School of Law
University of California, Davis

400 Mrak Hall Drive
Davis, CA 95616
530.752.0243
http://www.law.ucdavis.edu

UC Davis Legal Studies Research Paper Series

Research Paper No. 178
June 2009

Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond

Courtney G. Joslin

This paper can be downloaded without charge from
The Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract=1424535

Electronic copy available at: http://ssrn.com/abstract=1424535

Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond

COURTNEY G. JOSLIN*

In a number of recent cases, litigants have argued that states have the authority to disregard prior parentage adjudications when those determinations violate the forum's law and policy on lesbian and gay parenting. The Article offers two contributions to the analysis of these interstate parentage cases. The first contribution is doctrinal. Drawing upon recent legal scholarship about interstate recognition of adoption judgments, the Article demonstrates that other forms of parentage adjudications, including those made in the context of otherwise modifiable orders such as child custody and support orders, are entitled to exacting respect under the Full Faith and Credit Clause.

The second contribution is normative. Thus far, the scholarship on these interstate parentage cases has been limited largely to consideration of their implications for other same-sex parent families. Lesbian and gay parenting is not, however, the only area of parentage law where the states have adopted widely divergent rules based on moral or policy concerns. To the contrary, parentage has become an increasingly contested area of law. This Article seeks to fill the gap in the literature by considering the potential ripple effects of these same-sex parent cases in two other areas of parentage law—surrogacy and paternity disestablishment.

I. INTRODUCTION

After several years together as a committed same-sex couple, Lisa and Janet Miller-Jenkins had a child together.[1] Unfortunately, as is true for many

---

* Acting Professor of Law, University of California-Davis School of Law. I thank Afra Afsharipour, Keith Aoki, Katherine Florey, Joan Heifetz Hollinger, Lisa C. Ikemoto, Edward J. Imwinkelried, Maya Manian, Martha Matthews, Melissa Murray, and the participants at the University of Arizona, Rogers College of Law, Faculty Enrichment Forum for their helpful suggestions and comments. I am grateful to UC Davis School of Law for providing generous financial support for this project and to the library staff at the UC Davis School of Law for their assistance. Julia S. Lin and Darius Pazirandeh provided invaluable editing and research assistance. The word "disharmony" in the title is borrowed from Professor Helene S. Shapo's article: *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465 (2006).

[1] This description is based on the facts of Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 955–57 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007), and the related Virginia proceedings, Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. Ct. App. 2006). *See also infra* Part II.B.

Electronic copy available at: http://ssrn.com/abstract=1424535

couples, their relationship did not last. At the time of their separation, the couple resided in Vermont, a jurisdiction that supported and embraced lesbian and gay couples and their families. In the initial proceeding to dissolve the parties' civil union, a Vermont court applying Vermont law concluded that both women were legal parents and allocated custody between the two of them. Time passed, and Lisa, the child's genetic parent, decided that she did not like this arrangement. In fact, Lisa concluded that she did not want Janet to have any contact with their child. To this end, Lisa filed a second action, this time in Virginia. Lisa asked the Virginia court to declare that she was the child's only legal parent. The court did not need to respect or defer to the prior Vermont order, she argued, because the Vermont court's conclusion that Janet was a parent was inconsistent with Virginia law and public policy, which was hostile towards lesbian and gay couples and lesbian and gay parenting.

Lisa Miller-Jenkins is not the first parent who sought to avoid an unfavorable child custody or support order by trying again in another state. This type of conduct—famously referred to by Justice Jackson as a "rule of seize-and-run"[2]—was rampant through much of the twentieth century.[3] Under this legal regime, parents unhappy with the custody or support order of one court would seize their children, take them to another state, and relitigate the issue, hoping the second jurisdiction's court would give them the result they wanted. This behavior was fueled by confusion and conflict over whether child custody and support orders were entitled to respect under the Full Faith and Credit Clause of the Constitution. As interpreted by the Supreme Court, the Full Faith and Credit Clause requires states to respect and enforce judgments issued by the courts of other states. Moreover, as applied to judgments, the requirement of full faith and credit is exacting, that is, there is no "roving 'public policy exception' to the full faith and credit due *judgments*."[4] Some courts concluded, however, that child custody and support orders fell outside this mandate of exacting recognition and respect. This was true, they reasoned, because child custody and support orders were inherently modifiable and, therefore, were not final judgments.[5] Courts adhering to this position held that they were free to reconsider child custody

---

[2] May v. Anderson, 345 U.S. 528, 542 (1953) (Jackson, J., dissenting).

[3] *See, e.g.*, Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction*, 58 LA. L. REV. 449, 463 (1998).

[4] Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

[5] Thompson v. Thompson, 484 U.S. 174, 180 (1988) ("[C]ustody orders characteristically are subject to modification as required by the best interests of the child. As a consequence, some courts doubted whether custody orders were sufficiently "final" to trigger full faith and credit requirements . . . .").

Electronic copy available at: http://ssrn.com/abstract=1424535

or support questions anew without regard to what the court of another state had previously concluded.

Recognizing the severe harms caused by this "seize-and-run" conduct, Congress and state legislatures eventually intervened to curb this destructive behavior. Starting in the late 1960s, the states and Congress passed a series of statutory schemes intended to ensure that orders about children would be enforced even as the children moved about the country.[6] Despite these efforts, there has been a recent revival of this seize-and-run behavior in a number of cases involving children born to and raised by same-sex couples.

What has prompted this new wave of interjurisdictional battles over children? As the story of Lisa and Janet Miller-Jenkins suggests, the legal treatment of lesbian and gay couples and their children varies dramatically state to state. Some states accord comprehensive protections to these families.[7] Other states have gone in the opposite direction.[8] A number of litigants, including Lisa Miller-Jenkins, have sought to capitalize on this wide and expanding gulf in legal treatment by urging courts to depart from the now-clear rules requiring states to enforce out-of-state orders about children when the orders violate the forum's strong public policy on lesbian and gay parenting; that is to create a public policy exception.

Although hardly a new phenomenon, these recent interjurisdictional conflicts differ from the cases that initially prompted Congress and the states to act in an important and profound respect. The parents to whom Justice Jackson referred sought to get the court of a second state to issue a more favorable allocation of custody or visitation. In sharp contrast, in this new wave of same-sex parent cases, the litigants seek to persuade a court to declare that a person previously held to be a parent by the court of another state is, in fact, not a parent at all. Absent a legally recognized parent-child relationship, children may have no right to maintain a relationship with a functional parent.[9] Without a legally recognized relationship, children also may be denied a host of financial protections, such as social security and

---

[6] *See infra* Part II.C.

[7] *See, e.g.*, NAT'L CTR. FOR LESBIAN RTS., MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: AN OVERVIEW OF RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE UNITED STATES 8–12 (2008), *available at* http://www.nclrights.org/site/DocServer/marriage_equality0905.pdf?docID=881 (describing states that permit same-sex couples to enter into legally recognized relationships).

[8] *See, e.g.*, American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 397–403 (2004) [hereinafter *ABA White Paper*] (describing state "defense of marriage" statutes).

[9] *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991).

other governmental benefits.[10] Thus, in addition to placing children at risk of being subjected to repeated and often increasingly hostile litigation, these cases also place children at risk of losing vital emotional and financial protections.

This Article makes both a doctrinal and a normative argument. A number of other scholars have carefully explained why adoptions judgments—including adoptions by lesbian and gay couples—are entitled to exacting full faith and credit as a matter of constitutional law and, therefore, must be respected and enforced by other states even if they violate the public policy of the second state.[11] The first contribution of the Article is to demonstrate why other types of parentage adjudications, including those made in the context of otherwise modifiable orders like child custody and support orders, are likewise entitled to exacting full faith and credit under the Constitution.[12] As noted above, prior to the involvement of the federal and state legislatures, some courts concluded that child custody and support orders fell outside the scope of the Full Faith and Credit Clause. This was true, they reasoned, because allocations of custody and support are determinations that are inherently modifiable. By contrast, even when made in the context of a custody or support proceeding, a judicial determination of a child's legal parentage is intended to be a final status determination, challengeable only through direct appeal or pursuant to the rules governing collateral attacks. As such, parentage adjudications are entitled to exacting recognition and respect in sister states as a matter of constitutional law.

The Article also makes a normative point. A rule permitting courts to disregard prior out-of-state parentage determinations that violate the forum's law and public policy would have profound consequences for children born

---

[10] *See, e.g.*, *ABA White Paper*, *supra* note 8, at 361–62.

[11] *See, e.g.*, Rhonda Wasserman, *Are You* Still *My Mother? Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1, 26–27 (2008). *See generally* Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751 (2003); Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples From Other States*, 40 TULSA L. REV. 467 (2005).

[12] In this Article, I address only issues related to interstate recognition and enforcement of prior judicial determinations of parental status. The Article does not consider the important but distinct legal issue of whether a person who is considered a parent under the law of a particular state but who has not obtained a judicial determination of that status must be treated as a parent by other states. For further discussion and analysis of that issue, see, e.g., Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004), and Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299 (2001).

to same-sex couples. However, these children would not be the only children significantly disadvantaged by such a rule. Historically, state parentage rules were fairly uniform.[13] Thus, while there might have been reasons to ask the court of another state to readjudicate the custody or support allocation, there was little incentive to ask that court to reconsider the underlying parentage determination. Recently, though, a number of technological developments—including the advent and widespread availability of reproductive technologies and genetic testing—have forced courts and policymakers to grapple with these traditional rules and to consider whether and under what circumstances genetics should be trumped by conduct or intention.[14] The conclusions that courts and state legislatures have reached on these controversial questions have not been uniform.[15] The Article examines two areas of parentage law in which the states are struggling with the relative importance of genetics, function, and intention: surrogacy and paternity disestablishment.[16] In both areas, the state responses have produced a varied patchwork of inconsistent positions. Some states permit surrogacy arrangements.[17] Other states prohibit surrogacy. A few states are so opposed to surrogacy that they impose civil or criminal penalties on parties involved

---

[13] June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005) (noting that in 2000 she thought "parenthood was a settled category").

[14] *See, e.g.*, David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125 (2006).

[15] While I do have strong opinions about the relative weight and importance that genetics and function or intention should play in assigning parentage, I do not take a position on that debate in this Article. Rather, my focus here is to address the question of how parentage adjudications, once made, should be treated by other states. I recognize that my argument—that a final adjudication of parentage should be entitled to exacting full faith and credit—would apply equally to initial parentage adjudications with which I do not agree as a substantive matter.

[16] It should be noted that surrogacy and paternity disestablishment are included here as examples, not as an exhaustive list of other areas of parentage law in which the states are moving in different directions. Other such areas of parentage law include, but are not limited to: the legal status of sperm providers; the legal status of functional parents; and the legal parentage of posthumously conceived children.

[17] *See, e.g.*, FLA. STAT. ANN. § 742.11–742.17 (West 2005); 750 ILL. COMP. STAT. ANN. 47/1–47/75 (West 2005); NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2004); N.H. REV. STAT. ANN. §§168-B:1–B:32 (LexisNexis 2001); TEX. FAM. CODE ANN. § 160.751–763 (Supp. 2005); UTAH CODE ANN. § 78B-15-801–809 (Supp. 2008); VA. CODE ANN. § 20-156–165 (LexisNexis 2004); WASH. REV. CODE § 26.26.210–260 (West 2005).

in surrogacy arrangements.[18] States also have staked out a variety of positions with respect to the question of whether and under what circumstances evidence of a lack of genetic connection can be used to challenge a prior presumption or adjudication of parentage. Some states strictly limit the use of genetic evidence.[19] Other states permit prior determinations of parentage to be set aside based on genetic evidence, regardless of the level and depth of the parent-child relationship.[20] Moreover, as is true with regard to lesbian and gay parenting, the positions that states have staked out on these questions are often deeply held and rooted in moral and policy concerns.

While some scholars have written about interstate recognition issues as they relate to same-sex parent families,[21] and others have examined the increasingly contested nature of parentage,[22] the overlap between these two issues has remained largely unexplored. This Article fills that gap in the literature by exploring the potential ripple effects of the same-sex parent cases; the Article critically evaluates how a "public policy exception" could play out in the two areas of surrogacy and paternity disestablishment.

Part II describes the historical background of the case law and legislative developments regarding the enforceability of out-of-state orders about children, including child custody and support orders. This Part describes the circumstances that prompted the state and federal governments to intervene initially and provides an overview of the state and federal statutes enacted to ensure family stability and to protect children from interjurisdictional competition and conflict. Part III turns to the recent wave of interjurisdictional custody actions involving children born to same-sex couples. This Part contains an overview of the rules governing the parentage of children born to same-sex couples, demonstrating that there is an increasingly wide gulf in the states' legal treatment of these children. It then examines two recent cases that illustrate how litigants have sought to capitalize on these stark differences in state law and policy as a means of

---

[18] *See, e.g.*, D.C. CODE § 16-402(b) (2001); MICH. COMP. LAWS ANN. § 722.859 (West 2002); N.Y. DOM. REL. LAW § 123(b) (McKinney 1999).

[19] *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-607 (Supp. 2004).

[20] *See, e.g.*, ALA. CODE § 26-17A-1 (LexisNexis Supp. 2005); ARK. CODE ANN. § 9-10-115(e) (Supp. 2005).

[21] *See generally* Cox, *supra* note 11; Spector, *supra* note 11; Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561 (2005); Wasserman, *supra* note 11.

[22] *See, e.g.*, Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347 (2008); Meyer, *supra* note 14; Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465 (2006).

urging courts to create an exception to the now-established mandate of interstate recognition for orders about children. Part IV argues, as a doctrinal matter, that prior determinations of parental status are entitled to exacting full faith and credit in other states. Part V supports this doctrinal point with a normative consideration—namely, the broader potential ramifications of a "public policy exception" beyond the limited context of same-sex parent families. Specifically, this Part explores two other areas of parentage law—surrogacy and paternity disestablishment—in which the states are moving in different and at times conflicting directions. After reviewing the widely divergent approaches to surrogacy and paternity disestablishment, the Part considers what has heretofore been underdeveloped—that is how the manipulative interjurisdictional strategies employed in the same-sex parent cases threaten the stability of a wide range of family configurations.

II. INTERSTATE RECOGNITION OF ORDERS ABOUT CHILDREN: A BRIEF OVERVIEW

This Part considers the relevant background law and history regarding interstate recognition of orders about children. This background information is necessary not only to understand the current law governing interstate recognition of orders about children, but also because it provides an important historical context for the discussion that follows. As described below, the recent wave of interjurisdictional child custody actions between former-same sex partners are not the first cases in which disgruntled parents sought "their luck in the court of a distant state where they hope[d] to find—and often d[id] find—a more sympathetic ear."[23] To the contrary, due in part to a series of Supreme Court decisions declining to clarify whether orders about children were entitled to full faith and credit in other states, such conduct was rampant.[24] In recognition of the harm this conduct caused to the children at the center of these battles, both Congress and the states passed a series of statutory schemes intended to curb this behavior and ensure that children and their parents had security even as they moved about the country.

---

[23] UNIF. CHILD CUSTODY JURISDICTION ACT (UCCJA), prefatory note (1968), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/uccja68.htm.

[24] Brigette Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1216 (1969) (noting that the "rule of seize and run" was "indeed rampant"). *See* Thompson v. Thompson, 484 U.S. 174, 181 (noting that in 1980 it was estimated that "between 25,000 and 100,000 children were kidnaped [sic] by parents who had been unable to obtain custody in a legal forum").

A. *The Full Faith and Credit Clause*

An important starting point with regard to any interstate recognition question is the Full Faith and Credit Clause of the federal Constitution. The Full Faith and Credit Clause 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."[25] As the Court has explained,

> [t]he animating purpose of the full faith and credit command . . . 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 throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.[26]

The Clause seeks to balance two goals—enabling the states to develop their own laws and policies while, at the same time, "prevent[ing] rivalry among the states and . . . guard[ing] against parochialism and protectionism by individual states."[27]

The Court's interpretation of the Clause reflects these twin goals. Although the text of the Clause does not suggest or require this interpretation, the Supreme Court has held that the Clause applies differently to public acts or statutes than it does to judgments.[28] With regard to statutes, the Supreme Court has held that courts are not required to apply the laws of other states and that they can decline to do so when that law is inconsistent

---

[25] U.S. CONST. art. IV, § 1. Under its authority to enforce the Full Faith and Credit Clause, Congress passed the Full Faith and Credit Act. 28 U.S.C. § 1738 (2000) ("Such Acts, records and judicial proceedings [of any State, Territory, or Possession of the United States] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.").

[26] Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 232 (1998) (citations omitted).

[27] Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 891 (2004). *See also* Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 935 (2006) ("Case law makes clear, however, that the Clause aims not only at unifying the states, but also at ensuring that the states remain meaningfully empowered, distinct polities.").

[28] *See, e.g.*, Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 470 (2005).

with the public policy of the forum.[29] By contrast, the Court has held that for judgments, the requirement of full faith and credit is exacting; there is no "public policy exception."[30] The Court explained:

> Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. . . . The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Regarding judgments, however, 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.[31]

What this means in practice is that once a judgment has been issued by the court of one state, it must be given the same effect in sister states that it is due in the initial decree state.[32] To the extent a judgment is immune from collateral attack in the initial decree state, it is also immune from collateral attack in the forum. This is true, moreover, even if the judgment is inconsistent with the law and public policy of the second state.[33]

---

[29] *See, e.g.*, Cox, *supra* note 11, at 761.

[30] *Baker*, 522 U.S. at 233 ("[O]ur decisions support no roving 'public policy exception' to the full faith and credit due *judgments*.") (emphasis in original). There are, however, some exceptions to this rule, including, for example, where the initial decree court lacked fundamental subject matter jurisdiction. *See, e.g.*, Wasserman, *supra* note 11, at 68–80.

[31] *Baker*, 522 U.S. at 232–33.

[32] *See, e.g.*, Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 841 (2003) (noting that the "same effects" rule is required under the Full Faith and Credit Clause and under its implementing statute). "Essentially, the 'same effect' rule requires a reference to the res judicata law of the judgment-rendering state in order to determine the effect that another state must give to the judgment." *Id.* at 841. *See also* Durfee v. Duke, 375 U.S. 106, 109 (1963) (providing that the forum state must "give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it").

[33] It is important to note that because marriages do not involve or result from court proceedings, most scholars agree that Full Faith and Credit Clause does not require states to recognize out-of-state marriages. *See, e.g.*, Whitten, *supra* note 28, at 486 ("I believe that there is . . . a consensus that the Full Faith and Credit Clause as currently interpreted does not require states to give effect to same-sex marriages performed in other states."). The issue of interstate recognition of marriage is beyond the scope of this Article.

B. *A Rule of "Seize and Run"*

As noted above, the Supreme Court has clarified that judgments are entitled to exacting recognition in sister states. Some courts and scholars have asserted that this exacting full faith and credit is due only to "final" judgments.[34] Since child custody and support orders are orders that by their very nature are modifiable, some courts reasoned that they were not "final judgments" within the meaning of the Full Faith and Credit Clause and, therefore, that they were not entitled to exacting recognition and respect in other states.[35] For example, the Arizona Supreme Court explained: "A custody decree precludes, by its very nature, that degree of permanence and finality requisite for a strict application of the full faith and credit clause."[36] Confusion about the level of respect due child custody and support orders persisted, in part, because the United States Supreme Court never definitively resolved this issue.[37] In a series of cases, the Court carefully avoided deciding whether child custody or support orders were entitled to recognition and respect under the Full Faith and Credit Clause.[38]

---

[34] Sack, *supra* note 27, at 857 (citing EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 24.8, at 1153–54 (3d ed. 2000)). Others, however, have disputed this claim. For example, in *Barber v. Barber*, Justice Jackson stated: "Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or, for that matter, about any judgments. Both require that full faith and credit be given to 'judicial proceedings' without limitation as to finality." Barber v. Barber, 323 U.S. 77, 87 (1944) (Jackson, J., concurring).

[35] *See, e.g.*, Pennsylvania *ex rel* Thomas v. Gillard, 198 A.2d 377, 379 (Pa. Super. Ct. 1964) (concluding that the court was not bound by an out-of-state custody order because custody orders are "temporary in nature and subject to modification by changing conditions"); Thompson v. Thompson, 484 U.S. 174, 180 (1988) (noting that because "custody orders characteristically are subject to modification as required by the best interests of the child . . . some courts doubted whether custody orders were sufficiently 'final' to trigger full faith and credit requirements").

[36] *In re* Guardianship of Rodgers, 413 P.2d 744, 746 (Ariz. 1966).

[37] Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 339 (1986).

[38] In *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615 (1947), for example, the United States Supreme Court held that a New York court could modify a Florida custody order. In reaching this conclusion, however, the Court avoided clarifying the level of credit due child custody orders by reasoning that, even assuming the order was entitled to enforcement under the Clause, the New York court was still entitled to modify the decree to the same extent a Florida court could. In a subsequent case, *May v. Anderson*, 345 U.S. 528, 528–29 (1953), the Court again avoided answering the underlying question of whether custody orders were entitled to full faith and credit by holding that the order was not enforceable in the second state because it had been obtained ex parte and without personal jurisdiction over one of the parents. In two subsequent cases, the Court again

As a result, courts in some states took the position that they were not bound by the orders of other courts and could, instead, engage in a de novo custody or support determination without regard to the conclusion of the first court. For example, in *Fox v. Fox*,[39] a Florida appellate court held that Florida courts not only had the authority but actually had a *duty* to make an independent custody determination, notwithstanding the adjudication of that issue by the court of another state.[40]

Encouraged by such decisions, some parents engaged in what Justice Jackson famously described as "seize-and-run"[41] tactics: if the parent was unhappy with the first court's custody or support allocation, the parent would move the child to a different state and initiate a new action, hoping for a better result the second time around.[42] Child advocates realized this type of conduct—abruptly uprooting children from their homes and communities and subjecting them to repeated and often increasingly hostile litigation—was extremely harmful to the children involved. The drafters from the

---

ducked the issue. Specifically, in *Ford v. Ford*, 371 U.S. 187, 192 (1962), the Court held that it "need not reach that question" because the custody order would not have been binding in the issuing state. In the next case, *Kovacs v. Brewer*, 356 U.S. 604, 607 (1958), the Court explained that it should "postpone deciding [that question] as long as a reasonable alternative exists," and again decided the case on alternative grounds.

[39] 179 So.2d 103 (Dist. Ct. App. 1965). *See also* Pennsylvania *ex rel.* Thomas, 198 A.2d at 379 (concluding that a Pennsylvania court could "exercise its independent judgment on the same facts that determined the foreign state's order").

[40] *Fox*, 179 So.2d at 104 ("[W]hen a court of this state has jurisdiction . . . [in] a contest relating to their custody, notwithstanding a final order conferring custody of the one or the other may have been made in a foreign state . . . it is the duty of the court to decide the issue as to custody on its merits.").

[41] In his dissent in *May*, Justice Jackson commented that the Court's failure to hold that courts were required to recognize and enforce out-of-state custody orders "seem[ed] to reduce the law of custody to a rule of seize-and-run." *May*, 345 U.S. at 542 (Jackson, J., dissenting).

[42] As Congress explained, these and similar decisions prompted "[p]arties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, [and] obtaining . . . conflicting orders by the courts of various jurisdictions . . . ." Parental Kidnaping [sic] Prevention Act of 1980, Pub. L. No. 96-611, § 7(a)(3), 94 Stat. 3566, 3568–69 (codified as amended at 28 U.S.C. § 1738A (2000) (Congressional Findings and Declaration of Purpose)).

Similarly, the Reporters of the Uniform Child Custody Jurisdiction Act (UCCJA) explained, "It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in the court of a distant state where they hope to find—and often do find—a more sympathetic ear for their plea for custody." UNIF. CHILD CUSTODY JURISDICTION ACT, prefatory note (1968), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/uccja68.htm.

National Conference of Commissioners on Uniform State Law (NCCUSL) explained in 1968:

> It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection. A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.[43]

More recent research on child development has confirmed these intuitions. Social science has confirmed that continuity and stability are important for children's emotional and physical well-being.[44] Research also confirms that the emotional and psychological difficulties children experience as a result of family dissolution are exacerbated when the children are at the center of acrimonious and extended litigation between their parents.[45] Moreover, rules that permit or reward repeated litigation can be

---

[43] UNIF. CHILD CUSTODY JURISDICTION ACT (UCCJA), prefatory note (1968), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/uccja68.htm. *See also* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31–34, 37–39 (1973) (describing potential negative effects of lack of stability on children); Andrew S. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 71 (1969) (explaining that stability of environment is important to children's development).

[44] Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 428 (2008) (noting that children thrive when they have "the security of a primary attachment figure and consistent routines"). *See also id.* at 420 n.3 ("Continuity of care and routines also promote the well-being of children.").

[45] ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 205 (1994) ("Numerous experimental and field studies point to the detrimental role of parental conflict, particularly conflict that is extended, open, angry, unresolved, and involves the child.") (citations omitted). *See also* Janet R. Johnson, Roberto Gonzalez, & Linda E.G. Campbell, *Ongoing Postdivorce Conflict and Child Disturbance*, 15 J. OF ABNORMAL CHILD PSYCH. 493, 504 (1987) (noting that children who are at the "centerpiece of the parental dispute" may be harmed in a "unique manner"); Joan B. Kelly, *Children's Adjustment in Conflict Marriage and Divorce: A Decade Review of Research*, 39 J. AM. ACAD. OF CHILD & ADOLES. PSYCH. 963, 970 (2000) ("Adolescents who are caught in the middle of their parents' disputes after divorce are more poorly adjusted than those whose parents have conflict but do not use their children to express their disputes.").

particularly harmful. Studies confirm that the longer the duration of the conflict, the greater the psychological problems the children encounter.[46]

C. *The Legislative Response*

Both the states and the federal government took steps to deter these harmful interstate controversies. On the federal level, in 1980, Congress passed the Parental Kidnaping [sic] Prevention Act (PKPA).[47] The PKPA statutorily extends full faith and credit to child custody and visitation orders.[48] The Act provides, in relevant part, that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify except as [otherwise provided], any custody determination or visitation determination made consistently with the provisions of this section by a court of another State."[49] The PKPA also provides that a court may not exercise jurisdiction over a custody or visitation action if the court of another state is already properly adjudicating that issue.[50] As stated in the Congressional Findings and Declaration of Purpose, the goals of the PKPA are to:

> [F]acilitate the enforcement of custody and visitation decrees of sister States; . . . discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child; . . . [and] avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation

---

[46] Catherine C. Ayoub, Robin M. Deutsch, & Andronicki Maraganore, *Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM. & CONCILIATION COURTS REV. 297, 299 (1999) ("More specifically, research has shown that as the level of interparental conflict increases, the number of emotional and behavioral difficulties that children exhibit also increase . . . . The duration of conflict has been found to be associated with the child's emotional and behavioral reaction.") (citations omitted).

[47] Parental Kidnaping Prevention Act, Pub. L. No. 96-611, § 8(a), 94 Stat. 3569 (1980) (codified as amended at 28 U.S.C. § 1738A (1988)).

[48] 28 U.S.C. § 1738A (2000).

[49] *Id.* at § 1738A(a).

[50] *Id.* at § 1738A(g) ("A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.").

> which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being . . . .[51]

Congress also took action on the child support front. In 1988, Congress created the U.S. Commission on Interstate Child Support.[52] The Commission's mandate was to make recommendations to improve the enforcement of out-of-state child support orders.[53] As the Commission explained, at the time, "the easiest way to avoid paying child support was to leave the state in which you were ordered to pay support."[54] In 1994, based on one of the Commission's recommendations, Congress passed the Full Faith and Credit for Child Support Orders Act of 1994 (FFCCSOA).[55] The FFCCSOA requires recognition and enforcement of out-of-state child support orders.[56] The act also governs a court's ability to modify a child support order issued by the court of another state.[57]

On the state level, by 1983, all fifty states had adopted the Uniform Child Custody Jurisdiction Act (UCCJA).[58] The UCCJA was promulgated for adoption by the states by NCCUSL in 1968.[59] Like the PKPA, the UCCJA was intended to "bring some semblance of order into the existing chaos"[60] of child custody litigation by, among other things, providing for the recognition

---

[51] Parental Kidnaping Prevention Act, Pub. L. No. 96-611, § 7(c), 94 Stat. 3568, 3568–69 (1980).

[52] *See* Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541, 547 (1998).

[53] *See id*. (citing Margaret Campbell Haynes, *Supporting Our Children: A Blueprint for Reform*, 27 FAM. L.Q. 7, 8 (1993)).

[54] Patricia W. Hatamyar, *Interstate Establishment, Enforcement and Modification of Child Support Orders*, 25 OKLA. CITY U.L. REV. 511, 512 (2000) (quoting U.S. COMM'N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 4 (1992)).

[55] 28 U.S.C. § 1738B (2000). *See also* Estin, *supra* note 52, at 547.

[56] *Id.* at § 1738B(a)(1) (providing that "[t]he appropriate authorities of each State . . . shall enforce according to its terms a child support order made consistently with this section by a court of another State").

[57] *Id.* at § 1738B(a)(2) (providing that "[t]he appropriate authorities of each State . . . shall not seek or make a modification of such an order except [as otherwise provided]").

[58] Mark H. Kruger, *Jurisdiction Under the Uniform Child Custody Jurisdiction Act*, 44 J. MO. BAR 467, 470 (1988).

[59] Blakesley, *supra* note 37, at 297–98.

[60] UNIF. CHILD CUSTODY JURISDICTION ACT (UCCJA), prefatory note (1968), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/uccja68.htm.

and enforcement of out-of-state custody orders.[61] The UCCJA, like the PKPA, also provides that another state cannot exercise jurisdiction over a child custody proceeding if, at the time of the filing of the petition, a child custody proceeding is pending in the court of another state.[62] In 1997, NCCUSL promulgated a revised version of the UCCJA, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[63] The UCCJEA updates the UCCJA to make it more consistent with federal law and to refine various provisions that had been subject to conflicting interpretations.[64] NCCUSL also promulgated a uniform law regarding interstate enforcement of child support orders—the Uniform Interstate Family Support Act (UIFSA).[65] UIFSA provides for the enforcement and governs the modification of family support orders, including child support orders.[66]

III. SAME-SEX PARENT FAMILIES

Despite the efforts of the state and federal governments to discourage interstate jurisdictional fights over children, recently, there has been a revival of this seize-and-run behavior in a number of cases involving children born to and raised by same-sex couples. In order to understand the circumstances that prompted this new wave of interjurisdictional custody battles, it is necessary to examine the landscape regarding the legal treatment of these

---

[61] *See id.* at § 13.

[62] *Id.* at § 6(a).

[63] LINDA ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 3:01 (2004). *See generally* UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997). As of July 2008, forty-six states and the District of Columbia had enacted the UCCJEA. *See* NCCUSL, Fact Sheet on the UCCJEA, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp.

[64] Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 FAM. L.Q. 267, 268 (1998).

[65] UIFSA replaced two earlier uniform laws—the Uniform Reciprocal Enforcement of Support Act (URESA) and the Revised Uniform Reciprocal Enforcement of Support Act (RURESA). *See* UNIF. INTERSTATE FAMILY SUPPORT ACT, prefatory note (1996), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uifsa96.htm. The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) requires all states to adopt UIFSA or risk losing federal block grants. 42 U.S.C. § 666(f) (2000).

[66] UNIF. INTERSTATE FAMILY SUPPORT ACT § 207(a) (1996) ("If a proceeding is brought under this [Act] and only one tribunal has issued a child-support order, the order of that tribunal controls and must be so recognized."); *id.* at § 611 (providing that a court can only modify a registered child support order under certain, specified conditions).

children. This treatment varies dramatically state to state.[67] Aware of these often vast differences in law and policy positions,[68] in a number of recent cases former same-sex partners have urged courts to depart from now-established rules and to disregard prior out-of-state parentage determinations when those prior determinations are inconsistent with the public policy of the forum. Part II.A explores the evolution of the legal treatment of children born to same-sex couples. Part II.B uses two recent cases to illustrate how former same-sex partners have sought to capitalize on the often stark differences in state law and public policy.

A. *Disharmony Among the States*

In the past, when a same-sex couple had a child together through assisted reproduction, only the birth parent was considered a legal parent of the child.[69] Since the mid-1980s, a growing number of states have permitted the nonbirth same-sex partner to establish a legal parent-child relationship through a procedure known as a second parent adoption.[70] By contrast, appellate courts in three states have held that second parent adoptions are not permissible.[71] In addition, four other states—Arkansas,[72] Florida,[73]

---

[67] *See, e.g.*, Richard F. Storrow, *Rescuing Children From the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 339–41 (2006).

[68] Andrea Stone, *Drives to Ban Gay Adoption Heat Up*, USA TODAY, Feb. 21, 2006, at 1A ("Efforts to ban gays and lesbians from adopting children are emerging across the USA as a second front in the culture wars that began during the 2004 elections over same-sex marriage.").

[69] *See, e.g.*, Nancy S. v. Michele G., 279 Cal. Rptr. 212, 215 (Cal. Ct. App. 1991) (holding that because a former same-sex partner was not connected to the child through genetics, marriage, or adoption, she "could not establish the existence of a parent-child relationship"), *overruled by* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

[70] A second parent adoption is the process by which a person who is not related to the child through biology or marriage becomes the child's second legal parent without affecting the legal rights of the first parent. Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 934 (2000). Currently, thirteen states and the District of Columbia permit second-parent or joint adoptions either by statute or appellate court decision. *See, e.g.*, NATIONAL CENTER FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS, http://www.nclrights.org/site/DocServer/2PA_state_list.pdf?docID=3201. Advocates report that second parent adoptions have been granted at the trial court level in at least fifteen additional states. *Id.*

[71] Interest of Angel Lace M., 516 N.W.2d 678, 686 (Wis. 1994); *In re* Adoption of Doe, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998); *In re* Adoption of Luke, 640 N.W.2d 374, 383 (Neb. 2002).

Mississippi,[74] and Utah[75]—have statutory provisions that prevent either lesbian and gay individuals or couples from adopting. While the motivations for these court decisions and statutory developments vary, at least in some states, these judicial and legislative conclusions reflect an underlying policy position that lesbian and gay parenting is harmful or immoral. For example, Florida's adoption ban, was "enacted [in 1977] after an organized and relentless anti-homosexual campaign led by [conservative activist] Anita Bryant."[76] During the campaign, Bryant sought to invoke fear in voters by claiming that gay teachers were more likely to molest children.[77] These anti-gay sentiments persist. The State of Florida recently defended its adoption ban by arguing that precluding lesbian and gay people from adopting was "rationally related to a legitimate governmental interest in furthering public morality in the context of child rearing."[78]

In situations where the same-sex couple did not complete a second parent adoption, again state law varies as to whether the functional but non-genetic parent is entitled to any parental rights or obligations.[79] Courts in some states have applied common law or equitable doctrines to protect these functional parent-child relationships.[80] Under these doctrines, courts have recognized

---

[72] Arkansas Initiated Act 1, An Act Providing that an Individual who is Cohabitating Outside of a Valid Marriage May Not Adopt or be a Foster Parent of a Child Less Than Eighteen Years Old (January 1, 2009), *available at* http://www.sos.arkansas.gov/elections/elections_pdfs/proposed_amendments/2007-293_Adopt_or_Foster_parent.pdf (prohibiting a person from serving as adoptive or foster parents if he or she is "cohabiting with a sexual partner outside of a marriage which is valid under the constitution or laws of this state").

[73] FLA. STAT. ANN. § 63.042(3) (West 2005) (providing that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual").

[74] MISS. CODE ANN. § 93-17-3(5) (West 2005) (prohibiting adoptions by "couples of the same gender").

[75] UTAH CODE § 78B-6-117(3) (Supp. 2001) (prohibiting adoptions by persons living with nonmarital partners).

[76] Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275, 1301–02 (11th Cir. 2004) (Barkett, J., dissenting from denial of en banc review), *cert. denied sub nom.*, Lofton v. Sec'y, Fla. Dep't of Children & Families, 543 U.S. 1081 (2005).

[77] *Id.* at 1302 (citing *Battle Over Gay Rights*, NEWSWEEK, June 6, 1977, at 16).

[78] Brief of Appellees, Lofton v. Kearney, Sec'y of the Dep't of Child. & Fam., at *3 No. 01-16723-DD (11th Cir. July 1, 2002) 2002 WL 32868748.

[79] *See, e.g.*, Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 354–66 (2002) (analyzing equitable parentage cases); *see also* Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 254–63 (2000-2001).

[80] Jacobs, *supra* note 79, at 354–66; Velte, *supra* note 79, at 260; National Center

that a person who functioned as the child's parent with the consent of the legal parent is entitled to seek custody or visitation with the child[81] and may be responsible to support the child.[82] Other courts, however, have held that, in the absence of a genetic or adoptive connection to the child, a same-sex functional parent is a legal stranger to the child.[83]

The differences in state law on this issue have led to radically different results in cases with similar facts. For example, in *Jones v. Jones*,[84] a Pennsylvania intermediate appellate court affirmed a trial court decision granting primary physical custody of two children to a same-sex partner who was not connected to the children through either genetics or adoption, but who had functioned as the children's parent for many years. By contrast, in *In re C.M. v. C.H.*, a New York trial court held that a woman lacked standing to seek *any contact* with the child born to her former same-sex partner.[85] The court reached this conclusion despite the facts that the parties had jointly planned the birth of the child, that the woman was an adoptive parent to the couple's oldest child (and therefore was entitled to seek custody of that child on a best interest of the child standard), and that the couple had begun making plans to complete a second parent adoption for the younger child but had not completed it at the time the couple ended their relationship.[86]

---

for Lesbian Rights, *State by State List of Custody Cases Involving Same-Sex Partners*, *available at* http://www.nclrights.org/site/DocServer/states_custodycases.pdf?docID=1241.

[81] *See, e.g.*, Mason v. Dwinnell, 660 S.E.2d 58, 65 (N.C. Ct. App. 2008) (holding that a woman had standing to seek custody of the child born to her former partner through alternative insemination); *In re* Parentage of L.B., 122 P.3d 161, 163 (Wash. 2005), *cert. denied sub nom.*, Britain v. Carvin, 547 U.S. 1143 (2006) (holding that a lesbian co-parent had standing as de facto parent to seek custody of the child she raised with her former same-sex partner); *In re* Clifford K., 619 S.E.2d 138, 157 (W. Va. 2005) (holding that, in exceptional circumstances, a "psychological parent" has standing to intervene in a custody proceeding).

[82] *See, e.g.*, L.S.K. v. H.A.N., 813 A.2d 872, 874 (Pa. Super. Ct. 2002) (holding that a woman was responsible to support the children that she jointly planned for and parented with her former same-sex partner even though she was not biologically related to the children). *But see* T.F. v. B.L., 813 N.E.2d 1244, 1253 (Mass. 2004) (holding that a woman was not responsible to support the child born to her former same-sex partner where couple separated prior to birth of the child).

[83] *See, e.g.*, Janice M. v. Margaret K., 948 A.2d 73, 74 (Md. 2008) (holding that "de facto parenthood is not recognized in Maryland"); Stadter v. Siperko, 661 S.E.2d 494, 496 (Va. Ct. App. 2008) (declining to apply the doctrine of de facto parentage); Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991) (holding that a former same-sex partner lacked standing to seek visitation with the child she coparented).

[84] 884 A.2d 915, 916 (Pa. Super. Ct. 2005), *appeal denied*, 912 A.2d 838 (Pa. 2006).

[85] 789 N.Y.S.2d 393, 402 (N.Y. Sup. Ct. 2004).

[86] *Id.* at 396.

The gulf in legal treatment has widened ever farther in recent years. In the last decade, a small but growing number of states have extended comprehensive legal protections to same-sex couples. Two states—Massachusetts[87] and Connecticut[88]—permit same-sex couples to marry. Five additional states—California,[89] New Hampshire,[90] New Jersey,[91] Oregon,[92] and Vermont[93]— permit same-sex couples to enter into alternative statuses that that provide all or almost all of the state-conferred rights and responsibilities of marriage.[94] Among hundreds of other protections, same-sex couples in these comprehensive legal statuses are entitled to the same automatic parental rights and responsibilities with regard to a child born to the couple as are conferred on heterosexual married couples.[95] This means, for example, that where the parties in one of these relationships comply with any relevant statutory criteria, both women should be considered the legal

---

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

[88] Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 412 (Conn. 2008). On May 15, 2008, the California Supreme Court likewise held that excluding same-sex couples from marriage violated that State's Constitution. *In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008). As a result of the court's decision, same-sex couples began marrying in California on June 16, 2008. The marriages came to a halt, however, after the voters of California narrowly approved Proposition 8 on November 4, 2008. Proposition 8 amended the California Constitution to limit marriage to the union of one man and one woman. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008 at A1. Three lawsuits challenging the validity of Proposition 8 are pending before the California Supreme Court. Aurelio Rojas, *Gay Marriage Ban/Measure's LegalityCchallenged: High Court to Hear Prop. 8*, SACRAMENTO BEE at A1, Nov. 11, 2008, *available at* 2008 WLNR 22211979.

[89] CAL. FAM. CODE §§ 297–299.6 (West 2004 and Supp. 2007).

[90] N.H. REV. STAT. ANN. §§ 457-A:1 to A:8 (LexisNexis Supp. 2007).

[91] N.J. STAT. § 37:1-28 (West Supp. 2007).

[92] OR. REV. STAT. §§107.615, 192.842, 205.320, 409.300, 432.005, 432.235, 432.405, and 432.408 (2007).

[93] VT. STAT. ANN. tit. 15, §§ 1201–1206 (2002).

[94] In New Hampshire, New Jersey, and Vermont, the status available to same-sex couples is a civil union. In California and Oregon, the status that is available to same-sex couples is a registered domestic partnership. In addition to permitting same-sex couples to marry, Connecticut also allows same-sex couples to enter into civil unions. CONN. GEN. STAT. ANN. §§ 46b-38aa to 38pp (2008).

[95] *See, e.g.*, CAL. FAM. CODE § 297.5(d) (West 2004 & Supp. 2007) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."). *See also* CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-31(e) (West Supp. 2007); VT. STAT. ANN tit. 15, § 1204(f) (2002).

parents of children born to them through alternative insemination.[96] In stark contrast, many states have enacted statutory or constitutional provisions providing that the state will not recognize marriages, and in some states other legal relationships, between two people of the same sex.[97]

In sum, the legal treatment of same-sex-parent families varies, and at times varies dramatically, between and among the states, and the positions adopted by the states are often rooted in deeply-held moral and political beliefs about homosexuality generally and lesbian and gay parenting more specifically. For example, on the one hand, California permits same-sex partners to utilize the second parent adoption procedure;[98] permits registered domestic partners and same-sex married spouses to utilize the more streamlined stepparent adoption procedure;[99] recognizes that a person who has functioned as a child's parent may be a legal parent, regardless of that person's sex, sexual orientation, or marital status;[100] and provides that a child born through assisted reproduction to a lesbian couple married or registered as domestic partners is automatically the legal child of both partners.[101] These legal rules are based on strong state public policies that support and celebrate same-sex parent families.[102]

On the other end of the spectrum, there are states like Florida. Florida statutorily prohibits adoptions by lesbian and gay individuals;[103] does not permit a nonbiological same-sex functional parent to seek custody or

---

[96] *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 666 (Cal. 2005) (noting in dicta that children born to registered domestic partners will be considered the legal children of both partners); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970 (Vt. 2006) ("If Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial insemination. . . . Because of the equality of treatment of partners in civil unions, the same result applies to Lisa.") (citations omitted).

[97] *See* HUM. RTS. CAMPAIGN, *Statewide Marriage Prohibitions*, *available at* http://www.hrc.org/documents/marriage_prohibitions.pdf (last visited Mar. 9, 2009) (hereinafter STATEWIDE MARRIAGE PROHIBITIONS).

[98] Sharon S. v. Superior Court, 73 P.3d 554, 570 (Cal. 2003).

[99] CAL. FAM. CODE § 9000(a)–(b), (g) (West 2004).

[100] *Elisa B.*, 117 P.3d at 670.

[101] *Id.* at 666.

[102] *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 428 (Cal. 2008) (noting that California "recognize[s] that gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children."); Assemb. B. 205, 2003 Leg., Reg. Sess. § 1(b) (Cal. 2003) (finding that "[e]xpanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships").

[103] FLA. STAT. ANN. § 63.042(3) (West 2005) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

visitation with a child that she jointly planned and raised;[104] and has enacted a statutory provision that provides that the state will not recognize marriages between two people of the same sex entered into in other states.[105] These legal positions are the manifestation of the state's policy position that lesbian and gay parenting violates public morality.[106]

B. *Seize and Run Revisited*[107]

As the gulf among and between the states with regard to the legal treatment of same-sex co-parents has widened, so has the incentive to try to take advantage of these legal differences. This incentive has not been lost on litigants. In the past several years, there have been a number of cases in which parties have urged courts to disregard prior out-of-state parentage determinations with which they were unhappy. This section will provide an overview of two such cases.

The litigation between Lisa and Janet Miller-Jenkins provides a useful illustration of this behavior.[108] In December 2000, after being together a number of years, Lisa and Janet Miller-Jenkins traveled from their home in Virginia to Vermont to enter into a civil union.[109] After returning to their home in Virginia, the couple took steps to have a child together through assisted reproduction.[110] The insemination attempts were successful and the couple's child—IMJ—was born in April 2002.[111] Four months later, Lisa and Janet moved to Vermont so that they could live in a state that recognized

---

[104] *See, e.g.*, Kazmierazak v. Query, 736 So.2d 106, 110 (Fla. Dist. Ct. App. 1999); Music v. Rachford, 654 So.2d 1234,1235 (Fla. Dist. Ct. App. 1995).

[105] FLA. STAT. ANN. § 741.212 (West 2005). Forty-three other states also have provisions providing that the state will not recognize marriages between two people of the same sex. *See Statewide Marriage Prohibitions*, *supra* note 97, at 1.

[106] *See, e.g.*, Brief of Appellees at *3, Lofton v. Sec'y of the Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004) (No. 01-16723-DD).

[107] I use the phrase "seize and run" here to refer generally to attempts by a disgruntled parent to avoid an unfavorable child custody or support order by asking the court of another state to readjudicate the issue without regard to the what first court concluded. The cases described in this section do not involve situations in which the disgruntled parents literally kidnapped their children for the purpose of establishing jurisdiction in a second state.

[108] Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 974 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130, 2130 (2007).

[109] *Id.* at 956.

[110] *Id.*

[111] *Id.*

their relationship.[112] Lisa, Janet, and their child lived together in Vermont for about a year, until the fall of 2003, at which point Lisa and Janet ended their relationship.[113] In November 2003, Lisa filed a petition with a Vermont family court to dissolve the parties' civil union.[114] In her complaint for dissolution, Lisa listed IMJ as the child "of the civil union"[115] and asked the court to award her primary custody of the child and to grant Janet "parent-child contact."[116] In June 2004, consistent with Lisa's request, the Vermont family court issued an order awarding Lisa temporary physical and legal custody of IMJ and granting Janet parent-child contact.[117]

While the Vermont action was pending, however, Lisa had a change of heart and decided that she no longer wanted Janet to have contact with the child. As a result, after the first weekend of court-ordered parent-child contact, Lisa cut off all contact between Janet and IMJ.[118] Shortly thereafter, on July 1, 2004, less than one month after the Vermont court issued its order, Lisa filed a second action, this time with a Virginia court asking the Virginia court to declare that she was IMJ's only legal parent and to grant her sole custody.[119] Despite the mandate of state[120] and federal law[121] requiring deference to the Vermont proceeding, Lisa argued that the Virginia court had jurisdiction over the action and had the authority to disregard the Vermont proceedings and any determinations or orders issued by the Vermont court because Vermont law regarding same-sex couples was inconsistent with the law and public policy of Virginia. Specifically, Lisa argued that the Virginia court could disregard the prior Vermont parentage determination because "[e]nforcing the Vermont orders as parentage or custody orders in this tribunal would require [the Virginia c]ourt to substitute a public policy position in place of established public policy of the Commonwealth of Virginia."[122]

---

[112] *Id.*

[113] *Id.*

[114] *Miller-Jenkins*, 912 A.2d at 956.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] VA. CODE ANN. § 20-146.17 (West 2006).

[121] 28 U.S.C. § 1738A(g).

[122] Points and Authorities Court Memorandum for Lisa Miller-Jenkins, Miller-Jenkins v. Miller-Jenkins, No. CH04000280-00 (Vir. Cir. Oct. 15, 2004) http://www.publicadvocateusa.org/news/article.php?article=141 (last visited Mar. 19, 2009). *See also Miller-Jenkins*, 912 A.2d at 956 ("The Full Faith and Credit clause does

Judge John R. Prosser, of the Frederick County Circuit Court in Virginia agreed with Lisa,[123] holding that he was not bound to recognize or enforce the Vermont court's conclusion that Janet was a parent because "any claims of Janet to parental status were 'based on rights under Vermont's civil union laws that are null and void under [Virginia's Defense of Marriage Act (DOMA)].'"[124] Thereafter, on October 15, 2004, the Virginia trial court issued an order finding Lisa to be the "sole biological and natural parent" of IMJ and holding that Janet had no "claims of parentage or visitation rights over" IMJ.[125]

Similar tactics were utilized even more recently in *A.K. v. N.B.*[126] In the case, a lesbian couple had a child together through alternative insemination.[127] For the next five years, the two women jointly parented the child together in California.[128] After the women ended their relationship, the nongenetic, nonadoptive parent filed an action in a California trial court arguing that under California law she was one of the child's legal parents based on her conduct of receiving the child into her home and holding it out

---

not require Virginia to elevate Vermont's public policy above its own, nor, as Respondent's counsel asserted, does it prevent a state from looking behind a judicial decree to ensure that it is acceptable.").

[123] *Miller-Jenkins*, 912 A.2d at 957. *See also* Paul Bradley, *Appeal Heard Over Same-Sex Custody; Previous Va. Ruling Took Parental Rights From Vermont Woman*, RICHMOND TIMES-DISPATCH, Sept. 15, 2005, at B4.

[124] *Miller-Jenkins*, 912 A.2d at 957. Virginia's state DOMA provides: "A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." VA. CODE ANN. § 20-45.3 (West 2006).

[125] *Miller-Jenkins*, 912 A.2d at 957. The decision of the Virginia trial court was reversed by the Virginia Court of Appeals. Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. Ct. App. 2006). In its decision, the Court of Appeals held that the federal Parental Kidnaping [sic] Prevention Act (PKPA) required Virginia to defer to the first-filed Vermont action, notwithstanding any inconsistent state law and public policy. Lisa's requests for further review were denied. Miller-Jenkins v. Miller-Jenkins, 128 S. Ct. 1127 (2008) (denying certiorari); Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822 (Va. 2008) (holding that prior Court of Appeal decision was law of the case). Lisa's attempts to obtain further review of the Vermont Supreme Court's decision also were denied. Miller-Jenkins v. Miller-Jenkins, 127 S. Ct. 2130 (2007) (denying certiorari).

[126] A.K. v. N.B., No. 2070086, 2008 WL 2154098 (Ala. Civ. App. 2008).

[127] *Id.* at *1.

[128] *Id.*

as her own.[129] The California trial court agreed with her and issued an order recognizing her as a legal parent.[130] Just like in the *Miller-Jenkins* case, while the first action was still pending, the genetic parent—N.B.—filed a second action in another state—this time Alabama—in which she asked the court to declare that she was the child's only legal parent.[131]

As N.B. surely realized, in contrast to the comprehensive protection extended to same-sex couples and their children in California, Alabama does not embrace lesbian and gay parenting. For example, in 2002, the former Chief Justice of the Alabama Supreme Court stated that homosexuality was "destructive to a basic building block of society—the family" and was "an inherent evil against which children must be protected."[132] A few years earlier, the Alabama Supreme Court affirmed a restriction that prevented a lesbian mother from having visitation in the presence of her partner on ground that "[e]xposing her children to such a lifestyle, one that is illegal under the laws of this state and immoral in the eyes of most of its citizens, could greatly traumatize them."[133]

In sum, *Miller-Jenkins* and *A.K.* provide useful illustrations of how disgruntled parents have sought to avoid or invalidate determinations that their former partners were legal parents by trying to relitigate the parentage issue in a state with strong anti-gay policies.[134] The hope in these and similar cases is that the court would conclude it could depart from the usual rules requiring deference to and recognition of out-of-state child custody

---

[129] *Id.* Specifically, the woman argued that she should be recognized as a legal parent under the California Supreme Court's decision in *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005). In *Elisa B.*, the California Supreme Court held that "a woman who 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, is the children's parent under the Uniform Parentage Act[.]" *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005). Thus, the initial parentage determination in *A.K. v. N.B.* was not in any way related to or dependent upon a legal relationship between the adults.

[130] *A.K.*, 2008 WL 2154098, at *3 (noting that the "California court ordered that the child's birth certificate be amended to reflect A.K.'s status as a parent of the child").

[131] While the trial court agreed with the genetic parent and held that it was "not required . . . to defer to the California court," this conclusion was reversed by the Court of Civil Appeals of Alabama. *Id.* at *3–5.

[132] *Ex parte* H.H., 830 So.2d 21, 26 (Ala. 2002) (Moore, C.J., concurring).

[133] *Ex parte* D.W.W., 717 So.2d 793, 796 (Ala. 1998).

[134] *See On the Docket*, NCLR NEWSLETTER (Nat'l Ctr. for Lesbian Rts., San Francisco, C.A.) Winter 2005, at 10, *available at* http://www.nclrights.org/ site/ DocServer/winter2005.pdf?docID=1363 (describing *Hayes v. Mohr*, 935 So.2d 7 (Fla. App. 2 Dist. 2006), in which a genetic parent argued that Florida should not recognize a Colorado order granting joint custody to both partners in a lesbian relationship).

proceedings because the first court's parentage determination was profoundly inconsistent with the second state's policies on lesbian and gay parenting.

IV. INTERSTATE RECOGNITION OF PARENTAGE

As noted in Part II, over the past fifty years, Congress and the states have enacted a series of statutory schemes designed to deter disgruntled parents from engaging in "continuing interstate controversies over child custody [and support]."[135] In addition to provoking some of the same concerns that prompted Congress and the states to act in the first instance, this new wave of interjurisdictional child custody battles presents a risk that should be even greater cause for concern. In the same-sex parent cases described above, the litigants were not simply seeking a more favorable allocation of custody or support; rather, what these litigants sought to do was to get the court of the second state to declare that a person previously adjudicated to be a parent was, in fact, not a parent at all. While there is a need to have a degree of stability with regard to the custodial and support arrangements for children, the need for stability and finality is significantly more important with respect to the question of the child's legal parentage. A rule permitting prior adjudications of parentage to be set aside based on public policy concerns would leave children at risk of losing a host of benefits intended to protect them.

This Part examines the law in the related context of interstate challenges to adoption judgments. The existing case law and academic writing overwhelmingly conclude that the Constitution requires that adoption judgments—including adoptions by lesbian and gay individuals—be recognized and respected by other states. This is true, moreover, even if the judgment could not have been obtained initially in the second state and even if the judgment is inconsistent with the law and public policy in the second state. In Part III.B, I argue that this rule applies equally to other types of parentage adjudications. Unlike support and custody allocations, judicial determinations of parentage, including those made in the context of otherwise modifiable orders, are not modifiable in the initial decree state. Rather, they are intended to be final status adjudications. Accordingly, these parentage determinations are entitled to full faith and credit as a matter of constitutional law and must be accorded the same effect in other states that they are due in the initial decree state. Finally, in Part III.C, I argue that DOMA does not alter this conclusion.

A. *Adoption Judgments*

---

[135] Parental Kidnaping Prevention Act, Pub. L. No. 96-611, § 7(c)(4), 94 Stat. 3566, 3568–69 (1980).

In Part II, I examined two cases in which former same-sex partners challenged parentage determinations made in prior out-of-state *custody proceedings*. Over the last decade, there have been a number of cases in which similar arguments were made in the context challenges to out-of-state second parent adoption decrees. One of the first known cases was the case of *Starr v. Erez*.[136] After the birth of the couple's child, the nongenetic parent established a legal parent-child relationship with the child by completing a second parent adoption in Washington State.[137] The couple eventually ended their relationship and, at some point thereafter, the genetic mother moved to North Carolina. In litigation in North Carolina, the genetic mother argued that the North Carolina court should refuse to recognize the out-of-state adoption judgment on the ground that the judgment was inconsistent with the law and public policy of the state of North Carolina.[138] The North Carolina court rejected this argument as inconsistent with principles of Full Faith and Credit. An adoption decree is a judgment. The Supreme Court has made clear that judgments are entitled to exacting full faith and credit in other states;[139] they must be respected even if "considerations of policy of the forum . . . would defeat" an action brought in the forum in the first instance.[140] In other contexts, the Court has clarified that this principle requires recognition even if the forum's conflicting public policy is expressed in the form of a criminal prohibition.[141]

Consistent with these basic constitutional principles and with the holding of the North Carolina appellate court, the Tenth Circuit Court of Appeals recently reached a similar conclusion.[142] After being directed by the state's Attorney General to honor second parent adoption judgments issued by the courts of other states, the Oklahoma legislature passed a statute providing that the state would not "recognize an adoption by more than one individual

---

[136] 97 CVD 624 (Durham County, N.C. General Court of Justice 1997). *See, e.g.*, Cox, *supra* note 11, at 780–81 (2003) (discussing case); Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 735 & n.113 (2000) (discussing case).

[137] Cox, *supra* note 11, at 780–81.

[138] *Id.*

[139] *See supra* Part I.A. For a detailed discussion of why none of the recognized exceptions to this exacting mandate apply, see Wasserman, *supra* note 11.

[140] Milwaukee County v. M.E. White Co., 296 U.S. 268, 277 (1935).

[141] *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230 (1908) (holding that Mississippi had to recognize and enforce a Missouri gambling debt judgment even though Mississippi imposed criminal penalties on those convicted of gambling).

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

of the same sex from any other state or foreign jurisdiction."[143] On appeal, the Tenth Circuit struck down the statute, holding that it violated the Full Faith and Credit Clause.[144] Regardless of Oklahoma's position on adoptions by lesbian and gay couples, the court explained, Oklahoma must recognize and give effect to judgments, including second parent adoption judgments, issued by the courts of other states. The law, therefore, was unconstitutional.[145]

A number of scholars, including Barbara Cox, Robert Spector, and Rhonda Wasserman have carefully explained why this conclusion—that adoptions by lesbian and gay people must be respected by sister states, regardless of whether the adoption violates the public policy of the forum—is correct.[146] I will not attempt to duplicate their efforts here. Suffice it to say that the case law, legal scholarship, and relevant treatises overwhelmingly reach the same conclusion.[147]

---

[143] OKLA. STAT. tit. 10, § 7502-1.4(A) (Supp. 2007).

[144] *Finstuen*, 496 F.3d at 1141 ("We hold that final adoption orders [including second parent adoptions by same-sex partners] by a state court of competent jurisdiction are judgments that must be given full faith and credit under the Constitution by every other state in the nation. Because the Oklahoma statute at issue categorically rejects a class of out-of-state adoption decrees, it violates the Full Faith and Credit Clause.").

[145] *Id. See also* Adar v. Smith, 591 F.Supp. 2d 857, 862 (E.D. La. 2008) ("Regardless of whether the out-of-state adoption decree [to a gay male couple] contravenes Louisiana law or public policy, the obligation to recognize the judgment under the full faith and credit clause remains . . . 'exacting.'") (citation omitted); Giancaspro v. Congleton, 2009 WL 416301 (Mich. Ct. App. 2009) (holding that Michigan courts were required to recognize an out-of-state second parent adoption judgment); Russell v. Bridgens, 647 N.W.2d 56, 59 (Neb. 2002) ("A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.") (citations omitted). Other courts have reached the same conclusion with respect to other types of adoptions. *See, e.g.*, *In re* Morris' Estate, 133 P.2d 452 (Cal. Ct. App. 1943) (holding that California had to recognize an adult adoption granted by Rhode Island court, even though adult adoptions were contrary to California policy).

[146] Cox, *supra* note 11; Spector, *supra* note 11; Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 317–18 (2001). *But see* Wardle, *supra* note 21, at 616 (arguing that "[t]he Full Faith and Credit Clause does not compel states with strong public policies against lesbigay adoption . . . to recognize or enforce lesbigay adoption decrees from other states"); Wasserman, *supra* note 11; Whitten, *supra* note 32. For a detailed critique of Wardle's argument, see Wasserman, *supra* note 11.

[147] In addition to the articles cited in note 146 *supra*, many other scholars have stated that adoption judgments generally are entitled to recognition and respect in sister states. *See, e.g.*, Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703, 741 (1996) ("A judgment granting or denying an adoption, entered by a court with proper jurisdiction over the subject matter

B. *Other Parentage Adjudications*

This Part will explain why other judicial determinations of parentage, including those made in the context of otherwise modifiable orders, also are entitled to exacting interstate recognition and respect under the Full Faith and Credit Clause.[148]

Just as is true with regard to adoption judgments, children and their families need to have assurance that parentage, once established by a court, will travel with them even as they cross state lines. Children receive a wide array of emotional and financial protections based on the existence of a legally recognized parent-child relationship. In some states, a person who is not a legal parent to a child may lack standing to seek custody or visitation.[149] As a result, if a court refused to enforce an out-of-state order recognizing a person as a legal parent, the child may be completely cut off from one of the only two parents she has ever known. It is not hard to imagine how harmful this would be to the individual child involved. A child could be permanently stripped from receiving emotional support from a person who, not only was relied upon by the child as a parent, but who also had been adjudicated to be a parent by a court of another state. As a Texas court recently explained: "The destruction of a parent-child relationship is a traumatic experience that can lead to emotional devastation for all the parties involved . . . ."[150]

With regard to financial protections, refusing to treat a person previously adjudicated to be a parent as a parent may result in the child losing eligibility for important benefits and protections, including social security or workers compensation benefits in the event of the death or disability of the adult.[151] Other people and entities rely on parent-child relationships as well, including

---

and the parties, is a final judgment entitled to recognition in other states."); 1 JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW & PRACTICE § 4.02(6) (2004) ("Because adoption decrees and termination orders are considered final judgments, not subject to modification, the basic federal statute [28 U.S.C. § 1738] requires that they be recognized and enforced in other states . . . ."); EUGENE F. SCOLES, ET AL., CONFLICT OF LAWS 678 (3d ed. 2000) ("An adoption decree entered by a court of competent jurisdiction will ordinarily be recognized everywhere.").

[148] In both contexts, of course, a person's parental status can be ended through a formal termination or adoption proceeding.

[149] *See, e.g.*, Kazmierazak v. Query, 736 So.2d 106 (Fla. Dist. Ct. App. 1999) (holding that a woman was not entitled to seek visitation or custody of the child she jointly planned and raised with her former same-sex partner); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (same).

[150] Goodson v. Castellanos, 214 S.W.3d 741, 749 (Tex. App.-Austin 2007), *rehearing overruled* (2007), *review denied* (2008).

[151] *See, e.g.*, Jacobs, *supra* note 79, at 346–47.

friends and extended family members, insurance companies, and employers. Many employers, for example, only extend health insurance to the legal children of their employees.[152] If the employee is no longer recognized as a legal parent, the child may not be entitled to health insurance benefits through that person. Thus, the emotional and financial ramifications for the children at issue are profound. Moreover, the number of children born to and raised by same-sex couples potentially affected is also great. While there are no accurate statistics about the number of children raised by lesbian and gay parents, The Williams Institute for Sexual Orientation Law and Public Policy at UCLA estimates that there are "4 to 6 million adults who self-identify as gay men or lesbians in the United States,"[153] and that approximately 28% of same-sex couples are raising children.[154] Others have reported that there are between six to fourteen million children being raised by lesbian or gay parents.[155]

Fortunately for these children, there is strong doctrinal support for the conclusion that all parentage adjudications, even those made in the context of otherwise modifiable orders, are entitled to full faith and credit in other states, irrespective of whether the determination violates the forum's law and public policy. Confusion over whether child custody and support orders are entitled to full faith and credit under the Constitution arose because custody and support allocations are inherently modifiable.[156] Moreover, there was a

---

[152] *See, e.g.*, Evans v. Safeco Life Ins. Co., 916 F.2d 1437 (9th Cir. 1990) (holding that a policy that included "children" did not cover stepchildren or children of former spouses). *See also* Jacobs, *supra* note 79, at 346 n.20 (citing 42 U.S.C. § 666 (a)(19)(A) (2007) (providing that "all child support orders enforced pursuant to this part shall include a provision for medical support of the child to be provided by either or both parents")).

[153] R. Bradley Sears, Gary Gates, and William B. Rubenstein, The Williams Project on Sexual Orientation Law and Public Policy, UCLA School of Law, *Same-Sex Couples and Same-Sex Couples Raising Children in the United States: Data From Census 2000*, at 1 (2005), *available at* http://www.law.ucla.edu/Williamsinstitute/ publications/ USReport.pdf.

[154] *Id.* at 4 ("Gates and Ost suggest that while national unadjusted figures show that 28.2% of same-sex couples are raising children, a more accurate estimate that attempts to adjust for the presence of different-sex couples is 27.5%.").

[155] 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, 1235–36 (2005) (citing Margaret S. Osborne, Note, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 365–66 (2004); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 461 n.2 (1990)).

[156] *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 180 (1988).

sense that it was important to provide the forum with the power to protect the well-being of children should circumstances change.[157]

By contrast, even when made in the context of a custody or support proceeding, a judicial determination of a child's legal parentage is intended to be final status determination,[158] challengeable only through direct appeal or pursuant to the rules governing collateral attacks on determinations of parentage within the initial decree state;[159] it is not a status that is "modifiable" based on a change of circumstance in the initial decree state.[160] Thus, in subsequent intrastate actions, while parties may seek to modify a

---

[157] *See, e.g.*, Sack, *supra* note 27, at 858.

[158] In the *Miller-Jenkins* case, the proceedings in Vermont were ongoing at the time the second action was filed in Virginia. As noted above, there is some disagreement as to whether the Full Faith and Credit Clause applies only to final judgments. *See* Sack, *supra* note 27, at 857 and text accompanying note 34. Even assuming the Clause only applies to final judgments, whether an order is a final judgment depends on the law of the forum. *See, e.g.*, Sack, *supra* note 27, at 857 ("The 'finality' of a judgment is determined by the law of the issuing state . . . . "). "In a large majority of the cases it has been held or recognized that the full faith and credit provision of the Federal Constitution is applicable to a judgment despite the pendency of an appeal or nonexpiration of the time allowed for an appeal." B.C. Ricketts, *Judgment Subject to Appeal as Entitled to Full Faith and Credit*, 2 A.L.R. 3d 1384, § 2. *See also, e.g.*, Edwards v. Ghandour, 159 P.3d 1086 (Nev. 2007); Shaffer v. Smith, 673 A.2d 872, 874 (Pa. 1996) ("A judgment is deemed final for purposes of *res judicata* or collateral estoppel unless or until it is reversed on appeal.") (citations omitted); Gausvik v. Abbey, 107 P.3d 98 (Wash. Ct. App. 2005). In any event, my point here—that parentage determinations are entitled to full faith and credit under the Constitution—would certainly apply to the Vermont parentage determination now that all further review of that decision has been exhausted.

[159] Different forms of parentage determinations may be more or less subject to collateral attack in the initial decree state. For example, adoptions judgments are almost completely immune from collateral attack in the initial decree state. *See, e.g.*, Cox, *supra* note 11, at 761 (explaining why "collateral attacks will not be available in most situations to challenge the validity of adoption decrees"). Depending on the jurisdiction, however, there may be more circumstances under which other types of parentage determinations are subject to collateral attack. My point here is not that parentage orders can never be collaterally attacked, but simply that they must be given the same effect in the second state that they would be due in the initial decree state regardless of whether they violate the public policy of the forum.

[160] State of New York/Andrews v. Paugh, 521 S.E.2d 475, 478 (N.C. Ct. App. 1999) ("We find that while New York courts may modify or cancel child support arrearages . . . they may not allow a father to collaterally attack support orders on the issue of paternity where paternity was judicially determined as part of prior divorce and support proceedings.") (citations omitted); Pennsylvania *ex rel.* Nedzwecky v. Nedzwecky, 199 A.2d 490, 491 (Pa. Super. Ct. 1964) (holding that a determination of parentage that is "necessarily determined as a prerequisite to the entry of an original support order may not, under the doctrine of res judicata, be challenged or put at issue in any subsequent proceeding.").

prior custody order or aspects of a divorce decree, rules of res judicata or collateral estoppel generally preclude the parties from relitigating the parentage determination upon which the order was premised.[161] As the Massachusetts high court recently explained: "[O]ther jurisdictions have universally held that a divorce decree constitutes an adjudication of the paternity of a child of the marriage" and that this determination of parentage cannot be relitigated under principles of res judiciata and collateral estoppel.[162] Moreover, this is true even when the prior parentage determination was based on the parties' stipulation.[163] The Restatement (Second) of Judgments is consistent with this position. The Restatement provides: "A judgment in an action whose purpose is to determine or change a person's status is conclusive upon the parties to the action . . . [w]ith respect to the existence of the status, and rights and obligations incident to the status . . . ."[164]

Consistent with these rules governing subsequent intrastate actions, in *inter*state actions, where a parentage status determination is res judicata in the initial decree state, courts of other states are precluded from relitigating the issue. Thus, just as is true with regard to adoption judgments, to the extent the parentage determination is immune from being relitigated in the initial decree state, it must also be immune in the second state.[165] Stated another way, even if a court properly has authority under state and federal law to modify the custody or support allocation made by the court of another state,[166] it still lacks authority to readjudicate the parental status determination upon which the order is premised.

---

[161] *See, e.g.*, Grice v. Detwiler, 488 S.E.2d 755 (Ga. Ct. App. 1997); *In re* Paternity of Rogers, 697 N.E.2d 1193 (Ill. App. Ct.1998); Beyer v. Metze, 482 S.E.2d 789 (S.C. Ct. App. 1997).

[162] Anderson v. Anderson, 552 N.E.2d 546, 550 (Mass. 1990).

[163] *See, e.g.*, Adoption of Bonner, 66 Cal. Rptr. 812 (Cal. Ct. App. 1968) (holding that a prior interlocutory divorce decree, that incorporated the parties' settlement agreement wherein parties declared there was a child of the marriage, precluded a subsequent attempt to litigate the child's parentage); Sorenson v. Sorenson, 119 N.W.2d 129 (Iowa 1963) (holding that a divorce decree that incorporated an agreement in which the husband acknowledged his paternity precluded him from subsequently relitigating the issue of paternity). *See also* State Office of Child Support Enforcement v. Williams, 995 S.W.2d 338 (Ark. 1999); Powers v. State, 622 So.2d 400 (Ala. Civ. App. 1993); Brown v. Superior Court of S.F., 159 Cal. Rtpr. 604 (Cal. Ct. App. 1979).

[164] RESTATEMENT (SECOND) OF JUDGMENTS § 31(1)(a) (1982).

[165] *See, e.g.*, Durfee v. Duke, 375 U.S. 106, 109 (1963) (providing that the forum must "give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it").

[166] In both *Miller-Jenkins* and *A.K.*, the first-filed actions were still pending at the time the second actions were filed. Therefore, in both cases, the courts of the second

Case law supports this conclusion. For example, the Virginia Supreme Court recently explained that where the initial parentage determination was res judicata in the initial decree state, "relitigation of that issue in Virginia [wa]s barred."[167] The court continued: "The forum court is bound by the original forum's determination of the preclusive effect of its former judicial proceedings."[168] This was true, moreover, even though the determination of parentage was made in the context of a child support proceeding, and even though the support allocation would, under appropriate circumstances, be modifiable.[169] A Pennsylvania court reached a similar conclusion; it explained that while "the application of the Full Faith and Credit Clause to the child support provisions of the decree is limited to the extent that those provisions are modifiable . . . [, a] modification proceeding cannot be used to relitigate issues adjudicated in making the prior order" such as parentage.[170] The parentage determination could not be relitigated, the court explained, because parentage is "a circumstance which by its nature cannot change."[171] In sum, while modifiable aspects of a custody or visitation order may not be entitled to constitutionally-based full faith and credit,[172] a parentage determination upon which that order is based is entitled to exacting full faith and credit under the Constitution and must be given the same preclusive effect in sister states that it is due in the initial decree state.

Recent congressional action further supports this conclusion. Over the past two decades, Congress has taken steps to facilitate the establishment of

---

states did not have jurisdiction under the uniform acts or the PKPA to modify the initial custody allocation.

[167] Hupp v. Hupp, 391 S.E.2d 329, 332 (Va. 1990) (citations and internal quotations omitted). *Cf.* G.P. v. A.A.K., 841 So.2d 1252, 1256 (Ala. Civ. App. 2002) ("*Ab initio* consideration of the issue [of whether a person is entitled to seek an award of visitation] . . . would contravene the full faith and credit clause [sic] of the United States Constitution.").

[168] *Hupp*, 391 S.E.2d at 332 (citations and internal quotations omitted).

[169] *Id.*

[170] Chrzanowski v. Chrzanowski, 472 A. 2d 1128, 1131 (Pa. Super. Ct. 1984).

[171] *Id. See also* Thompson v. Santiago, 57 Pa. D. & C.4th 170, 177 (Pa. Com. Pl. 2001) (holding that a parentage finding is a "final order[ ] entitled to constitutionally-based full faith and credit"). Other courts similarly have concluded that even if part of an order is modifiable, non-modifiable aspects of the judgment are entitled to constitutionally-based full faith and credit. *See, e.g.*, Bard v. Charles R. Myers Ins. Agency, Inc., 839 S.W.2d 791, 794 (Tex. 1992) ("[T]his court held that the Washington judgment was entitled to full faith and credit despite the fact that certain provisions of the judgment not at issue were subject to modification.") (citations omitted).

[172] *See supra* Part II.B.

parentage for non-marital children.[173] To this end, in 1996, Congress required all states to establish administrative procedures for the establishment of parentage through what are known as acknowledgements or declarations of paternity.[174] Essentially, this process permits a man to establish his legal parentage by signing, along with the woman, a form stating that he is the child's father.[175] Congress required all states to enact legislation providing that these acknowledgements or declarations would have the force of a judgment of parentage.[176] Because acknowledgements of paternity are not the result of a court proceeding, however, they are not entitled to exacting full faith and credit as a matter of constitutional law. Recognizing the importance of ensuring that these parentage determinations will be enforced in other states, Congress required the states to statutorily extend to these administrative determinations of parentage the same level of exacting full faith and credit that is due parentage determinations resulting from court proceedings. Specifically, Congress directed all states to establish "[p]rocedures under which a State must give full faith and credit to a determination of paternity made by any other State, whether established through voluntary acknowledgment or through administrative or judicial processes."[177] As a result of these provisions, even those parentage determinations that are not entitled to constitutionally-based full faith and

---

[173] *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

[174] *See, e.g.*, 42 U.S.C. § 666(a)(2) (2000) (requiring each participating State to have procedures providing for "[e]xpedited administrative and judicial procedures [including the procedures specified in subsection (c) of this section] for establishing paternity"). *See also id.* § 666 (a)(5)(C)(i) (requiring all participating states to have simple civil procedures for voluntarily acknowledging paternity).

[175] *Id.* § 666 (a)(5)(C)(i).

[176] *Id.* § 666(a)(5)(D)(ii). *See also* Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 63 (2003) (noting that after the period for rescission has elapsed, an "acknowledgement is the equivalent of a court order and binds all three parties.").

[177] 42 U.S.C. § 666(a)(11) (2000). *See also* 45 C.F.R. § 302.70(a)(11) (2007) (providing that all states must adopt "[p]rocedures under which the State must give full faith and credit to a determination of paternity made by any other State, whether established through voluntary acknowledgment or through administrative or judicial processes"). Some courts have relied on the relevant state provision in holding that prior parentage determinations were entitled to full faith and credit. *See e.g.*, Susan H. v. Keith L., 609 N.W.2d 659, 662 (Neb. 2000) (holding, under Nebraska's statute that Nebraska was "require[d] us to give full faith and credit to the Oklahoma decree of paternity"); State of New York/Andrews v. Paugh, 521 S.E.2d 475, 478 (N.C. Ct. App. 1999) (holding, under North Carolina's relevant provision, that "[a] prior adjudication of paternity by a foreign court of competent jurisdiction must be accorded full faith and credit in North Carolina").

credit still must be accorded exacting full faith and credit as matter of statutory law. And, just as is true for other types of judicial proceedings, a court of another state is not permitted to reconsider a prior judicial parental status determination on the ground that the determination is inconsistent with the public policy of the forum.

C. *What about DOMA?*

Some litigants and scholars have argued that the federal Defense of Marriage Act (DOMA)[178] permits courts to depart from the established rules that apply to other families when considering cases involving lesbian and gay parents.[179] 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. There are a number of reasons why DOMA does not authorize courts to depart from existing rules regarding recognition and enforcement of out-of-state parentage determinations.

As a preliminary matter, DOMA is inapposite to any of the cases discussed above, including the *Miller-Jenkins* case. DOMA has two parts. Section 2 is the provision addressing recognition by the states. Specifically, Section 2 provides that states can refuse to recognize or give effect to a marriage or a relationship that is "treated as a marriage" between two people of the same sex or a right arising out of such relationship:

> No State . . . shall be 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.[180]

As the clear statutory language provides, DOMA is relevant only to the extent the case involves a relationship that is a marriage or is "treated as a marriage."[181] Neither the couple in the *Miller-Jenkins* case, nor the couple in the *A.K.* case was in such a relationship. The couple in the *Miller-Jenkins* case was in a Vermont civil union. The couple in the *A.K.* case was not in

---

[178] 28 U.S.C. § 1738C (2000).

[179] *See, e.g.*, David M. Wagner, *A Vermont Civil Union and a Child in Virginia: Full Faith and Credit?* 3 AVE MARIA L. REV. 657, 667–68 (2005) (arguing that DOMA "modifies PKPA, explicitly expanding the authority of states to refuse recognition to same-sex marriages, their imitations (such as Vermont civil unions), and their incidents").

[180] 28 U.S.C. § 1738C (2000).

[181] *Id.* (emphasis added).

any legally recognized relationship. As Professor Emily Sack has explained, "[alt]hough it could be argued that a civil union is 'treated as a marriage,' this argument is not likely to succeed."[182] And, in fact, every court to address the question has rejected this position. Courts uniformly have held that civil unions and California domestic partnerships are not "treated as a marriage" because the states permitting these statuses do not treat them as marriages. For example, a district court in Oklahoma held that a couple joined in a Vermont civil union did not have standing to challenge Section 2 of DOMA. As the court explained, the couple's "Vermont civil union [wa]s not 'treated as a marriage' under Vermont Law."[183] In creating the status of civil unions, the court explained, the Vermont Legislature "expressly clarified, in the civil union statute itself, that 'marriage' was limited to one man and one woman. . . . The legislative findings accompanying the Vermont statute noted that 'a system of civil unions does not bestow the status of civil marriage.'"[184] The Ninth Circuit Court of Appeals and appellate courts in New York and Georgia have reached similar conclusions.[185]

For couples—like the couple in *A.K.*—who are not in any legally recognized relationship, it is even clearer that DOMA has no bearing on any subsequent interstate dispute.[186] A federal administrative law judge (ALJ) recently reached this conclusion with respect to Section 3[187]—the federal benefits portion of DOMA—in a case involving a child's social security

---

[182] Emily J. Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 AVE MARIA L. REV. 497, 507 (2005).

[183] Bishop v. Edmondson, 447 F. Supp. 2d 1239, 1247 (N.D. Okla. 2006).

[184] *Id.* (citations omitted).

[185] *See, e.g.*, Smelt v. County of Orange, 447 F.3d 673, 683 n.26 (9th Cir. 2006) (holding that a same-sex couple in a California domestic partnership lacked standing to challenge Section 2 of DOMA on the ground that "[e]ven if Smelt and Hammer were now in a California registered domestic partnership, that is not by any means a marriage"); Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476 (N.Y. App. Div. 2005), *appeal dismissed*, 850 N.E.2d 672 (N.Y. 2006) ("[T]he Vermont Legislature went to great pains to expressly decline to place civil unions and marriage on an identical basis."); Burns v. Burns, 560 S.E.2d 47, 48–49 (Ga. Ct. App. 2002) (holding that a Vermont civil union is not the equivalent of marriage).

While many state DOMAs do purport to deny recognition to civil unions and domestic partnerships, state law cannot trump or override the state's obligations under federal law. U.S. CONST. art. VI, cl. 2.

[186] A.K. v. N.B., No. 2070086, 2008 WL 2154098, at *5 (Ala. Civ. App. May 23, 2008).

[187] Section 3 of DOMA provides: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2006).

benefits. In that case, a California court had issued a judgment declaring a nongenetic same-sex partner to be a legal parent based on her conduct of receiving in and holding the child out as her own.[188] The parentage determination was not based or dependent on a legal relationship between the two adults. When social security benefits were sought for the child based on the nongenetic parent's disability, the claim initially was denied.[189] On appeal, the ALJ concluded that "DOMA and the definition of marriage in that legislation are inapplicable to the instant case" because "no aspect of the claimant's case is based on a 'marriage.'"[190] Accordingly, the parental relationship had to be recognized and benefits were awarded.[191]

Furthermore, even in cases in which the couple was in a marriage or a relationship treated as a marriage, there are strong arguments that DOMA still would not authorize courts to depart from the usual constitutional or statutory rules that apply to orders about children. While section 2 of DOMA may permit courts to decline to recognize a marital relationship between two people of the same sex, 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. When DOMA was being debated, the only judgments that Congress considered were nonadversarial declaratory judgments and, among those, only nonadversarial judgments specifically addressing the validity of the parties' marriages.[192] Specifically, the members of Congress were concerned that out-of-state couples would travel to a state that permitted same-sex couples to marry. Once there, the couples would marry, obtain declaratory judgments decreeing their marriages to be valid, and then seek enforcement

---

[188] Application of A. (Unreported Office of Disability Adjudication and Review Decision March 19, 2007), copy of decision on file with author. *See also*, The National Center for Lesbian Rights Secures Federal Benefits for Child, National Center for Lesbian Rights Press Release (June 6, 2007), *available at* http://www.nclrights.org/site/PageServer?pagename=press_pr_federalbenefits_060607. As was true in the *A.K.* case, the nongenetic same-sex partner had obtained a judgment from a California court declaring her to be the child's legal parent based on the *Elisa B.* decision.

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *See, e.g.*, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 17 (1997) (noting that, "[i]n writing the provision to cover judgments as well as choice-of-law decisions, Congress does not seem to have contemplated any genuinely adversarial proceeding"); Rosen, *supra* note 27, at 981 ("Congress did not consider DOMA's application to garden-variety judgments but instead focused on ensuring that the nonadversarial declaratory judgments advised by gay rights advocates not be thought to bind other states.").

of those judgments in their home states.[193] There was no discussion or consideration of issues related to children born to same-sex couples or a desire to permit states to disregard parentage determinations that were related to the parents' status as same-sex married couples.

It is a "cardinal rule" of statutory construction that "repeals by implication are not favored."[194] This presumption against repeals by implication is buttressed by the fact that a number of statutory provisions requiring interstate recognition of orders regarding children have been amended since the enactment of DOMA, and in none of these amendments did Congress give any indication it intended to alter those rules for children born to same-sex couples.[195] Based on this reasoning, the Virginia Court of Appeal concluded in the *Miller-Jenkins* case that DOMA did not amend or alter the PKPA because there was "[n]othing in the wording or the legislative history of DOMA [that] indicate[d] that it was designed to affect the PKPA and related custody and visitation determinations."[196]

This conclusion is further supported by the canon of statutory construction that directs courts to avoid constitutional difficulties.[197] As noted above, the Supreme Court has clarified that judgments are entitled to exacting full faith and credit under the Full Faith and Credit Clause.[198] A number of scholars have argued that, to the extent DOMA is interpreted to apply to judgments, it is unconstitutional because Congress's authority to

---

[193] *See, e.g.*, H.R. Rep. No. 04-664, 30, n.77 (1996), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_reports&docid=f:hr664.104.pdf (discussing this scenario). See also Koppelman, supra note 191, at 17.

[194] Jones v. Mayer Co., 392 U.S. 409, 437 (1968).

[195] For example, both the PKPA and PRWORA have been amended since DOMA was enacted.

[196] Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 337 (Va. Ct. App. 2006). *See also* A.K. v. N.B., No. 2070086, 2008 WL 2154098, at *4–5 (Ala. Civ. App. May 23, 2008). *Cf.* Memorandum Opinion for the Acting General Counsel Social Security Administration (Oct. 16, 2007), *available at* http://www.justice.gov/olc/2007/saadomaopinion10-16-07final.pdf (last visited Mar. 9, 2009) (holding that § 3 of DOMA does not preclude the Administration from recognizing a child of a same-sex civil union couple as a beneficiary under the Act because determining the child's eligibility "does not require any interpretation of the words 'marriage' or 'spouse' under the Social Security Act or any other provision of federal law").

[197] William N. Eskridge, Jr. & Phillip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992) ("Probably the most important of the constitutionally based canons is the rule that '[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (citation omitted).

[198] *See supra* Part I.A.

implement the Clause does not include the power to "ratchet down" the level of credit due judgments.[199] Moreover, even assuming Congress does have this power, selective use of this authority to disadvantage an identifiable group—and in a way that inhibits that group's ability to form families and maintain parent-child relationships—raises serious Equal Protection and Due Process concerns.[200]

V. THE RIPPLE EFFECTS: BEYOND SAME-SEX PARENT FAMILIES

In this Part, I support the doctrinal argument made in Part III with normative considerations of the potential ramifications of a contrary rule. While a number of other scholars have examined issues related to interstate recognition of parentage,[201] thus far, the scholarly and mainstream discussion has been almost exclusively limited to the implications of these issues for other same-sex parent families.[202] Lesbian and gay parenting, however, is not the only area of parentage law in which the states have adopted different and at times directly conflicting rules. To the contrary, due in part to a number of technological advancements, courts and policymakers have been forced in recent years to grapple with new questions about the

---

[199] *See, e.g.*, Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1066 (1999) ("[T]his sweeping authorization to invalidate final judgments raises serious doubts about DOMA's constitutionality under well-settled law."); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 974 (1998) ("[I]t is doubtful that Congress has the power thus to nullify the self-executing force of the Full Faith and Credit Clause."); Letter from Laurence H. Tribe, Professor, Harvard Law School, to Sen. Kennedy (May 24, 1996), *reprinted in* 142 Cong. Rec. 13359-61 (1996).

[200] Koppelman, *supra* note 191, at 23 ("To the extent that DOMA denies full faith and credit to state courts' adjudications of matters properly before them, and does so only selectively, in cases in which Congress doesn't like the substantive result, it invades the states' legitimate sphere of authority.") (emphasis omitted); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1536 n.181 (2007) ("To 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."). *But see* Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 371 (2005) (arguing that "[i]t is constitutional for states to decline to recognize sister state judgments treating same-sex relationships as marriages").

[201] *See, e.g.*, Cox, *supra* note 11; Forman, *supra* note 12; Jacobs, *supra* note 79; Spector, *supra* note 11; Wagner, *supra* note 178; Wardle, *supra* note 21; Wasserman, *supra* note 11.

[202] Professor Wardle does mention in passing the potential that a public policy exception with respect to "lesbigay" adoptions might have implications for "surrogacy adoptions." Wardle, *supra* note 21, at 595.

relative importance of genetics, function, and intention with respect to parentage. The states' responses to these new questions have been far from consistent. Moreover, not only have the states adopted different rules, but, as is true with regard to same-sex parenting, the rules often are based on deeply-held political or moral concerns. Accordingly, to the extent courts accept the invitation to create a public policy exception with regard to interstate recognition of parentage determinations, such a result would have broad and severe consequences for a wide range of family configurations.[203]

A. *Parentage: An Increasingly Contested Category*

As other scholars have noted, until recently, the rules governing the determination of legal parentage were relatively clear.[204] "For most of its history, American law proceeded on the assumption that legal parents were the persons who created a child through sexual reproduction or who assumed the legal obligations of parenthood through formal adoption."[205] The rules were straightforward, based largely on presumptions of genetic connections.[206] The woman who gestated the child was considered the child's legal mother.[207] The man who was most likely the child's genetic father was considered the legal father.[208] Because there was no way to establish biological paternity with any degree of certainty, "the law did not then often face a forced choice between social and biological paternity."[209] In the last several decades, however, a number of technological

---

[203] Moreover, as noted in Part III.C *supra*, there are a number of reasons why DOMA does not provide a basis for limiting this potential ripple effect.

[204] *See, e.g.*, Carbone, *supra* note 13, at 1295 (noting that in 2000 she thought parenthood was "a settled category"); Meyer, *supra* note 14, at 125 (noting that, until very recently, "the idea of parenthood stood out as an island of relative calm").

[205] David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 859 (2006). *See also, e.g.*, Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 524 (2000) ("Within the traditional family, the nature of familial bonds was predicated on, and was understood to flow from shared biogenetic substance.").

[206] Dolgin, *supra* note 205, at 527 (noting that "courts determined paternity by relying on a presumption about biological facts").

[207] Dolgin, *supra* note 205, at 534 ("Inevitably, until the last decades of the twentieth century, a woman who gestated and gave birth to a child was also that child's genetic mother."); Meyer, *supra* note 14, at 127.

[208] Meyer, *supra* note 14, at 127 ("For fathers, whose genetic connection was not as apparent, the law did the best it could to infer biological paternity through a network of presumptions and defenses.").

[209] Ira Mark Ellman, *Thinking about Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 52 (2002).

developments have forced a rethinking of these basic rules.[210]

One such development is the increasing availability of an ever-widening array of assisted reproductive technologies. These technologies enable people who are unable to bear children or who do not want to undergo a pregnancy to create families. Although alternative insemination[211] has been around for well over a century, its wide availability is a more recent phenomenon.[212] Moreover, in addition to alternative insemination, people can now also take advantage of in vitro fertilization (IVF) technology,[213] which makes it possible for a woman to gestate a genetically unrelated embryo.[214] The number of children born through IVF technology has increased steadily. In 1996, over 20,000 children were born through IVF[215] and by 2005, the number of children born through IVF that year increased to almost 50,000, accounting for more than one percent of the children born in the United States that year.[216]

The increasing availability of alternative insemination and IVF has in turn resulted in greater numbers of families created through surrogacy.

---

[210] Brian Bix, *Philosophy, Morality, and Parental Priority*, 40 FAM. L.Q. 7, 14 (2006) (noting that with the "recent introductions of reproductive technologies (such as IVF and surrogacy), there are more frequent instances where both social convention and legal rules are uncertain regarding parental status"). *See also, e.g.*, Meyer, *supra* note 205, at 860–61 (discussing these developments).

[211] Alternative insemination, also referred to as artificial insemination, is the process by which sperm—either from the woman's husband or partner or from a donor—is injected into a woman's vagina. *See, e.g.*, Karin Mika & Bonnie Hurst, *One Way To Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 993 (1996).

[212] *See generally* Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002).

[213] IVF is the procedure by which ova extracted from a woman are fertilized in a laboratory dish. Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need For Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 274 (1997). IVF has been available in the US since the early 1980s. George J. Annas & Sherman Elias, In Vitro *Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199, 202 (1983).

[214] *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 673 (Cal. 2005) (involving custody dispute between two former same-sex partners, one of whom provided the ova and one of whom gestated the embryo).

[215] *Assisted Reproductive Technology in the United States*, 71 FERTILITY & STERILITY 798, 798 (1999).

[216] CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 2005 11, 13 (2007), *available at* http://www.cdc.gov/ART/ART2005/508PDF/2005ART508.pdf (last visited Mar. 9, 2009).

Surrogacy is the process by which a woman agrees to gestate an embryo (which may or may not be genetically related to her) with the intention of relinquishing the resulting child to another individual or couple.[217] Surrogacy thus further complicates the underlying parentage question because it involves the partial or complete separation of the elements of genetics, gestation, and intention. For example, in some surrogacy arrangements, the genetic, gestational, and intentional functions are all provided by different women.[218]

Another development that has forced courts and legislatures to grapple with existing parentage rules is the advent and widespread availability of genetic testing. Historically, there was no way to determine a man's parentage with any degree of certainty.[219] Therefore, as noted above, the parentage rules were designed to point to the man who was most likely the child's genetic parent. The first scientific means of pointing to genetic paternity—ABO blood grouping—was introduced in the 1930s.[220] While blood grouping could potentially *exclude* a person as a genetic parent, the test was not able to reveal whether a person *was* a child's genetic parent.[221] Since the discovery of DNA in the 1950s, however, scientific tests to establish

---

[217] There are two types of surrogacy. In a "traditional surrogacy" situation, a woman is inseminated with semen either from the intended father or from a third-party sperm provider with the intention that woman will relinquish the resulting child to the intended parent(s). Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 675 (2000). By contrast, in a "gestational surrogacy" situation, the ova are provided either by the intended mother or another third-party provider; the carrier is therefore genetically unrelated to the resulting child. *Id.* at 681.

[218] *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (1998) (addressing parentage of child born through gestational surrogacy using embryo created from donated ova and donated sperm).

[219] Mary R. Anderlik, *Disestablishment Suits: What Hath Science Wrought?*, 4 J. CENTER FOR FAMILIES, CHILD. & CTS. 3, 5 (2003).

[220] Dee O'Neil Andrews, Comment, *DNA and Dads: Considerations for Louisiana in Using DNA Blood Tests to Determine Paternity*, 38 LOY. L. REV. 425, 428 (1992).

[221] Karen A. Hauser, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change*, 65 U. CIN. L. REV. 891, 947 (1997) ("Prior to 1977, the ABO blood grouping test, when used alone, was capable of proving a false allegation of paternity about twenty to twenty-five percent of the time."). *See also* E. Donald Shapiro, et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 25 (1992–1993) ("[T]heoretically, if a hundred random men were accused of fathering a specific child . . . , an ABO blood test should conclusively eliminate twenty men.").

genetic parentage have become much more accurate.[222] Moreover, in recent years, these tests have become relatively inexpensive and easy to obtain. Today, an individual can purchase a DNA testing kit for under $100[223] and testing results can be obtained through the mail.[224]

These and other developments have resulted in a "growing schism" between those who seek to maintain or move back to a parentage regime that is premised on genetic connection and those who see genetics as irrelevant or at least as less important than function in establishing parentage.[225] David Popenoe is an example of an advocate urging a genetics-based model. Popenoe believes it is crucial for children to be raised by their biological mother and father. In *War Over the Family*, Popenoe argues that the prevalence of families consisting of children being raised by people who are not their married, genetic parents "has led to considerable social malaise among the young, not to mention social decay in general."[226] Children suffer when raised by people who are not their biological parents, Popenoe argues, because, "given their very special nature, parental feelings and parental love

---

[222] "DNA profiling increases the accuracy to a near certainty so that, when used together with genetic marking tests, it is able to predict paternity within 99.999999% accuracy." Hauser, *supra* note 220, at 927.

[223] *See, e.g.*, Genetic Testing Laboratories, Inc., http://www.gtldna.com (listing a $89 DNA Paternity Test) (last visited July 1, 2008). *See also* Cheryl Wetzstein, *Test Answers Questions of Paternity; Advocates Say New Over-the Counter Kit Could Prevent Fraud*, WASH. TIMES, Mar. 26, 2008, at A01 (noting that "[a] new swab-the-mouth DNA Paternity Test Collection Kit from Identigene [available over the counter] costs about $30, plus a $119 fee for the mail-in lab processing").

[224] Anderlik, *supra* note 219, at 3–4.

[225] Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 329 (2004) (noting the "growing schism between the traditional family law realm, which makes biology extremely important in defining parentage, even if not always determinative, and the reproductive technology realm, which treats biology as quite unimportant"). *See also* Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 37–38 (2003) ("As a result [of widely available genetic testing], more paternity disestablishment actions are being brought . . . , and there is an organized movement to enact legislation making disestablishment of a previously established paternity based on genetic tests easier to pursue.").

[226] DAVID POPENOE, WAR OVER THE FAMILY 207 (2005). *See also* Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 255 (2006) ("Recent research has emphasized the potentially protective shield that the biological bond to a parent provides for children."). Many scholars and researchers take issue with the claim that children do best when raised by their genetic mother and father. *See, e.g.*, Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 362–66 (2006) (critiquing the "marriage movement" rhetoric).

are inherently more difficult to develop among persons unrelated to a given child."[227]

Others support genetics-based parentage rules for different reasons. For example, in the last decade, a number of organizations have urged legislatures to enact provisions permitting men to disestablish their paternity if genetic tests reveal that they are not the genetic parents of the children they have been parenting.[228] Groups such as U.S. Citizens against Paternity Fraud encourage all men to "obtain . . . legally binding DNA paternity test[s]."[229] These groups believe that it is unjust to require men to be responsible for children to whom they are not genetically related.[230]

On the other end of the spectrum are those who support parentage rules that prioritize conduct and intention over genetics. For example, Professor Marjorie Maguire Shultz has argued that where genetics and conduct do not coincide, the law should "prioritize intention and deliberative commitment over genes and gendered reproduction function."[231] Advocates of conduct or

---

[227] POPENOE, *supra* note 226, at 107.

[228] *See, e.g.*, Melanie B. Jacobs, *When Daddy Doesn't Want To Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 195 (2004) ("The issue of paternity disestablishment has become a cause célèbre for men who have unsuccessfully petitioned to disestablish their paternity subsequent to genetic testing which disproved their biological fatherhood."); Paula Roberts, *Truth and Consequences* (Parts I–III), 37 FAM. L.Q. 35 (2003) (examining legislative developments with regard to paternity disestablishment).

[229] U.S. Citizens Against Paternity Fraud, http://www.paternityfraud.com/pf_online_education.html (last visited July 3, 2008). *See also* Fathers for Life, http://fathersforlife.org/fatherhood/paternity.htm (last visited Aug. 12, 2008).

[230] Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 FAM. L.Q. 51, 52 (2006) ("The only thing that can be seen from the cases is that there is a growing recognition that it is wrong for the courts to be parties to the injustice done to these innocent men.").

[231] Marjorie Maguire Shultz, *Legislative Regulation of Surrogacy and Reproductive Technology*, 28 U.S.F. L. REV. 613, 618 (1994) ("Intention and biology are often mutually reinforcing in family design. When they are not, I would have the law prioritize intention and deliberative commitment over genes and gendered reproductive function."). *See also, e.g.*, Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 2 (2004) (arguing that "the law should abandon its interest in determining biological paternity" and that "[t]he legal rights and duties of fatherhood should emanate from commitment and contract, not from sex or genes"); Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 157 n.13 (2003) ("[M]y core thesis is that the redefinition of fatherhood must center around the nurture of children."); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1757 (1993) (urging the

intention-based rules have argued that intention-based rules are most likely to coincide with child's needs and best interests.[232]

Of course, the descriptions above represent only the two ends of a spectrum of varied positions about the role genetics and function should play with regard to parentage; there are many positions in between. Moreover, even people who agree about the rules that should apply in one context—such as paternity disestablishment—may not agree on what rules should govern in other areas of law—such as surrogacy.[233] My goal here is not to canvass all of the potential positions or to advocate for a particular position. Rather, my goal is simply to point out that these technological developments have raised new questions related to children's legal parentage and that the states have not answered these questions in uniform or consistent ways. Moreover, because family law rules impact people's lives in such an intimate and direct way and because the "[i]ndividual and social stakes in these matters are exceedingly high,"[234] the positions adopted—regardless of where they fall on the spectrum—tend to be very strongly and passionately held.[235] The next part will provide an overview of state responses to these developments in two areas of law—surrogacy and paternity disestablishment.

---

adoption of paternity rules that shift the focus from procreation and genetics to "functional nurturing").

[232] *See, e.g.*, Baker, *supra* note 231, at 69 ("This trend away from genetics and towards contract is a positive development . . . . It is a development that makes every parent-child relationship a wanted parent-child relationship.").

[233] *See, e.g.*, Joanna Grossman, *Family Boundaries: Third-Party Rights and Obligations with Respect to Children*, 40 FAM. L.Q. 1, 1 (2006) ("The debate about whether the law should accommodate the changing family form or stick to its traditional guns is far from resolved. It plays out differently, depending on the particular social change at issue, the nature of the family structure presented, and the particular moment in the ebb and flow of moral debate.").

[234] Shultz, *supra* note 231, at 614.

[235] Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 816 (1998) ("Family law is soaked in moral judgments that both reinforce the law and are reinforced by it. At some level, the question is not whether family law should reflect moral principles but what those principles will be."). *See also* Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1806 (1985) (noting that "people have tenacious and passionate beliefs about family morals").

B. *Surrogacy*

1. *Disharmony Among the States*

A review of the responses of state courts and legislatures to surrogacy reveal "complex cross-currents in societal opinions about the technology of reproduction, about gender and marriage, and about what it means to be a parent."[236] A number of states have enacted explicit statutory provisions permitting surrogacy in certain, regulated circumstances.[237] Other jurisdictions, by contrast, expressly prohibit surrogacy by statute.[238] Of the states that prohibit surrogacy, many of them have statutes that specifically provide that surrogacy violates the state's public policy.[239] For example, Michigan's statute provides that all surrogacy agreements are "void and unenforceable as contrary to public policy."[240] Moreover, some jurisdictions are so opposed to the use of surrogacy that they impose civil or, in some

---

[236] Shapo, *supra* note 22, at 479.

[237] Among the states that permit surrogacy by statute, the criteria for a permissible agreement vary. Some states only permit married couples to enter into enforceable surrogacy agreements. *See, e.g.*, FLA. STAT. ANN. § 742.15 (West 2005); NEV. REV. STAT. § 126.045(4)(b) (LexisNexis 2004); N.H. REV. STAT. ANN. § 168-B:1(VII) (LexisNexis 2001); TEX. FAM. CODE § 160.754(4)(b) (Vernon 2002 & Supp. 2006); UTAH CODE ANN. § 78B-15-801 (Supp. 2008); VA. CODE ANN. § 20-156 (LexisNexis 2004). Other states—including Nebraska, Nevada, and Washington—permit only uncompensated surrogacy arrangements. *See, e.g.*, NEB. REV. STAT. § 25-21, 200 (2007); NEV. REV. STAT. § 126.045(3) (LexisNexis 2004); WASH. REV. CODE ANN. § 26.26.230 (West 2007). Some states permit only gestational surrogacy agreements. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 47/10 (West 1999 & Supp. 2007); TEX. FAM. CODE ANN. § 160.754(c) (Vernon 2002 & Supp. 2006); UTAH CODE ANN. § 78B-15-801(7) (Supp. 2008).

[238] These jurisdictions include Arizona, the District of Columbia, Indiana, Louisiana, Michigan, New York, and North Dakota. ARIZ. REV. STAT. ANN. § 25-218 (West 2001) (statute held unconstitutional in *Soos v. Superior Court*, 879 P.2d 1356 (Ariz. App. Div. 1 1994)); D.C. CODE § 16-402 (2001); IND. CODE ANN. § 31-20-1-1 (West 1999); LA. REV. STAT. ANN.§ 9:2713 (2005); MICH. COMP. LAWS ANN. § 722.855 (West 2002); N.Y. DOM. REL. LAW § 122 (McKinney 1999); N.D. CENT. CODE § 14-18-05 (2004).

[239] *See, e.g.*, LA. REV. STAT. ANN. § 9:2713(A) (2005) (providing that a "contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy"); N.Y. DOM. REL. LAW § 122 (McKinney 1999) (providing that "[s]urrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable").

[240] MICH. COMP. LAWS § 722.855 (West 2002).

cases, criminal penalties on persons involved in surrogacy arrangements.[241] These provisions suggest that the moral and political reactions to surrogacy, at least in some states, may be even stronger than states' positions about lesbian and gay parenting. No state imposes civil or criminal penalties on lesbian and gay people who have children or who start families together, and no state has statutory provisions explicitly providing that lesbian and gay parenting violates the state's public policy.

The divergent underlying public policies also are evident in the varied rules for determining the legal parentage of children born through surrogacy. In some states, the intended parents are considered the legal parents of the resulting child.[242] In other states, statutory provisions provide that the surrogate and her husband, if any, are the legal parents.[243] And still other statutes direct courts to apply a best interests analysis to determine which of the potential candidates should get custody of the child.[244] Obviously, which state's parentage laws apply can dramatically impact the results in a dispute between the participants.

Courts in some of the states without relevant statutory provisions also have waded into the issue, again revealing a varied patchwork of responses. In *In re Baby M.*,[245] one of the first cases to address the legal parentage of a child born through surrogacy, the New Jersey Supreme Court held that traditional surrogacy agreements were unenforceable. Among other things,[246] the court was concerned that traditional surrogacy agreements confounded what the court considered to be a basic premise of family law—that "to the extent possible, children should remain with and be brought up by both of their natural parents."[247] Enforcement of surrogacy agreements, the court concluded, would "guarantee . . . permanent separation of the child from one of its natural parents."[248] Ultimately, the court concluded that the

---

[241] *See, e.g.*, D.C. CODE § 16-402(b) (2001); MICH. COMP. LAWS § 722.859 (West 2002); N.Y. DOM. REL. LAW § 123(b) (McKinney 1999).

[242] *See, e.g.*, N.H. REV. STAT. § 168-B:23(IV) (LexisNexis 2001); UTAH CODE ANN. § 78B-15-803(1) (Supp. 2008); VA. CODE ANN. § 20-160(D) (West 2000).

[243] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218(B), (C) (1989); N.D. CENT. CODE § 14-18-05 (2004).

[244] *See, e.g.*, MICH. COMP. LAWS ANN. § 722.861 (West 2002).

[245] 537 A.2d 1227 (N.J. 1988).

[246] The court also raised concerns about "the inducement of money" involved in surrogacy agreements and the fact that the agreement purported to include an irrevocable consent "prior to the birth, even prior to conception, to surrender the child." *Id.* at 1240.

[247] *Id.* at 1246–47.

[248] *Id.* at 1246.

legal parents of the resulting child were the intended/genetic father and the carrier who was connected to the child through gestation and genetics.[249]

In stark contrast, in *In re Marriage of Buzzanca*, a California Court of Appeal held that intention trumped genetics or gestation.[250] In the case, a married couple, Luanne and John Buzzanca, entered into a surrogacy arrangement with a woman who agreed to gestate an embryo with the intention of relinquishing the resulting child to Luanne and John. In the case, neither the intended parents nor the gestational carrier was genetically related to the embryo; rather, the embryo was created using ova and sperm from anonymous providers.[251] Luanne and John's relationship ended prior to the birth of the child and in the divorce proceeding, John took the position that he was not the legal parent of the resulting child because he "had no biological relationship with the child."[252] The California Court of Appeal rejected John's position, noting that this argument failed to appreciate the "well-settled body of law holding that there are times when fatherhood can be established by conduct apart from giving birth or being genetically related to a child."[253] "[G]iven their initiating role as the intended parents in her conception and birth," the court declared that John and Luanne were the child's legal parents despite their lack of genetic or gestational connection.[254] Whereas the New Jersey court concluded that parentage was, at its core, about genetics, the California court held that, at least in the context of reproductive technologies, genetics should give way to intention and conduct.

2. *Seize and Run Revisited*

Thus, a review of the statutory and case law developments reveals that the responses of the states to surrogacy have been varied. In light of the wide and often strongly expressed disagreement among the states with regard to the permissibility and parentage of children born through surrogacy, it is not hard to imagine how a party could seek to rely on these differences in law and policy to avoid a parentage determination with which the party was unhappy.

For example, assume a married couple, Carl and Daisy, decided to have a child through gestational surrogacy, using Carl's sperm and ova from an

---

[249] *Id.*

[250] 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

[251] *Id.*

[252] *Id.*

[253] *Id.* (emphasis omitted).

[254] *Id.* at 293.

anonymous provider. At the time, Carl and Daisy lived in California, which permits gestational surrogacy by case law.[255] They found an unmarried woman who agreed to serve as a surrogate carrier. The carrier also resided in California. Unfortunately, soon after the child was born, Carl and Daisy decided to get divorced. In the divorce proceeding, applying California law,[256] the court found that both parties were parents and awarded Carl primary custody and granted Daisy visitation. At some point, Carl decided that he no longer wanted to share custody with Daisy. He moved to North Dakota and, after the requisite period of time, filed a new action in North Dakota seeking a declaration that Daisy was not a legal parent. Carl argued that North Dakota was not bound by the prior California parentage determination. North Dakota law, he explained, clearly provided that surrogacy agreements were void as a matter of public policy and that the carrier, rather than the intended mother, was the legal mother of any child born through surrogacy.[257] Enforcing the California parentage order finding Daisy to be a parent, he continued, would therefore "require [the North Dakota c]ourt to substitute a public policy position in place of [the state's] established public policy."[258]

It turns out that the hypothetical above is not far fetched. Recent litigation in Pennsylvania and Ohio provides a useful illustration of how unhappy litigants have resorted to similar strategies. The series of cases arose out of a failed surrogacy arrangement involving an unmarried man, J.F., and his nonmarital female partner, E.D., both of whom resided in Ohio; a married gestational carrier who resided in Pennsylvania; and an ova provider (who was originally anonymous) from Texas.[259] In August 2002, the intended father, the ova provider, the gestational carrier, and the gestational carrier's husband entered into a surrogacy agreement under which the parties agreed

---

[255] *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993); *Buzzanca*, 72 Cal. Rptr. 2d at 282.

[256] *Buzzanca*, 72 Cal. Rptr. 2d at 293 (holding parents of child born to a gestational surrogate were intended parents even though they both lacked genetic connection to resulting child).

[257] N.D. CENT. CODE § 14-18-05 (LexisNexis 2007) ("Any agreement in which a woman agrees to become a surrogate or to relinquish that woman's rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by chapter 14-20.").

[258] Points and Authorities Court Memorandum for Lisa Miller-Jenkins, Miller-Jenkins vs. Miller-Jenkins, No. CH04000280-00 (Va. Cir. Oct. 15, 2004), http://www.publicadvocateusa.org/news/article.php?article=141 (last visited July 14, 2008).

[259] J.F. v. D.B., 897 A.2d 1261, 1265–1266 (Pa. Super. Ct. 2006).

that embryos created from ova from the anonymous provider and sperm from the intended father would be transferred to the carrier with the understanding that the carrier would relinquish any resulting children to the intended father.[260] The resulting triplets were born on November 19, 2003 at a hospital in Pennsylvania. Shortly after the children were born the carrier began to express a desire to keep the children. Without informing the intended parents, the carrier took the children from the hospital to her home in Pennsylvania.[261] Several weeks later, in December 2003, the intended father filed an action against the gestational carrier in Pennsylvania seeking custody of the triplets.[262] On April 2, 2004, the Pennsylvania trial court issued an order declaring the surrogacy contract to be void and declaring that the legal parents of the triplets were the intended father and the gestational carrier.[263]

The intended father, not surprisingly, was unhappy with the court's conclusion that the carrier was one of the triplet's legal parents. In his quest to obtain a more favorable result, the intended father participated in a second action, this one filed in Ohio, a state with radically different law and policy.[264] Prior Ohio case law had established a genetics-based rule for

---

[260] *Id.* at 1266.

[261] *Id.* at 1269.

[262] *Id.* at 1270.

[263] *Id.* Relying on the case law regarding sperm donors, the court also concluded that the ova provider was not a legal parent. *Id.* at 1278. The trial court's conclusion that the carrier was a legal parent was reversed on appeal. *Id.* at 1273. The appellate court also disagreed with the trial court's conclusion that the ova provider was not an indispensible party.

[264] Rice v. Flynn, No. 22416, 2005 WL 2140576, at *3 (Ohio Ct. App. Sept. 7, 2005). Although the Ohio action was nominally filed by the ova provider, there is reason to believe that the ova provider did so on behalf of and in coordination with the intended/genetic father. In a subsequent decision, the Pennsylvania court specifically noted its concern "about the . . . appearance of collusion between Rice [the ova provider] and plaintiff [the genetic and intended father]." *See, e.g.*, Flynn v. Bimber, 70 Pa. D. & C.4th 261, 284 n.7 (Pa. Com. Pl. Ct. 2005). The evidence the court cited to support this concern was the fact that the ova provider and the genetic/intended father were represented by the same law firm, and that there was no indication, despite her technical involvement in the Ohio action, that the ova provider had made any attempt to contact or to get information about the children. *Id.* In light of the likely collusion, even assuming only parties and privities are bound by res judicata, it is likely that the ova provider would be considered to be in privity with the intended father. *See, e.g.*, State ex rel. Davis v. Pub. Emp. Ret. Bd., 881 N.E.2d 294, 302 (Ohio Ct. App. 2007) (providing, for purposes of res judicata, that parties are in privity when there is a "mutuality of interest, including an identity of desired result") (citation omitted). Moreover, while in other contexts, judgments do not normally bind non-parties, "[a] judgment in an action whose purpose is to determine or change a person's status is [generally] conclusive with respect

determining the parentage of children born through surrogacy.[265] Under this prior case law, gestational carriers, being genetically unrelated to the resulting child, are not legal parents unless there is "consent, or waiver of consent, of the genetic parents."[266] The intended father's attempt was successful. The Ohio court concluded that it was authorized to disregard the Pennsylvania court's order.[267] Starting anew, this time applying Ohio law, the Ohio court concluded that, unless the evidence on remand demonstrated that the genetic parents had waived their rights, the gestational carrier was not a legal parent.[268]

These examples demonstrate how a public policy exception could have ripple effects on children born through surrogacy. Although there are no definitive statistics documenting the number of children born through surrogacy in the United States, sources suggest that "thousands of children

---

to that status upon all other persons." RESTATEMENT (SECOND) OF JUDGMENTS § 31(2) (1982).

[265] Belsito v. Clark, 644 N.E.2d 760, 766 (Ohio Com. Pl. 1994) ("For the best interest of the child and society, there are strong arguments to recognize the genetic parent as the natural parent.").

[266] *Id.* at 767. *See also id.* ("If the genetic providers have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents.").

[267] The Ohio court couched its conclusion that it was not bound to give full faith and credit to the Pennsylvania order in due process, rather than in public policy, concerns. Rice v. Flynn, No. 22416, 2005 WL 2140576, at *7 ("We find that the Pennsylvania court's failure to properly notify Rice and allow her to participate in the proceedings allows Ohio courts to decline to give full faith and credit to the April 2, 2004 Pennsylvania journal entry. As such, the Ohio courts are not bound by the April 2, 2004 Pennsylvania decision."). A person, however, has no right to be heard in a custody matter if, as a matter of law, the person is not entitled to parental rights. *See, e.g.*, Matter of Adoption of Child by J.M.G., 632 A.2d 550, 552 (N.J. Super. Ct. 1993) (holding that, because sperm donors are not legal parents, they do not need to be provided notice in an adoption proceeding). The Pennsylvania trial court had concluded that the ova provider was not a legal parent. In concluding that the ova provider was a parent and, therefore, was entitled to notice and an opportunity to be heard, the Ohio court appeared to consider only Ohio parentage law; it included no discussion or analysis of why the Pennsylvania trial court's conclusion was wrong as a matter of Pennsylvania parentage law. Stated another way, what the Ohio court essentially held was that it was not bound to defer to the Pennsylvania court's prior parentage determination because, *under Ohio law*, different parties would be considered the child's legal parents. Rice v. Flynn, No. 22416, 2005 WL 2140576, at *7. Although the Pennsylvania appellate court ultimately reversed the trial court's conclusion that the ova provider did not need to be provided notice, the important point here is that the Ohio court applied its own law rather than Pennsylvania law in deciding whether there was a due process violation.

[268] *Id.* at *9.

are born each year pursuant to gestational agreements."[269] Current patterns suggest that these numbers will continue to increase at a steady pace. If states were permitted to disregard out-of-state parentage adjudications when those prior determinations violated the forum's law and public policy on surrogacy, these thousands of children would always be at risk of having their family status invalidated.

C. *Paternity Disestablishment*

1. *Disharmony Among the States*

States are also moving in different directions with respect to the circumstances under which a man can disestablish or challenge his legal parentage based on evidence that he is not genetically connected to the child.[270] Today it is possible to determine with a high degree of accuracy whether a man is a child's genetic parent. A number of states have revised their statutory schemes to take account of these new developments, and to address the question of whether the traditional statutory presumptions should give way to genetic evidence and, if so, whether there should be any limits on the use of genetic testing.[271] Some states have amended their statutes to place relatively narrow limits on the time and conditions under which a man can seek to disprove his parentage through the use of genetic testing.[272] Other states, by contrast, have gone in the opposite direction, permitting men to disestablish their parentage regardless of the length of time they have been parenting the child and even if they previously had been adjudicated to be the child's legal parent.[273]

---

[269] UNIF. PARENTAGE ACT art. 8, introductory cmt. (amended 2002).

[270] *See* Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 252–55 (2006); Roberts, *supra* note 176, at 56.

[271] *See, e.g.*, Singer, *supra* note 270, at 252–55; *see also* Roberts, *supra* note 176, at 56.

[272] For example, the 2002 Uniform Parentage Act provides that any action to disestablish the parental status of a presumed parent in most circumstances must be commenced within two years of the child's birth. *See, e.g.*, UNIF. PARENTAGE ACT § 607(a) (amended 2002). Several states, including Delaware, North Dakota, and Washington have adopted this provision. DEL. CODE ANN. tit. 13, § 8-607 (Supp. 2006); N.D. CENT. CODE § 14-20-42 (Supp. 2007); WASH. REV. CODE ANN. § 26.26.230 (West 2005).

[273] *See, e.g.*, OHIO REV. CODE ANN. § 3119.962 (LexisNexis 2003). The Ohio Supreme Court recently upheld the validity of this provision. State ex rel. Loyd v. Lovelady, 840 N.E.2d 1062, 1065 (Ohio 2006).

Delaware is an example of a state that has responded by placing relatively strict time and circumstance limitations on the situations in which a man who is presumed to be a child's father can challenge this presumption. Under Delaware statutes, a man can bring an action seeking to disprove his paternity only in the first two years of the child's life.[274] Moreover, even within the first two years, a court can deny a request for genetic testing if it would "be inequitable to disprove the father-child relationship."[275] As noted in the Commentary to the revised 2002 Uniform Parentage Act, upon which the Delaware statutes are modeled, the purpose of this provision is to incorporate principles of equity to protect the child.[276] Even prior to the enactment of these statutory provisions, Delaware courts were reluctant to allow parties belatedly to challenge or relitigate the issue of paternity. As a Delaware family court explained, allowing such challenges would have a "potentially damaging effect" on "innocent children."[277]

Recently, however, a small but growing number of states have moved in the other direction, greatly expanding the circumstances under which a man can, not only challenge a presumption of paternity, but "disestablish" or set aside a prior judicial determination of paternity.[278] The Ohio legislature recently enacted such a statute. The Ohio statute permits men who have been adjudicated to be a child's parent to disestablish their paternity if genetic tests indicate a zero probability that they are the child's biological parent.[279] These more sweeping paternity disestablishment statutes are based on the policy position that, regardless of the duration and depth of the parent-child bond, it is unfair to require men to support children who are not their genetic children. The Indiana Supreme Court explained this underlying policy in holding that a husband should not and could not be required to support a child that was not his biological child:

---

[274] DEL. CODE ANN. tit. 13, § 8-607 (Supp. 2006).

[275] DEL. CODE ANN. tit. 13, § 8-608 (Supp. 2006) (listing factors that a court can consider when deciding whether to estop a man from challenging his parentage).

[276] UNIF. PARENTAGE ACT § 608, cmt. (amended 2002).

[277] Titus v. Rayne, No. CN91-6133, 1992 WL 437586, at *13 (Del. Fam. Ct. Nov. 19, 1992) (quoting *In re* Paternity of J.R.W., 814 P.2d 1256, 1265 (Wyo. 1991)).

[278] *See, e.g.*, ALA. CODE § 26-17A-1 (Supp. 2008); ARK. CODE ANN. § 9-10-115(e) (2008); GA. CODE Ann. § 19-7-54 (2004); IOWA CODE ANN. § 600B.41A (West 2007); MD. CODE ANN., FAM. LAW § 5-1038 (LexisNexis 2006); VA. CODE ANN. § 20-49.10 (2008). *See also* Diane S. Kaplan, *Immaculate Deception: The Evolving Right Of Paternal Renunciation*, 27 WOMEN'S RTS. L. REP. 139, 149 (2006) ("Since 1997, nineteen states have enacted an assortment of statutes that attempt to provide legal solutions to the paternal renunciation dilemma."). *See generally* Roberts, *supra* note 228 (reviewing developments).

[279] OHIO REV. CODE ANN. § 3119.961, 3119.962 (LexisNexis 2003).

> Proper identification of parents and child should prove to be in the best interests of the child for medical or psychological reasons. It also plays a role in the just determination of child support; we have already declared that public policy disfavors a support order against a man who is not the child's father.[280]

Thus, some states have taken the position that function and the establishment of a bonded parent-child relationship are more important than genetic truth with regard to the determination of parentage. By contrast, other states have concluded that it is unfair and inconsistent with the public policy of the state to require men to support children who are not genetically related to them. The fervency of positions on both sides of the issue tends to be particularly high.[281] Those supporting paternity disestablishment provisions often compare the issue to DNA exoneration for persons wrongfully incarcerated.[282] Those on the other side argue that allowing disestablishment claims "do[es] children a great disservice."[283]

2. *Seize and Run Revisited*

Given the disparate patchwork of approaches, again, it is not hard to imagine how nongenetic fathers, unhappy with one court's refusal to allow them to disestablish their parentage, could seek to avoid this determination by trying again in another state with a divergent public policy. Again, I will use a hypothetical to illustrate how this could play out. A married couple, Ellen and Frank, resided in Delaware. During the course of the marriage, Ellen gave birth to a child that was not Frank's genetic child. When the child was three, the couple divorced. In the divorce action, evidence was introduced suggesting that Frank might not be the child's genetic parent. Based on this information, Frank sought genetic testing to disprove his paternity and to avoid child support obligations. The court rejected Frank's request based on Delaware's statute prohibiting challenges to the husband's paternity after the child's second birthday.[284] Accordingly, the court declared

---

[280] Russell v. Russell, 682 N.E.2d 513, 517 n.7 (Ind. 1997) (internal quotes and citation omitted).

[281] *See, e.g.*, Veronica Sue Gunderson, *Personal Responsibility in Parentage: An Argument Against the Marital Presumption*, 11 U.C. DAVIS J. JUV. L. & POL'Y 335, 355 & 356 n.87 (2007) (noting that a "Google search of the term 'paternity fraud' will generate 1,040,000 links to various websites").

[282] *Id.* at 356 n.87 (noting that "[t]he forerunner of these sites is www.paternityfraud.com, whose slogan is 'If the genes don't fit, you must acquit.'™")

[283] Jacobs, *supra* note 228, at 196.

[284] DEL. CODE ANN. tit. 13, § 8-607 (Supp. 2006); *see also* DEL. CODE ANN. tit. 13, § 8-621(c) (Supp. 2006).

Frank to be the child's legal parent, granted primary custody to Ellen, and required Frank to pay child support. Several years later, after all of the parties had moved to Alabama, Frank filed a new action in Alabama asking the court to order genetic testing and, if the genetic testing revealed that he was not the child's genetic parent, to issue an order decreeing that he was not a legal parent and had no child support obligations.[285] Even though Frank would be precluded from bringing a collateral attack on the parentage determination in Delaware, Frank argued that the Alabama court should not be required to give it that same effect in Alabama because to do so would violate Alabama's law and policy permitting men to disestablish their paternity where genetic evidence indicated they were not a child's genetic parent.[286]

Accordingly, if a public policy exception was accepted, it would mean that even when a parentage adjudication was protected from subsequent collateral attacks in the initial decree state, it could be avoided by relitigating the issue in another state that provides an unqualified right to disestablish paternity. The number of children potentially impacted by such a rule is staggering. One study found that approximately two percent of men who thought they were raising their genetic children were in fact not the genetic parents of those children.[287] Other studies report significantly higher numbers. For example, some estimates suggest that 10 to 15% of all children born to married couples are not the genetic children of the husband.[288] A study in New Hampshire revealed that "as many as 30 percent of those paying child support are not the biological fathers of the children being supported."[289]

---

[285] ALA. CODE § 26-17A-1(a) (LexisNexis Supp. 2008) ("Upon petition of the defendant in a paternity proceeding where the defendant has been declared the legal father, the case shall be reopened if there is scientific evidence presented by the defendant that he is not the father.").

[286] Some states' paternity disestablishment statutes explicitly provide that they do not permit courts to set aside a paternity determination issued by a court of another state. *See, e.g.*, CAL. FAM. CODE § 7648.3 (West Supp. 2009); IOWA CODE ANN. § 600B.41A (West Supp. 2007). Alabama's statute does not include such a limitation.

[287] Leslie Joan Harris, *A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests, and Betrayal*, 44 WILLAMETTE L. REV. 297, 303 (2007).

[288] Ellman, *supra* note 209, at 56–57 & n.21 ("Medical students are routinely taught that the rate is ten to 15%, and standard genetics texts use a figure of 10 percent.") (citations omitted).

[289] Tresa Baldas, *Parent Trap? Litigation Explodes Over Paternity Fraud*, NAT'L L.J., Apr. 3, 2006, at 1. Similarly, in 2001, according to the American Association of Blood Banks, "almost 30% of the men who submitted samples for paternity determination were found not to be the fathers of the children in connection with whom the test was performed." Kristen Santillo, *Disestablishment of Paternity and the Future of*

VI. CONCLUSION

Over the past fifty years, Congress and the states have passed a number of statutory schemes intended to "avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children . . . ."[290] Recently, in a number of cases involving children born to same-sex parents, there has been a revival of these interjurisdictional conflicts about children. While the tactics—seeking to avoid an unfavorable order by filing a new action in a second state—are similar to those that inspired Congress and the states to act, what is at stake in this new wave of cases is even more profound. In these same-sex parent cases, the parties seek to challenge not simply a court's allocation of rights and responsibilities, but rather seek to challenge a prior adjudication of the child's legal parentage.

As a doctrinal matter, these attempts should be rejected. Unlike a custody or support allocation, a parentage determination is not modifiable. Rather, a parentage adjudication is intended to be a final status adjudication, challengeable only through direct appeal or under the rules permitting collateral attacks on such determinations. Accordingly, it is entitled to exacting full faith and credit as a matter of constitutional law. Thus, as is true with other judgments, it must be entitled to the same effect in sister states that it would have in the initial decree state, regardless of whether it violates the law and policy of the forum.

While the consequences of a contrary rule—permitting courts to disregard parentage determinations based on public policy considerations—for same-sex parent families alone should be great cause for concern, this Article also demonstrates that children born to same-sex couples are not the only ones who would be affected by such a rule. Parentage has become an increasingly contested issue. There are a number of areas of parentage law in which the states have adopted different and at times conflicting approaches to determining a child's legal parentage. A rule permitting courts to disregard prior determinations of parentage based on public policy concerns would upset not just the stability and security of lesbian and gay parent families, but it would threaten a wide array of family configurations.

Child Support Obligations, 37 FAM. L.Q. 503, 504–05 (2003) (citing PARENTAGE TESTING PROGRAM UNIT, AMERICAN ASSOCIATION OF BLOODBANKS, ANNUAL REPORT SUMMARY FOR TESTING IN 2001 (2002)).

[290] UNIF. CHILD CUSTODY JURISDICTION ACT, prefatory note (1968).