WILLIAMS v. NORTH CAROLINA, DIVORCE RECOGNITION, AND SAME-SEX MARRIAGE RECOGNITION

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I. INTRODUCTION - THE CONTINUING SIGNIFICANCE OF WILLIAMS v. NORTH CAROLINA (I) AND WILLIAMS v. NORTH CAROLINA (II)

During World War II, the Supreme Court of the United States rendered two major decisions regarding interstate recognition of divorce decrees. In the more than fifty years since those decisions, they have come to represent the yin and the yang of interstate divorce recognition, the polar principles defining when states may and may not refuse to give full faith and credit to sister state divorce decrees, the parameters of state jurisdiction to enter divorce decrees that will be valid in other states. Both decisions involved the same parties, the same facts, the same states, the same disputes, the same case, and bear the same name, Williams v. North Carolina.1 They are commonly known as Williams I2 and Williams II.3

In Williams I, the Court, by a vote of 7-2, reversed as a violation of full faith and credit a North Carolina criminal conviction of a man and a woman for bigamy.4 The Court held that “a divorce granted by Nevada, on a finding that one spouse was domiciled in Nevada, must be respected in North Carolina, where Nevada’s finding of domicile was not questioned though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina.”5 Two and a half years later, when the case came before the Supreme Court a second time, following the couple’s second conviction of bigamy, the Court in Williams II affirmed the convictions 6-3, holding that “North Carolina had the power ‘to refuse full faith and credit to Nevada divorce decrees

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1. 317 U.S. 287 (1942) (Williams I); 325 U.S. 226 (1945) (Williams II).
because, contrary to the findings of the Nevada court, North Carolina [found] that no bona fide domicil was acquired in Nevada.\footnote{Williams II, 325 U.S. at 227.}

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.

Today, some legal commentators assert that if any state legalizes same-sex marriage, other states will be obligated to recognize those marriages, or at least some of them.\footnote{See infra App. I.} On the other hand, Congress recently has enacted a law declaring that states are not required to recognize same-sex marriages, even if entered into in states where they are permitted.\footnote{Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C).} And in the past four years, more than half of the state legislatures have enacted laws declaring that same-sex marriages will not be recognized even if entered into in states where they are permitted.\footnote{See infra note 296 and accompanying text; see infra App. II.}

While neither Williams I nor Williams II deals directly with same-sex marriage recognition, both have been cited frequently in the controversy over same-sex marriage because 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. Part II of this article reviews the background of the Williams case, examines the holdings and rationales of the majority and other opinions, and describes the subsequent history of the case. The continuing relevance of these decisions in both case law and in scholarly literature is also documented. Part III focuses particularly on the potential significance of Williams I for the same-sex marriage recognition debate. The arguments asserted by various writers regarding why Williams I supports recognition of same-sex marriages are reviewed, and in response to these arguments some reasons are suggested that support the conclusion that Williams I does not mandate interstate recognition of same-sex marriages. Part IV reviews the Defense of Marriage Act ("DOMA") and the potential
significance of the Williams cases for it, both concerning the substantive marriage recognition rule adopted by Congress and regarding the power of Congress to enact DOMA.

II. THE CASE AND DECISIONS IN WILLIAMS I AND II

A. BACKGROUND OF THE WILLIAMS CASES

The facts of Williams v. North Carolina are both fascinating and ordinary. Otis B. Williams married Carrie Wyke in Caldwell County, North Carolina, in 1916. They lived together as husband and wife in Caldwell County (primarily in the small town of Granite Falls) for the next twenty-four years, raising four children. In 1920, Thomas G. Hendrix married Lillie Shaver in Icard, North Carolina. They lived together in Caldwell County for the next twenty years. Mr. Williams owned a store in Granite Falls where he employed Mr. Hendrix.

On May 7, 1940, Mr. Williams and Mrs. Hendrix disappeared. Eight days later they appeared in Las Vegas, Nevada, where they “established a residence” at the Alamo Auto Court Motel. Exactly six weeks later (the minimum time of residence for divorce in Nevada at that time), they each filed a petition for divorce in Nevada. Both individuals were represented by the same attorney, and each alleged the same ground for divorce (“extreme cruelty”).

Their spouses remained in North Carolina where Mrs. Williams was personally served by the local sheriff and Mr. Hendrix was served by publication. Neither Mrs. Williams nor Mr. Hendrix personally appeared in the Nevada action, nor was either served in Nevada.

13. Powell, 58 HARV. L. REV. at 933 n.7. Granite Falls had a population of 2147 in 1930. Id.
16. Id.
17. Id.
18. Id.
19. Id.
21. Baer, 24 N.C. L. REV. at 2. Mr. Hendrix had written a postcard to his wife’s Las Vegas attorney telling him that he would sign an appearance if one was sent, but Mr. Hendrix did not follow through with his promise. Id. Note that the Supreme Court decided Williams I before it reached a decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945). However, the decision in Washington probably would not have
The Nevada divorce suits proceeded as uncontested, with Mr. Williams obtaining a divorce decree on August 26, 1940, and about six weeks later Mrs. Hendrix obtaining her divorce decree. Mr. Williams and Mrs. Hendrix were married the same day she obtained her divorce decree, October 4, 1940. Almost immediately the couple returned to North Carolina where they settled in Pineola, North Carolina, a very small town in a county next to Caldwell County.

Within months, both Mr. Williams and his new wife, the former Mrs. Hendrix, were indicted in Caldwell County for bigamy. The trial took place during the February-March term of 1941. The state called six witnesses and argued that the Nevada divorce decrees were invalid for two different reasons: first, because under the rule of Hadcock v. Haddock, the Nevada court lacked jurisdiction to enter a decree entitled to full faith and credit in North Carolina, and second, because neither defendant had established bona fide domicile in Nevada. The defense called no witnesses and neither defendant testified; thus, the defense essentially rested on the Nevada divorce judgments. The judge instructed the jury as a matter of law that substituted service of process in a divorce where the defendant did not appear was not recognized in North Carolina, but left it for the jury to determine if the defendants had proven legal residence in Nevada. The jury found the defendants guilty, and the judge sentenced Mr. Williams to three to ten years of hard labor in the state prison and Mrs. Hendrix to three to five years of labor in the state prison.

The North Carolina Supreme Court affirmed the convictions, suggesting that domicile was not properly established in Nevada but primarily relying on the ground that the Nevada decrees were not entitled to full faith and credit under Haddock. In Haddock, decided thirty-five years earlier by the United States Supreme Court, a husband had abandoned his wife in New York, where he and his wife had married and established their marital domicile. He established his domicile in Nevada without having any business or personal connection with that State. The Court in Haddock held that the Nevada courts lacked jurisdiction to grant a divorce because the plaintiff had not shown himself domiciled in Nevada.
separate domicile in Connecticut where he secured a divorce. His wife, who remained in New York, was served by publication but did not appear. Later, she sued him in New York for separation and alimony, claiming he had abandoned her. He defended by relying on his Connecticut divorce decree, but the New York courts refused to recognize the Connecticut divorce, found that he had abandoned his wife, and awarded her a separation and alimony. The United States Supreme Court affirmed the New York decision, holding that a divorce decree by a court of a state in which the husband is newly domiciled is not entitled to full faith and credit in the state of last matrimonial domicile if the wife still lives there, and if she was abandoned (without fault in not following him to his new domicile), and if she was not personally served in the rendering state.

B. SUMMARY OF THE UNITED STATES SUPREME COURT DECISION IN WILLIAMS I

Mr. Williams and his new wife sought and received a writ of certiorari from the U.S. Supreme Court, which reversed their convictions four days before Christmas, 1942, and remanded the case. Justice William O. Douglas wrote the majority opinion on behalf of the seven justices in the majority of the Court. Three other opinions were also filed — a concurring opinion by Justice Frankfurter, and two dissenting opinions by Justice Murphy and Justice Jackson.

1. The majority opinion in Williams I

The majority opinion in Williams I, authored by Justice Douglas, presents ten significant points of analysis. First, the opinion addressed only the Haddock question — whether an out-of-state court divorce decree rendered without personal service on the defendant may be denied full faith and credit in the state of matrimonial domicile where the abandoned spouse still lives. According to Justice Douglas, that issue was precedent to the domicile question. The question whether North Carolina could reexamine the issue of domi-

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34. Haddock, 201 U.S. at 565.
35. Id. at 564-65.
36. Id. at 565.
37. Id. at 570-71.
39. Id. at 289.
40. Id. at 304 (Frankfurter, J., concurring).
41. Id. at 308 (Murphy, J., dissenting).
42. Id. at 311 (Jackson, J., dissenting).
43. Id. at 287.
44. Id. at 292-93.
cile was not before the Court.\textsuperscript{46} Justice Douglas reiterated that the only question was 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.\textsuperscript{46}

However, Justice Douglas stretched mightily to bury the domicile question by implication, suggesting strongly that North Carolina had admitted “that there probably is enough evidence in the record to require that petitioners be considered ‘to have been actually domiciled in Nevada.’”\textsuperscript{47} Throughout the opinion, Justice Douglas pressed the assumption that Mr. Williams and Mrs. Hendrix “had a bona fide domicile in Nevada. . . .”\textsuperscript{48} Apparently, Justice Douglas realized that the issue of the preclusion of the Nevada domicile finding could come back to bite the defendants and to block the liberal divorce recognition policy for which he was pushing, but apparently Justice Douglas lacked the votes to directly decide that issue at that time the way he wanted to decide it, so he tried hard to finesse the issue, to put it to rest without actually deciding it. As we shall see, Justice Douglas’ perception of the importance of that issue was vindicated, and, as he apparently feared, his policy preference was frustrated, in Williams II, three years later.\textsuperscript{49}

Having identified the issues he was not addressing, Justice Douglas next endorsed the power of Congress to resolve the full faith and credit question, making the issue before the Court primarily turn on interpretation of the Congressional full faith and credit statute.\textsuperscript{50} However, the opinion ended by leaving an unanswered question about the extent of that Congressional power. Justice Douglas quoted Article IV, which provides that “Congress may by general Laws prescribe the Manner in which [state] Acts, Records and Proceedings shall be proved, and the Effect thereof.”\textsuperscript{51} Thus, the 1790 Full Faith and Credit statute, 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.\textsuperscript{52} Citing Hampton v. M’Connel,\textsuperscript{53} Fauntleroy v. Lum,\textsuperscript{54} and Davis v. Davis,\textsuperscript{55} Justice Doug-
las read the statute to mean 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.56 "Whether Congress has the power to create exceptions [to the rule of mandatory recognition] . . . is a question on which [the Court] express[ed] no view."57 However, suggestively, Justice Douglas did cite a note in a dissenting opinion of Justice Stone in Yarborough v. Yarborough,58 in which the power of Congress to resolve such issues is strongly endorsed.59 Justice Douglas' opinion also noted that the Court "is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause."60

Third, the Court emphasized heavily the unifying and integrative purpose of the Full Faith and Credit Clause of the Constitution.61 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 foreign sovereignties, each free to ignore . . . the judicial proceedings of the others, and to make them integral parts of a single nation."62 In the penultimate paragraph of his majority opinion, Justice Douglas reiterated the importance of the Full Faith and Credit Clause to "bring separate sovereigns into an integrated whole. It is a Constitution which we are expounding. . . ."63 The 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.

Fourth, 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.64 Justice Douglas admitted that in case of statutes, "the extrastate effect of which Congress has not prescribed," some latitude for nonrecognition to accommodate the conflicting and "superior" interests of the forum state is necessary. Justice Douglas further noted "[s]ome exceptions" to the general rule of mandatory rec-
ognition, especially for recognition of sister states' statutes (choice of law), but he emphasized that "the room left for the play of conflicting policies is a narrow one." So far as judgments are concerned ... the exceptions have been few and far between, apart from Haddock v. Haddock.65 Thus, Haddock was portrayed as an exception to the general rule of mandatory full faith and credit for judgments, and the issue was presented whether such an exception was justified.66 The final paragraph of analysis, expressing the holding of the Court, 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.67

Fifth, 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.68 The majority opinion considered and rejected a general exception to the rule of recognition in order to protect "local public policy."69 Thus, even though the cause of action could not be entertained in the state of the forum either because it had been barred by the local statute of limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit.70 The difference between intrastate divorce policy, which a state may control, and interstate recognition was reiterated.71 Intrastate divorce policy involves a "choice in the realm of morals and

65. Id. at 294-95 (citing Alaska Packers Ass'n v. Industrial Accident Comm'n of Cal., 294 U.S. 532, 547 (1935), which allowed a California employment contract stipulating the application of Alaska law to be relied on by a non-resident in California; Broderick v. Rosner, 294 U.S. 629, 642 (1935), in which a New York bank sued its individual stockholders in New Jersey and the Court held that the New Jersey court must entertain the action despite New Jersey law which would not have allowed for the individual proceeding).

66. Id. at 297. Williams I did not involve a choice of law question because North Carolina did not claim that Nevada had wrongfully failed to apply North Carolina divorce law in the Williams and Hendrix divorce cases. Id.


68. Id. at 294.

69. Id. at 294-95.

70. Id. at 294 (citing Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866) (declaring that an act denying full faith and credit to a foreign judgment based on a statute of limitations is unconstitutional); Fauntleroy v. Lum, 210 U.S. 230 (1908) (holding that the illegality of a cause of action in Mississippi could not be used to deny a Missouri judgment); Kenny v. Supreme Lodge, 252 U.S. 411 (1920) (holding that Illinois cannot deny jurisdiction to other courts in order to avoid giving effect to an Alabama judgment); Titus v. Wallick, 306 U.S. 282, 291 (1939) (holding that the Ohio court must allow suit based on a New York judgment)).

71. Id. at 303.
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religion [that] rests with the legislatures of the states.”

But interstate judgment recognition is different.

[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.

Like or dislike for the internal policy of another state was irrelevant for interstate recognition: “Our own views . . . are immaterial.”

Justice Douglas noted that even Haddock did not challenge 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 a sister state is entitled to full faith and credit.”

The Connecticut divorce decree in Haddock was denied recognition because Connecticut was thought to lack jurisdiction to render a decree 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.

Sixth, Justice Douglas also noted that “[i]t is difficult to perceive” how North Carolina could claim an interest superior to Nevada in this case, and noted that there was 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.” From this perspective, public policy considerations supported requiring North Carolina to give full faith and credit to the Nevada divorce decrees involving Nevada domiciliaries.

Seventh, Justice Douglas distinguished jurisdiction to render a divorce decree valid within the rendering state from jurisdiction to render a decree valid in other states. In the case at bar, “if the Nevada decrees are taken at their full face value . . . they were wholly effective to change in that state the marital status of the petitioners

72. Id. Nevertheless, Justice Douglas also asserted that “society . . . has an interest in the avoidance of polygamous marriages . . . and in the protection of innocent offspring . . . deemed legitimate in other jurisdictions.” Id.

73. Williams I, 317 U.S. at 303.

74. Id.

75. Id. at 297.

76. Id.

77. Id. at 303 (emphasis added).

78. Id. at 296.

79. Id. at 298-99.
and each of the other spouses by the North Carolina marriages.\textsuperscript{80} Thus, the majority assumed "that the decrees were effective in Nevada. . . ."\textsuperscript{81} Justice Douglas acknowledged that divorce is "not a mere in personam action. Domicil of the plaintiff . . . is recognized . . . as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance."\textsuperscript{82} Justice Douglas explained why domicile, rather than mere personal presence, was the traditional jurisdictional requirement in divorce cases:

[D]ivorce decrees are more than in personam judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power. . . . Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal.\textsuperscript{83}

Divorce jurisdiction, Justice Douglas reiterated, "is dependent on the relationship which domicile creates and the pervasive control which a state has over marriage and divorce within its own borders."\textsuperscript{84} Thus, "each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of spouses domiciled there, even though the other spouse is absent."\textsuperscript{85} So long as procedural due process were met (notice, opportunity to be heard, etc.), Nevada could alter the marriage status within Nevada of both the domiciliary spouses and abandoned spouses, just as the Supreme Court reasoned in Haddock that Mr. Haddock's Connecticut divorce decree was binding on both spouses in Connecticut.\textsuperscript{86}

Eighth, Justice Douglas reasoned that "if one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina," a "complicated and serious condition would be realized."\textsuperscript{87} The problem of inconsistent marital status and inconsistent judg-

\textsuperscript{80} Id. at 299.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 297.
\textsuperscript{83} Id. at 298-99.
\textsuperscript{84} Id. at 300.
\textsuperscript{85} Id. at 299.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
ments in different states presented a "perplexing and distressing complication." The Court was very concerned about these "intensely practical considerations." The Haddock rule could cause "considerable disaster to innocent persons' and 'bastardize children'... or else encourage collusive divorces." In the final explanatory paragraph of the opinion, Justice Douglas reiterated 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."

Ninth, Justice Douglas attributed these problems to Haddock's "legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicile so that the domicile of the other spouse follows him wherever he may go..." Under Haddock, the existence of the power of a state to alter marital status (divorce jurisdiction) turned, at least potentially, on whether a spouse who changed domicile was at "fault" in leaving the marital domicile. That was too subjective, too ambiguous a foundation for "[t]he existence of the power of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise...." The majority could "see no reason" to make a state's power to alter marital status constitutionally depend on an inquiry into personal fault. Nor could the majority see any such test implied in the Full Faith and Credit Clause regarding interstate recognition of divorce. While 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. The Haddock rule was too complicated and troublesome for a recognition rule. Reiterating that under the full faith and credit statute there was no exception to mandatory full faith and credit, such as 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 [F]ull [F]aith and [C]redit [C]lause and of the supporting legislation," the Court explicitly declared: "Haddock v. Haddock is overruled," the North Carolina judgment was reversed, and the case remanded.

88. Id. at 299-300.
89. Id. at 301.
90. Id.
91. Id. at 303-04.
92. Id. at 300.
93. Id.
94. Id. at 301.
95. Id. at 303-04.
Finally, Justice Douglas acknowledged that recognition of some sister state divorce decrees could result in "a substantial dilution of the sovereignty of . . . states" with strict rules about divorce because they "could be thwarted by the [divorce] decree of a more lax state." However, Justice Douglas, citing Fauntleroy, brushed that concern aside, simply noting that the Full Faith and Credit Clause produces the same effect in "many other situations."

2. Additional Opinions in Williams I

Three additional opinions were filed in Williams I. Justice Frankfurter joined the majority opinion but also filed a concurring opinion noting that the Constitution of the United States, unlike the charters of other countries, "reserves authority over marriage and divorce to each of the forty-eight states. That is our starting-point." Neither the Supreme Court nor Congress had any authority to formulate a national marriage and divorce law. Second, it is not the Haddock rule but movement of citizens from one state to another that "inevitably" creates "tangled marital situations" like the case of the Williams and Hendrix families. Third, the Supreme Court could "contribute uniformity to the law of marriage and divorce" by enforcing respect for sister state divorce decrees "rendered in accordance with settled procedural standards." The general rule is settled, 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." The decision in Haddock needed to be overturned because it "made an arbitrary break with the past and created distinctions incompatible with the role of this Court in enforcing the Full Faith and Credit Clause." In Haddock, the Supreme Court had "stray[ed] outside the modest bounds of its own special competence" by "formulating judgments of social policy" as the basis for its recognition rule. Furthermore, assuming that Mr. Williams and Mrs. Hendrix were truly domiciled in Nevada when their divorce was rendered, de-

96. Id. at 302.
97. Id.
98. See supra notes 40-42 and accompanying text.
100. Id. at 304-05 (Frankfurter, J., concurring).
101. Id. (Frankfurter, J., concurring).
102. Id. at 306 (Frankfurter, J., concurring).
103. Id. (Frankfurter, J., concurring).
104. Id. at 307 (Frankfurter, J., concurring).
105. Id. (Frankfurter, J., concurring).
nial 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.\(^{106}\)

Justice Murphy filed a dissenting opinion "because the Court today introduces an undesirable rigidity" in the matter of interstate recognition of divorce decrees.\(^{107}\) Eschewing substantive due process, Justice Murphy emphasized that the regulation of marriage and divorce has "been left to the individual states" because the state has "the deepest concern for its citizens in those matters" and the state of domicile has a "paramount interest" over the marital status of its citizens.\(^{108}\) The sole issue for Justice Murphy in *Williams I* was whether Mr. Williams and Mrs. Hendrix acquired a *bona fide* domicile in Nevada, and Justice Murphy agreed with Justice Jackson that they did not; thus, the Nevada divorce decrees "are entitled to no extraterritorial effect when challenged in another state."\(^{109}\) The effect of the Nevada divorce decrees in Nevada was not before the Court; conceivably, the defendants could be validly divorced in Nevada, but domestic (Nevada) validity did not automatically guarantee interstate (North Carolina) validity.\(^{110}\) The "tragic incongruity . . . that an individual may be validly divorced in one state but not another" is the inevitable price of our federal system.\(^{111}\) Such incongruities exist in many other areas of law (such as tax, where a person with only one domicile can be taxed by two different jurisdictions).\(^{112}\) Rather than a rigid, automatic recognition rule, Justice Murphy favored "flexibility" and "appraising the governmental interests of each jurisdiction."\(^{113}\) The Full Faith and Credit Clause contributed to forging a single nation by harmonizing competing state interests, rather than mechanical application "with literal exactness like a mathematical formula."\(^{114}\) Because both Nevada and North Carolina have interests entitled to protection, the adoption of a rigid rule was inappropriate. North Carolina's interests justified nonrecognition of the Nevada decree in this case. Citing

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106. *Id.* (Frankfurter, J., concurring).
107. *Id.* at 308 (Murphy, J., dissenting).
108. *Id.* (Murphy, J., dissenting). Justice Murphy noted: "This is not to say that our function is to become censors of public morals and decide this case in accordance with what we may think is the wise rule for society with respect to divorce." *Id.* (Murphy, J., dissenting).
110. *Id.* (Murphy, J., dissenting).
111. *Id.* at 311 (Murphy, J., dissenting).
112. *Id.* at 310-11 (Murphy, J., dissenting).
113. *Id.* at 309 (Murphy, J., dissenting) (quoting *Alaska Packers*, 294 U.S. at 547).
114. *Id.* at 310 (Murphy, J., dissenting) (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934)).
Fall v. Eastin, Justice Murphy noted that the Court had previously permitted states to decline to recognize sister state judgments in "matters of far less concern to a state" than protection of marital status of domiciliary spouses.

Justice Jackson also wrote a lengthy dissenting opinion, nearly as long as the majority opinion. The issue for Justice Jackson was whether North Carolina was powerless "to protect its own citizens against dissolution of their marriages by the courts of other states which have an easier system of divorce," simply because their spouses had "lived for a few weeks" in Nevada. According to Justice Jackson, the majority opinion "repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there." He also expressly repudiated the Court's "power to resolve ... moral, religious or social questions" about divorce. He further argued that the "orderly function of our federal system" allows each state to regulate the marriages of its own permanent inhabitants; complications only arise when one state opens its doors to transitory divorce. Furthermore, Justice Jackson noted the general rule that "[i]f a judgment is conclusive in the State where it was pronounced, it is equally conclusive everywhere," arose out of commercial cases, not divorce cases. Justice Jackson stated that the majority's sweeping, absolute recognition rule would deprive the Court of control over full faith and credit and "vest it in the first state to pass on the facts necessary to jurisdiction." It bothered Justice Jackson that "settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect the

115. 215 U.S. 1 (1909) (holding that Nebraska does not have to recognize a deed of land issued by a divorce court in Washington).
116. 216 U.S. 386 (1910) (holding that full faith and credit does not require New York to apply Michigan legitimacy law for inheritance purposes).
117. 237 U.S. 611 (1915) (holding that Alabama can recognize a Louisiana adoption without granting the same rights to inherit land in Alabama as would be given in Louisiana).
118. 294 U.S. 532 (1935) (holding that California, where the contract was made, can apply its own workers' compensation law instead of that of Alaska where the plaintiff was injured).
119. 146 U.S. 657 (1892) (stating that a sister-state's judgment based on a penal claim need not be enforced by state court).
120. Williams I, 317 U.S. at 311, 313 (Jackson, J., dissenting).
121. Id. at 311 (Jackson, J., dissenting).
122. Id. at 314 (Jackson, J., dissenting).
123. Id. (Jackson, J., dissenting).
124. Id. (Jackson, J., dissenting) (quoting Christmas, 72 U.S. (5 Wall.) at 302).
125. Id. at 315 (Jackson, J., dissenting).
grocery bill." Rights under a marriage contract, no less than under a commercial contract, should not be vulnerable to a foreign judgment without process. The artificiality of the in rem conceptualization of divorce was criticized, and the uniqueness of the marriage relationship was underscored. The fact that domicile is necessary for divorce jurisdiction did not necessarily mean that domicile is sufficient for divorce jurisdiction. While Nevada may give domestic effect to the defendants' divorce decrees for purpose of Nevada's criminal and other laws, it cannot dissolve the marriage in North Carolina or "dictate the incidence of the bigamy statute of North Carolina...." The crux of Justice Jackson's dissent was that good-faith domicile of one of the spouses is required for a state's divorce decree to be given full faith and credit, and domicile "as a controlling factor in choice of law to govern many relationships" was well known to the framers of the Constitution who "undoubtedly expected that the Court would in many cases of conflict use one's domicile as an appropriate guide in selecting the law to govern his controversies." The parties had not been bona fide domiciliaries of Nevada. Arguing for a federal definition of domicile for purposes of full faith and credit, Justice Jackson asserted that six weeks in a motel may be deemed "domicile" for purposes of Nevada's own law, but for the full faith and credit clause it is insufficient. The practical considerations that weighed so heavily in the majority's opinion actually cut against divorce recognition. Namely, recognizing the Nevada divorce decrees effectively rendered the Williams' children fatherless, and being divorced in one state but not in another was no more "complicated and serious" than forcing North Carolina to give full faith and credit to the Nevada divorce decrees.

C. Back to the North Carolina Courts

1. The Second Trial

The case was remanded to the North Carolina Supreme Court for further proceedings consistent with the Williams I decision. The state decided to proceed with a second trial, not resting on the Haddock rule as the basis for nonrecognition of the Nevada divorce decrees. Instead, the state picked up on the dissenting opinions of Justices Murphy and Jackson and chose to revive its attack upon the alleged domicile of the defendants in Nevada.

126. Id. at 316 (Jackson, J., dissenting).
127. Id. at 317-18 (Jackson, J., dissenting).
128. Id. at 317 (Jackson, J., dissenting).
129. Id. at 318 (Jackson, J., dissenting).
130. Id. at 319 (Jackson, J., dissenting).
131. Id. at 321-22 (Jackson, J., dissenting).
132. Id. at 320-22 (Jackson, J., dissenting).
The second trial began November 29, 1943, before a new judge, Sam Ervin. By November of 1943, the abandoned Mrs. Williams had died and the abandoned Mr. Hendrix, who had obtained a North Carolina divorce, had remarried. But the prosecution proceeded. Again, the defendants chose not to testify, and relied upon the Nevada divorce decrees. Judge Ervin instructed the jury that the validity of the Nevada divorces, for purposes of recognition in North Carolina, depended upon whether Mr. Williams and Mrs. Hendrix had been domiciled in Nevada and gave a standard definition of "domicile." The jury again returned verdicts of guilty. Judge Ervin sentenced Mr. Williams to one to three years, and Mrs. Hendrix to eight to twenty-four months in prison, with no hard labor for either.

2. The Second Appeal to the North Carolina Supreme Court

On appeal to the North Carolina Supreme Court, the convictions were unanimously affirmed. In affirming the convictions, the court relied on Bell v. Bell, in which the United States Supreme Court held that "[n]o valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled."141

D. The Second Trip to the United States Supreme Court: *Williams II*

The defendants sought review of the North Carolina Supreme Court's decision in the United States Supreme Court, and the Court granted certiorari. In *Williams II*, the Court affirmed the convictions by a vote of 6-3. The majority opinion was written by Justice Frankfurter, who had written the concurring opinion in *Williams I*. Justice Douglas, who wrote the majority opinion in *Williams I*, joined the dissenting opinion of Justice Black in *Williams II*. Justices Murphy and Jackson, who had dissented in *Williams I*, joined the ma-

133. Baer, 24 N.C. L. Rev. at 17. After his time as a judge, Sam Ervin gained notoriety as a United States Senator. Senator Ervin achieved some popularity during the Senate Watergate hearings because of his lively, bushy eyebrows and his vivid, homespun, common sense speaking.
134. Baer, 24 N.C. L. Rev. at 17.
135. Id.
136. Id. at 18.
137. Id.
138. Id.
140. 181 U.S. 175 (1901).
141. Williams, 29 S.E.2d at 744 (quoting Bell v. Bell, 181 U.S. 175, 177 (1901)).
144. Id. at 261 (Black, J., dissenting).
1. The majority Opinion in Williams II.

Justice Frankfurter began the majority opinion of the Court by summarizing the holding of Williams I as: "[A] divorce granted by Nevada, on a finding that one spouse was domiciled in Nevada, must be respected in North Carolina, where Nevada's finding of domicil was not questioned though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina."147 The issue before the Court in Williams II was described 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 domicil was acquired in Nevada.'"148

Justice Frankfurter first noted that it 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.149 "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had . . . jurisdiction, that is, to render the judgment."150

Next, the majority opinion emphasized that jurisdiction to grant a divorce is founded on domicil, a principle that was established in 1789 and never questioned since.151 According to this principle:

Domicil implies a nexus between the person and place of such permanence as to control the creation [and termination] of legal relations and responsibilities of the utmost significance [such as divorce] . . . Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society.152

145. Id. at 239 (Murphy, J., concurring).
146. Id. at 244 (Rutledge, J., dissenting).
147. Id. at 227.
148. Id.
149. Id. at 228 (citing Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813); Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234, 235 (1818); Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873)).
150. Id. at 229.
151. Id. (citing Bell, 181 U.S. at 175; Andrews v. Andrews, 188 U.S. 14 (1903)).
152. Id. at 229-30.
Third, Justice Frankfurter noted that after issues (including jurisdictional issues) have been contested and decided they may not be relitigated by the parties. But nonparties are not precluded. Here, the question of domicile had not been contested, nor had North Carolina been a party to the Nevada proceeding. Thus, North Carolina was not bound by the recitation of domicile declared by the Nevada court. A State concerned with vindicating its own social policy should not be bound by an unfounded recital 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 established “whenever that judgment is elsewhere called into question.” “North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada.”

Fourth, this may lead to conflicting state decisions about marital status, but such conflicts are “inherent in . . . our federal system.” Previous cases had established that neither full faith and credit nor due process require interstate uniformity in domicile determinations. Otherwise, “the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. That would be “intolerable“ and this Court has long ago denied the existence of such destructive power.”

Fifth, the 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 domicile.” While the Supreme Court is not a mere divorce court, it is open to review the jurisdictional ruling if there is abuse.

Sixth, in this case the judgment of the North Carolina Supreme Court that Mr. Williams and Mrs. Hendrix were not domiciled in Nevada was “amply supported in evidence.” Because the Nevada court found that the parties were domiciled there, the individual challenging the judgment had a heavy burden to disprove domicile. How-

153. Id. at 230.
154. Id.
155. Id. at 232.
156. Id. at 239.
157. Id. at 231.
158. Id. at 231, 234. It was stated: “Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer.” Id. at 234.
159. Williams II, 325 U.S. at 233.
160. Id. at 234.
ever, evidence in the record supported the North Carolina Supreme Court’s finding that the parties were not domiciled in Nevada, because the evidence showed “that the petitioners, long-time residents of North Carolina, came to Nevada, where they stayed in an auto-court for transients, filed suits for divorce as soon as the Nevada law permitted, married one another as soon as the divorces were obtained, and promptly returned to North Carolina to live.”

1 The trial court’s charge to the jury that the burden of proof was on the defendants to show domicile in Nevada, that the Nevada decree reciting that a Nevada domicile was prima facie evidence sufficient to support a finding of domicile, and the charge defining “domicile” was adequate, and there was no evidence that the issue was not fairly submitted to or assessed by the jury. Thus, the jury could reasonably find that the defendants “intended all along to return to North Carolina.”

Finally, Justice Frankfurter noted that the defendants had “assumed the risk” that the Supreme Court would find that the North Carolina Supreme Court had reasonably concluded they were not truly domiciled in Nevada. A person’s fate often depends on whether he estimates rightly how a jury will rule. Mistaken estimates are no bar to prosecution. According to Justice Frankfurter, “in vindicating its public policy and particularly one so important as that bearing upon the integrity of family life,” North Carolina could refuse to recognize Nevada quickie divorce decrees obtained by North Carolina residents.

2. Additional Opinions in Williams II.

On behalf of three justices, Justice Murphy wrote a concurring opinion joining the majority opinion, but he emphasized additional points. Justice Murphy 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. But for the divorce decrees to be entitled to Full Faith and Credit, at least one party in an ex parte divorce must have bona fide domicile in the state of divorce. According to Justice Murphy, this principle had been recognized for decades, and was reaffirmed in Williams I. The state of domicile has “the exclusive right to regulate the dissolution of . . . marital rela-

161. Id. at 235-36.
162. Id.
163. Id. at 237.
164. Id. at 238.
165. Id.
166. Id. at 239-44 (Murphy, J., concurring).
167. Id. at 239 (Murphy, J., concurring).
The Court’s ruling did not jeopardize uncontested divorces, except “those based upon fraudulent domicils,” which could be retroactively validated by state legislation, if that was deemed desirable. Justice Rutledge filed a dissenting opinion, charging that the majority had simply recast and returned to play the Haddock rule of matrimonial domicile. Justice Rutledge’s lengthy opinion presented five main objections. First, because the Nevada divorces and remarriage in Williams II were valid in Nevada, but not in North Carolina, persons could be married validly in one state but bigamously in another state. Justice Rutledge predicted a parade of horribles — that “every divorce, wherever granted, whether upon a residence of six weeks, six months or six years, may now be re-examined by every other state....” Second, by letting the second state determine whether full faith and credit is to be given (based on a review of domicile), Justice Rutledge posited that the majority had “abdicate[d]” its responsibility. Third, Justice Rutledge argued that the majority allowed the state of marital domicile to reexamine and reject another state’s finding of domicile for divorce, not just in cases of fraud, but even when the evidence could be construed to support the divorce state’s finding of domicile. Thus, the evidentiary standard for non-recognition set by the majority was too low and too easy. Fourth, the majority rule unwisely allowed states to deny full faith and credit because their own divorce policies were different than those in the rendering state. Fifth, domicile was too subjective, too “unstable,” too “variable... an inconstant, vacillating pivot for allocating power” to grant interstate divorces or to deny full faith and credit to divorce judgments. Justice Rutledge argued for “objective standards” such as a specific, reasonable “length of stay” in the state.

Finally, Justice Black, joined by Justice Douglas, filed a lengthy dissenting opinion. It encompasses six points. First, Justice Black,

168. Id. at 241 (Murphy, J., concurring).
169. Id. at 242 (Murphy, J., concurring). Regarding the alleged fraud, it appears that the only inquiry was this leading question: “And that residence was an indefinite permanent residence?” and this answer: “[Y]es, sir.” Powell, 58 HARV. L. REV. at 945 n.36.
171. Id. at 247 (Rutledge, J., dissenting). According to the opinion, “every divorce granted a person who has come from another state is vulnerable....” Id. at 253.
172. Id. at 248 (Rutledge, J., dissenting).
173. Id. at 245 (Rutledge, J., dissenting).
174. Id. at 248-49 (Rutledge, J., dissenting).
175. Id. (Rutledge, J., dissenting).
176. Id. at 250 (Rutledge, J., dissenting).
177. Id. at 246, 259 (Rutledge, J., dissenting).
178. Id. at 259 (Rutledge, J., dissenting).
179. Id. at 261-78 (Black, J., dissenting).
like Justice Rutledge, believed that the majority had opened Pandora’s box and a parade of horribles were predicted. Justice Black noted that “[n]ot one” of the more than 4.5 million persons with uncontested divorce decrees was secure after the decision in Williams II.\textsuperscript{180} Justice Black stated: “Ever present will be the danger of criminal prosecution and harassment.”\textsuperscript{181} Furthermore, Justice Black commented that it was “an inescapable trap for any person who places the slightest reliance on another state’s divorce decree. . . .”\textsuperscript{182} Second, the “harsh consequences” — criminal convictions — were especially troubling to the dissenters; the fact that persons who had been validly married in one state could be sent to jail in another state for living as husband and wife greatly bothered them.\textsuperscript{183} Justice Black noted that “never before” had the Court endorsed such treatment of people who had been lawfully married in one of the United States.\textsuperscript{184} Third, Justice Black argued that the majority decision undermined the power of Nevada to control marriage in its own territory, even though the countervailing interest of North Carolina was very “attenuated” because one abandoned spouse had died and the other had remarried.\textsuperscript{185} The majority decision restricted the historically unrestricted power of state courts to pass upon petitions for divorce in cases involving “persons . . . within their boundaries.”\textsuperscript{186} Fourth, the domicile rule for interstate divorce recognition violated the Congressional mandate of the federal full faith and credit statute which required North Carolina to give the Nevada judgment the same effect as it would have in the rendering state.\textsuperscript{187} Fifth, the notion that a divorce decree is void and a violation of due process if rendered by a court in which neither spouse is domiciled was criticized as unwise, because domicile is “dependent upon a mental state.”\textsuperscript{188} The unpredictability of the domicile standard and its vagueness were criticized and the accusation that criminal conviction “hinges on his ability to ‘guess’” made the majority

\begin{itemize}
  \item \textsuperscript{180} Id. at 263 (Black, J., dissenting).
  \item \textsuperscript{181} Williams II, 325 U.S. at 263 (Black, J., dissenting). The majority decision signified that the Full Faith and Credit Clause did not apply to divorce decrees. Id. at 264 (Black, J., dissenting).
  \item \textsuperscript{182} Williams II, 325 U.S. at 276 (Black, J., dissenting).
  \item \textsuperscript{183} Id. at 263-65, 278 (Black, J., dissenting).
  \item \textsuperscript{184} Id. at 265 (Black, J., dissenting).
  \item \textsuperscript{185} Id. at 265, 267 (Black, J., dissenting). Justice Black stated: “I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution. . . .” Id. at 271 (Black, J., dissenting). One commentator noted that Mr. Justice Black’s exclusive concern for the interests of North Carolina made him “oblivious . . . to any interest of North Carolina. . . .” Powell, 58 Harv. L. Rev. at 959.
  \item \textsuperscript{186} Williams II, 325 U.S. at 273 (Black, J., dissenting).
  \item \textsuperscript{187} Id. at 268 (Black, J., dissenting).
  \item \textsuperscript{188} Id. at 271-72 (Black, J., dissenting).
\end{itemize}
rule seem like mere entrapment. Sixth, the majority wrongfully upheld criminal convictions in a case in which the burden of proof (regarding domicile in Nevada) had been put upon the defendants, not on the prosecution.

E. WHAT HAPPENED TO THE PARTIES AFTER THE DECISION IN WILLIAMS II.

Three months after the Supreme Court decided Williams II, Mr. Williams and the former Mrs. Hendrix lawfully married each other in Lenoir, North Carolina. They were scheduled to begin their prison sentences a month later, in September. However, the integrity of North Carolina marriages and the authority of the state to control its own marriage policy had been fully vindicated by the Supreme Court, and the defendants were paroled without ever having served a day in jail or prison.

The Williams cases, especially Williams II, stimulated a lot of comment and discussion in the professional literature. However, the tidal wave of challenges to past divorce decrees forecast by the dissenters in Williams II and other critics never materialized.

F. CONTINUING RELEVANCE OF THE WILLIAMS DECISIONS

Both of the Williams decisions remain profound, vital precedents in American law. These two cases are still cited frequently by both judges and legal commentators. They are the foundational decisions for the current doctrine regarding the interstate effect of divorce decrees. There has been surprisingly little significant subsequent development of the principles established in the Williams cases. Later decisions of the Supreme Court regarding interstate effects of divorce decrees build upon the foundation laid in the Williams cases.

1. Case law

Williams I is still regularly cited by federal and state courts. Justice Kennedy, in his concurring opinion in Baker v. General Motors Corp., cited that case just this year. It has been cited in two

189. Id. at 276-78 (Black, J., dissenting).
190. Id. at 275 (Black, J., dissenting).
191. Baer, 24 N.C. L. Rev. at 32.
192. Id.
193. Id.
other Supreme Court opinions since 1990. Additionally, other federal court decisions and state court decisions have cited Williams I in recent years. While federal courts seem to cite Williams I most often regarding verdicts resting on unconstitutional optional grounds, most state courts cite Williams I for its holding regarding interstate divorce jurisdiction and recognition.

Likewise, Williams II continues to be cited regularly in state and federal courts. It has been cited less frequently by the Supreme Court in recent years than Williams I, but federal courts of appeals and district courts continue to cite it frequently, as well as recently. Williams II remains popular in the state courts also.

196. See Baker v. General Motors Corp., 118 S. Ct. 657, 669 (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.”).

197. See Griffin v. United States, 502 U.S. 46, 52, 54 (1992) (citing Williams I for the proposition that a verdict may not stand if it rests on two possible grounds, one of which is unconstitutional, and it cannot be determined which ground the jury relied upon); Boyde v. California, 494 U.S. 370, 389 (1990) (Marshall, J., dissenting) (citing Williams I for the proposition that a verdict may not stand if it rests on two possible grounds, one of which is unconstitutional, and it cannot be determined which ground the jury relied upon).

198. See United States v. Palazzolo, 71 F.3d 1233, 1235 (6th Cir. 1995); Butler v. Dowd, 979 F.2d 661, 670 n.13 (8th Cir. 1992); Union Pacific R.R. Co. v. Bolton, 840 F. Supp. 421, 436 (E.D. La. 1993); United States v. Naserkhaki, 722 F. Supp. 242, 249 (E.D. Va. 1989). See also Abernathy v. Abernathy, 482 S.E.2d 265, 267 (Ga. 1997) (“[E]ach state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.”); Poston v. Poston, 624 A.2d 853, 855 (Vt. 1993) (“There is no question that the Texas court had jurisdiction to end the parties' marriage, and that the divorce is entitled to full faith and credit. [E]ach state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.”); Brawer v. Pinkins, 626 N.Y.S.2d 674, 675 (1995) (“Nearly all modern cases that discuss jurisdiction in matrimonial matters use domicile or residence of the parties as the basis for according the judgment full faith and credit...”); Oyakawa v. Gillett, 854 P.2d 1212, 1217 (Ariz. Ct. App. 1993) (“Since the Supreme Court decided Williams [II], ex parte divorce decrees have been given full faith and credit in New York as far as the marital status has been adjudicated.”).

199. See supra note 198.


201. See, e.g., In the Marriage of Murphy, 952 P.2d 624, 629 (Wash. Ct. App. 1998) (applying res judicata); Special Indem. Fund v. Bedford, 852 P.2d 150, 156 (Okla. 1993) (“Even if the remedy is exclusive, a state is not compelled to subordinate its laws to those of another state.”); Burke v. Burke, 617 N.E.2d 959, 962 (Ind. Ct. App. 1993) (“Full faith and credit requires the courts of each state to give preclusive effect to final judg-
2. Law reviews

The decision in Williams I continues to be a vital part of the scholarly and professional dialogue in the law reviews. As will be discussed in a subsequent section, Williams I has been cited many times in recent years in law review articles addressing the issue of potential interstate recognition of same-sex marriages. Additionally, it has been cited in quite a few law review articles dealing with other issues. Williams II also continues to be cited regularly by legal scholars.

III. THE POTENTIAL SIGNIFICANCE OF WILLIAMS I TO SUPPORT RECOGNITION OF SAME-SEX MARRIAGE

A. Arguments from Williams I

Williams I is particularly appealing to advocates of mandatory interstate recognition of same-sex marriage, because the Court reversed North Carolina’s refusal to recognize the Nevada divorces of Mr. Williams and Mrs. Hendrix, and because of the expansive dicta in the majority opinion articulating policy reasons for a general rule of divorce recognition. Five arguments are presented by the majority in Williams I that, on their face, appear to offer some support to advocates of same-sex marriage.

First, the majority stated that the purpose of the Full Faith and Credit Clause was to “alter the status of the several states as independent foreign sovereignties, each free to ignore . . . the judicial proceedings of the others, and to make them integral parts of a single nation.” The emphasis on the subordinate status of the states and

202. See infra notes 205-43 and accompanying text (Part III).
205. Williams I, 317 U.S. at 295 (quoting Milwaukee County, 296 U.S. at 276, declaring that a judgment cannot be denied full faith and credit because it involves taxes).
the superior relational position of the federal government appeals to advocates of same-sex marriage because it reduces the number of sovereigns that must be persuaded to recognize same-sex marriages to just one — the federal government.

Second, Williams I repudiated the idea that contrary local public policy generally can justify a refusal to give full faith and credit to foreign divorce decrees. "Thus even though the cause of action could not be entertained in the state of the forum either because it had been barred by the local statute of limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit."\textsuperscript{206} Moreover, "the room left for the play of conflicting policies is a narrow one."\textsuperscript{207} "[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."\textsuperscript{208}

Third, the power of each state to control marital relations of persons within the state was emphasized. "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal."\textsuperscript{209} Additionally, the Court opined that "each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of spouses domiciled there, even though the other spouse is absent."\textsuperscript{210} Giving priority to the status-altering divorce state over the marital domicile state suggests that priority might also be given to the status-altering same-sex marriage state over the prior or subsequent domicile state.

Fourth, the Court recognized and was concerned about the problem of having marriages that were valid in one state but invalid in another. The "perplexing and distressing complication" of a full faith and credit rule that could cause "considerable disaster to innocent persons" was cited by the Court as part of the reason it reversed the

\textsuperscript{206} Id. at 287, 294.
\textsuperscript{207} Id. at 294 (quotation omitted).
\textsuperscript{208} Id. at 303.
\textsuperscript{209} Id. at 298-99.
\textsuperscript{210} Id. at 299.
North Carolina convictions. It is clear that the majority in Williams I was concerned about ameliorating this dilemma. That “perplexing and distressing complication” is similar to the dilemmas that may be presented in the same-sex marriage cases.

Finally, the majority expressed little sympathy for the effect which its decision would have to cause “a substantial dilution of the sovereignty of . . . states” with strict rules about divorce because they “could be thwarted by the [divorce] decree of a more lax state.” Because opponents of same-sex marriage would make the same argument, the fact that the majority in Williams I had brushed aside and downplayed that concern could be significant.

B. Arguments from Law Reviews citing Williams I

In the past five years numerous articles, essays, notes, and comments have been published in American law reviews and bar journals advocating mandatory (full faith and credit) or discretionary (as a matter of conflicts-of-law policy) recognition of same-sex marriage. Many of these published pieces cite Williams I and assert some of the potential arguments for same-sex marriage that I have distilled from that decision.

The most popular argument for same-sex marriage from Williams I in the law reviews is the “perplexing and distressing dilemmas” problem that may arise if different states give different marital status to the same individual. One student Note writer put it this way, after recounting the Williams I decision:

Consider a same-sex couple which lawfully marries in Hawaii and then separates without a divorce. If other states were able to withhold recognition of the marriage, one of those parties could legally remarry in a nonrecognizing state but be subject to bigamy prosecution in Hawaii (or in any state that recognized the marriage). The illegitimacy issue bears just as much relevance. Children raised by same-sex couples legally married in Hawaii would be considered illegitimate in every state that withholds recognition of the marriage. In short, “a rule would be fostered which [would] . . . ‘bastardize children [who are] supposed to be the offspring of lawful marriage.’”

Another student writer argued, citing Williams I:

211. Id. at 299-301.
212. Id. at 302.
213. Most of the 61 periodical pieces listed in Appendix I support interstate recognition of same-sex marriage. On the basis of a quick review of the titles, authors, and a reading of some of them, it appears that published pieces advocating recognition of same-sex marriage outnumber those opposing at a ratio of about seven to one (36:5).
Part of the Court's reasoning looked to the effects of the opposite outcome. Thus, if one party to the marriage receives a lawful divorce in state A, remarries in state A, and then eventually relocates to state B (which does not recognize the state A divorce), that party would be subject to bigamy prosecutions in state B and every other state that does not recognize the divorce, and not subject to bigamy prosecutions in state A or any other state that does recognize the state A divorce. With same-sex marriage, a similar scenario could exist if Florida refuses recognition of a marriage recognized by Hawaii or another state. Should one or both of the parties to the Hawaii marriage relocate to Florida they would be unable to secure a divorce since, pursuant to the Act, they are not legally married within the state of Florida. Should either party enter a valid heterosexual marriage, he or she would be subject to bigamy prosecutions in Hawaii and any state that recognizes the Hawaii marriage, and not subject to prosecution in Florida or any state which does not recognize the first marriage. In both cases, children of the marriage would be considered illegitimate in some states and legitimate in others. 

This differentiation among the states is exactly what the Full Faith and Credit Clause was intended to prohibit. In the words of Justice William O. Douglas, "[i]t is a Constitution we are expounding — a Constitution which in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause." A valid marriage, and hence a valid same-sex marriage, should be given full faith and credit in every state in the country.

Another writer reviewed the relevant language from Williams I and argued:

This rationale for granting full faith and credit to divorce decrees applies just as effectively to marital decrees. A same-sex couple could lawfully marry in Hawaii and then separate without obtaining a divorce. Because many other states likely will not recognize the Hawaiian same-sex marriage, one party to the marriage could lawfully remarry in one of those states. If this occurs, that party will be subject to a bigamy prosecution in Hawaii and every other state that recognizes the Hawaiian marriage because that party will have two lawful spouses. This is a major reason for granting full faith and credit to marital decrees.

In a variation on the same theme, Professor Mark Strasser argues:


If a marriage can be retroactively invalidated by having one or both members of a couple move across state lines, individuals will not be secure in their knowledge concerning their marital status. Indeed, precisely because individuals travel so frequently among states, it is important as a matter of public policy to establish that a marriage is valid anywhere in the United States if valid in the states of celebration and domicile at the time of the marriage.\footnote{Mark Strasser, \textit{For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages}, 66 U. CIN. L. REV. 339, 374 (1998). See also Seth F. Kreimer, \textit{Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values}, 16 QUINNIPIAC L. REV. 161 (1996) (making similar arguments and citing \textit{Williams II}).}

The next most popular pro-same-sex-marriage recognition argument based on \textit{Williams I} is the rejection of a local public policy exception to recognition of changed marital status conferred by a sister state.\footnote{Kelly, 7 CORNELL J.L. & PUB. POL'Y at 211-12; Balian, 68 S. CAL. L. REV. at 415.} This argument is used to overcome laws enacted in about thirty states that declare that same-sex marriages will not be recognized (Appendix II), and to persuade courts in the remaining states not to attempt to apply the traditional "public policy" exception to interjurisdictional marriage recognition by finding that same-sex marriage strongly offends local public policy.

Finally, the \textit{Williams I} Court's lack of sympathy for the dilution of sovereignty of states with strict marriage laws also has been cited.\footnote{Cynthia M. Reed, \textit{When Love, Comity and Justice Conquer Borders: INS Recognition of Same-Sex Marriages}, 28 COLUM. HUM. RTS. L. REV. 97, 120-21 (1996) ("Although North Carolina law was frustrated by the decision, the Court stated that '[s]uch is the price of our federal system.'").} Same-sex marriage advocates argue that even if local public policy is undermined, national interests (in marriage recognition generally, or in eliminating discrimination against gays and lesbians, specifically) must be given priority.

C. Responses to, and Analysis of, Those Arguments

I believe that the arguments from \textit{Williams I} for recognition of same-sex marriage are well worth considering, but ultimately are unpersuasive. They are contradicted internally within the \textit{Williams I} opinion of the Court, as well as externally by the opinion of the Court in \textit{Williams II}.

First, the key term in the statement about the Full Faith and Credit Clause altering state power to refuse recognition to judgments is \textit{judgments}. \textit{Williams I} focused on nonrecognition of a divorce \textit{judgment}, explicitly distinguished judgments from statutes in terms of full faith and credit, and the majority emphasized that the range of lati-
tude for nonrecognition of judgments is particularly "narrow" and the exceptions very few.\textsuperscript{220} Additionally, the majority opinion said other things about state sovereignty and control over marriage status that support the nonrecognizing state. The majority expressly rejected 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."\textsuperscript{221} Of course, Williams I must be read in light of Williams II. Repeatedly, Justice Frankfurter's majority opinion in Williams II referred to the fact that the "regulation of domestic relations has been left with the States and not given to the national authority," and reiterated the importance of each state "vindicating its public policy and particularly one so important as that bearing upon the integrity of family life. . . .\textsuperscript{222}

Second, the Court in Williams I did not altogether reject public policy exceptions as a basis for nonrecognition of judgments, but noted that those exceptions are few and very narrow, and relied on the fact that Congress had not created any exceptions regarding divorce recognition.\textsuperscript{223} Of course, today Congress has expressed a different rule regarding same-sex marriage recognition, which the legislative deference principle of Williams I supports. Moreover, the reasons given in Williams I for rejecting the specific Haddock rule — that it was too subjective, too vague, too unpredictable — would not apply to an objective, clear, predictable, narrow exception allowing states to decline to recognize same-sex marriages. Furthermore, the language rejecting public policy exceptions was largely dicta.\textsuperscript{224} North Carolina had not declined to recognize the Nevada divorce decrees because of

\textsuperscript{220} Williams I, 317 U.S. at 294-95. See generally David P. Currie, Full Faith and Credit to Marriages, 1 Green Bag 2d 7, 9 (1997) (noting the importance of "the special status of judicial proceedings under the full faith and credit clause" for the Court's decision in Williams I).

\textsuperscript{221} Williams I, 317 U.S. at 296.

\textsuperscript{222} Williams II, 325 U.S. at 237. Occasional disregard by a sister state "is hardly an argument to deprive the other forty-seven States of their constitutional rights." \textit{Id.} The Court in Williams II stated that a "most important aspect of our federalism whereby 'the domestic relations of husband and wife . . . were matters reserved to the states' . . . and do not belong to the United States." \textit{Id.} at 233. The state has legitimate concerns for "vindication of its own social policy" regarding divorce. \textit{Id.} at 230. It was stated: "North Carolina was not required to yield her State policy. . . ." \textit{Id.} at 239.

\textsuperscript{223} Williams I, 317 U.S. at 294-95. "It is sufficient here to note 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 exceptions to enforcement when contrary to forum public policy]." \textit{Id.} at 295, 303. Indeed, the majority believed that the ruling in Williams I was necessary or the "purpose of the full faith and credit . . . legislation would be thwarted to a substantial degree. . . ." \textit{Id.} at 304.

\textsuperscript{224} See infra note 230 and accompanying text.
contrary policy. The state had never raised that argument, and arguably it could not.225

Third, the statement of the Court in Williams I rejecting the assertion 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,” seems to cut against mandatory recognition as much as against nonrecognition.226 Just as the Court in Williams I had been primarily concerned about the dilemma of persons being married or divorced in one state but not in another, in Williams II, the Court was primarily concerned about the effect upon the stay-at-home spouse, and the “destructive power” of mandatory full faith and credit by which “the policy of each State in matters of most intimate concern could be subverted by the policy of every other State.”227 Williams II, the last word in the case, certainly gave priority to the power of a state to deny full faith and credit in certain cases in order to protect the marriages of its domiciliaries and vindicate the state’s marriage policy.

Fourth, the “perplexing dilemmas” that troubled the Williams I Court result more from our federal system rather than from state marriage law.228 Our Constitution reserved control over domestic relations to the states, virtually guaranteeing that there will be inconsistencies from one state to another and as individuals move from one state to another. The “lowest common denominator” standard is hardly a solution to interstate conflict dilemmas, but only a guarantee that there will be a perpetual “race for the bottom” as states vie with each other to enact looser and lower standards. The “perplexing and distressing complication” is really attributable to having different sovereigns with different standards for divorce, divorce jurisdiction and for interjurisdictional divorce recognition, regardless of what the different standards are. It is relevant that the dissenters in Williams II presented a parade of horribles, claiming that the majority opinion would result in upsetting many previously uncontested out-of-state divorces and wreaking havoc on many remarriages.229 However, now, more than fifty years later, we can unequivocally state that those fears were unfounded. No widespread movement to overturn out-of-state divorces developed, no plague of litigation resulted, no rampage unsettling divorces and remarriages ensued.

225. See infra notes 231-32 and accompanying text.
227. Williams II, 325 U.S. at 231.
228. Williams I, 317 U.S. at 304-05 (Frankfurter, J., concurring); id. at 311 (Murphy, J., dissenting).
229. See supra notes 170-90 and accompanying text; Caldwell, 23 LAW. SOC. INQUIRY at 41-43 (“Justice Black’s dissent exaggerated the implications of the case. . . .”).
Fifth, the dicta in *Williams I*, expressing lack of concern about subverting the marriage policies of states with strict marriage laws (and harming the marital interests of abandoned spouses), was counterbalanced in *Williams II* with dicta emphasizing the importance of protecting the state sovereignty of state’s with strict marriage policies, and discounting the agonies of individuals who relied mistakenly (to their conviction) on the looser divorce and domicile standards of a sister state. The holding and judgment in *Williams II* seems to check the dicta in *Williams I*.

In addition to these specific responses to the specific potential arguments for same-sex marriage recognition based upon *Williams I*, there are several general qualifying considerations. First, the issue in *Williams I* was very narrow, and both the majority and concurring opinion emphasized the narrowness of the specific issue — whether one state could refuse to recognize divorce decrees from another state where one of the spouses had become domiciled because that party was “at fault” in abandoning a spouse in a former domicile, as the *Haddock* rule allowed.230 There was a lot of dicta in both *Williams* decisions — loose rhetoric unnecessary to resolve the narrow issue before the Court in each instance. Indeed, it is remarkable that more than half of Justice Douglas’ majority opinion in *Williams I* is devoted to arguing that a state may not refuse to recognize a divorce judgment simply because “the grounds for divorce would not be recognized by the courts of the forum.”231 It is remarkable because that argument was not made by North Carolina in the case at bar.232 Moreover, it apparently could not have been argued that the Nevada divorce on grounds of mental cruelty violated strong North Carolina marriage policy because cruelty was also ground for divorce *(a mensa et thoro)* in North Carolina at that time.233

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230. The issue before the Court in *Williams I* was quite narrow, and Justice Douglas spent a great deal of time and ink emphasizing what it was and was not. Perhaps one reason Justice Douglas’ majority opinion spends so much time emphasizing that it is not deciding the issue of whether the defendants had bona fide domicile in Nevada is because both dissenting judges thought that should be the issue, and they were convinced that Mr. Williams and Mrs. Hendrix did not have *bona fide* domicile in Nevada. Additionally, because Justice Douglas thought they should be deemed to be Nevada domiciliaries for purposes of divorce recognition, he wanted in passing to counter the effect of the forceful dissents on that point. In that effort he did not succeed. *Williams I*, 317 U.S. at 289-304.


233. N.C. Gen. Stat. § 1660 (1939) (providing that cruelty was a ground for separation, which could ripen into a divorce after two years); see Carnes v. Carnes, 169 S.E. 222 (N.C. 1933); Brewer v. Brewer, 153 S.E. 165 (N.C. 1933).
Second, Haddock was decided in 1903, just two years before Lochner v. New York,234 the heyday of "substantive due process" in constitutional interpretation. The ghosts of Lochner and of substantive due process — which in 1942, when Williams I was decided, had only recently been exorcised — haunted the Haddock rule. That may explain why all the opinions in Williams I — majority, concurring and dissenting — disavowed any interest in settling the substantive policy issue. Furthermore, it explains why Justice Douglas spent so much time and space in the majority opinion in Williams I writing dicta about why the substantive policy was irrelevant to the divorce recognition question. It also may explain why Justice Frankfurter emphasized "the modest bounds" of the judicial authority, and criticized the Haddock Court for "formulating judgments of social policy."235 Furthermore, it explains why dissenting Justice Murphy specifically declared that it was not the Court's function "to become censors of public morals and decide this case in accordance with what we may think is the wise rule for society with respect to divorce."236 Justice Jackson also noted the irrelevance of the social policy issue in his opinion.237 The disfavor for public policy exceptions, like the disavowal of judicial policy preferences, are probably linked to the recent repudiation of substantive due process.

Third, Justice Jackson argued for a national definition of domicile for purposes of full faith and credit to sister state divorce decrees. In one sense, that is what the majority decided. Williams I may be read as redefining domicile for purposes of full faith and credit to sister state divorce decrees by eliminating the Haddock requirement that the new domicile had to be acquired "without fault." Justice Jackson would more particularly define domicile for purposes of full faith and credit in divorce as "the place, and the one place, where he has his roots and his real permanent home."238 Thus, for Justice Jackson, something more than six weeks in a motel, followed by immediate departure after entry of the divorce, would be necessary if parties expected the Full Faith and Credit Clause to compel other states to recognize the divorce decree.

By contrast, Justice Frankfurter's opinion in Williams II rejected a detailed national (federal) definition of domicile in favor of deference.

234. 198 U.S. 45 (1905).
235. Williams I, 317 U.S. at 304-07 (Frankfurter, J., concurring); see supra note 105 and accompanying text.
236. Williams I, 317 U.S. at 308 (Murphy, J., dissenting); see supra note 106 and accompanying text.
237. Williams I, 317 U.S. at 313 (Jackson, J., dissenting); see supra note 122 and accompanying text.
238. Williams I, 317 U.S. at 322 (Jackson, J., dissenting).
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to the states’ determination (both initially and in the second state) of domicile. Justice Frankfurter did not strictly define “domicile,” but explained generally that it “implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.”

Satisfied that domicile is “an historic notion common to all English speaking courts,” Justice Frankfurter left it to the state courts to fill in the definitional details, subject to review in a second state court (upon application for full faith and credit) and general review of that decision in the Supreme Court.

Interestingly, given their opinions in Williams I, Justices Murphy and Jackson made no argument for a more specific national definition of domicile in their concurring opinion in Williams II. However, Justice Rutledge, dissenting in Williams II, strenuously objected to the presumptive deference to state court definition and determination of domicile, arguing for an objective national standard such as a specific time of residence in the decree- rending state.

The dissenting opinion of Justices Black and Douglas in Williams II curiously criticized the Court for not deferring sufficiently to the first state’s domicile definition because the majority undermined the congressional command. Justices Black and Douglas read the federal full faith and credit statute as requiring North Carolina to give the Nevada divorce decree the same effect Nevada would give it, and they complained that the majority had disregarded that command and permitted North Carolina to deny the Nevada decree the “same effect” because it failed a federal standard for interstate divorce jurisdiction (namely, bona fide domicile of one of the spouses).

IV. THE POTENTIAL SIGNIFICANCE OF WILLIAMS I FOR THE DEBATE OVER DOMA

A. BACKGROUND, TEXT AND ENACTMENT OF DOMA

The Defense of Marriage Act (“DOMA”) was introduced in the United States House of Representatives in May of 1996. In four months, it passed the House of Representatives by a vote of 342-67.

239. Williams II, 325 U.S. at 229.
240. Id. at 234-37.
241. Id. at 245-46, 259 (Rutledge, J., dissenting).
242. Id. at 268-69 (Black, J., dissenting).
243. Id. (Black, J., dissenting).
passed the United States Senate by a vote of 85-14, and President William Clinton signed the Act on September 21, 1996.245

DOMA contains two operative sections. Section 2, now codified as 28 U.S.C. § 1738C, addresses the potentially serious controversy concerning federal Full Faith and Credit recognition of same-sex marriages by providing, in pertinent part, that "[n]o 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. . . ."246 Thus, if a state chooses to legalize same-sex marriage, federal full faith and credit rules do not force that radical redefinition of marriage upon the other states. This preserves the right of each state to choose for itself whether to recognize same-sex marriage. Section 3, now codified in 1 U.S.C. § 7, eliminates any ambiguity in federal statutes, regulations, and programs regarding the meaning of "marriage" in federal law by explicitly providing that, for purposes of federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."247 This prevents the back-door importation of same-sex marriage into federal law without the approval of Congress. Both sections leave undisturbed the power of each state to define marriage for itself, and to control the incidents of marriage provided by state law. Thus, DOMA protects the crucial balance of federalism in our constitutional system, preserving the right of each state and of Congress to settle the same-sex marriage question for itself.

Section 2, the full faith and credit section of DOMA, is of particular interest to Conflict of Laws scholars and this paper. That section clarifies the "effect" that federal full faith and credit rules require a state to give to public acts, records and judicial proceedings from another state that establishes, recognizes, or gives legal effect to a same-sex relationship as a marriage. Nothing in Section 2 prohibits any state from recognizing same-sex marriage or recognizing other states' acts, records, or judicial proceedings treating same-sex unions as marriages.248 Each state is still free to legalize same-sex marriage, or to give effect to another states' legalization of same-sex marriage, if it chooses to do so. A state may have or may create conflict of laws rules

that recognize same-sex marriages if legal in other states, and Section 2 does not interfere with that at all. Section 2 only specifies that the federal full faith and credit rules do not compel other states to recognize or enforce same-sex marriages legalized or recognized in another state. Thus, DOMA takes a "neutral" position, that federal full faith and credit law neither prohibits nor requires any state to recognize same-sex marriage acts, records and judgments from other states.

DOMA balances federalism and full faith and credit to provide equilibrium vertically between the states and the federal government, and horizontally among the states themselves. Federalism is the core concept in our system of shared sovereignty between states and the federal government, one of the essential "balances" of power-against-power that prevents the abuse of power by either repository of governmental power. Federalism defines the constitutional relationship of the states and federal government. In the Federalist Papers, James Madison described that relationship this way:

The powers delegated by the proposed constitution to the federal government are few and defined. Those that remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and the properties of the people, and the internal order, improvement, and prosperity of the State.

Hamilton suggested in Federalist No. 17 that the national government would be concerned with matters of "commerce, finance, negotiation, and war" while the State governments would have priority in regulating "[t]he administration of private justice between citizens of the same State, the supervision of agriculture and of other concerns of a similar nature," and "regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake. . . ."

Since 1789, the broad, general authority of the states to regulate family relations and the absence of virtually any authority of the federal government to directly regulate family relations has been one of the clearest boundary lines of our federalism. The regulation of family relations historically has been, and as a matter of constitutional law

249. Id.
250. JAMES MADISON, THE FEDERALIST NO. 45 292-93 (Clinton Rossiter ed., 1961). In his paper, Madison also noted: "[T]he States will retain under the proposed Constitution a very extensive portion of active sovereignty." Id. at 290.
still remains, primarily a matter of state law. Indeed, the Supreme Court of the United States has observed, not infrequently, that the "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states."\(^{252}\) Behind the practices of federalism are strong policy values such as respect for the value of and appreciation of the need to preserve what Alexander Hamilton described as "the constitutional equilibrium between the general and the State governments," the desire to preserve and foster pluralism, the belief that laws regulating families should reflect local values, respect for the expertise of state courts, and the belief that the federal government has more than enough other important problems to address.\(^{253}\)

There is a second structural principle that operates to preserve the constitutional balance and preserve the role and responsibilities of the states: the Full Faith and Credit Clause. As the federalism principle polices the vertical relations of the national government and the states, the full faith and credit principle operates to police the horizontal relations of the states with other states. As the federalism principle protects the integrity of the states from possible overreaching by the national government, the Full Faith and Credit Clause protects the states from possible overreaching by each other. In a sense, federalism provides the longitudinal coordinate and full faith and credit provides the latitudinal coordinate defining the position of the states in the Union under the compact of federation we call the Constitution. Both principles function together like a gyroscope to define the relational position of the states and the federal government, to protect and preserve the position of each of the individual states and the national government within the constitutional system that has functioned so successfully for so many generations in this great country.

DOMA is very unpopular with supporters of same-sex marriage, and a cottage industry attacking DOMA in the law reviews has sprung up in the past two years.\(^{254}\) Lawyers representing parties and organizations advocating same-sex marriage have promised to challenge DOMA as soon as same-sex marriage is legalized in some state. Thus, the constitutionality of DOMA is a very relevant issue. The \textit{Williams} cases shed some light on three issues that may arise in that litigation.


\(^{254}\) \textit{See App. I.}
B. RELEVANCE OF WILLIAMS I FOR DEBATE OVER THE POWER OF CONGRESS TO ENACT DOMA

The first issue that will arise in DOMA litigation will be whether Congress had the constitutional authority to enact DOMA's marriage recognition rule. I believe that it did and does. My comments on this have been published in statements I made to committees of Congress. Here I summarize them, as follows. There is no serious doubt that Congress has the power to enact legislation defining the "effect" of one states' laws, records and judgments in other states. Sentence two of the Full Faith and Credit Clause of the Constitution (Article IV, §1) explicitly provides that: "The Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The Congressional Research Service of the Library of Congress has stated: "Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States." A host of scholarly authority for many decades concurs with this assessment.

The opinions of the Court in Williams I and Williams II lend support to this conclusion. In Williams I, Justice Douglas's majority opinion acknowledged that under the Constitution, "Congress may by general Laws prescribe the Manner in which [state] Acts, Records and Proceedings shall be proved, and the Effect thereof." Thus, the 1790 Full Faith and Credit statute, 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. The absence of any exception in the congressional mandate was cited as a major reason for rejecting an exception for local public policy.


256. U.S. CONST. art. 4, § 2.


259. Williams I, 317 U.S. at 293 (quoting U.S. CONST. art. IV, § 1).

260. Id. at 293-94.

261. Id. at 303.
Justice Douglas alluded again to the power of Congress to control the matter in quoting the statement that in the case of interstate recognition of sister state statutes, "the extrastate effect of which Congress has not prescribed" a second state need not necessarily defer to the statutory policy of another state. Moreover, the Court cited Justice Stone's statement in Yarborough, in which the Court strongly endorsed the power of Congress to resolve interstate recognition issues:

The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress. Much of the confusion and procedural deficiencies which the constitutional provision alone has not avoided may be remedied by legislation. . . . The constitutional provision giving Congress power to prescribe the effect to be given to acts, records, and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone. It was remarked on the floor of the Constitutional Convention that, without the extension of power in the Legislature, the provision 'would amount to nothing more than what now takes place among all Independent Nations. . .' The play which has been afforded for the recognition of local public policy in cases where there is called in question only a statute of another state, as to the effect of which Congress has not legislated, compared with the more restricted scope for local policy where there is a judicial proceeding, as to which Congress has legislated, suggests the congressional power.

Thus, Williams I was primarily a statutory decision only; the Court was interpreting the full faith and credit statute passed by Congress. Concurring, Justice Frankfurter even more emphatically suggested that "[t]he real remedy lies in national legislation." In Williams II, Justices Black and Douglas, dissenting, suggested very strongly that Congress has authority to establish an interstate recognition rule for divorce, and criticized the majority for ignoring the existing mandate of Congress in the full faith and credit statute.

The Constitution provides that 'Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.' Acting pursuant to this constitutional authority, Congress in 1790 declared what law should govern and what

262. Id. at 295 (citing Alaska Packers, 294 U.S. at 547).
263. Yarborough, 290 U.S. at 215 n.2 (Stone, J., dissenting) (emphasis added).
‘Effect’ should be given the judgments of state courts. That statute is still the law. Its command is that they ‘shall have such faith and credit given to them * * * as they have by law or usage in the courts of the State from which they are taken. . . . ’ If, as the Court today implies, divorce decrees should be given less effect than other court judgments, Congress alone has the constitutional power to say so. We should not attempt to solve the ‘divorce problem’ by constitutional interpretation. At least, until Congress has commanded a different ‘Effect’ for divorces granted on a short sojourn within a state, we should stay our hands. A proper respect for the Constitution and the Congress would seem to me to require that we leave this problem where the Constitution did. . . . The logic of the Court does not persuade me that we should ignore these mandates of the congress and the Constitution.265

Legal commentators at the time agreed that Congress could resolve the matter by legislation. For example, Professor Powell wrote:

It seems clear that Congress, with the power to prescribe the effect to be given in one state to the judicial proceedings of another, could set forth standards requisite and sufficient for compulsory recognition. It is more doubtful whether Congress could compel non-recognition of non-complying decrees or public acts. It is clear enough that a state may give more recognition than it would be compelled to give. Any restrictions on this must derive from conceptions of the due process clause of the Fourteenth Amendment.266

Many contemporary legal scholars agree that the Williams cases point to the power of Congress to enact marriage-recognition standards like DOMA.267 Just as Congress could mandate a specific period of resi-

265. Williams II, 325 U.S. at 268-69 (Black, J., dissenting). As was stated in Williams II: “Congress might, under the Full Faith and Credit Clause, prescribe the ‘effect’ in other states of decrees based on the finding [of domicile]. . . .” Id. at 270 n.10 (Black, J., dissenting).

266. Powell, 58 HARV. L. REV. at 1011. Powell also suggested that Congress could “forbid some one to cross a state line to do something that Congress, because of the exclusive power of the state, may not constitutionally forbid residents to do there. Conceivably, therefore, Congress might forbid persons to cross a state line to get a divorce that would be invalid under a judicially approved conception of due process of law.” Id. at 1012.

dency before full faith and credit must be given to a divorce decree, it can mandate another specific requirement (opposite sex couples) before a marriage in another jurisdiction must be recognized. Of course, DOMA sets a much more modest standard for interstate recognition of same-sex marriage — that it conform to public policy of the second state. That standard may not be as rigorously dogmatic as some opponents or most advocates of same-sex marriage would like it to be, but it is certainly consistent with the principles established in the Williams cases.

C. Relevance of Williams I for the Constitutionality of the General DOMA “Full Faith and Credit” Rule

The key question about the substantive validity of the rule of DOMA allowing states to refuse to give the same faith and credit to same-sex marriages as they are given in the states in which they are created is whether Congress constitutionally can protect the ability of states that do not permit same-sex marriage to control marital status within their own borders and shield them from encroachments upon their marriage policies by states that wish to export same-sex marriages. There is no doubt that the Constitution has a “special concern” for protecting “the autonomy of the individual States within their respective spheres.” This concern is especially acute when it concerns matters of state domestic relations law. DOMA is designed to protect the states’ sovereign ability to determine for themselves whether to recognize same-sex marriages. It does this by closing two avenues of federal law that have been singled out by gay and lesbian strategists as a means of imposing same-sex marriage on all states if any state chooses to legalize same-sex marriage. DOMA prevents states that legalize same-sex marriage from forcing their policy on other states or upon federal programs. Thus, it protects the fundamental constitutional notion that “[n]o state can legislate except with reference to its own jurisdiction.”

The Supreme Court of the United States has noted that Congress has a “substantial interest” in “balancing the interests” of the several states by “prevent[ing] [one state’s] policy from dictating” what the legal policy of other states will be. For example, in United States v.

\[268. \text{Williams II, 325 U.S. at 259 (Rutledge, J., dissenting).}\\
\[270. \text{Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881).}\\
Edge Broadcasting Co., the Supreme Court upheld a federal restriction on speech — a statute forbidding broadcasters from carrying advertisements for lotteries if lotteries were forbidden in the state in which the broadcaster was located — in order to vindicate the sovereignty of each state to determine its own lottery rules. In Edge, the broadcaster who challenged the law was located in North Carolina, which prohibited lotteries, but 90% of the broadcaster's listeners lived in Virginia, where the lottery was legal. Even though the overwhelming majority of the listeners resided in a state whose public policy would not be violated by allowing the lottery advertisements, the Court held that the "congressional policy of balancing the interests of lottery and nonlottery States" was a "substantial governmental interest" that justified even the prohibition of free speech by the broadcaster in this instance. The Court further endorsed the "substantial federal interest in supporting North Carolina's laws making lotteries illegal," and "prevent[ing] Virginia's lottery policy from dictating" what advertisements would be carried on stations located in another state. The Court approved the enforcement of the federal law because it "advance[d] the governmental interest in enforcing the restriction in nonlottery States, while not interfering with the policy of lottery States like Virginia." The Court specifically approved congressional action "to accommodate non-lottery States' interest in discouraging public participation in lotteries, even as they accommodate the countervailing interests of lottery States."

DOMA responds to the Court's explicit concern that "[t]o vest the power of determining the extraterritorial effect of a State's own laws and judgments in the [first] State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." It neutrally protects the balance of interests between the interested states.

Certainly the "substantial federal interest in supporting [state] laws [prohibiting same-sex marriage]" and "prevent[ing] [one state's same-sex marriage] policy from dictating" what marriages are recognized in another state is at least as important to state sovereignty as the interest in protecting state restrictions on advertising lotteries.

274. Edge Broad., 509 U.S. at 428.
275. Id. at 429.
276. Id. at 430.
277. Id. at 434.
279. Edge Broad., 509 U.S. at 429.
DOMA "advances the governmental interest in enforcing the restriction in [non-same-sex-marriage] States, while not interfering with the policy of [same-sex marriage] States," and is designed "to accommodate non-[same-sex marriage] States' interest in discouraging [same-sex marriage], even as they accommodate the countervailing interests of [same-sex marriage] States."\(^2\)

Another recent case supports this conclusion. In *BMW of North America, Inc. v. Gore*,\(^2\)\(^8\)\(^1\) decided the same day as *Evans v. Romer*,\(^2\)\(^8\)\(^2\) the Court discussed whether Alabama courts could impose punitive damages upon a defendant calculated on acts done in other states that were legal in those states but illegal in Alabama.\(^2\)\(^8\)\(^3\) In *Gore*, Justice Stevens wrote for the Court that under the Constitution it is impermissible for one state to "impose its own policy choice on neighboring States." A state's power to impose its legal policy, upon other states, even in matters of commerce, is "constrained by the need to respect the interests of other States...."\(^2\)\(^8\)\(^4\) The Court emphasized the need to follow "these principles of state sovereignty and comity" which forbid one state giving its laws and legal policy an extraterritorial effect that "infringe[s] on the policy choices of other States," because the Constitution requires each state "[t]o avoid such encroachment."\(^2\)\(^8\)\(^5\) If such protection of state sovereignty is required for mere state commercial interests, it is even more important that one state not impose a radical redefinition of marriage on other states.

The cases of *Williams I* and *Williams II* support this analysis. The Court in those decisions balanced the competing interests of states with potentially conflicting policies regarding marriage, and actually conflicting court judgments regarding the marital status of four individuals. It underscored the need to balance those policies, rejected ab-

\(^{280}\) Id. at 430, 434.
\(^{281}\) 517 U.S. 559 (1996).
\(^{283}\) *Gore*, 517 U.S. at 568-69. BMW had repainted parts of a new car that had suffered some paint damage while being transported from Germany to the United States, and then sold the car as a new car in Alabama without disclosing that it had been partially repainted at a cost of $601.37. That was lawful in other states, but a recent Alabama case made it improper there. The plaintiff introduced evidence that the repainted parts lowered the resale price of the car by about 10% and the jury awarded the buyer $4000 in compensatory damages (10% of the car's price). BMW had sold about 1000 such repainted cars in the United States, including fourteen cars in Alabama. The jury mathematically awarded $4,000,000 in punitive damages, reduced on appeal to $2,000,000. The Supreme Court reversed and remanded, 5-4, noting that the award was so grossly excessive as to violate due process, in part because the award appeared to be based on out-of-state conduct that was lawful where it occurred and had no impact in Alabama. *Gore*, 517 U.S. at 563-65.
\(^{284}\) *Gore*, 517 U.S. at 571 (citing *Healy*, 491 U.S. at 335-36 (1989); Edgar v. MITE Corp., 457 U.S. 624, 643 (1982)).
\(^{285}\) Id. at 572.
solutism, and vindicated the right of states not to have other states' marriage status adjustment policies imposed upon them.

D. RELEVANCE OF WILLIAMS I FOR THE “JUDGMENTS” PART OF THE DOMA “FULL FAITH AND CREDIT” RULE

Section 2 of DOMA applies not only to laws from others states (choice of law) but also to records and judgments.286 Thus, it intends that if a same-sex couple were married in a state (A) that had legalized same-sex marriage, another state (B) will not be forced to recognize that marriage, even if the same-sex couple received a judgment in the first state (A) recognizing their “marriage” as valid. Section 2 allows, but does not compel, others states to recognize (or to not recognize) that judgment. DOMA simply removes the potential federal compulsion one way or the other, and leaves it up to the second state to decide for itself what effect to give such marriages or marriage judgments.

It should be noted that most marriages do not involve judgments. The reference to judgments in DOMA may have been primarily intended to cover the kinds of collusive, friendly, artificial, or fraudulent cases where parties to a same-sex marriage involve the courts in a minuet to bolster their prospective claim for same-sex marriage recognition in other states.287 I do not think there is much question that other states can reject those kinds of judgments. Even the dissenters in Williams II made it clear that they agreed that fraudulent or collusive judgments were not entitled to full faith and credit.288

But what about the noncollusive case, the case of a bona fide dispute, a real litigation contest, resulting in a direct judgment that two persons of the same sex are married (or have certain rights predicated on marital status)? If, some time later, the parties move to another state, is that judgment binding in that state? What about the hypotheticals posed by Professor Borchers and Professor Cox in their papers in this symposium, involving benefits based upon marriage such as consortium or inheritance as to which, at the time the judgment was rendered, the rendering (same-sex marriage) state clearly had the most significant connection to the parties and the issues litigated?289

287. See H.R. REP. No. 104-664, 104 Cong., 2d Sess., at 28, 37 (July 9, 1996); see also Hearings on H.R. 3396, supra note 255, at 187.
288. Williams II, 325 U.S. at 249, 254 n.7 (Rutledge, J., dissenting); id. at 262 n.1 (Black, J., dissenting).
If such a judgment were later taken to another state for enforcement, could the second state refuse to recognize it?

Certainly, 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 II to support that conclusion. However, the Court in Williams I also acknowledged that there are (and is still room for) exceptions, including narrow exceptions reflecting policy concerns, especially if the exception is defined by Congress. In Williams I, the Court emphasized that Congress had not then created any public policy exception to its general legislative requirement of full faith and credit, and that is why it rejected a general public policy exception to the general rule of judgment recognition.\(^290\) Of course, DOMA would seem to be precisely such a congressional declaration. It is clear, not ambiguous; it is focused, narrow, and specific — not a general "roving public policy exception."\(^291\) In Williams I, Justice Douglas suggested that such a statute would be controlling, and, in Williams II, he and Justice Black reaffirmed that belief.\(^292\) Also, DOMA appears to meet the Justice Stone (Yarborough) standard for Congressional implementation of full faith and credit.\(^293\)

Several opinions in the Williams cases clearly invited Congress to enact legislation regarding the interstate effects of divorce decrees.\(^294\) Law review writers fifty years ago so construed the opinions, and they agreed that congressional legislation would be the most desirable solution to perplexing interjurisdictional divorce recognition dilemmas like the Williams cases.\(^295\) Congress, however, ignored those judicial pleas then. Today, however, DOMA may be seen as an acceptance of the invitation for Congress to enact legislation establishing a clear and objective standard for determining what effect must be given to one state's action creating new or modified marital status in interstate cases affecting persons or property in, and marital policies of, other states. Congress is not the only legislative body in America to react negatively to the threat that the legalization of same-sex marriage in one state will force other states to recognize same-sex marriages. In less than four years, more than half of the state legislatures have en-

\(^{290}\) Williams I, 317 U.S. at 303.
\(^{291}\) Baker, 118 S. Ct. at 664.
\(^{292}\) Williams II, 325 U.S. at 268 (Black, J., dissenting).
\(^{293}\) Yarborough, 290 U.S. at 215 n.2.
\(^{294}\) Williams I, 317 U.S. at 306 (Frankfurter, J., concurring); id. at 311 (Murphy, J., dissenting); Williams II, 325 U.S. at 243 (Murphy, J., concurring); id. at 274 (Black, J., dissenting).
\(^{295}\) Powell, 58 HARV. L. REV. at 930; Scovel Richardson, Note, Conflict of Laws – Divorce – Full Faith and Credit to Foreign Divorce Decrees Based on Constructive Service of Non-Residents, 3 NAT'L B.J. 1310 (1945).
acted laws to clarify that same-sex marriages will not be recognized.\textsuperscript{296} If the legislature of a state (now most states) feels so strongly about not recognizing same-sex marriage that it enacts legislation to eliminate even the remote possibility of a violation of its policy against same-sex marriage by imported marriages, and if Congress feels so strongly about protecting the right of those states to maintain their policy on that matter that it enacts legislation preserving that facet of state sovereignty, there is nothing in the Constitution that compels the Supreme Court to thwart that in the name of full faith and credit. The Court has protected legitimate state interests before against over-zealous assertions of full faith and credit recognition of sister state judgments.\textsuperscript{297}

Thus, if the case involved any significant connections to the second state, if it involved the incidents or benefits of marriage, and if that state had a clear policy in effect regarding, not extending, marital status or benefits to same-sex unions, under \textit{Williams I} and \textit{II} courts should rule that the Full Faith and Credit Clause does not compel states to recognize same-sex marriage judgments. However, the context of the case would be very important. Significant contacts (not necessarily the \textit{most} significant) could provide a sound basis for non-recognition of same-sex marriage or marriage incidents, even embodied in a judgment.

If the case had \textit{no} significant affiliating connection with the forum (second) state and no perceivable impact on the policy of that state, then a much harder case would be presented and possibly a different outcome justified. Probably, a \textit{forum non conveniens} dismissal would be justified in those circumstances. If the case were not dismissed, it is not clear that DOMA was intended to be applied in those tenuous circumstances, or that failure to apply DOMA would seriously (or at all) undermine the policy and objectives of DOMA. Nevertheless, if the DOMA neutrality rule were seen as the equivalent of a \textit{forum non conveniens} rule, allowing a state to not use its courts to enforce a policy that is seriously repugnant to the policies of the forum state, application of DOMA might well be upheld even in these circumstances. If what the Court said in the \textit{Williams} cases about marriage, involving not just the married persons but also the interests of the state, is still

\textsuperscript{296} In addition to the 29 states listed in Appendix II, the Missouri legislature enacted a sex-recognition law that was invalidated because the bill of which it was a part contained multiple subjects, contrary to Missouri law. \textit{See} Mo. Rev. Stat. § 451.022 (1996).

true (or at least not unconstitutional), even if there are not private party interests at stake, the state itself may have a sufficient interest in declining to allow its courts to extend legal benefits to same-sex marriages that nonrecognition and nonenforcement of such judgments would be upheld.298

V. CONCLUSION: CLARITY, AMBIGUITY, AND THE NEED FOR THE COURT TO REVISIT THE ISSUES

It was fortunate for the country and for millions of divorcing couples that the Court decided the Williams cases and established the general standards for interstate divorce recognition when it did in 1945. With the end of World War II just a few months later, millions of young couples who had entered hasty “wartime marriages” with little preparation for, or commitment to, those marriages found themselves in very troubled and unhappy relationships, and divorce filings spiked to unprecedented levels for a couple of years.299 Because the Court had addressed the divorce recognition issue and had established clear boundaries regarding jurisdiction to enter a divorce decree effective extraterritorially and general standards for full faith and credit recognition of divorces, a host of divorce recognition problems were avoided by the millions of people seeking divorces in the post-war divorce boom. The main principles of divorce jurisdiction and of interstate divorce recognition had been clarified. Later cases confirmed and predictably built upon the Williams foundation.300 Divorce law and practice continued as usual. The parade of horribles predicted by the dissenters in Williams II never materialized.

The implications of Williams I and II for interstate recognition of same-sex marriages are not entirely discernable. A number of questions remain.301 The Supreme Court may soon have the opportunity to clarify those issues. At the risk of being taken no more seriously than most people who offer unsolicited advice, I suggest that the Wil-

298. As quoted from Williams I:
    Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal.


300. See supra note 154.

301. One thing that is clear from the Williams decisions is “that attorneys cannot be too cautious when called upon to predict court action” in the area of interstate recognition of domestic relations status. Baer, 24 N.C. L. Rev. at 30.
Williams cases exemplify three important principles about resolving such recognition issues. First, the Court should resolve those questions specifically and narrowly in the context of the case or cases in which they arise. The Williams cases illustrate the wisdom of narrow, focused decisions, and the risks and mischief attendant to broad dicta and broad policy discussions in Supreme Court opinions. Second, part of the wisdom of the Williams decisions must be credited to the fact that the Court did not attempt to create or promote a national judicial divorce policy or try to force interstate uniformity of substantive policy (even though some of the Justices had, and sought to implement, a strong personal preference to facilitate national divorce recognition). Likewise, a wise Supreme Court will not try to create a national judicial policy or force interstate harmony regarding same-sex marriage. Third, the Court in the Williams cases prudently deferred to and respected the shared responsibility of Congress to establish interstate full faith and credit policy. While our justices are brilliant and wise indeed, the value of legislative expertise in determining where to draw the line on full faith and credit effect is constitutionally recognized and congressional authority is constitutionally established. In this instance, the Court should recognize and respect the power of Congress to establish standards for interstate recognition of same-sex marriage.
APPENDIX I

ARTICLES, NOTES, AND ESSAYS DISCUSSING PRIMARILY SAME-SEX MARRIAGE RECOGNITION PUBLISHED IN AMERICAN LAW REVIEWS AND BAR JOURNALS

JANUARY 1, 1993 - JUNE 1, 1998

1998


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Rebecca S. Paige, Comment, Wagging the Dog - If the State of Hawaii Accepts Same-Sex Marriage Will Other States Have To?: An Examination of Conflict of Laws and Escape Devices, 47 Am. U. L. Rev. 165 (1997).


Mark Tanney, Note, The Defense of Marriage Act: A “Bare Desire to Harm” an Unpopular Minority Cannot Consti-


Mark Strasser, Loving the Romer out for Baehr: On Acts in De-


1996


Andrew Sullivan, Recognition of Same-Sex Marriage, 16 Quinnipiac L. Rev. 13 (1996).


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APENDIX II

STATES WITH LAWS THAT PROHIBIT RECOGNITION OF SAME-SEX MARRIAGE

Alabama - H.B. 152(2) (Ala. 1998)
Alaska - ALASKA STAT. ANN. § 25.05.013 (1996)
Florida - H.B. 147, § 1 (Fla. 1997)
Georgia - GA. CODE. ANN. § 19-3-3.1 (1996)
Hawaii - HAW. REV. STAT. § 572-3 (1996)
Indiana - IND. CODE ANN. § 31-711-2 (Michie 1996)
Iowa - HR 382 (Iowa 1998)
Kentucky - H.B. 13, § 1 (Ky. 1998)
Maine - Laws 65 (Me. 1997)
Minnesota - MINN. REV. STAT. § 517.01(1) (1997)
Mississippi - MISS. CODE ANN. § 93-1-1(2) (1997)
North Dakota - N.D. CENT. CODE § 14-3-01 (1997)
Oklahoma - OKLA. STAT. tit. 43, § 3.1 (1996)
Pennsylvania - 23 PA. CONS. STAT. ANN. § 1704 (West 1996)
South Dakota - S.D. CODIFIED LAWS § 25-1-1 (Michie 1996)
Tennessee - TENN. CODE ANN. § 36-3-113 (1996)