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By: Ruth Hackford-Peer[1]

In 2007, the Tenth Circuit held as unconstitutional, under the Full Faith and Credit Clause, the Oklahoma adoption statute that refused to recognize or issue a birth certificate to a child adopted by a same-sex couple. In 2011, on similar facts, the Fifth Circuit upheld Louisiana's refusal to reissue a birth certificate to a child who was born in Louisiana but adopted by a gay male couple in New York. This recent circuit split highlights constitutional issues regarding the treatment of adopted children of gay and lesbian couples and raises questions in both equal protection jurisprudence and Full Faith and Credit jurisprudence. This Note uses these cases as a lens through which to explore full faith and credit and equal protection doctrines as applied to children born in one state but adopted by a same-sex couple out of state. This Note argues the need for a child-centric solution to this circuit split. In particular, this Note (1) introduces the circuit split; (2) explores the legal realities of gay and lesbians and the failure of the equal protection doctrine to prevent discrimination against them — and more relevantly — their children; (3) discusses the split under the Full Faith and Credit Clause of the U.S. Constitution; and (4) raises policy concerns regarding the nation's public health and vital statistics program that is put at risk by the Adar holding. This Note concludes that children — indeed all children — though perhaps particularly those children marginalized by their same-sex parents' marital status deserve to have a document that proves their identity, their parentage, their age, and their nationality.

I. Introduction: By Accident of Your Birth — When your parents are gay or lesbian, you have more rights if you were born in Oklahoma than if you were born in Louisiana.

Since many dysfunctional, abusive households have a mother and a father present, it's clear that being heterosexual is not necessarily a qualification for being a good parent.[2]

Betty DeGeneres

On August 3, 2007, the Tenth Circuit held as unconstitutional under the Full Faith and Credit Clause the Oklahoma adoption statute that refused to recognize an adoption by a same-sex couple.[3] The court reasoned that not only did Oklahoma have to recognize the adoption and give full faith and credit to it, Oklahoma "already has the necessary mechanism for enforcing judgments."[4] The same-sex parents merely sought to have Oklahoma apply its own laws to "enforce their adoption order in an even-handed manner."[5] On April 12th, 2011, on similar facts, the Fifth Circuit upheld Louisiana's refusal to reissue a birth certificate to a child who was born in Louisiana but adopted by a gay male couple in New York. The court determined neither the Full Faith & Credit Clause nor the Equal Protection Clause of the United States Constitution require Louisiana to do so.[6] The court further noted that Louisiana "recognized" the New York adoption but reasoned the reissuance of a birth certificate was an enforcement measure and held that the Full Faith and Credit Clause "does not oblige Louisiana to confer particular benefits on unmarried adoptive parents contrary to its law."[7]

The circuit split between the Tenth Circuit and the Fifth Circuit gives rise to questions regarding both Equal Protection and Full Faith and Credit jurisprudence. Among these questions are: how can the children of same-sex couples be protected? Should gays and lesbians have heightened scrutiny under equal protection analysis? Should children of same-sex couples receive heightened scrutiny under equal protection? Does the Full Faith & Credit Clause require interstate recognition of an adoption decree and if so, when does that recognition require one state to trounce on another state's public policy? Finally, does a child have a fundamental right to an accurate birth certificate that reflects his or her legal familial realities?

This Note takes up these questions and argues the need for a child-centric solution to this circuit split. Part II of this Note explores the legal realities of gays and lesbians and the failure of the equal protection doctrine to prevent discrimination against them and their families. Part III explores the possibility of the equal protection doctrine being applied to the children of same-sex couples as a way to secure benefits and protections that are currently denied to the children. Part IV details the full faith and credit issues and further explores the facts of *Finstuen* and *Adar*. Part V raises policy concerns regarding the nation's public health and vital statistics program should the holding in *Adar* be undisturbed. Part VI concludes with the prediction — and the hope — that the *Finstuen* holding will eventually prevail.

II. Equal Protection: Equal for Whom?

If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.[8]

Justice William J. Brennan Jr.

The legal status of same-sex couples, and indeed the legal status of their families, is not yet settled in law. The Defense of Marriage Act ("DOMA") ensures that no state shall "be required to give effect to" same-sex marriages from any other state and defines marriage for purposes of federal law as a "legal union between one man and one woman as husband and wife."[9] Currently there are six states and the District of Columbia where same-sex couples can legally marry.[10] There are sixteen states and the District of Columbia where same-sex couples can petition to adopt statewide.[11] Utah, Louisiana, and Mississippi have adoption laws that essentially prohibit same-sex couples from adopting in their jurisdictions.[12] Estimates vary on the number of children raised by same-sex couples in the United States but the figures often cited range from 1,000,000 to more than 9,000,000.[13]

Until recently, lawmakers had been able to overtly discriminate against gays and lesbians as a class.[14] In 1952 the American Psychological Association classified homosexuality as a mental illness.[15] In the same year Congress passed the McCarran-Walter Immigration and Nationality Act,[16] which excluded from entry into the United States "psychopathic personalities."[17] The Supreme Court not only upheld the law in deportation proceedings against a gay man in *Boutilier v. Immigration and Naturalization Services*,[18] but noted that "[t]he legislative history of the Act indicates beyond a shadow of a doubt that Congress intended the phrase 'psychopathic personality' to include homosexuals …."[19] In 1953, President Eisenhower prohibited gays and lesbians from federal employment.[20] Perhaps the best example of class-based discrimination against gays and lesbians is evident in the history of statutes that criminalize consensual same-sex sodomy.[21]

Though undoubtedly curbed somewhat recently due to favorable holdings in *Lawrence v. Texas*[22] and *Romer v. Evans,*[23] lawmakers can still use their lawmaking power to discriminate against gay and lesbian individuals and families.[24] Despite this history of discrimination, the Supreme Court has not yet definitively weighed in on whether gays and lesbians constitute a suspect or quasi-suspect class and are thus entitled to a higher level of judicial scrutiny under the equal protection analysis.[25] Still, the Court has struck down discriminatory laws using a seemingly more exacting form of rational basis.[26] In *Lawrence*, the Court struck down a sodomy statute used to prosecute two men for engaging in consensual sex in the privacy of their home.[27] In *Romer*, the Court used rational basis to strike down as a violation of equal protection a Colorado state constitutional amendment that repealed state and local laws barring sexual-orientation discrimination.[28]

The Equal Protection Clause of the U.S. Constitution provides that states may not "deny to any person within its jurisdiction the equal protection of the laws."[29] The equal protection framework applies when a law either draws a distinction among people based on a particular characteristic or when the law is facially neutral, but there is a discriminatory impact or effect on a particular class.[30] Most laws are subject to rational review, the most deferential standard.[31] Only when the court deems the classification to categorize based on certain protected classes, (considered "suspect"[32] or "quasi-suspect"[33] classes) will the court look more closely at the law, its purpose, and the "fit" between the law and its purpose.[34] In looking at the "fit," a court will consider whether the classification is rationally related to a legitimate governmental interest.[35] Equal protection is often discussed as a three-tiered approach and some scholars have advocated for a complete overhaul of equal protection doctrine.[36]

Lower courts have also been reluctant to designate gays and lesbians as a suspect or quasi-suspect class.[37] Although recently some courts have done just that.[38] When a court designates a group as a suspect or quasi-suspect class, every law that implicates a facial classification of that group by its class is entitled to heightened scrutiny.[39] Perhaps this partly explains why the Supreme Court has not — since 1977 — designated any new groups as quasi-suspect or suspect classes, though the Court has had the chance to review cases involving gays and lesbians, the indigent, and the developmentally disabled.[40] This hesitance is not new; in 1927 the Court referred to equal protection as "the usual last resort of constitutional arguments …."[41]

Some have made the argument that gays and lesbians ought to receive heightened judicial scrutiny, which would protect them and their families from possible legislative biases.[42] Currently, most courts apply rational basis scrutiny, which requires only a rational relationship between the law's classification and the law's legitimate purpose.[43] Rational basis scrutiny offers little protection to gays and lesbians as a class. Until the Supreme Court intervenes, state legislatures will likely continue to discriminate against gay and lesbian individuals and families, though perhaps less openly. Perhaps because of cases like *Romer* and *Lawrence*, there seems to be a greater trend of policy makers couching their anti-gay biases in statutes that, on their face, do not target gays and lesbians.[44] Legislators can invoke DOMA, which provides that no state will be required to extend marriage rights to same-sex couples without its consent. Policy makers in more conservative states can now condition certain rights, such as adoption rights, on the status of being married and assure that same-sex couples will have a difficult time making an effective equal protection claim because the facial classification is "marriage" and not "sexual orientation".[45]

Essentially, unmarried heterosexual couples and their families are shafted alongside same-sex couples so that these statutes will not reveal a sheer animus toward same-sex couples.[46] The children of same-sex couples suffer the most.[47]

Situated within this background of uncertain legal rights for same-sex couples, are the children of these couples. These children exist with all the complexity and diversity of typical modern families but there is an added layer of complexity by virtue of the children's parents being the same sex. This Note focuses on adoptive children of same-sex couples. These children have a legally established relationship with both their parents regardless of whether one parent also has biological ties to the child.

III. What about the Children?

One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness.[48]

Benjamin N. Cardozo

"Since the first generation of lesbian mother family law issues … advocates have been fighting to keep the focus on the children."[49] The issue often gets framed as one of discrimination or oppression, which ultimately focuses on the individual same-sex couple or on gay and lesbian people more generally.[50] "The framing of the issue as one of discrimination tends to overlook the effects on children and reinforces the tactics of the opponents of recognizing same-sex families." [51] Advocates should insist on keeping the focus on children. One way to do this is to put in the forefront the benefits and protections denied to the children of same-sex couples because of their parents'

inability to marry. The issue is not that the parents are denied the benefits and protections of marriage, but that their children are denied the benefits and protections of their parents being married. When referencing heterosexual family life, courts already emphasize the importance of raising children as being intermingled with the importance of marriage.[52]

> One of the key contemporary justifications for marital laws is that marriage directly and indirectly benefits the children reared by the couple …. If the goal were truly child welfare, the most direct way of accomplishing the goal would be permitting all couples that have children to marry. Such a policy would be easy to administer, and would acknowledge that all children are equally entitled to the rights and benefits purportedly created for child welfare …. [T]he reality is that there is a large class of children that are not able to have their development assisted by rights purportedly created for their benefit.[53]

The issue of same-sex marriage is beyond the purview of this Note, but the focus should remain the same — on the children. In the case at hand, even if the state of Louisiana has a legitimate state interest in denying adoption rights to same-sex couples, what purpose can denying that child an accurate birth certificate serve to the state? A birth certificate is recognized as a fundamental document that proves identity, parentage, age, and nationality.[54] It is important for a range of activities, and can be required for sports, for jobs, to get public assistance, to get a passport required for travel, and most importantly, would prove parentage in the case of a medical emergency.[55]

The Supreme Court has applied intermediate scrutiny as the appropriate standard of review for classifications based on illegitimacy.[56] "[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[57] The Court went on to state, "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as an unjust — way of deterring the parent."[58] In *Plyler v. Doe*,[59] the Supreme Court recognized that intermediate scrutiny for children does not apply only to illegitimate children but anytime the state is punishing a child for the parents' misconduct.[60] The *Plyler* Court ruled that withholding state educational funds from undocumented children and allowing local school districts to deny enrollment to these children is a violation of the Equal Protection Clause.[61] The Court extended the equal protection doctrine beyond illegitimate children, holding anytime there is "legislation directing the onus of a parent's misconduct against his children [it] does not comport with fundamental notions of justice."[62] Further, the Court decided the case on equal protection grounds, noting "[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."[63] Sex classifications also receive intermediate scrutiny.

Applying intermediate scrutiny would offer increased protections for same-sex couples and their children because it requires the law that classifies regarding sexual orientation to do so because of an important government interest (a higher bar than a legitimate government interest) and the fit between the law and the interest must substantially advance that interest (not just be rationally related to it). Indeed, no longer will theoretical justifications suffice, but the government interest must actually be the purpose for which the law was passed.

These precedents should serve as guideposts when legislatures, courts, and executive officials withhold benefits and protections to children of same-sex couples on account of the marital status and/or sexual orientation of their parents. It is surprising then that the majority in *Adar* quickly dismissed the equal protection argument, ignored *Plyler*, and limited the *Weber* line of cases to biological illegitimacy.[64] Consequently the *Adar* court applied rational basis to the classification.[65] The *Adar* court then compared marriage outcomes with cohabitation outcomes noting marriage "is associated with better outcomes for children since marriage is more likely to provide the stability necessary for the healthy development of children."[66] The court reasoned that, "Louisiana may rationally conclude that having parenthood focused on a married couple or single individual — not the freely severable relationship of unmarried partners — furthers the interest of adopted children."[67]

Because the lower court in *Adar* granted summary judgment to the parents on the full faith and credit issue, it declined to reach the equal protection issue.[68] The Fifth Circuit, therefore, dismissed the equal protection claim without it ever being heard by the lower court. Typically, the only time the Fifth Circuit addresses an issue that was not first addressed by the district court is "when such issue presents a pure question of law, the proper resolution of which is beyond any doubt."[69] The district court in *Finstuen* certainly did not find the issue to be one such matter of law beyond any doubt.[70] While the Tenth Circuit decided *Finstuen* on the states' full faith and credit obligations, the district court in *Finstuen v. Edmondson*[71] held Oklahoma's adoption amendments constituted an equal protection violation.[72] The *Adar* court was not troubled by the equal protection challenge and was not persuaded by the *Weber* line of cases nor by *Finstuen* on this matter.

IV. The Circuit Split: Recognition or Enforcement?

The real issue is not whether the court of either state must conform its decision to that of the other, but whether both must not conform their decisions in this field to some federal constitutional standard.[73]

Justice Robert H. Jackson

The Full Faith and Credit Clause of the United States Constitution provides, in relevant part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."[74] The purpose of the 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 …."[75] The clause upholds the intent that individual states be "integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."[76] The Clause "is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns."[77]

Though the clause's intent and purpose is clear, its application has never been. Sixty-six years ago, former Supreme Court Justice Robert H. Jackson said this about the Full Faith and Credit Clause,

> [I]t is doubtful if a century and a half of constitutional interpretation has advanced us much beyond where we would be if there had never been such a clause. Local policies and balance of local interest still dominate the application of the federal requirement. This is more strange since the states have less to fear from a strong federalist influence in dealing with this than with most other constitutional provisions. The Federal Government stands to gain little at the expense of the states through any application of it. Anything taken from a state by way of freedom to deny faith and credit to law of others is thereby added to the state by way of a right to exact faith and credit for its own.[78]

The Clause has now undergone more than two centuries of "constitutional interpretation," but the recent *Adar* decision makes one wonder if the jurisprudence "has advanced us much beyond where we would be if there had never been such a clause." One aspect of the Clause remains clear; judicial precedent differentiates the credit owed to laws from that owed to judgments.[79]

Regarding statutes, a court may be guided by a forum state's public policy.[80] Regarding judgments, the full faith and credit obligation is exacting and gives rise to no "roving public policy exception" to the full faith and credit due.[81] The Supreme Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit itself.[82] "Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments."[83] The power to determine the time, manner, and mechanisms for enforcing judgments is reserved for the forum state and does not travel with a sister state's judgment.[84] "Orders commanding action or inaction have been denied enforcement in a sister State …."[85] These enforcement measures "remain subject to the even-handed control of forum law."[86]

One such illustrative case is *Rosin v. Monken*.[87] Rosin accepted a plea agreement for a misdemeanor offense of non-consensual sexual contact in New York that did not require him to register as a sex offender in New York.[88] While living in Illinois, the local police department informed him that he was required to register as a sex offender in Illinois.[89] He brought suit alleging Illinois failed to give full faith and credit due to the judgment of the New York court. [90] He asserted that Illinois could not force him to register as a sex offender in its jurisdiction.[91] The court disagreed, noting the absence in the order of any provision relieving him of an obligation to register in any state other than New York.[92] The court also reasoned that, even if the order did contain such language, "[one state] has no extra-territorial jurisdiction to exercise police power in [another state]."[93] Though a public policy exception does not exist for judgments, another exception does.[94] One state cannot use the Full Faith and Credit Clause to "interfere impermissibly with the exclusive affairs of another."[95] New York simply lacks the power to "dictate the means by which Illinois can protect its public."[96]

Justice Jackson was adamantly opposed to any public policy exception to the Full Faith and Credit Clause, believing such an exception would strip the clause of all practical meaning.[97] He advocated for a broad reading of the Full Faith and Credit Clause, believing that the clause should "meet the needs of an expanding national society for a modern system of administering, inexpensively and expeditiously, a more certain justice."[98] In dealing with full faith and credit problems, Jackson asserts the "policy ultimately to be served … is the federal policy of 'a more perfect union' of our legal systems."[99]

Whether the policy of 'a more perfect union' is best served by a narrow or a more broad interpretation of "recognition" and indeed "enforcement" is dependent on one's views of same-sex marriage, same-sex adoption, and same-sex parenting generally. In order to take up the intricacies of the Full Faith and Credit Clause and its obligation to "recognize," but not necessarily "enforce" sister-state judgments, the facts of *Finstuen* and *Adar* become illustrative.

a. Finstuen v. Crutcher — *A Story of State "Recognition" of Judgments*

Three same-sex couples and their adopted children brought a challenge to Oklahoma's adoption law that refused to recognize out of state adoptions by same-sex couples.[100] The first couple, Greg Hample and Ed Swaya, adopted a child, in 2002, in their home state of Washington.[101] The parents petitioned the child's birth state of Oklahoma for a valid birth certificate, but the state refused to list both parents on the form.[102] The couple contested the action, prompting the Oklahoma State Department of Health ("OSDH") to seek an opinion from the Oklahoma Attorney General whether the state was required to list both men on the birth certificate.[103] The Attorney General, citing the United State Constitution's Full Faith and Credit Clause, opined that Oklahoma was required to issue the child an updated birth certificate reflecting both of the child's legal parents.[104] The OSDH issued the couple a birth certificate that listed both men as parents.[105] The state legislature responded a month later by enacting what the *Finstuen* court called the "adoption amendments," which statutorily gave Oklahoma the right to refuse to recognize a same-sex adoption from any jurisdiction.[106] The Hample/Swaya family's claim was dismissed for lack of standing because they had received a valid revised birth certificate, therefore, their injury — refraining from visiting Oklahoma — was too speculative.[107]

Two other couples were involved in the litigation. The second couple — Anne Magro and Heather Finstuen — lived in Oklahoma but their children were born and adopted in New Jersey.[108] The couple has valid revised birth certificates from New Jersey.[109] The Tenth Circuit ultimately dismissed the Finstuen/Magro family's claim for lack of standing because the children had valid New Jersey birth certificates.[110]

The third couple — Lucy Doel and Jennifer Doel — sought an Oklahoma birth certificate for their child, who was born in Oklahoma but adopted in California.[111] OSDH issued a birth certificate naming only Lucy Doel as her mother and denied the couple's request to have a revised birth certificate naming both parents.[112] Ultimately only the Doels satisfied the standing requirement of "injury in fact."[113]

In addition to showing that the OSDH refused to revise the child's birth certificate to reflect

the child's legal realities, the Doel couple encountered a medical emergency and were told by an ambulance crew and emergency room personnel that only "the mother" could accompany the child in a medical emergency.[114]

After a lengthy discussion of jurisdictional issues,[115] the Tenth Circuit affirmed the lower court decision that the adoption amendment was unconstitutional because "the Full Faith and Credit Clause requires Oklahoma to recognize adoptions — including same-sex couples' adoptions — that are validly decreed in other states."[116] The Tenth Circuit noted that an adoption, though sometimes called a "decree" or "order" refers to a final adoption decision, and is a "court's final determination of the rights and obligations of the parties in a case" and as such is a final judgment of the court.[117] The Tenth Circuit then reiterated the precedential distinction between statutes and judgments under the Full Faith and Credit Clause, noting that the clause "applies unequivocally to … judgments of sister states."[118] In holding the Oklahoma adoption amendment unconstitutional, the Tenth Circuit quoted the Supreme Court in *Baker*, "[r]egarding judgments … the full faith and credit obligation is exacting" and there is "no roving 'public policy exception' to the full faith and credit due judgments."[119]

The *Finstuen* court reasoned that OSDH's "argument improperly conflates Oklahoma's obligation to give full faith and credit to a sister state's judgment with its authority to apply its own state laws in deciding what state-specific rights and responsibilities flow from that judgment."[120] The court noted that if "Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children, the Doels could not invoke the Full Faith and Credit Clause in asking Oklahoma for a new birth certificate."[121] Enforcement of the judgment is transferred to the laws of the forum state (in this case Oklahoma), which means Oklahoma law applies. Oklahoma law has a method to deal with reissuance of birth certificates. "The State Registrar, upon receipt of a certificate of a decree of adoption, shall prepare a supplementary birth certificate in the new name of the adopted person with the names of the adopted parents listed as the parents."[122] Same-sex couples and their children are entitled to evenhanded enforcement of Oklahoma's own laws.[123]

b. Adar v. Smith — *A Story of State "Enforcement" of Judgments*

The facts of *Adar* are quite similar to the facts in *Finstuen*. In this case, Mickey Smith and Oren Adar, a gay couple then living in New York legally adopted a Louisiana-born infant (Infant J) in 2006.[124] The couple petitioned the Louisiana state Registrar to revise the child's birth certificate to reflect the adoption.[125] The Fifth Circuit held that no such suit could be filed in federal district court because the Full Faith and Credit Clause is an obligation upon state courts and does not create a basis for federal court jurisdiction.[126] Further, the Fifth Circuit held, the only "remedy for a state's refusal to discharge its obligations under the [Full Faith and Credit Clause] remains an appeal to the Supreme Court."[127] The Fifth Circuit then advanced the opinion that even if 42 U.S.C. Section 1983[128] provides a remedy for Full Faith and Credit Clause violations, the Louisiana Registrar did not deny recognition of the New York Adoption decree.[129]

Understanding the reasoning of the Fifth Circuit requires separating the concepts of "recognition" and "enforcement." Though the Fifth Circuit admits that judgments give rise to "exacting" credit obligations, the "enforcements of judgments is subject to the evenhanded control of forum law."[130] The Fifth Circuit noted that evenhanded "means only that the state executes a sister state judgment in the same way that it would execute judgments in the forum court."[131] Thus, the reasoning continues, since Louisiana does not issue adoptions for same-sex couples, then Louisiana does not have to issue revised birth certificates for children born in Louisiana but adopted out of state.

Louisiana and its Registrar have not refused to recognize the validity of the New York adoption decree, the adoption is arguably sufficiently recognized for full faith and credit purposes, but Louisiana insists nothing in the adoption order entitles the child to an accurate birth certificate.[132] "[T]he mechanics for enforcing a judgment do not travel with the judgment itself for purposes of full faith and credit."[133] According to the Fifth Circuit, "Louisiana is competent to legislate in the area of family relations, and the manner in which it enforces out-of-state adoptions does not deny them full faith and credit."[134]

c. Searching for an "Exacting" Story of "Evenhanded" "Enforcement" of Forum Law

The Fifth Circuit's holding in *Adar* is problematic both as a matter of public policy and as a doctrinal application of the Full Faith and Credit Clause. First, against precedent and policy,[135]the *Adar* court cited *Thompson v. Thompson*[136] as foreclosing a 42 U.S.C. Section 1983 action against executive actors who violate the Full Faith and Credit Clause.[137] A Section 1983 action has the effect of voiding any state statute that deprives an individual of any right arising from the United States Constitution.[138] In *Thompson*, "the principal problem Congress sought to remedy was the inapplicability of full faith and credit requirements to custody determinations." [139] The solution Congress adopted was the Parental Kidnapping Prevention Act — a statutory "command to state courts to give full faith and credit to the child custody decrees of other states."[140] The legislative history makes it clear that Congress did not intend Federal Courts to play an enforcement role.[141]

The facts of *Thompson* simply cannot be compared to the facts in *Adar*. *Thompson* is a suit between an ex-husband and an ex-wife; it is naturally limited "as a suit between two private parties."[142] *Adar* is a "private party against a state actor."[143] As such, the petitioners in *Adar* "have no need for an implied cause of action: Section 1983 expressly provides them with the only remedy they seek and the only one they need."[144] In every case that the Fifth Circuit cites to support the proposition that the Full Faith and Credit Clause affords only a rule of decision in state courts, the defendant was a private citizen, not a state official.[145] "This is the only reason why the default federal remedies that are available in actions against state officials, i.e., the doctrine of *Ex Parte Young* and 42 U.S.C. Section 1983, were not available against the private actors in *Thompson* and its progeny."[146]

The Fifth Circuit misapplied the law in *Adar* in a second way as well. An adoption, as a final judgment, is binding throughout the country.[147] In fairness, occasionally interested parties, like grandparents or foster parents are permitted to challenge an adoption.[148] Though, it does not make sense to allow an uninterested party to challenge such adoption.[149] In *Finstuen,* the OSDH advanced the argument that Oklahoma was not required to recognize an out-of-state adoption decree because the Oklahoma Commissioner of Health was not a party to the judgment.[150] The court ultimately rejected the argument because it "would vitiate the Full Faith and Credit Clause by seemingly requiring each state in the nation to be a party to the original action in a sister state in order for the resulting judgment to be enforced across the country." [151]

Even if Louisiana truly recognizes the out-of-state adoption of Infant J and reissuing a birth certificate is an enforcement measure, it must be noted that the parents are trying to seek enforcement of a Louisiana statute, not a New York statute. The Fifth Circuit relies on the 1915 Supreme Court Case of *Hood v. McGehee*[152] to advance its enforcement theory. In *Hood,* a man adopted children in Louisiana, and then bought property in Alabama.[153] At his death, the children brought an action to quiet title to the land in Alabama. [154] Under Louisiana law, the adopted children would have inheritance rights to the property but under the Alabama inheritance statute, children could not inherit land by or through an adoptive parent.[155] The Supreme Court held that there is "no failure to give full credit to the adoption of the Plaintiff, in a provision denying them the right to inherit land in another state. Alabama is sole mistress of the devolution of Alabama land by descent."[156]

The *Hood* case is not the best case to analogize to *Adar*. The petitioners are not attempting to impose New York's adoption practices nor New York's vital statistics statute upon Louisiana. Petitioners acknowledge that Louisiana law governs the issue, not New York law.[157] The reliance on *Hood* only strengthens the argument that Louisiana must reissue Infant J an accurate birth certificate.

The problem is not just that Louisiana refuses to issue a valid birth certificate to Infant J, but that Louisiana refuses to issue a valid birth certificate to Infant J even though its own vital statistics law requires it to do so.[158] Louisiana's own vital statistics statute regarding adoption decrees provides, "[u]pon receipt of the … decree, the state registrar shall make a new record in its archives, showing: … [t]he names of the adoptive parents and any other data about them that is available and adds to the completeness of the certificate of the adopted child."[159] There is no forum state issue here. The couple is not trying to get New York's birth certificate statute to reach into Louisiana. They are merely trying to get Louisiana to

apply its own vital statistics statute without prejudice toward them as the legal parents of their Louisiana-born child.

Louisiana's *vital statistics* statute is separate from Louisiana's *adoption* statute. The vital statistics statute directs the registrar on how to record a foreign adoption for vital statistics purposes. Louisiana's *adoption* statute limits adoption to single individuals and married couples and prevents same-sex couples from adopting in Louisiana.[160] Louisiana's own *vital statistics* law requires the Registrar to reissue an accurate birth certificate for an adopted child who was born in Louisiana.[161] Pursuant to its *adoption* statute, Louisiana does not issue adoption judgments to same-sex couples, which Louisiana has not been forced to do. Pursuant to its *vital statistics* statute, Louisiana is required to re-issue birth certificates to children born in Louisiana, but adopted outside of the state.

In order to see the flaw in the holding in *Adar*, consider Louisiana's own statutes. It may be helpful to consider Louisiana's *adoption* statute as representing its *public policy*. Because of Louisiana's public policy concerns, it does not allow for same-sex adoptions. To continue this analogy, Louisiana's *vital statistics* statute then represents its records *obligations*. The Registrar refused to issue a revised birth certificate for Infant J even though Louisiana's own vital statistics law requires it. To support its lack of recognition/discriminatory enforcement of New York's judgment, Louisiana cites its adoption law as authority for this discriminatory act, a law that is wholly separate from Louisiana's vital statistics statute.[162]

Evenhanded enforcement of an out-of-state adoption decree, under Louisiana's own state law requires the registrar to issue a new birth certificate that includes the names of the adoptive parents. There is nothing "evenhanded" about purporting to recognize an out of state adoption yet, refusing to follow Louisiana's own law in reissuing a revised birth certificate. The State Registrar's refusal to provide an amended birth certificate that accurately reflects the legal parent/child relationship to some children adopted in states other than Louisiana is not only a denial of recognition of those out-of-state adoptions, but is also a denial of evenhanded enforcement of Louisiana's own forum law, running afoul of the Full Faith and Credit Clause of the United States Constitution.

If Louisiana's adoption statute represents its public policy and its vital statistics statute its records obligations, then the holding in *Adar* appears to be nothing more than Louisiana trying to assert a public policy exception into the credit owed to judgments. Why else would it apply its own vital statistics law to some adoptions, issuing valid birth certificates to those children, but refuse to do so for children of same-sex couples?

Considering the denial of certiorari, these misapplications of the Full Faith and Credit Clause appear not to concern the United States Supreme Court. Perhaps the risk to the vital statistics program of the nation is more concerning to the Court or Congress.

V. Birth Certificates: What's in a name? Or Two?

I found it almost impossible to imagine how one would go through life without an identity.[163]

Anil Kapoor

The children in this case were not provided accurate birth certificates, so they will become adults without identification that adequately reflects who they are.

Louisiana's refusal to issue an accurate birth certificate for these individuals undermines the accuracy of Louisiana's vital records and, in fact, the entire United States vital statistics program. This refusal means that an incorrect birth certificate remains on file for many children. The child's birth certificate is inaccurate in that it lists the names of the biological parents who are no longer the child's legal parents. Numerous complications arise because birth certificates are widely recognized as providing identity, nationality, and parentage.[164]

Birth certificates are widely used by coaches of sports teams to determine age, by schools for eligibility purposes, for employment purposes, and are used to obtain other documents such as driver's licenses, social security cards, and passports.[165] Birth certificates are also widely used to determine public assistance eligibility for state and federal benefits.[166] In a medical emergency, a birth certificate serves as proof of legal parentage and thus may be needed by same-sex couples in order to direct the medical services of their child.[167]

In 1989, the United Nations Convention on Rights of the Child ("CRC"), acknowledged birth registration as a fundamental human right.[168] The CRC is the most widely ratified human rights treaty.[169] The United States and Somalia are currently the only countries that have not adopted its provisions.[170] Plan International, a child's rights/anti-poverty organization, has launched a global campaign to achieve universal birth registration.[171] Although Plan International focuses on the problems experienced by children whose birth has not been registered at all, certainly some of these problems, and perhaps others, arise when a child has a legally inaccurate birth certificate. The CRC has identified the impact of non-registration on children to include negative consequences in education, health, employment, problems with statelessness, and consequences in conflicts, wars, and natural disasters.[172]

Such registration also offers protection against exploitation, including trafficking, illegal adoption, child labor, and early military service.[173] Child trafficking was so pervasive following the Asian tsunami of 2004, that in some instances, many adults came forward to collect the same child. [174] "During conflicts and wars, identity becomes important as children and their families are often displaced."[175] The connection between accurate registration and public health has historical roots. It was the fear of cholera that drove the need for precise statistics, as it was early sanitarians who pressed for effective and comprehensive registration laws.[176]

Some in the United States see these problems as primarily issues of developing countries, which for the most part is true.[177] It is arrogant, though, for people in the United States to think that the problems other countries face will never impact its boundaries. Imagine a large-scale emergency such as Hurricane Katrina, the terrorist attacks of September 11, 2001, a tragic earthquake, or even a simple car accident. Now imagine a child who is orphaned or separated from his parents during such an event. Now imagine that a same-sex couple has adopted this child but the child's birth certificate names only his biological parents who have relinquished their legal rights to the child.

As a matter of public policy — and to protect the accuracy and vitality of its vital statistics — the United States Congress should insist that the individual states record legally accurate information on a child's birth certificate. Vital statistics as a state function was nothing more than a historical accident anyway.[178] Because of the bicameral system of representation, the United States Constitution provided for the decennial census.[179] Thus the census has always been a national function.[180] "The need for vital statistics … was unrecognized when the Constitution was framed, and the vital records and statistics system developed originally not as a national undertaking, but first as a local, then as a State function."[181] "The vital statistics of the United States are collected and published through a decentralized, cooperative system. Responsibility for registration of births … is vested in the individual States."[182] This is not the states' prerogative; it is the states' responsibility. In the United States,

> [v]ital records are the primary source of the most fundamental public health information. Data on births, access to prenatal care, maternal risk factors, infant mortality, causes of death, and life expectancy are examples of the type of information provided by vital statistics. Over the past 100 years, the national vital statistics system has matured into a program that can provide complete and continuous information on issues of importance to the Nation's health.[183]

The United States does recognize the federal interest in the health, the education and the welfare of its citizens in the maintenance of accurate vital statistics data.[184] Currently, the collaboration between the National Center for Health Statistics and individual states "set forth the principles and procedures essential for complete and accurate registration of vital events."[185] Accurate vital statistics requires dealing with the various legal realities including realities of legitimation cases, foundling cases, and cases of adoption:

> In all States, special consideration is given to adoption …. The recent tendency among the States has been to make legislative provision for new birth certificates in these instances. The law specifies that the original certificate in adoption cases shall be sealed with the certified court

> order of adoption, while a new birth certificate is prepared showing the adopting persons as the parents.[186]

Though the legal responsibility for the registration of vital records fall on the individual States, The 1992 Model State Vital Statistics Act and Regulations acknowledges the federal government works in partnership with the states to "build a uniform system that produces records to satisfy the legal requirements of individuals and their families and also to meet statistical and research needs at the local, State, and national levels."[187] "No Federal requirement exist[s] regarding the reporting and collection of birth certificate information."[188] It is time that Congress act under its Commerce authority to standardize the state birth certificates, require legal accuracy,[189] and require uniformity in the states' birth certificate reporting. Alternately, Congress could alter the United States' vital statistics program to conform to other countries' systems that overwhelmingly have national systems of registration.[190] The federal interest is simply too important to allow a state to undermine the accuracy and legitimacy of the entire vital records program. The impermissible holding of *Adar* allows Louisiana to maintain legally inaccurate birth registrations, thus allowing states to shirk their responsibilities under this system. If Louisiana can do this, what is stopping any other state from doing so?

VI. Conclusion: Suffer Little Children

But Jesus said, Suffer little children, and forbid them not, to come unto me: for of such is the kingdom of heaven.[191]
Matthew 19:14

Children of same-sex couples, indeed all children, deserve the benefits and protections assured to them by the document that proves their identity, their parentage, their age and their nationality. While both the Full Faith and Credit Clause and the Equal Protection Clause of the United States Constitution provide a possible avenue to rectify the holding in *Adar*, Congress, too, has the power to enact legislation that put children first. Neither the courts nor legislatures should be off the hook, until this needed reform is accomplished.

Justice Jackson had another relevant statement regarding states' obligations to each other:

> [T]he [F]ull [F]aith and [C]redit [C]lause is the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have. If I have any message to the legal profession worthy of the occasion it is this: that you must not suffer this lawyer's clause to become the orphan clause of the Constitution.[192]

It seems fitting that Justice Jackson warns not to let the Full Faith and Credit Clause become the orphan clause of the constitution. Particularly fitting after *Adar* because this narrow interpretation of the clause, quite literally, creates orphans.

All hope is not lost. Although the Supreme Court did not grant certiorari on this particular appeal, there is still the possibility *Adar* will be overruled by the United States Supreme Court who may resolve this split and clarify the full faith and credit obligations states owe each other. Congress may enact legislation to resolve this split as well, perhaps in this age of identity theft,[193] federal legislation might emphasize a requirement for accurate vital statistics or, perhaps the Fifth Circuit will eventually overrule its interpretation of the Full Faith and Credit Clause. Lastly, there is the possibility that *Adar* will strengthen future equal protection challenges in the Fifth Circuit.

Adar's holding rests on the rationale that Louisiana may conclude that only married couples or single individuals can adopt. Same-sex couples can marry now in six states.[194] When a same-sex *married* couple adopts a Louisiana-born child, what then? Louisiana will either recognize the adoption and issue a revised birth certificate as its law requires,[195] or more likely, the state would try to avoid its obligations, perhaps summoning DOMA in order to avoid recognition. Louisiana will not be able to rely on its adoption statute because that classification is based on marriage. Louisiana will then have to rely on DOMA, the constitutionality of which is not yet determined,[196] in order to dismiss the parents' marriage. Sheer animus is not a legitimate state interest; however, Louisiana's response to this fact pattern just might start to reek of it.

Judge Haynes' powerful dissent in *Adar* might persuade other circuits when faced with this or similar issues. One way or another, there is the hope that it is only a matter of time until the majority holding in *Adar* is corrected. For, as Dr. Martin Luther King, Jr., noted "[t]he moral arc of the universe is long, but it bends towards justice."[197] The arc, unfortunately, does not bend on its own; child advocates, scholars, advocacy organizations, and lawmakers must refuse to let *Adar* permanently jeopardize children's rights and exert pressure, until the arc leans back towards justice.

(Endnotes)

[1] Ruth Hackford-Peer is a third year law student at S.J. Quinney College of Law at the University of Utah. She will graduate with her *Juris Doctor* in May 2013. Many thanks to Kim Hackford-Peer for being a supportive partner and efficient editor. Also, thanks to Riley and Casey for "letting Mama work!"

[2] Betty DeGeneres, Love Ellen: A Mother/Daughter Journey 314 (1999).

[3] *See* Finstuen v. Crutcher, 496 F.3d 1139, 1156 (10th Cir. 2007).

[4] *See id.* at 1154.

[5] *See id.*

[6] *See* Adar v. Smith, 639 F.3d 146, 162 (5th Cir. 2011) *cert. denied*, No. 11-46, 2011 U.S. Lexis 7300.

[7] *See id.* at 161.

[8] Dep't. of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[9] Defense of Marriage Act, 1 U.S.C. § 7 (2006), 28 U.S.C. §1738C (2006).

[10] States have accepted same-sex marriage both by judicial decision and by legislation. *See, e.g.,* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); N.H. Rev. Stat. Ann §457:1-a (2010); Vt. Stat. Ann. tit. 15, § 8 (2010); N.Y. CLS Dom. Rel. § 10-a (2011); D.C. Code §46-501 (2012). For a map of relationship recognition by state, *see* National Gay and Lesbian Task Force: Relationship Recognition for Same-sex Couples in the U.S., (updated June 28, 2011), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_6_28_11_color.pdf.

[11] *See* Human Rights Campaign, Parenting Laws: Joint Adoption, (updated April 12, 2011), www.hrc.org/files/assets/resources/parenting_laws_maps(1).pdf.

[12] *See* Miss. Code Ann. §93-17-3(5) (2011) (prohibiting adoption by couples of the same gender); LA. Child. Code Ann. Art. 1221 (2011) (allowing only single individuals or married couples to adopt); Utah Code Ann. § 78B-6-117(3) (LexisNexis 2011) (prohibiting adoption by all unmarried cohabitants whether gay and lesbian or straight but not prohibiting single non-cohabiting gay or lesbian individuals from adopting); Ala. Code § 26–10A–5 (2011) ("Any adult person or husband and wife jointly who are adults may petition the court to adopt a minor."); Catherine L. Hartz, *Arkansas's Unmarried Couple Adoption Ban: Depriving Children of Families*, 63 Ark. L. Rev. 113, 125 (2010) (noting that most statutes are not a *per se* ban by gays and lesbians but are worded in such a way to ensure that effect). Alabama's statute, as applied, might actually allow a gay or lesbian individual to petition for a second-parent adoption wherein a non-biological partner adopts the other partner's biological child thus effecting a "same-sex" adoption yet would not allow a same-sex couple to jointly adopt a child.

[13] *Compare* Judith Stacey & Timothy J. Biblarz, (*How) Does the Sexual Orientation of Parents Matter?,* Am. Soc. Rev., April 2001, at 159, 164 (placing the number of currently dependent children who are raised by at least one gay or lesbian parent between 1 and 9 million), *with* Lynn Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions,* 3 Ave Maria L. Rev. 561, 562 (2005) (critiquing the 2000 Census estimate of 317,000 children raised by same-sex couples as being significantly too large).

[14] *See generally* Great Events From History: Gay, Lesbian, Bisexual, Transgender Events, 111–13, 129–32, 176–78, 255–57, 582–85 (Lillian Faderman et al, eds., 2007) (an encyclopedic chronicling of gay and lesbian events from 1848–2006 including numerous discriminatory laws and judicial opinions).

[15] *See id.* at 111–13.

[16] McCarran-Walter Immigration and Nationality Act, ch. 477, tit II, §212, 66 Stat. 163, 182 (1952) (current version codified at 8 U.S.C. § 1182 (2006)); For a detailed history of exclusion of gay and lesbian aliens that predates even this act see, Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What is in the future for homosexual aliens?,* 7 Yale L. & Pol'y Rev. 201, 206–15 (1989).

[17] *See* Great Events From History, *supra* note 13, at 117–21. The gay and lesbian exclusion was not removed from American immigration policy until 1990. "Congress eliminated the homosexual exclusion clause from the Immigration Act of 1990. With that, gays and lesbians gained the legal right to enter the United States … without hiding their identities." *Id.* at 120. *See also* Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978.

[18] *See* 387 U.S. 118 (1967).

[19] *Id.* at 120.

[20] *See* Exec. Order No. 10450, 18 Fed. Reg. 2491 (April 29, 1953); Great Events from History, *supra* note 13, at 129–32 ("The order barred homosexuals from 20 percent of the nation's jobs and led to the firing of fifteen hundred and the resignation of six thousand federal employees.").

[21] *See, e.g.,* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (upholding criminalizing of consensual sodomy and providing a detailed historical analysis of sodomy laws in the United States, noting "until 1961, all 50 States outlawed sodomy").

[22] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[23] *See* Romer v. Evans, 517 U.S. 620 (1996).

[24] *See infra* notes 28–43 and accompanying text. One scholar argues that stereotypes about gays and lesbians drive this lawmaking. *See generally* Sunanda K. Ray-Holmes, *The Conservative Era of the 1980's: Discrimination Based on One's Sexual Preference: Should Strict Scrutiny Apply?,* 34 How. L. J. 341, 347–48 (1991) (arguing that stereotypes that gays and lesbians are "recruiters," child molesters, and mentally ill are used to justify discriminatory laws including sodomy statutes, employment discrimination practices, and restrictions in situations where a gay or lesbian might be considered a role model to children).

[25] *See Romer*, 517 U.S. at 635 (applying rational basis review).

[26] *See id*. at 635 ("A State cannot so deem a class of person a stranger to its laws. *Amendment 2* violates the Equal Protection Clause."). The significance of such a holding is not lost. *See e.g.,* Great Events from History, *supra* note 13, at 582–85 ("[F]or the first time in history, the nation's top judicial authority had acknowledged and delimited antigay prejudice. Also, the majority decision in this case represents a new way of speaking about [gay and lesbian] people, one that regarded them as citizens worthy of respect and civil rights. These two shifts laid a foundation for judicial rulings very different from tradition.").

[27] *See Lawrence*, 539 U.S. at 578 ("The state cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[28] *See Romer,* 517 U.S. at 634 ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." (quoting Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973))).

[29] U.S. Const. amend. XIV.

[30] *See, e.g.,* Erwin Chemerinsky, Constitutional Law, 667–778 (3d ed. 2006). However, a discriminatory impact alone is insufficient to prevail in an equal protection challenge. When a classification is facially neutral, one must also prove a discriminatory purpose to the law.

[31] *See id.* at 677.

[32] *See, e.g.,* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (subjecting classifications based on race to strict scrutiny — the classification will be invalid unless the classification is the least restrictive means to serve a compelling government interest).

[33] *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197 (1976) (subjecting classifications based on gender to intermediate scrutiny — the classification must substantially relate to serving an important government interest).

[34] *See* Chemerinsky, *supra* note 29, at 670–74.

[35] *See id.* at 670.

[36] *Compare* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 581–82 (2004) (noting that recent Supreme Court Cases seem to be moving away from a 3-tiered approach to equal protection and advocating for a single tier approach), *with* Lisa Powell, Note: *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 Yale L. & Pol'y Rev. 481, 511–12 (2003) (advocating for an overhaul of equal protection and adopting a anti-subordination framework rather than the current differentiation one), *and* M. Katherine Baird Darmer, *Structural Barriers: Keeping Outsiders Out: "Immutability" and Stigma: Towards a More Progressive Equal Protection Rights Discourse*, 18 Am. U. J. Gender Soc. Pol'y & L. 439, 453

(2010) (arguing for a rejection of immutability as a factor in the test for heightened scrutiny).

[37] *Compare* Lofton v. Sec. of Dep't. of Children and Fam. Servs., 358 F.3d 804, 818 (11th Cir. 2004) ("[H]omosexuality is not a suspect class that would require … strict scrutiny under the Equal Protection Clause."), *with* Conaway v. Deane, 932 A.2d 571, 609–14 (Md. 2007) (holding that sexual orientation discrimination is not entitled to heightened scrutiny because gays and lesbians are not politically powerless as a class), *and* Andersen v. King Cnty., 138 P.3d 963, 973–76 (Wash. 2006) (holding also that sexual orientation is not a suspect class for equal protection purposes because sexual orientation is not immutable).

[38] *See* Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009) (holding that sexual orientation receives heightened scrutiny under Iowa law but not deciding whether the group is a quasi-suspect or suspect class); *see also* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 475–76 (Conn. 2008) (holding that "gay persons are entitled to recognition as a quasi suspect class.").

[39] *Compare* United States v. Virginia, 518 U.S. 515 (1996) (holding that Virginia Military Academy could not constitutionally prohibit female students from enrolling), *with* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding a state university for women could not constitutionally prohibit male students from enrolling).

[40] *Compare* Romer v. Evans, 517 U.S. 620, 632 (1996) (finding that because the statute in question did not meet even rational basis review, the court struck down the law using rational review), *with* Maher v. Roe, 432 U.S. 464, 471 (1977) ("But this Court has never held that financial need alone identifies a suspect class for equal protection analysis."), *and* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (holding that the developmentally disabled as a class do not constitute a suspect or quasi-suspect classification).

[41] Buck v. Bell, 274 U.S. 200, 208 (1927).

[42] *See, e.g.*, Jennie Croyle, Recent Development: Perry v. Schwarzenegger, *Proposition 8, and the Fight for Same-sex Marriage*, 19 Am. U. J. Gender Soc. Pol'y & L. 425, 430–32 (2011); Emily K. Baxter, Note, *Rationalizing Away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians*, 72 Mo. L. Rev. 891 (2007).

[43] *See generally,* Anderson v. King Cnty., 138 P.3d 963 (Wash. 2006) ("To qualify as a suspect class for purposes of an equal protection analysis, the class must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class.") (internal citations omitted).

[44] *See, e.g.*, Utah Code Ann. § 78B-6-117(3) (LexisNexis 2011) (prohibiting adoption and foster parenting by people who are "cohabiting in a relationship that is not a legally valid and binding marriage under the law of [Utah]."); *see also* Arkansas Family Council Action Committee, Frequently Asked Question #7 (2008), *available at* http://adoptionact.familycouncilactioncommittee.com/index.asp?pageID=4 (last visited January 14, 2012) (noting that the Arkansas Adoption Act is patterned after Utah's adoption law and further stating "[s]ince the Arkansas Adoption and Foster Care Act treats all unmarried couples the same way any discrimination arguments have no merit").

[45] *See, e.g.*, Utah Code Ann. § 78B-6-117(3) (LexisNexis 2011).

[46] Similarly, in considering the history of sodomy laws, some statutes criminalized both same-sex and opposite-sex sodomy but the purpose (or enforcement) of the statutes often indicated animus. *See* Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L. J. 145, 153 (1988) ("In each of the states where sodomy statutes remain on the books, animus against lesbians and gays has been a major, if not the sole, reason for the decision to retain them … For example, while Georgia's statute is facially gender-neutral, the state defended it before the Supreme Court 'both in its brief and at oral argument … solely on the grounds that it prohibits homosexual activity.'"); *accord* Ray-Holmes, *supra* note 23, at 347–48.

[47] *See, e.g.,* Sam Castic, *The Irrationality of a Rational Basis: Denying Benefits to the Children of Same-Sex Couples*, 3 Am. U. Modern Am. 3 (2007).

[48] Benjamin N. Cardozo, Nature of the Judicial Process, 112 (Yale University Press, 1921) *available at* http://xroads.virginia.edu/~HYPER/CARDOZO/CarNatIII.html.

[49] Nancy D. Polikoff, Article, *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. C.R. & C. L. 201, 267 (2009).

[50] *See* Castic, *supra* note 46, at 7.

[51] *Id.*

[52] *See e.g.,* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("The right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause.").

[53] Castic, *supra* note 46, at 8.

[54] *See* Office of Inspector Gen., Dep't of Health and Human Servs., Birth Certificate Fraud, 6 (2000), *available at* http://oig.hhs.gov/oei/reports/oei-07-99-00570.pdf (last visited January 14, 2012).

[55] *See* discussion *infra* Part V.

[56] *See* Clark v. Jeter, 486 U.S. 456, 471–72 (1988) (acknowledging that classifications that burden illegitimate children for the sake of punishing the parents is illogical and unjust).

[57] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

[58] *Id.*

[59] 457 U.S. 202 (1982).

[60] *See id*. at 220.

[61] *See id.* at 230.

[62] *Id.* at 220.

[63] *Id.* at 213.

[64] *See* Adar v. Smith, 639 F.3d 146, 161–62 (5th Cir. 2011).

[65] *See id.*

[66] *Id.* at 162.

[67] *Id*. The court did not take up the issue that the child is already adopted by a same-sex couple and therefore is already being reared within a freely severable relationship. Even if the court is correct about the lack of stability in these relationships, it did not clarify how further withholding a birth certificate from a child whose family relationship is already so tenuous in any way furthers the interest of *the particular* adopted child.

[68] *See* Adar v. Smith, 591 F. Supp. 2d 857, 862 (E.D. LA 2008), *rev'd en banc*, 639 F.3d 146 (5th Cir. 2011), *cert. denied*, No. 11-46, 2011 U.S. Lexis 7300.

[69] *See Adar*, 639 F.3d at 183 (Haynes, dissenting).

[70] *See* Finstuen v. Edmondson, 497 F. Supp. 2d 1295 (W.D. Okla. 2006), *aff'd in part, rev'd in part,* Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007).

[71] *See id.*

[72] *See id.* at 1315. In a very precise analysis, the court found the Oklahoma statute not to be a facial classification implicating homosexuals. Instead the court rested its analysis on the statute's discriminatory purpose. The court found the statute has a "disparate impact on homosexual individuals as they are more likely to be same-sex parents seeking recognition of their adoption." *Id.* at 1310.

[73] Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 29 (1945).

[74] U.S. Const. art. 4, §1.

[75] Baker *ex rel.* Thomas v. Gen. Motors Corp., 522 U.S. 222, 232 (1988).

[76] *Id.* at 232 (quoting Milwaukee Cnty., v. M.E. White Co., 296 U.S. 268, 277 (1935)).

[77] Estin v. Estin, 334 U.S. 541, 545–46 (1948).

[78] Jackson, *supra* note 72, at 33.

[79] *See, e.g.,* Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488, 494 (2003) ("The full faith and credit command 'is exacting' with respect to a final judgment rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, but is less demanding with respect to choice of laws." (quoting Baker v. General Motors Corp. 522 U.S. 222, 223 (1997))).

[80] *See Baker*, 522 U.S. at 232.

[81] *See id.* at 233.

[82] *See id. at 232; see also Estin*, 334 U.S. at 546 (In a divorce action, Full Faith and Credit Clause "ordered submission … even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."); Sherrer v. Sherrer, 334 U.S. 343, 355 (1948) ("If in [the Full Faith and Credit Clause's] application local policy must at times be required to give way, such is part of the price of our federal system.").

[83] *Baker*, 522 U.S. at 235.

[84] *See id.*

[85] *Id.*

[86] *Id.*

[87] *See* 599 F.3d 574 (7th Cir. 2010).

[88] *See id.* at 575.

[89] *See id.*

[90] *See id*.

[91] *See id*.

[92] *See id.* at 576.

[93] *Id.*

[94] *See id*. at 576–77.

[95] *Id.* at 577.

[96] *Id.*

[97] *See* Jackson, *supra* note 72, at 27.

[98] *Id.* at 24.

[99] *Id*. at 27.

[100] *See* Okla. Stat. Ann. tit. 10, §7502–1.4(A) (2011) (The statute reads in relevant part, "[t]he rights and obligations of the parties …shall be determined as though the decree, judgment, or final order were issued by a court of this state. Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.")

[101] *See* Finstuen v. Krutcher, 496 F.3d 1139, 1142 (10th Cir. 2007).

[102] *See id.*

[103] *See id.*

[104] *See id.*

[105] *See id.*

[106] *See* Okla. Stat. Ann. tit. 10, §7502–1.4(A) (2011) (The statute reads in relevant part, "[t]he rights and obligations of the parties …shall be determined as though the decree, judgment, or final order were issued by a court of this state. Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.").

[107] *See Finstuen,* 496 F.3d at 1143.

[108] *See id.* at 1142.

[109] *See id.* at 1145.

[110] *See id.* at 1145.

[111] *See id.*

[112] *See id.*

[113] *See id.* at 1145.

[114] *See id.*

[115] Though only the Doels had standing on these facts, the author intentionally named the facts of each of the petitioners as an illustration of the complexity and diversity of families even among adopted children of same-sex couples.

[116] *Finstuen,* 496 F.3d at 1151–52.

[117] *See id.* at 1153.

[118] *See id.* at 1152.

[119] *Id.* at 1153. (quoting Baker *ex rel.* Thomas v. Gen. Motors Corp., 522 U.S. 222, 233 (1988)).

[120] *Id.*

[121] *Id*. at 1154. While arguably legally permissible on these facts, the vital statistics and public health complications to such a holding would still exist. *See* discussion *infra* Part V.

[122] Okla. Stat. Ann. tit. 10, § 7505-6.6 (2011).

[123] *See Finstuen*, 496 F.3d at 1154.

[124] *See* Adar v. Smith, 639 F.3d 146, 149 (5th Cir. 2011).

[125] *See id.*

[126] *See id*. at 157 (stating "[a]bsent an independent source of jurisdiction over such claims, federal district courts may not hear such cases").

[127] *Id.* at 156.

[128] *See id*. at 154. The Fifth Circuit has identified the Full Faith and Credit Clause as imposing a rule of decision on state courts only and not as an individual right. The court notes that even when the Supreme Court refers to the clause in terms of individual rights, it does so only when the violators of that right are state courts. The court therefore asserts that a Section 1983 action is improperly brought.

[129] *See id*. at 158.

[130] *Id.* at 158–59.

[131] *Id.* at 159.

[132] *See id.*

[133] Baker *ex rel.* Thomas v. Gen. Motors Corp., 522 U.S. 222, 239 (1988).

[134] *Adar*, 639 F.3d at 161.

[135] For a detailed account of the precedent and policy arguments, *see generally* Brief of Dean Erwin Chemerinsky et al. as Amici Curiae Supporting Petitioners, Adar v. Smith, 639 F.3d 146 (2011) (No. 11-46).

[136] *See* Thompson v. Thompson, 484 U.S. 174, 183 (1988).

[137] *See* Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007) (allowing Section 1983 action for Full Faith and Credit Claims against state actors to be adjudicated on the merits); Rosin v. Monken, 599 F.3d 574 (7th Cir. 2010) (same); Farm Workers v. Ariz. Agric. Emp't Relations Bd., 669 F.2d 1249 (9th Cir. 1982) (same).

[138] *See* 42. U.S.C. §1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state … subjects … any citizen of the United States or other person within the jurisdiction … to the deprivation of any rights … secured by the Constitution … shall be liable to the party injured in an action at law ….").

[139] *Thompson*, 484 U.S. at 181. Custody determinations are not final because they are subject to be modified and ultimately they are not judgments.

[140] *Id*. at 183.

[141] *See id.* at 183–84.

[142] *See* Adar v. Smith, 639 F. 3d 146, 170 (5th Cir. 2011) (Haynes, dissenting).

[143] *Id.*

[144] *Id.* at 171.

[145] *See id*. at 171 n.21.

[146] *Id.* at 171.

[147] *See* Baker *ex rel.* Thomas v. Gen. Motors Corp., 522 U.S. 222, 233 (1988) ("For claim and issue preclusion (res judicata) purposes … the judgment of the rendering State gains nationwide force.").

[148] *See* Rhonda Wasserman, Article, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 Am. U. L. Rev. 1, 65 (2009).

[149] *See id. But cf.* Wardle, *supra* note 12, 587–88 (arguing that a third person might not be barred from challenging an adoption that is binding on the parties themselves and that state courts might be able to decline jurisdiction over the claim when it would violate the public policy of the forum.).

[150] *See* Finstuen v. Crutcher, 496 F.3d 1139, 1154-55 (10th Cir. 2007)

[151] *Id*. For an in depth assessment of this argument *see generally*, Wasserman, *supra* note 147, at 52–82.

[152] *See* 237 U.S. 611 (1915).

[153] *See id.* at 614.

[154] *See id.*

[155] *See id.* at 614–15.

[156] *Id.* at 615.

[157] *See* Adar v. Smith, 639 F.3d 146, 176–77 (5th Cir. 2011) ("Louisiana is not required to apply New York's birth certificate law or afford Appellees any rights granted to 'adoptive parents' by New York Law but Louisiana must maintain 'evenhanded control' of its own birth certificate law.").

[158] *See* La. Rev. Stat. Ann. §40:76(c) (2011) (appearing under Title 40, "Public Health and Safety", Chapter 2, "Vital Statistics Laws", Part 5, "Adoptions", the statute itself §40.76 is entitled, "Record of foreign adoptions").

[159] *Id.*

[160] *See* LA. Child. Code Ann. Art. 1221 (2011) ("A single person, eighteen years or older, or a married couple jointly may petition to privately adopt a child.").

[161] *See* La. Rev. Stat. Ann. §40:76(c) (2011).

[162] *See id.*

[163] Plan Int'l, Count Every Child: The Right to Birth Registration 37 (2009).

[164] *See* Office of Inspector Gen., Dep't of Health and Human Servs., *supra* note 53, at 6.

[165] *See id.*

[166] *See id.*

[167] *See* Castic *supra* note 46, at 3 (retelling of a true story of infant Quintin who, during a medical emergency, was delayed ambulance transportation because the paramedics could not believe that the child could have parents of the same sex).

[168] *See* United Nations Convention on the Rights of the Child, Nov. 20, 1989, *available at* http://www2.ohchr.org/english/law/pdf/crc.pdf. Article 7.1 "The child shall be registered immediately after birth and shall have the right from birth to a name ….''; Article 8.1 "State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."; Article 8.2 "Where a child is illegally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

[169] *See* Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for the United States Ratification of the United Nations Convention on the Rights of the Child,* 19 Harv. Hum. Rts. J. 161, 162 (2006).

[170] *See* UNICEF, Frequently Asked Questions, Convention on the Rights of the Child, http://www.unicef.org/crc/index_30229.html (last visited January 14, 2012) ("Only two countries, Somalia and the United States, have not ratified this celebrated agreement. Somalia is currently unable to proceed to ratification, as it has no recognized government. By signing the Convention, the United States has signaled its intention to ratify — but has yet to do so.").

[171] *See* Plan Int'l, *supra* note 162, at 7.

[172] *See id.* at 18–26.

[173] *See id.*

[174] *See id.* at 26.

[175] *Id.*

[176] *See* Alice M. Hetzel, U.S. Dep't of Health and Human Servs. Ctr. for Disease Control and Prevention, Nat'l Ctr. for Health Statistics, History and Org. of the Vital Statistics Sys., 44 (1997), *available at* http://www.cdc.gov/nchs/data/misc/usvss.pdf (last visited January 14, 2012) (citing Sir Arthur Newsholme, Evolution of Preventative Medicine, 113 (1927) ("It may truly be said that the early adoption of accurate registration of births and deaths was hastened by fear of cholera, and by the intelligent realization that one must know the localization as well as the number of the enemy to be fought.").

[177] *See Birth registration — giving every child their 'first right'*, EUROPEAN COMMISSION, (July 27, 2012), http://ec.europa.eu/europeaid/what/children-youth/features/birth-registration_en.htm.

[178] *See id.*

[179] *See* U.S. CONST. art. 1, §2 ("The actual Enumeration shall be made … every subsequent Term of ten Years, in such Manner as they shall by Law direct.").

[180] *See* HETZEL, *supra* note 175, at 44.

[181] *Id.*

[182] DIVISION OF VITAL STATISTICS, NATIONAL CENTER FOR HEALTH STATISTICS, REPORT OF THE PANEL TO EVALUATE THE U.S. STANDARD CERTIFICATES, 9 (November 2001), *available at* http://www.cdc.gov/nchs/data/dvs/panelreport_acc.pdf.

[183] HETZEL, *supra* note 175 at 26.

[184] *See id.* at 66 ("The Department of Health, Education, and Welfare is the Federal agency responsible for publishing national vital statistics, and for giving expression to the national interest in vital records.").

[185] *Id.* at 11.

[186] *Id.* at 55; MODEL STATE VITAL STATISTICS ACT AND REGULATIONS, §12 (1992) ("The State Registrar shall establish a new certificate of birth for a person born in this State when he or she receives … a certificate of adoption prepared and filed in accordance with the laws of another State …."), *available at* http://www.cdc.gov/nchs/data/misc/mvsact92b.pdf (last visited January 14, 2012).

[187] *See* MODEL STATE VITAL STATISTICS ACT AND REGULATIONS, preface (1992), *available at* hittp://www.cdc.gov/nchs/data/misc/mvsact92b.pdf (last visited Oct. 18, 2011).

[188] OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 53, at 2.

[189] *See* HETZEL, *supra* note 175, at 65. Currently there is no federal law that requires legal accuracy of birth certificates. Some states value the originality of the birth certificate more than its accuracy. Even the Model State Vital Statistics Act gives considerable discretion to the State Registrars. *See* MODEL STATE VITAL STATISTICS ACT AND REGULATIONS, *supra* note 186, at 27. Regarding amendments to birth certificates the Act states, "[t]he State Registrar shall evaluate the evidence submitted in support of any amendment, and when he or she finds reason to doubt its validity or adequacy, the amendment may be rejected and the applicant advised of the reasons for this action." The amount of discretion undermines one of the Act's goals, "to promote uniformity among States in definitions, registration practices … and in many other functions that comprise a State system of vital statistics." *Id.* at preface.

[190] *See id.* at 44 ("This historic accident, which makes the course of American vital statistics so different from that of countries where the function is national like the census, posed enormous difficulties, and undoubtedly slowed its development by many decades.")

[191] *Matthew* 19:14 (King James).

[192] Jackson, *supra* note 72, at 34.

[193] *See generally* About Identity Theft - Deter. Detect. Defend. Avoid ID Theft, http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html (last visited May 31, 2012) (discussing the pervasiveness of identity theft in the United States).

[194] *See supra* text accompanying note 9.

[195] *See* Adar v. Smith, 639 F.3d 146, 162 (5th Cir. 2011) ("Louisiana may rationally conclude that having parenthood focused on a married couple or single individual — not the freely severable relationship of unmarried partners — furthers the interest of adopted children.").

[196] The Supreme Court has not yet ruled on the constitutionality of DOMA, but the Court may hear a DOMA case in its 2013 session as a petition for certiorari has already been filed. *Massachusetts v. United States Dept. of Health & Human Services*, 682 F.3d 1 (1d Cir. 2012). There are currently several legal challenges to DOMA working their way through the courts. Most notably, the First Circuit found Section 3 of DOMA unconstitutional as a violation of equal protection. *Id.* at 17. In addition, other cases have received similar dispositions in federal district courts. *See Pederson v. Office of Pers. Mgmt.*, 2012 U.S. Dist. Lexis 106713 (D. Conn. July 21, 2012) (noting DOMA violates the Equal Protection Clause); *Accord Windsor v. United States*, 833 F.Supp. 2d, 394, 406 (S.D.N.Y. 2012) and *Golinski v. Office of Pers. Mgmt.,* 824 F.Supp 2d 968, 1003 (N. D. Cal 2012).

[197] Martin Luther King Jr., Speech at the Alabama State Capitol at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965) *available at* http://mlkkpp01.stanford.edu/index.php/encyclopedia/multimedia_contents.