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ADOPTION BY SAME-SEX COUPLES AND THE USE OF THE REPRESENTATION REINFORCEMENT THEORY TO PROTECT THE RIGHTS OF THE CHILDREN

By Nadia Stewart

ABSTRACT

This Note discusses the growing trend of adoptions by same-sex couples in the United States. Although most states do not outright prohibit adoptions by same-sex partners, it is often very difficult for both partners to adopt the same child. This Note will explore the legal and social ramifications of adoption limitations and the effects they may have on the adoptive children of same-sex couples. Additionally, this Note will explore how the situation can be remedied using the principle of representation reinforcement.

Part one of this Note gives a brief overview of the development of the representation reinforcement theory. The representation reinforcement theory corrects the injustices of a democratic political system that occur when majority rule unfairly burdens the fundamental rights of a minority. Part two of this Note assesses and addresses the types of adoptions that occur in the United States and how they are applied unevenly and unfairly so as to burden potential adoptive children of same-sex partners. Part three of this Note assesses and reviews the variances in adoption statutes and how they affect the rights and statuses of adoptive children. Part four of this Note addresses the importance of recognizing adoptive children as a class that requires judicial protection because their interests are not properly represented in the political process.

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I. INTRODUCTION

On a cold and icy Christmas Eve in 2007, the state of West Virginia asked Kathryn Kutil and Cheryl Hess to foster a brand new baby girl, TiCasey.[1] TiCasey was a beautiful baby and a dream come true for the couple; however, she was born with cocaine and opiates in her system.[2] TiCasey suffered from extreme withdrawal symptoms and was difficult to care for, but the couple fell in love with the red headed baby girl instantly and wanted to adopt her making her forever a part of their family.[3]

TiCasey, along with five other foster children, was cared for by Hess, a stop-at-home mother, and Kutil, a nursing home director.[4] The state Department of Health and Human Resources (DHHR) relied on the couple to take high-risk children into their home at any time, day or night.[5] The couple opened their hearts and home to more than eighteen foster children over the years.[6]

Only a few months prior to TiCasey's arrival in the Kutil-Hess home, Kutil adopted Renee, one of the foster children, making her the family's first permanent child and Kutil's legal daughter.[7] DHHR was aware that the couple also wanted to adopt TiCasey, therefore the agency issued a permanency plan.[8] The plan stated that TiCasey's adoption by the couple would be "appropriate."[9] Although West Virginia had approximately 4,200 children in state custody, with almost one-third of them living in group homes or institutions, adopting TiCasey proved to be a difficult feat.[10] After a routine visit, TiCasey's court-appointed attorney, confirmed that the baby was in a comforta-

1. Pamela Paul, *The Battle over a Baby*, N.Y. TIMES MAG. (July 26, 2009), http://www.nytimes.com/2009/07/26/magazine/26lesbian-t.html.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

ble and physically safe environment where she "seemed to be doing well. . . ."[11] However, the attorney petitioned for removal of the baby because she was in a homosexual household.[12] The court initially allowed TiCasey to remain with Kutil and Hess, the only parents she knew, while her adoption case was under review.[13]

Despite spending over eleven months in one of the best foster homes DHHR had, the court ordered that TiCasey be removed from the only home and family she knew and placed with another foster family, the Thompsons.[14] The court stated that "the best interest of a child is to be raised by a traditional family, mother and father."[15] Only five days after TiCasey arrived at the Thompson's home, the family informed DHHR that they were no longer interested in adopting her, so TiCasey was uprooted again and moved to yet another foster home.[16]

Three hours after TiCasey's second upheaval and removal from a foster home, the West Virginia Supreme Court granted an emergency stay and allowed the baby girl to reunite with Kutil and Hess so that she could remain in their home with her brothers and sisters.[17] Kutil and Hess have been supported by almost everyone in the community, even those who do not agree with their lifestyle.[18] On June 5, 2009, almost a year and a half after TiCasey first arrived at the couple's home, the West Virginia Supreme Court issued a unanimous opinion condemning the lower court's decision to "ignore the bond forged between TiCasey and her foster parents[.]"[19] The Court stated that adoption proceedings should begin immediately, and that Kutil or Hess should at the very least be considered, if not favored, in the adoptive parent selection process for TiCasey.[20]

II. THE SUPREME COURT'S DUTY TO PROTECT CHILDREN AVAILABLE FOR ADOPTION

It is commonly believed that children are one of the United States' most precious and valuable assets because they are critical to a successful future. The rights of most children in the United States are protected by parents, grandparents, relatives, and even the community. However, there are groups of children who do not have parents or relatives and are merely hoping for permanent homes.

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

The 115,000[21] plus children who are available for adoption in the United States need representation and consistency. Children ready for adoption far out-number qualified adoptive families. Trends do indicate an increase in the number of single-parent adoptions, but the number of children in need of a permanent home continues to grow. Although the need for adoptive families is tremendous, the process of adopting a child can prove to be quite difficult, especially for same-sex couples that would like to adopt children and create a family together.

Each of the fifty states have different approaches to the adoption of children, but almost all states base the ultimate decision on the "best interest of the child," a determination that is made by individual judges frequently without the benefit of well-defined guidelines. Many state adoption statutes will only allow adoption of a child by one same-sex partner and not the other; leaving many children with only one parent who is legally and financially obligated to care for them. When children are only allowed to be adopted by one parent and not two they are placed at a significant disadvantage legally, socially, and economically. This Note asserts that adopted children deserve the rights and benefits of having two parents when possible; the status of being recognized as a child of two parents is one that should be protected by the courts.

Due to the fact that adoptive children are a class of citizens that are not adequately represented in the democratic political process, the Supreme Court should use the theory of representation reinforcement to ensure the rights of these children are protected. It would be ideal for each state to have an adoption statute that is consistent and cohesive, but this would require significant and lengthy legislative action. Because of adoptive children's lack of power and representation in the political process, especially in the case of children who may be adopted by an unmarried same-sex couple, the children do not have adequate resources or influence to ensure their rights are being protected. Recognition of the adoptive children as children of both same-sex parents wanting to adopt them, will afford the children the rights they deserve and will benefit from. Adoptive children like TiCasey and her brothers and sisters will be afforded the legal, social, physical, and emotional benefits derived from the stability of having two legal parents. Using the theory of representation reinforcement to give adoptive children these rights will also be beneficial and cost-effective for society in general.

Although recognition of same-sex marriages would resolve many of the dual-parent adoption issues addressed in this Note, same-sex marriage is not necessary to ensure that the rights of adoptive children are protected. The focus of this Note is on the rights of the adoptive chil-

21. CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, § 310, 124 Stat. 3459.

dren not the rights of same-sex parents. The issue of same-sex marriage is a topic that is at the forefront of many social debates; it is beyond the scope of this Note and, in many respects, is irrelevant to the discussion. The public sentiment regarding extending marital rights to same-sex partners may be very different to the public's sentiments regarding the rights of children who do not have permanent homes or families.

Part I of this Note gives a brief overview of the development of the representation reinforcement theory. Part II of this Note assesses and addresses the types of adoptions that occur in the United States. Part III of this Note assesses and reviews the different types of adoption statutes in this country and how they affect the rights and statuses of adoptive children. Part IV of this Note addresses the importance of recognizing adoptive children as a class of people that require judicial protection because their interests are not properly represented in the political process.

A. *Explanation of Representation Reinforcement*

In a 1938 Commerce Clause case, *United States v. Carolene Products*, Justice Stone wrote what has been called "the most famous footnote in constitutional law," footnote number four:

> It is unnecessary to consider now whether legislation which restricts those political processes [such as voting, expression, and political association] which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities[;] [conditions], whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[22]

Many scholars have credited this footnote, along with Justice Stone, for the concept of applying a higher level of scrutiny, or review, in cases that involve legislation aimed at "discrete and insular minorities." The footnote has been used in modern times to justify judicial activism when minorities are being overrun by the majority voters in the democratic process.[23]

22. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (citations omitted).

23. Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 278 (1995).

Out of this footnote has come a theory dubbed by scholars as representation reinforcement. This theory is most notably explained by John Hart Ely in *Democracy and Distrust: A Theory of Judicial Review*.[24] Ely's rationale for judicial review is based on the concept that the court is actually promoting democracy by overturning decisions made solely by, and for, the majority who are "chocking off the channels of political change to ensure that they will stay in and the outs will stay out."[25]

Not only scholars, but the Supreme Court itself has recognized the value of the representation reinforcement theory. In *Schneider v. State of New Jersey*, the Court stated that in cases involving legislation that restricts fundamental rights, there should be a more stringent examination of the challenged legislation and how it will affect both majority and minority factions of society.[26] The Court held that stringent examination of legislation was necessary because legislative beliefs on matters of public convenience may be enough to regulate personal activities but may not be enough to justify regulation of the exercise of rights "vital to the maintenance of democratic institutions."[27] Judicial review of legislation means "the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[28]

The representation reinforcement theory establishes that as far as fundamental rights are concerned, the courts have the duty to ensure that no group or class is subject to the permanent control of the majority.[29] Representation reinforcement is based on the principle that the Supreme Court, under the Constitution, is delegated the task of safeguarding "the basic democratic theory of our government."[30] Oppression caused by the rule of the majority that impacts, and in some instances dictates, the fundamental rights of minority groups, must be overseen by the Court to ensure that the rights of minority groups are not disregarded. This oversight will cause the democratic political process to work fairly, smoothly, and successfully. Ely uses Stone's famous footnote number four as a basis to assert that the Court has two roles: first, "to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open"[31] and, second, "[to] concern itself with what majorities do to minorities, particularly . . . laws di-

24. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard Univ. Press 2002) (1938).
25. *Id.* at 103.
26. Schneider v. New Jersey, 308 U.S. 147, 151 (1939).
27. *Id.*
28. *Id.*
29. ELY, *supra* note 23, at 45.
30. *Id.*
31. *Id.* at 76.

rected at religious, national, and racial minorities and those infected by prejudice against them."[32]

B. *Groups Entitled to Representation Reinforcement-Discrete and Insular Minorities*

In order to establish whether a person or group of people may be entitled to representation reinforcement, it must be determined that the person or group of people is a discrete and insular minority. The Supreme Court has not offered a list of whom it considers to be discrete and insular minorities, but it has suggested characteristics that it may consider to make the determination. Lack of power in the political system, immutability of a defining trait, and unfair stereotypes are a few of the characteristics the Court will consider, although none of the characteristics are dispositive nor necessary for the Court to determine whether or not a discrete and insular minority exists.[33] The Court has stated that no single characteristic will determine whether a group is a discrete and insular minority and experience, not logic, will be the primary guide.[34] These defining characteristics may, however, point to social and cultural isolation which leads the majority to disregard the interests of others and ignore the impact that a piece of influential and possibly life-altering legislation may have on a minority group.[35]

The Court has addressed the political powerlessness of minors on many occasions and has concluded that they are not a discrete and insular minority group. Due to the fact that everyone in society has been a minor and may also have minor children of their own, the Court suggests that the rights of minors are respected and considered, and they are therefore properly represented.[36] Although minors are not considered a discrete and insular minority, the subset of minor children who do not have parents and who can potentially be adopted by same-sex parents are likely a discrete and insular minority. The status of being a child without parents is immutable in the sense that a child cannot change his or her status. Potential adoptive children do lack power in the political process because they are minors without parents to represent them.

The Court goes on to say that determining discreteness and insularity must be a social and cultural, as well as political determination, and that judges are best suited for the task.[37] As is the case in many criti-

32. *Id.*
33. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973).
34. *Id.* at 28.
35. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 (1985).
36. *Id.*
37. *Id.*

cal legal determinations: "[A] page of history is worth a volume of logic."[38]

If the Court weighed in and used policy and logic to determine a consistent and flexible approach to the adoption of children in the United States that allows two unmarried same-sex partners to jointly adopt a child, it may alleviate the confusion and frustration that occurs during the adoption process. Streamlining the adoption process to promote stability, consistency, and to allow not one, but two same-sex parents to adopt, would undoubtedly protect the best interest of adoptive children. Currently there are many different forms of adoptions allowed in different parts of the United States and they are used unevenly and inconsistently, making adoption difficult and at times impossible for certain parents.

III. FORMS OF ADOPTION AVAILABLE TO SAME-SEX COUPLES

A. *Second-Parent Adoption or Co-Parent Adoption:*

The term *second-parent adoption* was first used in legal literature by Elizabeth Zuckerman in a 1986 Davis Law Review Paper on Lesbian Families.[39] Zuckerman used second-parent adoption "to designate the adoption of a child by her parent's non-marital partner, without requiring the first parent to give up any rights or responsibilities to the child."[40] Second-parent adoption essentially allows two unmarried people to become the legal adopted parents of a child, giving both parents legal rights to that child as well as giving the child the legal and financial benefit of two parents.[41] Second-parent adoption can apply to heterosexual couples who reject the institution of marriage, but it is a tool primarily used by same-sex couples who are unable to marry, but nevertheless want to adopt and raise a child together.[42] Most states will allow a homosexual person to adopt a child as a single parent, but there is a significant number of states that do not allow same-sex partners to adopt a child together. Second-parent adoptions, if recognized by all states, would allow couples to adopt jointly, or at least authorize one partner to adopt a child and then allow the other to petition the court for a second-parent or co-parent adoption of that child.[43]

Currently only nine states—Vermont, New Jersey, Massachusetts, Pennsylvania, California, Connecticut, New York, Illinois, and the

38. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

39. Mark A. Momjian, *Cause of Action for Second-Parent Adoption*, *in* 25 CAUSES OF ACTION 2D. 1, § 1 (2004).

40. Elizabeth Zuckerman, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731–32 n.8 (1986).

41. *Id.* at 730-31.

42. *Id.* at 743-44.

43. *Id.* at 743.

District of Columbia—expressly permit second-parent adoption.[44] Five states—Wisconsin, Ohio, Nebraska, Arkansas (which does not permit adoption by unmarried couples), and Mississippi (which does not permit adoption by gay couples) prohibit second-parent adoption.[45] There are fifteen other states that allow second-parent adoptions, but only in certain circumstances.[46]

The National Center for Lesbian Rights views the concept of second-parent adoption as protecting the rights of children in same-sex families.[47] In a second-parent adoption, two parents become legally responsible for the child and must fulfill all parental duties.[48] If the adoptive parents ever separate, the child can have visitation with the second parent, the second parent can have custody of the child, and the second parent will remain responsible for support of the child.[49]

On February 14, 1995, the American Bar Association approved the Uniform Adoption Act. One of its principle aims is to promote the interests of minor children being raised by individuals who are committed to, and capable of caring for them.[50] "The Act encourages different kinds of people to adopt, including individuals who have served as a minor child's foster or de facto parents."[51] Under the Act, no one may be categorically excluded from being considered as an adoptive parent.[52]

In an article published in 2002, the American Academy of Pediatrics (Academy) advocated allowing second-parent adoptions for children of same-sex partners.[53] The Academy recognized that in the interest of the child's health, comfort, and happiness, it is best that both of the parents are legally recognized as such, even if they are same-sex parents.[54] The Academy advocated a broad, nationwide, ethical mandate to guide the courts in providing a child adopted by a same-sex couple with the stability of two legally recognized parents.[55]

The Academy noted the following benefits that are created for a child when he or she has two legally recognized same-sex parents: (1)

44. Ramon Johnson, *Gay Adoption: Where Is Gay Adoption Legal?*, ABOUT.COM, http://gaylife.about.com/od/gayparentingadoption/a/gaycoupleadopt.htm (last visited Jan. 20, 2011).

45. *Id.*

46. *Id.*

47. Momjian, *supra* note 39.

48. *Id.* at §8

49. *Id.*

50. *Id.* § 4.

51. *Id.*

52. *Id.*

53. Ellin C. Perrin, Am. Acad. of Pediatrics Comm. on Psychosocial Aspects of Child & Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, *in* 109 PEDIATRICS 339, 339 (2002), *available at* http://pediatrics.aappublications.org/cgi/content/full/109/2/341.

54. *Id.*

55. *Id.*

the child has a legally assured relationship with both parents, which is crucial if one parent should become incapacitated or die; (2) both the child and parents have a right to custody and visitation in the event of a separation; (3) the child has a right to financial support by both parents in the event of a separation; (4) the child is eligible for health benefits from either or both parents; (5) both parents have the legal ability to consent to the child's medical care; and (6) the child will have the ability to receive benefits such as social security benefits from either or both parents in the event of a tragedy.[56] Based on these facts, the Academy recommended that adoptive children of same-sex parents should have a sense of permanency established for their legal, physical, and mental well-being.[57]

Eight years after the Academy made the above recommendations there has not been significant change in the legislature regarding the adoption of children by same-sex parents.[58] Many same-sex parents have to adopt their children individually. In some states the second parent may be able to successfully adopt their partner's legally recognized child, but this often requires two separate adoption processes that can be time consuming and expensive. Second-parent or co-parent adoption is the most adaptable form of adoption that could be used to help same-sex partners accomplish the goal of adopting a child together. Other forms of adoptions that may benefit adoptive children of same-sex parents are recognized in only a few states and are much more complicated.

B. *Joint Adoptions*

Joint adoption is a form of adoption that allows two unmarried people to simultaneously adopt a child with whom they have no legal relationship.[59] Joint adoption allows the adoption process to be completed in one step, rather than one parent adopting a child and then the other parent filing for a second-parent or co-parent adoption.[60] Joint adoption gives a child two parents who are legally obligated to provide care and support.[61]

Single adults and married couples are allowed to adopt children in all states as long as they meet specified qualifications, and a judge

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56. *Id.*

57. *Id.*

58. Johnson, *supra* note 42.

59. COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 5:12 (2009).

60. *Id.*

61. Nancy D. Polikoff, *Recognizing Partners but Not Parents / Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 745 (2000).

finds that the adoption is in the best interest of the child.[62] If a married couple is attempting to adopt a child, they must adopt jointly;[63] this requirement tends to indicate a belief that two adults in a committed relationship should both be legally recognized as parents of an adopted child brought into the family. There would likely be many more eligible adoptive parents, and therefore more children adopted, if all states would allow unmarried partners in a committed relationship to adopt jointly.[64]

Only a few courts have addressed the issue of joint adoption involving unmarried same-sex partners.[65] California and Massachusetts have allowed joint adoptions by gay and lesbian couples, but many other states have denied them.[66] Allowing unmarried same-sex couples to file joint petitions for adoption promotes the rights and privileges of adoptive children and simplifies and clarifies adoption law.[67] The Maine Supreme Court stated that interpreting statutes to allow joint adoption by same-sex couples promotes the public policy of creating permanency for adoptive children in a more efficient and timely manner.[68] Adoption by both same-sex partners will assure adoptive children a continued relationship with both parents and makes the children eligible for both public and private benefits extending from both parents, including insurance, social security, worker's compensation benefits, and intestate succession.[69]

C. *Equitable Adoptions*

Equitable adoption is a form of "adoption" that may, in some instances, be used by a child of same-sex parents as a tool to protect the child's rights to his or her parent's assets should a parent die intestate. A child who was never formally adopted by one or both of his or her parents may be able to assert that he or she was equitably adopted, which would allow him or her to inherit from his or her adoptive parents should they die intestate.[70] In order for a successful equitable adoption to occur, five elements must be proven: (1) an agreement must have existed between the natural parents and the adoptive parents; (2) the natural parents must have performed by giving up the

62. Cynthia R. Mabry, *Joint and Shared Parenting: Valuing All Families and All Children in the Adoption Process with an Expanded Notion of Family*, 17 AM. U. J. GENDER SOC. POL'Y & L. 659, 660 (2009).

63. *Id.*

64. *Id.*

65. Id. at 664.

66. 1 THOMAS JACOBS, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 4:68 (2010).

67. *In re* Adoption of M.A., 2007 ME 123, ¶¶ 24–26, 930 A.2d 1088, 1096–97.

68. *Id.* ¶¶ 26, 29, 930 A.2d at 1097–98.

69. *Id.*

70. Lindsay Ayn Warner, *Bending the Bow of Equity: Three Ways Florida Can Improve Its Equitable Adoption Policy*, 38 STETSON L. REV. 577, 579 (2009).

child; (3) the child must have performed by living in the adoptive parents' home; (4) the adoptive parents must have partially performed by raising the child as their own; and (5) the adoptive parent(s) must have died intestate.[71] The adopted child must prove these five elements by clear and convincing evidence. If all the elements of an equitable adoption are proven, the adopted child will be able to inherit his or her intestate share of the parents' estates; otherwise, this child will be left without a share of the inheritance.[72]

The principle of equitable adoption is used by courts to allow for a more equitable and fair outcome based on the "theory that equity regards that as done which ought to have been done."[73] Equitable adoption "protect[s] the interests of a minor child who, through no fault of his or her own, was never formally and legally adopted by his or her adoptive parents."[74] Some states refuse to apply the equitable adoption doctrine because it is a doctrine grounded in probate law.[75] Even in most states that do recognize the doctrine of equitable adoption, the doctrine is not applied in workers compensation claims or wrongful death actions.[76] Application of the equitable adoption doctrine can provide equity to a child raised by same-sex parents, where the child knew only the couple as his or her parents, but was never formally adopted by one or both of them.[77] Equitable adoption was created to protect the child's interests rather than punish the child; especially since it is often not the fault of the child that his or her parents have not completed the necessary documents to create the legal status of the parent-child relationship.[78] Equitable adoption is used by some states as a remedy because "justice, equity and good faith require it."[79] Courts should grant an equitable adoption:

> to protect the interest of a child in a case where one has expressly agreed to adopt such child, or by his acts and conduct has placed himself in a position where it would be inequitable to permit it to be asserted that the child was not adopted; [otherwise the best interest of the child is not served][80]

The argument above, used to support the use of equitable adoption, is the same argument that the Supreme Court should use to support the principle of representation reinforcement and allow children waiting for parents to be adopted by same-sex couples.

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71. *Id.*
72. *Id.* at 579–80.
73. *Id.* at 585.
74. *Id.* (citations omitted).
75. *Id.* at 587-588.
76. *Id.*
77. *Id.* at 605.
78. *Id.* at 607.
79. Hogane v. Ottersbach, 269 S.W.2d 9, 11 (Mo. 1954).
80. *Id.*

The principle of equitable adoption, and the rationale that many courts have given for its use, seems to bolster the argument that the rights of children who have not been legally adopted, but who have formed a parent-child relationship, should have their rights and interests protected by the Court. Although equitable adoption offers some relief to adoptive children, it is not recognized in all states and it is not applied in many cases beyond intestate succession. A more broadly sweeping remedy is necessary to protect the interests of children who may be adopted by same-sex partners.

IV. THE JUDICIARY'S ROLE IN ADOPTIONS

A. *Best Interest of the Child Analysis*

In addition to the language of an adoption statute in a particular jurisdiction, the individual court's analysis of whether an adoption is in the best interest of a child is one of the most critical findings in most adoption cases. A review of the subject state's statutes and local practices is required "to determine what criteria must be employed in making the best interest determination."[81] It is also important to know how a court that is hearing a specific case will weigh each criterion with respect to the others and what subjective factors come into play in that particular court.[82] The best interest of the child determination is a critical but very subjective determination and can vary greatly from jurisdiction to jurisdiction and even from courtroom to courtroom.

There are not many cases that actually outlay the factors that a court will consider when conducting a best interest of the child analysis; however, in *Holley v. Adams*, the Supreme Court of Texas summarized the factors that have been previously considered by most courts.[83]

> An extended number of factors have been considered by the courts in ascertaining the best interest of the child. Included among these are the following: (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent.[84]

81. Momjian, *supra* note 39, § 40.
82. *Id.*
83. Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976).
84. *Id.* (citations omitted).

The court established that the list of factors considered in a best interest of the child analysis, although extensive, was not an exhaustive list.[85] In some states the best interest of the child (BIC) analysis is guided by statutes that determine which factors can be considered; in contrast, there are some states where case law guides the BIC analysis, and other states allow the judge to decide the factors that the court will or will not consider when determining BIC.[86] However, after considering the factors, the ultimate "best interest of the child" decision is always based on the presiding judge's discretion.[87]

A California court has held that establishing parentage is one of the first steps toward allowing a child to benefit from a multitude of financial benefits that include: child support, health insurance, social security benefits, inheritance rights, and military benefits.[88] The California court's acknowledgement that establishing paternity is in the best interest of the child because of the benefits a child can receive from his or her biological father can easily be analogized to the importance of a child to be adopted by two parents, even if they are same-sex parents, because of the benefits the child will receive from two legally recognized parents.

B. *A Judge's Discretion*

In determining the best interest of a child in the context of an adoption by a same-sex couple, there have been mixed responses from the courts. In 2004, the Indiana Court of Appeals stated that:

> To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest. By allowing same-sex adoptions to come within the step-parent exception of § 448, we are furthering the purposes of the statute as was originally intended by allowing children of such unions the benefits and security of a legal relationship with their de facto second parents.[89]

The court also noted that "[a]llowing a second parent to share responsibility for the financial, spiritual, educational, and emotional well-being of the child in a stable, supportive, and nurturing environment can only be in the best interest of that child."[90]

Many BIC analyses, the cornerstone of adoption decisions, seem to indicate that there is a belief that it is in the best interest of a child to

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85. *Id.*

86. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 369 (2008).

87. *Id.*

88. Elisa B. v. Super. Ct., 117 P.3d 660, 669 (Cal. 2005) (quoting CAL. FAM. CODE § 7570(a) (West 2005)).

89. *In re* Adoption of K.S.P., 804 N.E.2d 1253, 1259 (Ind. Ct. App. 2004) (footnote omitted).

90. *Id.* at 1256 (quoting *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 270–71 (Ind. Ct. App. 2003)).

have two legally recognized and obligated parents when possible. If this is so, then there is no explanation why courts should disallow children from being adopted by both same-sex partners. It is necessary for courts to ascertain and protect the best interest of the children. In instances concerning adoptive children of same-sex couples, it is important for the courts to represent them. They are a minority group that is not adequately represented in the voting population and therefore cannot influence the legislature through the political process to implement laws that protect their interests.

V. ADOPTION STATUTES—HOW DRASTICALLY THE STATE STATUTES VARY

The various adoption statutes that exist throughout the United States indicate that it may be difficult, if not entirely impossible, for the state legislatures to act on behalf of children adopted by same-sex parents in order to ensure that their interests and rights are protected. There are only a few states that expressly permit joint adoption by same-sex couples, there are even some states that expressly prohibit adoption by same-sex couples, and there are many more that do not expressly indicate either way, whether or not same-sex couples can adopt jointly. It can be argued that the Equal Protection rights of adoptive children of same-sex partners are violated because they are not entitled to the same rights of children born to or adopted by married and/or straight couples.

The lack of uniformity and lack of clarity in many of the current adoption statutes tend to indicate that change may be required. There is also an indication that the area of adoption law is often overlooked or disregarded by the legislature, and it is left out of the political process because only a small subset of the population is effected by the adoption laws. The following review of the statutes will show that the variety of language, the outright prohibition of same-sex parent adoptions, and the discretion given to individual judges, necessitates the use of the representation reinforcement theory to protect the interests and rights of children that could be adopted by same-sex partners.

A. *Colorado's Adoption Statute*

Individual courts' broad interpretations of Colorado's adoption statute have allowed for same-sex couples to adopt jointly and have also allowed a same-sex partner to adopt the legally recognized child of his or her partner.[91] However, not all of the Colorado courts have agreed with the broad interpretation of the adoption statute, and in fact have held that second-parent adoption in Colorado was impermissible. The Colorado adoption statute reads as follows:

91. COLO. REV. STAT. § 19-5-202 (2010).

> (1) Any person twenty-one years of age or older, including a foster parent, may petition the court to decree an adoption. (2) A minor, upon approval of the court, may petition the court to decree an adoption. (3) A person having a living spouse from whom he is not legally separated shall petition jointly with such spouse, unless such spouse is the natural parent of the child to be adopted or has previously adopted the child.[92]

In an adoption case in 1996, where two same-sex partners were trying to adopt each other's biological children, the Colorado Court of Appeals held that same-sex partners could not use the Colorado adoption statute to obtain a second-parent adoption, and therefore could not have a legal parent-child relationship with their children.[93] This court followed a strict construction of the statutory language and held that a "best interest of the child" analysis only applies if the adoption statute is ambiguous.[94] The court decided that the best interest of the child issue was moot because the threshold adoption requirements were not met, and there was no parental liberty interest to protect because neither of these prospective adoptive parents were actually the parent of these children.[95] Based on this decision, second-parent adoption was found to be unavailable in Colorado without judicial wrangling of the meaning of the adoption statute.

Lack of clarity and consistency in Colorado's adoption statute's interpretation led the legislature, in 2007, to enact a law that outright permitted second-parent adoptions by same-sex couples as well as by unmarried heterosexual couples.[96] This law allows a second-parent to adopt a legal parent's child as long as a criminal background check and home study are successfully completed.[97] However, second-parent adoption is not the same as joint adoption; it is a long and redundant process that must take place after a child has already been legally adopted by one parent. Proponents of the law claim that it is not a gay adoption law but a "child-friendly" law that protects families and the rights of children.[98]

Although Colorado seems to be taking legislative action to remedy the inequities that some adoptive children have faced, it is a lengthy process. A change in legislation takes a lot of time, effort, and commitment from the public, and, as is often the case in situations like

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92. *Id.*

93. *In re* Adoption of T.K.J., 931 P.2d 488, 490–91 (Colo. App. 1996).

94. *Id.* at 493.

95. *Id.* at 494.

96. COLO. PROTECTS ALL, EQUAL RIGHTS COLORADO FACT SHEET: COLORADO'S SECOND PARENT ADOPTION LAW, http://www.coloradoprotectsall.info/pdfs/2ND_PARENT_ADOPTION.pdf (last visited Feb. 13, 2011).

97. *Id.*

98. Jason N.W. Plowman, Note, *When Second-Parent Adoption Is the Second-Best Option: The Case for Legislative Reform As the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 80 (2008).

second-parent adoption for same-sex couples, legislative action is usually prompted by a judicial decision on the matter.[99] In states like Colorado, where courts are split on the interpretation of the adoption statute, a judicial decision on the matter is available. However, in states that firmly prohibit second-parent adoption these types of judicial decisions are likely few and far between.

Statutory reform can be much more difficult than a judicial challenge.[100] Judicial challenges tend to resolve themselves much more quickly and involve fewer players.[101] Even though some state adoption statutes have been reformed, the difficulty in the reformation process tends to support the notion that the Supreme Court should use representation reinforcement to protect the rights to adoptive children of same-sex couples.

B. *Vermont's Adoption Statute*

Standing firmly on one side of the issue, Vermont has an adoption statute that expressly allows same-sex partners to adopt children jointly, and it also allows second-parent adoptions by same-sex partners.[102] The express provisions of the Vermont adoption statute alleviate the confusion of differing statutory interpretations by the courts. The Vermont adoption statute states:

> Subject to this title, any person may adopt or be adopted by another person for the purpose of creating the relationship of parent and child between them. (b) If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection.[103]

Vermont's adoption statute is a good example of how a handful of states are protecting the rights of adoptive children of same-sex partners. However, many adoption statutes do not mirror this one.

C. *Florida's Adoption Statute*

Until the end of 2008, Florida had an adoption statute that outright prohibited same-sex couples from adopting children. § 63.042 read:

> (1) Any person, a minor or an adult, may be adopted. (2) The following persons may adopt: (a) A husband and wife jointly; (b) An unmarried adult; or (c) A married person without the other spouse joining as a petitioner, if the person to be adopted is not his or her spouse, and if: 1. The other spouse is a parent of the person to be

99. *Id.* at 80-81.
100. *Id.*
101. *Id.*
102. VT. STAT. ANN. tit. 15A, § 1-102 (2010).
103. *Id.*

> adopted and consents to the adoption; or 2. The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for good cause shown or in the best interest of the child. (3) No person eligible to adopt under this statute may adopt if that person is a homosexual. (4) No person eligible under this section shall be prohibited from adopting solely because such person possesses a physical disability or handicap, unless it is determined by the court or adoption entity that such disability or handicap renders such person incapable of serving as an effective parent.[104]

Subsection (3) of § 63.042 was eventually found unconstitutional by *In re Adoption of Doe*, in which the Florida Circuit Court stated that the adoption statute disallowing same-sex couples from adopting children "violated foster children's constitutional right to permanency, protected under the federal Adoption and Safe Families Act."[105] The court elaborated on its holding by stating that a prohibition on same-sex partners adopting children violated the liberty interests of the children because the children were being held in state custody awaiting a permanent home.[106] It was acknowledged that by disallowing same-sex partners the ability to jointly adopt children, the state was denying children the right to a permanent home.[107]

Since the *In re Adoption of Doe* decision, the Florida legislature proposed legislation that would repeal subsection (3) of § 63.042 as it was found unconstitutional.[108] The proposed legislation did die however on May 2, 2009, in the House Civil Justice & Courts Policy Committee, and no further action has been taken regarding this matter.[109] This is a clear example of how statutory reform will likely not provide adoptive children of same-sex couples the rights and protections they are entitled to.

D. *Mississippi's Adoption Statute*

Standing firmly on the other side of the issue, Mississippi has an adoption statute that does not allow same-sex couples to adopt children that has not yet been found unconstitutional.[110] The Mississippi statute states that the following persons may adopt:

> An unmarried adult, a married person jointly with his or her spouse, a State resident for at least 90 days, except in an agency adoption, Adoption by persons of the same gender is prohibited.[111]

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104. FLA. STAT. ANN. § 63.042 (West 2005), *invalidated by In re* Adoption of Doe, 2008 WL 5006172, at *29 (Fla. Cir. Ct. Nov. 25, 2008).
105. *In re Adoption of Doe*, 2008 WL 5006172, at *29.
106. *Id.* at *24–25.
107. *Id.* at *25.
108. H.R. 413, 111 Leg., Reg. Sess. (Fla. 2009).
109. *See id.*
110. MISS. CODE ANN. § 93-17-3(5) (2004 & Supp. 2010).
111. *Id.* § 93-17-3(1), (4)–(5).

Mississippi's adoption statute is likewise a clear indication that the rights of adopted children, especially those children who have the potential to be adopted by same-sex couples, are not being adequately protected by the legislature or the political process. An outright ban on the adoption of children by same-sex couples denies many children the opportunity to have the legal benefits of two parents, not to mention a stable and loving home.

E. *The Problems with Statutory Inconsistencies*

These statutes come from a variety of states, and they vary tremendously. It is more common for the state adoption statutes to be ambiguous as to whether or not same-sex partners can adopt children together. Often, as stated previously, the decision is left up to the discretion of the judge. The decision to allow an adoption is too critical to the rights and interests of the adoptive children to leave up to a particular judge's discretion, or to rely on the action of slow moving and slow adapting legislatures to permit.

Only four states, Vermont, California, Connecticut, and New Hampshire, have statutory language that can easily be used to allow both same-sex parents to have adoption rights to a child.[112] These four states have based their adoption statutes on the Uniform Adoption Act of 1994, particularly, the provisions that allow anyone to adopt and create a legally recognized parent-child relationship, without mention of sexual orientation.[113] Judges must be willing to broadly interpret statutes that do not have explicit language allowing same-sex parents to jointly adopt in order to allow both parents legal rights when the adoption has been found to be in the best interest of the child.[114] Only six states have recognized the right of a same-sex partner to adopt using second-parent adoption, but this process of adoption is time consuming, costly, and redundant.[115]

On the other hand, many state statutes have been interpreted to prohibit adoptions of children by same-sex couples.[116] This is senseless because many of these states do allow one same-sex partner to adopt the child; the only person suffering is the child who is limited to having only one instead of two legal parents. Most of these prohibitions are based on a strict construction of the state adoption statute.[117]

Congressional findings on adoption noted that there has been a twenty-four percent increase in the number of children in foster care

112. Lynne Marie Kohm, Megan Lindsey & William Catoe, *An International Examination of Same-Sex Parent Adoption,* 5 REGENT J. INT'L L. 237, 251 (2007).
113. *Id.* at 251-52.
114. *Id.* at 253.
115. *Id.* at 257-58.
116. *Id* at 258.
117. *Id.*

in this country in the last decade.[118] Many of these children remain in foster or substitute care solely because of legal barriers that are preventing their adoption.[119] The congressional findings also indicate that in order to promote a healthy life and stability for these children, as well as to avoid the waste and overspending of public funds, it is important to facilitate and promote adoptions whenever possible.[120] Even studies by Congress show that children are healthiest when provided with the stability of adopted parents. It is in the best interest of the child and society to allow adoptions whenever possible. It is for these reasons that representation reinforcement must be substituted for the political process and used as a tool for change, instead of statutory reformation, to allow children available for adoption by same-sex couples to enjoy the stability of a loving home with two legal parents whenever possible.

VI. ADOPTION BY EITHER ONE OR TWO PARENT(S) AND ITS EFFECTS ON THE CHILDREN

A. *Statistics-Children Awaiting Adoption*

The most recent statistics gathered by the U.S. Department of Health and Human Services, published in March 2008, revealed that there are 126,967 children in public foster care waiting to be adopted.[121] This number does not include children who are in foster homes who are not currently adoptable, but may become adoptable in the future.[122] The statistics also do not include children over the age of sixteen.[123]

A prior study by the North American Council on Adoptable Children indicated that there were over 520,000 children in foster care.[124] Of those, over 120,000 were available for adoption, but only 50,000 are adopted into permanent homes annually.[125] An analysis of the 2000 census went on to note that approximately 250,000 children are being raised by same-sex couples, but only 12,500 have been legally adopted.[126] In 2003, more than thirty-three percent of adopted fami-

118. 42 U.S.C. § 5111(a)(5)(A) (2006) (amended 2010).

119. *Id.* § 5111(a)(4).

120. *Id.* § 5111(a)(8).

121. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN IN PUBLIC FOSTER CARE ON SEPTEMBER 30TH OF EACH YEAR WHO ARE WAITING TO BE ADOPTED FY 1999 – FY 2006 (2008), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/waiting2009.pdf.

122. *Id.*

123. *Id.*

124. Andrea Stone, *Both Sides on Gay Adoption Cite Concern for Children*, USATODAY.COM, Feb. 20, 2006, http://www.usatoday.com/news/nation/2006-02-20-gay-adoption-foster_x.htm.

125. *Id.*

126. *Id.*

lies were single-parent families.[127] Although nearly sixty-five percent of children adopted with state-agency involvement are adopted by married parents, the number of single parents and co-habitating couples adopting children is growing at a faster rate than married couples.[128]

B. *Studies on Same-Sex Parents and Their Children*

The American Academy of Pediatrics (Academy), in a 2002 study, recommended that pediatricians advocate for initiatives that establish permanency through co-parent/second-parent adoptions for children of same-sex partners.[129]

More recently, Michael Lamb, a Cambridge University Developmental Psychologist has asserted that children of same-sex couples are just as well adjusted as children with two heterosexual parents.[130] Lamb testified in federal court, and cited studies that show that same-sex parents have very much the same relationship with their children as heterosexual parents.[131] Lamb was called to testify for a same-sex couple who was challenging the California ban on same-sex marriage.[132] He noted that children of same-sex partners are more likely to be teased about their parents, but he indicated that studies show that they are no more likely to be teased more than children with heterosexual parents.[133] Lamb's testimony concluded with a statement that studies indicate that children are better off and more properly adjusted when they have two parents who are actively involved in their lives.[134]

C. *The Effects of Restrictions on Adoption by Same-Sex Couples*

It has previously been alleged that denying same-sex parents the right to jointly adopt children may be a violation of their parental rights, but perhaps more importantly, it may be an equal protection violation of the children's rights.[135] By prohibiting children of same-sex parents from being adopted by two parents, as would be the case if

127. Mary Eschelbach Hansen, AM. UNIV. & CTR. FOR ADOPTION RESEARCH, AFCARS ADOPTION DATA RESEARCH BRIEF NUMBER 1: ADOPTIVE FAMILY STRUCTURE 6 (2006), http://academic2.american.edu/~mhansen/Invited/adoptivefamily structure.pdf.

128. *Id.* at 7.

129. Perrin, *supra* note 53.

130. Maura Dolan, *Children Thrive Equally with Same-Sex, Heterosexual Parents, Psychologist Testifies at Prop. 8 Trial*, L.A. TIMES, Jan. 15, 2010, http://latimes blogs.latimes.com/lanow/2010/01/children-thrive-equally-with-same-sex-heterosexual-parents-psychologist-testifies-at-prop-8-trial.html.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1074 (1995).

they were children of heterosexual couples, the United States is treating these children differently from others without valid justification.[136]

In order to use the theory of representation reinforcement to gain equal treatment for these children, they must be considered a discrete and insular minority. Once it has been established that a class is a discrete and insular minority, the class is labeled a suspect class and legislation regarding them will be reviewed with heightened scrutiny.[137] Courts have held that some groups of children who do not have control over their status are discrete and insular minorities and deserve to be treated as a suspect class.[138]

In *Louisiana v. Levy*, the U.S. Supreme Court held that illegitimate children were entitled to wrongful death benefits although the Louisiana statute at the time only allowed legitimate children to recover.[139] The Court noted that a state has power to make laws but may not "draw a line which constitutes an invidious discrimination against a particular class."[140] The Court went on to note that although these children were illegitimate, the mother had raised and nurtured them; their status of illegitimacy was through no fault of their own so they did not deserve the unfair and unequal treatment.[141]

Likewise, in *Weber v. Aetna Casualty & Surety Company*, the U.S. Supreme Court analyzed a Louisiana statute that disqualified illegitimate children from recovering workman's compensation benefits after the death of a parent.[142] The Court noted that society has long condemned the action of parents bearing children outside of a marriage and nuclear family.[143] The Court also noted that it is unfair to make innocent children suffer because of their parent's mistakes.[144] According to the Court, "[v]isiting this condemnation on the head of the infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility and wrongdoing."[145] It can hardly be argued that a child is responsible for the actions of his or her parents, be it the parents' marital status, as in this case, or the parents' sexual orientation as in the case of adoptive children of same-sex partners.

136. *See id.*
137. *Id.* at 1075.
138. *Id.*
139. Levy v. Louisiana, 391 U.S. 68, 72 (1968).
140. *Id.* at 71.
141. *Id.* at 72.
142. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 174–75 (1972).
143. *Id.*
144. *Id.*
145. *Id.*

VII. CONCLUSION

Many people mistakenly compare the issue of adoption of children by same-sex couples to the issue of same-sex marriage. As Jon Husted, a Republican politician who was adopted as a child, has proclaimed, "This is not an issue about gays, this is about children. . ."[146] It has been said that unlike bans on same-sex marriages, disallowing same-sex couples the right to adopt children is likely to be viewed as overreaching and punitive, and is an action that the majority of the public would not support.[147]

Unfortunately, conclusions about the public sentiment regarding a ban on same-sex couples adopting is not conclusive evidence that the public is cognizant enough to utilize the legislature and political system to ensure that the rights of adoptive children are protected. Although polls show that the public is unlikely to support a ban on same-sex adoption, this does not indicate that the public is willing to use the political arena to ensure adoptive children in same-sex families equal rights and equal representation under the law. The current state adoption statutes and their various effects lend credence to the argument that the public will not take action on the adoptive children's behalf.

The representation reinforcement principle is designed specifically to help classes of people just like potential adoptive children of same-sex couples. Although adoptive children of same-sex couples can arguably be represented politically by their parents, many of these children are foster children awaiting an adoptive family and therefore have no representation. It is possible that more same-sex couples would be willing to adopt children if they had the ability to take on the rights and responsibilities together, as most parents prefer to do. The ability to have two parents responsible for one or more children also ensures that the child or children will receive social security benefits, health care benefits, intestate succession, child support, visitation rights, and workman's compensation benefits, just to name a few.

By allowing both same-sex parents to adopt, children like TiCasey and her siblings will be given the stability and support that they deserve. Representation reinforcement by the courts will ensure that these children, who by no fault of their own, have no parents or have only one legal same-sex parent, will at least have the opportunity to have the privileges given to children who have a legal relationship with both of their parents. It is difficult, if not impossible, to argue that it is more beneficial to have one legal parent instead of two.

146. Stone, *supra* note 124.
147. *Id.*