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## 'Til Death Do Us Part: The Difficulties of Obtaining a Same-Sex Divorce

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# 'Til Death Do Us Part: The Difficulties of Obtaining a Same-Sex Divorce

Ellen Shapiro\*

## ABSTRACT

*This Article explores a problem faced by many wedded same-sex couples: the difficulty in obtaining a divorce. Suppose two men from Pennsylvania travel to Massachusetts to obtain a marriage license and return to Pennsylvania shortly thereafter. If their marriage breaks down, the couple will be unable to divorce in the state because Pennsylvania refuses to recognize the marriage for any purpose. Moreover, due to Massachusetts' residency requirement, the couple cannot simply travel back to Massachusetts to divorce. Because this problem is in part encouraged by state mini-DOMAs, and the Supreme Court has the opportunity to rule on DOMA's constitutionality, this Article will also explore the various rationales for holding DOMA unconstitutional, how each affects mini-DOMAs, and thus same-sex divorce. If mini-DOMAs are permitted to stand, this Article urges that all States be required to recognize same-sex marriage at least for the limited purpose of granting divorce so that married same-sex couples will no longer find themselves "wedlocked."*

## TABLE OF CONTENTS

INTRODUCTION .....	208
I. SAME-SEX COUPLES HAVE A FUNDAMENTAL RIGHT TO MARRY AND DIVORCE:.....	212
ERADICATING DOMA .....	212
A. <i>History of DOMA</i> .....	213
B. <i>Reasons to strike down DOMA and recognize a national right to same-sex marriage</i> .....	216
1. DOMA violates the Equal Protection Clause.....	216
2. DOMA violates the Due Process Clause.....	222
3. DOMA violates the Tenth Amendment .....	223
4. DOMA violates the Full Faith and Credit Clause .....	224
II. MINI-DOMAS PREVENT SAME-SEX COUPLES FROM ACCESSING COURTS .....	226
III. STATES WITH SAME-SEX MARRIAGE BANS SHOULD RECOGNIZE SUCH MARRIAGES FOR THE PURPOSE OF DIVORCE PROCEEDINGS. ....	230

## INTRODUCTION

It is unclear whether Jessica Port and Virginia Anne Cowan should be referred to as a lucky couple. They lived in Maryland, which did not recognize same-sex marriage.

Nevertheless, in October 2008, they married out-of-state.<sup>1</sup> Unfortunately, their undying love for each other did not last. The women separated in June of 2009, and, in July of 2010, they filed for divorce in Maryland.<sup>2</sup> However, this did not end their story. Following a seven-minute hearing,<sup>3</sup> Judge A. Michael Chapdelaine denied the couple's request for an uncontested divorce. He cited the fact that the state of Maryland did not recognize the women's marriage even though he acknowledged the parties demonstrated an "express purpose of ending their marriage and there [was] no hope or expectation of reconciliation."<sup>4</sup> Judge Chapdelaine further remarked that to recognize the marriage, even solely for the purpose of granting the divorce, would be contrary to public policy.<sup>5</sup> What made this case odd was that Maryland had previously recognized other marriages that were not allowed in Maryland for purposes of divorce.<sup>6</sup> Moreover, at the time Judge Chapdelaine denied the couple's divorce, other courts in Maryland were willing to grant same-sex divorces.<sup>7</sup>

This Maryland district court, however, left Port wondering if she would ever get divorced.<sup>8</sup> She feared that she would be tied to Cowan forever, and without a divorce, Port worried she would not be able to move forward.<sup>9</sup> Port was also concerned about the consequences of purchasing assets and eventually having children: would Cowan have any property interest in the house Port recently purchased if the couple was technically still married? If Port had a child, would Cowan be presumed to have joint-custody?<sup>10</sup> Fortunately, by 2012, Port's fears were subdued when the highest court in Maryland finally granted the couple a divorce, finding it unconstitutional to leave same-sex married couples without a remedy to dissolve a marriage.<sup>11</sup>

Future same-sex couples facing divorce in Maryland will not face the same trauma that Port and Cowan had to endure because the state legislature recently passed a bill that legalizes same-sex marriage.<sup>12</sup> Still, the majority of states do not recognize same-sex marriage, and the inability of married same-sex couples to divorce is bound to be a

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<sup>1</sup> Port v. Cowan, Case No. CAD10-22420 at \*1 (Cir. Ct. Md. Oct. 22, 2010). Thanks to the National Center for Lesbian Rights for providing a copy of the case.

<sup>2</sup>*Id.*

<sup>3</sup>*Md. High Court to Hear Same-Sex Divorce Case*, CBS NEWS (April 6, 2012), [http://www.cbsnews.com/8301-201\\_162-57410423/md-high-court-to-hear-same-sex-divorce-case/](http://www.cbsnews.com/8301-201_162-57410423/md-high-court-to-hear-same-sex-divorce-case/).

<sup>4</sup>Port, Case No. CAD10-22420 at \*1.

<sup>5</sup>*Id.* at \*1-2.

<sup>6</sup>Fensterwald v. Burk, 129 Md. 131, 98 A. 358, 359 (1916) (recognizing a union between an uncle and a niece for purpose of divorce only).

<sup>7</sup>See, e.g., Cole v. Clover, No. 18-C-10-000327 (Cir. Ct. St. Mary's Cnty., Md. 2010).

<sup>8</sup>Andrea F. Siegel, *Same-Sex Divorce Case Heads to Top Maryland Court*, THE BALTIMORE SUN, March 17, 2012 available at [http://articles.baltimoresun.com/2012-03-17/news/bs-md-ar-same-sex-divorce-20120317\\_1\\_gay-divorce-divorce-hearing-uncontested-divorce/2](http://articles.baltimoresun.com/2012-03-17/news/bs-md-ar-same-sex-divorce-20120317_1_gay-divorce-divorce-hearing-uncontested-divorce/2).

<sup>9</sup>See Elizabeth Landau, *Denied Divorce, Some Same-Sex Couples 'Wed-locked'*, CNN (June 7, 2012), <http://www.cnn.com/2012/06/07/living/same-sex-divorce/index.html>.

<sup>10</sup>*Seid.*

<sup>11</sup>Port v. Cowan, 44 A.3d 970, 982 (2012) ("Under the principles of the doctrine of comity . . . Maryland courts will withhold recognition of a valid foreign marriage only if that marriage is "repugnant" to State public policy. . . . A valid out-of-state same-sex marriage should be treated by Maryland courts as worthy of divorce . . .").

<sup>12</sup>Civil Marriage Protection Act, 2012 Maryland Laws Ch. 2 (H.B. 438) (effective Jan. 1, 2013).

problem until same-sex marriage is nationally recognized (and not just for purposes of receiving federal benefits) or until courts realize their ability (or requirement, if Congress steps in) to grant same-sex divorces. Under the current framework, as more same-sex couples get married, more same-sex couples will desire divorces and yet be forced to remain in their failed marriages.<sup>13</sup> Courts in Nebraska, Indiana, Texas, and Pennsylvania—states that do not recognize same-sex marriage—have each denied same-sex divorces.<sup>14</sup> The problem arises because, for the most part, states that do not recognize same-sex marriage are refusing to grant couples that have been married elsewhere divorces.<sup>15</sup> To make matters worse, many couples are also being denied access to courts for the purpose of being divorced in the state where the original marriage was performed due to standard residency requirements. For example, a same-sex couple from Philadelphia married in Massachusetts would likely be denied a divorce if they returned to Pennsylvania, which does not recognize same-sex marriage.<sup>16</sup> Additionally, on account of Massachusetts' residency requirement for divorce—that at least one spouse live in Massachusetts for a year prior to filing for divorce—the couple would be left without a venue to perform a divorce.<sup>17</sup> To complicate matters further, Massachusetts' statute not only requires one year of residency, but the state also will not grant a divorce to a couple that “removed into this commonwealth for the purpose of obtaining a divorce.”<sup>18</sup>

In many respects, same-sex marriage has given the words “’til death do us part” a whole new meaning. While no one enters a marriage wishing that it will end prematurely, nearly 50% of all marriages end in divorce.<sup>19</sup> There is no reason to believe the divorce rate for same-sex couples will be drastically different from that of heterosexual couples. Although divorce can have negative effects on the individuals involved as well as children,<sup>20</sup> the ramifications for same-sex couples who are unable to divorce are catastrophic. But neither Congress nor the circuit courts have adequately addressed this problem. Congress needs to amend the law to explicitly require courts to hear same-sex divorce cases. Alternatively, courts should adjust their understanding of the law to open

<sup>13</sup>See, e.g., *In re Marriage of Ranzy*, No. 49D12-0903-DR-014654 (Ind. Super. Ct. Sept. 4, 2009) (denying divorce to same-sex couple); *Mueller v. Pry*, No. CI10-237 (Neb. Dist. Ct. Jan. 25, 2011) (same); *Kern v. Taney*, No. 09-10738 (Pa. Berks County Ct. Com. Pl. Mar. 15, 2010) (same); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010) (same).

<sup>14</sup>*Id.*

<sup>15</sup>A few courts in states that do not recognize same-sex marriage continue to open their courtrooms for the purpose of performing same-sex divorces. See, e.g., *Christiansen v. Christiansen*, 253 P.3d 153, 157 (Wyo. 2011); *Port*, 44 A.3d at 982.

<sup>16</sup>750 ILL. COMP. STAT. ANN. 5/213.1 (2012).

<sup>17</sup>See MASS. ANN. LAWS. ch. 208 § 5 (2012).

<sup>18</sup>*Id.*

<sup>19</sup>See, e.g., Stephen J. Bahr, *Social Science Research on Family Dissolution: What it Shows and How it Might be of Interest to Family Law Reformers*, 4 J.L. & FAM. STUD. 5 (2002).

<sup>20</sup>See, e.g., CATHARINE A. MACKINNON, *SEX EQUALITY* 653 (2d Ed. 2007) (referring to the uneven socio-economic consequences of divorce); L. WEITZMAN, *THE DIVORCE REVOLUTION* xii (1985) (noting that divorced women and children experience a 73% decline in standard of living post-divorce); JUDITH S. WALLERSTEIN, JULIA M. LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE* xiv (2000) (arguing that children often have negative effects from taking on new responsibilities after their parents are divorced); Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1269 (2000); Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1169 (1999) (describing the hardships women and children experience after divorce).

their doors to grant same-sex divorces. Regardless of whether a state acknowledges same-sex marriages for other purposes, its courts should grant these divorces so that same-sex couples will no longer be “wedlocked”<sup>21</sup> in failed marriages.

This Article argues that same-sex couples have the same right to divorce as heterosexual couples. Denying same-sex divorces creates a serious burden on same-sex couples, violates their right to divorce, and amounts to a denial of these couples’ due process rights. Because the issue of same-sex divorce is intimately related to recognition of same-sex marriage, this Article will first explore in depth the Defense of Marriage Act, the federal law that (a) defines marriage as exclusively between one man and one woman, and (b) permits states to refuse to recognize same-sex marriages performed out-of-state.<sup>22</sup> Assuming the Supreme Court finds jurisdiction to rule on *Windsor* this term,<sup>23</sup> it will determine whether Congress may define marriage for federal purposes as between one man and one woman. How the Court decides will also determine whether states may continue to deny recognition of same-sex marriages performed out-of-state. Since one of the biggest obstacles to divorce for same-sex couples is state courts’ refusal to recognize same-sex marriage, the Court’s ruling in *Windsor* will directly affect the ability of same-sex couples to divorce.

This Article explores the various legal arguments for holding the Defense of Marriage Act unconstitutional, considers their implications for same-sex divorce, and explains why those implications matter. Part I examines the history of the Defense of Marriage Act and the various rationales for holding the legislation unconstitutional. While it is likely the Supreme Court will strike down the federal Defense of Marriage Act, there is a distinct possibility the Court will craft a narrow decision. In such a decision, the Court may find that not all states are required to perform same-sex marriages but may permit states to maintain or enact their own state legislation that resembles the federal Defense of Marriage Act. Part II explains why under such a regime, same-sex divorce is a serious problem the Court should consider when reaching its decision this spring. Part III proposes a possible solution for same-sex couples seeking divorces, arguing that even if states may continue to forbid performing same-sex marriage, they should be required to recognize same-sex marriage for purposes of divorce proceedings. These states should make their courts available for same-sex couples who were married out-of-state and wish to divorce. If states are not required to do so, same-sex couples may be bound in unworkable marriages indefinitely and may thereby be denied their fundamental right to divorce.

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<sup>21</sup> Both scholars and the media have used the term. See Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1 (2012); Landau, *supra* note 9.

<sup>22</sup> 1 U.S.C.A. § 7 (2006); 28 U.S.C. § 1738C (2006).

<sup>23</sup> *United States v. Windsor*, 133 S. Ct. 786 (2012) (granting certiorari to hear the decision).

I. SAME-SEX COUPLES HAVE A FUNDAMENTAL RIGHT TO MARRY AND DIVORCE:  
ERADICATING DOMA

Although the Supreme Court has yet to acknowledge the same-sex right to marriage,<sup>24</sup> more than a decade ago, scholars argued that America was “on the verge of legalizing same-sex ‘marriage’ by way of a court-ordered redefinition of marriage . . . .”<sup>25</sup> Nevertheless, we are not quite there yet, as less than one-quarter of states have legalized same-sex marriage, and the Court is not required to decide whether there is a fundamental right to same-sex marriage. At the end of this term, however, the Supreme Court will rule on the validity of the Defense of Marriage Act, the federal law commonly known as DOMA, which defines marriage as between a man and a woman.<sup>26</sup> The Court will also rule on the constitutionality of Proposition 8, a California constitutional amendment adopted via a 2008 ballot initiative that extinguished same-sex couples’ right to marry—a right established by the Supreme Court of California earlier that year.<sup>27</sup>

Although I remain uncertain how the Court will rule on Proposition 8—it seems unlikely that the Court will recognize same-sex marriage as a fundamental right but instead reach a narrow decision<sup>28</sup>—this Article will focus on the Defense of Marriage Act. It seems likely the Court will strike down the Defense of Marriage Act this term.<sup>29</sup> During his confirmation hearings, Attorney General Eric Holder declared, “The duty of the Justice Department is to defend statutes that have been passed by Congress, unless

<sup>24</sup> Some argue this is in part due to America’s moral repulsion against same-sex marriage; others argue it is in part due to that opening the door for condoning polygamy. *See, e.g.*, David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB.POL’Y 623, 640 (2001); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL’Y 581, 628–31 (1999).

<sup>25</sup> Organ & Duncan, *supra* note 24, at 627.

<sup>26</sup> 1 U.S.C.A. § 7 (2006) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”). *See also* 28 U.S.C. § 1738C (2006) which declares that:

Certain acts, records, and proceedings and the effect thereof 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.

<sup>27</sup> *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010). *See also* *In Re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>28</sup> Some scholars believe the Court should rule narrowly so as not to forbid mini-DOMAs. *See* William Eskridge & Hans Johnson, *Commentary on Marriage Grants: Marriage Equality’s Cinderella Moment*, SCOTUS BLOG (Dec. 9, 2012, 2:10AM), <http://www.scotusblog.com/2012/12/commentary-on-marriage-grants-marriage-equalitys-cinderella-moment/> (“[t]here is good precedent for this narrow approach.”). *See also* Kenji Yoshino, *Commentary on Marriage Grants: Different Ways of Splitting the Difference—The Menu of Options in Hollingsworth v. Perry*, SCOTUS BLOG, (Dec. 8, 2012, 9:48 AM), <http://www.scotusblog.com/2012/12/commentary-on-marriage-grants-different-ways-of-splitting-the-difference-the-menu-of-options-in-hollingsworth-v-perry/> (There are at least five ways in which the Court may rule).

<sup>29</sup> *See, e.g.*, Michael J. Klarman, “*Gay Rights May Get Its Brown v. Board of Education*,” N.Y. TIMES, Oct. 11, 2012, available at <http://www.nytimes.com/2012/10/12/opinion/gay-rights-may-get-its-brown-v-board-of-education.html>. (“Conservative justices who value federalism and liberal justices who sympathize with gay marriage will probably combine to invalidate the act.”); Yoshino, *supra* note 28 (“[T]he Court will strike down DOMA. . . . Justices on the right tend to favor state power (relative to federal power); Justices on the left tend to favor gay rights.”).

there is some very compelling reason not to.”<sup>30</sup> On February 23, 2011, the Attorney General informed Congress that after careful consideration, including a recommendation from the President, the Justice Department would no longer defend Section 3 of the Defense of Marriage Act, the portion of the act limiting marriage to “a legal union between one man and one woman.”<sup>31</sup> Attorney General Holder continued that together he and the President concluded Section 3 of DOMA is unconstitutional under the Fourteenth Amendment’s Equal Protection Clause.<sup>32</sup> Most recently, the President publically reaffirmed his commitment to the cause when he declared that “[o]ur journey is not complete until our gay brothers and sisters are treated like anyone else under the law, for if we are truly created equal, then surely the love we commit to one another must be equal, as well.”<sup>33</sup> Still, Attorney General Holder explained that the President has instructed the Executive Branch to continue to comply with DOMA “unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality.”<sup>34</sup> Even if the Court chooses this path, it will be interesting to see which of the several rationales available the Court chooses to strike down the law. There are legitimate arguments that DOMA is unconstitutional based on the Equal Protection Clause, the Due Process Clause, the Tenth Amendment, and the Full Faith and Credit Clause. If the Court finds DOMA unconstitutional, whichever rationale it chooses will have a significant effect on the ability of individual states to continue to ban both the performance and recognition of same-sex marriage and therefore, on the ability of individual states to forbid same-sex divorce.

#### A. *History of DOMA*

Congress adopted the Defense of Marriage Act in 1996 as a direct response to a lawsuit brought by three same-sex couples in Hawaii challenging the Hawaii Department of Health’s denial of marriage licenses on the ground that same-sex couples could not marry.<sup>35</sup> At the time, no major national gay rights organization supported the lawsuit for fear it would lose and thereby hurt the cause.<sup>36</sup> Gay rights organizations also feared a lawsuit would create backlash from gay rights opponents who may have feared that general anti-discrimination laws would lead to same-sex marriage<sup>37</sup>—a fact

<sup>30</sup>*Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States: Hearing Before the Comm. on the Judiciary*, 111th Cong. 112 (2009).

<sup>31</sup>*Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter *Letter*]; 1 U.S.C.A. § 7 (2006). Although Eric Holder has publically declared Section 3 to be unconstitutional, Paul Clement will be arguing on behalf of its constitutionality this spring. *See generally* Brief for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives on the Merits, *United States v. Windsor* (2013), (No. 05-1631), 2013 WL 267026.

<sup>32</sup>*Letter, supra* note 31.

<sup>33</sup> Barack Obama, Inaugural Address (Jan. 21, 2013).

<sup>34</sup>*Id.*

<sup>35</sup>H.R. REP. NO.104-664, 2 (1996) (“[DOMA] is a response to a very particular development in the State of Hawaii.”). *See also* *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>36</sup>MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR 48 (2012) (“In 1989 . . . executive director of Lambda Legal, stated, ‘As far as I can tell, no gay organization of any size, local or national, has yet declared the right to marry as one of its goals.’”).

<sup>37</sup>*Id.* at 55, 216. *See also* *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (holding that forbidding same-sex couples from civil marriage violated the state constitution).

which, although later proved true, leaders did not wish to concede. Even though the Hawaii case was not the first attempt to legalize same-sex marriage,<sup>38</sup> it may have been the first time the notion that a state would permit same-sex marriage became real. While the trial court granted judgment on the pleadings to the Hawaii Department of Health, the Hawaii Supreme Court reversed, holding that the three plaintiffs were entitled to an evidentiary hearing regarding their Equal Protection claim.<sup>39</sup> Additionally, the court held the state had discriminated against the plaintiffs on the basis of their sex, and therefore, their Equal Protection claim would be subject to heightened scrutiny.<sup>40</sup> The case was remanded to determine whether Hawaii had a compelling reason to exclude same-sex couples from marriage.<sup>41</sup> Before the trial court had the opportunity to rule on the case, the Hawaiian legislature tried to make it explicit that same-sex couples could not marry.<sup>42</sup>

As a result, Congress was concerned that “[t]he prospect of permitting homosexual couples to ‘marry’ in Hawaii threaten[ed] to have very real consequences. . . .”<sup>43</sup> Congress particularly worried that under the Full Faith and Credit Clause, states that believed same-sex marriage to be repugnant would have been forced to recognize and give binding legal effect to same-sex unions performed in other states.<sup>44</sup> Moreover, Congress wanted to stop what it viewed to be an “orchestrated legal assault” against traditional heterosexual marriage.<sup>45</sup>

Accordingly, Congress passed DOMA with two goals in mind. The first was “to defend the institution of traditional heterosexual marriage.”<sup>46</sup> The second was “to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.”<sup>47</sup> Although the main purpose of DOMA appears to be protecting the institution of heterosexual marriage, Congress also acknowledged the legislation would advance two additional governmental interests: “protecting state sovereignty and democratic self-governance”—a Tenth Amendment consideration—and “preserving scarce government resources.”<sup>48</sup>

Despite the controversy that surrounds DOMA today,<sup>49</sup> the bill made its way through Congress quickly and with overwhelming support. In July, the House passed

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<sup>38</sup>See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 54 (Free Press 1996) (discussing the National Coalition of Gay Organization’s 1972 attempt to repeal all legislative provisions restricting marriage to one man and one woman).

<sup>39</sup>*Baehr*, 852 P.2d at 68.

<sup>40</sup>*Id.* at 65–67.

<sup>41</sup>*Id.*

<sup>42</sup>1994 Haw. Sess. Laws 217. Although the trial court ultimately ruled that Hawaii had no compelling justification for excluding same-sex couples from marriage, *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), the Hawaii Supreme Court eventually vacated the trial court’s decision and directed the trial court to dismiss the lawsuit in light of the State’s new mini-DOMA. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

<sup>43</sup>H.R. REP. NO.104-664, 2 (1996).

<sup>44</sup>*Id.* See also U.S. Const. Art. IV, §1.

<sup>45</sup>H.R. REP. NO.104-664, 2 (1996).

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* at 12.

<sup>49</sup>See, e.g., KLARMAN, *supra* note 36, at 119, 161.



DOMA by a vote of 342 to 67,<sup>50</sup> and by September, the Senate passed the bill by 85 to 14.<sup>51</sup> DOMA sped through Congress in part due to many Congressmen's deep-rooted homophobic views.<sup>52</sup> On September 21, 1996, late at night and without a public ceremony, President Clinton signed DOMA into law.<sup>53</sup>

Following the passage of DOMA, the United States remains divided on the issue of same-sex marriage. While some states later moved in the direction of legalizing same-sex marriage, even before DOMA was passed, many states were already taking anti-same-sex marriage measures. However, in 2003, Massachusetts became the first of now twelve states and the District of Columbia to legalize same-sex marriage.<sup>54</sup> In these twelve states and the District of Columbia, DOMA still applies. Therefore, it still prevents married same-sex couples from using their marital status to benefit from the more than 1100 federal rights statutes and programs, including tax and employment benefits,<sup>55</sup> whose administration in part turns on one's marital status.<sup>56</sup> At the other end of the spectrum, several states have taken affirmative steps to forbid same-sex marriage within their borders. The non-recognition of out-of-state marriages is not a new phenomenon; rather, states have always had the ability to refuse to recognize out-of-state marriages that clearly violate those states' public policies.<sup>57</sup> Whether states may constitutionally ban same-sex marriage under this exception remains unanswered. Still, a majority of states have adopted their own mini-DOMAs, both banning the performance of same-sex marriage and refusing to recognize same-sex marriages performed out-of-state.<sup>58</sup> Some of these mini-DOMAs include express language that state recognition of same-sex marriage would violate public policy.<sup>59</sup> In total, thirty-seven states have either constitutional amendments or statutory provisions that define marriage as a civil union between a man

<sup>50</sup>142 CONG. REC. 17094-95 (1996).

<sup>51</sup>*Id.*

<sup>52</sup>Brief on the Merits for Respondent at 9, *United States v. Windsor*, (2013) (No. 12-307), 2013 WL 701228.

<sup>53</sup>KLARMAN, *supra* note 36, at 63.

<sup>54</sup>*See generally Goodridge*, 798 N.E.2d at 968 (holding that forbidding same-sex couples from civil marriage violated the state constitution).

<sup>55</sup>*See, e.g., Mass. v. U.S. Dep't of Health & Human Services*, 698 F. Supp. 2d 234, 236 (D. Mass. 2010) *aff'd*, 682 F.3d 1 (1st Cir. 2012).

<sup>56</sup>*See* U.S. GEN. ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004) (identifying 1138 federal laws upon which one's marital status is a factor).

<sup>57</sup>ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 117 (2006). *See also* Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353 (2005) (arguing that the Full Faith and Credit Clause only applies to judgments and therefore has no effect on a state's decision to recognize same-sex marriage).

<sup>58</sup>*See* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2166-94 (2005). It is noteworthy that Maryland, New Hampshire, and Wyoming each adopted bans on same-sex marriage before the 1993 *Baehr* case. *Id.* at 2165; MD. CODE ANN., FAM. LAW § 2-201 (1984); N.H. REV. STAT. ANN. § 457:2 (1987); WYO. STAT. ANN. § 20-1-101 (1977).

<sup>59</sup>*See, e.g.,* ALA. CODE § 30-1-19 (2004), ARK. CODE ANN. § 9-11-208, GA. CODE ANN. § 19-3-3.1 (2004), 750 ILL. COMP. STAT. ANN. 5/213.1, KY. REV. STAT. ANN. § 402.040 (1998).

and a woman.<sup>60</sup> The Supreme Court may ban these state mini-DOMAs either by finding a fundamental right to same-sex marriage or by invalidating DOMA on Fourteenth Amendment grounds. If the Court relied on the Fourteenth Amendment to invalidate DOMA, this would make it extremely difficult for mini-DOMAs to stand as they discriminate in the same manner as the federal law. The Court could also rely on the Tenth Amendment or principles of federalism to invalidate DOMA, which would still permit state mini-DOMAs to persist. If the Court ultimately chooses to strike down DOMA, the rationale it chooses will have serious consequences for the constitutionality of mini-DOMAs and the rights accessible to same-sex married couples, including the right to divorce.

*B. Reasons to Strike down DOMA and recognize a national right to same-sex marriage*

1. DOMA violates the Equal Protection Clause

There are several arguments tied to the Fourteenth Amendment's Equal Protection Clause, which, if accepted, would lead the Court to find a federal ban on the recognition of same-sex marriage unconstitutional. The first argument is that such a ban constitutes sex discrimination and should be stricken under intermediate scrutiny.<sup>61</sup> Although some refuse to view the prohibition of same-sex marriage as a matter of sex discrimination because it applies equally to both men and women,<sup>62</sup> individuals are being denied the right to marry solely because of their sex.<sup>63</sup> That is, if Abby wants to marry Caroline, she is denied the right for the sole reason that she is a woman. Had Abby been born a man (or in some jurisdictions even transitioned into a man), the law would allow Abby to marry Caroline. In many respects, this argument echoes the notion that past miscegenation laws discriminated on the basis of race even though they applied equally to Caucasians and African Americans.<sup>64</sup> If the Court chooses this path, DOMA will only stand if it is substantially related to an important government interest.<sup>65</sup>

Second, the Court may invalidate DOMA under the Equal Protection Clause as unconstitutional discrimination on the basis of sexual orientation. Indeed, this was the

<sup>60</sup>*Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NCSL, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx#2> (last visited May 17, 2013).

<sup>61</sup>*See, e.g., Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (J. Levison) (explaining that restricting marriage to a man and a woman violates the state constitution's equal protection clause on the basis of sex-discrimination because "on its face and as applied, [the statute] regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex."). *See also Craig v. Boren*, 429 U.S. 190, 199 (1976) (holding that gender discrimination warrants intermediate scrutiny).

<sup>62</sup>*See MACKINNON*, *supra* note 20, at 1065–69. *See also Goodridge*, 798 N.E.2d at 968 (does not mention gender discrimination in holding Massachusetts must recognize same-sex marriage).

<sup>63</sup>*See WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 218–28 (1999) (arguing discrimination on the basis of sexual orientation is a form of sex discrimination).

<sup>64</sup>*See Loving v. Virginia*, 388 U.S. 1, 8 (1967).

<sup>65</sup> The Government's brief on the merits which argues DOMA fails intermediate scrutiny as "[n]one of Section 3's actual purposes as expressed in the House Report, or any of the additional interests now asserted . . . substantially further[] an important governmental objective," Brief for the United States on the Merits at 14, *United States v. Windsor* (2013), (No. 12-307) and the lower court's decision in *Windsor v. United States*, 699 F.3d 169, 188 (2012), discussed *infra*, may be used to support this claim.

argument the Second Circuit ultimately adopted in *Windsor* to hold DOMA unconstitutional.<sup>66</sup> It was also the rationale used by the Supreme Court of Connecticut<sup>67</sup> and the Supreme Court of Iowa,<sup>68</sup> which both held laws restricting civil marriage to heterosexual couples violated their state constitutions' equal protection clauses. Additionally, it is the argument set forth in the Government's brief on the merits in the upcoming Supreme Court case.<sup>69</sup> In *Windsor*, the Second Circuit found that DOMA discriminated on the basis of sexualorientation, and discrimination on the basis of sexualorientation required intermediate scrutiny.<sup>70</sup> The court rejected the four justifications for DOMA: to (1) maintain a uniform definition of marriage; (2) protect the fiscal treasury; (3) preserve a traditional understanding of marriage; and, (4) encourage responsible procreation.<sup>71</sup> The court rejected the first rationale as being of unprecedented breadth and not "exceedingly persuasive" as the law itself "creates more discord and anomaly than uniformity."<sup>72</sup> The court quickly rejected the second rationale, explaining DOMA is "so broad . . . that it is not substantially related to fiscal matters."<sup>73</sup> Recently, the Government has added the argument that even if DOMA "actually saves the government money (a dubious assertion), that rationale would not suffice under heightened scrutiny."<sup>74</sup> The court denied the third rationale, as "DOMA does not, strictly speaking, preserve the institution of marriage as one between a man and a woman [as the decision to permit such marriages is left to the states]."<sup>75</sup> Regarding the fourth argument, the court questioned whether a rational basis even existed regarding the connection between DOMA and encouraging responsible procreation.<sup>76</sup>

Currently, only a few courts, including one federal appellate court, have recognized sexualorientation as requiring intermediate scrutiny for purposes of equal protection analysis,<sup>77</sup> thereby placing a higher burden on the government. Although the Supreme Court has yet to apply heightened scrutiny to discrimination on the basis of

<sup>66</sup>*Windsor*, 699 F.3d at 181–88.

<sup>67</sup>*Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425–61 (Conn. 2008).

<sup>68</sup>*Varnum v. Brien*, 763 N.W.2d 862, 885–904 (Iowa 2009).

<sup>69</sup>*Kerrigan*, 957 A.2d at 476–481; *Varnum*, 763 N.W.2d at 896–906; Brief for the United States on the Merits, *United States v. Windsor* (2013), (No. 12-307).

<sup>70</sup>*See generally Windsor*, 699 F.3d 169.

<sup>71</sup>*Id.* at 185–88.

<sup>72</sup>*Id.* at 186.

<sup>73</sup>*Id.* at 187. *But cf.* *Mass. v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012) (finding such a claim would pass rational basis review as "Congress could rationally have believed that DOMA would reduce costs.").

<sup>74</sup> Brief for the United States on the Merits, *United States v. Windsor* (2013), (No. 12-307) at 15 (citing *Plyler v. Doe*, 457 U.S. 202, 227 (1982)).

<sup>75</sup>*Windsor*, 699 F.3d at 187.

<sup>76</sup>*See id.* at 182–83

<sup>77</sup>*See, e.g., id.* at 185–88 (declaring that homosexuals should receive heightened scrutiny due to the fact (a) they have faced historical discrimination, (b) that homosexuality has no relation to homosexuals' ability to contribute to society, (c) that homosexuals comprise a discernible group, and (d) that the class represents a politically weakened minority). *But see* *Mass. v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012) ("[E]xtending intermediate scrutiny to sexual preference classifications is not a step open to us.").

sexualorientation,<sup>78</sup> there is some possibility the Court will apply such scrutiny this spring.<sup>79</sup> Because the Court has never considered applying heightened scrutiny to discrimination on the basis of sexual orientation—it has previously employed a minimum rationality test to strike down laws discriminating on the basis of sexual orientation<sup>80</sup>—applying heightened scrutiny would not require the Court to overturn precedent. Additionally, Attorney General Holder and President Obama have expressly requested that the Court apply intermediate scrutiny to strike down DOMA.<sup>81</sup> Specifically, the Government argues that classifications based on sexual-orientation warrant heightened scrutiny because: (1) there is a significant history of discrimination against gay and lesbian people;<sup>82</sup> (2) sexual orientation bears no relation to one’s ability to participate in and contribute to society;<sup>83</sup> (3) sexual orientation is an immutable or distinguishing characteristic;<sup>84</sup> and, (4) gay and lesbian people comprise a minority group with limited political power.<sup>85</sup>

These arguments notwithstanding, Professors Michael Klarman and William Eskridge believe the Government’s brief will have little influence.<sup>86</sup> The respondents argue heightened scrutiny should not apply since gays and lesbians are not politically powerless but “one of the most influential, best-connected, best-funded, and best-organized interest groups in modern politics.”<sup>87</sup> They also argue there is no longstanding history of discrimination,<sup>88</sup> and sexual orientation is not an immutable trait.<sup>89</sup> If the Court were to adopt intermediate scrutiny, it would have broad implications far beyond DOMA, and therefore, the Court may not be willing to do so. Even if the Court chooses to adopt rational basis review, the likelihood of which remains uncertain, there is a strong

<sup>78</sup>Romer v. Evans, 517 U.S. 620, 635 (1996) (employing rational basis to decide a case of discrimination on the basis of sexual orientation); Lawrence v. Texas, 539 U.S. 558, 560 (2003) (refusing to employ heightened scrutiny to perceived discrimination on the basis of sexual orientation).

<sup>79</sup>See Witt v. Dep’t of Air Force, 527 F.3d 806, 817–18 (2008) (arguing that *Lawrence*, 539 U.S. 558, requires sexual orientation discrimination receive intermediate scrutiny); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012) (hearing en banc denied, 680 F.3d 1104 (9th Cir. 2012)). There is also an argument under the traditional *Carolene Products* analysis that LGBTQ community constitutes a class of “discrete and insular minorities” being denied access to the political system and therefore in need of heightened scrutiny under equal protection analysis. *United States v. Carolene Prods. Co.*, 304 U.S. 144, n.4. See also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 761–62 (2011) (“[I]t is certainly possible that the Court may give formal heightened scrutiny to another classification or two in addition to the five that currently benefit from this form of judicial review. The fact that state courts have given legislation burdening gays strict or ‘quasi-suspect’ scrutiny under their state constitutions, for instance, may inspire federal courts to do the same.”).

<sup>80</sup>See generally *Lawrence*, 539 U.S. 558; *Romer*, 517 U.S. 620.

<sup>81</sup>*Letter, supra* note 31.

<sup>82</sup>Brief for the United States on the Merits at 22–27, *United States v. Windsor* (2013), (No. 12-307).

<sup>83</sup>*Id.* at 27–29.

<sup>84</sup>*Id.* at 27–32.

<sup>85</sup>*Id.* at 14 (“[T]he fact that gay and lesbian people have achieved some political gains does not tilt this factor against, let alone preclude, heightened scrutiny.”).

<sup>86</sup>See Miranda Leitsinger, *Obama’s Supreme Court Brief on Same-sex Marriage Will Have Little Impact: Experts*, NBC NEWS (Feb. 28, 2013, 10:46 PM), [http://usnews.nbcnews.com/\\_news/2013/02/28/17138448-obamas-supreme-court-brief-on-same-sex-marriage-will-have-little-impact-experts?lite](http://usnews.nbcnews.com/_news/2013/02/28/17138448-obamas-supreme-court-brief-on-same-sex-marriage-will-have-little-impact-experts?lite).

<sup>87</sup>Brief on the Merits for Respondent at 53, *United States v. Windsor*, (2013) (No. 12-307), 2013 WL 701228.

<sup>88</sup>*Id.* at 57.

<sup>89</sup>*Id.* at 54–56.

argument that any ban on same-sex marriages is unconstitutional because such bans constitute bare animus.

Under traditional rational basis review, courts are very lenient toward policies that may be discriminatory under the Fourteenth Amendment. Despite this lenient standard, there is an argument that refusing to allow same-sex couples the right to marry violates rational basis review as interpreted under its bare animus standard.<sup>90</sup> The Supreme Court has emphasized “[i]f the constitutional conception of ‘equal protection of laws’ means anything, it must at the very least mean that bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* interest.”<sup>91</sup> Using this logic, the Court has struck down four laws which denied benefits to individuals on the sole basis the group was denied benefits because of the legislatures’ animosity toward those particular groups.

In *U.S. Dept. of Agriculture v. Moreno*, the Court introduced the notion of bare animus by striking down a law that prevented unrelated individuals living together in a house from receiving food stamps.<sup>92</sup> The Court reasoned that the legislature passed the law only to manifest its desire to harm a politically unpopular group, hippies, and that in order to survive rational basis, the law required more than a discriminatory purpose. The Court insisted a “purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify [the classification].”<sup>93</sup> Moreover, the Court declared that despite the independent interests present, such as safeguarding the health and well-being of the population, as well as alleviating hunger and malnutrition by increasing food security for low-income households, those interests were insufficient to hold the law constitutional, as the mandated classification of excluding households with non-related individuals proved irrelevant to those stated interests.<sup>94</sup>

Nearly a decade after *Moreno*, the Supreme Court returned to the notion of impermissible animus in two cases. In *Palmore v. Sidotti*, the Court overturned a family court’s order to grant custody to a father so that the child would avoid bias by living with his mother who was in a biracial relationship.<sup>95</sup> Again, the Court was unwilling to give effect to what it perceived to be nothing other than animus, in this instance, against biracial relationships.<sup>96</sup> Then, in *City of Cleburne v. Cleburne Living Center*, the Court struck down a municipal zoning ordinance that required a special use permit for operating certain group homes, including “[h]ospitals for the insane or feeble-minded.”<sup>97</sup> The case was brought by Cleburne Living Center, which wished to operate a group home for

<sup>90</sup> Cf. *Mass. v. U.S. Dep’t of Health & Human Services*, 682 F.3d 1, 18 (1st Cir. 2012) (although the Court does not use the term “bare animus,” it seems to employ a heightened form of rational basis to ultimately strike down DOMA).

<sup>91</sup> *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original).

<sup>92</sup> *Id.* at 528.

<sup>93</sup> *Id.* at 534–35 (internal quotations omitted).

<sup>94</sup> *Id.* at 533–35 (“[T]o be sustained, the challenged classification must rationally further some legitimate governmental interest other than . . . to prevent so-called [sic] ‘hippies’ and ‘hippie communes’ from participating in the [federal] food stamp program.”).

<sup>95</sup> See *Palmore v. Sidotti*, 466 U.S. 429 (1984).

<sup>96</sup> *Id.* at 433 (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

<sup>97</sup> *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 436 (1985) (internal quotations omitted).

thirteen intellectually disabled individuals but was denied a special use permit at a public hearing.<sup>98</sup> The Court reasoned the ordinance requiring the special use permits was unconstitutional because it was motivated solely by an “irrational prejudice” against the intellectually disabled.<sup>99</sup> In both of these cases, the Court was stern in its judgment that prejudice against a politically unpopular group is insufficient to withstand a rational basis review of constitutionality.

Although the facts of *Cleburne* are not directly analogous to those in the same-sex marriage cases, that decision is particularly pertinent today as it could have direct consequences on the Court’s ruling on DOMA. In deciding *Cleburne*, the Court debated whether people with intellectual disabilities should receive heightened scrutiny as a class.<sup>100</sup> Ultimately, the Court reasoned they should not. Instead, the Court relied on the “irrational prejudice” of the ordinance to rule in favor of Cleburne Living Center.<sup>101</sup> Similarly, if the Court takes an equal protection approach to deciding DOMA’s constitutionality, it could employ intermediate scrutiny<sup>102</sup> but would more likely revert to employing rational basis review.

Most similar to the situation at hand, *Romer v. Evans*<sup>103</sup> examined a facial challenge to the constitutionality of Colorado’s 1992 Amendment 2, which adopted a popular referendum that prohibited all legislative, executive, and judicial action designed to protect individuals from discrimination on the basis of sexual orientation.<sup>104</sup> The effect of the law was not only to prevent future action but also to repeal existing gay-friendly statutes, notably in Aspen and Boulder, which barred discrimination on the basis of sexual orientation.<sup>105</sup> Without addressing whether sexual orientation should receive heightened scrutiny, the Court employed rational basis review to strike down Colorado’s Amendment 2 because it had no legitimate purpose but was “born of animosity” toward gays, with a goal “to make them [gays] unequal to everyone else.”<sup>106</sup> The Court rejected the State’s argument that Amendment 2 simply placed lesbians and gays in the same position as others by removing a cause of action for discrimination on the basis of their sexual orientation but instead reasoned that the law “impose[d] a[n impermissible] special

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<sup>98</sup>*Id.* at 435.

<sup>99</sup>*Id.* at 450.

<sup>100</sup>*Id.* at 442–447. The Court was required to address this argument as the Court of Appeals held in favor of the plaintiffs using intermediate scrutiny. *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 197 (5th Cir. 1984) (“[W]e conclude that although mental retardates are not a suspect class, they do share enough of the characteristics of a suspect class to warrant heightened scrutiny.”).

<sup>101</sup>*City of Cleburne*, 473 U.S. at 450.

<sup>102</sup>See generally *Windsor*, 699 F.3d 169 (explaining DOMA discriminated on the basis of sexual orientation thus requiring intermediate scrutiny).

<sup>103</sup>517 U.S. 620 (1996).

<sup>104</sup> Amendment 2 read:

Neither the State of Colorado . . . nor any of its agencies . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. . . . *Romer*, 517 U.S. at 624.

<sup>105</sup>*Id.* at 623–24. See also Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 911 (2012) (explaining the legislative history of Amendment 2, whose record was full of anti-homosexual sentiments).

<sup>106</sup>*Id.* at 621.

disability upon those persons alone.”<sup>107</sup>The Court went on to analyze whether Amendment 2 withstood rational basis review and ultimately concluded the amendment was unconstitutional.<sup>108</sup> This case demonstrates the Court will not permit legislation designed to target politically unpopular group.

Despite the inherent similarities to *Romer*, it may be argued that the inability of same-sex couples to divorce is actually more similar to *Moreno* and *Cleburne*. The laws in each case were motivated by animus and resulted in economic disadvantages to the unpopular groups. Specifically, hippies were unable to access the federal government’s welfare program because of their lifestyle choices, and the facility for the intellectually disabled was unable to access a desired permit. Similarly, DOMA prevents same-sex couples from accessing, among a long list of benefits, the financial benefits of marriage.

The concept of bare animus could be crucial in an equal protection analysis of DOMA or of same-sex marriage generally; without clear evidence of bare animus, plaintiffs almost always lose under traditional rational basis review.<sup>109</sup> This is particularly important because the Court has never indicated it would be willing to adopt heightened scrutiny for discrimination on the basis of sexual orientation. Assuming the Court does use a rational basis standard, the animus rationale could be an easy route to hold DOMA unconstitutional without forcing the Court to determine whether discrimination on the basis of sexual orientation warrants heightened scrutiny.<sup>110</sup> As Professor Laurence Tribe explained nearly a decade ago:

For what, after all, could be the rationale for permitting an otherwise eligible same-sex couple to enjoy the tangible benefits and assume the legal obligations of some version of civil union but withholding from them that final measure of respect . . . ? What could be the rationale for refusing two men or two women the full symbolic benefits of civil marriage so long as the state remains in the business of licensing within secular, civil law a status that no doubt piggybacks on its nonsecular counterparts in religious marriage? Plainly, the rationale must be the state’s disapproval of the same-sex couple’s expression of dissatisfaction with a second-class version of the marital bond; the rationale must be to demand for opposite-sex couples complete dominion over the last vestiges of gender privilege in civil law.<sup>111</sup>

<sup>107</sup>*Id.* at 631.

<sup>108</sup> *Id.* at 633 (The Court reasoned, Amendment 2 “is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.”).

<sup>109</sup> See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 370 (1999) (explaining that between 1971 and 1999, of the 110 Supreme Court cases decided, employing rational basis review, only ten plaintiffs prevailed on their claims). See also *Mass. v. Dep’t of Health*, 682 F.3d at 9 (“Equal protection claims tested by this rational basis standard, famously called by Justice Holmes the ‘last resort of constitutional argument,’ rarely succeed.”) (internal citations omitted).

<sup>110</sup> Cf. *Goodridge*, 798 N.E.2d at 968 (“The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.”).

<sup>111</sup> Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1945–46 (2004). See also *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (Scalia, J.,

The challenge in applying the bare animus rationale would be that if the Court took this approach, all states would be required to recognize same-sex marriage, a move for which the Court may not be ready.<sup>112</sup> If the Court holds DOMA to be unconstitutional under a rational basis review, it must find no rational basis for the law. Once the Court makes this finding, it would be nearly impossible for states to come up with a rational basis for upholding their mini-DOMAs. Because mini-DOMAs would remain discriminatory on the basis of sexual orientation without a rational basis to support that discrimination, mini-DOMAs would also be unconstitutional, and all states would not only be forced to recognize same-sex marriage within their borders but also be forced to perform such unions. A similar problem would develop if the Court used any of the equal protection analyses to hold DOMA unconstitutional. For if the Court were to hold that defining marriage as between one man and one woman for federal purposes constitutes impermissible discrimination, a state law that discriminated in the same manner would almost certainly also be considered impermissible discrimination. The Court may also fear the political consequences if it applies this analysis; if DOMA is analyzed and ultimately held unconstitutional under an equal protection analysis, it is possible that its supporters will be branded as “prejudiced bigots.”<sup>113</sup> Although there are several strong arguments that DOMA is unconstitutional as it violates the Fourteenth Amendment’s Equal Protection Clause, the Court will likely avoid this analysis.

## 2. DOMA violates the Due Process Clause

The Court could also use the Due Process Clause of the Fourteenth Amendment to find that there exists a fundamental right to marriage for same-sex couples and therefore find DOMA unconstitutional. Although none of the lower courts employed this tactic to hold a same-sex marriage ban unconstitutional, a viable argument does exist.<sup>114</sup> The due process argument begins with the Supreme Court’s declaration that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>115</sup> The Court has overturned restrictions against interracial marriage,<sup>116</sup> onerous restrictions on marriages involving a prisoner,<sup>117</sup> and a law that prevented individuals who were delinquent on child support payments from marrying.<sup>118</sup> Some scholars argue that a

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dissenting) (“[P]reserving the traditional institution of marriage is just a kinder way of describing the State’s moral disapproval of same-sex couples.”) (internal quotations omitted).

<sup>112</sup> Yoshino, *supra* note 28 (arguing that the Court will likely find a way to strike down DOMA without requiring the forty-one States that do not currently recognize same-sex marriage to do so).

<sup>113</sup> Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 99–100 (2003) (arguing that the Supreme Court avoided the equal protection route in *Lawrence* because doing so would have either turned sexual-orientation into a suspect classification, or because it would have had to find that the anti-sodomy law was created due to animus, thereby “branding supporters of anti-sodomy laws as prejudiced bigots”).

<sup>114</sup> Kenji Yoshino, *The New Equal Protection*, 124 HARV L. REV. 747, 748 (2010) (“the Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of the Fifth and Fourteenth Amendments”).

<sup>115</sup> *Loving*, 388 U.S. at 12.

<sup>116</sup> *Id.*

<sup>117</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>118</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).



ban on same-sex marriage is similar to a ban on interracial marriage.<sup>119</sup> Moreover, if marriage truly were one of the “basic civil rights of man,” it would seem odd that homosexuals cannot exercise that right. Although extending the fundamental right to heterosexual marriage to a fundamental right to marriage in general would require a small logical step by the Court, such a step is not inconceivable. If the Court is unwilling to recognize a fundamental right to same-sex marriage this spring, it seems likely that it or Congress will in the future.<sup>120</sup>

### 3. DOMA violates the Tenth Amendment

The Supreme Court has acknowledged on several occasions that “[m]arriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.”<sup>121</sup> Indeed, when the Constitution was written in 1787, the issue of marriage was never raised because it was understood that regulating marriage was an exercise of state police power.<sup>122</sup> By then, the states had already set up detailed marriage laws and regulations as a means of establishing public order.<sup>123</sup>

Today, states have a significant amount of flexibility “in setting marriage requirements, including regulations related to age of consent, mental capacity, [and] consanguinity.”<sup>124</sup> The Tenth Amendment argument against DOMA is simply that the federal government does not have the authority to regulate marriage in this manner. Prior to the passage of DOMA in 1993, Congress had never before attempted to pass such sweeping regulations on marriage.<sup>125</sup> Under traditional Tenth Amendment jurisprudence, a violation of the Tenth Amendment occurs only when the federal government is found to have commandeered state governments.<sup>126</sup> Although the First Circuit found DOMA did not constitute a violation of the Tenth Amendment,<sup>127</sup> a lower Massachusetts court found

<sup>119</sup> Kim Forde-Mazrui, *Live and Let Love: Self-Determination in Matters of Intimacy and Identity*, 101 MICH. L. REV. 2185, 2200–07 (2003) (reviewing RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003)) (finding many parallels between the opposition to same-sex intimacy and anti-miscegenation ideology). See also *Baehr*, 852 P.2d at 68.

<sup>120</sup> See KLARMAN, *supra* note 36, at 193–207; Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 479–80 (2012).

<sup>121</sup> *Loving*, 388 U.S. at 7. See also *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (declaring that the regulation of marriage is “an area that has long been regarded as a virtually exclusive province of the States.”); *Baehr*, 852 P.2d at 58 (“The power to regulate marriage is a sovereign function reserved exclusively to the respective states.”); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (“The whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.”).

<sup>122</sup> See Affidavit of Nancy Cott, *Massachusetts v. U.S. Dep’t of Health & Human Services*, 2010 WL 604595, para 10 (D. Mass.). But see Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 132 (2004) (explaining that Utah was required to ban polygamy before becoming a State).

<sup>123</sup> Cott, *supra* note 122, at para. 9.

<sup>124</sup> Lauren Brown & Jena Shoaf, eds., *Marriage and Divorce*, 12 GEO. J. GENDER & L. 493, 495 (2011).

<sup>125</sup> *Massachusetts*, 682 F.3d at 12.

<sup>126</sup> See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

<sup>127</sup> *Massachusetts*, 682 F.3d at 11.

such a violation.<sup>128</sup> Specifically, the lower court found DOMA violated the Tenth Amendment by regulating the states as states because it affects federal grants and costs, concerns attributes of state sovereignty, and is “of such a nature that compliance would impair a state’s ability to structure integral operations in areas of traditional governmental functions.”<sup>129</sup> Finding a Tenth Amendment violation would merely require the Court to find that Congress has overstepped its authority. If the Supreme Court wants to avoid a decision on the constitutionality of same-sex marriage for the time being, this appears to be the best option.<sup>130</sup> Even if DOMA is declared unconstitutional, by this rationale, mini-DOMAs would remain constitutional.

#### 4. DOMA violates the Full Faith and Credit Clause

When DOMA was initially passed, many believed that it violated the Full Faith and Credit Clause. In particular, many felt that Section 2 of the Act, which allows states to refuse to recognize same-sex marriages performed out-of-state, violates the Constitution’s requirement that each state must fully credit “the public acts, records, and judicial proceedings of every other state.”<sup>131</sup> The Full Faith and Credit Clause also permits Congress to enact general laws to “prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”<sup>132</sup> The Supreme Court has said that this clause transformed states from “independent foreign sovereignties, each free to ignore rights and obligations. . . of others” into “integral part[s] of a single nation, in which rights judicially established in any part are given nation-wide application.”<sup>133</sup> It has also been said that the Full Faith and Credit Clause “serves to coordinate the administration of justice among the several independent legal systems which exist in our Federation.”<sup>134</sup> These reasons may explain why the Continental Congress included a similar clause in the Articles of Confederation.<sup>135</sup> The Constitutional Convention left the clause mainly intact, but extended it to include public acts and records, as well as an effects clause.<sup>136</sup>

“During the Congressional debates surrounding DOMA, many worried whether the bill would violate the Full Faith and Credit Clause.”<sup>137</sup> For example, in 1996, Senator

<sup>128</sup>Massachusetts v. U.S. Dep’t of Health & Human Services, 698 F. Supp. 2d 234, 249–252 (D. Mass. 2010) *aff’d*, 682 F.3d 1 (1st Cir. 2012).

<sup>129</sup>*Id.*

<sup>130</sup>*But see* Laurence H. Tribe & Joshua Matz, An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights, 37 N.Y.U. REV. L. & SOC. CHANGE 199, 210 (2013) (“[I]f LGBT litigation strategies result in a more robust articulation of the Court’s federalism doctrine, negative consequences may follow in other contexts that LGBT advocates (and other progressives) consider important including seemingly far afield issues of regulatory and economic policy . . .”).

<sup>131</sup>U.S. CONST. art.IV, § 1.

<sup>132</sup>*Id.*

<sup>133</sup>Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).

<sup>134</sup>Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV 1, 2 (1945).

<sup>135</sup>*Id.* at 3.

<sup>136</sup>*Id.* at 4.

<sup>137</sup>28 U.S.C. § 1738C (2006). *But see* Wilson v. Ake, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005)

(“DOMA is an example of Congress exercising its powers under the Full Faith and Credit Clause . . . .

Kennedy declared DOMA was “plainly unconstitutional,”<sup>138</sup> articulating that although the Full Faith and Credit Clause gives Congress authority to prescribe the effect of one state’s laws in other states, “[it] does not give Congress the power to say that any such laws shall have no effect.”<sup>139</sup> During this period, Laurence Tribe also argued that “[t]he Full Faith and Credit Clause cannot be read as a fount of authority for Congress to set asunder the states that this clause so solemnly brought together.”<sup>140</sup> Tribe explained that the enforcement clause permitting Congressional action does not permit Congress to create a categorical exception to the Full Faith and Credit Clause.<sup>141</sup> Tribe argued that such a reading “would convert the Constitution’s most vital unifying clause into a license for balkanization and disunity.”<sup>142</sup> Despite its long history and visible connection to DOMA, neither the First Circuit nor the Second Circuit mentioned any connection with the Clause during their decisions involving DOMA.<sup>143</sup> Still, there is a legitimate argument that DOMA is unconstitutional under this rationale. Moreover, by holding DOMA unconstitutional under the Full Faith and Credit Clause, the Court would not be forced to strike down state mini-DOMAs.

However, it should be noted that a Full Faith and Credit Clause argument is not quite this simple. There exists a well-recognized public policy exception to traditional conflict of law problems whereby an individual state need not respect the acts, records, or judicial proceedings of another state if deemed contrary to that state’s public policy.<sup>144</sup> Indeed, several of the mini-DOMAs include express language indicating that recognizing same-sex marriage is contrary to public policy.<sup>145</sup> For the Court to hold DOMA unconstitutional under the public policy exception to the Full Faith and Credit Clause, it would need to invalidate those state public policy decisions. This is possible since the Court seems unwilling to recognize the moral disapproval of homosexuality as a legitimate public policy concern.<sup>146</sup> Still, there may be other rationales to justify the application of the exception. Whether the Court could recognize an assault to the tradition of marriage as a legitimate public policy concern is a more open question. On this issue, the First Circuit was explicit that defending traditional heterosexual marriage and traditional notions of morality failed constitutional scrutiny.<sup>147</sup>

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Congress’ actions are an appropriate exercise of its power to regulate conflicts between the laws of two different States, in this case, conflicts over the validity of same-sex marriages.”)

<sup>138</sup>142 CONG. REC. S10102 (Sept. 10, 1996).

<sup>139</sup>*Id.*

<sup>140</sup>Laurence H. Tribe, *Toward a Less Perfect Union*, N.Y. TIMES, May 26, 1996, at E11.

<sup>141</sup>*Id.*

<sup>142</sup>*Id.*

<sup>143</sup>*See generally Windsor*, 699 F.3d 169; *Massachusetts*, 682 F.3d 1.

<sup>144</sup>*See e.g.*, Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 79-81 (1993). *But see* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1980–1992 (1997) (arguing that reading a public policy exception into the Full Faith and Credit Clause is unconstitutional).

<sup>145</sup>*See, e.g.*, *Kan. Const. art. XV § 16*.

<sup>146</sup>*See Romer*, 517 U.S. at 644–53.

<sup>147</sup>*Massachusetts*, 682 F.3d 1, 15 (1st Cir. 2012). *See also Dragovich v. U.S. Dept. of Treasury*, 872 F. Supp. 2d 944, 955–57 (N.D. Cal. 2012) (holding that protecting traditional notions of heterosexual marriage fail rational basis).

## II. MINI-DOMAS PREVENT SAME-SEX COUPLES FROM ACCESSING COURTS

Although few advocates for same-sex marriage want to talk about divorce, with such a high divorce rate, same-sex marriage advocates *should* be thinking about divorce, especially if same-sex marriage continues to be acknowledged in some states and not others. The right to marry typically carries with it the right to divorce. However, only some states recognize same-sex marriage, and many states have residency requirements for divorce. Therefore in at least some states, same-sex couples have the right to marry without the corollary right to divorce. If the Court invalidates DOMA but permits states to choose whether or not to perform or even recognize same-sex unions, many same-sex couples will continue to find themselves without access to divorce. Whether same-sex wedlock will remain a problem depends for the most part on how the Court rules in *Windsor*.<sup>148</sup>

Meanwhile, it is important to understand the trauma faced by same-sex couples unable to access state courts for the purpose of obtaining a divorce. To understand the extent of the problem of marital wedlock, it is important to understand why people get divorced and how divorce affects an individual in the future. Although many believe divorce is a modern phenomenon, the first American divorce took place in 1637.<sup>149</sup> Today, divorce is common in America, and almost 5,000 divorces are granted every day.<sup>150</sup> Despite the emotional and economic trauma often associated with divorces, married couples are able to end their marriages with relative ease.<sup>151</sup>

People divorce for a variety of reasons. In the late nineteenth century, it was said that:

Many causes [for divorce] may arise, physical, moral, and intellectual, such as the contracting by one of the parties of an incurable disease like leprosy, or confirmed insanity, or hopeless idiocy, or a conviction of a felony, which would render the continuance of the marriage relation intolerable to the other party. . . .<sup>152</sup>

Today, individuals continue to divorce for countless reasons. Among others, individuals may choose to end marriage because their spouses were unfaithful, the marriage has grown stale or unsatisfying, or the marriage is damaging in some way.<sup>153</sup> It has been said that “[t]he primary effect to be accomplished by a divorce or dissolution is the separation of the parties in a manner that enables each to continue his or her life as free[ly] as possible.

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<sup>148</sup> As explained above, if the Court holds DOMA unconstitutional under an equal protection framework, it seems likely that mini-DOMAs will be held unconstitutional. *See supra* Part II(b)(1). If DOMA is held unconstitutional under the Full Faith and Credit Clause, states would at least be required to recognize same-sex marriages performed out-of-state. *See supra* Part II(b)(4). Finally, if the Court holds DOMA unconstitutional under a Tenth Amendment framework, mini-DOMAs would likely stand. *See supra* Part II(b)(3).

<sup>149</sup> GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION 2* (1991).

<sup>150</sup> Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RES. L. REV. 447, 448 (2011).

<sup>151</sup> *Id.* at 448–449, 455.

<sup>152</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

<sup>153</sup> *See e.g.*, Mary Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce* [forthcoming VILLANOVA L. REV. 2013] 49.

...<sup>154</sup> Moreover, divorce itself “provides a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities.”<sup>155</sup> Divorce not only provides couples with an orderly means by which they can divide their assets and separate their financial relationship but also grants individuals an emotional ritual of separation.<sup>156</sup> Without the possibility of divorce, couples are bound to each other both emotionally and legally.<sup>157</sup> Although the potential negative consequences of divorce should not be overlooked (for instance, it is common for one spouse to be left at a significant economic disadvantage),<sup>158</sup> for many the benefits outweigh the disadvantages.

Professor Judith Stinson, who has written on the evolution of American divorce law, claims that restricting individuals’ ability to divorce is “morally problematic for a number of reasons”<sup>159</sup>:

First, when a government forces a person to remain married to an individual who is no longer of his or her choosing, that person's personal autonomy is significantly reduced. Second, the perspective that marriage is, at least in some sense, a contract rather than simply a status suggests that divorce cannot be prohibited. Third, married persons are often legally liable for their spouse's actions, even absent consent, and courts should not shackle a person with unwanted and unintended liability. Finally, individuals cannot remarry if they remain legally married to another person.<sup>160</sup>

These factors appear consistent with the notion that the primary effect of divorce is to enable freedom and flexibility.<sup>161</sup> Still, Stinson does not seem to direct enough attention to the non-economic entanglement that occurs when married couples are unable to divorce. Not only will separated same-sex couples married and unable to divorce deal with legal liability for their spouses’ actions, but they will also continue to be legally tied to their spouses’ lives. Returning to Port and Cowan’s marriage,<sup>162</sup> when Port was worried she would be unable to divorce Cowan, one of her concerns would be the consequences of Port having children.<sup>163</sup> Given the rise of reproductive technology, it is increasingly common for lesbians to have biological children.<sup>164</sup> Specifically, Port was concerned that

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<sup>154</sup>Ward v. Ward, 41 Or. App. 447, 451 (1979).

<sup>155</sup>Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

<sup>156</sup>*Gay Divorce Still Legal in California*, N.Y. TIMES, May 27, 2009, available at <http://thelede.blogs.nytimes.com/2009/05/27/gay-divorce-still-legal-in-california/>.

<sup>157</sup>Boddie v. Connecticut, 401 U.S. 371, 376 (1971) (“[T]wo consenting [heterosexual] adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage . . .”).

<sup>158</sup>MACKINNON, *supra* note 20, at 653 (“Men tend to maintain the standard of living they had before the divorce, while women and children sink into instant poverty.”).

<sup>159</sup>Stinson, *supra* note 150, at 465.

<sup>160</sup>*Id.*

<sup>161</sup>See Jackson *supra* note 134 (and accompanying text).

<sup>162</sup>See *supra* notes 1–11 (and accompanying text).

<sup>163</sup>See Landau, *supra* note 9.

<sup>164</sup>KLARMAN, *supra* note 36, at 51.

if she remained legally married to Cowan, Cowan would be presumed to have joint-custody of Port's future child, even if she and Cowan no longer interacted.<sup>165</sup>

While Cowan and Port's separation appeared fairly amicable, without access to a divorce, there is no way to ensure an equitable division of assets.<sup>166</sup> Additionally, without a formal divorce, spouses may not receive alimony or child support even when they would be entitled to such.<sup>167</sup> Another issue which may arise if a couple is unable to divorce is the presumed authority for end-of-life decision making, by which an estranged spouse could have the final say on whether to grant or withhold life-saving treatment.<sup>168</sup> As a result of the many difficulties that arise, at least a few scholars believe that divorce is a fundamental right and that an individual without access to divorce knows neither liberty nor justice.<sup>169</sup>

Nevertheless, it seems likely that this problem will persist for at least a limited time, as the nation in its entirety does not seem ready to embrace same-sex marriage. Although "[same-sex marriage] is closer to ordinary than ever before in America,"<sup>170</sup> the nation remains split on the issue. Only forty-eight percent of Americans say they favor same-sex marriage, while forty-three percent are opposed.<sup>171</sup> A review of specific states shows a majority of Alabama, Kentucky, Louisiana, Oklahoma, and Texas oppose same-sex marriage while only thirty-five percent support its legality.<sup>172</sup>

If the Court were to strike down DOMA while allowing mini-DOMAs to stand, those states with such legislation and many others could continue to ban same-sex marriage through their own legislatures. Indeed, it is possible that if the Court takes a stance moving in the direction of the nationalization of same-sex marriage, the nation will see a period of backlash, and individuals in some states may become more hostile to the LGBTQ community. If the Court allows mini-DOMAs to remain, it should realize the consequences this will have on same-sex marriage and divorce. While the legal system typically dictates "*when* a divorce may occur, *how* a divorce must be procured, and *what* the consequences of divorce will be,"<sup>173</sup> in regards to same-sex divorce, the legal system seems to have gone astray. In 1888, the Supreme Court declared, "it is not perceived that any principle should prevent the legislature itself from interfering, and putting an end to the relation [marriage] in the interest of the parties as well as of society."<sup>174</sup> In 1971, the

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<sup>165</sup> *Id.*

<sup>166</sup> *See, e.g.,* MASS. GEN. LAWS ANN. Ch. 208 § 34 (2012).

<sup>167</sup> *See, e.g.,* MASS. GEN. LAWS ANN. Ch. 208 §§28, 53 (2012).

<sup>168</sup> *See, e.g.,* N.Y. PUB. HEALTH LAW §2994-d.

<sup>169</sup> Penrose, *supra* note 153, at 46, 48; *Stinson, supra* note 150, at 473. Although the Court has not expressly declared divorce is a fundamental right, *Boddie* supports this notion. *See generally Boddie*, 401 U.S. 371.

<sup>170</sup> Michael A. Lindenberger, *America's Coming-Out Election: How Gay Issues Became Mainstream*. TIME. November 12, 2012. Available at <http://nation.time.com/2012/11/12/americas-coming-out-election-how-gay-issues-became-mainstream/>.

<sup>171</sup> PEW RESEARCH CENTER. *Behind Gay Marriage Momentum, Regional Gaps Persist*. (November 9, 2012), <http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist/> [hereinafter, PEW RESEARCH]. *But see* KLARMAN, *supra* note 36, at 161 ("Six opinion polls conducted within a year showed national support for gay marriage ranging from 51 percent to 53 percent.").

<sup>172</sup> PEW RESEARCH, *supra* note 171.

<sup>173</sup> Mnookin & Kornhausert, *supra* note 155, at 951 (emphasis in original).

<sup>174</sup> *Maynard v. Hill*, 125 U.S. 190, 206 (1888).

Court explained due process required parties seeking divorce to have a “meaningful opportunity to be heard.”<sup>175</sup> And yet today, many married same-sex couples find themselves trapped in their marriages.

As long as states fail to recognize same-sex marriages performed out-of-state, it is likely that couples will find themselves unable to divorce.<sup>176</sup> If some states acknowledge same-sex marriage while others do not, individuals who are married in a state which recognizes same-sex marriage and then move to a state which neither performs nor recognizes same-sex marriages for any purpose, may find themselves unable to receive a divorce in their new home state. Moreover, due to state laws that require residency for access to state courts for the purpose of divorce, these couples may also be unable to get divorced in the state in which they originally married.<sup>177</sup> For instance, Massachusetts’ residency requirement is so strict as to deny court access to those couples who have “removed into this commonwealth for the purposes of obtaining a divorce.”<sup>178</sup> Denying same-sex couples the right to divorce is a violation of their due process rights and a serious assault on their personal liberty.

The due process issue of divorce mirrors one addressed by the Supreme Court in *Boddie v. Connecticut*.<sup>179</sup> There, the Court considered whether a state may limit access to its divorce courts by charging fees that effectively bar the poor from dissolving an existing marital bond or from forming another.<sup>180</sup> The Supreme Court held that, given the fundamental nature of the marriage relationship and the state’s monopolization of the means of dissolving that relationship, where a state failed to waive unaffordable divorce filing fees, the state deprived poor couples of liberty without due process of law.<sup>181</sup> Because most states do not recognize same-sex marriage and the Court has expressly held residency requirements are constitutional,<sup>182</sup> the question of same-sex divorce is slightly more complicated. Still, if a partial ban on divorce in the form of preventing those who could not afford to pay from obtaining a divorce is unconstitutional, how is one to defend a complete ban on divorce for same-sex couples?

It took Jessica Port and Virginia Cowan three years to divorce after numerous expensive, time-consuming, and emotionally draining appeals. Other couples encountered even more challenges. When Francesca and Donna-Marie Cerutti-O’Brien decided they were ready to end their marriage, the courts were uncooperative.<sup>183</sup> The couple married in Massachusetts in November 2006 and moved to Florida shortly

<sup>175</sup> *Boddie*, 401 U.S. at 377, 379–80 (Although this opportunity may be denied on account of a “countervailing state interest of overriding significance,” it “must be protected against denial by particular laws that operate to jeopardize it for particular individuals.”).

<sup>176</sup> It is possible that States banning same-sex marriage could recognize same-sex marriage for the limited purpose of granting a divorce. See *infra* Part III.

<sup>177</sup> See e.g., MASS. GEN. LAWS ANN. ch. 208, § 4 (2012) (“A divorce shall not, except as provided in the following section, be adjudged if the parties have never lived together as husband and wife in this commonwealth; nor for a cause which occurred in another jurisdiction, unless before such cause occurred the parties had lived together as husband and wife in this commonwealth, and one of them lived in this commonwealth at the time when the cause occurred.”).

<sup>178</sup> MASS. GEN. LAWS ANN. ch. 208 §5 (2012).

<sup>179</sup> *Boddie*, 401 U.S. at 376.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Sosna v. Iowa*, 95 S.Ct. 553 (1975) (holding that a one year residency requirement was constitutional).

<sup>183</sup> *Cerutti-O'Brien v. Cerutti-O'Brien*, 928 N.E.2d 1002 (Mass. App. Ct. 2010).

thereafter.<sup>184</sup> Problems in the relationship arose swiftly, and the couple filed for divorce in Massachusetts on June 27, 2007.<sup>185</sup> After the probate and family court dismissed their complaint for divorce due to a lack of subject matter jurisdiction, Francesca, determined to secure a divorce, appealed.<sup>186</sup> The Court of Appeals affirmed the probate and family court's decision, explaining that although the couple had married in Massachusetts, because the plaintiff was not continuously domiciled in Massachusetts following the wedding, the couple did not satisfy the residency requirements of Massachusetts divorce law, and the case was dismissed.<sup>187</sup> Because Francesca moved to Florida to be with her wife following the wedding, the couple was ineligible for divorce in Massachusetts and elsewhere.<sup>188</sup> That same-sex couples are finding themselves trapped in their marriages with no escape is unacceptable.

### III. STATES WITH SAME-SEX MARRIAGE BANS SHOULD RECOGNIZE SUCH MARRIAGES FOR THE PURPOSE OF DIVORCE PROCEEDINGS.

As this article has demonstrated, one of the many complicated unforeseen issues surrounding same-sex marriage is the inability of same-sex married couples to divorce. Although some scholars cannot imagine marriage without its corollary, divorce,<sup>189</sup> few gay-rights activists fought for same-sex marriage with divorce in mind. Instead, they argue that same-sex couples “needed the law to adapt to the reality of their changing families” through same-sex marriage or at least the rights associated with marriage.<sup>190</sup> Because the inability to divorce is a serious issue for those couples who find themselves trapped in a marriage they are ready to put behind them, today's same-sex couples not only require the right to enter into marriages, but they also need the law to permit the dissolution of such marriages. If the Supreme Court permits states to retain their mini-DOMAs, the question will remain whether these laws alone are sufficient to keep married couples from divorcing. While the Court should consider the possibility that mini-DOMAs will continue to prevent same-sex couples from divorcing, congressional measures could also relieve the inherent tension of permitting same-sex divorces in a mini-DOMA state.

Under the current State-by-State framework, it is often difficult for same-sex couples to divorce due to (1) domicile requirements to access state courts for the purpose of divorce, and (2) state statutory or constitutional provisions in the form of mini-DOMAs which prevent courts from recognizing (and therefore abolishing) same-sex marriages. Relying on mini-DOMAs, state courts can quickly reject claims for same-sex divorces for lack of subject-matter jurisdiction. For example, in *J.B. & H.B.*, the Texas Court of Appeals ruled that a lower court did not have the authority to entertain a petition for same-sex divorce because the state constitution and statutes defined marriage as between a man and a woman.<sup>191</sup> Because the state was constitutionally and statutorily

<sup>184</sup>*Id.* at 1003.

<sup>185</sup>*Id.* at 1004.

<sup>186</sup>*Id.*

<sup>187</sup>*Id.* at 1004–09.

<sup>188</sup>*See id.* at 103.

<sup>189</sup>*See generally* Penrose, *supra* note 153.

<sup>190</sup>KLARMAN, *supra* note 36, at 51 (emphasis added).

<sup>191</sup>*In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 663 (Tex. App. 2010).



prohibited from recognizing same-sex marriages entered out-of-state, the court claimed that it did not have the authority to recognize the marriage for purposes of divorce.<sup>192</sup> Although the couple had been separated for two years,<sup>193</sup> they were left without a means of ending their marriage. This particular court went so far as to say, “[a] Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person.”<sup>194</sup> Similarly, prior to its legislated recognition of same-sex marriage,<sup>195</sup> the Supreme Court of Rhode Island in *Chambers v. Ormistad* found that a Rhode Island family court could not properly recognize a same-sex marriage for the purpose of entertaining a divorce.<sup>196</sup> The *Chambers* court’s analysis was quite simple: [a]lthough family courts may “hear and determine all petitions for divorce from the bond of marriage,” the court found “absolutely no reason to believe that . . . the legislators understood the word marriage to refer to any state other than ‘the state of being united to a person of the opposite sex.’”<sup>197</sup>

Despite these cases, there remains some question as to whether mini-DOMAs are sufficient to keep married couples from divorcing. Mary Patricia Byrn and Morgan Holcomb argue that mini-DOMAs do not prevent state courts from granting relief to same-sex couples seeking divorce.<sup>198</sup> Byrn and Holcomb contend that judicial findings of a lack of subject-matter jurisdiction over same-sex divorce are justified by misguided readings of mini-DOMAs and state court jurisdiction.<sup>199</sup> Specifically, Byrn and Holcomb argue that because state courts have broad jurisdiction to hear any justiciable dispute, absent express legislative intent to prohibit state courts from hearing same-sex divorces, state courts should hear the cases rather than engage in judicial activism to strip jurisdiction.<sup>200</sup> Accordingly, Byrn and Holcomb would likely applaud the Wyoming Supreme Court’s *Christiansen* decision for finding subject-matter jurisdiction over same-sex divorce despite Wyoming’s mini-DOMA.<sup>201</sup>

In *Christiansen*, Paula Christiansen and Victoria Lee Christiansen, residents of Wyoming, were married in Canada in 2008.<sup>202</sup> In February 2010, the couple filed for divorce in Wyoming, a state that did not recognize same-sex marriage.<sup>203</sup> The district court dismissed the divorce petition for lack of subject-matter jurisdiction, relying on the State’s mini-DOMA.

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<sup>192</sup>*Id.* at 663.

<sup>193</sup>*Id.* at 659.

<sup>194</sup>*Id.* at 666 (quotations omitted).

<sup>195</sup>*Same-Sex Marriage Bill Becomes Law*, RHODE ISLAND STATE HOUSE (May 2, 2013), available at <http://webserver.rilin.state.ri.us/News/pr1.asp?prid=9245>.

<sup>196</sup>*Chambers v. Ormistad*, 935 A.2d 956, 958 (R.I. 2007).

<sup>197</sup>*Id.* at 962.

<sup>198</sup>Byrn & Holcomb, *supra* note 21, at 6.

<sup>199</sup>*Id.* at 9 (“No state has placed same-sex divorce in a specialized tribunal. As such, state trial courts are presumed to have subject-matter jurisdiction over same-sex divorce petitions. . . . Georgia is the only state in which its state DoMA strips the trial courts of jurisdiction over same-sex divorce because Georgia’s is the only state DoMA that mentions divorce.”). See also GA. CONST. art. 1 § 4 para. 1(b).

<sup>200</sup>Byrn & Holcomb, *supra* note 21, at 9.

<sup>201</sup>See *id.* at 27. See also *Christiansen v. Christiansen*, 253 P.3d 153, 157 (Wyo. 2011).

<sup>202</sup>*Christiansen*, 253 P.3d at 153.

<sup>203</sup>*Id.* See also WYO. STAT. ANN. § 20–1–101.

The Wyoming Supreme Court, while finding inherent tension between the mini-DOMA defining marriage as “a civil contract between a male and a female,”<sup>204</sup> and another Wyoming statute adopted much earlier that provided “[a]ll marriage contracts which are valid by the laws of the country in which contracted are valid in this state,”<sup>205</sup> found no such conflict in regards to same-sex divorce proceedings.<sup>206</sup> In an attempt to harmonize the statutes which appeared facially in conflict, the Court recognized same-sex marriage for the limited purpose of divorce.<sup>207</sup> The Court explained that while the mini-DOMA prevents same-sex couples from entering into a marriage in Wyoming, it does not mention same-sex marriages entered elsewhere<sup>208</sup>; moreover, the other statute expressly allows for Wyoming to recognize a valid Canadian same-sex marriage.<sup>209</sup> It is important to realize that although few States have such a parallel statutory structure expressly requiring courts to reconcile them, the Wyoming statute mandating recognition of out-of-state marriages is for the most part a codification of the dominant common law principle *lex loci celebrationis* that requires a State to recognize an out-of-state marriage as long as the marriage does not offend state public policy.<sup>210</sup> Viewed in this light, most states should be able to use *Christiansen* as a model.<sup>211</sup> It is important for other states to understand the Court’s declaration recognizing same-sex marriage for the limited purposes of divorce proceedings does not threaten a state’s general ban on such marriages:

[R]ecognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. . . . Respecting the law of Canada, as allowed by § 20-1-111, for the limited purpose of accepting the existence of a condition precedent to granting a divorce, is not tantamount to state recognition of an ongoing same-sex marriage.<sup>212</sup>

New York, prior to its legalization of same-sex marriage in June 2011, may also be used as a model for how states that do not generally recognize same-sex marriage can do so for the limited purpose of granting a divorce. Even though New York did not yet recognize same-sex marriage, its courts were willing to recognize same-sex marriage for the limited purpose of granting same-sex divorces. For example, in *C.M v. C.C.*, the State Supreme

<sup>204</sup>WYO. STAT. ANN. § 20-1-101.

<sup>205</sup>WYO. STAT. ANN. § 20-1-111.

<sup>206</sup>*Christiansen*, 253 P.3d at 156.

<sup>207</sup>*Id.*

<sup>208</sup>*Id.* See also Wyo. Stat. Ann. § 20-1-101 (“Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.”).

<sup>209</sup>*Christiansen*, 253 P.3d at 156. See also Wyo. Stat. Ann. § 20-1-111 (“All marriage contracts which are valid by the laws of the country in which contracted are valid in this state.”).

<sup>210</sup>See KERMIT ROOSEVELT, III, CONFLICT OF LAWS 13 (2010); Elisabeth Oppenheimer, *No Exit*, 90 N. C. L. Rev. 73, 99 (2011).

<sup>211</sup>Only in states that expressly declare that recognizing same-sex marriages performed out-of-state violates public policy will this argument fail. See, e.g., Kan. Const. art. XV § 16.

<sup>212</sup>*Christiansen*, 253 P.3d at 156.

Court held the New York court had jurisdiction to grant a divorce to a same-sex couple married in Massachusetts.<sup>213</sup> Like the Wyoming Supreme Court, this court distinguished the recognition of marriages from the performance of marriages, reasoning that “the recognition of a same sex marriage solemnized abroad was not contrary to the public policy of this state even if the marriage could not be solemnized in New York.”<sup>214</sup>

However, this court took a more expansive approach than the Wyoming court by declaring that recognition of same-sex marriages performed out-of-state, not just for purposes of divorce, is a general question of comity. Unlike the Wyoming Court, Judge Rosalyn H. Richter wrote, “it 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.”<sup>215</sup> Because the same-sex couple was validly married in Massachusetts in 2005, Judge Richter concluded that the common law doctrine of comity required the New York court to grant jurisdiction for divorce.<sup>216</sup> It should be noted that although this decision was enabled in part because the Court drew upon a lower court decision which already established same-sex marriages performed out-of-state should be recognized,<sup>217</sup> notions of comity could still be used by other states to reach the same conclusion. Although the general notion of comity is one rationale to justify same-sex marriage, states that do not permit same-sex marriages would likely follow the rationale of the Wyoming court as its holding is more limited. Still, this case should be used as an example of how states that do not permit same-sex marriage may still allow for same-sex divorce.

Using a similar rationale as the New York State Supreme Court, in *Hammond v. Hammond*, a New Jersey court was willing to recognize a Canadian same-sex marriage for the limited purposes of divorce in spite of the state Attorney General’s arguments to the contrary.<sup>218</sup> The opinion sympathized with the couple’s situation in which a dying woman wished to break legal ties to her spouse with whom she was no longer in a relationship and against whom she had previously obtained a domestic violence restraining order so that she could marry her current partner, thereby transferring rights, including end-of-life decision making from her removed spouse to her current partner.<sup>219</sup> Ultimately, the court invoked *lex loci celebrationis*, by which marriages validly contracted in other jurisdictions are valid in New Jersey as long as they are not offensive to New Jersey’s public policy.<sup>220</sup> Interestingly, the New Jersey court relied on the same case as the *C.M v. C.C* court to affirm that comity should be employed.<sup>221</sup> Judge Mary Jacobson reasoned, “I don’t see how granting a divorce here is inconsistent with the legislature’s intent because the legislature did not address the specific issue.”<sup>222</sup> This court believed “we would have a very different situation” if New Jersey had enacted a

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<sup>213</sup> 867 N.Y.S.2d 884, 889 (Sup. Ct. 2008).

<sup>214</sup> *Id.* at 886.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 885–87.

<sup>217</sup> *Martinez v. Cnty of Monroe*, 850 N.Y.S.2d 740 (2008).

<sup>218</sup> Transcript of Oral Decision at 10–11, *Hammond v. Hammond*, No.FM-11-905-08-B (N.J. Super. Ct. Ch. Div. Feb. 6, 2009)

<sup>219</sup> *Id.* at 6–9.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 20–21 (citing *Martinez*, 850 N.Y.S.2d 740).

<sup>222</sup> *Id.* at 19.

mini-DOMA.<sup>223</sup> However, as evident in *Christiansen*, the presence of a mini-DOMA does not necessitate a ban on same-sex divorce.

Wyoming, New York, and New Jersey should be used as models for how to handle same-sex divorce. Even if the Court makes same-sex marriage a state-by-state issue, all fifty states should still hear cases regarding same-sex divorce. While in Texas, Judge Tena Callahan (whose decision was ultimately overruled) permitted same-sex divorce by declaring that Texas' ban on same-sex marriages and civil unions violated the Fourteenth Amendment's Equal Protection Clause<sup>224</sup>—thereby permitting two men which had married in Massachusetts to divorce—a complete upheaval on same-sex marriage bans is not required for a court to hear a same-sex divorce. The couple in question had a simple request for a non-contentious divorce that became a national story and an attempt to overhaul the state's mini-DOMA.<sup>225</sup> Given that only thirty-five percent of Texas supports the legalization of same-sex marriage,<sup>226</sup> it is hardly surprising that any attempt to overturn Texas' mini-DOMA<sup>227</sup> would be met with significant resistance.<sup>228</sup>

As long as states are permitted to ban same-sex marriage, an issue that will likely be decided this spring in *Hollingsworth v. Perry*, the difficulties with same-sex divorces will remain. As demonstrated above, courts in Wyoming, New York, New Jersey, and Maryland overcame the inherent tension in forbidding the performance of same-sex marriage while allowing same-sex divorce by separating the issues and by confining the recognition of same-sex marriage to the specific purpose of ending the marriage. If courts acknowledge, as the Wyoming Supreme Court did, that recognizing same-sex marriage for the “limited purpose of accepting the existence of a condition precedent to granting a divorce, is not tantamount to state recognition of an ongoing same-sex marriage,”<sup>229</sup> the difficulties of same-sex divorce will be reduced.

The recognition of same-sex marriage for the limited purposes of divorce should be required even in states that assert specific public policy reasons banning same-sex marriage or have passed explicit bans on recognizing same-sex marriages. Although it has been settled that “[t]he State. . . has [the] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved,”<sup>230</sup> it remains unclear whether states may prescribe limitations on divorce other than jurisdictional requirements. To require states to recognize same-sex marriage for the limited purpose of divorce would resolve a serious due process problem faced by same-sex couples unable to seek a divorce without interfering with the state's policies against such marriages. Recognizing a marriage for

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<sup>223</sup> *Id.*

<sup>224</sup> *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010).

<sup>225</sup> See, e.g., Stephanie Chen, *Serious Legal Hurdles for Gay Divorce*, CNN, (May 3, 2010, 9:40AM), <http://www.cnn.com/2010/LIVING/05/03/texas.gav.divorce/index.html>; Ashby Jones, *Dallas Judge Shoots Down Texas' Ban on Gay Marriage*, WSJ LAW BLOG (Oct. 2, 2009, 9:06AM), <http://blogs.wsj.com/law/2009/10/02/dallas-judge-shoots-downtexas-ban-on-gay-marriage/>.

<sup>226</sup> PEW RESEARCH, *supra* note 171.

<sup>227</sup> Vernon's ANN.TEXAS CONST. Art. 1, § 32.

<sup>228</sup> See, e.g., Brief for Appellant/Intervenor, *J.B. & H.B.*, 326 S.W.3d (2010) (No. 05-09-01170-CV).

<sup>229</sup> *Christiansen*, 253 P.3d at 156.

<sup>230</sup> *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878).

purposes of its termination is surely distinct from performing the marriage. Moreover, considering that it is possible states will be forced to recognize same-sex marriage for purposes of determining federal benefits, it would seem incongruent not to recognize same-sex marriage for purposes of divorce. While marriages are meant to last forever, they often fail, and the couples wish to part ways. Married same-sex couples deserve this opportunity just as much as married heterosexual couples. By demanding states recognize same-sex marriage for the limited purposes of divorce, many couples will be saved from unwanted wedlock.