

THE OLD BALL AND CHAIN:* THE CONSTITUTIONAL PROBLEM WITH MISSISSIPPI'S DIVORCE STATUTES

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* The phrase "old ball and chain" is a figurative expression that means a restriction or a burden, especially a financial one. See *Ball and Chain*, OXFORD ENG. DICTIONARY (Dec. 2024), https://www.oed.com/dictionary/ball-and-chain_n?tab=factsheet [<https://perma.cc/PB8D-24QP>]. The first incidence of the phrase "ball and chain" in connection with marriage is dated to 1854: "Wives . . . are less eager to enjoy their independence than to assert it. They do not cast off altogether the ball and chain of their matrimonial bonds but show themselves so restless that they keep their legal guardians in a state of constant suspicion and anxiety . . ." *Whom Shall We Marry?*, in 9 HARPER'S NEW MONTHLY MAGAZINE 765, 770 (1854).

** I would like to thank my family for their constant support while I wrote this article. I would also like to extend my gratitude to Professor Jade Craig, whose input helped clarify my clumsy arguments, and Professor Susan Duncan, whose Family Law class inspired the origins of the article. Finally, I dedicate this article to my second husband Andrew Wildman—I wouldn't want to do round two with anyone else.

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INTRODUCTION

No-fault divorce has been a central part of family law in the United States since its popularity and large-scale implementation in the 1970s. Mississippi¹ and South Dakota² are the only states that do not allow for unilateral divorce. Instead, fault-based divorces predominate Mississippi, a system most states abandoned in the twentieth century.³ Past scholarship on a constitutional right to divorce forms its arguments on the Due Process Clause of the Fourteenth Amendment. This Comment suggests that, considering the abrogation of privacy rights in the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,⁴ the right to freedom of association, rooted

¹ Deborah H. Bell, *The Cost of Fault Based Divorce*, 82 SUPRA 131, 142 (2013).

² Amended & Restated Judgment of Divorce at 26 n.19, *Gerty v. Gerty*, No. 2401:13-cv-2446-2 (Ch. Ct. June 8, 2017), Dkt. No. 45 (stating that Bell has since corrected this footnote to add South Dakota).

³ Bell, *supra* note 1, at 142 (citing a 2006 study that found that only five states, Arkansas, Delaware, Mississippi, New York, and Tennessee, had not adopted a unilateral divorce statute, whether through no-fault or after a period of separation). As of 2010, when New York adopted unilateral divorce, Mississippi and South Dakota remain the last to adopt unilateral no-fault divorce. See Mariel Padilla, *In Mississippi, Another Push to Ease Restrictions on Divorce*, 19TH NEWS (Feb. 23, 2022, at 06:00 CT), <https://19thnews.org/2022/02/divorce-mississippi-legislature-law/> [<https://perma.cc/VVT7-5ZDG>].

⁴ See generally *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (finding that the right to an abortion is not a protected liberty interest, thus

in the First Amendment, deserves a higher place in the argument for a constitutional right to divorce.

Legal scholars have argued for and against a constitutional right to divorce for the past two decades.⁵ Following the Supreme Court decision in *Obergefell v. Hodges*, the constitutional right to divorce argument found a doctrinal home in substantive Due Process.⁶ The many articles that followed the Court's 2015 decision advocated for a right to divorce on the foundation that the fundamental right to marriage creates an implied right to divorce under the Due Process Clause. Elizabeth Horowitz argues that under the Due Process Clause, there is a protected liberty interest in the right to form and break intimate relationships through marriage.⁷ Horowitz also argues that the fault-based divorce statutes are unduly burdensome on that right.⁸ Horowitz's argument is now much broader in its application, as at its publication, only seventeen states had adopted no-fault as the sole ground for divorce and twenty-eight had adopted a no-fault but still retained traditional fault grounds.⁹

Horowitz better articulates what Brian L. Frye and Maybell Romero argue—that some divorce statutes are unduly burdensome.¹⁰ Distinguished from this proposed paper, Horowitz provides a framework for this unconstitutionally burdened right in states that continue to have fault-based divorce schemes and a broader view, as opposed to a specific analysis of the constitutionality of fault-based divorce in Mississippi.¹¹

overturning the Court's early holdings in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

⁵ See, e.g., Elizabeth Horowitz, Comment, *The "Holey" Bonds of Matrimony: A Constitutional Challenge to Burdensome Divorce Laws*, 8 U. PA. J. CONST. L. 877 (2006); Tom Bosworth, *The Federal Constitutional Right to Divorce*, 14 J. CONTEMP. LEGAL ISSUES 103, 104-05 (2004) (asserting that there is no substantive fundamental right to divorce, only a procedural right to divorce seekers).

⁶ See Bosworth, *supra* note 5, at 103-04.

⁷ Horowitz, *supra* note 5, at 878-79.

⁸ *Id.* at 888.

⁹ See Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. RELS. 317, 322-23 (2002).

¹⁰ Compare Horowitz, *supra* note 5, at 882, with Brian L. Frye & Maybell Romero, *The Right to Unmarry: A Proposal*, 69 CLEV. ST. L. REV. 89, 102 (2020).

¹¹ See Horowitz, *supra* note 5, at 882.

Before the *Obergefell* decision, Professor Meg Penrose explored the constitutional right to divorce within the context of same-sex marriage.¹² Penrose bases her argument on substantive due process rights but with a particular look at full faith and credit clauses and their application across the States. Her analysis included those which had same-sex marriage and those which did not.¹³ This full-faith and credit analysis on the federal approach to family law issues is discussed in detail by Ann Estin, whose work serves as background information for this paper on federalism in family law.¹⁴ Penrose's argument for a fundamental right is based solely on the implied privacy rights established in *Roe*, *Casey*, *Griswold*, and *Loving*.¹⁵ The argument for the right to divorce as an implicit logical extension of the fundamental right to marriage remains unchanged in the wake of *Obergefell*.

After the Supreme Court held in *Obergefell* that marriage is a fundamental right, legal scholars naturally argued that the inverse implies divorce must also be a fundamental right.¹⁶ While the specific right to divorce has been argued for in international law,¹⁷ within American scholarship, Brian L. Frye and Maybell Romero argue for a "right to unmarry" based on due process in post-*Obergefell* scholarship.¹⁸

In their proposal, Frye and Romero base their legal argument for the right to divorce on the language of *Obergefell* and *Loving*, focusing on the principle that the government cannot burden the fundamental right to marry by preventing people from marrying the person of their choice.¹⁹ Thus, according to Frye and Romero, the government cannot similarly burden the choice of married individuals to uncouple from one another. This part of Frye and Romero's analysis is sound. Much of Penrose's argument rests on

¹² See generally Meg Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILL. L. REV. 169 (2013).

¹³ *Id.* at 177.

¹⁴ See generally Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381 (2007).

¹⁵ Penrose, *supra* note 12, at 172, 190-94.

¹⁶ Brian L. Frye & Maybell Romero, *The Right to Unmarry: A Proposal*, 69 CLEV. ST. L. REV. 89, 102 (2020).

¹⁷ See, e.g., Ram Rivlin, *The Right to Divorce: Its Direction, and Why It Matters*, 4 INT'L J. JURIS. FAM. 133 (2013).

¹⁸ Frye & Romero, *supra* note 16, at 99.

¹⁹ See *id.* at 98-99.

two landmark Due Process cases dealing with divorce, *Boddie v. Connecticut* and *Sosna v. Iowa*.²⁰ While the Supreme Court's jurisprudence has not addressed the specific question of the right to divorce, it has addressed the rights of parties to access the court to obtain a divorce.

In *Boddie v. Connecticut*, an impoverished married couple sought a divorce but could not pay for statutorily required litigation costs and fees to access the courts.²¹ In its decision, the Supreme Court drew on the long precedent which "establish[es] that a statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."²² Ultimately, the Court found the fees to access the courts, without some waiver for income-eligible parties, violated the Due Process Clause of the Fourteenth Amendment.²³ Specifically, the Court's decision hinged on the fact that because a marriage "cannot be dissolved except by 'due judicial proceedings,'" the financial hurdle effectively denied the parties access to the courts.²⁴

Frye and Romero's argument only engages with the argument of the "unburdened" right to divorce in a limited manner, focusing on the length of time divorces take to be finalized, and does not pinpoint a specific area of divorce law that burdens the individual's right, like what is discussed in *Boddie*.²⁵ However, a strict reading of *Boddie* clearly only establishes the due process right to divorce by access to the courts, not a speedy or unencumbered dissolving of the marriage bonds, as Penrose argues.²⁶

The Court's narrow application of a burdened right in *Boddie* is reflected in its decision in *Sosna v. Iowa*. In *Sosna*, a husband challenged Iowa's one-year residency requirement to obtain a divorce.²⁷ The Court agreed with the lower court that the

²⁰ Penrose, *supra* note 14, at 202-05.

²¹ *Boddie v. Connecticut*, 401 U.S. 371, 372 (1971).

²² *Id.* at 379.

²³ *See id.* at 374.

²⁴ *Id.* at 381 n.8 (quoting *Jeffreys v. Jeffreys*, 296 N.Y.S.2d 74, 87 (1968)).

²⁵ Frye & Romero, *supra* note 18, at 102-03.

²⁶ Penrose, *supra* note 14, at 203-04.

²⁷ *Sosna v. Iowa*, 419 U.S. 393, 405 (1975).

residency requirement did not violate the petitioner's equal protection or due process rights because the petitioner was not foreclosed from getting a divorce.²⁸ The Court determined that the one-year residency requirement did not create the same barrier as in *Boddie*, since the petitioner could access the divorce process after meeting the requirement.²⁹ On the equal protection argument, the Court found there was no equal protection violation based on residency, as once the requirement was met, the petitioner would have the same opportunity as Iowa residents who similarly sought a divorce.³⁰

In light of the nation's swing to extreme conservatism, especially in regards to gender and sexuality,³¹ what was once a fringe movement by the far right to abolish or roll back no-fault divorce has now entered the mainstream through politics, most notably through Vice President JD Vance.³² While on its face this appears to be an unpopular initiative, the far right's attacks on rights, especially those that disproportionately impact women, makes the right to divorce worth discussing.³³ This Comment explores the right to divorce, the history of divorce in American society, and the impact of no-fault divorce on American families by exploring Mississippi's divorce statute. The primary argument is that fault-based divorce is unconstitutional because (1) it deprives individuals of the right to associate and disassociate within

²⁸ *Id.* at 410.

²⁹ *Id.*

³⁰ *Id.* at 406-10.

³¹ See, e.g., Michaela Millender, *The Exploitation of Gender and Masculinities on the Far-Right*, INT'L PEACE INST.: GLOB. OBSERVATORY (Oct. 25, 2023), <https://theglobalobservatory.org/2023/10/the-exploitation-of-gender-and-masculinities-on-the-far-right/> [<https://perma.cc/8WLP-TC6S>].

³² See, e.g., Emily Wax-Thibodeaux, *The Issues of No-Fault Divorce, A Target of JD Vance and Conservatives*, WASH. POST (Aug. 4, 2024), <https://www.washingtonpost.com/nation/2024/08/04/no-fault-divorce-jd-vance-women/> [<https://perma.cc/9QT8-PMDR>]; Chloe Nazra Lee, *Will Divorce Be the Next GOP Target Against Women?*, MS. MAG. (July 15, 2024), <https://msmagazine.com/2024/07/15/jd-vance-republicans-divorce/> [<https://perma.cc/NM4A-KQP6>].

³³ See Kimberlee Kruesi, *Repealing No-Fault Divorce Has So Far Stalled Across the US. Some Worry That'll Change Under Trump*, ASSOC. PRESS (Nov. 26, 2024, at 10:03 CT), <https://apnews.com/article/divorce-nofault-repeal-republican-states-40d6c51bd26b7d8c6a2d4969b21d4b53> [<https://perma.cc/3L3P-ZWRN>] (noting that Republican Party platforms in Texas and Nebraska called for the removal of no-fault divorce in 2022 with Republicans in South Carolina, Oklahoma, and South Dakota introducing various ends to no-fault divorce that stalled in committees).

marriage, and (2) it functionally deprives individuals of their due process rights. Additionally, when the fault-based divorce system is only accompanied by irreconcilable differences divorce, which *requires* mutual consent, this intractable divorce system creates a barrier to accessing a divorce.

Part I provides a background on the development of divorce in U.S. history and the current state of Mississippi divorce law. It also uses two real cases that illustrate the reality of divorce in Mississippi. Part II discusses recent Supreme Court decisions that have acknowledged the fundamental right to marriage on the one hand and, on the other, revoked a previously held fundamental right based on the right to privacy. Part III presents the scholarship that discusses a fundamental right to divorce under the Due Process and Equal Protection Clause. Part IV looks at these arguments and suggests that the decision in *Dobbs* necessitates challenging the Mississippi divorce statute on First Amendment grounds.

I. FIRST COMES MARRIAGE, THEN DIVORCE

A. *Divorce in America*

1. A Brief History

As long as there have been marriages in the United States, there have been divorces. The first recorded instance of divorce on American soil was in December of 1639 when the wife of James Luxford asked the Puritan court to dissolve her marriage because her husband was already married.³⁴ The court dissolved her marriage and seized James' property to care for his ex-wife and their children.³⁵ The Puritans and their fellow Protestant brethren embraced the belief held by Martin Luther and John Calvin "that marriage and divorce were civil concerns."³⁶ Thus, an American tradition grew from the idea that non-ecclesiastical courts could join and unjoin couples in marriage.³⁷ While the colonists were not united in their ideas about when and how a marriage could be

³⁴ GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 12 (1991).

³⁵ *Id.*

³⁶ *Id.* at 11.

³⁷ *See id.*

dissolved, those who believed in divorce argued that because the family was the basic unit of society, underpinning the social order and stability, divorce would ultimately preserve the institution of the family in a broader sense.³⁸ “Puritans agreed that embattled spouses should be encouraged to remain together” but also recognized that “[d]ivorce could dissolve highly dysfunctional marriages[,] . . . [allowing] divorced spouses to form more stable and orderly marriages in the future.”³⁹

Colonial courts almost exclusively granted divorces on fault grounds, such as impotence, bigamy, incest, and, most commonly, adultery.⁴⁰ Historian Glenda Riley’s comprehensive study of divorce in American history reinforces the idea that the South has always been more conservative in its approach to divorce.⁴¹ Traditionally, courts allowed divorce in two primary forms: absolute divorce⁴² and the English common law, bed and board divorce.⁴³ For much of the eighteenth and nineteenth centuries, divorce was a civil but limited avenue for spouses to end their marriages.⁴⁴ However, though courts made divorce difficult and inaccessible, “one out of fourteen to sixteen marriages ended in divorce” during the 1880s.⁴⁵

³⁸ *Id.* at 31. Riley cites to a growing trend in divorce in the colonies as a natural extension of revolutionary fervor. She points to Thomas Jefferson’s own personal work in divorce cases in Virginia as an illustration. Jefferson used revolutionary terms in preparation for a 1771 divorce of Dr. James Blair of Williamsburg, suggesting that it was cruel “to chain a man to misery till death” and that “liberty of divorce prevents and cures domestic quarrels,” and “preserves liberty of affection.” *Id.*

³⁹ *Id.* at 11.

⁴⁰ *See id.* at 19, 21.

⁴¹ *See id.* at 25-28.

⁴² *See* Glenda Riley, *Legislative Divorce in Virginia, 1803-1850*, 11 J. EARLY REPUBLIC 51, 52 (1991). Absolute divorce ended the marriage to where both parties were entirely removed from the union and had a right to marry. *Id.* at 66.

⁴³ DEBORAH H. BELL, *BELL ON MISSISSIPPI FAMILY LAW* 67 (3d ed. 2020). Bed and board divorce allows a spouse to enter a legal separation and support the injured or innocent spouse. This divorce served as a legal way for spouses to be away from their married partner, but still confined the two to a legal, though not physical, marriage. Often, bed and board divorces were typically reserved for extreme cases of abuse or mistreatment and restricted the remarriage rights of the innocent spouse. *See, e.g.*, RILEY, *supra* note 34, at 14 (noting that in 1768, a bed and board divorce was granted to a free black wife who alleged extreme cruelty, including that her husband forcibly kidnapped and sold her as a slave).

⁴⁴ *See* RILEY, *supra* note 34, at 4.

⁴⁵ *Id.* at 5.

Scholars who study marriage and divorce trends note that the rise in divorces was not due to any change in formal law.⁴⁶ Laura Oren's historical analysis of no-fault divorce laws argues that couples seeking a divorce in the 1930s through the 1950s often evaded the "strict" fault-based requirements.⁴⁷ These couples often accomplished this with the help of trial courts, who tolerated collusion between parties, and willing state legislatures, which eased residency requirements to facilitate migratory divorce seekers.⁴⁸ Oren recounts the National Association of Women Lawyers' (NAWL) efforts to eliminate fault-based divorce and the organization's use of changing social norms and judicial unhappiness with the fault-based system to adopt a "conciliatory" approach to divorce.⁴⁹ NAWL sought for spouses "ceas[ing] to be 'squared off like prizefighters in a ring' but instead be 'encouraged to collaborate in rebuilding for the future welfare of the family.'"⁵⁰ Ronald Reagan,⁵¹ then Governor of California, enacted the United States' first true no-fault divorce statute in 1969.⁵² Despite NAWL's assertions that they did not advocate for unilateral divorce, the no-fault statute in California gave broad discretion to judges to grant a divorce based on the irretrievable breakdown of

⁴⁶ Laura Oren, *No-Fault Divorce Reform in the 1950s: The Lost History of the "Greatest Project" of the National Association of Women Lawyers*, 36 L. & HIST. REV. 847, 862 (2018); see also Stéphane Mechoulam, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 149-50 (2006) (noting that fault-based systems often created collusion amongst couples "to have friends commit perjury" to support a couple's suit for divorce).

⁴⁷ Oren, *supra* note 46, at 862-63.

⁴⁸ *Id.*

⁴⁹ *Id.* at 876-77 (quoting Note, *Toward Uniform Divorce Laws*, WOMEN LAWS. J., Fall 1952, at 15, 16).

⁵⁰ *Id.*

⁵¹ Ronald Reagan became the first divorced president of the United States. See Christina Capatides, *Will Donald Trump Be the First President Who Has Been Divorced?*, CBS NEWS (Nov. 9, 2016, at 14:44 ET), <https://www.cbsnews.com/news/will-donald-trump-be-the-first-president-who-has-been-divorced/> [https://perma.cc/D26N-WK9C].

⁵² Patt Morrison, *California Settled the No-Fault Divorce Question Decades Ago. Why Is It Back in the News?*, L.A. TIMES (May 24, 2024, at 04:00 PT) <https://www.latimes.com/california/story/2024-05-24/california-settled-the-no-fault-divorce-question-decades-ago-why-is-it-back-in-the-news> [https://perma.cc/LC6W-EE6B].

the marriage, even without testimony, functionally adopting unilateral divorce in these instances.⁵³

2. Divorce in Modern America

Thirty-seven other states adopted some form of no-fault divorce following California's adoption of no-fault divorce as a part of the "divorce law revolution" of the 1970s.⁵⁴ Some states removed their fault-ground entirely,⁵⁵ while others added no-fault to their existing fault-based grounds.⁵⁶ Only two states do not have a unilateral no-fault divorce statute: Mississippi and South Dakota.⁵⁷ Almost every state with a no-fault divorce system uses the "irretrievably broken" language in its pleading language.⁵⁸ In Florida, if one party meets the residency requirement, a spouse can file a divorce petition only because the marriage is irretrievably broken.⁵⁹ Upon proper service, the petitioning spouse does not need the other's permission to proceed with the divorce, nor does the defendant spouse's absence bar the petitioning spouse from receiving a divorce. Conversely, Mississippi will not grant a divorce even when the defendant's spouse does not show, present evidence, or answer the pleading.⁶⁰ However, property division and child custody may be subject to a trial if the parties cannot agree. This is distinguishable from Mississippi, which allows the parties to contest the grounds for the divorce when pursuing a fault-based divorce and issues like custody, alimony, and property division.⁶¹

Some states, like Louisiana,⁶² North Carolina,⁶³ Arkansas,⁶⁴ and South Carolina⁶⁵ include a mandatory separation period

⁵³ Oren, *supra* note 46, at 882.

⁵⁴ Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. RELS. 317, 317 (2002).

⁵⁵ *Id.* at 320.

⁵⁶ *Id.* at 321-22.

⁵⁷ See Bell, *supra* note 1, at 142; Padilla, *supra* note 3.

⁵⁸ See, e.g., FLA. STAT. ANN. § 61.052 (West 2025).

⁵⁹ §§ 61.052, 61.021.

⁶⁰ See generally Bell, *supra* note 1, at 142.

⁶¹ See Bell, *supra* note 1, at 144-45.

⁶² LA. CIV. CODE ANN. art. 103.1 (2024).

⁶³ N.C. GEN. STAT. ANN. § 50-6 (West 2025).

⁶⁴ ARK. CODE ANN. § 9-12-310 (West 2025).

⁶⁵ S.C. CODE ANN. § 20-3-80 (2025).

before a spouse qualifies for a no-fault divorce. These separation periods can be as short as six months or as long as one year.⁶⁶ “Thirty-five states include ‘cooling off’ period[s] where couples must wait a [specific] amount of time *after* filing for their divorce for it to be finalized.”⁶⁷ These cooling-off periods can be as brief as twenty days⁶⁸ or as long as 120 days from when an individual files for divorce.⁶⁹ In Mississippi, parties must wait sixty days after filing before continuing proceedings to finalize a divorce.⁷⁰ These waiting periods and cooling-off periods are to encourage reconciliation.

An important feature of divorce in America is that out of the almost 700,000 divorces in the United States each year,⁷¹ around seventy percent of divorces are initiated by women.⁷² Research suggests that not only are women seeking divorces more often, but they are also disproportionately impacted by statutory waiting periods.⁷³ Women are particularly vulnerable in these mandatory waiting periods “as only thirty percent of wives in dual-income homes earn more than their husbands,” with mothers earning less than \$16,000 a year than fathers.⁷⁴ Thus, the long periods of separation financially impact women harder than men, and financial burdens during separation often drive women back into marriages.⁷⁵

Research suggests that there is an increase in violence when a domestic partner makes the other partner aware that they

⁶⁶ See, e.g., LA. CIV. CODE ANN. art. 103.1 (2024) (requiring one year of separation for couples with minor children; requiring six months for couples without children).

⁶⁷ Rebecca Feinglos & Sophia Laurenzi, *America Makes It Too Hard and Dangerous to Get Divorced*, TIME (Apr. 27, 2023, at 07:00 ET) (emphasis added), <https://time.com/6274819/us-accessible-divorce-unwanted-marriages/> [<https://perma.cc/6PZF-GWY7>].

⁶⁸ See, e.g., FLA. STAT. ANN. § 61.19 (West 2025).

⁶⁹ *Finalizing a Divorce*, MASS.GOV, <https://www.mass.gov/info-details/finalizing-a-divorce> [<https://perma.cc/363N-78UX>] (last visited Nov. 28, 2024).

⁷⁰ MISS. CODE ANN. § 93-5-2(4) (West 2025).

⁷¹ *Marriage and Divorce*, CDC: NAT'L CTR. HEALTH STAT. (Mar. 17, 2025), <https://www.cdc.gov/nchs/fastats/marriage-divorce.htm> [<https://perma.cc/M99K-R7AP>].

⁷² *Women More Likely Than Men to Initiate Divorces, But Not Non-Marital Breakups*, AM. SOCIO. ASS'N (Sep. 28, 2022), <https://www.asanet.org/women-more-likely-men-initiate-divorces-not-non-marital-breakups/> [<https://perma.cc/N7W5-PY9X>].

⁷³ Feinglos & Laurenzi, *supra* note 67.

⁷⁴ *Id.*

⁷⁵ *Id.*

intend to leave or attempt to leave the relationship.⁷⁶ Spousal violence affects children who witness it within their families. These children often develop behavioral and psychological issues that affect their performance in school and overall mental and physical well-being.⁷⁷ Additionally, children who observe domestic violence are likely to perpetuate cycles of abuse in their relationships later.⁷⁸ Economists discovered that states adopting no-fault divorce saw an “eight to sixteen percent decline in female suicide, roughly a thirty percent decline in domestic violence for both men and women, and a ten percent decline” in domestic violence-based homicides of women.⁷⁹

With the widespread adoption of no-fault divorce, opponents of no-fault divorce argued that no-fault would lead to further erosion of the nuclear family and its related connection to the social order.⁸⁰ But there is no evidence that fault-based divorces lead to marriage stability.⁸¹ On the contrary, divorce is often a stabilizing consequence, especially in situations where domestic violence is a part of the marriage.⁸² Some studies found an increase in violence in cases where couples are forced to remain married while seeking a divorce.⁸³

Even advocates for fault-based divorce acknowledge that no-fault divorce schemes generally do not encourage families to stay together. For example, Florida, a no-fault divorce state since 1971,

⁷⁶ See Jerry Mitchell, *Most Dangerous Time for Battered Women? When They Leave.*, CLARION LEDGER (Jan. 28, 2017, at 19:01 CT), <https://www.clarionledger.com/story/news/2017/01/28/most-dangerous-time-for-battered-women-is-when-they-leave-jerry-mitchell/96955552/> [https://perma.cc/5DQE-V4AS].

⁷⁷ *Effects of Domestic Violence on Children*, OFF. ON WOMEN'S HEALTH (Sep. 26, 2025), <https://womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children> [https://perma.cc/ZN2K-2RZN].

⁷⁸ *Id.*

⁷⁹ Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q.J. ECON. 267, 267 (2006).

⁸⁰ See Ali Kunen, Note, *Divorce and Domestic Violence in the United States: A Focus on New York State's Adoption of No-Fault Legislation and Its Impact on the Incidence of Domestic Violence*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 353, 361-67 (2013).

⁸¹ See generally Lisa Stolzenberg & Stewart J. D'Alessio, *The Effect of Divorce on Domestic Crime*, 53 CRIME & DELINQ. 281, 282-83 (2007).

⁸² *Id.*

⁸³ *Id.* at 294.

requires divorcing parents to undergo parenting classes before a court will finalize a divorce.⁸⁴ A study comparing Florida and Alabama, which lacked a parental class requirement, concluded that mandatory parenting classes in the divorce process improve parental communication.⁸⁵ While states differ in their approaches to requiring and providing parenting classes as a part of divorce, the overall goal of these programs is to improve the outcomes for families going through divorce. This is not only because it directly addresses central conflicts within divorcing parents and centers children in considerations of parenting strategies and timesharing but also because it provides greater access to resources, the crucial determining factor in family stability post-divorce.⁸⁶

B. Divorce in Mississippi

1. The Past and Present

Southern states have historically adopted a more conservative approach to divorce.⁸⁷ In the early years, Southern states, like Mississippi, prohibited divorce with few exceptions and granted it to spouses only as a private legislative bill.⁸⁸ However, by the late 1800s, a shift in social norms led to the acceptance of divorced people in society and a demand for divorce; fault-based divorce became the preferred method for the dissolution of marriages.⁸⁹ Mississippi adopted the traditional, common law grounds for fault-based divorce in the late 1800s.⁹⁰ For most of Mississippi's history, adultery was the most common fault for which a court granted divorce.⁹¹ Today, Mississippi recognizes approximately twelve fault-based grounds for divorce.⁹² These

⁸⁴ FLA. STAT. ANN. § 61.21 (West 2025).

⁸⁵ See Kevin M. Kramer et al., *Effects of Skill-Based Versus Information-Based Divorce Education Programs on Domestic Violence and Parental Communication*, 36 FAM. & CONCILIATION. CTS. REV. 9, 25-26 (1998).

⁸⁶ See generally Susan L. Pollet & Melissa Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 46 FAM. CT. REV. 375 (2008).

⁸⁷ See RILEY, *supra* note 34, at 28.

⁸⁸ Deborah H. Bell, *Family Law at the Turn of the Century*, 71 MISS. L.J. 781, 782 (2002).

⁸⁹ *Id.* at 782-83.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² MISS. CODE ANN. § 93-5-1 (West 2025).

fault grounds include traditional standard law foundations for divorce, such as adultery; desertion; cruel, habitual, and inhuman treatment; insanity; incest; bigamy; imprisonment; impotence; and the wife being pregnant by another at the time of the marriage.⁹³ It was not until 2017 that the legislature created a special carve out for divorce actions based on allegations of spousal domestic abuse. Responding to concerns and evidence that the spousal abuse ground was functionally useless because it required a witness to the abuse other than the filing spouse to grant a divorce, the legislature removed this second witness requirement.⁹⁴ When doing so, the legislature acknowledged that domestic violence rarely has witnesses, and thus, the lowered standard of proof reflects the realities of spousal abuse.⁹⁵

Mississippi finally adopted its alternative to no-fault divorce in 1976 when it added “irreconcilable differences” as a cause of action.⁹⁶ Legal scholar Deborah Bell notes that the decision by the Mississippi legislature to add irreconcilable differences as a cause for divorce followed trends in the chancery courts.⁹⁷ By the 1960s and 1970s, courts increasingly granted divorces on the grounds of habitual, cruel and inhuman treatment. Bell’s study of these cases shows that although the chancery courts were articulating the traditional test for cruelty, the circumstances surrounding the cases suggest that the reasons for granting these divorces were more in line with the concept of irretrievable breakdown, which was becoming increasingly popular in other states.⁹⁸

Irreconcilable differences divorce requires that the parties agree or consent to a divorce, file a joint complaint for divorce, and initially have all matters related to property and child custody settled before the grant of divorce.⁹⁹ While Section 93-5-2 retains

⁹³ *Id.*

⁹⁴ S.B. 2680, 2017 Gen. Assemb., Reg. Sess. (Miss. 2017); *see also* Michelle Liu, *One Year Later, New Divorce Law Helps More Than 600 Abuse Survivors Find a Way Out*, MISS. TODAY (July 31, 2018), <https://mississippitoday.org/2018/07/31/one-year-later-divorce-law-helping-abuse-survivors-out-very-difficult-situations/> [<https://perma.cc/K6AG-J649>].

⁹⁵ DEBORAH H. BELL, *BELL ON MISSISSIPPI FAMILY LAW* 88 (2d ed. 2011).

⁹⁶ Bell, *supra* note 88, at 786-87.

⁹⁷ *Id.*

⁹⁸ *Id.* at 785.

⁹⁹ MISS. CODE ANN. § 93-5-2 (West 2025).

the language of compulsory consent on all matters and prohibits a chancellor from decreeing a marriage dissolved before all matters are settled,¹⁰⁰ the Mississippi Supreme Court routinely upholds divorce judgments even though issues like child custody, property, and alimony remain undecided.¹⁰¹

2. The Problem with Mississippi's Divorce Scheme

“Civil marriage takes a couple’s [intimate] relationship and makes it official, adding the state itself as a third ‘partner.’”¹⁰² However, the state’s role as this “third partner” is limited by the protections of the Fourteenth Amendment. This Comment contends that Mississippi’s divorce statute infringes on the right to freedom of association and individual due process rights. Adopting Horowitz’s argument that burdensome divorce laws are unconstitutional, this Comment argues that Mississippi’s binary divorce scheme, which requires either fault-based grounds or mutual assent to irreconcilable differences, is unconstitutional.

The result of the fault-based and mandatory consent for the irreconcilable difference divorce statute is that divorces in Mississippi can take many years to finalize, and the withholding of consent is used to gain “some monetary or custodial advantage . . . to force the other party to compromise in order to obtain their freedom.”¹⁰³ If we apply Frye and Romero’s burden argument to legal scholar Deborah Bell’s exploration of the cost of fault-based divorce in Mississippi, there is a strong argument that the fault-based statute is unconstitutional because it is unduly

¹⁰⁰ MISS. CODE ANN. § 93-5-2(3) (West 2025).

¹⁰¹ See, e.g., *Rounsaville v. Rounsaville*, 732 So. 2d 909, 911 (Miss. 1999) (husband who agreed to order sought to reverse divorce after ex-wife remarried); *Johnston v. Johnston*, 722 So. 2d 453, 456-57 (Miss. 1998) (harmless error where the court took child support and property issues under advisement while granting divorce); see also *Gordon v. Gordon*, 126 So. 3d 922, 926-27 (Miss. Ct. App. 2013) (failure to address custody and support of eighteen-year-old was technically an error, but was harmless—no evidence was presented that the parents failed to provide for the boy, who was not emancipated); *Curtis v. Curtis*, 59 So. 3d 623, 628 (Miss. Ct. App. 2011) (reserving ruling on two pieces of property until two years after divorce did not prejudice husband).

¹⁰² Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 932 (2016).

¹⁰³ Amended & Restated Judgment of Divorce at 16, *Gerty v. Gerty*, No. 2401:13-cv-2446-2 (Ch. Ct. June 8, 2017), Dkt. No. 45.

burdensome.¹⁰⁴ Though Bell does not argue that Section 93-5-2 is unconstitutional, her research supports the assertions of this Comment; both the current irreconcilable difference statute and the fault-based statutes are unconstitutional.¹⁰⁵

First, Bell argues that the Mississippi justice system is unequipped to handle the growing number of low-income litigants who lack legal representation in family law matters.¹⁰⁶ Further, the strict application and nature of proving fault-based petitions make navigating complex court procedures and laws challenging for pro se litigants.¹⁰⁷ Bell points to the required proof of specific grounds, which often includes demanding corroborative evidence and costly litigation resources that make the system unduly burdensome on low-income petitioners.¹⁰⁸ Notably, even if the respondent spouse does not engage in the divorce litigation, the court cannot enter a default judgment on divorce grounds and insists on the petitioner meeting the burden of proof for the grounds pleaded.¹⁰⁹

Perhaps the most mind-bending example of this system of proof is the fault-based ground for desertion. In theory and practice, desertion is the simplest ground to prove by clear and convincing evidence. Desertion requires a showing that the defendant has been absent for one year, intentionally abandoned the family, and did not consent to the separation.¹¹⁰ While showing this to the court may appear straightforward, pro se litigants are often barred from their sought-after divorce because the chancellor must inquire whether the petitioner would reconcile with the absent spouse if they were to walk through the

¹⁰⁴ See Bell, *supra* note 1, at 142.

¹⁰⁵ See *id.* at 144. Bell proposed a new model for Mississippi's divorce scheme, which borrows from other Southern states that give alternatives that do not require mutual consent or proof of a bad act by one spouse. *Id.*

¹⁰⁶ *Id.* at 142.

¹⁰⁷ *Id.* at 132.

¹⁰⁸ *Id.* at 138.

¹⁰⁹ *Id.* at 135.

¹¹⁰ *What are the Grounds for Divorce in Mississippi*, The Mississippi Bar, <https://www.msbar.org/for-the-public/consumer-information/what-are-the-grounds-for-divorce-in-mississippi/#:~:text=Desertion%20is%20a%20spouse's%20willful,intends%20to%20end%20the%20marriage> [https://perma.cc/R92R-KSKL].

courtroom door and ask to come home.¹¹¹ Understandably, petitioners who are in court to legally ask for a dissolution of their marriage often respond that they have no interest in reconciling with the long-gone spouse, destroying their chance of divorce.¹¹²

Additionally, Bell points out that the current fault-based system allows for various defenses, like recrimination, when both parties are at fault.¹¹³ This defense of recrimination is seen in both the *Gerty* and *Watson* cases, where both spouses alleged bad acts and neither party is “innocent.”¹¹⁴ Litigation is extended when multiple defenses are available against the other spouse, increasing costs.¹¹⁵ This leads to Bell’s best reasoning for moving away from the current system: fault-based divorce proceedings are expensive, time-consuming, and encouraging divorcing couples to use the complicated system to litigate each other into submission.¹¹⁶

Bell highlights how the fault-based system disproportionately harms domestic violence survivors, who are particularly vulnerable to the issues surrounding mutual consent for irreconcilable differences. An abusive partner often continues controlling and abusive behavior even after the relationship ends, particularly when children are involved.¹¹⁷ Bell points to legal headaches created by allowing broad defenses like condonation.¹¹⁸ Victims of domestic violence often leave and then go back to an abusive spouse for many reasons, such as economic instability and shared children, before making a final break.¹¹⁹ The abusive

¹¹¹ Bell, *supra* note 1, at 137.

¹¹² *Id.*

¹¹³ Bell, *supra* note 1, at 139.

¹¹⁴ See Amended & Restated Judgment of Divorce at 17-21, *Gerty v. Gerty*, No. 2401:13-cv-2446-2 (Ch. Ct. June 8, 2017), Dkt. No. 45; *Watson v. Watson*, No. 3:21-CV-26-KHJ-MTP, 2022 U.S. Dist. LEXIS 238283, at *2-3 (S.D. Miss. Mar. 3, 2022).

¹¹⁵ Bell, *supra* note 1, at 140.

¹¹⁶ Amended & Restated Judgment of Divorce, *supra* note 116, at 24-26 (citing Bell, *supra* note 3).

¹¹⁷ Kunen, *supra* note 80, at 375.

¹¹⁸ Bell, *supra* note 1, at 140.

¹¹⁹ See Laura Johnson et al., *Examining the Impact of Economic Abuse on Survivors of Intimate Partner Violence: A Scoping Review*, 22 BMC PUB. HEALTH, no. 1014, 2022, at 1, 13 (finding that over two-thirds of women stayed in abusive relationships with over half of those women citing pregnancy or young children; also finding that economic dependence on the abusive partner was a large factor for remaining). Women

spouse can use condonation as a defense to argue that the abusive spouse's return to the home condoned the abusive partner's behavior, thus barring the grant of divorce and trapping victims in dangerous marriages.¹²⁰ This dynamic leaves spouses desperate to escape bad, often dangerous, marriages at the mercy of the other spouse, who can withhold consent to irreconcilable differences or force prolonged litigation into financial ruin. Essentially, Mississippi becomes complicit in inflicting domestic abuse on victims.

Advocates in Mississippi have attempted to add a true no-fault option but have not yet succeeded. In 2017, there was an effort to adopt no-fault divorce in the wake of the legislature's relaxation of the evidence requirement for spousal abuse cases.¹²¹ There was another push to add an "irretrievable breakdown of the marriage" ground in 2022, allowing a chancellor to grant a divorce when either party proves "further attempts to reconciliation are impractical or futile."¹²² The struggle to get any movement on divorce reform supports the argument that a constitutional challenge to Mississippi's divorce scheme may be the only method to enact change. In light of the dangers the current system entails, as detailed above, there is a strengthened call for change.

3. "Criminal lawyers see bad people at their best; divorce lawyers see good people at their worst."¹²³

It is not certain that Michael and Joesie Gerty were at their worst when they filed a joint complaint for divorce based on

also feel unable to leave after repeated failed attempts. *See generally* LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

¹²⁰ Bell, *supra* note 1, at 140.

¹²¹ See The Clarion-Ledger, *High Court Asked to Find Miss. Divorce Law Unconstitutional*, ASSOC. PRESS (Oct. 28, 2017, at 00:05 CT), <https://apnews.com/general-news-f124abb9e19d4a69a624de2de52ba051> [<https://perma.cc/9X4F-JECP>]

¹²² Mariel Padilla, *In Mississippi, Another Push to Ease Restrictions on Divorce*, 19TH NEWS (Feb. 23, 2022, at 06:00 CT), <https://19thnews.org/2022/02/divorce-mississippi-legislature-law/> [<https://perma.cc/28D7-V6TQ>].

¹²³ MARRIAGE STORY, Netflix, at 48:12 (Heyday Films 2019) (a recent film exploring how mutual desire for divorce can become acrimonious when tension arises from child custody matters). In the film, even innocent behavior becomes weaponized against the other parent in each party's desire to be the primary custodian of their child. *See generally id.*

irreconcilable differences in 2013.¹²⁴ But the couple was undoubtedly approaching their worst nearly two years later when Joesie withdrew her joint complaint and sued for divorce based on habitual, cruel, and inhuman treatment and adultery.¹²⁵ In turn, Michael would sue for divorce based on the same fault-based claims as Joesie.¹²⁶

Though the Gertys' divorce would lead to two Mississippi Supreme Court decisions, neither decision mentions Michael and Joesie Gerty's early marriage.¹²⁷ There is no recounting of the couple's first date, awkward first meeting with parents, romantic proposal, and tearful exchange of wedding vows. Instead, their story, like an ancient Greek tragedy, begins *in medias res*, within the legal documents that are the only public record of Michael and Joesie's relationship.¹²⁸ What remains of the Gertys' and other Mississippi couples' relationships is not the stuff of a romantic novel but rather the worst, last gasps of a marriage, exacerbated by Mississippi's divorce scheme.

It is important to note that Michael and Joesie Gerty initially filed a joint complaint for divorce based on irreconcilable differences in 2013.¹²⁹ Irreconcilable differences is the divorce action closest to the "no-fault" that Mississippi allows. The key difference between Mississippi's irreconcilable differences and most states' irretrievably broken divorce statutes is that both parties must consent to the irreconcilable differences in divorce.¹³⁰ Nothing further occurred in the couple's divorce case until two years later, when Joesie withdrew her joint complaint and filed for divorce, alleging multiple fault-based causes of action, including habitual, cruel, and inhuman treatment; desertion; and adultery.¹³¹ As a part of her cause of divorce, Joesie pleaded as an

¹²⁴ See Amended & Restated Judgment of Divorce, *supra* note 114, at 2-3.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See *Gerty v. Gerty*, 265 So. 3d 121 (Miss. 2018); *Gerty v. Gerty*, 296 So. 3d 704 (Miss. 2020).

¹²⁸ *In medias res* is a literary device where a narrative begins by plunging into a crucial situation that is part of a much longer related chain of events; often, the situation that begins in the narrative is an extension of previous events that will be developed in later action.

¹²⁹ *Gerty*, 265 So. 3d at 123.

¹³⁰ See MISS. CODE ANN. § 93-5-2(1) (West 2025).

¹³¹ *Gerty*, 265 So. 3d at 123-24.

alternative to the irreconcilable differences in the fault-based claims.¹³²

In July 2015, Michael answered and asserted various affirmative defenses and cross-pleaded for divorce against Joesie on the grounds of adultery or, in the alternative, cruel and inhuman treatment.¹³³ The divorce trial took place over three days in May 2016. Chancellor Jennifer Schloegel entered a final divorce decree on November 15, 2016. In the decree, Chancellor Schloegel *sua sponte* found Section 93-5-2 of the Mississippi Code, the divorce statute, unconstitutional.¹³⁴ In her decree, Chancellor Schloegel laid out the argument for why Mississippi's divorce statutes, in part and as applied, deprives the chancery court of its constitutional authority to grant the relief of divorce and, in doing so, deprives the citizens of Mississippi of the fundamental right to marry and the freedom of association in intimate relationships.¹³⁵ Unfortunately, the Mississippi Supreme Court reversed Chancellor Schloegel's determination that Mississippi's irreconcilable differences divorce statutes were unconstitutional.¹³⁶ The Mississippi Supreme Court found that because neither party had raised a constitutional challenge to the divorce statutes, it was inappropriate for the chancellor to raise the issue *sua sponte*.¹³⁷ Interestingly, the court noted that both parties "aver that the trial court erred by *sua sponte* raising the issue of the constitutionality of [the statute] . . . thus granting unrequested declaratory relief in the form of an irreconcilable-differences divorce."¹³⁸ While it is true that Michael and Joesie Gerty both pled fault-based grounds for their divorce, it is uncontradicted that both parties no longer wanted to be married. Both had asked for a divorce; the simple fact that they could not agree meant that the parties had to engage in multiple years of litigation.¹³⁹ Thus, the Gertys and the Mississippi Supreme Court

¹³² *Id.*

¹³³ Amended & Restated Judgment of Divorce, *supra* note 114, at 3.

¹³⁴ *Id.* at 51.

¹³⁵ Amended & Restated Judgment of Divorce, *supra* note 114, *passim*; *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015).

¹³⁶ *Gerty*, 265 So. 3d at 124, 130.

¹³⁷ *Id.* at 130-31.

¹³⁸ *Id.* at 130.

¹³⁹ *See id.* at 123-24, 133.

proved Chancellor Schloegel's argument that the mutual consent requirement does not save or preserve marriages but rather is a tool for divorcing spouses to use against one another to attain an advantage.

The Mississippi Supreme Court reviewed Joesie and Michael Gerty's divorce twice, first on the grounds of the divorce in 2018¹⁴⁰ and later on child custody issues in 2020.¹⁴¹ It is not disputed that both Joesie and Michael wanted a divorce from one another.¹⁴² Both parties alleged and presented evidence of the other's adultery.¹⁴³ Both parties alleged and presented evidence of the other's habitual, cruel, and inhumane treatment.¹⁴⁴ However, in the strict application of the law in granting a fault-based divorce, each party failed to meet the standard for the chancellor to grant a divorce.¹⁴⁵

Instead, because of the lack of no-fault divorce in Mississippi, both parties were required by the State to remain married and incur an incredible amount of financial and emotional harm through the contested grounds for divorce. Further, the only non-fault-based divorce, irreconcilable differences, requires both parties' consent. What transpired over the next seven years between the original joint complaint for divorce illustrates why the chancellor found the statute unconstitutional. Joesie and Michael used the mutual consent requirement for irreconcilable differences to gain "some monetary or custodial advantage . . . to force the other party to compromise in order to obtain their freedom."¹⁴⁶ This is precisely what occurred in the Gertys' case and led to what Chancellor Schloegel predicted: acrimony that spread to the rest of the couple's property and child custody settlement,¹⁴⁷ slowing an already glacial process of ending a marriage where both people no longer want to be married.¹⁴⁸ While the stated aim of Mississippi's divorce statute is to "support

¹⁴⁰ See generally *id.*

¹⁴¹ See generally *Gerty v. Gerty*, 296 So. 3d 704 (Miss. 2020).

¹⁴² Amended & Restated Judgment of Divorce, *supra* note 114, at 2-3, 17-21.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 17-21.

¹⁴⁶ *Id.* at 16.

¹⁴⁷ *Id.* at 21-26.

¹⁴⁸ *Id.* at 25-27.

marriage or family,” the statute functions as a “bludgeon instead of an instrument of justice.”¹⁴⁹

4. A Constitutional Violation for Me, Not for Thee

The Mississippi Supreme Court refused to address the constitutionality of Mississippi’s divorce statute in Gerty’s divorce because neither Joesie nor Michael raised the issue.¹⁵⁰ Kevin and Mary Watson, however, brought a constitutional challenge in their divorce proceedings—alleging that Mississippi’s lack of a no-fault option infringed on their rights under the Due Process Clause of the Fourteenth Amendment.¹⁵¹

John Kevin Watson and Mary Carole Brand Watson began to seek a way out of their marriage in 2014, when Carole filed her first divorce petition, citing adultery and irreconcilable differences.¹⁵² The chancellor denied her divorce petition.¹⁵³ Kevin responded with multiple petitions citing cruel and habitual punishment and irreconcilable differences, all of which were also denied.¹⁵⁴ On the third petition for a divorce, Kevin asked for “general relief,” stating that he had “done everything within his power to make his marriage to Carole happy and successful for both parties, all to no avail,” but this was also denied.¹⁵⁵ On the fourth attempt, this time on irreconcilable differences, the chancery court directed both parties at trial to address the constitutionality of Mississippi’s no-fault divorce statute, Miss. Code Ann. § 93-5-2.¹⁵⁶

Kevin pursued the chancery court directive and sought a declaratory judgment, arguing that Mississippi’s no-fault divorce statute, which requires mutual consent, violates the Due Process Clause of the Fourteenth Amendment.¹⁵⁷ The Madison County Chancery Court denied his motion but did grant Kevin a divorce

¹⁴⁹ *Id.* at 27, 35.

¹⁵⁰ *Gerty v. Gerty*, 265 So. 3d 121, 130-31 (Miss. 2018).

¹⁵¹ *Watson v. Watson*, No. 3:21-CV-26-KHJ-MTP, 2022 U.S. Dist. LEXIS 238283, at *1-3 (S.D. Miss. Mar. 3, 2022).

¹⁵² *Id.* at *2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *2-3.

¹⁵⁷ *Id.* at *3.

from Carole on constructive desertion.¹⁵⁸ Despite having previously attempted to end her marriage and a clear breakdown in the marriage, as evidenced by Kevin's four attempts to obtain a divorce, Carole appealed, and the Mississippi Court of Appeals reversed the chancery court's grant of divorce.¹⁵⁹ In its decision, the court stated that though "there was clearly a significant amount of mutual animosity" between the couple, "the problem [in the marriage] is [the couple's] fundamental incompatibility," which the chancery court could not grant a divorce for under Section 93-5-2.¹⁶⁰

In response, Kevin filed another petition, asking the district court to grant a no-fault divorce, pleading specifically that Miss. Code Ann. § 93-5-2 denied him of a protected constitutional right by requiring Carole's consent to the divorce.¹⁶¹ Carole removed the case to federal court where the district court retained jurisdiction to answer whether Mississippi's divorce statute violated the Constitution.¹⁶²

A review of the pleadings in the federal case gives insight into how acrimonious the marriage and litigation around the divorce had become. In her answer to Kevin's complaint, Carole argued that the Mississippi divorce statute was constitutional, further stating that Kevin was neither part of a protected class protected under the Fourteenth Amendment, nor was there a fundamental right of privacy implicated.¹⁶³ Thus, no violation of Kevin's rights had occurred. However, in her countercomplaint, Carole argued that if the court were to determine Miss. Code Ann. § 93-5-2 unconstitutional, the court would be required to determine the division of assets under the "equitable distribution standard."¹⁶⁴ One of the factors that the court would need to

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Watson v. Watson*, 306 So. 3d 800, 804 (Miss. Ct. App. 2020) (quoting *Day v. Day*, 501 So. 2d 353, 355 (Miss. 1987)).

¹⁶¹ Amended Answer, Affirmative Defs. & Counterclaim at 2, *Watson v. Watson*, No. 3:21-CV-26-KHJ-MTP, 2022 U.S. Dist. LEXIS 238283 (S.D. Miss. Mar. 3, 2022), Dkt. No. 43.

¹⁶² *See generally* Notice of Removal, *Watson*, 2022 U.S. Dist. LEXIS 238283, Dkt. No. 1.

¹⁶³ Amended Answer, Affirmative Defs. & Counterclaim, *supra* note 161, at 2.

¹⁶⁴ *Id.* at 3-4.

assess is the contribution to “marital and family stability,” which requires penalizing a spouse whose marital misconduct contributed to the breakup of the marriage.¹⁶⁵ Carole argued that if the court were to penalize Carole for any fault or misconduct, such findings or any subsequent order would violate *her* privacy rights under the Due Process and Equal Protection Clauses.¹⁶⁶

The district court denied Kevin’s motion because there was no established fundamental right to a unilateral or non-mutual divorce under the Supreme Court or Fifth Circuit’s precedent.¹⁶⁷ The court differentiated Kevin’s case from precedents like *Boddie v. Connecticut* and *Sosna v. Iowa*, finding Kevin’s claim targeted the substance of the law, not his access to it.¹⁶⁸ Since the district court did not find a fundamental right to divorce, it applied rational basis review to assess the statute’s constitutionality. Mississippi justifies its no-fault divorce statute by citing legitimate state interests, such as protecting children and economically dependent spouses, encouraging amicable settlements, and preventing rash divorces.¹⁶⁹ The district court upheld these interests as rationally related to the statute, concluding it constitutionally valid.

II. RECENT DEVELOPMENTS IN THE FUNDAMENTAL RIGHT TO PRIVACY

A. *The Fundamental Right to Marriage*

One of the earliest cases to recognize marriage as a fundamental right was *Loving v. Virginia*, where the Supreme Court struck down laws prohibiting interracial marriage.¹⁷⁰ The Court ruled that marriage is a fundamental civil right and that

¹⁶⁵ *Id.* (quoting *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994)) (citing *Singley v. Singley*, 846 So. 2d 1004, 1007 (Miss. 2002)).

¹⁶⁶ Amended Answer, Affirmative Defs. & Counterclaim, *supra* note 161, at 4.

¹⁶⁷ *Watson v. Watson*, No. 3:21-CV-26-KHJ-MTP, 2022 U.S. Dist. LEXIS 238283, at *10-12 (S.D. Miss. Mar. 3, 2022).

¹⁶⁸ *Id.* at *11-12; *see supra* Part I.

¹⁶⁹ Mariel Padilla, *In Mississippi, Another Push to Ease Restrictions on Divorce*, 19TH NEWS (Feb. 23, 2022, at 06:00 CT), <https://19thnews.org/2022/02/divorce-mississippi-legislature-law/> [<https://perma.cc/28D7-V6TQ>].

¹⁷⁰ *See generally* *Loving v. Virginia*, 388 U.S. 1 (1967).

laws restricting it based on race violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁷¹

Following *Loving*, the Supreme Court recognized marriage's importance as a fundamental right in several decisions, including a fundamental right to marry even though an individual may be behind on child support payments¹⁷² or incarcerated.¹⁷³

The fundamental right to marry evolved further in the twenty-first century, with *United States v. Windsor* invalidating the Defense of Marriage Act's (DOMA) definition of marriage as being between one man and one woman for federal purposes.¹⁷⁴ This decision paved the way for the groundbreaking ruling in *Obergefell v. Hodges*, where the Court recognized that same-sex couples have a constitutional right to marry under the Due Process and Equal Protection Clauses.¹⁷⁵ *Obergefell* affirmed that marriage is vital to personal dignity, autonomy, and social equality, reinforcing its status as a fundamental right for all Americans.

B. The Dobbs Decision: Fundamental Right of Privacy is on Shaky Ground

Since no-fault divorces have predominated since the late 1960s and nearly all states except Mississippi and South Dakota have adopted it, should we be concerned about access to and the right to divorce? Considering recent landmark legal decisions and the current political climate, the answer is yes.

In June 2022, the Supreme Court discarded forty years of precedent and overturned *Roe v. Wade*.¹⁷⁶ In doing so, the Supreme Court made prior decisions based on the fundamental right to privacy vulnerable to challenge. The majority took great pains to reassure that other such privacy rights are not at risk:

¹⁷¹ *Id.* at 12; *see also* U. S. CONST. amend. XIV, § 1.

¹⁷² *See generally* Zablocki v. Redhail, 434 U.S. 374 (1978).

¹⁷³ *See generally* Turner v. Safley, 482 U.S. 78 (1987).

¹⁷⁴ Defense of Marriage Act, Pub. L. No. 104-199, 1996 U.S.C.C.A.N. (110 Stat.) 2419, *invalidated by*, United States v. Windsor, 570 U.S. 744 (2013).

¹⁷⁵ *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015); *see also* U.S. CONST. amend. XIV, § 1.

¹⁷⁶ Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (rejecting the fundamental right rooted in privacy to an abortion as determined in *Roe v. Wade*, 410 U.S. 113 (1973)).

“What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely . . . [none of these cases] involved the critical moral question posed by abortion. They are therefore inapposite.”¹⁷⁷ But there remains an incredible amount of anxiety on whether to take the majority at their word.¹⁷⁸ Justice Thomas’s concurrence gives a more truthful and more concerning reason to think that other privacy rights are just as at risk as *Roe*.¹⁷⁹ The Court’s decision in *Dobbs* now casts doubt on the privacy rights argument central to the works of Horowitz, Frye, and Romero. Thus, this calls for adoption of a First Amendment approach to recognizing divorce as a constitutional right.

III. DIVORCE AS A FUNDAMENTAL RIGHT

As Chancellor Schloegel argued in *Gerty v. Gerty*, the mutual consent requirement for irreconcilable differences unduly burdened Mississippians’ rights to marriage and infringed on their associational rights.¹⁸⁰ By relying on *Griswold v. Connecticut*, Chancellor Schloegel framed her argument that Mississippi’s divorce law infringed on the inherent connection between privacy, intimate association, and liberty that underpins intimate association rights.¹⁸¹ However, the overturning of *Roe*

¹⁷⁷ *Id.* at 257 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

Casey relied on cases involving the right to marry a person of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to marry while in prison, *Turner v. Safley*, 482 U.S. 78 (1987); the right to obtain contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972)

Id. at 256 (citations omitted). The respondents in *Dobbs* relied on the right to engage in private, consensual sexual acts, *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U.S. 644 (2015). *Id.* at 257.

¹⁷⁸ See *Nothing Is Safe: Threats to Other Fundamental Rights in the Wake of Roe v. Wade Being Overturned*, NAT’L WOMEN’S L. CTR. (July 1, 2022), <https://nwlc.org/resource/even-more-than-abortion-the-constitutional-importance-of-ro-v-wade/> [<https://perma.cc/E8PZ-75AS>].

¹⁷⁹ See *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (“[W]e should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

¹⁸⁰ Amended & Restated Judgment of Divorce, *supra* note 114, at 30-37.

¹⁸¹ *Id.*; see also *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

and *Casey* in *Dobbs* necessitates that the argument for a protected right to divorce must now be rooted in the explicit right of freedom of association protected by the First Amendment.

Despite the sweeping implications of *Dobbs*, one critical constitutional safeguard remains untouched: the explicit protections of the First Amendment.¹⁸² Unlike the right to privacy, which *Dobbs* narrowed, the First Amendment's protections are delineated and include the freedoms of speech, association, and expression.¹⁸³ As recognized by the Supreme Court, these freedoms extend to the freedom to associate with others and the equally important freedom not to associate.¹⁸⁴ This distinction is particularly relevant when considering the intersection of the First Amendment with marital relationships, as well as the dissolution of those relationships through divorce.

A. *Three Approaches to Freedom of Association*

The First Amendment provides three distinct but interconnected associational freedoms: the freedom of expressive association, intimate association, and freedom from compelled speech.¹⁸⁵ Understanding each of these freedoms is critical to understanding the constitutional dimensions of marriage and divorce.

1. Intimate Associations

The freedom of intimate association, as articulated by legal scholar Kenneth Karst, protects relationships that are “close and familiar” and comparable to family or marriage.¹⁸⁶ As mentioned above, Justice Thomas’ concurrence in *Dobbs* raises serious concerns about the longevity of the intimate association rights first discussed in *Griswold* and later affirmed and expanded in

¹⁸² See U.S. CONST. amend. I.

¹⁸³ See Nat’l Ass’n for Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

¹⁸⁴ *Id.* at 462; Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 655-61 (2000).

¹⁸⁵ See *Roberts*, 468 U.S. at 617-29 (rejection and reasoning as to the intimate association and expressive association arguments raised by the Jaycees).

¹⁸⁶ Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980).

Lawrence v. Texas and *Obergefell v. Hodges*.¹⁸⁷ While not the focus of this argument, a brief discussion of intimate association is instructive as a canon of the court's association jurisprudence.

The Supreme Court recognized intimate dimensions of association in cases such as *Griswold* and *Lawrence*,¹⁸⁸ underscoring the significance of privacy in deeply personal relationships.¹⁸⁹ Within the context of marriage, the Court invokes "association" to describe the right to form intimate relationships:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁹⁰

While Justice Douglas's use of "association" in the above case involved a married couple's access to birth control, the association that Justice Douglas invokes is integral to the private and public structuring of the two individuals' lives.¹⁹¹

2. Expressive Associations

The freedom of expressive association safeguards an individual's right to associate with others to engage in certain activities, whether public or private.¹⁹² This right encompasses the

¹⁸⁷ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring) (calling for the overturning of *Obergefell* "[b]ecause any substantive due process decision is demonstrably erroneous, [so] we have a duty to correct the error in those precedents").

¹⁸⁸ See generally *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Lawrence v. Texas*, 539 U.S. 558, 564-73 (2003) (finding that the liberty protected by the Constitution protects the intimate personal relationships that adults enter into and cannot be controlled or punished as at issue in this case and *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

¹⁸⁹ See Karst, *supra* note 186, at 624-25; see also Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R.L.J. 269, 270 (2006).

¹⁹⁰ *Griswold*, 381 U.S. at 486.

¹⁹¹ See *Turner v. Safley*, 482 U.S. 78, 95-96 (1987).

¹⁹² *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

freedom to join expressive groups and exclude individuals whose inclusion fundamentally alters the group's message or purpose.¹⁹³

The Court has addressed the freedom of association and the right not to associate. In *Boy Scouts of America v. Dale*, the Court considered whether a group could exclude certain classes of people in light of anti-discrimination statutes.¹⁹⁴ In *Dale*, the Boy Scouts revoked an assistant scoutmaster's membership after he came out as gay because the organization did not condone homosexuality.¹⁹⁵ The Supreme Court's analysis hinged on whether the forced inclusion of unwanted persons infringes on the group's expressive association, and it did not matter whether the expression infringed was public or private.¹⁹⁶ The Court eventually found that the public nature of the scoutmaster's homosexuality was inconsistent with the Scouts' public and official policy to mandate inclusion.¹⁹⁷

Based on freedom of expressive association, the *Dale* decision is one of the few federal cases that deals with the right to disassociate rather than exclude.¹⁹⁸ For divorce to be an expressive right within First Amendment protection, the character of marriage needs to be analyzed. The Boy Scouts are private organizations with rules and membership requirements. Marriage is similarly private, governed by the rules and requirements of the two people who entered the relationship. Both the Boy Scouts and a married couple take an oath pledging loyalty, support, and other promises of the unified body. As Maren Lowrey points out, married couples wear wedding rings, much like the uniforms of the Boy Scouts, which signal their expressive participation and association with one another.¹⁹⁹ To require the plaintiff seeking a divorce to continue to hold themselves out as

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 640.

¹⁹⁵ *Id.* at 644-45.

¹⁹⁶ *Id.* at 648.

¹⁹⁷ *Id.* at 655-56.

¹⁹⁸ See generally *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 559 (1995) (addressing whether a Massachusetts public accommodations law could be used to force a private parade to include a message that the organizers opposed).

¹⁹⁹ Maren H. Lowrey, *Hopefully Enduring: How North Carolina's Divorce Laws Violate the First Amendment*, 10 CHILD & FAM. L.J. 112, 131 (2022).

married before adequately proving the elements of the fault-based cause would be similar to requiring the Boy Scouts to allow an openly gay person to wear the symbol of the scouts.

In *Hero v. Lake City Election Board*, a lifelong Republican became dissatisfied with a Republican-comprised election board.²⁰⁰ In response, Hero and others formed a coalition to elect two independent members to the board.²⁰¹ One of the candidates was Hero. Subsequently, the state Republican Party learned “of Hero’s efforts to oust Republican incumbents.”²⁰² It issued Hero a letter informing him that “for the next ten years, [Hero] was ‘not a Republican in good standing’ and thus barr[ed] him from seeking elected office in Indiana”²⁰³ Under Indiana law, there are three ways to appear on an election ballot: one involves certification that the candidate is a member of a major party and two involve running as an independent or write-in candidate.²⁰⁴

In response, Hero brought a 42 U.S.C. § 1983 claim arguing that the Indiana Republican Party and the local election board deprived Hero of his First and Fourteenth Amendment rights.²⁰⁵ On appeal, the court held that the county election board could allow the Republican Party to determine its members and restrict its standard bearers.²⁰⁶ The court found that the forced inclusion of Hero would infringe on the Republican Party’s freedom of expressive association because it “may seriously distort” the party’s collective decisions and thus impair its essential function of advocating for a particular form of government.²⁰⁷

Similar to the facts in *Dale*, Anita Green, an openly transgender woman, sued the Miss United States of America pageant on the basis that the pageant’s requirement that contestants be “natural born female” violated Oregon’s Public Accommodation Act.²⁰⁸ The Ninth Circuit agreed with the district

²⁰⁰ *Hero v. Lake Cnty. Election Bd.*, 42 F.4th 768, 770-71 (7th Cir. 2022).

²⁰¹ *Id.* at 770.

²⁰² *Id.*

²⁰³ *Id.* at 770-71.

²⁰⁴ *Id.* at 771.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 776-77.

²⁰⁷ *Id.* at 776 (quoting *Democratic Party of U.S. v. Wisc. ex rel. La Follette*, 450 U.S. 107, 122 (1981)).

²⁰⁸ *Green v. Miss U.S. of Am., LLC*, 52 F.4th 773, 777 (9th Cir. 2022).

court ruling that the First Amendment protected the pageant's expressive association rights to exclude a person who impacted the group's ability to express its views.²⁰⁹ The appellate court found that the pageant engaged in protected expressive conduct, similar to the expressive conduct at issue for inclusion in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*²¹⁰ The court reasoned that forcing the pageant to include Green would necessitate eliminating the "natural born female" rule, which directly affects the message conveyed by every contestant in a Miss United States of America pageant.²¹¹ The court noted that though the pageant did not have an explicit opposition to transgender women, its apparent use of "natural born female" communicates its narrow view of womanhood, and to include transgender women would broaden its definition of woman, which is the core of its express goal of celebrating women's "beauty, intelligence, and empowerment."²¹²

Marriage is a quintessential example of an expressive association. It represents one of the most private and sacred relationships, yet it also carries outward expressions of commitment and unity. In Mississippi, the statute requires a ceremony to solemnize the marriage.²¹³ This expressive conduct must be performed by an "authorized person."²¹⁴ This list includes ministers, rabbis, or any justice in Mississippi's judicial system.²¹⁵ The solemnization requirement for Mississippi marriage is analogous to the expressive conduct in *Dale*.²¹⁶ The Scout's oath, which included terms of remaining "morally straight" and "clean," was expressive for purposes of First Amendment protection. Similarly, marriage involves not only private vows but also public symbols, such as the exchange of rings, the adoption of shared

²⁰⁹ *Id.* at 793.

²¹⁰ *Id.* at 777; *see generally* *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995).

²¹¹ *Green*, 52 F.4th at 785-92.

²¹² *Id.* at 780-81; *About, MISS USA*, <https://missusa.com/about/> [https://perma.cc/BH8B-LX4P] (last visited Dec. 4, 2024).

²¹³ MISS. CODE ANN. § 93-1-15(1) (West 2025).

²¹⁴ *Id.*

²¹⁵ MISS. CODE ANN. § 93-1-17 (West 2025).

²¹⁶ *See supra* Part III.A.ii.

surnames, and the use of titles like “Missus.”²¹⁷ These outward expressions, much like the uniforms and oaths of the Boy Scouts in *Dale*, serve as markers of identity and association.

It follows that to force an individual to continue in their marriage, with the expressive association of marriage, such as rings, last names, and titles, would violate the principle in *Dale*. This would be akin to the Court’s finding that the Boy Scouts’ First Amendment rights were violated, as it recognized a distinction between a heterosexual person wearing a scout uniform and a homosexual person wearing a scout uniform.²¹⁸ This application of expressive conduct can be even more nuanced, as seen in *Green v. Miss United States of America*. While the pageant did not expressly oppose transgender women, it simply did not want transgender women to be included in its definition of “woman.” Here, the nuanced expression acknowledged in *Green* fits within the dissociation of divorce. Basing its analysis on *Hurley*, the *Green* court reasoned that the speaker’s decision “to exclude a message it did not like . . . is enough to invoke its right as a private speaker to shape its expression”²¹⁹

²¹⁷ Lowrey, *supra* note 199, at 131.

²¹⁸ Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000).

²¹⁹ Green v. Miss U.S. of Am., LLC, 52 F.4th 773, 784 (9th Cir. 2022) (quoting Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995)).

The Indiana Republican Party's exclusion of Hero from party membership is like divorce as both acts of exclusion serve to achieve similar goals. In *Hero*, the Republic Party's goal was to prevent Hero from running under their name—to protect their theory and practice of government. Exclusion, like the exclusion in *Dale*, served as a way to disassociate physically from the group and, more importantly, ideologically. In divorce, the petitioning party aims to physically and ideologically separate themselves from their spouse. To sever the bonds of matrimony is like severing the bond of political connection. As the court held in *Hero*, the First Amendment protected the Republican Party's dissociation from Hero. Thus, a person seeking to dissociate from their marriage is similarly entitled to the same protection.

3. Compelled Speech

Finally, the First Amendment's prohibition against compelled speech ensures that individuals cannot be forced to express ideas or messages that contradict their beliefs or intentions. The First Amendment prohibits the government from compelling individuals to express ideas or messages they do not wish to convey.²²⁰

When applying this analysis to Mississippi's divorce statute, the issue raised earlier on the requirements for desertion also raises a First Amendment issue under compelled speech. To prevail on desertion, the court must inquire whether the plaintiff's spouse will reconcile with the defendant if they were to return home. To obtain the divorce, the plaintiff must affirm, under oath, that they would take back the wayward spouse.²²¹ A married person actively suing for divorce and alleging desertion would be publicly required to affirm their loyalty to the marriage that they seek to dissolve under the penalty of perjury. This is the "distinctly different message" of association that was repugnant to the Court in *Dale*.²²²

Mississippi's Section 93-5-2 fault-based divorce statute similarly infringes on First Amendment protections by compelling

²²⁰ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²²¹ Bell, *supra* note 1, at 137.

²²² *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

plaintiffs to affirm positions inconsistent with their intent to dissolve their marriage. The compulsory marital reconciliation required to prove desertion undoubtedly violates the individual's freedom from compelled speech and undermines their right to disassociate from an unwanted relationship.

Similarly, the mutual consent requirement for irreconcilable differences compels speech. When seeking a divorce, individuals signal their desire to dissolve the marital union and disassociate from the vows and commitments they once made. If one spouse refuses to consent, the requirement functions as compelled speech. It traps the other spouse in the marriage and its expressive associations, thus violating the First Amendment.

IV. A CONTRACTUAL SOLUTION TO MISSISSIPPI'S DIVORCE CONUNDRUM?

Even if the courts reject that divorce is a fundamental right under the First Amendment, there remains a contractual argument. The Constitution's Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."²²³ Though drafted broadly to imply a complete prohibition on states' legislative impairment of contracts, the Supreme Court has interpreted the clause to limit a state's power to enact legislation that either breaches or modifies its contracts or regulates contracts between private parties.²²⁴ "It is settled law in [Mississippi], that marriage is a contract"²²⁵ Just as an offer and acceptance or a meeting of the minds is essential to forming a contract, mutual consent free from coercion or duress is required to form a marriage.²²⁶ Since marriage is a contract, one party should have the right to terminate the agreement without mutual consent.

Mississippi acknowledges the contractual nature of marriage in tort actions. Like tortious interference with a contractual relationship, Mississippi acknowledges the tort of alienation of affection. The alienation of affection tort provides a cause of action

²²³ U.S. CONST. art. I, § 10, cl. 1.

²²⁴ See *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 (1977).

²²⁵ *Rundle v. Pegram*, 49 Miss. 751, 754 (1874).

²²⁶ BELL, *supra* note 43, at 13.

against a third party who interferes with a marriage.²²⁷ Often used by former spouses against their ex-spouse's lover or paramour, alienation of affection claims must show (1) wrongful conduct of the defendant, (2) loss of affection or consortium, and (3) a causal connection between such conduct or loss.²²⁸ Notably, "wrongful conduct" does not require proof of an adulterous relationship; it requires only conduct that directly and intentionally interferes with the marriage relationship.²²⁹

Thus, if Mississippi treats interference with marriage as it treats interference with other contractual relationships, it stands to reason that the breakup of the marriage should also be treated as a contract. There is no doubt that while marriage is a contract, "[i]t is more than an ordinary contract."²³⁰ Thus, the dissolution of these special contracts should be carefully administered, but that is what Mississippi already does through the requirement that the court dissolve marriage. However, the strict requirement that the parties mutually consent to a divorce does not comport with the established common law of contracts.

In a breach-of-contract action, a court does not force the parties to continue under the contract if one party does not want to. Instead, the other party must pay damages for the breach to be released from the contract. However, unlike traditional breach of contract cases, where the court steps in *after* the breach occurs, the court carefully monitors divorce as a breach. Thus, the unique nature of the marriage contract, which underpins the formation of families and society, is protected—the court approves the custody of children and the division of property to ensure equity. Regardless of their divorce scheme, the child's best interest remains the lodestar for custody in all states. Unlike contract disputes, which can be resolved out of court, families must continue to return to court after the initial disputes over custody and property are resolved to vary the terms of the agreement.²³¹

²²⁷ See, e.g., *Lyon v. McGee*, 249 So. 3d 436, 441-42 (Miss. Ct. App. 2018).

²²⁸ *Id.* at 441.

²²⁹ *Id.*

²³⁰ *Rundle*, 49 Miss. at 754.

²³¹ Bell, *supra* note 1, at 133.

The courts generally do not heavily penalize a spouse for marital misconduct when dividing property.²³² This is primarily because waste or dissipation of assets is already included in the court's consideration of property division.²³³ The courts have also overturned alimony awards intended to "punish" spouses for bad behavior.²³⁴ Like in property division, alimony factors account for "fault or misconduct."²³⁵

Mississippi's treatment of marriage as both a contract and a social institution underscores the diametrical goals of the Mississippi legislature: to preserve the sanctity and institution of marriage by keeping couples bound together through hard-to-prove fault grounds but not using the fault in the demonstration of property or alimony. The current mutual consent requirement for divorce is at odds with established principles of contract law, which permit one party to terminate an agreement unilaterally. Recognizing divorce as a contractual right rather than a fault-based mechanism allows the courts to balance the dissolution of marriage with equitable protections for children, property, and societal interests. While marriage is undeniably more than an ordinary contract, its dual nature demands a legal approach that accommodates its contractual underpinnings and broader implications for families and society—and Sections 93-5-2 and 93-5-1 do not meet those goals.

CONCLUSION

Mississippi's fault-based divorce system represents a relic of outdated legal principles that impose undue burdens on individuals seeking to dissolve their marriages. By requiring

²³² For cases in which divorce was based on fault of one spouse, but no penalty was given in property division based on those bad acts, see *Vaughn v. Vaughn*, 798 So. 2d 431, 435 (Miss. 2001); *Henderson v. Henderson*, 757 So. 2d 285, 293 (Miss. 2000); *Godwin v. Godwin*, 758 So. 2d 384, 386-87 (Miss. 1999); *Voda v. Voda*, 731 So. 2d 1152, 1156-58 (Miss. 1999); *Bullock v. Bullock*, 699 So. 2d 1205, 1209-12 (Miss. 1997); *Wallmark v. Wallmark*, 863 So. 2d 68, 71-72 (Miss. Ct. App. 2003); *Duncan v. Duncan*, 815 So. 2d 480, 484-85 (Miss. Ct. App. 2002).

²³³ See *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994).

²³⁴ *Lauro v. Lauro*, 847 So. 2d 843, 850 (Miss. 2003); see also *Dogan v. Dogan*, 98 So. 3d 1115, 1127 (Miss. Ct. App. 2012); *Welch v. Welch*, 755 So. 2d 6, 11 (Miss. Ct. App. 1999).

²³⁵ See *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993).

mutual consent for irreconcilable differences or adhering to fault-based grounds that are difficult to prove, these statutes entrench financial, emotional, and psychological hardships that disproportionately impact women, low-income individuals, and survivors of domestic violence.

As this article demonstrates, Mississippi's divorce scheme is a practical obstacle and a constitutional violation. Rooted in both the Due Process Clause of the Fourteenth Amendment and the First Amendment's protections of expressive and intimate association, the right to divorce deserves recognition as a fundamental liberty. Furthermore, the mutual consent requirement for no-fault divorce is a form of compelled speech, forcing individuals to express an association they no longer wish to maintain. These principles underscore the urgent need for reform.

While *Dobbs* significantly altered the constitutional framework surrounding privacy rights, the First Amendment's explicit protections remain robust. Marriage and divorce fall squarely within these protections as intimate and expressive associations. By compelling individuals to remain associated with a marital union or to affirm their desire to reconcile, laws like Section 93-5-2 and Section 93-5-1 infringe upon fundamental freedoms central to the First Amendment.