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“I Now Pronounce You Husband and Son”: Confronting the Need to Amend Adult Adoption Codes to Facilitate Same-Sex Marriage*

Hope C. Blain**

I. INTRODUCTION

“We never thought we’d see the day” where same-sex marriage was legal in Pennsylvania, said Nino Esposito.¹ But with the Supreme Court’s legalization of same-sex marriage in *Obergefell v. Hodges*,² Nino Esposito and his partner of forty years, Drew Bosee, saw that elusive day become a reality for all Americans. Except, Mr. Esposito and Mr. Bosee still could not marry. The problem: They were legally father and son. In 2012, three years before the Supreme Court legalized same-sex marriage across the nation, Mr. Esposito and Mr. Bosee adopted each other.³ For them, their decision to adopt was motivated by a desire to secure inheritance and medical visitation rights, and more importantly, it was motivated by a desire to be legally considered a family.⁴

* For the inspiration of my title, see Rich Schapiro, *Gay Pennsylvania Couple Seeks to Annul Adoption that Fetched them Inheritance Rights Now that Same-Sex Marriage is Legal*, N.Y. DAILY NEWS (Nov. 3, 2015, 10:52 PM), <http://www.nydailynews.com/news/national/gay-pa-couple-annul-adoption-wed-article-1.2422060> [<http://perma.cc/SM58-DG8N>].

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¹ Evan Perez & Ariane de Vogue, *Couple Seeks Right to Marry. The Hitch? They’re Legally Father and Son*, CNN (Nov. 3, 2015, 3:55 PM), <https://www.cnn.com/2015/11/03/politics/same-sex-marriage-adoption-father-son-pennsylvania/index.html> [<http://perma.cc/JEH2-9RB4>].

² 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

³ Yanan Wang, *These gay men became ‘father and son.’ Now they want to get married but can’t*, WASH. POST (Nov. 5, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/05/these-gay-men-became-father-and-son-now-they-want-to-get-married-but-cant/?utm_term=.80781b46a6f4 [<http://perma.cc/34AG-LGTS>].

⁴ See *id.*

With the legalization of same-sex marriage, the couple sought to annul their adoption and exercise their inherent right to marry.⁵ On March 23, 2015, Mr. Esposito and Mr. Bosee filed a petition to revoke their adoption with the Allegheny County Court of Common Pleas Orphan's Court in Pennsylvania.⁶ Their petition even included an affidavit of Mr. Bosee's consent to the adoption annulment.⁷ Yet, the Orphan's Court rejected the couple's petition reasoning that state law barred the adoption revocation.⁸ On appeal, the Superior Court reversed and found that denying the adoption annulment "frustrated the couple's ability to marry," which directly conflicted with *Obergefell*.⁹ While the Superior Court remanded the case and expressly gave the lower court the authority to annul same-sex adult adoptions, it failed to provide any guidance or requirements to swiftly effectuate the adoption annulments.¹⁰ Now, years after the couple attempted to annul their adoption, it seems they have still not been able to marry as they await the formal revocation of their adoption.¹¹

Stuck in this legal limbo-land, Mr. Esposito and Mr. Bosee are not alone. While there is "no reliable data—or even flimsy data" regarding the number of same-sex adult adoptions,¹² many same-sex couples across the nation turned to adult adoption to create a legal family unit.¹³ In fact, adult adoption was arguably the only way to legally formalize same-sex relationships, allowing couples to secure essential insurance benefits and inheritance rights.¹⁴ However, with the legalization of same-sex marriage in

⁵ *In re Adoption of R.A.B.*, 153 A.3d 332, 333 (Pa. Super. Ct. 2016).

⁶ *Id.*

⁷ *Id.* Note, this Article uses the terms "adoption revocation," "adoption annulment," and "adoption termination" interchangeably.

⁸ See Schapiro, *supra* note *. The Orphan's Court reasoned that state law prohibited the adoption revocation since Pennsylvania's adoption code does not contain any provision regarding adoption revocation and, historically, only permitted revocation under rare circumstances, such as clear and convincing evidence of fraud. 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

⁹ *Adoption of R.A.B.*, 153 A.3d at 336.

¹⁰ *Id.*

¹¹ See *id.* It is unclear if the couple is now married. See Chris Potter, *Adoption decision ends marriage predicament for gay couples in Pennsylvania*, PITT. POST-GAZETTE (Dec. 21, 2016, 9:12 PM), <http://www.post-gazette.com/local/north/2016/12/21/Pennsylvania-court-ruling-clears-way-for-gay-Fox-Chapel-couple-to-marry/stories/201612210196> [<http://perma.cc/H42D-D39B>].

¹² Elon Green, *The Lost History of Gay Adult Adoption*, N.Y. TIMES (Oct. 19, 2015), <https://www.nytimes.com/2015/10/19/magazine/the-lost-history-of-gay-adult-adoption.html> [<http://perma.cc/PC4X-9DSE>] ("The practice seems to have taken hold amid the tumult of the 1970s and 1980s, during rampant discrimination and the onset of the AIDs crisis.")

¹³ Brynne E. McCabe, *Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations*, 22 QUINNIPIAC PROB. L. J. 300, 306 (2009).

¹⁴ See Gwendolyn L. Snodgrass, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 75-76 (1998) (noting that same-sex couples could also use wills, insurance policies, partnership agreements, and durable powers of attorney to establish some

2015, the motivations behind these adult adoptions became obsolete since *all* couples now had the right to marry.¹⁵ Yet, even with the recognition of this fundamental right, some same-sex couples who adopted each other, like Mr. Esposito and Mr. Bosee, cannot easily exercise their right to marry because adoption is often irrevocable and most states lack any formal revocation process.¹⁶ Thus, confronted with couples that cannot exercise their constitutional right to marry, states¹⁷ must reform their adoption codes to effectuate the efficient annulment of same-sex adult adoptions.

Adoption, including adult adoption, did not exist at common law.¹⁸ Instead, adoption is a product of state-specific statutory language.¹⁹ Therefore, given adoption's statutory origins, any solution to Mr. Esposito's, Mr. Bosee's, and countless other same-sex couples' problem should be statutory in nature. However currently, many state adoption codes fail to even mention adult adoption revocation and lack any statutory revocation procedure.²⁰ Instead, most adoption codes highlight the extreme permanency of adult adoption or only permit adoption revocation within an extremely narrow timeframe.²¹ In fact, only one state provides a detailed adult adoption revocation procedure—California.²² California's Family Code dedicates an entire section to adult adoption revocation and details a comprehensive process for individuals seeking revocation.²³ Further, not only does California's adoption code provide a comprehensive revocation procedure, it ensures that both the

legally recognized rights, but "adoption [was] the only solution that [created] a bona fide family relationship").

¹⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

¹⁶ See Schapiro, *supra* note *, see also Peter N. Fowler, *Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U. L. REV. 667, 706 (1984) ("Except in very narrow circumstances, or unless the statute provides for it, once an individual has adopted her/his lover, the adoption cannot be abrogated.").

¹⁷ Unless otherwise indicated, for the purposes of this Article, "states" includes all fifty states and the District of Columbia.

¹⁸ McCabe, *supra* note 13, at 302.

¹⁹ See *id.*

²⁰ See, e.g., CAL. FAM. CODE § 9340 (1993).

²¹ See, e.g., ARK. CODE ANN. § 9-9-216 (2018) ("[U]pon the expiration of one (1) year after an adoption decree is issued, the decree cannot be questioned by any person including the petitioner [the individual that sought the adoption], in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter . . ."); see also ALASKA STAT. ANN. § 25.23.130 (West 1974) ("[A]ll legal relationships between the adopted person and the natural parents and other relatives of the adopted person, so that the adopted person thereafter is a stranger to the former relatives for all purposes" (emphasis added)).

²² See CAL. FAM. CODE § 9340 (1993).

²³ See generally *id.* Within California's Family Code, Division 13 "Adoption" includes Part 3 "Adoption of Adults and married Minors" which includes Chapter 3 "Procedure for Terminating Adult Adoption." See *id.*

adoptee and the adopter are protected by requiring the consent of both parties.²⁴ Although improvements can be made to California's adoption code, all states should look to California's statutory language as a model and amend their respective codes accordingly.

This Article proceeds in four parts. Part I briefly discusses the current need to amend state adoption codes to allow same-sex couples that adopted each other pre-*Obergefell* to efficiently annul their adult adoption and marry. Part II provides background on the legal avenues open to same-sex couples to solidify their relationships pre-*Obergefell*. This section also discusses the history and ramifications of *Obergefell*. Part III delves into the problem—same-sex couples that adopted each other pre-*Obergefell* often cannot, or at least cannot efficiently, annul their adoption. Part IV provides a solution. This Part outlines the need to amend state adoption codes by comparing states that lack statutory guidance²⁵ with the one state that has a clear statutory framework for adult adoption revocation—California.²⁶ Part IV advocates for states to adopt language similar to California's statutory language, which requires that both the adoptee and the adopter provide consent before a formal adoption revocation is granted.²⁷ Further, Part IV discusses the importance of implementing a statutory framework, as opposed to relying on equitable relief, since courts and same-sex couples alike need clear and comprehensive *statutory* requirements.

II. BACKGROUND

Adoption is “[t]he creation by judicial order of a parent-child relationship.”²⁸ Adult adoption is the creation of a parent-child relationship between two adults.²⁹ In both the adoption of a child and of an adult, the adoption bestows significant inheritance, medical, and countless other rights upon those involved.³⁰ A noteworthy difference between child adoption and adult adoption is the underlying motivation. Unlike the motivations behind child adoption, which usually center on a desire to provide a child

²⁴ *Id.*

²⁵ *See, e.g.*, 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

²⁶ *See* CAL. FAM. CODE § 9340 (1993).

²⁷ *Id.*

²⁸ *Adoption*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Fowler, *supra* note 16, at 677 (“[T]he adoptive parent in an adult adoption bears no legal duty of support for her/his adult child.”). While adoption has ancient roots and can be traced back to the Code of Hammurabi, adoption did *not* exist at common law and is the product of state specific statutes. *See* 17 WEST'S PA. PRAC., FAMILY LAW § 32:1 (7th ed. 2017).

²⁹ *See Adoption, supra* note 28.

³⁰ *See* Fowler, *supra* note 16, at 679 (“In every American jurisdiction, if an unmarried intestate decedent is survived by an adopted child, but no natural-born descendants, the adopted child inherits the entire estate.”).

with basic necessities,³¹ adult adoption has been historically utilized for “strictly economic purposes, especially inheritance.”³²

A. American Adult Adoption: A Legal Avenue for Same-Sex Couples

Before the nationwide legalization of same-sex marriage, adult adoption served as one avenue to legally formalize same-sex relationships. Other legal options, like civil unions and domestic partnerships, existed, but were often not as widely available as adult adoption. For example, as of November 2014, only four states allowed for civil unions between same-sex couples and only six states and the District of Columbia allowed for domestic partnerships between same-sex couples,³³ whereas most states recognize, and have recognized adult adoption for decades.³⁴ Further, adoption bestowed more expansive benefits than the other available options.³⁵

For example, one available method to formalize same-sex relationships was a domestic partnership. Yet, a domestic partnership was a “municipality-based convention, unrecognized by state legislatures,” that only extended limited employment benefits to the domestic partner—with those benefits chosen at the complete discretion of the employer.³⁶ Further, unlike adoption, domestic partnerships did not “create heirs or establish property or inheritance rights.”³⁷

Another common means of formalizing same-sex relationships pre-*Obergefell* were cohabitation contracts.³⁸ Cohabitation contracts allowed same-sex couples to live together as if married, provide companionship, and share earnings and property.³⁹ However, the contract was only enforceable if legitimate consideration, independent of the sexual relationship, existed.⁴⁰ And even if the

³¹ See *supra* text accompanying note 16.

³² *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 200 (N.Y. App. Div. 1982).

³³ Jodi B. Mileto, Note, *Fallout from Obergefell: The Dissolution of Unconventional Adoptions to Pave the Way for Same-Sex Marriage Equality*, 120 W. VA. L. REV. 285, 294 (2017).

³⁴ See Fowler, *supra* note 16, at 673 (commenting that Arizona and Nebraska were the only states that did not authorize adult adoption in 1984); see also *Who May Adopt, be Adopted, or Place a Child for Adoption*, CHILD WELFARE INFORMATION GATEWAY (2016), <https://www.childwelfare.gov/pubPDFs/parties.pdf#page=5&view=SummariesofStatelaws> [http://perma.cc/G2AC-SJJP9] (noting, that as of 2016, Louisiana, Missouri, Idaho, South Carolina, and Wyoming did not permit adult adoption).

³⁵ Snodgrass, *supra* note 14, at 77.

³⁶ *Domestic Partnership*, BLACK'S LAW DICTIONARY (10th ed. 2014); see also Snodgrass, *supra* note 14, at 76.

³⁷ Snodgrass, *supra* note 14, at 76.

³⁸ See *id.* at 77; see generally Whorton v. Dillingham, 202 Cal. App. 3d 447 (1988).

³⁹ Snodgrass, *supra* note 14, at 77.

⁴⁰ See *id.*

contract was enforceable, property distribution was the only right provided by the contract and was only enforced upon the dissolution of the relationship.⁴¹ Thus, unfortunately, cohabitation contracts only provided enforceable rights if the relationship ended.

Similarly, other legal avenues, such as “[w]ills, insurance policies, trusts, health-care proxies, partnership agreements[, and] durable powers of attorney,” were available, but none created the depth of legal rights that accompanied adoption.⁴² For example, wills, especially reciprocal wills, and trusts provided an avenue for same-sex couples to leave property to each other. But, “the greatest threat to each [of these options was a] surviving blood relative wielding a charge of undue influence.”⁴³ Such a threat was not uncommon. Due to the stigma of homosexuality, wills and trusts made by homosexual individuals were historically more likely to be successfully challenged than wills and trusts made by heterosexual individuals.⁴⁴ Thus, using a will or trust to create inheritance rights was a gamble for same-sex couples. There was no guarantee that the same-sex partner would ever receive the bequeathed property.⁴⁵

Thus, while each aforementioned option provided some legal benefits to same-sex couples, they often had severe limitations. Moreover, they all failed to establish inalienable inheritance rights and create a cognizable family unit.

Unlike other options available in the pre-*Obergefell* world, adult adoption allowed same-sex couples to “formally and legally express their commitment to one another by creating a family unit.”⁴⁶ Not only did adoption bestow the legal label of “family” on a same-sex couple, it also provided vast legal rights, including inheritance, successorship, next-of-kin, and beneficiary rights.⁴⁷ Such comprehensive rights and privileges illustrate why same-sex couples often chose adult adoption over other legal avenues.

One of the most significant benefits of adoption was the creation of inheritance rights, which vested immediately upon the adoption and required no other legal instrument.⁴⁸ Further, “every state honor[ed] the rights of an adopted child [or adult] to inherit the estate of an unmarried intestate decedent over the

⁴¹ *See id.*

⁴² *Id.* at 75–77. Unlike adoption, the other avenues were merely contract-based methods to secure rights. *Id.* at 76.

⁴³ *Id.* at 78.

⁴⁴ *Id.* at 79.

⁴⁵ *Id.*

⁴⁶ *Id.* at 80–81.

⁴⁷ *Id.* 81–83.

⁴⁸ *Id.* at 81.

rights of the decedent's 'nonimmediate' blood relatives."⁴⁹ Thus, through the fairly simple legal act of adoption, same-sex couples were able to cut off blood relatives and solidify their inheritance rights. In addition to inheritance rights, adoption also established successorship rights. For example, same-sex couples successfully used adult adoption to "safeguard possession" of rent-controlled apartments upon the death of a partner.⁵⁰ Moreover, adoption also provided benefits during the lives of both partners through next-of-kin privileges.⁵¹ The next-of-kin designation allowed a person to be legally recognized as the "closest living relative of another," which in turn provided "privileges in case of hospitalization or imprisonment [and conferred] decision-making authority in case of emergency or incapacity."⁵² Additionally, adult adoption also allowed same-sex couples to take advantage of beneficiary privileges.⁵³ Beneficiary privileges allowed a surviving same-sex partner to collect "insurance policies, retirement funds, and employee benefits."⁵⁴ In short, with the vast benefits and rights conferred by adult adoption, it was often used to create a pseudo-marriage between same-sex couples.

Many have argued that the use of adult adoption in this way—creating a parent-child relationship when there is clearly a sexual relationship—perverts adoption's purpose.⁵⁵ While it is true that the parent-child relationship is a legal fiction within these same-sex adult adoptions, many courts have found that the motivations behind these adult adoptions are legitimate and sincere.⁵⁶ For example, in *In re Adoption of Adult Anonymous*, the New York Family Court of Kings County granted a same-sex couple's petition for adoption.⁵⁷ The couple, a twenty-two-year-old male and his twenty-six-year-old male partner, desired to create "a legally cognizable relationship."⁵⁸ The court granted the adoption despite challenges stemming from public policy and morality concerns.⁵⁹ Moreover, in *In re Adult Anonymous II*, the Supreme Court of New York reversed an order denying a

⁴⁹ *Id.*

⁵⁰ *Id.* at 82 (noting that adult adoption was used to successfully bypass New York City's rent and eviction regulations which "provide[d] that no surviving spouse or relative of a deceased tenant will be evicted so long as that person lived with the tenant while the tenant was alive").

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 83.

⁵⁴ *Id.*

⁵⁵ See, e.g., Fowler, *supra* note 16, at 668–69.

⁵⁶ See, e.g., *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 199–201 (N.Y. App. Div. 1982); see also McCabe, *supra* note 13, at 307–08.

⁵⁷ *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 531 (N.Y. Fam. Ct. 1981).

⁵⁸ *Id.* at 527.

⁵⁹ *Id.* at 531; see also McCabe, *supra* note 13, at 308.

same-sex couple's adult adoption.⁶⁰ The court found that the couple's motivation for entering into the adoption—to avoid eviction—was sincere and not a manipulation of the adoption statute.⁶¹ Furthermore, the court noted that “[h]istorically . . . [adult] adoption has served as a legal mechanism for achieving economic, political, and social objectives rather than the stereotypical parent-child relationship.”⁶² Thus, as the precedent cases and literature make clear, same-sex adult adoption was not a perversion of adoption, but rather a sincere attempt to create a family—the very purpose of adoption.

But the rights created by adoption come at a price: Finality. Absent a showing of undue influence or fraud, adult adoption is often irrevocable.⁶³ Therefore, even if the romantic relationship ends, the legal relationship of parent-child remains. Case in point, if the romantic relationship sours and the adopter or “parent” disinherits the adoptee or “child” by excluding the adoptee from his or her will, the adoptee will *always* have standing to contest the adopter's will because the adoptee is *forever* a bona fide child of the adopter.⁶⁴ As such, the irrevocability of adult adoption is considered its most significant flaw because it creates an immutable legal relationship, remaining even after death.

Moreover, adult adoption's permanency also forever removes the adoptee from his or her biological bloodline.⁶⁵ Thus, adult adoption terminates the adoptee's natural right to inherit from his or her biological parents and places the adoptee into the adopter's bloodline. Once the adult adoption is complete the adoptee can never restore his or her right to inherit from the biological parents.⁶⁶ This is highly problematic for the adoptee if the same-sex relationship ends and the adoptee is excluded from the adopter's will. In this scenario, the adoptee would be up the proverbial creek without a paddle; she would not inherit from her biological parents or her same-sex partner, the adopter.⁶⁷

⁶⁰ *Adult Anonymous II*, 452 N.Y.S.2d at 201.

⁶¹ *Id.* at 199–200.

⁶² *Id.* at 200.

⁶³ See 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017); but see CAL. FAM. CODE § 9340 (1993). Further, even in the presence of fraud, an adoption often cannot be revoked. See ARK. CODE ANN. § 9-9-216 (2018).

⁶⁴ Snodgrass, *supra* note 14, at 83–84.

⁶⁵ *Id.* at 84.

⁶⁶ *Id.*

⁶⁷ In this situation the adoptee would have two options: (1) seek a devise from the biological parents, which would be moot if they are both deceased, or (2) contest the adopter's will. See *id.*

Same-sex adult adoption may also bring about significant psychological ramifications. Same-sex couples that turn to adult adoption have to cope with the legal dynamics of their relationship—father and son by day, lovers by night. While courts have consistently upheld the motivations behind these adoptions,⁶⁸ their legal fiction may create tension between relatives, friends, and even between the same-sex couple.⁶⁹ Therefore, while adult adoption was a viable option for same-sex couples, it was an inappropriate method to achieve the legal status that these couples desired and deserved: Marriage.⁷⁰

B. *Obergefell* & its Outcomes

At its core, *Obergefell v. Hodges*, which legalized same-sex marriage, is about the interlocking constitutional guarantees of liberty and equality.⁷¹ Justice Kennedy began the monumental decision by highlighting the foundation of our country—the Constitution—which “promises liberty to *all* within its reach, a liberty that includes certain specific rights that allow persons within a lawful realm, to define and express their identity.”⁷² The Constitution’s promise of liberty and equality was the cornerstone of Justice Kennedy’s opinion.

The petitioners in *Obergefell* were fourteen same-sex couples and two men whose same-sex partners were deceased.⁷³ The petitioners had filed individual actions in federal district court arguing that their respective states violated the Fourteenth Amendment by denying them the right to marry or by failing to recognize their marriages lawfully performed in other states.⁷⁴ The respondents were state officials responsible for enforcing state laws that denied same-sex couples the ability to marry.⁷⁵ In each action, the district courts found for the petitioners.⁷⁶ But the Sixth Circuit, consolidating the cases, reversed, finding that states do not have a constitutional obligation to license or recognize same-sex marriage.⁷⁷

⁶⁸ See *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 531 (N.Y. Fam. Ct. 1981); see also *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 200, 201 (N.Y. App. Div. 1982).

⁶⁹ Snodgrass, *supra* note 14, at 84.

⁷⁰ See Lisa R. Zimmer, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 691 (1990).

⁷¹ 135 S. Ct. 2584, 2604 (2015).

⁷² *Id.* at 2593 (emphasis added).

⁷³ *Id.*

⁷⁴ *Id.* The states at issue were Michigan, Kentucky, Ohio, and Tennessee. *Id.* All of these states defined marriage as a union between one man and one woman. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

Before addressing the substance of the petitioners' legal claims, the Court delved into the "transcendent importance" of marriage and the tragic outcomes caused by prohibiting same-sex marriage.⁷⁸ Noting marriage's significance, the Court stated that "marriage is essential to our most profound hopes and aspirations" and arises "from the most basic human needs."⁷⁹ Further, as the Court aptly noted, it was and is the importance of marriage that instigated the petitioners' claims.⁸⁰ Far from trying to demean the institution of marriage, as the respondents genuinely believed, the petitioners sought the ability to be a part of an institution they revered.⁸¹

Turning to the facts, the Court outlined the petitioners' challenges.⁸² Take petitioners April DeBoer and Jayne Rowse of Michigan as an example. Ms. DeBoer and Ms. Rowse celebrated their relationship in a commitment ceremony in 2007.⁸³ Over the years their family had grown.⁸⁴ In 2009, they adopted a baby boy and took in another baby boy that was abandoned by his biological mother.⁸⁵ "The next year a baby girl with special needs joined their family."⁸⁶ But in the eyes of Michigan law, Ms. DeBoer and Ms. Rowse could never truly be a "family" because they *both* could not be their children's legal parents.⁸⁷ Under Michigan law, only married couples and single individuals could adopt children, "so each child [could] have only one woman as his or her legal parent."⁸⁸ This legal separation, caused by the couple's unmarried status, posed serious problems for their family. If there was an emergency, schools, hospitals, and first-responders would have to "treat the three children as if they had only one parent."⁸⁹ And if Ms. DeBoer or Ms. Rowse became ill or died, the other woman would have no legal rights over the children she had not adopted—she might even lose those children.⁹⁰ This ever-present uncertainty, caused by the couples' inability to marry, led them to take legal action.⁹¹

⁷⁸ *Id.* at 2594.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 2595.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Similarly, petitioner James Obergefell’s claim stemmed from the same uncertainty caused by his inability to marry his partner. Together for over two decades, Mr. Obergefell and his partner, John Arthur, promised to marry before Mr. Arthur died.⁹² However, same-sex marriage was illegal in their home state of Ohio.⁹³ “To fulfill their . . . promise, [Mr. Obergefell and Mr. Arthur] traveled from Ohio to Maryland, where same-sex marriage was legal.⁹⁴ Struggling with the debilitating effects of ALS, Mr. Arthur was unable to move, so the couple was married inside a medical transport plane on a tarmac in Maryland.⁹⁵ Mr. Arthur died three months later.⁹⁶ Although they were lawfully married in Maryland, “Ohio law [did] not permit Obergefell to be listed as the surviving spouse on Arthur’s death certificate.”⁹⁷ Thus, “[b]y statute, [Mr. Obergefell and Mr. Arthur] must remain strangers even in death”⁹⁸

Turning to the legal claims at hand, the Court determined that same-sex couples have a fundamental right to marry by analyzing two core constitutional principles—liberty and equality.⁹⁹ The Court found that marriage was a constitutional liberty guaranteed by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁰ To reach its conclusion, the Court discussed four interrelated principles.¹⁰¹

First, the Court reasoned that marriage is a highly personal choice rooted in the concept of individual autonomy.¹⁰² Looking at past precedent, the Court determined that personal decisions regarding marriage, including same-sex marriage, are “among the most intimate that an individual can make” as these decisions have the power to define an individual, while simultaneously binding that individual to another.¹⁰³ And, thus, the right to marry, like other intimate personal choices

⁹² *Id.* at 2594. Mr. Arthur was diagnosed with amyotrophic lateral sclerosis (“ALS”) in 2011. *Id.* This condition has no known cure. *Id.*

⁹³ *Id.* at 2593.

⁹⁴ *Id.* at 2594.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 2598, 2603.

¹⁰⁰ *Id.* at 2602–03. The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV, § 1. The liberties protected by the Due Process Clause include “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Obergefell*, 135 S. Ct. at 2597.

¹⁰¹ *Obergefell*, 135 S. Ct. at 2599.

¹⁰² *Id.*

¹⁰³ *Id.*; see also *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

“concerning contraception, family relationships, procreation, and childrearing,” deserves protection under the Constitution.¹⁰⁴

Second, the Court opined that the right to marry is guaranteed by the Constitution “because it supports a two-person union unlike any other in its importance to the committed individuals.”¹⁰⁵ Drawing on the Court’s decision in *Turner v. Safley*, which held that inmates could not be denied their right to marry,¹⁰⁶ and *Loving v. Virginia*, which invalidated interracial marriage bans,¹⁰⁷ the Court found that same-sex couples, too, have the right to find companionship and participate in a legally-recognized relationship.¹⁰⁸

Third, the Court reasoned that safeguarding *all* individuals’ right to marry protects children, the future of American society.¹⁰⁹ By recognizing same-sex marriage, same-sex relationships are afforded legal legitimacy, which in turn allows children of same-sex couples “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”¹¹⁰ In other words, it ensures that children of same-sex couples are not labeled the “other.” Thus, excluding same-sex marriage would cause these children to “suffer the stigma of knowing their families are somehow lesser.”¹¹¹

Fourth, the Court noted that the right to marry is protected under the Constitution because, quite simply, marriage is the “keystone of [American] social order.”¹¹² It is an essential building block of American life. The Court reasoned that the fundamental importance of marriage in America is evident in “the constellation of benefits” awarded to couples just by virtue of their marriage.¹¹³ In fact, the Court listed fourteen categories of benefits awarded to married couples.¹¹⁴ And the Court reasoned

¹⁰⁴ *Obergefell*, 135 S. Ct. at 2599; *see also* *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (finding that it would be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society”).

¹⁰⁵ *Obergefell*, 135 S. Ct. at 2599.

¹⁰⁶ 482 U.S. 78, 79 (1987).

¹⁰⁷ 388 U.S. 1, 2 (1967).

¹⁰⁸ *See Obergefell*, 135 S. Ct. at 2600 (“Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”).

¹⁰⁹ *Id.*

¹¹⁰ *United States v. Windsor*, 570 U.S. 744, 772 (2013).

¹¹¹ *Obergefell*, 135 S. Ct. at 2600.

¹¹² *Id.* at 2601.

¹¹³ *Id.*

¹¹⁴ *Id.* Marital benefits in the United States include:

[T]axation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making

that excluding same-sex couples from the opportunity to receive any of these benefits “demeans gays and lesbians [and] lock[s] them out of a central institution of the Nation’s society.”¹¹⁵ With these benefits in mind, the Court declared that the continued prohibition of same-sex marriage was inconsistent with the tenants of the Constitution: “Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”¹¹⁶

Additionally, the Court also reasoned that denying same-sex couples their fundamental right to marry violated the Equal Protection Clause of the Fourteenth Amendment.¹¹⁷ Quite simply, the Court opined that marriage laws that deny same-sex couples the ability to marry, while affording opposite-sex couples that ability, are unequal and, thus, unconstitutional.¹¹⁸ Therefore, the Court held that the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment prohibited any law that deprived same-sex couples of their inherent right to marry.¹¹⁹

C. Adoption v. Marriage—Why the need to get Hitched?

Since adult adoption affords same-sex couples vast legal benefits,¹²⁰ one may ask why couples would trouble themselves with the hassle of the adoption revocation process to simply marry.¹²¹ While there is considerable overlap between the benefits offered by adoption and marriage,¹²² the motivations to revoke an adult adoption and subsequently marry include significant economic and legal benefits unique to marriage. And, perhaps, the most important motivation to marry is psychological

authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.

Id.

¹¹⁵ *Id.* at 2602.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2604.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2604–05.

¹²⁰ See Snodgrass, *supra* note 14, at 75–76 (noting that same-sex couples also had the option to use wills, insurance policies, partnership agreements, and durable powers of attorney to establish some legally recognized rights, but “adoption [was] the only solution that [created] a bona fide family relationship”).

¹²¹ In many states, adoption is irrevocable. See *e.g.*, 17 WEST’S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

¹²² Buchanan, No. 2015 DRB 4111, 2016 WL 2755848, at *1 (D.C. Super. Ct. Mar. 18, 2016) (implying that comparable hospital visitation rights and inheritance rights are bestowed by both adoption and marriage).

and stems from securing the status of a married individual—a status that has eluded same-sex couples for decades.¹²³

As *Obergefell* noted, there are numerous economic benefits to marriage¹²⁴ (many of which differ or are more advantageous than adoption benefits). In fact, laws benefiting married individuals “permeate nearly every field of social regulation in this country—taxation . . . social welfare, inheritance, adoption, and on and on.”¹²⁵ Of the hundreds of federal financial marital benefits, the social security system is arguably the most valuable because it provides spousal benefits for retirement, disability, and survivorship.¹²⁶ For example, most married couples, and even some divorced couples, “have the option to claim either their own Social Security benefits or spousal benefits under their spouse’s earnings.”¹²⁷ This benefit can result in sizable monetary benefits if one spouse earned significantly less than the other or did not pay into Social Security for a prolonged period.¹²⁸ These options are simply not available to adult adoptees since the Social Security Administration places significant restrictions on an adoptee’s ability to collect benefits.¹²⁹

Moreover, federal and state tax and inheritance laws often provide significant benefits to married individuals. Marriage, unlike adoption, allows individuals to file joint tax returns and escape gift and estate taxes.¹³⁰ In fact, the new federal tax law may privilege married individuals more than ever before.¹³¹ For instance, in the 2017 tax year, married couples faced a possible tax penalty for filing jointly if their individual incomes were at or

¹²³ See KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW xiii (2006) (noting that during the 1970s same-sex couples throughout the nation unsuccessfully sought marriage rights).

¹²⁴ *Obergefell*, 135 S. Ct. at 2601.

¹²⁵ David L. Chambers, *What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 447 (1996).

¹²⁶ See Beth Braverman, *The Financial Benefits of Marriage*, CONSUMER REP. (last updated Feb. 8, 2018), <https://www.consumerreports.org/marriage/financial-benefits-of-marriage/> [<http://perma.cc/B6NZ-B936>]; M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081, 1092 (2010).

¹²⁷ Braverman, *supra* note 126; *Benefits for your spouse*, SOC. SECURITY ADMIN., <https://www.ssa.gov/planners/retire/applying6.html> [<http://perma.cc/NV4G-FXB7>].

¹²⁸ *Benefits for your spouse*, *supra* note 127.

¹²⁹ *Can children and students get Social Security benefits?*, SOC. SECURITY ADMIN. (last updated July 2, 2018), <https://faq.ssa.gov/en-US/Topic/article/KA-02053> [<http://perma.cc/H26K-L4PS>] (noting that adopted children may receive their parents social security benefits only if they are unmarried and are either minors or adults with a disability that begin before they were twenty-two years old).

¹³⁰ HULL, *supra* note 123, at 119.

¹³¹ *Cf.* Braverman, *supra* note 126 (discussing that, while the new tax law benefits married individuals, it severely limits married individuals’ ability to take sizable itemized deductions, capping them at \$10,000).

exceeded \$80,000.¹³² But that penalty will largely disappear in the 2018 tax year.¹³³ Under the new tax law, “only households with a combined income of \$600,000 or more will pay a tax penalty for getting hitched.”¹³⁴ Clearly, adult adoption does not provide a comparable benefit.¹³⁵ Furthermore, while both adult adoption and marriage provide some level of inheritance rights, marriage provides more secure inheritance rights. Case in point, if the adopter in a same-sex adult adoption marries another person, then the adoptee would not automatically inherit from the intestate adopter. In that situation, marriage trumps adoption. Marriage would allow the surviving spouse to collect the entirety of adopter’s estate, leaving the adoptee with nothing.¹³⁶ Further, an adoptee child’s inheritance rights can generally be terminated by excluding them from a will, whereas, in some states a spouse is *guaranteed* a share of their partner’s estate.¹³⁷

Intrinsically tied to its financial benefits, marriage, unlike adoption, provides a formal legal exit strategy—divorce.¹³⁸ State and federal laws provide married individuals seeking marriage dissolution with rules and guidelines concerning property distribution, alimony, and child support.¹³⁹ These guidelines are a far cry from the overwhelming grey-area that surrounds adult adoption revocation. In fact, unlike the clear legal procedure available to dissolve a marriage, there is no universal mechanism to annul an adult adoption.¹⁴⁰ Thus, when a relationship ends, married individuals have defined legal procedures to follow, whereas, adopted same-sex couples only have uncertainty. In short, instead of grappling with the finality of adoption and the immense time and money associated with seeking adoption revocation,

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ In fact, with the elimination of the personal exemption from federal income tax, there is arguably less of a financial incentive to adopt, as the adopter can no longer take the adoptee’s personal exemption. I make this point fully knowing that most adult adoptees would not be considered a dependent; thus historically, the adopter would likely not be able to take a personal exemption for the adult adoptee. However, arguably, some same-sex adult adoptees have been claimed as a dependent by the adopter for federal income tax purposes.

¹³⁶ This situation presumes that the adopter died intestate.

¹³⁷ See HULL, *supra* note 123, at 119. For example, Oklahoma, Louisiana, and Puerto Rico have “forced heir” statutes that prohibit spousal disinheritance. 95 C.J.S. § 80 (2018). Whereas, Vermont, Florida, Pennsylvania, and Washington have statutes that prohibit the testator from depriving the surviving spouse of a certain share of the estate, unless the surviving spouse consents or waives their right to the share. *Id.*

¹³⁸ Mileto, *supra* note 33, at 293.

¹³⁹ See EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY* 13 (2004).

¹⁴⁰ Mileto, *supra* note 33, at 303–04.

“marriage even makes separation and divorce more streamlined by allowing access to legal and financial guidelines.”¹⁴¹

While certainly not as significant as the benefits discussed above, another marital benefit is spousal evidentiary privilege.¹⁴² Both federal and state law shield married couples from testifying against each other in certain legal proceedings and deem marital communications confidential.¹⁴³ Such an evidentiary privilege simply does not extend to the parent-child relationship. This benefit, while arguably not as important or heavily utilized as tax or inheritance benefits, illustrates the importance of marriage in American society. Namely, all of these benefits, including the evidentiary privilege, were created by the government to “protect and foster [the] emotional attachments” between *only* one sect of American society—married individuals. No other relationship is given such sweeping protection and privilege under the law.

Americans’ reverence for the institution of marriage leads to the most significant motivation behind same-sex couples’ desire to annul their adoption and marry: Securing the label of “married.” Same-sex couples fought for decades to secure this label because the word itself “carries prestige [and] status” in American culture.¹⁴⁴ As *Obergefell* eloquently stated, marriage “[promises] nobility and dignity to *all* persons, without regard to their station in life.”¹⁴⁵ Thus, faced with an opportunity to marry—an opportunity that most same-sex couples never thought would come—it seems natural that individuals like Mr. Esposito and Mr. Bosee would fervently desire to revoke their adoptions and exercise their constitutional right to marry.

¹⁴¹ *Id.* at 293.

¹⁴² Other minor marital benefits include the ability to recover damages in tort for actions committed against a spouse. See HULL, *supra* note 123, at 119. Married individuals have the right to recover economic losses in wrongful death cases involving their spouse and also have the opportunity to seek loss of consortium resulting from the death or injury of their spouse. See 2 AM. LAW OF TORTS § 8.22 (2018) (defining consortium as encompassing the financial support and services rendered by spouses, including the intangible elements of “affection, society, companionship, and sexual relations”) (internal citations omitted). However, it should be noted that adoption has comparable benefits. See Snodgrass, *supra* note 14, at 82–83. Adoption allows the adopter or adoptee to recover damages in torts for actions committed against the adoptee or adopter, respectively. *Id.* Adoption also allows the adoptee to seek loss of parental consortium, however such action is not as widely recognized or accepted as loss of spousal consortium. See *Can children claim loss of consortium for a parent’s injury, or vice versa?* ROTTENSTEIN LAW GROUP LLP, <http://www.rotlaw.com/legal-library/can-children-claim-loss-of-consortium-for-a-parents-injury-or-vice-versa/> [<http://perma.cc/GZU5-2EEX>].

¹⁴³ WOLFSON, *supra* note 139, at 14.

¹⁴⁴ Mileto, *supra* note 33, at 293.

¹⁴⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (emphasis added).

With the legalization of same-sex marriage, Mr. Esposito and Mr. Bosee and other same-sex couples can legally transition from a parent-child relationship to a spousal partnership. Such a change, legally and psychologically, allows their relationship and other same-sex relationships to be celebrated with the same legitimacy as heterosexual marriages. In sum, adult adoption, while a viable option, never provided an adequate definition for the relationship between same-sex couples.¹⁴⁶ Now same-sex couples have the opportunity to take part in a legal and social institution that truly reflects their intimate union. As *Obergefell* noted, “[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”¹⁴⁷ Now the question is how to efficiently facilitate the marriage of these adopted same-sex couples.

III. THE PROBLEM: APPLYING *OBERGEFELL* TO EXISTING SAME-SEX ADULT ADOPTIONS

While the Court in *Obergefell* opened the door for approximately ten million Americans to marry,¹⁴⁸ it also created the very predicament that Mr. Esposito, Mr. Bosee, and other same-sex couples now face. By legalizing same-sex marriage, the Court eliminated the motivations behind same-sex adult adoption and also indirectly highlighted an inherent flaw of adult adoption: Irrevocability.¹⁴⁹ While the Court strived to allow *all* individuals to marry, its holding cannot be fully achieved because adult adoption cannot easily be revoked in most states. In fact, the Court in *Obergefell*, unknowingly, created a new legal hurdle for some same-sex couples.

Unlike marriage, which can be legally terminated through divorce, “divorcing” an adult adoptee is an unsettled legal matter.¹⁵⁰ Generally, adult adoptions are irrevocable, but may be revoked under “narrow circumstances, or [if] the statute provides for it.”¹⁵¹ Thus, given adoption’s general irrevocability, adopted same-sex couples face an utter lack of legal mechanisms or procedures when attempting to revoke their adoptions. In fact, many states lack any statutory reference to adult adoption

¹⁴⁶ Zimmer, *supra* note 70, at 691.

¹⁴⁷ *Obergefell*, 135 S. Ct. at 2608.

¹⁴⁸ Gary Gates, *In U.S. More Adults Identifying as LGBT*, GALLUP (Jan 11, 2017), <http://news.gallup.com/poll/201731/lgbt-identification-rises.aspx> [<http://perma.cc/5856-S3BW>] (finding that 4.1% of the American population, roughly 10 million people, identifies as LGBT [Lesbian, Gay, Bisexual, and Transgender]).

¹⁴⁹ See Richard C. Ausness, *Planned Parenthood: Adult Adoption and the Right of Adoptees to Inherit*, 41 ACTEC L.J. 241, 246 (2016).

¹⁵⁰ Mileto, *supra* note 33, at 301.

¹⁵¹ Fowler, *supra* note 16, at 706.

revocation.¹⁵² The remainder of this Part discusses multiple cases where same-sex couples that adopted each other pre-*Obergefell* confront the utterly inefficient adult adoption revocation process.

A. The District of Columbia: *Buchanan*¹⁵³

In 2002, Donald Ray Buchanan and Thomas Ainora entered into an adult adoption to secure legal protections and rights since they were unable to marry.¹⁵⁴ However, with the legalization of same-sex marriage in 2015, the couple, who had been together for over thirty years, filed a petition to terminate their adoption so they could marry.¹⁵⁵

On February 19, 2016, the Superior Court of the District of Columbia granted Mr. Buchanan and Mr. Ainora's Consent Petition for Termination of Parental Rights.¹⁵⁶ While not expressly granted or prohibited by statute, the court found it had the equitable authority to terminate Mr. Ainora's parental rights to Mr. Buchanan.¹⁵⁷ In utilizing its equitable authority, the court was mindful that this situation was atypical: "Mr. Buchanan [was] not a 'child' who must be placed with a family, but rather [was] a sixty-seven year old" who fully consented to both entering into and, subsequently, terminating the parent-child relationship.¹⁵⁸ Furthermore, the court reasoned that terminating the adoption was in the best interest of the adoptee, Mr. Buchanan, because:

Mr. Buchanan's physical, mental, and emotional health will only be enriched upon termination, as he will finally be able to marry his partner of over three decades and receive the societal and personal recognition and protection associated with such. . . . Mr. Buchanan's relationship with Mr. Ainora will only be strengthened if they are allowed to marry, and the romantic and loving nature of their relationship will finally be accurately reflected in their legal statuses.¹⁵⁹

The court also opined that terminating the adoption was not only in the best interest of Mr. Buchanan, but was also in the best interest of Mr. Ainora, as it would allow both individuals to enjoy the "plethora of legal, financial, and personal benefits of marriage."¹⁶⁰

At the heart of the court's decision was dignity.¹⁶¹ The court desired to bestow upon the couple the dignity and freedom to

¹⁵² See 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

¹⁵³ *Buchanan*, No. 2015 DRB 4111, 2016 WL 2755848 (D.C. Super. Ct. Mar. 18, 2016).

¹⁵⁴ *Id.* at *1.

¹⁵⁵ *Id.* at *1–2.

¹⁵⁶ *Id.* at *9.

¹⁵⁷ *Id.* at *3.

¹⁵⁸ *Id.* at *4.

¹⁵⁹ *Id.* at *6.

¹⁶⁰ *Id.*

¹⁶¹ See *id.* at *7.

marry after three decades together.¹⁶² Recognizing that the law now allows for same-sex marriage, the court found it illogical to keep this couple in a legal paradigm that inaccurately reflected their relationship when a more appropriate legal relationship was available.¹⁶³

B. Delaware: *In re the Adoption of C.A.H.W.*¹⁶⁴

Strikingly similar to the facts of *Buchanan*,¹⁶⁵ H.M.A. adopted her partner, C.A.H.W, to secure significant financial benefits and legally formalize their romantic relationship.¹⁶⁶ The adoption was granted by the Family Court of Delaware on July 17, 1995.¹⁶⁷ By 2013, the parties had been together for thirty-three years.¹⁶⁸

On October 16, 2012, H.M.A. motioned to vacate the couple's adoption in order to enter into a civil union.¹⁶⁹ H.M.A. and C.A.H.W. both consented to the adoption annulment.¹⁷⁰ They contended that a civil union would be "a more appropriate way to recognize the strong emotional bond between the parties."¹⁷¹ Such a legal option, however, was not available to the couple at the time of their 1995 adoption.¹⁷² Thus, H.M.A. sought to annul the adoption under Family Court Civil Rule 60(b)(5), arguing that the adoption was no longer equitable, and under Family Court Civil Rule 60(b)(6), arguing that it was in the interest of justice to annul the adoption.¹⁷³

In determining that the adoption was no longer equitable *and* that an adoption annulment was in the interest of justice, the court focused on the scarce legal options available to the couple in 1995.¹⁷⁴ "At that time in Delaware, adult adoption was essentially the parties' only available legal option to formalize their close relationship and their financial rights and responsibilities toward

¹⁶² *Id.*

¹⁶³ *Id.* ("Fortunately, the law no longer prevents Mr. Buchanan and Mr. Ainora from legally marrying and they, and other same sex couples, no longer have to resort to actions such as an adoption to gain a few basic legal rights accorded to married couples.").

¹⁶⁴ *In re the Adoption of C.A.H.W.*, No. 95-05-03-A, 2013 WL 1748618 (Fam. Ct. Del. Mar. 28, 2013).

¹⁶⁵ See *supra* notes 154–155 and accompanying text.

¹⁶⁶ *Adoption of C.A.H.W.*, at *1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* ("On March 22, 2011, the Delaware legislature passed a bill allowing same-sex couples to enter into civil unions with all the rights and responsibilities of marriage under Delaware law.").

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *2.

one another.”¹⁷⁵ Yet, now, the law has changed and provides more appropriate legal avenues for same-sex couples through the civil union statute.¹⁷⁶ But, as the court recognized, by virtue of their adoption, H.M.A. and C.A.H.W. might be ineligible to enter into a civil union since they were legally parent and child.¹⁷⁷ Thus, since the law in Delaware now allowed same-sex couples to enter civil unions and reap the same benefits as married couples, the court found that it was in the interest of justice to vacate the adoption and allow H.M.A. and C.A.H.W. the opportunity to seek a civil union.¹⁷⁸

C. Pennsylvania: *In re Adoption of R.A.B., Jr.*¹⁷⁹

Mirroring the facts of both *Buchanan* and *In re the Adoption of C.A.H.W., N.M.E.* (Mr. Nino Esposito) adopted his same-sex partner R.A.B., Jr. (Mr. Drew Bosee) on April 20, 2012.¹⁸⁰ The adoption stemmed from the couple’s desire to become a cognizable family unit and secure inheritance and financial benefits.¹⁸¹ By 2015, the couple had been together for over forty years.¹⁸²

With the legalization of same-sex marriage in Pennsylvania in 2014 and nationwide in 2015, the couple fervently desired to marry.¹⁸³ However, given their existing parent-child relationship, marriage was prohibited.¹⁸⁴ Thus, on March 23, 2015, the couple filed a petition with the Orphan’s Court to annul their adoption.¹⁸⁵ The petition included an affidavit of Mr. Bosee’s consent to the adoption annulment.¹⁸⁶ Yet, even with both parties consent to the adoption revocation, the petition was denied.¹⁸⁷ The lower court reasoned that state law barred the adoption revocation.¹⁸⁸ On appeal, Mr. Esposito focused on two issues: (1) whether the denial of their adoption revocation petition violated the Fourteenth Amendment of the

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Under Delaware law, “[a] civil union is prohibited and void between a person and his or her ancestor, descendant, brother, sister, half-brother, half-sister, uncle, aunt, niece, nephew[,] or first cousin.” *Id.* Thus, H.M.A. and C.A.H.W., legally considered ancestors and descendants, were not eligible to enter into a civil union. *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *In re Adoption of R.A.B.*, 153 A.3d 332, 333 (Pa. Super Ct. 2016).

¹⁸⁰ *See id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 333, 335.

¹⁸⁴ *Id.* at 333.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (“There is no specific statute in Pennsylvania relating to the revocation of decrees of adoption nor does our present adoption statute contain any provisions therefor.”) (internal citation omitted); *see also* Schapiro, *supra* note *, 17 WEST’S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017) (stating that adoption revocation in Pennsylvania has historically only been permitted in rare circumstances).

United States Constitution, and (2) whether the Orphan’s Court abused its discretion by failing to consider the best interest of the adoptee, Mr. Bosee.¹⁸⁹

The Superior Court reversed and remanded.¹⁹⁰ In coming to its determination, the Superior Court recognized that at the time “adult adoption was [the couple’s] only option to become a family, as they were prohibited from marrying by an unconstitutional statute.”¹⁹¹ However, times have changed.¹⁹² The court referenced *Whitewood*,¹⁹³ which legalized same-sex marriage in Pennsylvania, and *Obergefell*,¹⁹⁴ which not only legalized same-sex marriage on a national level but also held that state laws are “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”¹⁹⁵ In light of this precedent, the court reasoned that denying the adoption annulment “frustrated the couple’s ability to marry,” which was in directly conflicted with *Whitewood’s* and *Obergefell’s* holdings.¹⁹⁶ Thus, the court expressly gave the Orphan’s Court the authority to annul same-sex adult adoptions, allowing same-sex partners to exercise their constitutional right to marry.¹⁹⁷

D. The Problem: Sifting through a Sea of Court-Issued Adoption Revocations

Since all of the aforementioned cases eventually permitted the annulment of same-sex adult adoptions, it may be argued that no true problem exists. Same-sex couples, often in their mid-sixties, should wait for a court’s case-by-case determination. While this is a possible option, the issue comes down to efficiency. The courts that have revoked same-sex adult adoptions did not provide guidelines for courts or couples to effectively address same-sex adult adoption revocation and merely stated that courts have the *authority* to revoke these adoptions. Thus, without clear statutory guidelines, these couples have waited and will continue to wait in this legal limbo-land for far too long.¹⁹⁸

¹⁸⁹ *Adoption of R.A.B.*, 153 A.3d at 333.

¹⁹⁰ *Id.* at 336.

¹⁹¹ *Id.* at 334.

¹⁹² *Id.* at 335.

¹⁹³ *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014).

¹⁹⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁹⁵ *Id.* at 2605.

¹⁹⁶ *Adoption of R.A.B.*, 153 A.3d at 336.

¹⁹⁷ *Id.*

¹⁹⁸ See Buchanan, No. 2015 DRB 4111, 2016 WL 2755848 (D.C. Super. Ct. Mar. 18, 2016) (taking over a year to terminate parental rights); *In re the Adoption of C.A.H.W.*, No. 95-05-03-A, 2013 WL 1748618 (Fam. Ct. Del. Mar. 28, 2013) (requiring over a year to annul the adoption and enter a civil union); *Adoption of R.A.B.*, 153 A.3d at 332 (failing to secure adoption revocation after multiple years).

However, all of the aforementioned cases touch on a vital component of the solution: Consent. In each of the aforementioned cases, both parties—the adopter and the adoptee—consented to the adoption annulment. This commonality is significant because it harkens back to the purpose of adoption—protecting the adoptee.¹⁹⁹ Thus, a comprehensive solution must both streamline the adoption revocation process and ensure that consent is duly given, especially by the adoptee.

IV. THE SOLUTION: AMENDING CURRENT ADULT ADOPTION CODES

Not recognized at common law, adoption, including adult adoption, is the product of state-specific statutory provisions.²⁰⁰ Although created by statute, a great number of states have no statutory provisions addressing adult adoption revocations.²⁰¹ Since adoption was created by statute, any solution to the legal limbo-land trapping Mr. Esposito, Mr. Bosee, and other same-sex couples must be statutory in nature. Thus, states are urged to amend their adoption codes by enacting statutory language that requires the consent of both parties and allows for the swift annulment of same-sex adult adoptions.

This Part compares current state adoption codes, breaking states into three distinct groups based on their respective statutory language. Further, it advocates for all states to model California's Family Code when creating a statutory adult adoption revocation process. Moreover, this Part also discusses how California's statutory language can be improved to allow for the swift annulment of same-sex adult adoptions.

A. States and Same-Sex Couples need Statutory Guidance to Efficiently Annul Adoptions

States need to provide comprehensive statutory requirements to streamline same-sex adult adoption revocation. Currently, both same-sex couples and lower courts have no statutory guidance to effectuate adult adoption revocation.²⁰² Same-sex couples, like Mr. Esposito and Mr. Bosee, have no clear guidance when seeking an adoption revocation because the majority of states lack a statutory revocation process. These couples can only file a petition, sign an affidavit, and say a prayer.

¹⁹⁹ McCabe, *supra* note 13, at 304.

²⁰⁰ *Id.* at 302.

²⁰¹ See 17 WEST'S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017); *but see* CAL. FAM. CODE § 9340 (1993).

²⁰² The one exception to this is California's Family Code, which provides fairly comprehensive revocation requirements. See CAL. FAM. CODE § 9340 (1993).

1. Outline of Current Statutory Language

Currently, most states' adoption codes do not address adoption revocation, but instead only highlight the absolute permanency of adult adoption. Some states even uphold the finality of adult adoption despite the presence of fraud.²⁰³ In fact, only twenty states have statutory language addressing adult adoption revocation.²⁰⁴ Of these states, most only provide a limited timeframe, such as six months or a year, to seek adult adoption revocation²⁰⁵ and only *one* state fully addresses adult adoption revocation by providing statutory guidelines for the revocation process.²⁰⁶ This section analyzes the current statutory language concerning adult adoption revocation starting with the states discussed in Part III. It then analyzes the remaining states' statutory language, breaking the states into three distinct groups.

a. Analysis of the District of Columbia's, Delaware's, and Pennsylvania's Respective Adoption Codes

The states²⁰⁷ discussed in Part III, the District of Columbia, Delaware, and Pennsylvania, all lack comprehensive statutory guidelines for adult adoption revocation. In fact, of the three, the District of Columbia is the only one to provide any statutory revocation period. Each of the three states' adoption codes are discussed in turn.

The District of Columbia's code states, "An attempt to invalidate a final decree of adoption by reason of a jurisdictional or procedural defect may not be received by any court of the District, unless regularly filed with the court within one year following the date the final decree became effective."²⁰⁸ By providing such limited grounds for revocation (only jurisdictional or procedural defect) within such a small timeframe (only one year), the District of Columbia's Code indirectly highlights the irrevocability of adoption. Beyond the narrow situation set forth in the statute, the adopter and the adoptee's legal relationship is set in stone.

Delaware's statutory language, which expressly allows for adult adoption, directly illustrates the permanency of

²⁰³ ARK. CODE ANN. § 9-9-216 (2018).

²⁰⁴ *See, e.g.*, CAL. FAM. CODE § 9340 (1993); ARK. CODE ANN. § 9-9-216 (2018); IND. CODE § 31-19-14-2; D.C. CODE § 16-309 (2010).

²⁰⁵ *See, e.g.*, N.H. REV. STAT. § 170-B:21 (2018).

²⁰⁶ *See* CAL. FAM. CODE § 9340 (1993).

²⁰⁷ As previously noted, for the purposes of this Article, unless otherwise indicated, "states" includes all fifty states and the District of Columbia.

²⁰⁸ D.C. CODE § 16-309 (2010).

adoption—perhaps even more forcefully than the District of Columbia. Delaware’s Code declares:

Upon the issuance of the decree of adoption and *forever* thereafter, all the duties, rights, privileges and obligations recognized by law between parent and child shall exist between the petitioner or petitioners and the person or persons adopted, as fully and to all intents and purposes as if such person or persons were the lawful and natural offspring or issue of the petitioner or petitioners.²⁰⁹

Thus, Delaware’s statutory language spells out the conundrum that same-sex couples seeking adoption revocation face—in the eyes of the law they are *forever* legally recognized as parent and child.

Lastly, as evidenced in *In re Adoption of R.A.B.*,²¹⁰ Pennsylvania does not contain any statutory language addressing adult adoption revocation or even discussing the finality of adult adoption. Pennsylvania’s statutory language merely states: “Any individual may be adopted, regardless of his age or residence.”²¹¹ However, case law precedent implies that Pennsylvania, like the District of Columbia and Delaware, also views adult adoptions as irrevocable.²¹² Pennsylvania only grants adoption revocation in rare circumstances, such as when there is clear and convincing evidence of fraud.²¹³

Thus, there is no statutory framework to revoke an adult adoption under the laws of any of these three states. Of the three, the District of Columbia at least provides a one-year grace period when it comes to procedural and jurisdictional claims, whereas, Pennsylvania does not even contain a statutory provision about the permanency or revocability of adult adoption.²¹⁴ Such a complete lack of statutory guidance creates problems for same-sex couples seeking adoption revocation *and* challenges for courts attempting to justify adoption revocations.

b. Analysis of the Remaining States’ Adoption Codes

After analyzing the adult adoption statutes of all the states,²¹⁵ three groups emerge: (1) states that outline the extreme finality of adult adoption and fail to mention adult adoption revocation, (2) states that provide a very narrow revocation window,

²⁰⁹ 13 DEL. CODE § 954 (1953) (emphasis added).

²¹⁰ 153 A.3d 332, 333 (Pa. Super Ct. 2016).

²¹¹ PA. STAT. § 2311 (1981).

²¹² See 17 WEST’S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

²¹³ *Id.*

²¹⁴ Delaware may also include a six-month window for adoption revocation. See 13 DEL. CODE § 918 (2001). However, it is not clear if this window extends to the adoption of adults or just the adoption of children. *Id.*

²¹⁵ (Or lack thereof.)

and (3) states that provide a comprehensive statutory adult adoption revocation process.

States in group one stress the irrevocable nature of adult adoption.²¹⁶ For example, Delaware's adoption code states that adoption establishes an *eternal* parent-child relationship.²¹⁷ Similarly, Alaska's adoption code declares that adoption terminates "all legal relationships between the adopted person and the natural parents and other relatives of the adopted person, so that the adopted person *thereafter is a stranger to the former relatives for all purposes . . .*"²¹⁸ Florida's adoption code parallels Alaska's code and also labels the adoptee a "stranger" to his or her natural relatives.²¹⁹ Further, Arizona's statutory language states that upon the entry of the adoption decree, the adoptee's relationship with his or her natural parents "is *completely severed* and all legal rights, privileges, duties, and obligations and other legal consequences of the relationship cease to exist . . ." ²²⁰ Such language emphasizes the absolute finality of adoption. In fact, all of the states in group one exclude any statutory window for adult adoption revocation, therefore leaving adopted same-sex couples eternally cemented in their parent-child relationship.

States in group two include those that provide a narrow timeframe for adult adoption revocation.²²¹ For example, the District of Columbia's Code, discussed above, only provides a one-year period to challenge an adoption decree.²²² And such a challenge must be based on a procedural or jurisdictional defect.²²³ Further, Arkansas' adoption code provides a limited

²¹⁶ The states in group one include: Alaska, Arizona, Delaware, Florida, Hawaii, Illinois, Kansas, and Mississippi, Montana, New York, Tennessee, and Texas. *See, e.g.*, ALASKA STAT. § 25.23.130 (1974); ARIZ. REV. STAT. § 8-117 (1970); 13 DEL. CODE § 945 (1953); FLA. STAT. ANN. § 63.172 (West 2002); MISS. CODE ANN. § 93-17-17 (1955); MON. CODE ANN. § 42-1-109 (2017); N.Y. CODE ANN. § 117 (2002); TENN. CODE ANN. § 36-1-122 (2014); VERNON'S TEX. STAT. & CODES ANN. FAM. CODE § 162.507 (Sept. 1, 2005). Note, Alabama, Idaho, Ohio, South Carolina, Utah, Wyoming, and Virginia were not included in this Article because the aforementioned states either do not allow for adult adoption (Idaho, Wyoming, and South Carolina) or have such specific adult adoption criteria that same-sex adult adoption is essentially prohibited (Alabama, Ohio, Utah, and Virginia). *See* CHILD WELFARE INFORMATION GATEWAY, *supra* note 34.

²¹⁷ 13 DEL. CODE § 945 (1953).

²¹⁸ ALASKA STAT. § 25.23.130 (1974) (emphasis added).

²¹⁹ FLA. STAT. ANN. § 63.172 (West 2002).

²²⁰ ARIZ. REV. STAT. § 8-117 (1970) (emphasis added).

²²¹ The states in group two are Arkansas, Colorado, the District of Columbia, Georgia, Indiana, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont, Washington, and West Virginia. *See, e.g.*, D.C. CODE § 16-309 (2010); ARK. CODE ANN. § 9-9-216 (1977); N.H. REV. STAT. § 170-B:21 (2018); N.D. CENT. CODE ANN. § 14-15-15 (2003); 52 MINN. STAT. ANN. § 47.02 (2007).

²²² D.C. CODE § 16-309 (2010).

²²³ *Id.*

timeframe for adult adoption revocation and also highlights the utter finality of adoption. It states that “upon the expiration of one (1) year after an adoption decree is issued, the decree cannot be questioned by any person including the petitioner [the individual that sought the adoption], in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter”²²⁴ Arkansas’ statutory language spells out the serious problem facing some same-sex couples—that even in the presence of fraud or a complete lack of notice, the legal relationship of parent-child remains. Similarly, Oklahoma’s adoption code states that “[n]o adoption may be challenged on any ground either by a direct or collateral attack more than three (3) months after the entry of the final adoption decree regardless of whether the decree is void or voidable”²²⁵ Thus, similar to Arkansas’ statutory language, Oklahoma’s statutory language allows the parent-child relationship to remain *even if* the decree is void.²²⁶ Other states, like Colorado²²⁷ and Minnesota,²²⁸ also provide a limited timeframe to challenge and revoke adult adoptions.

Still included in group two are states that provide a unique, yet limited, window for adult adoption revocation. For example, North Carolina provides a very specific window for adult adoption revocation. Its statutory language states that “[a] parent or guardian whose consent or relinquishment was obtained by fraud or duress may, within six months of the time the fraud or duress is or ought reasonably to have been discovered, move to have the decree of adoption set aside and the consent declared void.”²²⁹ Similarly, Indiana’s adoption only allows a natural parent to challenge an adoption decree within six months after entry of the adoption decree or within one year after the adoptive parent’s obtain custody.²³⁰

²²⁴ ARK. CODE ANN. § 9-9-216 (1977); *see also* N.H. REV. STAT. § 170-B:21 (2018) (containing the exact same statutory language as Arkansas); N.D. CENT. CODE ANN. § 14-15-15 (2003) (containing the exact same statutory language as Arkansas).

²²⁵ OKLA. STAT. ANN. § 7505-7.2 (1998).

²²⁶ *Id.*

²²⁷ COLO. REV. STAT. ANN. § 19-5-214 (2012) (allowing for procedural or jurisdictional attacks within ninety-one days after entry of the adoption decree and allowing adoption revocation *at anytime* if there is clear and convincing evidence that such revocation is in the best interest of the adoptee).

²²⁸ 52 MINN. STAT. ANN. § 47.02 (2007) (allowing an adoption to be revoked within ninety days after entry of the adoption decree upon a showing of “(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; or (5) any other reason justifying relief from the operation of the order”).

²²⁹ N.C. GEN. STAT. ANN. § 48-2-607 (2000).

²³⁰ IND. CODE § 31-19-14-2 (1997).

Unlike most of the other states in group two, North Carolina and Indiana not only limit the revocation timeframe but also limit the individual allowed to revoke the adoption.

Maine, another state in group two, provides a much broader scope for revocation. Maine's adoption code allows a judge "on petition of [two] or more persons and after notice and hearing, [to] reverse and annul a decree of the Probate Court" if the judge finds the adoption was "obtained as a result of fraud, duress or illegal procedures," or if there is good cause to reverse the adoption.²³¹ Maine's broad statutory language provides for fairly expansive adult adoption revocation. In fact, theoretically, courts in Maine would be able to annul same-sex adult adoptions because there is "good cause" (i.e., constitutional grounds) to revoke the adoptions and allow these couples to marry.²³² However, Maine's statutory language still has a significant flaw—it fails to outline a clear revocation *process*.

Conversely, California, the only state in group three, provides a clear statutory framework for the adult adoption revocation process. California's Family Code even includes a section dedicated to adult adoption revocation.²³³ California's statutory guidelines highlight the significant flaw in all other statutory provisions—the utter lack of a comprehensive procedure to revoke adult adoptions.²³⁴ Unlike other states where adult adoption revocation may not be possible even in the presence of fraud, California provides clear procedures to efficiently revoke same-sex adult adoption.²³⁵

2. California's Adoption Provisions—Providing a Clear and Comprehensive Adult Adoption Revocation Process

California's Family Code states:

- (a) Any person who has been adopted under this part [i.e., the adult adoptee] may, upon written notice to the adoptive parent, file a petition to terminate the relationship of parent and child. The petition shall state the name and address of the petitioner, the name and

²³¹ ME. REV. STAT. ANN. § 9-315 (1997).

²³² *Id.*

²³³ *See generally* CAL. FAM. CODE § 9340 (1993). Within California's Family Code, Division 13 "Adoption" includes Part 3 "Adoption of Adults and married Minors" which includes Chapter 3 "Procedure for Terminating Adult Adoption." *See id.*

²³⁴ California not only allows for the revocation of adult adoption but details what an adoptee must include in his or her petition to terminate (i.e., the name and address of the petitioner, the name and address of the adoptive parent, the date and place of the adoption, and the circumstances upon which the petition is based). *Id.* Further, if the adopter consents to the termination then the court may immediately terminate the parent-child relationship. *Id.*

²³⁵ As outlined below, California even includes a procedure if the adopter does not consent to the adoption revocation. *See id.*

address of the adoptive parent, the date and place of the adoption, and the circumstances upon which the petition is based.

(b) If the adoptive parent consents in writing to the termination, an order terminating the relationship of parent and child may be issued by the court without further notice.

(c) If the adoptive parent does not consent in writing to the termination, a written response shall be filed within 30 days of the date of mailing of the notice, and the matter shall be set for hearing. The court may require an investigation by the county probation officer or the department.²³⁶

Instead of limiting adult adoption revocation to a narrow and specific timeframe,²³⁷ California allows for expansive revocation and efficiently allows adult adoptees to terminate the legal parent-child relationship. The beauty and efficiency of California's process is evident in subsections (a) and (b). Subsection (a) removes any mystery concerning the requirements for adult adoption revocation because it simply lists what is needed. Furthermore, subsection (b) highlights the efficiency of the procedure—namely, once both parties consent to the revocation the court may terminate the adoption “without further notice.”²³⁸ Upon applying such statutory language to Mr. Esposito and Mr. Bosee's situation, the couple's adoption would likely have been terminated years earlier.²³⁹ Moreover, California's statutory language even provides guidelines when the adoptive parent refuses to consent.²⁴⁰

Not only does subsection (b) facilitate efficient revocation, its emphasis on consent provides a vital aspect of the adoption revocation process. Specifically, requiring the consent of *both* parties assuages concerns about the adoptee's vulnerability.²⁴¹ Instead of allowing the adopter to leave the adoptee high and dry

²³⁶ *Id.*

²³⁷ *See, e.g.*, 52 MINN. STAT. ANN. § 47.02 (2007) (allowing revocation within ninety days); ARK. CODE ANN. § 9-9-216 (2018) (providing a one-year revocation period).

²³⁸ CAL. FAM. CODE § 9340(b) (1993).

²³⁹ However, note that the adopter, Mr. Esposito, instead of the adoptee, initiated the termination proceedings, and the adoptee, Mr. Bosee, instead of the adopter, submitted an affidavit consenting to the revocation. *In re Adoption of R.A.B.*, 153 A.3d 332, 333 (Pa. Super Ct. 2016).

²⁴⁰ *See* CAL. FAM. CODE § 9340(c) (1993). Arguably, the situation described in subsection (c) will likely not arise in the context of same-sex adult adoption since both partners likely desire, and will consent to, the revocation. For confirmation, see generally the couples in *In re the Adoption of C.A.H.W.*, No. 95-05-03-A, 2013 WL 1748618 (Fam. Ct. Del. Mar. 28, 2013), *Adoption of R.A.B.*, 153 A.3d at 333, and *Buchanan*, No. 2015 DRB 4111, 2016 WL 2755848 (D.C. Super. Ct. Mar. 18, 2016). In each case, *both* partners desired to revoke the adoption to either marry or enter a civil union. *Adoption of C.A.H.W.*, 2013 WL 1748618; *Adoption of R.A.B.*, 153 A.3d at 333; *Buchanan*, 2016 WL 2755848.

²⁴¹ Historically, adoption's general irrevocability stems from a desire to protect the adoptee, often considered the fragile or vulnerable party. Here, consent provides adequate protection to the adoptee.

by unilaterally terminating the adoption,²⁴² subsection (b) ensures that both parties agree to the revocation. Furthermore, requiring the *adoptee* to instigate the termination process also guarantees that the adoptee is protected since he or she has to individually begin the termination process.

While California's statutory language is leaps and bounds beyond its sister states, improvements can be implemented to increase efficiency. First, an affidavit of the adopter's consent should be listed as an optional item to include in the initial petition. Including an affidavit of the adopter's consent in the petition will streamline the revocation process because all required documents, including the adopter's consent, will be submitted at one time. Furthermore, using the term "affidavit" provides a concrete example of acceptable written consent. Thus, same-sex couples seeking revocation will know at the onset exactly what is needed for revocation. Second, the statutory language should be modified to allow both the adoptee and the adopter to instigate the revocation proceedings if the adoptee is not mentally disabled.²⁴³ Allowing both parties to begin the revocation process increases efficiency. For example, let's look at Mr. Esposito and Mr. Bosee's situation. In that case, Mr. Esposito, the *adopter*, filed the petition to annul the adoption.²⁴⁴ He initiated (or attempted to initiate) the revocation process. However, even though Mr. Esposito's petition included an affidavit of Mr. Bosee's consent, the petition would have violated California's statutory language.²⁴⁵ Mr. Esposito and Mr. Bosee would have to begin the process again because the adopter, not the adoptee, initiated the proceedings. Such a redo would cost the couple precious time and money. Thus, instead of forcing an adopted same-sex couple to begin the process again, merely because the wrong partner commenced the process, both parties should be able to begin the revocation process.

This suggested change might be challenged by some since it arguably provides less protection to the adoptee. However, in adult adoptions, consent provides adequate protection.²⁴⁶ As courts and

²⁴² Remember, that even if the adoption is revoked the adoptee can never re-join the natural parents' bloodline for inheritances purposes. See Snodgrass, *supra* note 14, at 84.

²⁴³ However, if the adoptee is a mentally disabled individual then the court should not allow the adopter to unilaterally terminate the adoption. Rather, the court should apply the "best interests of the child" test when determining if revocation is appropriate. This ensures that the mentally disabled adoptee is sufficiently protected. See, e.g., COLO. REV. STAT. ANN. § 19-5-214 (2012).

²⁴⁴ *Adoption of R.A.B.*, 153 A.3d at 334.

²⁴⁵ See CAL. FAM. CODE § 9340 (1993) (limiting the commencement of the adoption revocation process to "[a]ny person who has been adopted under this part" (i.e., the adoptee)).

²⁴⁶ Again, the adopter and the adoptee should only have the right to individually begin the process if the adoptee is not mentally disabled. See *supra* note 243 and accompanying text.

scholars have noted the need to protect an adoptee is lessened in an adult adoption because of the participants' ages.²⁴⁷ Thus, by *still* requiring that the non-instigating party consent to the revocation, both the adopter and the adoptee are sufficiently protected.

B. Statutory—Not Equitable—Relief Provides the Needed Comprehensive Framework

Relying on judicial equitable relief is not sufficient to address same-sex adult adoption. In fact, it only masks the root of the issue: The statutes themselves.²⁴⁸ Without amending state adoption codes, courts will have to consider each adult adoption revocation on a case-by-case basis. Such an arbitrary and individual process keeps couples, like Mr. Esposito and Mr. Bosee, in a legal relationship that does not adequately reflect their true relationship for far too long. Thus, while relying on judicial equitable power provides a solution,²⁴⁹ its fatal flaw is its inefficiency. Instead, amending state adoption codes allows states to outline clear procedures for adoption revocation. Such a comprehensive statutory structure is necessary since many courts may face an increase in these types of adoption revocation petitions.²⁵⁰

Since “[a]doption was unknown at common law and is strictly statutory,” states are urged to amend the root of the problem—their respective adoption statutes.²⁵¹ States must amend their adoption codes to streamline same-sex adult adoption revocation and allow same-sex couples to exercise their constitutional right to marry. However, any statutory amendment must ensure that the adoptee and the adopter are protected. California’s statutory language, which provides a clear revocation process and ample protection for the participants, sets forth a comprehensive model that all states should follow.²⁵² However, states should not blindly mimic California’s statutory language. States, instead, should implement statutory language that allows both the adoptee and the adopter

²⁴⁷ McCabe, *supra* note 13, at 304; Buchanan, No. 2015 DRB 4111, 2016 WL 2755848 (D.C. Super. Ct. Mar. 18, 2016) (noting “Mr. Buchanan [was] not a ‘child’ who must be placed with a family, but rather [was] a sixty-seven year old” that consented to the adoption revocation).

²⁴⁸ *But see* Mileto, *supra* note 33, at 320–22. Note, Mileto mentions that courts should look to state adoption codes, but she does not urge states to amend those codes. *See id.* at 320–21. Instead, Mileto seems to rely only on the court’s equitable powers to revoke same-sex adult adoptions as the adequate solution. *See id.* at 321–22.

²⁴⁹ In fact, every case in this Article that has dealt with the revocation of same-sex adult adoption has found that courts have the power to annul such adoptions. *See In re Adoption of C.A.H.W.* No. 95-05-03-A, 2013 WL 1748618 (Fam. Ct. Del. Mar. 28, 2013); *In re Adoption of R.A.B.* 153 A.3d 332, 333 (Pa. Super Ct. 2016); Buchanan, 2016 WL 2755848.

²⁵⁰ *See* 17 WEST’S PA. PRAC., FAMILY LAW § 32:15 (7th ed. 2017).

²⁵¹ *Id.* § 32:1.

²⁵² *See* CAL. FAM. CODE § 9340 (1993).

to commence the revocation process, while also requiring the non-instigating party's consent to the adoption revocation. Such statutory framework ensures that same-sex couples can quickly revoke their adoption while affording adequate protection. Furthermore, consent—mandated by statute—provides adequate protection to adult adoptees who do not require a heightened level of protection like child adoptees.²⁵³

V. CONCLUSION: TRULY LIVING OUT THE TENANTS OF *OBERGEFELL*

Before the monumental case, *Obergefell v. Hodges*,²⁵⁴ same-sex couples had scarce legal options to formalize their relationship. In the face of such limited legal avenues, some same-sex couples turned to adult adoption. In fact, adult adoption was the only way to create a legal family unit, allowing couples to secure vast rights and benefits.²⁵⁵ Yet, adoption was far from a perfect legal option for same-sex couples. Instead of legally recognizing their commitment, partnership, and love, same-sex couples that adopted each other were labeled “parent and child.” In fact, before the nationwide legalization of same-sex marriage in 2015, all same-sex couples' relationships were never legally recognized or celebrated to the same extent as opposite-sex couples. But all this changed with *Obergefell*. In *Obergefell* the Supreme Court passionately declared:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.²⁵⁶

By recognizing same-sex couples' constitutional right to marry, *Obergefell* indirectly rendered same-sex adult adoptions obsolete. But, the Court in *Obergefell* also highlighted the intrinsic problem of adult adoption—irrevocability. Generally, adult adoption cannot be revoked. For example, even in the presence of fraud or utter invalidity, the parent-child relationship created by adoption often

²⁵³ See McCabe, *supra* note 13, at 304 (noting that “the many concerns plaguing [child adoption] are no longer prevalent once the potential adoptee is an adult”).

²⁵⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

²⁵⁵ Snodgrass, *supra* note 14, at 75–81.

²⁵⁶ *Obergefell*, 135 S. Ct. at 2608.

cannot be undone.²⁵⁷ Further, most state adoption codes lack any reference to adult adoption revocation or only provide a severely limited revocation window. Thus, faced with such permanency, some same-sex couples that adopted each other cannot participate in “one of civilization’s oldest institutions.”²⁵⁸ They cannot reap the immense financial and psychological benefits associated with marriage. But most importantly, they cannot exercise their constitutional right to marry. They are, instead, trapped in a legal paradigm that fails to reflect the true nature of their relationship.

To truly live out the constitutional tenants of *Obergefell* and ensure that all same-sex couples can marry, including those that adopted each other pre-*Obergefell*, states must amend their adoption codes. Specifically, states must amend their adoption codes, using California’s statutory language as a guide, to allow for the efficient annulment of same-sex adult adoptions. Same-sex couples like Mr. Esposito and Mr. Bosee have waited decades for the recognition of their inherent right to marry—now is the time to ensure that *all* same-sex couples can exercise that inherent right.

²⁵⁷ See ARK. CODE ANN. § 9-9-216 (2018) (noting that after the passage of one year an adoption decree cannot be questioned for any reason, including fraud); *but see* ME. REV. STAT. ANN. § 9-315 (1997) (allowing a court to annul an adoption on the basis of fraud).

²⁵⁸ *Obergefell*, 135 S. Ct. at 2608.