Vacating Adult Adoptions Post-Obergefell

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Sarah A. Quarles

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1 Articles Editor, KENTUCKY LAW JOURNAL Vol. 106.
In 2012, Nino Esposito and Drew Bosee, both residents of Pennsylvania, chose to take advantage of the most efficient way to legally protect the interests created over the course of their forty-year romantic relationship.

Pennsylvania’s “Defense of Marriage Act” was still in force, the United States Supreme Court had not yet taken up the issue of same-sex marriage, and marriage equality seemed out of reach. Nino adopted Drew, a man ten years his junior, in order to avoid reliance on easily challenged estate planning documents and to establish a legally recognized relationship.

Nino and Drew had no way of knowing that the Supreme Court would strike down the federal “Defense of Marriage Act” only a year later, nor did they suspect that full marriage equality would arrive in 2015. In light of this unanticipated social progress, Nino and Drew wished to have a traditional marriage. Unfortunately, a trial judge initially denied their petition to vacate the adoption, which left them unable to marry due to their legal status as parent and child. Though unfortunate, Nino and Drew’s story is not so unusual. Prior to the landmark decision in Obergefell v. Hodges, some same-sex couples chose to pursue adult adoption as a marriage substitute. Those who adopted their partner, but now wish to marry under the auspices of Obergefell, have no guarantee that the court will grant a petition to vacate their adoption. Where these petitions are denied, the rights of same-sex couples are further curtailed by the very notions of traditionalism (albeit in a package labeled “parenthood” rather than “marriage”) that induced the subversive act of adopting a romantic partner in the first place.

The implication of Obergefell, as it pertains to adult adoptions, reveals a need for reform to ensure that adoption as a mechanism for dispersing property or as a

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3 Id.
6 Culhane, supra note 2. The Pennsylvania Superior Court ultimately reversed and remanded the denied petition to vacate the adoption because it “frustrated the couple’s ability to marry,” which is now a fundamental right. In re Adoption of R.A.B. Jr., 153 A.3d at 336.
7 See, e.g., Richard C. Ausness, Planned Parenthood: Adult Adoption and the Right of Adoptees to Inherit, 41 ACTEC L.J. 241, 244–45, 300 (2016); see also In re Adoption of R.A.B. Jr., 153 A.3d at 333 (involving same-sex partners seeking adoption to “becom[e] a family unit”).
8 For example, in Pennsylvania, the Superior Court stated, “[T]he Adoption Act does not expressly provide for the annulment of adult adoption” but permits “unopposed annulment or revocation of an adult adoption” because of the “new and unique circumstances.” In re Adoption of R.A.B., Jr., 153 A.3d at 336 (emphasis added).
method for creating a legally-recognized relationship,\textsuperscript{12} does not interfere with the fundamental right to marry.\textsuperscript{13} In exploring alternative methods for vacating adult adoptions that mitigate judicial avenues for denying the right to marry, this Note considers how the \textit{Obergefell} decision creates a tension between our socio-legal valuations of marriage, non-marriage, and parenthood, where one relationship must be compromised in order to preserve the other.

First, this Note will briefly consider the history of adult adoption and the purposes it serves in modern society. Second, it will discuss the significance of adult adoption within the Lesbian, Gay, Bisexual, Transgender, Queer + ("LGBTQ+")\textsuperscript{14} community in a time before marriage equality. Third, it will describe how the statutorily prescribed methods for vacating adult adoptions creates the potential for undue judicial influence. Fourth, it will examine marriage as a fundamental right and the significance of the \textit{Obergefell} decision. Fifth, it will consider the problems faced by LGBTQ+ couples who wish to marry but are trapped in an adoptive relationship. Sixth, it will recommend solutions to avoid judicial infringement upon the right to marry. Finally, it will consider the broader social implications of this newly created need for amending the process for dissolving an adult adoption in order to facilitate a same-sex marriage.

\section*{I. ADULT ADOPTION: HISTORY AND PURPOSES}

Adult adoptions occurred in ancient Rome, where the process typically centered on the adoption of adult males for the perpetuation of religious rights or preservation of the adopter’s family.\textsuperscript{15} Adoption outlived the Roman Empire, the medieval period, and took hold in Continental Europe as a tool for securing succession of property and the perpetuation of lineage.\textsuperscript{16} In the first formalized adoption procedure, the Napoleonic Code explicitly authorized the strategic adoption of adults in order to mold the dispersal of property to conform with an individual’s donative intent.\textsuperscript{17} Despite the legal traditions concerning adoption in Continental Europe, England

\begin{footnotesize}
\textsuperscript{12} See, e.g., Ausness, supra note 10, at 244–45, 298, 300 (explaining that same-sex couples have long used adult adoption as a means to have a legally recognized relationship and inheritance rights before same-sex marriage was legally recognized).


\textsuperscript{14} The "+" is utilized here to denote the panoply of other non-heteronormative sexual orientations and political alignments (Ally, Intersex, Two-Spirited, Pansexual, Agender, Gender Variant, etc.). See \textit{What Does LGBTQ+ Mean?}, OK2BME, https://ok2bme.ca/resources/kids-teens/what-does-lgbtq-mean/ [https://perma.cc/6NZ2-4S5G] [May 16, 2018].


\textsuperscript{16} Ausness, supra note 10, at 249–51.

\end{footnotesize}
did not formally recognize childhood adoption until the Adoption of Children Act of 1926, which was silent on the issue of adult adoption.\textsuperscript{18}

Perhaps for want of a reference point, the United States largely accepts the English common law as the bedrock of tradition.\textsuperscript{19} Unfortunately, the common law’s silent default to the idea that a parent-child relationship exists solely between an individual and their progeny is a part of our ideological inheritance.\textsuperscript{20} Without a common law directive, the legal procedures for adoption splintered amongst the states, resulting in a multitude of statutory provisions that vary from one jurisdiction to the next.\textsuperscript{21} Although these statutes are varied, the substantive apple does not fall far from the common law tree. Across states, statutory language regarding adoption largely intersects at the presumption that adoption occurs between an adult and a minor to create a parent-child relationship as defined by nineteenth century family structure, which the English common law deferred to and which is regarded as “traditional” within our legal framework.\textsuperscript{22}

\textbf{II. ADULT ADOPTION IN THE LGBTQ+ COMMUNITY}

Prior to marriage equality in the United States, LGBTQ+ individuals “lack[ed] true donative freedom under . . . probate law.”\textsuperscript{23} Without an established legal relationship, relatives of a deceased gay or lesbian person could easily challenge the decedent’s dispositions to “non-family” through the doctrines of “testamentary capacity, undue influence, and testamentary fraud.”\textsuperscript{24} “These doctrines are sufficiently nebulous to give wide breadth to a trier of fact who is intent on disregarding testamentary plans that offend the majoritarian norm that favors dispositions to blood relatives.”\textsuperscript{25} Given the ease with which one’s donative intent could be overturned by a blood relative with standing to challenge a will\textsuperscript{26} and the

\begin{footnotesize}
\begin{enumerate}
\item Ausness, supra note 10, at 251. More recently, England’s “Adoption and Children Act of 2002 declares that only children [under the age of eighteen] [may] be adopted.” Id.
\item See Ausness, supra note 10, at 251–52.
\item See generally K.M. Potraker, Annotation, Adoption of Adult, 21 A.L.R.3d 1012 (1968) (reflecting the variance in states’ adoption statutes).
\item See Ausness, supra note 10, at 242, 251–52, 304–05.
\item Edwards, supra note 23, at 717–18.
\item See supra notes 24–25 and accompanying text.
\end{enumerate}
\end{footnotesize}
fact that the law of intestacy has long favored children over ancestors,\(^27\) it makes sense that same-sex couples pursued adult adoption as a strategic marriage substitute.\(^28\)

A minority of states strictly impose "traditional" adoption values on the process of adopting an adult by requiring a preexisting parent-child relationship;\(^29\) mandating that the spouse or parents of the adoptee consent to the adoption;\(^30\) imposing a minimum requisite age difference of ten years;\(^31\) or explicitly prohibiting individuals from adopting a same-sex romantic partner.\(^32\) These restrictions give rise to a consideration as to why this minority of states expressed a greater interest in regulating adoptive relationships than marital ones. Adults who wish to marry are not required to make a showing of the nature of their relationship; they are not required to get parental consent; and there is no required age difference.\(^33\) Perhaps it is because the sanctity of adoptive relationships is of greater concern to courts or maybe it is because adult adoption was the only viable avenue for creating quasi-marital rights of inheritance and filiation between same-sex partners, either way, in a state that imposed any of these restrictions, the pursuit of an adult adoption as a marriage substitute would reveal that traditionalism and subversion cannot be kept in the same cage.

Courts displayed an awareness of adult adoption as a marriage substitute in opinions where the homosexual relationship between the parties served as the sole basis for rejecting the adoption. In *In re Robert Paul P.*, the court stated that adoption ought to imitate nature and, as such, adoptions that served as a "quasi-matrimonial vehicle" were invalid.\(^34\) Later, in *In re Adoption of Swanson*, a same-sex couple sought to enter an adoption agreement in order to "formalize the close emotional relationship that had existed between them for many years . . . ."\(^35\) Hearkening to United States courts' tendency to falsely conflate adoptions that occur for the purpose of creating a parent-child relationship and those that occur for strategic reasons and/or as a marriage substitute, the lower court had denied the petition on the grounds that there was no pre-existing parent-child relationship between the parties.\(^36\)

\(^27\) See Jesse Dukeminier & Robert H. Sitkoff, Wills, Trusts, and Estates 65 (9th ed. 2013) ("American intestacy law generally favors the decedent's spouse, then descendants, then parents, and then collaterals, and more remote kindred.").

\(^28\) This is precisely the scenario that played out in *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 527–28, 531 (N.Y. Fam. Ct. 1981).

\(^29\) Ausness, supra note 10, at 255.

\(^30\) Id. at 255–56.


\(^32\) Ausness, supra note 10, at 256, 263–64.


\(^35\) *In re Adoption of Swanson*, 623 A.2d 1095, 1096 (Del. 1993).

\(^36\) See *In re Adoption of John A.S.*, No. 91-09-02-A, 1992 WL 361416, at *3–4 (Del. Fam. Ct. Oct. 5, 1992) (holding an adult adoption must occur for a purpose and that purpose "[w]as to formalize existing parent-child relationships"); see also *In re Adoption of Swanson*, 623 A.2d at 1096, 1099 (overturning
By way of independent statutes and judicial decisions interpreting adoption statutes, most states have managed to circumvent traditionalism in granting adult adoptions. But, broadening the class of individuals who may enter into an adoptive relationship largely failed to alter the lens through which adult adoptions were viewed. The factors driving many adult adoptions are quite distinct from those motivating adoptions intended to create a parent-child relationship. Even where independent adult adoption statutes are in place, their provisions mirror many principles found in statutes authorizing the adoption of minors. As a result, “adult adoption statutes and court decisions interpreting them fail to distinguish between” adult adoptions that are sought to establish a parent-child relationship and those that are desired for purposes that are beyond the scope of “traditional” adoptions.

[A]doption may affect a party’s right to contest a will, to take advantage of an anti-lapse or a pretermitted child statute, to make a workers’ compensation claim, to seek Social Security benefits, to benefit from rent control regulations, or to take as the beneficiary of a life insurance policy. In addition, adoption may affect inheritance tax rates and it may also affect the amount that a surviving spouse can receive under dower or elective share statutes.

Various motivations compel individuals to accept the legal fiction that, through adoption, the adoptee “acquires novel relationships that are reckoned as equivalent to congenital ones and either wholly or partially supersede the old ties.” Though there are often strategic interests at play in adoptions between same-sex partners, such as grasping at donative freedom and creating rights of filiation, there are also more sensitive issues at stake. In a time when marriage was a privilege available only to opposite-sex couples, many same-sex couples sought to legally formalize their romantic relationship by way of adoption.

Even when same-sex couples succeed in adopting for want of a legally recognized relationship, the arrangement presented its own drawbacks. The late civil rights
activist Bayard Rustin adopted his partner, Walter Naegle, in 1982.\textsuperscript{45} Though Naegle and Rustin’s romantic relationship was well-known, Rustin’s obituary cited Naegle as his “child.”\textsuperscript{46} Naegle has since lamented that this erasure of his loving relationship with Bayard felt particularly painful.\textsuperscript{47} It is clear that even when same-sex couples were able to pursue adoption as a marriage substitute, it served as an imperfect solution. In addition to being unable to marry the person of their choosing because of their status as adopter and adoptee, judicial reluctance to grant a petition to vacate an adult adoption may mean that the adopted party will remain legally severed from their biological families,\textsuperscript{48} which may serve as a source of psychological hardship. Absent other motivating factors for pursuing adoption over marriage, it seems that adult adoption as a marriage substitute for same-sex couples was a solution to a problem that does not exist post-\textit{Obergefell}. As such, Obergefell has left in its wake a small sub-set of individuals who pursued adult adoption for want of a legally cognizable relationship.

III. PROCEDURES FOR VACATING ADULT ADOPTIONS AND THE POTENTIAL FOR JUDICIAL INTERFERENCE

As is often the case in matters of law, the seemingly simple process of vacating, nullifying, or otherwise dissolving adult adoptions between same sex couples is far more complicated than perhaps it should to be. The “traditional” mode of adoption is that the adult adopter integrates the child adoptee into the family.\textsuperscript{49} As such, it is understandable that the statutory language surrounding adoptions maintains a high bar for dissolution.\textsuperscript{50} However, the family integration rationale of traditional adoption does not translate to adult adoptions.\textsuperscript{51} Unfortunately, as previously discussed, the statutory language surrounding adult adoption borrows so heavily from “traditional” adoption statutes that the process for vacating an adult adoption maintains the high standards that are applied in vacating the adoption of a minor.\textsuperscript{52} We turn now to a description of the process for undoing adult adoptions and a consideration of the hardships faced by same sex couples who are unable to do so.

\textsuperscript{46} Id.
\textsuperscript{47} See id. (noting that following Rustin’s death, one reporter “suggested [to Naegle] that, because of the adoption, [their] relationship was incestuous”).
\textsuperscript{48} Cf. Ausness, \textit{supra} note 10, at 277–79.
\textsuperscript{49} Id. at 242.
\textsuperscript{50} 2 AM. JUR. 2D \textit{Adoption} §§ 141, 143–151, 154, 157–160 (2018) (discussing the stringent limits on having an adoption order vacated, annulled, or otherwise dissolved); see also Ausness, \textit{supra} note 10, at 304.
\textsuperscript{51} See Ausness, \textit{supra} note 10, at 243–46 (discussing the differences between the rationales for adopting minors versus adopting adults).
\textsuperscript{52} Id. at 304–05.
Much like legislative language authorizing adult adoptions, statutes regarding vacation or annulment of adult adoptions vary from state to state. Some states only require the signature of the adoptive “parent” to terminate the adoption. But, generally, adult adoptions are considered final and will not be overturned in the absence of judicial findings of fraud, mistake, or other reason warranting relief. For example, Nino Esposito and Drew Bosee’s petition to have their adoption vacated was initially denied by a trial judge who claimed that it was beyond his discretion to dissolve the adoption due to the lack of an express statutory provision permitting annulment. But, the refusal to vacate the adoption for fear of abusing judicial discretion is arguably discretionary in its own right. Other judges within other states had vacated adult adoptions for reasons similar to those presented by Nino and Drew.

Some extant case law reveals that courts are most likely to rely on equitable considerations to determine whether to grant or deny a petition to vacate an adult adoption between same-sex couples. In *H.M.A. v. C.A.H.W.*, the Family Court of Delaware, Sussex County, granted movant’s request to reopen and vacate an adoption decree so that the parties could enter a civil union. The court reasoned that, because the adoption occurred at a time when state law did not recognize same-sex unions, “it [wa]s no longer equitable” for the adoption to remain valid.

Though the *H.M.A.* court reached a favorable outcome, it is not certain that all courts would be willing to view the facilitation of same-sex marriage as serving public policy. Judge Richard Posner famously posited the notion that the canons of statutory interpretation are so numerous and varied that there is a canon to support nearly any stance on any issue, which ultimately facilitates what he refers to as “judicial activism.” Imagine, for instance, asking a former Fayette County, Kentucky Family Court Judge who was quoted as stating that gay marriage was an...
"oxymoron [like] jumbo shrimp" whether the vacation of an adoption agreement between two consenting adults in order for them to marry constituted a valid reason to justify relief. Due to the competing public policies of promoting marriage and upholding the sanctity of the parent-child relationship that is established via an adoption, it is difficult to say with certainty that all judges would seek to uphold the former. In light of the advent of same-sex marriage as a constitutional right, the denial of a petition to vacate an adult adoption between a same-sex couple to facilitate their marriage both violates the supremacy clause and fails to uphold the values of "equality, openness, flexibility, and growth" that are "critical . . . [to any] . . . legal system."

IV. THE OBERGEFELL DECISION AND THE RIGHT TO MARRY

Although the Constitution is facially silent on the matter, the Supreme Court has interpreted the Constitution to establish marriage as a fundamental civil right. Though some have argued that Constitutional silence mandates judicial inaction, the Supreme Court has taken the Due Process Clause to impute equal protection to all races and sexual orientations. The operational constitutional text is Section One of the Fourteenth Amendment, which reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This specific language was applied in the Supreme Court's decision Loving v. Virginia, in which Chief Justice Earl Warren wrote that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

In Obergefell v. Hodges, fifty-one years after Loving, the Supreme Court responded to a circuit split over whether state bans on same-sex marriage violated

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64 See id. at 85 nn. 389–90 (highlighting rights that have been recognized as "fundamental" and therefore considered within the scope of "liberty [interests] specially protected by the Due Process Clause").
65 U.S. CONST. amend. XIV, § 1.
66 Loving, 388 U.S. at 12.
Beyond simply ruling as to whether those bans were in violation of the Fourteenth Amendment, the Supreme Court issued a sweeping ruling, echoing earlier cases that recognized marriage as a fundamental right and holding that "couples of the same-sex [could] not be deprived of that right and that liberty."68

Obergefell held that same-sex couples have a constitutional right to marry protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.69 Ultimately, the four principles underpinning the protection of the right to marry apply equally to opposite and same-sex couples: (1) the right to choose whether and whom to marry is "inherent in the concept of individual autonomy,"70 (2) the right to marry serves relationships that are equal in importance to all who enter them;71 (3) assuring the right to marry protects children and families, which implicates the myriad of rights related to procreation and childrearing;72 and (4) marriage is the very "keystone of our social order" and foundation of the family unit.73 The Court explained that refusing to allow same-sex couples to marry denies them a myriad of legal rights, including those related to taxation, insurance benefits, intestate succession, spousal evidentiary privileges, child custody and support, etc.74

The Supremacy Clause of the United States Constitution establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority constitute "the supreme [l]aw of the [l]and."75 As such, state courts are bound by the Constitution and generally, in a conflict between state and federal law, federal law must be applied.76 Post Obergefell, if state adoption statutes allow judges to enforce an adult adoption between a same-sex couple or if judges construe adoption statutes in such a way as to require enforcement of the adoption, such enforcement denies the couple's fundamental right to marry, as recognized by the Supreme Court, and violates the Supremacy Clause. Under the authority of the Supremacy Clause, public policy concerns and state interests in the security of adoptive relationships must take a back seat to the constitutionally protected fundamental right to marry.

68 Obergefell, 135 S. Ct. at 2604.
69 Id.
70 Id. at 2599.
71 Id.
72 Id. at 2600.
73 Id. at 2601.
74 Id.
75 U.S. CONST. art. VI, cl. 2.
76 See id. art. VI, cl. 2, 3; see also LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 647 (2013) ("Questions of federal control . . . often turn on identifying the proper scope of federal law, since the supremacy clause . . . leaves no doubt that federal law can displace conflicting state law.").
V. PROBLEMS FACED BY SAME-SEX COUPLES IN ADOPTIVE RELATIONSHIPS

The failure of courts to dissolve adult adoptions creates a host of issues for the those trapped in a legally recognized union that no longer best reflects the nature of their relationship. Beyond the fact that a spousal relationship vests greater rights of intestacy and succession, forcing a homosexual couple to remain in a legally recognized parent-child relationship creates other, highly problematic, issues. The most extreme point of concern for homosexual partners trapped in an adoption that no longer serves its purpose is the possibility that they will be subject to criminal incest statutes due to the sexual nature of their relationship. Though this may seem outlandish, the American political landscape following the 2016 election has taken such a turn for the bizarre that one is hesitant to count anything out. The applicability of incest statutes largely turns on whether the state recognizes an adult adoptee as a "child" of the adopter.

Due to the multiplicity of adoption statutes in the United States, not all adopted adults are conferred status as the adopter's "child." In some cases, courts included an adopted adult within the meaning of the term "children" or "lawful children." In California, for example, adopted individuals are, by statute, accorded the same status as natural children. This includes the right to succeed to the estate of the adoptive parents. A California court held that the construction of a statute determines whether the term "children" includes adopted children and that the word "children" as used in the California statutes included all adopted persons. A New Mexico Court stated that the term "lawful child" included the petitioner's adopted adult

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79 See Ausness, supra note 10, at 255-58 (discussing states that have required a "[p]re-existing parent-child relationship" for adult adoptions); Mani Rae Urban, The History of Adult Adoption in California, 11 J. CONTEMP. LEGAL ISSUES 612, 615 & n.22 (2000) ("Other disadvantages include . . . the threat of criminal prosecution in states with affinity-based incest statutes . . . . "); see also State Criminal Incest Statutes, AM. PROSECUTORS RESEARCH INST. (2010), http://www.ndaa.org/pdf/criminal_incest%20chart%20_2010.pdf [https://perma.cc/9SWU-Z6BU] (showing that many states prohibit relationships with adopted children).
80 See, e.g., Potraker, supra note 21, at §§ 3[b], 4[c], 14, 18[c]-[d] (discussing variation among states with regard to adult adoptees' classification as children of the adopter).
81 See, e.g., Sanders v. Yanez, 190 Cal. Rptr. 3d 495, 499-501 (Cal. Ct. App. 2015) (interpreting Texas law and ruling that "adult adoption created a parent-child relationship for all purposes."); see id. at 499 (noting that "[t]he status of an adopted child is determined by the laws of the state in which the adoption was effected") (quoting In re Hebert's Estate, 109 P.2d 729, 730 (Cal. Dist. Ct. App. 1941)).
82 In re Estate of Stanford, 315 P.2d 681, 689 (Cal. 1957) ("It has been the policy of this state, at least since the adoption of the Civil Code, to accord to adopted children the same status as natural children.").
83 Id. at 689–90; see also CAL. PROB. CODE § 6450(b) (West 2018).
84 In re Estate of Stanford, 315 P.2d at 691.
stepdaughter. Illinois expressly limits its statute's reach in cases of aggravated incest to sexual relations between parents and adopted minors under the age of eighteen years, thereby implicitly acknowledging that unrelated adults have the right to decide for themselves what type of sexual relationships to pursue and with whom.

For adult adoptees of their romantic partners, the status of "child" has become a double-edged sword: where granted it may subject them to criminal incest statutes, where denied, the adoption may not have the desired influence with regard to jurisdictional laws of intestacy. Iowa courts, for instance, adhere to the Loco Parentis rule, which provides that adopted adults are not ordinarily considered the adopter's "'child' or 'legally adopted child' unless the adult [had originally been] taken into the adoptive home as a minor and reared as a member of adopting parent's family."

The threat of falling under the purview of criminal incest statutes is certainly jarring, but at the heart of the matter is the fact that adult adoptions that are not vacated could either prevent same-sex couples from marrying or, where the parties attempt to marry in spite of their legal status as parent and child, that their unions could be voided.

VI. SOLUTIONS

This Note now turns to two possible safeguards against state judicial infringement upon the Obergefell decision. Though this is far from an exhaustive list, these proposed solutions are initial steps in finding legal solutions for same-sex couples who had once pursued adult adoption as a marriage substitute but now wish to exercise the fundamental right to marry. The first addresses the nature of the constitutional interests at stake, the second speaks to the nature of adult adoptions.

A. Federal Statutory Provision

Although family law is thoroughly entrenched in state-specific statutory law, the interests at stake in dissolving adult adoptions following Obergefell are so constitutional in nature that they would legitimize the passage of a federal provision allowing gay and lesbian couples to marry by vacating their adoptions. Although Nino and Drew ultimately won on appeal and were able to marry, they could have avoided additional court costs and emotional hardship had the trial court been made subject to a remedial federal statute that mitigates judicial discretion where same sex couples wish to vacate an adult adoption in order to marry.

Broadly speaking, remedial statutes are statutes that are designed to introduce new regulations for the advancement of social welfare or are conducive to the social good. Given the language of Obergefell, it seems that both marriage and the right...
to equal protection under the law are both matters of social welfare. As such, a remedial statute to advance the matters of social welfare present in the Obergefell decision would be within reason.

The Uniform Adoption Act of 1994, which has already been adopted in its entirety by several states, could easily serve as the template for such a remedial federal statute. However, it would be unwieldy and unnecessary to implement the entirety of the act as a federal statute. The language in § 5 of the 1994 Uniform Adoption Act concerning adult adoptions could be amended to remove the avenues for judicial discretion in procedures for vacating adult adoptions between same sex couples who wish to marry. Judges Posner and Easterbrook have persuasively explained, in a series of cases, that maxims of statutory construction suggesting that certain types of statutes should be interpreted “liberally” and other types “strictly” are among “the least persuasive canons” and are “useless in deciding concrete cases.” But, it is still a widely accepted maxim that remedial statutes ought to be construed liberally. As such, a federal remedial statute would need to be narrowly tailored to facilitate vacating adult adoptions between gay and lesbian couples to further the public interest espoused by the Obergefell opinion without infringing upon the public interest in the practice of “traditional” adoption as a secure method of forming familial bonds.

This approach is the more extreme of the two, as “federalism in family law is long and deeply established in judicial precedents, including a long-line of decisions by the Supreme Court of the United States.” However, it is worth noting that, in practice, this concept seems to only come out of hiding when critics of marriage equality are searching for an ideological foothold. Consider, for example, the proposed Federal Marriage Amendment, introduced in the House of Representatives in 2002 and reintroduced in 2003, which in its entirety read:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

93 See Stomper v. Amalgamated Transit Union, Local 241, 27 F.3d 316, 320 (7th Cir. 1994); Bushendorf v. Freightliner Corp., 13 F.3d 1024, 1026 (7th Cir. 1993); Contract Courier Servs., Inc. v. Research & Special Program Admin., U.S. Dep’t of Transp., 924 F.2d 112, 115 (7th Cir. 1991).
94 See, e.g., Posner, supra note 59, at 808–09.
The principle of “federalism in family law” has been wielded both to support and oppose the Federal Marriage Amendment on the grounds that it abolished same-sex marriage and did not do enough to outlaw all same-sex unions, respectively. 98

As previously discussed, there is an established federal constitutional pretext for preemption via the Supremacy Clause. 99 Some commentators have argued that the Supremacy Clause in and of itself renders the principle of “federalism in family law . . . a dead letter.” 100 Although enacting a remedial federal statute would be highly controversial, the current statutory schema for vacating adult adoption in most states is preempted by the Obergefell decision. 101

B. Adult Adoptions as Contractual Agreements

This Note also seeks to reconcile the critiques of courts that denied the adoption of LGBTQ+ individuals and the need for uniform procedures to ensure that the right for gay and lesbian couples to marry is upheld. In rejecting the petition for adoption in In re Adoption of Robert Paul P., the court noted that it was inappropriate to use adult adoption to achieve the objectives that are achieved by marriage, wills, and business contracts. 102 The court missed the point in its analysis, as clearly these two adult men would have pursued marriage if it was available because it provides as much security as an adoptive relationship. But, the case does provide some insight into how adult adoptions could be re-conceptualized to make the process of vacating them more mechanical and thereby less prone to judicial interference.

To think about the nature of an adoptive relationship between adult members, it makes little sense that it would be caught up in the social and legal sentimentality associated with the adoption of minors. Professor Richard Ausness of the University of Kentucky College of Law succinctly describes the differences between adult adoptions and “traditional adoptions” as they influence how adoptions ought to be terminated:

Perhaps where a “familial” [adult] adoption is concerned, the adoptive relationship should be terminated by a judicial decree with an appearance by one or both parties. However, in [the case of] other [adult adoptions], if the rights of third parties are not affected, perhaps either party should have the power to terminate the relationship by written notice to the other. . . . While it may be appropriate to refer to one party as a “parent” and the other as a “child” in the context of a familial adult adoption, it makes no sense when a member of a same sex couple adopts the other . . .

98 See Wardle, supra note 96, at 139–40.
99 U.S. CONST. art. VI, § 1, cl. 2; see also supra notes 75–76 and accompanying text.
100 Wardle, supra note 96, at 140; Wardle, supra note 95, at 244–45.
... [It is inaccurate to describe a relationship between equals as "parental" in nature.]

Because adult adoptions between same-sex couples are generally used as "proxies for marriage" to "establish rights and responsibilities between same-sex cohabitators," it makes sense to think of an adult adoption as a contractual agreement as opposed to a "traditional" adoption. It is drilled into the minds of every aspiring attorney in this country that the formation of a contract requires an offer, consideration, acceptance, and mutuality. Where two gay or lesbian partners sign a document conferring to one the intestacy status of the other's issue, it is plain that all elements of a contract are met.

Article I, Section 10, Clause 1 of the United States Constitution bars interference with any private contract, which may serve as some relief to those who fear that the doctrine of "federalism in family law" would be tread upon by allowing same-sex partners to terminate legal relationships that no longer best serve their needs. The process for terminating an adult adoption would be streamlined, as the termination of a contract may be independently negotiated and agreed upon without court interference. Conceptualizing adult adoption as a contractual agreement would bring the practice of adult adoption out of conflict with the Obergefell decision and would save the courts a good deal of work.

Though by far the simplest solution to streamline the termination of adult adoptions, the notion of treating adult adoptions as a contract may be harmful to those who enter into the adoption for the sheer purpose of establishing the parent-child relationship that is established in "traditional" adoptions. Though rare, adult adoptions do occur for the sole purpose of establishing a familial relationship. This practice has been seen by courts between an individual and their caregiver that had long been considered a child by the family or in the adoption of adult stepchildren. But, concerns regarding adult adoptions for familial relationship

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103 Ausness, supra note 10, at 304.
104 Id. at 298.
106 See, e.g., In re Estate of Griswold, 354 A.2d 717, 726 (1976) ("Adoption of adults is ordinarily quite simple and almost in the nature of a civil contract."); Ausness, supra note 10, at 268 & n.269 (noting that some courts viewed the adoption process as "contractual in nature" in determining the adopted child's inheritance rights); id. at 299 ("[Adult adoptions] are strategic in nature and the essential relationship between the parties is contractual rather than familial in character."); Farabee, supra note 105, at 237-40; Arthur Jay Silverstein, Adoption in Jewish Law, 48 CONN. B.J. 75, 81-82 (1974) (discussing "Jewish law's conception of adoption as simply an enforceable contract or promise to support the child"); Lisa R. Zimmner, Note, Family, Marriage, and the Same-Sex Couple, 12 CARDOZO L. REV. 681, 688-92 (1990).
109 See Ausness, supra note 10, at 254, 256-57, 297-98.
purposes could be addressed within the language of the contract itself. Parties wishing to establish a familial bond could provide express provisions within the language of their agreement. If parties to an adult adoption wishing to establish a familial relationship take offense that their familial bond, if re-conceptualized as a contractual agreement, could be voided by one or both parties, they could incorporate a robust termination clause in their contract.

VII. BROADER IMPLICATIONS

Beyond potentially violating the Supremacy Clause, denying a petition to vacate an adult adoption to facilitate marriage implicitly prioritizes adoptive relationships over marital ones. Public policy has long favored marriage and parenthood. But, the necessity of vacating an adoption between same-sex partners to facilitate their marriage pits the two relationships, which are often considered by policy makers to exist in tandem, against one another.

Although the law stakes an interest in upholding familial autonomy, states have long “influence[d] families by enacting legal rules that provide incentives . . . [to] shape familial behavior.” Choice architecture,” or “the state[’s] influence[] [on] families [through] describing, framing, or presenting choices in a manner that affects decisions,” has been cited as a legal method for impacting familial outcomes. For example, choice architecture can be seen in the distribution of property that occurs at death: most states adhere to equitable property distribution, thereby ensuring that homemakers are able to take despite their low earning capacity during the marriage. These rules, though arguably for the betterment for society, allow the social norm that “marriage is a partnership” centered around household management to bleed into legislation.

112 See, e.g., Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982) (“It is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child’s benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.” (citing Walton v. Coffman, 169 P.2d 97, 103 (Utah 1946))); Carl E. Schneider, The Channeling Function in Family Law, HOFSTRA L. REV. 495, 500–01 (1992).

113 See, e.g., Martha Albertson Fineman, What Place for Family Privacy?, 67 GEO. WASH. L. REV. 1207, 1207–09 (1999) (discussing the definition of “family” and noting that while “[t]oday there is much less agreement about . . . who should be considered ‘family,’ [t]he traditional core of husband and wife, with or without children, seems to qualify in all definitions”).


116 See id.

117 See id.
Though marriages are created and recognized by law, they are privately lived and widely varied in practice.\textsuperscript{118} To individuals within a marital relationship, a marriage may serve as a symbolic commitment, an economically advantageous arrangement, or a "religious mandate."\textsuperscript{119} Beyond the individual level, "the society that constructs and contains [marriage]" ascribes particular meanings to it.\textsuperscript{120} Social interests in marriage include the establishment of a system for "property transfers at death" and the perpetuation of a moral and religious order.\textsuperscript{121} It has even been argued that marriage exists to reign in and confine male sexuality for the betterment of society as a whole.\textsuperscript{122} These outdated modalities of marriage limit the development of family law and fail to align with the way that marriage is experienced at the individual level.\textsuperscript{123}

Like marriage, adoption is legally granted but privately lived. Adoption is also like marriage in that the social interests informing adoption policy are largely incongruent with individual motivations for pursuing adoption, particularly with adoptions that occur between adults. Perhaps the judicial pause in granting petitions to vacate adult adoptions stems from a concern about corrupting the institution of parenthood or a concern that adoptions that occur for the purpose of establishing a parent-child relationship are somehow diminished when petitions to vacate adult adoptions are granted. This pause, however, makes little sense where there are such a wide range of motivating factors for adult adoption that do not involve the establishment of a parent-child relationship.\textsuperscript{124} Early 20th century scholars have described adoption as "an institution of high morality; for the love between parent and child is of the highest ethical and educative value . . . ."\textsuperscript{125} Although this is certainly a charming sentiment, it fails to reflect the realities of same-sex couples who entered an adoptive relationship as a marriage substitute and should not serve as the basis for statutory language governing the formation and dissolution of adult adoptions.\textsuperscript{126}

When the enforcement of an adoptive relationship serves as a blockade to marriage, sociological fictions regarding the nature of family are levied at the judicial level under the guise of public policy. Same-sex couples who are trapped in an adoptive relationship and unable to marry may be made subject to negative psychological and legal implications that hinge on the idea that they are engaged in a parent-child relationship. This judicial imposition of social norms regarding the nature of family is antithetical to the law's continued interest in familial autonomy.

\textsuperscript{119} \textit{Id.} at 242.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} & n.6.
\textsuperscript{123} See \textit{id.} at 240-41, 244-45.
\textsuperscript{124} See Ausness, supra note 10, at 243-46.
Though the Obergefell decision is undoubtedly equivocated with social progressivism, it is worth noting that ultimately couches marriage as an end within itself, rather than a means to an end. This is to say that the thrust of Obergefell contemplates the primacy of marriage as an institution rather than individual autonomy in the formation of relationships and the sharing of benefits. Denial of a petition to vacate an adult adoption designed to facilitate a same-sex marriage further heightens the inequality between marital and non-marital relationships that was exacerbated in the Obergefell decision. Although the decision in Lawrence v. Texas is often cited as the groundwork for the Obergefell decision, it is worth noting that Lawrence ultimately espoused an ambivalence toward the prioritization of marital and non-marital sexual relationships rather than staking an interest in the legality of same-sex marriage. Though this may be a boon for many, Obergefell ultimately serves to funnel gay and lesbian couples who are engaged in non-traditional family structures into marriage. As Professor Melissa Murray noted: “Obergefell builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution into which individuals may enter. Alternatives to marriage . . . are by comparison undignified, less profound, and less valuable.”

Even when a same-sex couple in an adoptive relationship does not wish to marry, marriage may seem compulsory in order to secure superior rights of inheritance and filiation, as well as to take better advantage of social programs aimed at incentivizing marriage. In sum, there exists a fair amount of irony in the denial of a petition to vacate an adult adoption in order to facilitate a same-sex marriage in that it imposes social norms to restrict a transition from a subversive family structure to one that more closely aligns with how our society and legal system conceives of marriage.

CONCLUSION

Where same-sex couples adopt one another but later wish to marry and are denied their petition to vacate their adoptions, they are denied superior rights of inheritance and, more importantly, they are denied the due process of law and equal protection of the laws granted to them by the Fourteenth Amendment. Nino Esposito and Drew Bosee were eventually able to marry, but does that truly excuse

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130 See id. at 1210–11, 1258; see also Craig W. Christensen, Legal Ordering of Family Values: The Case of Gay and Lesbian Families, 18 CARDOZO L. REV. 1299, 1307–08, 1346, 1363 & n.383, 1390 & n.552 (1997).
the interim between trial and appeal during which they were denied superior rights of inheritance and could have been made subject to criminal incest statutes.\textsuperscript{131}

The procedural language in place for the vacation of adult adoption varies from one jurisdiction from the next, but each iteration largely relies on judicial findings of fraud, mistake, or other reasons justifying relief.\textsuperscript{132} Though it may seem that the procedure for vacating adult adoptions is simply a formality or that compassion and common sense would guide any judge to vacate an adoption between a same-sex couple who wished to marry, the current American political landscape has taught us that reason and compassion do not always win the day.

This Note contemplated two possible solutions to the hole in the law regarding the dissolution of adult adoptions. First, the implementation of a remedial federal statute. This avenue is less likely in light of the spirit of our current federal governing body and the fact that family law has traditionally fallen under the state’s purview. But, it is not beyond reason to suspect that the Obergefell opinion is attempting to inch our legislative scheme away from “federalism in family law” and toward an understanding of family law that falls within federal jurisdiction.

Second, this Note suggested that a re-conceptualization of adult adoptions as contractual agreements could streamline the process of vacating adult adoptions. This, however, is problematic in its own right as it would ultimately serve to remove adult adoption agreements from the courts entirely. Though courts may welcome the lightened workload, allowing individuals to freely contract themselves in to and out of familial relationships could radically alter the family structure. But, this argument may prove to be less than persuasive in practice, as it seems unlikely that an adult wishing to form a “parent-child” relationship for sentimental reasons would want to breach or otherwise excuse themselves from the agreement.

In identifying the need to reform procedures for vacating adult adoptions, this Note has brought the tension between legislative interests in romantic and familial relationships into focus. Trapping same-sex couples in an adoptive relationship that does not best reflect the nature of their relationship subjects them to undesirable consequences simply because the exercise of a fundamental right to marry does not fall within courts’ understanding of “other reason[s] justifying relief.”\textsuperscript{133} This Note also touched on how Obergefell may have ultimately denigrated the reception of non-marital romantic relationships between same-sex partners to the point that marriage is nearly compulsory for same-sex partners who had previously adopted one another.

Adoption is a sensitive subject, especially as it applies to adults, and rightfully so. Any solution reached for vacating adult, same-sex couple adoptions should temper the social interests present in both marriage and the formation of familial bonds. It is difficult to imagine how the current procedures for vacating adult adoptions could

\textsuperscript{131} See supra note 88 and accompanying text.
\textsuperscript{132} See supra notes 53–54 and accompanying text.
\textsuperscript{133} See, e.g., DEL. FAM. CT. R. CIV. P. 60(b).
be unified or modified to mitigate judicial infringement upon the rights of members within the LGBTQ+ community. Although it is not simple, it must be done.

[T]he right to marry is a fundamental right inherent in the liberty of the person, and . . . couples of the same-sex may not be deprived of that right and that liberty. . . . [S]ame-sex couples may exercise the fundamental right to marry. . . . State laws . . . are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.\textsuperscript{134}

Under Obergefell, state legislation that grants judicial discretion in granting or denying petitions to vacate adult adoptions should be deemed invalid to the extent that they bar same-sex couples for marrying. It is the responsibility of lawmakers to modify the systems that are in place so that no one may be impeded in the exercise of their fundamental rights.

\textsuperscript{134} Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).