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## **Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines**

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# Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines

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Courtney G. Joslin\*

## INTRODUCTION

Until recently, when a lesbian couple had a child through artificial insemination, only one member of the couple was considered the legal parent of the resulting child at the moment of birth. Today, in a small but growing number of states, this is no longer the case. Instead, in this small group of states, from the moment of birth, both members of the couple are treated as legal parents of a child born to the couple through artificial insemination. While this advancement in state law is tremendously important for many children, the resulting protections are extremely tenuous. These children are assured protection only so long as they and their families remain in one place, never crossing state lines. This essay explores why this legal vulnerability exists and offers a proposal for mitigating this potentially harmful state of affairs.

When a married couple has a child through artificial insemination, so long as the husband consented to his wife's insemination, he is automatically treated in law as the legal parent of the resulting child. By contrast, when a lesbian couple has a child together through artificial insemination, generally only the birth parent has been recognized as the child's legal parent. At least until the recent past, the legal status of the nonbirth parent has been recognized only if the couple was able to complete a second-parent adoption.<sup>1</sup> This was true because no state had explicitly extended its rules governing the legal parentage of children born through assisted reproduction to children born to unmarried couples.

Over the years, the law's failure to recognize the legal status of one of the child's two intended and functional parents has left tens if not hundreds of thousands of children<sup>2</sup> emotionally and financially vulnerable. In terms of

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<sup>1</sup> A second-parent adoption is a procedure by which a person is able to adopt his or her nonmarital partner's child without affecting the legal rights of the first parent. The procedure is analogous to a stepparent adoption, but is available to unmarried couples. Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 934 (2000); see also COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW § 5:3 (West 2009), available at LGFAMLAW 5:3.

<sup>2</sup> Although no accurate statistics are available, the data suggest that the number of same-sex parent families is significant. For example, using data from the 2000 census, the Williams Institute estimated that in 2005, over 270,000 children in the United States were being raised in households headed by same-sex couples. WILLIAMS INSTITUTE, CENSUS SNAPSHOT: UNITED

emotional stability, where a child lacks a legal relationship with one of his or her functional parents, the child may not be entitled to maintain any contact at all with the nonbirth parent, even if that person had been parenting the child for five, ten, or fifteen years.<sup>3</sup> For example, in 1991, New York's highest appellate court held that mother Alison D. lacked standing to seek visitation with the nine-year-old child that she had jointly planned for and parented with her former same-sex partner.<sup>4</sup> Additionally, in the absence of a legally recognized parent-child relationship, a child likely would not be entitled to a vast array of important financial safeguards if that functional but nonlegal parent died or became disabled. For example, the child likely would not be entitled to receive social security survivor benefits or worker's unemployment benefits.<sup>5</sup> These legal inadequacies have received a fair amount of scholarly attention over the last two decades.<sup>6</sup>

Recently, a number of states have heeded the calls for legal reform. In a small but growing number of states, there are now means by which same-sex couples can ensure that children born to them are considered the legal children of both partners from the moment of birth as a matter of state law. First, a number of states have expanded their assisted reproduction statutes to apply equally to marital and nonmarital children. Under these statutes, when an unmarried couple has a child through assisted reproduction consistent with the terms of the statute, both members of the couple will be treated as the legal parents of the resulting child. In addition to those jurisdictions, there are now a growing number of states that extend to same-sex couples all or almost all of the state-conferred rights and responsibilities of marriage. If a same-sex couple has a child through assisted reproduction in one of these

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STATES 2 (Dec. 2007), available at [http://www.law.ucla.edu/williamsinstitute/publications/US\\_CensusSnapshot.pdf](http://www.law.ucla.edu/williamsinstitute/publications/US_CensusSnapshot.pdf). This number does not include the hundreds of thousands of children being raised by single lesbian, gay, or bisexual people. In all, recent reports have estimated that as many as fourteen million children in the United States are being raised by lesbian or gay people. See Stephanie Armour, *Gay Parents Cheer a Benefit Revolution*, USA TODAY, Jan. 10, 2005, at 1B; Valerie Kellogg, *How the Children of the Gay Baby Boom Are Faring*, NEWSDAY, July 10, 2001, at B10.

<sup>3</sup> Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 345 (2002).

<sup>4</sup> Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991).

<sup>5</sup> For a more in-depth analysis of the financial harms caused by exclusionary parentage laws, see Courtney G. Joslin, *Protecting Children(?): Examining the Effects of Marriage-Based Restrictions in Assisted Reproductive Technology* (Nov. 18, 2009) (unpublished manuscript, on file with the Harvard Law School Library) [hereinafter Joslin, *Protecting Children*].

<sup>6</sup> For general analyses of the law's failure to provide adequate legal protection to lesbian and gay parent families, see, for example, Jacobs, *supra* note 3; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 573 (1990) [hereinafter Polikoff, *Two Mothers*]. For more detailed analyses of how current assisted reproduction law largely excludes lesbian and gay parent families, see, for example, Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683 (2005); Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the 21st Century*, 5 STAN. J. OF C.R. & C.L. 101 (2009) [hereinafter Polikoff, *Adopt Her Own Child*]; Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006).

jurisdictions, both members of the couple should automatically be treated as the child's legal parent from the moment of birth as a matter of state law.<sup>7</sup>

These developments are of crucial importance to these families. They provide the child with a right to maintain emotional ties with both of the people that the child views as his or her parents even if the parents' relationship breaks down while the child is a minor. The recent developments also entitle the child to important financial protections—such as social security benefits, intestacy rights, and the right to sue for wrongful death—in the event of the death or disability of either of the people that the child views as his or her parent.

While these legal changes represent critical advancements in the struggle to achieve full and equal protection of lesbian and gay couples and their families, the reality is that the children born to these couples are still in an extremely tenuous legal position. Currently, even when one state views both members of a same-sex couple as legal parents, this legal parental status is not secure when the family moves about the country. Many states likely will continue to view the nonbirth parent as a legal stranger to the child, possibly without any rights or obligations with respect to the child.

This result is due in large part to two issues. First, at this moment in time, the states are moving in radically different directions with respect to legal treatment of same-sex couples. As noted above, a small but growing number of states are dramatically expanding the protections extended to same-sex couples and their families. At the same time, however, many other states are quickly moving in the other direction—passing statutes and, increasingly, constitutional amendments intended to ensure that these states will not recognize relationships between same-sex couples.<sup>8</sup> Second, as interpreted and applied by the U.S. Supreme Court, the Full Faith and Credit Clause does not require states to apply the laws of other states; rather, a state can refuse to apply another state's laws when those laws violate the strong public policy of the forum.<sup>9</sup> What this means in this context is that even when both members of the couple are treated as legal parents as a matter of one state's laws, other states may refuse to recognize that status.

This essay discusses this newly emerging challenge facing same-sex parent families—the inability for same-sex parents to maintain their legal parental status as they move about the country. Unlike other challenges facing same-sex parent families, this issue has received little attention in the

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<sup>7</sup> The couple must comply with the requirements of the relevant alternative or artificial insemination statute to guarantee this result.

<sup>8</sup> Compare HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS (2009), available at [http://www.hrc.org/documents/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf) (indicating that five states permit or soon will permit same-sex couples to marry and that two other jurisdictions—New York and the District of Columbia—recognize marriages between same-sex couples entered into in other jurisdictions), with HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2009), available at [http://www.hrc.org/documents/marriage\\_prohibitions\\_2009.pdf](http://www.hrc.org/documents/marriage_prohibitions_2009.pdf) (indicating that forty states have statutory and/or constitutional provisions limiting marriage to the union of one man and one woman).

<sup>9</sup> *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

scholarly or advocacy literature. The essay begins by providing an overview of why this vulnerability exists and concludes by proposing a system designed to eliminate or at least alleviate it.

## I. LEGAL TREATMENT OF SAME-SEX PARENT FAMILIES

### A. *An Overview of the Law*

As noted above, increasing numbers of same-sex couples are creating intentionally formed families with children, commonly through assisted reproductive technologies (ART). The ART techniques most commonly used by lesbian couples are artificial insemination and in vitro fertilization.<sup>10</sup> In many of these families, the children are brought into the world as a result of a conscious and deliberate decision by both members of the couple and with the intention that both members of the couple will function as parents to any resulting children. Despite these clear intentions, many of these children only have a legal relationship with one of their two intended and functional parents.<sup>11</sup> As other scholars and I have discussed elsewhere, children can face severe emotional and financial harms when they lack a legal relationship with one of their functional parents.<sup>12</sup> In the absence of a legally recognized parent-child relationship, a child may be permanently cut off from his or her functional parent in the event that the adults' relationship dissolves or the legal parent dies.<sup>13</sup> In addition, in the absence of a legally recognized relationship, children may be denied a host of important financial benefits if the functional parent dies or becomes disabled.<sup>14</sup> The discussion below analyzes how the law in many jurisdictions today leaves these children without adequate legal protections in a variety of contexts.

When a married couple has children through alternative insemination, almost all states consider both spouses to be the legal parents of the resulting

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<sup>10</sup> Although surrogacy is another common ART technique, the law with regard to surrogacy is much more complicated, even with respect to heterosexual married couples. As a result, this essay focuses primarily on children born through artificial or alternative insemination. That said, many of the principles developed in this essay are relevant to children born to gay men through surrogacy.

As I have explored in greater detail elsewhere, approximately eighteen states have addressed surrogacy statutorily, with about half prohibiting all forms of surrogacy and about half permitting surrogacy only under specified circumstances that may disadvantage same-sex couples. Many states have no statutory or case law one way or the other. See JOSLIN & MINTER, *supra* note 1, § 4:2.

<sup>11</sup> See, e.g., Jacobs, *supra* note 3, at 342–43; Polikoff, *Two Mothers*, *supra* note 6, at 463–64.

<sup>12</sup> See, e.g., Jacobs, *supra* note 3, at 345–47; Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO STATE L.J. 563, 584 (2009) [hereinafter Joslin, *Interstate Recognition of Parentage*].

<sup>13</sup> See, e.g., Alison D. v. Virginia M., 572 N.E.2d 27, 28 (1991) (holding that nonbirth parent lacked standing to seek visitation with the child born to her former same-sex partner); Jones v. Barlow, 2007 UT 20, ¶¶ 1–2, 154 P.3d 808 (same); Jacobs, *supra* note 3, at 345; Polikoff, *Two Mothers*, *supra* note 6, at 463.

<sup>14</sup> See, e.g., Jacobs, *supra* note 3, at 346–47.

child, regardless of their biological connection or lack thereof to the resulting child.<sup>15</sup> In most states, however, the relevant statutes are limited to children born to married couples.<sup>16</sup> For example, the Illinois ART provision provides: "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband shall be treated in law as if he were the natural father of a child thereby conceived."<sup>17</sup>

The vast majority of states do not permit same-sex couples to marry and do not recognize marriages between same-sex couples entered into in other jurisdictions.<sup>18</sup> Therefore, most children born to same-sex couples through alternative insemination fall outside the literal language of any relevant statute or case law governing the parentage of children born through alternative insemination.<sup>19</sup> As a result, for most lesbian couples who have children through alternative insemination, only one member of the couple (generally the birth parent) will be considered the child's legal parent at the moment of the child's birth. Thus, in a recent case, the Utah Supreme Court concluded that even though Keri Jones consented to Cheryl Barlow's insemination with the intention of parenting the resulting child, Keri was a legal stranger to the resulting child and lacked standing to seek even visitation with the child after the couple ended their relationship.<sup>20</sup> Of particular relevance to this essay, the court reached this conclusion despite the fact that the couple was in a Vermont civil union at the time the child was born.<sup>21</sup>

In some states, it may be possible for the nonlegal same-sex partner to establish a legally recognized parent-child relationship with a child born through ART by completing what is commonly referred to as a second-parent adoption. A second-parent adoption is a procedure by which "a person who is co-parenting a child with the child's legal parent but who is not married to the child's legal parent becomes the child's second legal parent without terminating or affecting the legal relationship between the child and the child's existing legal parent."<sup>22</sup> Second-parent adoptions, however, are not

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<sup>15</sup> See, e.g., JOSLIN & MINTER, *supra* note 1, § 3:3.

<sup>16</sup> *Id.*

<sup>17</sup> Illinois Parentage Act, 750 ILL. COMP. STAT. 40/3(a) (2008). This provision is modeled on the 1973 version of the Uniform Parentage Act, which, as of December 2000 had been adopted fully by nineteen states and partially by many others. UNIF. PARENTAGE ACT, Prefatory Note, 9B U.L.A. 5 (2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf>.

<sup>18</sup> See HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS, *supra* note 8; HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS, *supra* note 8.

<sup>19</sup> Cf., e.g., UTAH CODE ANN. § 78B-15-703 (2008) ("If a husband provides sperm for, or consents to, assisted reproduction by his wife as provided in Section 78B-15-704, he is the father of a resulting child born to his wife.").

<sup>20</sup> See *Jones v. Barlow*, 2007 UT 20, ¶¶ 1-2, 4-5, 154 P.3d 808. By contrast, in Utah a husband who consents to his wife's insemination is treated in law as the legal parent of the resulting child. UTAH CODE ANN. § 78B-15-703 (2008).

<sup>21</sup> *Id.* ¶ 75 (Durham, C.J., dissenting).

<sup>22</sup> JOSLIN & MINTER, *supra* note 1, § 5:3.

available for the majority of such families.<sup>23</sup> Moreover, even where technically available, financial and practical barriers may prevent or hinder some families from taking advantage of this option.<sup>24</sup> In addition, an adoption cannot be completed until after the birth of the child.<sup>25</sup> Therefore, even where the parents are able to and plan to utilize the second-parent adoption procedure, the child remains vulnerable until the adoption is completed. Often this does not occur until the child is one year old or older.

### *B. New Challenges in a Time of Advancement*

Because of the harms that befall children as a result of the legal inadequacies discussed above, other scholars and I have called for reform.<sup>26</sup> As discussed in the preceding section, a number of states have responded by attempting to ensure adequate protection for children born to same-sex couples. In a small but growing number of states, children born to same-sex couples are treated as the legal children of both members of the couple. These developments, however, have created a new and unexpected challenge for same-sex couples. The children are ensured protection only so long as their family stays in one place. Once the family crosses the state line, the family has no assurance that their status will travel with them. While a few scholars have noted this new challenge, thus far few proposed solutions have

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<sup>23</sup> The Human Rights Campaign found that, as of 2004, two-thirds of children being raised by same-sex couples lived in states in which their parents were not guaranteed the right to complete a second-parent adoption. LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN, THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS 7–8 (2004), available at <http://www.hrc.org/documents/costkids.pdf>.

<sup>24</sup> See, e.g., Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.*, 17 COLUM. J. GENDER & L. 307, 340 (2008) (noting that most couples “need to hire not only a lawyer but also a social worker to do an in-home evaluation” and that some couples delay completing a second-parent adoption of their first child in order to better protect their ability to adopt another child internationally).

<sup>25</sup> See, e.g., DANA SHILLING, LAWYER’S DESK BOOK pt. 4, § 16.10 (2009), available at LDKBK 16.10 (Westlaw) (“Generally, the birth mother will not be allowed to consent to adoption until after the baby’s birth, although some states do allow prenatal consent that is affirmed after the child is born.”).

<sup>26</sup> See, e.g., Jacobs, *supra* note 3, at 389–91; Polikoff, *Adopt Her Own Child*, *supra* note 6, at 165–67; Polikoff, *Two Mothers*, *supra* note 6, at 483–91; Joslin, *Protecting Children*, *supra* note 5, at 62–69. National legal and law reform entities, including the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the ABA, have heeded this call. See, e.g., UNIF. PARENTAGE ACT § 703 cmt. (amended 2002), 9B U.L.A. 52 (Supp. 2008), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm> (“This provision [addressing the parentage of children born through assisted reproduction] reflects the concern for the best interests of nonmarital as well as marital children of assisted reproduction demonstrated throughout the Act.”); MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECH. § 603 (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (“An individual who provides gametes for, or consents to, assisted reproduction by a woman as provided in Section 604 with the intent to be a parent of her child is a parent of the resulting child.”).

been offered.<sup>27</sup> This essay explores one means of responding to this new hurdle.

As noted above, several states have extended to same-sex couples the protections that opposite-sex couples receive when they conceive a child through assisted reproduction. Four states—Delaware, New Mexico, North Dakota, and Wyoming—and the District of Columbia apply their assisted reproduction statutes equally to children born to unmarried couples.<sup>28</sup> For example, New Mexico's assisted reproduction provision provides: "A person who provides eggs, sperm or embryos for or consents to assisted reproduction as provided in Section 7-704 of the New Mexico Uniform Parentage Act with the intent to be the parent of a child is a parent of the resulting child."<sup>29</sup> Thus, unlike the statutes in the majority of states, the statute is not limited by its terms to situations where the intended parents are married.<sup>30</sup>

In addition to those states that have made their statutes applicable without regard to marital status, a small but growing number of states permit same-sex couples to marry or to enter into comprehensive legal statuses. Same-sex couples can marry in five states—Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont.<sup>31</sup> Moreover, five additional states—California, Nevada, New Jersey, Oregon, and Washington—and the District of Columbia permit same-sex couples to enter into alternative statuses that provide all or almost all of the state-conferred rights and responsibilities of marriage.<sup>32</sup> Among hundreds of other protections, these statuses extend the same "rights and obligations . . . with respect to a child of either [member of the couple]" that are extended to children born to married spouses.<sup>33</sup> Thus, for couples who have children in states that recognize these statuses, their children fall within the scope of ART statutes that apply only to marital

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<sup>27</sup> A few scholars have noted the problems that may arise as some jurisdictions become more protective of same-sex parent families while a greater number of states simultaneously move in the opposite direction. See generally, e.g., Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004); Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299 (2001).

<sup>28</sup> See DEL. CODE ANN. tit. 13, § 8-703 (Supp. 2008); N.M. STAT. ANN. § 40-11A-703 (West, Westlaw through 2009 Sess.) (effective Jan. 1, 2010); N.D. CENT. CODE § 14-20-61 (West, Westlaw through 2009 Sess.); WYO. STAT. ANN. § 14-2-903 (2009); D.C. CODE § 16-909(e) (2009). Of these five jurisdictions, only two—the District of Columbia and New Mexico—have provisions that clearly apply to same-sex couples. In the other jurisdictions, while there are strong arguments that the provisions apply equally to a same-sex couple, same-sex couples are not covered by the literal language of the provisions. For more discussion of these provisions, see, for example, Polikoff, *Adopt Her Own Child*, *supra* note 6, at 131–45.

<sup>29</sup> N.M. STAT. ANN. § 40-11A-703 (West, Westlaw through 2009 Sess.) (effective January 1, 2010).

<sup>30</sup> Cf. MINN. STAT. ANN. § 257.56, subdiv. 1 (West 2007) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the biological father of a child thereby conceived.").

<sup>31</sup> HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY, *supra* note 8.

<sup>32</sup> *Id.*

<sup>33</sup> CAL. FAM. CODE § 297.5(d) (Deering Supp. 2009).



children.<sup>34</sup> As a result of these developments, some children born to same-sex couples are now automatically, as a matter of state law, considered the legal children of both adults from the moment of birth, without the need for an adoption.

Both of these important developments—the inclusion of same-sex couples in state ART statutes and the recognition of same-sex marriage or marriage-like statuses—ensure that these families have some protections as long as they remain in a state that recognizes the adults' legal relationship or extends ART provisions without regard to marital status. That said, because the majority of states neither recognize marriages or other legal relationships between same-sex couples<sup>35</sup> nor apply ART provisions without regard to marital status, the protections extended to these children in their home state may not travel with them as they cross state borders.<sup>36</sup> For example, if the family got into a car accident while on vacation in Nebraska, it is possible that a Nebraska court would not recognize both adults as the legal parents of the child.<sup>37</sup> As a result, the nonbirth parent may be denied the right to make medical decisions for the child, or possibly even the right to visit the child in the hospital.<sup>38</sup>

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<sup>34</sup> See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005) ("We perceive no reason why both parents of a child cannot be women. That result now is possible under the current version of the domestic partnership statutes, which took effect this year. (§ 297 et seq.)"); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) ("If Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial insemination. . . . Because of the equality of treatment of partners in civil unions, the same result applies to Lisa.") (citations omitted); see also Polikoff, *Adopt Her Own Child*, *supra* note 6, at 115 ("This should mean that a civil union partner of a woman who gives birth is the child's presumptive parent, and Vermont does issue birth certificates with both women listed as parents.").

<sup>35</sup> See, e.g., HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS, *supra* note 8 (stating that, as of June 2009, twenty-nine states had constitutional provisions limiting marriage to the union of one man and one woman, that eleven additional states had statutory provisions limiting marriage to the union of one man and one woman, and that eighteen of these jurisdictions have provisions that do or may affect recognition of other legal statuses between same-sex couples).

<sup>36</sup> See Polikoff, *Adopt Her Own Child*, *supra* note 6, at 158 ("Because full faith and credit does not extend to the *statutes* of other states, however, the nonbiological mother and her child may be vulnerable to losing their parent-child relationship should the family move to a different state. The subsequent state may not recognize the validity of the couple's marriage, civil union, or domestic partnership, and may therefore refuse to recognize a parent-child relationship arising by operation of law out of the couple's status.").

<sup>37</sup> Nebraska has a particularly broad constitutional provision regarding recognition of legal relationships and rights and responsibilities between same-sex couples. The relevant provision provides: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership or other similar same-sex relationship shall not be valid or recognized in Nebraska." NEB. CONST. art. I, § 29. The Nebraska Attorney General interpreted this provision as precluding the state from adopting a statute that would "vest in a 'domestic partner' the same rights as a surviving spouse with regard to the disposition of the deceased person's remains and the making of anatomical gifts of all or part of the decedent's body." Op. Neb. Atty. Gen. No. 03004, 24 Neb. Gov't Reg. 15 (Weil Mar. 2003), available at 2003 WL 21207498.

<sup>38</sup> See, e.g., Press Release, Lambda Legal, Federal Court Dismisses Lambda Legal's Lawsuit Against Jackson Memorial Hospital on Behalf of Deceased Lesbian's Family (Sept. 29, 2009), available at [http://www.lambdalegal.org/news/pr/xfl\\_20090929\\_fed-court-dismisses-](http://www.lambdalegal.org/news/pr/xfl_20090929_fed-court-dismisses-)

### C. Parentage and the Full Faith and Credit Clause

Some may think that the Full Faith and Credit Clause of the Constitution protects against the result described above. As discussed in more detail below, however, the Full Faith and Credit Clause of the Constitution only ensures that a person's parental status will be recognized and respected by the courts of other states if that status is established by virtue of a court adjudication. By contrast, if the status is established automatically simply as a matter of state law, other states are not required as a matter of constitutional law to respect that status.

The U.S. Supreme Court has made clear that 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."<sup>39</sup> Moreover, the Court has clarified that with regard to judgments, the requirement of full faith and credit is exacting—that is, there is no public policy exception to this rule.<sup>40</sup> Accordingly, if a same-sex couple obtains a court judgment or other court adjudication that their child is the legal child of both members of the couple, that parental status adjudication is entitled to exacting full faith and credit in other states.<sup>41</sup> Consistent with this principle, every court that has considered the question has concluded that adoption judgments involving children raised by same-sex couples are entitled to recognition and respect in all other states.<sup>42</sup> This is true, these courts have concluded, even if the adoption judgment violates the public policy of the second state and could not have been obtained initially in the second state.<sup>43</sup> As I have argued elsewhere, the same rule should apply to other types of court adjudications of parentage, including adjudica-

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lambda-legal-suit-jackson-memorial-hospital-langbehn-family.html (reporting that a federal district court rejected a "lawsuit filed against Jackson Memorial Hospital on behalf of Janice Langbehn, the Estate of Lisa Pond and their three adopted children who were kept apart by hospital staff for eight hours as Lisa slipped into a coma and died").

<sup>39</sup> *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

<sup>40</sup> *Id.* (holding that there is "no roving 'public policy exception' to the full faith and credit due judgments" (emphasis omitted)).

<sup>41</sup> For a more thorough analysis of out-of-state recognition of adoptions by same-sex parents, see generally Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Gay Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751 (2003); Joslin, *Interstate Recognition of Parentage*, *supra* note 12; Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples From Other States*, 40 TULSA L. REV. 467 (2005); Rhonda Wasserman, *Are You Still My Mother? Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1 (2008).

<sup>42</sup> See, e.g., *Embry v. Ryan*, 11 So. 3d 408, 410 (Fla. Dist. Ct. App. 2009) ("Therefore, regardless of whether the trial court believed that the Washington adoption violated a clearly established public policy in Florida, it was improper for the trial court to refuse to give the Washington judgment full faith and credit."); see also *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007); *Giancaspro v. Congleton*, No. 283267, 2009 WL 416301 (Mich. Ct. App. Feb. 19, 2009); *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002).

<sup>43</sup> See, e.g., *Embry*, 11 So. 3d at 410 ("[R]egardless of whether the trial court believed that the Washington adoption violated a clearly established public policy in Florida, it was improper for the trial court to refuse to give the Washington judgment full faith and credit.").

tions of parentage made in the context of otherwise modifiable orders, such as child custody or child support orders.<sup>44</sup>

By contrast, however, if the couple does not obtain a court adjudication that both members of the couple are the legal parents of the child, the legal status of the child may be much less certain if the family moves about the country. I will use an example to illustrate how this could play out for an individual family. The hypothetical case involves a lesbian couple who resides in the state of Massachusetts and who is considered to be validly married by the state of Massachusetts. While living in the state of Massachusetts and with the consent of her spouse, one member of the couple becomes pregnant through artificial insemination using sperm from an anonymous provider. Massachusetts state law provides that “[a]ny child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.”<sup>45</sup> Since the Supreme Court of Massachusetts has held that state marriage applies equally to same-sex couples, under the aforementioned law both members of the hypothetical couple should be considered the legal parent of the resulting child.<sup>46</sup>

Despite their status as legal parents under state law, many same-sex couples in this situation are being urged nonetheless to obtain a second-parent adoption or some other judgment decreeing the nonbirth parent to be a legal parent to the child.<sup>47</sup> If the couple heeds this advice and obtains a second-parent adoption, their legal status as parents likely will be recognized outside the state under the Full Faith and Credit Clause as described above. Again, this is true even if the second state does not permit second-parent adoptions in the first instance.

What happens, however, if no adjudication is obtained in Massachusetts and the parties later move to another state? At least in some circumstances, if the child’s legal parentage is later litigated in the new state, only the birth parent will be considered the child’s legal parent. The Full Faith and Credit Clause of the Constitution may not be relevant to this situation, where parentage is based only on the Massachusetts marriage statute and not on a court adjudication. The Supreme Court has held that states can refuse to apply the laws of other states when those laws violate the public policy of

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<sup>44</sup> Joslin, *Interstate Recognition of Parentage*, *supra* note 12, at 584–90.

<sup>45</sup> MASS. GEN. LAWS ch. 46 § 4B (2008).

<sup>46</sup> See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that same-sex couples have the right to marry under the Massachusetts Constitution).

<sup>47</sup> E.g., GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD), HOW TO GET MARRIED IN MASSACHUSETTS 26 (Oct. 2009), available at <http://www.glad.org/uploads/docs/publications/how-to-get-married-ma.pdf> (“GLAD strongly recommends that you consult a lawyer and continue the practice of securing a second-parent adoption in order to obtain a decree of legal parenthood that should be recognized broadly outside of Massachusetts, independent of the marriage.”); Polikoff, *Adopt Her Own Child*, *supra* note 6, at 158 (“Regretfully, I conclude, as do other commentators, that a couple with the resources to do so should obtain a judgment of parentage or a second-parent adoption that will offer security across state lines.”).

the forum.<sup>48</sup> Thus, the second state could argue that it has a clear public policy against recognizing a marriage between same-sex couples and therefore refuse to recognize the parties' marital status in an action regarding the parentage of a child born to the couple. Because the vast majority of states have laws that are unfavorable to same-sex parent families as described above, it will frequently be the case that a court will *not* consider both partners to be legal parents of the child. This result is particularly likely in states that have explicit provisions providing that the law of the home jurisdiction should be applied to determine a child's legal parentage, regardless of where the child was born or previously resided.<sup>49</sup> The couple could argue that even if the state considers them "unmarried," it should nonetheless treat the child as the legal child of both partners.<sup>50</sup> But there certainly is a distinct possibility that the second state will reject these arguments, will apply its own law, and will conclude that the child is only the legal child of the birth parent.

This could be the result, for example, if the child's parentage was later litigated in Virginia. The assisted reproduction provision in Virginia is limited to children born to married couples.<sup>51</sup> Thus, in light of relevant statutory and constitutional provisions purporting to deny any recognition to marriages, civil unions, or other legal statuses between same-sex couples,<sup>52</sup> it is unlikely that a Virginia court would recognize the couple's marital status. Moreover, it is unlikely that a Virginia court would apply Massachusetts law to determine the child's legal parentage. Virginia law specifically provides that Virginia law should apply in any action pending in a Virginia court to determine the parentage of a child born through assisted reproduction.<sup>53</sup> Finally, existing Virginia case law involving children born to same-sex

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<sup>48</sup> *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) ("The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939))); see also Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 Nw. U. L. REV. 827, 864 (2004).

<sup>49</sup> See, e.g., UNIF. PARENTAGE ACT § 103(b) (amended 2002), 9B U.L.A. 12 (Supp. 2008) ("The court shall apply the law of this State to adjudicate the parent-child relationship . . . [regardless of:] (1) the place of birth of the child; or (2) the past or present residence of the child.").

<sup>50</sup> For example, a party could argue that even if the state has a public policy against recognizing the relationship between the two adults, it does not necessarily mean that the state has a public policy against providing protection to children born to same-sex couples. A party also could argue that even if the state does not recognize the child as the legal child of the nonbirth partner, the nonbirth partner nonetheless should be accorded at least some parental rights and obligations under equitable theories. For a more detailed discussion of these potential arguments see JOSLIN & MINTER, *supra* note 1, §§ 6:11–6:14.

<sup>51</sup> VA. CODE ANN. § 20-158 (2008).

<sup>52</sup> See VA. CODE ANN. § 20-45.2 to -45.3 (2008); VA. CONST. art. I, § 15-A.

<sup>53</sup> VA. CODE ANN. § 20-157 (2008) ("The provisions of this chapter shall control, without exception, in any action brought in the courts of this Commonwealth to enforce or adjudicate any rights or responsibilities arising under this chapter [governing the parentage of children born through assisted conception]."); cf. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337–38 (Va. Ct. App. 2006) (holding that a Vermont court's pending custody action was entitled to the full faith and credit of Virginia courts only because that action had been filed first in Vermont).

couples makes it very likely that a Virginia court would hold that only the birth parent was a legal parent of the child.<sup>54</sup>

## II. ENSURING EQUAL PROTECTION ACROSS STATE LINES

### A. *Assessing the Situation*

This situation is untenable. Parents must have assurance that, once established as legal parents as a matter of state law, their status is final and certain and will travel with them as they move about the country. As I have noted elsewhere, failure to provide certainty about a child's legal status can result in profound emotional harms for the child involved.<sup>55</sup> For example, if one of the parents is determined by another state to be a legal stranger to the child, the child may have no right to maintain a relationship or even a connection with that parent. Moreover, as noted above, the child may face a host of financial harms in the event of the death or disability of the nonbirth functional parent. And the knowledge that one could render a legal parent a legal stranger by filing first in a hostile jurisdiction may encourage manipulative behavior by birth parents, harming the child.

It is true that in most—but not all—cases, there may be ways that parties can protect themselves against this type of future uncertainty. For example, same-sex nonbirth parents who are considered to be legal parents of children born to their partners as a matter of state law likely would be able to obtain an adoption or other type of court judgment decreeing their status as legal parents.<sup>56</sup>

That said, such a system—requiring the parties affirmatively to go to court to obtain a court adjudication of parentage—will leave many children unprotected in several ways. First, an adoption cannot be completed until after the birth of a child.<sup>57</sup> Accordingly, if one of the intended parents passes away or the relationship between the adults dissolves prior to the birth of the child, the child may be left unprotected. Second, many people simply do not understand the need to obtain a court judgment of parentage when the state is telling them that both parties already are considered legal parents as a

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<sup>54</sup> See, e.g., *Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008) (holding that a woman was not entitled to seek visitation with a child born to her former same-sex partner through alternative insemination in the absence of clear and convincing evidence that denial of visitation would harm the child).

<sup>55</sup> Joslin, *Interstate Recognition of Parentage*, *supra* note 12, at 568–69 (citing Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 428 (2008) (noting that children thrive when they have “the security of a primary attachment figure and consistent routines”)).

<sup>56</sup> Almost all jurisdictions that permit same-sex couples to enter into comprehensive legal statuses also permit same-sex partners to complete second-parent adoptions. Compare HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY, *supra* note 8, with HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: SECOND-PARENT ADOPTION, available at [http://www.hrc.org/documents/parenting\\_laws\\_maps.pdf](http://www.hrc.org/documents/parenting_laws_maps.pdf) (listing states that permit second-parent adoption).

<sup>57</sup> See, e.g., SHILLING, *supra* note 25.

matter of law. More specifically, it is clear in California that when a child is born to a lesbian registered domestic partner, her partner may be listed as the child's second-parent on the original birth certificate.<sup>58</sup> Under those circumstances, many of these couples may not understand that further steps may be needed to ensure protection for their families. Third, depending on the jurisdiction and the circumstances, adoptions can be expensive and may be financially out of reach for many families.<sup>59</sup> Finally, as a matter of principle, some parents simply may decide not to pursue adoption or some other judgment of parentage out of a belief that they should not be required to take steps that other married or legally recognized couples do not have to take.

This is not the first time in history when the law has provided incentives for parents to forum shop to get more favorable (in their opinion) determinations with respect to their child. Prior to the 1960s, it was unclear whether child custody and support determinations made by the courts of one state were entitled to recognition and respect in other jurisdictions. This lack of certainty prompted many unhappy parents to repeatedly relitigate child custody and child support awards with which they were unsatisfied.<sup>60</sup> This situation was extremely harmful to the children at the center of these adversarial and often long-drawn out battles.<sup>61</sup>

In response, Congress passed a series of statutory schemes designed to ensure that full faith and credit would be accorded to orders involving children.<sup>62</sup> As discussed in more detail below, Congress should take similar steps in the context of legal parentage recognition as well.

### B. Suggestions for Reform

Specifically, I propose that Congress enact legislation that requires all states to adopt a simple, administrative registration system for establishing the parentage of children born through various forms of assisted reproduction. The scheme would not address the substance of the parentage rules;

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<sup>58</sup> CAL. DEP'T OF HEALTH SERVS., IMPORTANT INFORMATION AND CORRECTION NOTICE, UPDATE TO ACL 04-14, at 3 (2005), available at <http://www.avss.ucsb.edu/news/ACL04-14U.pdf> (providing that if a registered domestic partner gives birth to a child, her same-sex registered domestic partner can be listed as the child's "father" on the original birth certificate).

<sup>59</sup> See Goldberg, *supra* note 24.

<sup>60</sup> See *Thompson v. Thompson*, 484 U.S. 174, 181 (1988) (noting that in 1980, "between 25,000 and 100,000 children were kidnaped [sic] by parents who had been unable to obtain custody in a legal forum").

<sup>61</sup> See, e.g., UNIF. CHILD CUSTODY JURISDICTION ACT (UCCJA), Prefatory Note, 9 U.L.A. 263 (1999), available at [http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920\\_69/uccja68.pdf](http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/uccja68.pdf) (noting the harm inflicted on children by the lack of "security and stability" in their families). For further discussion of this history and the legislative responses to this seize and run behavior, see Joslin, *Interstate Recognition of Parentage*, *supra* note 12, at 569–77.

<sup>62</sup> E.g., Parental Kidnaping [sic] Prevention Act, Pub. L. No. 96-611, § 8(A), 94 Stat. 3569 (1980) (codified as amended at 28 U.S.C. § 1738A (2006)); Full Faith and Credit for Child Support Orders Act of 1994, Pub. L. 103-383, 108 Stat. 4064 (1994) (codified as amended at 28 U.S.C. § 1738B (2006)). For further discussion of the passage of these statutes, see, for example, Joslin, *Interstate Recognition of Parentage*, *supra* note 12, at 575–76.

this would be left to the individual states. What the scheme would do, however, is to provide a simple procedure by which families with a child born through assisted reproduction could ensure that the parentage rules of the birth state—whatever those may be—result in a final, binding determination of parentage entitled to exacting respect and credit in all other states.

While the notion of having such a system for children born through assisted reproduction is novel, the underlying principle of this proposal is not.<sup>63</sup> In order to provide for better collection of child support funds, starting in the 1990s, Congress passed a series of statutes that require states to adopt a simple, administrative registration system establishing the legal parentage of children born to unmarried women.<sup>64</sup> Among other things, Congress required the states to adopt “a hospital-based program in which parents are asked to sign an affidavit of voluntary acknowledgement [of paternity] immediately before or after the child’s birth.”<sup>65</sup> If such an acknowledgment is validly signed by both parties and the period for rescission has elapsed, the acknowledgment is treated as a judicial adjudication of parentage, and states are required to give full faith and credit to this determination.<sup>66</sup> The purpose of these provisions is to encourage the establishment of legal parentage of these children as soon as possible after birth and to ensure that any such establishment is, generally speaking, a final, binding determination of parentage that will travel with the child as the child and his or her family move about the country.<sup>67</sup>

Again, under my proposal, a similar system should be implemented with regard to children born through assisted reproductive technology. Specifically, I suggest that Congress, pursuant to its power to implement the Full Faith and Credit Clause, pass a statute mandating that all states adopt simple, administrative procedures, including hospital-based programs, pursuant to which a birth mother would be permitted to sign an affidavit of parentage regarding a child born through assisted reproduction. The rules for completing this affidavit would be consistent with the law in the relevant

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<sup>63</sup> For a related recommendation for amending the Uniform Parentage Act, see Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1 (2007).

<sup>64</sup> Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 250–52 (2006); Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 547–48 (1998).

<sup>65</sup> Singer, *supra* note 64, at 251 (citing 42 U.S.C. § 666(a)(5)(C)(ii) (2006)).

<sup>66</sup> 42 U.S.C. § 666(a)(5)(C)(iv) (2006) (providing that states must “give full faith and credit to such an affidavit signed in any other State according to its procedures.”); 42 U.S.C. § 666(a)(5)(D)(ii) (2006) (providing that “a signed voluntary acknowledgement of paternity is considered a legal finding of paternity”).

<sup>67</sup> As implemented in many states, same-sex couples cannot take advantage of the Voluntary Acknowledgment of Paternity (VAP) procedures. The procedures in many states require the woman and the man to state under penalty of perjury that the man is the child’s genetic father. *See, e.g.*, UNIF. PARENTAGE ACT § 301 (amended 2002), 9B U.L.A. 20 (Supp. 2008) (“The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man’s paternity.”).

jurisdiction, whatever that may be.<sup>68</sup> So, for example, if the relevant state's alternative insemination law applied only to married couples,<sup>69</sup> then the partner of the birth parent could only sign the form and claim to be the child's second-parent if the parties were validly married in that jurisdiction.<sup>70</sup>

As is true of voluntary acknowledgements of paternity today, if this affidavit is properly completed (including that it be signed under penalty of perjury) and the period for rescission passes, the affidavit would have the force of a judgment and the federal law would require that all states grant exacting full faith and credit to that determination of parentage. Again, while covering a different subset of children, the purpose and underlying principles of this system are similar to those undergirding the Voluntary Acknowledgment of Paternity programs that exist in all fifty states.

Moreover, as noted above, this scheme would also complement a number of other federal statutory schemes intended to ensure that children have finality and security with regard to their family structure even as their family moves about the country. For example, pursuant to its power to implement the Full Faith and Credit Clause, Congress has passed statutory schemes ensuring that child custody and child support orders are entitled to full faith and credit in other states.<sup>71</sup>

### *C. Potential Critiques and Rejoinders*

In this section, I try to anticipate and respond to critiques that may be leveled against the proposal discussed above. As explained above, children of same-sex couples are one group of children who would be protected by

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<sup>68</sup> Thus, the proposal does not involve any federal mandate with respect to the substantive rules that an individual state may apply to children born through ART. Rather, the proposal would simply be a way of providing families who have children through such means with a simplified procedure designed to ensure that the law of the child's birth state, whatever they may be, will establish the child's parentage and will be final and respected by other states.

To be clear, this system would not be a way around the state's ART rules. So, for example, if the relevant state's statutes require the intended parents of a child born through surrogacy to obtain court approval of their agreement in order to be determined the legal parents of the resulting child, this registration system would not enable the parties to bypass that process. Rather, this process would simply be a means by which people who are clearly considered legal parents as a matter of the relevant state's laws could obtain a final determination of parentage that has the force of a judgment without having to go to court.

<sup>69</sup> As noted above, it is my position that all states should have ART parentage provisions that apply equally, without regard to the marital status, sex, or sexual orientation of the intended parents. With regard to this particular issue, however, I am focusing only on problems related to interstate recognition and am not proposing that the federal government take a position on the substance of an individual state's parentage provisions.

<sup>70</sup> There may be situations where there is uncertainty about whether a person's marriage is valid in the relevant jurisdiction. Issues such as this would have to be worked out through legislative or regulatory guidance and attorney general opinions, as well as through court decisions.

<sup>71</sup> Parental Kidnaping [sic] Prevention Act, Pub. L. No. 96-611, § 8(A), 94 Stat. 3569 (1980) (codified as amended at 28 U.S.C. § 1738A (2006)); Full Faith and Credit for Child Support Orders Act of 1994, Pub.L. 103-383, 108 Stat. 4064 (1994) (codified as amended at 28 U.S.C. § 1738B (2006)).



the proposal outlined above. Accordingly, some advocates and policymakers may oppose this scheme on this ground. That is, there are some who believe that children are harmed by having lesbian or gay parents and, therefore, that the states and certainly the federal government should not pass laws that protect or facilitate the formation of lesbian and gay parent families.<sup>72</sup> There are a number of important rejoinders to this position. First, as a practical matter, these families exist and will continue to exist regardless of whether the law extends adequate protection to them. Accordingly, having un- or under-inclusive laws does not eliminate the existence of these families. In fact, there is no evidence that suggests that having un- or under-inclusive laws even reduces the number of children being raised by lesbian and gay people. Rather, the result is simply to leave these children and their parents without the legal protections that they need and deserve. Refusing to recognize the parental status of one of the two people raising these children will deny these children crucial benefits intended to protect them in times of family crisis. Regardless of what one thinks about the relationship between the child's parents, denying protections to children clearly runs contrary to states' interest in the welfare of children.<sup>73</sup>

Second, and maybe more importantly, existing social science simply does not support the claims that children are harmed by having lesbian or gay parents.

[Rather], the weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes towards parenting. No data have pointed to any risk to children as a result of growing up in a family with [one] or more gay parents.<sup>74</sup>

Based in part on this overwhelming weight of social science evidence, at least thirteen mainstream legal and child welfare groups have adopted policy positions supporting adoption by lesbian and gay people.<sup>75</sup>

In addition to these arguments regarding laws that generally protect lesbian and gay parent families, advocates may also raise concerns more specific to the proposal offered herein. For example, some may argue that the proposal ultimately would force other states to recognize marriages between same-sex couples, something that the Full Faith and Credit Clause of the

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<sup>72</sup> See, e.g., Lynn D. Wardle, *The "Inner Lives" of Children in Lesbian Gay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 539 (2005) (raising some "serious concerns about lesbian gay adoption").

<sup>73</sup> Hernandez v. Robles, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting).

<sup>74</sup> ELLEN C. PERRIN ET AL., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 342 (2002), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/341.pdf>.

<sup>75</sup> JEANNE HOWARD & MADELYN FREUNDLICH, EXPANDING RESOURCES FOR CHILDREN: LEGAL & PRACTICE BARRIERS 5 (2008) available at [http://www.adoptioninstitute.org/publications/2008\\_09\\_Expanding\\_Resources\\_Legal.pdf](http://www.adoptioninstitute.org/publications/2008_09_Expanding_Resources_Legal.pdf).

Constitution does not require<sup>76</sup> and something that Congress—through the enactment of the so-called Defense of Marriage Act (DOMA)—has said the states do not need to do.<sup>77</sup> However, this scheme does not require other states to recognize the legal relationship between same-sex couples. The proposal simply addresses the parent-child relationship; it ensures that once the parental status of a child has been established pursuant to this administrative procedure, that status will be recognized and respected by other states. Moreover, regardless of what a state's policy is with respect to same-sex couples, the U.S. Supreme Court has made clear that it is a violation of the Equal Protection Clause to penalize children as a means of expressing disapproval about the conduct or relationship of the children's parents.<sup>78</sup> Accordingly, a Virginia appellate court and the federal Office of Legal Counsel both have concluded that states and the federal government must recognize a child's parental status, even if that status is dependent upon the legal relationship between a same-sex couple and even if the entity has a public policy against recognizing relationships between same-sex couples.<sup>79</sup>

Finally, this proposed legislation would be fully consistent with the Congress' prior full faith and credit legislation (with the one glaring exception of DOMA).<sup>80</sup> All of the prior full faith and credit legislation enacted pursuant to this power has been legislation related to family law.<sup>81</sup> These prior enactments, like the instant proposal, do not direct the substantive laws of the states in the area of parentage. Rather, these prior enactments (again, with the exception of DOMA) are intended to ensure that, once made, determinations regarding children will remain final and secure even as the children crosses state boundaries. In passing these statutes, Congress has recognized the harm that befalls children when there is uncertainty about the credit due to decisions about a child's family structure. This proposal would extend these principles to children born through assisted reproduction.

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<sup>76</sup> See, e.g., Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2146–47 (2005).

<sup>77</sup> In 1996, Congress passed and President Clinton signed into law the so-called Defense of Marriage Act. Among other things, DOMA purports to provide that states are not required to recognize marriages between same-sex couples entered into in other states. Pub. L. 104-199 § 2(a), 110 Stat. 2419 (codified at 28 U.S.C. § 1738C (2006)).

<sup>78</sup> See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (“[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”).

<sup>79</sup> *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337 (Va. Ct. App. 2006) (“Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation terminations.”); *Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union From Qualifying for Child's Insurance Benefits Under the Social Security Act*, 31 Op. Off. Legal Counsel 1, 13 (2007), available at 2007 WL 5254330, at \*4 (“The fact that Elijah's right of inheritance ultimately derives from Vermont's recognition of a same-sex civil union is simply immaterial under DOMA. Accordingly, DOMA would not preclude Elijah from qualifying for CIB as a child of Karen under the Social Security Act.”).

<sup>80</sup> DOMA, unlike the other full faith and credit legislation, seeks to “ratchet down” the credit due certain familial statuses.

<sup>81</sup> Sack, *supra* note 48, at 876 (“Congress has passed only a handful of specific full faith and credit legislation, focused exclusively in the family law area.”).

## CONCLUSION

As is often the case, progress brings about new challenges. This is no less true in the context of same-sex parent families. A small but growing number of states have heeded the calls of scholars and commentators to ensure that the children's relationships with their intended and functional parents are protected as a matter of law. While these advancements are important, these children still remain vulnerable because their status may not travel with them across state lines. This article offers a way for Congress—without interfering with the individual states' definitions of parentage—to ensure the finality and security of the status of parents with children born through assisted reproduction.