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ARTICLES

Wedlocked

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I. INTRODUCTION

For as long as marriage has existed in the United States, divorce has been its necessary opposite.[1] So strong is the need for divorce that every state in the country allows access to no-fault divorce,[2] and the Supreme Court has suggested it is a fundamental right.[3] For opposite-sex couples, legally ending their marriage is possible as a matter of right. For married same-sex couples, however, state Defense of Marriage Acts ("DoMAs")[4] have been a stumbling block. Same-sex couples residing in

1. GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 3 (1991) ("Puritan settlers first introduced [divorce] in the American colonies during the early 1600s."); Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1501 (2000) ("Judicial divorce was almost universal [within the United States] by 1900 . . . .") (footnote omitted)).

2. Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664 (1984). California instituted the first no-fault divorce regime in 1970. *Id.* at 667. Since 1985, all states but Arkansas have offered at least some form of no-fault divorce. *Developments in the Law—The Law of Marriage and Family, v. Marriage As Contract and Marriage As Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2089 (2003). Arkansas has offered no-fault divorce since 1991. Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. REL. 317, 323 (2002).

3. Boddie v. Connecticut, 401 U.S. 371, 374 (1971) ("[D]ue 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.").

4. The majority of state DoMA provisions were passed in the mid-1990s to early 2000s following the passage of the federal DoMA in 1996. *See* 28 U.S.C. § 1738C (2006); Virgina F. Coleman, *Same-Sex Marriage*, SR013 A.L.I.-A.B.A. 467, 512 (2009) (listing the passage years of state statutory and constitutional DoMA provisions as of 2009). *See generally* Mary Patricia Byrn & Morgan L. Holcomb, *Same-Sex Divorce in a DoMA State*, 50 FAM. CT. REV. 214 (2012). Relevant to this Article, the federal DoMA provides that no state "shall be required to give effect" to same-sex marriages performed in other states. 28 U.S.C. § 1738C. One federal district court described this section of DoMA as follows: "Congress permitted the states to decline to give effect to the laws of other states respecting same-sex marriage. In so doing, Congress relied on its 'express grant of authority,' under . . . the Constitution's Full Faith and Credit Clause . . . ." Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 378 (D. Mass. 2010), *aff'd sub nom.* Mass. v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012) (citations omitted). There is a vigorous debate about the constitutionality of DoMA. *See, e.g.*, ALISON M. SMITH, CONG. RESEARCH SERV., RL 31994, SAME-SEX MARRIAGES: LEGAL ISSUES 4–9 (2012), *available at* http://www.fas.org/sgp/crs/misc/RL31994.pdf (reviewing the various constitutional challenges to

numerous DoMA states have been told by courts that because their state DoMA renders their marriages void, they cannot terminate their legal marriages.[5] In a word, these couples are wedlocked.

The cost of being wedlocked might not be self-evident. After all, what is the harm in being trapped in a void marriage? As it turns out, the harms can be significant.[6] A same-sex couple validly married in one jurisdiction remains in that valid marriage despite the fact that the

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DoMA in federal courts); Adam Liptak, *A Tipping Point for Gay Marriage?*, N.Y. TIMES, Apr. 30, 2011, http://www.nytimes.com/2011/05/01/weekinreview/01gay.html?pagewanted=all (describing the public debate surrounding same-sex marriage and DoMA). An equally vigorous debate surrounds whether, absent § 2 of the federal DoMA, states would be obliged to recognize same-sex marriages from other jurisdictions. *See, e.g.*, Mark Strasser, *Life After DOMA*, 17 DUKE J. GENDER L. & POL'Y 399, 399–400 (2010) ("[O]n some interpretations of DOMA, the repeal or invalidation of the Act will have little or no effect on the power of states to refuse to recognize same-sex marriages validly celebrated elsewhere, although on other interpretations the repeal or invalidation of DOMA would have important effects."). Because we argue a state need not recognize an out-of-state same-sex marriage in order to grant divorce, a discussion of why state DoMAs fail to establish a valid exception to the general principle that a marriage valid in the place of celebration is valid everywhere—otherwise known as the principle of comity—is outside the scope of this Article. *See generally* Brief of Sha'rron Ameedah Saleem in Opposition to the Maryland State's Attorney's Motion to Compel Testimony at 9–16, State v. Snowden, No. 21-K-11-45589 (Md. Cir. Ct. June 15, 2011) (outlining the argument that state DoMAs fail to establish a valid exception to comity, the historical roots of comity, and full faith and credit in the context of same-sex marriage recognition); Marriage—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, 3–4 (2010) (discussing how the state of Maryland may recognize marriages of same-sex couples validly married in another state).

5. Several cases have denied divorce to same-sex couples. *See, e.g.*, Rosengarten v. Downes, 802 A.2d 170, 172 (Conn. App. Ct. 2002); Lane v. Albanese, No. FA044002128S, 2005 WL 896129, at *4 (Conn. Super. Ct. Mar. 18, 2005); *In re* Marriage of Ranzy, No. 49D12-0903-DR-014654, slip op. at 3 (Ind. Super. Ct. Sep. 4, 2009); Mueller v. Pry, No. CI10-237, slip op. at 2 (Neb. Dist. Ct. Jan. 25, 2011); B.S. v. F.B., 883 N.Y.S.2d 458, 466–67 (Sup. Ct. 2009); Gonzalez v. Green, 831 N.Y.S.2d 856, 858–59 (Sup. Ct. 2006); Irwin v. Lupardus, No. 41379, 1980 WL 355015, at *2 (Ohio Ct. App. June 26, 1980); Kern v. Taney, 11 Pa. D. & C. 5th 558, 562–63 (Ct. Com. Pl. 2010); Chambers v. Ormiston, 935 A.2d 956, 967 (R.I. 2007); *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 659 (Tex. App. 2010). There are, however, other decisions that have granted relief to same-sex couples seeking divorce. *See In re* Marriage of Brown & Perez, No. CDCD 119660, slip op. at 1–2 (Iowa Dist. Ct. Dec. 24, 2003); Port v. Cowan, 44 A.3d 970 (Md. 2012); Salucco v. Alldredge, No. 02E0087GC1, 2004 WL 864459, at *1 (Mass. Super. Ct. Mar. 19, 2004); Glaser v. Grassman, No. 27-CV-10-16600, at 3–4 (Minn. Dist. Ct. July 22, 2010); Hammond v. Hammond, No. FM-11-905-08B, slip op. at 2 (N.J. Super. Ct. Div. Ch. Feb. 6, 2009); Carrejo v. Haught, No. D-0101-DM-2009-0504, slip op. at 2 (N.M. Dist. Ct. Oct. 12, 2010); Dickerson v. Thompson, 897 N.Y.S.2d 298, 301 (App. Div. 2010); Parker v. Waronker, 918 N.Y.S.2d 822, 824–25 (Sup. Ct. 2010); Beth R. v. Donna M., 853 N.Y.S.2d 501, 506 (Sup. Ct. 2008); C.M. v. C.C., 867 N.Y.S.2d 884, 889 (Sup. Ct. 2008); State v. Naylor, 330 S.W.3d 434, 442–43 (Tex. App. 2011) (denying Texas' motion to intervene after the trial court entered a final divorce decree for a same-sex couple); Gill v. Adkins, No. 09-3-01572-1, slip op. at ¶ 3.1 (Wash. Super. Ct. Feb. 5, 2010); *In re* Marriage of Gorman & Gump, No. 02-D-292, slip op. ¶ 1 (W. Va. Fam. Ct. Dec. 19, 2002); Christiansen v. Christiansen, 253 P.3d 153, 156–57 (Wyo. 2011).

6. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1683–89 (2011) (discussing the harms of denying divorce to same-sex couples).

couple, or a member of the couple, resides in a jurisdiction that does not recognize their marriage. The couple's legal union will be recognized by the growing number of jurisdictions that recognize same-sex unions.[7] As a result, if a member of the couple moves to, or even travels through a recognizing state, the individual will be considered married in that state. Likewise, if the non-recognizing state where the couple resides changes its policy and becomes a recognizing state, suddenly the couple—previously unable to get a divorce because the marriage was void—will be married.

Married couples seek divorce for a myriad of reasons. Those reasons include the pragmatic—such as distribution of property, assignment of spousal support, and division of debt,[8] and the emotional—such as finality and repose.[9] Married couples also seek divorce knowing that without a divorce decree neither partner can remarry.[10] This last reason

7. As of September 14, 2012 the following jurisdictions permit either same-sex marriage or same-sex civil unions: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, the District of Columbia, Delaware, Hawaii, Illinois, New Jersey, and Rhode Island. *See Where State Laws Stand,* FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/where-state-laws-stand (last visited Sept. 14, 2012). Maryland and New Mexico explicitly recognize out-of-state same-sex marriages and civil unions. *Id.*

8. Although technically divorce does not dissolve preexisting debtor obligations, courts routinely divide or assign debts upon divorce. *See* Jill C. Rush, Comment, *Unequal Treatment and Creditor Frustrations: The Limited Impact of Legalizing Same Sex Marriage*, 21 EMORY BANKR. DEV. J. 743, 749 (2005). A creditor may still use any remedies it had before the divorce to recover from either liable spouse, but "under the held-harmless doctrine, the spouse who does not claim responsibility is held harmless by the court." *Id.* at 750 (footnote omitted). On the flip side, divorce ensures that future good fortune will not inure to the benefit of the ex-spouse. This possibility is not simply the musing of underworked academics. In a well-known Illinois case, an opposite-sex couple dissolved their relationship but did not obtain a judicial divorce. *In re* Marriage of Morris, 640 N.E.2d 344, 346 (Ill. App. Ct. 1994), *cited in* Colleen McNichols Ramais, Note, *'Til Death Do You Part . . . and This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013, 1036 n.169. Over a decade later, one member of the couple won the lottery, and the other member of the couple successfully sued for a portion of the winnings. *In re* Marriage of Morris, 640 N.E.2d at 347. We also include inheritance in this pragmatic column. Nearly every state has enacted laws that prohibit spouses from disinheriting each other. *See* Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 739 (2006) ("[F]orty-nine of the fifty states and the District of Columbia severely limit freedom of testation *vis-à-vis* surviving spouses." (footnote omitted)). Ex-spouses typically have no such obligation. *See e.g.*, MINN. STAT. ANN. § 524.2-301 (2012) (noting entitlement of surviving spouse, but not mentioning ex-spouse); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 99-102 (1994) (omitting any discussion of obligations to ex-spouses).

9. This repose is especially pressing for members of abusive relationships. Jennifer L. Vainik, Note, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives*, 91 MINN. L. REV. 1113, 1128 (2007). Although "research on lesbian and gay domestic violence has been limited and conflicting" there is no question that domestic violence exists in same-sex relationships. KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY 477 (4th ed. 2006).

10. Without a divorce decree the remarrying partner could not certify honestly that he is not

is likely the most important because, although couples can sometimes handle the pragmatic and emotional issues surrounding the end of marriage on their own, there is no way couples can legally divorce—thereby allowing the individuals to remarry—absent judicial intervention.[11] As the Supreme Court counsels, "we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage . . . without invoking the State's judicial machinery."[12] It is for these reasons that married same-sex couples, regardless of the state in which they live, need access to divorce.

Indeed, married same-sex couples in states that do not recognize same-sex unions understand the importance of divorce and have sought it out. Too many courts, however, have refused to allow access to divorce, basing that refusal on two related but distinct rationales. Some courts have asserted that they do not have subject-matter jurisdiction over same-sex divorce,[13] while other courts have maintained that same-sex divorce is not a claim for which relief can be granted.[14] Both of these conclusions, however, are wrong. Assertions regarding lack of subject-matter jurisdiction over same-sex divorce have been justified by misguided readings of state DoMAs and misunderstandings of state court jurisdiction. Similarly, the conclusion that courts cannot provide relief to same-sex couples seeking divorce is based on misinterpretations

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currently married on her new marriage application. *See, e.g.*, *Application to Marry in Iowa*, IOWA DEP'T OF PUB. HEALTH, *available at* http://www.polkrecorder.com/marriageappnew.pdf (requiring applicants to certify they are "both unmarried"). If he were to remarry, his subsequent marriage would be considered void ab initio. *See, e.g.*, Elia-Warnken v. Elia, 972 N.E.2d 17 (Mass. 2012) (declaring a Massachusetts marriage void ab initio under the state's polygamy laws because one of the parties to the marriage had not validly dissolved his prior Vermont civil union). He could also be tried as a bigamist, IOWA CODE § 726.1 (2011) (defining bigamy, a serious misdemeanor, as "[a]ny person, having a living husband or wife, who marries another . . . ").

11. *See, e.g.*, Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIMONIAL LAW. 249, 249–250 (2010) ("American states increasingly allow[ ] different types of private ordering in a range of different family law areas . . . [w]ithin quite broad limits, consenting adults can act and interact as much as they please in domestic matters; it is only when they seek recognition by the state of their arrangements or enforcement of their commitments that the issue of 'private ordering' arises.").

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

13. *See, e.g.*, Lane v. Albanese, No. FA044002128S, 2005 WL 896129, at *4 (Conn. Super. Ct. Mar. 18, 2005) ("[T]his court has no choice but to dismiss this case for lack of subject matter jurisdiction."); *In re* Marriage of Ranzy, No. 49D12-0903-DR-014654, slip op. at ¶ 20 (Ind. Super. Ct. Sep. 4, 2009) ("The Court lacks subject matter jurisdiction and cannot grant the petition for dissolution.").

14. *See e.g.*, Gonzalez v. Green, 831 N.Y.S.2d 856, 859 (Sup. Ct. 2006) (although New York did not have a state DoMA, the judge dismissed the claim for divorce on the grounds that the Massachusetts marriage was void and plaintiff failed to state a claim for which relief could be granted). *See also e.g.*, Irwin v. Lupardus, No. 41379, 1980 WL 355015, at *2 (Ohio Ct. App. June 26, 1980).

of the requirements of state DoMAs. Moreover, refusing to allow same-sex couples to divorce violates long-standing principles of equity and violates rights guaranteed by the federal Constitution.

Part II of this Article begins by untangling the muddle state courts have made of jurisdiction in same-sex divorce cases. We explain how, in the vast majority of states, state courts of general jurisdiction have the power to exercise subject-matter jurisdiction over same-sex divorce. With that settled, we proceed in Part III to explain that, with only one exception, state DoMAs neither explicitly nor implicitly prevent a court from granting relief to same-sex couples seeking divorce. Part IV then offers a practical guide to obtaining such relief—explaining how a court can grant a same-sex divorce by applying either the residency state's divorce statute, the divorce statute of the marrying state, or by granting equitable relief. Finally, Part V demonstrates that denying access to divorce to same-sex couples is constitutionally suspect. We describe how three interlocking constitutional rights—the right to access the courts, the right to divorce, and the right to remarry—converge at the exact moment of same-sex divorce. We describe how these constitutional rights interact to ensure that all individuals in a legal marriage, whether or not that marriage is recognized by their state of residence, must have access to legal divorce.

II. State DoMAs Do Not Prohibit State Courts from Exercising Subject-Matter Jurisdiction over Same-Sex Divorce

To grant a divorce, a court must possess and exercise two distinct powers: the court must have the power to hear the case, typically referred to as subject-matter jurisdiction, and the court must have the power to render a judgment on the merits, often referred to as the power to grant relief.[15] Most state courts that have denied petitions for same-sex divorce have dismissed the cases for lack of subject-matter jurisdiction.[16] A finding that a state court does not have subject-matter jurisdiction over divorce has significant consequences. If a court does not have

15. Robert E. Oliphant, *Jurisdiction in Family Law Matters: The Minnesota Perspective*, 30 Wm. Mitchell L. Rev. 557, 559–60 (2003); Lacks v. Lacks, 359 N.E.2d 384, 388 (N.Y. 1976) ("[T]he overly stated principle that lack of subject matter jurisdiction makes a final judgment absolutely void is not applicable to cases which, upon analysis, do not involve jurisdiction, but merely substantive elements of a cause for relief. To do so would be to undermine significantly the doctrine of *res judicata*, and to eliminate the certainty and finality in the law and in litigation which the doctrine is designed to protect."). *See also In re* Jones & Laughlin Steel Corp., 412 A.2d 1099, 1102 (Pa. 1980) ("The question is whether the court has power to enter into the inquiry and not whether it is able to grant the relief sought in the particular case." (quoting Cooper-Bessemer Co. v. Ambrosia Coal & Constr. Co., 291 A.2d 99, 100 (1972))).

16. *E.g.*, Rosengarten v. Downes, 802 A.2d 170, 184 (Conn. App. Ct. 2002); *Lane*, 2005 WL

subject-matter jurisdiction, any judgment it renders on the merits is void[17] and may be collaterally attacked.[18] Furthermore, a court must sua sponte dismiss the case if it determines that it does not have subject-matter jurisdiction.[19]

The severe consequences that flow from a lack of subject-matter jurisdiction counsel courts to distinguish carefully between dismissals premised on subject-matter jurisdiction and dismissals based on other grounds. It is crucial for courts to speak clearly and carefully about the rationale for their dismissals because if a court does not have subject-matter jurisdiction "it can do nothing 'in any cause' at all."[20] On the other hand, "good jurisdiction [is] the ticket to a broad and flexible . . . judicial power: a party who clear[s] the jurisdictional hurdle w[ill] 'fin[d] a court clothed with entire power to do justice according to law, or according to equity . . . .'"[21]

896129, at *4; *In re* Marriage of Ranzy, No. 49D12-0903-DR-014654, slip op. at ¶ 20; *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 659 (Tex. App. 2010).

17. *E.g.*, *In re* Estate of Falck, 672 N.W.2d 785, 789 (Iowa 2003) ("If a court enters a judgment without jurisdiction over the subject matter, the judgment is void." (citing Crawley v. Gardiner (*In re* Adoption of Gardiner), 287 N.W.2d 555, 559 (Iowa 1980))); Matson v. Matson, 310 N.W.2d 502, 506 (Minn. 1981) ("A void judgment is one rendered in the absence of jurisdiction over the subject matter or the parties." (citing Lange v. Johnson, 204 N.W.2d 205, 208 (Minn. 1973))); Editorial Photocolor Archives, Inc. v. Granger Collection, 463 N.E.2d 365, 368 (N.Y. 1984) ("A judgment or order issued without subject-matter jurisdiction is void . . . ."); *In re* United Servs. Auto. Ass'n, 307 S.W.3d 299, 309–10 (Tex. 2010) ("A judgment is void if rendered by a court without subject matter jurisdiction." (citing Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex. 1990))).

18. Carter v. Carter, 307 P.2d 630, 633 (Cal. Ct. App. 1957) ("[A] void order or judgment is subject to collateral attack at any time and in any place by any interested party."); Hauser v. Mealey, 263 N.W.2d 803, 808 (Minn. 1978) ("[I]t is the general rule that a judgment rendered by a court which lacks jurisdiction to hear a case does not have the effect of res judicata." (citing Muellenberg v. Joblinski, 247 N.W. 570, 572 (Minn. 1933))); Booth v. McKnight, 70 P.3d 855, 859–60 & n.22 (Okla. 2003) (noting that when the record reveals a lack of jurisdiction, a probate "decree is facially void and subject to collateral attack by any interested party at any time and wherever venue may be laid"); Lawrence Sys., Inc. v. Superior Feeders, Inc., 880 S.W.2d 203, 212 (Tex. App. 1994) ("[A] null judgment has no legal effect and will not support a res judicata plea." (citing City of Lufkin v. McVicker, 510 S.W.2d 141, 144 (Tex. App. 1973))).

19. *E.g.*, Lloyd v. State, 251 N.W.2d 551, 558 (Iowa 1977) ("If the court has no subject matter jurisdiction it has no power to enter a judgment on the merits and must dismiss the action."); Moses v. Dallas Indep. Sch. Dist., 12 S.W.3d 168, 170, 172 (Tex. App. 2000) (dismissing for want of jurisdiction and holding that "the trial court's lack of subject matter jurisdiction is fundamental error that [the appellate court] may raise *sua sponte* because [appellate] jurisdiction over the merits of a case is no greater than that of the court from which the appeal is taken" (citing Dallas Cnty. Appraisal Dist. v. Funds Recovery, Inc., 887 S.W.2d 465, 468 (Tex. App. 1994))); *see also, e.g.*, MINN. R. CIV. P. 12.08(c) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

20. Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 977 (2009) (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

21. Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1216 (2001) (emphasis omitted) (quoting BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR

Unfortunately, several courts dismissing same-sex divorce petitions for lack of subject-matter jurisdiction have done so without such a careful analysis. These courts have based their dismissals on three different and inaccurate conclusions regarding subject-matter jurisdiction. Some courts assert that their state DoMA strips them of subject-matter jurisdiction over same-sex divorce.[22] Other courts assert that they lack jurisdiction because their state divorce statute does not provide for same-sex divorce.[23] Finally, one state supreme court has held that because its state family courts are courts of limited jurisdiction, same-sex couples have no avenue for relief in the couple's state of residence.[24] These courts are mistaken. Under a proper analysis, state courts do have subject-matter jurisdiction over same-sex divorce petitions.

A. *State DoMAs Do Not Strip Courts of Subject-Matter Jurisdiction over Same-Sex Divorce Cases*

The dismissals described above are confounding because most state courts are courts of general jurisdiction with broad jurisdiction to hear any justiciable dispute.[25] One exception is when jurisdiction over a particular dispute is placed with some other tribunal.[26] In these instances, jurisdiction over the dispute does not disappear from the state. Instead,

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22. *E.g.*, *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 664–67, 670 (Tex. App. 2010) (overruling the trial court's determination that it had subject-matter jurisdiction despite acknowledging that Texas's trial courts are courts of general jurisdiction and reasoning that Texas's DoMA stripped subject-matter jurisdiction). *See also*, *e.g.*, Rosengarten v. Downes, 802 A.2d 170, 182 (Conn. App. Ct. 2002); Mueller v. Pry, No. CI10-237, slip op. at 2 (Neb. Dist. Ct. Jan. 25, 2011); Kern v. Taney, 11 Pa. D. & C. 5th 558, 576 (Ct. Comm. Pl. 2010). In other instances, confusion results when courts merely sidle up to the jurisdiction issue, as the Oklahoma court of appeals did in *O'Darling v. O'Darling*, No. 106,732, slip op. at 9–10 (Okla. Civ. App. Mar. 11, 2010). In *O'Darling*, the court refused to decide whether Oklahoma courts have subject-matter jurisdiction over same-sex divorce and instead decided the case on an evidentiary basis. *Id.*

23. *E.g.*, Christiansen v. Christiansen, No. 2010-266, slip op. at ¶¶ 6, 14–15 (Wyo. Dist. Ct. Nov. 8, 2010), *rev'd*, 253 P.3d 153 (Wyo. 2011) (quoting WYO. STAT. ANN. § 20-1-101(2012)).

24. Chambers v. Ormiston, 935 A.2d 956, 967 (R.I. 2007) ("We conclude that the word 'marriage' in . . . the statute . . . was not intended by the General Assembly to empower the Family Court to hear and determine petitions for divorce involving . . . 'two persons of the same sex who were purportedly married in another state.'" (citing R.I. State Labor Relations Bd. v. Valley Falls Fire Dist., 505 A.2d 1170, 1171 (R.I. 1986))).

25. Indeed, one commentator noted that "state common law courts do tend to hear an array of questions that would be nonjusticiable under federal law." Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1863 (2001) (footnote omitted). Hershkoff, in particular, invites us to study the willingness of state courts to adjudicate widely in order to "question conventional assumptions about judicial capacity and the idea that there are inherent limits to adjudication." *Id.* at 1841.

26. Some states have created tribunals with limited jurisdiction, such as conciliation courts or state tax courts. *See, e.g.*, *Chambers*, 935 A.2d at 958 (noting that the Rhode Island Family Court is a "legislatively created court of *limited* jurisdiction") (emphasis added) (footnote omitted)).

jurisdiction is simply placed in a separate, specialized court that is intended to better address such disputes. No state has placed same-sex divorce in a specialized tribunal. As such, state trial courts are presumed to have subject-matter jurisdiction over same-sex divorce petitions.[27] Curiously, however, some state courts have been unwilling to recognize their broad jurisdiction and have asserted that state DoMAs strip them of jurisdiction over same-sex divorce.[28] In all but one state, this assertion is incorrect.

Georgia is the only state in which its state DoMA strips the trial courts of jurisdiction over same-sex divorce because Georgia's is the only state DoMA that mentions divorce. Georgia's lengthy constitutional DoMA provides, *inter alia*, that "[t]he courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any [same-sex] relationship . . . ."[29] Assuming for the moment that this removal of jurisdiction is constitutional,[30] Georgia is the only state whose courts can correctly assert that they do not have jurisdiction over same-sex divorce. No other state has stripped its courts of jurisdiction over same-sex divorce through its DoMA, and, absent such extraordinary language as that found in Georgia's DoMA, there is no reason to presume that state courts do not retain jurisdiction over same-sex divorce.

When state legislatures intend to constrict the jurisdiction of their state's courts, they do so explicitly. Georgia did so for same-sex divorce, and other states have done so in other domestic contexts. Minnesota's co-habitation statute provides one such example. That statute explicitly provides that "[u]nless the individuals have executed a contract . . . the courts of this state are *without jurisdiction* to hear . . . any claim . . . based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock . . . ."[31] This statute, like Georgia's

27. *See, e.g.*, C.M. v. C.C., 867 N.Y.S.2d 884, 888 (Sup. Ct. 2008) ("The Supreme Court in New York is a court of general jurisdiction and has the power to grant a [same-sex] divorce even if the marriage could not lawfully occur in this State.").

28. *E.g.*, *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 664–67, 670 (Tex. App. 2010) (holding that because Texas statutes declare same-sex marriages to be void, the court could not give legal effect to the marriage by granting a divorce, and thus the Texas statutes deprived the courts of statutory jurisdiction over a divorce petition of a same-sex couple).

29. GA. CONST. art. I, § 4, para. 1(b).

30. It would be an extraordinary undermining of judicial power and inconsistent with traditional notions of separation of powers to permit the entirety of a state court's subject-matter jurisdiction to be subject to the whim of a legislative majority. Separately, Part V establishes that access to divorce for same-sex couples is a federal constitutional guarantee that requires the portion of the Georgia law denying divorce to yield to the supremacy of federal law. *See* U.S. CONST. art. VI, cl. 2; *infra* Part V.A–B.

31. MINN. STAT. ANN. § 513.076 (West 2012) (emphasis added). Minnesota permits opposite-sex, unmarried cohabitants to enter into contracts concerning their joint property and financial

DoMA, explicitly strips courts of jurisdiction in certain instances, showing that state legislatures are perfectly able to explicitly convey their intent to limit a court's jurisdiction in the domestic relations arena. Furthermore, Georgia enacted its DoMA statute, which explicitly prohibits its courts from granting same-sex divorce, in 1996.[32] It is assumed that legislatures enacting DoMAs after 1996 knew of the express language in Georgia's DoMA. Therefore, according to the cannon of statutory interpretation *expressio unius est exclusio alterius*,[33] the exclusion of explicit divorce language in any DoMA enacted after 1996 can be seen as intentional. Forty-nine states have chosen not to include language that strips their state courts of jurisdiction over same-sex divorce. This legislative silence is deafening.

When a state's DoMA does not explicitly modify the jurisdiction of the trial courts, state courts should not engage in judicial activism by reading such a jurisdiction-stripping element into their state's DoMA. State courts favor interpreting state statutes as leaving general jurisdiction unaltered unless it is clear that the legislature intended a change.[34] Reading DoMAs as jurisdiction-stripping violates this established canon of statutory interpretation. A Texas appellate court provides an example of just such overreaching. In *In re Marriage of J.B. & H.B.*, a Texas appellate court interpreted Texas's DoMA as stripping subject-matter jurisdiction over same-sex divorce.[35] Texas's DoMA provides that marriage is a union between a man and a woman and that no effect may be given to:

> (1) [a] 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 (2) [a] 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.[36]

If the *J.B.* court's reading of Texas's DoMA as jurisdiction-stripping

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relations in contemplation of a sexual relationship, but the state will enforce the contract only if the contract is written and signed and if its enforcement is sought after the relationship is terminated. *Id.* § 513.075.

32. GA. CODE ANN. § 19-3-3.1(b) (2010).

33. *See* BLACK'S LAW DICTIONARY 661 (9th ed. 2009) ("[T]o express or include one thing implies the exclusion of the other, or of the alternative.").

34. When a state's legislature intends to strip jurisdiction from the court, courts require the legislature to do so in very plain language. When a statute imposes a mandatory requirement but does not express whether failure to satisfy that requirement strips jurisdiction, courts "begin with the presumption that the [l]egislature did not intend to make the [statutory requirement] jurisdictional" and that presumption is "overcome only be clear legislative intent to the contrary." City of DeSoto v. White, 288 S.W.3d 389, 394 (Tex. 2009).

35. 326 S.W.3d 654, 667 (Tex. App. 2010).

36. TEX. FAM. CODE ANN. § 6.204(c) (West 2011).

were compelled by the language of Texas's DoMA, the court's holding would be understandable. It is simply not the case, however, that Texas's DoMA requires such a reading. In fact, another Texas appellate court later offered two ways to interpret Texas's DoMA so as to preserve jurisdiction to grant divorce to same-sex couples.[37] One such reading is to understand "divorce [a]s a 'benefit' of state residency, rather than a . . . 'benefit' . . . resulting from marriage."[38] Granting a divorce, then, would not require the court to provide marriage-like benefits to the same-sex couple, which is what Texas's DoMA forbids.[39] The second rationale proffered by the Texas court was that the Texas DoMA only prohibits courts "from taking actions that create, recognize, or give effect to same-sex marriages on a 'going-forward' basis . . . ."[40] Divorce terminates the marriage but does not grant "going-forward" privileges. Under either of these alternative readings, Texas's DoMA can be read to preserve subject-matter jurisdiction over same-sex divorce.[41] Such a reading not only protects the broad jurisdiction of the state court, but also honors the language of the statute and avoids the significant state and federal constitutional quandaries that arise when jurisdiction over a dispute is stripped from the trial court and essentially disappears from the state.

Texas's DoMA is not unique in its language or structure. Other state DoMAs similarly provide that marriage is a civil contract between one man and one woman[42] or that marriage can be entered into only by persons of the opposite sex.[43] These DoMAs do not affect the trial court's general jurisdictional power. Absent explicit jurisdiction-stripping language, trial courts retain the power to hear petitions for same-sex divorce.

B. *The Statutory Roots of Modern Divorce Law Do Not Prevent Courts from Exercising Subject-Matter Jurisdiction over Same-Sex Divorce*

In same-sex divorce cases, confusion over subject-matter jurisdic-

37. State v. Naylor, 330 S.W.3d 434, 441–42 (Tex. App. 2011).

38. *Id.* at 441 (quoting TEX. FAM. CODE ANN. § 6.204(c) (West 2011)).

39. TEX. FAM. CODE ANN. § 6.204(c).

40. *Naylor*, 330 S.W.3d at 441.

41. The narrow issue before the Naylor court was whether the state had standing to intervene. *Id.* at 439. The court, however, provided a cogent interpretation of its DoMA. *Id.* at 441.

42. *E.g.*, COLO. REV. STAT. ANN. § 14-2-104(1) (West 2012) ("[A] marriage is valid in this state if . . . [i]t is only between one man and one woman."); MINN. STAT. ANN. § 517.01 (West 2012) ("Marriage . . . is a civil contract between a man and a woman . . . .").

43. *E.g.*, IND. CODE ANN. § 31-11-1-1 (LexisNexis 2012) ("Only a female may marry a male. Only a male may marry a female."); OHIO REV. CODE ANN. § 3101.01(A) (LexisNexis 2012) ("A marriage may only be entered into by one man and one woman.").

tion also stems from the frequently invoked, but seldom explained, truism that divorce is statutory.[44] Some courts have premised their denial of same-sex divorce petitions on the ground that they lacked subject-matter jurisdiction because their state's divorce statute did not provide for same-sex divorce.[45] An example of this misapprehension of subject-matter jurisdiction is found in a recent Wyoming trial court's dismissal of a same-sex divorce petition.[46] Although ultimately reversed by the Wyoming Supreme Court, the trial court's reasoning in *Christiansen v. Christiansen* is illustrative. The trial court began by noting that Wyoming's DoMA statute defines marriage as a civil contract between a man and a woman.[47] Reasoning that "the jurisdictional grant to dissolve marriages is premised on the definition of marriage provided in [the Wyoming DoMA statute]," the court concluded that "Wyoming statutes do not grant the [c]ourt jurisdiction to dissolve a same-sex marriage" and dismissed the divorce petition for lack of subject-matter jurisdiction.[48] In other words, the court looked to the state DoMA statute to determine whether the court had subject-matter jurisdiction over a same-sex divorce. This "divorce is statutory" argument can also be found in briefs of parties and amici opposing petitions for same-sex divorce in various state trial courts.[49] This argument, however, is wrong.

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44. 27A C.J.S. *Divorce* § 148 (2012) ("The power to grant a divorce is a statutory, and not a common-law, power." (footnote omitted)); *see also*, Bitner v. Bitner, 176 N.W.2d 162, 164 (Iowa 1970) ("Divorce under Iowa law is strictly statutory."); Ruprecht v. Ruprecht, 96 N.W.2d 14, 22 (Minn. 1959) ("Divorces are purely statutory and follow the course of equity so far as the same is applicable."); Northrup v. Northrup, 373 N.E.2d 1221, 1223 (N.Y. 1978) ("The courts of this State have no common-law jurisdiction over divorce or its incidents. The power to modify a provision for alimony is only such as is conferred by statute." (citations omitted)); Wood v. Wood, 320 S.W.2d 807, 810 (Tex. 1959) ("'The right to apply for or obtain a divorce is not a natural one, but is accorded only by reason of statute, and the state has the right to determine who are entitled to use its courts for that purpose and upon what conditions they may do so.'" (quoting 17 AM. JUR. *Divorce and Separation* § 8 (1957))).

45. *E.g.*, Christiansen v. Christiansen, No. 2010-266, slip op. at ¶¶ 6, 14–15 (Wyo. Dist. Ct. Nov. 8, 2010), *rev'd*, 253 P.3d 153 (Wyo. 2011).

46. *Id.*

47. *Id.* at ¶ 6.

48. *Id.* at ¶¶ 14–15.

49. *See, e.g.*, Brief Amicus Curiae of Senator Delbert Scott at 1, Sparks v. Mauceri-Sparks, No. 07BU-CV04904 (Mo. Cir. Ct. Apr. 1, 2008), *available at* http://www.npgdigital.net /files/ sparks_amicus_brief.pdf. In *Sparks*, the trial court denied a motion to dismiss premised on lack of subject-matter jurisdiction. *See* Order Denying Motion to Dismiss, Sparks v. Mauceri-Sparks, No. 07BU-CV04904 (Mo. Dist. Ct. Mar. 18, 2008). Amicus Senator Delbert Scott argued that Missouri courts lack jurisdiction to hear petitions for same-sex divorce because divorce jurisdiction depends on statute. Brief Amicus Curiae of Senator Delbert Schott at 2-3 (quoting London v. London, 826 S.W.2d 30, 32 (Mo. Ct. App. 1992)). Similarly, the Texas Attorney General, in his Response to the State of Texas to the Petition for Review in *In re Marriage of J.B. & H.B.*, argued that a valid opposite-sex marriage is a prerequisite to the Texas court's jurisdiction in divorce cases. Response of the State of Texas to the Petition for Review at 3–4, *In re* Marriage of J.B. & H.B., No. 11-0024, 2011 WL 1113415 (Tex. Mar. 21, 2011).

The "divorce is statutory" truism is readily found in state court matrimonial jurisprudence, but because it is rarely explained, the phrase has the potential to mislead courts facing petitions for same-sex divorce. These courts might presume that because divorce as we understand it today did not exist at common law, their only jurisdiction over divorce must necessarily derive from statutes. Historically speaking, however, that underlying presumption is incorrect. While it is true that the colonies inherited from England the tradition that "[m]atrimonial actions were not known to the common-law courts, but were instead a creation of the ecclesiastical courts,"[50] individuals seeking freedom from their matrimonial bonds could nonetheless find judicial as well as legislative relief.[51] The House of Lords granted legislative divorce, as did many early legislatures in the United States.[52] More important for our purposes, some common law courts in the colonies followed the tradition of the common law courts of England by asserting jurisdiction over causes of action similar to divorce.[53] At that time, courts of equity and courts of law granted certain relief, albeit in different ways. Modern courts have by and large abandoned the distinction between courts of equity and courts of law: judges get just one hat, and it has the powers of both law and equity.[54] The claim that a court lacks subject-matter jurisdiction over same-sex divorce because divorce is statutory is therefore historically inaccurate.[55]

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50. Lacks v. Lacks, 359 N.E.2d 384, 388 (N.Y. 1976) (citing Langerman v. Langerman, 104 N.E.2d 857, 858–59 (N.Y. 1952)).

51. NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 34–40 (1962) (discussing both judicial and legislative divorce in the American colonies).

52. *Id.* at 32–40; 9 RULING CASE LAW, *Divorce and Separation* §§ 20–24 (William M. McKinney et al. eds., 1929); RILEY, *supra* note 1, at 34–36. The practice of legislative divorce seems curious to modern day couples because it ceased in the mid-1800s when states began to pass constitutional and legal bans on legislative divorce. *Id.* at 36. **R**

53. BLAKE, supra note 51, at 38 (explaining that courts in Massachusetts often handled divorces, whereas in Connecticut divorce was often a legislative function); *see also* 9 RULING CASE LAW, *supra* note 52, at § 190 ("[C]ourts of equity in this country have, as a general rule, assumed inherent jurisdiction to decree the annulment of marriages for certain causes which under the law as administered in the ecclesiastical courts were ground for a divorce a vinculo matrimonii [from the bonds of matrimony]." (footnote omitted)). Even in the conservative southern colonies, unhappily married couples could obtain "divorces of bed and board" which permitted couples to live apart and permitted a court to order maintenance but did not permit parties to remarry. RILEY, *supra* note 1, at 25–26. **R** **R** **R**

54. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.6(1) (2d ed. 1993).

55. The assertion that "divorce is statutory" is appropriate to limit a court's exercise of extra-statutory remedies in cases that are covered by the state's divorce statute. For example, if a statute limits alimony, the court's ability to order additional alimony-like payments would be circumscribed. In that sense, the phrase "divorce is statutory" makes sense, but we suggest abandoning the phrase because it is misleading.

C. *Even in States with Family Courts of Limited Jurisdiction, Courts Have Subject-Matter Jurisdiction over Same-Sex Divorce*

A third jurisdictional muddle over same-sex divorce arises in states that have created family courts with limited jurisdiction. In a handful of jurisdictions, the state has created a special court to hear family law cases, including divorce.[56] In Rhode Island, for example, the family court's jurisdiction is limited to issues surrounding divorce and children.[57] The placement of divorce in a specialized court raises the potential for same-sex couples seeking divorce to be caught betwixt and between, which is what happened to a same-sex couple in a 2007 Rhode Island case. In *Chambers v. Ormiston*, two Rhode Island residents who had been married in Massachusetts petitioned for divorce in Rhode Island's family court.[58] The family court questioned its own jurisdiction and certified the jurisdiction question to the Rhode Island Supreme Court.[59] A divided court ruled that the family court did not have jurisdiction over same-sex divorce, reasoning that when the legislature created the family court, it could not have envisioned same-sex marriage so it could not have vested jurisdiction over same-sex divorce in the family court.[60]

The majority's analysis is questionable on several levels, but what is crucial when considering jurisdiction is that both the majority and dissent indicated that under the facts, no forum existed to provide relief for these parties. As the dissent rails and the majority regrets, the denial of access to Rhode Island's Family Court apparently leaves the parties in "a virtual legal limbo, unable to extricate themselves from [their Massachusetts marriage]"[61] because "the Rhode Island Family Court is the

56. The states of South Carolina, Delaware, Rhode Island, and West Virginia have family courts of limited jurisdiction. S.C. CONST. art. V, § 11 (granting original jurisdiction to circuit courts, except in those cases in which exclusive jurisdiction is given to inferior courts); S.C. CODE ANN. § 63-3-530 (2011) (creating family courts with exclusive jurisdiction in domestic matters); DEL. CODE ANN. tit. 10, § 921 (West 2012) (identifying the jurisdiction of Delaware's family court); R.I. GEN. LAWS § 8-10-3 (2011) (identifying the jurisdiction of Rhode Island's family court); W. VA. CODE ANN. § 51-2A-2 (West 2012) (establishing the jurisdiction of family courts). In addition, the Louisiana legislature has the power to establish a separate family court but has done so for only one parish. LA. CONST. art. V, §§ 16(A), 18 (granting original jurisdiction to district courts but limiting jurisdiction of juvenile and family courts); LA. REV. STAT. ANN. § 13:1401 (2011) (establishing family court for the parish of East Baton Rouge). We do not mean this discussion to include courts' internal organizational decisions, such as when a court, for its own administrative convenience, assigns certain judges to the "family calendar."

57. *About the Family Court*, RHODE ISLAND JUDICIARY, 1 http://www.courts.ri.gov/Courts/FamilyCourt/PDFs/AbouttheFamilyCourt.pdf (last visited Sept. 14, 2012).

58. 935 A.2d 956, 958–59 (R.I. 2007).

59. *Id.* at 958.

60. *Id.* at 962, 967. The Rhode Island Supreme Court has five members; two dissented. *Id.* at 967.

61. *Id.* at 973 (Suttell, J., dissenting).

only forum available to them to terminate their marriage."[62] The implications of this extraordinary conclusion do not appear to have been contemplated by either the majority or dissent. If the parties truly have no forum to terminate their marriage, then the Rhode Island General Assembly effectively rendered a cause of action moot, not by eliminating the cause of action, but by an inadvertent jurisdictional sleight of hand.

Consider the following analogy to a minor's access to the fundamental right to abortion. Suppose a state legislature seeks to limit access to abortion by requiring minors to obtain parental consent prior to the abortion. Supreme Court precedent requires that the state set up a system through which the minor can bypass the parental consent requirement and receive consent from a court, rather than her parents, for the procedure.[63] It would be constitutionally problematic if the state's family court of limited jurisdiction disclaimed the ability to hear such petitions because of its statutorily limited jurisdiction, while the state's general trial court disclaimed jurisdiction because family matters have been located in the family court. This minor would also be caught betwixt and between with her federal constitutional right being denied based on a perceived lack of subject-matter jurisdiction. It cannot be that no state court has jurisdiction over the minor's petition. If it turns out that the limited family court does not have jurisdiction, then jurisdiction over the minor's petition must remain in the state trial court.

Neither the majority nor the dissent in *Chambers* contemplated that if the Rhode Island Family Court is unavailable to hear a same-sex divorce petition, then the parties nonetheless could find relief in Rhode Island's courts of general jurisdiction. Absent such a conclusion, this example illustrates the constitutional quandary that the Rhode Island court's conclusion invites.

Forty-nine states have subject-matter jurisdiction over same-sex divorce. With the exception of Georgia, state DoMAs do not strip courts of subject-matter jurisdiction; state divorce statutes do not dictate whether a court has subject-matter jurisdiction; and unless a state has granted a specialty court jurisdiction over same-sex divorce, the state trial court of general jurisdiction retains subject-matter jurisdiction over same-sex divorce petitions. As such, state courts cannot refuse to hear

62. *Id.* at 970. The majority agreed that the parties are in a virtual legal limbo. *Id.* at 966–67 (majority opinion) (noting that its decision will be "cold comfort" to the parties, and suggesting that the parties' remedy lies with the legislature).

63. Bellotti v. Baird, 443 U.S. 622, 647 (1979) (declaring that if a state requires parental notification for a minor's decision to have an abortion, the state must also provide access to the courts as an avenue for the minor to obtain authorization to seek an abortion in lieu of the parental consent).

same-sex divorce petitions by asserting that the courts lack subject-matter jurisdiction.

III. State DoMAs Do Not Prohibit State Courts from Granting Relief in Same-Sex Divorce Cases

Careful examination of dismissed same-sex divorce cases reveals that although courts often assert that they lack subject-matter jurisdiction over same-sex divorce, the issue they are really grappling with is whether they have the authority to grant relief. As stated above, nearly all state courts have subject-matter jurisdiction over same-sex divorce. Thus, the next hurdle for same-sex couples seeking divorce can be establishing a claim for which relief can be granted.

In cases where courts did acknowledge jurisdiction over same-sex divorce, some went on to dismiss the divorce petitions on the premise that their state's DoMA, or the absence of any state law recognizing same-sex marriages, prevented them from granting relief.[64] Like the assertion that courts lack subject-matter jurisdiction, this assertion is false. With only one exception, no state DoMA explicitly or implicitly denies courts the power to grant same-sex divorce.

A. *DoMA Statutes Do Not Explicitly Prohibit a Court from Granting a Same-Sex Divorce*

By carefully examining the express statutory language of state DoMAs and their corresponding legislative history, the vast majority of DoMAs do not explicitly prohibit a court from granting relief to same-sex couples seeking divorce. Only Georgia's DoMA includes explicit language pertaining to how same-sex marriages from other states should be treated by the courts for the purpose of divorce.[65] The silence coming from all other states on this issue likely stems from the simple reality that DoMAs are about marriage, not divorce. DoMAs were enacted to prevent same-sex couples from marrying in a different state and then demanding the rights, responsibilities, and privileges of marriage from their home state.[66] DoMAs were not created to prevent same-sex couples

64. *E.g.*, Gonzalez v. Green, 831 N.Y.S.2d 856, 859 (Sup. Ct. 2006) (dismissing the claim for divorce on the grounds that the Massachusetts marriage was void and plaintiff failed to state a claim for which relief could be granted despite the fact that New York did not have a state DoMA); Irwin v. Lupardus, No. 4137, 1980 WL 355015, at *1–2 (Ohio Ct. App. 1980) (affirming the lower court's determination that relief could not be granted for same-sex divorce).

65. Ga. Const. art. I, § 4, para. 1(b). For the language of every state DoMA, see Erica A. Holzer, *Defense of Marriage Acts: A Fifty State Survey*, Mitchell Open Access (Mar. 5, 2012), http://open.wmitchell.edu/stusch/1.

66. *See*, *e.g.*, Miss. Const. art. XIV, § 263A ("Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or

from getting divorced. This same conclusion was reached by a Washington state court in *Gill v. Adkins*.[67] In that proceeding, a same-sex couple seeking divorce faced a state DoMA that declared same-sex marriages from other jurisdictions to be invalid in Washington.[68] The *Gill* court nonetheless entered a decree of dissolution, explaining that the text of the state DoMA did not impact its ability to grant a same-sex divorce.[69]

The original intent of state DoMAs supports the textual reading that these laws were never intended to implicate divorce. The intent propelling the enactment of state DoMAs concerned the granting and recognizing of same-sex marriages—not same-sex divorce.[70] State marriage policy has to do with what types of relationships the state wants to sanction and what types of family structures the state wants to endorse. State DoMAs were drafted to specify that the state's marriage policy does not condone same-sex marriage. State divorce policy, however, is quite different. Divorce policy focuses on the process of facilitating an efficient and equitable disentanglement of a couple's affairs.[71] Broadly speaking, although any divorce is arguably against the state's interests in marriage, states have decided that forcing acrimonious couples to stay married is even worse.[72] As such, although DoMA restrictions on who can marry

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foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.").

67. No. 09-3-01572-1, slip op. at ¶ 3.1 (Wash. Super. Ct. Feb. 5, 2010) (granting a dissolution of marriage of a same-sex couple).

68. WASH. REV. CODE § 26.04.020(1)(c) (West 2005) (subsection repealed 2012) (prohibiting marriages between parties "other than a male and female"); *see id.* § 26.04.020(3) (stating that marriages from other jurisdictions are invalid if prohibited under Washington law).

69. *See Gill*, slip op. at ¶ 3.1; Laura McVicker, *Clark County's First Same-Sex Divorce Finalized by Judge*, THE COLUMBIAN, Feb. 10, 2010, http://www.columbian.com/news/2010/Feb/10/clark-countys-first-same-sex-divorce-finalized-by; *see also* Port v. Cowan, 44 A.3d 970 (Md. 2012).

70. It is difficult to establish what lawmakers were *not* thinking. We can establish, though, that the lawmakers *were* thinking and talking about marriage. Consider this excerpt from a comprehensive article telling the story of the enactment of state DoMAs:

> The year is 1993 and the Hawaii Supreme Court has just declared—as a matter of state constitutional law—that the state prohibition of same-sex marriage constitutes gender discrimination. Within a few years, thirty-five states enacted laws prohibiting the recognition of same-sex marriages and Congress, responding "to a very particular development in the State of Hawaii," enacted the Defense of Marriage Act.

Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1630 (2010) (footnotes omitted). It is telling that in this article Professor Devins does not mention the word "divorce."

71. *See, e.g.*, 23 PA. CONS. STAT. ANN. § 3102(a) (West 2012) (stating the policy of Pennsylvania's divorce code).

72. This is evidenced by the adoption of no-fault divorce regimes throughout the states. *See* P.B. v. L.B., 855 N.Y.S.2d 836, 839 (2008) ("Implicit in the statutory scheme is the legislative

are consistent with the state's alleged interests in marriage, suggesting that DoMAs also restrict who can divorce is in direct contravention of the state's interests when it comes to divorce.

A good example of a court looking to the intent behind a state DoMA to interpret its language arose in Ohio in the context of domestic violence. In *State v. Carswell*, the Ohio Supreme Court determined that Ohio's constitutional DoMA, enacted by ballot initiative, did not preclude same-sex married partners from utilizing domestic violence statutes that criminalized domestic violence between spouses.[73] The court determined that voter intent in enacting the DoMA was to prevent the creation or recognition of a legal status for same-sex couples that approximates marriage through legislative, executive, or judicial action—not to deny same-sex couples access to domestic violence statutes.[74] As such, the court held that giving same-sex couples access to domestic violence statutes did not contradict the state's constitutional DoMA.

The text and intent of state DoMAs reveal that state legislatures simply did not contemplate the situation now facing same-sex couples seeking divorce. Divorce never entered the DoMA debate in part because the policies behind marriage are so vastly different from the policies behind divorce. Examining the text and intent of state DoMAs reveal that DoMA statutes do not explicitly—nor were they ever intended to—prevent a court from granting relief to same-sex couples seeking divorce.[75]

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recognition that it is socially and morally undesirable to compel parties to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them 'to extricate themselves from a perpetual state of marital limbo.'" (citation omitted)).

73. 871 N.E.2d 547, 554 (Ohio 2007) (holding that "the term 'person living as a spouse' as defined in [Ohio's domestic violence statute] . . . does not create or recognize a legal relationship that approximates the designs, qualities, or significance of marriage as prohibited by Section 11, Article XV of the Ohio Constitution"). Ohio's DoMA states:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

OHIO CONST. art. XV, § 11.

74. *Carswell*, 871 N.E.2d at 553–54. Determining the collective intent of thousands of voters poses an interesting challenge, but most scholars agree that the ordinary rules of construction apply to constitutional amendments. *See* 5 MICH. CIV. JUR. *Constitutional Law* § 17 (2012).

75. The sole exception, as we discuss above, is the state of Georgia. *See* GA. CONST. art I, § 4, para. 1(b).

B. *DoMA Statutes Do Not Implicitly Prohibit a Court from Granting a Same-Sex Divorce*

Although only Georgia's DoMA explicitly prevents a court from granting a same-sex divorce, the absence of such a provision in other DoMAs does not preclude arguments that these DoMAs implicitly prevent courts from doing so. Courts accepting such arguments have been persuaded by specific language in their state's DoMA. The language of various state DoMAs regarding the court's power to grant relief can be divided into four groups: (1) DoMAs declaring same-sex marriages void or void ab initio; (2) DoMAs that prohibit a court from "recognizing" or "giving effect to" same-sex marriages performed in other states; (3) DoMAs that prohibit courts from granting any "benefit of marriage" to a same-sex couple; and (4) DoMAs that define marriage as only a union of "one man and one woman."[76] It is our contention that none of this statutory language implicitly prohibits same-sex divorce. Regardless of the language found in a state DoMA, courts have the power to grant relief to same-sex couples seeking divorce.

1. DoMAs That Declare Same-Sex Marriages Void or Void Ab Initio Do Not Prohibit Same-Sex Divorce

Some state DoMAs flatly declare that same-sex marriages performed in other jurisdictions are void[77] or void ab initio.[78] The key question raised in these jurisdictions is whether a court can dissolve a void marriage. The answer, simply put, is yes. Courts have been dissolving void marriages for over two centuries, taking at least two approaches to do so. One approach grants dissolution without recognizing the marriage as valid. The second approach recognizes the marriage for the limited purpose of granting a divorce. Both of these methods are viable in jurisdictions with DoMAs that declare same-sex marriages to be void because neither approach requires the court to rule, or even opine, on the validity of the marriage before it.

76. *See* Holzer, *supra* note 65, at 2–4. R

77. *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 701 (2011) ("When residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State. . . . Any marriage performed in another state that would violate any provisions of subsections 2 to 5 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State." (section 5 prohibits same-sex marriage)); *see also id.* § 751.

78. *See* BLACK'S LAW DICTIONARY 1709 (9th ed. 2009) (defining void ab initio as "[n]ull from the beginning . . ."); *see, e.g.*, MISS. CODE ANN. § 93-1-1(2) (West 2011) ("Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.").

Courts have long been willing to divorce parties to void marriages because, in so doing, they need not recognize the marriage as valid.[79] In her preeminent book on the history of divorce, Glenda Riley noted that as early as 1745, a Massachusetts man obtained a divorce despite the fact that his marriage was legally void because of his status as a slave.[80] Similarly, in putative spouse cases, divorce is an available remedy to parties who entered their marriage in good faith even though the marriage is technically void.[81] As the Wisconsin Supreme Court stated, the divorce proceeding in a putative spouse case "merely establishe[s] the status of the parties toward each other as judicially separated and absolved from all obligations of a marital nature existing between them."[82] In other words, a court need not "recognize" a marriage that is deemed void under its state's law in order to provide the remedy of divorce.[83]

As an equally sufficient alternative, matrimonial jurisprudence is littered with examples of courts recognizing void marriages for a specific, limited purpose without validating the marriage as a whole. This "incidental approach" has been used for decades—especially by courts facing petitions from couples that are not accepted by society for moral reasons.[84] For example, in 1953, the Court of Appeals of New York recognized an out-of-state incestuous marriage between an uncle and niece for the purpose of distributing the wife's estate upon her death, despite a New York statute that would have prohibited the couple from marrying in New York.[85] Additionally, in *In re Dalip Singh Bir's Estate*, the California Court of Appeals held that two women could share in their deceased husband's estate despite the fact that the second marriage was polygamous and therefore void.[86] Similarly, the Supreme Court of

79. *See, e.g.*, Blumenthal v. Blumenthal, 275 P. 987, 989 (Cal. Dist. Ct. App. 1929) ("[D]ivorce is not conclusive that a marriage actually existed at the time of the divorce between the parties to the action in which the divorce was granted.")

80. RILEY, *supra* note 1, at 14.

81. *See* Hicklin v. Hicklin, 509 N.W.2d 627, 631 (Neb. 1994) (ordering a wife to be compensated as if there were a dissolution of marriage even though the marriage was void). A putative spouse is typically granted many of the rights of an actual spouse, such as alimony. *See, e.g.*, Mabry v. Mabry, 452 So. 2d 248, 249–50 (La. Ct. App. 1984) (entitling the putative spouse to the civil effects of marriage and affirming the district court's decree, which recognized a putative spouse and awarded alimony).

82. Oborn v. State, 126 N.W. 737, 744 (Wis. 1910).

83. *See, e.g.*, Beth R. v. Donna M., 853 N.Y.S.2d 501, 505 (Sup. Ct. 2008).

84. *See generally* 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, 722–57 (2004).

85. *In re* May's Estate, 114 N.E.2d 4, 4–7 (N.Y. 1953).

86. 188 P.2d 499, 502 (Cal. Dist. Ct. App. 1948); *see also* Albina Engine & Mach. Works v. O'Leary, 328 F.2d 877 (9th Cir. 1964) (granting death benefits to a woman whose marriage was invalid because her husband was technically married to another woman).

Mississippi recognized an interracial couple's out-of-state marriage for inheritance purposes even though the Mississippi Constitution and a state statute voided interracial marriages within the state.[87] In all three of these cases, the courts were explicit in stating that they considered these marriages to be absolutely void, yet each of these courts was able to provide relief by focusing on the narrow issue before it.

As outlined by these examples, a court need not recognize a marriage as valid in order to provide the remedy of divorce. Slaves, putative spouses, and couples in incestuous, polygamous, and interracial marriages that are void under state law have previously sought and obtained judicial relief. Therefore, without explicit statutory language to the contrary, courts can grant same-sex couples divorces even if the state DoMA declares that the couple's marriage is void.

2. DoMAs That Prohibit "Recognizing" or "Giving Effect to" Same-Sex Marriages Performed in Other Jurisdictions Do Not Prohibit Same-Sex Divorce

Twenty state DoMAs contain language that prohibits "recognizing" or "giving effect to" a same-sex marriage from another jurisdiction.[88] Some courts have found that this type of DoMA prevents them from divorcing same-sex couples. For example, in *In re Marriage of J.B. & H.B.*, a Texas Court of Appeals held that it could not grant a same-sex divorce because Texas's statutory DoMA prohibits courts from giving effect to any public act, record, or judicial proceeding that validates a same-sex marriage in Texas or any jurisdiction.[89] Since the couple's Massachusetts marriage certificate was a public record that validated the couple's same-sex marriage, the court determined that presiding over the couple's divorce petition—even if only to deny the petition—would be giving that certificate some legal effect.[90]

As previously discussed, the *J.B.* court erred in its analysis of its DoMA's effect on subject-matter jurisdiction. The court misapprehended the impact of Texas' DoMA on its ability to grant relief. That mistake is highlighted by the court's conclusion that Texas's DoMA for-

87. Miller v. Lucks, 36 So. 2d 140, 141–42 (Miss. 1948).

88. *See* Erica A. Holzer, *DoMA Statutes and Same-Sex Divorce Litigation*, Mitchell Open Access, 2–3 (Mar. 5, 2012), http://open.wmitchell.edu/stusch/2. *See also, e.g.*, Tex. Const. art. I, § 32(b) ("This state or a political subdivision of this state may not create or *recognize* any legal status identical or similar to marriage." (emphasis added)); Fla. Stat. Ann. § 741.212(2) (West 2012) ("The state, its agencies, and its political subdivisions may not *give effect to* any public act, record, or judicial proceeding of any state . . . or any other place or location respecting either a marriage or relationship [between persons of the same-sex] or a claim arising from such a marriage or relationship." (emphasis added)).

89. 326 S.W.3d 654, 665, 667 (Tex. App. 2010).

90. *Id.* at 665.

bade it from dissolving a same-sex marriage because doing so would "give effect to" the marriage, while then going on to state that this same DoMA would not forbid a court from declaring the same-sex marriage void.[91] The court asserted, without analysis, that divorce presupposes a valid and lawful marriage, and therefore requires the court to recognize the same-sex marriage, while a decree of voidness does not.[92] It is unclear why a voidness proceeding that would provide nearly all the same relief as a divorce—including property division, custody determinations, name changes, temporary restraining orders, and a legal termination of the marriage—could be done without "recognizing" the relationship. It would certainly seem that if no "recognition" or "authorization" is necessary to determine the legal status of parties in a voidness proceeding, then there is no logical reason why such recognition would be necessary in a divorce proceeding.

DoMA statutes were enacted to prevent couples from marrying elsewhere and then demanding the benefits and rights that flow from marriage. Granting a divorce is not what legislatures had in mind when they decreed that courts could not "give effect to" a marriage license from another state. A Texas Court of Appeals in the case of *State v. Naylor* considered this analysis plausible.[93] Reading the same Texas DoMA provision analyzed by the *J.B.* court, the *Naylor* court reasoned that the plain language of Texas's DoMA could allow the court to grant relief to same-sex couples seeking divorce.[94] According to *Naylor*, one could argue that Texas courts are merely prohibited from "giv[ing] effect to same-sex marriages on a '*going-forward*' basis, so that the granting of a divorce would be permissible."[95] In other words, the Texas DoMA could be read as prohibiting giving same-sex marriages effect only in the sense of allowing couples to pursue rights and responsibilities that flow from an ongoing marriage; such a reading does not prohibit giving the marriage effect by granting the couple a divorce. Thus, even states with DoMAs prohibiting "recognizing" or "giving effect to" same-sex marriages can grant a same-sex divorce because providing such relief neither requires courts to recognize nor give effect to that marriage.

91. *Id.* at 667.

92. *Id.*

93. 330 S.W.3d 434, 441 (Tex. App. 2011).

94. *Id.*

95. *Id.* (emphasis added). Similarly, a West Virginia judge dissolved a Vermont civil union, holding that "[t]he parties are citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state." *In re* Marriage of Gorman & Gump, No. 02-D-292, slip op. at ¶ IX (W. Va. Fam. Ct. Dec. 19, 2002). At the time, West Virginia had a state DoMA similar to Texas's. *See* W. VA. CODE ANN. § 48-2-603 (West 2012) (effective Sept. 1, 2001).

3. DoMAs That Prohibit Granting Any "Benefits of Marriage" to Same-Sex Couples Do Not Prohibit Same-Sex Divorce

A third group of DoMAs are those that include language prohibiting courts from granting any "benefits of marriage" to same-sex couples married in other states.[96] Concluding that this language also prohibits a court from granting a same-sex couple a divorce requires a determination that divorce is a "benefit" of marriage. It is not. Benefits of marriage are typically thought to be the rights and privileges that flow from a legal marriage. Examples of such benefits include filing joint state income tax returns; inheriting a share of a spouse's estate; receiving exemptions from state estate and gift taxes; receiving wages, workers' compensation, and retirement plan benefits for a deceased spouse; making medical decisions for a spouse should the spouse become incapacitated; and receiving state medical, disability, and education benefits.[97] Couples get married, in part, to gain access to these advantages. Further, these benefits are exactly what state legislators sought to prevent same-sex couples from obtaining when they enacted DoMAs that explicitly deny same-sex couples the benefits of marriage. An obvious reason divorce is not listed among these benefits is that, unlike inheritance rights, for example, couples do not get married to gain access to divorce. Indeed, divorce is an unfortunate result of a failed marriage, not a boon offered only to those who are legally wed.

Still, some argue that divorce comes with certain benefits—such as a mechanism for dividing property, determining custody, and obtaining spousal support—so same-sex couples should be denied access to these benefits. This argument fails for two reasons. First, excluding same-sex couples from the benefits of marriage is not the same as excluding them from the efficiencies of obtaining a judicial divorce. If the legislature intended to do both, they could have stated as much.[98] Second, this argu-

96. *E.g.*, Alaska Stat. Ann. § 25.05.013(b) (West 2012) ("A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage"); La. Civ. Code Ann. art. 3520(B) (2011) ("A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.").

97. *See* A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 Fordham L. Rev. 69, 87–88 (1999).

98. *See, e.g.*, Assemb. Judiciary Comm., Statement to Assemb., Leg. 212-3787, 1st Sess., at 2 (N.J. 2006), *available at* http://www.njleg.state.nj.us/2006/Bills/A4000/3787_S1.PDF. The statement first declares that same-sex couples are entitled to the benefits of marriage. *Id.* ("The bill provides that parties to a civil union would have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage.").

ment fails to recognize that these "benefits" of divorce are already available to same-sex couples, even in non-recognizing states. Courts regularly provide property division, custody orders, and spousal support to couples—even same-sex couples—regardless of marital status.[99] The only relief that married same-sex couples cannot obtain is a legal dissolution of their marriage. The actual divorce decree is merely another way courts provide relief to untangle legal relationships; it is not a "benefit" of marriage.

A judge faced with a DoMA prohibiting her from granting any benefit of marriage may well be precluded from granting a same-sex couple a spousal share, workers' compensation, loss of consortium damages, and a myriad of other benefits that flow from legal marriage. This same judge, however, is not precluded from granting the same couple a divorce because divorce is not a benefit of marriage.

4. DoMAs That Define Marriage as Only a Union of "One Man and One Woman" Do Not Prohibit Same-Sex Divorce

Finally, a handful of DoMAs simply define marriage as a union between one man and one woman.[100] When determining the implication of these definitional DoMAs, perhaps more important than what these DoMAs say is what they do not say. These DoMAs do not declare same-sex marriages void, nor do they prohibit courts from recognizing same-sex marriages validly performed in other states or from granting the benefits of marriage to these couples. Instead, these DoMAs simply provide a definition of marriage without prescribing how to treat same-sex marriages from other jurisdictions.

The plain language of these definitional DoMAs indicates that the state legislatures were interested in preserving marriage as a status available only to opposite-sex couples. The legislatures in these jurisdictions

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Then, three sentences later—in a separate proclamation—the statement declares that same-sex couples are entitled to the benefits of divorce. *Id.* ("The dissolution of civil unions would also follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of a marriage."). Had there been no difference between the benefits of marriage and the benefits of divorce, the legislature would not have considered and discussed these two institutions separately.

99. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005) (holding a woman was required to pay child support to her former same-sex partner when the couple planned for a child conceived through artificial insemination and held the child out as their natural child).

100. Six states currently have such DoMAs. *See* Holzer, *supra* note 88, at 2 (listing Colorado, Hawaii, Idaho, Maryland, North Carolina, and Oregon). *See also, e.g.*, COLO. CONST. art. II, § 31 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); MD. CODE ANN., FAM. LAW § 2-201 (West 2012) ("Only a marriage between a man and a woman is valid in this State.").

could have included more specific restrictions, as other jurisdictions have,[101] but they did not. Therefore, as previously argued, it can be presumed that excluding these specific restrictions was intentional and any reading of these definitional DoMAs as prohibiting divorce would impermissibly amend the plain meaning of these statutes. The Maryland Court of Appeals took just such a view when it recently dissolved a California same-sex marriage.[102] The court held that the plain wording of its DoMA only precluded the court from recognizing same-sex marriages performed in Maryland, not those validly performed in another jurisdictions.[103] An Iowa court similarly dissolved a civil union under its then-valid definitional DoMA in *In re Marriage of Brown & Perez*.[104] In 2003, Iowa's DoMA stated that "[o]nly a marriage between a male and a female is valid."[105] Nonetheless, the court terminated the couple's Vermont civil union and also distributed the couple's property.[106] Likewise, in *Glaser v. Grassman*, a Minnesota court declared that two women, who had been validly married in California, were henceforth "single individuals, with all rights of an unmarried individual, and are free and clear of any continuing obligation to each other deriving from their marriage . . . ."[107]

The legislative intent propelling the enactment of these definitional

101. *See, e.g.*, DEL. CODE ANN. tit. 13, § 101(d) (West 2009) ("A marriage obtained or recognized outside the State between persons [of the same gender] shall not constitute a legal or valid marriage within the State."); KAN. STAT. ANN. § 23-2508 (West 2012) ("It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman."); 23 PA. CONS. STAT. ANN. § 1704 (West 2012) ("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."); VA. CODE ANN. § 20-45.2 (West 2012) ("Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable"); W. VA. CODE ANN. § 48-2-603 (West 2012) ("A public act . . . of any other state . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state . . . shall not be given effect by this state.").

102. Port v. Cowan, 44 A.3d 970 (Md. 2012).

103. Id. At 978 ("Other states intending to prevent recognition of valid foreign same-sex marriages have done so expressly and clearly, rather than by implication, subtlety, or indirection.").

104. *In re* Marriage of Brown & Perez, No. CDCD 119660, slip op. at 1–2 (Iowa Dist. Ct. Dec. 24, 2003).

105. IOWA CODE § 595.2(1) (2009). Iowa's DoMA was subsequently held unconstitutional. Varnum v. Brien, 763 N.W.2d 862, 906–07 (Iowa 2009).

106. *In re Marriage of Brown & Perez*, slip op. at 2 (incorporating the Stipulation entered into by the parties).

107. No. 27-CV-10-16600, slip op. at 3 (Minn. Dist. Ct. July 22, 2010). Minnesota's DoMA states that contractual rights granted by virtue of an out-of-state same-sex marriage or its termination are unenforceable in Minnesota. MINN. STAT. § 517.03(b) (2011) ("A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.").

DoMAs concerned the granting and recognizing of same-sex marriages, with a focus on who is allowed to marry and not who is allowed to divorce. Like the even more proscriptive DoMAs previously discussed, these DoMAs neither explicitly nor implicitly prevent a judge from granting the remedy of divorce to married same-sex couples, and they were never intended to do so.

IV. Pathways to Same-Sex Divorce In DoMA States

This Article has discussed and debunked initial roadblocks facing same-sex couples seeking divorce. In sum, regardless of the type of DoMA on the books, state trial courts have subject-matter jurisdiction to hear petitions for same-sex divorce, and married same-sex couples seeking a divorce state a valid claim for which relief can be granted. That being established, this Part discusses three pathways to obtaining a same-sex divorce: using the resident state's divorce statutes, using the marrying state's divorce statutes, or obtaining declaratory relief.

A. *Using the Resident State's Divorce Statutes to Obtain a Same-Sex Divorce*

A same-sex couple can petition a court for a divorce under the divorce statutes of their state of residence. Some statutes define divorce as "the termination of the marital relationship between a husband and wife."[108] Such statutes arguably create two prerequisites for dissolution—first, that the couple be married, and second, that the couple be of the opposite sex.

Presumably, if a same-sex couple is seeking a divorce, the couple is legally married, at least in some jurisdictions. The question might arise, however, whether a couple can meet the statutory requirement of a "marriage" in a state that considers that marriage invalid. A same-sex couple can offer three responses to this question. First, even if the marriage is invalid in their state of residency, the marriage is valid in several other jurisdictions. Divorce statutes do not specify that the marriage needs to be valid in the divorcing state and courts need not read such a requirement into the statute.[109] Second, the couple can argue that a void marriage does not prevent a court from granting relief.[110] As previously

108. *E.g.*, Minn. Stat § 518.06 (2011).

109. *See* State v. Naylor, 330 S.W.3d 434, 441 (Tex. App. 2011); *see also* Salucco v. Alldredge, No. 02E0087GC1, 2004 WL 864459, at *4–5 (Mass. Super. Ct. Mar. 19, 2004) (dissolving a Vermont civil union using Massachusetts law); Hammond v. Hammond, No. FM-11-905-08B, slip op. at 2 (N.J. Super. Ct. Ch. Div. Feb. 6, 2009) (using New Jersey divorce law rather than civil union dissolution law with respect to a Canadian same-sex marriage).

110. Simply because a marriage is invalid in the state in which the couple seeks divorce does not mean relief cannot be granted. *See supra* Section III.B.1. *But see* Kern v. Taney, 11 Pa. D. &

discussed, countless courts have divorced couples in void marriages. Third, under the incidents of marriage approach previously discussed, same-sex couples can ask the court to recognize their marriage for the specific, limited purpose of divorce. For example, in *Christiansen v. Christiansen*, the Wyoming Supreme Court recognized the existence of a valid Canadian same-sex marriage for the limited purpose of establishing a condition precedent to granting a divorce.[111] The court clearly stated that the recognition was "not tantamount to state recognition of an ongoing same-sex marriage."[112] Under each of these arguments, the court can find that a valid marriage exists for the purposes of the state divorce statute.

Still, some courts may insist that their divorce statute includes a second requirement: that the couple seeking the divorce be in a valid opposite-sex marriage. This requirement, however, is misplaced. Courts have often encountered gendered language in statutes—especially in family law—and have applied gender-neutral readings in order to address modern issues that previous legislatures did not consider.[113] One such example is statutes providing for second-parent adoptions. Although many of these statutes refer to a husband and wife, courts have applied these statutes to allow lesbians and gay men to adopt their spouses' children.[114] Similarly, courts have applied a gender-neutral reading to statutes regarding parentage of children conceived using anonymously provided sperm and to child support obligations between former same-sex partners.[115] This trend continues in the context of same-sex marriage. In 2011, a Maryland court ruled that "the spousal privilege preventing spouses from being compelled to testify against one another applies to a lesbian couple married in Washington DC . . . ."[116]

C. 5th 558, 563 (Ct. Comm. Pl. 2010) ("Without a legally recognizable marriage, relief under the Divorce Code is simply not available.").

111. 253 P.3d 153, 156 (Wyo. 2011); *see also* Carrejo v. Haught, No. D-0101-DM-2009-0504, slip op. at 1–2 (N.M. Dist. Ct. Oct. 12, 2010) (recognizing the validity of a marriage for the limited purpose of granting a divorce).

112. *Christiansen*, 253 P.3d at 156–157; *see also id.* 154 n.1 ("Our analysis is expressly limited to the issue before us. Nothing in this opinion should be taken as applying to the recognition of same-sex marriages legally solemnized in a foreign jurisdiction in any context other than divorce. The question of recognition of such same-sex marriages for any other reason, being not properly before us, is left for another day.").

113. *See* Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 118 (2005) ("Even for laws rooted in biology and procreation, gender neutrality is becoming the rule of the day." (footnote omitted)).

114. *See, e.g.*, *In re* K.M. & D.M., 653 N.E.2d 888, 893, 899 (Ill. App. Ct. 1995) (granting right of second-parent adoption to same-sex couple despite statute's use of the terms "husband" and "wife").

115. *See* Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005).

116. Zach Zagger, *Maryland Court Recognizes Spousal Privilege for Same-Sex Married Couple*, JURIST (June 24, 2011, 8:55 AM), http://jurist.org/paperchase/2011/06/maryland-court-

In all of these cases, courts were dealing with outdated statutes adopted by legislatures that had no reason to predict the emergence of such issues. Same-sex divorce presents an analogous situation. As such, as in other cases where same-sex couples have encountered statutes that appear to be limited to opposite-sex couples, courts need not refuse to grant a same-sex divorce due to the gendered language of typical divorce statutes.

B. *Using the Marrying State's Divorce Statutes to Obtain a Same-Sex Divorce*

If a court refuses to provide relief under its own divorce statutes, a same-sex couple can ask the court to apply the statutes of the marrying state to dissolve the marriage. In *Parker v. Waronker*, after a New York trial court determined it had jurisdiction to dissolve a Vermont civil union, the court discussed the emerging New York public policy of protecting same-sex couples, and the fact that other New York cases have enforced or adjudicated rights for same-sex couples under the principles of comity.[117] In response, the court determined that it had the power to apply the relevant statutes from the marrying state and dissolved the civil union under Vermont law.[118]

The application of another state's laws is not a novel approach created by the *Parker* court to deal with same-sex divorce cases. In fact, courts routinely apply the laws of other forums, using well-established, if occasionally messy, choice-of-law doctrines.[119] Courts are often asked to apply the law from another state pursuant to a choice-of-law clause. When that is the case, the court looks for "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[120] The application of another state's law is not limited, however, to instances in which there is a valid choice-of-law clause. Courts often apply another state's law to non-contract disputes, such as in tort.[121] Typically, the state whose law

recognizes-spousal-privilege-for-same-sex-married-couple.php. *Cf.* MD. CODE ANN., FAM. LAW § 2-201 (West 2012) ("Only a marriage between a man and a woman is valid in this State.").

117. 918 N.Y.S.2d 822, 823-24 (Sup. Ct. 2010).

118. *Id.* at 824–25.

119. *See* William A. Reppy, Jr., *Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union*, 82 TUL. L. REV. 2053, 2054, 2056 (2008) (describing "three different theories employed in choice-of-law methodology to allocate to a state's control over resolution of a litigated claim or issue within a claim through applications of its substantive law" and noting that on occasion, courts "combine[ ] two (or all three) of the theories for allocating sovereignty to create a modern method of choice of law to resolve a multiple-state claim or issue that is a part of the claim" (footnote omitted)).

120. Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

121. Reppy, *supra* note 119, at 2054, 2056–57.

will be applied must have a sufficient connection with the underlying dispute or issue.[122] In this instance, the fact that the marriage was granted by a particular state should be sufficient to establish significant contacts with that state.

Courts have applied choice-of-law clauses in the context of other family law disputes, such as prenuptial agreements.[123] Courts have scrutinized these clauses no differently than they would a choice-of-law clause in a conventional business agreement. For example, the Minnesota Court of Appeals affirmed a district court decision to apply California law to a marriage dissolution pursuant to a prenuptial agreement.[124] Courts have also enforced choice-of-law clauses in gestational surrogacy agreements.[125] Thus, should a state refuse to apply its own divorce statutes to dissolve a same-sex marriage, applying the laws of the marrying state is a viable option for same-sex couples seeking relief.

C. *Obtaining a Declaratory Judgment*

Should a court refuse to apply its own divorce statutes or the statutes of the marrying state, a same-sex couple may still obtain equitable relief.[126] Every trial court has the inherent power to exercise equity jurisdiction—"to do equity and to mould each decree to the necessities of the particular case."[127] When legal relief is unavailable or inadequate, trial courts are authorized to supplement and expand existing law so that new

122. *Hague*, 449 U.S. at 312–13.

123. *E.g.*, Jundt v. Jundt (*In re* Marriage of Jundt), Nos. A05-693, A05-955, 2006 WL 917592, at *2–3 (Minn. Ct. App. Apr. 11, 2006) (applying choice-of-law provision in prenuptial agreement).

124. *Id.* at *3 ("[W]e find no authority in [a case cited to by a party asking for closer scrutiny of a choice of law provision in family-law cases] for the assertion that closer scrutiny of choice-of-law provisions must be applied to an antenuptial agreement.").

125. *E.g.*, P.G.M. v. J.M.A. (*In re* Paternity & Custody of Baby Boy A.), No. A07-452, 2007 WL 4304448, at *3 (Minn. Ct. App. Dec. 11, 2007) (recognizing Minnesota's traditional enforcement of parties' contractual choice-of-law provisions).

126. While distinct courts of equity still exist in some jurisdictions, in most states legal and equitable remedies can be granted by any court. Despite this unification, the distinguishing features of the two classes of remedies are clearly marked and widely recognized because of the substantial difference between legal and equitable rights. *See* 27A AM. JUR. 2D *Equity* § 3 (2012) (discussing the nature of equitable remedies); *see also* Taylor's Marine, Inc. v. Waco Mfg., Inc., 792 S.W.2d 286, 288 (Ark. 1990) (holding that because appellant's "defenses were not exclusively cognizable in equity, [the court could not] say that the trial court erred in failing to transfer the case [to a court of equity]"); Cain v. Cross, 687 N.E.2d 1141, 1144 (Ill. App. Ct. 1997) (announcing that the distinctions between equitable and legal actions still apply and that the chancery division of the circuit court had jurisdiction over equity cases); 423 S. Salina St., Inc. v. City of Syracuse, 503 N.E.2d 63, 67 (N.Y. 1986) (recognizing and accepting the distinction between law and equity); Buchanan v. Buchanan, 197 S.E. 426, 434 (Va. 1938) (holding the distinctions between equitable and legal jurisdiction still exist and have not been modified to allow an equitable remedy for a legal disposition).

127. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); *see also* Camp v. Boyd, 229 U.S. 530,

remedies may be invented or old ones modified in order to meet the requirements of the case.[128] If a judge decides she cannot grant a divorce under the laws of her state or the laws of the marrying state, she still has the authority to provide adequate relief to the couple before her. To establish equity jurisdiction, the couple must demonstrate the following: (1) there is no adequate remedy at law; (2) the couple will suffer real harm; and (3) no equitable defenses preclude jurisdiction.[129] The decision to grant equitable relief lies within the discretion of the court.[130]

The first requirement of equity jurisdiction will be met as soon as a couple is denied their petition for dissolution under the divorce statutes of either the residency state or the marrying state."[131] A decree of dissolution is the only way the couple can resolve uncertainty as to issues such as financial planning, family relationships, and the ability to remarry.[132] Being denied access to the only sufficient and complete legal remedy—a dissolution of their marriage—establishes the couple's lack of an adequate remedy at law.

The second requirement of equity jurisdiction is that the couple must show that not being able to obtain a divorce creates irreparable harm. The implications of denying access to judicial divorce are substantial. Same-sex married couples can demonstrate actual, substantial harm by outlining the continuing limitations, uncertainties, and hardships involved in being denied their ability to terminate their ongoing obligations to one another due to their legal marital status.

Finally, for a court to exercise its equity jurisdiction, the couple must demonstrate that no equitable defenses preclude jurisdiction. For instance, the court, or a party opposing the divorce, could invoke the maxim that "one who comes into equity must come with clean

551–52 (1913) (discussing the trial court's ability to hear an entire case in equity, even if it requires determination of legal rights, when justice so requires).

128. 27A AM JUR. 2D *Equity*, *supra* note 126, at § 77; *see also* Cannon v. Bingman, 383 S.W.2d 169, 174 (Mo. Ct. App. 1964) (discussing equity as elastic and not bound by rules that will produce an inequitable result); Discover Bank v. Owens, 822 N.E.2d 869, 874 (Ohio Mun. Ct. 2004) ("The function of equity is to supplement the law where it is insufficient, moderating the unjust results that would follow from the unbending application of the law.").

129. Ne. Women's Ctr., Inc. v. McMonagle, 665 F. Supp. 1147, 1153 (E.D. Pa. 1987) (citing 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2942–44 (1973)).

130. 27A AM. JUR. 2D *Equity*, *supra* note 126, at § 206.

131. To be deemed adequate, a legal remedy must be clear, certain, sufficient, complete, final, and obtainable as of right. *See id.* at §§ 21, 29 (discussing the adequacy and certainty of a legal remedy).

132. *See* Brief for Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae Supporting Appellant, Alons v. Iowa District Court for Woodbury County, 698 N.W.2d 858 (Iowa 2005) (No. 03-1982), 2004 WL 4912312, at *22 [hereinafter Alons Amicus Brief].

hands."[133] One might argue that if a same-sex couple knowingly leaves the couple's state of residence to gain access to legal marriage in another state, the parties have unclean hands, under the view that the couple's behavior was dishonest or executed in bad faith and that the couple should therefore be denied equitable relief.[134] Many couples, however, be they same-sex or opposite-sex, travel to other states to get married. Typically, couples are not condemned for their "destination weddings," nor are such weddings considered fraudulent.[135] When same-sex couples travel out of their home state to marry, they have the added incentive to celebrate their union in a state that will legally recognize it. They do not do so to be evasive, dishonest, or fraudulent. Just as importantly, most couples contemplating marriage believe they are going to stay together. To suggest that same-sex couples marry in another state in an effort to later take advantage of the court system in their home state to dissolve that marriage would be an unusual argument indeed.

Once a couple has established the three requirements of equity jurisdiction, a court has broad discretion to grant relief.[136] The court's primary concern is providing a remedy that meets the necessities of the particular situation so "that justice may be done."[137] When it comes to

133. Dobbs, *supra* note 54, at § 2.4(2); s*ee also* 27A Am. Jur. 2d *Equity*, *supra* note 126, § 92 (providing additional maxims: "(1) equity will not intrude to relieve party from the foreseeable consequences of a conscious course of action; (2) equity will not assist in extricating a party from his or her own wrongful and fraudulent conduct; (3) equity cannot be invoked when its aid becomes necessary through a party's own fault; (4) equity will not aid a volunteer; (5) a person must be just before being generous; (6) equity cannot aid the violator of an oath; and (7) equity will not allow a party to change horses in midstream. It is also said that equity cannot be invoked for selfish or ulterior purposes" (footnotes omitted)). Because equity jurisdiction provides such wide discretion to the courts, the purpose of these maxims is to ensure that the principles of equity are upheld. *See id.* § 98 (explaining the purpose of the maxims on courts).

134. *See* Dobbs, *supra* note 54, at § 2.4(2).

135. It may, however, be considered evasive, and some jurisdictions have statutes that explicitly prohibit the state from recognizing such marriages. *See, e.g.*, Wis. Stat. § 765.04 (2009) ("If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state."). *But see* Westerman v. Westerman, 247 P. 863, 865 (Kan. 1926) (holding that a district court had jurisdiction to annul marriages "both by statute . . . and by virtue of [its] general equity jurisdiction" and that jurisdiction included the adjudication of whether an evasive marriage is valid or void in an annulment suit (citations omitted)).

136. Dobbs, *supra* note 54, at § 2.4(1). Statutes attempting to strip a court of equity jurisdiction rarely succeed. *See, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.").

137. 27A Am. Jur. 2d *Equity*, *supra* note 126, at § 206 (footnote omitted). "The trial court is authorized in equity proceedings to mold its judgment so as to adjust the equities of all parties and meet the obvious necessities of each situation." *Id.* (footnote omitted); *see also* Valley Forge Ins. Co./CNA Ins. Co. v. Strickland, 620 So. 2d 535, 541 (Miss. 1993) ("'Equity jurisdiction permits

same-sex divorce, the judge has before her at least one state resident who wishes to dissolve her legal obligations pursuant to her legal marriage. To provide a remedy, a judge need not determine whether the marriage is valid or void, or whether granting a divorce recognizes a marriage or extends benefits of marriage.[138] The judge simply needs to acknowledge that the parties are in need of a judicial remedy that is otherwise unavailable at law.[139]

Several courts have already provided this remedy. For example, in Minnesota, a judge issued a declaratory judgment providing that two married women were "single individuals, with all rights of an unmarried individual, and [were] free and clear of any continuing obligation to each other deriving from their marriage . . . ."[140] Similarly, an Iowa judge used equitable powers to enter an amended decree terminating a Vermont civil union and ratifying the parties' property settlement.[141]

Although equitable relief in the form of a declaratory judgment may appear to be the path of least resistance—as opposed to asking a court to apply either its divorce statutes or those of the marrying state—a declaratory judgment is arguably the least favorable remedy. Only a divorce decree issued by a court of law is sure to terminate the couple's marriage. As of the writing of this Article, it is unclear whether a state would accept a declaratory judgment from another state as a full and complete termination of a marriage.

If a same-sex couple pursues a declaratory judgment to terminate their marriage, careful thought should be given to the specific language requested in the judgment. For example, obtaining a judgment that declares the marriage "terminated" or "dissolved" may prove a more satisfactory remedy than one that merely declares the parties to be "single individuals." A declaratory judgment that uses the magic word "divorce" and other language typically found in the state's standard divorce decree may be the best possible scenario for this less-than-ideal remedy. Still, while the subsequent enforceability of these declaratory judgments is unknown, this pathway may prove adequate for married same-sex couples who are unable to get purely legal relief, but who are seeking to move on with their lives.

Once a court acknowledges that it has subject-matter jurisdiction over same-sex divorce petitions and that such petitions are valid claims

innovation that justice may be done. That there is no precedent for the exact relief sought is of no consequence.'" (quoting Hall v. Wood, 443 So.2d 834, 842–43 (Miss. 1983))).

138. *See* Alons Amicus Brief, *supra* note 132, at *26–27 n.5.

139. *See, e.g.*, Dickerson v. Thompson, 897 N.Y.S.2d 298, 301 (App. Div. 2010).

140. Glaser v. Grassman, No. 27-CV-10-16600, slip op. at 3 (Minn. Dist. Ct. July 22, 2010).

141. *In re* Marriage of Brown & Perez, No. CDCD119660, slip op. at 1–2 (Iowa Dist. Ct. Dec. 24, 2003).

for which relief can be granted, petitioners can provide a judge with three pathways for her to grant relief. A judge could apply the divorce statutes of the parties' state of residence or the divorce statutes of the state that granted the marriage, or the court could provide equitable relief in the form of a declaratory judgment. Although the arguments supporting each pathway vary and the relief each provides is not identical, any one of the three should allow same-sex couples to obtain a judicial termination of their marriages in almost every jurisdiction in the United States.

V. Same-Sex Divorce as a Constitutional Imperative

We have demonstrated the undisputable need for same-sex divorce, even for couples in states where their marriages are not legally recognized. We have also shown that courts in forty-nine states have the power to hear same-sex divorce cases and the power to grant relief to same-sex couples seeking divorce. In this Part, we argue not that courts could, or even should, grant same-sex divorces—but that they must. Supreme Court precedent regarding substantive due process and equal protection creates a constitutional imperative for courts to grant same-sex divorce, thereby obligating state courts to do so.

A. *The Due Process Trinity: The Fundamental Rights to Access the Courts, Divorce, and Remarry*

When a court refuses to hear a petition for same-sex divorce, it implicates several rights of the petitioners. First, the parties' right to access the courts is affected because legal marriage can be granted only by the state, and ending a legal marriage can be done only through state-sanctioned judicial action. Second, denying same-sex couples access to the courts to terminate their marriages denies the couples any right to divorce that may exist. Though some argue that the Supreme Court has yet to recognize an explicit fundamental right to divorce, the Court has been clear that married couples have a right to access the courts to obtain a divorce.[142] Finally, preventing married couples from divorcing infringes upon their fundamental right to marry because an individual is required to obtain a divorce before marrying again. The unique interdependence of these three rights—the right to access the courts, the right to divorce, and the right to remarry—can be observed in the Supreme Court case of *Boddie v. Connecticut*.[143] This same trinity is implicated in

142. *See* Boddie v. Connecticut, 401 U.S. 371, 374, 382–83 (1971) ("[D]ue 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.").

143. *Id.* at 371.

same-sex divorce cases.

In the landmark case of *Boddie v. Connecticut*, an indigent couple was denied access to divorce because they could not pay the filing fee.[144] The Supreme Court struck down the filing fee on due process grounds, holding that it was unconstitutional to deprive the couple of a remedy that affects a fundamental right that is available solely through the courts.[145] In coming to that conclusion, the Court implicitly recognized an interdependent trinity of fundamental rights: the right to access the courts, the right to divorce, and the right to remarry. Each of these rights is deduced from the other, and an offense against one of the rights operates as an offense against the other two.[146] To illustrate, suppose a married couple wants to end their legal marriage. To do so, the couple must obtain access to the court. If a court denies the couple access, the couple cannot get divorced and must remain married. Similarly, if a court allows the couple to access the court, but then refuses to allow them access to divorce, again the couple must remain married. As such, denying a married couple access to the court in order to obtain a divorce forces them to stay married, which ultimately infringes their fundamental right to marry again. Each right in the trinity—the right to access the courts, the right to divorce, and the right to remarry—was addressed by the Court in *Boddie*.[147] The Court reasoned that appearing before a judge to seek a dissolution "is the exclusive precondition to the adjustment of a fundamental human relationship" and that a state runs afoul of the Due Process Clause when it "pre-empt[s] the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so."[148]

For the *Boddie* Court, perhaps the most important right of the trinity is the fundamental right to marry. In securing the couple's access to the courts to obtain a divorce, the Court's view was decidedly prospective. The Court focused less on the fact that a divorce would end the current marriage and more on the fact that a divorce would allow for a future marriage.[149] In other words, the Court recognized that the right of access to the courts and the right to divorce must be protected in order to

144. *Id.* at 372.

145. *Id.* at 374–76.

146. *See id.* at 376. For example, a judge who denies access to the court to a married couple prevents the couple from obtaining a divorce, which then prevents either member of the couple from marrying again in the future. Similarly, a judge who allows access to the court, but refuses to grant a divorce, also prevents the parties from marrying again in the future. A judge who denies the right to remarry renders moot the right to access the courts or seek divorce.

147. *Id.* at 376.

148. *Id.* at 383.

149. *Id.* at 376 ("Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the

protect the individual's right to remarry. A judge who denies a same-sex divorce destroys this elegant structure of interlocking rights.

Because *Boddie* focused on the next marriage and not the current one, the trinity of rights protected in *Boddie* is not dependent on whether there is a fundamental right to same-sex marriage.[150] In other words, just because the *Boddie* appellants were in an opposite-sex marriage does not mean the right to divorce is reserved for opposite-sex couples. Instead, the right to marry implicitly entails a right to remarry that is not limited to persons currently in opposite-sex marriages.[151] The right to divorce established in *Boddie* is not only about ending the current marriage, but about enabling the parties to marry again in the future. Some individuals seeking same-sex divorce may intend to remarry a person of the opposite sex, which is exactly the right *Boddie* protects.

Supreme Court precedent has established a fundamental right to

constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.").

150. Some courts have held the fundamental right to marry is only recognized as a right to an opposite-sex marriage. *See, e.g.*, Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. 1995) ("Thus, in recognizing a fundamental right to marry, the Court has only contemplated marriages between persons of opposite sexes . . ."); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."). However, other courts have abandoned the notion that opposite-sex marriage is substantively different than same-sex marriage for the purposes of a Due Process Clause analysis. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown 671 F.3d 1052 (9th Cir. 2012).

151. The fundamental rights of marriage and divorce are separate legal issues and should receive separate, discrete analyses. While parties voluntarily pursue marriage obligations largely free of judicial interference, freeing themselves of those obligations through divorce is impossible without the intervention of the courts. *Boddie*, 401 U.S. at 376. Consequently, it is simply not sound legal analysis to read an opposite-sex dimension into divorce rights based on earlier decisions where courts have detected an opposite-sex dimension in marriage rights. The Texas Court of Appeals provides a striking example of the erroneous linking between marriage and divorce rights. In *In re Marriage of J.B. & H.B.*, the Texas Court of Appeals commented that "[a] petition for divorce is a claim . . . to legal protections, benefits, or responsibilities 'asserted as a result of a marriage'" and concluded that it is therefore prohibited by Texas's DoMA. *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 665 (Tex. App. 2010) (quoting TEX. FAM. CODE ANN. § 6.204(c)(2) (West 2011). In analyzing whether the Texas statute violates the Equal Protection Clause, the court concluded that *Loving v. Virginia* sanctions a fundamental right to marry a person of the opposite sex and not a fundamental right to marry anyone of the litigant's choosing. *See id.* at 675–76 (explaining that *Loving* "does not embrace the broad formulation" that there is a "right to marry a person of the same sex" (citations omitted)). Thus, the court found that the parties were not seeking to avail themselves of a fundamental right and upheld the Texas statute under a rational basis review. *See id.* at 676–81. The court did not address—in spite of its reading of *Loving*—whether *Boddie* created an independent fundamental right to divorce. Instead, the court concluded, without citation to any authority, that divorce is concomitant with marriage and the recognition of a same-sex divorce insinuates recognition of a same-sex marriage. *See id.* at 675. The better approach would have been to analyze the right to divorce in relation to how denying the dissolution petition would restrain the petitioners' paths to marry in the future. *See Boddie*, 401 U.S. at 376.

marry.[152] For any person in a legal marriage, exercising his or her right to remarry includes access to the court to obtain a divorce. As such, denying same sex-couples access to divorce infringes both the right to divorce and the right to remarry. This state courts cannot do.

B. *Equal Protection: An Animus-Based Analysis*

Denial of a same-sex divorce not only violates due process, but also constitutes unconstitutional discrimination. The Equal Protection Clause requires states to treat similarly situated individuals alike. When it comes to the need for divorce, opposite-sex and same-sex couples are similarly situated—both want to terminate the obligations of a legal marriage and to be free to exercise their fundamental right to remarry. As such, denying same-sex couples access to divorce is constitutional only if it passes equal protection review.

The proper standard of equal protection review to apply to a denial of same-sex divorce is a matter of debate. It is arguable that such denials would be subject to the highest standard of review—strict scrutiny—because they implicate the denial of the fundamental right to marry. Others may argue that this situation only implicates same-sex couples' access to divorce, and divorce is not a fundamental right. Although we disagree with both prongs of this argument, we are willing, for the moment, to accept this assertion. As such, if denying same-sex couples access to divorce does not implicate a fundamental right, it would constitute discrimination based on sexual orientation and, presumably, would be subject to a standard of review less than strict scrutiny.

The scrutiny applied to classifications based on sexual orientation is not settled. Historically, most federal courts have applied rational basis review to laws that discriminate based on sexual orientation.[153] The Supreme Court suggested it was applying rational basis review in two discrimination cases involving sexual orientation, but in striking down both laws the Court did not enlist the outright deference to governmental prerogatives typically seen under rational basis review.[154] Recently courts have held, and the Executive Branch has argued, that a more heightened standard of review for sexual orientation is warranted. The United States District Court for the Northern District of California in *Perry v. Schwarzenegger*, in striking down an amendment to the California constitution prohibiting gay marriage, stated that "gays and lesbi-

152. Zablocki v. Redhail, 434 U.S. 374, 383–88 (1978).

153. *See, e.g.*, Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 863, 866 (8th Cir. 2006) (applying rational basis review to an amendment of the state constitution that limited marriage to opposite-sex couples).

154. Lawrence v. Texas, 539 U.S. 558, 578 (2003); Romer v. Evans, 517 U.S. 620, 635 (1996).

ans are the type of minority strict scrutiny was designed to protect."[155] In addition, United States Attorney General Eric Holder announced that classifications based on sexual orientation merit heightened scrutiny and that the Department of Justice will no longer defend equal protection claims brought against the federal DoMA.[156]

Although the law's trajectory is bending toward heightened scrutiny for discrimination based on sexual orientation, the denial of divorce to same-sex couples fails even rational basis review because there is no legitimate reason for the denial. The Supreme Court has repeatedly held that governmental actions driven by animus alone lack a legitimate purpose and will not survive even rational basis review. In 1973, in *United States Department of Agriculture v. Moreno*, the Court struck down a statute denying food stamps to hippies.[157] In holding that the law failed rational basis review, the Court observed that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."[158] Twelve years later, the Court put a finer point on its *Moreno* holding in *City of Cleburne v. Cleburne Living Center, Inc.* when it applied rational basis and struck down a municipal zoning law that would have prohibited the opening of a home for persons with cognitive disabilities.[159] The Court noted that although "'[p]rivate biases may be outside the reach of the law . . . the law cannot, directly or indirectly, give them effect.'"[160]

In 1996, the Court struck down a facially discriminatory law targeted specifically at gays and lesbians under rational basis review.[161] In *Romer v. Evans*, the Court struck down an amendment to the Colorado Constitution that banned all state laws providing protection from discrimination to gays and lesbians.[162] Justice Kennedy, writing for the

155. 704 F. Supp. 2d at 997 (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)). In its final analysis, however, the district court in *Perry* applied a rational basis review, holding that the amendment failed even this most forgiving standard. *Id.* at 1003.

156. Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html [hereinafter Holder] ("After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.").

157. 413 U.S. 528, 529, 534, 538 (1973).

158. *Id.* at 534.

159. 473 U.S. 432, 448 (1985) ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently [from other multiple-tenant dwellings].").

160. *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

161. Romer v. Evans, 517 U.S. 620, 635 (1996).

162. *Id.* at 624.

majority, observed that the "sheer breadth [of the amendment] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."[163]

Denying same-sex couples divorce is equally broad. A complete ban, in fact, can be no broader. Moreover, no legitimate reason has been offered for the denial. As previously discussed, the social policy supporting marriage that led to state DoMAs does not support a ban on same-sex divorce. The only remaining reason for banning same-sex divorce, then, is animus. Indeed, in announcing that the Obama Administration would no longer defend the federal DoMA, Attorney General Holder noted that the legislative history of the federal DoMA was littered with signs that its passage was driven by animus against gays and lesbians.[164] State DoMAs directly follow from the federal DoMA and are based on this same illegitimate rationale.

While gay marriage opponents are struggling to put forth legitimate arguments supporting a ban on gay marriage, there can be no explanation, other than animus, for a ban on same-sex divorce. No rational basis can exist for a legislative policy so disapproving of gay marriage that it forces same-sex couples to remain married. Only animus could explain such a law, and judges, who are charged with implementing the legislature's divorce scheme, become the means by which states violate the Equal Protection Clause by denying same-sex divorce.[165] This judges may not do.

VI. Conclusion

A judge holds tremendous power in ordering the relationships between married persons. For an opposite-sex couple seeking a divorce, the judge's role is almost pro forma. Once the couple petitions the court for a divorce, the divorce is granted as a matter of course. This makes sense: No state interest is benefited by binding a loveless couple together by judicial fiat. Not only would such an arrangement signal governmental abdication, it offends the most basic sense of right and wrong. Yet many judges, using tortured readings of their states' DoMAs, lock same-sex couples together, depriving them of any way to obtain a means to legally end their relationship. This outcome flies in the

163. *Id.* at 632.

164. Holder, *supra* note 156.

165. The typical marital dissolution statute assigns to the judiciary the job of executing the legislature's intent regarding divorce. In essence, the legislature has assigned control over divorce proceedings to the courts, and a judge is the only governmental actor standing between marriage and divorce. Boddie v. Connecticut, 401 U.S. 371, 376 (1971).

face of a well-established line of constitutional protections embraced by the Supreme Court. The Equal Protection and Due Process Clauses obligate judges to provide the remedy of divorce to same-sex couples. In addition, in the vast majority of states, nothing in their state DoMA strips from the court the power to hear a petition for divorce from a same-sex couple or prevents a court from granting such relief. As a result, although same-sex couples can marry in only a handful of states, they can divorce in forty-nine. For same-sex couples, it seems, first comes divorce, and then comes marriage.