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Recognition and Enforcement of out-of-State Adoption Decrees under the Full Faith and Credit Clause: The Case of Supplemental Birth Certificates.

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**RECOGNITION AND ENFORCEMENT OF OUT-OF-STATE
ADOPTION DECREES UNDER THE FULL FAITH AND
CREDIT CLAUSE: THE CASE OF SUPPLEMENTAL
BIRTH CERTIFICATES**

KAREL RABA*

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I. INTRODUCTION

Times change. During the first half of the twentieth century, a homosexual would be marked as a “presumptive sodomite,” a “gender invert believed to be biologically degenerate,” or a “sexual psychopath” in the face of society and the law.¹ Even throughout the 1980s homosexuality was understood as a ground for exclusion from immigration.² As recently as ten years ago, laws criminalizing consensual homosexual relations remained in effect in a number of states.³ Today, the situation is markedly different and gay rights advocates can claim a number of groundbreaking victories in the fight for social justice and legal equality.

1. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1335 (2000).

2. See *Gay and Lesbian Immigrants: Late Twentieth and Early Twenty-First Century Issues*, ENCYCLOPEDIA OF IMMIGR. (Dec. 12, 2011), <http://immigration-online.org/515-gay-and-lesbian-immigrants.html> (discussing the challenges homosexuals faced when seeking to immigrate to the United States). The exclusion of homosexuals from immigration has an interesting history. The Immigration and Nationality Act of 1940 denied immigration benefits to those who could not demonstrate good moral character but it did not specifically include homosexuality. See William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 930 (1997) (examining the language of the 1940 Act). The Immigration and Nationality Act of 1952 (McCarran-Walter Act) prohibited immigration into the United States of those “afflicted with psychopathic personality.” Immigration and Nationality (McCarran-Walter) Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 182 (repealed 1990). The Immigration and Naturalization Service (I.N.S.) interpreted this language to exclude homosexuals and bisexuals. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 930 (1997). A number of cases unsuccessfully challenged this interpretation. *Id.* at 930–31; *Fleuti v. Rosenberg*, 302 F.2d 652, 658 (9th Cir. 1962). To strengthen the I.N.S. interpretation of the law, Congress added “sexual deviation” as a basis for exclusion in 1965. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 932 (1997). The Supreme Court firmly set homosexuality as a ground for exclusion from immigration in 1967. *Id.* at 931–32; *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118, 118 (1967) (holding that homosexuality is covered in the Immigration and Nationality Act under the “psychopathic personality” provision). In later years the situation improved with the I.N.S.’s “ingenious don’t ask, don’t tell policy” which stated that “[a]n alien shall not be asked any questions concerning his or her sexual preference during primary inspection.” William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 937 (1997). For those whose homosexuality was known, the I.N.S. adopted a policy of routinely granting waivers of excludability. *Id.* at 939. Finally, the Immigration Act of 1990 removed homosexuality as a ground for exclusion from immigration to the United States. Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5067 (1990).

3. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (“The 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”).

In terms of social acceptance, research today shows that the majority of the population in the United States accepts homosexuality.⁴ Gallup's May 2010 opinion poll showed that 62% of men and 59% of women between the ages of eighteen and forty-nine consider gay relations "morally acceptable."⁵ The number of people who report having a gay friend or close acquaintance rose from 22% in 1985 to 60% in 2012.⁶ As to partnerships, the support for civil unions has also grown rapidly.⁷ The Pew Research Center reported that while only 49% of Americans supported civil unions in 2004, five years later support reached 57%.⁸ Furthermore, a number of agencies now report majority support for same-sex marriage.⁹

In tandem with social acceptance, legal protection for homosexuals is stronger than ever. The 1990s started a legal revolution in gay rights that is still occurring today. The Immigration Act of 1990 did away with homosexuality as a ground for exclusion from immigration.¹⁰ *Romer v. Evans*¹¹ made clear that mere moral disapproval of homosexuality is an illegitimate government purpose under rational basis scrutiny.¹² With the invalidation of Texas's sodomy law in *Lawrence v. Texas*,¹³ the Supreme

4. Elizabeth O'Brien & John-Henry Westen, *Gallup Poll Shows Highest-Ever Acceptance of Homosexuality in America*, LIFE SITE NEWS (May 30, 2007), <http://www.lifesitenews.com/news/archive/ldn/2007/may/07053003>.

5. Lydia Saad, *Americans' Acceptance of Gay Relations Crosses 50% Threshold*, GALLUP (May 25, 2010), <http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx>.

6. Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 940 (2010); CNN Poll: *Americans' Attitudes Toward Gay Community Changing*, CNN (June 6, 2012), <http://politicalticker.blogs.cnn.com/2012/06/06/cnn-poll-americans-attitudes-toward-gay-community-changing/>.

7. *Majority Continues to Support Civil Unions: Most Still Oppose Same-Sex Marriage*, PEW RES. CENTER (Oct. 9, 2009), <http://www.people-press.org/2009/10/09/majority-continues-to-support-civil-unions/>.

8. *Id.*

9. *Same-Sex Marriage, Gay Rights*, POLLINGREPORT, <http://www.pollingreport.com/civil.htm> (last visited Oct. 3, 2012) (indicating that in Washington Post's polls 52% of respondents favored allowing same-sex couples to marry); *CNN Poll: Americans' Attitudes Toward Gay Community Changing*, CNN (June 6, 2012), <http://politicalticker.blogs.cnn.com/2012/06/06/cnn-poll-americans-attitudes-toward-gay-community-changing/> (indicating that in a CNN poll 54% of respondents favored legal recognition of same-sex marriage).

10. Brian J. McGoldrick, *United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?*, 8 GEO. IMMIGR. L.J. 201, 201 (1994) (showing that while "Congress wished to remove homosexuality as a ground for exclusion" with the 1990 Act, it was not at first clear whether the Act's wording would actually achieve that goal).

11. 517 U.S. 620, 635–36 (1996).

12. *Id.*

13. 539 U.S. 558, 559 (2003).

Court recognized constitutional protection of the most fundamental incident of homosexuality—sexual expression.¹⁴ Today, being homosexual does not prevent any American from participation in the armed forces.¹⁵ Both social and legal acceptance of homosexuality have reached such a high level that, according to the Westboro Baptist Church, “God hates . . . the United States for its tolerance of homosexuality.”¹⁶ We can assume that future legislation and court rulings will further irritate the nerve of this extremist group.¹⁷

The next logical step in the fight for gay rights is national recognition of the familial relationships of homosexuals. Gays and lesbians are now engaged in a vocal legal and political fight for marriage equality—a concept unthought-of a mere generation ago.¹⁸ It has been less than a decade

14. *Id.*

15. See James Dao, *Don't Ask, Don't Tell Ends This Week With Celebrations, Revelations and Questions*, N.Y. TIMES BLOG (Sept. 19, 2011, 7:00 AM), <http://atwar.blogs.nytimes.com/2011/09/19/dont-ask-dont-tell-ends-this-week-with-celebrations-revelations-and-questions> (reporting that the policy was repealed in 2011); Elizabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES, July 23, 2011, <http://www.nytimes.com/2011/07/23/us/23military.html> (detailing the end of the “Don't Ask, Don't Tell” policy). For a number of years homosexuals were not permitted to serve openly in the military. See 10 U.S.C. § 654 (2006), *repealed by* Pub. L. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2011) (listing the United States policy on homosexuals serving in the military); Dep't of Defense Directive 1332.14 (1982) (Enlisted Administrative Separations (Dec. 21, 1993)), *available at* <http://dont.stanford.edu/regulations/regulation41.pdf> (banning homosexuals and bisexuals from serving in the military before the new policy in 1993); Robert I. Corrales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 415, 417 (2008) (reporting that President Clinton introduced “Don't Ask, Don't Tell” in 1993 and that the policy allowed homosexuals who were not open about their sexual orientation to serve in the military).

16. *Snyder v. Phelps*, 131 S.Ct. 1207, 1213 (2011).

17. The Anti-Defamation League, whose mission it is to “scrutinize[] and expose[] extremists and hate groups,” termed the Westboro Baptist Church a “hate group.” *About the Anti-Defamation League*, ADL, <http://www.adl.org/about.asp?s=topmenu> (last visited Oct. 3, 2012); see also *Westboro Baptist Church*, ADL, http://www.adl.org/learn/ext_us/WBC/default.asp?LEARN_Cat=Extremism&LEARN (last visited Oct. 3, 2012) (describing the Westboro Baptist Church as “a small virulently homophobic, anti-Semitic hate group that regularly stages protests around the country.”). As to future legislation, there have been numerous attempts in Congress to repeal the Defense of Marriage Act—a statute that limits marriage to opposite-sex couples for purposes of federal law. See 1 U.S.C. § 7 (2006) (“[T]he word “marriage” means only a legal union between one man and one woman.”); Respect for Marriage Act of 2011, S. 598, 112th Cong. (2011) (asserting the desire to repeal DOMA). The Defense of Marriage Act was also being challenged judicially in the First Circuit. *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 235 (D. Mass. 2010); *Gill v. Office of Pers. Mgnt.*, 699 F. Supp. 2d 374, 374 (D. Mass. 2010).

18. While the concept of same-sex marriage found its way to the courts in the 1970s and 1980s, it was not until 1996 with *Baehr v. Miike* that the possibility of victory in the arena of same-sex marriage litigation became realistic for gay rights advocates. *Baehr v.*

since Massachusetts became the first state to allow gay and lesbian couples to legally marry.¹⁹ Today, nine states—Maine,²⁰ Maryland,²¹ Massachusetts,²² Connecticut,²³ Iowa,²⁴ New Hampshire,²⁵ New York,²⁶

Miike, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996) (holding that a limitation of marriage to opposite-sex couples violated the Hawaii Constitution); *but see* Adams v. Howerton, 673 F.2d 1036, 1042–43 (9th Cir. 1982) (holding that “section 201(b) of the Act is not unconstitutional because it denies spouses of homo-sexual marriages the preferences accorded to spouses of heterosexual marriages.”); Jones v. Hallahan, 501 S.W.2d 588, 589–90 (Ky. 1973) (upholding Kentucky’s refusal to issue a marriage license to a same-sex couple); Baker v. Nelson, 191 N.W.2d 185, 185–87 (Minn. 1971) (holding that neither state statutes nor the U.S. Constitution authorized same-sex marriage).

19. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968–69 (2003) (validating same-sex marriages in Massachusetts). As a result of the *Goodridge* decision, Massachusetts began issuing marriage licenses to same-sex couples on May 17, 2004. Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, <http://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html?pagewanted=all&src=pm>.

20. In November 2012, Maine, together with Maryland and Washington, became the first states to legalize same-sex marriage by a ballot vote. Alana Semuels, *Voters OK Gay Marriage in Maine, Maryland*, L.A. TIMES (Nov. 7, 2012), <http://www.latimes.com/news/nationworld/nation/la-na-gay-marriage-20121107,0,1194693.story>.

21. Maryland originally approved same-sex marriage legislatively. Aaron C. Davis, *Maryland Senate Passes Same-Sex Bill*, WASH. POST, Feb. 23, 2012, http://www.washingtonpost.com/local/md-politics/maryland-senate-passes-same-sex-marriagebill/2012/02/23/gIQAfbakWR_story.html (announcing the passage of the Maryland statute and reactions from both sides of the debate); Reuters, *Maryland: Same-Sex Marriage Signed into Law*, N.Y. TIMES, Mar. 2, 2012, <http://query.nytimes.com/gst/fullpage.html?res=9C05E2DD1F30F931A35750C0A9649D8B63> (announcing Maryland Governor Martin O’Malley signed a same-sex marriage bill into law on March 1, 2012). The opposition vouched to challenge the law in a referendum. Sabrina Tavernise, *In Maryland, House Passes Bill to Allow Gays to Wed*, N.Y. TIMES, Feb. 17, 2012, <http://www.nytimes.com/2012/02/18/us/maryland-house-approves-gay-marriage-measure.html> (announcing the passage of Maryland’s statute that allows same sex couples to marry beginning in 2013, which the opposition hopes to challenge in a referendum in November 2012). On November 6, 2012, a majority of Maryland voters voted to legalize same-sex marriage. Alana Semuels, *Voters OK Gay Marriage in Maine, Maryland*, L.A. TIMES (Nov. 7, 2012), <http://www.latimes.com/news/nationworld/nation/la-na-gay-marriage-20121107,0,1194693.story>. Besides Maryland, the New Jersey legislature passed a bill allowing same-sex marriage in 2012; however, the bill was vetoed by Governor Chris Christie. Kate Zarnike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 18, 2012, at A19.

22. *Goodridge*, 798 N.E.2d at 968–69 (redefining civil marriage to be a voluntary union between two spouses as to the exclusion of other individuals).

23. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (holding that restriction of marriage rights to opposite-sex couples violates same-sex couples’ state constitutional rights). In 2009, the Connecticut legislature withdrew the old marriage law that had been invalidated by the court and replaced it with a gender-neutral counterpart. Chase Matthews, *Connecticut Gov. Signs Gay Marriage Into Law*, CHICAGO PRIDE (Apr. 23, 2009, 12:00 AM), <http://chicago.gopride.com/news/article.cfm/articleid/7272400>.

24. *Varnum v. Brien*, 763 N.W.2d. 862, 906 (Iowa 2009) (striking statutory language that banned same-sex marriage because it violated the state’s constitution). Iowa began

Vermont,²⁷ and Washington²⁸—and the District of Columbia²⁹ permit

issuing marriage licenses to same-sex couples on April 27, 2009. See Monica Davey, *A Quiet Day in Iowa As Same-Sex Couples Line Up to Marry*, N.Y. TIMES, Apr. 27, 2009, http://www.nytimes.com/2009/04/28/us/28marriage.html?_r=0 (discussing the first day Iowa began issuing marriage licenses to same-sex couples).

25. N.H. REV. STAT. ANN. § 457:1-a (LexisNexis Supp. 2011). The statute states that “[m]arriage is the legally recognized union of 2 people” and “[a]ny person . . . may marry any other eligible person regardless of gender.” *Id.* Governor John Lynch signed the law on June 3, 2009. Press Release, New Hampshire Government, Governor Lynch Statement Regarding Same-Sex Marriage Legislation Singed into Law Today (June 3, 2009) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*), available at http://www.governor.nh.gov/media/news/2009/060309_marriage.htm.

26. N.Y. DOM. REL. LAW § 10-a (McKinney 2011) (“A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”). New York began issuing marriage licenses to same-sex couples in July 2011 and is one of the largest states so far to do so. Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 24, 2011, <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all>.

27. *Baker v. Vermont*, 744 A.2d 864, 886 (1999) (holding that “exclusion of same-sex couples from the benefits incident to a civil marriage” violates the state constitution). On July 1, 2000, as a response to *Baker*, Vermont became the first state to grant civil unions to same-sex couples with the same legal rights and responsibilities of marriage. Carey Goldberg, *In Vermont, Gay Couples Head for the Almost-Altar*, N.Y. TIMES, July 2, 2000, <http://www.nytimes.com/2000/07/02/us/in-vermont-gay-couples-head-for-the-almost-altar.html?pagewanted=all&src=pm>. Years later, in a heated exchange between the Vermont legislature and the state’s Governor, the state legislature overruled the Governor’s veto of a bill legalizing same-sex marriage. *Gay Marriage Advances in Vermont and the District*, WASH. POST, Apr. 8, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040703434.html>. In 2009, Vermont then became “the first state to legally recognize gay marriage through a legislative act rather than a court order.” *Id.*

28. Similar to Maryland, Washington’s legislature initially approved same-sex marriage. Associated Press, *Washington: Foes of Gay Marriage Vow to Fight Law*, N.Y. TIMES, Feb. 2, 2012, <http://www.nytimes.com/2012/02/03/us/washington-foes-of-gay-marriage-vow-fight-measure.html> (explaining the opposition’s plan to repeal the recently passed same-sex marriage legislation). Opponents sought to challenge the measure by a ballot vote. Kim Murphy, *Washington State Makes 7: Governor Signs Gay Marriage Law*, L.A. TIMES (Feb. 13, 2012, 2:12 PM), <http://latimesblogs.latimes.com/nationnow/2012/02/washington-governor-signs-law-legalizing-same-sex-marriage.html>; Reuters, *Washington: Gay Marriage Legalized*, N.Y. TIMES, Feb. 13, 2012, <http://www.nytimes.com/2012/02/14/us/washington-gay-marriage-legalized.html> (reporting that the state of Washington would begin performing same-sex marriages on June 7, 2012, unless opponents collect the necessary signatures to put the law to a referendum in November). Voters approved of same-sex marriage in the November 2012 elections. Elizabeth Hartfield, *Washington Approves Same-Sex Marriage, Marking Shift in Nation’s Views*, ABC NEWS, <http://abcnews.go.com/blogs/politics/2012/11/washington-approves-same-sex-marriage-marking-shift-in-nations-views/>.

29. D.C. CODE § 46-401(a)–(b) (Supp. 2009) (“Marriage is the legally recognized union of 2 persons” and “[a]ny person may enter into a marriage in the District of Columbia with another person, regardless of gender.”). See *Jackson v. D.C. Bd. of Elections and Ethics*, 999 A.2d 89, 120 (D.C. 2010) (holding that an initiative seeking to define marriage

same-sex marriages.³⁰ At the same time, a number of states have passed constitutional amendments that limit marriage to opposite sex couples.³¹

as between a man and a woman on a ballot would violate the District of Columbia Human Rights Act, signifying another major victory for same-sex marriages); *Victory for Gay Marriage in D.C.*, ADVOCATE (July 15, 2010, 11:10 AM), <http://www.advocate.com/news/daily-news/2010/07/15/victory-gay-marriage-dc>.

30. See *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16430> (last updated June 2012) (listing the states that offer marriage licenses to same-sex couples).

31. ALA. CONST. amend. 774 (“Marriage is inherently a unique relationship between a man and a woman.”); ALASKA CONST. art. I, § 25 (“[A] marriage may exist only between one man and one woman.”); ARIZ. CONST. art. 30, § 1 (“Only a union of one man and one woman shall be valid or recognized as a marriage.”); ARK. CONST. amend. 83, § 1 (“Marriage consists only of the union of one man and one woman.”); CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized.”); COLO. CONST. art. II, § 31 (“Only a union of one man and one woman shall be valid or recognized as a marriage.”); FLA. CONST. art. I, § 27 (“[M]arriage is the legal union of only one man and one woman”); GA. CONST. art. I, § 4, para. 1 (“This state shall recognize as marriage only the union of man and woman.”); HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”); IDAHO CONST. art. III, § 28 (“A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized”); KAN. CONST. art. 15, § 16 (“Marriage shall be constituted by one man and one woman only.”); KY. CONST. § 233A (“Only a marriage between one man and one woman shall be valid or recognized as a marriage”); LA. CONST. art. 12, § 15 (“Marriage . . . shall consist only of the union of one man and one woman.”); MICH. CONST. § 1.I(25) (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage.”); MISS. CONST. art. 14, § 263A (“Marriage may take place and may be valid . . . only between a man and a woman.”); MO. CONST. art. I, § 33 (“[A] marriage shall exist only between a man and a woman.”); MONT. CONST. art. 13, § 7 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage.”); NEB. CONST. art. I, § 29 (“Only marriage between a man and a woman shall be valid or recognized”); NEV. CONST. art. I, § 21 (“Only a marriage between a male and female person shall be recognized and given effect”); N.C. CONST. art. VIX, § 6 (“Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.”); N.D. CONST. art. XI, § 28 (“Marriage consists only of the legal union between a man and a woman.”); OHIO CONST. art. XV, § 11 (“Only a union between one man and one woman may be a marriage valid in or recognized.”); OKLA. CONST. art. 2 § 35 (“Marriage . . . shall consist only of the union of one man and one woman.”); OR. CONST. art. XV, § 5a (“[O]nly a marriage between one man and one woman shall be valid or legally recognized.”); S.C. CONST. art. XVII, § 15 (“A marriage between one man and one woman is the only lawful domestic union.”); S.D. CONST. art. 17, § 9 (“Only marriage between a man and a woman shall be valid or recognized by this state.”); TENN. CONST. art. XI, § 18 (“The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract.”); TEX. CONST. art. I, § 32 (“Marriage . . . shall consist only of the union of one man and one woman.”); UTAH CONST. art. I, § 29 (“Marriage consists only of the legal union between a man and a woman.”); VA. CONST. art. I, § 15-A (“[O]nly a union between one man and one woman may be a marriage valid in or recognized by the state.”); WIS. CONST. art. 13, § 13 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage.”). North Carolina was the last state to pass a similar constitutional amendment

Such amendments are targets of legal challenges by gay rights activists.³²

The Ninth Circuit has invalidated one such amendment.³³ In February 2012, the court invalidated California's marriage amendment put in place by the infamous Proposition 8.³⁴ The court found the state's withdrawal of previously granted same-sex marriage rights unconstitutional on equal protection grounds.³⁵ With a narrow holding tailored to the unusual situ-

banning same sex marriages and civil unions on May 8, 2012. North Carolina's Proposition One stated that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized." Nate Silver, *North Carolina's Ban on Gay Marriage Appears Likely to Pass*, N.Y. TIMES BLOG (May 4, 2012, 1:51 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/05/04/north-carolinas-ban-on-gay-marriage-appears-likely-to-pass/>. Scholars refer to such state constitutional amendments as "mini-DOMAs" in light of the Defense of Marriage Act (DOMA)—a congressional act that limits marriage to opposite-sex couples for purposes of federal law. See, e.g., Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265 (2007) (discussing the impact of state legislation on same-sex marriages). One state—Minnesota—successfully defeated a proposed ballot measure that would add a constitutional provision limiting marriage to opposite-sex couples. Lila Shapiro, *Gay Marriage Victory in Maine, Maryland; Minnesota Votes Down 'Traditional' Amendment*, HUFFINGTON POST (Nov. 7, 2012), http://www.huffingtonpost.com/2012/11/07/gay-marriage-victory_n_2085900.html.

32. See Gabriel Arana, *Gay on Trial*, THE AM. PROSPECT (Nov. 20, 2009), <http://prospect.org/article/gay-trial> (illustrating how gay-rights leaders shifted their focus to state courts and the ballot box).

33. See *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012) (finding California's marriage amendment unconstitutional).

34. *Id.*; see Adam Nagourney, *Court Strikes Down Ban on Gay Marriage in California*, N.Y. TIMES, Feb. 7 2012, http://www.nytimes.com/2012/02/08/us/marriage-ban-violates-constitution-court-rules.html?_r=0 (analyzing the Ninth Circuit's holding); see also Michael J. Ritter, Article, *Perry v. Schwarzenegger: Trying Same-Sex Marriage*, 13 SCHOLAR 363, 365–66 (2010) (chronicling same-sex marriage in California); M.K.B. Darmer & Tiffany Chang, Article, *Moving Beyond the "Immutability Debate" in the Fight For Equality After Proposition 8*, 12 SCHOLAR 1, 3440 (2009).

35. *Perry*, 671 F.3d at 1096 ("By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause."). In 2000, California adopted Proposition 22, an "initiative statute" limiting marriage to opposite-sex couples. *Perry v. Brown*, 671 F.3d 1052, 1065 (9th Cir. 2012) (citing Cal. Fam. Code § 308.5 (Deering 2012)). The Supreme Court of California subsequently invalidated the new statute in *In re Marriage Cases* but not before the state had issued over 18,000 marriage licenses to same-sex couples. 183 P.3d 384, 453 (Cal. 2008) ("[W]e determine that the language of section 300 limiting the designation of marriage to a union between a man and a woman is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples.") (internal quotation marks omitted); *Perry v. Brown*, 671 F.3d at 1067. In 2008, five California residents collected signatures to have the issue of same-sex marriage placed on the ballot once again, as "Proposition 8," not an "initiative statute" but rather the proposition for the ratification of a new state constitutional amendment. *Perry v. Brown*, 671 F.3d 1052, 1065, 1067 (9th Cir. 2012). Voters approved this new proposition by a "slim majority." *Perry v. Brown*, 671 F.3d 1052, 1065, 1067 (9th Cir. 2012) (stating

ation in California, the Ninth Circuit's decision will most likely not reach the U.S. Supreme Court.³⁶

Another aspect of the fight for marriage equality concerns the recognition of same-sex marriages at the federal level.³⁷ In May 2012, the First Circuit affirmed a lower court decision finding unconstitutional on equal protection grounds section three of the Defense of Marriage Act (DOMA).³⁸ The initial DOMA challenges were brought on equal protection, Tenth Amendment, and Spending Clause grounds.³⁹ The plaintiffs' success throughout the litigation and appeal process further fueled

that Proposition 8 passed with 52.3 percent approval and that the resulting constitutional amendment took effect on November 5, 2008). The Ninth Circuit ultimately invalidated the new constitutional amendment in February 2012. *Id.* at 1096.

36. Maura Dolan & Carol J. Williams, *Divided Court Rejects Proposition 8; 9th Circuit Panel Declares the State's Gay-Marriage Ban Unconstitutional*, L.A. TIMES, Feb. 8, 2012, <http://articles.latimes.com/2012/feb/08/local/la-me-prop8-20120208> (commenting that the Ninth Circuit based its decision "on a 1996 U.S. Supreme Court precedent that said a majority may not take away a minority's rights without legitimate reasons"). Retired Chief Judge Vaughn Walker, the judge who presided over *Perry at trial*, *has acknowledged that the U.S. Supreme Court may decide to turn down this case because of its narrow holding*. See *Scottie Thomaston*, *Prop 8: Former Chief Judge Walker Questions If Supreme Court Would Review Challenge*, PROP 8 TRIAL TRACKER (Apr. 20, 2012), <http://www.prop8trial-tracker.com/2012/04/20/prop-8-former-chief-judge-walker-questions-if-supreme-court-would-review-challenge> ("Because of the narrow grounds the 9th Circuit ruled on, [the U.S. Supreme Court] could turn down that case.").

37. Two code provisions enacted by the Defense of Marriage Act of 1996 affect same-sex marriages. See 1 U.S.C. § 7 (2006) ("In determining the meaning of any Act of Congress . . . the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.") and 28 U.S.C. § 1738(C) (2006) ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . ."); see also *Defense of Marriage Act*, Pub. L. No. 104-199, §§ 2(a), 3(a), 110 Stat. 2419, 2419 (1996) (limiting marriage one man and one woman).

38. See *Mass. v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 17 (1st Cir. 2012) (finding DOMA unconstitutional on equal protection grounds). "These appeals present constitutional challenges to section 3 of the Defense of Marriage Act . . . which denies federal economic and other benefits to same-sex couples lawfully married in Massachusetts and to surviving spouses from couples thus married." *Id.* See also 1 U.S.C. § 7 (2006) (codifying the definitions from DOMA); *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (defining marriage as between one man and one woman); *U.S. Dep't of Health & Human Serv.*, 698 F. Supp. 2d at 253 (overturning DOMA on Tenth Amendment grounds); David G. Savage, *Federal Appeals Court Rules Defense of Marriage Act Unconstitutional*, L.A. TIMES, May 31, 2012, <http://articles.latimes.com/2012/may/31/news/la-pn-doma-appeals-court-20120531>.

39. *U.S. Dep't of Health & Human Serv.*, 682 F.3d at 7; see *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (holding that DOMA violates Equal Protection).

political debates.⁴⁰ Strong voices, including those of President Barack Obama and Senator Dianne Feinstein, have called for Congress to repeal DOMA.⁴¹ In fact, shortly before the First Circuit handed down its affirmation of the lower court holding, President Barack Obama officially expressed his support of same-sex marriage.⁴²

This Note addresses a less frequently cited gay rights issue affecting same-sex relationships—the interplay between the Full Faith and Credit Clause and state laws governing issuance of supplemental birth certificates to out-of-state adoptive parents of the same sex.⁴³ Courts have interpreted the Full Faith and Credit Clause to require recognition of out-of-state adoption decrees.⁴⁴ State laws regulate their enforcement and generally allow adoptive parents to receive a new birth certificate for a child born in the forum state and adopted in a foreign jurisdiction.⁴⁵ Such

40. See Kirk Johnson, *Basis of Ruling on Gay Unions Stirs Debate*, N.Y. TIMES, July 9, 2010, <http://www.nytimes.com/2010/07/10/us/politics/10tent.html> (commenting on “fractures and fault lines among groups working to bolster states’ rights.”).

41. The most recent initiative, Senate Bill 598, proposed by Diane Feinstein, successfully passed the Senate Judiciary Committee on November 10, 2011. S. 598, 112th Cong. (2011); see also Paul Guequierre, *Senate Judiciary Committee Approves Bill Repealing Discriminatory Defense of Marriage Act*, HRC (Nov. 10, 2011), <http://www.hrc.org/blog/entry/senate-judiciary-committee-approves-bill-repealing-doma> (quoting President Barack Obama, “DOMA belongs with ‘Don’t Ask, Don’t Tell’ in the history books.”); see David Nakamura, *Obama Backs Bill to Repeal Defense of Marriage Act*, WASH. POST, July 19, 2011, http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI_story.html (announcing President Barack Obama’s support). Notably, this was not the first attempt to repeal DOMA. See, e.g., H.R. 3567, 111th Cong. (2009) (introduction an earlier Respect for Marriage Act targeting the repeal of DOMA).

42. The White House Blog (May 10, 2012, 7:31 p.m.), <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>.

43. Krista Stone-Manista, *Parents in Illinois Are Parents in Oklahoma Too: An Argument for Mandatory Interstate Recognition of Same-Sex Adoptions*, 19 LAW & SEXUALITY 137, 138 (2010).

44. See *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (holding “that final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause.”).

45. *Id.* at 1154 (stating that “[e]nforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law”); see, e.g., HAW. REV. STAT. ANN. § 338-20(a) (LexisNexis 2008) (declaring that “[i]n case of the adoption of any person born in the State, the department of health, upon receipt of a properly certified copy of the adoption decree, or certified abstract thereof on a form approved by the department, shall prepare a supplementary certificate”); MONT. CODE ANN. § 50-15-223 (2011) (stating that “[t]he department shall establish a new certificate of birth for a person born in this state when the department receives . . . a certificate of adoption”); N.J. STAT. ANN. § 26:8-40.10 (West 2007) (maintaining that “[t]he State registrar shall, upon the request of a parent of any such child who is adopted outside of this State or the United States or the request of any person on behalf of such child, issue a new certificate of birth”); N.M. STAT. ANN. § 24-14-17 (LexisNexis

birth certificates then reflect the changes in parentage effectuated by the out-of-state adoption decree.⁴⁶ Most jurisdictions sanction same-sex parent adoptions⁴⁷ and thus also allow same-sex couples to obtain revised birth certificates for their adoptive children.⁴⁸ Yet, same-sex parents who adopt out-of-state may struggle with receiving revised birth certificates in the handful of states that prohibit gay and lesbian couples from jointly adopting children.⁴⁹

2007) (declaring that “[t]he state registrar shall establish a new certificate of birth for a person born in this state when he receives . . . a report of adoption”).

46. *See* Crutcher, 496 F.3d at 1156 (holding “that final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause”); *see, e.g.*, N.J. STAT. ANN. § 26:8-40.10 (West 2007) (stating that “[t]he State registrar shall . . . issue a new certificate of birth . . . showing . . . the names of the adopting parents”).

47. *See, e.g.*, N.J. STAT. ANN. § 26:8-40.10 (West 2007) (stating that “[t]he State registrar shall . . . issue a new certificate of birth . . . showing . . . the names of the adopting parents”).

48. Elizabeth Burleson, *International Human Rights Law, Co-Parent Adoption, and the Recognition of Gay and Lesbian Families*, 55 LOY. L. REV. 791, 793 (2009); *see also* HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: JOINT ADOPTION, MAPS OF ST. LAWS & POLICIES, http://www.hrc.org/files/assets/resources/Joint_Adoption_parenting_Laws_April_2011.pdf (last updated Jan. 6, 2012) (providing information of the state of joint adoption laws around the United States); HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: SECOND-PARENT ADOPTION, MAPS OF ST. LAWS & POLICIES 1 (2012), *available at* http://www.hrc.org/files/images/general/2nd_Parent_Adoption.pdf (providing information of the state of second-parent adoption laws around the United States).

49. *Adar v. Smith*, 639 F.3d 146, 161 (5th Cir. 2011) (en banc) (holding that Louisiana need not issue a supplemental birth certificate that reflects the names of both parents to an unmarried same-sex couple). In Louisiana, only married couples can jointly adopt a child. LA. CHILD. CODE ANN. art. 1221 (2004) (effective Jan. 1, 1992) (“A single person, eighteen years or older, or a married couple jointly may petition to privately adopt a child.”). Because the State prohibits same-sex marriages and does not recognize same-sex marriages performed in other jurisdictions, it has in effect banned same-sex couples from jointly adopting children. *See* LA. CONST. art. 12, § 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.”); LA. CIV. CODE ANN. art. 89 (1999) (“Persons of the same sex may not contract marriage with each other.”); LA. CIV. CODE ANN. art. 3520 (2011) (“A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.”). Utah, in addition to banning unmarried couples from joint adoptions, prohibits adoption by a single individual “cohabiting in a relationship that is not a legally valid and binding marriage.” UTAH CODE ANN. § 78B-6-117(3) (LexisNexis 2008); *see also* Jason N.W. Plowman, *When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 67 (detailing statutes prohibiting second-parent adoptions).

Two circuit level decisions stand as an archetype of such conflicting treatment—*Finstuen v. Crutcher*⁵⁰ and *Adar v. Smith*.⁵¹ In both cases, same-sex couples jointly adopted in a state other than the child's state of birth.⁵² Each couple then petitioned to receive a revised birth certificate reflecting the newly created parental status.⁵³ Following initial denials, the couples brought suit.⁵⁴ In the end, the Tenth Circuit in *Finstuen* held that the Full Faith and Credit Clause required Oklahoma to recognize the out-of-state adoption decree and state law mandated the State Registrar to issue a revised birth certificate.⁵⁵ In *Adar*, the Fifth Circuit also held that the Full Faith and Credit Clause mandated recognition of the parental relationship created by the out-of-state adoption decree.⁵⁶ Unlike the Tenth Circuit, however, it concluded that Louisiana law did not command the Registrar to issue a supplemental birth certificate listing both same-sex parents.⁵⁷ Surprisingly, closer inspection reveals that the Oklahoma and Louisiana statutes implicated in *Finstuen* and *Adar* are practically the same.

This Note posits that the Fifth Circuit in *Adar* misinterpreted Louisiana law and incorrectly concluded the state's statutes prohibited issuance of a revised birth certificate to the plaintiffs. The Note proceeds in four parts. First, it surveys the history and current state of the law regarding same-sex parent adoptions. It then charts the role of the Full Faith and Credit Clause in recognition and enforcement of out-of-state judgments and provides a summary of the Tenth and Fifth Circuits' decisions and the respective state statutes behind those holdings. The following section compares the state statutes implicated in *Finstuen* and *Adar* and asks whether the latter erroneously concluded that Louisiana law did not require issuance of a revised birth certificate. This Note concludes that in its quest to distinguish *Finstuen*, *Adar* misinterpreted established law and incorrectly concluded that "Louisiana does not permit any unmarried couples—whether adoption [occurred] out-of-state or in-state[—]to obtain revised birth certificates with both parents' names on them."⁵⁸

50. See *Crutcher*, 496 F.3d at 1142.

51. *Adar v. Smith*, 639 F.3d 146, 149 (5th Cir. 2011) (en banc). See also Jason N.W. Plowman, *When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 67–68 (detailing judicial decisions permitting second-parent adoptions).

52. *Adar*, 639 F.3d at 149; *Crutcher*, 496 F.3d at 1142.

53. *Adar*, 639 F.3d at 149; *Crutcher*, 496 F.3d at 1142.

54. *Adar*, 639 F.3d at 149–50; *Crutcher*, 496 F.3d at 1142.

55. *Crutcher*, 496 F.3d at 1156.

56. *Adar*, 639 F.3d at 159.

57. *Id.*

58. *Id.* at 161.

II. THE HISTORY AND LAWS SURROUNDING SAME-SEX PARENT ADOPTION

The “gayby boom”⁵⁹ is now in its third decade.⁶⁰ More and more same-sex couples beget children by artificial insemination, surrogacy, and adoption.⁶¹ A number of legal issues surround each of the listed methods.⁶² In debating the conflicting treatment of adoptive same-sex parents

59. See Scott Harris, *2 Moms or 2 Dads—and a Baby: Gay Parents Give Birth to Families of Their Own, Thanks to Such Methods as Artificial Insemination and Adoption*, L.A. TIMES, Oct. 20, 1991, http://articles.latimes.com/1991-10-20/news/mn-470_1_artificial-insemination (depicting the “gayby boom” as “Children . . . added to gay households in a variety of ways: by winning custody of offspring in the dissolution of heterosexual marriages, by adoption, by alternative means of conception”). The term “gayby boom” can be traced back to a 1990 Newsweek article titled “The Future of Gay America.” See Eloise Salholz et al., *The Future of Gay America*, GAYLIB (Mar. 12, 1990), <http://www.gaylib.com/text/rept6.htm> (“[A] new generation of gay parents has produced the first-ever ‘gayby boom.’”).

60. See Harris, *supra* note 59 (depicting the “gayby boom” as “Children . . . added to gay households in a variety of ways: by winning custody of offspring in the dissolution of heterosexual marriages, by adoption, by alternative means of conception.”); see also Eloise Salholz et al., *The Future of Gay America*, GAYLIB (Mar. 12, 1990), <http://www.gaylib.com/text/rept6.htm> (using the phrase “gayby boom” to describe the growing movement for same-sex partners to become parents). For years scholars have used the term “gayby boom” in academic writing. See Otis R. Damslet, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RES. 555, 562 (1993) (“[C]ontemporary American culture has begun to include a renaissance of Gay parenting . . .”); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 342 (2002) (stating that by 2002 approximately ten million children had same-sex parents); Tiffany L. Palmer, *The Winding Road to the Two Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples*, 8 RUTGERS J. L. & PUB. POL’Y 895, 896 (2011) (arguing that the “gayby boom” has exploded in the last twenty years); Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC’Y REV. 285, 287 (2002) (indicating that courts are increasingly “being forced to deal with the intersection of sexuality and family law”).

61. See Gary J. Gates, *Family Formation and Raising Children Among Same Sex Couples*, NAT’L COUNCIL ON FAM. REL., at F1, F2–F3 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf> (showing an increase in gay and lesbian child rearing through 2006); Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 147 (2000) (noting that growing numbers of same-sex couples are having children through assisted reproductive technologies); Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic in Vitro Fertilization*, 7 AM. U. J. GENDER SOC. POL’Y & L. 431, 436 (1999) (stating that a growing number of unmarried couples, including same-sex couples, have been using assisted reproductive technologies to build families).

62. See Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of “Best Interest of the Child” and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 1 (2008) (discussing legal issues surrounding artificial insemination); see also Austin Caster, *Don’t Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating*

with respect to the issuance of supplemental birth certificates, it is important to understand the laws surrounding adoption. This section briefly portrays the history behind same-sex parent adoptions and charts the state of the law with respect to joint⁶³ and second parent⁶⁴ adoptions by gay and lesbian couples.

A. *History of Same-Sex Parent Adoption*⁶⁵

Adoption was not practiced at common law.⁶⁶ Rather, it is a statutory privilege.⁶⁷ Modern adoption, which focuses on the provision of a family for a child and only secondarily on an adult's desire to obtain an heir, dates back to 1851 when Massachusetts passed the first adoption law focused on children's welfare.⁶⁸ While the Massachusetts law did not specifically prohibit same-sex parent adoption, the time was not ripe to test the wording of the statute.⁶⁹ Given that the American Psychiatric Association kept homosexuality in the Diagnostic and Statistical Manual of Mental Disorders until 1973⁷⁰ and that until 1962 each state had criminal

the British Surrogacy Law Regime, 10 CONN. PUB. INT. L.J. 477, 479 (2011) (discussing legal issues surrounding surrogacy agreements).

63. Joint adoption refers to adoption by two adoptive parents at one time. See discussion *infra* Part II.B.1.

64. Second-parent adoption allows a person to become a co-parent with someone who already holds legal parent status. See discussion *infra* Part II.B.2.

65. Some sources use the term "lesbigay adoption." See, e.g., Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561, 561 (2005) (defining "lesbigay adoption" as "adoption of a child or children by a person or persons involved in a lesbian or gay relationship").

66. Martin R. Gardner, *Adoptions by Homosexuals in the Wake of Lawrence v. Texas*, 6 J. L. & FAM. STUD. 19, 22–23 (2004) (noting that adoption "did not exist at common law"); Vanessa A. Lavelly, *The Path to Recognition of Same-Sex Marriage: Reconciling the Differences Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 263 (2007) ("At common law, adoption did not exist . . .").

67. See Vanessa A. Lavelly, *The Path to Recognition of Same-Sex Marriage: Reconciling the Differences Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 263 (2007) (finding that adoption is a "statutory privilege, rather than a right").

68. See Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561, 564 (2005). *Contra* Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 264 (2002) (presenting an alternative view claiming that adoption is "nonstatutory, with deep private-ordering roots in contract law").

69. See *Massachusetts Adoption of Children Act, 1851*, THE ADOPTION HISTORY PROJECT, <http://darkwing.uoregon.edu/~adoption/archive/MassACA.htm> (last updated Feb. 24, 2012) (outlining the requirements for adoption in Massachusetts in 1851).

70. *When Homosexuality Was Mental Illness*, DAILY KOS (Apr. 26, 2011, 2:36 PM), <http://www.dailykos.com/story/2011/04/26/970357/-When-homosexuality-was-mental-illness>

sodomy laws on the books,⁷¹ this adoption model, which was intended to imitate traditional family relationships for children, obviously precluded adoptions by same-sex couples.⁷²

The issue of same-sex parent adoption first arose in the 1970s.⁷³ During that time, however, judges were unsympathetic to the idea of parenting by gays and lesbians and there is no record of an adoption by an openly homosexual person during the 1970s.⁷⁴ With judges pondering the topic, the state legislatures also joined the debate. In 1977 Florida stripped the eligibility to adopt from any person, “if that person [was] a homosexual.”⁷⁵ New Hampshire followed suit in 1986 with a similar ban.⁷⁶

71. Carlos Maza, *State Sodomy Laws Continue to Target LGBT Americans*, EQUALITY MATTERS (Aug. 8, 2011, 3:26 PM), <http://equalitymatters.org/blog/201108080012>.

72. See Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1043 n.66 (2002) (noting that in 1973 the Association voted to exclude homosexuality as a recognized disorder); N.H. REV. STAT. ANN. § 170-B:4 (2010) (specifying that a married couple includes a husband and wife) (repealed in part in 1999); see also Jeffrey M. Goldman, *Protecting Gays From the Government’s Crosshairs: A Reevaluation of the Ninth Circuit’s Treatment of Gays Under the Federal Constitution’s Equal Protection Clause Following Lawrence v. Texas*, 39 U.S.F. L. REV. 617, 625 n.38 (2005) (indicating that Illinois was the first state to decriminalize consensual sodomy in 1962); Wardle, *supra* note 68 (“[T]he heart of this child-centered model of adoption was the creation of family relationships that imitated and were intended to replicate the relationship that exists between parents and child(ren) in a birth (natural) family.”). On the other hand, perhaps surprisingly, single parent adoptions have been legal since the birth of modern adoption. *Massachusetts Adoption of Children Act, 1851*, THE ADOPTION HISTORY PROJECT, <http://darkwing.uoregon.edu/~adoption/archive/MassACA.htm> (last updated Feb. 24, 2012) (“Any inhabitant of this Commonwealth may petition the judge of probate, in the county wherein he or she may reside, for leave to adopt a child not his or her own by birth.”). Openly homosexual individuals, however, were rarely able to adopt even very recently. See, e.g., FLA. STAT. ANN. § 63.042 (2012), held unconstitutional by Fla. Dep’t of Children and Families v. Adoption of X.X.G., 45 So.3d 79, 79 (2010); MISS. CODE ANN. § 93-17-3(2) (2004) (“Adoption by couples of the same gender is prohibited.”); UTAH CODE ANN. § 78B-6-117(3) (2008) (“A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.”). Nevertheless, because single parent adoption is not an issue raised by *Adar v. Smith* or *Finstuen v. Crutcher*, it is outside of the scope of this comment. This comment concerns joint and second-parent adoptions. The two types of adoption above are the potential source of conflict in light of the apparent conflict created by *Adar* and *Finstuen*.

73. Lavelly, *supra* note 67, at 264.

74. *Id.*

75. FLA. STAT. ANN. § 63.042 (2012), held unconstitutional by Fla. Dep’t of Children and Families v. Adoption of X.X.G., 45 So.3d 79, 79 (Fla. Dist. Ct. App. 2010).

76. N.H. REV. STAT. ANN. § 170-B:4 (2010) (amended in 1999) (omitting any language providing for adoption by same-sex couples).

Gradual liberalization in the 1990s brought change and same-sex parent adoptions began to take place in the United States.⁷⁷ Yet, even today exact statistics on same-sex parenting are difficult to obtain.⁷⁸ In 2005, data suggested that as many as 317,000 children were being raised by same-sex couples.⁷⁹ Now, in the third decade of the “gayby boom,” some sources speak of a decreasing trend in the number of lesbian, gay, and bisexual parents raising a child.⁸⁰ The National Council on Family Relations suggests that this trend may be caused by a decrease in the number of biological children born to lesbian, gay, and bisexual parents engaged in opposite sex relationships at an early age, perhaps because of increased acceptance of homosexuality and decreasing need to put on a façade of heterosexuality.⁸¹

In any event, with television series such as *Modern Family*,⁸² same-sex couple parenting has become more visible to mainstream society.⁸³ Similarly, while the numbers of biological children born to lesbian, gay, and bisexual parents may be decreasing, same-sex parent adoptions are increasingly more common in the United States.⁸⁴ According to the 2000 Census, nearly 10% of same-sex unmarried couples were raising an adopted child.⁸⁵ Research suggests that this number nearly doubled to

77. Lively, *supra* note 67, at 265–66; *see In re* Petition of L.S., No. A-29-90, 1991 WL 219598 at *4 (D.C. Super. Ct. Aug. 30, 1991) (granting second-parent adoption to a lesbian couple); *In re* M.M.D., 662 A.2d 837, 862 (D.C. 1995) (granting second-parent adoption to a gay couple); *In re* Petition of K.M., 653 N.E.2d 888, 899 (Ill. App. Ct. 1995) (holding that state law did not prohibit second-parent adoption by same-sex couples); Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) (granting joint adoption to a lesbian couple); *In re* Jacob, 660 N.E.2d 397, 405 (N.Y. 1995) (granting second-parent adoptions to lesbian couples); *In re* Adoptions of B.L.V.B., 628 A.2d 1271 (Vt. 1993) (granting second-parent adoption to a lesbian couple and noting that it was not an issue of first impression in Vermont).

78. Susan Donaldson James, *Census 2010: One-Quarter of Gay Couples Raising Children*, ABC NEWS, Jun. 23, 2011, at 1, <http://abcnews.go.com/Health/sex-couples-census-data-trickles-quarter-raising-children/story?id=13850332#.T3EXyE9xVhk> (stating that it was not until the 2010 Census that the Census Bureau began counting same-sex couples and their children).

79. *See* Wardle, *supra* note 68, at 561–62 (stating that the 2010 Census suggests that today there are over 110,000 same-sex couples raising children).

80. Gates, *supra* note 61, at F1, F2.

81. *Id.*

82. *How T.V. Brought Gay People into Our Lives Homes*, NAT’L PUBLIC RADIO (May 12, 2012) (downloaded using [npr.org](http://www.npr.org)), available at <http://www.npr.org/2012/05/12/152578740/how-tv-brought-gay-people-into-our-homes>.

83. Gates, *supra* note 61, at F1, F2.

84. *See, e.g.,* Wardle, *supra* note 68 (saying that “lesbigay” adoption is increasingly accepted in the United States).

85. *See* Gates, *supra* note 61, at F1, F2 (showing an increase in gay and lesbian child rearing).

19% by 2009.⁸⁶ The U.S. Department of Health and Human Services reported surveys suggesting that two million lesbian, gay, and bisexual individuals expressed an interest in adopting a child.⁸⁷ The data shows that a true “gayby boom” is still coming. Nevertheless, a number of obstacles stand in the way of same-sex parents wanting to adopt a child.

First, adoption agencies may utilize a hierarchy of placement that treats same-sex couples as families of last resort.⁸⁸ While state agencies may be unable to prioritize in a similar fashion because of existing laws, private organizations (particularly private religious organizations) are not constrained by the same laws as state actors.⁸⁹ Second, even though same-sex couples may legally adopt in the vast majority of the states, many lesbian, gay, and bisexual individuals still believe they are legally barred from adopting.⁹⁰ Third, while in one way or another most states would allow a child to be raised by a same-sex couple, in a number of instances the law stands as an obstacle to joint and second parent adoptions.⁹¹ The

86. *Id.*; Sabrina Tavernise, *Adoptions by Gay Couples Rise, Despite Barriers*, N.Y. TIMES, June 14, 2011, http://www.nytimes.com/2011/06/14/us/14adoption.html?_r=1 (“About [19%] of same-sex couples raising children reported having an adopted child in the house in 2009, up from just 8 [%] in 2000.”).

87. U.S. DEP’T OF HEALTH AND HUMAN SERV., WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) FAMILIES IN ADOPTION 5 (2011), available at www.childwelfare.gov/pubs/f_profbulletin/f_profbulletin.pdf.

88. *Id.* at 7.

89. *Id.*; see *Catholic League for Religious and Civil Rights v. City and Cnty. of San Francisco*, 464 F. Supp. 2d 938, 948 (N.D. Cal. 2006) (holding that a municipal resolution opposing a Vatican directive that the Catholic archdiocese stop placing children in homosexual households did not violate the Establishment Clause of the First Amendment). At least two states expressly sanction discrimination toward homosexuals by private adoption organizations. See N.D. CENT. CODE ANN. § 50-12-07.1 (West, Westlaw through the 2011 Regular and Special Sessions of the 62nd Legislative Assembly) (“A child-placing agency is not required to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the agency’s written religious or moral convictions or policies.”); H.189, Reg. Sess. (VA 2012) (“[N]o private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency’s written religious or moral convictions or policies.”); Trudy Ring, *Va. OK’s Discrimination in Adoption Services*, ADVOCATE (Feb. 22, 2012, 9:30PM), <http://www.advocate.com/news/daily-news/2012/02/22/va-oks-discrimination-adoption-services> (discussing Oklahoma’s legalized discrimination against same-sex adoptive parents).

90. See U.S. DEP’T OF HEALTH AND HUMAN SERV., *supra* note 87, at 8 (expressing that this misconception often serves as a barrier for same-sex parents).

91. See *id.* (recognizing that “[i]n states that do not permit second-parent adoptions by LGBT families, adopted children are denied equal protection under the law.”); see also Gardner, *supra* note 66, at 23 (noting that adoption “did not exist at common law”); NAT’L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LESBIAN, GAY, AND BISEXUALS PARENTS: AN OVERVIEW OF CURRENT LAW 4 (2012), available at <http://www.google.com/url?q=Http://www.nclrights.org/site/DocServer/adptn0204.pdf%3FdocID%3D1221&sa=U&ei=i853T->

following section addresses precisely the last point and charts the current state of the law with regard to joint and second parent adoptions by same-sex couples in all fifty states.

B. *State of the Law Regarding Same-Sex Parent Adoption*

There are a number of ways in which same-sex couples can parent a child through adoption. Individual adoption is always an option for unmarried individuals regardless of sexual orientation.⁹² However, whether it be for sociological or merely economic and practical reasons, having two parents is beneficial for the parents and the child alike. Joint⁹³ and second parent⁹⁴ adoptions describe the legal process for creating such relationships between same-sex couples and adoptive children. According to the National Center for Lesbian Rights:

Second-parent and joint adoptions protect children in same-sex parent families by giving the child the legal security of having two legal parents, entitling them to crucial financial benefits, including inheritance rights, wrongful death and other tort damages, Social Security benefits, and child support. In many situations, second-parent adoptions are important to ensure health insurance coverage for the child and to allow both parents to make medical decisions for the child. Moreover, second parent and joint adoptions foster children's emo-

bFBtT1gAfaorDZDg&ved=0CAQQFjAA&client=internal-uds-cse&usg=AFQjCNGYCwZK8z_88SgQ7KqXniZ-sVak9g (encouraging courts to forego a strict interpretation of adoption statutes in order to further the underlying goal of promoting the best interests of the child).

92. NAT'L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LESBIAN, GAY, AND BISEXUALS PARENTS: AN OVERVIEW OF CURRENT LAW 2 (2012), available at http://www.google.com/url?q=http://www.nclrights.org/site/DocServer/adptn0204.pdf%3FdocID%3D1221&sa=U&ei=i853T-bFBtT1gAfaorDZDg&ved=0CAQQFjAA&client=internal-uds-cse&usg=AFQjCNGYCwZK8z_88SgQ7KqXniZ-sVak9g (claiming that most states theoretically allow lesbian, gay, bisexual, and transgender individuals to adopt). The caveat to this statement comes in the form of Utah's adoption law. UTAH CODE ANN. § 78B-6-117(3) (LexisNexis 2008) (stating that "[a] child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."). Moreover, until 2010 Florida expressly prohibited adoptions by anyone "if that person [was] a homosexual." FLA. STAT. ANN. § 63.042 (West 2005); Fla. Dep't of Children and Families v. Adoption of X.X.G., 45 So.3d 79, 99 (Fla. Dist. Ct. App. 2010) (holding the categorical ban of Florida Statute § 63.042(3) unconstitutional).

93. See HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: JOINT ADOPTION 1 (2011), available at http://www.hrc.org/files/assets/resources/parenting_laws_maps.pdf (defining a joint adoption as "adopting a child from the child's biological parent(s) or adopting a child who is in the custody of the state.").

94. See NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 92 (classifying a second-parent adoption as an adoption that allows a partner of the same sex to adopt a partner's adoptive or biological child).

tional and developmental health by recognizing the children's actual relationship to both adults in such families. Second-parent adoptions also protect the rights of the same sex second parent, by ensuring that he or she will continue to have a legally recognized parental relationship to the child if the couple separates or if the biological (or original adoptive) parent dies or becomes incapacitated or incarcerated.⁹⁵

Unfortunately for same-sex couples, the laws governing joint and second parent adoption are not always clear.⁹⁶ The following sections briefly describe the state of the law with respect to joint and second parent adoptions in the United States.

1. Joint Adoption

Joint adoption with specific reference to same-sex couples is understood to be "a couple adopting a child from the child's biological parent(s) or adopting a child who is in the custody of the state."⁹⁷ The rights of the state or the biological parents terminate with joint adoption.⁹⁸ This type of adoption stands in contrast to second parent or stepparent adoptions, which do not terminate the rights of the previously recognized biological or adoptive parent, but instead allow a co-parent to gain shared parental rights.⁹⁹

For same-sex couples seeking to adopt jointly, marriage is generally the most burdensome requirement imposed by state law.¹⁰⁰ By the same token, the states that permit same-sex marriage also permit same-sex mar-

95. *Id.*

96. See HUMAN RIGHTS CAMPAIGN, *supra* note 93, at 1; Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 766 (1999) (noting that the courts are left to decide if same-sex couples are eligible to adopt due to ambiguous language in statutes and unclear legislative intent); Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law Over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 102-04 (1996) (finding that state adoption statutes are often confusing and incoherent).

97. HUMAN RIGHTS CAMPAIGN, *supra* note 93, at 1.

98. See Ann K. Wooster, Annotation, *Adoption of Child by Same-Sex Partners*, 61 A.L.R. FED. 6 (2011) (describing the laws of New York in relation to second-parent adoption).

99. See *id.* (indicating that some second-parent and stepparent adoptions can be used to prevent the automatic termination of the biological parent's rights when a same-sex partner adopts).

100. See UTAH CODE ANN. § 78B-6-117(3) (West 2011) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.").

ried couples to jointly adopt.¹⁰¹ In addition to the District of Columbia and the nine states that allow same-sex marriages, eight states—Arkansas,¹⁰² California, Colorado, Illinois, Indiana, Nevada, New Jersey, and Oregon—permit joint adoptions by unmarried same-sex couples statewide.¹⁰³

Only Mississippi expressly targets homosexuals and prohibits “[a]doption by couples of the same gender.”¹⁰⁴ In some jurisdictions, such as Louisiana, the law does not on its face prohibit joint same-sex parent adoptions but does so in effect. Specifically, Louisiana law states that “[a] single person . . . or a married couple jointly may petition to privately adopt a child.”¹⁰⁵ While the text does not expressly prohibit unmarried couples from jointly adopting, the state’s Attorney General has opined otherwise.¹⁰⁶ This interpretation of Louisiana law, taken in conjunction with Louisiana’s constitutional prohibition against recognition of out-of-state same-sex marriages,¹⁰⁷ creates a de facto prohibition of same-sex couple adoptions.¹⁰⁸ Utah law has a similar effect as it does

101. See *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, *supra* note 30 (reporting that the District of Columbia, Connecticut, Iowa, Massachusetts, Maryland, New Hampshire, New York, Vermont, and Washington have passed legislation allowing for same-sex marriage); Alana Semuels, *Voters OK Gay Marriage in Maine, Maryland*, L.A. TIMES (Nov. 7, 2012), <http://www.latimes.com/news/nationworld/nation/la-na-gay-marriage-20121107,0,1194693.story>.

102. See *Ark. Dep’t of Human Serv. v. Cole*, 2011 Ark. 145, at *24–26 (2011) (overturning the Arkansas Adoption and Foster Care Act of 2008 prohibiting unmarried couples from adopting children).

103. See HUMAN RIGHTS CAMPAIGN, *supra* note 93, at 1; *Adoption*, ALTERNATIVES TO MARRIAGE PROJECT, <http://www.unmarried.org/adoption.html> (last visited Oct. 6, 2012) (listing California, Connecticut, Illinois, Indiana, Massachusetts, New Jersey, New York, Oregon, Vermont, and the District of Columbia as jurisdictions that allow unmarried couples to adopt jointly).

104. MISS. CODE ANN. § 93-17-3(5) (2011) (“Adoption by couples of the same gender is prohibited.”).

105. LA. CHILD. CODE ANN. art. 1221 (2004) (asserting that “[a] single person, eighteen years or older, or a married couple jointly may petition to privately adopt a child”).

106. *Adar v. Smith*, 597 F.3d 697, 701 (5th Cir. 2010), *rev’d en banc*, 639 F.3d 146 (5th Cir. 2011).

107. See LA. CONST. art. 12, § 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.”).

108. See Steve Sanders, *Interstate Recognition of Parent-Child Relationships: The Limits of the State Interests Paradigm and the Role of Due Process*, U. CHI. LEGAL F. 233, 249 (2011) (explaining that “in the absence of some right protected by the Constitution or other federal law, a state court is bound to apply its own statutory law or an interpretation thereof”).

not allow “a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of [the] state” to adopt.¹⁰⁹

In many states, the law regarding joint same-sex parent adoptions is unclear because it does not expressly address the issue. Consequently, where the law neither expressly permits nor prohibits same-sex couples from jointly adopting, desiring couples can petition judges for adoptions and argue for joint adoptions on a case-by-case basis.¹¹⁰ The Human Rights Campaign lists Minnesota as the only state where same-sex couples have successfully petitioned to jointly adopt in some jurisdictions.¹¹¹ However, even when joint adoption is not an option supported by the law, some same-sex couples may be able to adopt a child through second parent adoption.

2. Second Parent Adoption

In the 1980s, lawyers and academics working on issues of same-sex parenting began using the term “second parent adoption” as a “natural extension” of stepparent adoption.¹¹² This type of adoption, also referred to as co-parent adoption,¹¹³ allows a second person of the same sex to gain co-parent rights through adoption without terminating the parental

109. UTAH CODE ANN. § 78B-6-117(3) (West 2011); UTAH CONST. art. I, § 29 (Lexis-Nexis 2012) (“Marriage consists only of the legal union between a man and a woman.”).

110. See HUMAN RIGHTS CAMPAIGN, *supra* note 93, at 1; Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 766–77 (1999) (discussing the courts’ role in shaping social norms).

111. See HUMAN RIGHTS CAMPAIGN, *supra* note 93, at 1; *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, *supra* note 30; see also Christian Eichenlaub, “Minnesota Nice”: A Comparative Analysis of Minnesota’s Treatment of Adoption by Gay Couples, 5 U. ST. THOMAS L.J. 312 (2008) (providing a detailed analysis of Minnesota’s stance on same-sex parent adoptions).

112. See Elizabeth Zuckerman, *Second-parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 n.8, 733 (1986) (arguing that second-parent adoptions would allow a biological parent’s partner to adopt a child without affecting the rights of the natural parent); Lavelly, *supra* note 67 (arguing that in the 1990s “courts and legislatures became increasingly receptive to the idea of same-sex couples as parents [and] [l]awyers working on behalf of the same-sex couples ‘coined the term ‘second-parent adoption’ to describe the same-sex equivalent of a stepparent adoption’”); Mark A. Momjian, *Causes of Action for Second-Parent Adoption*, in 25 CAUSES OF ACTION 2D § 1, at 7 (2004) (giving credit for coining the term “second-parent adoption” to the National Center for Lesbian Rights); see also *Overview*, NAT’L CTR. FOR LESBIAN RTS., http://www.nclrights.org/site/PageServer?pagename=issue_families_overview (last visited Oct. 6, 2012) (“We were among the first to pioneer the concept of second-parent adoption and since then, we’ve worked to protect our families one state at a time.”).

113. NAT’L CTR. FOR LESBIAN RTS., *supra* note 92.

rights of the single (biological or adoptive) parent.¹¹⁴ Given the continued unavailability of same-sex marriage in most states (and hence unavailability of stepparent adoption), second parent adoptions are a way to “provide the child with two legal parents.”¹¹⁵

Currently, eleven states and Washington, D.C., expressly permit second-parent adoptions either by statute or court rulings and Colorado, Connecticut, and Vermont permit second parent adoptions by statute.¹¹⁶

114. Jason C. Beekman, *Same-Sex Second-Parent Adoption and Intestacy Law: Applying the Sharon S. Model of “Simultaneous” Adoption to Parent-Child Provisions of the Uniform Probate Code*, 96 CORNELL L. REV. 139, 141-42 (2010).

In retrospect, “under present law, if *A* and *B* are unmarried, *B* and the child have no legal relationship. Although the adults planned to coparent, *A* is legally a single parent. *B*, the mother’s partner, has no enforceable rights or responsibilities to the child. Conversely, the child is denied the legal and financial benefits of a second parent.”

Id.

115. Zuckerman, *supra* 112, at 731; *see also* *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, *supra* note 30.

116. *See* CAL. FAM. CODE § 9000(g) (West 2011) (“[S]tepparent adoption includes adoption by a domestic partner”); COLO. REV. STAT. § 19-5-203(1)(d.5)(II) (2011) (“In a petition for a *second-parent* adoption, the court shall require a written home study report prepared by a county department of social services”) (emphasis added); COLO. REV. STAT. § 19-5-208(5) (2011) (“In all stepparent, *second parent*, custodial, and kinship adoptions, the petition shall contain a statement informing the court whether the prospective adoptive parent was convicted . . . of a felony or misdemeanor”) (emphasis added); COLO. REV. STAT. § 19-5-210(1.5) (2011) (“Except in stepparent, *second parent*, custodial, or kinship adoptions, the court shall issue a certificate of approval of placement”) (emphasis added); CON. GEN. STAT. § 45a-724(a)(3) (2011) (“[A]ny parent of a minor child may agree in writing with *one other person* who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child”); VT. STAT. ANN. tit. 15, § 1-102(b) (2011) (“If a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent.”); *Sharon S. v. Super. Ct. of San Diego Cnty.*, 73 P.3d 554, 570, 568–69 (Cal. 2003) (holding second-parent adoptions valid under the independent adoption laws); *In re* *Petition of K.M.*, 274 Ill. App. 3d 189, 205 (Ill. App. Ct. 1995) (holding that unmarried same-sex cohabitants have standing to petition for adoption); *In re* *Adoption of M.M.G.C.*, 785 N.E.2d 267, 270 (Ind. Ct. App. 2003) (finding that Indiana common law permits second-parent adoption); *Adoption of M.A.*, 930 A.2d 1088, 1093 (Me. 2007) (recognizing that Maine law allows second-parent adoption); *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (finding the availability of second-parent adoption under Massachusetts law); *In re* *Adoption of Two Children by H.N.R.*, 666 A.2d 535, 539 (N.J. Super. Ct. App. Div. 1995) (recognizing availability of second-parent adoptions in New Jersey); *In re* *Jacob*, 660 N.E.2d 397, 401 (N.Y. 1995) (finding that New York law did not prohibit second-parent adoption); *In re* *Adoption of R.B.F.*, 803 A.2d 1195, 1201 (Pa. 2002) (upholding that same-sex couples could petition to adopt in a second-parent adoption); *In re* *Adoption of B.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993) (recognizing availability of second-parent adoption under Vermont law); *In re* *M.M.D.*, 662 A.2d 837, 862 (D.C. 1995) (holding that “unmarried couples living together in a committed personal relationship, whether of the same sex or of opposite sexes, are eligible to ‘petition the court for a decree of adoption’”). Per statute, Washington, D.C., also allows for stepparent and do-

Appellate courts in California,¹¹⁷ Illinois,¹¹⁸ Indiana,¹¹⁹ Maine,¹²⁰ Massachusetts,¹²¹ New Jersey,¹²² New York,¹²³ Pennsylvania,¹²⁴ Vermont,¹²⁵ and the District of Columbia¹²⁶ have found no legal bar to second-parent adoptions. A number of lower level courts in various jurisdictions have also permitted second parent adoptions.¹²⁷ According to the National Center for Lesbian Rights (NCLR), courts in some counties of Alabama, Alaska, Georgia, Louisiana, Maryland, Michigan, Minnesota, New Mexico, Texas, and West Virginia have all granted second parent adoptions to same-sex couples.¹²⁸ Because of the difficulty in gathering data from all county courts in the country, the NCLR predicts that there are “undoubtedly others.”¹²⁹

mestic partner adoptions. *See also* D.C. CODE § 16-308(2) (2011) (explaining “[t]he court may dispense with the investigation, report, and interlocutory decree provided for by this chapter when . . . [t]he petitioner is a spouse or domestic partner of the natural parent of the prospective adoptee and the natural parents consents to the adoption or joins in the petition for adoption”).

117. *See Sharon S. v. Super. Ct. of San Diego Cnty.*, 73 P.3d 554, 570, 568–69 (Cal. 2003) (holding second-parent adoptions valid under the independent adoption laws); CAL. FAM. CODE § 9000(g) (2011) (including domestic partners in second-parent adoptions).

118. *See In re Petition of K.M.*, 274 Ill. App. 3d 189, 205 (Ill. App. Ct. 1995) (finding that unmarried same-sex cohabitants have standing to petition for adoption).

119. *See In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 270 (Ind. Ct. App. 2003) (asserting that Indiana common law permits second-parent adoption).

120. *See Adoption of M.A.*, 930 A.2d 1088, 1093 (Me. 2007) (recognizing that Maine law allows second-parent adoption).

121. *See Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (finding the availability of second-parent adoption under Massachusetts law).

122. *See In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 539 (N.J. Super. Ct. App. Div. 1995) (stating that second-parent adoption is available in New Jersey).

123. *See In re Jacob*, 660 N.E.2d 397, 401 (N.Y. 1995) (finding that New York law did not prohibit second-parent adoption).

124. *See In re Adoption of R.B.F.*, 803 A.2d 1195, 1201-02 (Pa. 2002) (holding that same-sex couples could petition to adopt in a second-parent adoption).

125. *See Adoption of B.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993) (recognizing availability of second-parent adoption under Vermont law).

126. *See In re M.M.D.*, 662 A.2d 837, 862 (D.C. 1995) (holding that “unmarried couples living together in a committed personal relationship, whether of the same sex or of opposite sexes, are eligible to ‘petition the court for a decree of adoption’”). Per statute, Washington, D.C., also allows for stepparent and domestic partner adoptions. D.C. CODE § 16-308(a)(2) (Lexis 2001 & Supp. 2012) (“The court may dispense with the investigation, report, and interlocutory decree provided for by this chapter when . . . [t]he petitioner is a spouse or domestic partner of the natural parent of the prospective adoptee and the natural parents consents to the adoption or joins in the petition for adoption.”).

127. *See NAT’L CTR. FOR LESBIAN RTS.*, *supra* note 92 (providing examples of cases and statutes allowing second-parent adoptions).

128. *Id.*

129. *Id.*

Like joint adoptions, a number of states have statutes and judicial decisions that either directly or indirectly limit same-sex couples from pursuing second-parent adoptions.¹³⁰ A Mississippi statute expressly prohibits same-sex couples from adopting a child.¹³¹ Some states limit adoptions to married couples and at the same time proscribe same-sex couples from marrying in the state, effectively barring homosexual couples from second-parent adoptions.¹³² Appellate courts in Kentucky,¹³³ Nebraska,¹³⁴ North Carolina,¹³⁵ Ohio,¹³⁶ and Wisconsin¹³⁷ have declined to recognize second parent adoptions. For the most part, these courts interpret the states' statutes to mean that an adoption by a second parent of the same sex would necessarily terminate the parental rights of the initial biological or adoptive parent.

The Supreme Court of Arkansas and a Florida appellate court recently held that exclusion of same-sex couples from child adoption violated the respective states' constitutions.¹³⁸ The disparities between the laws of the fifty states raise questions regarding same-sex adoptive parents' rights and privileges in states that do not permit gay and lesbian couples to adopt either jointly or through second parent adoption.¹³⁹ The following

130. *Id.*

131. See MISS. CODE ANN. § 93-17-3 (2011) (asserting that “[a]doption by couples of the same gender is prohibited”).

132. See UTAH CODE ANN. § 78B-6-117 (2008) (“A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.”).

133. See S.J.L.S. v. T.L.S., 265 S.W.3d 804, 827-28 (Ky. Ct. App. 2008) (noting in dicta that an unmarried couple cannot use the state’s stepparent adoption procedure).

134. See *In re Adoption of Luke*, 640 N.W.2d 374, 382-83 (Neb. 2002) (refusing to recognize second-parent adoption).

135. See *Boseman v. Jarrell*, 704 S.E.2d 494, 500 (N.C. 2010) (holding that North Carolina law does not allow second-parent adoptions).

136. *In re Adoption of Doe*, 719 N.E.2d 1071, 1072-73 (Ohio Ct. App. 1998) (finding that second-parent adoption is not available under Ohio law).

137. *In re Angel Lace M.*, 516 N.W.2d 678, 683 (Wis. 1994) (finding that second-parent adoption is not available under Wisconsin law).

138. Ark. Dep’t of Human Servs. v. Cole, 2011 Ark. 145, at *1 (2011); Fla. Dep’t of Children and Families v. Adoption of X.X.G., 45 So.3d 79, 92 (Fla. Dist. Ct. App. 2010); see also David Gröshöff, *The Wrong Track, Baby—How Damage to Gay Youth Was Borne This Way: Via Ideologically Bound Law Reviews Publishing “Hopey Changey Stuff,”* 18 CARDOZO WOMEN’S L.J. 275 (forthcoming 2012), available at <http://ssrn.com/abstract=1905606> (providing an interesting account of the events surrounding the adoption and repeal of the Florida and Arkansas statutes and the role of law reviews in perpetuating damaging perceptions of the queer community).

139. See Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751 (2003); see also David Gröshoff, *The Wrong Track, Baby: How Damage to Gay Youth Was Borne This Way: Via Ideologically Bound Law Reviews Publishing “Hopey Changey Stuff,”* 18 CARDOZO WO-

section describes two circuit court decisions that exemplify the uncertainties brought about by the plethora of contradicting adoption laws affecting gay and lesbian couples—*Finstuen v. Crutcher* and *Adar v. Smith*.

III. *FINSTUEN V. CRUTCHER VS. ADAR V. SMITH*

In *Finstuen*, the Tenth Circuit ordered the State Registrar to issue a supplemental birth certificate to a same-sex couple that adopted a child out-of-state.¹⁴⁰ In *Adar*, the Fifth Circuit reached the opposite result.¹⁴¹ To set the stage for a clear comparison of the apparently conflicting treatment created by *Adar* and *Finstuen*, this part provides necessary background information. Because both cases involve interstate adoption, the decisions inherently raise questions of constitutional full faith and credit.¹⁴² Therefore, the following section first explains the Supreme Court's view of the role of the Full Faith and Credit Clause in recognition and enforcement of out-of-state judgments. Because *Adar* assigned the differing outcome in *Finstuen* to supposedly dissimilar state laws regarding issuance of supplemental birth certificates,¹⁴³ this section also summarizes the reasoning of the *Finstuen* and *Adar* courts and describes the Oklahoma and Louisiana laws implicated in the two cases.

A. *The Constitutional Reach of the Full Faith and Credit Clause*

The Full Faith and Credit Clause receives little scholarly attention.¹⁴⁴ In plain language the Clause states that “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”¹⁴⁵ The Clause's statutory counterpart carries similar language.¹⁴⁶ The purpose of the Clause, as stated by the Supreme Court,

MEN'S L.J. 275 (forthcoming 2012), available at <http://ssrn.com/abstract=1905606> (giving information about the repeal of the Florida and Arkansas statutes).

140. *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007).

141. *Adar v. Smith*, 639 F.3d 146, 159 (5th Cir. 2011) (en banc), cert denied, 132 S.Ct. 400 (2011); Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 752 (2003).

142. Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 752 (2003).

143. *Adar*, 639 F.3d at 157, 159.

144. Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 754 (1998).

145. U.S. CONST. art IV, § 1.

146. 28 U.S.C. § 1738 (2006) (“Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”). Congress enacted the

is to “preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states.”¹⁴⁷ Over the years, the Court has produced a solid body of law interpreting the Clause and established well-reasoned judicial rules that interpret its meaning and reach.¹⁴⁸ A number of these rules are particularly relevant to the issue of interstate adoption.

The Supreme Court has interpreted the reach of the Full Faith and Credit Clause to be different for statutes and judgments.¹⁴⁹ As to the full faith and credit due statutes, the Clause cannot be invoked where the forum state is competent to legislate with respect to that subject matter.¹⁵⁰ Moreover, a forum state need not apply a sister state statute if such application would violate the forum state’s “legitimate public policy.”¹⁵¹ In connection with judgments, however, the full faith and credit

implementing statute for the Full Faith and Credit Clause in 1790. Act of May 26, 1790, ch. 11, 1 Stat. 122. The Clause stated:

[t]hat the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.

Act of May 26, 1790, ch. 11, 1 Stat. 122. The statute was amended only once in 1948. 28 U.S.C. § 1738 (2006).

147. *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n of Cal.*, 306 U.S. 493, 501 (1939).

148. *See, e.g., Baker v. General Motors Corp.*, 522 U.S. 222, 240–41 (1998) (holding that Michigan cannot protect a witness from another jurisdiction’s subpoena power; that subpoena is given Michigan’s full faith and credit); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 734 (1988) (finding that a state can apply their own statute of limitations “even if governed by the substantive law of a different State”); *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 286 (1980) (stating that “[t]he Full Faith and Credit Clause should not be construed to preclude successive workmen’s compensation awards”); *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 279 (1935) (holding that “a judgment is not to be denied full faith and credit in state and federal courts merely because it is for taxes”).

149. *See Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n of Cal.*, 306 U.S. 493, 504-05 (1939) (holding that “[f]ull faith and credit does not here enable one state to legislate for the other or to protect its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it”).

150. *Id.*

151. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 489 (2003) (“The Court has already ruled that the Full Faith and Credit Clause does not require a forum State to apply a sister State’s sovereign immunity statutes where such application would violate the forum State’s own legitimate public policy.”).

obligation is “exacting.”¹⁵² There is “no roving ‘public policy exception’ to the full faith and credit due judgments,” and the rule applies equally to judgments in law as well as equity.¹⁵³

With reference to judgments, the court has created a distinction between *recognition* and *enforcement*.¹⁵⁴ A final judgment rendered by a court exercising proper jurisdiction “qualifies for recognition throughout the land.”¹⁵⁵ The mechanisms for enforcing a judgment, however, “remain subject to the evenhanded control of forum law.”¹⁵⁶ In other words, the Full Faith and Credit Clause merely mandates a forum state to recognize a sister state’s judgment, but leaves the enforcement, or execution, of a foreign judgment to the laws and procedures of the forum state. The parties involved in the two suits discussed in this Note struggled with the understanding of these two abstract terms as applied to issuance of supplemental birth certificates based on out-of-state adoption decrees.¹⁵⁷ The following section describes the state statutes that were implicated in *Finstuen* and *Adar* as well as each court’s reasoning.

152. *See Baker*, 522 U.S. at 240-41 (holding that Michigan cannot protect a witness from another jurisdiction’s subpoena power; that subpoena is given Michigan’s full faith and credit); see also *Estin v. Estin*, 334 U.S. 541, 546 (1948):

The fact that the requirements of full faith and credit so far as judgments are concerned, are exacting, if not inexorable, does not mean, however, that the State of the domicile of one spouse may, through the use of constructive service, enter a decree that changes every legal incidence of the marriage relationship.

153. *Baker*, 522 U.S. at 223.

154. This Note does not discuss whether adoption decrees constitute judgments, as there is practically a universal understanding that they do. *See, e.g., Fed. R. Civ. P. 54(a)* (2009) (“‘Judgment’ as used in these rules includes a decree and any order from which an appeal lies.”).

155. *Baker*, 522 U.S. at 233.

156. *Id.* at 235; see also *McElmoyle v. Cohen*, 38 U.S. 312, 324 (1839) (“To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit.”).

157. *See Adar v. Smith*, 639 F.3d 146, 160, 166, 177 (5th Cir. 2011) (showing that the justices on the Fifth Circuit Court of Appeals cannot agree on the meaning of the two terms as applied to issuance of supplemental birth certificates); *Finstuen v. Crutcher*, 496 F.3d 1139, 1154-55 (10th Cir. 2007). The parties to the two suits are likely not the only ones trying to untangle the meaning of the two terms. *See Baker*, 522 U.S. at 235 (asserting that states have to recognize the judgment from a sister state but do not have to enforce the judgment if it contradicts that state’s law); see also *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 455 (1943) (explaining that a state is not required to enforce every judgment of a sister state if the state’s jurisdiction is contrary to the judgment); *Hannah v. Gen. Motor Corp.*, 969 F. Supp. 554, 559 (D. Ariz. 1996). Unfortunately, the issues raised by the meaning of the words *recognition* and *enforcement* are outside of the scope of this article. For the purposes of this text, it is assumed that laws governing the issuance of supplemental birth certificates constitute *enforcement* outside of the reach of the Full Faith and Credit Clause.

B. *The Oklahoma Approach*

1. Laws Governing Adoption and Issuance of Supplemental Birth Certificates

In the wake of Massachusetts's approval of same-sex marriages, the Attorney General of Oklahoma¹⁵⁸ issued a number of opinions pertaining to same-sex couples and their rights under Oklahoma law.¹⁵⁹ In one, the Attorney General specified that “[u]nder Oklahoma law, a marriage is a civil contract between one man and one woman.”¹⁶⁰ He added that neither Oklahoma law, the Defense of Marriage Act, nor the Full Faith and Credit Clause “require[d] Oklahoma to recognize, as valid and binding, same-gender marriages performed in other states.”¹⁶¹ In another opinion, relying on judicial precedent, the Attorney General opined that unmarried individuals are ineligible to jointly adopt under Oklahoma law.¹⁶² Because Oklahoma did not recognize any form of same-sex marriage and only married couples could jointly adopt under its laws, the Attorney General concluded that “same-gender petitioners are among those who are ineligible to adopt in Oklahoma.”¹⁶³ Yet, in the same opinion the Attorney General stated that Oklahoma, under its own laws and under the mandate of the Full Faith and Credit Clause, must “recognize out-of-state adoption decrees establishing the relationship of parent and child, irrespective of whether the adoptive parents are eligible to

158. The Attorney General of Oklahoma at the time was William Andrew Edmondson. See generally EXECUTIVE BRANCH, OFF. OF THE ATT. GEN., <http://www.odl.state.ok.us/sginfo/oksg/attorney-general.pdf> (last visited Oct. 6, 2012) (providing information about the State Attorney General).

159. See, e.g., Op. Att’y Gen. 04-008 (Okla. 2004), available at 2004 WL 557472 (“Must the Oklahoma State Department of Health comply with a request from same-gender adoptive parents to produce an Oklahoma supplementary birth certificate pursuant to an out-of-state adoption decree?”); Op. Att’y Gen. 04-010 (Okla. 2004), available at 2004 WL 557473 (“Does Oklahoma law consider marriage to be between one woman and one man? Is Oklahoma required to recognize as valid and binding a marriage performed in another state which is not between one woman and one man?”).

160. Op. Att’y Gen. 04-010 (Okla. 2004), available at 2004 WL 557473.

161. *Id.* Oklahoma voters added this provision into the state’s constitution in the November 2004 election. OKLA. CONST. art. II, § 35 (“Marriage . . . shall consist only of the union of one man and one woman.”); *Election Results*, CNN (2004), <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/>. 76% of voters voted “yes” and embraced State Question 711. *Id.* *Election Results*, CNN (2004), <http://www.cnn.com/ELECTION/2004/pages/results/ballot>.

162. See Op. Att’y Gen., *supra* note 160 (stating that “more than one single (unmarried) person cannot adopt a child in Oklahoma”).

163. *Id.*; see also *Adoption of M.C.D. v. Depew*, 42 P.3d 873, 881 (Okla. Civ. App. 2002) (“The requested adoption by two divorcing persons fails to fit within any of the statutory categories of those eligible to adopt.”).

adopt in this state.”¹⁶⁴ Accordingly, he added that Oklahoma laws required the Oklahoma Department of Health to issue supplemental birth certificates to same-sex couples “upon receipt of a certificate of a decree of adoption.”¹⁶⁵ He also added that “upon receipt of a certified copy of an adoption decree, the parentage established therein must be reflected on the supplementary birth certificate[,]” essentially stating that Oklahoma law required the Oklahoma Department of Health to issue supplemental birth certificates to same-sex couples.¹⁶⁶ According to statute, the revised certificates should reflect “the names of the adoptive parents listed as the parents.”¹⁶⁷

In response to the Attorney General’s opinion requiring recognition of out-of-state same-sex parent adoptions and subsequent issuance of revised birth certificates to these couples, the Oklahoma legislators proposed to amend the state’s Adoption Code.¹⁶⁸ The proposed bill stated that “[the] state, any of its agencies, or any court of [the] state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.”¹⁶⁹ The Oklahoma House of Representatives passed House Bill 1821 by an overwhelming 93–4 vote.¹⁷⁰ After the Senate’s unanimous approval, the Governor signed the amendment into law in May 2004.¹⁷¹ Following the inclusion of the amendment, the Oklahoma Adoption Code read:

The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, is-

164. Op. Att’y Gen., *supra* note 160.

165. *See id.* (explaining the Attorney General’s opinion).

166. Op. Att’y Gen., *supra* note 161.

167. OKLA. STAT. ANN. tit. 10, § 7505-6.6(B) (2007).

168. *See Rhonda Wasserman, Are You Still My Mother?: Interstate Recognition of Adoption by Gays and Lesbians*, 58 AM. U. L. REV. 1, 18 (2008) (“The very next business day [after the issuance of the Attorney General’s opinion], Republican lawmakers in the Oklahoma legislature ‘vowed . . . to enact legislation banning recognition of out-of-state adoptions of Oklahoma children by same-sex couples.’”) (quoting Marie Price, *GOP Vows Gay Adoption Law: Lawmakers Hope to Ban Recognition of Out-of-State Adoptions by Same-Sex Partners*, TULSA WORLD, Mar. 23, 2004, at A14).

169. OKLA. STAT. ANN. tit. 10, § 7502-1.4 (2007), *held unconstitutional* by *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007).

170. *HRC Urges Oklahoma Governor to Veto Anti-Family Measure*, HUM. RTS. CAMPAIGN (Apr. 27, 2004), <http://sites.hrc.org/issues/parenting/custody/2128.htm>; *Oklahoma NOT OK for Gay and Lesbian Parents*, REPUBLIC OF T. ARCHIVES BLOG (Apr. 28, 2004), <http://archives.republicoft.com/index.php/archives/2004/04/28/oklahoma-strongnotstrong-ok-for-gay-lesbian-parents/>.

171. *HRC Urges Oklahoma Governor to Veto Anti-Family Measure*, HUM. RTS. CAMPAIGN (Apr. 27, 2004), <http://sites.hrc.org/issues/parenting/custody/2128.htm>; *Week in Review*, OKLAHOMA SENATE (May 2004), http://www.oksenate.gov/news/week_in_review/week_in_review_2004/wir2004050306.html.

sued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. *Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.*¹⁷²

Relying on the above amendment, the Oklahoma State Registrar refused to issue a revised birth certificate with both parents' names to an adoptive same-sex couple.¹⁷³ This act ultimately resulted in the *Finstuen* lawsuit.¹⁷⁴ The following section describes the facts behind that case as well as the court's reasoning in invalidating the amendment and ordering Oklahoma to issue the supplemental birth certificate.¹⁷⁵

2. *Finstuen v. Crutcher*

In 2006, an unmarried same-sex couple, Lucy and Jennifer Doel, challenged the 2004 amendment to Oklahoma's Adoption Code.¹⁷⁶ The Doels adopted Ellie, an Oklahoma-born child, in California in 2002.¹⁷⁷ Lucy Doel adopted Ellie in January and Jennifer Doel did the same six months later in a second parent adoption.¹⁷⁸ The Doels then moved to Oklahoma and requested a revised birth certificate.¹⁷⁹ The Oklahoma State Department of Health issued a supplemental birth certificate naming only Lucy as a parent.¹⁸⁰ The Department denied the couple's request to include Jennifer's name on the child's supplemental birth certificate.¹⁸¹ The Doels filed suit in federal court under 42 U.S.C. § 1983 alleging that the language of the 2004 amendment, which "[stood] as a barrier to the issuance of an accurate birth certificate for Ellie," violated

172. OKLA. STAT. ANN. tit. 10, § 7502-1.4 (2007) *held unconstitutional by Crutcher*, 496 F.3d at 1156 (amendment in italics, emphasis added).

173. *Crutcher*, 496 F.3d 1139.

174. *Id.*

175. *Id.*

176. *See id.* (detailing the circumstances leading up to the Doels' lawsuit challenging the Oklahoma Adoption Code). Initially, three same-sex families challenged the 2004 amendment to Oklahoma's statute governing recognition of out-of-state adoptions; however, on appeal to the Tenth Circuit, the court recognized only the Doels' standing to challenge the statute. *Id.*

177. *Id.* at 1142.

178. *Id.*

179. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1301 (W.D. Okla. 2006).

180. *Crutcher*, 496 F.3d at 1142.

181. *Id.*

the Full Faith and Credit Clause of the U.S. Constitution.¹⁸² Their arguments succeeded in the district court.¹⁸³

The Court of Appeals reviewed the couple's full faith and credit claim *de novo*.¹⁸⁴ Relying on the Supreme Court's distinction between statutes and judgments, it first addressed whether a final adoption decree constitutes a judgment.¹⁸⁵ The court referred to Black's Law Dictionary and Rule 54 of the Federal Rules of Civil Procedure in concluding that an adoption "decree" or "order" is in fact a final judgment for purposes of a Full Faith and Credit Clause analysis.¹⁸⁶ Since "the full faith and credit obligation is exacting" for judgments, it ruled that "final adoption orders . . . are entitled to recognition by all other states under the Full Faith and Credit Clause."¹⁸⁷

The Department of Health argued that recognition of the couple's California adoption decree would amount to an "impermissible, extra-territorial application of California law in Oklahoma."¹⁸⁸ Rejecting this reasoning, the court pointed out that the Full Faith and Credit Clause merely dictates that Oklahoma recognize the adoptive relationship itself—that Lucy and Jennifer are Ellie's parents.¹⁸⁹ As a consequence, Oklahoma still retains the ability to define the rights and obligations that flow from an adoptive relationship.¹⁹⁰ The court then pointed out that Oklahoma "has spoken on that subject" when it decided to give adoptive parents "the relation of parent and child and all the rights, duties, and other legal consequences of the natural relation of child and parent."¹⁹¹

182. Compl. for Declaratory and Injunctive Relief at 2 *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295 (W.D. Okla. 2006) (No. 04CV1152), 2004 WL 3139176.

183. *Edmondson*, 497 F. Supp. 2d at 1315 ("By its refusal to recognize and give effect to a valid judgment, from another court of competent jurisdiction, which established their status as parents of their respective children, the Amendment violates the Full Faith and Credit Clause of the United States Constitution.").

184. *Crutcher*, 496 F.3d at 1152.

185. *Id.*

186. *Id.*

Despite the fact that courts may use different words, such as 'decree' or 'order,' to refer to final adoption decisions, it is clear that all such decisions are 'judgments' under the common definition of the term as a 'court's final determination of the rights and obligations of the parties in a case. The term *judgment* includes an equitable decree and any order from which an appeal lies.

187. *Id.* at 1156.

188. *Id.* at 1153.

189. *Id.* at 1151.

190. *Id.* at 1154.

191. *Id.*; OKLA. STAT. tit. 10, § 7505-6.6(B) (2001).

With that in mind, the court affirmed the district court's order to issue a revised birth certificate to the Doels.¹⁹²

C. *The Louisiana Approach*

1. Laws Governing Adoption and Issuance of Supplemental Birth Certificates

Like Oklahoma, Louisiana does not permit unmarried couples to jointly adopt children.¹⁹³ The Louisiana Children's Code expressly permits either "[a] single person, eighteen years or older, or a married couple jointly [to petition for adoption]."¹⁹⁴ As pointed out in an Opinion of the Attorney General of Louisiana, "[t]here is no provision allowing for two unmarried persons . . . to adopt a child jointly."¹⁹⁵ This lack of express permission has been interpreted to ban unmarried couples from joint adoption. Additionally, Louisiana does not sanction same-sex marriages and the Louisiana Constitution expressly prohibits recognition of same-sex marriages performed elsewhere.¹⁹⁶ Because of Louisiana's proscription of joint adoption by unmarried couples and its prohibition and non-recognition of same-sex marriages, Louisiana in effect bans joint adoption by all same-sex couples.¹⁹⁷ Based on this, the Louisiana Attorney General concluded that the state "is not required to recognize an adoption by a same[-]sex couple [even] when the state in which the adoption took place recognizes same[-]sex marriages . . . because same sex marriages violate Louisiana's public policy and need not be recognized under the Full Faith and Credit Clause."¹⁹⁸

192. *Crutcher*, 496 F.3d at 1156; *see Edmondson*, 497 F. Supp. 2d at 1315 (explaining that "the Court directs Defendant Crutcher and the Oklahoma Department of Health to issue a birth certificate for E., identifying Jennifer and Lucy Doel as her parents").

193. Op. Att'y Gen. La. 06-0325, at 1 (Apr. 18, 2007) (stating that "[t]here is no provision allowing for two unmarried persons (whether of the same sex or not) to adopt a child jointly"), available at <http://www.ag.state.la.us/Shared/ViewDoc.aspx?Type=4&Doc=18900>.

194. LA. CHILD. CODE ANN. art. 1221 (2011); LA. CHILD. CODE ANN. art. 1198 (2011).

195. La. Att'y Gen. 325, *supra* note 193

196. 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."); LA. CIV. CODE ANN. art. 89 (2012) ("Persons of the same sex may not contract marriage with each other.").

197. *See* LA. CONST. art. XII, § 15 (detailing Louisiana's prohibition of same-sex marriages and its position on same-sex marriages from other jurisdictions); LA. CHILD CODE ANN. art. 1198, 1221 (2004) (describing Louisiana's policy regarding persons who may petition for adoption in both agency and private adoption situations).

198. Vital Records Rejection of Out-of-State Adoption Judgments, Op. La. Att'y Gen. 026-0235, at 3 (April 18, 2007), 2007 WL 1438453, available at <http://www.ag.state.la.us/Shared/ViewDoc.aspx?Type=4&Doc=1890>; *see* LA. CHILD CODE ANN. art. 1198, 1221 (2004) (clarifying that Louisiana only permits married couples to adopt either through an

In terms of revised birth records, Louisiana law permits “a person born in Louisiana [and] adopted in a court of proper jurisdiction in any other state” to obtain a supplemental birth certificate.¹⁹⁹ The statute states that “[u]pon receipt of the certified copy of the [out-of-state adoption] decree, the state registrar shall make a new record in its archives, showing . . . [t]he names of the adoptive parents.”²⁰⁰ The law does not define the term “adoptive parents.”²⁰¹ This lack of definition then led the Louisiana Registrar to rely on the state’s prohibition of joint adoption by unmarried couples in refusing to issue a revised birth certificate showing both parents’ names to an unmarried same-sex couple.²⁰² These facts gave rise to the *Adar* lawsuit. The following section focuses on *Adar* and describes the Fifth Circuit panel and en banc decisions.

a. *Adar v. Smith*

In 2007, a same-sex couple challenged the determination of the Louisiana Attorney General that the State Registrar need not recognize out-of-

agency or privately). The Attorney General’s interpretation, which prohibits even mere recognition, would likely be held unconstitutional under the Full Faith and Credit clause. The Clause requires exacting *recognition* of judgments. It is state law enforcement of judgments that the Constitution cannot reach. *See, e.g., Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (en banc) (overturning decisions by a circuit panel and a district court that had held that Louisiana’s refusal to issue a new original birth certificate for the Louisiana-born child legally adopted by an unmarried same-sex couple in New York violated the Full Faith and Credit Clause); La. Att’y Gen. 325, *supra* note 193.

199. LA. REV. STAT. ANN. § 40:76A (2012). LA. REV. STAT. ANN. § 40:76(A) (2010).

200. LA. REV. STAT. ANN. § 40:76C(3) (2012). LA. REV. STAT. ANN. § 40:76(C) (2010).

201. *See* LA. REV. STAT. ANN. § 40:76 (2012) (using the term “adoptive parents” but providing no definition); *Adar v. Smith*, 597 F.3d 697, 715 (5th Cir. 2010) (“The Registrar does not offer, and our research does not reveal, any place where the phrase ‘adoptive parents’ is expressly defined in the Louisiana Civil Code, the State’s statutes, or the case law.”), *rev’d en banc*, 639 F.3d 146 (5th Cir. 2011); *but see* LA. CHILD CODE ANN. art. 1270A (2012) (noting that adoption “terminat[es] . . . parental rights and responsibilities of biological parents and . . . creat[es] . . . the relationship of parent and child between an adopted person and his adoptive parents”); *Succession of D’Asaro*, 167 So.2d 391, 395 (La. Ct. App. 1964) (indicating that “[i]n Louisiana the adopted person is considered for all intents and purposes as a legitimate child and forced heir of the adoptive parent”). It is quite unfortunate that the language of the Louisiana statute (LA. CHILD CODE ANN. art. 1270A (2012)) does not utilize gender-neutral language. Perhaps Louisiana can learn from Illinois, which created a commission with the sole purpose of “mak[ing] the Illinois Compiled Statutes gender neutral.” 5 ILL. COMP. STAT. ANN. 90/10 (LexisNexis Supp 2012). LA. REV. STAT. ANN. § 40:76 (2010); *Adar v. Smith*, 597 F.3d 697, 701 (5th Cir. 2010) (“The Registrar does not offer, and our research does not reveal, any place where the phrase ‘adoptive parents’ is expressly defined in the Louisiana Civil Code, the State’s statutes, or the case law.”), *rev’d en banc*, 639 F.3d 146 (5th Cir. 2011).

202. *See* LA. CHILD CODE ANN. art. 1198, 1221 (2004) (limiting agency and private in-state adoption to married couples or single people over the age of eighteen).

state adoption decrees obtained by same-sex parents.²⁰³ Oren Adar and Mickey Ray Smith, an unmarried same-sex couple, adopted a Louisiana-born infant in New York in April 2005.²⁰⁴ After obtaining the adoption decree, the couple requested the Louisiana Department of Health and Hospitals, Office of Public Health, Vital Records and Statistics, to issue a new birth certificate reflecting the names of the adoptive parents.²⁰⁵ The office requested an opinion of the State's Attorney General on the issue.²⁰⁶ In response, the Attorney General opined: "Louisiana does not owe full faith and credit to the instant New York adoption judgment because it is repugnant to Louisiana's public policy of not allowing joint adoptions by unmarried persons."²⁰⁷ Subsequently, relying on Louisiana law, the Registrar informed the adoptive parents that she was "not able to accept the New York adoption judgment to create a new birth certificate."²⁰⁸ Instead the Registrar offered to place one of the parents' names on the birth certificate since Louisiana allows single-parent adoptions.²⁰⁹

The couple filed a lawsuit in federal court against the Registrar in her official capacity under 42 U.S.C. § 1983.²¹⁰ The plaintiffs alleged violations of the Full Faith and Credit Clause and the Equal Protection Clause of the U.S. Constitution.²¹¹ In granting summary judgment for the plaintiffs, the district court turned solely to full faith and credit and Louisiana

203. See La. Att'y Gen. 325, *supra* note 193; *Adar v. Smith*, 591 F. Supp. 2d 857, 859 (E.D. La. 2008) ("[The State Registrar] further relied on an advisory opinion from the Louisiana Attorney General's Office, which concluded that Louisiana is not required to give full faith and credit to an out-of-state adoption decree that violates Louisiana public policy.").

204. See *Adar*, 597 F.3d at 701.

205. See *Adar*, 597 F.3d at 701 (illustrating that the adoptive parents had the New York Department of Health forward a Report of Adoption to the necessary agency in Louisiana to obtain the new birth certificate).

206. See *Adar*, 597 F.3d at 701 (asserting that prior to making a decision on whether or not to issue a new birth certificate, the Department of Health and Hospitals wanted to know if Louisiana was required to do so).

207. *Adar*, 597 F.3d at 701.

208. *Adar*, 597 F.3d at 701. The Louisiana State Registrar declined to accept the New York adoption decree because Louisiana law only recognizes in-state adoptions by married couples or single adults, giving the Registrar full discretion in issuing birth certificates, and authorizing only the Registrar to issue amended birth certificates. *Id.*

209. *Id.*

210. See *Adar v. Smith*, 639 F.3d 146, 150 (5th Cir. 2011) (stating the adoptive parents are seeking declaratory and injunctive relief under 42 U.S.C. § 1983, claiming the Registrar's action denies equal protection to them and the child and denies full faith and credit to the adoption decree issued in New York); see also Compl. for Declaratory and Injunctive Relief at 1, *Adar v. Smith*, 591 F. Supp. 2d 857 (E.D. La. 2007) (No. 07-6541) ("Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation under color of state law of rights secured by the [U.S.] Constitution.").

211. *Adar*, 597 F.3d at 702.

law, and did not reach the couple's equal protection claim.²¹² The defendants appealed to the Fifth Circuit.²¹³ On appeal, the court of appeals relied on the Supreme Court's clear distinction between the full faith and credit owed statutes and judgments.²¹⁴ Reasoning that there is "virtually universal agreement that adoption decrees are judgments[,]” the court held that Louisiana “*must* recognize that the Adoptive Parents are Infant J's legal parents.”²¹⁵

Like the Tenth Circuit, the court held that while out-of-state judgments must be recognized, “provisions for enforcing [them] are determined by the law of the forum state.”²¹⁶ Like the Tenth Circuit, the court thus went on to evaluate whether Louisiana's statutes mandated the State Registrar to issue a revised birth certificate listing both adoptive parents' names.²¹⁷ The court first ruled that as a matter of separation of powers, it would amount to unconstitutional delegation of legislative authority if the State Registrar were allowed to unconditionally decide whether or not to issue a revised birth certificate.²¹⁸ It then rejected the Registrar's argument that the phrase “adoptive parents” in Section 40:76(C) should be interpreted in light of the state's proscription of joint adoptions by unmarried couples.²¹⁹ As support, the court relied on the Louisiana Supreme Court's decision in *Crescionne v. Louisiana State Police Retirement*

212. *Id.*

213. *Id.* at 701.

214. *Id.* at 707; *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 223 (1998).

215. *Adar*, 597 F.3d at 708, 711.

216. *Id.* at 708.

217. *Id.* at 713–15.

218. *Id.* at 715–18.

219. *Id.* at 718–19. In its holding the Court rejected a number of other arguments brought by the defendant in support of her contention that Louisiana does not owe exacting recognition to out-of-state adoption decrees. *Id.* Specifically, the Registrar argued that the Full Faith and Credit Clause is only coextensive with the reach of traditional *res judicata* principles—i.e. to prevent future litigation. *Id.* at 709. As such, because alteration of records (and not re-litigation) was at issue, Louisiana's recognition of the out-of-state adoption decree would be “no different than requiring Louisiana to substitute a New York statute for one of its own.” *Id.* Additionally, “because Louisiana was not party to the New York proceedings,” the Registrar argued that the state could not be required to obey the adoption decree. *Id.* In rejecting the argument, the court made clear that *res judicata* is a voluntary principle while full faith and credit is a mandatory constitutional curb and the “*modus vivendi* of federalism.” *Id.* at 709–10. It reasoned that non-recognition of a judgment simply because it is based on a statute was not supported by precedent and was merely a “circular attempt to conflate ‘judgment’ and ‘statute.’” *Id.* at 710. In any event, the judgment itself was not an attempt to compel action by Louisiana; instead it sought Louisiana to respect the adjudicated parent-child relationship. *Id.* at 711.

Board,²²⁰ which established that where a statute provides no special definition of an unambiguous term, it must be given “ordinary, commonly understood meaning”²²¹ Because the term “adoptive parents” is unambiguous and not defined anywhere in the statute, the court ruled that it should be given the ordinary meaning of “a father or mother who adopts a child” and ordered the Registrar to make a new record reflecting both plaintiffs’ names.²²²

b. *Adar v. Smith* Revisited

In 2011, the Fifth Circuit voted to rehear *Adar v. Smith*²²³ en banc and vacated the panel’s previous decision.²²⁴ On rehearing, the court invoked the well-established *Baker* rule, which states that the Full Faith and Credit Clause mandates *recognition* of judgments but cannot compel their *enforcement* under state law.²²⁵ With respect to recognition, the court held that the Registrar’s refusal to issue a revised birth certificate with both parents’ names did not deny the plaintiffs recognition of the foreign adoption decree.²²⁶ In support of this conclusion, the court noted that “the Registrar recognize[d] Appellees as the legal parents of their adopted child” and conceded that “the parental relationship . . . cannot be relitigated in Louisiana.”²²⁷

Moreover, the court added that it is “[f]orum state law [that] determines what incidental property rights flow from a validly recognized judgment.”²²⁸ The court analogized to the Seventh Circuit’s decision in *Rosin v. Monken*,²²⁹ which refused to honor a New York plea agreement

220. See *Crescione v. La. State Police Ret. Bd.*, 455 So.2d 1362, 1363 (La. 1984) (reasoning that “only when one statute is unclear that another on the same subject should be called in aid to explain it”).

221. See *id.* at 1364 (“Since there is no special statutory definition of the term ‘surviving spouse,’ we hold that it must be given its ordinary, commonly understood meaning”).

222. *Adar v. Smith*, 597 F.3d 697, 719 (5th Cir. 2010).

223. See generally *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (en banc).

224. See *id.* at 150 (vacating prior decision).

225. *Id.* (“The states’ duty to ‘recognize’ sister state judgments, however, does not compel states to ‘adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.’”).

226. *Id.* (“[T]he Registrar’s refusal to place two names on the certificate can in no way constitute a denial of full faith and credit.”); see *id.* at 159–61 (describing background case law where the Full Faith and Credit Clause similarly served as the focal point of contention).

227. *Id.* at 159

228. *Id.*

229. See generally *Rosin v. Monken*, 599 F.3d 574 (7th Cir. 2010) (describing a case in which an Illinois resident claimed that his having to relocate and register as a sex-offender for life violated the Full Faith and Credit Clause).

in Illinois.²³⁰ The agreement, which had been reduced to a judgment, indicated that the plaintiff need not register as a sex offender.²³¹ The court refused to honor the agreement because the Full Faith and Credit Clause did not require Illinois to “dispense with its preferred mechanism for protecting its citizenry by virtue merely of a foreign judgment that envisioned less restrictive requirements.”²³² Similarly, the *Adar* court concluded that Louisiana law, and not full faith and credit, governed the “incidental benefits of a foreign judgment.”²³³ Based on this, it held that “[o]btaining a birth certificate falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition.”²³⁴ Turning to the state laws in question, the court, without any reasoning to support its conclusion, held that Louisiana law “does not permit any unmarried couples—whether adopting out-of-state or in-state—to obtain revised birth certificates.”²³⁵

Unlike the Tenth Circuit in *Finstuen* and the Fifth Circuit panel in *Adar*, the en banc court also addressed an entirely different legal issue to support its holding—the propriety of using 42 U.S.C. § 1983 to vindicate alleged violations of the Full Faith and Credit Clause in federal courts.²³⁶

230. *Adar*, 639 F.3d at 160–61.

231. *Rosin v. Monken*, 599 F.3d 574, 575 (7th Cir. 2010).

232. *Id.* at 577.

233. *Adar*, 639 F.3d at 161.

234. *Id.* at 177.

235. *Id.* at 161. Note that Louisiana law does not expressly prohibit unmarried couples from obtaining birth certificates. See LA. CHILD. CODE ANN. art. 1221 (2004) (“A single person . . . may petition to privately adopt a child.”). To reach this conclusion, the court combined two separate statutes—one that permits out-of-state “adoptive parents” to receive supplemental birth certificates, and another that does not permit unmarried couples to adopt in Louisiana. *Adar*, 639 F.3d at 161; LA. REV. STAT. ANN. § 40:76 (2010).

236. *Adar*, 639 F.3d at 151. While a discussion of Section 1983 exceeds the scope of this article, it is an important issue worth noting because it constitutes an essential part of the conflict between *Finstuen* and *Adar*. See generally *Finstuen v. Crutcher*, 496 F.3d 1139, 1153–54 (10th Cir. 2007); *Adar*, 639 F.3d at 146–62. In *Finstuen*, neither the district court nor the Tenth Circuit expressly addressed the applicability of Section 1983 to the Full Faith and Credit Clause, although the plaintiffs’ complaint clearly stated that the action was brought under that Section. Compl. for Declaratory and Injunctive Relief at 2, *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295 (W.D. Okla. 2006) (No. 04CV1152), 2004 WL 3139176. (“Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation under color of state law of rights secured by the [U.S.] Constitution.”); *Finstuen v. Crutcher*, 496 F.3d 1139, 1153 (10th Cir. 2007). Similarly, the Seventh and Ninth Circuits have entertained Section 1983 actions in cases addressing violations of the Full Faith and Credit Clause without questioning the propriety of doing so. See *Rosin v. Monken*, 599 F.3d 574, 575 (7th Cir. 2010) (“Mitchell Rosin brought suit under 42 U.S.C. § 1983”); *United Farm Workers of America v. Ariz. Agric. Emp’t Relations Bd.*, 669 F.2d 1249, 1252 (9th Cir. 1982) (“[T]he UFW alleged claims for relief under . . . 42 U.S.C. [§] 1983.”). On the other hand, the majority of the en banc court’s decision in *Adar* dealt with the inapplicability of Section 1983 to claims of alleged violation of the Full Faith and Credit Clause.

Adar, 639 F.3d at 151–58. That section authorizes a private cause of action in federal court for “deprivation of any *rights, privileges, or immunities* secured by the Constitution and laws.” 42 U.S.C. § 1983 (2006) (emphasis added). The crux of the problem for the en banc court was the fact that neither the Full Faith and Credit Clause nor its implementing statute conferred any *right, privilege, or immunity* that could be vindicated under Section 1983. 42 U.S.C. § 1983 (2006) (emphasis added); *Adar*, 639 F.3d at 151–52. This issue, which the defendant first raised during the en banc review, sparked a popular debate and played a prime role in the various briefs supporting the request for certiorari. Supplemental Brief of Appellees Oren Adar and Mickey Ray Smith on En Banc Review at 4–5, *Adar*, 639 F.3d 146 (“Never having raised the issue below, Registrar now contends that the court below lacked federal jurisdiction to hear a claim brought pursuant to 42 U.S.C. § 1983.”); Brief of Dean Erwin Chemerinsky, et al., in Support of the Pet. for Writ of Cert. at 3, *Adar v. Smith*, 132 U.S. 400 (2011) (No. 11-46) (“Section 1983 provides a cause of action to enforce the Full Faith and Credit Clause against state executive officers.”). In their petition for certiorari, the *Adar* plaintiffs termed the discrepancy in the courts’ treatment of Section 1983 a “circuit split.” Petition for Writ of Certiorari at 26, *Adar v. Smith*, 132 U.S. 400 (2011) (No. 11-46) (“The Fifth Circuit’s Limitation On The Scope Of Section 1983 Creates A Circuit Split.”). Scholars have done the same since. Steve Sanders, *Interstate Recognition of Parent-Child Relationships: The Limits of the State Interests Paradigm and the Role of Due Process*, 2011 U. CHI. LEGAL F. 233, 263 (2011) (“The Fifth Circuit’s en banc decision thus creates a split with the Tenth Circuit’s decision in *Finstuen* over whether the federal courts are available to enforce full faith and credit for an adoption decree.”). This Note avoids the phrase “circuit split,” given that neither the Seventh, Ninth, nor Tenth Circuits expressly addressed whether the Full Faith and Credit Clause confers a “right, privilege, or immunity” for purpose of Section 1983. See generally *Rosin v. Monken*, 599 F.3d 574 (7th Cir. 2010); *United Farm Workers of America v. Ariz. Agric. Emp’t Relations Bd.*, 669 F.2d 1249 (9th Cir. 1982); *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007). However, although the parties in *Rosin* and *Finstuen* never raised the issue, it is important to point out that both courts had the chance to answer the same question *sua sponte* under a different statute implicated in the two cases—28 U.S.C. § 1343. This section grants federal courts subject matter jurisdiction over actions seeking “[t]o redress the deprivation . . . of any *right, privilege or immunity* secured by the Constitution.” 28 U.S.C. § 1343 (2006) (emphasis added). As shown above, the language of Sections 1343 and 1983 is virtually the same and both statutes refer to constitutional rights, privileges, and immunities. See 28 U.S.C. § 1343 (2006); 42 U.S.C. § 1983 (2006). In fact, Sections 1343 and 1983 always go hand in hand and both date back to the Civil Rights Act of 1871. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 28 U.S.C. § 1343 (2006) and 42 U.S.C. § 1983 (2006)). The plaintiffs in *Finstuen* cited both sections in their complaints. Compl. for Declaratory and Injunctive Relief at 2–4, *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295 (W.D. Okla. 2006) (No. 04CV1152), 2004 WL 3139176. It is established practice that courts may raise issues pertaining to subject matter jurisdiction *sua sponte*. FED. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”). In fact, with respect to subject matter jurisdiction, the Supreme Court has made it the courts’ duty to raise the issue where federal jurisdiction is doubtful. *Clark v. Paul Gray*, 306 U.S. 583, 588 (1939), *superseded by statute on other grounds*, 28 U.S.C. § 1367 (2000), *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 547 (2005); *McNutt v. Gen. Motors Acceptance Corp. of India*, 298 U.S. 178, 182 (1936); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908); *Metcalf v. Watertown*, 128 U.S. 586, 589 (1888). Although the court in *Finstuen* had a chance to question the applicability of the Full Faith and Credit Clause as a constitu-

Section 1983 permits a private cause of action in federal court for “deprivation of any rights, privileges, or immunities secured by the Constitution.”²³⁷ The court explained that although the Supreme Court has at times referred to full faith and credit in terms of individual rights, it consistently identified the state *courts* (as opposed to state executive officers) as violators.²³⁸ Because a claimant cannot assert the right until trial, the court viewed the Full Faith and Credit Clause as merely imposing a duty on the courts rather than granting an individual right to the people.²³⁹ The court based its conclusion on the understanding that full faith and credit is merely coextensive with principles of *res judicata*.²⁴⁰ On these

tional *right, privilege, or immunity* under Section 1343 *sua sponte*, they did not do so. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1300, 1315 (W.D. Okla. 2006). Because Sections 1343 and 1983 implicate the same question—whether the Full Faith and Credit Clause confers a constitutional right, privilege, or immunity—the courts’ inaction with respect to Section 1343 could further suggest their approval of using Section 1983 to vindicate full faith and credit claims. Whether the Seventh and Tenth Circuits’ omissions were a deliberate exercise of their duty to raise doubtful claims of federal jurisdiction *sua sponte* or, as the Fifth Circuit would have it, the courts failed to spot an issue only the Fifth circuit saw, we will never know. What we do know, however, is that the Fifth circuit, by denying the right to bring a Full Faith and Credit Clause claim under Section 1983, in effect treats citizens of the same country differently than courts of the Seventh, Ninth, and Tenth Circuits. This might not be a “circuit split” per se, but the issue does raise serious questions of constitutional law. Future scholarship should tackle this diverging treatment of Section 1983. *See generally* 28 U.S.C. § 1343 (2006); 42 U.S.C. § 1983 (2006); *Adar*, 639 F.3d at 181.

237. 42 U.S.C. § 1983 (2006).

238. *Adar*, 639 F.3d at 156.

239. *Id.* at 153.

240. *See id.* at 152 (supporting its claim that plaintiffs cannot invoke Section 1983 to vindicate violations of the Full Faith and Credit Clause, the Fifth Circuit held that the clause merely “imposes an obligation on courts to afford sister-state judgments *res judicata* effect” and “replace[s] the international law rule of comity”); *but see* U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”). While the topic is outside of the scope of this Note, the history behind the inclusion of the Clause in the Constitution and the Supreme Court’s interpretation of the Clause both suggest otherwise. *See Adar*, 639 F.3d at 152 (stating the common law interpretation of “full faith and credit” was applicable only to judicial proceedings); *see also* Ralph U. Witten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 258 (1998) (examining the original interpretation of the Full Faith and Credit Clause and its impact on issues relating to the recognition of same-sex marriages across the states). With regard to history, the en banc majority in *Adar* went to great lengths to identify the meaning assigned to the Full Faith and Credit Clause by originalist scholars. *See Adar*, 639 F.3d at 152–53 (explaining how the Supreme Court determined the meaning of the term “full faith and credit” to be that “other states’ courts were obliged ‘to honor’ the ‘res judicata rules of the court that rendered an initial judgment’”) (quoting 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403, at 44 (2d ed. 2002));

grounds, the Fifth Circuit concluded that the action should properly have been brought in state court, subject to Supreme Court review.²⁴¹ For the above reasons, the court reversed the panel's holding.²⁴²

Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943). However, the court makes an unconvincing suggestion that the Full Faith and Credit Clause merely makes the common law rule of res judicata the supreme law of the land. *Adar*, 639 F.3d at 153, *cert. denied*, 132 S.Ct. 400 (2011) (“[T]he full faith and credit clause brought to the [United States] a useful means of ending litigation by making ‘the local doctrines of res judicata . . . a part of national jurisprudence.’”). The Supreme Court has stated that the purpose behind the clause “was to alter the status of the several states as independent foreign sovereignties.” *Milwaukee Cnty. v. M.E. White Co.*, 296 US 268, 277 (1935). Hence, the Clause cannot be seen as a mere codification of res judicata principles. U.S. CONST. art. IV § 1. As aptly stated by the Fifth Circuit panel in *Adar*, res judicata is a state’s “voluntary restraint” while constitutionally prescribed full faith and credit is a “mandatory, constitutional curb” on state sovereignty. *Adar*, 597 F.3d at 709–10 (distinguishing res judicata as a “voluntary restraint” by a forum state, as opposed to the full faith and credit clause as a “mandatory, constitutional curb” on state sovereignty). Unlike res judicata, which merely applies to final judgments on the merits, the Full Faith and Credit Clause has been interpreted to also apply to state laws unless the forum state is not “competent to legislate” in the field. *Pac. Emp’rs Ins. v. Indus. Accident Comm’n of California*, 306 U.S. 493, 501 (1939). While there are few, if any, such areas, the fact that the Full Faith and Credit Clause covers both judgments and statutes makes it inherently broader in reach than common law principles of res judicata. Shawn Gebhardt, *Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 CALIF. L. REV. 1419, 1435 (2009). Moreover, by holding that exacting full faith and credit must be given to judgments, the Supreme Court has made clear that the Clause goes further than ordinary principles of comity, which allow for disregard of a foreign judgment that “violates an important public policy of the forum.” *Estin v. Estin*, 334 U.S. 541, 546 (1948) (noting that the full faith and credit clause “substituted a *command* for the earlier *principles* of comity and thus basically altered the status of the States as independent sovereigns”) (emphasis added); *Baker v. Gen. Motors*, 522 U.S. 222, 233 (1998) (holding that there exists “no roving ‘public policy exception’ to the full faith and credit due judgments”). Examination and explication of the differences between the principles of res judicata and comity on the one hand, and those of the Full Faith and Credit Clause on the other, is an important project for scholars and judges alike. In the en banc court’s quest to prove that Section 1983 does not apply to alleged violations of the Full Faith and Credit Clause, the court unnecessarily narrowed the meaning of the Full Faith and Credit Clause. Future decisions should address the issue with further specificity to ensure that the Full Faith and Credit Clause does not stand as a mere empty shell or a simple reminder of our federalist system.

241. *Adar*, 639 F.3d at 151 (“Because the clause guides rulings in courts, the ‘right’ it confers on a litigant is to have a sister state judgment recognized in courts of the subsequent forum state. The forum’s failure properly to accord full faith and credit is subject to ultimate review by the Supreme Court of the United States.”).

242. *Id.* at 162.

IV. SETTING THE RECORD STRAIGHT (NO PUN INTENDED)

Adar and *Finstuen* were based on similar factual scenarios.²⁴³ Yet, while the couple in *Finstuen* walked away with a supplemental birth certificate reflecting both parents' names, due to the Supreme Court's denial of certiorari, the *Adar* plaintiffs ultimately lost their battle.²⁴⁴ Interestingly, the courts agreed on the scope of constitutional full faith and credit. According to the en banc court, the inconsistency in treatment then came down to one difference between the cases: the fact that "Louisiana law, unlike Oklahoma law, [did] not require issuing birth certificates to two unmarried individuals."²⁴⁵ However, closer inspection of the implicated Oklahoma and Louisiana laws reveals their remarkable similarities. In fact, as this Note will point out, neither state prevents unmarried individuals from obtaining supplemental birth certificates of their adopted child. The unsupported conclusions of the Fifth Circuit's en banc decision in *Adar* misconstrued and unnecessarily confused established Louisiana law with respect to the eligibility of unmarried adoptive couples to obtain revised birth records for their children. The following sections summarize the agreed-upon meaning of recognition and enforcement in the adoption context and explain the errors in statutory interpretation made by the *Adar* court.

A. *Recognition and Enforcement in the Adoption Context*

As previously mentioned, the Supreme Court has distinguished between recognition and enforcement in defining the reach of the Full Faith and Credit Clause.²⁴⁶ The Clause constitutionally mandates exacting recognition of out-of-state judgments.²⁴⁷ Enforcement measures, on the other hand, are outside of the reach of full faith and credit and "remain subject to the evenhanded control of forum law."²⁴⁸

Both *Finstuen* and *Adar* adopt these distinctions.²⁴⁹ In *Finstuen* the Tenth Circuit held that "final adoption orders and decrees are judgments that are entitled to *recognition* by all other states under the Full Faith and Credit Clause."²⁵⁰ The court further acknowledged that "Oklahoma continues to exercise authority over . . . the rights and obligations in

243. *See id.* at 149; *Finstuen v. Crutcher*, 496 F.3d 1139, 1301 (10th Cir. 2007).

244. *Adar v. Smith*, 132 U.S. 400 (2011) (denying petition for writ of certiorari).

245. *Adar*, 639 F.3d at 157.

246. *Baker*, 522 U.S. at 223–24.

247. *Id.* at 223.

248. *Id.* at 224.

249. *Crutcher*, 496 F.3d at 1153–54.

250. *Id.* at 1156.

Oklahoma flowing from an adoptive relationship.”²⁵¹ Similarly, the Fifth Circuit went out of its way to reiterate that it “maintain[s] a stark distinction between *recognition* and *enforcement* of judgments under the [F]ull [F]aith and [C]redit [C]lause.”²⁵² It expressly stated that “[f]orum state law governs the incidental benefits of a foreign judgment.”²⁵³

The cases suggest that in the context of out-of-state adoptions, recognition under the Full Faith and Credit Clause merely requires the forum state to refrain from terminating the relationship established by the foreign adoption decree between the adoptive parents and their child. On the other hand, enforcement of the judgment—i.e. the grant of positive rights and duties to adoptive parents—rests with the state.²⁵⁴ This framework contradicts the Louisiana Attorney General’s view that the state “is not required to *recognize* an adoption by a same[-]sex couple”²⁵⁵ Unlike Charles C. Foti, Jr., former Attorney General of Louisiana, *Finstuen* and *Adar* use this framework correctly, by *recognizing* the adoptive parent status created by the respective adoption decrees.²⁵⁶ In terms of enforcement, however, *Finstuen* held that Oklahoma law assigned the right to obtain a revised birth certificate to all couples, irrespective of marital status.²⁵⁷ *Adar*, on the other hand, ruled that Louisiana law did not.²⁵⁸ The following section compares the Oklahoma and Louisiana laws and shows that *Adar* incorrectly interpreted Louisiana law.

251. *Id.* at 1154.

252. *Adar v. Smith*, 639 F.3d 146, 160 (5th Cir. 2011) (emphasis added).

253. *Id.* at 161.

254. *See id.* at 151–52; *Crutcher*, 496 F.3d at 1153–54. This framework, which was adopted by *Finstuen* and *Adar* alike, could have potentially disastrous effects on some groups of adoptive parents. With so many rights and privileges of parenthood being codified in statutes, many adoptive parents could be deprived of these rights at the state’s whim. For example, if, as in *Adar*, a state were to limit the definition of the term “adoptive parents” to opposite-sex married couples, same-sex couples that jointly adopt a child out-of-state could find themselves in a situation where a co-parent is deprived hospital visitation rights or denied the right to make educational decisions for his or her child. Ultimately, an out-of-state adoption decree would become merely a piece of paper that certifies an imaginary relationship without any practical consequences. Whether such understanding makes the Full Faith and Credit Clause (with its mere recognition principles) a powerless doctrine is a topic for further research. Scholars and judges should thoroughly reevaluate where constitutionally mandated recognition stops and statutorily mandated enforcement begins.

255. Op. La Att’y Gen. 06-0325, at 3 (2007), available at <http://www.ag.state.la.us/Shared/ViewDoc.aspx?Type=4&Doc=18900>.

256. *Adar*, 639 F.3d at 152, 154.

257. *Crutcher*, 496 F.3d at 1141.

258. *Adar*, 639 F.3d at 157.

B. *Adar's Mistaken View of Louisiana Law*

In refusing to order the State Registrar to issue a revised birth certificate, the *Adar* court called Louisiana's records and adoption laws "critically different" from the Oklahoma laws implicated in *Finstuen*.²⁵⁹ Aside from this conclusory statement, the *Adar* court never actually discussed these fictional differences. In fact, a thorough examination reveals that Oklahoma and Louisiana's laws governing adoption and issuance of supplemental birth certificates are remarkably similar. First, neither Oklahoma nor Louisiana allowed joint in-state adoptions by unmarried couples when the two cases were decided.²⁶⁰ Second, both states' laws mandated the State Registrars to place the names of both adoptive parents on supplemental birth certificates upon receipt of the proper evidence of foreign adoption.²⁶¹ Specifically, the Oklahoma law requested

259. *Adar*, 639 F.3d at 157 (quoting the Fifth Circuit's interpretation of the ruling in *Finstuen*).

260. See Op. Okla. Att'y Gen. 04-008, at 2 (2004), available at 2004 WL 557472, (listing those not allowed to adopt a child in Oklahoma).

261. Note that neither state grants its State Registrar the discretion to subjectively decide to whom to issue a supplemental birth certificate or the power to create extra-statutory criteria to issue one. See OKLA. STAT. tit. 63, § 1-316(A)(1) (2004); LA. REV. STAT. ANN. § 40:76(C) (2012). In fact, in both instances, the Registrar must act and issue a supplemental birth certificate upon the presentation of proper evidence of out-of-state adoption. OKLA. STAT. tit. 63, § 1-316(A)(1) (2004); LA. REV. STAT. ANN. § 40:76(C) (2012). In the case of Oklahoma, by using the word "shall," the pertinent statute orders the Registrar to issue a revised birth certificate once the adoptive parents submit "[a]n adoption certificate . . . or a certified copy of the decree of adoption." OKLA. STAT. tit. 63, § 1-316(A)(1) (2004). Similarly, in the case of Louisiana the statute prescribes that "[u]pon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives" and "shall issue to the adoptive parents a certified copy of the new record." LA. REV. STAT. ANN. § 40:76(C) (2012) (emphasis added); LA. REV. STAT. ANN. § 40:77 (2012) (emphasis added). In another instance, the Louisiana law states that "the state registrar may create a new record of birth." In another instance, the Louisiana law states that "the state registrar may create a new record of birth." LA. REV. STAT. ANN. § 40:76(A) (2012) (emphasis added) (quoting the responsibility of the state registrar). As the panel decision of the Fifth Circuit aptly pointed out, the mere use of the word "may" in the statute does not give the Louisiana Registrar "unfettered discretion to issue or not to issue a birth certificate." *Adar v. Smith*, 597 F.3d 697, 716 (5th Cir. 2010) (emphasis added), *rev'd en banc*, 639 F.3d 146 (5th Cir. 2011) (quoting the court's rebuttal of the state registrar's argument). Because such reading would improperly delegate legislative authority to the state Registrar, a more narrow understanding, which "affords the Registrar the limited discretion of determining whether the certification furnished by the applicants is satisfactory," is appropriate. See *id.* at 716, 718 (noting that the Supreme Court of Louisiana has created a three-prong test to determine unconstitutional delegation of legislative authority, under which the "[d]elegation of authority to an administrative agency is constitutionally valid if the enabling statute (1) contains a clear expression of legislative policy, (2) prescribes sufficient standards to guide the agency in the execution of that policy, and (3) is accompanied by adequate procedural safeguards to protect against abuse of discretion by the agency");

issuance of a new birth certificate “with the names of the *adoptive parents* listed as the parents.”²⁶² The Louisiana statute likewise mandated the recording of “[t]he names of the *adoptive parents*.”²⁶³ Third, both Oklahoma and Louisiana’s statutes failed to define the phrase “adoptive parents.”²⁶⁴ This raises the question of why the *Adar* court ruled differently than the Tenth Circuit in *Finstuen*.

For the *Adar* defendants, the meaning of the phrase “adoptive parents” was the crux of the conflict. In that case the Louisiana State Registrar refused to issue a supplemental birth certificate listing both plaintiffs precisely because, in her interpretation of the law, the words “adoptive parents” did not include unmarried couples.²⁶⁵ In its holding, the Fifth Circuit adopted this logic and ruled that “Louisiana law, unlike Oklahoma law, [did] not require issuing birth certificates to two unmarried individuals.”²⁶⁶ This is simply not true with regard to Louisiana law. The Fifth Circuit, without explanation or mention of any method of statutory interpretation, arrived at the above conclusion by combining two Louisiana statutes, each from a different code.²⁶⁷ The first law, codified in the Louisiana Revised Statutes, governs foreign adoptions and allows for the creation of a new birth record for a Louisiana-born child adopted out-of-state.²⁶⁸ The second, present in the Louisiana Children’s Code, limits the availability of joint adoption to married couples.²⁶⁹ In its conclusion, the court improperly adopted the view of the State Registrar that the term “adoptive parents” in the Revised Statutes “means married parents, because in Louisiana, only married couples may jointly adopt a child.”²⁷⁰ Interpreted appropriately it becomes obvious that the term “adoptive parents” under Louisiana law applies to any person made a parent by an adoption decree, irrespective of marital status.

Louisiana v. All Pro Paint & Body Shop, 639 So.2d 707, 711 (La. 1994) (formulating the preceding test). Hence, assuming that proper documentation is provided, both Oklahoma and Louisiana’s laws require the Registrar to issue a revised birth certificate.

262. OKLA. STAT. tit. 10, § 7505-6.6(B) (2007) (emphasis added).

263. LA. REV. STAT. ANN. § 40:76(C) (2012) (emphasis added).

264. OKLA. STAT. tit. 10, § 7501-1.3 (2011); *Adar v. Smith*, 597 F.3d 697, 715 (5th Cir. 2010) (“The Registrar does not offer, and our research does not reveal, any place where the phrase ‘adoptive parents’ is expressly defined in the Louisiana Civil Code, the State’s statutes, or the case law.”).

265. *Adar*, 639 F.3d at 149–50.

266. *Id.* at 157.

267. *Id.* at 161.

268. LA. REV. STAT. ANN. § 40:76 (A), (C) (2010) (“[T]he state registrar may create a new record of birth in the archives upon presentation of a properly certified copy of the final decree of adoption . . . showing . . . [t]he names of the adoptive parents.”).

269. LA. CHILD. CODE ANN. art. 1221 (2004) (“A single person, eighteen years or older, or a married couple jointly may petition to privately adopt a child.”).

270. *Adar*, 639 F.3d at 149–50.

The en banc court and the Louisiana State Registrar incorrectly interpreted the term “adoptive parents” under Section 40:76(C) of the Revised Statutes *in pari materia* with Article 1221 of the Children’s Code.²⁷¹ The Louisiana Civil Code states that “[l]aws on the same subject matter must be interpreted in reference to each other.”²⁷² This statute, however, has no relevance to the issue at hand because the two statutes do not deal with the same subject matter.²⁷³ One statute, titled “Record of foreign adoptions,” deals with record keeping and recognition of out-of-state adoptions.²⁷⁴ The other, titled “Persons who may petition for adoption,” deals with in-state eligibility to adopt.²⁷⁵ Because one statute concerns the subject matter of full faith and credit and the other the subject matter of in-state eligibility to adopt, the two are different and cannot be interpreted *in pari materia* with one another.

In any event, the state’s supreme court has limited the applicability of this rule of interpretation to instances where there is ambiguity present.²⁷⁶ In all other instances, the words of a statute are to be read “according to their general and popular use.”²⁷⁷ Merriam-Webster’s Collegiate Dictionary defines “ambiguity” as something “that can be understood in two or more possible senses or ways.”²⁷⁸ The term “adoptive parents” in Section 40:76 has only one meaning. It cannot be read as “a couple eligible to jointly adopt in Louisiana” when the statute deals with recognition of adoptions performed by foreign courts. While both the Fifth Circuit panel and five judges dissenting to the en banc opinion recognized this and expressly noted that the term “adoptive parents” is unambiguous, the en banc majority did not even touch on the subject of

271. See LA. REV. STAT. ANN. § 40:76(C) (2010); LA. CHILD. CODE ANN. art. 1221 (2004).

272. LA. CIV. CODE ANN. art. 13 (1999) (emphasis added).

273. See *Adar v. Smith*, 597 F.3d 697, 718 (5th Cir. 2010) (doubting the relevance of reading the two statutes in tandem).

274. LA. REV. STAT. ANN. § 40:76 (2010).

275. LA. CHILD. CODE ANN. art. 1221 (2004).

276. *Crescienne v. La. State Police Ret. Bd.*, 455 So.2d 1362, 1363 (La. 1984):

While it is true that the Civil Code directs that laws on the same subject matter should be construed with reference to one another, it is also true that it is only when one statute is unclear that another on the same subject should be called in aid to explain it. Otherwise, where there is no ambiguity, the words of a statute are to be read in their most usual significance, that is, according to their general and popular use. (citations omitted).

277. *Id.*

278. *Ambiguity Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ambiguity> (last visited Sept. 27, 2012). Louisiana courts use the same test of ambiguity in interpreting the language of contracts. See, e.g., *Bowab v. St. Paul Fire & Marine Ins. Co.*, 152 So. 2d 66, 73 (La. Ct. App. 1963) (defining the “common-sense test of ambiguity” as being “susceptible of two reasonable constructions”).

statutory interpretation.²⁷⁹ Accordingly, because the statute deals with foreign adoptions, in its general use, the term “adoptive parents” must be measured by an all-inclusive national standard not a limiting state-specific standard.

Alternatively, assuming *arguendo* that the two statutes are in fact interpreted *in pari materia* with one another, the law nonetheless cannot be read as denying unmarried out-of-state adoptive parents access to supplemental birth certificates. The en banc court, without explanation, read Article 1221 as a limitation on Section 40:76.²⁸⁰ Contrarily, as shown below, proper reading of Louisiana law suggests that Section 40:76 must be read as an extension of Article 1221. Because each state may choose to implement a different adoption process, as suggested by the Restatement (First) of Conflict of Laws, it is not the process, but the resulting “status of adoption” that is common to all states of the union.²⁸¹ In adopting a statute dealing with a situation “[w]here a person born in Louisiana is adopted in a court of proper jurisdiction in any other state,” Louisiana acknowledged (and did not question) a foreign courts ability to create such status of adoption.²⁸² Instead of doubting the process and choosing to re-litigate each adoption according to its own whim, Louisiana chose to trust the courts of its sister states.²⁸³ Accordingly, irrespective of the limitations imposed on in-state adoption, Section 40:76 extends status of adoption to anyone who gains such status “in a court of proper jurisdiction in any other state.”²⁸⁴ The *Adar* plaintiffs gained such status in New York courts. Accordingly, Louisiana should have issued them a revised birth certificate reflecting both parents’ names.

279. *Adar*, 639 F.3d at 181.

280. *See id.* at 161. “In this case, Louisiana does not permit any unmarried couples—whether adopting out-of-state or in-state-to obtain revised birth certificates with both parents’ names on them.” *Id.*

281. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 143 (1934) (“The status of adoption, created by the law of a state having jurisdiction to create it, will be given the same effect in another state as is given by the latter state to the status of adoption when created by its own law.”).

282. LA. REV. STAT. ANN. § 40:76(A) (2010) (emphasis added).

283. *See id.* (requiring no more than a “certified copy of the final decree of adoption” or “certified statement from the record custodian attesting to the adoption decree” for the issuance of a new birth record in Louisiana). Note that *Adar* suggests that relitigation of a foreign adoption decree would amount to non-recognition and be unconstitutional under the Full Faith and Credit Clause. *Adar*, 639 F.3d at 152. “The Registrar concedes it is bound by the New York adoption decree, such that the parental relationship of *Adar* and *Smith* with *Infant J* cannot be relitigated in Louisiana.” *Id.*

284. LA. REV. STAT. ANN. § 40:76(A) (2010).

V. CONCLUSION

Every state recognizes the concept of adoption.²⁸⁵ With some states allowing same-sex couples to jointly adopt children and others fighting tooth and nail to keep homophobic laws on the books, interstate movement can raise issues regarding the validity of out-of-state adoption decrees. Two circuit level decisions exemplify the problems created by such inconsistent state laws—*Finstuen v. Crutcher* and *Adar v. Smith*.²⁸⁶ In *Finstuen*, three same-sex couples adopted children out-of-state and applied for revised birth certificates reflecting the adoptive parents' names.²⁸⁷ Following a long legal battle, the Tenth Circuit ordered the issuance of new birth certificates for two of those families.²⁸⁸ In *Adar*, based on similar facts, the Fifth Circuit refused to order Louisiana to issue a revised record of birth.²⁸⁹ This apparently dissimilar treatment raises questions about the reach of constitutional full faith and credit and the role of state laws governing issuance of supplemental birth certificates.

Interestingly, *Finstuen* and *Adar* agree on the scope of the Full Faith and Credit Clause in the adoption context. Both cases hold that the Constitution mandates exacting recognition of out-of-state adoption decrees.²⁹⁰ However, the cases add that any privileges stemming from or incidental to such status fall outside of the reach of the Full Faith and Credit Clause and are governed by state law. These are considered measures of enforcement and cannot be challenged on constitutional full faith and credit grounds. According to *Adar*, it was precisely the difference between Oklahoma's and Louisiana's laws that caused the opposite results of the two cases.²⁹¹

However, closer inspection reveals that the Oklahoma and Louisiana laws governing adoption and issuance of revised birth certificates are remarkably similar.²⁹² In fact, both states' laws permit issuance of supplemental birth certificates to all out-of-state adoptive parents, irrespective

285. See *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L. J. 715, 725 (1950) ("Adoption by deed persisted in other states for many years thereafter, but such provisions have gradually been repealed, and today every state requires that adoption be by judicial proceeding.").

286. *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

287. *Id.* at 1142.

288. *Id.* at 1156.

289. *Adar*, 639 F.3d at 146–47.

290. See *id.* at 151.

291. *Id.* at 157.

292. See generally OKLA. STAT. tit. 63, § 1-316 (2004); LA. REV. STAT. ANN. § 40:76(C) (2012).

of sex or marital status.²⁹³ With minimal explanation, the *Adar* court hurriedly arrived at the wrong result because it used unorthodox statutory interpretation. It is quite unfortunate that today, under *Adar*, Louisiana law denies all out-of-state same-sex adoptive parents the chance of obtaining revised Louisiana birth certificates. By denying certiorari, the Supreme Court allowed this incorrect reading of Louisiana law to negatively affect the gay and lesbian community for years to come.

293. OKLA. STAT. tit. 63, § 1-316 (2004) (notes of decision); LA. REV. STAT. ANN. § 40:75 (2012).