

CONNECTICUT LAW REVIEW

VOLUME 58

FEBRUARY 2026

NUMBER 2

Article

I Do Not to Un-Do: The Constitutionality of Voluntary Limits on Marital Exit

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American divorce law in the twenty-first century stands on the brink of a troubling paradigmatic shift. States have begun to experiment anew with divorce-restrictive regimes, most prominently covenant marriage. This singular antidivorce mechanism—the first of its kind worldwide—establishes an optional marital framework in which exit is severely constrained. Despite a voluminous literature examining covenant marriage through sociological, theological, policy, and legal lenses, its constitutional validity has been all but ignored. This Article argues that marital freedom is an unenumerated fundamental right within the American constitutional edifice and explores the implications of that right for this novel divorce regime. It pioneers the constitutional analysis of exit barriers—whether imposed by covenant legislation or contractual stipulation—and finds them indefensible. It then confronts covenant marriage’s most radical innovation: the purported permissibility of voluntary limits on marital exit. Grounded in theories of inalienability, the Article establishes that the core right to divorce lies beyond the reach of waiver and concludes that this recognition calls into question the very legitimacy of the covenant marriage regime.

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I Do Not to Un-Do: The Constitutionality of Voluntary Limits on Marital Exit

KARIN CARMIT YEFET*

INTRODUCTION

It has been said that “no area of state law is more important than the rules surrounding marriage and divorce,”¹ and perhaps for this reason no area of American law has been so prone to change and has changed as rapidly as the laws regulating matrimony and its dissolution.² Indeed, in the twenty-first century, American divorce law seems to be—once again—on the brink of a troubling paradigmatic shift.³ Ever since the mid-twentieth century’s “divorce revolution,” the general legal trend has been to facilitate marital exit via liberal, unilateral no-fault rights. Today, however, there is a growing contingent of self-styled counterrevolutionaries, calling to turn back the clock on divorce and eliminate, or at least weaken, no-fault laws.⁴

Various statutory reform efforts have embraced a range of substantive and procedural hurdles designed to stall divorce or even eliminate it outright. Some mandate pre-divorce counseling, lengthy waiting periods, and spousal consent requirements; others exchange no-fault for fault grounds; still others

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¹ FRANKLIN E. ZIMRING, *Foreword*, in *DIVORCE REFORM AT THE CROSSROADS* vii (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

² See Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 384 (2007) (“This diversity and experimentation continued in the years after independence and remains an unusual feature of American divorce law.”); see also ZIMRING, *supra* note 1, at vii–viii (describing the rapid developments in divorce law as “experiments in legal change” that lacked a sufficient study of their empirical results); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 31 (1985).

³ See Karin Carmit Yefet, *Marrying Dissolution to the Constitution: Divorce as a Fundamental Right* (J.S.D. dissertation, Yale Law School, 2012) (on file with author); J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 593 (2007) (describing the shift in scholarly and legislative focus to perceived harms of no-fault divorce); Nicole D. Lindsey, Note, *Marriage and Divorce: Degrees of “I Do,” An Analysis of the Ever-Changing Paradigm of Divorce*, 9 U. FLA. J.L. & PUB. POL’Y 265, 268–69 (1998) (listing the state legislative actions taken to weaken their no-fault divorce regimes).

⁴ For a discussion of contemporary attempts to overthrow no-fault divorce, see Karin Carmit Yefet, *From Matrimony to Autonomy: Divorce as a Fundamental Right*, 47 CARDOZO L. REV. 261 (2025).

restrict the divorce rights of parents.⁵ In a prominent testament to the success of this “counter-revolution,”⁶ three states to date have adopted a unique antiodivorce mechanism, and the first of its kind in the world—covenant marriage legislation—that establishes an *optional* marital regime from which exit is considerably restricted.⁷

In breaking a two-century Western consensus of ever-expanding marital exit, covenant marriage stands as the first statute to make divorce more difficult to obtain—an innovation that has animated both public discourse and scholarly inquiry.⁸ In fact, not a single issue about marriage and divorce has sparked as much commentary as covenant marriage legislation.⁹ Yet despite extensive analysis from sociological, theological, economical, policy, and doctrinal perspectives,¹⁰ the constitutional validity of this novel type of divorce regulation has remained largely overlooked. This striking neglect is

⁵ As Steven Nock predicted, “some type of divorce reform will probably exist in almost every state in the next 10 to 15 years.” Mary Otto, “Save Marriage” Push: Classes, Tougher Laws, SEATTLE TIMES, Mar. 3, 1999, at A9, NEWSBANK.

⁶ See, e.g., Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L.Q. 783, 794, 799 (1999) (“The intensity and breadth of the dissatisfaction with the current regime of unilateral no-fault divorce is so great that it has been described as ‘a “counter-revolution” . . . against no-fault divorce.’ . . . ‘[C]ommentators and politicians across the country decry the loss of ‘family values’ and urge legislative and social reform to bring back the traditional family.’ . . . [This] very significant divorce reform movement in the United States at the present time . . . is likely to continue to be a major social force in the coming decade.”) (citation omitted).

⁷ LA. STAT. ANN. §§ 9:272–275 (2006); ARIZ. REV. STAT. ANN. §§ 25-901–06 (effective July 1, 2025); ARK. CODE ANN. § 9-11-804(a)(1) (2011). While three states to date have enacted such legislation, many others have considered it. Joel Nichols, Comment, *Louisiana’s Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 973–74 (1998); Amy L. Stewart, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509, 514–15 (1999); see Tom Su & Thomas Ledermann, *Marital Satisfaction in Covenant Versus Standard Marriages: Is There a Difference?* 63 FAM. PROCESS 229, 229–30 (2024) (comparing metrics of marital satisfaction between covenant and standard marriages in Louisiana); see also *Benoit v. Benoit*, 341 So.3d 719, 737–39 (La. Ct. App. 2022) (illustrating the challenges of exiting a covenant marriage); cf. Hannah C. Williamson, Jerica X. Bornstein, Veronica Cantu, Oyku Ciftci, Krystan A. Farnish & Megan T. Schouweiler, *How Diverse Are the Samples Used to Study Intimate Relationships? A Systematic Review*, 39 J. SOC. & PERS. RELATIONSHIPS 1087, 1089 (2022) (assessing the diversity of study samples in relationship science, which had been used to justify antiodivorce public policy initiatives).

⁸ Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 107 (1998).

⁹ See Adam Pertman, MAKING BREAKING UP HARDER TO DO: STATES ATTEMPT TO CUT RATES OF DIVORCE AND ITS MANY SOCIAL COSTS, Bos. Globe, March 11, 2001, at E2; Marie Summerlin Hamm, *Opportuning Virtue: The Binding Ties of Covenant Marriage Examined*, 12 REGENT U. L. REV. 73, 88 (1999) (“Though the first year of its existence has been anything but a honeymoon, the concept of covenant marriage has taken the realm of family law by storm.”).

¹⁰ For a list of articles analyzing covenant marriage legislation from various aspects, see Samuel Pycatt Menefee, *The “Sealed Knot”: A Preliminary Bibliography of “Covenant Marriage,”* 12 REGENT U. L. REV. 145 (1999). See also Jeanne Louise Carriere, “It’s Déjà Vu All Over Again”: *The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1704 (1998) (examining the “dissonance between [the] cultural perception and the legal reality of covenant marriage”); Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2498–505 (1998) (considering a hypothetical constitutional challenge to Louisiana’s covenant marriage law).

particularly baffling given that the United States is, in the words of one observer, “unlike any other country” in the paramount importance it places on “the ability to escape from marriage.”¹¹

The optional divorce regime gives rise to the vexed question of whether couples in jurisdictions that do not contemplate super-vows are constitutionally allowed to opt-out of their state’s “disposable” marriage and bind themselves to stronger marital promises in pursuit of a long-lasting relationship. Various commentators have espoused a pluralism of alternatives in state-run divorce law,¹² envisioning that “pre-nuptial agreements by couples would become the norm, especially regarding divorce requirements, and would be fully enforceable by the state.”¹³ Indeed, in the current age, private ordering has come into vogue, marked by a dramatic rise in both premarital contracting and legal receptivity to agreements that tailor various aspects of family life to individual preferences.¹⁴

This Article pioneers the constitutional analysis of covenant marriage legislation and, more broadly, of voluntary limits on marital exit. Its underlying premise is that what I term “marital freedom” belongs intrinsically to the pantheon of fundamental rights—both under the judicial

¹¹ KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 268 (5th ed. 2010) (relying on ANDREW CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 3, 18 (2010)); *see also* EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* 163, 166, 175–76 (2d ed. 2008) (noting the public generally has no tolerance for laws restricting “absolute freedom to marry or to divorce at will,” showing a cultural dissonance in the context of protests against gay marriage).

¹² *See, e.g.*, Christopher Wolfe, *The Marriage of Your Choice*, *FIRST THINGS: MONTHLY J. RELIGION & PUB. LIFE*, Feb. 1995, at 37 (proposing state laws permit, but not require, couples to voluntarily enter an indissoluble marriage); Amitai Etzioni, *How to Make Marriage Matter*, *TIME*, Sept. 6, 1993, at 76 (proposing “supervows” as voluntary premarital contracts that commit parties to more than marriage laws require).

¹³ Nichols, *supra* note 7, at 991; *see also* Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 *IND. L.J.* 453, 464–65 (proposing legislation that extends private control over marital arrangements); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549, 569 (2001) (providing a broader theoretical framework regarding alienability and exit in liberal legal regimes); Brian H. Bix, *The ALI Principles and Agreements: Seeking a Balance Between Status and Contract*, in *RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 372, 377–78 (Robin Fretwell Wilson ed., 2006) (viewing favorably premarital commitments that limit divorce options and criticizing a per se rule of non-enforceability). Some go so far as to suggest that states should allow an optional indissoluble marriage. Wolfe, *supra* note 12.

¹⁴ Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 *COLUM. L. REV.* 75, 80 n.12 (2004); *see also* MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 36 (1999) (providing an economic analysis of marriage arrangements in terms of a “long-term contract”); Brian Bix, *Private Ordering and Family Law*, 23 *J. AM. ACAD. OF MATRIM. LAWS.* 249 (2010) (examining private ordering in family law and weighing competing arguments for and against state enforcement of family-related agreements); Brian Bix, *Agreements in American Family Law*, 4 *INTERNATIONAL JOURNAL OF THE JURISPRUDENCE OF THE FAMILY* 115 (2013) (documenting the significant rise in private ordering in American family law and exploring which types of family-related agreements are enforceable by the state); 7 *AM. JUR. PROOF OF FACTS* 3d *Enforceability of Premarital Agreement Based on Fairness of Terms and Circumstances of Execution* § 581 (2025) (describing the enforceability of premarital agreements).

frameworks of substantive due process and the leading academic theories for deriving non-textual constitutional liberties.¹⁵ In earlier work, I laid the foundation for a constitutional jurisprudence of dissolution rights, establishing the thesis that unilateral no-fault divorce constitutes a fundamental liberty on multiple intersecting grounds.¹⁶ Divorce is a settled feature of America's lived Constitution.¹⁷ It enjoys a legal "blueblood" and a historical pedigree of such a degree as to ground marital freedom profoundly in this "Nation's history and tradition,"¹⁸ reflected in both continuing traditions and society's evolving sensibilities.¹⁹ Moreover, personal control over the formation, duration, and dissolution of marriage aligns closely with the line of substantive due process jurisprudence that places intimate life decisions beyond the reach of state authority. Constitutional privacy—whether conceived as the capacity to control highly personal information,²⁰ decisional autonomy over "important" categories of life choices,²¹ or freedom from state intrusion into identity-defining

¹⁵ Yefet, *supra* note 3.

¹⁶ *Id.*; see also Yefet, *supra* note 4.

¹⁷ See generally Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734 (2011) (explaining that rights qualify for substantive protection not only if they can claim longstanding traditions, but also if they reflect the contemporary lived practices, experiences, and beliefs of the American people).

¹⁸ *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). Justice Harlan's famous dissent in *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961), is the forerunner of this traditionalist test. The traditionalist test was most notably applied by the *Bowers*, *Michael H.*, and *Glucksberg* Courts, only to be reconstructed by *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) and brought to its zenith in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). *Bowers v. Hardwick*, 478 U.S. 186, 191–92, 194–95 (1986); *Michael H. v. Gerald D.*, 491 U.S. 110, 121–24, 126 (1989); *Washington v. Glucksberg*, 521 U.S. 702, 710–19, 723–24, 727–30 (1997); see Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1171–74 (1988) (viewing the traditionalist test in the context of the Court's privacy jurisprudence as aspirational); Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1177 (1980) (describing the Court's traditionalist approach as a means of recognizing fundamental rights in the family cases).

¹⁹ See, e.g., GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 3–4 (1991) (tracing the "long and venerable history" of divorce in American society from its Puritan roots); Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984) (tracing the legal history of divorce in the United States). Even recalcitrant New York, which featured the strictest law in the nation for centuries, finally gave in and, in late 2010, issued a liberal, unilateral no-fault passport out of marriage. See Act of Aug. 13, 2010, ch. 384, § 1(7), 2010 N.Y. Laws Reg. Sess. 1169, 1169 (codified as amended at N.Y. DOM. REL. LAW § 170(7) (McKinney 2010)).

²⁰ See *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977) (introducing the analogy-based, precedential test for coining unenumerated fundamental rights by sketching the two overarching interests of informational privacy and decisional autonomy).

²¹ The unifying theme that runs through the Court's due process precedents is a "recurring concern" for "individual autonomy in intimate and personal decisions," especially those that relate to familial and sexual relationships. Carl E. Schneider, Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 269, 271 (1978); see also *Sosna v. Iowa*, 419 U.S. 393, 423 (1975) (Marshall, J., dissenting) ("The critical importance of the divorce process, however, . . . underscores the necessity that the State's regulation be evenhanded."). Indeed, virtually all the rights recognized within the liberty component of

decisions²²—must encompass the right to divorce. Finally, this body of earlier work also developed the constitutional argument for marital freedom as a gender equality right, exposing the complicated ways in which divorce restrictions compromise women’s equal citizenship status in society.²³

Drawing on these conceptual and normative insights, this Article explores the constitutional dimensions of divorce law by focusing on the most complex and challenging divorce-restrictive regulation in existence today: voluntary limits on exit. Part I introduces the American experiment with covenant marriage models, with particular emphasis on the exit barriers embedded in this innovative marital regime. Part II analyzes the ramifications of a fundamental right to divorce by considering the constitutional conundrums uniquely posed by covenant marriage legislation. Part III addresses the constitutionally novel element that covenant marriage introduces to the world of divorce regulation: the permissibility of *voluntary*

the due process clause involve the establishment, management, avoidance, or dissolution of intimate human relationships. See Mitchell F. Park, *Defining One’s Own Concept of Existence and the Meaning of the Universe: The Presumption of Liberty in Lawrence v. Texas*, 2006 BYU L. REV. 837, 863 (2006) (tracing parallel shifts away from the traditionalist test and privacy protections in substantive due process cases post-*Bowers*); Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 850–52, 854–55 (2007) (critiquing the establishment of the right to abortion as “flowing out of constitutional protections for marriage, procreation, contraception, family relationships, and child rearing and education”); Donald L. Beschle, *Defining the Scope of the Constitutional Right to Marry: More than Tradition, Less than Unlimited Autonomy*, 70 NOTRE DAME L. REV. 39, 58–59 (1994) (tracing the right to marry through the Court’s substantive due process jurisprudence); Lois Shepherd, *Looking Forward with the Right of Privacy*, 49 KAN. L. REV. 251, 317 (2001).

²² This is the personhood thesis espoused by most constitutional scholars. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1305–14, 1414–20 (2d ed., 1988) (describing the personhood thesis as a constitutional limit on state action which compromises one’s ability to be “master of the identity one creates in the world,” particularly within social and familial relationships); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (“[T]he [Lawrence] Court left no doubt that it was protecting the equal liberty and dignity not of atomistic individuals torn from their social contexts, but of people as they relate to, and interact with, one another.”); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 633–34 (1980) (distinguishing between two meanings of intimacy: one which is synonymous with privacy and the other which relies on intimate associations between people); Elizabeth Horowitz, Comment, *The “Holey” Bonds of Matrimony: A Constitutional Challenge to Burdensome Divorce Laws*, 8 U. PA. J. CONST. L. 877, 891 (2006) (arguing that fault-based divorce laws violate the Fourteenth Amendment because they restrict personal autonomy in intimate decisions of marriage and divorce). *But see* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739, 753–70, 777–82 (1989) (challenging the validity of the personhood theory); David M. Wagner, *The Constitution and Covenant Marriage Legislation: Rumors of a Constitutional Right to Divorce Have Been Greatly Exaggerated*, 12 REGENT U. L. REV. 53, 53–54 (1999) (rebutting constitutional challenges to covenant marriage legislation that “couch[] [the ‘right to marry’] in terms so individualistic as to imply a correlative right to divorce”).

²³ See generally Karin Carmit Yefet, *Divorce as a Substantive Gender-Equality Right*, 22 U. PA. J. CONST. L. 455 (2020) [hereinafter Yefet, *Substantive Gender-Equality*] (reviewing the history of constitutional interpretations of gender equality and the existing gender inequalities in modern marriages and divorces as byproducts of the current state of the law); Karin Carmit Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. 793 (2020) [hereinafter Yefet, *Formal Gender-Equality*] (building on the companion article to discuss how limited exit options in a fault-based divorce regime is practically burdensome and reinforces the traditional gender hierarchy).

restrictions on marital exit—whether imposed by statute or contract—through the lens of inalienability theory.

By confronting a constitutional blind spot at the crux of modern divorce law, this Article seeks to illuminate what a liberal constitutional order must refuse to enforce—even when cloaked in the language of consent or sealed in super-vows.

I. COVENANT MARRIAGE LEGISLATION AS A “SUPERVOW”: A VOLUNTARY LIMIT ON EXIT

Covenant marriage legislation is the newest and most controversial instrument of the divorce counterrevolution.²⁴ It has been passed in three states—Louisiana in 1997,²⁵ Arizona in 1999,²⁶ and Arkansas in 2001²⁷—and has been proposed in at least thirty-two others.²⁸ The innovation of covenant marriage lies in offering couples the choice of heightened requirements for entry into and exit from marriage.²⁹ The covenant regime is available to all couples, whether engaged or already married,³⁰ while liberal no-fault divorce remains the default rule for those who do not choose to “upgrade” their unions.³¹

Three distinct features characterize covenant marriage statutes: mandatory pre-marital counseling, stressing the seriousness of the marital

²⁴ James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 962 (2000); see also Alan J. Hawkins, *Will Legislation to Encourage Premarital Education Strengthen Marriage and Reduce Divorce?*, 9 J.L. & FAM. STUD. 79, 97 (2007); Nichols, *supra* note 7, at 944.

²⁵ LA. STAT. ANN. § 9:272 (1997).

²⁶ ARIZ. REV. STAT. ANN. § 25-901 (1999).

²⁷ ARK. CODE ANN. §§ 9-11-801–11 (2001). On the enactment of this statute, see Nicole Licata, Note, *Should Premarital Counseling be Mandatory as a Requisite to Obtaining a Marriage License?*, 40 FAM. CT. REV. 518, 520 (2002); Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?* 25 U. ARK. LITTLE ROCK L. REV. 261, 277 (2003) (noting that covenant marriage legislation was identified by Arkansas’s governor as “a key 2001 legislative priority”).

²⁸ Thomas More Garrett, *Something Old and Something New: The Catholic Church and Covenant Marriage Legislation*, 58 J. CHURCH & STATE 710, 712 (2016); see also Cynthia M. VanSickle, *A Return to the Anti-Feminist Past of Divorce Law: The Implications of the Covenant or Marriage Laws as Applied to Women*, 6 J.L. SOC’Y 154, 178 (finding, as of 2005, proposals in “more than half of the United States”); Heather Flory, *“I Promise to Love, Honor, Obey . . . and Not Divorce You”: Covenant Marriage and the Backlash Against No-Fault Divorce*, 34 FAM. L.Q. 133, 134 n.5 (2000) (listing states that considered proposals as of 2000).

²⁹ Cynthia DeSimone, Comment, *Covenant Marriage Legislation: How the Absence of Interfaith Religious Discourse Has Stifled the Effort to Strengthen Marriage*, 52 CATH. U. L. REV. 391, 412 (2003); J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 593 n.259 (2007); Lindsey, *supra* note 3, at 272.

³⁰ Couples who are married under the regular Louisiana marriage law or married in other states are accorded an option to redesignate their marital commitment into a covenant marriage. LA. STAT. ANN. § 9:275(A) (1999). See also *Welsh v. Welsh*, 783 So. 2d 446, 448 (La. Ct. App. 2001) (existing standard marriages may be converted to covenant marriages if both parties agree); Gary H. Nichols, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. MEM. L. REV. 397, 445–46 (describing the mechanisms of Louisiana’s optionality provision).

³¹ Wardle, *supra* note 6, at 788.

undertaking and the expectation that the marriage will be lifelong;³² a legal commitment to take all “reasonable efforts to preserve [the] marriage, including marital counseling”;³³ and limited options for marital release.³⁴ For example, in an ordinary Louisiana marriage where there are no minor children from the marriage, a couple may be released on a no-fault basis after living apart for six months,³⁵ or immediately upon establishing other grounds like adultery or imprisonment.³⁶ By contrast, a covenant marriage permits divorce “[o]nly when there has been a complete and total breach of the marital covenant commitment.”³⁷ Such a breach requires either living separate and apart for two years,³⁸ or proof of narrowly-defined fault grounds: adultery, imprisonment, abandonment for one year, or physical or sexual abuse of a spouse or child of the parties.³⁹ There is no option, however, to break marital ties based on habitual intemperance, cruel treatment, or outrages that render the relationship insupportable.⁴⁰

In addition to imposing strict fault-based grounds, covenant marriage legislation has resurrected the infamous fault defense of recrimination—“a rare combination of silliness, futility and brutality.”⁴¹ Recrimination bars divorce when both spouses are found at fault,⁴² even if the respondent’s misconduct vastly exceeds the petitioner’s.⁴³ In one notorious case, for example, the court denied a wife’s plea for freedom despite

³² The statutes offer no indication of how long premarital counseling should last, how much counseling is necessary, what specifically should be discussed in the counseling sessions, or who qualifies as a “marriage counselor.” Flory, *supra* note 28, at 146; Hamm, *supra* note 9, at 86.

³³ LA. STAT. ANN. § 9:273(A)(1)–(2)(a). Reasonable efforts may include “living in separate bedrooms . . . or in separate dwellings,” as expressed by the author of Louisiana’s covenant marriage legislation. Spaht, *supra* note 8, at 63, 99; see also Daniel W. Olivas, *Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to Be Ignored*, 71 TENN. L. REV. 769, 780 (2004) (noting that the reasonableness inquiry is judicially determined on a case-by-case basis).

³⁴ See Katherine Shaw Spaht, *What’s Become of Louisiana Covenant Marriage Through the Eyes of Social Scientists*, 47 LOY. L. REV. 709, 711 (2001) (describing the conditions for dissolving covenant marriage).

³⁵ LA. CIV. CODE ANN. art. 102, 103.1.

³⁶ LA. CIV. CODE ANN. art. 103(2)–(3) (2018).

³⁷ LA. STAT. ANN. § 9:272(A) (2006).

³⁸ LA. STAT. ANN. § 9:307(A)(5) (2004). Louisiana also allows divorce for covenant marriage spouses who have lived separately for one year—or for one year and six months when minor children are involved, unless child abuse motivated the separation—after a judgment of separation from bed and board. *Id.* at (A)(6).

³⁹ LA. STAT. ANN. § 9:307(A)(1)–(4) (2004).

⁴⁰ Monica Hof Wallace, *A Primer on Divorce in Louisiana*, 64 LOY. L. REV. 617, 653–54 (2018).

⁴¹ ROBERT EARL LEE, 1 NORTH CAROLINA FAMILY LAW § 71, at 347 (4th ed. 1979) (quoting HOMER H. CLARK, JR., CASES AND MATERIALS ON DOMESTIC RELATIONS 704 (2d ed. 1974)).

⁴² Spaht, *supra* note 8, at 124–26. As Judge Alexander has sarcastically defined *recrimination*, “the law has placed itself in the anomalous position of saying, to the amazement and amusement of laymen and lawyers alike, that if both spouses have grounds for divorce, neither has ground.” Paul W. Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem*, 36 A.B.A. J. 105, 108 (1950).

⁴³ Spaht, *supra* note 8, at 125–26 (noting that the doctrine of “comparative rectitude,” which developed historically to temper the perceived harshness of the recrimination defense, is unavailable for covenant spouses).

finding that she had been severely beaten and humiliated by her adulterous, drunken, and miserly husband since she was not free of fault either.⁴⁴ Under this doctrine, parties both guilty of fault are deemed to deserve one another, not a divorce.⁴⁵

While both the Arizona⁴⁶ and Arkansas⁴⁷ laws are patterned after the Louisiana model, they differ somewhat in the restrictions they apply to marital exit.⁴⁸ First, Arizona, unlike Louisiana and Arkansas,⁴⁹ deems habitual intemperance or cruel treatment legitimate bases for divorce⁵⁰ and also allows spouses in abusive relationships to end the marriage more easily.⁵¹ Second, Arizona differentiates between consensual and contested divorce, allowing for immediate no-fault divorce where “[t]he husband and wife both agree to a dissolution of marriage.”⁵² Third, Arkansas distinguishes between couples based on parental status, requiring parents of minor children to wait six months more than childless couples to divorce.⁵³

In short, covenant marriage legislation considerably constricts the conditions under which a marriage may be dissolved. But does this dissolution regime represent a permissible exercise of the state’s broad latitude to experiment with solutions to pressing social concerns? In the

⁴⁴ *De Burgh v. De Burgh*, 250 P.2d 598, 605 (Cal. 1952) (en banc) (overruling the trial court and eliminating the defense of recrimination in divorce proceedings). The wife’s fault in this case was based on her allegedly false accusations of dishonesty and homosexuality, which she also communicated to her husband’s business associate. *Id.* at 599. See also *Kucera v. Kucera*, 117 N.W.2d 810, 813–14 (N.D. 1962) (denying divorce as a matter of law on the grounds of recrimination, despite both parties having proven their independent causes of action for divorce in the trial court); *Rankin v. Rankin*, 124 A.2d 639, 643–45 (Pa. Super. Ct. 1956) (reversing divorce decree as requested by the “principal offender” rather than the “innocent and injured spouse”).

⁴⁵ William E. McCurdy, *Divorce—A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart*, 9 VAND. L. REV. 685, 695 (1956) (quoting *Wood v. Wood*, 2 Paige Ch. 108, 111 (N.Y. Ch. 1830)).

⁴⁶ ARIZ. REV. STAT. ANN. § 25-903 (1998).

⁴⁷ ARK. CODE ANN. § 9-11-808(a) (2001).

⁴⁸ Compare ARIZ. REV. STAT. ANN. § 25-903 (1998), with LA. STAT. ANN. § 9:307 (2004), and ARK. CODE ANN. § 9-11-808(a) (2001). Arizona gives couples the most latitude, while Arkansas dissolves covenant marriages on almost identical grounds as Louisiana. DeSimone, *supra* note 29. See also Brummer, *supra* note 27, at 274–88 (2003) (describing the features of the Louisiana and Arizona covenant marriage statutes in comparison to the Arkansas statute, and the various approaches to annulment and rescission).

⁴⁹ Compare LA. STAT. ANN. § 9:307(A) (2004), and ARK. CODE ANN. § 9-11-808(a) (2001) (declining to authorize divorce in instances of habitual intemperance or cruelty), with LA. STAT. ANN. § 9:307(B)(6) (2004), and ARK. CODE ANN. § 9-11-808(b) (2001) (authorizing separation in instances of habitual intemperance and cruelty).

⁵⁰ ARIZ. REV. STAT. ANN. § 25-903(4), (7) (1998).

⁵¹ Compare LA. REV. STAT. ANN. § 9:307(A)(4) (2004), and ARK. CODE ANN. § 9-11-808(a)(3) (2001) (limiting release conditions to physical or sexual abuse suffered by the spouse seeking divorce or a child of one of the spouses), with ARIZ. REV. STAT. ANN. § 25-903(4) (1998) (expanding release conditions to be inclusive of abuse suffered by the spouse, a child, or even “a relative of either spouse permanently living in the matrimonial domicile”). See DeSimone, *supra* note 29 (comparing the terms for legal separation and divorce in covenant marriage across Arizona, Arkansas, and Louisiana).

⁵² ARIZ. REV. STAT. ANN. § 25-903(8) (1998).

⁵³ ARK. CODE ANN. § 9-11-808(a)(5)(A)–(B)(i) (2001).

pages that follow, I analyze the constitutionality of the covenant's exit provisions and consider whether its voluntary nature might render otherwise objectionable provisions constitutional.

II. RIGHTS OF EXIT UNDER COVENANT MARRIAGE: CONSTITUTIONAL EVALUATION

Legal scholarship has largely shied away from examining the constitutional validity of covenant marriage legislation, and those few commentators who have engaged with such analysis have focused primarily on its vulnerability to Establishment Clause challenges.⁵⁴ In what follows, I challenge the constitutionality of the covenant divorce regime on substantive due process grounds. As I will demonstrate, the unholy trinity of divorce restrictions that combine in a covenant regime—fault requirements, prolonged waiting periods, and mandatory counseling—constitutes an impermissible encroachment on unenumerated fundamental liberties.

A. *Faulting Fault Thresholds*

The fault regime is constitutionally offensive to divorce rights both in effect and in theory. A fault-based scheme is problematic because it requires that one spouse commit at least one of a narrow set of state-defined marital transgressions, while the other must be entirely exonerated.⁵⁵ Yet the statutory grounds for fault rarely align with the actual reasons that lead individuals to seek divorce,⁵⁶ prompting couples to either contort their grievances to fit the state's taxonomy of fault or forfeit their access to marital

⁵⁴ Several commentators, among them the American Civil Liberties Union, oppose covenant marriage on the grounds that such legislation violates the spirit of the constitutional separation of church and state. See, e.g., Kimberly Diane White, *Covenant Marriage: An Unnecessary Second Attempt at Fault-Based Divorce*, 61 ALA. L. REV. 869, 886 (2010) (“Opponents of covenant marriage also see it as ‘state enforcement of religious vows.’”); Lawton, *supra* note 10, at 2508 (“The American Civil Liberties Union . . . takes another liberal view, arguing that covenant marriage laws are an impermissible joinder of church and state insofar as the legislation incorporates Christian values into law.”); Kristina E. Zurcher, Note, “*I Do*” or “*I Don’t*”? *Covenant Marriage After Six Years*, 18 NOTRE DAME J. L. ETHICS & PUB. POL’Y 273, 298 n.118 (2004) (“Covenant marriage has been challenged for mixing church and state in violation of the Constitution.”). *But see* Nichols, *supra* note 7, at 963, 965–66 (refuting arguments that covenant marriage constitutes excessive governmental entanglement of religion and an improper state delegation of authority); Jason Andrew Macke, Note, *Of Covenants and Conflicts—When “I Do” Means More than It Used To, but Less than You Thought*, 59 OHIO ST. L.J. 1377, 1389–90 (1998) (arguing that covenant marriage laws would survive an Establishment Clause challenge).

⁵⁵ VanSickle, *supra* note 28, at 158.

⁵⁶ Susan Westerberg Reppy, Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. REV. 1306, 1310 (1970); Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 638 (1955). See also Kenneth Rigby, *Report and Recommendation of the Louisiana State Law Institute to the House Civil Law and Procedure Committee of the Louisiana Legislature Relative to the Reinstatement of Fault as a Prerequisite to a Divorce*, 62 LA. L. REV. 561, 588–93 (2002) (providing empirical support that divorce is motivated for personal reasons, not statutorily mandated causes).

freedom.⁵⁷ As a result, spouses who have suffered grave but unrecognized harm or whose relationships are plainly irreparable may remain indefinitely trapped in dysfunctional marriages.⁵⁸

This predicament is especially pronounced under the covenant regime, which is extremely limited—even by fault standards—and revives the archaic defense of recrimination.⁵⁹ A defending spouse may thus “admit even the most repellent charges made in the complaint”⁶⁰ and still succeed in locking the petitioner into a moribund or even violent marriage. The fault principle thus operates not merely as a substantial burden on marital freedom, but at times as an outright bar to it.

A fault-based scheme is also constitutionally untenable because it runs afoul of the constitutional principles that undergird marital freedom. In such a regime, the state dictates when and according to what standards spouses may separate,⁶¹ in flagrant disregard of the recognized constitutional right to independent decision-making in matters of intimate life.⁶² Divorce is thus made precariously dependent on the value preferences of the majority, a limitation deemed unsupportable when imposed on other intimate decisions, most prominently those involving reproduction.⁶³ The Constitution demands

⁵⁷ See, e.g., RILEY, *supra* note 19, at 149 (describing the moral, social, and strategic qualms Americans in the mid-twentieth century faced in choosing which fault grounds to sue for divorce); Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 631 (1997) (“[R]equiring a spouse to prove fault is unnecessarily intrusive and substantially limits his or her ability to make choices about the marriage.”).

⁵⁸ For such decisions, see Scheu v. Vargas, 778 N.Y.S.2d 663, 664 (N.Y. Sup. Ct. 2004); Horzely v. Horzely, 365 N.E.2d 412, 413–14 (Ill. App. Ct. 1977); Johnson v. Johnson, 561 N.Y.S.2d 1018, 1018 (N.Y. App. Div. 1990); McGill v. McGill, 432 N.Y.S.2d 1015, 1016 (N.Y. Sup. Ct. App. Div. 1990). See also Horowitz, *supra* note 22 (“Fault-based laws . . . could render it impossible for women who are victims of domestic violence to obtain a divorce.”).

⁵⁹ See generally Alexander, *supra* note 42 (critiquing the practical effects of the recrimination defense); J.G. Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213, 213 (1942) (tracing the history of the recrimination defense from 12th-century Roman property law).

⁶⁰ See Beamer, *supra* note 59 (noting that this defense was usually raised when one partner was dissatisfied with the property arrangements); Robert B. Jones, *The Ohio Divorce Reforms of 1974*, 25 CASE W. RESV. L. REV. 844, 847 (1975) (discussing how spouses can become “trapped in their marriage with no effective means of legal termination” of the union).

⁶¹ Leonard P. Strickman, *Marriage, Divorce and the Constitution*, 15 FAM. L.Q. 259, 318 (1982); Horowitz, *supra* note 22.

⁶² Donna J. Zenor, *Untying the Knot: The Course and Patterns of Divorce Reform*, 57 CORN. L. REV. 649, 654 (1972).

⁶³ If society were invited to scrutinize the reasons for women’s abortion decisions, the right to abortion would be perniciously jeopardized. As Linda McClain shows, public opinion polls suggest a significant disparity between the reasons most women cite for having abortions (socioeconomic reasons, being unmarried, or being unready to parent) and the reasons the majority approve as motivations for doing so (fetal or pregnant women’s health problems). See Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER. L. 119, 167–68 (2006); see also Lawrence B. Finer, Lori F. Frohworth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 114 (2005) (discussing interference with education or career as additional reasons women opt for abortion).

that marriage partners be free to pursue dissolution according to the dictates of conscience, not the will of legislatures or judges.⁶⁴

Moreover, conditioning divorce on a showing of fault impermissibly intrudes into the marital relationship in violation of the right to informational privacy. Courts adjudicating fault-based divorces often probe the most intimate details of a marriage, prompting many divorce-seekers to go to great lengths to avoid such personal exposure.⁶⁵ The inquests inherent in the fault system compel individuals to choose between two fundamental interests—privacy and liberty—their desire to shield their marriage from scrutiny and their desire to exit it. In other contexts, such concerns have proven decisive in vindicating constitutional rights.⁶⁶

Further, the fault regime violates principles of gender equality by rendering marital freedom particularly elusive for women.⁶⁷ As I have shown elsewhere, fault-based limitations on divorce have historically been tied either to patriarchal efforts to control women or to paternalistic efforts to “protect” them. In legal praxis, fault regimes have often operated through a gendered double standard, entrenching impermissible status-based judgments about women’s capacities, roles, and destinies—judgments rooted in stereotyped assumptions drawn from the separate-spheres tradition.⁶⁸ Fault-based systems have an especially detrimental effect on

⁶⁴ Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 333 (1982); Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 619 (2006).

⁶⁵ See RILEY, *supra* note 19, at 138 (listing examples of spouses revealing very personal causes of their divorces); Raymond C. O’Brien, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339, 353 (1999) (describing the component of divorce proceedings that involves revealing private matters of a relationship).

⁶⁶ Compare, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 763–67 (1986) (noting that the Court has consistently refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected activities), with *Planned Parenthood v. Danforth*, 428 U.S. 52, 79–81 (1976) (discussing how some forms of protected activity disclosure is necessary to preserve the health of female citizens).

⁶⁷ I showed elsewhere how fault-based regimes, in their current and historical instantiations, implicate gender equality. See generally Yefet, *Formal Gender-Equality*, *supra* note 23.

⁶⁸ These may include, for example, gender stereotypes about husbandly dominance and wifely subordination, or male libido contrasted with female chastity. For example, under the fault system, a woman’s failure to conform to the roles of wife and mother was a sufficient basis for her husband to force a divorce and evade maintenance claims; yet a husband’s behavior would not be grounds for divorce unless he repeatedly abused his wife or completely abandoned her financially. The same inequality of treatment, working to the detriment of women, also applied to the adultery ground. See, e.g., Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1110–11 (1989) (traditional fault grounds reflect “both the gender-based expectations of the traditional marriage contract and the double standard applied to men’s and women’s sexual behavior.”); see also Yefet, *Formal Gender-Equality*, *supra* note 23, at 803 (discussing how Western legislatures often adopted policies intended to subordinate the role of women in relationships).

women who are victims of spousal abuse,⁶⁹ an issue that warrants deeper examination given the ubiquity of domestic violence as both a social phenomenon and a leading cause of divorce.⁷⁰ Historically, judicial intolerance for husbands' brutality was slow to develop; the American legal system consistently treated abusive husbands more sympathetically than battered wives.⁷¹ "Mild chastisement" was often considered "wholly insufficient" to justify marital dissolution on grounds of cruelty.⁷² Even when wives endured violence deemed "sufficiently" severe to warrant release, divorce was routinely denied if the wife had continued to live with her batterer or was found to have "provoked" his abuse.⁷³ These patterns

⁶⁹ Martha Heller, Note, *Should Breaking-Up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have upon Domestic Violence*, 4 VA. J. SOC. POL'Y & L. 263, 283 (1996); Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1446 (1992).

⁷⁰ RICHARD A. STORDEUR & RICHARD STILLE, ENDING MEN'S VIOLENCE AGAINST THEIR PARTNERS: ONE ROAD TO PEACE 21 (1989); Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1288 (1992) [hereinafter Mahoney, *Exit*]; Lynn Hecht Schafran, *Gender Bias in the Courts*, in WOMEN AS SINGLE PARENTS: CONFRONTING INSTITUTIONAL BARRIERS IN THE COURTS, THE WORKPLACE, AND THE HOUSING MARKET 39, 59–60 (Elizabeth A. Mulroy ed., 1988); Syawalia Aziza & Taufiq Nugroho, *Patriarchy in the Family: A Study of the Causal Factors of Divorce in the Perspective of Legal Feminism*, 5 INDON. L. REFORM J. 43, 44–45, 53 (2025); THE JUDGE ELMO B. HUNTER LEGAL CTR. FOR VICTIMS OF CRIMES AGAINST WOMEN, REPEALING NO-FAULT DIVORCE WOULD HARM SURVIVORS OF DOMESTIC VIOLENCE IN TEXAS, SMU DEDMAN SCH. L., 1–2, 5, 8 (2018); Görkem Kelebek-Küçükarıslan & Reyhan Atasü-Topcuoğlu, *Women's High-Conflict Divorce Experiences and Access to Statutory Social Services in Turkey*, 39 AFFILIA: FEMINIST INQUIRY IN SOC. WORK 607, 621 (2024); Elina Einiö, Niina Metsä-Simola, Mikko Aaltonen, Elina Hiltunen & Pekka Martikainen, *Partner Violence Surrounding Divorce: A Record-Linkage Study of Wives and Their Husbands*, 85 J. OF MARRIAGE AND FAM. 33, 35–36 (2023); Shreya Malhotra, *Impact of Divorce Law Liberalisation on Domestic Violence*, 23 ARTHANITI: J. ECON. THEORY & PRAC. 223, 237 (2022); LENORE E.A. WALKER, THE BATTERED WOMAN SYNDROME 77–79 (4th ed., 2017); ELIZABETH COMACK, FEMINIST ENGAGEMENT WITH THE LAW: THE LEGAL RECOGNITION OF THE BATTERED WOMAN SYNDROME 18–19 (1993); JENNIFER ANDRUS, NARRATIVES OF DOMESTIC VIOLENCE: POLICING, IDENTITY, AND INDEXICALITY 55 (2021).

⁷¹ DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 240–41 (1989); Angie Perone, Note, *Unchain My Heart: Slavery as a Defense to the Dismantling of the Violence Against Women Act*, 17 HASTINGS WOMEN'S L.J. 115, 115 (2006); see also Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 495 (1999) (noting that varying legal responses to domestic violence have had more to do with political and social changes than the incidence of crime itself); Schafran, *supra* note 69, at 60–61 (discussing how victim blaming by judges is commonplace); Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280, 283–84 (1987) (noting how judicial insensitivity and sexualization of victims hinders unbiased decisionmaking). As a Michigan Supreme Court decision denying divorce to a domestic violence victim put it: "There is at stake, for our society as a whole, too much of the public welfare . . . in the preservation of family ties, to permit the spouses to come and go as tempers wax and wane." *Williams v. Williams*, 88 N.W.2d 483, 484 (Mich. 1958).

⁷² See, e.g., *Glantz v. Glantz*, 310 P.2d 23, 24 (Cal. Dist. Ct. App. 1957) (explaining that certain alterations will not support a finding of grievous bodily injury or grievous mental suffering); *Wenderlich v. Wenderlich*, 311 N.Y.S.2d 797, 798 (N.Y. App. Div. 1970) (holding that certain "isolated act[s] of violence . . . [do] not constitute cruel and inhuman treatment sufficient to warrant a judgment of divorce").

⁷³ RHODE, *supra* note 71, at 238. For examples of cases in which physical violence was not considered sufficient grounds for divorce, see *David v. David*, 27 Ala. 222, 224–25, 227–28 (Ala. 1855);

persisted at least well into the late twentieth century, as reports on gender bias in the courts repeatedly documented the tendency to disbelieve or trivialize women's complaints absent clear evidence of severe physical injuries.⁷⁴

Adjudicating cases of domestic violence through the lens of fault thus illustrates the dangers inherent in a divorce regime that conditions marital relief on judicial discretion. Abusive relationships already impose “horrendous obstacles” to divorce,⁷⁵ making a dissolution process free from discretionary barriers all the more essential. The justifiable fears of leaving an abusive spouse⁷⁶—the vicious cycle of low self-esteem, learned helplessness, psychological paralysis, economic dependency, and feelings of responsibility toward children—often keep battered wives trapped in abusive marriages.⁷⁷ Indeed, many women who attempt to leave fail repeatedly.⁷⁸ Worse still, the very act of initiating divorce can provoke

Nogees v. Nogees, 7 Tex. 538, 540 (Tex. 1852). See also Jane Turner Censer, “Smiling Through Her Tears”: Ante-Bellum Southern Women and Divorce, 25 AM. J. LEGAL HIST. 24, 35 (1981) (discussing how class bias may influence judicial decisionmaking in the context of domestic violence). Invoking domestic violence as the basis for a divorce could sometimes cost a woman custody of her children. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 43–49 (1991) [hereinafter Mahoney, *Legal Images*].

⁷⁴ RHODE, *supra* note 71, at 241. As late as the 1980s, it was noted that “even a woman judge . . . may not understand the seriousness to some women of mild physical abuse. . . .” RICHARD NEELY, THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE 22 (1984).

⁷⁵ Battered Women’s Syndrome recognizes women’s feelings of paralysis and helplessness in abusive relationships. See WALKER, *supra* note 70, at 77–79; see also State v. Kelly, 478 A.2d 364, 377 (N.J. 1984); Mahoney, *Exit*, *supra* note 70, at 1309; Nan Seuffert, *Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law*, 23 MELB. U. L. REV. 211, 214 (1999).

⁷⁶ Steve Duck, *A Topography of Relationship Disengagement and Dissolution*, in 4 PERSONAL RELATIONSHIPS: DISSOLVING PERSONAL RELATIONSHIPS 1, 7–8 (Steve Duck ed., 1982); McClain, *supra* note 62, at 132. Indeed, the act of separation escalates violence. See Mahoney, *Exit*, *supra* note 70, at 1305; Mahoney, *Legal Images*, *supra* note 73, at 6, 64–65.

⁷⁷ BARTLETT & RHODE, *supra* note 11, at 357–58; Lisa E. Martin, Comment, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim’s Right to Counsel*, 34 GONZ. L. REV. 329, 331 (1999).

⁷⁸ LORIANN HOFF OBERLIN, SURVIVING SEPARATION AND DIVORCE 81–115 (2d ed., 2005); STORDEUR & STILLE, *supra* note 70, at 26; Mahoney, *Legal Images*, *supra* note 73, at 19; Mahoney, *Exit*, *supra* note 70, at 1288; Erin Kern, *Systemic Barriers Faced by Women Attempting to Leave Abusive Military Marriages*, 95 J. COUNSELING & DEV. 354, 361–62 (2017); Keren Gueta & Liraz Levy Ladell, “If He Were a Terrorist, You Would Have Caught Him Already”: The Experience of Divorce Denial Among Intimate Partner Violence Survivors, 30 VIOLENCE AGAINST WOMEN 75, 77, 92, 94 (2024); Anat Ben-Porat & Adi Reshef-Matzpooon, *Stay–Leave Decision-Making Among Women Victims of Domestic Violence in Israel: Background, Interactional, and Environmental Factors*, 38 J. INTERPERSONAL VIOLENCE 3688, 3698–702 (2022); Jinseok Kim & Karen A. Gray, *Leave or Stay?: Battered Women’s Decision After Intimate Partner Violence*, 23 J. INTERPERSONAL VIOLENCE 1465, 1478–79 (2008); Jennifer E. Copp, Peggy C. Giordano, Monica A. Longmore & Wendy D. Manning, *Stay-or-Leave Decision Making in Nonviolent and Violent Dating Relationships*, 30 VIOLENCE & VICTIMS 581, 594–96 (2015); Giulia Lausi, Jessica Burrari, Michela Baldi, Fabio Ferlazzo, Stefano Ferracuti, Anna Maria Giannini & Benedetta Barchielli, *Decision-Making and Abuse, What Relationship in Victims of Violence?*, 20 INT’L J. ENV’T RSCH. & PUB. HEALTH 5879, 5885–86 tbl.2 (2023).

retaliatory violence, heightening the wife's risk of serious harm.⁷⁹ Since battered women who lack access to divorce remain at risk,⁸⁰ it is all the more constitutionally incumbent upon the law to facilitate, rather than frustrate, their pursuit of marital freedom.⁸¹

The fault regime does precisely the opposite—breeding litigation that may generate three distinct evils in cases of domestic violence. First, fault-based contests intensify hostility, jeopardizing the safety of wives already subjected to abuse,⁸² and heightening the risk of violence even in marriages not previously marked by it.⁸³ Second, fault schemes allow batterers to weaponize litigation to harass and intimidate their partners,⁸⁴ thereby prolonging the very contact that survivors seek to escape.⁸⁵ Third, a fault threshold demanding proof of domestic or psychological abuse may trap many women in abusive relationships—those afraid to testify, those unwilling to expose themselves to public scrutiny, and those reluctant to embrace the stigmatizing identity of the “dysfunctional, helpless, dependent” victim.⁸⁶ In light of these constraints, a woman may elect continued cohabitation over the daunting prospect of legal confrontation, viewing the marriage itself as the more navigable terrain.⁸⁷ Indeed, the

⁷⁹ Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 FLA. B.J. 24 (1994); Lacey, *supra* note 68, at 1445; Mahoney, *Legal Images*, *supra* note 72, at 5–7. This has even been described as a death sentence. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 164 (1987); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 150–51 (1989); Julie Linares-Fierro, *A Mother Removed – A Child Left Behind: A Battered Immigrant's Need for a Modified Best Interest Standard*, 1 THE SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 253, 272 (1999); Mahoney, *Legal Images*, *supra* note 73.

⁸⁰ Lacey, *supra* note 69, at 1445.

⁸¹ *Id.* at 1444–45.

⁸² Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L. REV. 2525, 2553–54 (1994).

⁸³ Michael A. Robbins, *Divorce Reform: We Need New Solutions, Not a Return to Fault*, 79 MICH. B.J. 190, 192 (2000).

⁸⁴ Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 FAM. & CONCIL. CTS. REV. 393, 394 (1999); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 161–62 (2003).

⁸⁵ Carriere, *supra* note 10, at 1714–16, 1746.

⁸⁶ Mahoney, *Legal Images*, *supra* note 72, at 93; *see also id.* at 18–19, 25, 59–60 (describing the difficulties women face in having to disclose such personal details and viewing their identity as connected to these experiences of abuse); *see also* Carriere, *supra* note 10, at 1746 (describing the challenges of testifying about abuse that will both expose contact to their abusers and may be futile if the court does not rule in their favor); Bradford, *supra* note 56, at 632 (refuting the argument that fault-based divorce standards are likely to build respect for marriage as an institution when couples have to share their personal conflicts or attempt to get divorced in a no-fault divorce state).

⁸⁷ *See* Gary Wisby, *Divorce, Finding Fault with Breakups*, CHI. SUN-TIMES, Feb. 22, 1998, at 43, NEWSBANK (discussing the statistics in favor of and against fault- and no-fault-based systems); *see also* Carriere, *supra* note 10, at 1746 (discussing how development of evidence under the fault ground may be humiliating to the victim while also facilitating continued contact with the batterer); Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 737 (1997) (noting that fault based divorce may lead to more

advent of fault-free divorce was, in part, a deliberate attempt to ease the path out of abusive marriages—allowing survivors to leave without disclosing, much less proving, the violence they endured.⁸⁸ Commentators are therefore right to warn that efforts to revive fault divorce will only exacerbate the plight of women caught in abusive marriages.⁸⁹

Fault limitations not only produce constitutionally troubling outcomes—they also fail to satisfy a modest threshold of advancing a compelling state interest even under rational basis review. The principal justification invoked for such regimes is the preservation of viable marriages. This rationale, however, does not jibe with the ideals of liberal

violence); Robert M. Gordon, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1459 (1998) (discussing how women become trapped in their marriages under a fault-based system).

⁸⁸ Eric V. Wicks, *Fault-Based Divorce “Reforms,” Archaic Survivals, and Ancient Lessons*, 46 WAYNE L. REV. 1565, 1597 (2000); Rebecca E. Silberbogen, *Does the Dissolution of Covenant Marriages Mirror Common Law England’s Subordination of Women?*, 5 WM. & MARY J. WOMEN & L. 207, 224 (1998); Sean E. Brotherson & Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J.L. & FAM. STUD. 23, 53 (2001). Even staunch opponents of no-fault concede the benefits of this regime in encouraging abused wives to seek help and protection against further assaults. See RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY* 113, 157 (1st ed., 1988) (discussing modern economic resources for women that reduce the power imbalance in their marriages and that legal resources are the least likely used support mechanism in relationship struggles); Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741, 747 (arguing that more accessible divorce in no-fault regimes can reduce domestic violence by providing an avenue for the victim to receive protection). Two critics who charge that no-fault is actually inimical to battered women have been discredited. See, e.g., Ellman & Lohr, *supra* note 87, at 719–20, 749–62 (highlighting the flaws in the standards of measurement and data collection to invalidate a 1994 study connecting no-fault divorce regimes to increased spousal violence).

⁸⁹ Wardle, *supra* note 6, at 793; see also Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 824–25 (1998) (highlighting statistics demonstrating fault-based divorce laws have not reduced divorce rates, and pointing to economic factors that may have contributed to the rise in divorce rates in no-fault states).

democracy⁹⁰ and is empirically unsound.⁹¹ As one court aptly observed: “Any injury to the state from the dissolution of the family cannot now be cured by insisting on the continuance of a semblance of a marriage when the substance has long since disappeared.”⁹² The notion of a compelling state interest in preserving marriage—though superficially appealing—profoundly misapprehends what, in most cases, is actually being preserved.

While this critique applies to divorce restrictions more generally, it is especially trenchant in the context of fault regimes, which are particularly ill-equipped to distinguish viable from non-viable marriages.⁹³ Indeed, fault ideology performs the paradoxical feat of being both over-inclusive and under-inclusive. It is over-inclusive because some marriages permitted to dissolve under its standards may in fact be salvageable: isolated or repeated acts of marital misconduct do not necessarily destroy a marriage.⁹⁴ Fault thus

⁹⁰ Indeed, the Supreme Court recognized in *Smith v. Organization of Foster Families for Equality and Reform*, that “the importance of the familial relationship, to the individuals involved and to the society, stems from the *emotional attachments* that derive from the intimacy of daily association.” 431 U.S. 816, 844 (1977) (emphasis added); see also Brummer, *supra* note 27, at 299 (noting that there can only be one set of rules for dissolving a relationship); Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 546 (1995) (discussing how the law cannot make parties sincerely perform the obligations of a marriage contract); Horowitz, *supra* note 22, at 898 (discussing how no-fault divorce options are supported by the Fourteenth Amendment); McClain, *supra* note 63, at 129 (noting that the government should be prioritizing the interests of all relationships, whether marital or nonmarital); Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State’s Regulation of Intimate Relationships Between Adults*, 30 HARV. J. L. & GENDER 25, 45 (recognizing that “the state has a limited ability to encourage citizens to acquire and formalize healthy caretaking relationships”); RILEY, *supra* note 19, at 33 (noting that colonial divorce was a precursor to the growing trend of divorce in the United States); Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25, 39–40 (1990) (discussing how marriage is not meant to be merely a legal union but a relationship of mutual love and kindness).

⁹¹ Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 82. The architects of no-fault divorce captured why fault restrictions serve no state interest:

Certainly the state is interested in preserving marriages, in trying to keep them stable and enduring unions. But . . . we accepted as fact that marriage flowered out of a delicate relationship and we determined that there was no good purpose served by digging back into the delicate relationship to find out what caused it to deflower.

John D. Cannell, *Abolish Fault-Oriented Divorce in Ohio—As a Service to Society and to Restore Dignity to the Domestic Relations Courts*, 4 AKRON L. REV. 92, 108–09 (1971) (quoting James A. Hayes, Member, Cal. Legislature, Thirty-Ninth Assembly Dist.).

⁹² *Dever v. Dever*, 146 A. 478, 479 (R.I. 1929); see also, e.g., *Howay v. Howay*, 264 P.2d 691, 697 (Idaho 1953) (discussing how no state rule or regulation can restore a broken relationship); *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952) (en banc) (noting that when a marriage has failed and the family unit ceases to exist, divorce will be permitted).

⁹³ See, e.g., J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 49 (1997) (discussing how personal blamelessness is generally insufficient to overcome jurisprudence obstacles).

⁹⁴ See, e.g., Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 135 n.16 (2000) (explaining that marriages often stay intact at the cost of a power imbalance); Martin J. Siegel, *For Better or For Worse: Adultery, Crime & The Constitution*, 30 J. FAM. L. 45, 90 (discussing how states have a limited ability to restrict who may marry); *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital*

fails to identify the precise causes of non-salvageability. Yet the overall state of the marriage is deemed irrelevant to fault; courts are not authorized to consider whether the relationship is irretrievably broken.⁹⁵

At the same time, fault ideology is under-inclusive because it excludes from the ambit of liberating behavior many acts that may be equally or even more destructive to the marital bond.⁹⁶ If divorce law is to learn anything from the lived experiences of divorcing couples, it is that “comparatively minor legal guilt can be and often is vastly more devastating to the parties and definitely more disruptive of family life than that guilt which the law, religion, and society regard as most offensive.”⁹⁷ Women—who initiate the majority of divorce proceedings—are especially likely to seek marital freedom due to interpersonal harms that fall outside the narrow purview of legal fault.⁹⁸

Sex, 104 HARV. L. REV. 1660, 1668 (1991) (noting that the government often provides an insufficient justification for coercive invasion of fundamental freedoms); *see also* Zenor, *supra* note 62, at 653 (maintaining that fault-oriented divorce law cannot cover all events that may or may not destroy a marital relationship); E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 34 (1st ed., 2002) (noting that alcoholism, physical abuse, or extramarital sex were not always sufficient to end a marriage); J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 534 (1994) (discussing how repeated acts of adultery or cruelty do not always destroy a marriage); Duck, *supra* note 76, at 7–8 (maintaining that some marriages survive repeated instances of adultery, brutality, and perversion); Reppy, *supra* note 56 (noting that a single act of fault rarely causes irreparable breakdown of a marriage).

⁹⁵ *See e.g.*, DiFonzo, *supra* note 93, at 7 (discussing how legal inquiries often take precedence over the reality of a marital relationship).

⁹⁶ For example, of the main causes of marital breakdown—poor communication, incompatibility, inequality in marriage, and financial problems—only infidelity is recognized as a fault-based divorce ground. Rigby, *supra* note 56, at 589; *see also* *Marriage and Divorce*, 10 GEO. J. GENDER & L. 801, 810 (2009) (discussing how the fault divorce scheme improperly required marital misconduct); McCurdy, *supra* note 45, at 688, 698; Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q., 269, 270–71 (advocating for incompatibility and irreconcilable differences as necessary fault grounds); Zenor, *supra* note 62, at 653 (noting that specific acts such as adultery are often indicative of deeper marital problems); White, *supra* note 54, at 887–88 (discussing the relevance of marital counseling for a covenant marriage); LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 130 (2006) (noting arguing and domestic violence as common reasons for divorce); Carl E. Schneider, *Marriage, Morals, and The Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 552 (1994) (discussing how evidence in divorce proceedings is often unsatisfactory due to minimal recordkeeping of problems).

⁹⁷ Alexander, *supra* note 42, at 107; *see also* Schneider, *supra* note 96, at 521 (arguing that minor incompatibilities of personalities could be more destructive to a marriage, regardless of the legal standard of divorce in that jurisdiction); David E. Seidelson, *Systematic Marriage Investigation and Counseling in Divorce Cases: Some Reflections on Its Constitutional Propriety and General Desirability*, 36 GEO. WASH. L. REV. 60, 61 (1967) (arguing that the emotionally burdensome experience of divorce proceedings could be avoided if legal grounds for divorce were liberalized).

⁹⁸ *See* FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 19–20 (1991) (describing how women tend to be more attentive to the emotional pitfalls of a marriage that lead to its demise); Jones, *supra* note 60, at 864 (advocating for the adoption of unilateral dissolution grounds for marriages); *Constitutional Barriers*, *supra* note 94, at 1679 n.140 (noting that few states provide grounds for other destructive causes for marital dissolution beyond just adultery, but questions of their constitutionality remain open).

In practice, the under-inclusivity of fault is often more troubling than its over-inclusivity. The covenant regimes in Louisiana and Arkansas vividly illustrate why. In these regimes, “a single act of adultery is grounds for divorce, but 20 years of incompatibility is not.”⁹⁹ Moreover, neither regime recognizes the classic fault ground of habitual drug or alcohol abuse,¹⁰⁰ even though such misconduct ranks among the top three reasons women cite for ending their marriages.¹⁰¹ Worse still, by statutorily limiting relief to abuse of a “physical or sexual nature,” the covenant framework forecloses immediate exit from emotionally or psychologically abusive relationships¹⁰²—leaving both survivors and their children trapped in harmful domestic environments.¹⁰³

Taken together, the fault regime does not merely fail to advance the state interests it purports to promote; it affirmatively undermines them. The adversary fault system makes divorces more expensive and more acrimonious, breeding ugly and protracted litigation that impedes reconciliation.¹⁰⁴ It also inflicts emotional harm on both spouses and their

⁹⁹ See Katha Pollitt, *What's Right About Divorce*, N.Y. TIMES, June 27, 1997, at A29 (suggesting that continuous fighting is often more harmful to children than the act of divorce itself).

¹⁰⁰ See, e.g., Clark, *supra* note 90, at 26–27 (discussing the need for legal separation or divorce in cases of alcoholism). Though these circumstances are not recognized as grounds for divorce, they suffice for legal separation. See, e.g., ARK. CODE ANN. § 9-12-301(3) (LexisNexis 2005) (noting habitual drunkenness for one year as grounds for separation); see also *id.* § 9-11-808(b)(5)(A) (LexisNexis 2001) (noting the same).

¹⁰¹ Paul R. Amato & Denise Previti, *People's Reasons for Divorcing: Gender, Social Class, the Life Course, and Adjustment*, 24 J. FAM. ISSUES 602, 614–15 (2003); WILLIAM J. BENNETT, *THE BROKEN HEARTH: REVERSING THE MORAL COLLAPSE OF THE AMERICAN FAMILY* 149 (1st ed. 2001).

¹⁰² See Nichols, *supra* note 30, at 453 (noting that mental abuse is not covered by the covenant marriage law); Lawton, *supra* note 10, at 2478 (describing the argument that it is not reasonable to foreclose a divorce when these forms of fault are alleged).

¹⁰³ See Heather Shulick, *New Law Will Lock Women Into Abusive Marriages, Foes Say*, TUSCON CITIZEN, June 2, 1998, at 1A (quoting Eleanor Eisenberg, Executive Director of the Arizona Civil Liberties Union, objecting to covenant marriage because “women and children will find themselves trapped in abusive marriages”); see also Stephen Dinan, *House Mulls “Covenant Marriage” Option*, WASH. TIMES, Feb. 9, 1999, at C6 (quoting Virginia Poverty Law Center spokesperson in opposition to a proposed Virginia law about covenant marriages, expressing concern for “putting battered women into a trap”); Jennifer Peter, *House Votes Against Proposal to Recognize Covenant Marriages Proponents of the Legislation Say It Could Decrease the Number of Divorces*, VIRGINIAN PILOT, Feb. 11, 1999, at B4 (reporting the Virginia state legislature rejecting a proposed law to establish covenant marriages).

¹⁰⁴ NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 239 (1962); RIANE TENNEHAUS EISLER, *DISSOLUTION, NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN* 40 (1977); HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 68 (1988); Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. ILL. L. REV. 651, 667–68 (2002); Christopher Price, Comment, *Finding Fault with Irish Divorce Law*, 19 LOY. L.A. INT'L & COMP. L.J. 669, 685 (1997); GRAHAM B. SPANIER & LINDA THOMPSON, *PARTING: THE AFTERMATH OF SEPARATION AND DIVORCE* 92 (2d ed., 1987).

children,¹⁰⁵ prolongs children's exposure to discordant marriages,¹⁰⁶ and undercuts the post-divorce inter-parental relationships so critical to children's adjustment and well-being.¹⁰⁷ Indeed, fault trials have such "an adverse effect on children, often more so than the dissolution of the marriage itself,"¹⁰⁸ that the National Conference of Commissioners on Uniform State Laws concluded that it is in the *state's* best interests that fault be divorced from the divorce regime.¹⁰⁹

If there was any lingering doubt about the inefficacy of fault regimes in "saving" marriage or preventing unnecessary divorces, a brief look at Louisiana's divorce history quickly dispels it. Louisiana's "novel" covenant marriage legislation is in fact a reincarnation of its long-abandoned 1960s divorce regime¹¹⁰—whose failure to shore up marriage was demonstrated decades ago. Louisiana experienced its sharpest rise in divorce under that earlier fault-based law, which was criticized for being too lenient,¹¹¹ and later adopted its current no-fault scheme based on "empirical evidence indicating that no-fault schemes do not promote divorce."¹¹²

Yet today's covenant marriage legislation may be even more detrimental to the state's interest in preserving the institution of marriage than its predecessor. Many fear that the establishment of two distinct marital tracks may degrade the status of "regular" unions, casting them as "marriage

¹⁰⁵ The child's psychopathology was often intensified by the parents' legal wrangles, with resulting depression, withdrawal, phobic fears and bad behavior. See RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 67 (1988); Dennis P. Saccuzzo, *Controversies in Divorce Mediation*, 79 NOTRE DAME L. REV. 425, 426 (2003).

¹⁰⁶ JACOB, *supra* note 104; BLAKE, *supra* note 104; EISLER, *supra* note 104; ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 277–78 (1992); Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 432 (1999).

¹⁰⁷ Catherine C. Ayoub, Robin M. Deutsch & Andronicki Maraganore, *Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM. & CONCIL. CTS. REV. 297, 298–99 (1999); Ver Steegh, *supra* note 84, at 160; King, *supra* note 106.

¹⁰⁸ Reppy, *supra* note 56, at 1309; see also Charles W. Tenney, Jr., *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 58 (1967). In that context, see also the factual situations reported in Stack v. Stack, 11 Cal. Rptr. 177, 183 (Cal. Ct. App. 1961); Goto v. Goto, 338 P.2d 450 (Cal. 1959) (en banc); Holsinger v. Holsinger, 279 P.2d 961 (Cal. 1955) (en banc).

¹⁰⁹ MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 382–83 (1972) (quoting HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 181 (35th ed. 1965)).

¹¹⁰ LA. REV. STAT. ANN. 9 § 301 (West 1960).

¹¹¹ One scholar's critical assessment of the previous Louisiana fault regime is worth repeating: "In the last analysis, this is divorce at the whim of either spouse, perhaps against the other's innocence and strong desire to continue the marriage. . . . Other states' laws may be applied loosely to make divorce easier in fact than it is in Louisiana, but no state's law as written shows lesser respect for the stability of marriage." Nichols, *supra* note 7, at 945 (quoting ROBERT ANTHONY PASCAL, LOUISIANA FAMILY LAW COURSE 85 (1973)); see also Amy L. Stewart, Note, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509, 535 (1999) (maintaining that legal restrictions on divorce do not create healthier families); Kristine M. Holmgren, *Holy History Teaches a Simple Truth: You Can't Legislate Covenant*, STAR TRIB., Mar. 18, 1999, at 19A (discussing how covenant marriage laws may cause political officials to be thought of as religious leaders).

¹¹² Olivas, *supra* note 33, at 774; Rigby, *supra* note 56, at 575.

lite”¹¹³ or “an uncommitted or inferior form of marriage,”¹¹⁴ thereby undermining its stature by “giving more credence to premium marriages.”¹¹⁵ Others warn of a new form of marital-type discrimination, in which state or private associations might confer or withhold benefits based on the form of marriage chosen.¹¹⁶ Covenant marriage, one commentator cautioned,

necessarily signifies a certain commitment between the parties. By default, the assumption becomes that those who choose not to covenant do not share the same degree of commitment. . . . Conceivably, insurance companies and employers could confer special benefits on covenant couples. The government could get in on the act, using its tax laws to favor covenant marriages over noncovenant marriages, or providing higher social security benefits for widows of a covenant marriage.¹¹⁷

A two-tiered system of marriage, then, may weaken the institution rather than fortify it.

In short, the fault system flagrantly violates core constitutional principles—decisional autonomy, informational privacy, and gender equality—all the while *disserving* the purported state interest in preserving marriage. To the extent it ever did “preserve” marriages, those unions existed in name only: already-broken relationships, sustained to the detriment of all involved. The policy lesson is clear: for the sake of spouses, their children, and society at large, the state’s primary concern when marital ties begin to fray must not be limiting divorce, but limiting the damage to the residual family unit and freeing individuals to form healthier unions.¹¹⁸

If a fundamental right to divorce means anything, then it must encompass the right to exit marriage on a no-fault basis.

¹¹³ Nichols, *supra* note 7, at 956.

¹¹⁴ White, *supra* note 54, at 869, 885 (covenant marriage serves to make traditional marriages seem inferior).

¹¹⁵ See Terry Hursh, “Premium” Option, INDIANAPOLIS STAR, Oct. 2, 1998, at A19 (questioning the decision to create different types of marriage); Vansickle, *supra* note 28, at 167 (noting that covenant marriages are regarded as more durable); Brummer, *supra* note 27, at 293 (discussing the redundancy of introducing covenant marriage); Olivas, *supra* note 33, at 786 (noting the Covenant Marriage Act could imply that some marriages are less sacred); Zucher, *supra* note 54, at 295 (maintaining that a tiered marriage system inherently devalues traditional marriage); Macke, *supra* note 54, at 1397 (noting same); Elizabeth H. Baker, Laura A. Sanchez, Steven L. Nock & James D. Wright, *Covenant Marriage and the Sanctification of Gendered Marital Roles*, 30 J. FAM. ISSUES 147, 148, 151 (2009) (discussing an American attitudinal trend towards egalitarianism).

¹¹⁶ See Hamm, *supra* note 9 (discussing how pressure from family and friends may cause a party to enter into a particular type of marriage without evaluation); Bartlett, *supra* note 89, at 833–34 (noting an employer’s likelihood to only confer benefits upon those who elect a covenant marriage).

¹¹⁷ Hamm, *supra* note 9, at 83.

¹¹⁸ Joseph Goldstein & Max Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75, 78 (1969).

B. *Time-Related Restrictions*

Within certain limits, waiting periods constitute a constitutionally permissible barrier to marital exit, as they advance important state interests in protecting and promoting marriage. By imposing mild and temporary obstacles to divorce, the state underscores that marriage is an enduring union marked by mutual commitment and reciprocal obligations.¹¹⁹ In today's legal landscape—where cohabitation increasingly mirrors marriage in both form and recognition¹²⁰—temporal restrictions also help maintain a principled distinction between the two regimes.¹²¹ As Joseph Raz has argued, it is the responsibility of the liberal state to enable individuals to choose among varied social and institutional arrangements.¹²² The state furnishes meaningful choices among intimate unions when it differentiates marriage from cohabitation by attaching differing levels of commitment to each.¹²³ In doing so, it fosters a range of relational possibilities and empowers individuals to choose deliberately among them.¹²⁴

Mandatory “cooling-off” periods may also serve the practical purpose of encouraging reconciliation or at least facilitating a more thoughtful and informed deliberation.¹²⁵ In upholding a twenty-four-hour waiting period for

¹¹⁹ J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORN. L. REV. 563, 576–77 (1976-1977); Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 243–44 (2004).

¹²⁰ Developments toward treating cohabitation like marriage include the repeal of criminal sanctions against cohabitation, the abolition of legal distinction between legitimate and illegitimate children, and the enforcement of express and implied contracts between cohabitants. See *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (en banc), one of the first cases to recognize rights of cohabiting couples (observing that the social acceptance of nonmarital relationships, including cohabitation without formal marriage, reflects a broader societal shift that courts can no longer dismiss). See also Shahar Lifshitz, *Marriage Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565 (2009).

¹²¹ Some reasonable pause before dissolution is essential to distinguishing marriage from all other relationships. See, e.g., Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 364 (2005) (stating exit costs are greater for marital partners than cohabitants).

¹²² See generally JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 179–93 (1994) (explaining that the authority of law rests in providing general, predictable rules that empower individuals to pursue varied institutional and social choices).

¹²³ Lifshitz, *supra* note 120, at 1593; Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1261 (1998); Siegel, *supra* note 94, at 74, 76.

¹²⁴ Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 438 (2004).

¹²⁵ See, e.g., Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95, 105–06 (discussing the positives and negatives to a waiting period in divorce); Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 92–93 (1990) [hereinafter Scott, *Rational Decisionmaking*] (arguing that mandatory delays before divorce could provide the parties a chance to change course on their divorce decision); Dagan & Heller, *supra* note 13, at 600 (arguing that cooling-off periods allow parties to be more cooperative and prepared in respect to divorce proceedings); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 788, 796 (1983) (noting that these laws are justified by the opportunities for the parties to proceed with

abortion, the pre-*Dobbs* Supreme Court expressly endorsed this logic: “The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable. . . .”¹²⁶ That same rationale applies here with equal force.

This is not to suggest, however, that all time-based restrictions are constitutionally sound. The no-fault option in covenant marriage statutes—a minimum two-year waiting period¹²⁷—amounts to a substantial obstacle for couples seeking marital dissolution.¹²⁸ Justice Marshall, dissenting in *Sosna*, was troubled even by a one-year waiting period, recognizing “the severity of the deprivation suffered”¹²⁹ by a divorce-seeker “lock[ed] . . . into what may be an intolerable, destructive relationship.”¹³⁰ Prolonged exposure to the anxiety and agony of marital limbo may impair quality of life, health, and wealth,¹³¹ prevent individuals in untenable marriages from securing a better future for themselves and their children,¹³² and diminish their prospects of finding a new partner or having children in the future.¹³³ The two-year hurdle is particularly perilous for victims of domestic abuse, as it prolongs their exposure to violence and may even intensify it; the initiation

better judgement); Jones, *supra* note 60, at 857 (arguing that the parties are given an opportunity for reconnection instead of rushed decisions).

¹²⁶ Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 885 (1992); *see also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1224–25 (1996) (noting a court’s view of the waiting period as time for decision-making). Many commentators, however, chastised the Court for suggesting that women do not give their decisions informed and serious attention. *See, e.g.*, Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 940 (1992) (discussing the degrading message the twenty-four-hour waiting requirement sends to all women); McClain, *supra* note 62, at 144–45 (arguing the imposition of the waiting-period is disrespectful and to the detriment of women); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 203–04 (1992) (arguing that the waiting-period would increase the practical obstacles for a woman to get an abortion).

¹²⁷ *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-904(5) (West 1998); LA. STAT. ANN. § 9:307(5) (West 2004).

¹²⁸ Lacey, *supra* note 69, at 1458; Bradford, *supra* note 57, at 622.

¹²⁹ *Sosna v. Iowa*, 419 U.S. 393, 421 (1975) (Marshall, J., dissenting).

¹³⁰ *Id.* at 422.

¹³¹ A prolonged wait may produce economic and psychological hardship for both spouses and their children. *See* Gordon, *supra* note 87, at 1447, 1456, 1461–62 (discussing the effects of prolonged divorce on children); Jones, *supra* note 60, at 863 (noting expert opinions that delayed divorce can increase negative emotions); Bradford, *supra* note 57, at 631 (arguing two years of waiting for divorce is too onerous); Horowitz, *supra* note 22, at 894 (arguing the courts are making divorce proceedings too difficult by imposing waiting periods); VanSickle, *supra* note 28, at 165 (arguing that it is logical to allow parties to exit failing or abusive marriages); Brummer, *supra* note 27, at 263, 293–94 (noting the economic and psychological impacts of waiting periods); *see also, e.g.*, Scott, *Rational Decisionmaking*, *supra* note 125, at 77 (discussing the costs of mandatory delay before divorce); Silberbogen, *supra* note 88, at 234 (arguing that the waiting period produces emotional and financial consequences); Olivas, *supra* note 33, at 791 (discussing how the waiting period put spouses’ lives on hold).

¹³² Ellman & Lohr, *supra* note 87, at 732; DiFonzo, *supra* note 24, at 948.

¹³³ Bartlett, *supra* note 89, at 840; Jane W. Ellis, *Surveying the Terrain: A Review of Divorce Reform at the Crossroads*, 44 STAN. L. REV. 471, 492 (1992).

of divorce often triggers such a sharp escalation in abuse that many battered women are deterred from seeking relief altogether.¹³⁴

In marked contrast to the very real financial, emotional, and other burdens a prolonged mandatory wait imposes on the right to divorce, its benefits to the state remain largely speculative. A two-year delay is both unnecessary and ineffective. It far exceeds the time needed to preserve salvageable marriages¹³⁵—especially in light of the already formidable extra-legal barriers that deter hasty dissolution¹³⁶—and ignores research indicating that most individuals contemplate divorce only after months, or even years, of struggle and deliberation.¹³⁷ Moreover, empirical studies consistently show that reconciliation during a waiting period is the exception rather than the rule.¹³⁸

¹³⁴ See, e.g., Karla Fischer, Neil Vidmar & Rene Ellis, *Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2138–39 (1993) (explaining the dangers separation causes to victims of abuse); Mahoney, *Legal Images*, *supra* note 73, at 76 (describing the heightened danger when the spouse has also requested protective action simultaneously with filing for divorce); Lacey, *supra* note 69, at 1445 (advocating for no mandatory waiting period for battered women who have the chance to leave their marriage); Marcellane Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1160 (1998) (noting that women are most likely to be killed after filing for separation); Michelle L. Toews & Autumn M. Bermea, “*I Was Naive in Thinking, I Divorced This Man, He Is Out of My Life*”: A Qualitative Exploration of Post-Separation Power and Control Tactics Experienced by Women, 32 J. INTERPERSONAL VIOLENCE 2166, 2167–68, 2185–86 (2017) (describing control tactics used by men after separation); Susan L. Miller & Jamie L. Manzer, *Safeguarding Children’s Well-Being: Voices From Abused Mothers Navigating Their Relationships and the Civil Courts*, 36 J. INTERPERSONAL VIOLENCE 4545, 4549, 4564 (2021) (explaining the emotional toll on women to negotiate with their spouse and maintain a new form of relationship with them post-separation).

¹³⁵ A key reason to avoid prolonged waiting periods is that successful reconciliation during a waiting period is the exception, not the rule. See Henry H. Foster Jr., *Current Trends in Divorce Law*, 1 FAM L.Q. 21, 24–25 (1967) (arguing there is a lack of scientific justification for cooling off periods); see also Brigitte M. Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 191 n.57 (citing authorities finding waiting periods ineffective); Susan Hager, Comment, *Nostalgic Attempts to Recapture What Never Was: Louisiana’s Covenant Marriage Act*, 77 NEB. L. REV. 567, 587 (1998) (arguing that the delays to divorce are not productive for the parties); Horowitz, *supra* note 22, at 897 (describing a lack of evidence on the benefits of waiting periods); DiFonzo, *supra* note 93, at 39, 43–45 (explaining the variance in state laws on mandatory waiting periods); DiFonzo, *supra* note 24, at 947–48 (describing the ineffectiveness of waiting periods statutes in lowering divorce rates and the possible consequences of them to the larger institution of marriage). Skeptical liberal theory further makes clear that few people who choose to divorce when faced with a short waiting period would try to make their marriages work if faced with a longer one. See, e.g., Gordon, *supra* note 87, at 1442–43, 1455–56, 1461 (discussing the lack of positive impact restrictive laws have on possible reconciliation); Bartlett, *supra* note 89, at 854 (arguing that the irrationality and emotions involved in family life makes these laws ineffective to sway someone’s behavior).

¹³⁶ See Yefet, *supra* note 3, at Chapter VI, Section III.A.3 (discussing the financial costs, emotional consequences, parenting responsibilities, religious restrictions, and social pressures that serve to limit freedom of divorce).

¹³⁷ See *id.* (summarizing the divorce literature on this point); see also FURSTENBERG & CHERLIN, *supra* note 98 (stating that most couples consider divorcing over a long period of time).

¹³⁸ Empirical examinations indicate that delays of longer than several months fail to divert divorce

Another reason lengthy waiting periods rarely promote responsible decision-making is that they foster defection rather than deliberation. Historically, their primary effect has been to prompt couples to circumvent the regulation—by abandoning one another, entering adulterous cohabitations, or pursuing fault-based grounds as a quicker passport to formal freedom.¹³⁹ Indeed, researchers have consistently found that when mandatory separation periods exceed six months, individuals overwhelmingly opt for more immediate routes to divorce, bypassing the very mechanisms intended to encourage reflection.¹⁴⁰ Worse still, a delay as long as two years is not merely unnecessary, ineffective, or impractical—it may well be self-defeating to the state’s interest in protecting children. Prolonging divorce proceedings traps children in unhealthy environments of sustained—and often escalating—conflict, “the most damaging possible circumstances” for their well-being.¹⁴¹ As the duration of parental conflict increases, so too does the risk of behavioral and psychological harm.¹⁴² Given that most divorces are already preceded by extended periods of tension and turmoil,¹⁴³ compelling couples to wait years longer seems not only unwise, but affirmatively harmful.

Finally, covenant marriage statutes mandate that couples live “separate and apart” prior to filing for divorce. This requirement is constitutionally untenable for two reasons. First, a physical separation may effectively operate as an outright prohibition for couples who cannot afford separate accommodations¹⁴⁴—disproportionately burdening low-income women, in a

or improve marriage. See DiFonzo, *supra* note 93, at 39, 43–45 (discussing the inadequacy of the waiting period); DiFonzo, *supra* note 24, at 947–48 (noting that divorce-seekers turned much more towards cruelty grounds instead to obtain a divorce).

¹³⁹ Gordon, *supra* note 87, at 1457; Bartlett, *supra* note 89, at 827; DiFonzo, *supra* note 93, at 43–44; DiFonzo, *supra* note 24, at 947; Ellman & Lohr, *supra* note 87, at 724–25; Lacey, *supra* note 69, at 1458 n.115; Jones, *supra* note 60, at 863.

¹⁴⁰ Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 86 (1991); Nichols, *supra* note 30, at 414; Lee E. Teitelbaum, *Cruelty Divorce Under New York’s Reform Act: On Repeating Ancient Error*, 23 BUFF. L. REV. 1, 40 (1973); WILLIAM J. GOODE, *WORLD CHANGES IN DIVORCE PATTERNS* 86 (1993); RHEINSTEIN, *supra* note 109, 337–38.

¹⁴¹ ASHTON APPLEWHITE, *CUTTING LOOSE: WHY WOMEN WHO END THEIR MARRIAGES DO SO WELL* 66 (1997).

¹⁴² Ayoub, Deutsch & Maraganore, *supra* note 107, at 299.

¹⁴³ *Id.* at 309; FURSTENBERG & CHERLIN, *supra* note 98, at 21.

¹⁴⁴ A divorce-seeker who is forced to live separate and apart from one’s spouse incurs almost double the expenses of living together. Spaht, *supra* note 8, at 83 n.91. Consequently, for many couples, complete separation of households is not economically feasible. See GWYNN DAVIS & MERVYN MURCH, *GROUNDS FOR DIVORCE* 143 (1988) (discussing the inability of some couples to divorce based on a lack of alternative accommodations); Dervla Browne, *Divorce in Other Jurisdictions: Including an Overview of the White Paper*, in *DIVORCE? FACING THE ISSUES OF MARITAL BREAKDOWN* 71, 76 (Mags O’Brien ed., 1995) (noting that some couples cannot afford to live apart); Sarah E. Fette, *Learning from Our Mistakes: The Aftermath of the American Divorce Revolution as a Lesson in Law to the Republic of Ireland*, 7 IND. INT’L & COMPAR. L. REV. 391, 425 (1997) (describing the limitations of the law for those who cannot afford to live separately).

pattern well-documented in family law research.¹⁴⁵ Indeed, divorce research confirms that some couples continue to cohabit post-divorce due to the economic constraints of living apart.¹⁴⁶ Regulatory schemes that inflate the cost of exercising fundamental rights have been deemed constitutionally impermissible in other contexts.¹⁴⁷ Second, the “separate and apart” requirement invites intrusive judicial scrutiny into the most intimate aspects of couples’ lives. Courts have not hesitated to probe sexual habits, domestic arrangements, and even the emotional tenor of the household to determine whether the separation is sufficiently “authentic.” These voyeuristic incursions violate the right to privacy and entrench gendered, heteronormative assumptions about how families ought to endure, perform, and part.¹⁴⁸

In sum, a waiting period is, in principle, constitutionally permissible: it targets the decisional process itself—reflecting society’s legitimate interest in safeguarding marriage—without, in the words of the *Casey* Court, infringing upon the individual’s “right to make the ultimate decision.”¹⁴⁹ But when the state’s aim of discouraging impulsive decisions is weighed against its duty to minimize the burdens of prolonged delay, the constitutional balance tips in favor of burden minimization. A timeframe of six months, or at most one year, should mark the upper limit of permissible delay: such a window affords adequate time to serve any legitimate state interest in reflection, while minimizing the emotional, physical, and financial toll on families.¹⁵⁰ Anything longer unjustifiably compounds harm and deters, rather than informs, the exercise of a fundamental right.

C. Mandatory Marital Counseling Requirement

Predivorce counseling requirements evoke the logic of the informed consent provisions for abortion that were upheld in *Casey*. Just as the joint

¹⁴⁵ See, e.g., Laurie S. Kohn, *Justice Delayed by Design: The Harms of Our Protracted Divorce System*, 70 VILL. L. REV. 169, 176, 193–208, 213 (2025) (analyzing the harm divorce actions exert on low-income women).

¹⁴⁶ Gunhild O. Hagestad & Michael A. Smyer, *Dissolving Long-Term Relationships: Patterns of Divorcing in Middle Age*, in 4 PERSONAL RELATIONSHIPS: DISSOLVING PERSONAL RELATIONSHIPS 171, 173 (Steve Duck ed., 1982).

¹⁴⁷ See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 434, 438 (1983) (invalidating the second-trimester hospitalization requirement, reasoning that its “additional cost to the woman,” unduly burdened “women’s access to a relatively inexpensive, otherwise accessible, and safe abortion procedure”); *Planned Parenthood Ass’n of Ark. City v. Ashcroft*, 462 U.S. 476, 489–90 (1983) (sustaining a pathology reporting provision because the costs it imposed on abortions were “comparatively small” and would “not significantly burden” the choice).

¹⁴⁸ See Claire P. Donohue, *Fifty Ways to Leave Your Lover: Doing Away with Separation Requirements for Divorce*, 96 S. CALIF. L. REV. 77, 80 (2022), for an analysis of the deeply personal problems inherent in separation requirements.

¹⁴⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992) (O’Connor, Kennedy & Souter, JJ., plurality opinion).

¹⁵⁰ *But see* Horowitz, *supra* note 22, at 893 (suggesting that even a delay as short as six months is unreasonable).

opinion in *Casey* viewed certain provisions of the Pennsylvania Abortion Control Act as facilitating thoughtful decision-making, mandatory counseling for divorce may be framed as serving a similar function.¹⁵¹ Even at the height of constitutional protection for abortion, the Supreme Court emphasized that a fundamental right entails “the right to make the ultimate decision, not a right to be insulated from all others in doing so,”¹⁵² such that the state may compel individuals to confront the intellectual, emotional, and spiritual dimensions of their choices.¹⁵³ This conception of fundamental rights, scholars have pointed out, moves us towards an understanding that fundamental rights imply communal, not only individualistic, interests.¹⁵⁴ Viewed through this lens, mandatory predivorce counseling appears less as a substantial obstacle to exiting marriage and more as a permissible expression of the communal interest in encouraging responsible and reflective decision-making.

Even assuming, *arguendo*, that mandatory counseling could qualify as a constitutionally permissible barrier to divorce—a proposition I shall shortly resist—constitutional safeguards would still be required to ensure that such counseling does not unduly burden the right to marital freedom. First, counseling must be limited in duration so as not to substantially delay marital exit. Counselors and judges must be barred from prolonging the process beyond a statutorily prescribed period,¹⁵⁵ and discretion should be granted to shorten or waive counseling in appropriate cases. As currently structured, however, covenant marriage laws are deficient in this respect: they prescribe no temporal boundaries for counseling and provide no clear guidelines to delimit the authority of counselors.¹⁵⁶

Second, if counseling is made a prerequisite for divorce, it must be subsidized for those unable to pay¹⁵⁷—offered either free of charge or on a sliding scale based on income.¹⁵⁸ Under *Boddie v. Connecticut*, it is unconstitutional to deny access to divorce solely due to indigence.¹⁵⁹ A state-mandated counseling requirement, if not financially accessible, effectively operates as a wealth-based barrier to marital exit.

Third, any mandatory counseling regime must include explicit statutory exemptions, at a minimum, for cases involving spousal and child abuse.

¹⁵¹ See *Casey*, 505 U.S. at 883 (stating that a mature and informed decision is no undue burden).

¹⁵² *Id.* at 877 (O'Connor, Kennedy & Souter, JJ., plurality opinion).

¹⁵³ *Id.* at 872.

¹⁵⁴ Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 HASTINGS L.J. 961, 966–97 (1994).

¹⁵⁵ See, e.g., Rheinstein, *supra* note 56, at 637 (arguing courts should not delay divorce absent facts constituting “condonation, recrimination or connivance”).

¹⁵⁶ See, e.g., Olivas, *supra* note 33, at 790 (noting the uncertainty the Act causes due to the lack of specificity).

¹⁵⁷ *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). See also Carriere, *supra* note 10, at 1712 (discussing the need to fund required counseling for those who cannot afford it).

¹⁵⁸ Lacey, *supra* note 69, at 1461; Hager, *supra* note 135, at 581, 587.

¹⁵⁹ For a discussion of *Boddie* and other monetary requirements, see *infra* Section II.C.

Covenant marriage statutes fail this test: they impose counseling indiscriminately, without regard to the grounds for divorce or to the surrounding circumstances,¹⁶⁰ even though such requirements may pose a serious security risk or a considerable financial obstacle to exit in abusive relations.¹⁶¹ They not only prolong a dangerous union, but also compel continued contact with the abuser, jeopardizing the safety, dignity, and autonomy of survivors.¹⁶² Indeed, even ardent proponents of covenant marriage have urged the elimination of counseling requirements in cases involving domestic violence.¹⁶³

Fourth, concerns of informational privacy demand that all communications made during counseling be rendered inadmissible in any subsequent legal proceedings. Such a rule would protect the privacy of marital partners, while simultaneously advancing the state's interest in fostering candid and productive dialogue. By shielding participants from the threat of later exposure, embarrassment, or legal disadvantage, confidentiality promotes the very conditions necessary for effective counseling.¹⁶⁴

Even with appropriate limitations, a mandatory counseling requirement remains constitutionally suspect. While such programs may pursue laudable aims—preserving viable marriages and reinforcing the notion that divorce is a measure of “last resort”¹⁶⁵—they compel litigants to disclose the most intimate details of their marital lives to a state-sanctioned agent, thereby infringing on informational privacy.¹⁶⁶ Moreover, insofar as the requirement vests judges or counselors with discretion to obstruct marital exit, it threatens not only privacy, but also

¹⁶⁰ LA. STAT. ANN. § 9:307 (West 2004); ARK. CODE ANN. § 9-11-804(a)(2) (West 2011). See Brummer, *supra* note 27, at 281 (discussing the harm that the statutory requirements of seeking counseling for marital difficulties may cause).

¹⁶¹ The requirement to participate in mandatory marriage counseling will further delay release and jeopardize safety in abusive marriages. See Carriere, *supra* note 10, at 1714–17 (recognizing the dangers compulsory counseling has in domestic violence situations); Brummer, *supra* note 27, at 293 (arguing that the restrictions of access to divorce under covenant marriage force a spouse to undergo further abuse).

¹⁶² Hamm, *supra* note 9, at 90; Carriere, *supra* note 10, at 1716–17; Matthew J. Astle, Essay, *An Ounce of Prevention: Marital Counseling Laws as an Anti-Divorce Measure*, 38 FAM. L.Q. 733, 749 (2004). Compulsory counseling may trigger “separation assault.” See Mahoney, *Legal Images*, *supra* note 73, at 6, 64–65 (proposing the name “separation assault” to describe the dangers women endure in separation and divorce). See also Carriere, *supra* note 10, at 1716 (discussing the dangers victims of abuse face when required to attend counseling).

¹⁶³ See, e.g., Hamm, *supra* note 9, at 90 (arguing an exception to predivorce marriage counseling is necessary to keep those in abusive relationships out of danger); Nichols, *supra* note 7, at 954 (discussing the safety threats of the covenant marriage counseling requirement for abuse victims).

¹⁶⁴ Philip L. Hammer, *Divorce Reform in California: The Governor's Commission on the Family and Beyond*, 9 SANTA CLARA L. REV. 32, 45 (1968).

¹⁶⁵ Astle, *supra* note 162, at 750; Gordon, *supra* note 87, at 1463; J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 136 (1997).

¹⁶⁶ See Seidelson, *supra* note 97, at 88–89, 91 (discussing the harms of investigative process of marriage counseling); Rheinstein, *supra* note 56, at 638–640 (rejecting the effectiveness of psychotherapy in promoting reconciliation).

the core constitutional value of decisional autonomy. Precisely because mandatory marital counseling carries such “frightful possibilities,”¹⁶⁷ at least one American jurisdiction has struck down this a requirement as unconstitutional.¹⁶⁸

The constitutional infirmity is only heightened by the demonstrated ineffectiveness of compulsory counseling in advancing the state’s interest. Empirical evidence across jurisdictions, including the United States,¹⁶⁹ reveals that mandatory counseling does little—if anything—to promote reconciliation. Indeed, it is frequently described as “self-defeating,”¹⁷⁰ “useless and impracticable,”¹⁷¹ and a “complete farce,”¹⁷² that accomplishes “nothing,”¹⁷³ and, in some cases, exacerbating rather than alleviating spousal conflict.¹⁷⁴ Far from fostering harmony, coerced counseling may deepen resentment and undermine the very relationships it purports to save. If the state genuinely seeks to reduce unnecessary divorces and support marital stability, it should focus its efforts on funding accessible, voluntary counseling services. Such an approach would provide real support for couples motivated to reconcile, without imposing undue burdens on constitutional rights. In short, the path to promoting family cohesion lies in persuasion, not coercion.

* * *

I have argued that the covenant marriage experiment is unlikely to achieve its stated objectives and is highly likely to infringe upon fundamental rights. Both propositions weigh decisively against the legislation’s constitutional legitimacy. Yet, this conclusion does not bring the inquiry to a close. The element of choice—valorized within liberal

¹⁶⁷ Rheinstein, *supra* note 56, at 639.

¹⁶⁸ *People ex rel. Bernat v. Bicek*, 91 N.E.2d 588, 595 (Ill. 1950).

¹⁶⁹ For example, a California program enacted in the 1950s, which allowed one spouse to compel the other to attend a “conciliation hearing” failed miserably, even though at least one spouse presumably wanted to save the marriage. DIFONZO, *supra* note 165, at 133–37; Carriere, *supra* note 10, at 1712. A legislative experiment in New Jersey establishing “quasi-mandatory marriage counseling” for divorcing couples was also a massive failure, with a success rate below three percent, and a conciliation procedure attempted in New York was abandoned because of its even lower success rate of under one percent. *Id.* at 1712; DIFONZO, *supra* note 165; RHEINSTEIN, *supra* note 109, at 360; JACOB, *supra* note 104, at 42.

¹⁷⁰ Carriere, *supra* note 10, at 1711; *See also* Victor J. Baum, *A Trial Judge’s Random Reflections on Divorce: The Social Problem and What Lawyers Can Do About It*, 11 WAYNE L. REV. 451, 470 (1965) (compulsory counseling may be counterproductive and may even result in the loss of any prospect of reconciliation).

¹⁷¹ Carriere, *supra* note 10, at 1711; *See also* Baum, *supra* note 170, at 470.

¹⁷² John Leslie Goddard, *The Proposal for Divorce upon Petition and Without Fault*, 43 J. STATE BAR CAL. 90, 98 (1968).

¹⁷³ Olivas, *supra* note 33, at 791.

¹⁷⁴ Lindsey, *supra* note 3, at 282–83; Hammer, *supra* note 164, at 42; Victor J. Baum, *Law and Social Work: Marriage Counseling, A Case in Point*, 3 J. FAM. L. 279, 284 (1963).

political theory—assumes central importance at this stage of the inquiry.¹⁷⁵ The principal virtue of the legislation, supporters contend, lies in its capacity to allow the state to endorse traditional family values without imposing them on those who reject that vision.¹⁷⁶ But does the fact that couples are free to choose the covenant model of marriage suffice to secure its constitutional validity?¹⁷⁷

III. THE FREEDOM TO WAIVE CONSTITUTIONAL FREEDOM

The question at the heart of this Section is whether a person may constitutionally surrender a fundamental right and, if so, whether the decision to enter into a covenant marriage constitutes a genuinely voluntary waiver of marital freedom. If a state were to promote covenant marriage by conferring certain benefits upon participants,¹⁷⁸ such a scheme would likely run afoul of the Supreme Court's unconstitutional conditions doctrine.¹⁷⁹ According to this body of jurisprudence, the state may not condition the receipt of a public benefit on the waiver of a constitutional right—that is, on the performance or nonperformance of conduct that the Constitution otherwise protects from government interference.¹⁸⁰ A condition of this type, though exerting only indirect pressure on fundamental liberties, is

¹⁷⁵ See Olivas, *supra* note 33, at 784 (discussing the choice couples have under the Louisiana Covenant Marriage Act whether to enter into a covenant marriage or not); Brummer, *supra* note 27, at 292 (labeling covenant marriage as voluntary in nature).

¹⁷⁶ Tony Perkins, *Covenant Marriage: A Legislator's Perspective*, 12 REGENT U. L. REV. 27, 29 (1999); Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1500 (2000).

¹⁷⁷ Some commentators certainly think so. VanSickle, *supra* note 28, at 157; Nichols, *supra* note 7, at 960; Katherine Shaw Spaht, *How Law Can Reinvigorate a Robust Vision of Marriage and Rival Its Post-Modern Competitor*, 2 GEO. J.L. & PUB. POL'Y 449, 464–66 (2004); Shultz, *supra* note 64, at 333.

¹⁷⁸ This is a real risk given that covenant unions still make up a very small portion of the marriages performed in all three states. ALISON CLARKE-STEWART & CORNELIA BRENTANO, *DIVORCE: CAUSES AND CONSEQUENCES* 239 (2006); VanSickle, *supra* note 28, at 163; O'Brien, *supra* note 65, at 366.

¹⁷⁹ See *TRIBE*, *supra* note 22, at 681 (explaining that the unconstitutional conditions doctrine forbids the government from conditioning the receipt of its benefits on the nonassertion of constitutional rights); *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1399 (1970) [hereinafter *Unconstitutionality*] (discussing how Supreme Court jurisprudence forbids the government from conditioning a benefit on an individual's relinquishment of their Fifth Amendment privilege against self-incrimination). For a relatively recent Supreme Court case that discusses this doctrine, see *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). For a recent critique of the case law applying this doctrine, see generally Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 YALE L.J. 1401 (2024); Ryan C. Williams, *Unconstitutional Conditions and the Constitutional Text*, 172 U. PA. L. REV. 747 (2024).

¹⁸⁰ Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 887 (1980). For an analysis of this doctrine and the Supreme Court cases establishing it, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1477–89 (1989); *Constitutional Alternatives to Plea Bargaining: A New Waive*, 132 U. PA. L. REV. 327, 331–35 (1984).

considered just as suspect as direct burdens in part because of its coercive effect on the beneficiary.¹⁸¹

Covenant marriage as currently enacted, however, presents a more complex problem because the state offers no material benefits to those who opt into the regime. In such circumstances, is it constitutionally permissible to waive one's right to divorce—either statutorily, through adherence to a covenant marriage framework, or contractually, by executing a prenuptial agreement?¹⁸² And if so, what qualifies as a valid waiver? The Supreme Court's waiver jurisprudence, alongside the philosophical foundations of inalienable rights, offers important insight into these constitutional and conceptual puzzles.

A. *Marital Freedom as a Waivable Right?*

What is the American approach to the freedom not to be free? In principle, within a legal culture that valorizes autonomy, voluntary waivers of rights are entitled to deference.¹⁸³ Accordingly, waivers are recognized across virtually every domain of law and are applied to nearly every category

¹⁸¹ Sullivan, *supra* note 180, at 1419–20. Other rationales for the unconstitutional conditions doctrine is the systemic effects on the distribution of rights in the polity that a condition of this type may have, or its potential to corrupt legislative processes and “commodify” constitutional rights. *Id.* at 1420–21. Even if the government has “absolute discretion to grant or deny a privilege or benefit, it simply cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.” Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988). The less germane a condition to a benefit, the closer the scrutiny. Sullivan, *supra* note 180, at 1457. Consequently, the Supreme Court has struck down various schemes granting a variety of benefits in return for the individual's waiver of fundamental rights. *Id.* at 1416.

¹⁸² The question of waiver of divorce rights relates not only to covenant marriage, but also to contractual arrangements between the parties. To be sure, judicial enforcement of such agreements makes the court entangled in the right's infringement and amounts to “state action” that triggers constitutional protections. *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948); *TRIBE*, *supra* note 22, § 18-6, at 1714–15; Joline F. Sikaitis, Comment, *New Form of Family Planning? The Enforceability of No-Child Provisions in Prenuptial Agreements*, 554 CATH. U. L. REV. 335, 364 (2004). As of today, the American Law Institute declares unenforceable agreements limiting or enlarging the “grounds for divorce otherwise available under state law.” PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.08(1) (A. L. I. 2002). Not everyone agrees, however. For example, in *Massar v. Massar*, 652 A.2d 219 (N.J. Super. Ct. App. Div. 1995), the court enforced an agreement in which a wife agreed to waive her access to fault-based divorce and limit her divorce options to New Jersey's no-fault ground requiring an eighteen-month separation, instructing that the validity of contractual limits on divorce should be decided on an individual basis.

¹⁸³ Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1712 (1992). Despite the problems that inhere in an autonomy model, Winick concludes that the conception of “the individual as an autonomous decisionmaker . . . is a useful foundation upon which to build a legal system. . . . [and] to place limitations on governmental power.” *Id.* at 1769. Indeed, the ability to make binding commitments is widely considered an important aspect of individual liberty. THOMAS C. SCHELLING, *CHOICE & CONSEQUENCE* 98 (1984); CHARLES FRIED, *CONTRACT AS PROMISE* 13 (1981); Julia Halloran McLaughlin, *Should Marital Property Rights Be Inalienable? Preserving the Marriage Ante*, 82 NEB. L. REV. 460, 494 (2003).

of legal right.¹⁸⁴ Beyond their value as expressions of personal autonomy, waivers are respected because in certain contexts individuals may be better off relinquishing rights than retaining them¹⁸⁵ and because waivers can streamline decision-making and enhance legal flexibility.¹⁸⁶ Nonetheless, waivers may at times prove undesirable—either because the alternatives to protected rights are substantively inferior, because the waiver itself is not freely chosen but coerced, implicit, or poorly understood,¹⁸⁷ or because it undermines a public constitutional value.¹⁸⁸

In an attempt to preserve the virtues of waiver while minimizing its risks, the Supreme Court has set a strict standard for valid waivers of fundamental rights. In the criminal context, all reasonable presumptions against waivers of fundamental rights must be indulged.¹⁸⁹ To be constitutionally valid, a waiver must be “voluntary . . . knowing, [and] intelligent.”¹⁹⁰ That is, the individual must possess “sufficient awareness of

¹⁸⁴ I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1186 (2008); Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 233 (1985); see, e.g., *New York v. Hill*, 528 U.S. 110, 114 (2000) (recognizing that a criminal defendant may constitutionally waive statutory time limits under the Interstate Agreement on Detainers).

¹⁸⁵ Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 489 (1981) (citing as an example the right not to be subject to experiment, which may prove extremely burdensome for a patient for whom an experimental operation may be lifesaving); see *United States v. Barnett*, 415 F.3d 690, 691 (7th Cir. 2005) (observing that the defendant chose to waive his privacy rights because doing so was preferable to incarceration).

¹⁸⁶ Rubin, *supra* note 185, at 488–89.

¹⁸⁷ *Id.* at 489–90. One oft-cited example of the dangers of waiver concerns plea bargaining. Several commentators view plea bargaining as inherently unconstitutional because it necessarily involves threats (of punishments) and promises (of leniency). See, e.g., *Unconstitutionality*, *supra* note 179, at 1395–407 (1970) (arguing that plea bargaining is unconstitutional because it relies on coercive threats and promises that pressure defendants to waive core Fifth and Sixth Amendment rights).

¹⁸⁸ Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 863–65 (2003).

¹⁸⁹ *Johnson v. Zerbst*, 304 U.S. 458, 463–64 (1938); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

¹⁹⁰ *Brady v. United States*, 397 U.S. 742, 748 (1970). The three-part test has developed gradually over time, beginning in the Court’s 1938 decision in *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938), which held that a defendant must waive constitutional rights competently and intelligently. The strict waiver standard espoused by *Johnson v. Zerbst* has been applied to a range of criminal issues, including the Sixth Amendment right to counsel, right to trial by jury, right to confront one’s accusers, and right to remain silent. See *Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver of counsel); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (waiver of counsel); *In re Gault*, 387 U.S. 1, 34–35 (1967) (waiver of counsel in a juvenile proceeding); *Brady v. United States*, 397 U.S. 742, 748 (1970) (entering a guilty plea); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (entering a guilty plea); *Adams v. United States ex rel McCann*, 317 U.S. 269, 278–79 (1942) (waiver of jury trial); *Barker v. Wingo*, 407 U.S. 514, 525–26 (1972) (waiver of speedy trial); *Miranda v. Arizona*, 384 U.S. 436, 466–67 (1966) (waiver of right to silence and to counsel in pretrial custody); *Green v. United States*, 355 U.S. 184, 191–92 (1957) (discussing how the defendant did not waive their right to be protected from double jeopardy); *Smith v. United States*, 337 U.S. 137, 149–50 (1949) (waiver of privilege against self-incrimination); *Emspak v. United States* 349 U.S. 190, 195–98 (1955) (discussing how the defendant did not waive his privilege against self-incrimination). For a list of lower court cases applying this standard, see Elizabeth S. Crook,

the relevant circumstances and likely consequences”¹⁹¹ of the decision, and the waiver must not be “extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.”¹⁹²

In the civil context, however, the requirements for waiving constitutionally protected rights remain ill-defined. Despite some dicta suggesting that the familiar three-part waiver test applies to all fundamental rights,¹⁹³ the Supreme Court has never expressly extended the criminal waiver standard to civil matters. In the absence of clear guidance, lower courts have developed a range of doctrinal tests governing the waiver of civil constitutional rights, with the applicable standard often varying according to the method of waiver or the type of right waived.¹⁹⁴

In re Blessen H.: *Lower Waiver Standard in CINA Proceedings Satisfies Due Process and Leaves Policy Issue to Legislature*, 66 MD. L. REV. 1186, 1194 nn.87 & 92–94 (2007).

It is noteworthy that even in the criminal context, courts have failed to consistently apply this strict standard for waivers. See, for example, *Schneckloth v. Bustamonte*, 412 U.S. 218, 241–42 (1973), in which the Court distinguished consent to search from consent to waive other constitutional protections, declining to apply the strict waiver standard to the Fourth Amendment right to be free from unreasonable search or seizure. Distinguishing between the rights that protect a fair criminal trial (such as the right to counsel) and Fourth Amendment protections, which guard individual privacy against arbitrary police invasion, the Court explained that the heightened waiver standard has almost always been applied exclusively to fundamental rights preserving a fair trial, while Fourth Amendment protections “are of a wholly different order.” *Id.* Thus, a much less demanding standard has also been applied to such rights as the right to be tried in the district where the offense was committed. See *United States v. Turcotte*, 515 F.2d 145, 150 n.11 (2d Cir. 1975), *cert. denied sub nom. Gerry v. United States*, 423 U.S. 1032 (1975); see also Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669, 709 & n.185 (2001) (noting that courts have found it sufficient for a company to show it mailed materials containing an arbitration clause to establish assent by employees or consumers).

¹⁹¹ *Brady*, 397 U.S. at 748.

¹⁹² *Id.* at 753.

¹⁹³ In *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 184–87 (1972), the Supreme Court case dealing most directly with the issue of contractual waiver of constitutional rights, the Court upheld a contractual waiver of due process rights in a “cognovit note” (or confession of judgment), rejecting the argument that it was “unconstitutional to waive in advance the right to present a defense in an action on the note,” finding that Overmyer had “voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences.” *Id.* at 184, 187–88; *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972); Crook, *supra* note 190, at 1193; Nick Anderson, *Dr. Jekyll’s Waiver of Mr. Hyde’s Right to Refuse Medical Treatment: Washington’s New Law Authorizing Mental Health Care Advance Directives Needs Additional Protections*, 78 WASH. L. REV. 795, 811 (2003); see Wayne Klomp, Note, *Harmonizing the Law in Waiver of Fundamental Rights: Jury Waiver Provisions in Contracts*, 6 NEV. L.J. 545, 559 (2005) (noting support for applying the waiver factors used in criminal cases to evaluate the enforceability of contractual waivers). *But see* *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971) (interpreting the scope of a defendant’s waiver of the right to litigate issues in a consent decree based on the agreement’s “four corners,” rather than the purposes of either party); Rubin, *supra* note 185, at 514 (discussing how courts have employed the principles of contract law for evaluating waivers of the right to civil trial).

¹⁹⁴ Consider, for example, the waiver standard applied in arbitration clauses, property-deprivation cases, forum-selection cases, and consent-to-jurisdiction cases (contract-law standards) to the one governing jury-waiver clauses (the three-part test). Stephen J. Ware, *Arbitration Clauses, Jury-Waiver*

While dispute persists over the appropriate legal framework for evaluating civil waivers, there is no serious dispute that certain rights are categorically unwaivable—no matter how voluntary, informed, or intelligent their relinquishment may appear.¹⁹⁵ Even John Stewart Mill, among the most ardent philosophical defenders of personal autonomy, acknowledged that the liberty to surrender liberty cannot be boundless.¹⁹⁶ The paradigmatic example of an unwaivable right in the American constitutional tradition is the Thirteenth Amendment’s prohibition of slavery.¹⁹⁷ Courts have also treated as unwaivable a range of procedural and substantive guarantees, including the right to representation free from conflicts of interest,¹⁹⁸ the right to a unanimous jury verdict,¹⁹⁹ the right to be present at a capital trial,²⁰⁰ the right to raise a plea of incompetence to

Clauses, and Other Contractual Waivers of Constitutional Rights, 67 L. & CONTEMP. PROBS. 167, 181–98, 202–03 (2004); Rubin, *supra* note 185, at 512. As to contractual waiver of due process rights in the civil context, a plethora of lower court decisions have applied, albeit inconsistently, the “voluntary, knowing, and intelligent” standard to assess the waiver’s validity. *See, e.g.*, *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir. 1997) (holding that plaintiffs knowingly and intelligently waived their right to privacy, which includes the right not to have their HIV status disclosed); *Lake James Cmty. Volunteer Fire Dep’t, Inc. v. Burke Cnty.*, 149 F.3d 277, 280–81 (4th Cir. 1998) (holding that a plaintiff voluntarily, knowingly, and intentionally waived the statutory right to challenge the county’s transfer of fire protection areas to other fire departments). For a cogent critique of the law of waiver, see generally Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 56–57 (1997) (arguing that courts too readily find waiver of constitutional rights in arbitration agreements, and that such waivers are often neither knowing nor voluntary).

¹⁹⁵ Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2012 (2000); Rubin, *supra* note 185, at 494; *see* *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (“There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived.”); *United States v. Gambino*, 59 F.3d 353, 359–60 (2d Cir. 1995) (holding that defendants generally may not waive the protections of the Speedy Trial Act, 18 U.S.C. §§ 3161–74).

¹⁹⁶ *See* JOHN STUART MILL, ON LIBERTY 184 (2d ed. 1859) (“The principle of freedom cannot require that he should be free not to be free.”).

¹⁹⁷ *Id.*; *Pollock v. Williams*, 322 U.S. 4, 24 (1944); *see* Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 291 (2003) (“[P]romotion of autonomy requires that individuals relinquish the freedom or right to give up . . . autonomy itself.”); Kronman, *supra* note 125, at 766–80 (offering economic justifications for the non-waivability of the implied warranty of habitability). *But see* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 58, 331 (1974) (arguing for a non-paternalistic position that permits individuals to make choices regarding their own lives, including suicide or voluntary slavery).

¹⁹⁸ *Wheat v. United States*, 486 U.S. 153, 162–63 (1988).

¹⁹⁹ Blank, *supra* note 195, at 2052.

²⁰⁰ *Diaz v. United States*, 223 U.S. 442, 455 (1912); *Proffitt v. Wainwright*, 685 F.2d 1227, 1257 (11th Cir. 1982) (“[O]ur review of the relevant case law convinces us that presence at a capital trial is nonwaivable.”). As to non-capital cases, the Supreme Court has reaffirmed in several cases that a defendant can waive his presence at trial. *Taylor v. United States*, 414 U.S. 17, 18–19 (1973) (*per curiam*); *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970).

stand trial,²⁰¹ the privilege against self-incrimination,²⁰² and the right to avoid cruel and unusual punishment.²⁰³

Despite widespread recognition that certain rights are unwaivable, courts have failed to explain in any depth why some rights may never be waivable, why others may be waived prospectively, and why still others are waivable only contemporaneously—or, to use the vernacular of some scholars, why certain rights are deemed *inalienable*.²⁰⁴ To be sure, it is clear that the line does not fall neatly between procedural and substantive rights. First Amendment protections, among the most revered substantive guarantees in American constitutional culture, may be waived in certain

²⁰¹ *Pate v. Robinson*, 383 U.S. 375, 384–85 (1966); Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, 17 J. CONTEMP. HEALTH L. & POL'Y 432, 443 (2001).

²⁰² *Stevens v. Marks*, 383 U.S. 234, 244 (1966).

²⁰³ See Catherine Rylyk, Note, *Lest We Regress to the Dark Ages: Holding Voluntary Surgical Castration Cruel and Unusual, Even for Child Molesters*, 16 WM. & MARY BILL RTS. J. 1305, 1336–40 (2008) (discussing the rationales for the non-waivability of Eighth Amendment protections and surveying court decisions holding the same); Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 646–51 (2000) (arguing that the Eighth Amendment's ban on cruel and unusual punishment sets structural limits on the state that cannot be waived by an individual's consent).

²⁰⁴ See Blank, *supra* note 195 (noting that while courts have recognized that most rights can be waived and some cannot, they have failed to articulate a clear explanation for this distinction); Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 760 (1988) (noting that the Supreme Court's articulation of the principles underlying its waiver jurisprudence in the plea-bargaining context has been inconsistent and incoherent). For a thorough definition of waiver and an attempt to distinguish between three concepts of waiver, see John T. Hundley, "Inadvertent Waiver" of Evidentiary Privileges: *Can Reformulating the Issue Lead to More Sensible Decisions?*, 19 S. ILL. U. L.J. 263, 270–72 (1995). For the current state of disarray in the field, see Simona Grossi, *The Waiver of Constitutional Rights*, 60 HOUS. L. REV. 1021, 1024, 1060 (2023) ("[E]ven though almost all of our constitutional rights are waivable, there is not a fully developed system of criteria or set of considerations through which we can determine whether a particular constitutional right is in fact waivable.").

contexts.²⁰⁵ So too may some substantive due process rights²⁰⁶—parental rights, for example, can be relinquished through consent to adoption.²⁰⁷

Legal scholars have long sought to fill in this doctrinal void. In the criminal context, numerous efforts, albeit fragmented and contradictory,²⁰⁸ have been made to construct a general theory of waiver, one that could explain when, why, and under what circumstances relinquishment of constitutional protections by defendants is permissible.²⁰⁹ In the civil

²⁰⁵ Both free exercise rights and free expression rights may be subject to waiver. *See, e.g.*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (addressing the waiver of First Amendment rights); *Snepp v. United States*, 444 U.S. 507, 510 (1980) (per curiam) (holding that contractual waiver of the First Amendment “right to publish unclassified information” is permissible); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665, 672 (1991) (noting that First Amendment rights can be waived by contract); *Murray v. Town of N. Hempstead*, 853 F. Supp. 2d 247, 259–60 (E.D.N.Y. 2012) (holding that First Amendment rights may be waived provided that there is clear and convincing evidence that the waiver is intelligent, knowing, and voluntary). The federal courts of appeals have similarly allowed the waiver of freedom of speech. *See, e.g.*, *Leonard v. Clark*, 12 F.3d 885, 889–92 (9th Cir. 1993) (holding that the plaintiff voluntarily, knowingly and intelligently waived its First Amendment rights); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1314–15 (8th Cir. 1991) (finding that the plaintiff had voluntarily bargained away its commercial free speech rights). For waiver of free exercise right, see *Flynn v. Maine Emp. Sec. Comm’n*, 448 A.2d 905, 909 (Me. 1982) (holding that the plaintiff knowingly waived his free exercise rights by accepting a job), *cert. denied*, 459 U.S. 1114 (1983); *Marshall*, *supra* note 183 (“Given the fact that waivers are recognized in cases involving actual life and physical liberty, there is no reason to believe that they should be rejected in the free exercise context.”); *see also* *Cohen*, *supra* note 183, at 1188 (“[F]ew rights are more hallowed than that of freedom of expression, and yet the right can be waived by contract.”); *Rubin*, *supra* note 185, at 521–22 (distinguishing between waivers related to the adjudication process and waivers of substantive rights). *See generally* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORN. L. REV. 261 (1998) (critiquing advance waivers of free-speech rights and urging that only narrow, carefully circumscribed contractual waivers be enforced).

²⁰⁶ *See* Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 351 (2004) (discussing waiver of privacy rights guaranteed by the Constitution).

²⁰⁷ *Klomp*, *supra* note 193, at 564; ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS, 46, 220 n.34 (2004).

²⁰⁸ *Blank*, *supra* note 195, at 2013.

²⁰⁹ The suggested theories are variously drawn from principles of due process, contracts, public policy, and economics. *See* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1383 (1984) (discussing how waivers of constitutional rights ensure the protection of individual choice and autonomy). The scholarly writing has been particularly prolific in the context of analyzing the issue of plea bargains. *See, e.g.*, Richard P. Adelstein, *The Negotiated Guilty Plea: A Framework for Analysis*, 53 N.Y.U. L. REV. 783, 786 (1978) (discussing plea-bargaining as a cost-reducing device); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 683–86 (1981) (arguing against the view of plea-bargaining as effective form of dispute resolution); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1978 (1992) (noting that the legitimacy of plea bargains is supported by autonomy and efficiency); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 41 (1983) (analyzing plea-bargaining through a contract model); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992) (arguing that an economic analysis of plea bargaining supports its abolition); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1188–89 (1998) (proposing that prosecutors adopt office level standards for plea-bargaining to ensure fairness); David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 941 (1997) (discussing how public policy should inform an analysis of whether a defendant’s waiver should be validated).

context, the questions are even more unsettled.²¹⁰ Scholarly attempts to articulate coherent rationales for civil waivers have thus far failed to produce a unified or widely accepted theoretical framework.²¹¹

One of the most comprehensive theories of waiver is that of Jessica Berg, who carefully distinguishes the constitutional context from ordinary legal or contractual domains. Her account properly recognizes that constitutional rights raise distinct concerns, particularly in relation to individual autonomy.²¹² On Berg's view, whether and how a right may be waived depends on the implications of both the right itself and its relinquishment for personal autonomy.²¹³ The theory generally defers to waivers as legitimate exercises of autonomy²¹⁴ and tolerates legal limitations only when the loss of autonomy resulting from the waiver outweighs the autonomy gained through the act of waiving the right.²¹⁵ Drawing on the work of Richard Fallon, Berg classifies rights into three categories, each with different implications for waiver. First, *ascriptive autonomy rights*,

²¹⁰ Gostin, *supra* note 201, at 443. See Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 73–74 (2005) (noting how the law governing whether a court should enforce an employee's waiver of discrimination claims is in disarray).

²¹¹ Civil law waivers are subdivided into contract law waiver and tort waiver theories and rely on efficiency or other law and economics rationales for evaluating waivers. Among the classic works in the field are Marc A. Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966); Richard C. Ausness, "Waive" Goodbye to Tort Liability: *A Proposal to Remove Paternalism from Product Sales Transactions*, 37 SAN DIEGO L. REV. 293 (2000); Mark A. Hall, *A Theory of Economic Informed Consent*, 31 GA. L. REV. 511 (1997); Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605 (1986); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 408 (1998) (critiquing the rules that govern client waiver of attorney conflicts of interest). For a recent attempt to formulate a framework for determining whether a right should be waivable, see Grossi, *supra* note 204, at 1059–65.

²¹² Berg, *supra* note 197, at 285. Edward Rubin is one notable exception who has outlined a general theory of waiver of rights. Rubin, *supra* note 185, at 536–62. The general theory only tells us how to judge the validity of waivers (and thus provide an alternative to the three-part standard) but fails to tell us which rights may or may not be subject to waiver at all. Rubin's theory is lacking for our purposes because it focuses too heavily on the process protections that rights serve, but not enough on the substantive nature of rights themselves. For criticism in that spirit, see Berg, *supra* note 197, at 284–85 n.15.

²¹³ Berg, *supra* note 197, at 284–86 (providing an overarching theory explaining why courts have set different standards for valid waivers in different legal contexts).

²¹⁴ *Id.* at 291–95 (relying on RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 222–24 (1st ed. 1993)); see Aaron J. Rappaport, *Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy*, 2001 UTAH L. REV. 441, 449 (2001) (discussing how liberty stands for the proposition that individuals are best suited to make decisions about their own good); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 463 (1983) ("There is no paradox when a morally autonomous person exercises his sovereign right of self-government to diminish his own *de facto* freedom of action.").

²¹⁵ Berg, *supra* note 197, at 293. The theory posits that individuals are generally the best judges of what promotes their own welfare (the "evidentiary view" of autonomy), and that autonomy requires letting individuals lead their lives in accordance with their own character and values (the "integrity view" of autonomy). *Id.* at 288–89 (relying on the work of DWORKIN, *supra* note 213). See Rappaport, *supra* note 214 (noting how individuals are best suited to make decisions about their own good).

which implicate sovereignty over oneself,²¹⁶ cannot be waived, no matter how autonomous the waiver may be.²¹⁷ The paradigmatic example is slavery, which so thoroughly extinguishes the capacity for self-governance that it is deemed an impermissible object of personal choice.

Second are *descriptive autonomy rights*, which vary based on one's "critical and self-critical ability," capacity for competent action, access to a range of meaningful options, and freedom from coercion or manipulation.²¹⁸ These rights give rise to the vast majority of contested waivers, and may be waived when certain conditions are met.²¹⁹ Waivers of descriptive autonomy protections, however, may be limited *categorically* in at least three circumstances: (1) where such waivers would undermine the autonomy of others; (2) where the power imbalances involved render autonomous choice effectively impossible; or (3) where the cost of verifying the authenticity of the waiver renders enforcement impractical. Statutory protections, such as maximum work hours²²⁰ and usury proscriptions,²²¹ are examples of laws that may fall into this category. Yet waivers of descriptive autonomy rights may also be restricted in *specific cases*, when the autonomy given up through the waiver outweighs the autonomy exercised by making the decision to waive that autonomy.²²²

Third are "*system limitations*"—rights and rules essential to preserving the structural integrity of the legal system's commitment to autonomy. Although these rights do not directly implicate autonomy, they cannot be waived because their relinquishment would erode the legal system's capacity to safeguard autonomy more broadly.²²³ A paradigmatic example is the right to have guilt proven beyond a reasonable doubt—an entitlement whose waiver would compromise the foundational legitimacy of the criminal process itself.

Under Berg's framework, marital freedom may plausibly be understood as an ascriptive autonomy right; the decision to divorce implicates the core of self-sovereignty, and, as we shall soon observe, bears a sufficiently close analogy to contracts for personal services to warrant a categorical limitation on waiver for ascriptive autonomy reasons.²²⁴ After all, marriage obligates

²¹⁶ Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 890–91 (1994).

²¹⁷ Berg, *supra* note 197, at 297. For Berg, only a handful of rights fall under this category; they must be strongly analogous to the slavery situation and focused on the sale or other "use" of one's physical body, for example, surrogacy. *Id.* at 297, 305.

²¹⁸ Fallon, *supra* note 216, at 886–88.

²¹⁹ Berg, *supra* note 197, at 306–07.

²²⁰ *Id.* at 298; Gerald Dworkin, *Paternalism*, in PATERNALISM 19, 23 (Rolf Satorius ed., 1983).

²²¹ 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 1515, at 731–32 (1962).

²²² Berg, *supra* note 197, at 299–300.

²²³ *Id.* at 300–04.

²²⁴ In the next subsection, we analyze the right to divorce through different theories of inalienability that largely correspond to the concept of ascriptive autonomy, and thus we spare the reader of analysis

individuals to provide an array of personal and pervasive services to their spouses; prohibiting exit functionally compels continued performance of these duties—at least in theory—thereby compromising self-governance.²²⁵

There are also descriptive autonomy considerations that support categorical limits on the waiver of divorce rights. When descriptive autonomy is involved, the calculus depends on the extent to which divorce rights are being waived and the prospects of truly autonomous waiver in the circumstances. While the calculus of losses and gains in autonomy is not strictly mathematical, the guiding principle seems to imply that as long as a waiver does not foreclose divorce entirely or delay it substantially or indefinitely,²²⁶ the autonomy approach may favor allowing waiver.²²⁷

Viewed through this lens, current covenant marriage laws appear to represent a constitutionally permissible constraint on marital freedom. Covenant couples do not surrender all rights to divorce, but rather agree to modify the *manner* and *means* by which divorce is obtained, and, most importantly, they retain the core right to a unilateral no-fault exit.²²⁸ Although the statutory requirement of a two-year separation period would ordinarily raise constitutional concerns, it does not appear so burdensome as to tip the autonomy balance—the autonomy surrendered through the waiver does not clearly exceed that exercised in making the waiver. Indeed, if even

here. For example, personhood concerns that are a prime characteristic of inalienable rights are analogous to the concept of ascriptive autonomy. Berg, *supra* note 197, at 284 n.14. In addition, analyzing divorce as a contract for personal services—which for Berg, is a classic case where a waiver should be restricted because of the implications for ascriptive autonomy, *id.* at 305—will be attempted under Anthony Kronman’s framework for inalienable rights. See Kronman, *supra* note 125, 781–84 (discussing how requiring a party to honor a contract for personal services that he later regrets can threaten his integrity and self-respect).

²²⁵ See *infra* Part III (discussing if entering into a covenant marriage is truly a voluntary waiver in comparison to waiver of other fundamental rights).

²²⁶ It is undoubtedly challenging to delineate the boundary between a reasonable limitation on the right to divorce and an excessive surrender of one’s divorce options. That said, the waiting periods currently mandated by covenant marriage statutes do not, in my view, amount to an objectionable curtailment of liberty. Rather, they may be regarded as permissible waivers: calibrated temporal restraints that reflect a tolerable and principled reduction in immediate exit options. Indeed, if we do not permit such a limitation, then we effectively disallow waiver. By contrast, the proposal to encourage and enforce time-based prenuptial agreements that require couples to forgo the right to divorce for a full decade—effectively instituting a ten-year mandatory marriage—strikes a far more troubling note. Such a sweeping and prolonged renunciation of exit rights constitutes a drastic surrender of marital liberty. See Janine Campanaro, *Until Death Do Us Part? Why Courts Should Expand Prenuptial Agreements to Include Ten-Year Marriages*, 48 FAM. CT. REV. 583, 588–590 (2010) (arguing in favor of time-based prenuptial agreements).

²²⁷ Scott & Scott, *supra* note 122, 1260–61, 1328–29; Nichols, *supra* note 7, at 959. It is clear, however, that in cases of psychological or physical abuse, a swift exit must be available. Indeed, even those commentators who recognize that the right to abortion may be contractually relinquished insist that it must not be waivable in cases of danger to the mother. See, e.g., Katie Marie Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263, 280–82 (1981) (proposing a model surrogacy contract where a surrogate waives her right to abortion unless “such action is necessary for the physical health of the [s]urrogate”).

²²⁸ Bartlett, *supra* note 89, at 831–34; Nichols, *supra* note 7, at 959–60.

this modest limitation is deemed impermissible, then meaningful waiver is rendered effectively impossible. Waiver in this context serves both *ex ante* and *ex post* autonomy: it affirms freedom of contract at the point of marital formation; it expands the spectrum of available relationship models;²²⁹ it protects the freedom to pursue long-term commitment and relational stability;²³⁰ and it enables individuals to symbolically resist prevailing norms surrounding marriage and gender roles.²³¹ The statutory covenant option is particularly salient given that most courts do not enforce contractual restrictions on divorce.²³²

Some covenant proposals, which envision stricter divorce models,²³³ however, are far more difficult to justify on autonomy grounds. Legislative initiatives have previously been introduced in California, Michigan, Virginia, Iowa, and Georgia, for example, which would have eliminated unilateral no-fault divorce for covenant participants,²³⁴ and at least one

²²⁹ Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1957–58 (2000).

²³⁰ Brummer, *supra* note 27, at 297; Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 722, 725 (1994); Scott, *Rational Decisionmaking*, *supra* note 124, at 48; Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 168–69 (1998); Margaret F. Brinig & Steven L. Nock, *What Does Covenant Mean for Relationships?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 183–84 (2004).

²³¹ Baker, Sanchez, Nock & Wright, *supra* note 115, at 153.

²³² Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325, 328–29 (1998); F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 572 (2001); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 901–04 (1988); Rasmusen & Stake, *supra* note 13, at 454–55, 462–63.

²³³ For example, a more restrictive covenant marriage rule is proposed in a Minnesota bill conditioning dissolution on a five-year separation period, during which the parties must live separate and apart, and undergo at least sixty hours of counseling over at least half a year. S. 80-2935, Reg. Sess. § 7 (Minn. 1998). A Mississippi bill is particularly severe, recognizing a single fault ground—adultery—as a basis for dissolving covenant marriage. H.B. 1645, 1998 Reg. Sess. § 2 (Miss. 1998). For a review of such proposals, see Lynne Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31, 41–50 (1999) (comparing covenant marriage proposals across twenty-two states).

²³⁴ See S.B. 1377, Reg. Sess. §§ 7–12 (Cal. 1998) (limiting dissolution to an enumerated set of circumstances); H.B. 434, 144th Gen. Assemb., Reg. Sess. § 1 (Ga. 1997) (limiting divorce to a set of enumerated circumstances); H.B. 5217, 89th Leg., Reg. Sess. § 5(1) (Mich. 1997) (requiring completion of a “divorce effects program” where parties consent to divorce, and in cases where one or more parties do not consent, divorce is limited to a set of enumerated circumstances); S. 80-2935, Leg., Reg. Sess. § 7 (Minn. 1997) (limiting both dissolution and separation for covenant marriage to a set of enumerated circumstances and requiring counseling in both cases); H.B. 2624, 1997 Sess. § 1(9)(a) (Va. 1997) (limiting divorce to a set of enumerated circumstances); S.B. 6135, 55th Leg., Reg. Sess. §§ 9–11 (Wash. 1998) (requiring parties of a covenant marriage to obtain counseling before seeking dissolution and limiting dissolution to a set of enumerated circumstances; this proposal would also limit suits against former spouses for restitution for separate property); H.B. 470, 53rd Leg., 2d Sess. § 1 (Idaho 1996) (amending definition of “irreconcilable differences” to require “substantial reasons for not continuing the marriage” in order for dissolution to occur); H. 76-2473, Gen. Assemb., 2d Sess. §§ 11(2), (6), 12 (Iowa 1996) (conditioning dissolution on a mandatory waiting period and either a finding by the court that there has been a “breakdown of the marriage relationship” or meeting a set of enumerated circumstances).

commentator has gone so far as to advocate for an indissoluble marriage option.²³⁵ When the waiver effectively nullifies or indefinitely delays access to divorce—a right that lies at the heart of most conceptions of personal autonomy²³⁶—the autonomy forfeited plainly exceeds the autonomy exercised in executing the waiver.²³⁷ As this Article elaborates below, waiver of the core no-fault right to divorce should be categorically prohibited because the context of premarital negotiations is uniquely ill-suited for meaningful autonomy: it is fraught with cognitive distortions, emotional idealism, and deeply embedded social pressures. In such a setting, assessing the voluntariness of any given waiver is prohibitively difficult on a case-by-case basis.²³⁸ Under these circumstances, the purported benefits of respecting individual choice are outweighed by the substantial risks and systemic costs.

Finally, even if the waiver of marital freedom were deemed permissible in principle, the sheer magnitude of the autonomy ceded demands a correspondingly high threshold for demonstrating that the waiver is truly autonomous.²³⁹ The greater the autonomy surrendered,²⁴⁰ the stronger the assurance needed that the waiver is actually autonomous.²⁴¹ At the very least, any waiver of the fundamental right to divorce must satisfy the Supreme Court's three-part standard: waivers must be knowing, voluntary, and intelligent—executed with “sufficient awareness of the relevant circumstances and likely consequences.”²⁴²

²³⁵ Wolfe, *supra* note 12 (proposing a covenant marriage regime that cannot be dissolved for any reason). At least one conservative commentator has even called for the implementation of a *mandatory* covenant marriage system. See Hamm, *supra* note 9, at 89–90.

²³⁶ See ALSTOTT, *supra* note 207, at 52 (explaining that ability to divorce is central to individual autonomy in that individuals should be able to choose their own life plan as their values “change over time”); Benjamin Shmueli, *What Have Calabresi & Melamed Got to do with Family Affairs?: Women Using Tort Law in Order to Defeat Jewish and Shari’a Law*, 25 BERKELEY J. GENDER L. & JUST. 125, 168 (2010) (explaining that in the context of recognizing the right to autonomy, the right to divorce can be considered an inalienable right); see also McLaughlin, *supra* note 183, at 490–91 (explaining that state-created marital property was designed in anticipation of divorce to ensure personal autonomy for both parties); Karst, *supra* note 22, at 635–36 (arguing that intimate relationships help shape one’s identity).

²³⁷ See Berg, *supra* note 197, at 335 (explaining that waivers are only appropriate when there is a balance between the autonomy waived, and the autonomy to waive).

²³⁸ See *infra* Section III.A (analyzing the factors impacting whether a waiver is truly voluntary).

²³⁹ Berg, *supra* note 197, at 344.

²⁴⁰ *Id.* at 294 & n.61.

²⁴¹ *Id.* at 294; see also Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 287 (1994) (explaining that all states agree that a premarital agreement must be made under fair circumstances, but courts disagree as to what is “procedural fairness”).

²⁴² *Brady v. United States*, 397 U.S. 742, 748 (1970) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); see also Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, 1 UCLA WOMEN’S L.J. 89, 119 n.124 (1991) (explaining that a contract may be used to waive a constitutional right depending on the terms and circumstances of the contract establishing the waiver). The Supreme Court has held a waiver of constitutional rights invalid if “coerced, by explicit or implicit means, by implied threat or covert force,” *Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973),

The most basic safeguards to determine whether the individual demonstrates sufficient intelligence and knowledge are disclosure requirements.²⁴³ In a variety of settings, the Supreme Court has held that individuals must be aware that they possess a particular right before they can validly waive it.²⁴⁴ By the same token, covenant marriage legislation must ensure that participants understand their constitutional right to unilateral no-fault divorce and are informed of the consequences, risks, and alternatives to relinquishing that right.²⁴⁵

Current covenant marriage statutes, however, fall short of this standard. Though the original Louisiana law required premarital counseling to include discussion of the difficulty of exiting a covenant marriage,²⁴⁶ legislators—under pressure from religious leaders reluctant to address divorce²⁴⁷—amended the statute to eliminate any obligation for counselors to raise the issue.²⁴⁸ The responsibility for disclosure now rests with state employees,

or if it is the product of an improper controlling influence. *See also* Berg, *supra* note 197, at 314 & n.162 (explaining that waiver cannot be derived from an improper controlling influence—such as coercion—because any act following it would be involuntary); TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 121 (4th ed. 1994) (explaining that sometimes autonomous people temporarily lack the ability to make choices due to illness, coercion, or other restrictions, and that any choice made under such conditions would not be consensual). This, of course, means that it is unconstitutional to prevent a party coerced into a covenant marriage from accessing divorce. *See* Hager, *supra* note 135, at 581 (“[T]here are limits to what a state may do to impede a citizen from reasonable access to divorce and remarriage.”); Nichols, *supra* note 7, at 960 (arguing that courts are likely obligated to investigate whether marriages were entered into “voluntarily, without coercion”).

²⁴³ Berg, *supra* note 197, at 319, 321–22.

²⁴⁴ *Id.* at 322. For example, *Miranda* warnings are designed to inform defendants of their Fifth Amendment rights. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). In contrast, a judge is required to inform defendants that they have the right to a trial and that they do not have to plead guilty. FED. R. CRIM. P. 11(b)(1)(A)–(F).

²⁴⁵ For similar judicial intervention respecting premarital agreements, see *Ex parte Williams*, 617 So.2d 1032, 1035 (Ala. 1992) (holding that summary judgment in favor of a husband filing for divorce was inappropriate because there were general issues of material fact as to whether, prior to marriage, he coerced his wife into signing an antenuptial contract and whether there was a “full disclosure” of the value of his estate), and *In re Estate of Crawford*, 730 P.2d 675, 678–79 (Wash. 1986) (holding a prenuptial agreement invalid and void because the distribution of property was grossly inequitable, and because there was a lack of full disclosure such that enforcing the agreement would be unfair).

²⁴⁶ LA. REV. STAT. ANN. § 9:273(A)(2) (1999). Prior to entering into the legal marriage agreement, prospective spouses were required to attest that, “[w]ith full knowledge of what this commitment means, we do hereby declare our marriage will be bound by Louisiana law on Covenant Marriages . . .” *Id.* at § 9:273(A)(1). To assure this “full knowledge” the covenant marriage legislation required the couple to receive counseling, see H.B. 756, 1997 Reg. Sess. No. 1380, § 5 (La. 1997), which requires the Attorney General to issue a pamphlet entitled “Covenant Marriage Act.” Some commentators therefore believe that to “subsequently allege and prove that a spouse was in error in contracting a covenant marriage after all of the information is provided in many varied forms presents substantial hurdles.” Spaht, *supra* note 8, at 92.

²⁴⁷ DeSimone, *supra* note 29, at 409 n.119; Hager, *supra* note 135, at 579–80; Baker, Sanchez, Nock & Wright, *supra* note 115, at 151.

²⁴⁸ LA. REV. STAT. ANN. § 9:273(A)(2) (1999) (amended by H.B. 1631, 1999 Reg. Sess. No. 1298 § 1 (La. 1999)); see White, *supra* note 54, 878–79 (explaining that the amended statute does not require counselors to understand or even discuss the legal consequences with those seeking to enter a covenant marriage before signing an affidavit that the couple has been sufficiently counseled).

who are merely required to hand out a courthouse pamphlet describing the covenant divorce regime. Even in states where premarital counseling must address grounds for divorce, participants remain under-informed about the consequences of covenant marriage.²⁴⁹ In Arkansas, for example, although the law requires counselors to disclose covenant dissolution standards, the approved list of counselors is composed primarily of religious figures, who may lack familiarity with or are hesitant to discuss the legal ramifications of covenant marriage.²⁵⁰ It is therefore doubtful that existing covenant marriage laws ensure waivers that are truly made with knowledge and intelligence.²⁵¹

In sum, even if one accepts the general permissibility of waiving marital freedom, there are compelling descriptive autonomy concerns that support limiting—if not outright proscribing—comprehensive waivers of divorce rights and underscore the need for meaningful procedural safeguards throughout the waiver process.

B. *Marital Freedom as an Inalienable Right?*

A more developed framework for conceptualizing waivers of marital freedom is the theory of inalienable rights,²⁵² which has become “one of the keys to understanding and construing the system of rights secured by the

²⁴⁹ DeSimone, *supra* note 29, at 409. In Louisiana, for example, the case of the first couple to choose covenant marriage is illustrative. See Joanna Weiss, *Couple’s New Vows Make Breaking Up Hard to Do*, TIMES-PICAYUNE, Aug. 19, 1997, at B1 (describing how one couple was able to easily convert their standard marriage into a covenant marriage in a single afternoon, requiring a “brief counseling session” and notarizing two forms).

²⁵⁰ Indeed, “[t]he senators knew that virtually all of the counselors . . . would be religious and thus not trained in the law,” and suggestions that a legal professional should clarify the legal consequences of the law were “never seriously entertained by any legislator.” Spaht, *supra* note 8, at 88; see also ARK. CODE ANN. § 9-11-802(1) (2003) (enumerating a list of categories of authorized counselors, many of which are religious leaders); Brummer, *supra* note 27, at 280–81 (explaining the statute does not address the quality of premarital counseling and does not require authorized counselors to be neutral during counseling sessions—they can even advocate for covenant marriage).

²⁵¹ Brummer, *supra* note 27, at 278, 281; Carriere, *supra* note 10, at 1717. *But see* Nichols, *supra* note 7, at 955 (arguing that entering a covenant marriage is “entirely voluntary”); Spaht, *supra* note 8 at 92 (arguing that the declaration which spouses must give when entering a covenant marriage is an affirmation of disclosure—implying the decision to enter is an informed one—and that where one party does make material misrepresentations, the marriage may be annulled on the basis of fraud).

²⁵² For philosophical accounts of the moral principles that justify designating rights as inalienable, see generally Diana T. Meyers, *The Rationale for Inalienable Rights in Moral Systems*, 7 SOC. THEORY & PRAC. 127 (1981); Arthur Kuflik, *The Inalienability of Autonomy*, 13 PHIL. & PUB. AFF. 271 (1984); Arthur Kuflik, *The Utilitarian Logic of Inalienable Rights*, 97 ETHICS 75 (1986); Terrance McConnell, *The Nature and Basis of Inalienable Rights*, 3 LAW & PHIL. 25 (1984). For a helpful history of inalienability theory, see DAVID ELLERMAN, NEO-ABOLITIONISM: ABOLISHING HUMAN RENTALS IN FAVOR OF WORKPLACE DEMOCRACY 15–71 (2021). For accounts that deny the existence of inalienable rights, see generally Chen Jinghui, *Inalienable Rights: Are They Tenable?*, 2 TSINGHUA U. L. J. 5 (2020); Hillel Steiner, *Directed Duties and Inalienable Rights*, 123 ETHICS 230 (2013). For a critique of such accounts, see generally Pierfrancesco Biasetti, *Infinite Regress and Hohfeld: A Comment on Hillel Steiner’s “Directed Duties and Inalienable Rights,”* 126 ETHICS 139 (2015); Shukun Zhao & Qing Yu, *Defending Inalienable Right: Response to Three Critical Propositions*, 22 J. HUM. RTS. 422 (2023).

Constitution.”²⁵³ While many equate inalienable rights with unwaivable ones,²⁵⁴ some scholars of inalienability distinguish between the two: for those scholars, unwaivable rights may never be relinquished, whereas inalienable rights may be waived, but only contemporaneously.²⁵⁵ In this sense, inalienability does not confer absolute immunity from waiver, but rather mitigates the impact of a waiver doctrine that some regard as “freedom-diminishing affront to autonomy,” and a paternalistic departure from the prevailing norm that rights tend to be individual, alienable, and negative in the American constitutional edifice.²⁵⁶

The scholarly literature has identified four general rationales for conferring inalienability status: paternalism, efficiency, distribution, and personhood.²⁵⁷ Paternalistic theories favor inalienability because they assume that individuals are not the best judges of their interests and may

²⁵³ Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 748 (2001).

²⁵⁴ See, e.g., Giorgio Pino, *The Puzzle of Inalienable Rights*, 2024 SING. J. LEGAL STUD. 323, 323 (2024) (“Whereas all fundamental rights cannot be violated by the State and/or other fellow citizens, some fundamental rights cannot be violated also by the right-holder himself. An inalienable right is, then, the most inviolable among fundamental rights.”) (footnote omitted). For instance, the Declaration of Independence refers to the rights to life, liberty, and the pursuit of happiness as inalienable, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), and so do the constitutions of twenty-three states. Daniel Avila, *Assisted Suicide and the Inalienable Right to Life*, 16 ISSUES L. & MED. 111, 113 & n.6 (2000).

²⁵⁵ See Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 94, 98 (1999) (explaining that rights falling into the “inalienability” group are distinct from unwaivable rights, which can never be relinquished, even contemporaneously); McLaughlin, *supra* note 183, at 487 (describing inalienability in the context of property rights). In the context of property rights, where inalienability scholarship originated, the term market inalienability is used to convey that an object is non-salable but can be given away, and strict inalienability indicates that an object is completely nontransferable. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853 (1987) (arguing that “inalienability” has different meanings depending on its usage, and in the context of “market-inalienability” it means something that is non-salable—but generally “inalienability” means something that cannot be given away); John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORN. L. REV. 1179, 1186 & n.23, 1203–209 (1989) (arguing that essential rights are inalienable and cannot be given away or transferred); see also ELLERMAN, *supra* note 252, at 15–16 (arguing that contractual slavery is inherently invalid under the theory of inalienable rights due to its absolute lack of consent).

²⁵⁶ Moustakas, *supra* note 255, at 1024–25; Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330–31 (1985).

²⁵⁷ For prominent discussions of inalienability rules in the private market context, see generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093–115 (1972); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 563–65, 624–49 (1982); Sullivan, *supra* note 179; Radin, *supra* note 254, at 1849, 1855 & n.24, 1859–60; Walter Block, *Market-Inalienability Once Again: Reply to Radin*, 22 T. JEFFERSON L. REV. 37, 37–65 (1999).

undervalue the worth of their fundamental rights.²⁵⁸ Efficiency theories defend inalienability for its potential to achieve what the market would produce in the absence of transaction costs and collective action problems.²⁵⁹ Distributive theories, attentive to structural imbalances, promote inalienability as a corrective to asymmetries in bargaining power.²⁶⁰ Finally, personhood theories endorse inalienability for rights that are so intimately tied to self-definition and so integral to our conception of a human being that their alienation would constitute an injury to personal identity.²⁶¹

Personhood theory offers the most compelling framework for analyzing the surrender of divorce rights. This theory best accounts for why many rights are deemed inalienable today,²⁶² translates neatly from private market relationships to constitutional rights, and attends to dimensions of human experience that other theories tend to overlook.²⁶³ Let us examine closely the multilayered application of the personhood theory of inalienability to the divorce context.

1. *The Inalienability of Divorce as a Decision Implicating Identity and Self-Definition*

There are several prime characteristics of inalienable fundamental rights that have been identified in personhood literature. The primary criterion for

²⁵⁸ See Pino, *supra* note 254, at 324 (explaining that inalienability is justified, *inter alia*, in case of concerns about the full agency of the right-holder, as in the case of minors); Sullivan, *supra* note 180, at 1480–81 (arguing that under paternalism, making constitutional rights inalienable is justified because people can “underassess risk” or undervalue their own “long-term interests.” Sullivan further argues these predictions about human behavior are reflected in the constitutional requirement that some rules cannot be changed by a majority vote); see also William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1762–66 (1988) (explaining that under paternalism, a policy designed to incentivize following certain intellectual principles may be justified when, on balance, it would allow those who follow them to live a better life). *But cf. Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1942–46 (1986) [hereinafter *Rumpelstiltskin Revisited*] (explaining that government should impose values on individuals in ways that would harm the individual the least, and where there is conflict, government should favor the values of the individual).

²⁵⁹ Calabresi & Melamed, *supra* note 257, at 1111–15; Sullivan, *supra* note 180, at 1481–83; Radin, *supra* note 255, at 1863–70.

²⁶⁰ Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 940 (1985); Sullivan, *supra* note 180, at 1483–84.

²⁶¹ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (“The premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment.”); Radin, *supra* note 255, at 1905–06 (explaining that the idea that the components of one’s personhood can be monetized or removed is “violen[t] to our deepest understanding of what is to be human”); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 466–79 (1981) (“[A]ttempting to change [sic] a person’s values by main [sic] force, or to override them, directly assaults the integrity of [their] personality.”); Sullivan, *supra* note 180, at 1480 (arguing that under personhood theory, some things are inalienable because they are so central to one’s own identity that they cannot be sold or given away).

²⁶² *Rumpelstiltskin Revisited*, *supra* note 258, at 1948.

²⁶³ *Id.* at 1947, 1954–55. Personhood also justifies inalienable constitutional rights without falling prey to calcified doctrines or the contradictions of non-paternalist theories, and while avoiding the theoretical pitfall of liberal justifications for inalienable rights. Personhood analysis facilitates more responsible decisions about inalienable rights. *Id.* at 1947–48, 1954–55.

inalienability is that the right must be “central to personhood,” that is, it must relate to deeply personal decisions that are central to identity and one’s sense of self.²⁶⁴ Since inalienability protects future freedoms at the expense of present ones, a right may be deemed inalienable only if the choices made available in the future are likely to be more central to people’s identity or personhood than the security and autonomy gained by making a decision in advance.²⁶⁵ Second, inalienable rights are typically present in situations where it is particularly difficult to anticipate one’s likely reaction to future events. Third, rights are often treated as inalienable to protect against the risk of pressure, coercion, or fraud. Finally, inalienable rights implicate important societal values.²⁶⁶

i. The Symbiotic Relationship Between the Divorce Decision and Personhood.

The prohibition on the sale of slaves, babies, or human organs is a well-cited example of an inalienability rule predicated on the collective judgment that such sales constitute an attack on personhood.²⁶⁷ Similarly, rights such as the right to have or not to have an abortion,²⁶⁸ the right to marry,²⁶⁹ the

²⁶⁴ Thomas Kleven, *On the Freedom to Associate or Not to Associate with Others*, 1 TENN. J.L. & POL’Y 69, 89–90 (2004); Sullivan, *supra* note 180, at 1485; Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier’s Right to Abortion*, 70 FORDHAM L. REV. 93, 152–53 (2001).

²⁶⁵ *Rumpelstiltskin Revisited*, *supra* note 258, at 1947. Radin, for one, distinguishes between rights that are central to identity such as the choice of a profession or of a spouse and rights, like those to industrial property, that rarely constitute core elements of personhood. Radin, *supra* note 261, at 960, 968, 974, 980, 984, 986 & n.101.

²⁶⁶ Coleman, *supra* note 255, at 95; McLaughlin, *supra* note 183, at 489–90; Kronman, *supra* note 125, at 763 n.1. It is noteworthy that some inalienable rights also reflect considerations that are less applicable to decisions about marriage. One such example is the right to vote, which is grounded in societal conceptions of the meaning of citizenship. Rose-Ackerman, *supra* note 260, at 961–63.

²⁶⁷ McLaughlin, *supra* note 183, at 491; Calabresi & Melamed, *supra* note 257, at 1111–14.

²⁶⁸ *See In re Baby M.*, 537 A.2d 1227, 1240, 1268 (N.J. 1988) (holding a contract for sale of a surrogate mother’s child containing a clause conditioning abortion on the consent of the biological father was void and unenforceable); Martha A. Bohn, *Contracts Concerning Abortion*, 31 U. LOUISVILLE J. FAM. L. 515, 525–27 (1992-1993) (discussing how courts have held that contracts obligating one to obtain an abortion are void as a matter of public policy); *see, e.g., Rumpelstiltskin Revisited*, *supra* note 258, at 1949–50 (arguing that judges should hold that the right to abortion is inalienable); Iris Leibowitz-Dori, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOB. TRADE 329, 348 (1997) (explaining that even though a woman may enter a surrogacy contract, she still retains an unwaivable right to abortion). *But see* John Dwight Ingram, *Surrogate Gestator: A New and Honorable Profession*, 76 MARQ. L. REV. 675, 693 (1993) (arguing that although women have a right to abortion, “that right may be voluntarily and knowingly waived, just as other constitutional rights may be waived”); John J. Mandler, *Developing a Concept of the Modern “Family”: A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1313–14 (1985) (explaining that “[t]he Supreme Court has held certain constitutional rights to be waivable,” and that there are conflicting views as to whether a woman’s right to abortion may be waived); Yamamoto & Moore, *supra* note 264, at 161 (arguing that a woman’s right to abortion may be waived, provided it was not waived under coercion or duress, and that there is no Supreme Court decision indicating the right to abortion has received more protection from waiver than other fundamental rights).

²⁶⁹ Coleman, *supra* note 255, at 92–93 (explaining that a contract to marry is unenforceable if one party changes their mind).

right of a surrogate mother to “make future decisions about her body, lifestyle, and an intimate future relationship with her child,”²⁷⁰ and the right not to be a genetic parent²⁷¹ are all considered inalienable rights that cannot be contracted away. In the same spirit, some courts have refused to enforce prior agreements to enter familial relationships—be it marriage or parenthood—against individuals who subsequently reconsidered their decisions.²⁷²

This personhood-based account of inalienable rights offers powerful support for the proposition that divorce is a fundamental individual liberty that cannot be surrendered. To begin with, the decision to terminate the most intimate of human relationships—marriage—profoundly affects personhood.²⁷³ Both the choice to enter marriage and the choice to exit it are deeply self-definitional. Precisely because marriage carries such “profound, even defining significance” for most individuals,²⁷⁴ the right to determine whether it endures must be recognized as a constitutive identity choice of the highest order.²⁷⁵ As the Supreme Court has long acknowledged, marriage simply cannot “define the attributes of personhood” so long as it is

²⁷⁰ Gostin, *supra* note 201, at 444; *Rumpelstiltskin Revisited*, *supra* note 258, at 1936–37; Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, 120 (1998); Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 203 & n.61 (1986); *see also* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 486–92 (1990) (discussing Supreme Court jurisprudence on the Thirteenth Amendment and how compulsory pregnancy is a form of prohibited involuntary servitude); Thomas Wm. Mayo, *Medical Decision Making During a Surrogate Pregnancy*, 25 HOUS. L. REV. 599, 613 (1988) (arguing that under Thirteenth Amendment jurisprudence and common law principles, a person’s right to abortion is inalienable).

²⁷¹ The status of the right not to be a genetic parent most often arises in disputes over the disposition of one’s frozen embryos; the argument is that this right is so central to personhood that it is inalienable. This position is endorsed by a number of U.S. jurisdictions, and finds its most prominent champion in Coleman, *supra* note 255, at 88–89. *But see* John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 1007, 1024–25 (2001) (taking a contractual approach and arguing that parties who “knowingly, intelligently, and voluntarily” enter into embryo disposition agreements must be bound by them for the sake of respecting procreative liberty, reducing uncertainty, and preventing courts from having to make substantive choices about reproduction on behalf of the parties); *see also* I. Glenn Cohen, *The Right not to be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1161–69, 1181 (2008) (making the case for allowing advance waiver via contract of the right not to be a genetic parent).

²⁷² *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) (refusing to enforce such an agreement in order to enhance “freedom of personal choice in matters of marriage and family life.”) (citing *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977)).

²⁷³ *See* Yefet, *supra* note 4, at 317–21; *see also* *Rumpelstiltskin Revisited*, *supra* note 258, at 1947 (“The right . . . to find a spouse constitute[s] central elements in . . . identity . . .”).

²⁷⁴ David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 576–77 (2000).

²⁷⁵ Choosing whether or not to share one’s life with a marital partner is a paradigmatic illustration of self-definition and personal self-government. Yefet, *supra* note 4, at 317–21; Wardle, *supra* note 88, at 752; Mary Lyndon Shanley, *Public Values and Private Lives: Cott, Davis, and Hartog on the History of Marriage Law in the United States*, 27 LAW & SOC. INQUIRY 923, 932 (2002); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 62 (2000); Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 187–88 (1999).

maintained by “compulsion of the State.”²⁷⁶ A constitutional commitment to divorce rights, by contrast, affirms the individual’s prerogative to revise, disrupt, and reconstruct the self.²⁷⁷

It is thus unsurprising that prominent personhood theorists have specifically noted the self-definitional and expressive dimensions of marital freedom.²⁷⁸ Indeed, at least two inalienability scholars have explicitly identified divorce as a “right[] [that] can never be waived” owing to its profound significance for personal integrity.²⁷⁹

Further, while parties may voluntarily embrace restrictions on marital exit at the time a covenant contract is formed, their identities may change over time²⁸⁰—sometimes so fundamentally that “[i]n some real sense they may be ‘different’ persons from the couple that married.”²⁸¹ As each spouse’s self-definition naturally evolves over time,²⁸² there are bound to be numerous instances in which the two no longer constitute suitable partners in their quest for selfhood.²⁸³ Thus, while enforcing a marital commitment may honor the preferences of one’s former self, it may simultaneously contravene the deeply held values, desires, and beliefs of the present self—the self who must live with the consequences of that decision.²⁸⁴ In such cases, maintaining the marital bond may amount to an act of “self-denial”²⁸⁵ and a threat to one’s own status or identity.²⁸⁶ Binding an individual to an

²⁷⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

²⁷⁷ Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 176 (1998); see also Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 11–12, 15–16, 21 (1990) (discussing liberalism and its relation to social, marital, and political mobility).

²⁷⁸ See, e.g., Wilkinson & White, *supra* note 119, at 577 (“Divorce is a lifestyle choice of sufficient intimacy to override laws that . . . make divorce unduly difficult to obtain.”); Karst, *supra* note 22, at 638 (explaining that value of consent and the danger of coercion underlie the case for protecting the freedom to form intimate associations).

²⁷⁹ McLaughlin, *supra* note 183, at 491; Shmueli, *supra* note 236, at 167–68.

²⁸⁰ VanSickle, *supra* note 28, at 161; Shultz, *supra* note 64, at 242; Coleman, *supra* note 255, at 91; George J. McCall, *Becoming Unrelated: The Management of Bond Dissolution*, in PERSONAL RELATIONSHIPS 4: DISSOLVING PERSONAL RELATIONSHIPS 211, 216 (Steve Duck ed., 1982).

²⁸¹ Scott, *Rational Decisionmaking*, *supra* note 125, at 58–59.

²⁸² *Id.* at 61–62; Schneider, *supra* note 96, at 527–28 (1994); Ann Swidler, *Love and Adulthood in American Culture*, in INDIVIDUALISM & COMMITMENT IN AMERICAN LIFE: READINGS ON THE THEMES OF HABITS OF THE HEART, 107, 119–20 (Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler & Steven M. Tipton eds., 1987); Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 20–21 (2006).

²⁸³ Schneider, *supra* note 96, at 527–28; Swidler, *supra* note 282, at 121. As a matter of fact, spouses may “change so fundamentally from the time of marriage that, at the time of divorce, they are, in some sense, ‘different persons.’” Scott, *Rational Decisionmaking*, *supra* note 125, at 39.

²⁸⁴ Coleman, *supra* note 255, at 91; Bix, *supra* note 230, at 197; Scott, *Rational Decisionmaking*, *supra* note 125, at 58; Hamilton, *supra* note 206, at 343.

²⁸⁵ Scott, *Rational Decisionmaking*, *supra* note 125, at 58.

²⁸⁶ *Id.* at 62; see also *id.* at 60–61 (applying Derek Parfit’s theory of identity to the marital context and noting that dramatic changes in character and life plan may occur over the course of a marriage in some persons, especially for young couples); CLARKE-STEWART & BRENTANO, *supra* note 178, at 36–38 (arguing that divorce is more likely to occur when couples marry at a young age because younger

early marital commitment, then, forces her to deny who she is now and to conform to her predecessor's sense of who she should be.²⁸⁷

It follows that in matters so central to personal identity, individuals must retain the freedom to make choices aligned with their contemporaneous wishes.²⁸⁸ As Carl Coleman aptly observed:

If rights central to individual identity are protected because of the consequences of being forced to live in conflict with one's basic sense of self, it makes little sense to subordinate the individual's current wishes to those expressed in the past. What matters most is who she is at the time the decision will be carried out, not who she was at some other time. Making the right to control these decisions inalienable ensures that, as a person's identity changes over time, she will not be forced to live with the consequences of prior decisions that are no longer consistent with the values and preferences of the person she has become.²⁸⁹

For these reasons, in the realm of marital freedom, *ex ante* autonomy—the right to restrict one's future freedoms—must yield to *ex post* autonomy, the enduring right to make unencumbered decisions in the future.

Yet the impact of marital freedom on personal identity and the dilemma of “later selves”²⁹⁰ is only one facet of why divorce should be understood as an inalienable right. Another hallmark of inalienability is the difficulty of predicting the ramifications of life-altering future experiences—a challenge that is particularly acute in the context of marital dissolution. When a decision implicates personhood, we are far more concerned with the quality

people are still forming their identity and are prone to “change in unanticipated directions”); Kronman, *supra* note 125, at 782 (explaining that a person's goals and values change over time and consequently people may consider what was once believed to be rational decision appear irrational or even evil in hindsight); JOSEPH GUTTMANN, *DIVORCE IN PSYCHOSOCIAL PERSPECTIVE: THEORY AND RESEARCH* 32 (1993) (arguing that divorce may be considered not only a “family crisis but also . . . a personal one” and that this crisis may be considered a “threat”).

²⁸⁷ Dagan & Heller, *supra* note 13, at 569. This is not much different, in practice, than a commitment that would bind a different individual without that person's consent. See Scott, *Rational Decisionmaking*, *supra* note 125, at 60 (“If [a] person binds himself to perform certain acts in the future, he may be binding a different person without that person's agreement.”); Donald H. Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113, 122–34 (Rolf Sartorius ed., 1983) (using Derek Parfit's theory of the “complex view” of personal identity to justify paternalistic intervention on behalf of future selves to prevent harms from the outside world and to argue that later selves should not be bound by the promises of earlier selves).

²⁸⁸ While there is no general constitutional principle that requires that waiver of constitutional rights only be made contemporaneously (Robertson, *supra* note 271, at 1029), “[t]here are some rights that cannot be irrevocably waived—that is, the person can change her mind even after she has agreed to waive her rights.” Gostin, *supra* note 201, at 443.

²⁸⁹ Coleman, *supra* note 255, at 96.

²⁹⁰ For an illuminating discussion of the “future self” or “different self” rationale—under which a person may *not* be bound tomorrow by the choices she makes today—see generally Kaiponanea T. Matsumura, *Binding Future Selves*, 75 *LA. L. REV.* 71, 111 (2014).

of the individual's predictions than we are in the realm of conventional transactions, such as buying or selling a house or car. Whereas parties to ordinary contracts are presumed competent to forecast future developments and are accordingly held to their bargains even when their expectations prove mistaken, the human inability to "foresee all the circumstances that will affect a future decision"²⁹¹ becomes more troublesome when the waiver of a constitutional right bound up with personhood is at stake.²⁹² The concern is not merely that circumstances may change in unforeseeable ways but that individuals may fail to grasp in advance how they would feel if the situation were to occur.²⁹³ Social psychological research on *affective forecasting* further attests to the inability to predict future emotional states and the intensity and duration of those emotions.²⁹⁴

This concern looms large when decisions involve intensely emotional matters, not because individuals are irrational, but because the transformative character of such experiences resists full imaginative projection.²⁹⁵ In such moments, individuals cannot fully anticipate the moral and psychological implications their choices will assume once lived, or the effect those experiences may ultimately have on their evolving sense of self.²⁹⁶ The risk, then, is that a choice made today might "one day seem antithetical to [their] deepest interests . . ."²⁹⁷ For this reason, legal scholars have long suggested that decisions concerning profoundly emotional matters ought to be deemed inalienable—that is, revocable until the moment of execution.²⁹⁸ For similar reasons, courts have invalidated pre-foster care agreements terminating parental rights,²⁹⁹ surrogacy contracts signed before

²⁹¹ Gostin, *supra* note 201.

²⁹² Coleman, *supra* note 255, at 97–98.

²⁹³ *Id.* at 98 (quoting The New York State Task Force on Life and the Law, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 124 (1988)).

²⁹⁴ For a thorough discussion of the psychological research on affective forecasting and its implications for legal policy, see generally Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155 (2005).

²⁹⁵ *Id.* at 160.

²⁹⁶ Kronman, *supra* note 125, at 790, 796.

²⁹⁷ *Id.* at 794.

²⁹⁸ Coleman, *supra* note 255, at 98.

²⁹⁹ See, e.g., *Rivera v. Marcus*, 696 F.2d 1016, 1024–25, 1028–29 (2d Cir. 1982) (holding that custodians are entitled to due process rights from state removal of a relative from their household); *In re MP*, 22 N.Y.S.3d 330, 333, 3337 (N.Y. Fam. Ct. Nov. 13, 2015) (holding that the court has the power to vacate a voluntary surrender of parental rights if the condition upon which the rights were surrendered is violated); see also Gostin, *supra* note 201 (confirming that "[t]he legal question of whether a person can waive . . . parental rights [is] unsettled"). See generally Spencer B. Olmstead, Lenore M. McWey & Tammy Henderson, *In the Child's Best Interest: Terminating the Rights of Fathers with Children in Foster Care*, 32(I) J. FAM. ISSUES 31 (2011) (comparing the various factors and circumstances that were considered by appellate courts in cases where fathers' parental rights were terminated).

the birth of the child,³⁰⁰ and pre-conception arrangements relinquishing a child for adoption³⁰¹ or disposing of frozen embryos.³⁰²

Divorce is intrinsically analogous to these circumstances and, inasmuch, a strong candidate for inalienability. The difficulties of “predict[ing] and project[ing] a response to profound [human] experiences that have not yet unfolded”³⁰³ are stark in the domain of marital freedom. Unlike commercial actors who can anticipate the contours of a business deal, engaged couples cannot reliably foresee the ideal length of their relationship, given the deeply contingent nature of emotional development, the magnitude of their mutual investments, and the unpredictability of life events—children, financial hardship, illness, infidelity—that shape and strain marital bonds.³⁰⁴

The foregoing analysis explains why divorce implicates personhood in ways that resist irrevocable commitment. A complementary inquiry asks whether the process of advance waiver itself can be trusted.

³⁰⁰ In the celebrated *In re Baby M*, 537 A.2d 1227 (N.J. 1988), the court concluded that any advance waiver of parental rights before experiencing pregnancy and childbirth is necessarily “uninformed” since the woman cannot “know[] the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby’s birth is, in the most important sense, uninformed.” *Id.* at 1248; see also *In re Baby*, 447 S.W.3d 807 (Tenn. 2014) (holding that the voluntary termination of parental rights—as opposed to the involuntary—of a surrogate mother may only be executed if through a surrender or a consensual petition for adoption); *In re the Paternity of F.T.R.*, 349 Wis.2d 84, 118 (Wis. 2013) (finding the portion of a surrogacy contract terminating the birth mother’s parental rights unenforceable).

³⁰¹ See, e.g., *Sullivan v. Mooney*, 407 So.2d 559 (Ala. 1981) (finding that the fact that the biological mother’s consent for adoption was given pre-birth, as well as the coercive tactics used by her physician in getting said consent, is grounds for voiding the adoption); see also *Rumpelstiltskin Revisited*, *supra* note 258, at 1952 (explaining that “[t]he law never enforces a pregnant woman’s promise to consent to adoption after the child is born.”); John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 421 (1990) [hereinafter *Prior Agreements*] (confirming preconception agreements terminating parental rights and surrendering a child up for adoption are generally unenforceable).

³⁰² See, e.g., *J.B. v. M.B.*, 783 A.2d 707, 718–19 (N.J. 2001) (adopting the “better rule” that either party may change his or her mind about the destruction of frozen embryos); see also Coleman, *supra* note 255, at 100–02 (defending a cautious approach to destroying frozen embryos); I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, HASTINGS CENT. REP. 46, at 13–17 (2016) (considering various approaches to resolving embryo disposition agreements in cases of divorce or death). *But see* Robertson, *Prior Agreements*, *supra* note 301, at 422 (emphasizing the benefit in ensuring embryo disposition agreements are freely made). For recent scholarship that analyzes the three main judicial methodologies for resolving embryo-disposition disputes, see generally Nicole Marks Kaufman, *A One-Egg Wonder: Working to Cure Judicial Gender Bias and Increase Access to Pre-Embryos for Infertile Parties*, 46 CARDOZO L. REV. 585 (2024); Benjamin C. Carpenter, *Sperm Is Still Cheap: Reconsidering the Law’s Male-Centric Approach to Embryo Disputes After Thirty Years of Jurisprudence*, 34 YALE J.L. & FEMINISM 1, 13–29 (2023); Sarah B. Kirschbaum, *Who Gets the Frozen Embryos During a Divorce? A Case for the Contemporaneous Consent Approach*, 21 N.C. J.L. & TECH. 113 (2019); Alex M. Johnson, Jr., *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements*, 43 SW. L. REV. 191 (2013).

³⁰³ Coleman, *supra* note 255, at 98 (quoting THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY, at 124 (1988)).

³⁰⁴ Scott, *Rational Decisionmaking*, *supra* note 125, at 63, 82; Scott & Scott, *supra* note 123, at 1259–60; Brummer, *supra* note 27, at 293; Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 111 (1998).

ii. Divorce and Decision Theory

The decision to divorce exemplifies the second core feature of inalienable rights: the tendency of cognitive distortions to compromise the integrity of advance waivers. Scholarly insight into decision theory suggests that various cognitive biases may result in poor decision-making regarding divorce.³⁰⁵ Chief among them is the “anchoring effect,” which inhibits decision-makers from adequately adjusting their predictions in light of subsequent information. As a consequence, their final estimates are systematically biased to overvalue information acquired early on.³⁰⁶ In the marital context, Elizabeth Scott and Robert Scott argue that prospective spouses may fall prey to this bias when their expectations are “anchored” to the idealized prospect of a long and happy union, rather than to the more realistic possibility of discord or dissolution—a scenario that may seem remote, even inconceivable, at the time of commitment.³⁰⁷ Empirical studies confirm this anchoring effect in intimate relationships, revealing a persistent tendency to exaggerate a partner’s early positive traits and to minimize or rationalize disconfirming evidence encountered later.³⁰⁸

This distortion is compounded by additional probability-based biases. The *availability heuristic*³⁰⁹ skews judgment by privileging vivid and recent

³⁰⁵ *Rational Decisionmaking*, *supra* note 125, at 13, 63; *see generally* Robert P. Abelson & Ariel Levi, *Decision Making and Decision Theory*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 231, 234, 265, 283–84, 292 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985) (analyzing several ways biases may affect decision-making); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY 3 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) [hereinafter *Judgment Under Uncertainty*] (confirming the effects of heuristic principles on acts of judgment); Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem In Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 395–96, 399–402 (2006) (exploring the influence of heuristic errors). Aside from the literature on cognitive bias, social psychology exposes people’s “very low” ability to accurately see reality; due to the complexity of the human mind, we are subject to influences we are not always aware of, favor certain things for reasons we cannot always explain, and perceive reality according to many irrelevant factors. Yuval Feldman, *Control or Security: A Therapeutic Approach to the Freedom of Contract*, 18 TOURO L. REV. 503, 548 (2002).

³⁰⁶ For an analysis of anchoring research, *see*, for example, D. Michael Risinger, Michael J. Saks, William C. Thompson & Robert Rosenthal, *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 16–18 (2002).

³⁰⁷ Scott & Scott, *supra* note 123, at 1258–59.

³⁰⁸ *Judgment Under Uncertainty*, *supra* note 305, at 15–16; Scott, *Rational Decisionmaking*, *supra* note 125, at 62–64 & n.141; Bix, *supra* note 230, at 193.

³⁰⁹ The availability heuristic is “the tendency to estimate the likelihood or frequency of an event occurring based on how readily one can recall an example of it. People overestimate the frequency of an event’s happening based on its salience—how dramatic, sensational or otherwise memorable the event is. Similarly, they tend to underestimate the probability of less spectacular events happening.” Levit, *supra* note 305, at 396 (footnotes omitted). On the biasing effects of the availability heuristics, *see*, for example, Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207 (1973); Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 103 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

experiences—such as premarital bliss—over more abstract or temporally distant risks, such as marital breakdown.³¹⁰ Cognitive psychology has likewise identified an optimism bias that predisposes individuals to underestimate the likelihood of adverse future events.³¹¹ Research consistently demonstrates that engaged couples are overly optimistic about their own prospects for lasting marital success.³¹² Bounded rationality was on full display in one study: not a single couple believed they would ever divorce—an expression of private optimism that stood in stark defiance of the sobering national dissolution rate.³¹³ Additional findings show that individuals tend to underestimate the likelihood of disjunctive events (such as relational failure), while overestimating the probability of conjunctive events (such as the confluence of factors necessary for a happy marriage).³¹⁴ Taken together, these distortions systematically skew ex ante assessments of marital durability.

The decisions of engaged couples may be further skewed by *cognitive dissonance*—the psychological discomfort of holding conflicting beliefs or contemplating incompatible future scenarios.³¹⁵ In this context, prospective spouses may underestimate the possibility of divorce not only because of probabilistic miscalculation, but because they are unwilling or unable to

³¹⁰ See Scott, *Rational Decisionmaking*, *supra* note 125, at 62–68 (considering the influence of availability heuristics for persons entering marriage); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 217–18, 254 (1995) (discussing empirical studies comparing individuals' personal assessments with prevailing public conceptions of rational decision-making in contract contexts); Karen Servidea, *Reviewing Premarital Agreements to Protect the State's Interest in Marriage*, 91 VA. L. REV. 535, 544 (2005) (asserting that probability is often calculated with “comparable data and scenarios that are readily available to [a person’s] memory and imagination”); PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 When Enforcement Would Work A Substantial Injustice cmt. b (2002).

³¹¹ See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78 (1998) (imagining how past occurrences may influence future decisions). See generally Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955) (discussing the phenomenon).

³¹² See Eisenberg, *supra* note 310, at 216–18, 254 (relying on behavioral economics to show that people are naturally disposed towards optimism and systematically underestimate the chances of bad events, and concluding that this dispositional bias is likely to cause people to underestimate the probability that they will ever need to use their prenuptial agreement); Servidea, *supra* note 310 (noting the effects of the availability bias in the premarital context); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 cmt. b (2002) (confirming that couples are generally overly optimistic at the time of their marriage).

³¹³ Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993); Hamm, *supra* note 9, at 84; Carriere, *supra* note 10, at 1709–10.

³¹⁴ *Judgment Under Uncertainty*, *supra* note 305, at 15–16; Scott, *Rational Decisionmaking*, *supra* note 125, at 62–64 & n.141; Bix, *supra* at 230, 193–194 & n.198.

³¹⁵ Scott, *Rational Decisionmaking*, *supra* note 125, at 64. For the general theory of cognitive dissonance, see the seminal works of LEON FESTINGER, CONFLICT, DECISION, AND DISSONANCE 5–6, 10, 48, 155 (Robert R. Sears, Leon Festinger & Douglas H. Lawrence eds., 1964); LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1–31 (1957). See also Hazel Markus & R.B. Zajonc, *The Cognitive Perspective in Social Psychology*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 137, 202 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985) (breaking down the theory into nine prepositions).

imagine marital breakdown while immersed in the optimism and emotional intensity of engagement. This motivational resistance to negative forecasting calls into question the depth and neutrality of advance consent.

Temporal distortions further compromise deliberation. As Melvin Eisenberg has observed, individuals often exhibit “faulty telescopic faculties”—a tendency to undervalue future consequences while overweighing immediate considerations.³¹⁶ When considering future dissolution options, individuals are therefore likely to ascribe disproportionate weight to the present emotional cost of contemplating divorce and insufficient weight to the long-term benefit of retaining the option to exit. The result is a systematic discounting of future autonomy in favor of present affective comfort.

These psychological distortions are compounded by the “unique emotional atmosphere”³¹⁷ under which covenant marriage contracts are typically executed—precisely the moment when the right to divorce appears least salient.³¹⁸ Prospective spouses are likely to be deeply influenced by romantic and erotic attraction,³¹⁹ an emotional state which “inhibit[s] the imagination, making it more difficult for those involved to achieve a measure of neutrality”³²⁰ in predicting the possibility of marital failure.³²¹ Numerous scholars who have studied premarital bargaining have expressed skepticism about the ability of couples at the cusp of marriage to grapple seriously with contingencies that contradict their current aspirations.³²² As they argue, the context itself “calls into question the ‘rationality,’ ‘consent,’ or ‘voluntariness,’ in the full senses of those concepts, of a party to the agreement.”³²³

To be sure, these considerations have not proved strong enough to invalidate prenuptial agreements regulating the *economic* consequences of

³¹⁶ Eisenberg, *supra* note 310, at 222; Servidea, *supra* note 310.

³¹⁷ Barbara Ann Atwood, *Ten Years Later: Lingered Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 134–35 (1993).

³¹⁸ See Bartlett, *supra* note 89, at 832 (“Few people marry expecting to divorce.”); Bix, *supra* note 230, at 194–95 (marveling at how worry about the likelihood of failure—i.e., divorce—may cause the failure to happen); Sherman, *supra* note 121, at 381–82 (recognizing the problematic timing of prenuptial agreements).

³¹⁹ White, *supra* note 54, at 876; Carriere, *supra* note 10, at 1747; Michael J. Trebilcock, *Marriage as a Signal*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 245, 254 (F. H. Buckley ed., 1999).

³²⁰ Kronman, *supra* note 125. Kronman concedes that “similarly distorting passions may be at work even in the most mundane commercial transactions,” but explains that “there is no way of distinguishing these cases from those in which the parties’ judgment is unclouded without an intrusive and probably futile inquiry into their feelings and motives.” *Id.* See also Brummer, *supra* note 27, at 293 (expressing concern that the decision to enter into covenant marriage can never be “arm’s length”).

³²¹ Scott, *Rational Decisionmaking*, *supra* note 125, at 63; Bix, *supra* note 230, at 193–94.

³²² Scott & Scott, *supra* note 123, at 1258; VanSickle, *supra* note 28, at 161; *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2096 (2003); Scott, *Rehabilitating Liberalism*, *supra* note 230, at 730; Eisenberg, *supra* note 310, at 254.

³²³ Bix, *supra* note 230, at 195; see also Atwood, *supra* note 317 (opining how hesitancy may be misconceived as unsurety).

divorce,³²⁴ only to subject them to heightened procedural (and in some jurisdictions substantive) safeguards.³²⁵ They seem stronger, however, when applied to premarital commitments whose implications far exceed mere financial loss.³²⁶ Moreover, whereas conventional premarital agreements often entail adversarial negotiation and legal representation,³²⁷ waivers of marital dissolution rights are frequently framed as joint commitments ostensibly serving the mutual good. This framing may lull parties into a false sense of security, making them even less vigilant about the risks of waiving a fundamental right. At the very least, these considerations counsel against the enforceability of marital contracts that fail to meaningfully preserve the possibility of marital exit.³²⁸

iii. Divorce and the Dangers of Duress

A third rationale for inalienability—preventing subtle forms of pressure and duress that are difficult to detect and cannot easily be attacked more directly³²⁹—further supports the inalienability of marital freedom. As Jules Coleman explains, inalienability rules are a “response to situations where pressure, coercion, or other illegitimate influences may lead people to relinquish rights they would actually prefer to keep. In these situations,

³²⁴ Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 889, 894 (1997); Margaret Ryznar & Anna Stepień-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 27 (2009); see also Jeffrey R. Thurrell, *The Premarital Agreement: A “Warm-Hearted” Planning Device*, 11 J. CONTEMP. LEGAL ISSUES 126, 126–27 (2000) (suggesting ways in which agreements’ prospects of enforceability might be maximized).

³²⁵ Prenuptial agreements are recognized and enforced by all fifty states (see ROBERT E. OLIPHANT & NANCY VER STEEGH, *WORK OF THE FAMILY LAWYER* 447 (Vicki Been et al. eds., 2d ed. 2008)), but they are subject to somewhat more rigorous conditions for their validity. See Ryznar & Stepień-Sporek, *supra* note 324, at 39–40 (providing the court has great discretion in enforcing premarital agreements). That is, courts subject these agreements to procedural fairness requirements “to guard against fraud, duress, and undue influence at the time of execution.” McLaughlin, *supra* note 183, at 475. At least nine states obligate the court to also analyze the substantive fairness of prenuptial agreements. See *id.* at 475–81, 476 n.84 (comparing the different considerations and methods of these courts); see also Thurrell, *supra* note 324, at 126 (“Th[e] courts have long disfavored premarital agreements . . .”); Sherman, *supra* note 121, at 384 (incorporating the principle of equitability into the enforcement of prenuptial agreements).

³²⁶ As well-articulated by DiFonzo, *supra* note 24, at 957 & n.510.

³²⁷ Indeed, prenuptial agreements usually represent the interests of one party with extremely one-sided provisions. See Servidea, *supra* note 310, at 551–52 (opining that one-sided provisions may be the result of intentional bargaining). When intimate partners enter a contract that involves monetary stipulations, they are usually represented by a lawyer who is entrusted with protecting their interests, a mechanism that alleviates most concerns about the problematic circumstances of a premarital setting. See Ryznar & Stepień-Sporek, *supra* note 324 (“Lawyers . . . often . . . participate in the negotiations, fueling prospective spouses in their demands.”); Marston, *supra* note 324, at 913–16 (recognizing legal representation as evidence of a party’s intentionality). Indeed, independent counsel is an important factor courts consider in determining whether the parties voluntarily entered into the prenuptial agreement. For an elaboration of cases, see Sikaitis, *supra* note 182, at 358 nn.143 & 146 (2004); Nancy R. Schembri, *Prenuptial Agreements and the Significance of Independent Counsel*, 17 ST. JOHN’S J. LEGAL COMMENT. 313, 332, 338–40 (2003).

³²⁸ Scott & Scott, *supra* note 123, at 1260.

³²⁹ Kronman, *supra* note 125, at 777.

giving people the right to change their minds protects them from being bound to promises that were extracted unfairly.”³³⁰

Allowing a pregnant woman to reconsider an adoption decision, for example, acknowledges that “circumstances may propel some women to make a decision before or immediately after the birth of a child that does not reflect their true wishes and the depth of the bond they feel to the child.”³³¹ Likewise, contracts to terminate a pregnancy are deemed impermissible because “[t]he very nature of an abortion contract is highly coercive to a pregnant woman.”³³² In such cases, the inherent difficulty of proving voluntariness, coupled with the grave risks of enforcing a coerced waiver, warrants a prophylactic rule of categorical prohibition rather than a case-by-case inquiry.³³³

Although covenant marriage is, in formal terms, an optional and voluntary regime, critics have persuasively argued that it may involve coercive elements. In particular, they caution that religious, social, or familial pressures may unduly influence couples to select the covenant model.³³⁴ Most couples, for example, are introduced to covenant marriage through religious authorities,³³⁵ and some religious leaders refuse to officiate weddings unless couples opt into the covenant framework.³³⁶ The potential for religious coercion is especially pronounced given that covenant couples tend to be significantly more devout than their non-covenant counterparts.³³⁷ For couples deeply embedded in church life, “the thought of being married by a complete stranger instead of their own church pastor in the church they have attended for many years may, in effect, ‘force’ a couple to be married under the new law.”³³⁸

³³⁰ Coleman, *supra* note 255, at 102. In response to this problem, Coleman advocates a categorical approach that functions as “a prophylactic rule: it ensures that promises motivated by illegitimate factors will not be enforced, even though doing so means that those promises that are voluntary will be unenforceable as well.” *Id.*

³³¹ A.M. Capron & M.J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 L. MED. & HEALTH CARE 34, 35 (1988).

³³² Bohn, *supra* note 268, at 531.

³³³ Berg, *supra* note 197, at 299, 325; Radin, *supra* note 255, at 1909–10. Joel Feinberg, therefore, proposes an irrefutable presumption of involuntariness in all situations would be cumbersome, at least when significant waiver of autonomy is at stake. Joel Feinberg, *Legal Paternalism*, in PATERNALISM 3, 14 (Rolf Sartorius ed., 1983).

³³⁴ See Steve Wilson, ‘Covenant Marriage’ Tries to Fix Problem at Wrong End, ARIZ. REPUBLIC, Feb. 14, 1998, at A2; Hamm, *supra* note 9, at 83–84 (highlighting different sources of religious pressure); Brummer, *supra* note 27, at 294 (cautioning against the “moral influence [of] religious counselors”); White, *supra* note 54, at 875–76 (considering the coercive effect of various social and religious factors).

³³⁵ Steven L. Nock, Laura Sanchez, Julia C. Wilson & James D. Wright, *Covenant Marriage Turns Five Years Old*, 18 MICH. J. GENDER & L. 169, 186 (2003) (finding that covenant married couples “mostly learned about the option from a religious authority”).

³³⁶ Nichols, *supra* note 30, at 454–55; see also Hager, *supra* note 135, at 580; VanSickle, *supra* note 28, at 163.

³³⁷ Brinig & Nock, *supra* note 230, at 152; Baker, Sanchez, Nock & Wright, *supra* note 115, at 172; Nock, Sanchez, Wilson & Wright, *supra* note 335, at 179, 187.

³³⁸ Nichols, *supra* note 30, at 454.

Moreover, as covenant marriage gains cultural traction,³³⁹ individuals may increasingly face pressure from prospective spouses, relatives, or community members to submit to a restrictive marital regime they might not otherwise choose.³⁴⁰ It takes little imagination to see a partner acquiesce to a covenant agreement under threat of a canceled wedding or from fear that refusal would signal distrust or faltering commitment.³⁴¹

Power differentials within intimate relationships further heighten the risk of coercion. In settings marked by substantial disparities in bargaining power, “we make a societal determination not to allow waivers in these contexts.”³⁴² Such concerns are acutely present in premarital negotiations. These interactions often reflect a structural imbalance of power, particularly along gender lines.³⁴³ Because bargaining strength tends to correlate with earning power³⁴⁴—and men continue to out-earn women in the vast majority of relationships—women are generally at a disadvantage.³⁴⁵ Feminist

³³⁹ The low rates of participation in covenant marriage today, fortunately, largely alleviate concerns that this form of marriage is not one that couples are free to reject. Bartlett, *supra* note 89, at 832–33; Garrett, *supra* note 28, at 729; Olivia Luongo, Hema Gharia, Mell Choy, Hattie Phelps & Jessica Flynn, *Marriage and Divorce*, 25 *GEO. J. GENDER & L.* 767, 785 (2024).

³⁴⁰ Bartlett, *supra* note 89, at 833; Hamm, *supra* note 9; *see also* Nichols, *supra* note 30, at 461 (addressing concerns about coercion by pastors or future spouses); Hager, *supra* note 135, at 580 (indicating the additional financial considerations); Nichols, *supra* note 7, at 954 (“People will be under psychological pressure to enter into a marriage contract . . . by virtue of . . . a prospective spouse, their family, their religious group, or from society as a whole.”); Olivas, *supra* note 33, at 784–85 (recognizing the various types of influence that exist); Buckley & Ribstein, *supra* note 232, at 577 (discussing the phenomenon of “over-signaling”).

³⁴¹ Atwood, *supra* note 317; *see also* Kronman, *supra* note 125, at 776.

³⁴² Berg, *supra* note 197, at 313. *See also* Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 *UCLA L. REV.* 738, 755, 759–60 (1978) (considering the implications of unequal bargaining power, and how imposing fiduciary duties might help to correct them).

³⁴³ Lacey, *supra* note 69, at 1453. *See also* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497, 1537–38 (1983) (highlighting the necessity of provisions promoting equality).

³⁴⁴ *See* Elaine Hatfield & Jane Traupmann, *Intimate Relationships: A Perspective From Equity Theory*, in 1 *PERSONAL RELATIONSHIPS: STUDYING PERSONAL RELATIONSHIPS* 165, 176 (1981) (exemplifying potential shifts in the marital power structure); *see also* Atwood, *supra* note 317, at 154 (correlating “women’s inferior earning capacity” with their diminished bargaining power); Beverly Horsburgh, *Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs*, 25 *U. MICH. J.L. REFORM* 423, 486 (1992) (suggesting that contracts, by their very nature, are not suited for the reality of womanhood). *See generally* Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 *VA. L. REV.* 509, 619–20 (1998) (conjecturing that although a singular woman may prove an anomaly, women as a population are disadvantaged); Jana B. Singer, *The Privatization of Family Law*, 1992 *WIS. L. REV.* 1443, 1541 (1992) (“[E]vidence suggests that husbands are often in a better position to [assert their interests without needing counsel] than wives.”).

³⁴⁵ This has led several commentators to argue forcefully that “[l]awmakers should recognize premarital agreements for what they are: contracts that violate societal norms against gender discrimination.” Brod, *supra* note 241, at 279. This view is not shared by everyone, however. *See, e.g.*, Shultz, *supra* note 64, at 207–10, 216–23, 285–86, 288–91, 328–34 (describing the role of contract principles and damages in governing the marital relationship and its dissolution); *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (recognizing that women are no longer regarded as the “weaker’ party”). *But see id.* at 168 (Papadakos, J., concurring) (“I fear my colleague[s] do[] not live in the real world.”).

scholars have rightly expressed concern that women, and especially women in abusive relationships, are particularly vulnerable to coercion in the context of covenant marriage.³⁴⁶

Socio-cultural factors surrounding marriage may further exacerbate these power asymmetries. Girls continue to be socialized to value marriage more than boys,³⁴⁷ a cultural construct that significantly undermines their bargaining power.³⁴⁸ Linda Lacey sounds a cautionary note: “Too many women have been socialized to regard marriage as the ultimate goal in life. . . . Therefore, the possibility that a prospective spouse will break an engagement unless the other party signs an agreement will usually be a more serious threat to a woman than a man.”³⁴⁹ This structural disadvantage is compounded by the fact that women tend to have higher expectations than men that their marriages will endure. Their reluctance to contemplate the possibility of divorce “leads to unequal bargaining positions in many situations.”³⁵⁰

Given the difficulty of gauging autonomy and voluntariness in premarital negotiations shaped by such social pressures and entrenched inequalities, a case-by-case inquiry may prove not only burdensome, but illusory.³⁵¹ These considerations tilt the balance toward a flat prohibition on covenant contracts.³⁵²

iv. Divorce as a Decision Involving Important Societal Values

Finally, inalienable rights reflect important societal interests in the nature of family ties. The refusal to enforce promises to marry, for instance, embodies our collective commitment to the voluntary character of intimate

³⁴⁶ Hager, *supra* note 135, at 581–82; VanSickle, *supra* note 28, at 167. Indeed, a study examining the characteristics of newlyweds who opt for covenant marriage reported, “[s]ome covenant marriages involved unions in which a rigid, unyielding patriarch struggled with a wife who was failing to meet his expectations.” Baker, Sanchez, Nock & Wright, *supra* note 115, at 167.

³⁴⁷ Wax, *supra* note 344, at 650.

³⁴⁸ *Id.* at 654.

³⁴⁹ Lacey, *supra* note 69, at 1453.

³⁵⁰ *Id.* at 1454; *see also* EVELYN GOODENOUGH PITCHER & LYNN HICKEY SCHULTZ, *BOYS AND GIRLS AT PLAY: THE DEVELOPMENT OF SEX ROLES* 135–36 (1983) (analyzing the societal effect of marriage dynamics).

³⁵¹ This result seems particularly justified given that it is difficult not only to prove that an act is voluntary, but also to define voluntariness as anything capable of proof. Rubin, *supra* note 185, at 529 (explaining how voluntariness is an unwieldy notion whose meaning in waiver cases has been a source of continuing confusion). For a discussion of the complexities of assessing voluntariness, *see generally* D, *TAKING CARE OF STRANGERS* (1980); Feinberg, *supra* note 333 (contending that testing voluntariness is expensive and fallible).

³⁵² Similar considerations of administrative needs have also been invoked to support prohibitions on other involuntary acts. *See* Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 *AM. U. L. REV.* 803, 836–48 (1995) (analyzing the state’s role in placing limitations on physician-assisted suicide in comparison to other rights of bodily autonomy); *see also* Kronman, *supra* note 125, at 777 (noting a flat prohibit against contracts for self-enslavement).

relationships.³⁵³ Likewise, rendering the right to divorce inalienable would affirm and advance fundamental values underpinning marriage itself.³⁵⁴

Family relationships, unlike marketplace transactions, are expected to be based on commitments whose force is rooted in affection and a sense of mutual responsibility, not the threat of legal liability. Indeed, that family members will generally honor their promises to one another without legal compulsion is part of what makes family relationships so valuable to most people. Thus, people tend not to turn to the law to enforce intrafamilial promises; when they do, courts are usually reluctant to get involved. The marriage vows themselves are not treated like binding contracts; couples may end their marriage despite an advance agreement to remain together for life.³⁵⁵

By sustaining marriages through legal compulsion, covenant regimes threaten to erode the foundations of the American ideal of companionate marriage—an institution grounded in mutual affection, personal commitment, and emotional intimacy. In this model, marriage endures not by virtue of legal constraint, but by the strength of the partners' voluntary devotion. As Alexander Capron has aptly observed, “[c]ontracts are a fine way to make binding agreements about the disposition of property, but they are much less appropriate when deciding about personal relationships”³⁵⁶

A right of exit is also crucial to imbuing enduring marital commitments with meaning. What lends marriage both its personal and cultural significance is that it is an intimate union sustained by continuous choice.³⁵⁷ The inalienability of marital freedom thus fortifies the institution of marriage, enhancing its social meaning and encouraging entry in the first place—even as it dissolves individual unions.³⁵⁸ In short, for all its important and beneficial functions, a right to marital freedom must be regarded as an integral component of the very societal values that inalienability seeks to protect.

In the final analysis, the right to divorce is a quintessential candidate for protection under the personhood theory of inalienability.

³⁵³ Coleman, *supra* note 255, at 104; *cf.* Alexander M. Capron & Margaret J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 LAW MED. & HEALTH CARE 34, 35 (1988) (the right to revoke a promise to relinquish a child for adoption “manifests society’s traditional respect for biological ties”).

³⁵⁴ Coleman, *supra* note 255, at 104.

³⁵⁵ *Id.* at 105 (footnotes omitted).

³⁵⁶ Alexander Morgan Capron, *Parenthood and Frozen Embryos More than Property and Privacy*, 22 HASTINGS CTR. REP. 32, 33 (1992).

³⁵⁷ Karst, *supra* note 22, at 637 (“It is the *choice* to form and maintain an intimate association that permits full realization of the associational values we cherish most.”). The possibility to divorce promotes the realization of values in an intimate association that endures. *Id.*

³⁵⁸ *Id.* at 659–63.

2. *The Inalienability of Divorce as a Contract for Personal Services*

Anthony Kronman's variant of inalienability analysis offers further personhood-based grounds for the inalienability of marital freedom.³⁵⁹ His theory of employee agreements—finding them akin to enslavement when they permit employers to compel specific performance³⁶⁰—is readily extrapolated to covenant or contractual restrictions on divorce.

Kronman's account of inalienability stresses the depersonalization inherent in specific performance. As he explains, a person typically enters a personal service contract with particular goals in mind; if those goals later shift, the individual may come to regard the earlier decision as irrational—an imposition by a former self who betrayed her by binding her to the contract.³⁶¹ Specific performance that requires ongoing personal cooperation under these conditions profoundly undermines one's sense of competence and generates intense feelings of regret and self-betrayal.³⁶² For Kronman, it “weakens a person's confidence in his ability to make lasting commitments and guard the things he cares for, and this, in turn, strikes at his self-respect.”³⁶³ Kronman also warns of a broader danger of demoralization: that compelling specific performance of personal services would appear degrading and erode both individual autonomy and societal respect for human dignity. Because damages mitigate both the individual and social

³⁵⁹ See generally Kronman, *supra* note 125, at 763. But see generally Walter Block, *Alienability, Inalienability, Paternalism and the Law: Reply to Kronman*, 28 AM J. CRIM. L. 351 (2001) (opposing Kronman's view).

³⁶⁰ Kronman, *supra* note 125, at 778 (explaining that even a contract of short duration calling for the performance of routine and unobjectionable tasks is a contract of self-enslavement if it bars the employee from substituting money damages for his promised performance). See also Angela R. Holder, *Surrogate Motherhood: Babies for Fun and Profit*, 12 LAW, MED. & HEALTH CARE 115, 117 (1984) (explaining that the remedy of specific performance violates the Thirteenth Amendment); Shahar Lifshitz & Ram Rivlin, *Marital Contracts on The Fault Lines: A Liberal Inquiry*, 38 CAN. J.L. & JURIS. 148, 160 (2025) (agreeing that “seriously” limiting marital exit is “excessive self-enslavement” by taking a liberal perfectionist approach); Kronman, *supra* note 125, at 780 (explaining that such contracts are prohibited not only because people should not be permitted to bargain away too much of their personal liberty, but also because of the special threat that these contracts pose to a person's integrity or self-respect; RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. A (A. L. I. 1981) (noting that courts' resistance to specific performance reflects reluctance to compel that personal relations that have already soured continue and reluctance to effectively create involuntary servitude).

³⁶¹ Kronman, *supra* note 125, at 780–84.

³⁶² Kronman distinguishes between disappointment, which stems from a mistaken assumption about the world, and regret, which stems from a change in values. He explains that the inalienability of the right to substitute damages for the specific performance of obligations derives from internal changes of values rather than from new circumstances in the world that leave personal values unaffected. As long as there is continuity in goals, disappointment from the contract will not lead the person to doubt the rationality of the original decision. *Id.* at 780–82. For instance, the decision to give up a child with whom one has an emotional bond seems precisely the sort of decision that, if one's values later change, would seem an irrational self-betrayal. *Rumpelstiltskin Revisited*, *supra* note 258, at 1952.

³⁶³ Kronman, *supra* note 125, at 782.

harms of compelled service, the right to depersonalize a contractual relationship must remain inalienable.³⁶⁴

On this theory, an agreement waiving the right to marital exit is a quintessential example of a contract of self-enslavement. Since the more personal the contract, the greater the threat it poses to one's integrity and self-respect, compulsory performance in the divorce context presents an even graver affront than other agreements requiring personal services.³⁶⁵ Indeed, Kronman himself acknowledged the implications of his theory for marital exit, concluding that “neither [party] can give the other the power to compel specific performance by waiving the right to terminate the relationship through divorce. . . . [A]ny agreement purporting to forfeit this entitlement is invalid.”³⁶⁶

The inalienability of divorce derives further support in the longstanding American rejection of specific performance for an equally personal commitment: the promise to marry.³⁶⁷ In fact, every U.S. jurisdiction bars such a cause of action, often decrying it as a “barbaric remedy.”³⁶⁸ The very intuition underlying this rule—that marriage is the most intimate commitment imaginable, demanding sustained physical, psychological, and emotional performance, including sexual and reproductive services³⁶⁹—

³⁶⁴ *Id.* at 783.

³⁶⁵ *Id.* at 775, 779. See also *Rumpelstiltskin Revisited*, *supra* note 258, at 1943 (describing a contract for marriage as bearing “a striking similarity to slavery”); Scott, *Rational Decisionmaking*, *supra* note 125, at 80 (noting that extreme restrictions on divorce implicate the prohibition against voluntary enslavement); Scott & Scott, *supra* note 123, at 1259.

³⁶⁶ Kronman, *supra* note 125, at 779.

³⁶⁷ See JOSEPH W. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS 148 (1931) (explaining that performance of the marriage contract, while formerly recognized in English law in the form of an action for the restoration of conjugal rights, has never been recognized in the United States).

³⁶⁸ HARRIET SPILLER DAGGETT, LEGAL ESSAYS ON FAMILY 39 (Charles W. Pipkin ed., 1935).

³⁶⁹ Singer, *supra* note 344, at 1525–26; *Rumpelstiltskin Revisited*, *supra* note 258, at 1938; Spaht, *supra* note 177, at 464; Hamilton, *supra* note 206, at 344; see *Warren v. State*, 336 S.E.2d 151, 153 & n.6 (Ga. 1985) (explaining that historically, consent to marriage was consent to provide sexual services on demand); Martha Albertson Fineman, *Why Marriage*, 9 VA. J. SOC. POL'Y & L. 239, 262, 265 (2001) (noting that historically marriage has been a patriarchal institution where husbands are thought of to be owed these services by their wives); Joyce McConnell, *Beyond Metaphor: Battered Women and Involuntary Servitude*, 4 YALE J.L. & FEM. 207, 230 (1992) (describing that marital relationships are seen to inherently include these reciprocal services); McLaughlin, *supra* note 183, at 465 (labeling marriage as a contract containing obligations for these services); Sofi Ohlsson-Wijk, Maria Brandén & Ann-Zofie Duvander, *Getting Married in a Highly Individualized Context: Commitment and Gender Equality Matter*, 84 J. MARRIAGE & FAM. 1081, 1086, 1096–97 (2022) (finding in a study of young adults in Sweden that marriage is viewed as a more binding form of commitment than just living together); Ann Berrington, Brienna Perelli-Harris & Paulina Trevena, *Commitment and the Changing Sequence of Cohabitation, Childbearing, and Marriage: Insights from Qualitative Research in the UK*, 33 DEMOGRAPHIC RSCH. 327, 353–57 (2015) (finding in a study of focus groups in Southampton, United Kingdom that people generally perceive marriage as a higher form of commitment in a relationship than just living together, but the traditional obligations of living together and childbearing after marriage is not as common as this order of events can vary); Corinne Reczek, Sinikka Elliott & Debra

militates against permitting individuals to alienate their right to exit. It follows that a person who voluntarily submits to a rigid divorce regime, whether imprudently or after meticulous deliberation, must be “protected from himself, no matter how rational his decision or compelling the circumstances.”³⁷⁰

This theory implies that while covenant contracts may not be enforced to compel continued marriage, they may nonetheless subject a divorce initiator to monetary damages. For Kronman, where inalienable rights are at stake, the law should relieve the promisor of the duty to perform, but not necessarily of the duty to compensate. To excuse all consequences of breach, he cautions, “would lend itself to exploitation and tend to undermine the stability of contractual relations generally.”³⁷¹ While many states squarely reject this theory in the context of the marriage contract—expressly prohibiting damages for breach of promise to marry³⁷²—various legal commentators have endorsed it in relation to more personal agreements, such as surrogacy agreements,³⁷³

Umberson, *Commitment Without Marriage: Union Formation Among Long-Term Same-Sex Couples*, 30 J. FAM. ISSUES 738, 746–49 (2009) (finding that same-sex couples who have historically faced unequal access to the institution of marriage have shaped the idea of a committed relationship in other ways than through marriage and are less likely to mark this commitment through a marriage ceremony); Alyssa M. Sucrese, “*Not Now, I Am Too Stressed*”: *Stress and Physical Intimacy in Early Marriage*, 41–44 (2023) (M.A. thesis, University of Texas at Austin) (Sage Journals).

³⁷⁰ Kronman, *supra* note 125, at 775.

³⁷¹ *Id.* at 784.

³⁷² *See, e.g.*, CAL. CIV. CODE § 43.4 (West 1959) (prohibiting damages for breach of promise to marry); MASS. GEN. LAWS ANN. ch. 207, § 47A (West 1938) (rendering breach of contract to marry as inactionable); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1963) (abolishing the right of action to recover damages for breach of contract to marry); OHIO REV. CODE ANN. § 2305.29 (West 1978) (prohibiting awards of civil damages for breach of promise to marry). Yet, some jurisdictions which erect statutory bans still allow recovery on the theory of unjust enrichment. *See, e.g.*, *Jury v. Ridenour*, No. 98CA100, 1999 WL 436843 at *4–5 (Ohio Ct. App. Jun. 15, 1999) (upholding the trial court’s jury instruction for finding unjust enrichment); *see also* *Bradley v. Somers*, 322 S.E.2d 665, 667, 667 (S.C. 1984) (upholding a prohibition of damages for a breach of promise to marry for loss of opportunity to marry); Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIMONIAL LAWS. 413, 437 (2008) (illustrating forbidden provisions in prenuptial agreements).

³⁷³ *See In re Baby M*, 525 A.2d 313, 375 (N.J. Super. Ct. Ch. Div. 1987) (holding that an action for breach of a surrogacy contract is entitled to monetary damages), *rev’d in part*, 537 A.2d 1227 (1988) (citing public policy grounds to find the surrogacy contract conflicted with state adoption laws); Margaret F. Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein’s Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2390 (1995) (listing proposed state interventions in surrogacy agreements, including allowing for money damages for breach).

or contracts to undergo or forgo abortion,³⁷⁴ arguing that breach should be met with monetary compensation.

At least one scholar has extended this logic to divorce, contending that personal autonomy does not go so far as to absolve a spouse who sues for divorce in contravention of a no-divorce agreement from liability for liquidated damages.³⁷⁵ Even on this view, however, such damages must be compensatory—limited to the economic losses occasioned by the breach (including loss of income, services, complementarity and economies of scale)³⁷⁶—and not punitive.³⁷⁷

³⁷⁴ See, e.g., Bohn, *supra* note 268, at 532–33 (explaining that a breach of such a contract cannot be remedied by specific performance, since this would violate a woman’s personal autonomy and bodily integrity, but according to many, a failed contract for abortion must still have legal consequences); Mayo, *supra* note 270, at 616–20 (discussing the constitutional considerations on the power to contract rights to have an abortion in relation to entitlement to damages); Roosevelt, *supra* note 270, at 120–22 (analyzing the right to recover damages from a contracted surrogate mother who undergoes abortion); Susan M. Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble with Specific Performance*, 4 N.Y.L. SCH. J. HUM. RTS. 375, 381–82 n.50 (1987) (describing the right to contract to have an abortion is rooted in constitutional principles versus surrogacy contracts that are focused on contract principles).

³⁷⁵ Theodore Haas concludes from the cases on negative covenants and partnerships for a term that the decision to terminate a relationship in breach of contract subjects the breaching party to damages. Haas, *supra* note 232, at 910.

³⁷⁶ *Id.* at 912–14. Based on these guidelines, Theodore Haas has proposed a divorce arrangement whereby the exercise of a unilateral no-fault divorce is burdened by unfavorable division of family property and future income. According to his calculations, dividing the spouses’ property in the following manner is a fair estimation of the extent of losses suffered by the divorced spouse, and thus is not as an impermissible penalty on the initiator of the divorce action:

(a) The divorced spouse shall receive 50% of that portion of the net value of the divorcing spouse’s commercial or professional goodwill, licenses, or degrees developed or earned during their marriage. (b) The divorcing spouse shall receive none of the value of the divorced spouse’s commercial or professional goodwill, licenses, or degrees. (c) Regarding the remainder of the spouses’ property, the divorced spouse shall receive 75% of the net value of the spouses’ property (including marital property and the divorcing spouse’s separate property) with a net value up to twice the family’s annual income. In this regard, marital property shall be exhausted before the divorcing spouse’s separate property is divided. The parties shall equally divide the net value of marital property with a net value greater than twice the family’s annual income. . . . (f) The divorcing spouse shall have no right to any of the separate property of the divorced spouse.

Id. at 926–27. This result would accord with the judicial practice that routinely enforces ante-nuptial agreements that leaves one spouse in a worse position than one would under the statutory provisions concerning the economic consequences of divorce. *Id.* at 913–14.

³⁷⁷ This risk of punitive damages, obviously, is that they act as a *de facto* restriction on marital exit. Sometimes, the line between compensatory and punitive damages can be hard to draw. Clearly, an agreement as drastic as the one in *Sanders v. Sanders*, 288 S.W.2d 20, 24 (Tenn. Ct. App. 1956), providing that “[s]hould either party file a divorce against the other, then the party so filing shall by such filing forfeit to the other all right, title, and interest in all the property, real, personal or mixed, jointly held and owned by them” is a sheer penalty for the exercise of the right and thus is unsupportable. Courts, however, have tended to respect contracts that punish a divorce-seeker by depriving her of any interest in the other’s estate, depending upon the specific contractual terms and the circumstances. See, e.g., *Eule v. Eule*, 320 N.E.2d 83, 87–88 (Ill. App. Ct. 1974) (finding a clause in a postnuptial agreement forfeiting the spouse’s right to alimony did not prevent a temporary order to grant alimony); *Buettner v. Buettner*, 89 Nev. 39,

In conclusion, the law may not permit a spouse to alienate the right to divorce; at most, it may allow for the imposition of reasonable, compensatory, but not punitive, damages for breaching a covenant agreement.

3. *The Inalienability of Divorce as a Relational Right of Gender Equality*

Thus far, we have considered the inalienability of marital freedom through an autonomy-based framework stressing personhood. Lawrence Tribe offers a distinct analytic approach, conceiving of certain “relational” or “systemic” rights as inherently inalienable. These rights, he averred,

serve not only to recognize spheres of personal autonomy, but also to replace vertically stratified patterns of power with more horizontal or egalitarian arrangements—between accuser and accused, between governors and governed, between the Union and the States, between those who hold power and those who aspire to it.³⁷⁸

For Tribe, rights that restructure relationships “to avoid the creation or perpetuation of hierarchy in which some perennially dominate others”³⁷⁹ cannot be waived for their purpose transcends the individual and targets structural subordination. For example, Tribe deems a woman’s right to terminate her pregnancy inalienable because it serves a “relational” function: protecting women as a class from subjugation by men.³⁸⁰

On this account, marital freedom is more than an individual liberty; it is a relational right that reconfigures power dynamics between husbands and wives—and between men and women more broadly. As with the abortion

43–45 (Nev. 1973) (holding provisions of an antenuptial agreement governing property settlement were not void on public policy grounds); *Unander v. Unander*, 265 Or. 102, 105–07 (Or. 1973) (finding alimony provisions in antenuptial agreements should be enforced short of leaving a spouse without any means of support); *Posner v. Posner*, 233 So.2d 381 (Fla. 1970) (holding a provision outlining property rights of the spouses or their estates upon the death of one spouse is enforceable, so long as the divorce was entered into in good faith and the provision follows all other applicable rules); *Hudson v. Hudson*, 350 P.2d 596, 597–98 (Okla. 1960) (holding an antenuptial agreement fairly entered into forfeiting the right to receive alimony does not entitle a spouse to then claim alimony; they are only entitled to their property held before the marriage); see also *Kronman*, *supra* note 125, at 777–78 (noting the different circumstances in which a consequential antenuptial provision may be enforceable); *Hass*, *supra* note 232, at 922 (analyzing the legal theories under contract law applied to antenuptial agreements).

³⁷⁸ Tribe, *supra* note 256, at 333.

³⁷⁹ *Id.*

³⁸⁰ A contract not to abort may exploit a “special vulnerability of women in such a way as to reinforce their subservience to men, and thus their lack of fully autonomous and equal roles in social and political life.” *Id.* at 337–38; Consequently, a woman cannot contract away her right to abortion, whatever the underlying circumstances; government enforcement of such a contract would violate the Fourteenth Amendment. *Id.* at 336. Likewise, the prohibition of peonage is inalienable not only because it protects individuals who might themselves become indentured, but also because it shields society from “the creation of a perpetual hierarchy that offends most people’s vision of a free society.” *Rumpelstiltskin Revisited*, *supra* note 257, at 1943. But see GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES* 33 (1978) (arguing that the prohibition against indentured servitude is an unequal distribution of societal costs and prohibitive to free will).

right, denying women secure control over their intimate lives would not merely disempower them—it would entrench the very hierarchies the American constitutional order strives to dismantle. That the right to exit from inegalitarian marital arrangements falls within this “intimate” domain cannot be seriously contested.³⁸¹ As I have shown elsewhere, the institution of marriage—as historically and currently structured and lived—has constituted a formidable barrier to women’s equality, often anchoring women in relationships marked by abuse, rigidly prescribed sex roles, and asymmetrical power.³⁸² Marriages today continue to reflect a gendered division of labor, pronounced economic dependence, domestic violence, and sexual exploitation.³⁸³ This marital inequality begets a vicious cycle: the subordination of women within the home reverberates into the market and civic sphere, undermining their quest for full citizenship and equal standing.³⁸⁴ That feedback loop impairs women’s careers, stunts their acquisition of human capital and labor skills, and reduces their chances of ascending to legislatures, judiciaries, and other sites of power.³⁸⁵

Understood in these terms, legal barriers on exit inflict dignitary and status harms on women by narrowing their horizons and channeling them into diminished lives. Divorce restrictions force women to remain wives without ameliorating the very conditions that render marriage a locus of female oppression. A unilateral, no-fault right to divorce is thus not merely a procedural convenience—it is a linchpin of gender equality, a crucial

³⁸¹ VanSickle, *supra* note 28, at 177–78.

³⁸² See generally Yefet, *Formal Gender-Equality*, *supra* note 23 (explaining how the institution of marriage has created a barrier to women’s equality); Yefet, *Substantive Gender-Equality*, *supra* note 23 (explaining how a lack of exit options in divorce reinforces traditional gender stereotypes).

³⁸³ See generally Yefet, *Formal Gender-Equality Right*, *supra* note 23 (explaining how marriages can reinforce gender inequities); Yefet, *Substantive Gender-Equality*, *supra* note 23 (showing how marriage creates strong gender inequalities).

³⁸⁴ See *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 737, 740 (2003) (holding that state employees may recover money damages in federal court in the event of the state’s failure to comply with the family-care provisions of the FMLA); see also Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies In The Preservation Of Male Workplace Norms*, 9 EMPL. RTS. & EMPLOY. POL’Y J. 1, 25, 37 (2005) (supporting that marital inequality reverberates into the market and civic sphere); Kenneth L. Karst, *Sources of Status-Harm and Group Disadvantage in Private Behavior*, 2 ISSUES LEGAL SCHOLARSHIP 11 (2002) (arguing the recognition of reproductive rights as fundamental has allowed women to participate more substantially in public life); Brinig & Allen, *supra* note 94, at 133 (describing the change in gender roles within a marriage once the couple has children); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 5, 138–39, 147 (1989).

³⁸⁵ See Wax, *supra* note 344, at 635 (explaining that effects of gender inequality perpetuate into the labor market); Kenneth L. Karst, *Woman’s Constitution*, 1984 DUKE L.J. 447 (1984), at 458–59 (describing a woman’s traditional gender role as focused inward to her family and how that view is shaped by the media); OKIN, *supra* note 384, at 25, 31; Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994) (explaining the anticaste principle and how it relates to gender). See generally Yefet, *Substantive Gender-Equality*, *supra* note 23 (supporting that marital inequality impairs women’s careers).

mechanism for dismantling marital subordination,³⁸⁶ and restoring what Elizabeth Cady Stanton once called women's "natural right of equality."³⁸⁷

Concerns of this nature have been raised in critiques of covenant marriage legislation. Feminist scholars argue that such law's constraints on marital freedom "serve to catapult women back into positions of subordination to and financial dependence upon men,"³⁸⁸ since in practice, divorce restrictions often compel women either to secure their husbands' consent or remain subject to their control.³⁸⁹ These exit barriers also betray paternalistic assumptions that women should wish to remain wives, that marriage is essential to their well-being or even survival, or that the law must intervene to prevent husbands from abandoning them.³⁹⁰

Such laws are also inimical to gender equality because covenant divorce regimes amount to a de facto return to the discriminatory fault system—one that historically embodied both the gender-based expectations of the traditional marriage contract and the double standard applied to men's and women's sexual behavior—and which, to this day, may still be applied with gendered bias in judicial decision-making.³⁹¹ Moreover, covenant marriage's revival of fault poses a grave threat to women's autonomy.³⁹² Given that women remain economically disadvantaged relative to their

³⁸⁶ DIFONZO, *supra* note 165, at 24 (stating that divorce gives women the chance to get better by getting out); Singer, *supra* note 344, at 1518; Robert E. Goodin, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 197 (1985). *But see* Frantz & Dagan, *supra* note 14, at 93 (viewing exit as only a limited solution since once women are married "exit from a subordinating relationship will not necessarily be a tenable alternative").

³⁸⁷ RILEY, *supra* note 19, at 31; *see id.* at 4 (noting that advocates of divorce often hoped that it would eventually lead to equality and reciprocity in marriage). *But see* Carol Brown, *Mothers, Fathers and Children: From Private to Public Patriarchy*, in WOMEN AND REVOLUTION 239, 259 (Lydia Sargent ed., 1981).

³⁸⁸ VanSickle, *supra* note 28, at 156.

³⁸⁹ *See, e.g.*, Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 953 (1998); *Covenant Marriages: New Louisiana Law Makes It Harder to Divorce*, ABC NEWS NIGHTLINE, Transcript (Aug. 20, 1997), <http://www.abcnews.com/onair/Nightline/html<uscore>files/transcripts/ntl0820.html> (quoting Terry O'Neill, Louisiana National Organization for Women).

³⁹⁰ Vansickle, *supra* note 28, at 156, 161; Silberbogen, *supra* note 88, at 207.

³⁹¹ Judicial discretion may and has often been influenced by gender bias and cultural assumptions about women and their "proper" social and familial roles in the application of fault grounds. *See generally* Yefet, *Formal Gender-Equality*, *supra* note 23; EISLER, *supra* note 104, at 190; D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 542–43, 543 nn.3 & 5 (2d ed. 2002) (describing the historical significance of adultery as a ground for divorce since it threatened the idea that a wife is a husband's property); Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 625 (1999) (noting the level of discretion judges are allotted in divorce proceedings to determine issues such as financial dissolution and monetary penalties); Bradford, *supra* note 57, at 634–35 (describing the tendency for judges to find women at fault more often than men on the fault-based grounds); Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 3 (1990) (commenting on both the sexual harassment women may face in the courtroom and judicial biases against women's testimonies).

³⁹² VanSickle, *supra* note 28, at 168.

partners, the heightened procedural and financial burdens of a fault regime would, in practice, leave many women unable to escape moribund or oppressive unions.³⁹³

Finally, that strict divorce regimes reinforce gender stratification is perhaps most vividly illustrated by the lived experience of covenant marriage participants.³⁹⁴ Although the legislation purports to be gender-neutral, substantial evidence shows that the covenant marital model accommodates—indeed, encourages—gender role traditionalism.³⁹⁵ Empirical studies reveal that nearly all covenant couples express a desire to restore traditional gender norms within marriage and “explicitly seek to short-circuit some of the hostilities, ambivalences, and confusions inherent in the negotiation of gender roles in newlywed marriages.”³⁹⁶ Researchers report that covenant couples overwhelmingly believe they “must adhere to a strict traditional gender hierarchy,” doing so “dramatically” more than their counterparts under ordinary marriage laws.³⁹⁷ These couples uniformly affirm husbandly headship and wifely submission,³⁹⁸ with many explicitly citing their belief in conservative gender ideology as the very reason for choosing the covenant model.³⁹⁹ For them, covenant marriage serves not merely as a private marital arrangement but as a public declaration—a symbolic reaffirmation of “the need to uphold a more traditional ideology concerning religion and hierarchical gender roles.”⁴⁰⁰

Taken together, the evidence on gender dynamics within covenant marriage powerfully supports the conclusion that, from a relational perspective, divorce rights must be inalienable. If marital freedom could be contractually surrendered in advance, the relationships safeguarded by its enforcement would be rendered, in Tribe’s terms, “too vulnerable to destruction by private bargains.”⁴⁰¹ Gender equality, in short, demands the inalienability of dissolution rights.

³⁹³ Friedman, *supra* note 19, at 662–63; Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61 (1976).

³⁹⁴ See Baker, Sanchez, Nock & Wright, *supra* note 115, at 166, 172 (explaining that covenant marriages reinforce gender stratification).

³⁹⁵ Clare Huntington, *The Institutions of Family Law*, 102 B.U. L. REV 393, 447 (2022) (“Covenant marriage was intended to reinforce traditional gender norms.”).

³⁹⁶ Baker, Sanchez, Nock & Wright, *supra* note 115, at 169.

³⁹⁷ *Id.* at 164, 168–71; see also Nock, Sanchez, Wilson & Wright, *supra* note 335, at 179 (claiming that those in covenant marriages adhere to strict traditional gender hierarchy).

³⁹⁸ Baker, Sanchez, Nick & Wright, *supra* note 115, at 169.

³⁹⁹ *Id.* at 171 (observing that “standard spouses care deeply about the success and potential stability of their marriages but deny the power of gender roles as being meaningful in the shaping of experiences and qualities in their marriages. Conversely, covenant spouses seem to undertake gender roles as the great project on which marital success hinges. They feel as though they must confront the consequences and importance of gender.”); see also Su & Ledermann, *supra* note 7, at 229–31, 239–40 (stating that those who choose covenant marriage adhere to religious beliefs and traditional matrimonial values).

⁴⁰⁰ Baker, Sanchez, Nock & Wright, *supra* note 115, at 164.

⁴⁰¹ Tribe, *supra* note 256, at 335.

C. *The Right to Rescind the Waiver of a Right*

Our analysis has thus far suggested that marital freedom generally cannot be waived or alienated. Even if it could, a person cannot constitutionally forfeit her divorce entitlements, at least not entirely or indefinitely. In these cases, we must still consider the possibility of a constitutional right to rescind the waiver of a right⁴⁰²—a theory advanced by numerous scholars and implicitly recognized by the Supreme Court.⁴⁰³

Broadly speaking, this theory maintains that waivers should be revocable unless the state has incurred substantial detrimental reliance.⁴⁰⁴ Under this so-called reliance theory, the state “does not permanently discharge its duty to respect constitutional rights by the simple expedient of securing a waiver from the holder of those rights.”⁴⁰⁵ Only when the state—as opposed to some other third party, such as a spouse⁴⁰⁶—would be prejudiced by the withdrawal is there a constitutional justification to deny rescission. As one Supreme Court justice succinctly stated: “I cannot accept a concept of irrevocable waiver of constitutional rights, at least where the government will not suffer substantial prejudice in restoring those rights.”⁴⁰⁷

For example, Fourth Amendment protections against unreasonable searches and seizures may be waived through consent,⁴⁰⁸ but that consent

⁴⁰² Kenneth W. Simons, *Rescinding a Waiver of a Constitutional Right*, 68 GEO. L.J. 919, 923 (1980).

⁴⁰³ See *Stevens v. Marks*, 383 U.S. 234, 249–51 (1966) (implicitly recognizing the constitutional thesis that a waiver is revocable absent serious detrimental reliance); *Santobello v. New York*, 404 U.S. 257, 266, 268 (1971) (explaining that a plea bargain is inherently cutting against a defendant’s fundamental right to a trial); see also Simons, *supra* note 402, at 920, 926–27 (illustrating the possibility of a constitutional right to rescind the waiver of a right).

⁴⁰⁴ Simons, *supra* note 402, at 920; see also Peter Westen, *Forfeiture By Guilty Plea—A Reply*, 76 MICH. L. REV. 1308, 1321–22 (1978) (explaining the reliance theory and how it relates to waivers of rights); Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1254–59 (1977) (analyzing the constitutionality of forfeiture versus waiver in the context of plea bargains) [hereinafter Westen, *Away from Waiver*].

⁴⁰⁵ Simons, *supra* note 402, at 922.

⁴⁰⁶ While reliance theory takes into account only state reliance and not reliance by other individuals, even if reliance by the other spouse is considered, a waiver of the right to marital freedom may still be revocable. As suggested in the literature, inalienable rights are so central to those who hold them, that “it is usually the case that the rights-holder’s interest in changing her mind will outweigh the claims of those who may be frustrated if a promise to relinquish an inalienable right is not kept.” Coleman, *supra* note 255, at 124. For example, a biological mother’s interests in retaining a relationship with her child will generally outweigh those of prospective adoptive parents in establishing a relationship with a child to whom they have no pre-existing bond. Since “the party seeking to change her mind has more at stake, appeals to the reliance interests of the party who seeks to enforce the original agreement are less persuasive.” *Id.*

⁴⁰⁷ *Neely v. Pennsylvania* 411 U.S. 954, 958 (1973) (Douglas, Stewart & Marshall, JJ., dissenting).

⁴⁰⁸ Rubin, *supra* note 185, at 504–05. Several courts have upheld searches of probationers and parolees that would otherwise not meet ordinary Fourth Amendment principles “on the ground that the search in question was pursuant to an express waiver of Fourth Amendment rights made as a condition of and at the time of release.” See WAYNE R. LAFAYE, 5 SEARCH & SEIZURE 438–39 (4th ed. 2004)

may be withdrawn prior to the search, as long as the state has not already wasted time or incurred expense in reliance.⁴⁰⁹ By contrast, waiver of a Sixth Amendment jury trial is often deemed irrevocable because withdrawal obviously harms a state that has already invested in a non-jury trial.⁴¹⁰

Applied to marital freedom, this logic implies that individuals who waive their divorce rights via covenant contracts should retain the right to rescind those waivers, since the government suffers no concrete harm if a covenant spouse reconsiders and petitions for a standard no-fault divorce. This is true in two respects. First, mere disappointment of government expectations does not constitute cognizable prejudice.⁴¹¹ Second, the state—having provided no incentives for entering into covenant marriage—is in no tangible sense worse off if couples reclaim the dissolution rights available to all others.

To be sure, under this approach, covenant marriage legislation would still play an important role. The reliance theory of waiver would treat the relinquishment of divorce rights as voidable, rather than void, enabling a spouse to waive the exercise of her dissolution rights at the time divorce is contemplated. Only if and when she changes her mind and seeks to reclaim the full array of exit options would the covenant contract become unenforceable and the right to a liberal, unilateral, no-fault divorce be restored.

CONCLUSION

States have enjoyed too much leeway, for too long, in experimenting with divorce law and controlling the individual's right to marital exit. This work has argued that the Constitution safeguards the right to marital freedom, securing for Americans a dissolution regime that respects their liberty, equality, and dignity, and that does not exacerbate the emotional and economic burdens inherent in divorce.

Exploring the constitutional stature of marital freedom and its implications for contemporary divorce regime is especially urgent at this juncture, as states have begun—once again—to experiment with divorce-restrictive measures. The twenty-first century has ushered in a nascent

(explaining that Fourth Amendment protections can be waived through consent); *see, e.g.*, *Samson v. California*, 574 U.S. 843, 850–57 (2006) (holding that the conditions of parole and reasonable government interests reduce parolees' reasonable expectation of privacy under the Fourth Amendment).

⁴⁰⁹ *See, e.g.*, *Mason v. Pulliam*, 557 F.2d 426, 428–29 (5th Cir. 1977) (holding that consent may be withdrawn prior to a search by distinguishing the strength of the standards for waiver in comparison to other constitutional rights); *United States v. Bily*, 406 F. Supp. 726, 728–29 (E.D. Pa. 1975) (finding that consent to a search by law enforcement and subsequent revocation of consent two hours into the search was a voluntary waiver of rights); *see also* *Simons*, *supra* note 402, at 929 (explaining that mere disappointment of the government's expectations cannot constitute prejudice).

⁴¹⁰ *Simons*, *supra* note 402, at 929. *See, e.g.*, *People v. Melton*, 271 Cal. App. 2d Supp. 901, 904–06 (Cal. Ct. App. 1954) (holding that waiver of a Sixth Amendment jury trial is often deemed irrevocable because withdrawal obviously harms a state that has already invested in a non-jury trial).

⁴¹¹ *Simons*, *supra* note 402, at 953; *Westen, Away from Waiver*, *supra* note 404, at 1236–37.

divorce “counterrevolution,” with covenant marriage legislation as its hallmark. Covenant marriage imposes on couples’ numerous restrictions that may well be unconstitutional in their own right—but does so under the guise of mutual consent.

According to the inalienability theories we have examined, marital freedom is an inalienable right—one that requires present choices to yield to future freedoms in order to safeguard personhood, prevent self-enslavement, and curtail gender subordination. By contrast, the Supreme Court’s waiver jurisprudence and autonomy-based accounts of waivable rights suggest that the permissibility of relinquishing divorce rights is a matter of degree. On the one hand, the autonomy exercised in making the waiver, the value of contractual freedom, and the individual interest in undertaking stronger marital commitments all weigh in favor of the constitutional legitimacy of current covenant marriage legislation. On the other hand, the risks endemic to the premarital context—including cognitive biases, relational pressure, and asymmetries of power—likely warrant a categorical prohibition on waiver, at least where the core right to unilateral no-fault divorce is surrendered.

Even under the most permissive, autonomy-based approach to the relinquishment of fundamental rights, a waiver may be constitutionally acceptable only if it does not completely bar or indefinitely delay exit, and provided that any descriptive autonomy concerns about the nature of waiver as an autonomous act are properly addressed. A constitutional covenant regime must include special protections—currently absent—to ensure that even a partial or time-limited waiver satisfies the judicially crafted standards for the surrender of fundamental rights: that the decision be knowing, voluntary, and intelligent. Anything less would subvert the very premise of covenant marriage legislation—that of an optional strict divorce regime—and turn a vow of faith into a fetter of fate.