

Same-Sex Relationships and the Full Faith and Credit Clause: Reducing America to the Lowest Common Denominator

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SAME-SEX RELATIONSHIPS AND THE FULL FAITH AND
CREDIT CLAUSE: REDUCING AMERICA TO THE LOWEST
COMMON DENOMINATOR

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ABSTRACT

This Article examines the legal and policy implications that arise when a state that expressly prohibits recognition or enforcement of any rights arising from a same-sex relationship is confronted with a request to register and enforce a child custody order issued by another state that gives custody or visitation rights to a biological mother's former same-sex partner. As more states confer marital rights to same-sex couples, this issue will occur with increasing frequency. The first reported case in the nation to address the issue, *Miller-Jenkins v. Miller-Jenkins*, has garnered attention from the national media, including a cover story in the Washington Post Magazine and, most recently, a feature story in Newsweek Magazine. The underlying issue arises from two seemingly conflicting federal statutes, both passed pursuant to Congress's authority to prescribe what effect, if any, a foreign judgment should have in another state. In 1980, Congress passed the federal Parental Kidnapping Prevention Act (PKPA), which requires a receiving state to give full faith and credit to another state's custody or visitation order. In 1996, however, Congress passed the federal Defense of Marriage Act (DOMA), which expressly recognizes the right of each state to refuse to give full faith and credit to any orders arising out of same-sex relationships treated as marriage. Thus, when a court in Vermont, Massachusetts, California, or New Jersey (to name a few) declares a woman to be a parent to her former same-sex partner's biological child and grants a visitation or custody order in her favor when the relationship between the women ends, are other states required to give the order full faith and credit as a result of the PKPA, or can states refuse to give it full faith and credit pursuant to DOMA? This Article discusses the various arguments raised on both sides of the issue in the context of the *Miller-Jenkins* litigation. It then articulates a workable standard for interstate custody disputes arising out of same-sex relationships that gives proper

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respect to the constitutional mandate to give full faith and credit to sister state judgments while preserving state sovereignty over core domestic relations matters.

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INTRODUCTION

While it is fair to state that the question of whether same-sex relationships should be legally recognized has been discussed in-depth and at-length by the legal academy, one question that has not garnered nearly as much attention is whether a state can refuse full faith and credit to child custody orders that arise out of same-sex relationships. Whether through single-parent adoption, same-sex adoption, assisted reproductive technology, or self-insemination with a known sperm donor, there is an increasing number of couples who are raising children while in a same-sex relationship.¹ When those

1. *Doctors Note Increase in Same-Sex Couples Using IVF to Start Families*, REUTERS, Dec. 7, 2007, <http://www.reuters.com/article/pressRelease/idUS191801+04-Dec-2007+PRN20071204> (“[P]hysicians at the Reproductive Science Center (RSC) of New England say the number of same-sex couples seeking assisted reproductive technologies has been on

relationships end, custody battles often ensue.² Depending on the

a significant and steady increase.”); *see also* Associated Press, *Married With Children: An Option for More Gay Men* (Aug. 11, 2008), <http://www.aol.com.au/news/story/Married-with-children-an-option-for-more-gay-men/835161/index.html> (“[Dr. Jeffrey] Steinberg says inquiries from gay men to his offices [for fertility and surrogacy services] have increased 30 percent in the past six months.”); Kathy Barrett Carter, *To Be Gay, Separated and Seeking Custody: Courts Wrestle with One Fate of Same-Sex Parenting*, STAR-LEDGER, Oct. 24, 1999, available at 1999 WLNR 7180154 (stating there has been an increase in gay couples adopting as a result of cases giving more parental rights to homosexual parents’ gay partners); Nicole Martin, *Most Sperm Donor Children to Be Fatherless*, TELEGRAPH.CO.UK, July 31, 2007, <http://www.telegraph.co.uk/news/uknews/1558918/Most-sperm-donor-children-to-be-fatherless.html> (“Lesbians and single women are on course to become the largest group to have donor insemination . . .”).

2. *See, e.g.*, *Kristine H. v. Lisa R.*, 117 P.3d 690, 692, 695-96 (Cal. 2005) (upholding the stipulation naming Lisa as a legal parent despite Kristine’s motion to vacate the judgment); *K.M. v. E.G.*, 117 P.3d 673, 677, 682 (Cal. 2005) (granting parental rights to a lesbian who donated eggs to her former lesbian partner despite signing acknowledgment forms of a waiver of legal parentage upon donating ova); *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (granting parental rights and responsibilities to the biological mother’s former lesbian partner); *Charisma R. v. Kristina S.*, 44 Cal. Rptr. 3d 332, 333, 336-37 (Cal. Ct. App. 2006) (remanding the case for consideration to determine the presumption of parenthood by concluding whether the partner seeking rights held the child out as her own and the child was conceived with the intention that it would be raised by both partners); *In re E.L.M.C.*, 100 P.3d 546, 562 (Colo. App. 2004) (granting former same-sex partner joint parenting time and decision-making authority over objection of fit, biological mother); *Smith v. Gordon*, 968 A.2d 1, 3, 7, 16 (Del. 2009) (concluding that former same-sex partner did not have standing as a *de facto* parent to petition for custody because she was neither the biological nor adoptive parent and did not satisfy statutory requirements to establish presumption of legal parentage); *Kazmierazak v. Query*, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999) (denying non-parent in same-sex relationship parental rights because psychological parent lacked parental status equivalent to biological mother); *In re Visitation with C.B.L.*, 723 N.E.2d 316, 320-21 (Ill. App. Ct. 1999) (refusing to award visitation to former same-sex partner due to lack of standing); *King v. S.B.*, 837 N.E.2d 965, 966-67 (Ind. 2005) (reversing the trial court’s dismissal for summary judgment against former same-sex partner and remanding for lower court to determine any visitation rights the former partner may have with respect to her former partner’s biological child); *C.E.W. v. D.E.W.*, 2004 ME 43, ¶ 11, ¶ 15, 845 A.2d 1146, 1151-52 (finding that once a court determines non-parent in a same-sex relationship to be a *de facto* parent, the court is free to award parental rights over biological parent’s objections); *McGuffin v. Overton*, 542 N.W.2d 288, 291-92 (Mich. Ct. App. 1995) (refusing to allow deceased mother’s former same-sex partner to challenge biological father’s custody rights or gain visitation rights); *Soohoo v. Johnson*, 731 N.W.2d 815, 821-22, 824 (Minn. 2007) (citing *Troxel v. Granville*, 530 U.S. 57, 73 (2000)) (upholding both the constitutionality of a third party visitation statute and the lower court’s granting visitation to a third party who stood *in loco parentis* over parental objection); *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000) (holding that once an individual is found to be a psychological parent, “he or she stands in parity with the legal parent”); *A.C. v. C.B.*, 829 P.2d 660, 663-64 (N.M. Ct. App. 1992) (holding coparenting agreement between a lesbian couple may be enforceable); *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 507-09 (N.Y. App. Div. 2008) (concluding that biological parent equitably estopped from cutting off former same-sex partner’s custody and visitation rights); *Mason v. Dwinnell*, 660 S.E.2d 58, 64 (N.C. Ct. App. 2008) (noting that the best interest of the child standard shall apply whenever custody is sought, regardless of the relationship of the recipient of custody to the child); *In re Bonfield*, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241, at ¶ 35 (rejecting a claim that the same-sex partner was a parent for purposes of entering shared parenting agreement); *Rubano v. DiCenzo*,

state where the same-sex couple lives, one or both of them may be treated as a parent to the child.³ If the state issues an order granting custody or visitation to the former same-sex partner, what obligation, if any, does a sister state have to afford full faith and credit to that custody or visitation order? Litigation over that exact question is pending in several state courts.⁴ The results are far-reaching: if sister states are required to give full faith and credit to custody and visitation orders granting parental rights to a former same-sex partner over the biological parent's objections, then the policy decision of a handful of states to change the longstanding tradition of family and marriage, in effect, becomes the law in all fifty states as each state confronts a request for full faith and credit.

Part I of this Article will introduce the full faith and credit issues raised by interstate custody disputes between former partners in same-sex relationships where one of the partners is the child's biological parent. This part will highlight three cases that represent varying fact patterns that have arisen.⁵ In the context of one of those

759 A.2d 959, 975 (R.I. 2000) (stating that a *de facto* parent has parental rights in limited circumstances, in spite of *Troxel*); *In re Thompson*, 11 S.W.3d 913, 919 (Tenn. Ct. App. 1999) (rejecting biological mothers' former same-sex partners' claims to visitation and concluding that "Tennessee law does not provide for any award of custody or visitation to a non-parent except as may be otherwise provided by [its] legislature") (emphasis omitted); *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 635-36 (Tex. App. 2003) (rejecting same-sex partner's claim for visitation because *in loco parentis* is temporary and ends when the child is no longer under the care of the person *in loco parentis*); *Jones v. Barlow*, 2007 UT 20, ¶ 22, 154 P.3d 808 ("[A] legal parent may freely terminate the *in loco parentis* [sic] status by removing her child from the relationship, thereby extinguishing all parent-like rights . . . vested in the former surrogate parent."); *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶¶ 45-47, 180 Vt. 441, 912 A.2d 951 (concluding that the rationale behind granting a former same-sex partner acting *in loco parentis* custody over opposition of biological parent applies equally to visitation); *Stadter v. Siperko*, 661 S.E.2d 494, 498, 501 (Va. Ct. App. 2008) (affirming lower court's holding that former cohabitant failed to prove by clear and convincing evidence that denial of visitation would harm child); *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005) (en banc) (holding that "a *de facto* parent stands in legal parity with" a biological parent).

3. See Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger To Be a Parent Over The Objections of the Child's Biological Parent*, 21 REGENT U. L. REV. 1, 16 & n.107, 17 & n.108 (2008-2009) (listing those courts that have, and have not, treated third parties as parents and laying out a constitutional framework to determine whether a third party can be treated as a parent). The question of whether one or both of them should be treated as legal parents to the child is beyond the scope of this Article. For a thorough discussion of whether a state must give full faith and credit to a same-sex adoption, see Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian Adoptions*, 3 AVE MARIA L. REV. 561, 569-71 (2005) [hereinafter Wardle, *Critical Analysis*].

4. See discussion *infra* Part I (discussing *Charisma R. v. Kristina S., A.K. v. N.B.*, and *Miller-Jenkins v. Miller-Jenkins*).

5. See *infra* notes 6-33 and accompanying text (discussing *Charisma R. v. Kristina S.*), notes 34-58 and accompanying text (discussing *A.K. v. N.B.*), and notes 59-93 and accompanying text (discussing *Miller-Jenkins v. Miller-Jenkins*).

cases, Part II will introduce the controlling, and seemingly competing, policies of full faith and credit, on the one hand, and state sovereignty, on the other. This part will briefly lay out the legal arguments advanced by the parties and the decisions rendered by the courts in those cases. Part III will explore the various issues implicated by the full faith and credit obligation and articulate a workable standard for interstate custody disputes arising out of same-sex relationships that gives proper respect to the mandate to give full faith and credit to sister state child custody determinations while preserving state sovereignty over core domestic relations matters.

I. THE FACTS GIVING RISE TO INTERSTATE LITIGATION: THE THREE CASES AND TEN LIVES INVOLVED

A. Charisma R. v. Kristina S.⁶

Charisma and Kristina began dating in California in July 1997 and moved in together in August 1998.⁷ In January 2002, they registered as domestic partners with the State of California.⁸ Later that year, Kristina became pregnant by artificial insemination with sperm from an anonymous donor.⁹ Her daughter Amalia was born in April 2003.¹⁰ “Amalia was given a hyphenated last name, which was a combination of Charisma and Kristina’s last names.”¹¹ Charisma did not adopt Amalia even though California permitted second parent adoption by a same-sex partner.¹² In July 2003, when Amalia was three months old, Kristina moved out of the home with Amalia.¹³ At that time, Kristina ended virtually all contact between Charisma and

6. 44 Cal. Rptr. 3d 332 (Cal. Ct. App. 2006).

7. *Id.* at 333.

8. *Id.* At that time, pursuant to AB 25 and 26, a registered domestic partner was treated as the spouse of a taxpayer for purposes of: (i) several state tax deductions relating to medical care and health care costs; (ii) certain unemployment benefits; (iii) maintaining a cause of action for negligent infliction of emotional distress; (iv) second parent adoption; (v) governmental health care coverage upon death of partner; (vi) health care decisions; (vii) sick leave; (viii) disability benefits; and (ix) certain probate matters. Assem. B. 25, 2001-02 Leg., Reg. Sess. (Cal. 2001); Assem. B. 26, 1999-2000 Leg., Reg. Sess. (Cal. 1999). It was not until January 1, 2005, through AB 205, that California afforded domestic partners the same rights and benefits as married couples. Assem. B. 205, 2003-04 Leg., Reg. Sess. (Cal. 2003).

9. *Charisma R.*, 44 Cal. Rptr. 3d at 333.

10. *Id.*

11. *Id.*

12. *See id.* (detailing the facts Charisma asserts in support of her claim for a parental relationship); *see also* Sharon S. v. Superior Court, 73 P.3d 554, 558, 565-66 (Cal. 2003) (permitting same-sex couples to use the second parent adoption statute).

13. *Charisma R.*, 44 Cal. Rptr. 3d at 333.

Amalia.¹⁴ On July 21, 2003, a termination of domestic partnership was filed.¹⁵

In May 2004, Charisma filed a petition in California to establish a parental relationship with Amalia.¹⁶ In that petition, she stated that she and Kristina had “decided to have a child together with the intention that they would both be the child’s parents.”¹⁷ In October 2004, the trial court denied the petition, holding that under then-existing California law, Charisma lacked standing to bring the action under the Uniform Parentage Act.¹⁸ In denying standing to Charisma, the trial court relied on three California Court of Appeals decisions, each of which held that a former same-sex partner lacking a biological connection to a child could not establish a parent-child relationship with the child under the Uniform Parentage Act.¹⁹

Almost a year later, Kristina moved to Texas.²⁰ Two months later, in unrelated litigation, the California Supreme Court held *for the first time* that a child could have two mothers without the use of second parent adoption,²¹ and that the *paternity*²² presumption — used in determining a child’s father — must “apply equally to women.”²³ Specifically, the court held that California law should apply *to a woman* in a same-sex relationship the presumption that a man is

14. *Id.*

15. Notice of Termination of Domestic Partnership, No. 10700 (filed July 21, 2003).

16. *Charisma R.*, 44 Cal. Rptr. 3d at 333.

17. *Id.*

18. *Id.*; *see also* Uniform Parentage Act, CAL. FAM. CODE §§ 7600-01 (West 2004).

19. *Charisma R.*, 44 Cal. Rptr. 3d at 334; *see also* West v. Super. Ct., 69 Cal. Rptr. 2d 160, 160-62 (Cal. Ct. App. 1997) (former same-sex partner lacked standing as parent under Uniform Parentage Act); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 215 (Cal. Ct. App. 1991) (same); *Curiale v. Reagan*, 272 Cal. Rptr. 520, 521 (Cal. Ct. App. 1990) (same).

20. *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 32-33 (Cal. Ct. App. 2009).

21. *Sharon S. v. Superior Ct.*, 73 P.3d 554, 572 (Cal. 2003). Second parent adoption “refers to an independent adoption whereby a child born to [or legally adopted by] one partner is adopted by his or her non-biological or non-legal second parent, with the consent of the legal parent, and without changing the latter’s rights and responsibilities.” *Id.* at 558 n.2 (quoting Emily Doskow, *The Second Parent Trap: Parenting For Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 5 (1999)).

22. Paternity is defined as “the relation of a father.” NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); *see also* BLACK’S LAW DICTIONARY 1163 (8th ed. 2004) (“The state or condition of being a father . . .”). “Presumption of paternity” and “presumption of maternity” are separately defined, reflecting the inherent differences between a mother and a father. BLACK’S LAW DICTIONARY at 1225.

23. *Elisa B. v. Super. Ct.*, 117 P.3d 660, 666-67 (Cal. 2005) (citing *In re Karen C.*, 124 Cal. Rptr. 2d 677, 681 (Cal. Ct. App. 2002)). Prior to the August 2005 decision, the court had explained that “[t]he ‘parent and child relationship’ is thus a legal relationship encompassing two kinds of parents, ‘natural’ and ‘adoptive.’” *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal. 1993). In that case, the court refused to declare the surrogate a mother over the objection of the intended parents. *Id.* at 777-78, 787. It was not until August 2003 that the court declared that a mother could consent to a second parent adoption by her same-sex partner. *Sharon S.*, 73 P.3d at 572.

the “natural father” of a child if “[h]e receives the child into his home and openly holds out the child as his natural child.”²⁴ In that decision, the court specifically stated its disapproval of the three Court of Appeals’ decisions cited by the trial court in Charisma’s case.²⁵ In light of the California Supreme Court ruling, the Court of Appeals remanded Charisma’s case to determine, consistent with the California Supreme Court’s August 2005 decision, whether Charisma was a presumed parent and, if so, whether this was an appropriate action in which to use scientific evidence to rebut the presumption that Charisma was Amalia’s parent.²⁶

By order dated December 27, 2006, which was more than one year after Kristina moved to Texas with her daughter, the California trial court declared Charisma to be a legal parent to Amalia pursuant to the paternity presumption.²⁷ The court cited three reasons, based on contested facts, for its conclusion that this was not “an appropriate action in which to rebut” the parentage presumption: (i) Charisma participated in the child’s conception with the understanding that she would be a parent; (ii) after the child’s birth, Charisma voluntarily assumed parental responsibilities for the short time the three lived together; and (iii) no one else claimed to be the child’s second parent.²⁸ By order dated May 8, 2008, the trial court issued an order concerning child custody and visitation.²⁹ In that order, the judge granted Kristina sole legal and physical custody of Amalia, who was then five years old, and ordered the parties to meet with a court-appointed psychologist to begin the reunification process between Charisma and Amalia.³⁰

Kristina, a Texas resident since summer 2005,³¹ faces the question of whether Texas courts, despite a state defense of marriage act

24. *Elisa B.*, 117 P.3d at 666-67 (quoting CAL. FAM. CODE § 7611(d) (West 2004)).

25. *Id.* at 670-72.

26. *Charisma R. v. Kristina S.*, 44 Cal. Rptr. 3d 332, 336-37 (Cal. Ct. App. 2006). The court explained that presumed parent status depended upon affirmative findings that Charisma received Amalia into her home and openly held Amalia out as her natural child. *Id.* at 336.

27. Reporter’s Transcript of Reasons for Judgment at 10, 14, *Charisma R. v. Kristina S.*, No. HF04153838 (Cal. App. Dep’t Super. Ct. Dec. 27, 2006).

28. *Id.* at 10-14. In *Elisa B.*, the Supreme Court explained its decision to declare that a child could have two mothers by emphasizing the importance of two parents to provide emotional and financial support. 117 P.3d at 669.

29. Statement of Decision and Ruling on Issues of Child Custody and Visitation, *Charisma R. v. Kristina S.*, No. HF04153838 (Cal. App. Dep’t Super. Ct. May 8, 2008).

30. *Id.* at 14-15.

31. *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 32-33 (Cal. Ct. App. 2009). Kristina became a Texas resident nearly one year *after* the trial court held that Charisma lacked standing to seek parental rights, two months before the California Supreme Court held for the first time that a child could have two mothers without the use of second parent adoption, and nearly eighteen months before the trial court, on remand, declared Charisma to be a parent to Kristina’s child.

and constitutional amendment,³² will permit Charisma to register and enforce the California custody order in the state of Texas. If it does, Kristina could be forced to give visitation to Charisma, a woman with no biological or adoptive relationship with the child and who has seen the now-six-year-old child only twice since she was three months old.³³

*B. A.K. v. N.B.*³⁴

In 1998, N.B. became pregnant by artificial insemination from an anonymous sperm donor.³⁵ She gave birth to a child in California in April 1999.³⁶ At that time, only N.B. (the child's biological mother) was listed on the birth certificate as a parent to the child.³⁷ N.B. and A.K. lived together for five years, acting as "co-parents" to the child.³⁸ In March 2004, the relationship between N.B. and A.K. ended, and N.B. left the shared residence with her daughters.³⁹ In August 2005, N.B. moved with her children to Alabama.⁴⁰ One month later, shortly after the California Supreme Court issued its decision in three companion cases holding that the paternity presumption should apply

32. In its constitution, Texas declares that "[m]arriage . . . shall consist only of the union of one man and one woman," and that "[t]his state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage." TEX. CONST. art. 1, § 32. By statute, Texas defined "civil union" as "any relationship status other than marriage that: (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage." TEX. FAM. CODE ANN. § 6.204(a) (Vernon 2009). The statute then declares that "[a] marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state" and that

[t]he state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

§ 6.204(b)-(c).

33. *Charisma R. v. Kristina S.*, 44 Cal. Rptr. 3d 332, 333 (Cal. Ct. App. 2006).

34. No. 2070086, 2008 WL 2154098 (Ala. Civ. App. May 23, 2008), *cert. granted*, No. 1080440 (Ala. Mar. 11, 2009).

35. *Id.* at *1.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* N.B. had previously adopted a daughter, who was seven years old at the time N.B. began her relationship with A.K. A.K. made no claim to parentage over N.B.'s older daughter. Petitioner's Brief: Oral Argument Requested at 1, *A.K.*, 2008 WL 2154098 (Ala. filed Apr. 14, 2009) (No. 1080440) [hereinafter *Petitioner's Brief*].

40. *A.K.*, 2008 WL 2154098, at *1. The child has not seen A.K. since that time. *Petitioner's Brief*, *supra* note 39, at 1.

to a woman in a same-sex relationship with the child's biological parent,⁴¹ A.K. "filed in the California court a 'Petition to Establish Parental Relationship' in which she described herself as a 'presumed mother' of the child under" California's Uniform Parentage Act.⁴²

In particular, consistent with the California Supreme Court's August 2005 decision, A.K. alleged that she was a presumed mother under section 7611(d) of the California Family Code because she received the child into her shared home with N.B. and openly held the child out as her natural child.⁴³ After a contested hearing in August 2006, on September 11, 2006, a California trial court declared A.K. and N.B. both to be parents to the child.⁴⁴ Five days *earlier*, however, N.B. had filed a "Petition for Temporary Custody" in the Alabama court, in which she sought sole custody of her daughter.⁴⁵ On November 16, 2006, the Alabama trial court entered a judgment finding that N.B. was the child's sole parent.⁴⁶

After a hearing in December 2006, "the California court ordered that the child's birth certificate be amended to reflect A.K.'s status as a parent of the child."⁴⁷ On February 1, 2007, the California court issued an order granting limited visitation between A.K. and the child.⁴⁸ Two months later in the Alabama court, A.K. appeared for the first time and filed a "Motion to Dismiss" the Alabama proceeding.⁴⁹ She contended that under the federal Parental Kidnapping Prevention Act (PKPA), only California could properly exercise jurisdiction over visitation and custody issues.⁵⁰ Specifically, she argued that the PKPA granted continuing exclusive jurisdiction over custody and visitation matters to California because it first took jurisdiction over the matter, even though Alabama had issued the first visitation determination.⁵¹ The Alabama trial court held that "the proceedings in the California court were not 'consistent with' the PKPA and that it was not required, under the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act], to defer to the California court."⁵²

41. *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673, 680-81 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690, 692 (Cal. 2005).

42. *A.K.*, 2008 WL 2154098, at *1.

43. *Id.*

44. *Id.* at *2.

45. *Id.*

46. *Id.*

47. *Id.* at *3.

48. *A.K. v. N.B.*, No. 2070086, 2008 WL 2154098, at *3 (Ala. Civ. App. May 23, 2008), *cert. granted*, No. 1080440 (Ala. Mar. 11, 2009).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* See *infra* notes 104-15 and accompanying text for an explanation of the PKPA's statutory structure.

On May 23, 2008, the Alabama Court of Civil Appeals reversed the trial court.⁵³ The court held “that the PKPA preempted the Alabama court’s jurisdiction to enter a judgment touching and concerning A.K.’s visitation rights with respect to the child.”⁵⁴ It explained that A.K. filed her petition in California before Alabama could have acquired home state jurisdiction;⁵⁵ “therefore, as a matter of federal law, the Alabama court could not properly determine visitation rights as to the child.”⁵⁶

The current Alabama litigation presents the question of whether Alabama is deprived of jurisdiction pursuant to the PKPA because California was the child’s “home state” at the time A.K. commenced the California proceeding.⁵⁷ Eventually, the ultimate question between the parties will be whether Alabama must register and enforce a visitation order arising out of a same-sex union from California when the Alabama Constitution states that “[a] union replicating marriage of or between persons of the same sex . . . shall be considered and treated in all respects as having no legal force or effect in this state.”⁵⁸

C. *Miller-Jenkins v. Miller-Jenkins*⁵⁹

Lisa Miller met Janet Jenkins in 1997 while both women were living in Virginia.⁶⁰ In March or April 1998, Miller moved in with

53. *A.K.*, 2008 WL 2154098, at *5.

54. *Id.*

55. *Id.* Home state jurisdiction is defined in 28 U.S.C. § 1738A(b)(4), (c)(2)(A) (2006); see *infra* note 109 (quoting definition from the United States Code).

56. *A.K.*, 2008 WL 2154098, at *4.

57. Petitioner’s Brief, *supra* note 39, at 6.

58. ALA. CONST. amend. 774; see also ALA. CODE § 30-1-19 (2009) (prohibiting same-sex marriage).

59. The *Miller-Jenkins* case is actually four separate but related cases. The first, *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, 180 Vt. 441, 912 A.2d 951, addressed a claim initiated by Lisa Miller in a Vermont family court in December 2003 which sought dissolution of her civil union to Janet Jenkins and resulted in a temporary custody order for then two-year-old Isabella, Miller’s biological child. This case laid the foundation for the ongoing interstate custody battle. The second, *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006), addressed in a Virginia circuit court Miller’s request in July 2004 asking Virginia to decide parentage for Isabella and declare Miller Isabella’s sole parent under Virginia’s assisted conception statute. The third, *Miller-Jenkins v. Miller-Jenkins*, No. 0688-06-04, 2007 WL 1119817 (Va. Ct. App. Apr. 17, 2007), *aff’d on procedural grounds*, 661 S.E.2d 822 (Va. 2008), addressed Janet Jenkins’s request in a Virginia Juvenile and Domestic Relations court in March 2005 asking Virginia to register the June 2004 Vermont temporary custody order. The fourth, *Jenkins v. Miller*, Nos. JJ018902-01F, JA013947-02F (Va. Juv. & Dom. Rel. Ct. Jan. 14, 2009), handled Jenkins’s request for Virginia to enforce the final Vermont custody order.

60. See April Witt, *About Isabella*, WASH. POST MAG., Feb. 4, 2007, at 18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/30/AR2007013001316.html> (providing detailed history of the factual and legal issues involved in the case); see

Jenkins.⁶¹ In December 2000, just a few months after Vermont legalized same-sex civil unions, they traveled to Vermont to enter into a civil union and immediately returned to their home in Virginia.⁶² In August 2001, Miller became pregnant in Virginia via artificial insemination with sperm from an anonymous donor.⁶³ In April 2002, Miller gave birth to Isabella in Virginia.⁶⁴ Four months later, they all moved to Vermont.⁶⁵ But in late August and early September 2003, when Isabella was seventeen months old, Miller ended her relationship with Jenkins and returned to Virginia with Isabella.⁶⁶

In November 2003, Miller filed standard court forms in Vermont to dissolve the civil union.⁶⁷ In response to the complaint, Jenkins retained counsel and asserted a counterclaim seeking an award of physical and legal custody in her favor, with an award of visitation to Miller.⁶⁸ The answer and counterclaim did not contain any allegation that Miller was an unfit parent but simply alleged that Jenkins was a parent and desired for custody to be awarded to her.⁶⁹

Without deciding whether Jenkins was a parent to Isabella, on June 17, 2004, over Miller's objections, the court issued a temporary order (the "Temporary Custody Order") awarding Miller "legal and physical responsibility" over Isabella and granted Jenkins parent-child contact.⁷⁰ The order directed Miller to give Jenkins unsupervised

also Transcript of Videotaped Deposition of Lisa Miller-Jenkins at 7-8, *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 Rddm (Rutland Fam. Ct. Mar. 26, 2007) (preparing for Vermont trial).

61. Witt, *supra* note 60, at 18.

62. *Miller-Jenkins*, 2006 VT ¶ 3, 180 Vt. at 445, 912 A.2d at 956.

63. Witt, *supra* note 60, at 14.

64. *Miller-Jenkins*, 2006 VT ¶ 3, 180 Vt. at 445, 912 A.2d at 956.

65. *Id.*

66. *Id.* Jenkins drove Miller and Isabella back to Virginia, where Miller became a Christian. Witt, *supra* note 60, at 20-21.

67. *Miller-Jenkins*, 2006 VT ¶ 3, 180 Vt. at 445, 912 A.2d at 956. At the time, because Virginia did not legally sanction same-sex relationships, Vermont was the only state in which Miller could file to dissolve the civil union. *See, e.g.*, *Rosengarten v. Downes*, 802 A.2d 170, 174-75, 184 (Conn. App. Ct. 2002) (affirming the trial court's decision that it lacked subject matter jurisdiction to dissolve Vermont same-sex civil union); *Lane v. Albanese*, No. FA044002128S, 2005 WL 896129, at *4 (Conn. Super. Ct. Mar. 18, 2005) (holding that the court lacks subject matter jurisdiction to dissolve Massachusetts same-sex marriage).

68. Witt, *supra* note 60, at 28 ("In early 2004, seven weeks after [Miller] asked the court to dissolve their union, [Jenkins] filed a counterclaim seeking custody of Isabella for herself and visitation for [Miller].").

69. *See* Answer to Civil Union Dissolution Complaint and Counterclaim, *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 Rddm (Rutland Fam. Ct. Jan. 16, 2004) (asking the court to award Jenkins "legal rights and responsibilities" and "physical rights and responsibilities for the minor [child]" while only granting Miller "suitable parent/child contact").

70. *Miller-Jenkins*, 2006 VT ¶ 4, 180 Vt. at 445-46, 912 A.2d at 956. Prior to the court's first hearing concerning a temporary order for parental rights and responsibilities, Miller's first attorney objected to the court treating Jenkins as a second parent to

visitation with then two-year-old Isabella two weekends in June, one weekend in July, and then one week each month of unsupervised visitation in Vermont beginning in August 2004.⁷¹

Two weeks later, on July 1, 2004,⁷² Miller asked a Virginia circuit court to decide parentage of Isabella.⁷³ Miller asked the court to declare her Isabella's sole parent pursuant to Virginia's assisted conception statute.⁷⁴ The assisted conception statute provides that "[t]he gestational mother of a child is the child's mother."⁷⁵

Jenkins challenged the Virginia court's subject matter jurisdiction to entertain the parentage action, arguing that the UCCJEA

Isabella. For the first day of hearings on March 15, 2004, Miller obtained new counsel, Deborah Lashman, to represent her. Witt, *supra* note 60, at 28 (explaining that "[Miller] worked her way through" the phone book to find a new attorney). Miller met Lashman for the first time at the courthouse, approximately thirty minutes before the hearing began. *Id.*; Transcript of Continuation of Request for Temporary Order Hearing at 40-41, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. May 26, 2004) [hereinafter Transcript of Continuation]. Without consultation with Miller, Lashman purported to waive Miller's right to challenge the court's treatment of Jenkins as a parent. Lashman testified that she had a different interpretation than Miller's previous attorney concerning the parental rights of former partners and, without discussing the waiver issue with Miller, purported to waive Miller's parental rights in court. During a break in the hearing, Miller asked Lashman to clarify the courtroom discussion concerning the waiver, but Lashman explained that she would not discuss the issue with her at that time. Transcript of Continuation, *supra*, at 41-45. After the hearing, Miller demanded that Lashman take steps to revoke the purported waiver. Lashman refused and withdrew from the case. Witt, *supra* note 60, at 28-29. Later in the case, Miller learned that Lashman was an anonymous plaintiff in the landmark Vermont case legalizing second parent adoption for same-sex couples. *Id.* at 28; see also *In re B.L.V.B. v. E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (explaining Vermont's decision to legalize second parent adoption for same-sex partners, the case in which Lashman was the anonymous plaintiff). Despite the efforts of Miller's third attorney, Ms. Barone, to revoke the waiver at the next day of hearings, the court refused to address the waiver issue. Witt, *supra* note 60, at 29-30; see also *Miller-Jenkins*, 2006 VT ¶ 62, 180 Vt. at 468-69, 912 A.2d at 972 (acknowledging Miller's attempt to revoke the waiver).

71. *Miller-Jenkins*, 2006 VT ¶ 4, 180 Vt. at 445-46, 912 A.2d at 956.

72. On that day, Virginia's Marriage Affirmation Act became effective. It declares same-sex relationships, and any rights arising from a same-sex relationship, void in all respects in Virginia. VA. CODE ANN. § 20-45.2 to .3 (2008) (prohibiting same-sex marriage and civil unions or other same-sex relationships purporting to legally approximate marriage).

73. Petition to Establish Parentage and for Declaratory Relief at 2, Miller-Jenkins v. Miller-Jenkins, No. CH04-280 (Va. Cir. Ct. July 1, 2004) [hereinafter Petition to Establish Parentage]. It was not until November 2004 that the Vermont trial court issued a parentage determination. In that order, the court acknowledged that the question of how to determine parentage of a child born by assisted reproductive technology had not been addressed by either the Vermont legislature or any prior Vermont court opinion. The court then adopted the reasoning of other states to create a new parentage test for Vermont and applied it retroactively to determine parentage of Isabella, who was born two and one-half years earlier. Ruling on Plaintiff's Motion to Withdraw Waiver to Challenge Presumption of Parentage at 9-14, Miller-Jenkins v. Miller-Jenkins, No. 451-11-03 (Rutland Fam. Ct. Nov. 17, 2004) [hereinafter Vermont Parentage Order]. For more about the Vermont Parentage Order, see *infra* note 79.

74. Petition to Establish Parentage, *supra* note 73, at 1-2.

75. VA. CODE ANN. § 20-158(A)(1) (2008).

prevented Virginia from exercising jurisdiction over the petition.⁷⁶ She argued that because Vermont had issued the Temporary Custody Order, the Vermont court had continuing, exclusive jurisdiction over questions of custody concerning Isabella.⁷⁷ Despite Jenkins's objections, on October 15, 2004, the Virginia circuit court issued an order (the "Virginia Parentage Order") declaring Miller to be Isabella's sole parent.⁷⁸ One month later, the Vermont trial court issued a ruling (the "Vermont Parentage Order") declaring Jenkins a parent to Isabella.⁷⁹

In March 2005, after the appeals were taken in both Vermont and Virginia, but before they were argued, Jenkins attempted to register the Vermont Parentage Order in Virginia.⁸⁰ By order dated August 8, 2005 (the "Registration Order"), the Juvenile and Domestic Relations

76. Respondent's Demurrer and Motion for Costs, Fees and Expenses at 4, *Miller-Jenkins v. Miller-Jenkins*, No. CH04-280 (Va. Cir. Ct. July 29, 2004).

77. *Id.* at 5.

78. Final Order of Parentage, *Miller-Jenkins v. Miller-Jenkins*, No. CH04-280 (Va. Cir. Ct. Oct. 15, 2004). The order also declared that "[n]either Respondent [Jenkins] nor any other person has any claims of parentage or visitation rights over Isabella Miller-Jenkins." *Id.*

79. Vermont Parentage Order, *supra* note 73. The Vermont Parentage Order was issued on November 17, 2004, five months after the Vermont court had granted Jenkins parent-child contact in the Temporary Custody Order. In the Vermont Parentage Order, the court addressed Miller's arguments that (1) she be permitted to rebut any presumption of parentage in favor of Jenkins by submitting evidence that Jenkins had no genetic link to Isabella, and (2) Lashman's waiver of Miller's parental rights was without her consent. With respect to the paternity presumption, Miller argued that to the extent a husband or wife is able to rebut a paternity presumption through submission of genetic tests demonstrating that the husband is not the father, Miller should also be able to rebut any presumption that Jenkins is a parent to Isabella with genetic proof that Jenkins is not biologically related to Isabella. *Id.* at 3, 6, 9; *see* VT. STAT. ANN. tit. 15, § 308 (2009) (presumption of parentage statute). Although the court applied the paternity presumption to the case, it refused to apply the genetic exception. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶¶ 53-55, 180 Vt. 441, 912 A.2d 951. The court analyzed the parentage question by first explaining that Vermont had not previously "been presented with the question of parental status concerning a child born during a marriage and conceived through artificial insemination." Vermont Parentage Order, *supra* note 73, at 10. After briefly discussing a case from New York and one from California, the court "adopt[ed] the reasoning of other courts" and created a new test for Vermont. *Id.* at 11 (citing *People v. Sorensen*, 437 P.2d 495 (Cal. 1968); *In re Adoption of Anonymous*, 345 N.Y.S.2d 430 (N.Y. Surr. Ct. 1973)). The test provides that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology." Vermont Parentage Order, *supra* note 73, at 11. The court then retroactively applied this new test to determine parentage of Isabella. *Id.* at 12. Pursuant to the new test, the court declared Jenkins to be Isabella's second mother because Jenkins and Miller were in a civil union relationship and intended to create a family unit when Miller and Jenkins planned for Miller to have a child. *Id.* at 11; *see also Miller-Jenkins*, 2006 VT ¶ 56, 180 Vt. at 465, 912 A.2d at 970 (detailing the reasons for finding Jenkins to be Isabella's parent).

80. *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 825 (Va. 2008).

(J & DR) District Court registered the Vermont Parentage Order.⁸¹ On March 1, 2006, however, the Frederick County Circuit Court reversed the Registration Order, finding that the Vermont Parentage Order not only contravened Virginia public policy prohibiting recognition of same-sex relationships, but also directly conflicted with Virginia's express statutory provisions against recognizing same-sex relationships.⁸² Jenkins appealed that order to the Court of Appeals.⁸³ On August 4, 2006, the Vermont Supreme Court affirmed the family court orders, including the Vermont Parentage Order, in Jenkins's favor.⁸⁴

On November 28, 2006, relying heavily on the Vermont Supreme Court decision, a panel of the Virginia Court of Appeals reversed the Virginia Parentage Order.⁸⁵ The Panel concluded that, despite Virginia's prohibition against recognizing any rights flowing from same-sex unions, Virginia was required to give full faith and credit to the Vermont Parentage Order pursuant to the PKPA and therefore lacked jurisdiction to hear Miller's parentage petition.⁸⁶ The court specifically rejected Miller's argument that DOMA created an exception to the full faith and credit obligation for any order, including

81. Order, *Miller-Jenkins v. Miller-Jenkins*, No. JJ018902-01F (Va. Juv. & Dom. Rel. Ct. Aug. 8, 2005). On September 7, 2005, the Vermont Supreme Court heard oral arguments on Miller's appeals. Ann Rostow, *Unique Custody Battle Pits Vermont Against Virginia*, SAN FRANCISCO BAY TIMES, Sept. 8, 2005, http://www.sfbaytimes.com/index.php?sec=article&article_id=4065. One week later, on September 14, 2005, the Virginia Court of Appeals heard oral argument on Jenkins's appeal from the Virginia Parentage Order. *Miller-Jenkins v. Miller-Jenkins*, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, June 23, 2009, <http://www.acluva.org/docket/miller-jenkins.html>.

82. Order Declining Registration of Vermont Order at 2-3, *Miller-Jenkins v. Miller-Jenkins*, No. CH05-000336-00 (Va. Cir. Ct. Mar. 1, 2006). The court also held that: (i) the Vermont Parentage Order granting Jenkins parent-child contact conflicted with the October 2005 Virginia Parentage Order, which declared Miller the sole, biological parent to Isabella; and (ii) the court held that Vermont lacked subject matter jurisdiction to issue the Vermont Parentage Order because the civil union was void *ab initio*. *Id.* at 2; *see infra* note 135 (explaining why Miller pressed the argument that the civil union should be treated as void *ab initio*).

83. *Miller-Jenkins v. Miller-Jenkins*, No. 0688-06-04, 2007 WL 1119817 (Va. Ct. App. Apr. 17, 2007).

84. *Miller-Jenkins*, 2006 VT ¶ 2, 180 Vt. at 444-45, 912 A.2d at 955-56. In its decision, the court affirmed the validity of the civil union, the decision to declare Jenkins a parent to Isabella, and the trial court's refusal to give full faith and credit to the Virginia Parentage Order. *Id.* ¶¶ 30, 40, 48, 180 Vt. at 454, 458, 461, 912 A.2d at 962, 965, 967. The court rejected Miller's argument that the order granting Jenkins parental rights to Isabella, over Miller's objections, infringed Miller's fundamental constitutional rights. In particular, the court held that because it had declared Jenkins to be a parent, she had the same constitutional rights as Miller with respect to Isabella's care and custody. *Id.* ¶ 59, 180 Vt. at 466-67, 912 A.2d at 971. The Vermont Supreme Court denied a petition for reargument on November 9, 2006. *Miller-Jenkins*, 912 A.2d at 951.

85. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337-38 (Va. Ct. App. 2006).

86. *Id.*

child custody orders, that arose from same-sex relationships treated as marriage.⁸⁷ After stating that it did not need to address the question of whether Virginia's marriage laws required a different result, the Panel stated, in dicta, that to the extent Virginia laws required a different result, they were preempted by the PKPA.⁸⁸

On April 17, 2007, a panel of the Virginia Court of Appeals reversed the March 1, 2006 circuit court order that had refused to register the Vermont Parentage Order, expressly adopting the rationale set forth in the Court of Appeals' November 28, 2006 decision.⁸⁹ Although the Virginia Supreme Court did not grant review from the parentage order, it did grant Miller's petition in the registration case. On June 8, 2008, the Virginia Supreme Court affirmed, on a procedural ground, the Court of Appeals' decision in the registration case.⁹⁰ On January 14, 2009, in a separate action, a Virginia J & DR court ordered the Vermont Parentage Order to be registered and enforced in Virginia.⁹¹ The court specifically stated that (i) the federal PKPA required Virginia to enforce the order, despite its Marriage Amendment to the contrary, and (ii) "[r]egistration and enforcement of this Order is not a recognition or condonation of the Vermont same-sex civil union."⁹² An appeal is now pending in that case.⁹³

The Virginia cases raise several questions concerning the proper interpretation of the PKPA and DOMA, including: (i) whether a "valid" order from a sister state must be registered (recognized) when it violates core domestic relations' policy of the receiving state; and (ii) whether a child custody order from a sister state must be enforced in violation of the receiving state's statutes and constitution. This Article addresses those questions. Because the *Miller-Jenkins* case is the first case in the nation to result in a reported opinion on these full faith and credit questions, with the most developed record and discussion of the issues, Part II will discuss the full faith and credit issues within the context of that case.

87. *Id.* at 336-37.

88. *Id.* at 337.

89. *Miller-Jenkins v. Miller-Jenkins*, No. 0688-06-04, 2007 WL 1119817 (Va. Ct. App. Apr. 17, 2007).

90. *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 827 (Va. 2008). The court did not reach the merits in the registration case, holding that the opinion in the Virginia parentage case was law of the case in the separate registration case. *Id.*

91. *Order, Jenkins v. Miller*, Nos. JJ018902-01F, JA013947-02F (Va. Juv. & Dom. Rel. Ct. Jan. 14, 2009).

92. *Id.* ¶¶ 4, 5.

93. *Jenkins v. Miller*, Nos. JJ018902-01F, JA013947-02F (Va. Juv. & Dom. Rel. Ct. Jan. 14, 2009), *aff'd*, No. CL09000042-00 (Va. Cir. Ct. Mar. 16, 2009), *appeal docketed*, No. 070509-4 (Va. Ct. App.).

II. HOW A MISINTERPRETATION OF THE PKPA AND DOMA UNDERMINES STATE SOVEREIGNTY OVER CORE DOMESTIC RELATIONS MATTERS

At the heart of the three cases described above are two questions: whether a state is required to give full faith and credit to a sister state's order when the order at issue offends the receiving state's strong public policy (as set forth in state laws and constitutional amendments) on core matters relating to marriage and family; and, if so, whether the full faith and credit obligation also requires the receiving state to enforce the order. Even more to the point, the case presents the question of whether a state can refuse to recognize or enforce a child custody order arising out of a same-sex relationship even though the PKPA requires a state to give full faith and credit to child custody orders.⁹⁴ The federal statutory and constitutional provisions relevant to this discussion are: Article IV, Section 1 of the U.S. Constitution; the Full Faith and Credit Act (28 U.S.C. § 1738) (FFC Act); PKPA (28 U.S.C. § 1738A); and DOMA (28 U.S.C. § 1738C).

Pursuant to Article IV, Section 1 of the U.S. Constitution, "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."⁹⁵ Exercising the authority granted to it in the Constitution, Congress passed the first Full Faith and Credit Act in 1790.⁹⁶ The current version of the FFC Act, enacted in 1948, provides, in relevant part, that:

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its

94. Unquestionably, Congress intended for the PKPA to require a state to give full faith and credit to a child custody order where the order involves a custody determination between the child's biological parents, regardless of whether the parents ever married. Similarly, the PKPA requires full faith and credit to be given to a child custody order where the order involves a custody determination between a heterosexual, married couple who adopted a child. Those custody orders that arise out of same-sex relationships, however, necessarily impact unique state law concerns when the state has passed a law or constitutional amendment refusing to recognize legal unions other than the traditional one-man and one-woman marriage. DOMA is explicit Congressional recognition of the unique state sovereignty issues at play under those circumstances. *See, e.g.*, H.R. REP. No. 104-664, at 2, 17, 24-25 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 (explaining that DOMA clarifies the sovereign right of states to determine whether to give full faith and credit to any rights, including custody rights, arising out of same-sex relationships treated as marriage).

95. U.S. CONST. art. IV, § 1.

96. Act of May 26, 1790, ch. 11, 1 Stat. 122 (1790).

Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.⁹⁷

For more than a century, the United States Supreme Court acknowledged that protection of an individual state's sovereignty required some limitations on the broad scope of the full faith and credit obligation. In particular, "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy,"⁹⁸ "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate,"⁹⁹ or adopt enforcement mechanisms of the foreign state.¹⁰⁰

Unquestionably, when Congress passed the PKPA in 1980, it necessarily encroached upon a state's sovereignty over domestic relations matters as part of Congress's effort to address the specific problem of parental kidnapping.¹⁰¹ Prior to the PKPA, many states refused to afford full faith and credit to child custody orders from sister states because, by their nature, child custody orders are always subject to modification and therefore are not final judgments.¹⁰² The PKPA established a national standard that deprived a second state of jurisdiction over child custody or visitation matters once a sister

97. 28 U.S.C. § 1738 (2006).

98. *Nevada v. Hall*, 440 U.S. 410, 422 (1979).

99. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988)).

100. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998); see *infra* notes 215-250 and accompanying text for a full discussion of the enforcement exception.

101. *Thompson v. Thompson*, 484 U.S. 174, 181-82 (1988).

102. *Id.* at 180. Interestingly, a 1953 decision by the Supreme Court may have contributed to the national problem of parental kidnapping. In *May v. Anderson*, the Court held that Wisconsin lacked jurisdiction to issue a custody order because it lacked personal jurisdiction over the mother who, until just a few weeks prior to the husband's Wisconsin filing for a divorce and custody determination, had lived with her husband and three children in Wisconsin for more than twelve years. 345 U.S. 528, 530, 534 (1953). At the time the husband filed, the wife was in Ohio with the children where she had taken them in December to think about the future of her marriage. By New Year's Day, she had decided not to return to Wisconsin. The husband immediately filed in Wisconsin. *Id.* at 530. If, as the *May* Court held, Wisconsin lacked jurisdiction over the wife, then arguably no state had jurisdiction to issue a custody order, because Ohio lacked jurisdiction over the husband, who was a Wisconsin resident. This jurisdictional loophole might have encouraged some to flee to a jurisdiction perceived to be friendlier to the parent's circumstances.

state had properly exercised jurisdiction over a custody or visitation proceeding.¹⁰³

The PKPA, which is codified in the section immediately following the FFC Act, requires the courts in one state to “enforce according to its terms . . . any custody determination or visitation determination made consistently with the provisions” set forth in the PKPA.¹⁰⁴ Simply, the first state that properly exercises jurisdiction over a case involving a child custody or visitation determination has exclusive, continuing jurisdiction over those matters as long as it (i) does not decline jurisdiction,¹⁰⁵ (ii) continues to have jurisdiction under the laws of that state,¹⁰⁶ and (iii) “remains the residence of the child or of any contestant.”¹⁰⁷

The PKPA establishes a two-tiered criteria upon which a court can properly exercise jurisdiction over a custody or visitation matter. First, the court issuing the order must properly exercise both personal *and* subject matter jurisdiction over the case under the laws of that state.¹⁰⁸ Second, one of the following must be satisfied: (1) the state in which the custody proceeding is commenced must be the child’s home state on the date of commencement,¹⁰⁹ or must “ha[ve] been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention” by a person who claims a right to custody,¹¹⁰ (2) no other state has home state jurisdiction and it is in the best interest of the child that a court of the state in which the proceeding was commenced assume jurisdiction because the child and at least one party claiming custody rights have a “significant connection with [the] State other than mere physical presence in [the] State, and there is available in [the] State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships”;¹¹¹ (3) regardless of the child’s home state,

103. See *Meade v. Meade*, 812 F.2d 1473, 1476 (4th Cir. 1987) (“The PKPA quite simply preempts conflicting state court methods for ascertaining custody jurisdiction.”); see *infra* notes 150-63 and accompanying text for a discussion of the circumstances that led Congress to pass the PKPA.

104. 28 U.S.C. § 1738A(a) (2006).

105. *Id.* § 1738A(f)(2).

106. *Id.* § 1738A(f)(1).

107. *Id.* § 1738A(d).

108. *Id.* § 1738A(c)(1).

109. *Id.* § 1738A(c)(2)(A)(i). “Home state” is defined as

the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any such persons.

Id. § 1738A(b)(4).

110. *Id.* § 1738A(c)(2)(A)(ii).

111. *Id.* § 1738A(c)(2)(B).

the child is physically present in the state in which the proceeding was commenced and “the child has been abandoned, or it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse”;¹¹² (4) no other state has jurisdiction under categories (1) through (3), or another state with jurisdiction under categories (1) through (3) has “declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and it is in the best interest of the child that such court assume jurisdiction”;¹¹³ or (5) the court has continuing jurisdiction over the matter because the court previously properly exercised jurisdiction consistently with the PKPA.¹¹⁴ Thus, if a court has subject matter and personal jurisdiction over the case *and* one of the criteria (1) through (5) is satisfied, once the court issues a custody or visitation determination, it will, unless it declines jurisdiction, continue to have exclusive jurisdiction over future custody or visitation matters as long as the state continues to be the residence of either the child or any “contestant” for visitation or custody.¹¹⁵

In the Virginia Parentage Action, for example, Jenkins argued that Virginia lacked jurisdiction to hear Miller’s claim that Miller be declared Isabella’s sole parent because Vermont had already exercised jurisdiction over a child custody matter consistent with the PKPA.¹¹⁶ In particular, Jenkins asserted that Vermont had properly exercised jurisdiction under Vermont law in issuing the Vermont Parentage Order, thus satisfying the first criteria.¹¹⁷ She also argued that the second criteria was satisfied because (i) Vermont had been Isabella’s home state within the six months prior to November 2003, when Miller commenced the civil dissolution proceeding, (ii) Isabella was absent from the state because she was living in Virginia with Miller, and (iii) a “contestant” for custody, Jenkins, continued to live in Vermont.¹¹⁸ While that first Virginia litigation raised a novel question

112. *Id.* § 1738A(c)(2)(C) (section numerals omitted).

113. *Id.* § 1738A(c)(2)(D) (section numerals omitted).

114. *Id.* § 1738A(c)(2)(E).

115. A “contestant” is defined as “a person, including a parent or grandparent, who claims a right to custody or visitation of a child.” *Id.* § 1738A(b)(2).

116. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332-33 (Va. Ct. App. 2006).

117. Brief of Appellant at 17, *Miller-Jenkins*, 637 S.E.2d 330 (No. 2654-04-4). Miller argued that Vermont did not properly exercise subject matter jurisdiction over the custody dispute and, therefore, Vermont did not have continuing, exclusive jurisdiction under the PKPA. *See infra* note 135 (explaining Miller’s argument in more detail).

118. Brief of Appellant, *supra* note 117, at 16-18. Miller argued that Jenkins was not a contestant because Jenkins did not have a legal basis in either Vermont or Virginia, at the time the proceeding was commenced, to claim that she was a parent to Isabella. Reply Brief of Appellant at 1-2, *Miller-Jenkins*, 637 S.E.2d 330 (No. 2654-04-4).

concerning whether a parentage action constitutes a “custody or visitation determination,”¹¹⁹ the complex full faith and credit issues became central when Jenkins subsequently sought to register, and then later enforce, the Temporary Custody and Vermont Parentage Orders.¹²⁰

In March 2005, Jenkins sought to register in Virginia the Vermont Parentage Order.¹²¹ As in other states, once a foreign custody or visitation order is registered, it is treated for enforcement purposes as

119. Miller argued that Virginia could exercise jurisdiction over the Virginia action because the PKPA only prohibits a second state from exercising jurisdiction over a *custody* or *visitation* determination, not a *parentage* determination. *Miller-Jenkins*, 637 S.E.2d at 335-36. Specifically, the PKPA requires a state to enforce according to its terms, and not modify, a valid *custody* or *visitation* determination of another state, except under certain exceptions provided for in the statute. A “custody determination” means “a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications.” § 1738A(b)(3). A “visitation determination” means “a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.” § 1738A(b)(9). On its face, therefore, the PKPA does not prohibit a second state from determining *parentage* as opposed to *custody*.

Based on the plain language of the statute, other courts have held that where the PKPA does not include certain proceedings within the definition of “custody determination” or “visitation determination,” it indicates a deliberate choice by Congress to omit them from those actions a second court is precluded from taking. For example, in *L.G. v. People*, the court had before it the question of whether Colorado had jurisdiction to enter orders on a petition in dependency and neglect filed by the State when an effect of the court’s orders was to alter the father’s visitation rights previously granted by an Oklahoma court. 890 P.2d 647, 653 (Colo. 1995) (en banc). The Colorado Supreme Court reversed the Court of Appeals’ conclusion that the PKPA applied to dependency and neglect proceedings. The Supreme Court explained that

[t]he definition of “custody determination” provided by the PKPA conspicuously omits any reference to child dependency and neglect proceedings. . . . [W]e find that Congress’ omission of dependency and neglect proceedings in the definitional section of the PKPA can only mean that Congress made a deliberate choice not to include those proceedings within the coverage of the statute.

Id. at 661; *see also* Dep’t of Human Servs. v. Avinger, 720 P.2d 290, 292 (N.M. 1986) (refusing to apply PKPA to custody determination made within context of a child dependency or neglect proceeding); *In re Sayeh R.*, 693 N.E.2d 724, 727 (N.Y. 1997) (“[C]hild protective proceeding is not a ‘custody determination’ within the meaning of the PKPA or New York’s UCCJEA.”); *Sheila L. v. Ronald P.M.*, 465 S.E.2d 210, 221 (W. Va. 1995) (“The parentage action in Ohio was not a ‘custody determination’ as defined by the PKPA.”).

A panel of the Virginia Court of Appeals agreed with Jenkins, finding that “any common understanding of the term ‘parental rights’ includes the right to custody We therefore reject the contention that [Miller’s] ‘parentage action’ is not a custody or visitation determination embraced by the PKPA.” *Miller-Jenkins*, 637 S.E.2d at 336; *see also* A.K. v. N.B., No. 2070086, 2008 WL 2154098, at *5 (Ala. Civ. App. May 23, 2008), *cert. granted*, No. 1080440 (Ala. Mar. 11, 2009) (following the analysis in *Miller*, the Alabama Court of Appeals also held that “the PKPA preempted the Alabama court’s jurisdiction to enter a judgment touching and concerning A.K.’s visitation rights with respect to the child”).

120. *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 825 (Va. 2008).

121. *Id.*

a valid order in the receiving state.¹²² Miller opposed the request, arguing, among other things, that registration of the Vermont Parentage Order was prohibited under Virginia law,¹²³ which statute is expressly permitted by the federal Defense of Marriage Act (DOMA).¹²⁴

DOMA provides in relevant part that:

No State . . . shall be required to *give effect* to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex *that is treated as a marriage* under the laws of such other State . . . or a right or claim *arising from* such relationship.¹²⁵

Consistent with its authority to decide what effect, if any, to give to same-sex relationships, the Virginia Marriage Affirmation Act (MAA), which became effective July 1, 2004, provides that:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction *shall be void in all respects* in Virginia and any contractual rights created thereby shall be void and unenforceable.¹²⁶

Based on that statute, Miller explained that the Vermont Parentage Order, which treated Jenkins as a parent to Isabella, was void because the parental rights granted to Jenkins arose out of, and were dependent upon, their former same-sex civil union.¹²⁷

Miller explained that the Vermont trial court's jurisdiction to render the Vermont Parentage Order arose from the fact that a civil dissolution petition had been filed.¹²⁸ Thus, just as a court in a divorce

122. VA. CODE ANN. §§ 20-146.26 to .27 (2008) (concerning registration and enforcement of foreign orders).

123. Memorandum of Law in Opposition to Registration of Foreign Orders at 5-6, *Miller-Jenkins v. Miller-Jenkins*, No. JJ018902-01-00 (Va. Juv. & Dom. Rel. Ct. Mar. 23, 2005). Miller also argued that (1) the Vermont Parentage Order conflicted with the Virginia Parentage Order and thus could not be registered and (2) the Vermont Parentage Order infringed Miller's fundamental parental rights. *Id.*; Brief of Appellant at 38-41, *Miller-Jenkins*, 661 S.E.2d 822 (No. 070933).

124. 28 U.S.C. § 1738C (2006); see also *supra* note 94 for a discussion of the rights of states to make full faith and credit determinations.

125. § 1738C (emphasis added).

126. VA. CODE ANN. § 20-45.3 (2008) (effective July 1, 2004) (emphasis added).

127. Brief of Appellant, *supra* note 123, at 26-29; *cf.* *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶¶56-58, 180 Vt. 441, 912 A.2d 951 (explaining the significance of the underlying civil union to the Vermont court's parentage determination).

128. Brief of Appellant, *supra* note 123, at 12-13; see also VT. STAT. ANN. tit. 15, § 665 (2009) (stating that a court has jurisdiction to issue an order concerning parental rights

action has subject matter jurisdiction to also determine custody and visitation, the Vermont family court had jurisdiction to determine custody and visitation over children of a civil union by virtue of the pending civil union dissolution proceeding.¹²⁹ In Vermont, pursuant to the civil union statute, the court's subject matter jurisdiction to make custody determinations in a civil union dissolution action was identical to that in a divorce action between a husband and a wife.¹³⁰ Thus, the custody order was an order arising out of a same-sex relationship, which in Vermont was treated as marriage.¹³¹ Miller also explained that the new parentage test adopted and applied by the Vermont trial court in its November 2004 order was dependent upon, and inextricably tied to, the underlying same-sex civil union.¹³²

In particular, the test created by the trial court to determine parentage of a child born by assisted reproductive technology contained two elements: (1) Jenkins and Miller were a legally connected couple; and (2) Jenkins and Miller intended to bring a child into the world and raise the child as their own as part of a family unit.¹³³ The court ruled that "where a *legally connected couple* utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology."¹³⁴ Because both the jurisdictional basis for the court's custody order (arising out of a dissolution action) and the test adopted to determine parentage of a child born by assisted reproductive technology (requiring the couple to be legally connected) were dependent upon the underlying same-sex civil union, Miller maintained that any order flowing out of the dissolution proceeding was an order arising out of the civil union.¹³⁵ Thus, she argued that the MAA required

and responsibilities when it has jurisdiction to hear the underlying divorce or civil union dissolution proceeding).

129. *Id.* §§ 665, 1206.

130. *Id.* §§ 1204, 1206.

131. *Id.* § 1204(a) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.").

132. Brief of Appellant, *supra* note 123, at 13.

133. *Miller-Jenkins*, 2006 VT ¶ 56, 180 Vt. at 465, 912 A.2d at 970. On appeal, the Vermont Supreme Court affirmed the trial court's order, explaining that [m]any factors are present here that support a conclusion that [Jenkins] is a parent, including, *first and foremost*, that [Jenkins] and [Miller] were in a valid legal union at the time of the child's birth. . . . [T]he couple's legal union at the time of the child's birth is *extremely persuasive* evidence of joint parentage.

Id. (emphasis added).

134. Vermont Parentage Order, *supra* note 73, at 11 (emphasis added).

135. Brief of Appellant, *supra* note 123, at 12-13 & n.10. Miller separately argued before the Vermont Supreme Court and before the Virginia courts that the Vermont trial

Virginia to treat the Vermont Parentage Order as void in all respects *in Virginia*.¹³⁶

Jenkins responded by arguing that DOMA did not exempt states from their obligation under the PKPA to give full faith and credit to child custody orders, but that even if it did, DOMA only concerned whether one state had to recognize another state's same-sex marriage, not whether it could refuse to recognize a custody order arising out of that relationship.¹³⁷ She explained that the PKPA's specific language requiring full faith and credit to be given to child custody orders trumped the later-enacted DOMA, which generally exempted states from the obligation to give effect to rights or claims arising from a same-sex relationship treated as marriage.¹³⁸ In addition, she explained that when a state fulfilled its obligation to give full faith and credit it did not give effect to the underlying same-sex relationship but simply recognized that a custody order had been issued by a state of proper jurisdiction.¹³⁹ She separately argued that DOMA was inapplicable because it did not apply to Vermont civil unions, which were not "treated as a marriage" under Vermont law.¹⁴⁰

court lacked subject matter jurisdiction to dissolve the civil union and therefore any order issued by that court, in that action, was void. Specifically, Miller explained that Vermont's marriage evasion statute declares void any marriage entered into in Vermont by out of state residents when the marriage is prohibited by the couple's home state. *Id.* at 38-41. *See* VT. STAT. ANN. tit. 15, § 6 (2009) (repealed 2009) ("A marriage shall not be contracted in this state by a person residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction."). Miller argued that insofar as the Vermont civil union law requires civil union couples to be treated the same as married couples, the marriage evasion statute should apply to declare void a civil union entered into by out of state residents when the couple's home state prohibits legal recognition of same-sex relationships. Brief of Appellant, *supra* note 123, at 40. The Vermont Supreme Court rejected her argument. *Miller-Jenkins*, 2006 VT ¶¶ 35-40, 180 Vt. at 455-58, 912 A.2d at 963-65.

136. Brief of Appellant, *supra* note 123, at 12 & n.9. Even if Virginia declared the order void in Virginia, it would remain a valid Vermont order, fully enforceable in that state and any other state without marriage laws declaring such orders unenforceable. *See, e.g.,* *Austin v. Austin*, No. CL07-607, slip op. at 6 (Va. Cir. Ct. May 27, 2008) (dismissing petition to dissolve Vermont civil union, holding that "[w]ithin the boundaries of Virginia, the purported civil union . . . is void").

137. Brief of Appellee at 21, *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008) (No. 070933). DOMA expressly addresses more than same-sex marriage. The statutory language expressly recognizes a state's right to refuse to give full faith and credit to same-sex relationships treated as marriage. 28 U.S.C. § 1738C (2006).

138. Brief of Appellee, *supra* note 137, at 21-22.

139. *Id.* at 30.

140. *Id.* at 25-28 (arguing that because the Vermont "legislature created a separate and largely 'parallel'" structure for civil unions, they were not treated as marriage). *But see* VT. STAT. ANN. tit. 15, § 1204(a) (2009) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.").

By order dated August 8, 2005, the J & DR court registered the Vermont Parentage Order.¹⁴¹ The court concluded that registration of the Vermont Parentage Order was not barred by the MAA because “registration of this Order is not a recognition or condonation of the Vermont same-sex civil union; it is only a recognition that a Vermont court with jurisdiction over the contestants and the child made a custody determination.”¹⁴²

On March 1, 2006, the circuit court reversed the J & DR’s registration order, holding that “[t]he Vermont Order cannot be registered in Virginia because it contravenes the public policy and direct statutory law of Virginia.”¹⁴³ On April 17, 2007, the Virginia Court of Appeals, relying entirely on its November 2006 decision in the Parentage case,¹⁴⁴ directed the circuit court to register the Vermont order in Virginia.¹⁴⁵

In the latest stage of litigation, on November 25, 2008, Jenkins asked a Virginia J & DR court to register and enforce a November 7, 2008 Vermont custody determination, which grants substantial, unsupervised visitation to Jenkins.¹⁴⁶ By order dated January 14, 2009, that court registered and enforced the Vermont order.¹⁴⁷ The court specifically found that “[n]either registration nor enforcement of this order is barred by the Marriage Affirmation Act or the Marriage Amendment. The PKPA pre-empts state law and requires [full faith

141. Order, *supra* note 81.

142. *Id.* ¶ 5. The court also held that (i) insofar as all the necessary paperwork was filed, the request for registration comports procedurally with Virginia law; (ii) because the circuit court, which had entered the Virginia Parentage Order, had exclusive jurisdiction over custody and visitation matters, the J & DR could register the order but lacked “jurisdiction to entertain any enforcement proceeding arising out of the Vermont order”; and (iii) an order registering the Vermont Parentage Order was not in conflict with the Virginia Parentage Order because the circuit court, which had entered the Virginia Parentage Order, had no original jurisdiction to address the question of registration. *Id.* ¶¶ 1-5.

143. Order Declining Registration of Vermont Order, *supra* note 82, at 2-3.

144. *See supra* notes 85-88 and accompanying text (explaining the November 2006 order in the Parentage case).

145. *Miller-Jenkins v. Miller-Jenkins*, No. 0688-06-4, 2007 WL 1119817 (Va. Ct. App. Apr. 17, 2007). The Virginia Court of Appeals adopted the language of the first opinion for its opinion in the registration case even though (i) the first Virginia Court of Appeals decision was issued *before* passage of the Marriage Amendment, (ii) the first decision expressly stated that the MAA was irrelevant to the question then before the court, and (iii) the effect and scope of MAA and amendment lie at the heart of the registration case. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332, 337 (Va. Ct. App. 2006). In other words, the April 2007 decision did not address the only question that was before it — whether Virginia was required to give full faith and credit to the Vermont Parentage Order when DOMA and the MAA prohibited it.

146. Order, *supra* note 91.

147. *Id.*

and credit be given] to Vermont's custody determination."¹⁴⁸ Repeating its holding from three years earlier, the Order also states that:

[r]egistration and enforcement of this Order is not a recognition or condonation of the Vermont same-sex civil union; it is only a recognition that a Vermont court with jurisdiction over the contestants and the child made a custody or visitation determination. It does not matter to us what the relationship of the parties, or the reasons why the Vermont judge made his decision.¹⁴⁹

III. PRESERVING STATE SOVEREIGNTY: A PROPER INTERPRETATION OF THE FFC ACT, PKPA, AND DOMA

Although the proper interpretation of the interplay among the FFC Act, PKPA, and DOMA is a pure "legal question," the significance of the underlying political and emotional issues cannot be ignored. The dispute over the scope of the three statutes is a dispute about federalism,¹⁵⁰ state sovereignty,¹⁵¹ separation of powers,¹⁵² and family values.¹⁵³ This author posits that, but for these underlying issues,

148. *Id.* ¶ 4 (citations omitted).

149. *Id.* ¶ 5. The circuit court affirmed the Order on March 16, 2009, and the matter is currently pending before the Virginia Court of Appeals. *Jenkins v. Miller*, Nos. JJ018902-01F, JA013947-02F (Va. Juv. & Dom. Rel. Ct. Jan. 14, 2009), *aff'd*, No. CL09000042-00 (Va. Cir. Ct. Mar. 16, 2009), *appeal docketed*, No. 070509-4 (Va. Ct. App.).

150. Federalism is a structural device established by the Founders to restrain tyranny by preventing a concentration of power in the central government. For a discussion of the Founders, federalism, and family law, see Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 *YALE J.L. & FEMINISM* 221, 224-27 (2005) [hereinafter Wardle, *Tyranny*].

151. Under our dual sovereignty form of federalism, the Constitution expressly grants the national government ultimate authority over specific matters, with all remaining authority retained by the states. The Tenth Amendment to the Constitution reflects that any power not expressly granted to the national government remains a matter falling within the sovereignty of the states. U.S. CONST. amend. X. Family law matters are one of those areas that are uniquely of state law concern. Wardle, *Tyranny*, *supra* note 150, at 227.

152. As the cases discussed in this Article reflect, the legal issue of how to properly interpret the PKPA and DOMA has thus far involved underlying custody orders issued by state court decisions redefining parentage, which new "laws" were then retroactively applied to determine parentage of a child born years earlier. For example, in 2004, the Vermont courts created a new rule to determine parentage of a child born in 2002. For the discussion of the retroactive application of the parentage determination, see *supra* notes 133-34 and accompanying text.

153. An interpretation of DOMA, which expressly permits states to refuse to recognize orders arising out of same-sex relationships treated as marriage, inevitably invokes the national debate over what is marriage and how to define family. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 15 (1959) ("[C]ourts in constitutional determinations face issues that are inescapably 'political' . . . in that they involve a choice among competing values or desires."); see also *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 835-36 (Ky. Ct. App. 2008) (chastising lower court for granting petition for

there would be little dispute about how to apply them. A historical review of the Full Faith and Credit Clause, the PKPA, and DOMA, reveal that each state has the sovereign right to refuse to recognize child custody orders from other states that arise from same-sex relationships.

A. *History of the PKPA and DOMA*

Prior to 1980, some courts refused to give full faith and credit to child custody orders because they were, by their nature, subject to modification, and therefore non-final.¹⁵⁴ Other courts seized on the language in the FFC Act, which required states to treat custody orders in the *same* manner as the issuing state, to exercise jurisdiction over the custody matter and then modify the sister state's prior order.¹⁵⁵ In an effort to avoid the result of a custody order, parents would kidnap their children, move to a "friendlier" state, and begin custody litigation anew.¹⁵⁶ In response to a national problem of states refusing to treat custody orders as final orders for full faith and credit purposes, the PKPA sought to clarify that child custody orders should be given the *same* status as final judgments for purposes of the full faith and credit obligation contained in 28 U.S.C. § 1738.¹⁵⁷ When it passed the PKPA, Congress hoped to significantly decrease the incidence of parental kidnapping by requiring states to treat child custody orders the same as final judgments for full faith and credit purposes.¹⁵⁸ While the PKPA requires states to treat child custody

same-sex adoption in clear contravention of Kentucky law in order to achieve a desired political result); *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 645 (Mass. 2006) (addressing, with respect to non-resident same-sex couples, the constitutionality of a state law prohibiting out of state couples from marrying in Massachusetts in contravention of a couple's home-state's laws); *cf. Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct.").

154. *See Thompson v. Thompson*, 484 U.S. 174, 180 (1988) ("[S]ome courts doubted whether custody orders were sufficiently 'final' to trigger full faith and credit requirements.").

155. *See id.* at 180 (explaining courts' entitlement to act in this manner).

156. *Id.* at 180-81 ("At the time the PKPA was enacted, sponsors of the Act estimated that between 25,000 and 100,000 children were kidnaped [sic] by parents who had been unable to obtain custody in a legal forum.").

157. *Id.*

158. *Id.* at 183 ("Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations.").

orders as final judgments for purposes of full faith and credit, the PKPA did not expressly exempt child custody orders from application of any relevant exceptions to the full faith and credit obligation.¹⁵⁹

The United States Supreme Court has explained that the fact that the PKPA is an addendum to the FFC Act is itself “strong proof” Congress intended child custody orders to have the “*same operative effect*” as other acts, records, and judicial proceedings that fall within the mandate of the FFC Act:¹⁶⁰

[I]t seems highly unlikely Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring section 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738.¹⁶¹

That “enforcement practice” of the full faith and credit obligation would include application of any then-existing or later-enacted exceptions thereto.¹⁶² DOMA is an express exception to the full faith and credit obligation for rights arising from same-sex relationships treated as marriage.¹⁶³

Invoking its authority under Article IV, Section I of the U.S. Constitution to prescribe “what (if any) effect” states must give to “any public act, record, or judicial proceeding . . . respecting a relationship between persons of the same sex that is treated as marriage under the laws of such other State . . . or a right or claim arising

159. 28 U.S.C. § 1738A (2006) (including no express language exempting child custody orders from application of exceptions to full faith and credit); *see also* Brief of Appellant, *supra* note 123, at n.7 (utilizing this argument in Miller’s brief to the Virginia Supreme Court).

160. *Thompson*, 484 U.S. at 183 (emphasis added).

161. *Id.* Representative Moss, the sponsor of the PKPA in the House, indicated that the PKPA “simply would require that the initial State’s custody decree be granted full faith and credit by subsequent States . . .” 124 CONG. REC. 5727 (1978). Senator Wallop, the sponsor of the Senate version, intended that the PKPA “would require that full faith and credit be given to custody determinations which are made in compliance with the standards set forth in the succeeding subsections.” 124 CONG. REC. 786 (1978).

162. *Cf. Nevada v. Hall*, 440 U.S. 410, 422 (1979) (acknowledging limitations on the applicability of the Full Faith and Credit Clause); *Mason v. Mason*, 775 N.E.2d 706, 709 & n.3 (Ind. Ct. App. 2002) (stating general rule that courts will give full faith and credit to marriage validly contracted in the place where it is celebrated, unless it violates strong public policy); 129 Ala. Op. Att’y Gen. 11 (2000), 2000 WL 33310632, at *7 (“[T]he Full Faith and Credit Clause would not require the State of Alabama . . . to recognize any form of homosexual ‘marriage’ that might be conducted in the future under the laws of the State of Vermont, whether that relationship were legally styled a ‘marriage,’ a ‘civil union,’ or a ‘domestic partnership.’”).

163. H.R. REP. NO. 104-664, at 6-10 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2910-14.

from such relationship,” Congress passed DOMA.¹⁶⁴ It did so in 1996 because the nation faced important questions about federalism, state sovereignty, and the impact of the full faith and credit obligation as Hawaii considered whether to legalize same-sex “marriage.”¹⁶⁵ DOMA reserves for each state the authority to determine for itself what legal effect to give to: (a) same-sex relationships treated as marriage, but not necessarily called marriage; and (b) rights or legal claims arising from same-sex relationships treated as marriage.¹⁶⁶

At the time of its passage, there was little dispute that DOMA was express federal recognition that “[d]omestic relations are preeminently matters of state law.”¹⁶⁷ A House Report from the Judiciary Committee reveals that DOMA was to remove any doubt about a state’s power to refuse to give full faith and credit to a sister state’s order that would undermine the receiving state’s power to define marriage and family for itself.¹⁶⁸ The Report explains that:

[W]e simply cannot know exactly how courts will rule on the Full Faith and Credit Clause issue. As a result, we are confronted now with significant legal uncertainty concerning this matter of great importance to the various States. While the Committee does not believe that the Full Faith and Credit Clause, properly interpreted and applied, would require sister States to give legal effect to same-sex “marriages” celebrated in other States, there is sufficient uncertainty that we believe congressional action is appropriate.

The Committee therefore believes that this situation presents an appropriate occasion for invoking our congressional authority under the second sentence of the Full Faith and Credit Clause to enact legislation prescribing what (if any) effect shall be given by the States to the public acts, records, or proceedings of other States relating to homosexual “marriage.”¹⁶⁹

164. H.R. REP. NO. 104-664, at 25 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2929.

165. H.R. REP. NO. 104-664, at 7 & n.21 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2911 (discussing questions of whether a Hawaiian same-sex marriage would need to be recognized by other states).

166. *See* 28 U.S.C. § 1738C (2006) (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage.”).

167. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Mansell v. Mansell*, 490 U.S. 581, 587 (1989)); *see also infra* notes 164-87 and accompanying text (discussing state sovereignty over domestic relations matters).

168. H.R. REP. NO. 104-664, at 25-26 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2929-30.

169. H.R. REP. NO. 104-664, at 25, *as reprinted in* 1996 U.S.C.C.A.N. at 2929; *see Wardle, Tyranny*, *supra* note 150, at 223 (explaining that federalism leaves each state to regulate matters concerning family and marriage); *see also* H.R. REP. NO. 104-664, at 10, *as reprinted in* 1996 U.S.C.C.A.N. at 2925 (“[N]ot content to rely on the amorphous ‘public policy’ exception” in order to protect a state’s right to decline to give full legal effect to same-sex relationships treated as marriage in another state, Congress enacted DOMA.).

The Report echoed the sentiments shared by others that DOMA did not create a new exception, but rather, expressly codified an existing exception.¹⁷⁰ For example, Professor Lawrence Tribe, in a letter he wrote to senator Edward Kennedy, which was introduced into the Congressional record, urged Congress not to pass DOMA, explaining that “in light of the ‘public policy’ exception to the Full Faith and Credit Clause, [it] is probably unnecessary.”¹⁷¹ That report also reflects that DOMA was designed to reserve for each state the decision whether to confer a broad range of marital benefits on same-sex couples that are treated as married in other states:

In the abstract, it is difficult to know precisely what consequences would result if a same-sex couple from, say, Ohio, flew to Hawaii, got “married,” returned to Ohio, and demanded that the State or one of its agencies give effect to their Hawaiian “marriage” license. . . . In general, the Committee believes that at least two things would occur.

First, the State law regarding marriage would be thrown into disarray, thereby frustrating the legislative choices made by that State that support limiting the institution of marriage to male-female unions. . . . Second, in a more pragmatic sense, homosexual couples would presumably become eligible to receive a range of government marital benefits. For example, . . . *child custody* and support payments; spousal support; premarital agreements; name changes; nonsupport actions; post-divorce rights; evidentiary privileges; and others.¹⁷²

On its face, DOMA confirms a state’s sovereignty to refuse to give any effect to any “right or claim arising from such relationship.”¹⁷³ Examples of a right or claim arising from a same-sex relationship treated as marriage include, for example, claims for divorce,¹⁷⁴ second parent adoption,¹⁷⁵ child custody, parentage,¹⁷⁶ wrongful

170. H.R. REP. NO. 104-664, at 26, *as reprinted in* 1996 U.S.C.C.A.N. at 2930.

171. H.R. REP. NO. 104-664, at 28, *as reprinted in* 1996 U.S.C.C.A.N. at 2932.

172. H.R. REP. NO. 104-664, at 7 n.21, *as reprinted in* 1996 U.S.C.C.A.N. at 2911 n.21 (emphasis added).

173. 28 U.S.C. § 1738C (2006).

174. *Compare* *Rosengarten v. Downes*, 802 A.2d 170, 172, 184 (Conn. Ct. App. 2002) (holding that the trial court lacked jurisdiction to dissolve civil union because Connecticut law did not recognize civil unions) *with* *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 502, 504-06 (N.Y. Sup. Ct. 2008) (exercising jurisdiction over petition for divorce and child custody determination of same-sex couple married in Canada).

175. *See Sharon S. v. Super. Ct.*, 73 P.3d 554, 572 (Cal. 2003) (finding that California law allows for second parent adoptions and “[n]othing on the face of the domestic partnership provisions . . . implies a legislative intent to forbid, repeal, or disapprove second parent adoption”).

176. *See supra* notes 133-34 and accompanying text (explaining that the parentage test created by the Vermont trial court in the *Miller-Jenkins* case declared the partner to be a parent if the couple was “legally connected” at the time of conception).

death,¹⁷⁷ spousal inheritance,¹⁷⁸ spousal evidentiary privileges,¹⁷⁹ and income tax.¹⁸⁰ In interpreting the two federal statutes, therefore, the key legal question becomes whether, on the one hand, the earlier-enacted PKPA mandates full faith and credit despite the later-enacted DOMA or, on the other hand, DOMA exempts from the PKPA's full faith and credit obligation those child custody orders arising out of same-sex relationships.

Following DOMA's enactment, thirty-eight states passed statutes defining marriage as the union of one man and one woman or declaring what effect, if any, same-sex relationships would have in their states.¹⁸¹ Three other states had previously enacted statutes defining marriage as the union of one man and one woman.¹⁸² Presently, only five states lack statutory language explicitly defining marriage as the union of one man and one woman,¹⁸³ and thirty states

177. See *Bouley v. Long Beach Mem. Med. Center*, 25 Cal. Rptr. 3d 813, 816 (Cal. Dist. Ct. App. 2005) (finding statutory support for the standing of a same-sex domestic partner to sue for wrongful death).

178. See T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 60 (2005) (providing overview of same-sex partners' ability to receive spousal inheritance).

179. See *Greenwald v. H & P 29th St. Assoc.*, 659 N.Y.S.2d 473, 473 (N.Y. App. Div. 1997) (declining to apply spousal disclosure privileges to same-sex couple).

180. See *Lewis v. Harris*, 875 A.2d 259, 264 (N.J. 2005) (stating the New Jersey Domestic Partnership Act provides for many rights to same-sex couples such as an exemption on state income tax and the right to claim partner as a dependent).

181. ALA. CODE § 30-1-19 (2009); ALASKA STAT. § 25.05.013 (2006); ARIZ. REV. STAT. ANN. §§ 25-101(C), -112(A) (2007); ARK. CODE ANN. §§ 9-11-107, -11-109, -11-208(a) to (b) (West 2008); CAL. FAM. CODE §§ 300, 308.5 (West 2004); COLO. REV. STAT. ANN. § 14-2-104 (West 2007); CONN. GEN. STAT. ANN. § 45a-727a(4) (West 2008) (repealed 2009); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. § 741.212 (2005); GA. CODE ANN. § 19-3-3.1 (West 2009); HAW. REV. STAT. § 572-1, -3 (2009); IDAHO CODE ANN. §§ 32-201, -209 (2009); 750 ILL. COMP. STAT. 5/212(a)(5), 5/213.1 (1999 & Supp. 2009); IND. CODE ANN. § 31-11-1-1 (West 2009); IOWA CODE ANN. § 595.2 (West 2008); KAN. STAT. ANN. § 23-101(a) (2008), *declared unconstitutional by Varnum v. Brien*, 763 N.W.2d 862 (2009); KY. REV. STAT. ANN. § 402.020(1)(d), .040 and .045 (West 2009); LA. CIV. CODE ANN. arts. 89 (1999 & Supp. 2009), 3520 (1994 & Supp. 2009); LA. REV. STAT. ANN. §§ 9:272, :273, :275 (2009); ME. REV. STAT. ANN. tit. 19-A, § 701(5) (1998) (amended 2009); MICH. COMP. LAWS §§ 551.1, .272 (2005); MINN. STAT. §§ 517.01, .03(a)(4) (West 2008); MISS. CODE ANN. § 93-1-1(2) (2007); MO. ANN. STAT. § 451.022 (West 2009); MONT. CODE ANN. § 40-1-401(1)(d) (2007); NEV. REV. STAT. ANN. § 122.020(1) (West 2009); N.C. GEN. STAT. ANN. § 51-1.2 (West 2009); N.D. CENT. CODE § 14-03-01 (2009); OHIO REV. CODE ANN. § 3101.01(A), .01(C)(1)-(2) (West 2005); OKLA. STAT. tit. 43, § 3.1 (2009); 23 PA. CONS. STAT. §§ 1102, 1704 (2001); S.C. CODE ANN. § 20-1-15 (2008); S.D. CODIFIED LAWS §§ 25-1-1, -1-38 (2009); TENN. CODE ANN. § 36-3-113(a) to (b) (West 2009); TEX. FAM. CODE ANN. § 2.001 (Vernon 2009); UTAH CODE ANN. § 30-1-2 (West 2007); VA. CODE ANN. §§ 20-45.2, .3 (2008 & Supp. 2009); WASH. REV. CODE ANN. §§ 26.04.010(1), .04.020(1)(c) (West 2009); W. VA. CODE §§ 48-2-104(c), -603 (2009).

182. MD. CODE ANN., FAM. LAW § 2-201 (West 2009); N.H. REV. STAT. ANN. § 457:1, :2 (2009); WYO. STAT. ANN. § 20-1-101 (2009).

183. Those five states are Massachusetts, New Mexico, New Jersey, New York, and Rhode Island. The remaining forty-five states define marriage as one man and one woman. In 2003, the Massachusetts Supreme Judicial Court declared the marriage laws unconstitutional. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Although

have passed constitutional amendments defining marriage as the union of one man and one woman.¹⁸⁴ The breadth of the statutes and amendments vary. Some simply define marriage as one man and one woman,¹⁸⁵ others provide that a marriage is the union of a man and a woman and that any legal status identical or substantially similar to that of marriage for unmarried individuals is not valid or recognized,¹⁸⁶ while still others comprehensively explain that a same-sex union will not be recognized and is void or unenforceable.¹⁸⁷ Virginia passed both a comprehensive statute and amendment protecting traditional marriage.

the legislature has not passed any implementing legislation, Massachusetts now permits same-sex couples to marry. In October 2008, the Connecticut Supreme Court declared unconstitutional the state's marriage laws defining marriage as the union of one man and one woman as well as the civil union law. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008). On April 7, 2009, the Vermont legislature overrode the governor's veto of a bill legalizing same-sex marriage. John Dillon, *Vermont Legislature Oks Gay Marriage*, NPR, Apr. 7, 2009, <http://npr.org/templates/story/story.php?storyId=102851810>. On May 6, 2009, the governor of Maine signed legislation permitting same-sex marriage. S.P.0384-L.D. 1020, 124th Leg., First Sess. (Me. 2009). On November 3, 2009, Maine voters repealed the law through voter referendum. Ashley Surdin, *Gay Groups Say Loss Won't Alter Strategy*, WASH. POST, Nov. 5, 2009, at A9.

184. ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV, para. I; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

185. Those states are Hawaii, Iowa, Illinois, Maryland, Minnesota, Washington, and Wyoming. *See, e.g.*, WYO. STAT. ANN. § 20-1-101 (2009) ("Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.").

186. Those states are Alaska, Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Michigan, Missouri, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, West Virginia, and Wisconsin. *See, e.g.*, CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."); OR. CONST. art. XV, § 5A ("[O]nly a marriage between one man and one woman shall be valid or legally recognized as a marriage.").

187. Those states are Georgia, Kansas, Nebraska, Ohio, South Carolina, South Dakota, Texas, Utah, and Virginia. *See, e.g.*, OHIO REV. CODE ANN. § 3101.01(4) (West 2005) ("Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state."); *see also* Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221, 221-25 (2004-2005) (discussing and explaining the various types of marriage amendments that existed at the time).

In 2004, Virginia passed the Marriage Affirmation Act (MAA). It provides that:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction *shall be void in all respects* in Virginia and any contractual rights created thereby shall be void and unenforceable.¹⁸⁸

On November 7, 2006, the Virginia electorate voted to amend the Commonwealth's Constitution to provide:

That only a union between one man and one woman may be a marriage valid in or *recognized* by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that *intends to approximate* the design, qualities, significance, or *effects of marriage*. Nor shall this Commonwealth or its political subdivisions create or *recognize another union*, partnership, or other legal status to which is assigned the *rights, benefits, obligations, qualities, or effects of marriage*.¹⁸⁹

Unlike the language of some statutes or amendments that simply define marriage as the union of one man and one woman, Virginia's laws are comprehensive in their mandate that the Commonwealth and its political subdivisions cannot recognize or enforce a legal status, other than a marriage between one man and one woman, "to which is assigned the rights, benefits, obligations, qualities, or effects of marriage."¹⁹⁰ The focus then becomes whether the federal interests behind the PKPA and the full faith and credit obligation override a state's decision to categorically refuse to recognize or enforce child custody orders arising out of same-sex relationships.

B. Federalism Demands Respect for State Sovereignty over Child Custody Matters

1. There are No Federal Interests Sufficient to Justify Usurping State Control over a Core Domestic Relations Matter of Who is a Parent

A proper balance between the full faith and credit obligation and respect of state sovereignty requires the PKPA to be interpreted

188. VA. CODE ANN. § 20-45.3 (2008) (emphasis added).

189. VA. CONST. art. I, § 15-A (emphasis added).

190. *Id.*

as subject to the full faith and credit exception codified in DOMA as well as a public policy exception. The U.S. Constitution creates a federal government of limited, enumerated powers,¹⁹¹ not one of general power, such as the powers retained by the states.¹⁹² Whereas the states may legislate in nearly any area that does not violate the natural rights of the people,¹⁹³

the federal government is limited to those few powers it was expressly granted in the Constitution.

. . . .

Thus, the Framers' Constitution guards the powers of the people and their state governments jealously. It gives up to the federal government precisely those powers the Framers considered necessary to correct the shortcomings of its predecessor confederation and to effect the limited ends of the federal governments.¹⁹⁴

In response to critics of the proposed constitution who were concerned that it conveyed too much power to the federal government, James Madison explained in *Federalist* No. 45 that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”¹⁹⁵ He clarified that “[t]he powers

191. See, e.g., *U.S. v. Morrison*, 529 U.S. 598, 608 (2000) (discussing the limits to the power of the federal government); *U.S. v. Lopez*, 514 U.S. 549, 552 (1995) (“The Constitution creates a Federal Government of enumerated powers.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution [sic] is written.”).

192. See, e.g., *THE FEDERALIST* No. 45, at 289 (James Madison) (Signet Classic ed., 2003) (“The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”).

193. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *38, *41 (“Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this”). Blackstone further explained that the laws and moral code of God, our creator, “is called the law of nature.” *Id.* at *39. The Bible explains that God created us male and female, in His own image, and then declared that “a man will leave his father and mother and be united to his wife, and they will become one flesh.” *Genesis* 1:26-27, 2:24. Jesus referred to these same passages when he spoke of marriage to the Pharisees. *Matthew* 19:3-5; see also *Ephesians* 5:31 (referring to the same passages). The Bible also depicts the responsibilities of a husband toward his wife in terms of Christ’s commitment, as the bridegroom, to his Church, the bride. *Ephesians* 5:25-28; *Matthew* 9:15. Applying Blackstone’s understanding of the law, human laws that contradict God’s design of marriage are of no validity.

194. ANDREW M. GROSSMAN, *THE HERITAGE FOUND., ENUMERATED POWERS ACT BRINGS THE CONSTITUTION TO CAPITOL HILL* 3, 5 (2008), available at http://www.heritage.org/Research/LegalIssues/upload/lm_29.pdf.

195. *THE FEDERALIST* No. 45, at 289 (James Madison) (Signet Classic ed., 2003).

reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”¹⁹⁶ Determining who is a parent lies at the very center of the state’s authority over the lives and liberties of its people.¹⁹⁷

The United States Supreme Court has repeatedly proclaimed 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.”¹⁹⁸ Because domestic relations are “preeminently matters of state law,” the Court has explained that when Congress passes general legislation it “rarely intends to displace state authority in this area.”¹⁹⁹ In fact, “[b]efore a state law governing domestic relations will be overridden, it ‘must do major damage to clear and substantial federal interests.’”²⁰⁰

A state’s non-recognition or enforcement of child custody orders arising out of same-sex relationships does not do “major damage to clear and substantial federal interests.”²⁰¹ The national interests that supported passage of the PKPA in 1980 do not permit Congress to nationalize a redefinition of who is a parent. Insofar as the first successful use of assisted reproductive technology in the United States occurred just two years before Congress passed the PKPA, and long before the national debate over legal recognition of same-sex relationships began,²⁰² the Act was not designed to nationalize

196. *Id.*; see also THE FEDERALIST No. 14, at 97 (James Madison) (Signet Classic ed., 2003) (“[T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects . . .”).

197. Wardle, *Tyranny*, *supra* note 150, at 226 (“Federalism in family law was intended to check the emergence of national tyranny over family life.”); see also *Franks v. Smith*, 717 F.2d 183, 185 (5th Cir. 1983) (“[I]ssues of domestic relations are the province of state courts . . .”); *Schapiro v. Montgomery County Court*, No. 95-0986, 1995 WL 348670, at *4 (E.D. Pa. June 8, 1995) (“For over one hundred years, courts have consistently held that family law cases are of paramount importance to the states in which they are pending.”).

198. *Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004) (discussing the state court’s role in domestic issues); *Moore v. Sims*, 442 U.S. 415, 435 (1979) (“Family relations are a traditional area of state concern.”).

199. *Mansell v. Mansell*, 490 U.S. 581, 587 (1989).

200. *Rose v. Rose*, 481 U.S. 619, 625 (1987) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)) (quotation marks omitted).

201. *Id.*

202. See, e.g., *Assisted Reproductive Technology (ART) Timeline*, ART PARENTING ORGANIZATION, <http://www.artparenting.org/about/index.html> (last visited Oct. 11, 2009) (tracking the evolution of Assisted Reproductive Technology). Assisted reproductive technology refers generally to the various “techniques facilitating human procreation by means other than normal sexual intercourse.” LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 275 (2002). The major techniques include *in vitro* fertilization, artificial insemination, and surrogacy. *Id.* at 275-76. “IVF involves the removal of an egg or eggs from a woman, the donation of sperm from a man, and the combination of them” outside the uterus. *Id.* at 276. The fertilized egg is then returned

a federal parentage standard for same-sex couples. Rather, when it passed the PKPA, Congress sought to address the widespread problem of a parent fleeing with his child to another state to relitigate custody issues after a first state had issued a custody order with which he disagreed.²⁰³ The PKPA deprives a second state from exercising jurisdiction when the requirements in the PKPA are satisfied, preventing multi-state litigation by a child's natural or adoptive father and mother over custody.²⁰⁴ Federal interests in preventing parents from kidnapping their children, however, are not implicated with respect to child custody disputes between former same-sex couples where only one of them is the child's biological parent.²⁰⁵

Although Congress has the constitutional authority to prescribe that child custody orders generally should be treated as final orders for purposes of the full faith and credit obligation, there are outer limits on that authority.²⁰⁶ Supreme Court precedent concerning Congress's authority to regulate interstate commerce recognizes that Congress's authority is not unlimited.²⁰⁷ The U.S. Constitution gives

to the woman's body or donated to someone else. *Id.* Artificial insemination, on the other hand, does not require removal of the eggs from the woman's body. Instead, the semen is injected into the woman's body in the hopes that fertilization will occur. *Id.* at 275. Surrogacy refers to the situation where a woman carries and gives birth to a child for another woman. *Id.* at 276. The surrogate can use either an egg from another woman or her own egg fertilized by donated sperm. *Id.* Although artificial insemination had been successfully performed prior to the 1970s, the use of all forms of assisted reproductive technology dramatically increased after the first successful birth using *in vitro* fertilization in 1978. See U.S. OFFICE OF TECH. ASSESSMENT, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY — BACKGROUND PAPER, OTA-13P-BA-48 (1988), available at <http://www.princeton.edu/~ota/disk2/1988/8804/8804.PDF> (presenting statistical, technical, economic, ethical, and legal conclusions regarding infertility practices, including IVF); see also *supra* note 165 and accompanying text (pointing out that the national debate over same-sex marriage began in earnest in 1996).

203. See *supra* notes 154-63 and accompanying text (providing more background on why Congress passed the PKPA).

204. 28 U.S.C. § 1738(A) (2006).

205. This Article does not address the question of whether one state must give full faith and credit to an adoption decree that either (i) declares a same-sex partner to be the adoptive parent to the partner's child or (ii) declares both partners in a same-sex relationship to be a child's parents. While this author maintains that a state can refuse to give full faith and credit to those adoption decrees, that discussion is beyond the scope of this Article. See Wardle, *Critical Analysis*, *supra* note 3, at 568-69 (explaining why states constitutionally can refuse recognition to same-sex adoptions); cf. *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (declaring unconstitutional Oklahoma statute prohibiting recognition of same-sex adoptions); *Adar v. Smith*, 591 F. Supp. 2d 857, 864 (E.D. La. 2008) (directing Louisiana to recognize foreign same-sex adoption decree); *Embry v. Ryan*, 11 So. 3d 408 (Fla. Dist. Ct. App. 2009) (reversing a decision dismissing Ms. Embry's petition for visitation or custody because Florida law does not recognize the second-parent adoption decree from Washington that permitted Ms. Embry to adopt Ms. Ryan's biological child).

206. *U.S. v. Lopez*, 514 U.S. 549, 557 (1995).

207. *Id.* at 556-57.

Congress authority to “regulate Commerce . . . among the several States.”²⁰⁸ To determine the outer limits of Congress’s authority, the Court has explained that:

the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.”²⁰⁹

The same concern with obliterating the distinction between what is of national concern (thus necessitating national uniformity) and what is of local concern must be considered in interpreting the outer limits of the PKPA.²¹⁰ Given the Supreme Court’s longstanding acknowledgment that domestic relations matters are “preeminently matters of state law,” a nationalized standard of what is marriage and who is a parent that conforms not to the standard of the overwhelming majority of states but to that of a handful of states obliterates the distinction between national and local interests without advancing any clear and substantial federal interest.²¹¹ Interpreting the PKPA

208. U.S. CONST. art. I, § 8.

209. *Lopez*, 514 U.S. at 557 (quoting *Nat’l Labor Bd. v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)); *see also* *Champion v. Ames*, 188 U.S. 321, 365 (1903) (Fuller, C.J., dissenting) (“To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment . . .”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The distinction between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed . . .”). The author takes no position in this Article as to whether the Supreme Court has properly decided the outer limits of Congress’s Commerce Clause powers. *Cf.* KEVIN R. C. GUTZMAN, *THE POLITICALLY INCORRECT GUIDE TO THE CONSTITUTION* 99-101 (2007) (discussing how Congress has exceeded its authority under the guise of its power to regulate interstate commerce).

210. *See* THE FEDERALIST No. 45 (James Madison) (discussing the limited powers of the federal government).

211. Congress interferes with a state’s sovereignty over child custody matters when a custody determination is based on one state’s redefinition of parentage that permits a legal stranger to be treated as a parent over the objections of the child’s fit parent. Each state has the right to refuse to recognize that fundamental restructuring of the family. In contrast, a state’s interest in a joint custody presumption or primary caretaker presumption does not involve the same type of core domestic relations issue, and therefore the state interest must cede to the federal interests behind the full faith and credit obligation. *Cf.* *Walker v. Commonwealth*, 127 S.W.3d 596, 601 (Ky. 2004) (“[T]he Full Faith and Credit Clause was designed to give the United States certain benefits of a unified nation, but a judgment of sister state need not be recognized by another state if it is an improper infringement on the interests of the latter state.” (quoting *Brengle v. Hurst*, 408 S.W.2d 418, 420 (Ky. Ct. App. 2004))); *Wamsley v. Nodak Mut. Ins. Co.*, 178 P.3d 102, 115 (Mont. 2008) (“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

as to require full faith and credit to child custody orders with an exception for orders arising out of same-sex relationships (including treating a non-parent as a parent) strikes the proper balance.

The issue of whether to nationalize a parentage standard through the full faith and credit obligation raises unique concerns that are not implicated to the same degree in the Supreme Court precedent requiring a state to give full faith and credit to a divorce decree rendered in another state even if the divorce decree violates the public policy of the receiving state.²¹² Professor Lynn Wardle, in his article discussing whether states must give full faith and credit to adoptions by same-sex couples, explains the substantive distinction between giving full faith and credit to a divorce judgment and an adoption decree:

A divorce judgment . . . 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. 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. . . . 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, advise (for spouses), and training and direction (for children). It is well-established that marriage recognition is not regulated by strict interstate recognition rules; so it would be logical and reasonable to expect that adoption recognition also would not be governed by strict (judgment) recognition rules.²¹³

national policy of full faith and credit because it would involve an improper interference with important interests of the sister State."); *Seiller & Handmaker, L.L.P. v. Finnell*, 165 S.W.3d 273, 276-77 (Tenn. Ct. App. 2004) ("Tennessee courts are not obligated to give full faith and credit to any judgment of a state which we hold to be violative of Tennessee's public policy or the Federal Constitution." (quoting *Aqua Sun Inv., Inc. v. Henson*, 1993 WL 382230, at *2 (Tenn. Ct. App. 1993))). *But see* *Craven v. S. Farm Bureau Cas. Ins. Co.*, 117 P.3d 11, 14 (Colo. Ct. App. 2004) ("[T]he United States Supreme Court has ruled that there is no public policy exception to the Full Faith and Credit Clause as it relates to judgments of a sister state."); *Clark v. Rockwell*, 435 S.E.2d 664, 667 (W. Va. 1993) ("[L]ater cases appear to hold that the forum state's public policy cannot override the enforcement of a valid judgment . . .").

212. For the Supreme Court's discussion regarding the moral and religious dilemmas posed by reconciling the Full Faith and Credit Clause with divorce decrees issued in one state but affecting another state's marriage and divorce laws, see *Williams v. North Carolina*, 317 U.S. 287 (1942).

213. Wardle, *Critical Analysis*, *supra* note 3, at 590-91 (emphasis omitted) (footnotes omitted).

This same argument would apply with equal force to child custody orders arising from same-sex relationships where a judge has created the legal fiction that a third party is a parent to another person's biological child.

Not only must an exception to the PKPA be recognized to protect the state sovereignty of the majority of states that prohibit recognition of same-sex relationships, but the language of the PKPA itself does not support the argument that the PKPA imposes an absolute, national requirement to give full faith and credit to child custody orders. Nothing in the PKPA's text or legislative history exempts it from application of then-existing or yet-to-be enacted exceptions.²¹⁴

2. The Enforcement Exception to the Full Faith and Credit Requirement

A separate exception to an interpretation of the PKPA that establishes a nationalized parentage standard is the enforcement exception. Thus, even if the PKPA requires a state to give full faith and credit to a child custody order arising from a same-sex relationship, the obligation to give full faith and credit to a foreign order does not impose upon a sister state the obligation to *enforce* any order to a greater extent than the order would be enforced if rendered by a court in the state.

The U.S. Supreme Court has explained the scope of the full faith and credit obligation. Specifically, although pursuant to the full faith and credit requirement an order "gains nationwide force" for purposes of "claim and issue preclusion (*res judicata*)," it "does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. *Enforcement measures do not travel with the sister state judgment* as preclusive effects do; such measures remain subject to the evenhanded control of forum law."²¹⁵ Thus, according to the Court's decision in *Baker*, while a foreign order might be given *res judicata* effect as to the

214. Whether Congress has the constitutional authority to enact a statute requiring full faith and credit under any and all circumstances is beyond the scope of this Article. In light of the discussions contained in this Article, however, the author maintains that Congress lacks authority to do so.

215. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233, 235 (1998) (emphasis added); see also *Finstuen v. Crutcher*, 496 F.3d 1139, 1153-54 (10th Cir. 2007) (explaining, in the context of asking whether Oklahoma had to recognize an out of state same-sex adoption, that "[e]nforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law. . . . If Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children, the Doels could not invoke the Full Faith and Credit Clause in asking Oklahoma for a new birth certificate.").

issues litigated, thereby preventing a second state from relitigating the issues, the order can only be enforced pursuant to the time, manner, and mechanisms available for enforcement in the receiving state.²¹⁶ For example, “[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority.”²¹⁷ Consistent with this exception, the Supreme Court has long held that a “sister State’s decree concerning land ownership in another State has been held ineffective *to transfer title*, although such a decree may indeed preclusively adjudicate the rights and obligations running between the *parties* to the foreign litigation.”²¹⁸

In *Fall v. Estin*,²¹⁹ the Supreme Court held that a Washington divorce decree purporting to transfer title to marital property located in Nebraska need not be recognized in Nebraska under the Full Faith and Credit Clause.²²⁰ The Court explained that while the full faith and credit obligation conclusively determines the merits of the underlying claim of land ownership, the Washington order does not require Nebraska to transfer title to the property.²²¹ Consistent with that logic, in his concurring opinion in *Baker*, Justice Scalia explained that the “Full Faith and Credit Clause ‘did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, *as evidence*.’”²²²

The distinction between enforcement and res judicata effect is a longstanding one. In 1839, the Supreme Court differentiated between recognition of foreign judgments as evidence for issue or claim preclusion, which is what *Baker* says is required under the Full Faith and Credit Clause, and execution of foreign judgments, which is governed by the law of the forum state:²²³

216. *Baker*, 522 U.S. at 235, 238.

217. *Id.* at 235; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 (1971) (distinguishing between enforcement and res judicata effect for purposes of the full faith and credit obligation); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 cmt. b (1971) (“[A state can deny full faith and credit] 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.”); 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4467 (2d ed. 2002) (explaining that although a second state may not need to directly enforce a non-monetary judgment from another state it would still be required to give the judgment res judicata effect).

218. *Baker*, 522 U.S. at 235 (citation omitted).

219. 215 U.S. 1 (1909).

220. *Id.* at 2, 4.

221. *Id.* at 4, 11.

222. *Baker*, 522 U.S. at 241 (Scalia, J., concurring) (citation omitted).

223. *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 324-25 (1839).

[T]he judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. . . . [U]nder the first section of the fourth article of the Constitution, judgments out of the state in which they are rendered, are only evidence in a sister state that the subject matter of the suit has become a debt of record, which cannot be avoided but by the plea of nul teil record.²²⁴

Thus, while the full faith and credit obligation might require a receiving state to acknowledge a foreign custody determination arising out of a same-sex relationship as evidence for *res judicata* purposes, it can only be executed in the receiving state as that state's "laws may permit."²²⁵

Two recent federal court decisions highlight the distinction.²²⁶ In *Finstuen*, the court addressed the question of whether a state law that refused to "recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction" was constitutional.²²⁷ Although the Tenth Circuit held that Oklahoma's statute prohibiting *recognition* of out of state same-sex adoptions violated the Full Faith and Credit Clause, the decision acknowledges *Baker*'s enforcement distinction.²²⁸ Following the logic of *Baker*, the Oklahoma non-recognition statute in *Finstuen* was constitutionally defective because it impermissibly created an exception to recognition (*res judicata*), rather than refused to enforce an out of state adoption on the same terms as it would refuse to enforce such an adoption within the state.²²⁹ Since the statute refused to even give *res judicata* effect to sister state orders, consistent with *Baker*, the *Finstuen* court held that it was directly contrary to the Full Faith and Credit Clause.²³⁰

224. *Id.* at 325.

225. *Baker*, 522 U.S. at 242 (quoting *Lynde v. Lynde*, 181 U.S. 183, 187 (1901)); see also *Olmsted v. Olmsted*, 216 U.S. 386, 394 (1910) ("[The full faith and credit obligation] does not extend the jurisdiction of the courts of one State to property situated in another, but only makes the judgment rendered conclusive on the merits . . . [and then it] can only be executed in the latter [state] as its laws permit."); *Johnson v. Johnson*, 849 N.E.2d 1176, 1179-80 (Ind. Ct. App. 2006) (concluding that a domesticated foreign judgment, including the interest award, is entitled to full faith and credit "unless the judgment debtor can show that the enforcement of the post-judgment interest part of the judgment would violate Indiana public policy").

226. See *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (involving recognition of out of state same-sex adoption); *Adar v. Smith*, 591 F. Supp. 2d 857 (E.D. La. 2008) (same).

227. 496 F.3d at 1141-42 (emphasis added).

228. *Id.* at 1153, 1156.

229. *Id.* at 1155-56 ("The Doels do not seek to *enforce* their adoption order At issue here is a state statute providing for categorical non-recognition").

230. *Id.*

As further evidence of the recognition/enforcement distinction, the *Finstuen* Court explained that the full faith and credit obligation is not violated if the state applies its law to deny adoptees the right to inherit land or attain similar state rights and privileges.²³¹ Citing the Supreme Court's explanation of the Full Faith and Credit Clause in *Baker*, as well as the provision in Restatement(Second) of Conflict of Laws section 99 that "[t]he local law of the forum determines the methods by which a judgment of another state is enforced," the Tenth Circuit emphasized that the Full Faith and Credit Clause does not strip states of their ability to enforce their own laws.²³² In other words, if the Oklahoma statute had both prohibited recognition and enforcement, the result would likely have been different.

The Tenth Circuit emphasized the recognition/enforcement distinction when it explained that Oklahoma's argument that it could refuse to recognize the same-sex adoption "conflates Oklahoma's obligation to give full faith and credit to a sister state's judgment with its authority to apply its own state laws in deciding what state-specific rights and responsibilities flow from that judgment."²³³ "If Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children," then the plaintiffs could *not* invoke the Full Faith and Credit Clause to compel Oklahoma to issue a new birth certificate.²³⁴ However, since Oklahoma did have such a statute, and lacked any state law of even-handed application that precluded enforcement of same-sex adoptions, it already had the "necessary mechanism for enforcing" the adoption judgment as requested.²³⁵ Therefore, the plaintiffs were merely asking Oklahoma to apply its own law to their adoption order.²³⁶ The *Finstuen* Court

231. *Id.* (citing *Hood v. McGehee*, 237 U.S. 611, 615 (1915)). In *Hood*, the Supreme Court upheld the right of Alabama to exclude children adopted by proceedings in other states from those upon whom property will devolve by descent. In that case, plaintiffs, who sought a share of their adopted father's estate, were adopted in Louisiana. The decedent's will plainly intended for all his children, including his adopted children, to share equally in the estate. Alabama, however, refused to treat the adopted children as heirs for purposes of the property located in Alabama. *Hood*, 237 U.S. at 614-15.

The Alabama statute of descents . . . excludes children adopted by proceedings in other States. . . . The construction does not deny the effective operation of the Louisiana proceedings but simply reads the Alabama statute as saying that whatever may be the status of the plaintiffs, whatever their relation to the deceased by virtue of what has been done, the law does not devolve his estate upon them. There is no failure to give full credit to the adoption of the plaintiffs, in a provision denying them the right to inherit land in another State.

Id. at 615.

232. *Finstuen*, 496 F.3d at 1153-54.

233. *Id.* at 1153.

234. *Id.* at 1154.

235. *Id.* (quotation marks omitted).

236. *Id.*

explained: “Oklahoma continues to exercise authority over the manner in which adoptive relationships should be enforced in Oklahoma and the rights and obligations in Oklahoma flowing from an adoptive relationship.”²³⁷

A federal district court reached the same result, following the same *Baker* logic, in a very similar case.²³⁸ In *Adar*, the court concluded that Louisiana had to recognize an out of state same-sex adoption even though same-sex adoptions were, by practice but not statute, prohibited in Louisiana.²³⁹ Although Louisiana did not have a statute expressly stating that it refused to recognize out of state same-sex adoptions, its recent constitutional amendment expressly stated that “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”²⁴⁰ As in *Finstuen*, the ban only spoke of the state’s refusal to recognize; it was not a refusal to enforce any same-sex adoption or rights arising from a same-sex relationship.²⁴¹ After discussing the *Baker* distinction between recognition and enforcement, it concluded that Louisiana had to recognize the out of state adoption.²⁴²

Thus, while the full faith and credit obligation may require registration or recognition for purposes of giving preclusive, res judicata effect, it “can only be executed in [another State] as its laws may permit.”²⁴³ Even assuming *Baker* requires a sister state to register (give res judicata effect to) a foreign custody order contrary to that state’s express public policy on a core domestic relations matter,²⁴⁴ the state cannot be required to enforce those orders to any greater extent than they would be enforced in the receiving state.²⁴⁵

To the extent the PKPA is interpreted as requiring enforcement of a child custody order arising out of a same-sex relationship, Congress lacks the authority to require enforcement of such an order.

237. *Id.*

238. *Adar v. Smith*, 591 F. Supp. 2d 857 (E.D. La. 2008).

239. *Id.* at 862.

240. LA. CONST. art. XII, § 15.

241. *Adar*, 591 F. Supp. 2d at 862-64.

242. *Id.* at 861-62 (“Defendant . . . confuses the issues of Louisiana’s obligation to give full faith and credit to a valid out-of-state adoption decree and Louisiana’s right to apply its own laws in deciding what rights flow from that judgment.” (citing *Finstuen*, 496 F.3d at 1153)).

243. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 242 (1998) (quoting *Lynde*, 181 U.S. at 187) (quotation marks omitted).

244. To the extent *Baker* stands for the proposition that a state must give full faith and credit to an order arising from a same-sex relationship, it unconstitutionally infringes upon a matter reserved to the states. *See supra* notes 95, 191-200 and accompanying text (discussing the Tenth Amendment, the Full Faith and Credit Clause, and separation of powers).

245. *Baker*, 522 U.S. at 235, 242.

The U.S. Constitution states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”²⁴⁶ Consistent with that authority, Congress enacted the Full Faith and Credit Act, which explains how a foreign order is authenticated and that, once authenticated, it “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State[s].”²⁴⁷ As discussed, the Supreme Court has explained that full faith and credit obligation requires a state to give the judgment *res judicata* effect but the “time, manner, and mechanisms for enforcing judgments . . . remain subject to the evenhanded control of the forum law.”²⁴⁸ Because the Constitution requires states to give full faith and credit (which means *res judicata*, but not enforcement), and the Constitution only grants Congress the authority to provide the manner in which foreign orders shall be proved for purposes of that full faith and credit obligation,²⁴⁹ Congress lacks constitutional authority to mandate enforcement of foreign orders. Thus, whether a child custody order arising out of a same-sex relationship is enforceable in another state is determined by the evenhanded application of the receiving state’s laws. For those states that evenhandedly refuse to enforce orders arising out of same-sex relationships — whether derived from an in-state or out-of-state order — those states can refuse to enforce a foreign custody order arising out of a same-sex relationship.

C. Relevant Canons of Statutory Construction

Interpreting the PKPA as subject to the exception recognized in DOMA and the enforcement exception is consistent with at least two canons of statutory construction:

It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” A court must therefore interpret the statute as a “coherent regulatory scheme . . .”

. . . .

. . . The “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered

246. U.S. CONST. art. IV, § 1.

247. 28 U.S.C. § 1738 (2006).

248. *Baker*, 522 U.S. at 233, 235.

249. U.S. CONST. art. IV, § 1.

by the implications of a later statute.” This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.²⁵⁰

The legislative history confirms that DOMA, as the later-enacted, more specific statute, carved child custody orders out from a state’s general full faith and credit obligation, as codified in the PKPA.²⁵¹ Prior to the PKPA, child custody orders were not treated as final orders and, therefore, were not afforded full faith and credit.²⁵² From 1980 until 1996, states were required to give full faith and credit to custody orders issued consistently with the requirements of the PKPA.²⁵³ In 1996, Congress expressly carved out a subset of *all* final orders, including child custody orders treated as final orders pursuant to the PKPA, for an exception to the full faith and credit obligation.²⁵⁴ DOMA exempts from the full faith and credit obligation any and all orders arising out of same-sex marriages or same-sex relationships treated as marriage.²⁵⁵ By definition, *some* of the orders that fall within that exception will be child custody orders arising out of same-sex relationships and *some* will be wholly unrelated to child custody matters. Regardless of the subject of the order, if it arises from a same-sex marriage or a same-sex relationship treated as marriage, then DOMA codifies each state’s sovereign right to refuse to give full faith and credit to the order.

A second relevant canon of construction is that courts have a duty to interpret statutes so as to avoid constitutional deficiencies.²⁵⁶ An interpretation of the PKPA that requires Virginia to give full faith and credit to an order declaring a third party to be a parent over the objections of the fit, biological parent, requires Virginia to treat similarly situated same-sex couples differently. A recent Virginia Court

250. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 143 (2000) (citation omitted).

251. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 336-37 (Va. Ct. App. 2006); see *supra* notes 158-63 and accompanying text (explaining that the PKPA is subject to then-existing and later-enacted exceptions to the full faith and credit requirement).

252. *Miller-Jenkins*, 637 S.E.2d at 333-34.

253. *Id.* at 334, 336.

254. 28 U.S.C. § 1738C (2006).

255. *Id.*

256. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (“[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”); *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (“First, as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. Second, if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.”) (citation omitted).

of Appeals decision involving a same-sex custody dispute highlights this issue within Virginia and the dozen or more states that refuse to grant parental rights to third parties over the objections of the sole, fit biological parent.²⁵⁷

Christine Stadter and Jennifer Siperko were in a same-sex relationship from May 1999 until the early summer of 2004.²⁵⁸ On January 10, 2003, Jennifer gave birth to a child.²⁵⁹ Christine did not adopt the child, because she could not in Virginia.²⁶⁰ When the relationship between Christine and Jennifer ended, the child was approximately one and a half years old.²⁶¹ In September 2004, Christine filed in Virginia a petition for visitation, to which Jennifer objected.²⁶² Christine asked the court to grant visitation based on her “asserted status as [the] child’s *de facto* parent.”²⁶³ The Court of Appeals affirmed the lower court’s refusal to grant visitation.²⁶⁴

The court explained that “courts may grant visitation to a non-parent in contravention of a fit parent’s expressed wishes only when justified by a compelling state interest.”²⁶⁵ It went on to state that,

[C]ompelling state interests in the child’s health or welfare will operate to overcome the presumption in favor of a fit biological parent in certain specific circumstances, including where a parent “voluntarily relinquishes” custody and care of a child to a non-parent, or where it has been “established by clear and convincing evidence [that there are] ‘special facts and circumstances . . . constituting an extraordinary reason for taking a child from its parent, or parents.’”²⁶⁶

Finding no such special facts and circumstances, the trial court refused to grant Christine visitation.²⁶⁷

In *Miller*, the court directed Virginia to register as a valid Virginia order a decision that is directly at odds with the holding in *Stadter*.²⁶⁸

257. *Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008); see Lindevaldsen, *supra* note 3, at 7-16 (exploring the Supreme Court’s decision in *Troxel v. Granville*, 530 U.S. 57 (2000), which held unconstitutional a Washington statute allowing any person to sue for visitation over the fit parent’s objection).

258. *Stadter*, 661 S.E.2d at 496.

259. *Id.*

260. *Id.* at 496, 501.

261. *Id.* at 496, 497.

262. *Id.* at 496.

263. *Id.*

264. *Id.* at 501.

265. *Id.* at 497.

266. *Id.* at 498.

267. *Id.* at 497.

268. See *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 72, 180 Vt. 441, 912 A.2d 951 (affirming temporary visitation award to Jenkins despite no finding that Miller was an

In *Miller*, the Vermont courts declared Jenkins a parent without any showing of special facts and circumstances or any consideration whatsoever of the biological parent's wishes.²⁶⁹ Thus, in Virginia, two biological mothers who live less than three hours apart are treated differently. Both women were in a same-sex relationship for five to seven years, both mothers ended their relationship when the child was approximately eighteen months old, and both were Virginia residents at the time the child was born.²⁷⁰ Nevertheless, in one case, the former partner is not entitled to parentage rights because the Virginia courts have held that granting such rights would infringe the biological mother's constitutional rights,²⁷¹ while in the other case, a former partner is entitled to parentage rights pursuant to a foreign order that now must be treated as a valid Virginia order.²⁷² Under these

unfit parent); *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337-38 (Va. Ct. App. 2006) (reversing trial court's decision and instructing that full faith and credit be given to the Vermont court's decision).

269. *Miller-Jenkins*, 2006 VT ¶ 59, 180 Vt. at 466-67, 912 A.2d at 971 ("[Jenkins] was awarded visitation because she is a parent of IMJ. [Miller's] parental rights are not exclusive.").

270. *Stadter*, 661 S.E.2d at 496; *Miller-Jenkins*, 637 S.E.2d at 332.

271. *Stadter*, 661 S.E.2d at 498.

272. *Miller-Jenkins*, 637 S.E.2d at 337. The Virginia decision undermines Virginia's marriage policies in yet another way. The Virginia Court of Appeals stated that [t]his case does not place before us the question whether Virginia recognizes the civil union entered into by the parties in Vermont. Rather, the only question before us is whether, considering the PKPA, Virginia can deny full faith and credit to the orders of the Vermont court regarding [Isabella's] custody and visitation. It cannot.

Id. The J & DR court reached the same conclusion in its January 14, 2009 order. See *supra* note 92 and accompanying text (explaining the J & DR court's order). In other words, the court addressed the child custody order in a vacuum, ignoring the fact that Vermont declared a legal stranger to be Isabella's parent because Isabella's biological mother was in a same-sex civil union with that legal stranger at the time Isabella was born. That analysis, however, elevates form over substance. The substance of the case before the Vermont court was the fact that Jenkins's claim to parentage and custody was inextricably tied to her same-sex civil union with Miller: (i) Jenkins had no claim to parentage under Vermont law but for her civil union relationship with Miller; and (ii) the court's jurisdiction in that case to issue the custody order arose from the pending same-sex civil union dissolution proceeding. The Vermont opinions clearly explained the significance of the underlying civil union to the parentage and custody determinations. See *Miller-Jenkins*, 2006 VT ¶ 56, 180 Vt. at 465, 912 A.2d at 970 ("Many factors are present here that support a conclusion that [Jenkins] is a parent, including, *first and foremost*, that [Jenkins] and [Miller] were in a valid legal union at the time of the child's birth.") (emphasis added); *Miller-Jenkins*, 2006 VT ¶ 56, 180 Vt. at 466, 912 A.2d at 971 ("[T]he couple's legal union at the time of the child's birth is *extremely persuasive* evidence of joint parentage.") (emphasis added); Vermont Parentage Order, *supra* note 73, at 10-11 (adopting a new parentage rule: "where a *legally connected* couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology.") (emphasis added). In addition, the trial court's jurisdiction to issue the temporary custody order was derivative of its jurisdiction to dissolve the same-sex civil union. *Miller-Jenkins*, 2006 VT ¶ 2, 180 Vt. at 445, 912 A.2d at 956.

circumstances, the PKPA, as applied, raises equal protection concerns. In addition, as discussed earlier, to require a state to enforce an order arising from a same-sex relationship in violation of that state's public policy, on a matter preeminently of state concern, would render the PKPA unconstitutional as applied.²⁷³

D. Unconstitutional Orders Cannot Be Given Full Faith and Credit

Another practical reason that the orders in *Miller*, *Charisma R.*, and *A.K.* cannot be registered or enforced is that they are unconstitutional. Neither the Vermont courts (in *Miller*) nor the California courts (in *Charisma R.* and *A.K.*) properly considered the fundamental constitutional rights of a fit parent to direct the upbringing of her child.²⁷⁴ The United States Supreme Court has explained that the right of a parent to direct the upbringing of her child is a fundamental right.²⁷⁵ In *Troxel*, the Court explained that when a court is deciding a third party claim for *visitation*, the constitutional minimum requires that at least "some special weight" be given to the parent's preference.²⁷⁶ On the face of the orders from the Vermont and California courts, no special weight was given to the parent's preference. No constitutional analysis whatsoever was performed prior to declaring a legal stranger to be a parent.²⁷⁷ On their face, therefore, the orders are unconstitutional.²⁷⁸

273. *See supra* notes 247-50 and accompanying text (discussing Congress's lack of authority to require states' enforcement of child custody orders arising from same-sex relationships in other states).

274. In *Miller*, the Vermont Supreme Court dispensed with Lisa's parental rights claim in two sentences: "[Jenkins] was awarded visitation because she is a parent of IMJ. [Miller's] parental rights are not exclusive." 2006 VT 78, ¶ 59, 180 Vt. 441, 912 A.2d 951. Thus, without any constitutional analysis, the court declared Jenkins a parent and gave her constitutional rights equivalent to the biological parent.

275. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

276. *Id.* at 70. *Troxel* involved a question of what weight, if any, should a parent be given when a third party (a grandparent in *Troxel*) seeks visitation. If a parent's fundamental rights dictate that courts perform a constitutional inquiry before a third party can be awarded visitation, the constitutional analysis is even more vital to protect the biological parent's rights when a court considers treating a third party as a parent. *See Lindevaldsen, supra* note 3, at 43-58 (discussing the proper standard to be applied in third party parentage and visitation cases).

277. *See Charisma R. v. Kristina S.*, 44 Cal. Rptr. 3d 332 (Cal. Ct. App. 2006) (deciding on statutory grounds); *Miller-Jenkins*, 2006 VT at ¶¶ 45-47, 180 Vt. at 460-61, 912 A.2d at 966-67 (looking solely at the status of the two women based on their domestic partnership).

278. With respect to those cases where a third party asks to be treated as a parent, any test other than the strict scrutiny analysis to resolve those claims fails to protect a biological or adoptive parent's fundamental constitutional rights. *See, e.g., C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004) ("The question of by what standard a person is determined to be a de facto parent implicates both the fundamental liberty interests of natural and adoptive parents . . ."); *Jones v. Barlow*, 2007 UT 20, ¶ 33, 154 P.3d 808 ("[I]n carving out a permanent role in the child's life for a surrogate parent, this court would necessarily

The full faith and credit obligation cannot logically be interpreted to require a state to register and enforce an unconstitutional order from a sister state.²⁷⁹ For example, no one would question a state court's decision to refuse to give full faith and credit to a court order from a sister state that declared a marriage void solely because it involved an interracial couple.²⁸⁰ It is illogical to suggest that a receiving state, recognizing the unconstitutionality of the sister state's order, must give full faith and credit to the order. The Supreme Court has long held, for example, that "[a] judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction."²⁸¹ The Supreme Court, however, has not yet addressed the question of whether a court order that violates some other federal constitutional guarantee — other than procedural due process — must be given full faith and credit. There can be no federal interest, however, in requiring one state to give full faith and credit to an order that unconstitutionally infringes an individual's substantive rights under the U.S. Constitution.

The decisions in *Miller*, *Charisma R.*, and *A.K.* are unconstitutional for at least two reasons. First, as briefly mentioned above, they unconstitutionally infringe the biological mother's parental rights insofar as they fail to apply, at a minimum, the *Troxel* presumption.²⁸² Second, courts have retroactively applied new parentage rules to declare the former partners to be parents, which infringes the substantive parental rights of the biological parents.²⁸³ While the U.S.

subtract from the legal parent's right to direct the upbringing of her child and expose the child to inevitable conflict between the surrogate and the natural parents."). For a detailed discussion of the rights of fit parents when faced with third party parentage claims, see Lindevaldsen, *supra* note 3, at 43-57.

279. See, e.g., *Starr v. George*, 175 P.3d 50, 57 (Alaska 2008) (refusing to give full faith and credit to tribal council adoption proceeding because due process was denied in the proceedings); *Weidner v. W.G.N.*, 371 N.W.2d 379, 381 (Wis. Ct. App. 1985) (refusing to give full faith and credit to Michigan judgment obtained in violation of equal protection).

280. Cf. *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating race-based classifications relating to who could marry whom); *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidating state law that prohibited certain real estate transactions in order to maintain racially segregated neighborhoods).

281. *Griffin v. Griffin*, 327 U.S. 220, 228 (1946) (citation omitted); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere.") (citation omitted); cf. *Malissa C. v. Wayne H.*, 2008-NMCA-128, ¶ 30, 145 N.M. 22, 193 P.3d 569 ("[T]he UCCJEA by its express terms requires a court faced with a child-custody proceeding pending in another state to determine whether the court in the other state has 'jurisdiction substantially in conformity' with the UCCJEA.") (citation omitted).

282. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 59, 180 Vt. 441, 912 A.2d 951 (declaring the *Troxel* argument to be waived because it was not mentioned during trial and further rejecting the argument because it assumes that Janet is not Isabella's parent).

283. *A.K. v. N.B.*, No. 2070086, 2008 WL 2154098, at *1 (Ala. Ct. App. May 23, 2008), cert. granted, No. 1080440 (Ala. Mar. 11, 2009); *Charisma R. v. Kristina S.*, 44 Cal. Rptr. 3d 332, 337 (Cal. Ct. App. 2006).

Constitution's *ex post facto* clause has been interpreted to prohibit only retroactive application of criminal laws, many states prohibit retroactive application of civil laws.²⁸⁴ Those states recognize that retroactive application of laws that adversely affect substantive or vested rights violates due process guarantees because the due process clause "safeguard[s] . . . interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws."²⁸⁵ Retroactive application of new parentage rules created by the judiciary is equally unconstitutional.²⁸⁶

A decision by the Wisconsin Court of Appeals in a child support case is instructive.²⁸⁷ In that case, W.G.N., who was named as the father of a child in a Michigan paternity suit brought by the mother, settled the action by an agreement approved by a Michigan court in 1978.²⁸⁸ "The agreement, in which W.G.N. acknowledged paternity, provided \$1,000 for confinement and medical expenses of the mother and a lump sum payment of \$3,000 held in trust for the benefit of the child"²⁸⁹ The agreement also provided that all other remedies for support and education of the child are "forever barred."²⁹⁰

In 1983, the mother petitioned a court in Wisconsin for appointment of a guardian ad litem to "initiate a support action on the child's behalf."²⁹¹ After a child support action was filed, W.G.N. argued that

284. For a list of state cases analyzing retroactive civil laws under the Due Process Clause, see, for example, 21st Century Ins. Co. v. Superior Court, 26 Cal. Rptr. 3d 476, 479 n.3 (Cal. Ct. App. 2005); DaimlerChrysler Corp. v. Hurst, 949 So. 2d 279, 285 (Fla. Ct. App. 2007); *In re Marriage of Duggan*, 877 N.E.2d 1140, 1144 (Ill. Ct. App. 2007); *Town of Eunice v. Childs*, 205 So. 2d 897, 900 (La. Ct. App. 1967); *Bereano v. State Ethics Comm'n*, 944 A.2d 538, 547 (Md. 2008); *Town of Eureka v. State Eng'r of Nev.*, 826 P.2d 948, 951 (Nev. 1992); *R.I. Insurers' Insolvency Fund v. Leviton Mfg. Co.*, 716 A.2d 730, 735 (R.I. 1998); see also *Starnes v. Cayouette*, 419 S.E.2d 669, 674-75 (Va. 1992) (protecting both substantive and vested rights from retroactive legislation).

285. *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001).

286. Judicially created parentage definitions also violate the doctrine of separation of powers. See *Jones v. Barlow*, 2007 UT 20, ¶ 35, 154 P.3d 808 ("While the distinction between applying the law to unique situations and engaging in legislation is not always clear, by asking us to recognize a new class of parents, Jones invites this court to overstep its bounds and invade the purview of the legislature."); *Holtzman v. Knott*, 533 N.W.2d 419, 442 (Wis. 1995) (Day, J., concurring and dissenting) ("There is no justification for a court to seek to impose in the name of the law, common or equitable, its own ideas of social policy and a new found theory of family law which creates new 'rights' for those who have no legally binding relationship to the child."); see also *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 835 (Ky. Ct. App. 2008) (chastising lower court for having granted a same-sex adoption in violation of Kentucky law through the "legal fiction" of treating the same-sex partner as a step-parent, explaining that "[t]he function of the Judiciary is to answer the legal question whether 'stepparent-like' adoptions are permitted under Kentucky law. Courts are constitutionally prohibited from addressing the political question, 'Why not?'").

287. *Weidner v. W.G.N.*, 371 N.W.2d 379 (Wis. Ct. App. 1985).

288. *Id.* at 380.

289. *Id.*

290. *Id.*

291. *Id.*

the Michigan agreement barred the action.²⁹² The Wisconsin trial court refused to give full faith and credit to the Michigan agreement.²⁹³ Affirming, the court of appeals explained that the Michigan statute that authorized the settlement agreement in paternity actions was unconstitutional and, therefore, did not require Wisconsin to treat the agreement as valid.²⁹⁴ In particular, the Michigan statute, which authorized agreements in paternity actions that bar future support obligations, is based on illegitimacy — an unwed mother seeking to establish paternity for her child.²⁹⁵ On appeal, the Wisconsin Court of Appeals affirmed the trial court's decision, concluding "that Michigan's classification fails to bear an evident and substantial relation to its state interest."²⁹⁶ Insofar as "[a] judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction[,] [w]e see no reason to accord full faith and credit to a judgment obtained in violation of equal protection."²⁹⁷

In the context of the *Miller-Jenkins* case, both Vermont and Virginia prohibit retroactive application of laws that affect substantive rights.²⁹⁸ Vermont law provides that "[a]cts of the general assembly, except acts regulating practice in court, relating to the competency of witnesses or to amendments of process or pleadings, shall not affect a suit begun or pending at the time of their passage."²⁹⁹ Pursuant to that statute, any legislative act after Miller filed suit in Vermont that created a new rule to determine parentage of a child born via assisted reproductive technology could not be applied to determine parentage of Isabella.

Thus, if the legislature had passed a law during the pendency of Miller's case that was identical to the new rule created by the trial court, it could not be retroactively applied to Miller's case. The same result should apply to judge-made law.³⁰⁰ The rationale underlying

292. *Id.*

293. *Id.*

294. *Id.* at 380-81.

295. *Id.* at 380.

296. *Id.* at 381.

297. *Id.* (citation omitted).

298. VT. STAT. ANN. tit. 1, § 213 (2009) ("Acts of the general assembly, except acts regulating practice in court, relating to the competency of witnesses or to amendments of process or pleadings, shall not affect a suit begun or pending at the time of their passage."); Potomac Hosp. Corp. v. Dillon, 329 S.E.2d 41, 44 (Va. 1985) ("[S]ubstantive and vested rights are included within those interests protected from retroactive application of statutes.") (citation and quotation marks omitted).

299. § 213.

300. See *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) (stating that the ex post facto prohibition applies equally against the judiciary and the legislature); see also *Rogers v. Tennessee*, 532 U.S. 451, 470-74 (2001) (Scalia, J., dissenting) (opining that to

the prohibition of retroactive laws made by the legislature applies equally to judge-made law: the aggrieved individual had no notice or fair warning of the change in the law.³⁰¹ The parties had structured their lives around then-existing laws.³⁰²

The Vermont Parentage Order in Jenkins's favor was based on a new parentage rule created by the court. The court held "that where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology."³⁰³ The court's analysis conceded that prior to the court's decision no law existed to determine parentage of a child born by assisted reproductive technology.³⁰⁴ Prior to the court's decision, a spouse in a marriage or partner in a same-sex civil union would be presumed to be the parent of a child born during the marriage or civil union.³⁰⁵ That presumption could be rebutted with proof of no genetic link to the child.³⁰⁶ Thus, to protect one's status as a parent to a child born by assisted reproductive technology, the non-biological spouse or partner had to adopt the child through second parent adoption procedures.³⁰⁷

the same extent retroactive legislation is unconstitutional, so too are retroactive judicial pronouncements); *Johnson v. State*, 472 A.2d 1311, 1314 (Del. 1983) (determining whether retroactive elimination of a prisoner's good time credits violates ex post facto clause); *Syntex Labs. v. Dep't of Treasury*, 590 N.W.2d 612, 616 (Mich. Ct. App. 1998) (holding that retroactive change in tax laws is permissible in this case although due process forbids retroactive laws from divesting property rights or impairing contracts); *State v. Goebel*, 31 P.3d 340, 344-47 (Mont. 2001) (addressing retroactive application of statute concerning probable cause hearing); *State v. Davlin*, 639 N.W.2d 631, 640 (Neb. 2002) (discussing constitutionality of retroactive application of statute removing malice as an element of second degree murder); *Price v. Beck*, 571 S.E.2d 247, 251 (N.C. App. 2002) (sustaining retroactive application of case law affecting prisoner's parole eligibility); *State v. Bruce*, 170 Ohio App. 3d 92, 2007-Ohio-175, 866 N.E.2d 44, at ¶ 8 (allowing retroactive application of case law that impacted defendant's sentence); *State v. Collins*, 495 S.E.2d 202, 205 n.4 (S.C. 1998) (reversing defendant's conviction for accessory after the fact of murder because of retroactive application of change in required elements); *Chalin v. State*, 645 S.W.2d 265, 268 (Tex. Crim. App. 1982) (reversing defendant's conviction due to retroactive application of changed drug laws); *State v. Hensler*, 415 S.E.2d 885, 887 (W. Va. 1992) (rejecting retroactive application of changes to elements for sexual assault).

301. See *Bowie*, 378 U.S. at 354-55 (explaining that retroactive application eliminates fair warning regarding whether the "contemplated conduct" is legal).

302. See *id.* at 355 (observing that petitioners acted in a manner that was legal at the time).

303. Vermont Parentage Order, *supra* note 73, at 11.

304. *Id.* at 9-10 ("The issue of parental status of a child conceived through artificial insemination is one of first impression in Vermont.").

305. *Id.* at 7-8.

306. See *id.* at 9 (refusing to find that genetics alone could overcome the presumption). *But see* VT. STAT. ANN. tit. 15, § 308 (2009) (creating presumption).

307. Cf. *Titchenal v. Dexter*, 693 A.2d 682, 687-88 (Vt. 1997) (declining to adopt de facto parent or equitable adoption doctrines in case where former partner in a same-sex

Finding that process unrealistic or unworkable, and not wanting to wait any longer for an acceptable legislative response, the court created its own parentage rule.³⁰⁸ Thus, three and one-half years after Isabella's birth in Virginia, eleven months after Miller filed suit in Vermont, and weeks after a Virginia court declared Miller the sole parent to Isabella under Virginia's assisted conception statute, the Vermont trial court created a new parentage test and applied it to the case before it to declare Jenkins a parent.³⁰⁹ That decision retroactively stripped Miller of her substantive parental rights. The PKPA cannot be interpreted to require a state to give full faith and credit to that order.

CONCLUSION

The debate over legal recognition of same-sex relationships has been raging for years,³¹⁰ and will likely continue to do so for years to come. After the Massachusetts Supreme Judicial Court redefined marriage to include same-sex couples,³¹¹ an explosion of litigation began that directly challenged as unconstitutional marriage laws across the country.³¹² A separate battle strategy that garnered little national attention, but which proved more successful, involved

relationship claimed parental status of a child adopted by the other woman during the relationship because plaintiff could have adopted the child to protect her parental status).

308. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 52, 180 Vt. 441, 912 A.2d 951 (“[T]he Legislature has not dealt directly with new reproductive technologies and the families that result from those technologies. Nonetheless, the courts must define and protect the rights and interests of the children that are part of these families.”).

309. *Id.* ¶ 56, 180 Vt. at 465, 912 A.2d at 970.

310. See, e.g., Tim Evans, *Gay Couples' Challenge Reaches Judge; State Seeks Dismissal of Lawsuit Challenging Indiana's Marriage Law*, INDIANAPOLIS STAR, Mar. 31, 2003, at 1A (discussing a case filed in Marion County by the Indiana Civil Liberties Union on behalf of three same-sex couples challenging the state's ban on gay marriage); Rachel S. Garron & David C. Garron, Editorial, *Marriage is a Contract, So Why Not Treat it That Way?*, HARTFORD COURANT, Feb. 16, 2001, at A15 (discussing the national debate about gay marriage); Editorial, *Shotgun Divorce: The House Rushes to Distance Itself from Gay Marriage*, PITTSBURGH POST-GAZETTE, July 17, 1996, at A18 (discussing the passage of DOMA in the U.S. House of Representatives).

311. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963, 969 (Mass. 2003).

312. See, e.g., *Standhardt v. Super. Ct.*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) (finding marriage laws constitutional); *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) (finding marriage laws unconstitutional); *Kerrigan v. Dep't of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (finding civil union statute unconstitutional); *O'Kelley v. Perdue*, 632 S.E.2d 110, 113 (Ga. 2006) (finding marriage laws constitutional); *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005) (finding marriage laws constitutional); *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (finding marriage laws constitutional); *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006) (finding marriage laws unconstitutional); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006) (finding marriage laws constitutional); *Andersen v. King County*, 138 P.3d 963, 1010 (Wash. 2006) (finding marriage laws constitutional); see also *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (upholding constitutionality of DOMA).

indirect assaults on the states' marriage laws. Thus, litigation took place around the country that sought court orders either permitting same-sex couples to adopt,³¹³ or declaring legal strangers to be parents to their former partners' biological children.³¹⁴ Armed with an order conferring parental rights, one or both of the parties then sought to export those orders to states that expressly prohibited recognition or enforcement of same-sex relationships.³¹⁵ Thus, as the *Miller-Jenkins* litigation demonstrates, Vermont's decision to fundamentally redefine marriage and parentage was exported to Virginia by means of the full faith and credit obligation, despite Virginia's express prohibition in its statutes and Constitution against recognition or enforcement of any orders arising from same-sex relationships.³¹⁶ Unless the PKPA, DOMA, and Full Faith and Credit Act are interpreted as set forth in this Article, core domestic relations matters will, in essence, be federalized.

Not only is this sort of federalization of domestic relations laws inconsistent with Article IV, Section 1 of the U.S. Constitution, but it poses an immediate threat to the very concept of liberty on which this nation is founded. The founders of this nation knew the dangers of concentrating too much power in the centralized government and purposefully created a federal government of limited, enumerated powers:

This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." . . . "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."³¹⁷

313. *See, e.g.,* *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (upholding Florida's ban on homosexual adoption); *see also* *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (declaring unconstitutional an Oklahoma statute that denied recognition of same-sex adoptions).

314. *See* *Lindevaldsen*, *supra* note 3, at nn.107-08 and accompanying text (listing cases decided in more than twenty-five states involving claims to visitation, custody, or parentage rights on behalf of third parties).

315. *Id.*

316. *See* VA. CONST. art. I, § 15-A (defining marriage as only a union between a man and a woman); VA. CODE ANN. §§ 20-45.2 to .3 (2008) (prohibiting same-sex marriage and civil unions).

317. *Printz v. U.S.*, 521 U.S. 898, 921-22 (1997) (citations omitted); *see also* *U.S. v. Lopez*, 514 U.S. 549, 552 (1995) ("This constitutionally mandated division of authority

A proper understanding of federalism requires us to remember that, as a nation made up of fifty individual states, there are constitutional limitations on the scope of the federal government's powers:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.³¹⁸

Because “[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,”³¹⁹ the federal government has no authority, through an unconstitutional application of the full faith and credit obligation, to reduce the domestic relations policy of each of the fifty states to that of a small handful of states that has chosen to experiment with the father-mother parentage paradigm. Unfortunately, the first state in the nation to have addressed the full faith and credit issue improperly ceded its state control over domestic relations matters to Vermont and the federal government.

‘was adopted by the Framers to ensure protection of our fundamental liberties.’ ‘Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.’”) (citations omitted).

318. THE FEDERALIST NO. 45, at 289 (James Madison) (Signet Classic ed., 2003).

319. *Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992).