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Same-Sex Divorce

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Same-sex marriage is now legal in seventeen states and sixteen countries.[1] With this change, a question increasingly being asked is how same-sex couples can divorce. It is an easy answer for those who live in a marriage equality state; the usual divorce procedures apply. The problem arises for those who live in or move to a prohibition state that does not authorize same-sex marriage. As an article in the *New York Times* recently explained, "[i]n a highly mobile society, state bans on same-sex marriage have in many cases made untying the knot far harder than tying it in the first place."[2] Without the legal option to divorce, same-sex couples cannot remarry, suffer psychological harm from forced personal relationships and incur continued financial burdens from joint obligations like debt, insurance, and federal taxes.[3]

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1. As of January 2014, the states are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, and the District of Columbia. The countries are Argentina, Belgium, Brazil, Canada, Denmark, England/Wales, France, Iceland, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and Uruguay.

2. *See* Erica Goode, *Ruling on Same-Sex Marriage May Help Resolve Status of Divorce*, N.Y. TIMES (July 2, 2013), http://www.nytimes.com/2013/07/03/us/ruling-might-also-ease-the-way-for-same-sex-divorces.html.

3. Dahlia Lithwick & Sonja West, *Texas Hold 'Em*, SLATE (Sept. 11, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/texas_and_gay_marriage_will_texas_refusal_to_grant_divorces_to_same_sex.single.html; Karen Hartman, *Bound in a Gay Union by a State Denying It*, N.Y. TIMES (July 15, 2011), http://www.nytimes.com/2011/07/17/nyregion/bound-in-a-gay-union-by-a-state-that-didnt-recognize-it.html?pagewanted=all&_r=0; *see* Mary P. Byrn & Morgan L. Holcomb, *Same-Sex Divorce in a DOMA State*, 50 FAM. CT. REV. 214 (2012); Goode, *supra* note 2; Jesse Green, *From "I Do" to "I'm Done"*, N.Y. MAG. (Feb. 24, 2013),

The legal gap between marriage and divorce exists because divorce jurisdiction requires the domicile of a party while marriage does not. "Domicile" is the state where the party resides with the intent to remain. Divorce jurisdiction usually requires residence for six months to one year prior to filing.[4] A few marriage equality states—California, Delaware, the District of Columbia, Minnesota, and Vermont—now statutorily exempt same-sex marriage from the residency requirements and allow non-residents married in the state to return to divorce if their home state refuses to dissolve the marriage.[5] One state, Georgia, expressly bans same-sex divorce for out-of-state marriages.[6] In the rest of the marriage prohibition states, the only option seems to be that one partner permanently relocate to a marriage equality state to establish the domicile required to petition for divorce.[7]

Courts confronted with the question of same-sex divorce have responded in conflicting ways. Some courts have denied divorces,[8] while others have granted them.[9] Looking closely at the reasoning of the cases suggests some

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http://nymag.com/news/features/gay-divorce-2013-3.

4. *See* Sosna v. Iowa, 419 U.S. 393 (1975) (upholding state's one-year residency requirement for divorce as permissible, but not required under due process); In re Marriage of Kimura, 471 N.W.2d 869 (Iowa 1991) (recognizing a husband's domicile as sufficient basis for divorce jurisdiction despite wife's residence and place of marriage in Japan). *But see* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669 (2011) (proposing a change in the basis of divorce jurisdiction from the corporate-like *in rem* domicile rule to the usual *in personam* minimum contacts rule) .

5. CAL. FAM. CODE § 2320 (West 2013); DEL. CODE ANN. tit. 13, § 129(f) (West 2010); D.C. CODE § 16-902(b)(1) (West 2013); MINN. STAT. ANN. § 518.07 (West 2006); VT. STAT. ANN. tit. 15, § 592(b)–(c) (West 2007); *see also* Civil Marriage Act, S.C. 2005, c. 33, s. 7 (Can.); COLO. REV. STAT. ANN. §§ 14-15-115 & 14-15-116 (West 2013) (allowing divorce through a civil union statute). There may also be a question of proper personal jurisdiction over the non-residents necessary to adjudicate the incidents of divorce such as financial and custodial issues where the respondent does not consent to jurisdiction. *See* Armin U. Kuder & Marcia Kuntz, *Legal Challenges of Divorce for Same-Sex Couples*, *in* UNDERSTANDING THE LEGAL ISSUES SURROUNDING SAME-SEX MARRIAGE 27 (2013); *see, e.g.*, DEL. CODE ANN. tit. 13, § 129(f) (requiring consent to nonexclusive jurisdiction for divorce proceedings as a condition of same-sex marriage); VT. STAT. ANN. tit. 15, § 592(b)–(c) (allowing non-resident same-sex divorce only if no children were born or adopted during the marriage and the parties agree to financial stipulations).

6. GA. CONST., art. I, § 4; GA. CODE ANN. § 19-3-3.1 (West 2003).

7. *See generally* Ellen Shapiro, *'Til Death Do Us Part: The Difficulties of Obtaining A Same-Sex Divorce*, 8 NW. J. L. & SOC. POL'Y 208 (2013); Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73 (2011).

8. *See, e.g.*, Alan Johnson, *Judge Refuses Lesbians a Divorce*, COLUMBUS DISPATCH (Aug. 24, 2012), http://www.dispatch.com/content/stories/local/2012/08/24/judge-refuses-to-give-lesbians-a-divorce.html (denying divorce in *Thompson v. Roller*); In re Marriage of Ranzy, No. 49D12-0903-DR-014654 (Ind. Super. Ct. Sept. 4, 2009) (denying divorce for Canadian same-sex marriage); *see also* O'Darling v. O'Darling, 188 P.3d 137 (Okla. 2008) (invalidating divorce where same-sex nature was not disclosed to and addressed by the court).

9. *See, e.g.*, Ryan Dunn, *Hancock County First: A Same-Sex Divorce*, COURIER (Aug. 16, 2013), http://www.thecourier.com/Issues/2013/Aug/16/ar_news_081613_story3.asp (granting divorce in *Mason v. Essinger*); Alan Johnson, *Married in New York, Local Gay Couple Gets Divorced in Columbus*, COLUMBUS DISPATCH (Mar. 23, 2012), http://www.dispatch.com/content/stories/local/2012/03/23/ohio-gay-couple-receive-divorce.html (granting divorce in *Baize v. Wissman*); Johnson, *supra* note 8 (granting divorce in *Dzhembaz v. Volkov*).

legal options for courts in marriage prohibition states facing divorce petitions from same-sex couples. These options include limited recognition of the external marriage under conflicts of laws principles; declaring unconstitutional the laws that deny recognition to legal same-sex marriages or that deny same-sex couples access to the courts; or voiding the marriage by annulment.

I.
LIMITED RECOGNITION OF EXTERNAL MARRIAGE

One legal option is for courts to consider limited recognition of a same-sex marriage solely for purposes of divorce.[10] This incidental recognition promotes the policies behind divorce laws—disentanglement of affairs, personal freedom, ability to remarry, and access to the courts—but does not necessarily validate ongoing same-sex marriages.[11] It thus arguably furthers the public policy of the states prohibiting same-sex marriage by terminating those unauthorized partnerships.

A. Conflicts of Law

Under the usual conflicts-of-law rule, a state will recognize out-of-state marriages that were valid in the state where they were performed.[12] In the vast majority of cases, courts apply the rule of *lex loci celebrationis*, looking to the law of the location where the marriage was celebrated or contracted to determine its validity.[13] Thus, states typically recognize easily lawful out-of-state marriages even when they differ from the state's own laws governing, for example, marital age, degrees of kinship, or common-law marriages.[14] The lex loci rule arises from comity by which "courts will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and respect."[15] Accordingly, the Supreme Courts of Wyoming and Maryland and courts in New York have relied on comity to recognize lawful out-of-state same-sex marriages and grant divorces.[16]

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10. *See generally* Barbara J. Cox, *Using an "Incidents of Marriage" Analysis when Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699 (2004).

11. *See, e.g.*, Christiansen v. Christiansen, 253 P.3d 153, 156 (Wy. 2011) ("[A]ccepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role.").

12. *See, e.g.*, Port v. Cowan, 44 A.3d 970, 975–76 (Md. 2012); Beth R. v. Donna M., 853 N.Y.S.2d 501, 504 (Sup. Ct. 2008); *see* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971 (1997).

13. *See Christiansen*, 253 P.3d at 156; Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINN. L. REV. 61 (1996). *But see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) (exception for marriage evasion).

14. *See* Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013); *Beth R.*, 853 N.Y.S.2d at 504; Mazzolini v. Mazzolini, 155 N.E.2d 206, 208 (Ohio 1958) (recognizing lawful Massachusetts marriage between first cousins even though such kinship marriages were not authorized in Ohio).

15. *Port*, 44 A.3d at 975 (internal quotations omitted).

16. *See Christiansen*, 253 P.3d at 156; *Port*, 44 A.3d at 982; *Beth R.*, 853 N.Y.S.2d at 504;

Courts might also use more generalized, commercial choice-of-law principles to apply the law of the state where the couple formed the marital contract. Under this approach, the state forum would function merely as a conduit for the other state's law of marriage validity and divorce remedies of marital property, support, and custody.[17]

Article IV of the Constitution of the United States similarly supports the application of conflicts of law principles, providing that states should give full faith and credit to the "public Acts, Records, and judicial Proceedings" of the sister states.[18] The clause embodies the general "wise policy" of respect for the official acts of another state,[19] and facially seems to require that states recognize the lawful marriages of other states. Scholars, however, disagree as to whether the clause mandates interstate recognition of same-sex marriage, questioning whether marriage is an "act" or "record" and whether there is any exception to the recognition command.[20]

More significantly, the federal Defense of Marriage Act (DOMA)—enacted pursuant to the authority of the Full Faith and Credit Clause—provides an exemption that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceedings of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage."[21] Relying on this language, one Pennsylvania court concluded that DOMA eliminated any requirement to recognize a Massachusetts same-sex marriage for purposes of divorce.[22] Yet, the federal statute, by its express exception, implies that the constitution otherwise requires recognition of external same-sex marriages.

B. Public Policy Exceptions

While broad principles of common law and federalism support recognition of same-sex marriages, both incorporate a public policy exception to that recognition. Under this exception, states will not recognize the validity of an out-of-state marriage where it would violate their own public policy.[23] Courts have traditionally used the public policy exception when legal marriages

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C.M. v. C.C., 867 N.Y.S.2d. 884, 889 (Sup. Ct. 2008). *But see* Chambers v. Ormiston, 935 A.2d 956, 964 (R.I. 2007) (denying divorce as state did not authorize same-sex marriage), *superseded by statute*, R.I. GEN. LAWS § 15-1-1 (eff. Aug. 1, 2013).

17. *See* Byrn & Holcomb, *supra* note 3, at 218; Parker v. Waronker, 918 N.Y.S.2d 822, 824–25 (Sup. Ct. 2010).

18. U.S. CONST. art. IV, § 1.

19. Nevada v. Hall, 440 U.S. 410, 425–26 (1979).

20. *Compare* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2155 (2005) *with* Kramer, *supra* note 12, at 1986–87.

21. 28 U.S.C. § 1738C (2012).

22. Kern v. Taney, 11 Pa. D. & C. 5th 558, 563 (Com. Pl. Ct. 2010); *see also* Wilson v. Ake, 354 F. Supp. 2d 1298, 1303–04 (M.D. Fla. 2005).

23. Kramer, *supra* note 12, at 1975–76.

implicate crimes like polygamy or incest.[24] But importantly, "[t]he policy exception is necessarily narrow, lest it swallow the rule."[25]

The Supreme Court of Wyoming reconciled its own public policy against establishing same-sex marriage to grant a divorce of a lawful Canadian marriage. In *Christiansen v. Christiansen* the court held that recognizing a 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."[26] The Wyoming court emphasized that "[a] divorce proceeding does not involve recognition of a marriage as an ongoing relationship," but merely establishes the condition precedent to granting a divorce.[27] The court emphasized that the divorce petition did not seek to give effect to the marriage or establish a right to live in the state as a married couple: "They are not seeking to enforce any right incident to the status of being married. In fact, it is quite the opposite."[28]

Similarly, the Maryland Court of Appeals in *Port v. Cowan* granted a divorce to a couple married lawfully out of state, distinguishing its then-existing policy against same-sex marriage.[29] The court held that limited recognition was not repugnant to state policy because the state did not criminalize same-sex marriage; rather, the state's laws recognized and protected against discrimination based on sexual orientation.[30]

Unlike Wyoming and Maryland, most prohibitory states have express language against recognizing out-of-state marriages. A few "super-DOMA" states like Texas and Ohio have additional language against giving effect or any legal benefit to same-sex marriages.[31] Courts in Texas and Pennsylvania emphasized these restrictive prohibitions in refusing to grant same-sex divorces.[32] For example, in In re *Marriage of J.B.*, a Texas Court of Appeals found divorce to be a claim or "demand of a right" to legal benefits like community property rights that are "asserted as a result of a marriage."[33] Thus, the court held that divorce would improperly give effect to the couple's marriage by presuming a valid marriage capable of divorce and by granting "paradigmatic legal benefit[s]" like marital property,[34] violating state law that

24. *Id.* at 1970.
25. Christiansen v. Christiansen, 253 P.3d 153, 156 (Wy. 2011).
26. *Id.* at 156.
27. *Id.*
28. *Id.*
29. 44 A.3d 970, 975 (Md. 2012).
30. *Id.* at 979–80.
31. TEX. FAM. CODE ANN. § 6.204(c)(2) (West 2013); OHIO REV. CODE ANN. § 3101.01(C)(3) (2011). *See* Robert E. Rains, *A Minimalist Approach to Same-Sex Divorce: Respecting States that Permit Same-Sex Divorce and States that Refuse to Recognize Them*, 2012 UTAH L. REV. 393, 420 (2012).
32. *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 665 (Tex. App. 2010), *review granted*, Aug. 23, 2013; Kern v. Taney, 11 Pa. D. & C. 5th 558, 562–63 (Com. Pl. Ct. 2010).
33. 326 S.W.2d at 665.
34. *Id.* at 666.

prohibited "giving *any effect whatsoever*" to same-sex marriage. On pending appeal to the Texas Supreme Court, plaintiffs argue that divorce is not a marital benefit, but rather a residential benefit, extending the right of access to the courts to those who reside in the state.[35]

Following this line of reasoning, states with "super-DOMA" laws might read narrowly the prohibition against marital legal benefits to restrict only the beneficial establishment of same-sex partnerships, thus permitting divorce. For example, Ohio treats out-of-state same-sex marriages "in all respects as having no legal force or effect" and prohibits granting "specific statutory benefits of a legal marriage" to these partnerships.[36] Yet, the Ohio Supreme Court held in *State v. Carswell* that the voter intent behind this constitutional provision enacted by ballot initiative was to prevent the legislative or judicial creation of legal statuses that approximate marriage, like civil unions or domestic partnerships.[37] Therefore, the court held, the constitutional provision did not preclude same-sex partners from accessing statutory benefits of marriage like the domestic violence protection.[38] Similarly, the divorce statute, like the domestic violence statute, may not be precluded by the constitutional provision that aims to prevent the establishment of marriage-like status for same-sex couples.[39]

II.
UNCONSTITUTIONAL DENIALS

A state's assertion of the public policy exception to deny recognition of same-sex marriage for divorce must still comport with the Constitution.[40] The exception cannot be used to accomplish unconstitutional objectives, as the Supreme Court held in the inter-racial marriage case of *Loving v. Virginia.*[41] Legal scholars have concluded that denying same-sex divorce violates equal protection and due process because there is "no legitimate reason to keep acrimonious couples married," especially in a time where all fifty states permit no fault divorce.[42] The recent U.S. Supreme Court decision in *United States v. Windsor* bolsters this conclusion in striking down the provision of DOMA denying recognition to valid state same-sex marriages.

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35. *See* Lithwick & West, *supra* note 3. The companion case in the Texas appeal did uphold the same-sex divorce granted by the trial court, finding that the state had no standing to intervene in the private matter. State v. Naylor, 330 S.W.3d 434 (Tex. App. 2011), *review granted*, Aug. 23, 2013.

36. OHIO REV. CODE ANN. § 3101.01(C)(2)–(3) (West 2011).

37. 871 N.E.2d 547, 551 (Ohio 2007).

38. *Id.* at 554.

39. *See* Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1, 16–26 (2012).

40. Kramer, *supra* note 12, at 1971.

41. 388 U.S. 1 (1967).

42. *E.g.*, Byrn & Holcomb, *supra* note 39, at 25; Byrn & Holcomb, *supra* note 3, at 215; Oppenheimer, *supra* note 7, at 108-110.

A Texas trial court in In re *Marriage of J.B.* agreed that a denial of same-sex divorce violated equal protection, but was reversed on appeal.[43] The Texas Court of Appeals held that the legitimate state interest in "promoting the raising of children in the optimal familial setting" justified under rational basis the classification granting the right to divorce only to opposite-sex couples and not to same-sex couples.[44] The court held that the persons classified were distinguished by the relevant characteristic of their "natural ability to procreate" based on the state's legitimate interest in "fostering relationships that will serve children best."[45] On pending appeal to the Texas Supreme Court, the petitioners challenge that "the court of appeals never connects the dots" to show a rational relation, questioning how denying same-sex couples access to *divorce* promotes the optimization of marriage, procreation, and the raising of children in opposite-sex households.[46]

The Supreme Court's decision in *Windsor* concludes more emphatically that non-recognition of valid same-sex marriages is unconstitutional, finding only animus against same-sex couples behind the pretext of optimal family life.[47] The majority framed the problem with DOMA as discrimination in the government's recognition of all lawful state marriages, except same-sex marriages.[48] The government, the Court held, expressly targeted a class of marriages some states had intended to protect. The Court concluded that no rational state interest justified this denial, as the legislative intent simply disapproved of homosexuals, stigmatized gay marriages, and created a preference for heterosexual marriages.[49]

Relying on *Windsor*, an Ohio federal court in *Obergefell v. Kasich* recognized the validity of a lawful out-of-state same-sex marriage for purposes of identification on a death certificate.[50] The court framed the issue as Ohio's usual practice of recognizing the validity of lawful out-of-state marriages under lex loci versus its differing treatment of denial of same-sex marriages.[51] It concluded that "this [wa]s not a complicated case" and *Windsor* supported the conclusion that the targeting of same-sex partners of lawful marriages lacked basis in any rational state interest, but rather arose from animus and disapproval of homosexuality in violation of equal protection.[52] The court, in a related

43. *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 659 (Tex. App. 2010).

44. *Id.* at 677.

45. *Id.* at 674; *see* Kern v. Taney, 11 Pa. D. & C. 5th 558, 575–76 (Com. Pl. Ct. 2010).

46. Petitioner's Brief on the Merits at 26, *In re* Marriage of J.B. & H.B., No. 11-0024 (Tex. Sept. 6, 2011), 2011 WL 8584393, at *26.

47. 133 S. Ct. 2675 (2013); *see* Goode, *supra* note 2.

48. *Windsor*, 133 S. Ct. at 2689.

49. *Id.* at 2695–96; *see* Romer v. Evans, 517 U.S. 620, 632 (1996).

50. No. 1:13-cv-501, 2013 WL 3814262, at *5 (S.D. Ohio July 22, 2013) (granting temporary restraining order). The plaintiff, John Arthur, died three months later. Tim Swift, *Gay Ohio Man Who Sparked a Legal Case Dies*, HUFFINGTON POST (Oct. 23, 2013), http://www.huffingtonpost.com/2013/10/23/gay-ohio-marriage-case-death_n_4147659.html

51. *Obergefell*, 2013 WL 3814262 at *5.

52. *Id.* at *1.

decision on the merits, articulated the constitutional implications of the usual deference to out-of-state marriages, explaining that "once you get married lawfully in one state, another state cannot summarily take your marriage away, because the right to remain married is properly recognized as a fundamental liberty interest protected by the Due Process Clause of the United States Constitution."[53]

The differential treatment of same-sex couples with respect to divorce might also be framed as an unconstitutional denial of access to the courts.[54] Individuals cannot divorce themselves through private agreement, and thus require access to the courts. This state monopoly over divorce led the U.S. Supreme Court in *Boddie v. Connecticut* to find that a categorical denial of access to the courts for one group of people violated due process.[55] In striking down a categorical denial of divorce for indigent plaintiffs, the Court emphasized the special nature of divorce as "a right of substantial magnitude" that embodied access to the courts, the ability to escape constraints and legal obligations, and the denial of the fundamental right to remarry.[56] By distinguishing divorce from marriage, petitioners seeking same-sex divorce can draw on the right of access to the courts and *Windsor*[57] to conclude that no basis other than animus exists for denying divorce when no-fault divorce is otherwise available in all states.[58]

III.
VOIDING THE MARRIAGE

Parties to a same-sex marriage may alternatively seek to void or annul the marriage. Courts in marriage prohibition states like Arizona, Texas, and Pennsylvania have endorsed this option as a viable way to harmonize the parties' desire for divorce with state prohibitions on recognizing same-sex marriage.[59]

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53. Obergefell v. Wymyslo, No. 1:13-cv-501, 2013Wl 6726688, at*1 (S.D. Ohio Dec. 23, 2013).

54. Meg Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILL. L. REV. 169, 203 (2013); Byrn & Holcomb, *supra* note 39, at 33-36; Oppenheimer, supra note 7, at 110; L. Lynn Hogue, *The Constitutional Obligation to Adjudicate Petitions for Same-Sex Divorce and the Dissolution of Civil Unions and Analogous Same-Sex Relationships: Prolegomenon to a Brief*, 41 CAL. W. INT'L L.J. 229, 229–30 (2010).

55. 401 U.S. 371, 374 (1971); *see* Byrn & Holcomb, *supra* note 39, at 33–36; Byrn & Holcomb, *supra* note 3, at 215.

56. *Boddie*, 401 U.S. at 380–81 & n.8.

57. 133 S. Ct. 2675 (2013).

58. Hogue, *supra* note 54, at 229.

59. *E.g.*, Atwood v. Riviotta, No. 1CA-CV 12-0280, 2013 WL 2150021, at *1 (Ariz. Ct. App. May 16, 2013); Surnamer v. Ellstrom, No. 1CA-CV 11-0504, 2012 WL 2864412, at *1 (Ariz. Ct. App. July 12, 2012); *In re* Marriage of J.B. & H.B., 326 S.W.3d 654, 667, 678–79 (Tex. App. 2010); Kern v. Taney, 11 Pa. D. & C. 5th 558, 576 (Com. Pl. Ct. 2010).

In marriage prohibition states, laws and constitutional provisions deem same-sex marriages void ab initio or invalid from their inception.[60] Voidance by its nature does not recognize the validity of the marriage, but instead is "based on the premise that the marriage is void" from the start.[61] This theoretical distinction allows the courts to reconcile their state DOMAs because voidance does not "recognize or effectuate a marriage" yet facilitates the same-sex parties' primary objectives of disentangling their personal and economic affairs.[62]

Annulment is the usual process for obtaining a judicial declaration voiding a marriage.[63] However, annulment actions suffer from some potential limitations. First, availability of annulment can be limited by short statute of limitations periods after the celebration of the marriage or discovery of the defect.[64] Second, annulment actions may not offer the usual range of marital remedies like property division and spousal support that same-sex couples may seek.[65] Some states have equitable savings clauses that extend such remedies in annulment by analogy.[66] Alternatively, a court might resolve financial issues using contract principles to enforce an express separation agreement or use equitable principles of implied contract or unjust enrichment.[67]

Third, a declaration of voidness might not be respected in marriage equality states as terminating the marriage.[68] A Virginia court considering the analogous issue of dissolving a civil union in a non-recognition state thought its decision would not be binding in the originating state.[69] Yet, the Texas court in In re *Marriage of J.B.* dismissed this extraterritorial concern, stating simply that a declaration of voidness should be effective in other jurisdictions.[70] As previously discussed, judicial decrees generally receive the highest degree of interstate recognition under the Full Faith and Credit Clause, but only if DOMA does not provide an exception.[71] Thus, uncertainty surrounds the

60. *E.g.*, TEX. FAM. CODE ANN. § 6.204(b) (West 2013) ("void in this state"); OHIO REV. CODE ANN. § 3101.01(C)(1) (West 2011) ("void ab initio and shall not be recognized by this state").

61. *Atwood*, 2013 WL 2150021, at *1; *see also Surnamer*, 2012 WL 2864412, at *2.

62. In re *Marriage of J.B.*, 326 S.W.3d at 667; *see* Hartman, *supra* note 3.

63. *E.g.*, OHIO REV. CODE ANN. §§ 3105.31 & 3105.32; HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 136–38 (2d. ed. 1988).

64. *E.g.*, OHIO REV. CODE ANN. § 3105.32 (two-year limitation for minors and fraud).

65. *E.g.*, Liming v. Liming, 691 N.E.2d 299, 301 (Ohio Ct. App. 1996); In re *Marriage of J.B.*, 326 S.W.3d at 679.

66. *See Liming*, 691 N.E.2d at 301; *Atwood*, 2013 WL 2150021, at *1; *Surnamer*, 2012 WL 2864412, at*2; In re *Marriage of J.B.*, 326 S.W.3d at 667; CLARK, *supra* note 63, at 138–40; *see also* AMERICAN LAW INSTITUTE, PRINCIPLES FOR THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.03, 6.05 (2002).

67. *E.g.*, Marvin v. Marvin, 557 P.2d 106, 122–23 (Cal. 1976); Gonzales v. Green, 831 N.Y.S.2d 856, 859 (Sup. Ct. 2006); *see* OHIO REV. CODE ANN. § 3101.01(C)(3)(b) (dictating that the state's DOMA will not "[a]ffect the validity of private agreements that are otherwise valid under the laws of th[e] state").

68. *See* Rains, *supra* note 31, at 414.

69. Austin v. Austin, 75 Va. Cir. 240, 243 (2008).

70. In re *Marriage of J.B.*, 326 S.W.3d at 667.

71. *See supra* Part I.B.

finality and effect of an annulment decree in a marriage equality state, and states may even subject a party to liability for polygamy after remarriage, should the state not recognize the annulment.[72]

Finally, petitioners have also resisted the option of voiding the marriage as a second-class alternative. They argue that voidance symbolically stigmatizes their prior marriage by placing them in the "odious company" of unions traditionally deemed illegitimate and criminal, like incestuous and polygamous marriages, even though the Supreme Court has explicitly held the criminalization of homosexual behavior to be unconstitutional.[73]

CONCLUSION

Courts thus have several possible avenues for addressing petitions for same-sex divorce in the absence of state authorization of same-sex marriage. They might apply the law of the state of marriage celebration to acknowledge the validity of that out-of-state marriage for the limited purpose of granting the divorce. Principles of comity, lex loci, or full faith and credit support this general approach with the secondary determination that the public policy exception against establishing same-sex marriage is not implicated by the limited recognition for termination. Courts relying on public policy against same-sex marriage to prohibit the divorce must go further to evaluate the constitutionality of that policy under equal protection and due process both for discrimination in light of *Windsor* and for denial of access to the courts. Alternatively, courts might process the case as an annulment to declare the marriage void. Property, support, and custody issues would then be resolved by designated statute where available, analogous equitable principles, or principles of contract law. Given these available legal options, courts can no longer simply dismiss the same-sex divorce action outright, but instead, must give full legal consideration to the issue.

72. *See* Elia-Warnken v. Elia, 972 N.E.2d 17, 21–22 (Mass. 2012).

73. *See* In re *Marriage of J.B.*, 326 S.W.3d at 679–80 (citing Lawrence v. Texas, 539 U.S. 558, 578–79 (2003)).