'TIL DEATH DO YOU PART . . . AND THIS TIME WE MEAN IT: DENIAL OF ACCESS TO DIVORCE FOR SAME-SEX COUPLES

COLLEEN MCNICHOLS RAMAIS*

During the last decade, the debate over same-sex marriage has resulted in the increasing recognition of same-sex unions in several states as well as specific prohibitions against the recognition of such unions in other states. Many gay couples have travelled from their home states that do not allow same-sex marriage to be married in states that do. But if these couples later decide to separate, they are often confronted with an unanticipated problem: residency requirements in most states' divorce laws mean that they cannot simply go back to the state in which they were married to institute divorce proceedings and they cannot dissolve their bond in their home state if that state does not recognize their union as valid to begin with. This Note explores the issues posed by this dilemma, proposing that it could be solved if all states provided a forum for dissolving same-sex unions, even if they do not choose to recognize them as valid marriages.

The author begins by outlining the current state of the law regarding same-sex relationships in the United States. Federal and state laws passed in the last few years have prohibited or allowed recognition of same-sex unions; this causes jurisdictional issues that arise from residency requirements in divorce laws. The Note provides an analysis of the conflict-of-law problems posed by same-sex couples seeking divorces in states that do not recognize their marriages and the constitutional issues raised by court decisions refusing to grant these couples divorces. Supreme Court due process decisions regarding impermissible restrictions on access to divorce should make such refusals unconstitutional. In conclusion, states have an obligation to provide a forum for dissolution of same-sex marriages contracted elsewhere. This forum can be provided without forcing states to recognize the validity of such unions.

* J.D. Candidate 2010, University of Illinois College of Law. The information in this Note is current as of March 2010. Thanks to Professors David Meyer, Janice Pea, and Stephanie Davidson for their help and guidance, and to the *University of Illinois Law Review* membership, editors, and professional staff for all their hard work. A special thanks to my husband and parents for their constant support.

I. INTRODUCTION

The 2003 Massachusetts Supreme Judicial Court decision in *Goodridge v. Department of Public Health* declared that the Massachusetts Constitution guarantees the right of same-sex couples to marry.[1] This made Massachusetts the first state to fully grant same-sex couples the right to marry and reignited the scholarly debate over the implications of the Full Faith and Credit Clause[2] and its effects on interstate recognition of same-sex marriage. This debate was originally sparked ten years earlier by a Hawaii Supreme Court decision applying strict scrutiny to a ban on same-sex marriage and suggesting that it might be unconstitutional.[3] The Massachusetts decision transformed the issue, once a purely theoretical exercise, into a question whose answer influences Americans' tangible rights under the law. During 2008 and 2009, the California and Iowa Supreme Courts similarly found that the equal protection clauses of their state constitutions guaranteed same-sex couples the right to marry;[4] the Connecticut Supreme Court ruled that its state's civil union law offered insufficient protection for same-sex couples and declared laws restricting civil marriage to heterosexual couples invalid under the Connecticut Constitution;[5] the Massachusetts legislature issued an emergency act repealing the evasion provision of the state's marriage law, which voided marriages between nonresidents of Massachusetts that are contrary to the laws of the state of domicile;[6] and the legislatures of Vermont and New Hampshire, followed by the Council of the District of Columbia, voted to recognize and grant same-sex marriages in those jurisdictions.[7]

1. 798 N.E.2d 941, 948 (Mass. 2003) ("The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not.").

2. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); 28 U.S.C. § 1738 (2006).

3. Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (remanding the case to the lower court for a determination of whether the state statute limiting marriage to opposite-sex couples passed the strict scrutiny standard under the equal protection provision of Hawaii's state constitution), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998); *see also* Brenda Cossman, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private*, 71 LAW & CONTEMP. PROBS. 153, 157 (2008).

4. *In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008), *superseded by constitutional amendment*, CAL CONST. art. 1, § 7.5 (amended 2008); Varnum v. Brien, 763 N.W.2d 862, 906–07 (Iowa 2009).

5. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008).

6. MASS. ANN. LAWS ch. 207, § 11 (LexisNexis 2003), *repealed by* Act of July 31, 2008, Mass. ch. 216, § 1, *available at* http://www.mass.gov/legis/laws/seslaw08/sl080216.htm.

7. Vermont was the first state to legislatively authorize same-sex marriage and became the fourth state to grant such marriages on April 7, 2009. Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1 [hereinafter Goodnough, *Vermont*]. The bill also repealed Vermont's marriage evasion laws, eliminating the requirement that a marriage entered into in Vermont by nonresidents of the state must not be void if contracted into in the parties' state of residence. Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, No. 003, § 12(a)(4), 2009 Vt. Acts & Resolves 33, 37 (repealing VT. STAT. ANN. tit. 15, § 6 (2002)). New Hampshire soon followed, voting to allow same-sex marriage on June 3, 2009. Abby Goodnough, *New*

These events have considerably increased the opportunities for same-sex couples to formalize their relationships and have called on courts in other states to make decisions about what these marriages represent.

In 1996, while the questions surrounding interstate recognition of same-sex marriages remained theoretical, Congress passed the Defense of Marriage Act (DOMA),[8] defining "marriage" as used in the United States Code to mean only a legal union between a man and a woman and "spouse" to mean a husband or wife of the opposite sex.[9] DOMA also explicitly permits each state to refuse to recognize same-sex marriages solemnized in other states.[10] By 1998, twenty-six states had enacted local versions of this statute, commonly referred to as "mini-DOMA" statutes, indicating that their public policy forbade recognition of same-sex marriage.[11] Today, forty states operate under such laws, and twenty-four of these states have also codified this policy in their constitutions.[12] This confluence of factors has led to a situation where a same-sex couple's marital status is in question, particularly when the couple leaves the state where they entered into the marriage.[13]

Hampshire Approves Same-Sex Marriage, N.Y. TIMES, June 4, 2009, at A19 [hereinafter Goodnough, *New Hampshire*]. This legislation took effect on January 1, 2010. *New Hampshire Now 5th State to Allow Same-Sex Marriage*, CNN, Jan. 1, 2010, http://www.cnn.com/2010/POLITICS/01/01/new.hampshire.same.sex/index.html. In the District of Columbia, the City Council approved a measure legalizing the performance (beyond the mere recognition) of same-sex marriages in the nation's capital on December 15, 2009. Ian Urbina, *D.C. Council Approves Gay Marriage*, N.Y. TIMES, Dec. 15, 2009, http://www.nytimes.com/2009/12/16/us/16marriage.html [hereinafter Urbina, *D.C. Council Approves*]. The bill went into effect on March 3, 2010. Ian Urbina, *Nation's Capital Joins 5 States in Legalizing Same-Sex Marriage*, N.Y. TIMES, Mar. 4, 2010, at A19 [hereinafter Urbina, *Nation's Capital Joins*]. The Maine legislature similarly authorized same-sex marriage in May 2009, Abby Goodnough, *Maine Governor Signs Same-Sex Marriage Bill as Opponents Plan a 'Veto*,*'* N.Y. TIMES, May 7, 2009, at A21 [hereinafter Goodnough, *Maine*], but before the legislation was set to go into effect it was repealed by public referendum. Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 4, 2009, http://www.nytimes.com/2009/11/05/us/politics/05maine.html?_r=2 [hereinafter Goodnough, *Setback in Maine*].

8. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7 (2006)).

9. 1 U.S.C. § 7.

10. 28 U.S.C. § 1738C ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."). It has been argued that this is somewhat redundant because states have always had the option of "declin[ing] to recognize foreign marriages when those marriages are contrary to the strong public policy of the forum state." Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2146–47 (2005). The expansive language used in DOMA may, however, have more extensive implications for divorce. *See infra* note 173 and accompanying text.

11. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923–24 (1998).

12. *See infra* note 70.

13. *See* Koppelman, *supra* note 11, at 924–25 (noting that, though legislators were primarily concerned with residents traveling to get married, coming home, and demanding recognition in their home state, the mini-DOMA laws have been interpreted broadly as "blanket rule[s] of nonrecognition" under which "a state's courts would never recognize any same-sex marriage for any purpose whatsoever").

Because the majority of states refuse to recognize same-sex marriages and civil unions, the rights and responsibilities that come with marriage apply only in those jurisdictions where the couple's union is recognized as valid.[14] This means that, for many same-sex couples, entering into a same-sex marriage or civil union remains largely symbolic. The limited recognition of these marriages, however, combined with divorce statutes containing residency requirements[15] and the Supreme Court's interpretation of the Full Faith and Credit Clause as extending only to those divorce decrees made with subject matter jurisdiction predicated on at least one party to the divorce being domiciled in the state,[16] creates a situation in which couples may be able to create a legal bond that they are unable to dissolve.

As of March 2010, any same-sex couple can be validly married in Massachusetts, Connecticut, Iowa, New Hampshire, Vermont, or Washington, D.C. without regard to the validity of their marriage in their home state.[17] Couples who would not be permitted to marry at home have thus joined the population of those who married as residents of these states and later moved away in facing a new predicament: they cannot simply go back to the state in which they were married to institute divorce proceedings, and they cannot dissolve their bond in their home state if that state does not recognize that they have a legal bond to begin with. While it may seem inconsequential to not be able to dissolve a bond that is not legally recognized, the fact that it is recognized in certain jurisdictions may give one party unilateral power to compel enforcement—i.e., if the couple separates, one spouse could, at some point, move to a state that recognizes the marriage if he or she so chose and then sue for divorce after establishing residency, even if the couple has been separated for years.

This Note outlines the potential problems posed by the differences in states' approaches to same-sex marriage, discusses the ways in which courts have responded to these marriages in the context of divorce, and evaluates potential solutions. Part II begins with an overview of pertinent law: the current status of same-sex relationships in the United States as of March 2010 and the principles of conflicts-of-laws as they relate to interstate recognition of marriage and divorce. Part III then examines

14. *See id.* at 921–25.

15. 1 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 703 (2d ed. 1987) ("Statutes in nearly all states impose, as a condition upon the right to sue for divorce, requirements that either the plaintiff or one of the parties has been a resident of the state for a specified period ranging from six weeks to two years, the most common period being six months.").

16. Williams v. North Carolina (*Williams II*), 325 U.S. 226, 229 (1945) ("Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil.").

17. In 1912, the Uniform Marriage Evasion Law was promulgated, nullifying, for purposes of the jurisdiction where a marriage is contracted, a marriage between nonresidents if it would be void if contracted into in their home state. Only Illinois, Louisiana, Massachusetts, Vermont, and Wisconsin adopted this provision, however, and it was withdrawn in 1943. J. Philip Johnson, *The Validity of a Marriage Under the Conflict of Laws*, 38 N.D. L. REV. 442, 454 (1962). The Massachusetts law was repealed in 2008 and the Vermont law in 2009. *See supra* notes 6–7 and accompanying text.

the ways in which these principles have been applied in some recent cases and the constitutional implications of these applications. Finally, Part IV explores alternatives for remedying the situation, ultimately concluding that states have an obligation to provide a forum for dissolution of marriages and civil unions contracted elsewhere. This Note argues that, under the principles of due process as established by the Supreme Court in *Boddie v. Connecticut*,[18] because these unions are legally created and can only be dissolved by court order and because jurisdiction in these proceedings is so intimately tied to domicile, statutes that operate to exclude same-sex couples seeking dissolution of their marriage or civil union from the courts of their home state are unconstitutional.

II. BACKGROUND—THE CURRENT STATE OF THE LAW

To understand the particular legal difficulties surrounding access to divorce for same-sex couples, it is important to first review some interstate recognition principles in the area of marriage generally and the ways in which DOMA has destabilized these basic assumptions as well as the fundamentals of divorce proceedings and interstate enforcement.

A. DOMA, Mini-DOMAs, and the Status of Same-Sex Marriage

As same-sex marriage becomes more readily available for couples from all corners of the country, the limits of our conflicts-of-laws jurisprudence have been, and will undoubtedly continue to be, tested.[19] It is, therefore, worth noting how courts generally determine the validity of a given marriage. Courts normally follow the common law principle of comity, according a certain level of respect to actions taken by other states.[20] When a matter has ties to more than one state, a court must choose which state's law will govern the transaction, balancing each state's interest in the particular issue.[21] With respect to marriage, American law has arrived at a solution that takes into account both the personal and territorial interests at play. States generally follow the rule formulated by the *Restatement (Second) of Conflict of Laws*: a marriage that is valid where it was contracted will be recognized as valid everywhere "unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."[22] Historically, this "strong public policy" exception has

18. 401 U.S. 371, 379–81 (1971).

19. *See, e.g.*, Lane v. Albanese, 39 Conn. L. Rptr. 3, 5 (Super. Ct. 2005) (holding that the Connecticut Superior Court did not have jurisdiction to annul a same-sex marriage contracted into in Massachusetts); Wilson v. Ake, 354 F. Supp. 2d 1298, 1301–04 (M.D. Fla. 2005) (holding that Florida was not required under the Full Faith and Credit Clause of the U.S. Constitution to recognize a same-sex marriage contracted into in Massachusetts).

20. ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES 13 (2006).

21. *Id.* at 13–16.

22. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971); KOPPELMAN, *supra* note 20, at 17.

primarily been applied to permit a state to refuse to recognize interracial marriages, polygamous marriages, and incestuous marriages.[23]

Most often, "the place with the 'most significant relationship' [to the spouses and to the marriage] will be the state where the couple makes their home."[24] Under this rule, a state would normally only be able to refuse recognition of a marriage if it was invalid according to the public policy of the state where the couple resided when they were married.[25] Aside from these limitations, opposite-sex couples may freely travel out of their state of residence to celebrate their marriage, or may freely move or travel to other states after the wedding without concern over whether their marriage will be recognized. In the case of same-sex marriage, however, this traditional rule has been modified in many jurisdictions. This Section summarizes the various statutory schemes relating to the recognition, or lack thereof, of same-sex relationships.

1. Recognition of Same-Sex Marriage

In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court outlined some of the major tangible and intangible benefits of marriage, noting examples such as (1) enhanced income provided by tax benefits; (2) easily navigable parentage laws; (3) "reasonably predictable guidelines for child support, child custody, and property division on dissolution"; and (4) the "immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized.'"[26] The court concluded that the state had failed to provide a convincing argument for denying same-sex couples this "cornucopia of substantial benefits [afforded] to married parents and their children."[27] To redress this wrong, the court reconstrued "civil marriage" as "the voluntary union of two persons as spouses, to the exclusion of all others" and declared that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[28] As a result of this new definition of "marriage," those laws and procedures that govern opposite-sex marriage in Massachusetts are applied to same-sex marriage.[29]

23. Koppelman, *supra* note 10, at 2148–49.

24. KOPPELMAN, *supra* note 20, at 17.

25. *Id.* at 18.

26. 798 N.E.2d 941, 963–64 (Mass. 2003) (citation omitted).

27. *Id.* at 964, 968 ("The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason.").

28. *Id.* at 969.

29. Massachusetts Trial Court Law Libraries, Massachusetts Law About Same-Sex Marriage, http://www.lawlib.state.ma.us/subject/about/gaymarriage.html (last visited Mar. 1, 2010) ("The same laws and procedures that govern traditional marriage also apply to same-sex marriages. There are no special procedures for a same-sex marriage."). The court upheld this standard in the absolute, finding that a bill creating civil unions as a separate institution for same-sex couples violated the Massachu-

On October 1, 2005, legislation went into force in Connecticut creating the institution of a "civil union" for same-sex couples[30] and defining marriage as "the union of one man and one woman."[31] Three years later, the Connecticut Supreme Court, in *Kerrigan v. Commissioner of Public Health*, held that the provision denying same-sex couples the right to marry violated the equal protection clause of the Connecticut Constitution.[32] Same-sex couples began marrying under the same conditions as opposite-sex couples the following November[33] and, in April 2009, the Connecticut legislature passed a bill codifying this change and repealing the civil union scheme as of October 1, 2010.[34] Similarly, the Iowa Supreme Court unanimously decided on April 3, 2009, that, under the Iowa Constitution's equal protection clause, classifications based on sexual orientation must be analyzed under heightened scrutiny, and that the law limiting marriage to opposite-sex couples did not meet this standard.[35] Accordingly, the court ordered that the Iowa code be amended and interpreted to allow for same-sex marriages.[36]

Recently, state legislatures have begun to voluntarily change their laws to recognize and grant same-sex marriages. On April 7, 2009, the Vermont legislature became the first state to legislatively extend marriage to same-sex couples, overriding a veto by the state's governor.[37] Maine, New Hampshire, and Washington, D.C. followed closely behind: Maine's same-sex marriage bill was signed into law on May 6, 2009,[38] New Hampshire's was enacted on June 3, 2009,[39] and the District of Columbia's was approved by the City Council on December 15, 2009.[40] While the legislation in Vermont, New Hampshire, and Washington,

setts Constitution despite the fact that it afforded the same tangible benefits of marriage. Opinions of the Justices to the Senate, 802 N.E.2d 565, 571–72 (Mass. 2004).

30. *See* Act Concerning Civil Unions, Pub. Act No. 05-10, 2005 Conn. Acts 13 (Reg. Sess.) (codified at CONN. GEN. STAT. ANN. §§ 46b-38aa to -38pp (West 2009)).

31. CONN. GEN. STAT. ANN. § 46b-38nn, *repealed by* Act of Apr. 23, 2009, Conn. Pub. Act No. 09-13, http://www.cga.ct.gov/2009/ACT/Palpdf/2009PA-00013-R00SB-00899-PA.pdf.

32. 957 A.2d 407, 481–82 (Conn. 2008). The case only preempted this one provision, however—the remainder of the civil union law was unaffected by the *Kerrigan* decision. *Id.* at 482 n.84.

33. Connecticut began issuing marriage licenses to same-sex couples on November 12, 2008. *See* Lisa W. Foderaro, *A New Day for Marriage in Connecticut*, N.Y. TIMES, Nov. 13, 2008, at A31.

34. Act of Apr. 23, 2009, Conn. Pub. Act No. 09-13, http://www.cga.ct.gov/2009/ACT/Pa/pdf/2009PA-00013-R00SB-00899-PA.pdf (implementing the guarantee of equal protection under the Connecticut Constitution for same-sex couples).

35. Varnum v. Brien, 763 N.W.2d 862, 896, 906 (Iowa 2009).

36. *Id.* at 907 ("[T]he language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.").

37. Goodnough, *Vermont*, *supra* note 7.

38. Goodnough, *Maine*, *supra* note 7.

39. Goodnough, *New Hampshire*, *supra* note 7.

40. Urbina, *D.C. Council Approves*, *supra* note 7.

D.C. took effect as scheduled, a public referendum in November of 2009 repealed the Maine legislation before it could take effect.[41]

In February 2008, a New York state appellate court, closely following the Restatement rule providing for recognition of marriages solemnized elsewhere, found that, absent express state legislation prohibiting recognition of same-sex marriages, same-sex marriages solemnized outside of New York are entitled to recognition in New York.[42] In *Martinez v. County of Monroe*, the court enforced recognition of a same-sex marriage entered into in Ontario, Canada, in the context of an employer's provision of spousal health benefits.[43] Subsequent to this ruling, New York Governor David A. Paterson issued a directive, on May 14, 2008, that required "all state agencies to begin to revise their policies and regulations to recognize same-sex marriages performed in other jurisdictions, like Massachusetts, California, and Canada," specifying that these marriages "should be afforded the same recognition as any other legally performed union."[44] Though New York does not issue marriage licenses to or perform marriages for same-sex couples, the expectation is currently that these marriages will be treated as any opposite-sex marriage would be for purposes of state law.[45] This was similarly the policy in effect in Washington, D.C. for several months before same-sex marriage became fully legal in March 2010.[46]

For a period of about five months, California recognized and performed same-sex marriages.[47] In May 2008, the Supreme Court of California decided in *In re Marriage Cases* that (1) the right to marry was protected by the guarantees of due process and right to privacy under the California Constitution, (2) sexual orientation is a suspect classification and such a classification warrants strict scrutiny, and (3) the family code provisions that limited marriage to a union between a man and a woman were unconstitutional because they were not necessary to serve a compelling state interest.[48] The court remanded the case to the appellate court with directions to issue a writ of mandamus directing state officials to

41. Goodnough, *Setback in Maine*, *supra* note 7. New Hampshire retains a "reverse evasion" statute, prohibiting nonresidents from marrying in the state if their marriage would be void in their state of residence. N.H. REV. STAT. ANN. § 451:44 (LexisNexis 2002).

42. Martinez v. County of Monroe, 850 N.Y.S.2d 740, 743 (App. Div. 2008).

43. *Id.* at 743–44.

44. Jeremy W. Peters, *New York Backs Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1.

45. *See id.* (internal quotations omitted).

46. An ordinance enacted by the Council of the District of Columbia in May 2009, and implemented on July 7, 2009, provided recognition of same-sex marriages performed elsewhere. Jury and Marriage Amendment Act of 2009, 56 D.C. Reg. 3797 (May 6, 2009); *Recognition of Same-Sex Marriages*, N.Y. TIMES, July 8, 2009, at A17. On March 3, 2010, the District of Columbia began issuing marriage licenses to same-sex couples. Urbina, *Nation's Capital Joins*, *supra* note 7.

47. *See* Foderaro, *supra* note 33.

48. 183 P.3d 384, 419–20, 441–42, 451–52 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (amended 2008).

> take all actions necessary to effectuate [the] ruling in this case so as to ensure that county clerks and other local officials throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court,[49]

and same-sex couples began to wed on June 17, 2008.[50] Some 18,000 same-sex marriages were performed in California before November 4, 2008, when voters approved a ballot initiative measure (commonly referred to as Proposition 8)[51] amending the state constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."[52] As interpreted by the Supreme Court of California,[53] the amendment does not "invalidate retroactively the marriages of same-sex couples performed prior to its effective date."[54] In October 2009, the California legislature clarified that *all* same-sex marriages, valid by the laws of the states where entered into, are valid and recognized as marriages in California as long as they were contracted before November 5, 2008.[55]

2. Civil Unions and Domestic Partnerships

Several states have extended many or all of the rights afforded by their state law to marriages to formalized same-sex relationships of some sort. In addition to Connecticut,[56] only New Jersey currently grants civil unions.[57] California, Oregon, Nevada, and the District of Columbia provide statutory schemes for domestic partnerships operating in much the

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49. *Id.* at 453.

50. Jesse McKinley, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold*, N.Y. TIMES, June 17, 2008, at A19.

51. Susan Ferriss, *California Bill Would Recognize Same-Sex Marriages from Other States*, SACRAMENTO BEE, July 21, 2009, http://www.sacbee.com/2009/07/21/2041961/california-bill-would-recognize.html.

52. CAL. CONST. art. I, § 7.5 (amended 2008).

53. While the Supreme Court of California upheld Proposition 8 as a permissible amendment to the California Constitution, Strauss v. Horton, 207 P.3d 48, 119 (Cal. 2009), it has been challenged in federal court under the Equal Protection and Due Process Clauses of the U.S. Constitution. Jesse McKinley, *Fight to Reverse California's Same-Sex Marriage Ban Heads to Courtroom*, N.Y. TIMES, Jan. 11, 2010, at A9, *available at* http://nytimes.com/2010/01/11/us/11prop8.html.

54. *Strauss*, 207 P.3d at 119.

55. 2009 Cal. Legis. Serv. ch. 625; Dan Smith, *Schwarzenegger Signs Gay Rights Bill*, SACRAMENTO BEE, Oct. 19, 2009, http://sacbee.com/2009/10/12/2248216/schwarzenegger-signs-gay-rights.html.

56. At present, Connecticut affords same-sex couples the option of entering into either a marriage or a civil union. Beginning on October 10, 2010, all civil unions will be converted into marriages, and the state will no longer offer that option. *See supra* notes 30–34 and accompanying text.

57. N.J. STAT. ANN. §§ 37:1-28 to :1-36 (West Supp. 2009). Vermont, the first state to offer civil unions, stopped issuing them in September 2009, when the legislative amendments providing for same-sex marriage went into effect. Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, No. 003, § 12(b), 2009 Vt. Acts & Resolves 33, 37 (repealing VT. STAT. ANN. tit. 18, §§ 5160–5165 (2000) (relating to issuance and certification of civil union licenses)). New Hampshire similarly stopped issuing civil unions when its same-sex marriage legislation went into effect. *See* Act of June 3, 2009, N.H. ch. 61:3, *available at* http://www.gencourt.state.nh.us/legislation/2009/HB0073.html (prohibiting the establishment of civil unions on or after January 1, 2010).

same way,[58] though the District of Columbia's scheme is scheduled to be phased out on January 1, 2011, due to the city's adoption of same-sex marriage.[59] These states provide that all "benefits, protections, and responsibilities" associated with marriage apply equally to the civil union or domestic partnership.[60] Hawaii, Maryland, Wisconsin, and Maine also have domestic partnership schemes in place, which confer limited spousal benefits.[61] For the purposes of this Note, the focus will remain on those relationships that have been formalized either as a marriage or as a functional equivalent of a marriage.

It is not always clear whether states that grant civil unions or domestic partnerships will recognize a same-sex relationship formalized in another state, whether by marriage or under another scheme. New Jersey has specifically provided that same-sex marriages granted in other states will be given the same effect as a New Jersey civil union.[62] California law, on the other hand, explicitly refuses to recognize same-sex marriages performed elsewhere,[63] though it accords domestic partnership status to other unions between individuals of the same sex.[64]

58. CAL. FAM. CODE §§ 297–299.6 (West 2004); Oregon Family Fairness Act, ch. 99, 2007 Or. Laws 425–31; Nevada Domestic Partnership Act, ch. 393, 2009 Nev. Stat. 2183–87; HUMAN RIGHTS CAMPAIGN, EQUALITY FROM STATE TO STATE 2009, at 7, www.hrc.org/documents/HRC_States_Report_09.pdf (noting that Washington's 2009 "everything but marriage" law was upheld by public referendum on November 3, 2009 and that the new provisions went into effect on December 3 of the same year); Steve Friess, *Nevada Partnership Bill Now Law*, N.Y. TIMES, June 1, 2009, at A12 (reporting that the Nevada legislature overrode a veto by the governor to enact a bill creating domestic partnerships in the state on May 31, 2009); Human Rights Campaign, D.C. Marriage/Relationship Recognition Law, http://www.hrc.org/issues/marriage/domestic_partners/836.htm (last visited Mar. 1, 2010) (compiling D.C. Code provisions that confer upon registered domestic partners "all the rights and responsibilities provided to spouses under D.C. law").

59. Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 27 (Jan. 1, 2010).

60. N.J. STAT. ANN. § 37:1-31(a); *see also* CAL. FAM. CODE § 297.5(2); N.H. REV. STAT. ANN. § 457-A:6 (LexisNexis Supp. 2009); VT. STAT. ANN. tit. 15, § 1204(a) (2002); Oregon Family Fairness Act, ch. 99 § 9, 2007 Or. Laws 427.

61. HAW. REV. STAT. ANN. §§ 572C-1 to 572C-7 (LexisNexis 2005) (establishing the "reciprocal beneficiary relationship"); Human Rights Campaign, Maine Marriage/Relationship Recognition Law, http://www.hrc.org/laws_and_elections/882.htm (last visited Mar. 1, 2010) (compiling statutes establishing Maine's domestic partnership registry and outlining benefits thereby conferred); Human Rights Campaign, Maryland Marriage/Relationship Recognition Law, http://www.hrc.org/issues/marriage/domestic_partners/904.htm (last visited Mar. 1, 2010) (noting that in 2008, Maryland conferred eleven protections formerly available only to spouses on domestic partners); Human Rights Campaign, Wisconsin Marriage/Relationship Recognition Law, http://www.hrc.org/issues/marriage/domestic_partners/1148.htm (last visited Mar. 1, 2010) (announcing a domestic partnership scheme for same-sex couples in Wisconsin effective as of the end of July 2009, which confers limited rights).

62. N.J. STAT. ANN. § 37:1-34.

63. CAL. CONST. art. I, § 7.5 (amended 2008) ("Only marriage between a man and a woman is valid or recognized in California."). This applies only to same-sex marriage entered into after November 4, 2008, however, as earlier marriages, no matter where contracted, are recognized under 2009 Cal. Legis. Serv. Ch. 625. *See supra* notes 52–55 and accompanying text.

64. CAL. FAM. CODE § 299.2 (West 2005) ("A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.").

A handful of states have not adopted legislation either providing for or denying recognition to same-sex marriages or other unions, including New York, New Mexico, and Rhode Island.[65] While treatment of these relationships has been judicially established in both New York[66] and Rhode Island,[67] New Mexico's laws remain untested.[68]

3. Mini-DOMA States

As previously noted, a majority of states have passed mini-DOMA laws, and many have made "defense of marriage" amendments to their constitutions.[69] Forty states are currently operating under some form of legislation that limits recognition of same-sex relationships.[70] State laws and constitutional amendments come with a combination of the following provisions: (1) an explicit definition of marriage as solely between a man and a woman or an inherently male/female relationship, (2) a prohibition against solemnizing same-sex marriages, (3) a prohibition against recognizing same-sex marriages granted elsewhere, and (4) a prohibition against recognizing civil unions granted elsewhere.[71] With broad language invalidating all such marriages as "void" or asserting that only opposite-sex marriages will be recognized for purposes of state legislation, many of the state provisions seem to expand the traditional public policy exception to the doctrine of comity to reach anyone who even enters the state, regardless of where they are domiciled or which state had the most

65. *See* David Abel, *Same-Sex Couples from N.M. Allowed to Marry in Mass.*, BOSTON GLOBE, July 27, 2007, at B3 (New Mexico); Peters, *supra* note 44 (New York); *RI Governor Opens Door to Domestic Partnerships*, GAY & LESBIAN TIMES, Nov. 19, 2009, at 18 (Rhode Island).

66. *See supra* notes 42–44 and accompanying text.

67. *See* Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007).

68. *See RI Governor Opens Door to Domestic Partnerships*, *supra* note 65.

69. *See supra* text accompanying notes 11–12.

70. To date, twenty-four states have made constitutional amendments (and enacted statutes) affecting recognition of same-sex relationships (Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, and Wisconsin), and sixteen additional states have enacted statutes bearing on this question (Alabama, Colorado, Delaware, Hawaii, Illinois, Indiana, Kansas, Maryland, Minnesota, North Carolina, Pennsylvania, South Carolina, Tennessee, Washington, West Virginia, and Wyoming). *See* ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. LXXXIII, § 1; CAL. CONST. art. I, § 7.5; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4; IDAHO CONST. art. III, § 28; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.D. CONST. art. XXI, § 9; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13; ALA. CODE § 30-1-19 (LexisNexis 1998); COLO. REV. STAT. ANN. § 14-2-104 (West 2005); DEL. CODE ANN. tit. 13, §§ 101, 104 (1999 & Supp. 2008); HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2005); 750 ILL. COMP. STAT. 5/201 (2006); IND. CODE ANN. § 31-11-1-1 (LexisNexis 2007); KAN. STAT. ANN. § 23-101 (2007); MD. CODE ANN. FAM. LAW § 2-201 (LexisNexis 2006); MINN. STAT. ANN. § 517.01 (West 2006); N.C. GEN. STAT. § 51-1 (2009); 23 PA. CONS. STAT. ANN. § 1102 (West 2001); S.C. CODE ANN. § 20-1-10 (Supp. 2009); TENN. CODE ANN. § 36-3-113 (2005); WASH. REV. CODE ANN. § 26.04.010 (West 2005); W. VA. CODE ANN. § 48-2-104 (LexisNexis 2004); WYO. STAT. ANN. § 20-1-101 (2009).

71. *See supra* note 70.

significant relationship to the marriage and the parties when the marriage was entered into.[72]

B. Divorce Law

The particular structure of divorce law in the United States, in which jurisdiction hinges on domicile, makes the issue particularly difficult where one's home state does not recognize his or her marriage. This Section provides some background information on the importance of divorce, including the rights and benefits it confers, and explores the underpinnings of jurisdiction and interstate recognition of a divorce decree.

1. Dissolution of Marriage: Divorce and Annulment

Many arguments in favor of recognizing same-sex marriage have focused on the benefits conferred upon couples via the recognition of one's marital status, including hospital visitation rights, automatic parental status, tax benefits, access to certain types of property ownership, and the like.[73] However, divorce proceedings also offer couples a variety of rights and imply various consequences. These include (1) the distribution and tax-preferential transfer of property between spouses, (2) the right to seek spousal support (such as alimony), (3) the right to seek custody and visitation rights for children of the marriage, and (4) preferential treatment for claims made under a divorce decree by former spouses in bankruptcy court.[74]

These benefits may also arise out of a declaration of invalidity, or annulment.[75] In its modern sense, the term divorce refers to "the legal termination of a valid marriage," while annulment "technically means the declaration by a court that a purported marriage was invalid from its beginning because of defects existing at the time it was contracted,"[76] or "a declaration recognizing that the marriage attempted by the parties never came into existence at all because of a fatal impediment at the time of formation."[77] In early American law, annulment provided few protections to parties wishing to dissolve a marriage.[78] Because "the marriage was deemed never to have existed, early law saw no basis for affording either party the economic or social protections that come with marriage."[79] The "obvious injustice of this legal regime" has prompted "many states [to regularize] relief by enacting statutes that expressly au-

72. *See* KOPPELMAN, *supra* note 20, at 70.

73. *See, e.g.*, Am. Bar Ass'n Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 367–70 (2004).

74. *Id.*

75. CLARK, *supra* note 15, at 693.

76. *Id.*

77. DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 453 (2006).

78. *See id.*

79. *Id.* at 453–54.

thorize courts to provide alimony or property distribution in cases of annulment."[80] For example, Minnesota law provides that the statutory "provisions . . . relating to property rights of the spouses, maintenance, support and custody of children on dissolution of marriage are applicable to proceedings for annulment."[81] Even where such provisions are not expressly made, some courts have drawn upon their equitable powers to apply some of the rights accorded in a divorce to parties in a declaration of invalidity.[82]

At least in theory, if a state refused to recognize the existence of a valid marriage between same-sex spouses, the couple would, at a minimum, have recourse to proceedings to declare the marriage invalid (and equitably divide the couple's property). Normally, state family courts have subject matter jurisdiction to decree divorces or issue declarations of invalidity where there is some defect in the marriage that makes it void or voidable.[83] Despite language in many mini-DOMAs declaring same-sex marriages "void" or "prohibited" which should, at a minimum, confer jurisdiction on the courts to hear divorce or invalidity petitions,[84] a combination of a statutory definition of marriage as between two people of the opposite gender and family court jurisdiction predicated on the existence of a "marriage" could result in the complete absence of a forum for dissolution of a same-sex marriage validly contracted into elsewhere.[85]

2. Jurisdiction and Interstate Recognition of Divorce

Nearly all states require, by statute, that at least one of the parties to a divorce proceeding has been a resident of that state for a specified period (ranging from six weeks to two years, but most commonly six months).[86] For purposes of these statutes, residence "usually means domicile."[87] The Supreme Court upheld one such minimum residency requirement as a prerequisite to divorce in *Sosna v. Iowa*.[88] The Iowa law at issue in that case imposed a one-year residency requirement for di-

80. *Id.* at 454.

81. MINN. STAT. ANN. § 518.03 (West 2006).

82. *See, e.g.*, Splawn v. Splawn, 429 S.E.2d 805, 806–07 (S.C. 1993) (construing two separate provisions of the South Carolina Code giving family court exclusive jurisdiction over all family law matters, including annulment, and over all questions relating to family support or property rights to confer to family court subject matter jurisdiction to equitably distribute property of a bigamous marriage).

83. *See* ABRAMS ET AL., *supra* note 77, at 453 (discussing the difference between void and voidable marriage defects); CLARK, *supra* note 15, at 703–05 (discussing state divorce jurisdiction).

84. *See* KOPPELMAN, *supra* note 20, at 140–41.

85. *See* discussion *infra* Part III (examining the Rhode Island Supreme Court's determination, even in the absence of a statutory definition of the term "marriage," that the Rhode Island Family Court did not have jurisdiction to hear a petition for the dissolution of a same-sex marriage validly entered into in Massachusetts).

86. CLARK, *supra* note 15, at 703.

87. *Id.* at 703–04.

88. 419 U.S. 393, 409–10 (1975).

vorce jurisdiction.[89] Commentators later noted that, while *Sosna* "seems to establish the validity of residence requirements for divorce which last no longer than one year, . . . longer or more complex requirements . . . may still be constitutionally suspect if they go beyond the effectuation of the interests relied on in support of the Iowa statute."[90] The Court has further reinforced this connection between residency and divorce jurisdiction, however, holding in *Williams v. North Carolina* (*Williams II*) that "[u]nder our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil" and that "[t]he domicil of one spouse within a State gives power to that State . . . to dissolve a marriage wheresover [sic] contracted."[91] The Court has also repeatedly confirmed that divorce is the exclusive purview of the state and that the federal courts "do not have jurisdiction to grant divorces, award alimony or determine the custody of children on divorce, even though there may be diversity of citizenship between the parties and the required amount in controversy."[92]

In 1940, O.B. Williams and Lillie Shaver Hendrix left their spouses in North Carolina, moved to Nevada, where they stayed for at least six weeks, and filed for divorces from their spouses.[93] Although both respondent spouses were served notice of the proceedings in North Carolina, neither appeared before the Nevada court.[94] Despite their absence, the Nevada court found that each petitioner had satisfied Nevada's six-week residency requirement and granted the divorce petitions.[95] Williams and Hendrix were married to each other after their respective divorces became final, and moved back to North Carolina.[96] They were subsequently "tried and convicted of bigamous cohabitation" under North Carolina law, even though they presented evidence of their Nevada divorces.[97] The North Carolina court refused to recognize the Nevada proceedings on the grounds that neither respondent was served in Nevada nor appeared there.[98] The couple challenged this decision, and the Supreme Court granted certiorari.[99] In *Williams I*, the Court established that, as between the states, "full faith and credit must be given divorce decrees of the various states when one of the parties to the action, usual-

89. *Id.* at 395.
90. CLARK, *supra* note 15, at 705.
91. 325 U.S. 226, 229–30 (1945).
92. CLARK, *supra* note 15, at 705; *see also* Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383 (1930); De La Rama v. De La Rama, 201 U.S. 303, 307 (1906); Simms v. Simms, 175 U.S. 162, 167 (1899); *Ex parte* Burrus, 136 U.S. 586, 594 (1890); Barber v. Barber, 62 U.S. (21 How.) 582, 583 (1858).
93. Williams v. North Carolina (*Williams I*), 317 U.S. 287, 289–90 (1942).
94. *Id.* at 290.
95. *Id.*
96. *Id.*
97. *Id.* at 289–90.
98. *Id.* at 290–91.
99. *Id.* at 289.

ly the plaintiff but conceivably the defendant, was domiciled in the state where the decree was granted."[100]

When the Court considered questions arising at a later stage of the controversy in *Williams II*, however, it noted that the divorcing court's determination of domicile (and, therefore, that it had jurisdiction to award a divorce decree), though entitled to substantial weight, "cannot . . . foreclose reexamination [of this determination] by another State."[101] The Court went on to note that "the legal situation created by our federal system [is such that] one State can grant a divorce of validity in other States only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage" and that, if the forum state (the state in which recognition of the divorce decree is being sought) finds that the parties had not established domicile in the state where the divorce was granted, it is entitled to disregard the judgment of the divorcing court.[102] Thus, if a party trying to "escape the operation of a [divorce] judgment decreed in another State" can sustain his or her burden of proof as to lack of domicile, the court in which the validity of the decree is challenged may find that the divorcing court lacked subject matter jurisdiction and, consequently, refuse to enforce the decree.[103]

III. ANALYSIS

Marriage dissolution laws in Connecticut, Massachusetts, Vermont, Iowa, New Hampshire, New York, and the District of Columbia apply indiscriminately to same-sex marriages and opposite-sex marriages. Residency requirements vary, but can range from six months in Vermont and the District of Columbia[104] to twelve months in Connecticut, Massachusetts, New Hampshire, and Iowa, and even up to two years in New York, depending on the circumstances of the marriage and divorce.[105] Married same-sex couples who live in any of these states should not have a problem gaining access to divorce as long as they have met the residency requirement. Problems arise, however, for same-sex couples who have either (1) married while living in the jurisdiction that performed the marriage or civil union but have subsequently moved out of the state ("migratory" marriages), or (2) have traveled specifically to that jurisdic-

100. CLARK, *supra* note 15, at 717; *see also Williams I*, 317 U.S. at 301–02. Clark notes, however, that this doctrine "governs only the circumstances under which the marital status may be terminated. Where alimony, property, support and custody of children are involved, additional legal principles may become relevant." CLARK, *supra* note 15, at 718.

101. *Williams II*, 325 U.S. 226, 234 (1945).

102. *Id.* at 238–239.

103. Esenwein v. Pennsylvania *ex rel.* Esenwein, 325 U.S. 279, 280–81 (1945).

104. D.C. CODE § 16-902 (2001) (requiring at least one party to have resided in D.C. for at least six months immediately preceding the time of filing); VT. STAT. ANN. tit. 15, § 592 (2002) (at least one party to the marriage must have resided in Vermont for at least six months at the time of filing).

105. *See* N.Y. DOM. REL. LAW § 230 (McKinney 1999).

tion to get married before returning home (considered "evasive" marriages when the couple's home state would not perform the marriage).[106]

This Part focuses on (1) the developing conflict-of-laws analysis as it relates to same-sex divorce, (2) the practical problems that can arise if states refuse to recognize the existence of the marriage for even the limited purpose of dissolving it, and, finally, (3) the constitutional concerns raised by a state's refusal to provide a forum for divorce.

A. Conflict-of-Law Problems Posed by Migratory and Evasive Marriages

When Massachusetts first permitted same-sex marriage, an old "reverse evasion" law prohibited those parties "residing and intending to reside in another jurisdiction" from marrying in Massachusetts "if such marriage would be void if contracted in such other jurisdiction."[107] This theoretically limited the availability of same-sex marriages to couples who resided in a state where their marriage would be recognized. The law could not, however, prevent couples married in Massachusetts from later moving to a state where their union was not recognized.[108] The issues surrounding nonrecognition only intensified when California began permitting same-sex marriage without such a restriction[109] and Massachusetts repealed its reverse evasion law on July 31, 2008.[110] Connecticut, Iowa, and the District of Columbia similarly impose no such requirement,[111] and Vermont's "reverse evasion" law was repealed by the same bill that authorized same-sex marriage.[112]

Same-sex couples are susceptible to finding themselves in a unique legal limbo under these laws. Those couples who reside in one of these states, marry there, and live out the rest of their lives there are in the same situation when it comes to divorce as any other married couple. However, the scenarios of migratory and evasive marriages present couples (and courts) with significant complications in dissolution proceedings.[113] Depending on the choice-of-law rules adopted by a state, a married same-sex couple who move out of the state where the marriage

106. *See* Koppelman, *supra* note 10, at 2152–53.

107. MASS. ANN. LAWS ch. 207, § 11 (LexisNexis 2003) (repealed 2008).

108. *See id.*

109. *See supra* note 17.

110. Act of July 31, 2008, Mass. ch. 216, *available at* http://www.mass.gov/legis/laws/seslaw08/sl080216.htm.

111. *See* LAMBDA LEGAL, LEGAL RECOGNITION OF SAME-SEX COUPLES' MARRIAGES, CIVIL UNIONS & DOMESTIC PARTNERSHIPS 5 n.1 (2008), http://data.lambdalegal.org/publications/downloads/fs_legal-recognition-same-sex-couples.pdf (noting that, other than Massachusetts, the only other states to have implemented reverse evasion laws are Illinois, New Hampshire, Vermont, Wisconsin, and Wyoming).

112. *See* Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, No. 003, § 12(a)(4), 2009 Vt. Acts & Resolves 33, 37 (repealing VT. STAT. ANN. tit. 15, § 6 (2002)). New Hampshire retains such a law. N.H. REV. STAT. ANN. § 451:44 (LexisNexis 2002).

113. *See* KOPPELMAN, *supra* note 20, at 102–10.

was granted or who merely travel to one of these states to get married before returning home to their state of residence may find that they are considered married in some states for some purposes and unmarried in other states for the same or other purposes.[114] Given the current legal landscape in the United States and the significant rejection of same-sex marriages across the country, one might argue that, when a couple moves out of a state that recognizes same-sex marriage or travels to Massachusetts or Connecticut just to get married, the parties to the marriage cannot logically expect recognition of the benefits of marriage to follow them everywhere. This may very well be the case, particularly in an evasive marriage. However, because the marriage will be formally recognized in a handful of jurisdictions across the country, if a couple does not have access to a means of dissolving the relationship, perverse results may occur.

An extrapolation of the consequences of the Rhode Island Supreme Court's ruling in *Chambers v. Ormiston*[115] illustrates this problem. In that case, Rhode Island residents Margaret Chambers and Cassandra Ormiston were married in Massachusetts in 2004.[116] After just over two years, the women filed to dissolve their marriage, which was considered valid in Massachusetts, in the Rhode Island Family Court.[117] The family court certified a question to the Rhode Island Supreme Court to determine "whether or not the Family court has subject matter jurisdiction to grant a petition for divorce with respect to a same-sex couple."[118] The court, while "sensitive to the fact that [its] holding . . . deprives the parties . . . of the opportunity to seek a divorce in [Rhode Island] Family Court," answered in the negative.[119]

The consequences of such a decision are ultimately untenable. As Justice Suttell noted in his dissent, "[u]nless one or both of [the parties] establish[ed] the domicile and residency requirements of another jurisdiction . . . the Rhode Island Family Court [was] the only forum available to them to terminate their marriage."[120] Presumably, the Chambers-Ormiston marriage was not recognized in Rhode Island, and the legal relationship could not be enforced in that state in order to confer benefits or impose obligations on the parties. However, because the marriage was validly entered into in Massachusetts and has not been dissolved, it

114. *See id.* at 16–17 (explaining the need for a scheme of interstate marriage recognition that does not result in "people's marital status blink[ing] on and off like a strobe light as they jet across the country").

115. 935 A.2d 956 (R.I. 2007).

116. *Id.* at 958.

117. *Id.* at 959.

118. *Id.*

119. *Id.* at 958 n.2.

120. *Id.* at 970 (Suttell, J., dissenting). This observation has since been confirmed by the Rhode Island Superior Court, a court of general jurisdiction, when it refused to hear Chambers's renewed request for divorce in 2008, also citing jurisdictional grounds. *Constitutional Issue Raised in R.I. Gay Divorce*, GAY CHI. MAG., June 26–July 6, 2008, at 14, 14. Ormiston has, meanwhile, moved to Massachusetts and is waiting to satisfy the residency requirement to file for divorce there. *Id.*

would be reasonable to conclude that the benefits and obligations of marriage could be enforced in Massachusetts or any other state recognizing the validity of the legal relationship.[121]

A number of complications can arise from such a disparity in the recognition of such marriages. If a state decides "that same-sex marriages are so abominable that they will not be recognized, ever, for any purposes"[122] (theoretically the stance of most mini-DOMA laws[123]), it could "become [a] haven[] for people wanting to avoid obligations of spousal property and child support that they had validly entered into."[124] Under such a policy, "those who undertake the obligations of marriage in Massachusetts may, unlike other married couples, escape those obligations simply by relocating to another state."[125] If Chambers were, for example, to move to Massachusetts and establish domicile there in order to get a divorce, the Massachusetts court would only be able to dissolve the legal status of the marriage. The court would not have jurisdiction to award alimony or equitably divide the couple's property if Ormiston was still living in Rhode Island and had not consented to personal jurisdiction in Massachusetts,[126] though orders otherwise enforceable under the Uniform Interstate Family Support Act (UIFSA) or the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) should remain enforceable in Rhode Island.[127] At least in theory, however, DOMA gives states the right to refuse to recognize any judgment predicated on the existence of a valid same-sex marriage, which would conceivably extend to support or custody orders.[128]

To obtain an enforceable award of alimony or division of property, Chambers would have to get the Rhode Island court to recognize the divorce and to make an equitable distribution of the couple's property un-

121. Massachusetts same-sex marriages are recognized as valid marriages in the four other states that grant same-sex marriages (Connecticut, Iowa, New Hampshire, and Vermont), as well as in the District of Columbia and in New York. *See supra* notes 4–7, 44, 46 and accompanying text. It is often unclear how those states that permit civil unions or domestic partnerships will treat a same-sex marriage. *See supra* notes 62–68 and accompanying text.

122. KOPPELMAN, *supra* note 20, at 70.

123. *See supra* Part II.A.3.

124. KOPPELMAN, *supra* note 20, at 71.

125. Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 6 (2005).

126. *See* KOPPELMAN, *supra* note 20, at 72; *see also* Singer, *supra* note 125, at 15–16.

127. The UIFSA has been adopted in all American jurisdictions and "provides universal and uniform rules for the enforcement of family support orders." Uniform Law Commissioners of the National Conference of Commissioners on Uniform State Laws, Summary of UIFSA, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-uifsa.asp (last visited Mar. 1, 2010). The UCCJEA, also adopted by all U.S. states, establishes rules for interstate enforcement of child custody orders. Uniform Law Commissioners of the National Conference of Commissioners on Uniform State Laws, Summary of UCCJEA, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-uccjaea.asp (last visited Mar. 1, 2010).

128. 28 U.S.C. § 1738C (2006) ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

der either Massachusetts or Rhode Island law.[129] In this case, it is unclear whether Rhode Island would uphold a divorce decree from Massachusetts for these purposes, or whether the lack of jurisdiction found in *Chambers* would extend to preclude recognition of divorce decrees dissolving a same-sex marriage.[130] If Rhode Island had enacted a mini-DOMA statute, formally prohibiting recognition of the marriage, it would likely prohibit recognition of the divorce decree as predicated on this prohibited marriage, and the marital property would not be distributed.[131] In such a case, the application of a blanket nonrecognition rule would effectively leave no remedy for Chambers.[132] Even if Rhode Island recognized the divorce decree, the interpretation of its jurisdictional requirements would force one party to uproot her life and move to another state simply to dissolve this legal relationship.[133]

As explored in the next Section, a state's refusal to entertain a petition for dissolution of a same-sex marriage is unconstitutional. Such a decision violates individuals' due process rights and the principles established by the Supreme Court in *Boddie v. Connecticut*.[134] This Note argues that, by extension, the refusal to recognize same-sex civil unions or domestic partnerships for the limited purpose of dissolution is similarly unconstitutional, and examines some of the approaches that courts have taken when confronted with the problem of interstate recognition of a same-sex marriage or civil union for purposes of divorce proceedings and enforcement of divorce decrees.

B. The Constitutional Concern Raised by Chambers

The *Chambers* decision came as a particularly harsh blow to gay rights advocates. Before Massachusetts repealed its marriage evasion statute, several out-of-state couples brought suit against the Department of Public Health of Massachusetts to allow them to marry, including two couples from Rhode Island.[135] The Massachusetts Supreme Judicial

129. *See* Singer, *supra* note 125, at 17.

130. The *Chambers* court determined that the Rhode Island statute establishing the family court and giving it jurisdiction to "hear and determine all petitions for divorce from the bond of marriage" did not confer the power to dissolve a same-sex marriage because the word "marriage" at the time of enactment of the statute did not encompass a same-sex relationship. Chambers v. Ormiston, 935 A.2d 956, 961–63 (R.I. 2007) (quoting R.I. GEN. LAWS § 8-10-3(a) (1997)). The same statute gives the family court jurisdiction over "all motions for allowance, alimony, support and custody of children, . . . and other matters arising out of petitions and motions relative to real and personal property . . . arising out of the family relationship, wherein jurisdiction is acquired by the court by the filing of petitions for divorce." R.I. GEN. LAWS § 8-10-3(a). The logic that led the court to conclude that "marriage" only applied to opposite-sex relationships could similarly lead to a conclusion that "divorce" only relates to the dissolution of opposite-sex marriages.

131. *See* Singer, *supra* note 125, at 16–17.

132. *See* KOPPELMAN, *supra* note 20, at 72.

133. *See supra* notes 122–26 and accompanying text.

134. 401 U.S. 371, 377–80 (1971).

135. Cote-Whiteacre v. Dep't of Pub. Health, 844 N.E.2d 623, 631 (Mass. 2006) (Spina, J., concurring).

Court remanded the question of whether Rhode Island prohibited same-sex marriage to the superior court,[136] which subsequently found that Rhode Island did *not* prohibit the marriages and thus allowed same-sex couples residing in Rhode Island to marry in Massachusetts notwithstanding the Massachusetts reverse evasion statute.[137] In February 2007, the Rhode Island attorney general supported this conclusion, opining that the state would recognize same-sex marriages performed in Massachusetts.[138] The Rhode Island Supreme Court, however, came to the opposite conclusion.[139]

As previously mentioned, in *Chambers*, the court was asked to determine whether the Rhode Island Family Court had jurisdiction to "recognize [a Massachusetts same-sex marriage] for the purpose of entertaining a divorce petition."[140] The court focused on the meaning of "marriage" in the 1961 Family Court Act, which created the family court and gave it jurisdiction to "determine all petitions for divorce from the bond of marriage."[141] Finding that the statute was not ambiguous, the court looked to the plain meaning of the statute to determine legislative intent.[142] Because the meaning of "marriage" in 1961 did not contemplate same-sex unions, the court concluded that the intent of the legislature was to give the family court subject matter jurisdiction only over marriage between opposite-sex partners, and that it was not the role of the supreme court to infer jurisdiction over the matter at hand.[143] The court followed its holding with a suggestion that it was for the Rhode Island legislature to decide whether to expand the jurisdiction of the family court to give it the power to dissolve such marriages.[144]

It does not take much imagination to suppose that, had Rhode Island enacted a mini-DOMA statute, this case would have had the same result. Most of the mini-DOMAs not only define marriage as between a man and a woman, but specifically prohibit the recognition of a same-sex marriage.[145] The argument for lack of subject matter jurisdiction in a di-

136. *Id.* (rescript).

137. Cote-Whiteacre v. Dep't of Pub. Health, No. 04-2656, 2006 WL 3208758, at *4–5 (Mass. Dist. Ct. Sept. 29, 2006).

138. Katie Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, N.Y. TIMES, Feb. 22, 2007, at A19.

139. Chambers v. Ormiston, 935 A.2d 956, 974 (R.I. 2007).

140. *Id.* at 958.

141. R.I. GEN. LAWS § 8-10-3(a) (1997).

142. *Chambers*, 935 A.2d at 961.

143. *Id.* at 961–63. The court also noted that the Rhode Island General Laws "consistently use gendered terms when referring to various aspects of marriage," *id.* at 962 n. 13, and that even if the statute in question was ambiguous, the principle of *noscitur a sociis* would lead them to conclude that the family court's jurisdiction was limited to opposite-sex marriages, *id.* at 963–65.

144. *Id.* at 966. Given this rationale, it is likely that the outcome would be the same had the couple petitioned for a declaration of invalidity as opposed to divorce, as the court seems to consider there to be no marriage at all, not even a void or voidable marriage.

145. ALASKA CONST. art. I, § 25; CAL. CONST. art. I, § 7.5; GA. CONST. art. I, § 4; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28;

vorce proceeding would only be strengthened by these statutes, as they clearly indicate that a marriage between two individuals of the same sex is against the public policy of the state and should not be recognized.[146] As illustrated earlier, predicating a court's subject matter jurisdiction on the existence of a valid marriage denies same-sex couples access to divorce and leaves them with a legal relationship that, although valid and enforceable in some states, cannot be dissolved. This clearly contravenes the guarantee of due process in the Fifth and Fourteenth Amendments of the U.S. Constitution as it was understood in *Boddie v. Connecticut*.[147]

In *Boddie*, the Supreme Court heard an as-applied challenge to a Connecticut statute that imposed a mandatory fee for instituting divorce proceedings.[148] The challenge was brought as a class action by welfare recipients whose meager income "barely suffice[d] to meet the costs of the daily essentials of life," preventing them from budgeting to be able to pay the required court costs.[149] The Court concluded that the statute in question violated the plaintiffs' due process rights, finding that "the right to a meaningful opportunity to be heard within the limits of practicality must be protected against denial by particular laws that operate to jeopardize it for particular individuals,"[150] even if the "general validity [of those laws] as . . . measure[s] enacted in the legitimate exercise of state power is beyond question."[151] While underscoring the fact that it was "not decid[ing] that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual,"[152] the Court focused on the particular nature of the marital relationship and a petition for divorce, emphasizing that the right of access to the courts in such a circumstance "is the exclusive

OHIO CONST. art. II, § 35; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.D. CONST. art. XXI, § 9; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13; ALA. CODE § 30-1-19 (LexisNexis 1998); ALASKA STAT. § 25.05.011 (2008); ARIZ. REV. STAT. ANN. § 25-112 (2007); ARK. CODE ANN. § 9-11-107 (2008); COLO. REV. STAT. ANN. § 14-2-104 (West 2005); DEL. CODE ANN. tit. 13, §§ 101, 104 (1999 & Supp. 2008); FLA. STAT. ANN. § 741.212 (West 2008); GA. CODE ANN. § 19-3-3.1 (2004); IDAHO CODE ANN. § 32-209 (2006); 750 ILL. COMP. STAT. 5/212, /213.1, /216 (2006); IND. CODE ANN. § 31-11-1-1 (LexisNexis 2007); KAN. STAT. ANN. § 23-115 (2007); KY. REV. STAT. ANN. § 402.045 (LexisNexis 1999); MICH. COMP. LAWS ANN. § 551.272 (West 2005); MINN. STAT. ANN. § 517.03 (West 2006); MISS. CODE ANN. § 93-1-3 (2004); MO. ANN. STAT. § 451.022 (West 2003); N.C. GEN. STAT. § 51-1.2 (2009); N.D. CENT. CODE § 14-03-08 (2004); OHIO REV. CODE ANN. § 3101.01 (LexisNexis 2008); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.D. CODIFIED LAWS § 25-1-38 (2004); TENN. CODE. ANN. § 36-3-113 (2007); TEX. FAM. CODE ANN. § 6.204 (Vernon 2008); UTAH CODE ANN. §§ 30-1-4, 30-1-4.1 (2007); VA. CODE ANN. § 20-45.2 (2008); WASH. REV. CODE ANN. § 26.04.020 (West 2005); W. VA. CODE ANN. § 48-2-603 (LexisNexis 2004); WIS. STAT. ANN. § 765.04 (West 2009).

146. *See* Koppelman, *supra* note 11, at 923–24.

147. 401 U.S. 371, 383 (1971).

148. *Id.* at 372.

149. *Id.* at 372–73.

150. *Id.* at 379–80 (citations omitted).

151. *Id.* at 379.

152. *Id.* at 382–83.

precondition to the adjustment of a fundamental human relationship."[153] Because "[t]he requirement that these appellants resort to the judicial process is entirely a state-created matter," the Court held "that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so."[154]

Even if the marriage is of little practical value in a same-sex couple's current state of residence (assuming that their state does not confer any benefits on same-sex relationships), the marriage will remain valid wherever such marriages are recognized. While the attendant rights and obligations of the relationship can be enforced in these other states, the only way to effectively dissolve the marriage is through a court order issued in the parties' state of residence.[155] Construing jurisdictional restrictions so as to preclude access to the courts for same-sex couples seeking a divorce appears to directly contravene the Supreme Court's holding in *Boddie*, because such a construction effectively denies these couples recourse by providing "no means of dissolving the marriage they entered into in [another state], and thereby no means of altering their marital status in their domiciliary state."[156] Though the parties may technically have recourse by returning to the state in which they were married and establishing domicile there in order to file for divorce, this solution puts the right to due process in direct conflict with the constitutionally protected right to travel: access to the courts would come at the cost of the liberty to live where one chooses.[157] Moreover, this less-than-ideal solution may not even be effective. If it could be shown that the petitioner moved solely for the purposes of obtaining a divorce decree, domicile could not be established and the validity of a divorce order would be subject to attack.[158]

The difficulties attendant to this situation are heightened in the case of a civil union or domestic partnership. The reasoning adopted by the *Chambers* court parallels that of an earlier decision by the Connecticut Appellate Court. In 2002, before Connecticut instituted civil unions or same-sex marriage,[159] its appellate court concluded that the Connecticut

153. *Id.* at 383.

154. *Id.*

155. *See* Singer, *supra* note 125, at 13–18 (discussing the difficulties a hypothetical same-sex couple would encounter if their state of residence would not grant them a divorce).

156. Chambers v. Ormiston, 935 A.2d 956, 973 (R.I. 2007) (Suttell, J., dissenting).

157. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 502–04 (1999) (reaffirming that a newly arrived citizen to a state has the right to the same privileges and immunities enjoyed by other citizens of the state).

158. Intent to remain in the state is a crucial component of domicile. Williamson v. Osenton, 232 U.S. 619, 624 (1914) (noting that domicile requires residency with the intent to remain, or "the absence of any intention to live elsewhere"). Moreover, a finding of domicile by one state is not binding on another state when determining the effectiveness of a divorce decree. *See Williams II*, 325 U.S. 226, 237 (1945).

159. The Connecticut legislature passed a law instituting civil unions for same-sex couples in April 2005, which went into effect on October 1 of the same year. William Yardley, *Day Arrives for Recog-*

Superior Court did not have subject matter jurisdiction to dissolve a same-sex civil union entered into in Vermont.[160] In *Rosengarten v. Downes*, a same-sex couple living in Connecticut sought an order dissolving their civil union pursuant to a Connecticut statute conferring jurisdiction onto the Superior Court to resolve "[m]atters . . . deemed to be family relations matters," including dissolution and annulment of marriage, separation, support obligations, parental rights, and, in pertinent part, "all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court."[161] The plaintiff argued that this catchall provision extended to the dissolution of a Vermont civil union as a matter "concerning family relations."[162] The court predicated its analysis of subject matter jurisdiction on the validity under the laws of Connecticut of the relationship solemnized in Vermont. The court held that

> [i]mplicit in the plaintiff's argument that jurisdiction exists under [the catchall provision] is that we must recognize the validity of the Vermont civil union as a matter concerning family relations. If Connecticut does not recognize the validity of such a union, then there is no res to address and dissolve.[163]

Concluding that existing legislation and common law principles indicated that the legislative intent behind the statute "was not to make Connecticut courts a forum for same sex, foreign civil unions," the court emphasized that "the Vermont legislature cannot legislate for the people of Connecticut" and that their statutes "do not have extraterritorial effect."[164] The court determined that Connecticut public policy did not support recognition of civil unions as a valid legal relationship[165] and held that "a civil union is not a family relations matter and, therefore, the [trial] court was correct in determining that it had no subject matter jurisdiction to dissolve the civil union . . . ."[166]

The analysis announced in *Boddie* should apply equally to the right to dissolve a civil union or domestic partnership. These, too, are legally sanctioned relationships designed to at least approximate, if not replicate, the "fundamental human relationship" of marriage and whose dissolution requires judicial pronouncement.[167] As *Chambers* and *Rosen-*

nition of Gay Unions in Connecticut, N.Y. TIMES, Oct. 1, 2005, at B1; *see also* CONN. GEN. STAT. ANN. §§ 46b-38aa to -38pp (West 2009). In 2008, the Connecticut Supreme Court ruled that having a separate institution for same-sex couples was impermissibly discriminatory under the equal protection clause of the Connecticut Constitution, and the state began to issue marriage licenses to same-sex couples in November 2008. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481–82 (Conn. 2008); Foderaro, *supra* note 33.

160. Rosengarten v. Downes, 802 A.2d 170, 172 (Conn. App. Ct. 2002).
161. *Id.* at 174–75 (quoting CONN. GEN. STAT. ANN. § 46b-1 (internal quotations omitted)).
162. *Id.* at 175.
163. *Id.*
164. *Id.* at 178.
165. *Id.* at 179–82.
166. *Id.* at 184.
167. Boddie v. Connecticut, 401 U.S. 371, 383 (1971).

garten show, courts have been wary of recognizing same-sex unions of any kind, even for the limited purpose of dissolving them, if there is a suggestion that such a union is void under the public policy of their state. The following Part explores some solutions to this problem, as well as the particularities of the civil union and domestic partnership cases in comparison with the case of marriage.

IV. RECOMMENDATION

Imagine that Adam and Brad, a same-sex couple living in Rhode Island, take a trip to Boston for a weekend and celebrate their marriage, return home to Rhode Island where they live together until the marriage breaks down, and separate a few years later. Under *Chambers*, the men cannot dissolve their marriage, which, under current law, is legally enforceable in Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, and the District of Columbia (at a minimum).[168] As with any separation, Adam and Brad might disagree about how to divide assets or share custody of any children they may be raising together and, if they have not made legally enforceable contracts governing the disposition of assets in case of separation (assuming that any such contract could be enforced), they effectively have no legal remedy in the state of Rhode Island.

This could pose future problems. For example, if one of the men wants to remarry, he could be considered a bigamist in any state that recognizes the first marriage. Another problem could arise if one of them moves to Massachusetts or to another state that recognizes the validity of the marriage. Suppose that, ten years after the couple splits up, Adam wins the Rhode Island lottery and buys a house in Cambridge, Massachusetts. Since he was unable to get a divorce, he is still legally married to Brad. Brad could, theoretically, sue for divorce once Adam has established domicile in Massachusetts, and he may be entitled to share in Adam's lottery winnings and his property in Cambridge.[169]

The following Sections explore the reasons Massachusetts will not be able to give the couple an adequate remedy and ultimately suggest an alternative to the *Chambers* reasoning that would provide a remedy without obliging Rhode Island to give the marriage full recognition for other purposes.

168. *See supra* note 121 and accompanying text.

169. Though this might seem unlikely, this is precisely what happened in an Illinois divorce proceeding between a husband and wife who had separated without formalizing the divorce years before the husband won the lottery. The Illinois Appellate Court ruled that to distribute the property as if the marital property had stopped accruing upon physical separation "would be to recognize 'common law divorce,'" which was against Illinois public policy. *See In re* Marriage of Morris, 640 N.E.2d 344, 347 (Ill. App. Ct. 1994).

A. The Problems with a Legislative Solution in the Granting State

A relatively simple means of assuring access to divorce proceedings for same-sex married couples is for the state granting the legal union to provide a means for dissolving it. The only way for Massachusetts, for example, to allow Adam and Brad to get divorced there without infringing on their right of free movement by obliging at least one of them to move to the state, is to essentially eliminate its residency requirements for divorce, at least as applied to couples in such a situation.[170] While this would, theoretically, nullify the legal relationship for purposes of the application of Massachusetts statutes, this may not have any effect outside the state of Massachusetts, as other states are under no obligation from the Full Faith and Credit Clause to give legal effect to the divorce decree when the couple has no domicile in the granting state.[171]

A divorce decree so obtained would therefore not necessarily preclude another jurisdiction from regarding the couple as still married or as legal partners and, therefore, from enforcing the rights and obligations arising out of such a status under its own laws. For example, if Adam and Brad return to Boston for a weekend to get divorced, presumably their relationship will no longer be legally recognized in Massachusetts. If, however, five years later, Adam moves to Connecticut with Chad and wants to get married, he may not be able to; the Connecticut court is not obligated to recognize the dissolution of Adam's marriage to Brad because neither of the men were domiciled in Massachusetts at the time of the divorce. Connecticut could, therefore, prohibit him from getting remarried due to a state prohibition of bigamy.[172]

Furthermore, any division of property or other assets between Adam and Brad would not necessarily be enforceable in any other state. For example, if the couple owns a vacation home in Florida, a Florida court could refuse to order distribution of that property based on the Massachusetts judgment because Florida denies recognition not only of the marital status conferred by Massachusetts, but of "any public act, record, or judicial proceeding . . . respecting . . . a claim arising from [a same-sex] marriage or relationship [treated as a marriage in any jurisdiction]."[173]

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170. New Hampshire law has taken a step in this direction, giving the state courts jurisdiction to annul a marriage entered into in New Hampshire, "even though neither party has been at any time a resident" of the state. N.H. REV. STAT. ANN. § 458:3 (LexisNexis 2005). This, however, requires the parties to declare their marriage void and, as such, constitutes an imperfect solution.

171. *See supra* Part II.B.2.

172. *See* Mazzei v. Cantales, 112 A.2d 205, 208 (Conn. 1955) (noting that "[a] bigamous marriage is prohibited by law" and therefore void); *see also* CONN. GEN. STAT. ANN. § 53a-190 (West 2007) (making bigamy a felony).

173. FLA. STAT. ANN. § 741.212(2) (West 2005). This particular formulation is explicitly authorized under DOMA. 28 U.S.C. § 1738C (2006) ("No State . . . of the United States . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.").

While offering a substantially compromised remedy to out-of-state same-sex couples seeking divorce, elimination of the residency requirement to obtain a Massachusetts divorce would likely produce undesirable side effects. Should Massachusetts cease to inquire into parties' domicile in adjudicating petitions for divorce, the decrees issued from the state will no longer be entitled to a presumption of validity.[174] Finally, even if such a statutory scheme would give rise to recognition elsewhere, it would impermissibly infringe upon Rhode Island's right to govern the status of its own residents[175] and, thus, poses far too many jurisdictional complications to be an adequate remedy. Instead, given the current scheme of interstate recognition of divorce decrees, the burden falls squarely on individuals' home states to resolve the problems arising when one of its residents seeks to dissolve a marriage considered void or invalid under the laws of that state by either providing a forum for dissolution of the marriage or enforcing a divorce decree from another state, even in the absence of domicile.

B. Dissolution in Other States—Where Courts Have Been Getting It Right and Where They Have Been Getting It Wrong

On October 14, 2008, a New York trial court decided a case with facts substantially similar to those in *Chambers*.[176] In 2005, C.M. and C.C., a same-sex couple residing in New York, were married in Massachusetts and, in 2008, the parties filed for a divorce in the New York trial court, presenting their certificate of marriage from Massachusetts.[177] The court raised a question of its own subject matter jurisdiction sua sponte.[178] In this case, the court followed *Martinez v. County of Monroe*, decided earlier that year by the intermediate appellate court, which applied the rule espoused by the *Restatement (Second) of Conflict of Laws*[179] to recognize a same-sex marriage between New York residents entered into in Canada.[180] There, the court held that "if a marriage is valid in the place where it was entered, 'it is to be recognized as such in the courts of [New York], unless contrary to the prohibitions of natural law or the express prohibitions of a statute.'"[181] Concluding that same-sex

174. *See Williams I*, 317 U.S. 287, 297–99 (1942) (concluding that a Nevada court's determination of domicile created a presumption in North Carolina courts that the divorce decree was valid).

175. *See Williams II*, 325 U.S. 226, 229–30 (1945).

176. *See* C.M. v. C.C., 867 N.Y.S.2d 884 (Sup. Ct. 2008).

177. *Id.* at 885.

178. *Id.*

179. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (proposing that a marriage which is valid where celebrated is valid everywhere "unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage"); *see also* KOPPELMAN, *supra* note 20, at 86.

180. Martinez v. County of Monroe, 850 N.Y.S.2d 740, 744 (App. Div. 2008).

181. *Id.* at 742 (citations omitted).

marriage did not fall into either of these categories,[182] the court further held that, unless and until the New York legislature decides to prohibit the recognition of same-sex marriages outside the state, "such marriages are entitled to recognition in New York."[183] *Martinez* thus laid the ground work for courts to alter the marital status of same-sex couples.[184] Following the doctrine of comity and the precedent set by *Martinez*, the *C.M.* court, after determining that the marriage was valid in Massachusetts when it was contracted, decided that "no basis exists to decline to exercise jurisdiction over the dissolution of the parties' Massachusetts marriage and this New York divorce action can proceed."[185]

The New York trial court distinguished the issues presented in *C.M.* from the holding in *Chambers*, noting that, in New York, the trial-level court to which the petition for divorce was submitted "is a court of general jurisdiction and has the power to grant a divorce even if the marriage could not lawfully occur in this State," whereas the Rhode Island Family Court was "a court of limited statutory jurisdiction."[186] The New York court went on to imply, however, that even in such a situation, it may have decided differently than the Rhode Island court, reinforcing the point made by the *Chambers* dissent that "it is a well established principle that the validity of a marriage is determined by the place where the marriage is celebrated."[187] Indeed, the dissenting justices in *Chambers* would have held that the Rhode Island Family Court does have jurisdiction over same-sex divorce proceedings, arguing that "the Family Court's authority to entertain a divorce petition does not depend on the validity of the marriage itself,"[188] as Rhode Island law provides that "[d]ivorces from the bond of marriage shall be decreed in case of any

182. The court noted that there was no "'New York statute expressing clearly the Legislature's intent to regulate within this State marriages of its domiciliaries solemnized abroad' . . . to prohibit recognition of a marriage that would have been invalid if solemnized in New York," and therefore that the positive law exception did not apply. *Id.* at 742 (citation omitted). The court further concluded that the natural law exception was not applicable, as it "has generally been limited to marriages involving polygamy or incest or marriages 'offensive to the public sense of morality to a degree regarded generally with abhorrence . . . , and that cannot be said here.'" *Id.* at 743 (citation omitted).

183. *Id.*

184. *Martinez* mandated that employers recognize same-sex marriages so as to conform to the provisions of a state law forbidding employment discrimination on the basis of sexual orientation. *Id.*

185. C.M. v. C.C., 867 N.Y.S.2d 884, 889 (Sup. Ct. 2008). The question remains open as to whether this new policy would recognize a same-sex civil union, but it currently appears that this level of recognition is limited to those relationships constituting valid "marriages" elsewhere. The *C.M.* court relied heavily on the marital status of the parties, noting that the holdings in *Langan v. State Farm Fire & Casualty* and *Langan v. St. Vincent's Hospital of New York*, refusing to recognize the surviving partner to a Vermont same-sex civil union as "a 'surviving spouse' for purposes of the applicable New York law," did not bar the recognition of a Massachusetts marriage because in those cases both appellate courts "noted that the parties had not been married." *Id.* at 887 n.2; *see also* Langan v. State Farm Fire & Cas., 849 N.Y.S.2d 105 (App. Div. 2007); Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476 (App. Div. 2005). In *B.S. v. F.B.*, however, a New York trial court determined that a properly pleaded complaint for dissolution of a Vermont civil union was within the general equitable jurisdiction of the trial court. *See* B.S. v. F.B., 883 N.Y.S.2d 458, 467 (Sup. Ct. 2009).

186. *C.M.*, 867 N.Y.S.2d at 888.

187. *Id.*

188. Chambers v. Ormiston, 935 A.2d 956, 972 (R.I. 2007) (Suttell, J., dissenting).

marriage originally void or voidable by law . . . ."[189] What is particularly interesting about the dissenting opinion in *Chambers* is that it makes an argument for access to divorce even presuming a situation where the marriage is void as "strongly against the public policy" of the state,[190] contending that the *Chambers* majority got it wrong when they determined jurisdiction based on the validity or invalidity of the marriage.[191]

The approach taken by the New York courts has had the effect of entitling migratory and evasive marriages to full recognition as marriages, along with all the attendant benefits and obligations, under New York law.[192] This seems to be what the *Chambers* court and the *Rosengarten* court were afraid of—a slippery-slope argument that once same-sex unions are recognized for purposes of dissolving the relationship, they would have to be recognized for all other purposes as well. This, however, is not a necessary conclusion. As Andrew Koppelman has argued in support of an "incidents of marriage" approach to recognition *vel non* of a same-sex union, "[t]he ability to exit is one incident of marriage that should be available everywhere."[193] Indeed, "[i]t is odd for a state to oppose same-sex marriages [(or civil unions, for that matter)] by making it virtually impossible for people to end them."[194] A policy allowing courts to dissolve even those marriages that are void or voidable under state law would allow courts to recognize the fact that there is a legal relationship that is recognized in some places without compelling recognition of the marriage for other purposes.[195]

The key area in which courts seem to be led astray is in assuming that a marriage (or civil union) must be valid under the laws of the state in which dissolution is sought in order for the court to even hear the case.[196] As the dissent in *Chambers* and the majority in *C.M.* point out, this assumption is inconsistent with prior case law and accepted choice-

189. R.I. GEN. LAWS § 15-5-1 (2003).

190. *Chambers*, 935 A.2d at 973 (Suttell, J., dissenting).

191. *Id.* at 972.

192. While this has not been thoroughly tested, the court's decision in *Martinez* prompted New York Governor David Paterson to issue a directive requiring all state agencies to recognize same-sex marriages performed elsewhere under their policies. *C.M.*, 867 N.Y.S.2d at 887 ("Governor David Paterson issued an executive directive to all state agency counsels asking them to conduct a review of agency policy statements and regulations to ensure that terms such as 'spouse,' 'husband' and 'wife' are construed in a manner that encompasses legal same sex marriages."); *see also* Peters, *supra* note 44.

193. KOPPELMAN, *supra* note 20, at 105.

194. *Id.*

195. *See id.* at 104–05; Danielle Johnson, Comment, *Same-Sex Divorce Jurisdiction: A Critical Analysis of* Chambers v. Ormiston *and Why Divorce Is an Incident of Marriage that Should Be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225, 245–48 (2010) (arguing for an "incidents of marriage" approach to permit courts to grant a divorce without necessitating recognition of a same-sex marriage for other purposes).

196. *See* Rosengarten v. Downes, 802 A.2d 170, 175 (Conn. App. Ct. 2002) ("Implicit in the plaintiff's argument that jurisdiction exists under § 46b-1(17) is that we must recognize the validity of the Vermont civil union as a matter concerning family relations. If Connecticut does not recognize the validity of such a union, then there is no res to address and dissolve."); *Chambers*, 935 A.2d at 960–61 (predicating a determination of jurisdiction on the validity of the marriage).

of-law principles.[197] The *Chambers* majority seems to have patently disregarded statutory law directing that a divorce "shall be decreed in case of any marriage originally void or voidable by law."[198] As Justice Suttell points out in his dissent, this statute entitles "a Rhode Island resident who may have entered into an incestuous or bigamous marriage, both of which are statutorily void, . . . to divorce."[199] Because the legislature is presumed to have known about this statute when enacting the Family Court Act, the result of the two statutes effectively provides "a means of relief in the Family Court to parties who have entered a marriage that could neither be performed in Rhode Island nor granted legal effect in the state."[200] The *C.M.* court similarly draws a parallel with "common law marriages[] that would not be valid if they occurred in New York, but which are recognized by New York if they are valid out of state marriages."[201] In each of these opinions, the judges reach the same conclusion: in deciding whether the court can exercise jurisdiction over a marriage that occurred out of state, even if only to declare it null and void, "the critical question is whether the marriage would be valid where contracted."[202]

In determining jurisdiction to hear a petition for divorce, the crucial question thus must be whether there exists a marital (or other legally binding) relationship that bears upon domiciliaries of the forum in question, as recognized by any state.[203] While the jurisdictional requirements will have to be established differently according to the language of state statutes granting the authority to hear petitions for dissolution,[204] the principles of *Boddie* cannot be completely disregarded simply because the marriage is against the public policy of the state.

Establishing jurisdiction to dissolve a civil union or domestic partnership may require a further step. Although most states do not have statutory provisions allocating subject matter jurisdiction to dissolve civil

197. *C.M.*, 867 N.Y.S.2d at 886 ("[I]t is well-settled that in deciding whether to recognize a marriage that occurred in a sister state, the critical question is whether the marriage would be valid where contracted."); *Chambers*, 935 A.2d at 972 (Suttell, J., dissenting) ("[T]he well-settled rule of law in 1961 was, and still remains, that the validity of a marriage is determined by the law of the place where celebrated.").

198. R.I. GEN. LAWS § 15-5-1 (2003).

199. *Chambers*, 935 A.2d at 972 (Suttell, J., dissenting).

200. *Id.*

201. *C.M.*, 867 N.Y.S.2d at 886; *see also* Beth R. v. Donna M., 853 N.Y.S.2d 501, 505 (Sup. Ct. 2008).

202. *C.M.*, 867 N.Y.S.2d at 886; *see also Chambers*, 935 A.2d at 972 (Suttell, J., dissenting).

203. *See Chambers*, 935 A.2d at 970 (Suttell, J., dissenting) ("[I]t cannot be gainsaid that the parties are married for all legal purposes under the laws of the Commonwealth of Massachusetts. . . . The subject-matter jurisdiction of the Family Court does not turn on the gender of the parties; rather it turns on their status as a married couple.").

204. It may prove considerably more difficult to read jurisdiction to dissolve a same-sex civil union into Rhode Island's Family Court Act (which relies heavily on the existence of a "marriage") than it would have been to read it into Connecticut's corresponding statute, granting jurisdiction over marriage and "other matters . . . concerning family relations." *Compare* R.I. GEN. LAWS § 8-10-3(a) (2003), *with* CONN. GEN. STAT. ANN. § 46b-1 (West 2009).

unions or similar nonmarital bonds, a recognition that these relationships relate to one's family status (even if only so recognized in other states) would arguably provide jurisdiction under statutes such as the Connecticut statute at issue in *Rosengarten*.[205] Under a statute such as Rhode Island's Family Court Act, which relies heavily on the existence of a "marriage" for jurisdictional purposes,[206] a state may still be able to afford some relief through equitable exercise of its powers to dissolve contracts. In this area, the New York courts serve as an example yet again. In July 2009, a New York trial court considered a petition for "dissolution of marriage" filed by one party to a lesbian couple whose relationship had been formalized as a civil union in Vermont.[207] The court dismissed the petition, concluding that "[i]n the absence of a legal marriage performed in a jurisdiction that recognizes and provides for same, New York cannot grant plaintiff a divorce."[208] The court also made it clear, however, that its "decision does not conclude plaintiff has no civil New York remedy," but rather "must be afforded a legal avenue to accomplish the fair and equitable dissolution of her fractured relationship with defendant."[209] Thus, the New York court left the option open to the plaintiff to file a "properly pleaded complaint for dissolution" of a Vermont civil union which the trial court could hear pursuant to its "general jurisdiction to hear and decide all equitable civil actions including actions which may also be heard by the Family Courts."[210]

The existence of mini-DOMA provisions on the state level should not alter this outcome. As Koppelman points out, statutory language declaring a marriage "void" or "prohibited" was frequently used in miscegenation statutes, yet this did not prevent courts from recognizing the marriage in certain circumstances.[211] While Koppelman focused on recognition of migratory marriages,[212] this Note argues that, for the purposes of divorce, it should not matter whether the marriage would be considered migratory or evasive. The mere acknowledgement that there exists a bond that imposes obligations on the parties in some jurisdictions and that can only be dissolved by the state where the parties are domiciled imposes no duty on the forum state to extend other benefits to the couple or to recognize the relationship in other contexts.[213] Further, the court would still have the discretion to treat the marriage as void and issue an annulment instead of a divorce if the forum's statutes so dictated.

205. *See* CONN. GEN. STAT. ANN. § 46b-1; Rosengarten v. Downes, 802 A.2d 170, 175 (Conn. App. Ct. 2002).

206. *See* R.I. GEN. LAWS. § 8-10-3.

207. B.S. v. F.B., 883 N.Y.S.2d 458, 466 (Sup. Ct. 2009).

208. *Id.* at 466–67.

209. *Id.* at 467.

210. *Id.*

211. KOPPELMAN, *supra* note 20, at 140–41.

212. *See id.* at 141.

213. *See id.* at 97–113 (arguing against a blanket rule of nonrecognition (or one of recognition), proposing instead that a determination of whether a same-sex marriage will be recognized should depend on the purpose for which recognition is demanded and on the situation of the parties).

What is crucial, however, is that the parties be provided a forum for effective dissolution of the relationship, as *Boddie* guarantees.

V. CONCLUSION

Not only do same-sex couples "deserve help breaking up households and navigating custody of children,"[214] but, because their unions are legally created, these couples need access to the courts in order to legally dissolve them.[215] Greater access to marriage for same-sex couples is creating a growing need for dissolution. Because dissolution is so intimately tied to domicile, however, statutory interpretation that operates to exclude these couples from the courts of their home state for this purpose violates the principles enunciated in *Boddie v. Connecticut*.[216] While recognition of same-sex marriages and civil unions by nongranting states for the limited purpose of issuing a divorce does not necessarily advance the cause for broader recognition of such relationships in other contexts, it would at least give the divorcing couple the benefits that come with judicial oversight of the disposition of their mutual assets and the legal termination of the relationship.

214. Cossman, *supra* note 3, at 163 (quoting Kathy Anderson, *My Vermont ~~Civil Union~~ Divorce*, ADVOCATE, Sept. 28, 2004, at 10).

215. *See supra* notes 148–54 and accompanying text.

216. *See supra* Part III.B.