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THE INFLUENCE OF RELIGION AND MORALITY LEGISLATION ON THE INTERPRETATION OF SECOND-PARENT ADOPTION STATUTES: ARE THE CALIFORNIA COURTS ESTABLISHING A RELIGION?

I. INTRODUCTION

Everyday for the last three years—his whole life—he had two loving, involved parents. Then he only had one. Both of his parents desperately wanted to be a part of his life, but the law dictated that he could only have one. This is Joshua's story.

Pat and Sydney, after a seven-year relationship, decided to have a child together. Because they were physically unable to have a biological child, they chose artificial insemination as the next best option. Pat underwent the procedure and nine months later gave birth to a son, Zachary. Solidifying *legally* what the family already knew to be true, Sydney adopted Zachary and became his second legal parent.

Like many other parents, Pat and Sydney decided to have a second child. In order for the new baby and Zachary to be biological siblings, Pat used sperm from the donor involved in the first procedure during the second artificial insemination procedure. The couple had another son, Joshua, and again Sydney began the adoption proceedings. The couple hired an attorney to ensure that Pat retained her rights as a parent when Sydney adopted Joshua as his second-parent.¹ Pat and Sydney both signed an Independent Adoption Placement Agreement with an addendum, which gave Sydney legal parental rights with respect to Joshua without taking away Pat's parental rights.

Before the adoption of Joshua was finalized Pat and Sydney broke up. Despite Pat's obvious intentions that Sydney be Joshua's second-parent—as evidenced by Sydney's adoption of their first child and by Pat's signature on Joshua's adoption agreement—Pat prohibited the execution of the adoption. She even refused to allow Sydney visitation or custody of baby Joshua. Pat could exercise this authority because she was Joshua's only current *legal*

1. Pursuant to CAL. FAM. CODE § 8617 (West 2000), a legal parent relinquishes all rights of care, custody, and control of the child upon adoption. The only exception is found in CAL. FAM. CODE § 9000 (West 2000) for stepparent adoptions, *see infra* Part II, where the legal parent retains rights to the child. Because Sydney is not Pat's spouse, as defined in CAL. FAM. CODE § 308.5 (West 2000), this exception does not apply. Although CAL. FAM. CODE § 9000 (West 2002, pocket part) has been amended to include domestic partners, this section did not become effective until after the adoption proceeding had begun. *See infra* Part V for a detailed discussion of this section. Therefore, Pat and Sydney searched for another route.

parent. Sydney, however, did not understand how the couple's subsequent break-up could vitiate the determination—by both Pat and Sydney—that Sydney would be Joshua's second legal parent. Joshua, too, wondered why Sydney moved out of the house and never visited. Even Zachary was confused. During their visits (which were allowed because his adoption was completed), Sydney explained that Pat and Sydney were no longer together and that Sydney did not have legal rights to Joshua, but Zachary did not understand why. She did not know how to explain to her son that under the law she was considered a legal stranger to his brother.

This situation seems contrary to current notions of family, parental rights, and the best interests of the child.² After all, Sydney had been a part of the decision to have Joshua from the beginning. Furthermore, Sydney and Pat were raising Joshua's brother together. At the time of conception, they both intended for Sydney to be Joshua's second-parent. It does not seem fair that, because the two broke up, Sydney lost all rights to be the child's parent. It does not seem right that, although two parents usually are deemed better than one, Joshua has been deprived of one of his parents. This situation contravenes what is thought to be fair for the parents and best for the child.

This Comment will explain why fairness and the child's best interests are dismissed in these circumstances. The Comment will focus specifically on the case of *Sharon S. v. Superior Court of San Diego County*,³ involving a lesbian⁴ couple, to connect the three-tiered explanation of law, religion, and morality. It will explore the religious origin behind disapproving of a second-parent's rights when it involves a homosexual couple and approving those same rights when it involves a heterosexual couple. It will then demonstrate the immense similarity between religion and morality, which are embedded in legislation and judicial decision-making. Part II of this Comment will provide a case history of the *Sharon S.* decision. Part III will discuss the religious influence on this decision, specifically with regard to the choices by the court to strictly construe the relevant adoption statutes and to adopt the "best interests of the child" test in determining which parent will receive legal recognition. Part IV will address the issue of whether the courts legislate morality by implicitly endorsing a "civil religion"⁵ consonant with

2. This story is based upon the case of *Sharon S. v. Superior Court of San Diego County*, 113 Cal. Rptr. 2d 107 (Ct. App. 2001) (as modified on denial of rehearing, Nov. 21, 2001), *petition for review granted*, 39 P.3d 512 (Cal. Jan. 29, 2002) (No. S102671). See *infra* Part II for a case history.

3. *Id.*

4. Because the couple in *Sharon S.* was a lesbian couple, this will be the term primarily used throughout the article to refer to homosexuals.

5. MEANING AND MODERNITY: RELIGION, POLITY AND SELF 5-7, 11, 13 (Richard Madsen et al. eds., 1970). Many authors in this book refer to Robert Bellah's essay in which he coined the term "civil religion." Robert N. Bellah, *Civil Religion in America*, in DAEDALUS 96, 1-21 (1967). Robert Bellah himself revisits this idea in the epilogue. Robert N. Bellah, *Epilogue*, in MEANING AND MODERNITY: RELIGION, POLITY AND SELF, at 255-76 (Richard Madsen et al. eds., 1970). See also JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM, ch. 8 (2000).

Judeo-Christian beliefs. Part V will discuss the most relevant piece of legislature, Assembly Bill 25 enacted on January 1, 2002, and address whether it was passed *due to* changing religious beliefs or *despite* them. Concluding remarks focus on the influence of California on legal decisions made throughout the nation. Should the California Supreme Court strictly construe the adoption statutes to reinforce Judeo-Christian-based beliefs that homosexuality is immoral? Consequently, other states may follow California's reasoning, violating the Establishment Clause of the First Amendment.

II. THE SHARON S. DECISION

The facts of the case mimic those in the Pat/Sydney hypothetical.⁶ Sharon and Annette began dating in 1989, moved to San Diego in 1990, attended couples counseling to work through conflicts, and eventually decided to have a baby together.⁷ Sharon gave birth to Zachary in 1996 following artificial insemination by an anonymous donor.⁸ The superior court approved Annette's petition to adopt Zachary as a co-parent with Sharon, so that Sharon would retain all of her parental rights.⁹

The couple decided to have another child, and in 1999 Sharon gave birth to Joshua.¹⁰ Soon thereafter Annette and Sharon began adoption proceedings by retaining an attorney.¹¹ They both signed an Independent Adoption Placement Agreement stating that Sharon was "giv[ing] up all [her] rights of custody, services, and earnings of [Joshua]" to Annette "for the purpose of [an] independent adoption" and that Sharon had ninety days to revoke her consent.¹² Sharon attached an addendum to the agreement, developed by the Department of Social Services (DSS) to facilitate these types of adoptions,¹³ which stated that, regardless of the words of the agreement, she intended to retain all of her parental rights with respect to Joshua.¹⁴ She understood the agreement as creating a legally recognized parent-child relationship between

6. See *supra* Part I.

7. *Sharon S.*, 113 Cal. Rptr. 2d at 109-10.

8. *Id.* at 110.

9. *Id.* See *supra* note 1. The court approved the petition despite an allegedly contrary recommendation by the Department of Social Services. *Id.* The reason behind the contrary recommendation probably had more to do with the governor of California than it did with Annette's ability as a parent. During Governor Pete Wilson's tenure, he signed an order forbidding social workers with the Department of Social Services from recommending homosexuals as adoptive parents. Governor Gray Davis rescinded this order on November 18, 1999. Therese Jansen, *Adoption in California*, at http://www.lesbianworlds.com/articles/family_111999.htm (last visited Feb. 28, 2002).

10. *Sharon S.*, 113 Cal. Rptr. 2d at 110.

11. *Id.*

12. *Id.*

13. Although the agency is now called "Department of Health and Human Services," this paper will refer to the agency as DSS, the name used by the court.

14. *Sharon S.*, 113 Cal. Rptr. 2d at 110.

Joshua and Annette, co-existent with her own.¹⁵ Annette filed the requisite petition to adopt Joshua as a co-parent and eight months thereafter DSS recommended to the court that the petition be granted.¹⁶ Sharon continuously postponed the hearing on the petition after troubles in the relationship became more frequent.¹⁷ Sharon eventually asked Annette to move out, at which time they each retained independent counsel regarding the adoption.¹⁸ After the parties reached an agreement regarding custody of both the boys, Annette filed a motion to establish a legal parental relationship with Joshua followed by a motion to adopt.¹⁹ In addition to arguing that she had a right to adopt Joshua under estoppel and that an adoption was in Joshua's best interests, Annette argued that Sharon's consent, given in the Adoption Agreement, had become irrevocable pursuant to California Family Code section 8814.5.²⁰ Both the family court services counselor and DSS recommended that Annette remain a part of Joshua's life; DSS requested that the court approve Annette's petition to adopt Joshua.²¹

Sharon responded by withdrawing her consent to the adoption, arguing that it was obtained as a result of "fraud, undue influence and duress."²² Additionally, she argued that this adoption would not be in Joshua's best interests, nor did it have any legal basis.²³ The superior court denied Sharon's motion to dismiss the adoption petition, indicating that the adoption petition would be in Joshua's best interests.²⁴

Sharon appealed. The Fourth District Court of Appeals agreed with Sharon's argument that Annette had no legal right to adopt Joshua and, in fact, did not have any right to adopt Zachary.²⁵ Despite the latter contention, however, the court allowed Zachary's adoption to stand and retracted its inference that all adoptions of this type were invalid.²⁶

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* CAL. FAM. CODE § 8814.5 (West 2000) states that once the legal parent has consented to the adoption in writing, that parent has thirty days to revoke the consent.

21. *Sharon S.*, 113 Cal. Rptr. 2d at 110-11.

22. *Id.* at 110.

23. *Id.* at 110-11.

24. *Id.* at 111.

25. The original opinion issued on October 25, 2001 suggested that because adoptions of this type have no statutory basis, all existing adoptions might be invalid. San Diego's Gay, Lesbian, Bisexual & Transgender Bar Association, at <http://www.thla.org> (last updated Jan. 21, 2002).

26. *Sharon S.*, 113 Cal. Rptr. 2d at 115. The modified opinion issued on November 21, 2001 deleted the sentence suggesting all such adoptions are invalid and adding a sentence stating that the court does not address the validity of existing second-parent adoptions. San Diego's Gay, Lesbian, Bisexual & Transgender Bar Association, at <http://www.thla.org> (last updated Jan. 21, 2002).

After explaining the three methods for adopting a minor (explained below), the court of appeals held that Annette's petition to adopt Joshua had no statutory basis.²⁷ In a stepparent adoption, the spouse of the legal parent²⁸ petitions the court to adopt the legal parent's child(ren), with the consent of one or both of the legal parents.²⁹ This procedure, disparate from the other two methods of adoption, does not terminate the legal parent's rights in connection with the child.³⁰ Annette's alleged adoption did not qualify as a stepparent adoption because she was not married to Sharon at the time of the adoption.³¹

An agency adoption requires that the legal parents³² relinquish their parental rights to a licensed adoption agency or to DSS, such that the agency (or DSS) has exclusive custody and control over the child until that child is adopted.³³ This option allows the legal parents to name the parent(s) with whom the child is to be placed. Annette's alleged adoption of Joshua did not qualify because Sharon did not place Joshua with an agency or with DSS with intent to relinquish her rights.³⁴

An independent adoption follows the same basic procedure as an agency adoption, although with this method the legal parents relinquish their rights directly to the adoptive parents without any other agency (or DSS) joining in the adoption petition.³⁵ The legal parents must sign an adoption placement agreement consenting to the adoption, and may revoke this consent within ninety days.³⁶ The final step requires court approval.³⁷ Annette's alleged adoption did not qualify as an independent adoption because Sharon did not agree unequivocally to terminate her parental rights.³⁸ Annette argued, however, that she successfully sought a "modified" independent adoption, al-

27. *Sharon S.*, 113 Cal. Rptr. 2d at 111-12.

28. "Legal parent" refers to either a biological parent or an adoptive parent. CAL. FAM. CODE § 8512 (West 2000).

29. *Sharon S.*, 113 Cal. Rptr. 2d at 112; CAL. FAM. CODE §§ 9000, 8548 (West 2000).

30. *Sharon S.*, 113 Cal. Rptr. 2d at 112; CAL. FAM. CODE §§ 9000, 8548 (West 2000).

31. *Sharon S.*, 113 Cal. Rptr. 2d at 112. See Assemb. B. 25, 2001-2002 Sess. (Cal. 2002), allows registered domestic partners to adopt their partner's child(ren) under a stepparent adoption procedure. This does not apply in Annette's situation because the procedure took place before the enactment of the statute. Additionally, because Annette and Sharon are no longer involved, Annette cannot use domestic partner registration as a way to pursue the adoption. See *infra* Part V for further discussion on Assemb. B. 25, 2001-2002 Sess. (Cal. 2002).

32. See CAL. FAM. CODE § 8512 (West 2000), using the term "legal parents" to mean existing parents of the child.

33. *Sharon S.*, 113 Cal. Rptr. 2d at 111; CAL. FAM. CODE §§ 8700-8720, 8518 (West 2000).

34. *Sharon S.*, 113 Cal. Rptr. at 112; CAL. FAM. CODE §§ 8700(a), 8703 (West 2000).

35. *Sharon S.*, 113 Cal. Rptr. at 112; CAL. FAM. CODE §§ 8800-8823, 8524 (West 2000).

36. *Sharon S.*, 113 Cal. Rptr. 2d at 112; CAL. FAM. CODE § 8801.3(b) & (c)(2) (West 2000).

37. *Sharon S.*, 113 Cal. Rptr. 2d at 112; CAL. FAM. CODE §§ 8616, 8617 (West 2000).

38. *Sharon S.*, 113 Cal. Rptr. 2d at 112; CAL. FAM. CODE §§ 8617, 8819 (West 2000).

lowed under a liberal construction of the adoption statutes.³⁹ This method, commonly referred to as a “second-parent adoption,” has been used routinely by same sex couples and involves one partner adopting the child(ren)⁴⁰ of the other, with the legal parent expressing an intent to retain parental rights. For over ten years California superior courts and DSS have approved of second-parent adoptions.⁴¹ DSS, recognizing that no express statutory authority existed for second-parent adoptions, developed two methods of executing them.⁴² They include modified independent adoptions (where the legal parent allows her partner to adopt the child without relinquishing her rights) and agency adoptions (where the legal parent relinquishes her rights to an adoption agency, expressly designating herself and her partner as the adoptive parents).⁴³ Nonetheless, the Fourth District Court of Appeals applied a literal reading to the adoption statutes, ignoring the interpretation accepted by the superior courts and the procedures adopted by DSS, and held that second-parent adoptions have no statutory basis.⁴⁴ As DSS is in the business of deciding where to place children, a fact the court conceded,⁴⁵ it seems ironic that the court would dismiss the judgment of professionals and refuse to employ a liberal interpretation of the adoption statutes such that DSS’s judgment could continue to be realized.⁴⁶

The court reasoned that to liberally construe these statutes would exceed the scope of its authority and usurp the authority of the Legislature.⁴⁷ The court must passively apply the Legislature’s intent as reflected in the words of the statute.⁴⁸ Therefore “in accordance with the clear and unambiguous

39. *Sharon S.*, 113 Cal. Rptr. 2d at 112. See *infra* Part III for a further discussion of statutory construction.

40. This includes biological children (either through artificial insemination or through a previous relationship) and children from an earlier adoption. The adoption scenario occurs when one partner legally adopts a child by herself either because that state’s laws did not allow a gay couple to adopt or because the couple was not in a relationship at the time of the adoption. Because this article focuses on the *Sharon S.* case, it will focus primarily on the situation involving a biological mother.

41. *Sharon S.*, 113 Cal. Rptr. 2d at 112.

42. DSS approves or disapproves each adoption on a case-by-case basis. *Id.*

43. *Id.* at 113. The court only discussed the former method because that was the method called into question on appeal. *Id.* It can be assumed that because the latter method is similarly not statutorily authorized (it is somewhat of a hybrid of agency and independent adoption procedures), the court’s holding and rationale would be the same.

44. *Id.* at 113-14. The court stated it was not bound by the interpretation adopted by superior courts. *Id.* at 114.

45. The court stated that contrary legislative purposes, as are present here, prevail over “agency interpretations of statutes within the purview of agency’s expertise.” *Id.* at 114.

46. See *infra* Part III for a discussion regarding reasons, other than those stated (*supra* note 41), behind the court’s refusal to adopt a liberal interpretation.

47. *Sharon S.*, 113 Cal. Rptr. 2d at 113-14 (stating that the role of the court is to interpret and apply the statutes as written, not to re-write them).

48. *Id.* at 114.

language of the statutes," second-parent adoptions through the use of a modified independent adoption procedure are not allowed.⁴⁹

In justifying this holding, the court mentioned that when the Legislature authorized stepparent adoptions, which allows an adoption by a second parent without termination of the legal parent's rights, it did not similarly authorize modified independent adoptions by same-sex parents or co-parents.⁵⁰ In response to the argument that by not explicitly *disallowing* such adoptions the Legislature has approved of them, the court stated that the Legislature does not enact major policy silently.⁵¹ To support this contention, the court discussed the Legislature's rejection of bills that would have allowed second-parent adoptions,⁵² and then discussed the passage of Assembly Bill 25, which authorized registered domestic partners to adopt the child(ren) of their domestic partners.⁵³ The court interpreted this action as reflecting the Legislature's past disapproval of modified independent adoptions, suggesting that the Legislature only now approved of such adoptions.⁵⁴ This rationale is flawed, however, because Assembly Bill 25 applies to the stepparent adoption procedure, not the independent adoption procedure.⁵⁵ This suggests that the Legislature approved of the long-standing modified independent adoption procedure and merely wanted to create a similar procedure for same sex couples in the stepparent adoption realm.⁵⁶ The court, however, refused to contemplate this option and remained firm in its stance against any other interpretations.⁵⁷

Presiding Justice Kremer dissented, agreeing with the position taken by Annette, and several amici including Children of Lesbians and Gays Everywhere (COLAGE), Family Pride Coalition, the National Center for Youth Law and Legal Services for Children, the American Civil Liberties Unions of San Diego and Southern California (ACLU), and the Lambda Legal Defense and Education Fund (Lambda Legal). Justice Kremer relied on the 1925 case of *Marshall v. Marshall*,⁵⁸ despite the majority's attempt to distinguish it.⁵⁹ In *Marshall*, a widowed mother of two minor children married her

49. *Id.*

50. *Id.*

51. *Id.* (quoting *In re Christian S.*, 872 P.2d 574 (Cal. 1994)).

52. *Sharon S.*, 113 Cal. Rptr. 2d at 115 (citing Assemb. B. 53, 1997-1998 Reg. Sess. §§ 1, 2).

53. *Id.* at 115 (citing Assemb. B. 25, 2001-2002 Sess. (Cal. 2002)).

54. *Id.*

55. CAL. FAM. CODE § 9000(f) is amended to read "For the purposes of this chapter, *stepparent adoption* includes adoption by a *domestic partner*, as defined in Section 297." Assemb. B. 25, 2001-2002 Sess. § 5 (Cal. 2002) (emphasis added).

56. See discussion *infra* Part V for details on Assemb. B. 25, 2001-2002 Sess. (Cal. 2002).

57. The court neglected to address the issue of de facto parenthood in this context. See *infra* Part III for a discussion on this possibility as well as a discussion on parenthood by equitable estoppel.

58. 239 P. 36 (Cal. 1925).

59. *Sharon S.*, 113 Cal. Rptr. 2d at 116.

second husband.⁶⁰ The children's new stepfather adopted them pursuant to former Civil Code sections 221 to 229.⁶¹ Eventually, however, the couple divorced and the husband agreed to surrender his adoption of the children to allow for the readoption of the children by the wife.⁶² Four days after the wife completed the adoption of her children, the court rendered an interlocutory divorce decree (finalized soon thereafter) awarding custody of the children to the wife and ordering the husband to pay her child support alimony (which had been previously agreed to by the parties in a separate agreement).⁶³ After several years of paying his child support alimony obligations, the husband moved to modify the decrees to eliminate the provision stating there were children of the marriage.⁶⁴ The superior court agreed with the husband that there were no children of the marriage and thus he did not owe child support alimony.⁶⁵

The California Supreme Court found the superior court's decision erroneous.⁶⁶ Of particular relevance, the court commented on the principle of readoption, noting the absurdity of a natural and legal mother having to readopt her children in order to obtain custody during divorce simply because her new husband had adopted them at one point.⁶⁷ In order for this to be appropriate, the court stated, the adoption by her husband would had to have severed her parental relationship with her children.⁶⁸ Despite the clear and unambiguous statutory language of former Civil Code section 229,⁶⁹ the court refused to accept the thought that a mother's rights as a parent could be severed when her husband adopted her children because this was not the intent of the parties.⁷⁰ The court found support for its deviation from the text of the statute in *In re Estate of Williams*,⁷¹ where the court acknowledged the absence of express authority and nevertheless allowed a couple to jointly adopt a child because it was the "obvious purpose and intent of both of the parties" to do so.⁷²

Justice Kremer took exception to the majority's strict construction of the relevant adoption statutes. As he stated, "California adoption laws are to be

60. *Id.* (citing *Marshall*, 239 P. at 36).

61. *Sharon S.*, 113 Cal. Rptr. 2d at 116 (citing *Marshall*, 239 P. at 36).

62. *Id.*

63. *Id.* (citing *Marshall*, 239 P. at 37).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 116-17 (citing *Marshall*, 239 P. at 38).

69. The text stated: "The parents of an adopted child are, from the time of adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it." *Sharon S.*, 113 Cal. Rptr. 2d at 117; *Marshall*, 239 P. at 38.

70. *Sharon S.*, 113 Cal. Rptr. 2d at 117.

71. 36 P. 407 (Cal. 1894).

72. *Sharon S.*, 113 Cal. Rptr. 2d at 117; *Marshall*, 239 P. at 38.

construed liberally to protect the welfare of the children.”⁷³ Even though the Civil Code adoption statutes in *Marshall* did not expressly allow stepparent adoptions, the Supreme Court liberally construed the statutes to allow such adoptions so as to harmonize with the intent of the parties.⁷⁴ Similarly here, although the statutes may not expressly authorize second-parent adoptions, the statutes must be liberally construed to effectuate the intentions of Sharon and Annette.⁷⁵ Proof of these intentions was found in the independent adoption placement agreement and the attached addendum, which together provided that Annette would acquire legal rights to Joshua without Sharon losing hers.⁷⁶ Following *Marshall*, Justice Kremer concluded, second-parent adoptions are viable and are not prohibited by the adoption statutes.⁷⁷

The amicus brief of COLAGE, Family Pride Coalition, ACLU of San Diego, ACLU of Southern California, Lambda Legal, and National Center for Lesbian Rights took a consonant position to that of Justice Kremer.⁷⁸ The brief focused on the legal question of statutory construction, stressing that “[t]his state’s adoption law always must be interpreted liberally and consistently with its policy goal of securing legal and emotional relationships between children and adults who raise them.”⁷⁹ California, too, has benefited from the successful execution of second-parent adoptions because those children now have stable two-parent homes.⁸⁰

The argument of the amicus brief began by acknowledging that superior courts across California for approximately fifteen years have interpreted the adoption statutes to permit second-parent adoptions.⁸¹ To strictly construe these statutes, it continued, would sever child-parent bonds that the children

73. *Sharon S.*, 113 Cal. Rptr. 2d at 117 (citing *Dep’t of Soc. Welfare v. Superior Court of Contra Costa County*, 459 P.2d 897 (Cal. 1969)); see *infra* Part III for further discussion on statutory interpretation.

74. *Sharon S.*, 113 Cal. Rptr. 2d at 119.

75. *Id.* at 118.

76. *Id.* at 119.

77. *Id.*

78. For a description of these organizations see Brief of Amici Curiae Children of Lesbians and Gays Everywhere, Family Pride, et al. at 16-18, *Sharon S. v. Superior Court of San Diego County*, 113 Cal. Rptr. 2d 107 (Ct. App. 2001) (No. DO 37871).

79. *Id.* at 2.

80. *Id.* Although the brief does not discuss how the state benefits exactly, it can be assumed that the reference was towards the numerous children in foster care who are adopted by one parent and then subsequently adopted by that parent’s partner. The state benefits because gay couples are often willing to take children others are not, namely those children with the greatest needs. Kristen Kreishner, *Gay Adoption*, CHILDREN’S VOICE, Jan. 2002, at 3. According to the Adoption and Foster Care Analysis and Reporting System, in September of 1999, there were 127,000 children in the public welfare system hoping to be adopted. Kristen Kreishner, *Gay Adoption*, CHILDREN’S VOICE, Jan. 2002, at 1. Needless to say, when people take these children out of the public welfare system, the financial responsibility for them is taken from the state.

81. Brief of Amici Curiae Children of Lesbians and Gays Everywhere, *supra* note 78, at 4.

depend upon and that the parties (originally) intended to remain intact.⁸² After analogizing *Marshall* to the *Sharon S.* case, the brief listed all the states that have allowed second-parent adoptions,⁸³ indicating broad recognition that second-parent adoptions are in the best interests of the child.⁸⁴ The brief concluded with a request that the court continue to permit second-parent adoptions in California.⁸⁵

The Court of Appeal in the *Sharon S.* case chose not to liberally construe the adoption statutes, such that Joshua would be stripped of one of his parents. This case demonstrates that legal decisions are based often, not on precedent, but on personal morality and religious beliefs.

III. THE RELIGIOUS INFLUENCE ON CONSTRUCTION OF ADOPTION STATUTES

Despite the request of the amici curiae, the Court of Appeals determined that a strict construction of the statutes was necessary and ruled second-parent adoptions impermissible. The court simply dismissed precedent, which held that adoption statutes are to be liberally construed.⁸⁶ The explanation offered in this Comment as to why the court turned away from the established rule requires a look inside the minds of the judges. As people with morals, judges and justices unconsciously (and sometimes consciously) impose their values in their judgments.⁸⁷ This country was founded on a specific set of Judeo-Christian⁸⁸ beliefs and many Americans,⁸⁹ including most judges, continue to believe in them today. These judges often rule in cases according to how they feel best resonates with those Judeo-Christian beliefs.⁹⁰ Second-parent adoptions do not harmonize with those beliefs because

82. *Id.* at 5.

83. *Id.* at 8.

84. *Id.* at 9. Indeed, the National Adoption Information Clearinghouse stated that several courts have begun to rule that qualifications such as being married and/or heterosexual do not take priority over the child's best interests. *State laws regarding adoptions by gay and lesbian parents: Second-parent adoptions*, at http://adoption.about.com/gi/dynamic/offsite.htm?site=http%3A%2F%2Fwww.calib.com%2Fnaic%2Fpubs%2F%2F_same.htm (last updated Aug. 2, 2000).

85. Brief of Amici Curiae Children of Lesbians and Gays Everywhere, *supra* note 78, at 15.

86. *See supra* note 73 and accompanying text.

87. *See infra* Part IV.

88. This term will be used to refer to the Jewish and Protestant religions as they are commonly understood in America today. For an analysis of the Judeo-Christian tradition, see Wilfred M. McClay, *The Judeo-Christian Tradition and the Liberal Tradition in the American Republic*, in PUBLIC MORALITY, CIVIC VIRTUE, AND THE PROBLEM OF MODERN LIBERALISM 124-36 (T. William Boxx & Gary M. Quinlivan eds., 2000).

89. This is not to ignore the diverse religious background of Americans. However, because Judeo-Christianity remains the dominant religion in the United States, and especially with regards to judges and justices, this Comment focuses on Judeo-Christianity.

90. *See infra* Part IV.

this method of adoption is used most often by homosexual couples and homosexuality is condemned by Judeo-Christianity.⁹¹

A. Construction of Adoption Statutes

Dating back to 1960, the California Supreme Court prescribed the general rule regarding adoption statutes; it required that adoption statute provisions be “liberally construed with a view to effect [sic] its objects and to promote justice.”⁹² Since 1960, California appellate courts, as well as the California Supreme Court followed this rule,⁹³ determining that the purpose of adoption statutes is “the promotion of the welfare of children, bereft of the benefits of the home and care of their real parents, by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child.”⁹⁴

In *In re Adoption of Barnett*,⁹⁵ the biological mother gave her child up for adoption to Mr. and Mrs. Davey.⁹⁶ Before the completion of the adoption, the Daveys divorced and Mrs. Davey continued to raise the child by herself.⁹⁷ Mrs. Davey notified the natural mother that only she would be adopting the child and, although the biological mother at that time stated she would not withdraw her consent, she eventually did just that.⁹⁸ This presented Mrs. Davey with a problem because former Civil Code section 226 required the natural mother to give her consent, again, but this time only to Mrs. Davey instead of to her and her husband.⁹⁹ The California Supreme Court refused to mechanically apply the statutory requirements because it would be unjust and unreasonable.¹⁰⁰ It continued by noting that the natural mother consented to the adoption, albeit by more relaxed standards than those required in the statute, such that Mrs. Davey’s adoption should stand.¹⁰¹ In order to “preserve the integrity of the family,” the court decided that, “as between the welfare of the child and the mechanical requirement. . . , the welfare of the child should prevail.”¹⁰²

The California Supreme Court heard a similar case in 1969 where adoptive parents divorced and one parent wanted to keep the child whereas the

91. See *infra* Part III.B.1.

92. *In re Adoption of Barnett*, 354 P.2d 18, 22 (Cal. 1960).

93. See, e.g., *Dep’t of Soc. Welfare v. Superior Court of Contra Costa County*, 459 P.2d 897 (Cal. 1969); *Barnett*, 354 P.2d 18 (Cal. 1960); *In re Adoption of Backhaus*, 25 Cal. Rptr. 581 (Ct. App. 1962).

94. *Backhaus*, 25 Cal. Rptr. at 584.

95. 354 P.2d 18.

96. *Id.* at 19-20.

97. *Id.* at 20.

98. *Id.* at 20-21.

99. *Id.* at 22.

100. *Id.*

101. *Id.* at 23.

102. *Id.*

other did not.¹⁰³ Again, the court decided to excise the part of the relevant adoption statute that would not facilitate the adoption.¹⁰⁴ Under the holdings of the court in these cases, it would seem as though the court in *Sharon S.* should have allowed Annette to adopt Joshua because this was the intent of Sharon and Annette, and because this would have preserved the family unit and ensured Joshua's welfare. Furthermore, under *Adoption of Backhaus*,¹⁰⁵ the court in *Sharon S.* should not have limited the meaning of the statute because no express declaration prohibiting second-parent adoptions existed.¹⁰⁶

In second-parent adoptions, the child already has a legal relationship with one parent and thus the purpose of the adoption statutes, as enunciated in *Backhaus*,¹⁰⁷ must be grafted for this situation to mean that children deserve the legal recognition of two parents. Indeed, the American Academy of Pediatrics supports second-parent adoptions because they offer an opportunity for children "to know that their relationships with both of their parents are stable and legally recognized."¹⁰⁸ Nonetheless, in the context of second-parent adoptions, or of gay parent custody issues in general, courts have refused to liberally construe the statutes to comport with this purpose.

A 1991 First District Court of Appeals case illustrates; *Nancy S. v. Michele G.*¹⁰⁹ reads almost identically to *Sharon S.* Two women lived together for eleven years and then decided to have a baby.¹¹⁰ After Nancy became pregnant through artificial insemination and had their first child, the couple wanted to have another child.¹¹¹ Nancy again was artificially inseminated and gave birth to their second child.¹¹² The children called both women "Mom."¹¹³ The couple eventually broke up, and after several custody disputes, the biological mother moved for sole legal and physical custody alleging that Michele had no legal rights as a parent.¹¹⁴ The court, noting that Michele qualified as a "de facto" parent and conceding that the children would suffer from this result, strictly interpreted the statute such that Michele had no parental rights.¹¹⁵

103. *Contra Costa County*, 459 P.2d 897 (Cal. 1969).

104. *Id.* at 900.

105. *See supra* notes 93 and 94 and accompanying text.

106. *Backhaus*, 25 Cal. Rptr. at 585 (stating "[t]he courts of this state have evinced a concern to further the spirit and purpose of adoption and have been loath to place a restriction or limitation upon the meaning of the Legislature which the statutory language will not support").

107. *See supra* note 94 and accompanying text.

108. Committee on Psychosocial Aspects of Child and Family Health, *Coparent or Second-Parent Adoptions by Same-Sex Parents*, 109 PEDIATRICS 3, 339-40 (Feb. 2002), at <http://www.aap.org/policy/020008.html>.

109. 279 Cal. Rptr. 212 (Ct. App. 1991).

110. *Id.* at 214.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 219.

The courts in *Nancy S.* and *Sharon S.* failed to respect the long-established principle that “[t]he literal meaning of the words of a statute may be disregarded to avoid absurd results,”¹¹⁶ arguably because it would have resulted in two lesbian parents raising a child. It seems absurd that one parent, with the help of the court, can deny the other parent rights to custody, visitation, or adoption of the child she has raised since birth, simply because the former parent chose to give birth to the baby or signed on the dotted line at the adoption agency first. There is, however, a logical explanation: repugnance towards homosexuals, which originated with this country’s adoption of the Judeo-Christian religion.

B. The Religious Influence

Robert N. Bellah, a well-known religious scholar, asserted in several essays that America was modeled on the Protestant church.¹¹⁷ Although America may not have explicitly implemented the Protestant religion, he argued, “the Protestant Reformation was the single most significant archetype underlying American self-understanding.”¹¹⁸ He also noted that “[o]ur culture has always been Protestant to the bone and still is,” accounting for the “Judeo” part of “Judeo-Christianity” by stating that Catholics and Jews have been “Protestantized” for a long time.¹¹⁹

Numerous other scholars have agreed with Bellah on this issue. For instance, one collection of essays begins by declaring that the Judeo-Christian tradition “contributed profoundly to the moral character and vitality of American society and, indeed, played no inconsiderable role in shaping the political life of the developing country.”¹²⁰ Justice John T. Noonan, Jr. has argued that, despite the Supreme Court’s attempts to ignore the country’s obvious approval of the Judeo-Christian (mostly Christian) religion,¹²¹ America overtly condones the practices and beliefs of Christianity.¹²² To support this contention, Noonan points to the national holidays of Christmas and Thanksgiving, to the prayer conducted at the opening of a court, and to the phrase “In God We Trust” imprinted on the coinage.¹²³

116. *Times Mirror Co. v. Superior Court*, 813 P.2d 240, 245, n.7 (Cal. 1991) (quoting *Silver v. Brown*, 409 P.2d 689, 692 (Cal. 1966)).

117. See sources cited *supra* note 5.

118. Robert N. Bellah, *Epilogue*, in *MEANING AND MODERNITY: RELIGION, POLITY AND SELF* 255, 260 (Richard Madsen et al. eds., 1970).

119. *Id.* at 267.

120. *PUBLIC MORALITY, CIVIC VIRTUE, AND THE PROBLEM OF MODERN LIBERALISM*, at xi (T. William Boxx & Gary M. Quinlivan eds., 2000).

121. Noonan refers to a situation where the Supreme Court considered Christmas to have a secular purpose. NOONAN, *supra* note 5, at 230.

122. *Id.* at 230-31, 245.

123. *Id.*

C. *The Origin of the Animus Towards Homosexuals*

Both the Bible and the Torah condemn homosexuality. The oft-quoted passage shared by the Bible and the Torah states “thou shall not lie with mankind, as with womankind: it is abomination.”¹²⁴ Elsewhere in the book of Leviticus, ironically best known for the passage “[l]ove your neighbor as you love yourself,”¹²⁵ the author calls homosexual relations disgusting and worthy of death.¹²⁶ Apostle Paul includes “homosexual perverts” in his list of sinners that also contains those who are immoral, adulterers, and drunkards.¹²⁷ Several authors of books of the Bible refer to the story of Sodom and Gomorrah, where God condemned men in the city who raped other men.¹²⁸ Orthodox Jews consider homosexuality unnatural and a sickness.¹²⁹ It is seen to undermine the mitzvah of procreation and to destroy the cherished family structure.¹³⁰

D. *The Effect of the Animus in the Legal System*

Despite the other viable interpretations of the Bible and the Torah,¹³¹ and despite the facts indicating that homosexuality does not destroy the Jewish (or any other) family life,¹³² homosexuality is still considered immoral,

124. *Leviticus* 18:22 (American Standard Version). Other versions state it differently: “No man is to have sexual relations with another man; God hates that.” *Leviticus* 18:22 (Today’s English Version).

125. *Leviticus* 19:18 (Today’s English Version).

126. *Leviticus* 20:13 (Today’s English Version).

127. 1 *Corinthians* 6:9-10 (Today’s English Version).

128. *Genesis* 19:1-29 (Today’s English Version).

129. Jonathan J. Oriole, *Homosexuality and its role in Judaism*, at <http://www.geocities.com/westhollywood/4943/homojew.html> (last visited Mar. 30, 2002).

130. *Id.*

131. For instance, another way to interpret the Sodom and Gomorrah story stresses condemnation of xenophobia, lack of hospitality, and violent sexual relations. Rabbi Don Rossoff, *Union of American Hebrew Congregations*, at <http://uahc.org/ask/homosexuality.shtml> (last visited Mar. 30, 2002). When the Bible was written, it was not known that homosexual relations could be consensual and loving. *Judaism and Homosexuality*, at <http://philo.ucdavis.edu/zope/home/bruce/RST23/STDNTPAGES/michelle.html> (last modified Mar. 9, 1997). Some people have advocated that God approved of homosexual relationships as long as they were caring. J. Richards, *The Love Between David and Jonathan*, at <http://rainbowallianceopenfaith.homestead.com/GayLove3.html> (last visited Mar. 30, 2002) (discussing the relationship of David and Jonathan introduced in 1 *Samuel* 18:20 as more than a friendship). It has also been pointed out that literally abiding by the word of the Bible and Torah would result in the continuation of sacrificing of animals and Shabbat violators being stoned to death. Oriole, *supra* note 129.

132. This can be evidenced by the fact that there are thirty family-oriented gay synagogues in North America (Oriole, *supra* note 129), as well as by the fact that the Central Conference of American Rabbis, the Federation of Reconstructionist Congregations and Havvrot, and the Reconstructionist Rabbinical Association have documented their approval of same-sex relationships. Marc Wolinsky, *Stereotypes, Tolerance and Acceptance: Gay Rights in Courts of Law and Public Opinion*, 19 DEL. LAW. 13, n.57 (Summer 2001).

wrong, and by some, even contagious.¹³³ The following cases illustrate the influence this belief has on the opinions of the judges and thereby on the judicial system.¹³⁴

In 1978, Justice Rehnquist dissented from the decision to deny certiorari in a case concerning the right of a gay student group to exist on a university campus.¹³⁵ In his dissent, he likened the issue to “whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles.”¹³⁶ This comment implies that Justice Rehnquist considered homosexuality to be a disease that can be spread and caught by others who stand too close. It can be inferred, then, that he would not want two homosexuals to “get” a straight child “sick” by raising that child together.

Another case, *Bowers v. Hardwick*,¹³⁷ stands for the proposition that homosexuals do not have a fundamental right to engage in sexual relations.¹³⁸ In justifying its decision, the Supreme Court relied heavily on religious beliefs. Justice Burger, in his concurrence, supported the decision because “proscriptions against sodomy have very ‘ancient roots.’ . . . Condemnation of [homosexual conduct] is firmly rooted in Judeo-Christian moral and ethical standards.”¹³⁹ Justice Blackmun, in a dissent joined by Justice Brennan, Justice Marshall, and Justice Stevens, acknowledged the Court’s religious undertones disapproving of homosexual conduct by stating that, before the Court can decide to take away a man’s right to privacy, it must “do more than assert that the choice [homosexuals] have made is an ‘abominable crime not fit to be named among Christians.’”¹⁴⁰ He continued with the assertion that “traditional Judeo-Christian values . . . cannot provide an adequate justification for” the law against homosexual sex.¹⁴¹ Despite his plea, the Court ruled in favor of established theonomy against homosexual conduct.

133. “Contagious” may be hyperbole, but it epitomizes the naïvete of people like Dr. Norman Geisler and Frank Turek who write that “heterosexuals reproduce, but homosexuals can only recruit.” DR. NORMAN GEISLER & FRANK TUREK, *LEGISLATING MORALITY: IS IT WISE? IS IT LEGAL? IS IT POSSIBLE?* 138 (1998).

134. “A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.” Matthew A. Ritter, *Constitutional Jurisprudence of Law and Religion*, 40 *CATH. LAW.* 323, n.23 (2001) (quoting *Lee v. Weisman*, 505 U.S. 577, 591-92 (1992) (Blackmun, J. concurring)).

135. See *Univ. of Missouri v. Gay Lib*, 434 U.S. 1080 (1978) (Rehnquist, J. dissenting).

136. Wolinsky, *supra* note 132, at 14-15 (quoting *Univ. of Missouri v. Gay Lib*, 434 U.S. 1080, 1082, 1084 (1978) (Rehnquist, J. dissenting)).

137. 478 U.S. 186 (1986).

138. *Id.* at 197.

139. Marc L. Rubinstein, *Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause*, 46 *HASTINGS L.J.* 1585, 1592 (1995) (quoting *Bowers*, 478 U.S. 186, 196-97 (1986) (Burger, C.J. concurring)). See also *supra* Part III.B.

140. *Bowers*, 478 U.S. at 199-200.

141. *Id.* at 211.

Justice Scalia similarly expressed his thoughts supporting morality legislation (against homosexuality) in his dissent from the *Romer v. Evans* decision.¹⁴² The majority did not even decide whether homosexuality should be considered a suspect classification for equal protection analysis purposes, but the prospect of getting near to that decision scared Scalia. He argued that Colorado's Amendment 2 (essentially discriminating against homosexuals) effectively "preserved traditional sexual mores," as the legislation was meant to do.¹⁴³ His position promotes the enactment of laws based on "hostility and moral disapproval."¹⁴⁴ An Oscar Wilde quote seems appropriate: "Morality is simply the attitude we adopt toward the people we personally dislike."¹⁴⁵

Mississippi, Alabama, North Carolina, Virginia, and Florida are just a few of the states that have ignored studies regarding the best interests of children in a homosexual family¹⁴⁶ and have injected moral views into their laws to prohibit homosexual parenting (to the extent legally possible).¹⁴⁷ A dramatic example of such a situation in Mississippi is *Weigand v. Houghton*.¹⁴⁸ Soon after Mom and Dad had a son together, they divorced.¹⁴⁹ Mom got remarried to Son's stepfather, an unemployed convicted felon, who physically abused his wife, drank too much, and cheated on his wife.¹⁵⁰ Dad moved to California, bought a home, and settled into a healthy, long-term relationship.¹⁵¹ Mom worked two jobs and left Son at home with her second abusive husband since divorcing Dad.¹⁵² Dad remodeled a room in his house for Son, investigated private schools for Son to attend, and sought informa-

142. 517 U.S. 620 (1996) (Scalia, J. dissenting). See *infra* Part IV for a further discussion of his dissent.

143. S.I. Strong, *Romer v. Evans and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259, 1265-68 (Winter 1997) (quoting *Romer v. Evans*, 478 U.S. 186 (1986)).

144. Strong, *supra* note 143, at 1267.

145. Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L. J. 331, 404 (Spring 1995) (quoting Oscar Wilde, *An Ideal Husband*, in *SELECTED WRITINGS OF OSCAR WILDE* 173 (R. Fraser ed., 1969)).

146. See Wolinsky, *supra* note 132, at n.36 (quoting a 1995 American Psychological Association paper stating that "not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents"); Kreishner, *supra* note 80, at 4 (explaining a study completed by University of Southern California researchers that found that children of gay parents exhibit no differences in child outcomes when compared to children of heterosexual parents, no higher tendency to identify themselves as gay than children of heterosexual parents, and a *higher* level of affection, responsiveness and psychological strength than children of heterosexual parents); Committee on Psychosocial Aspects of Child and Family Health, *supra* note 108 (reporting on the American Academy of Pediatrics' approval of second-parent adoptions as in the best interest of the children because it guarantees rights and protections not otherwise given to homosexual families).

147. Wolinsky, *supra* note 132, at 19.

148. 730 So. 2d 581 (Miss. 1999) (McRae, J. dissenting).

149. *Id.* at 583.

150. *Id.* at 584-85, 588.

151. *Id.* at 583-84.

152. *Id.* at 585.

tion concerning publication of Son's short stories.¹⁵³ After Dad discovered that Son had been witnessing stepfather's abusive attacks on Mom, he moved for custody of Son.¹⁵⁴ Son did not express any preference regarding which parent to live with,¹⁵⁵ and the court subsequently held that it would be in the child's best interest to remain with Mom.¹⁵⁶

As the dissenting opinion, written by Justice McRae astutely recognized, the "majority [is] blinded by the fact that [son's] father is gay."¹⁵⁷ Justice McRae stressed that in no way did the majority base its opinion on the best interests of the child, but instead based the decision on its perceptions of morality as it relates to sexual orientation.¹⁵⁸ The majority ignored the inevitable psychological damage living in an abusive home would have on Son and instead focused on "condemning" Dad's lifestyle.¹⁶⁰ Justice McRae noted that the majority likely was most appalled by Dad's openness towards his homosexuality and thus resolved the custody issue against him.¹⁶¹

In Florida, the legislature and the courts are more blatant with their negative views on homosexuality. Florida continues to ban lesbians and gays from adopting.¹⁶² This law has gotten a lot of media coverage since Rosie O'Donnell wanted to adopt in Florida but could not due to her sexuality. Currently, she is advocating for the removal of this law because of its prohibition on one particular gay couple from adopting a foster child whom they have raised since he was a little boy.¹⁶³

Precedent demonstrates that adoption statutes are liberally construed, except, however, in the context of homosexual parents. Although the rationale given by the courts frequently stems from the best interests of the child standard, reality dictates that those on the bench often subscribe to the Judeo-Christian belief that homosexuals are immoral, and subsequently incorporate this belief into their decisions.

IV. THE ENDORSEMENT OF JUDEO-CHRISTIAN BELIEFS

It is difficult to find another explanation for denying homosexual parents the same rights as heterosexual parents besides the one professed by this Comment: courts continue to abide by the archaic notions of right and wrong, erroneously based on religious ideology. Courts have gone so far as

153. *Id.* at 584.

154. *Id.* at 584-85.

155. *Id.* at 584.

156. *Id.* at 587-88.

157. *Id.* at 588.

158. *Id.*

159. Note the religious rhetoric, no doubt a purposeful use of the word.

160. *Weigand*, 730 So. 2d at 588.

161. *Id.* at 590-91.

162. Ryan Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U.J. GENDER SOC. POL'Y & L. 207, 213 (Spring 2001).

163. *Prime Time* (ABC television broadcast, Mar. 14, 2002).

to avoid the de facto parent and parent by estoppel arguments raised by second-parents in adoption and custody cases presumably because they are aware that this would require them to find a compelling interest before interfering with these parents' rights to care, custody, and control of their children.¹⁶⁴ It would be difficult to discover a compelling interest because the motivation behind these laws turns on the judges' personal morals, which are founded in religion, and using religion as a compelling governmental interest violates the First Amendment.

A. *The Connection Between Morality Legislation and Religion*

Morality legislation refers to the "category of laws regulating conduct that violates established social norms but poses no concrete or tangible harm to persons other than the actor, and possibly not even to him or herself."¹⁶⁵ Although some people contend that homosexuality in general, and second-parent adoptions specifically, harms others, numerous studies have demonstrated that no such harm exists.¹⁶⁶ Nonetheless, because both situations contravene traditional American mores, legal decision-makers continue to target them. "It would be foolish to dispute that morality enters into the decision-making processes of political policy makers."¹⁶⁷

164. The court in *Sharon S.*, 113 Cal. Rptr. 2d 107 (Ct. App. 2001) did not discuss the issue of Annette as a de facto parent or parenthood by estoppel. The court in *Nancy S.*, 279 Cal. Rptr. 212 (Ct. App. 1991) did discuss the issue and decided that the legal mother's former partner "may" be a de facto parent to their child but nonetheless denied the partner rights to custody. Cf. *In re Guardianship of Z.C.W.*, 84 Cal. Rptr. 2d 48, 50-51 (Ct. App. 1999) (court held that a legal mother's former partner did not have standing to ask for guardianship of their child and could not be considered a de facto parent because that designation is only allowed in juvenile dependency proceedings). According to the American Law Institute's Principles of Law of Family Dissolution, however, the former partner of a legal mother would qualify at least as a de facto parent, if not as parents by estoppel, a more stringent standard. Mary Coombs, *Insiders and Outsiders: What the American Law Institute has done for Gay and Lesbian Families*, 8 DUKE J. GENDER L. & POL'Y 87, 96-97 (2001). Under intestacy laws, these women (or at least Annette) would be considered parents as well. See CAL. PROB. CODE § 6454 (West 2000) (requiring the relationship between parent and child to have begun during the child's minority and clear and convincing evidence that the parent would have adopted but for a legal barrier). Therefore, according to the United States Supreme Court, the state needs a compelling interest to interfere with parents' fundamental right to make decisions regarding the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 66, 72-76 (2000).

165. Strong, *supra* note 143, at n.8.

166. Dr. Geisler and Frank Turek argue that homosexuals die earlier simply by virtue of being gay. GEISLER & TUREK, *supra* note 133, at 129-52. They state that "[n]ature seems to reward with good health and long life those who practice traditional morality." *Id.* at 133. They believe the legalization of homosexual marriages would encourage children to be gay. *Id.* at 138. No doubt they would similarly disapprove of second-parent adoptions because of the "unhealthy example" it sets for the children. *Id.* The statistics do not support this contention. See *supra* note 146.

167. Gey, *supra* note 145, at 331.

Arguably the most famous decision where morality dominated the decision is *Bowers v. Hardwick*.¹⁶⁸ In coming to the conclusion that homosexual sodomy is not a fundamental right, the court acknowledged that the “law . . . is constantly based on notions of morality,” and it refused to invalidate anti-sodomy laws based on its sentiments about the morality of homosexuality.¹⁶⁹ As the dissent discussed, this decision was filled with religious undertones.¹⁷⁰

A more recent, and more blatant, approval of morality legislation is Justice Scalia’s dissent in *Romer v. Evans*.¹⁷¹ He expressed his disappointment in the majority’s opinion (outlawing a Colorado discriminatory amendment) by writing a seventeen-page dissent, concentrating primarily on the duty of decision-makers to legislate morality.¹⁷² He claimed the purpose of the law is to shape public morality.¹⁷³ This premise rested on the idea that “if legislation is unable to preserve or protect societal mores, then the law loses its claim to legitimacy.”¹⁷⁴ After putting the pieces together, Scalia’s argument essentially advocated for the implementation of anti-homosexual beliefs through laws.¹⁷⁵

Although Scalia did not explicitly justify his theory on religious grounds, theonomy no doubt played a role. As George Washington recognized during his presidential farewell address, “[b]oth reason and experience forbid us to expect that national morality can prevail in exclusion of religious principle.”¹⁷⁶ Indeed, at one time it was thought that the sin of immorality endangered the chances for religious salvation.¹⁷⁷ The state, however, no longer has an obligation “to save its citizens’ souls,” and therefore should remain out of the business of doing so through legislation or otherwise.¹⁷⁸

168. 478 U.S. 186 (1986).

169. *Id.* at 196. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court conceded that it should not mandate its own moral code, despite the pressures to do so. *Id.* at 958. This Comment questions whether the Court has been able (or wants) to overcome the intense pressure. Justice Scalia made it clear in his dissent in *Romer* that he had no intentions of leaving his morals out of legislation. Dr. Geisler and Frank Turek agree that if government does not legislate morality, “evil will prevail.” GEISLER & TUREK, *supra* note 133, at 142.

170. *Id.* at 210; *see supra* Part III.B.

171. 517 U.S. 620, 636-53 (1996) (Scalia, J. dissenting). *See supra* Part III.B. For an in depth analysis of Justice Scalia’s dissent, *see Strong, supra* note 143.

172. *See Romer*, 517 U.S. 620, 636-53 (1996); *see also Strong, supra* note 143.

173. Strong, *supra* note 143, at 1267.

174. *Id.*

175. *Id.* at 1280.

176. DAVID G. MYERS, *THE AMERICAN PARADOX: SPIRITUAL HUNGER IN AN AGE OF PLENTY* 268 (2000). President Washington introduced a syllogism that solidified this idea: “Morality is necessary for the existence of republican government. Religion is necessary for morality. Therefore, religion is necessary for the continued existence of the republic.” NOONAN, *supra* note 5, at 114.

177. Strong, *supra* note 143, at 1286-87.

178. *Id.* at 1289. *See discussion infra* Part IV.B. regarding ways to avoid the seemingly inevitable commingling.

Granted, this separation will be quite difficult because religion and morality are so intertwined. Furthermore, legal decision-makers (i.e., legislators and judges) are both government officials with responsibilities and human beings with consciences.¹⁷⁹ It is easy to see how their personal theological interpretation could get confused with their governmental tasks, such as statutory interpretation.¹⁸⁰ Herein lies the problem with the *Sharon S.* decision.

B. An Establishment of a Religion Clause Challenge

An establishment of religion violation by the judicial system seems more apparent after this robust connection between morality legislation and religion is drawn.¹⁸¹ Although people may not think of themselves as religious per se, they continue to abide by the basic tenets of the dominant religions, mostly Judeo-Christianity.¹⁸² Within these tenets remains the fear and animosity towards homosexuals.¹⁸³ Courts, as a result, strictly construe statutes because it resonates with the moral principles of the judges, and therefore resonates with the religious tenets of Judeo-Christianity.

In enacting and regulating morality legislation, such as second-parent adoptions, the courts disintegrate the wall between church and state¹⁸⁴ and in its place construct a bridge between the two. Once church and state become this enmeshed, the courts become vulnerable to a First Amendment attack. The Supreme Court in *Everson v. Board of Education of Ewing Tp.*¹⁸⁵ gave a comprehensive summary of the meaning behind the Establishment Clause of the First Amendment, specifically delineating what the government cannot do without violating the Constitution.¹⁸⁶

179. NOONAN, *supra* note 5, at 246.

180. *Id.* at 224.

181. See Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 306 (1984) (stating that this connection "is not difficult to make since most morality legislation is 'a relic in the law of our religious heritage'").

182. See Ritter, *supra* note 134, at 142 (2001) (asserting that religion is more a matter of living properly, namely within the Judeo-Christian heritage, than conforming to express dogma and ritual). See also Rubinstein, *supra* note 139, at 1613 (acknowledging that individuals, contrary to anti-gay-rights initiative sponsors, "may not realize the connection between popular morality and traditional Christian belief").

183. See discussion *supra* Part III.

184. Strong, *supra* note 143, at 1298 (stating that "it seems incongruous to recognize religious freedom and tout the institutional separation of church and state while still allowing the state to regulate morality with a free hand). See Ritter, *supra* note 134, at 103 for a detailed analysis of the erection of the wall between church and state (theorizing that separation between church and state "covertly valorized a Protestant religiosity" from the origin). See generally Gey, *supra* note 145, for church/state discussion and for similarities between establishment of religion and moral regulation, suggesting constitutional concerns regarding one is applicable to the other.

185. 330 U.S. 1 (1947).

186. Actual text of the relevant portions of the First Amendment states: "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or *prefer one religion over another*. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be *punished* for entertaining or professing religious beliefs or *disbeliefs*, for church attendance or non-attendance.¹⁸⁷

Under *Everson*, the courts that condemn homosexuality through the law are violating the Establishment Clause. As there is no demonstrated reason, besides a moral (and therefore religious) one, to disallow second-parent adoptions by strictly construing the statutes, the courts essentially are endorsing the beliefs of Judeo-Christianity. The Fourth District Court of Appeals in *Sharon S.*, for example, preferred the Judeo-Christian belief that homosexuality is immoral and extended that to mean that lesbians should not and cannot co-parent. These second-parents, in effect, are being punished for their disbelief in, at least parts of, the Judeo-Christian religion. "Divine revelation and scripture may be a proper basis for a moral standard, but they cannot serve as the unexamined basis for discrimination by our government."¹⁸⁸

1. Background

The fact that "no court has ruled in favor of a gay rights position on an Establishment Clause basis"¹⁸⁹ does not take away from the efficacy of the argument.¹⁹⁰ For instance, it is no secret that the Court in *Bowers v. Hardwick*¹⁹¹ decided the case on religious grounds: "[P]roscriptions against sodomy have very 'ancient roots.' . . . Condemnation of [homosexual conduct] is firmly rooted in Judeo-Christian moral and ethical standards."¹⁹² Although the current courts hide their disapproval of the homosexual lifestyle better by avoiding religious language and searching for secular-appearing justifications, the result is the same. The courts, in wanting to preserve the status quo with which they are comfortable, in turn establish a religion.¹⁹³

187. *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 15-16 (1947) (emphasis added).

188. Wolinsky, *supra* note 132, n.20 (quoting Brief of Amici Curiae Young, Conaway, Stargatt & Taylor, *Steffan v. Perry, Sec'y of Def.*, 41 F.3d 677 (D.C. Cir. 1994) (en banc)). See Gey, *supra* note 145, at 386 (discussing how an establishment of a particular religion by the government undermines the principle of individual autonomy (to choose and exercise one's religion) deemed so fundamental in this country).

189. Rubinstein, *supra* note 139, at 1591.

190. See generally *id.*

191. 478 U.S. 186 (1986).

192. Rubinstein, *supra* note 139, at 1592 (quoting *Bowers*, 478 U.S. 186, 196-97 (1986) (Burger, C.J. concurring)). See also *supra* Part III.B.

193. Rubinstein, *supra* note 139, at 1609.

2. Application

To overcome an Establishment Clause challenge, the courts (specifically the court in *Sharon S.*) must pass the test enunciated in *Lemon v. Kurtzman*.¹⁹⁴ This three-prong test requires the court's strict statutory construction to have (1) a secular legislative purpose, (2) a principal or primary effect that neither advances nor inhibits religion, and (3) no "excessive government entanglement with religion."¹⁹⁵ Concededly, the court's construction cannot fail the *Lemon* test merely because it coincides with the tenets of the Judeo-Christian religion.¹⁹⁶ According to the Supreme Court's declaration in *McGowan v. Maryland*,¹⁹⁷ in order for the court in *Sharon S.* to have violated the Establishment Clause, it must have adopted the strict statutory construction with the purpose of endorsing Judeo-Christian beliefs.¹⁹⁸ This is exactly what it did.

Because the courts wisely have eliminated most of the religious rhetoric from their opinions, it is absent in those opinions regarding second-parent adoptions; it is difficult, therefore, to show a complete lack of a secular legislative purpose because the language used disguises the religious principles. The different treatment between heterosexual couples and homosexual couples in this context, however, impliedly demonstrates the religious motivation and the religious primary effect.¹⁹⁹ Nothing else accounts for the court's decision in *Sharon S.* to suddenly strictly construe adoption statutes after years of precedent that liberally construed those statutes.²⁰⁰ There is no harm to the children and in fact it has been reported that a second-parent situation will foster positive child development.²⁰¹ It follows, then, that because there is no secular purpose and a primary effect that advances religious beliefs, the statutory construction fails the *Lemon* test.²⁰²

Michaelson offers another analysis of Establishment Clause violations.²⁰³ Under Michaelson's "competing constitutional values model" Estab-

194. 403 U.S. 602 (1971).

195. *Id.* at 612-613.

196. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

197. *Id.*

198. *Id.*

199. *See supra* Part II for a discussion of *Marshall* and Part III.A. for a discussion of *Barnett* and *Contra Costa County*, three heterosexual cases where the courts liberally construed the relevant adoption statutes. In contrast, the court in *Sharon S.* (among others) strictly construed the statutes. *See supra* Part II for *Sharon S.* discussion and Part III.A. for other examples of strict construction in homosexual context.

200. In a similar vein, a gay rights activist fighting against the anti-gay-rights initiatives in Florida stated: "What these people are doing is to try to codify into law their version of the Bible." Rubinstein, *supra* note 139, at n.114.

201. *See supra* note 146.

202. The statutory construction similarly fails the third prong of the *Lemon* test because by advancing a religious purpose, the courts are excessively entangled with religion.

203. *See Michaelson, supra* note 181, at 312-14, 388-96, using the example of prohibitions against gay marriages.

lishment Clause challenges take a two-step approach. "First, the interests underlying the suspect [statutory construction] must be scrutinized to determine whether they can be traced to values recognized explicitly or implicitly in the Constitution."²⁰⁴ If the interests do not have roots in the Constitution, then the statutory construction is unconstitutional *per se*.²⁰⁵ If the interests can be traced to the Constitution, then the second step requires a balancing between the interests advanced by strict construction and the values underlying the Establishment Clause.²⁰⁶

The court in *Sharon S.* arguably found constitutional interests to satisfy step one, but it fails again at step two. The interests enumerated by the court to support the decision of strict construction include: the avoidance of "defeat[ing] the overall statutory framework and fundamental rules of statutory construction,"²⁰⁷ the refusal to terminate a legal mother's rights, the discretion of the courts to interpret statutes without deference to DSS, and the right of the legislature to solve important social problems.²⁰⁸ The problem, however, is that these constitutionally-recognized interests ignored precedent demanding liberal construction of adoption statutes, overlooked the clear intent of Sharon to have Annette adopt Joshua, dismissed recommendations by the Department of Social Services (whose job it is to execute the best interests of the children), and misinterpreted Assembly Bill 25.²⁰⁹ The connection between the stated interests and the ultimate decision to proscribe second-parent adoptions is so attenuated that the interests no longer seem to have sufficient roots in the Constitution for this purpose. As a result, such a strict construction of the statutes would be unconstitutional *per se*.

Supposing the interests maintain a sufficient connection to the Constitution, the values underlying the Establishment Clause outweigh the interests stated by the court. The fact that the court strained to find justification for its decision, coupled with the fact that the efficacy of second-parent adoptions is heavily debated, "confirms the supposition that the [strict statutory construction was] meant to advance certain conceptions of traditional morality," and thus traditional Judeo-Christian beliefs.²¹⁰ Therefore, the strict statutory construction by the court in *Sharon S.* violated the Establishment Clause.²¹¹

204. Michaelson, *supra* note 181, at 314.

205. *Id.*

206. *Id.*

207. *Sharon S.*, 113 Cal. Rptr. 2d at 114.

208. *Id.* at 113-14.

209. *Id.* at 114-15. See *supra* Part II for a description of these problems.

210. Michaelson, *supra* note 181, at 394 (concluding her analysis on gay marriage prohibitions).

211. See also Gey, *supra* note 145, at 391, discussing another two-step analysis for Establishment Clause challenges: "all government action regulating individual expression or behavior must have a primarily amoral purpose" and "must have a substantially amoral effect." Under the same rationale as given above, strict interpretation of second-parent adoption statutes would fail this test.

V. ASSEMBLY BILL 25

In 1999, Assembly Bill 26 statutorily recognized domestic partnerships in California.²¹² Governor Davis vetoed a similar, more inclusive bill (Senate Bill 75) in the same year because Senate Bill 75 was “overly broad” and because Assembly Bill 26 would serve the same purposes and had a narrower scope.²¹³ To follow up, several Senators and Assembly members introduced bills to extend rights given to married couples to domestic partners.²¹⁴ These bills were either made inactive or vetoed.²¹⁵ The timing must have been right for Democratic Assemblywoman Carol Midgen because in 2001 her proposed bill, Assembly Bill 25, passed through both houses.²¹⁶

In the context of adoptions, Assembly Bill 25 allows domestic partners to be treated as stepparents. Specifically, Section 9000 of the California Family Code reads: “A domestic partner, as defined in Section 297,²¹⁷ desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides.”²¹⁸ The statute continues by stating that “[f]or the purposes of this chapter, stepparent adoptions include adoption by a domestic partner, as defined in Section 297.”²¹⁹

This bill will make it much easier for second-parents to adopt the children of their partners, while in a committed, healthy relationship. The bill does not, however, account for a variety of other realistic situations that occur in the course of relationships. The most obvious situation is that of Sharon and Annette; when a legal parent and the soon-to-be-second-parent separate before the adoption proceedings are complete, the legal parent can deny the would-be second-parent any rights to care, custody, and control of the child.²²⁰ Another situation where the would-be second-parent cannot legally adopt the child is where the couple does not qualify as domestic partners under Family Code 297, usually because they have moved out of California and therefore do not satisfy the residency requirement.²²¹ A third situation that the legislation does not address focuses on where the child would live should the legal parent die or become incapacitated before the

212. *Background: Hearing on Assemb. B. 25 Before the S. Judiciary Comm.* 3, 1999-2000 Sess. (Cal. 1999) (statement of Martha M. Escutia, Chair, Senate Judiciary Committee).

213. *Id.*

214. *Id.*

215. *Id.*

216. S. Judiciary Comm., *Assemb. B. 25*, 2001-2002 Sess. (Cal. 2002).

217. CAL. FAM. CODE § 297(a) (West 2000) defines domestic partners as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.” It goes on to list the requirements that must be met in order to qualify as such.

218. CAL. FAM. CODE § 9000(b) (West 2000).

219. CAL. FAM. CODE § 9000(f) (West 2002, pocket part).

220. *See, e.g.,* Martha Matthews & Jordan Budd, *Sharon S. v. Superior Court*, at <http://www.aclu-sc.org/litigation/gylsbian.shtml#sharonsvsuperiorcourt>.

221. *See, e.g.,* *What is the Sharon S. decision*, at <http://www.thla.org/> (last updated Jan. 21, 2002).

successful completion of the second-parent adoption.²²² Because the would-be second-parent is considered a legal stranger to the child, the child will most likely be removed from “the only other person that was responsible for the child’s upbringing” and placed in either foster care or the care of other legal family members.²²³

Although the legislature seems to be turning in the right direction with its passage of Assembly Bill 25, questions remain regarding why homosexual parents are not given all of the rights given to heterosexual parents. It could be that Assembly Bill 25 was a compromise between those endorsing the Judeo-Christian beliefs and those attempting to deviate from that bad habit. A more positive response might focus on the fact that this bill is a stepping-stone for more truly legislation, which will consider the interests of the child instead of the religious implications.

VI. CONCLUSION

Other states look to California to set the legal trend.²²⁴ Should California statutorily allow second-parent adoptions, other states likely will follow. They will recognize the many benefits for the children of having two loving parents. For example, the children will be entitled to inherit from the second-parent upon that parent’s death, to receive support upon separation, and to be eligible for insurance coverage under the second-parent’s policies during life.²²⁵ Moreover, the children will not be forced to sever all familial ties with the second-parent and her extended family merely because their parents separated or because the legal parent died before the second-parent completed the adoption.²²⁶ In the alternative, however, if California chooses to strictly construe the adoption statutes, contrary to precedent and to the children’s best interests, then the children will be “denied the affection of a functional parent who has been with them since birth.”²²⁷

It is sobering to think that if Annette were a man, with all other facts analogous to Annette’s scenario, this case would likely not be going to the California Supreme Court. The Fourth District Court of Appeals probably would have recognized Sharon’s blatant approval of Joshua’s second-parent adoption by her partner and subsequently ordered Sharon to be estopped from prohibiting the execution of the adoption. Joshua deserves two parents just as much as his brother does and should not be denied access to one parent simply because Zachary was born first. However, timing is not the issue here; religious beliefs dictated the court’s decision. To be sure, the legaliza-

222. Wolinsky, *supra* note 132, at 18.

223. *Id.*

224. *What is the Sharon S. decision*, at <http://www.thla.org/> (last updated Jan. 21, 2002).

225. *Adoption of Tammy*, 619 N.E.2d 315, 320 (Mass. 1993); *Lilith*, *supra* note 162, at 224-25.

226. *Adoption of Tammy*, 619 N.E.2d at 320; *Lilith*, *supra* note 162, at 224-25.

227. *Adoption of Tammy*, 619 N.E.2d at 214-15.

tion of second-parent adoptions is a moral issue. Moral issues, especially of this type, invariably have their roots in Judeo-Christianity. Thus, the court's denial of Annette's rights to adopt Joshua endorsed Judeo-Christian beliefs and violated the Establishment Clause of the First Amendment.

Assembly Bill 25 provides some hope. Nonetheless, religious influences still exist. The bill was opposed by several religiously affiliated groups such as the Traditional Values Coalition and the Committee on Moral Concerns.²²⁸ Both the California Public Policy Foundation and the Mountain Park Baptist Church wrote letters opposing the bill on the grounds that allowing second-parent adoptions undermines the traditional (no doubt, religiously-defined heterosexual) institution of family.²²⁹ This thought seems backwards, however, because *not* allowing second-parent adoptions *deprives* children of a stable, two-parent family. Besides, "love makes a family—nothing more, nothing less."²³⁰

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228. *Background: Hearing on Assemb. B. 25 Before the S. Judiciary Comm.* 24, 1999-2000 Sess. (Cal. 1999) (statement of Martha M. Escutia, Chair, Senate Judiciary Committee).

229. *Id.* at 23.

230. Barbara J. Cox, *Love Makes a Family—Nothing More Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J.L. & POL. 5 (1991).

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