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Citizen Spouse

Kerry Abrams*

Marriage and citizenship have a complicated relationship to one another. Marriage is often the primary way in which a person can exercise and demonstrate his or her identity under law, by claiming legal benefits and by performing legal obligations. This Essay examines the history of one particularly salient example of marriage-as-citizenship—the derivative domicile rule—and uses this history to consider how the relationship between marriage and citizenship has changed and developed over time. The derivative domicile rule linked a woman’s domicile, and her state citizenship along with all the rights and obligations it carried, with her husband’s domicile by operation of law. This happened regardless of where she actually lived or what state she subjectively owed allegiance to. Derivative domicile remains pertinent today because many states still use it to determine state citizenship for married people, either as a presumption rebuttable by a married woman or as a rule that applies to both spouses and links their domicile by presuming they will each regard one single place as their home. The history and current application of the derivative domicile rule demonstrate that these presumptions fail to accurately reflect the preferences of many married people whose domiciles do not match their spouses’. This

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Essay argues that derivative domicile illustrates the dangers of uncritically eliding marriage and citizenship.

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INTRODUCTION

*“Where you go I will go, and where you stay I will stay. Your people will be my people and your God my God. Where you die, I will die, and there I will be buried.”*¹

When Ruth says these words to Naomi, she articulates a common ideal of modern marriage: it represents a union between two people that trumps other affiliations and allegiances. In becoming a part of Naomi’s “people,” Ruth is effectively altering her citizenship, casting aside other loyalties to follow Naomi wherever she may go. This vision of marriage as citizenship is romantic and aspirational; indeed, the Ruth story is often recited at weddings—gay and straight—because it so perfectly reflects notions of marital fidelity, even though the Ruth and Naomi of the Bible were not technically married.² The insight that marriage can function as a form of citizenship is one of the greatest cultural contributions of the marriage equality movement.

The notion of marriage-as-citizenship may sound romantic, but when enshrined in law, it also has important consequences for civil, political, and social rights. Until quite recently, a woman’s citizenship was determined by her marriage, not just metaphorically but also legally. At the state level, a married woman’s citizenship followed her husband’s under the rule of “derivative domicile”; at the national level, her citizenship could be bestowed or taken

1. *Ruth* 1:16–17.

2. See THE HARPERCOLLINS STUDY BIBLE 383 (Harold W. Attridge & Wayne Meeks eds., 2006); see also READING RUTH: CONTEMPORARY WOMEN RECLAIM A SACRED STORY (Judith A. Kates & Gail Twersky Reimer eds., 1994).

away depending on the citizenship status of her husband. In this Essay, I examine the history of the derivative domicile and national citizenship rules to explore the ways in which marriage can and does function as citizenship, and to offer a critique of how analogies to citizenship still infuse our understanding of marriage today. Understanding marriage as an identity-producing legal status akin to state or national citizenship, I argue, can lead it to dwarf or trump other identity statuses.

A. *The Meaning of Citizenship*

To understand how marriage can function as a form of citizenship, one needs to understand clearly what citizenship is. This is no easy task. Like marriage, citizenship is a notoriously slippery concept that can invoke different meanings in varying contexts. Sociologist Rogers Brubaker famously described citizenship as “both an instrument and an object of closure.”³ As an instrument of closure, it is a “prerequisite for the enjoyment of certain rights, or for participation in certain types of interaction”; as an object of closure, it is a “status to which access is restricted.”⁴ Citizenship, in other words, includes access to a bundle of rights and also the status of membership itself, the identity of “citizen.”

In his seminal essay, *Citizenship and Social Class*, the sociologist T.H. Marshall subdivided the rights associated with citizenship into civil, political, and social rights.⁵ Civil rights include the rights to contract, sue, and own property; political rights include the rights to vote, run for office, and serve on a jury; social rights include rights to education and welfare.⁶ But, as Brubaker makes clear, citizenship is more than just access to rights. It is the bundling of these rights into a coherent status category that creates a legally cognizable class of “citizens.” As Brubaker puts it, “There is a conceptually clear, legally consequential, and ideologically charged distinction between citizens and foreigners.”⁷ It is this distinction that makes citizenship not only an instrument but also an object of closure—not everyone can get it, so the status itself becomes something to desire. Citizenship thus connotes a sense of belonging, a political or patriotic affiliation with a nation or state. It becomes an identity category, describing the allegiance a person has to a culture or country, an

3. ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 23 (1992).

4. *Id.* at 31.

5. T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 10 (1950).

6. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 19, 21 (2006) (discussing Marshall’s conception of citizenship and providing some examples). Some scholars have further identified civil, political, and social forms of citizenship that entail not only rights but also obligations, such as military service and jury service. See, e.g., William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 *FORDHAM L. REV.* 1721, 1738–39 (2001).

7. BRUBAKER, *supra* note 3, at 21.

allegiance constitutive of the person's place in the world, and also describing the dignity and respect with which the community treats its members.⁸

B. *Derivative Citizenship*

Marriage, like citizenship, is a legal status category that can be thought of as “both an instrument and object of closure” as articulated by Brubaker. Like citizenship, marriage carries with it a bundle of rights and obligations. Access to these rights has been a central goal of the marriage equality movement—many lawsuits have focused on the “1,138 federal benefits, rights and protections” afforded to married couples.⁹ And like citizenship, marriage has become a coveted and desirable social and legal status—so much so that the Ninth Circuit Court of Appeals recently declared California had “adversely” affected the “status and dignity” of gay and lesbian couples by stripping them of the right to designate their legally recognized, long-term adult relationships as “marriage.”¹⁰

Marriage and citizenship are overlapping status categories that do not map neatly onto each other. Sometimes one is dependent on the other,¹¹ and sometimes they provide access to similar sets of rights.¹² Although “citizenship talk” abounds in the legal scholarship on marriage,¹³ the complex relationship between the two status categories has been largely unexplored.

This Essay examines the history of a much-neglected legal doctrine to illuminate the contemporary interaction between marriage and citizenship: the rule of derivative domicile. Under this rule and the federal statutes that adopted the rule on a national level, a married woman's state and national citizenship was determined not by where she was born, where she decided to live, or what

8. See BOSNIAK, *supra* note 6, at 98 (noting that “the practice of ensuring the ‘belonging’ and ‘unity’ of the nation’s members simultaneously and inevitably signals the existence of a sharp divide between insiders and outsiders to the nation”).

9. For a summary, see HUMAN RIGHTS CAMPAIGN, *An Overview of Federal Rights and Protections Granted to Married Couples*, HRC.ORG, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples> (last visited Jan. 4, 2013).

10. *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012) (striking down California Proposition 8 as violative of the Equal Protection Clause).

11. For an example of citizenship giving access to marriage, consider the rush by recently freed slaves to marry as an incident of full citizenship. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 35–37 (1997) (discussing the enthusiasm of former slaves to marry as a sign of social and legal status). For an example of marriage giving access to citizenship, consider the faster track to naturalization for the spouses of U.S. citizens than for others. See Immigration and Nationality Act § 316, 8 U.S.C. § 1427 (2006) (setting forth residency requirements for naturalization); § 319, 8 U.S.C. § 1430 (setting forth reduced residency requirements for spouses of U.S. citizens).

12. For example, in contemporary America, the right to health care is understood primarily as a right to insurance access for full-time employees and their spouses, but it could just as easily be understood as a right of social citizenship. Nancy Fraser & Linda Gordon, *Contract Versus Charity: Why Is There No Social Citizenship in the United States?*, in *THE CITIZENSHIP DEBATES* 113 (Gerson Shafir ed., 1998).

13. See *infra* Part III.A.

state or country she chose to adopt as her own, but instead by the citizenship of her husband. This meant that a woman could be expatriated if she married a foreigner, a consequence that aroused vociferous complaint from feminists, and ultimately led to legal reform.¹⁴

Less obviously, on the state level, the derivative domicile rule meant that a woman could be deprived of rights given to citizens in a particular state if her husband chose to change his domicile. Today, this may not seem like a particularly significant problem. Federal diversity jurisdiction is the context in which attorneys most commonly think domicile matters. But in the years between 1839, when some states began passing Married Women's Property Acts,¹⁵ and the 1970s, when the Supreme Court began to strike down gender-discriminatory laws under the Equal Protection Clause,¹⁶ the state of a woman's domicile mattered enormously. She might have full civil rights in one state—the ability to enter into contracts, to manage her own property and retain her own wages, to sue and be sued, or to be a member of a profession—but not in another. State citizenship was a threshold status category leading to a particular set of civil and political rights. Derivative domicile meant that married women's rights were tenuous and unpredictable.

Even though the derivative domicile rule has been largely eroded, understanding its history has important consequences for thinking about the relationship between marriage and citizenship today. First, analyzing the derivative domicile rule demonstrates that marriage has been, and continues to be, a threshold status that grants or denies access to the civil, political, and social rights associated with citizenship. Because women's civil and political rights varied from state to state, a woman's citizenship rights could flicker on and off depending on where her husband lived. For nineteenth-century women, marriage could function as the “on/off” switch to civil rights, since state coverture law could abrogate those rights. Even as coverture unraveled in some states, however, women's citizenship was still tied to marital status. The derivative domicile rule enabled husbands to alter the substance of their wives' citizenship rights by changing their domicile from a jurisdiction where their wives had civil rights to one where they did not. Today, marriage only confers rights, and these rights are largely social citizenship rights rather than civil rights—access to health care, welfare payments, and housing.

Second, the derivative domicile rule also reveals the ways in which a woman's marital identity subsumed her other identities. A wife living in a particular state or nation might have a strong sense of allegiance to it, close family ties there, a desire to vote or manage property in it, or may simply want

14. For an excellent history of the national derivative citizenship rule and its demise, see CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998).

15. See 1839 Miss. Laws 72.

16. See *infra* notes 108–114 and accompanying text.

to live there. But the derivative domicile rule rendered these factors irrelevant in determining her citizenship—marriage would do the work of determining her legal and social identity. Or, as one court put it: “Marriage is for man only an episode, while for woman it is the epic of her life.”¹⁷

In short, the derivative domicile rule, archaic though it now seems, was a rule that transformed a woman, through marriage, into a citizen *wife*. Her citizenship rights were mediated through her status as a wife, and her social and legal identity was the identity of “wife” to the exclusion of anything else. Indeed, being a wife and mother was an accepted and celebrated form of exercising citizenship.¹⁸ For women, marriage was the ultimate form of belonging.

Nineteenth-century marriage law seems far away, but it continues to undergird American family law and to influence societal expectations of who married couples are and what they should do.¹⁹ Echoes of the derivative domicile rule sound in the marriage-as-citizenship arguments raised in the marriage equality context today. But the rule has transformed as well. No longer does marriage determine whether a wife will have civil or political rights, but it still determines who will have social citizenship rights. No longer does the derivative domicile rule function to turn married women’s rights on and off, but the patchwork of state responses to same-sex marriage means a same-sex spouse may find her rights flickering on and off depending on where she is domiciled.²⁰ No longer does marriage turn women into citizen wives, their identities subsumed to their husbands’, while leaving men autonomous, independent selves; marriage is now capable of turning *any* single person into a “citizen spouse.” The idea of the citizen spouse may be gender-neutral, but it is hardly *marriage*-neutral. In many cases, it is marriage and not citizenship that provides public benefits, a social identity, and a sense of legitimacy and belonging.

This Essay explores the history of the derivative domicile rule and links it to marriage’s place in the current legal and social landscape. Part I presents the

17. *State v. Walker*, 13 P. 279, 280 (Kan. 1887).

18. See LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 11–12 (1980) (arguing that the ideology of “Republican Motherhood” functioned to domesticate women’s civic virtue, allowing women to play a political role so long as it was confined to the education of new citizens within the home).

19. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1119 (1997) (describing the process of “preservation-through-transformation,” whereby “the effort to disestablish the common law of marital status transformed its structure and translated its justifications into a more contemporary gender idiom”).

20. For a fascinating account of how rights of same-sex couples flicker, see Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 *UNBOUND: HARV. J. LEGAL LEFT* 1, 49–58 (2010). For an explanation of how state marriage law can function as immigration law by discouraging couples from migrating to states where their rights will be curtailed, see Sarah Abramowicz, *The Legal Regulation of Gay and Lesbian Families as Interstate Immigration Law*, 65 *VAND. L. REV. EN BANC* 11, 13–17 (2012).

history of the derivative domicile rule, emphasizing the facets highlighted here: its ability to determine the citizenship rights of married women, and the way in which it made marriage a woman's primary legal identity. Part II traces the demise and transformation of the derivative domicile rule, showing the legal and social transformation of the citizen and his citizen wife to citizen spouses. Part III considers the importance of this history for our understanding of marriage today.

I.

THE DERIVATIVE DOMICILE RULE

Domicile is a form of state citizenship. Sometimes the term “domicile” is used as a synonym for state citizenship. Other times it is used descriptively, to show the requirements for achieving state citizenship. As with national citizenship, a person has a “domicile of origin” from birth in a particular state and may obtain a “domicile of choice” by moving to a new state or jurisdiction and intending to remain there.²¹ Thus, a person's domicile “is the place of ‘his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom.’”²²

As a citizenship status, “domicile” is declining in use today; many states instead use “residence” or “inhabitation” to distribute state citizenship-based rights such as voting, welfare, or tuition benefits.²³ But at common law, domicile was a more robust and far-reaching concept. Just as national citizenship could be acquired by birth on American soil, birth to American parents, or through naturalization, the acquisition of domicile—by birth, by choice, or by operation of law—gave a person state citizenship. Under the derivative domicile rule as expressed at common law, a wife took on her husband's domicile by operation of law, even if her husband was domiciled in a place where she had never been.²⁴ Similar laws affected women's national

21. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 6R-025, -033, -074 (14th ed. 2006).

22. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (quoting *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954)).

23. See Willis L.M. Reese & Robert S. Green, *That Elusive Word, “Residence,”* 6 VAND. L. REV. 561, 561 (1953) (discussing how state statutes tend to use the word “residence” to determine citizenship rather than “domicil”).

24. Obviously, in many cases a husband and wife were both domiciled in the same state before and after marriage. But in an era of westward expansion and extensive internal migration, Americans frequently made temporary migrations without a fixed desire to permanently settle. Thus it was quite common for a wife to find herself in a Western state or territory with a husband who was domiciled elsewhere, or, conversely, waiting in her state of birth for her husband to return from a westward adventure only to discover later that he had settled, established a new domicile, and, sometimes, divorced her and remarried without her consent. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 209 (1888) (upholding Washington Territory's power to grant husband a legislative divorce without notice to his wife, whom he had left behind in Ohio); see also Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 384–85 (2007) (discussing how women's opportunities to migrate and their economic autonomy led to increased separation and divorce and the

citizenship as well: an 1855 statute granted automatic citizenship to women who married U.S. citizen men, and a 1907 statute expatriated women who married foreigners.²⁵ Like the state law derivative domicile rules, the derivative national citizenship laws treated a woman's marital identity as her primary identity-producing legal status. Other affiliations, including a sense of affiliation with a nation, were effectively trumped by marriage.²⁶

For married women, then, marriage was a legal status of such strength that it could override others, including national citizenship and state citizenship.²⁷ State citizenship could be crucial to accessing civil and political rights, and the rights of married women were especially variable. Prior to the Nineteenth Amendment's passage, women had the statutory right to vote in some states but not others,²⁸ and married women's civil rights—including the right to contract, sue and be sued, and own and manage their own property and wages—varied dramatically from state to state.²⁹ Other rights determined by state citizenship included where or whether a woman could file for divorce,³⁰ where her will was probated (and thus what terms her will could include under the jurisdiction's substantive law),³¹ where and under what rules her property was

exception to the derivative domicile rule made it more likely that two states would be in direct competition for jurisdiction over divorce cases).

25. Act of 1855, 10 Stat. 604 (reenacted as 1 Rev. Stat. 350, § 1994 (1878)); Expatriation Act, ch. 2534, §§ 3–4, 34 Stat. 1228, 1228–29 (1907).

26. For detailed histories of derivative national citizenship, see BREDBENNER, *supra* note 14; NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 143–44 (2000); MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP 1870–1965*, at 24–30 (2005); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405–07 (2005).

27. I provide an extensive examination of the rights associated with domicile in Kerry Abrams, *A Legal Home: Derivative Domicile and Married Women's Citizenship, 1840–1940* (draft on file with author).

28. Between 1869 and 1914, state after state, especially in the western part of the country, gave women the statutory right to vote. By 1914 all western states but New Mexico had given women the franchise, and many others granted women a limited right to vote in school elections. See T.A. Larson, *Woman Suffrage in Western America*, 38 UTAH HIST. Q. 7, 19 (1970).

29. See Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082–83 (1994) (showing how coverture unwound slowly and unevenly, so that women might only have capacity to contract in some states).

30. See Comment, *Capacity of a Married Woman to Acquire Separate Domicil*, 38 YALE L.J. 381, 382–83 (1929) (discussing implications of derivative domicile rule on a woman's capacity to obtain divorce); see also *Smith v. Morehead*, 59 N.C. (6 Jones Eq.) 369, 370 (1863) (denying woman an annulment, where “after cohabiting with [her husband] some two or three weeks, she found him to be . . . utterly and incurably impotent,” because she filed suit in the county in which she was born and raised instead of the county in which the husband lived).

31. See, e.g., *In re Geiser's Will*, 87 A. 628, 630 (N.J. Prerog. Ct. 1913) (although the wife moved from Pennsylvania to New Jersey, expressed her intention of adopting New Jersey as her domicile “in order to circumvent the operation of the intestate laws of Pennsylvania relating to a husband's interest in his wife's estate,” the husband failed to support his wife during her lifetime, and she made “frequent declarations of ill will toward him,” the court found that the wife was nevertheless domiciled in Pennsylvania, and the New Jersey court therefore had no jurisdiction to admit her will to probate).

taxed,³² whether she could obtain government employment,³³ whether she could run for office,³⁴ whether she could claim a homestead,³⁵ whether she could vote,³⁶ and even her eligibility for in-state resident tuition at state universities.³⁷

For a woman, then, marriage was a status category that effectively trumped state citizenship. Her status as a wife mattered first and foremost; citizenship came second, and she exercised it in a particular way, as a wife. As Justice Bradley famously explained in his concurring opinion in *Bradwell v. Illinois*, denying women the right to a profession did not damage their rights as citizens, for citizenship protected only the “privileges and immunities of the sex,” which included “the noble and benign offices of wife and mother.”³⁸

The derivative domicile rule had its roots in coverture, the law that applied to married women at common law. In its strongest form, coverture meant that a married woman “perform[ed] everything” under the “wing, protection, and cover” of her husband, and therefore, she was referred to as a *feme covert*, or covered woman, and her condition during marriage was called “coverture.”³⁹ The legal effects of coverture on married women were extensive: wives could not enter into contracts without their husbands’ consent, enter a

32. See, e.g., *Howland v. Granger*, 45 A. 740 (R.I. 1900) (holding that where wife lived apart from husband, her property was taxable based on the law of his domicile).

33. See, e.g., *Plains Twp. Sch. Dist.’s Appeal No. 2*, 59 Pa. D. & C. 95 (Pa. Com. Pl. 1947) (striking down rule that wife may not establish separate domicile from husband where residence within school district is required for public school teachers).

34. See *id.*; see also *Weisinger v. McGehee*, 134 So. 148, 150 (Miss. 1931) (finding female candidate for school superintendent ineligible for office because of her subsequent marriage to a Texan); cf. *Gladwin v. Power*, 249 N.Y.S.2d 980, 981–82 (N.Y. App. Div. 1964) (overturning derivative domicile rule and holding that wife may maintain separate residence from her family to be eligible to run for public office in a particular election district).

35. See, e.g., *McClellan v. Carroll*, 42 S.W. 185, 187 (Tenn. Ch. App. 1897) (holding that a wife was not entitled to retain a homestead in Tennessee where husband lived in Missouri).

36. See, e.g., *Shute v. Sargent*, 36 A. 282, 283 (N.H. 1893) (noting that derivative domicile rule was “subversive of the statutory voting right and being elected to office”). Prior to the Nineteenth Amendment, which gave women the right to vote nationally, the derivative domicile rule could even mean that a woman would be prevented from voting at all. Imagine, for example, that a jurisdiction gave women the right to vote but observed the derivative domicile rule; she might have nowhere to vote if the state of her husband’s domicile did not give women the right to vote.

37. See *Samuel v. Univ. of Pittsburgh*, 375 F. Supp. 1119, 1131 (W.D. Pa. 1974), *appeal dismissed*, 506 F.2d 355 (3d Cir. 1974), *decision to decertify class vacated*, 538 F.2d 991 (3d Cir. 1976) (summarizing rules that fixed married female students’ residency using husbands’ domicile).

38. 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (distinguishing the right to practice law as distinct from the “privileges and immunities of the sex” and using a separate spheres theory, in which “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother” to justify excluding women from legal practice); cf. KERBER, *supra* note 18 (developing theory that women exercised citizenship through their role as “Republican mothers” because they were denied direct access to political engagement).

39. 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

profession, sue or be sued, make a will, or testify for or against their husbands.⁴⁰

Courts justified derivative domicile in the same way they justified other coverture rules: through the ideal of marital unity. As one court put it, “the whole theory of the marital relation involves the idea of a single home, established by the husband and cared for by the wife, where the two shall dwell together.”⁴¹ Indeed, the rule was intimately connected to the other incidents of coverture, including the duty of the husband to support the wife and her duty to render services to him. One 1888 treatise explained it this way: “The husband is the head of the family. He decides where the family residence shall be, and may change it as often as his pleasure, business or health dictates; and his wife must live where he directs.”⁴² Wives were “bound to follow” their husbands if a change of domicile occurred.⁴³

The notion of a husband’s absolute control over the family was so entrenched that Congress expanded the derivative domicile rule to cover national citizenship as well. At common law, a woman’s national citizenship had existed independent of her husband’s.⁴⁴ But in 1855, Congress passed a statute that automatically naturalized any woman who married a U.S. citizen, provided she was otherwise eligible for citizenship herself.⁴⁵ This action was justified, according to Representative Francis Cutting of New York, because married women had no political rights to speak of. “[W]omen possess no political rights,” he explained, so “where you confer on her the political character of her husband, it is a relief to the husband, it aids him in the instilling

40. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 219–20 (1968) (discussing the legal position of married women). The literature on coverture is extensive. See, e.g., NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982); HENDRIK HARTOG, *MAN & WIFE IN AMERICA: A HISTORY* (2000).

41. Plains Twp. Sch. Dist.’s Appeal No. 2, 59 Pa. D. & C. 95, 97 (Pa. Com. Pl. 1947).

42. 9 *THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW* 812 (John Houston Merrill ed., Northport, Edward Thompson Co. 1889).

43. IRVING BROWNE, *ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED* 15 (2d ed. 1890) (“The husband is entitled to select the mutual domicile, where the wife is bound to reside, and whither she is bound to follow him.”); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 182 (O.W. Holmes, Jr. ed., Little, Brown, & Co. 12th ed. 1896) (“The husband is the best judge of the wants of the family, and the means of supplying them; and if he shifts his domicile, the wife is bound to follow him wherever he chooses to go.”); see also G. Van Ingen, Annotation, *Wife’s Failure to Follow Husband’s Domicile as Constituting Desertion or Abandonment as Ground for Divorce*, 29 A.L.R. 2d 474, § 1 (2009) (compiling cases from thirty-four states).

44. See *Shanks v. Dupont*, 28 U.S. 242, 246 (1830) (holding that a woman did not lose her citizenship by virtue of marriage to a foreigner); see also LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES* 34–38 (1998).

45. Act of Feb. 10, 1855, 1 Rev. Stat. 1875, § 1994. Women who were not otherwise qualified fell into one of two categories: they were barred from naturalization because of race, or they had a record of “immoral sexual behavior.” BREDBENNER, *supra* note 14, at 16; see also Act of Feb. 5, 1917, 39 Stat. 874, 889 (amending 1855 law to deny derivative citizenship to alien women of “sexually immoral classes”).

of proper principles in his children, and cannot interfere with any possible right of a political character.”⁴⁶ In 1907, Congress went even further, passing an act declaring: “[A]ny American woman who marries a foreigner shall take the nationality of her husband.”⁴⁷ When Ethel Mackenzie famously challenged the 1907 law and lost, she did so by attempting to register to vote in California, a right guaranteed to female U.S. citizens in California.⁴⁸ Mackenzie argued her marriage should not determine her citizenship status, but the Court disagreed, likening Mackenzie’s decision to marry a foreigner to an explicit renunciation of her U.S. citizenship.⁴⁹ It took enfranchisement through the Nineteenth Amendment, extensive feminist activism, and the specter of illiterate, potentially disloyal, and now *voting* foreign wives to finally persuade Congress that derivative national citizenship was a bad idea.⁵⁰

Because the derivative domicile rule was based on the fiction of marital unity, it sometimes rubbed up uncomfortably against fact. For example, if the derivative domicile rule were taken at face value, it would mean husbands but not wives would have access to divorce. A woman who had been abandoned by her husband would lack a forum in which to seek a divorce. Her husband could obtain a new domicile, thereby changing her domicile through operation of law,

46. CONG. GLOBE, 33d Cong., 1st. Sess. 169–71 (1854). In contrast, in early America men were sometimes enfranchised because of women’s dependence; “[s]tatesmen likened married status to property holding as evidence of men’s suitability for political participation.” Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830–1934*, 103 AMER. HIST. REV. 1140, 1452 (1998).

47. Expatriation Act, ch. 2534, §§ 3–4, 34 Stat. 1228, 1228–29 (1907). The Act also provided that

[a]t the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

Id.

48. *Mackenzie v. Hare*, 239 U.S. 299, 312 (1915) (holding that the 1907 Act did not violate women’s constitutional rights to citizenship because the act of marriage constituted “consent” to expatriation).

49. *Id.* at 311–12.

50. See Cott, *supra* note 46, at 1465 (noting that the Nineteenth Amendment “aroused a counter-prejudice against foreign-born women becoming voters immediately upon marrying American men”); Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 POL. & SOC. 1, 13–16 (1984) (arguing that the Cable Act was passed in order to impose more rigorous naturalization procedures for alien wives to restrict the immigrant vote). The 1855 and 1907 Acts were repealed piecemeal through several pieces of legislation. See An Act Relative to the Naturalization and Citizenship of Married Women (Cable Act), ch. 411, § 3, 42 Stat. 1021, 1021–22 (1922) (partially repealing 1907 Act); Act of July 3, 1930, ch. 835, § 2, 46 Stat. 854, 854 (1930) (allowing women who had lost citizenship through marriage to regain it if they had not lived abroad with their husbands); Act of July 3, 1930, ch. 826, § 8, 46 Stat. 849, 849 (1930) (setting out grounds upon which a woman regaining citizenship could enter the United States); Act of Mar. 3, 1931, ch. 442, § 4(a), 46 Stat. 1511, 1511–12 (1931) (allowing repatriation of women who had lost citizenship through marriage to racially ineligible (e.g., Asian) men); An Act to Repatriate Native-Born Women Who Have Heretofore Lost Their Citizenship by Marriage to an Alien, and for Other Purposes, ch. 801, 49 Stat. 1917, 1917 (1936) (allowing women who lost citizenship between 1907 and 1922 based on marriage and whose marriage to such alien terminated to renaturalize).

and she would have no way to know where it was.⁵¹ Because domicile was required to access a state court, she would therefore be unable to seek a divorce in the state in which she lived. As a result, many jurisdictions developed exceptions to the derivative domicile rule for wives seeking divorces because their husbands had abandoned them.⁵²

The abandonment exception to the derivative domicile rule, however, did not upend coverture's hold on the effects of marriage on a woman's citizenship rights. It only shifted the end of the marriage forward in time. In 1858, for example, the U.S. Supreme Court justified the exception by arguing that the wife's marriage was functionally over by the time she filed for divorce.⁵³ A husband who abandoned his wife failed to do his duties under coverture by ridding himself "of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquish[ing] altogether his marital control and protection."⁵⁴ In other words, the marital status no longer existed; the husband had shirked his status obligations, so the wife could abandon hers as well—he had "yield[ed] up that power and authority over her which alone ma[d]e his domicil hers."⁵⁵ An exception for divorce cases where the husband was at fault did not, however, disrupt the logic of the rule itself.⁵⁶

The derivative domicile rule shows how marriage can function as a form of citizenship in both of the ways I have identified. First, it highlights the extent to which marriage can be the on/off valve for exercising citizenship rights. Before the passage of the Married Women's Property Acts, simply marrying was enough to alter a woman's citizenship status, at least as far as her civil rights were concerned. But as coverture unraveled at various speeds across the states, the derivative domicile rule—and state citizenship more broadly—took on more importance. A woman might live in a state where she possessed the freedom to contract, vote, and practice a profession, but if her husband were to

51. See Note, *The Domicile of a Wife*, 26 HARV. L. REV. 447, 447 (1913) (noting that "a wife at common law would be required to sue for a divorce at her husband's domicile, no matter to what place he may have removed it").

52. See *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858) (where husband abandoned wife, domicile of the wife remained unchanged, not following that of the husband); *Cheever v. Wilson*, 76 U.S. 108, 109 (1869) (holding that "a wife may acquire a domicil different from her husband's whenever it is necessary or proper that she should have such a domicil, and . . . may institute proceedings for divorce, though it be neither her husband's domicil nor have been the domicil of the parties at the time of the marriage or of the offence"); Comment, *supra* note 30, at 382–83 (stating that "[p]ractically all American courts permit the wronged wife to acquire a separate domicil for purposes of divorce").

53. *Barber*, 62 U.S. (21 How.) at 595.

54. *Id.*

55. *Id.*

56. See Note, *supra* note 51, at 448 ("In no other case do strong practical considerations exist as in the case of divorce, which would justify a departure from the historical rule that every incident of the marriage continues as long as the status itself. It does not seem unreasonable to make other rights depend on the termination of that status.").

unilaterally change his domicile in favor of a less progressive state, her civil and political rights would be snuffed out.

Second, the derivative domicile rule makes explicit what other legal rules or social conventions only imply: the status of marriage is superior to other statuses, and marriage alters a woman so completely that after marriage she becomes a completely new person. At common law, most of coverture's rules forced a woman to take on the identity of her husband at the expense of other identities. Married women were legally discouraged from crafting a business identity (since they lacked capacity to contract or to sue or be sued, and often, were barred from certain professions)⁵⁷ or a property-owning identity (since prior to legislative reform, their husbands controlled and managed their real property and outright owned their personal property),⁵⁸ or even a parenting identity to the extent that their plans were at odds with their husbands' (since a husband would be granted custody in a divorce).⁵⁹

One may imagine that the wave of Married Women's Property Acts and wage acts passed in the mid- to late-nineteenth century, the ratification of the Nineteenth Amendment, and an increasingly mobile society might together have conspired to do away with the derivative domicile rule. But the rule turned out to be surprisingly persistent, for reasons to which I now turn.

II.

FROM CITIZEN WIFE TO CITIZEN SPOUSE

The derivative domicile rule should have been fairly easy to get rid of. All courts needed to do was to interpret the statutory law abolishing coverture to mean that married women were independent agents, to be treated just like married men. In the case of domicile, this would mean that a married woman's domicile would turn on her intent. This would not necessarily mean marriage was completely irrelevant to the analysis; in a case where a person had equal ties to two places, it might be sensible to consider their commitment to a spouse domiciled in a particular place as evidence of intent to remain there. And in many if not most cases, a woman would be married to someone who shared the same domiciliary intent since most people cannot afford to maintain multiple homes.

The contexts in which domicile commonly arises are furthermore specific to the individual. For instance, domicile involves cases in which an *individual* must pay taxes, can file a lawsuit, or can vote. Even those cases that involve the

57. See Aziz Z. Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351 (2001) (discussing resistance of some Justices to protecting women's rights to enter some professions despite their critique of barriers to entry for others).

58. See Siegel, *supra* note 29, at 1083 (discussing state legislature's creation of "earnings statutes," which provided women with property rights over their personal work earnings).

59. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 235–39 (1985) (discussing legal treatment of custody claims).

marital relationship most directly, such as suits for divorce, do not require *both* parties to be domiciled in one place. Under principles of in rem jurisdiction, so long as at least one spouse is domiciled in a state, the court has jurisdiction over the status of the marriage.⁶⁰ Yet outside the context of divorce, courts were stubbornly persistent in enforcing the derivative domicile rule. Even after women obtained political rights, and Married Women's Property Acts gave women limited control over some aspects of their financial lives, they remained legally "covered" by their husbands in many other respects.⁶¹

A. *The Persistence of Derivative Domicile for Wives*

In the first half of the twentieth century, some courts began to deviate from the derivative domicile rule, but the cases are remarkable for their efforts to distinguish the facts at bar from "usual" marriages. In perhaps the most famous case justifying a deviation from the traditional rule, *Virginia v. Rutherfoord*, the Virginia Supreme Court created an exception to the derivative domicile rule where the wife was the clear breadwinner.⁶² Helen Rutherfoord, a wealthy widow domiciled in New York who had remarried a Virginian, challenged Virginia's attempt to tax securities she owned.⁶³ The Virginia Supreme Court sided with her, holding that even when a wife and husband were living together happily with no intention of separation, a wife could maintain a domicile separate from her husband.⁶⁴ The Rutherfoords appeared to spend their time, usually together, at three different residences in New York, Washington, D.C., and Virginia.⁶⁵ Mrs. Rutherfoord voted and paid income taxes in New York, and Mr. Rutherfoord in Virginia.⁶⁶

In holding that Mrs. Rutherfoord could choose to maintain her domicile in New York, the Virginia Supreme Court explicitly linked the rights granted in Married Women's Property Acts to a woman's right to determine her own domicile. In Mrs. Rutherfoord's case, fixing her domicile in Virginia rather than New York would have substantial tax consequences, since Virginia

60. Divorce jurisdiction is generally understood as a form of in rem jurisdiction: the res is the marriage, and the marriage travels with either party, so having one party domiciled in a state gives the state jurisdiction over the divorce. See Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1693–96 (describing evolution of the Supreme Court's understanding of divorce jurisdiction).

61. See, e.g., Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 844–48 (2004) (showing that coverture lives on in many aspects of law, including the marital rape exemption, interspousal tort immunity, the right of spouses to uncompensated domestic labor, and the doctrine of necessities); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 983 (2002) (stating that "[e]ven the briefest look at antisuffrage discourse reveals that core concepts of coverture were a vibrant part of American legal culture well into the twentieth century and shaped public as well as private law").

62. 169 S.E. 909 (Va. 1933).

63. *Id.* at 909.

64. *Id.* at 912–13.

65. *Id.* at 910.

66. *Id.*

imposed taxes on forms of property—securities—that New York chose not to tax at all.⁶⁷ Although Virginia’s Married Women’s Property Act had given Mrs. Rutherford the right to management and ownership of her separate property, the court implied this right would be seriously curtailed if she could not determine her own domicile and therefore manage the tax effects of her property ownership.⁶⁸ If the common law of coverture had really been wiped away, then it would be illogical to “trammel[] the wife with a domicile, undesired by herself or her husband . . . thereby fastening upon her a personal manacle which can but seriously affect her property rights.”⁶⁹ But even here, there was an emphasis on the husband’s authority; Mrs. Rutherford had obtained her domicile with his consent.⁷⁰ In fact, the couple had even sought legal counsel before marrying to determine whether marriage would affect her domicile, and had been assured that it would not.⁷¹

Similarly, in one New Jersey case, the court went through tortuous machinations to avoid overturning the derivative domicile rule, using the husband’s “consent” to justify deviating from the result the rule apparently demanded. In *In re Simpson’s Will*, the court emphatically stated that “[i]t is the law of this state that the domicile of the wife follows that of her husband,”⁷² but then proceeded to fix the matrimonial domicile in New Jersey, where the wife, Mrs. Simpson, had lived before marriage and continued to maintain at least one residence.⁷³ The court conceded Mrs. Simpson “was the dominant personality.”⁷⁴ Mr. Simpson “had no visible means of support; no separate income, and no employment during all of his married life. She was the provider, she paid the bills, and it was but natural that he should adopt her home, her domicile, as his own.”⁷⁵ Even still, the court did not find that a dependent spouse’s domicile followed that of the breadwinner. Instead, it found that Mr. Simpson had *voluntarily* adopted his wife’s domicile upon marriage, thereby changing his domicile from New York to New Jersey. And because a married wife’s domicile follows her husband’s by operation of law, Mrs.

67. *Id.* at 912.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *In re Simpson’s Will*, 42 A.2d 373, 376 (N.J. Prerog. Ct. 1945).

73. *Id.*; see also *Haymes v. Columbia Pictures Corp.*, 16 F.R.D. 118, 121 (S.D.N.Y. 1954) (declining to address wife’s “interesting contention that since the rule by which the wife’s domicile becomes that of her husband rests on the common-law fiction of the unity of husband and wife—a vanishing fiction with little, if any, validity today—it is no longer universally applied” since husband was domiciled in Nevada, the state where the wife claimed to be domiciled); *Blair v. Blair*, 85 A.2d 442, 445 (Md. 1952) (wife not guilty of desertion where she left her husband at his college and returned to her home because she was the family breadwinner and the derivative domicile rule is “based upon the fact that the husband earned the money for the support of the family, and, therefore, had the right to decide where the family should live”).

74. *In re Simpson’s Will*, 42 A.2d at 380.

75. *Id.*

Simpson's was also in New Jersey.⁷⁶ No matter the facts on the ground, the husband's role in the marriage was that of The Decider, even if deciding meant deferring to his wife.⁷⁷

Married Women's Property Acts and the Nineteenth Amendment were apparently not enough to dissuade courts from the idea that husbands were breadwinners who controlled their wives' locale and therefore their citizenship. But by the 1970s, many states were scrapping their allegiance to the rule by creating either codified or judicially mandated exceptions to it. A handful had abrogated it altogether.⁷⁸ But even in the 1970s, a truly gender-neutral domicile rule remained elusive. The rule's tenacity appears to have resulted not only from regressive ideas about gender roles in marriage but—more importantly for the purposes of this paper—from romantic notions about the nature of marriage itself and its importance to personal identity.

For example, the Second Restatement of Conflict of Laws, published in 1971, retained the derivative domicile rule but made it rebuttable by the wife. A married woman was presumed to have the same domicile as her husband “unless the special circumstances of the wife make such a result unreasonable.”⁷⁹ This rule was dictated, according to the Restatement writers, by what it termed “natural feelings”: “the wife will usually regard the

76. *Id.* at 382.

77. *See, e.g., In re Daggett's Will*, 174 N.E. 641, 642 (N.Y. 1931) (holding that a married woman cannot “to suit her convenience or pleasure” create a “legal residence for herself apart from that of her husband”); *Tate v. Tate*, 142 S.E.2d 751, 754 (W. Va. 1965) (holding that a husband “has the right to fix the domicile of himself and his wife, the wife's domicile merging in that of her husband, where such right is exercised in a reasonable and equitable manner and with honest intent”).

78. *See, e.g.,* 1941 Ark. Acts 913, Act 355, § 7 (codified at ARK. CODE ANN. § 9-3-107 (1941)) (“The right of any citizen of the United States to become a resident domiciled in the State of Arkansas shall not be denied or abridged because of sex or marital status.”); CAL. ELEC. CODE § 2029 (West 2003) (for purposes of voting, the “domicile of one spouse shall not be presumed to be that of the other, but shall be determined independently in accordance with this article”); CAL. WELF. & INST. CODE § 12003 (West 2001) (“For the purposes of this chapter, neither the residence nor domicile of the husband or wife shall be deemed the residence or domicile of the other, but each may have a separate residence or domicile dependent upon proof of the fact and not on legal presumption.”); GA. CODE ANN. § 19-2-3 (2010) (“The domicile of a married person shall not be presumed to be the domicile of that person's spouse.”); OR. REV. STAT. § 108.015(1) (2001) (“Each married person may establish and maintain a domicile in the State of Oregon as if that person were not married.”); N.Y. DOMESTIC RELATIONS LAW § 61 (McKinney 2010) (amending Domestic Relations Law to read “[t]he domicile of a married man or woman shall be established for all purposes without regard to sex”); *see also* *Lansford v. Lansford*, 465 N.Y.S.2d 583, 585 (N.Y. App. Div. 1983) (holding that a “husband may no longer assert an overriding control of the choice of a matrimonial domicile,” and pursuant to statute, a “wife has the same capacity to acquire a domicile of her choice as does her husband” and finding that a wife domiciled in New York and married to a domiciliary of South Carolina who traveled with him abroad during his military service retained her New York domicile); *Psaty v. Psaty*, 402 N.Y.S.2d 779 (1978) (wife may establish own domicile in Washington to pursue a divorce action against husband in New York); *Green v. Comm'r of Corps. & Taxation*, 305 N.E.2d 92, 93 (Mass. 1973) (holding that a wife is not an “inhabitant” of a state for tax purposes based on her husband's domicile there; avoiding constitutional question of whether finding wife to be an inhabitant would violate equal protection but discussing doctrine).

79. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21(1) (1971).

husband's home as her own because he is the head of the family and because she will wish her home to be the same as his."⁸⁰ If a wife had the temerity to claim her own domicile, she would need to present "convincing evidence" of it, and "[r]arely in the nature of things will such a finding be made except upon the initiative of the wife."⁸¹ This rule blends the two features identified above. First, it retains the idea that husbands are breadwinners and decision makers, but grounds this authority not in law but in a wife's "natural feelings," even as it uses these "feelings" to craft a legal rule. Second, the shift from law to feelings is one of the first indications in the derivative domicile jurisprudence of a shift in the understanding of marriage from a hierarchical, gender-based relationship to a companionate one. Under the 1971 Restatement, a married woman did not *need* to share her husband's citizenship; a married woman would *want* to.

The Restatement's assertion of "natural feelings" was exactly the kind of language that offended women's rights leaders of the 1970s. Indeed, abolishing the derivative domicile rule was on women's rights activists' agendas. The pioneering feminist legal scholar Herma Hill Kay drew attention to the problem in her casebooks on conflict of laws and sex discrimination.⁸² In a leading guide to the likely impact of the Equal Rights Amendment (ERA) on state laws, several attorneys from the Women's Law Project explained that the rule harmed women's access to equal citizenship by potentially denying them eligibility for resident tuition at state schools, jury duty, voter registration, eligibility to run for office, venue in law suits, reduced tax liability, and jurisdiction over estates.⁸³ The ERA's ratification, they explained, could result in one of two options. Either married women would be treated like married men or unmarried people—as individuals—or married men and married women would *both* be subject to the rule.⁸⁴ This latter option they dismissed as impracticable: "[T]he extension to men of the conclusive presumption that now applies to married women would produce an insoluble conflict in the case of a disagreement over domicile between two spouses."⁸⁵ As we shall see, this problem has not stopped some states from attempting to retain the rule while making it gender neutral.⁸⁶

80. *Id.* cmt. b.

81. *Id.* As we have seen, the Restatement comment is flatly wrong on this point: it was not just wives who had an interest in their obtaining separate domiciles—sometimes it was their heirs, or their business partners, or the electorate, or municipalities that wanted to tax them.

82. ROGER C. CRAMTON ET AL., *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* (2d ed. 1975); KENNETH M. DAVIDSON ET AL., *TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION* (1974).

83. BARBARA A. BROWN ET AL., *WOMEN'S RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAWS* 113–14 (1977).

84. *Id.* at 113.

85. *Id.* at 113–14.

86. *See infra* Part II.B.

But no derivative domicile case ever made it to the Supreme Court during this period, and the one case that garnered national attention failed to address the issue at hand.⁸⁷ That case was *Mas v. Perry*, a favorite of civil procedure casebooks.⁸⁸ Judy and Jean Paul Mas, a married couple, sued Oliver Perry, their peeping-tom landlord, for installing a two-way mirror in the bedroom they shared as graduate students at Louisiana State University.⁸⁹ After the Mases obtained verdicts of \$15,000 (for Judy) and \$5,000 (for Jean Paul), Perry challenged the court's jurisdiction to hear the case.⁹⁰ He argued Jean Paul was a French citizen, and therefore diverse from Oliver Perry, a Louisiana citizen, for purposes of a federal diversity action.⁹¹ Judy Mas, however, was not diverse, despite the fact that she had lived in Mississippi all her life before attending school in Louisiana and thus under normal domicile rules would still have been domiciled in Mississippi.⁹² In fact, Perry argued, Judy Mas could not access the federal courts in a diversity case *at all*.

Perry argued the derivative domicile rule dictated that Judy was a domiciliary of France because Jean Paul was a French citizen.⁹³ But Judy was simultaneously a citizen of the United States. To have her case heard in federal court, she needed to either be a U.S. citizen, diverse from the defendant, or an alien.⁹⁴ The Fifth Circuit sided with Judy and Jean Paul Mas, but declined to completely overturn the derivative domicile rule, missing a crucial opportunity to put the nail in its coffin. The result in Judy Mas's case, the court explained, was "curious" and "absurd,"⁹⁵ but *only* because her husband was an alien—if her domicile followed his, then she, a U.S. citizen, could never access a federal forum at all. Therefore, the court concluded, "for diversity purposes a woman does not have her domicile or State citizenship changed solely by reason of her marriage to an alien."⁹⁶

87. The Supreme Court treated other derivative domicile cases much earlier, but the holdings in these cases left openings for states to retain portions of the rule. *See Williams v. North Carolina*, 317 U.S. 287 (1942) (either party to a marriage may obtain new domicile for purpose of obtaining divorce); *Williamson v. Osenton*, 232 U.S. 619, 625–26 (1914) (holding that a married woman could establish her own domicile and that "the motive for the change was immaterial" because "[she] had a right to select her domicil for any reason that seemed good to her" but qualifying the holding, saying "[w]e see no reason why the wife who justifiably has left her husband should not have the same choice of domicil for an action for damages that she has against her husband for a divorce"); *Haddock v. Haddock*, 201 U.S. 562, 571 (1906) (a wife may obtain separate domicile to seek a divorce).

88. *Mas v. Perry*, 489 F.2d 1396 (5th Cir. 1974).

89. *Id.* at 1398.

90. *Id.*

91. *Id.* at 1398 (citing 28 U.S.C. § 1332(a)(2) (2006)) (federal jurisdiction extends to suits brought by aliens against citizens).

92. College students do not usually obtain domicile where they attend school because they lack the requisite intent to remain; their domicile is still their domicile of birth, or the jurisdiction of their parents' most recent domicile. *See Mas*, 489 F.2d at 1400.

93. *Id.* at 1399–1400.

94. *Id.* at 1398–99; *see also* 28 U.S.C. § 1332(a) (2006).

95. 489 F.2d at 1399–1400.

96. *Id.*

Mas v. Perry, however, left open the question whether Judy Mas's domicile would have followed her husband's had he been a U.S. citizen. The case never made it beyond the Fifth Circuit, and the Supreme Court has not heard a gender-discrimination challenge to the rule.⁹⁷ Some states persisted, pursuant to the Restatement, in presuming a wife's domicile followed that of her husband—a presumption that might be difficult to rebut in practice.⁹⁸ Unlike other sex-discriminatory laws, derivative domicile has never been definitively struck down.⁹⁹ In fact, there is some evidence that the derivative domicile rule frequently still functions in a gendered way, even today.¹⁰⁰

Indeed, although many states have moved toward ostensibly gender-neutral domicile rules, commentators have struggled to articulate how a gender-neutral rule should work in practice. The Restatement of Conflict of Laws, for example, was amended in 1988 to make the rule gender neutral. Now the title of the relevant section reads: "The rules for the acquisition of a domicile of

97. Oliver Perry's application for writ of certiorari was denied. See *Perry v. Mas*, 419 U.S. 842 (1974) (denying certiorari).

98. See, e.g., 23 ILL. COMP. STAT. ANN. 2/10 (West 1988) (for purposes of obtaining welfare benefits, "[t]he residence of a married woman shall be that of her husband unless they are living separate and apart, in which case she may acquire a separate residence"); *Gordon v. Gordon*, 369 So. 2d 421, 423 (Fla. Dist. Ct. App. 1979) (holding that although "[w]e are aware that the position of married women has changed a great deal... [w]e do not think that the change requires an abandonment of the idea that a wife's residence is normally that of the husband" since "[t]he family relation presupposes that the wife and mother will have a residence with the family"); *In re Marriage of Rinderknecht*, 367 N.E.2d 1128, 1132 (Ind. Ct. App. 1977) (holding that "the domicile of the wife follows that of the husband, unless she, with the requisite physical presence and intent, chooses another domicile"); *Laborde v. La. Ins. Guar. Ass'n*, 670 So. 2d 614, 617 (La. Ct. App. 1996) (stating in dicta that "[t]here is a legal presumption that a man and his wife have the same domicile; 'strong proof' must be offered to overcome that presumption"); *Hobbs v. Fireman's Fund Am. Ins. Cos.*, 339 So. 2d 28, 35 (La. Ct. App. 1977) (retaining the requirement that a wife be "abandoned" or leave the matrimonial domicile "as a result of serious misconduct on the part of her husband . . . similar in nature to that necessary to support a suit for separation" in order to obtain separate domicile); *Jones v. Jones*, 402 N.W.2d 146, 148–49 (Minn. App. 1987) (avoiding overturning the derivative domicile rule by distinguishing "domicile" from "residence" in a divorce case, and limiting the rule to the facts of earlier cases, where the rule governed a determination of the parties' homestead).

99. This may be because the posture of derivative domicile cases made the rule difficult to challenge. In order to bring a constitutional challenge, a plaintiff must come forward with a claim that cannot be otherwise disposed of; most courts will avoid the constitutional question if they can. Even though many states retain the gender discriminatory language of the derivative domicile rule, they generally allow a wife to come forward with evidence of her separate domicile to rebut the presumption. Most women who challenge a finding of derivative domicile under a rebuttable presumption rule would win their claims, thus obviating the need for a constitutional challenge.

100. See Judge John D. Geathers & Justin R. Werner, "[A]n Inglorious Fiction": *The Doctrine of Matrimonial Domicile in South Carolina*, 18 WISC. WOMEN'S L.J. 233 (2003) (critiquing recent use of derivative domicile in South Carolina). Some of the scholarship on postdivorce parental relocation suggests that the rule may silently influence judges and legislators to assume that male breadwinners' choice of domicile should prevail; custodial mothers often have more difficulty obtaining court approval to move than do fathers. See, e.g., Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791 (1993); Julie Hixson-Lambson, *Consigning Women to the Immediate Orbit of a Man: How Missouri's Relocation Law Substitutes Judicial Paternalism for Parental Judgment by Forcing Parents to Live near One Another*, 54 ST. LOUIS U. L.J. 1365 (2010).

choice are the same for both married and unmarried persons.”¹⁰¹ But a careful look at the comments to the revision calls the title into question. The comments retain the “nature” language from the 1971 version discussed above, but now reflect not the feelings of the wife, who will wish to have a home with the “head of the family,” but instead the feelings of *both* spouses, who will “usually regard the same place as their home.”¹⁰² The requirement of convincing evidence to the contrary, usually upon initiative of the wife, still stands.¹⁰³ In fact, the Reporter’s Note acknowledges that the gender-neutral change to the title is purely semantic: “There has been no change in substance. The black-letter rule and the commentary have been amended to reflect modern times and modern mores.”¹⁰⁴ As Professor Anita Bernstein has recently noted, “although the Reporters did all they could to state a clear, gender-egalitarian, freedom-respecting rule about domicile . . . the current *Restatement of Conflicts* lacks both statutes and case law to cite in support of its modernized revision. . . . Uncertainty remains.”¹⁰⁵

B. *Toward a Gender-Neutral Rule*

Although some states have retained a softened version of a gendered derivative domicile rule, the equal protection revolution of the 1970s largely transformed the legal landscape in which the rule could operate. That gendered laws now attracted heightened constitutional scrutiny meant courts and legislatures had to choose: either they could repudiate the idea that marital status trumped other allegiances, or they could retain the principle but make it gender-neutral. Although lawyers such as those involved in the Women’s Law Project observed that a gender neutral rule would create “insoluble conflict,”¹⁰⁶ that is precisely the rule some states have adopted. At first glance this approach may seem absurd or impracticable, but it actually falls in line nicely with the Supreme Court’s 1970s family law jurisprudence. A close look at these cases shows that the trend during this period was not only to abolish gender as a permissible means of legal discrimination, but also to bolster marriage as a source of social citizenship rights.

In those cases, the usual result was that the Court brought the contested law into compliance with the Equal Protection Clause not by limiting its coverage but by expanding it to spouses of either sex. In *Orr v. Orr*, for example, the Supreme Court famously overturned an Alabama statute that

101. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 (1988 revision).

102. *Id.* cmt. b.

103. *Id.*

104. *Id.* Reporter’s Note (also noting a reorganization: “This Section was originally in Topic 3, ‘Infants and Incompetents,’ but has been moved to Topic 2, ‘Acquisition and Change of Domicil.’”).

105. Anita Bernstein, *Toward More Parsimony and Transparency in “The Essentials of Marriage,”* 2011 MICH. ST. L. REV. 83, 115.

106. BROWN ET AL., *supra* note 83, at 113–14.

allowed wives but not husbands to petition for alimony upon divorce.¹⁰⁷ The Court could have disapproved of alimony altogether as a relic of a time when marriage represented a breadwinner-dependent relationship instead of a partnership of equals. Instead, it extended the possibility of alimony to both husbands and wives.¹⁰⁸ This extension had what I term a “marriage-intensifying effect”—it made marriage a status that potentially trumped other identities. In *Orr*, broadening alimony’s reach is a marriage-intensifying move in that paying alimony prevents a “clean break” from a marriage and perpetuates a potentially permanent obligation to one’s ex-spouse.¹⁰⁹

Similarly, several other gender discrimination cases decided by the Court in the 1970s were not only about gender but also about how marriage acts as a gateway to important social citizenship benefits. *Weinberger v. Weisenfeld*, for example, struck down a section of the Social Security law that granted “Mother’s insurance benefits” to widows but had no comparable “Father’s insurance benefits” available to widowers.¹¹⁰ *Frontiero v. Richardson* struck down a statute that gave spousal medical benefits and larger housing benefits to married male but not married female servicemembers.¹¹¹

What went unnoticed in both cases was the significance of marriage as a prerequisite for obtaining these benefits; they buttressed the notion that married parents are more worthy of receiving Social Security survivor’s benefits than unmarried parents, and that married service members deserve larger housing allowances and spousal medical benefits because of the long-term commitment of marriage. Where equal protection law could have dismantled the architecture of marriage-based benefits, it was instead used to expand them. Marriage went from a gendered status that defined women’s legal identities to a gender-neutral status that defines married *people’s* identities, simultaneously marking them as more worthy of state support than the unmarried and limiting their ability to act in ways that contradict the state’s notion of what married people must do.¹¹²

107. *Orr v. Orr*, 440 U.S. 268, 270–71 (1979).

108. *Id.* Deborah Widiss has recently argued that the Supreme Court’s gender discrimination jurisprudence of the 1970s failed to create equality in marriage because doing away with sex-discriminatory laws was not enough; by retaining the underlying substantive law of marriage, the Court perpetuated a system that incentivizes breadwinner/caregiving specialization. Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721 (2012).

109. *See Orr*, 440 U.S. at 268; *cf.* Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 50–51 (1989) (arguing that alimony, by requiring one ex-spouse to compensate the other even after the end of their marriage, eliminates “financial incentives or penalties that might otherwise flow from different marital lifestyles,” and therefore “maximizes the parties’ freedom to shape their marriage in accordance with their nonfinancial preferences”).

110. *Weinberger v. Weisenfeld*, 420 U.S. 636, 639, 653 (1975).

111. *Frontiero v. Richardson*, 411 U.S. 677, 681, 690–91 (1973).

112. Feminists may have had good reasons to litigate these cases as gender-discrimination cases without trying to dismantle marriage itself. The reality for many women was that marriage was their profession; to take away marriage-based Social Security, tax, or health insurance benefits would be tantamount to taking away a major source of support. For a helpful summary of the goals of the feminist movements of the 1970s and 1980s, see Herma Hill Kay, *From the Second Sex to the Joint*

If the transformation of derivative domicile is framed as a transformation from a gendered practice to a marriage-intensifying one, it falls in line more neatly with the constitutional gender discrimination cases of the 1970s. Some courts, rather than doing away with the derivative domicile rule altogether, have indeed attempted to turn it into a gender-neutral rule that makes marriage the most important factor in determining a person's state citizenship. As the Women's Law Project lawyers anticipated, this process has been messy.¹¹³

Some states have explicitly taken up the challenge to neuter derivative domicile, resulting in a rule under which the status of marriage not only trumps other allegiances for married women but for their spouses as well. Take, for example, Louisiana's articulation: "A man and wife are presumed to have the same domicile. This presumption flows in favor of both."¹¹⁴ The rule is reciprocal under this articulation, yet still ties married people more closely to each other than to others, regardless of their particular agreement. The language of the Louisiana rule is fraught with contradiction—it describes a *man* and wife, not husband and wife, suggesting, perhaps reflexively and unconsciously, the husband's primacy in the relationship. And the presumption "flows in favor" of both parties, assuming apparently that derivative domicile will be helpful and not harmful. Would it have helped Mrs. Rutherford's bottom line if the Virginia Supreme Court, rather than recognizing her domicile of choice, had determined that the derivative domicile rule "flowed in her favor"? Instead of imagining a wife's political and social ties as mapping onto her husband's regardless of her whereabouts, the Louisiana rule imagines the couple as inwardly focused, each spouse's domicile reinforcing the other's.¹¹⁵

California's rules for determining in-state tuition eligibility recently made the national news, once again putting a gender-neutral twist on derivative domicile into the spotlight. To establish eligibility, a student must show three things: physical presence, intent to stay, and financial independence.¹¹⁶ These

Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century, 88 CALIF. L. REV. 2058–73 (2000).

113. See BROWN ET AL., *supra* note 83, at 113–14.

114. McClendon v. Bel, 797 So. 2d 700, 704 (La. Ct. App. 2000) (citation omitted).

115. For an interesting example of the tortuous logic that the gender-neutral presumption can result in, see *Hofferbert v. City of Knoxville*, 470 F. Supp. 1001 (E.D. Tenn. 1979). The case was a challenge to a mayoral candidate's claim to domicile within the city of Knoxville. Although his wife and children continued to live in Knox county, it seemed clear from the circumstances that Mr. Hofferbert had rented an apartment in Knoxville solely to establish himself as a resident so he could run for office. The fact that he still owned a house in the county and that his family continued to live there seemed to be fairly good evidence of his subjective, personal intent not to remain in Knoxville. Thus, the court applied the derivative domicile rule and concluded that "it is difficult for the Court to understand . . . how Mr. Hofferbert could establish a legal residence within the city limits of Knoxville while his wife continues to live in Knox County, or outside the city limits of Knoxville." *Id.* at 1002.

116. Tess Townsend, *Get Married, Save Thousands on Tuition*, N.Y. TIMES, Feb. 6, 2011, at A27 (describing how the University of California system requires physical presence, intent to stay, and financial independence to qualify for in-state tuition, and how marriage demonstrates financial independence).

first two requirements essentially track the rule for establishing domicile. The third elliptically imports a piece of the marital domicile rule. Provided that their parents do not claim them on their tax returns, married students are automatically considered financially independent.¹¹⁷ The fact of the marriage, rather than determining the student's domicile, supplements her presence and intent by showing her *lack of intent* to remain a domiciliary of her parents' state. Bizarrely, a rule intended to prevent out-of-state students from fraudulently obtaining in-state tuition actually functions to allow students to fraudulently marry to obtain in-state tuition. In fact, there is a matchmaking service specifically oriented toward helping students to get around financial aid requirements by arranging what it calls "marriage[s] of convenience."¹¹⁸ The state's assumption that marriage fundamentally alters a person's other identities, including her dependence on her parents, functions counterproductively.

The reluctance of courts and legislatures in some states to completely move away from the notion that marital status trumps a person's state citizenship may be a reflection of the idea that marriage, like domicile, is a status that fundamentally alters a person's identity and cannot be contracted around. Marriage itself determines a couple's citizenship rights, regardless of what each spouse's personal goals and desires may be. Marriage is no longer "for man only an episode, while for woman it is the epic of her life." The law now understands it as an "epic" for *both* spouses.¹¹⁹

III.

CITIZEN SPOUSES IN THE AGE OF MARRIAGE EQUALITY

The notion that a woman would lose her legal identity upon marriage seems absurd and offensive today. On the surface, that marriage is transformative of a *person's* identity seems less troubling. Same-sex couples may seem to have less to worry about than did wives under coverture; after all, in the same-sex couple's case there is no hierarchical, gendered stereotype that the couple might revert to despite its best intentions.¹²⁰ And there is no longer any risk that one person's civil and political rights will be shut off by marriage, or that his or her legal and social identity will be subsumed by the other's. Yet the trope of marriage-as-citizenship continues to be extraordinarily powerful. The marriage equality movement has used the analogy extensively in advocating for LGBT rights. The substance of these arguments closely tracks

117. *Id.*

118. WHY PAY TUITION?, <http://whypaytuition.com> (Feb. 7, 2011).

119. *State v. Walker*, 13 P. 279, 280 (Kan. 1887).

120. Although social scientific data indicate that same-sex couples generally allocate breadwinning and caretaking tasks more equally than different-sex couples, the effect of legal marriage on how same-sex couples allocate roles remains to be seen. *See* Widiss, *supra* note 108, at 770–86 (reviewing literature on same-sex couples and suggesting that marriage equality can serve as a "natural [social] experiment" to investigate whether legal marriage produces gendered roles in relationships).

the two facets of citizenship at issue in the derivative domicile cases—access to rights and a desirable status. This Part explores the modern instantiations of the marriage-as-citizenship trope and extends the observation that even a gender-neutral law can be marriage-intensifying, first by analyzing the derivative domicile’s application to same-sex couples, and then by discussing the expanding functional recognition of both gay and straight cohabitants.

A. *Marriage-as-Rights*

As discussed in the Introduction, citizenship has many meanings, including those highlighted by Rogers Brubaker when he identified citizenship as both an instrument and object of social closure. The first aspect, citizenship as an instrument of social closure, is readily apparent in the arguments made for marriage equality that hinge on access to social citizenship rights available only through marriage.¹²¹ In the second aspect, citizenship is the object of social closure. This aspect manifests itself in the claim that regardless of whether public benefits are conferred through different means, such as civil unions or domestic partnerships, “withholding the word marriage impermissibly connotes a kind of second-class citizenship.”¹²² Sometimes, as in President Obama’s recent endorsement of same-sex marriage, both aspects are combined.¹²³

121. See HUMAN RIGHTS CAMPAIGN, *supra* note 9 (summarizing benefits); see also *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948, 955 (Mass. 2003) (“For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations.” Additionally, “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.”); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006) (holding that same-sex couples must be given access to the same rights, benefits, and obligations as married couples); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (holding that denial to same-sex couples of the privileges associated with marriage violated the Vermont Constitution’s Common Benefits Clause by denying them equal access to public benefits and protections for the community as a whole).

122. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1269 (2011); see also *In re Marriage Cases*, 183 P.3d 384, 434–35 (Cal. 2008) (“The current statutes—by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership—pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 417 (Conn. 2008) (Poritz, C.J., concurring and dissenting) (quoting *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (“[B]y excluding same-sex couples from civil marriage, the [s]tate declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as ‘real’ marriage, that such lesser relationships cannot have the name of marriage.”); *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009) (rejecting the possibility of creating an alternatively-named institution parallel to marriage); *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004) (“The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”).

123. See *Good Morning America: Interview by Robin Roberts with President Barack Obama* (ABC television broadcast May 9, 2012), available at <http://abcnews.go.com/Politics/transcript-robin->

Both of these strains of “citizenship talk” are rhetorically powerful. They appear to resonate with activists, judges, politicians, and the public alike. But why is the argument so compelling? Taking a step back, it seems clear that the current relationship between marriage and citizenship was not inevitable, whether one imagines citizenship as access to rights or citizenship as belonging. The United States could, for example, have a system that distributes most social citizenship rights irrespective of marriage (this is, to be overly simplistic, what many northern and western European countries have done).¹²⁴ Likewise, the United States could have a system in which marriage is considered a private social matter that may or may not signal a person’s belonging in the community. Such a system might make sense, given the substantial number of people who are currently unmarried in America today—nearly half of all adults¹²⁵—and the frequency with which Americans both marry and divorce.¹²⁶

But neither of those is the system we have in the United States today. Instead, we have placed marriage on a pedestal, both socially and legally, using it to dispense important social welfare benefits and to signal maturity and belonging to the community. In other words, we treat marriage as a form of citizenship in both of Brubaker’s senses of the word. Like citizenship, marriage is an object of social closure, a status that demarcates insiders from outsiders. Historically, marriage functioned in England as a status that distinguished adult members of the community; indeed, marriage as a marker of adulthood exists

roberts-abc-news-interview-president-obama/story?id=16316043&singlePage=true#.T9idD7XhcnU (stating that “[w]hen I hear from them the pain they feel that somehow they are still considered—less than full citizens when it comes to—their legal rights—then—for me, I think it—it just has tipped the scales in that direction”).

124. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 110–22 (2008) (describing “countries where marriage matters less”); Fraser & Gordon, *supra* note 12, at 113 (discussing European social welfare systems).

125. See D’vera Cohn et al., *Barely Half of U.S. Adults Are Married—A Record Low*, PEW RESEARCH CENTER (Dec. 14, 2011), <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/#fn-10398-10> (“In 1960, 72% of all adults ages 18 and older were married; today just 51% are. If current trends continue, the share of adults who are currently married will drop to below half within a few years. Other adult living arrangements—including cohabitation, single-person households and single parenthood—have all grown more prevalent in recent decades.”); see also THE NATIONAL MARRIAGE PROJECT & INSTITUTE FOR AMERICAN VALUES, *THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA* 60 (2011), available at http://www.virginia.edu/marriageproject/pdfs/Union_2011.pdf (stating that the number of adult women marrying declined 50% between 1970 and 2010); Lydia Saad, *Americans Have Complex Relationship with Marriage*, GALLUP NEWS SERVICE (May 30, 2006), <http://www.gallup.com/poll/23041/Americans-Complex-Relationship-Marriage.aspx#1> (noting that in Gallup polls conducted on marriage trends after the year 2000, only 53% of those polled were currently married).

126. See ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 5 (2009) (arguing that what distinguishes American family life from family life in other Western countries is a combination of frequent marriage, frequent divorce, and short-term cohabiting relationships, which together “create a great turbulence in American family life, a family flux, a coming and going of partners on a scale seen nowhere else”).

cross-culturally.¹²⁷ Although its reign is in decline,¹²⁸ marriage-as-adulthood still holds some purchase in American culture today.¹²⁹ Marriage symbolizes taking on obligations for another, interdependence rather than mere dependence or independence.¹³⁰

Marriage also operates as a means of access to many of the rights Marshall identified, especially those he named “social citizenship” rights. Indeed, in contemporary American law, marriage is the status category that is *most* likely to provide social welfare to adults, including Social Security, tax benefits, and access to health insurance.¹³¹ Far more money is redistributed to women through marriage-based entitlements such as Social Security than through needs-based welfare.¹³² Married women are much more likely to enjoy good health, not because marriage makes them healthier but because they are “married to health insurance.”¹³³

Marriage also connotes a sense of belonging. The extension of marriage to a particular person is evidence of the community’s—or, rather, the state’s—approval of that person and her relationship. This social approval is made concrete in social customs such as wedding showers, wedding gifts, elaborate parties, and respect for a person’s spouse; legal approval is concretized through the availability of the numerous marriage-based entitlements outlined above, plus the promise of state intervention in property distribution and spousal support should the relationship fail.

The marriage-as-citizenship model, then, still resonates in the twenty-first century, even when nearly half of the adult population is unmarried, the poor

127. See STEPHANIE COONTZ, *MARRIAGE, A HISTORY* 113 (2005) (discussing how in the middle ages in England, marriage marked men’s and women’s transition to adulthood in peasant society, and that men could alternatively be understood as adults through landholding); BARBARA ROGOFF, *THE CULTURAL NATURE OF HUMAN DEVELOPMENT* 176 (2003) (discussing cross cultural phenomenon where marriage marks adulthood rather than actual age); see also *Turner v. Safley*, 482 U.S. 78, 94–95 (1987) (striking down a prison regulation denying some inmates the right to marry as an infringement of their constitutional rights).

128. See ROGOFF, *supra* note 127, at 176–77 (arguing that in modern American culture, financial independence and not marriage is the marker of adulthood).

129. Engaged people, for example, frequently “register” for household items such as pots and pans, bedding, and small appliances. The idea is that they are moving from their parents’ home or dorm room into adulthood—an idea that often seems patently absurd when the couple in question is no longer young.

130. See Eskridge, *supra* note 6, at 1739 (reading early Supreme Court cases on marriage as viewing marriage as a “civic republican right associated with the common good—indeed obligatorily associated”).

131. See Fraser & Gordon, *supra* note 12, at 113 (discussing absence of social citizenship rights).

132. Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1089–90 (2009); see also Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1 (describing how Social Security redistributes contributions to spouses of earners).

133. Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 179–80 (2003).

are less likely to be married than the wealthy, and marriage is no longer necessary for women's economic security.¹³⁴ Why is understanding marriage as a form of citizenship so compelling? What do we gain or lose from conceiving of marriage in this way?

By reformulating marriage-as-citizenship in new, ostensibly gender-neutral forms, American law and society may be perpetuating many of its ill effects and even creating new ones. The most obvious criticism of the marriage-as-citizenship paradigm is a familiar one: perhaps marriage simply should not be the repository for important social citizenship rights, no matter how egalitarian it is. Adding the relatively small percentage of the population who are in same-sex relationships to those eligible for marriage does not solve the problem that nearly half the adult population cannot currently benefit from marriage-based benefits at all.¹³⁵ Concern for the large group of "outsiders" who will remain even if marriage equality is universally successful has led many scholars to question whether advocates should expend so much energy on achieving it.¹³⁶

As Professor Laura Rosenbury has shown, for example, our current system of privileging marriage above all else pushes people into marriage for lack of other alternatives and effectively effaces the kinship and friendship networks many unmarried individuals rely on for social and economic support, preventing them from creating the kind of legal stability the married can enjoy.¹³⁷ It is enormously frustrating to be denied the health insurance a spouse would be entitled to, based on something as arbitrary as the sex of one's partner. But connecting health insurance to marriage in the first place is equally indefensible.¹³⁸ It is not just same-sex couples who need many of the benefits we have somewhat arbitrarily tied to marriage. It is everyone. Of course, critically assessing marriage's outside role in the American legal system does not require abandoning a commitment to equality; as Professor Suzanne A.

134. See NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 165–67 (2010) (discussing failure of marriage-promotion programs).

135. See, e.g., Fraser & Gordon, *supra* note 12, at 124–26 (discussing reluctance to extend social citizenship benefits to all in the United States).

136. See, e.g., POLIKOFF, *supra* note 124; Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 245 (2001); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 214–16 (2007); Katherine M. Franke, *Marriage Is a Mixed Blessing*, N.Y. TIMES, June 24, 2011, at A25.

137. Rosenbury, *supra* note 136, at 214–15; see also Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 19 (2005).

138. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1713–14 ("Lawmakers still presume that fixing marriage by strengthening its core meaning as a permanent provider-dependent relationship and by bringing more women within its ostensibly protective confines will provide a powerful check on female poverty. Operating within this logic, it makes perfect sense to allocate hundreds of millions of dollars of federal welfare money to state programs designed to promote marriage . . . [but marriage] has proven persistently incapable of effectively serving that public, economic function.").

Kim has shown, we can advocate for a “skeptical marriage equality” that simultaneously recognizes the importance of equality while questioning why marriage should be the basis for social citizenship rights at all.¹³⁹

B. *Marriage-as-Identity*

Although the close linkage of rights to marriage should be a cause of concern, it does represent quite a reversal compared with how marriage affected the citizenship rights of women under coverture. When coverture was the law of the land, marriage functioned to deprive women of their civil rights. And even once coverture began to unravel, marriage could deprive women of rights; a woman subject to the derivative domicile rule could be unilaterally expatriated from her state of citizenship by her husband, and thereby deprived of that state’s civil rights protections. In this Part I will explore some ways in which marriage continues to trump other identities.

1. *Derivative Domicile, Redux*

It is in the context of citizenship’s identity aspects—Brubaker’s “object of closure”—that the link between derivative domicile and our current notions of marriage-as-citizenship is most analogous. As in the case of wives under the old derivative domicile rule, a strong form of marriage-as-citizenship makes marriage a person’s primary identity-producing status. Women under coverture could have no other durable legal statuses than “wife,” because these statuses would compete with their husbands’ for their allegiance. Similarly, much of contemporary marriage law works hard to make marriage a person’s primary identity status. Contemporary versions of the derivative domicile rule are, once again, a good example. Recall that some states—Louisiana and Massachusetts most prominently—solved the equal protection problem of derivative domicile by making their rules gender neutral. As it turns out, the consequence of this move for same-sex couples is that marriage can trump other affiliations—another example of a marriage-intensifying rule.

Consider, for example, a recent case arising out of Massachusetts. Francesca Cerutti-O’Brien, a resident of Massachusetts for over ten years, was denied the right to divorce on the theory that her marriage to another woman, Donna-Marie Cerutti-O’Brien, and their residence and subsequent purchase of property in Florida, made her a domiciliary of Florida.¹⁴⁰ The two women had been seeing each other for years, with Francesca living in Massachusetts and Donna-Marie in Florida.¹⁴¹ Each winter—when Massachusetts is cold but Florida is quite comfortable—Francesca had made trips to Florida, ranging

139. Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37 (2011); see also Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 63–66 (2012) (arguing that the state should not reflexively use marriage as the basis for granting public benefits).

140. *Cerutti-O’Brien v. Cerutti-O’Brien*, 928 N.E.2d 1002, 1005–09 (Mass. App. Ct. 2010).

141. *Id.* at 1003.

from two to five months in duration, but retained her primary residence in Massachusetts.¹⁴² When they married in late November of 2006, Francesca followed her usual pattern of spending the winter in Florida—but this time she had married a domiciliary of Florida.¹⁴³ Within a few months, the marriage was suffering, and Francesca remained in Florida slightly longer than usual (seven months) to undergo marital counseling with Donna-Marie.¹⁴⁴ When that proved unsuccessful, she filed for divorce in Massachusetts in June of 2007.¹⁴⁵

Had the court abandoned the derivative domicile rule and treated Francesca's domicile as one of choice, it almost certainly would have granted Francesca her divorce.¹⁴⁶ Upon her marriage, Francesca had maintained her home in Truro, Massachusetts, and kept her voter and vehicle registrations there.¹⁴⁷ She filed her 2006 taxes as a resident of Massachusetts.¹⁴⁸ Francesca had closed her business in 2005, a year before the marriage.¹⁴⁹ But she appeared to have other sources of income, so the existence of her business told the court little about her domicile.¹⁵⁰ Donna-Marie, the defendant, had stated on the form she submitted to obtain her marriage license that *she* intended to reside in Massachusetts, which at the time the state required by law for her to marry there.¹⁵¹ Donna-Marie had told Francesca that she would not reside in Massachusetts because of the weather and her desire to be close to her family; the trial judge concluded from this that Francesca was “fully aware of the fact that the defendant was adamant” that they could not reside as a married couple in Massachusetts and that Francesca therefore intended to give up her own Massachusetts domicile.¹⁵² But in her counterclaim to the divorce petition, Donna-Marie admitted that Francesca “maintain[ed] Massachusetts as her principal domicile.”¹⁵³

The court determined that Francesca had changed her domicile—not because she intended to, but by virtue of her marriage and the purchase of real estate in Florida jointly titled with her wife.¹⁵⁴ It did not matter that their lives

142. *Id.* at 1013 (Duffly, J., dissenting).

143. *Id.* at 1007 (majority opinion).

144. *Id.* at 1004.

145. *Id.*

146. Under Massachusetts law, a spouse who wishes a unilateral divorce must submit an affidavit stating that an irretrievable breakdown of the marriage exists and wait six months after filing the initial complaint before the case can be heard. MASS. GEN. LAWS ch. 208, §§ 1A, 1B (2012). To have jurisdiction over a divorce case where the cause of the divorce occurred outside of Massachusetts, a court must find that one party resided in Massachusetts for at least one year prior to filing for divorce. MASS GEN. LAWS ch. 208, §§ 4–5 (2012).

147. *Cerutti-O'Brien*, 928 N.E.2d at 1008.

148. *Id.* at 1013 (Duffly, J., dissenting).

149. *Id.* at 1007 (majority opinion).

150. *Id.* at 1007 n.9.

151. *Id.* at 1012 n.6 (Duffly, J., dissenting).

152. *Id.* at 1008 (majority opinion).

153. *Id.* at 1011 n.5 (Duffly, J., dissenting).

154. *Id.* at 1006–09 (majority opinion).

appeared to have continued as they had before the marriage, because “in Massachusetts, [f]or the purpose of jurisdiction in cases of divorce, the general rule is that the domicil of the husband is the domicil of the wife.”¹⁵⁵ How could this rule apply to a same-sex couple? “As a practical matter and in light of changing constitutional norms, the rule simply means that domicil is presumed to follow the marital residence, i.e., that married couples live together.”¹⁵⁶ Francesca’s domicile necessarily followed Donna-Marie’s, because they had “moved” to Florida four days after their wedding and jointly purchased a home there.¹⁵⁷ The burden therefore shifted to Francesca to show that she intended to keep Massachusetts as her domicile. That she kept her voter registration and vehicle license registration did her no good; the court merely concluded that because the marriage fell apart so quickly, in less than seven months, she “never got around to” changing them.¹⁵⁸ To keep her domicile, the court held, she needed to “establish[] a declaration of choice of domicil prior to the marriage.”¹⁵⁹

Normally, domicile is durable. There is a presumption that a person’s domicile remains the same unless evidence clearly shows intent to change it.¹⁶⁰ In Francesca’s case, absent the court’s imposition of the derivative domicile rule, she almost certainly would have won.¹⁶¹ But in this case, her marriage overrode all other facts. Gender is no longer the operative factor; now the test reflects a notion that there must be a marital residence, “that married couples live together.”¹⁶² In so holding, the court adopted the 1971 Restatement’s companionate theory of marriage. Husbands and wives—indeed, wives and wives—are now equals, but as equals they must subordinate their other affiliations to the marriage.

The ability to file for a divorce may not seem to matter much. All Francesca had to do to get divorced was to reestablish domicile in Massachusetts by living there for a one-year period.¹⁶³ She could not obtain a

155. *Id.* at 1005 (alteration in original) (quoting *Burlen v. Shannon*, 115 Mass. 438, 447 (1874)).

156. *Id.* at 1006 (citing the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §21 (1971)).

157. *Id.* at 1007.

158. *Id.* at 1004.

159. *Id.* at 1007.

160. DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 21, at 6R-017 (“An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.”).

161. *See Cerutti-O’Brien*, 928 N.E.2d at 1013 (Duffly, J., dissenting) (noting that without the application of the derivative domicile rule, it would be the defendant’s burden to establish by a preponderance of the evidence that the plaintiff changed her domicile to Florida).

162. *Id.* at 1006 (majority opinion) (citing the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 (1971)).

163. *Id.* at 1008.

divorce in Florida, which does not recognize same-sex marriage.¹⁶⁴ Like those of the *femes covert* of one hundred years ago, Francesca's civil rights depend on which state claims her as a citizen. Of course, unlike our nineteenth-century citizen wives, Francesca can get her divorce after one year. But there remains a problem with privileging her marital identity over her link to Massachusetts, because it denies her agency and autonomy.

The court's reasoning could easily have severe repercussions on different facts. Imagine Spouse *A*, who claims to be domiciled in Massachusetts, is a high-income earner. In the one year she has to wait to become a resident per Massachusetts statute, she could earn a significant amount of money that would be marital property, divisible at divorce, despite the fact that the marriage had become factually dead sooner. Or perhaps Spouse *B* has a gambling problem. Spouse *A* may face major liability when she is finally divorced.¹⁶⁵ Or imagine they have children: the couple used Spouse *A*'s egg and donor sperm to impregnate Spouse *B*. How can Spouse *A* obtain a custody order in a state like Florida that might not recognize her as a parent?¹⁶⁶ If she leaves the state and takes her child with her, she will be subject to criminal kidnapping laws.¹⁶⁷ If she leaves the child behind while reestablishing her Massachusetts domicile, she will be in a poor position to make a custody claim after living apart from the child for an entire year.¹⁶⁸ Allowing the status of marriage to trump the

164. FLA. CONST. art. I, § 27 (2008) (“Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.”).

165. For more extensive discussion of the problems same-sex couples face when they cannot obtain a divorce in their home jurisdiction, see Joslin, *supra* note 60.

166. Florida law on this issue is currently in flux. Florida does not recognize same-sex marriage, see FLA. STAT. § 741.212 (2012), so in this hypothetical, it would not recognize Spouse *A* as a parent of a child based on a marital presumption of maternity. Case law suggests that Florida would also not recognize a functional parenting relationship by a nonbirth mother. See, e.g., *Music v. Rachford*, 654 So. 2d 1234 (Fla. Dist. Ct. App. 1995) (denying a custody and visitation claim brought by the former lesbian partner of the parent of a child). While this article was going to press, however, the Florida Supreme Court held oral arguments in a case in which the biological mother (egg donor) of a child gestated by her former partner brought a constitutional claim challenging a trial court's refusal to give her parental rights. See *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. Dist. Ct. App. 2011) (striking down Florida statute as an unconstitutional burden of family rights); *Oral Argument Schedule & Briefs*, FLORIDA SUPREME COURT, http://www.floridasupremecourt.org/pub_info/summaries/oa10-12.shtml (last visited Jan. 4, 2013) (noting that oral argument in the case was scheduled for Oct. 2, 2012).

167. See Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2006).

168. Massachusetts, like most states, uses a “best interest of the child” standard in adjudicating child custody in child custody cases. See, e.g., *Adams v. Adams*, 945 N.E.2d 844, 872 (2011) (applying a standard of “child’s best interests”). A Massachusetts court making a best-interests determination will likely consider whether the child has a “strong emotional bond” with the parent; a parent who has left the child behind voluntarily might have a harder time convincing the court that a strong emotional bond exists. See *Hunter v. Rose*, 463 Mass. 488, 495–96 (2012) (finding that child had “developed a strong emotional bond” with nonbiological mother “from . . . birth until she was almost fifteen months old” before biological mother unilaterally cut child’s contact with nonbiological mother, and reasoning that these facts supported upholding award of custody to nonbiological mother).

status of state citizenship can have dire consequences, especially in circumstances like these where the family rights involved are contingent on state-law recognition of the underlying marriage.

Many people think of their marital relationship as their primary, identity-constructing relationships, but many—perhaps like Francesca—do not. Some people are happily married but live apart. In 2006, the Census Bureau reported that 3.6 million married Americans, not including separated couples, were living apart from their spouses.¹⁶⁹ They do this for many reasons: they work in different places, they are from different states or communities and retain ties and loyalties to those places, or the state continues to tie benefits and burdens, including welfare, tax, and voting rights, to the place of a person's domicile. For many of these couples, tying domicile to the residence of one spouse, as opposed to the place where each party separately resides or has resided and intends to remain, makes little sense.

There are numerous other ways people signal the degree to which they want their marriages to subsume other identities and affiliations. Some married people retain their previous surnames; some married people maintain separate finances. Some may feel that their nationality, their religious or ethnic identity, their work, or their parental relationships shape their core personal identities more than their marriage does.¹⁷⁰ There ought to be room for legal recognition of adult intimate relationships that does not by necessity trump all other allegiances and affinities. In other words, a person should be able to be both a citizen and a spouse, without having each status define and limit the other. By setting marriage on a pedestal as the ideal intimate relationship, American law and society may be missing an opportunity to think critically about what the contours of legally recognized relationships should be and how they relate to other expressions of identity.

2. *Beyond Derivative Domicile*

The *Cerutti-O'Brien* case, of course, is but one isolated example of how marriage-as-citizenship can operate as a marriage-intensifying agent in its modern, gender-neutral mode. But I think this trend may be more widespread than it initially appears.

Retaining the custom of name changing upon marriage, for example, means that marriage alters a spouse's legal name, creating a new professional and social identity. Perhaps not surprisingly, this change is still commonly

169. Jennifer Conlin, *Living Apart for the Paycheck*, N.Y. TIMES, Jan. 4, 2009, at ST1.

170. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (parental relationships); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996) (national identity); WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, CITIZENSHIP* (2001) (religious or ethnic identity); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1890–91 (2000) (work).

undergone almost solely by wives. Similarly, the extent to which family, tax, and pension law not only presume but *promote* female dependency by financially incentivizing single-breadwinner families could also be described as marriage-intensifying legal norms.¹⁷¹

Even legal trends that appear to provide alternatives to marriage may actually operate as marriage-intensifying. Here is just one example: there is a nascent trend in U.S. law, more developed in other countries, toward assimilation of cohabitation into marriage. We normally think of people as *choosing* to marry: they go to the county clerk's office, apply for a marriage license, and have a legally recognized officiant perform a marriage ceremony during the period in which the license is valid. At common law, people sometimes married by agreeing to marry, holding themselves out as husband and wife, and cohabiting—what was referred to as “common law marriage.” Common law marriage is largely gone today, but in its place a new doctrine is developing of legal recognition of cohabiting couples. Unlike common law marriage, this form of “marriage” does not require intent to marry. In fact, the very opposite is true.

Washington State's “meretricious relationship” doctrine defines a meretricious relationship as “a stable, marital-like relationship where both parties cohabit *with knowledge that a lawful marriage between them does not exist.*”¹⁷² The result of such a relationship in Washington State is that, should the couple break up, any property acquired during the relationship will be subject to equitable jurisdiction, just as if the couple were divorcing.¹⁷³ The courts have made it clear that a meretricious relationship is *not* a marriage; after all, “[t]he parties to such a relationship have chosen not to get married and therefore the property owned by each party prior to the relationship should not be before the court for distribution at the end of the relationship.”¹⁷⁴ But given

171. Individuals who choose to take on a spouse's surname upon marriage are signaling something important to the public about their identity and affiliations—a signal that may vary dramatically depending on who is sending it. A heterosexual woman taking her husband's name, for example, may be sending a different signal than a lesbian woman taking her wife's name. Both are indicating that their marital status has significantly changed their personal identity, but in the latter case the decision to change names may also be a political statement demanding recognition of a family form that may not be recognized by law. For more extensive analysis of the effects of same-sex marriage on the tradition of marital name-changing, see Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Naming*, 74 U. CHI. L. REV. 761 (2007). For a discussion of the gendered aspects of public entitlements, see Liu, *supra* note 132, and Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORETICAL INQUIRIES L. 631 (2010).

172. *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc) (emphasis added).

173. *Id.* at 834–35.

174. *Id.* at 836. *Connell* did not address the issue of alimony, but it is likely that a court would refuse to grant alimony to a cohabiting couple for the same reasons it denied a split of the prerelationship property, to distinguish the relationship from a marriage. Indeed, there are no reported cases in Washington State where a litigant made a claim for alimony or maintenance using the meretricious relationship doctrine. Courts have rebuffed other attempts to expand the doctrine beyond property distribution. See *Foster v. Thilges*, 812 P.2d 523, 527 (Wash. Ct. App. 1991) (quoting Davis

that the majority of states do not provide for equitable division of premarital property¹⁷⁵ and alimony awards are relatively rare,¹⁷⁶ the Washington meretricious relationship doctrine essentially gives unmarried partners the same rights in Washington that spouses would have at divorce in California—an equitable distribution of whatever they earned during the relationship.

Initially, this doctrine arose in a more limited context, where a meretricious relationship developed into a legal marriage. In *Marriage of Lindsey*, a wife claimed an interest in property acquired during the two-year period in which she and her future husband had lived together before marriage.¹⁷⁷ The Supreme Court of Washington agreed that the property acquired during the meretricious relationship should have been included in the equitable division of property on divorce.¹⁷⁸ The court then expanded this holding in *Connell*, where the couple never married at all.¹⁷⁹ Some other states have begun to adopt similar equitable approaches to extending divorce-like treatment to unmarried cohabitants who break up.¹⁸⁰ In other countries—notably New Zealand, Australia, and Canada—unmarried cohabitants are entitled and subject to the same law of marital property and spousal support as married couples if they have lived together for a set period of time.¹⁸¹

v. Dep't of Emp't, 737 P.2d 1262 (1987)) (refusing to extend doctrine to allocate attorney's fees in the way normally available at divorce and noting that "the extension of property distribution rights of spouses to partners in meretricious relationships does not elevate meretricious relationships themselves to the level of marriages for any and all purposes").

175. LESLIE JOAN HARRIS ET AL., *FAMILY LAW* 355 (4th ed. 2010) (listing only fifteen states as of 2009 that equitably divide all property, including premarital property, on divorce).

176. *Id.* at 394 (stating that "relatively few divorced women have ever been awarded spousal support").

177. 678 P.2d 328, 329–31 (Wash. 1984) (en banc).

178. *Id.* at 331–32.

179. *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc).

180. See Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1391 (2001) (noting that in Nevada, like Washington, courts apply the law governing distribution of community property to some cohabiting couples "by analogy"; that Kansas, Mississippi, and Oregon courts have sometimes entered property distribution orders in cohabitation cases based on "general equitable principles"; and that California, West Virginia, and Wisconsin courts "achieve a similar result through generous application of implied contract principles").

181. See Bill Atkin, *The Challenge of Unmarried Cohabitation—The New Zealand Response*, 37 FAM. L.Q. 303 (2003); Nicholas Bala, *Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships*, 29 QUEEN'S L.J. 41 (2003); Lindy Willmott et al., *Defacto Relationships Property Adjustment Law—A National Direction*, 17 AUSTL. J. FAM. L. 37 (2003). The ALI Principles of the Law of Family Dissolution recommend an even broader absorption of cohabiting relationships into marriage law, advocating a rebuttable presumption that a couple has created a "domestic partnership" if they have cohabited for the requisite number of years. "Domestic partnership" status means that divorce law applies to the couple for both property and alimony purposes. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §§ 6.01–06 (2002); see also Clare Huntington, *Staging the Family*, N.Y.U. L. REV. (forthcoming) (manuscript at 36) (draft on file with author) ("To assimilate nontraditional families into family law, the *Principles* require those seeking legal rights to act in ways that reflect dominant social fronts as a condition of receiving legal benefits.").

What does recognizing cohabitation mean for same-sex couples? One potentially positive development is the availability of marriage-like relationships without marriage. Where same-sex marriage is unavailable, sometimes the recognition of cohabitation can provide security that the couple was otherwise denied. In *Vasquez v. Hawthorne*, for example, the Washington State Supreme Court held in yet another en banc decision that a same-sex couple could have entered into a meretricious relationship such that one could inherit from the other.¹⁸²

But there is also a difficulty with these cases. Like marriage itself, visiting legal obligations on long-term cohabitants imposes on them the idea that their relationship should have a certain meaning. For heterosexual couples, this meaning has often been imposed to protect women. Marriage is the institution that traditionally dealt with female dependency, but the law sometimes finds a way to manage this problem even where no marriage has occurred.¹⁸³ But in the case of same-sex couples, in states where marriage is available, it is less clear who the “victim” of a long-term cohabitation is. Is it the person who stayed home to care for the children? Does the law now presume that same-sex couples experience the same social pressures as heterosexual couples, and that therefore the lesser wage-earner needs the same protection that has commonly been given to wives and cohabiting heterosexual women? Now that marriage is increasingly available to same-sex couples, would those couples realistically want their cohabiting relationships to be legally construed “like a marriage,” even when they have intentionally eschewed marriage?¹⁸⁴

Recently, there have been reports that some same-sex couples are discovering that their newly-acquired marital status can be retroactive. Some courts are apparently giving credit to spouses in same-sex marriages for the time during which they were together but not married, à la *Lindsey*. If a couple was together for twenty-five years but only had the right to marry a few years before divorcing, some courts will take the relationship’s entire duration into account when dividing assets.¹⁸⁵ These couples are discovering not only the

182. *Vasquez v. Hawthorne*, 33 P.3d 735, 736 (Wash. 2001) (en banc); see also *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53–54 (N.Y. 1989) (holding that the definition of “family” for purposes of New York City rent control law includes “two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence”).

183. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2206–09 (1995) (discussing the history of family’s role in creating and responding to female dependency). This feature is one explanation for the prevalence of common law marriage in the nineteenth century. See Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1920 (1998) (arguing that “[c]ommon law marriage in the nineteenth century privatized the dependencies of women and children through individual contracts, thereby shielding the state from financial responsibility”).

184. Cohabitants in general look quite different as a group from married people; one salient feature is that they tend to have “relatively comparable earnings” and are more likely to stay together “where their earnings remain equal.” Estin, *supra* note 180, at 1388.

185. Eve Conant, *The Right to Love—and Loss*, NEWSWEEK (Apr. 13, 2010, 8:00 P.M.), <http://www.thedailybeast.com/newsweek/2010/04/13/the-right-to-love-and-loss.html>.

benefits and obligations of marriage-as-citizenship, but also that they were, by virtue of their intimate relationships, already citizens, even before they were recognized by law. For some, this legal treatment may be a welcome relief. They were, after all, married in spirit, so why not have their unions recognized after the fact? But for others, this treatment may be most unwelcome. Individuals who affirmatively rejected marriage may find themselves caught in its web.¹⁸⁶ By recognizing a nonmarital relationship as a marriage, the state reifies the status aspects of marriage over its more contract-like features, strengthening its role as a form of citizenship and further demarcating the haves from the have-nots.

Marriage is increasingly becoming the only option; jurisdictions that used to have civil union statutes frequently convert these relationships to marriages once marriage becomes available to same-sex couples.¹⁸⁷ It's all or nothing; a couple can choose marriage and all the burdens and benefits it entails, or no legal recognition at all.¹⁸⁸ And in jurisdictions like Washington State that impose recognition on cohabitants, it's not just all or nothing—cohabitation inexorably leads to “all,” even for couples who want less.

CONCLUSION

This Essay began with an epigraph from the Book of Ruth. In that story from the Hebrew Bible, Ruth, a Moabite, daughter-in-law of Naomi, an Israelite, follows Naomi to Bethlehem after Ruth's husband, Naomi's son, is killed.¹⁸⁹ In deciding to follow Naomi, Ruth famously states: “Where you go I will go, and where you stay I will stay. Your people will be my people and your God my God. Where you die, I will die, and there I will be buried.”¹⁹⁰ Essentially, she is taking on Naomi's citizenship and her domicile, extending the obligations she owed her husband during his life to his mother after his death.

186. This criticism could, of course, be applied to the recognition of heterosexual cohabitation as well. Many people, straight or gay, may choose not to marry even when they have the option because they specifically want to opt out of its protections and burdens. See William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1984 n.382 (2012) (noting that “many couples would be unhappy if they were married, perhaps because they do not ‘want’ a lasting relationship or because they fear the expense and terror of divorce more than other couples”).

187. See David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115, 115 (2010) (arguing that “the current burst of innovation in creating alternative family forms for same-sex couples may ultimately prove to be more transitional than transformative”); see also Halley, *supra* note 20, at 39–42 (showing how civil union statutes can simply mimic marriage-as-status and that states have had low tolerance for allowing simultaneous civil unions and marriages).

188. See Halley, *supra* note 20, at 33–35 (describing Massachusetts as a “steep drop-off state,” in which “all of marriage's attributes are piled up inside marriage, and evacuated from the rest of the regime”).

189. *Ruth* 1:15 (New International Version).

190. *Ruth* 1:16–17.

The story of Ruth has been interpreted in three ways that each bear directly on the notion of marriage as citizenship.¹⁹¹ First, “Jews-by-choice” embrace the story. Ruth’s status as a convert, first through marriage but then by choosing to follow her mother-in-law, makes her the ideal example of a person who changed her affinity (“naturalized,” if you will).¹⁹² Second, the story is a popular reading at heterosexual Christian wedding ceremonies “because it so perfectly captures the essence of the love that should exist between spouses.”¹⁹³ And third, gays and lesbians have appropriated the second interpretation, claiming the story of Ruth and Naomi as a story of proto-same-sex marriage, in which Ruth’s vow to Naomi is equivalent to a wedding vow.¹⁹⁴

What I have tried to suggest here is that these interpretations necessarily go hand-in-hand. The story of Ruth and Naomi is powerful for gays and lesbians because it conveys how all-encompassing love can be. But it is also deeply disturbing. Ruth and Naomi are not on an equal playing field. Ruth is sacrificing her life to be of use to Naomi—she even indentures herself to the farmer Boaz to glean grain to support herself and Naomi, and bears a child to him, of whom the villagers say “a son has been born to Naomi.”¹⁹⁵ The story of Ruth may be the story of marriage, but it is also the story of coverture, the story of one partner giving up herself, including her citizenship, for the other.¹⁹⁶

The observation that marriage can trump other forms of belonging is not necessarily an argument against marriage. There are many reasons the state might have an interest in retaining marriage. It seems to make people happier and healthier (although correlation is not necessarily causation).¹⁹⁷ It provides a set of default rules for relationships in which the parties may have difficulty

191. For several contemporary interpretations of *Ruth*, many of which track the ones I discuss here, see READING RUTH: CONTEMPORARY WOMEN RECLAIM A SACRED STORY, *supra* note 2.

192. See THE HARPERCOLLINS STUDY BIBLE, *supra* note 2, at 383.

193. REV. JEFF MINER & JOHN TYLER CONNOLEY, THE CHILDREN ARE FREE: REEXAMINING THE BIBLICAL EVIDENCE ON SAME-SEX RELATIONSHIPS 31 (2002).

194. See, e.g., *id.* (interpreting the Ruth and Naomi story as follows: “Ruth gave up everything so she could be with Naomi; she put her own life at risk, so she could spend it caring for Naomi These actions and emotions are difficult, almost impossible, to explain as mere friendship”); see also JULIA KRISTEVA, STRANGERS TO OURSELVES 71 (Leon S. Roudiez trans., 1991) (reading Ruth’s speech to Naomi as demonstrating “a loyalty—that one might call passionate—between the two women”).

195. *Ruth* 4:17.

196. It is also a variation of what historian Linda Kerber has termed “Republican motherhood”; Ruth exercises her newfound citizenship by bearing a child, a child that will be the ancestor of David, and, for the Christian tradition, Jesus. See KERBER, *supra* note 18 (introducing the idea of Republican motherhood as a way of understanding women’s citizenship in early U.S. history). For an analysis of the unsettling nature of David’s connection to Ruth, see BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 48–67 (2001).

197. Compare Kelly Musick & Larry Bumpass, *Reexamining the Case for Marriage: Union Formation and Changes in Well-Being*, 74 J. MARRIAGE & FAM. 1, 1 (2012) (demonstrating a causal connection between marriage and happiness), with Alois Stutzer & Bruno S. Frey, *Does Marriage Make People Happy, or Do Happy People Get Married?*, 35 J. SOCIO-ECON. 326 (2006) (finding significant selection effects).

predicting their needs years in advance.¹⁹⁸ Making the significant commitment marriage entails may also increase the likelihood that the relationship will flourish.¹⁹⁹ But there are different functions that marriage can serve in a society. It can be a rigid status, into which the lion's share of public welfare benefits is bundled, and that is experienced as a person's primary affiliation—what I've called here a vision of marriage-as-citizenship. Or, it can be one alternative among many, *none* of which is the repository for most sources of state and federal largesse.

The history of the derivative domicile rule serves as a cautionary tale of what can happen when rights are determined by marriage and not by other affiliations, especially in times of rapid legal change. For the women of the nineteenth century, civil rights could be turned on or off through marriage depending on their domiciliary state's laws. For same-sex couples today, the situation is similar but even more complicated. Civil rights, such as the right to contract or manage property, are guaranteed to all, but social citizenship rights are increasingly linked to marriage. Yet the right to marry is contingent on state law, so a change in residence can alter the citizenship rights bundled into marriage, turning them on or off when a border is crossed. The fight for the right to marry may have the unintended effect of obscuring marriage's unsavory aspects, including its ability to trump other identities, not only socially but legally. We may be moving toward a world where to be a full citizen, a person *must* be a "citizen spouse."

198. See Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1314–15 (2006).

199. See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 40–44 (1990) (discussing role of precommitment in creating lasting marriages).