

# Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration

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## INTRODUCTION

The story behind *In re Marriage of J.B. and H.B.*<sup>1</sup> starts typically enough: J.B. and H.B. married in their home state of Massachusetts in 2006, and then, in 2008, moved to Texas.<sup>2</sup> They apparently grew apart, however, as they separated in November 2008. J.B. filed for divorce in early 2009.<sup>3</sup>

Because J.B. and H.B. are of the same sex,<sup>4</sup> however, seeking that divorce came with enormous complications. The Texas attorney general intervened in their divorce action to prevent the court from hearing it and appealed when his intervention was denied.<sup>5</sup> On appeal, the Texas Court of Appeals agreed with the attorney general that, under state law that precludes giving “any legal effect” to same-sex marriages,<sup>6</sup> Texas courts lacked the authority to even *entertain* the action for J.B. and H.B.’s divorce, much less grant it.<sup>7</sup> “A Texas court,” it held, “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>8</sup>

Such a disposition might not create substantial difficulties for J.B. and H.B. if they were able to travel back to Massachusetts, the “state of celebration” of their marriage, to obtain a divorce. But Massachusetts law generally limits divorce to couples domiciled there

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<sup>1</sup> 326 SW3d 654 (Tex App 2010), briefs on the merits requested, No 11-0024 (Tex Aug 5, 2011).

<sup>2</sup> *J.B.*, 326 SW3d at 659.

<sup>3</sup> These facts are drawn from the trial court’s Findings of Fact and Conclusion of Law. *In re Marriage of J.B. and H.B.*, No DF-09-1074, slip op at 1–2 (Tex, Dist Ct 302d Jud Dist, Dec 7, 2009).

<sup>4</sup> See *J.B.*, 326 SW3d at 658–59.

<sup>5</sup> *Id.* at 659. See also Brief of the State of Texas, *In re Marriage of J.B. and H.B.*, No 05-09-01170-CV, \*3, 5 (Tex App filed Jan 5, 2010) (available on Westlaw at 2010 WL 1367402).

<sup>6</sup> 326 SW3d at 665, citing Tex Fam Code Ann § 6.204 and Tex Const Art 1, § 32.

<sup>7</sup> *J.B.*, 326 SW3d at 665 (holding that § 6.204(c) of the Texas Family Code removes jurisdiction from the trial court because granting jurisdiction would give effect to the same-sex marriage).

<sup>8</sup> *J.B.*, 326 SW3d at 666, quoting *Mireles v Mireles*, 2009 WL 884815, \*2 (Tex App).

or residing there for at least one year.<sup>9</sup> Thus, J.B. and H.B. cannot obtain a divorce in Massachusetts unless they leave their new home. And similar laws make residence or domicile a prerequisite for dissolving a marriage in almost every US state.<sup>10</sup>

For J.B. and H.B., the consequence of this situation is continued legal limbo.<sup>11</sup> Texas's hostility to their relationship, combined with the strict jurisdictional requirements for divorce, means that J.B. and H.B. will be simply unable to obtain a divorce as long as they both reside in Texas.

Such an inability to divorce works an immense hardship on same-sex couples such as J.B. and H.B.<sup>12</sup> Consider that if one spouse travels to a state that *does* recognize such relationships, he is still married—a fact that generally confers substantive rights on his spouse, such as the ability to make life-or-death medical decisions.<sup>13</sup> And even if neither spouse travels outside the state in which they both live (the “domiciliary state”), their inability to divorce still may work a significant hardship. They will be unable to access adversarial court procedures, such as those dividing marital property, for the orderly unwinding of their affairs. They may also be ineligible for certain benefits, such as spousal maintenance, automatic orders to change their names, or tax exemptions for the transfer of assets pursuant to a marital settlement. And the courts may refuse to recognize the maritally derived relationship between a nonbiological parent and her child, treating them instead as legal strangers. This may not only deprive one parent of her eligibility for custody, visitation, or child

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<sup>9</sup> See Mass Gen Laws Ann ch 208, §§ 4–5; *Cerutti-O'Brien v Cerutti-O'Brien*, 928 NE2d 1002, 1004–07 (Mass App 2010) (upholding refusal to entertain a same-sex divorce action when one party had not established domicile in Massachusetts).

<sup>10</sup> See Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 Wm & Mary L Rev 1, 19–24 (1997) (noting that, exemptions for military personnel aside, those few states that deviate from the domicile requirement still require residence). Domicile is distinguished from residence in that the former requires an intent to stay. See, for example, *Mas v Perry*, 489 F2d 1396, 1399 (5th Cir 1974).

<sup>11</sup> For a discussion of the possibility—raised in dicta by the *J.B.* court—that such parties might be able to void their marriages, see text accompanying notes 47–49.

<sup>12</sup> The Supreme Court has recognized that the state monopoly on the dissolution of the marriage relationship implicates important due process concerns. See *Boddie v Connecticut*, 401 US 371, 375–77 (1971). This Comment limits itself to arguments that do not rely upon a constitutionally protected liberty interest in divorce. See Part III.A. Nevertheless, the Court's holding in *Boddie* highlights the signal importance of access to divorce.

<sup>13</sup> States with marriage and civil union laws often have statutes explicitly designed to provide for such recognition. See, for example, Conn Gen Stat Ann § 46b-28a (West 2009 & Supp 2011) (recognizing out-of-state civil unions as marriages). This also causes immense complications if either party chooses to remarry, although a full treatment of the myriad complications that might arise is beyond the scope of this Comment. Consider also that if one party does eventually take up residence in another state, the parties will have been married longer than either intended—a fact that may affect the postmarital division of assets.

support, but also may deprive the child of his right to support from that parent.<sup>14</sup>

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This Comment suggests that the best solution for same-sex couples like J.B. and H.B.—that is, those same-sex couples in marriages or civil unions who have migrated to states hostile to their relationships—is for states that perform these unions to provide fora for dissolving them.<sup>15</sup> In four such states, legislatures enacting civil union laws<sup>16</sup> have done precisely that by conferring on courts in their states subject matter jurisdiction to dissolve civil unions performed there, *even if neither spouse is still a resident*. These statutes, which have heretofore gone almost entirely unnoticed by legal scholarship,<sup>17</sup> would at least allow couples like J.B. and H.B. to return to the state where they obtained their marriage in order to settle their affairs.

That these states have loosened their own statutory requirements of *subject matter* jurisdiction, however, does not mean that state-of-celebration divorce actions are based on sufficient *personal*

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<sup>14</sup> For cases treating nonbiological or nonadoptive mothers as legal strangers to their children, see, for example, *Janice M. v Margaret K.*, 948 A2d 73, 84–93 (Md 2008); *Smith v Gordon*, 968 A2d 1, 9–16 (Del 2009), revd by Act of July 6, 2009, 77 Del Laws ch 97. See also *Smith v Guest*, 16 A3d 920, 924 (Del 2011) (noting *Gordon's* abrogation by the Delaware legislature).

<sup>15</sup> Such a solution represents a break with the existing literature, which focuses entirely on solutions that will force states such as Texas to perform these divorces. For a review of the extant literature, see note 94.

<sup>16</sup> Unless otherwise specified, this Comment, when referring to same-sex civil unions, includes domestic partnerships conferring substantively all of the rights and benefits of marriage. Such a definition excludes domestic partnerships (or other structures) available in certain states that provide only a limited, enumerated set of benefits. See, for example, Colo Rev Stat § 15-22-101 et seq.

In October 2011, as this Comment was going to print, California passed a law permitting same-sex couples who married there (during the period in mid-2008 before such marriages were outlawed by referendum) to dissolve their relationships there “in accordance with California law.” Act of October 9, 2011 § 4, 2011 Cal Legis Serv ch 721, codified at Cal Fam Code § 2320(b). While the timing of the law’s passage prevents more expansive discussion here, it is notable for purposes of the constitutional analysis undertaken in Part IV that this essentially retroactive statute does not claim to operate via the parties’ consent, but—consistent with this Comment’s recommendations—does prohibit evasive divorces by limiting itself to circumstances in which “[n]either party to the marriage resides in a jurisdiction that will dissolve the marriage.” Act of October 9, 2011 § 4, Cal Fam Code § 2320(b). See also Part III.B.

<sup>17</sup> The jurisdictional barriers to nondomiciliary divorces described in Part II of this Comment no doubt contribute to this inattention. See, for example, Colleen McNichols Ramais, Note, *Til Death Do You Part . . . and This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U Ill L Rev 1013, 1037–38 (dismissing the possibility of granting same-sex divorces in the state of celebration as creating jurisdictionally defective divorces that would not be entitled to full faith and credit).

jurisdiction to entitle those state courts to exert their control over both parties—a prerequisite for the validity of any such decree.<sup>18</sup> The Supreme Court’s decision in *Williams v North Carolina*<sup>19</sup> (*Williams II*) renders domicile a *constitutional prerequisite* for personal jurisdiction over divorce<sup>20</sup> and therefore calls into question the validity of divorce decrees issued in the state of celebration. This poses a significant constitutional hurdle to any widespread acceptance of the solution advocated here.

This Comment seeks to resolve the jurisdictional barriers that may prevent more widespread adoption of state-of-celebration divorce statutes by arguing that the constitutional concerns undergirding the domicile requirement in *Williams II* simply do not apply to same-sex divorces granted in the state of celebration, at least when the couple originally lived there<sup>21</sup> and the parties’ current state will not grant them a divorce. It thus contends that state-of-celebration divorce decrees are not invalid simply because the parties were not domiciled in the state where they were granted.

The Comment proceeds first by examining the twin barriers that prevent migratory same-sex couples from obtaining divorces: Part I establishes the reasons why same-sex couples who have left states that perform same-sex marriages and civil unions are currently unable to dissolve these statuses where they live. Part II examines the domicile rule of *Williams II*, which appears to establish a constitutional barrier to the ability of same-sex couples to obtain divorces in any other state, including the state where they originally obtained their marriage or civil union.

Part III briefly examines the key features of the legislative solutions adopted in California, Delaware, Illinois, and Oregon that provide for dissolution of *any* civil union contracted in those states—solutions which this Comment advocates as a model for legislative action in other same-sex marriage friendly states. Part IV then examines whether such divorce actions would be founded on sufficient personal jurisdiction, given the domicile rule. It argues that the domicile rule expounded in *Williams II* simply should not apply to

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<sup>18</sup> See Part II. Personal jurisdiction is also a prerequisite for judgments to be entitled to full faith and credit in other states. See *Thompson v Whitman*, 85 US (18 Wall) 457, 462–63 (1873); *Williams v North Carolina (Williams II)*, 325 US 226, 229 (1945).

<sup>19</sup> 325 US 226 (1945).

<sup>20</sup> *Id.* at 238. For more on the personal jurisdiction issues raised by divorce actions, see Part II.

<sup>21</sup> This Comment does not address the situation in which a couple has temporarily left its home state to obtain a marriage that could not be validly performed there. See text accompanying notes 29–32. See also Part III.

same-sex couples who validly marry in their home state and later move to another state that refuses to recognize their marriage.

#### I. THE FIRST BARRIER TO SAME-SEX DIVORCE: THE REFUSAL TO LEGALLY RECOGNIZE SAME-SEX RELATIONSHIPS

The most obvious forum for same-sex couples to obtain divorces would be the state where they live. This Part examines the legal reasons why same-sex couples who have moved to certain states are currently unable to obtain divorces there.

Same-sex couples in a number of states have successfully gained either the freedom to marry<sup>22</sup> or the rights and benefits of marriage under another name such as civil unions or domestic partnerships.<sup>23</sup> Yet thirty states have also passed constitutional amendments that bar performing—or often even recognizing—same-sex marriages or civil unions;<sup>24</sup> and even more have passed statutes seeking to accomplish the same goals.<sup>25</sup> As the analysis below will show, these differences in the extent to which states will recognize and perform same-sex marriages, when combined with the various background rules states have adopted governing the respect generally afforded to all out-of-state marriages (same-sex or not), have resulted in a treacherous and complicated patchwork of recognition for same-sex couples in marriages or civil unions.

Comity principles generally guide the recognition of marriages, and the resultant performance of divorces, in states other than those in which they were performed.<sup>26</sup> While these principles come into play

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<sup>22</sup> See, for example, 15 Vt Stat Ann § 8; *Varnum v Brien*, 763 NW2d 862, 882–84, 896–907 (Iowa 2009). For a regularly updated list of the jurisdictions performing same-sex marriages and civil unions and where state constitutional provisions target same-sex relationships, see *Status of Same-Sex Relationships Nationwide* (Lambda Legal 2011), online at <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (visited Aug 29, 2011).

<sup>23</sup> See, for example, Nev Rev Stat § 122A.100; *Lewis v Harris*, 908 A2d 196, 223–24 (NJ 2006).

<sup>24</sup> See, for example, Alaska Const Art I § 25; Va Const Art I, § 15-A. Hawaii's constitutional amendment does not explicitly bar same-sex marriages but authorizes the state legislature to do so. Hawaii Const Art I, § 23.

<sup>25</sup> See, for example, NC Gen Stat § 51-1.2. For a 2005 compilation of such statutes, see Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U Pa L Rev 2143, 2165–94 (2005).

In 1996, Congress enacted the Defense of Marriage Act (DOMA), Pub L 104-199, 110 Stat 2419, codified at 1 USC § 7 and 28 USC § 1738C (1996), which purports to enable states to deny recognition to these same-sex marriages. See DOMA § 2(a), 28 USC § 1738C. DOMA purports to *enable* these states to deny recognition, but nothing in DOMA *compels* or even suggests that states will depart from the normal comity rules governing recognition of out-of-state marriages. See Mark Strasser, *The Legal Landscape Post-DOMA*, 13 J Gender Race & Just 153, 157 (2009).

<sup>26</sup> See Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* 28–50 (Yale 2006).

any time a marriage performed in one state is not available in another,<sup>27</sup> the role of comity principles was particularly prominent historically when numerous states refused to perform interracial marriages.<sup>28</sup> Under these principles, a marriage does not simply disappear when couples domiciled in a state that permitted a particular marriage move to another state that does not; rather, such “migratory” marriages have historically (although not universally) been entitled to respect.<sup>29</sup> Though this rule may seem surprising, there are a number of good reasons for it, not the least of which is the fact that a contrary rule would allow one spouse to abandon his marital obligations by moving to states that do not respect his marriage.<sup>30</sup>

A different situation is created when couples *leave* their home state to enter into a marriage that would be forbidden there. Such “evasive” marriages have enjoyed far less respect than migratory marriages; the normal rule is that states may refuse to recognize these marriages or even declare them void,<sup>31</sup> although some states (including, notably, New York) have policies of recognizing even these

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<sup>27</sup> New York, for example, once forbade the adulterous party to a divorce from remarrying within a certain number of years. See *Van Voorhis v Brintnall*, 86 NY 18, 18 (1881). And a similar situation would be created if one party to a marriage were, for example, too young to consent to marriage in another state.

<sup>28</sup> See Koppelman, *Same Sex, Different States* at 28–50 (cited in note 26).

<sup>29</sup> See *id.* at 42–47 (collecting cases). See also *id.* at 106–10; Restatement (Second) of Conflicts of Laws § 283(2) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of marriage.”).

A general exception from recognition is arguably available for marriages that violate the “strong public policy” of a state. As Koppelman describes, this public policy exception has never been applied to marriages that were regularly performed by US states. See Koppelman, 153 U Pa L Rev at 2146–53 (cited in note 25).

<sup>30</sup> Courts have recognized this potential for evasion for quite some time. See *Medway v Needham*, 16 Mass 157, 159 (1819). See also Koppelman, *Same Sex, Different States* at 71–72 (cited in note 26) (arguing that a blanket nonrecognition rule for same-sex marriages creates opportunities for abuse by those seeking to void a marriage without acquiring obligations for spousal or child support).

<sup>31</sup> See Koppelman, *Same Sex, Different States* at 37–39, 102–06 (cited in note 26); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L J 1965, 1970 (1997) (noting the “obvious difference between a couple that recently married outside a state to evade that state’s marriage restrictions and a couple that moved into the state after living together for twenty years in a place that recognized their union”). See also Restatement (Second) of Conflicts of Laws § 283 comment j (noting that an evasive marriage may be invalidated “when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter” because the domiciliary state “may have an interest sufficiently great to justify the invalidation”).

marriages.<sup>32</sup> Because of this difference in the respect traditionally afforded to migratory and evasive marriages, this Comment limits itself to divorces of migratory same-sex marriages like the one at issue in *J.B.*

The availability of divorce for a marriage contracted out of state usually depends on whether the marriage *itself* will be recognized. In some instances, however, states have not adopted an all-or-nothing policy regarding recognition—instead of refusing entirely to recognize a marriage, they may recognize the particular “incident” of marriage at stake, such as granting a divorce, settling an estate, or paying a workmen’s compensation claim.<sup>33</sup> Such limited recognition may be called for whenever the public policy that militates against more blanket recognition would not be offended in the more limited circumstance.

In the same-sex marriage context, some states have followed these historical patterns. Certain states have refused to recognize evasive same-sex marriages.<sup>34</sup> Other states have followed their traditions of recognizing even evasive marriages that they themselves would not perform. For example, married same-sex couples in New York were entitled to almost all the rights and benefits of marriage, even before they were legally allowed to marry in that state.<sup>35</sup> Notably,

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<sup>32</sup> See *In re May’s Estate*, 114 NE2d 4, 6–7 (NY 1953) (recognizing an uncle–niece marriage validly performed in Rhode Island, even though such marriage would be illegal if performed in New York); *Van Voorhis*, 86 NY at 22–25, 32–37.

<sup>33</sup> See 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, 718–29 (2004) (discussing theoretical accounts of this principle and applications of it by courts). See also, for example, *In re Bir’s Estate*, 188 P2d 499, 501–02 (Cal App 1943) (recognizing a polygamous marriage so that an estate could be equally divided between wives); *Succession of Caballero v The Executor*, 75 La Ann 573, 574–78 (La 1872) (recognizing a Spanish interracial marriage to establish legitimacy of legatee); *Langan v State Farm Fire and Casualty*, 849 NYS2d 105, 109–10 (NY App 2007) (Rose dissenting) (arguing for such an approach with regard to workmen’s compensation benefits).

<sup>34</sup> See, for example, *Hennefeld v Township of Montclair*, 22 NJ Tax 166, 178–84 (2005) (noting the “public policy of this state against same-sex marriage” and refusing to recognize Canadian marriage), superseded by *Lewis*, 908 A2d at 224.

<sup>35</sup> *Lewis v New York State Department of Civil Service*, 872 NYS2d 578, 582–84 (NY App Div 2009) (upholding the New York Department of Civil Service’s recognition of same-sex marriages from other jurisdictions for the purposes of granting access to spousal benefits), *aff’d* on other grounds, *Godfrey v Spano*, 920 NE2d 328, 335–36 (NY 2009); *Martinez v County of Monroe*, 850 NYS2d 740, 742–43 (NY App Div 2008) (recognizing as valid in New York validly performed out-of-state marriages of same-sex couples). These recognition precedents have been effectively superceded by New York’s recently enacted Marriage Equality Act, under which same-sex couples may now obtain marriages in that state. Marriage Equality Act § 3, 2009 NY Sess Laws ch 95, codified at NY Domestic Relations Law § 10-a.

Certain state attorneys general have also opined that their states should recognize same-sex marriages. See Gary K. King, Opinion No 11-01, NM Op Atty Gen, 2–5 (Jan 4, 2011) (available on Westlaw at 2011 WL 111243) (opining that New Mexico should recognize marriages performed out of state); Douglas F. Gansler, *Marriage—Whether Out-of-State Same-Sex*

some states that would not otherwise recognize civil unions have recognized them for the limited purpose of dissolving them.<sup>36</sup>

But the more common experience in the area of same-sex marriage has been a marked departure from historical comity principles, particularly in the respect afforded to migratory marriages. As exemplified by the Texas appellate opinion with which this Comment began,<sup>37</sup> courts in most states have been entirely dismissive of claims for the recognition of same-sex marriages and civil unions—whether migratory or evasive—even when asked only to dissolve them. In fact, the attorney general of Texas has been *proactive* in intervening in the dissolution actions of same-sex couples, thus successfully preventing these couples from obtaining divorces.<sup>38</sup> The Pennsylvania attorney general recently intervened in a similar case, with the same result.<sup>39</sup> And even absent intervention by state officials, courts in both Indiana<sup>40</sup> and Rhode Island<sup>41</sup> have refused to exercise jurisdiction over actions to dissolve same-sex marriages.

The Rhode Island result is perhaps the most glaring deviation from historical comity principles, because that state has no statute or constitutional amendment that prohibits recognizing a same-sex

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*Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland*, 95 Md Op Atty Gen 3, 29–51, 53–55 (Feb 23, 2010) (available on Westlaw at 2010 WL 886002) (collecting marriage recognition precedents and reaching the same conclusion in Maryland).

<sup>36</sup> *Dickerson v Thompson*, 897 NYS2d 298, 300–02 (NY App Div 2009) (finding New York’s court of general jurisdiction had subject matter jurisdiction to entertain action for dissolution of Vermont civil union, even though New York did not recognize civil unions); *Alons v Iowa District Court for Woodbury County*, 698 NW2d 858, 869–74 (Iowa 2005) (refusing to allow collateral attack on lower court dissolution of Vermont civil union). See also *In re Marriage of Gorman*, No 02-D-292, slip op at 2 (W Va, Fam Ct, Jan 3, 2003) (dissolving civil union); *Fricke v Townsend*, No 07-CV-57, slip op at 1 (Me, Super Ct, Nov 29, 2007) (same).

<sup>37</sup> *J.B.*, 326 SW3d at 670.

<sup>38</sup> While the attorney general may intervene as a matter of right when, as in *J.B.*, a constitutional challenge is made to the state’s marriage law, see Tex Civ Prac and Remedies Code § 37.006(b), the attorney general has also intervened even when no such challenge was present. See *Texas v Naylor*, 330 SW3d 434, 443–44 (Tex App 2011) (denying as untimely the post-judgment intervention by the state attorney general when no constitutional issue was raised); Office of the Attorney General of Texas Greg Abbott, Press Release, *Judge Vacates Order in Beaumont Divorce Case after Attorney General Abbott Intervenes* (Mar 28, 2003), online at <https://www.oag.state.tx.us/oagnews/release.php?print=1&id=104> (visited Sept 1, 2011).

<sup>39</sup> See *Kern v Taney*, 11 Pa D & C 5th 558, 559–60, 576 (Pa Com Pl 2010) (noting intervention of state attorney general after the court sua sponte raised jurisdictional concerns, and finding that court lacked subject matter jurisdiction to grant a same-sex divorce).

<sup>40</sup> *In re Marriage of Ranzy and Chism*, No 49D12-0903-DR-014654, slip op at 3 (Ind Super Ct, Sept 4, 2009) (finding lack of subject matter jurisdiction to entertain an action to dissolve a same-sex marriage performed in Canada, and noting uncertainty as to the where the parties resided at the time of celebration).

<sup>41</sup> *Chambers v Ormiston*, 935 A2d 956, 961–63 (RI 2007) (holding that the Rhode Island Family Court lacks subject matter jurisdiction to entertain an action to dissolve a same-sex marriage, arguing that the statutory grant of authority to the Family Court should be given the meaning it had at its passage in 1961).



marriage.<sup>42</sup> In cases such as these, judicial construction expands upon statutes that prohibit *performing* such marriages to prohibit *recognizing* them as well.<sup>43</sup> Such constructions are striking in their rejection of family law's strong presumption for the validity of marriages<sup>44</sup> and essentially strip interstate marriage recognition of all meaning beyond cases in which a foreign marriage could have been locally performed.<sup>45</sup>

The courts that have denied these divorces are not unaware of their rulings' potential to leave same-sex couples without any mechanism for dissolving their relationships.<sup>46</sup> Some have suggested that these couples ought to be able to *void* these marriages as a substitute for divorce.<sup>47</sup> Yet with a migratory marriage, voidness doctrine cannot substitute for divorce. Voidness entails a finding that the marriage was void from the outset—a legal nullity from its inception.<sup>48</sup> Such a finding is improper for the same-sex marriages at

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<sup>42</sup> Indeed, Rhode Island has no statute that expressly prohibits performing (much less recognizing) same-sex marriages, although prevailing legal interpretations of its marriage statutes do not permit performing them. See Letter from Rhode Island Attorney General Patrick C. Lynch to Jack R. Warner, Commissioner, Rhode Island Board of Governors for Higher Education \*5 (Feb 20, 2007), available at <http://www.oag.state.md.us/Opinions/2010/Warner.pdf> (visited Sept 1, 2011). By contrast, Texas has a constitutional amendment and statutory language banning same-sex marriage, see note 6, and both Indiana and Pennsylvania have laws explicitly barring recognition of same-sex marriages, see Ind Code Ann § 31-11-1-1(b); 23 Pa Cons Stat Ann § 1704.

<sup>43</sup> See, for example, *May*, 114 NE2d at 7 (“[H]ad the Legislature been so disposed it could have declared by appropriate enactment that marriages contracted in another State—which if entered into here would be void—shall have no force in this State.”).

<sup>44</sup> See, for example, 36 Am Jur 2d, Proof of Facts 441 § 8 (“Once a marriage has been shown to exist, it is presumed to be a legal and valid marriage . . . . This presumption has been variously described by the courts as strong, very strong, extremely strong, and one of the strongest known to the law.”).

<sup>45</sup> Connecticut also refused to give any effect to civil unions before its legislature passed a civil unions bill, and even then would not recognize same-sex marriages. See *Rosengarten v Downes*, 802 A2d 170, 178–84 (Conn App 2002) (noting “strong legislative policy against permitting same sex marriages,” and holding that a Vermont civil union was not a “family relations matter” giving rise to subject matter jurisdiction for dissolution); *Lane v Albanese*, 39 Conn L Rptr 3, 4–5 (Conn Super Ct 2005) (adopting rationale in *Rosengarten* and holding that a Massachusetts marriage was not a “family relations matter” as needed to give rise to subject matter jurisdiction for dissolution). Both of these decisions have since been overruled by *Kerrigan v Commissioner of Public Health*, 957 A2d 407, 481–82 (Conn 2008).

<sup>46</sup> See *Chambers*, 935 A2d at 966–67 (noting the “palpable hardship” that its decision might work but arguing that it is bound by a “fundamental principle of jurisprudence” and judicial restraint). *Chambers* left open the possibility that a court of general, and not statutory, jurisdiction might exercise its equitable powers to grant the divorce. One of the parties, however, later represented to the lower court on remand that she would return to Massachusetts and seek dissolution there. See Edward Fitzpatrick, *Judge Puts Off Same-Sex Divorce Ruling*, Providence J-Bull Local 1 (May 9, 2008).

<sup>47</sup> *J.B.*, 326 SW3d at 667; *Kern*, 11 Pa D & C 5th at 573.

<sup>48</sup> *J.B.*, 326 SW3d at 667 (“A decree of voidness . . . establishes that the parties to the ostensible but void marriage were never married.”).

issue here, which were validly performed in the state of celebration; indeed, the couple may have been validly married in their home state for years before they even conceived of entering a hostile state. While a hostile state court might validly apply its own law to void an evasive marriage of its own domiciliaries, applying its own law retroactively to void a *migratory* marriage raises considerable constitutional concerns.<sup>49</sup> In so doing, the hostile state is essentially announcing that its own substantive law should have governed a controversy to which, at the time, it may have had no connection whatsoever.

As a practical matter, voiding such marriages also undermines reliance that may have developed on the marriage prior to its entering the hostile state (by the spouses as well as by third parties such as creditors); any interest one party may have developed in community property while they were validly married in a community-property state, for example, might be extinguished.<sup>50</sup> As one court recognized, retroactively invalidating marriages would “disrupt thousands of actions taken . . . by [ ] same-sex couples, their employers, their creditors, and many others, throwing property rights into disarray, destroying the legal interests and expectations of . . . couples and their families, and potentially undermining the ability of citizens to plan their lives.”<sup>51</sup> And, of course, it continues to leave the parties with a difficult road ahead for untangling any joint legal interests independent of the marriage, such as property and children.

Thus, the hostility of a number of states to same-sex relationships leaves many couples without the ability to obtain divorces where they live.

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<sup>49</sup> See *Strauss v Horton*, 207 P3d 48, 122 (Cal 2009); Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U Miami L Rev 1, 18 (2000) (noting concerns based on the constitutional right to travel); Mark Strasser, *For Whom the Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U Cin L Rev 339, 375–80 (1998). By contrast, if, as in an evasive marriage, the individuals were already domiciled in the hostile state, a far more convincing case is available that the hostile state has an exclusive interest over the parties and that, therefore, its law should apply to void the marriage. See note 31.

<sup>50</sup> Such a result would be particularly unfair given that couples are currently being forced to deal with the tax implications of community property on a yearly basis rather than at the time of dissolution. See Internal Revenue Service, Publication No 555, Community Property \*2–8 (Dec 2010), online at <http://www.irs.gov/pub/irs-pdf/p555.pdf> (visited Sept 1, 2011). Such a practice is consistent only with the notion that the community property will retain its community character even if the couple relocates to or divorces in a noncommunity-property state, as is typically the case.

Of course, if a voidness declaration were limited to the period during which the parties were domiciled in Texas, both these pragmatic and constitutional concerns might be assuaged. *J.B.*, however, expressly rejects such a limitation. 326 SW3d at 679. If such a proceeding left unresolved the consequences of the marriage as it existed in the migratory state, similar problems would remain.

<sup>51</sup> *Strauss*, 207 P3d at 122.

## II. THE SECOND BARRIER TO SAME-SEX DIVORCE: THE DOMICILE RULE

That migratory same-sex couples cannot obtain divorces in their home states would not be a significant problem if they were able to return to their former residences—the states in which they celebrated their marriages—to obtain divorces. This Part looks at the barriers that currently prevent them from doing so.

The immediate barrier to same-sex couples' ability to obtain divorces outside their home states is statutes requiring, as a jurisdictional prerequisite for filing a divorce action, that one of the parties meets a residence or domicile requirement. But these statutes reflect a more substantial barrier: the Supreme Court's suggestion that domicile is a *constitutional prerequisite* for a state to exercise personal jurisdiction over a divorce action.<sup>52</sup> Such a requirement is a marked deviation from the rules that would govern personal jurisdiction for other actions, in which the parties' consent or even transient presence in the forum state would suffice to confer personal jurisdiction.<sup>53</sup>

The most prominent articulation of this constitutional requirement was in *Williams v North Carolina (Williams II)*, a case that came before the Court twice in the 1940s<sup>54</sup> and was one of many mid-twentieth century cases the Court decided dealing with problems of domestic relations in the federal system.<sup>55</sup> Defendants O.B. Williams and Lillie Shaver Hendrix left their spouses and escaped to Nevada, where, after a short while, they obtained ex parte divorces from their spouses and married each other, subsequently returning to North Carolina. Unamused by this evasion of its restrictive divorce laws, North Carolina refused to recognize the Nevada divorces and successfully prosecuted Williams and Hendrix for "bigamous cohabitation"; they appealed their convictions.<sup>56</sup>

In its first pronouncement on the case, the Court held definitively that any state in which *either* spouse is domiciled has jurisdiction over a divorce action.<sup>57</sup> That is, to the extent that Williams and Hendrix were properly domiciled in Nevada, such a finding constituted

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<sup>52</sup> See *Williams II*, 325 US at 229–30.

<sup>53</sup> See notes 144–51 and accompanying text.

<sup>54</sup> See *Williams II*, 325 US at 227 (summarizing the case and noting that the court had visited the controversy in *Williams v North Carolina (Williams I)*, 317 US 287 (1942)).

<sup>55</sup> Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm & Mary Bill Rts J 381, 382 & n 6 (2008).

<sup>56</sup> *Williams I*, 317 US at 289–91.

<sup>57</sup> *Id.* at 298–99. This holding reversed prior jurisprudence suggesting the existence of a "marital domicile" as the place where such an action ought to be entertained. See *id.*

sufficient personal jurisdiction for Nevada courts to properly entertain their divorce actions, even if the other spouses were absent.

But, in ruling as it did, the Court had *assumed* that the finding of domicile in Nevada was correct.<sup>58</sup> In its second pronouncement on the case, however, the Court addressed this question, as North Carolina had taken the opportunity on remand to introduce evidence undermining Nevada's finding of domicile—leading a jury to determine that Williams and Hendrix had not properly obtained domicile in Nevada.<sup>59</sup> The Court held that the bases of the Nevada court's jurisdictional finding were subject to collateral attack and new factual findings in North Carolina, because North Carolina should not be bound by “an unfounded, even if not collusive, recital in the record of a court of another State.”<sup>60</sup> It therefore upheld North Carolina's determination that no such domicile existed.<sup>61</sup>

In reaching its second holding, however, the Court also took the opportunity to generalize about the prerequisites for a divorce action, beyond the specific jurisdictional prerequisites at issue (Nevada's domicile requirement): “Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. . . . Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.”<sup>62</sup> The Court claimed that such a domicile requirement had been in place—and unquestioned—since the writing of the Constitution.<sup>63</sup>

The extent to which this language from *Williams II* actually spells out a rule *requiring* domicile for a finding of personal jurisdiction in a divorce action is not entirely clear.<sup>64</sup> Justice Felix Frankfurter's broad

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<sup>58</sup> Id at 302 (“[W]e repeat that in this case we must assume that petitioners had a bona fide domicil in Nevada, not that the Nevada domicil was a sham.”). Note that, as is often the case in personal jurisdiction jurisprudence, the question of whether the divorce action was founded on sufficient personal jurisdiction arose here in the context of whether the divorce decree was entitled to full faith and credit in another state. Among other things, this highlights the fact that even if neither party to a divorce action contests personal jurisdiction in the original action, the holding remains vulnerable if there is reason to question the personal jurisdiction of the original court.

<sup>59</sup> *Williams II*, 325 US at 235–36.

<sup>60</sup> Id at 230–32.

<sup>61</sup> Id at 235–37.

<sup>62</sup> Id at 229, citing *Bell v Bell*, 181 US 175 (1901) and *Andrews v Andrews*, 188 US 14 (1903). The Court later reiterated that “one State can grant a divorce of validity in other States only if the applicant has a bona fide domicil in the State of the court purporting to dissolve a prior legal marriage.” *Williams II*, 325 US at 238.

<sup>63</sup> *Williams II*, 325 US at 229.

<sup>64</sup> Some may question whether the domicile rule is, in fact, a rule of personal jurisdiction at all and not a rule of subject matter jurisdiction (which it may in many ways resemble). In the era of long-arm personal jurisdiction and personal jurisdiction via consent, the domicile rule is, indeed, an anomalous rule of personal jurisdiction. See Part IV.A.2.a. But federal subject matter

pronouncement on domicile and personal jurisdiction has often been regarded as dicta.<sup>65</sup> The legal question at issue was North Carolina's ability to collaterally attack Nevada's factual finding that the parties were domiciled in Nevada, at least when the defending spouse was absent.<sup>66</sup> The Court's holding that North Carolina was entitled to relitigate this issue was therefore sufficient to resolve the case.<sup>67</sup> The court did not need to reach the sweeping question of whether *only* domicile would suffice to confer personal jurisdiction over a divorce action—particularly when (unlike in *Williams II*) the defending party actually appears in the action.<sup>68</sup> And since *Williams II*, the Court has *never* squarely decided a divorce case in which personal jurisdiction was founded on any basis other than domicile.<sup>69</sup> Commentators—and some courts—have suggested that this leaves open whether a

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jurisdiction limits only the types of questions that the *federal* courts may hear; state courts of general jurisdiction have plenary subject matter jurisdiction over questions arising under the laws of other states and federal law, as long as they meet state law requirements. See *Tafflin v Levitt*, 493 US 455, 458–59 (1990); *Hughes v Fetter*, 341 US 609, 612–14 (1951); Fleming James Jr, Geoffrey C. Hazard Jr, and John Leubsdorf, *Civil Procedure* § 2.22 at 125 (Foundation 5th ed 2001) (“Subject to [personal jurisdiction] limitations, each state is free to organize its own court system and to prescribe rules of jurisdiction and venue governing them.”).

Thus, the constructs of personal jurisdiction provide the only available theoretical framework for considering the domicile rule as a jurisdictional requirement. See *Shaffer v Heitner*, 433 US 186, 212 (1977) (“[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”); James, Hazard, and Leubsdorf, *Civil Procedure* § 2.7 at 85–86 (cited in note 64) (considering the domicile rule under the heading of personal jurisdiction). And the role of the domicile rule as a rule of personal jurisdiction is apparent when one considers its effect in an *ex parte* divorce, in which it permits bringing a suit in a state where one spouse is domiciled even though the other spouse may not have any other connection that would otherwise give rise to personal jurisdiction. See *Williams I*, 317 US at 288–89.

<sup>65</sup> See Homer H. Clark Jr, 1 *The Law of Domestic Relations in the United States* 724 (West 2d ed 1987); Albert A. Ehrenzweig, *A Treatise on the Conflicts of Laws* 238 (West 1962); Helen Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 *Tex L Rev* 501, 502 (1980).

<sup>66</sup> See *Williams II*, 325 US at 230 & n 6.

<sup>67</sup> Read charitably, the Court's decision might be seen as depending upon a finding that *Williams* and *Hendrix*'s brief stay in “an auto-court for transients” was insufficient to grant Nevada jurisdiction over the divorce, at least when their spouses (who had been constructively served) had not appeared to contest the divorce. See *id* at 230–31, 236–37. Such a holding, however, still falls short of the domicile rule's application to divorces in which both spouses appear.

<sup>68</sup> The Court acknowledged as much in *Williams I*. See 317 US at 302 (“We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state.”).

<sup>69</sup> See Restatement (Second) of Conflicts of Laws § 72, Reporter's Note (1971) (“The Supreme Court of the United States has never had occasion to determine whether the domicil of at least one spouse in the divorce State is an essential jurisdictional basis for the granting of a divorce.”). In the one action where the Court entertained such a case, it avoided the personal jurisdiction question by finding the divorce statute invalid on other grounds. See note 77.

jurisdictional basis *other* than domicile is sufficient to confer personal jurisdiction.<sup>70</sup>

Deviations from the domicile rule have become a practical reality given the inherent difficulties in the concept of domicile (which generally requires intent to stay), as opposed to mere residence. Thus, in a few states, divorce statutes rely on *residence* for a particular amount of time, and not domicile, as the jurisdictional prerequisite for divorce.<sup>71</sup> The domicile rule has also been relaxed in certain limited and extenuating circumstances (for example, with regard to soldiers stationed away from home).<sup>72</sup>

And while the domicile rule expounded in *Williams II* has not been explicitly overturned, the Court has severely circumscribed its practical effect, suggesting some level of discomfort with its consequences. The Court, in subsequent cases, significantly limited collateral attacks on the findings of domicile: first by preventing parties to a divorce from collaterally attacking the original court's jurisdiction (whether or not they exercised that opportunity)<sup>73</sup> and, second, by holding that even third parties are collaterally estopped from contesting the basis for the court's jurisdiction.<sup>74</sup> Together, these cases have expanded the security of domicile findings in divorce actions beyond the normal rules of collateral estoppel, and have "effectively limited the relitigation rule to *ex parte* divorces."<sup>75</sup> Relatedly, the Court has limited the scope of actions that are actually subject to the domicile rule by dividing the dissolution of marital *status* from subsequent questions, such as matrimonial support, property, and child custody (for which in personam jurisdiction is necessary and sufficient to confer jurisdiction over actions).<sup>76</sup>

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<sup>70</sup> See, for example, *David-Zieseniss v Zieseniss*, 129 NYS2d 649, 653–54 (NY S Ct 1954) (declining to follow *Williams II* as "too loose" an utterance); Wasserman, 39 Wm & Mary L Rev at 12–24, 52 (cited in note 10). See also Restatement (Second) of Conflicts of Laws § 72 (adopting a rule contrary to *Williams II*).

Commentators often note that the sweeping historical assertions underlying the *Williams II* language has been amply undermined. See, for example, Ehrenzweig, *Conflicts of Laws* at 238–40 (cited in note 65). But see *Alton v Alton*, 207 F2d 667, 673–74 (3d Cir 1953), vacd as moot, 347 US 610 (1954) (rejecting the idea that *Williams II* is not binding). For further discussion of *Alton*, see text accompanying notes 77–83.

<sup>71</sup> See, for example, *Wheat v Wheat*, 318 SW2d 793, 794 (Ark 1958) ("The effect of the 1957 statute is to substitute residence, in the sense of physical presence, for domicile as a jurisdictional requirement in divorce cases."). See also Wasserman, 39 Wm & Mary L Rev at 21–24 (cited in note 10). But see note 89 and accompanying text.

<sup>72</sup> See Wasserman, 39 Wm & Mary L Rev at 20–21 (cited in note 10).

<sup>73</sup> See *Sherrer v Sherrer*, 334 US 343, 351–52 (1948); *Coe v Coe*, 334 US 378, 383–84 (1948).

<sup>74</sup> *Johnson v Muelberger*, 340 US 581, 587–89 (1951).

<sup>75</sup> Garfield, 58 Tex L Rev at 508 (cited in note 65).

<sup>76</sup> See id at 510–12; Note, *Divisible Divorce*, 76 Harv L Rev 1233, 1237–40 (1963).

Despite these limits on the applicability of *Williams II*, at least one circuit court has held that attempts to base jurisdiction for a divorce action on something other than domicile would be per se unconstitutional. In *Alton v Alton*,<sup>77</sup> the Third Circuit confronted a Virgin Islands statute requiring only six weeks' inhabitance to entertain a divorce action—a requirement not even intended as prima facie evidence of domicile but rather as the *only* jurisdictional prerequisite to obtain a divorce.<sup>78</sup> The *Alton* court held that not only did the District Court of the Virgin Islands *not* have jurisdiction to entertain such a divorce action, but that the mere granting of such a divorce not founded on domicile was *itself* unconstitutional: “[A] state where the party is not domiciled is, in rendering him a divorce, attempting to create an interest where it has no jurisdiction. Its attempt to do so is an invalid attempt, and contrary to the due process clause.”<sup>79</sup>

In so holding, the *Alton* court extended beyond the reach of *Williams II*. First, it treated as binding the language from *Williams II*, which it might have dismissed as dicta.<sup>80</sup> It thus confronted the question that the Supreme Court has yet to squarely address: whether *Williams II* bars all divorce decrees when domicile is not the jurisdictional basis for the action.<sup>81</sup> Second, the *Alton* court did not simply hold, as the *Williams II* Court had with the Nevada decree, that other states were entitled to *ignore* (that is, refuse full faith and credit to) the Virgin Islands decree.<sup>82</sup> Rather, it took the question as one of

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<sup>77</sup> 207 F2d 667 (3d Cir 1953), vacd as moot, 347 US 610 (US 1954). *Alton* was vacated as moot when the parties, whose Virgin Islands divorce formed the basis of the dispute, subsequently obtained a divorce in Connecticut. See 347 US at 610. However, the Third Circuit deferred entirely to the reasoning in *Alton* and struck down the Virgin Islands statute once again in *Granville-Smith v Granville-Smith*, 214 F2d 820, 820 (3d Cir 1954) (en banc) (per curiam). The Supreme Court affirmed but on different grounds, allowing it to evade the due process concerns raised in *Alton*. See *Granville-Smith v Granville-Smith*, 349 US 1, 4 (1955) (noting the “obvious importance of the issue which brought the *Alton* case here” but holding that “[w]e need not consider any of the substantive questions passed on below” and striking down the Virgin Islands statute as beyond the congressional grant of authority to the Virgin Islands legislature).

Though technically *Granville-Smith* is the precedential holding, courts and commentators have referred to the legal principles by reference to the *Alton* decision (a practice adopted here). See, for example, *Wheat*, 318 SW2d at 796 (noting that *Alton* was dismissed as moot but using it as the basis for the court’s due process analysis); Wasserman, 39 Wm & Mary L Rev at 48 (cited in note 10).

<sup>78</sup> *Alton*, 207 F2d at 669–70. Compare this with the statute currently in place in Arkansas, which renders three months’ presence before entry of the judgment prima facie evidence of domicile. Ark Code Ann § 9-12-307. See also Wasserman, 39 Wm & Mary L Rev at 21–24 (cited in note 10).

<sup>79</sup> *Alton*, 207 F2d at 676.

<sup>80</sup> See *id* (noting the “unequivocal language” language in *Williams II*).

<sup>81</sup> See *id* at 674 (“We now go out beyond the place where legal trails end.”).

<sup>82</sup> The issue of personal jurisdiction in *Alton* did not appear as the same legal question as it had in *Williams II*: whether the divorce decree was entitled to full faith and credit. See note 58.

due process, thus implicating the *validity* of the Virgin Islands divorce decree itself, a question that simply had not arisen in *Williams II*.<sup>83</sup> In so doing, it created the possibility of *offensive* uses of the *Williams II* rule by parties seeking to affirmatively invalidate divorce decrees as violative of due process. These twin aspects of the *Alton* holding cast a considerable shadow over any attempt to expand the jurisdictional bases of divorce beyond domicile.<sup>84</sup>

Consistent with the *Alton* holding, courts and commentators have continued to treat the domicile rule expounded in *Williams II* as binding precedent. In 1975, the Court, in *Sosna v Iowa*,<sup>85</sup> affirmed the *Williams II* principle. In *Sosna*, Iowa's statute requiring one year of domicile in the state in order to obtain a divorce was challenged on right-to-travel and due process grounds.<sup>86</sup> In upholding the statute, the Court enumerated, as a justification for the residence requirement, Iowa's interest in ensuring that any divorce decree entered there was founded on a sufficient jurisdictional finding so as to entitle it to full faith and credit in another state.<sup>87</sup> In so doing, the Court stated as a rule the *Williams II* holding that the jurisdictional basis for divorce could not be anything other than domicile.<sup>88</sup>

And while the Supreme Court has not addressed the issue since *Sosna*, state courts—paying continued respect to the holding in *Williams II*—have rejected as unconstitutional statutes basing personal jurisdiction for divorce on residence or some basis other than domicile—or construed such statutes to conform to *Williams II*'s

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Rather the issue was the ability of the Virgin Islands court to grant the decree to begin with. Thus, exactly replicating the *Williams II* holding was not an option for the *Alton* court.

<sup>83</sup> *Alton*, 207 F2d at 677 (“[W]e believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere.”).

<sup>84</sup> If nothing else, state legislatures may be understandably reticent to expand the jurisdictional bases of divorce beyond those permitted in *Alton*, given that any misstep might result in the invalidation of numerous divorces. Such legislatures would also potentially face the added hurdle of determining choice-of-law rules to apply to such nondomiciliary divorces and applying foreign law. See Wasserman, 39 Wm & Mary L Rev at 38–39 (cited in note 10).

<sup>85</sup> 419 US 393 (1975).

<sup>86</sup> See *id.* at 405. While the statute itself required only one year of residence, it also required that “the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only.” *Id.* at 395 n 1, quoting Iowa Code § 598.6 (1973), repealed by Act of April 28, 2005 § 58, 2005 Iowa Acts ch 69. As the Court noted, by requiring some intent to be present other than obtaining the dissolution, “the Iowa courts have construed the term ‘resident’ to have much the same meaning as is ordinarily associated with the concept of domicile.” *Sosna*, 419 US at 404, citing *Korsrud v Korsrud*, 45 NW2d 848 (Iowa 1951).

<sup>87</sup> *Sosna*, 419 US at 407–09 (noting Iowa's interest in being “convinced that [a party] intends to remain in the State”).

<sup>88</sup> See *id.* at 407, citing *Williams II*, 325 US at 229. Of course, as the dissent rightly pointed out, nothing inherent in the concept of domicile requires a stay of a particular length. See *Sosna*, 419 US at 424–25 (Marshall dissenting).



domicile requirement.<sup>89</sup> Numerous commentators also continue to note the viability of this doctrine.<sup>90</sup> For these reasons, a significant constitutional hurdle stands in the way of any attempt to expand divorce jurisdiction to permit divorces in the state of celebration of a same-sex marriage or civil union.

### III. LOOKING FOR A FORUM IN THE STATE OF CELEBRATION

If same-sex couples in hostile states are to gain access to divorce, one of these two barriers must fall: either hostile states must begin providing divorces for same-sex couples, or friendly states must find a way to begin granting them divorces. This Part describes why a solution in the friendly states is the more pragmatic answer to this problem and describes the important features of state statutes providing a forum for the dissolution of same-sex civil unions and marriages in the state of celebration.

#### A. Why Not Focus on Hostile States?

So far, the attention of courts and commentators addressing dissolution of same-sex marriages and civil unions has been focused entirely on undoing the first barrier to the availability of these divorces—that is, on improving the situation in states that do *not* recognize or perform same-sex marriages.<sup>91</sup> Some courts have already held that hostile states’ refusal to permit same-sex couples to marry (or at least access the benefits of marriage) violates equal protection or due process, and some state legislatures have similarly acted to afford same-sex couples either marriage or civil unions.<sup>92</sup> With these changes, the ability to divorce flows as a legal consequence. Courts and commentators have also argued that comity, equal protection, or due process requires that hostile states at least *recognize* out-of-state same-sex marriages, even if they do not perform them.<sup>93</sup> The literature

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<sup>89</sup> See, for example, *Viernes v District Court*, 509 P2d 306, 310 (Colo 1973) (en banc), citing *Williams II*, 325 US 226. See also *Padron v Padron*, 641 SE2d 542, 543 (Ga 2007); *Fletcher v Fletcher*, 619 A2d 561, 565–66 (Md App 1993); *In re Marriage of Kimura*, 471 NW2d 869, 873–76 (Iowa 1991); *Carr v Carr*, 385 NE2d 1234, 1236 (NY 1978); *Whitehead v Whitehead*, 492 P2d 939, 942–43 (Hawaii 1972).

<sup>90</sup> See, for example, Garfield, 58 Tex L Rev at 508 (cited in note 65) (“*Williams II* is still the law today.”). Even those who do advocate departing from the domicile rule in favor of *residence* do not believe the constitutional requirements could be necessarily loosened beyond that. See, for example, Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, *Conflict of Laws* 695–98, 707–08 (West 5th ed 2010).

<sup>91</sup> See sources cited in note 94.

<sup>92</sup> See notes 22–23 and accompanying text.

<sup>93</sup> See authorities cited in note 35. See also, for example, Koppelman, *Same Sex, Different States* at 69–81 (cited in note 26).

that addresses same-sex divorce uses the same doctrines in support of a more limited proposition: that hostile states should at least recognize these marriages *for the purpose of dissolving them*, even if they will not perform same-sex marriages or recognize them for all purposes.<sup>94</sup>

While many of these arguments are cogent and compelling, the reality is that these claims are unlikely to provide a remedy for same-sex couples in the near future. Though some states have moved legislatively to allow same-sex couples access to marriage or civil unions, such movement continues to proceed slowly (if steadily). Achieving even limited recognition of migratory marriages in hostile states has proven exceptionally difficult,<sup>95</sup> perhaps because courts fear that such limited recognition will lead to full marriage equality.<sup>96</sup> Nonrecognition is encouraged, and perhaps required, by state constitutional and statutory enactments banning same-sex marriage.<sup>97</sup> To the extent these constitutional enactments require popular majorities to overturn them, progress may take a significant amount of time.<sup>98</sup> Federal law also encourages (though does not mandate) nonrecognition.<sup>99</sup> Ultimately, progress for same-sex divorce in many hostile states seems unlikely to gain significant traction until the equal protection and due process claims in favor of same-sex marriage gain more widespread purchase. Absent a dispositive ruling from the Supreme Court or a rapid shift in public opinion, the situation in hostile states is not likely to change soon, even if the number of hostile states looks likely to decrease somewhat.

And in the meantime, the number of same-sex marriages performed in the United States continues to grow; by 2010, an estimated fifty thousand same-sex couples had obtained marriages within the United States, with an additional eighty-five thousand

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<sup>94</sup> See Ramais, Note, 2010 U Ill L Rev at 1038–43 (cited in note 17) (arguing that due process considerations mandate that states such as Rhode Island grant same-sex divorces); Danielle Johnson, Comment, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce Is an Incident of Marriage That Should be Uniformly Recognized throughout the States*, 50 Santa Clara L Rev 225, 252–54 (2010) (arguing that courts should evaluate the particular incident of marriage at issue and recognize marriages for the purpose of divorce); Louis Thorson, Comment, *Same-Sex Divorce and Wisconsin Courts: Imperfect Harmony?*, 92 Marq L Rev 617, 646–48 (2009) (arguing that Wisconsin could entertain a same-sex divorce action and grant a divorce). See also *J.B.*, 326 SW3d at 677 (recognizing the independent equal protection concern at issue in the denial of divorce).

<sup>95</sup> See notes 37–45 and accompanying text.

<sup>96</sup> See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv L Rev 1026, 1071 (2003).

<sup>97</sup> See notes 24–25 and accompanying text.

<sup>98</sup> See Jeffrey R. Lax and Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 Am Polit Sci Rev 367, 373 (2009) (showing that in many states, same-sex marriage enjoys far less than majority support).

<sup>99</sup> See note 25.

couples having obtained civil unions.<sup>100</sup> No evidence suggests that these couples are significantly less (or more) likely to divorce than different-sex couples.<sup>101</sup>

But the approach advocated in this Comment does not require waiting for hostile states to change their policies, for public opinion in these states to move toward popular acceptance of same-sex marriage, or for the equal protection and due process claims of same-sex couples to gain further traction in the courts. Instead, it can be accomplished now and in states that have perhaps already demonstrated some receptivity to the equality and rights claims of same-sex couples by providing them access to marriage or civil unions in the first place.

#### B. Features of the State-of-Celebration Solution

Statutes permitting divorce in the state of celebration are not unprecedented. From 1862 until at least 1954, New York law provided for the dissolution of marriages on adultery grounds, regardless of the domicile of the parties, when the marriage had been celebrated in New York.<sup>102</sup> While some New York courts applied a narrowing construction of this statute and refused to apply it to out-of-state domiciliaries,<sup>103</sup> at least a few did apply it to out-of-state domiciliaries, and at least one did so with full knowledge of the Third Circuit's result in *Alton*.<sup>104</sup> And some commentators have suggested adopting divorce in the place of celebration as part of a more general loosening of the domicile rule.<sup>105</sup>

Four states—California, Delaware, Illinois, and Oregon—have recently passed state-of-celebration dissolution statutes as part of their civil union laws. Couples who obtain civil unions in one of these states may dissolve them in that state, even if neither party can claim domicile there at the time of dissolution. Such statutes may be seen as

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<sup>100</sup> See Williams Institute, Press Release, *Williams Institute Experts Comment on Department of Justice DOMA Decision* \*1 (Feb 24, 2011), online at <http://www2.law.ucla.edu/williamsinstitute/pdf/Pressrelease2.24.pdf> (visited Sept 2, 2011).

<sup>101</sup> See Gary J. Gates, M.V. Lee Badgett, and Deborah Ho, *Marriage, Registration, and Dissolution by Same-Sex Couples in the U.S.* \*16 (Williams Institute July 2008), online at <http://www3.law.ucla.edu/williamsinstitute/publications/Couples%20Marr%20Regis%20Diss.pdf> (visited Sept 2, 2011).

<sup>102</sup> See *David-Zieseniss v Zieseniss*, 129 NYS2d 649, 651–52 (NY S Ct 1954) (reviewing history of the statute).

<sup>103</sup> See *Huneker v Huneker*, 57 NYS2d 99, 100 (NY S Ct 1945) (collecting cases). See also *Gray v Gray*, 38 NE (98 Sickles) 301, 302 (NY 1894) (assuming the limitation to domiciliaries).

<sup>104</sup> See *David-Zieseniss*, 129 NYS2d at 651, 654–58 (collecting New York cases granting such divorces and distinguishing *Alton* in order to grant a divorce to out-of-state domiciliaries).

<sup>105</sup> See Part IV.A.2.b.

having three parts: a consent provision, a jurisdictional provision, and a choice-of-law provision, each of which will be discussed in turn.

The consent provisions render entry into a civil union an act of either express or implied consent (depending on the particular statute) to that state's jurisdiction over the divorce. The consent provision in Illinois's civil union law, for example, provides, "Any person who enters into a civil union in Illinois consents to the jurisdiction of the courts of Illinois for the purpose of any action relating to a civil union even if one or both parties cease to reside in this State."<sup>106</sup> This implied consent provision differs from those in California<sup>107</sup> and Oregon,<sup>108</sup> which appear as part of contract-like agreements—Declarations of Domestic Partnership—that couples actually sign and notarize.<sup>109</sup> For example, Oregon's provision requires that

[o]n the Declaration of Domestic Partnership, each individual who wants to become a partner in a domestic partnership shall . . . [s]tate that the individual consents to the jurisdiction of the circuit courts of Oregon for the purpose of an action to obtain a judgment of dissolution or annulment of the domestic partnership . . . even if one or both partners cease to reside in, or to maintain a domicile in, this state.<sup>110</sup>

Illinois's and Delaware's civil union laws are procedurally more marriage-like in this respect, because, as with marriages, there is no such literal contractual agreement: couples fill out an application containing basic information, pay a fee, and then receive a license and certificate.<sup>111</sup>

The jurisdictional provisions actually confer subject matter jurisdiction on state courts to dissolve these unions. In California, for example, the statute plainly states that "[t]he superior courts shall have jurisdiction over all proceedings relating to the dissolution of domestic partnerships. . . . [E]ven if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed."<sup>112</sup> Similar explicit language appears in the

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<sup>106</sup> 750 ILCS § 75/45. See also Act of May 11, 2011, 78 Del Laws ch 22 (effective Jan 1, 2012), codified at 13 Del Code Ann § 216.

<sup>107</sup> Cal Fam Code § 298(c)(3).

<sup>108</sup> Or Rev Stat § 106.325(5).

<sup>109</sup> Cal Fam Code §§ 298(a)(1), 298.5(a); Or Rev Stat § 106.325(1).

<sup>110</sup> Or Rev Stat § 106.325(5).

<sup>111</sup> Compare, for example, 750 ILCS § 75/30, with 750 ILCS §§ 5/202, 5/203 (laying out identical application and licensing procedures for marriages and civil unions). See also 13 Del Code §§ 207–09.

<sup>112</sup> Cal Fam Code § 299.

Delaware civil union law.<sup>113</sup> The Illinois and Oregon provisions contain conferrals of jurisdiction that operate in a less straightforward manner.<sup>114</sup>

Finally, the choice-of-law provisions dictate the substantive law that should govern the dissolution of civil unions performed in the state of celebration.<sup>115</sup> In Illinois, for example, the civil union law holds that the statutes governing dissolutions of marriages “shall apply to a dissolution of a civil union.”<sup>116</sup> Though this serves the larger purpose of creating parity between civil unions and marriages by requiring the same procedures to dissolve them, it also functions as a choice-of-law rule by mandating that Illinois dissolution law will govern all civil union dissolutions in Illinois, even those brought by couples living out of state. Similar provisions exist in California and Delaware,<sup>117</sup> and the same result may be implied in the Oregon statute.<sup>118</sup>

It is important to note, however, that some of the laws outlined here may permit divorces beyond the scope of the defense outlined in Part IV. The California, Delaware, and Oregon statutes may apply to “evasive” unions obtained by couples who have left their home state for the sole purpose of contracting a civil union (for example, an Idaho couple who visits Los Angeles, obtains a domestic partnership, and then returns home), which a domiciliary state may validly void.<sup>119</sup> And the California, Illinois, and Oregon statutes apply regardless of whether the couple is able to seek divorce in their home state, thus

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<sup>113</sup> 13 Del Code Ann § 216. Note that in Delaware, this exercise of jurisdiction is limited if either party to the civil union may obtain a dissolution elsewhere. See note 122 and accompanying text.

<sup>114</sup> In Oregon, the provision allows for filing of divorce actions even though a couple might not meet the state’s residence requirement. See Or Rev Stat § 106.325(4). In Illinois, courts are directed to dissolve civil unions whenever the grounds for dissolution of a marriage, set forth in 750 ILCS § 5/401(a)(1)–(2), are present. 750 ILCS § 75/45. By requiring only that the *grounds* for dissolution be present, the residency requirement found elsewhere in the marriage dissolution statute, 750 ILCS § 5/401(a), is bypassed as a requirement for civil union dissolutions.

<sup>115</sup> The significance of these laws as dictating choice of law is discussed further in Part IV.B. Nothing in these laws suggests that they would serve as extraterritorial choice-of-law clauses (that is, that they would require a court in another state dissolving a civil union to apply state-of-celebration law).

<sup>116</sup> 750 ILCS § 75/45. See also 750 ILCS § 75/50.

<sup>117</sup> Cal Fam Code § 299; 13 Del Code Ann § 216.

<sup>118</sup> The Oregon statute does not explicitly single out civil union dissolution procedures as needing to follow the same procedures as Oregon marriage dissolutions, but does generally require parity between civil unions and marriages in all respects. Or Rev Stat § 106.340(1)–(2), (4).

<sup>119</sup> See note 31 and accompanying text. The justifications for states of celebration to exercise jurisdiction are less compelling when the couples did not live there or when such an alternative mechanism is available. See Parts IV.A.3–5.

eliminating a number of rationales that support the granting of state-of-celebration divorces.<sup>120</sup>

Some of these statutes, however, contain provisions that limit their applicability. The Illinois statute, for example, forbids performing evasive civil unions (that is, those that could not be obtained in the couples' home state).<sup>121</sup> And the Delaware statute limits its jurisdiction over nondomiciliary dissolutions to those instances in which "the jurisdiction of domicile or residency of the petitioner and/or the respondent does not by law affirmatively permit such a proceeding to be brought in the courts of that jurisdiction."<sup>122</sup> These provisions more narrowly tailor state of celebration divorce statutes to dissolutions for which a state of celebration has a stronger case to exercise personal jurisdiction.

#### IV. RECONCILING STATE-OF-CELEBRATION DIVORCES WITH THE DOMICILE RULE

The domicile rule presents a significant hurdle for any divorce granted in the state of celebration, such as the ones permitted in California, Delaware, Illinois, and Oregon, because it calls into question whether any such decrees are founded on sufficient personal jurisdiction. Under the strict domicile requirement *Williams II* expounds, such decrees would not be entitled to full faith and credit in another state.<sup>123</sup> And under *Alton*, such divorces would inherently violate the Due Process Clause.<sup>124</sup>

The problems that the domicile rule creates are not solely academic. For every state-of-celebration divorce, there is a party with the ability—and, often, the incentive—to challenge the court's personal jurisdiction based on the domicile rule. First, not all same-sex divorces are achieved by mutual consent; thus one spouse might find it significantly advantageous to contest personal jurisdiction in the state of celebration in order to avoid the consequences of the dissolution (including sharing custody or paying spousal maintenance).<sup>125</sup> If he can

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<sup>120</sup> The rationales of Parts IV.A.3.a–b, IV.A.4.a, and IV.B, in particular, would likely not apply to same-sex couples who are able to divorce in their home state or whose inability to divorce is the result of some other factor than the hostile state's refusal to recognize their marriage. In addition, permitting such couples a forum for dissolution in the state of celebration might create an incentive to forum shop (assuming—as has traditionally been the case—the domiciliary state will apply its own law, see note 197 and accompanying text).

<sup>121</sup> See 750 ILCS § 75/35(a). See also 750 ILCS § 5/217 (prohibiting marriages so obtained).

<sup>122</sup> 13 Del Code Ann § 216.

<sup>123</sup> 325 US at 229–35.

<sup>124</sup> 207 F2d at 676–77.

<sup>125</sup> These custody or maintenance consequences seem likely to flow from a dissolution in a friendly state, because the choice-of-law provisions generally provide that all of the procedures

successfully avoid the foreign forum, a spouse may be able to completely evade any consequences from the marriage ever having existed.<sup>126</sup> Second, the couple's state of residence *itself* might also be able to contest the exercise of personal jurisdiction by the state of celebration, either by intervening in the original action or by intervening in (or perhaps even commencing) a subsequent action—like the one in *Williams II*—that permits collateral attacks to invalidate the prior decree (such as an action brought by one spouse to enforce the state-of-celebration dissolution in the hostile state).<sup>127</sup> This eventuality is made more plausible by the apparent eagerness of certain state attorneys general to intervene to prevent same-sex divorces.<sup>128</sup> Finally, even if no party contests the jurisdiction, it is nevertheless possible that a court might raise this issue itself, as the *Alton* court did.<sup>129</sup>

This Part argues that state-of-celebration divorce actions should survive any challenge based on the assertion that they constitute an unjustified deviation from the domicile rule. Part IV.A examines two state interests that might justify applying the domicile rule as a rule of

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that would attend a normal divorce should apply to these dissolutions—including any ancillary issues such as children or property (though the court would need to assure itself of adequate personal jurisdiction in order to issue any such rulings). See notes 116–18 and accompanying text. (Though a more full discussion of the proper way to treat these downstream issues would fill an important lacuna in the literature, it is unfortunately beyond the scope of this Comment.) For one particularly prominent case of a party to a same-sex civil union seeking to use the law of a hostile state in order to avoid sharing custody, see *Miller-Jenkins v Miller-Jenkins*, 637 SE2d 330, 332–33 (Va App 2006). One might also imagine a party using the mere threat of contesting personal jurisdiction as a bargaining chip in divorce negotiations.

<sup>126</sup> The ability to evade the obligations of the marriage stems from the fact that the hostile state would likely not impose any such obligations flowing from the marriage. See, for example, the sweeping language in *J.B.*, 326 SW3d at 666 (“[The Texas Constitution and Family Code] forbid the State and its agencies from giving *any effect whatsoever* to a same-sex marriage.”).

<sup>127</sup> Although the Court's holdings in *Sherrer*, *Coe*, and *Johnson* limit the parties who may collaterally attack the jurisdictional bases of a divorce decree, most commentators believe that the couples' true state of domicile might retain that ability. See Garfield, 58 Tex L Rev at 508 & n 43 (cited in note 65) (collecting authorities).

Consider also that the jurisdictional foundations of a divorce granted in the state of celebration might be subject to collateral attacks (in subsequent proceedings) by additional third parties, even though domiciliary divorces might not. This is because, just as *Williams II* may be limited to divorce actions founded upon findings of domicile, so too may the holdings in *Sherrer*, *Coe*, and *Johnson* limiting relitigation of jurisdiction. See Jeffrey S. Guilford, *Guam Divorces: Fast, Easy, and Dangerous*, 1990 Army Law 20, 25–26 (Mar) (urging readers to remember that the decision in *Sherrer* was predicated on the original court finding domicile, which leaves a collateral attack on jurisdiction possible when jurisdiction for divorce is *not* founded on domicile).

<sup>128</sup> See notes 37–39 and accompanying text.

<sup>129</sup> The divorce in *Alton* was not contested; as the Third Circuit opinion recounts, it was the district court judge who demanded that the jurisdictional prerequisites be met. See 207 F2d at 668 (“When the case came to the judge of the district court he asked for further proof on the question of domicile.”).

personal jurisdiction: state interests in exclusively controlling marital status, and state interests in exclusively controlling divorce. It argues that—in the case of migratory same-sex marriages that the couples’ domiciliary state refuses to recognize—neither of these state interests is sufficiently exclusive or persuasive to justify the domicile rule as a bar to state-of-celebration divorces. Part IV.B then argues that constitutional constraints on choice of law are also insufficient to justify barring state-of-celebration divorces.

#### A. The Domicile Rule as a Rule of Personal Jurisdiction

The primary rationale that has been offered to support the domicile rule as a rule of personal jurisdiction is that it protects important state interests. While these interests might have been compelling at the time of the adoption of the domicile rule and might remain compelling in certain circumstances, this Part argues that such interests are not offended by allowing same-sex couples to obtain divorces in the state of celebration, at least when their domiciliary state refuses to recognize their relationships.

##### 1. State interests as justifying the domicile rule.

A state has a significant interest, derived from its status as a sovereign, in controlling its land, its citizens, and in particular, “the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”<sup>130</sup> The Supreme Court’s personal jurisdiction jurisprudence has been one mechanism for protecting these long-standing state interests within the federal system. As “an instrument of interstate federalism,” due process may sometimes “divest the State of its power to render a valid judgment.”<sup>131</sup> As the Court has recognized, protecting such state interests as a matter of personal jurisdiction is a crucial part of the federal system, because

the Framers [ ] intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister

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<sup>130</sup> *Pennoyer v Neff*, 95 US 714, 734–35 (1878). See also *United States v Morrison*, 529 US 598, 616 (2000) (situating “family law” as unquestionably within the exclusive sphere of state sovereignty).

<sup>131</sup> *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 294 (1980).



States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.<sup>132</sup>

The state's interest as a "third party" to a marriage has been frequently described as justifying the unique burdens attached to dissolving them (embodied in divorce).<sup>133</sup> Similarly, here, the states' interests in controlling the domestic relations of their citizens have been invoked by both courts and commentators as justifying the holdings in *Williams II* and *Alton*.<sup>134</sup> In *Williams II*, the Court based its domicile requirement on the fact that only domicile "implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."<sup>135</sup> Noting that divorce "touches basic interests of society," it held that a state "concerned with the vindication of its social policy" should not be bound by the "selfish action of those outside its borders" who improperly obtain (or grant) divorces.<sup>136</sup> *Alton* also reflects this understanding of the domicile rule. In granting a divorce to Connecticut domiciliaries, the *Alton* court argued, the Virgin Islands had improperly "readjust[ed] domestic relations between those domiciled elsewhere."<sup>137</sup> The court insisted that "adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens."<sup>138</sup>

States' exclusive interests in regulating the domestic relations of their citizens were particularly at risk in an era when states differed greatly in the reasons for which—and the ease with which—couples could obtain divorces. The court in *Alton* gave a paradigmatic example of the differences in state laws that the domicile rule was designed to protect: "In the Virgin Islands incompatibility of temperament constitutes grounds for divorce. In Connecticut it does not."<sup>139</sup> The concern was that couples would leave their home state and forum shop for the state with the most advantageous divorce procedures, effectively

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<sup>132</sup> Id at 293.

<sup>133</sup> See, for example, *Gant v Gant*, 329 SE2d 106, 114 (W Va 1985); *Hempel v Hempel*, 181 NW 749, 752 (Wis 1921).

<sup>134</sup> See *Williams II*, 325 US at 230–32, 237–38; *Alton*, 207 F2d at 676–77; *David-Zieseniss v Zieseniss*, 129 NYS2d 649, 655 (NY Sup Ct 1954); Wasserman, 39 Wm & Mary L Rev at 24–32 (cited in note 10); Garfield, 58 Tex L Rev at 522 (cited in note 65); David P. Currie, *Suitcase Divorce in the Conflict of Laws*: Simons, Rosenstiel, and Borax, 34 U Chi L Rev 26, 45–46 (1966).

<sup>135</sup> *Williams II*, 325 US at 229.

<sup>136</sup> Id at 230. See also *Sosna*, 419 US at 407 (describing the grant of a divorce to domiciliaries of another state as "officious intermeddling in matters in which another State has a paramount interest").

<sup>137</sup> *Alton*, 207 F2d at 676–77.

<sup>138</sup> Id at 676.

<sup>139</sup> Id at 676–77.

nullifying a domiciliary state's efforts to restrict or discourage divorce.<sup>140</sup> As one commentator put it, "[S]tates with strict divorce laws . . . needed *exclusive* power to grant their citizens divorces. If other states, with more liberal divorce laws, could grant divorces to citizens domiciled in the strict divorce state, then the strict divorce state would lose all ability to regulate the status of its citizens."<sup>141</sup>

The *Alton* court thus issued its due process ruling to prevent the Virgin Islands' loose divorce policy from interfering with Connecticut's more restrictive policy.<sup>142</sup> That is, the purpose of the domicile rule was to allow each state to preserve its own substantive divorce law, thus protecting, within the federal system, the "contrast between states that denied divorce except on the most restrictive grounds and those that granted it virtually on demand."<sup>143</sup> The domicile rule provided a solution by limiting couples to obtaining divorce in their domiciliary states, thus protecting that state's substantive divorce policy.

## 2. Rejecting broader rationales for supplanting state interests.

The existing literature on the domicile rule suggests a number of broader rationales for arguing that the domicile rule is no longer justified, and, in particular, that the state interests that undergirded *Williams II* and *Alton* have lost their ongoing salience. While these rationales do offer reason to think that these state interests are not quite as compelling as they once were, they are insufficient, for reasons stated below, to justify the wholesale evisceration of the domicile rule they would require.

a) *Post-International Shoe personal jurisdiction jurisprudence.* The Supreme Court's personal jurisdiction precedents since its landmark decision in *International Shoe v. Washington*<sup>144</sup> govern personal jurisdiction in nearly every other context.<sup>145</sup> One might argue that these rules of personal jurisdiction have simply superseded the domicile rule. Under this view, post-*International Shoe* precedents might be seen, in their loosening of the once strictly territorial rules

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<sup>140</sup> See Garfield, 58 Tex L Rev at 522–24 (cited in note 65).

<sup>141</sup> Wasserman, 39 Wm & Mary L Rev at 25–26 (cited in note 10).

<sup>142</sup> *Alton*, 207 F3d at 677.

<sup>143</sup> Garfield, 58 Tex L Rev at 524 (cited in note 65).

<sup>144</sup> 326 US 310 (1945).

<sup>145</sup> *Shaffer v. Heitner*, 433 US 186, 212 (1977) ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."). But see *id.* at 209 n 30.

governing personal jurisdiction, as shifting the balance between state and individual interests toward the latter.<sup>146</sup>

Such an approach is tempting because, in the controversies at issue here, the modern rules of personal jurisdiction would likely validate the state of celebration's power to issue a divorce decree. When both parties to the action are willingly present, there is no question that the state of celebration could properly exercise jurisdiction (indeed, the fact that an individual merely passes through a state is sufficient to confer personal jurisdiction).<sup>147</sup> And even if one party were absent, the personal jurisdiction inquiry demands only that the state of celebration's exercise of personal jurisdiction be "consistent with traditional notions of fair play and substantial justice."<sup>148</sup> The parties' consent,<sup>149</sup> combined with the fact that the marriage was celebrated in the state and the fact that the couple was domiciled there for some time,<sup>150</sup> would provide more than the necessary "minimum contacts" to confer personal jurisdiction over the dissolution.<sup>151</sup>

But the fact that the domicile rule is arguably incongruous with modern personal jurisdiction jurisprudence is not itself an adequate reason to depart from it.<sup>152</sup> Despite its anomalous nature, the domicile rule has coexisted with the modern personal jurisdiction rules for some decades and largely continues to govern American divorce jurisprudence.<sup>153</sup> Even under these modern rules, the Court has shown some deference to certain "traditional notions" governing personal jurisdiction.<sup>154</sup> Thus, this Comment rejects jettisoning the domicile rule

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<sup>146</sup> See *Insurance Corp of Ireland v Compagnie des Bauxites de Guinee*, 456 US 694, 702 (1982) (noting that personal jurisdiction restricts judicial power "not as a matter of sovereignty, but as a matter of individual liberty"); Wasserman, 39 Wm & Mary L Rev at 52–53 (cited in note 10).

<sup>147</sup> *Burnham v Superior Court of California*, 495 US 604, 619 (1990) (Scalia) (plurality) ("[P]hysical presence alone constitutes due process."). See also Wasserman, 39 Wm & Mary L Rev at 52 (cited in note 10).

<sup>148</sup> *Burnham*, 495 US at 618 (Scalia) (plurality), quoting *International Shoe*, 326 US at 316 (quotation marks omitted).

<sup>149</sup> See *Carnival Cruise Lines, Inc v Shute*, 499 US 585, 593–95 (1991) (enforcing forum-selection clause); *Hess v Pawloski*, 274 US 352, 356–57 (1927).

<sup>150</sup> Recall that in the migratory marriages at issue here, the parties will always have lived for some time in the state of celebration. See text accompanying note 29.

<sup>151</sup> The parties here would likely be held to have purposefully availed themselves of the state's laws by marrying there and continuing to live there for some time. See *Burger King Corp v Rudzewicz*, 471 US 462, 474–76 (1985) (noting jurisdiction when a defendant "purposefully avails" himself of the "benefits and protections" of a state's law and particularly when the defendant *himself* initiated that connection). Exercising personal jurisdiction over an absent spouse would, however, still require proper service.

<sup>152</sup> See, for example, *In re Marriage of Kimura*, 471 NW2d 869, 873–76 (Iowa 1991) (discussing the divergent lines of cases but applying the domicile rule).

<sup>153</sup> See notes 85–90 and accompanying text.

<sup>154</sup> *Burnham*, 495 US at 609–10 (Scalia) (plurality). See also *Shaffer*, 433 US at 209 n 30.

altogether on this basis, and attempts to give substantive meaning to the domicile rule by seeking justifications for its departure from these modern personal jurisdiction rules.

b) *The reduced salience of state interests in controlling marriage and divorce.* It may simply be that, as some commentators argue, the state interests that the *Williams II* and *Alton* courts found so compelling have simply lost their salience with time.

Some have argued that any state interests that might have existed at the time of *Williams II* and *Alton* have been eclipsed by the heightened respect given to individual rights—in particular, by the Supreme Court’s recognition of constitutionally protected liberty interests in marriage, divorce, and procreation.<sup>155</sup> Greater solicitude for individual prerogatives in the area of family relations can be identified in the Court’s post-*Williams II* decisions, which base personal jurisdiction for custody and child support actions on in personam jurisdiction instead of domicile.<sup>156</sup> Indeed, as mentioned above, the revolution in personal jurisdiction since the Court’s seminal decision in *International Shoe* has been seen to diminish the importance of state interests as a consideration in personal jurisdiction decisions altogether.<sup>157</sup>

Others have argued that the states themselves have effectively abdicated their interest in controlling the domestic relations of their citizens by eliminating sanctions against unmarried cohabitation and making some of the rights and benefits of marriage available to unmarried couples.<sup>158</sup> In particular, the widespread acceptance of accessible, no-fault dissolution procedures has been seen as states abdicating a policy of strictly regulating domestic relations.<sup>159</sup> Purely from a pragmatic perspective, acceptance of no-fault divorce has provided greater uniformity in substantive divorce law across states; this not only limits the extent to which couples obtaining divorces in other states will undermine their home state’s substantive divorce law if they travel abroad, but also, correspondingly, limits the incentive that couples have to forum shop to begin with.<sup>160</sup> The potential challenges to state interests that would arise from a loosening of the domicile rule, therefore, are no longer as daunting as they once were.<sup>161</sup>

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<sup>155</sup> See, for example, *Boddie v Connecticut*, 401 US 371, 375–77 (1971); *Zablocki v Redhail*, 434 US 374, 383–91 (1978). See also Garfield, 58 Tex L Rev at 517–20 (cited in note 65).

<sup>156</sup> Estin, 16 Wm & Mary Bill Rts J at 424–28 (cited in note 55).

<sup>157</sup> See note 146 and accompanying text.

<sup>158</sup> See Garfield, 58 Tex L Rev at 524–26 (cited in note 65).

<sup>159</sup> See id at 522–23.

<sup>160</sup> See id at 523–24.

<sup>161</sup> A further, and more limited, argument is available to defend the particular state-of-celebration dissolution laws discussed in Part III—that any state interests that might have

Yet while the state interests that once justified the domicile rule are no longer as persuasive in the modern era as they once were, these recent developments do not suffice to completely undermine the domicile rule. Long-standing traditions, which remain the touchstone of the Court's federalism jurisprudence, place domestic relations squarely within the province of states.<sup>162</sup> Such traditions suggest that states still have *some* legitimate interests in not allowing their substantive divorce policy to be easily flouted—interests that cannot be so easily dismissed. More limited rationales, discussed below, are available to support the departure from the domicile rule advocated here.

3. The domicile rule is an inapt tool to protect state interests in determining who may marry.

That the domicile rule should not be jettisoned *altogether*, however, does not mean that it should apply to the dissolutions of migratory same-sex marriages at issue here. This Section and the next evaluate the state interests that hostile states might articulate to prevent states of celebration from exercising personal jurisdiction over the divorce actions of hostile state domiciliaries.<sup>163</sup> They suggest that, in the case of migratory same-sex marriages, neither of these state interests is sufficient to justify applying the domicile rule.

The more sweeping interest that hostile states might articulate stems from their policy of refusing to perform or recognize same-sex marriages—the same policy that has justified the refusal to perform

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justified applying the domicile rule to *marriages* simply do not apply to *civil unions* (or domestic partnerships) for two reasons: First, the “traditional notions” governing personal jurisdiction for marriage (such as the domicile rule) need not *necessarily* apply to these new types of relationships, which do not carry with them any traditions. Second, given that so many states refuse to offer or recognize these new types of relationships, it is particularly understandable that the state creating these statuses would retain the power to dissolve them. See, for example, *Miller-Jenkins v Miller-Jenkins*, 912 A2d 951, 962–65 (Vt 2006) (holding that Vermont's reverse evasion law applies solely to marriages and not civil unions). These civil union-specific rationales may be seen as explaining the fact that civil union states have been the first to adopt state-of-celebration dissolution laws. See Part III.B.

However, such civil union-specific rationales are problematic in that they are at odds with statutory and state constitutional requirements in civil union-granting states, which require that they be treated as similarly to marriages as possible. See, for example, Or Rev Stat § 106.340 (mandating equal treatment of civil unions and marriages in all respects); *Strauss v Horton*, 207 P3d 48, 77 (Cal 2009) (noting that although same-sex couples may be denied “marriage,” they are constitutionally entitled to domestic partnerships identical “in all other respects”).

<sup>162</sup> See notes 130–33 and accompanying text.

<sup>163</sup> Note that hostile states themselves need not assert these issues. These state interests may be asserted by the parties, as they are every time one party contests personal jurisdiction. These state interests may also be raised by the court itself, as in *Alton*.

such divorces in the first place.<sup>164</sup> The argument might be that, by allowing divorces, states of celebration are recognizing and validating the couples' marriages—necessarily undermining the hostile state's policy that no such marriage can have existed to begin with. For example, Texas might contend that Delaware, by dissolving a civil union or marriage of Texas domiciliaries, is treating the couple as having been married for the period during which the parties were domiciled in the Texas. This, the argument goes, would violate a domiciliary state's exclusive and sovereign interest in controlling who may be married.<sup>165</sup>

Ultimately, however, the vindication of such an interest is, for two reasons, an unpersuasive rationale for applying the domicile rule to bar state-of-celebration divorces.

a) *The domicile rule is not intended to protect substantive marriage policy.* As an initial matter, there is a particular oddity in applying the *domicile rule* to vindicate a hostile state's interest in having its domiciliaries treated as unmarried. Recall that the original purpose of the domicile rule as a rule of personal jurisdiction was to protect a state's substantive *divorce* policy against the possibility of evasion.<sup>166</sup> That is, the domicile rule was crafted for the situation in which the relevant difference in substantive law was whether one state permitted a ground for divorce that another did not. The rule was designed to prevent parties from circumventing state interests in, for example, mitigating the collateral harms of an increased divorce rate on children or society—in cases like *Williams II* and *Alton*, the underlying *validity* of the marriages was simply not in dispute.

When the concern is that parties are evading a substantive difference in *marriage* policy—that is, when the state interest sought to be vindicated is whether a particular couple should be treated as married—neither the domicile rule nor personal jurisdiction more broadly have traditionally been necessary to vindicate state interests.<sup>167</sup> Rather, the rules of *comity* have come into play.<sup>168</sup> Though obviously constrained by constitutional limitations on personal jurisdiction, full faith and credit, and choice of law, these rules reflect a different balancing of the relevant state interests than the domicile rule (one struck in favor of the state of domicile *at the time of the marriage*, in

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<sup>164</sup> See *Chambers v Ormiston*, 935 A2d 956, 964–65 (RI 2007); *J.B.*, 326 SW3d at 665–66.

<sup>165</sup> This Comment takes such state interests, and the expression of them in nonrecognition of same-sex marriages, as a given (if historically anomalous, see Part I; Part IV.A.3.a).

<sup>166</sup> See notes 134–41 and accompanying text.

<sup>167</sup> Admittedly, this is partly because marriage is not in itself the type of judicial proceeding that generally calls for personal jurisdiction analysis.

<sup>168</sup> See notes 26–33 and accompanying text.

that comity principles generally permit states to void evasive marriages of their domiciliaries but also generally require states to recognize the migratory marriages at issue here if they were valid in the state where contracted<sup>169</sup>).

This is not to suggest that states do not have legitimate interests in refusing to perform or recognize same-sex marriages or that the rules of comity could somehow replace rules of personal jurisdiction. It is simply to suggest that the particular state interest in exclusively controlling whether a couple is *married* was not the one that the domicile rule, or personal jurisdiction more broadly, was intended to protect—which calls into question its use to bar the dissolution of the migratory same-sex marriages at issue here.

*b) Hostile states do not have an exclusive interest over migratory same-sex marriages.* Even accepting that the domicile rule might be a proper tool to protect a state's interests in determining who is permitted to marry, a hostile state's interest in regulating the migratory marriages at issue here is *not* the type of *exclusive* interest that requires vindication via so strict a rule of personal jurisdiction such as the domicile rule.

In the migratory marriages at issue here, the hostile state is simply not the only state to have an interest in the marriage. Consider that there is a clear limitation on the reach of any state's exclusive interest in controlling the domestic relations of its domiciliaries: that state interest applies, by definition, only to its domiciliaries. States of celebration, too, have legitimate state interests in seeing that the legal relationships of their own domiciliaries are validated, insulated from evasion, and, if necessary, dissolved in an orderly fashion. And the hostile state's interests, resulting from after-acquired domicile, do not entirely wipe out the state of celebration's interests. After all, hostile states cannot retroactively obliterate a same-sex marriage (nor any attendant legal reliance on that marriage) that was validly created long before the parties moved to the hostile state by, for example, voiding migratory marriages from the date of their inception.<sup>170</sup> The existence of the state of celebration's interests suggests that the domicile rule, which *exclusively* vindicates the interests of domiciliary states, should not apply here.

One might wonder whether the existence of the state of celebration's interests makes a difference for the applicability of the domicile rule, given that the domicile rule still applies in the typical

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<sup>169</sup> See text accompanying notes 29–32.

<sup>170</sup> See notes 48–51 and accompanying text. See also Koppelman, *Same Sex, Different States* at 69–81 (cited in note 26).

migratory marriage case. That is to say, if both the state of celebration and the new domiciliary state have interests in a migratory marriage, then why has the domicile rule still traditionally applied to migratory marriages?

The answer is simple: in the typical migratory marriage case, the new domiciliary state has *always* given some respect to the prerogatives of the state of celebration, by *recognizing the migratory marriage*. As Professor Andrew Koppelman recounts, the complete unwillingness of hostile states to recognize migratory marriages—even for the limited purpose of dissolving them—is truly unprecedented in American history.<sup>171</sup> The only types of marriages that have been subject to such “blanket nonrecognition” are polygamous marriages and the “core” cases of incest (parent–child or sibling marriages), neither of which has *ever* been regularly performed by any US state.<sup>172</sup> Therefore, in the typical migratory marriage case, the new domiciliary state has not sought to completely obliterate the legal interests created in the state of celebration; even dissolution proceedings would have, at a minimum, acknowledged that the couple’s relationship once existed. Accommodating the state of celebration’s interests allowed the domiciliary state to assert something approaching an exclusive interest over the marital relationship at issue, which was sufficient to justify the domicile rule.

But the same cannot be said for the current context of migratory same-sex marriages. Hostile states such as Texas refuse to offer the solutions—like recognizing migratory marriages or providing divorces—that would normally take into account the competing interests of states of celebration, thus undermining the reliance states of celebration seek to encourage on marriages performed there.<sup>173</sup> By refusing to grant the respect that has always been afforded to states of celebration, hostile states leave the state of celebration’s interests unaddressed, and in need of consideration. And when the accommodation of state-of-celebration interests that has permitted new domiciliary states to assert an *exclusive* interest over migratory marriages no longer applies, this suggests that the domicile rule, too, should no longer apply.

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<sup>171</sup> Koppelman, *Same Sex, Different States* at 30–32, 42–47 (cited in note 26).

<sup>172</sup> *Id.* (stating that no state has ever performed polygamous marriages or marriages violating the core incest taboos—that is, parent–child or sibling marriages).

<sup>173</sup> Texas has also rejected a compromise that would accommodate these interests, such as a proceeding in the hostile state that “voids” the marriage *only* from the time the parties acquired domicile in the hostile state and also provides a mechanism to unwind affairs from the period the parties were domiciled in the state of celebration. See note 50.



Indeed, it would be ironic that a rule of personal jurisdiction would deny parties state-of-celebration divorces in the name of protecting a hostile state's legitimate interests over the marital status of its domiciliaries, when the parties' only other available option—a voidness decree—does far more to impair legitimate state interests of the state of celebration. This irony is particularly acute given that the end result of a state-of-celebration dissolution—a declaration that the parties are no longer married—largely *conforms* to the way that the hostile state itself seeks to treat the parties (even if, in the process, it requires the state of celebration to treat them as married).<sup>174</sup> Given this, it is irrational for the strict personal jurisdiction requirement embodied in the domicile rule to prevent state-of-celebration divorces in order to vindicate the domiciliary state's interests in refusing to treat same-sex couples as married.

4. State interests in regulating divorce do not justify applying the domicile rule.

Hostile states, however, might articulate a more narrow interest to justify the domicile rule than controlling their domiciliaries' marital status. They might simply argue that, even if it is legitimate for another state to treat its citizens as married, a domiciliary state ought to at least have exclusive control over any proceeding in which its citizens are *divorced*. After all, the potential for citizens to evade substantive differences in divorce policy was the type of harm that the domicile rule sought to address in the first place.<sup>175</sup>

a) *Hostile states can assert little interest in applying their substantive divorce law.* While in the normal case, a state might have a legitimate interest in applying its substantive divorce policy to any divorce of its citizens—an interest that merits protecting with the domicile rule—hostile states cannot assert any such interest with regard to migratory same-sex marriages.

Certainly any interest the domiciliary state has in exclusively applying its substantive divorce policy does not extend to the downstream consequences of a divorce decree—for example, the property divisions or child custody orders that may result. The Supreme Court has permitted the more common requirements of in

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<sup>174</sup> Indeed, a hostile state might welcome innovations such as state-of-celebration divorces that accommodate their “hostility” to same-sex marriages. After all, permitting state-of-celebration divorces surely leaves the public policy of hostile states more intact than forcing them to recognize same-sex marriages or perform same-sex divorces.

<sup>175</sup> See notes 139–43 and accompanying text. To the extent that such a divorce policy includes not treating same-sex couples as married to begin with, the rationales discussed in Part IV.A.3 suggest that the domicile rule should not apply to vindicate it.

personam jurisdiction to govern these downstream actions.<sup>176</sup> These rules therefore reflect a determination that domiciliary states simply do not have the type of exclusive interest over adjudications for custody and support that would call for as strict a rule of personal jurisdiction as the domicile rule. A hostile state is therefore already required to permit other states to adjudicate custody or support determinations over all of its domiciliaries—whether different-sex couples or same-sex couples—who obtained a declaration of divorce before moving to the hostile state. The state’s interest over the custody and support determinations of same-sex couples with migratory marriages is not so heightened as to require a different result for them alone.

More fundamentally, it is difficult to understand how a hostile state can have *any* interest in exclusively controlling the dissolution (or downstream consequences) of a legal relationship whose very existence it vehemently rejects in the first place. After all, hostile states are not refusing to divorce same-sex couples because these couples have not met the requisite grounds for divorce or have failed to follow the proper divorce procedures. Rather, hostile states have refused to even exercise *jurisdiction* over actions for same-sex divorce, contending that there is simply *no legal entity* that could properly be the subject of a legal action in the first place.<sup>177</sup> As the court in *J.B.* put it, “If a trial court were to exercise subject-matter jurisdiction over a same-sex divorce petition, even if only to deny the petition, it would give that petition some legal effect.”<sup>178</sup> The proper response to a same-sex marriage, the court concluded, is simply to give it “no legal effect.”<sup>179</sup>

If a same-sex marriage is not a legal entity akin to a different-sex marriage, however, it is hardly apparent why it should simultaneously be treated just like a different-sex marriage for purposes of the domicile rule. That is to say, a state refusing to consider a relationship a marriage simply should not be able to simultaneously assert an

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<sup>176</sup> See text accompanying note 76.

<sup>177</sup> See notes 37–45 and accompanying text. Such a determination is arguably suspect under the Supreme Court’s decision in *Hughes v Fetter*, 341 US 609, 611 (1951).

<sup>178</sup> 326 SW3d at 665. The court’s holding that respecting a same-sex marriage would be like “administer[ing] the estate of a living person,” see *id.* at 666, can be seen as consistent with legal theories holding that same-sex marriages are, by definition, simply *not* marriages because marriage involves *only* different-sex couples. See Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can J Fam L 11, 84 (“Same sex couples look to the law to let them into the privileged institution [of marriage], and the law . . . may want to, but it cannot; it can only give them access to a different institution of a different value.”).

<sup>179</sup> *J.B.*, 326 SW3d at 665 (determining that the only way to avoid giving the same-sex marriage effect was to reject jurisdiction).

exclusive and sovereign interest over how it is dissolved. Any such interest a hostile state could assert would be required to begin from the proposition that the same-sex couple, in fact, had a relationship to dissolve in the first place—an acknowledgement by the hostile state that there was “a legally recognized relationship between the parties that [one of them] seeks to alter.”<sup>180</sup> This is precisely the position such states reject—as the Texas court did in *J.B.*<sup>181</sup>

Applying the domicile rule to forbid state-of-celebration divorces would, in effect, permit hostile states to have their nonrecognition cake and eat it, too—by allowing hostile states to enjoy (via the domicile rule) the exclusive control over a domestic relationship the interstate system traditionally affords domiciliary states, even though hostile states have refused to grant the respect traditionally afforded a domestic relationship created by other states. There is no evidence that the domicile rule was intended to produce such a result.

*b) DOMA provides additional justifications for granting state-of-celebration divorces.* The Constitution’s Full Faith and Credit Clause generally requires that the judgments of one state be recognized in other states.<sup>182</sup> But in 1996, Congress enacted the Defense of Marriage Act<sup>183</sup> (DOMA), which expressly authorizes states to *refuse* recognition to validly obtained judgments from another state if they “respect[] a relationship between persons of the same sex that is treated as a marriage . . . or a right or claim arising from such relationship.”<sup>184</sup> By enacting DOMA, Congress fundamentally changed the full faith and credit baseline for recognition of same-sex marriages.<sup>185</sup> While DOMA obviously contributes to the nonrecognition of same-sex marriages, it

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<sup>180</sup> *Id.* at 667.

<sup>181</sup> *Id.* (noting that Texas law does not contemplate same-sex divorce because “[a] person does not and cannot seek a divorce without simultaneously asserting the existence and validity of a lawful marriage”).

<sup>182</sup> US Const Art IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”). See also *Baker v General Motors Corp.*, 522 US 222, 234 (1998) (“[O]ur decisions support no roving ‘public policy exception’ to the full faith and credit due judgments.”).

<sup>183</sup> Pub L 104-199, 110 Stat 2419, codified at 1 USC § 7 and 28 USC § 1738C.

<sup>184</sup> DOMA § 2, 28 USC § 1738C.

<sup>185</sup> See, for example, Kramer, 106 Yale L J at 2001 (cited in note 31). The “unprecedentedly selective” effect of DOMA on full faith and credit has led some to believe that it an improper exercise of Congress’s full faith and credit power. See, for example, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 Iowa L Rev 1, 18–24 (1997). Note, however, that the provision of DOMA at issue above, which affects *states*, is distinct from the provision of DOMA controlling the definition of marriage for *federal* purposes. 1 USC § 7. Recent constitutional litigation has centered entirely around this latter (federal) provision and leaves the former intact. See *Gill v Office of Personnel Management*, 699 F Supp 2d 374, 376–79 (D Mass 2010) (distinguishing the two provisions and noting limitation of holding to the federal provision).

does provide two independent rationales for suggesting that the domicile rule should not apply to bar state-of-celebration divorces.

First, DOMA substantially reduces the injury to the hostile state's interests in controlling dissolutions. Consider that a key concern that led the *Williams II* Court to expound the domicile rule was the binding impact of nondomiciliary divorces on other states; the Court worried that domiciliary states like North Carolina would be "seriously affected"—indeed bound—by these judgments.<sup>186</sup> This rationale, however, no longer supports applying the domicile rule to the same-sex marriage context, because hostile states are not bound by these judgments. DOMA, by its plain text, entitles hostile states to completely ignore a state-of-celebration divorce (and, potentially, any downstream judgments) as "arising from" a same-sex marriage. Hostile states, released from any obligation to recognize the consequences of these marriages, therefore have less of a need for the domicile rule to protect their interests.

Simultaneously, DOMA's change to the full faith and credit baseline *heightens* the state of celebration's interest in controlling dissolutions. As the logic of the *Williams II* Court suggests, full faith and credit is inextricably linked to limits on personal jurisdiction in that it determines the consequences of limiting a state's personal jurisdiction. This link is more explicitly illustrated in *Shaffer v Heitner*,<sup>187</sup> in which the Court rejected Delaware's attempt to found personal jurisdiction over a corporation and its officers on the fact that its law made "Delaware the situs of ownership of all stock in Delaware corporations."<sup>188</sup> Heitner, in defense of the Delaware law, argued that a loose jurisdictional rule was necessary—that "jurisdiction should be recognized without regard to whether the property is [actually] present in the State"<sup>189</sup>—because otherwise a debtor might "avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit."<sup>190</sup> The Court rejected this contention, reasoning that any concerns regarding evasion were assuaged by the fact that "[t]he Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States."<sup>191</sup>

What *Shaffer* illustrates is that full faith and credit may be seen as the spoonful of sugar to help distasteful medicine—namely, personal

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<sup>186</sup> *Williams II*, 325 US at 230. See also *id.* at 232.

<sup>187</sup> 433 US 186 (1977).

<sup>188</sup> *Id.* at 189–93.

<sup>189</sup> *Id.* at 210.

<sup>190</sup> *Id.*, quoting Restatement (Second) of Conflicts of Law § 66 comment a.

<sup>191</sup> *Shaffer*, 433 US at 210.

jurisdiction's stringent limits on states—go down. Though states might wish to exercise universal personal jurisdiction and exert extraterritorial control (as Delaware effectively attempted to do in *Shaffer*), they are limited in their ability to do so. Full faith and credit, however, lowers the stakes of that limitation on a state's personal jurisdiction, because what is taken away is replaced by the full faith and credit that one's own judgments will obtain, thus ensuring that their consequences can be enforced.

Since its inception, the domicile rule's strict personal jurisdiction limitation on states has been balanced by the full faith and credit afforded to properly undertaken state judgments. States could not grant nondomiciliary divorces, but they were assured that their own divorce decrees would be entitled to respect elsewhere, and that marriages celebrated there could be dissolved elsewhere (and, under full faith and credit, the dissolution would be binding even in the state of celebration). But when Congress, as it has with DOMA, begins to deprive states of their "sugar"—that is, when it deprives their marriages and their judgments of full faith and credit—this balance breaks down. States, aware that their marriages and divorce decrees may not be afforded respect elsewhere, thus have an incentive to expand the extraterritorial reach of their courts and laws—that is, they have a heightened interest in controlling the dissolution. Given the strong relationship between full faith and credit and personal jurisdiction *Shaffer* illustrates, such an increase in the reach of a state's personal jurisdiction is neither surprising nor, necessarily, outside the proper limits of state authority. Thus, in the context of same-sex marriages, the loosening of the domicile rule is buttressed by DOMA's alteration of long-standing full faith and credit principles.

##### 5. Pragmatic considerations may trump hostile state interests.

The rules of personal jurisdiction are not blind to pragmatic considerations. Indeed, the Supreme Court has noted that personal jurisdiction doctrine does not lend itself to bright-line rules.<sup>192</sup> One reason for this is that an important purpose of the Court's personal jurisdiction jurisprudence is to ensure the "orderly administration of the laws."<sup>193</sup> This is no small task, given that the Court must simultaneously create a workable legal system to unify the fifty-two different American jurisdictions (the states, the District of Columbia,

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<sup>192</sup> See *Kulko v Superior Court of California*, 436 US 84, 92 (1978) ("We recognize that this determination is one in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable.").

<sup>193</sup> *International Shoe*, 326 US at 319.

and the federal system) while respecting the sovereignty of each state. The Court has thus been particularly attuned to the *practical* contexts and consequences of its personal jurisdiction holdings; indeed, the Court has described pragmatic concerns as a primary impetus for the modern revolution in personal jurisdiction.<sup>194</sup>

Thus, when the system of personal jurisdiction produces extreme hardships for individuals, we might expect that the ability of states to address such a problem in a limited fashion would be afforded some respect—even though the solution might not comport with bright-line rules or rigid conceptions of state interests. This has been the case with deviations from the domicile rule for military personnel; these limited provisions, which address a significant hardship to such personnel, have existed in some states since at least the middle of the last century.<sup>195</sup> Therefore, the extreme difficulties created by leaving same-sex couples with no forum in which to divorce might, itself, be a sufficient reason to suggest that the strict rules of personal jurisdiction—and the rigid conceptions of state interests—might need to give way.

The solution offered here—state-of-celebration divorce—requires only a limited exception to personal jurisdiction’s current rules. While it intrudes on a long-standing tenet of personal jurisdiction, it does so to address a truly unprecedented situation—complete refusal to recognize migratory marriages—that creates unprecedented hardships. And it intrudes on that tenet of personal jurisdiction only as far as necessary to address that problem, by limiting itself to *migratory* marriages—and then only to those marriages the domiciliary state refuses to dissolve or even recognize as marriages. Finally, instead of throwing the doors open to any other state that might wish to provide a forum for such divorces, it offers only *one* forum as an alternative—a forum whose relationship to the marriage at issue is substantial. The principles that support the domicile rule should give way to allow such a limited and carefully crafted solution.

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<sup>194</sup> See *Hanson v Denckla*, 357 US 235, 250–51 (1958) (citing the “increased [ ] flow of commerce between States;” and “progress in communications and transportation” as justifying the evolution “from the rigid rule of *Pennoyer* . . . to the flexible standard of *International Shoe*”).

<sup>195</sup> Wasserman, 39 Wm & Mary L Rev at 20–21 (cited in note 10) (discussing states that permit military personnel to obtain divorces even absent domicile and arguing that this demonstrates states’ awareness of the hardships created by being unable to obtain a divorce). But see *Viernes v District Court*, 509 P2d 306, 310 (Colo 1973) (invalidating a statute permitting nondomiciliary military personnel to obtain divorces as inconsistent with the domicile rule).

## B. The Domicile Rule as a Choice-of-Law Rule

Although the domicile rule has traditionally been thought of as a rule governing personal jurisdiction, it can also be understood as a rule expressing constitutional constraints on choice of law. Yet, as explained below, these choice-of-law constraints do not justify the domicile rule any more than the constraints governing personal jurisdiction.

Choice-of-law principles, which are limited constitutionally by due process and full faith and credit, determine the substantive law that applies to a particular controversy. These principles lower the stakes of finding personal jurisdiction, because the fact that an action may be *heard* in a state does not, under choice of law, necessarily require *applying the substantive law* of that state.<sup>196</sup>

But choice-of-law principles have been entirely absent from divorce actions, because the state in which divorce actions are brought has *always* applied its own substantive law (a rule that makes sense when at least one of the parties is necessarily domiciled there).<sup>197</sup> This link between forum and choice of law heightens the stakes of any determination regarding personal jurisdiction in the divorce context. In any other legal controversy, the choice of forum need only meet the constitutional constraints regarding personal jurisdiction, because another substantive law might apply. In divorce actions, however, the forum must satisfy constitutional constraints regarding personal jurisdiction *and* the application of *forum law* must satisfy constitutional choice-of-law constraints.

It follows, then, that the domicile rule, as a rule governing divorce, operates both as a rule of *personal jurisdiction* (requiring the divorce to be heard in the state of domicile) and (because the substantive law follows that determination) as a rule governing *choice of law*. And some commentators, most notably Professor David Currie, have further understood the domicile rule as the result of constitutional constraints governing choice of law, not personal jurisdiction.<sup>198</sup> As Currie noted, “[T]he paramount interest of the domicile” was expressed in what he claimed was a “constitutional requirement that [the domicile’s] law be applied.”<sup>199</sup> Under this logic, *Williams II* and *Alton* might be seen as having folded the choice-of-law requirement that the domicile law apply into the personal jurisdiction inquiry, on

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<sup>196</sup> Wasserman, 39 Wm & Mary L Rev at 2 (cited in note 10).

<sup>197</sup> Id at 2, 19–20 (referring to this as the “choice-of-law corollary” to the domicile rule). See also Restatement (Second) of Conflict of Laws § 285.

<sup>198</sup> See Currie, 34 U Chi L Rev at 48–53 (cited in note 134); Wasserman, Wm & Mary L Rev at 53–54 (cited in note 10). See also *Alton*, 207 F2d at 684–85 (Hastie dissenting).

<sup>199</sup> Currie, 34 U Chi L Rev at 48 (cited in note 134).

the assumption that they both must lead to the same result.<sup>200</sup> Buttressing this claim is the fact that, as some commentators have noted,<sup>201</sup> *Alton*'s main holding relies exclusively on cases dealing with choice of law, and not personal jurisdiction.

If the constitutional constraints on choice of law did dictate the domicile rule, one way to address the issue would simply be to undo the link between forum and substantive law and add a choice-of-law component when divorce jurisdiction is extended beyond domicile.<sup>202</sup> However, such an endeavor not only creates practical difficulties in fashioning choice-of-law principles (and flies in the face of long-standing divorce practice) but also leads to particular problems for providing a forum for same-sex divorces. A rule that provided a forum in the state of celebration, only to apply the law of a hostile state (a likely choice of law because it is the couple's domicile), might lead to the same result as if the action had been brought in a hostile state—no divorce. Thus, as noted above, the legislative solutions in Part III contain provisions addressing choice of law by specifying that their own substantive law should apply to a divorce granted there, leaving intact the correlation between forum and substantive law.

But do these statutes—dictating that state-of-celebration divorces be governed by state-of-celebration law—violate constitutional constraints on choice of law? The answer, despite Professor Currie's objections, is almost certainly no—at least for the migratory divorces at issue here. Certainly the domicile rule is not *necessary* to ensure that the choice of law in any action comports with constitutional constraints, because choice of law is an issue that may be waived. Both parties could simply consent to the application of the state of celebration's law—in which case the domicile rule serves only to thwart their mutual consent as to the governing law.<sup>203</sup>

But even in cases where choice of law is contested, there is no reason for the domicile rule to serve as a bright-line rule limiting choice of law to that of the parties' domicile. For the migratory marriages at issue here, applying the substantive law of the state of celebration to the divorce action would most likely pass constitutional muster. In *Phillips Petroleum Co v Shutts*,<sup>204</sup> the Court held that, for a

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<sup>200</sup> Currie sought to escape the domicile rule by unlinking the choice of forum and choice of law and arguing that the paramount concern was application of domiciliary *law*, whatever the forum. See *id.* at 48–53. This Comment takes a different approach, preserving the link between forum and choice of law.

<sup>201</sup> See, for example, Garfield, 58 Tex L Rev at 515 (cited in note 65).

<sup>202</sup> See *id.* at 535–39.

<sup>203</sup> See *id.* at 536.

<sup>204</sup> 472 US 797 (1985).



choice-of-law analysis, all the Constitution requires is that a state have “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>205</sup> This test can be easily met by the state-of-celebration divorces discussed in this Comment. The same factors that combine to give rise to personal jurisdiction under the modern regime—in particular, the fact that the state of celebration is the place where the marriage took place and the fact that the parties were domiciled there—would likely qualify as “a significant contact,” if not a “significant aggregation of contacts,” to satisfy the *Phillips* test and allow application of the state of celebration’s substantive law over a divorce action.<sup>206</sup> And any interests hostile states have in applying their own law would be subject to the same criticisms as their interests in controlling personal jurisdiction.<sup>207</sup>

It is true that the domicile rule is a convenient shorthand for choice-of-law analysis. It provides *a* forum (the domiciliary state) in which applying the substantive law is generally appropriate. It also avoids *some* fora in which applying substantive law would obviously not be appropriate (such as a state to which no party had any ties). But the domicile rule cannot be said, by any measure, to be mandated by constitutional constraints on choice of law, any more than the modern rules of personal jurisdiction or the state interests at play mandate the domicile rule.

#### CONCLUSION

One might well wonder what effect a divorce decree enabled by this solution may have in a world in which the reciprocity that normally characterizes our legal system has broken down and in which states are encouraged by federal law to ignore marriages and divorce decrees from neighboring states. Couldn’t a couple’s domiciliary state (or another hostile state) simply refuse to respect a same-sex divorce, the way it refuses to respect a same-sex marriage or civil union?

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<sup>205</sup> *Id.* at 818, quoting *Allstate Insurance Co v Hague*, 449 US 302, 312–13 (1981) (Brennan) (plurality) (quotation marks omitted).

<sup>206</sup> See text accompanying notes 149–51. See also Wasserman, 39 *Wm & Mary L Rev* at 54 (cited in note 10). The state of celebration here can certainly articulate interests—such as protecting the reliance that has developed on the relationship and providing the parties with an orderly procedure for unwinding their affairs—that are at least as compelling as those deemed sufficient by the plurality in *Allstate* (and are certainly more related to the substantive law sought to be applied). 449 US at 313–20.

<sup>207</sup> See Parts IV.A.3–4.

Indeed it might.<sup>208</sup> But, even in this “worst case” scenario, the parties would still, at a minimum, have achieved something significant: dissolution of their status in the state where their marriage or civil union was formed. Such a dissolution decree (and any obligations flowing from it) would also likely be recognized in other friendly states under normal full faith and credit principles, even if it might not be respected in hostile ones. This is a large step forward, since the friendly states where such a divorce decree would be respected are the ones that were likely to treat the couple as married to begin with, even if their hostile domiciliary state did not.<sup>209</sup> And given the political realities that greet same-sex couples in marriages and civil unions, such a limited solution may be the only feasible option for couples such as J.B. and H.B.

Justice Robert Jackson once wrote, “If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married.”<sup>210</sup> Married same-sex couples living in hostile states do not enjoy this certainty. Instead, they face an entirely uncertain and treacherous environment in which they have no simple mechanism to exit a relationship that imposes substantial legal rights and responsibilities. The solution advanced in this Comment suggests one possible mechanism for these couples and provides the possibility of unwinding their assets and providing closure to their relationships in an orderly fashion. The domicile rule—a rule designed to protect entirely different set of state interests—should not create a constitutional barrier to the certainty that would be afforded these couples by obtaining a divorce decree, even if that decree is obtained in the state of celebration.

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<sup>208</sup> See text accompanying notes 184–86. See also *J.B.*, 326 SW3d at 666. But see *Miller-Jenkins*, which at least suggests that child custody orders might be respected in such a hostile state. 637 SE2d at 333–35 (holding that the Parental Kidnapping Prevention Act, 28 USC § 1738A, foreclosed the lower court in Virginia from exercising jurisdiction over child custody issues when Vermont already had).

<sup>209</sup> See note 13 and accompanying text.

<sup>210</sup> *Estin v Estin*, 334 US 541, 553 (1948) (Jackson dissenting).