

**THE CONSTITUTIONAL OBLIGATION TO ADJUDICATE
PETITIONS FOR SAME-SEX DIVORCE AND THE
DISSOLUTION OF CIVIL UNIONS AND ANALOGOUS SAME-
SEX RELATIONSHIPS: PROLEGOMENON TO A BRIEF**

L. LYNN HOGUE*

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I. INTRODUCTION

Same-sex couples who entered into marriage, or marriage-like relationships in states that recognize such relationships, have been denied divorce or dissolution of those relationships by other states. These states refuse to recognize same-sex marriages, or their cognates,

* Professor of Law, Georgia State University College of Law; A.B. (magna cum laude), William Jewell College, 1966; M.A., University of Tennessee, Knoxville, 1968; Ph.D., University of Tennessee, Knoxville, 1972; J.D., Duke University, 1974. The author is an active member of the Bars of Georgia and North Carolina, and a retired member of the Arkansas Bar. Thanks to colleagues Bernadette Hartfield, Wendy Hensel, and Nirej Sekhon, for their generosity in reviewing an early draft, and to the California Western School of Law for hosting the symposium at which this article was presented as a paper.

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on constitutional or statutory grounds generally for want of jurisdiction.¹ This Article argues that all such denials are unconstitutional. The argument is based on a doctrinal trifecta anchored by the law of three cases: *Williams v. North Carolina*,² which deconstructed marriage;³ *Boddie v. Connecticut*,⁴ which swept away impediments to court access in family law matters, particularly divorce, where the state retains a monopoly on dissolution of a fundamental relationship;⁵ and *Hughes v. Fetter*,⁶ which required states to open their courts to narrowly similar juridical analogues from other states pursuant to the Full Faith and Credit Clause.⁷ Importantly, Justice Black identified “the national policy of the Full Faith and Credit Clause” in *Hughes*, a meta-policy that informs the Clause and controls its meaning and application beyond the micro-issues of enforcement,⁸ which restricts application of the Federal Defense of Marriage Act (“DOMA”)⁹ in these circumstances.

Consider the following hypothetical: suppose two same-sex partners enter into a marriage or marriage-like relationship allowed in the state where they currently reside, then move to another state where they decide to get divorced; they discover, however, that they have relocated to a hostile forum state whose courts will not entertain an action for divorce or dissolution of a same-sex union. They may want out of their relationship for any number of reasons, including: a desire to be free of the legal obligations attendant to the status of the relationship; a desire to contract a marriage in the forum or elsewhere, as in the instance of a bisexual person who falls in love with a person of the opposite sex whom he or she wants to marry; or one partner

1. *See infra* Part II.

2. 317 U.S. 287 (1942).

3. *Id.*

4. 401 U.S. 371 (1971).

5. *Id.*

6. 341 U.S. 609 (1951).

7. *Id.* at 611 (“[A state cannot escape its] constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent.”); *See* U.S. CONST. art. IV, § 1.

8. *Hughes*, 341 U.S. at 613.

9. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7 (2006)).

wants to contract another same-sex union in a state that allows this. The consequences are significant if partners in a same-sex relationship are unable to divorce or otherwise dissolve their union. Remarrying without first severing the same-sex relationship could subject the partners to charges of bigamy in the state where they first contracted their relationship, as well as other states recognize that relationship, and adultery if such laws are enforced. It can be argued that anti-gay hostility could increase the likelihood of selective enforcement of these laws against gay and lesbian partners in some jurisdictions. In any event, divorce and dissolution offer the only effective prospects for clearing the legal decks for a legally uncomplicated future union.

In two recent cases from Indiana and Rhode Island, same-sex partners whose relationships¹⁰ were solemnized in certain states were unable to dissolve these relationships elsewhere.¹¹ This Article posits that those refusals, irrespective of the courts' proffered bases, are unconstitutional. This argument is based on the doctrinal trifecta anchored by the law of *Williams*, *Boddie*, and *Hughes*. Each run of this trifecta is a necessary, but in and of itself insufficient, part of this argument.¹² I propose, however, that taken together these three constitutional doctrinal strands knit together to create an obligation to dissolve same-sex unions contracted in other states. This is true despite forum non-recognition policies and irrespective of whether they are based on public policy, or state constitutional or statutory restraints.¹³ Further, DOMA does not affect this obligation.

10. See the useful taxonomy suggested by Hillel Y. Levin in his article contained in this publication. Hillel Y. Levin, *Resolving Interstate Conflicts Over Marriage, Marriage-Like and Marriage-Lite Relationships*, 41 CAL. W. INT'L L.J. 93 (2010).

11. Order on Petition for Dissolution of Marriage, *In re the Marriage of Tara Ranzy and Larissa Chism*, No. 49D12-0903-DR-014654 (Ind. Super. Ct., Sept. 4, 2009) [hereinafter *Ranzy and Chism*]; *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007). Cf. *C.M. v. C.C.*, 867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008) (granting the divorce of a Massachusetts same-sex couple).

12. I later waffle a bit on whether, in fact, I have to win all three races in my discussion following *Boddie*. See *infra* Part III.C.

13. See L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 42-44 (1998).

II. RECENT CASES: BACKGROUND OF THE PROBLEM

Unsuccessful efforts to secure divorce or dissolution of same-sex relationships legalized in other states have failed on questions of jurisdiction—either for want of express statutory authorization, an express bar in a state constitution, or statutes that make such relationships void or legally unrecognizable. For example, a recent Texas case, *In re the Matter of Marriage of J.B and H.B.*,¹⁴ held that “Texas courts have no subject-matter jurisdiction to adjudicate a divorce petition in the context of a same-sex marriage.”¹⁵ As a result, partners in a same-sex marriage celebrated in Massachusetts were denied a Texas divorce. Similarly, an Indiana Superior Court considered a request for the dissolution of a same-sex marriage by parties who were legally married in Toronto, Canada, where same-sex marriage was legally sanctioned.¹⁶ The ground asserted for the dissolution was “an irretrievable breakdown in the marriage.”¹⁷ There were no children to consider, and no real or personal property nor debts to divide.¹⁸ The court denied the divorce because the parties were lesbians.¹⁹ It concluded that in the absence of a statute, “which confers upon the courts the authority to dissolve same sex marriages in the same manner as marriages between a man and a woman,” that it lacked “subject matter jurisdiction.”²⁰ The court further noted, in a previous case, that under Indiana law “same-gender marriage is void in Indiana even if it was valid in the place in which it was solemnized.”²¹ Indiana has a state variant of DOMA that prohibits homosexual marriage: “Sec. 1. (a) Only a female may marry a male. Only a male may marry a female. (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the

14. No. 05-09-01170-CV, 2010 WL 3399074 (Tex. App. Aug. 31, 2010).

15. *Id.* at *9.

16. Ranzy and Chism, *supra* note 11.

17. *Id.* at 2.

18. *Id.*

19. *Id.* at 2-3.

20. *Id.*

21. *Morrison v. Sadler*, 821 N.E.2d 15, 19 n.2 (Ind. Ct. App., 2005) (citing IND. CODE ANN. § 31-11-1-1(b) (West 2008)) (rejecting a state constitutional attack on Indiana’s variant of DOMA).

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place where it is solemnized.”²² In weighing the policy behind the statute, the court notes that:

[a]s the State of Indiana has chosen to prohibit same sex marriage as a matter of public policy, it might logically follow that Indiana would have a policy interest in granting same sex divorce. However, the General Assembly has not enacted a statute which confers upon the courts the authority to dissolve same sex marriages in the same manner as marriages between a man and a woman.²³

Similarly, in the Connecticut case *Rosengarten v. Downes*,²⁴ the parties sought to dissolve a civil union contracted and legally recognized in Vermont.²⁵ The Connecticut Supreme Court concluded that it lacked subject matter jurisdiction and affirmed a lower court’s dismissal of the action.²⁶

III. RUNS OF THE DOCTRINAL TRIFECTA

The three doctrinal strands that knit together to anchor the right to dissolve same-sex relationships recognized out-of-state, but not recognized by the forum where divorce or dissolution is sought, are separated by time and pedigree. This doubtlessly inhibits recognition of the right argued for here. For example, casebook editors question whether the full faith and credit principle of *Hughes* requires state courts to entertain domiciliaries’ petitions for dissolution of these relationships.²⁷ The short answer is that *Hughes* alone cannot do the doctrinal heavy lifting required because divorce and dissolution of same-sex relationships are insufficiently analogous to wrongful death suits, which was the subject of *Hughes*.²⁸ However, what will be apparent from the ensuing analysis is that, in separate doctrinal strands

22. IND. CODE § 31-11-1-1 (West 2008).

23. Ranzy and Chism, *supra* note 11, at 2-3.

24. 802 A.2d 170 (Conn. App. Ct. 2002), *appeal dismissed*, 806 A.2d 1066 (Conn. 2002).

25. *Id.* at 172.

26. *Id.* at 184.

27. *E.g.*, DAVID P. CURRIE, ET AL., CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 618 (8th ed. West 2010).

28. *See Hughes v. Fetter*, 341 U.S. 609-10 (1951).

(the runs of the trifecta), the United States Supreme Court has hollowed out the marital union to the point where, for purposes of divorce, marriages and same-sex unions recognized by a state must stand on an equal footing for full faith and credit purposes as defined by *Hughes*. When all three races of the trifecta are run and analyzed, the legal implications of *Williams*, *Boddie*, and *Hughes* are clear—divorce or dissolution of a same-sex relationship cannot be denied. As will be explored below, this right is limited to issues of marital *status only*.²⁹ *Hughes* preserves separate issues governed by local law for the forum. Ancillary issues of the relationship that can be resolved separate and apart from the status issue—such as alimony, property, and child custody—may be denied jurisdiction.³⁰

A. *Williams v. North Carolina*

The first run of the doctrinal trifecta was accomplished around fifty years ago, beginning with the constitutional emergence of the concept of *ex parte* divorce in *Williams*.³¹ *Williams* began a legal deconstruction of marriage in earnest. Marriage previously existed as a congeries of interests including, but not limited to, legally sanctioned sexual congress, financial support obligations that included spouses and children, property interests, and special interests in the nurture and upbringing of children. As a result of *Williams*, marriage began to disentangle into separable elements.³² An important aspect of that disentanglement was the exclusivity of the relationship fortified by restrictions on contracting another such relationship until the first was legally dissolved.³³ Other interests also disaggregated on the strength of the *Williams* principle. For example, in *Estin v. Estin*³⁴ the Court held that a New York award for maintenance and support survived a Nevada *ex parte* divorce.³⁵ *Vanderbilt v. Vanderbilt*³⁶

29. Marital Status is “[the] condition of being single, married, legally separated, divorced, or widowed.” BLACK’S LAW DICTIONARY 1054 (9th ed. 2004).

30. *See infra* Part III.C.

31. *Williams v. North Carolina*, 317 U.S. 287 (1942).

32. *Id.* at 298-99.

33. *See id.* at 300.

34. 334 U.S. 541 (1948).

35. *Id.* at 546 (holding an *ex parte* divorce decree does not change “every legal incidence of the marriage relationship.”).

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arguably went further by sustaining a New York alimony award to a wife even though the husband previously procured an *ex parte* divorce in Nevada.³⁷ *May v. Anderson*³⁸ extended the deconstruction of marriage by disaggregating child custody from divorce.³⁹ The effect of these various steps was to legally hollow out divorce to the point where, at its minimum, it only concerns status—the persistence *vel non* of a state-recognized status (i.e., whether one is single, married, divorced, or widowed). Laws preclude individuals from entering into another relationship until the preceding one is dissolved—a restriction that is reinforced by laws against adultery⁴⁰ and bigamy.⁴¹

An important contribution to the *Williams* run is provided by *Lawrence v. Texas*,⁴² which invalidated state regulation of homosexual conduct.⁴³ *Lawrence*, however, affected more than just the rights of homosexual persons. It fundamentally undermined reliance on morality as a predicate for limiting lawful sexual activity to marriage.⁴⁴ Justice Marshall explained the pre-*Lawrence* state of the law in his opinion for the Court in *Zablocki v. Redhail*⁴⁵: marriage is “the only relationship in which the State of Wisconsin allows sexual

36. 354 U.S. 416 (1957).

37. *Id.* at 418-19.

38. 345 U.S. 528 (1953).

39. *Id.* at 528-29.

40. *See, e.g.*, GA. CODE ANN. § 16-6-19 (2007) (“A married person commits the offense of adultery when he voluntarily has sexual intercourse with a person other than his spouse . . .”).

41. *See, e.g.*, GA. CODE ANN. § 16-6-20(a) (2007) (“A person commits the offense of bigamy when he, being married and knowing that his lawful spouse is living, marries another person or carries on a bigamous cohabitation with another person.”).

42. 539 U.S. 558 (2003).

43. *Id.* at 579 (2003) (holding that a Texas statute, which made it a crime for two persons of the same sex to engage in certain intimate sexual conduct, was unconstitutional).

44. *Id.* at 589-90 (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.”).

45. 434 U.S. 374 (1978).

relations legally to take place.”⁴⁶ That all changed with the decision in *Lawrence*. The validation of non-marital sexual relations by homosexuals was similarly extended to consenting heterosexuals, so long as minors, coercion, commercialization, and public indecency are not involved.⁴⁷

The impact of *Lawrence* on marriage-related laws, such as adultery and bigamy laws remains unclear. Indeed, Justice Kennedy’s majority opinion in *Lawrence* expressly disclaimed any involvement in marriage matters—“[*Lawrence*] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁴⁸

A facile reading of Justice Kennedy’s words might suggest that *Lawrence* leaves same-sex marriages and similar relationships untouched. However, a close reading of Justice Kennedy’s disclaimer, in fact, seems narrowly focused on *entry into relationships*; i.e., states will not be forced to accommodate same-sex marriages or their cognates by allowing them to occur when they do not wish to do so. *Lawrence* says nothing about divorce or dissolution of same-sex relationships that already exist.⁴⁹

If I am correct, the impact of *Lawrence* on marriage is profound because it severed the link between sexual morality and marriage. It effectively ended the hegemony that marriage existed as a privileged legal sanctuary for engaging in sexual relations,⁵⁰ and deconstructed the state regulation of sexual acts on moral grounds. Justice Scalia’s hyperbolic assessment of the impact of *Lawrence* reinforces this conclusion: “[State] laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*’ validation of laws based on moral choices.”⁵¹ One need not concede all of the

46. *Id.* at 386 (1978).

47. *Lawrence*, 539 U.S. at 578 (“[*Lawrence*] does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”).

48. *Id.*

49. *See id.*

50. *See Zablocki*, 434 U.S. at 386 (“[Marriage is] the only relationship in which the State of Wisconsin allows sexual relations legally to take place.”).

51. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (footnote omitted).

implications suggested by Justice Scalia in order to agree with him that morality as a basis for regulating sexual conduct ended with the decision in *Lawrence*, and that fornication laws applicable to adults are no longer constitutionally valid.⁵² The marriage hegemony over sex has ended.

Laws aimed at protecting the institution of marriage, like those proscribing adultery and bigamy, may survive *Lawrence*. However, I will argue below that this only adds force to the argument that states may not refuse to dissolve same-sex relationships on a basis comparable to those wishing to escape heterosexual marriages.

The cumulative impact of these post-*Williams* cases was that aspects of a marriage other than status could be resolved separate and apart from the status issue. Once the jurisdictional exclusivity of the state of marital domicile ended, and the so-called suitcase divorce legally legitimized, divorce could emerge as a minimalist change of status—a reversion to an unmarried state with resolution of issues around money, property, and offspring deferrable to another time in potentially separate proceedings.

B. *Boddie v. Connecticut*

Although conventionally viewed as a “right to judicial process” or “court access” case,⁵³ *Boddie* cannot be understood apart from its core issue—marriage and divorce.⁵⁴ This legal nub is derived from a congeries of substantive due process and equal protection interests that comprise the right of personal, associational, sexual, marital, and family privacy; a number of cases define such rights.⁵⁵ *Boddie*

52. See L. Lynn Hogue, *Romer Revisited or ‘The Devil in the Details’: Is Georgia’s Marriage Amendment Constitutionally Defective?*, 7 FLA. COASTAL L. REV. 255, 261 n.48 (2005) (stating that *Lawrence* recognized the right of adults to engage in a range of sexual activity outside of marriage.).

53. See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLITICS 881-84 (2d ed. 2002); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 674-76 (7th ed. 2000).

54. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

55. See, e.g., *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833 (1992) (upholding *Roe*’s essential holding recognizing a woman’s right to choose an abortion before fetal viability); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a state criminal law prohibiting abortions at any stage of pregnancy except to save the life of the mother is unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 (1965)

involved a challenge by indigent welfare recipients who sought to file divorce actions, but were unable to pay the required sixty dollars in court fees and costs for service of process.⁵⁶ Justice Harlan wrote for the majority and concluded that because of the State's "monopolization of the means for legally dissolving [the marriage] relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages."⁵⁷ Although Justice Harlan's due process rationale appears to be narrowly focused on financial barriers to court access, the postulates he identified in support of his claim are, as will be seen immediately below, equally applicable to those in legally sanctioned same-sex relationships who seek dissolution of those relationships in a hostile forum.

First, Justice Harlan notes that claims asserted by the appellants were "akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes."⁵⁸ Hence, the applicable principles were those stated "in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum."⁵⁹ Under one of the settled principles "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."⁶⁰ Justice Harlan signaled out two factors to account for the particular application of due process in this context: at issue is "the adjustment of a fundamental human relationship" and "[t]he requirement that these appellants resort to the judicial process is entirely a state-created matter."⁶¹

Obviously, parties in a same-sex marriage or marriage analogue entered into in another state are in much the same situation as the indigents in *Boddie* who were trapped in a marriage by poverty. These

(holding that a state law forbidding the use of contraceptives is unconstitutional because it invades on marital people's rights to privacy).

56. *Boddie*, 401 U.S. at 372.

57. *Id.* at 374.

58. *Id.* at 376.

59. *Id.* at 377.

60. *Id.*

61. *Id.* at 383.

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parties seek divorce or dissolution from the only entity that can grant it. Like the parties in *Boddie*, they meet all the requisites for divorce, except one—the filing fee in the instance of *Boddie*, and an acknowledgment of jurisdiction in the instance of same-sex marriages entered into in another state. Cases of legal parity such as these, where access to justice is denied to claimants from the only legal forum available to them, raise similar due process concerns.⁶²

The Supreme Court has refused to expand *Boddie* into a broad doctrine of constitutional limits on financial barriers to justice as an elaboration of due process or equal protection rights.⁶³ Nonetheless, the Court carefully preserves *Boddie*'s principle that a state cannot impose barriers to divorce or dissolution of state-sanctioned relationships that only a state can dissolve. In distinguishing divorce from other cases in which the Court upheld court fees against constitutional challenges, the Court has adhered to the view that marriage and divorce involve constitutionally distinct, fundamental interests. For example, in *United States v. Kras*,⁶⁴ which involved a challenge to a fifty-dollar fee required to secure discharge in bankruptcy,⁶⁵ the Court distinguished *Boddie* by holding that interest in discharging debt in bankruptcy “[did] not rise to the same constitutional level” as the interest in establishing or dissolving a marriage.⁶⁶

In fact, the Court has singled out family law and domestic relations cases as a distinguishable subset that must be judged by a

62. No argument is put forth here that divorce or dissolution of a prior legally sanctioned relationship is a fundamental right, such as marriage itself. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Logically, if the state is limited in imposing barriers to marriage because of marriage's fundamental nature, then it would seem that capricious refusals of divorce or dissolution (as in *Boddie* or *Zablocki*), which impose barriers to remarriage, would be problematic. Therefore, I need not argue that divorce itself is in any way fundamental or a correlate to marriage in that way.

63. *United States v. Kras*, 409 U.S. 434, 441-46 (1973). As this article was being prepared a lower federal court in California held marriage to be a fundamental right. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991-95 (N.D. Cal. 2010). Should this ruling be upheld on appeal, a right of same-sex persons to divorce would rest on an alternative and more constitutionally robust foundation than is argued here.

64. 409 U.S. 434 (1973).

65. *Id.* at 434.

66. *Id.* at 445.

stricter standard of review because of the fundamental character of the interest involved.⁶⁷ Therefore, refusals by the states to divorce same-sex couples or to dissolve their relationships cannot survive heightened scrutiny.

An important case that preserved and reemphasized *Boddie*'s principle is *M.L.B. v. S.L.J.*,⁶⁸ which held that a state could not require a trial record preparation fee as a predicate to an appeal involving termination of a child-custody award.⁶⁹ Justice Ginsburg placed *M.L.B.* within a spectrum of cases representing that the special status of marriage and divorce "reflect both equal protection and due process concerns."⁷⁰ In her majority opinion for the Court, she stated:

[T]ellingly, the Court has consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships. In that domain, to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion.⁷¹

M.L.B. provided a safe harbor for domestic relations cases, including divorce cases, for which state restrictions face a more exacting standard of review than mere rationality.⁷² *Boddie* is unique because it concerned "the special nature of the marital relationship and its concomitant associational interests."⁷³

Note that the constitutional obligation for which I contend is limited to cases in which the parties seeking divorce or dissolution otherwise comply with all other state-imposed predicates for divorce, such as residence and fee requirements, unless they meet *Boddie*'s indigency standard. Therefore, these cases are like cases of

67. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 104-05 (1996).

68. 519 U.S. 102 (1996).

69. *Id.* at 119-20, 128.

70. *Id.* at 130 ("[T]he Court's decisions concerning access to judicial processes, commencing with *Griffin* [*v. Illinois*, 351 U.S. 12 (1956),] and running through *Mayer* [*v. City of Chi.*, 404 U.S. 189 (1971)], reflect both equal protection and due process concerns.").

71. *Id.* at 116.

72. *Id.* at 116-17. See also *United States v. Kras*, 409 U.S. 434 (1973).

73. *Ortwein v. Schwab*, 410 U.S. 656, 658 (1973). See also *Kras*, 409 U.S. at 441-42.

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heterosexual divorce petitioners in the forum, but the state still refuses to take jurisdiction.

Relief from this circumstance comes from the third run of my doctrinal trifecta—the Full Faith and Credit Clause—as it was interpreted and applied in *Hughes*.⁷⁴

C. *Hughes v. Fetter*

I begin this subsection on a personal note. One person, whose views I respect, who heard an earlier version of this paper, suggested that my case could perhaps be made even better without resort to *Hughes*. Certainly, *Hughes* has its detractors and is not cited often. However, four Supreme Court Justices agreed with Justice Black in *Hughes*, so I believe it worthy of serious attention. Thus, I preserve this piece of my analysis, both because I believe it strengthens my argument and, after teaching *Hughes* in my Conflict of Laws classes for over twenty five years, I have come to believe the case is more than merely a sport in the law. Instead, I believe it represents a fundamental principle of full faith and credit jurisprudence that has unique application to this problem.

Hughes is a minimalist case—sparse in both pedigree and progeny. Its sparse pedigree is evident in the fact that it is not based on the text, history, structure, or practice of the Full Faith and Credit Clause, but rather on what Justice Black called “the national policy” of the clause.⁷⁵ In *Hughes*, Justice Black described a legal world created by the Full Faith and Credit Clause in which states have a mutual “obligation to enforce the rights and duties validly created under the laws of other states.”⁷⁶ Elsewhere, he described this obligation as “the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states.”⁷⁷

74. *Hughes v. Fetter*, 341 U.S. 609 (1951).

75. *Id.* at 613.

76. *Id.* at 611.

77. *Id.* at 612. Justice Black traces this principle to *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943), which stated that the Full Faith and Credit Clause “altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the

The Court in *Hughes* held that a Wisconsin statutory policy disallowing wrongful death causes of action brought under another state's laws was "forbidden by the national policy of the Full Faith and Credit Clause."⁷⁸ Wisconsin breached its obligation by closing its courts to causes of action for wrongful death based on the analogous laws of sister states.⁷⁹ Wisconsin regulated jurisdiction by confining it to actions "brought for a *death caused in this state*."⁸⁰ The trial court in *Hughes* dismissed the plaintiff's claim on the merits holding that the Wisconsin wrongful death statute established "a local public policy against Wisconsin's entertaining suits brought under the wrongful death acts of other states."⁸¹

A close reading of Justice Black's basis for invalidating the Wisconsin law demonstrates why that principle is equally applicable to actions for dissolution of same-sex unions in states hostile to such actions. First, Wisconsin had "no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum [was] regularly provided for cases of this nature, the exclusionary rule

judicial proceedings of the others, by making each an integral part of a single nation" *Hughes*, 341 U.S. at 612 n.9. Within the confines of the issue of whether workers' compensation awards are entitled to full faith and credit, *Magnolia's* constitutional status has long been clouded by a later decision, *Indus. Comm'n of Wis. v. McCartin*, 330 U.S. 622 (1947), which purported to distinguish, but did not overrule *Magnolia*. In *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), the Court revisited the issue of finality of workers' compensation awards, but was unable to muster five votes to overrule either *Magnolia* or *McCartin*. A dissenting opinion by Justice Rehnquist, joined by Justice Marshall, describes the Court's apparent confusion as follows: "[S]ix of us agree that [*McCartin* is] analytically indefensible. The remaining three Members of the Court concede that it 'rest[s] on questionable foundations.' Nevertheless, when the smoke clears, it is *Magnolia* rather than *McCartin* that the plurality suggests should be overruled." *Thomas*, 448 U.S. at 290 (Rehnquist, J., dissenting) (citations omitted). Two points are important here. First, *Magnolia* remains good law because the Court in *Thomas* was unwilling to disturb it. Second, *Magnolia*, on its facts, deals narrowly with full faith and credit to administrative tribunal awards (workers' compensation awards); so, Justice Black's citation of *Magnolia* for recognition of a "unifying principle embodied in the Full Faith and Credit Clause" applicable to statutorily created rights, as opposed to those based on judgments or judgment-like awards, retains all of its force. *Hughes*, 341 U.S. at 612.

78. *Hughes*, 341 U.S. at 613.

79. *Id.* at 612-13.

80. *Id.* at 610 n.2 (emphasis added).

81. *Id.* at 610.

extending only so far as to bar actions for death not caused locally.”⁸² The state’s “local public policy” was a constitutionally insufficient ground for refusing to hear the case.⁸³ Second, all the parties were residents of Wisconsin.⁸⁴ Finally, Justice Black made it clear that although states may not refuse jurisdiction over claims based on foreign law in violation of local public policy, the forum may nonetheless apply its own substantive law to other issues in the case.⁸⁵ As applied to an action for dissolution of a same-sex union not recognized by the forum, this would mean that there is a constitutional obligation to provide for dissolution of the relationship on the same basis that divorce is provided for married couples. However, there is no obligation to resolve collateral issues concerning property, support, or child custody issues.⁸⁶ It is thus my contention that the Constitution only trumps non-recognition laws to the extent that they deny access to divorce or dissolution for individuals in same-sex marriages, or analogous relationships, that were legally created by foreign law.

82. *Id.* at 612 (footnotes omitted).

83. *Id.* at 612-13.

84. *Id.* at 613. Residence of at least one party is routinely required of parties seeking a divorce. *See, e.g.*, CAL. FAM. CODE § 2320 (LexisNexis 2006) (“A judgment of dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition.”); FLA. STAT. § 61.021 (2009) (“To obtain a dissolution of marriage, one of the parties to the marriage must reside 6 months in the state before the filing of the petition.”); N.C. GEN. STAT. § 50-8 (2009) (“The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint . . .”).

85. *Id.* at 612 n.10. “The present case is not one where Wisconsin, having entertained appellant’s lawsuit, chose to apply its own instead of Illinois’ statute to measure the substantive rights involved.” *Id.*

86. Gillian Metzger offers an illustration:

Nor is it difficult to envision instances when an individual might sue to enforce a judgment that involves a same-sex marriage—for example, a judgment that an insurer is liable to cover the costs of medical procedures under a health insurance policy covering spouses. DOMA’s Section 2 clearly allows states to refuse to recognize judgments of this sort . . .

Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1534-35 (2007).

All states and the District of Columbia allow for divorce.⁸⁷ State laws may impose restrictions on the availability of divorce by determining the grounds for divorce and setting residence requirements, even stringent and exacting ones as in *Sosna v. Iowa*,⁸⁸ which upheld a one-year residency requirement for divorce.⁸⁹ However, if same-sex petitioners satisfy these prerequisites for divorce, then, under *Hughes*, the Constitution compels the dissolution of an analogous relationship.

It is important to recognize that *Hughes*, by requiring the exercise of jurisdiction where state laws exhibit closely analogical policies, did not suggest an exception to the ordinary rule that the Full Faith and Credit Clause applies to judgments and not statutes.⁹⁰ Nor did *Hughes* require recognition of a foreign statute, at least not for any significant purpose. Consultation of foreign law is limited to determining whether the parties were legally joined in a union under another state's law. The question again is parity. Is this couple otherwise like couples married in other states in conformity with their law? What *Hughes* did mandate was respect for a policy common to both states of divorce or dissolution of marriage-like or marriage-lite unions on the same basis accorded to marriages under the "the national policy of the Full Faith and Credit Clause."⁹¹ Non-recognition with respect to foreign

87. See Legal Information Institute, *Divorce Laws*, CORNELL U. L. SCH., http://topics.law.cornell.edu/wex/table_divorce (last visited Aug. 11, 2010) (listing the state divorce statutes of all fifty states, the District of Columbia, and Puerto Rico).

88. 419 U.S. 393 (1975).

89. *Id.* at 406-08.

90. Compare *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532 (1935), and *Pac. Employers Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 504-05 (1939) (holding preclusive jurisdiction provided in workers' compensation statutes was not entitled to full faith and credit), with *Fauntleroy v. Lum*, 210 U.S. 230, 237-38 (1908) (ruling a conclusive judgment in Missouri was due full faith and credit in Mississippi).

91. Justice Black enumerated the circumstances in *Hughes* that forbid Wisconsin, the hostile forum in that case, from denying jurisdiction to the wrongful death action that occurred in Illinois. *Hughes v. Fetter*, 341 U.S. 609, 612-13 (1951). There was (1) no antagonism or hostility to this type of cause of action; (2) no claim that this is an exercise of the doctrine of forum non conveniens (nor any possibility that such a claim could be credibly asserted under the facts of the case); (3) no case involving nonresident parties or a cause of action with which the state lacked any connection (no disinterested forum); and, (4) no reasonable prospect that the parties

marriage judgments, or even foreign marriage, marriage-like, or marriage-lite statutes, is not at issue.⁹²

IV. FATHOMING DOMA'S ROLE

This phase of my analysis assumes the validity of DOMA.⁹³ As this article was being prepared for publication, a federal district court in Massachusetts concluded that DOMA violated equal protection principles embodied in the Fifth Amendment's Due Process Clause and was therefore unconstitutional.⁹⁴ Whether appellate courts will accept this reasoning remains to be seen. If DOMA is constitutionally infirm,⁹⁵ then of course it plays no role. Gillian Metzger, a constitutional defender, concluded that if yet-to-be recognized constitutional objections relating to same-sex marriage⁹⁶ are properly

could resolve their dispute elsewhere. *Id.* These triggering factors are also present in actions by same-sex partners who seek divorce in a hostile forum. Jurisdictional denials in such cases should likewise be "forbidden by the national policy of the Full Faith and Credit Clause." *Id.* at 613.

92. See Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 475 n.48 (2005) (citations omitted).

93. 28 U.S.C. § 1738C (2006) ("No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.")

94. *Gill v. Office of Pers. Mgmt.*, 699 F.Supp.2d 374 (D. Mass. 2010).

95. See Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604 (1997) (arguing that DOMA is unconstitutional); Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions After Lawrence v. Texas*, 65 OHIO ST. L. J. 1265 (2004); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L. REV. 1965 (1997). Chabora's conclusions are challenged. See Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 377-79 (1998). Kramer's position has also been contested. See Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 153-54, 167-71 (1998) (disputing Kramer's public policy argument); Whitten, *supra*, at 372-75 (evaluating Kramer's historical references). Chabora's conclusions are challenged. See Whitten, *supra*, at 377-79.

96. "The fact that same-sex marriage is involved may be an unconstitutional

bracketed then “DOMA’s Section 2 appears to fall within congressional power.”⁹⁷

DOMA purports to relieve states and similar entities from any obligation to recognize any form of legalization of a same-sex relationship (marriage, marriage-like, or marriage-lite) from another state or similar entity.⁹⁸ States have also adopted anti-recognition statutes.⁹⁹ The enforcement provision in the Full Faith and Credit Clause¹⁰⁰ is limited textually to what I would term micro-issues of enforcement.¹⁰¹ Congress is not obligated to further enforce the clause, although it can and has done so.¹⁰² However, Congress cannot abrogate what Justice Black called, “the national policy of the Full

basis for denying a judgment’s enforcement, either because it constitutes invidious discrimination against homosexuals or because it violates the fundamental right to marry.” Metzger, *supra* note 86, at 1536.

97. *Id.*

98. 28 U.S.C. § 1738C (2006).

99. *See, e.g.*, Georgia’s anti-recognition statute which provides:

(a) It is declared to be the policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such marriage.

GA. CODE. ANN. § 19-3-3.1 (2007). Furthermore, Georgia law provides: “No marriage license shall be issued to persons of the same sex.” GA. CODE. ANN. § 19-3-30(b)(1) (2007).

100. “Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.” U.S. CONST. art. IV, § 1.

101. What I refer to as the micro-issues of enforcement regarding the Full Faith and Credit Clause are treated extensively by Engdahl and Sachs. *See* David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L. J. 1584 (2009); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009).

102. Literature on the Full Faith and Credit Clause is voluminous. *See, e.g.*, Whitten, *supra* note 255.

Faith and Credit Clause”¹⁰³ (the meta-policy that informs the clause and controls its meaning and application beyond the micro-issues of enforcement).¹⁰⁴ What I refer to as micro-issues of enforcement derive from the clause’s textually prescribed role as a prima facie rule of evidence. Its meta-policy, as articulated in *Hughes*,¹⁰⁵ assures that parochial local policies do not facilely displace sparsely defined, analogous causes of action. What Justice Black recognized in *Hughes* is a self-enforcing meta-policy that states cannot avoid in instances where a closely analogous law, whose basic underlying policy is indistinguishable from forum policy, confronts the forum. This is the case whether the law concerns actions for wrongful death or actions for divorce or dissolution of a foreign union that would foreclose the possibility of otherwise lawful marriage.

V. CONCLUSION

A gradual evolution in constitutional law has produced a doctrinal trifecta anchored by the law of three cases: *Williams*, which deconstructed marriage;¹⁰⁶ *Boddie*, which recognized a right to dissolve legal relationships constructed by states and which can only be dissolved by state action for those, particularly residents, who otherwise meet the requirements for divorce (assuming they sought divorce from a traditional marriage);¹⁰⁷ and *Hughes*, which required states to open their courts to juridical analogues from other states by force of the “national policy of the Full Faith and Credit Clause.”¹⁰⁸

103. *Hughes v. Fetter*, 341 U.S. 609, 613 (1951).

104. Cf. Paige E. Chabora, *Congress’ Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 621 (1997) (contending that a one-way ratchet operates with respect to the Full Faith and Credit Clause to limit Congress’s power).

105. “This clause ‘altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation’” *Hughes*, 341 U.S. at 612 n.9 (quoting *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943)).

106. *Williams v. State of North Carolina*, 317 U.S. 287 (1942).

107. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

108. U.S. CONST. art. IV, § 1; *Hughes*, 341 U.S. at 611 (a state cannot escape its “constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts

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Together they provide a constitutional basis to require states, even in the face of the Federal DOMA or state anti-recognition statutes and policies, to grant dissolution of legally contracted, foreign same-sex relationships.

otherwise competent.”).