

A CRITICAL ANALYSIS OF INTERSTATE RECOGNITION OF LESBIGAY ADOPTIONS

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I. INTRODUCTION: THE PROSPECT OF INTERSTATE CONFLICT OVER RECOGNIZING LESBIGAY ADOPTIONS

A. *The Social Phenomenon of Lesbigay Adoption*

“Lesbigay” adoption,¹ the adoption of a child or children by a person or persons involved in a lesbian or gay relationship, is increasingly practiced and accepted in the United States. While the estimates vary,² the best recent census data indicates that it is possible

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1. The felicitous term “lesbigay” parenting first came to my attention in an influential supportive article by Professors Judith Stacey and Timothy Biblarz describing adults who are raising children while living a homosexual lifestyle, usually in a gay or lesbian relationship. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001). At least one other sociologist used the term “lesbigay” before Stacey and Biblarz, to include “lesbians, bisexuals, and gay men.” CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN 5 (1999) (describing the “details of everyday life in the households of lesbigay families”) (emphasis omitted in parenthetical), cited in Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677, 690 n.96 (2000). In this article, I adapt that term to the adoption context; “lesbigay adoption” refers to the adoption of children by adults who are involved in gay or lesbian sexual relationships. Thus, lesbigay adoptions include what many sympathetic writers term “second parent” adoptions.

2. Unfortunately, some courts and law review writers sympathetic to lesbigay adoption often cite unreliable, obviously inflated, and politically exaggerated estimates. For example, the Vermont Supreme Court in *Baker v. State*, 744 A.2d 864, 881-82 (Vt. 1999), cited sensational estimates that between six million and fourteen million children are being raised by gay fathers or lesbian mothers and that between one-and-one-half million and five million lesbian mothers resided with their children in the United States in 1990. Similarly, the California Supreme Court

that as many as 317,000 children are being raised by lesbian and gay couples,³ though it is probable that the actual number of children of lesbian/gay parenting is significantly smaller.⁴ The number of children who have been involved in actual lesbian/gay adoptions is just a fraction of the number of children being raised by lesbian/gay parents. The latest

suggested that between ten thousand and twenty thousand second parent adoptions had been granted in the state of California. Sharon S. v. Superior Court, 73 P.3d 554, 568 (Cal. 2003). David Flaks estimated that there are between six million and fourteen million children with a lesbian or gay parent in the United States. David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 345 (1994). The same figure is cited by Maxwell Peltz. Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175, 175 (1995). Juliet Cox estimated that "three million homosexual parents . . . are the primary caretakers of between eight and ten million children." Juliet A. Cox, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity?*, 59 MO. L. REV. 775, 786 (1994).

3. The most recent census report on the number of children living with a parent and an unmarried partner reveals that 1,799,000 children are living with their mother and her unmarried partner (both heterosexual and homosexual), and 1,081,000 children are living with their father and his unmarried partner (both heterosexual and homosexual), for a total of 2,880,000 children being raised by a parent and a non-marital partner. Jason Fields, *Children's Living Arrangements and Characteristics: March 2002*, CURRENT POPULATION REP. 2 (Dep't of Commerce, June 2003) (located in Table 1, *Children by Age and Family Structure: March 2002*), at <http://www.census.gov/prod/2003pubs/p20-547.pdf> (on file with the Ave Maria Law Review). The 2000 census reported that 11% of non-marital couple households in the United States were of the same sex. STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 48, Table 49 (Dep't of Commerce, Dec. 2002) (reporting 594,391 same-sex couples among the 5,475,768 unmarried partner households). Applying that proportion to the number of children being raised by a parent and his or her non-marital partner produces the figure of 317,000 children potentially being raised by same-sex couples.

4. The number of children being raised by lesbian/gay parents is likely much lower because: (1) it is unlikely that all 594,391 of the couples of the same gender sharing households are homosexuals—it is still quite common for two heterosexual persons of the same sex to share a house, condo or apartment and live as a household; and (2) the calculation of 317,000 children is valid only if same-sex couples are raising children in the same proportion as unmarried heterosexual couples and that seems unlikely—the 2000 census reportedly indicated that only about 20% of gay couples and about one-third of lesbian couples are raising children. See Christopher Seely, *Gay Parents Face Back-To-School Jitters*, SOUTHERNVOICE.COM, Aug. 8, 2003, at <http://www.sovo.com/2003/8-8/news/localnews/gayparents.cfm> (on file with the Ave Maria Law Review). International comparison also points to lower figures. For example, Denmark was the first country in the world (in 1989) to give legal status (called "domestic partnership") to same-sex couples, and the Danes are very supportive of homosexual relations. Yet a survey of Danish same-sex registered partnerships in 1997 revealed that "only 128 Danish children were growing up with a parent living in a registered partnership." Rainer Frank, *Adoption by Unmarried Cohabitants, Same-Sex Couples and Single Persons in Europe*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY 121, 128 (Alan J. Hawkins, Lynn D. Wardle & David Orgon Coolidge eds., 2002). Of course, in some areas the actual number of children being raised by lesbian/gay couples may be under-reported which may offset some of the likely overage.

Census Bureau report on adopted children, *Adopted Children and Stepchildren: 2000*, shows that a total of 57,693 adopted children are living with men or women with an unmarried partner.⁵ That includes heterosexual nonmarital partners (who greatly outnumber same-sex partners in the population) as well as same-sex partners. If the proportion of adopted children being raised by lesbian or gay couples is the same as the proportion of adult cohabiting couples that are homosexual couples,⁶ that would mean that in 2000, fewer than 6350 adopted children were being raised by same-sex partners. However, that is just an estimate based on census data. The actual number of children who are being raised by or who have been adopted by lesbian/gay parents is not known for certain. Nonetheless, it is clear that the number of children being raised and adopted by lesbian and gay adults has increased dramatically in recent years, and the “gayby” boom has caught the attention of journalists and sociologists, as well as lawyers, judges, law students and professors.⁷

5. Rose M. Kreider, *Adopted Children and Stepchildren: 2000*, CENSUS 2000 SPECIAL REP. 14 (Dep’t of Commerce, Oct. 2003) (located in Table 6, *Children of the Householder by Type of Relationship, Age, and Selected Characteristics of the Householder: 2000*), at <http://adoption.about.com/gi/dynamic/offsite.htm?site=http://www.census.gov/prod/2003pubs/censr%2D6.pdf> (on file with the Ave Maria Law Review).

6. See *supra* note 3.

7. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 342 (2002) (stating that “our country is undergoing a ‘gayby boom’” and that “approximately ten million children [are] being raised by same-sex parents in the United States”); Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC’Y REV. 285, 287 (2002) (“Given the relatively new social realities of the ‘gayby boom’ (a term commonly given to describe the increase in planned gay and lesbian headed families as a result of new reproductive technologies) and the expanding public and legal acceptance of alternative sexualities, courts are increasingly being forced to deal with the intersection of sexuality and family law in a way that forces them to question—or at least temporarily suspend—their standard operating assumptions, definitions, and identifications, which would generally assume ‘homosexual parent’ to be a contradiction in terms.”); Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 81 n.247 (1998) (“Six to fourteen million children have a gay parent. One to five million lesbians are mothers, and one to three million gay men are fathers.”); Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RTS. 555, 562 (1993) (“Estimates place the number of Gay parents . . . [at] between three and five million. According to a recent American Bar Association study, eight to ten million children are currently being raised in three million Gay households.”) (footnote omitted); Sherri L. Toussaint, Comment, *Defense of Marriage Act: Isn’t It Ironic . . . Don’t You Think? A Little Too Ironic?*, 76 NEB. L. REV. 924, 974 n.366 (1997) (“It has been estimated that 6 to 14 million children are raised by homosexual parents in at least 4 million households.”); Ilene Chaykin, *Babes in Arms: Are Two Moms Better Than One? In Hollywood, the Latest Fad in Lesbian Chic Is Getting in the Family Way—By Any Means*

B. *The Changing State Adoption Laws Allowing
Lesbigay Adoptions*

Until recently, adoption by same-sex couples was not allowed in the United States. Adoption was not known at common law, and adoption in Roman-influenced civil law was for the purpose of adults—either or both the adult adopter or an adult adoptee.⁸ The era of modern adoption began with the enactment of child-welfare-focused adoption laws in Massachusetts in 1851.⁹ The primary, dominant, motivating purpose of American-style adoption was to provide parents for parentless children, and only secondarily, but simultaneously, to fulfill the reciprocal aspirations of adults to raise children.¹⁰ Thus, the heart of this child-centered model of adoption was the creation of family relationships that imitated and were intended to replicate the relationship that exists between parents and child(ren) in a birth (natural) family. By the twentieth century, child-welfare-oriented, imitative adoption had become the dominant paradigm for adoption, replacing the old adult-centered, property, or status-transmission focus. As the California Supreme Court put it in a 1921 decision: “The main purpose of adoption statutes is the promotion of the welfare of children . . . by the legal recognition and regulation of the consummation of the closest conceivable counterpart

Necessary, LOS ANGELES MAG., July 1, 2000, at 105 (describing the great number of lesbian and gay parents), *cited in* Jacobs, *supra*, at 342 n.3; Valerie Kellogg, *How the Children of the Gay Baby Boom Are Faring*, NEWSDAY, July 10, 2001, at B10 (noting an American Bar Association estimate of ten million children being raised by homosexual parents), *cited in* Jacobs, *supra*, at 342 n.2; Eloise Salholz et al., *The Future of Gay America*, NEWSWEEK, Mar. 12, 1990, at 20-21, *cited in* Damslet, *supra*, at 562 n.32; *see also* Barbara Kantrowitz, *Gay Families Come Out*, NEWSWEEK, Nov. 4, 1996, at 50; Stacey & Biblarz, *supra* note 1.

8. *See* Homer H. Clark, Jr., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.1, at 850-51 (2d ed. 1988); C. Deborah Phillips, *Adoption*, in 2 LYNN D. WARDLE ET AL., CONTEMPORARY FAMILY LAW § 10:01 at 2 (1988). *See generally* 1 JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW & PRACTICE 1-1 (2004).

9. *See* Elizabeth S. Cole, *Adoption: History, Policy, and Program*, in A HANDBOOK OF CHILD WELFARE: CONTEXT, KNOWLEDGE, AND PRACTICE 640 (Joan Laird & Ann Hartman eds., 1985).

10. Lisa K. Gold, Comment, *Who's Afraid of Big Government? The Federalization of Intercountry Adoption: It's Not as Scary as It Sounds*, 34 TULSA L.J. 109, 110 (1998) (“Modern adoption and particularly international adoption, now serves a more reciprocal function of meeting the needs of children who would otherwise be without homes and families, as well as the adults who would otherwise be without children.”).

of the relationship of parent and child. . . . [This] is attainable through actual adoption"¹¹

The imitative model of adoption obviously precluded adoption by same-sex parents. Thus, it is not surprising that lesbian adoption was unknown historically in adoption law. However, the pool of adoptive parents has broadened with the use of single-adult adoptions, with the implementation of a variety of programs to increase adoption placements (such as subsidized adoption), and with the dramatic accessibility of Assisted Reproduction Technology (most notably, artificial insemination, in vitro fertilization, and surrogacy). When those developments are coupled with the recent growth of lesbian parenting and the recent decriminalization and increasing social acceptance of homosexual relations, the emergence of lesbian adoption is hardly surprising.

Attempts to change adoption laws to allow lesbian adoption began with litigation efforts seeking to have existing adoption laws interpreted to allow lesbian adoption. In the absence of specific legislation authorizing lesbian adoptions, appellate courts in nine states and the District of Columbia—comprising the majority of recent decisions—have interpreted the general adoption laws to allow gay partners or individuals to adopt,¹² while appellate courts in at least

11. Santos v. Santos, 195 P. 1055, 1057 (Cal. 1921). See generally Cole, *supra* note 9 (stating that adoption “provide[s] children with nurturant environments in the care of legally recognized parents whose custody, control, responsibilities, and rights are assured”).

12. See Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003) (allowing adoption by a former lesbian partner); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995) (allowing second-parent adoption in stages by a gay male couple); *In re C.M.A.*, 715 N.E.2d 674 (Ill. App. Ct. 1999) (stating that the prior judge had no authority to prevent a later judge from issuing an order allowing lesbian partners to adopt); *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995) (allowing lesbian partner adoption); *Adoption of Galen*, 680 N.E.2d 70, 71 (Mass. 1997); *Adoption of Tammy*, 619 N.E.2d 315, 319 (Mass. 1993); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re Adoption of a Child by J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sup. Ct. 1992); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002) (detailing an exception provision that gives the court discretion to grant a partner’s adoption that otherwise is not allowed by statute); *In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); see also *In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio 1990) (holding the adoption of a severely impaired eight-year-old child by his male counselor not barred because the prospective adoptive parent is a homosexual man living with his male partner); *In re Adoption of M.J.S.*, 44 S.W.3d 41 (Tenn. Ct. App. 2001) (allowing an adoption by a former same-sex partner); Marc Wolinsky, *Stereotypes, Tolerance and Acceptance: Gay Rights in Courts of Law and Public Opinion*, 19 DEL. LAW 13, 18 (2001).

five states have rejected—in whole or in part—lesbigay adoption.¹³ Similarly, there have been efforts to amend adoption laws to authorize or deny lesbigay adoptions. Legislatures in four states have passed legislation to explicitly *allow* gay couple adoption,¹⁴ while five state legislatures—six if counting one that also allows some gay adoptions—have enacted laws that *bar* or explicitly permit rejection of all or some adoptions by homosexual couples.¹⁵

13. See *In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. Ct. App. 1996) (holding that statutes do not allow lesbian partner adoption, and that this does not violate equal protection); *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1385 (S.D. Fla. 2001) (granting summary judgment to defendants on the basis that “there is a plausible reason for the State’s action” in forbidding homosexual adoption), *aff’d sub nom. Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *reh’g en banc denied*, 377 F.3d 1275 (11th Cir. 2004) (the court was evenly divided on the decision to deny a rehearing); *cert. denied Lofton v. Sec’y Dep’t Children & Family Servs.*, 125 S. Ct. 869 (Jan. 10, 2005); Dep’t of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1217 (Fla. Dist. Ct. App. 1993), *aff’d in part sub nom. Cox v. Fla. Dep’t of Health & Rehabilitative Servs.*, 656 So. 2d 902, 903 (Fla. 1995) (quashed in part on other grounds); *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002); *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998) (holding that a lesbian partner may not adopt without the termination of the biological parent’s rights); *In re Bonfield*, 773 N.E.2d 507, 509 (Ohio 2002) (ruling that a lesbian partner is not a parent but can file for shared custody; in dicta the court notes that “second parent adoption is not available in Ohio”); *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994) (holding that second-parent adoption is not permitted under stepparent-adoption statutes); see also *S.B. v. L.W.*, 793 So. 2d 656, 662 (Miss. Ct. App. 2001) (Payne, J., concurring) (noting that Mississippi does not allow a same-sex partner to adopt). For further discussion, see *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999), where the court held that an adoption review board has no authority to waive statutes requiring the termination of the biological same-sex parent’s parental rights if the partner adopts. The *Baby Z.* case was overruled by legislation the next year. See CONN. GEN. STAT. §§ 45a-724(a)(2)-(3) (2004).

14. See CAL. FAM. CODE § 9000(b) (West 2005) (“A domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides.”); CONN. GEN. STAT. ANN. § 45a-724(a)(3) (West 2004) (“Subject to the approval of the Court of Probate as provided in section 45a-727, any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, of any other person other than the parties to such agreement have been terminated.”); N.H. REV. STAT. ANN. § 170-B:4 (2004) (repealing, in 1999, New Hampshire’s twelve-year ban on gay adoption and foster parenting); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002) (“If a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent’s parental rights is unnecessary in an adoption under this subsection.”). Some of these laws were passed after state courts had interpreted earlier statutes to allow gay-couple adoptions.

15. See ALA. CODE § 26-10A-5, 6 (2004); FLA. STAT. ANN. § 63.042(3) (West 2000); MISS. CODE ANN. § 93-17-3 (2004); OKLA. STAT. ANN. tit. 10, § 7502-1-4 (A) (West Supp. 2005); UTAH CODE ANN. § 78-30-1 (2002); see also CONN. GEN. STAT. ANN. § 45a-726a (West 2002) (disallowing lesbigay adoptions unless strict standards are met). See generally William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787

Thus, at present, lesbigay adoption is authorized by legislation or state appellate court interpretation in approximately one-fourth of the states. Sympathetic trial courts in other states have reportedly approved adoptions by adults in lesbian and gay relationships, but the precedential effect of those interpretations of state adoption laws to allow lesbigay adoption is minimal.¹⁶ When the issue arises, whether in the courts or in the legislature, there seems to be a consistent split in the states over whether to allow lesbigay adoption. Since previously lesbigay adoption was not permitted, there is and continues to be a current increase in the number of states that allow lesbigay adoption. As the number of adults in lesbian and gay relationships who are raising children increases, and the number of states in which lesbigay adoptions are permitted grows, the number of children who will be adopted by adults in homosexual relationships can be expected to increase as well.

C. *The Lesbigay Adoption Recognition Dilemma*

These social and legal changes create a potentially significant dilemma for interstate recognition of lesbigay adoption. A significant and growing minority of states allow lesbigay adoption, either by legislative enactment or appellate judicial interpretation.¹⁷ A similar significant minority of states explicitly prohibit lesbigay adoption,¹⁸ and the remaining states—about half of the states—historically have not allowed lesbigay adoption and have not yet addressed the interpretive issue at a legislative or an appellate court level. Thus, about three-fourths of the states either explicitly prohibit or implicitly do not allow lesbigay adoption. That is about the same percentage of states (78%) that enacted state Defense of Marriage Act (“DOMA”)

(2003) (summarizing the debate, providing the history, and surveying the law regarding sexual orientation and adoption).

16. Lower courts in the following states have reportedly granted adoption to same-sex couples or partners: Alabama, Alaska, California, Indiana, Iowa, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington. Similar adoptions reportedly have been approved by family, appellate, or state supreme courts in the following states: Delaware, Hawaii, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania. See PARTNERS TASK FORCE FOR GAY AND LESBIAN COUPLES, ADOPTIONS BY SAME-SEX COUPLED PARTNERS (2005), at <http://www.eskimo.com/~demian/parent.html#a-chart> (on file with the Ave Maria Law Review).

17. See *supra* notes 14, 16.

18. See *supra* note 15.

laws to ban same-sex marriage and prohibit the recognition of same-sex marriages from other jurisdictions (prior to the election of November 2, 2004).¹⁹ Those DOMAs are generally recognized as manifesting strong public policy against same-sex marriage. While lesbian adoption is different than same-sex marriage,²⁰ some “conservative” family value systems link the two and, in at least some states, the DOMAs are likely the tip of an iceberg, manifesting a strong underlying public sentiment against not just homosexual marriage in particular, but against legal recognition of homosexual family forms in general, including lesbian adoption.

Because American families are quite mobile,²¹ it is inevitable—apart from any tactical manipulations where “test cases” are artificially generated—that lesbian adoptions will be transported, in the normal course of employment transfers, job changes, family break-up, etc., from states where they are permitted into states where they are not allowed, or where they are expressly forbidden.

Because laws and judicial decisions barring lesbian adoption in most cases probably manifest strong public policies about conjugal marital families, if the issue of interstate recognition of lesbian

19. MARRIAGEWATCH.ORG, STATE DEFENSE OF MARRIAGE ACTS (2005) at <http://marriagelaw.cua.edu/Law/states/doma.cfm> (on file with the Ave Maria Law Review). On November 2, 2004, voters in eleven (of eleven) states where state constitutional amendments prohibiting same-sex marriage were on the ballot approved such constitutional DOMAs, bringing the total number of states with legislative or constitutional DOMAs to forty (for example, voters in Oregon, which previously did not have any bar against recognizing same-sex marriage, passed a state marriage amendment). *See id.*

20. Much of the opposition to same-sex marriage manifests a concern about marriage as a public institution, and about the message that allowing same-sex marriage would convey to society. While marriage is generally seen as an important public institution, parenting has long been protected by a strong constitutional parental autonomy and privacy doctrine that protects the right of parents to make parenting decisions largely unsupervised by the state and in spite of the state’s displeasure. “Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right... [to] bring up children” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925). “[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce*). *See infra* discussion in Part I.D.

21. About 8% to 10% of the American population moves every year. Jane Adler, *Retirees Choose Offbeat Destinations*, EXPERIENCE, Summer 2004, at 42 (“Curiously, migration among the general population is gradually declining. The percentage of people who have moved in the last five years dropped from 9.9 percent in 1980 to 8.4 percent in 2000.”).

adoption arises in a choice of law context, it is very likely that states which do not allow lesbigay adoptions could properly refuse to recognize sister-state lesbigay adoption rules. However, the lesbigay adoption recognition question is likely to arise most frequently, not in a choice of law context, but with regard to whether an adoption judgment, order, or decree establishing a lesbigay adoption, in a state that allows lesbigay adoption, will be recognized in a state that does not allow lesbigay adoption, or that specifically prohibits lesbigay adoption.

While there is great latitude for states to not recognize the laws of sister states, there is much less “wiggle room” for a state to decline recognition of a judgment from a sister state. For example, in *Matsushita Electric Industrial Co. v. Epstein*,²² the Supreme Court declared: “The [Full Faith and Credit] Act thus directs all courts to treat a state-court judgment with the same respect that it would receive in the courts of the rendering State.”²³ In 2004, the Court reiterated in *Franchise Tax Board v. Hyatt*²⁴ that “the full faith and credit command ‘is exacting’ with respect to ‘[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment,’ . . . [but is] less demanding with respect to choice of laws.”²⁵ The most comprehensive recent explanation of the difference between the full faith and credit given to judgments and the full faith and credit given to laws was in *Baker v. General Motors*,²⁶ where Justice Ginsburg, for the Court, explained:

Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. “In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded.” . . . 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.

22. 516 U.S. 367 (1996).

23. *Id.* at 373.

24. 538 U.S. 488 (2003).

25. *Id.* at 494 (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)).

26. 522 U.S. 222 (1998).

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. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force. . . .

A court may be guided by the forum State's "public policy" in determining the *law* applicable to a controversy. . . . But our decisions support no roving "public policy exception" to the full faith and credit due *judgments*.²⁷

This misapprehension creates the lesbian adoption dilemma. Must states that forbid or do not allow lesbian adoption recognize and enforce lesbian adoption decrees and orders from sister states that permit lesbian adoptions? If so, in all respects? As to all incidents?

D. *Apart from DOMA*

Congress may have answered the question about interstate recognition of adoption decrees indirectly when it enacted the Defense of Marriage Act ("DOMA"),²⁸ or the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A (2000), which mandates interstate recognition of lesbian adoption.²⁹ In one of its two operative provisions,³⁰ the full faith and credit provision, the federal DOMA provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, *or judicial proceeding* of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory,

27. *Id.* at 232-34 (footnotes and citations omitted). As Professor Reese observed more than a half-century ago, "the Court has been steadily engaged in enlarging the scope of the [Full Faith and Credit] clause by limiting the defenses which may be made in actions on judgments." Willis L. M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 155 (1949).

28. 28 U.S.C. § 1738C (2000); 1 U.S.C. § 7 (2000).

29. 28 U.S.C. § 1738A (2000).

30. The other provision, not of relevance to this article, provides that for purposes of federal law (statutory, administrative, and case law) marital terms "mean[] only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7 (2000).

possession, or tribe, or a right or claim arising from such relationship.³¹

Thus, DOMA explicitly authorizes states to refuse to recognize judgments “respecting a relationship between persons of the same sex that is treated as a marriage.”³² In states where only couple adoption by married couples is allowed, it could be argued that recognition of a sister-state lesbian adoption decree, judgment, or order granting adoption by a same-sex partner would be to treat the same-sex relationship as a marriage, and that nonrecognition would be authorized under DOMA.³³ However, the Parental Kidnapping Prevention Act could arguably be read to mandate such recognition.

This article bypasses those statutory DOMA and PKPA issues. It also puts aside such constitutional questions as whether the “Effects Clause” empowers Congress to change the judgment recognition interpretation of the Full Faith and Credit Clause.³⁴ This article focuses instead upon whether nonrecognition of lesbian adoption might be permissible otherwise under general conflicts and

31. 28 U.S.C. § 1738C (emphasis added).

32. *Id.*

33. See generally Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2000 (1997) (“Existing law does not . . . allow one state to refuse recognition to the final judgment of another state’s courts. DOMA does—it expressly authorizes states to ignore even judgments involving the marital rights or status of a same-sex couple. All bets are off for these people, and no divorce decree, property settlement, or adoption is safe.”) (footnote omitted); Evan Wolfson & Michael F. Melcher, *DOMA’s House Divided*, 44 FED. LAW. 30, 32 (1997) (“Determinations on adoption, child custody, and child support are also judgments that are already granted full faith and credit. DOMA impedes this recognition in violation of established precedent and directly contradicts laws like the Parental Kidnapping Prevention Act of 1980 and the Full Faith and Credit for Child Support Orders Act of 1994.”). However, some advocates of interstate recognition of lesbian adoptions interpret DOMA differently, and would place lesbian adoptions outside of DOMA’s reach. See Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 316 (2001) (“It is precisely because there need not be a same-sex marriage or marriage-like relationship in order for a same-sex partner to establish a parental relation with his or her partner’s child via a second-parent adoption that such an adoption would not come under the DOMA exceptions referred to above.”); see also Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 849-50 (2003) (arguing that just as Congress had power to enact DOMA to address the concern about forced interstate recognition of same-sex marriage, Congress also has power to enact a statute to bar forced interstate recognition of lesbian adoptions).

34. See generally Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365 (2005).

constitutional principles governing interstate adoption recognition. It will demonstrate that in many situations nonrecognition of lesbian and gay adoption decrees would be proper and permissible under existing precedents and reasonable applications of established constitutional, statutory, and common law principles governing the recognition of interstate judgments in general, and specifically those governing recognition of adoption decrees.

E. *Putting Aside Questions About Recognition of Foreign Nation Adoption Decrees*

A comprehensive analysis of interjurisdictional recognition of adoption decrees would include thorough review and discussion of the principles governing the recognition in American courts of adoption decrees from foreign nations—international adoption recognition. The focus of this paper, however, is on *interstate* adoption recognition, and an in-depth review of international adoption recognition will be put aside. For purposes of this paper, it will suffice to note that the basic conflicts principles governing interstate and international adoption recognition are related and very similar. The general rule concerning recognition of adoption decrees of foreign nations is the rule of comity—a valid foreign adoption (one rendered by a proper court with jurisdiction, following due procedures, and not procured by fraud) will be recognized in American courts unless it violates the strong public policy of the state where recognition is sought.³⁵ The Iowa Supreme Court explained that “[a]n adoption decree of a court of another state or nation is entitled to recognition here, if the court had jurisdiction to render it, at least to the extent it does not offend the laws or the public policy of this state.”³⁶ As one legal commentator put it, “[I]f the adoption

35. See *Walsh v. Walsh*, 764 N.E.2d 1103, 1108 (Ohio Ct. App. 2001) (“The Supreme Court of Ohio has stated that ‘the recognition and effectiveness of a foreign adoption decree are subject to the condition that the decree *not* be repugnant to the laws of Ohio.’”) (citation omitted); Malinda L. Seymore, *International Adoption & International Comity: When Is Adoption “Repugnant”?*, 10 TEX. WESLEYAN L. REV. 381, 391-94 (2004); Margaret Liu, Comment, *International Adoptions: An Overview*, 8 TEMP. INT’L & COMP. L.J. 187 (1994); Mary Ann Candelario McMillan, Comment, *International Adoption: A Step Towards a Uniform Process*, 5 PACE INT’L L. REV. 137 (1993); *In re Marriage of Lunina*, 584 N.W.2d 564 (Iowa 1998); *State ex rel. Smith v. Smith*, 662 N.E.2d 366 (Ohio 1996).

36. *Corbett v. Stergios*, 137 N.W.2d 266, 268 (Iowa 1965); see also *Kupec v. Cooper*, 593 So. 2d 1176, 1178 (Fla. Dist. Ct. App. 1992) (refusing to recognize German adoption in which mother

forum . . . were a foreign country, not a sister state, mandatory recognition in the restrictive state would not follow. . . . [T]he restrictive state could ignore or question the validity of the foreign-country adoption. . . ."³⁷ Likewise, the Supreme Court of Ohio has summarized the rule as the following: "The recognition and effectiveness of a foreign adoption decree are subject to the condition that the decree not be repugnant to the laws of Ohio."³⁸ Even the prominent Hague International Adoption Convention contains an explicit public policy exception allowing signatory states to decline to recognize adoptions that are contrary to strong public policy of the receiving state.³⁹

At least two major differences exist between interstate and international adoption decrees concerning their interjurisdictional recognition.⁴⁰ The Full Faith and Credit Clause of the Constitution and the complementary implementing full faith and credit statutes

obtained a false birth certificate indicating stepfather was the father of the child, without notice to biological father); *Doulgeris v. Bambacus*, 127 S.E.2d 145 (Va. 1962) (declining to recognize Greek adoption for purposes of distribution of estate in Virginia when Greek adoption procedures did not provide for investigation into best interests of child and adoptive mother did not have to appear at or consent to adoption).

37. Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 416-17.

38. See *Smith*, 662 N.E.2d at 367 (declining to hold that an Ohio paternity action was barred by the legal adoption of child conceived in Ohio when the mother, originally from South Africa, returned to South Africa before birth and the child was born in and properly adopted there under South African adoption law that does not require notice to or consent of the biological father); see also *Walsh*, 764 N.E.2d at 1110 (affirming the refusal to recognize Honduran adoption or paternity acknowledgment by the issuance of new birth certificate in an Ohio divorce proceeding because it was not certified by the Immigration and Naturalization Service).

39. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1142 [hereinafter Hague Conference: Final Act]. See generally *Seymore*, *supra* note 35, at 392.

40. Another difference between interstate and international adoption recognition is that the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, generally known as the Hague Convention on Intercountry Adoption, applies to international but not domestic, interstate adoptions. Hague Conference: Final Act, *supra* note 39, at 1134 (entered into force May 1, 1995). The United States Senate ratified the Hague Convention on Intercountry Adoption. Hague Conference on Private International Law, Full Status Report Convention #33, on Protection of Children and Co-Operation in Respect of Intercountry Adoption, at http://hcch.e-vision.nl/index_en.php?act=conventions.statusprint&cid=69 (on file with the Ave Maria Law Review). See generally Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53, 54 (1994).

enacted by Congress clearly govern interstate recognition issues, but do not apply to international recognition issues. From this perspective, the question boils down to whether those differences—the constitutional and statutory full faith and credit rules—always compel interstate recognition of adoption decrees generally, or of lesbian adoption decrees in particular. Upon careful examination, it appears that they do not.

II. THE CONVENTIONAL WISDOM OF MANDATORY INTERSTATE ADOPTION RECOGNITION

A number of Conflicts scholars and other legal commentators have addressed the issue of interstate recognition of adoption decrees generally.⁴¹ The conventional wisdom is that state adoption decrees are generally treated like any other ordinary judgment under the Full Faith and Credit Clause and the Full Faith and Credit Act. For example, many Conflicts treatises suggest that state adoption decrees generally must be recognized by other states. As the fifth edition of McDougal's *American Conflicts Law* explains: "It is generally assumed that adoption decrees are within the protection of the Full Faith and Credit Clause, though specific authority to that effect is meager."⁴² Professor Albert Ehrenzweig suggests that "refusal to recognize a foreign [sister-state] adoption as 'repugnant' would hardly be held constitutional today."⁴³ Another respected Conflicts treatise states, "An adoption decree entered by a court of competent jurisdiction will ordinarily be recognized everywhere."⁴⁴ Other Conflicts scholars writing in law reviews today generally agree.⁴⁵ Even fifty years ago, when many courts expressed the general rule in

41. See generally Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703 (1996).

42. LUTHER L. MCDUGAL, III ET AL., *AMERICAN CONFLICTS LAW* § 224, at 786 (5th ed. 2001) (footnote omitted).

43. ALBERT A. EHRENZWEIG, *TREATISE ON THE CONFLICT OF LAWS* 188 (1962) (footnotes omitted).

44. EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* § 16.6 (4th ed. 2004). This treatise, however, also notes, "A permissible exception exists in the event that the foreign adoption violates local public policy." *Id.* at 703 n.2.

45. See Kay, *supra* note 41, at 741 ("A judgment granting or denying an adoption, entered by a court with proper jurisdiction over the subject matter and the parties, is a final judgment entitled to recognition in other states. This proposition is noncontroversial as applied to a judgment granting an adoption . . .") (footnotes omitted); Charles W. Taintor, II, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222, 251 (1954).

terms of allowing nonrecognition for violation of the public policy of the second state, and declined to recognize some interjurisdictional adoptions on the grounds of relatively minor policy differences,⁴⁶ Professor Charles Taintor argued vigorously for construing the exceptions to interjurisdictional adoption recognition very narrowly.⁴⁷ Some Conflicts scholars, however, have noted several exceptions to the general rule of adoption decree recognition.⁴⁸ Those exceptions might encompass some or all lesbian adoptions, as shall be discussed below.

Many family law scholars agree with the conventional wisdom that states must recognize sister-state adoptions. A leading treatise on American adoption law explains:

The basic federal statute, 28 U.S.C. Section 1738, implementing the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, requires each state and every court to recognize and accord the same “full faith and credit” to judicial proceedings as they have “by law or usage in the courts of the state” where they originated. Because adoption decrees and termination orders are considered final judgments, not subject to modification, the basic federal statute requires that they be recognized and enforced in other states—assuming, however, that the state that issued these decrees or orders had valid subject matter jurisdiction.⁴⁹

Later, the treatise writer, Professor Joan Hollinger, adds, “Because adoption or termination decrees rendered by courts with valid subject matter jurisdiction are final judgments, . . . the basic federal statute, Section 1738, compels their full recognition and enforcement in other states.”⁵⁰ Other legal scholars agree.⁵¹

46. Taintor, *supra* note 45, at 251-53.

47. *Id.* at 253-55; *see also* HERBERT F. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 618-21 (3d ed. 1949) (discussing strict judgment recognition generally).

48. MCDUGAL ET AL., *supra* note 42, § 224 (mentioning lack of jurisdiction, changed conditions, nonrecognition of specific incidents, inheritance governed by former not latter state).

49. 1 HOLLINGER ET AL., *supra* note 8, § 4.02(6) (footnotes omitted).

50. *Id.* § 4.07(6)(a); *see also id.* § 4.07(6) (discussing the Parental Kidnapping Prevention Act and the Uniform Adoption Act); MCDUGAL ET AL., *supra* note 42, § 224.

51. *See* Kay, *supra* note 41, at 741 (“A judgment granting or denying an adoption, entered by a court with proper jurisdiction over the subject matter and the parties, is a final judgment entitled to recognition in other states. This proposition is noncontroversial as applied to a judgment granting an adoption . . .”) (footnotes omitted); Taintor, *supra* note 45, at 251-55. Likewise, Professor Susan Frelich Appleton has suggested that, with a few possible exceptions,

A few law review writers, including a couple of capable Conflicts teachers, addressed the issue of interstate lesbian adoption recognition specifically.⁵² Professor Barbara Cox, a respected Civil Procedure and Sexual Orientation Law teacher, argues, through analogy to interstate divorce recognition,⁵³ that lesbian adoption decrees must be recognized as a simple matter of mandatory constitutional interstate judgment recognition.⁵⁴ Professor Cox cites a decision by the Nebraska Supreme Court⁵⁵ and the deletion of a provision in the original draft of the Mississippi state DOMA to support her conclusion that interstate recognition of lesbian adoption is constitutionally mandated.⁵⁶

Professor Ralph Whitten, a highly respected and prolific Conflicts scholar, agrees that the Full Faith and Credit Clause of the Constitution and implementing statutes should be interpreted to generally require states to recognize sister-state lesbian adoption decrees.⁵⁷ Professor Whitten argues that:

surrogacy adoptions (of children born to a surrogate mother) in permissive states (with liberal surrogacy and adoption rules) generally would have to be recognized in sister states that have more restrictive policies regarding surrogacy and adoptions. Appleton, *supra* note 37, at 414-22. She recognizes possible exceptions for lack of jurisdiction, fraud, *ex parte* proceedings, errors of law and fact, and different incidents. *Id.* at 417-19.

52. See 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); Whitten, *supra* note 33.

53. Cox, *supra* note 52, at 762-70. Professor Cox cites heavily an earlier article of this author distinguishing divorce judgment recognition from same-sex "marriage" recognition. *Id.* (citing Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition*, 32 CREIGHTON L. REV. 187 (1998)). As noted below, just as same-sex marriage is distinguishable from divorce judgments for purposes of interstate recognition, so also adoptions are distinguishable. See *infra* notes 146-50 and accompanying text.

54. Cox, *supra* note 52, at 761-63, 773-74, 777-78. Professor Cox favors same-sex marriage and lesbian adoptions. See Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155, 155 (1997) (referring to the "work" she does toward "gaining the right to marry for same-sex couples").

55. Cox, *supra* note 52, at 781-85 (discussing *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002)).

56. *Id.* at 781.

57. Whitten, *supra* note 33. Unlike Professor Cox, who believes that same-sex marriages should be recognized and who opposes the DOMA, Professor Whitten believes that under long-established (and proper) choice of law principles the state would be free to decline to recognize same-sex marriages and that the DOMA marriage recognition provision is constitutional. See generally Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998); see also Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 BYU L. REV. 1235. The fact that two persons who hold different views

[A]doption is accomplished through court proceedings, which result in judgments granting adoption The existence of a valid judgment eliminates . . . choice-of-law problems that exist with . . . marriage. Once a valid judgment is rendered . . . the Full Faith and Credit Clause [and statute] limit[s] the ability of the parties . . . to challenge the judgment in another state.⁵⁸

Thus, "the effect of a valid judgment of adoption is to eliminate the ability of other states to reject the adoption because they disagree with it" ⁵⁹ Professor Whitten reviews the choice of law rules generally applicable in adoption law (generally *lex fori*),⁶⁰ and the jurisdictional requirements in adoption (generally local subject matter jurisdiction or territorial subject matter jurisdiction).⁶¹ Professor Whitten also reviews judgment recognition principles⁶² and argues that, under the general full faith and credit statute,⁶³ "states must give effect to the valid adoption judgments of other states,"⁶⁴ unless the parties have not fully litigated (contested) the issues in the adoption proceeding.⁶⁵ Professor Whitten reviews whether the Parental Kidnapping Prevention Act,⁶⁶ rather than the general Full Faith and Credit Act, should govern interstate recognition of adoption and concludes that in some cases it could apply to control custody-related issues, but not status-related issues, which would still be governed under the general statutes.⁶⁷ In conclusion, he explains that Congress has the authority to enact a law establishing standards for interstate recognition or nonrecognition of lesbigay adoptions, and that there are some good

concerning same-sex marriage recognition and DOMA agree that lesbigay adoptions must be recognized is noteworthy.

58. Whitten, *supra* note 33, at 804 (footnotes omitted).

59. *Id.* at 805.

60. *Id.* at 805-17.

61. *Id.* at 817-40.

62. *Id.* at 841-49.

63. 28 U.S.C. § 1738 (2000).

64. Whitten, *supra* note 33, at 841.

65. *Id.* at 844; *see infra* note 114 and accompanying text.

66. 28 U.S.C. § 1738(A). Professor Herma Hill Kay disagrees with Professor Whitten, arguing that the PKPA was intended for purposes other than regulating adoption jurisdiction and recognition issues; she favors application of the Uniform Adoption Act. *See Kay, supra* note 41, at 703.

67. Whitten, *supra* note 33, at 845-49.

reasons for so doing, but he recommends leaving the issue to the states without federal intervention.⁶⁸

Other law review writers have also argued that interstate recognition of lesbian and gay adoptions is required.⁶⁹ Professor Mark Strasser argues that the “exacting” full faith and credit rule of interstate judgment recognition mandates sister-state recognition of lesbian and gay adoptions.⁷⁰ Similarly, Professor Larry Kramer asserts that a public policy exception to interstate recognition is generally unconstitutional,⁷¹ which, if true, certainly would bar interstate nonrecognition of lesbian and gay adoptions on grounds that they offend the public policy of the second state.

The prevailing belief among academics is that under ordinary conflicts principles and full faith and credit constitutional and statutory mandates, states must generally recognize and give effect to adoption decrees entered in sister states, and many commentators believe that this would include lesbian and gay adoptions. However, on closer consideration, there are several reasons why a prudent person would conclude that states have considerably more latitude in declining to recognize lesbian and gay adoptions from sister states than in declining to recognize other judgments generally. There are several significant factors that distinguish the adoption process, proceedings, and lesbian and gay adoption decrees in particular from most other judicial proceedings and judgments.

III. SIX REASONS FOR QUESTIONING THE CONVENTIONAL WISDOM: WHY STATES WITH STRONG PUBLIC POLICIES

68. *Id.* at 849-51. Since Professor Whitten interprets the existing Full Faith and Credit Clause and statute to require states to recognize properly contested lesbian and gay adoptions, his reason for recommending that Congress not pass a statute explicitly authorizing states not to recognize same-sex adoptions seems not to be satisfied.

69. See Kari E. Hong, *Parens Patriarchy: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1 (2003); Devyani Mishra, *The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91 (1996); Lydia A. Nayo, *In Nobody's Best Interests: A Consideration of Absolute Bans on Sexual Minority Adoption from the Perspective of the Unadopted Child*, 35 U. LOUISVILLE J. FAM. L. 25 (1996).

70. Strasser, *supra* note 33, at 317-18 (“Assuming no fraud or lack of jurisdiction, final judgments issued by a court in one state are entitled to full faith and credit in every state. . . . [This is an] exacting rule with respect to other state’s judgments. . . .”) (footnote omitted). Professor Strasser correctly distinguishes recognition of lesbian and gay adoptions from declaratory judgments establishing parenthood and presumptions of parenthood. *Id.* But see Wolfson & Melcher, *supra* note 33.

71. See Kramer, *supra* note 33.

FAVORING CONJUGAL MARITAL PARENTING MAY BE
JUSTIFIED IN DECLINING TO RECOGNIZE AND ENFORCE
LESBIGAY ADOPTIONS FROM OTHER STATES

The Conflicts scholars and other legal writers who conclude that states have no latitude to decline to recognize lesbigay adoptions created in one state (herein *S-1*) that conflict with the strong public policy of the second state (herein *S-2*) assume, and emphasize, that adoption decrees are like ordinary judgments, and interstate recognition of them is governed by the general rules of judgment recognition that apply to other ordinary judgments.⁷² Their analysis overlooks six fundamental questions: (1) whether one or more of the well-established exceptions to judgment recognition applies to give a second state discretion to decline to recognize some adoptions, (2) whether adoption proceedings and decrees are conceptually distinguishable from ordinary judgments as to which the general rule of strict judgment recognition applies, (3) whether lesbigay adoptions in particular are distinguishable from traditional (imitative) adoptions because they create an entirely new and different kind of parental relationship, (4) whether all the incidents authorized in *S-1* must be recognized in *S-2*, (5) how to reconcile the “must recognize” rule with the numerous case precedents that have denied adoption recognition, and (6) whether the constitutionally significant governmental interests of *S-2* may be paramount in some cases. These questions are considered below.

A. *Nonrecognition of Lesbigay Adoptions May Be Justified in Many Cases Under Established Exceptions to Judgment Recognition*

“[A] literal reading [of the Full Faith and Credit Clause] would mean that judgments must be accorded precisely the same effect as they enjoy in the rendering state. Such an interpretation, however, has never been completely accepted,”⁷³ as Professor Willis Reese, later Reporter of the *Restatement (Second) of Conflict of Laws*, noted. Historically, from the earliest years of the Republic, the Supreme Court allowed exceptions to the constitutional rule of mandatory judgment recognition and, “by its announcement in some of the

72. See *supra* notes 37-71 and accompanying text.

73. Reese & Johnson, *supra* note 27, at 153.

earliest cases that the only effect of full faith and credit was to make a state judgment conclusive on the merits, the Court . . . implied that at least some of the common law grounds for refusing to enforce a foreign judgment remained in effect."⁷⁴ While "the Court has been steadily engaged in enlarging the scope of the [Full Faith and Credit] clause by limiting the defenses which may be made in actions on judgments,"⁷⁵ a series of mid-twentieth-century Supreme Court "decisions indicate that the command of full faith and credit [to sister-state judgments] is neither inexorable nor without its exceptions."⁷⁶

There are many exceptions to the general rule of interstate judgment recognition, some of which could justify nonrecognition of lesbian and gay adoptions generally or in specific cases. For example, the *Restatement (Second) of Judgments* identifies at least sixteen different exceptions to the general rule of interstate judgment recognition that are applicable in at least some situations, including: (1) lack of territorial jurisdiction;⁷⁷ or (2) lack of subject matter jurisdiction;⁷⁸ or (3) lack of adequate notice;⁷⁹ or (4) if granting relief would be permitted under the law of the rendering state, is compatible with comity, and concerns a default judgment induced by fraud or duress;⁸⁰ or (5) likewise and the party obtaining the default judgment knew the claim was fraudulent;⁸¹ or (6) likewise and the defaulting party's failure to contest resulted from his or her justifiable mistake;⁸² or (7) likewise and the default resulted from a substantial judicial mistake;⁸³ or (8) likewise and the defaulting party was an unrepresented minor, incompetent, or known by the other party to be incapable of defending adequately;⁸⁴ or (9) if modification would be permitted under the law of the rendering state, it is compatible with

74. *Id.* at 155 (footnote omitted).

75. *Id.*

76. *Id.* at 156; *see also id.* at 156-60 (citing and discussing, as support, *Kreiger v. Kreiger*, 334 U.S. 555 (1948); *Estin v. Estin*, 334 U.S. 541 (1948); *Indus. Comm'n v. McCartin*, 330 U.S. 622 (1947); *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U.S. 279 (1945); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Yarborough v. Yarborough*, 290 U.S. 202 (1933)).

77. RESTATEMENT (SECOND) OF JUDGMENTS §§ 1, 81 (1982).

78. *Id.* §§ 1, 12, 69, 81.

79. *Id.* §§ 1, 81.

80. *Id.* §§ 68(1), 82(2).

81. *Id.* §§ 68(2), 82.

82. *Id.* §§ 68(3), 82.

83. *Id.* §§ 68(3), 82.

84. *Id.* §§ 68(4), 82.

comity, and changed circumstances warrant such modification;⁸⁵ or (10) if relief would be permitted under the law of the rendering state, is compatible with comity, and such a substantial change in circumstances has occurred that it would be unjust to give continued effect to the judgment;⁸⁶ or (11) if relief would be permitted under the law of the rendering state, is compatible with comity, and the contested judgment resulted from corruption or duress upon the court;⁸⁷ or (12) if relief would be permitted under the law of the rendering state, is compatible with comity, and the contested judgment resulted from corruption or duress upon the losing party or his or her attorney;⁸⁸ or (13) if relief would be permitted under the law of the rendering state, it is compatible with comity, and the contested judgment was based on a claim the prevailing party knew to be fraudulent;⁸⁹ or (14) if relief would be permitted under the law of the rendering state, is compatible with comity, and the contested judgment was based on a mistake of law or fact by a diligent party that involved denial of a fair hearing;⁹⁰ or (15) likewise and the mistake involved failure to express the judgment of the court;⁹¹ or (16) if relief would be permitted under the law of the rendering state, is compatible with comity, and the losing party was an unrepresented or inadequately represented minor, an incompetent party, or a person known by the prevailing party to be incapable of defending adequately.⁹²

Likewise, the *Restatement (Second) Conflict of Laws* notes seventeen defenses to recognition and enforcement of judgments—some different from the *Restatement (Second) of Judgments*—which could apply to interstate cases, including: (1) limitations on full faith and credit;⁹³ or (2) the judgment was rendered by a court lacking judicial jurisdiction;⁹⁴ or (3) the judgment was rendered without

85. *Id.* §§ 68(5), 73(1), 82.

86. *Id.* §§ 73(2), 82.

87. *Id.* §§ 70(1), 82.

88. *Id.*

89. *Id.* §§ 70(1)(b), 82.

90. *Id.* § 71(2)(c).

91. *Id.* § 71(2)(a).

92. *Id.* §§ 72, 82.

93. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971).

94. *Id.* § 104.

adequate notice or opportunity to be heard;⁹⁵ or (4) the judgment was rendered by a court lacking competence (subject matter jurisdiction);⁹⁶ or (5) the judgment was erroneous;⁹⁷ or (6) the judgment was not final;⁹⁸ or (7) the amount of the judgment is uncertain;⁹⁹ or (8) the judgment is modifiable;¹⁰⁰ or (9) the judgment is not on the merits;¹⁰¹ or (10) the judgment is conditional;¹⁰² or (11) the judgment has been vacated;¹⁰³ or (12) an injunction has been obtained against enforcing the judgment;¹⁰⁴ or (13) there are inconsistent judgments;¹⁰⁵ or (14) equitable relief is available in the rendering state;¹⁰⁶ or (15) the judgment has been paid or discharged;¹⁰⁷ or (16) the statute of limitations on judgment enforcement in *S-2* has run;¹⁰⁸ or (17) the judgment on which the judgment being enforced was based has been reversed.¹⁰⁹ While both *Restatements* make it clear that repugnance of the claim under the public policy of *S-2* is not grounds to not enforce a valid, otherwise enforceable judgment from *S-1*,¹¹⁰ section 103 of the *Restatement (Second) Conflict of Laws* notes that in rare cases when the national interest behind full faith and credit does not require it, and when enforcement would infringe upon important governmental interests of the state where enforcement is sought, mandatory recognition or enforcement of the sister-state judgment is not required.¹¹¹ Other cases and authorities have noted a variety of the same and other exceptions to the general rule of interstate judgment recognition.¹¹² For instance, in cases in which “the first state has lost

95. *Id.*

96. *Id.* § 105.

97. *Id.* § 106.

98. *Id.* § 107.

99. *Id.* § 108.

100. *Id.* § 109.

101. *Id.* § 110.

102. *Id.* § 111.

103. *Id.* § 112.

104. *Id.* § 113.

105. *Id.* § 114.

106. *Id.* § 115.

107. *Id.* § 116.

108. *Id.* § 118.

109. *Id.* § 121.

110. *Id.* § 117; RESTATEMENT (SECOND) OF JUDGMENTS § 81 cmt. a, § 82 cmt. a (1982).

111. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971).

112. See *Yarborough v. Yarborough*, 290 U.S. 202, 215-18 (1933) (Stone, J., dissenting) (describing numerous exceptions to mandatory judgment recognition, including criminal and

all contact with the parties subsequent to the judgment, it therefore seems highly probable that its law could not constitutionally be applied to the newly arisen issues."¹¹³

Thus, under existing principles of interstate judgment recognition, the "rule" of mandatory recognition is far from absolute; it is riddled with exceptions. It is quite likely that lesbigay adoption decrees could be denied recognition in particular cases under most of these numerous exceptions. Some of these well-established "hornbook" exceptions might even provide justification for nonrecognition of lesbigay adoptions as a general rule. A few examples will illustrate this point.

1. *Non-Adversarial Proceedings*

A well-established exception to general judgment recognition is for judgments that do not result from adversarial judicial proceedings. Adoption proceedings are almost *sui generis*—unlike almost any other judicial proceedings. Unlike most other judicial proceedings, adoptions are not normally adversary proceedings. Unlike other parent-child status-affecting proceedings, such as ordinary custody and visitation disputes, rarely are there two opposing parties before the court in an adoption case. Adoption involves two discrete and necessary legal procedures: (1) termination of parental rights ("TPR"), and (2) the creation of a new adoptive parent-child relationship. Usually both are uncontested. In adoption-by-consent cases, both parts are usually not contested. In involuntary adoption cases—as when the state intervenes to terminate parental rights due to abuse, neglect, or dependency, or occasionally in private cases where the mother has married another man and attempts to terminate the parental rights of an unwed or divorced biological father—it is not rare for the biological parent to contest the termination of his parental rights. However, after the TPR proceeding, only rarely is the actual adoption procedure, the creation

penal judgments, protecting marriage, inheritance of adopted children, disposition of real property not located in the state of judgment by will or divorce decree, sanity determinations of local citizens, remarriage restrictions in divorce decrees, etc.); see also Reese & Johnson, *supra* note 27, at 153, 165-71 (discussing lack of jurisdiction); *id.* at 173-74 (noting an exception if the law or facts are different).

113. Reese & Johnson, *supra* note 27, at 175 (citing *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930)).

of a new parent-child relationship, contested. In sharp contrast to custody disputes, for example, where adverse parties with the strong interest and ability to challenge, dispute, and closely scrutinize the other party's claims, allegations, and evidence before the court, in adoption proceedings only the adopting couple, their lawyer, and their hand-picked sympathetic adoption agency social worker are normally in court.¹¹⁴ Because adoption is not normally an adversary proceeding, but is usually essentially *ex parte*, the procedure underlying an adoption decree does not have all of the hallmarks of reliability: decision based upon due adversary process, independent evaluation, and judicial consideration associated with judicial judgments.¹¹⁵

114. See generally Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345, 385-86 (2003) (noting the lack of adversary proceedings in usual adoption cases).

115. See generally *In re R.K.*, 649 N.W.2d 18, 21 (Iowa Ct. App. 2002) (upholding the termination of parental rights so the child could be freed for adoption, and finding that “[w]hile both the parents’ and child’s interests in the parent-child relationship are great, so is the State’s interest in resolving matters on appeal that have already been fully litigated.”); *E.I.B. v. J.R.B.*, 611 A.2d 662 (N.J. Super. Ct. App. Div. 1992) (holding that an action brought under a later-repealed New Jersey statute, which had not allowed children to institute paternity actions, was barred by *res judicata* in action brought by child subsequent to new statute’s adoption since the matter had been fully litigated by child’s grandparent); *State ex rel. H.J.*, 986 P.2d 115, 125 (Utah Ct. App. 1999) (“Issue preclusion, or collateral estoppel, ‘involves two different causes of action and only bars those issues in the second litigation necessarily decided in the first.’ . . . Utah courts apply a four-part test to evaluate collateral estoppel: 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question? 2. Was there a final judgment on the merits? 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? 4. Was the issue in the first case competently, fully, and fairly litigated?”) (citations and internal quotations omitted); Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J.L. & FAM. STUD. 1, 3 (2003) (arguing for recognition of paternity and adoption judgments to “remake the possibilities for family certainty” and “constrain the uncertainty”). Entry of a paternity judgment in a non-adversarial proceeding by a settlement does not change the *res judicata* effect. See *Moore v. Moore*, No. C-910846, 1992 WL 393197 (Ohio Ct. App. Dec. 30, 1992) (stressing the importance of leaving paternity determinations undisturbed). *But see In re Adoption of A.F.M.*, 15 P.3d 258, 268 (Alaska 2001) (“We agree that Farley’s reliance on collateral estoppel must fail because the question of sexual assault was not actually litigated in the Washington proceeding. Restatement (Second) of Judgments § 27 requires an issue to be ‘actually litigated’ before a ruling on it becomes conclusive in subsequent actions”); *McAdams v. McAdams*, 109 S.W.3d 649 (Ark. 2003), *aff’d* *McAdams v. McAdams*, No. 04-27, 2004 WL 1217922 (Ark. 2004) (affirming the denial of motion to annul an adoption, thirty-four years after the decree was entered, because, *inter alia*, the issue had been fully litigated and decided in earlier litigation); *H.J.*, 986 P.2d at 125-27 (holding a grandmother’s petition for adoption not barred because it was not fully litigated in a prior temporary custody proceeding).

Professor Ralph Whitten acknowledges that this presents a sound basis for nonrecognition of uncontested adoption decrees. Discussing a Nebraska Supreme Court lesbian adoption recognition case, *Russell v. Bridgens*,¹¹⁶ Professor Whitten notes,

the ordinary rules of issue preclusion stated in § 27 of the *Restatement (Second)* require, before preclusion can apply, that issues of fact or law must actually be litigated and determined. Because the Pennsylvania action in *Russell* appears to have been essentially a non-adversarial proceeding, it is unlikely that the “actual litigation” requirement of § 27 would be satisfied. For to satisfy the actual litigation requirement, an issue of fact or law must actually be raised, submitted for determination, and decided. Putting it another way, no one was fighting over any issue in *Russell*, and, as observed earlier with regard to the position of the concurring justice on the issue of subject-matter jurisdiction, mere boilerplate recitals in an opinion or judgment over which there is no real litigation will not normally suffice to satisfy the “actual litigation” requirement. To the extent that many other adoption proceedings may also occur in a non-adversarial context, there will be the same problems with establishing issue preclusion.¹¹⁷

In fact, *most* adoption cases are precisely like *Russell* in that respect; most adoptions are uncontested, nonadversary proceedings, so an essential prerequisite for issue preclusion is missing. The adoption recognition rule might be expected to reflect that general situation.¹¹⁸

2. *Judgments Concerning Children*

The *Restatement (Second) of Judgments* notes a category of potential exceptions to the rule of mandatory judgment recognition

116. 647 N.W.2d 56 (Neb. 2002).

117. Whitten, *supra* note 33, at 844 (footnotes omitted).

118. Another well-established and related exception in judgment recognition doctrine exists for administrative agency “judgments.” In many respects, an adoption decree more closely resembles an administrative determination than a judicial decision. The court, in approving an adoption, is acting, in some respects, in a quasi-administrative capacity. The procedure is so non-adversarial that the decrees almost resemble a mere “rubber-stamp.” That is not due to any failing or fault of the court, but rather is due to the nature of the proceeding in which only one party and that party’s hand-selected expert witnesses (usually) only provide the court with the formulaic information (to “fill in the blanks,” as it were) required by statute for the approval of the adoption.

that could cover adoptions: "Although most sister-state judgments are covered by the Full Faith and Credit Clause, some are not. The protection of the clause may not apply to sister-state judgments concerning custody of children . . ." ¹¹⁹ The *Restatement (Second)* does not limit this exception to custody decrees alone, but indicates that the exception applies more broadly to "sister-state judgments concerning . . . children." ¹²⁰ Custody decrees have long been held not subject to strict full faith and credit recognition largely because they are subject to later modification. ¹²¹ Adoption decrees are undeniably more stable and final than custody decrees, but they remain alterable and terminable under a variety of circumstances, such as defects in the adoption process, ¹²² conditions allowing a parent to revoke consent, ¹²³ failure to properly terminate parental rights of the proper parent(s), ¹²⁴ and wrongful adoption, ¹²⁵ in addition to the grounds for

119. RESTATEMENT (SECOND) OF JUDGMENTS § 82 cmt. b (1982).

120. *Id.*

121. See generally *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

The analytical litany traditionally used by the United States Supreme Court is that only final judgments are entitled to enforcement under the full faith and credit clause; whatever the state of rendition may do to alter its decrees, a sister state may do as well when presented with a foreign judgment. Since child custody decrees are universally modifiable by the state of rendition upon a showing of changed conditions, most states have held that a custody judgment does not command enforcement, but, instead, may be modified by any sister state. In fact, Justice Frankfurter has stated that, in his view, the Supreme Court should expressly exempt all child custody decrees from the command of the full faith and credit clause.

Lucy S. McGough & Anne R. Hughes, *Chartered Territory: The Louisiana Experience with the Uniform Child Custody Jurisdiction Act*, 44 LA. L. REV. 19, 64-65 (1983) (citing *Kovacs v. Brewer*, 356 U.S. 604, 613 (1958) (Frankfurter, J., dissenting)) (footnotes omitted).

122. *Presley v. Presley*, 47 S.E.2d 647 (Ga. Ct. App. 1948) (holding that the husband was estopped from having a final adoption decree annulled and declared invalid because he failed to show any illegality or irregularity in the adoption process).

123. *Skaggs v. Gannon*, 170 S.W.2d 12 (Ky. 1943) (holding that where a mother's signed consent form to permit others to adopt her child showed questionable consent on the part of the mother and where the mother had no notice, the mother was permitted to revoke her consent).

124. *In re Adoption of Lay*, No. 41, 1988 WL 130345 (Tenn. Ct. App. Dec. 7, 1988) (reversing decree that declared child to be the adoptive child of adoptive parents because the decree disclosed that no specific finding of abandonment was made by chancery court, and issue of termination of parental rights was not expressly addressed).

125. *Mohr v. Commonwealth*, 653 N.E.2d 1104 (Mass. 1995) (deciding to recognize cause of action in tort that would allow adoptive parents to seek compensatory damages against

termination of parental rights generally: abuse, neglect, or dependency.¹²⁶ Thus, as Professor Herma Hill Kay has noted, with dissatisfaction, the general rule of mandatory interstate recognition of adoption decrees

has been questioned by prospective adoptive parents seeking to escape the effect of a judgment denying an adoption. Attempts to avoid the force of a judgment denying an adoption rest on a claim that the judgment is modifiable. Thus, some parties, as in the case of Baby Jessica, have invoked the UCCJA as permitting a second state to “modify” the “custody determination” that required the prospective adoptive parents to return the child to the birth parents.¹²⁷

The judgment recognition exception for cases involving children may also reflect the general principle (discussed below) that mandatory interstate preclusion assumes and primarily applies to retrospective judgments—typically involving orders to pay money—and not to prospective judgments that govern ongoing and future relations. Judgments regulating ongoing relationships assume, to some extent, the continuing jurisdiction of the court and the court’s ability to make ongoing adjustments, to change the order when changed circumstances and conditions would justify that. When children are the subject of a judgment regulating the parent-child relationship, the state’s persisting *parens patriae* power and responsibility to protect and provide for children adds another reason why interstate judgment recognition may not be as forceful as when the judgments concern commercial and other retrospective, non-parenting contexts.

adoption agency for agency’s negligent material misrepresentations of fact prior to adoption concerning adopted child’s history).

126. *In re Adoption of K.M.C.*, 606 So. 2d 1262 (Fla. Ct. App. 1992) (holding that when there were no allegations of child abuse, neglect, or abandonment, an adoption intermediary exceeded her authority in unilaterally removing the child from appellants, the adoptive parents, after one of them was arrested).

127. Kay, *supra* note 41, at 741.

3. *Non-Parties Are Not Precluded*

Non-parties to a judgment ordinarily are not bound by the judgment. As the Supreme Court noted in *Williams v. North Carolina*:¹²⁸

It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. . . . But those *not parties* to a litigation *ought not to be foreclosed* by the interested actions of others.¹²⁹

Thus, third persons asserting parental rights or responsibilities who were not parties in the case in which the lesbian adoption was granted might not be barred from raising issues that would be binding on the parties themselves (the adopting parties and the relinquishing parent(s), if any).

4. *Declining Jurisdiction*

The public policy exception to judicial jurisdiction (as distinct from a public policy exception to choice of law or judgment recognition) might be invoked. Thus, courts in a state with a strong public policy against lesbian adoptions might decline to assert judicial jurisdiction over a claim where a related or derivative claim is asserted, or possibly even a claim for recognition or enforcement of a lesbian adoption from a sister state on the ground that to assert jurisdiction over such a claim would violate the strong public policy of the forum. In chapter 4 of the *Restatement (Second) of Conflict of Laws*, dealing with limitations on the exercise of judicial jurisdiction, this exception is explained. Section 90 provides: "No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."¹³⁰ The official comment notes that this rule allowing "the forum [to] refuse[] to entertain the suit on the ground that the cause of action is contrary to

128. 325 U.S. 226 (1945).

129. *Id.* at 230 (citations omitted) (emphasis added).

130. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971).

a strong local public policy” is “a narrow” exception,¹³¹ and requires the forum to have both a very strong public policy and some “reasonable relationship to the transaction and the parties.”¹³²

However, “[f]ull faith and credit prohibits a State, under the guise of public policy, from closing its courts to the enforcement of a sister State cause of action which is essentially similar to a cause of action provided by its own local law.”¹³³ The Reporter’s Note cites gambling cases, and others, in which this jurisdiction-closing rule has been properly invoked.¹³⁴ It would not be surprising to learn that in some states strongly committed to dual-gender parenting, the public policy against lesbigay adoption is at least as strong as the public policy against gambling, and such states would not consider lesbigay adoption to be “essentially similar” to imitative adoption. Thus, under the *Restatement (Second) of Conflicts of Laws*, the courthouse door may be closed to hearing claims that are deeply offensive to the public policy of a state.

B. *The Nature of Adoption Decrees Differs Significantly from Other Judgments*

Most judgment enforcement cases involve efforts to enforce what Professor Reese describes as “a judgment [that] operates on a completed transaction and settles once and for all the rights of the parties under it.”¹³⁵ He distinguishes such judgments that “determine the rights of the parties in a completed transaction” from judgments that establish rights “in a relationship . . . which would continue to exist in the future.”¹³⁶ Adoption is a classic example of the latter kind of judgment. Most of the leading cases in which the Supreme Court has held or declared that the Full Faith and Credit Clause requires strict recognition of sister-state judgments have occurred in the context of money judgments entered in litigation over ordinary commercial or financial liability disputes. The seminal *Fauntleroy*¹³⁷

131. *Id.* cmt. a.

132. *Id.* (citing *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930)); *see also id.* cmt. b, cmt. c.

133. *Id.* § 90 Reporter’s Note (citing *Hughes v. Fetter*, 341 U.S. 609 (1951)).

134. *Id.*

135. Reese & Johnson, *supra* note 27, at 172; *see also id.* at 177-79.

136. *Id.* at 173.

137. *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

case involved a dispute over the sale of cotton futures;¹³⁸ *Baker v. General Motors*¹³⁹ involved a lawsuit seeking recovery of damages for injuries allegedly caused by an automobile design or engineering defect;¹⁴⁰ and *Matsushita Electric Industrial Co. v. Epstein*¹⁴¹ involved a shareholders' lawsuit claiming violation of federal securities laws.¹⁴² The national government's constitutional authority over, and interest in, the regulation of commerce and in the resolution of disputes over financial liability for serious personal injuries from products sold in interstate commerce is clear and long-standing. Adoption decrees, on the other hand, do not involve money judgments or settle commercial or financial claims or disputes, but concern an entirely noncommercial interest, the creation of family—specifically parent-child—relations. The nature of the adoption decree is thus clearly distinguishable. Unlike money judgments, which are retrospective in their application and only involve enforcement of payment of the judgment, adoption decrees create an ongoing relationship. When a decree concerns a prospective, ongoing relationship, the “iron law” of strict full faith and credit may not be applicable.¹⁴³

These differences are not without significance for interstate recognition analysis. Professor Stewart Sterk has explained that strict full faith and credit for sister-state judgments is required, in part,

because judgments, unlike statutes, typically adjudicate past behavior rather than proscribing future behavior, [so] a requirement that states enforce sister-state judgments imposes only weak limits [“intrusions”] on the sovereign power of a state to control behavior within its borders.

... [That] reason[], however, does not apply when a judgment purports to control post-judgment behavior.... When post-

138. *Id.* at 233.

139. 522 U.S. 222 (1998).

140. *Id.* at 226.

141. 516 U.S. 367 (1995).

142. *Id.* at 369-70. Even the recent case *Franchise Tax Board v. Hyatt*, 538 U.S. 488 (2003), involved damage liability claims asserted by a citizen against a state tax collection agency for misconduct in its audit of the citizen, including claims for “invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation.” *Id.* at 491.

143. See Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 WASH. & LEE L. REV. 47, 49-50 (2001) (quoting William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994)). See generally Cox, *supra* note 52, at 776 n.145.

judgment behavior might occur in sister states, the power of those sovereign states to control activity within their borders becomes a counterweight to the general federal interests in finality and uniformity. As a result, the usually automatic rule requiring enforcement of sister-state judgments becomes more flexible, approximating more closely the Court's interpretation of the constitutional requirement that each state give full faith and credit to the "public Acts" of sister states. That is, the Full Faith and Credit Clause does not require enforcement of sister-state judgments that proscribe future behavior.¹⁴⁴

Professor Sterk also suggests that this helps explain the decision in *Baker*.¹⁴⁵

From this perspective, judicial adoption decrees are clearly distinguishable from the divorce decrees to which some advocates of mandatory interstate recognition of lesbigay adoptions have compared them.¹⁴⁶ It is well established that the Full Faith and Credit Clause ordinarily requires states to recognize valid divorce judgments from other states.¹⁴⁷ A divorce judgment, however, *terminates* an ongoing relationship, declaring an end to the parties' spousal relationship. It declares an end to the family relationship of husband and wife. No further supervision of the spousal relationship is required.¹⁴⁸ An adoption decree, on the other hand, *creates* a new family relationship, bringing into existence an ongoing relationship, and one which the state, as *parens patriae*, has extraordinary interest in monitoring, supervising, and regulating.¹⁴⁹

144. Sterk, *supra* note 143 (footnote omitted).

145. *Id.* at 50.

146. See generally Cox, *supra* note 52, at 762-70.

147. See *Williams v. North Carolina*, 317 U.S. 287 (1942).

148. There may be ongoing financial obligations which need to be enforced, but that is no different from the enforcement effects of a judgment awarding money damages, which must still be collected, and may be due in installments.

149. Helen Cavanaugh Stauts has argued:

Parens patriae, the idea of the government as "parent of the country," has deep roots in our legal system's history. Tracing its foundations back to English common law, *parens patriae* connotes the authority of a political sovereign, formerly a monarch, to care for children and other citizens who are unable to care for themselves.

Helen Cavanaugh Stauts, *Parens Patriae: The Federal Government's Growing Role of Parent to the Needy*, 2 J. CENT. FAMS. CHILD. & CTS. 139, 139 (2000).

Conceptually, adoption is equivalent in parent-child relations to marriage in spousal relations; both create a core family relationship (marriage being a horizontal family relationship; adoption being a vertical family relationship). Both marriage and adoption involve the state “artificially” creating a new, close family relationship among persons who previously were not related as family and whom the state did not recognize as having any legal or kinship obligations or privileges. Together, marriage and adoption establish the longitude and latitude of nuclear family relations, from which a host of legal duties, responsibilities, and privileges derive, such as spousal and child support, and many noneconomic obligations and rights including testimonial privileges, rights regarding consultation, advice (for spouses), and training and direction (for children). It is well-established that marriage recognition is not regulated by strict interstate recognition rules;¹⁵⁰ so it would be logical and reasonable to expect that adoption recognition also would not be governed by strict (judgment) recognition rules.

Judicial adoption of children was unknown at the time the Constitution was adopted; adoption was not a part of the common law, and the process of judicial adoption is generally said to have been created in 1851 when Massachusetts first created that procedure. Thus, for instance, Justice Story’s *Commentaries on the Conflict of Laws*, published in 1834 (some seventeen years before the first state invented judicial adoption in the interest of children), does not mention adoption.¹⁵¹ There were other procedures, however, which are considered the historical antecedents of modern judicial adoption to promote the best interests of children. Those procedures (including the placement of children with unrelated adults by apprenticeship, by

150. See generally Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex “Marriage”: How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29 (1998); Richard S. Myers, *Same-Sex “Marriage” and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45 (1998); Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 191-96 (1996); Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83 (1998).

151. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (Arno Press 1972) (1834). Neither does Justice Story’s treatise deal with parentage, parent-child status, or paternity. Nor does his index entries under “Judgments” list any judgments regarding parent-child relations.

deed, and by contract)¹⁵² involved procedures as to which ordinary choice of law principles would apply. Thus, adoption is the outgrowth of and replacement for procedures to which the strict rules of interstate judgment recognition did not apply.

It is not surprising to discover that, historically, adoption decrees have not been given the same rigorous full faith and credit given to most other judgments, such as ordinary money judgments. For example, Professor Homer Clark's long-respected treatise on family law captured the tentativeness in this area of law when it correctly notes that "[i]n a few cases the Full Faith and Credit Clause has been held to require interstate recognition of adoption decrees."¹⁵³ Professor Clark cites only three cases (state court decisions of 1893, 1952, and 1962) for this proposition.¹⁵⁴ Thus, it cannot be said that all adoption decrees have always been considered to be subject to mandatory recognition under the Full Faith and Credit Clause.¹⁵⁵

Likewise, a look at the laws designed to achieve uniformity and consistency in adoption is another indicator of less than absolute interstate adoption decree recognition. One of the reasons for interstate and uniform laws is to achieve interstate consistency when substantive legal policies and interstate recognition rules are not able to do so. Thus, the existence of the Interstate Compact on the Placement of Children,¹⁵⁶ as well as the Uniform Adoption Act,¹⁵⁷ the

152. See generally 1 HOLLINGER ET AL., *supra* note 8, at 1-1 (describing wardships, guardianships, indentures, and apprenticeships used in England before judicial adoption was enacted); Yasuhide Kawashima, *Adoption in Early America*, 20 J. FAM. L. 677 (1981) (describing various devices to transfer children or parental authority); Brett S. Silverman, *The Winds of Change in Adoption Laws: Should Adoptees Have Access to Adoption Records?*, 39 FAM. CT. REV. 85 (2001) (detailing the use of apprenticeship in America to accomplish adoption before 1851); Amanda C. Pustilnik, Note, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263 (2002) (describing the use of contract and other private ordering to transfer children in America before adoption laws); see also Taintor, *supra* note 45, at 222 n.7 (1954) (noting historical use of contract and deed to transfer children).

153. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 869 (2d ed. 1988) (emphasis added).

154. *Id.* at 869 n.3.

155. See discussion *infra* Part III.E.

156. See The Council of State Governments, National Center for Interstate Compacts, at <http://www.csg.org/CSG/Programs/National+Center+for+Interstate+Compacts/statutes.htm> (on file with the Ave Maria Law Review). The website provides the text of a number of interstate agreements and proposals furthering this proposition, including the Interstate Compact on the Placement of Children (for a statutory codification of the compact, see, for example, GA. CODE ANN. § 39-4-7 (1995)).

Uniform Child Custody Jurisdiction Act,¹⁵⁸ its replacement, the Uniform Child Custody Jurisdiction and Enforcement Act,¹⁵⁹ and the Parental Kidnapping Prevention Act,¹⁶⁰ might cause prudent persons to anticipate that there may be some uncertainty otherwise with regard to interstate enforcement of adoption decrees.

Fifty years ago Professor Taintor explained that the prevailing rule regarding recognition of adoptions created in another jurisdiction was “that a state should recognize a foreign adoption to be valid, ‘unless such status, or the rights flowing therefrom, are inconsistent with, or opposed to [its] laws and policy,’ or unless the foreign law of adoption ‘differs essentially’ from that of the state in which the right is sought.”¹⁶¹ He acknowledged that courts had declined to recognize interjurisdictional adoptions for various reasons including nonallowance of adult adoptions, and such minor policy differences as lack of a trial period before approval of the adoption in the foreign jurisdiction, different procedure (adopting as *heir* instead of as *child*) or different form (adoption by filing with the county clerk rather than by judicial decree), and nonrecognition of some incidents allowed in the adoption-creating state.¹⁶²

C. *The Nature of Lesbian Adoption Differs Profoundly from Traditional Adoption*

Because lesbian adoption differs fundamentally from imitative adoption, the question of recognition of lesbian adoption decrees in a state where only imitative adoption exists involves a question about forcing states to create new forms and institutions simply because sister states have done so. That proposition can be compared to requiring a state that does not allow for or create same-sex civil unions or domestic partnerships to recognize a sister state’s judgment creating or declaring the existence of a same-sex union or partnership. In states with policies that favor dual-gender parenting in adoption

157. UNIF. ADOPTION ACT, 9 U.L.A. 20 (1999).

158. UNIF. CHILD CUSTODY JURISDICTION ACT (amended 1997), 9 U.L.A. 261 (1999).

159. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9 U.L.A. 649 (1999 & Supp. 2003).

160. 28 U.S.C. § 1738A (2000).

161. Taintor, *supra* note 45, at 251 (citing Phelan v. Conron, 81 N.E.2d 525, 527 (Mass. 1948); Glanding v. Indust. Trust Co., 46 A.2d 881, 884 (1946)) (footnotes omitted).

162. *Id.* at 251-53.

and disallow lesbigay adoption, mandatory recognition of lesbigay adoption decrees might raise the same kind of strong moral and social objections as requiring (150 years ago, before the Civil War) a state that did not allow slavery to recognize a judgment from a slave state establishing the “domestic relation” of master and slave with regard to a black person residing in the free state.

The historical English rule (which came with the common law to America) was “that ‘a status of a kind not recognized by English law will not be recognized as such in England.’”¹⁶³ That principle would seem to fit comfortably within the parameters of the Full Faith and Credit Clause and statute, as applied to lesbigay adoptions.

Historically, strict interstate recognition of adoption decrees has not always been required because adoptions have been crafted, manipulated, and used for such a variety of purposes that the term “adoption” has no set or fixed meaning.¹⁶⁴ As Professor Ehrenzweig notes, “[r]elationships based on ‘adoption’ may have little in common but the name.”¹⁶⁵ Professor Appleton observes that interstate adoption recognition has already been denied in some American cases when the “out-of-state adoptions [have been] deemed fraudulent or inconsistent with the basic purposes of adoption law—in other words, *not ‘real’ adoptions at all.*”¹⁶⁶

The adoption law of the state creating the lesbigay adoption, and that relationship, may “differ[] essentially” from the law or legal relationship of the state in which such adoption is sought to be enforced.¹⁶⁷ In some cases, American courts have refused to recognize adoptions from other jurisdictions based on a much less significant difference in the laws.¹⁶⁸

For example, in many cases, discussed later in Part III.E, states have declined to recognize sister-state “adult” adoptions in various

163. G.C. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 147 (4th ed. 1952) (citation omitted). Ironically, this rule was applied to deny recognition of adoption in British jurisdictions before those jurisdictions had enacted adoption laws.

164. *See generally* 1 HOLLINGER ET AL., *supra* note 8.

165. EHRENZWEIG, *supra* note 43, § 51, at 185. This section deals with equity decrees in the interstate context.

166. Appleton, *supra* note 37, at 419 n.76 (emphasis added) (discussing two cases involving adult adoptions).

167. Taintor, *supra* note 45, at 251 (quoting *Glanding v. Indus. Trust Co.*, 46 A.2d 881, 884 (1946)) (internal quotation marks omitted).

168. *Id.*

contexts.¹⁶⁹ In those cases, the adoption of adults was seen to be a different kind of institution than the lawmakers (or testators or settlors) had in mind when they provided for the inclusion of adopted children in certain statutes, wills, or trust provisions.

Similarly, it has been anticipated that controversy might arise in the context of interstate recognition of some “surrogacy adoptions.” Some states have strong policies that absolutely ban surrogacy contracts, or allow them under very narrow conditions; other states allow surrogacy arrangements very liberally and permissively.¹⁷⁰ In at least some specific cases, if not generally, concerns about “baby-selling,” the absence of procedures to adequately protect the best interests of the child, and exploitation of poor women (who might feel compelled to sell their own children through surrogacy) might create opposition to recognition in strict (no-surrogacy) states of surrogacy adoptions granted in permissive (liberal-surrogacy) states.¹⁷¹

A related controversial type of adoption would be the “free market” adoption. Suppose state *A* adopted Richard Posner’s and Elisabeth Landes’s controversial proposal (an application of economic analysis to adoption law and policy) that states allow children to be adopted by the highest bidder.¹⁷² If a child were “sold” for adoption and the adoption decree entered in state *A*, would state *B* have to recognize that adoption? In all circumstances?

169. See Appleton, *supra* note 37, at 419 n.75 (citing *In re Estate of Griswold*, 354 A.2d 717, 720 (Morris County Ct. 1976); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 290 cmt. c (1971); E. SCOLES & P. HAY, CONFLICT OF LAWS 543-44 n.1 (1982)); see also *Kupec v. Cooper*, 593 So. 2d 1176, 1178 (Fla. Dist. Ct. App. 1992) (refusing to recognize German adoption in which mother obtained new birth certificate indicating stepfather was the father of the child, without notice to biological father); *Gardner v. Hancock*, 924 S.W.2d 857, 859 (Mo. Ct. App. 1996) (citing cases declining to recognize equitable adoptions); *Doulgeris v. Bambacus*, 127 S.E.2d 145 (Va. 1962) (declining to recognize Greek adoption for purposes of distribution of an estate in Virginia when Greek adoption procedures did not provide for investigation into best interests of child and the adoptive mother did not have to appear at, or consent to, adoption); Tracy Bateman Farrell, *Modern Status of Law as to Equitable Adoption or Adoption by Estoppel*, 122 A.L.R.5th 205, § 6 (2004).

170. Appleton, *supra* note 37, at 414-22.

171. See *id.*; see also *supra* note 51.

172. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). For purposes of this hypothetical, and to avoid a debate that would divert attention from the judgment recognition issue, we must put aside questions about the Thirteenth and Fourteenth Amendments and assume that the Posner-Landes policy would not be unconstitutional on substantive grounds.

There are cases in which persons have attempted to adopt their wives,¹⁷³ their mistresses,¹⁷⁴ or a vulnerable paramour.¹⁷⁵ For at least a couple of decades, especially before it seemed likely that any state would allow gays and lesbians to marry or to enter into any marriage-like domestic status, some creative gay activists have attempted to establish legal family relationships with their same-sex partners by adoption.¹⁷⁶ As one commentator recently explained:

Since the early 1980s, adult adoption has become rather controversial because homosexual couples have used the device to create a sort of "pseudo-marriage." In a majority of states that recognize adult adoption, homosexuals who cannot legally marry may nevertheless create a legitimate family relationship by adopting their adult lovers.¹⁷⁷

One law review writer reported that "[m]ost petitions for adult adoption of a gay or lesbian partner are filed in California and routinely granted,"¹⁷⁸ and further indicated that up to that time (1998) only four gay lover adult adoption cases had been reported in the

173. *Bedinger v. Graybill's Ex'r & Tr.*, 302 S.W.2d 594 (Ky. 1957) (describing a case where a husband had adopted his wife, which was technically permitted under the adoption law, the court subsequently held that the adoption made her the husband's heir for the purpose of his mother's will, which left the corpus of a testamentary trust to his "heirs at law").

174. *Greene v. Fitzpatrick*, 295 S.W. 896 (Ky. 1927) (upholding a man's adoption of his mistress), *aff'd on other grounds*, 16 S.W.2d 477 (Ky. 1929).

175. *Stevens v. Halstead*, 168 N.Y.S. 142, 144 (N.Y. App. Div. 1917) ("Surely it is against public policy to admit a couple living in adultery to the relation of parent and child. This meretricious relationship, and the undue influence which imposed the will of defendant on decedent, condemn the adoption. It is not only against public policy, but it is a fraud on the surrogate to induce him to approve the relation of parent and child between an adulteress and her aged and infirm paramour. If the facts alleged in the complaint are established, the adoption should be annulled.").

176. *See, e.g., In re Adoption of Robert Paul P.*, 471 N.E.2d 424, 425 (N.Y. 1984) (rejecting the use of adoption as a "quasi-matrimonial vehicle"); *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 527, 531 (Fam. Ct. 1981) (approving adoption by twenty-two-year-old male of his twenty-six-year-old male homosexual lover).

177. Mandi Rae Urban, *The History of Adult Adoption in California*, 11 J. CONTEMP. LEGAL ISSUES 612, 615 (2000) (footnote omitted); *see also* Gwendolyn L. Snodgrass, Note, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75 (1997) (favorably reviewing the practice and describing the benefits and detriments to the parties).

178. Snodgrass, *supra* note 177, at 85 (footnote omitted).

country, and three of them had been granted.¹⁷⁹ If a gay man adopted his homosexual lover in one state and the couple moved to a second state that has adopted a state DOMA barring recognition of same-sex marriage or marriage-equivalent relationships and that also explicitly disallowed lesbigay adoptions, and the gay couple sought recognition of the gay adult lover adoption for purpose of state income tax deduction, or state employee health insurance coverage, or a contest over succession arose between the parents and “adopted” adult lover, it seems unlikely that the second state would be required to recognize the adoption decree in all circumstances, and for all purposes, if any.

In some cases, the differences between what is called “adoption” in one state and what is considered “adoption” in another state are so profound that the second state does not recognize it as the same legal relationship or institution. This may be the basis for the occasional broad observation that “states may refuse to recognize out-of-state adoptions that violate a strongly held ‘public policy of the forum [state].’”¹⁸⁰

D. *The Incidents Involved or Issues Decided in S-1 May Differ from the Incidents or Issues Raised in S-2*

The issue regarding which recognition of the lesbigay adoption is sought makes a difference. It may be that the public policy and interest of S-2 would not be seriously infringed by recognition of some incidents, while recognition of other incidents of adoption would seriously undermine the strong public policy of S-2 regarding a state interest as to which it has the most significant relationship.¹⁸¹ Nonrecognition of these controversial incidents of adoption in such circumstances has been endorsed even by a scholar who, as a general

179. *Id.* In a seminal decision, the New York Court of Appeals repudiated this use of adult adoption in *In re Adoption of Robert Paul P.*, 471 N.E.2d at 425-26, finding it to be an improper distortion of the process of adoption. However, a decade later, the Supreme Court of Delaware approved of such an adult gay lover adoption in *In re Adoption of Swanson*, 623 A.2d 1095 (Del. 1993).

180. Mishra, *supra* note 69, at 122 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971)); *see also id.* at 124-27. The student author of this piece apparently was confused by, and conceptually conflated, the three separate branches of conflict of laws; adoptions are judgments, but she links this (text) statement to “choice-of-law principles.” *Id.* at 122. She then cites a section of the *Restatement* governing assertion of jurisdiction. *Id.* at 122 n.178 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971)).

181. *See Taintor, supra* note 45, at 251-55.

rule, strongly favors and encourages general interjurisdictional recognition of adoptions.¹⁸² Professor Taintor, who asserts unequivocally that adoption “decrees should be recognized in other states and, where the Constitution of the United States is applicable, are entitled to full faith and credit,”¹⁸³ nonetheless recognizes a limited “public policy” exception. He gives as an example:

Suppose that the law of the adopting state permits a bachelor of 25 to adopt a girl of 20. Should the inquiry in the other states not be whether he should be permitted to exercise custody of her, or whether she should take from him by intestate succession? Should not these inquiries be independent and she be allowed to succeed, *though the right of custody might well be denied to him?*¹⁸⁴

The *Restatement (Second) of Conflict of Laws* notes that a state may decline to recognize or enforce incidents of adoptions from sister states that violate strong public policy of the state. Thus, section 290 of the *Restatement (Second) of Conflict of Laws* makes it clear that not all incidents of adoption will be given interstate credit and faith; rather, “[a]n adoption rendered in a state having judicial jurisdiction . . . will *usually* be given the same effect in another state as is given by the other state to a decree of adoption rendered by its

182. *See generally id.* Taintor stated the prevailing rule (in 1954):

An overwhelming majority of the cases in this country hold that the existence of the *status* of adoption is to be determined by the law of the state in which it was decreed or otherwise effected, but that the *incidents* thereof are those which are attributed to the status under the law of the state which governs the principal question.

Id. at 256 (emphasis added). The author further commented:

Adoption, by all the tests, is a status like any other relational status. . . . It should, then, be treated by the courts in the same way they treat other types of domestic status.

The existence of all the other types of domestic status is determined under some system of law, but the content of the status, the nature of the incidents, is never discovered in that law as such, but is found in the law of the state which governs the right demanded. . . . Adopted children should be treated no differently.

Once the status of adoption has been created the incidents thereof should be found in the law governing the incident demanded.

Id. at 263.

183. *Id.* at 266.

184. *Id.* at 254 (emphasis added) (footnote omitted).

own courts.”¹⁸⁵ The Reporter added this comment: “A state will not give a particular incident to a foreign adoption when to do so would be contrary to its strong public policy.”¹⁸⁶ Likewise, Professor Appleton has noted:

[S]ome authority would allow a sister state to refuse to accord the *incidents* of adoption to a relationship established by means of an out-of-state decree violative of local public policy. . . . [T]hese cases might allow a court in the restrictive state to issue orders *inconsistent with the incidents* that out-of-state adoptions would ordinarily entail. For example, *custody is ordinarily an incident* of the parent-child relationship created by adoption; under these cases perhaps a court in the restrictive state could cite this state’s strong anti-surrogacy policy to award custody to the surrogate if she seeks to have the child returned even after the issuance of a final out-of-state adoption decree in favor of the semen-provider and his wife.¹⁸⁷

Thus, it may be that the incident or issue involved in the case in the second state may be distinguished from the incident or issue involved when the adoption was granted, as several courts have indicated.¹⁸⁸ The second state may recognize the status of adoption but properly decline to recognize or extend all of the incidents the parties would want to enjoy.

E. *The Conventional Wisdom Diverges from the Caselaw*

There have been numerous cases in which American courts have declined to recognize adoptions created in other jurisdictions (including sister states) because those adoptions violated some strong public policy, essential procedure, or clear local interest of the second state. The cases have arisen in a variety of contexts, and some courts

185. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 290 (1971) (emphasis added).

186. *Id.* cmt. c.

187. Appleton, *supra* note 37, at 419 (emphasis added) (citations omitted). Professor Appleton disfavors this result but admits it is possible. *Id.* at 419-20.

188. *See, e.g., In re Estate of Sendonas v. Paltsavias*, 381 P.2d 752, 754 (Wash. 1963) (“[W]hile the laws of the place of adoption determine the legality of the status, the rights of an adopted child to inherit property are determined by the law of the situs of decedent’s real property, and by the law of decedent’s domicile with respect to personal property.”); *In re Estate of Wagner*, 748 P.2d 639, 643 (Wash. Ct. App. 1987) (stating that the law of the state of an adoption governs the status of the adoptee, but incidents such as inheritance are determined by the law of the state in which the claim is asserted).

have invoked the modifiability of the former adoption decision.¹⁸⁹ Sometimes the defect had to do with jurisdiction or notice.¹⁹⁰

One frequently recurring situation involved nonrecognition of “adult adoptions” (adoptions of adults) in states or countries that did not allow adult adoptions, even though the adoptions were authorized by law and created by decrees in states where adult adoptions were permitted and valid.¹⁹¹ A recent summary of the conflicting state policies concerning adult adoptions in the *Harvard Law Review* explains:

The availability of adult adoption varies from state to state. Some jurisdictions prohibit adult adoption altogether; other jurisdictions expressly permit it. Still others permit only certain kinds of adult adoptions. In general, courts have been reluctant to allow the adoption of adults who are not wards of the state, because adoption traditionally has been viewed as a mechanism to protect the well-being of a child. Where the statutes are vague, courts have disagreed as to the validity of an adult adoption designed for inheritance purposes only. . . . Courts that have denied such adoptions have argued that courts must uphold the moral values or policy purposes of the adoption statute.¹⁹²

A number of American state courts have declined to recognize “adult adoptions” even though such were valid where performed.¹⁹³ While not all of the courts or jurisdictions declined to recognize adult adoptions (the cases are split, as one might expect when the public policies and connecting interests of the second state are such a

189. See Kay, *supra* note 41, at 706-09.

190. See Appleton, *supra* note 37, at 416-19 (noting exceptions to adoption recognition for lack of jurisdiction, ex parte proceedings, errors of law and fact, and different incidents).

191. See, e.g., Delaney v. First Nat'l Bank, 386 P.2d 711 (N.M. 1963) (recognizing, on full faith and credit grounds, the adoption of a twenty-five-year-old woman by a thirty-nine-year-old man despite the fact that such an adoption is illegal in New Mexico, because the adoptor was not at least twenty years older than the adoptee); Barrett v. Delmore, 54 N.E.2d 789 (Ohio 1944) (recognizing the New York adoption of an adult by his stepfather even though such adoptions are not permitted in Ohio).

192. *Same-Sex Couples and the Law*, 102 HARV. L. REV. 1603, 1626-27 (1989) (footnotes omitted).

193. See K.M. Potraker, Annotation, *Adoption of Adult*, 21 A.L.R.3d 1012, § 20[b] (1968) (describing two cases where the foreign decree was not recognized, *First Nat'l Bank v. Mott*, 133 So. 78 (Fla. 1931) and *Tsilidis v. Pedakis*, 132 So. 2d 9 (Fla. Dist. Ct. App. 1961)); Appleton, *supra* note 37, at 419 n.75.

significant element in the nonrecognition equation),¹⁹⁴ a significant number of adult adoptions have been denied interstate recognition.¹⁹⁵ For example, in *In re Estate of Griswold*,¹⁹⁶ a New Jersey court refused to recognize an "adult adoption" decree that was entered and valid in California for purposes of determining who was entitled to receive the remainder of a trust established for the adopter and his children by a stranger to the adoption. The adopter and his brother were beneficiaries of separate New Jersey trusts that their father had established, giving each brother a life interest in the trust with the remainder of each trust to go the children of that brother, or, if he had no children, to the children of the other brother. The adopter had no biological children; he was living in California with his second wife; on advice of a California attorney he adopted the adult son of his second wife, who was fourteen years and eleven months younger than the adopter. Such adult adoptions are valid in California. New Jersey law prohibited adoption of a person who is less than fifteen years younger than the adopter. When the adopter died, the brother's children contested the claim of the adult adoptee. The New Jersey probate court found that the adoption "offends New Jersey policy" but that "the offense to policy [wa]s minimal."¹⁹⁷ A prior New Jersey case held that minor adopted children would be treated as children in probate, but the court declined to treat the California adoption the

194. See generally *In re Morris's Estate*, 133 P.2d 452 (Cal. Dist. Ct. App. 1943). In this case, the California appellate court reversed the lower court ruling that adult adoption by ninety-two-year-old man of his sixty-one-year-old niece in Rhode Island, valid there, would not be recognized in California, where such adoptions were not at the time permitted, for the purpose of determining whether the estate would be taxed in California, where decedent had died, at the lower lineal relationship tax rate or higher collateral relationship tax rate. *Id.* at 453, 456. The court noted that twenty-two states at that time specifically allowed adult adoption, so it could not be said to violate strong public policy. *Id.* at 454.

We therefore hold that when the State of Rhode Island, acting in accord with its laws, established through valid adoption proceedings the status of adopted child and adoptive parent between decedent herein and her uncle, full faith and credit must be given to such decree and the status thereby created must be recognized by the State of California, notwithstanding a claimed conflict with the announced policy of the latter state.

Id. at 456; see also Potraker, *supra* note 193, § 20[a] (listing and summarizing six cases recognizing adult adoptions from other jurisdictions).

195. As state policies have changed and more states recognize adult adoptions, the number of cases refusing to recognize sister-state adult adoptions has declined.

196. 354 A.2d 717 (N.J. Super. Ct. 1976).

197. *Id.* at 720.

same way because “[i]n an adult adoption the relation between the parties is different, the motivation can be quite varied, and such adoptions are treated differently in the statutes.”¹⁹⁸ The court doubted that

the feelings and attitudes of people toward *adopted adults* are the same as toward adopted children The adoption of children and the adoption of adults involve quite different considerations and different factors of policy and require and receive different treatment. The basic purpose of child adoption is to provide and protect the welfare of children, to provide homes and families and security for homeless children, and to provide children for couples

198. *Id.* at 726. The court noted that a California court had summarized some differences between adult adoptions and adoptions of children that would justify treating them differently:

There is a distinction which the testator, acting sometime prior to 1930, might well have had in mind if he ever thought of the subject of adult adoptions, a subject then unknown to the law of this state. It is that adopted minor children most likely would be closer to family traditions, history and affections than would adult adoptees, and might be expected to regard more gratefully and affectionately the deceased father of their adopting mother as an ancestor and benefactor.

Another distinction is that in adopting minors the daughter would become responsible for their support and education; wherefore, if she should die before these obligations had been fulfilled, the estate, which for some reason the testator did not wish to go completely to the daughter during her lifetime, would be useful for the benefit of the adopted children. When adults are adopted the usual duty of support (as distinguished from that which may arise from extraordinary circumstances) is not assumed by the adopter.

Another difference is this: adoption of minors (except in stepparent adoptions) can be effected only following investigation carried on by an agency of the State Department of Social Welfare (Civ. Code, § 226). But in the case of adult adoptions no such investigation is required (Civ. Code, § 227p). One significance of this difference is that the purposes of the adopter may be inquired into when there is a proposed adoption of a minor. If the adoption of a minor is a second or later one, it can be ascertained that the subsequent adoption does not unduly diminish the right to support of earlier adoptees. Moreover, it can then be ascertained that the motive of the adopter is not that of cutting down a remainder which has been left to children. When there is an adult adoption conducted without the investigation, there is opportunity for a life tenant, such as the daughter in this case, to reduce the remainder simply by adoption of willing adults. It is improbable that the testator intended such results. If he had wished to give his daughter power of appointment, he could have done so.

Id. at 726-27 (quoting *Williams v. Ward*, 93 Cal. Rptr. 107, 110 (Dist. Ct. App. 1971)) (internal quotation marks omitted). The New Jersey court further noted that “[t]he case [*Williams v. Ward*] may be distinguished by the fact that at the date of testator’s will adult adoption was not permitted in California, but the above statement is nevertheless appropriate.” *Id.* at 727.

who desire to have children to love and raise and maintain. A substantial factor here is the duty and obligation of support and maintenance.

In an adult adoption the relation between the parties is different, the motivation can be quite varied, and such adoptions are treated differently in the statutes. Adoption of adults is ordinarily quite simple and almost in the nature of a civil contract. (California requires an agreement signed by the parties whereby, as in this case, they agree to assume toward each other the legal relationship of parent and child.) The complete severing of the relation to natural parents is not accomplished in an adult adoption; the relation remains in New Jersey as to inheritance in case of intestacy of the natural parents.¹⁹⁹

Later, the Appellate Division in New Jersey endorsed the *Griswold* distinction between adoptions of adults and adoptions of children. In *In re Estate of Nicol*,²⁰⁰ the court reversed an order that allowed an adult adoptee to share in the distribution of an estate left to the issue (or lineal descendant) of the testatrix, explaining:

The distinction between adopted children and adopted adults is by no means an idle one in the search for the probable intent of a testator. It is one thing to ascribe to a testator a contemplation of the possibility of that which has come to be relatively commonplace, namely, the adoption of a child at some time in the future by a member of the family or other relative, or any other prospective beneficiary under a will. Frequently, in such cases, the child is acquired in infancy, although the child may be older where a spouse adopts a stepchild. In both instances, however, the child is reared as one's own by the adopting parent and is recognized as such among the family and friends.

199. *Id.* at 726. The court held that it was not the probable intent of the testator to benefit an adult adopted by his son. *Id.* at 733.

200. 377 A.2d 1201 (N.J. Super. Ct. App. Div. 1977); see also *In re Trust for Duke*, 702 A.2d 1008 (N.J. Super. Ct. Ch. Div. 1995) (barring adult adoptee from sharing in distribution of estate to "lineal descendants" of settlor); *In re Estate of Comly*, 218 A.2d 175 (N.J. Gloucester County Ct. 1966) (adopted adult barred from inheriting from a stranger to the adoption). All three of these cases emphasized that adult and minor adoptions are to be treated differently with respect to the "stranger to the adoption" doctrine.

But it is quite another matter where the adopted person is an adult. . . . One would be hard-pressed to ascribe to a testator, in the absence of any expression thereon or of clarifying attendant circumstances, a probable intent to include an adopted adult among the children or issue of a testamentary beneficiary. It is extremely unlikely that a testator would foresee the likelihood that his or her child, or any other prospective beneficiary, might at some time in the future adopt an adult. It is equally improbable that an adopted adult would be embraced in the bosom of the family members other than the adopting parent, as would an adopted child.²⁰¹

In *In re Nowels Estate*,²⁰² a Michigan appellate court declined to recognize a California adoption of a forty-two-year-old cousin of the adopter for the purpose of distributing the remainder share of a trust established by the adopter's mother for the benefit of her grandchildren. It characterized the adult adoption as "an abuse of the adoption process . . . where the end result would violate the settlor's probable intent and normal expectations."²⁰³ It agreed with the *Griswold* court that adoption of minors is designed to provide for the best interests of parentless children, while "adoption of adults is ordinarily quite simple and almost in the nature of a civil contract."²⁰⁴

In *Mott v. First National Bank*,²⁰⁵ the court denied the petition of a woman to be declared the daughter of a decedent and entitled to share in his estate because she was an adult when she had been legally adopted by him in another state. The court declared:

The relation of parent and child having been competently established by adoption in Connecticut, however, that status will be recognized in Florida under the rules of comity or under the full faith and credit clause of the Federal Constitution, *unless such status or the rights flowing therefrom are not contemplated by or are repugnant to the laws or policy of the state of Florida* upon the subject.

Each state possesses the sovereign power to prescribe its own laws as to adoptions, as well as its own laws of descent and

201. *Estate of Nicol*, 377 A.2d at 1207-08.

202. 339 N.W.2d 861 (Mich. Ct. App. 1983).

203. *Id.* at 863.

204. *Id.* at 864.

205. 124 So. 36 (Fla. 1929).

distribution with reference to property within its limits, in the exercise of which power a state may deny the right of inheritance in that state to one adopted under the laws of another state, or may refuse to recognize an adoption under the laws of a foreign state for the purpose of transmitting title by inheritance.²⁰⁶

In the related case in which the disappointed suitor asserted essentially the same claim and won, *First National Bank v. Mott*,²⁰⁷ the Florida Supreme Court reversed and reiterated that adoption in Florida applied only to minors and not to adults, and the Connecticut adult adoption did not entitle her to share in the estate as a child of the decedent.²⁰⁸

In *Tsilidis v. Pedakis*,²⁰⁹ a Florida court held that a valid Greek adoption of an adult by a Florida resident who was unmarried violated strong public policy and would not be recognized in probate court under the Pretermitted Heir Statute.²¹⁰ A Florida statute specifically allowed adoption of adults by married couples in Florida,²¹¹ but the decedent had never married, and the appellate court read that limited permission as indicating a narrow exception: "The very fact that the legislature restricts the right to adopt an adult to a 'married couple, or the survivor thereof' establishes by exclusion the right of a single person to adopt an adult and implies that such is repugnant to the laws and policy of this state."²¹² While the foreign adoption was from Greece and not a sister state, the Florida court emphasized the broad policies applicable in either setting, and citing the *Mott* cases in which the Florida Supreme Court had refused to recognize an adult adoption from Connecticut, the court of appeals affirmed the denial of the pretermitted heir claim.

Likewise, another Florida court explained the rule governing full faith and credit to adoptions to be: "If the evidence shows that the adoption proceedings were in compliance with another state's law

206. *Id.* at 37 (emphasis added) (citations omitted).

207. 133 So. 78 (Fla. 1931).

208. *Id.* at 79.

209. 132 So. 2d 9 (Fla. Dist. Ct. App. 1961).

210. *Id.* at 10, 13.

211. *Id.* at 13.

212. *Id.* (citing F.S. § 72.34 (renumbered to 63.241 in 1967, repealed in 1973)).

and that law is similar to the law of Florida, then Florida will give it full faith and credit."²¹³

In *Corbett v. Stergios*,²¹⁴ the Iowa Supreme Court stated the general rule to be: "An adoption decree of a court of another state or nation is entitled to recognition here, if the court had jurisdiction to render it, at least to the extent it does not offend the laws or the public policy of this state."²¹⁵ The court indicated that the rule applies equally to adoption decrees from other states and foreign nations. Since *Corbett* involved a foreign adoption, its statement of the rule in interstate adoption cases is mere dictum and may be questioned; what is unquestionable is that the unique nature of adoption distinguished adoption decrees from ordinary judgment recognition principles. Thus, the *Corbett* court declared, if "the particular adoption, in its nature . . . violates some public policy of the situs," the adoption will not be recognized or enforced.²¹⁶

In *Cross v. Cross*,²¹⁷ a woman created a trust in Illinois for the life benefit of her son and the remainder for her descendants, or her husband's nieces and nephews, or those descendants her son selected. After her death, her forty-nine-year-old son adopted a thirty-six-year-old man in Texas and exercised his power of appointment giving him

213. *Kupec v. Cooper*, 593 So. 2d 1176, 1178 (Fla. Dist. Ct. App. 1992) (emphasis added) (declining to recognize a German de facto adoption in which mother obtained new birth certificate indicating stepfather was the father of the child).

214. 137 N.W.2d 266 (Iowa 1965).

215. *Id.* at 268.

216. *Id.* at 269 (quoting C.C. Marvel, Annotation, *Conflict of Laws as to Adoption as Affecting Descent and Distribution of Decedent's Estate*, 87 A.L.R.2d 1240, 1244 (1963)). In *Corbett*, the Iowa courts had declined to recognize a Greek adoption because it did not appear that Greek law granted reciprocal rights and benefits to American adoptees, as required by an Iowa statute, but the Supreme Court of the United States had reversed on the ground that the Iowa statute was nullified by a treaty between Greece and the United States. *Id.* at 267. On remand, the Iowa Supreme Court examined other possible bases for nonrecognition of the Greek adoption and found no violation of a strong Iowa public policy even though in several significant respects the adoption procedure and effects in Greece differed from those in Iowa. *Id.* at 272. Differences included (1) adoptive parents do not inherit from their adopted children in Greece but do in Iowa; (2) the spouse of the adopter is required to join in the adoption petition in Iowa, but in Greece only a declaration of the spouse consenting to the adoption is necessary; (3) in Iowa the child must normally reside in the home of the adopter for one year (unless the court finds good cause to shorten the period), but in Greece the adoptive parent does not even need to see the child before the adoption; and (4) adopters in Greece, but not Iowa, must be at least 50 years old, and without a natural child. *Id.* at 269-70. Distinguishing adoption of an adult adoptee, *id.* at 271, the court recognized the Greek adoption for purpose of Iowa inheritance.

217. 532 N.E.2d 486 (Ill. App. Ct. 1988).

the remainder of his mother's trust. The Illinois court declined to allow the adopted adult to take under the trust as a "descendant," declaring:

The adoption of an adult solely for the purpose of making him an heir of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption is an act of subterfuge. . . . This practice does great violence to the intent and purpose of our adoption laws, and should not be permitted. If there had been no trust, there would undoubtedly have been no adoption.²¹⁸

Likewise, in *In re Estate of Tafel*,²¹⁹ a Pennsylvania court agreed with this distinction, stating that it would not recognize adult adoptions for purposes of passing property to children not of the settlor:

By the restriction of this rule of construction to minor adoptions we serve and effectuate the purpose of preventing an adult adoptee or adoptees from being considered a testamentary "child" or "children" where such adoption is undertaken by a person other than the testator to prevent a gift over in default of a natural "child" or "children" and thus, in effect, rewrite the testator's will.²²⁰

A similar policy is evidenced in *Estate of Pittman*,²²¹ where the court declared:

We have concluded that as to wills executed before adult adoptions became valid in California, an adult adoptee generally is not entitled to take under a gift to "children" or "children of . . . children" but that an exception should be recognized where the adoptee had been

218. *Id.* at 488-89 (citing *Minary v. Citizens Fid. Bank & Trust Co.*, 419 S.W.2d 340 (Ky. 1967)) (internal citations omitted).

219. 296 A.2d 797 (Pa. 1972). The opinion does not indicate in which state the adult adoption was decreed. *See also* *Wilson v. Johnson*, 389 S.W.2d 634, 634 (Ky. 1965) (declining to recognize step-children adopted when adults as "children" of the adopting man for purposes of his father's will which left estate to the "children" of the adopter).

220. *Estate of Tafel*, 296 A.2d at 803.

221. 163 Cal. Rptr. 527 (Ct. App. 1980).

taken into the adoptive parents' home as a minor and reared by them.²²²

Similarly, the Colorado Court of Appeals distinguished adult adoptions in *In re Trust Created by Belgard*.²²³ In that case, the settlor created a trust in Illinois for the benefit of the children of her son including "persons legally adopted" by him.²²⁴ The son "ha[d] three sons from his first marriage."²²⁵ Later, he married another woman with whom he had no children; he adopted his second wife and she attempted to take a share of the trust estate.²²⁶ The Colorado courts rejected the attempt, noting that "the legal effects of an adult adoption are quite different from those flowing from adoption of a child."²²⁷

Even autonomy-minded California, which has long allowed adult adoptions, has also declined to recognize adult adoptions for purpose of trusts and estates law in some cases. For example, in *Williams v. Ward*²²⁸ and *Abramovic v. Brunken*,²²⁹ California appellate courts held that because adult adoption was not legal when the instruments were drafted, adult adoptions that were effected later, after the law changed, would not be recognized as creating any interest under such instruments, even though California no longer had any policy against recognizing such adoptions for such purposes. In *Williams*, the court distinguished adult adoption from adoption of minors, noting that "adopted minor children most likely would be closer to family traditions, history and affections than would adult adoptees, and might be expected to regard more gratefully and affectionately the deceased father of their adopting mother as an ancestor and benefactor."²³⁰

These cases and principles are neither new nor do they involve any politically-motivated manipulation of adoption recognition principles invented recently just to stifle interstate recognition of lesbian adoptions. Rather, these exceptions are long-established in

222. *Id.* at 529.

223. 829 P.2d 457 (Colo. Ct. App. 1991).

224. *Id.* at 458.

225. *Id.*

226. *Id.* at 458-59.

227. *Id.* at 459.

228. 93 Cal. Rptr. 107 (Ct. App. 1971).

229. 94 Cal. Rptr. 303 (Ct. App. 1971).

230. *Williams*, 93 Cal. Rptr. at 110.

the case law and commentary. Thus, the *Restatement (Second) of Conflict of Laws*, section 290, indicates that a state may decline to recognize a sister-state adult adoption for purpose of local inheritance if the adoption was done solely for inheritance or emigration purposes, if that violates a strong local public policy.²³¹

These cases clearly indicate that some kinds of adoption may be denied full (or any) recognition in sister states if the nature of what is called “adoption” is so different from the institution recognized and regulated in the second state that it violates strong public policy of the second state. Accordingly, there are compelling reasons to believe that lesbigay adoption decrees might not be given mandatory recognition in sister states, at least in some circumstances. When there are competing interests regarding issues such as recognition of lesbigay adoptions, turgid zero-sum rules which mandate “all-or-nothing” solutions are not necessary or rational when multifaceted issues can be rationally disentangled.

F. *Compelling Governmental Interests May Sometimes Justify Nonrecognition of Lesbigay Adoptions*

The reality of the fact that two states have legitimate interests when a lesbigay adoption is imported into a state that prohibits or otherwise has a strong public policy against lesbigay adoptions cannot be ignored. The importance of protecting and balancing the competing legitimate significant interests of multiple states (including state adoption policy, state sovereignty and *parens patriae* duties) to protect those interests should be considered.

Section 103 of the *Restatement (Second) Conflict of Laws* recommends applying a form of governmental interest analysis to interstate recognition of judgments generally. That seems particularly appropriate in the lesbigay adoption context. The *Restatement (Second)* notes an important exception to that general rule of mandatory interstate judgment recognition: if the national (governmental) interest behind full faith and credit would not “require” recognition (that is, if the national interest in interstate comity, harmony, and national unity would not be significantly furthered) and if enforcement would infringe upon important governmental interests of the state where enforcement is sought (if

231. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 290 cmt. c (1971).

the state interests of *S-2* are the “most significant” with respect to the issue and the parties at the time of enforcement), the judgment of *S-1* “need not be recognized or enforced” in *S-2*:

A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.²³²

The Reporter’s Comments note that money judgments would “almost invariably” not qualify for nonrecognition under the “extremely narrow” exception of section 103,²³³ and that “[a]lmost invariably” the national unity purpose behind the Full Faith and Credit Clause “will outweigh any interest that a State may have in not recognizing or enforcing a sister State judgment,”²³⁴ yet

[t]here will be extremely rare occasions, however, when recognition of a sister State judgment would require too large a sacrifice by a State of its interests in a matter with which it is primarily concerned. On these extremely rare occasions, the policy embodied in full faith and credit will give way before the national policy that requires protection of the dignity and of the fundamental interests of each individual State. . . . [I]t may be that full faith and credit is not owed a sister State custody decree on the ground that a court should be free to disregard such a decree when this is required by the best interests of the child.²³⁵

Governmental interest analysis under section 103 of the *Restatement (Second)* is particularly relevant when considering intersovereign conflicts between the American states concerning family relations. Every jurisdiction has “strong governmental interests in the structure of the family and the relationship of family members,”²³⁶ since “[m]arital and family issues reflect important

232. *Id.* § 103.

233. *Id.* § 103 cmt. a.

234. *Id.* § 103 cmt. b.

235. *Id.*

236. Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies—International Child Abduction and Same-Sex Unions*, 32 HOFSTRA L. REV. 233, 233 (2003).

values and social norms in particular communities.”²³⁷ The regulation of family relations and of adoption is primarily a matter constitutionally reserved to the states.²³⁸ The federal interest is marginal and minimal; the state interest is core, essential, and critical.²³⁹ The long-established (and recently reiterated) doctrine of federalism in family law emphasizes the primacy of the individual states in ordering, establishing, controlling, and supervising the creation, existence, and termination of family relations, including adoption.²⁴⁰ This principle is underscored by a host of collateral doctrines, such as the domestic relations exception to diversity jurisdiction.²⁴¹ Respect for the interest of the state in determining which domestic relations will be established or recognized could certainly justify an exception to the rule of recognition of sister-state judgments when the effect would be to force a state to recognize lesbian adoption despite a strong public policy prohibiting such. The profound interests of the second state were not considered, weighed, or balanced in the adoption proceeding in the first state that entered the lesbian adoption decree. The second state was not a party, and was not given notice or an opportunity to participate in the prior proceeding. The exception to enforcement of adoption decrees against persons who were not party to the former litigation would seem to apply to prevent the adoption decree of *S-1* from binding the interests of *S-2* or from precluding application of its domestic relations policy.

237. *Id.* at 272.

238. *See generally* U.S. CONST. amends. IX, X.

239. *See* THE FEDERALIST NOS. 10, 45 (James Madison), NO. 17 (Alexander Hamilton).

240. The Supreme Court of the United States has frequently observed that the “regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States.” *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also* *United States v. Morrison*, 529 U.S. 598 (2000); *Lehman v. Lycoming County Children’s Servs. Agency*, 458 U.S. 502 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). For a general discussion of the role of federalism in developing domestic relations law, *see* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821-25 (1995).

241. The Supreme Court has stated:

One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 8-9 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

The majority and dissenting opinions in *Yarborough v. Yarborough*²⁴² also suggest that a compelling governmental interest in family regulation may, in some cases, justify nonrecognition of a sister-state judgment. In *Yarborough*, a Georgia court had entered a lump-sum child support decree that the father, who still resided in Georgia, had fully paid.²⁴³ Under Georgia law, that relieved the father of any further support obligation.²⁴⁴ The minor, who had moved to South Carolina to live with her maternal grandfather, brought suit in South Carolina through her grandfather (guardian ad litem) seeking additional child support to cover the costs of her college education.²⁴⁵ The South Carolina court rejected the Georgia law defense and ordered the father to pay an additional fifty dollars per month in child support. The United States Supreme Court reversed, holding that the South Carolina courts had violated the Full Faith and Credit Clause in failing to give effect to the Georgia decree.²⁴⁶ However, the majority opinion, written by Justice Brandeis, emphasized the continuing jurisdictional-territorial connections and interests of Georgia and its local resident:

The fact that Sadie has become a resident of South Carolina does not impair the finality of the judgment. South Carolina thereby acquired the jurisdiction to determine her status and the incidents of that status. Upon residents of that State it could impose duties for her benefit. Doubtless, it might have imposed upon her grandfather who was resident there a duty to support Sadie. But the mere fact of Sadie's residence in South Carolina does not give that State the power to impose such a duty upon the father who is not a resident and who long has been domiciled in Georgia. He has fulfilled the duty which he owes her by the law of his domicile and the judgment of its court. Upon that judgment he is entitled to rely.²⁴⁷

Further underscoring the governmental interest analysis and indicating how close the issue was, the Court specifically distinguished and reserved the question of whether South Carolina

242. 290 U.S. 202 (1933).

243. *Id.* at 204.

244. *Id.*

245. *Id.*

246. *Id.* at 212-13.

247. *Id.* at 212 (footnotes omitted).

might have disregarded the Georgia judgment and imposed an additional support obligation on the father if he had moved to South Carolina.²⁴⁸ That reservation has been read as indicating that the command of full faith and credit will defer to the greater governmental interest of a second state when the rendering state of the nonmodifiable judgment has no more interest in the issue because no party continues to reside in that state.²⁴⁹

Justice Stone in dissent, joined by Justice Cardozo, would have upheld the South Carolina judgment for additional support on grounds that resonate in governmental interest analysis:

Between the prohibition of the due process clause, acting upon the courts of the state from which such proceedings may be taken, and the mandate of the full faith and credit clause, acting upon the state to which they may be taken, there is an area which federal authority has not occupied. As this Court has often recognized, there are many judgments which need not be given the same force and effect abroad which they have at home In the assertion of rights defined by a judgment of one state, within the territory of another, there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other.²⁵⁰

Both the majority and dissenting opinions in *Yarborough* clearly suggest that consideration of the governmental interests of both states provides a viable basis for upholding the power of a state in some situations to decline to recognize and enforce a judgment of a sister state concerning parent-child relations when the rendering state has less or no ongoing governmental interest in the relationships and the second state has a strong interest in declining to give the same full recognition, force, and effect to the judgment as it might be given in the rendering state. Likewise, a series of post-*Williams* Supreme Court decisions involving the survival of marital support decrees

248. *Id.* at 213.

249. See generally *Elkind v. Byck*, 439 P.2d 316, 320 (Cal. 1968); *Thompson v. Thompson*, 645 S.W.2d 79, 85 (Mo. Ct. App. 1982); *Scholla v. Scholla*, 201 F.2d 211, 217 (D.C. Cir. 1953) (Washington, J., dissenting).

250. *Yarborough*, 290 U.S. at 214-15 (Stone, J., dissenting). Professors Reese and Johnson noted that "this theory . . . has often been hinted at in the cases but rarely applied." Reese & Johnson, *supra* note 27, at 171.

following subsequent divorce judgments underscores the governmental interest perspective by "plac[ing] similar emphasis upon the interests of the second state."²⁵¹

Thus, it is not surprising that section 103 has been cited and relied upon in cases involving family interests. For example, several courts have rejected full faith and credit objections to modifying a sister-state child support decree when the parties no longer reside in *S-1* and *S-2* is the state where the children and custodial parent reside and where the impact of insufficient child support will be felt.²⁵²

Nonrecognition of sister-state lesbian adoption decrees under some analyses, such as that suggested by section 103's focus on the governmental interests of the respective states, would appear to conflict with conventional wisdom about absolute, monolithic mandatory interstate judgment recognition. Nonrecognition of lesbian adoption decrees as to some issues and for some purposes, however, appears to be consistent with the well-established conflict of laws principles of governmental interest analysis in conflict of laws generally, and with the understanding of the Full Faith and Credit Clause of the *Restatement (Second) of Conflict of Laws* in cases in which the second state has a significant interest in the issue and in the policy of nonrecognition of lesbian adoption.

CONCLUSION

American states are divided over the legalization of lesbian adoptions. Lesbian adoptions present very controversial and powerful family and child-care policy dilemmas. In those states that have strong public policies in favor of placing children for imitative adoption, where they will be raised by both a father and a mother, whenever possible, or with a responsible single individual who remains eligible to marry, an imported lesbian adoption from another jurisdiction presents a very serious challenge to the integrity of the state's child welfare policy.

251. Reese & Johnson, *supra* note 27, at 157 (discussing *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U.S. 279 (1945); *Estin v. Estin*, 334 U.S. 541 (1948); *Kreiger v. Kreiger*, 334 U.S. 555 (1948)).

252. See, e.g., *Lewis v. Roskin*, 895 S.W.2d 190 (Mo. Ct. App. 1995); *Thompson v. Thompson*, 645 S.W.2d 79 (1982).

Lesbigay adoptions are not the first kinds of adoptions to create interstate recognition controversies and dilemmas. As noted above,²⁵³ adoptions of adults generally, adoptions of spouses, adoptions of mistresses, adoptions of homosexual lovers, adoptions of children placed (sold) for adoption with the highest bidder, adoptions of children pursuant to surrogacy contracts, adoptions in which the procedures differ dramatically from that required in the forum state (e.g., when fathers were denied notice and a hearing before their parental rights were terminated, or when the children were placed under procedures that did not protect the children—such as no investigation) have raised similar issues. States have been able to decline full (or any) recognition or enforcement to such controversial “adoptions” despite the language of the Full Faith and Credit Clause and statute. Likewise, historically, many other unique and highly controversial domestic relationships and institutions (such as slavery, consanguinity, and polygamy) have been the source of similar interstate judgment recognition controversies in which the states have been able to decline giving full recognition or enforcement to family relationships that were prohibited in the forum, even if a judgment recognizing the relationship had been obtained in another state.

Because adoption decrees prospectively create ongoing relationships that can be altered, modified, and terminated, adoption decrees are more comparable to marriage certificates than to ordinary money judgments. Adoption proceedings are largely *ex parte*, and rarely involve contested or disputed adversary proceedings, the issues are not “fully and fairly litigated” and thus they are not generally entitled to recognition and enforcement under long-established principles of *res judicata*—collateral estoppel of judgments. In addition the second state is not a party to the first proceeding, and because the second state has a strong interest when it comes to the welfare of children in its territory, principles of due process would seem to bar mandatory judgment recognition and preclusion applied against the second state based on the proceeding in the first state. Also, because adoption decrees are noncommercial, noneconomic determinations creating ongoing family relations, they are distinguishable from the kinds of judgments as to which full faith and credit normally applies. It seems the nature of lesbigay adoption differs so radically from traditional imitative adoption, mandatory

253. See *supra* notes 165-69 and accompanying text.

recognition of lesbian adoption would require some states to create an entirely new category and kind of domestic relationship, which goes beyond the scope of the Full Faith and Credit Clause. Finally, because the former state has no legitimate interest in enforcing its policies upon another state, and because the second state usually has the predominant state interest in regulating the ongoing family relationship and its incidents within its borders, there is no justification for mandating recognition and enforcement of lesbian adoption and its incidents over the strong public policy and prevailing interests of the second state. Indeed, that might violate several provisions of the Constitution.²⁵⁴

The social importance of parenthood requires the internal recognition or external imposition of some limitations upon the lifestyles of adults who wish to become adoptive parents. Adoption is the gold standard of parenting; to preserve that quality it should provide for every child whenever possible a mother and a father, not two mothers or two fathers. Redefining the critical social institution of imitative adoption merely to send a signal of acceptance to same-sex couples is inappropriate. In adoption, the best interests of the child should always prevail, and the adult preferences should not dictate or unduly influence the structure and requirements of adoption. Respect for adult sexual preferences does not require that children be offered less than they need for their best childhood development opportunity, which includes a mother and father in adoption. Responsible public policy may appropriately define and enforce limits on adult lifestyle preferences when they jeopardize the best interests of children. The Full Faith and Credit Clause does not compel states with strong public policies against lesbian adoption which are directly implicated in a case in which the integrity of the state's interests are at stake to recognize or enforce lesbian adoption decrees from other states that would effectively require the second state to legitimate lesbian adoption and its incidents within its territory.

254. Provisions that are possibly violated include those relating to the Due Process of Law, Equal Protection, and Guarantee of Republican Form of Government provisions; principles of state sovereignty and federalism are also implicated.