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A MINIMALIST APPROACH TO SAME-SEX DIVORCE: RESPECTING STATES THAT PERMIT SAME-SEX MARRIAGES AND STATES THAT REFUSE TO RECOGNIZE THEM

Robert E. Rains*

"Thus Grief still treads upon the Heels of Pleasure: Married in haste, we may repent at leisure."
—William Congreve, The Old Batchelour, Act V, Scene 1 (1693)

I. INTRODUCTION

Unlike most modern countries, the United States has no general law of domestic relations. The powers delegated in the Constitution to the Congress do not include the governance of family law.[1] Moreover, the Bill of Rights provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[2] Thus, in 1890, the US Supreme Court unequivocally stated, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[3] In the ensuing 120 years, Congress has, directly and indirectly, addressed multiple family law issues utilizing its various delegated powers.[4] But it remains true that there is no federal law of marriage or divorce. Each of the fifty states has its own marriage and divorce laws, and they are often in sharp conflict with each other.[5] For example, until the Supreme Court ruled such laws unconstitutional in *Loving v. Virginia*[6] in 1967, sixteen states still prohibited interracial couples from getting married, while thirty-four states authorized such unions.[7]

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[1] *See* U.S. CONST. art. I, § 8, cl. 1.

[2] U.S. CONST. amend. X.

[3] *Ex parte* Burrus, 136 U.S. 586, 593–94 (1890).

[4] *See, e.g., infra* text accompanying notes 15–16.

[5] There have been efforts over the years to create uniform marriage and divorce laws on the state level, but they have met with little success. The National Conference of Commissioners on Uniform State Laws issued a proposed Uniform Marriage and Divorce Act in 1970, but, to date, only eight states have adopted some form of that act. *See* UNIF. MARRIAGE & DIVORCE ACT (amended 1973), 9A U.L.A. 159 (1998).

[6] 388 U.S. 1 (1967)

[7] *Loving*, 388 U.S. at 6. Had Barack Obama's parents attempted to get married in 1961 in Virginia, or to have even lived in Virginia as a married couple, they would have been subject to criminal prosecution as were the Lovings.

While the once heated debate over interracial marriage is today probably viewed in most circles as an embarrassing vestige of the era of "Jim Crow," basic disagreements continue among the states as to who can marry whom. American states are fairly equally divided as to whether first cousins may marry.[8]

But, of course, the current marriage issue that most animates vitriolic political dispute in the United States and elsewhere is the question of same-sex couples. This issue first came to the fore in the United States with the 1993 decision of the Hawaii Supreme Court in *Baehr v. Lewin*,[9] in which that court ruled that several same-sex couples had stated a cause of action that Hawaii's prohibition on same-sex marriage arguably violated the Hawaii State Constitution.[10] This decision, which only called for a remand of the case, created a public firestorm. At the federal level, Congress enacted the "Defense of Marriage Act" ("DOMA").[11]

The federal DOMA has but two substantive provisions. One provision is that the United States government will not recognize a same-sex marriage for any federal purpose.[12] The other provision addresses interstate concerns, specifically recognition by one state of a same-sex marriage legally performed in another state:

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[8] *See* Frederick Kunkle, *Pa. Cousins Try to Overcome Taboo of 'I Do,'* WASH. POST, Apr. 25, 2005, at B1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/04/24/AR2005042401406.html (reporting on Pennsylvania first cousins who traveled to Maryland to avoid Pennsylvania's prohibition on first cousins' marriage, and noting the cloyingly named Cousins United to Defeat Discriminating Laws Through Education (C.U.D.D.L.E.)); *cf.* Marriage Act, 1949, 12 & 13 Geo. 6, c. 76, sch. 1 (U.K.) (allowing the marriage of first cousins).

[9] 852 P.2d 44 (Haw. 1993).

[10] *Id.* at 52–54. *Baehr* was a sharp departure from prior state court decisions on the subject, all of which had rejected the concept of a right to same-sex marriage. *See* Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (asserting "marriage has always been considered as the union of a man and a woman"); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (holding Minnesota law "does not authorize marriage between persons of the same sex and that such marriages are . . . prohibited" and dismissing the appeal for "want of a substantial federal question"), 409 U.S. 810 (1972); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971) ("The law makes no provision for 'marriage' between persons of the same sex."); DeSanto v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding, "as a matter of law," two persons of the same sex cannot contract a common law marriage).

[11] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended in scattered sections of 1 U.S.C. and 28 U.S.C.).

[12] 1 U.S.C. § 7 (2006). This provision has been and continues to be challenged. Most notably, on July 8, 2010, federal district Judge Joseph L. Tauro issued two companion decisions striking down this section. In *Massachusetts v. U.S. Department of Health and Human Services*, he ruled that this section violated both the Tenth Amendment and the Spending Clause of the U.S. Constitution. 698 F. Supp. 2d 234, 249, 253 (D. Mass. 2010). In *Gill v. Office of Personnel Management*, he further ruled that it violated "the equal protection principles embodied in the Fifth Amendment." 699 F. Supp. 2d 374, 397 (D. Mass. 2010). The United States appealed both decisions to the First Circuit Court of Appeals, but the status of those appeals became murky when Attorney General Eric Holder announced on Feb. 23, 2011, that President Obama has concluded that this provision is unconstitutional and, "[g]iven that conclusion, the President has instructed the Department

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[13]

This provision carves out an exception to the general American rule that a marriage validly entered into in one state will be recognized in all other states.[14] There is a constitutional, as well as a common law, basis for this rule, as the Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[15] However, in enacting DOMA, Congress purported to rely on its enforcement power under the Full Faith and Credit Clause: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[16] Whether this second provision of DOMA is a proper exercise of that enforcement power, or a violation of it, is a hotly debated question.[17]

This Article will address the legal conundrum that arises when a person who validly entered a same-sex marriage in one state seeks a divorce in another state that refuses to recognize same-sex marriage. The Article will first discuss the interstate recognition of marriages and divorces in general, then the patchwork quilt of same-sex marriage laws in the United States, followed by a discussion on seeking a legal exit from a same-sex marriage in a state that does not recognize that marriage, and finally, suggest a path which will allow a court in the latter state

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not to defend the statute in such cases. I fully concur with the President's determination." *See Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, U.S. DEP'T JUST. (Feb. 23, 2011), http://www.justice/gov/opa/pr/2011/February/11-ag-222.html. A group of Republican leaders of the House of Representatives—the Bipartisan Legal Advisory Group—retained counsel and intervened to defend this section of DOMA. On May 31, 2012, a panel of the First Circuit Court of Appeals unanimously affirmed the district court in a consolidated opinion. Comm'n of Massachusetts v. U. S. Dep't of Health and Human Servs., No. 10-2204, 2012 WL 1948017 (1st Cir. May 31, 2012).

[13] 28 U.S.C. § 1738C.

[14] *See* Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 261 (2006).

[15] U.S. CONST. art. IV, § 1.

[16] *Id.*

[17] *Compare* Lynn D. Wardle, *Non-recognition of Same-Sex Marriage Judgments under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365 (2005) (arguing Congress was acting within its authority under the Full Faith and Credit Clause when it enacted DOMA), *with* Hay, *supra* note 14, at 261 (arguing a "fine distinction" may be the key to DOMA's constitutionality). A federal district court upheld this provision of DOMA against multiple constitutional challenges in *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303–04, 1309 (M.D. Fla. 2005).

to grant relief without violating the letter or spirit of state provisions barring recognition of same-sex marriage.

II. INTERSTATE RECOGNITION OF MARRIAGES (AND DIVORCES) IN GENERAL

The validity of a marriage entered into in another state is a matter that is litigated with some frequency, but not usually on a constitutional basis. Different courts have developed different frameworks for addressing this issue.

Perhaps the best-known case is the 1953 decision of the New York State Court of Appeals in *In re May's Estate*.[18] In that case, a Jewish uncle and niece were barred from marrying in New York.[19] They traveled to Rhode Island, which generally prohibited such marriages but allowed them for persons of the Jewish faith.[20] The marriage lasted thirty-two years until the wife's death, and produced six children.[21] An estate battle ensued between the widower and three of the children who claimed that their parents' marriage was invalid under New York law, and therefore they were next of kin to their deceased mother.[22] The surrogate court (that is, the trial court) agreed with the three children that their parents' marriage was void because it was "opposed to natural law" and contrary to New York statutory law.[23]

The New York Court of Appeals, that state's highest court, disagreed.[24] It expressed the "settled law" that the legality of a marriage is to be determined by the law of the place where it is celebrated (*lex loci celebrans*).[25] The only exceptions are: (1) cases within the prohibition of positive law; and (2) "cases involving polygamy or incest in a degree regarded generally as within the prohibition of natural law."[26] The court found that New York's statute did not contain a positive prohibition on recognition of an out-of-state uncle-niece marriage.[27] And since the marriage was performed in accordance with "the ritual of the Jewish faith," it was "not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law."[28]

The *May's Estate* decision presents a number of interesting aspects. First, the court never addressed the constitutionality of allowing a marriage of persons of one faith where the same marriage would be declared void if the parties were of another faith. Could a couple convert from one religion to another to avoid a

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[18] 114 N.E.2d 4 (N.Y. 1953).
[19] *See id.* at 4–5.
[20] *Id.* at 5.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 7.
[25] *Id.* at 6.
[26] *Id.*
[27] *Id.* at 6–7.
[28] *Id.* at 7.

marriage prohibition? If a couple such as the Mays lawfully married in one religion but later converted to another religion, would it affect their civil marriage? What if they were an interfaith couple? Could they choose which religion governed the validity of their marriage?

The second aspect of the *May's Estate* decision worth noting is the subjectivity involved in a civil court's attempt to find and apply "natural law." This was highlighted by the fact that a dissenting judge would have found that "[a]ll such misalliances are incestuous, and all, equally, are void."[29] A court's reliance on such an amorphous concept as natural law is akin to reliance on scripture, as often happens today in the battle over same-sex relationships.[30] Those resorting to such scriptural reliance would do well to recall that in 1959 the trial judge who sentenced the Lovings for their crime of inter-racial marriage found support from the Deity in doing so:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his [*sic*] arrangement there would be no cause for such marriages. The fact that he [*sic*] separated the races shows that he [*sic*] did not intend for the races to mix.[31]

It appears that none of the nine justices of the US Supreme Court who reversed the Lovings' convictions shared the trial judge's views of a mandate from the Lord nor did they fear divine retribution.[32]

The third interesting lesson from *May's Estate* is that context is often critical in marriage recognition cases. The Mays' marriage was of long duration, lasting over three decades, and happy enough to produce six children.[33] There is no indication that the couple ever separated, or that they doubted the validity of their union.[34] Their marriage was not attacked by either of them, but rather by three of their children who were apparently motivated by greed over their mother's estate.[35]

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[29] *Id.* at 9 (Desmond, J., dissenting).

[30] *See, e.g.*, Steven W. Fitschen, *Marriage Matters: A Case for a Get-the-Job-Done-Right Federal Marriage Amendment*, 83 N.D. L. Rev. 1301, 1302, 1307–08 (2007) (quoting Bible passages supporting the author's position that "God ordained heterosexual marriage from the beginning of human history"); *see also* Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. Rev. 265, 315 nn.323–27 (2000) (discussing the debate on whether heterosexual marriage is ordained by God).

[31] Loving v. Virginia, 388 U.S. 1, 3 (1966).

[32] *Id.* at 12 (holding that marriage restrictions based on race violate Equal Protection and Due Process); *see also id.* at 13 (Stewart, J., concurring) ("It is simply not possible for a state law to be valid . . . which makes the criminality of an act dependent upon the race of the actor.").

[33] *In re May's Estate*, 114 N.E.2d at 5.

[34] *See id.*

[35] *See id.*

Might the result have been different if, shortly after their wedding in Rhode Island and return to New York, the bride had "come to her senses," left her uncle/husband, and sued for an annulment? There is, of course, no way of knowing, but it seems far more likely that the New York courts would have declared the marriage void under those circumstances.

Often, courts invoke the notion of "comity" to validate an out of state marriage. Thus, in *Hesington v. Estate of Hesington*,[36] the Missouri Court of Appeals opined: "However, as a matter of comity, Missouri will recognize a marriage valid where contracted unless to do so would violate the public policy of this state."[37] Note, however, that comity (giving deference to a foreign judgment, decree, etc.) is a lesser mandate than the constitutional mandate of full faith and credit—which itself is not absolute.[38] In *Hesington*, a Missouri woman wished to establish that she was the widow of a deceased Missouri man by virtue of a common law marriage they had entered into in Oklahoma in 1978.[39] At the time of the common law marriage ceremony, Oklahoma permitted common law marriages, but Missouri had abolished such marriages in 1921.[40] The Missouri trial judge found that had the couple been Oklahoma residents, they would have met Oklahoma's requirements for a common law marriage.[41] Nevertheless, the trial judge ruled that the couple's Oklahoma marriage was invalid in Missouri, and the appellate court affirmed.[42] The appellate court noted with approval the Restatement (Second) of Conflict of Laws § 283(1) (1971): "The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage . . . ."[43]

Nevertheless, applying the principle of comity, the court indicated that "Missouri will recognize a marriage valid where contracted unless to do so would violate the public policy" of Missouri.[44] The court noted that while other states are split on the subject, the majority view is that a state that does not permit common law marriages will not recognize a common law marriage of its residents when the

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[36] 640 S.W.2d 824, 826–27 (Mo. Ct. App. 1982).

[37] *Id.* at 826.

[38] *Compare id.* ("[A]s a matter of comity, Missouri will recognize a marriage valid where contracted unless to do so would violate the public policy of this state."), *with* Williams v. North Carolina, 317 U.S. 287, 296 (1942) ("[E]ven though [a] cause of action could not be entertained in the state of the forum, either because it had been barred by the local statute of limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit . . . [and although s]ome exceptions have been grafted on the rule . . . [they] have been few and far between . . . .").

[39] *Hesington*, 640 S.W.2d at 824.

[40] *Id.* at 825.

[41] *Id.* at 824–25.

[42] *Id.* at 824–25, 827.

[43] *Id.* at 826.

[44] *Id.*

common law marriage took place during a temporary sojourn to a state that permits such marriages.[45]

The court found that when the Missouri legislature abolished common law marriage, it had as a purpose "to require some degree of solemnity and reliability in establishing a marriage of those domiciled in and residing in Missouri."[46] Recognizing the Oklahoma common law marriage of the Missouri residents in this case would violate that public policy.[47]

On a strictly logical basis, it is hard to square the result in *Hesington* with the result in *May's Estate*. Both involved marriages that were lawful where contracted. But the couple in *May's Estate* could not under any circumstances have married in their state of residence because of their consanguinity. There is no suggestion in *Hesington* that there was any bar whatsoever to the Hesingtons' marriage in their home state; they simply entered into their marriage in a less formal fashion than their home state allowed. In other words, their error only went to the "formalities" of marriage, not the essentials. Therefore, from a logical standpoint, Mr. Hesington's widow had a stronger claim than Mrs. May's widower.

Other than different courts addressing different cases at different times, the only reasonable explanation for the contradictory results is, again, context. The Mays were married for thirty-two years and produced six children. A ruling that their marriage was void would have almost certainly rendered those children "illegitimate" at a time when illegitimacy not only carried a great social stigma, but also far greater legal disadvantages than it does today.[48] (It is indeed ironic that three of the Mays' children were effectively arguing in court for their own illegitimacy.)

By contrast, the Hesingtons entered into their purported common law marriage less than two years before Mr. Hesington's death.[49] There is no indication that their union was blessed with issue, hence there were apparently no children who would be deemed illegitimate by virtue of the Missouri court's ruling.

A case applying yet another approach to marriage recognition is the 1984 Washington Court of Appeals decision, *In re Estate of Shippy*.[50] This case actually involved the laws of three states: Washington, California, and Alaska.[51] James Shippy executed a will in January 1972, leaving his estate to his then wife,

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[45] *Id.* (collecting cases).

[46] *See id.* at 827.

[47] *Id.* (noting that the statute provided the "highest evidence" of the state's public policy regarding common law marriage).

[48] Lili Mostofi, *Legitimizing the Bastard: The Supreme Court's Treatment of the Illegitimate Child*, 14 J. CONTEMP. LEGAL ISSUES 453 (2004) (describing the extension of rights to illegitimate children over the course of approximately forty years). *But see* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011) (arguing that social stigma and discrimination against illegitimate issue continue).

[49] *Hesington*, 640 S.W.2d at 824.

[50] 678 P.2d 848 (Wash. Ct. App. 1984).

[51] *See id.* at 849.

Marion.[52] In January 1973, Marion obtained an interlocutory decree of divorce from James in California.[53] James married Inge in Alaska in 1978 although his divorce from Marion was not final.[54] James died in a plane crash in Alaska on July 15, 1981.[55] On November 16, 1981, four months after James' death, the California court entered the final decree *nunc pro tunc* divorcing James and Marion as of May 14, 1973.[56] In the subsequent estate battle in Washington, the trial court found that Inge was not James' surviving spouse because her marriage to James was void under Alaska law.[57] The nice issue presented was which state's law would control regarding the retroactive effect of a *nunc pro tunc* decree on an intervening second marriage.[58] Under the majority view, including the law of Washington state, the later *nunc pro tunc* decree would validate the intervening marriage.[59] Some states took the contrary position.[60] Although Alaska courts had not addressed the issue, Alaska statutory law provided that, "[a] subsequent marriage contracted by a person during the life of a former husband or wife which marriage has not been annulled or dissolved is void."[61] Hence the Washington Court of Appeals concluded that if it applied Alaska law, James and Inge's marriage would appear to be void.[62] This would have defeated Inge's claim because the counterpart of the general rule that a marriage validly entered into is valid everywhere is that a marriage invalidly entered into is invalid everywhere.[63]

The court went on, however, to apply a choice of law approach that appears to be the polar opposite of those used in *May's Estate* and *Hesington*. Relying on the Restatement (Second) of Conflict of Laws § 283 comment i (1971), it reasoned that the Alaska marriage would not be deemed invalid in Washington unless:

> [t]he intensity of the interest of the state where the marriage was contracted in having its invalidating rule applied outweighs the policy of protecting the expectations of the parties by upholding the marriage and

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[52] *Id.*

[53] *Id.*

[54] *See id.*

[55] *Id.*

[56] *Id.* The opinion does not explain the eight-year delay from the interlocutory decree to the final decree nor indicate who, if anyone, asked the California court to issue the final decree.

[57] *Id.* at 849–50.

[58] *Id.* at 850.

[59] *Id.*

[60] *Id.* (collecting cases).

[61] *Id.* (citing ALASKA STAT. § 09.55.-080 (1982)).

[62] *Id.* The court noted that Alaska did not have a provision for common law marriage, and that under Alaska statutory law, a "[m]arriage is prohibited and void if performed when (1) either party to the proposed marriage has a husband or wife living." *Id.* (citing ALASKA STAT. § 25.05.021).

[63] *See* Farah v. Farah, 429 S.E.2d 626, 629 (Va. Ct. App. 1993) ("A marriage that is void where it was celebrated is void everywhere.").

> the interest of the other state with the validating rule in having this rule applied.[64]

Although the court was unable to determine James and Inge's state of residence at the time of their Alaska marriage, it found that Washington had a substantial relationship to the parties because they resided in Washington when James died, property existed in Washington to be distributed, and probate proceedings were pending in Washington.[65] Thus, Washington law would apply unless Alaska had a clearly contrary policy.[66] Alaska law, by itself, did not establish such a policy.[67] Indeed Washington had a similar statute, but its courts would still recognize such a marriage.[68] Thus, "to protect the expectations of James and Inge," the court applied Washington law and validated their Alaska marriage.[69]

The *Shippy* decision raises as many issues as it answers. The Shippys' marriage was longer (five years)[70] than the Hesingtons' (two years), but considerably shorter than the Mays' (thirty-two years). While the court explicitly concerned itself with James and Inge's expectations, it did so at the expense of James' children (who may or may not have been the product of his marriage to Marion).[71] The most reasonable explanation is that James and Inge were unaware that his divorce from Marion had not been finalized. Although ignorance of the law is generally no excuse, the court simply chose to protect Inge if she was unfamiliar with the difference between a California interlocutory divorce decree and final divorce decree. Indeed, it is probable that James told her—and actually believed—that he was divorced from Marion. It appears that it was his intention to divorce Marion and, later, to marry Inge. Viewed this way, his error might, or might not, be deemed to have gone to the formalities—as opposed to the essentials—of marriage.

Some state legislatures have sought to proactively bar their residents who cannot marry in their state of residency from getting married in another jurisdiction. For example, Wisconsin enacted a law in 1971 to prevent Wisconsin "deadbeat dads" from marrying.[72] The law generally barred parents who were in

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[64] *Shippy*, 678 P.2d at 851 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. i (1971)).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 851–52 (citing *In re* Estate of Storer, 544 P.2d 95 (Wash. Ct. App. 1975)).

[69] *Id.* at 852.

[70] *Id.* at 849.

[71] *See id.* at 849, 852. James had two children, Dorothy Coe and Thomas Shippy. It is unclear whether they were the product of James' marriage to Marion.

[72] WIS. STAT. §§ 245.10(1), (4), (5) (1973). The United States Supreme Court considered the constitutionality of the law seven years after its passage. Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

arrears in paying child support from marrying.[73] It specifically addressed out-of-state marriages:

> This section shall have extraterritorial effect outside the state; and s. 245.04(1) and (2) [providing that out-of-state marriages to circumvent Wisconsin law are void] are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.[74]

The United States Supreme Court struck down the law in its entirety, finding that it violated the Equal Protection Clause of the Constitution, and hence had no occasion to address the constitutionality of its extraterritorial provision.[75]

Attacking this issue from the opposite perspective, in 1912 the National Conference of Commissioners on Uniform State Laws proposed the confusingly named "Uniform Marriage Evasion Act."[76] Under that statute, a state would not permit a marriage to take place within its borders if it was between nonresidents who were forbidden to marry in their home state. (Hence the statute should have been called the Uniform Marriage Prohibition Evasion Act. It was intended to prevent certain people from evading marriage prohibitions in their home states, rather than evading marriage.) Most states already had some form of marriage evasion act.[77] The proposed uniform act was only adopted in five states, and the Uniform Law Commissioners withdrew it in 1943.[78] However, withdrawal by the commissioners of a uniform law does not repeal that law in any state that has already adopted it.[79] Only a state's legislature can repeal a law (or that state's courts may strike it down). Indeed, over six decades after the Uniform Marriage Evasion Act was withdrawn, the Massachusetts Supreme Judicial Court applied Massachusetts' version of that act to bar same-sex couples from Connecticut, Maine, New Hampshire, and Vermont from getting married in Massachusetts.[80]

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[73] *See* WIS. STAT. §§ 245.10(1)–(3).

[74] *Zablocki*, 434 U.S. at 375 n.1 (alterations in original) (quoting WIS. STAT. § 245.10(5)).

[75] *Id.* at 377.

[76] *See* Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 632 n.3 (Mass. 2006) (Spina, J., concurring).

[77] Proceedings of the Fifty-Third Annual Meeting of the National Conference of Commissioners on Uniform State Laws, 1943 HANDBOOK NAT'L COMMISSIONERS ON UNIFORM ST. L. & PROC. FIFTY-THIRD ANN. CONF. 64.

[78] *See id.*

[79] *See Cote-Whitacre*, 844 N.E.2d 632 (Spina, J., concurring).

[80] *Id.* at 631. On remand, the Superior Court of Massachusetts, at Suffolk, also applied Massachusetts' Marriage Evasion Act to bar same-sex couples from New York from being married in Massachusetts. Cote-Whiteacre v. Dep't of Pub. Health, No. 04-2656, 2006 WL 3208758, at *4–5 (Mass. Super. Ct. Sept. 29. 2006).

The US Supreme Court has had limited opportunity to address interstate marriage recognition. In 1888, in *Maynard v. Hill*,[81] the Court upheld a ruling of the Supreme Court of the Territory of Washington that a decedent was married to his second wife at the time of his death.[82] David Maynard had married Lydia Maynard in Vermont in 1828 and had two children by her.[83] In 1852, allegedly with no notice to Lydia, David obtained a legislative divorce from her.[84] Shortly thereafter, David married Catherine, with whom he lived until his death.[85] In the ensuing estate battle, Lydia's children asserted that Lydia was still legally married to David when he made a "donation claim" to certain land after the legislative divorce.[86] Lydia's children raised various due process objections to the legislative divorce, all of which were ultimately rejected.[87] The Court did not directly address any interstate conflict of laws issues in *Maynard*.

In 1907, in *Travers v. Reinhardt*,[88] the US Supreme Court reviewed a decision of the Court of Appeals of the District of Columbia addressing the marriage of a man from Washington, D.C. to a woman from West Virginia.[89] The marriage took place in Virginia, but was defective there because of the lack of a proper minister; however, it was arguably ratified as a common law marriage in New Jersey during short stays there.[90] The US Supreme Court affirmed the District of Columbia court's finding that the parties had been validly common law married in New Jersey.[91] As in *Maynard*, the Court did not directly address the standards for interstate marriage recognition.

In *Williams v. North Carolina*,[92] a case that went to the US Supreme Court twice, the Court did address, under the Full Faith and Credit Clause, North Carolina's refusal to recognize the marriage of two North Carolinians in Nevada.[93] However, the validity of their marriage hinged on the recognition of the parties' divorce decrees, which were issued by the State of Nevada and purported to dissolve the parties' prior marriages to their respective spouses who remained in North Carolina.[94]

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[81] 125 U.S. 190 (1888).

[82] *See id.* at 193, 215–16.

[83] *Id.* at 191–92.

[84] *Id.* at 192–93.

[85] *Id.* at 193.

[86] *Id.* at 193–95.

[87] *Id.* at 193, 196, 216.

[88] 205 U.S. 423 (1907).

[89] *Id.* at 432–33.

[90] *Id.* at 433–34, 438–39. The parties also had lived in Maryland during the marriage. *Id.* at 438.

[91] *Id.* at 442.

[92] 317 U.S. 287 (1942) (*Williams I*); *see also* Williams v. North Carolina, 325 U.S. 226 (1945) (*Williams II*).

[93] *Williams I*, 317 U.S. at 289–92; *Williams II*, 325 U.S. at 234, 236.

[94] *Williams I*, 317 U.S. at 289–92; *Williams II*, 325 U.S. at 235–39.

Briefly, O.B. Williams married Carrie Wyke in 1916 in North Carolina and lived with her there until 1940.[95] Lillie Shaver Hendrix married Thomas Hendrix in 1920 in North Carolina and lived with him there until 1940.[96] In May 1940, O.B. and Lillie travelled to Las Vegas, Nevada ("Sin City," then as now), where each filed for divorce in June 1940.[97] Neither of their spouses was personally served in Nevada, although each apparently received notice of the proceedings.[98] Neither entered an appearance or participated in any way in either divorce action.[99] The Nevada court granted O.B. a divorce on August 26, 1940, and Lillie a divorce on October 4, 1940.[100] Not letting the grass grow under their feet, O.B. and Lillie got married that same day in Nevada.[101] Presumably, if they had remained in Nevada, they could have lived there together legally ever after.

But O.B. and Lillie returned to North Carolina, where they were tried, convicted, and sentenced to imprisonment for the crime of bigamous cohabitation.[102] The North Carolina courts ruled that North Carolina was not required to recognize their Nevada divorce decrees under the Full Faith and Credit Clause.[103]

The first time that the *Williams* case went to the US Supreme Court, in 1942, the Court presumed that the newlyweds had met Nevada's domiciliary requirements for a divorce.[104] Overturning past precedent, the Court ruled that a state is empowered to enter a divorce decree that is entitled to full faith and credit in all other states, as long as one of the spouses is domiciled in that state and provides "substituted service" on the other party that meets the requirements of due process.[105] In other words, a state court—applying its own state divorce laws—can grant a divorce that is binding on both parties even when the marriage was entered into in another state, their entire married life took place in another state, and the defendant spouse has never set foot in the state issuing the divorce, was not served in that state and did not participate in the divorce action—as long as the defendant spouse has received "substituted service." Finally, in *Williams I*, the Court remanded the case to the courts of North Carolina for further proceedings.[106]

O.B. and Lillie were retried before a jury of their peers in North Carolina.[107] The trial judge instructed the jury that O.B. and Lillie had the burden to

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[95] Herbert R. Baer, *So Your Client Wants a Divorce!:* Williams v. North Carolina, 24 N.C. L. REV. 1, 2 (1949).

[96] *Id.*

[97] *Id.*

[98] *Williams I*, 317 U.S. at 289–90.

[99] *Id.*

[100] *Id.* at 290.

[101] *Id.*

[102] *Id.* at 289–90.

[103] *Id.* at 291.

[104] *Id.* at 292–93, 302.

[105] *Id.* at 299, 302–04.

[106] *Id.* at 304.

[107] *Williams II*, 325 U.S. at 233–36.

demonstrate that they were domiciled in Nevada at the time they obtained their divorces, and that the Nevada court's recitation of *bona fide domicil* in their divorce decrees was "prima facie evidence," but did not compel "such an inference."[108] If they had only gone to Nevada to get their divorces, intending to return to North Carolina on obtaining them, then they neither lost their North Carolina domicil nor acquiesced new domicils in Nevada.[109] The jury duly convicted O.B. and Lillie again of bigamous cohabitation, and that conviction was upheld through the North Carolina courts.[110]

On appeal to the US Supreme Court the second time, the critical issue was whether the North Carolina courts had failed to give full faith and credit to the Nevada divorce decrees, specifically insofar as those decrees found that O.B. and Lillie had bona fide domicil in Nevada.[111] In *Williams II*, the Court ruled that, although the "fact that the Nevada court found that they were domiciled there is entitled to respect, and more," the North Carolina courts were not bound by that finding.[112] North Carolina was free to reexamine this issue and had done so, giving appropriate weight to the Nevada court's findings.[113] Concluding that North Carolina had not violated the full faith and credit clause, the Supreme Court affirmed the convictions for bigamous cohabitation.[114]

The *Williams I* and *Williams II* decisions—made during the era of "migratory divorce," when the unhappily married frequently left their spouse and home state to find a more conducive jurisdiction and congenial life partner—remain the law in the United States today. The result of those decisions for the individual litigants (O.B. and Lillie) was a truly anomalous situation. As far as Nevada was concerned, they were divorced from their original spouses and lawfully married to each other. As far as North Carolina was concerned, they were each married to their original spouses and it was criminal for them to hold themselves out as married to each other. The Supreme Court rather blithely acknowledged that if one state can review the validity of a divorce, and hence a remarriage, in another state, then "persons may, no doubt, place themselves in situations that create unhappy consequences for them."[115] And that is precisely the situation faced today by certain people who have entered into a same-sex marriage in one state that they have tried to lawfully exit in another state.

Two more Supreme Court full faith and credit cases in the domestic relations arena warrant brief discussion. The Court refined the *Williams I* doctrine in two subsequent decisions, both of which, not coincidentally, involved departing spouses who sought their legal freedom in Nevada.

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[108] *Id.* at 235–36 N.B. In describing *Williams*, this Article uses the Court's spelling of "domicil" in the case. Modern usage is "domicile."

[109] *Id.*

[110] *Id.* at 227.

[111] *Id.*

[112] *Id.* at 233–34.

[113] *Id.*

[114] *Id.* at 239.

[115] *Id.* at 237.

In the 1948 case *Estin v. Estin,*[116] the Court addressed the situation of Mr. Estin, who was married in New York in 1937 and lived there with his wife until they separated in 1942.[117] In 1943, his wife filed an action against him in New York for a legal separation, which the court granted, along with $180 per month as legal alimony that, under New York law as it then existed, would continue until the parties were divorced.[118] Mr. Estin, like other unhappy spouses before and since, headed out to Nevada in 1944 and brought a divorce action in 1945 (thereby clearly meeting the domiciliary requirement).[119] His wife was notified of the action (thereby meeting the due process requirement), but entered no appearance and did not participate.[120] Mr. Estin duly informed the Nevada court of the New York separation and alimony decree; nevertheless, the Nevada court entered a divorce decree with no provision for alimony.[121] So, of course, Mr. Estin stopped paying his now ex-wife.[122] She, naturally, sued him in New York to compel continued payments.[123] He appeared in that action and moved to eliminate the New York alimony order on the basis of his Nevada divorce decree, but the New York courts ruled that the Nevada decree did not extinguish his ex-wife's right to alimony under the earlier New York decree.[124]

On appeal, the Supreme Court created the doctrine of "divisible" divorce, ruling that the Nevada decree was entitled to full faith and credit to the extent that it changed the marital status of the parties, but not insofar as it purported to change the "legal incidence of the marriage," in other words, the alimony order.[125] Because the alimony order was a property interest of the wife, Nevada could not affect that interest without personal jurisdiction over her, which it lacked.[126]

A decade later, the Court refined the *Estin* divisible divorce doctrine in *Vanderbilt v. Vanderbilt.*[127] The Vanderbilts were married in 1948 and lived in California, where they separated in 1952. She moved to New York, and he went to Nevada where he obtained a divorce decree in 1953, freeing both parties "from the bonds of matrimony and all the duties and obligations thereof."[128] Mrs. Vanderbilt received notice of the Nevada action but was not served in Nevada and did not participate.[129] In 1954, the former Mrs. Vanderbilt filed suit in New York for a

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[116] 334 U.S. 541, 541 (1948).
[117] *Id.* at 542.
[118] *Id.* at 542–43.
[119] *Id.*
[120] *Id.* at 543.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 549.
[126] *Id.* at 549.
[127] 354 U.S. 416 (1957).
[128] *Id.* at 417.
[129] *Id.*

legal separation and alimony.[130] Mr. Vanderbilt appeared specially in that proceeding and argued that the Full Faith and Credit Clause compelled New York "to treat the Nevada divorce as having ended the marriage and as having destroyed any duty of support which he owed . . . ."[131] The New York court recognized the Nevada decree as terminating the status of the parties' marriage, but found that it did not preclude New York from directing Mr. Vanderbilt to pay support, which it duly ordered.[132]

On appeal, the Supreme Court affirmed, reasoning that the fact that Mrs. Vanderbilt's right to support had not yet been reduced to judgment did not materially distinguish the case from *Estin*.[133] Since Mrs. Vanderbilt had not been subject to personal jurisdiction in the Nevada court, that court could not terminate her right to support in an *ex parte* proceeding.[134]

The 1967 "miscegenation" case of *Loving v. Virginia* also presented a potential interstate marriage recognition issue.[135] Two Virginia residents, Mildred Jeter, described as a Negro woman, and Richard Loving, a white man, had been married in Washington, D.C., pursuant to its laws.[136] Shortly after their marriage, they returned to Virginia where they were indicted, pled guilty to, and were sentenced to jail for violating the Virginia anti-miscegenation statute.[137] While the case might have been litigated and decided under the Full Faith and Credit Clause, that issue was not presented to the Court, which found that the statute violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[138]

III. THE PATCHWORK QUILT OF SAME-SEX MARRIAGE LAWS IN THE UNITED STATES

With regard to lawful recognition of same-sex couples, states generally fall into three main categories: 1) those that permit such couples to enter into marriage or a quasi-marriage relationship such as civil union or registered partnership; 2) those that do not permit same-sex couples to enter into legal marriage or marriage-type relationships but recognize such relationships if entered into elsewhere, at least for some purposes; and 3) those that prohibit and do not recognize same-sex marriages or quasi-marriage relationships.

At the time of this writing,[139] six states permit same-sex couples to marry: Massachusetts (as of 2004),[140] Connecticut (2008),[141] Iowa (2009),[142] Vermont

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[130] *Id.*

[131] *Id.*

[132] *Id.* at 417–18.

[133] *Id.* at 418.

[134] *Id.* at 418–19.

[135] Loving v. Virginia, 388 U.S. 1 (1967).

[136] *Id.* at 2.

[137] *Id.* at 2–3 N.B. The trial judge suspended the sentence for 25 years on condition that the Lovings leave Virginia and not return together during that period of time.

[138] *Id.* at 10–12.

[139] June 2012.

(2009),[143] New Hampshire (enacted 2009, effective 2010),[144] and New York (2011).[145] Three additional states have passed laws permitting same-sex marriage, which had not yet taken effect as of this writing. On February 8, 2012, the Washington State Legislature enacted a bill to allow same-sex couples to marry, which Governor Christine Gregoire signed on February 13, 2012.[146] Opponents have stated that they will seek to block implementation through a referendum measure.[147] New Jersey's legislature passed a bill allowing same-sex marriage on February 16, 2012,[148] which was quickly vetoed by New Jersey Governor Chris Christie.[149] Soon afterward, Maryland enacted a law permitting same-sex marriages, which was signed by Maryland Governor Martin O'Malley and will go into effect (unless blocked) on January 1, 2013.[150]

On Dec. 18, 2009, Washington, D.C. Mayor Adrian Fentry signed bill 18-482, which legalized same-sex marriage in the District of Columbia.[151] It became effective March 2010,[152] after Chief Justice John Roberts, acting as circuit justice for the District, refused to issue a stay.[153]

California permitted same-sex couples to enter into marriage for approximately six months in 2008,[154] during which time it is reported that

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[140] *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[141] Kerrigan v. Comm'r Pub. Health, 957 A.2d 407 (Conn. 2008).

[142] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[143] VT. STAT. ANN. tit. 15, § 8 (2009), enacted over gubernatorial veto. *See Vermont Lawmakers Enact Same-Sex Marriage Bill*, 35 FAM. L. REP. (BNA), no. 21, 2009, at 1251.

[144] N.H. House Bill No. 436 (2009).

[145] New York Marriage Equality Act, 2011 N.Y. Laws 95.

[146] S.B. 6239, 62 Leg., Reg. Sess. (Wash. 2012); *see* William Yardley, *Washington State Legislators OK Same-Sex Marriage: Change Could be Stalled by a Referendum*, BOS. GLOBE, Feb. 9, 2012, at 2; *Washington: Gay Marriage Legalized*, N.Y. TIMES, Feb. 14, 2012, at A17.

[147] Yardley, *supra* note 146.

[148] MaryAnn Spoto, *N.J. Assembly Passes Gay Marriage Bill*, NJ.COM (Feb. 16, 2012, 5:12 PM), http://www.nj.com/news/index.ssf/2012/02/nj_assembly_passes_gay_marriag.html.

[149] Kate Zernickie, *Christie Keeps Promise to Veto Gay Marriage Bill*, N.Y. TIMES, (Feb. 17, 2012), http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gaymarriage-bill.html. Under state law, the New Jersey Assembly has two years, until January 2014, to override the veto. *Id.*

[150] *See Maryland Legislature Enacts Same-Sex Marriage Law*, 38 FAM. L.REP. (BNA), no. 18, 2012, at 1227.

[151] Religious Freedom and Civil Marriage Equality Amendment Act, 2009 D.C. Legis. Serv. 18-110.

[152] *See Fate of Same-Sex Marriage in D.C. Rests in Hands of Congress*, 36 FAM. L.REP. (BNA), no. 8, 2009, at 1095; *Marriage-Homosexuality-District of Columbia-Law Takes Effect*, 36 FAM. L. REP. (BNA), no. 18, 2010, at 1215.

[153] Jackson v. D.C. Bd. of Elections & Ethics, 130 S. Ct. 1279 (2010).

[154] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment as recognized in* Strauss v. Horton, 207 P.3d 48, 65 (Cal. 2009).

approximately 18,000 couples entered these unions.[155] California voters approved Proposition 8 in November 2008, banning such marriages. The California Supreme Court subsequently upheld Proposition 8, but it also ruled that those same-sex marriages that had been lawfully entered into remained valid.[156] A federal district court subsequently struck down California Proposition 8 as unconstitutional.[157] On February 7, 2012, a divided panel of the Ninth Circuit Court of Appeals affirmed the district court.[158] The Ninth Circuit denied rehearing en banc by order of June 5, 2012.[159]

Several other states permit same-sex couples to enter into variously named forms of legally recognized quasi marriages. In the midst of the *Baehr v. Lewin* litigation, the Hawaii legislature enacted a law in 1997 allowing same-sex couples to become "reciprocal beneficiaries" with many of the "rights and benefits available only to married couples."[160] Similarly, Vermont created "civil unions" for same-sex couples in 1999 after its supreme court ruled that denying such couples the benefits of marriage violated the state constitution.[161] Parties to a Vermont civil union were to have "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in marriage."[162] When Vermont amended its marriage law to permit same-sex couples to marry as of September 1, 2009, it also repealed the procedure for such couples to enter civil unions, while allowing existing civil unions to continue and allowing parties in civil unions to marry their civil union partners if they so choose.[163] In 2004, New Jersey enacted its "Domestic Partnership Act," permitting same-sex and opposite-sex couples to register as domestic partners and obtain some of the rights of married couples.[164] In late 2006, New Jersey enacted a Civil Union Act, amending the 2004 Domestic Partnership Act.[165] Under the Civil Union Act, two eligible individuals of the same sex can enter a civil union and "receive

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[155] *California high court upholds same-sex marriage ban*, CNN (May 27, 2009), http://www.cnn.com/2009/US/05/26/california.same.sex.marriage/index.html (last visited Jan. 12, 2012).

[156] *Strauss*, 207 P.3d at 48.

[157] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[158] Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

[159] Perry v. Brown, No. 10-16696, 2012 WL 1994574 (9th Cir. June 5, 2012).

[160] H.B. 118, 1997 Leg., Reg. Sess. (Haw. 1997). Hawaii has since established civil unions, and, effective Jan. 1, 2012, the provisions of Hawaii state tax law that apply to married spouses apply to partners in a civil union. *See* Matthew J. Eickman, *Same-Sex Marriage: DOMA and the States' Approaches*, 36 FAMILY L. REP. (BNA) 1383, 1385 (2010).

[161] Baker v. State, 744 A.2d 864 (Vt. 1999); *see Vermont Lawmakers Enact Same-Sex Marriage Bill*, FAM. L. REP. (BNA), no. 21, 2009, at 1251.

[162] VT. STAT. ANN. tit. 23, § 1204(a) (2007).

[163] S.B. 115, 2009 Leg., 2009-2010 Sess. (Vt. 2009).

[164] 2003 N.J. Laws 246.

[165] 2006 N.J. Laws 103 (enacted in response to *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)).

the same benefits and protections and be subject to the same responsibilities as spouses in a marriage."[166]

The latest state to create a statutory framework for same-sex (and opposite-sex) couples to enter into a civil union is Illinois. On January 31, 2011, Illinois Governor Pat Quinn signed legislation creating civil unions in that state, effective June 1, 2011.[167] The Governor's Office noted that California, Nevada, New Jersey, Oregon, Washington State, and Washington, D.C. all have civil union or similar laws on the books.[168]

Such state quasi-marriage laws have not been consistent as to the means to dissolve a civil union, domestic partnership, etc., but the trend has been to apply the same rules that apply to married couples. For example, under Washington State's 2007 registered domestic partnership law, a member of a registered domestic partnership could exit that legal status by the simple expedient of filing a notice of termination and paying a filing fee.[169] However, in 2009, the Washington State legislature amended the law to make those in registered domestic partnerships subject to the same rules as married people:

> It is the intent of the legislature that for all purposes under state law, state registered domestic partners shall be treated the same as married spouses. Any privilege, immunity, right, benefit, or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was a spouse, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a state registered domestic partnership, or because the individual is or was, based on a state registered domestic partnership, related in a specified way to another individual. The provisions of [this act] shall be liberally construed to achieve equal treatment, to the extent not in conflict with federal law, of state registered domestic partners and married spouses.[170]

Oregon law places the same burden upon a party to a domestic partnership; that partnership will be treated like a marriage for purposes of dissolution:

> An individual who has filed a Declaration of Domestic Partnership may not file a new Declaration of Domestic Partnership or enter a marriage with someone other than the individual's registered partner unless a

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[166] N.J. REV. STAT. § 37:1–29 (2009); *see also* N.J. REV. STAT. § 37:1–31 (2009).

[167] Chrisstine Nyholm, *Illinois Governor Quinn signs civil union bill*, EXAMINER.COM (Feb. 1, 2011), http://www.examiner.com/social-justice-in-national/illinois-governor-quinn-signs-civil-union-bill.

[168] *Id.*

[169] 2007 Wash. Sess. Laws 618, WASH. REV. CODE § 26-60-055 (repealed 2009).

[170] WASH. REV. CODE § 26-60-015 (2012).

> judgment of dissolution or annulment of the most recent domestic partnership has been entered. This prohibition does not apply if the previous domestic partnership ended because one of the partners died.[171]

New Jersey follows the same pattern with its civil unions:

> The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage.[172]

The point is that most states that permit same-sex couples to enter legally recognized, quasi-marital relationships, will normally require a disillusioned member of that couple to obtain a divorce in order to become legally free, just as if she were in a state that permits same-sex marriage by name.

There is another, smaller group of states that will not allow same-sex couples to marry or enter into quasi-marital relationships, but will recognize same-sex marriages validly entered into elsewhere, at least for certain purposes. New York State was a notable example before it authorized same-sex marriage in 2011.[173] Similarly in May 2009, prior to allowing same-sex marriages to be performed there, the Washington D.C. Council had voted to recognize same-sex marriages from other jurisdictions.[174] In February 2010, the Attorney General of Maryland issued a formal opinion that Maryland may recognize such marriages.[175] In May 2010, the Maryland Department of Budget and Management announced that it was extending health benefits to the same-sex spouses of active and retired state employees who were validly married in another state.[176] In January 2011, the Attorney General of New Mexico issued a formal opinion, not binding on New Mexico courts, that "a same-sex marriage that is valid under the laws of the

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[171] OR. REV. STAT. § 106.325(3) (2009).

[172] N.J. STAT. ANN. § 37:1-31 (West 2011), *available at* http://www.njleg.state.nj.us/2006/Bills/PL06/103_.HTM.

[173] *See* Godfrey v. Spano, 920 N.E.2d 328 (N.Y. 2009); C.M. v. C.C., 867 N.Y.S.2d 884 (2008) (holding that principles of comity permitted New York to recgnize, and thus exercise jurisdiction over, a couple's same-sex marriage in Massachusetts). Thus, a New York trial court was able in 2010 to grant a divorce to a same-sex couple who had entered into a civil union in Vermont without addressing the difficult issues that a state law prohibiting recognition of same-sex marriages would have presented. Parker v. Waronker, 918 N.Y.S.2d 822, 822 (N.Y. Supp. Ct. 2010).

[174] *See* Tim Craig, *Uproar in D.C. as Same-Sex Marriage Gains*, WASH. POST, May 6, 2009, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/05/AR2009050501618.html.

[175] Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration May be Recognized in Maryland, 95 Md. Op. Att'y Gen. 3 (2010).

[176] *Maryland Offers Health Benefits to Workers in Same-Sex Marriages from Other States*, 36 FAMILY LAW REP. (BNA) 1335, 1335 (2010).

country or state where it was consummated would likewise be found valid in New Mexico."[177]

The largest group of states are those that not only do not allow same-sex marriage (or quasi marriage), but also explicitly provide by a state statute or constitutional provision that they will not recognize a same-sex marriage validly entered into elsewhere. Following the federal DOMA, many of these state provisions are known as "mini-DOMAs" or "state DOMAs." A survey published in the *BNA Family Law Reporter* in June 2010 concluded:

> As of June 2, 2010, 45 states prohibit same-sex marriage. Ten do so through statute only, four through state constitution amendments only, 27 through both statute and state constitution amendments, two through case law (New York and New Jersey), and two through the state attorney general's office (New Mexico and Rhode Island). Depending on one's statutory construction, approximately 40 of those expressly refuse to recognize same-sex marriages of other jurisdictions, and some of those more broadly refer to other same-sex relationships.[178]

Pennsylvania enacted a typical mini-DOMA in 1996, containing two new statutory provisions. The first defines marriage as "[a] civil contract by which one man and one woman take each other for husband and wife."[179] The second addresses interstate recognition:

> It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. 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.[180]

IV. BETWEEN A ROCK AND A HARD PLACE: SEEKING A LEGAL EXIT FROM A SAME-SEX MARRIAGE IN A STATE THAT DOES NOT RECOGNIZE THAT MARRIAGE

Americans are a famously restless people. Two centuries ago, Alexis de Tocqueville observed that, "[i]n the United States a man builds a house in which to spend his old age, and he sells it before the roof is on; . . . he settles in a place, which he soon afterwards leaves to carry his changeable longings elsewhere."[181] Those words are even truer in today's world of high-speed transportation and the Internet than when they were written in the 1830s.

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[177] 11-01 N.M. Op. Att'y Gen. 1 (2011).

[178] Matthew J. Eickman, *Same-Sex Marriage: DOMA and the States' Approaches*, 36 FAMILY L. REP. (BNA) 1383, 1385 (2010).

[179] 23 PA. CONS. STAT. § 1102 (2012).

[180] *Id.* § 1704.

[181] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 136 (Alfred A. Knopf 1945).

Moreover, the break up of a serious relationship often triggers, or is triggered by, a move of one or both of the parties to that relationship. A party may leave and put distance between herself and her spouse or partner to escape abuse, to take a new job, to be near or live with family members or friends who can provide a support system (especially when she has minor children), to follow or join a new significant other, or simply to get a "fresh start." Normally the physical departure from the relationship and the situs of the relationship precedes any serious thought about legally ending the relationship. Indeed, physical separation is often deemed by one or both of the parties to be part of a "trial separation."

Additionally, for a variety of reasons, couples often get married in a jurisdiction where they do not reside. They may marry where one or both have family. They may choose to have a "destination wedding" in some romantic or vacation location. As was the case in *May's Estate,* they may temporarily leave a jurisdiction where they cannot marry, travel to a jurisdiction where they can and do marry, and then return home.

For all these reasons, it is not surprising that an individual may well reside in a different jurisdiction from the one in which she married at the time that she decides to initiate divorce proceedings. If she has left a same-sex marriage (or quasi marriage) and is domiciled in a jurisdiction that refuses to recognize that marriage, she is likely to find herself in a form of legal limbo. A recent Pennsylvania case, *Kern v. Taney*,[182] illustrates her dilemma.

Two women, Carole Kern and Robin Taney, were married in Massachusetts.[183] Subsequently, Carole moved to Pennsylvania and filed for a divorce, utilizing the Pennsylvania no-fault divorce ground of irretrievable breakdown of the marriage.[184] Robin did not appear to defend the action.[185] However, the Attorney General of Pennsylvania intervened in order to defend the constitutionality of Pennsylvania's mini-DOMA.[186]

The trial judge reasoned that, "relief under the Divorce Code can only be obtained by parties who are recognized to be married."[187] Under the second section of Pennsylvania's mini-DOMA, Section 1704 of the Domestic Relations Code, quoted above, the parties could not be recognized as married.[188] Therefore, Carole attacked the constitutionality of the act, asserting that it violated her substantive due process and equal protection rights to marry under both the Pennsylvania and United States Constitutions.[189]

The trial court dismissed all of Carole's constitutional challenges, finding that homosexuals have no fundamental right to be married to each other.[190] The court

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[182] Pa. D. & C.5th 558 (2010).
[183] *Id.* at 559.
[184] *Id.* at 559–60.
[185] *See id.*
[186] *Id.*
[187] *Id.* at 562.
[188] *Id.* at 562–63.
[189] *Id.* at 564.
[190] *Id.* at 574.

applied the "rational basis" test.[191] In arguably a circular piece of reasoning, the court concluded, "The amendment did not expand, limit, alter or otherwise change the law of the Commonwealth of Pennsylvania. As such, the legislation did not impose an inequality on homosexuals."[192] Accordingly, the court could not grant her a divorce.[193] The court did, however, offer Carole an alternative legal solution:

> Plaintiff has a concern that she has no available remedy in Pennsylvania, and since she does not qualify under the residency requirements of Massachusetts, she is unable to obtain a divorce. While it is true that Pennsylvania cannot grant her a divorce, there is no reason why she cannot seek relief under section 1704, requesting the court to have her marriage declared void.[194]

However, a declaration in Pennsylvania that Carole and Robin's Massachusetts marriage was void as against Pennsylvania public policy would hardly be the equivalent of a Pennsylvania divorce decree. Under *Williams I*, a divorce decree should be entitled to full faith and credit in all states.[195] It is difficult to believe that a decree of annulment based on Pennsylvania's public policy against same-sex marriage would be accorded full faith and credit in those states that permit such marriages, especially Massachusetts. So, with a Pennsylvania annulment, Carole might well find herself in the "unhappy" circumstance that befell O.B. and Lillie in the *Williams* litigation. She would be married in one state and not in another. As was the case with O.B. and Lillie, it would remain questionable whether she could legally remarry. If, after obtaining an annulment in Pennsylvania, she were to marry a man in Pennsylvania, could they honeymoon on "Old Cape Cod" per Patti Page's old chartbuster? If they did, could not Massachusetts arrest, try and punish her for bigamy under Massachusetts law,[196] just as happened to O.B. and Lillie seven decades ago in North Carolina? Indeed, could not that fate befall her if she were to go to any of the states that either permit or recognize same-sex marriage?

Presumably the only effective remedy theoretically available to Carole would be to file for divorce in Massachusetts. But, in Massachusetts, as elsewhere in the United States, it is significantly more time-consuming to get divorced than to get married. As noted by the trial court, there is no residency requirement to be married in Massachusetts, but to get a divorce generally the parties have to have resided in Massachusetts together for a year preceding the commencement of the action.[197] Since Carole had to have resided in Pennsylvania for six months before

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[191] *Id.*
[192] *Id.* at 575.
[193] *Id.* at 576.
[194] *Id.*
[195] *See supra* text accompanying notes 93–105.
[196] MASS. GEN. LAWS ch. 272, § 15 (2012).
[197] *Kern*, Pa. D. & C.5th at 560 n.2 (citing MASS. GEN. LAWS ch. 208, §§ 4–5).

filing her Pennsylvania divorce action,[198] she would have to move to Massachusetts—and presumably find housing and employment—for a year just to commence a divorce action there.[199]

The result in *Kern v. Taney* is consistent with that reached in other mini-DOMA jurisdictions in similar situations (with three recent notable exceptions that will be discussed infra[200]). Thus, in 2007, in *Chambers v. Ormiston*,[201] the Rhode Island Supreme Court was presented with this certified question:

> May the Family Court properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state?[202]

In *Chambers*, two Rhode Island women, Margaret Chambers and Cassandra Ormiston, had married each other in Massachusetts in 2004, and then returned to reside together in Rhode Island.[203] In October 2006, Ms. Chambers filed for divorce in Rhode Island.[204] The Family Court was concerned that it lacked jurisdiction and asked for guidance from the state's highest court as to whether the parties were married under Rhode Island law.[205] The Rhode Island courts assumed that the parties' marriage was valid under Massachusetts law.[206] But, the Rhode Island Supreme Court ruled that "marriage" under its state statute is "the state of being united to a person of the opposite sex."[207] Since the parties, therefore, were not married under Rhode Island law, the Rhode Island courts lacked jurisdiction to entertain a divorce action.[208]

Like the Pennsylvania trial court in *Kern*, the Rhode Island Supreme Court expressed some sympathy for the thwarted plaintiff:

> We know that sometimes our decisions result in palpable hardship to the persons affected by them. It is, however, a fundamental principle of jurisprudence that a court has no power to grant relief in the absence of jurisdiction, as is true in the instant case. Ours is not a policy-making branch of the government. We are cognizant of the fact that this observation may be cold comfort to the parties before us. But, if there is

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[198] 23 PA. CONS. STAT. § 3104(b) (2012).

[199] The U.S. Supreme Court has upheld the constitutionality of a one-year residency requirement to commence a divorce action in *Sosna v. Iowa*, 419 U.S. 393, 410 (1975).

[200] *See infra* text accompanying notes 228–245.

[201] 935 A.2d 956 (R.I. 2007).

[202] *Id.* at 958.

[203] *Id.*

[204] *Id.* at 958–59.

[205] *Id.* at 959.

[206] *Id.* at 958–59.

[207] *Id.* at 962.

[208] *Id.* at 967.

> to be a remedy to this predicament, fashioning such a remedy would fall within the province of the General Assembly.[209]

In 2008, in *O'Darling v. O'Darling*,[210] the Oklahoma Supreme Court ruled that a trial court judge had properly vacated a divorce decree of a couple that had been married in Canada, where the trial judge learned after entering the decree that both parties were women.[211] The state supreme court admonished counsel for the plaintiff for having failed to disclose the fact that the marriage was between two women, hence invalid under Oklahoma law.[212]

In 2010, a Texas court of appeals likewise ordered dismissal of a divorce action filed between two men who had been married in Massachusetts in *In the Matter of the Marriage of J.B. and H.B.*[213] In *J.B. and H.B.*, the trial court had granted the divorce, ruling that the state's constitutional and statutory provisions barring recognition of same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[214] On appeal by the state, the Texas Court of Appeals reversed and ordered dismissal of the divorce action for lack of subject matter jurisdiction.[215] The Texas Constitution had been amended in 2005 to provide:

> (a) Marriage in this state shall consist only of the union of one man and one woman.
> (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.[216]

Further, the Texas Family Code had been amended to provide in Section 6.204:

> (b) 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.
> (c) The state or an agency or political subdivision of the state may not give effect to a:
>
> > (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or

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[209] *Id.* at 966–67.
[210] 188 P.3d 137 (Okla. 2008).
[211] *Id.* at 138.
[212] *Id.* at 139. The state supreme court remanded the case for procedural reasons. *Id.* at 140.
[213] 326 S.W.3d 654 (Tex. App. 2010).
[214] *Id.* at 659.
[215] *Id.* at 681.
[216] *Id.* at 663 (citing TEX. CONST. art I, § 32).

> (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.[217]

The appellate court readily concluded that these constitutional and statutory provisions barred the same-sex divorce action.[218] Thus the court was compelled to address whether these provisions violated the United States Constitution.[219] Applying the rational basis test, the court concluded: "Texas's marriage laws are rationally related to the goal of promoting the raising of children in households headed by opposite-sex couples."[220]

Finally, the appellate court noted that the plaintiff could file a "voidance action" seeking to have his marriage annulled, even though he would not have all the ancillary remedies available in that action that he would have had in a divorce action, such as spousal maintenance and community property rights.[221] The court quite unconvincingly disagreed with his contention that such a declaration of voidance might not be recognized in other jurisdictions.[222] But the court failed to provide any cogent reason why Massachusetts, for example, would give full faith and credit to a declaration that a Massachusetts same-sex marriage is void as against public policy.[223]

In a similar case, *Rosengarten v. Downes*,[224] decided by the Appellate Court of Connecticut six years before Connecticut authorized same-sex marriage, the court ruled that Connecticut courts lacked jurisdiction to entertain an action by one of its residents to dissolve a same-sex civil union he had entered in Vermont.[225] The court reasoned that, "[i]f Connecticut does not recognize the validity of such a union, then there is no res to address and dissolve."[226]

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[217] *Id.*

[218] *Id.* at 669–70.

[219] *Id.* at 670.

[220] *Id.* at 677.

[221] *Id.* at 678–79.

[222] *Id.* at 679.

[223] There is one Texas trial court case in which the court granted a divorce by agreement to two women who had been married in Massachusetts. The state tried to intervene unsuccessfully. The state appealed, but the Court of Appeals, Austin, ruled that the state lacked standing and dismissed the appeal. State v. Naylor, 330 S.W.3d 434 (Tex. App. 2011), *petition for review filed* Mar. 21, 2011. Thus, while the divorce decree remains valid, the appellate decision cannot be construed as an affirmance on the merits, nor is it inconsistent with *In the Matter of the Marriage of J.B. and H.B.*

[224] 802 A.2d 170, 172 (Conn. App. Ct. 2002).

[225] *Id.* at 172, 184.

[226] *Id.* at 175. The refusal of most American states to recognize valid same-sex marriages from other jurisdictions does not always disadvantage one or both parties to such a marriage. In the anomalous case of *In re Marriage of Bureta*, a former husband sought to end his pension payments to his ex-wife on the grounds that she had remarried. 164 P.3d 534, 534 (Wash. Ct. App. 2007). She had traveled to Oregon with her female partner,

It was not until June 2011 that a state appellate court in a mini-DOMA jurisdiction found a way to grant relief to an individual seeking legal escape from a foreign[227] same-sex marriage. In *Christiansen v. Christiansen*,[228] two women, Paula and Victoria, had been legally married in Canada in 2008.[229] Paula filed an apparently uncontested divorce action against Victoria in Wyoming in 2010.[230] The district court dismissed the case for lack of subject matter jurisdiction, applying the now familiar reasoning that since the forum state does not recognize same-sex marriage, the state's divorce law did not apply.[231] In a brief and unanimous opinion, the Wyoming Supreme Court reversed the district court and remanded the case.[232]

The Wyoming Supreme Court expressly limited its analysis to recognition of a foreign same-sex marriage for the sole purpose of granting a divorce. "The question of recognition of such same-sex marriages for any other reason, being not properly before us, is left for another day."[233]

The Court viewed the matter as one of statutory construction, attempting to resolve statutory provisions in apparent conflict with each other. Wyoming Statute Annotated §20-1-111 provides, "all marriage contracts which are valid by the laws of the country in which contracted are valid in this state."[234] But, Wyoming's mini-DOMA defines a marriage as "a civil contract between a male and a female person . . . ."[235] Significantly, however, Wyoming's mini-DOMA "does not speak to recognition of a same-sex marriage validly entered into [elsewhere]."[236]

The Court acknowledged long-standing case law that there are exceptions to Wyoming's recognition of validly entered-into foreign marriages: "namely, marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, such as polygamous and incestuous marriages, and those which the legislature of the state has declared shall not be allowed any validity, because contrary to the policy of its laws."[237]

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obtained a marriage license, and participated in a marriage ceremony. *Id.* at 535. But, later, the Oregon Supreme Court declared such marriage to be invalid. *Id.* Thus, the Washington courts concluded that the ex-wife had never remarried—despite the ceremony—and the ex-husband was not entitled to an order terminating the payments to her. *Id.* at 536.

[227] I use "foreign" in the sense of extra-territorial. This could mean another state, although in this case the parties were married in a foreign country.

[228] 253 P.3d 153 (Wyo. 2011).

[229] *Id.* at 154.

[230] *Id.* Victoria did not file a brief in the subsequent appeal. *Id.*

[231] *Id.* at 154–55.

[232] *Id.* at 157.

[233] *Id.* at 154 n.1.

[234] *Id.* at 155 (quoting WYO. STAT. ANN. § 20-1-111 (2009)).

[235] *Id.* at 154 (quoting WYO. STAT. ANN. § 20-1-101).

[236] *Id.* at 156. (discussing WYO. STAT. ANN. § 20-1-101).

[237] *Id.* (citing Hoagland v. Hoagland, 193 P. 843, 843–44 (Wyo. 1920)).

However, the exceptions are meant to be narrow, lest they "swallow the rule."[238] Thus, for example, although Wyoming will not permit a common law marriage to be created within the state, it will consider valid a common law marriage legally entered into in another state.[239] Accordingly, the Court concluded that "recognizing 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."[240]

The Court noted that all that was being sought was a divorce, that the parties were "not seeking to live in Wyoming as a married couple . . ." and, importantly, that they "are not seeking to enforce any right incident to the status of being married."[241]

In July 2011, between the date that the New York legislature enacted its Marriage Equality Act and that Act's effective date, an appellate court in New York reached a similar conclusion in *Dickerson v. Thompson*.[242] Two women, Audrey and Sonya, had entered into a civil union in Vermont. Unable to meet Vermont's residency requirements for a dissolution action, Audrey brought an action in New York to dissolve the civil union, and Sonya did not defend that action. The trial court dismissed the action for lack of subject matter jurisdiction, and the appellate court reversed and remanded.[243] On remand, the trial court entered "a declaration relieving the parties from all rights and obligations arising from the civil union, but denied that portion of the motion seeking a dissolution of the union."[244] The appellate division again reversed. "We disagree with the [trial court's] conclusion that, in the absence of any legislatively created mechanism in New York by which a court could grant the dissolution of a civil union entered into in another state, it was powerless to grant the requested relief."[245]

Most recently, in May 2012, the Maryland Court of Appeals reached a similar conclusion in *Port v. Cowan*.[246] Two women, Jessica and Virginia, had been legally married in California in 2008 when such marriages could be legally performed there. They separated two years later by mutual agreement. Subsequently Jessica filed for divorce in Maryland on the ground of voluntary separation, and Virginia answered the complaint in a "no contest" manner. The couple had no children, and neither raised a financial claim against the other. Nevertheless the trial court denied the divorce on the ground that the marriage was not valid under Maryland law.[247]

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[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] 928 N.Y.S.2d 97 (N.Y. App. Div. 2011).
[243] *Id.* at 97.
[244] *Id.* at 99, 123.
[245] *Id.*
[246] No. 69, 2012 WL 1758629 (Md. Ct. App. May 18, 2012).
[247] *Id.* at *1.

The Maryland Court of Appeals unanimously reversed.[248] Although at the time of this case Maryland Family Law provided that "only a marriage between a man and a woman is valid in this State,"[249] it did not specifically address the recognition of out-of-state same-sex marriages legally performed in another jurisdiction. The Court found that "for purposes of the application of its domestic divorce laws," the doctrine of comity compels recognition of the marriage, and that such recognition is not repugnant to Maryland public policy.[250]

Unfortunately, the *Christiansen*, *Dickerson* and *Port* decisions will be of little or no value to unhappy spouses locked in same-sex marriages in most of the United States. The approach of the Wyoming Supreme Court in *Christiansen*, whatever its merits under Wyoming law, cannot be utilized in the vast majority of mini-DOMA states. That court was not confronted with a state statute explicitly barring recognition of a foreign same-sex marriage, nor was the *Dickerson* court confronted with such a statute in New York.[251] Indeed, the Maryland Court of Appeals in *Port* noted that whereas other states, such as Pennsylvania and Virginia, have enacted specific statutory provisions preventing recognition of foreign same-sex marriages, Maryland's statute is silent on the subject.[252] But, as noted above, approximately forty of forty-five mini-DOMA states do have statutory or constitutional provisions explicitly barring such recognition.[253]

V. THREADING THE NEEDLE: A PATH FORWARD

Legal scholars who have examined this issue have proposed various ingenious solutions to address it, none of which, as the cases cited above show, have commanded judicial respect.

Professor Barbara J. Cox, herself in a same-sex marriage entered into in Ontario, Canada, has argued that courts in mini-DOMA states:

> should consider whether an 'incidents of marriage' approach to the issue in the case may lead them to recognize the civil union, domestic partnership, or marriage based on the policy reasons behind that disputed issue. They should work as hard to honor the relationships of same-sex couples as they have worked to honor the relationships of opposite-sex couples.[254]

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[248] *Id.*

[249] *Id.* (quoting MD. CODE ANN., FAM. LAW § 2-201 (2009)).

[250] *Id.* at *6.

[251] *See supra* text accompanying notes 234–237, 245.

[252] No. 69, 2012 WL 1758629 at *5 (Md. Ct. App. May 18, 2012).

[253] *See supra* text accompanying note 178.

[254] 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, 757 (2004).

Under this approach a court could address the benefits, rights, and responsibilities flowing to a couple, without necessarily recognizing the marriage itself.[255] There are two major problems with this approach. First, unless those benefits, rights or responsibilities flow out of a valid antenuptial agreement, they don't exist absent a valid marriage. Second, a finding of a valid marriage will be not only contrary to the state's mini-DOMA, but also be politically untenable in a state that has enacted such a statute or constitutional amendment. Indeed, the very plea that courts in such states should work "hard to honor the relationships of same-sex couples" is doomed to failure (absent, of course, repeal of the state mini-DOMA).[256]

Professor Linda Silberman has taken a more cautious approach.[257] She has proposed "balanced choice-of-law rules," along the line of the old "marriage evasion" laws whereby the problem is avoided by having:

> states . . . limit the application of their same-sex marriage or civil union laws to members of their own community—either through a residency requirement or by restricting application of the law to persons who do not face an impediment to such a marriage under the laws of the jurisdictions where they reside or intend to reside.[258]

There are two main problems with this approach. First, it provides no avenue of legal redress to the person who entered a same-sex marriage while residing or intending to reside in a same-sex marriage jurisdiction, who later—for any of myriad reasons—relocates to a mini-DOMA state. Second, as a practical matter, the genie is already out of the bottle. The first same-sex marriage state, Massachusetts, repealed its "marriage evasion" act in 2008, after its courts used that act to bar same-sex couples from mini-DOMA states from getting married in Massachusetts.[259] Proponents of repeal explicitly noted that Massachusetts had an economic interest in becoming a same-sex marriage destination:

> State officials said they expected a multimillion-dollar benefit in weddings and tourism, especially from people who live in New York. A just-released study commissioned by the State of Massachusetts concludes that in the next three years about 32,200 couples would travel here to get married, creating 330 permanent jobs and adding $111 million to the economy, not including spending by wedding guests and tourist activities the weddings might generate.

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[255] *Id.* at 718–19.

[256] *Id.*

[257] Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195 (2005).

[258] *Id.* at 2204, 2213.

[259] 2008 Mass. Acts 216 (repeal effective Aug. 1, 2008); *see supra* text accompanying notes 76–80.

> "We now have this added pressure, given what's happened in California, that we really think that it is a good thing that we be prepared to receive the economic benefit," State Senator Dianne Wilkerson, a Democrat who sponsored the repeal bill, said Tuesday after the vote.[260]

Several law student notes and comments have struggled heroically to resolve the issue of same-sex divorce in mini-DOMA jurisdictions. Writing in the *Hastings Law Journal* in 2003, Jessica A. Hoogs proposed that states create a "uniform dissolution proceeding," presumably through legislative enactment.[261] Given the failure of the states to generally adopt the Uniform Marriage and Divorce Act[262] and the political divide over same-sex unions, this clever idea appears to be infeasible.

Writing in the *Marquette Law Review* in 2009, Louis Thorson suggested three methods that Wisconsin courts could use in same-sex divorce cases: 1) bar access to the courts for relief, 2) apply Wisconsin divorce law, or 3) have Wisconsin courts apply the laws of the state where the relationship was founded.[263] He acknowledged that while all three approaches have their justifications, they also have their own difficulties.[264] He admitted that the second approach, applying Wisconsin divorce law, "likely would violate both the Wisconsin Statutes and the Wisconsin Constitution."[265]

Writing in the *Boston University Law Review*, also in 2009, John M. Yarwood argued that mini-DOMA states should create property distribution mechanisms for same-sex couples seeking to terminate an out-of-state same-sex marriage.[266] While this might be a "consummation devoutly to be wished,"[267] unfortunately it probably falls within the category of wishful thinking, given current political realities.

Writing in the *Santa Clara Law Review* in 2010, Danielle Johnson proposed, "courts should use an incidental approach to marriage recognition when

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[260] Pam Belluck & Katie Zezima, *A 1913 Law Dies to Better Serve Gay Marriages*, N.Y. TIMES (July 16, 2008), http://www.nytimes.com/2008/07/16/us/16gay.html?_4=1&pagewanted=print.

[261] Jessica A. Hoogs, *Divorce Without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners Through a Comparative Analysis of European and American Domestic Partners Laws*, 54 HASTINGS L.J. 707, 708 (2003).

[262] *See supra* note 5.

[263] Louis Thorson, *Same-Sex Divorce and Wisconsin Courts: Imperfect Harmony?*, 92 MARQ. L. REV. 617, 618–19 (2009).

[264] *Id.* at 619.

[265] *Id.* at 642.

[266] John M. Yarwood, *Breaking Up is Hard to Do: Mini-DOMA States, Migratory Same-Sex Marriage, Divorce, and a Practical Solution to Property Division*, 89 B.U. L. REV. 1355, 1388 (2009).

[267] WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK 51 (W.G. Clark & W.A. Wright eds., 2d ed. 1874).

considering a divorce petition in order to avoid unreasonably burdensome, illogical results."[268] She argued cogently that:

> When the law of the forum state conflicts with, or is silent on, the legality of the underlying marriage, the court can use an incidental approach to marriage recognition and consider the divorce as an incident of that marriage. By recognizing the marriage for the limited purpose of the divorce, the court can confine its consideration of the relationship so as to avoid addressing the validity of the underlying marriage. The ability to legally end a marriage validly performed in another state is an incident of that marriage that should be available uniformly across the states, regardless of whether that state disagrees with the underlying marriage. Parties seeking an uncontested dissolution of their union are not asking the court to validate the union; they are simply asking the court to dissolve it. By refusing to perform a divorce in a same-sex couple's home state, some states have made it incredibly burdensome for that couple to legally end their relationship.[269]

She concluded:

> Using the incidental approach, the court can view divorce as an incident of marriage, analyze the policies behind the incident at issue, and then decide whether the marriage should be recognized for the sole purpose of performing the divorce.[270]

While this approach has the merit of being practical and is similar to what I will suggest, it has one fatal flaw. It would require a court in a mini-DOMA state to do something it is prohibited from doing: recognize a same-sex marriage.

Any effort to bridge the enormous divide between those states that permit same-sex marriage and those that consider it an anathema is obviously fraught with peril. Bearing in mind Justice Holmes' aphorism that, "[t]he life of the law has not been logic: it has been experience,"[271] surely an incremental approach which respects the position of anti-same-sex marriage jurisdictions while providing relief to their unhappily wed citizens is the most likely of success.

The author's proposal for same-sex divorce is minimalist: Where a party to a same-sex marriage seeks a simple, uncontested, no-fault divorce in a mini-DOMA jurisdiction, the court can and should grant the divorce *without inquiring into or addressing the validity of the marriage.*

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[268] Danielle Johnson, *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 States*, 50 SANTA CLARA L. REV. 225, 227 (2010).

[269] *Id.* at 245–46.

[270] *Id.* at 253–54.

[271] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Harvard Univ. Press 1881).

It must be acknowledged that this proposal will not aid the happily married (or quasi-married) same-sex couple now residing in a mini-DOMA jurisdiction. Under current law, they have no benefits flowing out of their marital relationship other than those that might be secured by contract. This proposal will not circumvent the incidents of marriage rules articulated by the Court in *Estin*, *Vanderbilt*, and their progeny. Even a court that might be persuaded to grant a divorce would probably be barred from addressing financial issues that it would normally resolve in the dissolution of an opposite-sex marriage. The proposal would also provide no relief, for example, to a member of a same-sex couple whose spouse is negligently killed in a mini-DOMA state, who wishes to bring a wrongful death claim.[272]

The proposed solution has several important benefits. First, it is completely consistent with dominant legal practice in the United States today. Since the advent of no-fault divorce in California in 1970,[273] all states have made efforts to simplify the divorce process and make it less adversarial.[274] Based on the author's three decades of family law practice, it would be truly extraordinary for a court to spend its time in an uncontested no-fault divorce questioning the validity of the marriage.

Second, and in the same vein, judicial resources are scarce and judicial time precious. How does it benefit the court or the parties to waste limited judicial resources inquiring into the validity of a marriage when the only action before the court is an uncontested one to terminate the marriage?

Third, as noted, courts in some of the cited cases have recognized the hardship imposed on their own residents by refusing to grant a divorce in this situation.[275] Hence, one may be able to appeal to the judge's sense of equity in seeking such a result.

Fourth, this proposal is neither fanciful nor radical. The author has served as codirector of his law school's Family Law Clinic for almost three decades. During this time, the clinic has filed divorce complaints where it was far from clear that the client was legally married. For example, in one case, the client and her husband had separated years before, and she had no way to contact him.[276] She recalled receiving some papers from a lawyer long ago about a divorce but had long since lost them and didn't even know what state they were from. She asked the clinic if she were already divorced, and, of course, no one could tell her.[277] The only practical option to clarify her legal situation was to file a divorce and serve her

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[272] *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223, 223, 231 (Tex. Ct. App. 1998) (holding that the person who had married a male decedent could not maintain a wrongful death action as a surviving spouse because she was a male-to-female transsexual and hence in a non-recognized same-sex marriage).

[273] *See* Robert E. Rains & Gianluca Benedetti, *A Discursive Essay on the Nature of Marriage and Divorce in Italy and the United States*, 10 DIG. 1, 22–23 (2002).

[274] *See id.*

[275] *See, e.g.*, *supra* text accompanying note 241.

[276] Since this case did not result in a reported decision, the client's name is not cited here for privacy reasons.

[277] There is no national register of divorces in the United States.

husband by publication. He did not enter an appearance, and the court granted her a no-fault divorce without further ado. In another case, where the parties had had a marriage ceremony in another state but it appeared that they had failed to obtain a marriage license, the clinic filed a divorce for the wife, and the husband appeared and defended on the grounds that there was no valid marriage. Once the defendant spouse raised the issue, the court quite properly held a hearing on the subject (and ruled that there was a valid marriage).[278] The point is that it is perfectly appropriate—and commonplace—to file a divorce even where a party's marital status might be questioned, and a court will not ordinarily waste its time conducting an inquiry into marital status when a simple, no-fault divorce is uncontested.[279]

Fifth, while a purist might question the logic of granting a divorce from a void marriage, there is nothing that inherently prevents a court from granting a divorce where an annulment might also be available. Pennsylvania statutory law contains an explicit example. Section 3304(a)(1) of the Pennsylvania Domestic Relations Code, "[g]rounds for annulment of void marriages," provides:

> (a) **General rule**—Where there has been no confirmation by cohabitation following the removal of an impediment, the supposed or alleged marriage of a person shall be deemed void in the following cases:
>
> > (1) Where either party at the time of such marriage had an existing spouse and the former marriage had not been annulled nor had there been a divorce except where that party had obtained a decree of presumed death of the former spouse.[280]

Thus, a woman (or man) who discovers, as one of the clinic's clients did, that her spouse was married all along to someone else, may seek and obtain an annulment of her void marriage. But, she also has a second legal option: divorce. Section 3301(a)(4) of the Domestic Relations Code, "[g]rounds for divorce," provides:

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[278] Jagdeo v. Dookharan, 58 Cumb. 195 (2009).

[279] This approach is also completely consistent with the only appellate case in Pennsylvania addressing same-sex marriage, De Santo v. Barnsley, 476 A.2d 952, 956 (Pa. Super. Ct. 1984). In *De Santo*, one man sued another man in divorce claiming that they had entered into a common law marriage. *Id.* at 952. The defendant filed an answer denying that the defendant and the plaintiff were ever married or were capable of being married. *Id.* Since the defendant put the existence of the marriage at issue, it was entirely appropriate for the trial court to address that matter, and it did so, finding that there was no valid marriage. *Id.* That finding was affirmed on appeal, with the superior court ruling as a matter of law that two persons of the same sex could not contract a common law marriage in Pennsylvania. *Id.*

[280] 23 PA. CONS. STAT. § 3304(a)(1) (1990).

> (a) **Fault**—The court may grant a divorce to the innocent and injured spouse whenever it is judged that the other spouse has: . . .
>
> > (4) Knowingly entered into a bigamous marriage while a former marriage is still subsisting.[281]

The fact that such a marriage is void and subject to annulment does not prevent a court from granting a divorce.

Finally, it can be readily and honestly argued that this approach is fully consistent with the mini-DOMA states' anti-same-sex marriage position. The cases where courts have denied a divorce have had the counter-productive result of *preserving* a same-sex marriage rather than *terminating* it. By refusing to grant the divorce, the court is assuring that its resident remains in the very same-sex marriage that is antithetical to the state's public policy. For reasons stated above, even an annulment in the mini-DOMA state is unlikely to free its resident from her same-sex marriage in states that recognize such marriages. On the other hand, a divorce granted in compliance with the dictates of *Williams I* would be entitled to full faith and credit in all states.

Indeed, in striking down a mandatory filing fee for poor people seeking divorces, the Supreme Court recognized the inextricable connection between the right to divorce and the right to marry:

> Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.[282]

The short-term result of a universally recognized divorce is one fewer same-sex marriage. For the plaintiff spouse, the long-term result may be either: 1) remaining single, or 2) entering an opposite-sex marriage, or 3) entering another same-sex marriage. The first two long-term outcomes carry forward the state's anti-same-sex marriage position. The third outcome is actually neutral: the individual is still in a same-sex marriage, albeit a new one, and the sum total of same-sex marriages is not affected.[283] The second outcome is not at all fanciful. Individuals have been known to leave same-sex relationships and, then or later, form opposite sex relationships.[284] It would be the height of irony for a court's

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[281] *Id.* at § 3301(a)(4).

[282] Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

[283] Of course, it is possible that the other party to the initial same-sex marriage might also remarry another person of the same sex, which would create an additional same-sex marriage.

[284] See, for example, *L.S.K. v. H.A.N.*, a Pennsylvania child support case between two formerly lesbian partners, in which the court noted that both women are now married. 813

refusal to grant an uncontested divorce to someone in a same-sex marriage to result in that person's not being truly legally free to enter into an opposite-sex marriage, the very institution the mini-DOMA states are supposedly trying to preserve and support.

A.2d 872, 875 n.2 (Pa. Super. Ct. 2002). Similarly, in the long-running interstate custody battles between former Vermont civil union partners, Lisa Miller and Janet Miller-Jenkins, *see* Miller-Jenkins v. Miller-Jenkins, 12 A.3d 768 (Vt. 2010), Lisa Miller has purportedly "renounced her homosexuality," rediscovered her Baptist faith, and "is often flanked by others who've renounced their homosexuality and joined the faith." *See* Lorraine Ali, *Mrs. Kramer vs. Mrs. Kramer*, NEWSWEEK (Dec. 6, 2008), http://www.newsweek.com/2008/12/05/mrs-kramer-vs-mrs-kramer.print.html.