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Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption

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CONSTRUCTING FAMILIES IN A DEMOCRACY: COURTS, LEGISLATURES AND SECOND-PARENT ADOPTION

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One item I would nominate for the list of unfinished feminist business is the ongoing effort to dislodge the normative nuclear family as the only legitimate affiliative structure in which women—and men too—might live. This effort is probably better disaggregated and understood as embracing multiple efforts to create legal and social spaces that can accommodate different lives—including, to name a few, a life in which women do not marry or bear children, in which women raise children without men, or in which same-sex couples live or raise children together. I would like to focus on the last of these struggles, and to focus more precisely on how one of the less glamorous tools of law reform—statutory interpretation—has figured prominently in advancing that struggle.

The last decade has been an amazingly active one for those advocating the rights of same-sex families. In terms of sheer media coverage of issues of this kind, little has rivaled the campaign to win same-sex marriage rights, especially in Hawaii and Vermont. But somewhat off the radar screen, a different struggle has been unfolding and it has been steadily—though unevenly—producing important results for same-sex couples and their children. I have in mind the campaign to win adoption rights for lesbian and gay couples, and more specifically the campaign to win the right of “second-parent adoption.” That term describes a situation in which many same-sex couples who are part of the so-called “gay-by boom” find themselves. As an empirical matter, lesbian couples have dominated the cases that have tested the second-parent adoption theory, but what I say applies to male couples as well.²

* Thanks to David Chambers and Juliet Brodie for insightful comments. A substantial part of this research was completed when I was a member of the University of Michigan Law School faculty, and I gratefully acknowledge the financial support I received for this project.


2. For a case involving a gay male couple pursuing a second-parent adoption after one of the men had individually adopted a child the couple was raising together, see generally In re M. M. D., 662 A.2d 837 (D.C. 1995). Despite this counterexample, there are several plausible
In a typical second-parent adoption scenario, a lesbian couple decides to raise a child together. In most cases, one woman is the biological parent of a child who has been conceived through donor insemination, and the other woman seeks to adopt the child and become the child's second legal parent without the biological mother having to relinquish her parental rights. In the last several years, courts in at least twenty-one states have authorized this sort of adoption, and appellate courts in five states and the District of Columbia have affirmed the second-parent adoption theory. The Uniform Adoption Act proposed by the National Conference of Commissioners on Uniform State Laws has also approved second-parent adoption. While there have been important losses, including in four appellate courts, this has nevertheless been an area of significant progress, and has inspired one commentator to observe that second-parent adoption has "become the unmistakable trend of the law's development in this area." Indeed, the advent of this legal form, and the publicity it has sometimes generated, has helped to make the very idea of a lesbian or gay family an emerging part of our
collective social and legal life.\textsuperscript{10}

The victories have come as a result of lawsuits urging courts to construe existing state adoption statutes to permit one partner in a same-sex couple to adopt the other partner's legal child. Although several litigants have also invoked a constitutional theory in favor of second-parent adoption, none of the courts that have recognized such a right have grounded their ruling in a constitutional principle and, with one exception, none of the resulting judicial holdings have been codified.\textsuperscript{11} The relevant arena has, in other words, been the judicial arena of statutory interpretation.

In this Essay, I first review the appellate opinions in this area in order to illustrate how principles of statutory interpretation have been such a productive tool of reform. Then, I consider an argument characteristically mounted by opponents of second-parent adoption (including judges in the majority or dissent in several cases)—the argument that it is undemocratic for courts, as opposed to legislatures, to recognize and authorize same-sex families in this fashion. I offer several responses to this democratic objection, and I emphasize here the importance of what definition of democracy is embraced. I argue that even if one accepts the conventional, majoritarian definition of democracy, judicially recognized second-parent adoption is a legitimate doctrine and the product of an appropriate exercise of judicial power. I then suggest that the majoritarian account is, in any event, impoverished in ways that are nicely illustrated by the second-parent adoption cases. I also sketch out some ways in which the idea of second-parent adoption exemplifies, and is consistent with, other democratic values that emphasize social pluralism and a strong commitment to social equality. These alternative democratic values have implications that range far beyond the context of second-parent adoption, including important implications for feminism.

\textsuperscript{10} See Jane S. Schacter, "Counted Among the Blessed": One Court and the Constitution of Family, 74 TEX. L. REV. 1267, 1269-70 (1996) (examining early trial court opinion on second-parent adoption and the press coverage it received as an example of the capacity of law to help shape social understandings).

\textsuperscript{11} In 1995, the Vermont legislature codified the Vermont Supreme Court's decision interpreting that state's law to permit second-parent adoption. See VT. STAT. ANN. tit. 15A, § 1-102(b) (Supp. 1999). In addition, the Connecticut legislature recently passed a bill codifying second-parent adoption, but that law overturned a state Supreme Court decision that had denied such an adoption to a lesbian couple. See Cheryl Wetzstein, Mississippi Bans Adoption by Homosexuals, WASH. TIMES, May 5, 2000, at A1.
SECOND-PARENT ADOPTION: THE APPELLATE CASES

The demand for second-parent adoption has emerged as more and more same-sex couples have sought to raise children together. It is not hard to understand the origins of that demand once the legal situation of same-sex families is examined. Without the legal protection afforded by adoption, both the child and non-biological parent are put at substantial risk and disadvantage. Consider some consequences if one partner bears the child and the other partner fully co-parents the child but is not permitted to adopt. The child may well be ineligible for the functional co-parent’s health insurance, life insurance or disability benefits and, absent a will, would be unable to inherit from that parent. In a medical emergency, the functional co-parent may be unable to consent to needed procedures. In many jurisdictions, if the couple breaks up, the nonbiological parent will be without legal standing to seek visitation or custody rights, or otherwise to protect what may be an extremely significant parental relationship in the child’s life. If the biological parent dies, the surviving partner may well lose custody to a biological relative of the child. Apart from these tangible legal risks, there is the disturbing asymmetry between the profound emotional bonds that may link a child to a non-biological parent and the law, which, in the absence of second-parent adoption, is likely to treat that parent as a “legal stranger” to the child.

Understanding the legal status of second-parent adoptions requires understanding some elementary principles of adoption law. In the United States, adoption is a creature of state law. Although there are variations among state laws, most statutes share certain characteristics. Common statutory requirements, for example, include: the consent of certain parties (such as natural parents, any court-appointed guardian, or the child if of majority age); an agency-generated home study of prospective adoptive parents; and a judicial determination that the adoption would be in the best interests of the child. Most relevant to the second-parent adoption context, adoption laws commonly contain a so-called “cut-off” provision that requires the birth parents to surrender all legal rights and

12. For a thoughtful analysis of the ramifications of denying the right of second-parent adoption, see generally Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 527-41 (1990).

13. For a comprehensive overview, see generally H. JOSEPH GITLIN, ADOPTIONS: AN ATTORNEY’S GUIDE TO HELPING ADOPTIVE PARENTS 3-5, 30-72 (1987).
responsibilities to the child, or a court to terminate those rights, in order to pave the way for the adoption. An example of typical language of this kind is found in a New York statute, which provides that "after the making of an order of adoption the natural parents of the adoptive child...shall have no rights over such adoptive child or his property by descent or succession." Such termination of the birth parents’ legal rights is consistent with the basic principle that the adoption extinguishes an existing set of family relationships and creates a new set in its place. The adoptive parents, that is, acquire all the rights and responsibilities that are relinquished by the birth parents.

State adoption statutes generally recognize an exception to this cut-off provision for stepparent adoptions, which, by some tallies, have come to comprise the majority of all adoptions. In stepparent adoptions, one of the birth parents remarries (or marries for the first time), and that parent’s new spouse seeks to adopt the child. The remarried birth parent remains a primary parent to the child and has no intent to relinquish parental rights and responsibilities. In order to permit that parent’s new spouse to adopt the child and to tailor the idea of adoption to these circumstances, adoption statutes commonly forego the cut-off provision in the context of a stepparent adoption by permitting adoptions to go forward even though one of the birth parents retains full legal rights. The stepparent adoption does, however, generally have the effect of terminating the parental rights of the remaining (noncustodial) biological parent. As a result, the child ends up having only two legal parents when the stepparent adoption is concluded.

This cut-off provision creates an obvious dilemma when a lesbian couple seeks a second-parent adoption because the child’s legal parent—like the custodial biological parent in a stepparent

14. N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 1999); see also, e.g., MASS. GEN. LAWS ANN. ch. 210, § 6 (West 1999) ("[A]ll rights, duties and other legal consequences of the natural relation of child and parent shall...terminate between the child so adopted and his natural parents and kindred"); WIS. STAT. ANN. § 48.81(1) (West 1997) (except as otherwise specified, a child is eligible for adoption only if that child’s “parental rights have been terminated”); id. at § 48.92(2) ("After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person’s birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.").

15. See Christenson, supra note 9, at 1409-10.

16. See id.


18. See id.
adoption—emphatically does not wish to surrender any rights to the child. Rather, the child’s legal parent is consenting only to her partner’s acquisition of the same parental rights and responsibilities. Unlike other custodial biological parents, however, a lesbian mother is not yet permitted in any state to marry the person who seeks to adopt her child. Courts asked to approve a second-parent adoption have thus had to determine whether, in the face of these facts, the statutory cut-off provision precludes the requested adoption. Indeed, the dilemma created by the cut-off provision has been the most common statutory obstacle confronting courts. Many of the courts that have rejected second-parent adoptions have regarded this provision as critical statutory evidence that the legislature did not authorize such adoptions.19

Conversely, those courts that have approved second-parent adoption have had to confront the cut-off provision directly and have generally used tools of statutory construction to negotiate the obstacle. Several interpretive routes have been employed, many of them using familiar canons of construction. Some courts have held that it would violate the rule against construing statutes to produce “absurd results” to read the adoption laws to terminate the rights of a parent who intends to raise the child jointly with a prospective adoptive parent, in circumstances in which the adoption would serve the child’s best interests.20 Relying on this principle, these courts have departed from what might be taken to be the “literal” language of the statute in order to avoid such results. In a variation on this theme, the dissent to the Wisconsin Supreme Court’s opinion that denied second-parent adoption relied on the canon construing language as “directory” rather than “mandatory” to support the conclusion that the cut-off provision should be dispensed with under the circumstances.21 Another appellate court concluded that the cut-off provision should not be applied in these ambiguous circumstances because the interpretive directions in the body of the applicable statute instructed courts to construe the adoption law liberally and to


apply it to serve the child’s best interests. Pursuing a somewhat different course, two courts have construed the petition for adoption as one made jointly on behalf of the legal mother and her partner, and have held that the cut-off provision was never intended to apply when the natural legal parent was a party to the adoption. Finally, some courts have analogized lesbian co-parents to stepparents and have held that the statutory stepparent provisions that waive the cut off requirement should be applied.

Courts that have declined to grant second-parent adoptions, or dissenting judges in cases that have approved adoptions, have frequently characterized the use of interpretive principles like these as a judicial encroachment on legislative prerogatives and as undemocratic. The central theme in these opinions has been that second-parent adoption should be a legislative rather than judicial determination. In the remainder of this Essay, I assess the strength of this democratic objection.

IS JUDICIALLY-RECOGNIZED SECOND-PARENT ADOPTION UNDEMOCRATIC?

In this Section, I argue that the democratic objection falls short

24. See In re M. M. D., 662 A.2d at 860-61; cf. In re Jacob, 660 N.E.2d at 405 (comparing second-parent adoption to other situations in which cut-off provision had been held inapplicable, including stepparent context, and concluding that the cut-off provision was "designed as a shield to protect new adoptive families [and] was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents").
25. See, e.g., In re Adoption of T. K. J., 931 P.2d 488, 493 (Colo. Ct. App. 1996) (stating that petitioners’ theory would be "tantamount to judicial legislation"); Id. at 496 (determining whether the unavailability of second-parent adoption "is or is not in keeping with the changing social mores of the public at large is the role of the democratic process and not of the courts"); In re Adoption of Tammy, 619 N.E.2d at 321-22 (Lynch, J., dissenting) (arguing that majority should have construed adoption law to permit nonbiological mother to adopt as an individual with biological mother’s consent, rather than reading law to permit a joint adoption as majority opinion did, because pursuing the former option would have avoided "invading the prerogatives of the Legislature and giving legal status to a relationship by judicial fiat that our elected representatives and the general public have, as yet, failed to endorse"); In re Jacob, 660 N.E.2d at 414 (Bellacosa, J., dissenting) (concluding that "[b]ecause the Legislature did not . . . [clearly authorize second-parent adoption], neither should this Court in this manner. Cobbling law together out of interpretive ambiguity that transforms fundamental, societally recognized relationships and substantive principles is neither sound statutory construction nor justifiable lawmaking"); In re Adoption of Jane Doe, 19 N.E.2d 1071, 1073 (Ohio Ct. App. 1998) ("Although we are mindful of the dilemma facing the parties and sympathetic to their plight, it is not within the constitutional scope of judicial power to change the face and effect of the plain meaning of . . . [the statute]. This case is not about alternative lifestyles but statutory construction.").
and is wrong in two senses. First, the objection is wrong even if one grants the premise that democracy means majoritarianism, such that the adoption decisions are democratically acceptable if—and only if—they can be reconciled with a theory of legislative supremacy. Second, it is wrong because the majoritarian premise is limited and unsatisfying in significant respects. Viewed in the context of a more robust set of democratic values than bare majoritarianism can provide, second-parent adoption decisions are democracy-enhancing in the best sense of the word, though undoubtedly a more controversial sense than many of the judges granting second-parent adoptions had specifically in mind.

SECOND-PARENT ADOPTION DECISIONS AND MAJORITARIANISM

At the outset, it is important to ask what majoritarian principles of democracy demand. Employing the conventional view of democratic legitimacy, against what benchmark should the adoption decisions be evaluated? On the traditional view, that benchmark is some form of originalism—that is, some theory conditioning the legitimacy of interpretive decisions on legislative supremacy, so that the case can be made that courts are identifying and vindicating the legislative as opposed to the judicial will. But in an important sense, equating democracy with legislative supremacy begins rather than ends the inquiry, for there are many competing theories grounded in the legislative supremacy ideal.

If we equated legislative supremacy with a specific legislative intent to authorize second-parent adoptions, the case would be a difficult one to make because—with the exceptions of Vermont and Connecticut, which have codified second-parent adoption—it seems clear that legislators did not have lesbian couples in mind when they enacted state adoption laws. Indeed, many of the statutes were passed decades before the idea of same-sex families had made any real social appearance. But specific intent is a notoriously flawed and unrealistic test, one that a great many statutory interpretation decisions would flunk. Legislatures rarely speak with the level of precision that this sort of test would demand and many interpretive questions that generate litigation arise in court precisely because the statute must be applied to contexts unforeseen by the enacting legislature. Moreover, the sources of statutory meaning often point in different directions, meaning that there is rarely any clear paper trail that reliably points the court toward any specific intent on the
statutory issue in question.

But in the context of the second-parent adoption decisions, as elsewhere, the futility of a search for an extant, specific intent on the key question does not exhaust the possibilities for an interpretation that is nevertheless grounded in some measure of legislative will. Instead, the originalist mandate underlying legislative supremacy approaches can be accommodated by reframing the search for legislative intent in more general terms. The most plausible means of honoring the legislature's prerogatives is to interpret ambiguity in a way that vindicates the statute's core values and policy choices. In the domain of second-parent adoption, there are various ways to recast the search for legislative will in this purpose-oriented fashion.

First, consider judicial conclusions that the cut-off provision should not be applied because it would produce "absurd results," that the cut-off provision should be read as "directory" rather than "mandatory" in order to avoid results at odds with the basic purpose of enhancing the child's welfare, or that a second-parent adoption should be analogized to a stepparent adoption with which it shares essential structural features. In each of these circumstances, the court might plausibly be seen as attributing to the legislature an intent on the question of second-parent adoption that the court derives not from any historical search for such an intent, but by applying the overarching values that animate adoption statutes. This "intent" is, in the end, an imputed one, but it is imputed based on the larger purposes that the legislature plainly sought to advance.

A slightly different way to reframe the search for the legislative will in these cases is to abandon as fictional any pursuit of legislative intent on the question of second-parent adoption and instead to simply seek out and apply the larger statutory purpose. What is perhaps most salient in adoption statutes is the commitment to advancing the best interests of the child. After all is said and done, this would seem to be the irrefutable core purpose of adoption laws. This is highly significant, for even those courts that have rejected second-parent adoptions have generally conceded the fact that the adoption would be in the child's best interest, and have undoubtedly

27. For a concise statement of this principle, see UNIF. ADOPTION ACT Prefatory Note, 9 U.L.A. 2 (Supp. 1999) (characterizing the Act's "guiding principle" as the "desire to promote the welfare of children").
28. See In re Adoption of Baby Z., 724 A.2d 1035, 1060 (Conn. 1999); In re Adoption of Jane Doe, 719 N.E.2d at 1073; In re Angel Lace M., 516 N.W.2d 678, 680-82 (Wis. 1994); cf.
known from the record in the case that the child will, in fact, be raised by two lesbian parents whether or not the adoption is granted. The question for these courts should be whether the child will receive the added legal, emotional and financial benefits that would result from acquiring a second legal (as opposed to merely functional) parent. Seen in this light and given that the child will continue to live with the two mothers in any event, it is exceedingly perverse to interpret a statute that is dedicated to advancing the welfare of children to deprive the child of benefits that a second functional parent willingly seeks to provide. Even if a judge believes, in good faith, that growing up in a same-sex family may impose some sort of social burdens on a child, the fact remains that those burdens, if any, will be imposed in any event, yet the judge will be depriving the child of the sort of material benefits that generally figure centrally in the best interest evaluation.

Although one cannot, of course, drain all the judicial discretion out of such purpose-oriented approaches—any more than one can make virtually any approach to interpretation a “value-free” judicial exercise—this kind of search for the relevant legislative will is more plausible than a search for an actual legislative intent on the sorts of open questions that routinely arise in statutory interpretation cases. Moreover, what is unmistakably clear from looking at adoption statutes is the legislative delegation of decision-making power in individual cases to judges. Compelling functional justifications support this institutional design. Adoption law is built on a premise of delegation: the legislature grants broad powers to courts to make case by case decisions and to decide what arrangement is in a child’s best interests. This sort of delegation, of course, goes beyond the adoption context and describes much of family law affecting children, such as custody and visitation decisions.

The reasons for delegating discretionary powers to courts are best seen as institutional ones. Individual judges, immersed in the facts of particular cases, are far better suited—at least in theory—to make decisions about the well-being of individual children than are large, unwieldy, multimember legislatures that are, by design,

Adoption of T. K. J., 931 P.2d at 494 (declining to determine whether second-parent adoption was in the best interest of the child because, as a matter of law, the child was not available for adoption).

responsive to political pressures. The highly individualized and proceduralized fact-finding procedures used by judges enable them to engage closely with the specific circumstances in which children find themselves. By contrast, broad rhetoric and ungrounded generalizations abound in the legislative setting, and the empiricism is casual at best. Legislatures are thus ill situated to make far-reaching decisions about the welfare of children in lesbian and gay families when crucial facts about the children and adults in those families remain unknown—and perhaps institutionally unknowable—to legislators. I mean here neither to idealize family law judges, nor to demonize legislatures, for there are judges who make themselves maddeningly impervious to facts and in whose hands the "best interests" standard is a license for crude bias. Conversely, there are legislators who try conscientiously to educate themselves about the areas they regulate. Nevertheless, there are important institutional features of courts and legislatures that should be compared as we consider why it is that legislatures generally make no attempt to arrogate to themselves the power to make detailed decisions about the particular family arrangements that are best suited to individual children. And, it may well be that judges' superior access to the particularized facts about individual children being raised by lesbian or gay parents helps to explain why progress on second-parent adoption has been so much more a judicial than a legislative phenomenon.

A response to this point might be to distinguish between two different sorts of factual inquiries—one directed toward the appropriateness of lesbian parents in general, the other toward the appropriateness of a particular lesbian, prospective adoptive parent who is before the court. Perhaps the former question might legitimately be seen as one of "legislative fact" and the latter as one of "adjudicative fact." But there are two significant problems with this formulation. First, and most important, the vast majority of state legislatures have not expressly decided the more general policy question of whether lesbian or gay individuals are suitable adoptive parents. With the exceptions of Florida and Mississippi, no state

30. For a general analysis of the difference between these sorts of fact questions, see BERNARD SCHWARTZ, ADMINISTRATIVE LAW 235-36 (3d ed. 1991) (characterizing adjudicative facts as particular facts "about individuals and their businesses, activities, and properties" and legislative facts as more "generalized facts that apply more broadly" and that may "serve as a ground for laying down a rule of law").
adoption statute explicitly forbids lesbian or gay adoption, and, indeed, two state laws expressly permit second-parent adoptions. The same adoption statutes that are ambiguous on second-parent adoption are almost always silent on the issue of lesbian and gay parenting. Second, any attempt by legislatures to make lesbians and gay men categorically ineligible to adopt children would, at the very least, raise serious constitutional questions. Given the strong

31. The Florida statute provides that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.” FLA. STAT. Ch. 63.042(3) (1999). Mississippi recently enacted a similar law. See Wetzstein, supra note 11. In addition, Utah recently enacted a bill that, while less explicit, is likely to have the same effect. The Utah bill bans adoption by a person who is “cohabiting in a relationship that is not a legally valid and binding marriage,” defines “cohabiting” to mean “residing with another person or being involved in a sexual relationship with that person,” and makes a specific legislative finding that “it is not in a child’s best interest to be adopted by a person or persons who are cohabiting.” Utah Legislature HB0103 (visited Mar. 21, 2000) <http://www.le.state.ut.us/-2000/hbillenr HB0103.htm>. In 1998, Alabama passed a joint resolution expressing its “intent to prohibit child adoption by homosexual couples.” H.J.R. 35, 1998 Reg. Sess. (Ala. 1998). In addition, Arkansas limits gay and lesbian adoption by executive regulation, but not by statute. See Joan Lowy, Adoptions by Gays Ignite Fights Across U.S., DETROIT NEWS, Mar. 7, 1999, at A10. By contrast, in its decision upholding second-parent adoption, the New York Court of Appeals alluded to a New York administrative regulation “forbidding the denial of an agency adoption based solely on the petitioner’s sexual orientation.” In re Jacob, 660 N.E.2d 397, 401 (N.Y. 1995).

32. See supra note 11 (discussing Vermont and Connecticut statutes).

33. Nor would it be persuasive to infer from the asserted lack of authority for second-parent adoptions that legislatures thereby intended to ban lesbian and gay adoption. For one thing, many of these statutes permit individuals to adopt. In the absence of any language restricting adoption based on sexual orientation, there is no basis to read these statutes to ban gay or lesbian adoptions. For another, if a legislature had intended to codify such a broad and constitutionally questionable ban, a court might well require a clearer statement to that effect before construing the statute to do so. See generally Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003 (1994) (exploring the principle that unnecessary constitutional questions should be avoided, including through statutory interpretation).

34. The issue is neither clear, nor settled. The Florida Supreme Court upheld the constitutionality of a statute banning lesbian and gay adoption against two federal constitutional claims, but remanded to the trial court for consideration of the equal protection issue. See Cox v. Florida Dep’t of Health & Human Servs., 656 So. 2d 902, 903 (Fla. 1995). In a previous case, a Florida trial court struck down the Florida statute as unconstitutional, but that ruling was not appealed. See Seebol v. Farie, 16 FLA. L. WEEKLY CS2 (Fla. Cir. Ct. 1991). The New Hampshire Supreme Court issued an advisory opinion approving a statute that similarly banned lesbian and gay adoptions, but that statute has since been repealed. See In re Opinion of the Justices, 530 A.2d 21, 24-27 (N.H. 1987). For a variety of arguments asserting the unconstitutionality of statutes banning lesbian and gay adoption, see generally William E. Adams, Jr., Whose Family Is It Anyway? The Continuing Struggle for Lesbian and Gay Men Seeking to Adopt Children, 30 NEW ENG. L. REV. 579 (1996); Carlos A. Ball & Janice Farrell Pea, Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents, 1998 U. ILL. L. REV. 253, 331-38; Lydia A. Nayo, In Nobody’s Best Interests: A Consideration of Absolute Bans on Sexual Minority Adoption from the Perspective of the Unadopted Child, 35 U. LOUISVILLE J. FAM. L. 25 (1996); Carmel B. Sella, When a Mother Is a Legal Stranger to Her Child: The Law’s Challenge to the Lesbian Nonbiological Mother, 1 UCLA WOMEN’S L.J. 135 (1991); Mark Strasser, Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interests of the Child, 45 U. KAN. L. REV. 49 (1996); Julia Frost Davies, Note, Two Moms and a Baby Protecting the Nontraditional Family Through Second-Parent Adoptions, 29 NEW ENG. L. REV. 1055 (1999); Danielle Epstein & Lena Mukherjee, Note,
interests of both children and functional parents in this context, and the dearth of any reliable social science data linking gay or lesbian parents to bad outcomes for children, any such legislative initiative should merit highly skeptical judicial review.

Once adoption statutes are seen in this functional/institutional context, it becomes clearer why the characteristically ambiguous language in state laws on second-parent adoption should be read to favor such authority. Judges, as a class, are generally better situated to determine whether it would be in the best interest of a child to be adopted by that child’s second functional parent than are legislatures who, typically, act on limited, generalized and sometimes strategically distorted information. Moreover, the very structure of adoption laws seems quite clearly to recognize this comparative institutional advantage and to empower courts in light of it.

Finally, in the context of any of these majoritarian arguments, it is important to note that because courts have recognized second-parent adoptions through statutory interpretation and not constitutional adjudication, their decisions may be set aside by the legislature at any time. To date, I have found no state statute that was enacted to overturn a judicially recognized second-parent adoption. Indeed, only six states have taken specific legislative action on the issue of adoption by homosexuals, and in three of those six states, the legislation enacted is more favorable to such adoptions. The adoption statutes in Vermont and Connecticut specifically permit second-parent adoption, and in 1999, New Hampshire repealed its statutory ban on adoption by homosexuals. By contrast, Florida and Mississippi ban adoption by homosexuals, and Utah recently passed a

Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit, 12 ST. JOHN’S J. LEGAL COMMENT. 782 (1997).

35. The social science literature thus far has focused on children raised by gay and lesbian parents to whom they are born (as opposed to those raised by adoptive parents). That literature points decisively to the conclusion that there is generally no difference in the development of children raised by lesbian or gay (versus heterosexual) parents. See generally Charlotte J. Patterson, Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective, 2 DUKE J. GENDER L. & POL’Y 191 (1995); see also Ball & Pea, supra note 33; Polikoff, supra note 12, at 561-67. Recently, Professor Lynn Wardle, a well-known opponent of same-sex marriage, has challenged the findings in the literature. See generally Lynn D. Wardle, The Potential Impact of Homosexual Parenting on Children, 1997 U. ILL. L. REV. 833. While freely conceding that most of the published work identifies no adverse effects on children that is related to lesbian or gay parenting, Wardle questions the reliability of this data based on asserted problems like small sample size, absence of control groups and longitudinal studies, and investigator bias. See id. at 844-52. A year after it was published, however, Wardle’s article was subjected to a powerful point-by-point critique. See generally Ball & Pea, supra note 33.

36. See supra note 11.

law that will have a similar effect, but there is no evidence that any of these antigay laws were enacted in response to any judicial action recognizing adoptive rights. Indeed, the only relevant laws that I have been able to locate that were enacted in specific response to a court decision on second-parent adoptions are the Vermont and Connecticut laws, which codify second-parent adoptions.\footnote{VT. STAT. ANN. tit. 15A, § 1-102(b); Wetzstein, supra note 11.} Bills have been introduced in other states to broadly ban adoption by gay or lesbian parents,\footnote{See Lowy, supra note 31.} just as bills to permit second-parent adoptions have been introduced in some states where courts have refused to allow such adoptions,\footnote{See, e.g., A.B. 859, 93rd Leg., 1997 Reg. Sess. (Wis. 1997) (This bill would have allowed two unmarried adults living in the same home to adopt a child jointly, but it died in committee.).} but thus far, little of this legislation has passed.

On a majoritarian account, the absence of legislation overturning second-parent adoption decisions is noteworthy. Read for all that it might be worth, this conspicuous legislative inaction could be taken to signify affirmative legislative support for the judicial decisions. Deriving such a strong inference from legislative inaction, however, would be unwise, for there are multiple plausible reasons that a legislature might not act to overturn a decision that do not necessarily equate to affirmative endorsement of the ruling. Legislative inertia is too complex to permit us to necessarily equate legislative inaction with affirmative endorsement.\footnote{For a discussion regarding the perils of drawing strong inferences from the legislative failure to override a judicial decision, see Schacter, supra note 29, at 605-06. For a thoughtful empirical analysis of legislative overrides, see generally William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331 (1991).} At the very least, however, the record of inaction does suggest an absence of substantial majorities in state legislatures willing to devote time, energy and political capital to enacting legislation against second-parent adoptions or the broader class of all adoptions by lesbian or gay individuals.

Perhaps the best way to read the record of legislative inaction in relation to second-parent adoption rulings is to think of the question in terms of allocating what Guido Calabresi calls the "burden of inertia."\footnote{GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164 (1982).} Given the strong interest of children and lesbian and gay parents in achieving the greatest possible legal security and stability for their families, together with a long, more general history of anti-gay bias, it seems fair to place the burden of inertia on legislatures. It is reasonable, in other words, to ask legislatures to be unmistakably clear if their will is to block second-parent adoption and to make that
result the official policy of the state. Doing so would clarify the statutory issue, as well as force the constitutional question of whether children or their parents have any protected right to use the adoption laws made available to other families.

**BEYOND MAJORITARIANISM: SECOND-PARENT ADOPTION DECISIONS AND BROADER DEMOCRATIC VALUES**

Moving beyond the restricted confines of majoritarianism, second-parent adoption decisions can be justified by looking to a broader set of democratic values. These thicker democratic values are obscured by the narrow, institutionally superficial approach of majoritarianism, which considers the legislative process intrinsically democratic because legislators are assumed to have political accountability, and the courts intrinsically undemocratic because judges are assumed to lack that accountability. While I do not argue that the courts that have granted second-parent adoption had these more expansive democratic values specifically in mind, I do suggest that the adoption decisions may fruitfully be seen to illustrate how courts can vindicate democratic values in a different way than majoritarianism prescribes when they construe ambiguous statutes. In this sense, the second-parent adoption decisions may be understood to exemplify a "metademocratic" approach to statutory interpretation that links democracy not to pursuing the unattainable end of eliminating all judicial discretion in statutory interpretation, but instead to channeling the court’s inevitable discretion with democratic values self-consciously in mind.43

Second-parent adoptions, of course, have tremendous significance for the lesbian and gay families to which they bring legal security. But beyond these tangible, individual benefits, these adoptions have the capacity to exert important social effects as well—effects that I believe should be seen as democratizing effects for the reasons I discuss below. Perhaps the most important potential social effect that second-parent adoptions might be understood to have is in bringing more visible images of lesbian and gay families into public view. As citizens deal more regularly with families in which children are being raised by two mothers or fathers who are recognized by the law as such, the available imagery about what it means to be gay, and what it means more particularly to be a gay family, is necessarily

43. For a defense of this approach, see generally Schacter, *supra* note 29.
enriched. New—and newly concrete—pictures of non-heterosexual families appear and have the potential, at least, to eclipse the tired anti-gay cultural caricatures and mythologies that can flourish when unchallenged.\textsuperscript{44} Such caricatures and mythologies have historically abounded where children are concerned and where sometimes grotesque claims have been asserted that conflate homosexuality with pedophilia or that categorically assume that lesbians and gay men cannot model appropriate values for children.\textsuperscript{45}

This newly visible public imagery of homosexuality and family, in turn, can contribute to powerfully undermining what I have elsewhere called the "regime of coerced gay invisibility."\textsuperscript{46} Under this regime, lesbians and gay men have historically been coerced by legal discrimination, social stigmatization, and high rates of anti-gay violence to suppress their own social visibility and so to participate in reinforcing their own inequality.\textsuperscript{47} Living under conditions of coerced invisibility prevents lesbian and gay families from enriching the impoverished social imagery that constructs them in such distorted terms.

By contrast, when the law—here, acting through adoption laws—works to make the multiple realities of gay and lesbian family lives more visible, democracy is served in several ways. First, social pluralism is encouraged because the normative nuclear family is called into question as the only appropriate family form. Affiliative options multiply. Bonds can be established between people who consider themselves to be family, whether or not a married couple anchors that family. This sort of pluralism has implications beyond the gay and lesbian context because unmarried heterosexuals may also choose new or different family forms as the law permits relationships to be secured in more than one way.

Second, such increased visibility opens the way to making the

\textsuperscript{44} Lesbian parents, and the concept of second-parent adoption, made perhaps their most prominent cultural appearance in a recent episode of \textit{Larry King Live} on which singer Melissa Etheridge and her partner Julie Cypher appeared along with David Crosby, the man who provided sperm to the couple, and Crosby's wife. On the show, they discussed the fact that Etheridge had adopted the two children borne by Cypher. \textit{See CNN Larry King Live} (CNN television broadcast Jan. 20, 2000).


\textsuperscript{47} For a fuller account of these dynamics at work, see \textit{id.} at 366-71.
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political process more fair for lesbian and gay citizens by helping to challenge unsustainable anti-gay stereotypes that, in turn, impair the ability of gay interests to form coalitions, marshal their numbers, and compete fairly on the traditional terrain of politics.48 Third, such increased visibility can enhance the fairness of the democratic process in a different way, one that looks beyond the formal political process per se to the wider arena of our collective cultural life. Legal regulation is by no means the only apparatus of collective self-governance. To the contrary, the informal but potent social norms that grow outside of—though in synergy with—the law reflect an important additional mechanism of self-governance. What people know and believe about homosexuality can more powerfully affect the lives of lesbians and gay men than can legal regulation on its own. And the regime of coerced invisibility inhibits the ability of lesbian and gay citizens to change social norms precisely because that regime suppresses the fuller picture of lesbian and gay lives and families that might help to work such change.49

The second-parent adoption decisions, by creating legal security for lesbian and gay families, encourage these families to be more visible and thus to challenge the fragmentary public understandings in this area. While such families do and should comprise only one segment of a diverse and multifarious lesbian and gay community, it is a segment that has long been shrouded. That shrouding has had significant costs for the families, for forms of regulation both legal and social, and for democracy itself.

CONCLUSION

The second-parent adoption cases provide an interesting window on principles of statutory interpretation, on the role of courts and legislatures in constructing families, and on the nature and meaning of democracy itself. These cases also have important implications for feminism in what they suggest on all these points. In addition, the adoption cases bear on the unfinished business of feminism both because they powerfully affect the lives of some women—lesbian parents—and because they have the potential to affect the lives of many more women by challenging conventional gender roles and the normative nuclear family. Having said that, it is important to

48. See id. at 400-01.
49. See id. at 401-06.
acknowledge that advocacy for second-parent adoption should be conducted self-consciously with its own limits in mind. Not all children must be raised by two parents to have a secure and happy upbringing, and there is a danger that the pursuit of second-parent adoption may work to marginalize single parents (straight or gay) or those who choose to parent without adopting. That result would run counter to what I take to be the feminist objective I alluded to at the start—to create multiple legal and social spaces that can accommodate different lives. But the answer, it seems to me, is not to forego second-parent adoption. It is, instead, to bear firmly in mind the overarching objective of what we might call affiliative pluralism, so that second-parent adoption can secure the families who pursue it without helping to subjugate those who do not.