

DOMA AND THE HAPPY FAMILY: A LESSON IN IRONY

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* Professor of Law, University of Pittsburgh School of Law. I am grateful to Barbara Cox and Lynn Wardle for inviting me to participate in the Symposium on DOMA and Issues Concerning Federalism and Interstate Recognition of Same-Sex Relationships, co-hosted by California Western School of Law and Brigham Young University, at which I presented an earlier draft of this article. I appreciate the many constructive comments I received from participants in the Symposium and in a faculty colloquium at the University of Pittsburgh School of Law. I thank Andy Koppelman and Gary Simson for their helpful and insightful comments on an earlier draft of this article, and Nate Gruz and Matt Steranko for their diligent research assistance and perennial good cheer. Finally, I dedicate this Article with much love and great pride to my son, Scott Wasserman Stern, on the forthcoming publication of his first book, *Outside the Box Origami: A New Generation of Extraordinary Folds* (Tuttle 2011).

I. INTRODUCTION

The Defense of Marriage Act (“DOMA”),¹ enacted by Congress in 1996, purports to free states of the obligation to recognize same-sex marriages celebrated in other states, or to recognize any right or claim arising from such marriages.² While much of the scholarly literature on DOMA addresses its constitutionality and its impact on same-sex couples, I wish to examine DOMA’s effect on parent-child relationships. To the extent that scholars have examined DOMA’s impact on parent-child relationships, they have focused primarily on unhappy families, examining the unique problems that arise when same-sex couples with children separate and states compete for jurisdictional authority to determine the child custody and visitation issues.³ While those issues are of great importance and interest, I will focus instead on DOMA’s impact on the *happy* family. In particular, I

1. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7 (2006)).

2. Section two of DOMA provides: “No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such a relationship.” *Id.* § 2(a). Section three of DOMA provides: “In determining the meaning of [a federal law] . . . the word ‘marriage’ means only a legal union between one man and one woman as husband and wife.” *Id.* § 3(a). This section of DOMA was recently struck down as unconstitutional in a lawsuit filed by Symposium participant Mary Bonauto. *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010).

3. *See, e.g.*, Kathryn J. Harvey, Note, *The Rights of Divorced Lesbians: Interstate Recognition of Child Custody Judgments in the Context of Same-Sex Divorce*, 78 *FORDHAM L. REV.* 1379, 1422-25 (2009) (concluding that DOMA partially repealed the Parental Kidnapping Prevention Act (“PKPA”)); Alison M. Schmieder, *Best Interests and Parental Presumptions: Bringing Same-Sex Custody Agreements Beyond Preclusion by the Federal Defense of Marriage Act*, 17 *WM. & MARY BILL RTS. J.* 293, 295 (2008) (“DOMA should not preclude recognition of cross-state custody agreements.”); Mark Strasser, *Interstate Recognition of Adoptions: On Jurisdiction, Full Faith and Credit, and the Kinds of Challenges the Future May Bring*, 2008 *BYU L. REV.* 1809, 1840 (footnote omitted) (“[Finding] no evidence that it was Congress’s intent to modify the PKPA when it passed DOMA.”); *see also* *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 336 (Va. Ct. App. 2006) (rejecting the argument that “DOMA . . . was intended to affect or partially repeal the PKPA”), *aff’d*, 661 S.E.2d 822 (Va. 2008).

seek to determine the effect, if any, that DOMA has on a state's obligation to recognize relationships between children and their gay or lesbian parents, created under the laws of other states, when the family remains intact and happy.

My thesis is that DOMA's impact on the happy family is a lesson in irony. Here's the argument: in enacting DOMA, Congress chose to protect heterosexual marriage because of its "deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children."⁴ State family law, too, recognizes that children thrive when they are raised by parents in a committed relationship.⁵ In fact, under both state family law and federal constitutional law, the willingness of a father to marry or otherwise commit to the mother of his child actually bolsters the legal protections afforded to his relationship with his children.⁶ Given this implicit recognition that children are better off living with two parents who not only love their children, but also love one other, it is deeply ironic that DOMA may *reduce* the likelihood that a child's relationship with her gay or lesbian parents will be recognized if the parents marry and rely on the marital presumption of parentage. For a law intended to protect marriage as a means of protecting children, this potential result is ironic indeed.

This Article will proceed in three parts. Part II will examine DOMA's legislative history to demonstrate that Congress intended DOMA, in no small part, to protect children. Part III will briefly discuss the role marriage plays in bolstering a man's claim to be recognized as a parent. And Part IV will demonstrate that under DOMA, marriage between a child's gay or lesbian parents may actually *undermine*, rather than strengthen, her legal relationship with her parents in states that are hostile to same-sex marriage.

4. H.R. REP. NO. 104-664, at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2917; *see also id.* at 14 (footnote omitted) (discussing the "irreplaceable role that marriage plays in childrearing and in generational continuity").

5. *See infra* Part III.A.

6. *See infra* Part III.

II. DOMA'S LEGISLATIVE HISTORY AND ITS GOALS

DOMA was introduced in the wake of *Baehr v. Lewin*,⁷ the Hawaii Supreme Court decision that presumed Hawaii's marriage statute, which authorized only opposite-sex marriage, was unconstitutional unless the state could prove a compelling state interest and demonstrate the statute was narrowly drawn to avoid infringement of constitutional rights.⁸ A Hawaii court scheduled trial in Hawaii was scheduled for September 1996, and many expected the Hawaii courts to require the state to issue marriage licenses to same-sex couples.⁹ The legislatures in other states were in a frenzy; they debated and rapidly passed laws designed to deny gays and lesbians the opportunity to marry and to reinforce the states' prerogatives to deny recognition to same-sex marriages that might be celebrated in Hawaii or elsewhere.¹⁰ In fact, it was these states' concerns, reflected in this flurry of legislative activity, that persuaded the House Judiciary Committee that federal legislation was warranted.¹¹

Congress designed DOMA to serve two primary purposes: "to defend the institution of traditional heterosexual marriage," and "to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."¹² The House Judiciary Committee Report explained the preferred legal status of heterosexual marriage by identifying civil society's "deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children."¹³ It quoted a Council on Families in America Report, which identified "the irreplaceable role that marriage plays in childrearing and in

7. 852 P.2d 44 (Haw. 1993) (plurality opinion).

8. *Id.* at 67.

9. *See, e.g.*, H.R. REP. NO. 104-664, at 5 (discussing a "strong possibility").

10. *Id.* at 9-10

11. *Id.*

12. *Id.* at 2. In addition, Congress designed DOMA to "defend[] traditional notions of morality" and to "preserv[e] scarce government resources." *Id.* at 12.

13. *Id.* at 13.

generational continuity.”¹⁴ And a co-sponsor of the bill, the late Senator Robert Byrd of West Virginia, opined that the very purpose of heterosexual marriage itself is to establish “a home atmosphere in which a man and a woman pledge themselves exclusively to one another and who *bring into being children* for the fulfillment of their love for one another and for the greater good of the human community at large.”¹⁵ In short, DOMA’s celebration of heterosexual marriage reflected a deep concern for the well-being of children and a recognition that children thrive when they are raised by two parents who not only love their children, but also love one another.

III. THE ROLE OF MARRIAGE IN DETERMINING PARENTHOOD

This respect for marriage, and the role it plays in providing children with secure and loving two-parent homes, is not only reflected in DOMA, but in state family law as well, particularly in the law governing parentage. The point I wish to make here is a modest one: state law not only respects the institution of marriage, but it recognizes the benefits children receive when they are raised in an intact family. The law’s respect for marriage as an incubator of healthy children is not only reflected in the marital presumption of paternity, but also in a line of United States Supreme Court cases addressing the constitutional rights of unwed fathers. We will analyze these areas of the law in turn.

A. *The Marital Presumption of Paternity*

At common law, motherhood was a function of biology, and fatherhood was a function of marriage, so a woman who gave birth to a child was its mother, and her husband was its father.¹⁶ This marital presumption of paternity conclusively presumed that any child born

14. *Id.* at 14 (footnote omitted).

15. 142 CONG. REC. 22436, 22446 (1996) (statement of Sen. Byrd) (emphasis added).

16. *In re Sebastian*, 879 N.Y.S.2d 677, 679 (N.Y. Sur. Ct. 2009); Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 550, 562-63 (2000); Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 44 (2001); Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 248 (2006).

during a marriage was the legal child of the mother's husband; the presumption could be rebutted only by proof that the husband was sterile or lacked access to his wife during the period of conception.¹⁷ The marital presumption of paternity was one of the strongest presumptions in law,¹⁸ and some courts and commentators maintain that it remains "one of the most firmly-established and persuasive precepts known in law."¹⁹

A child born out of wedlock had only one legal parent at common law—the mother.²⁰ Because legislators recognized that children were better off with two legal parents who were obligated to support them, states enacted statutes authorizing filiation or paternity proceedings to establish the parenthood of a biological father who was not married to the child's mother.²¹ Initially, these proceedings were quasi-criminal

17. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion) (citations omitted); AM. LAW. INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 3.03 cmt. d (2000); Roberts, *supra* note 16, at 44. This presumption is sometimes referred to as the presumption of legitimacy. See, e.g., Susan F. Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 228-29 (2006); Munonyedi Ugbo, Note, *Who's Your Daddy?: Why the Presumption of Legitimacy Should be Abandoned in Vermont*, 34 VT. L. REV. 683, 685 (2010). It is also known as the presumption of parentage. See, e.g., Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 74 (2006).

18. Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It Is Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 353 (2006).

19. *Baker v. Baker*, 582 S.E.2d 102, 103 (Ga. 2003); see e.g., Brenda J. Runner, *Protecting a Husband's Parental Rights When His Wife Disputes the Presumption of Legitimacy*, 28 J. FAM. L. 115, 116 (1989-90) (footnote omitted) ("One of the strongest presumptions in law is that a child born to a married woman is the legitimate child of her husband.").

20. *In re Sebastian*, 879 N.Y.S.2d at 679.

21. *Id.* at 679, 688-89; see also *Hough v. Light*, 89 N.Y.S.2d 361, 363 (N.Y. App. Div. 1949) ("An affiliation proceeding is a creature of statute . . . Its twofold purpose, to determine paternity and to secure support for the child, was unknown to the common law."). The state's interest is not entirely altruistic in that an establishment of paternity frees the state of potential financial responsibility for the child. *In re Dep't of Soc. Servs. ex rel. Sandra C. v. Thomas J.S.*, 474 N.Y.S.2d 322, 330 (N.Y. App. Div. 1984) ("[T]he protection of the community against burdensome taxation produced by the acts of the individuals in derogation of public policy was a

in nature.²² In 1993 Congress required states to develop simple processes, such as in-hospital acknowledgment programs, whereby unwed fathers could voluntarily acknowledge paternity and have their names placed on the child's birth certificate.²³ This legislative action reflected both the dramatic increase in the percentage of children born out of wedlock in recent decades,²⁴ and the government's growing interest in shifting financial responsibility for non-marital children onto their biological parents.²⁵

Today a man has more opportunities to establish a legal relationship with his child than he had at common law, even if he declines to marry the child's mother. But the law still reflects the view that children are typically better off being raised by parents who are married to each other. This recognition is reflected in the modern marital presumption of paternity.²⁶ The presumption today is a rebuttable one,²⁷ often codified by statute,²⁸ that varies in strength

paramount consideration in the enactment of the modern paternity statutes.”); see also *In re Sebastian*, 879 N.Y.S.2d at 689 n.42.

22. Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 617 (2009); Roberts, *supra* note 16, at 45.

23. Singer, *supra* note 16, at 250-53 (citing 42 U.S.C. § 666(a)(5)(C)(i) (2006)) (describing “early and expedited procedures for voluntary acknowledgement of paternity”). Such voluntary acknowledgments are entitled to full faith and credit in other states. *Id.* at 251 (citing 42 U.S.C. § 666(a)(5)(C)(iv) (2006)); see also Harris, *supra* note 22, at 620 (describing federal pressure on states to establish the paternity of unwed fathers and to impose child support obligations on them).

24. STEPHANIE J. VENTURA, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES, NCHS DATA BRIEF NO. 18, at 2 (May 2009), available at <http://www.cdc.gov/nchs/data/databriefs/db18.pdf> (“In 2007, nearly 4 in 10 births were to unmarried women: The proportion of all births to unmarried women was 39.7%, up from 34% in 2002. The 2007 proportion was more than double that for 1980 (18.4%).”). See also Harris, *supra* note 22, at 618-19.

25. See, e.g., Singer, *supra* note 16, at 249-50.

26. Rebecca Moulton, *Who's Your Daddy? The Inherent Unfairness of the Marital Presumption for Children of Unmarried Parents*, 47 FAM. CT. REV. 698, 700 n.18 (2009) (“Approximately thirty-five of the fifty states have a marital presumption of legitimacy.”).

27. AM. LAW. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.03 cmt. d (2000); McRae, *supra* note 18, at 355.

28. See, e.g., CAL. FAM. CODE § 7540 (West 2004) (“Except as provided in

from state to state.²⁹ The marital presumption of paternity is designed to protect children from the stigma of illegitimacy, ensure financial support from two parents, preserve public resources, and protect the integrity of marriage and the stability of an intact family (at least in part by limiting or precluding inquiries into the couple's sex life and the wife's fidelity).³⁰

In recent years, the stigma and disadvantages of illegitimacy have diminished.³¹ Moreover, with the greater availability of reliable DNA testing, some states now permit formerly married men to rebut the marital presumption of paternity. This scientific evidence is used to prove that they are not the biological fathers of children born to their former wives during marriage.³² These men seek to rebut the presumption in order to avoid an obligation to financially support children with whom they have no biological connection. Since one of the policies underlying the marital presumption of paternity is to preserve the marriage—and in these cases there is no longer a salvageable marriage to preserve—some states have concluded the

Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”); CAL. FAM. CODE § 7541 (West 2004) (permitting the presumption to be rebutted by blood tests within two years of the child's birth in certain cases); UNIF. PARENTAGE ACT § 204(a) (2000, amended 2002), 9B U.L.A. 311 (2001 & Supp. 2009) (“A man is presumed to be father of a child if: (1) he and the mother of the child are married to each other and the child is born during the marriage.”) (adopted in 8 states); UNIF. PARENTAGE ACT § 4(a)(1) (1973), 9B U.L.A. 393 (2001 & Supp. 2009) (“A man is presumed to be the natural father of a child if (1) he and the child's natural mother are or have been married to each other and the child is born during the marriage”) (adopted in 13 states).

29. AM. LAW. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.03 Reporter's Notes (2000); Appleton, *supra* note 17, at 234-36.

30. Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (plurality opinion); Appleton, *supra* note 17, at 237, 242-59; Harris, *supra* note 22, at 615; McRae, *supra* note 18, at 349, 359-63; Roberts, *supra* note 16, at 53-54; Singer, *supra* note 16, at 249, 256-57; Ugboode, *supra* note 17, at 686-87.

31. See, e.g., Appleton, *supra* note 17, at 228, 243-44; Glennon, *supra* note 16, at 554.

32. See, e.g., Doran v. Doran, 820 A.2d 1279, 1282-83 (Pa. Super. Ct. 2003); Michael K.T. v. Tina L.T., 387 S.E.2d 866, 870 (W. Va. 1989); Appleton, *supra* note 17, at 235-36 & n.36 (“[A]t least six jurisdictions allow a husband to disestablish paternity at the time of divorce.”); Glennon, *supra* note 16, at 559, 566, 577-82; Harris, *supra* note 22, at 632-33.

marital presumption of paternity no longer applies (or may be rebutted by scientific evidence).³³

But even as some states acknowledge the diminished force of the marital presumption of paternity when a marriage fails, many remain reluctant to “award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child.”³⁴ Some states permit the presumption of parentage to be rebutted only if doing so would serve the child’s best interests.³⁵ In these states, when alleged biological fathers claim paternity of children born during an intact marriage, courts decline to order blood tests or DNA tests to determine paternity unless the determination would be in the child’s best interests.³⁶ Courts make this best interest determination by balancing the putative father’s interest in establishing his status as the child’s biological father against the married couple’s interest in protecting their marriage and

33. See, e.g., *Doran*, 820 A.2d at 1283; *Michael K.T.*, 387 S.E.2d at 870; see also *Fish v. Behers*, 741 A.2d 721, 723 (Pa. 1999) (concluding that the marital presumption of paternity did not apply in a suit for child support by a mother against the biological father of her child born during her marriage to her former husband; “there is no longer an intact family or a marriage to preserve.”). These states “elevate fairness to husbands . . . over and above protection of child welfare (by permitting disruption of well established, functional father-child relationships).” *Appleton*, *supra* note 17, at 244 (footnote omitted); accord *Glennon*, *supra* note 16, at 592-93. In some cases, divorcing mothers challenge the paternity of their children to defeat a husband’s claim to child custody. See, e.g., *Baker v. Baker*, 582 S.E.2d 102, 102 (Ga. 2003); *Glennon*, *supra* note 16, at 582-85.

34. *Michael H.*, 491 U.S. at 127 (plurality opinion) (disclaiming awareness of even a single case that awarded substantive parental rights to the biological father of a child conceived and delivered by a married woman).

35. *Appleton*, *supra* note 17, at 235 & n.35 (identifying approximately twelve states that permit the presumption of parentage to be rebutted if it would serve the child’s best interests); see also UNIF. PARENTAGE ACT § 608(b) (2000, amended 2002), 9B U.L.A. 49 (Supp. 2009); *Harris*, *supra* note 22, at 623, 634-36.

36. See, e.g., *R.N. v. J.M.*, 61 S.W.3d 149, 155, 157 (Ark. 2001); *Evans v. Wilson*, 856 A.2d 679, 692 (Md. 2004); *In re Paternity of C.A.S.*, 468 N.W.2d 719, 726 (Wis. 1991); see also *Baker*, 582 S.E.2d at 106 (concluding that the trial court should have determined whether it was in the child’s best interest to permit the mother to “delegitimize” the child where a divorcing mother sought to prove that her husband was not the father of her child). Even when statutes authorize challenges to a presumed father’s paternity without requiring a best interest analysis, courts have declined to order testing unless a decision in favor of the alleged biological father would be in the child’s best interests. *Glennon*, *supra* note 16, at 574-75.

their family.³⁷ Courts are quite reluctant to undercut the marital presumption when the mother and her husband have co-parented the child, the husband has provided financial and emotional support to the child, and the child has bonded with the husband.³⁸ The United States Supreme Court in *Michael H. v. Gerald D*³⁹ noted that “even in modern times . . . the ability of [a man who purportedly fathered the child of a married woman] to claim paternity has not been generally acknowledged.”⁴⁰

B. Marriage and the Constitutional Rights of Fathers

Not only does the state law marital presumption of paternity emphasize the saliency of marriage in determining parentage, but so does a line of United States Supreme Court cases that delineates the federal constitutional rights of unwed fathers. In these cases, the Court has determined the circumstances in which an unwed father has a constitutionally protected interest in his relationship with his non-marital child, and the constitutionality of distinctions drawn by state laws between unwed fathers and once-married fathers. In *Quilloin v. Walcott*⁴¹ the Court unanimously upheld the constitutionality of a Georgia adoption statute that treated unwed fathers differently from other parents, including once-married fathers.⁴² The statute barred the adoption of a marital child unless each living parent voluntarily surrendered rights to the child or was found to be unfit; however, the statute required only the mother’s consent regarding a child born out

37. See, e.g., *Evans*, 856 A.2d at 693 (citing *Turner v. Whisted*, 607 A.2d 935, 940 (Md. 1992)). The Uniform Parentage Act (“UPA”) lists additional factors to be considered in assessing the child’s best interests. UNIF. PARENTAGE ACT § 608(b)(1)-(9) (2000, amended 2002).

38. See, e.g., *R.N.*, 61 S.W.3d at 155 (stating a party seeking to rebut the presumption must first show that doing so is “in the best interest of a child whose parents were married at the time the child was born and perhaps, as in this case, remain married and plan to continue as the only parents the child has ever known”); *Evans*, 856 A.2d at 693; *In re Paternity of C.A.S.*, 468 N.W.2d at 726-27, 729.

39. 491 U.S. 110 (1989) (plurality opinion).

40. *Id.* at 125. But see *Appleton*, *supra* note 17, at 236 & n.37 (“[A] few states recognize a ‘right’ on the part of putative fathers to challenge a husband’s status as father.”).

41. 434 U.S. 246 (1978).

42. *Id.* at 248.

of wedlock.⁴³ To acquire a right to veto the adoption of his child an unwed father had to marry the mother, acknowledge the child as his own, or obtain a legal order legitimating the child.⁴⁴ The Court found no violation of due process because the unwed father, Leon Webster Quilloin, never sought or had physical or legal custody of his child during the child's first eleven years; the mother had married another man; and the trial court found that an adoption by the child's stepfather would be in the child's best interests.⁴⁵

The biological father argued that the statute nevertheless violated equal protection because his interests were indistinguishable from those of a once-married father who divorced the mother and no longer lived with his child.⁴⁶ The Court rejected this contention noting that Quilloin "never exercised actual or legal custody over his child," whereas "legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage."⁴⁷ Thus, the Court concluded that by virtue of having been married to his child's mother and having lived with his child during the marriage, a once-married father was entitled to greater legal protection than an unwed father who never made a legal commitment to his child's mother and never had custody of his child.

In *Lehr v. Robertson*⁴⁸ the Court recognized even more explicitly that "[t]he institution of marriage has played a critical role . . . in defining the legal entitlements of family members . . ."⁴⁹ and noted that "state laws almost universally express an appropriate preference

43. *Id.* (citing GA. CODE § 74-403(1), (3) (1975)).

44. *Id.* at 249 (citing GA. CODE §§ 74-101, 74-103 (1975)).

45. *Id.* at 255.

46. *Id.* at 256. The Court did not rule on the birth father's claim that the statute unconstitutionally distinguished between unwed mothers and fathers. *Id.* at 253 n.13.

47. *Id.* at 256; *cf.* *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (footnote omitted) (striking down an adoption statute that required the consent of an unwed mother, but not an unwed father; concluding that "this undifferentiated distinction between unwed mothers and unwed fathers . . . does not bear a substantial relationship to the State's asserted interests.").

48. 463 U.S. 248 (1983).

49. *Id.* at 256-57 (footnote omitted).

for the formal family.”⁵⁰ The Court emphasized that a mere biological relationship between a man and his child is not determinative of a constitutionally protected relationship; the biological connection is meaningful only to the extent that:

it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.⁵¹

In commenting on the means by which a biological father may grasp this opportunity, the *Lehr* Court opined that “[t]he most effective protection of the putative father’s opportunity to develop a relationship with his child is provided by the laws that authorize *formal marriage* and govern its consequences.”⁵²

In emphasizing that marriage to his child’s mother is the most effective way for a man to preserve and develop a relationship with his child, both the Court in *Lehr* and the plurality in *Michael H.* quoted Justice Stewart’s dissent in *Caban v. Mohammed*,⁵³ which made this point more fully:

The Constitution does not require that an unmarried father’s substantive parental rights must always be coextensive with those afforded to the fathers of legitimate children. In this setting, it is plain that *the absence of a legal tie with the mother* provides a constitutionally valid ground for distinction

. . . .

. . . Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claim must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother [T]he

50. *Id.* at 257 (footnote omitted).

51. *Id.* at 262 (footnote omitted).

52. *Id.* at 263 (emphasis added).

53. 441 U.S. 380 (1979).

*absence of a legal tie with the mother may in [some] circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children.*⁵⁴

The plurality in *Michael H.* reiterated this point: “[when a] child is born into an extant marital family, the natural father’s unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter.”⁵⁵

In sum, both the state law marital presumption of paternity and the United States Supreme Court case law on unwed fathers’ constitutional rights emphasize that a man’s willingness to marry the mother of his child enhances his claim to have a constitutionally protected relationship with his child. Like DOMA, these sources of law reflect a deep respect for the institution of marriage and acknowledge the benefits children receive when they are raised in an intact family by parents who are committed both to one another and their children.

IV. DOMA’S POTENTIAL TO UNDERMINE PARENT-CHILD RELATIONSHIPS

Given DOMA’s deep respect for marriage, the law is ironic on many levels. Most obviously, if Congress really wanted to defend marriage, why didn’t it provide counseling for distressed couples, seek to eradicate spousal abuse, or provide other resources to struggling couples?⁵⁶ Rather than defend marriage, DOMA undercuts it by enabling states to deny marriage benefits to same-sex couples.

The irony I focus on here, however, is this: for heterosexual couples, a decision to marry strengthens the legal bonds between parent and child, whereas under DOMA, marriage has the opposite

54. *Id.* at 397 (Stewart, J., dissenting) (emphasis added), *quoted in Lehr*, 463 U.S. at 260 n.16; *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (plurality opinion).

55. *Michael H.*, 491 U.S. at 129 (plurality opinion).

56. *See, e.g.*, 142 CONG. REC. 22436, 22449 (1996) (statement of Sen. Boxer) (“[I]f we want to defend marriage, we should be discussing ways that truly help lift the strains and stresses on marriage.”).

effect for gay and lesbian parents. The act of marriage may actually *undercut* the legal bond between a gay or lesbian parent and his or her child. Three subsidiary points must be established to support this conclusion: first, the states that permit same-sex marriage treat the children of either spouse, who are born during the marriage, as the children of both spouses; second, the public policy exception to traditional choice of law rules may permit states that are hostile to same-sex marriage to apply their own family law, and thus to disregard these legally-constructed parent-child relationships between lesbian and gay parents and their non-biological children; and third, the Full Faith and Credit Clause of the Federal Constitution renders this public policy exception unavailable where a court in one state actually renders a *judgment* determining that the non-biological parent is a legal parent of the child. These three subsidiary points will be established in turn before developing the central irony of this Article.

A. *The Marital Presumption of Parentage and Same-Sex Couples*

Today, five states—Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont—and the District of Columbia permit same-sex couples to marry.⁵⁷ These “marriage states” do, or at least should, treat the children of either spouse born during a same-sex marriage as the children of both spouses.⁵⁸ In other words, what courts have

57. D.C. CODE § 46-401(a) (LexisNexis Supp. 2010); N.H. REV. STAT. ANN. § 457:1-a (LexisNexis Supp. 2009); VT. STAT. ANN. tit. 15, § 8 (Supp. 2009); Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 476 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 906-07 (Iowa 2009); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 943, 961-62 (Mass. 2003).

58. See *infra* notes 59-67; accord Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 9 (2004); Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 581 (2009) (footnote omitted) (stating that same-sex couples that marry “are entitled to the same automatic parental rights and responsibilities with regard to a child born to the couple as are conferred on heterosexual couples”); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 215 (2009) (“[A] female spouse . . . of a woman who bears a child receives the same presumption of parentage that a husband receives.”); *id.* at 248; Rosato, *supra* note 17, at 75-76.

referred to as the marital presumption of paternity has become a gender-neutral marital presumption of parentage.

As a normative matter, strong arguments can be made that the marital presumption of parentage should apply to children born during a same-sex marriage. Children of lesbian and gay parents benefit from having two legal parents (especially two legal parents who are obligated to provide financial support).⁵⁹ Likewise, application of the presumption preserves public resources by assigning financial responsibility to the non-biological parent, thereby reducing the need for public support.⁶⁰ While a marital presumption of parentage by same-sex couples is so obviously counter-factual that it would not discourage inquiries regarding fidelity and sexual activity,⁶¹ it nevertheless would protect the stability and privacy of the unitary family by shielding it from attacks by third parties.⁶²

Moreover, while it is not entirely clear, it appears the states that permit same-sex marriage do apply the marital presumption of parentage to the children of same-sex parents; they treat the biological child of one spouse born during the marriage to be the child of the other spouse. This point is most clearly demonstrated in Iowa, which has a gender-neutral statutory presumption of parentage that does not distinguish between same-sex and opposite-sex couples: "A child or children born of parents who, at any time prior or subsequent to the birth of such child, have entered into a civil or religious marriage ceremony, shall be deemed the legitimate child or children of both parents"⁶³ Vermont, too, has a statutory presumption of parentage, which provides that "[a] person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if . . . the

59. See Appleton, *supra* note 17, at 245-46, 260 (focusing on lesbian couples).

60. *Id.* at 246-48, 260.

61. *Cf. id.* at 254 ("[P]retended biological relationships were to be regarded and treated as 'real' familial relationships so long as the pretense was not obvious to the outside observer.").

62. *Id.* at 248-51, 260; Ugbode, *supra* note 17, at 687.

63. IOWA CODE § 252A.3(4) (2008). Even in Iowa, however, the point is not perfectly clear. The Iowa Department of Public Health has declined to issue a birth certificate listing both spouses when a married lesbian has a child through artificial insemination. *Gay Couple Sues Over Birth Certificate*, DES MONIES REG., May 14, 2010, at A1. The Department's practice is currently being challenged in court. *Id.*

child is born while the husband and wife are legally married to each other.”⁶⁴

Other states that permit same-sex marriage employ a common law marital presumption of parentage. For example, under New Hampshire case law, a “child born in wedlock [is] presumed to be an offspring of the marriage.”⁶⁵ While the “marriage states” need to give greater thought to the circumstances in which the marital presumption of parentage may be rebutted and how it should apply when gay

64. VT. STAT. ANN. tit. 15, § 308(4) (2002). Although the presumption may be rebutted (and genetic evidence will invariably show that one spouse in a same-sex couple is not a biological parent), the Vermont Supreme Court has refused to read the statute as requiring a biological connection between parent and child. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 967 (Vt. 2006). The court has stated that same-sex and opposite-sex couples that employ artificial insemination should be treated the same. *Id.* Since the Vermont legislature has not addressed parentage in cases involving artificial insemination, the court has decided parentage issues in such cases involving artificial insemination without formal reliance on the marital presumption. *Id.* at 970. Nevertheless, the court concluded in *Miller-Jenkins* that the spouse of the biological parent was also a parent, and the court emphasized that “the couple’s legal union at the time of the child’s birth is extremely persuasive evidence of joint parentage.” *Id.* at 971 (emphasis added); see also Forman, *supra* note 58, at 11-15; Polikoff, *supra* note 58, at 215-17, 247-58.

Application of the marital presumption of parentage is even more complicated when gay male couples enlist the assistance of a surrogate. If the spouse of the gay biological father is presumed to be a father, does the surrogate retain any legal relationship with the child? Does the child have three legal parents? See Opinions of the Justices to the Senate, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Sosman, J., dissenting) (noting the Massachusetts statutory presumption is expressly gender-based, presuming a married man to be the father of his wife’s child; suggesting that application of the presumption to a child carried by a surrogate for a gay male couple would yield anomalous results; it might “make sense to rethink precisely how this biologically impossible presumption of paternity ought to apply to same-sex couples, and perhaps make some modification that would clarify its operation in this novel context”); Appleton, *supra* note 17, at 261-68. These important questions require greater attention by law makers and scholars and reflect the law’s ongoing struggle to balance the interests of intended parents (regardless of sexual orientation), gestational surrogates, and their children.

65. *Watts v. Watts*, 337 A.2d 350, 352 (N.H. 1975) (citations omitted) (“[The presumption] may be rebutted by clear and convincing evidence such as a blood test.”); see also *Elisa B. v. Super. Ct.*, 117 P.3d 660, 666 (Cal. 2005) (stating, in dicta, that a registered domestic partner shall have the same rights and responsibilities regarding the child of his or her partner as a spouse would have).

married couples enlist the help of a surrogate,⁶⁶ it is fair to assert that the states that authorize same-sex marriage do, or at least should, extend the marital presumption of parentage to gay and lesbian married couples who choose to have a child together.

To illustrate this first subsidiary point, consider a simple hypothetical. Beth and Susan, life-long residents of Iowa, meet in Iowa, marry in Iowa, and continue to live in Iowa. The women decide to have a child, and Beth is impregnated with sperm donated by an anonymous donor. When the child, Michael, is born, both women are listed as parents on Michael's birth certificate. Under Iowa law, both women are his legal parents even though Susan has no biological connection to Michael.⁶⁷

B. Choice of Law and the Public Policy Exception

If the family were to move to Florida at a later date, the second subsidiary issue—choice of law—would be raised. Whether Florida (or any other state) would recognize the parent-child relationship between Susan and Michael would be governed, in the first instance, by state choice of law rules. Of course, different states apply different approaches to choice of law, and there is not time here to review all of the possible approaches. Suffice it to say that under Restatement (First) of Conflict of Laws, a child's legitimacy at birth is determined "by the law of the state of domicil of that parent at that time."⁶⁸ If the child is the legitimate child of both parents under the law of the state in which both parents are domiciled, then the child "will be recognized *everywhere* as the legitimate [child]" of both parents.⁶⁹ If Michael was the legitimate child of both mothers under Iowa law at the time of his birth, then under the First Restatement, he would be recognized as the legitimate child of both mothers in other states.

Likewise, under section 287 of the Restatement (Second) of Conflict of Laws, legitimacy is determined

66. *See supra* note 64.

67. *Cf. supra* note 63 (regarding the unwillingness of the Iowa Department of Public Health to issue birth certificates and the resulting litigation). The hypothetical avoids the complexities that may arise when a gay male couple enlists the assistance of a surrogate. *See supra* note 64.

68. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 138 (1934).

69. *Id.* § 138 illus. (emphasis added).

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by the local law of the state which . . . has the most significant relationship to the child and the parent under the principles stated in § 6. The child will usually be held legitimate if this would be his status under the local law of the state where . . . the parent was domiciled when the child's status of legitimacy is claimed to have been created⁷⁰

A comment to section 287 adds that one of the most relevant factors is "protection of the justified expectations of the parties"⁷¹ The comment further notes that since "the law favors the status of legitimacy over that of illegitimacy . . . a status of legitimacy once created under the principles stated [here] will usually be recognized as continuing to exist in the face of subsequent events, such as a change of domicile by the parties."⁷² Both Beth and Susan were domiciled in Iowa when Michael was born, and the family remained in Iowa for years following his birth, so a court applying the Restatement (Second) of Conflict of Laws would likely apply Iowa law to determine Michael's parentage even after the family moved to Florida (unless Florida claimed a more significant relationship to Michael and Susan under the principles stated in section six of the Restatement). Moreover, application of Iowa law would protect the parties' reasonable expectations and, even more importantly, prevent the "delegitimation" of the child.

While both Restatements support the application of the law of the state in which the parents were domiciled at the time of a child's birth to determine his legitimacy and parentage, both contain public policy exceptions that could be invoked to deny recognition to the parent-child relationship. Section 612 of the Restatement (First) of Conflict of Laws recognizes that "[n]o action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."⁷³ According to a comment to section 612, this rule applies "when the entire basis of the claim upon

70. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 287 (1971). Section six of the Second Restatement identifies a number of factors deemed relevant to choice of law including the relevant policies of the forum state and other interested states, and the protection of justified expectations. *Id.* § 6.

71. *Id.* § 287 cmt. d.

72. *Id.*

73. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 (1934).

which suit is brought is so contrary to the public policy of the forum that it will withhold altogether the use of its courts to enforce the claim.”⁷⁴ The Restatement (Second) of Conflict of Laws contains a similar provision.⁷⁵ The classic statement of the circumstances in which the public policy exception may be invoked is found in the New York Court of Appeals opinion *Loucks v. Standard Oil Co. of N.Y.*,⁷⁶ in which Justice Cardozo wrote, “[t]he courts [of a state] are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”⁷⁷ The same court later reformulated the test using even stronger language: “foreign-based rights should be enforced unless . . . judicial enforcement . . . would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.”⁷⁸

It is difficult to see how a parent-child relationship that is the product of neither rape nor incest could ever be deemed “*inherently* vicious, wicked or immoral.”⁷⁹ But a state like Florida, which has a mini-DOMA,⁸⁰ nevertheless might invoke the public policy exception and decline to apply Iowa’s marital presumption of parentage. Or it might conclude its mini-DOMA would override any common law choice of law rule that otherwise would call for the application of Iowa law to determine the child’s legitimacy or parentage. After all, under Florida law, “the term ‘marriage’ means only a legal union between one man and one woman as husband and wife,”⁸¹ and “[m]arriages between persons of the same sex . . . are not recognized

74. *Id.* § 612 cmt. a.

75. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971) (“No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.”).

76. 120 N.E. 198 (N.Y. 1918).

77. *Id.* at 202.

78. *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 212 (N.Y. 1964) (citations omitted).

79. *Id.* at 212 (emphasis added) (citations omitted).

80. FLA. STAT. ANN. § 741.212 (West 2010).

81. *Id.* § 741.212(3).

for any purpose in [Florida].”⁸² Moreover, “[t]he state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state . . . respecting . . . a marriage . . . not recognized under [this law] or a claim arising from such a marriage”⁸³ The claim that Michael is the legitimate child of his non-biological mother, Susan, arguably derives from Iowa’s statutory marital presumption of parentage. Therefore, Florida’s mini-DOMA might preclude the state, its agencies, and political subdivisions from giving effect to the parentage claim.⁸⁴

C. *The Full Faith and Credit Clause and Judgments*

The final subsidiary point that needs to be addressed before considering DOMA’s ironic role is whether the Federal Constitution would compel Florida to apply Iowa law to determine the existence of a parent-child relationship in our hypothetical, or at least preclude it from invoking its own public policy to disregard Iowa’s marital presumption of parentage. The United States Supreme Court has acknowledged that in cases where more than one state has a legitimate interest in the application of its law to a multi-state problem, the Full Faith and Credit Clause does not compel the forum state to disregard its own law and policy in favor of the foreign law.⁸⁵ Rather, “[a] court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy.”⁸⁶ Thus, as long as the family *moved*

82. *Id.* § 741.212(1).

83. *Id.* § 741.212(2) (emphasis added).

84. *Accord In re Sebastian*, 879 N.Y.S.2d 677, 684 (N.Y. Sur. Ct. 2009) (“[Mini-DOMAs that express a public policy against same-sex marriage] would appear to permit courts . . . to deny recognition . . . to legal rights flowing from [same-sex] marriages, including presumptive parenthood.”). Not all courts have adopted this view. *See infra* notes 98-126 and accompanying text. For a more comprehensive and somewhat different choice of law analysis, see Forman, *supra* note 58, at 17-65.

85. *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 500-05 (1939); *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 545-50 (1935).

86. *Thomas ex rel. Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998); *see also, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citation omitted) (“[T]he Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required ‘that

to Florida (giving Florida some interest in applying its law to the parent-child relationship), the Full Faith and Credit Clause would likely not command application of the Iowa marital presumption of parentage and would likely permit Florida to apply its own law to determine the existence of a parent-child relationship between Susan and Michael. Even if Florida's choice of law rule would have called for the application of Iowa law to determine the parentage question, the Constitution would not preclude Florida from invoking a public policy exception to disregard it.⁸⁷ Thus, in the absence of a *judgment* determining Michael to be Susan's child, it is likely that DOMA would operate only in the background. Surely it would be inconsistent with state choice of law rules and sound policy for Florida to disregard Iowa's marital presumption of parentage. But if a Florida court chose to do so, the Full Faith and Credit Clause would likely permit it and there would be no active role for DOMA to play.

As flexible as the Court has been in permitting states to apply their own *laws* to controversies connected with the state, it nevertheless has clearly rejected a public policy exception to avoid giving full faith and credit to *judgments* of sister states.⁸⁸ As the United States Supreme Court stated in *Baker v. General Motors Co.*⁸⁹: “[r]egarding judgments . . . the full faith and credit obligation is exacting [Our] decisions support no roving ‘public policy exception’ to the full faith and credit due *judgments*.”⁹⁰ Thus, if an

for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”).

87. See, e.g., *Baker*, 522 U.S. at 233; cf. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1980 (1997) (footnote omitted) (“Most commentators take the constitutionality of the public policy doctrine on faith, but a good argument can be made that it violates the Full Faith and Credit Clause.”). Although Professor Kramer's analysis is forceful, the United States Supreme Court has not yet adopted it in the context of the credit owed to laws (as opposed to judgments).

88. See, e.g., *Baker*, 522 U.S. at 233; *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

89. 522 U.S. 222 (1998).

90. *Id.* at 233 (citations omitted). I have elaborated upon several reasons for the differential treatment between the amount of credit owed to laws and judgments. See Rhonda Wasserman, *Are You Still My Mother? Interstate Recognition of*

Iowa court had entered a *judgment* holding that Susan was Michael's mother, then the Full Faith and Credit Clause would require Florida to recognize the parent-child relationship (at least in a suit between the same parties)⁹¹ notwithstanding its public policy against same-sex marriage.

For example, imagine that Susan's Iowa employer declined to recognize Michael as Susan's child for group health insurance purposes because it was opposed to same-sex marriage. Susan could file suit in Iowa and obtain a judgment both finding, that under Iowa's marital presumption of parentage, she is Michael's legal mother and requiring the employer to provide Michael with health insurance benefits. If Susan's employer then transferred her to Florida and declined to provide Michael with insurance benefits, Florida would have to recognize the Iowa judgment, notwithstanding any policy objection it might have to Susan and Beth's same-sex marriage or the parent-child relationship that arguably "arise[s] from such a marriage."⁹²

D. DOMA and the Happy Family

In a case like this, where the Full Faith and Credit Clause would demand recognition of a parent-child relationship "arising from" a same-sex marriage, DOMA would emerge from the background. But DOMA, which Congress enacted to protect marriage in order to provide a nurturing and stable environment for child-rearing,⁹³ could ironically have precisely the opposite effect. Section two of DOMA provides that "[n]o State . . . shall be required to give effect to any . . .

Adoption by Gays and Lesbians, 58 AM. U. L. REV. 1, 29-32 (2008).

91. Ordinarily a judgment is binding only on the parties to the action. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). But a judgment affecting personal status may have a "transformational" effect that "others must recognize, at least until they come forward to assert their own claims through litigation . . ." FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* 715 (5th ed. 2001); *see also* Wasserman, *supra* note 90, at 47-49 (explaining how parentage determination likely has such a transformational effect).

92. FLA. STAT. ANN. § 741.212(2) (West 2010). This is a variant of a hypothetical situation regarding same-sex marriage that was posed in Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 446 (1998).

93. *See supra* Part II.

judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . *or a right or claim arising from such relationship.*⁹⁴ Thus, DOMA would authorize Florida to disregard the Iowa court's judgment that Michael is Susan's child if the parentage claim is seen as "arising from" the marriage,⁹⁵ and if section two of DOMA is constitutional.⁹⁶

In our hypothetical, the Iowa court would have found that Susan and Beth's same-sex marriage was valid under its laws and would have applied the marital presumption of parentage to support Susan's claim. Since Susan's parental relationship with Michael would have derived from her marriage to Beth, it is possible, if not likely, that under DOMA Florida would be free to disregard the Iowa judgment because it resolved a claim "arising from" a same-sex marriage.⁹⁷

94. Defense of Marriage Act, § 2(a), Pub. L. No. 104-199 (1996) 110 Stat. 2419 (codified at 28 U.S.C. § 1738C (2006)) (emphasis added).

95. *Cf. Joslin, supra* note 58, at 598 ("[T]here is nothing in the language or history of DOMA that suggests it was intended to authorize courts to depart from the usual rules that apply to judicial orders about children born to and raised by [same-sex] couples.").

96. The constitutionality *vel non* of DOMA, which has been called into serious question by many, is beyond the scope of this article. *See, e.g.*, 142 CONG. REC. 13299, 13360 (1996) (letter to Sen. Kennedy from Professor Laurence H. Tribe) ("[T]he congressional power to 'prescribe . . . the effect' of sister-state . . . proceedings, within the context of the Full Faith and Credit Clause, includes no congressional power to prescribe that some . . . proceedings shall . . . be entitled to no faith or credit at all!"); ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 126-27 (2006) (identifying equal protection problems with DOMA because it "single[s] out gays for extraordinary burdens"); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 974 (1998) (footnote omitted) ("[I]t is doubtful that Congress has the power . . . to nullify the self-executing force of the Full Faith and Credit Clause."); *see also* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376-77 (D. Mass. 2010); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 234 (D. Mass. 2010) (both holding that section three of DOMA is unconstitutional).

97. *See In re Sebastian*, 879 N.Y.S.2d 677, 684 (N.Y. Sur. Ct. 2009) ("[Mini-DOMAs] would appear to permit courts . . . to deny recognition . . . to legal rights flowing from [same-sex] marriages, including presumptive parenthood. Such a position is supported by DOMA."); *see also* Strasser, *supra* note 3, at 1845 (footnotes omitted) ("[T]he presumption of parentage created by a child's birth into a civil union would not have to be recognized by other states [under DOMA].").

Alternatively, if Susan and Beth had not married, but all other facts remained the same, an Iowa court might have nevertheless found Susan to be Michael's parent on a *de facto* parentage or estoppel theory because Susan received Michael into her home and held him out as her own child.⁹⁸ If the Iowa court held that Susan was Michael's parent *without* relying on the marital presumption of parentage, its judgment would be entitled to full faith and credit in Florida. DOMA would no longer free Florida of its obligation to recognize the Iowa judgment because the parent-child relationship between Susan and Michael would no longer "arise from" the same-sex marriage, but rather from the nature of the interactions and commitments between parent and child.⁹⁹ Ironically then, DOMA—which was designed to protect marriage as a means of protecting children—appears to provide children with less protection if their parents marry and rely on the marital presumption of parentage than if they do not marry and instead rely on a *de facto* parentage theory. The couple's willingness to commit to one another in marriage, which in the heterosexual context is celebrated as a means of providing greater security for children, ironically has the opposite effect when the parents are gay or lesbian.

Before closing, I want to note that this irony may be avoided if courts read DOMA narrowly to limit its impact on parent-child relationships. Several examples from the case law are illustrative. First, in the context of unhappy families, courts have considered whether a child custody or visitation order in favor of a gay or lesbian co-parent is governed by the Parental Kidnapping Prevention Act ("PKPA"), which requires its enforcement in other states,¹⁰⁰ or

98. See, e.g., *Elisa B. v. Super. Ct.*, 117 P.3d 660, 670 (Cal. 2005) (holding that the lesbian partner of the twins' biological mother, who had received them into her home and held them out as her own children, was the children's second parent); *In re Parentage of L.B.*, 122 P.3d 161, 163 (Wash. 2005) ("Washington's common law recognizes the status of *de facto* parents and grants them standing to petition for a determination of the rights and responsibilities that accompany legal parentage in this state."); see also Harris, *supra* note 22, at 624-26, 630-31; Joslin, *supra* note 58, at 579-80.

99. See Prashad v. Copeland, 685 S.E.2d 199, 207 (Va. Ct. App. 2009) (finding DOMA irrelevant where "the custody orders [in favor of two men, who were domestic partners under California law] did not arise from [their] relationship being treated as a marriage," but rather by virtue of their relationship with the child).

100. Parental Kidnapping Prevention Act of 1980, § 8(a), Pub. L. No. 96-611,

DOMA, which frees states of that obligation if the order “arises from” a same-sex marriage or marriage-like relationship.¹⁰¹ Several courts have avoided the issue by concluding that DOMA was not applicable to the facts of the case.¹⁰² At least one court that addressed the issue head-on found no evidence that DOMA “was intended to affect or partially repeal the PKPA,”¹⁰³ and rejected “repeal by implication.”¹⁰⁴ Professor Mark Strasser adds that the PKPA itself was amended after the enactment of DOMA, but included no exception for custody or visitation rights arising from a same-sex relationship, reinforcing the conclusion that DOMA has no effect on the PKPA.¹⁰⁵ Thus, it is possible for DOMA to be read narrowly to limit interference with enforcement of child custody and visitation orders entered in disputes between gay and lesbian parents.

Second, several courts have managed to avoid applying DOMA (or state law mini-DOMAs) by finding the parent-child relationships at issue did not “arise from” a same-sex marriage or marriage-like relationship.¹⁰⁶ For example, in a custody dispute between lesbian parents of three adopted children, the Michigan Court of Appeals in *Giancaspro v. Congleton*¹⁰⁷ held that Michigan’s mini-DOMA did not affect the obligation of a Michigan court to recognize an Illinois

94 Stat. 3566 (codified at 28 U.S.C. § 1738A (2006)) (requiring states to enforce, and barring states from modifying child custody and visitation orders of other states that are made consistently with the Act).

101. 28 U.S.C. § 1738C (2006).

102. *See, e.g., Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 961-62 (Vt. 2006) (declining to decide “whether DOMA, and not the PKPA, governs to determine the effect of a Vermont custody or visitation decision based on a civil union”); *Prashad*, 685 S.E.2d at 207 (declining to determine whether DOMA had an impact on the PKPA; concluding that DOMA did not apply).

103. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 336 (Va. Ct. App. 2006), *aff’d*, 661 S.E.2d 822 (Va. 2008); *see also* Strasser, *supra* note 3, at 1840 (footnotes omitted) (“[Finding] no evidence that it was Congress’s intent to modify the PKPA when it passed DOMA, even bracketing the presumption against reading an implicit repeal into a statute.”).

104. *Miller-Jenkins*, 637 S.E.2d at 336-37.

105. Strasser, *supra* note 3, at 1841-42.

106. *See, e.g., Giancaspro v. Congleton*, Docket No. 283267, 2009 WL 416301 (Mich. Ct. App. Feb. 19, 2009) (*per curiam*); *Prashad*, 685 S.E.2d at 199.

107. No. 283267, 2009 WL 416301 (Mich. Ct. App. Feb. 19, 2009).

adoption by the lesbian couple.¹⁰⁸ The Full Faith and Credit Clause required Michigan to recognize the Illinois adoption even if the couple could not have jointly adopted the children in Michigan.¹⁰⁹ The court concluded that neither a Michigan constitutional provision¹¹⁰ nor a Michigan statute,¹¹¹ which precluded the recognition of same-sex marriage in Michigan, altered the result because “[t]he only relevant consideration in this matter is each individual party’s established relationship as an adoptive parent *with the children*, not their relationship with each other.”¹¹²

Interestingly, one of the women argued that the adoption by her former partner was a second-parent adoption, a type of adoption typically available only when a couple is in a marriage-like relationship.¹¹³ Thus, the woman argued that her former partner’s relationship with her children ultimately derived from the “same-sex lesbian relationship between the parties.”¹¹⁴ Her former partner disclaimed the “second-parent” adoption label. Without determining whether or not the adoption had been a second-parent adoption, the

108. *Id.* at *2.

109. *Id.* at *2, *4.

110. MICH. CONST. art. 1, § 25 (“To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”).

111. MICH. COMP. LAWS § 551.1 (1979) (“Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.”).

112. *Giancaspro*, 2009 WL 416301, at *4; *see also Prashad*, 685 S.E.2d at 203 (holding that the case involved the obligation of Virginia, under the PKPA and Virginia law, to recognize a North Carolina custody order in favor of the child’s two fathers; since neither the fathers nor their adversary, the surrogate who bore their child, was “seeking to have the [California] civil union between [the two men] recognized under Virginia law . . . this case is not about homosexual marriage, civil unions, or same-sex relationships”).

113. “Like a step-parent adoption, a second-parent (or co-parent) adoption permits the partner of a child’s biological or adoptive parent to adopt the child without first terminating the parental rights of the custodial biological or adoptive parent.” Wasserman, *supra* note 90, at 7 n.25 (citations omitted).

114. *Giancaspro*, 2009 WL 416301, at *1.

court focused exclusively on “each individual party’s established relationship as an adoptive parent *with the children*, not their relationship with each other,”¹¹⁵ rejecting the claim that the parental relationship derived from the couple’s relationship.¹¹⁶

Similarly, in *Prashad v. Copeland*,¹¹⁷ a gay couple entered into an agreement with a surrogate to carry their child.¹¹⁸ After the child was born, and the relationship between the men and the surrogate soured, the men traveled to California and entered into a domestic partnership.¹¹⁹ Sometime later, the surrogate filed suit in North Carolina seeking custody of the child and a determination stating which of the men was the child’s genetic father.¹²⁰ The North Carolina court granted primary custody to the men.¹²¹ The men and the child later moved to Virginia, and the surrogate filed suit there seeking modification of the custody order.¹²² The court concluded that DOMA did not free the Virginia court of the obligation to recognize the North Carolina order, noting that “neither party is asking the Court to recognize [the men’s] relationship as a valid marriage in the Commonwealth of Virginia [T]he custody orders did not arise from [their] relationship being treated as a marriage, [therefore] DOMA is inapplicable to the present case.”¹²³ For similar reasons, the court concluded that Virginia’s mini-DOMA, adopted as the Virginia

115. *Id.* at *4; see also OFFICE OF LEGAL COUNSEL, DEP’T OF JUSTICE, WHETHER THE DEFENSE OF MARRIAGE ACT PRECLUDES THE NON-BIOLOGICAL CHILD OF A MEMBER OF A VERMONT CIVIL UNION FROM QUALIFYING FOR CHILD’S INSURANCE BENEFITS UNDER THE SOCIAL SECURITY ACT (2007), available at 2007 WL 5254330, at *4 (citations omitted) (determining that for purposes of a child’s eligibility for insurance benefits under the Federal Social Security Act, “the fact that [his] right of inheritance ultimately derives from Vermont’s recognition of a same-sex civil union is simply immaterial under DOMA”; interpreting section 3 of DOMA, which defines the word “marriage” for federal law purposes as “a legal union between one man and one woman as husband and wife”).

116. *Giancaspro*, 2009 WL 416301, at *4.

117. 685 S.E.2d 199 (Va. Ct. App. 2009).

118. *Id.* at 201.

119. *Id.* at 201-02.

120. *Id.* at 202.

121. *Id.*

122. *Id.*

123. *Id.* at 207.

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Marriage Amendment to the state constitution,¹²⁴ was not implicated.¹²⁵

The surrogate pressed the issue further, arguing that the North Carolina custody order “tacitly” recognized the men’s relationship because “the only basis that the North Carolina court had to grant custody to [the non-biological father] was his relationship with [his partner].”¹²⁶ The Virginia court rejected this argument because North Carolina, like Virginia, declines to recognize same-sex marriages. It would have been “highly illogical” for the North Carolina court to have granted the “[non-biological father] custodial rights based on a relationship that the State of North Carolina does not recognize and that the North Carolina court does not acknowledge in its orders.”¹²⁷ The Virginia court concluded that the North Carolina court had permitted the non-biological father to intervene in the initial custody proceeding not because of his relationship with the biological father, but because of his relationship with the child.¹²⁸

As these cases illustrate, an exclusive focus on the parent-child relationship, rather than on the underlying relationship between the couple, may permit courts to avoid DOMA’s ironic and devastating effect on the integrity and portability of legal relationships between gay and lesbian parents and their children.

V. CONCLUSION

Congress enacted DOMA to protect the institution of marriage and to ensure children have the security of a two-parent household. Like DOMA, the marital presumption of parenthood and the United States Supreme Court case law on the constitutional rights of unwed

124. The Virginia Marriage Amendment provides, in relevant part: “[t]his Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.” VA. CONST. art. I, § 15-A.

125. *Prashad*, 685 S.E.2d at 207.

126. *Id.*

127. *Id.* at 207-08.

128. *Id.* at 208.

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fathers reflect a deep respect for the institution of marriage and acknowledge the benefits children receive when they are raised in an intact family. When a heterosexual couple marries, the partners not only create a legal bond between themselves, but they strengthen their legal ties to their children. It is deeply ironic, then, that when a gay and lesbian couple makes the same choice—to marry—DOMA threatens, rather than strengthens, any parent-child relationship that derives from the marriage.

