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E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions

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***E PLURIBUS UNUM?* THE FULL FAITH AND CREDIT CLAUSE AND MEANINGFUL RECOGNITION OF OUT-OF-STATE ADOPTIONS**

*Pamela K. Terry**

Parents and children whose legal relationships derive from state adoption judgments face uncertainty when they travel across state lines. State officials have denied out-of-state adoptive parents revised birth certificates, which recognize their status as legal parents in their child's birth state, because the parents would be statutorily unable to adopt in that state.

Various U.S. Courts of Appeals have disagreed as to whether, and to what extent, the Full Faith and Credit Clause in Article IV of the Constitution requires that state executive officials recognize out-of-state rights. Circuits also differ as to whether the Full Faith and Credit Clause confers an individual right for purposes of 42 U.S.C. § 1983 on parents alleging a violation of the Clause. The divergent opinions result from conflicting interpretations of the force and scope of the Full Faith and Credit Clause, distinctions between recognition and enforcement of out-of-state rights, and the varying views of the Clause's balance of state policy interests and federal unity imperatives.

This Note argues that the language, history, and purpose of the Full Faith and Credit Clause demonstrate that the Clause requires states—including both judicial and executive officers—to give meaningful recognition to judicially established rights. It concludes that the denial of revised birth certificates to out-of-state adoptive couples violates the Full Faith and Credit Clause's mandate to meaningfully recognize and equally enforce out-of-state judgments.

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INTRODUCTION

It is when a clash of policies between two states emerges that the need of the Clause is the greatest.¹

In 2000, Heather Finstuen became a legal mother of two girls after adopting the biological daughters of her partner in New Jersey.² The family moved to Oklahoma soon after the adoption.³ Beginning in 2004, however, Finstuen began to avoid signing her daughters’ permission slips for school field trips, gymnastics, and Girl Scout camp.⁴ She stopped signing school enrollment forms and health release forms, even when one daughter had surgery.⁵ She and her partner, Anne Magro, feared that Finstuen would be unable to visit her daughters if one was admitted to intensive care, or be unable to sign forms in an emergency should Magro be unavailable.⁶

The family’s concern arose from a 2004 amendment to Oklahoma’s adoption code that prohibited any state official, agency, or court from recognizing an out-of-state adoption by a same-sex couple.⁷ To Oklahoma officials, these out-of-state parent-child relationships did not exist.⁸ Pursuant to the amendment, state officials began refusing to issue revised

1. *United Nat’l Bank v. Lamb*, 337 U.S. 38, 42 (1949).

2. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1302 (W.D. Okla. 2006), *aff’d in part, rev’d in part on other grounds sub nom.* *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

3. *Id.*

4. *See id.*; Brief for Appellees at 9, *Finstuen*, 496 F.3d 1139 (No. 06-6213), 2006 WL 3381195.

5. Brief for the Appellees, *supra* note 4, at 9.

6. *Id.*

7. *See Finstuen*, 497 F. Supp. 2d at 1300, 1302.

8. *See* Brief for the Appellees, *supra* note 4, at 9.

birth certificates for the children of same-sex couples who presented out-of-state adoption decrees.⁹ Without these birth certificates, same-sex couples were unable to prove their parent-child relationships.¹⁰

Once an obscure provision termed the “lawyer’s clause” of the Constitution,¹¹ the Full Faith and Credit Clause is now at the center of a nationwide debate involving parents, children, adoption, and same-sex marriage.¹² Circuit courts have split regarding the force and scope of the Clause. In *Finstuen v. Crutcher*,¹³ the U.S. Court of Appeals for the Tenth Circuit held that the Oklahoma adoption code amendment violated the Clause by categorically prohibiting recognition of out-of-state adoption decrees held by same-sex couples.¹⁴ In so holding, the Tenth Circuit allowed the plaintiffs to bring a federal action under 42 U.S.C. § 1983 for the deprivation of constitutional rights by a state executive official.¹⁵

Five years later, in *Adar v. Smith*,¹⁶ the Fifth Circuit held that a Louisiana policy of denying revised birth certificates to same-sex out-of-state couples did not violate the Full Faith and Credit Clause.¹⁷ The Fifth Circuit also held that the Clause governed only state courts, rather than state officials, and that plaintiffs had no federal cause of action under § 1983 for alleged violations of the Clause.¹⁸ This circuit split reflects the current climate in the United States of “volatile uncertainty regarding the portability of parental rights acquired by same-sex or unmarried couples and other alternative families from state to state.”¹⁹

This Note explains the legal conflict surrounding a state’s obligation under the Full Faith and Credit Clause to recognize out-of-state adoption judgments held by certain groups or individuals, and whether that obligation confers an individual right enforceable under § 1983. Part I of this Note explores the command of the Full Faith and Credit Clause, the policies and law underlying American adoption practice, and the protection of constitutional rights under § 1983. Part II analyzes the split among courts over whether out-of-state adoptive couples are entitled to receive revised birth certificates recognizing their status as legal parents in their child’s birth state, when the couple would be unable to adopt in that state.

9. *Finstuen*, 496 F.3d at 1146–47 (10th Cir. 2007).

10. *Id.* at 1145.

11. Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 2 (1945).

12. *See, e.g.*, Laurie Goodstein, *Illinois Bishops Drop Program over Bias Rule*, N.Y. TIMES, Dec. 29, 2011, at A16 (discussing a controversy regarding a new Illinois law requiring Catholic Charities to consider same-sex couples as potential adoptive parents in order to receive state funding); Mark Landler, *Obama Still Lets Surrogates Take the Lead as Gay Rights Momentum Builds*, N.Y. TIMES, Dec. 31, 2011, at A11.

13. 496 F.3d 1139.

14. *Id.* at 1156.

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

16. 639 F.3d 146 (5th Cir.) (en banc), *cert. denied*, 132 S. Ct. 400 (2011).

17. *Id.* at 160.

18. *Id.* at 156–57.

19. 1 KAREN MOUDLING, *SEXUAL ORIENTATION AND THE LAW* § 1:26 (West 2012).

In Part III, this Note proposes a framework of “meaningful recognition” to describe the Clause’s mandate concerning judicially established rights. It asserts that this obligation binds both state judicial and executive officers. The Note concludes that the denial of revised birth certificates to out-of-state adoptive couples violates the Full Faith and Credit Clause’s command to meaningfully recognize and equally enforce out-of-state judgments.

I. BACKGROUND: THE LEGAL ISSUES

This Note first explores the three legal fields that have converged in the current circuit split. Part I.A explains how the Full Faith and Credit Clause requires states to recognize—to varying degrees—legal rights and obligations created in sister states. Part I.B describes state adoption practice with a focus on same-sex couples’ access to adoption. Part I.C considers the vindication of constitutional rights under § 1983.

A. *The Full Faith and Credit Command: The Clause, Its History and Purpose*

This section examines how the knotty doctrine of full faith and credit regulates interstate relations and protects rights and obligations that travel across state lines. Part I.A.1 introduces the Full Faith and Credit Clause and the fundamental issues surrounding its application. Part I.A.2 details the development of the full faith and credit doctrine, as advanced by the U.S. Supreme Court. After explaining the principles animating the Clause in Part I.A.3, Part I.A.4 shows how the Clause’s underlying principles determine the different credit due to state records, laws, and judgments. Part I.A.5 concludes by describing Supreme Court precedent that has addressed the scope of the Clause.

1. Primer on a Problematic Clause

Article IV, Section 1, of the Constitution commands that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”²⁰ At its core, the Full Faith and Credit Clause addresses what a state should do when presented with a sister-state law or judgment. In doing so, it “serves to coordinate the administration of justice among the several independent legal systems which exist in our Federation.”²¹

20. U.S. CONST. art. IV, § 1. The second sentence of the Full Faith and Credit Clause is sometimes referred to as the “Effects Clause.” See Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 257 (1998). For clarity, this Note will refer to the first sentence as the Full Faith and Credit Clause, and to the second sentence as the Effects Clause.

21. See Jackson, *supra* note 11, at 2.

It is uncontested that the terms “faith” and “credit” derive from the English law of evidence²² and that the doctrine generally developed from the law of nations.²³ It is also clear that the Clause does not mean that one state’s judgment holds the same force in a second state as a judgment rendered by that second state.²⁴ The Supreme Court has acknowledged that literal enforcement of the Clause can lead to “absurd” results.²⁵ Thus, despite its modifier “full,” the Full Faith and Credit Clause is neither “inexorable [nor] unqualified” in its application to records, statutes, and judgments.²⁶ Scholars have asserted that “murky”²⁷ origins and a “hazy”²⁸ understanding of this constitutional clause have contributed to its problematic interpretation.

A fundamental uncertainty has been how to weigh the full faith and credit due to the various sister-state activities listed in the Clause. Since the Clause’s enactment, scholars have debated whether it provides for a narrow, evidentiary effect, or a broader, preclusive effect.²⁹ Under the narrow evidentiary approach, out-of-state enactments would be given effect only insofar as a court must accept them as proof that another state’s statutes and judgments exist and “deal with the matters described in their text.”³⁰ Their content could then be impeached or challenged.³¹

Interpreting the Full Faith and Credit Clause to contain a broader provision would demand that states give substantive effect to sister-state laws and judgments.³² For example, a judgment’s merits—not just its existence—would be given conclusive effect so as to preclude a second state from examining the same issues of the judgment.³³ This approach would oblige states to recognize the rights and obligations created by a

22. *See infra* note 44.

23. *See infra* note 41.

24. *See Williams v. North Carolina*, 325 U.S. 226, 229 (1945) (asserting that the Framers rejected such a proposal at the 1787 Constitutional Convention).

25. *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935). For a discussion on how the Clause has been interpreted to avoid such a result, see *infra* Part I.A.2.e.

26. *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941).

27. WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 1 (2005).

28. Jackson, *supra* note 11, at 6.

29. Compare Whitten, *supra* note 20, at 294 (“[F]rom English law through the ratification of the Constitution, the evidence is compelling that the first sentence . . . [contained commands] merely to admit [judgments of other states] into evidence as ‘full’ proof of their own existence and contents”), with REYNOLDS & RICHMAN, *supra* note 27, at 6–7 (describing the Clause at the time of ratification as “giving the judgments of each state preclusive effect”), and Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 290 (1992) (asserting that “the Full Faith and Credit Clause has always been understood” to mean that “[i]f the first court had jurisdiction, its judgment is binding on all other states”).

30. *See Whitten, supra* note 20, at 257, 263–64.

31. *Id.* at 263–64.

32. *See REYNOLDS & RICHMAN, supra* note 27, at 13.

33. *See id.*

sister-state's judgment.³⁴ Such a firm mandate would also, in theory, require states to substitute another state's statutory or common law for their own when the two laws conflict.³⁵ And yet, such a requirement would be, in the Supreme Court's language, "absurd."³⁶

Defining the substantive effect entitled to a sister-state's laws complicated the Clause's earliest interpretation.³⁷ A group of scholars has recently asserted that the modern full faith and credit doctrine has significantly diverged from what the Framers intended.³⁸ The sections below provide further detail on the administration of full faith and credit.

2. Origins and Interpretation

This section discusses the origins of the full faith and credit doctrine and the judicial development of the American approach to full faith and credit. It considers how the same command came to require different levels of credit for laws and judgments. This section also explains how both the absence of codified choice-of-law rules to address conflicting state laws,³⁹ and the addition of a federal full faith and credit implementing statute,⁴⁰ led to initial uncertainty over the extent of a state's obligation under the Clause to give effect to out-of-state laws and judgments.

a. *The Law of Nations and English Full Faith and Credit*

The full faith and credit doctrine speaks to situations in which a state is presented with a "foreign" (out-of-state) law or judgment. The doctrine has its origins in principles of the law of nations.⁴¹ Generally, the laws of one

34. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

35. See *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935).

36. *Id.*

37. See Whitten, *supra* note 20, at 345 (asserting that judges interpreting the full faith and credit command between 1790 and 1813 considered its application to public acts to be "a large obstacle to a broad interpretation . . . of the Clause"); *infra* Part I.A.2.

38. See, e.g., David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1586–92 (2009) (arguing that the classic full faith and credit rule, concerning evidentiary sufficiency, has been obscured and forgotten because of judicial error and insufficient critical commentary); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1278–79 (2009) (contending that the Clause contained only an evidentiary framework, and that "[o]ver the past 200 years, courts have made ever more of the spirit of the Clause and of its implementing statute, but in doing so they have rendered the doctrine less and less coherent"); Whitten, *supra* note 20, at 257 ("[M]odern Supreme Court decisions have . . . gone far beyond the original understanding of the provision . . . [and] there is little chance that the Supreme Court will revise its current interpretation of the Clause to return to the original meaning . . .").

39. See *infra* Part I.A.2.e.

40. See *infra* Part I.A.2.c.

41. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723–24 n.1 (1988) (observing that the original content of the Full Faith and Credit Clause was "properly derived from [international conflicts law]"); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 51–55 (2006) (drawing on nineteenth-century and early-twentieth-century full faith and credit cases to conclude that the Supreme Court has turned to international law as a source of authority when interpreting the Full Faith and Credit Clause). But see *infra* notes 42, 91–93 and accompanying text for examples of how the Full Faith and Credit Clause

nation are not binding in the territory of another nation; thus, any effect given to foreign laws and judgments is a gesture of comity.⁴² Accordingly, nations treat foreign judgments only as prima facie evidence of the underlying claim, the merits of which could be reexamined by the second nation.⁴³

Scholars agree that the Constitution's phrase "full faith and credit" derives from the English law of evidence.⁴⁴ The term's usage by English courts, however, was "ambiguous"⁴⁵ or, more positively, "highly flexible."⁴⁶ To accord full faith and credit could mean authenticating an affidavit,⁴⁷ deeming a record trustworthy,⁴⁸ or giving prior proceedings preclusive effect.⁴⁹ Significantly, English courts treated prior domestic records and foreign records differently.⁵⁰ By the eighteenth century, foreign judgments were given only evidentiary credit, while domestic judgments from different courts could be entitled to substantive credit depending on the type or authority of the rendering court.⁵¹

b. From Colonial Clauses to Constitution

For the colonies, the two-fold English treatment raised the question of whether sister-colony judgments should be treated as foreign or domestic.⁵² Eighteenth century colonial laws varied between granting evidentiary or substantive effect to neighboring colonies' judgments or records.⁵³ Thus, the drafters of the Articles of Confederation in 1777 faced a diversity of approaches to full faith and credit.⁵⁴

differs from the law-of-nations approach. The law of nations is a set of natural law rules that governs peacetime relations among nations, and addresses traditionally domestic legal issues such as contract, property, tort, and crime. See 4 WILLIAM BLACKSTONE, COMMENTARIES *66–68.

42. See *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) (distinguishing the Full Faith and Credit Clause from the "general principle of international law by which local policy [was] permitted to dominate rules of comity"). Comity, one nation's recognition of another nation's legislative, executive, or judicial acts, is "neither a matter of absolute [legal] obligation . . . nor of mere courtesy and good will" but derives from a nation's regard to "international duty and convenience" and "to the rights of . . . persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

43. See *Hilton*, 159 U.S. at 181.

44. See, e.g., Sachs, *supra* note 38, at 1217–19; Whitten, *supra* note 20, at 269–73. While one scholar has suggested that the Clause's term "faith" implies "good faith," another has dismissed this interpretation and argued that the historical evidence "indicates that it was understood to mean 'trust.'" Compare Laycock, *supra* note 29, at 296, with Whitten, *supra* note 20, at 351.

45. Sachs, *supra* note 38, at 1218.

46. Whitten, *supra* note 20, at 267.

47. Sachs, *supra* note 38, at 1218–19.

48. *Id.* at 1219.

49. Whitten, *supra* note 20, at 267.

50. *Id.* at 269–71.

51. Engdahl, *supra* 38, at 1599–1600; Sachs, *supra* note 38, at 1219.

52. Engdahl, *supra* 38, at 1607; Whitten, *supra* note 20, at 271.

53. See Whitten, *supra* note 20, at 274–80 (describing full faith and credit acts from Connecticut, Maryland, Massachusetts, and South Carolina).

54. Sachs, *supra* note 38, at 1223; Whitten, *supra* note 20, at 281.

The Articles of Confederation contained a full faith and credit clause identical to that in the Constitution but did not contain an Effects Clause.⁵⁵ The five reported cases decided under the Articles' full faith and credit provision suggest an evidentiary approach but do not constitute conclusive evidence about how early courts understood the force of full faith and credit.⁵⁶ The cases indicate that courts were concerned about defining what, if any, substantive effect was entitled to sister-state judgments and laws.⁵⁷

The Constitutional Convention of 1787 retained the Articles' full faith and credit command but added the Effects Clause⁵⁸ in response to objections that "if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all Independent Nations."⁵⁹ The Effects Clause allows Congress to provide the manner of authentication and declare the effect of state public acts, records, and judicial proceedings.⁶⁰ The draft text, however, granted discretion to the states on whether to accord faith and credit, and mandated the federal government to prescribe the interstate effects of judgments.⁶¹ The Convention eventually adopted James Madison's suggestion to switch the verbs "ought" and "shall" so that the Clause's charge was binding on states and the power to promulgate effects of the Clause was within Congress's discretion.⁶² Consequently, the Full Faith and Credit Clause

55. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3 ("Full faith and credit shall be given in each of these States to records, acts and judicial proceedings of the courts and magistrates of every other State."). No surviving document describes how the clause came to be included in the Articles. See Engdahl, *supra* note 38, at 1607.

56. Compare Engdahl, *supra* note 38, at 1618 (asserting that, taken together, the decisions indicate that courts gave evidentiary, but not binding, effect to sister-state judgments), with Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 53 (1957) ("These few decisions are insufficient to support any specific construction of the Full Faith and Credit clause in the Articles."). James Madison described the Articles' provision as "extremely indeterminate" and "of little importance under any interpretation which it will bear." THE FEDERALIST NO. 42, at 221 (James Madison) (George W. Carey & James McClellan eds., 2001).

57. See Engdahl, *supra* 38, at 1614–19 (describing cases); Whitten, *supra* note 20, at 281–88 (same).

58. See *supra* note 20 and accompanying text.

59. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 488 (Max Farrand ed., 1986) (quoting James Wilson); see Whitten, *supra* note 20, at 376.

60. REYNOLDS & RICHMAN, *supra* note 27, at 5–6.

61. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 564–65 (1937).

62. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 59, at 489; Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 323 (1998). Madison praised the final constitutional provision as "an evident and valuable improvement" over the Articles of Confederation, and described Congress's Effects Clause power as "a very convenient instrument of justice." See THE FEDERALIST NO. 42, *supra* note 56, at 221–22 (James Madison).

became mandatory for states,⁶³ while the Effects Clause permitted the federal government to modify states' compliance at its discretion.⁶⁴

c. The Full Faith and Credit Statute

Congress soon exercised its Effects Clause power by passing a full faith and credit act in 1790 (Full Faith and Credit Act).⁶⁵ In addition to prescribing specific modes of authentication, the Act required that "records and judicial proceedings . . . shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."⁶⁶ Because the Act varied from the Clause in scope⁶⁷ but echoed the Clause's

63. In other words, the Clause, its effect notwithstanding, was self-executing. *See, e.g.,* Laycock, *supra* note 29, at 292; Sachs, *supra* note 38, at 1229.

64. *See* Crane, *supra* note 62, at 315, 323. The passage of the Defense of Marriage Act, 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006), ignited vigorous debate over the extent of congressional power under the Effects Clause; this Note can only briefly summarize the controversy in the context of full faith and credit. According to one theory, Congress can constitutionally legislate to augment the faith and credit mandate but cannot authorize anything less than "full" faith and credit. *See, e.g.,* Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 635–39 (1997) (comparing this "Ratchet Theory" to the one-way ratchet theory considered in *Katzenbach v. Morgan*, 384 U.S. 641 (1970), in which the Supreme Court suggested that Section Five of the Fourteenth Amendment allowed Congress to strengthen but not narrow Fourteenth Amendment rights); James M. Patten, *The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939, 952–57 (1998) (arguing that Congress has no power to enact legislation that limits the effect of the Full Faith and Credit Clause because such legislation reduces the Clause to "surplusage"); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 44 (2005) (contending that to decrease the required effect of state statutes and judgments would "repeal part of the Constitution"). The opposing theory asserts that the Effects Clause permits Congress to excuse recognition of out-of-state marriage, thus contracting the full faith and credit command. *See, e.g.,* H.R. REP. NO. 104-664, at 26–27 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2930–31 ("Congress retains a discretionary power to carve out such exceptions as it deems appropriate."); Lynn D. Wardle, *Non-recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 391–419 (2005) (arguing that the Effects Clause grants qualified power to Congress to prescribe the effect of sister-state activities because it is the "branch of government best suited to make the decision about conflicting state policy interests"). The Supreme Court has not ruled on this matter, but once observed:

[W]hile Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.

Thomas v. Wash. Gas Light Co., 448 U.S. 261, 272 n.18 (1980).

65. *See* Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (2006)). This act is often called the "implementing statute." *E.g.,* *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998); Ruth Bader Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States*, 4 INT'L LAW. 720, 722 n.10 (1970).

66. Act of May 26, 1790, ch. 11.

67. The Act's language varies from the Clause's text in several ways. First, the Act is silent as to the interstate effect of laws (public acts). Second, whereas the Clause mandates that full faith and credit be given "in each State," the Act limits its prescribed effect to courts. Third, the Act also limits its scope to judicial records. Fourth, the Act extends the

faith and credit language, judges interpreting the Act were required to address whether Congress was importing the Clause's command or dictating a different effect.⁶⁸ As with the faith and credit provision in the Articles of Confederation, the lower court decisions included both evidentiary and substantive interpretations of the term "full faith and credit."⁶⁹ A second implementing statute, enacted in 1804 to cover executive records,⁷⁰ did little to resolve the uncertainty.⁷¹ Eventually, the Supreme Court addressed the divergent interpretations in its first full faith and credit case in 1813.

d. The Supreme Court Resolves Credit Owed to Judgments

In *Mills v. Duryee*,⁷² the Supreme Court ruled that the Full Faith and Credit Act prescribed a substantive effect for records and judgments so as to preclude the reexamination of merits.⁷³ *Mills* concerned an action of debt brought in the District of Columbia on a New York judgment, and addressed the question whether the defendant could enter a plea denying the existence of the debt.⁷⁴ The Supreme Court, therefore, had to resolve whether the prior New York judgment should be introduced into the D.C. court as merely rebuttable evidence of debt, or given substantive effect.⁷⁵

Writing for the majority, Justice Joseph Story explained that interpreting the Act to contain a mere evidentiary rule would render the constitutional Clause "illusory."⁷⁶ *Mills* clarified that the judgment of a state court must have the same "credit, validity and effect" in other states as it had in the

faith and credit obligation to all courts, thus including federal courts. Fifth, though using the Clause's phrase "faith and credit," the Act does not specify "full faith and credit" but employs the comparative expression "such faith and credit . . . as" the record or judgment had where rendered. The current statute, as amended in 1948, requires full faith and credit to sister-state statutes, and expands its coverage to federal courts. *See* 28 U.S.C. § 1738 (2006) ("Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.").

68. *See* Engdahl, *supra* note 38, at 1588, 1640–47 (surveying cases and arguing that the Clause contained an evidentiary sufficiency rule and the Act prescribed substantive effect); Whitten, *supra* note 20, at 296–327 (analyzing cases and concluding that a "clear majority" of judges rejected a broad reading of both the Clause and Act).

69. *See* Engdahl, *supra* note 38, at 1640–47; Whitten, *supra* note 20, at 296–327; *supra* notes 56–57 and accompanying text.

70. *See* Act of Mar. 27, 1804, ch. 11, 2 Stat. 298 (recodified as 28 U.S.C. § 1739 (2006)) (providing all "records [once authenticated] . . . shall have the same full faith and credit in every court and office within the United States . . . as they have . . . in the courts or offices of the State . . . from which they are taken.").

71. *See* Sachs, *supra* note 38, at 1246–48.

72. 11 U.S. (7 Cranch) 481 (1813).

73. *Id.* at 483.

74. *Id.*

75. *Id.* at 484.

76. *Id.* at 485. Reynolds and Richman note that Justice Story's "emphatic rejection" of an evidentiary interpretation of the Act was "heightened" by the fact that it was issued over a dissent, "a rare event in those days." REYNOLDS & RICHMAN, *supra* note 27, at 9.

rendering state.⁷⁷ In *Mills*, therefore, the substance of the prior New York judgment could not be revisited or impeached in a second state.⁷⁸ Justice Story attributed the substantive effect to the Act and did not directly address the Clause's force.⁷⁹

Nevertheless, by the end of the nineteenth century, the effect given to sister-state judgments was attributed to both the Clause and Act without regard to the provisions' differing language.⁸⁰ Thus, in 1887's *Chicago & Alton Railroad Co. v. Wiggins Ferry Co.*,⁸¹ the Supreme Court stated in dicta that "[w]ithout doubt" the Clause by itself meant that even statutes "shall be given the same effect by the courts of another state that they have by law and usage at home."⁸²

e. The Clause and Choice of Law

As noted above, the Full Faith and Credit Clause generally governs the force with which a state judgment or law travels across state lines.⁸³ The Clause does not, however, specify what happens where one state court is faced with another state's conflicting statutory or common law.⁸⁴ The Clause's silence as to choice-of-law rules has been a thorny issue in full faith and credit doctrine for state legislative acts.⁸⁵ This Note briefly summarizes the issue.

In the first half of the twentieth century, the Supreme Court experimented with and abandoned an application of the Full Faith and Credit Clause that involved appraising states' competing interests to determine which state law to apply in a dispute.⁸⁶ Under this balancing approach, "[p]rima facie every state [was] entitled to enforce in its own courts its own statutes," unless one of the parties showed "that of the conflicting interests involved those of the foreign state [were] superior to those of the forum."⁸⁷ This method

77. See *Hampton v. McConnell*, 16 U.S. (3 Wheat.) 234, 234 (1818) (summarizing *Mills*'s holding).

78. *Mills*, 11 U.S. at 483.

79. *Id.* at 485.

80. See Engdahl, *supra* note 38, at 1588 ("By the last quarter of the nineteenth century . . . habituation to the longstanding replication rule prescribed by the 1790 Act had induced the impression that [the Clause's phrase "full faith and credit"] by itself imported sister-state replication of effect [for judgments from other forums].").

81. 119 U.S. 615 (1887).

82. *Id.* at 622.

83. See *supra* Part I.A.1.

84. For a summary of modern full faith and credit doctrine regarding state laws, see *infra* Part I.A.4.b.

85. See, e.g., REYNOLDS & RICHMAN, *supra* note 27, at 19–43 (providing an overview of the "public acts" provision's "long and checkered history"); Jackson, *supra* note 11, at 6–7 (concluding that the Framers did not "anticipate the refinements and distinctions that have been developed by later experience and now find place in that peculiarly American body of scholarship and controversy known as 'Conflict of Laws'").

86. See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 495 (2003) (describing this line of cases).

87. *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547–48 (1935).

suggested that a state would not have to apply sister-state law that it found “obnoxious to its policy.”⁸⁸

Having discarded this balancing approach, the Supreme Court’s application of full faith and credit now allows a state to choose its own 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.”⁸⁹ In this way, the evolving application of the Full Faith and Credit Clause to statutes has merged with the Due Process Clause to impose a minimal constitutional limit on a state’s choice of law in its courts.⁹⁰

3. Purpose and Principles

The Full Faith and Credit Clause is an essential tool for welding the states into a unified and integrated country.⁹¹ The Supreme Court has repeatedly declared that the Clause’s animating purpose was “to alter the status of the several states as independent foreign 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.”⁹² To achieve the change from foreign sovereigns to united states, the Framers “substituted [the Clause’s] command for the earlier principles of comity.”⁹³ As a result, the Full Faith and Credit Clause prevents states from discriminating against other states and refusing to enforce validly created rights and obligations.⁹⁴

When the Clause restricts one state’s authority, however, it concurrently promotes state sovereignty by preserving the policies encompassed in

88. *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 504 (1939). For discussion on the “public policy” exception to full faith and credit due to statutes, see *infra* notes 121–25 and accompanying text.

89. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981).

90. REYNOLDS & RICHMAN, *supra* note 27, at 19.

91. See, e.g., *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 289 (1980) (White, J., concurring) (“[T]he major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force.”); *Johnson v. Muelberger*, 340 U.S. 581, 584 (1951) (“[T]he Framers intended [the Clause] to help weld the independent states into a nation”); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (describing the Clause as “a nationally unifying force” similar to the Commerce Clause).

92. *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935); see, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998); *Hughes v. Fetter*, 341 U.S. 609, 612 n.9 (1951); *Williams v. North Carolina*, 317 U.S. 287, 295 (1942).

93. *Estin v. Estin*, 334 U.S. 541, 546 (1948). For a definition of comity, see *supra* note 42.

94. See *Hughes*, 341 U.S. at 611 (“It is also settled that [a state] cannot escape [its] constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent.”); *Estin*, 334 U.S. at 546–47 (“The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate [a court’s] personal predilections.”); *Milwaukee Cnty.*, 296 U.S. at 276–77 (interpreting the Clause to prevent states from ignoring legal obligations created by other states); cf. *Haywood v. Drown*, 129 S. Ct. 2108, 2125–26 n.5 (2009) (Thomas, J., dissenting) (asserting that the Clause is a “textual prohibition” on “state-to-state discrimination”).

another state's judicial determination, law, or record.⁹⁵ The Supreme Court has observed that the Clause prevents "parochial entrenchment on the interests of other States" that would occur if the rendering state could dictate an external effect other than full faith and credit.⁹⁶ The Clause promotes interstate compromise by allowing a state to determine the extraterritorial effects of its laws, but only "indirectly, by prescribing the effect of its judgments within" its own territory.⁹⁷

In addition to balancing state interests in securing and defending policies, the Full Faith and Credit Clause obliges states to respect judicial finality.⁹⁸ The Clause limits a state legislature's ability to undermine the enforcement of obligations created by sister-state judiciaries.⁹⁹ Similarly, the Clause prohibits state executive officers from substituting their judgment for the policies underlying a sister-state's judicial determination.¹⁰⁰ Though the Full Faith and Credit Clause allows state legislatures to direct the enforcement of rights and obligations resulting from out-of-state judgments, the Clause ensures that states treat the judgments with equal dignity, regardless of the conflicting policies.¹⁰¹

The Supreme Court has also articulated that the Clause benefits individual litigants by preserving their rights acquired or confirmed under a state's validly created law or judgment.¹⁰² The Clause advances the "maximum enforcement" of state obligations or rights in sister-states.¹⁰³

95. See Jackson, *supra* note 11, at 34 (asserting that the Clause promotes a system of justice "based on the preservation but better integration" of state jurisdictions); Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 935 (2006) ("Case law makes clear . . . that the Clause aims not only at unifying the states, but also at ensuring that the states remain meaningfully empowered, distinct polities.").

96. *Thomas*, 448 U.S. at 272.

97. *Id.* at 270; cf. REYNOLDS & RICHMAN, *supra* note 27, at 10 (asserting that the Clause minimizes interstate friction).

98. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996) (stating that the Full Faith and Credit Clause requires a state to "treat a state-court judgment with the same respect that it would receive in the courts of the rendering State"); REYNOLDS & RICHMAN, *supra* note 27, at 10 (asserting that the Clause requires states to "trust the integrity of the activities of other states").

99. See *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (holding that an Oklahoma statute that categorically denied the "effective operation" of a class of sister-state judgments violated the Full Faith and Credit Clause); *infra* Part II.A.2.

100. See *Davenport v. Little-Bowser*, 611 S.E.2d 366, 372 (Va. 2005) (invalidating a state registrar's interpretation of a statute providing for the recognition of out-of-state adoption decrees to exclude adoptions by same-sex couples because "[j]ust as we cannot substitute our judgment for that of the [Virginia] General Assembly, neither can an agency of the executive branch of government"). *But see* *Adar v. Smith*, 639 F.3d 146, 160 (5th Cir.) (en banc), *cert. denied*, 132 S. Ct. 400 (2011) (upholding a state registrar's interpretation of a statute directing the recognition of out-of-state adoption decrees to exclude adoptions by same-sex couples without addressing the registrar's power to do so).

101. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (explaining that a state's obligation to recognize sister-state judgments is "exacting" and lacks any "public policy exception").

102. See, e.g., *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941); *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939).

103. *Hughes v. Fetter*, 341 U.S. 609, 612 (1951).

By preserving the finality of judgments, the Clause protects individual liberty and allows individuals to travel through states with the security that judicially created rights enjoy “nation-wide application.”¹⁰⁴ Moreover, a state’s full faith and credit duty promotes finality and certainty for individuals by preventing dissatisfied litigants from relitigating issues that have already been decided in another state.¹⁰⁵ The Clause protects parties from the “uncertainty, confusion, and delay” that accompany such reexamination.¹⁰⁶

In sum, the Full Faith and Credit Clause carefully balances four competing interests: (1) the interest of federalism in state compromise; (2) dual state interests in promoting state policies and defending against the intrusion of other state’s policies; (3) the interest of separation of powers in preserving judgments; and (4) the interests of individuals in liberty and security.¹⁰⁷ The different credit due to sister-state laws or judgments reflects the Clause’s cautious balance.¹⁰⁸ Scholars debate when the Clause may recognize that a single state’s interest in preserving its own policies—and declining the policies encompassed by an out-of-state judgment—is outweighed by the competing federal, state, and individual interests.¹⁰⁹ In such cases, the Clause may “order submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system . . . demand[s] it.”¹¹⁰ Thus, a state’s full faith and credit obligation is the “price” of a unified federal system.¹¹¹

4. Modern Doctrine: How to Measure Full Faith and Credit

In effecting the principles discussed above, contemporary Supreme Court decisions have clarified that the demand of full faith and credit adjusts depending on the type of law rendered. Building on the history and principles outlined above, this section details the modern doctrine of full faith and credit.

104. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943); see Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL’Y REV. 31, 39–40 (2010).

105. See *Kovacs v. Brewer*, 356 U.S. 604, 611 (1958).

106. *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704 (1982).

107. See Rhonda Wasserman, *Are You Still My Mother? Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1, 3–4 (2008) (identifying the tension between family, state, and federal interests).

108. See *infra* Part I.A.4.b–c.

109. Compare Wasserman, *supra* note 107, at 82 (concluding that state, federal, and—especially in the adoption context—a child’s “overriding interest in stable family relationships,” outweigh a single state’s interest in denying recognition or enforcement to out-of-state adoption decrees), with Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian and Gay Adoptions*, 3 AVE MARIA L. REV. 561, 598–99 (2005) (concluding that a state may decline to recognize or enforce incidental rights of sister-state adoption judgments that violate a strong, conflicting policy of the state).

110. *Estin v. Estin*, 334 U.S. 541, 546 (1948).

111. See *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) (“If in [the Clause’s] application local policy must at times be required to give way, such ‘is the part of the price of our federal system.’” (quoting *Williams v. North Carolina*, 317 U.S. 287, 302 (1942))).

a. Records and Routine Admission

Case law and commentary are sparse on the full faith and credit doctrine's application to records.¹¹² "Records" in the Clause refer to nonjudicial records.¹¹³ The two implementing statutes provide simple procedures for authenticating records for admission into evidence,¹¹⁴ which courts have followed without controversy.¹¹⁵ The "records" provisions of the Clause and its companion acts have not been applied beyond this effect.¹¹⁶ Generally, to give full faith and credit to sister-state records means to "admit them routinely" into evidence in court.¹¹⁷

b. Public Acts and the Public Policy Exception

A state's compliance with the full faith and credit command when asked to apply another state's "public acts" is more complex.¹¹⁸ It is well established that a state's statutes constitute "public acts" under the Full Faith and Credit Clause.¹¹⁹ For choice-of-law purposes, the Supreme Court has articulated that the Clause operates along with the Due Process Clause to impose a minimal constitutional limit on a forum state's authority to apply its own law in a dispute between diverse parties.¹²⁰

With an accommodating standard,¹²¹ the Clause does not require "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."¹²² Although by the 1950s the Supreme Court had abandoned the notion that a court should weigh conflicting state interests,¹²³ it has reiterated that a court may be "guided by the forum State's 'public policy' in determining the law applicable to a controversy."¹²⁴ As recently as 2003, the Supreme Court

112. See REYNOLDS & RICHMAN, *supra* note 27, at 13–18.

113. See Whitten, *supra* note 20, at 294.

114. See *supra* notes 66–71 and accompanying text.

115. See REYNOLDS & RICHMAN, *supra* note 27, at 13–14 (observing that the "absence of controversy" about the application of full faith and credit to records "reveals how well the system [for records] works in practice").

116. See *id.* at 13–18. *But see* Shawn Gebhardt, Comment, *Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 CALIF. L. REV. 1419, 1422–25 (2009) (arguing that personal status records issued by administrative agencies should be accorded the same faith and credit as judgments).

117. REYNOLDS & RICHMAN, *supra* note 27, at 13.

118. See *supra* Part I.A.2.e.

119. *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 154–55 (1932) ("That a statute is a 'public act' within the meaning of [the Clause] is settled.").

120. See *supra* notes 89–90 and accompanying text.

121. See *Williams v. North Carolina*, 317 U.S. 287, 295 (1942).

122. *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939); *accord Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003).

123. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981); *Carroll v. Lanza*, 349 U.S. 408, 413 (1955).

124. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (citing *Nevada v. Hall*, 440 U.S. 410, 421–24 (1979)).

alluded to the Clause's public policy exception with respect to applying sister-state statutes.¹²⁵

c. Judgments and the Distinction Between Recognition and Enforcement

The full faith and credit command is most demanding with respect to judicial proceedings.¹²⁶ In contrast to the accommodating statutory approach, an "exacting" obligation denies states any discretion in choosing to recognize sister-state judgments.¹²⁷ Simply put, there is "no roving 'public policy exception'" that might permit states to ignore another state's judgment.¹²⁸ Through the Full Faith and Credit Clause, "rights judicially established in any part are given nation-wide application."¹²⁹

Accordingly, sister-state judgments are entitled to nationwide force "for claim and issue preclusion (*res judicata*) purposes."¹³⁰ To qualify for this fullest treatment, a judgment must be final,¹³¹ and rendered by a court with

125. See *Franchise Tax Bd.*, 538 U.S. at 499 (quoting *Carroll*, 349 U.S. at 413) ("States' sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State."). Some scholars assert that, though the public policy allowance was part of the law-of-nations approach to conflict of laws, the Clause was intended to eliminate the exception. See, e.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 665, 1971-72, 1985-86 (1997) (arguing that the public policy exception was "a matter of customary international law" and had been "incorporated into American practice with no particular thought given to its appropriateness in the context of a federal system defined by a written constitution," but that "[t]he central object of the Clause was . . . to eliminate a state's prideful unwillingness to recognize other states' laws or judgments on the ground that these are inferior or unacceptable"); Laycock, *supra* note 29, at 313 ("The public-policy exception is a relic carried over from international law without reflection on the changes in interstate relations wrought by the Constitution.").

126. See, e.g., REYNOLDS & RICHMAN, *supra* note 27, at 71-74; William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 412-14 (1994).

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

128. *Id.*

129. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

130. *Baker*, 522 U.S. at 233. The Supreme Court first articulated this comparison in 1942. See *Riley v. N.Y. Trust Co.*, 315 U.S. 343, 349 (1942) ("By the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, [became] a part of national jurisprudence."). American *res judicata* doctrine is an almost entirely judge-made body of law governing both the issue and claim preclusive effects of judgment. ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 5, 9 (2001). Issue preclusion refers to the bar on relitigation of matters actually litigated and determined. *Id.* at 11. Claim preclusion refers to a judgment's extinguishing of claims presented for adjudication, whether or not all matters within the claim were litigated in the action. *Id.*

131. *Baker*, 522 U.S. at 233. For purposes of full *res judicata* effect (both issue and claim preclusion), "[a] judgment is final when all the issues on which it turns have been decided" and "the trial court has concluded the regular proceedings in adjudicating the claim." CASAD & CLERMONT, *supra* note 130, at 51-52. Even judgments that control future activity and may be subject to modification, such as custody determinations, are "sufficiently final" for *res judicata* purposes because any change in circumstances that might allow modification would create different claims and issues. *Id.* at 51. Nevertheless, because of uncertainty among courts as to whether custody determinations qualified as "final judgments" for purposes of the Full Faith and Credit Clause, Congress exercised its Effects Clause authority with the Parental Kidnapping Prevention Act (PKPA) of 1980. See Pub. L. No. 96-611, 94

both personal and subject matter jurisdiction.¹³² Although each jurisdiction independently generates its own distinctive *res judicata* body of law,¹³³ the extent of a judgment's preclusive effect in a sister state is defined by the rendering state.¹³⁴

Similarly, because a state may not dictate the extraterritorial effect of its judgment beyond what the state provides within its borders,¹³⁵ "[e]nforcement measures do not travel" with the judgment.¹³⁶ Enforcement measures broadly encompass state practices "regarding the time, manner, and mechanisms for enforcing judgments"¹³⁷ and include statutes of limitations, execution procedures, garnishment availability, and provisions governing property interests and creditor prioritizing for debtor judgments.¹³⁸ Accordingly, an enforcing state may refuse an order that "purport[s] to accomplish an official act within [its] exclusive province."¹³⁹

Though the Full Faith and Credit Clause grants a state control over its enforcement mechanisms, the Clause requires that the state apply them in an "evenhanded" manner.¹⁴⁰ The enforcing state may not, for example, "under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause" when those claims were validly rendered.¹⁴¹

5. Enforcing the Full Faith and Credit Clause: *Thompson v. Thompson*

The Full Faith and Credit Clause is most commonly invoked by litigants after one court refuses to substantively recognize the laws or judgments of another state.¹⁴² In *Thompson v. Thompson*,¹⁴³ the Supreme Court

Stat. 3568 (codified at 28 U.S.C. § 1738A (2006)); *infra note* 149 and accompanying text. The PKPA requires that the "appropriate authorities" of every state "shall enforce . . . and shall not modify" sister-state custody or visitation determinations, except under certain enumerated circumstances. 28 U.S.C. § 1738A(a).

132. See *Baker*, 522 U.S. at 233; see also CASAD & CLERMONT, *supra* note 130, at 49–50 (identifying this *res judicata* requirement as "validity," which requires valid subject-matter jurisdiction, territorial jurisdiction, and adequate notice).

133. See CASAD & CLERMONT, *supra* note 130, at 5.

134. See, e.g., *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982); *Fauntleroy v. Lum*, 210 U.S. 230, 237–38 (1908); *supra* note 97 and accompanying text.

135. See *supra* notes 96–97 and accompanying text.

136. *Baker*, 522 U.S. at 235 (citing *McElmoyle ex rel. Bailey v. Cohen*, 38 U.S. (13 Pet.) 312, 323 (1839)); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (1971) ("The local law of the forum determines the methods by which a judgment of another state is enforced.").

137. *Baker*, 522 U.S. at 235.

138. See Wasserman, *supra* note 107, at 72.

139. *Baker*, 522 U.S. at 235.

140. *Id.*

141. *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) (citing *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 300 (1866)); see also *Philadelphia v. Bauer*, 478 A.2d 773, 777 (N.J. 1984) ("The legislature cannot accomplish indirectly that which it could not do directly." (quoting *Coons v. Am. Honda Motor Co.*, 463 A.2d 921, 927 (N.J. 1983))). The *Bauer* court continued, "A state may not by subterfuge refuse to give full faith and credit to the judgment of a sister state." *Id.* at 777.

142. See *Adar v. Smith*, 639 F.3d 146, 154 (5th Cir.) (en banc), *cert. denied*, 132 S. Ct. 400 (2011); Brief for Dean Erwin Chemerinsky, et al. as Amici Curiae Supporting the

addressed whether the Clause provided a private federal cause of action to “enforce” the Clause when two conflicting state orders existed, but neither state court had denied recognition to the other’s order.¹⁴⁴

In *Thompson*, a father brought suit in federal court against his ex-wife, and sought an order declaring the validity of a Louisiana order that had granted him custody of their child, while invalidating a California custody order in favor of his wife.¹⁴⁵ The plaintiff did not allege a violation of the Full Faith and Credit Clause because he had not challenged the California order in state court prior to initiating the case in federal court.¹⁴⁶ Instead, he based the action against his wife on a full faith and credit provision in the Parental Kidnapping Prevention Act¹⁴⁷ (PKPA).

The *Thompson* court ruled that the PKPA’s full faith and credit reference did not provide an implied private cause of action in federal court to determine which of two conflicting custody orders should prevail.¹⁴⁸ In the Court’s words, the purpose of the PKPA was to increase a state court’s full faith and credit obligation owed to custody orders, whose status as “final judgments” was in doubt because they were modifiable.¹⁴⁹ The Supreme Court found that Congress intended the PKPA to have the “same operative effect” as the Full Faith and Credit Act.¹⁵⁰ The Court reasoned that the PKPA was “most naturally construed” as a “mandate directed to state courts” and therefore, did not “create an entirely new cause of action” beyond challenging a state court’s denial of full faith and credit.¹⁵¹

In its analysis, the *Thompson* court observed that “the Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action.”¹⁵² The Court, citing 1904’s *Minnesota v. Northern Securities Co.*, noted that the Clause “only prescribes a rule by which courts, Federal and state, are to be guided” when deciding the effect and applicability of sister-state laws or statutes.¹⁵³

Expressing concern that federal review to enjoin a state custody order would require inquiry into states’ substantive domestic relationship

Petition for Writ of Certiorari at 11, *Adar*, No. 11-46 (U.S. July 11, 2011), 2011 WL 3584748, at *11.

143. 484 U.S. 174 (1988).

144. *Id.* at 179–80.

145. *Id.* at 178–79.

146. *Id.* at 178.

147. Pub. L. No. 96-611, 94 Stat. 3568 (codified at 28 U.S.C. § 1738A (2006)); *see supra* note 131.

148. *See Thompson*, 484 U.S. at 179–80.

149. *See id.* at 180–82 (“[T]he principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations.”).

150. *Id.* at 183.

151. *Id.*

152. *Id.* at 182 (citing *Minnesota v. N. Sec. Co.*, 194 U.S. 48, 72 (1904)). In *Minnesota v. Northern Securities Co.*, Minnesota argued that a question of according full faith and credit to its laws was grounds for removal to federal court where the state alleged that Northern Securities had violated state antitrust law. 194 U.S. 48, 71–72 (1904). The Supreme Court dismissed this argument as irrelevant and observed that “the clause has nothing to do with the conduct of individuals or corporations.” *Id.* at 72.

153. *Thompson*, 484 U.S. at 182–83 (citing *Northern Securities Co.*, 194 U.S. at 72).

determinations, the Supreme Court also found that Congress did not intend to involve the federal courts in the enforcement of state custody orders.¹⁵⁴ It dismissed the suggestion that federal review was necessary because state courts were “unable or unwilling” to give full faith and credit to sister-state custody determinations.¹⁵⁵ Accordingly, the *Thompson* court concluded that the full faith and credit mandate encompassed in the PKPA did not create a cause of action for an individual against another individual for federal review of the validity of conflicting state custody decrees.¹⁵⁶

*B. The Twenty-First Century Brady Bunch:
Adoption, Legal Parenthood, and Same-Sex Couples*

Part I.B presents an overview of the American process of adoption. First, it explores state and federal law governing adoption practice, with a focus on state policies that control adoption by gays, lesbians, and same-sex couples. Next, this section explains the rights and obligations created by adoption, while providing detail on state statutes that require the issuance of revised birth certificates following an adoption.

1. The Requirement of Judicial Sanction

Though a “creature of . . . statutes,”¹⁵⁷ adoption is sealed with a judgment.¹⁵⁸ Since Massachusetts enacted the first modern American adoption statute in 1851,¹⁵⁹ a distinctive feature of American adoption practice has been the requirement of a judicial finding that the “best interests” of the child are served.¹⁶⁰ Prior to 1851, private transfers effected

154. *Id.* at 186 n.4. The Supreme Court also noted the “extraordinary nature” of such an action that would allow federal review of a state trial court’s decision prior to review by a state’s appellate or highest court. *Id.* at 187 n.5.

155. *Id.*

156. *Id.*

157. 1 JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW AND PRACTICE § 1.02[1] (2008). There was no common law right to adoption. *Id.* For a history of adoption from Roman times, and of the development of American law, see generally Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956), and Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971).

158. See 1 HOLLINGER ET AL., *supra* note 157, § 1.01[2][a]–[b].

159. See, e.g., *id.* § 1.02[2]; *id.* app. 1-A.

160. See, e.g., UNIF. ADOPTION ACT § 3-703(a) cmt., 9 U.L.A. 94 (1994) (“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.”); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 NW. U. L. REV. 1038, 1042–43 (1979) (describing the 1851 Massachusetts adoption statute as the first “modern” adoption law and emphasizing its “notable” feature that “[t]he heart of the adoption transaction became the judicially monitored transfer of rights”). A child’s “best interests” were defined more in economic than in psychological terms well into the twentieth century. See 1 HOLLINGER ET AL., *supra* note 157, § 1.03[2]. Beginning in the 1930s, the modern view of adoption emerged, characterized by concern for the social and psychological well-being of the child. See *id.* § 1.04.

adoption in America.¹⁶¹ Adoption was viewed as a contract between adults to address concerns of inheritance and the continuity of the adopter's family.¹⁶²

The shift in American adoption law, from private contracts to public statutes requiring judicial approval, reflected a realization “of what is accomplished in the legal act of adopting”—the endowment to the adopted child of rights equal to that of a natural child.¹⁶³ The magnitude of this result necessitated state involvement to protect the child.¹⁶⁴ The modern approach therefore incorporated an “expanded [judicial] authority to employ . . . discretion” that already existed for the resolution of custody disputes.¹⁶⁵ In sum, “the public sector triumphed over the private” in American adoption policy.¹⁶⁶

Although an agency or individuals may now “arrange” an adoption,¹⁶⁷ the legal relationship of parent and child cannot be created without a judicial decree.¹⁶⁸ A court must determine a biological parent's consent (or waiver) and a child's “best interests” before any legal rights or obligations transfer.¹⁶⁹ Despite a common standard of “best interests,” however, state adoption statutes rarely define the term with specificity.¹⁷⁰ As a result of state legislatures' silence, courts hold broad authority in evaluating and finalizing adoptions.¹⁷¹

2. Judicial Adoption Procedures and Determining a Child's “Best Interests”

Both the state legislature and judiciary share in controlling the privilege to legally adopt,¹⁷² with a statute directing who may adopt and how, and a judge deciding who and what will serve the child's “best interests.”¹⁷³

161. See Presser, *supra* note 157, at 461–64; Zainaldin, *supra* note 160, at 1075–83.

162. See Huard, *supra* note 157, at 748–49.

163. Presser, *supra* note 157, at 463–64.

164. Adoption, therefore, involves a state's *parens patriae* interest in “preserving and promoting the welfare of the child” with the goal of providing a permanent home. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); see also BLACK'S LAW DICTIONARY 1221 (9th ed. 2009) (defining *parens patriae* as, literally, “parent of the country,” and, in application, to “the state in its capacity as provider of protection to those unable to care for themselves”).

165. Zainaldin, *supra* note 160, at 1052, 1085–86.

166. *Id.* at 1089.

167. See 1 HOLLINGER ET AL., *supra* note 157, §§ 3.01–4.

168. See *id.* § 4.03[1]; Zainaldin, *supra* note 160, at 1042–43.

169. See 1 HOLLINGER ET AL., *supra* note 157, § 1.01[2][a]–[b].

170. See *id.* § 4.01[1]; see also, e.g., CONN. GEN. STAT. ANN. § 45a-727a (West Supp. 2011) (listing legislative findings that the best interests of a child in adoption are promoted “by having persons in the child's life who manifest a deep concern for the child's growth and development”; when “a child has as many persons loving and caring for the child as possible”; and when “the child is part of a loving, supportive and stable family”).

171. See 1 HOLLINGER ET AL., *supra* note 157, § 4.01[1] (noting that “most adoption statutes do not include a list of specific factors to be considered in making a best interests determination”); see also *In re L.W.*, 613 A.2d 350, 355 (D.C. 1992) (asserting that a court's determination as to the “best interests” of a child must be fact-specific because “magic formulas have no place in decisions designed to salvage human values” (citing *Lemay v. Lemay*, 247 A.2d 189, 191 (N.H. 1968))).

172. See *supra* Part I.B.1.

173. See *supra* Part I.B.1.

Because the term “best interests” lacks any uniform statutory description,¹⁷⁴ adoption law reflects diverse state policies regarding domestic relations and family law.¹⁷⁵ In determining whether a particular household promotes a child’s “best interests,” the judicial gatekeeper must consider whether the prospective adopters are suitable.¹⁷⁶ Among other factors,¹⁷⁷ courts have accorded weight to an adopter’s age,¹⁷⁸ religion,¹⁷⁹ race,¹⁸⁰ marital status,¹⁸¹ and sexual orientation.¹⁸² Though state adoption law is diverse and therefore inconsistent,¹⁸³ courts commonly articulate the goal of adoption statutes as providing the child with a loving, stable, and permanent home.¹⁸⁴ Nevertheless, attempts to achieve uniformity among state adoption law and procedures have largely faltered.¹⁸⁵

174. 1 HOLLINGER ET AL., *supra* note 157, § 4.01[1].

175. Compare FLA. STAT. ANN. § 63.042 (West 2003) (prohibiting any homosexual person from adopting), *invalidated by* Florida Dep’t of Children & Families v. Adoption of X.X.G., 45 So. 3d 79 (Fla. 2010), and G.S. v. T.B., 985 So. 2d 978, 983 (Fla. 2008) (describing the goal of Florida’s adoption scheme as a “stable, permanent, and loving environment” for an adopted child), with *In re M.M.D.*, 662 A.2d 837, 857 (D.C. 1995) (describing the purpose of the District of Columbia’s adoption statute as to “provide a loving, nurturing home” and concluding that a committed, unmarried same-sex couple could fulfill this purpose).

176. See 1 HOLLINGER ET AL., *supra* note 157, § 3.06[1].

177. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 965 (4th ed. 2010) (listing decisions that considered adopter’s intelligence, undisclosed pregnancy, or deafness).

178. 1 HOLLINGER ET AL., *supra* note 157, § 3.06[2]. For commentary on the consideration of this factor, see generally Sara C. Mills, *Perpetuating Ageism via Adoption Standards and Practices*, 26 WIS. J.L. GENDER & SOC’Y 69 (2011).

179. 1 HOLLINGER ET AL., *supra* note 157, § 3.06[3]. For commentary on the consideration of this factor, see generally Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption*, 58 FORDHAM L. REV. 383 (1989).

180. 1 HOLLINGER ET AL., *supra* note 157, § 3.06[4]. For commentary on the consideration of this factor, see generally Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991); Ruth-Arlene W. Howe, *Race Matters in Adoption*, 42 FAM. L.Q. 465 (2008).

181. 1 HOLLINGER ET AL., *supra* note 157, § 3.06[5]. For commentary on the consideration of this factor, see generally Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006); Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. FAM. STUD. 345 (2003).

182. See WEISBERG & APPLETON, *supra* note 177, at 966–72; *infra* Part I.B.3.

183. See 1 HOLLINGER ET AL., *supra* note 157, §§ 1.01[1], 4.03[2].

184. See, e.g., *In re Roger B.*, 418 N.E.2d 751, 756 (Ill. 1981) (explaining that Illinois’s adoption statute benefits an adoptee “by providing a home, support, a family unit, and loving care”); *In re Adoption of K.F.*, 935 N.E.2d 282, 289 (Ind. Ct. App. 2010) (citing *In re Adoption of N.W.*, 933 N.E.2d 909, 914 (Ind. Ct. App. 2010)) (reiterating that the purpose of Indiana’s adoption statutes is to provide “stable family units” for children).

185. See 1 HOLLINGER ET AL., *supra* note 157, § 1.01[1] (noting that only six states adopted the original Uniform Adoption Act, a model code promulgated in 1951 by the National Conference of Commissioners on Uniform State Laws); Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter’s Ruminations*, 30 FAM. L.Q. 345, 345, 377 (1996) (describing the process of drafting the Uniform Adoption Act of 1994 as “bitterly divisive” and acknowledging that the Act faced immediate “intense criticism” from lobbying groups).

Though most adoption proceedings are non-adversarial,¹⁸⁶ states generally require that a petitioner file a pleading¹⁸⁷ and give notice to interested parties,¹⁸⁸ and that a court hold a hearing¹⁸⁹ and issue a judicial finding approving the adoption.¹⁹⁰ When a natural parent contests an adoption, the procedural requirements are more stringent.¹⁹¹ Similarly, where the termination of the natural parents' rights, if required,¹⁹² occurs prior to or as a consequence of an adoption judgment, the judicial proceedings may be more vigorous.¹⁹³ Reflecting a growing trend among states, the Uniform Adoption Act¹⁹⁴ (UAA) requires an evaluation of the prospective parents for all adoptions, whether placements by individuals or agencies, that may then be submitted to the court.¹⁹⁵ Finally, even where uncontested, adoptions entail judicial scrutiny and are not automatically approved.¹⁹⁶

3. State and Federal Laws Addressing Access to Adoption for Gays and Lesbians

One way in which state statutes control access to adoption is by specifying certain means to create legal parentage. For example, in a joint or dual petition adoption, both birth parents relinquish their parental rights, allowing a married couple to jointly assume legal parentage.¹⁹⁷ In a stepparent adoption, the most common in the United States,¹⁹⁸ a child is adopted by her custodial biological parent's new spouse.¹⁹⁹ A second-parent adoption allows an adult who is not related to a child through biology or marriage to become a parent without affecting the legal relationship between the child and existing parent.²⁰⁰ Every procedure requires a judicial decree to establish the adopter's and adoptee's legal rights.²⁰¹

186. See Wasserman, *supra* note 107, at 40–42.

187. See, e.g., ARIZ. REV. STAT. ANN. § 8-109 (2008).

188. See, OHIO REV. CODE ANN. § 3107.11 (LexisNexis 2008); S.C. CODE ANN. § 63-9-730 (2010).

189. See, e.g., HAW. REV. STAT. § 578-8 (West 2008); S.C. CODE ANN. § 63-9-750 (2008).

190. See MINN. STAT. ANN. § 259.57 (West 2007).

191. See 1 HOLLINGER ET AL., *supra* note 157, § 4.09.

192. For example, where a stepparent or a same-sex partner is adopting her spouse's child, existing parental rights may not be terminated. See *infra* notes 199–200 and accompanying text.

193. See 1 HOLLINGER ET AL., *supra* note 157, § 4.04[1][a] (noting stricter evidentiary standards when an adoption entails the involuntary termination of parental rights).

194. UNIF. ADOPTION ACT § 2-201, 9 U.L.A. 94 (1994).

195. See *id.*; 1 HOLLINGER ET AL., *supra* note 157, § 1.05[3][b].

196. See Wasserman, *supra* note 107, at 40 (listing decisions denying uncontested adoptions).

197. BLACK'S LAW DICTIONARY, *supra* note 164, at 56 (defining "joint adoption").

198. *Id.* at 57.

199. 1 HOLLINGER ET AL., *supra* note 157, § 1.01[1].

200. See BLACK'S LAW DICTIONARY, *supra* note 164, at 57 (noting that second-parent adoptions are especially used by lesbian and gay adults).

201. 1 HOLLINGER ET AL., *supra* note 157, § 4.01[1].

As of April 2012, sixteen states and the District of Columbia allow adoption by same-sex couples through joint or second-parent adoptions.²⁰² Some states have passed statutes to expressly permit such adoption, often abrogating prior decisions.²⁰³ In other states, appellate decisions interpreting opaque state statutes allow adoption by same-sex couples.²⁰⁴ In ten additional states, trial courts have granted second-parent adoptions to a non-birth partner.²⁰⁵ At least seven states have laws limiting or prohibiting adoption by homosexual individuals.²⁰⁶

Where families have challenged state laws restricting adoption based on the Federal Constitution, federal courts have expressed doubt as to whether a fundamental right to adopt or be adopted exists.²⁰⁷ Although the Eleventh Circuit rejected an Equal Protection challenge to a Florida statute prohibiting homosexuals from adopting,²⁰⁸ commentators continue to split as to whether this type of law violates the Federal Constitution.²⁰⁹ State appellate courts have concluded that laws barring adoption by homosexuals violate state constitutions on privacy²¹⁰ or equal protection²¹¹ grounds.

202. See *Adoption by LGBT Parents*, NAT'L CENTER FOR LESBIAN RTS., http://www.nclrights.org/site/DocServer/2PA_state_list.pdf?docID=3201 (last updated March 2012).

203. See, e.g., COLO. REV. STAT. § 19-5-203(1)(d.5)(I) (2011), *abrogating In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. App. 1996); CONN. GEN. STAT. ANN. § 45a-724 (West 2004), *abrogating In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999).

204. See *Adoption by LGBT Parents*, *supra* note 202.

205. See *id.*

206. See *id.* (listing various restrictions found in seven states).

207. See, e.g., *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”); *Griffith v. Johnston*, 899 F.2d 1427, 1437 (5th Cir. 1990) (“[W]e cannot recognize a ‘fundamental right’ to adopt a child.”). Courts dismissing claims that adoption is a fundamental right often cite Supreme Court dicta regarding fundamental privacy rights, in which the Court distinguished a foster family from a natural family by stating that the former “has its source in state law and contractual arrangements.” *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842–47 (1977); see also *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) (citing *Smith* and rejecting a claim of fundamental right to adoption); *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1380 (S.D. Fla. 2001) (citing *Smith* and stating that no constitutional right to adopt or to be adopted exists), *aff'd sub nom. Lofton v. Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

208. *Lofton*, 358 F.3d at 817–27 (upholding the constitutionality of the Florida statute and concluding that the legislature “could have reasonably believed that prohibiting adoption into homosexual environments would further its interest in placing adoptive children in homes that will provide them with optimal developmental conditions”).

209. Compare 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*, 539 U.S. 558 (2004), which held that sodomy bans are unconstitutional, “leaves policy-makers free . . . to deny adoptions to parties involved in homosexual relationships”), with Christopher D. Jozwiak, *Lofton v. Secretary of the Department of Children and Family Services: Florida's Gay Adoption Ban Under Irrational Equal Protection Analysis*, 23 LAW & INEQ. 407, 418–22 (2005) (concluding that the Florida statute unconstitutionally excluded homosexuals from the process of adoption based on animus).

210. See *Ark. Dep't of Human Servs. v. Cole*, 2011 Ark. 145, --- S.W.3d --- (holding that an Arkansas adoption statute that banned cohabiting same-sex couples from adoption violated an individual's fundamental right of privacy afforded by the Arkansas constitution).

4. The Adoption Decree, “Incidental” Rights of Parent and Child, and Birth Certificate Amendment Statutes

The judicial sanction of adoption creates a legal relationship of parent and child that entails legally enforceable obligations.²¹² Generally, the adopter promises to support the child, relieves the biological parent of his or her rights and obligations, and gains full and exclusive parental rights over the child.²¹³ Most state statutes provide that after an adoption, the child is treated as if she were the adopter’s biological offspring.²¹⁴ Absent “fraud or some other fundamental irregularity,” an adoption decree is final and irrevocable.²¹⁵ For these reasons, most scholars agree that an adoption judgment is entitled to full faith and credit in subsequent litigation.²¹⁶

In addition to a change in legal status, the child usually gains inheritance and property rights as provided by the state of the adoption.²¹⁷ These “incidents”²¹⁸ of adoption—including an adoptee’s right to her adoptive parent’s name or her right to recover damages for the wrongful death of an adoptive parent—vary from state to state.²¹⁹

For example, in recognition of the new legal identity acquired by an adopted child, every state has a statute providing for the reissuance of a birth certificate following the out-of-state adoption of a child born in-state.²²⁰ As suggested by the UAA, these statutes generally entitle a family to a new birth certificate including the name of the adoptive parents upon

211. See Fla. Dep’t of Children & Families v. Adoption of X.X.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (striking down a Florida statute prohibiting any homosexual from adoption as violating the equal protection clause of the Florida constitution).

212. See 1 HOLLINGER ET AL., *supra* note 157, § 1.01[1]; Presser, *supra* note 157, at 445 (distinguishing pre-1851 private contractual practice from modern legal adoption in that an adopted child could “expect no assistance from the law in enforcing any obligations which his adopting parents might have toward him”).

213. See 1 HOLLINGER ET AL., *supra* note 157, § 1.01[2][c]–[f].

214. See, e.g., HAW. REV. STAT. § 578-16 (West 2008); IDAHO CODE ANN. § 16-1508 (2009); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 n.51 (1977) (Stewart, J., concurring) (“Adoption . . . is recognized as the legal equivalent of biological parenthood.”).

215. 1 HOLLINGER ET AL., *supra* note 157, § 1.01[2][e].

216. See, e.g., 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, 752–53 (2003) (“[A] valid, final adoption decree rendered in one state establishing a parent-child relationship between the adoptive parent[s] and the adoptive child[ren] must be recognized in every other state as equally valid as an adoption decree rendered in that other state.”); Wasserman, *supra* note 107, at 7–10; Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 841 (2003) (“There is no question that states must give effect to the valid adoption judgments of other states.”).

217. 1 HOLLINGER ET AL., *supra* note 157, §§ 1.01[1]–[2][c], 12.03[1].

218. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 290, cmt. b (1971).

219. See Wasserman, *supra* note 107, at 75–79 (analyzing the incidental rights resulting from the change in legal status of each party to adoption).

220. See, e.g., ALA. CODE § 22-9A-12 (LexisNexis 2006); KY. REV. STAT. ANN. § 199.570 (LexisNexis 2007); WYO. STAT. ANN. § 35-1-417 (2011); Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 376 (2001) (pointing out that the practice began in the 1930s).

submission of an authenticated adoption decree.²²¹ States delegate this task to state registrars,²²² clerks of the court,²²³ or agencies such as the department of health²²⁴ or bureau of vital statistics.²²⁵ Almost all states use gender-neutral and sexuality-neutral language by providing that the names of adoptive “person” or “parents” may be substituted.²²⁶ Nevertheless, in states where only married couples or single individuals can adopt,²²⁷ and same-sex couples cannot legally marry,²²⁸ out-of-state adoptive families involving same-sex couples have had difficulty in obtaining new birth certificates.²²⁹

Courts and scholars dispute whether the Full Faith and Credit Clause governs the incidents of adoption. One approach asserts that the incidental rights of adoption fall within an enforcement framework and are therefore outside the exacting full faith and credit owed to judgments.²³⁰ Another approach asserts that an adoption’s incidental rights fall within the Clause’s mandate of evenhanded enforcement.²³¹ At least one court has declined to apply full faith and credit analysis to the issuance of revised birth certificates.

In *Davenport v. Little-Bowser*, the Virginia Supreme Court held that the state registrar could not refuse to reissue a birth certificate with both names of an out-of-state adoptive same-sex couple when the relevant statute referred to only “adoptive parents” and “intended parents.”²³² Virginia first argued that other birth certificate regulations referring to “mother” and

221. See UNIF. ADOPTION ACT § 3-802, 9 U.L.A. 94 (1994).

222. See, e.g., KAN. STAT. ANN. § 65-2423 (Supp. 2010); N.D. CENT. CODE § 23-02.1-05 (Supp. 2011).

223. See ALASKA STAT. § 25.23.170 (2010).

224. See HAW. REV. STAT. § 338-20 (West 2008).

225. See MISS. CODE ANN. § 93-17-21 (West 2007).

226. See, e.g., ARK. CODE ANN. § 20-18-406 (2005); DEL. CODE ANN. tit. 16, § 3126 (2003); MASS. ANN. LAWS ch. 210, § 6A (LexisNexis 2011).

227. For example, in Mississippi, Nebraska, and Utah. See *States with Restrictions on Adoption or Fostering by LGB People*, ACLU, https://www.aclu.org/files/assets/aclu_map1.pdf (last updated February 14, 2012).

228. For example, in Florida, Montana, Oklahoma, and Virginia. See *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated February 24, 2012).

229. See, e.g., *Davenport v. Little-Bowser*, 611 S.E.2d 366 (Va. 2005); see also *infra* Part II.

230. See, e.g., *Adar v. Smith*, 639 F.3d 146, 161 (5th Cir.) (en banc), *cert. denied*, 132 S. Ct. 400 (2011) (concluding that while Louisiana must recognize under the Clause the preclusive effect of a sister-state adoption judgment granted to a same-sex couple, the Louisiana statute providing for the reissuance of the adopted child’s birth certificate was governed by Louisiana law and, therefore, permitted the exclusion of the couple); Wardle, *supra* note 109, at 597–99, 616 (concluding that the Clause “does not compel states with strong public policies against lesbian adoption . . . to recognize or enforce lesbian adoption decrees from other states that would effectively require the second state to legitimate lesbian adoption and its incidents within its territory”).

231. See Wasserman, *supra* note 107, at 82 (arguing that “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”).

232. *Davenport*, 611 S.E.2d at 370–72; see VA. CODE ANN. § 32.1-261 (2003).

“father” supported a restrictive reading of the adoption provision.²³³ In addition, Virginia contended that the state restriction of adoption to single individuals or to married couples sustained its interpretation.²³⁴ The Virginia Supreme Court concluded that a plain reading of the statute invalidated the state’s arguments.²³⁵ The court declined to address the plaintiffs’ full faith and credit claims, concluding, “The sole issue in this case is the enforcement of [the Virginia code].”²³⁶

C. The Beneficent Sword: 42 U.S.C. § 1983 and “Other” Constitutional Clauses

Part I.C explores when individuals may maintain actions against state officials for deprivation of constitutional rights, other than traditional civil rights such as anti-discrimination and equal protection. Part I.C.1 introduces the text and purpose of 42 U.S.C. § 1983. Part I.C.2 focuses on how the Supreme Court determines whether a constitutional provision creates a right that is actionable under § 1983. Since lower courts considering whether the Full Faith and Credit Clause creates enforceable rights for purposes of § 1983 have cited recent Supreme Court analysis,²³⁷ this section examines in detail the Court’s decision that the Dormant Commerce Clause confers an individual right for purposes of § 1983.

1. The Purpose and Scope of § 1983

Section 1983 allows a private citizen to bring a cause of action for incursions upon federal constitutional rights under color of state law.²³⁸ Congress enacted this beneficent²³⁹ statute in 1871 in response to escalating racial discrimination in the South and, in particular, to address the state and local officials who refused to enforce existing legal protections.²⁴⁰

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

234. *Id.* at 372.

235. *Id.*

236. *Id.*

237. *See, e.g., Adar v. Smith*, 639 F.3d 146, 173–75 (5th Cir.) (en banc) (Wiener, J., dissenting), *cert. denied*, 132 S. Ct. 400 (2011).

238. 42 U.S.C. § 1983 (2006). Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

239. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 684 (1978) (Section 1983 must be “liberally and beneficently construed” (quoting Congressman Samuel Shellabarger, who introduced the original act into the 42nd Congress in 1871)).

240. Section 1983 derives from Section 1 of the 1871 Civil Rights Act, Act of April 20, 1871, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983). *See Monroe v. Pape*, 365 U.S. 167, 171–73 (1961) (describing the origins of § 1983).

The statute was a part of the “profound revolution in federalism”²⁴¹ that “alter[ed] the relationship between the States and the Nation.”²⁴² Section 1983 focuses on vigilante state officers who abused their “badge of authority” to deprive victims of protected rights.²⁴³ The “very purpose” of § 1983 was “to interpose the federal courts between the States and the people, as guardians” of constitutional rights, and to protect individuals from unconstitutional state action, “whether that action be executive, legislative, or judicial.”²⁴⁴ Recognizing the “paramount role Congress has assigned to the federal courts to protect constitutional rights,” there is no requirement of exhaustion of state judicial remedies under § 1983.²⁴⁵

Although it “lay virtually dormant” from the 1890s to the 1940s,²⁴⁶ § 1983 is now a “sword”²⁴⁷ and the primary vehicle for vindicating constitutional rights against violations by state actors.²⁴⁸ The Supreme Court has reiterated that the scope of the statute must be broadly and liberally construed.²⁴⁹ Both the expansive statutory language²⁵⁰ and the emphatic legislative history²⁵¹ mandate this approach. Accordingly, the Court has “rejected attempts to limit the types of constitutional rights that are encompassed within the [statute’s] phrase ‘rights, privileges, or immunities.’”²⁵²

2. Determining Constitutional Rights Within § 1983’s Purview:

Dennis v. Higgins

Given § 1983’s expansive breadth, the Supreme Court has considered several times whether constitutional provisions, other than those concerning

241. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 3 (1985).

242. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

243. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.” (citing *Carey v. Piphus*, 435 U.S. 247, 254–57 (1978))).

244. *Mitchum*, 407 U.S. at 242 (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1879)).

245. *Steffel v. Thompson*, 415 U.S. 452, 472–73 (1974).

246. Blackmun, *supra* note 241, at 12.

247. 1 SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983*, at § 1:1 (4th ed. 1997).

248. Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 185.

249. *See, e.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (asserting that the Court has “repeatedly held that the coverage of [§ 1983] must be broadly construed”); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 684 (1978) (emphasizing that § 1983 must be “liberally and beneficently construed”).

250. *See, e.g.*, *Dennis v. Higgins*, 498 U.S. 439, 445 (1991); *Golden State Transit Corp.*, 493 U.S. at 105.

251. *See, e.g.*, *Monell*, 436 U.S. at 684; David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color of” Law*, 1999 UTAH L. REV. 1, 5 (closely analyzing the development of the Ku Klux Act and § 1983 and concluding that “this history should dispel the remarkably persistent myth that . . . Congress never intended the provision to cover constitutional wrongs unless those wrongs were actually authorized by state law”).

252. *Dennis*, 498 U.S. at 445 (quoting 42 U.S.C. § 1983).

equal protection or fundamental rights, confer an individual right vindicable under the statute.²⁵³ In *Dennis v. Higgins*,²⁵⁴ the Supreme Court held that the Dormant Commerce Clause²⁵⁵ conferred individual rights actionable under § 1983.²⁵⁶ The Supreme Court analyzed the provision according to three considerations.²⁵⁷ First, the Court asked whether the clause “create[d] obligations binding on the governmental unit or rather [did] no more than express a congressional preference for certain kinds of treatment.”²⁵⁸ Second, the Court inquired whether the “right” asserted was so “vague and amorphous” to be “beyond the competence of the judiciary to enforce.”²⁵⁹ Third, the Court determined whether the constitutional provision was “intended to benefit” the putative plaintiff.²⁶⁰

Acknowledging that the Commerce Clause’s text addressed only Congress, the Court concluded that the long-established understanding of the Commerce Clause as a limit to states’ regulatory power supported its enforcement against states.²⁶¹ Describing the Commerce Clause as a “self-executing limitation” on state power,²⁶² the Supreme Court concluded that Congress intended its protection to benefit individuals engaged in interstate commerce.²⁶³ Focusing on the third consideration, the Court invoked its own “repeated references to ‘rights’” under the Commerce Clause as support for this conclusion.²⁶⁴

In so holding, the Supreme Court rejected the defendants’ three arguments that the Commerce Clause’s protection was not a “right” for purposes of § 1983 because: first, the clause was only a power-allocating, rather than a right-conferring provision;²⁶⁵ second, the clause was designed to promote national economic and political union, rather than benefit

253. See, e.g., *Golden State Transit Corp.*, 493 U.S. at 103 (Supremacy Clause); *Carter v. Greenhow*, 114 U.S. 317 (1885) (Contracts Clause).

254. 498 U.S. 439 (1991).

255. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides that “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” *Id.* The Dormant Commerce Clause is the principle, inferred from the Section Eight provision, that “state and local laws are unconstitutional if they place an undue burden on interstate commerce.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 450 (3d ed. 2009).

256. *Dennis*, 498 U.S. at 450.

257. The three-factor inquiry was first articulated to determine whether a statutory provision created a privately enforceable right. See *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997).

258. *Dennis*, 498 U.S. at 448–49 (quoting *Golden State Transit Corp.*, 493 U.S. at 106).

259. *Id.* at 449 (quoting *Golden State Transit Corp.*, 493 U.S. at 106).

260. *Id.* (quoting *Golden State Transit Corp.*, 493 U.S. at 106).

261. *Id.* at 447. The Court also emphasized that it had already held that individuals injured by state action in violation of the Commerce Clause were entitled to relief in a state court action brought under the Eleventh Amendment. *Id.* (citing *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990)).

262. *Id.* at 447 (quoting *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984)).

263. *Id.* at 449.

264. *Id.*

265. *Id.* at 447. The Court agreed that the Commerce Clause both allocated power and conferred an individual right. *Id.*

individuals;²⁶⁶ and third, the clause was subject to qualification or elimination by Congress.²⁶⁷

The Supreme Court recently limited *Dennis*'s holding by stating that the doctrine of comity required individuals asserting state violations of the Commerce Clause to proceed first in state court, rather than filing directly in federal court.²⁶⁸ The Court explained that the federal-state incarnation of comity "serves to ensure that 'the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.'"²⁶⁹

II. THE CONFLICT OVER RECOGNITION AND ENFORCEMENT OF OUT-OF-STATE ADOPTION DECREES: WHOSE DUTY IS IT AND WHAT IS "EVENHANDED"?

Part II of this Note details the conflict between U.S. Courts of Appeals over a state's obligation to reissue birth certificates to out-of-state adoptive parents. Courts differ over whether the Full Faith and Credit Clause contains an enforceable obligation of recognition for various state actors, or a guiding rule for state courts faced with a law or judgment conflicting with the state's own law. In addition, courts are split as to whether issuing a revised birth certificate falls within the Clause's provision for stringent recognition of sister-state adoptions. In the following sections, this Note examines the two approaches to each of these issues.

A. *The U.S. Court of Appeals for the Tenth Circuit*

In *Finstuen v. Crutcher*,²⁷⁰ the Tenth Circuit held that an Oklahoma policy of refusing revised birth certificates to out-of-state same-sex adoptive parents violated the Full Faith and Credit Clause.²⁷¹ The *Finstuen* plaintiffs sought to enjoin enforcement of an amendment to Oklahoma's adoption code that prohibited any recognition of out-of-state adoptions by same-sex couples.²⁷² Oklahoma residents Lucy and Jennifer Doel adopted

266. *Id.* at 449.

267. *Id.* at 450. The Court dismissed this argument as "too much," observing that Congress could similarly alter or eliminate federal statutory rights. *Id.* Justice Anthony Kennedy, writing for the dissent, elaborated on the defendants' first two arguments, stating that the Framers intended the Commerce Clause as a "structural provision" to "preserve economic union and to suppress interstate rivalry." *Id.* at 453 (Kennedy, J., dissenting). The dissent concluded that "[a]t best," the Court's interpretation of the Commerce Clause granted an individual the "right to have a judicial determination" nullifying the state tax that had violated the Commerce Clause. *Id.* at 458 (citing *Carter v. Greenhow*, 114 U.S. 317, 322 (1885)).

268. See *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2328 (2010).

269. *Id.* at 2336 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

270. 496 F.3d 1139 (10th Cir. 2007).

271. *Id.* at 1156.

272. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1300 (W.D. Okla. 2006), *aff'd in part, rev'd in part on other grounds sub nom.* *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007). Three couples originally filed suit, but two were found to lack standing. See *Finstuen*, 496 F.3d at 1143–51.

their child, “E,” in California in 2002.²⁷³ Upon the Doels’ return to Oklahoma, the Oklahoma State Department of Health (OSDH) refused to issue a revised birth certificate listing both parents, and instead issued a certificate that named only Lucy Doel as E’s mother.²⁷⁴

In 2004, the Oklahoma Attorney General issued an opinion stating that the Full Faith and Credit Clause required the OSDH to issue revised birth certificates reflecting the parental relationship in the adoption judgment, irrespective of whether the parents were eligible to adopt in Oklahoma.²⁷⁵ In response, the Oklahoma legislature amended its adoption code to prohibit any state agency or court from recognizing a sister-state adoption by two individuals of the same sex.²⁷⁶ The Doels then renewed their request, and were again denied a new birth certificate for E that included both mothers’ names.²⁷⁷

The Doels filed suit in federal court against three state executive officials: the OSDH Commissioner, the Governor, and the Attorney General.²⁷⁸ The plaintiffs alleged violations of the Full Faith and Credit Clause, the Equal Protection Clause, and the Due Process Clause, as well as impairment of their constitutional right to travel.²⁷⁹ Explaining their injury, the Doels recounted an incident when E had to be taken to the emergency room in an ambulance, and both the ambulance crew and emergency room personnel stated that only “E’s mother” could accompany her.²⁸⁰

The U.S. District Court for the Western District of Oklahoma granted summary judgment for the plaintiffs on the full faith and credit, equal protection, and due process claims, and ordered that the Commissioner issue a new birth certificate listing both parents’ names.²⁸¹ Only the OSDH Commissioner, Dr. Michael Crutchen, appealed.²⁸² The Tenth Circuit affirmed in part and reversed in part, holding that the Commissioner’s conduct in enforcing the amendment violated the state’s obligation under the Full Faith and Credit Clause to recognize a sister-state’s judgment.²⁸³

273. *Finstuen*, 496 F.3d at 1142.

274. *Id.* Since neither woman was E’s biological parent, Lucy Doel first adopted E, and then six months later, Jennifer Doel adopted E through a second-parent adoption. *Id.*

275. See Question Submitted by: Michael Crutcher, M.D., M.P.H., Commissioner of Health and State Health Officer, 2004 Op. Okla. Att’y Gen. 8, ¶ 14, available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=438496>.

276. *Finstuen*, 496 F.3d at 1142, 1146 (quoting OKLA. STAT. tit. 10, § 7502-1.4(A) (2007) (“[T]his 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.”)).

277. *Id.* at 1146.

278. *Id.* at 1142.

279. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1300 (W.D. Okla. 2006), *aff’d in part, rev’d in part on other grounds sub nom. Finstuen*, 496 F.3d 1139.

280. *Id.* at 1301.

281. *Id.* at 1315.

282. *Finstuen*, 496 F.3d at 1143, 1156.

283. *Id.* at 1156. The Tenth Circuit declined to address the Doels’ additional due process and equal protection claims. *Id.*

1. An Individual May Bring a Federal Cause of Action
Against State Executive Officials for Alleged Violations
of the Full Faith and Credit Clause

In *Finstuen*, the Tenth Circuit permitted the Doels to bring a § 1983 claim against the OSDH Commissioner in his capacity as a state executive officer.²⁸⁴ Given that two of the original defendants did not pursue an appeal, the court clarified that Dr. Crutcher was an appropriately named defendant because plaintiffs may bring suit against a state officer connected to the enforcement of a challenged law.²⁸⁵ The Tenth Circuit also clarified the disposition of the case and stated that the Doels were not “seek[ing] to enforce their adoption order against Dr. Crutcher in his official capacity . . . as a matter of claim or issue preclusion.”²⁸⁶

In dicta, the *Finstuen* court dismissed as lacking merit OSDH’s claim that only a state court’s denial of a sister-state adoption triggered the Full Faith and Credit Clause.²⁸⁷ Because this assertion was raised only on appeal, the court declined to address it substantively.²⁸⁸ Nevertheless, the Tenth Circuit concluded that the Commissioner of Health had “failed to fulfill the constitutionally-imposed duty . . . to recognize another state’s judgment.”²⁸⁹

2. Reissuing a Birth Certificate Pursuant to State Law Is
Within the Clause’s Mandate

Addressing the merits of *Finstuen*, the Tenth Circuit ruled that the unamended Oklahoma adoption statute must be applied to all judgments of adoption, regardless of whether they were held by out-of-state couples that could not adopt under Oklahoma law.²⁹⁰ First, the court identified “a clear legislative expression of Oklahoma’s public policy contrary to adoptions by same sex couples.”²⁹¹ However, quoting the Supreme Court’s declaration in *Baker v. General Motor Corp.* that there is “no roving ‘public policy exception’ to the full faith and credit due judgments,”²⁹² the Tenth Circuit held that Oklahoma was obligated to recognize the Doels’ California adoption decree.²⁹³

In doing so, the court confirmed that adoption decrees were final judgments and, therefore, were entitled to the “unequivocal” mandate of the Full Faith and Credit Clause.²⁹⁴ The court rejected the defendant’s

284. *See id.* at 1141–42.

285. *Id.* at 1151 (citing *Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 372–73 (2d Cir. 2005)).

286. *Id.* at 1155.

287. *Id.* at 1155 n.13.

288. *Id.*

289. *Id.* at 1155.

290. *Id.* at 1156.

291. *Id.* at 1148–49 n.6.

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

293. *Finstuen*, 496 F.3d at 1152.

294. *Id.*

assertion that, despite requiring a judicial sanction, “adoptions are a matter of contract between the parties and not a judicial proceeding in the usual sense of the word.”²⁹⁵

The court next dismissed the defendants’ argument that requiring Oklahoma to issue a birth certificate when presented with a California adoption decree constituted the extraterritorial application of California law.²⁹⁶ According to the Tenth Circuit, such an assertion “improperly conflate[d] [a state’s] obligation to give full faith and credit to a sister state’s judgment with its authority to apply its own state laws in deciding what state-specific rights and responsibilities flow from that judgment.”²⁹⁷ The court emphasized that its ruling was not allowing California “control over the effect of its judgment” in Oklahoma.²⁹⁸

Instead, the Tenth Circuit stated that it was requiring that state executive officials apply Oklahoma law in an “evenhanded manner.”²⁹⁹ Therefore, Oklahoma’s amended statute violated the Full Faith and Credit Clause because it categorically denied the “effective operation” of a class of out-of-state adoption decrees.³⁰⁰

B. *The U.S. Court of Appeals for the Fifth Circuit*

In contrast with the Tenth Circuit, the Fifth Circuit held that out-of-state unmarried adoptive couples were not entitled to amended birth certificates under the Full Faith and Credit Clause.³⁰¹ In *Adar v. Smith*, a couple brought suit against the Louisiana Registrar after she refused to issue a revised birth certificate for the couple’s adopted child.³⁰² Mickey Smith and Oren Adar were an unmarried, same-sex couple who adopted Louisiana-born “J” in New York in 2006.³⁰³ In the adoption proceedings, Smith and Adar also changed J’s name from the one appearing on his original birth certificate.³⁰⁴ The couple then sought to have J’s Louisiana birth certificate reissued with both fathers’ names supplanting those of J’s biological parents.³⁰⁵

At the time, section 40 of Louisiana’s adoption code provided for the issuance of a new birth certificate with the names of the “adoptive parents” upon the showing of a properly certified out-of-state adoption decree.³⁰⁶

295. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1305 (W.D. Okla. 2006), *aff’d in part, rev’d in part on other grounds sub nom. Finstuen*, 496 F.3d 1139; *see Finstuen*, 496 F.3d at 1156.

296. *Finstuen*, 496 F.3d at 1153.

297. *Id.*

298. *Id.*

299. *Id.* at 1153–54 (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 234–35 (1998)).

300. *Id.* at 1156.

301. *See Adar v. Smith*, 639 F.3d 146, 160–61 (5th Cir.) (en banc), *cert. denied*, 132 S. Ct. 400 (2011).

302. *Id.* at 149–50.

303. *Id.* at 149. The Louisiana Registrar’s surname was also Smith. *Id.* at 146, 149.

304. *Id.* at 167 (Wiener, J., dissenting).

305. *Id.* at 149 (majority opinion).

306. *See* LA. REV. STAT. ANN. § 40:76(A), (C) (1990). The statute reads, in relevant part,

Another Louisiana statute made the Registrar the sole custodian of Louisiana birth certificates.³⁰⁷ When presented with Smith and Adar's authenticated New York adoption decree, the Louisiana Registrar, Darlene W. Smith, refused to reissue a birth certificate with both men's names.³⁰⁸

In a letter denying the couple's request,³⁰⁹ the Registrar posited that section 40 applied only to adoption decrees possessed by married parents.³¹⁰ She reasoned that section 40's term "adoptive parents"³¹¹ meant only married parents because, pursuant to a separate statute, Louisiana allowed only a "husband and wife" to jointly adopt a child.³¹² The Registrar also relied on an Attorney General advisory opinion,³¹³ which concluded that the Full Faith and Credit Clause did not require Louisiana to recognize out-of-state adoption judgments that violated Louisiana's "strong public policy" against both adoption by unmarried individuals and same-sex marriage.³¹⁴

The family sued the Louisiana Registrar under 42 U.S.C. § 1983, asserting that her actions violated Adar, Smith, and J's rights under the Full Faith and Credit Clause and the Equal Protection Clause.³¹⁵ As to injury, the family alleged that its inability to obtain an accurate birth certificate had caused problems related to obtaining medical insurance for J through Adar or Smith's employer.³¹⁶ The U.S. District Court for the Eastern District of Louisiana granted summary judgment for the plaintiffs on the Full Faith and Credit Clause claim, ruling that the Clause required the defendants to recognize the out-of-state adoption judgment.³¹⁷

A Fifth Circuit panel affirmed the district court in 2010, holding that final adoption decrees were entitled to exacting credit.³¹⁸ The panel also dismissed the Registrar's interpretation of section 40 as defying the

When a person born in Louisiana is adopted in a court of proper jurisdiction in any other state or territory of the United States, the state registrar may create a new record of birth in the archives upon presentation of a properly certified copy of the final decree of adoption Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives, showing . . . [t]he names of the adoptive parents

Id.

307. *Adar*, 639 F.3d at 149 n.1 (citing LA. REV. STAT. ANN. § 40:2).

308. *Id.* at 149.

309. *Adar v. Smith*, 591 F. Supp. 2d 857, 859 (E.D. La. 2008), *rev'd en banc*, 639 F.3d 146.

310. *See Adar*, 639 F.3d at 149–50.

311. LA. REV. STAT. ANN. § 40:76(C).

312. *Adar*, 639 F.3d at 149–50 (citing LA. CHILD. CODE ANN. art. 1221 (1992)).

313. *Adar*, 591 F. Supp. 2d at 859.

314. *See* Must the Vital Records Registrar Give Full Faith and Credit to an Out of State Adoption Judgment Obtained by Two Unmarried Individuals Adopting Jointly?, 06 Op. La. Att'y Gen. 0325 (2007), available at <http://www.ag.state.la.us/shared/viewdoc.aspx?Type=4&doc=18900>.

315. *Adar*, 639 F.3d at 150.

316. *Adar*, 591 F. Supp. 2d at 859 n.1.

317. *Id.* at 862.

318. *Adar v. Smith*, 597 F.3d 697, 719–20 (5th Cir.), *vacated*, 622 F.3d 426 (5th Cir. 2010).

statute's unambiguous meaning.³¹⁹ Finally, the Fifth Circuit panel emphasized that it was Louisiana's own statute that directed the Registrar to reissue birth certificates, while the Full Faith and Credit Clause required that section 40 be applied in an "evenhanded" manner.³²⁰

A few months later, the Fifth Circuit ordered a rehearing en banc.³²¹ The en banc majority, in an opinion authored by Chief Judge Edith H. Jones, reversed the district court and held that the Full Faith and Credit Clause did not govern the actions of a state executive official,³²² and, even if it did, the Registrar's refusal was not unconstitutional because issuing a birth certificate was beyond the recognition required by the Clause.³²³ A keenly worded dissent³²⁴ argued that the Full Faith and Credit Clause imposed a duty on state officials, and therefore created individual "correlative rights" vindicable under § 1983.³²⁵

1. The Clause Does Not Govern the Actions of a State Executive Official and Does Not Create Individual Rights Actionable Under § 1983

In *Adar*, the Fifth Circuit majority concluded that the Full Faith and Credit Clause governed only state courts and not any other state actors.³²⁶ According to the en banc majority, the Full Faith and Credit Clause introduced only a "rule of decision" to guide courts—"no more, no less."³²⁷ The court explained that the Clause governed only the res judicata effect of a judgment,³²⁸ which arose only when litigation was pursued in another state or federal court. Accordingly, the court concluded that the Full Faith and Credit Clause was a rule for state courts, rather than an obligation imposed on all state actors generally.³²⁹

Since the full faith and credit command fell only on courts, the *Adar* majority declared that "it is incoherent to speak of vindicating full faith and

319. *Id.* at 718–19.

320. *Id.* at 714 (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 224 (1998)).

321. *Adar*, 622 F.3d 426.

322. *See Adar v. Smith*, 639 F.3d 146, 154 (5th Cir.) (en banc), *cert. denied*, 132 S. Ct. 400 (2011).

323. *Id.* at 160–61.

324. *See id.* at 166 (Wiener, J., dissenting) ("Only by judicial legerdemain, is the en banc majority able to conclude [that the Louisiana Registrar did not violate the Full Faith and Credit Clause] I lament that, in its determination to sweep this high-profile and admittedly controversial case out the federal door . . . the en banc majority . . . strips federal . . . courts of subject matter jurisdiction . . . [and] [u]nduly cabins, if not emasculates [Supreme Court precedent].").

325. *Id.* at 165–87.

326. *Id.* at 154 (majority opinion).

327. *Id.* at 151. The Fifth Circuit majority cited *Thompson v. Thompson*, 484 U.S. 174 (1988), for the proposition that the Clause was a rule of decision. *Adar*, 639 F.3d at 153 n.13; *see supra* notes 152–53 and accompanying text.

328. *Adar*, 639 F.3d at 153; *see supra* notes 130–34 and accompanying text. The en banc majority noted the Supreme Court's distinction between the credit owed to laws and judgments. *Adar*, 639 F.3d at 154 n.3 (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998)). The Fifth Circuit described the credit owed to judgments as "simpler" than the credit owed to laws. *Id.*

329. *Adar*, 639 F.3d at 154.

credit rights against non-judicial state actors.”³³⁰ The Fifth Circuit majority acknowledged that the Supreme Court “ha[d] at times referred to the clause in terms of individual ‘rights,’” but asserted that the Court “consistently identif[ed] the violators of that right as state courts.”³³¹ The court therefore ruled that the § 1983 cause of action could not be sustained against state executive officials to enforce full faith and credit for out-of-state adoption decrees.³³²

In so holding, the en banc majority concluded that Adar, Smith, and J should have sought to compel the issuance of a revised birth certificate in Louisiana state court, rather than through a federal cause of action.³³³ Under the majority’s construction, only a state court’s denial of the parents’ request would implicate the Full Faith and Credit Clause, and even then only upon Supreme Court review of state court decisions.³³⁴

Observing in a footnote that the Full Faith and Credit Clause addressed itself to “each state,” not to “each state’s court,” the en banc majority acknowledged that one might consider its interpretation “curious.”³³⁵ The Fifth Circuit suggested that a contrary holding would create a “serious anomaly” whereby individuals pursuing § 1983 claims for violations by state executive officials “would have [the] considerable advantage” of immediate federal court redress.³³⁶ Individuals facing violations by state courts, on the other hand, would obtain federal redress only upon Supreme Court review.³³⁷

In a specially concurring opinion, Judge Leslie H. Southwick acknowledged that only a single Supreme Court sentence precluded the dissent’s “good arguments” that the Full Faith and Credit Clause conferred individual rights for purposes of § 1983.³³⁸ The concurrence cited *Thompson*,³³⁹ in which the Supreme Court had adopted language from 1904’s *Northern Securities* when stating that the Clause “only prescribes a rule by which courts . . . are to be guided.”³⁴⁰ But for this recent articulation, Judge Southwick would have considered *Northern Securities* an “anachronism from a day before the rediscovery of Section 1983.”³⁴¹ Accordingly, Judge Southwick joined the Fifth Circuit majority’s holding

330. *Id.*

331. *Id.*

332. *Id.* at 153–54.

333. *Id.* at 158.

334. *See id.* (“After Appellees’ case has been submitted to the state courts, the full faith and credit clause may provide the federal question to support Supreme Court review.” (citing *Ford v. Ford*, 371 U.S. 187 (1962))).

335. *Id.* at 154 n.6.

336. *Id.*

337. *Id.*

338. *Id.* at 164–65 (Southwick, J., specially concurring).

339. 484 U.S. 174 (1988).

340. *Adar*, 639 F.3d at 164 (Southwick, J., specially concurring); *see Thompson*, 484 U.S. at 182–83 (quoting *Minnesota v. N. Sec. Co.*, 194 U.S. 48, 72 (1904)); *see supra* notes 152–53 and accompanying text.

341. *Adar*, 639 F.3d at 164 (Southwick, J., specially concurring).

that the Full Faith and Credit Clause did not create a right enforceable against state executive officers.³⁴²

2. Issuing a Birth Certificate Is Enforcement of a Judgment,
and Therefore Outside of the Clause's Mandate

The Fifth Circuit majority then ruled in the alternative that, even if the Full Faith and Credit Clause did govern the actions of a state official, the Louisiana Registrar did not deny recognition to the New York adoption decree when she declined to reissue a new birth certificate for J.³⁴³ The court distinguished between recognizing the existence of the parental relationship—which the Registrar did, and was obligated to do under the Clause—and reissuing the birth certificate, a separate act of enforcement.³⁴⁴

According to the majority, issuing a revised birth certificate fell in the “heartland of enforcement” and was therefore beyond the mandate of the Full Faith and Credit Clause.³⁴⁵ The court cited the Supreme Court for the proposition that the 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.’”³⁴⁶ Thus, the Fifth Circuit explained, outside of the *res judicata* effect required by the Clause, Louisiana was the “sole mistress” of directing the rights created by out-of-state adoption decrees.³⁴⁷ In so holding, the en banc majority reasoned that a new birth certificate was an “incidental benefit[]” to adoption, rather than a right created by the couple’s New York adoption.³⁴⁸

Finally, the Fifth Circuit ruled that Louisiana had fulfilled its obligation under *Baker* to apply its laws concerning the “enforcement” of out-of-state judgments in an “evenhanded” way.³⁴⁹ The en banc majority stated that because Louisiana did not permit any unmarried couples to obtain revised birth certificates, the state was under no obligation to issue one to Adar and Smith.³⁵⁰ The Fifth Circuit majority concluded that the manner in which Louisiana enforced sister-state adoptions did not violate the Full Faith and Credit Clause.³⁵¹

342. *Id.* Finding the case resolved by this question, Judge Southwick would not have addressed whether the Louisiana Registrar’s actions constituted a failure to recognize the New York adoption decree. *Id.* at 165.

343. *Id.* at 158 (majority opinion).

344. *See id.* at 159 (“The Registrar acknowledged that even though she would not issue the requested birth certificate with both names, the Registrar recognizes [Adar and Smith] as the legal parents of their adopted child.”).

345. *Id.* at 160.

346. *Id.* (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (quoting *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939))).

347. *Id.*

348. *Id.* at 161.

349. *Id.* at 159 (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)); *see supra* notes 140–41 and accompanying text.

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

351. *Id.*

III. CLASH OF POLICIES: RECOGNITION AND ENFORCEMENT OF OUT-OF-STATE ADOPTION DECREES UNDER THE FULL FAITH AND CREDIT CLAUSE

As detailed in Part II, federal circuit courts have split regarding the effect that the Full Faith and Credit Clause obliges state officials to give to out-of-state adoption decrees. The conflict accentuates the Supreme Court's distinction between recognition and enforcement under the Clause.³⁵² The uncertainty over the Clause's command reflects the tension between the competing interests that the Clause balances: a federal interest in national unity;³⁵³ each state's interest in asserting its own policies within its territory;³⁵⁴ each state's interest in the finality and integrity of its judgments;³⁵⁵ and individuals' interest in the security of rights and obligations established by judgment.³⁵⁶ This Note argues that the federal, state, and individual interests in finality and unity outweigh a state's policy preferences. This Note therefore asserts that states must give meaningful recognition to out-of-state adoption decrees pursuant to the Clause, even when such judgments are contrary to the state's own policy.

Part III.A addresses the potential misapplication of the division between enforcement and recognition, arguing that states may not apply the distinction to undermine the substantive rights created by judgments. Part III.B asserts that, in addition to balancing state and federal power, the Clause confers an individual right to recognition of sister-state judgments that is vindicable under § 1983 when refused by a state official.

A. Clarifying the Distinction Between Recognition and Enforcement

Although the Supreme Court has articulated a distinction between a judgment's recognition and enforcement for purposes of the Full Faith and Credit Clause,³⁵⁷ states may not reframe this distinction to escape their constitutional obligation. It is well established that states must recognize out-of-state judgments and may apply their own enforcement measures.³⁵⁸ To comply with the Clause, however, states also must apply their enforcement mechanisms in an "evenhanded manner."³⁵⁹ Thus, both recognition and enforcement fall under the Full Faith and Credit Clause's command.

Although the distinction allows for local variance in enforcement measures,³⁶⁰ it does not constitute a de facto public policy exception to a state's constitutional obligation. The Supreme Court has clearly stated that there is "no roving 'public policy exception'" to the credit owed to

352. See *supra* notes 135–41 and accompanying text.

353. See *supra* notes 92–94, 110 and accompanying text.

354. See *supra* notes 95, 97 and accompanying text.

355. See *supra* notes 98–101 and accompanying text.

356. See *supra* notes 102–06 and accompanying text.

357. See *supra* notes 135–39 and accompanying text.

358. See *supra* notes 96–97, 136–37 and accompanying text.

359. See *supra* note 140 and accompanying text.

360. See *supra* notes 136–38 and accompanying text.

judgments.³⁶¹ Instead, the distinction reflects the Clause's balancing of state and federal interests. Though formulated as a unifying instrument of federalism,³⁶² the Clause does not demand uniformity in policy among states.³⁶³ Instead, the Clause requires uniform respect for the integrity and finality of sister-state judgments.³⁶⁴

The finality of sister-state adoption decrees includes the legal status of parent and child.³⁶⁵ The Supreme Court has long established that recognition under the Full Faith and Credit Clause speaks not only to the facial "validity" of a judgment, but also its substance or "effect."³⁶⁶ The effect of the judicial sanction of adoption is a legal relationship of parent and child.³⁶⁷ A state's refusal to recognize a legally created status as adoptive parent or child violates the Full Faith and Credit Clause's stringent command regarding judgments.

Even if the issuance of a revised birth certificate is termed "enforcement" of "incidental rights" of adoption,³⁶⁸ states should not be able to manipulate their enforcement provisions to avoid their Full Faith and Credit Clause obligation to recognize sister-state judgments.³⁶⁹ The Supreme Court's mandate that a state apply its enforcement mechanisms in an "evenhanded manner" prohibits that state from undermining or undoing the substantive rights created by a judgment.³⁷⁰ In the context of judgments, the Clause's command orders "submission by one State even to hostile policies reflected in the judgment of another State."³⁷¹ Thus, the federal, state, and individual interests underlying the Clause's strict command for judgments outweigh a single state's interest in asserting its own policy, in the context of judgments.³⁷²

Interpreting a statute that refers only to "adoptive parents" to exclude same-sex couples based on separate statutory provisions improperly incorporates public policy into a state's recognition of sister-state judgments.³⁷³ Where an in-state statute provides for in-state operation of out-of-state adoption decrees, a state registrar should not be free to discriminate based on any disagreement with another state's policy that gave rise to the judgment.³⁷⁴ This discrimination against other states' policies is precisely what the Framers sought to end with the Full Faith and

361. *See supra* note 128 and accompanying text.

362. *See supra* notes 91–94 and accompanying text.

363. *See supra* notes 95–97 and accompanying text.

364. *See supra* notes 98–101 and accompanying text.

365. *See supra* notes 212–16 and accompanying text.

366. *See supra* notes 77–78 and accompanying text.

367. *See supra* notes 212–13 and accompanying text.

368. *See supra* notes 141, 344–45 and accompanying text.

369. *See supra* notes 110, 128 and accompanying text.

370. *See supra* notes 77–78, 140–41 and accompanying text.

371. *See supra* note 110 and accompanying text.

372. *See supra* notes 107–10 and accompanying text.

373. *See supra* notes 128, 141 and accompanying text.

374. *See supra* notes 99–101 and accompanying text.

Credit Clause.³⁷⁵ This limit on state sovereignty is a “price” of a federal system.³⁷⁶

Furthermore, a state executive official’s interpretation of statutory language to withhold recognition or enforcement undermines the separation of powers principle underlying the Full Faith and Credit Clause.³⁷⁷ By substituting her own interpretation for that of the state legislature, so as to undermine the validity and integrity of a sister-state judgment, a state official infringes on the authority of both the judiciary and legislature to determine state policies.³⁷⁸ Therefore, the distinction between enforcement and recognition does not render the Clause powerless to a state’s application of its own enforcement mechanisms to an out-of-state judgment.

B. A State’s Binding Obligation Under the Clause Confers an Individual Right to Equal Recognition that Is Vindicable Under § 1983

While the Supreme Court has never stated that § 1983 can be used for Full Faith and Credit Clause violations, its application of § 1983 to the Commerce Clause indicates that the Court may be willing to recognize its use in Full Faith and Credit Clause cases because both clauses serve to unify states by limiting state authority. Indeed, the Supreme Court has equated the Clause’s “unifying force” to that of the Commerce Clause.³⁷⁹ The Full Faith and Credit Clause’s history and text, as well as the Supreme Court precedent that has given meaning to its command, support the conclusion that by prohibiting state discrimination against out-of-state judgments held by individuals, the Clause confers correlative, enforceable rights on individuals.

Moreover, the Court has reiterated that § 1983 must be broadly, liberally, and beneficently construed to ensure federal protection of constitutional rights.³⁸⁰ Permitting a § 1983 cause of action for violations of the Clause is consistent with the purpose of § 1983—to “interpose” the federal courts to guard against state officers who, under the badge of state authority, deprive individuals of constitutionally granted rights.³⁸¹ It is therefore reasonable to conclude that when a state official evades his constitutional obligation to recognize rights created by a sister-state’s judgment, such as the parent-child relationship created by adoption, the holder of those rights is entitled to bring suit in federal court.

375. *See supra* notes 93–94 and accompanying text.

376. *See supra* note 111 and accompanying text.

377. *See supra* notes 98–99, 101 and accompanying text.

378. *See supra* note 100 and accompanying text.

379. *See supra* note 91.

380. *See supra* notes 239, 244, 249–51 and accompanying text.

381. *See supra* notes 243–45 and accompanying text.

1. The Clause Imposes a Binding Obligation on States,
Including State Executive Officials

The Full Faith and Credit Clause imposes a binding constitutional duty on states. By its plain language,³⁸² a deliberate choice of the Framers,³⁸³ the Clause is a self-executing limitation on state power.³⁸⁴ The Framers intended the Clause to transform the states from “independent foreign sovereigns, each free to ignore” out-of-state judgments, to integral parts welded together through federal obligations.³⁸⁵ The Full Faith and Credit Clause eliminated a state’s discretion to disregard the judgments of sister-states based on its own policy preferences.³⁸⁶

The Supreme Court’s previous treatment of the Full Faith and Credit Clause does not control the question of whether the Clause reaches state officials. The cases in which the Court stated that the Clause only prescribes a “rule by which courts . . . are to be guided . . . in the progress of a pending suit”³⁸⁷ do not limit the Clause’s mandate to only state courts.³⁸⁸

In 1904’s *Minnesota v. Northern Securities Co.*,³⁸⁹ the Supreme Court’s explanation came in response to the state’s assertion of a Full Faith and Credit Clause violation in an attempt to remove its state law case to federal court.³⁹⁰ Since Minnesota asserted that a private corporation avoided recognition of Minnesota’s own antitrust laws,³⁹¹ it is reasonable to conclude that the statement referred to the Clause’s function in a court’s choice-of-law analysis.³⁹² In this context, the Clause serves as a guiding rule, alongside a forum state’s public policy considerations, in determining the application of sister-state laws.³⁹³ In addition, the Court’s declaration that the Clause had “nothing to do with the conduct of individuals or corporations”³⁹⁴ is correctly understood as dismissing the state’s contention that a private entity also had full faith and credit duties under the Clause’s “in each state” language, rather than excluding individuals as beneficiaries of the Clause.

Though in 1988’s *Thompson v. Thompson*,³⁹⁵ the Supreme Court echoed *Northern Securities*’s “guiding rule” language, it responded to a plaintiff’s attempt to appeal to federal courts to determine the validity of two

382. See U.S. CONST. art. IV, § 1 (“Full faith and Credit shall be given in each State . . .”); see also *supra* note 20 and accompanying text.

383. See *supra* note 62 and accompanying text.

384. See *supra* note 63 and accompanying text.

385. See *supra* notes 91–92 and accompanying text.

386. See *supra* note 94 and accompanying text.

387. See *supra* notes 152–53 and accompanying text.

388. See *supra* notes 327, 340–41 and accompanying text.

389. 194 U.S. 48 (1904).

390. See *supra* note 152 and accompanying text.

391. See *supra* note 152 and accompanying text.

392. See *supra* notes 89–90 and accompanying text.

393. See *supra* notes 89–90 and accompanying text.

394. See *supra* note 152 and accompanying text.

395. 484 U.S. 174 (1988).

competing state custody determinations.³⁹⁶ This is distinct from a claim alleging a state official's affirmative denial of full faith and credit. *Thompson* is not controlling because it addressed only a private claim brought against another private individual.³⁹⁷

Therefore, there is no controlling Supreme Court statement as to the Full Faith and Credit Clause's reach. Accordingly, the Clause's plain language should control, which binds state executive officials and state courts. Although typically invoked by litigants after a state court has refused to accord preclusive effect to the substance of a sister-state's judgment,³⁹⁸ the Clause unambiguously addresses "states."³⁹⁹

2. The Right to Meaningful Recognition of Adoption Is Sufficiently Specific for Federal Courts to Enforce

For litigants holding judicially created rights, the Full Faith and Credit Clause guarantees a right that is sufficiently specific for federal courts to enforce under § 1983. In contrast to the accommodating rule applied to sister-state statutes,⁴⁰⁰ the Clause's "exacting obligation" for sister-state judgments defines a clear right to nationwide recognition.⁴⁰¹ Whereas the credit due to statutory law is subject to a somewhat vague public policy exception,⁴⁰² the credit due to judicial rights is governed by an "iron" full faith and credit requirement that bars exceptions.⁴⁰³

The judicial sanction of adoption bestows a legal status determination of parent or child, and entitles the individuals who are party to an adoption to nationwide recognition and respect of that status.⁴⁰⁴ The Full Faith and Credit Clause secures recognition not only of the evidentiary validity of a judgment, but its substance or "effect."⁴⁰⁵ The legal status of parent and child is therefore specific enough to merit enforcement.

3. The Framers Intended the Clause to Benefit Litigants by Ensuring Finality and Certainty

The history and purpose of the Full Faith and Credit Clause indicate that the Framers intended the Clause to benefit individuals whose rights, statuses, and obligations were created by judgments. By deliberately imposing a binding obligation on states,⁴⁰⁶ the Framers protected litigants from the "accordion-like" predilections of states presented with sister-state

396. See *supra* notes 148–53 and accompanying text.

397. See *supra* notes 145–46, 150 and accompanying text.

398. See *supra* note 142 and accompanying text.

399. See *supra* note 20 and accompanying text.

400. See *supra* notes 89–90, 121–25 and accompanying text.

401. See *supra* notes 126–29 and accompanying text.

402. See *supra* notes 122–25 and accompanying text.

403. See *supra* notes 126–27 and accompanying text.

404. See *supra* notes 163–71, 212–16 and accompanying text.

405. See *supra* notes 20, 77 and accompanying text.

406. See *supra* note 62 and accompanying text.

judgments.⁴⁰⁷ The Clause not only guarantees that judicially confirmed rights are preserved as litigants travel among states, but also advances the “maximum enforcement” of those rights.⁴⁰⁸

Moreover, as the Supreme Court explained regarding the Commerce Clause in *Dennis v. Higgins*,⁴⁰⁹ the Full Faith and Credit Clause addresses itself to states and textually balances power among states and between the federal and state governments⁴¹⁰ is not prohibitive to determining that the provision also confers corresponding individual rights.⁴¹¹ Indeed, all the defendants’ unavailing arguments in *Dennis* regarding the Commerce Clause similarly fail when applied to the Full Faith and Credit Clause.

Though the Full Faith and Credit Clause is a power-allocating provision, it is also a substantive limitation on a state’s treatment of out-of-state judgments.⁴¹² While the Framers designed the Clause to promote national unity, they also intended the full faith and credit mandate to benefit individuals who held “obligations created . . . by the judicial proceedings” of other states.⁴¹³ Finally, though the Full Faith and Credit Clause is arguably subject to qualification by Congress pursuant to the Effects Clause,⁴¹⁴ both the Full Faith and Credit Clause and Full Faith and Credit Act currently secure the maximum recognition of sister-state judgments.⁴¹⁵

CONCLUSION

The Full Faith and Credit Clause is a meaningful imperative for states to respect sister-state judgments. Where one state has an interest in generating its own distinctive judgments, and another has an interest in asserting its own statutory policies, the Clause at times requires that a state’s local policy give way to the overriding combination of federal, state, and individual interests. Federalism and finality outweigh a single state’s interest in its own policies.

Even so, to balance these competing interests, the Supreme Court has distinguished between a state’s obligation of recognition and enforcement pursuant to the Clause. Under both standards, however, the Clause prohibits states from undermining the substantive rights and obligations sanctioned by a judgment. A state cannot undo substantive recognition by reframing the application of its enforcement measures. The framework of meaningful recognition best summarizes the Full Faith and Credit Clause’s command. Meaningful recognition allows for the maximum enforcement of judicially created rights within the Clause’s careful balance of interests.

407. See *supra* note 94 and accompanying text.

408. See *supra* notes 102–03 and accompanying text.

409. 498 U.S. 439 (1991).

410. See *supra* notes 20, 92–97 and accompanying text.

411. See *supra* notes 254–56, 265–66 and accompanying text.

412. See *supra* note 94 and accompanying text.

413. See *supra* note 92 and accompanying text.

414. See *supra* note 64 and accompanying text.

415. See *supra* notes 66, 77–78, 103 and accompanying text.