

THE DEFENSE OF MARRIAGE ACT AS AN EFFICACIOUS
EXPRESSION OF PUBLIC POLICY: TOWARDS A RESOLUTION OF
MILLER V. JENKINS AND THE EMERGING CONFLICT BETWEEN
STATES OVER SAME-SEX PARENTING

INTRODUCTION

When Nietzsche proclaimed the death of God, some suggested that determining the Deity's demise laid "at the foundation of a distinctly modern thought and experience."¹ Has modern thought now also proclaimed the death of mom and dad? A few states through legislative acts and judicial decrees have already answered this question in the affirmative.² Biologically, gametes are still necessary for child-bearing, of course, but beyond that do motherhood and fatherhood have any significance?

Although popular debate over that question continues to proliferate,³ established law already bears on the subject. The Federal Defense of Marriage Act ("DOMA") legally defines marriage as existing only "between one man and one woman." Through DOMA, the United States has not only stated something about marriage, but it has made a robust statement in favor of the uniqueness and intrinsic value of motherhood and fatherhood.⁴ DOMA and recent state caselaw regarding same-sex unions exhibit how an understanding of parenthood and a definition of marriage are intertwined; the definition or concept of one weighs heavily on decisions regarding the other. Moreover, in DOMA, Congress did not merely state a truism—DOMA is an efficacious expression of public policy.

This Note finds its impetus in the particular struggle over child visitation rights between Lisa Miller-Jenkins and Janet Miller-Jenkins. *Miller-Jenkins v. Miller-Jenkins* ("*Miller v. Jenkins*") involves the interaction of Vermont, Virginia, and federal law.⁵ The case carries

¹ THOMAS J.J. ALTIZER & WILLIAM HAMILTON, *RADICAL THEOLOGY AND THE DEATH OF GOD* ix–x (1966).

² See *infra* note 50 and text accompanying notes 53–66.

³ For one example in the culture war over parenting, compare Jennifer Chrisler, *Two Mommies or Two Daddies Will Do Fine, Thanks*, TIME, Dec. 14, 2006, <http://www.time.com/time/nation/article/0,8599,1569797,00.html> (arguing for same-sex family parenting as a societal good), and James C. Dobson, *Two Mommies Is One Too Many*, TIME, Dec. 18, 2006, at 123 (arguing that same-sex family parenting is not a societal good).

⁴ Defense of Marriage Act, 1 U.S.C. § 7 (2000); see *infra* text accompanying notes 30–33.

⁵ The Supreme Court of Vermont made its definitive ruling on the case in *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), and the Court of Appeals of Virginia issued its ruling on the matter in a case by the same name found at 637 S.E.2d 330 (Va. Ct.

significance as more individuals leave the homosexual lifestyle,⁶ as more same-sex unions come to an end,⁷ and as the states wrestle with how to legally deal with the consequences.

A brief recounting of the facts and disposition of the case weaves a winding course between Virginia and Vermont. The parties characterize the case very differently in their briefs.⁸ The essential facts are that, while living together in Virginia, Lisa and Janet traveled to Vermont and entered into a civil union in December of 2000.⁹ After returning to Virginia, Lisa and Janet selected an anonymous sperm donor, and Lisa was impregnated by means of artificial insemination.¹⁰ She gave birth to a daughter in 2002 with Janet present in the delivery room.¹¹ The three then moved to Vermont in August of 2002 when the infant girl ("IMJ") was about four months old.¹² The relationship between Lisa and Janet then soured, and Lisa traveled back to Virginia with IMJ in September of 2003, with Janet staying in Vermont.¹³ Lisa then filed to dissolve the civil union on November 24, 2003, in Vermont family court.¹⁴

App. 2006). Commonly, and in this Note, the Virginia case will be referred to simply as *Miller v. Jenkins*.

⁶ Lisa Miller left lesbianism, sparking the Miller-Jenkins' breakup and the ensuing legal battle. S. Mitra Kalita, *Vt. Same-Sex Unions Null in Va., Judge Rules*, WASH. POST, Aug. 25, 2004, at B1; see generally Parents and Friends of ExGays and Gays, <http://www.pfox.org> (last visited Feb. 26, 2008) (providing testimonials of individuals who have left the homosexual lifestyle).

⁷ For instance, *The New York Times* noted the "split" of Julie and Hillary Goodridge, the couple named in the case of *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the case that first legalized same-sex marriage in Massachusetts. See David Tuller, *A Knottier Knot for Gay Couples*, N.Y. TIMES, Nov. 12, 2006, at 2, available at <http://www.nytimes.com/2006/11/12/weekinreview/12basic.html>. As more same-sex couples separate, the newspaper observed that the legal "questions are new, so answers are in short supply, and court rulings have been mixed." *Id.*

⁸ See Brief of Appellant at 6–10, *Miller-Jenkins*, 637 S.E.2d 330 (R. No. 2654–04–4); Brief of Appellee at 4–8, *Miller-Jenkins*, 637 S.E.2d 330 (R. No. 2654–04–4). For example, Janet characterizes the breakdown of the relationship by simply stating, "in the fall of 2003, Lisa and Janet decided to separate." Brief of Appellant, *supra*, at 6. Lisa's account more expansively states: "Becoming fearful of Janet's abusive actions, Lisa eventually indicated she desired the relationship to end. Janet insisted Lisa leave immediately [and] . . . drove Lisa and the child back to Virginia where Lisa's family lives." Brief of Appellee, *supra*, at 5. Any interested reader should look at both accounts of the facts to better appreciate both sides of the case.

⁹ *Miller-Jenkins*, 912 A.2d at 956. For ease of identification, this Note will only use the first names of the parties.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* Keeping with the custom of the two court systems, this Note will refer to the biological daughter of Lisa by her initials "IMJ" instead of using her full name.

¹³ *Id.*

¹⁴ *Id.*

On June 17, 2004, the Vermont court issued a “Temporary Order Re: Parental Rights & Responsibilities” that gave Lisa “temporary legal and physical responsibility for” IMJ and gave Janet “on a temporary basis, *parent-child* contact with the minor child.”¹⁵ Then, on July 1, 2004, Lisa filed a “Petition to Establish Parentage and for Declaratory Relief” in the Circuit Court of Frederick County, Virginia, seeking a declaration that she was the sole parent of IMJ and that any parental rights claimed by Janet were void or without effect.¹⁶ On October 15, 2004, the Virginia circuit court defined the case as one which concerned *parenthood* and issued a “Final Order of Parentage,” declaring Lisa to be IMJ’s sole parent and refusing to recognize any claims of parental or visitation rights by Janet; thus, no full faith and credit was accorded to the Vermont court’s ruling.¹⁷

The Supreme Court of Vermont issued a resolute opinion on August 4, 2006, approaching the case as, “at base, an interstate *jurisdictional* dispute over visitation with a child.”¹⁸ The Vermont court’s ruling contained four holdings: (1) Lisa and Janet’s civil union was valid even though they were residents of Virginia at the time of its inception; (2) the Vermont family court had exclusive jurisdiction to dissolve the civil union and issue its orders on visitation; (3) Janet was a parent of IMJ; and (4) Lisa was in contempt for violating the visitation order of the family court.¹⁹ Vermont supported its exercise of jurisdiction, as opposed to that of any Virginia court, based on the Federal Parental Kidnapping Prevention Act (“PKPA”). The PKPA provides that “a court that had initial jurisdiction to issue a custody or visitation order continues to have jurisdiction as long as it continues to have jurisdiction under state law and one of the contestants remains a resident of the state.”²⁰ Vermont, however, left one question unanswered in its opinion: “[W]hether DOMA, and not the PKPA, governs to determine the effect of a Vermont custody or visitation decision based on a civil union.”²¹

On November 28, 2006, the Court of Appeals of Virginia published its much anticipated opinion and reversed the lower court’s decision.²² Reversal came on the narrow issue of jurisdiction, turning on the fact

¹⁵ See *Miller-Jenkins*, 637 S.E.2d at 332 (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.* at 332–33.

¹⁸ *Miller-Jenkins*, 912 A.2d at 957 (emphasis added). Elsewhere the court reiterated that “none of Lisa’s arguments change our conclusion that this is a straightforward interstate jurisdictional dispute over custody.” *Id.* at 962.

¹⁹ *Id.* at 956.

²⁰ *Id.* at 959 (citing Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A(d) (2000)).

²¹ *Id.* at 962.

²² *Miller-Jenkins*, 637 S.E.2d at 338.

that “Lisa invoked the jurisdiction of the courts of Vermont and subjected herself and the child to that jurisdiction” by filing her first action in Vermont.²³ According to the court, “[t]he PKPA forbids [Lisa’s] prosecution of this action in the courts of [Virginia].”²⁴ In its final analysis, the Virginia court did not read DOMA as prevailing upon the PKPA, but rather, the court stated: “Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations.”²⁵

At the time of this Note’s publication, *Miller v. Jenkins* is before the Supreme Court of Virginia²⁶ on appeal from the Court of Appeals’s decision that Vermont’s visitation order awarding parent-child contact to Janet must be allowed registration in Virginia.²⁷ Oral argument was held on April 17, 2008.²⁸ Regardless of how Virginia’s highest court rules, the Supreme Court of the United States will undoubtedly receive a petition to hear the case from one of the parties.²⁹

This Note demonstrates that the Federal DOMA and similar state statutes that define marriage likewise embody an intentional, generalized good about parenthood. Section I argues that this generalized good should be respected and furthered because legislators and citizens rationally understand that motherhood and fatherhood enhance the well-being of children. Section II posits that mothers and fathers are uniquely beneficial for children and that a respect for both affirms the inherent dignity in femininity and masculinity. Section III explains that DOMA was implemented to impact a large body of federal law. DOMA was not designed to simply state a truism, but also to enable

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 337.

²⁶ See Supreme Court of Virginia, Appeals Granted, <http://www.courts.state.va.us/scv/appeals/main.htm> (under the heading “Appeals Posted to the Web on 09-18-2007”) (last visited Apr. 14, 2008). The record number of the case at the Virginia Supreme Court is 070933. *Id.*

²⁷ For this case, the Court of Appeals of Virginia issued only a concise opinion, *Miller-Jenkins v. Miller-Jenkins*, No. 0688–06–4, 2007 Va. App. LEXIS 158 (Va. Ct. App. Apr. 17, 2007) (ordering the trial court to allow Janet to register the Vermont order in Virginia), choosing to rely on the same reasoning it expressed in detail in *Miller-Jenkins*, 637 S.E.2d at 332 (refusing to recognize Virginia’s jurisdiction over Lisa’s parentage claims after the trial court ruled that Lisa was the sole parent of IMJ and that Janet had no claim to parentage or visitation rights).

²⁸ See Supreme Court of Virginia, April Argument Docket, <http://www.courts.state.va.us/docket.htm> (last visited Apr. 14, 2008).

²⁹ Especially if the Supreme Court of Virginia’s holding is in conflict with Vermont’s, the U.S. Supreme Court will likely take the case. See SUP. CT. R. 10(b) (stating that conflicting interpretations of a federal law issue by the highest courts in two states is a likely reason for granting certiorari). Lisa’s counsel has already petitioned the Court to review the Supreme Court of Vermont’s decision but was denied. *Miller-Jenkins v. Miller-Jenkins*, 127 S. Ct. 2130 (2007).

the states to give effect to the statute's expression of public policy as they desire. Section IV reveals how DOMA prevails upon the PKPA to enable, even encourage, Virginia to act consistently with and in furtherance of its own public policies. Moreover, the people of Virginia have clearly expressed their policy on the matter, and Virginia's courts ought to rule accordingly. Thus, this Note concludes that DOMA is the prevailing law in *Miller v. Jenkins* and that Virginia should not register a Vermont court's order that was issued based on a Vermont civil union.

I. DOMA DEFENDS MORE THAN JUST MARRIAGE

A. DOMA's Definition of Marriage Is Interwoven with a Particular View of Parenthood

Signed into law by President Clinton in 1996, the Federal DOMA incorporates two prongs into the United States Code.³⁰ First, it defines the meaning of "marriage" for all federal laws:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.³¹

Second, the Federal DOMA affirmed the principles of federalism under the Full Faith and Credit Clause of the Constitution³² and protected the ability of states to develop and carry out their own public policy:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe *respecting a relationship between persons of the same sex that is treated as a marriage* under the laws of such other State, territory, possession, or tribe, *or a right or claim arising from such relationship*.³³

Questions about DOMA's constitutionality surfaced before its passage, and litigants have attacked its validity. However, having marked its ten year anniversary, DOMA remains in place as a constitutional and efficacious expression of public policy.³⁴

³⁰ Defense of Marriage Act, Pub. L. No. 104-199, §§ 1-3, 110 Stat. 2419, 2419-20 (1996).

³¹ 1 U.S.C. § 7 (2000).

³² U.S. CONST. art. IV, § 1.

³³ 28 U.S.C. § 1738C (2000) (emphasis added).

³⁴ See *Smelt v. Orange County*, 447 F.3d 673, 686 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 396 (2006) (ruling by the Ninth Circuit that a couple lacked standing to challenge DOMA's constitutionality); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1302, 1309 (M.D. Fla. 2005) (upholding the constitutionality of DOMA against challenges brought under the Full Faith and Credit, Equal Protection, and Due Process Clauses of the U.S. Constitution); 142

DOMA's legislative history reveals why Congress passed it. Amidst the testimony promoting its passage, DOMA's supporters expressed a clear desire to protect the special status of marriage precisely because it forms the family as the foundation of our society, a society in which a father and mother who are committed to one another can raise their children. In other words, the definition of marriage was important because a particular view of parenting and family was considered worthy of special promotion.

Representative Charles Canady, a co-sponsor of the DOMA bill, submitted House Report 664 which recommended DOMA for passage. The beginning of the report states the "two primary purposes" of DOMA:

The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.³⁵

The Court of Appeals of Virginia quoted this portion of the report on its way to ruling that DOMA did not "effectively trump[]" the PKPA.³⁶

The PKPA is not mentioned in this report by name in the quotation above. That omission, though, does not mean that DOMA has no bearing on the PKPA in *Miller v. Jenkins* because there is still a relevant question to explore based on House Report 664: *Why* is the institution of traditional heterosexual marriage worth defending? The Judiciary Committee asked that question, stating: "To understand why marriage should be preserved in its current form, one need only ask why it is that society recognizes the institution of marriage and grants married persons preferred legal status."³⁷ Further reading reveals the committee's answer:

At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging *responsible procreation and child-rearing*. Simply put, government has an interest in marriage because it has an interest in children.

Recently, the Council on Families in America, a distinguished group of scholars and analysts from a diversity of disciplines and perspectives, issued a report on the status of marriage in America. In the report, the Council notes the *connection* between marriage and children:

CONG. REC. 17,068, 17,068–96 (1996) (recording statements of representatives questioning DOMA's constitutionality).

³⁵ H.R. REP. NO. 104–664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

³⁶ *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 336–37 (Va. Ct. App. 2006).

³⁷ H.R. REP. NO. 104–664, at 12, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916.

“. . . Why is marriage our most universal social institution, found prominently in virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in *childrearing and in generational continuity*.”

And from this *nexus* between marriage and children springs the true source of society's interest in safeguarding the institution of marriage:

“Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their *long-term relationship* is socially important—a public concern, not simply a private affair.”³⁸

The legislative history of DOMA ties a concern for marriage with a corollary concern for parenthood and not just for the “procreation” of children but for the “rearing” of children, as well.

The floor debate in the House of Representatives over DOMA elicited similar contentions. Mr. Canady opened the debate by calling the family “the fundamental building block of society.”³⁹ Mr. Largent admonished that “a definition of marriage that transcends time has always been one man and one woman united for the purposes of forming a family.”⁴⁰ Mr. Ensign expressed that “it is important to reaffirm our commitment to ensuring that *moms and dads* are encouraged and strengthened in the task of *raising their children*.”⁴¹ Mr. Barr described the bill as being “of fundamental importance to this country, to our families, to our children . . .”⁴² Furthermore, Mr. Stearns added, “If traditional marriage is thrown by the wayside . . . children will suffer because family will lose its very essence.”⁴³ Lastly, Mr. Weldon, a co-sponsor, advocated that a “marriage relationship *provides children with the best environment in which to grow and learn*.”⁴⁴

The debate on the Senate floor echoed the themes of the House debate. Mr. Gramm called marriage a “special union between a man and a woman which forms the foundation of our traditional family.”⁴⁵ Mr. Byrd contended, “If same-sex marriage is accepted, the announcement will be official, *America will have said that children do not need a mother*

³⁸ *Id.* at 13–14, *reprinted in* 1996 U.S.C.C.A.N. at 2917–18 (emphasis added) (quoting COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION 10 (1995), *reprinted in* PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 293, 303 (David Popenoe et al. eds., 1996)).

³⁹ 142 CONG. REC. 16,969, 16,969 (1996).

⁴⁰ *Id.* at 16,971.

⁴¹ *Id.* at 16,977 (emphasis added).

⁴² *Id.* at 17,070.

⁴³ *Id.* at 17,076–77.

⁴⁴ *Id.* at 17,081 (emphasis added).

⁴⁵ *Id.* at 22,443.

and a father . . .”⁴⁶ Finally, Mr. Coats argued: “There is no longer any doubt that the slow demise of marriage in our country has been terribly harmful to children. It is time that we remind this country and ourselves how critically important heterosexual marriage is to a healthy society.”⁴⁷

DOMA’s proponents in House Report 664 and in the House and Senate floor debates understood that the legislation to protect marriage between one man and one woman also promoted a certain view of marriage’s natural corollaries of family, children, and parenthood. Running through the debates was the belief that in promoting opposite-sex marriage DOMA would have an effect of promoting the valuable roles of both a mother and a father for the raising of children. The opponents to DOMA made adamant objections, but, in the end, DOMA passed with a large, bi-partisan majority of 342 to 67 in the House and 85 to 14 in the Senate.⁴⁸

B. A State’s Definition of Marriage Is Interwoven With Its Policies on Parenting—Defining One Bears Significantly on the Other

Presently, twenty-six states have passed constitutional amendments defining marriage as existing only between one man and one woman⁴⁹ and sixteen have declared the definition by statute.⁵⁰

⁴⁶ *Id.* at 22,448 (emphasis added).

⁴⁷ *Id.* at 22,451.

⁴⁸ *See id.* at 17,094, 22,467 (recording the full vote tallies of the House and the Senate).

⁴⁹ The twenty-six states are Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. For specific provisions, see Alliance Defense Fund, DOMA Watch: Issues by State, <http://www.domawatch.org/stateissues/index.html> (last visited Feb. 27, 2008) [hereinafter DOMA Watch: Issues by State]. Hawaii, which nearly qualifies as state twenty-seven, did not define marriage but stated that its “[L]egislature shall have the power to reserve marriage to opposite-sex couples.” HAW. CONST. art. I, § 23.

⁵⁰ The sixteen states are Arizona, California, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, Washington, and West Virginia. *See* DOMA Watch: Issues by State, *supra* note 49. The remaining states consist of New Mexico, New York, Rhode Island, and Wyoming, which have no DOMA statutes, *id.*; New Jersey, whose Supreme Court has ruled that same-sex couples must be given the same benefits and privileges as heterosexual couples, *Lewis v. Harris*, 908 A.2d 196, 231 (N.J. 2006); Connecticut, which offers civil unions, CONN. GEN. STAT. ANN. §§ 46b-38aa–pp (Supp. 2007); Vermont, which offers civil unions, VT. STAT. ANN. tit. 15, §§ 1201–07 (2002) (Vermont does, though, define marriage as “the legally recognized union of one man and one woman.” VT. STAT. ANN. tit. 15, § 8 (2002)); and Massachusetts which allows same-sex marriage, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968–70 (Mass. 2003). California, Hawaii, Maine, New Hampshire, and the District of Columbia formally recognize same-sex relationships in some capacity. *See* CAL. FAM. CODE §§ 297–99.6 (West 2004 & Supp. 2008); HAW. REV. STAT. §§ 572C-1–7

Similar to the connection made at the federal level, states recognize that a definition of marriage links to a particular concept of family and parenthood. A glimpse at recent significant state court decisions regarding marriage solidifies this point. It holds true that “[w]hen society changes marriage it changes parenthood.”⁵¹ So, when a society affirms an understanding of marriage it, likewise, affirms a certain understanding of parenthood.

1. Where Motherhood and Fatherhood are Irrelevant

Vermont, Massachusetts, and New Jersey are among the few states that have administered last rites to moms and dads—deciding that it is irrelevant whether a child grows up with one or the other.⁵² In seeking and achieving a hollow kind of equality—essentially, that everything is equal when everything is meaningless—these states have mapped out an undetermined future for children and have degraded the masculinity inherent to fatherhood and the femininity inherent to motherhood.

The Supreme Court of Vermont in *Baker v. Vermont* mandated that the same benefits and protections under the Vermont Constitution afforded to opposite-sex couples in marriage be given to same-sex couples, forcing the Vermont legislature to ultimately create its civil union statutes.⁵³ In arriving at its unprecedented decision, the Vermont court evaluated certain “rationales” as to why only opposite-sex couples received “the statutory benefits and protections of marriage.”⁵⁴ The court considered “the State’s purported interests in ‘promoting child rearing in a setting that *provides both male and female role models*’ [and in] ‘bridging differences’ between the sexes.”⁵⁵ Additionally, the court acknowledged other “claims [of the state] relat[ing] to the issue of *childrearing*.”⁵⁶ According to the court, the “fundamental flaw” of these proffered rationales was grounded in the state’s existing legislation regarding matters of parenthood:

In 1996, the Vermont General Assembly enacted, and the Governor signed, a law removing all prior legal barriers to the adoption of children by same-sex couples. At the same time, the Legislature

(2006); ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2007); N.H. REV. STAT. Ann. § 457-A:1 (2008) (establishing same-sex civil unions in 2008); D.C. CODE ANN. §§ 32-701–710 (LexisNexis 2007).

⁵¹ ELIZABETH MARQUARDT, COMM’N ON PARENTHOOD’S FUTURE, INST. FOR AM. VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS 32 (2006), *available at* <http://www.americanvalues.org/pdfs/parenthood.pdf>.

⁵² *See supra* note 50.

⁵³ 744 A.2d 864, 886, 889 (Vt. 1999).

⁵⁴ *Id.* at 884.

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.* (emphasis added).

provided additional legal protections in the form of court-ordered child support and parent-child contact in the event that same-sex parents dissolved their “domestic relationship.” In light of these express policy choices, the State’s arguments that Vermont public policy favors opposite-sex over same-sex parents . . . [are] patently without substance.⁵⁷

The Vermont legislature’s actions in the areas of parenthood were interpreted as at odds with the claims Vermont made in the case for protecting opposite-sex marriage.⁵⁸ The people of Vermont changed their approach to parenthood, and the Supreme Court of Vermont interpreted that as meaning a change in marriage.

Massachusetts alone allows same-sex couples to marry following the case of *Goodridge v. Department of Public Health*.⁵⁹ Again, parenthood issues bore much weight in the ultimate decision to change Massachusetts’s concept of marriage. In defending the uniqueness of opposite-sex marriage, two of the three “legislative rationales” that the Massachusetts Department of Public Health offered stemmed from parenthood: “(1) providing a ‘favorable setting for procreation’; [and] (2) ensuring the optimal setting for child rearing, [that being] ‘a two-parent family with one parent of each sex.’”⁶⁰

The Supreme Judicial Court of Massachusetts disagreed with both rationales, finding that Massachusetts “facilitates bringing children into a family regardless of whether . . . the parent or her partner is heterosexual, homosexual, or bisexual.”⁶¹ The court found “no rational relationship between the marriage statute and the . . . goal of protecting the ‘optimal’ child rearing unit.”⁶²

In support of its anomalous ruling, the court itself incorporated a parenthood rationale: “The preferential treatment of civil marriage reflects the Legislature’s conclusion that marriage ‘is the foremost setting for the education and socialization of children’ precisely because it ‘encourages parents to remain committed to each other and to their children as they grow.’”⁶³ Lost from the court’s reasoning, though, is any recognition that the unique and inherent qualities of a father and a

⁵⁷ *Id.* at 884–85 (internal citations omitted).

⁵⁸ *Id.* at 885.

⁵⁹ 798 N.E.2d 941 (Mass. 2003).

⁶⁰ *Id.* at 961.

⁶¹ *Id.* at 962; *see id.* at 962 n.24 (citing the fact that, in Massachusetts, “adoption and certain insurance coverage for assisted reproductive technology are available to married couples, same-sex couples, and single individuals alike”).

⁶² *Id.* at 963.

⁶³ *Id.* at 964 (quoting *id.* at 996 (Cordy, J., dissenting)). Note how the court referenced the legislature’s conclusions about marriage in general to justify its holding but did not withhold its judgment in favor of waiting for the Massachusetts Legislature to make a conclusion regarding same-sex marriage.

mother actually contribute to marriage being that “foremost setting”—apparently the number of parents is all that matters.

In similar fashion to Vermont and Massachusetts, New Jersey by judicial order has joined the few states that give same-sex couples the same legal privileges as those given to opposite-sex marriages.⁶⁴ Again, the topics of children and parenthood permeated the opinion of the New Jersey court in *Lewis v. Harris*. Notably, in defending its marriage laws, the State of New Jersey did not even try to “argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children.”⁶⁵ Even if the state had made those arguments, though, it is likely that the court would have dismissed them. The court quoted past New Jersey court decisions with much approval, opining that “no one ‘particular model of family life’ has a monopoly on “family values” and that “[t]hose qualities of family life on which society places a premium . . . are *unrelated to the particular form a family takes*.”⁶⁶ Why would the Supreme Court of New Jersey mention past statements from court decisions involving issues of parenthood in order to make a decision regarding same-sex unions? Simply because parenthood and marriage are intertwined—the concept of one is made to justify the other.

As a foundation to the decisions of Vermont, Massachusetts, and New Jersey, each has accepted that it is irrelevant whether a child grows up with a mother or with a father. Children are very important, of course, in those states, but the courts’ implicit conclusion is that fatherhood and motherhood innately have no unique contribution to the best interests of children. Their decisions void fatherhood and motherhood of any unique value; moms and dads are viewed as irrelevant, or, as Nietzsche might say, they have died with the changing times.

2. Where Moms and Dads Still Matter

The respective uniqueness of moms and dads is still respected in most states. The majority of states still operate under the rationale articulated in two momentous marriage cases decided in New York and Washington in 2006. The two cases considered a definition of marriage, and, again, parenthood took center-stage. In New York, the highest court

⁶⁴ As in Vermont in 1999, the Supreme Court of New Jersey in 2006 gave an order to the state’s legislature to provide an avenue by which same-sex couples may receive all of the same “rights and benefits enjoyed by heterosexual married couples.” *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006).

⁶⁵ *Id.* at 217.

⁶⁶ *Id.* at 213 (quoting *V.C. v. M.J.B.*, 748 A.2d 539, 555–56 (N.J. 2000) (Long, J., concurring)) (emphasis added) (holding a woman to be a “*psychological parent*” of the children of her former same-sex partner and granting the woman visitation rights (emphasis added)).

held that the New York Constitution did not “compel” same-sex marriage and accepted two rational reasons as to why.⁶⁷ Both reasons came from the connection between marriage and its importance for rearing children. The court stated:

First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science . . . the Legislature could find that this will continue to be true. . . . It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an *inducement*—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.

There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with *both a mother and a father*. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule . . . [.] but the Legislature could find that the *general rule* will usually hold.⁶⁸

Only twenty days later, the Supreme Court of Washington echoed the opinion of the New York court and upheld Washington’s DOMA by “conclud[ing] that limiting marriage to opposite-sex couples furthers the State’s interests in procreation and *encouraging families with a mother and father* and children biologically related to both.”⁶⁹ Relying on testimony in the legislative history of Washington’s DOMA, the state argued and the court accepted that “rearing children in a home headed by their opposite-sex parents is a legitimate state interest furthered by limiting marriage to opposite-sex couples because children tend to thrive in families consisting of a father, mother, and their biological children.”⁷⁰

New York and Washington recognize the connection between a particular definition of marriage and a particular concept of parenthood. Other states have reflected this connection statutorily.⁷¹ In the end,

⁶⁷ Hernandez v. Robles, 855 N.E.2d 1, 5, 7 (N.Y. 2006).

⁶⁸ *Id.* at 7 (emphasis added).

⁶⁹ Andersen v. King County, 138 P.3d 963, 985 (Wash. 2006) (emphasis added).

⁷⁰ *Id.* at 983.

⁷¹ For example, Florida has a state DOMA statute and also does not allow adoption by those practicing a homosexual lifestyle. See FLA. STAT. ANN. §§ 63.042(3), 741.212 (West 2005). Similarly, Mississippi and Utah have approved constitutional amendments defining marriage as existing between one man and one woman and both state codes preclude adoption by couples of the same-sex. MISS. CONST. art. XIV, § 263A; UTAH CONST. art. II, § 29; MISS. CODE ANN. § 93-17-3(5) (Supp. 2007); UTAH CODE ANN. § 78-30-9(3) (2002) (“The

caselaw and statutes demonstrate that a definition of marriage likely mirrors an understanding of parenthood.⁷²

II. MOTHERHOOD AND FATHERHOOD BESTOW UNIQUE BENEFITS ON CHILDREN AND ENCOURAGE A HEALTHY RESPECT BETWEEN THE SEXES

How a court frames the issue in cases over same-sex relationships makes all the difference. Is the issue whether there is “any public need that would justify the legal *disabilities* that now afflict” same-sex couples who cannot marry,⁷³ or is the issue whether there is a legitimate state interest furthered by inducing opposite-sex couples to marry? Are states disabling some of its citizens or strategically inducing some of them toward a desired end? The answer hinges on whether any generalized good is found in one relationship beyond the other; or, stated differently, is one institution worthy of inducement beyond the other. The question centers on whether opposite-sex marriages and same-sex relationships are equal in terms of parenting potential to serve the best interests of children.⁷⁴

A. *The Importance of Moms and Dads*

Through heterosexual marriage, a child can experience both the femininity of motherhood and the masculinity of fatherhood. By definition, same-sex relationships deny one or the other to children. The logical extension, then, of sanctioning same-sex unions is that

Legislature specifically finds that it is not in a child’s best interest to be adopted by a person or persons who are cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state.”).

⁷² It is possible to uphold marriage laws defining marriage as existing between a man and a woman without relying on the importance of fathers and mothers. Maryland, for instance, upheld its legal definition of marriage with only a loose connection to parenting. In *Conaway v. Deane*, the Maryland high court considered under rational basis review two governmental interests supporting opposite-sex marriage. 932 A.2d 571, 629–30 (Md. 2007). The second of the two was Maryland’s interest in “encouraging” opposite-sex marriage as “a union that is uniquely capable of producing offspring within the marital unit.” *Id.* at 630. The court found this interest legitimate and sufficiently linked to Maryland’s legal definition of marriage, stating “marriage enjoys its fundamental status due, in large part, to its link to *procreation*.” *Id.* (emphasis added). Beyond the desirability of opposite-sex parents for procreation, Maryland did not outright assert an interest in encouraging families with both a mom and dad to raise their children. The legitimate governmental interest addressed more pointedly the need for “safeguarding an environment most conducive to the stable propagation and continuance of the human race.” *Id.*

⁷³ *Lewis v. Harris*, 908 A.2d 196, 218 (N.J. 2006) (emphasis added).

⁷⁴ The honest musings of Judge Parrilli in his concurring opinion to *In re Marriage Cases* are worth pondering: “The nuance at this moment in history is that the institution (marriage) and emerging institution (same-sex partnerships) are distinct and, we *hope*, equal. We hope they are equal because of the great consequences attached to each. Childrearing and passing on culture and traditions are potential consequences of each.” 49 Cal. Rptr. 3d 675, 728 (Ct. App. 2006) (Parrilli, J., concurring) (footnote omitted).

motherhood and fatherhood are independently irrelevant. Within that framework, only the aggregate number of parents in a child's life is of foremost significance.⁷⁵

As states, such as New York and Washington, render judicial opinions like those discussed above, and as dozens of states legislatively define marriage as existing only between one man and one woman, the message becomes clear that motherhood and fatherhood are worth defending. Likewise, the social sciences affirm the value of mothers and fathers. Sociologist David Blankenhorn⁷⁶ observes that, from even prehistoric times, the definition of marriage itself has "reflect[ed] one idea that does not change: For every child, a mother *and* a father."⁷⁷ Blankenhorn describes that type of marriage as "our society's most *pro-child* way of living . . ."⁷⁸

Two reports from 2006, one focusing on marriage ("Marriage Report")⁷⁹ and the other on parenthood ("Parenthood Report"),⁸⁰ together drew over 100 family and legal scholars from around the country, including makers of family law such as judges, legislators, members of the family law bar, and academia as signatories. The reports express grave concern over the radical changes being advocated for and taking place around the world in the realms of marriage and parenting without a proper amount of supportive social science research.⁸¹ Though the

⁷⁵ If only the number of parents for a child was important, it would seem that same-sex advocates would argue as well for legitimizing bigamous and polygamous marriages. However, not all of them make that argument. *See, e.g., Lewis*, 908 A.2d at 206 ("Plaintiffs do not profess a desire to overthrow all state regulation of marriage, such as the prohibition on polygamy . . .").

⁷⁶ Mr. Blankenhorn graduated magna cum laude with a degree in social studies from Harvard in 1977 and is founder and president of the Institute for American Values, "a private, nonpartisan organization devoted to contributing intellectually to the renewal of marriage and family life." AmericanValues.org, About David Blankenhorn, http://www.americanvalues.org/html/about_david_blankenhorn.html (last visited Feb. 27, 2008).

⁷⁷ DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 91 (2007).

⁷⁸ *Id.* at 120 (emphasis added).

⁷⁹ INST. FOR AM. VALUES, *MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES* (2006) [hereinafter *MARRIAGE AND THE LAW*], available at <http://www.marriagedebate.com> (click on "Marriage and the Law: A Statement of Principles (101 legal and family scholars)" under the "New From iMAPP" heading on the right-side column).

⁸⁰ MARQUARDT, *supra* note 51.

⁸¹ The Parenthood Report concluded that, "[a]round the world, the two-person, mother-father model of parenthood is being fundamentally challenged." *Id.* at 5. For example, Canada and Spain approved same-sex marriage and immediately, advocates called for the erasing of the words "mother" and "father" from legal documents issued to children. *Id.*

In the United States, "by far the most striking and potentially far-reaching development signaling slippage in the meaning of motherhood and fatherhood . . . is the increasing recognition of 'psychological' parenthood or 'de facto' parental status" by adults who are not connected to children by blood or marriage. *Id.* at 23–25. The danger comes in

reports endorse no official position on same-sex marriage,⁸² the Parenthood Report did issue a precaution: “The legalization of same-sex marriage, while sometimes seen as a small change affecting just a few people, raises *the startling prospect of fundamentally breaking the legal institution of marriage from any ties to biological parenthood*” because, very pointedly, “[t]his much is clear: *When society changes marriage it changes parenthood.*”⁸³

As such, society should contemplate why parenthood needs to change. Are the advocates for re-defining marriage focused on the best interests of children or on the rights of adults?⁸⁴ There is a “large body of social science evidence showing that children, on average, do best when raised by their own married mother and father.”⁸⁵ Conversely, existing research regarding same-sex parenting is not conclusive enough to make any definitive statements about how children fare in such families.⁸⁶

B. Same-Sex Parenting: What Do the Studies Really Show?

Some studies purport to show that children fare just as well under same-sex parenting as under the parental guidance and example of both

the form of judges making discretionary decisions trying to ascertain who has become a parent figure in the minds of children. *Id.* Other examples of changes in notions of parentage have come in California which allows a “second mother” to be entered on a birth certificate instead of a child’s father. *Id.* at 14. Also, California’s entire public education system must adjust in 2008 to the California Student Civil Rights Act which amends the Education Code to prohibit educators from “giving instruction . . . [and] sponsoring any activity, that reflects adversely upon persons” because of their sexual orientation or gender identity. 2007-6B Cal. Adv. Legis. Serv. 667 (Deering). How the law will be interpreted is unknown. Among other things, it “could feasibly prohibit lessons or stories that treat the terms ‘mother’ and ‘father’ as normative.” Jennifer Roback Morse, *Gender Jumble: California Student Civil Rights Act Ends Gendered Education*, NAT’L REV. ONLINE, Nov. 7, 2007, <http://article.nationalreview.com/?q=MDExZDE4MDIxZDhmODdkODE4ZjZmZDE1ZFkyTnI0DU=>. In New Jersey, a “judge [has] ruled for the first time . . . that the same-sex partner of a woman who conceives with donor sperm has an automatic right to be listed as a birth parent on the child’s birth certificate . . . , just as the husbands of women who use donor sperm are listed.” MARQUARDT, *supra* note 51, at 14.

⁸² MARRIAGE AND THE LAW, *supra* note 79, at 18.

⁸³ MARQUARDT, *supra* note 51, at 32 (emphasis added).

⁸⁴ The Parenthood Report emphasizes how radical changes in marriage and parenting “are being taken in the name of adult rights to form families they choose.” *Id.* at 6. The report advocates a child-centered focus to these issues. *Id.*; see also BLANKENHORN, *supra* note 77, at 20 (favoring “limiting certain adult freedoms in the name of *child well-being* and the health of marriage as an institution” and explaining that even with some personal “anguish,” he would “choose *children’s collective rights and needs*” and thus opposite-sex marriage “as a public good” over “the rights and needs of . . . same-sex couples” when those two priorities conflict (emphasis added)).

⁸⁵ MARQUARDT, *supra* note 51, at 6.

⁸⁶ *Id.* at 21 (noting that the data is “limited because same-sex couples raising children comprise a very small part of the overall population and are only recently becoming more visible”).

a mother and a father.⁸⁷ Multiple scholars, however, have discredited the studies as flawed. The late sociologist, Professor Steven Lowell Nock, from the University of Virginia, who taught Research Methods,⁸⁸ was asked by the Attorney General of Canada to submit an affidavit for a major same-sex “marriage” case in Canada.⁸⁹ Professor Nock reviewed the studies available, including ones that had been submitted to the court in *Baker v. Vermont*, and concluded that all of them “contained at least one fatal flaw of design or execution” and that “not a single one of those studies was conducted according to general accepted standards of scientific research.”⁹⁰ Professor Nock’s conclusions do not stand alone. Without taking any position on same-sex relationships, two other experts analyzed and eventually discounted every study that purports to bolster same-sex parenting because, in their words, “the methods used in these studies are so flawed that these studies prove nothing. . . . Their claims have no basis.”⁹¹

C. Degrading the Sexes

Recognizing the value of fathers and mothers serves the best interest of children and also facilitates a healthy respect between men and women. An “[i]rreplaceable good[]” found in “the equal dignity of men and women . . . [is] at stake in the marriage debate.”⁹² The dignity of men and women is applauded when society affirms that fatherhood and motherhood enable men and women to contribute their unique characteristics as men and women to their families. The uniqueness of men and women dictates that only women may express their femininity through motherhood and that only men may express their masculinity through fatherhood. In rendering women irrelevant as mothers and men irrelevant as fathers within a family, courts and legislators suppress, confuse, and degrade a fundamental expression of each sex.

⁸⁷ See Maggie Gallagher & Joshua K. Baker, Inst. for Marriage & Pub. Pol’y, *Do Mothers and Fathers Matter? The Social Science Evidence on Marriage and Child Well-Being*, IMAPP POL’Y BRIEF, Feb. 27, 2004, at 1, available at <http://www.marriage.debate.com/pdf/MothersFathersMatter.pdf> (containing full citations to the studies).

⁸⁸ Univ. of Va., Dep’t of Sociology, Steven L. Nock, <http://www.virginia.edu/sociology/peopleofsociology/snock.htm> (last visited Apr. 14, 2008). Professor Nock passed away on January 20, 2008. *Id.*

⁸⁹ Affidavit of Steven Lowell Nock at ¶¶ 1, 5, *Halpern v. Att’y Gen. of Can.*, No. 684/00 (Ont. Super. Ct. of Just.), available at http://marriagelaw.cua.edu/Law/cases/Canada/ontario/halpern/aff_nock.pdf.

⁹⁰ *Id.* at ¶¶ 1, 3. Those incredulous of Mr. Nock’s conclusions would benefit from his copious description of proper research methodology contained in his eighty-one page affidavit. His statements are far from conclusory.

⁹¹ ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS: WHAT THE STUDIES *DON’T* TELL US ABOUT SAME-SEX PARENTING 4–6 (2001).

⁹² MARRIAGE AND THE LAW, *supra* note 79, at 7.

Only women as mothers can know the bond found in sensing a child moving within the womb. Only women as mothers can know the experience of bringing forth new life into the world at birth. Only women as mothers can know the satisfaction of physically nursing their children from the fruits of their own body. The uniqueness and dignity of these acts ought to be honored. Of course, motherhood is in no way the sum total of a woman's dignity, but failing to honor and encourage women as mothers discards an inherent and exclusive source of esteem bestowed upon women in general, regardless of whether every individual woman becomes a mother.

Likewise, the role and bond of fathers to their children should not be trivialized to that of a simple "sperm donor"—the view that men are equivalent to "nothing more than a minimal and fairly crude biological product."⁹³ Along with women, men "need and want a vision of masculinity that affirms the indispensable role of good family men in protecting, providing for, and nurturing children, as well as in caring for and about their children's mother."⁹⁴ In the life of a family, characterizing fathers as no more than contributors of necessary genetic material dehumanizes them and degrades notions of masculinity.

Legally ratifying same-sex couples in marriage and as parents deprives motherhood and fatherhood of unique meaning and degrades the sexes in the pursuit of individual rights and so-called equality. Admittedly, a form of equality is achieved when everything is rendered meaningless. But, rather than rendering the sexes irrelevant and proffering androgyny to society, a more esteeming and empowering way to promote mutual respect and dignity between the sexes is through a celebration of the inherent value of each sex—especially when that value is as uniquely expressed as it is in mothers and fathers.

III. DOMA: MORE THAN A TRUISM

A definition of marriage draws from the corollary matters of family, children, and parenting. Motherhood and fatherhood offer distinct value to children. States ought to encourage marriages that provide both mothers and fathers, and they may do so regardless of how sister jurisdictions approach the issue because of the Federal DOMA. DOMA does more than simply state a truism.

A. DOMA Impacts a Vast Body of Federal Law

House Report 664 reflects the understanding that DOMA affects a vast amount of federal law. Consider the words of the House Report:

⁹³ MARQUARDT, *supra* note 51, at 23.

⁹⁴ MARRIAGE AND THE LAW, *supra* note 79, at 10.

[T]he Committee believes it can be stated with certainty that none of the federal statutes or regulations that use the words “marriage” or “spouse” were thought *by even a single Member* of Congress to refer to same-sex couples.

. . . [P]ermit[ting] homosexuals to “marry” . . . could have profound practical implications for federal law. For to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in [one state] to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits. While there are *literally hundreds of examples* that would illustrate this point, the Committee will recount two . . .⁹⁵

In addition to the two examples recounted by the committee, the above quote informs that DOMA was intended to impact “literally hundreds” of other federal statutes—statutes concerning which it could be “stated with certainty” that none of them was passed with “even a single Member of Congress” thinking they referred to same-sex couples.⁹⁶ Could same-sex unions and the differences in state laws that exist today have been on the minds of legislators in 1980 when they passed the PKPA?⁹⁷ Certainly not. Ultimately then, when it became law in 1996, DOMA affected a vast amount of federal law, including the PKPA. Even in terms of placement, the second prong of DOMA was inserted in the U.S. Code immediately after the text of the PKPA.⁹⁸ These factors cast serious doubt on the opinion that “[n]othing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA.”⁹⁹

*B. DOMA Is Efficacious by Enabling States to Implement
Their Own Public Policies*

Besides defining marriage, DOMA allows a state to pursue its own public policies surrounding marriage and related issues. DOMA provides: “*No State . . . shall be required to give effect to any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such*

⁹⁵ H.R. REP. NO. 104-664, at 10-11, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2914-15 (emphasis added). The first example cited in the report involved a claim for increased veterans educational benefits because the claimant listed a same-sex partner as a dependent spouse. *Id.* The second centered on the passage of the Family and Medical Leave Act and an amendment that defined a “spouse” as “a husband or wife, as the case may be.” *Id.* (quoting 29 U.S.C. § 2611(13) (2000)).

⁹⁶ *Id.*

⁹⁷ See Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2000).

⁹⁸ See *id.*; Defense of Marriage Act, 28 U.S.C. § 1738C (2000).

⁹⁹ *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337 (Va. Ct. App. 2006) (emphasis added).

relationship.”¹⁰⁰ DOMA thus simply codifies in this area of law the long-recognized public policy exception to the Full Faith and Credit Clause.¹⁰¹ As the U.S. Supreme Court has stated, “the Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy.”¹⁰² Consequently, DOMA explicitly allows a state to give no effect to a judicial proceeding, such as a custody or visitation order, issued by another state when the other state’s proceeding is held only out of respect for a right or claim arising from a relationship between persons of the same-sex that is treated like a marriage.

Commentators on DOMA from both sides admit to its efficacy. For example, one commentator, even while disparaging the statute, accepted that “civil unions under Vermont . . . are given *no effect for federal law purposes*” because of DOMA.¹⁰³ A second, this time favorable, commentator on DOMA pointed out that it “modifies [the] PKPA, explicitly expanding the authority of states to refuse recognition to same-sex marriages [and] their imitations (such as Vermont civil unions), and their incidents,” which means that the “authority of a forum state, such as Virginia . . . , to implement its public policy on matters of marriage and child custody . . . is almost certainly wider, not narrower” after DOMA’s passage.¹⁰⁴ A third commentator, who approached DOMA from a conflict of laws perspective and urged mutual respect among the states, also squarely addressed DOMA’s interaction with the PKPA:

In most situations, the right to a child’s relationship with a parent . . . is independent of the marital status of the parents. . . . The situation could arise, however, if a state does tie custody to marital status. One example is a custody or visitation order that results from the presumptive rule adopted in many states that when a child is born to a married couple, both of those parties are legal parents. If a nonbiological “parent” in a same-sex union would not be entitled to custody or visitation but for this presumption, it could be said that such a right of custody or visitation is a “right or claim arising from” a “relationship between persons of the same sex that is treated as a marriage.” Under [DOMA], such a judgment would not have to be recognized by a sister state, even if it otherwise would be entitled to

¹⁰⁰ 28 U.S.C. § 1738C (2000) (emphasis added).

¹⁰¹ The Full Faith and Credit Clause of the Federal Constitution states: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. art. IV, § 1.

¹⁰² *Nevada v. Hill*, 440 U.S. 410, 422 (1979) (citing *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 502–05 (1939)).

¹⁰³ Dominick Vetri, *The Gay Codes: Federal & State Laws Excluding Gay & Lesbian Families*, 41 WILLAMETTE L. REV. 881, 885–86 (2005) (emphasis added).

¹⁰⁴ David M. Wagner, *A Vermont Civil Union and a Child in Virginia: Full Faith and Credit?*, 3 AVE MARIA L. REV. 657, 667–68 (2005).

recognition and enforcement under the [PKPA] . . . in effect in all the states.¹⁰⁵

DOMA's text, legislative history, detractors and defenders alike appear to support that DOMA does more than express a truism. It modifies and informs federal law. Consequently, DOMA modifies the PKPA and allows a state like Virginia to operate according to its own public policies regarding marriage and corollary issues.

IV. RESOLVING *MILLER V. JENKINS*: THE PKPA DOES NOT BIND VIRGINIA

A. *DOMA Modifies the PKPA and Encourages Virginia to Implement Its Own Public Policy*

The Court of Appeals of Virginia acted as if its hands were bound by the PKPA and by Lisa's own choice of first filing to dissolve the civil union in Vermont; that, however, is not the case. Janet's visitation and parentage claims to IMJ rest on the Vermont civil union that Lisa and Janet obtained when the two were Virginia residents in 2000. No parentage was conferred upon Janet at IMJ's birth, nor did Janet ever adopt IMJ.¹⁰⁶ The civil union was never recognized in Virginia when the couple traveled back from Vermont because their civil union was premised on the same-sex of the couple. Janet's present claims and the Vermont visitation order arose only because Vermont gave legal significance to the same-sex relationship of the couple. Vermont's order is, thus, a type of judicial proceeding meeting the definition of what DOMA encompasses when it affirms: "No State . . . shall be required to give effect to any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship."¹⁰⁷ Consequently, if a Virginia court's hands are tied under the PKPA in this case, it is only because that court has chosen to bind itself.

One of Janet's attorneys has commented, "Virginia could become the Las Vegas of gay divorces. You would simply pack up and move to Virginia, and your partner would have no rights"¹⁰⁸ But the real

¹⁰⁵ Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2207 n.55 (2005) (quoting 28 U.S.C. § 1738C (2000)).

¹⁰⁶ See Brief of Appellee, *supra* note 8, at 4, 6 (noting that "Lisa is listed as the sole parent of IMJ on the official Virginia birth certificate" and that the provisions of Virginia's assisted fertilization statute, VA. CODE ANN. § 20-158(A)(1) (West 2001), only give parental rights to the gestational mother).

¹⁰⁷ 28 U.S.C. § 1738C (2000) (emphasis added).

¹⁰⁸ The attorney, Joseph Price, is quoted in Leah C. Battaglioli, Comment, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U. L. REV. 1235, 1261-62 (2005) (quoting Kalita, *supra* note 6, at B4).

look-a-like to the Las Vegas hot-bed of expedient legal proceedings is Vermont: Vermont is the state that allows non-residents to travel in and receive a “quickie” civil union and then return home. A neutral and scholarly commentator on the conflict of laws issues involved in this case has urged states to mutually respect each other’s policies:

As for states asked to “recognize” for various purposes a same-sex relationship entered into elsewhere, the appropriate choice of law rule for determining the rights and obligations of same-sex couples should also be the law of domicile or residence of the parties *at the time of the marriage*. *Such a rule gives deference to the policies of the state that has the most significant connection to the parties, and is consistent with predictability and party expectations. . . .* In return, states that decide to favor same-sex unions should not try to become the “Nevadas” of same-sex marriage.¹⁰⁹

Clearly, *Miller v. Jenkins* presents vital issues of state sovereignty. Thus, in an action aimed at “preserving its sovereign power over domestic relations,”¹¹⁰ the Commonwealth of Virginia has argued to its own Supreme Court that registering Janet’s Vermont court order would “indirectly” force Virginia to recognize same-sex unions.¹¹¹ Such a result appears to run contrary to “our constitutional system of dual sovereignty, [in which] the States retain sovereignty over domestic relations.”¹¹² Similarly, the Attorney General for the State of Michigan has sensed the importance of *Miller v. Jenkins* in terms of state sovereignty issues and supports Virginia’s ability to preserve its own public policy, stating: “Historically, laws regarding marriage, adoption, and custody implicate core police functions over which the people of the State govern, not judicial officers from outside the State.”¹¹³ No plausible argument can be made that by enacting the PKPA in 1980 Congress intended to dismantle state sovereignty to an extent which would require the states to unwillingly recognize same-sex unions.

Even if a court is sympathetic to the PKPA’s general purpose, no one should miss what the *Miller v. Jenkins* case is *not*—it is not a case about Lisa’s forum-shopping to find a better jurisdiction for her legal

¹⁰⁹ Silberman, *supra* note 105, at 2214; *see also* Brief of the Commonwealth of Virginia as Amicus Curiae in Support of the Appellant at 4, *Miller-Jenkins*, 637 S.E.2d 330 (R. No. 2654–04–4) [hereinafter Brief of the Commonwealth] (“In our constitutional system of dual sovereignty, neither Vermont nor Virginia may create national policy.”).

¹¹⁰ Brief of the Commonwealth, *supra* note 109, at 5.

¹¹¹ *Id.* at 6.

¹¹² *Id.*; *see also id.* at 5 (“The whole subject of the domestic relations of husband and wife, parent and child, *belongs to the laws of the States* and not to the laws of the United States.” (emphasis added) (quoting *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890))).

¹¹³ Brief of Michael A. Cox, Attorney General of the State of Michigan, as Amicus Curiae in Support of Appellant at 5, *Miller-Jenkins*, 637 S.E.2d 330 (R. No. 2654–04–4).

claims, as she has been accused of doing.¹¹⁴ The facts show that Lisa came back to Virginia because Virginia was her home, where her family lived.¹¹⁵ It was also where IMJ was born. Lisa resided in Vermont for only a little over a year, from August 2002 to September 2003, and then briefly visited Vermont again only to dissolve her civil union, *which she could only dissolve in Vermont*.¹¹⁶

The declared purposes of the PKPA do not address this case. In 1980, well before legislators considered the possibility of states legally ratifying same-sex relationships, Congress declared the PKPA's six purposes.¹¹⁷ The sixth listed and most potentially relevant purpose was to "deter interstate *abductions* and other *unilateral* removals of children undertaken to obtain custody and visitation awards."¹¹⁸ This purpose, however, hardly fits here since Lisa returned to Virginia before even filing for the dissolution of the civil union as she considered Virginia her home. Additionally, the facts indicate that "Janet insisted Lisa leave immediately" after Lisa expressed her desire to end her relationship with Janet in Vermont, and then "*Janet* drove Lisa and the child back to Virginia."¹¹⁹ There is no abducting or anything unilateral about the

¹¹⁴ Brief of Appellant, *supra* note 8, at 7 (accusing Lisa of attempting to "end-run the decision she sought from the Vermont Court"); *see also* Jennifer Ellis Lattimore, *Life After Lawrence v. Texas: An Examination of the Decision's Impact on a Homosexual Parent's Right to Custody of His/Her Own Children in Virginia*, 15 GEO. MASON U. CIV. RTS. L.J. 105, 128 (2004) (calling Lisa a "forum-shopper").

¹¹⁵ Brief of Appellee, *supra* note 8, at 5.

¹¹⁶ Lisa argued in Vermont that the residency requirements for marriage in Vermont also applied to civil unions, which would have voided her civil union with Janet because the two were residents of Virginia when they traveled to Vermont for the civil union. The court rejected this argument because the Vermont legislature had not explicitly applied the residency requirement to entering into a civil union. In contrast, though, the court pointed out that to dissolve a Vermont civil union the legislature had stated that "dissolution of civil unions shall follow the same procedures . . . that are involved in the dissolution of marriage . . . , *including any residency requirements*." *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 961–64 (Vt. 2006) (emphasis added) (quoting VT. STAT. ANN. tit. 15, § 1206 (2002)). Also, "the Legislature specifically required town clerks to provide civil union applicants with information to advise them 'that Vermont residency may be required for dissolution of a civil union in Vermont.'" *Id.* (quoting VT. STAT. ANN. tit. 18, § 5160(f) (2000)); *see also* Brief of Appellee, *supra* note 8, at 5.

Based on Vermont's requirements to dissolve the civil union, it seems a bit disingenuous for the Virginia Court of Appeals to fault Lisa as a *pro se* litigant for essentially tying its hands and sealing her own fate by first filing in Vermont. *See Miller-Jenkins*, 637 S.E.2d at 338; Brief of Appellee, *supra* note 8, at 5 ("Lisa filed *pro se* in Vermont the necessary forms" to seek a dissolution of the civil union.).

¹¹⁷ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c), 94 Stat. 3568, 3569 (1980) ("Findings and Purposes").

¹¹⁸ *Id.* at § 7(c)(6), 94 Stat. at 3569 (emphasis added).

¹¹⁹ Brief of Appellee, *supra* note 8, at 5 (emphasis added). However, Janet's contention is that she "urged Lisa to remain in Vermont, but Lisa insisted on taking IMJ and returning to Virginia." Brief of Appellant, *supra* note 8, at 6.

situation. The facts do not evince anything that the PKPA was intended to deter.

Furthermore, the PKPA's first and fourth listed purposes express a commitment to allowing courts to act in the best interests of the child.¹²⁰ Regarding IJM's best interests, one commentator on this matter concludes that, under this standard, "Janet should, at the very least, be granted visitation rights."¹²¹ As this Note addresses below, however, an examination of Virginia's clearly expressed public policy leads to a different conclusion.

B. Virginia Has Stated a Robust Public Policy in Support of Marriage and in Support of Moms and Dads

Legislatively and judicially, Virginia has affirmed the importance of fatherhood and motherhood. In the past ten years, Virginia has thrice affirmed the value of defining marriage as existing only between one man and one woman, which likewise makes a statement about Virginia's understanding of parenthood. First, in 1997, Virginia passed the Marriage Protection Act prohibiting "marriage between persons of the same sex" and voiding "any contractual rights created by such marriage."¹²² Then, in 2004, Virginia passed the "Marriage Affirmation Act" ("MAA") expressly prohibiting legal recognition of any civil unions between members of the same-sex and any contractual rights created by them.¹²³ Of particular note is the legislative findings supporting the MAA, which recognized "the beneficial health effects of heterosexual marriage" in contrast with "the life-shortening and health compromising consequences of homosexual behavior" that could be "to the detriment of all citizens regardless of their sexual orientation or inclination."¹²⁴ Finally, in the November 2006 elections, the people of Virginia consummated the actions of their legislators by amending the Virginia Constitution to define marriage as a "union between one man and one woman" and to exclude from legal status all other forms or approximations.¹²⁵

¹²⁰ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c)(1), (4), 94 Stat. 3568, 3569 (1980) ("Findings and Purposes"); see also Melissa Crawford, Note, *The Best Interests of the Child? The Misapplication of the UCCJA and the PKPA to Interstate Adoption Custody Disputes*, 19 VT. L. REV. 99, 109 (1994) ("Making custody determinations in the best interest of the child is an explicit goal of both the UCCJA [the Uniform Child Custody Jurisdiction Act] and the PKPA.").

¹²¹ Battaglioli, *supra* note 108, at 1266–67.

¹²² VA. CODE ANN. § 20-45.2 (West 2001).

¹²³ VA. CODE ANN. § 20-45.3 (Supp. 2007).

¹²⁴ H.D. 751, Gen. Assem., Reg. Sess. (Va. 2004).

¹²⁵ VA. CONST. art. I, § 15-A. The provision is worth quoting in its entirety:

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

In child custody disputes, the Supreme Court of Virginia has not favored parents who live an active homosexual lifestyle in the same residence where the child lives.¹²⁶ In *Roe v. Roe*, the court divested a father of physical custody of his daughter in favor of restricted visitation rights because the father engaged in open homosexual activities with a partner who lived at the same residence.¹²⁷ In another case, the court cited a mother's homosexual practices as one of a variety of factors which justified removing a child from the mother's custody.¹²⁸

Therefore, both in terms of legislation and judicial determinations of the best interests of the child standard, Virginia has expressed a robust public policy that values the institution and practices of opposite-sex marriage and the beneficial environment for children that is fostered when both a mother and father raise them.

C. Vermont Is Consistent; Virginia Should Be As Well

The Vermont Supreme Court did not see a need to consider the broader question of how DOMA affected the *Miller v. Jenkins* case. The court ruled consistently with Vermont's public policy as found in its civil

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that *intends to approximate* the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which *is assigned* the rights, benefits, obligations, qualities, or effects of marriage.

Id. (emphasis added).

¹²⁶ *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985).

¹²⁷ *Id.* at 692. The court indicated that

the father was living with a man who was his homosexual lover, that the two men occupied the same bed in a bedroom in the house in which the father lived with the child, that the child had reported seeing the two men 'hugging and kissing and sleeping in bed together,' and that other homosexuals visited the home and engaged in similar behavior in the child's presence.

Id. The court based its holding on *Brown v. Brown*, 237 S.E.2d 89 (Va. 1977), in which custody of two young sons was removed from a mother "on the sole ground that she was openly living in an adulterous relationship with a male lover, in the same home as the children, during the pendency of the divorce suit." *Roe*, 324 S.E.2d at 693. Based on *Brown*, the court in *Roe* explained:

[W]e have no hesitancy in saying that the conditions under which the child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large.

Id. at 694. Since *Lawrence v. Texas*, 539 U.S. 558, 564 (2003), and *Martin v. Zihlerl*, 607 S.E.2d 367, 371 (Va. 2005), the father's activity in *Roe* would no longer be "unlawful," but the court's second observation would still hold true in Virginia. To be clear, though, note that the Virginia Supreme Court has never held "that every lesbian mother or homosexual father is *per se* an unfit parent." *Roe*, 324 S.E.2d at 694. Neither does this Note argue such a point.

¹²⁸ *Bottoms v. Bottoms*, 457 S.E.2d 102, 107-08 (Va. 1995).

union statutes. There is little surprise that Vermont did not extend full faith and credit to the order of the Virginia circuit court that disavowed parental rights to Janet.¹²⁹

Virginia, however, at least at the court of appeals, is oddly inconsistent. Virginia's citizenry and elected officials have thrice voted to affirm marriage as existing solely between one man and one woman, and Virginia's Supreme Court has seriously questioned whether exposing children to the homosexual lifestyle of a parent is in the best interests of the child. Even Virginia's Constitution appears to reject Janet's attempt to register the Vermont visitation order.¹³⁰ Virginia courts should chart a consistent course with expressed public policy. To do so, Virginia courts do not need to blindly go out on a legal limb: DOMA enables, even encourages, Virginia to carry out its own public policy.

Under Virginia law and public policy, Janet is not a parent of IMJ. IMJ was born in Virginia as Lisa's biological daughter. Further, Virginia values heterosexual marriage and its corollaries of fatherhood and motherhood. This does not discard Janet as having no role in IMJ's birth or mean that Lisa should never allow IMJ to have any contact with Janet. However, encouraging Lisa to deal kindly and graciously with Janet is entirely different than binding Lisa under court order. Vermont's determination of Janet's parentage rests solely on the Vermont civil union, and therefore, Federal DOMA enables Virginia to give such a determination no legal effect.

The Court of Appeals of Virginia voluntarily chose to give effect to a judicial proceeding from Vermont that was based on Vermont's recognition of a relationship between persons of the same-sex. DOMA does not require that result. Instead of side-stepping the express public policy of Virginia's legislature and citizens, Virginia courts should rule consistently with that public policy as DOMA enables, even encourages, states to do.

CONCLUSION

Defining marriage in our country largely turns on issues of parenthood. One understanding of marriage reinforces the value of mothers and fathers, while another renders them meaningless, "dead" in modern thought and experience. When society changes marriage, it changes parenthood, and, so too, when society affirms marriage, it affirms a particular understanding of parenthood. DOMA and state court decisions on marriage capture the reality of this connection. The Federal DOMA not only affirms heterosexual marriage to be a societal good but also efficaciously enables states to follow their own public policy

¹²⁹ *Miller-Jenkins*, 912 A.2d at 961-62.

¹³⁰ VA. CONST. art. I, § 15-A. See *supra* note 125 for the text of this provision.

on issues of marriage and its corollary of parenthood. DOMA modifies the PKPA and is the controlling factor in *Miller v. Jenkins*. Virginia's legislature and citizens have expressed a robust affirmation of opposite-sex marriage and a respect for fatherhood and motherhood—Virginia courts should rule accordingly.

Cort I. Walker