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Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples

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**ADOPTIONS BY LESBIAN AND GAY PARENTS MUST BE
RECOGNIZED BY SISTER STATES
UNDER THE FULL FAITH AND CREDIT CLAUSE DESPITE
ANTI-MARRIAGE STATUTES
THAT DISCRIMINATE AGAINST SAME-SEX COUPLES**
BARBARA J. COX*

I. INTRODUCTION

I come to the question of interstate recognition of adoptions by gay men and lesbians from perhaps a slightly different place than some speakers at this symposium. In 1993, when the Hawaii Supreme Court released its decision in *Baehr v. Lewin*,¹ I became intrigued with the question of whether lesbian and gay couples could go to Hawaii, get married, return home, and have their marriages recognized. One of the reasons I became interested in this question was because my parents and both of my sisters were married in a state different than the one where they now live.

Like many people and countless newspapers, I originally assumed that the Full Faith and Credit Clause of the United States Constitution² would control this question. But upon researching it, I discovered that the U.S. Supreme Court has not used the Full Faith and Credit Clause when discussing marriage (which it has not done very often) and neither have most state courts. Although the argument can and has been made that marriage recognition should be controlled by the Full Faith and Credit Clause since the Clause applies on its face to the "acts" (or statutes) of the various states,³ the primary

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* Professor of Law, California Western School of Law. I want to thank Professors Mark Strasser, Capital University Law School; Lynn Wardle, Brigham Young University Law School; and Kent Markus, Dave Thomas Center for Adoption Law, Capital University Law School, for inviting me to participate in this symposium; and Jessica Poprocki, Capital University Law School, for her assistance in organizing the symposium. I also want to thank the California Western School of Law sabbatical program for providing me with the opportunity to write this article, and Associate Dean Janet Bowermaster for encouraging me to write this article. I would also like to thank my partner, Peg Habetler, and her nonbiological daughter, Sasha Sappanos Wells, for providing me with insight and understanding of the importance of lesbian and gay parenting.

¹ 852 P.2d 44 (Haw. 1993).

² U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

³ See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 14 (1997) [hereinafter Koppelman, *Dumb and DOMA*]

(continued)

focus has been on the area of conflicts of law. Under most conflict of law theories, marriages valid where celebrated are valid everywhere, although a public policy exception does permit courts to refuse to recognize marriages that would violate the forum state's internal policies.

Unlike marriages, however, the question of interstate recognition of judgments does fall within the Full Faith and Credit Clause.⁴ The Supreme Court has held that every state must give judgments from other states "the same credit, validity, and effect" that would be given to the judgment in the state that rendered it.⁵ Thus, a valid, final adoption decree⁶ rendered in one state establishing a parent-child relationship between the adoptive parent(s) and the adoptive child(ren) must be recognized in every other state as equally valid as an adoption decree rendered in that other state.⁷ Differences between the states on local public policy, significant in whether one state will recognize the statutes of another state, do not provide exceptions to the constitutional command to recognize a sister state's valid, final judgments.

But for the discriminatory anti-marriage recognition statutes that Congress⁸ and thirty-six states have passed,⁹ the question of interstate recognition of the adoptions by lesbian and gay parents would be

(citing Evan Wolfson's memorandum, *Winning and Keeping Marriage Rights: What Will Follow Victory in Baehr v. Lewin?* (Feb., 16, 1996), which was given to Congress while it was considering the Act).

⁴ U.S. CONST. art. IV, § 1.

⁵ *Williams v. North Carolina*, 317 U.S. 287, 293-94 (1942) (Williams I).

⁶ The reference to a "valid, final" judgment recognizes that judgments that are not valid or final may be appealed or collaterally attacked in a second court. For a discussion of collateral attacks, see *infra* Part III.B; See also Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, at Part III.B.

⁷ See *id.*

⁸ Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996), known as "the Defense of Marriage Act" or DOMA, added 28 U.S.C. § 1738C (2001) which reads:

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.

Section 3(a) amended 1 U.S.C. § 7 by limiting the terms "marriage" to "a legal union between one man and one woman as husband and wife" and "spouse" to "a person of the opposite sex who is a husband or a wife," in any U.S. Congressional act or regulation. Only § 1738C is at issue in this discussion.

⁹ See *Specific Anti-Same-Sex Marriage Laws in the U.S.*, at <http://www.nglftf.org/downloads/marriagemap0601.pdf> (last visited Mar. 14, 2003).

unremarkable. It would be unremarkable due to the obvious requirement for one state, established by the U.S. Constitution and Supreme Court precedent, to recognize another state's judgments. Even with anti-marriage statutes on the books, courts have recognized the adoptions by parents in same-sex relationships, despite statutes that deny equal marriage rights to those couples.¹⁰ The question becomes somewhat less clear, however, when the adoption is based on the underlying relationship of a same-sex couple which has had their relationship legally recognized in the state granting the adoption.

When the adoption at issue is based on a same-sex relationship recognized in one state, and another state's anti-marriage statute specifically declares that the second state will not recognize any "right or claim arising from such relationship,"¹¹ does the court in the second state still have to recognize the adoption?¹² Let me use a hypothetical to raise the question explicitly, a question that the rest of this article seeks to resolve.

Suppose that Ellen and Laurie live in California where they have registered with the State of California as domestic partners.¹³ One of the benefits of registering as domestic partners is that the couple becomes eligible for step-parent adoptions, a right that previously had been limited to married couples.¹⁴ Five years earlier, Ellen and Laurie had decided to become parents and raise children together. Ellen was artificially inseminated¹⁵ and gave birth

¹⁰ See *infra* Part IV.

¹¹ This is the language used in DOMA. 28 U.S.C. § 1738C.

¹² Professor Mark Strasser discussed a similar question concerning the presumption under Vermont civil unions' law that a civil union partner is a legal parent of any child(ren) born into that relationship, and whether the presumption would be recognized by other states. Mark Strasser, *When is a Parent not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299 (2001). He concluded that parents might be safer pursuing adoptions, rather than relying on the presumption, given the uncertainty surrounding the interstate recognition of rights provided to Vermont civil unions, although he too believes that the anti-marriage statutes should have no effect on the parental rights of civil union partners. See *id.* at 315-16.

¹³ AB 25 was signed on October 14, 2001, by Governor Gray Davis of California. This bill provides certain benefits to those domestic partners who register with the state. See 2001 Cal. Stat. 893, § 3. To register as domestic partners, go to http://www.ss.ca.gov/business/sf/sf_dp.htm. A description of the rights provided under the statute can be found at http://www.nclrights.org/publications/pubs/ab25_QnA_11-01.pdf. (last visited Mar. 14, 2003).

¹⁴ See National Center for Lesbian Rights, *The Transition from Second-Parent Adoptions to Stepparent Adoptions After AB 25*, at <http://www.nclrights.org/releases/2ndparent-ab25.html> (last visited Mar. 14, 2003).

¹⁵ Ellen and Laurie decided that Ellen would have the child because then the child would receive health insurance benefits through Ellen's employer. (At that time, Laurie was self-insured because she was running her own small business out of their home.) Same-sex couples and our families continue to face significant discrimination by the denial of access to

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to their daughter, Martha, who is now four. Ellen and Laurie filed a petition for adoption in early 2002, using the step-parent adoption procedure by which Laurie could be legally recognized, along with Ellen, as one of Martha's parents.¹⁶

They decided to use the step-parent adoption procedure (instead of the second-parent adoption procedure) because the viability of second-parent adoption in California is in limbo, due to the case of *Sharon S. v. Superior Court of San Diego County*, which is currently on appeal to the California Supreme Court.¹⁷ In that case, the Fourth District Court of Appeals held that the California statutes did not authorize the use of a "modified independent adoption procedure" through which one lesbian parent could retain her parental rights while letting her partner also adopt her child(ren).¹⁸ Although thousands of such adoptions have been permitted in California,¹⁹ the continuing viability of second parent adoptions is in limbo until the California Supreme Court issues its decision in the case.

But a problem for Ellen, Laurie, and Martha has arisen with the promotion that Laurie has just received from her new employer. Although the promotion comes with recognition of Laurie's excellent work and a significant increase in responsibility and salary, it raises difficult questions for this family. The promotion requires Laurie to transfer to the company's office in Miami, Florida. Laurie and Ellen are concerned about whether Laurie should accept the promotion and move the family to Florida because of all the press they

employer-sponsored benefits for our family members, even though those benefits are provided to married couples and their families. Increasingly, more and more employers are providing benefits to end this discriminatory practice. For a discussion of the growth in domestic partnership benefits over the past twenty years, see Barbara J. Cox, "The Little Project:" *From Alternative Families to Domestic Partnerships to Same-Sex Marriage*, 15 WIS. WOMEN'S L.J. 77 (2000) [hereinafter Cox, *Little Project*] (this is an introduction to the republication of my article, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986) (in the Wisconsin Women's Law Journal's 15th Anniversary volume).

¹⁶ See *supra* note 12, for a description of the procedure for step-parent adoptions in California.

¹⁷ 113 Cal. Rptr. 2d 107 (Cal. Ct. App. 2001), *cert. granted*, 39 P.3d 512 (2002). Since granting the *certiorari* petition vacates the Court of Appeals decision, the viability of same-sex second parent adoptions in California is in legal limbo. The court of appeals decision has been "depublished." See 2002 Cal. Lexis 459 (Cal. Jan. 29, 2002).

¹⁸ *Sharon S.*, 113 Cal. Rptr. 2d at 115.

¹⁹ See *Sharon S. v. Sup. Ct. of San Diego County*, 2001 Ca. App. Lexis 2199, at *3 (Cal. Ct. App. Nov. 21, 2001) (modifying opinion and denying rehearing (i)). The court revised its opinion to eliminate the concern that other second parent adoptions might be invalid, and limited the opinion to the parties before the court. There, the court referred to the "thousands of adoptions that were undertaken using a modified independent adoption procedure . . ." *Id.*

have seen about Florida's ban on adoptions by gay men and lesbians contained in section 63.042(3) of the 2002 Florida Statutes.²⁰ Several courts in Florida have upheld the ban as constitutional, including, most recently, the U.S. District Court for the Southern District of Florida, in the case of *Lofton v. Kearney*.²¹

Florida should be required to recognize the valid, final adoption decree from California, despite the fact that Florida prohibits adoptions by lesbians under Florida law. As the Supreme Court noted in *Williams v. North Carolina*.²²

[W]hen a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.²³

Just as divorce decrees from other states are entitled to recognition under the Full Faith and Credit Clause, so too are adoption decrees. But those who oppose the recognition of same-sex couples would argue that Florida should not have to recognize Laurie's adoption of Martha because of the ban in Florida of adoption by gay men and lesbians under section 63.042(3) of the 2002 Florida Statutes,²⁴ and Florida's anti-marriage statute section 741.212,²⁵ which prohibits recognition of marriages by same-sex couples or our relationships that are treated as marriages. The anti-marriage statute specifically reads:

(1) Marriages between persons of the same sex entered into in any jurisdiction, ...or relationships between persons of the

²⁰ See FLA. STAT. § 63.042(3) (2002) (stating: "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."). Significant press occurred when Rosie O'Donnell added her support to fighting this ban. See Jessica DuLong, *Rosie's crusade: Could the 'Queen of Nice' turn the tide for gay adoption*, ADVOCATE, Apr. 16, 2002, at 15; Monica Collins, *Rosie O'Donnell adopts new personal crusade and comes out on 'Primetime'*, B. HERALD, Mar. 14, 2002, at 41.

²¹ 157 F. Supp. 2d 1372 (S.D. Fla. 2001); see also William E. Adams, Jr., *A Look at Lesbian and Gay Rights in Florida Today: Confronting the Lingering Effects of Legal Animus*, 24 NOVA L. REV. 751 (2000); Carolyn S. Grigsby, Note, *Lofton v. Kearney, Discrimination Declared Constitutional in Florida*, 21 ST. LOUIS U. PUB. L. REV. 199 (2002).

²² 317 U.S. 287 (1942).

²³ *Id.* at 303. For a further discussion of this case, see *infra* Part III.

²⁴ FLA. STAT. § 63.042(3) (2002).

²⁵ *Id.* § 741.212.

same sex which are treated as marriages in any jurisdiction, ... are not recognized for any purpose in this state.

2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state ...of the United States ... respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.²⁶

It is clear that this statute should not apply to Laurie and Sandy's situation for two reasons. First, their domestic partnership in California is not "treated as a marriage" because it provides extremely limited rights as compared to those provided to married couples, and thus does not come within the scope of the Florida statute.²⁷ Second, Florida will not be permitted to refuse to recognize a valid judicial proceeding from California due to the commands of the Full Faith and Credit Clause,²⁸ which the rest of this article will explain.

Others may argue that the so-called Defense of Marriage Act ("DOMA")²⁹ created an exception to the Full Faith and Credit Clause and prior Supreme Court precedent that excuses Florida from its usual obligation to recognize the California adoption judgment. Section 2 of DOMA states, in part: "No State ... shall be required to give effect to any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, . . . or a right or claim arising from such relationship."³⁰

But Congress could not have intended to invalidate the adoptions by same-sex couples in situations such as Laurie and Ellen's, even though the adoption was permitted in California as a "right arising from"³¹ the domestic partnership relationship between the two women. To do so would violate the Full Faith

²⁶ *Id.*

²⁷ AB 25 and recent legislation provide about fifteen rights to same-sex couples who register as domestic partners. See 2001 Bill Text CA. AB. 25 (Lexis). In contrast, married couples receive hundreds of rights from states and over 1049 rights and benefits from the federal government. See Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VERMONT L. REV. 113, 113 n.3, 145 n.151 (2000) [hereinafter Cox, *But Why Not Marriage*]; *A Partial List of Marital Rights and Responsibilities That Are Denied to Same-Sex Couples and Their Families in California*, at <http://www.nclrights.org/publications/lgbtfamilies.htm> (last visited Mar. 14, 2003).

²⁸ U.S. CONST. art. IV, § 1.

²⁹ 28 U.S.C. § 1738 (2002).

³⁰ 28 U.S.C. § 1738C (2002).

³¹ See *id.*

and Credit Clause³² and alter almost two hundred years of Supreme Court precedent. The remainder of this article explains why Laurie's valid, final judgment adopting Martha in California must be recognized in Florida and every other state in the nation.

II. INTERSTATE RECOGNITION OF MARRIAGES BY SAME-SEX COUPLES

Before discussing interstate recognition of adoption decrees by gay men or lesbian parents, it may be helpful to understand interstate recognition of marriages, especially considering the role that the anti-marriage statutes passed by Congress, Florida, and thirty-five other states have in our discussion. Virtually all states have upheld the validity of a marriage by their own domiciliaries (or others) if that marriage was valid under the law of the state where it was celebrated.³³ States recognize these out-of-state marriages by their domiciliaries or others, even when they violate the internal law of the forum state, because of the strong public policy reasons behind such recognition:

The validation rule confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varies from state to state. The parties' expectations arise from the fact that the married couple needs to know reliably and certainly, and at once, whether they are married or not. Additionally, the concern about uncertainty arises either because the couple is married in one state and not another or because the couple's marital status is ambiguous during the pursuit of litigation to determine it.³⁴

Thus, for example, my sister who decided to get married while on vacation in South Carolina could be sure, without consulting a lawyer, that her marriage would be valid when she returned to her home state of Kentucky. My other sister who married in Tennessee had no question that her marriage would be recognized by her domicile, Kentucky. And, my parents never considered whether their marriage, which occurred in Illinois, would be recognized when they returned to their domicile of Wisconsin or moved to Kentucky ten years

³² U.S. CONST. art. IV, § 1.

³³ See Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1064 [hereinafter Cox, *If We Marry*] (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) and WILLIAM M. RICHMAN, ET. AL., UNDERSTANDING CONFLICT OF LAWS § 116 (2d ed. 1993)).

³⁴ Cox, *If We Marry*, *supra* note 33, at 1065 (citing Richman, *supra* note 33, at § 116 and ROBERT A. LEFLAR, ET AL., AMERICAN CONFLICTS LAW § 220 (4th ed. 1986)).

later.

It would be impossible for a married couple in our mobile, transitory country to have their marital status change as they traveled or moved around the country. Imagine having a "marriage visa"³⁵ that needed to be stamped as you moved from state to state, sometimes indicating that you were married and sometimes indicating that you were not.³⁶ This would be a terrible situation, so most states have agreed to recognize a marriage in their state, even if it could not be entered into under the local law of that state, if it was valid where celebrated. This has been true even if the couple before the court were domiciliaries of that state, left the state because they were prevented from getting married by the local law of that state, went to another state where they could marry, stayed long enough to marry, and then returned to their home state.

In numerous and repeated cases, courts have recognized out-of-state marriages even when the marriage violated the domicile's restrictions on underage marriages, on incestuous marriages (such as first cousin or uncle/niece marriages), on adultery or when divorced persons could remarry, and even on polygamous marriages for some limited purposes.³⁷ In the significant majority of these cases, the courts treated the couple as married.³⁸ Only with interracial marriages were courts, particularly those in the South, consistently unwilling to recognize the marriage celebrated in another state.³⁹ Most of these cases involved couples who lived in the forum state, left the state because they were prohibited from marrying by state statute, married elsewhere where the marriage was permitted, and then returned to the forum state to live

³⁵ See Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 228 (1996).

³⁶ For a discussion of the similar problems that occur for gay men and lesbians who have their sexual activities criminalized and decriminalized as they travel across the country, see Deb Price, *Anti-sodomy Laws Should Be Killed*, THE DETROIT NEWS, Dec. 9, 2002, at 9A.

³⁷ See Cox, *But Why Not Marriage*, *supra* note 27, at 139, (citing Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61, 66 (1996) [hereinafter Cox, *Public Policy Exception*] (referring to research from over thirty-two states as of September 1, 1996. The research of all fifty states was completed by July 1998 and simply confirmed this nationwide standard of recognizing out-of-state marriages in most cases)).

³⁸ Some states have refused to recognize these out-of-state marriages, either because they violated the internal public policy of the state or because they violated that state's marriage evasion statutes preventing domiciliaries from leaving the state to marry in violation of the state's internal statutes. For a discussion of these cases, see Cox, *Public Policy Exception*, *supra* note 37, at 68-72, 96-99.

³⁹ See Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1997).

together.⁴⁰ When the couple was married in their home state which permitted the interracial marriage, however, the marriage was usually held to be valid by other states, even if the couple would not have been permitted to marry in that other state.⁴¹

Courts refusing to recognize the out-of-state marriages of interracial couples and other disfavored marriages did so based on the public policy exception in choice-of-law theory. All major choice-of-law theories permit courts to consider public policy when deciding whether to recognize the out-of-state marriages by that state's own domiciliaries.⁴² For example, section 283(2) of the Restatement (Second) of Conflicts of Laws states the general rule: "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid *unless it violates the strong public policy* of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."⁴³ Although the public policy exception has been little used since the Supreme Court held the anti-miscegenation statutes to be unconstitutional and its viability remains in question today,⁴⁴ it is likely that courts will try to resuscitate it to refuse to validate marriages by same-sex couples.

Only to the extent the out-of-state marriages of same-sex couples are equated with the out-of-state marriages of interracial couples should courts be expected to refuse to treat them as equal to those marriages by couples also prohibited from marrying within their home states but whose marriages were validated. Since we now understand that the refusal by courts to validate out-of-state interracial marriages stemmed from the discriminatory underpinnings of the laws prohibiting interracial marriages within their own state,⁴⁵ it should

⁴⁰ *Id.* at 119.

⁴¹ *Id.*

⁴² Marriages by domiciliaries of other states that were permitted under their home state's statutes have almost universally been recognized as valid when those domiciliaries moved to a new state where their marriage would not have been permitted. Cox, *But Why Not Marriage*, *supra* note 27, at 141, and sources cited therein. This was true even with interracial marriages. See Koppelman, *supra* note 39, at 116-127.

⁴³ RESTATEMENT, *supra* note 32, at § 283(2) (emphasis added). The First Restatement of Conflict of Laws, as well as Brainerd Currie's governmental interest analysis theory and Robert Leflar's choice-influencing considerations theory, also instruct courts to consider public policy when deciding whether to recognize out-of-state marriages. See Cox, *Public Policy Exception*, *supra* note 37, at 63-65.

⁴⁴ See Larry Kramer, *Same-Sex Marriage, Conflict of Law, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Larry Kramer, *The Public Policy Exception and the Problem of Extra-Territorial Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 153 (1996).

⁴⁵ See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (finding the anti-miscegenation statutes to rest solely on racial distinctions that were unconstitutional). The court specifically
(continued)

be clear that the refusal by courts to validate out-of-state marriages by same-sex couples would similarly stem from discrimination.⁴⁶

Much has been written about whether states are permitted under the public policy exception of choice of law theories to refuse to recognize some marriages, particularly those by same-sex couples, if they violate the public policy of the forum state.⁴⁷ Anticipating this issue, Congress passed the improperly named, discriminatory Defense of Marriage Act, asserting that no state had to recognize the marriage by a same-sex couple in another state, and many other states have passed similar anti-marriage statutes claiming that they do not have to recognize these marriages.⁴⁸ Since no state has yet permitted marriage by same-sex couples, the constitutional validity of these statutes has not been challenged in court (although two states have had appellate-level cases concerning the interstate recognition of Vermont civil unions).⁴⁹ However, much controversy surrounds this question and much has been

found that the anti-miscegenation statutes of Virginia were “measures designed to maintain White Supremacy.” *Id.*

⁴⁶ See *Baker v. State*, 744 A.2d 864, 885 (Vt. 1999) (recognizing the “undeniable fact that federal and state statutes—including those in Vermont—have historically disfavored same-sex relationships,” and that “to the extent state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law”).

⁴⁷ See Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 234-38 (citing articles written on interstate recognition of marriages by same-sex couples between January 1, 1993 to June 1, 1998). Numerous other articles have been written since that time, including Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799 (1999); Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075 (2000); Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363 (2002).

⁴⁸ Defense of Marriage Act, 110 Stat. 2419 (1996).

⁴⁹ See *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002), and *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002), *cert. granted*, 806 A.2d 1066 (Conn. 2002) (dismissed as moot due to the death of Rosengarten); see also Katie Eyer, *Related Within the Second Degree? Burns v. Burns and the Potential Benefits of Civil Union Status*, 20 YALE L. & POL'Y REV. 297 (2002). Three trial courts have addressed this issue, with two of them recognizing the Vermont civil unions and one refusing any legal recognition. See *Langan v. St. Vincent's Hosp. of N.Y.*, N.Y. Sup. Ct., (Nassau Cty., Apr. 2003) (civil union partner considered spouse for purposes of wrongful death suit); *In re Marriage of Gorman & Gump*, W.V. Fam Ct., (Marion Cty., Jan. 2003); *In re Marriage of RS & JA*, Tex. Dist. Ct., (Jefferson Cty., Mar. 2003) (judge originally ordered divorce of parties to a civil union and divided assets and debt; Texas Attorney General intervened and objected to granting a divorce when civil union was not a marriage, parties withdrew petition and case dismissed) (the preceding cases are on file with author).

written about it.

When Professor Strasser invited me to this symposium, I wondered what I could possibly say about the interstate recognition of adoptions by lesbian and gay parents. It seemed clear to me then (and still seems clear to me now) that the controversy surrounding marriage does not and cannot apply in this area.

Unlike interstate recognition of marriages which have been analyzed under conflict of law theories and precedent, the validity of one state's adoption decree (which is a valid, final judgment by a court) in other states should excite little controversy (except perhaps by those who hope the backlash against the marriages of same-sex couples can be replicated against our adoptions). The reason for this lack of controversy is because of the difference in treatment by a court of the interstate recognition of judgments and the interstate recognition of a statute. Although the Full Faith and Credit Clause⁵⁰ seemingly does not differentiate between the credit owed a "public act" or a "judicial proceeding," Supreme Court and other precedent clearly makes that distinction.⁵¹ While the courts have been willing to permit a state to use the public policy exception in conflict of laws theory to refuse to recognize the statutes of other states, virtually no similar exception exists for the recognition of judgments.⁵² Once a court has decided a given case, a final judgment has been issued, and all appeals have been taken or lapsed, then the judgment can be taken from one state to another and used as a definitive statement of the resolution of the issues between the parties.⁵³ Only to a limited extent can that judgment be challenged, in what is known as a collateral attack, usually for lack of jurisdiction.⁵⁴ The following section explains why interstate recognition of adoption decrees is required by both the U.S. Constitution and almost two-hundred years of Supreme Court precedent. Additionally, this section explains why collateral attacks will not be available in most situations to challenge the validity of adoption decrees, even those of gay or lesbian parents.

III. INTERSTATE RECOGNITION OF ADOPTIONS BY GAY OR LESBIAN PARENTS

It has been settled, since at least 1813, that the Supreme Court treats a judgment from one state as a final resolution of the issues between the parties

⁵⁰ U.S. CONST. art. IV, § 1.

⁵¹ Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 259 (1998).

⁵² See Whitten, *supra* note 6, at Part III; see also *Franchise Tax Board of Cal. v. Hyatt*, 71 U.S.L.W. 4307, at *1 (Apr. 23, 2003) (referring to recognition of judgments as "exacting" and to statutes as "less demanding").

⁵³ Whitten, *supra* note 6, at Part III.

⁵⁴ Whitten, *supra* note 6, at Part III.

in all other states. In *Mills v. Duryee*,⁵⁵ the Court held that “final judgments of one state bind the parties as res judicata in all other states unless the judgment debtor can establish a ground for collateral attack generally recognized by the common law.”⁵⁶ Rather than review Supreme Court precedent since 1813, I will use the scholarship of Professor Lynn Wardle, one of the organizers of this symposium, and other commentators (who have argued that the Defense of Marriage Act is constitutional) to explain why full and faith and credit must be given to the out-of-state judgments that declared gay men and lesbians to be the adoptive parents of their children. Since Professor Wardle wrote his *Creighton Law Review* article in support of the power of Congress under the Full Faith and Credit Clause to adopt the Defense of Marriage Act and permit states to refuse to recognize other states’ marriages of same-sex couples, it seems a useful resource when discussing whether states must recognize the judgments of other states that have permitted gay men and lesbians to adopt children.⁵⁷

Professor Wardle primarily focused on the two *Williams v. North Carolina* cases⁵⁸ to illustrate the recognition that states must give to judgments of other states and the limited opportunities for states to refuse such recognition. My focus will be the same. Professor Wardle stated:

The Court’s decision in *Williams I* establishes certain limits on the power of states to refuse to recognize divorce judgments from sister states. The Court’s holding in *Williams II* establishes certain grounds upon which the second state may refuse to recognize divorce decrees from sister states. The opinion of *Williams I* vindicates the power of a state to enter divorce decrees that must be given full faith and credit; likewise, the Court’s decision in *Williams II* vindicates the power of a state to protect its domiciliaries and their marriages by refusing to give certain out-of-state divorce decrees full faith and credit.⁵⁹

Although both cases concerned interstate recognition of divorce decrees,

⁵⁵ 11 U.S. (7 Cranch) 481 (1813).

⁵⁶ Patrick J. Borchers, *Baker v. General Motors: Implications for Inter-Jurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 158 (1998). “As a practical matter, *Mills* meant that a judgment debtor could escape the effect of a judgment only if he [or she] could show that the court rendering the judgment lacked subject matter jurisdiction, personal jurisdiction or that there existed some other well-established defense to the judgment.” *Id.*

⁵⁷ Wardle, *supra* note 47.

⁵⁸ *Williams v. North Carolina*, 317 U.S. 287 (1942); (*Williams I*), *Williams v. North Carolina*, 325 U.S. 226, 227 (1945) (*Williams II*).

⁵⁹ Wardle, *supra* note 47, at 188.

Professor Wardle pointed out that they “establish interstate marital status recognition doctrines that are relevant, suggest jurisdictional principles that are potentially significant, and illustrate interstate comity principles that are profoundly pertinent to the growing debate over same-sex marriage recognition.”⁶⁰ These cases provide similar principles and illustrations relevant to the debate over interstate recognition of adoptions by gay men and lesbians.

In the first subsection below, I discuss *Williams I*, Professor Wardle’s characterizations of that opinion, and its clear applicability to the interstate recognition of adoptions by lesbian and gay parents. I also discuss *Williams II*, and Professor Wardle’s characterizations of that opinion. In the second subsection, I explain why *Williams I* requires interstate recognition of these adoption decrees, the Defense of Marriage Act notwithstanding. Additionally, I explain why *Williams II* will not prevent interstate recognition of these adoption decrees because collateral attacks will rarely be successful when questioning whether the adoption decree from one state must be recognized by other states. I conclude that subsection with a discussion of the important policy reasons for ensuring that states give the adoption decrees of lesbian and gay parents the interstate recognition to which they are entitled.

A. *Williams I*, *Williams II*, and Interstate Recognition of Judgments

Williams I involved the question of whether North Carolina had to recognize divorce decrees from Nevada by two people who previously had been married in North Carolina to separate spouses.⁶¹ Otis Williams married Carrie Wyke in 1916 and lived with her for twenty-four years; Lillie Shaver married Thomas Hendrix in 1920 and lived with him for twenty years.⁶² In May 1940, Otis and Lillie moved to Las Vegas, Nevada where they established a residence.⁶³ Six weeks later, they each filed a petition for divorce from their spouses in North Carolina, were later divorced in uncontested suits in Nevada, and were married there that same October.⁶⁴ They returned to North Carolina almost immediately, and were indicted for bigamy on the grounds that the Nevada divorce decrees were invalid.⁶⁵ The jury found the defendants guilty, and both were sentenced to prison.⁶⁶ The North Carolina Supreme Court affirmed these convictions, concluding that the Nevada decrees were not entitled to full faith and credit.⁶⁷

Without addressing the domicile issue that would be the focus of *Williams*

⁶⁰ Wardle, *supra* note 47, at 188.

⁶¹ 317 U.S. 287 (1942).

⁶² Wardle, *supra* note 47, at 189.

⁶³ Wardle, *supra* note 47, at 189.

⁶⁴ Wardle, *supra* note 47, at 189-90.

⁶⁵ Wardle, *supra* note 47, at 190.

⁶⁶ Wardle, *supra* note 47, at 190.

⁶⁷ Wardle, *supra* note 47, at 190.

II,⁶⁸ the court focused on “whether the domiciliary state of one spouse could enter a divorce decree entitled to full faith and credit in the state of marital domicile where an abandoned spouse still lived.”⁶⁹ Quoting the Full Faith and Credit Clause, Justice Douglas (who wrote the majority opinion), stated that the 1790 implementing statute,⁷⁰ “providing for the same faith and credit to be given to judgments in sister states as they have in the state rendering them, was the rule governing the *Williams* case.”⁷¹

Emphasizing “heavily” the unifying and integrative purpose of the Full Faith and Credit Clause, Justice Douglas concluded:

[a] broad interpretation of the full faith and credit statute was consistent with the purpose of the Full Faith and Credit Clause to ‘alter the status of the several states as independent sovereignties, each free to ignore . . . the judicial proceedings of the others, and to make them integral parts of a single nation.’⁷²

Professor Wardle noted the importance Douglas placed on using the Clause to “‘bring separate sovereigns into an integrated whole’” and on “[t]he fact that the Full Faith and Credit Clause substituted an absolute command for comity seemed to underscore the value of having an absolute recognition rule.”⁷³

According to Professor Wardle, “Justice Douglas’ opinion distinguished the full faith and credit that is required to be given to judgments from that required to be given to statutes.”⁷⁴ Although Justice Douglas “admitted . . . in case of statutes” that “some latitude for nonrecognition to accommodate the conflicting and ‘superior’ interests of the forum state is necessary,” he found the exception to mandatory recognition of statutes to be ‘a narrow one.’⁷⁵ But as far as judgments were concerned, Justice Douglas noted, “‘the exceptions

⁶⁸ Wardle, *supra* note 47, at 191-92. See *Williams v. North Carolina*, 325 U.S. 226, 227 (1945) (*Williams II*).

⁶⁹ Wardle, *supra* note 47, at 192.

⁷⁰ 28 U.S.C. § 1738 (2000). The statute was numbered 28 U.S.C. § 687 at the time of the Court’s decision.

⁷¹ Wardle, *supra* note 47, at 192. Justice Douglas cited *Hampton v. M’Connel*, 16 U.S. (3 Wheat.) 234, 235 (1918); *Fauntleroy v. Lum*, 210 U.S. 230 (1908); and *Davis v. Davis*, 305 U.S. 32, 40 (1938) as precedent finding the implementing statute of 1790 meant that “the second state must give a sister state judgment ‘the same credit, validity, and effect’ as it would be given in the state that rendered it.” Wardle, *supra* note 47, at 193.

⁷² Wardle, *supra* note 47, at 193 (quoting *Williams v. North Carolina* 317 U.S. 287, 295 (1942) (*Williams I*)).

⁷³ Wardle, *supra* note 47, at 193 (quoting *Williams I*, 317 U.S. at 303).

⁷⁴ Wardle, *supra* note 47, at 193.

⁷⁵ Wardle, *supra* note 47, at 193-94 (quoting *Williams I*, 317 U.S. at 294-95).

have been few and far between, apart from *Haddock v. Haddock*,⁷⁶ and “*Haddock* was portrayed as an exception to the general rule of mandatory full faith and credit for judgments.”⁷⁷ Professor Wardle explained that the court’s holding “reiterated ‘that Congress in its sweeping requirement that judgments of the courts of one state be given full faith and credit in the courts of another’ has not created any exception to that command.”⁷⁸

Professor Wardle’s article provides guidance to those wondering whether one state may refuse to recognize another state’s adoption decree because that adoption decree would not have been permitted in the forum state. He noted that “like or dislike for the internal policy of another state was irrelevant for interstate recognition.”⁷⁹

Justice Douglas expansively and repeatedly emphasized that Full Faith and Credit given to sister-state divorce judgments, unlike purely domestic divorce, does not depend upon the forum state’s substantive policy on divorce. The majority opinion considered and rejected a general exception to the rule of recognition in order to protect local public policy The difference between intrastate divorce policy, which a state may control, and interstate recognition, was reiterated. Intrastate divorce policy involves a choice in the realm of morals and religion [that] rests with the legislatures of the states. But interstate judgment recognition is different.⁸⁰

When a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.⁸¹

⁷⁶ 201 U.S. 562 (1906) (holding that a divorce decree by the newly acquired domicile of the husband was not entitled to full faith and credit in the state where the married couple last lived together, when the wife was abandoned and was not personally served).

⁷⁷ Wardle, *supra* note 47, at 194 (quoting *Williams I*, 317 U.S. at 294-95) (emphasis omitted).

⁷⁸ Wardle, *supra* note 47, at 194 (quoting *Williams I*, 317 U.S. at 303) (emphasis omitted).

⁷⁹ Wardle, *supra* note 47, at 195.

⁸⁰ Wardle, *supra* note 47, at 194-95 (quoting *Williams I*, 317 U.S. at 303).

⁸¹ Wardle, *supra* note 47, at 195 (quoting *Williams I*, 317 U.S. at 303). Justice Douglas explained that even *Haddock* had not challenged the general rule “that even though the cause of action could not have been entertained in the state of the forum, a judgment obtained thereon in

Justice Douglas explained that "it is difficult to perceive" how North Carolina, the "new" domicile of the married couple, could claim an interest that was superior to that of Nevada over Nevada's own domiciliaries.⁸² (Remember that Otis and Lillie lived in Nevada long enough to become Nevada domiciliaries by the time of their divorces, at least for purposes of *Williams I*).⁸³ Justice Douglas recognized "no authority for the argument that 'the Full Faith and Credit Clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state.'"⁸⁴

In divorce cases, the basis for the Nevada court's jurisdiction was that Nevada had become the domicile of Otis and Lillie.⁸⁵ The majority believed that the Nevada decrees were "wholly effective" to change the marital status of Otis and Lillie in Nevada.⁸⁶ Domicile of the plaintiff entitles the divorce decree to have extraterritorial effect, and domicile gave Nevada the power to "alter within its own borders the marriage status of spouses domiciled there, even though the other spouse is absent."⁸⁷

Justice Douglas' opinion expressed the majority's strong concern about the "intensely practical considerations" that would result "if one is lawfully divorced and remarried in Nevada and still married to the first spouse in North

a sister state is entitled to full faith and credit." Wardle, *supra* note 47, at 190 (quoting *Williams I*, 317 U.S. at 297). In *Haddock*, the Supreme Court refused to recognize the Connecticut divorce decree because Connecticut lacked jurisdiction to render a judgment that would be valid in New York, "not because the Connecticut substantive rule was rejected in New York. Moreover, the full faith and credit statute did not contain any exception permitting nonrecognition because the local public policy of the second state is offended." Wardle, *supra* note 47, at 195 (citing *Williams I*, 317 U.S. at 303).

⁸² Wardle, *supra* note 47, at 194-95 (quoting *Williams I*, 317 U.S. at 303).

⁸³ See *Williams I*, 317 U.S. at 290, 299.

⁸⁴ Wardle, *supra* note 47, at 195 (quoting *Williams I*, 317 U.S. at 296). Obviously, this is what Florida would be trying to do if it claimed that it did not have to recognize the valid, final adoption decree from California in Laurie and Ellen's situation. For an argument that subordination of judicial decisions to legislative ones is constitutional (rather than the current practice of subordinating legislative decisions to judicial ones); see Jeff Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV 409, 450-52 (1998).

⁸⁵ See *Williams I*, 317 U.S. at 299.

⁸⁶ *Id.*

⁸⁷ Wardle, *supra* note 47, at 196 (quoting *Williams I*, 317 U.S. at 299). Professor Ralph Whitten, in this symposium, explains that the domicile state of the adoptive child or adoptive parents also has jurisdiction over an adoption petition such as Laurie and Ellen's. See Whitten, *supra* note 6, at 8-10. Thus California, as the domicile of Laurie, Ellen, and Martha at the time of the adoption, had valid jurisdiction of the lawsuit.

Carolina.”⁸⁸ Just like the problems described above when a couple has a “marriage visa” that is stamped as they move from state-to-state, changing their marital status as they move, so too the *Williams I* Court was concerned about the “‘complicated and serious condition’” that would result, and recognized that “[t]he problem of inconsistent marital status and inconsistent judgments in different states presented a ‘perplexing and distressing complication.’”⁸⁹

A rule such as the one allowed in *Haddock* (which permitted one state to refuse to recognize another state’s final judgments) could cause “‘considerable disaster to innocent persons’ and ‘bastardize children’ . . .”⁹⁰ Justice Douglas repeated the majority’s concern about the “‘substantial and far-reaching effects which the allowance of an exception [to interstate recognition of divorce decrees] would have on innocent persons.’”⁹¹

Finally, Professor Wardle explained, “[w]hile a state could choose to restrict the divorce jurisdiction of its own courts to cases in which there was consent or fault of the absent spouse, it could not deny full faith and credit to a sister state divorce judgment on that ground.”⁹² He stated that the majority thought the *Haddock* rule to be “‘too complicated and troublesome’” to correctly state the constitutional rule for recognition of out-of-state judgments.⁹³

Reiterating that under the full faith and credit statute there was no exception to mandatory full faith and credit, such as [the Supreme Court had] articulated in *Haddock*, and re-emphasizing that the ‘substantial and far-reaching effects which the allowance of an exception would have on innocent persons,’ as well as the ‘purpose of the Full Faith and Credit Clause and of the supporting legislation,’ the Court explicitly declared: ‘*Haddock v. Haddock* is overruled,’ the North Carolina judgment was reversed, and the case remanded.⁹⁴

Although Justice Douglas understood that requiring states to recognize sister states’ divorce judgments could result in “‘a substantial dilution’” of state sovereignty in those states that permitted few divorces by those states that granted divorces more easily, Professor Wardle noted that Justice Douglas “‘brushed that concern aside, simply noting that the Full Faith and Credit Clause produces the same effect in ‘many other situations.’”⁹⁵

⁸⁸ Wardle, *supra* note 47, at 196 (quoting *Williams I*, 317 U.S. at 301, 299).

⁸⁹ Wardle, *supra* note 47, at 196 (quoting *Williams I*, 317 U.S. at 299-300).

⁹⁰ Wardle, *supra* note 47, at 197 (quoting *Williams I*, 317 U.S. at 301).

⁹¹ Wardle, *supra* note 47, at 197 (quoting *Williams I*, 317 U.S. at 303-04).

⁹² Wardle, *supra* note 47, at 197.

⁹³ Wardle, *supra* note 47, at 197.

⁹⁴ Wardle, *supra* note 47, at 197.

⁹⁵ Wardle, *supra* note 47, at 198 (quoting *Williams I*, 317 U.S. at 302).

The concurring opinion of Justice Frankfurter indicated that "authority over marriage and divorce" was reserved to the states;⁹⁶ and acknowledged the well-settled, general rule "under both the Full Faith and Credit Clause and the general full faith and credit statute that 'if a judgment is binding in the state where it was rendered, it is equally binding in every other state.'"⁹⁷ According to Professor Wardle, Justice Frankfurter concluded that, assuming that Otis and Lillie had become domiciliaries of Nevada before their divorces were rendered, then "denial of full faith and credit would mean that North Carolina was imposing its divorce policy on Nevada as much as North Carolina claimed recognition of the Nevada divorces would impose Nevada policy on North Carolina."⁹⁸

After remand, North Carolina brought a second suit against Otis and Lillie, using the dissenting opinions of Justices Murphy and Jackson as the basis for its argument that Nevada had not legitimately become their domicile and, thus, the judgments granting those divorces were invalid.⁹⁹ Again, Otis and Lillie were convicted.¹⁰⁰

On this second appeal, which the North Carolina courts also upheld, the Supreme Court stated the issue as "whether North Carolina had the power 'to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicile was acquired in Nevada.'"¹⁰¹ This time, Justice Frankfurter wrote the

⁹⁶ Wardle, *supra* note 47, at 198 (quoting *Williams I*, 317 U.S. at 304 (Frankfurter, J., concurring)). This raises the obvious question of why Congress defined "marriage" and "spouse" for federal purposes for the first time in the so-called Defense of Marriage Act, instead of continuing its longstanding tradition of applying each state's definitions of those terms to that state's residents whenever a federal issue arose. That Congress overstepped its bounds and legislated in an area which the Constitution left within state authority is clear. See Cox, *supra* note 27, at 144-46 (discussing why Congress should not have entered into this area of law); see also Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997); Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419 (1999).

⁹⁷ Wardle, *supra* note 47, at 198 (quoting *Williams I*, 317 U.S. at 306 (Frankfurter, J., concurring)).

⁹⁸ Wardle, *supra* note 47, at 198-99.

⁹⁹ Wardle, *supra* note 47, at 201-02. It is interesting to note that while *Williams I* was on review, the original Mrs. Williams died and Mr. Hendrix remarried. Despite the fact that no North Carolina residents remained interested in the suit, North Carolina pursued the prosecutions anyway.

¹⁰⁰ Wardle, *supra* note 47, at 202.

¹⁰¹ Wardle, *supra* note 47, at 203 (quoting *Williams v. North Carolina* 325 U.S. 226, 227 (1945) (*Williams II*)). The Court used the older spelling of domicile ("domicil") and I do the same when quoting the Court's language.)

majority's opinion, reiterating the rule

that . . . had long been established that the judgment of a state should have the same credit, validity, and effect in every other court in the United States that it has in the state in which it was rendered, *so long as the jurisdiction of the rendering court is not impeached*.¹⁰²

But if the court did not have proper jurisdiction over the case, the court's judgment was subject to collateral attack. To decide whether jurisdiction existed, the court had to determine whether the parties had become domiciled in Nevada, because "jurisdiction to grant a divorce is founded on domicile, a principle that was established in 1789 and never questioned since."¹⁰³

Reminding the Court's readers of basic principles of civil procedure, Justice Frankfurter noted that issues once litigated cannot be re-litigated by the parties, but since the issue of domicile had never been contested and since North Carolina had never been a party to the Nevada proceeding, it "was not bound by the recitation of domicil declared by the Nevada court."¹⁰⁴ Professor Wardle explained that:

A State concerned with vindicating its own social policy should not be bound by an unfounded recital [of domicile] in the record of another state. It has a right to ascertain for itself the truth of the jurisdictional facts, even if the court of the first state inquired into the question of domicile. Full faith and credit requires respect for a divorce judgment provided the jurisdictional facts are established¹⁰⁵

Justice Frankfurter was clear to note that when

[T]he problem of sister states improperly nullifying each others' divorce judgments because they dislike the divorce law of the sister state will not arise if the second states must limit their inquiry to the facts of jurisdiction. They may not deny full faith and credit to divorce decrees merely "under the guise of finding an absence of domicil" ¹⁰⁶

Although North Carolina had a heavy burden when challenging Nevada's previous finding that domicile existed, the majority determined that North Carolina's conclusion that Otis and Lillie were not domiciled in Nevada was

¹⁰² Wardle, *supra* note 47, at 203 (emphasis added).

¹⁰³ Wardle, *supra* note 47, at 203.

¹⁰⁴ Wardle, *supra* note 47, at 204.

¹⁰⁵ Wardle, *supra* note 47, at 204.

¹⁰⁶ Wardle, *supra* note 47, at 204 (quoting *Williams II*, 325 U.S. at 233).

“amply supported in evidence.”¹⁰⁷ That evidence included that (1) Otis and Lillie had been residents of North Carolina for a long time, (2) they lived in an “auto-court for transients” only long enough to obtain divorces and get remarried, and (3) they then returned to North Carolina to live.¹⁰⁸ Thus, the jury could have found that rather than changing their domicile, Otis and Lillie intended to return to North Carolina the entire time they were in Nevada and, therefore, remained domiciliaries of North Carolina.¹⁰⁹ The Supreme Court affirmed their convictions.¹¹⁰

Justice Murphy’s concurring opinion noted that “Nevada could grant divorces on any grounds it chose to all who meet due process requirements, and those divorces would be valid in Nevada.”¹¹¹ The domicile of at least one of the parties had the “exclusive right to regulate” marital relations, including dissolution, and the Court’s opinion did not “jeopardize uncontested divorces, except “those based upon fraudulent domiciles.”¹¹²

Finally, the case against Otis and Lillie ended. Upon remand, they remarried in North Carolina, and the parties were paroled without ever serving time in jail.¹¹³

Professor Wardle’s characterization of the *Williams I* case makes it clear that the adoption decrees of lesbian and gay parenting must receive the same recognition and effect in other states as in the state that renders them, under the Full Faith and Credit Clause. His characterization of *Williams II* makes it clear that only those rare decrees that are subject to collateral attack, because of questions concerning the domicile of the adoptive parent(s) or child(ren), will be subject to challenge in other states.¹¹⁴

B. The Defense of Marriage Act Should Not Be Interpreted to Weaken the Constitutional Demands of Williams I Concerning Adoption Decrees by Lesbian and Gay Parents, and Williams II Holds Little Promise For Collaterally Attacking Those Decrees

Professor Wardle noted that both *Williams I* and *Williams II* continue to be

¹⁰⁷ Wardle, *supra* note 47, at 204 (quoting *Williams II*, 325 U.S. at 234).

¹⁰⁸ Wardle, *supra* note 47, at 204-05 (quoting *Williams II*, 325 U.S. at 235-36).

¹⁰⁹ Wardle, *supra* note 47, at 205.

¹¹⁰ Wardle, *supra* note 47 at 204.

¹¹¹ Wardle, *supra* note 47, at 205.

¹¹² Wardle, *supra* note 47, at 205-06 (quoting *Williams II*, 325 U.S. at 241, 242

(Murphy, J., concurring)).

¹¹³ Wardle, *supra* note 47, at 208.

¹¹⁴ For example, if a Florida couple left the state, changed their domicile to another state, immediately adopted a child in that state, and then returned to Florida, it may be possible that an attack could be made on the adoption decree. However, to be successful, as in *Williams II*, such an attack would have to determine that the parents never intended to change their domicile, and thus, remained Florida citizens and subject to Florida law.

good law today, both are regularly cited by federal and state courts, and Justice Kennedy cited *Williams I* in his 1998 concurring opinion in *Baker v. Gen. Motors Corp.*¹¹⁵ Professor Wardle argued that *Williams I* does not support interstate recognition of marriages by same-sex couples, however, and stated:

First, the key term in the statement about the Full Faith and Credit clause altering state power to refuse recognition to judgments is judgments. *Williams I* focused on nonrecognition of a divorce judgment, explicitly distinguishing judgments from statutes in terms of full faith and credit, and the majority emphasized that the range of latitude for nonrecognition of judgments is particularly 'narrow' and the exceptions very few.¹¹⁶

Like the Court in *Williams I*, we too are concerned with interstate recognition of judgments, not statutes, and thus the latitude for nonrecognition of Laurie's adoption of Martha is "particularly narrow."

Later in his article, Professor Wardle again discussed the "judicial proceedings" language in the Defense of Marriage Act. He stated that section 2 applies to records and judgments as well as statutes, and that DOMA permits one state to refuse "to recognize that marriage, even if the same-sex couple received a judgment in [another] state recognizing their 'marriage' as valid."¹¹⁷

Without digressing to explain my disagreements with Professor Wardle's DOMA analysis generally, I believe that he is wrong about the viability of DOMA, at least with regard to its claim to permit states to refuse recognition to other state's judgments.

Assuming a valid, final judgment in one state finding the same-sex couple to be married or to have rights based on their marital status, I agree with Professor Wardle when he states that "the historical practice gives a strong presumption that such a judgment would be entitled to full faith and credit and that the second state could not refuse to recognize it. There is significant language in *Williams I* and *Williams II* to support that conclusion."¹¹⁸ However, Professor Wardle goes on to assert that DOMA has created an exception to this general rule, one that is "focused, narrow, and specific."¹¹⁹

¹¹⁵ Wardle, *supra* note 47, at 208-09 (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 243 (1998) (Kennedy, J., concurring)) ("We have often recognized the second State's obligation to give effect to another State's judgments even when the law underlying those judgments contravenes the public policy of the second State.").

¹¹⁶ Wardle, *supra* note 47, at 214-15 (citing *Williams I*, 317 U.S. at 294-95).

¹¹⁷ Wardle, *supra* note 47, at 229.

¹¹⁸ Wardle, *supra* note 47, at 230.

¹¹⁹ Wardle, *supra* note 47, at 230. This is just one of the many reasons why I believe DOMA is unconstitutional. To select the "focused, narrow, and specific" situation of marriages by same-sex couples against which to impose a rule refusing recognition to

(continued)

Thus, assuming the second state had a clear policy of not extending benefits to nor recognizing the marriages of same-sex couples, Wardle believes that “under *Williams I* and *II* courts should rule that the Full Faith and Credit Clause does not compel states to recognize same-sex marriage judgments.”¹²⁰

I believe that Professor Wardle’s analysis of *Williams I* and *Williams II*, stated earlier, argues persuasively and correctly for why Congress overstepped its bounds by passing DOMA and including judgments within its command. Additionally, and more to the point for this article, the exception claimed to be permitted under DOMA does not apply to the interstate recognition of adoptions by gay men and lesbians, even when those adoptions are based on the underlying same-sex relationship of the parents. As broad as DOMA claims to be, the judgment in an adoption situation is one between a parent and a child who have legally created a parent-child relationship, and the sexual relationship of the parents is irrelevant to that final judgment (even if it provided the initial statutory basis for obtaining the adoption.)¹²¹

Others who agree with Professor Wardle on the validity of DOMA with regard to statutes and the interstate recognition of marriages by same-sex couples seem disturbed by DOMA’s claim that it gives states the authority to refuse to recognize judgments concerning the marriages of same-sex couples or those relationships that are treated as marriages. Three commentators who generally support the constitutionality of DOMA have explained their discomfort with the notion that DOMA permits non-recognition of judgments relating to the relationships of same-sex couples which are treated as marriages.

Professor Jeffrey Rensberger discussed some of the broader implications of DOMA in his *Creighton Law Review* article.¹²² He noted that “in the context of judgments, full faith and credit is robust. The usual understanding of the full faith and credit owed to a judgment is that F<2> must give sister-state judgments the same effect they would have in the rendering state. Unlike

judgments between states, when the Supreme Court has consistently required that judgments receive recognition by sister states since 1813, and when Congress has not previously defined marriage or spouse but left those decisions where they rightfully belong with the states, shows the clear discriminatory nature of the statute. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“We cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability on those persons alone.”).

¹²⁰ Wardle, *supra* note 47, at 231.

¹²¹ See Nancy D. Polikoff, *Recognizing Partners But Not Parents/Recognizing Parents But Not Partners: Lesbian and Gay Family Law in Europe and the United States*, XVII N.Y.L. SCH. J. HUM. RTS. 711 (2000) (discussing how U.S. courts tend not to consider the underlying relationships of lesbian and gay parents when addressing parenting issues—at least for adoption purposes—while the courts of other countries do).

¹²² Rensberger, *supra* note 84.

the choice of law situation, F<2> thus may not simply rely on local policies to avoid the effect of a sister-state judgment."¹²³ He stated that before DOMA, "a state had to enforce sister-state judgments even though they offend state policies of a fundamental order."¹²⁴

Professor Rensberger cited *Fauntleroy v. Lum*,¹²⁵ as "the paradigm case for the full faith and credit requirement as applied to judgments." In that case, two Mississippi residents entered into a contract in cotton futures in that state, a contract that Mississippi treated as one for gambling, which was not only unenforceable but also prohibited by criminal statute.¹²⁶ The plaintiff served the defendant while he was temporarily in Missouri, and a Missouri court gave the plaintiff a judgment on the contract. The Missouri court reached this result despite the clear requirement under choice-of-law theory that Mississippi law should have applied, which would have resulted in a judgment for the defendant that the contract was unenforceable.¹²⁷ The Mississippi courts declined to enforce the judgment, and the Supreme Court reversed those courts' decisions.

In an opinion by Justice Holmes, the Court concluded that the "validity of [the Missouri] judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood."¹²⁸ The case clearly stands "for the proposition that there is a self-executing command in the Full Faith and Credit Clause as to judgments that mirrors the language of section 1738," and which requires "that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the state where it was brought."¹²⁹ Without DOMA, Professor Rensberger concluded that the forum state must honor the prior judgment of a sister state, "even though it conflicts with a profound policy" of the forum state.¹³⁰ The question then became whether Congress, when it passed DOMA, had the authority "to substantively alter the otherwise prevailing rules of full faith and credit under the Constitution."¹³¹

Professor Rensberger argued that Congress did have the power to lessen the command of Full Faith and Credit to be provided to judgments.¹³² But

¹²³ Rensberger, *supra* note 84, at 446-47. (When referring to F<2>, Professor Rensberger is referring to the choice-of-law situation where the forum state is F<2> and the state which took the initial action is F<1>.)

¹²⁴ Rensberger, *supra* note 84, at 444.

¹²⁵ 210 U.S. 230 (1908).

¹²⁶ Rensberger, *supra* note 84, at 447.

¹²⁷ Rensberger, *supra* note 84, at 447.

¹²⁸ Rensberger, *supra* note 84, at 447.

¹²⁹ Rensberger, *supra* note 84, at 447-48.

¹³⁰ Rensberger, *supra* note 84, at 448.

¹³¹ Rensberger, *supra* note 84, at 448.

¹³² Rensberger, *supra* note 84, at 449-55.

even while believing that Congress had the power to do so, he stated that

It is in the area of judgments that I believe Congress may have mis-stepped. I do believe that the current law of full faith and credit has overemphasized the value of the finality of judicial decisions at the expense of legislative policy. A narrow statute designed to reassert the power of legislatures in a particular context seems unobjectionable. But the cases in which such an exception make the most sense are those in which the judgment was most clearly in error and the legislative policy most clearly upset. . . . [But a narrower version of DOMA] would raise far fewer objections than the actual Act, which does not distinguish between the credit due to sound judgments and questionable ones.¹³³

Such a revised DOMA would, according to Professor Rensberger, only “target judgments that affirm same-sex marriage between domiciliaries of a state that bars such marriages.”¹³⁴ Clearly, it would not apply to an adoption decree, issued by a state that permits its domiciliaries to adopt as one of the benefits provided to them as part of that state’s recognition and protection of their same-sex relationship.

Additionally, Dean Patrick Borchers also wrote about the Full Faith and Credit Clause, DOMA, and same-sex marriage in the same Creighton Law Review symposium issue that contained Professors Wardle’s and Rensberger’s articles.¹³⁵ There, Dean Borchers explained the distinction between judgments and statutes for Full Faith and Credit Purposes:

Judgments—assuming they meet the Court’s exacting definition—are essentially unassailable if presented to another court, unless entered without personal or subject matter jurisdiction. Sister state laws, however, are by no means entitled to automatic application. Rather, courts are permitted to apply their own law and refuse the application of a sister state’s law in almost all cases.¹³⁶

Professor Borchers also seemed troubled by DOMA’s claim to apply to judgments that may arise out of the marriage or relationship of a same-sex couple. He says, “I, for one, would not construe DOMA to affect the obligation of courts to recognize money judgments simply because the existence of a same-sex marriage played into the underlying theory that led to

¹³³ Rensberger, *supra* note 84, at 455-56.

¹³⁴ Rensberger, *supra* note 84, at 456.

¹³⁵ See Borchers, *supra* note 56.

¹³⁶ Borchers, *supra* note 56, at 164.

the judgment."¹³⁷ Even though Professor Borchers believes that DOMA would be upheld even if it were interpreted to permit states to refuse recognition to otherwise valid judgments,¹³⁸ he anticipates that "courts will probably be reluctant to deny enforcement of such judgments, no matter how negative the sentiments about same-sex marriages might be in their states."¹³⁹

Additionally, Professor Ralph Whitten, who also writes on the interstate recognition of adoption judgments in this symposium issue, has previously stated that Congress, when passing DOMA, included "judicial proceedings" to prevent "bogus" declaratory judgments in one state that the same-sex couple was married, which could then be used to bind other states to find that the couple's marriage must also be recognized there.¹⁴⁰ Although Whitten believes Congress has the power to do so, he is concerned that:

In doing so, however, [Congress] endangered not only the bogus declaratory judgment actions described above, but also more traditional judgments such as money judgments recovered by plaintiffs in, e.g., wrongful death actions for the recovery of damages for the death of their same-sex (Hawaiian) spouses [W]e may hope that the application of DOMA to judgments will be limited to the 'declaration of marriage' scenario and not extended to more traditional judgments.¹⁴¹

In another article discussing interstate recognition of same-sex domestic partnerships, Professor Whitten wrote that DOMA may be applicable to domestic partnerships because they are "based on a relationship treated as a marriage" to a limited extent.¹⁴² He also stated that DOMA may

¹³⁷ Borchers, *supra* note 56, at 182. (He was discussing the situation of a loss of consortium action which resulted in a money judgment in favor of a person whose same-sex partner was injured in an accident by a tourist from another state, and the question of whether that other state had to recognize the judgment.)

¹³⁸ Borchers, *supra* note 56, at 183-84.

¹³⁹ Borchers, *supra* note 56, at 184.

¹⁴⁰ Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 391 (1998).

¹⁴¹ *Id.*

¹⁴² Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Law Questions and Concerns*, 2001 BYU L. REV. 1235, 1246. This limited extent is a significant argument for finding that domestic partnerships and civil unions do not fit within the bounds of DOMA. With marriage comes over one thousand and forty-nine federal and hundreds of state rights and benefits that are not provided to members of same-sex couples who are in domestic partnership, reciprocal beneficiary, or civil union relationships. See Cox, *supra* note 27. If same-sex couples receive such limited protections of our relationships under these alternative systems, then it is unfair to bring those relationships within the scope of DOMA

constitutionally permit states to refuse to recognize judgments from other states, even though it would be a clear exception to the general rule that they receive the “same effect” in other states as in the rendering state. But while believing that such a refusal may be constitutional, he questioned whether DOMA should be interpreted to do so:

Congress may have included more within [DOMA] than is desirable [When discussing an exception from interstate recognition for a valid money judgment in a wrongful death action by a same-sex spouse, e]nforcement of the judgment where the tortfeasor has assets, presumably in the tortfeasor’s home state, may no longer be a matter of right under the ‘same effect’ command of the implementing statute because the judgment might be removed from the command by a broad interpretation of DOMA as applied to judgments. Nevertheless, it is difficult to see why Congress would want to reach such a result, and the better construction of DOMA would limit its inclusion of judgments to the kind of evil at which Congress was aiming: a bogus declaratory judgment action in the state where the same-sex partners are wedded that is designed to force other states to accept the same-sex marriage contrary to their laws.¹⁴³

Although DOMA includes “judicial proceedings” within its scope, even its supporters question its wisdom in doing so. Essentially, they argue that DOMA was unnecessary to permit states to refuse to recognize the marriages of same-sex couples, since the public policy exception in choice-of-law theory permits the same result,¹⁴⁴ and DOMA was unwise in trying to alter the firmly established rule providing interstate recognition of judgments.

Numerous policy reasons exist for the “iron law of full faith and credit.”¹⁴⁵ One reason, expressed in *Williams I* and other cases, comes from the purpose of the clause “to make the several states ‘integral parts of a single

while also denying those couples the full range of benefits and rights given to marriages.

¹⁴³ Whitten, *supra* note 144, at 1249.

¹⁴⁴ See Borchers, *supra* note 56, at 180.

¹⁴⁵ Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 WASH. & LEE L. REV. 47, 98 (2001) (citing William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994)). Sterk does believe, however, that the “iron” law is relaxed when a court issues a judgment that controls post-judgment behavior, such as with injunctions against future activity and modifiable decrees in child support and custody. *Id.* at 49-50. Whether he would include adoptions, which create the status of parent-child both now and in the future, is unclear, but it seems likely that he would not because of the change of status that occurs at the end of the case and that must be final if the purposes of Full Faith and Credit are to be obtained. *See id.* at 60-61.

nation.”¹⁴⁶ Rather than permitting the country to consist of “a collection of independent, sovereign states,”¹⁴⁷ the clause “was adopted to ‘guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence.’”¹⁴⁸ When Congress exercises its full faith and credit authority, it should “harmonize with this constitutional principle,”¹⁴⁹ something that DOMA clearly does not do if it were to allow, in this case, the Florida statute banning adoption by lesbian and gay parents¹⁵⁰ to trump the adoption decree previously granted in California.

Another reason is the “national interest in finality of judgments: Litigation must end somewhere.”¹⁵¹ Besides the obvious concern that re-litigation of cases imposes significant costs and instability for the parties to the litigation, “the policy is based on the respect due the court that rendered the initial decision, whose abilities or even integrity might be cast in doubt if other courts refused to recognize the decisions it reached.”¹⁵² As the Supreme Court recognized:

[The Full Faith and Credit] clause compels that controversies be stilled so that where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered. . . . By the constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence¹⁵³

Having received a valid, final judgment permitting the adoption of Martha by Laurie under California law, that judgment and the parental status which goes with it must be final and not subject to relitigation whenever Laurie or Martha leave California.

¹⁴⁶ *Id.* at 60.

¹⁴⁷ 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, 647 (1997) (citing *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)); *Williams v. North Carolina* 317 U.S. 287, 303 (1942) (*Williams I*).

¹⁴⁸ Chabora, *supra* note 147, at 647 (citing Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945)).

¹⁴⁹ Chabora, *supra* note 147, at 647.

¹⁵⁰ FLA. STAT. § 63.042(3) (2002).

¹⁵¹ Chabora, *supra* note 147, at 647 (citing *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) (“It is just as important that there should be an end as that there should be a place to begin litigation.”)).

¹⁵² Koppelman, *Dumb and DOMA*, *supra* note 3, at 15 (quoting LEA BRILMAYER, *CONFLICT OF LAWS* 298-99 (2d ed. 1995)).

¹⁵³ Koppelman, *Dumb and DOMA*, *supra* note 3, at 22 n.109 (citing *Riley v. New York Trust Co.*, 315 U.S. 343, 348-49 (1942)).

Additionally, enforcement of judgments “coordinates the sovereign interests of the several states. Each state relinquishes one aspect of its sovereign power: The right to adjudicate disputes in which courts of a sister state have already rendered judgment. In return, the state obtains the assurance that its own judgments will enjoy nationwide force.”¹⁵⁴ By preserving equality between the states in this manner, “[a]nything taken from a state by way of freedom to deny faith and credit to law of others is thereby added to the state by way of a right to exact faith and credit for its own.”¹⁵⁵ California is entitled to have its adoption decree recognized in Florida and all other states, because it must recognize the adoption decrees granted by Florida and the other states. Only by consistently applying this requirement of full faith and credit is equality between the states assured. The Defense of Marriage Act should not be applied to judgments and particularly not to the adoption decree of Martha by Laurie, if the principles underlying the Full Faith and Credit Clause are to be upheld.

Additionally, DOMA should not apply to Laurie and Ellen’s situation because their domestic partnership, upon which their stepparent adoption rests, is neither a marriage nor “a relationship . . . that is treated as a marriage” in California. Even were DOMA interpreted to exempt judgments concerning marriages by same-sex couples from the usual requirements of full faith and credit, California’s domestic partnership statutes and the rights provided by it do not fall within the scope of DOMA, and thus, Laurie’s adoption of Martha must be recognized.

Having explained that *Williams I* prevents states, such as Florida in my hypothetical, to refuse to recognize the adoption decree by Laurie and Ellen from California,¹⁵⁶ it is important to explain why *Williams II* also does not threaten the interstate validity of that decree.¹⁵⁷

The usual avenue for attacking the validity of a judgment, after the time for appeal has passed, is to challenge whether the original court granting the judgment had jurisdiction over the lawsuit and the ability to render a judgment.

This is known as a collateral attack and can be made in a second state against the judgment from the first state. Professor Whitten provides an excellent discussion of the bases for such a collateral attack in his article,¹⁵⁸ and I will not repeat that discussion here.

The success of a collateral attack on an adoption decree is very unlikely in the usual situation. The adoptive parents usually live in the state where they seek the adoption, use the statutes of that state or its case precedent to pursue the adoption, and have a child who is also living in that state. Usually the

¹⁵⁴ Sterk, *supra* note 145, at 75.

¹⁵⁵ Chabora, *supra* note 147, at 648.

¹⁵⁶ *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*).

¹⁵⁷ *Williams v. North Carolina*, 325 U.S. 226 (1945) (*Williams II*).

¹⁵⁸ Whitten, *supra* note 6, at Part III.

child is either the biological child of one of the parties and already living with his or her parents, or is a foster child placed by the state in the home of the adoptive parent(s). Clearly the adoption decree by that state permitting the gay or lesbian parent(s) to adopt the child is within the jurisdiction of that state's courts, assuming the lawyers took Civil Procedure in law school and showed up at the right courthouse.¹⁵⁹ Because the court granting the adoption had jurisdiction over the parties before the court, attacks against the adoption decree in other states will not be successful.

Just as strong policy reasons exist for not requiring a married couple to have their marital status repeatedly questioned or litigated as they move across the country, even stronger policy reasons support interstate recognition of the valid, final adoption decrees of one state by its sister states. Perhaps nowhere is the traditional finality of judgments and interstate recognition of their validity more important than with adoption. The court that grants the adoption is recognizing the parental relationship that exists between the parent(s) and the child(ren). Courts when granting adoptions use the standard of whether the adoption is in the best interests of the child.¹⁶⁰ Having determined that it would be in the child's best interest to be adopted by the parent or parents, it would be terrible to have that relationship thrown into jeopardy as the family moved or traveled across the country. Even more than the importance of providing stability when recognizing the marriage of two adults is the importance of providing stability for the child and the family that has been legally developed by the adoption decree. To permit another state which may not have allowed that adoption in the first place to refuse to recognize it at a time when some threat has been made to the child or his or her parents (because their relationship has been challenged in court) would violate the Supreme Court's strict adherence to using the Full Faith and Credit Clause¹⁶¹ to protect judgments from later challenge.

IV. STATES THAT HAVE CONSIDERED WHETHER TO GIVE INTERSTATE RECOGNITION TO ADOPTIONS BY GAY OR LESBIAN PARENTS HAVE RECOGNIZED THE ADOPTIONS

States clearly understand the Constitutional requirement to give Full Faith and Credit to the adoption decrees of lesbian and gay parents.¹⁶² In three recent settings, state courts and legislatures analyzed the issue and determined that these adoption decrees, that are valid and final in one state, must be recognized by all others.

¹⁵⁹ Whitten, *supra* note 6, at Part II.A.

¹⁶⁰ See Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents under Uniform Adoption Act*, 51 FLA. L. REV. 89, 93 (1999); Polikoff, *supra* note 121, at 733.

¹⁶¹ U.S. CONST. art. IV, § 1.

¹⁶² See U.S. CONST. art. IV, § 1.

A. *Starr v. Erez*

In this case, S.E., the biological mother of her same-sex partner's adoptive child, tried to convince the North Carolina courts to refuse to recognize the second-parent adoption decree that Washington State granted to her former partner.¹⁶³ After the parties separated, S.E. moved to Georgia and then North Carolina, leaving full responsibility for their child with A.S., the adoptive mother. She then tried to use North Carolina's anti-marriage statute as a basis for declaring the adoption to be invalid in North Carolina.¹⁶⁴ After losing at the trial court level, S.E. pursued the issue in the Court of Appeals. According to Kate Kendall, Executive Director of the National Center for Lesbian Rights, S.E.'s suit was unprecedented because:

[A]doptions always have been sacrosanct and recognized in every state, even if a state does not approve second-parent adoptions for its residents . . . [and because] S.E. is attempting to use an anti-gay law, which has nothing to do with adoption, to destroy very hard fought rights and protections for our families.¹⁶⁵

Professor Nancy Polikoff discussed *Starr v. Erez*, and the argument that the North Carolina court should not recognize a second-parent adoption by a lesbian parent that had been granted in Washington State. Professor Polikoff explained:

[T]he status of parent and child, once created in one state, must be accepted by all states and by the federal government. Although North Carolina courts are not supportive of lesbian and gay parents, in one case a judge rejected an argument that a second-parent adoption granted in Washington state should not be recognized in North Carolina because it was against public policy in that state¹⁶⁶

¹⁶³ See *Lesbian Attempts to Use Anti-Gay Law to Invalidate Second-Parent Adoption*, Apr. 24, 2000, available at <http://www.nclrights.org/releases/nocar.htm> (last visited Mar. 14, 2003).

¹⁶⁴ *Id.* (citing N.C. GEN. STAT. § 51-1.2 (2002) which reads “[m]arriages, whether created by common law contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”).

¹⁶⁵ *Id.*

¹⁶⁶ Polikoff, *supra* note 121, at 735 (citing *Starr v. Erez*, 97 CVD 624 (Durham County, N.C. General Court of Justice 1997)). The trial judge refused to dismiss the custody petition filed by Starr, the nonbiological mother, and set the case for trial. Erez filed an interlocutory appeal to the North Carolina Court of Appeals which was dismissed as premature. *Id.* at 735 n.113.

Despite the argument that North Carolina's anti-marriage statute provided a basis for denying A.S.'s parental rights under the adoption decree, the North Carolina courts found that A.S.'s parental rights established in the Washington adoption decree had to be recognized in North Carolina during a custody dispute between the parents.

B. *Mississippi Statute Not Passed*

Professor Polikoff also observed that Mississippi has strong case law and statutes that disfavor the marriages and parenting of same-sex couples. In 1997, Mississippi adopted its version of an anti-marriage statute.¹⁶⁷ Mississippi also disfavors custody by gay or lesbian parents upon divorce.¹⁶⁸ Additionally, no evidence exists of an openly gay or lesbian parent adopting in Mississippi or of an openly gay or lesbian couple jointly adopting in the state.¹⁶⁹ In 2000, Mississippi prohibited "adoption by couples of the same gender."¹⁷⁰ But Polikoff notes: "Although Mississippi recently enacted a prohibition on adoption by same-sex couples in that state, the legislature rejected a portion of the original proposal that would have denied recognition to such adoptions granted in other states."¹⁷¹

The proposed legislation was not passed because it would have denied interstate recognition of otherwise valid, final adoption decrees, even though gay men and lesbians were not permitted to adopt in Mississippi under its new statute.¹⁷² This shows the recognition by the Mississippi legislature that such an option was not permitted under the U.S. Constitution.

C. *Serenna D. Russell v. Joan C. Bridgens*

In this case, the Supreme Court of Nebraska addressed the issue of whether a 1997 Pennsylvania adoption decree by two lesbians was entitled to full faith and credit in Nebraska under the U.S. Constitution.¹⁷³ Joan Bridgens

¹⁶⁷ Polikoff, *supra* note 121, at 750 (citing Miss. CODE ANN. § 93-1-1(2) (2002) which reads: "Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.").

¹⁶⁸ Polikoff, *supra* note 121, at 750 (citing Weigland v. Houghton, 730 So. 2d 581 (Miss. 1999)).

¹⁶⁹ Polikoff, *supra* note 121, at 750.

¹⁷⁰ *Id.* (citing Miss. CODE ANN. § 93-17-3(2) which reads: "Adoption by couples of the same gender is prohibited.").

¹⁷¹ Polikoff, *supra* note 121, at 735 (citing Miss. H.B. 49 (introduced Jan. 12, 2000, died on calendar Mar. 16, 2000)).

¹⁷² Miss. CODE ANN. § 93-17-3.

¹⁷³ *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002).

¹⁷³ *Id.* at 58.

adopted a minor child in Pennsylvania in September 1996.¹⁷⁴ In December 1997, Bridgens and her partner, Serenna Russell, jointly adopted the same child in a coparent adoption.¹⁷⁵ A certified copy of the 1997 adoption decree was part of the record before the Nebraska courts, although the petition to adopt was not.¹⁷⁶ The trial court acknowledged that “[t]he certified decree expressly states that ‘all requirements of the Acts of Assembly have been fulfilled and complied with.’”¹⁷⁷ Bridgens and Russell lived together and raised the child together until August 1999.¹⁷⁸ Then Russell and the child, who had been living with Bridgens in Germany, returned to the U.S. while Bridgens remained in Germany.¹⁷⁹ In November 2000, Russell filed a petition to establish custody and support for the child in Douglas County, Nebraska.¹⁸⁰

After answering and petitioning for custody and support herself, Bridgens filed a motion for summary judgment alleging that the 1997 adoption was invalid under Pennsylvania law.¹⁸¹ In July 2001, the trial court granted the motion, reasoning that “Pennsylvania law required Bridgens to terminate her parental rights prior to the 1997 adoption and. . . ‘it appears to the Court this was not done and [Russell] has not offered evidence to the contrary.’”¹⁸² In a motion for reconsideration, the district court “clarified that because the Pennsylvania statutory requirements for adoption were not met, the Pennsylvania court lacked subject matter jurisdiction to grant the adoption and that therefore, the adoption was not entitled to full faith and credit under the U.S. Constitution.”¹⁸³ Russell appealed and the Supreme Court moved the case to its own docket.¹⁸⁴

Professor Whitten discusses the Court’s opinion in detail in this issue,¹⁸⁵ and I will not repeat that discussion here. But I will highlight some of the main points of the majority and the concurring opinions. The Supreme Court made it clear that a final judgment from a sister state must be recognized in Nebraska.¹⁸⁶

“A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as

¹⁷⁴ *Id.* at 58.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 58-9.

¹⁸⁴ *Id.* at 59.

¹⁸⁵ See Whitten, *supra* note 6.

¹⁸⁶ *Russell*, 647 N.W.2d at 59.

in the state rendering judgment."¹⁸⁷

The Full Faith and Credit Clause of the U.S. Constitution¹⁸⁸ prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, but a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter.¹⁸⁹

The Nebraska Supreme Court held that the question of whether the Pennsylvania court had jurisdiction was dependent on Pennsylvania law.¹⁹⁰ As the one challenging the Pennsylvania adoption decree, Bridgens would have to show that subject matter jurisdiction was lacking.¹⁹¹ But, as the Supreme Court also noted:

The record before us, however, contains only the 1997 Pennsylvania adoption decree which affirmatively alleges on its face that it was decreed in conformance with Pennsylvania law. There is no evidence in the record establishing that the necessary consents were not included with the petition for adoption or that Bridgens did not. . . . relinquish her parental rights.¹⁹²

Thus, the Court found that Bridgens did not meet her burden for summary judgment and the trial court erred by granting her motion.¹⁹³ The court then remanded the case to the trial court. It also stated,

[f]or the benefit of the parties and the district court, we note that the legal issue of whether compliance with the statutory requirements of the Pennsylvania adoption act is an aspect of subject matter jurisdiction is an issue we view to be significantly dependent upon the Supreme Court of Pennsylvania's resolution of the pending appeals in *In re Adoption of R.B.F.*,¹⁹⁴ and *In re Adoption of C.C.G.*¹⁹⁵¹⁹⁶

Decided after the Nebraska Supreme Court's decision in *Bridgens*, the

¹⁸⁷ *Id.*

¹⁸⁸ U.S. CONST. art. IV, § 1.

¹⁸⁹ *Russell*, 647 N.W. 2d at 59.

¹⁹⁰ *Russell*, 647 N.W. 2d at 59.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Russell*, 647 N.W. 2d at 59.

¹⁹⁴ *In re Adoption of R.B.F.*, 762 A.2d 739 (Pa. Super. Ct. 2000).

¹⁹⁵ *In re Adoption of C.C.G.*, 762 A.2d 724 (Pa. Super. Ct. 2000).

¹⁹⁶ *Russell*, 647 N.W.2d at 60.

Pennsylvania Supreme Court held that the Pennsylvania adoption statutes did not expressly permit second-parent adoptions (whereby the legal or biological parent retains parental status and his or her partner also becomes a legal parent through adoption).¹⁹⁷ But the legislature had provided for situations when a parent can retain his or her parental status while also consenting to the adoption of the child by his or her partner.¹⁹⁸ The Court noted that:

There is no language in the Adoption Act precluding two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child who had no legal parents. It is therefore absurd to prohibit their adoptions merely because their children were either the biological or adopted children of one of the partners prior to the filing of the adoption petition.¹⁹⁹

The Pennsylvania Supreme Court remanded the cases to the trial courts for evidentiary hearings to determine whether the same-sex couples could demonstrate good cause, by clear and convincing evidence, why the requirement for relinquishing parental rights before adoption was either fulfilled or unnecessary in the two cases.²⁰⁰

Given the Pennsylvania court's determination that adoptions by same-sex couples were permitted under the Pennsylvania statutes, on remand, the Nebraska trial court should determine that the Pennsylvania adoption decree of Bridgens and Russell was valid and therefore entitled to Full Faith and Credit in Nebraska.

Importantly, nowhere in its decision did the Supreme Court of Nebraska consider local Nebraska law or the so-called Defense of Marriage Act in deciding whether the Pennsylvania adoption decree had to be recognized in Nebraska.²⁰¹ This was true even though that same Court had previously held, in *In re Adoption of Luke*, that step-parent adoptions were limited to married couples in Nebraska, and thus unavailable to same-sex couples.²⁰² Additionally, the Nebraska constitution had been recently amended by ballot initiative, on November 5, 2002, to limit marriage to "a male and a female person."²⁰³ Despite these expressions of local policy, the Nebraska court understood that the validity of the Pennsylvania adoption decree in Nebraska was dependent on Pennsylvania law, not Nebraska law.

¹⁹⁷ *In re Adoption of R.B.F. & R.C.F.* 803 A.2d 1195, 1199-1200 (Pa. 2002).

¹⁹⁸ *Id.* at 1202-03.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1203.

²⁰¹ *Russell*, 647 N.W.2d at 56.

²⁰² 640 N.W.2d 374, 380 (Neb. 2002).

²⁰³ National Gay and Lesbian Task Force, *Specific Anti-Same-Sex Marriage Laws in the U.S.*, at <http://www.nglft.org/downloads/marriagemap0601.pdg> (last visited Mar. 14, 2003).

In a separate concurrence, Justice Gerrard wrote:

I write separately, not because of a petty disagreement with the rationale of the majority opinion or as a mere intellectual exercise, but because the record reflects that the minor child's best interests have needlessly remained unaddressed while these proceedings continue on. The minor child affected by these proceedings has not had court-ordered visitation with Serenna D. Russell (a primary caregiver in his life) for several months, nor have the custody and visitation issues been addressed as they should have.²⁰⁴

He believed that the district court should have provided interim arrangements for visitation with whichever party did not have temporary custody.²⁰⁵ "So long as the ultimate disposition of this case remains uncertain, a temporary order of visitation should be entered that is consistent with the best interests of the child."²⁰⁶ Rather than leaving the child in limbo for several months while the appeal and remand were resolved, the trial court should have protected the child's relationship with one of his legal parents during the interim.

V. CONCLUSION

Thus, in our hypothetical situation, Laurie and Ellen should not let the fear that their adoption decree, valid and final in California, might not be recognized in Florida to determine whether they move their family to Florida. They may want to consider the negative impact of Florida law on their day-to-day lives when making this decision.²⁰⁷ However, they do not have to fear that their parental relationships with Martha will be questioned in Florida. Under the Full Faith and Credit Clause²⁰⁸ of the U.S. Constitution, Florida must recognize both Laurie and Ellen as Martha's legal parents.

²⁰⁴ Russell v. Bridgens, 647 N.W.2d 56, 61 (Neb. 2002).

²⁰⁵ *Id.* at 66.

²⁰⁶ *Id.* at 66.

²⁰⁷ See Adams, *supra* note 21.

²⁰⁸ U.S. CONST. art. IV, § 1.

