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# No Exit: The Problem of Same-Sex Divorce

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# NO EXIT: THE PROBLEM OF SAME-SEX DIVORCE\*

ELISABETH OPPENHEIMER\*\*

*Same-sex divorce is one of the most complicated and least discussed aspects of the gay rights movement. The legal complexity is best illustrated with an example. Suppose a same-sex couple marries in Massachusetts, which recognizes gay marriage, then moves to Pennsylvania, which does not. The relationship ends. Where can the couple divorce? The surprising answer is nowhere. Pennsylvania courts will not divorce them because Pennsylvania does not recognize their same-sex marriage. Massachusetts courts will not divorce them because Massachusetts—like every other state—only grants divorces to current residents, even though it will marry non-residents. As same-sex couples are beginning to discover, the problem is not hypothetical. There are people desperate to end their marriages who are unable to do so, and there are same-sex couples unwilling to get married in the first place because divorce may be unavailable.*

*This Article explains the state laws that create this problem and why there are no obvious solutions. The Article then surveys the state court decisions on same-sex divorce. In light of this jurisprudence, the Article examines the limited scholarship on how judges should treat divorce petitions from same-sex couples. The Article concludes that judges can often grant those divorce petitions, but that they must pay more attention to the state laws regulating same-sex unions than current scholarship suggests. Although legislative solutions to the same-sex divorce problem have been almost completely ignored, this Article argues that legislatures are in the best position to solve the problem. Specifically, this Article suggests that states that recognize same-sex marriage should allow any same-sex couple married in the*

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*state to divorce there, whether or not the members of the couple reside in the state at the time of the divorce. This Article further argues that Williams v. North Carolina does not bar this simple solution, as other writers have assumed. The Article ends by summarizing the most practical solutions to the same-sex divorce problem for judges, legislators, and same-sex couples.*

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## INTRODUCTION

One of the first things family lawyers tell excited gay couples planning to marry may come as a surprise: maybe they should reconsider.<sup>1</sup> While gay couples can now marry in several states, they are often unaware that they may not be able to divorce in any state.

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1. Fred A. Bernstein, *Gay Unions Were Only Half the Battle*, N.Y. TIMES, Apr. 6, 2003, § 9 (Style), at 2 (“Meanwhile, some legal experts are cautioning couples outside Vermont to think twice about traveling to obtain a civil union. ‘Unless you are a resident of Vermont, or plan to be a resident of Vermont, it is unwise to register for a civil union’ . . .”); Nathan Koppel, *Same-Sex Couples Face Another Growing Hurdle—Divorce*, WALL ST. J., June 10, 2008, at A12 (noting that a lawyer urged gay couples considering marriage “to run in the other direction”); Tara Siegel Bernard, *For Gay Couples, “Traditional” Divorce Isn’t Always an Option*, BUCKS, N.Y. TIMES (Nov. 17, 2009, 5:10 PM), <http://bucks.blogs.nytimes.com/2009/11/17/for-gay-couples-traditional-divorce-isnt-always-an-option/> (quoting a family lawyer who theorized she would be “hesitant” to

A simple example illustrates the same-sex divorce problem: suppose two women from Massachusetts marry there, then move to Pennsylvania a few years later. The relationship ends and they decide to divorce. Where do they go to get a divorce? They can't go to Massachusetts, which—like every other state—requires that at least one member of the couple live in the state for a significant period of time (there, one year) immediately before filing for divorce.<sup>2</sup> This is true regardless of whether the couple was married in Massachusetts, whether the spouses were Massachusetts residents at the time of the marriage, and whether both spouses agree to the divorce. On top of that, Massachusetts will not grant a divorce to anyone who has “removed into this commonwealth for the purpose of obtaining a divorce.”<sup>3</sup> But the couple can't get divorced in Pennsylvania, either. If they try, the judge will likely tell them that they are not married under Pennsylvania law, so there is no union to dissolve.<sup>4</sup> The couple might assume they could divorce in Nevada, which has a reputation as a “divorce mill.” But Nevada actually has a six-week residency requirement for divorce, and in any event it does not allow same-sex divorce because it doesn't recognize same-sex marriage.<sup>5</sup>

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marry in a state that recognized same-sex marriage if she lived outside the state); *see also* Melissa Meinzer, *Same-Sex Couples in St. Louis Can Get Married in Iowa. They Just Can't Ever Get Divorced.*, RIVERFRONT TIMES (St. Louis), Dec. 2, 2010, <http://www.riverfronttimes.com/2010-12-02/news/same-sex-divorce-st-louis-missouri/> (“When asked what out-of-state same-sex married couples should do if they want a divorce, [the attorney] laughs ruefully. ‘Drown themselves in the Mississippi!’”).

2. MASS. ANN. LAWS ch. 208, § 5 (LexisNexis 2003); Colleen McNichols Ramais, Note, *‘Til Death Do You Part . . . And This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 3 U. ILL. L. REV. 1013, 1016 (2010) (citing 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 703 (2d ed. 1987) (discussing residency requirements)).

3. MASS. ANN. LAWS ch. 208, § 5. Jurisdiction to grant a divorce is founded on domicile. *See Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229 (1945). Residence is only a proxy for proving domicile, and if the party intends to leave immediately after obtaining the divorce, there is no valid domicile. *See also Williamson v. Osenton*, 232 U.S. 619, 624 (1914) (“The essential fact that raises a change of abode to a change of domicil[e] is the absence of any intention to live elsewhere.”).

4. In fact, a scenario much like this one happened in March 2010. *See Kern v. Taney*, 11 Pa. D. & C.5th 558, 559 (Berks Cnty. Ct. Com. Pl. 2010). Two women were married in Massachusetts in 2009. *Id.* at 559. The court's decision does not make clear whether they were residents of Pennsylvania at that time or whether they later moved to Pennsylvania. *See id.* at 559–60. By October 2009, they were living in Pennsylvania and sought a divorce there. *Id.* at 559. The court found that it could not recognize the underlying marriage and thus denied the divorce. *Id.* at 563. The court noted that “[a]pparently, the parties are not permitted to obtain a divorce in Massachusetts for failure to qualify under the residency requirements, although the parties were permitted to be married there.” *Id.* at 560 n.2.

5. NEV. CONST. art 1, § 21 (“Only a marriage between a male and female person shall be recognized and given effect in this state.”); NEV. REV. STAT. § 125.020(e) (1985)

All of this means that some gay couples find themselves in the unique situation of being married without any way to divorce. The problem is not hypothetical. A couple much like the one described above had a divorce denied last year in Pennsylvania.<sup>6</sup> Some couples are so desperate to obtain a divorce that they uproot their lives to move to a state that recognizes gay marriage in order to divorce;<sup>7</sup> one woman is considering having a sex-change operation so that she can divorce as a member of a heterosexual couple.<sup>8</sup>

In the context of opposite-sex divorce, the Supreme Court has recognized that divorce is the only way that couples can “mutually liberate themselves from the constraints . . . that go with marriage.”<sup>9</sup> Divorce is so critical to individual autonomy that even proponents of “covenant” marriage—a type of marriage some states offer to heterosexual couples that theoretically cannot be dissolved via no-fault divorce—acknowledge that covenant marriages are likely unenforceable in court.<sup>10</sup> Yet gay marriages can turn into super-covenant marriages that cannot be dissolved in a no-fault divorce or for any other reason, including abuse, adultery, or medical catastrophes.

Moreover, the unavailability of same-sex divorce may harm same-sex marriage. Mobile same-sex couples who understand the divorce problem may choose not to marry as long as their marriage is

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(establishing a residency requirement). The only true domestic divorce mill is Guam, which will grant an uncontested divorce if one of the parties has resided in Guam for seven days. *See* 19 GUAM CODE ANN. § 8318(b) (2011) (“If both parties consent in writing to a divorce or dissolution of their marriage, a divorce or dissolution may be granted if one of the parties has resided in Guam for at least seven (7) days immediately preceding the filing of the complaint.”). Guam does not marry same-sex couples. *See* Brandon Miller, *Freedom to Marry Goes to Guam*, CHANGE.ORG (Dec. 30, 2010), <http://news.change.org/stories/freedom-to-marry-goes-to-guam>. *See generally* 19 GUAM CODE ANN. ch. 3 (2011) (including all statutes governing the “contract of marriage”). However, Guam does not ban recognition of same-sex marriages contracted in other states. *Id.* § 3107 (“All marriages contracted outside of the territory of Guam, which would be valid by the laws of the country in which the same were contracted, are valid in the territory of Guam.”). Thus far, it appears that no same-sex couple has tried to obtain a divorce in Guam, but it might be possible to do so.

6. *See Kern*, 11 Pa. D. & C.5th at 558.

7. *Divorce Hard to Get for Some Gay Couples*, USA TODAY (Apr. 15, 2008, 7:25 PM), [http://www.usatoday.com/news/nation/2008-04-15-gay-divorces\\_N.htm](http://www.usatoday.com/news/nation/2008-04-15-gay-divorces_N.htm).

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

9. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

10. *See* Brian H. Bix, *State Interest and Marriage—The Theoretical Perspective*, 32 HOFSTRA L. REV. 93, 106 & nn.68–69 (2003).

unequal to heterosexual marriage in this critical way.<sup>11</sup> That is exactly why their lawyers warn them about the issue.<sup>12</sup> One state law, now repealed, specifically provided that couples who were unaware of the divorce problem had to be informed of it when they applied for a civil union license (presumably creating some uncomfortable moments for couples already at the town hall).<sup>13</sup> Marriage equality necessarily includes equal access to divorce, but access to divorce is almost totally ignored in gay rights campaigns.

The problem of same-sex divorce also provides a new way of thinking about the argument that marriage regulation should always be left to the states. To some extent, state-by-state regulation of same-sex marriage has been a triumph of federalism and the notion that states are the “laboratories of democracy.”<sup>14</sup> Gay marriage has so far been legalized in only a few states, and decisionmakers in other states have been able to wait to see the effects of legalizing gay marriage before making a decision on the issue.<sup>15</sup> But, as the divorce cases show, state-by-state regulation of something as fundamental as marriage can have unintended, complicated consequences. This is particularly true in a society that is highly, and increasingly, geographically mobile.<sup>16</sup> Seen in this light, arguments that gay rights

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11. Unfortunately, there are no surveys or studies documenting the extent of this problem, and data that is not anecdotal is hard to come by. The fact that lawyers warn their clients about the issue, however, suggests that it is something that engaged same-sex couples take into consideration.

12. See *supra* note 1 and accompanying text.

13. VT. STAT. ANN. tit. 18, § 5160(f) (repealed 2009) (“A town clerk shall provide a person who applies for a civil union license with information prepared by the secretary of state that advises such person of the benefits, protections and responsibilities of a civil union and that Vermont residency may be required for dissolution of a civil union in Vermont.”).

14. Jonathan Rauch, *A More Perfect Union: How the Founding Fathers Would Have Handled Gay Marriage*, ATLANTIC MONTHLY, Apr. 2004, at 88; see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (explaining that one of the benefits of federalism is that one state may serve as a laboratory for new ideas).

15. See Same-Sex Marriage, Civil Unions and Domestic Partnerships, National Conference of State Legislatures, <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> (last updated July 14, 2011) (listing the states that issue marriage licenses to same-sex couples); Rauch, *supra* note 14, at 88 (noting that legislators may look to other states to see the effects of legalizing gay marriage).

16. See Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2155 (2005) (noting that automobiles and airplanes have increased societal mobility); J. Thomas Oldham, *What If the Beckhams Move to L.A. and Divorce? Marital Property Rights of Mobile Spouses When They Divorce in the United States*, 42 FAM. L.Q. 263, 263 & n.1 (2008) (citing census statistics on the number of married and separated couples that move each year); John R. Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823, 824 (1963) (citing statistics to show that “[g]eographic mobility has

organizations should push for uniform recognition of same-sex marriage under the federal Constitution,<sup>17</sup> or that the Full Faith and Credit Clause should be interpreted more broadly and enforced more stringently,<sup>18</sup> look more compelling.

The problem of same-sex divorce is just beginning to receive attention in the popular press. At this point, however, it has been addressed by only a few academics, and only limited aspects of the problem have been discussed.<sup>19</sup> This Article will present a comprehensive overview of the problem and will synthesize the existing literature for the first time. Part I explains the importance of divorce. Part II reviews the most significant same-sex divorce cases and the various theories on which judges are basing their opinions. Scholars have thus far spent relatively little time analyzing the gay divorce jurisprudence that already exists, but if academics are to give advice to judges, it is useful to know what theories judges are finding sensible now. Part II then reviews the extant scholarship in light of that jurisprudence and concludes that the scholarship offers a valuable starting point for analyzing same-sex divorce cases, but does not sufficiently account for the patchwork of state laws regulating marriage, divorce, and same-sex unions. Part III considers whether

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intensified at a comparatively steady rate in every decade since 1900"); Adam Weiss, *Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union*, 41 COLUM. J.L. & SOC. PROBS. 81, 82 (2007) (noting LGBT people move frequently because of different laws and societal norms relating to homosexuality in different states and countries); Sarah L. Gottfried, Note, *Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents in Relocation Cases*, 9 CARDOZO WOMEN'S L.J. 567, 567 & nn.3-11 (2003) (noting, among other statistics, that one in five Americans changes residence each year); Michael M. O'Hear, Note, *"Some of the Most Embarrassing Questions": Extraterritorial Divorces and the Problem of Jurisdiction Before Pennoyer*, 104 YALE L.J. 1507, 1512 & n.28 (1995) (discussing impact of the "increasingly migratory character of American society" on historical divorce law).

17. See, e.g., Jesse McKinley, *Bush v. Gore Foes Join to Fight Gay Marriage Ban*, N.Y. TIMES, May 27, 2009, at A1 (discussing a federal lawsuit seeking invalidation of California's Proposition 8 and some gay rights advocates' discomfort with the lawsuit).

18. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1968-2007 (1997) (arguing that the Defense of Marriage Act is unconstitutional under the Full Faith and Credit Clause).

19. See, e.g., Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699, 729-57 (2004); Herma Hill Kay, *Same-Sex Divorce in the Conflict of Laws*, 15 KING'S C. L.J. 63, 66 (2004); Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 205, 209 (2005); Danielle Johnson, Comment, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce is an Incident of Marriage that Should be Uniformly Recognized Throughout the United States*, 50 SANTA CLARA L. REV. 225, 244-45 (2010); Ramais, *supra* note 2, at 1028-31.

legislators, rather than judges, can solve the same-sex divorce problem, an idea that has been almost completely ignored in the academic literature.<sup>20</sup> Part III goes on to argue that in states where same-sex marriage is legal, any same-sex couple married in the state should be allowed to return there to divorce, regardless of residence or domicile. That is, those states should not enforce divorce residency or domicile requirements against same-sex couples who married in the state, even if the couple moved out of (or never resided in) the state. Most scholars who have mentioned legislative solutions at all have assumed that this solution is foreclosed by *Williams v. North Carolina (Williams II)*,<sup>21</sup> which has been read to say that residency requirements for divorce are constitutionally mandated.<sup>22</sup> Looking to both historical divorce laws and principles of jurisdiction, Part III argues that this reading is wrong and that legislative solutions, including allowing any same-sex couple married in a state to divorce there, are possible.

This Article ends by summarizing the most practical solutions to the same-sex divorce problem for judges, legislators, and same-sex couples. This area of law is complex and constantly evolving, and the best route for those concerned about the same-sex divorce problem is to pursue both judicial and legislative solutions.

### I. WHY SAME-SEX DIVORCE MATTERS

Divorce is best understood as a derivative benefit of marriage, providing a neutral adjudicator and a relatively dignified ending for marriages that don't last. Beyond the important questions of property allocation and custody division, divorce frees couples from marriages that may have been abusive or unbearable, erasing the legal connection and allowing the spouses to remarry.

So far, the number of formal same-sex divorces has been relatively low.<sup>23</sup> That's partly because there wasn't, until recently,

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20. The two brief discussions are found in Kay, *supra* note 19, at 89–90, and Ramais, *supra* note 2, at 1037–38.

21. 325 U.S. 226 (1945).

22. See, e.g., Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate*, 2008 BYU L. REV. 1703, 1798–99.

23. Statistics on gay divorce are not officially tracked, but the *Boston Globe* reported in an “informal survey” that 35 to 45 of the 7,300 couples married in Massachusetts between 2003 and 2006 had divorced. Conant, *supra* note 8 (citing Matt Carroll, *The Gay Divorcees*, BOS. GLOBE, Jan. 29, 2006, at E4). There are only about a dozen cases of couples who tried to divorce after moving out of states that recognize gay marriage. One interesting note is that the Goodridges, the plaintiffs in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), the case that first legalized same-sex marriage in the United



much same-sex marriage. American couples have been able to obtain Vermont civil unions since 2000, and could marry in Canada beginning in 2003.<sup>24</sup> But the first American state to recognize gay marriage, Massachusetts, did so in 2003 and limited marriage to resident couples until 2008.<sup>25</sup> Since 2008, couples have been able to legally marry in seven states and the District of Columbia.<sup>26</sup> As these marriages age, the number of couples seeking divorce will grow, and the problem of same-sex divorce will become more urgent.

The same-sex divorce problem presents compelling questions for people across the ideological spectrum, even for those who do not support same-sex marriage. Anyone who believes that divorce is a fundamental part of personal freedom should care about same-sex divorce. Moreover, anyone who supports gay marriage should pay attention to the issue. Because the lack of access to divorce may keep some couples from marrying, this is one of many issues that will have to be resolved if gay marriage rates are to match the number of gay couples that want to marry.<sup>27</sup>

There are also reasons that those who are lukewarm or openly hostile to gay marriage might look at divorce in a different light. Many people support some rights for gay individuals or couples, but stop short of endorsing civil unions or marriage.<sup>28</sup> This ambivalence is reflected in the policies of some states. A small handful of states neither allow gay marriage nor forbid it by statute or constitutional amendment.<sup>29</sup> Other states explicitly forbid gay marriage but have other protections for gay individuals and couples, including anti-

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States, are now separated. Katie Zezima, *Same-Sex Marriage Plaintiffs Separate*, N.Y. TIMES, July 22, 2006, at A11.

24. See VT. STAT. ANN. tit. 23, § 1204 (2000); Halpern v. Att'y Gen. of Can. (2003), 65 O.R. 3d 161, 199–200 (Can. Ont. C.A.).

25. *Goodridge*, 798 N.E.2d at 941, was the basis for the creation of same-sex marriage. The Massachusetts laws now contain no special provisions for same-sex marriage; it is simply not one of the prohibited categories listed in MASS. GEN. LAWS ch. 207, §§ 1–14 (2003). The residency legislation was repealed by the Act of July 31, 2008, 2008 MASS. ACTS ch. 216, § 1. See Ramais, *supra* note 2, at 1014 n.6.

26. Gay marriage is currently legal in Massachusetts, Connecticut, Iowa, New Hampshire, Vermont, New York, and the District of Columbia. See *Same-Sex Marriage*, *supra* note 15 (summarizing gay marriage and gay rights laws). Additionally, same-sex couples were able to marry in California for over five months in 2008. See Bob Egelko, *Same-Sex Marriage Issue Back to Top State Court*, S.F. CHRON., Nov. 6, 2008, at A19.

27. See *supra* note 1.

28. Andrew Gelman, *Gay Rights Are Popular in Many Dimensions*, FIVETHIRTYEIGHT.COM (June 13, 2009, 8:05 PM), <http://www.fivethirtyeight.com/2009/06/gay-rights-are-popular-in-many.html> (citing a graph by Professors Jeffrey Lax and Justin Phillips showing the state-by-state popularity of various gay rights measures).

29. See *infra* note 44.

discrimination laws and hospital visitation rights.<sup>30</sup> Judges in these in-between states have recognized the need to provide for structured dissolutions of long-term same-sex relationships—especially those that involve children or significant assets<sup>31</sup>—and the American Law Institute has published guidelines for dissolving “nonmarital relationships.”<sup>32</sup> In short, many people have recognized that two people whose lives are intertwined may need the assistance of the state to separate, and that assisting in a separation is conceptually different from validating and supporting the initial relationship. Citizens or legislators who do not support gay marriage but are willing to extend some practical benefits to gay couples might decide that divorce is a necessary benefit.

Even those who do not support gay rights at all might recognize the special case that divorce presents. In many states, legislators or voters have passed laws providing that the state will not recognize out-of-state same-sex unions or extend any other rights to gay individuals and couples.<sup>33</sup> It is difficult to argue that such states should extend the benefit of divorce to same-sex couples when those couples receive no other benefits—although it certainly is bizarre for gay-marriage opponents to argue that a gay couple *must* remain married.<sup>34</sup> There are, however, a few unique problems worthy of mention. If a state refuses to grant a same-sex couple a divorce, the state may then have to decide whether to allow the spouses to remarry new partners of the opposite sex.<sup>35</sup> Denying the right to remarry is fundamentally inconsistent with refusing to recognize the underlying marriage, but allowing the remarriage creates a form of bigamy. Imagine our Pennsylvania couple again. Suppose one of the women in the relationship decides to marry a man. Pennsylvania refuses to allow

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30. Same-Sex Marriage, *supra* note 15.

31. See generally John M. Yarwood, Note, *Breaking Up is Hard to Do: Mini-DOMA States, Migratory States, Marriage, Divorce, and a Practical Solution to Property Division*, 89 B.U. L. REV. 1355 (2009) (discussing property division rules for cohabitating, unmarried couples).

32. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 6 (2002).

33. See *infra* note 44; see also Koppelman, *supra* note 16, at 2165 (collecting statutes that prohibit states from recognizing marriages validly celebrated in other states).

34. Bernstein, *supra* note 1, at 2 (“There are people who are so against gay relationships they won’t let us get into committed relationships, and they won’t let us get out of them either.”).

35. Of course, as one person in this situation noted, being unable to divorce may create non-legal problems in seeking new relationships: “When you’re newly single and starting to date, it’s awkward: ‘I just want you to know I happen to be married in five states.’” Meinzer, *supra* note 1.

her to divorce her wife, but she is nonetheless allowed to marry the man. Whenever she travels to Massachusetts—or any other state that recognizes same-sex marriage—she is suddenly a bigamist. If she gets into an accident in Massachusetts, there would be a dispute over which spouse is entitled to make medical decisions. If a daughter from the first marriage goes to Harvard and tries to fill out financial aid forms, it will be unclear whom to list as “parents.” That may be a problem for Massachusetts to solve, but perhaps, especially in a time of a transient population, judges and legislators in every state should avoid exacerbating the problem. As the Supreme Court put it in an early case about inter-state recognition of opposite-sex divorces, “society . . . has an interest in the avoidance of polygamous marriages and in the protection of innocent offspring of marriages deemed legitimate in other jurisdictions.”<sup>36</sup>

Another issue involves a different aspect of the same-sex divorce problem. Even if a same-sex couple succeeds in divorcing in a state that recognizes their marriage, other states may not enforce divorce obligations, such as alimony.<sup>37</sup> A state that refuses to recognize same-sex divorces granted in other states runs the risk of becoming a “haven[]” for gay individuals seeking to avoid obligations under divorce settlements.<sup>38</sup> For instance, one mother who converted to Christianity and renounced her partner moved from Vermont to Virginia with the couple’s daughter in an attempt to avoid Vermont’s resolution of the custody dispute.<sup>39</sup> Despite relatively clear law governing custody disputes between legal parents, the case has spawned years of litigation.<sup>40</sup> Judges and legislators in states that

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36. *Williams v. North Carolina* (*Williams I*), 317 U.S. 287, 303 (1942).

37. Koppelman, *supra* note 19, at 209 (“More generally, blanket nonrecognition would mean that states following that rule would become havens for avoiding obligations of spousal property and child support that had been validly entered into pursuant to Massachusetts law.”).

38. *Id.*

39. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 336 (Va. Ct. App. 2006) (construing the Parental Kidnapping Prevention Act to require that Virginia give full faith and credit to Vermont’s custody and visitation orders in a child custody dispute involving estranged same-sex members of a civil union); Padraic Maroney, *With Gay Marriage Comes . . . Gay Divorce*, EDGE BOSTON, Mar. 22, 2010, <http://www.edgeboston.com/index.php?ch=entertainment&sc=culture&sc3=&id=103669&pf=1> (noting the publicity and interstate tensions generated by same-sex divorce).

40. Child custody decisions can be one of the most difficult parts of divorce proceedings, but the issue is not necessarily raised by the gay divorce cases, and few of the cases mentioned in this Article involve custody issues. Under the Uniform Child Custody Jurisdiction Act, 9 (1A) U.L.A. 657 (1997) and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2010), any legal parent can litigate custody of a child, regardless of the parents’ marital status. It is not clear, however, how the Parental Kidnapping Prevention

forbid gay marriage should be alert to this type of forum shopping and develop ways to avoid it.

## II. JUDICIAL SOLUTIONS TO THE SAME-SEX DIVORCE PROBLEM

There are only about a dozen cases dealing with same-sex relationship dissolution. There would doubtless be more, but some gay couples who were advised that divorces could not be obtained have resolved their separation issues without a divorce, for better or for worse.<sup>41</sup> This Part will describe some of the most important cases in detail, both to show the often-haphazard nature of gay divorce litigation and to illustrate the different theories that judges are using to grant or deny divorce petitions from same-sex couples.

Despite the variety of laws governing divorce and same-sex relationships, judges faced with divorce petitions from same-sex couples are generally trying to answer the same question: does the state statute allowing the judge to end a marriage via divorce apply to same-sex marriages? More specifically, when the word “marriage” is used in a divorce statute, what does it mean? Judges have taken a variety of analytical approaches to answer these seemingly straightforward questions. The cases are too few and too scattered to identify consistent trends over time or in different jurisdictions, but courts seem to be gradually arriving at a more nuanced jurisprudence. This Part will discuss the cases in approximate order of increasing sophistication, which corresponds roughly with chronological order. In a few early cases, judges made their decisions entirely based on equity and the feeling that something ought to be done for the same-sex couple. In other early cases, judges quickly dismissed divorce petitions on the ground that the long-ago legislatures that enacted the divorce statutes decades earlier could not have meant them to apply to same-sex marriages. More recently, several courts have analyzed their states’ divorce statutes with specific reference to the principles and jurisprudence that have historically governed marriage recognition. These different approaches have produced varied results

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Act would apply to a non-biological parent who had not formally adopted the child. See § 1738A(b) (failing to explicitly define “parent”).

41. See Jamie Stengle, *Court Will Decide If Homosexual Couples Married Elsewhere Can Get Divorced in Texas*, CNSNEWS.COM, Apr. 20, 2010, <http://www.cnsnews.com/news/article/court-will-decide-if-homosexual-couples-married-elsewhere-can-get-divorced-texas> (noting that same-sex couple had worked out a custody arrangement before realizing same-sex divorce might be available). See generally Meinzer, *supra* note 1 (noting the use of annulments and mediation services in lieu of divorce).

and, in some cases, judges have reached different results while applying the same analytical method to the same statute.

In addition to judges, academics have also been trying to work out the theoretical issues raised by same-sex divorce petitions. Thus, after describing the cases, this Part will flesh out some of the suggestions by scholars and point out potential problems with these suggestions in light of the caselaw and the nuanced family law that exists within each state. This Part will evaluate which academic theories have the most potential and how they might be modified to be most useful in the real world.

In discussing the cases and the scholarship, this Part will point to pertinent state laws regulating same-sex unions, which are referred to as “mini-DOMAs.” Section 2 of the federal Defense of Marriage Act (DOMA) provides

No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.<sup>42</sup>

Contrary to popular belief, states have never been required to recognize other states’ marriages under the Full Faith and Credit Clause or any other constitutional provision, although states generally do so as a matter of course.<sup>43</sup> Section 2 of DOMA, therefore, codified what history had already established. States’ mini-DOMAs, which can be either statutory or constitutional, are further barriers to ensure that a state will not be forced to recognize other states’ gay unions against its residents’ will.<sup>44</sup> Some are relatively narrow, merely

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42. 28 U.S.C. § 1738C (2010). DOMA is codified at 1 U.S.C. § 7 (2010) and 28 U.S.C. § 1738C (2010). The Department of Justice announced earlier this year that it would not defend section 3 of DOMA, which prohibits the federal government from recognizing same-sex marriage, in court. Letter from Eric H. Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>. This Article deals with section 2 of DOMA.

43. See Mark P. Strasser, *DOMA and the Constitution*, 58 *DRAKE L. REV.* 1011, 1017 (2010) (“Yet, even before same-sex marriage was a contentious issue in the United States, there was a long history of states refusing to recognize marriages validly celebrated elsewhere. The problem that DOMA was allegedly designed to solve—namely, protecting states from their domiciliaries who might enter into a same-sex marriage in Hawaii and then return home demanding that it be recognized—was not really a problem at all.”).

44. Forty-two states have some sort of mini-DOMA legislation; many of those have both statutory and constitutional mini-DOMAs. Twenty-nine states have constitutional mini-DOMAs. See ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II,

defining marriage as between a man and a woman; others are very broad, banning judicial enforcement of contracts that replicate the benefits of marriage.<sup>45</sup>

### A. Equity Cases

In the earliest cases, judges largely sidestepped legal analysis in favor of more intuitive decisionmaking. This Section will describe those cases and the reactions they provoked. Professor Barbara Cox

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§ 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV, ¶ I; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263-A; MO. CONST. art. I § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13. Hawaii's constitutional amendment simply gives the legislature the authority to limit marriage to couples of different sexes. HAW. CONST. art. I, § 23. Thirty-nine states have statutory mini-DOMAs. ALA. CODE § 30-1-19 (LexisNexis Supp. 2010); ALASKA STAT. §§ 25.05.011, .013 (2010); ARIZ. REV. STAT. ANN. §§ 25-101, -112 (2007); ARK. CODE ANN. §§ 9-11-107, -109 (2009), 9-11-208 (Supp. 2011); CAL. FAM. CODE §§ 300 (West Supp. 2011), 308.5 (West 2004); COLO. REV. STAT. §§ 14-2-104, -112 (2011); DEL. CODE ANN. tit. 13, § 101 (2009); FLA. STAT. ANN. §§ 741.04, .212 (West 2010); GA. CODE ANN. § 19-3-3.1 (2010); HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2010); IDAHO CODE ANN. §§ 32-201, -209 (2006); 750 ILL. COMP. STAT. ANN. §§ 5/201, /212 (West 1999), /213.1 (West 1999); IND. CODE ANN. § 31-11-1-1 (LexisNexis 2007); KAN. STAT. ANN. §§ 23-101, -115 (2007); KY. REV. STAT. ANN. §§ 402.005, .020, .040, .045 (LexisNexis 2010); LA. CIV. CODE ANN. arts. 89 (Supp. 2011), 96 (1999), 3520 (2011); ME. REV. STAT. ANN. tit. 19-A, § 701(5) (Supp. 2010); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2006); MICH. COMP. LAWS ANN. §§ 551.1, .271, .272 (West 2005); MINN. STAT. ANN. §§ 517.01, 518.01 (West 2006), 517.03 (West Supp. 2011); MISS. CODE ANN. § 93-1-1(2) (2007); MO. ANN. STAT. § 451.022 (West 2003); MONT. CODE ANN. §§ 40-1-103, -401 (2011); N.C. GEN. STAT. §§ 51.1, .2 (2009); N.D. CENT. CODE §§ 14-03-01, -08 (2009); OHIO REV. CODE ANN. § 3101.01 (LexisNexis 2008); OKLA. STAT. ANN. tit. 43, §§ 3 (West Supp. 2011), 3.1 (West 2001); OR. REV. STAT. § 106.010 (2007); 23 PA. CONS. STAT. ANN. § 1704 (West 2010); S.C. CODE ANN. §§ 20-1-10, -15 (Supp. 2010); S.D. CODIFIED LAWS §§ 25-1-1, -38 (2004); TENN. CODE ANN. § 36-3-113 (2010); TEX. FAM. CODE ANN. §§ 2.001, 6.204 (West 2006); UTAH CODE ANN. §§ 30-1-2, -4, -4.1 (LexisNexis 2007); VA. CODE ANN. §§ 20-45.2, -45.3 (2008); WASH. REV. CODE ANN. §§ 26.04.010-.020 (West 2005); W. VA. CODE ANN. § 48-2-603 (LexisNexis 2009); WIS. STAT. ANN. §§ 765.001(2), 765.01 (West 2009); WYO. STAT. ANN. § 20-1-101 (2011); *see also* Same-Sex Marriage, *supra* note 15 (noting which states have constitutional amendments and statutes). For a general discussion of mini-DOMA legislation, see Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265-66 (2007).

45. Compare, e.g., ARIZ. CONST. art. 30, § 1 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."), with, e.g., VA. CONST. art. I, § 15-A ("This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage..."). For further background on this issue, the best resource is Andrew Koppelman's excellent reference guide to state laws governing gay unions. Koppelman, *supra* note 16, at 2165.

has researched these cases extensively, and this Section draws on her analysis in describing them.<sup>46</sup>

The first partially successful civil union dissolution case was initially handled with minimal fuss and minimal law. In 2003, Russell Smith and John Anthony, two men who had been joined in a Vermont civil union, filed for divorce in Texas state court.<sup>47</sup> The dissolution was an “amicable, agreed-upon matter.”<sup>48</sup> After a day of discussion with the parties, the judge decided that Texas courts are courts of general jurisdiction and that the parties had the equivalent of a contract calling for property division.<sup>49</sup> He therefore concluded he had jurisdiction, heard the case, divided the property, and dissolved the civil union.<sup>50</sup>

Less than a month later, the Texas Attorney General objected to this outcome in a press release: there was no procedure under Texas law for dissolution of a civil union, he argued, and no marriage existed in the first place.<sup>51</sup> The judge could have responded that, as a court of general jurisdiction, he did not need a specific procedure to make an equitable division of property.<sup>52</sup> Instead, he vacated the order, and the plaintiff withdrew his petition because “he couldn’t afford to fight the attorney general.”<sup>53</sup>

A similar case in Iowa, *In re KJB & JSP*,<sup>54</sup> had a different outcome. A lesbian couple had a Vermont civil union.<sup>55</sup> Although they were not married under Vermont law, they filed a standard divorce petition in 2003 in Iowa alleging that they had been married in Vermont.<sup>56</sup> The judge granted the divorce.<sup>57</sup> As he “started to hand the papers back to . . . the lawyer for one of the women,” the judge

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46. See Cox, *supra* note 19, at 699.

47. *Id.* at 736; see also Molly McDonough, *Court OKs Divorce Without Recognizing ‘Marriage’: Gay Couple’s Civil Union, Created in Vermont, Is Dissolved in Texas*, 2 No. 11 A.B.A. J. eReport 2 (Mar. 21, 2003) (describing the Texas case).

48. McDonough, *supra* note 47.

49. See *id.*; Cox, *supra* note 19, at 736.

50. Cox, *supra* note 19, at 736; see also McDonough, *supra* note 47 (writing that the judge “ordered a straightforward no-fault divorce decree and civil union dissolution”).

51. McDonough, *supra* note 47; see also Bernstein, *supra* note 1, at 2 (noting the unique problem of deciding whether a “marriage” exists).

52. See *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000) (explaining that Texas state district courts are courts of general jurisdiction).

53. Bernstein, *supra* note 1, at 2.

54. Cox, *supra* note 19, at 742.

55. *Id.*

56. See *id.*

57. See *id.*

suddenly realized both divorce petitioners were women.<sup>58</sup> When the lawyer explained that the couple had a Vermont civil union, however, the judge decided that “‘[i]f people have disputes, and they . . . live here, then they should have access to the judicial system,’ ”<sup>59</sup> so he did not vacate the divorce. But the media noticed, and a firestorm ensued.<sup>60</sup> A large group of would-be intervenors—state representatives, a pastor, and a church, among others—filed a petition arguing that the divorce could not be granted because civil unions did not exist in Iowa and two women could not be married under Iowa law.<sup>61</sup>

After the Iowa Supreme Court denied the motion to intervene for lack of standing,<sup>62</sup> the trial judge rewrote his earlier opinion, resituating the dissolution action in the context of a civil union.<sup>63</sup> He acknowledged that he would have lacked jurisdiction to dissolve a “marriage” between two women.<sup>64</sup> Nonetheless, he decided that he could make an equitable termination of a civil union, a concept foreign to Iowa law.<sup>65</sup> His final decision “did not cite Iowa precedent”; rather, it was based on his belief that “‘[w]e can’t turn people away from our court system and say we can’t resolve your disputes . . . . [T]his [is] a dispute between parties that in some way I’m going to have to solve.’ ”<sup>66</sup> Like the judge in Texas, the Iowa judge faced considerable criticism for his decision, but, unlike his Texas counterpart, he did not vacate it.<sup>67</sup>

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58. Kathleen Burge, *Iowa Judge Causes Stir in Granting Gay Divorce*, BOS. GLOBE, Dec. 13, 2003, at B4. They are not the only same-sex couple to try to get a divorce by fudging that critical fact; one wonders how many other couples have succeeded. See *O’Darling v. O’Darling*, 2008 OK 71, ¶ 2, 188 P.3d 137, 138 (Okla. 2008) (permitting the trial judge to vacate its own ruling when “[t]he style of the case did not indicate that the marriage was between two women . . . [and] [t]he notary’s signature block on the waiver referred to the signor as he/she”). The women filed a divorce petition in which they identified themselves only by their first initials and last name. See Arthur Leonard, *Oklahoma Supreme Court Sends Mixed Signals on Same-Sex Divorce*, LEONARD LINK (July 3, 2008), <http://newyorklawschool.typepad.com/leonardlink/2008/07/oklahoma-suprem.html> (commenting on the *O’Darling* case).

59. Burge, *supra* note 58.

60. See *id.*; see also Cox, *supra* note 19, at 743 (describing the public backlash to the judge’s initial ruling).

61. See *Alons v. Iowa Dist. Court Woodbury Cnty.*, 698 N.W.2d 858, 862 (Iowa 2005) (enumerating the petitioners).

62. *Id.* at 874.

63. Cox, *supra* note 19, at 744 & n.195.

64. *Id.* at 744.

65. *Id.*

66. *Id.*

67. See, e.g., Press Release, Congressman Steve King, 5th Cong. Dist. of Iowa, Same-Sex Marriage and Judge Neary-Made Law (Oct. 20, 2004), available at <http://www.house>



Despite these early cases, the use of equitable jurisdiction to solve the same-sex divorce problem has received no academic attention. That lacuna may exist, in part, because there is not much theory to explain: judges merely invoke their general jurisdiction to explain why they can grant a divorce petition from a same-sex couple, then follow standard divorce procedures. Additionally, this solution would not work in every state, since some family courts are courts of limited jurisdiction, and some mini-DOMAs explicitly strip jurisdiction over same-sex divorce cases from the family courts.<sup>68</sup> But the most important reason that equitable jurisdiction has received limited attention may be that the same-sex divorce problem is now fairly well-known, so judges have access to more literature explaining how they can approach divorce petitions, and they are trying to write decisions that will stand up to public scrutiny.<sup>69</sup>

### B. Originalism Cases

In *Rosengarten v. Downes*,<sup>70</sup> a Connecticut court took on what would be the first civil union dissolution case to focus on a statute rather than equity. This Section describes that case and one other substantial originalist opinion on the same-sex divorce issue.

The *Rosengarten* plaintiff had a Vermont civil union but lived in Connecticut.<sup>71</sup> He sought dissolution because he was ill and wanted to ensure that his children, rather than his partner, would inherit his assets.<sup>72</sup> Under the Connecticut family code, the family court had jurisdiction over “matters affecting or involving: (1) Dissolution of marriage.”<sup>73</sup> But the parties conceded that a civil union was not a marriage as contemplated by Connecticut law or Vermont law, so that provision was inapposite.<sup>74</sup> Instead, the plaintiff argued that the court had jurisdiction over the matter under a catch-all clause in the family

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.gov/apps/list/press/ia05\_king/oped\_041020.html; see also Burge, *supra* note 58 (noting the disposition of the Texas case).

68. See, e.g., GA. CONST. art I, § IV; GA. CODE ANN. § 19-3-3.1 (2010); *Chambers v. Ormiston*, 935 A.2d 956, 958 & n.1 (R.I. 2007) (explaining that the Rhode Island Family Court is a court of limited jurisdiction).

69. The first substantial articles covering the same-sex divorce issue were published in 2004. See generally, e.g., Cox, *supra* note 19; Kay, *supra* note 19 (examining same-sex divorce for one of the first times in academia). More cases have accumulated since the first case in 2002. See *infra* notes 70, 102, and 108.

70. 802 A.2d 170 (Conn. App. Ct. 2002).

71. *Id.* at 172.

72. Bernstein, *supra* note 1, at 2.

73. CONN. GEN. STAT. ANN. § 46b-1(1) (West 2009).

74. *Rosengarten*, 802 A.2d. at 172, 174–77.

code, which encompassed “all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court.”<sup>75</sup>

The court took an originalist view of the divorce statute and rejected the couple’s petition.<sup>76</sup> The primary question, as the court saw it, was whether the legislature had demonstrated any intent to include civil union litigation in the catch-all provision, which was enacted in 1976.<sup>77</sup> Unsurprisingly, the court found that the answer was no.<sup>78</sup> The plaintiff appealed to the Connecticut Supreme Court and certiorari was granted, but the ill partner died before the appeal was complete.<sup>79</sup>

A few years later, a Rhode Island appellate court took a similar view in *Chambers v. Ormiston*,<sup>80</sup> the best known of the gay divorce decisions. Two women, Margaret Chambers and Cassandra Ormiston, were married in Massachusetts<sup>81</sup> and later sought a divorce in Rhode Island, where they lived.<sup>82</sup> The Rhode Island Family Court was a court of limited jurisdiction with no catch-all jurisdictional clause; thus, the parties filed under a provision authorizing the court to “hear and determine all petitions for divorce from the bond of marriage.”<sup>83</sup> The majority analyzed the word “marriage” solely in light of the legislature’s intent, asking whether the legislature that had enacted the statute in 1961 meant to include same-sex marriage.<sup>84</sup> Again, the majority had little difficulty concluding that the 1961 legislature

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75. CONN. GEN. STAT. ANN. § 46b-1(17) (West 2009).

76. *Rosengarten*, 802 A.2d. at 177–80, 184.

77. *Id.* at 177–78.

78. *Id.*

79. Cox, *supra* note 19, at 729; Bernstein, *supra* note 1, at 2.

80. 935 A.2d 956 (R.I. 2007). *Chambers* is the only gay divorce decision to date with a dissenting opinion. See *infra* notes 160–67 and accompanying text.

81. They were married despite the residential bar, that is, the provision of the Massachusetts marriage statute specifying that a same-sex marriage could only be performed in Massachusetts when it would not be void in the couple’s home state. *Chambers*, 935 A.2d at 968–69 & n.23 (Suttell, J., dissenting). Massachusetts authorities examined Rhode Island law and decided that the marriage would not be void under a *lex loci celebrationis* theory, a conclusion the Rhode Island Attorney General later approved, and therefore allowed the Rhode Island residents to marry. *Id.* at 972–73 (allowing the Rhode Island residents to marry); see Katie Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, N.Y. TIMES, Feb. 22, 2007, at A19 (reporting the announcement by the Rhode Island Attorney General that same-sex marriages performed in Massachusetts should be recognized in Rhode Island).

82. *Chambers*, 935 A.2d at 958–59 (majority opinion).

83. *Id.* at 961.

84. *Id.* at 961–65.

intended no such thing.<sup>85</sup> The court ended with the admission that “sometimes our decisions result in palpable hardship to the persons affected by them,” but stated that the legislature, not the court, would have to change the law.<sup>86</sup> Two dissenters, discussed below, took a different view of the case, and argued that the divorce should have been granted.<sup>87</sup> The parties in this case have remained particularly frustrated and vocal; after filing a subsequent unsuccessful divorce suit in Rhode Island, Ms. Ormiston gave in and decided to move to Massachusetts.<sup>88</sup>

There is not much academic support for the analysis in these two cases. As explained in the next two Sections, scholars have advocated defining “marriage” under a set of traditional rules unique to the family law context, rather than employing the originalist method of determining the intent of the legislature that enacted the family code.<sup>89</sup> In addition to this methodological criticism, Matthew Skinner, the student author of an article focused on the Rhode Island *Chambers* case, has pointed to another reason to take issue with the analysis of the *Chambers* and *Rosengarten* courts.<sup>90</sup> To discern what the 1961 legislators meant by the word “marriage,” the *Chambers* court relied solely on three dictionaries from that era.<sup>91</sup> First, Skinner points out that those dictionaries did not make any mention of same-sex marriage, although there is unambiguous evidence that some gay authors in that period were using the term to refer to same-sex unions.<sup>92</sup> More importantly, relying solely on dictionary definitions allowed the *Chambers* court to avoid discussing the obvious reason that the 1961 legislators almost certainly did not believe that marriage could include same-sex couples.<sup>93</sup> In the 1950s,

[t]he dominant view of [gay people was] as perverts, psychopaths, deviates, and the like. . . . [They were] [s]hunted to the margins of American society [and] harassed because of their sexuality . . . . Whether seen from the vantage point of

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85. *Id.*

86. *Id.* at 966–67.

87. See *infra* notes 160–67 and accompanying text.

88. *Divorce Hard to Get for Some Gay Couples*, *supra* note 7.

89. See discussion *infra* Part II.C–D.

90. Matthew J. Skinner, Comment, *To Harm, to Victimize, and to Destroy: The Ugly Reason Why the Chambers Majority Opinion Was So Right*, 72 ALB. L. REV. 825, 827–28 (2009).

91. *Id.* at 830.

92. *Id.* at 835–49.

93. *Id.* at 831, 850–51.

religion, medicine, or the law, the homosexual or lesbian was a flawed individual, not a victim of injustice.<sup>94</sup>

In Rhode Island, police began a “‘concerted antihomosexual vice campaign[.]’” in the 1950s.<sup>95</sup> In 1962, the Rhode Island Supreme Court upheld a sodomy conviction for a man engaged in a consensual same-sex encounter.<sup>96</sup> In rejecting the defendant’s argument that the law did not provide fair notice, the court wrote that “[i]t would not be reasonable to require a legislature to anticipate and describe in other than comprehensive terms all of the bizarre means for perverting the sexual function that are conceived by depraved minds.”<sup>97</sup>

In other words, the 1961 Rhode Island legislators doubtless did not mean “marriage” to include same-sex marriage—but that is because, in that era, gay people were considered shameful deviates, when they were considered at all.<sup>98</sup> It is troubling for a current court to rely on the assumptions and prejudices of long-ago legislatures, particularly in states that have rejected those assumptions and provided some protections to gay people and couples.<sup>99</sup>

### C. *Lex Loci Celebrationis* Cases

Although none of the foregoing cases relied on it, there is a traditional rule for deciding when an out-of-state marriage is valid in another state. The *lex loci celebrationis* (“law of the place of celebration”) rule prescribes that a state will recognize a marriage contracted in another forum, so long as the marriage is not offensive to the state’s public policy.<sup>100</sup> The rule has been used, for instance, to decide whether the husband of an interracial couple, validly married in one state, could inherit from his late wife in a state that banned interracial marriage.<sup>101</sup> Despite the unquestioned historical

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94. *Id.* at 847 (quoting JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 53 (2d ed. 1998)).

95. *Id.* at 848 (quoting WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 64 (1999)).

96. *Id.* at 849–50 (citing *State v. Milne*, 187 A.2d 136, 140 (R.I. 1962)).

97. *Milne*, 187 A.2d at 140.

98. See *Skinner*, *supra* note 90, at 847, 851–52.

99. Rhode Island is one of the only states that does not permit same-sex marriage but has never had a mini-DOMA. See *supra* note 44. At the time of the *Rosengarten* case, Connecticut had laws prohibiting discrimination on the basis of sexual orientation and allowed same-sex couples to adopt. *Rosengarten v. Downes*, 802 A.2d 170, 179–82 (Conn. App. Ct. 2002).

100. KERMIT ROOSEVELT, III, *CONFLICT OF LAWS* 13 (2010).

101. Cox, *supra* note 19, at 724–25 (citing *Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948)).

dominance of this rule, it has played a determinative role in surprisingly few of the same-sex divorce cases. Courts in only one state—New York—have explicitly analyzed the cases under the *lex loci celebrationis* rubric. This Section explores New York's caselaw and the reasons that it is difficult to translate to other states.

There are a number of same-sex divorce cases from New York. The most important is *Beth R. v. Donna M.*,<sup>102</sup> a case involving lesbians married in Canada. The *Beth R.* judge began by reciting the *lex loci celebrationis* principle, writing that an out-of-state marriage is valid in New York unless forbidden by strong public policy, such as policies against incest and polygamy.<sup>103</sup> The judge then exhaustively canvassed the out-of-state marriages New York had allowed to stand: for instance, an adulterer remarrying in the nineteenth century; a marriage involving an underage spouse; certain incestuous marriages, including marriages between cousins; common-law marriages; and marriages by proxy.<sup>104</sup> Next, the judge turned to the evidence that same-sex marriage was not repugnant to New York's public policy, citing executive department memoranda that allowed same-sex couples married out of state to receive certain benefits under New York law.<sup>105</sup> Finally, the judge noted that the recent case of *Hernandez v. Robles*<sup>106</sup> neither compelled state officials to recognize gay marriage nor forbade them to do so. Taking all these factors together, the judge granted the divorce.<sup>107</sup>

A different New York appellate court reasoned along the same lines in *C.M. v. C.C.*,<sup>108</sup> citing *Beth R.* approvingly.<sup>109</sup> By that time, late 2008, there were two additional factors in favor of a finding that gay marriage was not repugnant to New York public policy: an appellate division case finding that same-sex marriages solemnized out of state should be recognized in New York,<sup>110</sup> and a memorandum from then-Governor David Paterson's legal counsel to the executive department to the same effect.<sup>111</sup> With gay marriage now broadly recognized in

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102. 853 N.Y.S.2d 501 (Sup. Ct. 2008).

103. *Id.* at 504.

104. *Id.* at 505–06.

105. *Id.*

106. 855 N.E.2d 1 (N.Y. 2006).

107. *Beth R.*, 853 N.Y.S.2d at 506 (citing *Hernandez*, 855 N.E.2d at 6).

108. 867 N.Y.S.2d 884 (Sup. Ct. 2008).

109. *Id.* at 886.

110. See *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008).

111. Memorandum from David Nocenti, Counsel to Former Governor David Paterson, to Gov't Agency Counsel (May 14, 2008), available at <http://www.observer.com/2008>

New York, and no statutory or constitutional mini-DOMA limiting same-sex marriage, it took no great leap for the court to agree to grant the divorce.<sup>112</sup>

Unlike New York, the vast majority of states have some sort of statutory or constitutional mini-DOMA.<sup>113</sup> In those states, judges applying the *lex loci celebrationis* rule have to grapple with the question whether recognizing the marriage would be against public policy. As Professor Joanna Grossman has demonstrated, that question is not as straightforward as it might appear.<sup>114</sup> Historically, the public policy exception has been construed very narrowly, as it is important to maintain stability and to respect settled expectations in the marriage arena.<sup>115</sup> In past marriage recognition cases, it was generally agreed that “a mere statutory prohibition of a particular type of marriage” was not enough to invoke the public policy exception.<sup>116</sup> For example, if state A had a law prohibiting marriages between first cousins, state A would still recognize first-cousin marriages from other states because the statute did not amount to a public policy against first-cousin marriages.<sup>117</sup> Even a statute declaring a certain type of marriage “void” was not always enough to invoke the public policy exception to the *lex loci celebrationis* rule.<sup>118</sup> Only two types of statutes clearly triggered the public policy exception: statutes criminalizing particular marriages and statutes that explicitly said that a certain type of out-of-state marriage would not be recognized even if it were valid where performed.<sup>119</sup>

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/patersons-message-same-sex-marriage; see also *C.M.*, 867 N.Y.S.2d at 887–88 (quoting the letter from former Governor Paterson’s legal advisor).

112. *C.M.*, 867 N.Y.S.2d at 887–89.

113. Forty-two states have a statutory mini-DOMA, a constitutional mini-DOMA, or both. See *supra* note 44.

114. Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 465–67 (2005).

115. See *id.* at 465–66.

116. *Id.* at 465.

117. See *id.* at 465–67.

118. *Id.* at 466 (citing *Laikola v. Engineered Concrete*, 277 N.W.2d 653, 656 (Minn. 1979); *Maurer v. Maurer*, 60 A.2d 440, 443 (Pa. 1948)).

119. *Id.* at 466 (citing *Commonwealth v. Lane*, 113 Mass. 458, 471 (1873); *In re Miller’s Estate*, 214 N.W. 428, 430 (Mich. 1927); *In re May’s Estate*, 114 N.E.2d 4, 6 (N.Y. 1953); *Van Voorhis v. Brintnall*, 86 N.Y. 18, 32–33 (1881)); see also *United States ex rel. Devine v. Rodgers*, 109 F. 886, 888 (D. Pa. 1901) (refusing to recognize an uncle-niece relationship that would have been criminal in Pennsylvania); *In re G--*, 6 I. & N. Dec. 337, 337 (BIA 1954) (same); *In re Hirabayashi*, 10 I. & N. Dec. 722, 724 (BIA 1964) (recognizing a marriage between first cousins in part because there was no law in the state criminalizing such marriages). But see *In re C--*, 4 I. & N. Dec. 632, 632 (BIA 1952) (allowing uncle-

After *Lawrence v. Texas*,<sup>120</sup> where the Supreme Court held that consensual same-sex sexual conduct is part of the liberty interest protected by substantive due process under the Fourteenth Amendment,<sup>121</sup> no state could pass a statute criminalizing same-sex marriages. However, there are many mini-DOMAs that expressly provide that same-sex marriages will not be recognized even if they were validly celebrated in another state.<sup>122</sup> A 2009 case from Indiana provides a good example of this situation.<sup>123</sup> Two women who had married in Canada sought a divorce in Indiana.<sup>124</sup> The women had already divided their personal property and financial accounts, so the divorce's practical effect would likely have been only psychic relief and freedom to remarry.<sup>125</sup> Under Indiana law, divorce can be granted for "[i]rretrievable breakdown of the marriage."<sup>126</sup> However, Indiana law also provides that "[a] marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized."<sup>127</sup> In a brief order, the judge recognized that Indiana's mini-DOMA explicitly barred application of the *lex loci celebrationis* rule in the context of same-sex marriages, so she could not apply the divorce statute.<sup>128</sup> She noted that:

As the State of Indiana has chosen to prohibit same sex marriage as a matter of public policy, it might logically follow that Indiana would have a policy interest in granting same sex divorce. However, the General Assembly has not enacted a statute which confers upon the courts the authority to dissolve same sex marriages in the same manner as marriages between a man and a woman.<sup>129</sup>

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niece marriage to stand in Pennsylvania because of BIA's view that Pennsylvania authorities would not criminally prosecute a couple lawfully married elsewhere).

120. 539 U.S. 558 (2003).

121. *Id.* at 578.

122. Grossman, *supra* note 114, at 477 & nn.69–71 (listing the thirty-eight states with such mini-DOMAs in 2005).

123. Order on Petition for Dissolution of Marriage at 1, *In re Marriage of Tara Ranzy & Larissa Chism*, No. 49D12-0903-DR-014654 (Marion Cnty. Super. Ct., Ind. Sept. 4, 2009) (on file with the North Carolina Law Review).

124. *Id.*

125. *See id.* at 2.

126. IND. CODE § 31-15-2-3 (2007).

127. IND. CODE § 31-11-1-1 (2007).

128. Order on Petition for Dissolution of Marriage, *supra* note 123, at 2–3.

129. *Id.*

Thus, in a straightforward exercise in statutory interpretation, the court dismissed the petition for divorce.<sup>130</sup> Courts in Pennsylvania and Wyoming have reached similar conclusions.<sup>131</sup>

In states with mini-DOMAs similar to Indiana's, or in states with mini-DOMAs that explicitly declare same-sex marriage to be against the state's strong public policy, judges likely must refuse to recognize out-of-state same-sex marriages under the public policy exception, subject to the federal constitutional concerns discussed below.<sup>132</sup> However, in states with narrower mini-DOMAs—those that merely provide that the state will not marry same-sex couples, or declare same-sex marriages void—judges should be able to apply the *lex loci celebrationis* rule in its traditional form. Alternatively, as several academics have suggested, judges could apply the *lex loci celebrationis* rule in a modified narrow form, discussed in the next Section.

#### D. Incidents Analysis

The rule of *lex loci celebrationis* is meant to determine when an out-of-state marriage is valid.<sup>133</sup> Throughout the history of marriage litigation, however, judges and litigants have been concerned with a narrower variant on that question: when is a marriage valid for a particular purpose? Deciding a marriage's validity only for a particular purpose is known as "incidents analysis," and several scholars who have studied same-sex divorce have advocated that judges look at the divorce question in light of incidents analysis.<sup>134</sup> This Section will explain the basic concept, illustrate how it has been used in the caselaw, and evaluate the scholarship on incidents analysis. This Section will also consider whether judges can use

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130. *Id.* at 3.

131. See *Kern v. Taney*, 11 Pa. D. & C.5th 558, 575–76 (Berks Cnty. Ct. Com. Pl. 2010); *Christiansen v. Christiansen*, 2011 WY 90, ¶ 14, 253 P.3d 153, 157 (Wyo. 2011); see also Jeremy Pelzer, *Same-Sex Divorce Stirs Debate*, BILLINGS GAZETTE (Billings, Wyo.), Jan. 14, 2011, [http://billingsgazette.com/news/state-and-regional/wyoming/article\\_7a8c5230-2b3e-5a02-96b8-d90f1afae69d.html](http://billingsgazette.com/news/state-and-regional/wyoming/article_7a8c5230-2b3e-5a02-96b8-d90f1afae69d.html) (reporting on the *Christiansen* case); Jeanie Wright, *Same-Sex Divorce Case Appealed to High Court*, LUSK HERALD (Lusk, Wyo.), Jan. 13, 2011, [http://www.luskherald.com/v2\\_news\\_articles.php?heading=0&page=72&story\\_id=1681](http://www.luskherald.com/v2_news_articles.php?heading=0&page=72&story_id=1681) (reporting that the Wyoming appeals court had declined to grant a divorce to a same-sex couple married in Canada). That decision was recently overruled by the Wyoming Supreme Court. See *infra* note 153.

132. For mini-DOMAs that explicitly declare same-sex marriage to be against public policy, see, e.g., KAN. STAT. ANN. § 23-115 (2007); LA. CIV. CODE ANN. art. 3520 (2011); OHIO REV. CODE ANN. § 3101.01 (LexisNexis 2008).

133. ROOSEVELT, *supra* note 100, at 13.

134. See, e.g., Cox, *supra* note 19, at 733–34; Koppelman, *supra* note 19, at 207–08; Johnson, *supra* note 19, at 233–35.



incidents analysis to avoid confronting the serious constitutional questions raised by some states' mini-DOMAs.

The idea of this type of analysis is that marriage consists of a series of "incidents," just as property ownership is commonly conceptualized as a bundle of rights.<sup>135</sup> Incidents of marriage include, for instance, the right to institute a wrongful death suit or the right to inherit.<sup>136</sup> Instead of deciding whether a marriage is universally valid or invalid, these scholars argue, courts should decide whether a marriage is valid for the purpose of the specific incident being litigated.<sup>137</sup> Under this theory, one might argue that divorce is simply an incident of marriage—one set of rights tied to marriage—and that courts should ask whether a same-sex marriage is valid only for the purpose of divorcing the couple.<sup>138</sup>

Incidents analysis enjoys considerable support in caselaw and literature outside the context of same-sex unions. Conflicts-of-laws scholars writing before the gay divorce issue arose supported an incidents analysis of marriage, pointing out that "different incidents of marriage involve[] different policies," and suggesting that "determination of the validity of the marriage should be made with reference to" the incident under dispute.<sup>139</sup> In fact, Professor Andrew Koppelman has shown that the "blanket rule of nonrecognition" that many states have imposed on same-sex marriage is historically unprecedented.<sup>140</sup> Even in the case of miscegenation laws, marriages

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135. Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 676 (2007) ("Civil marriage is a bundle of rights, benefits, and responsibilities that only the government can bestow."). See generally J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996) (discussing the conception of property as a bundle of rights).

136. See Cox, *supra* note 19, at 719.

137. See, e.g., *id.* at 718–22; Koppelman, *supra* note 19, at 207–08; Johnson, *supra* note 19, at 245–46.

138. See, e.g., Cox, *supra* note 19, at 718–22; Koppelman, *supra* note 19, at 207–08; Johnson, *supra* note 19, at 245–46.

139. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 13.2 (4th ed. 2004); see also Cox, *supra* note 19, at 719–21 (listing authorities in support of incidents analysis); Willis M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 953 (1977) (considering the validity of different types of marriage).

140. Koppelman, *supra* note 16, at 2160–61. Historically, Professor Koppelman notes, judges made distinctions between cases where marriages were "evasive" (the couple married out of state because they knew the marriage was invalid in their home state); "migratory" (the couple married in their home state but then moved to a state that did not recognize the marriage); "visitor" (the couple was just passing through a state that did not recognize the marriage); or "extraterritorial" (the couple's marital status was litigated incident to some larger issue). *Id.* at 2145. The cases today, however, appear to have totally dispensed with that analysis. Sometimes it is difficult to tell from the cases what

barred within a state were sometimes recognized for some purposes; for instance, an interracial couple that was merely passing through a state would have their marriage recognized.<sup>141</sup>

While incidents analysis has some intellectual and historical appeal, it is also counterintuitive. Indeed, the simplest summary of the opposition to gay divorce is that it is impossible to grant a divorce without, on some level, recognizing the underlying marriage.<sup>142</sup> We are accustomed to thinking of marriage as a unitary whole; couples do not opt into a checklist of rights when they obtain a marriage license. Nonetheless, a few of the courts that have recently adjudicated same-sex divorces have imported incidents analysis into their decisions—some more than others, and some more coherently than others. Analysis of four cases—from New Jersey, Wyoming, Rhode Island, and Texas—ferrets out the ways in which the sometimes slippery notion of incidents analysis has been employed.

### 1. Caselaw

A 2009 New Jersey case involved two women who had been married in Canada.<sup>143</sup> Like the American states, Canada has a residency requirement for divorce, so the couple could not divorce in Canada.<sup>144</sup> But since New Jersey did not recognize same-sex marriage, it was not clear that the couple could divorce there. The court seemed to sympathize with the couple's situation and worried aloud about "the impact o[n] people in the society" of refusing access to divorce.<sup>145</sup>

Rather than invoking general equitable principles, however, the judge began by considering the *lex loci celebrationis* principle. In an oral opinion, she emphasized the long-standing rule that marriages validly contracted in other jurisdictions are valid in New Jersey, so

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type of marriage is at issue. See, e.g., *Kern v. Taney*, 11 Pa. D. & C.5th 558, 559 (Berks Cnty. Ct. Com. Pl. 2010) (failing to specify whether marriage was migratory or evasive).

141. Koppelman, *supra* note 16, at 2161.

142. See, e.g., Cox, *supra* note 19, at 736.

143. Transcript of Decision at 5–6, *Hammond v. Hammond*, No. FM-11-905-08-B (N.J. Super. Ct. Ch. Div. Feb. 6, 2009) (on file with the North Carolina Law Review). The plaintiff was ill and had a short life expectancy; she wished to divorce a spouse with whom she was no longer in a relationship and remarry in Canada so that the new wife would have full rights in dealing with her medical care. *Id.* at 8–9. The New Jersey Attorney General had issued a memorandum directing that out-of-state marriages were to be treated as civil unions, and it would have been routine for the plaintiff to dissolve the marriage as a civil union. *Id.* at 7–8. But because the plaintiff wanted to remarry in Canada, she insisted on having a divorce from a marriage, not a dissolution of a civil union, which Canadian officials might have refused to accept. *Id.* at 8–9.

144. Divorce Act, R.S.C. 1985, c. D-3, § 3(1) (Can.).

145. Transcript of Decision, *supra* note 143, at 24.

long as they are not offensive to New Jersey's public policy.<sup>146</sup> Her court granted twenty to twenty-five divorces a week, she noted, and many had been contracted out of state; the rule was "just ingrained in how we practice in family court."<sup>147</sup> The Attorney General had conceded that the marriage was not offensive to New Jersey's public policy.<sup>148</sup> The judge observed that "we would have a very different situation" if New Jersey had enacted a mini-DOMA, but since it had not, recognizing Canada's policy judgment did not "undercut the different policy judgment" in New Jersey.<sup>149</sup>

That analysis, though, would seem to imply that New Jersey should recognize out-of-state same-sex marriages for *all* purposes, not just for divorce. The judge did not explain why divorce was different from other incidents of marriage, but she did rely on incidents analysis in an intuitive sort of way. She acknowledged that her decision was at odds with the Attorney General's memorandum directing that same-sex marriages be treated as civil unions, but announced that she was "sort of carving out some sort of exception from the Attorney General's opinion" for divorce.<sup>150</sup> Her opinion, she explained, was limited to the divorce context.<sup>151</sup> Although the lack of uniformity troubled her, she thought it was outweighed by the need to respect Canada's decisions, follow traditional principles of family law, and make life simpler for gay couples by recognizing the Canadian marriage and granting the divorce.<sup>152</sup>

In a 2011 case, the Wyoming Supreme Court reached the same result as the New Jersey court, but provided more analysis.<sup>153</sup> Wyoming law defined marriage as "a civil contract between a male and a female person," but another provision of Wyoming law, adopted much earlier, stated that "[a]ll marriage contracts which are valid by the laws of the country in which they are contracted are valid in this state."<sup>154</sup> The parties were a lesbian couple married in Canada, so the latter provision appeared to apply to them, although the court noted that previous cases had interpreted the statute to contain an

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146. *Id.* at 12–15.

147. *Id.* at 15.

148. *Id.* at 18–19.

149. *Id.* at 18, 21.

150. *Id.* at 24.

151. *Id.* at 24, 26.

152. *Id.* at 24–26.

153. *See Christiansen v. Christiansen*, 2011 WY 90, ¶¶ 8–13, 253 P.3d 153, 157 (Wyo. 2011).

154. WYO. STAT. ANN. §§ 20-1-101, -111 (2011).

exception for marriages that violated Wyoming's public policy.<sup>155</sup> The court explained that when two provisions of Wyoming law appear to conflict, judges should find a way to reconcile them if possible.<sup>156</sup> The court found that the section defining marriage as between a man and a woman regulated whether same-sex couples could *enter* marital relationships in Wyoming but did not speak to whether Wyoming could *recognize* a same-sex marriage for the purpose of divorce.<sup>157</sup> The court explained:

[R]ecognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship.... Specifically, Paula and Victoria are not seeking to live in Wyoming as a married couple. They are not seeking to enforce any right incident to the status of being married. In fact, it is quite the opposite.... Respecting the law of Canada, as allowed by § 20-1-111, for the limited purpose of accepting the existence of a condition precedent to granting a divorce, is not tantamount to state recognition of an ongoing same-sex marriage. Thus, the policy of this state against the creation of same-sex marriages is not violated.<sup>158</sup>

Thus, the traditional *lex loci celebrationis* rule, as codified in the statute, applied instead of the narrow mini-DOMA. The court noted that “[n]othing in this opinion should be taken as applying to the recognition of same-sex marriages legally solemnized in a foreign jurisdiction in any context other than divorce.”<sup>159</sup>

The dissenters in the Rhode Island *Chambers* case offered a different, but compelling, incidents analysis that focused on the specific history of Rhode Island's divorce statute.<sup>160</sup> As described above, the Rhode Island majority simply concluded that the 1961 congress did not mean for the word “marriage” in the divorce statute to include same-sex marriage.<sup>161</sup> The dissenters agreed that the meaning of “marriage” was the question and that examination of the 1961 legislature's intent was relevant, but came to a different

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155. *Christiansen*, 2011 WY 90, ¶ 7, 253 P.3d at 156.

156. *Id.* at ¶ 8, 253 P.3d at 155.

157. *Id.* at ¶ 9, 253 P.3d at 156.

158. *Id.* at ¶¶ 12–13, 253 P.3d at 156–57.

159. *Id.* at ¶ 2, 253 P.3d at 154 n.1.

160. *Chambers v. Ormiston*, 935 A.2d 956, 967–74 (R.I. 2007) (Suttell, J., dissenting).

161. *See supra* notes 85–87 and accompanying text.

conclusion.<sup>162</sup> The dissenters began by emphasizing that the “question presented to this Court is extremely narrow in scope.”<sup>163</sup> In their view, the pertinent question was not what the legislature thought that “marriage” meant in the abstract, but how broad the legislature intended to make the forum for divorce.<sup>164</sup> The dissenters found that Ms. Chambers and Ms. Ormiston were entitled to that forum for two reasons.

First, the dissenters pointed out that the 1961 state congress knew that even marriages that were void in Rhode Island, like polygamous and incestuous marriages, could be terminated via divorce under Rhode Island law.<sup>165</sup> Second, the dissenters noted that the 1961 congress was also familiar with the *lex loci celebrationis* rule. The 1961 congress would therefore have understood that valid marriages could exist in Rhode Island that would not have been solemnized in Rhode Island, and that some of those couples might eventually seek divorce within the State.<sup>166</sup> The dissenters found that trying to pin down what the 1961 state congress meant by “marriage” was useless, but that the available evidence supported a finding that the congress intended to provide a broad forum for Rhode Island citizens seeking to dissolve their unions.<sup>167</sup>

Although most courts that have employed an incidents analysis have ultimately granted the requested divorce, not all judges have been persuaded. In *State v. Naylor*<sup>168</sup> and *In re Marriage of J.B. & H.B.*,<sup>169</sup> two Texas appellate courts recently used incidents analysis to reach different conclusions on different divorce petitions, both from same-sex couples married in Massachusetts. Under the Texas Family Code, a court cannot “give effect to a public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union.”<sup>170</sup> And under the Texas Constitution, a court cannot “create or recognize” a same-sex marriage.<sup>171</sup> The *Naylor* court, like the Wyoming Supreme Court, suggested that the Texas mini-DOMAs might apply only to the

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162. *Chambers*, 935 A.2d at 967–68 (Suttell, J., dissenting).

163. *Id.*

164. *Id.* at 971.

165. *Id.* at 971 n.24.

166. *Id.* at 972–73.

167. *Id.* at 968, 972.

168. 330 S.W.3d 434, 436 (Tex. App. 2011).

169. 326 S.W.3d 654, 659 (Tex. App. 2010).

170. TEX. FAM. CODE ANN. § 6.204(c)(2) (West 2006).

171. TEX. CONST. art. I, § 32(b).

ongoing recognition of same-sex marriages.<sup>172</sup> Thus, the *Naylor* court could recognize the marriage for the purpose of one incident, divorce, because no ongoing marriage was recognized. The other court rejected this idea.<sup>173</sup> In *J.B. & H.B.*, the second Texas court ruled that it was not possible to divorce the couple without “giv[ing] effect to” the marriage.<sup>174</sup> A divorce would “establish the validity of that marriage” for res judicata purposes.<sup>175</sup> Additionally, it would allow a judge to divide property, even though “community property is a paradigmatic legal benefit that is associated intimately and solely with marriage.”<sup>176</sup> Moreover, the *J.B. & H.B.* court said, the “inherent nature” of a divorce proceeding meant recognizing the underlying marriage.<sup>177</sup> The *J.B. & H.B.* court therefore remanded to the trial court with instructions to dismiss for lack of jurisdiction.<sup>178</sup> The application of incidents analysis depends on the state’s specific marriage and divorce regime, but as the Texas cases show, incidents analysis can lead to different answers even when courts are analyzing the same statute.

## 2. Scholarship

Much of the academic work in this area has addressed exactly how courts should apply the incidents theory in the context of divorce. The problem can be seen in cases like those in New Jersey and Wyoming, where the courts found that divorce was different but struggled to articulate exactly why.<sup>179</sup> What scholars have tried to illuminate is how to draw the line between divorce and other incidents of marriage.

Some scholars have suggested that incidents analysis should be applied through a balancing test.<sup>180</sup> Under that theory, a judge should balance the importance of the general policy against same-sex marriage against the importance of the incident being litigated.<sup>181</sup> For

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172. See *Naylor*, 330 S.W.3d at 441; see also *Christiansen v. Christiansen*, 2011 WY 90, ¶¶ 8–10, 253 P.3d 153, 156–57 (Wyo. 2011) (suggesting that in Wyoming, the mini-DOMA might apply only to the recognition of continuing marriages).

173. *J.B. & H.B.*, 326 S.W.3d at 666.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 666–67.

178. *Id.* at 681.

179. See Transcript of Decision, *supra* note 143, at 24; *Christiansen v. Christiansen*, 2011 WY 90, ¶ 11, 253 P.3d 153, 156–57 (Wyo. 2011).

180. Cox, *supra* note 19, at 721–22; Johnson, *supra* note 19, at 247.

181. Cox, *supra* note 19, at 721–22; Johnson, *supra* note 19, at 247.

example, the purpose of a statute granting survivor's or social security benefits to the spouse of a deceased person is to provide for the most likely dependent; if the state's interest in providing for the dependent outweighs the policy against same-sex marriage, the marriage should be valid as to that incident.<sup>182</sup> Andrew Koppelman has suggested another test: if the same-sex couple could have replicated the right by contract (e.g., inheritance rights for a spouse could have been replicated in a will), the marriage should be valid as to that incident, since there is no reason to punish the couple for having taken the "shortcut" of contracting for the benefit via a marriage ceremony.<sup>183</sup>

The balancing test has some intuitive appeal, but it is difficult to apply, since it is impossible to precisely quantify a state's interest in its various policies. Moreover, the balancing test might not produce positive results for same-sex couples. Dozens of states have both statutory and constitutional prohibitions banning recognition of same-sex relationships. These provisions suggest that a state's interest in non-recognition is often very strong and may outweigh its interests in other policies.<sup>184</sup> Koppelman's theory is easier to apply, but also sits somewhat uneasily with some states' mini-DOMAs. In states with strong policies against recognition of same-sex marriage, there *is* arguably a reason to force couples to explicitly contract for marriage-like benefits, rather than allowing a marriage ceremony to stand in for

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182. Cox, *supra* note 19, at 722 (citing David E. Engdahl, *Proposal for a Benign Revolution in Marriage Law and Marriage Conflicts Law*, 55 IOWA L. REV. 56, 105-09 (1970)); see also Langan v. St. Vincent's Hosp., 765 N.Y.S.2d 411, 421-22 (Sup. Ct. 2003), *rev'd*, 802 N.Y.S.2d 476 (App. Div. 2005) (allowing surviving partner with an out-of-state civil union to claim wrongful death benefits, although New York did not recognize civil unions at the time).

183. Koppelman, *supra* note 16, at 2145.

184. Danielle Johnson, a proponent of the balancing test, suggests that even in states with mini-DOMAs, "it is likely that a state's policies and concerns will favor entertaining a divorce petition among the state's domiciliaries." Johnson, *supra* note 19, at 247. She argues that states have strong interests in protecting their citizens and furthering their welfare, and that the state interests include dignifying a relationship that has ended with formal closure and dividing property fairly. See *id.* ("[T]he courts should be more concerned with providing assistance to its citizens than with politics."). That analysis is complicated, though, in states with strong mini-DOMAs and no protections for gay unions. Although domestic partnerships, civil unions, and same-sex marriage protect citizens and further their welfare by dignifying relationships and protecting property, many states have chosen not to enact such protections for same-sex couples—indeed, many states have passed constitutional amendments *prohibiting* such protections. See Koppelman, *supra* note 16, at 2165 (identifying statutes and constitutional provisions that prohibit protections for same-sex couples). It is not clear why such states would have a state interest in dignifying and protecting same-sex relationships by allowing same-sex divorce.

a contract.<sup>185</sup> Moreover, it is not entirely clear whether divorce is something that can be contracted for. Some couples in the divorce cases discussed above sought a divorce for psychic relief after they had finished all issues of property and custody division.<sup>186</sup> Psychic relief, and freedom to remarry, cannot be arranged by contract.<sup>187</sup>

The problems with these general theories suggest that it makes most sense to apply incidents analysis with respect to a specific set of state laws, rather than formulating a general test that applies in every state. As the *Hammond* case from New Jersey shows, it is relatively straightforward to apply incidents analysis when there is no state mini-DOMA.<sup>188</sup> And as the *Christiansen* case from Wyoming illustrates, it can sometimes make sense to recognize a same-sex marriage for the purpose of divorce even when the state has a mini-

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185. Professor Koppelman argues that the conservative opposition to gay marriage relates primarily to the normative, moral aspects of granting the marriage, not to the “administrative” aspects, such as allowing gay couples to inherit and file joint tax returns. See Koppelman, *supra* note 19, at 215–18. Most benefits that can be contracted for are administrative, not normative; therefore, Koppelman argues, many conservative opponents of same-sex marriage might agree that such administrative benefits should be universally provided. *Id.* That argument makes most sense in states that allow civil unions or domestic partnerships, but not same-sex marriages. Legislators or voters in those states have granted administrative rights but have withheld the normative benefit of labeling the relationship a “marriage.” See Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425, 1493 (2009) (“But the Civil Union Act deliberately withholds the unique name ‘marriage,’ which confers favored identity, normal status, and easily recognized kinship forms. This withholding could be understood as an insult from the legislature, albeit a discreet one.”). But in states that explicitly ban civil unions or domestic partnerships—or even contractual arrangements between same-sex couples—the argument that courts should grant administrative benefits to same-sex couples makes less sense. In states with expansive mini-DOMAs, the desire seems to be to ban any acknowledgment of same-sex unions for *any* reason, normative or administrative. See Koppelman, *supra* note 19, at 217 (discussing a Virginia Law that renders “‘void and unenforceable’ any ‘civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction to bestow the privileges or obligations of marriage’” (quoting VA. CODE ANN. § 20-45.3 (2008))). The position of the intervenors in same-sex divorce cases suggests that the symbolic value of recognizing a marriage for any reason, even a limited incident for “administrative” purposes, is perceived as powerful. See, e.g., *Alons v. Iowa Dist. Court Woodbury Cnty.*, 698 N.W.2d 858, 862 (Iowa 2005) (noting that state representatives, state senators, a pastor, and a church attempted to intervene in a same-sex divorce case).

186. For instance, the Indiana and New Jersey cases involved no property division. See Order on Petition for Dissolution of Marriage, *supra* note 123, at 2; Transcript of Decision, *supra* note 143, at 6–7.

187. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (“Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State’s judicial machinery.”).

188. Transcript of Decision, *supra* note 143, at 18, 21.



DOMA.<sup>189</sup> It is reasonable to interpret some narrowly worded mini-DOMAs to bar recognition of same-sex marriages only on an ongoing basis; indeed, ending a same-sex relationship may logically further the state's interest in eliminating same-sex unions within the state. Alternatively, as in the Rhode Island *Chambers* case, there may be specific evidence that the legislature intended to make the forum for divorce broader than the forum for marriage.<sup>190</sup> In those states and other states with relatively limited mini-DOMAs, judges can and should apply incidents analysis to adjudicate divorce petitions.

### 3. Constitutional Avoidance

In states with much broader mini-DOMAs, however, the application of incidents analysis is trickier. For instance, Pennsylvania's mini-DOMA provides that "[a] marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth."<sup>191</sup> The voidness provision is self-executing—that is, a same-sex marriage between Pennsylvania residents is immediately void—and the provision itself rejects the application of the *lex loci celebrationis* rule.<sup>192</sup> Thus, it would seem that, in Pennsylvania, there is never any ongoing same-sex marriage for a judge to recognize. Unlike in Wyoming, there is no need to harmonize statutes; the mini-DOMA itself provides that it takes precedence over the traditional rule.

Although it is conceptually easiest to apply incidents analysis in states with limited mini-DOMAs, there is an argument that even judges in states with expansive mini-DOMAs should apply incidents analysis. A standard canon of statutory construction says that judges should interpret laws to avoid serious constitutional questions, and there are serious questions about whether the mini-DOMAs are constitutional.<sup>193</sup> The equal protection arguments that apply to DOMA and same-sex marriage generally apply in this context as well. Additionally, the mini-DOMAs may impose a "special disability" on gay people and thus may be unconstitutional under the application of

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189. *Christiansen v. Christiansen*, 2011 WY 90, ¶¶ 4–13, 253 P.3d 153, 155–57 (Wyo. 2011).

190. *See Chambers v. Ormiston*, 935 A.2d 956, 967–73 (R.I. 2007) (Suttell, J., dissenting).

191. 23 PA. CONS. STAT. § 1704 (2010).

192. *See id.*; *see also* ROOSEVELT, *supra* note 100, at 13 (describing the *lex loci celebrationis* rule).

193. *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam).

the Equal Protection Clause in *Romer v. Evans*.<sup>194</sup> And, as explained in the next Section, there is a persuasive argument that forbidding divorce violates the Due Process Clause of the United States Constitution. Finally, Professor Larry Kramer has argued that the public policy exception embodied in the mini-DOMAs, though well established, violates the Full Faith and Credit Clause of the United States Constitution.<sup>195</sup>

To avoid ruling on the constitutional questions just described, a judge would have to find that an expansive mini-DOMA did not operate to deny the divorce. To do so, a judge would have to interpret a mini-DOMA that bans recognition of out-of-state same-sex marriages as allowing the recognition of such a marriage for the sole purpose of divorce. That interpretation is not intuitive, but it is defensible. Although there is not much caselaw on the issue, courts have historically been willing to recognize a problematic marriage for the purpose of a particular incident—even when there was clearly a state public policy against recognition—so long as the couple was not attempting to live as a married couple in the state.<sup>196</sup> For instance, marriages barred by public policy were recognized in inheritance cases.<sup>197</sup> If the state's interest is in prohibiting *ongoing* offensive marriages, such limited recognition makes sense. It is certainly possible to describe the state's interest more broadly, of course, but

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194. *Romer v. Evans*, 517 U.S. 620, 631 (1996); see Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2699–700 (2004) (noting the possible unconstitutionality of mini-DOMAs based on the special disability they may impose). In *Romer*, the Supreme Court invalidated, under the Equal Protection Clause, a Colorado constitutional amendment that specified that gay people could not be designated a “protected class” and that homosexuality could not “constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.” 517 U.S. at 624 (citing former COLO. CONST. art. II, § 30b, *invalidated by* *Romer v. Evans*, 517 U.S. 620, 631 (1996)). In invalidating the law, the Court noted that “the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution . . . .” *Id.* at 631. Similarly, in states with constitutional mini-DOMAs, gay people can obtain the right to marry only by “enlisting the citizenry” of various states to amend the state constitutions. *Id.*; see also *infra* notes 215–21 (addressing constitutional equal protection arguments in the same-sex divorce context).

195. Kramer, *supra* note 18, at 1991.

196. See Grossman, *supra* note 114, at 470.

197. See *id.* (citing *In re Dalip Singh Bir's Estate*, 188 P.2d 499, 502 (Cal. Dist. Ct. App. 1948); *Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948)).

far less intuitive statutory interpretations have been accepted in the name of constitutional avoidance.<sup>198</sup>

The constitutional avoidance argument is available in states with mini-DOMAs that bar recognition of out-of-state same-sex marriages. It would not work, however, in the handful of states with mini-DOMAs that expressly bar recognition of any *incident* of marriage.<sup>199</sup> In those states, the judge could only grant a divorce by confronting the constitutional questions head-on.

#### 4. Summary

There is certainly a place for incidents analysis in same-sex divorce litigation. It can provide a commonsense affirmation that one forum's policy choices have historically not been thought to undermine another forum's different choices, as in the New Jersey *Hammond* case, as a way to reconcile seemingly conflicting statutes, as in the Wyoming *Christiansen* case, or as a specific historical argument, as in the Rhode Island *Chambers* case.<sup>200</sup> It can even be applied in states with expansive mini-DOMAs as a way of avoiding difficult constitutional questions. Incidents analysis must, however, include a sensitive review of state law. Given the subtle variations in state laws—including laws governing same-sex unions, marriage laws, and divorce laws—there is no one-size-fits-all answer to the divorce problem in incidents analysis.

#### E. Voidness Cases

The final group of cases is not a new category, but a footnote to the cases already discussed. In *J.B. & H.B.*, one of the Texas cases, the Texas Attorney General took an approach that may foreshadow a new strategy in gay divorce litigation, arguing that the plaintiff's remedy is to have his marriage declared void rather than being

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198. See *Shelby Cnty., Ala. v. Holder*, No. 10-0651, 2011 WL 4375001, at \*14 (D.D.C. Sept. 21, 2011) (discussing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513–17 (2009)).

199. Grossman, *supra* note 114, at 483 (noting that eleven states bar recognition of any incident arising out of same-sex marriage); see, e.g., KAN. CONST. art. XV, § 16; LA. CONST. art. XII, § 15; OKLA. CONST. art. II, § 35.

200. See *Chambers v. Ormiston*, 935 A.2d 956, 971–72 (R.I. 2007) (Suttell, J., dissenting); *Christiansen v. Christiansen*, 2011 WY 90, ¶¶ 8–10, 253 P.3d 153, 156 (Wyo. 2011); see also Transcript of Decision, *supra* note 143, at 12 (“I don’t believe that allowing Ms. Hammond to obtain a final judgment of divorce in New Jersey undermines the legislative intent in the civil union statute . . . particularly [given] . . . the comity relationship between New Jersey and Canada and the strong, the very strong marriage recognition statute and process in New Jersey.”).

divorced.<sup>201</sup> The Texas Family Code provides that “[e]ither party to a marriage made void by this chapter may sue to have the marriage declared void,”<sup>202</sup> and the statutory mini-DOMA states that “[a] marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.”<sup>203</sup> In light of these two statutes, the voidness provision seems to apply, so the parties may end up with a marriage declared void.<sup>204</sup> Judges in Indiana and Pennsylvania divorce cases have also suggested that a declaration of voidness, rather than a divorce, would be the appropriate remedy.<sup>205</sup>

There are at least two problems, however, with setting up a shadow divorce system of voiding marriages to parallel the shadow marriage system of civil unions.<sup>206</sup> First, in many states, declarations of voidness do not have all of the substantive benefits of divorce. Divorce has two components: it provides a neutral adjudicator for property division and custody allocation, and it frees couples from the legal relationship and allows them to remarry. Voiding a marriage may not provide either aspect of divorce. In many states, including Indiana, a declaration of voidness does not allow a judge to divide property, allocate custody, or take any other substantive action.<sup>207</sup> In Texas, pre-marital agreements are not enforceable in voidness proceedings, nor are standard community property divisions available.<sup>208</sup> Smaller benefits like name changes are available, and judges have sometimes taken it upon themselves to divide property.<sup>209</sup> But in many or most states, voidness is clearly an inferior substitute for divorce when it comes to pragmatic issues.

The second problem is that it is not clear whether judgments of voidness will be given full faith and credit in other states; thus, a voidness declaration may not fulfill the second component of divorce. In the Texas proceedings, the state of Texas has cited no evidence

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201. Brief of Appellee at 8–12, *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App. 2010) (No. 05-09-01170-CV) (“A voidance proceeding is not an adequate substitute for divorce.”).

202. TEX. FAM. CODE ANN. § 6.307 (West 2007).

203. TEX. FAM. CODE ANN. § 6.204 (West 2007).

204. See Brief of Appellee, *supra* note 201, at 28–33.

205. See *supra* notes 125, 129 and accompanying text.

206. See *supra* notes 125, 130 and accompanying text.

207. E.g., IND. CODE § 31-11-1-1 (2007).

208. See Brief of Appellee, *supra* note 201, at 29.

209. *Id.*

showing that a Texas marriage declared void was ever accepted as void elsewhere.<sup>210</sup> As the plaintiff in one of the cases argued,

a suit to void a marriage simply “decrees,” somewhat circularly and tautologically, what Texas has already determined as a matter of law—that a “marriage” the state considers void is, in fact, void. The decree has no legal effect other than to express the state of affairs that already existed before the voidance proceeding. Such legal nullities are not given full faith and credit.<sup>211</sup>

Additionally, voidness declarations are sufficiently rare that having a marriage declared void might not provide sufficient security for a gay person who wished to remarry.<sup>212</sup> A divorce judgment would be easier to understand since it is so familiar.<sup>213</sup>

#### F. Constitutional Arguments

Although state courts have shown little enthusiasm for constitutional arguments in favor of same-sex divorce—only one case has granted a same-sex couple a divorce on a constitutional theory, and that case was quickly overturned—there are at least two arguments that same-sex couples have a specific constitutional right to divorce.<sup>214</sup> This Section will describe and evaluate those arguments.

The first constitutional argument is that denying same-sex couples the right to divorce is an equal protection violation. This is in line with the argument that denying same-sex couples the right to

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210. *Id.* at 31–32 (noting that the State had produced evidence that annulments were given full faith and credit elsewhere, but no evidence of voidness proceedings that had been given full faith and credit elsewhere).

211. *Id.*

212. *See id.* at 28–33.

213. Perhaps because the idea of voiding a same-sex marriage or civil union rather than divorcing the parties has only arisen in the last few years, it has received no academic attention. Scholarship might be able to illuminate how voidness declarations have functioned in the past, and whether voiding marriages could operate as a complete substitute for divorce. At the moment, however, voidness proceedings are a complicated, confusing replacement for routine divorce proceedings.

214. There appears to be only one case that granted a divorce based on an equal protection theory. *See* Order on Intervenor’s Plea to the Jurisdiction at 1, *In re Marriage of J.B. & H.B.*, No. DF-09-1074 (Dallas Cnty. Dist. Ct., Tex., Oct. 1, 2009), 2009 WL 3316580, at \*1; *see also* Findings of Fact and Conclusions of Law at 4–7, *J.B. & H.B.*, No. DF-09-1074 (Dallas Cnty. Dist. Ct., Tex. Dec. 7, 2009) (on file with the North Carolina Law Review) (explaining that denying same-sex couples access to divorce violates the federal Constitution’s Equal Protection Clause, the Due Process Clause, the First Amendment freedom of association, and the right to travel). The decision was promptly overturned by an appellate court. *See J.B. & H.B.*, 326 S.W.3d at 670–81.

marry is an equal protection violation. This Section will not address this argument at length because the argument is already well-known in the context of marriage.<sup>215</sup> In brief, proponents of the equal protection theory argue that gay people constitute a protected class; that laws discriminating against them are subject to either strict or intermediate scrutiny; and that there is no compelling government interest in the discriminatory laws, nor are they substantially related to an important governmental objective.<sup>216</sup> An alternative version of the argument is that gay people are not a protected class, but that the government lacks any rational basis for distinguishing between gay people and gay couples, on the one hand, and heterosexual people and couples, on the other.<sup>217</sup>

The equal protection argument is somewhat stronger in the divorce context than in the marriage context.<sup>218</sup> In the divorce context, the same-sex couple is already married in some state; the only question is whether the forum state has an interest in denying the couple a divorce. There may not be even a rational interest in denying the divorce, much less a compelling interest.<sup>219</sup> In the marriage context, some courts have found that the state has a rational interest in favoring opposite-sex marriage over same-sex marriage for reasons related to procreation: legislators are entitled to believe that children do best with opposite-sex parents, and legislators are entitled to promote opposite-sex marriage, since only opposite-sex couples can procreate naturally.<sup>220</sup> In the divorce context, however, that basis for favoring opposite-sex marriage disappears. Granting a divorce to a same-sex couple does not increase the likelihood that children will be raised in a household headed by opposite-sex parents, or in any way affect whether opposite-sex couples will choose to marry and

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215. See, e.g., Edward J. Schoen & Joseph S. Falchek, *Equal Protection, Due Process, and Same-Sex Marriage: The Reformation Continues*, 20 MIDWEST L.J. 23, 24–25, 46–48 (2006) (outlining the argument).

216. See *id.*; see also Mark P. Strasser, *Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex*, 38 PEPP. L. REV. 1021, 1022–30 (2011) (discussing how to determine the appropriate classification and level of scrutiny for a given group).

217. See Schoen & Falchek, *supra* note 215, at 24–25, 46–48.

218. See Petition for Review at 10–13, *J.B. & H.B.*, No. 11-0024-CV (Sup. Ct. Tex. Feb. 17, 2011).

219. *Id.*

220. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (“[W]e will discuss only these two [rational bases for the statute], both of which are derived from the undisputed assumption that marriage is important to the welfare of children.”); *J.B. & H.B.*, 326 S.W.3d at 674 (“The persons singled out and favored by Texas’s marriage laws, namely opposite-sex couples, have such a distinguishing and relevant characteristic: the natural ability to procreate.”).

raise children.<sup>221</sup> If there is no rational basis for denying a divorce to married same-sex couples, *a fortiori*, there is no exceedingly persuasive or compelling reason for doing so.

The second constitutional argument for divorce is a due process argument, and it is less well known than the equal protection theory. Colleen McNichols Ramais has developed this argument based on the Supreme Court's 1971 decision in *Boddie v. Connecticut*,<sup>222</sup> a case where a class of indigent plaintiffs challenged mandatory fees for opposite-sex divorce proceedings.<sup>223</sup> Instead of narrowing the issue to indigents' right of access to courts, the Supreme Court focused on the "special nature of the divorce action."<sup>224</sup> Unlike many other kinds of disputes, divorce actions can *only* be resolved via a court judgment; even if property can be divided via contract, individuals cannot contract for their freedom to remarry.<sup>225</sup> Without access to a court, then, an individual would be "locked into a marriage," an outcome that the *Boddie* Court found violated the Due Process Clause.<sup>226</sup>

The due process argument may apply to same-sex couples as well. Of course, they are not "locked in" to the marriage in the sense that they can establish domicile in a state that will grant them a divorce, but having to relocate is surely more onerous a burden than the approximately \$60 filing fee that was invalidated in *Boddie*.<sup>227</sup> However, one problem with the due process theory is that it is subject to the same sort of slipperiness that attends attempts to extend *Loving v. Virginia*,<sup>228</sup> a case that described marriage as a "fundamental" right, to same-sex couples.<sup>229</sup> Marriage is a fundamental right, but it is doubtful that the 1967 *Loving* Court thought it was describing *same-sex marriage* as a fundamental right. Similarly, access to divorce is a fundamental right, but the implicit notion in *Boddie* might be that *access to divorce for heterosexual couples* is a fundamental right. However, it is easier to translate *Boddie* than *Loving* into the same-sex context. The concern in *Boddie* was that people would be "locked into a marriage"; the people who

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221. See Petition for Review, *supra* note 218, at 10–13.

222. 401 U.S. 371 (1971).

223. *Id.* at 372–73; see also Ramais, *supra* note 2, at 1033–34 (discussing *Boddie*).

224. *Boddie*, 401 U.S. at 381 n.8.

225. *Id.* at 376.

226. *Id.* at 387 (Brennan, J., concurring).

227. *Id.* at 372 (majority opinion).

228. 388 U.S. 1 (1967).

229. *Id.* at 12.

need access to courts, therefore, are those who are married, whether to a person of the same sex or the opposite sex.

We do not know how a court faced with a *Boddie* argument would react because no plaintiff has yet invoked *Boddie*. A state court faced with a *Boddie* argument might, however, respond that if the state refuses to recognize the same-sex marriage, there is no need to grant access to state courts to dissolve the relationship. Consider, for instance, the Rhode Island majority in *Chambers*. It referred to the parties' union as a "purported" marriage, even though (as the dissent protested) there was undoubtedly a valid marriage in Massachusetts.<sup>230</sup> Even if the plaintiff had made a *Boddie* argument, the Rhode Island court could have published a virtually identical opinion denying a divorce from the "purported" marriage. This is not to say that the court would have been right to do so. Given *Boddie*, and given that the state of present domicile is in the best and perhaps only position to grant the divorce, perhaps the state ought to set aside its other interests and grant a same-sex couple's request for a divorce. *Boddie* thus provides a compelling reason for judges in every state to grant divorces to same-sex couples who seek them. But given that not every judge will be persuaded by the *Boddie* argument, it is not a complete solution to the same-sex divorce question. It is therefore still important to explore other judicial and legislative solutions.

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In many states, it is possible—indeed, logical—for a judge to take jurisdiction over a divorce petition and grant it in its entirety. In those states, a judge weighing all the provisions of the family code, the legislative intent behind the code, and prior state caselaw could reasonably decide that he may or must grant a divorce. But in other states, a constitutional argument may be the only way a judge can grant a divorce petition.

Because there is no obvious right answer for the judges who will decide these cases—and because couples moving to new states often have no idea whether they will be able to divorce—Part III will turn to whether legislatures have the power to weigh in on the same-sex divorce problem.

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230. *Chambers v. Ormiston*, 935 A.2d 956, 959 (R.I. 2007); *id.* at 968 (Suttell, J., dissenting).



### III. LEGISLATIVE SOLUTIONS TO THE SAME-SEX DIVORCE PROBLEM

The same-sex divorce problem has been characterized so far as a problem for judges to solve, but as we have seen, judges across and even within state lines still respond very differently when faced with divorce petitions. State supreme courts could bring order to the field eventually, but that will be a slow process, and a same-sex couple that does not know where they will eventually make their home may still be hesitant to marry if divorce is barred in many states. This Part will therefore explore whether legislative solutions could provide more certainty for such couples.

Fundamentally, there are two categories of legislative solutions to the same-sex divorce problem: those enacted in states with gay marriage, and those enacted in states without gay marriage.<sup>231</sup>

#### A. *Return-to-Divorce Clauses*

The simplest solution to the same-sex divorce problem is for states that already permit gay marriage—and thus have expressed a preference for equality for gay couples—to enact statutes providing that any same-sex couple married in the state may return to the state to divorce. Such statutes could be part of the original same-sex marriage legislation or could be enacted as a standalone act. This solution is very appealing because of the certainty it would create for gay couples. However, it is an open question whether states *can* draft such return-to-divorce clauses. This Section addresses that question, along with the pragmatic issues involved in enacting return-to-divorce clauses.

The legal uncertainty springs from the Supreme Court's 1945 opinion in *Williams v. North Carolina (Williams II)*.<sup>232</sup> In that case, the Supreme Court considered whether North Carolina had to

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231. There is also, of course, another legislative solution: A state can legalize same-sex marriage. Legalizing same-sex marriage is the most straightforward way to solve the same-sex divorce problem, but it obviously evokes many other political and social issues.

232. 325 U.S. 226 (1945). The case originally went to the Supreme Court on the question whether North Carolina had to give full faith and credit to Nevada's divorce judgment if only one member of each couple was properly domiciled in Nevada. *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 303 (1942). The *Williams I* Court found that North Carolina did have to give full faith and credit to the divorce in those circumstances. *Id.* But the Court reserved the question whether North Carolina could refuse to give full faith and credit to the divorce if North Carolina courts found, contrary to the findings of the Nevada court, that the divorce petitioners were not actually domiciled in Nevada. *Id.* at 302. After further proceedings in the lower courts, the Supreme Court addressed that question in *Williams II*, 325 U.S. at 227.

recognize a divorce granted in Nevada. A man and a woman, seeking to divorce their respective spouses and marry each other instead, had traveled to Nevada for six weeks.<sup>233</sup> Six weeks was exactly the amount of time needed to establish domicile in Nevada for divorce.<sup>234</sup> After six weeks, they both divorced their spouses, married each other, and returned to North Carolina.<sup>235</sup> North Carolina prosecuted them for bigamy, and the case eventually made its way to the Supreme Court. The Court concluded that divorce judgments are subject to full faith and credit, but noted that “[u]nder our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil[e],” that is, intent to remain indefinitely in the state (usually proved by a period of residence).<sup>236</sup> A court faced with an out-of-state divorce is allowed to assure itself that the courts of the state that granted the divorce had jurisdiction properly based on domicile.<sup>237</sup> If so, it must grant full faith and credit to the divorce decree, but if not, the state may refuse to recognize the divorce.<sup>238</sup> Most scholars have assumed that *Williams II* sets a constitutional floor—domicile—for the exercise of divorce jurisdiction, or have at least assumed that divorce without domicile “poses far too many jurisdictional complications to be an adequate remedy.”<sup>239</sup>

The idea that *Williams II* set a constitutional *minimum* for jurisdiction over divorce cases, however—as opposed to merely affirming that domicile is a constitutionally *sufficient* condition for jurisdiction—is questionable. First, the Court was noticeably vague about the basis for its holding. It did say that “[t]he framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it.”<sup>240</sup> But the Court did not quite say that those framers therefore made domicile a constitutional *requirement*; the Court might have merely been reiterating the historical common law requirement, or even just noting that Nevada

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233. *Id.* at 241 (Murphy, J., concurring); see also *Williams I*, 317 U.S. at 289–90 (recounting the circumstances surrounding petitioners’ divorces in Nevada).

234. *Williams II*, 325 U.S. at 235 n.8; see also NEV. REV. STAT. § 125.020 (2010) (codifying the amount of time needed to establish domicile in Nevada for divorce).

235. *Williams I*, 317 U.S. at 289–90.

236. *Williams II*, 325 U.S. at 229.

237. See *id.* (“A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.”).

238. *Id.*

239. See Kay, *supra* note 19, at 82, 84, 89–90; Ramais, *supra* note 2, at 1037–38.

240. *Williams II*, 325 U.S. at 229.

law specified that domicile was a prerequisite for jurisdiction.<sup>241</sup> The Court actually seemed to be driven by policy concerns: it noted that divorce affects society generally, and that a state should not be allowed to impose its divorce policy on other states without a sufficient stake in the matter.<sup>242</sup> Two dissenting justices picked up on the Court's vagueness as to the source of the domicile requirement, accusing the Court of "seem[ing]" to create a constitutional requirement out of whole cloth and asserting that divorce law was sounder without the concept of domicile.<sup>243</sup> In the years following *Williams II*, law review articles flew on both sides of the issue.<sup>244</sup> As Professor Edward S. Stimson pointed out, domicile was not a requirement for marriage, yet it certainly ought to be under the *Williams II* theory.<sup>245</sup>

The *Williams II* Court was wrong in asserting that the framers of the Constitution were familiar with domicile as a prerequisite for divorce. In England, divorce was solely a matter for ecclesiastical courts until 1858, and those courts had "jurisdiction over Christians" irrespective of domicile.<sup>246</sup> England did not impose a domicile requirement until 1895, and it was later replaced with a residency requirement.<sup>247</sup> In the United States, colonial legislatures handled divorces until around the time of the ratification of the Constitution.<sup>248</sup> While legislators presumably handled petitions from residents of their states, many of whom would also have been domiciliaries, there was no domicile requirement.<sup>249</sup> In the late

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241. See *id.*

242. *Id.* at 231-33.

243. *Id.* at 271 (Black, J., dissenting); see also *id.* at 244 (Rutledge, J., dissenting) ("[T]he Court has travelled in a domiciliary wilderness, only to come out with no settled constitutional policy where one is needed most.").

244. See, e.g., *Constitutional Law—Due Process—Statute Giving Court Jurisdiction for Divorce Without Proof of Domicile*, 23 *FORDHAM L. REV.* 206, 208 (1954); *Constitutionality of Assertion of Divorce Jurisdiction by Non-Domiciliary Forum*, 54 *COLUM. L. REV.* 415, 416 (1954); Peter L. Costas, *Divorce and Domicile: Where Confusion Reigns Supreme*, 5 *SYRACUSE L. REV.* 219, 221 (1954); Alan H. Levine, *Divorce Jurisdiction—Marriage Performed Within State Held Sufficient to Confer Jurisdiction on New York Courts*, 4 *BUFF. L. REV.* 252, 252 (1955); *Marriage Within the State As a Basis of Divorce Jurisdiction*, 54 *COLUM. L. REV.* 1165, 1166 (1954); W.C.S., *Domestic Relations: Statutory Presumption of Domicile*, 19 *ALB. L. REV.* 103, 107 (1955).

245. Edward S. Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 *A.B.A. J.* 222, 295 (1956).

246. Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 *WM. & MARY L. REV.* 1, 7-8 (1997).

247. *Id.* at 9-11.

248. *Id.* at 12.

249. See *id.* at 12-13.

eighteenth century, state courts began to share jurisdiction over divorces with state legislatures, and by “the mid-nineteenth century migratory divorce was being discouraged in many states by the imposition of minimum residency requirements.”<sup>250</sup>

The *Williams II* Court was also wrong in asserting that no “court in the English-speaking world has questioned” the domicile requirement.<sup>251</sup> Eighty-three years before *Williams II*, New York, which at that time had only fault-based divorce, enacted a return-to-divorce provision stating that couples married in the state could be divorced there:

In any of the following cases, a husband or a wife may maintain an action against the other party to the marriage to procure a judgment divorcing the parties and dissolving the marriage by reason of the defendant’s adultery:

. . . .

2. Where the parties were married within the state.<sup>252</sup>

The New York courts were untroubled by *Williams II* and reaffirmed the return-to-divorce provision’s validity shortly after that case. In *David-Zieseniss v. Zieseniss*,<sup>253</sup> the New York Supreme Court called the Supreme Court’s analysis in *Williams II* “too loose,” and pointed to years of its own unchallenged caselaw, wondering tartly whether “in making the statement [that no English-speaking court had ever questioned the domicile requirement], Mr. Justice Frankfurter was merely unaware of *Gould v. Gould* [an earlier New York case], or whether he intended to say that the New York Court of Appeals is not an English-speaking court.”<sup>254</sup> Another New York court, writing twenty years after *Williams II*, agreed that “domicile is not intrinsically an indispensable prerequisite to jurisdiction.”<sup>255</sup> The return-to-divorce provision was repealed as part of a comprehensive divorce reform law in 1966, but not because it was ever found unconstitutional.<sup>256</sup>

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250. *Id.* at 12–14 & n.64 (quoting RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 445 (1988)).

251. *Williams II*, 325 U.S. 226, 229 (1945).

252. N.Y. DOM. REL. LAW § 170(2) (Consol. 1964) (repealed 1966); *see also* *Brawer v. Pinkins*, 626 N.Y.S.2d 674, 676 (Sup. Ct. 1995) (noting that the statute was valid from 1862 to 1966, when it was repealed as part of a comprehensive divorce reform law).

253. 129 N.Y.S.2d 649 (Sup. Ct. 1954).

254. *Id.* at 654.

255. *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709, 712 (N.Y. 1965).

256. *Brawer*, 626 N.Y.S.2d at 676.

New York is not the only jurisdiction to dispense with the domicile requirement. Guam, a territory whose divorce judgments are entitled to full faith and credit, requires only a seven-day stay plus consent of both spouses in order to grant an uncontested divorce.<sup>257</sup> Yet there appear to be no instances of the validity of a Guam divorce being challenged on this ground. Additionally, some states have long allowed members of the military to seek a divorce in states where they are not domiciled.<sup>258</sup>

The Supreme Court took up the question of domicile and divorce again in 1975.<sup>259</sup> A plaintiff challenged Iowa's domicile requirement, claiming that it was unconstitutional because it violated the right to travel and imperiled *Boddie's* right of access to divorce.<sup>260</sup> The Court rejected both arguments. In doing so, however, the Court did not say—or even suggest—that the domicile requirement could not be unconstitutional because it was mandated by the Constitution. The Court merely held that “[w]ith consequences of such moment riding on a divorce decree issued by its courts, Iowa may insist that one seeking to instigate such a proceeding have the modicum of attachment to the State required here.”<sup>261</sup>

Thus, the Supreme Court has never clearly held that domicile is a requirement for divorce, and some jurisdictions have proceeded on the theory that it is not. Moreover, as several scholars have pointed out, the idea that domicile is a constitutional prerequisite for divorce makes no sense.<sup>262</sup> The law of divorce jurisdiction “inhabits a looking-glass world in which the usual conflicts principles are distorted beyond recognition. Jurisdiction over the defendant seems to be neither necessary nor sufficient to empower a court to hear a divorce

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257. 19 GUAM CODE ANN. § 8318 (2011) (“If both parties consent in writing to a divorce or dissolution of their marriage, a divorce or dissolution may be granted if one of the parties has resided in Guam for at least seven (7) days immediately preceding the filing of the complaint.”).

258. Wasserman, *supra* note 246, at 20–21; *see also, e.g.*, James Doores, *Statute Eliminating Requirement of Domicile for Servicemen's Divorces Held Valid Under State and Federal Constitutions*—Wood v. Wood, 320 S.W.2d 807, 37 TEX. L. REV. 626, 626 & n.1 (1959) (describing a case involving a member of the military who sought divorce outside his domicile).

259. *See Sosna v. Iowa*, 419 U.S. 393 (1975).

260. *Id.* at 405.

261. *Id.* at 407.

262. *See Wasserman, supra* note 246, at 27–32; *see also Costas, supra* note 244, at 219 (commenting on the confusion in divorce law with respect to domicile); *Constitutional Law, supra* note 244, at 207–09 (same); *Constitutionality of Assertion, supra* note 244, at 415 (same); *Marriage Within the State, supra* note 244, at 1166 (same).

case.”<sup>263</sup> Jurisdiction is not necessary because the defending spouse can be haled into court in the plaintiff spouse’s state of domicile.<sup>264</sup> And it is not sufficient because a state court could have judicial jurisdiction over both parties but be unable to adjudicate a divorce if neither party is a domiciliary of the state.<sup>265</sup>

There is no historical basis for believing that domicile is a constitutional prerequisite for divorce jurisdiction.<sup>266</sup> The question, then, is whether there is any constitutional reason to require domicile under the Supreme Court’s other judicial jurisdiction jurisprudence. Under *International Shoe Co. v. Washington*,<sup>267</sup> the seminal personal jurisdiction case decided the same year as *Williams II*, the exercise of jurisdiction is proper when the defendant has sufficient contacts with the state such that “the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>268</sup> This standard focuses on whether the forum is reasonably convenient for the defendant, not on whether the state has a sovereign interest in adjudicating the dispute. In 1980, the Court added a new dimension to the personal jurisdiction test in *World-Wide Volkswagen Corp. v. Woodson*<sup>269</sup>:

The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. . . . Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. . . . The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.<sup>270</sup>

If the Due Process Clause limits a state’s ability to exercise jurisdiction in a case that may interfere with another state’s sovereign interests, that could theoretically be a reason to treat jurisdiction in divorce cases differently. State sovereignty, after all, was the implicit

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

264. Wasserman, *supra* note 246, at 1–2.

265. *Id.* at 2.

266. See *supra* text accompanying notes 245–47.

267. 326 U.S. 310 (1945).

268. *Id.* at 316 (citations omitted) (internal quotation marks omitted).

269. 444 U.S. 286 (1980).

270. *Id.* at 292–93.

concern of the *Williams II* Court: as the Court explained, "[t]he problem is to reconcile the reciprocal respect to be accorded by the members of the Union to their adjudications with due regard for another most important aspect of our federalism whereby 'the domestic relations of husband and wife . . . were matters reserved to the States' . . . ." <sup>271</sup>

However, the evolution of the Supreme Court's jurisdiction jurisprudence, along with the evolution of divorce law, makes this argument questionable. Only two years after *World-Wide Volkswagen*, the Court retreated from the statement that state sovereignty concerns are an independent component of the Due Process Clause:

[Personal jurisdiction] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. <sup>272</sup>

Thus, the key component of the judicial jurisdiction inquiry remains whether the exercise of jurisdiction comports with traditional notions of "fair play and substantial justice" from the parties' perspective. As the same-sex divorce cases and other cases <sup>273</sup> make crystal clear, however, the domicile requirement undermines, rather than protects, the parties' interests. The *International Shoe* standard already provides that the parties must have some contact with a state (or consent to litigating there) before a state court can exercise jurisdiction. The domicile requirement adds nothing, but it makes divorce totally unavailable for some couples even as it forces other defendants to litigate in states that could not exercise jurisdiction over them in non-divorce cases. <sup>274</sup>

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271. *Williams II*, 325 U.S. 226, 232-33 (1945).

272. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 & n.10 (1982).

273. See, e.g., Wasserman, *supra* note 246, at 3-4, 33-35. In one case, for instance, a husband and wife had spent all twenty-five years of their marriage in New York. When a New York court denied their divorce, the wife flew to Alaska, declared that " 'she felt sure this was the place she wanted to be,' " and filed for divorce. *Id.* at 3 (quoting *Perito v. Perito*, 756 P.2d 895, 896 (Alaska 1988)). The court granted the divorce over the husband's protest. *Id.*

274. See *supra* text accompanying note 260.

Moreover, the state sovereign interest in regulating divorce has arguably diminished since 1945. At that time, states had markedly different divorce laws.<sup>275</sup> Now, all fifty states have adopted some version of no-fault divorce.<sup>276</sup> Because there is relatively little variation between state laws, the *Williams II* concern for protecting each state's choices is less important. Even in the arena of same-sex divorce, states do not vary in what is required for a divorce; they vary only in whether to recognize the underlying marriage. Moreover, if gay couples are not marrying because they fear they will not be able to divorce in other states, a state's sovereign interest in allowing its residents to marry may be affected.

In short, there is no longer any reason for allowing an archaic set of rules to govern jurisdiction over divorce but no other category of cases. The *International Shoe* test, which suffices in nearly every other area of law, should suffice here as well.<sup>277</sup> Under that test, it would be relatively straightforward for a state to enact a return-to-divorce law. The parties could be given the option of consenting to the state's jurisdiction in any future divorce at the time they receive a marriage license; or, alternatively, they could consent to the state's jurisdiction if no alternative divorce forum existed. Even without consent, parties might well be subject to specific divorce jurisdiction under the

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275. See Wasserman, *supra* note 246, at 25.

276. Stephanie Coontz, *Divorce, No-Fault Style*, N.Y. TIMES, June 16, 2010, at A29; see also Paterson Signs No-Fault Divorce Bill, N.Y. TIMES, Aug. 15, 2010, at A14 (reporting on the signing of a law that created no-fault divorce in New York, the last state to adopt such a law).

277. Although jurisdiction over divorce is usually characterized as a problem of judicial jurisdiction, the problem also has an aspect of legislative jurisdiction: may states apply their divorce law to non-residents? Under the test articulated in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), it seems clear that they can. A state court may apply its own law to a dispute when the parties have "a significant contact or significant aggregation of contacts [with the state], creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 312-13. The Supreme Court has paid more attention to the "arbitrary or unfair" portion of the test than the "state interest" portion; as one commentator has observed, the state interest "element of the test probably retains no independent constitutional significance. It is hard to think of a contact that would not create a constitutionally adequate interest." ROOSEVELT, *supra* note 100, at 131-32. The parties have contact with the state when they marry there and, if they know they may be subject to the state's divorce law in the future, the choice of law is neither arbitrary nor unfair.

In theory, it might be possible to solve the same-sex divorce problem entirely through choice-of-law rules: for instance, Texas could apply Massachusetts's divorce law to divorce two Texas domiciliaries who were married in Massachusetts. In practice, however, courts have always applied their own law to divorce cases; to apply normal choice-of-law rules to such family law cases would be unprecedented. Wasserman, *supra* note 246, at 2.



purposeful availment test if they chose to marry in the state, although there is obviously no current caselaw establishing that proposition.<sup>278</sup>

Perhaps reflecting these ideas, California already has such a return-to-dissolve clause in its domestic partnership act:

The superior courts shall have jurisdiction over all proceedings relating to the dissolution of domestic partnerships, nullity of domestic partnerships, and legal separation of partners in a domestic partnership. The dissolution of a domestic partnership, nullity of a domestic partnership, and legal separation of partners in a domestic partnership shall follow the same procedures, and the partners shall possess the same rights, protections, and benefits, and be subject to the same responsibilities, obligations, and duties, as apply to the dissolution of marriage, nullity of marriage, and legal separation of spouses in a marriage, respectively, except as provided in subdivision (a), and *except that, in accordance with the consent acknowledged by domestic partners in the Declaration of Domestic Partnership form, proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in this state may be filed in the superior courts of this state even if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed.*<sup>279</sup>

Although historical caselaw has naturally focused on marriage, there is no theoretical basis for distinguishing between dissolving a marriage and dissolving a domestic partnership, particularly since California law states that domestic partners “have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”<sup>280</sup> Yet California’s provision has not been challenged on constitutional or other grounds.

In sum, a quick reading of *Williams II*, along with the fact that states nearly always have domicile requirements for divorce, might suggest that a return-to-divorce clause would be invalid. But that argument does not take into account the persistence of state divorce

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278. See *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, Solano, 480 U.S. 102, 108–09 (1987) (discussing the purposeful availment test).

279. CAL. FAM. CODE § 299(d) (West 2004) (emphasis added).

280. CAL. FAM. CODE § 297.5(a) (West 2004).

laws dispensing with the domicile prerequisite; the consistent academic countercurrent against the *Williams II* holding; the Supreme Court's later equivocal pronouncements; and the evolution of the Supreme Court's jurisprudence on the constitutional basis for judicial jurisdiction.<sup>281</sup>

If it were certain that *Williams II* would not bar return-to-divorce clauses, they would clearly be the best answer to the gay divorce problem. Even with the uncertainty, such clauses are still the best answer.

### *B. Divorce Recognition Legislation*

In states that have not legalized gay marriage, legislators who are convinced that divorce is a benefit that ought to be extended to resident gay couples are in a good position to enact legislation. To this end, two types of laws would be helpful. First, unless a broad constitutional mini-DOMA constrained the legislature, it could enact a law providing that individuals domiciled in the state could seek a same-sex divorce in the state courts, so long as the couple had been validly married in another state. In states with a statutory (but not constitutional) mini-DOMA banning recognition of same-sex marriages, the legislature is in a better position to make divorce available to same-sex couples than a court. A judge might feel constrained to interpret a statutory mini-DOMA as precluding divorce; a legislature could simply clarify that the mini-DOMA did not prohibit recognition of an out-of-state same-sex marriage for the limited purpose of granting a divorce. In a state with no mini-DOMA at all, of course, there is no issue whatsoever with the legislature

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281. Legislators might not want to enact a return-to-divorce clause if they fear that such a clause would simply add to the already pervasive uncertainty in the same-sex divorce arena. Despite the uncertainty, such provisions would be worthwhile. The return-to-divorce provisions in existence have yet to be challenged, in part because there is little incentive for anyone to challenge them. To use Texas as an example, if the same-sex couples from Texas could have returned to Massachusetts to obtain a divorce, there would be a much weaker argument that Texas was being forced to recognize an underlying same-sex marriage. Indeed, the recognition question would only arise if a couple wanted Texas courts to enforce some aspect of the Massachusetts divorce.

One other concern could be that any state with such legislation would be turned into a gay divorce mill. But limiting the option to couples who marry in the state would cut down the number of migrant divorces. Simplified divorce proceedings are another way to keep costs down; California domestic partnerships, for instance, may be dissolved via a mail-in form when the dissolution is uncontested and a number of other conditions are met. See CAL. SEC'Y OF STATE: BUS. PROG. DIVIS., TERMINATING A CALIFORNIA REGISTERED DOMESTIC PARTNERSHIP (2011), <http://www.sos.ca.gov/dpregistry/forms/sf-dp2.pdf>.

enacting a law allowing same-sex couples to divorce. As long as one member of the couple was validly domiciled in the state, there would be no *Williams II* problem.

In Rhode Island, the legislature has already considered passing such a bill.<sup>282</sup> The sponsors of the bill proposed to add the following language to Rhode Island's divorce code:

Regardless of whether the parties would have been eligible to marry in Rhode Island, the parties to any marriage, or other domestic relationship granting substantially similar rights and obligations of marriage, recognized in any state of the United States, possession of the United States, or in any foreign country, may petition for a divorce proceeding in this state so long as the parties meet [other jurisdictional requirements].<sup>283</sup>

The Attorney General and various legal organizations supported the bill.<sup>284</sup> The bill was ultimately held over for further study, but the fact that there is some political will to make the change, and that it appears to be relatively simple to write the necessary statutory language, is encouraging to those who support legislative solutions.<sup>285</sup>

The second type of legislation that would be helpful concerns the second gay divorce problem, which this Article has otherwise not addressed—the case where a couple obtains a valid same-sex divorce in a state that will grant it, but then moves to another state that refuses to recognize the divorce. One might expect that a divorce judgment would always be recognized on full faith and credit grounds, but DOMA says that no state “shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage.”<sup>286</sup> Thus, states can apparently disregard divorce proceedings from other states, and some mini-DOMAs direct state actors to do just that.<sup>287</sup> A state that wanted to recognize such divorces, however, could do so by passing simple clarifying legislation.

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282. Randal Edgar, *RI Legislative Committee Hears Testimony on Same-Sex Divorce Bill*, PROVIDENCE J., May 5, 2010, available at [http://web.archive.org/web/20100508121458/http://www.projo.com/news/politics/content/SAME\\_SEX\\_DIVORCE\\_05-05-10\\_IHIBQ05\\_v37.42920c1.html](http://web.archive.org/web/20100508121458/http://www.projo.com/news/politics/content/SAME_SEX_DIVORCE_05-05-10_IHIBQ05_v37.42920c1.html).

283. H.B. 7990, 2010 Leg., Jan. Sess. § 1 (R.I. 2010) (not enacted).

284. Edgar, *supra* note 282.

285. *Id.* (noting the bill was held over).

286. 28 U.S.C. § 1738C (2010).

287. GA. CONST. art I, § IV; ALASKA STAT. § 25.05.013 (2010); ARK. CODE ANN. § 9-11-208 (Supp. 2011); FLA. STAT. ANN. § 741.212 (West 2010); KY. REV. STAT. ANN. § 402.045 (LexisNexis 2010); OHIO REV. CODE ANN. § 3101.01 (LexisNexis 2008); TEX. FAM. CODE ANN. § 6.204 (West 2006).

Such legislation would be useful to divorced gay individuals considering moving to a new state who want to know that a previous divorce would remain enforceable.

### CONCLUSION

Discriminatory access to divorce hurts gay people. Couples can be left without any neutral party to divide property or adjudicate custody of their children; they can find themselves unable to escape a legal relationship that they want to move beyond; a parade of intervenors can appear in their private divorce case; or they can end up with a rare and confusing “void” marriage. Same-sex couples wishing to marry already have to navigate a slew of confusing state and federal laws, and the divorce problem imposes the additional burden of having to decide whether the benefits of legal marriage are worth the risk that they may not be able to divorce. The lack of access to divorce is unique to same-sex couples, and because the problem is poorly publicized, all of this takes place in a haze of bad information and little precedent.

So far, the problem has played out mostly in courtrooms. Initially, several judges reacted based on the simple assumption that it couldn’t be right to keep people in unions they wished to end.<sup>288</sup> The law has since developed in a more rigid direction, as judges struggle to interpret divorce statutes and, specifically, how to interpret the word “marriage” as used in a divorce statute.<sup>289</sup> Some judges have jumped into the task of statutory interpretation without examining the special development of family law and considering whether the *lex loci celebrationis* principle or incidents analysis is the right way to dissect a divorce statute.<sup>290</sup> Those principles deserve to be taken more seriously in same-sex divorce cases, and judges in more states should grant same-sex divorce petitions based on those principles.

Because of the variety of state laws at play, however, the development of law in this area is almost guaranteed to be haphazard. In existing caselaw, judges in the same states have reached contrary results, and judges in different states have reached conflicting results on wildly different theories. This uncertainty will diminish somewhat when state supreme courts begin to issue definitive guidance, but it will not disappear in the near term. Couples who do not know where

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288. See *supra* Part II.A.

289. See *supra* Part II.A–D.

290. See *supra* Part II.B (discussing originalism cases); Part II.C (discussing *lex loci celebrationis* cases); Part II.D.1 (discussing incidents analysis cases).

the future will take them may still be reluctant to marry when some states allow same-sex divorce and others forbid it.

The best way to end that uncertainty is for states that allow gay marriage to guarantee that their courts will be available as a divorce forum, even if the couple has moved elsewhere. As Part III argued, *Williams II* should not bar that result. The basis for the *Williams II* holding was unclear, and the historical evidence is that return-to-divorce clauses survived it unchallenged.<sup>291</sup>

Given the current chaos, the best way to solve the same-sex divorce problem is to make all options available to gay couples. States that allow gay marriage or civil unions should consider following the lead of Vermont and warning prospective couples that they may not be able to dissolve their union if they leave the state.<sup>292</sup> States that allow gay marriage should also consider retaining or adding civil unions with return-to-divorce clauses as an additional option, since some mobile couples may decide that the benefits of a union formally called a “marriage” are not worth the greater risk of being unable to end the legal relationship.<sup>293</sup> Judges faced with divorce petitions should employ incidents analysis and consider the *lex loci celebrationis* principle when permissible under state laws; all judges should consider whether *Boddie* and other constitutional arguments mean that every state must make divorce available to same-sex couples. Legislators should try to clarify or expand state divorce forums. All of these tactics combined can end the Kafkaesque divorce maze and make a painful experience a little less so.

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291. See *supra* Part III.A.

292. VT. STAT. ANN. tit. 18, § 5160(f) (repealed 2009).

293. Some states have phased out civil unions upon legalizing gay marriage. For instance, Washington, D.C. began phasing out its civil unions on January 1, 2011 as a result of its same-sex marriage law. Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 27 (Jan. 1, 2010). As explained above, there is no theoretical reason that a return-to-divorce clause in the civil union context should be treated differently than a return-to-divorce clause in the marriage context, but because the historical caselaw focuses on marriage, judges might decide that civil unions create different legal issues. See *supra* note 280 and accompanying text. Alternatively, a judge may be constrained by a mini-DOMA to treat civil unions and same-sex marriages differently. See, e.g., *supra* note 280.