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Interstate Recognition of Parent-Child Relationships: The Limits of the State Interests Paradigm and the Role of Due Process

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INTRODUCTION

How secure are the legal relationships between gay or lesbian parents and their children when those families move from one state to another? This question is only beginning to get serious attention from courts and commentators.[1] Questions surrounding the interstate recognition of same-sex *marriages* have been the subject of voluminous commentary for more than a decade.[2] But what happens when a non-biological parent who has been legally recognized as a full parent under the laws of one state moves with her same-sex spouse and their child to a different state where public policy is unfriendly toward same-sex relationships? Or what happens when a same-sex couple that adopts a child, thus becoming its full legal parents, seeks recognition of their parental status in a different state?

The answers to these questions remain surprisingly uncertain. In this Article, I argue that the law's traditional approaches to analyzing and resolving interstate disputes cannot be relied upon to adequately protect the interests of such parents and children. Instead, courts must be guided by first principles: the fundamental rights that are inherent in the parent-child relationship and protected by the Constitution's Due Process Clause.

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[1] See generally, for example, Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 Harv L & Pol Rev 31 (2010); Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 BC L Rev 1 (2004).

[2] See, for example, Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (Yale 2006); Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 Stan L Rev 499 (1995).

I refer to the various conflict of laws doctrines I discuss in this Article, along with the related doctrines of constitutional and statutory full faith and credit, collectively as the "state interests paradigm." I coin this term to emphasize that these doctrines are primarily concerned with mediating relationships between states and deciding which state's law should prevail in a conflict. The state interests paradigm stands in contrast to the paradigm of constitutional litigation, which is concerned with the rights and interests of the individual vis-à-vis the state. The Supreme Court has recognized a parent's entitlement to the care, custody, and control of her child as a fundamental right protected against state interference under both the substantive and procedural branches of the Fourteenth Amendment's Due Process Clause. Yet, the principles of family autonomy and privacy the Court has developed over almost a century of Due Process Clause jurisprudence have been almost entirely absent from court decisions and scholarly commentary addressing issues of gay and lesbian parenting. Under the state interests paradigm, individual rights of the type protected by due process play no role in the analysis of an interstate problem.[3]

Roughly one out of every five same-sex couples in the United States is raising at least one child under the age of eighteen,[4] yet the current legal environment "is one of volatile uncertainty regarding the portability of parental rights acquired by same-sex couples and other alternative families from state to state."[5] This is because "[t]he law as it pertains to same-sex parents is made up of complications, inconsistencies, and an inadequate body of legal rights," and there remains in many jurisdictions "stern opposition to treating same-sex families with the same level of respect and equality as heterosexual or 'normal' families."[6] As the number of same-sex couples who are marrying and parenting continues to increase, cases involving gay or lesbian family rela-

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[3] The only role the Supreme Court has specified for the Due Process Clause in conflicts litigation is a minimal requirement that, in order for a forum state to apply its own law to a dispute, the forum "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Insurance Co v Hague*, 449 US 302, 313 (1981) (Brennan) (plurality). This requirement certainly would be satisfied if a family takes up residence in a new state and thus becomes subject to its laws.

[4] The Williams Institute, *Census Snapshot, United States, December 2007*, at 2–3, online at http://www2.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf (visited Sept 9, 2011).

[5] Karen Moulding, 1 *Sexual Orientation and the Law* § 1:24 (West 2010).

[6] Lissette Gonzalez, Comment, *"With Liberty and Justice for All [Families]": The Modern American Same-Sex Family*, 23 St Thomas L Rev 293, 322 (2011).

tionships will occupy a growing share of state and federal court dockets. These cases frequently will require courts to enter uncharted legal territory.

In this Article I argue that the state interests paradigm will not adequately protect the rights of non-biological parents, and thus the integrity of gay and lesbian families, but that well-established constitutional due process principles preclude a state from refusing to recognize a legal parent-child relationship that was established earlier in another state. Because the state interests paradigm does not account in any formal way for the individual rights and interests of parents or children, it typically will be too deferential to anti-gay state public policy arguments that may be invoked to deny recognition of a parent-child relationship and thus effectively terminate parental rights without due process. When litigation arises over family relationships that cross state lines and no formal weight is given to the constitutional rights and interests of parents and children, the litigation suffers from a structural defect. It is well established that the state may not intrude without good cause into established relationships within the nuclear family. Recognizing this principle in litigation over interstate recognition of parental rights would provide a necessary corrective to the state interests paradigm and a check against state interference with extant family relationships.

Scholarly commentary has been wrestling with how law should make sense of the very concept of parentage at a time when "new reproductive methodologies and . . . changing social attitudes . . . have made the opportunity to generate a family both feasible and societally acceptable for a greater variety of couples."[7] In particular, a body of commentary, generated by a small but growing number of cases, has begun to address the custody and visitation rights of persons who have acted in the role of parents toward their same-sex partners' biological or adopted children.[8] Custody is not necessarily the same thing as

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[7] John G. New, Comment, *"Aren't You Lucky You Have Two Mamas?": Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 Chi Kent L Rev 773, 805 (2006).

[8] See, for example, Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 Ohio St L J 563 (2009); Kathryn J. Harvey, Note, *The Rights of Divorced Lesbians: Interstate Recognition of Child Custody Judgments in the Context of Same-Sex Divorce*, 78 Fordham L Rev 1379 (2009); Leah C. Battaglioli, Comment, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 Cath U L Rev 1235 (2005); Rachel E. Shoaf, Note, *Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law*, 12 Wm & Mary J Women & L 267 (2005).

legal parenthood, however, and thus many of these cases and commentaries are concerned with equitable doctrines of "psychological" or "de facto" parenthood or "in loco parentis" relationships where no actual parent-child relationship was formed under law.[9] Moreover, the growing use of more sophisticated reproductive technologies, combined with the "dizzying array" of potential relationships among genetic donors, carriers (who may or may not be surrogates), and "intended" legal parents (who may be part of same- or opposite-sex couples), has sometimes "created confusion about who should be a parent," and "[c]hanging family relationships have only added to this confusion."[10] These are important issues and debates, but to be clear, my concern in this Article is not with how legal-parent status is established in the first instance, but rather with the durability of that status if the family moves to a new state with different laws and perhaps different social attitudes.

This Article is in three parts. In Part I, I describe how legal parenthood arises, and the constitutional protections that the Supreme Court has provided for extant family relationships. In Part II, I explain how interstate disputes over parent-child relationships might be resolved under prevailing understandings of conflict of laws and full faith and credit, and I discuss several recent cases that illustrate the problems and shortcomings of these approaches. In Part III, I argue that the state interests paradigm is inadequate to deal with the interstate problems posed by contemporary family configurations at a time when state policies toward gay and lesbian relationships vary widely. Conflict of laws doctrine is excessively deferential to a forum state's public policy and could too easily allow a court to effectively terminate a nonbiological parent's rights without due process.

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[9] See, for example, Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 Santa Clara L Rev 999, 1021–26 (2008) (noting that, "in several recent cases, a state court has considered the rights of the non-natural parent as a psychological or a de facto parent given the relationship the partner established with the child").

For examples of how courts have addressed such claims, compare *Jones v Barlow*, 154 P3d 808, 810 (Utah 2007) (holding that a woman with no legal or biological tie to her partner's child did not have standing to seek visitation after the couple's breakup because her in loco parentis relationship to the child had ended) with *Bethany v Jones*, 2011 Ark 67 (holding that a lesbian mother's former partner stood in loco parentis to the child and that an award of visitation would be in the child's best interest).

[10] Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology Is Used to Create Families*, 62 Ark L Rev 29, 29–33 (2009). See also Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 Wis J L Gender & Soc'y 25 (2009).

And thanks in part to a recent federal circuit split, full faith and credit doctrine in the area of parentage and adoption is confused and uncertain. Ultimately, I argue, the Fourteenth Amendment's well-established protections for extant family relationships preclude a state from refusing to recognize a legal parent-child relationship that was established under the laws in another state. Finally, Part IV provides a brief conclusion: parental rights are individual rights, and thus they must ultimately be vindicated, if necessary, not through doctrines of conflict of laws or full faith and credit, but under constitutional guarantees for family privacy and autonomy.

I. LEGAL PARENTHOOD AND ITS CONSTITUTIONAL PROTECTION

A. How Legal Parenthood Arises

How does one become a legal parent? The answer to that question is more complicated than it once was,[11] but it is possible to lay out a few general principles as background to my argument about interstate recognition. As Joanna Grossman explains,

> [a] legal parent is someone who, by virtue of a particular tie to a child, is endowed with constitutionally-protected rights, and subject to potentially onerous obligations. As a general matter, a biological mother is a legal parent unless and until her parental rights are terminated. A biological father is a legal parent if he is married to the child's mother at the time of conception or birth, or if some other criterion for fatherhood is met—such as an adjudication or acknowledgment of paternity, or his openly holding out the child as his own. . . . An adult can also become a legal parent through adoption—a legal process that creates a full parent-child relationship where one did not otherwise exist.[12]

Note that a biological tie to the father need not necessarily be proved for that father to be the child's legal parent. Under the doctrine of the "parentage presumption,"

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[11] See text accompanying notes 7–10.

[12] Joanna L. Grossman, *New York's Highest Court Recognizes A Lesbian Co-Parent's Rights, But Affirms an Unpopular Precedent: Part One in a Two-Part Series of Columns*, online at http://writ.news.findlaw.com/grossman/20100511.html (visited Sept 9, 2011).

> a child born during a marriage is the child of the mother's husband. In its modern version, [the parentage presumption] includes children conceived through artificial insemination with donor sperm. This presumptive father has all the rights and responsibilities of a biological parent, including child support and custody/visitation. The presumption is based on the well-established principle that children need the stability of two parents and that an individualized determination of paternity by a court should not be necessary. Parental obligations are imposed regardless of whether the parents stay together, divorce, or move to another state.[13]

Crucial to my argument here, in the six states where same-sex marriage is now legal (Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont), plus the District of Columbia, the parentage presumption is generally assumed to apply to same-sex couples, so that "a child born to either spouse during the marriage would be presumed to be the child of both."[14] Assisted reproduction will often play a role here. For example, imagine that Amanda and Karen live and marry in Massachusetts and that Amanda, after alternative insemination or *in vitro* fertilization and implantation, bears a child. By virtue of the marriage, Karen also would become the child's legal parent under Massachusetts law, despite her lack of a biological connection.[15]

The parentage presumption also applies to same-sex couples in at least six additional states (California, Illinois, Nevada, New Jersey, Oregon, and Washington) where civil unions or legal domestic partnerships provide the rights and benefits of marriage

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[13] Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 Fam Ct Rev 74, 75 (2006) (citations omitted). For additional discussion of the parentage presumption as applied to same-sex couples, see Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 BU L Rev 227 (2006).

[14] Moulding, 1 *Sexual Orientation and the Law* § 1:24 (cited in note 5). Litigation on this issue is pending in Iowa, where the state public health department has refused to list on a birth certificate the wife of a woman who gave birth to a child after the couple had wed. See *Des Moines Women Refile Birth Certificate Lawsuit*, Sioux City Journal (Mar 7, 2011), online at http://www.siouxcityjournal.com/news/state-and-regional/iowa/article_9bf3edbc-48fa-11e0-b02e-001cc4c03286.html (visited Sept 9, 2011).

[15] The case that legalized same-sex marriage in Massachusetts cited the "presumptions of legitimacy and parentage of children born to a married couple" as one of the marital benefits that the state could not deny to same-sex couples. *Goodridge v Department of Public Health*, 798 NE2d 941, 956 (Mass 2003).

in all but name.[16] For example, while the status of legal marriage for same-sex couples in California remains in limbo, state law provides that "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."[17]

Finally, in a few states, a person may be deemed a legal parent even in the absence of a formally recognized relationship with the child's biological parent. At least one state, Delaware, gives full parental rights by statute to a "de facto" parent—essentially, a person who lacks a biological tie to the child but who, with the consent of the actual parent(s), has "established a bonded and dependent relationship with the child that is parental in nature."[18] And in California, the state's high court has held that a woman could be a presumed parent, even without being in a marriage or other legal same-sex relationship, where she had "agreed to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting twin children into her home and held them out as her own."[19]

B. Constitutional Protections for Parental Rights and Family Privacy

Extant families whose legal ties have been created by biology or state law enjoy a high degree of constitutional protection against state interference. The protections of the Due Process Clause for parental rights and family autonomy have their origins in the *Lochner*-era cases of *Meyer v Nebraska*[20] and *Pierce v Society of the Sisters*.[21] *Meyer* struck down a Nebraska law that

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[16] Moulding, 1 *Sexual Orientation and the Law* § 1:24 (cited in note 5). See also Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 Stan J Civ Rts & Civ Liberties 201, 215 (2009) (noting that in California, Nevada, New Jersey, Oregon, and Washington, as well as the jurisdictions that allow same-sex marriage, "a female spouse or domestic/civil union partner of a woman who bears a child receives the same presumption of parentage that a husband receives"). The parentage presumption also apparently applies to civil unions in Illinois, where a law went into effect June 1, 2011 that accords both same- and opposite-sex couples "the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law." 750 ILCS 75/20.

[17] Cal Fam Code § 297.5(d) (West 2004).

[18] 13 Del Code Ann § 8-201(c) (2009).

[19] *Elisa B. v Superior Court*, 117 P3d 660, 662 (Cal 2005).

[20] 262 US 390.

[21] 268 US 510.

prohibited teaching in any language other than English in public schools, and *Pierce* invalidated an Oregon law that was aimed at eliminating parochial schools. The Court grounded both decisions in the right of parents to control the education and upbringing of their children. "The child is not the mere creature of the state," the Court said in *Pierce*, and "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children."[22]

Meyer and *Pierce* launched a long line of substantive due process cases explaining and protecting privacy and autonomy in family and intimate relationships. In 1944, in *Prince v Massachusetts*,[23] the Court described a "private realm of family life which the state cannot enter,"[24] and declared, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[25] In 1977, Justice Powell, writing for the plurality in *Moore v City of East Cleveland*,[26] drew on a string of opinions dating back to *Meyer* for the principles that when government "undertakes . . . intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate,"[27] and that, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[28] And in 2000, Justice O'Connor, writing for the plurality in *Troxel v Granville*,[29] called "the interest of parents in the care, custody, and control of their children . . . perhaps the oldest of the fundamental liberty interests recognized by this Court."[30]

Both the substantive and procedural forms of due process apply when a state seeks to sever the legal relationship between parent and child, usually based on a claim by the state that the parent is unfit. In *Santosky v Kramer*,[31] the Supreme Court held

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22 Id at 535.

23 321 US 158 (1944).

24 Id at 166.

25 Id.

26 431 US 494 (1977) (Powell) (plurality).

27 Id at 499.

28 Id.

29 530 US 57 (2000) (O'Connor) (plurality).

30 Id at 65.

31 455 US 745 (1982).

that termination of parental rights requires a hearing at which the state must meet an elevated evidentiary standard of clear and convincing evidence.[32] As a matter of substantive due process, the Court recognized that the Fourteenth Amendment protects "freedom of personal choice in matters of family life"[33] and that "parents retain a vital interest in preventing the irretrievable destruction of their family life."[34] As a matter of procedural due process, it recognized that, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."[35] Although the *Santosky* Court spoke of "natural parents," it is well established in federal and state law that, in the legal rights and duties it entails, adoptive parenthood is indistinguishable from biological parenthood. The same due process protections for the parent, and the same burdens on the government, apply.[36] As one state supreme court has explained, "adoption ends the parental role of the biological parents and transfers that role to the adoptive parents."[37] And, of course, since *Santosky* provides a constitutional rule applicable against all states, it makes no difference if the parent-child relationship was established in one state but termination is sought in another.

What about a parent who has neither a biological nor adoptive tie to a child, but whose legal relationship to the child arises from the parentage presumption? The Supreme Court has secured the rights of that type of parent as well, although ironically it came in a case where the Court was ostensibly upholding traditional family relationships over newfangled ones. In *Michael H. v Gerald D.*,[38] a married woman, Carole D., bore a child, Victoria, who had been fathered by Carole's adulterous lover, Michael H. At various times, both Carole's husband, Gerald, and Michael held Victoria out as their daughter. Michael filed a filiation action in California state court to establish his paternity and visitation rights. The state courts rejected Michael's claims on the

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[32] Id at 747–48.

[33] Id at 753.

[34] Id.

[35] *Santosky*, 455 US at 753–54.

[36] See, for example, *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816, 844 n 51 (1977) ("Adoption . . . is recognized as the legal equivalent of biological parenthood."); *Ellis v Hamilton*, 669 F2d 510, 513 (7th Cir 1982) ("Adoptive parents have all the legal rights, and generally the same emotional stake, in their children as natural parents.").

[37] *In re Adoption of a Child by D.M.H.*, 641 A2d 235, 244 (NJ 1994).

[38] 491 US 110 (1989) (Scalia) (plurality).

basis of the parentage presumption—specifically, a state evidentiary rule that "the [child] of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."[39]

The Supreme Court upheld the California courts' decisions. Writing for a plurality, Justice Scalia rebuffed Michael's claim of a "liberty interest" that was "created by biological fatherhood plus an established parental relationship."[40] Justice Scalia characterized the Court's parental rights and family privacy cases as instead protecting "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[41] Substantive due process did not protect a "natural father [who] assert[s] parental rights over a child born into a woman's existing marriage with another man."[42] Instead, legal tradition protected established family units like the one consisting of Gerald, Carole, and Victoria against interlopers like Michael, notwithstanding Gerald's lack of a biological tie to the child.

Of course, like any individual right, parental rights under the Due Process Clause are not absolute. For example, in *Prince v Massachusetts*,[43] the Court upheld the application of child labor laws to a nine-year-old who was soliciting on behalf of her religion at the direction of her parents. The principle was that the state, acting as *parens patriae*, may act to prevent harm or exploitation of children even if it conflicts with the parents' authority. Moreover, in other cases the Court "has noted that the rights of the parents are a counterpart of the responsibilities they have assumed,"[44] indicating that constitutional protection for parental rights serves "the paramount interest in the welfare of children."[45] But the circumstances in which a state may intervene between parent and child are narrowly limited, and the Court recently underscored that "so long as a parent adequately cares for his or her children . . . there will normally be no reason for the State to inject itself into the private realm of the family" or to displace the presumption that the parent is in the position

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[39] Id at 115, citing Cal Evid Code Ann § 621(a) (West Supp 1989).

[40] *Michael H.*, 491 US at 123.

[41] Id.

[42] Id at 125.

[43] 321 US 158 (1944).

[44] *Lehr v Robertson*, 463 US 248, 257 (1983).

[45] Id.

"to make the best decisions concerning the rearing of that parent's children."[46]

In summary, parental rights may arise in a variety of ways under state law, but the Supreme Court's Due Process Clause jurisprudence going back almost 100 years protects the parent-child relationship, once formed, against termination without good cause or other unwarranted state interference.

II. THE STATE INTERESTS PARADIGM AND INTERSTATE DISPUTES OVER PARENTAL RIGHTS

The United States is a highly mobile society. Between two and three percent of Americans move to a different state each year,[47] and families frequently relocate away from the state where a marriage was celebrated or a child was born or adopted. As more same-sex couples formalize their relationships and decide to raise children—nearly 50,000 same-sex couples already have wed since 2004[48]—courts will increasingly be confronted with difficult questions about whether these family relationships endure across state lines. Parents exercise care and legal authority for their children in countless transactions of daily life. Disputes may arise, for example, if a school, hospital, or insurance company refuses to acknowledge the status or authority of a non-biological same-sex parent. In this Section, I explore interstate recognition of parenthood under the state interests paradigm. Specifically, I discuss the limitations of both traditional conflict of laws doctrine and federal full faith and credit principles for protecting parental rights.

A. Background

Until the advent of marriage and other forms of legally recognized same-sex relationships, there were seldom any serious questions about whether a legal-parent relationship that had been established in one state would be recognized in another. Of course, some types of family controversies implicated the laws of more than one state—for example, uniform acts were promulgat-

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[46] *Troxel*, 530 US at 68–69.

[47] See Haya El Nasser and Paul Overberg, *Millions more Americans move to new states*, USA TODAY, Nov 30, 2007, online at http://www.usatoday.com/news/nation/2007-11-29-Mobility_N.htm (visited Sept 9, 2011) (citing US census data).

[48] See graph of data from the Williams Institute at UCLA Law School, online at http://www.npr.org/2011/07/11/137763596/lesbian-couples-boosting-gay-marriage-numbers (visited Sept 9, 2011).

ed to deal with questions of paternity[49] and with interstate recognition of child custody orders following divorce.[50] But for the most part, conflicts authorities did not address the interstate recognition of parental relationships—other than perhaps a few pages devoted to "legitimacy" and its consequences for the inheritance rights of children born out of wedlock[51]—because there was no need to do so. "[C]hildren had two easily identifiable parents: a mother who gave birth to the child and a father who was married to that mother."[52] Although the growing use of more sophisticated assisted reproductive technologies has begun to challenge this simple state of affairs,[53] it is safe to say that, until quite recently, parenting was generally assumed to involve heterosexuals; heterosexual parents were legally presumed to be capable of natural reproduction; and heterosexuals' relationships with their children were presumed to be secure absent a finding of unfitness or serious harm to the child.

Similarly, where adoptive children were concerned, while interstate disputes might sometimes arise about the jurisdiction of the court that granted the adoption,[54] it was uncontroversial hornbook law that "[a]n adoption decree entered by a court of competent jurisdiction will ordinarily be recognized everywhere."[55] Adoptive parents could move about the country secure that their relationships to their children would not be questioned from state to state.

In short, heteronormativity, natural reproduction, and a high degree of deference to traditional family relationships all made it unnecessary for courts and scholars to develop a modern body of conflicts principles to deal with the interstate recognition

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[49] See generally Uniform Parentage Act (amended 2002), online at http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm (visited Sept 9, 2011).

[50] See generally Uniform Child Custody Jurisdiction and Enforcement Act (1997), online at http: //www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm (visited Sept 9, 2011).

[51] See, for example, Eugene F. Scoles, et al, *Conflict of Laws* §§ 16.1–16.3 (Thomson West 4th ed 2004).

[52] Anderson, 62 Ark L Rev at 29 (cited in note 10).

[53] See text accompanying note 10. For a discussion of how assisted reproduction implicates some of the same interstate recognition issues as same-sex parenting, see generally Joslin, 70 Ohio St L J 563 (cited in note 8). The New York Times recently explored a complicated modern family relationship involving a birth mother, her sperm donor, their child, and the sperm donor's male partner. See N.R. Kleinfield, *Baby Makes Four, and Complications*, NY Times MB1 (June 19, 2011).

[54] See Scoles, *Conflict of Laws* at § 16.5 (cited in note 51).

[55] Id at § 16.6.

of parent-child relationships. Such recognition was simply assumed.

B. The Parent-Child Relationship as a Conflict of Laws Problem

The growing visibility and acceptance of gay/lesbian relationships poses a serious challenge to traditional conflicts doctrine. A leading family law scholar writes that, while gays and lesbians have made "critical advancements in the struggle to achieve full and equal protection" for their right to form families, their children

> are still in an extremely tenuous legal position. Currently, even when one state views both members of a same-sex couple as legal parents, this legal parental status is not secure when the family moves about the country. Many states likely will continue to view the nonbirth parent as a legal stranger to the child, possibly without any rights or obligations with respect to the child.[56]

Perhaps the most important reason that interstate recognition of gay/lesbian parental rights remains uncertain is that courts likely will view such recognition as inextricably intertwined with recognition of the underlying relationship between the parents. The number of jurisdictions that allow same-sex couples to form marriages or other legally sanctioned relationships remains small: as of this writing, six states plus the District of Columbia allow equal marriage, while six others provide civil unions or domestic partnerships that include the same state-conferred benefits and responsibilities as marriage.[57] At the same time, a majority of states not only refuse to create same-sex marriages, they actually purport to nullify such marriages when the couples enter their borders. Forty-one states currently prohibit same-sex marriage by statute or constitutional amendment[58] (these laws are commonly referred to as mini-Defense of

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[56] Joslin, 4 Harv L & Pol Rev at 33 (cited in note 1). See also Joanna L. Grossman, *When Same-Sex Couples Adopt: Problems of Interstate Recognition*, online at http://writ.news.findlaw.com/grossman/20090609.html (visited Sept 9, 2011).

[57] See Lambda Legal, *Status of Same-Sex Relationships Nationwide*, online at http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html (visited Sept 9, 2011).

[58] See National Conference of State Legislatures, *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, online at http://www.ncsl.org/default.aspx?tabid=16430 (visited Sept 9, 2011).

Marriage Acts, or "mini-DOMAs"), and based on their language, most of the mini-DOMAs also would void or deny recognition to perfectly valid same-sex marriages from other states.[59] Moreover, some of the nonrecognition laws are drafted broadly to also preclude recognition of civil unions, domestic partnerships, or *any* other form of same-sex relationship.[60]

Again, imagine that Amanda and Karen live and marry in Massachusetts, and Amanda bears a child. Karen is a legal parent under Massachusetts law. Amanda and Karen then pull up stakes and move to a mini-DOMA state such as Virginia.[61] The Virginia constitution provides that "only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions."[62] So it is clear that Virginia will not recognize Amanda and Karen's marriage. But will the state recognize Karen's parental rights—rights that arose as a legal incident of her Massachusetts marriage? What happens if Karen needs to make medical or educational decisions for the child and is denied the ability to do so? Or what happens if the couple later separates and Karen seeks joint custody? Would a Virginia court recognize her as a full and equal parent? Put another way, does the parentage presumption survive the move from an equal-marriage state to a mini-DOMA state? That critical question remains unanswered in reported cases. But, perhaps owing to the harshness of the mini-DOMAs passed in recent years and their categorical denial of *any* legal rights to same-sex couples,[63] many commentators appear to assume that

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[59] See Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U Pa L Rev 2143, 2149–50 (2005).

[60] See, for example, Va Const Art I, § 15-A, which provides that "only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions," and further provides that

> This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

[61] Lest there be any confusion, in this Article I am only concerned with nonbiological parents who have acquired their parental rights under the law of a state where they were actually domiciled at the time. I do not address whether enforceable parental rights arise by virtue of an "evasive" marriage, where the couple leaves home temporarily to obtain a marriage they could not get in their own state of domicile. The law traditionally has looked with disfavor on marriage-law evasion, and I do not argue that such marriages should give rise to rights that other states must respect.

[62] Va Const Art I, § 15-A.

[63] See, for example, Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38

the parental rights of someone like Karen would not be honored in a mini-DOMA state, and that children born into same-sex relationships will be "subject to fluctuating legal relationships based only on geographical location."[64]

The anxiety of nonbiological parents over the durability of their parental status, and the suspicion that some states may refuse to recognize two members of the same sex as a child's legal parents, were underscored in a recent New York adoption case. In *In re Adoption of Sebastian*,[65] two women, Ingrid and Mona, were legally married in the Netherlands and sought to start a family. Mona's ova were fertilized *in vitro* by an anonymous sperm donor, and an ovum was implanted in Ingrid's uterus. Their child, Sebastian, was born nine months later. Ingrid and Mona's marriage was recognized under New York law, and thus, "as the child of a married couple, Sebastian already ha[d] a recognized and protected child/parent relationship with both Ingrid," the birth mother, and Mona, her wife.[66] Nonetheless, the court noted pointedly that "the same recognition and protection of Mona's parental rights does not currently exist in the rest of this country."[67] Accordingly, the court approved Mona's petition to adopt Sebastian. Although such an adoption of a child by his legal parent was "arguably . . . unnecessary and . . . duplicative,"[68] the court was persuaded that "the best interests of this child require a judgment [granting adoption] that will ensure recognition of both Ingrid and Mona as his legal parents throughout the entire United States."[69] It should be noted that many same-sex couples would not have the same option as Ingrid and Mona, since second-parent adoptions are only available in 16 states and the District of Columbia.[70]

Of course, a heterosexual couple would not face the same dilemma as Ingrid and Mona because their marriage would be recognized everywhere. All states subscribe to the so-called "place of

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Loyola U Chi L J 265, 265 (2007) ("Some of the consequences of these laws are surprising. Some are so harsh and irrational as to make the laws unconstitutional.").

[64] Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 Pierce L Rev 1, 3 (2007).

[65] 879 NYS2d 677 (NY Sur 2009).

[66] Id at 682.

[67] Id.

[68] Id.

[69] *In re: Adoption of Sebastian*, 879 NYS2d at 692–93.

[70] See Human Rights Campaign, *Parenting Laws: Joint Adoption*, online at http://www.hrc.org/documents/parenting_laws_maps.pdf (visited Sept 9, 2011).

celebration rule," which holds that the validity of a marriage should be conclusively determined by the law of the state where it was celebrated and not questioned or redetermined in a new state. As one state high court explained in a classic statement of the rule, "[i]t is desirable that there should be uniformity in the recognition of the marital status, so that persons legally married according to the laws of one State will not be held to be living in adultery in another State, and that children begotten in lawful wedlock in one State will not be held illegitimate in another."[71] The rule "confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state."[72]

Although it is supported by powerful, sensible policies and human values—promoting certainty and stability in legal relationships, vindicating justified expectations, preventing the casual evasion of legal duties—the place of celebration rule has an escape mechanism: the so-called "public policy exception," under which a state may refuse to recognize a marriage if that marriage violates its strong public policy.[73] The public policy exception in conflict of laws has been criticized as "a substitute for the intellectual exertion necessary to find appropriate factors" for choice of law decisions[74] and as "a relic carried over from international law without reflection on the changes in interstate relations wrought by the Constitution."[75] Conflicts scholar Larry Kramer argues that, when used to deny recognition to same-sex marriages, the public policy exception is unconstitutional.[76] Nonetheless, until the Supreme Court either strikes down all anti-gay marriage laws, or recognizes the absurdity of a regime where same-sex couples can be simultaneously married and unmarried in different states,[77] there is no barrier against a state

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[71] *Henderson v Henderson*, 87 A2d 403, 408 (Md App 1952).

[72] William M. Richman and William L. Reynolds, *Understanding Conflict of Laws* 402 (Lexis 3d ed 2002).

[73] For discussion of the history and operation of the public policy exception concerning same-sex marriages, see Koppelman, *Same Sex, Different States* 12–27 (cited in note 2).

[74] Holly Sprague, Comment, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 Cal L Rev 1447, 1452 (1986) (citation omitted).

[75] Keane, 47 Stan L Rev at 515 (cited in note 2).

[76] See generally Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L J 1965 (1997).

[77] I have argued elsewhere that the Supreme Court should do so. See Steve Sanders, *The right to marry, and the right to remain married*, SCOTUSBlog (Aug 23, 2011), online

insisting on the power to unilaterally nullify the marriage of a same-sex couple that migrates into its borders.[78] The place of celebration rule may provide as an aspirational principle that all states should recognize each other's marriages, but conflicts doctrine has no external enforcement mechanisms; in the absence of some right protected by the Constitution or other federal law, a state court is bound to apply its own state's statutory law or an interpretation thereof.

When litigation arises in a mini-DOMA state over parental rights acquired in another state under the parentage presumption, the party opposing recognition may argue that, if a state's statutory public policy bars recognition of the parents' relationship, the same public policy also should bar recognition of parental rights that arose as a legal incident of that relationship. A court in a mini-DOMA state may well reason that, if its state's mini-DOMA can purport to convert duly married spouses into legal strangers when they cross state lines, then the same public policy can do the same with a child and her non-biological parent.

The Alabama Supreme Court suggested the possibility of such an outcome last year in *Ex parte N.B.*[79] That case involved a dispute between two former lesbian partners: "N.B.," the biological parent, and "A.K.," the partner who jointly raised the couple's child and sought visitation after the breakup. The family had lived in California, but N.B. and the child later moved to Alabama. N.B. filed a custody petition in Alabama juvenile court, claiming she "feared that A.K. was going to kidnap the child."[80] Shortly thereafter, A.K. obtained a California court order recognizing her as the child's second legal parent, even though A.K. and N.B. had never formalized their relationship.[81] The Alabama

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at http://www.scotusblog.com/2011/08/the-right-to-marry-and-the-right-to-remain-married/ (visited Sept 9, 2011).

[78] I have argued elsewhere that traditional conflicts doctrine "does not deal sensibly with the new challenge of same-sex matrimony" and that "courts should recognize a right of marriage recognition, grounded in the Fourteenth Amendment's due process clause, which would protect same-sex couples from this kind of harmful and unwarranted discrimination." Steve Sanders, *The Case for a Right of Marriage Recognition: Why Fourteenth Amendment Due Process Should Protect Same-Sex Couples Who Change States*, Findlaw.com (July 9, 2008), online at http://writ.news.findlaw.com/commentary/20080709_sanders.html (visited Sept 9, 2011).

[79] 2010 WL 2629064 (Ala).

[80] Id at *2.

[81] The California court relied on *Elisa B*, 117 P3d 660 (cited at note 19), which held that in certain circumstances a woman could qualify as a presumed parent even in the absence of a formalized relationship with the child's biological mother.

trial court refused to recognize the California court's order; the intermediate appellate court reversed, and N.B. appealed.

Rather than resolve the merits of the dispute, the Alabama Supreme Court threw out the case on jurisdictional grounds: N.B. had failed to name A.K. as a defendant in her original juvenile court petition and thus could not litigate A.K.'s legal rights.[82] Nonetheless, in dicta, the court noted that Alabama law provides that "[m]arriage is inherently a unique relationship between a man and a woman" and that "[a] union replicating marriage of or between persons of the same sex . . . shall be considered and treated in all respects as having no legal force or effect in this state."[83] Thus, it said, "questions regarding the judgment of the California trial court and its enforceability in Alabama may exist in light of the unequivocal nature of Alabama public policy on the issue presented by this case."[84] In other words, had it reached the merits, the Alabama high court might well have decided that its state's anti-gay public policy trumped the rights A.K. had established as a presumed parent under California law. Indeed, in light of the court's discussion of Alabama's marriage law, that result might have occurred even if N.B. and A.K. had been legally married when the child was born.

On the other hand, a court might observe, as an Ohio appellate court recently did in another visitation-rights case involving a lesbian couple, that its state mini-DOMA simply "says nothing about parenting or children" and thus is no impediment to recognizing the rights of a nonbiological same-sex parent.[85]

Given the uncertainty of how a public policy exception intended for marriage should apply to parents and children, decisions in such cases may ultimately hinge on judges' own ideologies and attitudes toward gay/lesbian family relationships, and their willingness to balance the interests of the specific family in front of them against the politics and social attitudes of their state. Even if a court is willing to put aside the question of the parents' relationship and focus on the relationship between the non-biological parent and child, judges and lawyers will not find much in their conflicts treatises to guide them.

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[82] *Ex Parte N.B.*, 2010 WL 2629064 at *5.

[83] Id.

[84] Id.

[85] *In re LaPiana*, 2010 WL 3042394, *10 (Ohio App) (holding that a grant of visitation to the former female partner of the biological mother of two children was in the children's best interest).

The closest that the Restatement (Second) of Conflict of Laws appears to come to addressing interstate recognition of parent-child relationships is in its discussion of "legitimacy," which is defined as "the legal kinship between a child and its parent or parents."[86] The Restatement provides that, "[g]enerally speaking, the law favors the status of legitimacy over that of illegitimacy. As a result, a status of legitimacy once created . . . will usually be recognized as continuing to exist in the face of subsequent events, such as a change of domicil by the parties."[87] Similarly, in a 1933 article on *The Status of the Child and the Conflict of Laws*, Joseph Beale, the father of the first Restatement of Conflict of Laws, said that, if a child is "legitimated by the proper law, the status will be everywhere recognized."[88]

Although the upshot of these authorities would seem to be that the legal kinship between a parent and child, once established in any state, must be respected in every other state, a rule based solely on the law of legitimacy may not prove persuasive to modern courts. First, this rule too could be subject to the public policy exception. Second, in modern understanding, the status of legitimacy is not generally thought to be the same thing as the existence, *vel non*, of a legal parent-child relationship. American courts long ago abandoned the draconian rule of English common law that a child of unmarried parents was "nullius filius"—a legal stranger to both of them.[89] Instead, courts reasoned that legal duties of custody and support arose from the parents' "responsibility for having brought [the child] into being," and that this rationale "is equally persuasive" whether the parents were married or not.[90] As a result, legitimacy as a legal issue came to be concerned mostly with rights of inheritance or the ability to sue for a parent's wrongful death or to claim certain public benefits, not the parent's basic rights and duties concerning the child's care, custody, and control.[91] Still, since the concept of legitimacy

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[86] Restatement (Second) of Conflict of Laws (1971) § 287 comment a.

[87] Id at comment d.

[88] Joseph H. Beale, *The Status of the Child and the Conflict of Laws*, 1 U Chi L Rev 13, 18 (1933).

[89] See *Doughty v Engler*, 211 P 619, 619 (Kan 1923) (discussing the English common law's treatment of illegitimacy).

[90] Id at 620.

[91] The legal relevance of illegitimacy further declined when the Supreme Court ruled that discrimination against illegitimate children violated the Equal Protection Clause. Holding that illegitimate children were entitled to recover state benefits for the wrongful death of their mother, the Court, through Justice Douglas, observed, "These children, though illegitimate, were dependent on [their mother]; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense." *Levy v Louisi-*

is the closest analogue in conflicts doctrine to the question of a parent-child relationship, courts should give careful consideration to the traditional rule that a personal status endures across state lines.

Where no specific rule is provided for a particular conflicts situation, the Second Restatement says that a court should consider the following factors:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[92]

Many of these factors clearly weigh in favor of recognizing a parent-child relationship for the sake of comity between states. After all, the needs of the interstate system, the protection of justified expectations, and the basic policies underlying family law all are advanced by continuity and stability in legal relationships, especially where children are involved. Moreover, a state that creates a legal parent-child relationship has an interest in seeing that relationship respected and protected as something fundamental and permanent. A rule that parental rights endure from state to state would provide "certainty, predictability and uniformity of result" and would be easy to apply.

But comity between states appears to carry little weight where novel questions of family law are concerned, and courts adjudicating such questions may be unlikely to sacrifice the policies of their own states to advance abstract multistate values like certainty and predictability.[93] Based on an extensive historical survey of conflicts cases, Lynn Wardle has written that, in "interjurisdictional conflicts concerning recognition of controversial forms of domestic relations[,] . . . protection of the strong domes-

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ana, 391 US 68, 72 (1968).

[92] Restatement (Second) of Conflict of Laws § 6.

[93] As one commentator has observed, "[t]he courts of each state are active participants in the formulation and implementation of local policies. To place in their hands extensive responsibility for deciding when those policies will yield to and when they will prevail over competing policies of sister states seems unsound." William F. Baxter, *Choice of Law and the Federal System*, 16 Stan L Rev 1, 23 (1963).

tic relations policy of the forum sovereign is the dominant, controlling consideration."[94] Although respect for established relationships was an "influential consideration[ ]" and comity was a "presumption," in the end, "when recognition of a novel form of domestic relations would directly contradict or seriously impair or defy a strong public policy of the forum sovereign regarding domestic relations, that consideration consistently controlled the outcome."[95] Indeed, Wardle himself concludes that "the resolution of questions about the importation into one state of new forms and controversial forms of domestic relationships created in another sovereign is not really a matter of, or appropriate for, conflicts analysis."[96] It is, rather, "a political, even ideological problem."[97]

The tradition of deference toward each state's power over its own family law also is reflected in the Uniform Parentage Act (UPA), which was intended by its drafters "to create uniformity in the law as it pertained to children born to unmarried parents" (a category that presumably would include same-sex couples whose marriages are not legally recognized in a new domicile) and to "address modern issues of parentage including the growing use of reproductive technologies."[98] In its choice of law section, the UPA simply provides that a "court shall apply the law of [its own] State to adjudicate the parent-child relationship. The applicable law does not depend on: (1) the place of birth of the child; or (2) the past or present residence of the child."[99] Its failure to protect the durability of parental rights against hostile laws in a new domicile is only one way that the "pressing need to develop the legal definition of the term 'parent' to encompass same-sex couples remains unfulfilled" in the UPA.[100]

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[94] Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L Rev 1855, 1903–04 (2008).

[95] Id at 1904.

[96] Id at 1920.

[97] Id (citation and quotation omitted).

[98] Gonzalez, Comment, 23 St Thomas L Rev at 298 (cited in note 6).

[99] *Uniform Parentage Act*, § 103(b) (National Conference of Commissioners on Uniform State Laws 2002), online at http://www.law.upen.edu/bll/archives/ulc/upa/final2002.htm (visited Sept 9, 2011).

[100] Gonzalez, Comment, 23 St Thomas L Rev at 299 (cited in note 6).

C. Parental Rights under Federal Requirements of Full Faith and Credit

To this point I have focused on how an interstate dispute about parental rights might be resolved under traditional conflict of laws doctrine. But there will be times when the Constitution's Full Faith and Credit Clause, or federal legislation enacted pursuant to that clause, also is relevant. In this Section I discuss several recent high-profile cases that illustrate the ambiguities in how full faith and credit applies to (1) court orders concerning parentage (which typically will arise in the context of divorce from a marriage or dissolution of a civil union or domestic partnership where the parents are contesting child custody), and (2) adoptions by same-sex couples. But first, some background on the Full Faith and Credit Clause will be helpful.

1. The Full Faith and Credit Clause.

Article IV, Section 1 provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[101] In a seminal commentary on the Full Faith and Credit Clause, Justice Robert Jackson wrote that, in adopting the provision, the framers "sought to federalize the separate and independent state legal systems" and "guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence."[102] Similarly, the Supreme Court has said that "[t]he very 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 obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation."[103]

As these explanations indicate, the original purpose of the Full Faith and Credit Clause was to mediate relations among the states, not to protect individual rights or mediate the relationship between the state and the individual. Of course, the Constitution's structural and federalism provisions are commonly thought to help protect individual liberty by regulating and channeling government authority and providing checks against

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[101] US Const Art IV, § 1.

[102] Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum L Rev 1, 17 (1945) (citation omitted).

[103] *Milwaukee County v M.E. White Co*, 296 US 268, 276–77 (1935).

concentrations of government power. But be this as it may, the purpose of the Full Faith and Credit Clause is not to protect the rights of individuals but rather to underscore the equal power and dignity of each state and to "balance[ ] conflicting state interests by commanding that the states respect the sovereignty of sister states in a federal context."[104]

Under the Supreme Court's modern interpretation of the clause, the requirement of full faith and credit is quite weak when a state is asked to honor another state's public policy. The Court has reasoned that one state is not required to "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[105] Thus, "[c]ourts have discretion as to whether to defer to sister states' statutes and legal precedents, or whether to apply the standards dictated by their own state's statutes and their own legal precedents. The decision to defer is an exercise of comity—respect for sister states—not a constitutional obligation."[106] This principle explains why, although the Supreme Court has never considered the question, it is conventional wisdom among conflicts scholars that the Full Faith and Credit Clause does not require one state to recognize another state's same-sex marriage, because a marriage is created under a statutory licensing scheme, not by a court judgment.[107] As I will explain below, the full faith and credit requirement is much stronger for final judgments by a court.

The Full Faith and Credit Clause also contains implementing language that gives Congress the power "by general Laws [to] prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[108] Although Congress has not often legislated pursuant to this power, it has done so in two ways that are relevant to my concerns in this Article. First, the Parental Kidnapping Prevention Act[109] (PKPA), passed in 1980, requires "appropriate authorities of every State [to] enforce according to its terms and [not to] modify except as provided in [the Act] any child custody determination made . . . by a

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104 Eugene F. Scoles, et al, *Conflict of Laws* 150 (Thompson West 4th ed 2004).

105 *Pacific Employers Ins Co v Indus Accident Commission*, 306 US 493, 501 (1939).

106 Joanna L. Grossman, *New York's Highest Court Recognizes A Lesbian Co-Parent's Rights, But Affirms an Unpopular Precedent: Part One in a Two-Part Series of Columns*, online at http://writ.news.findlaw.com/grossman/20100511.html (visited Sept 9, 2011).

107 See, for example, Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 Creighton L Rev 353, 358 (2005).

108 US Const Art IV, § 1.

109 28 USC § 1738(A).

court of another State."[110] In other words, where a court determines child custody arrangements in the context of a divorce or other legal separation, the PKPA is intended to prevent a spouse who is aggrieved by the terms of a custody order from seizing the child and seeking a different decision in another state. Second, the Defense of Marriage Act (DOMA), passed in 1996, provides that no state is "required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship."[111] In other words, according to Congress, even if Iowa wants to create same-sex marriages, Indiana is not required under the Full Faith and Credit Clause to recognize them.

2. The PKPA and children of same-sex relationships.

In theory, if a court has jurisdiction to render a custody order, the PKPA means that order should be respected by courts in all other states regardless of whether it involves an opposite- or same-sex couple. But the PKPA and its command of full faith and credit only come into play when a family is breaking up; they have no relevance for an intact family that is simply changing their state of domicile. A recent high-profile case involving a lesbian couple, *Miller-Jenkins v Miller-Jenkins*,[112] illustrates the PKPA's operation and limitations.

Janet and Lisa Miller-Jenkins entered into a Vermont civil union (a status that Vermont provided for same-sex couples before full marriage was legalized in that state in 2009). Lisa was artificially inseminated and gave birth to a child, "I.M.J." The couple later separated, and Lisa moved to Virginia, taking I.M.J. with her. Janet remained in Vermont. A Vermont family court dissolved the civil union and, pursuant to Vermont law, awarded Janet visitation rights of "parent-child contact."[113]

Unhappy with this arrangement, Lisa sought to defeat the Vermont family court order by filing a parentage action in Virginia. A Virginia trial court subsequently declared Lisa "the sole biological and natural parent" of I.M.J., with exclusive "legal

[110] 28 USC § 1738(A)(a).

[111] 28 USC § 1738(C).

[112] 637 SE2d 330 (Va App 2006).

[113] Id at 332.

rights, privileges, duties and obligations as parent."[114] The trial court denied Janet "any claims of parentage or visitation rights" over I.M.J.[115]

Upon learning of Lisa's petition, the Vermont court entered an order reasserting its jurisdiction over "all parent-child contact issues" and stating that it would not "defer to a different State that would preclude the parties from a remedy."[116] The Vermont court ultimately held Lisa in contempt for refusing to comply with its visitation order, and the Vermont Supreme Court affirmed, holding that under the PKPA, Vermont had preemptive jurisdiction to determine Janet's parental and visitation rights.[117]

In this classic conflict of laws standoff between two states, Virginia finally blinked. Its court of appeals agreed that, in light of the PKPA, Virginia could not "deny full faith and credit to the orders of the Vermont court regarding I.M.J.'s custody and visitation."[118] The Virginia Supreme Court declined to hear an appeal.

This result in *Miller-Jenkins* was undoubtedly correct, but it depended entirely on the fact that Janet's parental rights had been adjudicated under a sister state's court order. The PKPA's full faith and credit command does not help non-biological gay or lesbian parents in other contexts. For example, what if instead of breaking up, Janet, Lisa, and I.M.J. had all moved together as a happy family from Vermont to Virginia, and Janet needed to make medical or educational decisions for I.M.J.? If a hospital or school denied her the ability to do so and the family went to court, would a Virginia court recognize Janet as I.M.J.'s legal parent? Nothing in the court of appeals' decision indicates that a lower court would have been required to do so. Under current law, it is clear that Virginia could refuse to recognize Lisa and Janet's civil union—indeed, its state constitution declares just such a policy.[119] In light of Virginia's hostility toward legal recognition of same-sex relationships in any form, it seems quite

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[114] Id.

[115] Id.

[116] *Miller-Jenkins*, 637 SE2d at 333.

[117] Id.

[118] Id at 337.

[119] Va Const Art I, § 15-A (providing that "only a union between one man and one woman may be a marriage valid in or recognized" and that "[t]his Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage").

possible that a Virginia court might deny Janet legal-parent status as well.

It is a bedrock principle of modern conflicts doctrine that a state is entitled to apply its law to its own domiciliaries. Therefore, although Vermont considered Janet to be I.M.J.'s parent by virtue of Janet's civil union with Lisa, a Virginia court might reason that, once the family becomes domiciled in Virginia, it is Virginia's laws that determine their legal status. If Virginia does not recognize the civil union, then it might also refuse to recognize a parent-child relationship that arose solely as an incident of that civil union. Under the state interests paradigm, in the absence of an out-of-state court order that Virginia was required by federal law to honor, Virginia would be free to apply its own law without taking into account any right Janet might have to her established legal-parent relationship with I.M.J.

Indeed, some courts might find that their state's public policy against same-sex relationships is so strong that it even trumps a court order from another state. Recall that in *Ex Parte N.B.*, the Alabama case with strong parallels to *Miller-Jenkins* discussed in Part II.B. above, the Alabama Supreme Court indicated that its state's anti-gay marriage law might prohibit recognition of a legal parent-child relationship established under California law, even if it meant rejecting the parentage determination of a California court to which the PKPA arguably applied.[120]

Although it would seem that a state court that ignored the full faith and credit requirements of the PKPA would be in violation of the Supremacy Clause, the Supreme Court has held that the PKPA does not give an aggrieved parent an implied cause of action in federal court. In *Thompson v Thompson*,[121] the Court essentially said states must simply be trusted to enforce the PKPA,[122] and should they fail to do so, "Congress may choose to revisit the issue."[123] The fact that an individual plaintiff cannot sue for a state's violation of the PKPA further underscores the limitations of full faith and credit as a component of the state interests paradigm for analyzing interstate disputes over parental rights. The PKPA is "a mandate directed to state courts to

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[120] *Ex Parte N.B.*, 2010 WL 2629064, *5 (Ala).

[121] 484 US 174 (1988).

[122] See id at 187 ("[T]he unspoken presumption in petitioner's argument is that the States are either unable or unwilling to enforce the provisions of the Act. This is a presumption we are not prepared, and more importantly, Congress was not prepared, to indulge.").

[123] Id.

respect the custody decrees of sister States,"[124] and the affected parent essentially sits on the sidelines while her rights are recognized or not.

3. Recognition of adoptions by same-sex couples.

As I explained above, the constitutional command of full faith and credit does not mean that a forum state is required to substitute the statutory or decisional law of another state for its own.[125] By contrast, final judgments by courts get the strongest form of full faith and credit.[126] As the Supreme Court explained in *Baker v General Motors Corp*,[127] "[R]egarding judgments . . . the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."[128] A judgment by a court in State A might produce a legal outcome that State B disagrees with if State B becomes the forum for a dispute where State A's judgment must be recognized and given effect. But State B cannot refuse to give effect to the State A judgment based on public-policy objections. As the Supreme Court put it, "[a] court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy. But our decisions support no roving 'public policy exception' to the full faith and credit due *judgments*."[129] However, the Court distinguished between *recognizing* a judgment and *enforcing* that same judgment: "Full faith and credit . . . does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do."[130] Instead, forum law determines how a judgment shall be enforced.

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124 Id at 183.

125 See text accompanying notes 105–107.

126 Final judgments should not be confused with custody orders of the type protected by the PKPA. A custody order typically is not a final judgment because it can be modified at a later time by the court that issued it. The PKPA's requirement of full faith and credit for custody orders does not flow directly from the Constitution; rather, it is federal statutory law enacted pursuant to Congress's power under the implementing provision of Article IV, Section 1.

127 522 US 222 (1998).

128 Id at 233.

129 Id.

130 Id at 235.

Unlike marriage (which, as I explained above, is generally assumed not to implicate the Full Faith and Credit Clause), an adoption is finalized by a court judgment. And so, guided by the principle that final judgments get maximal full faith and credit, courts have routinely ruled that adoptions approved in one state must be recognized in all states.[131] The Tenth Circuit applied this rule in a 2007 case involving three same-sex couples and their adopted children, and as recently as 2009, a commentator could confidently assert that adoption was "the gold standard for unassailable parental status between a nonbiological mother and her child."[132] Courts and commentators have assumed that a state may not invoke its anti-gay public policy to refuse to recognize an adoption involving a same-sex couple that was finalized in another state. But a recent Fifth Circuit decision has cast uncertainty on this principle and effected a split with the Tenth Circuit on whether federal courts even have jurisdiction to hear a plaintiff's complaint that one state refused to give full faith and credit to another state's final judgment. I discuss the Tenth and Fifth Circuit cases below.

a) Finstuen v Crutcher. In *Finstuen v Crutcher*,[133] the Tenth Circuit rejected the State of Oklahoma's position that the state was not obligated to recognize out-of-state adoptions granted to individuals who were in same-sex relationships. The plaintiffs in *Finstuen* included families in which children had been adopted in other states either jointly (that is, with both members of a same-sex couple adopting and becoming parents at the same time) or through second-parent adoption (where an individual adopts a child who had been born to, or adopted in an earlier proceeding by, a same-sex partner).[134] Two of the plaintiff couples lived in Oklahoma with their adopted children; a third couple lived in Washington state but sought to have Oklahoma authorities issue a new birth certificate for their Oklahoma-born child. In 2004, Oklahoma legislators had approved a law that provided, in pertinent part, that the state and its courts "shall not recognize an adoption by more than one individual of the

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131 See, for example, *Embry v Ryan*, 11 So3d 408, 410 (Fla Ct App 2009) (holding that Florida courts were required to give full faith and credit to a Washington adoption judgment involving a same-sex couple).

132 Polikoff, 5 Stan J Civ Rts & Civ Liberties at 265 (cited in note 16).

133 496 F3d 1139 (10th Cir 2007).

134 Id at 1142–43.

same sex from any other state or foreign jurisdiction."[135] The plaintiffs sued over the state's failure to recognize the "parent-child relationships that are created by out-of-state adoptions."[136]

The Tenth Circuit took note of what it called "a clear legislative expression of Oklahoma's public policy contrary to adoptions by same sex couples."[137] Nonetheless, relying on *Baker* for the proposition that "there is 'no roving "public policy exception" to the full faith and credit due *judgments*,'"[138] the court held that "final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause."[139] Of course, nothing in *Finstuen* requires a state to *grant* adoptions to same-sex couples. But the decision meant that same-sex couples who had been denied recognition of their rights as adoptive parents could seek relief in the federal courts, and the Constitution's Full Faith and Credit Clause trumped a state's statutory policy against recognition of such adoptions.

b) Adar v Smith. In *Adar v Smith*,[140] a male same-sex couple, Oren Adar and Mickey Ray Smith, adopted a Louisiana-born child, known as "Infant J," in a New York family court. Although Adar and Smith do not live in Louisiana and apparently do not plan to do so, they asked the Louisiana registrar of vital records and statistics to change the child's Louisiana birth certificate to reflect the names of his two new parents—a routine procedure after a child is adopted. The registrar balked. Although Louisiana does not have a law like Oklahoma's barring recognition of out-of-state adoptions by same-sex couples, it does have a law that restricts in-state joint adoptions to married couples.[141] The state took the position that its adoption law prohibited the registrar from naming two unmarried men on a birth certificate as a child's parents. A Fifth Circuit panel ruled in 2010, in a decision quite similar to Finstuen, that "Louisiana owes full faith and credit to the New York adoption decree that declare[d]" the two men to be the child's legal parents.[142]

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[135] Id at 1148, quoting 10 Okla Stat § 7502–1.4(A).

[136] *Finstuen*, 496 F3d at 1142.

[137] Id at 1149 n 6.

[138] Id at 1152, quoting *Baker*, 522 US at 233.

[139] *Finstuen*, 496 F3d at 1156.

[140] 639 F3d 146 (5th Cir 2011) (en banc).

[141] La Child Code Ann art 1221.

[142] *Adar v Smith*, 597 F3d 697, 719 (5th Cir 2010).

A deeply split en banc court reversed the panel decision. Invoking the distinction between recognition and enforcement of judgments,[143] the majority opinion written by Chief Judge Edith Jones said that Louisiana had not refused to recognize the adoption. "The Registrar concedes that the parental relationship of Adar and Smith with Infant J cannot be revisited in its courts," the court said, and "no right created by the New York adoption order (i.e., right to custody, parental control, etc.) has been frustrated."[144] But the court reasoned that, since Louisiana would not issue a birth certificate naming two same-sex parents in an in-state adoption, it was not required to do so for an out-of-state adoption. "Obtaining a birth certificate," it said, "falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition."[145] Here the court differed with the Tenth Circuit, which saw changing a birth certificate to reflect new same-sex parents as part and parcel of recognizing their parental rights.[146]

The Fifth Circuit went considerably further, though, and reached a question that was not necessary to resolve the case: whether a federal cause of action is even available to enforce the Full Faith and Credit Clause. An en banc majority said it is not. Although 42 USC § 1983 gives federal courts the power to hear cases claiming violation of constitutional rights by state actors,[147] the court held that the Full Faith and Credit Clause does not "give[ ] rise to a right vindicable in a § 1983 action."[148] It reasoned as follows: The Full Faith and Credit Clause provides "a constitutional 'rule of decision' on state courts" to give res judicata effect to other state courts' judgments.[149] If a state court fails to do so, the relief is an appeal to the state's higher courts (and from there, ultimately to the Supreme Court), not a constitutional lawsuit in federal court under Section 1983.[150] Given that "the duty of affording full faith and credit *to a judgment* falls on courts, it is incoherent to speak of vindicating full faith and credit rights against non-judicial state actors," such as the Louisiana

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143 See text accompanying note 130.

144 *Adar*, 639 F3d at 159.

145 Id at 160.

146 See *Finstuen*, 496 F3d at 1142 (declaring the Oklahoma non-recognition statute unconstitutional and simultaneously "directing the issuance of a new birth certificate" for the adopted child of one of the plaintiff couples).

147 See *Monroe v Pape*, 365 US 167, 187 (1961).

148 *Adar*, 639 F3d at 153.

149 Id at 153–54, quoting *Thompson v Thompson*, 484 US 174, 182–83 (1988).

150 *Adar*, 639 F3d at 154.

registrar.[151] Thus, Adar and Smith's complaint against the registrar should have been brought in a Louisiana court, since "full faith and credit doctrine does not contemplate requiring an executive officer to 'execute' a foreign judgment without the intermediary of a state court."[152] The Fifth Circuit's en banc decision thus creates a split with the Tenth Circuit's decision in *Finstuen* over whether the federal courts are available to enforce full faith and credit for an adoption decree.[153]

c) Adoption: summing up. As a result of the circuit split discussed above, federal law is now unclear on two important points that affect gay and lesbian parents: whether "recognizing" an adoption includes issuing the child a new birth certificate, and whether a federal cause of action is available when adoptive parents are denied recognition of their parental status in a different state.

The birth certificate question is important to the security of the parent-child relationship because "[l]ack of an accurate birth certificate makes a child vulnerable."[154] As a leading gay rights attorney explains,

> [f]or example, state agencies and employers often request birth certificates to enroll a child for benefits. Many states require parents to produce a birth certificate to law enforcement agencies to report a lost child and secure the child's return, or to seek assistance in locating a kidnapped child. If one parent dies and the other is not listed on a child's birth certificate, the survivor may have trouble establishing in various contexts that he or she is a parent. Further, when parents break up, state agencies commonly require birth certificates to obtain delinquent child support.[155]

Although Louisiana did not purport to deny recognition to Adar and Smith's *adoption* of Infant J, its refusal to change the child's birth certificate arguably denies recognition of their full

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[151] Id.

[152] Id at 158, citing *Riley v NY Trust Co*, 315 US 343, 349 (1942).

[153] Attorneys for Adar and Smith filed a petition for certiorari with the Supreme Court in July 2011.

[154] Camilla Taylor, *Accurate Birth Certificates Make Families Less Vulnerable*, online at http://www.lambdalegal.org/news/of-counsel/oc_201012_accurate-birth-certificates.html (visited Sept 9, 2011).

[155] Id.

parental rights. At the very least, it is state action that disadvantages the couple vis-à-vis heterosexual adoptive parents and makes their family less secure.

Even though the Tenth Circuit provided more protection for families headed by same-sex couples, its decision nonetheless illustrates the key shortcoming of the state interests paradigm: its focus on state interests and its subordination of individual interests. In *Finstuen*, Oklahoma was required under the Full Faith and Credit Clause to yield, not to any right on the part of the plaintiffs to maintain their legal relationships to their children, but rather to the sovereignty of its sister states that had approved the various adoption decrees and embodied them in final judgments. Of course, the end result was that the parents' legal relationships with their children remained secure. But the rationale for the decision rested on the respect that the Constitution required for the judgments *as judgments*. The *substance* of the judgments was of no special relevance. A money judgment for one dollar would get the same privileged treatment as an adoption decree.

In holding that there is no federal cause of action for denial of constitutional Full Faith and Credit, the Fifth Circuit put an even sharper point on the matter. The Constitution may command state courts to give full faith and credit to other states' judgments, but if those courts improperly deny full faith and credit, "their rulings are not subject to declaratory or injunctive relief in federal courts."[156] A Section 1983 suit, the usual route to vindication of constitutional rights in federal courts, is not available. The rights of parents *as parents*, and their interest against the state in maintaining those rights, simply play no role in the litigation.

D. The Effect of DOMA

One more reason why the rights of nonbiological gay and lesbian parents remain uncertain is that same-sex couples are singled out for disfavored legal treatment by the federal DOMA. Scholars and litigants have disagreed over whether the federal DOMA authorizes courts to disregard normal conflict of laws and full faith and credit principles in cases involving legally married gay or lesbian parents.

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[156] *Adar*, 639 F3d at 152.

For example, some commentators have suggested that, where same-sex couples are concerned, DOMA displaces the PKPA and its mandate of full faith and credit for child custody judgments.[157] "Essentially, the argument is that while it may be the case that parentage determinations normally must be respected and honored by sister states, DOMA permits courts to refuse to recognize a parentage determination when the case involves a child born to a same-sex couple."[158] If this interpretation is correct, then "mini-DOMA states are permitted to ignore policies of comity and the best interest of the child because of their worries about same-sex marriage."[159] The result would be to encourage seize-and-run parental kidnapping behavior, "albeit only in the context of same-sex divorce," leading to "greater confusion, inconsistency, and conflict" in gay and lesbian family relationships.[160]

Other commentators have noted that, since DOMA by its terms only applies to marriages, it would not affect legal parentage arising out of a civil union or domestic partnership.[161] Moreover, while DOMA may permit states to refuse to recognize marriages between same-sex couples, "there is nothing in the language or history of DOMA that suggests it was intended to authorize courts to depart from the usual rules that apply to judicial orders about children born to and raised by these couples."[162] Indeed, this was the conclusion of the Virginia Court of Appeals in *Miller-Jenkins*, which rejected Lisa's argument that DOMA trumped the PKPA. As that court saw the matter, it was not being asked to decide "whether Virginia recognizes the civil union entered into by the parties in Vermont."[163] "Rather, the only question before" it was "whether, considering the PKPA, Virginia can deny full faith and credit to the orders of the Vermont court regarding I.M.J.'s custody and visitation. It cannot."[164]

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In summary, where a family is caught between the laws of two states with different policies and attitudes toward same-sex

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157 See Harvey, 78 Fordham L Rev at 1423–31 (cited in note 8).

158 Joslin, 70 Ohio St L J at 596 (cited in note 8).

159 Harvey, 78 Fordham L Rev at 1431 (cited in note 8).

160 Id.

161 See, for example, Joslin, 70 Ohio St L J at 596–97 (cited in note 8)

162 Id at 598.

163 *Miller-Jenkins*, 637 SE2d at 337.

164 Id.

relationships and gay and lesbian parenting, traditional conflict of laws doctrine and federal requirements of full faith and credit provide at best uncertain and incomplete protection for gay and lesbian parents' legal relationships with their children.

III. APPLYING CONSTITUTIONAL DUE PROCESS TO THE INTERSTATE RECOGNITION OF PARENT-CHILD RELATIONSHIPS

A. The State Interests Paradigm Cannot Adequately Protect the Parent-Child Relationship

In Part II, I explained why the prevailing modes of analysis for resolving interstate conflicts over parent-child relationships, which I refer to collectively as the "state interests paradigm," cannot be relied upon to adequately protect the rights of non-biological parents in same-sex relationships. Conflicts of law doctrine has not developed the principles necessary to deal with contemporary family configurations and controversies and is excessively deferential to the forum state's public policy, even where application of that public policy might mean summarily severing a legal parent-child relationship that was established under the law of another state. Where a parent-child relationship has been established under the parentage presumption, the PKPA's federal requirement of full faith and credit protects the relationship only in custody litigation—assuming, that is, that the federal DOMA does not place same-sex couples outside the protection of the PKPA. As the Alabama *Ex Parte N.B.* case indicates, it is possible that a court might interpret its state law as being so unequivocally opposed to any form of same-sex relationship that even another state's parentage order might not be respected. If so, the aggrieved parent would have no cause of action in federal court. Moreover, where a parent-child relationship was established by adoption decree, the *Adar* case casts uncertainty over what it means to "recognize" an adoption decree and whether a federal cause of action is available for denial of a constitutional (as opposed to statutory) command of full faith and credit.

Assuming that no one would dispute that a parent-child relationship is of fundamental importance and should be protected, the problem with these analytical frameworks is that they focus only on state interests and relationships between states and give no weight to the rights and interests of the affected individuals. As Lea Brilmayer has written in a critique of prevailing conflicts approaches, "[o]ne is hard put to find a serious discussion of 'rights' in the current academic literature or judicial discussions

of choice of law. With a few notable exceptions, the academic talk is all about 'policies,' or 'interests,' or 'functional analysis.'"[165] This is an important problem, Brilmayer argues, because

> [c]hoosing to talk in terms of rights rather than policies or interests represents a fundamental jurisprudential commitment which is reflected in the way that concrete problems are resolved. . . . Rights impose limits on state authority, protecting individuals from being forced to sacrifice for the good of society as a whole. They reflect a notion of individual desert that stands above the instrumental advantage to be achieved by the application of some particular state's substantive law.[166]

It is important to be clear about what would happen if a state purported to refuse to recognize a legal parent-child relationship that had been properly established under the law of another state, either by adoption or the parentage presumption. For all practical purposes, the state would be terminating parental rights without due process, in violation of the rule laid down in *Santosky* that such terminations require not only a hearing but clear and convincing evidence that the parent is unfit.[167] Two leading family law scholars also have made this argument.[168] Acknowledging that refusal to recognize duly established parental rights effectively amounts to a termination of those rights provides the predicate for my ultimate argument: that a court must be guided in interstate litigation over parental rights primarily by the Fourteenth Amendment's Due Process Clause, not by the state interests paradigm.

If someone is no longer recognized as her child's legal parent, then she and the child become legal strangers to one another, just as they do after a termination proceeding. The parent

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[165] Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 Yale L J 1277, 1277 (1989).

[166] Id at 1278.

[167] See text accompanying notes 31–37.

[168] Joan Hollinger writes that a state's refusal to recognize parental rights established in another state "may . . . be tantamount to an involuntary and unconstitutional termination of the rights and duties of one or both parents without proof of their unfitness." Joan H. Hollinger, *The Mobile Family: Interstate Jurisdictional Puzzles and Full Faith and Credit for Adoption and Other Parentage Orders*, 225 PLI/Crim 85, 117 (2010), citing *Santosky v Kramer*, 455 US 745, 753–54, 761 n 11, 765 (1982) and *Stanley v Illinois*, 405 US 645, 651–53 (1972). And Nancy Polikoff writes that that, "if a different state refuses to recognize [a] nonbiological mother's parentage, it is, in effect, terminating her parental rights," an action that "is constitutionally impermissible without numerous substantive and procedural safeguards." Polikoff, 5 Stan J Civ Rts & Civ Liberties at 264 (cited in note 16).

would have no legal right to make health care decisions for the child, including emergency or end of life decisions. Nor could the parent control schooling and education; consent to testing, immunizations, or psychological exams; or have the child excused for religious observances or released into her custody by law enforcement officers. Accordingly, as Joan Hollinger writes, "[a]ny rule or doctrine that would permit state courts to disregard adoption decrees or other parentage determinations based on public policy considerations would be extremely detrimental for children."[169] Because "[p]arental rights protect vital human interests," the termination of those rights "causes real psychological and physical harm."[170] Moreover, it would be "disruptive . . . to the social order if the status of parent and child were to come and go as families move from one place to another or as a child travels or moves with one parent, leaving the other behind in the decree state."[171] In light of "the need to ensure stability and finality in family status, the trend of national and international law has been toward universal recognition of adoptions and other parentage orders granted by a court or other competent authority in the child's home jurisdiction."[172]

The plaintiffs in *Finstuen* actually briefed due process arguments, though the Tenth Circuit, having decided the case on the basis of full faith and credit, did not reach them.[173] The parents argued that, by refusing to recognize their adoptions, the state was invading "[t]he private realm of the family" and "interfering in the lives of these parents and families."[174] Indeed,

> [t]he interference here is strong. The litany of protections provided to recognized parents and their children under Oklahoma's statutory scheme is both far-reaching and comprehensive. Additionally, by denying not only access to these statutory protections, but also recognition that they have legal parent-child relationships, the State has effectively forced the adult plaintiffs to alter their up-

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169 Hollinger, *The Mobile Family* at 117 (cited in note 168).

170 Donald C. Hubin, *Parental Rights and Due Process*, 1 J L & Fam Stud 123, 141 (1999).

171 Hollinger, *The Mobile Family* at 117 (cited in note 168).

172 Id at 117–18.

173 496 F3d at 1156 ("Because we affirm the district court on this basis, we do not reach the issues of whether the adoption amendment infringes on the Due Process or Equal Protection Clauses.").

174 Appellees' Principal Brief, *Finstuen v Crutcher*, No 06–6213, *52–53 (10th Cir filed Oct 16, 2006).

> bringing of their children to minimize risk. [Plaintiff] Finstuen no longer signs parental authorizations for their two girls. [Plaintiff] Jennifer Doel avoids making medical decisions on behalf of her daughter E. The act's invasive reach into the families' lives effectively sends the message that these families are unwanted and, indeed, the Oklahoma residents realize that they may be left with no other choice but to move from Oklahoma for the safety and security of their children and themselves.[175]

Allowing a state to effectively terminate parental rights without due process would be both unconstitutional and intolerable. If Lynn Wardle is correct to conclude on the basis of an extensive historical survey that a forum state's public policy "is the dominant, controlling consideration" when it is asked to recognize a "controversial" form of family relationship,[176] then we must look beyond conflicts doctrine for sensible and humane rules for interstate recognition of established parent-child relationships. Otherwise, the liberty and privacy interests inherent in family relationships could always be trumped by the raw political power of a state's insistence on the primacy of its own public policy.

B. Established Due Process Principles Require Interstate Recognition of Legal Parent-Child Relationships, However Formed

Given that constitutionally protected liberty and privacy interests are implicated when courts decide whether a parent-child relationship should be recognized across state lines, the parental rights and family autonomy principles of the Fourteenth Amendment, rather than conflicts or full faith and credit doctrines, generally should guide the resolution of such cases. The simple rule should be that legal parenthood, once properly established under one state's law, is a legal status that endures unless and until it is terminated in a proceeding that satisfies the standards of due process as specified by the Supreme Court.[177] If a child is born to a same-sex couple in a marriage, civil union, or domestic partnership, and if the state that creates the couple's relationship considers both parties to be the child's legal parents,

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[175] Id at 53.

[176] See text accompanying notes 94–95.

[177] See text accompanying notes 31–37.

then the non-biological parent cannot later be deprived of that status by another state, absent a proper proceeding and clear and convincing evidence of unfitness. Similarly, if a court grants an adoption to an individual who happens to be gay or lesbian or in a same-sex relationship, that person remains the child's legal parent unless and until she is adjudicated to be unfit. Legal-parent status is not dependent on whether the forum state disapproves of the type of family the adoption decree created. The public policy exception may allow a state to refuse to recognize a *marriage* that was created in another state because no federal court has yet questioned the constitutionality of applying a mini-DOMA to terminate an existing same-sex marriage. But the well-established protections of the Due Process Clause for parental rights mean that there can be no such exception to the interstate recognition of a parent-child relationship that was established under the laws of another state.

My argument that constitutional due process protects legal-parent status would be a departure from the analytical frameworks of the state interests paradigm, but it is a natural application of the Supreme Court's parental rights and family privacy doctrine. At the core of that doctrine is the principle that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."[178] As David Meyer has argued, a "state's relegation of some relationships to a disfavored and disadvantaged legal status might rightly be understood as actively destabilizing those relationships, triggering constitutional scrutiny."[179] He explained,

> [b]y privileging marriage and legal parenthood as uniquely valuable and legitimate family relations, government enhances the stability, depth, and prestige of those bonds while simultaneously discounting and denigrating the status of informal alternatives. The differentiation may be perfectly justifiable. The point, however, is that the state's withholding of formal recognition from those who are otherwise prepared to accept the roles those legal institutions

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[178] *M.L.B. v S.L.J.*, 519 US 102, 116 (1996), quoting *Boddie v Connecticut*, 401 US 371, 376 (1971) (citations omitted).

[179] David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 Vill L Rev 891, 919 (2006).

> require and provide might rightly be seen as a form of intervention undermining their family relations, squarely within the compass of even a purely negative conception of the right of privacy.[180]

Other scholars similarly have suggested that interstate disputes over gay/lesbian parenting implicate constitutional principles, though they have not elaborated on the argument. For example, Nancy Polikoff writes that, "if a different state refuses to recognize [a] nonbiological mother's parentage, it is, in effect, terminating her parental rights," an action that "is constitutionally impermissible without numerous substantive and procedural safeguards."[181] Gillian Metzger, noting that Section 2 of the federal Defense of Marriage Act provides that states are not required to recognize same-sex marriage by virtue of the Full Faith and Credit Clause, writes that "[t]o the extent DOMA's Section 2 is used to deny recognition to an out-of-state custody decree, it might also violate substantive due process protections of parental and family rights."[182] And another commentator writing on the perilous nature of same-sex couples' parentage rights argues that, "[i]n appreciation of the diversity and complexity of family life, and the great constitutional regard for family privacy, the fundamental rights of a parent should evolve to include protections for the particular family relationship at stake."[183]

Disadvantaging a child because the state does not want to recognize her parents' relationship may implicate the child's own constitutional rights as well.[184] The Ninth Circuit has observed that a "child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest."[185] Justice Stevens also expressed the view that it is "likely" that children have "liberty interests in preserving established familial or family-like bonds."[186] And aside from constitutional

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[180] Id at 913 (citation omitted).

[181] Polikoff, 5 Stan J Civ Rts & Civ Liberties at 264 (cited in note 16).

[182] Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv L Rev 1468, 1536 n 282 (2007).

[183] Gonzalez, Comment, 23 St Thomas L Rev at 317 (cited in note 6).

[184] See, for example, Graham, 48 Santa Clara L Rev at 1033–34 (cited in note 9) (observing that laws that "make it impossible for a child to be legally connected with both parents" who are in a same-sex relationship may "discriminate[ ] against a class of children in an [unconstitutional] manner").

[185] *Smith v City of Fontana*, 818 F2d 1411, 1419 (9th Cir 1987), overruled on other grounds by *Hodgers-Duran v Lopez*, 199 F3d 1037, 1040 n 1 (9th Cir 1999).

[186] *Troxel v Granville*, 530 US 57, 88 (Stevens dissenting).

concerns, it should be clear that continuity of legal parenthood almost always will best promote a child's well-being.[187]

Against the weight of the substantial protection the Court has given to family relationships and the high bar it has set for termination of parental rights, a state could not justify severing established legal bonds between a non-biological parent and her child merely because that state maintained a policy that heterosexual homes and relationships were preferable. This is especially so given that "[t]here is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation" and that "results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children."[188] In *Moore v City of East Cleveland*,[189] a leading case on family privacy and autonomy, the Supreme Court struck down a city zoning ordinance that would have prevented a grandmother from living under the same roof with her grandchildren. The plurality opinion forcefully admonished that, when government "undertakes such intrusive regulation of the family[,] . . . the usual judicial deference to the legislature is inappropriate."[190] While the family is not beyond regulation, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[191] *Moore* might not require a court to "creat[e] a new family unit where none existed before," but it should be properly understood to prohibit the state from "breaking up an existing family unit."[192]

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[187] See, for example, Christy M. Buchanan and Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 Wake Forest L Rev 419, 420 n 3 ("Continuity of care and routines also promote the well-being of children."); Oren Goldhaber, Note, *"I Want My Mommies": the Cry for Mini-DOMAs to Recognize the Best Interests of the Children of Same-Sex Couples*, 45 Fam Ct Rev 287, 296 (2007) (arguing that "[c]hildren of same-sex couples should not be included in a public policy against same-sex couples if doing so will hinder the child's physical and psychological well-being and growth").

[188] American Psychological Association Policy Statement: Sexual Orientation, Parents, & Children, online at http://www.apa.org/about/governance/council/policy/parenting.aspx (visited Sept 9, 2011).

[189] 431 US 494 (1977) (Powell) (plurality).

[190] Id at 499.

[191] Id.

[192] *Mullins v Oregon*, 57 F3d 789, 794 (9th Cir 1995).

The *Moore* opinion drew on the line of substantive due process and privacy cases from *Meyer* through *Roe v Wade*,[193] which it described as collectively standing for the principle that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."[194] Rejecting the defendant city's narrow readings of these cases, the plurality described them as building blocks of a broad, comprehensive doctrine that was founded on the "basic values that underlie our society."[195] The Court recognized that

> these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, or with the rights of parents to the custody and companionship of their own children, or with traditional parental authority in matters of child rearing and education. But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.[196]

Similarly, while the *Moore* court may not have seen same-sex parenting on the horizon, the opinion's logic supports a rule that states may not nullify a legal-parent status that has been granted in another state without good cause. "[T]he usual judicial deference to the legislature is inappropriate" where a state "undertakes such intrusive regulation of the family" and seeks to deny "freedom of personal choice in matters of . . . family life" by "forcing all to live in narrowly defined family patterns."[197]

David Meyer has warned against overreading the Court's family privacy cases, noting that despite their strong rhetoric, "the Court has been pragmatic, tacitly adjusting its scrutiny in light of the magnitude of the state's intrusion and the strength of the state's regulatory interests,"[198] especially where the cases involved tension "between private and communal interests in

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193 410 US 113 (1973).

194 *Moore*, 431 US at 499.

195 Id at 503.

196 Id at 500–01 (citations omitted).

197 Id at 499–506.

198 David D. Meyer, *The Paradox of Family Privacy*, 53 Vand L Rev 527, 529 (2000).

childrearing."[199] But if a court refused to recognize the legal relationship between a child and a fit parent merely because the relationship had been established in another state, the court could hardly be said to be upholding some valid state regulatory interest aimed at protecting the child's welfare. Refusing to validate the relationship would be nothing more than an assertion of state power in the service of a governing majority's disapproval toward gay or lesbian relationships.

The fact that the parent-child relationship at stake may have been created by operation of state law, rather than biology, does not alter the constitutional protection to which it is entitled. The Supreme Court made this clear in the *Michael H.* case, where it actually overrode the interests of a biological father and extended a shield of substantive due process protection around a family relationship that consisted of mother, child, and the mother's husband, who was deemed a presumptive parent under state law.[200] In *Michael H.*, the Court did not privilege traditionalism in the definition of a family *per se*; rather, it provided protection to families that have been legally recognized as such under a state's law. "Justice Scalia announced that the Court has been protecting the sanctity of the family and the interpersonal relationships that develop within the family and not per se protecting biological relationships."[201] He further recognized that in *Stanley v Illinois*,[202] a Due Process Clause case protecting the right of an unwed father to maintain custody of his children after the mother's death, the Court "forbade the destruction of . . . a family."[203] Due process protects the "unitary family" and the "relationships that develop within" such families.[204] And so, if a state deems two men or two women and their child to be a "unitary family" under its laws, then such a family may claim the same constitutional protections that the Court described in *Michael H.*

The result in *Michael H.* is consistent with a principle the Court noted in an earlier case—that "[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in

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199 Id at 545.

200 See text accompanying notes 38–42.

201 Philip S. Welt, *Adoption and the Constitution: Are Adoptive Parents Really "Strangers Without Rights"?*, Ann Surv Am L 165, 203 (1995).

202 405 US 645 (1972).

203 *Michael H.*, 491 US at 123.

204 Id.

the absence of blood relationship."[205] The essence of a family relationship "stems from the emotional attachments that derive from the intimacy of daily association."[206]

To be sure, a constitutional rule requiring a state to recognize a parent-child relationship that it would not have created involves some infringement on that state's sovereignty. But it is a necessary infringement given the reality that modern families expect to be able to move freely from state to state without fear that their legal relationships will be in jeopardy. The rule also would prevent states from elevating anti-gay public policies in a way that would distort "[t]he most important policy underlying the law of parentage[, which] is to ensure that children have at least one, and preferably two, legal parents who are responsible for their care and support."[207]

Federalism in family law, as in any other area where states are given the primary role to regulate human activities, "is an important constitutional value . . . but the United States is a single nation, and the fundamental rights of our citizens," such as the parent-child relationship, "are properly defined and protected as a matter of national constitutional law."[208] Federalism cannot tolerate one state taking the position that a legal parent-child relationship established under the laws of another state was somehow void ab initio. The approach I have outlined would not force any state to *create* a legal family relationship of which it disapproves. It would "defer to the states in the *prescription* of the substance of core family law relationships."[209] But it would provide a role for federal law and federal courts to "proscrib[e] constitutional violations and other unwarranted state intrusions on personal autonomy" by preventing a state from severing a legal family relationship without cause.[210] It thereby would "facilitate diverse approaches to family law issues, subject to judicial checks on state power."[211] Deployed to protect an extant legal

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[205] *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816, 844 (1977).

[206] Id.

[207] Gonzalez, Comment, 23 St Thomas L Rev at 308 (cited in note 6) (quotation marks and citations omitted).

[208] Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 NC L Rev 63, 94–95 (2006).

[209] Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 Wash & Lee L Rev 131, 201 (2009).

[210] Id.

[211] Id. See also June Carbone and Naomi Cahn, *Judging Families*, 77 UMKC L Rev 267, 269 (2008) (observing that although "different parts of the country are experiencing cultural change at different speeds," federal "courts can—and should—play a mediating

family relationship against the coercive power of a state that disapproves of the relationship and believes it should never have been formed, the use of due process I suggest actually "serves a conserving function, furthering stability in the law and protecting societal expectations concerning individual freedom."[212]

Constitutional rules that cabin the discretion of state courts to interpret and apply their own states' laws also run some risk of infringing on values of majoritarian self-government. But any state law or judicial interpretation that would purport to sever an existing legal parent-child relationship without good cause would not be worthy of respect under our deepest legal and political traditions. Indeed, under the common law, "both English and American judges view[ed] the origins of parental rights as being even more fundamental than property rights," and it is for the protection of such rights that "government is formed."[213] Finally, as the Supreme Court has admonished, "a state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all."[214]

IV. CONCLUSION

States differ in their laws regarding same-sex relationships. States also differ in their policies toward parentage and assisted reproduction. But states do not differ on the principle that the parent-child relationship is of profound importance, both to families and the larger society; and the Supreme Court has enshrined this principle in a clear and well-established line of due process jurisprudence.

With the prospect now emerging that states might not recognize the rights of gay or lesbian parents when they cross state lines, it is time to acknowledge that the parent-child relationship is too important to be left to the state interests paradigm. Parental rights are individual rights, and individual rights must be vindicated not through doctrines of conflict of laws or full faith and credit, but under the constitutional guarantee of "freedom of personal choice in matters of family life"[215] and the principle that

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role that articulates and helps solidify changing cultural understandings").

212 Conkle, 85 NC L Rev at 95 (cited in note 208).

213 Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L Rev 615–16 (1976).

214 *Hodgson v Minnesota*, 497 US 417, 452 (1990).

215 *Santosky*, 455 US at 753.

a state may not impose on any family without good cause "the irretrievable destruction of their family life."[216]

[216] Id.