

Bargaining in the Shadow of the “Law?” — The Case of Same-Sex Divorce

Jeremy Feigenbaum*

CONTENTS

I.	Introduction	245
II.	Bargaining in the Shadow of the Law	247
III.	The Background Rules of Same-Sex Marriage and Divorce	251
IV.	How Might Background Rules Affect Bargaining? Two Narratives	254
	A. States A/B: State and Federal Equality of Endowments	254
	B. State C: Bargaining Without Law — The Impact of No Divorce Rules	257
V.	Conclusion: Bargaining in the Shadow of the Supreme Court	262

I. INTRODUCTION

In November 2003, in a 4-3 decision, the Massachusetts Supreme Judicial Court held that Hillary and Julie Goodridge, a same-sex couple, were entitled to marry.¹ In 2004, they were then among the first same-sex couples to marry in the United States.² But in 2006,

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1. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

2. Lynne Marie Kohm, *What's the Harm to Women and Children? A Prospective Analysis*, in *WHAT'S THE HARM: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY?* 79, 79 (Lynn D. Wardle ed., 2008).

the two announced their separation, which ultimately ended in divorce.³ Commentators debated the meaning of their divorce: One LGBT advocate stated that this was proof “[o]ur marriages are not unlike everyone else’s marriages, which is that they are both precious and fragile,” while same-sex marriage opponents, alluding to their claim that same-sex relationships are less likely to last than heterosexual ones, declared that this “demonstrates again why we are so concerned for children in inherently unstable relationships.”⁴

For Hillary and Julie Goodridge, however, what surely mattered more than the statement their divorce made was their ability to divorce at all — and what it would mean for their daughter. An LGBT advocate noted, “[i]t is also good . . . they have the protections of wedlock as now they and their daughter will have all of the security and clear rules that married couples benefit from when they do divorce.”⁵

That sense of security is a recent phenomenon. In 1994, the *New York Times* highlighted a same-sex couple in Missouri and described the couple’s attempts to divorce as “loaded with ambiguities and unknowns, conducted in a court system that lawyers and clients say is hostile at worst and indifferent at best.”⁶ Yet while detailing these couples’ rights and struggles to divorce, articles like this one failed to offer meaningful insights into the substantive outcomes these couples were achieving in their divorces. The press did not write about how the Missouri couple decided who should keep the marital home or how Hillary and Julie handled custody.

In 1979, Professors Robert H. Mnookin and Lewis Kornhauser authored a seminal work on the relationship between divorce law and the actual divorce experience of American couples.⁷ Their central insight was that family and divorce laws do not impose outcomes “from above” on divorcing couples. Rather, the law creates the “framework” within which a divorcing couple will determine their post-divorce rights and responsibilities. While family law rules do not determine which spouse will keep the home or which deserves custody of the children, laws influence the parties’ expectations regarding what

3. *Id.*

4. *Gay “Marriage” First Couple Splits Up in Massachusetts*, WASH. TIMES, July 21, 2006, <http://www.washingtontimes.com/news/2006/jul/21/20060721-111920-1539r>.

5. *Id.* (internal quotation marks omitted).

6. Kirk Johnson, *Gay Divorce: Few Markers in This Realm*, N.Y. TIMES, Aug. 12, 1994, <http://www.nytimes.com/1994/08/12/us/gay-divorce-few-markers-in-this-realm.html>.

7. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

they will win if they fall back on their alternative of going to court instead of relying on negotiation. Those background rules — legal “entitlements” — affect how such parties should bargain with one another. According to Mnookin and Kornhauser’s “Bargaining in the Shadow of the Law” model, the law does not determine the outcome, but it still impacts the result reached.

This useful insight has not been applied to the problem of same-sex divorce, which poses especially interesting questions under the “Bargaining in the Shadow of the Law” model. The law governing same-sex marriage and divorce is unclear, ever changing, and widely divergent from state to state.⁸ The conventional story about same-sex couples and their families, such as the story told about heterosexual divorces before 1979, focuses solely on the relevant laws. There is no discussion of the role that these laws play as a “framework.” The literature focuses on such questions as: How do state laws treat same-sex couples? What rights should same-sex couples have? This Note focuses on a different issue: What *effects* do these state laws have on the actual experiences of same-sex couples when they negotiate their divorces?

This Note proceeds in four parts. First, it condenses key insights gleaned from Mnookin and Kornhauser’s work. Second, it summarizes the different legal regimes states might develop regarding same-sex divorce. Third, this Note explains how bargaining should differ for divorcing same-sex couples in different states on account of the endowments promoted by each regime. Fourth, it describes how the Supreme Court’s decision in *United States v. Windsor*⁹ will affect bargaining between divorcing same-sex couples, and how a decision recognizing that same-sex couples have a constitutional right to marry might further impact their bargaining.

II. BARGAINING IN THE SHADOW OF THE LAW

Mnookin and Kornhauser offer two crucial insights regarding the relationship between family law rules and divorce outcomes. First, the authors demonstrate that family law rules rarely impose the final settlement outcomes that divorcing couples reach. Second, the authors contend that, nevertheless, family law still plays a major role in shaping the agreements that parties reach themselves. Even if the

8. As of February 12, 2015, thirty-seven states and Washington, D.C., allow same-sex couples to marry. *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last visited Feb. 12, 2015).

9. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

family law rules do not demand specific outcomes, they shape the range of outcomes that divorcing couples are willing to accept in their private negotiations.

Indeed, Mnookin and Kornhauser reject the notion that divorce laws will determine the final settlements that divorcing couples reach (or, as they write, that laws will “impos[e] order from above”).¹⁰ The authors offer historical reasons for their conclusion: “Dramatic changes in divorce law during the past decade now permit a substantial degree of private ordering. The ‘no-fault revolution’ has made divorce largely a matter of private concern.”¹¹ The authors describe a limited judicial role that results: “divorcing couples resolve distributional questions concerning marital property, alimony, child support, and custody without bringing any contested issue to court for adjudication.”¹² Private bargains, rather than judicial decrees, resolve these issues.

When a couple has no children, the parties’ freedom to bargain is clear, even under states’ formal rules: “the law generally recognizes the power of the parties upon separation or divorce to make their own arrangements concerning marital property and alimony.”¹³ Formally, however, couples do not enjoy such discretion when they have minor children.¹⁴ Nevertheless, “evidence on how the legal system processes undisputed divorce cases involving minor children suggests that parents actually have broad powers to make their own deals. Typically, separation agreements are rubber stamped even in cases involving children.”¹⁵

Mnookin and Kornhauser attribute this to the difficulty that judges face in obtaining information when there is no dispute, as when both members of a couple seek approval of their settlement, and blame “the applicable legal standards [that] are extremely vague and give judges very little guidance as to what circumstances justify overriding a parental decision.”¹⁶ Moreover, since “the actual determination of what is in fact in a child’s best interest is ordinarily quite

10. Mnookin, *supra* note 7, at 950.

11. *Id.* at 953. Under no-fault divorce regimes, parties divorce when they believe doing so is appropriate; they do not have to prove to the state that divorce is justified. *Id.* at 953 & n.13. The decision to divorce becomes a private one (made by a couple or by either party acting unilaterally), and it no longer necessarily involves the state. *Id.* at 953.

12. *Id.* at 951.

13. *Id.* at 954.

14. *Id.*

15. *Id.* at 955.

16. *Id.* at 955–56.

indeterminate," parents will fashion settlements far more creatively than what a court might do in that situation, something the authors view as a virtue.¹⁷

Mnookin and Kornhauser show how private bargaining can override family law doctrine in multiple ways. For example, even as the formal legal rules impose different bodies of law for each issue in a divorce — including "marital property law," "alimony law," "child-support law," and "child-custody and visitation law"¹⁸ — the authors contend that "marital property, alimony, and child-support issues are all basically problems of money, and the distinctions among them become very blurred."¹⁹ For example, a father who is happy to support his children but despises his ex-wife might provide more in child support than alimony, even if that money helps the ex-wife too. Furthermore, given different "tax effects or differences in risk or time preferences of the parties," divorcing couples and lawyers can make arrangements that "make both spouses better off."²⁰ Even financial questions and custody debates are "inextricably linked," as parents may "exchange custodial rights and obligations for income" or "tie support duties to custodial prerogatives as a means of enforcing their rights without resort to court."²¹ The law might divide custody and different types of financial support, but when bargaining, private parties can fashion their agreements as a whole.

However, Mnookin and Kornhauser make a crucial second argument: they contend that legal rules do still have a role to play. Mnookin and Kornhauser do not seek to demonstrate the irrelevance of family law; rather, they believe that family law has an important influence, even if it does not play the traditionally understood role of imposing legal outcomes. Divorce law's role is in "providing a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities."²² Moreover, this idea of a framework remains powerful: "[t]he legal system affects *when* a divorce may occur, *how* a divorce must be procured, and *what* the consequences of divorce will be."²³

In imposing a framework in which negotiations occur, the legal regimes "governing alimony, child support, marital property, and

17. *Id.* at 957–58.

18. *Id.* at 959.

19. *Id.*

20. *Id.* at 963.

21. *Id.* at 964.

22. *Id.* at 950.

23. *Id.* at 951.

custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips — an endowment of sorts.”²⁴ While this still leaves much room for the parties to bargain — to try to reach agreements in which both divorcees would be better off — “neither spouse would ever consent to a division that left him or her worse off than if he or she insisted on going to court.”²⁵ By determining the parties’ “Best Alternative to a Negotiated Agreement” (“BATNA”),²⁶ the legal regime limits the range of options that divorcing couples will reach. The law may not determine which option they choose, but that hardly undermines the law’s relevance.

Ultimately, in developing a theory of negotiation that reflects these two considerations, the authors proceed to “identify five factors that seem to be important influences or determinants of the outcomes of bargaining”²⁷ They describe the following elements: (1) the preferences of the divorcing parents; (2) the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties’ attitudes toward risk; (4) transaction costs and the parties’ respective abilities to bear them; and (5) strategic behavior.²⁸

Factors (1) and (4) represent evidence of the limited role that legal rules play in divorce negotiations. Parents’ preferences — such as desires for more visitation time or for ownership of the home — do not directly result from legal rules. As Mnookin and Kornhauser note, the financial transaction costs of hiring negotiators and the emotional costs of the divorce are not the clear result of legal rules either. Finally, one theory of strategic behavior, the fifth factor, posits that negotiation strategies “center[] on the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, threat, and bluff”²⁹ If the “Strategic Model” of behavior is correct, then factor (5) also has little to do with legal rules.

24. *Id.* at 968.

25. *Id.* at 969.

26. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 2011).

27. Mnookin, *supra* note 7, at 966.

28. *Id.*

29. *Id.* at 973 (quoting Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638 (1976)).

By contrast, factors (2) and (3) represent evidence of the expansive role that legal rules still play in divorce. If legal endowments and uncertainty regarding the final outcome if the parties go to court impact parties' substantive negotiations, then the differences between the laws' treatment of opposite-sex and same-sex couples will impact if and how divorcing same-sex couples bargain. Further, another theory of strategic behavior suggests that “parties and their representatives [will] invoke rules, cite precedents, and engage in reasoned elaboration.”³⁰ If this “Norm-Centered Model” is correct, then ambiguities and conflicts inherent in the laws governing same-sex couples also affect factor (5).

III. THE BACKGROUND RULES OF SAME-SEX MARRIAGE AND DIVORCE

To understand the impact that an ambiguous, conflicting, and changing body of laws has on same-sex couples trying to bargain in its shadow, one must first know the rules. There are four approaches states might theoretically take. First, a state might legalize same-sex marriage and divorce. Second, a state might choose to ban same-sex marriage, but nevertheless recognize same-sex divorces for same-sex marriages performed elsewhere. Third, a state might ban same-sex marriage and divorce. Fourth, a state might legalize same-sex marriage, but ban same-sex divorce. However, given the rise of no-fault divorce, and the reality that no modern court would uphold a legal regime that prohibited divorcing,³¹ the fourth approach offers no more than an academic exercise. In practice, states have only followed the first three approaches.

At the time of this writing, thirty-seven states and Washington, D.C. authorize same-sex marriages and same-sex divorces.³² The first of these, Massachusetts, did so by court order in 2003.³³ In *Goodridge v. Department of Public Health*, the court determined that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”³⁴

30. *Id.* (citing Eisenberg, *supra* note 29, at 638–39).

31. *See generally* Boddie v. Connecticut, 401 U.S. 371 (1971) (finding that the U.S. Constitution's Due Process Clause prohibits a state from denying access to divorce courts for an indigent couple that cannot afford to pay the court fees).

32. *See* FREEDOM TO MARRY, *supra* note 8.

33. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

34. *Id.* at 969.

Admittedly, for a decade after *Goodridge*, same-sex and opposite-sex couples remained unequal for the purpose of marriage and divorce. Because the *Goodridge* majority had based its decision on the Massachusetts Constitution's equal protection guarantee, it had left federal law, including the Defense of Marriage Act ("DOMA"), in effect. But in 2013, the U.S. Supreme Court found that the part of DOMA defining marriage as a union between a man and a woman "violate[d] basic due process and equal protection principles" and thus invalidated that provision.³⁵

However, the other provision of DOMA, which was not at issue in *Windsor*, continues to empower states to reject the same-sex marriages validly performed in other states.³⁶ Despite that provision, many same-sex couples have moved to states that do not recognize their unions and have sought to initiate divorce proceedings. Some of these states recognized their divorces as valid. These states constitute the second type of regime, where same-sex marriage is banned, but divorce is nevertheless permitted.

Prior to its legalization of same-sex marriage in 2012,³⁷ Maryland was one such state. In *Port v. Cowan*,³⁸ the Court of Appeals decided that two female Maryland residents, who had married in California in 2008, were entitled to divorce. The court held, "Maryland courts will withhold recognition of a valid foreign marriage only if that marriage is 'repugnant' to State public policy. This threshold, a high bar, has not yet been met A valid out-of-state same-sex marriage should be treated by Maryland courts as worthy of divorce" ³⁹ While Maryland now recognizes same-sex marriages, other states adopted the *Port* approach. As recently as May 2014, a state court in Missouri granted a same-sex couple the right to divorce even as it left the state's ban on same-sex marriage unaltered.⁴⁰

35. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

36. 28 U.S.C. § 1738C (2012) ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other . . . 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.").

37. Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES (Nov. 7, 2012), <http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html>.

38. *Port v. Cowan*, 44 A.3d 970 (Md. 2012).

39. *Id.* at 982.

40. Andrew Denney, *Boone County Judge Grants Gay Couple a Divorce*, COLUMBIA DAILY TRIBUNE, May 4, 2014, http://www.columbiatribune.com/news/local/boone-county-judge-grants-gay-couple-a-divorce/article_67e474f6-d344-11e3-8ba6-10604b9f6eda.html.

But not every state that prohibits same-sex marriage has agreed that same-sex couples from other states should have the right to divorce. For example, prior to the recent Fourth Circuit decision to invalidate state prohibitions against same-sex marriage, Virginia refused to recognize same-sex relationships.⁴¹ In 2006, voters passed a constitutional amendment stating that “[o]nly a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.”⁴² In *Austin v. Austin*,⁴³ a Virginia Circuit Court decided that this amendment also barred courts from permitting same-sex divorce.⁴⁴ The judge refused to provide “[a]ny declaration about the status of the Vermont-created [same-sex] relationship between the parties”⁴⁵ Thus, courts in mini-DOMA states cannot follow Maryland’s example.⁴⁶ Same-sex couples have no recourse in their divorce courts.

These examples demonstrate the three approaches a state might take with respect to the issues of same-sex marriage and divorce:

	Same-Sex Marriages?	Same-Sex Divorces?
State A	Recognized	Recognized
State B	Not Recognized	Recognized
State C	Not Recognized	Not Recognized

In reality, even though three background regimes exist, there are only two different rules as they relate to divorcing couples’ bargaining. Functionally, the legal regimes under State A and State B should affect bargaining in the same manner — since the endowments they create are the same. Same-sex couples living in State B are treated just as opposite-sex couples for purposes of divorce law. This is what happens in family courts in State A regimes as well. As such, there are only two relevant situations in which to study bargaining: the situation common to States A and B, and the situation in State C.

41. See *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014) (invalidating Virginia’s mini-DOMA).

42. VA. CONST. art. I, § 15-A.

43. *Austin v. Austin*, 75 Va. Cir. 240 (Va. Cir. Ct. 2008).

44. *Id.* at *2–3.

45. *Id.* at *3.

46. Although the conflict-of-law problems posed by judicial decisions not to recognize same-sex unions performed in other states is beyond the scope of this Note, see Colleen McNichols Ramais, Note, *‘Til Death Do You Part . . . And This Time We Mean It*, 2010 U. ILL. L. REV. 1013 (2010), for an assessment of the relevant law.

IV. HOW MIGHT BACKGROUND RULES AFFECT BARGAINING? TWO NARRATIVES

In light of these background legal regimes, to what degree do same-sex couples actually Bargain in the Shadow of the Law? To answer that question, this Note will assess how both the bargaining endowments created by legal rules that indicate the particular allocation a court will impose (the second bargaining factor) and degree of uncertainty concerning the legal outcome if the parties go to court (the third) differ for same-sex couples *vis a vis* opposite-sex couples in States A/B and State C.

A. *States A/B: State and Federal Equality of Endowments*

According to a 2006 survey, “7,300 same-sex couples [in Massachusetts] have married and 45 have formally ended their union.”⁴⁷ Given that same-sex marriages are treated identically to opposite-sex marriages under state law, one would expect that legal endowments and legal uncertainty would operate in the same way for these couples as well. Accordingly, Mnookin and Kornhauser’s Bargaining in the Shadow of the Law model would apply just as effectively to a same-sex couple in Massachusetts as to an opposite-sex couple. Furthermore, after the U.S. Supreme Court invalidated the core provision of DOMA, these couples became entitled to the same federal rights as well.

Bargaining is likely to look the same for same-sex couples divorcing in Massachusetts as for similarly situated opposite-sex couples. After all, in *Goodridge*, the court listed those state rights that would now be given to same-sex couples. These rights included “equitable division of marital property” and “temporary and permanent alimony.”⁴⁸ The *Goodridge* court proceeded to highlight “[e]xclusive marital benefits that are not directly tied to property rights,” including “the application of predictable rules of child custody, visitation, [and] support”⁴⁹ Accordingly, the legal endowments remain exactly the same under state law for same-sex couples.

Courts have even extended a presumption of legitimacy to the children born to same-sex couples. In *Della Corte v. Ramirez*,⁵⁰ “Della Corte was artificially inseminated with the sperm of an anonymous donor approximately two months before Della Corte and Ramirez

47. Kohm, *supra* note 2, at 80 n.11 (internal quotation marks omitted).

48. 798 N.E.2d 941, 956 (Mass. 2003) (citations omitted).

49. *Id.*

50. 961 N.E.2d 601 (Mass. App. Ct. 2012).

were married. Ramirez was, however, involved in the insemination process and was an integral part of the couple’s decision to conceive.”⁵¹ In arguing that Ramirez was not entitled to joint custody, Della Corte relied on the “obvious fact that Ramirez is not, and could not be, the biological father of the child.”⁵² Nevertheless, the court found that Ramirez was entitled to joint custody. The court explained, “[w]e do not read ‘husband’ to exclude same-sex married couples, but determine that same-sex married partners are similarly situated to heterosexual couples in these circumstances.”⁵³ Accordingly, under state law, the endowments given to same-sex couples are the same as those afforded to opposite-sex couples, and the five factors of Mnookin and Kornhauser’s model remain applicable to same-sex couples’ bargaining.

Until 2013, federal law complicated this picture. For the first ten years of valid same-sex marriages in Massachusetts, same-sex couples were not treated as married for the purposes of federal law. Under DOMA, “the word ‘marriage’ mean[t] only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refer[red] only to a person of the opposite sex who is a husband or a wife.”⁵⁴ A same-sex couple’s divorce experience would have differed dramatically from the opposite-sex couple next door because there are “1049 federal laws classified to the United States Code in which marital status is a factor.”⁵⁵ For example, same-sex couples could not take advantage of the tax-deductible nature of alimony.⁵⁶ While this provision did not impact *whether* the divorcing same-sex couple Bargained in the Shadow of the Law — because the legal endowments were clear, albeit disadvantageous — DOMA impacted the substantive *outcomes* that the couples were likely to reach.

51. *Id.* at 602–03.

52. *Id.*

53. *Id.* (citing MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2012) (“Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.”)). The court drew this conclusion from the Supreme Judicial Court’s command in *Goodridge* to read other marriage statutes in a gender-neutral fashion. *Id.* (citing *Goodridge*, 798 N.E.2d at 969 n.34).

54. 1 U.S.C. § 7 (2012).

55. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/OGC-97-16, Defense of Marriage Act (1997).

56. *Id.* at 2. As GAO explained, “[g]ifts from one spouse to another are deductible for purposes of the gift tax. . . . The law permits transfers of property from one spouse to another (or to a former spouse if the transfer is incident to a divorce) without any recognition of gain or loss for tax purposes.” *Id.* at 4.

However, there is no longer reason to believe that same-sex and opposite-sex couples will reach different outcomes based on the applicable legal endowments. In finding the government's definition of marriage "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment," the Supreme Court ensured that the 1049 federal laws for which marital status matters must affect same-sex couples equally.⁵⁷ The executive branch adopted the ruling quickly, announcing same-sex couples "will be treated as married for all federal tax purposes, including income and gift and estate taxes."⁵⁸ Thus, when divorcing same-sex couples bargain over alimony, the legal framework influencing those conversations is now the same.

There is one admitted complication, imposed not by state or federal law, but by the reality that the legalization of same-sex marriage remains a recent phenomenon. Currently, the courts in states that recognize same-sex divorces are struggling to "determin[e] the true length of the partnership."⁵⁹ For example, Hillary and Julie Goodridge, married in 2004, had been together for seventeen years.⁶⁰ LGBT rights advocate Mary Bonauto explained that "[i]f a couple was together 25 years but was only given the right to marry a few years before divorcing, courts are taking into account the entire relationship when dividing assets."⁶¹ The length of the marriage thus becomes a discretionary judicial decision, not an obvious number. While a divorcing opposite-sex couple can determine the length of their marriage with ease, same-sex couples do not enjoy such clarity.

Moreover, the length of the relationship will have an impact on their legal endowments. Under Massachusetts law, courts "shall consider the length of the marriage" when determining the appropriate amount of alimony.⁶² Therefore, the ambiguous length of the earliest same-sex marriages, and the courts' treatment of such marriages, adds substantial uncertainty to a couple's negotiations, influencing the third factor of Mnookin and Kornhauser's model. While posing a problem only for the first same-sex marriages, this question does still

57. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

58. Press Release, U.S. Dep't of Treasury, All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes (Aug. 29, 2013), available at www.treasury.gov/press-center/press-releases/Pages/j12153.aspx.

59. Eve Conant, *The Right to Love — and Loss*, NEWSWEEK (Apr. 13, 2010), <http://www.thedailybeast.com/newsweek/2010/04/13/the-right-to-love-and-loss.html>.

60. *Gay "Marriage" First Couple Splits Up in Massachusetts*, *supra* note 4.

61. Conant, *supra* note 60.

62. MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012).

influence whether parties will bargain, or whether uncertainty will drive them to court instead.

In the legal regimes of States A and B, it is clear that the Bargaining in the Shadow of the Law described by Mnookin and Kornhauser is equally applicable to divorcing same-sex couples as to opposite-sex ones. Given the *Goodridge* court’s requirement that all legal endowments be shared equally by same-sex couples and the *Windsor* Court’s decision to strike down the federal definition of marriage as between a man and a woman, neither the couple’s legal entitlements if the parties went to court (the second factor) nor the degree of uncertainty regarding such legal entitlements (the third factor) should differ substantially for same-sex couples.

B. *State C: Bargaining Without Law — The Impact of No Divorce Rules*

While the Bargaining in the Shadow of the Law model holds true for same-sex couples in states such as Massachusetts, the same cannot be said for couples in DOMA states. Instead, state DOMAs have a dramatic impact on both factors (2) and (3): The legal endowments can no longer be said to exist, and although the uncertainty is clearly great, there is no court to which the couple can turn. The same list of rights that were granted by the *Goodridge* court and were available in States A/B — creating both equality in the law and equality in bargaining — are the same rights that same-sex couples in State C do not enjoy. These missing rights include the equitable division of property, alimony, the presumption of parentage, and the application of predictable rules of child custody, visitation, and support.⁶³ The lack of access to the divorce courts, and lack of substantive law, upends bargaining for these couples.

Property division becomes an exceedingly complicated challenge. Without a background regime of equitable division, or requirement of alimony in certain situations, the range of options grows dramatically. For example, an opposite-sex couple divorcing in a DOMA state should recognize that no court would allow one spouse to receive all the marital property and pay no alimony. As a result, while there would be a range of possibilities that could be seen as “equitable,” there are still some settlement possibilities that would be excluded based on the legal rule of equitable division. That is the role of Mnookin and Kornhauser’s second factor.

63. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003).

But for the same-sex couple divorcing in such a state, such rules cease to exist, and as a result, they do not cabin the possible outcomes that the divorcing couple can reasonably reach. Since state DOMAs prevent courts from asserting authority over same-sex couples' divorces, there are no background judicial rules to shape the bargaining.⁶⁴ Even though same-sex couples "will likely continue to desire the finality of divorce" for its "emotional and mental closure, legal status, and property division,"⁶⁵ they have no recourse in the courts.⁶⁶

Mnookin and Kornhauser take the possibilities of such ambiguities into account. As they note, the third factor in their model (uncertainty as to legal outcome and risk preferences) deals exactly with these situations.⁶⁷ In one poignant example, the notoriously vague "best interests of the child" standard for determining custody does not create clear legal entitlements.⁶⁸ In such cases, that uncertainty, combined with each party's respective risk preferences, may push them to court or may encourage a risk-averse partner to make sacrifices. This is the catch-22 that divorcing same-sex couples living in State C states face: Same-sex couples are left in limbo, as a mutual agreement may be difficult to reach at such a tense time. Most couples would then turn to the courts to determine how to proceed based on their state's divorce law. Many courts in mini-DOMA states may be unwilling to dissolve same-sex marriages for fear of giving legal recognition to the marriage, and thus violating that state's mini-DOMA.⁶⁹ Moreover, these couples cannot easily return to State A temporarily to solve this problem; some have residency requirements for divorcing couples that require them to have lived in the state for up to one year before dissolution.⁷⁰

This paradox demonstrates the impossibility of Bargaining in the Shadow of the Law for property and alimony payments in DOMA states. Factors (2) and (3) are empty. There is no law that applies to

64. *Austin v. Austin*, 75 Va. Cir. 240, *2-3 (Va. Cir. Ct. 2008).

65. John M. Yarwood, Note, *Breaking Up Is Hard to Do: Mini-DOMA States, Migratory Same-Sex Marriage, Divorce, and a Practical Solution to Property Division*, 89 B.U. L. REV. 1355, 1363 (2009).

66. Instead, some LGBT advocates and lawyers advise same-sex couples in such states to draft private contracts that create enforceable obligations or that at least outline their goals regarding asset division, and to legally partition shared properties. Tara Siegel Bernard, *Seven Tips for Dissolving Gay Unions*, N.Y. TIMES (Nov. 18, 2009), bucks.blogs.nytimes.com/2009/11/18/gay-divorce-part-2/.

67. Mnookin, *supra* note 7, at 969-71.

68. *Id.* at 969.

69. Yarwood, *supra* note 66, at 1387.

70. *Id.* at 1363.

these same-sex couples, and while uncertainty is high and their risk preferences may differ, neither party can turn to the courts even if he or she desires to do so. Under Mnookin and Kornhauser’s model, then, the same-sex couple would only be addressing financial issues in accordance with factors (1) and (4): their personal preferences and transaction costs.⁷¹ These couples are “bargaining,” but they are bargaining outside the shadow of any relevant family law.

Couples’ attempts to Bargain in the Shadow of the Law regarding child custody in State C are at least as challenging. The complicated litigation between Lisa Miller and Janet Jenkins, spanning six years, two states, and five courts, highlights the impossibility of applying factors (2) and (3) to a same-sex couple’s custody battle. The initial facts are deceptively simple: In 2000, Lisa and Janet entered into a valid civil union in Vermont.⁷² They decided to have a child and agreed Lisa would conceive by artificial insemination.⁷³ In 2002, IMJ was born, and the family lived in Virginia until July, when they moved back to Vermont.⁷⁴ But Lisa moved back to Virginia with IMJ in September 2003 and filed for dissolution of the union in Vermont that November.⁷⁵ The Vermont state court granted Lisa’s request, giving Lisa temporary custody, while Janet received visitation rights.⁷⁶

Difficulties arose after Janet’s first visit with IMJ in 2004, when Lisa “refused to permit Janet to have contact with IMJ as required by the terms of the Vermont custody order.”⁷⁷ Lisa then turned to a county court in Virginia to assert her right to sole custody.⁷⁸ Meanwhile, Janet turned to the Vermont courts, seeking “enforcement of the Vermont custody order and a determination that Lisa was in contempt of that court”⁷⁹

At this point, it is useful to consider how Lisa and Janet might bargain with each other under this complicated legal backdrop. The problem is somewhat different than when dividing assets. In the case of property division, there were *no* legal endowments, and there was

71. Moreover, the parties would also be able to engage in horse-trading, bluffing, and making threats. Thus, insofar as the “Strategic Model” of bargaining is accurate, factor (5) would apply to same-sex couples as well.

72. *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 824 (Va. 2008).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

no court to which the divorcing couple could turn. In that analysis, neither factors (2) nor (3) could be said to exist. Here, there are applicable child custody laws in each state and courts that might enforce them. Thus, there are *two* bodies of law, creating two sets of endowments. While factor (2) exists, there are two plausible conceptions of what it entails. Similarly, while uncertainty and risk-preferences undergirding factor (3) exist, the parties could turn to *two* different courts. As one model would predict, because parties tend to be overly optimistic about their chances of success, this uncertain conflict should push the parties into court.⁸⁰

Rather than bargaining, that is exactly what happened here, and the decisions of the two courts complicated the issue further. Lisa and Janet both won. For Janet, the Vermont court entered an order in July 2004 holding that it “had continuing jurisdiction over all custody matters in the case,” while a Virginia circuit court “entered an order [that August] temporarily awarding sole custody of IMJ to Lisa”⁸¹ In October, the Virginia court determined “Janet did not have any parental rights, and that Lisa was IMJ’s ‘sole’ parent.”⁸² But in November, “the Vermont court issued a contrary order holding that Lisa and Janet were both ‘parents’ of IMJ.”⁸³

These decisions only further complicated factors (2) and (3) of the model. Initially, Janet and Lisa thought they might be entitled to different legal endowments. This uncertainty pushed them to two different courts. After the two decisions, successful bargaining remained impossible for the two women that had each been told she should and would win custody.

The next stage of litigation brought a dramatic upheaval and changed the bargaining for the couple. In November 2006, Janet brought an appeal to the Virginia Court of Appeals, which held that “the circuit court did not have jurisdiction . . . because the dispute was a ‘custody and visitation determination’ subject to the provisions of the Parental Kidnapping Prevention Act [(“PKPA”)], which accorded Vermont sole jurisdiction”⁸⁴ The court also determined that DOMA “did not alter the applicability of the PKPA”⁸⁵ Since

80. Robert Cooter, et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 226 n.2 (1982).

81. *Miller-Jenkins*, 661 S.E.2d at 824.

82. *Id.*

83. *Id.* at 824–25.

84. *Id.* at 825 (citations omitted).

85. *Id.* (citations omitted).

Lisa failed to file a timely notice of appeal, her petition was dismissed before the Virginia Supreme Court.⁸⁶

This major legal change raised new issues for this couple’s attempts to bargain. Lisa and Janet’s was the rare case in which the law imposed substantive obligations “from above” — a case that would set endowments for other couples. For another hypothetical married same-sex couple that moves to Virginia, the legal endowments should now be clear: Custody orders from the state in which the union was valid are enforced. Moreover, it is now clear that if there were uncertainties, the couple would not have recourse in Virginia courts, but would instead turn to the same court system that had solemnized their union. Factors (2) and (3) would now exist for this couple much as though they had never left Vermont.

However, Lisa and Janet’s legal battles did *not* end there. Lisa’s next challenge to the Vermont custody and visitation order was a challenge to its enforcement (the first had challenged its inherent validity).⁸⁷ This time, Lisa’s case reached the Virginia Supreme Court, which applied the law of the case doctrine to bar her claim “because all the issues presented in this appeal were resolved by the Court of Appeals’ decision in the first Virginia appeal.”⁸⁸

Although this case was decided conclusively, the fact that it was ultimately decided under the law of the case doctrine is problematic for future bargaining. As the Chief Justice of the Virginia Supreme Court noted in a concurring opinion, “I have serious concerns about the Court of Appeals’ opinion in the former appeal. I do not believe that this decision was correctly decided. . . . [However, as] the majority correctly holds, the law of the case doctrine prohibits this Court from considering the merits of the former appeal in this proceeding.”⁸⁹

The court’s application of the law of the case doctrine, while beneficial to Janet Jenkins, could have proved problematic for subsequent couples. The state supreme court never answered the substantive issue, and at least the Chief Justice thought the Court of Appeals made a mistake. Until the Fourth Circuit’s decision to invalidate Virginia’s mini-DOMA, this issue was unsettled. That lack of clarity would have forced similarly situated couples to address the same problem Lisa and Janet faced: There were two legal endowments and two courts to rely on in uncertainty.

86. *Id.*

87. *Miller v. Jenkins*, 678 S.E.2d 268, 269 (Va. Ct. App. 2009).

88. *Miller-Jenkins*, 661 S.E.2d at 825.

89. *Id.* at 827–28 (Hassell, C.J., concurring) (citations omitted).

Even as Mnookin and Kornhauser's Bargaining in the Shadow of the Law model persists with limited alterations for same-sex couples bargaining in State A and B regimes, it has clearly broken down for same-sex couples who migrate to mini-DOMA states (State C). In the context of property division and other financial issues, these states refuse to apply their divorce laws to the couples or to allow them into their courts. Since there are no legal endowments (the second of the five bargaining factors) and because the parties' uncertainties and relative risk-preferences are irrelevant if there is no court to which they can turn (the third), these factors are absent.

Custody battles present the opposite problem. There, a couple has two legal endowments on which each person can rely and two courts to which he or she can turn given the uncertainties and relative risk-preferences. While the root of their problem is different, the result is the same: factors (2) and (3) are undermined where parties have entirely different, and entirely justifiable, conceptions of their BATNA. Accordingly, the parties are left with personal preferences (factor (1)), transaction costs (factor (4)), and their strategic tactics (factor (5)). Relying on these factors, parties will bargain in the shadow of their desires, devoid of the shadow of the law.

V. CONCLUSION: BARGAINING IN THE SHADOW OF THE SUPREME COURT

As this Note argues, the Court's decision to invalidate the heart of DOMA — its definition of marriage as between a man and a woman — ensures that the bargaining by divorcing same-sex couples and opposite-sex couples in States A and B will be identical. But, of course, *Windsor* only formally impacted the rights of the same-sex couples who live in states that recognize their marriage. Couples that move into states that bar same-sex marriage and divorce and then seek to divorce still are unable to Bargain in the Shadow of the Law, either because there is no law (for property division and alimony) or because there are two bodies of law (for child custody).

That is likely to change in the coming months. On January 16, 2015, the U.S. Supreme Court agreed to hear four challenges to state prohibitions on same-sex marriage.⁹⁰ The Court will hear two questions: (1) "Does the Fourteenth Amendment require a state to license

90. *Bourke v. Beshear*, No. 14-574, 2015 WL 213651 (2015) (mem.) (challenging Kentucky law); *DeBoer v. Snyder*, No. 14-571, 2015 WL 213650 (2015) (mem.) (challenging Michigan law); *Obergefell v. Hodges*, No. 14-556, 2015 WL 213646 (2015) (mem.) (challenging Ohio law); *Tanco v. Haslam*, No. 14-562, 2015 WL 213648 (2015)

a marriage between two people of the same sex?” and (2) “Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?”⁹¹ The Court’s subsequent refusal to stay a federal court’s order requiring Alabama to permit same sex couples to marry has been seen by many “as a signal of the Court’s intended resolution” of the cases — to permit same-sex couples to marry.⁹²

If the Court unexpectedly decides that same-sex couples do not enjoy the right to marry, then the impossibility of Bargaining in the Shadow of the Law for same-sex couples in State C remains unchanged. For property division, there would still be no legal entitlements. For custody battles, there may still be two bodies of law, and there will still be two different courts to which the parties will turn. So, the laws in those states would still undermine factors (2) (the legal endowments) and (3) (the parties’ uncertainty and risk preferences).

But if, as seems likely, the Court concludes that individuals enjoy a constitutional right to marry regardless of their partner’s sex, then all states will fit within the State A model — they will all recognize same-sex marriages. As a result, all same-sex married couples would be entitled to divorce in any U.S. state in which they later reside. If the Court takes this step, then a divorcing same-sex couple would be able to “Bargain in the Shadow of the Law” exactly as Mnookin and Kornhauser described thirty-five years ago.

(mem.) (challenging Tennessee law). The Supreme Court consolidated the four cases. *Id.*

91. *Id.*

92. *Strange v. Searcy*, No. 14A840, 2015 WL 505563 (2015) (Thomas, J., dissenting from denial of stay application).

