CODE ANN. § 3.54 (West 1993); UTAH CODE ANN. §§ 30-3-11.3, 30-3-13.1, 30-3-15.1, 30-3-16.1 to -3-18 (1995); WIS. STAT. ANN. §§ 767.11, 767.115 (West 1993 & Supp. 1996); see also Currie, *supra* note 1, at 52 (noting the increasing number of states requiring conciliation services).

157. See Currie, *supra* note 1, at 51-52 (stating that a foreign jurisdiction may be ill-equipped to apply another jurisdiction's divorce law).

158. See, e.g., *Maduro v. Maduro*, 145 P.2d 683, 684 (Cal. Dist. Ct. App. 1944) (noting that the state's strong interest in marriage makes it a third party to divorce proceedings); *Tripp v. Payne*, 171 N.E. 131, 133 (Ill. 1930) (stating that Illinois has long recognized the State as a third party to divorce proceedings), *overruled on other grounds*, *In re Estate of Gerbing*, 337 N.E.2d 29 (Ill. 1975).

159. Cf. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 (1981) (Stevens, J., concurring in the judgment) (questioning "whether a judge's decision to apply the law of his own State could ever be described as wholly irrational").

the law to govern contract disputes between parties living in different states, when the course of dealings spans both states; yet courts do so all the time.¹⁶⁰

In fact, it would not be particularly difficult to draft a choice-of-law rule, similar to many of the *Restatement (Second) of Conflict of Laws* rules,¹⁶¹ to govern transient divorce actions. For example: "The rights and liabilities of the parties with respect to an issue in a divorce action are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."¹⁶² Nor would it be difficult to apply governmental interest analysis to divorce actions.¹⁶³ Nor would it be difficult to draft a territorial rule, similar to many of the *Restatement (First) of Conflict of Laws* rules.¹⁶⁴ For example,

160. See, e.g., *Teas v. Kimball*, 257 F.2d 817, 823 (5th Cir. 1958) (applying Texas conflict of laws rules to determine whether Texas or Colorado law should decide a contract's validity in a diversity case).

161. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1971) (providing choice of law guidance in tort and contract disputes respectively). The contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue could include (a) the place where the couple celebrated the marriage; (b) the domicile, residence, and nationality of the parties; (c) the length of time the parties lived in any of the states whose laws are competing for application since the marriage; (d) the place where the parties centered their relationship. Cf. *id.* §§ 145(2), 188(2).

162. Section 6(2) requires consideration of the needs of the interstate system; the relevant policies of the forum and other interested states; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability, and uniformity of result; and ease of judicial administration. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

163. The court would have to ascertain the policies underlying the laws of the states in which the spouses currently reside, the state in which the couple last lived together, and the state in which the conduct providing the grounds for divorce, if any, occurred, and then determine whether any of the states would have an interest in having their law apply given the facts of the case. See generally Hans W. Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329 (1972) (applying interest analysis in the divorce and marriage contexts); David E. Seidelson, *Interest Analysis and Divorce Actions*, 21 BUFF. L. REV. 315, 330-37 (1972) (applying interest analysis in the divorce context, but considering only the laws of the states of the parties' domicile and the state in which the defendant's conduct occurred); Wills, *supra* note 83 (proposing the adoption of interest analysis in the divorce setting).

164. See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934) (stating that "[t]he law of the place of wrong determines whether a person has sustained a legal injury").

"[t]he grounds upon which a divorce may be decreed shall be determined by the law of the state in which the marriage was celebrated."¹⁶⁵ None of these rules or approaches would be completely free from criticism, but neither is any choice-of-law rule or approach.¹⁶⁶ The point is, it should be no more difficult to choose the law to govern divorce actions than any other interstate case.

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

In the relatively rare cases in which the forum would choose the divorce law of another state to govern, the court might encounter difficulty or inconvenience in applying the mediation or counseling requirements.¹⁶⁷ These obstacles, however, would not be insurmountable in most cases. First, courts might conclude that the provisions in another state's law requiring mediation and/or counseling are procedural and need not be applied in the forum.¹⁶⁸ Analogies from other contexts are helpful. For example, courts applying the medical

165. Like many of the *Restatement (First) of Conflict of Laws* rules, this rule would be relatively easy to apply and would afford couples a substantial degree of predictability. In some cases, however, it would not select the law of the state with the greatest interest in the couple. Several alternate territorial rules are possible: the divorce law of the state in which the partners reside, if they reside in the same state; the divorce law of the state in which the petitioner resides; or the divorce law of the state in which the couple lived together for the longest period of time.

166. See, e.g., Russell J. Weintraub, *Choice of Law in Contract*, 54 IOWA L. REV. 339 (1968) (criticizing the *Restatement (Second) of Conflict of Laws*' contract choice-of-law rule).

167. See *supra* note 156 and accompanying text.

168. Under the *Restatement (First) of Conflict of Laws*, "[a]ll matters of procedure are governed by the law of the forum." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934). Under the *Restatement (Second) of Conflict of Laws*, "[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971). Likewise, application of governmental interest analysis to truly procedural questions should yield forum law because such cases should be false conflicts. See LEA BRILMAYER, CONFLICT OF LAWS: CASES AND MATERIALS 331 (4th ed. 1995).

malpractice laws of other states have *not* applied the provisions requiring submission of claims to medical review panels, viewing such provisions as procedural.¹⁶⁹ In *Crider v. Zurich Insurance Co.*,¹⁷⁰ moreover, the United States Supreme Court held that an Alabama court could grant the plaintiff a remedy under the Georgia Workmen's Compensation Act even though the Georgia Act required the plaintiff to proceed administratively before the Georgia Compensation Board.¹⁷¹ The Court noted that a forum "may 'supplement' or 'displace' the remedy of the other State, consistently with constitutional requirements."¹⁷² To the extent that the mediation or counseling requirements in divorce laws can fairly be characterized as procedural, courts in the forum state therefore could apply their own provisions even while applying the substantive portions of the divorce laws of other states.

Second, even if the forum were to conclude that some of the mediation or counseling provisions were substantive, it should not encounter enormous difficulty applying them. Some of the provisions are general enough that they could easily be applied by other states' courts. For instance, Alaska law authorizes its courts to refer divorce litigants to mediation with any person deemed "suitable" by the court.¹⁷³ Some other states authorize their courts to require divorce litigants to seek counseling from psychologists, psychiatrists, members of the clergy, or other "li-

169. See *Ransom v. Marrese*, 524 N.E.2d 555, 558-59 (Ill. 1988) (relying on language of the Indiana statute to conclude that the medical review panel requirement applied only in Indiana courts); see also *Huang v. D'Albora*, 644 A.2d 1, 4 (D.C. 1994) (stating that the Maryland "arbitration procedure . . . is not part of the substantive action for wrongful death, and therefore provides no basis for our departing from the rule that forum law governs procedural matters"); *Vest v. St. Albans Psychiatric Hosp., Inc.*, 387 S.E.2d 282, 285-86 (W. Va. 1989) (stating that the review and notification requirements were procedural and that failing to comply may entitle another state to "deny plaintiffs access to its own courts, but may not by that act deny access to the courts of West Virginia").

170. 380 U.S. 39 (1965).

171. See *id.* at 43.

172. *Id.* at 42 (quoting *Carroll v. Lanza*, 349 U.S. 408, 414 (1955)).

173. See, e.g., ALASKA STAT. § 25.24.060 (Michie 1996) (authorizing courts to order divorce litigants to engage in settlement mediation both upon motion or *sua sponte* and allowing the courts to appoint "any person the court finds suitable to act as mediator").

censed professionals.”¹⁷⁴ Courts in any state could enforce these provisions without much difficulty.

More elaborate provisions would be more burdensome to apply, but not if the forum state had an identical or similar provision. For example, several states have provisions authorizing the creation of a conciliation court to hear domestic relations cases and enabling it to enlist the assistance of outside resources, including counselors.¹⁷⁵ If the forum state concluded that the divorce law of another state applied and even if that law would permit the parties to seek the aid of a conciliation court, then the forum might be able to apply this provision without undue difficulty if its divorce law also authorized the creation of a conciliation court.

Even if the court considered the mediation or counseling provisions to be substantive and the forum did not have a comparable provision, courts might still be able to apply the provisions without undue difficulty. Again, an analogous case may prove helpful. Federal courts sitting in diversity cases have concluded uniformly that state statutes requiring submission of medical malpractice claims to arbitration or mediation before litigation are substantive under *Erie*, and the federal courts have enforced

174. See, e.g., CAL. FAM. CODE § 3190 (West 1994) (authorizing the court to require parents involved in a custody or visitation dispute to participate in counseling with “a licensed mental health professional”); CONN. GEN. STAT. ANN. § 46b-10 (West 1996) (authorizing the judge in divorce actions to require either or both parties to appear before a “judge, referee or other disinterested person for the purpose of attempting a reconciliation or adjustment of differences between the parties”); FLA. STAT. ANN. § 61.052 (West 1985 & Supp. 1996) (authorizing the court in specified instances to order either or both parties to consult with a marriage counselor, psychologist, psychiatrist, clergy, or other person deemed qualified by the court and acceptable to the parties); OHIO REV. CODE ANN. § 3105.091 (Banks-Baldwin 1995) (authorizing the court to order the parties to an action for divorce to undergo conciliation and/or family counseling with a conciliator selected by the court); 28 PA. CONS. STAT. ANN. § 3302 (West 1991) (stating that in divorce actions raising specified grounds for divorce, the court may require up to three counseling sessions if either of the parties requests it or the parties have at least one child under sixteen years of age; the choice of the counselor is at the option of the parties); TEX. FAM. CODE ANN. § 3.54 (West 1993) (authorizing the court in divorce actions to direct the parties to counsel with a person named by the court).

175. See, e.g., ARIZ. REV. STAT. ANN. § 25-381.01 to .18 (West 1991); NEB. REV. STAT. § 42-801 to -823 (1993); OHIO REV. CODE ANN. §§ 3105.091, 3117.01 to .08 (Banks-Baldwin 1995).

the ADR requirements.¹⁷⁶ Generally, enforcement of the state law has meant dismissal of the federal action without prejudice until completion of the ADR procedure under state law.¹⁷⁷ In these cases, the federal court's application of the state law has been easier than a state court's application of a sister state's divorce law would be. In at least two cases, however, the federal court itself has overseen the ADR procedure.¹⁷⁸ In one case, the court constituted a panel "comparable to the panels utilized by the . . . State courts" with the "United States Magistrate . . . act[ing] as the Judge and presiding officer at the panel hearing."¹⁷⁹ Because the federal court applied the law of the state in which it sat, it may have been more familiar with the mandated procedure than would a court applying the divorce law of another state. Nevertheless, the experience of federal courts applying state ADR procedures suggests that state courts should not have inordinate difficulty applying the divorce laws of other states.

176. See, e.g., *Davison v. Sinai Hosp.*, 617 F.2d 361, 362 (4th Cir. 1980) (applying Maryland law, which required the parties to submit their malpractice claim to an arbitration panel); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1168 (5th Cir. 1979) (applying Florida law, which required malpractice claimant to submit claim to a medical liability mediation panel); *Sander v. Providence Hosp.*, 483 F. Supp. 895, 896 (S.D. Ohio 1979) (applying Ohio law, which required medical malpractice controversy to be "submitted to an arbitration board consisting of three arbitrators to be named by the court"); *id.* (quoting OHIO REV. CODE ANN. § 2711.21 (Banks-Baldwin 1995)); see also DEL. CODE ANN. tit. 18, § 6814 (1989) (making special provision for the appointment of malpractice review panels upon the request of federal district court judges sitting in diversity actions). But see *Wheeler v. Shoemaker*, 78 F.R.D. 218 (D.R.I. 1978) (declining to apply Rhode Island law, which required the court to refer an action to a medical liability mediation panel). See generally John H. Pavloff, Note, *The Confrontation Between State Compulsory Medical Malpractice Screening Statutes and Federal Diversity Jurisdiction*, 1980 DUKE L.J. 546, 547 (discussing the malpractice screening statutes, reviewing the federal decisions, and concluding that "the *Erie* line of cases, as well as the supremacy of federal diversity jurisdiction, frees the federal courts from the obligation to yield to the mandates of state medical malpractice screening systems").

177. See Pavloff, *supra* note 176, at 552 (discussing federal courts that have required medical malpractice plaintiffs to exhaust state mandated screening procedures).

178. See *Kanouse v. Westwood Obstetrical & Gynecological Assocs.*, 505 F. Supp. 129, 132 (D.N.J. 1981); *DiFilippo v. Beck*, 520 F. Supp. 1009, 1018 (D. Del. 1981).

179. *Kanouse*, 505 F. Supp. at 132 (emphasis added) (footnote omitted).

Moreover, if cases were to arise in which the forum concluded that it had to apply the divorce law of another state but that some provisions of that state's law would be too burdensome to apply, then the court could enter a *forum non conveniens* dismissal to avoid the burden.¹⁸⁰ As the above discussion suggests, however, such cases should be rare.

Finally, in the many cases in which the forum will apply its own divorce law, the parties will be assured a court familiar with, and sympathetic to, the policies underlying the law. Concededly, there will be some cases in which the forum will apply the divorce law of a state with which it is not completely familiar. But the Founding Fathers predicated our federal system, and the Full Faith and Credit Clause, in particular, upon the assumption that courts in one state can fairly apply the laws of other states.¹⁸¹ Because all states' family law policies are similar—they all favor marriage but currently permit no-fault divorce—we should extend this assumption to the divorce context.¹⁸²

In sum, the ease of judicial administration rationale for the domicile rule and its choice-of-law corollary is overbroad. It will not be particularly difficult to devise or apply choice-of-law rules to govern divorce cases. And in many cases it will not be difficult to apply the law chosen. In the rare cases in which the law chosen would be very burdensome to apply, the court could grant a *forum non conveniens* dismissal. Ease of judicial administration does not support the across-the-board domicile rule or its corollary.

Indeed, none of the public policy rationales justify retention of the domicile rule or the choice-of-law corollary. Rather, the rule and its corollary often result in inefficiency, inconvenience, and

180. In deciding whether to dismiss on *forum non conveniens* grounds, both state and federal courts may consider the difficulty that they would experience in applying another jurisdiction's law. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 (1981) (upholding the district court's dismissal on grounds of *forum non conveniens* based on the heavy burden of applying another jurisdiction's law); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) (noting that the forum's familiarity with law is a factor in determining whether to dismiss); *Miller v. United Techs. Corp.*, 515 A.2d 390, 395 (Conn. Super. Ct. 1986); *Shears v. Rigley*, 623 A.2d 821, 825 (Pa. Super. Ct. 1993); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84, cmt. c (1971) (quoting *Gilbert*, 330 U.S. at 508).

181. See *supra* note 5 and accompanying text.

182. See *supra* notes 108, 123-24 and accompanying text.

delay. Why, then, have the states clung to them so consistently? Is it possible that the Constitution actually compels retention of the domicile rule and its choice-of-law corollary? Part IV addresses this central question.

IV. THE CONSTITUTIONAL CHALLENGE

Two judicial opinions appear to support the view that the Constitution demands retention of the domicile rule and its choice-of-law corollary. First, in *Williams v. North Carolina (Williams II)*,¹⁸³ the Supreme Court considered whether the Full Faith and Credit Clause compelled North Carolina to respect an *ex parte* Nevada divorce decree granted to a petitioner who, according to a North Carolina court's findings, never acquired a Nevada domicile.¹⁸⁴ Holding that the Constitution did not require North Carolina to respect the Nevada decree, Justice Frankfurter's opinion elevated the concept of domicile to a constitutional dimension:

Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted

. . . The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State.¹⁸⁵

North Carolina, the petitioner's original state of domicile, was free therefore to determine for itself whether the petitioner had in fact acquired a *bona fide* Nevada domicile before obtaining the Nevada divorce.¹⁸⁶

183. 325 U.S. 226 (1945).

184. A number of prior Supreme Court opinions support the view that the domicile requirement stems from the Constitution. *See, e.g.*, *Andrews v. Andrews*, 188 U.S. 14, 37-39 (1903); *Streitwolf v. Streitwolf*, 181 U.S. 179, 182-83 (1901); *Bell v. Bell*, 181 U.S. 175, 177 (1901). *But see Williams II*, 325 U.S. at 272 (Black, J., dissenting) (distinguishing *Bell*, *Streitwolf*, and *Andrews* and concluding that none of them grounded the domicile requirement in the federal Constitution).

185. *Williams II*, 325 U.S. at 229-30 (footnote omitted).

186. *See id.* at 239.

The participating justices disagreed about the constitutional basis of *Williams II*. Justice Frankfurter's opinion for the majority mentioned only the Full Faith and Credit Clause.¹⁸⁷ Likewise, three concurring justices¹⁸⁸ and one dissenter¹⁸⁹ read the majority opinion as concluding that the Nevada divorce decree was valid in Nevada notwithstanding the lack of a domiciliary connection.¹⁹⁰ Thus, the Full Faith and Credit Clause required domicile, but the Due Process Clause did not. But Justice Black, joined in his dissenting opinion by Justice Douglas, interpreted the Court's holding differently. "The Court . . . seems to place its holding that the Nevada decrees are void on the basis that the Due Process Clause makes domicile an indispensable prerequisite to a state court's 'jurisdiction' to grant divorce."¹⁹¹ Because the Full Faith and Credit Clause "leave[s] the effect of divorce decrees to be determined . . . according to the laws and usages of the state where the decrees are en-

187. In his view, a reasonable jury could have concluded *either* that the North Carolinians did obtain a *bona fide* domicile in Nevada *or* that they did not. *See id.* at 236-37. If, on the other hand, Frankfurter found that no reasonable jury could have concluded that the North Carolinians had obtained a *bona fide* domicile in Nevada, then he might have concluded that the Nevada decree violated due process.

188. In his concurring opinion, Justice Murphy, joined by Chief Justice Stone and Justice Jackson, noted that:

Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. . . . But if Nevada's divorce decrees are to be accorded full faith and credit . . . at least one of the parties to each *ex parte* proceeding must have a *bona fide* domicil within Nevada

Id. at 239 (Murphy, J., concurring); *see also* Wheat v. Wheat, 318 S.W.2d 793, 796 (Ark. 1958) (interpreting *Williams II* as resting exclusively on the Full Faith and Credit Clause, which "does not purport to say that the decree is not valid in the state where rendered"). In Murphy's view, the domicile rule flows not from the Due Process Clause, but from the Full Faith and Credit Clause.

189. Justice Rutledge, who strongly dissented from the Court's opinion, stated repeatedly that the Nevada decree, which North Carolina was free to disregard notwithstanding the Full Faith and Credit Clause, was valid in Nevada. *See Williams II*, 325 U.S. at 246, 250 (Rutledge, J., dissenting); *see also* Currie, *supra* note 1, at 46 & n.90 (noting that Rutledge was critical of the majority's assertion of the divorce's validity in Nevada). It would not, then, have violated the Due Process Clause.

190. *See Williams II*, 325 U.S. at 239 (Murphy, J., concurring); *id.* at 246, 250 (Rutledge, J., dissenting).

191. *Id.* at 271 (Black, J., dissenting).

tered"¹⁹² and because "[n]o 'law or usage' of Nevada has been pointed out to us which would indicate that Nevada would . . . consider its decrees so 'void' as to warrant imprisoning those who have remarried in reliance upon such existing and unannulled decrees,"¹⁹³ then, in Black's view, the majority's conclusion that North Carolina was free to disregard the Nevada decree necessarily implied that the decree violated the Due Process Clause.¹⁹⁴

The Supreme Court's decision in *Williams II* arguably was ambiguous as to the constitutional source for the domicile rule, but the second judicial opinion to constitutionalize the domicile rule, the 1953 Third Circuit Court of Appeals' decision in *Alton v. Alton*,¹⁹⁵ firmly grounded it in the Due Process Clause. The court in *Alton* reviewed a divorce statute enacted by the Legislative Assembly of the Virgin Islands, section 9 of which required residence for six weeks in the Virgin Islands prior to commencement of a divorce action.¹⁹⁶ A 1953 act amended section 9 by adding a new subsection (a), which provided:

Notwithstanding the provisions of sections 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district or enters a general appearance in

192. *Id.* at 274 (Black, J., dissenting).

193. *Id.* at 269 (Black, J., dissenting).

194. Critical of the majority's approach, Black continued:

I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution which the Court derives from adding a new content to the Due Process Clause. The elasticity of that clause necessary to justify this holding is found, I suppose, in the notion that it was intended to give this Court unlimited authority to supervise all assertions of state and federal power to see that they comport with our ideas of what are "civilized standards of law." I have not agreed that the Due Process Clause gives us any such unlimited power, but unless it does, I am unable to understand from what source our authority to strip Nevada of its power over marriage and divorce can be thought to derive.

Id. at 271 (Black, J., dissenting) (citation omitted).

195. 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954) (per curiam).

196. *See Alton*, 207 F.2d at 668-69 & 669 n.2 (citing an Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1994, § 9).

the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose.¹⁹⁷

The court approached the problem as though one of the states in the Third Circuit had passed the legislation.¹⁹⁸

After invalidating the statutory presumption of domicile

as either an unreasonable interference by the legislative branch of the insular government with the exercise of the judicial power by the judicial branch or as an attempt by the legislature to convert the suit for divorce into what is in fact a transitory action masquerading under a fiction of domiciliary jurisdiction[,]¹⁹⁹

the court considered the validity of the second part of the statute. This portion granted divorce jurisdiction regardless of domicile as long as the plaintiff personally served the defendant in the district or the defendant made a general appearance.²⁰⁰ In the court's words, the question was whether "divorce [can] be turned into a simple, transitory action at the will of any legislature?"²⁰¹ Its answer was no.²⁰²

Judge Goodrich's majority opinion relied heavily on the Supreme Court's opinion in *Williams II*, which declared that "judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil."²⁰³ Goodrich continued:

197. *Id.* (quoting Bill No. 55, 17th Legislative Assembly of the Virgin Islands, passed May 19, 1953, approved May 29, 1953, which amended § 9 of the Divorce Law of 1944).

198. *See id.* at 670.

199. *Id.* at 673.

200. *See id.*

201. *Id.*

202. *See id.* at 677 (noting that the second part of the statute conflicted with the Due Process Clause).

203. *Id.* at 673 (quoting *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229 (1945) (citing *Bell v. Bell*, 181 U.S. 175 (1901) and *Andrews v. Andrews*, 188 U.S. 14 (1903))).

If it is still correct to say that the basis for divorce jurisdiction is domicile a state where the party is not domiciled is, in rendering him a divorce, attempting to create an interest where it has no jurisdiction. Its attempt to do so is an invalid attempt, and contrary to the due process clause.

... Domestic relations are a matter of concern to the state where a person is domiciled. *An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question.* The question may well be asked as to what the lack of due process is. The defendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere.²⁰⁴

Thus, in a case in which the Full Faith and Credit Clause was not even an issue, the Third Circuit held that the Due Process Clause compelled the domicile rule.

In the last few sentences of its opinion, the court added that a state court without a domiciliary connection to either spouse would lack subject matter jurisdiction for divorce.

Suppose a state statute purported to confer jurisdiction in matters concerning collision at sea upon a state court, in the absence of dissent by either party. Surely a conscientious state judge would not give any effect to the attempt by the legislature and the parties to take over what the Constitution assigns to another system of courts. The same is true here.²⁰⁵

In addition to suggesting that a court's exercise of territorial jurisdiction and application of its divorce law absent a domiciliary connection would violate due process, *Alton* also seemed to state that the court would lack subject matter jurisdiction.²⁰⁶

204. *Id.* at 676-77 (emphasis added) (footnotes omitted).

205. *Id.* at 677.

206. This conclusion is consistent with the Supreme Court's decision in *Andrews*,

The constitutional rationale for the domicile rule is subject to challenge on several grounds. First, *Alton's* reliance on *Williams II* for the proposition that due process requires domicile is misplaced. The majority in *Williams II* did not even mention due process.²⁰⁷ Even if the majority had held that due process required domicile, *Williams II* would be inapposite in bilateral divorce cases such as *Alton*. *Williams II* involved an *ex parte*²⁰⁸ divorce action; the defending spouse was not subject to *in personam* jurisdiction in the rendering state.²⁰⁹ None of the opinions in *Williams II* articulated this theory, but *Williams II* may have intimated that, in the absence of the defendant's appearance or minimum contacts, due process requires that one of the spouses be domiciled in the state. This suggestion makes some sense in the *ex parte* case. After all, in nondivorce cases, due process requires that the defendant be personally served within the forum state, make a general appearance, or have some meaningful connection with the forum state.²¹⁰ In divorce cases, where the Court has held that jurisdiction is available even if the defendant lacks minimum contacts,²¹¹ due process may require some *other* connection between the controversy and the forum *in lieu* of minimum contacts. Put differently, in *ex parte* cases, in which the courts have abandoned standard jurisdictional protections, the petitioner's domicile may be required as an imperfect substitute for personal service of process within the forum state, a general appearance, or minimum contacts.

188 U.S. at 39 (declaring that "jurisdiction over the subject matter depended upon domicil"), among others. *But see* Currie, *supra* note 1, at 53 (disputing that domicile is a jurisdictional requirement).

207. *See supra* note 185 and accompanying text.

208. In early America, the courts permitted truly *ex parte* divorces: proceedings without personal jurisdiction over the defendant and without notice to her. *See* Wasserman, *supra* note 18, at 816 n.13. Today, courts that apply the status exception and dispense with personal jurisdiction nevertheless require notice that satisfies *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314-15 (1950). *See* Wasserman, *supra* note 18, at 816 n.13. In this section, I will use the phrase "*ex parte* divorce" to refer to divorce proceedings conducted with notice but without personal jurisdiction over the defendant.

209. *Williams II*, 325 U.S. 226, 227 (1945).

210. *See supra* note 5 and accompanying text.

211. *See, e.g., Williams v. North Carolina (Williams I)*, 317 U.S. 287, 297-99 (1942).

But *Williams II* cannot be read to require domicile as a matter of due process in bilateral divorce actions such as *Alton*, in which the defending spouse receives notice and makes a general appearance.²¹² In such cases, it is hard to see how the defendant would be deprived of liberty or property without due process by the filing of the divorce proceeding in a nondomiciliary jurisdiction.²¹³ The court in *Alton* conceded as much but suggested that due process protects not only the individual defendant, but also state sovereignty over its domiciliaries.²¹⁴ The Supreme Court has repudiated this reading of the Due Process Clause, however, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,²¹⁵ which stated: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."²¹⁶

In a footnote to this passage, the Court acknowledged that in prior opinions, including *World-Wide Volkswagen Corp. v. Woodson*,²¹⁷ it had stated that the requirement of personal ju-

212. See *Alton v. Alton*, 207 F.2d 667, 668 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954) (per curiam) (stating that the defendant entered an appearance and waived service).

213. See Brief for Petitioner at 28, *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955) (No. 261) (noting that "[n]o person is being deprived of any rights, procedural or substantive. Plaintiff and defendant are the only 'persons' concerned, and neither of them is injured or threatened with injury"). The *Granville-Smith* case, like *Alton*, considered the constitutionality of the Virgin Islands' divorce legislation. See *Granville-Smith*, 349 U.S. at 2-3. When the Supreme Court dismissed *Alton* as moot, 347 U.S. 610, 610-11 (1954), it granted certiorari in *Granville-Smith* and invited Erwin Griswold to submit a brief as *amicus curiae* in support of the judgment below, which had declared the Virgin Islands legislation unconstitutional. See *Granville-Smith*, 349 U.S. at 4. Interestingly, Dean Griswold's brief did not argue that the Due Process Clause compelled the domicile requirement. Indeed, it conceded that "[t]here may be room for experiment as to jurisdiction by the several states." Brief of the Amicus Curiae at 24, *Granville-Smith* (No. 261). In affirming the Third Circuit's judgment, the Supreme Court held that the Virgin Islands' divorce legislation was inconsistent with the Organic Act, which extended the legislative authority of the Virgin Islands only to "subjects of local application." See *Granville-Smith*, 349 U.S. at 7, 10-16 (quoting 48 U.S.C. § 1405 (1958), *repealed by* Pub. L. No. 97-357, 96 Stat. 1709 (1982)).

214. See *Alton*, 207 F.2d at 676-77.

215. 456 U.S. 694 (1982).

216. *Id.* at 702.

217. 444 U.S. 286 (1980).

risdiction "reflects an element of federalism and the character of state sovereignty vis-à-vis other States."²¹⁸ The Court noted in *Ireland* that:

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.²¹⁹

In light of *Ireland*, it is hard to maintain that the Due Process Clause compels the domicile rule as a limit on state court territorial jurisdiction in bilateral divorces. As long as the petitioner voluntarily appears in the forum and as long as the respondent receives notice and either appears or has minimum contacts with the forum state, an assertion of territorial jurisdiction would comport with due process.

Second, if the *Alton* decision meant that it necessarily would violate due process for a state to apply its *law* to a divorce action between nondomiciliaries of the state,²²⁰ that position would be inconsistent with the Supreme Court's more recent decisions regarding constitutional limits on choice of law. In *Allstate Insurance Co. v. Hague*,²²¹ a plurality of the Court announced the

218. *Insurance Corp. of Ireland*, 456 U.S. at 702 n.10; see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (stating that personal jurisdiction requirements ensure that states do not overstep the limits imposed by the federal system).

219. *Insurance Corp. of Ireland*, 456 U.S. at 703 n.10.

220. See *Alton v. Alton*, 207 F.2d 667, 677, *vacated as moot*, 347 U.S. 610 (1954) (per curiam); cf. Brief of the Amicus Curiae at 38, 42, *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955) (No. 261) (arguing that it would violate the Full Faith and Credit Clause for a state with no "substantial and real connection" to apply its divorce law).

221. 449 U.S. 302 (1981) (plurality opinion).

standard for determining whether a state court's choice of its own law violated either the Due Process Clause of the Fourteenth Amendment or the Full Faith and Credit Clause: "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."²²² In *Phillips Petroleum Co. v. Shutts*,²²³ a majority of the Court reaffirmed the *Allstate* standard.²²⁴

In many cases, a state without a domiciliary connection nevertheless would have an interest in applying its divorce law, and, thus, choice of its own law would satisfy the *Allstate* standard. For example, as long as one of the partners lived in the state, the state would have a significant contact or aggregation of contacts, creating a state interest, making the choice of its law constitutionally permissible. Likewise, even if neither of the partners currently lived in the state, if the couple had spent most of their married life together in the state, the state would be able to apply its divorce law consistent with *Allstate*.²²⁵ The Due Process Clause may bar states from applying their divorce laws to cases with which they have no connection whatsoever, but it does not mandate application of the domicile rule.

Third, it is difficult to understand how the Due Process Clause would deprive a court without a domiciliary connection of subject matter jurisdiction. Subject matter jurisdiction refers to the competency of the court to hear a particular kind of case. Nothing in the Constitution grants the federal courts *exclusive* jurisdiction over divorce cases; in fact, the Supreme Court has interpreted the diversity jurisdiction statute²²⁶ as *barring* the federal district courts from entertaining domestic relations cases.²²⁷

222. *Id.* at 312-13. The three dissenting justices agreed with the plurality's statement of the constitutional standard. See *id.* at 332 (Powell, J., dissenting).

223. 472 U.S. 797 (1985).

224. See *id.* at 823.

225. See *Allstate*, 449 U.S. at 312-15 (discussing the contacts necessary for a state to apply its law to a party's action).

226. See 28 U.S.C. § 1332 (1994).

227. See *Ankenbrandt v. Richards*, 504 U.S. 689, 695 (1992) (continuing to recognize the domestic relations exception to diversity jurisdiction).

As long as the action is filed in the court within the state judicial system that has jurisdiction over divorce matters, it is difficult to understand how the federal Constitution's Due Process Clause could affect state court subject matter jurisdiction.²²⁸

If domicile plays any role in preserving due process, then it would be only in the *ex parte* cases, in which, under *Williams II*, the domicile rule may protect the defendant from a deprivation of liberty or property without due process by a court that lacks both *in personam* jurisdiction and a domiciliary connection.²²⁹ If the defendant appears or has minimum contacts with the forum, however, the Due Process Clause does not require application of the domicile rule to limit a court's territorial jurisdiction, to restrict its choice of law options, or to secure its subject matter jurisdiction.

Finally, because states are free to grant divorces as long as they satisfy due process, full faith and credit cannot *compel* states to adopt the domicile rule. It is, therefore, reasonable to conclude that the Constitution in no way compels retention of the domicile rule as long as the defendant appears or is subject to jurisdiction in the rendering state.²³⁰ That conclusion is correct, but it ignores the strong interest that states have in assuring the recognition of their decrees elsewhere. Reduced to its essentials, *Williams II* stands for the proposition that unless the rendering state follows the domicile rule, its divorce decrees will not receive full faith and credit in other states, at least not in the state of the parties' domicile.²³¹ Thus, although not constitutionally compelled, the domicile rule appears necessary to assure divorce decrees recognition in other states.

228. Cf. *Tennessee Coal, Iron & R.R. v. George*, 233 U.S. 354, 360 (1914) (stating that a state court's subject matter "jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action").

229. See *supra* notes 183-94 and accompanying text. As stated elsewhere, due process requires *not* the petitioner's domicile in the rendering state, but the defendant's minimum contacts therewith. See Wasserman, *supra* note 18, at 819-54.

230. See *Wheat v. Wheat*, 318 S.W.2d 793, 796 (Ark. 1958) (holding that even if a state statute granting divorce jurisdiction on the basis of residence alone "deprives the decree of prima facie extraterritorial validity . . . , it was for the legislature to say whether this disadvantage is outweighed by the beneficial consequences of the statute").

231. See *supra* notes 183-94 and accompanying text.

The Supreme Court should alter this result by making two things clear. First, the Court should limit the effect of *Williams II* by holding that due process requires domicile only in *ex parte* cases, or far better still, by dispensing with the status exception altogether. Second, the Court should clarify the relationship between due process and full faith and credit. Both before and after the *Williams II* decision, the Court has held that a state's judgment must receive the same preclusive effect in all other state and federal courts that it would receive in the rendering state.²³² This reasoning, compelled by the language of section 1738,²³³ suggests that a divorce decree valid in the rendering state, notwithstanding the lack of a domiciliary connection, should receive full faith and credit elsewhere. This Article already has concluded that a state may enter a valid divorce decree even if neither spouse is domiciled there as long as the defendant appears or has minimum contacts with the forum state.²³⁴ The Court thus should reconcile interstate judgments law in the divorce context with interstate judgments law in other contexts.²³⁵ If the Court did so, then states would be free to reject the status exception, the domicile rule, and its choice-of-

232. See, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 384, 386 (1985) (holding that 28 U.S.C. § 1738 (1994) bars a federal court from giving "a state court judgment greater preclusive effect than the state courts themselves would give to it" and chastising the lower court for ignoring state law in determining the preclusive effect of the state judgment); *Durfee v. Duke*, 375 U.S. 106, 109 (1963) (stating that "[f]ull faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it"); *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 302 (1866) (finding unconstitutional a Mississippi statute that authorized courts to disregard other states' judgments when those judgments did not comport with Mississippi law); see also Currie, *supra* note 1, at 46-48 (arguing that validity and interstate recognition of divorce decrees should be "congruent").

233. The full faith and credit statute provides:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the *same* full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.

28 U.S.C. § 1738 (1994) (emphasis added).

234. See *supra* text accompanying notes 209-33.

235. *But cf.* *May v. Anderson*, 345 U.S. 528, 535-36 (1953) (Frankfurter, J., concurring) (opining that a state could, consistent with the Full Faith and Credit Clause, decline to enforce a child custody decree valid under the Due Process Clause). See also Wasserman, *supra* note 18, at 874-79 (discussing *May*).

law corollary without jeopardizing the interstate recognition of their divorce decrees.

Even if the Court declines to revisit these issues, however, Congress and the state legislatures can act to assure the recognition of divorce decrees granted by states rejecting the status exception, the domicile rule, and its corollary. Put differently, even if the Full Faith and Credit Clause does not require states to recognize divorce decrees entered in the absence of a domiciliary connection, Congress could require them to do so or the states themselves could agree to do so by enactment of uniform legislation. If, as Parts III and IV of this Article have argued, none of the public policy or constitutional rationales offered to support the domicile rule retain force today, and if, as Part V will demonstrate, options exist to ensure the recognition of decrees rendered without a domiciliary connection, then states should abolish the domicile rule and its choice-of-law corollary. Upon doing so, the states should simultaneously abolish the status exception and durational residency requirements, the former to ensure that no one loses a liberty interest in marriage without due process, and the latter to avoid unnecessary delay. Durational residency requirements serve no legitimate role in a system that bases jurisdiction and choice of law on contacts, not domicile.

V. ENFORCEMENT SOLUTION

Two primary options exist to ensure the interstate recognition of divorce decrees of states rejecting the domicile rule. First, all states could enact uniform legislation pursuant to which each would agree to recognize other states' divorce decrees as long as they satisfied specified criteria.²³⁶ Alternatively, Congress could enact a federal statute requiring states to recognize the divorce decrees of other states.

Professor Garfield has advocated enactment of a Uniform Divorce Jurisdiction Act (UDJA), which would commit states to

236. See Garfield, *supra* note 83, at 542-43 (advocating uniform state legislation as "the ultimate solution").

recognize divorce decrees of other states if (1) for bilateral decrees, both spouses were present, or (2) for *ex parte* decrees, the petitioner satisfied a brief residency requirement, not longer than ninety days.²³⁷ Modelled after the Uniform Child Custody Jurisdiction Act,²³⁸ which all fifty states and the District of Columbia ultimately adopted,²³⁹ Garfield's proposed uniform law would include broad guidelines for choice of law in divorce cases and *forum non conveniens* provisions.²⁴⁰

In my view, uniform state legislation suffers from two problems, the first of which is minor in comparison to the second. First, enactment of uniform state legislation requires expenditure of significant legislative resources by all fifty states and the District of Columbia. In each jurisdiction, the proposed law would have to wend its way through the legislative process, with committee hearings, floor debates, and the like. Each state would have to commit substantial resources to ensure passage of the Act. Passage of the legislation by all fifty states would likely take years to achieve. Fifteen years passed from the time the National Conference of Commissioners on Uniform State Laws approved the UCCJA in 1968 until the last states adopted it in 1983.²⁴¹ Congressional legislation, on the other hand, requires only one legislative body—the United States Congress—to be convinced of the benefits to be gained by passage of the bill,²⁴² and Congress could enact a law in a single session.²⁴³

237. See *id.* at 544.

238. 9 U.L.A. 123-24 (1988 & Supp. 1997).

239. See Table of Jurisdictions Wherein Act Has Been Adopted, 9 U.L.A. at 117-18 (Supp. 1997).

240. See Garfield, *supra* note 83, at 544-45. Given my view that choice of divorce law should be treated in the same manner as choice of law in other contexts, see *supra* text accompanying notes 159-66, and given the variety of choice of law theories and approaches followed in the states, I do not believe inclusion of choice of law guidelines in uniform state legislation would be advisable.

241. Table of Jurisdictions Wherein Act Has Been Adopted, 9 U.L.A. at 117-18 (Supp. 1997) (noting that Texas and the District of Columbia adopted the 1968 Act in 1983).

242. In either case, the executive—the Governor or the President—must determine whether to sign the bill into law.

243. Of course, Congress also could decline to act on the bill for a period of years. For example, Congress passed the PKPA, discussed *infra* at text accompanying notes 246-49, approximately two years after its introduction; but the legislative history refers to a "predecessor proposal," which passed the Senate in the prior Congress but

Second, and more important, the uniform legislation would be ineffective unless all fifty states passed it in a substantially identical form.²⁴⁴ If only one state declined to adopt it, *no* divorce decree rendered in a state rejecting the domicile rule would receive nationwide enforcement. Moreover, in the likely event that states would modify the legislation upon enactment, some states would recognize decrees rendered in the absence of domicile but other states would not. For example, one state might pass legislation agreeing to recognize *ex parte* divorce decrees of other states as long as the petitioner satisfied a thirty day residency requirement. Another state might pass similar legislation, but impose a ninety day residency requirement. If the rendering state had only a sixty day residency requirement, then only one of the two previously described states would recognize an *ex parte* divorce. The failure of all states to enact substantially identical legislation would frustrate the goal of interstate recognition of divorce decrees rendered in the absence of domicile.

The problems with uniform state legislation are not merely hypothetical, as the experience with the UCCJA²⁴⁵ illustrates. In passing the Parental Kidnapping Prevention Act (PKPA)²⁴⁶ in 1980, Congress recognized the failure of all states to enact the UCCJA,²⁴⁷ the different states' interpretations of the UCCJA,²⁴⁸ and the resulting ability of parents to snatch chil-

was not taken up by the House. See *Parental Kidnapping Prevention Act of 1979*, S. 105: *Joint Hearing Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Dev. of the Comm. on Labor and Human Resources*, 96th Cong. 8 (1980) [hereinafter *Joint Hearing*].

244. Professor Garfield appears to concede this weakness by stating that "If all states adopted it, a full faith and credit ruling by the Court would be unnecessary." Garfield, *supra* note 83, at 544; see also *Joint Hearing*, *supra* note 243, at 12 (statement of Sen. Wallop) (noting that "[b]ecause the Uniform Act is a reciprocal act and may be freely adopted or rejected by the States, its effectiveness in interstate custody cases depends upon its adoption throughout the country"); *Joint Hearing* at 20 (statement of Rep. Duncan) (noting that it is unlikely that all states would adopt an interstate compact); Cook, *supra* note 44, at 189 (noting that "obviously any legislation to be fully effective must be national in scope").

245. 9 U.L.A. 115.

246. 28 U.S.C. § 1738A (1994).

247. At the time of the PKPA's introduction in 1979, only 39 states had adopted the UCCJA. See *Joint Hearing*, *supra* note 243, at 2 (opening statement of Sen. Mathias).

248. See *id.* at 133 (statement of Prof. Russell M. Coombs) (noting that "the Uni-

dren and flee to another state, "intending to defeat the original court order" ²⁴⁹ As Senator Cranston concluded:

Although legal custody issues relating to divorce and child-custody matters have traditionally been within the domain of the States and not the Federal Government, it is within the province of the Federal Government to resolve problems that are interstate in origin and which the States, acting independently, seem unable to resolve. ²⁵⁰

Constitutional authority for such federal legislation derives from the Full Faith and Credit Clause of the Constitution, which provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." ²⁵¹ Congress has exercised such authority to require interstate recognition of both child custody decrees ²⁵² and child support orders, ²⁵³ and actually has considered legislation to require interstate recognition of divorce decrees. ²⁵⁴ Although critics contend that the Full Faith and Credit Clause does not authorize enactment of the Defense of Marriage Act, ²⁵⁵ that statute purports to create a categorical ex-

form Act is being variously interpreted and applied by the States").

249. *Id.* at 2 (opening statement of Sen. Mathias).

250. *Id.* at 4 (opening statement of Sen. Cranston); see also 99 CONG. REC. 4575 (1953) (statement of Sen. McCarran) (noting the inadequacies of the Uniform Divorce Recognition Act in addressing the problem of interstate recognition of divorce decrees and concluding that "the only satisfactory method of giving uniformity of recognition to divorces granted in the different States is through a Federal law").

251. U.S. CONST. art. IV, § 1.

252. See 28 U.S.C.S. § 1738A (Law. Co-op Supp. 1997).

253. See § 1738B.

254. See, e.g., S. 39, 83d Cong. (passed the Senate May 6, 1953) (providing interstate recognition to decree of divorce meeting certain standards). The proposed legislation incorporated the domicile rule. See S. REP. NO. 83-113 at 5 (1953) (stating that "jurisdictional domicile of the plaintiff is a necessarily presumed condition").

255. See, e.g., 142 CONG. REC. S5931-33 (daily ed. June 6, 1996) (letter from Prof. Laurence H. Tribe); Kramer, *supra* note 124, at 2003-07; Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 128-31 (1996); Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages under the Internal Revenue Code*, 47 HASTINGS L.J. 1593, 1623-24 (1996). Critics also contend that the Defense of Marriage Act violates the equal protection component of the Due Process Clause. See, e.g., Courtney G. Joslin, Recent Development, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick*, 32 HARV. C.R.-

emption *from* the requirements of full faith and credit for gay marriages.²⁵⁶ The statute proposed here, on the other hand, would assure that divorce decrees are *accorded* full faith and credit even if neither spouse maintains domicile in the rendering state. Constitutional authority to enact this statute, thus, lies in the Full Faith and Credit Clause.

The following draft statute, modelled after sections 1738A and B,²⁵⁷ should be enacted to require interstate recognition of divorce decrees rendered by a state lacking a domiciliary connection.²⁵⁸

§ 1738D. Full faith and credit for divorce decrees

(A) GENERAL RULE. — The appropriate authorities of each State and of the United States shall recognize and enforce according to its terms a divorce decree made consistently with this section by a court of another State.

(B) DEFINITIONS. As used in this section, the term:

(1) "Divorce decree" means a final judgment, decree or order rendered by a court of competent jurisdiction that dissolves or annuls a marriage;

(2) "Spouse" means a party to the marriage prior to its dissolution or annulment;

(3) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(C) REQUIREMENTS OF DIVORCE DECREES. — A divorce decree is made consistently with this section if—

(1) the court that makes the order, pursuant to the laws of the State in which the court is located—

(A) has subject matter jurisdiction to hear the matter and enter such an order; and

C.L. L. REV. 225, 245 (1997) (quoting testimony of Prof. Cass Sunstein before the Senate Judiciary Comm.); Hayes, *supra*, at 1624-25.

256. See, e.g., 142 CONG. REC. S5931 (daily ed. June 6, 1996) (letter from Prof. Laurence H. Tribe).

257. 28 U.S.C.S. § 1738A-B (Law. Co-op Supp. 1997).

258. Because Congress codified the Defense of Marriage Act at 28 U.S.C. § 1738C (Law. Co-op Supp. 1997), this law likely would follow as § 1738D.

(B) has personal jurisdiction over both spouses, whether acquired by consent, general appearance, or personal service of process within the territory of the State, or on the basis of minimum contacts with the State;

(2) reasonable notice and opportunity to be heard is given to both spouses;

(3) the divorce decree is valid in the State where rendered; and

(4) the choice of governing law is consistent with the United States Constitution.

As proposed, this statute would not ensure enforcement of *ex parte* divorce decrees because, in my view, such divorces are inconsistent with due process.²⁵⁹

CONCLUSION

In an increasingly mobile society, it makes no sense to limit jurisdiction in divorce cases to the state of the parties' domicile. It is no longer safe to assume that the spouses will be domiciled in the same state; thus, no state can have complete control over the status of its citizens even if it retains the domicile rule. The domicile rule, thus, fails to preserve state sovereignty.

It does no better job of assuring convenience to the parties. Instead, it often frustrates convenience by compelling parties to sue in a distant state with which neither party retains much connection or to commence multiple proceedings to resolve all of their domestic relations disputes. Such inconvenient and inefficient results are not justified by concern for the courts because judges should have no greater difficulty ascertaining or applying another state's divorce law than another's contract law, for instance.

The only compelling reason for retaining the domicile rule is to ensure interstate recognition of divorce decrees. That concern, however, can and should be addressed by federal legislation requiring states to enforce the divorce decrees of other states as long as the rendering court had *in personam* jurisdiction over

259. See generally Wasserman, *supra* note 18, 831-54 (criticizing the *ex parte* divorce exception to standard jurisdictional rules).

both spouses. If Congress enacts such legislation, the states can, and should, amend their divorce statutes to abolish the status exception, the domicile rule, the choice-of-law corollary, and durational residency requirements. By doing so, the states would permit divorce litigation to proceed in the state most convenient to the litigants, subject to the law of the state most interested in their marital status.