THE BIRTH CERTIFICATE SOLUTION: ENSURING THE INTERSTATE RECOGNITION OF SAME-SEX PARENTAGE

ANNA MARIE D’GINTO†

In the celebrated decision of Obergefell v. Hodges, the Supreme Court held that same-sex couples have a constitutional right to marry that cannot be infringed by state law bans on marriage equality. Post-Obergefell, states around the country are grappling with what the mandate means for parentage and how their family law regimes should be adjusted in light of the increasing diversity in today’s family structures. Variation in whether states presume both partners in a same-sex relationship to be the legal parents of their child and, if not, whether a second-parent adoption is available to establish the parentage of the nonbiological parent implicates significant uncertainty for these couples. Entitling the parentage of same-sex couples as reflected in the birth certificate of the child to interstate recognition on the basis that the birth certificate is a "record" within the ambit of the Full Faith and Credit Clause would provide greater protection of their legal status. The birth certificate solution is both easily implementable and doctrinally supportable in light of various principles reflected in the Supreme Court’s recent family law jurisprudence. The interests at stake are significant for both the same-sex couple and their child, and entitling the parentage listed in the birth certificate to full faith and credit recognition would provide greater immediate protection to the legal status of these couples.

† Executive Editor, Volume 167, University of Pennsylvania Law Review; J.D., 2019, University of Pennsylvania Law School; B.A., 2016, Lehigh University.
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INTRODUCTION

Meet Pam and Sue, a married lesbian couple living in Washington, D.C. Desiring to start a family of their own, Pam conceives and gives birth to a child. At the hospital on the day of the birth, the hospital nurse records the names of both Pam and Sue on the child's birth certificate as parents. Pam and Sue intend for Sue to function as the child's other parent, a second mother. Assuming that Pam's egg is used, Sue will bear no biological

1 In a traditional surrogacy arrangement, the egg belongs to the female who carries the child to term. Scientific advances, principally in vitro fertilization, have enabled an alternative form of
connection to the child. Therefore, traditionally Sue would be considered a legal stranger vis-à-vis the child, with no right to custody or any of the other benefits attendant with valid parental status.2

However, because Pam and Sue are domiciled in Washington, D.C., Sue’s parentage will be recognized by virtue of her marital relationship with Pam, the child’s birth mother.3 To conclusively protect Sue’s status, Pam and Sue could pursue a second-parent adoption. However, there are myriad reasons why a same-sex couple may choose not to pursue adoption to formalize the status of the nonbiological parent, including barriers to access, unavailability of adoption, and the requirement that an adequate amount of time pass to allow the applicant to display conduct entitling her to parental status.4

In the absence of adoption, if Pam, Sue, and their child travel outside of D.C., Sue’s parentage will become insecure because there is no formal recognition of her status under current law.5 Therefore, if the family wishes to make a short trip to Delaware, Sue’s parental status, which is based on the operation of D.C.’s marital presumption provision, will be in jeopardy and even susceptible to rejection.


3 See D.C. CODE § 16-909(a-1)(2) (2016) (“There shall be a presumption that a woman is the mother of a child if she and the child’s mother are . . . married . . . at the time of either conception or birth . . . and the child is born during the marriage . . . .”).

4 See infra notes 79–83 and accompanying text (discussing the insufficiencies of second-parent adoption as a complete solution to the recognition problem faced by same-sex couples).

5 At present, in the absence of a formalized decree or judgment entitled to protection under the Full Faith and Credit Clause, the status of Sue’s parentage is uncertain. See infra Part II.

6 See DEL. CODE ANN. tit. 13, § 8-204 (2018) (“A man is presumed to be the father of a child if . . . [h]e and the mother of the child are married to each other and the child is born during the marriage . . . .”). Delaware’s use of gendered terms in its formulation of the marital presumption means that, on its terms, the marital presumption does not extend to same-sex couples because it is biologically impossible for a lesbian woman to father her partner’s child. While same-sex couples have had success in challenging marital presumptions using gendered terms on the theory that the failure to extend the presumption to same-sex couples constitutes a denial of equal protection in violation of the Fourteenth Amendment, there has been no challenge in Delaware, so at present, Sue’s legal status is insecure. Even if it is assumed that an equal protection challenge would be
Ambiguity regarding the validity of parental status also may arise in the event of dissolution of the same-sex partnership. Suppose that, after five years of coparenting in D.C., Pam and Sue terminate their relationship and Pam moves to Delaware. Now, Sue’s ability to maintain standing as a parent to sue for custody is in question because the basis for her parental status (i.e., her marital relationship to the child’s biological mother) has been terminated. In this circumstance, it is not unprecedented for the legal parent to use her partner’s lack of a legal connection to argue that the nonbiological parent should not have any custody rights to the child, an argument that has been met with varying degrees of success.

Finally, the validity of Sue’s parental status as reflected in the birth certificate may be relevant if Pam passes away because, as a nonlegal parent, Sue will not automatically be entitled to physical custody or decisionmaking rights with respect to the child’s upbringing. In this scenario, it is especially crucial for Sue’s legal status to be certain because the child is already grieving the loss of one parent.7

The unsettled nature of Sue’s parental status is a question that looms large for hypothetical Pam and Sue, along with thousands of couples facing similar situations across the country. The answer to the uncertainty is complicated by a patchwork of state family law regimes spawned by the Supreme Court’s landmark decisions in Obergefell v. Hodges8 and Pavan v. Smith.9 States differ significantly in their positions on whether both partners in a same-sex relationship are presumed to be the child’s legal parents, and, if not, whether a second-parent adoption is available to establish the parentage of the nonbiological parent, thus leading to great ambiguity.

While the Full Faith and Credit Clause provides some protection against these uncertainties, it does not, at present, adequately solve the problem in every situation. The law is not clear on the extent to which a parentage arrangement that is neither formalized in a litigated custody order nor an adoption decree is entitled to interstate recognition. As a result, same-sex

7 See, e.g., Suzanne Bryant, Second Parent Adoption: A Model Brief, 2 DUKE J. GENDER L. & POL’Y 233, 240 (1995) (describing a situation in which a nonbiological lesbian partner was ultimately deemed a parent of her deceased partner’s child, though this outcome was reached only after months of litigation, during which time the child was forced to bounce between the homes of her grandparents and her aunt).
8 135 S. Ct. 2584 (2015); see also Leslie Joan Harris, Obergefell’s Ambiguous Impact on Legal Parentage, 92 CHI.-KENT L. REV. 85, 81 (2017) (discussing the difficulties that same-sex couples continue to face post-Obergefell).
couples face a legal environment in which there is “volatile uncertainty regarding the portability of parental rights . . . from state to state.”

This Comment proposes entitling the parentage of same-sex parents as reflected in the birth certificate of the child to full faith and credit recognition on the basis that a birth certificate is a “record” within the ambit of the clause. The practicality of this solution is tied to the Supreme Court’s recent decision in \textit{Pavan v. Smith}, which held that the state-granted right of the marital partner of a woman who conceives a child through artificial insemination to be listed as a parent on the child’s birth certificate must be extended equally to same-sex couples. Because the vast majority of states have analogous statutes or judicial decisions requiring the marital partner of a woman who conceives through artificial insemination to be treated as the child’s other parent (despite the undisputed lack of a biological connection), and because \textit{Pavan} mandates that this guarantee be extended to same-sex couples, entitling birth certificates to full faith and credit recognition would provide greater

\begin{footnotesize}
\begin{enumerate}[label=\textit{\roman*}]
\item KAREN MOULDING, \textit{SEXUAL ORIENTATION AND THE LAW} § 1.24 (West 2010).
\item 137 S. Ct. at 2079.
\item See, e.g., CAL. FAM. CODE § 7613(a)(1) (West 2017) (“If a woman conceives through assisted reproduction . . . with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent . . . .”); IDAHO CODE ANN. § 39-5405(3) (2018) (“The . . . rights . . . [of] the mother’s husband shall be the same for all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother’s husband, if the husband consented to the performance of artificial insemination.”); MASS. GEN. LAWS ch. 46, § 4B (2017) (“Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be the legitimate child of the mother and such husband.”); New Mexico Uniform Parentage Act, N.M. STAT. ANN. §40-11A-703 (2019) (“A person who . . . consents to assisted reproduction as provided in Section 7-704 . . . with the intent to be the parent of a child is a parent of the resulting child.”); N.Y. DOM. REL. LAW § 73(1) (McKinney 2008) (“Any child born to a married woman by means of artificial insemination . . . and with the consent in writing of the woman and her husband, shall be deemed the legitimate child of the husband and his wife for all purposes.”); see also Nancy D. Polikoff, \textit{A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century}, 5 STAN. J. C.R. & C.L. 201, 234-35 (2009) (summarizing the special artificial insemination rule, whereby the husband of a married woman who conceives using donor sperm is presumed to be the father so long as he consented to the insemination procedure, and noting that more than half of the states have a statute to this effect).
\item See, e.g., Carson v. Heigel, No. 3:16-0045, 2017 U.S. Dist. LEXIS 2104, at *6 (D.S.C. Feb. 15, 2017) (opining that a nonbiological parent’s Fourteenth Amendment rights were infringed upon by the state’s refusal to list her as a second parent on the child’s birth certificate); Torres v. Seemeyer, 207 F. Supp. 3d 905, 913 (W.D. Wis. 2016) (holding that Wisconsin’s artificial insemination statute must be “appl[ied] . . . to female couples and different-sex couples equally”); Waters v. Ricketts, 159 F. Supp. 3d 992, 1001 (D. Neb. 2016) (concluding that under Obergefell, state officials must “treat same-sex couples the same as different-sex couples” in the context of birth certificate issuance); Gardenour v. Bondelie, 60 N.E.3d 1109, 1119 (Ind. Ct. App. 2016) (applying the judicially developed artificial insemination consent rule to protect the parentage of a nonbiological same-sex parent).
\end{enumerate}
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protection to same-sex parentage. As long as parental status is reflected in the birth certificate, the couple can expect interstate recognition of their status.

By exploring the intersection of the "records" prong of the Full Faith and Credit Clause and the jurisprudence of birth certificates, this Comment seeks to elucidate one way in which the parentage of same-sex couples can be equalized to that of opposite-sex couples. Part I overviews the current landscape of family law across the United States, discussing four of the major areas in which state policies diverge and describing the inadequacies of existing solutions to protect parentage. Part II analyzes birth certificates under the doctrinal full faith and credit framework, resolving that birth certificates most naturally fit within the "records" category but concluding that the proper treatment of records is unclear due to jurisprudential ambiguity. Part III discusses why birth certificates should be entitled to a higher level of deference under the Full Faith and Credit Clause and explains how judicially developed limitations do not undermine the feasibility of this solution. A brief conclusion follows.

I. REVIEW OF CURRENT LANDSCAPE

Before considering the practicality of the birth certificate solution, it is necessary to understand the differences in parentage law across the United States and how the uneven legal landscape affects same-sex couples.

A. Overview of Differences in State Policy Leading to the Full Faith and Credit Problem

Given the vast diversity in the codification of family law, clashes between various states’ policy choices inevitably arise. Because “[t]he regulation of domestic relations is traditionally the domain of state law,” family law legislation is an area where states can fully express the policy preferences of their citizenry. Indeed, this is an area where states make different, and sometimes diverging, policy choices. The potential for variation between states on various aspects of family law presents a potentially enormous problem for same-sex parents. This concern manifests in the possibility that a nonbiological, nonadoptive functional parent’s parental status, recognized in their state of domicile, may be denied in another jurisdiction whose laws do not accord the individual parent status.

With recent recognition of the uncertainty encountered by same-sex individuals seeking to establish their parentage under laws that were

formulated primarily with heterosexual couples in mind, many states are grappling with this thorny problem and attempting to provide either legislative or judicial clarity. Other states have not caught up with the problem, or have made a different policy choice. This disparity in treatment of the law of parentage creates critical uncertainty because without valid parental status, the parent will not have a legal right to “make health care decisions for the child, including emergency or end of life decisions . . . control schooling and education; consent to testing, immunizations, or psychological exams; or have the child excused for religious observances or released into her custody by law enforcement officers.” This Part will first briefly review the law on the marital presumption, surrogacy, de facto parenthood, and second-parent adoption, which are four of the key areas where state policies significantly diverge, and then summarize proposed and existing solutions, explaining why they are inadequate to solve the immediate recognition problem faced by same-sex couples.

1. Marital Presumption and Presumptive Parentage Generally

First, the longstanding marital presumption provides that the spouse of a woman who gives birth to a child during the course of the marriage is conclusively presumed to be the parent of the resulting child. The traditional formulation provided a presumption of paternity for the mother’s husband, based on a desire to both combat the stigma associated

15 See e.g., Gartner v. Iowa Dep’t of Pub. Health, 830 N.W.2d 335, 345 n.1 (Iowa 2013) (collecting statutes that define the marital presumption in gendered terms); see also Ailsa Chang, Same-Sex Spouses Turn to Adoption to Protect Parental Rights, NPR (Sept. 22, 2017, 4:45 PM), https://www.npr.org/2017/09/22/558447916/same-sex-spouses-turn-to-adoption-to-protect-parental-rights [https://perma.cc/2HRB-YSWA] (quoting an experienced family law attorney for the proposition that “[o]ur law is based on heterosexual, patriarchal circumstances”).

16 See, e.g., Assemb. 2684, 2017–2018 Leg., Reg Sess. (Cal. 2018) (stating that the impetus for an update to the family law was a desire to “[e]nsure that the parentage provisions of the Family Code treat same-sex parents equally, including the conclusive marital presumption of parentage”).

17 See, e.g., Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498-99 (N.Y. 2016) (noting that “[u]nder the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child” and exploring ways to formulate a proper test that “ensures equality for same-sex parents”).


20 See Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (confirming that California’s irrefutable marital presumption was constitutional and therefore rejecting the biological father’s Fourteenth Amendment objections to the statute).

21 See supra note 12 (referencing a collection of marital presumption provisions that use gender-specific language).
with illegitimacy and promote the familial unit. With the success of the marriage equality movement and shift in public opinion, courts and legislatures have begun to experiment with extending the presumption to same-sex couples, resulting in a presumption of parentage for the nonbiological lesbian partner for a child born during a marriage. This presumption is extended to the mother’s marital partner, despite the lack of a biological connection, because she is the intended parent of the child born during the marriage and will function as the child's parent. Unlike the traditional presumption, where the protected husband could plausibly be the genetic father of the child, the presumption as applied to a same-sex couple reflects a policy determination regarding who should get to be a parent, notwithstanding biological reality.

Three important advances in the law of marital presumption have facilitated application to same-sex couples in some states. First, a minority of legislatures are reformulating marital presumption provisions explicitly with same-sex lesbian couples in mind, using language directly tied to their circumstances. Second, some legislatures are formulating their marital presumptions using gender-neutral language, supporting application in the same-sex context. Third, courts increasingly interpret traditional marital presumptions that either use gendered terminology or reference a "natural"

22 The marital presumption is more naturally applied to same-sex female couples than same-sex male couples for a few reasons. First, when a lesbian couple conceives a child, generally a sperm bank will act as an intermediary, requiring the donor to sign a contract extinguishing his rights. With the donor’s parental rights eliminated by virtue of the contract he signed, the marital presumption can easily be applied to establish the legal parentage of both lesbian partners because there is no potential third parent in the picture. Second, the traditional marital presumption is sex specific, in that it applies to the spouse (whether male or female) of the birth mother of the child, so the presumption would seem to have no applicability to same-sex male couples (who cannot give birth). In fact, applying the traditional marital presumption to a same-sex male couple would not only be ineffective; it would hurt them because it would favor the husband of the surrogate, so long as he consented to his wife's insemination. In summary, the marital presumption as applied to gay male couples is unworkable as currently formulated. This is one of the many unique challenges faced by same-sex male couples in establishing parentage, but this Comment will focus on the marital presumption as applied to same-sex female couples.

23 See, e.g., D.C. CODE § 16-909(a-1)(2) (2016) ("There shall be a presumption that a woman is the mother of a child if she and the child's mother are . . . married . . . at the time of either conception or birth . . . and the child is born during the marriage . . . ").

24 See, e.g., ARK. CODE ANN. § 28-9-209(a)(2) (2018) ("A child born or conceived during a marriage is presumed to be the legitimate child of both spouses . . . "); N.Y. DOM. REL. LAW § 24(1) (McKinney 201) ("A child . . . born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage . . . is the legitimate child of both birth parents . . . "); WASH. REV. CODE § 26.26.166(3)(a) (2018) ("In the context of a marriage or a domestic partnership, a person is presumed to be the parent of a child if . . . [t]he person and the mother or father of the child are married to each other . . . and the child is born during the marriage . . . ").
parent to require extension to same-sex couples in order to satisfy constitutional guarantees of equal protection.\(^{25}\)

Additionally, a special form of the marital presumption rule has become increasingly common and is critical to the parentage of same-sex couples. This variation of the rule provides that when a woman conceives a child through assisted reproduction techniques, her marital partner, who will not bear any genetic connection to the child, is a parent so long as she consented to the procedure.\(^{26}\) This type of rule can be used by a same-sex couple to establish parenthood, although courts have refused to apply it where the statutorily enumerated procedures were not followed. For example, in New Jersey a lesbian couple conceived two children through alternative (as opposed to artificial) insemination, and despite the fact that both fathers initially signed contracts relinquishing their paternity rights, two family courts in New Jersey granted visitation to the respective fathers on grounds that the artificial insemination agreement was not enforceable since the proper statutory process was not followed.\(^{27}\) This meant that the

\(^{25}\) See, e.g., McLaughlin v. Jones, 401 P.3d 492, 498 (Ariz. 2017) (holding that under Obergefell and Pavan, a state statute providing presumption of parentage for a father, but not a second mother, violated the Equal Protection Clause because “[t]he marital paternity presumption is a benefit of marriage, [and] the state cannot deny same-sex spouses the same benefits afforded opposite-sex couples”), cert. denied sub nom. McLaughlin v. McLaughlin, 138 S. Ct. 1165 (2018); Gartner v. Iowa Dep’t of Pub. Health, 830 N.W.2d 335, 352, 354 (Iowa 2013) (mandating extension of the gender-specific marital presumption, which presumed the parentage of the husband of the birth mother, on the grounds that the differential treatment was not supported by a substantial interest and therefore failed intermediate scrutiny); In re Parental Responsibilities of A.R.L., 318 P.3d 581, 586 (Colo. 2013) (interpreting a gendered marital presumption provision to apply equally to same-sex couples based on a separate statutory provision mandating that the terms “father” and “mother” be used interchangeably); see also Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689 (2017) (noting that “[l]aws granting or denying benefits ‘on the basis of the sex of the qualifying parent’ . . . differentiate on the basis of gender, and therefore attract heightened review under the Constitution’s equal protection guarantee”). At the same time, not all courts are willing to apply a gendered marital presumption to a same-sex couple. See, e.g., Paczkowski v. Paczkowski, 128 N.Y.S.3d 270, 271 (App. Div. 2015) (concluding that a nongestational same-sex spouse was not presumed a parent because she lacked a “biological relationship” to the child).

\(^{26}\) See supra notes 12–13 and accompanying text; see also UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM’N, Draft 2002) (“An individual who consents . . . to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.”). A minority of jurisdictions presume consent of the husband. See, e.g., MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2019) (“A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed.”).

\(^{27}\) Andy Polhamus, N.J. Gay Couple’s Custody Battle with Sperm Donor Could Set Precedent, NJ.COM (Feb. 9, 2015, 8:00 AM), http://www.nj.com/gloucester-county/index.ssf/2015/02/nj_gay_couple_in_custody_battle_with_sperm_donor.html [https://perma.cc/6TYK-NRKJ]. Not all states take this strict compliance approach. See, e.g., Torres v. Seemeyer, 207 F.Supp.3d 905, 912 (W.D. Wis. 2016) (holding that where, despite nonconformance with requirements in the artificial insemination provision, a state provides a presumption of parentage for the
nonbiological lesbian mothers were not entitled to take advantage of
the artificial insemination marital presumption rule, because the respective
fathers were adjudicated as parents, leaving no room for a third parent.
Notwithstanding the possibility of rejection of parental status if the
statutory procedures for invocation of the artificial insemination marital
presumption are not followed, the existence of these provisions is crucial for
ensuring respect for the same-sex family, as exemplified by Pavan.

While promising, the foregoing developments in the extension of the
marital presumption do not wholly solve the full faith and credit problem
for same-sex couples because the laws across the states are not uniform. As
long as the family remains intact, their parentage as recognized under the
forum’s law will not be memorialized in a formal judgment, absent a second-
parent adoption. Thus, there is no guarantee that the nonbiological parent’s
status will be recognized by other jurisdictions who have not judicially or
legislatively applied the marital presumption to same-sex couples.

2. Surrogacy

Second, states differ significantly in the policy choices they make
regarding the parentage of various actors in the context of surrogacy. A
surrogacy contract will only provide limited protection to the legal status of
the intended, same-sex parents because of the significant variety in state
policy on surrogacy across the country. Only two jurisdictions, Michigan and
New York, continue to affirmatively penalize compensated surrogacy.28
Instead, in most jurisdictions, surrogacy is a matter of unenforceability.29
A sampling of state policies in the minority of jurisdictions that have provided

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28 See MICH. COMP. LAWS § 722.859(9) (2017) (punishing participants in a compensated surrogacy
arrangement with a $10,000 fine and imprisonment and providing that anyone who
“induces, arranges, procures, or otherwise assists” in a compensated surrogacy arrangement is
culpable of a felony, punishable by a $50,000 fine and up to five years in prison); N.Y. DOM. REL.
LAW § 123 (McKinney 2018) (penalizing compensated surrogacy with a fine of up to $500 and a
civil penalty of $10,000 for anyone who assists in the arrangement).

29 The two frequently cited model acts that deal with surrogacy arrangements similarly
permit both traditional and gestational surrogacy agreements but highly regulate the practice and
limit the circumstances in which these agreements are enforceable. See UNIF. PARENTAGE ACT
§§ 802–805; MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (AM. BAR
ASS’N, Proposed Draft 2008). Principles of traditional contract law may also be employed to
invalidate a surrogacy contract. See Margaret D. Townsend, Surrogate Mother Agreements:
Contemporary Legal Aspects of a Biblical Notion, 16 U. RICH. L. REV. 467, 469 (1982) (explaining
how the Restatement’s illegal bargain provision, which invalidates agreements that are “criminal,
tortious or otherwise opposed to public policy,” has been employed to challenge surrogacy
arrangements on the theory that they “involve the crime of adultery, violate adoption laws,
circumvent artificial insemination statutes, or offend the [T]hirteenth [A]mendment”).
legislative or judicial clarity on the extent to which surrogacy is unenforceable include: completely voiding traditional but recognizing gestational surrogacy agreements (North Dakota\textsuperscript{30} and Kentucky\textsuperscript{31}); generally allowing both traditional and gestational surrogacy contracts so long as there is no provision of compensation (Washington\textsuperscript{32} and New Jersey\textsuperscript{33}); having completely separate regulations and procedures depending on whether traditional or gestational surrogacy is used (Florida\textsuperscript{34}); and allowing for surrogacy contracts in certain situations but explicating a specific multistep process that must be followed to obtain judicial preapproval (Virginia\textsuperscript{35}). The lack of legislative clarity on the status of surrogacy contracts in the majority of states has required courts to confront this issue and develop ad hoc procedures looking to various factors, including the intent of the parties\textsuperscript{36} and other statutory provisions that help illuminate the legality of surrogacy contracts,\textsuperscript{37} to determine who is a legal parent.

To the extent that surrogacy issues arise regarding the validity and enforceability of the parties’ arrangement, they are a function of both our fifty-state system of law and the frequency with which people move from state to state. In the event of a clash between the laws of two jurisdictions, the issue of whose law should be applied is addressed by a discipline called conflict of laws.\textsuperscript{38}
Generally, conflict of laws doctrine, rather than full faith and credit, predominates in resolving questions regarding the validity of surrogacy arrangements.

While the role of the Full Faith and Credit Clause is more limited in the surrogacy context, it may become important if the parties have a court order or judgment memorializing the terms of their surrogacy agreement. California is one of the few jurisdictions that provides a process by which intended parents to a surrogacy agreement can establish their parentage with a judgment prior to the birth of the child.39 When such a judgment or order is obtained, there may be an issue of the credit to which it is entitled if the surrogate moves to another jurisdiction where surrogacy agreements are prohibited. This fact pattern arose in a recent New York case, where a family court magistrate validated a California paternity judgment recognizing the parentage of two gay males pursuant to the Full Faith and Credit Clause, despite the fact that New York's public policy explicitly renders surrogacy contracts unenforceable (and is one of the few jurisdictions that penalize the practice).40 On similar facts, a Texas court held that full faith and credit mandated the recognition of a parentage judgment issued to a gay male couple in California who had a child through surrogacy.41 In summary, same-sex couples may face uncertainty because states differ significantly in the policy choices they make regarding the parentage of various actors in the surrogacy context and the enforceability of surrogacy contracts to the extent that full faith and credit issues arise.

39 See CAL. FAM. CODE § 7682 (West 2018) (explicating the process whereby intended parents in a gestational surrogacy arrangement can file an assisted reproduction agreement and obtain a judgment or order establishing a parent–child relationship).


3. De Facto Parenthood

Third, some jurisdictions provide for parentage based on functional conduct, making parental status completely independent of either marriage or biological participation in the conception of the child. De facto parentage is an equitable doctrine that grants flexibility to the trial court in evaluating which actors have exhibited concern, affection, and care for the child, allowing them to demonstrate the parental role they hold through their actions.\(^{42}\)

For example, Delaware's recently codified de facto parentage statute provides a de facto parent legal status equivalent to that of the birth mother or one who adopts the child.\(^{43}\) The power of a de facto parenthood regime to protect the parentage of a same-sex couple is exemplified by the Delaware decision that revolutionized this change in the law. In *Smith v. Gordon*,\(^{44}\) the Delaware Supreme Court denied standing to a nonlegal parent who sought custody of her former same-sex partner's adoptive child.\(^{45}\) The unmarried same-sex partners had jointly raised the child for over a year, and the nonlegal parent provided medical benefits. Nonetheless, the Delaware Supreme Court refused to recognize her functional parental status, reasoning that because she was not a legal parent as defined by the Delaware Code, she lacked standing to petition for custody.\(^{46}\) This outcome prompted criticism,\(^{47}\) and the Delaware legislature enacted an amendment to the statutory definition of "parent" that expressly included the de facto parent. Retroactively applying the new de facto parent provision, the Delaware Supreme Court subsequently granted the nonlegal parent in *Gordon* joint custody of the child.\(^{48}\) In addition to Delaware, Indiana\(^{49}\) and the District of


\(^{43}\) See Delaware Code Ann. tit. 13, § 8-201(c) (2019) (providing that to be considered a de facto parent, an individual must (1) have the support and consent of the child's parent; (2) have exercised parental responsibility for the child; and (3) have acted as a parent for an amount of time sufficient for the child to have bonded with and depended on the individual seeking de facto parent status).

\(^{44}\) 968 A.3d 1 (Del. 2009).

\(^{45}\) Id. at 2-3.

\(^{46}\) Id. at 16.

\(^{47}\) See, e.g., Nancy Polikoff, *Delaware Got It Wrong: This Child Has Two Mothers*, BEYOND (STRAIGHT AND GAY) MARRIAGE (Feb. 11, 2009), http://beyondstraightandgymarriage.blogspot.com/2009/02/delaware-got-it-wrong-this-child-has.html [https://perma.cc/TUN4-ZTR4] (criticizing the Gordon holding and suggesting a legislative solution).

\(^{48}\) Smith v. Guest, 16 A.3d 920, 936 (Del. 2011).

\(^{49}\) IND. CODE § 31-9-2-35.5 (2018) (defining "de facto custodian" as one who has been the primary caregiver for, and financial support of, a child who the person has resided with for a required minimum period).
Columbia have codified the de facto parenthood doctrine legislatively, and many others have adopted it judicially. The related “holding out” doctrine provides that one who “holds out” a child as his own and establishes a personal, financial, or custodial relationship with the child is presumed to be a parent, with the attendant rights and obligations. To the extent that the de facto and holding out doctrines are available as a means to demonstrate parentage, they create another avenue for same-sex parents to establish their legal-parent status and have been successfully invoked by same-sex couples.

Although many states accept the de facto parent and related functional parenting doctrines, nearly half of the states reject these theories. Additionally, utilization of intended parent concepts requires the passage of time and expense of litigation. Therefore, although the states are trending toward recognizing the legal status of a functional, intended parent,

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50 D.C. CODE § 16-831.03 (2019) (providing that a de facto parent has standing to seek custody).
51 See, e.g., Conover v. Conover, 146 A.3d 433, 451 (Md. 2016) (recognizing, unanimously, the de facto parent doctrine and overturning a longstanding precedent that considered de facto status to be insufficient to establish standing); In re Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) (holding that a de facto parent stands in legal parity with a legal parent); A.H. v. M.P., 857 N.E.2d 1061, 1070 (Mass. 2006) (defining “de facto parent” and clarifying that one who holds this status is a legal parent); In re Custody of H.S.H.-K., 533 N.W.2d 419, 435-36 (Wis. 1995) (adopter a four-part test to maintain standing as a de facto parent); see also Harris, supra note 8, at 61 (noting that “eighteen [states] have cases that recognize a relationship called ‘de facto parent,’ ‘psychological parent,’ or person standing ‘in loco parentis’”).
52 See UNIF. PARENTAGE ACT §§ 201(b)(1), 204(a)(5) (UNIF. LAW COMM’N amended 2002) (providing that a man who resides in the same home as the child for the first two years of his life and takes the child into his home and/or holds out the child as his own is rebuttably presumed to be the father).
53 See, e.g., Chatterjee v. King, 280 P.3d 183, 288, 297 (N.M. 2012) (finding that the same-sex partner of the adoptive parent of a child was entitled to a presumption of parentage based on the holding out provision of the jurisdiction’s parental presumption and therefore holding that she had standing to petition for custody as a natural mother); Elisa B. v. Superior Court, 117 P.3d 660, 669-70 (Cal. 2005) (upholding an order imposing a child support obligation on a woman who supported her partner’s artificial insemination and held the resulting child out as her own but later disclaimed financial responsibility for the child).
54 See, e.g., Partanen v. Gallagher, 59 N.E.3d 113, 118 (Mass. 2016) (holding that a former same-sex partner who sought to establish legal parenthood of the children born to her former partner during the course of their relationship was entitled to do so, despite the lack of a biological connection, because she had openly held out the children as her own and jointly received them into her home).
55 See De Facto Parenting Statutes, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/de_facto_parenting_statutes [https://perma.cc/9XZZ-M3GE] (mapping thirty states that recognize de facto parenthood in some form, six states that do not recognize de facto parent status, and fourteen states that are ambivalent on the question); see also Harris, supra note 8, at 66 (“While the de facto parent doctrine and related theories protect functional parent–child relationships where they are recognized, they have not been adopted in almost half the states.”).
56 See, e.g., Partanen, 59 N.E.3d at 1142 (recognizing a nonbiological parent’s status where she was an active participant in her partner’s pregnancy and openly held out the children as her own); Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 500 (N.Y. 2016) (rejecting the longstanding Allison
despite a lack of marital or biological connection, this development is insufficient to completely eliminate the full faith and credit problem for same-sex couples, even as it marks an important step forward in efforts to adjust domestic relations laws in light of the increasingly diverse structure of today’s families. The variance in the ability of a same-sex parent to use a de facto parent theory to establish their status illustrates another way in which parentage may be in flux as a same-sex couple moves geographically across the United States and underscores the importance of providing a meaningful resolution to this problem.

4. Second-Parent Adoption

Fourth, there is significant variation in the availability of second-parent adoption across the states. Proper treatment of adoption is conceptually complex because it is both a part of the problem (due to variability in the availability of second-parent adoption) and part of the solution (due to the full faith and credit recognition given to adoption decrees). Differences in adoption policy cause difficulty for a same-sex couple who pursues a second-parent adoption because a majority of jurisdictions do not provide for this practice. Second-parent adoption provides a legal mechanism through which a nonmarital same-sex parent can validly adopt her partner’s biological or adoptive child. In a second-parent adoption, the existing parent does not have to relinquish her right to custody, making this apparatus especially effective as a means for the nonlegal parent in a same-sex partnership to formalize her status. The primary impediment to obtaining a

D. bright-line rule restricting legal parent status to biological or adoptive parents and granting a nonbiological, nonadoptive parent standing to petition for custody because she entered into a preconception agreement with her former partner to conceive and raise a child as coparents); Sinnott v. Peck, 180 A.3d 560, 569-73 (Vt. 2017) (recognizing “limited circumstances” in which a de facto parent theory can be invoked and discussing factors that should be considered). See infra notes 66–69 and accompanying discussion (summarizing the variability in the availability of second-parent adoption).

57 See infra notes 66–69 and accompanying discussion (summarizing the variability in the availability of second-parent adoption).

58 Akin to a stepparent adoption, the existing legal parent in a second-parent adoption is not required to relinquish parental rights. This contrasts with traditional adoption, where cutoff provisions require both birth parents of the child to relinquish all legal rights to the child in order for the adoption to be validly effectuated. See Jane S. Schachter, Constructing Families in a Democracy: Court, Legislatures and Second-Parent Adoption, 75 CHI.-KENT L. REV. 933, 936-38 (2000) (discussing requirements for traditional adoption, stepparent adoption, and second-parent adoption).

59 Although second-parent adoptions are commonly pursued by lesbian partners where the legal parent is also the birth mother, a second-parent adoption may also be pursued where the legal mother has individually adopted the child and her partner later wishes to adopt the child as well. See, e.g., In re Adoption of Sebastian, 879 N.Y.S.2d 677, 691-92 (Surr. Ct. 2009) (analyzing whether full faith and credit recognition was due to an out-of-state adoption decree obtained by the same-sex partner of an adoptive mother). Regardless of whether the legal mother’s parental status derives from biology or adoption, the result is the same: her parental rights and responsibilities will not be affected by the grant of second-parent status to her partner.
second-parent adoption is securing the relinquishment of the parental rights of the other biological parent. The rationale underlying this impediment is the basic principle that a child can only have two legal parents.

Because second-parent adoption is available regardless of the marital status of the parties, it has commonly been used by same-sex couples to ensure recognition of the nonlegal parent’s status vis-à-vis the child. With the legalization of same-sex marriage under Obergefell, theoretically stepparent adoption will be available equally to same-sex couples as it is to opposite-sex couples. Therefore, to the extent that the unavailability of a valid marital relationship was the impetus for a same-sex couple to pursue a second-parent adoption, as opposed to a stepparent adoption, that bar will be mitigated.

Nonetheless, there are other reasons same-sex couples may choose to pursue second-parent adoption, and it continues to be a critical means of ensuring that the nonlegal partner’s parental rights enjoy full faith and credit protection.

60 When the child is conceived through artificial insemination using anonymous sperm donation, often the fertility clinic will act as an intermediary, requiring the donor to sign a contract extinguishing his parental rights. See, e.g., Model Known Donor Agreement, GLBTQ LEGAL ADVOCS. & DEFENDERS, https://www.glad.org/wp-content/uploads/2017/10/Massachusetts-Known-Donor-Agreement-Model.pdf [https://perma.cc/PAJ9-RLDH] (providing sample sperm donor agreement expressly removing any right to custody that may be claimed by the donor or obligation for support that may be sought by the recipient).

61 In narrow circumstances, exceptions to this rule have been made. See, e.g., Finnerty v. Boyett, 469 So.2d 287, 289-90, 297 (La. Ct. App. 1985) (allowing the biological father of a child born shortly after the mother married another man to establish paternity and visitation rights despite the statutory presumption of parentage for the husband, effectively providing that the child had three parents). However, these exceptions are aberrational, and the weight of legislation and case law supports the longstanding two-parent paradigm.

62 Prior to Obergefell, the inability to obtain valid marital status was indeed an impediment to the ability of a same-sex partner to successfully pursue a stepparent adoption, even where the marriage had been validly issued in a state recognizing same-sex marriage. See In re Adoption of K.R.S., 109 So.3d 176, 178 (Ala. Civ. App. 2012) (concluding that despite the fact that two same-sex women were validly married in California, “under Alabama law, [the prospective adoptive parent’s] marriage to the child’s mother is not recognized . . . accordingly, [she] may not adopt the child pursuant to [the provision of the code], which allows adoptions by a stepparent”).

63 For example, a same-sex couple pursuing an international adoption may be disqualified based on their sexual orientation if the foreign country looks disfavorably upon such relationships. See Ian Parker, What Makes a Parent, NEW YORKER (May 22, 2017), https://www.newyorker.com/magazine/2017/05/22/what-makes-a-parent [https://perma.cc/3EHW-UCKF] (discussing the lengths that the adoptive parent went to in protecting her sexual orientation and listing her partner as a roommate to ensure she was not disqualified from international adoption); see also Julie Shapiro, The Law Governing LGBT-Parent Families, in LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH AND IMPLICATIONS FOR PRACTICE 297 (Abbie E. Goldberg & Katherine R. Allen eds., 2013). For a same-sex couple in this situation, it is not uncommon for one parent to pursue the international adoption, with the other parent intending to procure a second-parent adoption once the international adoption is complete.

64 See, e.g., In re Adoption of a Minor, 29 N.E.3d 839, 832 (Mass. 2015) (listing a desire to ensure “recognition of their parentage when they travel outside the Commonwealth” as a reason for seeking
The possibility of obtaining a second-parent adoption is not an adequate means to protect same-sex parentage because the availability of this practice is limited. In fact, only fourteen states explicitly allow second-parent adoption. Some states go further than being silent on the availability of the practice, affirmatively refusing to grant it. Conversely, just because a state does not explicitly provide for second-parent adoption does not mean that such an adoption will never be granted. One theory justifying second-parent adoption, even in the absence of a positive legislative right, is that the adoption serves the best interests of the child. For example, a second-parent adoption was granted in Washington, notwithstanding the statutory silence on whether such a remedy is available. Contrariwise, even in jurisdictions allowing second-parent adoption, it is by no means guaranteed, as courts authorized to recognize such an adoption have nonetheless refused to do so for reasons unrelated to the merits of the adoption petition, putting the security of same-sex parentage at great risk. As illustrated, the variability in the

an adoption); In re Adoption of Sebastian, 879 N.Y.S.2d 677, 691-92 (Surr. Ct. 2009) (pursuing a second-parent adoption to ensure recognition of their legal parentage throughout the United States).


For example, the Nebraska Supreme Court refused to grant an adoption to the companion of a biological parent on the theory that, because the biological parent had not relinquished her parental rights, the child was not eligible for adoption. In re Adoption of Luke, 640 N.W.2d 374, 382 (Neb. 2002). Employing similar reasoning, the Supreme Court of Wisconsin concluded that the “cut-off provision” of the state’s adoption statute was mandatory, thereby blocking the same-sex spouse of a biological mother from validly adopting her child, despite the fact that the biological father knowingly consented to a termination of his parental rights (because the biological mother had not relinquished her rights). In Interest of Angel Lacé M., 316 N.W.2d 678, 684 (Wis. 1994). Finally, the Supreme Court of North Carolina held that limited judicial subject matter jurisdiction over adoption meant that all second-parent adoptions were void ab initio. Boseman v. Jarrell, 704 S.E.2d 494, 496 (N.C.2010).

See, e.g., In re Adoption of Two Children by H.N.R., 666 A.2d 535, 541 (N.J. Super. Ct. App. Div. 1995) (providing that the “best interests of the child” standard governs the propriety of granting a second-parent adoption, and finding that where the children are “fully bonded to both parents by ties of mutual affection” that threshold is satisfied).

See Carrie Bashaw, Comment, Protecting Children in Nontraditional Families: Second Parent Adoptions in Washington, 13 U. PUGET SOUND L. REV. 321, 337 (1990) (describing the grant of second-parent adoption in In re the Interest of E.B.G., even though such an adoption “may not have been contemplated specifically by the legislature”).

See, e.g., In re Seb C-M, 2014 NYLJ LEXIS 5518, at *3 (Surr. Ct. Jan. 31, 2014) (refusing to grant the adoption petition of a same-sex couple, despite the abundant case law and statutory authority permitting the practice, because the court found no reason to “affirm an existing,
availability of second-parent adoption is vast due to differences in both statutory provisions for this process and judicially imposed limitations. Therefore, for an unmarried same-sex couple who wishes to formalize the nonlegal partner’s status, adoption is not guaranteed to be an available solution.

In summary, while some progress has been made in terms of recognizing the legal status of parents in same-sex families, most notably exemplified through updates to longstanding doctrines such as the marital presumption, law on surrogacy, de facto parenthood, and second-parent adoption, these advances do not entirely solve the problem. The changes, while laudable, remain insufficient to provide complete legal protection for two reasons.

First, where the status of the nonbiological same-sex parent is recognized in a court judgment due to application of the marital presumption or de facto parenthood doctrine—and would be entitled to full faith and credit recognition outside of the forum—this result only obtains after the case is fully litigated; however, an interstate recognition problem may arise before the couple has the opportunity to prove their parentage. For example, parentage based on a de facto parent theory, a holding out theory, or a formalized second-parent adoption order requires time to demonstrate the parent’s functional role. However, if the couple travels or moves across jurisdictions before adequate time to prove conduct exemplary of parental status has passed, they risk the possibility that their parentage will not be recognized.

Second, where parentage is based on application of the marital presumption, this statutory status will ordinarily not be formally memorialized in a judgment unless the parties separate and pursue litigation to adjudicate custody. Therefore, for a same-sex couple whose parental status is guaranteed under the marital presumption or artificial insemination rule of their home state, this status may nonetheless be at risk. If the family travels interstate as an intact unit, there is a possibility that under the laws of a neighboring jurisdiction, the nonbiological individual’s parentage will not be recognized.

recognized and protected parent-child relationship”). There is abundant case law trending in the other direction as well—granting adoption in circumstances where the petitioner’s parentage would have been protected under the laws of the state. See, e.g., In re Adoption of a Minor, 29 N.E.3d at 833 (granting a second-parent adoption to the nonbiological lesbian parent notwithstanding the fact that her parentage was recognized under the state’s artificial insemination statute); In re L, No. A-11966/15, 2016 WL 5943053, at *15 (N.Y. Fam. Ct. Oct. 6, 2016) (allowing same-sex couples to adopt notwithstanding the fact that their parentage was already recognized under New York’s family law and highlighting the full faith and credit issues implicated by international travel in addition to the uncertainty risked by domestic movement); In re Adoption of Sebastian, 879 N.Y.S.2d 677, 692 (Surr. Ct. 2009) (granting adoption judgment under the best interests standard, even though an adoption “should be unnecessary because [the child] was born to parents whose marriage is legally recognized in this state,” providing a presumption of parentage).

See Harris, supra note 8, at 84 (noting that even with marital presumption and artificial insemination rules, “[r]elationships remain vulnerable to disruption” because of the possibility of litigation).
be recognized, and the parents will not have a formalized decree from their home state. Moreover, until recently, marital status was largely unavailable to same-sex couples, making the presumption of legal parenthood out of reach, and it continues to be inapplicable where the couple is unmarried.

The possibility of refusal to recognize parentage is not a problem that besets the traditional opposite-sex couple. This challenge is unique in the same-sex context where the nonlegal partner’s relationship to the child is based on intent and function, rather than biology. Because various domestic relations doctrines developed against a backdrop of opposite-sex couples consisting of one male and female, existing laws are insufficient when applied to family structures that do not fit this mold.71 Given the inadequacies of the one mother–one father framework to provide predictability and stability to the modern same-sex family, a solution tied to the unique circumstances of these diverse family compositions is necessary.

B. Overview of Proposed and Existing Solutions

In recognition of the ever-increasing magnitude of the uncertainty faced by same-sex couples, and given the transiency of individuals and families and the increasing rate at which same-sex families are being formed,72 there have been calls for a cohesive response to the problem.

Proposed policy solutions include congressional implementation of an interstate registry for establishing the parentage of children born through artificial reproduction assistance,73 use of the parental rights and family autonomy principles of the Fourteenth Amendment to guide resolution of cases where the recognition of a parent–child relationship across state lines is in question,74 and development of legislative solutions such as uniform

71 See, e.g., Q.M. v. B.C., 995 N.Y.S.2d 470, 475-76 (Fam. Ct. 2014) (finding that the biological mother’s same-sex marital partner was not the child’s second mother, citing the biological impossibility of the parental relationship and the desire of the father to exercise his parental rights as factors supporting the holding).


74 See Sanders, supra note 19, at 269 (“The simple rule should be that legal parenthood, once properly established under one state’s law, is a legal status that endures unless and until it is terminated in a proceeding that satisfies the standards of due process as specified by the Supreme Court.”). Other scholars have argued that a refusal to recognize validly established parental rights is functionally equivalent to an unconstitutional termination of those rights. See id. at 267 n.168 (summarizing the positions of two scholars on this issue).
adoption of the de facto parent doctrine or implementation of the recently amended Uniform Parentage Act (UPA). While all of these solutions would provide a greater degree of protection to the parentage of same-sex couples, effective implementation is complicated and would require the passage of time. Given the importance of protecting parental status for the safety of the child and cohesion of the family unit, a more immediate solution is needed.

Adoption also exists as an accessible solution because it is well settled that an adoption judgment must be recognized in other states, regardless of whether the adoption would be recognized under the forum’s laws. Indeed, formalizing parental status through an adoption ensures that the legal status of the nonbirth parent will be respected, as the Supreme Court has deemed such a judgment to be of the type entitled to an “exacting” full faith and credit obligation. Because a formal adoption decree objectively establishes parentage, regardless of biological connection or marital status, many advocates urge same-sex couples to obtain an adoption judgment.

75 See Harris, supra note 8, at 85.
76 Courtney G. Joslin, Nurturing Parenthood Through the UPA (2017), 127 YALE L.J.F. 589, 589 (2018) (arguing that by adopting the recently amended UPA, “states can reform parentage law to more evenhandedly protect all parent–child relationships”).
77 Final adjudications on adoption petitions are variously referred to as decrees, orders, and judgments. Regardless of the phraseology, these final decisions on the merits of the adoption petition are functionally equivalent to a “judgment” within the meaning of the Full Faith and Credit Clause. See Finstuen v. Crutcher, 496 F.3d 1139, 1152 n.12 (10th Cir. 2007) (“[I]t is clear that all such decisions are ‘judgments’ under the common definition of the term . . . .”).
78 V.L. v. E.L., 136 S. Ct. 1017, 1020 (2016); see, e.g., Finstuen, 496 F.3d at 1156 (overturning an amendment that refused to recognize final adoption orders of other states that permitted adoption by same-sex couples because “final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause”); Bates v. Bates, 730 S.E.2d 482, 484 (Ga. Ct. App. 2012) (noting that although it was “doubtful” whether Georgia law permitted second-parent adoption, a prior ruling regarding whether a challenge to the second-parent adoption was time barred was determinative as to the validity of the adoption decree in a subsequent action regarding custody of the child); Giancaspro v. Congleton, No. 283267, 2009 WL 416301, at *4 (Mich. Ct. App. Feb. 19, 2009) (recognizing the validity of an Illinois second-parent adoption in Michigan, pursuant to which both mothers were permitted to seek custody under the Michigan custody provisions); Russell v. Bridgens, 647 N.W.2d 56, 59 (Neb. 2002) (“A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in [the new forum] as in the state rendering judgment.”).
79 See, e.g., GAY & LESBIAN ADVOCATES & DEFENDERS, MARRIAGE TIPS AND TRAPS (2012), http://legacy.glad.org/uploads/docs/publications/marriage-tips-traps.pdf [https://perma.cc/DVW2-QB3P] (acknowledging that while the marital presumption as applied to protect the parentage of same-sex couples is “good, . . . it is not the same level of protection as [the] family would gain by going through the legal process of jointly adopting any child born during the marriage”); LAMBDA LEGAL, CIVIL UNIONS FOR SAME-SEX COUPLES IN NEW JERSEY 5-6, https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_civil-unions-for-ss-couples-in-nj.o.pdf [https://perma.cc/Q5TV-QTDY] (noting that the marital “presumption does not have the same effect as a court judgment” and therefore recommending securing the legal relationship with both parents through adoption); see also Elizabeth A. Harris, Same-Sex Parents Still Face Legal Complications, N.Y. TIMES (June 20, 2017),
Indeed, family law attorneys urge same-sex couples to pursue adoption not only for the full faith and credit protection it provides, but also because it may be essential in safeguarding the parental rights of the nonbiological parent in the event of dissolution of the relationship. Additionally, if the child is taken abroad, a foreign country may be more willing to recognize parental rights if they are reflected in a judicial order, particularly if the same-sex marriage would not be recognized by the country.

Although there are many benefits to obtaining a formal adoption order, relying on the adoption process as the sole way of protecting the nonbiological partner’s parental status is inadequate. First, pursuing an adoption may be prohibitively expensive for some couples, making formal legal status realistically unattainable. Second, for an unmarried same-sex couple, adoption may be unavailable due to differences in state policy on second-parent adoption. Third, a couple cannot obtain an adoption until after the child has been born, so this does not solve the full faith and credit problem for the early months of the child’s life; if the couple travels during this time, there is a possibility that the nonbiological parent’s status vis-à-vis the child will not be recognized. Finally, the adoption protocol is invasive, and as a matter of principle, some same-sex couples resist going through the process due to the belief that they should not have to take steps that are not required of opposite-sex couples.

https://www.nytimes.com/2017/06/20/us/gay-pride-lgbtq-same-sex-parents.html (quoting the owner of an LGBTQ family law firm as noting that “[y]ou’ll always be safer in more-conservative states and more-conservative countries if parenthood is reliant on an adoption rather than on same-sex marriage”).

80 See, e.g., Embry v. Ryan, 11 So. 3d 408, 410 (Fla. Dist. Ct. App. 2009) (holding that full faith and credit was owed to a Washington second-parent adoption and therefore the adoptive mother who was the former same-sex partner of the biological mother was entitled to custody rights as any adoptive parent would be).

81 See generally, Hague Convention on the Civil Aspects of International Child Abduction art. 3(b), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (explaining that the right of custody may arise “by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State” where the child was habitually residing).


83 Joslin, supra note 73, at 43; see also Chang, supra note 15 (describing the $3500 outlay a Washington, D.C. couple expended in procuring a second-parent adoption for the nonbiological same-sex partner); Harris, supra note 79 (summarizing the steps required of a New York couple to obtain a second-parent adoption, including being fingerprinted, providing a comprehensive background, completing home visits, and spending $4000).

84 See supra notes 65–69 and accompanying text (discussing the lack of uniformity of state legislative and judicial policy on second-parent adoptions).

85 See Chang, supra note 15 (citing couples who described the second-parent adoption process as “humiliating,” “absurd,” and “frustrating”).
In summary, although obtaining a formalized judgment of adoption is an absolute means to ensure that a nonbiological parent's status is recognized nationwide, this solution is not independently sufficient because it is not universally available for an unmarried same-sex couple, and even where it is available, it may not be financially viable. Thus, even with the possibility of adoption, full faith and credit issues still loom large for many same-sex couples who travel interstate, and a more uniform solution is required if this problem is to be meaningfully resolved. Entitling the birth certificate to full faith and credit recognition as a “record” would provide greater immediate predictability to the uncertainty faced by same-sex parents because with the increasing willingness of states to grant birth certificates listing both same-sex partners as parents, this is a presently implementable solution.

II. DOCTRINAL ANALYSIS OF BIRTH CERTIFICATES UNDER THE FULL FAITH AND CREDIT CLAUSE

The opening clause of Article IV of the United States Constitution provides, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” This Part analyzes the three categories of full faith and credit jurisprudence as they relate to questions of family law, particularly same-sex parentage, concluding that the birth certificate most naturally fits within the scope of “records.”

A. Judicial Proceedings

Supreme Court interpretation of “judicial proceedings” has affirmed that the full faith and credit obligation as regards final determinations is “exacting.” Perhaps the fullest expression of the power of the Full Faith and Credit Clause


87 U.S. CONST. art. IV, § 1, cl. 1 (emphasis added).

88 Baker v. Gen. Motors Corp., 523 U.S. 222, 233 (1998); see also id. (“A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.”).
The Birth Certificate Solution

for judicial proceedings was captured by Fauntleroy v. Lum,\(^9\) where the Supreme Court held that Mississippi was required to enforce a Missouri judgment holding one party financially responsible for a futures contract, despite the fact that gambling in futures was prohibited under Mississippi law.\(^90\)

In the context of family law, the “exacting” obligation owed to a judicial proceeding ensures that a custody determination is entitled to unqualified recognition in a sister state, and the case law demonstrates that this result is well settled. For example, in Miller-Jenkins v. Miller-Jenkins,\(^91\) the Court of Appeals of Virginia awarded full faith and credit to a custody determination, reflected in a judicial order, adjudicated in Vermont Family Court that granted the nonbiological partner in a same-sex relationship visitation rights to the child of the couple, even though the civil union, which was the basis for the finding of parentage, likely would not have been recognized in Virginia.\(^92\)

However, birth certificates do not fall within the ambit of the judicial proceedings category because they are not “rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment” following full, adversarial litigation.\(^93\) Therefore, the exacting obligation owed to judicial proceedings does not support the propriety of entitling birth certificates to full faith and credit protection because this category is inapposite. Although the guarantee of nationwide recognition of litigated custody determinations provides a modicum of protection to same-sex parents, it is insufficient as a complete solution because recognition problems may arise before there is a need to obtain a court decision, and therefore the parentage of the nonbiological parent in an intact same-sex family may be unprotected when traveling interstate.

B. Public Acts

Similarly, the Supreme Court has unambiguously interpreted the term “public Acts” to refer to statutes.\(^94\) However, rather than entitling public acts to the exacting obligation that is guaranteed to judicial proceedings, the Court has clarified that a lower level of deference is required; that is, the forum state only needs to provide full faith and credit if the statute of the sister state does not violate the public policy of the forum.\(^95\) The diverging

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\(^{9}\) 210 U.S. 230 (1908).
\(^{90}\) Id. at 237.
\(^{92}\) Id. at 337-38.
\(^{93}\) Baker, 522 U.S. at 233.
\(^{95}\) See Nevada v. Hall, 440 U.S. 410, 422 (1979) (“[T]he Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy.”).
treatment between judicial proceedings and public acts derives from the difference in “the full faith and credit owed to other states’ laws, which permits the second forum to refuse recognition based on its own public policy, versus the full faith and credit owed to other states’ judgments and decrees, which leaves no room for nonrecognition based on public policy.”

For example, in Pacific Employers Insurance Co. v. Industrial Accident Commission, the Supreme Court upheld the denial of full faith and credit recognition to the substantive provisions of a sister state’s workmen’s compensation act because the policy of the sister state was obnoxious to the policy of the forum, and “[f]ull faith and credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.”

This standard has been interpreted liberally with respect to the statutory law of the forum, as full faith and credit recognition is not required where the statute “deal[s] with a subject matter concerning [an issue] which [the forum state] is competent to legislate.” More specifically, the Supreme Court has recognized that “regulation of domestic relations is traditionally the domain of state law,” so it is difficult to conceive of a situation where the forum state would not be competent to enact legislation on an issue such as the parental status of the consenting, marital spouse of the birth mother (who lacks a biological connection to the child).

Based on the foregoing principles that guide application of the full faith and credit guarantee for public acts, it is equally clear that birth certificates do not fit within this category. Invocation of the public acts category presupposes litigation because the underlying question this category seeks to resolve is a choice of which law—domicile or forum state—should apply. However, where a same-sex couple has a birth certificate listing both partners as parents and merely seeks recognition of that document in a sister state, designation as a parent on the birth certificate with the resulting rights and responsibilities has already been granted. Therefore, the question is not one of application as between the law of the forum state and the law of the sister state, but rather whether “rights acquired in a sister state must be respected in the forum.”

Said differently, there is a mismatch between the birth certificate and the public acts category of the Full Faith and Credit Clause.

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98 Id. at 504-05.
In summary, the birth certificate does not naturally fit within the framework of the Court’s public acts jurisprudence because the theme underlying challenges in this category is that there is a difference in the choice of law to be applied. However, in the context of birth certificates, the expression of the policy of the sister state is already encompassed in the birth certificate. The couple is simply seeking recognition of its validity, and there is no issue regarding whose law should be applied. Therefore, as with the judicial proceedings category, the public acts prong of full faith and credit jurisprudence is not instructive to the viability of the birth certificate solution.

C. Records

In comparison to the relatively robust jurisprudence on the judicial proceedings and public acts categories of the Full Faith and Credit Clause, the records class has received little attention. Records are considerably different from both judicial proceedings, in the sense that they are not the product of adversarial proceedings, and public acts, in the sense that they are not universally applicable but rather pertain exclusively to a particular individual; therefore, it is unsupportable that they can be rolled into either of these two categories. The obscurity of the proper treatment of such records has been noted by numerous commentators and, in conjunction with a recognition of the increasing significance of records issued by state executive offices in citizens’ daily lives, has led to calls for clarification from the Supreme Court or Congress.

To the extent that birth certificates fall within the scope of the Full Faith and Credit Clause, they would be within the “records” category. This conclusion derives from the language of the Act of March 27, 1804, in which Congress clarified that the term “records” in the Full Faith and Credit Clause encompasses both nonjudicial and judicial records. The 1804 Act, the second implementing statute passed by Congress to effectuate the full faith and credit mandate

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102 See Darren A. Prum, The Full Faith and Credit Clause: Do Factual Executive Documents Require Equivalent Treatment Between States?, 23 U. FLA. J.L. & PUB. POL’Y 151, 153 (2012) (expressing that only a “minimal amount” of attention has been paid to the executive record category of the Full Faith and Credit Clause); Gebhardt, supra note 101, at 1444 (noting that “the U.S. Supreme Court has . . . never clearly explained the level of full faith and credit that is due to state executive documents”).

103 Gebhardt, supra note 101, at 1444.

104 See, e.g., supra note 102 and accompanying text.

105 See, e.g., Gebhardt, supra note 101, at 1444 (“The U.S. Supreme Court or Congress must remedy this situation due to the great volume of executive decisions whose level of faith and credit in sister states is unclear and due to the immense impact that such decisions have on our lives.”).

pursuant to their power under the Effects Clause, specifically ensures full faith and credit recognition for “all records and exemplifications of office books, which are . . . kept in any public office of any state, not appertaining to a court.” The explicit identification of state-issued executive records as deserving of full faith and credit recognition supports the conclusion that the birth certificate is among this class because it is registered with and filed by the state, commonly the Department of Health. Congress’s expansive interpretation of the term “records” to include state executive records indisputably indicates that birth certificates fall within the scope of this category.

Birth certificates most naturally fit within the records group as indicated by the language in the 1804 Act. However, due to the lack of guidance on the level of legitimacy that other states must accord to records, the level of deference they are owed is uncertain. Part III will articulate why, for purposes of interstate recognition of parentage, birth certificates should be entitled to a high level of deference. Notwithstanding the doctrinal ambiguity, treating birth certificates as records entitled to full faith and credit deference would meaningfully resolve the uncertainty faced by same-sex couples in establishing parentage, and various doctrinal tenets underlying both full faith and credit and family law jurisprudence confirm this result.

### III. TREATING BIRTH CERTIFICATES AS RECORDS FOR PURPOSES OF INTERSTATE RECOGNITION OF PARENTAGE

Treating birth certificates as “records” entitled to interstate recognition under the Full Faith and Credit Clause would provide a greater degree of protection to the parentage of same-sex couples. If the status of two same-sex parents as listed on the child’s birth certificate is entitled to full faith and credit weight, same-sex parents will have assurance that their parentage will be respected in sister states, whether the birth certificate is used in the process of performing menial tasks such as school registration or in more dire circumstances, such as ensuring decisionmaking power in the event of

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107 The Effects Clause confers on Congress the power to “prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1, cl. 2.
an emergency. Not only is this solution practical, but it is also doctrinally tenable because the birth certificate has historically been treated as a critical indicator of parentage. Both the Court and Congress have highlighted the need for certainty regarding status determinations, and principles underlying recent Supreme Court decisions in the family law context support the societal significance attached to birth certificates. Moreover, judicially developed limitations on the full faith and credit doctrine do not undermine the feasibility of this solution.

A. Existing Treatment as a Critical Indicator of Parentage

In its earliest form, the birth certificate served to compile vital statistics and record population information, primarily for purposes of taxation and ascertaining military resources. The document took on heightened significance in the early American colonies as it provided a way to protect individual rights, most notably for property. The establishment of the U.S. Bureau of the Census centralized the collection of birth information on a national level, a responsibility that now belongs to the National Center for Health Statistics (NCHS). Today, NCHS provides a standard for birth certification that is supplemented by individual states, which have the ultimate responsibility for registration.

Birth certificates have evolved considerably and today symbolize far more than birth registration. Modern societal norms regard birth certificates with enormous significance, as these “slips of paper . . . imbued with political and social meaning” are used for activities ranging from school and sports registration to securing various state entitlements, such as a

\[110\] For a tragic illustration of the importance of legal status in emergency situations, consider the consequences of the court’s refusal to recognize the parentage of the nonbiological parent in Nancy S. v. Michele G. 279 Cal. Rptr. 3d 212 (Ct. App. 1991). Six years after the unsuccessful custody litigation, the biological parent was involved in a fatal car accident, but because the nonbiological second mother was not a parent in the eyes of the law, she was not contacted or consulted on questions of the child’s medical care following the accident. Id. at 215-16, 219. The child nearly became a ward of the state. Elaine Herscher, Family Circle, S.F. CHRON. (Aug. 29, 1999, 4:00 AM), https://www.sfgate.com/news/article/Family-Circle-For-Nancy-Springer-a-1991-court-2911717.php [https://perma.cc/4UL5-EESQ].


\[112\] Id.

\[113\] Id. at 407-08.

\[114\] Id. at 408.


\[116\] Failure to be listed as a parent on a birth certificate can lead to hardship in completing these activities. See Eyder Peralta, Texas Fights Suit After Denying Birth Certificates to Children of Illegal Immigrants,
The importance of the parties listed as “parents” on the birth certificate is also societally recognized as significant. Designation as a parent on the birth certificate entitles the parent to many rights, including being listed as an emergency contact; making emergency medical decisions; and conducting financial transactions, such as setting up a bank account, on the child’s behalf. Moreover, a parent–child relationship as reflected in the birth certificate can be crucial to the child’s entitlement to various state-provided services, as a birth certificate may be required to demonstrate eligibility for Social Security benefits, inclusion in a parent’s health insurance plan, child support, and inheritance rights. Additionally, parent status as reflected in the birth certificate can be important in the event of international travel, as a parent applying for a passport for a minor child must provide documentary evidence of parentage, which may be established by the birth certificate. More fundamentally, failure to be listed as a parent on the child’s birth certificate may stigmatize the child, implying that his family arrangement is not worthy of recognition. The effects of this prejudice also impact the same-sex parents, reinforcing the inferiority of their relationship by excluding an important incident of parentage.

These harms, which result from the inability to obtain a birth certificate, are far from theoretical. In contesting a state registrar’s refusal to grant a supplemental birth certificate, the same-sex parents of a child whom they validly adopted described the “great difficulty” in enrolling the child as a dependent for health insurance coverage. They further described an incident at an airport where they were asked for the child’s birth certificate to confirm their parental relationship. The overwhelming importance attached to parental status in the birth certificate is evidenced by the fact that this document is required for participation in a wide variety of activities.


120 Petition for Writ of Certiorari at 7, Pavan v. Smith, 137 S. Ct. 2075 (2017) (No. 16-992), 2017 WL 58527, at *7 (“The children will face this stigma throughout their lives, as they look to and use their birth certificates as an official record of their own identity and the identity of their parents.”).

In addition to the various entitlements that flow from parental designation on the birth certificate, many state statutes provide that after an adoption decree is granted, a new birth certificate must be granted.122 Importantly, although the adoption decree is the document that legally establishes parental status,123 “birth certificates are important documents and . . . a failure to issue them with all of the correct information included can create real problems for the families involved.”124 That a change in the formal legal status of the parties necessitates a need for issuance of a new birth certificate indicates that, just as societal norms attach significance to the parental information listed in the birth certificate, so do state legislatures.125 Moreover, the significance of the birth certificate as an indicator of parenthood is underscored by the numerous cases that have arisen over the refusal to issue a supplemental birth certificate listing both same-sex partners as parents, either in the first instance126 or after the

122 See, e.g., ALA. CODE § 22-9A-12(a)(1) (2018) (“The State Registrar shall establish a new certificate of birth . . . upon receipt of . . . a report of adoption . . . ”); CAL. HEALTH & SAFETY CODE § 10253(a) (West 2018) (same); FLA. STAT. § 382.015 (1) (2018) (same); IOWA CODE § 144.21 (2017) (same); ME. REV. STAT. tit. 22, § 276E(1)(A) (2017) (same); N.Y. PUB. HEALTH LAW § 438(1)(c) (McKinney 2019) (same); TENN. CODE ANN. § 68-3-310(1) (2018). Similarly, many states mandate that a new birth certificate be issued if another type of judgment establishing legal parenthood is entered. See, e.g., FLA. STAT. § 382.015(2) (2018) (“Upon receipt of the report, a certified copy of a final decree of determination of paternity . . . together with sufficient information to identify the original certificate of live birth, the department shall prepare and file a new birth certificate.”); MASS. GEN. LAWS ch. 46, § 13(a)(5) (2018) (requiring the state registrar to issue an amended birth certificate upon receipt of a “certified copy of such judgment” of paternity by a court or administrative agency); see also Berwick v. Wagner, 336 S.W.3d 805, 809 (Tex. App. 2011) (recognizing as a valid child-custody determination an out-of-state judgment naming two male same-sex partners as parents of a child born to a surrogate).  

123 See Raffopol v. Ramey, 12 A.3d 783, 789 n.17 (Conn. 2011) (“The birth certificate must accurately reflect the legal relationship between parent and child, but it does not create that relationship.”); In re T.J.S., 16 A.3d 386, 390 (N.J. Super. Ct. App. Div. 2011) (“A birth certificate simply records the fact of parenthood as reported by others; it neither constitutes a legal finding of parenthood nor independently creates or terminates parental rights.”). 


125 The significance of the information contained within birth certificates has also been recognized federally. See OFFICE OF INSPECTOR GEN., DEPT OF HEALTH & HUMAN SERVS., OEI-07-99-00570, BIRTH CERTIFICATE FRAUD 6 (2000) (noting that although birth certificates were originally only intended to certify the documentation of a birth, they now serve a myriad of purposes, including “assist[ing] in determining eligibility for public assistance and other benefits” and “enroll[ing] children in school”). 

conclusion of a formal legal process, such as adoption, memorializing the legal status of the partners.\textsuperscript{127}

Just as the “States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order,” the various statutory entitlements that derive from designation as a parent on the birth certificate underscore the significance of the document as reflected in the expression of legislatures across the United States.\textsuperscript{128} The societally recognized importance of information listed on the birth certificate is not limited to the parties designated as parents; indeed, various other details contained within the birth certificate have been recognized interstate with varying degrees of deference.

First, the accuracy of the date of birth contained in the birth certificate is an item of importance that has been a central issue in a variety of cases. In \textit{Bennett v. Schweiker},\textsuperscript{129} a case involving a claim for retirement insurance benefits, the court recognized that full faith and credit was owed to the out-of-state birth certificate, which corrected the date of the claimant’s birth.\textsuperscript{130} The conclusion that full faith and credit applied to the vital details in the birth certificate was apparently straightforward, as the court provided little explanation for why there was an “obligation” to entitle the out-of-state birth certificate to full faith and credit.\textsuperscript{131} Similarly, in \textit{Tindle v. Celebrezze},\textsuperscript{132} for the purpose of determining entitlement to Social Security benefits, full faith and credit recognition was granted to the date of birth in an out-of-state birth certificate, though the court noted that the birth certificate was only entitled to the weight that the enforcing forum would give it, that is, prima facie weight.\textsuperscript{133} Age as listed in the birth certificate can also be significant in the criminal context, where

\textsuperscript{127} See e.g., \textit{Adar v. Smith}, 639 F.3d 146, 149 (5th Cir. 2011) (“[T]wo unmarried individuals ... legally adopted Louisiana-born Infant J in New York ... [and] sought to have Infant J’s birth certificate reissued in Louisiana supplanting the names of his biological parents with their own.”); \textit{Finstuen v. Crutcher}, 496 F.3d 1139, 1156 (10th Cir. 2007) (noting that the resolution of the case turned on the validity of “a state statute providing for categorical non-recognition of a class of adoption decrees from other states, denying the ‘effective operation’ of out-of-state adoption proceedings”); \textit{Davenport v. Little-Bowser}, 611 S.E.2d 366, 372 (Va. 2005) (holding that the applicable state statute "require[d] that the Registrar issue a new certificate of birth").


\textsuperscript{129} 543 F. Supp. 897 (D.D.C. 1982).

\textsuperscript{130} Id. at 898.

\textsuperscript{131} See \textit{id}. (“Under section 1739 ... the Secretary is obligated to give full faith and credit to the ... correction [reflected in the out-of-state] birth certificate.”).


\textsuperscript{133} \textit{Id. at 915; see also Kappler v. Shalala}, 840 F. Supp. 582, 587 (N.D. Ill. 1994) (rejecting, ultimately, the full faith and credit argument, because “full faith and credit” is shorthand for the same credit that such a document is given under [forum state] law—and that merely means prima facie evidence”).
determining whether a defendant will be tried as a juvenile or an adult may hinge on age calculated from the birth certificate date of birth.\textsuperscript{134}

Second, the proper status of gender identification as listed in the birth certificate has received increasing attention in recent years. For example, in \textit{In re Estate of Gardiner},\textsuperscript{135} the Kansas Supreme Court refused to recognize the updated gender of a male-to-female transgender individual as reflected in her revised out-of-state birth certificate because under forum law she remained a male, and therefore her marriage with her husband was void.\textsuperscript{136} This holding attracted negative attention from media and criticism from academic commentators.\textsuperscript{137} It represents another way in which the lack of guidance on how the full faith and credit mandate applies to “records” creates significant problems and should be resolved in favor of ensuring continuity in the expectations of the affected individual.

In summary, society imbues various details in birth certificates with great significance. Parental designation in the birth certificate is especially important, as reflected by the centrality of this document in completing school registration, securing entitlements, and effectuating various other activities. The fact that the birth certificate is treated as a critical indicator of parentage is strong support for treating it as a “record” under the Full Faith and Credit Clause because this would provide a meaningful solution to the recognition problem faced by same-sex couples.

\section*{B. Judicial Identification of the Importance in Providing Stability}

In its full faith and credit jurisprudence, the Supreme Court has recognized the importance of providing stability and predictability to the validity of legal status because this enables individuals to organize their personal and professional endeavors with assurance that their status will not be questioned when travelling interstate. The value in providing certainty to legal status is especially significant in the context of family law, where the psychological and physical safety of a child depends, in large part, on the security of his or her family unit.

In \textit{Williams v. North Carolina},\textsuperscript{138} the Supreme Court considered whether a North Carolina couple who fell in love and travelled to Las Vegas to obtain divorces from their respective spouses was entitled to recognition of the

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\begin{itemize}
\item \textsuperscript{134} See Prum, \textit{supra} note 102, at 169 (summarizing a case where date of birth as reflected in the birth certificate played a role in determination of criminal liability).
\item \textsuperscript{135} 42 P.3d 120 (Kan. 2002).
\item \textsuperscript{136} \textit{Id. at 137}.
\item \textsuperscript{137} See Gebhardt, \textit{supra} note 101, at 1421 (summarizing overwhelmingly negative response to \textit{Gardiner} holding).
\item \textsuperscript{138} 317 U.S. 287 (1942).
\end{itemize}
Nevada divorce decrees as a defense to North Carolina’s prosecution for bigamy. The Court answered the question affirmatively, emphasizing the “intensely practical considerations” that supported recognizing, under full faith and credit principles, the legitimacy of the Nevada divorce decree. The argument that entitling the out-of-state divorce decree would allow “one state’s policy of strict control over the institution of marriage [to] be thwarted by the decree of a more lax state” was emphatically rejected because that “objection goes to the application of the full faith and credit clause to many situations.” Finally, the “considerable interests involved and the substantial and far-reaching effects” that failure to ensure interstate recognition would have indicated that full faith and credit was owed to the divorce decree.

The *Williams* decision is instructive to the proper treatment of birth certificates for a number of reasons. First, *Williams* highlighted various practical considerations, including the interest in discouraging polygamous marriages and in protecting children of lawful marriages, that were served by recognizing the divorce decree. Analogous “intensely practical considerations” exist in the family law context, where there is an interest in ensuring the legitimacy of a functional same-sex parent because this discourages forum shopping in the event of dissolution of the relationship and ensures stability for the child.

Second, the *Williams* court indisputably rejected the objection to full faith and credit recognition for divorce decrees based on the potential for the laws of a more permissive state to be invoked in a stricter state. The analogue in the parentage context is the potential for a state with a restrictive family law regime that does not recognize the parental status of a same-sex couple nonetheless being forced to recognize the parental status of the couple due to the fact that they enjoy this status in a more permissive state; *Williams* indicates that this critique lacks merit.

Third, *Williams* specifically highlighted the special importance of providing definiteness to status determinations as a factor to be weighed in the full faith and credit calculus. In the absence of the finality guarantee of the Full Faith and Credit Clause, an anomalous result would obtain: different states could seemingly pronounce on the status of an individual in contradictory ways. An

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139 Id. at 289-90.
140 Id. at 301.
141 Id. at 302.
142 Id. at 303-04.
143 Id. at 301.
144 See id. at 302 (“Such is part of the price of our federal system.”).
145 This argument was made by the biological parent seeking to cut off parental rights of her former same-sex partner in *Miller-Jenkins*, although it was ultimately rejected by the court. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337 (Va. Ct. App. 2006).
equally illogical result obtains if parental status as reflected in a birth certificate is not entitled to full faith and credit recognition: a lawful parent in one jurisdiction could be denied this status in others, leading to a denial of parental rights and privileges that turns on physical location.

Though the animating purpose of the need for certainty highlighted in Williams was in relation to the judicial proceedings category of the Full Faith and Credit Clause, the concern for ensuring predictability also applies in the context of records and supports entitling birth certificates to full faith and credit deference.

The significance of this concern is underscored by the long history of hostility to same-sex couples, evidenced most prominently in the context of marriage. Until the Supreme Court’s establishment of a constitutional fundamental right to marry for same-sex couples in Obergefell, many states not only prohibited the marriage of same-sex couples, but also refused to recognize otherwise valid out-of-state same-sex marriages.146 The overt hostility evidenced by the numerous states that enacted legislation or amended their state constitutions to exclude same-sex marriages from the general interstate recognition principle applied to marriage147 was exemplified at the federal level as well. In conjunction with the Defense of Marriage Act, Congress amended the Full Faith and Credit Act to bestow discretion on the individual states to decide whether to recognize otherwise valid same-sex marriages that were performed out of state.148 That both state and federal governments explicitly carved out same-sex marriage from recognition across state lines prior to subsequent Supreme Court invalidation of such laws only serves to highlight the importance of providing predictability, as emphasized by the Williams court, in an otherwise tenuous area.

146 See, e.g., LA. CONST. art. XII, § 15 (“No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.”), held unconstitutional by Robicheaux v. Caldwell, No. 13-5090, 2015 WL 4090333 (E.D. La. July 2, 2015); ALA. CODE § 30-1-19(e) (2018) (“The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred . . . as a result of the law of any jurisdiction regardless of whether a marriage license was issued.”), held unconstitutional by Strawser v. Strange, 105 F. Supp. 3d 1323 (S.D. Ala. 2015); ARK. CODE ANN. § 9-11-208(a)(2) (2018) (“Any marriage entered into by a person of the same sex, when a marriage license is issued by another state or by a foreign jurisdiction, shall be void . . . and any contractual or other rights granted by virtue of that license . . . shall be unenforceable in the Arkansas courts.”), held unconstitutional in part by Jernigan v. Crane, 64 F. Supp. 3d 1260 (E.D. Ark. 2014).

147 The common law place-of-celebration rule provides that a marriage validly contracted in any other state will be respected in all other states. See infra text accompanying notes 172–73.

C. Congressional Recognition of the Heightened Significance in Providing Certainty in Family Law

The necessity of providing assurance to actors in the family law context has also been recognized by Congress, as exemplified by the enactment of the Parental Kidnapping Prevention Act (PKPA)\(^\text{149}\) and the Full Faith and Credit for Child Support Orders Act (FFCCSOA).\(^\text{150}\) Through these statutes, Congress has ensured that child custody and support orders are respected nationwide. The interest in providing determinacy and certainty, identified as a motivating purpose behind the PKPA and FFCCSOA, applies equally to protecting the parentage of same-sex couples and thus supports entitling birth certificates to full faith and credit recognition as “records.”\(^\text{151}\)

Various policy arguments regarding the need for full faith and credit assurances were emphasized in the enactment of the PKPA. In particular, the interest in providing “greater stability of home environment and . . . secure family relationships for the child” was identified as a consideration motivating the Act’s passage.\(^\text{152}\) Congressional sensitivity to the problems that lack of recognition of familial status creates for children supports treating the birth certificate as a “record” for full faith and credit purposes because this treatment would help to ensure the continued stability and sanctity of the home. The explicit concern for providing certainty applies equally to the need for assurances of finality as to the legitimacy of the status of the parents listed on a child’s birth certificate. Therefore, treating birth certificates as “records” under the Full Faith and Credit Clause would further the purpose identified by the drafters of the PKPA.

Moreover, Congress’s identification of uncertainty in the determination of custody as a problem and its provision of a solution to that problem in the form of the PKPA indicate that the family law context is different. The uniquely intimate nature of the family law area justifies a higher level of deference to


\(^{151}\) The fact that Congress has exercised its constitutional full faith and credit enforcement power to ensure interstate recognition of custody and support orders raises the question of whether congressional legislation mandating nationwide recognition of birth certificates is a more appropriate effectuation mechanism. In all three of the narrow instances in which Congress, relying on its effects power, enacted statutes pertaining to domestic law, the action “was necessitated by the failure of sister state courts to give full faith and credit to orders not regarded as final judgments.” CONG. RESEARCH SERV., RL31201, FAMILY LAW: CONGRESS’S AUTHORITY TO LEGISLATE DOMESTIC RELATIONS QUESTIONS 22 (2012). That motivation applies equally to birth certificates since they are similarly modifiable and indicates that federal legislation guaranteeing interstate recognition of birth certificates is another way to implement this solution. However, given the historical limitations on Congress’s power to legislate in the domestic relations area, this Comment focuses on judicial implementation.

birth certificates because this would provide a greater level of certainty to same-sex parents, and by extension, their children. Congress’s expression of its desire to provide determinacy to the legal validity of parental status corroborates the feasibility of entitling birth certificates to full faith and credit recognition because this solution serves as another way to ensure certainty of parentage.

Although the definition of “custody determination” in the PKPA does not, by its terms, include birth certificates, this is not fatal to the analysis. Taken in context with the societal importance attached to birth certificates and the judicially acknowledged significance of providing predictability to status determinations, the fact that Congress has clearly expressed its intent to provide certainty to actors in the family law context is notable. This unambiguous intent supports treating birth certificates as “records” under the Full Faith and Credit Clause.

D. Principles Underlying Recent Supreme Court Family Law Decisions

That birth certificates are properly entitled to full faith and credit recognition is supported by recent Supreme Court pronouncements in Obergefell and Pavan, both decisions made within the context of same-sex marriage and parentage.

First, in Obergefell, the Supreme Court addressed the lack of uniformity of state policy on the legality of same-sex marriage, solving this “severe hardship” by designating the right to marry as a fundamental constitutional right that cannot be abridged.153 Reasoning under Fourteenth Amendment due process and equal protection guarantees, the Obergefell court identified four premises in support of their holding. Relevant to the context of same-sex parentage, the court emphasized the importance of affording same-sex parents the same rights and protections that are extended to opposite-sex parents. In particular, the court noted that the failure to do so caused disruption to the “hundreds of thousands of children” being raised in same-sex families, causing them to experience undeserved “harm and humiliat[ion].”154 Relatedly, the Obergefell court repudiated the symbolic harm inflicted on same-sex couples that was caused by exclusion from the revered institution of marriage, concluding that it “impose[d] stigma and injury of the kind prohibited by our basic charter.”155 Finally, the court explicated various rights within the “constellation of benefits” to which same-sex couples are entitled, specifically listing birth certificates as one such benefit.156 The broad phraseology used throughout the opinion indicates that the Court intended for its holding to protect more than just the singular

154 Id. at 2600–01.
155 Id. at 2602.
156 Id.
institution of same-sex marriage; this is confirmed by the fact that two of the Obergefell plaintiffs were challenging a state law that permitted opposite-sex, but not same-sex, couples to both serve as adoptive parents to the same child.\textsuperscript{157} The interpretation of Obergefell as protecting not only the right to marry, but also the benefits and privileges that are intertwined with marriage, was subsequently confirmed in Pavan v. Smith.

In Pavan, the Supreme Court made clear that where a jurisdiction recognizes the parental status of a nonbiological parent of a child conceived to her marital partner through artificial insemination, the state must list both members of the married same-sex couple on the birth certificate, just as they would list both members of the married opposite-sex couple as parents on the birth certificate.\textsuperscript{158} Pavan involved a state Department of Health official who refused to list both partners of a same-sex couple on a birth certificate when they conceived a child through anonymous sperm donation, instead issuing a certificate that bore only the birth mother’s name. Highlighting Obergefell’s explicit identification of the birth certificate as one of the “rights, benefits, and responsibilities” to which same-sex couples are entitled, the Supreme Court summarily reversed the state supreme court’s affirmation of the Department’s action.\textsuperscript{159} Commentators were encouraged by the fact that the opinion was issued per curiam, interpreting this as a sign that the “court emphatically declared that the rules about children must be applied equally to same-sex spouses.”\textsuperscript{160}

A question left open after Pavan is whether a state that treats the birth certificate as a mere record of biological parentage (i.e., a state that does not permit the husband of a woman who conceives through artificial insemination to be listed as father) would be able to deny a same-sex parent the right to be listed on the birth certificate of her spouse’s child. Indeed, pre-Pavan, the Court of Appeals of Oregon noted the distinction between a traditional marital presumption and a marital presumption that explicitly rejects biological reality in holding that Oregon’s artificial insemination statute, making a mother’s consenting husband the parent of her child, must be extended to same-sex couples; however, the court affirmed that limiting the traditional marital presumption to opposite-sex couples was acceptable because the key difference between the two scenarios was the “possibility of a biological relationship.”\textsuperscript{161}

The likelihood of success for a state that seeks to justify its birth certificate law on this ground, as the state of Arkansas (unsuccessfully) did

\textsuperscript{157} Id. at 2595.
\textsuperscript{158} Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).
\textsuperscript{159} Id.
in *Pavan*, is unclear. The *Pavan* court emphasized Arkansas’s artificial insemination rule heavily in reaching their ultimate holding, but the brief opinion also cites generally to “disparate treatment” proscribed by *Obergefell* in support of its conclusion. Such language perhaps indicates that *Pavan* guarantees more than simple equality between same- and opposite-sex couples with respect to birth certificate inclusion. Additionally, a state seeking to justify its birth certificate law on this theory would have to contend with the possibility that even where it is biologically viable for the child to be the offspring of the mother’s husband, the child still could have been conceived as a result of an extramarital affair, in which case the state’s asserted interest in maintaining accurate genetic records would not be served. Finally, concerns about *Pavan*’s reach to a same-sex couple where the state would not list the nonbiological parent of a different sex on the birth certificate are largely negated by the fact that the vast majority of states take Arkansas’s approach of using the birth certificate as a marker of not just biology-based parentage, but of functional parentage as well.

The landmark holdings of *Obergefell* and *Pavan*, and the premises underlying the decisions, are instructive in the parentage context and indicate that birth certificates should be entitled to conclusive weight. First, the sweeping language of *Obergefell* leaves no room for doubt that, as a constitutional matter, same-sex parents must be afforded rights on the same basis as opposite-sex parents. Therefore, if a nonbiological parent in an opposite-sex partnership is treated as a parent, there is no constitutional basis for denying that same status to a nonbiological parent in a same-sex partnership—a conclusion that *Pavan* affirms. If the animating principle is that same-sex partners must be afforded the same rights as those that are extended to opposite-sex couples, it is clear that the parentage of same-sex parents as reflected in a birth certificate must be recognized in other states. Because the opposite-sex nonbiological parent listed on his child’s birth certificate would be presumed a parent in other states, so too must the same-sex nonbiological parent listed as such on her child’s birth certificate be respected as a parent in other states. This is clear support for the

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162 *Pavan*, 137 S. Ct. at 2078.
163 See id. at 2078-79 (“The State uses [birth] certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.”).
164 Id. at 2078.
165 See supra notes 12–13, 26 (collecting and discussing states that provide for the marital partner of a woman who conceives a child through artificial insemination to be listed as a parent on the child’s birth certificate).
166 See, e.g., Chaissen v. State, 239 So. 3d 1074, 1081 (La. Ct. App. 2018) (reasoning that because *Obergefell* requires the state to “provide equal protection to same sex couples seeking to amend a birth certificate,” the biological mother could not invoke her former partner’s lack of a biological connection to justify efforts to remove the nonbiological parent from the certificate).
conclusion that entitling birth certificates to full faith and credit recognition would be one meaningful solution to the uncertainty that same-sex parents may face in establishing their parentage.

Second, Obergefell’s explicit identification of the harm caused to children by excluding same-sex couples from the institution of marriage as one of four factors relevant to the decision translates to the context of same-sex parentage. Just as the failure to recognize the legal validity of same-sex marriage causes children of same-sex parents to “suffer the stigma of knowing their families are somehow lesser,” the failure to provide certainty to the parentage of same-sex parents implicates a similar destabilization.167 Through no fault of their own, these children may face challenges in registering for school, sports, and various other activities simply as a result of the sexual orientation of their parents. Such a result is incompatible with Obergefell’s desire to mitigate against the hardship faced by children of same-sex couples and supports the conclusion that parentage as reflected in a birth certificate should be respected across the country. The importance of ensuring stability is amplified in the context of family relationships because of the need to protect children. Treating birth certificates as full faith and credit records represents one way in which the security of parental relationships could be meaningfully protected. Moreover, this solution can be implemented seamlessly with minimal expense.

Third, the Pavan court recognized that the birth certificate is more than “simply a device for recording biological parentage.”168 The birth certificate has evolved from a mere medical record into a symbolic embodiment of parentage, and this benefit must be extended equally to same-sex couples. Emphasizing the societal importance attached to the document is in accord with the great significance that the birth certificate carries as reflected in the norms and practices of various institutions, including schools and state agencies.169 This provides additional support for entitling birth certificates to conclusive interstate recognition because as noted by the Pavan court, the birth certificate has evolved into a document signifying far more than biological status, and therefore it is one of the many facets of the parent-child relationship to which same-sex couples must have equal access if the Obergefell mandate is to be fulfilled.

In summary, the doctrinal underpinnings of the Obergefell and Pavan decisions support the feasibility of entitling birth certificates, and the parentage of the parties as reflected within them, to full faith and credit recognition.

168 Pavan, 137 S. Ct. at 2078.
169 See supra Section III.A.
E. Other State-Issued Records Entitled to Interstate Recognition

Birth certificates are one of the most important state-issued records, as they establish critical information about an individual’s identity, background, and biology. Other state-issued records, in particular drivers’ licenses and marriage certificates, also play significant roles in their respective realms. A review of the treatment of these records is instructive to the feasibility of entitling birth certificates to full faith and credit protection as a means of solving the recognition problem for same-sex couples.

First, the driver’s license is the paradigmatic example of a document that is used regularly out of state and is undeniably entitled to interstate recognition. The driver’s license is used to signify successful completion of a driving test and establish an individual’s right to operate a vehicle on the public roadways. It also contains various personal characteristics, including an individual’s age and home address, and is used to prove identity at airports, voting polls, and when opening a bank account. Recognizing the difficulties that could arise if states refused to recognize foreign drivers’ licenses, an interstate agreement, the Driver License Compact (DLC), was enacted in the 1960s. Forty-six states and the District of Columbia are signatories to the DLC, which requires states to exchange information relating to license suspensions and to forward violations to the state where the individual is licensed.

Second, the marriage certificate is a document that is commonly used for interstate purposes and generally entitled to extraterritorial recognition under the place of celebration, or lex celebrationis, rule. The


172 See, e.g., Opening Your First Bank Accounts, WELLS FARGO, https://www.wellsfargo.com/goals-going-to-college/first-account/ [https://perma.cc/9J2X-LZAT] (noting that to open a basic checking account, the customer must present a driver’s license).


174 The notable exception to this generalization is same-sex marriage, which was explicitly carved out from interstate recognition by the elected representatives (through legislation) and voters (through constitutional amendment) of numerous states. See supra notes 146–148 and accompanying text. Thus, the place of celebration rule serves two analytical purposes in supporting the argument of this Comment: First, hostile state action excluding same-sex marriage from the place of celebration principle underscores the importance of providing certainty to couples who have historically been discriminated against. Second, the longstanding precedent of treating a marriage certificate, though not an order resulting from a judicial proceeding, as entitled to interstate recognition shows that documents of societal significance are treated differently for important policy reasons.
place of celebration principle developed to resolve conflicts resulting from a difference in how a union would be treated under the diverging laws of two jurisdictions. Two exceptions to the place of celebration doctrine developed: Under the natural law exception, a state could refuse to recognize a marriage if it would be considered universally objectionable. Relatedly, under the positive law exception, a state could refuse to recognize a marriage if its legislature had specifically provided that marriages of that type should not be given interstate effect. Notwithstanding the leeway for recognition refusal enabled by the natural law and positive law exceptions, states generally continue to favor recognition for four reasons: providing predictability and stability to families, promoting marital responsibility, facilitating interstate travel, and protecting expectations of privacy.

The extent to which other state-issued records, particularly driver’s licenses and marriage certificates, are entitled to interstate recognition supports giving the parentage details contained in the birth certificate full faith and credit deference. Just as the driver’s license establishes critical identity facts, the individuals listed as “parents” in a child’s birth certificate represent a crucial personal characteristic. However, in contrast to a driver’s

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175 Generally, interstate recognition of a marriage certificate is tied to the place of celebration principle, not the full faith and credit mandate. FAMILY LAW: CONGRESS’S AUTHORITY TO LEGISLATE DOMESTIC RELATIONS QUESTIONS, supra note 151, at 19 (noting that the “Full Faith and Credit Clause has rarely been used by courts to validate marriages” and therefore describing how the place of celebration rule is generally used to validate marriages).

176 Until the Obergefell decision mooted the question, there was considerable debate about whether states that did not recognize same-sex marriage were nonetheless obligated to recognize the validity of such marriages if they were completed legitimately in another jurisdiction that recognized marriage between two persons of the same sex. The place of celebration rule was one of the ways in which this question was answered.

177 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (AM. LAW INST. 1971) ("[A] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid . . . .").

178 If a state is hostile to same-sex parentage, perhaps by not providing for an artificial insemination marital presumption rule, then an analogue of the natural law exception could arguably be used by the state to refuse to honor the parentage of a same-sex couple as reflected in the birth certificate. However, invocation of this exception necessitates clearing a high bar: the positive law exception cannot be used by “courts . . . to refuse to enforce a foreign right at the pleasure of the judges.” Louncks v. Standard Oil Co. of New York, 120 N.E. 198, 202 (N.Y. 1918). Rather, refusal to apply the place of celebration rule under the positive law exception must be based on “some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.” Id. Given the intimacy of parentage and the constitutional rights implicated thereby, it is doubtful that a state’s justification for refusing to recognize the status of a same-sex parent would rise to this level.

licensure, the nature of the birth certificate does not require cross-state cooperation to ensure the tracking of illegal activity in order to protect the safety of road travelers. Birth certificates are used for ordinary tasks such as school registration and benefits eligibility, and though the possibility for birth certificate fraud is well documented, the fraud is not tied to the identity of the persons listed as parents. Therefore, there is little need for an interstate compact committed to cooperation in enforcement; certainty for same-sex parents can be achieved by simply recognizing the validity of the parents listed on the out-of-state birth certificate in the first instance.

Similar to marriage, where the claim for recognition is strong because of the societal significance attached to the institution and the benefits and privileges that flow from it, parental designation in the birth certificate analogously provides for the exercise of rights crucial to fulfilling the parental function. Just as the importance of providing for familial stability and supporting interstate travel were identified as significant factors in marriage recognition cases, those priorities equally militate in favor of providing predictability and certainty to same-sex parenthood, thus supporting entitling birth certificates to full faith and credit deference.

In summary, interstate recognition of other state-issued records, namely drivers’ licenses and marriage certificates, demonstrates the feasibility of the birth certificate solution to the recognition problem encountered by same-sex parents. Although recognition of these documents is not necessarily based on the full faith and credit mandate, commentators have argued for the provision of interstate recognition for state-issued records based on the Full Faith and Credit Clause. For purposes of this Comment, it is significant that various other state-issued records are entitled to recognition between the states and that the full faith and credit argument is not unprecedented in this context.

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181 For example, in the debate over the portability of a license to carry a firearm, several academics urged Congress to amend the Concealed Carry Reciprocity Act of 2017 to rest on the full faith and credit mandate, rather than the commerce power, because congressional power under the Full Faith and Credit Effects Clause was a more doctrinally tenable justification for the Act. See Letter from Stephen E. Sachs, Professor, Duke Univ. Sch. of Law, et al., to Trey Gowdy, Subcomm. on Crime, Terrorism, Homeland Sec. & Investigations, et al., (Mar. 23, 2017), http://www.stevesachs.com/HR38_SachsBarnettBaudeLtr_20170323.pdf [https://perma.cc/864K-JM7R].
F. Judicially Developed Limitations and the Practicality of the Birth Certificate Solution

Two judicially developed limitations, the lack of finality limitation and the distinction between recognition versus enforcement, do not undermine the feasibility of the birth certificate solution. First, the modifiable nature of birth certificates (and the lack of finality that this implicates) is not fatal because Congress has expressly indicated its intent to protect custody and support orders interstate, even though these orders are inherently flexible based on changes in circumstances. Second, the recognition–enforcement distinction does not unduly frustrate the birth certificate solution because it is only relevant when a third party seeks to rebut the parental status of the nonbiological parent, and the circumstances in which rebuttal is permitted are limited.

1. Lack of Finality Limitation

Even assuming that birth certificates are “records” under the Full Faith and Credit Clause entitled to deference, the extent to which they provide meaningful relief to the uncertainty faced by same-sex parents requires confronting the lack of finality limitation. Although the text of the Clause does not require finality as a prerequisite for application, many are of the opinion that lack of finality is fatal to a determination that full faith and credit recognition is owed, though this opinion is far from settled. The strength of the finality requirement is critical in the context of decisions made under family law because in the vast majority of jurisdictions, judgments concerning custody and support are modifiable. By definition, a judgment subject to modification is not final, theoretically supporting the position that birth certificates are not final within the scope of the Full Faith and Credit Clause.

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182 See Restatement (Second) of Conflict of Laws § 107 (Am. Law Inst. 1971) (“A judgment will not be recognized or enforced in other states insofar as it is not a final determination under the local law of the state of rendition.”); William L. Reynolds, The Iron Law of Full Faith and Credit, 53 Md. L. Rev. 412, 419 (1994) (“A judgment that is not final under the law of the state in which it was rendered is not entitled to full faith and credit.”).

183 See, e.g., Barber v. Barber, 323 U.S. 77, 87 (1944) (Jackson, J., concurring) (“Neither the full faith and credit clause . . . nor the Act of Congress implementing it says anything about final judgments . . . . Both require that full faith and credit be given to ‘judicial proceedings’ without limitation as to finality.”).

184 See, e.g., Thompson v. Thompson, 484 U.S. 174, 180 (1988) (suggesting that the confusion over the level of deference owed to custody orders derived from their modifiable nature, prompting the need for legislation in the form of the PKPA); Sistare v. Sistare, 218 U.S. 1, 26 (1910) (holding that an alimony payment determined by the continuing discretion of the rendering court was modifiable and therefore not entitled to full faith and credit); see also Restatement (Second) of Conflict of Laws § 109(a) (Am. Law Inst. 1971) (“A judgment rendered in one State . . . need not be recognized or enforced in a sister State insofar as the judgment remains subject to modification . . . .”).
Birth certificates implicate the lack of finality facet of the full faith and credit doctrine because they are modifiable, and thus not “final.” Listed attributes such as name and sex are modifiable by the owner of the certificate upon compliance with various statutory requirements, and significantly, parentage can also be updated if an adoption is successfully completed or if another type of judgment establishing legal parenthood is granted, where available.

However, in legislating pursuant to the Effects Clause, Congress has explicitly ensured that child custody and support determinations are entitled to full faith and credit recognition, notwithstanding the lack of finality. The legislative history of the PKPA in both the House of Representatives and the Senate indicates that concern for the lack of finality in custody orders, rather than being a reason not to treat these records as entitled to full faith and credit, was instead one of the considerations that animated the passage of the Act. In particular, records of the congressional debates noted that though the Full Faith and Credit Clause traditionally did not apply where the order was not final, this factor supported, rather than undermined, the propriety of legislation imposing a binding mandate to ensure interstate recognition of orders pertaining to custody and support. The policy arguments made in the PKPA debates about the need for full faith and credit assurances in the family law context, despite the fact that child custody orders are modifiable under the best interests standard, apply equally to the need for assurances of finality as to the parents listed on a child’s birth certificate and support entitling birth certificates to full faith and credit deference.

Additionally, the term “custody determination” as defined by the PKPA, though not by its terms including birth certificates, explicitly rejects the modifiable objection by explicitly including “temporary orders, and initial orders and modifications” within its scope. Therefore, to the extent that lack of finality is problematic, the modifiable nature of birth certificates should not raise this concern because in the family law context, Congress has expressed its intent to afford custody and support orders full faith and credit protection, notwithstanding the potential for modification.

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186 See supra note 122 (listing states that provide for issuance of a supplemental birth certificate when an adoption is procured).
189 See Thompson, 484 U.S. at 177 (noting that one of the purposes underlying Congress’s enactment of the PKPA was discouraging “jurisdictional competition and conflict between State courts”); see also FAMILY LAW: CONGRESS’S AUTHORITY TO LEGISLATE DOMESTIC RELATIONS QUESTIONS, supra note 151, at 22.
2. Circuit Split on Recognition Versus Enforcement Distinction

Entitling birth certificates to full faith and credit deference does not implicate the circuit split on the distinction between recognition and enforcement of an out-of-state judgment. The question of whether same-sex adoptive parents are entitled to a supplemental birth certificate listing them as such pursuant to a valid out-of-state adoption decree has prompted contradictory answers. The disagreement draws on the distinction between recognition and enforcement of an out-of-state judgment. Though relevant, this distinction does not impact the viability of entitling full faith and credit protection to birth certificates to conclusively protect the parentage of same-sex parents because the circumstances in which rebuttal of the marital presumption is allowed are narrow.

The distinction between recognition and enforcement of an out-of-state judgment was developed by a pair of cases from two Courts of Appeals: the Fifth Circuit and the Tenth Circuit.\textsuperscript{191} Both cases turned on the level of deference owed to a valid out-of-state adoption decree obtained by a same-sex couple for purposes of entitlement to a supplemental birth certificate. \textit{Finstuen v. Crutcher}\textsuperscript{192} invalidated the refusal of a state health department to issue a new birth certificate to same-sex adoptive parents with a valid out-of-state adoption decree for their child.\textsuperscript{193} Under the Tenth Circuit’s interpretation of the full faith and credit mandate, because the state had chosen to provide for the issuance of supplementary birth certificates for adopted children, it was required to apply this in an “even-handed” manner to same-sex couples.\textsuperscript{194} The Fifth Circuit reached the opposite conclusion in \textit{Adar v. Smith},\textsuperscript{195} holding that because the state did not provide for issuance of a revised birth certificate when the adoptive parents were unmarried, there was no enforcement mechanism available to support requiring the Registrar to issue the supplemental birth certificate.\textsuperscript{196}


\textsuperscript{192} \textit{496 F.3d} 1139 (10th Cir. 2007).

\textsuperscript{193} \textit{Id. at} 1154.

\textsuperscript{194} \textit{Id. at} 1154 (citing \textit{Baker v. Gen. Motors Corp.}, \textit{522 U.S.} 222, 235 (1998)).

\textsuperscript{195} \textit{639 F.3d} 146 (5th Cir. 2011).

\textsuperscript{196} \textit{Id. at} 161.
In both *Finstuen* and *Adar*, the request for new birth certificates was based on parentage as reflected in validly issued adoption decrees, making both cases factually distinguishable from the scenario envisioned by this Comment, where a same-sex couple simply wishes to protect the validity of their parentage as reflected in an out-of-state birth certificate. Nonetheless, extrapolating from the principles enunciated by the Fifth and Tenth Circuits indicates that the recognition–enforcement distinction does not undermine the feasibility of solving the parentage problem for same-sex parents by entitling birth certificates to full faith and credit recognition.

Regardless of whether a broad conception of recognition, adopted by the *Finstuen* court, or a narrow conception of recognition—as contrasted with enforcement—like that adopted by the *Adar* court, is used, the relevant question in analyzing the feasibility of the birth certificate solution turns on restrictions to the rights that flow from parental designation. The vast majority of states provide that the birth certificate is prima facie evidence of the facts that it contains, which would seem to solidify the parent–child relationship as reflected in the birth certificate of the child of a same-sex couple.

The language of some of the current formulations of statutory policy respecting the force and effect of birth certificates seems to go even further. For example, the New York provision provides that "a certification of birth . . . shall be prima facie evidence in all courts and places of the facts therein stated." Expansively phrased statutes that, by their terms, seem to reach outside the borders of the jurisdiction for purposes of determining the deference owed to the birth certificate support treating these documents as full faith and credit records.

Therefore, if a birth certificate lists both the biological mother and her lesbian spouse as parents of their child, then the presumption of parentage as reflected in the birth certificate is entitled to prima facie weight. That is, if the relationship dissolves and custody is litigated, then the nonbiological partner,

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197 See, e.g., HAW. REV. STAT. § 338-41 (2018) ("Any certificate of Hawaiian birth . . . shall be prima facie evidence of the facts therein stated."); 440 ILL. COMP. STAT. 555/25(6) ("Any certification or certified copy of a certificate in accordance with this Section shall be considered as prima facie evidence of the facts therein stated . . . ."); VT. STAT. ANN. tit. 18, § 5016(b)(4) (2017) ("A certified copy of a birth . . . certificate shall be prima facie evidence of the facts stated therein.").

198 N.Y. PUB. HEALTH LAW § 4103 (McKinney 2019) (emphasis added); see also CONN. GEN. STAT. § 7-55 (2017) ("Any certification of birth . . . shall be prima facie evidence of the facts therein stated in all courts and places and in all actions, proceedings or applications, judicial, administrative or otherwise, and such certification of birth shall have the same force and effect, wherever offered, with respect to the facts therein stated as an original certificate of birth." (emphasis added)).

199 It should be noted that presently, even New York courts recognize that the prima facie guarantee is likely not entitled to national recognition. See, e.g., In re Adoption of Sebastian, 879 N.Y.S.2d 677, 685 (Surr. Ct. 2009) ("A birth certificate is, however, only prima facie evidence of parentage and does not, in and of itself, confer parental rights that must be recognized elsewhere." (citation omitted)).
listed as a parent on the birth certificate, should have standing to petition the court for parental rights. But because the birth certificate is entitled to prima facie (as opposed to conclusive) weight, the facts it seeks to establish, including parentage, are rebuttable. There are two actors who may seek to rebut the presumption of parentage reflected in the birth certificate: the biological mother (i.e., the petitioner’s former partner) and the biological father. Case law indicates that the former scenario, where a same-sex relationship dissolves and the biological mother uses the availability of rebuttal to contest the parentage of the nonbiological parent, is more common than a biological father seeking to challenge the nonbiological partner’s presumed status.

Just as states have varying regimes on the marital presumption, state policy also differs significantly on the extent to which rebuttal of the presumption is permitted. Some jurisdictions, such as the District of Columbia, recognize the possibility of instability for the parentage of same-sex parents based on the potential for rebuttal and have narrowed the circumstances in which parentage based on the marital presumption can be rebutted. The D.C. scheme only allows for a challenge based on lack of genetic connection in two circumstances: before the child’s second birthday, which the court can reject under the best interests standard, or based on a showing of clear and convincing evidence that the presumed parent did not hold herself out as a parent of the child. Other states provide for a marital presumption that is rebuttable if it serves the best interests of the child. This would seemingly provide a great degree of protection to same-sex couples because if a child knows the nonbiological spouse as a second mother and clearly accepts the parental status that she holds, the child’s best interests

200 See, e.g., W. VA. CODE § 48-1-232 (2018) (defining a “legal parent” with standing as a party to a custody action as “a parent, by law, on the basis of biological relationship, presumed biological relationship, legal relationship, or other recognized grounds” (emphasis added)). A nonbiological parent’s ability to establish standing in a custody matter is highly complex. For a thorough discussion of these issues, see Kendra Huard Fershee, The Prima Facie Parent: Implementing a Simple, Fair, and Efficient Standing Test in Courts Considering Custody Disputes by Unmarried Gay or Lesbian Parents, 48 FAM. L.Q. 435, 436 (2014).

201 See Q.M. v. B.C., 995 N.Y.S.2d 470 (Fam. Ct. 2014), where validation of the biological father’s parent status necessarily negated any parentage claim that the biological mother’s marital female partner (who otherwise would have been entitled to a presumption of parentage) might make. Id. at 474. Q.M. is an outlier in this respect. Moreover, for couples who conceive through artificial insemination, if the sperm donation is anonymous—which is predominantly the case—there will be no possibility of a father later seeking to assert his parental rights. See Mary Kate Kearney, Identifying Sperm and Egg Donors: Opening Pandora’s Box, 13 J.L. & FAM. STUD. 215, 225 (2011) (“Most sperm donors choose to be anonymous and contract for that anonymity . . . .”).

202 D.C. CODE §§ 16-909(b)(1), 16-2342(c)–(d) (2019).


204 See generally Czajak v. Vavonese, 428 N.Y.S.2d 986, 986, 992 (Fam. Ct. 1980) (dismissing a filiation petition because the child was being adequately supported by the mother’s former husband who, though not the biological father, raised the child as his own).
are served by extending the marital presumption. Similarly, to the extent that the focus of the child’s best interests is on his financial well-being, then there will be little justification for rebutting the presumption if the nonbiological parent helps to provide for the child.\footnote{See, e.g., McLaughlin v. Jones, 401 P.3d 497, 499 (Ariz. 2017) (noting that extending the marital presumption to same-sex couples would “increase the likelihood that children born to opposite-sex parents [have] financial support from two parents”). However, this consideration could also work in the opposite direction to the detriment of same-sex parentage if the biological mother attempts to enforce a support obligation against the biological father. See, e.g., Joanna L. Grossman, Why a Craigslist Sperm Donor Owe\[space\]s Child Support, VERDICT (Jan. 27, 2014), https://verdict.justia.com/2014/01/27/craig\[space\]list-sperm-donor-owes-child-support [https://perma.cc/JJ5K-BVY] (describing how a child support obligation was imposed on a “Craigslist sperm donor” who provided genetic material to a same-sex couple pursuant to a contract between the biological mother, her lesbian partner, and the donor that came into effect when the lesbian relationship broke up). However, the lack of cases exemplifying this scenario, along with the predominance of anonymous sperm donation, indicates that rebuttal based on this theory is relatively unlikely. See supra text accompanying note 201.} Finally, rebuttal of the marital presumption may be barred where the challenger lacks standing, the estoppel doctrine precludes the challenger from challenging the presumption,\footnote{See, e.g., Barse v. Pasternak, No. HHBFA1240954S, 2015 WL 600973, at *14 (Conn. Super. Ct. Jan. 16, 2015) (holding that a nonbiological mother was entitled to argue that the biological mother should be equitably estopped from denying her parentage, where parentage was based on the marital presumption). See Harris, supra note 8, at 73.} a statute of limitations operates to bar rebuttal, or rebuttal is contrary to the interests of the child.\footnote{This possibility is not altogether unprecedented. For an example, see D.G. v. K.S., 133 A.3d 703 (N.J. Super. Ct. Ch. Div. 2015), where a woman who served as a traditional surrogate for a same-sex male couple later sought to establish a parental relationship with the child. Despite the fact that the name of the nonbiological male partner was listed on the birth certificate, the court refused to recognize his status, noting that absent biology or adoption, the birth certificate was “not dispositive of legal parentage”. Id. at 716. As D.G. shows, the birth certificate solution is not infallible, but it would provide a significantly greater degree of protection to same-sex parentage. Indeed, in D.G., ultimately all three parents—the surrogate, biological father, and his spouse—were awarded equal custody of the child. Id. at 706.} In conclusion, the practicality of solving the parentage problem for same-sex couples with interstate recognition of birth certificates is not unduly undermined by the recognition–enforcement distinction because this would only become relevant where a third party seeks to rebut the parental status of the nonbiological parent as reflected in the birth certificate, and the circumstances in which rebuttal is appropriate are narrow.\footnote{This possibility is not altogether unprecedented. For an example, see D.G. v. K.S., 133 A.3d 703 (N.J. Super. Ct. Ch. Div. 2015), where a woman who served as a traditional surrogate for a same-sex male couple later sought to establish a parental relationship with the child. Despite the fact that the name of the nonbiological male partner was listed on the birth certificate, the court refused to recognize his status, noting that absent biology or adoption, the birth certificate was “not dispositive of legal parentage”. Id. at 716. As D.G. shows, the birth certificate solution is not infallible, but it would provide a significantly greater degree of protection to same-sex parentage. Indeed, in D.G., ultimately all three parents—the surrogate, biological father, and his spouse—were awarded equal custody of the child. Id. at 706.}
most recent family law jurisprudence—which mandates that same-sex parents enjoy rights on par with opposite-sex parents and expresses a desire to protect the emotional well-being of children of same-sex couples—the birth certificate solution is eminently feasible and doctrinally supportable.

As Justice Jackson recognized, “The whole issue of faith and credit as applied to the law of domestic relations is difficult,”[209] but the prospect of refusal to recognize parental status of same-sex parents due to differing state policies places these families in a precarious position. Given the vital importance of the interests that legal parentage protects, the possibility of lack of recognition is highly disruptive to both the nonbiological parent and her child. To mitigate against this uncertainty, the parental designation reflected in the birth certificate should be entitled to interstate recognition.

For hypothetical Pam and Sue, this would mean that Sue, the nonbiological parent, could use the D.C. birth certificate to register her child for school, or to demonstrate her parentage in a later custody proceeding, or in the myriad other instances where parental designation on the birth certificate is necessary. Not only is the birth certificate solution doctrinally supportable under various principles of the Supreme Court’s full faith and credit jurisprudence, as well as its more recent pronouncements in the context of domestic relations laws, but it is also easily implementable and could provide greater certainty to the parentage of same-sex couples immediately. Given the importance of the interests at stake, for the well-being of both the child and her parents, it is imperative that states continue to adapt their family law regimes in ways that protect today’s increasingly diverse family structures. Until legislative clarity and predictability is provided across all fifty states, however, entitling birth certificates to full faith and credit recognition would provide greater immediate protection to same-sex parentage and ensure interstate recognition of the validity of their family structure.

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