

ARTICLES

ARE YOU *STILL* MY MOTHER?: INTERSTATE RECOGNITION OF ADOPTIONS BY GAYS AND LESBIANS

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Introduction	2
I. State Laws Addressing Adoption by Gays and Lesbians	10
II. The Current Interstate Recognition Landscape	13
A. Child Custody Litigation	13
B. Amended Birth Certificates	15
C. The Oklahoma Statute	16
III. The Full Faith and Credit Obligation	19
A. Full Faith and Credit Owed to “Public Acts”	21
B. Full Faith and Credit Owed to “Judicial Proceedings”	22
IV. Rationales for Non-Recognition of Adoption Decrees and Critique	23
A. The Public Policy Rationale	23
1. The interest of the rendering state	23
2. The interest of other states	25
3. Doctrinal rejection of the public policy rationale	26
4. Policy arguments against the public policy rationale	29
5. The public policy rationale’s last hurrah	33

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B.	The Unreliability Rationale	36
1.	The inter-relationship between the unreliability rationale and the public policy rationale	38
2.	The premises underlying the unreliability rationale ...	39
a.	Are adoptions judicial proceedings?	39
b.	Do courts fail to apply the law of the most interested state?	42
3.	Claims advanced by the unreliability rationale	46
a.	Are determinations underlying adoption decrees entitled to issue preclusive effect?.....	46
b.	Are final adoption decrees entitled to full faith and credit if the rendering court failed to apply the law of the most interested state?	49
C.	The Jurisdictional Rationale	52
1.	Prong 1: Judgments rendered without subject matter jurisdiction are not entitled to full faith and credit.....	54
2.	Prong 2: The enforcing court may determine whether the rendering court had subject matter jurisdiction	58
3.	Prong 3: The scope of the enforcing court's inquiry	59
4.	Complications	64
a.	Challenge by the enforcing state itself.....	64
b.	Lack of an adversarial contest.....	67
c.	Exception to the rule of jurisdictional finality.....	69
D.	The "Enforcement and Incidents of Adoption" Rationale	71
1.	The enforcement prong	72
2.	The incidents of adoption prong.....	75
a.	The mild version.....	75
b.	The strong version.....	76
	Conclusion	82

INTRODUCTION

Parents and their biological children routinely cross state borders safe in the assumption that their parent-child relationship will be recognized wherever they go.¹ The central issue raised in this Article is whether the law guarantees parents and their adopted children this

1. The state legislatures and Congress have enacted an elaborate statutory scheme to ensure that child custody decrees receive interstate recognition. *See* Parental Kidnapping Prevention Act (the "PKPA"), 28 U.S.C. § 1738A (2006) (requiring states to enforce sister-state child custody determinations); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (the "UCCJEA"), 9 U.L.A. 649 (Part IA 1997) (revising the UCCJA); UNIF. CHILD CUSTODY JURISDICTION ACT (the "UCCJA"), 9 U.L.A. 261 (Part IA 1968) (creating a jurisdictional framework for interstate child custody disputes).

same security and protection, regardless of the parents' sexual orientation.² Stated more technically, the Article considers whether states are obligated to recognize adoption decrees finalized by courts in sister states if the adoptive parents are gay.

This question is part of a broader debate about the obligation of states to recognize changes in family status effected under the laws of other states. Same-sex marriages and adoptions by gays and lesbians are at the forefront of the debate today.³ But the broader debate has raged for decades and has included questions regarding the obligation of states to recognize interracial marriages celebrated in other states;⁴ marriages between relatives that would have been proscribed in the enforcing state;⁵ migratory divorces rendered outside the couple's state of domicile;⁶ and adoptions of children borne by surrogate mothers outside the adoptive parent's home state.⁷ The debate is divisive because it pits the family against the state. The family has a need for universal recognition of its civil status while the state has an interest in regulating the status of its citizens

2. Interstate recognition of the parent-child relationship is even less certain for same-sex couples that formalize their relationship (as a marriage, civil union, or domestic partnership) but take no additional steps to secure state recognition of the parent-child relationship between the biological child of one partner and the other partner. See, e.g., Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 1 (2006); June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 355 (2006); Mark Strasser, *When is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 299-300 (2001); see also *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 827 (Va. 2008) (recognizing a child custody order issued by a Vermont court that provided a former same-sex partner visitation rights in a child custody dispute); *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 330 (Va. Ct. App. 2006) (holding that the PKPA required Virginia to give full faith and credit to a Vermont visitation order); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 951-52 (Vt. 2006) (affirming a visitation order in favor of the biological mother's former partner).

3. See, e.g., Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2143-44 (2005).

4. In *Loving v. Virginia*, the Supreme Court held that a statute barring interracial marriage violated the Fourteenth Amendment. 388 U.S. 1, 2 (1967). The case arose when Virginia declined to recognize a marriage celebrated in the District of Columbia. See Koppelman, *supra* note 3, at 2146-63 (drawing upon the miscegenation cases to guide the same-sex marriage recognition debate).

5. See, e.g., National Conference of State Legislatures, *State Laws Regarding Marriages Between First Cousins*, <http://www.ncsl.org/programs/cyf/cousins.htm> (last visited July 25, 2008) (demonstrating the diverging opinions among state legislatures with respect to the legality of marriage between first cousins).

6. See, e.g., *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (considering whether the state of matrimonial domicile was required to recognize a divorce rendered in another state to which the petitioning spouse had moved for a period of months).

7. See, e.g., Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399 (1990) (considering whether individuals living in states with restrictive regimes regarding surrogacy might evade those restrictions by establishing connections to states with more permissive regimes)..

through the application of its own laws regarding marriage, divorce, adoption and surrogacy.⁸ The debate also pits state against state, because the rendering state has an interest in the recognition of its status determinations while the enforcing state retains an interest in regulating the status of its citizens.⁹ And the debate pits the needs of the federal union against the interests of individual states.¹⁰

This rancorous debate is moderated by the Full Faith and Credit Clause of the federal Constitution, which demands that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”¹¹ As this Article will demonstrate, the Full Faith and Credit Clause imposes a far more rigorous obligation on states to recognize judgments, such as adoption decrees and divorces, than marriages and laws.¹² Since final adoption decrees are issued by courts at the conclusion of judicial proceedings, the Full Faith and Credit Clause requires all states to recognize these judgments, even if the adoptive parents are gay and even if the adoption law of the enforcing state proscribes adoptions by gays and lesbians.¹³

8. See, e.g., Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 381 (2007) (identifying a shift in Supreme Court case law on interstate recognition of divorce decrees “from an analysis based on the competing interests of different states to an approach that highlighted the individual interests of the parties involved”); Koppelman, *supra* note 3, at 2155 (explaining that in a recent trend, courts have moved toward recognition of family status with the individual in mind).

9. See, e.g., Jeffrey L. Rensberger, *Interstate Federalism: The Role of Federalism in the Same Sex Marriage Debate* 4, 22 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1011007 (last visited July 21, 2008) (claiming that interstate pluralism protects each state’s “ability to make and enforce choices on foundational matters such as fundamental ordering of . . . family relations”).

10. See Estin, *supra* note 8, at 419 (explaining that the regulation of family law falls under the authority of both the states and the federal government).

11. U.S. CONST. art. IV, § 1.

12. See *infra* Part III.

13. See, e.g., 1 JOAN HEIFETZ HOLLINGER ET AL., *ADOPTION LAW AND PRACTICE* § 3.06[6] (2007) (explaining that the Full Faith and Credit Clause does not provide states with any avenues for avoiding recognition of another state’s adoption decree); EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* § 16.6, at 703 (4th ed. 2004) (“An adoption decree entered by a court of competent jurisdiction will ordinarily be recognized everywhere.”); Lisa S. Chen, *Second-Parent Adoptions: Are They Entitled to Full Faith and Credit?*, 46 SANTA CLARA L. REV. 171, 173, 191–94 (2005) (arguing that an Oklahoma statute barring recognition of adoptions by gay and lesbian couples is unconstitutional under the Full Faith and Credit Clause); 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) (explaining that the Full Faith and Credit Clause requires each state to recognize adoption decrees issued by other states); Robert G. Spector, *The Unconstitutionality of Oklahoma’s Statute Denying Recognition to Adoptions by Same-Sex Couples From Other States*, 40 TULSA L. REV. 467, 468, 476 (2005) (concluding that the Oklahoma statute is unconstitutional under the Full Faith and Credit Clause); Strasser, *supra* note 2, at 321–22 (suggesting that a proposed Mississippi statute

But if the Full Faith and Credit Clause decisively resolves this piece of the debate by demanding interstate recognition of final adoption decrees, why have some states declined, in some instances, to recognize adoptions by same-sex couples finalized in other states, and why have some scholars defended non-recognition? This Article will focus on four rationales offered by those who question the obligation to give full faith and credit to adoption decrees, including the state of Oklahoma, which enacted a statute to bar interstate recognition of adoptions by same-sex couples,¹⁴ and Professor Lynn Wardle,¹⁵ who has argued that “in many situations nonrecognition of lesbigay adoption decrees would be proper and permissible.”¹⁶

refusing to recognize adoptions by same-sex couples would violate the Full Faith and Credit Clause); Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 804–05 (2003) (pointing out that a legally enforceable adoption decree in one state is not subject to challenge in another state under the Full Faith and Credit Clause); see also UNIF. ADOPTION ACT (“UAA”) § 1–108 & cmt., 9 U.L.A. 25 (Part IA 1994) (concluding that the Full Faith and Credit Clause or the PKPA requires a state to give legal effect to a final adoption decree issued in another state). *But see* Recent Case, 121 HARV. L. REV. 660, 663 (2007) (questioning the characterization of adoption proceedings as judgments in *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007)).

Even if the Constitution did not compel interstate recognition of adoption decrees, the adoptive family’s powerful interest in secure and stable family relationships would counsel strongly in favor of interstate recognition. See *infra* notes 189–195 and accompanying text; see also Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2217 (2005) (suggesting, in the marriage context, that courts should “engage[] in a good-faith attempt to determine what interests are legitimately in play in a recognition case and how those interests should be analyzed”). Professor Spector argues that the PKPA requires interstate recognition of adoption decrees rendered in proceedings that comply with the PKPA’s jurisdictional requirements. Spector, *supra*, at 470–74. This Article does not address the applicability of the PKPA, although it alludes to the controversy surrounding the applicability of the UCCJA to adoption proceedings. See *infra* notes 146–150 and accompanying text.

14. See *infra* Part II.C. The statute, enacted by the Oklahoma legislature and signed by its governor, was defended in the federal district court by the state’s governor, attorney general, and commissioner of health. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1295 (W.D. Okla. 2006), *aff’d*, 496 F.3d 1139 (10th Cir. 2007). Only the Commissioner of Health pursued the appeal to the Tenth Circuit. See *Finstuen*, 496 F.3d at 1143, 1151 (referring to the “odd posture of the appeal”).

15. Professor Wardle is a prolific scholar who has written on a wide range of family law issues. See, e.g., Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345, 387 (2003) (concluding that married couples deserve a preference in adoption over unmarried couples); Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 WIDENER J. PUB. L. 401, 402 (2002) (concluding that the recognition of same-sex partnerships has a negative impact on family law); Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 781 (2001) (concluding that “from the perspective of the social interests and public purposes that underlie the legal status of marriage, the claim that same-sex unions are equivalent to heterosexual marriage fails”).

16. Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 AVE MARIA L. REV. 561, 571 (2005). Some writers use the term “lesbigay” to refer to lesbians, gays and bisexuals. See, e.g., CHRISTOPHER CARRINGTON, NO PLACE LIKE

First, both the state of Oklahoma and Professor Wardle argue that states that deny gays and lesbians the right to adopt may decline to recognize adoptions deemed fundamentally inconsistent with their public policy.¹⁷ For example, Oklahoma state legislators invoked a public policy rationale when enacting a statute that bars recognition by Oklahoma and its courts and agencies of “an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.”¹⁸ Similarly, Professor Wardle, who posits that states have “considerabl[e] . . . latitude” in declining to recognize adoptions by same-sex couples,¹⁹ has argued that the strong public policy of states opposed to adoption by gays and lesbians “cannot be ignored” in the recognition context.²⁰

Second, since many adoption proceedings are uncontested, the state of Oklahoma and Professor Wardle have questioned whether a final adoption decree issued in the absence of an adversarial hearing is sufficiently reliable to be entitled to recognition under the Full Faith and Credit Clause.²¹ In defending its statute against a constitutional challenge, Oklahoma argued that “an adoption decree is not the type of judgment to which the [Full Faith and Credit] Clause applies” because “adoptions are a matter of contract between the parties and not a judicial proceeding in the usual sense of the word.”²² Professor Wardle, too, advances the unreliability rationale as

HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN 5 (1999) (“I use the term *lesbigay*, which is coming into wider use, because it includes lesbians, bisexuals, and gay men, all of whom participate in the families I studied.”). Professor Wardle uses the term “lesbigay adoption” to refer “to the adoption of children by adults who are involved in gay or lesbian sexual relationships.” Wardle, *supra*, at 561 n.1.

Because neither Professor Wardle nor the state of Oklahoma relied upon the Defense of Marriage Act (“DOMA”), 28 U.S.C. § 1738C (2006), to support nonrecognition of adoptions by gays and lesbians, this Article does not consider whether DOMA relieves states of the obligation to recognize such adoptions. For discussions of DOMA’s influence in this context, *see, e.g.*, Chen, *supra* note 13, at 199–201 (exploring a variety of situations in which DOMA might impact recognition of sister-state adoption decrees); Cox, *supra* note 13, at 756–57 (concluding that DOMA does not excuse states from their obligation to recognize sister-state adoption decrees); Strasser, *supra* note 2, at 316, 321 (concluding that “rights acquired by virtue of a second-parent adoption do not fall within the exception created by DOMA”).

17. *See, e.g., Finstuen*, 497 F. Supp. 2d at 1304 (identifying Oklahoma’s arguments); *see also* Wardle, *supra* note 16, at 599, 608–09. *See generally infra* Part IV.A.

18. OKLA. STAT. tit. 10, § 7502–1.4(A) (2007). *See infra* Part II.C.

19. Wardle, *supra* note 16, at 578.

20. *Id.* at 609.

21. *Finstuen*, 497 F. Supp. 2d at 1305; Wardle, *supra* note 16, at 583–85.

22. *Finstuen*, 497 F. Supp. 2d at 1304–05.

a possible ground for non-recognition of sister-state adoption decrees.²³

Third, at least one court has refused to recognize a sister-state adoption decree on the theory that the rendering court lacked subject matter jurisdiction to enter it.²⁴ Because the adoption statute in the rendering state did not explicitly permit second-parent adoptions²⁵ without the relinquishment of parental rights and because the record failed to establish that the requisite consents had been appended to the adoption petition, the trial court in the enforcing state held that the adoption court had lacked subject matter jurisdiction and that its decree was not entitled to full faith and credit.²⁶

Fourth, even if the Constitution requires a state (“F2” or the second forum) to recognize an adoption decree finalized in another state (“F1” or the first forum), Oklahoma and Professor Wardle have argued that the Constitution does not require F2 to apply F1’s laws to determine the incidents of adoption or the time, manner and mechanism for enforcing a sister-state adoption decree.²⁷ Put differently, while the law of the rendering state determines the status of the adopted child vis-à-vis her biological and adoptive parents, other states may apply their own enforcement mechanisms and their own laws to determine the incidents or consequences of that status.²⁸ Oklahoma and Professor Wardle have suggested that this “enforcement and incidents of adoption” rationale justifies non-recognition of sister-state adoptions by gays and lesbians.²⁹

None of these rationales justifies non-recognition of sister-state adoption decrees. The public policy rationale for non-recognition is flatly inconsistent with both Supreme Court precedent and an overriding policy favoring permanency in parent-child relationships.³⁰ The Supreme Court has repeatedly and forcefully held that states must recognize sister-state judgments even if they find them offensive

23. Wardle, *supra* note 16, at 583–85.

24. See *Russell v. Bridgens*, 647 N.W.2d 56, 58–59 (Neb. 2002) (describing the trial court’s rationale); *infra* Part II.A.

25. 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. See 1 HOLLINGER, *supra* note 13, § 3.02[1][a] (describing the mechanics of step-parent adoption, where the biological parent’s new spouse adopts the child); *id.* § 3.06[6] (discussing second-parent adoption and explaining that it enables an individual to adopt his or her same-sex partner’s child).

26. *Russell*, 647 N.W.2d at 58–59.

27. See *Finstuen*, 497 F. Supp. 2d at 1306; Wardle, *supra* note 16, at 597–99.

28. See generally *infra* Part IV.D.

29. *Finstuen*, 497 F. Supp. 2d at 1304, 1306; Wardle, *supra* note 16, at 597–99.

30. See *infra* Part IV.A.3.

on public policy grounds.³¹ Even if the Supreme Court had interpreted the Full Faith and Credit Clause to permit a general public policy exception for judgments, however, such an exception would be deeply problematic in this context.³² A child's need for security and stability in her family relationships, which counsels in favor of adoption over temporary foster care in so many cases,³³ strongly countervails in favor of interstate recognition of adoption decrees.

The unreliability rationale for non-recognition of sister-state adoption decrees is equally unavailing. Adoption decrees are the product of formal judicial proceedings, in which courts render judgments informed by input from licensed professionals and interested third parties; adoption decrees are not in the nature of consent decrees.³⁴ Even if findings untested by adversarial proceedings are denied issue preclusive effect,³⁵ final adoption decrees have a transformational effect—they alter the personal status of the parties and create a legal parent-child bond between the adoptee and her adopted parent(s)—whether contested or not.³⁶ If divorce decrees in uncontested cases³⁷ and consent decrees in other types of civil litigation³⁸ are entitled to interstate recognition under the Full Faith and Credit Clause, then, *a fortiori*, adoption decrees are entitled to such recognition since adoption decrees are rendered only upon a judicial finding that the adoption is in the best interests of the child.³⁹

The jurisdictional rationale is flawed because a court's failure to properly interpret and apply its adoption statute does not deprive it of subject matter jurisdiction.⁴⁰ And if a court with proper jurisdiction errs in the interpretation or application of its adoption law, the error must be corrected on appeal.⁴¹ If the error is not corrected through the appellate process in F1, the judgment is

31. *See, e.g., Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (rejecting a public policy exception); *Fauntleroy v. Lum*, 210 U.S. 230, 237–38 (1908) (same).

32. *See infra* Part IV.A.4.

33. *See infra* note 191.

34. *See infra* Part IV.B.2.a; *see also, e.g., In re Adoption of L.R.B.*, 664 N.E.2d 347, 348 (Ill. App. Ct. 1996) (stating that “[a]n adoption decree is not in the nature of a consent decree”) (quoting *Nees v. Doan*, 540 N.E.2d 1046, 1048 (Ill. App. Ct. 1989)).

35. *See infra* Part IV.B.3.a.

36. *Id.*

37. *See infra* text accompanying note 279.

38. *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374 (1996); *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 487 (4th Cir. 1981).

39. *See infra* Part IV.B.2.a (concluding that adoptions are judicial proceedings); *infra* note 236 (discussing the best interest of the child standard).

40. *See infra* Part IV.C.1.

41. *Id.*

entitled to full faith and credit in F2 even if erroneous.⁴² Moreover, even if the rendering court lacked subject matter jurisdiction, the parties to the F1 proceeding would be precluded from collaterally challenging the court's judgment for lack of jurisdiction in F2.⁴³ Both Supreme Court precedent and policy undercut the jurisdictional rationale.⁴⁴

Finally, while the "enforcement and incidents of adoption" rationale justifies a state's application of its own law regarding the incidents of adoption, it does not permit a state to decline to recognize the alteration in status effected by a sister-state adoption decree.⁴⁵ So, for example, if F2 does not issue amended birth certificates to adoptive parents upon entry of a final adoption decree, it need not issue an amended birth certificate to a same-sex couple that adopts in F1 a child born in F2, even if F1 issues amended birth certificates.⁴⁶ But if F2 *does* issue amended birth certificates, it may not deny one to the F1 adoptive parents on public policy grounds.⁴⁷

Part I of this Article examines state adoption laws, identifying those that permit and those that deny gay individuals and same-sex couples the opportunity to adopt. If Part I paints the background against which the interstate recognition debate rages, Part II presents the foreground. It describes two concrete contexts in which states have declined to recognize sister-state adoption decrees. First, Part II.A presents a child custody dispute between same-sex partners in which the trial court declined to recognize the validity of a second-parent adoption. Second, Part II.B demonstrates that several state agencies have balked when same-sex adoptive parents have requested amended birth certificates from the state in which their child was born. As Part II.C demonstrates, the state of Oklahoma went even further, enacting a statute that forbade recognition of "an adoption by more than one individual of the same sex from any other state or foreign jurisdiction."⁴⁸ Part II.C uncovers the impetus for the statute and the legislators' own statements regarding their intent.

Part III analyzes the command of the Full Faith and Credit Clause of the U.S. Constitution and the Supreme Court precedent that gives meaning to the Clause. It then applies this constitutional command in the adoption context, concluding that the Full Faith and Credit

42. *Id.*

43. *See infra* Part IV.C.3.

44. *See infra* Part IV.C.3–4.

45. *See infra* Part IV.D.

46. *Id.*

47. *Id.*

48. OKLA. STAT. tit. 10, § 7502–1.4(A) (2007).

Clause requires states to recognize sister-state adoption decrees. Part IV, the heart of the paper, presents and critiques the four rationales that have been offered in support of non-recognition of sister-state adoption decrees. Part IV demonstrates that none of the rationales permits states to disregard adoptions finalized in sister states, regardless of the sexual orientation of the adoptive parents.

I. STATE LAWS ADDRESSING ADOPTION BY GAYS AND LESBIANS

The opportunity to formally adopt a child did not exist at common law.⁴⁹ Although all fifty states have enacted adoption statutes since Massachusetts enacted the first general adoption statute in 1851,⁵⁰ few statutes expressly address adoption by gays and lesbians.⁵¹ Statutes in four states—California, Colorado, Connecticut and Vermont—explicitly permit second-parent adoption.⁵² California’s statute permits a person to adopt a child of his or her registered partner.⁵³ Colorado’s adoption statute specifically authorizes second-parent adoption if “the child has a sole legal parent, and the sole legal parent wishes the child to be adopted by a specified second adult.”⁵⁴ Connecticut’s statute authorizes “any parent of a minor child [to] agree in writing with one other person who shares parental responsibility for the child . . . that the other person shall adopt or join in the adoption of the child”⁵⁵ And Vermont’s statute permits “the partner of a parent [to] adopt a child of the parent” without the need to terminate the parent’s parental rights.⁵⁶ In addition, the Uniform Adoption Act (“UAA”) expressly authorizes second-parent adoption by a “de facto” step-parent.⁵⁷

Statutes in three states—Florida, Mississippi and Utah—explicitly bar adoption by gays and lesbians or same-sex couples. Florida’s

49. 1 HOLLINGER, *supra* note 13, § 1.02[1].

50. *Id.* § 1.02[2]; Appendix 1–A.

51. See generally Vanessa A. Lavelly, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 263–66 (2007) (noting that in the 1990s, some state legislatures began to permit gays to adopt).

52. Nat’l Gay and Lesbian Task Force, *Second-Parent Adoption in the U.S.* (May 2007), available at http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_5_07_color.pdf (last visited July 21, 2008) [hereinafter Task Force Report].

53. CAL. FAM. CODE § 9000(b) (West 2004). In addition, the California Supreme Court has interpreted the state’s adoption statute to permit second-parent adoption by same-sex couples not registered as domestic partners. See *Sharon S. v. Superior Ct.*, 73 P.3d 554, 554 (Cal. 2003).

54. COLO. REV. STAT. § 19-5-203(1)(d.5) (2007).

55. CONN. GEN. STAT. § 45a-724(a)(3) (2004).

56. VT. STAT. ANN. tit. 15A, § 1-102(b) (2002).

57. UAA § 4-102(b) & cmt., 9 U.L.A. 105 (Part IA 1994).

statutory ban is the most comprehensive: “[n]o person . . . may adopt if that person is a homosexual.”⁵⁸ Florida law not only implicitly bars second-parent adoption, but it explicitly bars gay individuals from adopting.⁵⁹ Mississippi’s statute bars adoption by same-sex couples.⁶⁰ Utah’s statute is less direct but has the same effect: in one title, it proscribes adoption “by a person who is cohabiting in a [sexual] relationship that is not a legally valid and binding marriage under the laws of this state,”⁶¹ and in another title, it prohibits marriages “between persons of the same sex.”⁶²

While most state legislatures have been silent on the question of adoption by gays and lesbians and second-parent adoption, courts in many states have been called upon to interpret opaque adoption statutes to determine whether or not they permit such adoptions.⁶³ Appellate courts in seven states and the District of Columbia and trial courts in fifteen states have interpreted their statutes liberally to permit second-parent adoption or joint applications to adopt filed by unmarried same-sex couples.⁶⁴ For example, in interpreting the Illinois statute, which permits a “reputable person of legal age and of either sex” to petition to adopt,⁶⁵ the Appellate Court of Illinois noted that nothing in the language of the statute barred adoption on the basis of sexual orientation.⁶⁶ “Because by its own terms the Act must be liberally construed . . . and because nothing in the Act specifically precludes it, the Act must be construed to give standing to the unmarried persons in these cases, regardless of sex or sexual orientation, to petition for adoption jointly.”⁶⁷

58. FLA. STAT. ANN. § 63.042(3) (West 2005).

59. *Id.*

60. MISS. CODE ANN. § 93-17-3 (2004).

61. UTAH CODE ANN. § 78-30-1(3)(b) (2002).

62. *Id.* § 30-1-2(5) (2007). An Arkansas regulation that barred persons from serving as foster parents “if any adult member of that person’s household is a homosexual” was struck down by the Arkansas Supreme Court. *Dep’t of Human Servs. & Child Welfare Agency Review Bd. v. Howard*, 238 S.W.3d 1, 1 (Ark. 2006).

63. See Lavelly, *supra* note 51, at 263–66 (discussing changes in state laws regarding adoption by same-sex couples during the 1970s, 1980s, and 1990s).

64. See Task Force Report, *supra* note 52 (citations omitted) (providing a map detailing the current status of second-parent adoption in each of the fifty states and the District of Columbia); *cf.* *Wheeler v. Wheeler*, 642 S.E.2d 103, 103 (Ga. 2007) (denying writ of certiorari in a case challenging the validity of a second-parent adoption); *Schott v. Schott*, 744 N.W.2d 85, 89 (Iowa 2008) (declining to “decide whether second parent adoptions are permissible”). In addition, the Tennessee Attorney General has opined that “there is no prohibition in Tennessee adoption statutes against adoption by a same sex couple.” *Tenn. Att’y Gen. Op. No. 07-140* (2007), <http://www.attorneygeneral.state.tn.us/op/2007/OP/OP140.pdf>.

65. 750 ILL. COMP. STAT. 50/2(a) (1999).

66. *In re* Petition of K.M. and D.M., 653 N.E.2d 888, 892 (Ill. App. Ct. 1995).

67. *Id.* at 899.

Appellate courts in three other states—Nebraska, Ohio, and Wisconsin—have read their statutes to bar second-parent adoption or joint applications to adopt.⁶⁸ For example, in *In re Adoption of Luke*,⁶⁹ the Nebraska Supreme Court affirmed a county court’s denial of a joint petition filed by a same-sex couple to permit the partner of the child’s biological mother to adopt the child without a relinquishment of the biological mother’s parental rights.⁷⁰ Stating that “it is inappropriate for this court to ‘extend the rights of adoption beyond the plain terms of the statutes,’”⁷¹ the Nebraska high court noted that the statutes permitted adoption by a “single adult person” only “after all necessary consents and relinquishments have been filed.”⁷² Since the biological mother had not relinquished her parental rights, and since “[t]he adoption statutes permit only the paradigms which are explicit,”⁷³ the court affirmed the denial of the adoption petition.⁷⁴

Thus, in the United States today, the right of gay individuals and same-sex couples to adopt varies by state and often depends upon judicial interpretation of opaque adoption statutes.⁷⁵

It may well be that laws denying gays and lesbians an equal opportunity to adopt violate the federal Constitution.⁷⁶ Whether the Constitution protects the right of gays and lesbians to adopt on the same terms as others (or the right of children to be adopted by their gay caretakers) is beyond the scope of this Article, but two points

68. Task Force Report, *supra* note 52 (citations omitted).

69. 640 N.W.2d 374 (Neb. 2002).

70. *Id.*

71. *Id.* at 378 (citations omitted).

72. *See id.* (quoting the county court).

73. *Id.* at 382.

74. *Id.* at 383.

75. Task Force Report, *supra* note 52 (citations omitted).

76. *See, e.g.,* Megan Backer, *Giving Lawrence its Due: How the Eleventh Circuit Underestimated the Due Process Implications of Lawrence v. Texas in Lofton v. Secretary of the Department of Children & Family Services*, 90 MINN. L. REV. 745, 746 (2006) (concluding that the Florida statute “impermissibly burdens a fundamental right of the gay plaintiffs in *Lofton*”); Christopher D. Jozwiak, *Lofton v. Secretary of the Department of Children & Family Services: Florida’s Gay Adoption Ban Under Irrational Equal Protection Analysis*, 23 LAW & INEQ. 407, 409 (2005) (arguing “that the *Lofton* court incorrectly determined that Florida’s treatment of gays and lesbians is not a denial of equal protection”). *But see, e.g.,* *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (upholding the constitutionality of the Florida statute); *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995) (stating that “whatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest”); Martin R. Gardner, *Adoption by Homosexuals in the Wake of Lawrence v. Texas*, 6 J.L. & FAM. STUD. 19, 22 (2004) (concluding that *Lawrence v. Texas* “leaves policy-makers free . . . to deny adoptions to parties involved in homosexual relationships”). A very recent decision of a state trial court in Florida found that the Florida statute barring adoption by gays and lesbians is unconstitutional. *In re Adoption of John Doe* (Fla. Cir. Ct. Aug. 29, 2008), at *65, available at <http://jurist.law.pitt.edu/pdf/flaadoption.pdf> (last visited Sept. 12, 2008).

nevertheless should be made. First, if the Constitution protects the right of gays and lesbians to adopt on the same terms as others, then the interstate recognition issue will be far less salient. Second, in the absence of an authoritative ruling by the Supreme Court on the substantive question, state laws governing adoption by gays and lesbians are likely to continue to vary. Given this patchwork quilt of state adoption laws and a highly mobile society,⁷⁷ the question of interstate recognition of adoption decrees assumes enormous importance in the lives of adoptive families.

II. THE CURRENT INTERSTATE RECOGNITION LANDSCAPE

Adoptions have enormous legal, economic, and social consequences for all members of the triad.⁷⁸ Adoptions alter the family status of all members of the triad and affect support obligations, inheritance rights, tax deductions, child custody, visitation rights, health insurance, government benefits, and a myriad of other issues. In the vast majority of cases, states recognize sister-state adoption decrees as a matter of course. But in two distinct contexts, state agencies and courts have refused to recognize sister-state adoption decrees. First, when a same-sex couple that adopted a child in F1 later separated and sought a judicial determination regarding child custody in F2, the F2 court declined to recognize the F1 adoption. Second, when a child born in F2 was adopted by a same-sex couple in F1 and the couple sought an amended birth certificate reflecting the adoption, the F2 agency charged with issuance of amended birth certificates (and ultimately its court) declined to recognize the F1 adoption. As we will see, in both of these contexts, the adoption decrees were accorded full faith and credit only on appeal.

A. *Child Custody Litigation*

Same-sex couples may create a family in a number of ways. One of the partners may have a biological child (with an opposite-sex partner, or with the assistance of a sperm donor or surrogate) and

77. See Adam Weiss, *Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union*, 41 COLUM. J.L. & SOC. PROBS. 81, 81 (2007) (evaluating “how the European experience of free movement might serve American activists looking to expand the rights of same-sex couples under the right-to-travel doctrine”); Wolff, *supra* note 13, at 2237 (opining that “a state may not structure . . . its policies regarding out-of-state marriages . . . for the purpose of deterring undesirable couples from migrating to its borders”).

78. See generally 3 HOLLINGER, *supra* note 13, ch. 12–13 (discussing the consequences of adoptions); Chen, *supra* note 13, at 172 n.8, 176–77 (discussing the rights that accrue to an adoptive parent in a second-parent adoption).

the other partner may adopt the child through a second-parent adoption.⁷⁹ Alternatively, both partners in the couple may adopt a child simultaneously. Or one partner may adopt a child and the other partner may later adopt the same child. If the same-sex couple later separates and seeks a judicial determination of child custody, one of the parents may challenge the validity of the adoption by the other parent.

For example, in *Russell v. Bridgens*,⁸⁰ Joan Bridgens adopted a child in Pennsylvania in 1996. About a year later, Bridgens and her partner, Serenna Russell, adopted the same child in Pennsylvania in what was referred to as a co-parent adoption. The family later moved to Germany. When the couple separated, Russell returned to the United States with the child and filed a petition to establish child custody and to seek child support in Nebraska. In a motion for summary judgment, Bridgens alleged that the 1997 adoption was invalid under Pennsylvania law.⁸¹ The Nebraska trial court granted the motion, finding that Bridgens's parental rights had not been relinquished or terminated before the child was adopted by her partner, as required by Pennsylvania law.⁸² In light of this failure to comply with Pennsylvania statutory requirements, the Nebraska court concluded that the Pennsylvania court had lacked subject matter jurisdiction and its adoption decree was not entitled to full faith and credit.⁸³

On appeal, the Nebraska Supreme Court reversed, finding no evidence in the record that Bridgens had not, in fact, relinquished her parental rights before the 1997 co-parent adoption.⁸⁴ In the absence of such evidence and in light of a statement in the Pennsylvania adoption decree that “[a]ll requirements of the Acts of Assembly have been fulfilled and complied with,”⁸⁵ the Nebraska Supreme Court concluded that Bridgens had failed to meet her burden on the motion for summary judgment.⁸⁶

79. See *supra* note 25 (describing the nature of a second-parent adoption).

80. 647 N.W.2d 56 (Neb. 2002). For other cases in which a child custody litigant sought to collaterally attack the validity of an adoption decree, see, e.g., *Kantaras v. Kantaras*, 884 So. 2d 155, 156 (Fla. Dist. Ct. App. 2004); *Starr v. Erez*, 97 CVD 624 (Durham County, N.C. General Court of Justice 1997); *Goodson v. Castellanos*, 214 S.W.3d 741, 746 (Tex. App. 2007); *Hobbs v. Van Stavern*, No. 01-05-00632-CV, 2006 WL 3095439, at *1–2 (Tex. App. Nov. 2, 2006).

81. *Russell*, 647 N.W.2d at 58.

82. *Id.* (describing the trial court decision).

83. *Id.* at 58–59 (discussing the trial court decision).

84. *Id.* at 60.

85. *Id.* at 58 (quoting the Pennsylvania decree).

86. *Id.* at 60; see *Cox*, *supra* note 13, at 781–85 (discussing *Russell* and noting that the Supreme Court clarified that Nebraska must recognize a final judgment from a sister state under the Full Faith and Credit Clause); *Whitten*, *supra* note 13, at 821–24

Although reversed on appeal, the *Russell* trial court decision illustrates a judicial willingness to decline recognition of a sister-state adoption decree in the context of child custody litigation.

B. Amended Birth Certificates

When a child born in one state is adopted in another state, the adoptive parents may ask the state in which the child was born (the “birth state”) to issue an amended birth certificate listing the adoptive parents as the parents on the birth certificate. Many states have statutes that authorize the issuance of amended or revised birth certificates in these circumstances.⁸⁷ In such cases, the birth state is asked to recognize the adoption decree entered by the court of a sister state.

In several cases, the birth state has declined to issue an amended birth certificate upon the adoption of a child by parents of the same sex. For example, Timothy Fisher was the biological father of two children born in Virginia.⁸⁸ After the parental rights of the biological mother had been terminated, a court in the District of Columbia permitted Scott Davenport to adopt the children without terminating Fisher’s parental rights. When Fisher and Davenport requested amended birth certificates, the Registrar of Vital Records and Health Statistics for the Commonwealth of Virginia issued new birth certificates listing Davenport as father, but omitting Fisher. The Registrar declined to issue birth certificates listing both men as parents.⁸⁹ When the men sued, the Circuit Court for the City of Richmond granted summary judgment in favor of the defendants, holding that state law only permitted issuance of birth certificates that listed a mother and a father, not two mothers or two fathers.⁹⁰ On appeal, the Supreme Court of Virginia reversed, concluding that the state statute and administrative code contemplated issuance of new birth certificates listing “adoptive parents” or “intended parents” and did not preclude recognition of same-sex couples as “adoptive

(using *Russell* to illustrate the difference between a failure to satisfy substantive statutory requirements and a lack of subject matter jurisdiction), 842–44 (discussing *Russell*), 847–49 (same).

87. See, e.g., CAL. HEALTH & SAFETY CODE § 102635 (West 2007); FLA. STAT. ANN. § 382.015(1) (West 2005); N.Y. PUB. HEALTH LAW § 4138(1)(c) (McKinney 2007); TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon 2005).

88. Davenport v. Little-Bowser, 611 S.E.2d 366 (Va. 2005).

89. *Id.*

90. Davenport v. Little-Bowser, Chancery No. HS-917-4 (Va. Cir. Ct. Feb. 24, 2004), *rev'd*, 611 S.E.2d 366 (Va. 2005).

parents.”⁹¹ The Supreme Court of Virginia declined to reach federal constitutional or statutory issues.⁹²

The agency charged with issuance of birth certificates in Mississippi has also declined to recognize adoptions by same-sex couples (or by the same-sex partner of a child’s biological parent).⁹³ When adoptive parents challenged this practice, the Chancery Court in Mississippi interpreted the state’s law to require issuance of revised birth certificates listing the names of both “adoptive parents,” even if of the same sex.⁹⁴ The Chancery Court further concluded that “recognition of the Vermont adoption decree is compelled under the Full Faith and Credit Clause of the federal constitution.”⁹⁵

Just as state agencies in Virginia and Mississippi balked at requests to issue amended birth certificates naming two parents of the same sex, so, too, did an agency in Oklahoma. As Part II.C recounts, the Oklahoma agency’s discomfort set off a chain of events that resulted in enactment of a statute barring recognition of adoptions by same-sex couples.

C. *The Oklahoma Statute*

In 2004, the Oklahoma legislature amended its adoption code to provide 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.”⁹⁶ The impetus for the amendment was the adoption of a baby, born in Oklahoma, by two men living in Washington State, Gregory Hampel and Edmund Swaya.⁹⁷ When Hampel and Swaya asked the Oklahoma Department of Health to provide an amended birth certificate listing the baby’s new name, Vivian Swaya, and her adoptive parents’ names,

91. *Davenport*, 611 S.E.2d at 371–72.

92. *Id.* at 372.

93. *E.g.*, *Perdue v. Mississippi State Bd. of Health*, No. G-2001-1891 S/2, at *2 (Miss. Chancery Ct., 1st Judicial Dist., Hinds Cty., Mar. 18, 2003) (on file with author).

94. *See id.* at *2 (explaining that the state statute is phrased in mandatory terms, leaving the Bureau of Vital Statistics with “no discretion to deviate from the statute’s terms”).

95. *Id.* at *2–3 (citations omitted).

96. OKLA. STAT. tit. 10, § 7502-1.4(A) (2007). The Mississippi legislature considered but rejected a similar proposal in 2000. *See* Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y. L. SCH. J. HUM. RTS. 711, 735 (2000); *see also* Cox, *supra* note 13, at 781. For the argument that the Oklahoma statute is immoral, *see* Carlos Ball, *The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men*, 38 LOY. U. CHI. L.J. 379, 390–97 (2007).

97. *See* Judy Gibbs Robinson, *State Reissues Birth Certificate for Gay Couple*, OKLAHOMAN, Apr. 7, 2004, at 6A (describing the Oklahoma adoption).

they received a birth certificate listing Hampel as Vivian's father and leaving the mother line blank. A letter to the couple's attorney explained that Edmund Swaya's name was not listed "due to the inability to establish [his] maternity."⁹⁸ Swaya wanted his name listed on the birth certificate so he could obtain a Social Security card for his daughter, make medical and educational decisions on her behalf, and take her on international flights.⁹⁹ With Lambda Legal, a national organization that works to secure civil rights for gays and lesbians, contemplating litigation¹⁰⁰ and a second request for an amended birth certificate received from a gay couple in Massachusetts that had adopted an Oklahoma child, the Oklahoma Commissioner of Health sought guidance from the state Attorney General.¹⁰¹

In a request for an official Attorney General opinion, the Commissioner asked whether the Registrar of Vital Statistics was required by existing provisions of the Oklahoma Code¹⁰² to prepare a supplementary birth certificate upon the adoption of a child if the adoptive parents did not meet Oklahoma's eligibility requirements to adopt. In particular, the Commissioner inquired about the obligation, if any, to prepare a supplementary birth certificate upon the adoption by a same-sex couple, outside the state of Oklahoma, of a child born in Oklahoma.

Stating that "[t]he Full Faith and Credit Clause of the United States Constitution requires Oklahoma to recognize properly entered sister-state judgments"¹⁰³ and further stating that Oklahoma law requires its courts to recognize adoption decrees issued by courts in other states or countries "as though the decree, judgment, or final order were issued by a court of this state,"¹⁰⁴ the Oklahoma Attorney General concluded that the Registrar was required to issue a supplementary birth certificate "irrespective of the gender" of the

98. *Oklahoma Health Department to Issue Birth Certificates to Same-Sex Couples*, HEALTH & MED. WK., Apr. 26, 2004, at 16 [hereinafter *Oklahoma Health Department*]; see Robinson, *supra* note 97.

99. Amy Fagan, *Oklahoma Abides by Out-of-State Adoptions by Gays*, WASH. TIMES, Apr. 14, 2004, at A07; *Oklahoma Health Department*, *supra* note 98, at 16.

100. Fagan, *supra* note 99.

101. See *id.*; Robinson, *supra* note 97.

102. See Op. Att'y Gen. Okla., No. 04-8, 2004 WL 557472, ¶ 0 (Mar. 19, 2004); see also OKLA. STAT. tit. 10, § 7505-6.6(B) (2007) (requiring the State Registrar to prepare a supplementary birth certificate upon receipt of an adoption decree); OKLA. STAT. tit. 63, § 1-316(A) (2007) (specifying the conditions under which the State Commissioner of Health must issue a new birth certificate for someone born in Oklahoma).

103. Op. Att'y Gen. Okla., No. 04-8, 2004 WL 557472, ¶ 16(1) (Mar. 19, 2004) (citation omitted).

104. *Id.* ¶ 12 (citing tit. 10, § 7502-1.4(A)).

adoptive parents.¹⁰⁵ The Attorney General issued his opinion on Friday, March 19, 2004.

The very next business day, Republican lawmakers in the Oklahoma legislature “vowed . . . to enact legislation banning recognition of out-of-state adoptions of Oklahoma children by same-sex couples.”¹⁰⁶ Legislators expressed a need “to protect Oklahoma children from adoption by homosexual couples”¹⁰⁷ and a fear that “Oklahoma could become the national capital for same-sex adoption in America.”¹⁰⁸ At least one of the legislators, Representative Thad Balkman, appeared to recognize that for some “older, harder to adopt children, some of whom are in state custody . . . ,”¹⁰⁹ adoption by an out-of-state gay couple might be their only chance for adoption. When asked what effect a statutory amendment barring recognition of adoptions by same-sex couples would have on such children, Balkman answered, “They would just stay in state custody.”¹¹⁰

Just three weeks later, on April 12, 2004, the Oklahoma Senate unanimously passed a bill providing, “This state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.”¹¹¹ The Oklahoma House passed the bill on April 26, 2004, by a vote of 93 to 4.¹¹² The sponsor of the House bill, Representative Susan Winchester, explained, “Oklahoma law already prevents same-sex adoptions, but not for gay couples from other states. . . . Oklahoma would have become a national target for

105. *Id.* ¶ 15; *see also id.* ¶ 14.

106. 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.

107. *Id.* (quoting Rep. Balkman).

108. *Id.* (quoting Rep. Cargill).

109. *Id.*

110. *Id.* (quoting Rep. Balkman). Before the legislature could take any action in response to the Attorney General’s opinion, on April 6, 2004, the Oklahoma Department of Health agreed to issue a new birth certificate for Vivian Swaya, listing Gregory Hampel as her father and Edmund Swaya as her mother. The Department’s assistant general counsel explained that the regulations in place did not permit the birth certificate to list the men as “parent 1” and “parent 2.” Robinson, *supra* note 97.

111. H.R. 1821, 49th Leg., 2d Reg. Sess. (Okla. 2004); *see* John Greiner, *Senate Passes Measure Concerning Adoptions: The Bill Says Birth Certificates of Some Adopted Children Will Carry One Parent’s Name*, OKLAHOMAN, Apr. 13, 2004, at 6A (quoting Senate bill); *see also* *Capitol Briefs: Senate Approves Anti-Gay Adoption Amendment*, TULSA WORLD, Apr. 13, 2004, at A8.

112. Marie Price, *House Roundup: Bill to Ban Recognizing Gay Adoptions Sent to Governor*, TULSA WORLD, Apr. 27, 2004, at A9; News Release, Oklahoma House of Representatives, Republican Legislators Applaud Passage of Bill to Prevent State Recognition of Same-Sex Adoptions (Apr. 26, 2004), *available at* <http://www.lsb.state.ok.us/HOUSE/news6772.html>; *see* H.R. 1821, 49th Leg., 2d Reg. Sess. (Okla. 2004); Judy Gibbs Robinson, *State Bill Reaffirms Stance on Adoptions by Gays*, OKLAHOMAN, May 1, 2004, at 7A (expanding on the policy behind the bill’s adoption).

same-sex couples to adopt our children, but this legislation appropriately changes that.”¹¹³ Senator James Williamson, the state Senator who crafted the language in the Senate bill, expressed disapproval not only of adoption by same-sex couples but also of same-sex marriage: “The radical homosexual agenda includes trying to be recognized both as married couples and as a . . . family union The whole concept of family . . . is being challenged across the nation.”¹¹⁴ Oklahoma Governor Brad Henry signed the bill into law on May 3, 2004.¹¹⁵

Although one opponent of the bill expected that its main effect would be to jeopardize the ability of same-sex couples who adopt Oklahoma children to obtain amended birth certificates listing the names of both parents,¹¹⁶ Brian Chase, an attorney for Lambda Legal, recognized that its impact was potentially much broader:

[T]he law means that if a same-sex couple adopts a child in another state and then moves to Oklahoma, the child would be an orphan in the eyes of state law, meaning the couple couldn’t register the child for school, visit the child in the hospital or take numerous other parental actions.¹¹⁷

Senator Williamson stated that only one of the parents would be recognized in Oklahoma.¹¹⁸

Is Oklahoma free to disregard adoptions finalized by courts in other states, or does the federal Constitution compel it to recognize sister-state adoptions even if it finds them offensive to its public policy? Parts III and IV address this central question.

III. THE FULL FAITH AND CREDIT OBLIGATION

The Full Faith and Credit Clause of the federal Constitution requires that “Full Faith and Credit . . . be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”¹¹⁹ According to the Supreme Court,

The animating purpose of the full faith and credit command . . . “was to alter the status of the several states as independent foreign

113. Price, *supra* note 112 (quoting Rep. Winchester).

114. Amy Fagan, *Same-Sex Adoption Negated in State: Oklahoma Law Reverses Ruling*, WASH. TIMES, May 7, 2004, at A05 (quoting Sen. Williamson).

115. Carmel Perez Snyder, *Adoption Ban Among 17 Bills Signed*, OKLAHOMAN, May 4, 2004, at 3A; *see also* Fagan, *supra* note 114 (“Oklahoma’s governor signed legislation this week ensuring homosexual couples from other states can’t force Oklahoma to list both partners’ names on a child’s adoptive birth certificate.”).

116. Price, *supra* note 112 (discussing views of Rodney Johnson of Noble, co-chair of the Oklahoma Freedom and Equality Coalition).

117. Fagan, *supra* note 114.

118. *Id.* (discussing Sen. Williamson’s views).

119. U.S. CONST. art. IV, § 1.

sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.”¹²⁰

Put differently, the purpose of the Full Faith and Credit Clause was to “transform[] an aggregation of independent, sovereign States into a nation.”¹²¹

The Full Faith and Credit Clause neither defines the terms “public acts,” “records,” or “judicial proceedings” nor clarifies the amount of “credit” that states must give to sister-state statutes and judgments to satisfy the command of “full faith and credit.” The implementing statute enacted by Congress enlarges and clarifies the full faith and credit obligation in two important respects.¹²² First, the statute requires that federal and territorial courts, like state courts, give full faith and credit to the public acts, records and judicial proceedings of the states, territories and possessions of the United States.¹²³ Second, the statute specifies that public acts, records and judicial proceedings of the states, territories and possessions “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.”¹²⁴

Interestingly, although a single sentence in the Constitution demands that full faith and credit be given to both “public acts” and “judicial proceedings” (as well as “records”), Supreme Court case law

120. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)); *accord* *Johnson v. Muelberger*, 340 U.S. 581, 584 (1951) (citing *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948)) (“[T]he Framers intended [the Full Faith and Credit Clause] to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum.”); *Sherrer*, 334 U.S. at 355 (citing *Milwaukee Cty.*, 296 U.S. at 276–77) (“The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.”).

121. *Sherrer*, 334 U.S. at 355 (footnote omitted). Professor Jeffrey Rensberger argues that full faith and credit serves not only a policy of national unity, but a competing policy of interstate pluralism. *See* Rensberger, *supra* note 9, at 5; *id.* at 13; *id.* at 19–39.

122. 28 U.S.C. § 1738 (2006). Congress first enacted a full faith and credit statute in 1790. *See* Act of May 26, 1790, ch. 11, 1 Stat. 122. Scholars have engaged in a vigorous debate on the historical meaning of the Full Faith and Credit Clause and the original implementing statute. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 288–315 (1992); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

123. 28 U.S.C. § 1738.

124. *Id.* (emphasis added).

has established that the amount and stringency of the credit owed to judicial proceedings is far greater than that owed to public acts.¹²⁵

A. *Full Faith and Credit Owed to “Public Acts”*

While acknowledging that the Full Faith and Credit Clause requires states to give the “public acts” or statutes¹²⁶ of sister states some credit, the Court has interpreted the Clause to impose only a minimal check on a state’s flexibility in choosing its own law: “The Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’”¹²⁷ Rather, a state is free to choose its own substantive law as long as it “ha[s] a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”¹²⁸

In adopting this flexible approach to the constitutional limits on choice of law, the Court has recognized that in many cases, more than one state will have a significant contact with, or connection to, the parties or the controversy, and in such cases, it would be illogical to interpret the Full Faith and Credit Clause as requiring the forum state to defer to the other state’s law rather than to apply its own law.¹²⁹ But the Court has gone even further, permitting a state court to choose forum law even when another state has a more significant connection to the underlying controversy than the forum state.¹³⁰

125. See, e.g., *Baker*, 522 U.S. at 232–33 (stating that “credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded”).

126. See, e.g., *Carroll v. Lanza*, 349 U.S. 408, 411 (1955) (stating that “[a] statute is a ‘public act’ within the meaning of the Full Faith and Credit Clause”) (citations omitted); *Hughes v. Fetter*, 341 U.S. 609, 611 (1951) (explaining that a particular Illinois statute is a “public act” entitled to full faith and credit). For an interesting discussion of whether the phrase “public acts” also encompasses judge-made law, see LUTHER L. MCDUGAL, III ET. AL., *AMERICAN CONFLICTS LAW* 268–70 (5th ed. 2001).

127. *Baker*, 522 U.S. at 232 (citation omitted).

128. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality op.)); see also Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *YALE L.J.* 1965, 1978 (1997) (arguing that the Full Faith and Credit Clause bars states with no interest from applying their laws).

129. See, e.g., *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939) (stating that “[a] rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own” (quoting *Alaska Packers*, 294 U.S. at 547)).

130. See, e.g., *Allstate*, 449 U.S. 302 (holding that it was constitutional for a Minnesota court to apply Minnesota law to an insurance claim on a policy issued to a Wisconsin citizen for an automobile accident that occurred in Wisconsin).

Not only does the Full Faith and Credit Clause permit states to apply their own laws as long as they have a contact or aggregation of contacts, creating state interests, but it also permits them to decline to apply the law of other states with significant connections to the underlying controversy if that law would violate a fundamental public policy of the forum.¹³¹ While Dean Larry Kramer has forcefully argued that the public policy exception violates the Full Faith and Credit Clause,¹³² the Supreme Court has not accepted this argument. As recently as 1998, the Supreme Court in *Baker v. General Motors Corp.*¹³³ reiterated that “[a] court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy.”¹³⁴

B. Full Faith and Credit Owed to “Judicial Proceedings”

But if the Court has read the Full Faith and Credit Clause to require only minimal credit to the “public acts” of sister states, it has taken quite a different view regarding the credit owed to sister-state “judicial proceedings” or judgments.¹³⁵ While neither the Full Faith and Credit Clause nor the implementing statute makes the judgment of one state a judgment of another state,¹³⁶ the statute makes clear that a judgment conclusive upon the parties in the rendering state is conclusive upon the parties in sister states as well.¹³⁷ More specifically, if a court in F1 rendered a judgment for the defendant and the plaintiff later filed a second complaint, seeking to relitigate the claim in F1, F1’s preclusion law would bar the plaintiff from presenting the same claim a second time. The Full Faith and Credit

131. See, e.g., RESTATEMENT (SECOND) OF THE 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.”); RESTATEMENT (FIRST) OF THE CONFLICT OF LAWS § 612 (1934) (“No 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.”).

132. Kramer, *supra* note 128, at 1966, 1986 (arguing that “the public policy doctrine ought to be deemed unconstitutional . . . across the board” because “‘offensiveness’ cannot be an appropriate reason under the Full Faith and Credit Clause for refusing to entertain a claim based on another state’s law”) (footnote omitted); see also Laycock, *supra* note 122, at 313 (viewing the public policy exception as a “relic”).

133. 522 U.S. 222 (1998).

134. *Id.* at 233 (citing *Nevada v. Hall*, 440 U.S. 410, 421–24 (1979)) (emphasis added); see also, e.g., *Pac. Employers Ins. Co.*, 306 U.S. at 504.

135. A judgment is a final determination by a court of the parties’ rights and obligations from which an appeal lies. BLACK’S LAW DICTIONARY 846 (7th ed. 1999); see FED. R. CIV. P. 54(a) (defining “judgment” as “a decree and any order from which an appeal lies”).

136. *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229 (1945). The Framers of the Constitution rejected such a proposal. *Id.* (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 447–48 (Max Farrand ed., 1937)).

137. 28 U.S.C. § 1738; *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813).

Clause and statute extend the preclusive effect of the F1 judgment by requiring other states to give it the *same* effect that F1 would give it. Courts in other states must apply F1's preclusion law, rather than their own, to ensure that the F1 judgment has the same preclusive effect in sister states that it would receive at home.¹³⁸ And even though states may decline to apply the *laws* of other states that they find offensive to their public policy, the Full Faith and Credit Clause does not permit states to decline to recognize the *judgments* of other states on public policy grounds.¹³⁹

But if the Full Faith and Credit Clause requires sister states to give judgments the same credit that they would receive in the rendering state, on what theory might a state seek to avoid recognition of a sister-state adoption decree? Put differently, what arguments did the state of Oklahoma make in support of its non-recognition statute? What arguments did Professor Wardle make in support of his contention that "in many situations nonrecognition of lesbigay adoption decrees would be proper and permissible"?¹⁴⁰ We turn to the four rationales that have been proffered to justify non-recognition of sister-state adoption decrees.

IV. RATIONALES FOR NON-RECOGNITION OF ADOPTION DECREES AND CRITIQUE

A. *The Public Policy Rationale*

1. *The interest of the rendering state*

Family law has traditionally been viewed as the province of the states.¹⁴¹ The state in which an individual is domiciled typically views itself as "most concerned in his personal . . . relations"¹⁴² and therefore justified in applying its law to determine matters of personal status.¹⁴³ When a child's personal status is at stake, as it is in

138. ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE AND PRACTICE* 213, 216 (2001); see Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996).

139. See *infra* Part IV.A.

140. Wardle, *supra* note 16, at 571.

141. See, e.g., Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992); Ex Parte Burrus, 136 U.S. 586, 593-94 (1890); cf. Estin, *supra* note 8, at 383 (stating that "[f]amily law in America today is extensively shaped by national law").

142. Herbert F. Goodrich, *Custody of Children in Divorce Suits: The Conflict of Laws Problem*, 7 CORNELL L.Q. 1, 2 (1921).

143. See, e.g., RESTATEMENT (SECOND) OF THE CONFLICTS OF LAWS §§ 285, 287 (1971) (discussing the law governing right to divorce and law governing legitimacy respectively); RESTATEMENT (FIRST) OF THE CONFLICTS OF LAWS § 142 (1934) (discussing marriages contrary to public policy).

adoption proceedings, several states may claim an interest: the state in which the child was born; the state(s) in which the birth parents are domiciled; and the state(s) in which the adoptive parents are domiciled, among others.¹⁴⁴ In determining which of these states has authority to conduct adoption proceedings, the goal is to choose the state “with the closest connections to, and the most substantial evidence about, the proposed adoptive family.”¹⁴⁵

Scholars have persuasively argued that the Uniform Adoption Act (“UAA”), rather than the Uniform Child Custody Jurisdiction Act (“UCCJA”),¹⁴⁶ should govern jurisdiction in adoption proceedings.¹⁴⁷ The UAA authorizes jurisdiction in a state that has access to “substantial evidence concerning the minor’s present or future care” as long the child or the prospective adoptive parent has lived there for a specified period of time.¹⁴⁸ Perhaps because only Vermont has adopted the UAA,¹⁴⁹ many courts have applied the UCCJA to adoption proceedings.¹⁵⁰ The UCCJA authorizes jurisdiction where the adoptee “has his home or where there are other *strong contacts* with the child and his family.”¹⁵¹

144. See, e.g., 1 HOLLINGER, *supra* note 13, § 4.07[2][a], [b]; SCOLES, *supra* note 13, at 700–03; see also RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 78(a) (1971) (establishing that a state has jurisdiction to grant an adoption if it is the state of domicile of either the adoptive parent or adopted child).

145. 1 HOLLINGER, *supra* note 13, § 4.07[2][b]; accord Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703, 729 (1996).

146. 9 U.L.A. 261 (Part IA 1968).

147. See, e.g., 1 HOLLINGER, *supra* note 13, § 4.07[2][b] (explaining that “the UAA contains provisions that would enable the states to more sensibly determine the most appropriate forum for exercising subject matter authority over adoption proceedings”); Kay, *supra* note 145, at 713–20 (same); cf. Spector, *supra* note 13, at 472–75 (considering whether an adoption decree is a child custody determination under the UCCJA or the PKPA). The UCCJEA, which was intended to supersede the UCCJA, makes clear that it “does not govern an adoption proceeding.” UCCJEA § 103, 9 U.L.A. 660 (1997).

148. UAA § 3-101(a)(1), (2), 9 U.L.A. 67 (1994). The UAA authorizes jurisdiction in other states in specified circumstances. *Id.* § 3-101(a)(3)–(5); see also Appleton, *supra* note 7, at 409–13 (discussing requirements for adoption jurisdiction); Charles W. Taintor, II, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222, 228–51 (1954) (considering a variety of bases for an assertion of jurisdiction in adoption proceedings).

149. 9 U.L.A. 11 (Part IA 1994 & 2007 Supp.).

150. See 1 HOLLINGER, *supra* note 13, § 4.07[2][a] & n.11 (listing decisions where courts have applied the UCCJA to adoption proceedings); Kay, *supra* note 145, at 712–28 (discussing the misapplication of the UCCJA and the PKPA in interstate adoption cases).

151. UCCJA prefatory note, 9 U.L.A. 264 (Part IA 1968) (emphasis added); see UCCJA § 3(a), 9 U.L.A. 307 (Part IA 1968) (specifying when a court has jurisdiction to make child custody determinations).

Although it is not entirely free from controversy,¹⁵² it is widely accepted that the forum state may apply its own law in the adoption proceedings.¹⁵³ Through the application of its adoption law, the forum state advances its public policy, which in this context often is framed in terms of protecting and serving the best interests of the child to be adopted.¹⁵⁴

2. *The interest of other states*

But the state in which the adoption proceedings are conducted (the “adoption state”) may not be the only state with an interest in the adoptive family. For example, if a child born in one state is adopted in another state, the child’s birth state may claim an interest in the status of the child, especially if the birth parents continue to live there. Likewise, if a child is adopted in one state and she and her adoptive parents later move to another state, the state to which they move may now claim an interest in the family. These “non-adoption” states, whose adoption laws presumably were *not* applied by the court that finalized the adoption, may claim an interest in the adoptee and her family.

Like the adoption law of the state that exercises jurisdiction and adjudicates the adoption proceeding, the laws of these “non-adoption” states may also embody deeply held public policies. To the extent that states define the best interests of adoptees differently or employ different means to serve those interests, the substantive content of the several states’ adoption laws and the public policies they serve may vary state to state. For example, while California and Vermont statutes permit adoptions by gay individuals or couples,¹⁵⁵ Florida’s adoption statute does not.¹⁵⁶ In litigation challenging the

152. 1 HOLLINGER, *supra* note 13, § 4.07[4], at 4–93 (noting that “the lingering due process concerns about permanently altering the status of birth parents who live elsewhere argue in favor of applying the laws of the forum in which a parent executes a consent or relinquishment or attempts to oppose the adoption”); *see also* Kay, *supra* note 145, at 730 & n.111 (noting that in situations where a choice of law problem presents a conflict between the policies and interests of two or more states, the temptation to use overlapping jurisdictional provisions in order to apply local law will be substantial).

153. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 289 (1971); 1 HOLLINGER, *supra* note 13, § 4.07[4]; SCOLAS, *supra* note 13, at 699; 2 AM. JUR. 2D *Adoption* §§ 36, 107 (2004); Appleton, *supra* note 7, at 408 n.30; Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 259 (2006); Whitten, *supra* note 13, at 805–07.

154. *See, e.g.*, UAA § 3-703(a), 9 U.L.A. 94 (Part IA 1994) (providing that the court shall grant a petition for adoption if the court determines that the adoption will be in the best interest of the minor).

155. CAL. FAM. CODE § 9000(b) (West 2004); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002).

156. FLA. STAT. ANN. § 63.042(3) (West 2005).

constitutionality of its statute, Florida claimed that its law served an “interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers. Such homes, Florida assert[ed], provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization.”¹⁵⁷

The public policy rationale posits that non-adoption states that retain or develop an interest in the adoptee and her family should be free to advance their public policies and, if necessary, to deny recognition to adoptions finalized in sister states that violate those policies. For example, in defending the Oklahoma statute that bars recognition of adoptions “by more than one individual of the same sex,”¹⁵⁸ the state proffered an interest in “halt[ing] the erosion of the mainstream definition of the family unit.”¹⁵⁹ State legislators who supported the statute expressed concern that “children of same-sex couples could have issues of gender confusion,”¹⁶⁰ fear that “Oklahoma could become the national capital for same-sex adoption in America,”¹⁶¹ and an interest in “keep[ing] adopted kids in traditional family homes.”¹⁶² These public policies, Oklahoma asserted, overrode any obligation to give full faith and credit to sister-state adoptions by same-sex couples. Professor Wardle, too, has argued that a state’s public policy objections to a sister-state judgment may be so basic and deeply-seated and fundamental as to outweigh the interest in national unity that underlies the Full Faith and Credit Clause.¹⁶³

3. *Doctrinal rejection of the public policy rationale*

Although persuasive at first blush (at least to some), the public policy rationale ultimately fails to justify non-recognition of sister-

157. *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004).

158. OKLA. STAT. tit. 10, § 7502-1.4(A) (2007). See *supra* Part II.C (discussing the Oklahoma statute).

159. *Finstuen v. Edmondson*, 497 F. Supp. 2d at 1311 (W.D. Okla. 2006), *aff’d*, 496 F.3d 1139 (10th Cir. 2007).

160. Price, *supra* note 106, at A14 (describing concerns of Rep. Kevin Calvey).

161. *Id.* (quoting Rep. Lance Cargill).

162. Price, *supra* note 112, at A9 (quoting Rep. Susan Winchester). Some policy interests that a state might articulate—for example, moral disapproval of same-sex intimate relationships—would not qualify as “legitimate” interests even if the Constitution permitted states to decline to recognize judgments on public policy grounds. See Wolff, *supra* note 13, at 2228–33 (considering the legitimacy of state interests in the context of interstate recognition of same-sex marriages).

163. Wardle, *supra* note 16, at 609–14.

state adoption decrees.¹⁶⁴ As a doctrinal matter, the Supreme Court has repeatedly rejected the public policy rationale for non-recognition of judgments. For example, in 1998 in *Baker v. General Motors Co.*, the Court stated that “[r]egarding judgments . . . , the full faith and credit obligation is exacting. . . . [O]ur decisions support no roving ‘public policy exception’ to the full faith and credit due judgments.”¹⁶⁵ The Second Restatement of the Conflict of Laws, too, explicitly rejects the public policy rationale, stating, “A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim.”¹⁶⁶

The case of *Fauntleroy v. Lum*¹⁶⁷ illustrates the stringency of the full faith and credit obligation in the judgments context. The state of Mississippi had made it a crime to deal in commodities futures and barred enforcement of futures contracts. Notwithstanding these legal proscriptions, the parties entered into a futures contract for the purchase of cotton. When the defendant declined to pay, the plaintiff sought to arbitrate the claim. No one raised the illegality of the underlying transaction and the arbitrator entered an award in favor of the plaintiff.

Later, the plaintiff filed suit in Missouri to enforce the award. The Missouri court rejected the defendant’s attempt to raise the illegality of the underlying transaction under Mississippi law. Instead, it “directed a verdict if the jury should find that the submission and award were made, and remained unpaid.”¹⁶⁸ The Missouri court thereupon entered judgment for the plaintiff. When the plaintiff sought to enforce the Missouri judgment in Mississippi, the Mississippi Supreme Court refused to hold

that a contract condemned by our civil and criminal laws as immoral, and which the courts of this state are prohibited from enforcing, is sanctified, and purged of its illegality, by a judgment rendered in another state against a citizen of this state . . . so that in

164. *Accord* Cox, *supra* note 13, at 770 (reading *Williams* as supporting the conclusion that “the adoption decrees of lesbian and gay parenting must receive the same recognition and effect in other states as in the state that renders them”); Whitten, *supra* note 13, at 805 (stating that “the effect of a valid judgment of adoption is to eliminate the ability of other states to reject the adoption because they disagree with it”).

165. 522 U.S. at 233 (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948) and *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908)).

166. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 117 (1971).

167. 210 U.S. 230 (1908). The description of the facts and the procedural posture of the case is taken from the Court’s opinion.

168. *Id.* at 234.

a suit here on such judgment the illegal character of the cause of action may not be inquired into.¹⁶⁹

In deciding whether the Full Faith and Credit Clause compelled Mississippi to enforce the Missouri judgment, the United States Supreme Court appeared to concede the possibility that the Missouri court might have erred in treating the arbitration award as conclusive or in declining to permit the defendant to seek to establish the illegality of the underlying transaction under Mississippi law.¹⁷⁰ But even if the Missouri court had erred, the Supreme Court emphasized that its

judgment was conclusive in Missouri on the validity of the cause of action. . . . [I]t cannot be impeached either in or out of the State by showing that it was based upon a mistake of law. [T]he judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law.¹⁷¹

Notwithstanding the dissent's concern that the Court's ruling "so enlarges [the Full Faith and Credit] Clause as to cause it to obliterate all state lines, since the effect will be to endow each state with authority to overthrow the public policy and criminal statutes of the others,"¹⁷² the majority concluded that "no . . . painful or humiliating consequences [would] follow upon [its] decision."¹⁷³ It expressed confidence that courts in each rendering state would decide cases in good faith.¹⁷⁴

The Supreme Court has occasionally recognized "limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy."¹⁷⁵ But these few cases (decided a century ago) involved judgments purporting to affect real estate located in another state¹⁷⁶ and judgments on penal claims.¹⁷⁷

169. *Lum v. Fautleroy*, 32 So. 290, 291 (Miss. 1902), *rev'd*, 210 U.S. 230 (1908).

170. *Fautleroy*, 210 U.S. at 237.

171. *Id.* (citations omitted).

172. *Id.* at 239 (White, J., dissenting).

173. *Id.* at 237.

174. *Id.* at 237-38.

175. *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939) (citations omitted).

176. *See Hood v. McGehee*, 237 U.S. 611, 615 (1915) (holding that an Alabama court was free to apply the Alabama statute of descents, which excluded children adopted by proceedings in other states, in a suit to quiet title to Alabama land); *Olmsted v. Olmsted*, 216 U.S. 386, 395 (1910) (stating that, in an action to partition real estate located in New York and devised by a will probated in New York, the New York court was free to apply its own law to determine which individuals qualified as "lawful issue" of the named legatee); *Clarke v. Clarke*, 178 U.S. 186, 195 (1900) (holding that a Connecticut court could apply its own law to determine the devolution of title to real estate located in Connecticut notwithstanding a South Carolina judgment regarding the property because the South Carolina court lacked

None of them supports a general public policy exception, and the Court's far more recent statement in *Baker* rejects such an exception.¹⁷⁸

4. *Policy arguments against the public policy rationale*

It would be quite unsatisfying if doctrine alone, unsupported by reason, militated against the public policy rationale. But good reasons support the doctrine and the Court's differential reading of the amount of "credit" owed to "public acts" and "judicial proceedings." First, while the legislative process may be costly—state resources are invested to perform research, hold hearings, draft legislation and engage in debate—the cost is spread over the hundreds of thousands or millions of citizens who may benefit from the new legislation. Therefore, if an F2 court chooses to apply its own law to an interstate conflict with which both F1 and F2 have significant contacts, that decision will not likely cause F1 to question its investment in its legislation or to feel that its resources have been squandered. F1's investment will still redound to the benefit of the broader F1 community, as intended.

On the other hand, once an F1 court assumes jurisdiction over a case, it invests resources—to issue a docket number, to accept filings, to hear motions, to write pre-trial opinions, to empanel a jury, to decide the case and to enter a judgment—that are dedicated to resolving the particular dispute before it.¹⁷⁹ While the broader F1 community ultimately may benefit from the creation of a precedent (in the unlikely event that the case produces a published opinion), the judgment itself binds only the litigants before the court and the investment is made for their exclusive benefit. If an F2 court declines

jurisdiction to adjudicate title to Connecticut real property). *Hood* will be discussed more fully *infra* Part IV.D.2.b. See *Fall v. Eastin*, 215 U.S. 1, 11 (1909) (stating that "the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree").

177. See *Huntington v. Attrill*, 146 U.S. 657, 666–67 (1892) (limiting the scope of Chief Justice Marshall's statement that "[t]he courts of no country execute the penal laws of another" to those laws that "impos[e] punishment for an offense committed against the state, and which . . . the executive of the state has the power to pardon"); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888), *overruled in part by Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935) (suit brought in a Wisconsin state court by Milwaukee County against an Illinois corporation for unpaid state income tax); see also *Williams v. North Carolina*, 317 U.S. 287, 294–95 (1942) (stating that as far as a public policy exception for *judgments* is concerned, "the decisions, as distinguished from *dicta*, show that the actual exceptions have been few and far between") (footnotes omitted).

178. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) ("[O]ur decisions support no roving 'public policy exception' to the full faith and credit due *judgments*." (citations omitted)).

179. See *Rensberger*, *supra* note 9, at 16–17.

to recognize F1's judgment on public policy grounds, F1's investment in the particular case will have been wasted or at least significantly diluted. Thus, economic considerations support the Court's unwillingness to recognize a public policy exception to the faith and credit owed to judgments.¹⁸⁰

Second, when a state legislature enacts a law, it seeks to ascertain and codify the best possible policy to address a perceived problem. But the legislature recognizes that reasonable minds may differ on what constitutes the best policy and that, even if everyone agreed on the best policy for F1, it might not be the best policy for F2, because of different demographics, topography, natural resources, social and political culture, or other conditions. In fact, we not only recognize the likelihood that there may be multiple, reasonable legislative prescriptions to many social problems, but we celebrate the states' ability to experiment with different approaches when we talk about our fifty state "laboratories."¹⁸¹ Given this multiplicity of reasonable policy prescriptions and given legislative tendencies to enact laws setting forth broad and general policies rather than specific solutions to narrow problems, when more than one state has a meaningful connection with the parties or the underlying transaction or occurrence, no one state can claim the exclusive right to have its law and policy applied to resolve the interstate controversy.¹⁸² Put differently, no state has reason to doubt the integrity of its legislative process merely because another state has enacted a different law and a court addressing an interstate problem has chosen to apply the other state's law.

When a court adjudicates a case, on the other hand, it does not (or at least is not supposed to) resolve abstract, broad or general policy questions, but rather it applies the chosen law to a particular,

180. See *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 293–94 (1980) (Rehnquist, J., dissenting) (discussing "Virginia's efforts and expense on an applicant's behalf" and stating that "[t]hese efforts, and the corresponding interests in seeing that those efforts are not wasted, lie at the very heart of the divergent constitutional treatment of judgments and statutes").

181. *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in part and dissenting in part); see also *Scafide v. Bazzone*, 962 So. 2d 585, 593 (Miss. Ct. App. 2006) (referencing "forty-nine other state laboratories of judicial decision-making"); NELSON A. ROCKEFELLER, *THE FUTURE OF FEDERALISM* 8–9 (1962) (describing the federal idea as promoting "creativity, imagination, and innovation in meeting the needs of the people"); Rensberger, *supra* note 9, at 21 ("Under the Full Faith and Credit Clause . . . the vision must be of the nation as a community of communities.").

182. See, e.g., David P. Currie, *Full Faith and Credit to Marriages*, 1 GREEN BAG 2D 7, 11 (1997) (stating that "modern decisions never require one state with a legitimate interest in applying its own law to defer to the laws of another").

concrete set of facts.¹⁸³ While some decisions are left to the sound discretion of the trial judge, other decisions—those on questions of law, for example—have a “right” answer; and if the trial court gets it wrong, the appellate court will review the decision *de novo*.¹⁸⁴ Even discretionary decisions can be reversed on appeal if they are “clearly and prejudicially wrong.”¹⁸⁵ With the appellate process in place to correct judicial errors, each state takes pride in the ability of its courts to resolve disputes fairly and in accordance with the law. Put differently, once a court assumes jurisdiction of a case, the state has a powerful interest in the integrity and accuracy of its judicial process and in the respectful treatment of its judgments by courts in other states. If another state were to decline to recognize a judgment, the integrity of the rendering state’s judicial process might be called into question. To avoid this potential friction and insult, our system leaves it to the rendering state’s judicial system to correct any errors and requires other states to recognize sister-state judgments.

Third, in the context of judgments, the Full Faith and Credit Clause serves the same policies that preclusion doctrine generally serves: finality, efficiency and consistency.¹⁸⁶ As the Supreme Court has stated more than once, “[i]t is just as important that there should be a place to end as that there should be a place to begin litigation.”¹⁸⁷ If F2 were not compelled to recognize F1 judgments, then the same claim might be relitigated repeatedly in different states. Such relitigation would be wasteful and potentially harassing, and it would stymie interstate commercial activity.¹⁸⁸ Moreover, it

183. See *Thomas*, 448 U.S. at 293 (Rehnquist, J., dissenting) (stating that “Virginia surely has a stronger interest . . . when that employer has already been haled before a Virginia tribunal and adjudged liable than when the employer simply claims the benefit of a Virginia statute in a proceeding brought in another State”).

184. While appellate courts apply deferential standards of review to findings of fact and discretionary decisions, they have “plenary and superior authority to determine” questions of law. FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* 772 (5th ed. 2001).

185. *Id.* at 767.

186. See, e.g., *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704 (1982) (stating that the Full Faith and Credit Clause was designed to reduce uncertainty, confusion, and delay); *Thomas*, 448 U.S. at 288–89 (White, J., concurring) (emphasizing that one purpose of the Full Faith and Credit Clause is to promote finality); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) (emphasizing the need for finality); see also *Cox*, *supra* note 13, at 777 (discussing the national interest in finality of judgments).

187. *Sherrer v. Sherrer*, 334 U.S. 343, 350 (1948) (quoting *Stoll*, 305 U.S. at 172); see also *Chen*, *supra* note 13, at 195–96 (discussing the need for finality); *Currie*, *supra* note 182, at 11 (same).

188. See *Rensberger*, *supra* note 9, at 17–18 (“Without a strong Full Faith and Credit Clause for judgments, and money judgments in particular, commercial relations between persons located in different states would be problematic[, and] the

could yield inconsistent results that would call into question the integrity of the judicial system.

While these policy considerations support the stringent interpretation of the Full Faith and Credit Clause in the judgments context, there is an additional concern in the adoption context that counsels powerfully in favor of interstate recognition of adoption decrees. The social science literature amply establishes every child's need for a stable, loving relationship with a "psychological" parent.¹⁸⁹ As Congress recognized when it enacted the Adoption and Safe Families Act of 1997,¹⁹⁰ "adoption is an effective way to assure that children grow up in loving families and that they become happy and productive citizens as adults. There seems to be almost universal agreement that adoption is preferable to foster care."¹⁹¹ The child experiences this universal need for a stable relationship with a parent not only in the state in which she is born or in the state that finalizes the adoption, but in all states to which she and her family travel or move.¹⁹²

If the state to which the family moved were to refuse to recognize the adoption, the adoptive parent would continue to serve as the child's psychological parent.¹⁹³ But in the absence of a legally

commerce of the United States would economically Balkanized due to significantly increased transaction costs in all interstate business.").

189. See, e.g., JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 17–20 (1973) (describing the psychological parent-child relationship); ANTHONY N. MALUCCIO ET AL., *PERMANENCY PLANNING FOR CHILDREN: CONCEPTS AND METHODS* 3, 16 (1986) (emphasizing that predictability, continuity and stability in relationships promotes a child's growth and functioning).

190. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C. (2006)).

191. H.R. REP. NO. 105-77, at 8 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2740; see also, e.g., GOLDSTEIN, *supra* note 189, at 31, 35 (emphasizing the importance of continuity in a child's life and explaining that adoptions provide continuity); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *STAN. L. REV.* 623, 637, 645–46, 667–72 (1976) (highlighting the need for a system that provides children with continuous and stable living arrangements, emphasizing the importance of continuity, and discussing the specific harms that result from temporary placement); cf. Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 *VA. J. SOC. POL'Y & L.* 499, 503, 528, 534 (2005) (questioning whether adoption more effectively achieves permanence than stable kinship foster care).

192. See Chen, *supra* note 13, at 196 (arguing that the inability to relitigate a final adoption judgment creates stability for the adoptive family); Cox, *supra* note 13, at 779 ("Having determined that it would be in the child's best interest to be adopted by the parent or parents, it would be terrible to have that relationship thrown into jeopardy as the family moved or traveled across the country.").

193. See, e.g., GOLDSTEIN, *supra* note 189, at 27–28 (explaining that a healthy psychological parent-child relationship may develop even without a formal adoption); see also Wolff, *supra* note 13, at 2218 (dispelling "the fantasy . . . that gay

recognized parent-child relationship, the would-be parent might not be able to secure employer-provided health insurance for the child; authorize medical care and emergency treatment for her; make educational decisions on her behalf; obtain a Social Security card for the child; or take her on international flights.¹⁹⁴ Thus, it likely would be more difficult for the parent to provide for the child's most basic needs. Moreover, to the extent that the child was aware of the state's refusal to recognize the adoption, she might feel anxiety that could threaten the security of the parent-child relationship. And the adoptee would have no legal entitlement to financial support from the adoptive parent, or the right to inherit from her, or even the right to maintain a parent-child relationship with her if the same-sex couple were to separate or if the adoptee's other parent were to die. In short, the child would lose the legal protections and benefits afforded by the parent-child relationship.¹⁹⁵

5. *The public policy rationale's last hurrah*

Proponents of the public policy rationale argue that even if there are legitimate reasons to require states to recognize standard money judgments regardless of public policy objections, a different rule should apply in cases involving personal status and family relations. The state's "vital interest" in the family relationships of its citizens is "vastly different from the interest it has in an ordinary commercial transaction."¹⁹⁶ Individual Supreme Court justices have argued, in

people . . . will simply cease to exist if they are denied any type of . . . formal acknowledgment"); *id.* at 2246.

194. *See, e.g.*, Anderson, *supra* note 2, at 1, 18 (discussing the effects of non-recognition of legally-recognized parent-child relationships); Chen, *supra* note 13, at 176-77 (discussing how the legal status of an adoptive parent-child relationship provides many benefits to the adopted child); *Oklahoma Health Department, supra* note 98, at 16 (describing Edmund Swaya's concerns); Fagan, *supra* note 99 (same); *see also* Ball, *supra* note 96, at 392 (discussing the implications of Oklahoma's statute); Joan Heifetz Hollinger, *Adoption and Aspiration: The Uniform Adoption Act, the DeBoer-Schmidt Case, and the American Quest for the Ideal Family*, 2 DUKE J. GENDER L. & POL'Y 15, 17 (1995) (describing the consequences of a state's refusal to recognize an adoption).

195. *See, e.g.*, *In re Adoption of C.C.G.*, 762 A.2d 724, 737 (Pa. Super. 2000) (Todd, J., dissenting), *vacated sub nom. In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002) (identifying as the benefits of adoption "the legal protection of the children's existing familial bonds, their rights to financial support from two parents instead of just one, rights to inheritance from each parent and rights to obtain other available dependent benefits").

196. *Sherrer v. Sherrer*, 334 U.S. 343, 358, 359 (1948) (Frankfurter, J., dissenting); *see also* *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) ("Property, personal claims, and even . . . marriage status generally give rise to interests different from those relevant to the discharge of a State's continuing responsibility to children within her borders."); Currie, *supra* note 182, at 9 (noting that "Illinois does not take the same nonchalant attitude toward evasion of its marriage laws as it does toward Delaware incorporation").

separate opinions in divorce and child custody cases, that a state's interest in its families—in the marriages of its citizens and in its children—“prevail[s] over the interest of national unity that underlies the Full Faith and Credit Clause.”¹⁹⁷ And section 103 of the Second Restatement of the Conflict of Laws provides that “[a] judgment rendered in one State . . . need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.”¹⁹⁸

But neither Supreme Court precedent nor section 103 lends much support to this final pitch for a public policy exception for judgments. While Justice Frankfurter's opinion that a state's interest in its citizens outweighs the command of the Full Faith and Credit Clause may resonate with some, it did not receive majority support. The Court's opinions in *Fauntleroy v. Lum* and *Baker v. General Motors Corp.* rejected a general public policy exception for judgments, and its opinion in *Williams v. North Carolina*¹⁹⁹ (*Williams I*) held that even the state of a couple's matrimonial domicile is required by the Full Faith and Credit Clause to recognize a divorce decree of a sister state that frustrates local divorce policy:

[W]hen a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the [F]ull [F]aith and [C]redit [C]lause merely because its enforcement or recognition in another state would conflict with the policy of the latter.²⁰⁰

While conceding that “under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the

197. *May*, 345 U.S. at 536; see *Sherrer*, 334 U.S. at 358 (Frankfurter, J., dissenting) (asserting that a state's power to determine the marital status of two of its citizens should not be foreclosed by a proceeding between the parties in another state, despite the desirability of putting an end to litigation); *Yarborough v. Yarborough*, 290 U.S. 202, 219 (1933) (Stone, J., dissenting) (stating that “full faith and credit does not command that the obligations attached to a status, because once appropriately imposed by one state, shall be forever placed beyond the control of every other state, without regard to the interest in it and the power of control which the other may later acquire.”); cf. *id.* at 213 (majority opinion) (concluding that the Full Faith and Credit Clause applies to an “unalterable decree of alimony for a minor child”).

198. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 103 (1971).

199. 317 U.S. 287 (1942).

200. *Williams I*, 317 U.S. at 303 (1942); see also *id.* at 294, 296 (reiterating the same principle).

decree of a more lax state,” it ultimately concluded that “[s]uch is part of the price of our federal system.”²⁰¹

As long as the rendering state has a meaningful connection with the parties whose personal status is in issue—a condition assured by jurisdictional requirements²⁰²—it too will have an interest in the parties and their status. Where both F1 and F2 have an interest in the parties and F1 renders a judgment respecting their status, F2’s interest does not justify a refusal to recognize F1’s judgment. If the F1 court lacks a meaningful connection with the parties—and therefore lacks jurisdiction—a different result may obtain, which will be considered in below.²⁰³

While section 103 of the Second Restatement of Conflicts appears to sanction a policy analysis in determining the credit owed to a sister-state judgment,²⁰⁴ a comment to the section acknowledges that “[t]he rule of this Section has an extremely narrow scope of application” and will apply only on “extremely rare occasions.”²⁰⁵ Moreover, section 117 of the Second Restatement of Conflicts explicitly rejects a public policy exception for judgments,²⁰⁶ and a comment to section 117 makes clear that “no departure from the command of full faith and credit is permitted by the principles stated in § 103” when the claim underlying a valid sister-state judgment is contrary to the strong public policy of the enforcing state.²⁰⁷ Since section 117 specifically rejects a public policy exception for judgments while section 103 speaks only vaguely about the “important interests of the sister State,” the specific language of section 117 should control over the general language of section 103.²⁰⁸

Even if section 117 did not undercut section 103, however, section 103 would stand on very uncertain footing. The only case cited in the

201. *Id.* at 302; see Taintor, *supra* note 148, at 253–54 (“Once a court admits that the state in which the adoption was worked had legislative jurisdiction to create the status there is no reason why it should refuse to recognize the absolute efficacy of the adoption. How can a foreign adoption be repugnant to the laws or morals of a state?”). For more thorough discussions of *Williams I*, see Cox, *supra* note 13, at 763–68; Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 189–201 (1998).

202. See *supra* notes 148–151; *infra* notes 250–256, 295 and accompanying text.

203. See *infra* discussion Part IV.C.

204. See *supra* text accompanying note 198.

205. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 103 cmt. a, b (1971).

206. *Id.* § 117 (stating that “[a] valid judgment rendered in one State . . . will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim”).

207. *Id.* § 117 cmt. b.

208. See, e.g., *Carchman v. Nash*, 473 U.S. 716, 726 n.4 (1985) (stating that “under normal rules of statutory construction the specific language . . . would control over the general language”).

comment to section 103 is *Williams v. North Carolina (Williams II)*,²⁰⁹ which held that an F2 court may reexamine whether the F1 court had jurisdiction to enter an *ex parte* divorce.²¹⁰ *Williams II* does not support the proposition that a court may decline to recognize a sister-state judgment on policy grounds. Indeed, the late Professor Albert Ehrenzweig flatly stated that section 103 was supported by “no authority whatsoever . . .”²¹¹ Dean Larry Kramer views it as unconstitutional,²¹² and Professor William Reynolds concludes that “section 103 lacks a policy basis.”²¹³

One is left, then, with the argument that the Supreme Court should alter its interpretation of the Full Faith and Credit Clause to permit states to decline to recognize sister-state judgments that violate a deeply held public policy of the enforcing state (if not generally, then at least in cases involving personal status). While one can imagine laws so odious that sister states should not be required to recognize judgments embodying them, such laws likely would violate the Fourteenth Amendment’s Due Process Clause or other provisions of the federal Constitution.²¹⁴ Thus, there should be little need for a public policy exception that would permit states to decline to recognize sister-state judgments.

B. *The Unreliability Rationale*

Those who claim that states retain flexibility to decline to recognize sister-state adoption decrees also invoke the unreliability rationale, which posits that states are not required to recognize adoption decrees issued at the conclusion of non-adversarial proceedings because they have not been tested through adversarial processes. For example, in defending its non-recognition statute in federal court,

209. 325 U.S. 226 (1945).

210. *Id.* at 239; see *infra* notes 343–351 and accompanying text. The Reporter’s Note refers to several additional, mostly non-majority, opinions.

211. Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1240 (1965); see WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 117[a] (3d ed. 2002) (stating that “it is quite doubtful whether § 103 provides an accurate general statement of the law”) (footnote omitted); SCOLES, *supra* note 13, § 24.21, at 1292–93 (describing the limited scope of section 103).

212. Kramer, *supra* note 128, at 2000 n.127.

213. William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 449 (1994).

214. See, e.g., Kramer, *supra* note 128, at 1973, 1989 (noting that “the federal Constitution . . . screens out laws inconsistent with widely shared national values”); Reynolds, *supra* note 213, at 449 (concluding that “a judgment complying with constitutional requirements satisfies our basic fairness and policy norms”). *But see* Rensberger, *supra* note 9, at 42–43 (challenging the assumption that the Constitution “provide[s] only a single permissible answer to all policy questions”).

the state of Oklahoma argued that “an adoption decree is not the type of judgment to which the [Full Faith and Credit] Clause applies,”²¹⁵ but rather is “a matter of contract between the [birth parents and the prospective adoptive parents] and not a judicial proceeding in the usual sense of the word.”²¹⁶ Professor Wardle, too, invokes a “well-established exception to general judgment recognition . . . for judgments that do not result from adversarial judicial proceedings” and quickly adds that “adoptions are not normally adversary proceedings.”²¹⁷ And Professor David Currie has argued, in an article written about same-sex marriage, that interstate recognition of judgments affecting family status should not be required if the proceedings in the rendering state were non-adversarial and the interest of the family’s home state was not protected.²¹⁸

The unreliability rationale appears to rest on two premises and to make two claims. The first underlying premise is that adoption proceedings are non-adversarial in nature, resolved by private agreement rather than by judicial determination.²¹⁹ The second related premise is that courts entertaining adoption petitions apply the forum state’s adoption law without considering the policies underlying the laws of other states that may claim a greater interest in the adoption—such as the state in which the child was born, the birth parents’ state of domicile, or the state in which they executed consents to the adoption—because the adoptive parents advocate or acquiesce in that choice and no adversary appears to advocate in favor of another state’s law.²²⁰

Relying on these premises, the unreliability rationale makes two claims. First, since issue preclusive effect is accorded only to issues that were actually litigated,²²¹ legal and factual determinations underlying adoption decrees are not entitled to issue preclusive effect.²²² Second, because the adoption court in the forum state may

215. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1304 (W.D. Okla. 2006), *aff’d*, 496 F.3d 1139 (10th Cir. 2007) (describing the defendants’ arguments).

216. *Id.* at 1305.

217. Wardle, *supra* note 16, at 583.

218. Currie, *supra* note 182, at 9–10.

219. *Finstuen*, 497 F. Supp. 2d at 1305; see Wardle, *supra* note 16, at 583 (stating that adoption proceedings are typically non-adversarial).

220. Wardle, *supra* note 16, at 611 (noting that “[t]he profound interests of the second state were not considered, weighed, or balanced in the adoption proceeding in the first state that entered the lesbian adoption decree”); see Currie, *supra* note 182, at 9–10 (questioning the obligation to recognize sister-state divorce decrees rendered without an adversarial contest on choice of law).

221. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

222. Wardle, *supra* note 16, at 584–85 (quoting Whitten, *supra* note 13, at 844).

not have even considered, let alone applied, the law of the state that cares most about the adoption triad, its judgment may not be entitled to full faith and credit.²²³ More generally, the rationale contends that because the adoption court's findings and conclusions are untested by the adversarial process, its judgment is not sufficiently reliable to command interstate recognition under the Full Faith and Credit Clause.²²⁴

1. *The inter-relationship between the unreliability rationale and the public policy rationale*

Before examining the premises underlying the unreliability rationale and testing its claims, let us first explore the inter-relationship between the unreliability rationale and the public policy rationale. States routinely recognize and enforce sister-state judgments even where the enforcing state claims an interest in the parties and the controversy that would have justified the application of the enforcing state's substantive law to the controversy. So why do some challenge the state's obligation under the Full Faith and Credit Clause in the interstate adoption context?

As the public policy rationale suggests, a state may bridle against its obligation to respect sister-state adoption decrees (even though it typically recognizes judgments regardless of the offensiveness of the underlying claim) because the state cares more about the family status of its citizens than, say, their right to contract.²²⁵ Moreover, in interstate commercial disputes and other adversarial proceedings, a state's interest in its laws and the policies embodied in them is protected to the extent that one of the litigants argues for the law's application. For example, imagine a Tennessee citizen who worked in Tennessee for a Mississippi corporation with its principal place of business in Mississippi.²²⁶ Further imagine that the worker filed suit against the corporation in Mississippi when it fired her only weeks after she sought workers' compensation benefits under Tennessee law for injuries sustained in Tennessee. If Tennessee law permits recovery for retaliatory discharge while Mississippi law does not, Tennessee could expect the plaintiff-worker to urge the Mississippi

223. Cf. Currie, *supra* note 182, at 9–10 (discussing collusive efforts by spouses to seek a divorce under the more permissive law of a state other than their home state).

224. See Wardle, *supra* note 16, at 583 (claiming that the adoption process lacks "all of the hallmarks of reliability").

225. See, e.g., Sherrer v. Sherrer, 334 U.S. 343, 358 (1948) (Frankfurter, J., dissenting) (maintaining that the state interest in family relations is greater than its interest in everyday commercial transactions).

226. This illustration is loosely based on *Nixon v. Waste Mgmt., Inc.*, 156 Fed. App'x 784 (6th Cir. 2005).

court to apply Tennessee law and to advance the substantive policy it embodies. Even if the Mississippi court declined to apply Tennessee law and granted the defendant's motion to dismiss for failure to state a claim under Mississippi law, Tennessee would fulfill its constitutional obligation to recognize the Mississippi judgment, taking comfort in the fact that the Mississippi court at least considered the application of Tennessee law.²²⁷

In non-adversarial proceedings like uncontested adoption proceedings, on the other hand, the unreliability rationale posits that the petitioners acquiesce in (or affirmatively seek) the application of forum law; no other litigant even suggests that the court should apply another state's law, such as the law of the state in which the adoptee was born or the state in which the birth parents executed their consents. Thus, the threat to important public policies embodied in the adoption laws of non-forum states is exacerbated by the lack of consideration the rendering court pays to the choice-of-law question and the policies and laws of sister states.²²⁸

2. *The premises underlying the unreliability rationale*

a. *Are adoptions judicial proceedings?*

With this understanding of the inter-relationship between the public policy and unreliability rationales in place, let us begin our assessment of the unreliability rationale by first examining its underlying premises. In defending its non-recognition statute, the state of Oklahoma argued that adoption is "a matter of contract between the parties and not a judicial proceeding in the usual sense of the word."²²⁹ It certainly is true that many adoption proceedings are non-adversarial.²³⁰ For example, birth parents may voluntarily relinquish to an agency all rights regarding a child, including legal and physical custody.²³¹ In direct private placements, birth parents

227. See Currie, *supra* note 182, at 9–10 (emphasizing the importance of "an adequate opportunity to protect the state's interest in the original proceeding—reinforced by the possibility of review by the impartial Supreme Court") (footnote omitted).

228. See *id.* at 10 (suggesting that marriages are not entitled to the same deference as judgments in part because they are non-adversarial).

229. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1305 (W.D. Okla. 2006).

230. Of course not all adoption proceedings are uncontested. Occasionally a biological parent will argue that a valid consent was never executed, or she will seek to revoke consent, or she will claim that valid notice of the adoption was not provided. See, e.g., 2 HOLLINGER, *supra* note 13, §§ 8.02[1] & 8.02[2].

231. UNIF. ADOPTION ACT § 2-403, 9 U.L.A. 53 (1994); 1 HOLLINGER, *supra* note 13, § 4.11[2][c].

consent to the adoption of their child by a particular person.²³² Even when the parental rights of the birth parents are terminated in adversary proceedings between the government and the birth parents—due to abuse, neglect, or abandonment, for example—often the judicial termination order issues before the adoption proceedings are commenced.²³³ In such cases, the adoption proceedings that follow are often non-adversarial.²³⁴ In other words, no party to the proceeding opposes the adoption and no party questions whether or how the prospective adoptive parent’s marital status or sexual orientation affects the child’s interests.

But even if many adoption proceedings are uncontested, other important features distinguish them from private agreements and serve the goals of the adversary process. To start with, there is an important difference between a private contract and a determination by a judge that an adoption is in a child’s best interests²³⁵ and meets the state’s other statutory requirements. As a comment to the UAA notes, “[a] judicial determination that a proposed adoption will be in the best interest of the minor adoptee is an essential—and ultimately the most important—prerequisite to the granting of the adoption.”²³⁶ As the district court in the *Finstuen* litigation commented when rejecting the defendants’ argument that adoptions are not judicial proceedings, “adoptions require the sanction of a judicial officer. That ‘sanction’ comes in the form of a judgment”²³⁷ For proof that judges exercise independent judgment even in uncontested adoption proceedings, one need look no further than judicial decisions denying unopposed petitions to adopt.²³⁸

232. UNIF. ADOPTION ACT § 2-102, §§ 2-401 & 2-402, §§ 2-404–2-408, 9 U.L.A. 30–31, 49–62 (1994); 1 HOLLINGER, *supra* note 13, ch. 2 (on consent) & 2-2 (stating that “most adoptions are consensual”).

233. 1 HOLLINGER, *supra* note 13, § 4.04[1]; Wardle, *supra* note 16, at 583.

234. *See* 1 HOLLINGER, *supra* note 13, § 4.04[5].

235. *See* UNIF. ADOPTION ACT § 3-703(a), 9 U.L.A. 94 (1994) (stating that a judge’s finding that the adoption will be in the best interest of the minor is a prerequisite to adoption).

236. *Id.* § 3-703 cmt., 9 U.L.A. 95 (1994); *see* Carbone, *supra* note 2, at 394 (noting that the “presence of the state involves an independent party charged with the responsibility of conducting an investigation to protect the child”) (footnote omitted).

237. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1305 (W.D. Okla. 2006); *see* Am. Fid. Fire Ins. Co. v. Paste-Ups Unlimited, Inc., 368 F. Supp. 219, 225–26 (S.D.N.Y. 1974) (defining the term judgment).

238. *See, e.g., In re Adoption of C.C.G.*, 762 A.2d 724, 727 (Pa. Super. 2000), *vacated*, 803 A.2d 1195 (Pa. 2002) (affirming the denial of an uncontested adoption petition and concluding that the state adoption statute did “not permit a non-spouse to adopt a child where the natural parents have not relinquished their respective parental rights”); *In re Angel Lace M.*, 516 N.W.2d 673, 680–81 (Wis. 1994) (affirming the denial of an adoption petition that was uncontested in the trial court).

Moreover, while one certainly may question the quality of judicial decisions made upon one-sided presentations of the facts,²³⁹ judges in adoption proceedings often are aided by impartial experts who evaluate the prospective adoptive parents and their home to determine the suitability of a placement.²⁴⁰ In agency placements, for example, the adoption agency to which the birth parents relinquish their child will evaluate the needs of the child and screen prospective adoptive parents.²⁴¹ Even in direct placements, where the birth parents select the prospective adoptive parents independently, an increasing number of states require that an officer of the court, an agency, or a licensed professional conducts a pre-placement home study to determine the suitability of the prospective adoptive parents and that a court or an agency finds the prospective adoptive parents to be “qualified” or “acceptable” even before the birth parents transfer physical custody of the child to a non-relative.²⁴² Likewise, the UAA requires an evaluation by a qualified individual of the prospective adoptive parent’s suitability before a child may be placed in the home.²⁴³ Some state statutes also require the court to appoint a guardian *ad litem* to represent the prospective adoptee.²⁴⁴ And federal law requires states to perform “criminal records checks, including fingerprint-based checks of national crime information databases . . . before the . . . adoptive parent may be finally approved

239. See, e.g., William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1445 (2006) (discussing the judge’s “remarkable informational deficit” when parties present a class action settlement for judicial approval); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 479–83 (2000) (noting informational deficiencies that arise in the absence of an adversarial proceeding).

240. Professor Wardle questions the impartiality of these experts, referring to them as “hand-picked [and] sympathetic” or “hand-selected” by the parties. Wardle, *supra* note 16, at 583, 585 n.118. He also questions whether they offer any genuine help to the court, suggesting that they “(usually) only provide the court with the formulaic information (to ‘fill in the blanks,’ as it were) required by statute for the approval of the adoption.” *Id.* at 585 n.118.

241. See, e.g., L. Jean Emery, *Agency Versus Independent Adoption: The Case for Agency Adoption*, 3 THE FUTURE OF CHILDREN 139, 142 (1993) (discussing how agencies benefit both the adoptive child and the prospective parents); see also 1 HOLLINGER, *supra* note 13, §§ 3.03[3], 4.12 (detailing services usually offered by licensed agencies); 2 HOLLINGER, *supra* note 13, § 7.02[2][b] (explaining that agencies ordinarily conduct a study of prospective adoptive parents and their home before approving any adoption).

242. 1 HOLLINGER, *supra* note 13, § 1.05[3][b], at 1–71 & n.43 (citations omitted). Home studies are not always required in step-parent and second-parent adoptions. See *id.* § 4.12 (noting the court’s discretionary power to order such a study); Carbone, *supra* note 2, at 394 & n. 342 (stating that a court would most likely not order a home study where a legal parent consents to adoption by her spouse).

243. UNIF. ADOPTION ACT §§ 2-201–2-207, 9 U.L.A. 40–45 (Part IA 1994).

244. See, e.g., 750 ILL. COMP. STAT. 50/13(B)(a) (2008).

for placement of a child.”²⁴⁵ Indeed, one might argue that because the state is so deeply invested and interested in the status of its citizens, it declines to rely on party presentation of the facts in adoption proceedings, but rather undertakes “an independent investigation of the facts and applicable legal standards.”²⁴⁶

In addition to requiring an evaluation by a qualified professional of the prospective adoptive parent, the UAA requires notice of the adoption proceeding to a number of interested persons, including those whose consent is required; certain putative fathers; those with legal or physical custody of, or a right to visit, the child; and any person who “can provide information that is relevant to the proposed adoption and that the court in its discretion wants to hear.”²⁴⁷ This notice provision is designed to provide the court with access to relevant information in the hands of non-parties.

Thus, the first premise underlying the unreliability rationale is correct to the extent that it posits that adoption proceedings are typically non-adversarial in nature. But it elides the critical roles played by impartial professionals, who gather evidence regarding parental fitness; other interested persons, who share data that inform the court’s judgment; and the judge, who adjudicates the proceedings. The active participation of these non-parties helps ensure the thorough fact-finding and informed decision-making associated with adversary processes.

b. Do courts fail to apply the law of the most interested state?

The second premise underlying the unreliability rationale is that courts entertaining adoption petitions apply the forum state’s adoption law without considering the policies underlying the laws of other states that may claim a greater interest in the adoption. As mentioned previously, it is widely accepted that the court in the forum state may apply its own law in adoption proceedings.²⁴⁸ But to

245. 42 U.S.C. § 671(a)(20)(A) (2006).

246. RESTATEMENT (SECOND) OF JUDGMENTS § 31 cmt. a (1982); *see also id.* cmt. b (stating that the state’s “supervisory interest in the personal and social relationships associated with status . . . is expressed in rules usually requiring that legal formation and dissolution of status be officially reviewed and approved”).

247. UNIF. ADOPTION ACT § 3-401, 9 U.L.A. 77-78 (Part IA 1994).

248. *See supra* note 153 and accompanying text; *see also, e.g.*, Adoption House, Inc. v. P.M., No. 02-12-07TN, 00-37796, 2003 WL 23354141, at *13 (Del. Fam. Ct. Oct. 9, 2003) (applying the forum state’s laws even though the mother’s consent was executed in another state); *In re Adoption of Baby Boy D*, 769 A.2d 508, 511 (Pa. Super. 2001) (recognizing the “dominant interest of the forum state in fixing the prospective adoptive child’s status and relationships”); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 289 (1971) (“A court applies its own local law in determining whether to grant an adoption.”); Interstate Compact on the Placement

the extent that the premise implies that the F1 court fails to apply the law of the most interested state, it is subject to question for at least three reasons. First, in many cases, the birth parents, the child, and the prospective adoptive parents all reside in the same state (F1); the child is born there; and the birth parents execute their consents there. In such purely domestic cases, there is no argument that another state's law should apply so the lack of an adversarial contest is, for these purposes, irrelevant.

If, some time after entry of a final adoption decree, the adoptive family were to move to F2, the law of which bars adoption by gays and lesbians, F1's adoption decree might be deemed to violate F2's public policy. But the lack of an adversarial contest regarding choice of law in the F1 proceeding would add nothing to the public policy rationale discussed in Part IV.A above, because on these facts, no litigant in even the most hotly contested adoption proceeding would have had reason to argue for the application of F2 law. In fact, on this (not uncommon) set of facts, it would have violated both the Due Process and Full Faith and Credit Clauses of the Constitution for the F1 adoption court to have applied the law of any state *other than* F1: "[F]or 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."²⁴⁹ Where all members of the adoption triad reside in F1, the child is born there, and the consents are executed there, no other state has a significant contact creating a state interest that would render choice of its adoption law constitutional.

Second, statutory restrictions on the jurisdiction of courts entertaining adoption petitions ensure that only states that have a meaningful connection with the adoption triad have authority to adjudicate adoption cases and to apply their adoption laws.²⁵⁰ For example, the UAA's goal is to have adoption proceedings "heard in the forum with the closest connections to, and the most substantial

of Children art. III(a) (the "ICPC") (2002), available at <http://icpc.aphsa.org/Home/resources.asp> (requiring compliance with the laws of the receiving state).

249. Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494-95 (2003) (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985)); see Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (holding that a state must have a significant contact or aggregation of contacts for the application of its own substantive law to comport with the Due Process and Full Faith and Credit Clauses).

250. See *supra* notes 148-151 & 202; *infra* notes 251-256 & 295 and accompanying text; Whitten, *supra* note 13, at 825-26.

evidence about, the proposed adoptive family.”²⁵¹ Accordingly, the UAA permits an assertion of jurisdiction by a court in the state in which the child has lived with a parent, guardian, or prospective adoptive parent for at least six months immediately preceding commencement of the adoption proceeding, or, in the case of a child less than six months old, in the state in which the child has lived “from soon after birth” with a parent, guardian, or prospective adoptive parent and “there is available in this State substantial evidence concerning the minor’s present or future care.”²⁵² Similarly, the UCCJA, which some courts apply in determining whether they have jurisdiction to adjudicate adoption proceedings,²⁵³ “limits . . . jurisdiction to the state where the child has his home or where there are other *strong contacts* with the child and his family.”²⁵⁴

Moreover, the Second Restatement of the Conflict of Laws provides that

[a] state has power to exercise judicial jurisdiction to grant an adoption if (a) it is the state of domicil of either the adopted child or the adoptive parent, and (b) the adoptive parent and either the adopted child or the person having legal custody of the child are subject to its personal jurisdiction.²⁵⁵

Thus, while adoption courts may not routinely perform independent choice-of-law analyses, statutory restrictions on jurisdiction ensure that they entertain petitions to adopt and apply their law only if they have a significant relationship with the parties or the issues, which is the very objective of the most widely followed choice-of-law approach (embodied in the Second Restatement of Conflicts).²⁵⁶

251. Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter’s Ruminations*, 30 FAM. L.Q. 345, 369 (1996).

252. UNIF. ADOPTION ACT § 3-101(a)(1), 9 U.L.A. 67 (Part IA 1994); *see id.* §§ 3-101(a)(2)–(3).

253. *See supra* note 150.

254. UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. 264 (1968) (emphasis added); *see* UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(1)–(2), 9 U.L.A. 307 (1968) (listing the situations in which a court has jurisdiction to decide child custody matters); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT § 103, 9 U.L.A. 660 (1997) (stating that the UCCJEA “does not govern an adoption proceeding”).

255. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 78 (1971).

256. The Second Restatement of Conflicts directs courts in many types of cases to apply “the local law of the state which, with respect to [a particular] issue, has the most significant relationship to [the transaction or] occurrence and the parties.” RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 145(1) & 188(1) (1971); *see* Whitten, *supra* note 13, at 817 (concluding that “it is difficult to see how the application of the law of the forum in an adoption case could infringe the interests of another state to the extent necessary to violate the Full Faith and Credit Clause, even under a more rigorous test than the one applied by the plurality in *Allstate*”).

Third, while it is generally true that courts entertaining adoption petitions apply forum law, several courts have acknowledged that “[c]ircumstances might permit or compel a state exercising adoption jurisdiction to defer to the substantial and dominant interest of a foreign state and to apply the law of that state in deciding some or all of the issues.”²⁵⁷ For example, in determining the revocability of a consent executed outside the forum state, the adoption court may apply the law of the state in which the consent was executed rather than the law of the state in which the adoption proceeding is pending. In *In re Appeal in Pima County Juvenile Action*,²⁵⁸ the birth parents executed consents in Arkansas, where the prospective adoptive parents were living at the time.²⁵⁹ Although the prospective adoptive parents later moved to Arizona and filed a petition to adopt there, the Arizona Supreme Court upheld the trial court’s choice of Arkansas law to govern the revocation question, noting that “[f]rom the beginning it was expected that the adoption would take place in Arkansas pursuant to the law of that state. The consent form was captioned and drawn for filing in an Arkansas court. The parties had been advised of their rights based upon Arkansas law.”²⁶⁰ Thus, although it is rarely employed, courts retain the flexibility to apply the law of another state that claims a greater interest in the parties and the proposed adoption than the forum state.²⁶¹

The second premise, then, both overstates the risk that, due to the uncontested nature of many adoption proceedings, a court will apply the adoption law of a state that lacks a significant connection to the adoption triad and understates the court’s flexibility to choose the adoption law of another, potentially more interested, state.

257. *In re Baby Girl P.*, 802 A.2d 1192, 1194 (N.H. 2002) (quoting *In re Adoption of Child by T.W.C.*, 636 A.2d 1083, 1090 (N.J. Super. 1994)); see 1 HOLLINGER, *supra* note 13, § 4.07[4] (explaining the relationship between subject matter jurisdiction and substantive laws concerning consent, relinquishment, and termination in adoption proceedings).

258. 577 P.2d 714 (Ariz. 1978) (en banc).

259. *Id.* at 714–16.

260. *Id.* at 716.

261. To the extent it provides that “the state from which the placement is made may . . . evaluate a projected placement before it is made,” the ICPC appears to contemplate application of the sending state’s law and may limit the potential for prospective adoptive parents to evade the law of the state with the most significant interest in the adoption. See, e.g., *In re Adoption No. 10087*, 597 A.2d 456, 462–63 (Md. Ct. App. 1991).

3. *Claims advanced by the unreliability rationale*

With these reservations about the premises underlying the unreliability rationale in mind, let us turn to the claims advanced by the unreliability rationale.

a. *Are determinations underlying adoption decrees entitled to issue preclusive effect?*

The unreliability rationale's first claim is that the legal and factual determinations underlying adoption decrees are typically not entitled to issue preclusive effect.²⁶² According to section 27 of the Second Restatement of Judgments, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties."²⁶³ As a comment elaborates, an issue is "actually litigated" when it "is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined."²⁶⁴ The Restatement further appears to require that, in order for an issue to be accorded issue preclusive effect, it must have been "actually litigated and determined" in the context of an adversarial proceeding.²⁶⁵ In addition to the "between the parties" language in section 27 itself,²⁶⁶ a comment explicitly states that "issue preclusion is operative where the second action is between the same persons who were parties to the prior action, and *who were adversaries* . . . with respect to the particular issue."²⁶⁷ Furthermore, as another comment explains, "[t]he concept of adversarial litigation is that determination of issues is not full and fair unless a party has an opportunity to present proofs and argument specifically directed to the matters in controversy."²⁶⁸

262. Wardle, *supra* note 16, at 584–85; *see also* Whitten, *supra* note 13, at 844.

263. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); *accord* United States v. Int'l Bldg. Co., 345 U.S. 502, 506 (1953) (requiring an adjudication on the merits in order for a determination to have issue preclusive effect).

264. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. d (1982). Another comment adds that "[a] judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action." *Id.* § 27 cmt. e. This rule, which assures litigants that stipulated facts will not be binding upon them in subsequent litigation, encourages the parties to reduce the acrimony and breadth of a lawsuit, thereby promoting both civility and judicial economy. *Id.*

265. *Id.* § 27.

266. *See supra* text accompanying note 263.

267. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. a (1982) (emphasis added).

268. *Id.* § 38 cmt. a. "Issue preclusion will not apply if "the party sought to be precluded . . . did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." *Id.* § 28(5)(c); *see In re Keaty*, 397 F.3d 264, 272 (5th Cir. 2005) (requiring that the issue have been "contested by the parties"); *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001) (requiring that the party to be precluded have had an incentive to litigate vigorously).

Adoption petitions are not granted on the basis of stipulated facts. The petitioner files a pleading, and the court holds a hearing to determine whether or not the adoption is in the child's best interests.²⁶⁹ The adoption statute may require the court to make additional findings regarding service of notice, execution of consents, and parental suitability, among other issues, before granting the petition.²⁷⁰ While these issues are "raised[] by the pleadings . . . submitted for determination, and . . . determined" by the court and therefore appear to be "actually litigated," they often are determined in the context of non-adversarial proceedings.²⁷¹

In some contexts, courts have accorded issue preclusive effect to findings rendered in the absence of a full adversarial contest. For example, where a defendant answers the complaint, denying its material allegations, but then defaults and the court enters a judgment after a trial at which the plaintiff offers evidence, courts have precluded the defendant from (re)litigating the issues decided against it.²⁷² Likewise, where a divorce decree incorporates an agreement between the spouses stating that a child is the issue of the marriage, courts have precluded the parties from later litigating the child's paternity.²⁷³ But even if courts occasionally accord issue preclusive effect to findings made in non-adversarial proceedings, it seems reasonable to question whether findings made in uncontested adoption proceedings (without even a nominal adversary) should be accorded issue preclusive effect.

Even if we accept the first claim of the unreliability rationale—judicial findings made in uncontested adoption proceedings are (or should be) denied issue preclusive effect—the crux of the interstate

269. *E.g.*, CAL. FAM. CODE § 8612(a) & (c) (West 2004); 750 ILL. COMP. STAT. 50/14(e) (2008); N.Y. DOM. REL. LAW §§ 112-a(2) & 114(1) (McKinney 2008); TEX. FAM. CODE ANN. §§ 162.014(a) & 162.016(b) (Vernon 2002); *see also* UNIF. ADOPTION ACT §§ 3-701 & 3-703(a), 9 U.L.A. 93 (1994).

270. UNIF. ADOPTION ACT § 3-703(a), 9 U.L.A. 94 (Part IA 1994).

271. *See supra* note 264 and accompanying text.

272. *See, e.g.*, *In re Gober*, 100 F.3d 1195, 1205 (5th Cir. 1996) (precluding the litigant from relitigation when he had been actively participating in the litigation for the last two years); *In re Garner*, 56 F.3d 677, 680 (5th Cir. 1995), *abrogated on other grounds*, *In re Caton*, 157 F.3d 1026, 1030 n.18 (5th Cir. 1998) (differentiating between a simple default judgment, where no answer is pled and the defendant is presumed to have admitted all the facts of the case, and a post-answer default judgment, where the merits of the case must still be decided at the hearing); *see also* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4442, at 243 (2d ed. 2002) (stating that "[i]t is far from clear that issue preclusion should be denied simply because the . . . trial [following a post-answer default] was one-sided") (footnote omitted).

273. *See, e.g.*, *Collier v. State*, 454 So. 2d 1020, 1022 (Ala. Civ. App. 1984); *Doe v. Doe*, 52 P.3d 255, 265 (Haw. 2002); *Pratt v. Pratt*, 84 P.3d 545, 550 (Haw. Ct. App. 2004).

recognition issue remains. That is because, as Part II demonstrates, the central question is not whether an adoption decree precludes relitigation of an *issue* that was previously litigated, but rather whether the decree itself—and the alteration in personal status that it effects—must be recognized in other states. Put differently, the question is whether sister states must recognize the “transformational” effect of an adoption decree.

In their treatise on civil procedure, Professors Geoffrey Hazard, John Leubsdorf, and the late Fleming James refer to judgments that determine personal status as transformational because they “transform[] a legal relationship”.²⁷⁴

A judgment transforms or confirms legal relations between the parties to the action in a way that others must recognize, at least until they come forward to assert their own claims through litigation. . . . If a married couple is divorced, the change in their marital status ordinarily may not be contested by others

These effects on the nonparty are not the result of *res judicata* rules as such. They flow from the fact that a judgment not only determines issues and claims but also may redefine the relationships of the parties to the litigation with respect to each other For nonparties, the judgment thus operates much like a privately negotiated contract or conveyance.²⁷⁵

In other words, just as neighbors are “bound,” as a practical matter, if landowner A sells her property to landowner B—they can no longer seek to hold landowner A responsible for maintenance of the property—so the broader community is “bound” if an adoption decree creates a new family.²⁷⁶ As Professor Homer Clark explained,

The reasons for giving adoption the broad effect indicated are that the relationship of parent and child is basic in society, it concerns the immediate parties more intimately than anyone else, and once

274. JAMES ET AL., *supra* note 184, at 30.

275. *Id.* at 715; see RESTATEMENT (SECOND) OF JUDGMENTS § 31(2) (1982) (stating that a judgment in an action determining or changing a person’s status is conclusive upon all other persons regarding that status—subject to certain qualifications, such as a person entitled under substantive law to contest the status, such as a birth mother, is not bound unless she was afforded an opportunity to be a party); *id.* § 31 cmt. f (stating that “[a] status determination is ordinarily binding on non-parties because it effects a transformation of the legal status of the person involved which others have no legal authority to challenge”).

276. See CASAD & CLERMONT, *supra* note 138, at 194 (stating that a judgment that alters status “determines, conclusively with regard to the parties and usually with regard to all other persons as well, the status in question”); 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 21.12, at 691 (2d ed. 1988) (stating that “[a] decree of adoption rendered with jurisdiction is binding with respect to the parent-child relationship which it creates not only upon those who are parties to the proceeding but upon all other persons”) (footnote omitted).

the parent-child relationship is established by the adoption decree everyone must be able to rely upon it.²⁷⁷

The transformational effect of the adoption decree is not mitigated by the non-adversarial nature of the proceedings. After all, even marriages²⁷⁸ and wholly consensual, private transactions, like real estate sales, have this transformational effect, as do *ex parte* divorce decrees.²⁷⁹ Once the family relationship is created (or altered, as in the case of divorce), the need for stability in family relations demands that the status be recognized elsewhere regardless of whether the proceeding was adversarial. As a comment to the Second Restatement of Judgments explains,

The form of these proceedings reflects the state's interest in that they are conducted with the sole or principal purpose of determining status and with a view to making a determination that can be taken as a firm legal premise in all matters in which the status may subsequently be significant. The court usually acts not only as arbiter but as monitor in behalf of a public interest.²⁸⁰

Thus, while the unreliability rationale's first claim—that the legal and factual determinations underlying adoption decrees are not typically entitled to issue preclusive effect—is accurate, it does not alter the obligation of sister states to recognize the transformational effect of adoption decrees.

b. Are final adoption decrees entitled to full faith and credit if the rendering court failed to apply the law of the most interested state?

The second claim made by the unreliability rationale is more questionable. To the extent that the unreliability rationale posits that final adoption decrees are not entitled to full faith and credit because the rendering court may not have applied the law of the most interested state, it is clearly inconsistent with precedent. The Supreme Court has long held that judgments are entitled to full faith and credit even if they embody or reflect significant errors by the rendering court. In *Fauntleroy v. Lum*,²⁸¹ for example, the Supreme

277. 2 CLARK, *supra* note 276, § 21.12, at 691.

278. See RESTATEMENT (SECOND) OF JUDGMENTS § 31 cmt. f (1982) (comparing status determinations with “status changes that parties are free to make without adjudicative proceedings, such as entry into marriage”).

279. See *Williams I*, 317 U.S. 287, 298–99, 301–02 (1942) (discussing the binding nature of *ex parte* divorce decrees). *But cf.* Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 818, 821–23 (2000) (questioning the constitutionality of the status exception to standard rules governing personal jurisdiction). The transformational effect of same-sex marriages is limited outside the state of celebration by the DOMA and state DOMAs.

280. RESTATEMENT (SECOND) OF JUDGMENTS § 31 cmt. b (1982).

281. 210 U.S. 230 (1908); see discussion *supra* Part IV.A.3.

Court held that the Full Faith and Credit Clause required Mississippi to enforce a Missouri judgment even if the judgment “was based upon a mistake of law” or “went upon a misapprehension of the Mississippi law.”²⁸² In fact, even if the rendering court makes a mistake of constitutional dimension—by applying its own law in violation of the Due Process Clause or the Full Faith and Credit Clause or by failing to recognize a sister-state judgment in violation of the Full Faith and Credit Clause—its judgment is nevertheless entitled to recognition in other states under the Full Faith and Credit Clause.²⁸³

It may be that the rendering state’s failure to apply another state’s law forbidding adoption by gays and lesbians may result from the parties’ conscious choice of a sympathetic forum and their acquiescence in (if not encouragement of) the application of favorable forum law. Because the adoption proceeding is uncontested, no litigant advocates the policy against adoption by gays and lesbians embodied in the law of another potentially interested state. But the forum’s failure to consider or apply the law of a more interested jurisdiction does not deprive the judgment of its preclusive effect.

Judgments in non-adversarial proceedings are entitled to interstate recognition even if the law of an interested state was overlooked because no litigant encouraged the court to apply it.²⁸⁴ Supreme Court precedent establishes that consent judgments are entitled to claim preclusive effect in the rendering state and, under the Full Faith and Credit Clause and statute, in sister states and in federal

282. *Fauntleroy*, 210 U.S. at 237 (citations omitted); see *Am. Express Co. v. Mullins*, 212 U.S. 311, 314 (1909) (“A judgment is conclusive as to all the *media concludendi*; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of the law.”) (quoting *Fauntleroy*, 210 U.S. at 237) (internal citation omitted).

283. See, e.g., *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 76–78 (1939); *Thoma v. Thoma*, 934 P.2d 1066, 1070–71 (N.M. Ct. App. 1996); *Hamilton v. SCM Corp.*, 334 N.W.2d 688, 692 (Wis. 1983); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 106 (1971) (“A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment”); see also Whitten, *supra* note 13, at 817 (“The parties to the adoption proceeding would . . . be precluded from attacking a judgment of adoption in another state on the grounds that the judgment-rendering state incorrectly or unconstitutionally applied its own law, even if such an objection would have been available in the adoption proceeding itself.”).

284. See 2 CLARK, *supra* note 276, § 21.12, at 692 (stating that sister-state adoption decrees “should be recognized pursuant to the Full Faith and Credit Clause regardless of differences in the law of adoption and in fact some courts have done so even where the forum law would not have authorized the granting of an adoption under the circumstances”) (footnotes omitted).

court,²⁸⁵ even if the parties acquiesced in the application of forum law. For example, in *Matsushita Electric Industrial Co. v. Epstein*,²⁸⁶ a Delaware state court entered a judgment approving the settlement of a class action, which purported to settle all claims arising out of the contested conduct, including claims under the federal securities laws, which the state court lacked subject matter jurisdiction to adjudicate.²⁸⁷ Having concluded that, under Delaware law, the state court judgment would have precluded litigation of claims within the federal court's exclusive jurisdiction, the Supreme Court then considered whether the exclusive jurisdiction provision of the Securities Exchange Act effected a partial repeal of section 1738, the full faith and credit statute.²⁸⁸ This step would have been unnecessary unless section 1738 compels courts to give claim preclusive effect to consent judgments entered without consideration or application of the law of an interested jurisdiction.

Even in the context of divorce litigation—where the state's interest in its citizens is very strong—the Supreme Court has held that a judgment is entitled to full faith and credit as long as the rendering court had jurisdiction, even if the proceeding was non-adversarial and no one questioned the forum's application of its own divorce law.²⁸⁹ This is true even though divorce proceedings alter the civil status of the litigants: courts entertaining divorce actions typically apply forum law without considering the possibility that another state might claim a greater interest in the parties or their marriage,²⁹⁰ and divorce actions can be uncontested and non-adversarial.

285. See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 369 (1996) (holding that a federal court cannot withhold full faith and credit from a state-court judgment “simply because the settlement releases claims within the exclusive jurisdiction of the federal courts”); *Laylor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327 (1955) (concluding that a dismissal with prejudice had res judicata effect); *United States v. Int'l Bldg. Co.*, 345 U.S. 502, 506 (1953) (concluding that a consent judgment had res judicata effect); see also *CASAD & CLERMONT*, *supra* note 138, at 82 (stating that the doctrine of claim preclusion applies to default judgments and dismissals); 18A *WRIGHT*, *supra* note 272, § 4443, at 265 (stating that generally, a consent judgment will sustain a claim preclusion).

286. 516 U.S. 367 (1996).

287. 516 U.S. at 370–72.

288. *Id.* at 380.

289. See generally *Williams v. North Carolina*, 317 U.S. 287 (1942) (holding that a divorce decree granted in Nevada to North Carolina residents that met the requirements of procedural due process of law was entitled to full faith and credit in North Carolina, even though the decree conflicted with North Carolina policy).

290. See, e.g., *RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS* § 285 (1971) (“The local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce.”); 2 *CLARK*, *supra* note 276, § 14.1, at 2; *SCOLES*, *supra* note 13, § 15.4, at 630–31; Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 *WM. & MARY L. REV.* 1, 13, 19 & n.82, 20 & n.86 (1997).

The concern articulated by Professor Currie—that the parties may collude to bring a status proceeding in a jurisdiction with law that contravenes the policy of their home state²⁹¹—is legitimate. But the adoption court will have jurisdiction to entertain an adoption petition and authority to apply its own adoption law only if it has a meaningful connection with the adoption triad.²⁹² The home study, which is prepared by an impartial professional to assess the quality of the home to be provided by the prospective adoptive parents, should uncover cases in which the petitioners lack any meaningful connection to the forum state. And the availability of a collateral attack for judgments rendered without jurisdiction may assuage Professor Currie’s concerns. It is to the jurisdictional rationale for non-recognition that we now turn.

C. *The Jurisdictional Rationale*

The jurisdictional rationale maintains that adoption decrees rendered by courts lacking subject matter jurisdiction are not entitled to recognition in other states.²⁹³ The jurisdictional rationale rests on three prongs: first, the judgment of a court lacking subject matter jurisdiction is not entitled to full faith and credit; second, the enforcing court itself is free to determine whether the rendering court had subject matter jurisdiction; and third, in determining whether the rendering court had subject matter jurisdiction, the enforcing court is not bound by the jurisdictional findings, if any, made by the rendering court itself. This Article will unpack each of these prongs in turn.

Before doing so, let us first differentiate between the two distinct meanings of the term “subject matter jurisdiction.” First, *true subject matter jurisdiction* refers to a court’s competence to adjudicate a general type of dispute, such as controversies between citizens of different states or disputes in which the amount in controversy is less (or more) than a given monetary amount.²⁹⁴ Second, in the context of litigation affecting family status, courts, legislatures and scholars also use the term subject matter jurisdiction to refer to the required

291. Currie, *supra* note 182, at 7.

292. See *supra* notes 148–151, 250–256 and accompanying text.

293. See, e.g., *Russell v. Bridgens*, 647 N.W.2d 56, 58–59 (Neb. 2002) (describing the trial court’s refusal to recognize a sister-state adoption decree for lack of subject matter jurisdiction).

294. BLACK’S LAW DICTIONARY 857 (7th ed. 1999); see, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 11 & cmt. a (1982) (defining subject matter jurisdiction); CASAD & CLERMONT, *supra* note 138, at 250 (same). Professor Whitten refers to this type of subject matter jurisdiction as “local subject matter jurisdiction.” Whitten, *supra* note 13, at 818–19.

nexus between the rendering state and the individuals whose status is in issue, which ensures that the state has a sufficient interest to make a status determination.²⁹⁵ I have previously expressed reservations about the appropriateness of a subject matter jurisdiction label to describe this nexus.²⁹⁶ But because courts, legislatures and family law scholars have treated this nexus as a subject matter jurisdiction requirement, we shall refer to it as *territorial subject matter jurisdiction*. Although different complications may arise regarding true and territorial subject matter jurisdiction respectively, at bottom the jurisdictional rationale maintains that a lack of either type of subject matter jurisdiction renders an adoption decree vulnerable to collateral attack in the enforcing state.

In the first instance, the legislature or even the governing constitution determines a court's true subject matter jurisdiction.²⁹⁷ While courts sometimes use the term "jurisdictional" to refer to time restrictions in procedural rules and other non-jurisdictional requirements,²⁹⁸ the Supreme Court has been critical of the practice, calling it "confounding,"²⁹⁹ "anomalous,"³⁰⁰ and "less than meticulous."³⁰¹ Indeed, the Court has gone so far as to "describe[] such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the . . . court had authority to adjudicate the claim in suit."³⁰²

295. See, e.g., *Durfee v. Duke*, 375 U.S. 106, 112 (1963) (citing *Sherrer v. Sherrer*, 334 U.S. 343 (1948), and *Davis v. Davis*, 305 U.S. 32 (1938), as examples of cases involving challenges to the rendering court's subject matter jurisdiction); *In re Marriage of Newsome*, 80 Cal. Rptr. 2d 555, 559 (Cal. Ct. App. 1998) (identifying the UCCJA as "[t]he exclusive method of determining subject matter jurisdiction in custody cases in California") (citation omitted); Whitten, *supra* note 13, at 825 (explaining that territorial connections for adoption jurisdiction are characterized as subject-matter jurisdiction); see also RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. b (1982) ("When a court exercises jurisdiction based on a relationship to a thing . . . it may be said that the thing . . . is the 'subject matter' of the adjudication."); *supra* notes 250–256 (describing statutory requirements for jurisdiction in adoption proceedings).

296. Wasserman, *supra* note 279, at 857 n.225.

297. See, e.g., *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (stating that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction").

298. See, e.g., *United States v. Robinson*, 361 U.S. 220, 229 (1960) ("The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional."); see also *Kontrick*, 540 U.S. at 454 (noting that "[c]ourts . . . have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court"); cf. *Steel Co. v. Citizens for A Better Env't*, 523 U.S. 83, 90 (1998) (observing that the term "jurisdiction" has too many meanings).

299. *Kontrick*, 540 U.S. at 455.

300. *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring).

301. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006); see also *id.* at 510 (admitting that the Court "has sometimes been profligate in its use of the term ['jurisdiction']").

302. *Id.* at 511 (quoting *Steel Co.*, 523 U.S. at 91).

Although not always following its own advice,³⁰³ the Supreme Court has urged courts and litigants to restrict use of the term “jurisdictional” to “prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”³⁰⁴ Thus, in determining whether a court has true subject matter jurisdiction, the central question is whether the court has authority to decide disputes of the general class presented.

1. Prong 1: Judgments rendered without subject matter jurisdiction are not entitled to full faith and credit

With this understanding of subject matter jurisdiction in mind, let us turn to the first prong of the jurisdictional rationale, which posits that a judgment rendered by a court lacking jurisdiction is not entitled to full faith and credit. This prong is well accepted. The Supreme Court has often stated that the judgment of a court lacking subject matter jurisdiction to resolve the matter before it is not entitled to full faith and credit.³⁰⁵ This principle is codified in both the Second Restatement of Judgments³⁰⁶ and in the Second Restatement of Conflicts.³⁰⁷ Since a judgment rendered by a court lacking competence is void in the rendering state itself, this prong of

303. See *Bowles v. Russell*, 127 S. Ct. 2360, 2363–66 (2007) (characterizing a statutory time limit for taking an appeal as “mandatory and jurisdictional”); see also *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008) (noting that the Court has “often read the time limits of . . . statutes as more absolute,” and “[a]s convenient shorthand, . . . has sometimes referred to [them] as ‘jurisdictional’” (citation omitted)).

304. *Kontrick*, 540 U.S. at 455; accord *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 504 (2006); *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). But see *Bowles*, 127 S. Ct. at 2362, 2366 (holding that a statutory time limit for filing an appeal was jurisdictional).

305. See, e.g., *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704–05 (1982); *Nevada v. Hall*, 440 U.S. 410, 421 (1979); *Durfee v. Duke*, 375 U.S. 106, 110 (1963); *Thompson v. Whitman*, 85 U.S. 457, 464–69 (1873); see also *CASAD & CLERMONT*, *supra* note 138, at 250 (making clear that the law allows for collateral attacks when a court lacked jurisdiction); *RICHMAN & REYNOLDS*, *supra* note 211, § 115[d] (stating that a court must have jurisdiction for its judgment to be entitled to full faith and credit); cf. *Kontrick*, 540 U.S. at 455 n.9 (stating that “[e]ven subject-matter jurisdiction . . . may not be attacked collaterally”) (citation omitted).

306. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 81 (1982) (“[T]he court rendering the judgment [must] have had territorial jurisdiction and jurisdiction of the subject matter of the action”); see also *id.* §§ 1, 11, 12, 65 & 69.

307. See *RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS* § 105 (1971) (“A judgment rendered by a court lacking competence to render it and for that reason subject to collateral attack in the state of rendition will not be recognized or enforced in other states.”).

the jurisdictional rationale merely establishes that other states need not recognize or enforce it either.³⁰⁸

But if it is well accepted that a judgment rendered without jurisdiction is not entitled to full faith and credit, it is equally well established that a judgment is impervious to collateral attack where the rendering court had jurisdiction but erred in making a finding of fact or conclusion of law that did not go to its jurisdiction.³⁰⁹ Rather, any mistake that a rendering court makes in the interpretation or application of substantive law, in choice of law, in an evidentiary ruling, or even in a decision to accord or deny a prior judgment full faith and credit must be corrected (if at all) on appeal or through an alternate method of direct review, such as a motion to vacate. Mistakes that do not affect the court's jurisdiction cannot be raised collaterally (in the rendering state or in a sister state).³¹⁰ Thus, the jurisdictional rationale is available only where the rendering court lacked jurisdiction, not where it made a mistake of substantive law.³¹¹

Although the Supreme Court has acknowledged that in some cases there may be difficulty distinguishing between limitations on a court's subject matter jurisdiction and limitations on a party's right to recover under substantive law,³¹² it nevertheless has emphasized the importance of the difference:

[T]he [theoretical] distinction between the two is plain. One goes to the power, the other only to the duty, of the court. . . . Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction, and deals with a matter upon which that court must pass, we naturally are slow to read

308. See *id.* at cmt. a (noting that a judgment by a court lacking subject matter jurisdiction will not be recognized in other states); *Underwriters Nat'l Assurance Co.*, 455 U.S. at 704 n.10 (noting that a state may refuse to enforce a sister state judgment rendered without jurisdiction).

309. See, e.g., RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 106 (1971) ("A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment . . ."); RICHMAN & REYNOLDS, *supra* note 211, § 114, at 375 (explaining that a decision by a court with proper jurisdiction will be entitled to full faith and credit, even if it embodies a mistake of law or fact).

310. RICHMAN & REYNOLDS, *supra* note 211, § 114, at 375.

311. See, e.g., *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513–14 (2006) (emphasizing the distinction between "jurisdictional" and "merits" issues); see also RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (1982) (analyzing the distinction between a lack of subject matter jurisdiction and "mere error").

312. See *Arbaugh*, 546 U.S. at 516 (distinguishing between matters that concern jurisdiction and matters that concern the merits of a case); *Fauntleroy v. Lum*, 210 U.S. 230, 234–35 (1908) ("No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits . . .").

ambiguous words as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide.³¹³

Thus, while legislatures are free to define particular statutory requirements as jurisdictional,³¹⁴ when they fail to do so explicitly, courts should refrain from treating them as jurisdictional.³¹⁵ This is so because the consequences of labeling a requirement as jurisdictional are so significant: a jurisdictional requirement cannot be waived or forfeited; the rendering court must raise jurisdictional issues *sua sponte*, the judge, rather than the jury, may determine contested jurisdictional facts; and, if the jurisdictional defect is not identified until after judgment is rendered, precious judicial resources will be wasted if the judgment is set aside for lack of jurisdiction.³¹⁶

Returning to the matter at hand, if a state statute were to deny courts jurisdiction to approve adoption petitions submitted by gay individuals or same-sex couples (and if such a statute were to withstand a constitutional challenge), then a judgment of a court in that state approving an adoption petition in favor of a gay individual or same-sex couple would be subject to collateral attack for lack of jurisdiction—at least in the absence of a (mistaken) determination by the rendering court that it had jurisdiction.³¹⁷ But statutory restrictions on parental qualifications to adopt that are not explicitly jurisdictional in nature should not be construed as limiting a court's competence or authority to grant adoptions, but rather—in the Supreme Court's words—as defining its duty.³¹⁸ In other words, if a court with authority to entertain adoption petitions were to finalize a

313. *Fauntleroy*, 210 U.S. at 235; see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (stating that “the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case”) (citation omitted); *Cement Masons Health & Welfare Trust Fund v. Stone*, 197 F.3d 1003, 1008 (9th Cir. 1999) (distinguishing between a dismissal on the merits and a dismissal for lack of subject matter jurisdiction); *Russell v. Bridgens*, 647 N.W.2d 56, 62 (Neb. 2002) (Gerrard, J., concurring) (same).

314. See *Arbaugh*, 546 U.S. at 514 (conceding that “Congress could make the employee-numerosity requirement [of Title VII] ‘jurisdictional,’ just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction”).

315. See *id.* at 516 (stating that “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character”).

316. See *id.* at 514–15.

317. See *infra* part IV.C.3 (considering whether the rendering court's determination that it has jurisdiction may be reexamined in the enforcing court).

318. *Fauntleroy*, 210 U.S. at 234–35 (distinguishing between jurisdiction, which “goes to the power” of the court, and the merits, which go “only to the duty, of the court”).

second-parent adoption, notwithstanding a statutory duty to approve adoption petitions only if both biological parents relinquished their parental rights, the court would retain subject matter jurisdiction and its decree would be entitled to full faith and credit. The mistake would have to be corrected on appeal or by way of a motion to open the judgment in the rendering court.³¹⁹

It is precisely this distinction between jurisdiction and duty that Justice Gerrard of the Nebraska Supreme Court emphasized in his concurring opinion in *Russell v. Bridgens*,³²⁰ the child custody case described above.³²¹ There, a Pennsylvania court granted a petition to adopt, submitted by a woman who previously had adopted the child, along with the woman's same-sex partner. Years after the second adoption petition was granted, the women separated and one sued the other in a Nebraska court seeking child custody. The original adoptive mother argued that the Pennsylvania court in the second adoption proceeding had failed to comply with the Pennsylvania adoption statute by failing to require the relinquishment of her parental rights before approving the co-parent adoption.³²² This mistake, she argued, deprived the Pennsylvania court of subject matter jurisdiction and rendered its judgment subject to collateral attack. The Nebraska trial court agreed, concluding that the Pennsylvania court "lacked subject matter jurisdiction to grant the adoption and . . . therefore, the adoption was not entitled to full faith and credit under the U.S. Constitution."³²³ The Nebraska Supreme Court reversed, concluding that the movant had not properly supported the motion for summary judgment because she failed to

319. See *In re Infant Girl W.*, 845 N.E.2d 229, 246 (Ind. Ct. App. 2006) (finding that an adoption decree entered by a court with both personal and subject matter jurisdiction cannot be impeached collaterally); *Schott v. Schott*, 744 N.W.2d 85, 89 (Iowa 2008) ("Because it was a court of general jurisdiction, it necessarily had subject matter jurisdiction to grant the adoptions. . . . Even if the [rendering] court . . . misinterpreted Iowa's adoption statute, the adoptions are not void.") (citation omitted); *Goodson v. Castellanos*, 214 S.W.3d 741, 748 (Tex. App. 2007) (stating that even if the rendering court "erred in issuing the adoption decree, the error was based on an erroneous construction of statutes, and the judgment would be based on an erroneous holding of substantive law. These errors would not deprive the district court of jurisdiction over the adoption and would not render the decree void.") (citations omitted).

320. See 647 N.W.2d 56, 61 (Neb. 2002) (Gerrard, J., concurring) ("I would, however, reverse the judgment of the district court based on my view that the Pennsylvania adoption decree was entered by a court with subject matter jurisdiction and is entitled to full faith and credit in Nebraska.").

321. See *supra* Part II.A (explaining the holding in *Russell*).

322. 647 N.W.2d at 58.

323. *Id.* (describing the district court's decision).

prove that she had not relinquished her parental rights in the rendering court.³²⁴

In his concurrence, Justice Gerrard distinguished between subject matter jurisdiction and the substantive relinquishment requirement. Gerard concluded that because a Pennsylvania statute explicitly granted the courts of common pleas original jurisdiction over adoption proceedings,³²⁵ the rendering court “had jurisdiction over adoption cases generally and entered a decree of adoption and that decree became a final judgment not subject to collateral attack on the ground of subject matter jurisdiction,” even if the rendering court had erred by failing to require that the original adoptive mother relinquish her parental rights.³²⁶ Thus, while the first prong of the jurisdictional rationale is well accepted—the judgment of a court lacking subject matter jurisdiction is not entitled to full faith and credit—it does not permit collateral challenges for alleged mistakes unrelated to the rendering court’s jurisdiction.

2. *Prong 2: The enforcing court may determine whether the rendering court had subject matter jurisdiction*

Like the first prong of the jurisdictional rationale, the second prong is generally well accepted: the Supreme Court has long recognized that “a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court’s jurisdiction to render that judgment.”³²⁷ Thus, if a Nebraska court is asked to recognize an adoption finalized in Pennsylvania, Nebraska may question whether the Pennsylvania court in fact had competence over adoption proceedings and whether it had the requisite connection to the parties to support territorial subject matter jurisdiction.³²⁸

From a policy perspective, since collateral attacks for lack of jurisdiction “almost always” question the court’s personal jurisdiction

324. *Id.* at 60.

325. See 23 PA. CONS. STAT. ANN. § 2301 (West 2001) (identifying the proper court in Pennsylvania for adoption proceedings).

326. *Russell*, 647 N.W.2d at 62 (Gerrard, J., concurring). It would have been ironic if the Nebraska Supreme Court had concluded that the Pennsylvania trial court had lacked subject matter jurisdiction given that, less than two months after *Russell* was decided, the Pennsylvania Supreme Court held that the Pennsylvania adoption statute “afford[ed] the trial court discretion to decree the adoption without termination of the legal parent’s rights.” *In re R.B.F.*, 803 A.2d 1195, 1202 (Pa. 2002).

327. *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

328. See, e.g., *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 705 (1982) (explaining that full faith and credit does not have to be given to a judgment if the rendering court lacked jurisdiction); *Thompson v. Whitman*, 85 U.S. 457, 469 (1873) (same).

over the defendant (rather than its subject matter jurisdiction),³²⁹ it makes sense to permit the collateral attack to be raised outside the rendering state. After all, a defendant who claims that it would be unfair to compel her to defend before a court in the (distant and inconvenient) rendering state should not have to travel there to challenge personal jurisdiction; she should be free to question the judgment's invalidity in her home state "or at least in a forum no more inconvenient to [her] than to the opposing party."³³⁰

On the other hand, when a judgment is challenged for lack of subject matter jurisdiction, the fairness argument in favor of a collateral challenge outside the rendering state is not as compelling.³³¹ It would not be unfair to compel the defendant to travel to the rendering state to challenge subject matter jurisdiction, since she presumably has minimum (or greater) contacts there. In fact, as a comment to the Second Restatement of Judgments suggests, "considerations of convenience and comity may indicate that the attack should be resolved in the rendering court."³³² Since the rendering state's own law determines its jurisdiction and since courts in the rendering state will be more familiar with its jurisdictional law than courts in other states, arguably it would make more sense to permit a court in the rendering state to review any challenge to subject matter jurisdiction and to expect other states to respect and honor that jurisdictional determination.

But even if the policy justification for permitting the enforcing court to examine the rendering court's subject matter jurisdiction is weak, its authority to do so is well established. Thus, given existing precedent, few would question a Nebraska court's authority to examine whether a Pennsylvania court had subject matter jurisdiction when asked to recognize its adoption decree.

3. *Prong 3: The scope of the enforcing court's inquiry*

The real question, then, is the scope of the inquiry that the enforcing court is permitted to make in assuring itself that the rendering court had subject matter jurisdiction.³³³ To the extent that the third prong of the jurisdictional rationale posits that the enforcing court is free to reexamine the jurisdictional question

329. RESTATEMENT (SECOND) OF JUDGMENTS § 81 cmt. b (1982).

330. *Id.*

331. *See id.* (positing that the rendering court is the proper court to hear attacks based on "lack of subject matter jurisdiction").

332. *Id.*

333. *See Durfee v. Duke*, 375 U.S. 106, 111 (1963) (stating that the Court has "carefully delineated the permissible scope" of the enforcing court's inquiry regarding the rendering court's jurisdiction).

without regard to the findings of the rendering court, it is unsupported by both doctrine and policy. A well-established body of Supreme Court precedent establishes that “[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.”³³⁴ In particular, if a party appears before the rendering court and contests either the court’s personal jurisdiction over her or its subject matter jurisdiction, standard principles of issue preclusion bar her from relitigating the jurisdictional issue in the rendering state.³³⁵ This doctrine advances the sound policy objectives that underlie preclusion doctrine generally: finality, efficiency, and consistency needed to maintain confidence in the integrity of the judicial process.³³⁶

The Full Faith and Credit Clause and corresponding statute extend this issue preclusive effect throughout the nation by requiring other states to give the judgment the same issue preclusive effect that it would have in the rendering state.³³⁷ As the Supreme Court stated in *Durfee v. Duke*,³³⁸ “a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court’s inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.”³³⁹

But the doctrine of issue preclusion, even bolstered by the Full Faith and Credit Clause, is not likely to preclude relitigation of an adoption court’s subject matter jurisdiction because, as established above,³⁴⁰ factual and legal determinations are entitled to issue preclusive effect only “[w]hen an issue . . . is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.”³⁴¹ As the unreliability rationale posits, adoption proceedings are typically non-adversarial in nature,³⁴² and it is highly unlikely that either partner would challenge the adoption

334. *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 706 (1982) (citations omitted).

335. *See, e.g., Durfee*, 375 U.S. at 111–14 (barring relitigation of the rendering court’s subject matter jurisdiction); *Stoll v. Gottlieb*, 305 U.S. 165, 172 & 177 (1938) (same); *Davis v. Davis*, 305 U.S. 32, 40 (1938) (same); *Baldwin v. Iowa State Traveling Men’s Ass’n*, 283 U.S. 522, 525–26 (1931) (same).

336. *See, e.g., Durfee*, 375 U.S. at 111–12 (stating that there should be an end to litigation and that parties should be bound by the decisions of a court before which they appeared); *Baldwin*, 283 U.S. at 525–26 (same).

337. *See, e.g., Durfee*, 375 U.S. at 109.

338. 375 U.S. 106 (1963).

339. *Id.* at 111; *accord Underwriters Nat’l Assurance Co.*, 455 U.S. at 704–05 (finding that courts must fulfill the constitutional mandate of the Full Faith and Credit Clause by upholding the validity of decisions of other states’ courts).

340. *See* discussion Part IV.B.3.a.

341. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); *see* discussion *supra* Part IV.B.3.a (discussing the “actually litigated” requirement for issue preclusion).

342. *See supra* notes 230–234 and accompanying text.

court's subject matter jurisdiction when submitting a second-parent adoption petition. In the absence of an adversarial contest on the issue of subject matter jurisdiction, any finding that the rendering court might have made regarding its subject matter jurisdiction would not (or might not) be entitled to issue preclusive effect in the rendering state and, therefore, would not be binding in the enforcing state.³⁴³

Even if the doctrine of issue preclusion does not preclude reexamination of the rendering court's subject matter jurisdiction, however, the doctrine of claim preclusion may. As a general rule, a defendant cannot seek to collaterally attack a judgment by raising defenses that might have been raised in the first action.³⁴⁴ This general rule applies even where the defendant seeks to challenge the rendering court's subject matter jurisdiction.³⁴⁵ For example, in *Chicot County Drainage District v. Baxter State Bank*,³⁴⁶ the United States Supreme Court considered whether bond holders could challenge, for lack of subject matter jurisdiction, a federal court judgment that had readjusted the indebtedness of the Chicot County Drainage District ("District").³⁴⁷ The District had issued bonds in 1924 but had been in default since 1932. Pursuant to a federal bankruptcy statute enacted in 1934, which authorized municipal debt readjustment, the District had filed suit in the United States District Court for the Eastern District of Arkansas, seeking approval of a plan pursuant to which the Reconstruction Finance Corporation would purchase the outstanding bonds from the bond holders. The decree approving the plan provided bond holders with one year in which to submit their claims but otherwise canceled the old bonds and enjoined the bond holders from asserting claims on them.³⁴⁸

343. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1982) (explaining that a judgment is not conclusive regarding issues that were not actually litigated); accord Whitten, *supra* note 13, at 844 (arguing that in a non-adversarial proceeding, the "actual litigation" requirement is likely not satisfied).

344. RESTATEMENT (SECOND) OF JUDGMENTS § 18(2) (1982).

345. See, e.g., *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) (stating, in dicta, that "[a] party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment"); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940) (stating that "the authority to pass upon [the court's] own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action" (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171, 172 (1938))).

346. 308 U.S. 371 (1940).

347. *Id.* at 372, 376.

348. *Id.* at 373.

Notwithstanding this decree, several bondholders later filed suit against the District in the same court to recover on the old bonds.³⁴⁹ The District argued that the prior decree precluded the second suit. In response, the bond holders contended that the decree was void because after it was entered, the Supreme Court had declared unconstitutional the federal bankruptcy law authorizing municipal debt readjustment.³⁵⁰ In the bond holders' view, the law struck down was "inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree."³⁵¹ Moreover, because the federal court had been sitting as a bankruptcy court and its jurisdiction had been limited by the statute later declared unconstitutional, the bond holders argued that "the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack."³⁵²

In rejecting this argument, the Supreme Court noted that, even though all federal courts are of limited jurisdiction, they have "authority . . . to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act"; their jurisdictional determinations are "open to direct review[] [but] may not be assailed collaterally."³⁵³ If the bond holders had challenged the validity of the statute or the court's jurisdiction in the initial proceeding, the district court's "determination would have been final save as it was open to direct review upon appeal."³⁵⁴

The Court rejected the argument that the bond holders were "privileged to remain quiet and raise [the jurisdictional defense] in a subsequent suit,"³⁵⁵ noting that claim preclusion bars presentation not only of matter actually presented in the earlier litigation, but also of "any other available matter which might have been presented to that end."³⁵⁶ Since the bond holders could have questioned the rendering court's subject matter jurisdiction in the initial proceeding (even though the Supreme Court had not yet declared the underlying statute unconstitutional), they were bound by the judgment and precluded from challenging the court's jurisdiction in a collateral proceeding.

349. *Id.* at 372-73.

350. *Id.* at 373-74.

351. *Id.* at 374 (citations omitted).

352. *Id.* at 376.

353. *Id.*

354. *Id.* at 378 (citation omitted).

355. *Id.*

356. *Id.* (citations omitted).

If *Chicot County* demonstrates the limited scope of the inquiry that an enforcing court is permitted to make in assuring itself that the rendering court had true subject matter jurisdiction, a number of other Supreme Court cases decided in the divorce context establish the limited scope of the inquiry regarding the rendering court's territorial subject matter jurisdiction. In the divorce context, where territorial subject matter jurisdiction is predicated upon the domicile of one of the spouses in the rendering state,³⁵⁷ the Court has held that a spouse who challenged the rendering court's subject matter jurisdiction in the rendering court could not relitigate jurisdiction in a court of a different state.³⁵⁸ Likewise, the Court has held that a spouse who appeared before the rendering court and had a "full opportunity to contest the jurisdictional issues" but failed to do so was precluded from collaterally attacking the divorce decree in another state for lack of subject matter jurisdiction.³⁵⁹ Indeed, the Court has gone so far as to hold that a party served within the rendering state (and therefore subject to personal jurisdiction) who declined to enter an appearance is precluded from challenging the rendering court's territorial subject matter jurisdiction in a collateral proceeding.³⁶⁰ Thus, both claim and issue preclusion apply to jurisdictional determinations, thereby dramatically limiting the scope of the inquiry that a court in the enforcing state may undertake to determine whether or not the rendering court had subject matter jurisdiction. In *inter partes* divorce cases in particular (where both parties are subject to the rendering court's personal jurisdiction), a collateral attack for lack of territorial subject matter jurisdiction is unavailing.³⁶¹

Applying this body of precedent to the adoption context, it would appear that as long as the parties to the adoption proceeding were subject to the rendering court's personal jurisdiction, they would be precluded from later seeking to collaterally attack the judgment for lack of subject matter jurisdiction whether or not they had

357. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 302(a)(1) (as amended 1973), 9A U.L.A. 200 (1998) (stating that the court may enter a decree of dissolution of marriage if one of the parties was domiciled in the state); *Williams II*, 325 U.S. 226, 229 (1945) (stating that "judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil"); see also Wasserman, *supra* note 290 at 2, 19–20 (stating that the domicile rule, requiring at least one spouse to be domiciled in the rendering state, is still broadly followed today).

358. *Sherrer v. Sherrer*, 334 U.S. 343, 351–52 (1948) (footnote omitted); *Davis v. Davis*, 305 U.S. 32, 40 (1938).

359. *Coe v. Coe*, 334 U.S. 378, 384 (1948).

360. See *Cook v. Cook*, 342 U.S. 126, 127–28 (1951).

361. See generally the principles outlined in *Cook*, 342 U.S. 126; *Coe*, 334 U.S. 378; and *Sherrer*, 334 U.S. 343.

challenged the rendering court's jurisdiction in the original action. Under the Full Faith and Credit Clause, the enforcing court's inquiry regarding the rendering court's jurisdiction would be exceedingly narrow: it could ascertain whether the parties had been subject to the rendering court's personal jurisdiction or had appeared before it.³⁶²

4. *Complications*

Having conceded the jurisdictional rationale's first two prongs and having refuted the third, we are left with three important and difficult complications. First, while the Supreme Court precedent analyzed above suggests that the *parties* to the first action are precluded from questioning the rendering court's subject matter jurisdiction in a collateral proceeding, a more difficult question is whether a *state* whose court did not issue the judgment may deny it full faith and credit if its independent examination reveals that the rendering court lacked subject matter jurisdiction. Second and related, while it makes sense to bar reexamination of jurisdictional findings in cases where the initial litigation was adversarial in nature, one may question the soundness of this approach where no party to the initial proceeding had incentive to contest the court's subject matter jurisdiction. Third, while precedent severely limits the scope of the enforcing court's inquiry into the subject matter jurisdiction of the rendering court, both the Supreme Court and the Second Restatement of Judgments acknowledge exceptions in certain cases involving true subject matter jurisdiction. Let us examine each of these complications in turn.

a. *Challenge by the enforcing state itself*

Ordinarily, only parties and those in privity with them are bound by judgments. As the Supreme Court has frequently noted, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."³⁶³ Thus, while it is constitutional to bind adoptive parents and other parties to an adoption proceeding by the

362. See *Cook*, 342 U.S. at 128–29.

363. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (citations omitted); accord *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471 (2000) (“[J]udicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated.”); *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (affirming that one must be a party or a privy to be bound by a judgment) (citations omitted); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (same).

rendering court's judgment and its jurisdictional findings, one must consider whether it is constitutional to preclude a sister state—which itself was not a party to the initial action—by the rendering court's jurisdictional findings. In support of his general argument that states with strong interests at stake should not be compelled to recognize adoptions by gays and lesbians, Professor Wardle has posited that “third persons . . . who were not parties in the case in which the lesbian adoption was granted might not be barred from raising issues that would be binding on the parties themselves.”³⁶⁴

Non-parties to adoption proceedings who claim an interest in the proceedings (such as grandparents or foster parents) have occasionally been permitted to collaterally attack adoption decrees,³⁶⁵ but Professor Homer Clark concludes that “[s]trangers to the adoption probably should not be permitted to attack the decree.”³⁶⁶ In explaining why non-parties are usually bound by adoption decrees, Clark states, “the relationship of parent and child is basic in society, it concerns the immediate parties more intimately than anyone else, and once the parent-child relationship is established by the adoption decree everyone must be able to rely upon it.”³⁶⁷

Although seemingly inconsistent, Professor Clark's conclusions can be reconciled with the general statement that it violates due process to bind a non-party by a judgment: because those with a pre-existing relationship with the child have (or claim) a protected liberty interest of which they might be deprived if they were bound by an adoption decree, such persons (e.g., grandparents) can be bound only if they

364. Wardle, *supra* note 16, at 587.

365. 2 CLARK, *supra* note 276, § 21.13, at 703; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 31(2) (1982) (stating that “[a] judgment in an action whose purpose is to determine or change a person's status is conclusive with respect to that status upon all other persons” subject to stated qualifications, such as when the person has an interest in the status under applicable law but was denied an opportunity to be a party to the action).

366. 2 CLARK, *supra* note 276, § 21.13, at 703.

367. *Id.* § 21.12, at 691. In the divorce context, the Supreme Court has held that as long as the spouses were subject to the rendering court's personal jurisdiction, not only are they precluded from collaterally attacking the judgment in a sister state, but so are strangers to the proceedings, such as children and subsequent spouses, as long as the rendering state would bar such a collateral attack. *See, e.g.,* Cook v. Cook, 342 U.S. 126, 127–28 (1951) (finding that if the defendant spouse was heard in the state court or served in that state, both he and strangers to the action would be barred from attacking the decree collaterally); Johnson v. Muelberger, 340 U.S. 581, 587–89 (1951) (“When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state, it cannot be attacked by them anywhere in the Union.”); *see also* Goldsmith v. Goldsmith, 225 N.E.2d 879 & 228 N.E.2d 400 (N.Y. 1967) (barring a collateral attack on a divorce by the couple's child); Virgil v. Virgil, 284 N.Y.S.2d 568, 570–71 (N.Y. Sup. Ct. 1967) (barring a collateral attack on a divorce by the second husband of one of the parties); SCOLAS, *supra* note 13, at 637–39.

were joined and had an opportunity to be heard. Non-parties who lack a relationship with the child—true strangers to the adoption—have no protected liberty interest. Therefore, it would not violate due process to “bind” them by the adoption decree.

While due process thus protects certain non-parties from the binding effect of an adoption decree, it does not protect states, which are not “persons” entitled to due process.³⁶⁸ But even if due process fails to protect states from the binding effect of a sister-state adoption decree, the state’s interest in the status of its own citizens and the policies underlying its family law might justify a more robust inquiry into the rendering court’s jurisdiction. In *Williams II*, for example, a man and a woman, both domiciled in North Carolina, wished to marry one another but first needed to obtain divorces from their respective spouses.³⁶⁹ So they traveled to Las Vegas and filed for divorces. Their spouses did not appear in the actions. A Nevada court granted the divorces, finding the petitioners to be Nevada domiciliaries. The couple then married in Nevada and returned to North Carolina, where they lived together as husband and wife. When the state of North Carolina prosecuted them for bigamy, the couple claimed that North Carolina was required to give full faith and credit to their Nevada divorce decrees.³⁷⁰ Having decided in *Williams I* that North Carolina was required to recognize a Nevada divorce decree if either party to the divorce action was a Nevada domiciliary,³⁷¹ the Court in *Williams II* held that North Carolina was *not* bound by Nevada’s determination on the issue of domicile:

[S]imply because the Nevada court found that it had power to award a divorce decree cannot . . . foreclose reexamination by another State. . . .

. . . .

To permit the necessary finding of domicile by one State to foreclose all States in the protection of their social institutions would be intolerable. . . .

. . . .

368. *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966) (“The word ‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union . . .”).

369. These facts are drawn from the Court’s opinion in *Williams I*, 317 U.S. 287, 289 (1942).

370. *Id.* at 289–90. For a discussion of how the *Williams* decisions “shifted from an analysis based on the competing interests of different states to an approach that highlighted the individual interests of the parties involved,” see Estin, *supra* note 8, at 381.

371. *Williams I*, 317 U.S. at 301–04.

We concluded that North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce.³⁷²

Although *Williams II* lends strong support to the argument that a state may question the subject matter jurisdiction of another state's court in an *ex parte* proceeding, according to a leading Conflict of Laws treatise by Professors Scoles, Hay, Borchers and Symeonides, “[n]o Supreme Court decision has addressed the question whether the state of the previous domicile may contest the validity of an out-of-state *inter partes* divorce.”³⁷³ Given the decisions that bar the litigants themselves from collaterally attacking divorce decrees for lack of subject matter jurisdiction, the treatise authors expect that the state of domicile, too, would be precluded from reexamining jurisdictional facts “when the parties had the opportunity to protect and vindicate their own interests.”³⁷⁴ Put differently, the party that would be advantaged by the application of the substantive law of the state of domicile can be counted on to challenge the jurisdiction of the rendering court and the application of its law. When the parties, who have the greatest interest in the litigation, have both the incentive and opportunity to challenge jurisdiction, it would be wasteful and inconsistent with the policies underlying preclusion doctrine to permit the state as a “third party” to reexamine the jurisdictional facts.³⁷⁵

b. Lack of an adversarial contest

This brings us to the second, related complication. When the parties do *not* have incentive to challenge the rendering court's jurisdiction—when they acquiesce in the exercise of jurisdiction by a court outside their state of domicile and in the application of the rendering state's law or even collude to create jurisdiction outside their state of domicile to avoid the application of their home state's law—arguably their state of domicile should remain free to reexamine the jurisdictional facts to assure that the rendering court

372. *Williams II*, 325 U.S. 226, 232, 234, 239 (1945); see Wardle, *supra* note 201, at 201–08 (describing the opinions of the Justices in *Williams II*).

373. SCOLES, *supra* note 13, at 639.

374. *Id.* at 640.

375. See *Finstuen v. Crutcher*, 496 F.3d 1139, 1154–55 (10th Cir. 2007) (rejecting the argument that Oklahoma was not required to recognize a Washington state adoption decree because Oklahoma's Commissioner of Health had not been a party). The court concluded that such an “argument would vitiate the Full Faith and Credit Clause by seemingly requiring each state in the nation to be a party to the original action in a sister state in order for the resulting judgment to be enforced across the country. The absurdity of the argument is obvious.” *Id.* (footnote omitted).

in fact had jurisdiction. As Justice Frankfurter argued in dissent in *Sherrer v. Sherrer*,³⁷⁶ the home state's interest in the civil status of its citizens "cannot be bartered or bargained away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a State to which the parties are strangers."³⁷⁷

This argument, which lies at the intersection between the unreliability and jurisdictional rationales, is most powerful when there is a question regarding the rendering court's territorial subject matter jurisdiction. In such cases, there is a risk that the home state's interest in regulating its citizens through the application of its substantive law will be thwarted if the parties collude to file in a state with which they have few or no connections in an effort to get more permissive law. This risk, which was realized in the nineteenth and early-to-mid-twentieth centuries when some states had very stringent divorce statutes while other states had more flexible ones,³⁷⁸ is far less threatening in the adoption context. Although gay and lesbian couples living in states that deny them the opportunity to adopt may well have incentive to "shop" for more progressive law elsewhere, their ability to do so is restricted both by the jurisdictional provisions in the laws of other states³⁷⁹ and by the home study and other pre-placement screening measures, which ensure that the prospective adoptive parents in fact have meaningful ties and a support system in the rendering state.³⁸⁰ Moreover, gay couples wishing to adopt may prefer to actually move to a more progressive state that permits them

376. 334 U.S. 343 (1948).

377. *Id.* at 358 (Frankfurter, J., dissenting); accord Currie, *supra* note 182, at 9–10 (characterizing Justice Frankfurter's dissent as "unanswerable" and stating, in the interstate divorce context, that "[t]o require an interested state to recognize the judgment of a disinterested one that subverts its legitimate public policy is to compromise the basic principle that each state has the right to regulate its own affairs") (footnote omitted).

378. See, e.g., Wasserman, *supra* note 290, at 13 (describing how married persons would file for divorce in states with more permissive divorce laws).

379. See *supra* notes 148–151, 202, 250–256 & 295 and accompanying text (explaining that strong contacts or meaningful connections are jurisdictional requirements to guarantee sufficient connection to the rendering state).

380. See *supra* notes 240–246 and accompanying text (describing screening and evaluation processes for prospective adoptive parents); see also Cox, *supra* note 13, at 778–79 (explaining that a collateral attack for lack of territorial subject matter jurisdiction in the adoption context will likely fail because "[t]he adoptive parents usually live in the state where they seek the adoption . . . and have a child who is also living in that state"). Although home studies are not usually required in step-parent and second-parent adoptions, *supra* note 242, the court nevertheless may order an evaluation of the prospective second parent. See, e.g., 1 HOLLINGER, *supra* note 13, § 4.12; UNIF. ADOPTION ACT § 4-111, 9 U.L.A. 110 (Part IA 1994).

to adopt rather than to adopt in a foreign state but have to seek recognition and live everyday life in a home state with hostile laws.

If a gay couple were to choose to avoid its home state's restrictive adoption law by adopting in another state and then returning home and seeking recognition of the adoption decree, the home state's regulatory interest might justify a reexamination of the jurisdictional facts to ensure that the rendering state had a sufficient connection to the parties to justify an assertion of territorial subject matter jurisdiction (and the concomitant application of its own adoption law).³⁸¹

But even if concern for the home state's regulatory interest may justify reexamination in the enforcing state of the jurisdictional facts underlying an assertion of territorial subject matter jurisdiction by the rendering state, it does not justify reexamination of the court's true subject matter jurisdiction. After all, if territorial subject matter jurisdiction is conceded, it follows that the rendering court had a genuine interest in the parties and a legitimate claim to apply its own adoption law. While the enforcing court might also be interested in one or more members of the adoption triad, it would have no unique interest in assuring that the proper court within the rendering state's judicial system had heard the case and certainly no expertise in making that judgment.³⁸² So the enforcing state's unique interest in a local family would not justify an exception to the general rule of jurisdictional finality in this context.

c. Exception to the rule of jurisdictional finality

This is where the third complication becomes relevant. Both Supreme Court precedent and the Second Restatement of Conflicts have recognized exceptions to the finality of jurisdictional determinations. In *Durfee v. Duke*, for example, where the Court held that "a judgment is entitled to full faith and credit—even as to questions of jurisdiction,"³⁸³ it nevertheless recognized that "the general rule of finality of jurisdictional determinations is not without

381. See Currie, *supra* note 182, at 9–10 (discussing uncontested divorce actions). Even in such cases, there are powerful countervailing concerns. The policy objectives underlying preclusion doctrine generally—finality, efficiency and consistency—would be thwarted by relitigation of the jurisdictional facts, and more importantly, the compelling interest in universal recognition of a final adoption decree to assure the child the stability and permanence required for healthy development would be frustrated.

382. *Supra* notes 329–332 and accompanying text.

383. 375 U.S. 106, 111 (1963); see *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939) ("One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties.") (footnotes omitted).

exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling.”³⁸⁴ Although neither of those exceptions is relevant in the context of interstate recognition of adoption decrees, the *Durfee* Court also cited to provisions in the First Restatement of Judgments and the First Restatement of Conflicts, which barred collateral challenges for lack of subject matter jurisdiction “unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction.”³⁸⁵

The Second Restatement of Judgments now provides:

When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court’s subject matter jurisdiction in subsequent litigation except if:

- (1) The subject matter of the action was so plainly beyond the court’s jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
- (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court’s subject matter jurisdiction.³⁸⁶

Durfee and the Restatement provisions reinforce legislative primacy in the allocation of authority among a state’s courts by permitting collateral challenges when the judicial authority exercised grossly exceeds the legislative allocation.

As long as courts in the both the rendering and enforcing states properly understand the narrow meaning of true subject matter jurisdiction,³⁸⁷ there should be few occasions for collateral attacks based on a lack of true subject matter jurisdiction. It will be the rare case where the petitioners file their adoption petition in a state court that lacks authority to consider it.³⁸⁸ Even if petitioners were to file in the wrong court, it is highly likely that the court would dismiss for

384. *Durfee*, 375 U.S. at 114 (citing *Kalb v. Feuerstein*, 308 U.S. 433 (1940) and *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940)).

385. *Id.* at 114 n.12 (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 451(2) (Supp. 1948); RESTATEMENT (FIRST) OF JUDGMENTS § 10(1) (1942)).

386. RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982).

387. See *supra* notes 297–304, 309–316 and accompanying text.

388. Whitten, *supra* note 13, at 820 (stating that “the circumstances in which a party will pick a court without subject-matter jurisdiction to grant an adoption under local law will be rare, if not non-existent”).

lack of jurisdiction (with leave to refile in the proper court). There is, of course, a risk that the rendering court will make an error of substantive law that the enforcing court will deem “jurisdictional”—either because the enforcing court misunderstands the narrow parameters of true subject matter jurisdiction or because the rendering state actually treats the underlying substantive requirement as jurisdictional in nature. But even in such cases, a collateral attack would be permitted under section 12 only if “entertaining the action was a manifest abuse of authority,” a very high standard that leaves the enforcing court no room to deny recognition to the judgment on public policy grounds.³⁸⁹

In sum, then, while the enforcing court may decline to recognize an adoption decree if the rendering court lacked subject matter jurisdiction, the availability of this rationale is greatly limited by the narrow definition of true subject matter jurisdiction; by preclusion doctrine, which bars the parties themselves from relitigating jurisdictional issues that they actually litigated or might have litigated in the rendering court; and by the great likelihood that the rendering court will have subject matter jurisdiction because petitioners will file their adoption petition before the proper court in a state with which they have some meaningful connection. The only circumstances in which the jurisdictional rationale might justify non-recognition of a sister-state adoption decree would be (1) where the petitioners filed in a state with which neither they nor the child had any meaningful connection and the proceeding was non-adversarial; or (2) where adoption was so “plainly” beyond the rendering court’s true subject matter jurisdiction “that its entertaining the action was a manifest abuse of authority.”³⁹⁰

D. *The “Enforcement and Incidents of Adoption” Rationale*

Both Professor Wardle and the State of Oklahoma have advanced the “enforcement and incidents of adoption” rationale for declining to recognize sister-state adoptions by same-sex couples.³⁹¹ The rationale has two prongs. First, the enforcement prong posits that states need not “adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.

389. *Accord id.* at 818–24.

390. RESTATEMENT (SECOND) OF JUDGMENTS § 12(1).

391. *See* *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1304 (W.D. Okla. 2006), *aff’d in part, rev’d in part sub nom.* *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (discussing Oklahoma’s position); Wardle, *supra* note 16, at 597–99 (arguing that states are not obligated to recognize incidents of adoption that violate their strong public policy).

Enforcement measures do not travel with the sister-state judgment . . . ; such measures remain subject to the evenhanded control of forum law.”³⁹² Second, the incidents prong posits that even if a state is compelled to recognize an adoption finalized in a sister state, it remains free to apply its own law regarding the incidents of adoption as long as it has a significant relationship with the family,³⁹³ or, at a minimum, to decline to recognize those incidents of adoption that would seriously undermine its strong public policy.³⁹⁴ While both prongs have some basis in law and policy, neither justifies a state’s refusal to recognize an adoption by a same-sex couple finalized in another state or to deny gay and lesbian adoptive parents and their families the same rights, responsibilities and other incidents of adoption as are accorded to other adoptive families under its law. We will address the two prongs in turn.

1. *The enforcement prong*

It is well accepted that F2 may apply its own enforcement measures, rather than those of the rendering state.³⁹⁵ For example, the enforcing court may apply its own statute of limitations to determine the period of time in which an action to enforce a judgment (even a sister-state judgment) must be brought;³⁹⁶ its own garnishment procedures;³⁹⁷ its own law to determine whether one spouse’s interest in community property may be used to satisfy a judgment rendered against her alone in a sister state,³⁹⁸ and its own law to establish the priority among competing judgment creditors.³⁹⁹ Likewise, if, because of a state constitutional prohibition against imprisonment

392. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998) (citing *McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839), and the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (1971)).

393. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 238(1), 262(1) & 290 (1971); 2 AM. JUR. 2d *Adoption* § 188 (2004).

394. *Wardle*, *supra* note 16, at 597–99; *cf.* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 290 cmt. c (1971) (“A state will not give a particular incident to a foreign adoption when to do so would be contrary to its strong public policy.”).

395. *See, e.g., Baker*, 522 U.S. at 235; *Dunn v. City of Elgin, Illinois*, 347 F.3d 641, 647 (7th Cir. 2003); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 99 (1971) (“The local law of the forum determines the methods by which a judgment of another state is enforced.”).

396. *See, e.g., McElmoyle ex rel. Bailey*, 38 U.S. at 328 (1839); *Pan Energy v. Martin*, 813 P.2d 1142, 1144, 1146 (Utah 1991); *Marine Midland Bank v. Bicknell*, 848 A.2d 1134, 1137 (Vt. 2004); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 118(2) (1971).

397. *See, e.g., Am. Standard Life & Accident Ins. Co. v. Speros*, 494 N.W.2d 599, 603-04 (N.D. 1993).

398. *See, e.g., Nat’l Bank of Ariz. v. Moore*, 122 P.3d 1265, 1267–69 (N.M. Ct. App. 2005); *Am. Standard Life & Accident Ins. Co.*, 494 N.W.2d at 603–05.

399. *See, e.g., Am. Fid. Fire Ins. Co. v. Paste-Ups Unlimited, Inc.*, 368 F. Supp. 219, 225 (S.D.N.Y. 1973).

for debt, the enforcing state does not order specific performance of separation agreements requiring the payment of money and does not hold debtors in civil contempt, then these remedies need not be made available to enforce a sister-state judgment even if a court in a sister state already has ordered specific performance.⁴⁰⁰

Even though it is well established that states are free to apply their own enforcement measures to sister-state judgments, the enforcement prong for nonrecognition is unavailing for two reasons. First, it is unclear whether or how the enforcement measures of the several states differ from one another in any meaningful way in the adoption context. In the context of civil judgments generally, enforcement problems typically arise in connection with money judgments, when the judgment debtor fails to pay and the judgment creditor seeks to invoke the state's assistance.⁴⁰¹ Laws vary in terms of "what types of collection actions may be used, how a judgment must be registered or otherwise established in the forum state, and what court or other proceedings must be used to enforce the judgment,"⁴⁰² and under the enforcement prong, the forum is free to apply its own law regarding these issues. Such problems do not typically arise in connection with adoption decrees, and neither Professor Wardle nor the state of Oklahoma identified any meaningful difference among state laws regarding *enforcement* of adoption decrees (although the incidents of adoption may vary state-to-state).⁴⁰³

Second, even if there were a difference among state enforcement mechanisms, states may not tinker with them in an effort to avoid their obligation to recognize or enforce sister-state judgments. For example, several decades ago, a federal employee who lived in New Jersey and worked in Philadelphia sought to avoid payment of a Philadelphia wage tax.⁴⁰⁴ The City of Philadelphia sued him in a Pennsylvania court to collect the tax and won. Philadelphia then sued the employee on the Pennsylvania judgment in New Jersey in the hope of levying against the employee's New Jersey property. In

400. See *Sainz v. Sainz*, 245 S.E.2d 372, 374–75 (N.C. Ct. App. 1978).

401. See, e.g., *JAMES ET AL.*, *supra* note 184, § 2.8, at 87 (noting that enforcement in another state may be necessary if the defendant fails to satisfy the judgment).

402. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1306 (W.D. Okla. 2006), *aff'd in part, rev'd in part sub nom. Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

403. Professor Wardle focused on the incidents prong, rather than the enforcement prong, of this rationale. See Wardle, *supra* note 16, at 597–99. While the state of Oklahoma specifically invoked the enforcement prong of the rationale, *Finstuen*, 497 F. Supp. 2d at 1304, its argument went to the issuance of a revised birth certificate, which is an incident of adoption. See *infra* Part IV.D.2 (discussing mild and strong versions of incidents of adoption prong).

404. *City of Phila. v. Bauer*, 478 A.2d 773, 774 (N.J. 1984) (quoting N.J. STAT. ANN. § 2A:17–17).

the meantime, New Jersey enacted a law providing that “[n]o judgment obtained for the payment of any employment wage tax shall be enforced’ by levying on the taxpayer’s real property.”⁴⁰⁵ At the time, there were no New Jersey municipalities that imposed a wage tax and the Governor’s signing statement made clear that the purpose of the law was to block Philadelphia from collecting unpaid wage taxes by attaching or disposing of the property of New Jersey residents.⁴⁰⁶

In holding that the statute violated the Full Faith and Credit Clause, the Supreme Court of New Jersey stated:

Although . . . local law may determine the scope and nature of available remedies[,] . . . it is clear that a state may not, by unduly burdening the means to enforce a foreign judgment, refuse to give full faith and credit to that judgment. . . . [T]he enforcing state “may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause”⁴⁰⁷

Thus, if gay adoptive parents needed the machinery of states beyond the rendering state to enforce their adoption decrees, the Full Faith and Credit Clause would bar such states from withholding their enforcement machinery because of a disagreement with the substantive law underlying the decrees.⁴⁰⁸ As the Tenth Circuit explained in the *Finstuen* litigation:

If Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children, the [plaintiffs] could not invoke the Full Faith and Credit Clause in asking Oklahoma for a new birth certificate. However, Oklahoma has such a statute—i.e., it already has the necessary “mechanism[] for enforcing [adoption] judgments.” The [plaintiffs] merely ask

405. *Id.* at 774.

406. *Id.* at 775, 777.

407. *Id.* at 778 (quoting *Broderick v. Rosner*, 294 U.S. 629, 643 (1935)) (other citations omitted).

408. *See Titus v. Wallick*, 306 U.S. 282, 292 (1939) (“A state which may not constitutionally refuse to open its courts to a suit on a judgment of another state because of the nature of the cause of action merged in the judgment, obviously cannot, by the adoption of a particular rule of liability or of procedure, exclude from its courts a suit on the judgment.”) (citation omitted); *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) (stating that a state “may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the [F]ull [F]aith and [C]redit [C]lause”) (citation omitted); *Hieston v. Nat’l City Bank*, 280 F. 525, 528 (D.C. Cir. 1922) (holding that a sister-state judgment must be recognized even if the underlying law violates the public policy of the enforcing state).

Oklahoma to apply its own law to “enforce” their adoption order in an “even-handed” manner.⁴⁰⁹

Thus, the enforcement prong of the “enforcement and incidents of adoption” rationale provides no justification for non-recognition of sister-state adoption decrees.

2. *The incidents of adoption prong*

a. *The mild version*

There are two distinct versions of the incidents prong of the “enforcement and incidents of adoption” rationale. The mild version is explicitly set out in the Second Restatement of the Conflict of Laws. Comment b to section 290 provides that “[a] state will usually give the same incidents to a foreign adoption that it gives to an adoption granted by its own courts.”⁴¹⁰ In other words, while F2 is required under the Full Faith and Credit Clause to recognize F1 adoptions, F2 is free to apply its own law regarding the incidents of adoption, such as an adoptee’s right to her adoptive parent’s name and support, her right to an intestate share in her parent’s estate, or her right to recover damages for the wrongful death of an adoptive parent.⁴¹¹ For example, if the biological parent of a child adopted in F1 were later to die intestate while domiciled in F2, F1’s law would determine the validity of the adoption but an F2 court would be free to apply F2’s intestate succession law to determine if the adoptee could inherit from the biological parent.⁴¹² If F2’s law permitted a child to inherit through intestacy from a biological parent even after adoption,⁴¹³ an F2 court would permit the adoptee to inherit from the biological parent domiciled in F2 even if F1’s law barred adoptees from inheriting through intestacy from their biological parents.⁴¹⁴ But the F2 court could not grant this inheritance right to most adoptees while denying it to children adopted in other states by gay parents; it must

409. *Finstuen v. Crutcher*, 496 F.3d 1139, 1154 (10th Cir. 2007) (quoting *Baker v. General Motors Corp.*, 522 U.S. 222, 235 (1998)).

410. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 290 cmt. b (1971); *accord Taintor*, *supra* note 148, at 256; Whitten, *supra* note 13, at 807.

411. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 290 cmt. a (1971); *see also CLARK*, *supra* note 276, § 21.12, at 683–91 (describing many of the incidents of adoption).

412. *See, e.g., Pyles v. Russell*, 36 S.W.3d 365, 366–68 (Ky. 2000); *N.W. Nat’l Cas. Co. v. Doucette*, 817 S.W.2d 396, 398–99 (Tex. Ct. App. 1991).

413. *See, e.g., COLO. REV. STAT. § 15-11-103* (2005).

414. *See, e.g., VT. STAT. ANN. tit. 15A, § 1-105(a)(2)* (2007) (stating that an adopted child’s right to inherit through intestacy from a biological parent terminates when the adoption decree becomes final); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 238(1) & 262(1) (1971) (forum courts use their local law to determine an adopted child’s intestacy rights); 2 AM. JUR. 2D *Adoption* § 188 (2004) (same).

apply its law regarding the incidents of adoption in an even-handed manner.⁴¹⁵

Thus, while the mild version of the incidents prong is well-established, it does not permit a state with a restrictive adoption law to discriminate against gay adoptive parents and their families by denying them the incidents of adoption afforded to other adoptive families.

b. The strong version

Professor Wardle has articulated the strong version of the incidents of adoption prong: “a state may decline to recognize or enforce incidents of adoptions from sister states that violate strong public policy of the state.”⁴¹⁶ Thus, under the strong version of the incidents prong, not only may F2 apply its own law regarding the incidents of adoption, but it may decline to accord a particular incident to a sister-state adoption based on public policy grounds. Thus, the strong version of the incidents of adoption prong intersects the public policy rationale.

Professor Wardle invokes both the Second Restatement of Conflicts and case law to support the strong version.⁴¹⁷ At first glance, comment c to section 290 of the Second Restatement appears to provide such support: “A state will not give a particular incident to a foreign adoption when to do so would be contrary to its strong public policy.”⁴¹⁸ But the Restatement provision is clearly limited to adoptions finalized outside the United States. The sentence in comment c that immediately follows makes this point explicit:

415. See *City of Phila. v. Bauer*, 478 A.2d 773, 777 (N.J. 1984) (“The legislature cannot accomplish indirectly that which it could not do directly.” A state may not by subterfuge refuse to give full faith and credit to the judgment of a sister state.”) (citation omitted).

It may well be that such discrimination would violate the Equal Protection Clause. See *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1307–12 (W.D. Okla. 2006) *aff’d in part, rev’d in part sub nom.* *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (holding that the Oklahoma statute violated the Equal Protection Clause); see also *Spector*, *supra* note 13, at 468 n.4 (considering an equal protection challenge to the Oklahoma statute). The equal protection analysis is beyond the scope of this Article.

416. Wardle, *supra* note 16, at 598; see *Taintor*, *supra* note 148, at 254 (stating that “[i]t may be that the public policy of one state demands that one of the incidents of an adoption be denied within the state” and positing that an unmarried 25-year-old father who adopted a 20-year-old daughter “might well” be denied the right of custody but the daughter might retain the right to inherit by intestate succession). But see 2 CLARK, *supra* note 276, § 21.12, at 692 (stating that it is “erroneous” to deny adoption decrees recognition on public policy grounds; concluding that “[t]hese decrees should be recognized pursuant to the Full Faith and Credit Clause regardless of differences in the law of adoption”) (footnote omitted).

417. Wardle, *supra* note 16, at 599–608.

418. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 290 cmt. c (1971).

So a state might not permit a child *adopted in a foreign nation* to inherit from his adoptive parent if it found that the only purpose of the parties in arranging for the adoption was to permit the child to emigrate to that state, or to permit inheritance by an adult adopted in a foreign proceeding from his one and only adoptive parent.⁴¹⁹

Moreover, the Reporter's Note that accompanies comment c cites only three cases, all of which involve Greek adoptions.⁴²⁰ Because foreign judgments are not entitled to full faith and credit under the Constitution, this section of the Second Restatement lends no support to the strong version of the incidents prong as applied to sister-state adoptions.

Professor Wardle also relies on case law that purportedly denies, on public policy grounds, adult adoptees (adopted in other states or countries) the right to inherit from or through an adoptive parent.⁴²¹ It is uncontroverted that:

[T]he inheritance rights of the adopted child . . . should be determined by the law governing succession; that is to say, by the law of the situs in the case of immovables [i.e., real estate] and in the case of movables by the law of the state where the adoptive parent was domiciled at the time of his death.⁴²²

But the cases cited by Professor Wardle go much further, denying adult adoptees the right to inherit even though inheritance is an incident of adoption under F2 law and even though the adult adoptions were valid in the rendering states.⁴²³

419. *Id.* (emphasis added).

420. *Id.* Reporter's Note (citing *Tsilidis v. Pedakis*, 132 So. 2d 9 (Fla. Dist. Ct. App. 1961); *In re Gillies' Estate*, 83 A.2d 889 (N.J. 1959); *Doulgeris v. Bambacaus*, 127 S.E.2d 145 (Va. 1962)).

421. Wardle, *supra* note 16, at 599–609 (citations omitted).

422. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 290 cmt. b (1971) (citations omitted); *see also id.* §§ 238(1), 262(1).

423. *See Abramovic v. Brunken*, 94 Cal. Rptr. 303, 305 (Cal. Ct. App. 1971) (determining that will executed by testator who died eleven years prior to enactment of adult adoption law could not have intended will to include adult adoptees); *Williams v. Ward*, 93 Cal. Rptr. 107, 109 (Cal. Ct. App. 1971) (finding that testator who died prior to the enactment of the adult adoption law and who knew that his daughter would not bear children did not intent to include adult adoptee); *In re Trust Created by Belgard*, 829 P.2d 457, 459 (Colo. Ct. App. 1992) (finding that without clear intent by testator to include adult adoptee, such an adoptee did not fall within definition of "child"); *Tsilidis v. Pedakis*, 132 So. 2d 9, 13 (Fla. Dist. Ct. App. 1961) (finding foreign adoption of adult invalid under Florida law); *Cross v. Cross*, 532 N.E.2d 486, 489 (Ill. App. Ct. 1988) (refusing to give adult adoptee inheritance rights); *In re Nowels Estate*, 339 N.W.2d 861 (Mich. Ct. App. 1983) (same); *In re Trust for the Benefit of Duke*, 702 A.2d 1008, 1021 (N.J. Sup. Ct. Ch. Div. 1995) (same); *In re Estate of Nicol*, 377 A.2d 1201, 1208 (N.J. Super. Ct. App. Div. 1977) (same); *In re Estate of Griswold*, 354 A.2d 717, 720 (Morris County (N.J.) Ct. 1976) (same); *In re Comly's Estate*, 218 A.2d 175, 178 (Gloucester (N.J.) County Ct. 1966) (same); *cf. Corbett v. Stergios*, 137 N.W.2d 266, 269 (Iowa 1965) (recognizing foreign adult adoption for inheritance purposes); *In re Estate of Tafel*, 296 A.2d 797, 800, 803 (Pa.

Although these cases appear to support the strong version of the incidents prong, in fact virtually all are inapposite. Two of the cited cases involve adoptions finalized in foreign countries, which are not entitled to full faith and credit.⁴²⁴ While these cases contain language that appears to support the strong version of the incidents prong—“the parties cannot . . . invest a foreign decree with such dignity as to preclude the local forum from applying its laws in determining whether the incidents of the foreign decree are repugnant to or against the policy of the local forum”⁴²⁵—these cases do not govern sister-state adoptions, which are entitled to full faith and credit under the federal Constitution.⁴²⁶

Most of the cited cases consider whether an adult adopted by the testator’s or settlor’s heir after the testator’s or settlor’s death should be considered members of a class of “children” or “issue” or “descendants” within the meaning of the testator’s will or trust instrument. These cases seek to “ascertain and give effect to the intent of the testator or settlor,”⁴²⁷ and therefore are not really interstate recognition cases at all. As one court put it, “[w]hatever the rights of inheritance of [the adoptees] may be by reason of their adoption, their status under the will . . . is to be decided by the answer to the question whether [they] are included among the persons the testator intended to share in his estate.”⁴²⁸ Put another way, even in a purely domestic case involving an adult adoption finalized in the forum state, a court would have to determine whether the testator intended to include adult adoptees as members of a class of “children” in her will.

Some states have developed default rules or presumptions to apply in the absence of express indications of intent. For example, in the absence of evidence of an intent to the contrary, some states permit adult adoptees to inherit as members of a class of “children” only if they lived as members of the adoptive parent’s household while minors⁴²⁹ or if they were adopted before the testator executed the

1972) (adopting presumption that testators intend to include adoptees for inheritance purposes).

424. See *Tsilidis*, 132 So. 2d at 13 (concluding that an adult adoption finalized in Greece violated Florida public policy). Professor Wardle also cites *Corbett*, 137 N.W.2d at 269, a case in which the Iowa Supreme Court concluded that an adoption of a minor finalized in Greece did *not* violate Iowa public policy.

425. *Tsilidis*, 132 So. 2d at 13.

426. Professor Wardle concedes this point. Wardle, *supra* note 16, at 605–06.

427. *In re Nowels Estate*, 339 N.W.2d at 863.

428. *Williams*, 93 Cal. Rptr. at 109 (citation omitted).

429. 3 HOLLINGER, *supra* note 13, § 12.04[3][b][v], at 12–58 n.82 and accompanying text (discussing CAL. PROB. CODE § 21115(b) (West 2007)); see *In re Estate of Pittman*, 163 Cal. Rptr. 527, 529 (Cal. Ct. App. 1980) (noting that, while

will.⁴³⁰ Since the question in these trusts and estate cases is the settlor's or testator's intent rather than the obligation of one state to recognize judgments entered by courts in sister states, these cases do not support the strong version of the incidents prong.

Given the irrelevance of the foreign adoption cases and the trusts and estates cases, only one of the adult adoption cases cited by Professor Wardle remains. On its face, *First National Bank of St. Petersburg v. Mott*⁴³¹ lends support to the strong version of the incidents prong. There, Samuel Doane and his wife adopted Mae Mott, a thirty-three-year-old woman, in Connecticut. During her childhood and youth, Mae had lived in their home and been treated as a daughter.⁴³² When Samuel Doane died intestate in Florida, the probate court was asked to determine whether Mae had the same right to inherit Samuel's Florida real estate as a biological child.

After initially concluding in *Mott I* that the county probate court lacked subject matter jurisdiction to determine the validity and effect of the Connecticut adoption,⁴³³ the Florida Supreme Court in *Mott II* relied upon two Florida statutes to support its conclusion that Mae could not inherit Samuel's real property under Florida's intestate succession law. One statute provided that a child adopted in another state could inherit as if the adoption had been finalized in Florida if she "shall afterward become a citizen of this State."⁴³⁴ Another statute provided that any child adopted under Florida's adoption statute "shall be declared the child and heir-at-law" of the adoptive parent.⁴³⁵ Even if Mae had become a citizen of Florida, bringing her within the scope of the first statute, the Florida Supreme Court held that "the [second] statute does not contemplate the adoption of an adult married woman by persons so that she 'shall be considered the heir'

adult adoptees normally cannot receive gifts given to "children," there is an exception for those adoptees who lived with their adoptive parents as minors).

430. 3 HOLLINGER, *supra* note 13, § 12.04[3][b][v], at 12-59 n.86 and accompanying text (citing *Minary v. Citizens Fid. Bank & Trust Co.*, 419 S.W.2d 340, 344 (Ky. Ct. App. 1967)); see *In re Estate of Tafel*, 296 A.2d 797, 802-03 (Pa. 1972) (noting that in the absence of intent to omit children adopted after the execution of a will, a testator is presumed to treat adopted children the same as biological children).

431. 133 So. 78 (Fla. 1931) (*Mott II*); see *Mott v. First Nat'l Bank of St. Petersburg*, 124 So. 36, 37 (Fla. 1929) (*Mott I*) (prior proceeding involving the same adoption). Professor Wardle cites another case that concluded that the Full Faith and Credit Clause required California to recognize an adult adoption finalized in Rhode Island even though adult adoption conflicted with California policy at the time. *In re Morris' Estate*, 133 P.2d 452, 456 (Cal. Dist. Ct. App. 1943).

432. *Mott I*, 124 So. at 37 (citation omitted).

433. *Id.* at 38.

434. *Mott II*, 133 So. at 79 (quoting FLA. REV. GEN'L STAT. § 3624 (1920) (repealed)).

435. *Id.* (quoting FLA. REV. GEN'L STAT. § 3268 (1920) (repealed)).

of such persons, 'and entitled to inherit according to the laws of Florida.'"⁴³⁶ Although the court in *Mott II* did not discuss the Full Faith and Credit Clause, the court in *Mott I* stated that the parent-child relationship created by the Connecticut adoption decree

will be recognized in Florida under the rules of comity or under the [F]ull [F]aith and [C]redit [C]lause of the Federal Constitution, unless such status or the rights flowing therefrom are not contemplated by or are repugnant to the laws or policy of the state of Florida upon the subject.⁴³⁷

Thus, it is fair to maintain that the *Mott* decisions support the strong version of the incidents prong.

But it would be a mistake to put too much weight on *Mott*. First, *Mott* and the strong version are inconsistent with the Supreme Court's far more recent statement in *Baker* that "[r]egarding judgments, . . . the full faith and credit obligation is exacting. . . . [O]ur decisions support no roving 'public policy exception' to the full faith and credit due judgments."⁴³⁸ *Baker* is relevant here because the strong version of the incidents prong is nothing more than the public policy rationale in disguise. It is one thing to maintain, as the weak version does, that the forum state is free to apply its own law regarding the incidents of adoption to all adoptive families before it, regardless of the state of adoption. The weak version accords full faith and credit to sister-state adoption decrees but reserves to the forum state the freedom to decide the legal consequences that flow from such status determinations. It is quite another thing to posit that the forum state may accord benefits to local adoptive families (or adoptive families with straight parents) while denying adoptive families created in sister states (or adoptive families with gay parents) those same incidents of adoption. After all, it is not the *incident* of adoption that the forum state finds objectionable—there is nothing objectionable about a child inheriting from her parent or a child's birth certificate reflecting her adoptive parents' names. What the forum state finds objectionable is the underlying adoption itself (in *Mott*, the adoption of an adult; here, the adoption by a gay couple). But the Full Faith and Credit Clause does not permit states to deny recognition to sister-state adoption decrees on public policy grounds.⁴³⁹

436. *Id.* (quoting § 3624).

437. *Mott I*, 124 So. at 37.

438. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (citations omitted).

439. See discussion *supra* Part IV.A.

Second, *Mott* may be better understood as a real property case than as a public policy (or strong version) case. At bottom, *Mott* considered a Connecticut adoptee's right to inherit real estate under Florida law. Its holding, that Florida could determine which adoptees qualified as heirs to Florida real property, is consistent with an early body of Supreme Court case law recognizing the right of states to determine the devolution of real estate within their borders regardless of sister-state judgments purporting to affect it.⁴⁴⁰ In *Hood v. McGehee*,⁴⁴¹ for example, George McGehee adopted children in Louisiana.⁴⁴² McGehee thereafter acquired real estate in Alabama. Upon McGehee's death, the adoptees claimed an interest in his Alabama property. Finding that a letter probated as a will in Mississippi, which left all his property to the adopted children in equal shares, "could [not] take effect on real estate in Alabama,"⁴⁴³ the Court considered whether the adoptees could inherit under Alabama's intestate succession law.⁴⁴⁴ The Alabama Supreme Court had previously construed the statute to exclude children adopted in other states. The United States Supreme Court held that "the law, so construed, is valid. . . . There is no failure to give full credit to the adoption of the plaintiffs, in a provision denying them the right to inherit land in another state. Alabama is sole mistress of the devolution of Alabama land by descent."⁴⁴⁵ Even though Alabama had no public policy objection to the Louisiana adoptions, the Court upheld Alabama's right to disregard them when quieting title to Alabama real estate.

A leading Conflicts treatise criticizes *Hood*, stating that "the forum should not treat a foreign adopted child differently from one adopted locally when the incidents of the relationship are substantially the same in both states"⁴⁴⁶ and suggesting "the probability that *Hood* would not be followed today."⁴⁴⁷ *Hood* appears inconsistent with both the Court's later decisions under the Full Faith and Credit Clause⁴⁴⁸ as well as basic anti-discrimination principles

440. See *supra* note 176 (summarizing early Supreme Court case law).

441. 237 U.S. 611 (1915).

442. *Id.* at 614.

443. *Id.* at 614–15.

444. *Id.* at 615.

445. *Id.* at 615 (citations omitted).

446. SCOLES, *supra* note 13, § 16.6, at 703 n.2 (citation omitted).

447. *Id.* (citations omitted).

448. See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (rejecting a public policy exception for judgments); *Hughes v. Fetter*, 341 U.S. 609, 611–14 (1951) (holding that, under the Full Faith and Credit Clause, Wisconsin could not decline to entertain an action under the Illinois Wrongful Death Act, where its own

underlying the Privileges and Immunities⁴⁴⁹ and Equal Protection Clauses.⁴⁵⁰ In light of *Hood*, *Mott* should be restricted to its facts rather than read as supporting the strong version of the incidents prong. In all events, *Mott* and *Hood* are rather thin reeds on which to rest the strong version of the incidents prong.

In sum, while states are free to apply their own mechanisms to enforce sister-state judgments and their own laws regarding the incidents of adoption, they must do so evenhandedly. Moreover, just as states must recognize sister-state adoptions regardless of public policy objections, they must afford sister-state adoptions the same incidents they afford to local adoptions. The strong version of the incidents of adoption prong suffers the same fate as the public policy rationale.

CONCLUSION

The Full Faith and Credit Clause commands that judgments rendered in one state be recognized in sister states. This command extends to adoption decrees regardless of the sexual orientation of the adoptive parents. None of the rationales offered to justify non-recognition is persuasive. The Supreme Court has consistently interpreted the Clause to require interstate recognition of judgments even where the enforcing court finds the law embodied in the judgment inimical to its public policy. The Court's rejection of a public policy exception serves the best interests of the states and the Union and, in the adoption context, serves the child's overriding interest in stable family relationships. While adoption proceedings often are non-adversarial, adoption decrees reflect an exercise of judgment by a judge informed by impartial experts and interested third parties. The transformational effect of an adoption decree is not altered by the consensual nature of the proceedings. While a state may decline to recognize an adoption decree rendered without subject matter jurisdiction, this rationale justifies nonrecognition in very few cases both because few rendering courts will actually lack jurisdiction and because preclusion doctrine often will bar relitigation of jurisdictional issues in the enforcing court. Finally, while states remain free to apply their own laws regarding the

statute permitted recovery for wrongful death and all of the parties were Wisconsin citizens).

449. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

450. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *see supra* note 415 and accompanying text (discussing possible equal protection violations).

incidents of adoption, they must do so in an evenhanded manner and may not withhold the incidents of adoption on public policy grounds.