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Leaving Home? Domicile, Family, and Gender

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INTRODUCTION 1455

* Copyright © 2014 Susan Frelich Appleton. Lemma Barkeloo & Phoebe Couzins Professor of Law, Israel Treiman Faculty Fellow for 2012–2013, and Vice Dean, Washington University in St. Louis. This Article derives from the Brigitte Bodenheimer Lecture on Family Law that I delivered at the UC Davis School of Law on March 11, 2013. Of course, at that time the United States Supreme Court had not yet decided the then pending marriage cases, and some of the related developments covered in this Article had not yet taken place. Nonetheless, the Court’s decisions and their aftermath provide a useful frame for the ideas that I presented in the lecture. In addition to my gratitude to all those who made my visit to UC Davis so rewarding, especially Dean Kevin Johnson, Professor Courtney Joslin, and Professor Emerita Carol Bruch, I express my thanks to Lisa Cagle, Kristin Collins, Deborah Dinner, Meredith Harbach, Rebecca Hollander-Blumoff, Courtney Joslin (again), Laura Kessler, Shari Motro, Doug Nejaime, Orly Rachmilovitz, Laura Rosenbury, Elizabeth Sepper, Deborah Widiss, and others who helped me refine my ideas about domicile as I discussed the project over the past several months — at faculty workshops at the American Bar Foundation, Boston University School of Law, Richmond Law School, and Washington University’s School of Law and its Political Theory series; at a symposium at Michigan State University College of Law; and at annual meetings of the Law & Society Association and the International Society of Family Law. Julie Brummond and Douglas Muskett provided enormously helpful research assistance for the lecture and this Article, respectively.

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INTRODUCTION

In striking down the sex-based definitions in the Defense of Marriage of Act (“DOMA”) in *United States v. Windsor*,¹ the Supreme Court lectured Congress and everyone else about the local character of family law in our federal system.² In particular, the Court pointed out the longstanding tradition that makes marriage definition and regulation state prerogatives.³ The Court then went on to hold that DOMA’s restrictive definitions of “marriage” and “spouse” unconstitutionally discriminate against “persons who are joined in same-sex marriages made lawful by *the State*.”⁴ In marking the divide between federal and state authority and emphasizing the latter, however, the Court notably left unaddressed the question of the proper allocation of power over family law *among* the states. Put differently, the majority opinion failed to identify which state’s law should govern in a multijurisdictional marriage case — an omission underscored by Justice Scalia’s riff on the choice of law questions left after *Windsor*.⁵

¹ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

² *Id.* at 2691 (explaining that, subject to constitutional outer limits, the “regulation of domestic relations” is ‘an area that has long been regarded as a virtually exclusive province of the States’ (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975))).

³ *Id.* at 2689-90 (“By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”). Identifying two different federalism arguments against DOMA, Courtney Joslin theorizes that *Windsor* did not embrace what she calls the “categorical federalism argument,” under which Congress has no authority “to define or determine family status.” Instead, *Windsor* followed the more modest “unusualness trigger argument,” which requires more careful scrutiny of federal laws that deviate from the traditional allocation of family law to the states. Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 158-59 (2013); see also Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 137-38 (2009) (critiquing federal courts’ growing avoidance of cases raising federal questions about families and family law); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 892 (2004) [hereinafter *Canon of Family Law*] (challenging the “canonical understanding” that “all of family law is and must be exclusively local”).

⁴ *Windsor*, 133 S. Ct. at 2695 (emphasis added).

⁵ Justice Scalia posed the following hypothetical in his dissenting opinion:

Imagine a pair of women who marry in Albany and then move to Alabama, which does not “recognize as valid any marriage of parties of the same sex.” ALA. CODE § 30-1-19(e) (2011). When the couple files their next federal tax return, may it be a joint one? Which State’s law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a

Just as longstanding tradition has made family law generally, and marriage in particular, a matter of state — not federal — law, longstanding tradition has provided an answer to the choice of law issues that the *Windsor* majority avoided: domicile. Domicile has served as the mechanism for the distribution among the states of regulatory authority over families. Despite *Windsor*'s silence, domicile routinely has played a decisive role in determining which state gets to control a wide range of family law issues — from conventional matters like marriage, divorce, legitimacy, and spousal immunity⁶ to more contemporary and unusual problems like the status of posthumously conceived children for purposes of Social Security survivors' benefits⁷ and the applicability of exclusive tribal jurisdiction over adoptions under the Indian Child Welfare Act.⁸

Domicile thus has endured as a foundation of family law, typically taken for granted and rarely questioned, especially after updates purporting to correct its expressly patriarchal treatment of married women.⁹ Yet, even with such updates, domicile is not a gender-neutral construct. Rather, domicile continues to exemplify a regime of domestic relations law from a mostly bygone era, when the state imposed tight restrictions on intimate life and gender-based rules and roles prevailed. Although family life and family law have changed enormously in recent years, the doctrine, significance, and gendered character of domicile have failed to keep pace with such transformation.

Perhaps until now: Now, *Windsor*'s silence about domicile, the diminished role of domicile in some of *Windsor*'s legal aftermath, and new rules for divorce that jettison domicile as a jurisdictional requirement for some same-sex couples all invite a fresh look at the

matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law?

Id. at 2708 (Scalia, J., dissenting). William Baude had anticipated this issue earlier. See William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1387 (2012). More recently, the media has noted the problem. See *Morning Edition: Getting Federal Benefits to Gay Couples: It's Complicated*, NAT'L PUB. RADIO (Oct. 22, 2013), <http://www.npr.org/2013/10/22/237196335/getting-federal-benefits-to-gay-couples-its-complicated>.

⁶ See *infra* Part I.B.

⁷ See *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2027-28 (2012).

⁸ See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42-44 (1989).

⁹ See Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 413-16 (2013) [hereinafter *Citizen Spouse*]; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 & cmt. b (1988 revision).

place of domicile today — not just in the particular context of marriage equality but throughout family law. This Article begins this re-examination.

My exploration unfolds in three parts: Part I introduces the concept of domicile, emphasizing its definition, its functions, and especially its primacy in what we now call family law. This analysis of domicile and its evolution highlights the features shared by domicile and the traditional legal treatment of intimate life or “old school domestic relations law,” as I dub it. This Part concludes by showing why domicile, which has changed little over the years, remains a gendered concept, thus perpetuating the legacy of old school domestic relations law.

Part II juxtaposes this older legal approach to intimate life with modern family law, using the law of parentage as an illustration that demonstrates the capacity for transformation. A narrow understanding of parentage once seemed natural and inevitable, but family law now has moved well beyond such old assumptions. In particular, today’s more expansive conceptualization of parentage exemplifies contemporary family law’s professed commitment to pluralism, liberty, and gender equality, as well as its responsiveness to changes in family life. This Part attempts to prompt a similar rethinking of domicile and its role, which also seem natural, by showing how family life has changed in ways that domicile cannot satisfactorily accommodate, including the rise of LATs (couples “living apart together”¹⁰) and the blurring of traditional domestic units and boundaries.

Part III begins by demonstrating how today, with the advent of same-sex marriage, we have begun to see some weakening and narrowing in domicile’s paradigmatic position. This Part then looks beyond such erosion, sketching out three thought experiments — ways we might reconceptualize domicile, further limit domicile’s significance, or leave behind altogether domicile as we know it. A brief conclusion follows.

I. DOMICILE — THEN AND NOW

Domicile plays several important roles in our federal system. For example, domicile usually provides the basis of one’s state “citizenship”¹¹ for purposes of exercising voting rights,¹² determining

¹⁰ See generally Constance Rosenblum, *Living Apart Together*, N.Y. TIMES (Sept. 13, 2013), <http://www.nytimes.com/2013/09/15/realestate/living-apart-together.html> (discussing the rising phenomenon of LATs).

¹¹ See Abrams, *Citizen Spouse*, *supra* note 9, at 413.

the obligation to pay certain taxes,¹³ and permitting federal diversity jurisdiction.¹⁴ A defendant's domicile serves as a basis of general personal jurisdiction, which allows a forum to adjudicate any claim against her there, even if the litigation is not related to the forum.¹⁵

Domicile also stands out in conflict of laws. Under both traditional and modern approaches to choice of law, domicile provides the primary and ultimate reference point for the applicable regime in matters of domestic relations or — as we call the field today — family law.¹⁶ This principle provides the focus for both my analysis and my critique.

For purposes of choice of law generally and domestic relations in particular, domicile typically identifies a given state.¹⁷ Unless otherwise noted, I will be using the term in this way. Nonetheless, we might envision one's domicile (or citizenship) as a special connection to both larger and smaller governmental units. For example, as illustrated by *Windsor's* facts, in which two New York women married in Canada (under Canadian law) and then the surviving spouse sought

¹² See Gerald Frug, *Voting and Justice*, in JUSTICE AND THE AMERICAN METROPOLIS 201 (Clarissa Rile Hayward & Todd Swanstrom eds., 2011); Douglas Laycock, *Equality and the Citizens of the Sister States*, 15 FLA. ST. U. L. REV. 431, 436 (1987) [hereinafter *Sister States*].

¹³ See Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1291 (2011).

¹⁴ See *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974).

¹⁵ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-61 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853-54 (2011); see also Allan R. Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 538-39 (2012); Emily Eng, Note, *A New Paradigm: Domicile as the Exclusive Basis for the Exercise of General Jurisdiction over Individual Defendants*, 34 CARDOZO L. REV. 845, 850-51 (2012).

¹⁶ See generally Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1371-86 (1998) [hereinafter *Federalism*] (detailing the development of modern family law).

¹⁷ See, e.g., HERMA H. KAY, LARRY KRAMER & KERMIT ROOSEVELT, CONFLICT OF LAWS: CASES — COMMENTS — QUESTIONS, at v (9th ed. 2013) ("The classic conflict-of-laws problem — classic at least in the sense of being the problem most thought about and discussed — involves a choice of law between or among states."). Domicile is typically a matter of state law. See, e.g., *White v. Tennant*, 8 S.E. 596, 600 (W. Va. 1888) (holding that Pennsylvania law, rather than West Virginia law, controls the estate distribution of a Pennsylvania domiciliary who died in West Virginia). Sometimes, however, federal law determines domicile. See, e.g., *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-54 (1989) (relying on common law principles to give content to the federal definition); *Williams v. North Carolina*, 325 U.S. 226, 231 n.7 (1945) ("Since an appeal to the Full Faith and Credit Clause raises questions arising under the Constitution of the United States, the proper criteria for ascertaining domicil[e], should these be in dispute, become matters for federal determination.").

recognition of the marriage for purposes of federal estate tax laws,¹⁸ one can be domiciled both in New York and in the larger United States and hence be a citizen of both.¹⁹ And, within the state of New York, one's domicile in a specific community determines the ability to vote in a local election or the school district for one's children.²⁰ Thus, we might imagine domicile as several concentric circles radiating from a fixed geographic point.

The sections that follow continue to introduce the concept of domicile, first setting out the defining characteristics that make a place one's domicile and then reviewing domicile's functions in domestic relations law and beyond. This Part concludes with an examination of domicile as a gendered construct.

A. Domicile as Home

Home is central to the notion of domicile.²¹ One classic statement defines domicile as a person's "true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom."²² Although identifying one's home has some features of a factual determination, understanding domicile as a legal conclusion represents the better view.²³

According to the Restatement First of Conflict of Laws (published back in 1934), "when a person has one home and only one home, his domicil[e] is the place where his home is."²⁴ It then provides what, for my purposes, turns out to be an even more notable definition, namely: "A home is a dwelling place of a person, distinguished from other dwelling places of that person by the *intimacy* of the relation between the person and the place."²⁵ The Restatement Second (published 1971) reflects a

¹⁸ *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

¹⁹ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 504 & n.17 (1999) (noting how, in this country, each citizen has two political capacities, one state and one federal).

²⁰ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding the constitutionality of a school finance system based on property taxes, despite educational disadvantages suffered by students residing in poor districts).

²¹ See Kerry Abrams, *A Legal Home: Derivative Domicile and Women's Citizenship* 12 (Working Paper, Mar. 7, 2012) [hereinafter *Legal Home*] (on file with author).

²² *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (internal quotation omitted).

²³ See *Galva Foundry Co. v. Heiden*, 924 F.2d 729, 730 (7th Cir. 1991) ("Domicile is not a thing, like a rabbit or a carrot, but a legal conclusion, though treated as a factual determination for purposes of demarcating the scope of appellate review.").

²⁴ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 12 (1934). The Restatement First uses the spelling "domicil." See *id.* (1934).

²⁵ *Id.* § 13 (1934) (emphasis added).

similar theme, distinguishing domicile from other places on the basis of a person's identification with that jurisdiction.²⁶ The Restatement Second goes on to define home as "the place where a person dwells and which is the center of his domestic, social, and civil life."²⁷

Everyone has one and only one domicile.²⁸ Each infant is born with a domicile by operation of law, derived from parental domicile.²⁹ Likewise, a domicile by operation of law is assigned to other incompetents, a category that traditionally included "the insane"³⁰ and married women³¹ — the latter a topic to which I return below.³²

A person loses a domicile only upon attaining a new one.³³ For one deemed capable of acquiring a domicile of choice, "a person must establish a dwelling-place with the intention of making it his home."³⁴ Under the Restatement Second, these twin requirements of act and mindset are expressed as "physical presence"³⁵ plus intent "to make that place one's home for a time at least."³⁶

Thus, the idea of home and its accompanying emotions stand out as critical, so that "factors to be considered include the person's feelings toward the place. . . . The search in each instance is for the state to which the person is most closely related at the time."³⁷ "Pre-eminent headquarters"³⁸ and "permanent allegiance"³⁹ are other ways of

²⁶ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971).

²⁷ *Id.* § 12 (1971).

²⁸ See *id.* § 11(2) ("Every person has at all times one domicil[e], and no person has more than one domicil[e] at a time.").

²⁹ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 30, 33-35 (1934).

³⁰ See *id.* § 40 (1934). Although the section's title refers to a person who is "Mentally Deficient or of Unsound Mind," the comments seem to use the adjective "insane" interchangeably. See *id.* § 40 cmts. b, c & f.

³¹ See *id.* § 27 (1934).

³² See *infra* notes 93-96, 137-139 and accompanying text.

³³ See, e.g., *White v. Tennant*, 8 S.E. 596, 597 (W. Va. 1888) ("[O]ne domicile cannot be lost or extinguished until another is acquired."). Indeed, in the United States, changing one's domicile from one state to another is a right of national citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment. *Saenz v. Roe*, 526 U.S. 489, 503-04 (1999).

³⁴ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 15(1)-(2) (1934); see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11(2) (1971).

³⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 15(3) (1971).

³⁶ *Id.* § 18 cmt. b (1971); see also Kit Applegate, Note, *Stifel v. Hopkins Revisited: Domicile and the Effects of Compulsion*, 32 RUTGERS L.J. 583, 587 (2001) ("To establish a domicile in a particular state an individual must reside within that state (physical element) and possess an intent to remain there indefinitely (mental element).").

³⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 cmt. b.

³⁸ See *Williamson v. Osenton*, 232 U.S. 619, 625 (1914); see David F. Cavers, "Habitual Residence": A Useful Concept?, 21 AM. U. L. REV. 475, 482-83 (1972)

expressing the subjective or emotional connection that has long been crucial to domicile. Accordingly, in contrast to what the Justices refer to as “nominal, permanent residen[ce],”⁴⁰ domicile has always required a more substantial and affective affiliation. The old saying “home is where the heart is” seems to capture this element of domicile — or at least the normative projection of such feelings. Yet, even when domicile attaches by operation of law, it nonetheless functions as one’s legal home,⁴¹ with the emotional bond or intimate connection supplied by legal fiction.

This core idea of home largely has survived one of the most persistent critiques of domicile — attacks calling out its rigidity and artificiality.⁴² The problems are colorfully highlighted by familiar casebook hypotheticals and classroom exercises in which an individual en route to a new home accidentally dies and thus has failed to change his domicile despite his firm intention to do so.⁴³ Other classics include prisoners as well as cases of sham domiciles, with presence achieved but no genuine plans to make a home.⁴⁴ A related attack takes aim at domicile as a “unitary concept,” given the many contexts for its use.⁴⁵

In response to such critiques, one finds occasional reliance on more modern constructs, but these still cling to a notion of home, albeit streamlined. These include “habitual residence,” used by the Hague Conference⁴⁶ and in law reform projects,⁴⁷ and “home state,” which

(elaborating upon the idea of pre-eminent headquarters).

³⁹ See Zelinsky, *supra* note 13, at 1291.

⁴⁰ Allstate Ins. Co. v. Hague, 449 U.S. 302, 309, 311 (1981) (plurality opinion).

⁴¹ See generally Abrams, *Legal Home*, *supra* note 21 (analyzing the derivative domicile rule and its implications for thinking about the exercise of citizenship).

⁴² See, e.g., Cavers, *supra* note 38, at 482-83 (reviewing criticisms of the “headquarters” understanding of domicile).

⁴³ See, e.g., KAY ET AL., *supra* note 17, at 38 (posing questions designed to highlight problems with the traditional concept and function of domicile).

⁴⁴ See, e.g., Williams v. North Carolina, 325 U.S. 226 (1945) (determining that North Carolina can refuse full faith and credit to a Nevada divorce decree now that facts show petitioners never intended to remain in Nevada).

⁴⁵ See, e.g., KAY ET AL., *supra* note 17, at 39 (reporting Walter Wheeler Cook’s contextual approach, which some courts continue to reject).

⁴⁶ Hague Convention on the Civil Aspects of International Child Abduction art. 3, Oct. 25, 1980, T.I.A.S. No. 11,670; see, e.g., Abbott v. Abbott, 560 U.S. 1 (2010) (applying federal legislation that implements the Abduction Convention’s provisions).

⁴⁷ E.g., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 6(c)(3) (1994); see Cavers, *supra* note 38, at 477-79 (tracing the emergence of “habitual residence” in the Hague Conventions); Gadi Zohar, Notes & Comments, *Habitual Residence: An Alternative to the Common Law Concept of Domicile?*, 9 WHITTIER J. CHILD

determines child custody jurisdiction in the United States.⁴⁸ Both emphasize presence over a prolonged period, with a supposedly diminished role for intent,⁴⁹ although courts often fail to appreciate this difference.⁵⁰ (In fact, despite the oft mentioned difference between domicile and habitual residence, many authorities conflate them.⁵¹) Brainerd Currie, often credited with modernizing choice of law theory,⁵² seems to have found the term “residence” less problematic,⁵³ and the Restatement Second uses a list that includes domicile along with alternative terms.⁵⁴ These sources all suggest that, while “domicile” might have its flaws, a smarter, perhaps less technical, understanding of “home” should cure the problem.

& FAM. ADVOC. 169, 170-71 (2009).

⁴⁸ See 28 U.S.C. § 1738A(a), (b)(4) (2012); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 102(7) (1997).

⁴⁹ Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 UC DAVIS L. REV. 1049, 1067 (2005) (“Habitual residence ought not to be confused with domicile, which usually does require both residence and ‘intention to remain’; habitual residence would not appear to rest so heavily on the long-term intentions of the parties.”); see also *Caruso v. Caruso*, No. 2013-A-0017, 2013 WL 6808608, at *3 (Ohio Ct. App. 2013) (“‘Home state’ and ‘domicile’ are distinct concepts. . . . [T]he requirement that the child must live in Ohio for six months before an Ohio court acquires jurisdiction [as the home state] does not mean the child must be domiciled in Ohio for six months. It simply means the child must physically live in Ohio for six months.”); *In re Walker*, No. 01-13-00922-CV, 2014 WL 303142, at *3 (Tex. Ct. App. 2014) (“[S]tate of mind and intentions are not part of the home-state inquiry.”).

⁵⁰ E.g., *Hofmann v. Sender*, 716 F.3d 282, 291-92 (2d Cir. 2013); *Mozes v. Mozes*, 239 F.3d 1067, 1073-79 (9th Cir. 2001); see Silberman, *supra* note 49, at 1063-68; Stephen I. Winter, *Home Is Where the Heart Is: Determining “Habitual Residence” Under the Hague Convention on the Civil Aspects of International Child Abduction*, 33 WASH. U. J.L. & POL’Y 351, 357-60 (2010) (analyzing how courts have interpreted the relationship between parental intent and habitual residence); Zohar, *supra* note 47, at 178-79. For additional discussion, see *infra* Part III.B.1.

⁵¹ E.g., *Hofmann*, 716 F.3d at 291-92; see Silberman, *supra* note 49, at 1066-67; Winter, *supra* note 50, at 355-56; Zohar, *supra* note 47, at 171-72. *But see, e.g., Mozes*, 239 F.3d at 1071.

⁵² See Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77 (1963); see also, e.g., Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, in 215 *RECUEIL DES COURS* bk. III, at 11 (1989) [hereinafter *A Defense*] (providing a detailed overview of Currie’s work on governmental interest analysis and its critics’ views).

⁵³ See Currie, *supra* note 52, at 86-87.

⁵⁴ See, e.g., *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 145(2)(c), 188(2)(e) (1971) (demonstrating that, on multiple occasions, the Restatement Second groups the terms “domicil[e], residence, nationality, place of incorporation and place of business of the parties” under a single subsection).

B. *Domicile and Domestic Relations Law*

In domestic relations cases with connections to multiple jurisdictions, the basic rule long has entailed applying the law of the domicile. These include multistate cases about marriage⁵⁵ and divorce⁵⁶ as well as the determination and consequences of family status,⁵⁷ such as family immunity,⁵⁸ legitimacy,⁵⁹ and intestacy (except for real property in another state).⁶⁰ Even when the choice of law process entails an initial reference to another state on a family law matter, as with *lex loci celebrationis*⁶¹ for determining the validity of a marriage, the domicile's own public-policy opposition can trump the celebration state's law.⁶² Alternatively, in such multistate marriage cases, the domicile's own policy favoring the validity of marriage and its own preference for comity often lead it to recognize a union that could not be licensed locally.⁶³ Either way, however, the domicile

⁵⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1), (2) & cmt. j (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 121 cmt. a, 132 (1934).

⁵⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 & cmts. (1971). Domicile provides the basis for divorce jurisdiction, with the forum then applying its own law. See *Sosna v. Iowa*, 419 U.S. 393, 407-08 (1975); *Williams v. North Carolina*, 325 U.S. 226, 229-30 (1945); *Williams v. North Carolina*, 317 U.S. 287, 297-99 (1942); *In re Marriage of Kimura*, 471 N.W.2d 869, 874-76 (Iowa 1991).

⁵⁷ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 54(2) (1934).

⁵⁸ See, e.g., *Haumschild v. Cont'l Cas. Co.*, 95 N.W.2d 814, 818 (Wis. 1959) (“[W]henver Wisconsin courts are confronted with a conflict of laws problem as to which law governs the capacity of one spouse to sue the other in tort, the law to be applied is that of the state of domicile.”).

⁵⁹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 287 (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 137 (1934).

⁶⁰ See, e.g., *White v. Tennant*, 8 S.E. 596, 599-600 (W. Va. 1888) (“[T]he law of the state in which the decedent had his domicile at the time of his death must govern the distribution of his estate.”); RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 236, 303 (1934) (providing for intestate succession to immovable property according to the law of the situs and to movable property according to the law of the decedent's domicile); Laycock, *Sister States*, *supra* note 12, at 446 (“[E]states are administered under the law of the decedent's domicile.”); see also Patrick J. Lannon, *Domicile Planning — Don't Take It for Granted*, 80 FLA. B.J., Jan. 2006, at 34, 37; Jerome L. Wolf, *The Importance of Domicile in Asset Preservation Planning*, 79 FLA. B.J., Nov. 2005, at 30-31.

⁶¹ See, e.g., *Holland v. Holland*, 212 N.Y.S.2d 805, 806 (N.Y. 1961) (asserting that the phrase *lex loci celebrationis* refers to the law of the place where the marriage was celebrated or solemnized); *Tanglewood Land Co., Inc. v. Wood*, 252 S.E.2d 546, 550 (N.C. Ct. App. 1979) (illustrating that, in commercial cases, courts sometimes use the phrase to refer to the place where the contract was entered, thereby highlighting the contractual aspects of marriage).

⁶² See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 121 cmt. d, 132, 133 cmt. a, 134 (1934).

⁶³ E.g., *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953); see Joanna L. Grossman,

traditionally has had the final say on such matters. Sometimes, the domicile's authority takes the form of jurisdictional limitations, such as the rule that confines divorce jurisdiction to the petitioner's domicile — which then applies its own divorce law.⁶⁴

1. Old School Domestic Relations Law

The rules of domicile and the work they performed fit well with what I call “old school domestic relations law,” modern family law's predecessor. Both marriage and slavery constituted domestic relations,⁶⁵ but long after the demise of slavery in the United States domestic relations law continued to operate frankly and expressly as a system of state control over intimate life. The state exercised this control by punishing transgressions (demonstrated by adultery and fornication prohibitions), specifying consequences of such deviations from the norm (shown by the status of illegitimacy and its disadvantages), normalizing irregular relationships for those who did not purposefully stray (represented by common law marriage and the putative spouse doctrine), limiting opportunities for personal autonomy (illustrated by fault-based divorce grounds and defenses as well as bans on birth control and abortion), and enforcing a strict code of gender roles (in turn constructing a public/private divide).⁶⁶

This conceptualization of family law reflected once prevailing notions of sex and sexualities as powerful “natural” and antisocial forces requiring discipline in the interests of maintaining civilization.⁶⁷

Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws, 84 OR. L. REV. 433, 435 (2005).

⁶⁴ See sources cited *supra* note 56.

⁶⁵ NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 62 (2000); Hasday, *Federalism*, *supra* note 16, at 1299.

⁶⁶ Any family law casebook traces out these familiar features of the traditional regulation of intimate life. See generally, e.g., D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* (5th ed. 2013).

⁶⁷ By contrast, modern theorists see sexual desire as the result of a socially constructed system of sexualities. See EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 8-11, 29-31, 40-42 (1990); Martha C. Nussbaum, *Constructing Love, Desire, and Care*, in *SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE* 17, 17-18 (David M. Estlund & Martha C. Nussbaum eds., 1997); Jeffrey Weeks, *History, Desire, and Identities*, in *CONCEIVING SEXUALITY: APPROACHES TO SEX RESEARCH IN A POSTMODERN WORLD* 33, 33 (Richard G. Parker & John H. Gagnon eds., 1995) (describing research that challenges the notion of sex as a “purely natural phenomenon”). Usually, Michel Foucault is credited with propounding this understanding of sexual desire as a social construction. See I MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 103, 155 (Robert Hurley trans., 1978); RICHARD A. POSNER, *SEX AND REASON* 23-24 (1992).

As Thomas Grey has explained, under this view, which is associated with Freud, Marxist theorists, and understandings rooted in the work of Durkheim and Weber, “modern civilization is built upon repression, particularly the repression of sexual drives.”⁶⁸ Family law provided the necessary discipline and accomplished the required repression. Thus, the state itself has long been recognized as a party to every marriage,⁶⁹ and laws limiting divorce or imposing disadvantages on those born outside marriage, for example, were thought to keep sexual urges in check for the benefit of both society and individual members of society.⁷⁰

Within this framework, domicile emerges as more than a reference for the governing family law; it is the engine for allocating this control over intimate life among the states.⁷¹ The terms themselves now make this connection seem natural: “domicile” and “domestic relations.” At the risk of oversimplifying, one could say that the state where an individual is “at home” has traditionally had the authority to control his or her “home life.”⁷² To ensure that each and every individual

⁶⁸ Thomas C. Grey, *Eros, Civilization and Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 83, 91.

⁶⁹ See COTT, *supra* note 65, at 102-03; *id.* at 2, 52 (noting how the state sets the terms of marriage); see also *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (“In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.”).

⁷⁰ See, e.g., HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971) (explaining and criticizing the legal disabilities imposed on nonmarital children, designed to condemn their parents’ conduct and to induce compliance with sexual norms); Marvin M. Moore, *Recrimination: An Examination of the Recrimination Doctrine*, 20 S.C. L. REV. 685, 714-15 (1968) (positing that the doctrine of recrimination, as a defense to divorce, sought to deter adultery and other immoral conduct); see also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 49-54 (2000) (summarizing and rejecting the rationales for considering fault in divorce, including a “fault rule as an agent of morality: rewarding virtue and punishing sin”).

⁷¹ See Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 390-92 (2007); see also, e.g., *Emery v. Emery*, 289 P.2d 218, 223 (Cal. 1955) (referring matters of family immunity to the domicile because “[t]hat state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents”).

⁷² For example, slaves who were manumitted by their owners and taken to a free state to establish a home could remain there as free blacks. See Adrienne D. Davis, *Slavery and Shadow Families: Rethinking Interracial Intimacy* (Working Paper, Fall 2009) (on file with author); Jane E. Larson, “A House Divided”: *Using Dred Scott to Teach Conflict of Laws*, 27 U. TOL. L. REV. 577, 579-80 (1996). Obviously, slaves in the South could not have a domicile because they constituted property. See Larson, *supra*, at 581; cf. Stein, *supra* note 15, at 539 (“[G]iving the home state plenary judicial

would be subject to the control of one sovereign or another (and only one), authorities insisted on identifying a domicile even for those who did not easily fit the usual criteria, such as infants⁷³ as well as vagrants and gypsies.⁷⁴

Consider all that the classic concept of domicile shares in common with the traditional law of domestic relations in general and its understanding of marriage in particular: First, domicile, like marriage, has been a gateway to an inseparable set of benefits. For both domicile and marriage, the switch is either “on” or “off,”⁷⁵ and both constructs can be understood as “package deals” that traditionally disallowed picking and choosing some elements while omitting others. You are a domiciliary or you are not, and specific invariable consequences follow, from divorce jurisdiction to certain tax obligations. Similarly, you are married or you are not, with a resulting aggregation of duties and rights. For both, the relationship can be ended but only by taking the prescribed steps necessary for the acquisition of a new domicile or a divorce, as the case may be.

Second, as a related point, both domicile and marriage impose monogamy,⁷⁶ albeit a serial monogamy. You can have only one spouse at a time, just as you can have only one domicile at a time. In fact, domiciliary monogamy is more demanding than the law of marriage because one could choose not to marry (despite social pressures, cultural constraints, and legal rewards all encouraging marriage);⁷⁷ one cannot avoid having a domicile.⁷⁸ And, while marriage is age-restricted,⁷⁹ even an infant must have a domicile.⁸⁰

authority over its citizens comports with a broader, universal authority that states normally possess over their citizens.”).

⁷³ See *supra* note 29 and accompanying text.

⁷⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 14 cmt. d (1971).

⁷⁵ See Abrams, *Citizen Spouse*, *supra* note 9, at 411.

⁷⁶ See Govind Persad, *What Marriage Law Can Learn from Citizenship Law (and Vice Versa)*, 22 LAW & SEXUALITY 103, 114 (2013) (citing Rawls’s notion of “monogamous family,” in contrast to Nussbaum’s cosmopolitanism, to make a similar observation); see also Frug, *supra* note 12, at 215 (exploring the possibility of nonresident voting, in addition to resident voting).

⁷⁷ See Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 223-25 (2004). See generally Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007) [hereinafter *Friends with Benefits?*] (arguing that family law’s recognition of friendship could alleviate traditional gender role expectations); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992) (detailing how family law supports social institutions, specifically marriage and parenthood, and channels people into them).

⁷⁸ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 11 (1934) (“One and Only One Domicil[e]: Every person has at all times one domicil[e], and no person has more

Third, the references to the *intimacy* connecting a person to his or her domicile⁸¹ bespeak a kind of specialness that makes one's home central to individual identity, just as decisions about marriage and family have long been described by the Supreme Court as central to identity.⁸² The fusion of a person with his or her domicile expresses itself, for example, in the rule that makes a defendant's domicile a basis for the assertion of jurisdiction in *any* litigation, whether connected to that place or not. In two very recent cases, Justice Ginsburg calls this "general or all-purpose jurisdiction"⁸³ and then writes: "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile."⁸⁴ This specialness might well exemplify what critical theorist Janet Halley condemns as "family law exceptionalism"⁸⁵ — the idea that the legal rules governing other parts of our lives cannot govern our family relations, which require extraordinary measures.

Finally, two intertwined binaries, male/female and public/private, infuse the understanding of domicile, just as they infuse old school domestic relations law. When domestic relations law included the master-slave (or master-servant) relationship,⁸⁶ the home or household⁸⁷ was expressly considered a site of productive labor.⁸⁸ By

than one domicil[e] at a time.").

⁷⁹ See generally Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1818 (2012) (canvassing age restrictions for marriage and arguing that states should raise the minimum age).

⁸⁰ See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 30 (1934) ("[A legitimate] minor child has the same domicil[e] as that of its father.").

⁸¹ See *supra* note 25 and accompanying text.

⁸² See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (asserting that "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" are central to the definition of "one's own concept of existence, of meaning, of the universe, and of the mystery of human life" (internal quotations omitted)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (making a similar statement).

⁸³ *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). See generally Stein, *supra* note 15 (providing a detailed analysis of the concept of "general jurisdiction").

⁸⁴ *Daimler*, 134 S. Ct. at 760; *Goodyear*, 131 S. Ct. at 2853; see *infra* Part III.B.3.

⁸⁵ See Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 754-55 (2010). But cf. Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 9 (2013) (offering a thought experiment about why immigration law might privilege family relationships).

⁸⁶ See *supra* note 65 and accompanying text.

⁸⁷ For an article that focuses on the household, not the family, to study how people structure their affairs without legal formalities, see Robert C. Ellickson,

the late 1700s, with the rise of capitalism and urban life, workplaces and living spaces had largely become distinct, however.⁸⁹ This separation prompted the construction of two specific and gendered spheres, the public sphere (or the world of commerce and ideas belonging to men) and the private sphere (or the realm of the family belonging to women).⁹⁰ Even as “a woman’s place,” however, the private sphere — the home — was not a site where she exercised authority and control. Indeed, we can see the home as ground zero for coverture and women’s subordination, as epitomized by once legally permitted spousal rape and family violence.⁹¹ In the meantime, women received no direct compensation for their assigned responsibilities in this sphere — household labor and other carework — but instead depended on the feeble and often illusory duty of support assigned to their husbands.⁹²

The doctrine of domicile exemplified and reinforced these binaries and their underlying assumptions in several ways. Most notably, the “derivative domicile” rule gave a married woman her husband’s

Unpacking the Household: Informal Property Rights Around the Hearth, 116 YALE L.J. 226, 229 (2006).

⁸⁸ See STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 154-57 (2005).

⁸⁹ MONA DOMOSH & JONI SEAGER, PUTTING WOMEN IN PLACE: FEMINIST GEOGRAPHERS MAKE SENSE OF THE WORLD 3-5 (2001); see also Katharine B. Silbaugh, *Women’s Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1830-32 (2007) (recounting the rise of the single family home and its disadvantages for today’s women).

⁹⁰ See, e.g., COONTZ, *supra* note 88, at 170, 197 (“[M]en and women were suited to entirely separate spheres of activity”); see also ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S, at 124 (2012) (noting how, in modern times, feminists “contended that patriarchy depended on the public-private divide to exploit women’s labor, control their sexuality, and harness their reproductive capacity”).

⁹¹ See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122-23 (1996). Blackstone memorialized the attributes of coverture in the late eighteenth century. 1 WILLIAM BLACKSTONE, COMMENTARIES *442-45.

⁹² The classic case for this proposition is *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953). See also *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 654 (1993) (dismissing, for absence of consideration, wife’s suit to enforce late husband’s promise to bequeath property to her in exchange for her caregiving, given wife’s marital duty); *Mary Anne Case*, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL’Y 225, 225-26, 234 (2011) [hereinafter *Enforcing Bargains*] (criticizing the traditional doctrine preventing the enforcement of spousal contracts in marriage); cf. *Kirchberg v. Feenstra*, 450 U.S. 455, 459-61 (1981) (invalidating, on equal protection grounds, statute designating the husband “head and master” with control over community property).

domicile by operation of law.⁹³ The Restatement First's comments clarify the gendered basis of the principle: "The husband is the head of the family, which includes the wife and minor children, and in normal cases the members of the family are domiciled at the place where he has his domicil[e]."⁹⁴ The rule encapsulates the separate-spheres ideology, under which the breadwinner called the shots about where the family would live so that he could pursue his employment opportunities, while the wife carried out the obligations of maintaining the home and family — wherever they may be.⁹⁵ To this extent, of course, derivative domicile was simply one facet of the broader system of coverture.⁹⁶

Some of the details of the domicile concept are especially telling in terms of the links I tease out here. For example, the two activities cited by the Restatement First for evidence of home — eating and sleeping⁹⁷ (or cooking and sex) — stand out as emblematic of the domestic services (or consortium) that law traditionally expected of a wife.⁹⁸ Moreover, as a reflection of the public/private split, sleeping for work was very different from sleeping at home. Thus, according to the Restatement First: "A laborer on a railroad has his home in a box car, which is continually carried from place to place as his services are needed. He does not acquire a domicil[e] of choice in any of the places to which the car is taken."⁹⁹

⁹³ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 27 (1934).

⁹⁴ See *id.* § 27 cmt. a.

⁹⁵ See generally *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 121 (2010) (recounting the use of the anti-stereotyping principle to challenge the separate-spheres ideology in the 1960s and 1970s).

⁹⁶ See *Abrams, Citizen Spouse*, *supra* note 9, at 415-19. True, the Restatement First provided an exception for wives living apart from husbands but not guilty of deserting them. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 28 (1934). Yet even this desertion proviso leaves the husband making the decisions about where the family will have its home. See *id.* § 28 cmt. d.

⁹⁷ *Id.* § 13 cmt. f (1934); see also 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 25.1 (1935) (citing authority that where one sleeps determines one's domicile when the home sits on the dividing line between two political units).

⁹⁸ See generally Kimberley A. Reilly, *Wronged in Her Dearest Rights: Plaintiff Wives and the Transformation of Marital Consortium, 1870-1920*, 31 LAW & HIST. REV. 61, 61-64 (2013) (explaining how consortium traditionally encompassed men's possessory rights to their wives).

⁹⁹ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 17 illus. 3 (1934).

2. Beyond Domestic Relations?

Domicile has provoked controversy, but *not* for its primacy in domestic relations or family law. Rather, such controversy arose from additional uses for domicile stemming from foundational revisions in choice of law theory that gained currency in the mid-twentieth century, even while the derivative domicile rule firmly held sway. Modern choice of law theory emerged at this time from the scholarship of Brainerd Currie, who rejected the then-prevailing notion that territorial sovereignty should determine the applicable law in a multistate case.¹⁰⁰ His governmental interests analysis and the spin-off theories that it inspired instead made a central issue whether the policy underlying a given law — on any topic — would be advanced by the application of that law to the particular facts at bar.¹⁰¹ Currie assumed that lawmakers (whether legislatures enacting statutes or courts making common law) ordinarily have local cases in mind, specifically their own residents, with little thought of those living elsewhere.¹⁰² Hence, determining whether a policy would be advanced in the case before it often would require the judge to consider the domiciles (or at least residences) of the parties, instead of focusing exclusively on territorial considerations such as where the injury in a tort case occurred or where the parties entered a contract.¹⁰³

This modern approach to choice of law expands the importance of domicile well beyond domestic relations or family law. For example, the Restatement Second (published in 1971), which partly embraced Currie's theory, explicitly lists "the domicil[e], residence, [and] nationality . . . of the parties" as contacts to be "taken into account" in determining which state's law should apply under "the most significant relationship" test that provides the ultimate standard for every choice of law.¹⁰⁴ Thus, one's home places one within the ambit of a state's concern in all manner of cases including, for example, torts cases; as a result, if the state's law reflects pro-recovery compensatory objectives, it follows that they will be furthered by applying this law to

¹⁰⁰ See generally Kay, *A Defense*, *supra* note 52 (explaining and defending Currie's theory).

¹⁰¹ Currie, *supra* note 52, at 188-89; see, e.g., Kay, *A Defense*, *supra* note 52 (explaining and defending Currie's theory).

¹⁰² Currie, *supra* note 52, at 81-82.

¹⁰³ See *id.* at 86-87; cf. DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 134-35 (1965) (expressing skepticism about modern departures from territorial principles).

¹⁰⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1971).

the state's domiciliaries (or residents) no matter where they might suffer injury.¹⁰⁵

Critics contested this expansive reliance on domicile, taking aim at Currie's hypothesis that domicile or residence sets the presumptive scope of a state's policy objectives and concerns.¹⁰⁶ One line of attack disputes the accuracy of the claim itself: Might not a state believe that its policies would be better for everyone, everywhere — regardless of domicile?¹⁰⁷ Another contends that, if accurately described, the assumptions of Currie's imagined lawmakers raise serious constitutional problems under Article IV's Privileges and Immunities Clause, which limits a state's ability to grant advantages to its own domiciliaries over those who hail from other states.¹⁰⁸

Despite such controversy concerning an across-the-board reliance on domicile, however, there seems to be little disagreement with the understanding that one's domicile or home ought to play the preeminent role in determining the law applicable to *family matters*. Indeed, as even Douglas Laycock, a critic of interest analysis and proponent of territorialism, explains, domicile-based choice of law rules provide a sound and obvious basis for governing family relationships, even if “there is an element of legal fiction in locating [such] relationship[s].”¹⁰⁹ Accordingly, one can still find considerable authority for the proposition that the domicile's own public policy about the invalidity of a particular type of marriage can trump the law

¹⁰⁵ See, e.g., *Tooker v. Lopez*, 249 N.E.2d 394, 398-99 (N.Y. 1969) (examining state interests in multistate litigation against car owner-host for wrongful death of guest-passenger by assuming that each state's law reflects policies aimed only at the particular state's domiciliaries); *Erwin v. Thomas*, 506 P.2d 494, 496 (Or. 1973) (examining state interests in multistate litigation for loss of consortium by assuming that each state's law reflects policies aimed only at the particular state's domiciliaries).

¹⁰⁶ E.g., John Bernard Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 4 UTAH L. REV. 651, 665 (1983).

¹⁰⁷ E.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 408-10 (1980) (condemning the parochialism of interest analysis and asking: “Why should a court accept the suggestion that protective and compensatory policies should be applied only when a forum resident will benefit?”).

¹⁰⁸ See John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 182-83 (1981); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 255, 261-70 (1992) [hereinafter *Equal Citizens*]. But see *McBurney v. Young*, 133 S. Ct. 1709, 1713 (2013) (rejecting a challenge based on the Privileges and Immunities Clause against Virginia's Freedom of Information Act, which allows only Virginia citizens to seek information); Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 894 (1988) (arguing, *inter alia*, that “most debate today about equality in the conflict of laws is meaningless”).

¹⁰⁹ Laycock, *Equal Citizens*, *supra* note 108, at 323.

of the place of celebration, especially in cases of “evasive marriages,” in which couples living in restrictive states had a “destination wedding”¹¹⁰ in a more hospitable state.¹¹¹ Likewise, the traditional and continuing use of a state’s application of its family law *only* to its own domiciliaries, as in divorce cases,¹¹² has avoided challenges under the Privileges and Immunities Clause of Article IV,¹¹³ with the Court expressly upholding state divorce laws that require domicile plus more, namely, residency for a specified period.¹¹⁴

In short, neither the modernization of choice of law theory nor the pushback against certain aspects of such developments has undermined the principle that the domicile’s family law controls.

3. Contemporary Reinforcements

Consistent with this longstanding approach that looks to the law of the domicile in multistate domestic relations cases, domicile continues to serve as the routine reference in deciding a host of family law matters today. The Supreme Court’s recent decision in *Astrue v. Capato*¹¹⁵ and the follow-up litigation in state after state provide a telling illustration.¹¹⁶ These cases all concern a very modern phenomenon: the eligibility of posthumously conceived children for

¹¹⁰ See Susan Frelich Appleton, *Domicile and Inequality by Design: The Case of Destination Weddings*, 2013 MICH. ST. L. REV. 1449 [hereinafter *Domicile and Inequality*].

¹¹¹ See, e.g., ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 140 (2006) (examining the effect of a restrictive state’s articulated public policy on the recognition of an out-of-state same-sex marriage). *But see infra* notes 338-341 and accompanying text (citing recent cases that rely on *Windsor*’s equality rationale to require states to recognize same-sex marriages performed elsewhere, given the comity they accord to other out-of-state marriages).

¹¹² See, e.g., *Williams v. North Carolina*, 325 U.S. 226, 229 (1945) (“Domicil[e] implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.”).

¹¹³ See generally Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960) (arguing that a choice of law approach based on interest analysis can withstand challenge under the Privileges and Immunities Clause).

¹¹⁴ *Sosna v. Iowa*, 419 U.S. 393, 410 (1975) (upholding the constitutionality of Iowa’s one-year durational residency requirement).

¹¹⁵ *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

¹¹⁶ See, e.g., *In re Certified Question (Mattison v. Soc. Sec. Comm’r)*, 825 N.W.2d 566 (Mich. 2012) (listing in Table 1 different states’ treatment of the issue); see also Paul Sullivan, *Fertility Treatments Produce Heirs Their Parents Never Knew*, N.Y. TIMES (Aug. 30, 2013), <http://www.nytimes.com/2013/08/31/your-money/fertility-treatments-produce-heirs-their-parents-never-knew.html>.

Social Security survivors' benefits as dependents of the deceased parent. In *Capato*, the twins in question were conceived by their mother, Karen Capato, through in vitro fertilization, using semen that her husband, Robert Capato, had frozen before his death.¹¹⁷ The Court resolved the question whether the twins were the deceased's "children" by looking to the intestacy law of Robert's domicile at death, the reference that it read the Social Security Act to direct.¹¹⁸ Because, as determined on remand from the Supreme Court, Robert was domiciled in Florida at the time of his death and Florida law would not recognize the posthumously conceived twins as his children under its intestacy law, they could not receive the survivors' benefits their mother had sought on their behalf.¹¹⁹

True, the Court was following a statute long on the books, but the legislative reference to domicile is worth noting precisely because it is so unremarkable. Given that parentage and the legal parent-child relationship are matters of family law, the domiciliary reference is completely expected — and utterly consistent with other illustrations old and new. Of course, one could debate "whose domicile" should count here: the deceased parent's, the surviving parent's, or even the children's,¹²⁰ but the reference to someone's domicile remains uncontroversial.

Similarly, domicile proved decisive in determining the applicability of jurisdictional limitations under the Indian Child Welfare Act ("ICWA"), as interpreted by the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*.¹²¹ Congress enacted the ICWA in response to evidence of the widespread removal of Native American children from their parents and their placement for adoption with nonnatives, reflecting disregard for Native American families and culture.¹²² To address this problem, the ICWA gives to tribal courts exclusive jurisdiction over Native American children who reside or are domiciled on a reservation,¹²³ while also outlining adoptive placement preferences for all Native American children — with (1) members of

¹¹⁷ See *Capato*, 132 S. Ct. at 2026.

¹¹⁸ *Id.* at 2028, 2031. The Court also noted that, under Florida law, a marriage ends upon a spouse's death. See *id.* at 2030.

¹¹⁹ See *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 532 F. App'x 251, 253 (3d Cir. 2013).

¹²⁰ Cf. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48-49 (1989) (identifying the determination of the domicile of the children as the sole issue of the case).

¹²¹ *Id.*

¹²² See *id.* at 32-35.

¹²³ See *id.* at 36 & n.5.

the extended family, (2) other members of the same tribe, or (3) other Indian families.¹²⁴ *Holyfield* concerned whether the exclusive-jurisdiction provision should apply to twins, born to unmarried parents who were domiciled on the Choctaw Reservation, after the mother had purposely traveled 200 miles away from the reservation to give birth and surrender the infants to nonnative adopters.¹²⁵ The answer turned on whether the children were domiciled on the reservation even though they had never been physically present there.¹²⁶ The Court determined that Congress intended a uniform federal law of domicile to govern,¹²⁷ that the ordinary meaning of the term “domicile” should control,¹²⁸ and that a child born to unmarried parents traditionally takes the mother’s domicile by operation of law.¹²⁹ Accordingly, through their mother, the twins were domiciled on the reservation, and tribal courts should have had exclusive jurisdiction over their adoptive placements.¹³⁰

Again, the Court accepted without hesitation or apology Congress’s use of domicile as the pivotal criterion for determining the applicable family law regime (the ICWA’s jurisdictional rules versus state adoption law). It also embraced traditional formulations of domicile tracking those in the Restatement First.¹³¹ In fact, the Court cited the Restatement First to support the proposition that a child born to an unmarried woman takes her domicile by operation of law, even if the child has never been to the place in question.¹³²

Lest one read *Holyfield*’s conclusion not to show the Court’s comfort with an understanding of family law centered on domicile, but instead to suggest simply that the Court is loath to undermine the ICWA, consider the more recent analysis and decision in *Adoptive Couple v. Baby Girl*.¹³³ In this controversy between a Native American birth

¹²⁴ *Id.* at 37.

¹²⁵ *See id.* at 37-39.

¹²⁶ *See id.* at 42.

¹²⁷ *See id.* at 45-47.

¹²⁸ *Id.* at 47-48.

¹²⁹ *See id.* at 48-49.

¹³⁰ *See id.* at 53. For a detailed examination of the case and the story behind it, see Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1 (2008).

¹³¹ *See Holyfield*, 490 U.S. at 48.

¹³² *See id.*

¹³³ 133 S. Ct. 2552 (2013). The case concerned a contested adoption, arising when the Native American father attempted to assert his parental rights under the ICWA after the nonnative mother had surrendered the child to a nonnative couple. In a 5-4 ruling, the Court determined that neither the ICWA’s evidentiary requirements for

father and a nonnative adoptive couple, the Supreme Court majority eviscerated the ICWA's placement preferences by substantially narrowing the class of cases to which they apply. Thus, *Holyfield*, read against the grudging approach to the ICWA reflected in *Adoptive Couple*, demonstrates how domicile has continued to serve as the axiomatic and unquestioned reference for matters of family law well into the present era.

As these cases illustrate, notions of family law as “personal law,”¹³⁴ something one carries from home everywhere she goes, still resonate today. Accordingly, the twins' mother in *Holyfield* carried the family law of the Choctaw Reservation with her even as she traveled 200 miles away, and it, in turn, attached to her infants at birth.¹³⁵ Indeed, even seemingly bold suggestions for the application of the law of the domicile in new areas might be best understood as reflections of this principle of family law. For example, the case studies of “medical tourism” that Glenn Cohen uses to argue for extraterritorial applications of the home country's criminal law (focusing on abortion, surrogacy, assisted suicide, and female genital cutting) can all be subsumed within family law, as this field is understood today.¹³⁶

termination of parental rights nor its requirements for the provision of remedial services to keep the original family together apply to a father who never had custody; further, the ICWA's placement preferences do not control when there are no competing adoption petitions.

¹³⁴ See Jeffrey A. Redding, *Slicing the American Pie, Federalism and Personal Law*, 40 N.Y.U. J. INT'L L. & POL. 941, 954-55 (2008); see also RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 128 (1934) (“If one or both of the parties to a marriage is a member of a tribe governed by tribal law, and the marriage takes place where the tribe is at the time located, and in accordance with the tribal law, the marriage is valid everywhere.”); cf. Ely, *supra* note 108, at 192-93 (identifying problems with “a system of ‘personal law’ wherein people carry their home states’ legal regimes around with them”).

¹³⁵ See *Holyfield*, 490 U.S. at 37-41.

¹³⁶ See, e.g., I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309 (2012) (arguing that home countries could extend some criminal laws to their citizens who travel abroad to engage in prohibited conduct); see also Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe's End*, 51 ST. LOUIS U. L.J. 655, 667-77 (2007) (analyzing choice of law questions posed by extraterritorial application of criminal abortion law when patients domiciled in restrictive states terminate their pregnancies in permissive states); Erik Eckholm, “Aid in Dying” Movement Takes Hold in Some States, N.Y. TIMES (Feb. 8, 2014), <http://www.nytimes.com/2014/02/08/us/easing-terminal-patients-path-to-death-legally.html> (“By law and medical standards, only genuine residents who have relationships with local doctors can qualify for the prescriptions in any of these states [that permit aid in dying], so patients . . . cannot move in at the last minute.”); cf. Laycock, *Equal Citizens*, *supra* note 108, at 260 (noting that, despite sharp divisions in the United States on abortion, “no state has yet tried to prosecute resident women who undergo abortions out of state, or even forbid insurance coverage for such abortions, and perhaps none will”).

C. Domicile's Enduring Gender

One unsurprising critique of domicile, particularly from more recent times, has focused on the patriarchal rule ascribing the husband's domicile to his wife.¹³⁷ It took until 1988 for the Restatement Second to abandon this derivative domicile doctrine, which epitomized married women's more general subordination. According to the revision: "The rules for the acquisition of a domicil[e] of choice are the same for both married and unmarried persons."¹³⁸ Still, the assumption persists that both spouses "will usually regard the same place as their home" and that "[t]hese natural feelings on the part of the spouses may also be buttressed by an awareness of the advantages of having a single law govern the interests of each member of the family unit."¹³⁹

Yet, despite these 1988 updates to the Restatement Second, designed to repudiate the derivative domicile rule's sexism, gender continues to permeate the understanding of domicile. Two illustrations and some larger conceptual observations support this conclusion.

First, Janet Bowermaster and others have revealed how remnants of the coverture doctrine underlying derivative domicile live on in contemporary disputes about parental relocation after divorce — cases in which legislatures and courts have tended to make it difficult for custodial parents, usually mothers, to move with their children, often for employment purposes.¹⁴⁰ Although restrictive approaches to such moves are said to ensure the child access to the second parent, usually the father, Bowermaster asserts that "ensuring access by denying relocation is not a gender neutral proposition."¹⁴¹ She continues: "[I]t is difficult, when reading the cases, to overlook the images of traditional marriage and the corresponding traditional gender roles

¹³⁷ See, e.g., Abrams, *Citizen Spouse*, *supra* note 9 (examining the derivative domicile rule).

¹³⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 (1988 revision).

¹³⁹ *Id.* § 21 cmt. b.

¹⁴⁰ See Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 843-45 (1992); see also 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, 1369 (2010); cf. Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281, 314 (2006) (arguing that the goal of promoting children's interests can best be served "in most cases, by protecting continuity in the child's relationship with its primary caregiver and that person's decisions, including a choice to relocate").

¹⁴¹ Bowermaster, *supra* note 140, at 842.

that are reflected.”¹⁴² In other words, restrictive approaches to relocation by custodial parents (but typically not by noncustodial parents) reveal assumptions about fathers as breadwinners and mothers as caregiving wives bound to their husbands’ domiciles — even after dissolution.

One can find evidence of such gendered assumptions in the Supreme Court’s recent international relocation case, *Abbott v. Abbott*.¹⁴³ In *Abbott*, the mother, to whom the Chilean court had awarded custody, left that country and moved to Texas, in violation of a *ne exeat* order, which gave her husband the power to veto her relocation with the child outside of Chile.¹⁴⁴ Her move was prompted in part by visa restrictions preventing her from obtaining a work permit in Chile and thus thwarting her ability to support herself and the child there.¹⁴⁵ Perhaps the inability to see the mother as a potential breadwinner (especially while she had primary custody) explains why the visa restrictions were not deemed sufficiently important to merit even a mention by any of the three courts in the United States that considered the case, in which the father ultimately prevailed.¹⁴⁶

A highly publicized trial court ruling in a custody contest goes even further, embracing such gender stereotypes explicitly.¹⁴⁷ According to this trial court, a woman’s relocation from California to New York while pregnant, to attend Columbia University, was an “irresponsible” and “reprehensible” “appropriation of the child while in utero.”¹⁴⁸ Reversing, the appellate court stated that a pregnant woman may move — change her domicile and thus that of her child-to-be — without making prior arrangements with the putative father with whom she had only a brief relationship.¹⁴⁹ Yet even this feminist victory echoes

¹⁴² *Id.*

¹⁴³ *Abbott v. Abbott*, 560 U.S. 1 (2010).

¹⁴⁴ *See id.* at 6.

¹⁴⁵ *See* Brief of Respondent, *Abbott*, 560 U.S. 1 (No. 08-645), 2009 WL 3865437, at *8.

¹⁴⁶ *See Abbott*, 560 U.S. at 1-22 (lacking mention of visa restrictions); *Abbott v. Abbott*, 542 F.3d 1081, 1081-88 (5th Cir. 2008) (same), *rev’d*, 560 U.S. 1 (2010); *Abbott v. Abbott*, 495 F. Supp. 2d 635, 636-41 (W.D. Tex. 2007) (same), *aff’d*, 542 F.3d 1081 (5th Cir. 2008), *rev’d*, 560 U.S. 1 (2010). *But see* Bill Mears, *Child at Center of High Court Fight Over Custody Gets Closure*, CNN (Feb. 14, 2012), <http://www.cnn.com/2012/02/14/us/scotus-child-custody/index.html>.

¹⁴⁷ *See In re Sara Ashton McK. v. Samuel Bode M.*, 974 N.Y.S.2d 434, 435-36 (N.Y. App. Div. 2013); *see* Erik Eckholm, *Custody Battle Raises Questions About the Rights of Women*, N.Y. TIMES (Nov. 23, 2013), <http://www.nytimes.com/2013/11/24/us/custody-battle-raises-questions-about-the-rights-of-women.html>.

¹⁴⁸ *See Sara Ashton McK.*, 974 N.Y.S.2d at 435.

¹⁴⁹ *Id.* at 435-36.

the traditional rule that assigns a nonmarital child the mother's domicile or citizenship, which sometimes works not only to defeat the mother's autonomy¹⁵⁰ but also to confine mothers and fathers to stereotypical roles.¹⁵¹

Consider a second illustration that comes from the work of Kerry Abrams: She has shown how assumptions that a wife follows her spouse persist even in the would-be genderless era of same-sex marriage.¹⁵² Abrams highlights a case in which a Massachusetts court concluded it lacked jurisdiction over a wife who long had resided there, on the assumption that she must have changed her own domicile when she married a woman domiciled in Florida and bought property there.¹⁵³ Of course, there is a more contemporary way to understand this couple's situation, using the now popular acronym "LATs"¹⁵⁴: The women had been interstate LATs for years before marrying, with one in Massachusetts and the other in Florida.¹⁵⁵ Although petitioner argued that the marriage did not change her previously established domicile, the court did not understand their choice to "live apart together," but instead presumed a marital domicile in Florida based on the couple's purchasing a home there.¹⁵⁶

¹⁵⁰ See *supra* notes 120-132 and accompanying text (discussing *Holyfield* case).

¹⁵¹ Compare, e.g., *Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001) (emphasizing distinction between biological differences related to procreation and gender stereotypes), with *id.* at 89 (O'Connor, J., dissenting) (criticizing the majority for using an unduly narrow and "misshapen notion of 'stereotype' and its significance in our equal protection jurisprudence").

¹⁵² See Abrams, *Citizen Spouse*, *supra* note 9, at 434-37.

¹⁵³ See *Cerutti-O'Brien v. Cerutti-O'Brien*, 928 N.E.2d 1002, 1005-09 (Mass. App. 2010).

¹⁵⁴ See Charles Q. Strohm et al., "Living Apart Together" Relationships in the United States, 21 DEMOGRAPHIC RES. 177, 177 (2009); see also Rosenblum, *supra* note 10; Carrie Sloan, *Living Apart Together: Why a Little Separation Can Bring Couples Closer*, ELLE (Apr. 12, 2009), <http://www.elle.com/life-love/sex-relationships/living-apart-together-338060>; LIVINGAPARTTOGETHER.INFO, <http://www.livingaparttogether.info/> (last visited Feb. 8, 2014) (informational website for LATs).

¹⁵⁵ See *Cerutti-O'Brien*, 928 N.E.2d at 1003-04.

¹⁵⁶ See *id.* at 1006 n.7. The dissenting opinion in *Cerutti-O'Brien* would instead apply the presumption that one's domicile continues absent proof of a change of domicile. *Id.* at 1010-11 (Duffy, J., dissenting). The classic tax case, *Hantzis v. C.I.R.*, 638 F.2d 248 (1st Cir. 1981), does not necessarily detract from *Cerutti-O'Brien's* reasoning. In *Hantzis*, the taxpayer, a law student who lived with her husband in Boston, unsuccessfully attempted to deduct as business expenses the costs she incurred over the summer while working in a law firm in New York. The court disallowed the deduction because she failed to "establish the existence of some sort of business relation both to the location she claims as 'home' and to the location of her temporary employment sufficient to support a finding that her duplicative expenses are necessitated by business exigencies." *Id.* at 256. Thus, the problem in *Hantzis*

Still, illustrations about custody and divorce do not tell the entire story. Because of the central place that domicile gives to the home, the gender problem runs much deeper than either of these examples fully captures. From the nineteenth century on, the home was the site of “wife’s moral dominion.”¹⁵⁷ Women’s place in the home loomed large as an obstacle to women’s suffrage,¹⁵⁸ the gender of the home became further entrenched with the rise of the “male breadwinner family” in the twentieth century,¹⁵⁹ and the private sphere itself — exemplified by the home — has served to protect domestic violence from public intervention.¹⁶⁰ Thus, moral dominion came with a price.

Feminist geographers have mapped the close associations of the home with women and women with the home.¹⁶¹ These associations encompass not just women who represent the stereotypical “homemaker,” but also those who define themselves by their separation from home, in their identities as workers and professionals.¹⁶² In fact, the connection is so close that women who defy the stereotype by leaving home are routinely understood to do so involuntarily, as Laura Agustin has observed:

It is striking that [today] women should so overwhelmingly be seen as pushed, obligated, coerced, or forced when they leave home to get ahead through work. But so entrenched is the idea

turned not on the taxpayer’s home (Boston versus New York), but rather on the absence of a business relation to her home. As the concurring judge points out, this analysis distorts the usual meaning of “home” by requiring it to be related to the taxpayer’s business. *Id.* (Keeton, J., concurring). See also *supra* notes 97-99 (emphasizing traditional distinction between home and work).

¹⁵⁷ COONTZ, *supra* note 88, at 164-65.

¹⁵⁸ See Reva Siegel, *She the People*, 115 HARV. L. REV. 947, 978-81 (2002).

¹⁵⁹ COONTZ, *supra* note 88, at 222; see *id.* at 247; see also SELF, *supra* note 90, at 4-5 (previewing author’s account of the transition from “breadwinner liberalism” in the 1960s to “breadwinner conservatism” in the 2000s); *id.* at 303-05.

¹⁶⁰ See, e.g., Maria Bevacqua & Carrie Baker, “Pay No Attention to the Man Behind the Curtain!”: Power, Privacy, and the Legal Regulation of Violence Against Women, 26 WOMEN & POL. 57 (2004) (arguing that ideology of public/private dichotomy perpetuates gendered violence); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (contending that the concept of privacy permits, encourages, and reinforces violence against women).

¹⁶¹ LINDA MCDOWELL, GENDER, IDENTITY, AND PLACE: UNDERSTANDING FEMINIST GEOGRAPHIES 71-96 (1999). See generally MARJORIE GARBER, SEX AND REAL ESTATE: WHY WE LOVE HOUSES 48 (2000) (likening the “ideals, fantasies, hopes and dreams” of “home” to those of “mother” because both “anticipate[] and answer[] all your needs before you know you have them”).

¹⁶² DOMOSH & SEAGER, *supra* note 89, at 1. See generally Silbaugh, *supra* note 89 (examining how sprawl, urban planning, and other issues of “place” exacerbate women’s work/family conflicts).

of women as forming an essential *part* of home, if not actually *being* it themselves, that they are routinely denied the agency to undertake a migration. So begins a pathetic image of innocent women torn from their homes, coerced into migrating, if not actually shanghaied or sold into slavery: the “trafficking” discourse.¹⁶³

Accordingly, even if the home is no longer ground zero for coverture, it remains the gendered nucleus of the private sphere. In turn, the public/private divide itself has been a frequent target of feminist legal scholars. Contemporary critiques condemn family law’s tendency to devalue household labor performed by family members, especially caregiving performed by women,¹⁶⁴ as well as the failure to recognize the work of caregivers outside the family, for example, nannies.¹⁶⁵ Because of the marginalization of care work, which we understand as a descendant of earlier principles of domestic relations law, some scholars conceptualize family law, particularly the privileged place of marriage, as a regulatory system designed to insulate the state from the costs of dependency.¹⁶⁶ From this perspective, law’s effort to confine sex, intimacy, and affection to “the private realm of family life”¹⁶⁷ perpetuates an illusion of autonomy and promotes neoliberal values, often at the expense of women and children.¹⁶⁸ Hence, even if married women have the same capacity for

¹⁶³ Laura Agustín, *Still Challenging “Place”: Sex, Money, and Agency in Women’s Migrations*, in *WOMEN AND THE POLITICS OF PLACE* 221, 224 (Wendy Harcourt & Arturo Escobar eds., 2005).

¹⁶⁴ See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 28 (1995) (“Motherhood has been the basis for discrimination and devaluation.”).

¹⁶⁵ See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 *VA. L. REV.* 385, 439 (2008) [hereinafter *Networked Family*]. See generally Laura T. Kessler, *New Frontiers in Family Law*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 226 (Martha Albertson Fineman ed., 2011) (describing changing disciplinary boundaries as one trend in family law); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *YALE J.L. & FEMINISM* 51 (1997) (exploring the dichotomy between spiritual and menial housework to reveal the racialized structure of women’s work).

¹⁶⁶ See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) [hereinafter *AUTONOMY MYTH*] (contending that the law privileges the marital family to prevent the state from bearing the costs of dependency).

¹⁶⁷ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹⁶⁸ FINEMAN, *AUTONOMY MYTH*, *supra* note 166, at 28. See generally Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1396 (2009) (arguing that “choice-based” arguments put forth by abortion rights advocates “have ill served not only progressive politics broadly conceived, but

establishing a domicile of choice as other adults,¹⁶⁹ we should acknowledge the constraints that might limit such choices, whether based on spousal affection,¹⁷⁰ the difference in economic power,¹⁷¹ the disparate impact of work/family conflicts,¹⁷² or the control that often characterizes domestic violence.¹⁷³

In sum, domicile and its analogues (like residence or even home state) carry much gendered baggage, even after the demise of the old derivative domicile rule. Indeed, getting derivative domicile out of the way helps expose the deeper problems and assumptions. Put differently, one can hardly consider domicile and its analogues without also thinking about home, a private sphere, and women's traditional domestic (and unpaid and subordinated) role within. Further, when it comes to choice of law, the almost unquestioned acceptance of domicile as the appropriate reference point for family issues reinforces these links.

II. FAMILY LAW AND FAMILY LIFE TODAY

To strengthen the case for re-examining domicile, this Part contrasts modern family law with old school domestic relations law, in which domicile fit so seamlessly. Changes in the law of parentage illustrate how many aspects of family law have evolved. The analysis then turns to two developments in contemporary family life, the rise of transhousehold families and the erosion of domestic boundaries, which highlight the inability of domicile, as traditionally formulated, to provide a meaningful reference point for identifying the governing regime.

also have ill served women, both narrowly, in terms of our reproductive lives and needs, and more generally”).

¹⁶⁹ See *supra* note 138 and accompanying text.

¹⁷⁰ Cf. Robin West, *Sex, Law and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 236 (Franklin G. Miller & Alan Westheimer eds., 2010) (cataloguing the myriad reasons why women often consent to unwanted sex).

¹⁷¹ See, e.g., Jane Farrell & Sarah Jane Glynn, *What Causes the Gender Wage Gap?*, *CTR. FOR AM. PROGRESS* (Apr. 9, 2013), <http://www.americanprogress.org/issues/labor/news/2013/04/09/59658/what-causes-the-gender-wage-gap/> (examining origins of the gender wage gap).

¹⁷² See Silbaugh, *supra* note 89, at 1798.

¹⁷³ See, e.g., Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *MICH. L. REV.* 1, 53 (1991) (asserting that “[b]attering is about domination” and power).

A. *A Glimpse of Twenty-First Century Family Law*

Family law today departs in many significant ways from old school domestic relations law. Certain themes uniting these changes stand out in cases, law reform initiatives, and scholarly analyses — in turn revealing how anachronistic domicile has become.

First and foremost, although family law continues to regulate, especially through the continued preeminence of marriage,¹⁷⁴ we find at least a rhetorical emphasis on liberty, autonomy, and self-determination, especially in constitutional cases limiting the state's authority to control family life and sexual activity. State coercion and repression have given way to “channeling” — guiding and nudging intimate and sexual activities into normative arrangements.¹⁷⁵ Supreme Court cases like *Loving v. Virginia*,¹⁷⁶ eliminating racial restrictions on marriage, and *Lawrence v. Texas*,¹⁷⁷ requiring decriminalization of consensual gay sex in “private,” exemplify this theme, which also surfaces from the limited constitutional protection accorded to contraception¹⁷⁸ and abortion.¹⁷⁹ In striking down a key section of DOMA as a violation of equal protection (as part of protected liberty)

¹⁷⁴ See, e.g., Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685 (2008) (challenging the normative superiority of marriage over other relationships); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 *VA. J. SOC. POL'Y & L.* 307, 311 (2004) (challenging the notion of marriage as a monolithic institution that promotes public welfare); Melissa Murray, *Marriage as Punishment*, 112 *COLUM. L. REV.* 1 (2012) (exploring past and current role of marriage as an instrument of state-imposed sexual discipline); see also Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 *CALIF. L. REV.* (forthcoming 2014) (showing how marriage drove LGBT advocacy even before today's marriage-centered movement).

¹⁷⁵ See Schneider, *supra* note 77 (positing and examining family law's channeling function). See also Susan Frelich Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 *BERKELEY J. GENDER, L. & JUST.* 267, 276-85 (2008) (tracing the move in family law from repression to channeling).

¹⁷⁶ 388 U.S. 1 (1967).

¹⁷⁷ 539 U.S. 558 (2003).

¹⁷⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (invalidating prohibition on the distribution of contraceptives to unmarried persons). *But see* *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120-21 (10th Cir. 2013) (en banc) (challenging the Affordable Care Act's mandate for employer-provided contraceptives), *cert. granted*, 134 S. Ct. 678 (2013).

¹⁷⁹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869, 877-78 (1992); *Roe v. Wade*, 410 U.S. 113, 164-66 (1973). *But see* *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

under the Fifth Amendment¹⁸⁰ and celebrating the special benefits of marriage,¹⁸¹ *United States v. Windsor* continues this trajectory.

This theme of autonomy also animates the rise of no-fault divorce¹⁸² and the increasing deference to private ordering,¹⁸³ strengthening the signal that the state has loosened its regulatory grip. With family members and families often fashioning their own premarital, marital, and separation agreements, the “package deal” that marriage once entailed¹⁸⁴ has come undone. True, state enforcement of agreements designed to apply during marriage remains largely off limits,¹⁸⁵ but adults have considerable freedom today to pick and choose the aspects of conventional marriage (such as cohabitation, sexual fidelity, and commingled finances) that they want to retain, redesign, or forgo altogether.¹⁸⁶ The only risk from such departures from the norm lies in the always available resort to unilateral no-fault divorce by a disappointed spouse, but that risk is equally present even in the most traditional marriages. Moreover, agreements between unmarried partners allow access to some of marriage’s benefits.¹⁸⁷ One can find the seeds of all these developments in longstanding doctrine rejecting the standardization of families,¹⁸⁸ but certainly family law’s respect for

¹⁸⁰ *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013).

¹⁸¹ *Id.* at 2693-96.

¹⁸² See, e.g., LYNNE CAROL HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 233-83 (1980) (detailing the emergence of no-fault divorce laws); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 671 (1980) (arguing that the freedom of intimate association implies a right to no-fault divorce).

¹⁸³ See *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §§ 7.01-7.12 (2002) (chapter on agreements); *UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT* §§ 3-7 (2012).

¹⁸⁴ See *supra* text accompanying note 75.

¹⁸⁵ See Case, *Enforcing Bargains*, *supra* note 92, at 225. But see *UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT* (2012). For earlier challenges to this conventional rule, see Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 *CALIF. L. REV.* 204, 329 (1982); Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 *CALIF. L. REV.* 1169, 1171 (1974).

¹⁸⁶ See Mary Anne Case, *Marriage Licenses*, 89 *MINN. L. REV.* 1758, 1772-74 (2005) [hereinafter *Marriage Licenses*] (asserting that domestic partners must meet higher standards of behavior for legal recognition than married couples, who may behave as they wish).

¹⁸⁷ See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (upholding as enforceable express and implied contracts and allowing resort to equitable remedies to address financial obligations between cohabiting couples after they separate).

¹⁸⁸ See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”); Peggy Cooper Davis, *Contested Images of*

pluralism has grown far more robust in recent times, widening the space for different families to embrace different values and address matters of concern in their own ways.

Second, family law today rejects official gender roles and reflects a commitment to formal gender equality.¹⁸⁹ One can even find an occasional effort to move beyond formal equality or at least an appreciation of how law can attempt to disrupt the gender stereotypes and performances embedded in our culture. For example, the Supreme Court has read the federal Family and Medical Leave Act as a Congressional initiative designed to “degender” carework, facilitating family leaves for men and enhancing the opportunities for workplace success for women.¹⁹⁰

Third, in recent years, family law has taken a functional turn, which also helps it break from its expressly gender-based past. Function and performance of “family” have become important criteria for legal recognition, diminishing the once exclusive emphasis on formalities, such as ceremonial marriage. For example, even without the old doctrine of common law marriage, considerable authority supports the recognition of unmarried couples,¹⁹¹ regardless of gender, according them rights and responsibilities inter se¹⁹² and vis-à-vis third parties,¹⁹³ including the state.¹⁹⁴ Thus, in several important ways, today law follows behavior, or “[f]amily law follows family life.”¹⁹⁵

Family Values: The Role of the State, 107 HARV. L. REV. 1348, 1363 (1994).

¹⁸⁹ I have examined this transformation elsewhere. See Susan Frelich Appleton, *Gender and Parentage: Family Law’s Equality Project in Our Empirical Age*, in WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY 237, 237-39 (Linda C. McClain & Daniel Cere eds., 2013); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 110-15 (2005) [hereinafter *Missing in Action*].

¹⁹⁰ See Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); see also, e.g., Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007) (demonstrating how revised default rules for names at the time of marriage can promote gender equality).

¹⁹¹ See, e.g., CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY (2010) (describing U.S. family law’s attempts to accommodate the dramatic increase of unmarried cohabitating unions).

¹⁹² See, e.g., *Marvin*, 557 P.2d 106 (authorizing remedies upon break-up of cohabitation relationships); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01-6.06 (2002) (discussing the recognition and consequences of domestic partnerships).

¹⁹³ See, e.g., *Graves v. Estabrook*, 818 A.2d 1255 (N.H. 2003) (granting recovery for negligent infliction of emotional distress for death of fiancé); *Braschi v. Stahl*, 543 N.E.2d 49 (N.Y. 1989) (protecting rent control for surviving cohabitant).

¹⁹⁴ See, e.g., *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007) (applying domestic violence laws to unmarried cohabitants, despite state constitutional amendment

Finally, notwithstanding the Supreme Court's encomia to federalism,¹⁹⁶ family law today is not the strictly local enterprise that it once might have been. An increasingly nationalized family law has emerged from the Supreme Court's recognition of federal constitutional outer limits on state authority over the family, mostly based on due process and equal protection;¹⁹⁷ from Congress's specification of family laws that states must follow to meet conditions for receiving federal funds;¹⁹⁸ and from the advent of projects to reform family law across the states, including models from the Uniform Law Commission¹⁹⁹ and the American Law Institute.²⁰⁰

As a result of this burgeoning nationalization, the state-by-state differences that made domicile so significant have faded. Family law will no doubt remain principally the domain of state lawmakers, but the room for variations on several topics has narrowed as constitutional boundaries become more clearly defined and as Congressional pressure and national models have evened out many of the distinctions that a local system of family law invites. Domicile remains the gatekeeper of family law and family life, but — in many

prohibiting the recognition of a legal relationship that approximates the designs, qualities, significance, or effect of marriage).

¹⁹⁵ JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 2 (2011).

¹⁹⁶ See *supra* notes 2-3 and accompanying text; see also *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (reaffirming the validity of the domestic relations exception to federal diversity jurisdiction “as it pertains to divorce and alimony decrees and child custody orders”).

¹⁹⁷ The long list of cases includes, just to name a few, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Orr v. Orr*, 440 U.S. 268 (1979); and *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁹⁸ See, e.g., 42 U.S.C. §§ 666-667 (2012) (conditioning funds on states' adoption of child support guidelines and specific enforcement tools); 42 U.S.C. § 675 (2012) (conditioning funds on states' adherence to federally specified permanency planning for children in foster or institutional care). *But see*, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (recognizing limits on Congress's power to use conditional funding to prompt state compliance). See generally Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013) (assessing the implications of the restriction on conditional funding articulated in *Sebelius*).

¹⁹⁹ E.g., UNIF. INTERSTATE FAMILY SUPPORT ACT (UIFSA) (rev. 2008); UNIF. PARENTAGE ACT (UPA) (2000, rev. 2002); UNIF. CHILD CUSTODY JURISDICTION ACT (UCCJEA) (1997).

²⁰⁰ E.g., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

applications — the gatekeeper itself must yield to federal limits and preferences.²⁰¹

B. *A Case in Point: The Transformation of Parentage*

The contemporary transformation of the law of parentage illustrates the changes in family law outlined above. Parentage, vibrant and evolving, contrasts with domicile, which has remained largely static, even in the wake of upheavals in family law for which it has served as the routine reference point.

We can date the beginning of the change in legal parentage to reforms in the 1970s that abolished many of the previous disabilities associated with out of wedlock births²⁰² and required including at least some unmarried genetic fathers in the legal category of “parent.”²⁰³ Since then, the meaning of the term “parent” has steadily expanded.

Traditional criteria for parentage, such as giving birth, marriage to a child’s mother,²⁰⁴ or adoption have now been joined by newer understandings based on conduct and resulting dependencies and affective ties. Exemplifying family law’s functional turn, concepts such as de facto parents,²⁰⁵ parents by estoppel,²⁰⁶ psychological parents,²⁰⁷

²⁰¹ Of course, some topics have largely evaded such nationalization, notwithstanding available model laws. Surrogacy arrangements stand out as one example. *See generally* UNIF. PARENTAGE ACT (UPA) art. 8, cmt (acknowledging continuing controversy evoked by recognition of gestational agreements); Dominique Ladamato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN’S L.J. 245 (2012) (surveying five state-law approaches and recommending federal regulation).

²⁰² *See, e.g.,* *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (overturning, under equal protection, the exclusion of dependent, unacknowledged nonmarital children from workers’ compensation upon their father’s death); *Levy v. Louisiana*, 391 U.S. 68 (1968) (invalidating, under equal protection, the exclusion of nonmarital, dependent children for recovery for the wrongful death of their mother).

²⁰³ *See, e.g.,* *Caban v. Mohammed*, 441 U.S. 380, 382 (1979) (holding unconstitutional the failure to require the consent to adoption of an unmarried father who had participated in the rearing of his children, despite requiring such consent by married parents and unmarried mothers); *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972) (recognizing due process protection for an unmarried father’s interest “in the children he has sired and raised”).

²⁰⁴ *See, e.g.,* *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding the presumption of legitimacy, recognizing the mother’s husband as a child’s legal father, in a constitutional challenge by a biological father and the child).

²⁰⁵ *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (2002).

²⁰⁶ *See id.* § 2.03(1)(b).

²⁰⁷ *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (1973) (developing the concept of “psychological parent”).

intent-based parenthood,²⁰⁸ and *in loco parentis* status²⁰⁹ can establish legal *parentage* based on *parenting conduct*.

In several jurisdictions, legal parents need not conform to once prevailing gender-based assumptions. In addition to rulings recognizing that a child may have two mothers, through the extension of the presumption of legitimacy and related doctrines traditionally applied to men,²¹⁰ some cases hold a child *at birth* may have only one father²¹¹ or even two fathers²¹² — with no mother required. Freed from limitations based on biology and gender, these evolving approaches make room for a child to have more than two parents. A few courts have so held,²¹³ including one from Florida that recently ruled that a child's birth certificate should list three parents.²¹⁴ California legislation now codifies this possibility, when recognition of only two parents would be detrimental to a child.²¹⁵ In the meantime, the

²⁰⁸ See *Johnson v. Calvert*, 851 P.2d 776, 782-83 (Cal. 1993); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 302-03.

²⁰⁹ See *In re Parentage of L.B.*, 155 Wash. 2d 679, 692 n.7 (2005) (defining the concepts of "in loco parentis," "psychological parent," and "de facto parent").

²¹⁰ See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 240-42 (2006); see also, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 666-69 (Cal. 2005) (applying paternity statute and doctrines to same-sex partner and finding her to be child's second mother with child support obligations); *Chatterjee v. King*, 280 P.3d 283, 286-93 (N.M. 2012) (holding a statutory paternity presumption applies to women for purposes of establishing the parentage of a second mother and adjudicating child custody); *Shineovich & Kemp v. Shineovich*, 214 P.3d 29, 40 (Or. Ct. App. 2009) (remediating a constitutional defect in Oregon's paternity statute by extending it "so that it applies when the same-sex partner of the biological mother consented to the artificial insemination").

²¹¹ Cf. *In re Roberto d.B.*, 923 A.2d 115, 121 (Md. 2007) (stating Maryland law permits birth certificates with no mother listed).

²¹² See, e.g., *Raftapol v. Ramey*, 12 A.3d 783, 793 (Conn. 2011) (holding that intent and gestational agreement create parentage, at birth, in the same-sex partner of child's biological father).

²¹³ See Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 12-13 (2008) [hereinafter *Parents by the Numbers*]; see, e.g., *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. 2007) (recognizing three legal parents for purposes of child support); *A.A. v. B.B.*, [2007] 278 D.L.R. 4th 519, paras. 34-41 (Can. Ont. C.A.) (holding same-sex partner can be second mother and third parent to child), *leave to appeal denied sub nom. Alliance for Marriage & Family v. A.A.*, [2007] 3 S.C.R. 124 (Can.).

²¹⁴ See Martha Neil, *3-Parent Birth Certificate Is OK'd by Judge*, A.B.A. J. (Feb. 8, 2013), http://www.abajournal.com/news/article/judge_oks_3-parent_birth_certificate_says/.

²¹⁵ See S.B. 274, 2013-2014 Leg., Reg. Sess. (Cal. 2013). The measure was approved by the Governor on October 4, 2013. See Christopher Cadelago, *Jerry Brown Signs a California Bill Allowing a Child to Have More than Two Parents*, SACRAMENTO BEE BLOG (Oct. 5, 2013, 5:47 PM), <http://blogs.sacbee.com/capitolalertlatest/2013/10/>

Uniform Law Conference of Canada has drafted a model law that would allow three parents for a child born of assisted reproduction.²¹⁶

Such departures from traditional parentage norms necessarily reflect an appreciation for pluralism.²¹⁷ They also provide a foundation for increased deference to private ordering on such matters, as typified by a recent case from the Kansas Supreme Court determining parentage for a nonbiological mother based in part on the contract she had entered with the biological mother.²¹⁸ Additional evidence of this private-ordering thread appears in the several jurisdictions' recognition of parentage pursuant to gestational carrier (surrogacy) agreements.²¹⁹

Modern parentage law shows some indicia of nationalization, although space remains for state variations. The Supreme Court has reaffirmed the primacy of parental rights under the Due Process Clause.²²⁰ The Court, however, has imposed only modest constraints on how states may define "parent," disallowing most illegitimacy-based discrimination²²¹ and the exclusion of an unmarried father who "grasps [the] opportunity [to develop a relationship with the child] and accepts some measure of responsibility for the child's future."²²² Within such limits, states develop their own definitions. Thus, in recent cases, as noted, we have seen the Court defer to state intestacy law for purposes of determining the parent-child relationship after posthumous conception for purposes of Social Security survivors'

jerry-brown-signs-bill-allowing-more-than-two-parents-in-calif.html.

²¹⁶ UNIF. CHILD STATUS ACT § 9 (Uniform Law Conference of Can. 2010) (Can.), available at http://ulcc.ca/images/stories/Uniform_Acts_EN/Child_Status_2010.pdf. For background, see *Assisted Human Reproduction Working Group Report 2009*, OTTAWA ON ANNUAL MEETING (Uniform Law Conference of Can., Ottawa, Ont.), Aug. 9–13, 2009, § III(D) (Can.), available at <http://ulcc.ca/en/2009-ottawa-on/192-civil-section-documents/396-assisted-human-reproduction-working-group-report-2009?showall=&start=8>.

²¹⁷ See Appleton, *Parents by the Numbers*, *supra* note 213, at 66 (contending that recognition of multiple parents reflects pluralism).

²¹⁸ See *Frazier v. Goudschaal*, 295 P.3d 542, 554-58 (Kan. 2013).

²¹⁹ See, e.g., Illinois Gestational Surrogacy Act, 750 ILL. COMP. STAT. 47/1-47/75 (2004) (establishing standards for recognition of gestational surrogacy agreements in Illinois); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (using gestational surrogacy agreement as evidence of parties' intent in applying intent-based parenthood concept).

²²⁰ See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) (citing past cases and asserting that the Court has "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children").

²²¹ See generally *Michael H. v. Gerald D.*, 491 U.S. 110, 123-27 (1989) (plurality opinion) (reviewing past cases). Congress has played a role, too. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (noting state compliance with federally directed limitations period for paternity cases).

²²² See *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

benefits²²³ and to state meanings of “custodial parent” in resolving a contested adoption under the Indian Child Welfare Act.²²⁴ Moreover, in following federal directives connected to conditional funding, some states have collected child support from those deemed parents under some of the more expansive approaches²²⁵ even if other states have hewed to a more conventional path.²²⁶

Parentage provides a striking counterpoint to domicile. Parentage, much like domicile, seems “natural”²²⁷ or inevitable, but a closer look underscores that law and culture shape both concepts so that they can achieve particular ends, such as the privatization of dependency²²⁸ or state control of family matters.²²⁹ While the law of parentage has undergone significant changes, the evolution remains incomplete, with scholars floating still bolder reforms, such as disaggregating parental functions²³⁰ or dismantling parentage altogether.²³¹ In short, parentage is a vital construct, at least partially responsive to contemporary problems, with still more revisions likely to come.

By contrast, domicile has stalled — with little revision other than the belated rejection of the derivative domicile rule in 1988 in the Restatement Second. Domicile remains a fusty, ossified concept that has been so taken for granted that we frequently forget about it. Typifying both domicile’s stagnation and its often subterranean role,

²²³ See *supra* text accompanying notes 115-119; see, e.g., *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2033-34 (2012) (holding courts must defer to state intestacy laws to determine who is a decedent’s child under the Social Security Act).

²²⁴ See, e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562 (2013) (invoking South Carolina and Oklahoma family law statutes). Although the Supreme Court expressly avoids deciding who is a “parent” under the ICWA, *id.* at 2560 n.4, it finds the federal ICWA inapplicable and defers to South Carolina law. Under the facts of the case, the biological father would not have met South Carolina’s requirements for parents entitled to object to an adoption. See *id.* at 2559; *cf. id.* at 2581 n.12 (Sotomayor, J., dissenting) (listing states that require consent of both biological parents before adoption).

²²⁵ See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 669-70 (Cal. 2005) (recognizing mother’s same-sex partner as second mother with child support obligations); see also *Jacob v. Shultz-Jacob*, 923 A.2d 473, 482 (Pa. 2007).

²²⁶ See, e.g., *In re Paternity of M.F.*, 938 N.E.2d 1256 (Ind. Ct. App. 2010) (seeking support from sperm donor instead of mother’s former same-sex partner).

²²⁷ See *supra* text accompanying notes 71-72.

²²⁸ See, e.g., FINEMAN, *AUTONOMY MYTH*, *supra* note 166, at xv (positing and challenging the resort to the private market and the private family to address dependency, inequality, and poverty).

²²⁹ See *supra* note 71 and accompanying text.

²³⁰ See Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 312 (2007).

²³¹ See Murray, *Networked Family*, *supra* note 165, at 453-54.

in *Inside the Castle*, the comprehensive treatment of how family law has followed family life in the twentieth century by legal historians Joanna Grossman and Lawrence Friedman,²³² “domicile” does not even merit an entry in the index. One might surmise that family life has changed little in ways that implicate domicile, but the next section challenges such inferences.

C. Changes in Family Life Implicating Domicile

Family life has shifted in several ways that should inspire the sort of re-examination of domicile that has become prominent in other parts of family law. Viewed through this lens of change, much of the scaffolding that supports our use of domicile to determine the governing regime for family relationships has weakened.²³³ I cite two particular developments: the rise of transhousehold families and the collapse of domestic boundaries.

1. The Rise of Transhousehold Families

Webster’s mid-nineteenth century dictionary definition of “family” provided: “The collective body of persons who live in one house under one head or manager; a household, including parents, children, servants and as the case may be lodgers and boarders.”²³⁴ Today’s definition of “family” severs it from co-residence assumptions, as follows: “[A] basic social unit consisting of parents and their children, considered as a group, whether dwelling together or not.”²³⁵ The contemporary definition suggests the possibility of what I call transhousehold families, namely families with members who span two or more residences, sometimes across state lines. Put differently, these families demonstrate that a host of considerations, emotional and practical, have come to outweigh what the Restatement Second

²³² See GROSSMAN & FRIEDMAN, *supra* note 195, at 428.

²³³ The changes strike me as qualitatively different from those that courts and commentators raised in earlier eras about how “the mobility of modern society” calls for revising our legal take on geography. See, e.g., *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 308 n.13 (1980) (Brennan, J., dissenting) (noting the “amazing expansion in mobility” in recent years); see also *Geographical Mobility/Migration — State-to-State Migration Flows*, <https://www.census.gov/hhes/migration/data/acs/state-to-state.html> (last visited Mar. 31, 2014) (providing data compilations on state-to-state migration flows from 2005 to 2012).

²³⁴ HENDRIK HARTOG, *SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE* 26 (2012) (internal quotation marks omitted) (quoting dictionary).

²³⁵ *Definition of “Family,”* DICTIONARY.COM, <http://dictionary.reference.com/browse/family?s=t> (last visited Feb. 2, 2014).

describes as “the advantages of having a single law govern the interests of each member of the family unit.”²³⁶

LATs, or couples who “live apart together,” provide one instantiation of this claim. The terms are used to refer to “intimate relationships between unmarried partners who live in separate households but identify themselves as part of a couple.”²³⁷ The phenomenon, which probably has always existed, is sufficiently substantial to have captured attention among scholars²³⁸ and in popular culture.²³⁹ Current data show that 7% of U.S. women and 6% of U.S. men are in a LAT relationship, representing 35% of all individuals who are not married or cohabiting.²⁴⁰ Conventional studies that focus on co-residential couples classify such individuals as single²⁴¹ — and thus would not reflect the relationship at all. Most U.S. LATs are white,²⁴² but African-Americans are less likely than whites to be married than in a LAT relationship.²⁴³ LATs among lesbians and gay men account for a substantial minority who would otherwise be classified as single, with the data showing 37% and 27% respectively.²⁴⁴

Of course, the LATs population includes some married couples as well,²⁴⁵ such as the Massachusetts-Florida couple in the divorce case examined earlier.²⁴⁶ This segment of the married population has grown as two-career couples have become more prevalent.²⁴⁷ Even without sharing a residence, married LATs would not be classified as single, given their formal status. Yet, under prevailing functional tests that use as their model marriage as it has been traditionally understood and imagined, unmarried couples who “live apart together” encounter difficulty in having their families recognized as such.²⁴⁸ Further, if our

²³⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 cmt. b (1988 revision).

²³⁷ Strohm et al., *supra* note 154, at 178.

²³⁸ *E.g.*, *id.*

²³⁹ *E.g.*, Rosenblum, *supra* note 10; Sloan, *supra* note 154.

²⁴⁰ Strohm et al., *supra* note 154, at 190.

²⁴¹ *Id.*

²⁴² *See id.* at 191 (reporting 58% of women and 75% of men in LAT relationships identifying as white).

²⁴³ *Id.* at 195.

²⁴⁴ *Id.* at 191.

²⁴⁵ *See generally* Sloan, *supra* note 154 (documenting LAT relationships, including a married LAT couple).

²⁴⁶ *See supra* note 153 and accompanying text.

²⁴⁷ *See, e.g.*, Sloan, *supra* note 154 (explaining how careers prompt some couples to live in LAT relationships).

²⁴⁸ *Cf.* Case, *Marriage Licenses*, *supra* note 186 (comparing rights of married

notion of “family” includes friendship, as some scholars recommend,²⁴⁹ or “voluntary kin,” as others suggest,²⁵⁰ then we should necessarily see more transhousehold families — precisely because shared residence is not part of our understanding of such relationships. Likewise, the increasing visibility of the asexual community, which claims family relationships through connections among multiple individuals,²⁵¹ might also highlight the decreasing importance of co-residence assumptions in our conceptualization of family.

Shifting the focus from adults to children reveals still additional illustrations of contemporary transhousehold families. We have long known that many children divide time between their parents’ homes or stay with various relatives or other adults.²⁵² Yet, modern family law reflects new ways of splitting once unitary parental rights and responsibilities. Joint legal custody, a preferred post-dissolution arrangement in many states, locates decisionmaking authority for children in two parents living in separate homes, whatever the allocation of physical custody.²⁵³ The burgeoning practice of open adoption, in which birth parents maintain connections with their children who have been adopted by others, similarly challenges the notion that “family” is confined to a single home. Indeed, some court orders in open adoption cases seem to split decisionmaking between birth parent and adoptive parent.²⁵⁴ Such arrangements, of course, might span state lines. An even clearer example is state-orchestrated

couples to live apart with limited options available to other types of couples seeking legal recognition). Further, some domestic partnership laws have required co-residence. See, e.g., NeJaime, *supra* note 174 (noting requirements under San Francisco’s recognition of domestic partnerships in 1990).

²⁴⁹ See Rosenbury, *Friends with Benefits?*, *supra* note 77, at 220-26; see also Franke, *supra* note 174, at 2702-05.

²⁵⁰ See Dawn O. Braithwaite et al., *Constructing Family: A Typology of Voluntary Kin*, 27 J. SOC. & PERS. RELATIONSHIPS 388, 391-92 (2010).

²⁵¹ See (A)SEXUAL (Arts Engine, Inc. 2011); see also Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 306 (2014) (detailing the emergence of the asexuality community and examining how our legal system and social practices and expectations “might look to asexual eyes”).

²⁵² See, e.g., Valenzuela v. Michel, 736 F.3d 1173, 1178 (9th Cir. 2013) (determining habitual residence under the Hague Convention in a case of cross-border “shuttle custody”).

²⁵³ E.g., Bell v. Bell, 794 P.2d 97, 99 (Alaska 1990); see Amber James et al., *Charts: A Review of the Year in Family Law*, 45 FAM. L.Q. 490, 494-96 (2012) (showing that the vast majority of states authorize joint custody, with 13 having a presumption in favor of joint custody).

²⁵⁴ See, e.g., Groves v. Clark, 982 P.2d 446, 450 (Mont. 1999) (upholding order of visitation with birth mother, in child’s best interests, despite disagreement with adoptive parents about seat belts and snowmobiling).

foster care, which divides parental functions among the child's legal parents, the child welfare agency, and foster parents.²⁵⁵ The rise of kinship foster care accounts for the multistate nature of many such arrangements today.²⁵⁶

Beyond these familiar and now well established practices, however, we can find new versions of transhousehold families. Naomi Cahn's work explores the efforts of the offspring of sperm and other gamete donors to develop and maintain familial connections with one another, creating — across their households — what Cahn calls “the new kinship.”²⁵⁷ The *New York Times* recently ran a story about pairs of single persons, living separately, taking to heart the idea that two parents are better than one and thus joining forces to conceive and raise a child, without any romantic attachment.²⁵⁸ Various matching websites facilitate such arrangements.²⁵⁹

Perhaps the “poster family” for such phenomena is the transhousehold and transjurisdictional family of Andrew Solomon, writer of the highly acclaimed book *Far from the Tree: Parents, Children, and the Search for Identity*. Solomon, his husband (John), and their son (George) live together in New York.²⁶⁰ John had served as sperm donor for his friends, a lesbian couple in Minnesota (Laura and Tammy), helping them conceive their two children (Oliver and Lucy).²⁶¹ Solomon later provided sperm to help a close friend living in Texas (Blaine) conceive a child (Little Blaine) before she met her partner (Richard).²⁶² When Solomon decided that he wanted a child to rear with John, Laura served as gestational carrier of the embryo

²⁵⁵ See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 826 (1977).

²⁵⁶ Cf. Vivek Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 *FAM. L.Q.* 435, 447-48 (2006) (criticizing delays caused by Interstate Compact on the Placement of Children, which sets requirements for interstate placements even with biological parents and relatives).

²⁵⁷ See Naomi Cahn, *The New Kinship*, 100 *GEO. L.J.* 367, 369 (2012).

²⁵⁸ Abby Ellin, *Making a Child, Minus the Couple*, *N.Y. TIMES* (Feb. 8, 2013), <http://www.nytimes.com/2013/02/10/fashion/seeking-to-reproduce-without-a-romantic-partnership.html>. Despite its ending, the popular film *Friends with Kids* plays with this idea. See *FRIENDS WITH KIDS* (Lionsgate 2011).

²⁵⁹ See Ellin, *supra* note 258.

²⁶⁰ Andrew Solomon, *Meet My Real Modern Family*, *NEWSWEEK* (Jan. 30, 2011), <http://www.newsweek.com/andrew-solomon-meet-my-real-modern-family-66661>.

²⁶¹ See ANDREW SOLOMON, *FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY* 689 (2012).

²⁶² See *id.* at 689-90.

created with Solomon's sperm and a donor egg²⁶³ — resulting in the birth of George. Solomon introduces this collection of individuals maintaining affiliations across state lines as his “real modern family.”²⁶⁴

At the other end of the life spectrum, even if we no longer reside in extended-family households, we might focus considerable caregiving and domestic energies on elderly parents living on their own or in facilities that provide assistance.²⁶⁵ In several jurisdictions, filial responsibility laws require financial contributions for elder care.²⁶⁶ Sometimes, those devoting caregiving energies and financial support to their aging parents or other relatives do so “long distance,” across state lines.²⁶⁷

Further, the traditional focus on domicile, a single home, and an identifiable household leaves invisible from family law many on both sides of the class divide. Wealthy individuals and families with more than one home must have their lives and preferences retrofitted to conform to the requirement of domiciliary monogamy.²⁶⁸ Likewise, domicile ignores the significant number of homeless persons²⁶⁹ and

²⁶³ See *id.* at 692-93.

²⁶⁴ See Solomon, *supra* note 260.

²⁶⁵ See, e.g., Charles R. Pierret, *The “Sandwich Generation”: Women Caring for Parents and Children*, MONTHLY LAB. REV., Sept. 2006, at 3 (studying the percentage and demographics of women in the “sandwich generation” simultaneously caring for children and elderly parents); cf. Janice Compton & Robert A. Pollak, *Proximity and Coresidence of Adult Children and Their Parents in the United States: Description and Correlates*, ANNALS ECON. & STAT. (forthcoming 2014) (analyzing patterns of intergenerational proximity and coresidence and finding that college graduates are less likely to live near their mothers and older children live further from their mothers).

²⁶⁶ See Allison E. Ross, Note, *Taking Care of Our Caretakers: Using Filial Responsibility Laws to Support the Elderly Beyond the Government's Assistance*, 16 ELDER L.J. 167, 168 (2008).

²⁶⁷ See, e.g., Paul Sullivan, *Caring for Aging Parents, Even from a Distance*, N.Y. TIMES (Nov. 19, 2013), <http://www.nytimes.com/2013/11/20/your-money/caring-for-aging-parents-even-from-a-distance.html>.

²⁶⁸ See *supra* notes 76-78 and accompanying text; cf. *California v. Texas*, 457 U.S. 164, 165 (1982) (asserting original jurisdiction of U.S. Supreme Court over dispute between two states attempting to collect taxes on Howard Hughes's estate because “it is the law of each State that an individual has but one domicile”); *Galva Foundry Co. v. Heiden*, 924 F.2d 729, 730 (7th Cir. 1991) (“Anyone with residences in two or more states could change his domicile continually, by changing his voter registration or his driver's license, in order to take advantage of changes in tax law or to opt in or out of federal diversity jurisdiction.”).

²⁶⁹ Data show 636,017 homeless persons in the United States in 2011, or 21 homeless persons per 10,000 in the general population, although the number rises to 31 out of 10,000 among veterans. See *The State of Homelessness in America 2012*, NAT'L ALLIANCE TO END HOMELESSNESS (Jan. 17, 2012), <http://www.endhomelessness.org/>

others with uncertain geographic affiliations in the face of economic hardship and other difficulties. For example, domicile fails to work for displaced persons and families like the many survivors of New Orleans's Hurricane Katrina in 2005 who were evacuated to Houston.²⁷⁰ Even years later, some still long to return to New Orleans but have found they must await improved circumstances.²⁷¹ What is their domicile? Louisiana because they have no intent to remain in Texas? Or Texas because, by necessity, they will continue to live there for at least some time? Of course, such situations recall not only the felt need to assign one (and just one) domicile to each individual as a means of discipline and control over intimate life²⁷² but also the resistance over the years by state governments to vagrancy and migration, especially on the part of the poor.²⁷³

These varied snapshots illustrate challenges to the assumption that family life is centered in a single home allowing an exclusive, intimate connection to one domicile. Certainly, domicile is an individual — not a collective — ascription. Yet, family life today is complicated. (Perhaps it has always been so.) If domicile, like home, is “where the heart is,”²⁷⁴ exclusivity might well prove too confining.

library/entry/the-state-of-homelessness-in-america-2012.

²⁷⁰ Cf. Mollyann Brodie et al., *Experiences of Hurricane Katrina Evacuees in Houston Shelters: Implications for Future Planning*, 96 AM. J. PUB. HEALTH 1402 (2006) (studying evacuation experiences of Hurricane Katrina survivors and noting their need to stay with friends, family, or at shelters).

²⁷¹ See Reeve Hamilton, *Five Years Later, Houstonians Conflicted About Katrina*, TEX. TRIB. (Aug. 30, 2010), <http://www.texastribune.org/texas-politics/texas-political-news/five-years-houstonians-conflicted-about-katrina/>.

²⁷² See *supra* note 74 and accompanying text.

²⁷³ See, e.g., *Saenz v. Roe*, 526 U.S. 489 (1999) (finding California's law reducing welfare benefits for those residing in California for less than one year violates the right to travel protected by the Fourteenth Amendment); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding state and D.C. statutes denying welfare assistance to those residing for less than one year in respective jurisdictions violate equal protection), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974); *Edwards v. California*, 314 U.S. 160 (1941) (invalidating California prohibition on the transport of indigent persons into the state as an unconstitutional burden on interstate commerce); see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1, 168-71 (1972); cf. Rick Lyman, *Once Suicidal and Shipped Off, Now Battling Nevada over Care*, N.Y. TIMES (Sept. 21, 2013), <http://www.nytimes.com/2013/09/22/us/once-suicidal-and-shipped-off-now-battling-nevada-over-care.html> (documenting stories of mentally ill and homeless individuals shipped off to San Francisco from Nevada care facilities).

²⁷⁴ See *supra* text accompanying notes 37-41.

2. The Collapse of Domestic Boundaries

Just as families now might be spread over multiple homes, the borders of the home itself have begun to crumble. Such deterioration tests the longstanding principle that the law of the domicile governs family matters,²⁷⁵ which assumes a bright line between family or home, on one hand, and the market, on the other — or between the private and public spheres. Despite the spatial dimensions of this split, which Kate Silbaugh has challenged for aggravating the role tension that women experience,²⁷⁶ several modern practices and legal responses require a new look at this assumption. A small sample will illustrate the types of developments I have in mind.

Notwithstanding Yahoo's much publicized recent directive that its employees must stop "telecommuting,"²⁷⁷ the boundaries separating home and work continue to blur. Sociologist Arlie Hochschild has chronicled how in our modern way of life "work becomes home and home becomes work."²⁷⁸ Even Silbaugh notes how individuals' work and family roles are coterminous, so that our family identities accompany us to work.²⁷⁹ Yet, our work responsibilities often follow us home, so that many of us "wear both hats" all the time and regardless of location.

Moreover, as Marion Crain has explained, employment itself has become a site that engages our emotions and shapes our identities in ways that we once attributed mainly to family.²⁸⁰ Laura Rosenbury's analysis of the "work wife" phenomenon shows how the intimacy and gender performances we associate with the family persist in the workplace, too, notwithstanding Title VII and other equality-motivated interventions.²⁸¹ These insightful observations necessarily pose questions about why the workplace cannot constitute one's

²⁷⁵ See *supra* Part I.

²⁷⁶ See Silbaugh, *supra* note 89, at 1799-800 (emphasizing how residential life is distinct from work life and how the physical distance separating these sites aggravates women's work-family conflicts).

²⁷⁷ See, e.g., Perna Gupta, *Why Five Days in the Office Is Too Many*, N.Y. TIMES (Mar. 2, 2013), <http://www.nytimes.com/2013/03/03/jobs/in-defense-of-working-mostly-from-home.html> (supporting telecommuting and commenting on Yahoo's recent ban on employees' working from home).

²⁷⁸ ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 217 (1997).

²⁷⁹ See Silbaugh, *supra* note 89, at 1810.

²⁸⁰ See Marion Crain, *Work Matters*, 19 KAN. J.L. & PUB. POL'Y 365, 373-74 (2010).

²⁸¹ See Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345, 347-48 (2013) [hereinafter *Work Wives*].

“principal establishment,”²⁸² “pre-eminent headquarters,”²⁸³ or site of “permanent allegiance,”²⁸⁴ as some formulations of domicile articulate the criteria. Indeed, my students tell me of young attorneys at New York firms who “live” at their offices, despite a nominal residence in New Jersey simply because of lower rents there. Alternatively, we might interpret these scenarios as challenges to the requirement of domiciliary monogamy.

In a similar vein, employers actively engage in workers’ personal and family lives, sometimes by legal requirement. Thus, employers assist with enforcement of employees’ child support obligations by withholding wages,²⁸⁵ help distribute property equitably after dissolution,²⁸⁶ provide insurance for healthcare coverage that includes contraception,²⁸⁷ and even offer on-site wellness programs.²⁸⁸

Although home and work are often located in the same state, this need not be so,²⁸⁹ and Justices on the Supreme Court have claimed that a state’s interest in its workers who commute from another state is not the same as its interest in its own domiciliaries.²⁹⁰ Citing the fact that many employees and employers spend more time at work than at

²⁸² See *supra* note 22 and accompanying text.

²⁸³ See *supra* note 38 and accompanying text.

²⁸⁴ See *supra* note 39 and accompanying text.

²⁸⁵ See, e.g., 42 U.S.C. § 666 (2012) (setting requirements states must follow to improve effectiveness of child support enforcement, including employer wage withholding); MO. REV. STAT. § 452.350 (2013) (outlining the requirements and procedures for employer duties to withhold employees’ wages on court order).

²⁸⁶ E.g., Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, §§ 206(d)(3), 514(b)(7), 88 Stat. 864 (codified as amended at 29 U.S.C. §§ 1056(d)(3), 1144(b)(7) (2012)) (enabling courts to subject employee retirement accounts to equitable distribution after divorce).

²⁸⁷ See 45 C.F.R. §§ 147.104, 147.130 (2013). *But see* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121 (10th Cir. 2013) (en banc) (challenging the Affordable Care Act’s mandate for employer-provided contraceptives), *cert. granted*, 134 S. Ct. 678 (2013).

²⁸⁸ See Natasha Singer, *On Campus, a Faculty Uprising over Personal Data*, N.Y. TIMES (Sept. 14, 2013), <http://www.nytimes.com/2013/09/15/business/on-campus-a-faculty-uprising-over-personal-data.html>.

²⁸⁹ See, e.g., Rita C. Grimm, *Henriksen v. Younglove Construction: Subject Matter Jurisdiction Based Solely on the Claimant’s Iowa Domicile*, 45 DRAKE L. REV. 859 (1997) (analyzing *Henriksen*, which involved a claimant domiciled in Iowa but working in Nebraska); Kirk Johnson, *Crossing Borders and Changing Lives, Lured by Higher State Minimum Wages*, N.Y. TIMES (Feb. 15, 2014), <http://www.nytimes.com/2014/02/16/us/crossing-borders-and-changing-lives-lured-by-higher-state-minimum-wages.html> (recounting how workers cross state lines to earn higher minimum wages).

²⁹⁰ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314 (1981) (plurality opinion); *Corr, supra* note 106, at 660.

home, Gerald Frug has suggested expanding the franchise from domiciliaries to local workers, further obscuring traditional categories.²⁹¹

Domestic workers might live with employers' families and send money to their own family members elsewhere.²⁹² Long distance truckers eat and sleep on the road²⁹³ — and so do professionals always on the move like George Clooney's character in *Up in the Air*.²⁹⁴ Of course, under the traditional view, none of this work-related behavior would count in determining where one might be domiciled.²⁹⁵

Many functions once performed in the home now take place elsewhere. As accustomed as we might have become to the education of the next generation as a state responsibility performed in schools, the prevalent use of day care²⁹⁶ and calls for universal preschool²⁹⁷ both demonstrate the outsourcing of activities once central to the home and women's caregiving within.²⁹⁸ The demands of work outside the home prompt additional outsourcing of domestic functions,²⁹⁹ in

²⁹¹ See Frug, *supra* note 12, at 212.

²⁹² See Marie Arana, Op-Ed., *The Migrant Cash Lifeline*, N.Y. TIMES (May 15, 2013), <http://www.nytimes.com/2013/05/16/opinion/arana-the-migrant-cash-lifeline.html>.

²⁹³ See, e.g., Brett Aquila, *Over the Road: The Life of a Long-Haul Truck Driver*, TRUCKINGTRUTH.COM, http://www.truckingtruth.com/over_the_road.htm (last visited Feb. 3, 2014) (documenting long distance truck driver's life on the road).

²⁹⁴ UP IN THE AIR (Paramount Pictures 2009). The story's protagonist, Ryan Bingham, travels the country to inform workers that they have lost their jobs.

²⁹⁵ See *supra* note 99 and accompanying text.

²⁹⁶ See, e.g., Meredith Johnson Harbach, *Outsourcing Childcare*, 24 YALE J.L. & FEMINISM 254 (2012) (using a business outsourcing lens to examine parents' decisions to outsource childcare); Pamela Druckerman, Op-Ed., *Catching Up with France on Day Care*, N.Y. TIMES (Aug. 31, 2013), <http://www.nytimes.com/2013/09/01/opinion/sunday/catching-up-with-france-on-day-care.html> (recounting a mother's experience with France's day care system and comparing American childcare system).

²⁹⁷ See, e.g., DAVID L. KIRP, *THE SANDBOX INVESTMENT: THE PRESCHOOL MOVEMENT AND KIDS-FIRST POLITICS* (2009) (examining national preschool movement); James J. Heckman, Op-Ed., *Lifelines for Poor Children*, N.Y. TIMES (Sept. 14, 2013), <http://opinionator.blogs.nytimes.com/2013/09/14/lifelines-for-poor-children/> (advocating early childhood education for disadvantaged children to address income inequality); Mokoto Rich, *In Alabama, a Model for Obama's Push to Expand Preschool*, N.Y. TIMES (Feb. 14, 2013), <http://www.nytimes.com/2013/02/15/education/details-emerge-on-obamas-call-to-extend-preschool.html> (discussing Obama's plans for expanding availability of preschool).

²⁹⁸ See SELF, *supra* note 90, at 126-31 (summarizing the history of federal legislation that would have included universal childcare in our national social welfare policy, which the opposition hailed as "as an assault on traditional motherhood" and which President Nixon vetoed in 1971).

²⁹⁹ See ARLIE RUSSELL HOCHSCHILD, *THE OUTSOURCED SELF: WHAT HAPPENS WHEN WE PAY OTHERS TO LIVE OUR LIVES FOR US* 8-14 (2013).

particular meal preparation³⁰⁰ and consumption to restaurants and fast food purveyors,³⁰¹ unsettling the traditional claim that where one eats reveals one's domicile.³⁰² Even gestation is outsourced today.³⁰³ And, we all know that intimacy now flourishes in cyberspace,³⁰⁴ where we undertake the task of creating many features of personal identity that were once associated with home,³⁰⁵ and where, at the same time, we fundamentally reshape the very meaning of "private."³⁰⁶

Family law as an academic discipline itself has begun to reflect some of these blurring borders. The domestic sphere is no longer the sole focus of courses and casebooks, which now cover some regulation of employment, like the Family and Medical Leave Act ("FMLA").³⁰⁷ According to the Supreme Court, Congress designed the FMLA to attack "mutually reinforcing stereotypes" about home and work,³⁰⁸ in turn highlighting the porous boundaries between these spheres and challenging the distinctly gendered character of each.

Family law still has far to go, however. One well-deserved critique of the field emphasizes how the customary focus on the purportedly private family camouflages the role of the state in delineating the very divide between public and private.³⁰⁹ Even more, this focus sends the

³⁰⁰ See Silbaugh, *supra* note 89, at 1807.

³⁰¹ E.g., Katherine W. Bauer et al., *Parental Employment and Work-Family Stress: Associations with Family Food Environments*, 75 SOC. SCI. & MED. 496, 497 (2012).

³⁰² See *supra* note 97 and accompanying text.

³⁰³ See, e.g., MADE IN INDIA (Chicken and Egg Pictures 2010) (documenting the practice of hiring "gestational surrogates" in India to carry pregnancies for Americans).

³⁰⁴ See John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1104, 1118-20 (2013) (examining online intimacy, including interactions of avatars in "Second Life").

³⁰⁵ See Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 306-07 (2006) (explaining how fan fiction authors create "character stand-ins for themselves" on the Internet).

³⁰⁶ See generally Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1880 (2013) (contending that consent, the usual means of protecting privacy, cannot provide people with adequate control over data today).

³⁰⁷ E.g., WEISBERG & APPLETON, *supra* note 66, at 272-83 (discussing work and family balance and providing overview of FMLA).

³⁰⁸ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728, 736 (2003).

³⁰⁹ See, e.g., Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835 (1985) (arguing "that the private family is an incoherent ideal" and "that the terms 'intervention' and 'nonintervention' are largely meaningless"); see also SELF, *supra* note 90, at 12 ("The question is not *whether* gender, sex, and family are structured and regulated by the state; the question is what kinds of regulations exist and to what end."); Silbaugh, *supra* note 89, at 1842-50 (showing how "place" laws, such as the legal treatment of home mortgages and

erroneous message that welfare law is not part of family law.³¹⁰ Yet, modern welfare law certainly regulates the family, with various public assistance programs purposely and expressly seeking to shape intimate behavior and conduct, including conduct in the home — whether encouraging marriage through rewards,³¹¹ discouraging abortion through selective funding schemes,³¹² or demanding “personal responsibility” for heterosexual procreation.³¹³

Put differently, official deployments of public funds to guide personal and family choices and conduct, like family law’s channeling function more generally,³¹⁴ belie the rhetoric of privacy and autonomy celebrated in family law today.³¹⁵ Accordingly, despite its rhetoric, family law routinely obscures the would-be line between family and state, just as it routinely obscures any such line between family and market, in turn challenging the notion of home as a separate and distinct realm³¹⁶ and an understanding of domicile based on such assumptions.

III. LEAVING HOME?

Domicile’s continued vitality perpetuates inflexibility, constrains choice, and accentuates gender differences. In response, this Part

zoning, shape family life).

³¹⁰ See Hasday, *Canon of Family Law*, *supra* note 3, at 892-98.

³¹¹ See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Marriage Control*, 93 CALIF. L. REV. 1647, 1675 (2005).

³¹² See Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 724-27 (1981).

³¹³ See Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL’Y & L. 347, 360-64 (2012).

³¹⁴ See, e.g., Schneider, *supra* note 77 (positing and analyzing the channeling function of family law); *supra* note 175 and accompanying text; see also June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 859-60 (2011) (questioning the continued viability of family law’s channeling function today); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2133 (2007) (re-examining the family law’s channeling function in light of contemporary law, social practices, and technology).

³¹⁵ See *supra* notes 174-188 and accompanying text.

³¹⁶ In her critique of domestic violence laws, Jeannie Suk pushes even harder on the state’s reach into the family: such laws have transformed the concept of home into a place of danger and potential violence where men subordinate women and where police presence is expected. Under this analysis, gender remains salient even as the concepts of home and privacy have changed. See generally JEANNIE C. SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* (2009).

considers two different approaches to unseating domicile's traditional primacy in matters of family law. Under the first, domicile might persist as a legal doctrine, but it would play a narrower, less powerful role — as one of several alternatives for determining the law governing family matters. Developments associated with the rise and increasing legitimacy of same-sex marriage illustrate this first approach. The second approach offers three thought experiments that go further, by replacing domicile with alternative constructs, entrusting parties to choose the governing regime, and exploring the law of corporations as an analogy that might transform our understanding of domicile. My snapshots of these possible alternatives consider how each might address some of the problematic features and consequences of the domicile-centered approach that we largely take for granted in family law today.

A. Unsettling Gender and Eroding Domicile

If domicile, even without the derivative domicile rule, remains a gendered concept, as I have asserted, then we might expect to see an erosion of domicile's traditional importance with the advent of same-sex marriage. After all, a marriage with two wives or two husbands necessarily disrupts the conventional vision of marriage,³¹⁷ its gender-based assumptions about spousal roles, and the purposes of the institution or practice of marriage itself.³¹⁸ And, in fact, in the wake of same-sex marriage, we have begun to see some inroads that reduce domicile's significance and authority, potentially portending a lesser role for domicile in all marriages and in family law more generally.

First, domicile is no longer an invariable requirement for divorce jurisdiction. Although scholars had been calling for a relaxation of domicile requirement for divorce jurisdiction for many years,³¹⁹ such

³¹⁷ See, e.g., Appleton, *Missing in Action*, *supra* note 189, at 110-15 (illustrating how gender-based family laws have been all but eliminated); Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 37 (2011) (synthesizing the political left's two major approaches to same-sex marriage: marriage equality and "marriage skepticism").

³¹⁸ Some arguments against marriage equality claim that the purpose of marriage is to address the possibility of accidental procreation that only heterosexual couples confront. See, e.g., Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 5-6 (2009) (critiquing accidental-procreation justification for marriage, which will diminish law's influence in regulating intimate behavior).

³¹⁹ See Helen Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 501-02 (1980); Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 4-5 (1997).

proposals gained little traction until the issue became particularly salient for same-sex couples. Recently, the challenge to traditional divorce jurisdiction has zeroed in on same-sex couples who have married in a state that so permits but are now domiciled in a state that does not recognize their marriage and hence refuses to dissolve it,³²⁰ leaving them “bound in a gay union”³²¹ or “wedlocked.”³²² To address this problem, several states now use the approach urged by Courtney Joslin,³²³ allowing same-sex spouses who married in a particular state to return there for divorce, especially if they cannot dissolve the relationship at their domicile.³²⁴

Second, the *Windsor* majority’s language implicitly decenters domicile in determining the validity of same-sex marriages. The opinion could have made clear that its frequent references to “State” — as in “same-sex marriages made lawful by the State”³²⁵ — contemplate a spouse’s or a couple’s domicile. Justice Scalia pointedly called the uncertainty to the majority’s attention.³²⁶ Yet, the majority did nothing to clarify its meaning. Perhaps the Court assumed a domiciliary reference would be obvious, given the well-entrenched choice of law principle for marriage and other family matters. This reading would be consistent with the Court’s assertions in *Windsor* about how DOMA injures “the very class [that] New York seeks to protect,”³²⁷ how “DOMA singles out a class of persons deemed by a State entitled to

³²⁰ See Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1678-79 (2011) [hereinafter *Modernizing Divorce*].

³²¹ Karen Hartman, *Bound in a Gay Union by a State Denying It*, N.Y. TIMES (July 15, 2011), <http://www.nytimes.com/2011/07/17/nyregion/bound-in-a-gay-union-by-a-state-that-didnt-recognize-it.html>.

³²² Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1, 3 (2012).

³²³ See Joslin, *Modernizing Divorce*, *supra* note 320, at 1711-20.

³²⁴ See, e.g., D.C. CODE § 16-902 (2012) (allowing same-sex couples who married in the District of Columbia to return there for divorce if neither resides in a jurisdiction that will maintain an action for divorce); see also Tracy A. Thomas, *Gay Divorce*, 5 CALIF. L. REV. CIRC. 218, 219 (2014) (“A few marriage equality states . . . allow non-residents married in the state to return to divorce if their home state refuses to dissolve the marriage.”); cf. *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011) (permitting in Wyoming dissolution of couple’s same-sex marriage, celebrated in Canada, despite Wyoming’s restrictive definition of marriage).

³²⁵ *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013) (using the term “State” four times in the last paragraph of the majority’s opinion).

³²⁶ See *id.* at 2708 (quoting Justice Scalia’s dissent).

³²⁷ See *id.* at 2693.

recognition and protection,”³²⁸ and how the stakes include “[equal] dignity in the community.”³²⁹ Alternatively, one could easily read the ambiguity as a purposeful effort to leave open the possibility that the domicile might *not* be the *only* state whose family law should control a couple’s marital status for purposes of federal law.

Third, post-*Windsor*, the place of celebration is competing with the domicile as the touchstone for marriage validity, regardless of any strong public policy the domicile might have articulated. Specifically, the Obama administration, in its effort to extend marriage equality as widely as possible, has accepted the invitation offered by *Windsor*’s ambiguity. For those federal laws or programs that assign the definition or reference-state for marriage to the Executive Branch, we have begun to see regulations or rulings looking to the state of celebration, not just the domicile, for the U.S. Office of Personnel Management;³³⁰ the Office of Homeland Security, which has authority over certain matters of immigration;³³¹ the Department of Treasury and the Internal Revenue Service, with respect to federal taxation;³³² and the Department of Justice, with respect to federal court proceedings and in the federal criminal justice system.³³³ Whatever the burden of traveling to a more hospitable state,³³⁴ this state-of-celebration option makes federal recognition as “married” more

³²⁸ See *id.* at 2695.

³²⁹ See *id.* at 2692.

³³⁰ See ELAINE KAPLAN, U.S. OFFICE OF PERS. MGMT., MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: GUIDANCE ON THE EXTENSION OF BENEFITS TO MARRIED GAY AND LESBIAN FEDERAL EMPLOYEES, ANNUITANTS, AND THEIR FAMILIES (June 28, 2013), available at <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=5700>. Although some states initially contested the position of Secretary of Defense Chuck Hagel that gay spouses of National Guard members receive the same federal benefits as mixed-sex spouses, they subsequently complied with the federal policy. See Richard A. Oppel, Jr., *3 States End Resistance to Spousal Benefits Order*, N.Y. TIMES (Nov. 27, 2013), <http://www.nytimes.com/2013/11/28/us/3-states-end-resistance-to-spousal-benefits-order.html>.

³³¹ See DEP’T OF HOMELAND SEC., STATEMENT BY SECRETARY OF HOMELAND SECURITY JANET NAPOLITANO ON THE SUPREME COURT RULING ON THE DEFENSE OF MARRIAGE ACT (June 26, 2013), available at <http://www.dhs.gov/news/2013/06/26/statement-secretary-homeland-security-janet-napolitano-supreme-court-ruling-defense>.

³³² See Rev. Rul. 2013-17, 2013-38 I.R.B. 201; Press Release, U.S. Dep’t of Treasury, All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes (Aug. 29, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2153.aspx>.

³³³ See Matt Apuzzo, *More Federal Privileges Extend to Same-Sex Couples*, N.Y. TIMES (Feb. 8, 2014), <http://www.nytimes.com/2014/02/09/us/more-federal-privileges-to-extend-to-same-sex-couples.html>.

³³⁴ See Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 44-45 (2014).

accessible than an exclusive domicile-based rule. This emerging approach recalls the “rule of validation”³³⁵ or “rule of alternative reference”³³⁶ sometimes used in multistate contracts cases, under which a court applies the law of any connected jurisdiction that would uphold the agreement. Moreover, this approach tracks the general policy favoring marriage validity apparent in other types of cases.³³⁷

Finally, the preeminence of the domicile and its own public policy has diminished in the months after *Windsor*, with some lower courts deploying the Supreme Court’s reasoning to compel recognition of same-sex marriages validly celebrated out of state. For example, in the first of such cases,³³⁸ two men, Obergefell and Arthur, flew on a special medically equipped aircraft from their home in Ohio to Maryland to marry before Arthur would die of advanced amyotrophic lateral sclerosis.³³⁹ Despite Ohio’s clearly stated public policy against recognition of same-sex marriages, even those validly celebrated elsewhere, the federal district court ordered that, upon Arthur’s death, his death certificate must record his status as “married” and must name Obergefell as his “surviving spouse.”³⁴⁰ The court invoked *Windsor*’s antidiscrimination rhetoric to reason that Ohio could not constitutionally refuse to recognize out-of-state same-sex marriages, given that it recognizes underage marriages and first-cousin marriages celebrated in other states even though such marriages could not take

³³⁵ E.g., RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 469 n.89 (4th ed. 2001) (citing Brainerd Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the “Rule of Validation,”* 18 OKLA. L. REV. 243, 339 (1965)); Symeon C. Symeonides, *Oregon’s Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 215 (2007).

³³⁶ See, e.g., Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133, 1149 (2000) (providing an example of alternative reference rules that “protect a contract against formal invalidity”).

³³⁷ See, e.g., *Carabetta v. Carabetta*, 438 A.2d 109, 112 (Conn. 1980) (“[W]e conclude that the legislature’s failure expressly to characterize as void a marriage properly celebrated without a license means that such a marriage is not invalid.”); Grossman, *supra* note 63, at 435 (showing that states usually recognize marriages celebrated elsewhere based on comity).

³³⁸ See *Obergefell v. Kasich* (*Obergefell I*), No. 1:13-CV-501, 2013 WL 3814262, at *1 (S.D. Ohio, July 22, 2013) (opinion accompanying temporary restraining order); *Obergefell v. Wymyslo* (*Obergefell II*), 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013) (opinion accompanying declaratory judgment and permanent injunction).

³³⁹ *Obergefell II*, 962 F. Supp. 2d at 975-76.

³⁴⁰ *Obergefell I*, 2013 WL 3814262, at *7; see also *Obergefell II*, 962 F. Supp. 2d at 975-76; *Henry v. Himes*, Case No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio, Apr. 14, 2014) (applying analysis from earlier cases to hold that “Ohio’s marriage recognition bans are facially unconstitutional under any circumstances”).

place in Ohio. Other courts have embraced similar reasoning.³⁴¹ Although the opinions leave much unsaid,³⁴² in turn raising several questions that I explore elsewhere,³⁴³ suffice it to say that this approach limits the traditional authority of the domicile to use its own public policy to refuse to recognize an out-of-state marriage. Of course, some lower courts read *Windsor* to disallow a state from preventing the celebration of same-sex marriages locally,³⁴⁴ slicing even more deeply into the domicile's traditional authority.

These changes do not discard the concept of domicile altogether. Nonetheless, they illustrate in one specific context how we might reduce domicile's importance — either by making available an alternative or substitute, such as the place of celebration, or by weakening the domicile's traditional authority over local families through generous application of equality-based constraints.³⁴⁵

Accordingly, these developments, however positive, do not fully solve or eliminate the domicile problem that I have explored any more than same-sex marriage solves or eliminates family law's gender problem.³⁴⁶ Rather, we might think of these limited erosions of the

³⁴¹ See, e.g., *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn., Mar. 14, 2014) (citing *Windsor*'s antidiscrimination rhetoric when granting a preliminary injunction prohibiting the enforcement of Tennessee's anti-recognition law); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *21-24 (W.D. Tex., Feb. 26, 2014) (relying on *Windsor*'s reasoning when granting a preliminary injunction prohibiting the enforcement of Texas' anti-same-sex marriage and anti-recognition laws); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *6-7 (W.D. Ky., Feb. 12, 2014) (finding that Kentucky's anti-recognition laws are unconstitutional under *Windsor*).

³⁴² See William Baude, *Interstate Recognition of Same-Sex Marriage After Windsor*, 8 N.Y.U. J.L. & LIBERTY 150, 157 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327634 (stating that "*Windsor* cannot do all of the work" necessary for requiring interstate recognition of same-sex marriage).

³⁴³ See Appleton, *Domicile and Inequality*, *supra* note 110.

³⁴⁴ See, e.g., *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978 (E.D. Va., Feb. 13, 2014) (holding unconstitutional Virginia's ban on same-sex marriage); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (holding unconstitutional Oklahoma's ban on same-sex marriage); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (holding unconstitutional Utah's ban on same-sex marriage), *stayed*, 134 S. Ct. 893 (2014).

³⁴⁵ For the classic example of this limitation on the domicile's authority to prohibit certain marriages, see *Loving v. Virginia*, 388 U.S. 1 (1967), invalidating Virginia's anti-miscegenation law. See also *Kitchen*, 961 F. Supp. 2d at 1216 (holding unconstitutional Utah's ban on same-sex marriage).

³⁴⁶ See, e.g., Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549 (1993) (rejecting arguments that same-sex marriage will transform marriage because the "underlying critique of the institution

domicile's authority either as "canaries in the coal mine" that alert us to difficulties we might have missed³⁴⁷ or as harbingers of larger changes to come. These developments not only help make the case for rethinking domicile more broadly; they also show that family law's reliance on domicile is not inevitable.

B. *Beyond Domicile: Three Thought Experiments*

Developments in the jurisprudence of same-sex marriage inspire a search for bolder and more thoroughgoing ways to unseat domicile as a foundational construct in family law. If domicile, as we know it, has become an anachronistic misfit, what sort of responses might bring this element of family law in line with other changes in the field? Redefining domicile offers one route for reform. Developing some other method(s) of analysis offers another. Both pose challenges stemming, in part, from the wide range of work that domicile performs, even when it comes to choice of law in family matters.³⁴⁸ Moreover, some family law cases feature two willing parties (such as bilateral divorces);³⁴⁹ others pit individual family members against each other (such as some parentage controversies);³⁵⁰ and still others stem from actions involving third parties or the state (such as suits to collect child support³⁵¹ or to obtain recognition of a marriage

. . . becomes not only secondary but marginalized, even silenced"); Rosenbury, *Work Wives*, *supra* note 281, at 372-82 (tracing persistence of traditional gender and marital roles even outside the family).

³⁴⁷ Cf. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2002) (using the analogy of the miner's canary to assert that the distress experienced by the racially marginalized reveals dangers to all).

³⁴⁸ See Cavers, *supra* note 38, at 480-81 (noting the critique of domicile as a "unitary concept," given the various uses of the construct).

³⁴⁹ E.g., *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (disallowing collateral attack for want of jurisdiction in divorce in which both spouses participated).

³⁵⁰ E.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (resolving a parentage dispute between biological father and mother's husband); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (adjudicating parentage in a contest between "gestational surrogate" and intended-genetic parents); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012) (adjudicating parentage in a custody dispute between two former same-sex partners when only one had adopted the child).

³⁵¹ E.g., *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (determining parentage of mother's former partner so that the county may collect child support from her); *In re Paternity of M.F.*, 938 N.E.2d 1256 (Ind. Ct. App. 2010) (recognizing sperm donor as legal father of one of two children in suit by prosecutor to impose child support).

celebrated elsewhere³⁵²). Bracketing such complications, however, consider the following possibilities, each providing a kernel for a vision of family law that leaves behind domicile as we know it.

1. A Functional Approach

We can begin the thought experiments on well-trodden ground, with those constructs that have already been designed or promoted in partial response to particular problematic aspects of domicile. These include formulations like “habitual residence,” used in several international conventions, such as the Hague Convention on the Civil Aspects of International Child Abduction,³⁵³ and in certain law reform initiatives, such as the ALI’s Complex Litigation project,³⁵⁴ as well as “home state,” used in the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act.³⁵⁵ Although offering several advantages over domicile, these alternatives have downsides, too.

In one advantage, habitual residence and home state purport to be less formal and more functional than domicile, emphasizing time spent instead of intent to remain.³⁵⁶ As such, they comport with family law’s more general turn from formalities to functional tests for relationship recognition.³⁵⁷ Further, a functional approach might allow more room to recognize the “reality of family life,”³⁵⁸ including changing gender roles in and outside the home.³⁵⁹

Despite this strength, habitual residence has failed to supersede domicile in American family law in part because definitions of the term have remained imprecise,³⁶⁰ perhaps purposely so to enhance flexibility.³⁶¹ Accordingly, one authority explains habitual residence as

³⁵² See *supra* notes 338-341 (citing cases that exemplify this situation).

³⁵³ See Hague Convention on the Civil Aspects of International Child Abduction art. 3, Oct. 25, 1980, T.I.A.S. No. 11,670.

³⁵⁴ See COMPLEX LITIGATION: STATE RECOMMENDATIONS AND ANALYSIS § 6(c)(3) (1994).

³⁵⁵ See 28 U.S.C. § 1738A(a), (b)(4) (2012); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 102(7) (1997).

³⁵⁶ See *supra* notes 46-50 and accompanying text.

³⁵⁷ See *supra* notes 204-209 and accompanying text.

³⁵⁸ *Braschi v. Stahl*, 543 N.E.2d 49, 53 (N.Y. 1989) (stating that family-protective policies, here rent control, “should find [their] foundation in the reality of family life”).

³⁵⁹ See *supra* notes 189-195 and accompanying text.

³⁶⁰ See, e.g., Silberman, *supra* note 49, at 1064 (demonstrating uncertainties in the definition of “habitual residence”).

³⁶¹ See, e.g., RANDAL S. BLOCH & GARY J. GOTTFRIED, BALDWIN’S OHIO PRACTICE, OHIO

a construct that “[lies] midway between domicile and residence . . . [and] differs from ordinary residence in its quality of continuity for a substantial period, and from domicile in its lack of the need for permanence.”³⁶² Yet, another expressly rejects this notion of “a half-way house between domicile and residence,” preferring to see habitual residence instead as “an apt connection between a person and a territory that is distinct from the notion of legal headquarters.”³⁶³ With such different readings, it should come as no surprise that courts in the United States have failed to coalesce around a consistent understanding of “habitual residence,” with some of them imposing the traditional requirements of domicile.³⁶⁴ By contrast, “home state” has a more precise definition, requiring a six-month period in most cases,³⁶⁵ but such precision comes at the cost of flexibility, as some cases illustrate.³⁶⁶

As a second advantage, these constructs permit departures from the compulsory monogamy that domicile has required,³⁶⁷ with some authorities interpreting “habitual residence” to permit a person to have none or more than one at any given time.³⁶⁸ The recognition of

DOMESTIC RELATIONS LAW § 17.67 (4th ed. 2013) (“The Hague conference use of the phrase ‘habitual residence’ was intentionally not defined by the Convention in order to avoid the problem of ‘domicile’ as that term may have been defined and interpreted by each contracting state.”).

³⁶² RONALD HENRY GRAVESON, CONFLICT OF LAWS: PRIVATE INTERNATIONAL LAW 196 (6th ed. 1969). He goes on to opine that habitual residence “appears to be the most appropriate available concept to meet the demands of a fluid, modern society.” *Id.* at 197.

³⁶³ Cavers, *supra* note 38, at 483. Authorities are split on how to classify a determination of habitual residence, with most American jurisdictions treating it as a mixed question of law and fact. *Valenzuela v. Michel*, 736 F.3d 1173, 1176 (9th Cir. 2013).

³⁶⁴ See Silberman, *supra* note 49, at 1064-68; see also Tai Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3343 (2009).

³⁶⁵ See 28 U.S.C. § 1738A(b)(4) (2012); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 102(7) (1997).

³⁶⁶ See, e.g., *Welch-Doden v. Roberts*, 42 P.3d 1166, 1174 (Ariz. Ct. App. 2002) (noting how the facts of the particular case require modifying the meaning of “home state” to avoid defeating one of the statute’s purposes).

³⁶⁷ See Cavers, *supra* note 38, at 380. Custody jurisdiction, for example, can rest on several bases, but the statutes attempt to prioritize the alternatives. See 28 U.S.C. § 1738A; UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT.

³⁶⁸ Cavers, *supra* note 38, at 483; see, e.g., *Valenzuela*, 736 F.3d at 1179 (Reinhardt, J., concurring) (calling for more thorough consideration of “the questions of ‘shuttle custody’ and ‘dual habitual residence’”); *Delvoye v. Lee*, 329 F.3d 330, 333 (3d Cir. 2003) (noting how, for some children, “no habitual residence may ever come into existence”).

dual citizenship provides a model for the latter.³⁶⁹ Yet, both “habitual residence” and “home state” might be read to assume a separate sphere of residential or domestic life, thus potentially bringing with them some of domicile’s gendered baggage and suggesting an exceptional reference point for matters of family law.

Accordingly, instead of these formulations, we might find even more promising the approach of the Uniform Adoption Act, albeit enacted only in Vermont, which makes the place where the adopters or child “lived” the preferred jurisdictional base (and source of applicable law).³⁷⁰ “Lived” might refer to a residential site — or a more transient

³⁶⁹ See generally Persad, *supra* note 76 (comparing marriage law with citizenship law).

³⁷⁰ UNIF. ADOPTION ACT § 3-101 (1994):

Section 3-101. Jurisdiction.

(a) Except as otherwise provided in subsections (b) and (c), a court of this State has jurisdiction over a proceeding for the adoption of a minor commenced under this [Act] if:

(1) immediately before commencement of the proceeding, the minor lived in this State with a parent, a guardian, a prospective adoptive parent, or another person acting as parent, for at least six consecutive months, excluding periods of temporary absence, or, in the case of a minor under six months of age, lived in this State from soon after birth with any of those individuals and there is available in this State substantial evidence concerning the minor’s present or future care;

(2) immediately before commencement of the proceeding, the prospective adoptive parent lived in this State for at least six consecutive months, excluding periods of temporary absence, and there is available in this State substantial evidence concerning the minor’s present or future care;

(3) the agency that placed the minor for adoption is located in this State and it is in the best interest of the minor that a court of this State assume jurisdiction because:

(i) the minor and the minor’s parents, or the minor and the prospective adoptive parent, have a significant connection with this State; and

(ii) there is available in this State substantial evidence concerning the minor’s present or future care;

(4) the minor and the prospective adoptive parent are physically present in this State and the minor has been abandoned or it is necessary in an emergency to protect the minor because the minor has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

(5) it appears that no other State would have jurisdiction under prerequisites substantially in accordance with paragraphs (1)

and less domestic and gendered affiliation. Thus, for example, perhaps one could be governed by the family law in one's state of employment (where one "lives" during working hours) if more favorable than the regime across the border in the state where one has his home, residence, or domicile.³⁷¹ Going still further, some family or juvenile courts assert jurisdiction over minors "found" within the county, treating temporary physical presence as a sufficient connection to exercise authority over their family situations.³⁷²

through (4), or another State has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to hear a petition for adoption of the minor, and it is in the best interest of the minor that a court of this State assume jurisdiction.

(b) A court of this State may not exercise jurisdiction over a proceeding for adoption of a minor if at the time the petition for adoption is filed a proceeding concerning the custody or adoption of the minor is pending in a court of another State exercising jurisdiction substantially in conformity with [the Uniform Child Custody Jurisdiction Act] or this [Act] unless the proceeding is stayed by the court of the other State.

(c) If a court of another State has issued a decree or order concerning the custody of a minor who may be the subject of a proceeding for adoption in this State, a court of this State may not exercise jurisdiction over a proceeding for adoption of the minor unless:

(1) the court of this State finds that the court of the State which issued the decree or order:

(i) does not have continuing jurisdiction to modify the decree or order under jurisdictional prerequisites substantially in accordance with [the Uniform Child Custody Jurisdiction Act] or has declined to assume jurisdiction to modify the decree or order; or

(ii) does not have jurisdiction over a proceeding for adoption substantially in conformity with subsection (a)(1) through (4) or has declined to assume jurisdiction over a proceeding for adoption; and

(2) the court of this State has jurisdiction over the proceeding.

³⁷¹ See, e.g., Kirk Johnson, *Gay Couples Face a Mixed Geography of Marriage*, N.Y. TIMES (Feb. 26, 2013), <http://www.nytimes.com/2013/02/27/us/state-laws-on-gay-marriage-lead-to-disparities.html> (telling the story of Henry D. Johnston, who resides with his male partner in Idaho, which does not permit same-sex marriage, but works in nearby Washington, which does).

³⁷² See, e.g., *Gann v. C.E.W. (In re interest of T.B.)*, 936 S.W.2d 913 (Mo. Ct. App. 1997) (upholding jurisdiction when the child was "found" within the county); cf. *Burnham v. Superior Ct.*, 495 U.S. 604 (1990) (upholding assertion of personal jurisdiction based on service during defendant's transient presence in the state).

Permitting such multiplicity captures the complexities of modern family life better than a rigid, exclusive, home-bound requirement like domicile, despite the preference for simple and certain jurisdictional rules³⁷³ (and simple and certain choice of law references). Multiplicity need not produce chaos, however, despite the problems that plagued child custody adjudication in the earlier concurrent-jurisdiction era.³⁷⁴ Under the Uniform Adoption Act, for example, jurisdictional competition that might arise from the multiple possibilities is to be resolved by a first in time principle — deference to a matter already pending elsewhere.³⁷⁵ This solution could address competition under other expansive approaches, too.

A first in time principle vests the decision in the hands of the party who files first. As a result, it readily suggests a different path for domicile reform: entrusting the selection of the governing regime to the family members themselves, that is, deferring to party choice.

2. Party Choice

Party autonomy or choice of the governing regime for one's family life, regardless of one's present home, stands out as an attractive replacement for domicile because it embodies the autonomy, private ordering, and respect for pluralism routinely touted in family law today.³⁷⁶ This approach would also resonate with the enduring notion that marriage is a contract even if it is also something more.³⁷⁷ Indeed, even under domicile's sway, families and family members may freely select the governing regime by "voting with their feet," namely moving to a different state and making their home there.³⁷⁸ The thought experiment here considers whether — in the name of autonomy,

³⁷³ See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (noting the desirability of easily ascertainable and simple jurisdictional rules, which promote predictability).

³⁷⁴ The case typically cited for the concurrent-jurisdiction approach to child custody is *Sampsel v. Superior Ct.*, 197 P.2d 739 (Cal. 1948). The resulting problems, including removal of the child to another state and inconsistent decrees, prompted legislative reform at both the state and federal levels. See generally, e.g., Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 *FAM. L.Q.* 267 (1998).

³⁷⁵ UNIF. ADOPTION ACT § 3-101; see Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 *CALIF. L. REV.* 703, 751 (1996).

³⁷⁶ See *supra* notes 182-188 and accompanying text.

³⁷⁷ See *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888).

³⁷⁸ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 503-04 (1999) (recognizing the constitutional right to establish a new domicile).

private ordering, and pluralism — the chosen state could be untethered from the home.

Consistent with this possibility, “delocalization” is said to be on the rise in some European countries.³⁷⁹ Accordingly, parties may choose the law applicable to their divorce.³⁸⁰ The available choices (under the Rome III regulation) include the law of: the common habitual residence at the time of choice, the last common habitual residence if one spouse still lives there, the nationality of either spouse at the time of the choice, or the forum.³⁸¹ Although several of these options rest on a notion of home, not all do so, eliminating one of the difficulties of domicile that I have identified. Moreover, the multiplicity avoids the problems posed by domicile’s insistence on exclusivity or monogamy.

We can find several examples of such party autonomy applied to family matters in this country: First, surrogacy arrangements often include choice of law clauses, which courts will enforce, notwithstanding manipulated contacts with the selected state and strong anti-surrogacy policies in the gestational carrier’s domicile, designed to protect her from exploitation.³⁸² In one notable case, a Connecticut couple engaged a New York woman to gestate their genetic child and included a choice of law clause in their agreement specifying the application of Massachusetts’s surrogacy-friendly determinations of parentage, which allow the names of the genetic and intended parents to appear on the birth certificate even if another woman gives birth.³⁸³ The Massachusetts court upheld the application of Massachusetts law, given that the birth took place there, as planned, even though New York prohibits surrogacy.³⁸⁴ Second, the emerging

³⁷⁹ See, e.g., 17 I.L.M. 1 (1978) (showing international arbitration agreement with choice of law and choice of forum clauses). *But see* Daimler AG v. Bauman, 134 S. Ct. 746, 760-61 (2014) (noting limited bases for adjudicatory jurisdiction over corporations in the European Union).

³⁸⁰ See Press Release 327, Council of the European Union, Divorce and Legal Separation (Dec. 3, 2010), available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/118195.pdf; Thalia Kruger, *Rome III and Parties’ Choice I* (Nat’l Research Found. of S. Afr., Nov. 10, 2012), available at <http://ssrn.com/abstract=2173334> or <http://dx.doi.org/10.2139/ssrn.2173334>.

³⁸¹ See Press Release 327, *supra* note 380.

³⁸² See, e.g., *Hodas v. Morin*, 814 N.E.2d 320 (2004) (giving effect to the choice of law provision); *In re Paternity & Custody of Baby Boy A.*, No. A07-452, 2007 WL 4304448 (Minn. Ct. App. Dec. 11, 2007) (enforcing the gestational-surrogacy agreement’s choice of law provision).

³⁸³ See *Hodas*, 814 N.E.2d at 323.

³⁸⁴ See *id.* at 325-26. The court relied on section 187 of the Restatement Second, which governs contracts in which the parties have designated the law that they wish

approach to same-sex marriage, in which the law of the state of celebration effectively controls the validity of the marriage and provides jurisdiction for divorce,³⁸⁵ entails a form of party autonomy. To operationalize this approach more broadly, a reference to the state of residence could provide the default rule, with both same-sex and mixed-sex parties permitted to opt out (say, at the time of the marriage or later) by selecting the law of another state.³⁸⁶

The prospect of using party autonomy in place of domicile necessarily prompts questions about appropriate limits, if any, on available choices. Should families and family members have free rein? Must both spouses make the same choice? What measures, if any, should curb forum shopping? To what extent should the availability of a state's law entail a quid pro quo, in the form of significant affiliation with or obligation to the governmental unit in question?

In the United States, principles of Due Process and Full Faith and Credit impose modest constraints on choice of law, disallowing the application of the law of a state that has no connection to the case, based on considerations of fairness and sovereignty.³⁸⁷ A similar requirement for some meaningful connection between the case and the chosen law appears as well in the Restatement Second's treatment of party autonomy.³⁸⁸ In the Massachusetts surrogacy case, which relied on the Restatement Second, the court found that Massachusetts had a sufficiently substantial connection to support the application of its law, based on the agreement that the birth would occur in Massachusetts and that a Massachusetts birth certificate would issue, "bolstered by the gestational carrier's receipt of prenatal care at a

to govern. *See id.* at 323-24; *cf.* Anemona Hartocollis, *And Surrogacy Makes 3: In New York, a Push for Compensated Surrogacy*, N.Y. TIMES (Feb. 19, 2014), http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?_r=0 (reporting efforts to reform New York's restrictive law).

³⁸⁵ *See supra* notes 319-344 and accompanying text.

³⁸⁶ *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 32 (2000) (explaining use of a similar approach, a default rule with an opportunity for the parties to opt out, in the *Principles'* treatment of nonmarital cohabitants). Alternatively, for those families created by formal means, law could require an agreement, including a choice of law clause. *See* Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 399 (1992) (proposing a legal requirement of premarital agreements, "compelling marrying parties to determine the economic consequences of their own divorce").

³⁸⁷ *See, e.g.*, *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985) (applying the constitutional principles to limit choice of law); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion) (same).

³⁸⁸ *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971).

Massachusetts hospital in anticipation of delivery at that hospital.”³⁸⁹ The place of celebration, even for a “destination wedding,”³⁹⁰ provides a sufficient link for marriage validity, although this basis for choice of law is easily manipulated and has not been challenged for constitutional sufficiency. How slight and attenuated such connections to the chosen state might become without creating constitutional problems would present an open question for family matters, but that would be nothing new. The same open question has long lurked outside the family law context.³⁹¹

The ideology of choice has helped diminish family law’s reliance on traditional gender norms, by supporting reproductive freedom³⁹² and the rejection of stereotypes that confine men and women to predetermined roles.³⁹³ Similarly, a choice-based alternative to domicile should offer a more gender-free reference for identifying the governing family regime. Yet, freedom of choice itself raises gender issues because it does nothing to disrupt the cultural and structural inequalities that continue to disadvantage women in our society.³⁹⁴ Put differently, a choice-based approach evokes all the concerns associated with purely negative rights in the private sphere.³⁹⁵

Hence, the search for a domicile replacement might productively move from the private sphere of the family to the public sphere, the world of business and commerce.

3. A Corporations Analogy

Family law could look to corporate and business law in rethinking domicile and its role. We have several cornerstones on which to build. First, the state plays an active role in the creation of corporations and other business entities, just as it does with marriages and legally

³⁸⁹ *Hodas*, 814 N.E.2d at 325.

³⁹⁰ See Appleton, *Domicile and Inequality*, *supra* note 110.

³⁹¹ See Robert H. Jackson, *Full Faith and Credit — The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945).

³⁹² See, e.g., SELF, *supra* note 90, at 135-37 (tracing emergence of “choice” formulation in abortion activism).

³⁹³ See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (showing how stereotypes may lead to subtle discrimination uneasily detected).

³⁹⁴ See *supra* notes 170-173 and accompanying text. See generally, e.g., FINEMAN, *AUTONOMY MYTH*, *supra* note 166 (examining ideological underpinnings of dominant societal constructs and the corresponding limits on equality).

³⁹⁵ See, e.g., SELF, *supra* note 90, at 11-12 (explaining how privacy and negative rights disproportionately benefit those with resources and power).

recognized families.³⁹⁶ Perhaps for this reason, the Supreme Court has occasionally compared certain kinds of business associations to marriages for choice of law purposes.³⁹⁷ Second, in analyzing substantive aspects of family law, scholars have developed useful analogies between families and business entities — including corporations,³⁹⁸ limited liability corporations,³⁹⁹ and partnerships.⁴⁰⁰ Last, and perhaps most provocative, are the insights that emerge from recent divisions on the Supreme Court about where a corporation should be deemed “at home.”⁴⁰¹

This model is attractive because jurisdiction and choice of law have typically displayed more flexibility and multiplicity for business entities than for marriages and families. Significantly, the “minimum contacts” standard for jurisdiction over litigation connected to the forum (specific jurisdiction⁴⁰²), which loosened traditional constraints based on power and sovereignty, grew out of a case against a corporate defendant.⁴⁰³ Indeed, this departure from old jurisdictional doctrine developed at the same time that the Court undertook to modernize divorce jurisdiction too,⁴⁰⁴ a project that stalled because of divisions on the Court.⁴⁰⁵ True, the minimum contacts standard now provides the jurisdictional test for some family law matters,⁴⁰⁶ and recent rulings portend a narrowing of this standard for corporations.⁴⁰⁷ Still,

³⁹⁶ See sources cited *supra* note 69 and accompanying text.

³⁹⁷ See *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 606 (1947).

³⁹⁸ See *Case, Marriage Licenses*, *supra* note 186, at 1778-82; Larry E. Ribstein, *Incorporating the Hendrickses*, 35 WASH. U. J.L. & POL'Y 273, 287 (2011); Teemu Ruskola, *Home Economics: What Is the Difference Between a Family and a Corporation?*, in *RETHINKING COMMODIFICATION* 324, 324-25 (Martha M. Ertman & Joan C. Williams eds., 2005).

³⁹⁹ See Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 123-31 (2001).

⁴⁰⁰ See Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 355 (2007).

⁴⁰¹ Compare *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), with *id.* at 769 (Sotomayor, J., dissenting). See also *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853-54 (2011).

⁴⁰² See *Daimler*, 134 S. Ct. at 754.

⁴⁰³ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁴⁰⁴ See *Williams v. North Carolina*, 317 U.S. 287, 297-302 (1942).

⁴⁰⁵ See *Williams v. North Carolina*, 325 U.S. 226, 239 (1945); *Estin*, *supra* note 71, at 420-28.

⁴⁰⁶ See *Kulko v. Superior Court*, 436 U.S. 84, 101 (1978) (holding that the defendant-father lacked sufficient contacts with California to confer jurisdiction over child support litigation there).

⁴⁰⁷ See *J. McIntyre Machinery v. Nicastro*, 131 U.S. 2780, 2791 (2011) (plurality

the corporate analogy has much to offer as a point of departure for a thought experiment.

In a pair of recent cases, a majority of the Court explains the criteria for general jurisdiction over a corporate defendant (jurisdiction to adjudicate a cause of action that does not arise in or relate to the forum⁴⁰⁸) by explicitly invoking domicile: “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”⁴⁰⁹ The Court goes on to say, however, that the counterpart paradigm for corporations includes *both* the principal place of business *and* place of incorporation.⁴¹⁰ In addition to providing a basis for general jurisdiction, each of these affiliations easily supports the application of the relevant state’s law in many situations, and each operates as a routine consideration in the choice of law process.⁴¹¹

Although Justice Ginsburg’s opinion for the Court calls these connections unique and commends their ease of application,⁴¹² for many corporations the analysis yields at least two places to be “at home.” Indeed, the majority asserts that the principal place of business and place of incorporation do not exhaust all the possibilities,⁴¹³ and Justice Sotomayor’s dissenting opinion in one of the cases would recognize many additional options that could meet the “at home” standard.⁴¹⁴ Further, Justice Sotomayor eschews the implication of the majority opinion that, to be “at home,” a corporation must have exceptional affiliations with a state compared to its ties elsewhere.⁴¹⁵

opinion) (holding, by a divided Court with no majority opinion, that a New Jersey worker could not sue a foreign manufacturer there for an injury caused there by the manufacturer’s product because the manufacturer did not purposely target New Jersey, as required for minimum contacts).

⁴⁰⁸ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014).

⁴⁰⁹ *Id.* at 760 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853-54 (2011)).

⁴¹⁰ *Id.*; see also John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court’s Decisions in Goodyear Dunlop and Nicaastro*, 90 WASH. U. L. REV. 1707, 1725 (2013) (theorizing reasons for constraints on general jurisdiction).

⁴¹¹ See *supra* note 54 (quoting from Restatement Second).

⁴¹² *Daimler*, 134 S. Ct. at 760.

⁴¹³ See *id.* (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”); see also *id.* at 761 n.19.

⁴¹⁴ See *id.* at 769 & n.8 (Sotomayor, J., dissenting).

⁴¹⁵ *Id.* at 770 & n.9; *cf. id.* at 762 n.20 (majority opinion) (“A corporation that operates in many places can scarcely be deemed at home in all of them.”).

While the Court's analysis borrows the concepts of domicile and home for application in the corporate realm, my thought experiment reverses direction, asking what it would mean to invoke these metaphorical uses and send them from corporate law back to family law. The words remain the same, but a corporate starting point changes the meaning of "domicile" and "home." Instead of leaving home (and domicile), then, this thought experiment explores the possibility for transforming how we understand these ideas.

For example, might domicile drop some of its gendered baggage if the place of incorporation and principal place of business, firmly rooted in the public sphere, became paradigmatic references for "at home"? Would those who make law and policy be able to see more clearly, and hence value, the labor and productivity that take place in the family? And, although I find Justice Sotomayor's version of the "home" metaphor especially intriguing because of the multiplicity it contemplates, even Justice Ginsburg's more restrictive test does away with domiciliary monogamy by acknowledging at least two places where a corporation might be at home.

Pursuing the analogy, even if the "principal place of family business" is one family member's residential dwelling — though I contend it will not always be — the "state of family incorporation" might well be different, for example, the place where the marriage is celebrated or the family is created, whether formally or functionally. As noted earlier, an approach along these lines, allowing the place of family formation to exercise divorce jurisdiction and apply its divorce law, has begun to emerge for same-sex spouses whose domiciles will not dissolve their marriages (because they do not recognize them)⁴¹⁶ and in the new-found emphasis on the place of celebration in determining marital status for purposes of federal law.⁴¹⁷

While the dominance of domicile in family law has both promoted state control and limited choice, principles of corporate law like the "internal affairs doctrine" seek to enhance choice and encourage competition within the "law market."⁴¹⁸ Under this doctrine, the law of the state of incorporation governs the relationships inter se of the principal actors, namely the corporation, directors, officers, and shareholders.⁴¹⁹ As a result of its responsiveness to corporate needs,

⁴¹⁶ See *supra* notes 321-324 and accompanying text.

⁴¹⁷ See *supra* notes 330-334.

⁴¹⁸ See, e.g., ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 79 (2009) (describing shopping in the "law market").

⁴¹⁹ See Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480, 1480 (2002). Like

Delaware has emerged as a market leader,⁴²⁰ just as — for example — same-sex marriage states have become a site for destination weddings,⁴²¹ facilitating choice and supporting pluralism.

The corporate model offers yet another advantage over the conventional approach to family law. Whether based on formalities (like marriage celebration or adoption) or behavior (under a functional approach), family formation has almost always required physical presence, with a few exceptions for proxy marriages.⁴²² Establishing a corporation does not. Recently, Adam Candeub and Mae Kuykendall have challenged the assumptions for family formation, invoking the corporations analogy explicitly and proposing to allow participants to celebrate their marriage from a distance, using videoconferencing, telephones, or the internet.⁴²³ Although they do not claim that the parties' domicile must recognize such marriages, they theorize that the resulting competition will spur a "race to the top,"⁴²⁴ which will improve marriage-entry laws, provide emotional even if not legal benefits, and (anticipating *Windsor's* outcome and consequences⁴²⁵) supply a basis for federal marriage-linked benefits

domicile in family law, the internal affairs doctrine in corporate law is taken for granted and seems natural. See Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 33, 35 (2006).

⁴²⁰ See O'HARA & RIBSTEIN, *supra* note 418, at 118.

⁴²¹ See Appleton, *Domicile and Inequality*, *supra* note 110.; see also M.V. Lee Badgett et al., *The Impact on Maryland's Budget of Allowing Same-Sex Couples to Marry*, 7 U. MD. L.J. RACE, RELIGIONS, GENDER & CLASS 295, 327-32 (2007); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 748 (1995).

⁴²² Several states allow one prospective spouse to participate from a distance via the practice of proxy marriages. CAL. FAM. CODE § 420(b) (2013); TEX. FAM. CODE § 2.203(b) (2013). See also *Tshiani v. Tshiani*, 81 A.3d 414 (Md. 2013) (recognizing, by comity, marriage validly celebrated in the Congo, although one spouse participated by telephone). Montana allows "double proxy" marriages (in which both spouses are represented by proxies) so long as one spouse is a member of the armed services or a resident, with the statutory definition of "residence" tracking the traditional criteria for domicile. MONT. CODE ANN. § 40-1-301 (2013); see also Scott Stump, *Double Proxy Wedding — Permission to Say "I Do": Military Couple Gets Married by Stand-Ins*, TODAY NEWS (Dec. 22, 2012), <http://www.today.com/news/permission-say-i-do-military-couple-gets-married-stand-ins-1C7717663>. But see 8 U.S.C. § 1101(a)(35) (2012) (for purposes of immigration law, "[t]he term 'spouse', 'wife', or 'husband' do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated").

⁴²³ See Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM. 735, 735 (2011).

⁴²⁴ *Id.* at 784-85.

⁴²⁵ See *supra* notes 325-334.

regardless of recognition at the domicile. The corporate analogy thus facilitates recognition of the multiple ways family members may interact in spaces beyond their domiciles.

CONCLUSION

Domicile, often invisible and long taken for granted, has always had flaws — including rigidity, artificiality, and gendered foundations. Contemporary developments in family law have made domicile all the more problematic, whatever the certainty and predictability it purports to promise.⁴²⁶ In particular, the ongoing application of federal constitutional principles to state family laws, exemplified today by marriage equality rulings, leaves domicile as a traditional reference point but one that is increasingly constrained.⁴²⁷

As family law continues to evolve — having provided new understandings of parentage, marriage, and family itself — we should not overlook domicile. This Article attempts to put domicile in the spotlight and, above all, to challenge its inevitability as a foundation of family law. My thought experiments, while neither recommendations nor roadmaps, demonstrate the possibility of imagining alternative constructs, in turn, inviting still newer conceptions and offering choices about whether, and how, to leave home.

⁴²⁶ Cf. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (making this point in the context of general jurisdiction over corporations); Stein, *supra* note 15, at 538 (same).

⁴²⁷ See *supra* notes 344-345 (citing cases).