CHRISTIAN J.W.—A TALE OF TWO MOMS: UNEQUAL TREATMENT OF SAME-SEX COUPLES AND A PROPOSED CHANGE IN ADOPTION LAWS IN WISCONSIN

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NOTE

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ABSTRACT

After In re the Termination of Parental Rights of Christian J.W., the legal community in Wisconsin is now more aware that same-sex, unmarried partners face more restrictive burdens when seeking to adopt one partner’s biological child than do heterosexual couples seeking to do the same. These burdens may raise Equal Protection concerns. These burdens also demonstrate that Wisconsin adoption laws simultaneously promote conflicting public policies. Finally, these burdens are unnecessarily wasting Wisconsinites’ resources.

Christian J.W. reveals an opportunity for the Wisconsin Legislature. Namely, the lawmaking body should act to eliminate this inequality in the state’s adoption laws. Such action will not only protect the state from potential discrimination lawsuits, but it will also promote public policy, save money, and protect Wisconsin’s children from the inequalities that result from the unequal treatment of their same-sex parents.

TABLE OF CONTENTS

I. INTRODUCTION: A TALE OF TWO MOMS ................................................................. 2

II. HOW THE LAW APPLIES TO SAME-SEX COUPLES WHO WANT TO ADOPT IN
    WISCONSIN .................................................................................................................. 7

   A. Wisconsin Statutes and Case Law Treat Same-Sex Couples and Opposite-
      Sex Couples Differently With Regard to Adoption ............................................ 8

      1. WISCONSIN ADOPTIONS DEPEND ON THE ELIGIBILITY OF BOTH THE CHILD
         AND THE PARENT(S) .............................................................................................. 8

      2. THE BEST INTERESTS OF THE CHILD STANDARD CANNOT OVERCOME THE
         UNEQUAL TREATMENT OF UNMARRIED AND MARRIED COUPLES WITH REGARD
         TO ADOPTION ........................................................................................................ 10

      3. UNMARRIED COUPLES CAN EACH GAIN PARENTAL RIGHTS OF ONE
         PARTNER’S BIOLOGICAL CHILD BY VOLUNTARILY TERMINATING PARENTAL
         RIGHTS AND COMPLYING WITH PREADPTION REQUIREMENTS .................... 11
B. Christian J.W. Demonstrates How Same-Sex Couples Can Each Legally Obtain Parental Rights to One Partner’s Biological Child................................. 15

C. The Process Employed in Christian J.W. Is Currently The Only Permissible Method Available for Same-Sex Unmarried Couples to Each Adopt the Same Child........................................................................................................ 18

D. The Equal Protection Clause of the United States Constitution Applies to All Wisconsin Adoption Laws....................................................................................................................... 20

   1. WISCONSIN ADOPTION LAWS THAT TREAT ANYONE UNEQUALLY ARE SUBJECT TO RATIONAL BASIS ANALYSIS....................................................................................... 21

   2. WISCONSIN ADOPTION LAWS THAT TREAT SUSPECT CLASSES OF PERSONS UNEQUALLY ARE SUBJECT TO STRICT SCRUTINY ANALYSIS ........................................ 22

III. Why the Current State of Inequality for Adoption By Same-Sex Couples Should Not Stand .................................................................................................................. 23

   A. Wisconsin’s Adoption Laws with Regard to Same-Sex Couples Raise Equal Protection Concerns.................................................................................................................. 23

      1. WISCONSIN ADOPTION LAWS FAIL RATIONAL BASIS ANALYSIS ........................................ 26

      2. WISCONSIN ADOPTION LAWS MAY FAIL STRICT SCRUTINY ANALYSIS ................. 31

   B. Wisconsin’s Adoption Laws with Regard to Same-Sex Couples Run Contrary to the Public Policy That Supports Two Parents Per Child .............. 33

   C. Wisconsin’s Adoption Laws Unnecessarily Waste Resources .................. 38

IV. Conclusion: The Legislature Should Create A Method for Same-Sex Couples to Jointly Adopt a Minor Child ................................................................. 41

I. Introduction: A Tale of Two Moms

Imagine a boy, Brian, who is raised by two loving parents. One parent, call her Jane, gave birth to Brian, and the other parent, Pat, became Brian’s parent through adoption. Imagine that Brian does not know or does not care that he is not biologically related to Pat. Brian only cares that both of his parents love him.
Now imagine that after several years together raising Brain, Jane and Pat end their relationship. Brian loves each parent equally. Unfortunately, the parents drag him into a contested separation. In fact, Jane seeks to eliminate Pat’s adoptive parental rights. Normally, Jane could only achieve this end if a court finds Pat unfit.¹ But due to uncertainty in Wisconsin’s adoption laws, Brian may lose Pat as a parent if Pat’s adoptive parental rights are challenged in court.

This uncertainty arises because Brian’s parents are gay. For both Jane and Pat to gain parental rights, Jane had to first terminate her biological parental rights, and then both Jane and Pat separately petitioned to adopt Brian as unmarried adults.² Wisconsin’s adoption laws prohibit an unmarried adult from adopting the biological child of his or her partner as long as the partner retains parental rights to the child.³ Additionally, Wisconsin adoption laws prohibit unmarried couples from jointly adopting the same child, regardless of whether the

¹ Grounds for an involuntary termination of parental rights include abandonment, relinquishment, need of protection or service, the parent’s continuing disability, continued denial of periods of physical placement or visitation, failure to assume parental responsibility, incestuous parenthood, parenthood as a result of sexual assault, commission of a serious felony against the child (or a sibling), or prior involuntary termination of parental rights. Wis. Stat. § 48.415 (2009).

² Either a married couple can jointly adopt a child, or an unmarried adult can adopt a child. Wis. Stat. § 48.82 (1) (a), (b) (1991). Only if an adult marries his/her partner can that adult jointly adopt the partner’s child. See Wis. Stat. § 48.82 (1) (a) (emphasis added). Same-sex couples cannot marry in Wisconsin. Wis. Const. art XIII, § 13 (defining marriage as between one man and one woman). Only when a child’s parental rights are terminated is that child eligible for adoption, except in the case of married stepparents. In Interest of Angel Lace M., 184 Wis. 2d 492, 519, 516 N.W.2d 678, 686 (1994); see also infra Part II.A.1. Same-sex couples can only adopt the same child if that child has no legal parents and they petition for adoption separately. In re the Termination of Parental Rights to Christian J.W.: Shelly J. v. Leslie W., 2011 WI App 121, ¶ 36.

³ See Wis. Stat. §§ 48.82 (1) (a), (b) (permits married couples to jointly adopt a child and unmarried adults to adopt a child); 48.81 (permits children with no legal parents to be adopted and permits children with one legal parent to be adopted by that parent’s spouse).
couple is same-sex or opposite-sex.\textsuperscript{4} Same-sex couples do not have the option of marriage as a means to jointly adopt one partner’s biological child.\textsuperscript{5}

Nothing in Wisconsin adoption law prohibits same-sex partners from simultaneously and individually petitioning for adoption of a minor child who has no other legal parent.\textsuperscript{6} In the scenario above, Jane successfully terminated her biological parental rights to Brian, and both Jane and Pat filed separate petitions to adopt Brian. Brian could not be adopted by an unmarried adult like Pat until his biological mother terminated her inherent biological parental rights.\textsuperscript{7}

The parents of Christian J.W., a same-sex couple in Wisconsin named Shelly J. and Leslie W., used this process to successfully adopt Shelly’s biological child.\textsuperscript{8} Shelly and Leslie separated several years after they each adopted Christian.\textsuperscript{9} Shelly, the biological mother, petitioned the court to vacate the previously granted termination of parental rights and to restore her sole legal parental rights of Christian.\textsuperscript{10} The case reached the Wisconsin appellate court.\textsuperscript{11}

\textsuperscript{4}Wis. Stat. § 48.82 (1) (a) (permits married couples to jointly adopt a minor child).

\textsuperscript{5}See supra note 2.

\textsuperscript{6}See Wis. Stat. § 48.82 (1)(b) (permits “an unmarried adult” to adopt a child, but does not say that two unmarried adults cannot simultaneously petition for adoption of the same child); Christian J.W., 2011 WI App 121, ¶ 4.

\textsuperscript{7}See Wis. Stat. § 48.82 (1) (describes who may adopt); see also Christian J.W., 2011 WI App 121, ¶ 4.

\textsuperscript{8}Id.; An anonymous sperm donor does not have parental rights in Wisconsin, as the donor is not married to the mother, nor does he establish a relationship with the child. In re Custody of H.S.H.-K., 193 Wis. 2d 649, 681, 533 N.W.2d 419, 430 (1995)

\textsuperscript{9}Christian J.W., 2011 WI App 121, ¶ 1.

\textsuperscript{10}Id.

\textsuperscript{11}Id. ¶ 5.
The appellate court upheld the original action: the termination of parental rights and subsequent separate adoptions by both the biological and non-biological mother.\(^\text{12}\) According to the appellate court, the biological mother failed to file her appeal within the statute of limitations and failed to meet her burden to justify relief under Wisconsin appellate procedure laws.\(^\text{13}\) The court denied her petition to reverse the original adoption on procedural.\(^\text{14}\) The court did not address the merits of the original adoption or the substantive merits of the appeal.\(^\text{15}\) However, the court established that, to successfully challenge this type of adoption in court, a party has to challenge the original adoption within one year.\(^\text{16}\) It is unlikely that a couple, so committed to adopting and raising a child, would separate and seek to invalidate an adoption within one year of going through the process,\(^\text{17}\) so the appellate decision narrowed the scope for review. Although the

\(^{12}\) Christian J.W., 2011 WI App 121, ¶ 36.

\(^{13}\) An appellant bears the burden to prove that certain circumstances exist that would justify relief under WIS. STAT. § 806.07 (1997). Christian J.W., 2011 WI App 121, ¶ 11 (citation omitted). Appeals must be made within “a reasonable time” or if extraordinary circumstances exist. Id. at ¶¶ 14, 19 (citing WIS. STAT. § 806.07(2)). Shelly J. failed to file her appeal within a reasonable amount of time and failed to show extraordinary circumstances existed that would justify relief after that reasonable time period. Christian J.W., 2011 WI App 121, ¶¶ 17, 20.

\(^{14}\) Christian J.W., 2011 WI App 121, ¶ 36.

\(^{15}\) Id. ¶ 35.

\(^{16}\) Id. (citing WIS. STAT. § 806.07 (1) (a), (c), and (h) (permits a court to grant relief from judgment because of mistake, fraud, or “any other reason justifying relief”)).

\(^{17}\) There is no evidence to suggest that divorce rate is higher among parents who adopt, and the divorce rate is likely lower among adoptive parents due to the preadoption vetting process. Rita Laws, Divorce After Adoption: Practical Tips for Parents, ADOPTION WEEK E-MAGAZINE, available at http://e-magazine.adoption.com/articles/496/divorce-after-adoption-practical-tips-for-parents.php (last visited April 4, 2012). Even if a couple’s relationship could dissolve in one-year’s time, the time limit will objectively limit future appeals by decreasing the amount of time available to file a claim. See Christian J.W., 2011 WI App 121, ¶ 35.
court was given the opportunity to strike down this process, the court created precedent that made judicial change of this adoption process nearly impossible.

Christian J.W. highlights a legal mechanism used by the homosexual community that allows gay parents to each obtain rights to the same child, although they cannot marry. This mechanism is legal, as it is not prohibited by the statutes or case law, but the homosexual community may not want to draw attention to it at this time. During a time of extreme political polarization and a Republican-controlled government, such publicity may render the battle for equal rights more difficult in the area of same-sex partner adoption in Wisconsin.

Despite the possibility of a difficult battle, now is the appropriate time for the homosexual community and homosexual-rights advocates to advocate for equal adoption rights in Wisconsin. Unlike their opposite-sex counterparts, same-sex couples can utilize only one legal mechanism by which each can gain parental

18 Shelly J. terminated her parental rights to her biological child, which allowed both her and Leslie W. to separately and simultaneously petition for adoption of Christian. Christian J.W., 2011 WI App 121, ¶ 4.

19 See Wis. Const. art XIII, § 13; Christian J.W., 2011 WI App 121.


rights to the same child. By authorizing an equal and/or parallel adoption procedure for unmarried adults, accessible to same-sex couples, Wisconsin will avoid potential Equal Protection challenges, promote public policy, and save money. The Legislature did not explicitly permit the mechanism employed in *Christian J.W.*, but this case may present the homosexual community, homosexual rights proponents, and the Legislature the perfect opportunity to advocate for and codify equal adoption rights for all couples, married or not.

II. How the Law Applies to Same-Sex Couples Who Want to Adopt in Wisconsin

Wisconsin’s adoption laws apply uniquely to same-sex couples. *Christian J.W.* demonstrates how same-sex couples are forced to maneuver around Wisconsin adoption laws to gain adoptive parental rights to one partner’s biological child. It is unclear whether Wisconsin’s adoption laws, as they pertain to same-sex couples, run afoul of the Equal Protection Clause of the United

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23 Same-sex couples can only employ the process used in *Christian J.W.* to each gain parental rights to the same child. See infra note 18. Heterosexual couples can either employ the *Christian J.W.* process, or they may get married and jointly adopt one partner’s biological child. *Wis. Const.* art XIII, § 13; *Wis. Stat.* § 48.82 (1) (a).

24 See infra Part III.A.

25 See infra Part III.B.

26 See infra Part III.C.

27 The statutes do not explicitly contemplate two unmarried adults simultaneously petitioning for adoption of the same child. See *Wis. Stat.* § 48.81 (1997).

28 See infra Part II.A.

29 See infra Part II.B.

30 No state shall “deny to any person within its jurisdiction the equal protection of the laws.” *U.S. Const.* amend. XIV, § 1.
States Constitution. This section describes the obstacles posed to same-sex couples by current Wisconsin law and takes a first look at how those laws interact with the principles of equal protection.”

A. Wisconsin Statutes and Case Law Treat Same-Sex Couples and Opposite-Sex Couples Differently With Regard to Adoption.

The Wisconsin Legislature and courts created an adoption doctrine that guides potential parents as they seek to gain parental rights of minor children. The law treats married and unmarried couples differently. Accordingly, the law treats same-sex couples and opposite-sex couples differently.

1. WISCONSIN ADOPTIONS DEPEND ON THE ELIGIBILITY OF BOTH THE CHILD AND THE PARENT(S)

Wisconsin statutes define who may be adopted. A minor child may be adopted if that child has no legal parents, either because the parents are dead or have terminated their parental rights. The Legislature also permits a child who lives with his or her parent and stepparent to be adopted by the stepparent, even if

31 See infra Part II.C.

32 See generally Wis. Stat. §§ 48.81-48.975 (1997) (These sections comprise Subchapter XIX of the Children’s Code that deals with adoption and guardianship); Angel Lace, 184 Wis. 2d 492.

33 See Wis. Stat. § 48.82 (1) (a), (b) (permits married couples to jointly adopt a minor child and permits an unmarried adult to adopt a minor child).

34 See Wis. Const. art XIII, § 13; Wis. Stat. § 48.82 (1) (a), (b).

35 Wis. Stat. § 48.81.

36 Wis. Stat. § 48.81 (1)-(3); Angel Lace, 184 Wis. 2d at 509-10, 516 N.W.2d at 682-83 (“The . . . [adoption] statute could mean that Angel is eligible for adoption only if the rights of both of her parents have been terminated. Or, it could mean that she is eligible for adoption as long as the rights of at least one of her parents have been terminated. The petitioners ask this court to construe the statute liberally to further the best interests of Angel, pursuant to sec. 48.01(2), and accept the second interpretation of the statute.”).
the biological parent, the other spouse, retains parental rights.\textsuperscript{37} A child cannot be adopted by a stepparent if both biological parents retain parental rights.\textsuperscript{38}

There are three categories of adults who are eligible to adopt: 1) a husband and a wife may jointly adopt a child, 2) a husband or wife may adopt his or her spouse’s child, or 3) an unmarried adult may adopt a minor child.\textsuperscript{39} Married couples may jointly adopt a child.\textsuperscript{40} Unmarried adults may individually adopt a child.\textsuperscript{41} For same-sex couples who cannot marry, joint adoption is unavailable.\textsuperscript{42}

The adoption statutes do not explicitly prohibit same-sex couples from joint adoption.\textsuperscript{43} In fact, in Wisconsin, homosexual adults are explicitly eligible to adopt.\textsuperscript{44} However, the statutes do not contemplate a committed, unmarried couple seeking to adopt a child.\textsuperscript{45} The Wisconsin Supreme Court interpreted the “Who May Be Adopted” statute\textsuperscript{46} to apply only to children with no legal parents or to

\begin{footnotesize}
\begin{enumerate}
  \item[] \textsuperscript{37} Wis. Stat. § 48.81 (4).
  \item[] \textsuperscript{38} Wis. Stat. § 48.81; Angel Lace, 184 Wis. 2d at 508, 516 N.W. 2d at 682 (noting that the minor child would have been eligible for adoption if both of his biological parents had terminated parental rights or if the proposed adoptive parent was married to his biological mother).
  \item[] \textsuperscript{39} Wis. Stat. § 48.82 (1) (a), (b).
  \item[] \textsuperscript{40} Wis. Stat. § 48.82 (1) (a) (“a husband and wife jointly”).
  \item[] \textsuperscript{41} See Wis. Stat. § 48.82 (1) (b).
  \item[] \textsuperscript{42} See supra note 2.
  \item[] \textsuperscript{43} See Wis. Stat. §§ 48.82 (1) (a), (b) (nothing in the text of the statute classifies same-sex couples differently than opposite-sex couples).
  \item[] \textsuperscript{44} Angel Lace, 184 Wis. 2d at 508, 516 N.W.2d at 682 (“Annette[, the unmarried same-sex partner of the biological mother,] does fit the description in sec. 48.82(1)(b) because she is “[a]n unmarried adult.” However, Annette was not allowed to adopt the minor child because the child’s biological mother, Annette’s partner, retained parental rights. Thus, Annette could only adopt if she was married to her partner.).
  \item[] \textsuperscript{45} See Wis. Stat. § 48.82 (1) (b); Angel Lace, 184 Wis. 2d at 509-10, 516 N.W.2d at 682-83.
  \item[] \textsuperscript{46} Wis. Stat. § 48.81.
\end{enumerate}
\end{footnotesize}
children with a stepparent through marriage.\textsuperscript{47} To hold otherwise would allow “a complete stranger [to] petition to adopt a minor who is a member of this stable family.”\textsuperscript{48} With regard to joint adoption of the same child, the Court characterized all unmarried couples exactly as they characterized complete strangers.\textsuperscript{49}

2. THE BEST INTERESTS OF THE CHILD STANDARD CANNOT OVERCOME THE UNEQUAL TREATMENT OF UNMARRIED AND MARRIED COUPLES WITH REGARD TO ADOPTION

Even if adoption by an unmarried couple would be in the best interests of the child, this does not necessarily permit a court to grant the adoption.\textsuperscript{50} Courts consider the best interests of the child standard\textsuperscript{51} paramount in all matters affecting the child.\textsuperscript{52} To grant an adoption, a court must find that the circumstances of the adoption would be in the best interests of the child.\textsuperscript{53} The

\textsuperscript{47} Angel Lace, 184 Wis. 2d at 509-10, 516 N.W.2d at 682-83.

\textsuperscript{48} Id. at 509.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 506.

\textsuperscript{51} The best interests of the child standard includes, but is not limited to, the following factors:

(a) The likelihood of the child’s adoption after termination;
(b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home;
(c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to sever these relationships;
(d) The wishes of the child;
(e) The duration of the separation of the parent from the child;
(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child’s placement, the likelihood of future placements and the results of prior placements.


\textsuperscript{52} Wis. Stat. § 48.426 (including adoption and termination of parental rights).

\textsuperscript{53} Angel Lace, 184 Wis. 2d at 505.
court must also find that the child is adoptable⁵⁴ and the parents are authorized to adopt.⁵⁵ The best interests of the child standard alone cannot permit is a court to grant the adoption; the parents and child must also be eligible.⁵⁶

3. **UNMARRIED COUPLES CAN EACH GAIN PARENTAL RIGHTS OF ONE PARTNER’S BIOLOGICAL CHILD BY VOLUNTARILY TERMINATING PARENTAL RIGHTS AND COMPLYING WITH PREADPTION REQUIREMENTS**

Any unmarried couple can gain parental rights to one partner’s biological child.⁵⁷ Unmarried partners may not *jointly* adopt one partner’s biological child, but they may individually and separately petition for adoption of the same child as unmarried adults.⁵⁸ To do so, the biological parent must first successfully terminate his or her parental rights, and then both partners must comply with all statutory preadoption requirements.⁵⁹

A parent may terminate his or her parental rights after satisfying procedural requirements.⁶⁰ A Wisconsin court must determine whether the parent’s consent to termination of his or her parental rights “is voluntary and informed and has set forth the conditions under which the court may accept a

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⁵⁴ *Id.* at 506; WIS. STAT. § 48.81 (A child is adoptable only if he/she has no legal parents or one legal parent whose spouse seeks to adopt the child.).

⁵⁵ WIS. STAT. § 48.82 (1) (A parent is only authorized to adopt if he/she is and unmarried or the spouse of someone who will jointly adopt the same child.).

⁵⁶ *Angel Lace*, 184 Wis. 2d at 505.


⁵⁸ A joint adoption occurs when a married couple petitions for adoption together. All other adoptions occur when an individual petitions alone. *See* WIS. STAT. § 48.82 (b); *see also supra* note 2.

⁵⁹ *See Christian J.W.*, 2011 WI App 121, ¶¶ 4, 36; *see also supra* note 2.

⁶⁰ A court may only accept a petition to voluntarily terminate his/her parental rights if the parent is present in court, if the judge explains the effect of the termination. WIS. STAT. § 48.41 (2) (2009).
parent’s voluntary consent.”\textsuperscript{61} To do so, the court must determine whether the
to the termination.\textsuperscript{62}

A Wisconsin court may only accept a voluntary consent to the termination
of parental rights after considering the best interests of the child standard.\textsuperscript{63} A voluntary termination of parental rights does not involve the same constitutional protections as an involuntary termination.\textsuperscript{64} A parent subject to an involuntary termination holds a constitutionally protected interest his or her relationship with the child, and that interest is protected by due process.\textsuperscript{65} The U.S. Supreme Court noted this liberty interest, noting “freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”\textsuperscript{66} However, if there is no liberty interest to protect through due process, such as in the case of a voluntary termination of parental rights, the standard for the termination is the best interests of the child.\textsuperscript{67} In a case like \textit{Christian J.W.}, a

\textsuperscript{61} \textit{T.M.F. v. Children’s Serv. Soc’y of Wisconsin}, 112 Wis.2d 180, 185, 332 N.W.2d 293, 296 (Wis. 1983).

\textsuperscript{62} \textit{In Interest of D.L.S.}, 112 Wis. 2d 180, 188, 332 N.W.2d 293, 288 (1983) (noting that informed consent can be derived from a court’s opportunity to adequately question a witness who is seeking to terminate his/her parental rights).

\textsuperscript{63} Wis. Stat. § 48.81 (1) (referring to Wis. Stat. § 48.426 that defines the best interests of the child as the court’s prevailing factor of consideration).

\textsuperscript{64} See infra note 65 and accompanying text.

\textsuperscript{65} \textit{In re Gwenevere T.}, 2011 WI 30, ¶¶ 83-84, 333 Wis. 2d 273, 316, 797 N.W.2d 854, 876 (noting that Wisconsin Stat. §48.415(6) differs from the other statutory factors a court must consider when terminating parental rights in that it sets forth the threshold constitutional question of whether a parent has a protected liberty interest in his/her relationship with the child).


\textsuperscript{67} \textit{In re Gwenevere T.}, 2011 WI 30, ¶ 84, 333 Wis. 2d at 316, 797 N.W.2d at 876 (citing J. Bradley’s dissent, ¶ 101 n.2).
court need not worry about a constitutional liberty, but will terminate the parental
rights if doing so would satisfy the best interests of the child.68

Wisconsin law does not prohibit parents from immediately regaining
adoptive parental rights after voluntarily terminating those rights.69 A termination
of parental rights constitutes the permanent severing of all rights, powers,
privileges, immunities, duties, and obligations existing between a parent and his
or her child.70 This action is final and only appealable under Section 806.07,
which generally describes the circumstances under which a court can grant relief
from a previous judgment.71 An appeal of a termination of parental rights must
also conform to procedural requirements.72 If a parent wishes to regain terminated
parental rights, the parent must appeal within a reasonable time from the
judgment73 and must provide a reason for which relief can be granted.74


71 Wis. Stat. § 48.43 (2) (“An order terminating parental rights permanently severs all legal rights
and duties between the parent whose parental rights are terminated and the child and between the
child and all persons whose relationship to the child is derived through that parent[.]”).


73 Wis. Stat. § 806.07 (2) (“The motion shall be made within a reasonable time, and, if based on
sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation
was made.”).

74 Wis. Stat. § 806.07 (1) (a)-(h) (“On a motion and upon such terms as are just, the court . . . .
may relieve a party or legal representative form a judgment, order or situation for the following
reasons: (a) Mistake, inadvertence, surprise, or excusable neglect; (b) Newly-discovered evidence
which entitles a part to a new trial under s. 805.15 (3); (c) Fraud, misrepresentation, or other
misconduct of an adverse party; (d) The judgment is void; (e) The judgment has been satisfied,
released, or discharged; (f) A prior judgment upon which the judgment is based has been reversed
or otherwise vacated; (g) It is no longer equitable that the judgment should have prospective
application; or (h) Any other reasons justifying relief from the operation of the judgment.”).
Alternatively, a parent may gain adoptive parental rights immediately after termination of parental rights through standard adoption procedures.  

In addition to terminating parental rights, unmarried couples must also meet preadoption requirements if they seek to adopt one partner’s biological child. These requirements include spending educational hours at government-approved agencies and programs. Adults petitioning for adoption must pay the costs of these course hours. All but one of the acceptable programs that offer these course hours are programs licensed and operated by the State.

Wisconsin statutes only require adoptive parents to satisfy these conditions of parentage; biological parents face no such burden. However, if a biological parent terminates his/her parental rights and subsequently seeks to adopt his/her biological child, that parent would have to adopt the child as an

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75 See supra Part II.A.6.
76 Wis. Stat. § 48.84 (2007) (describing preadoption requirements for proposed adoptive parents)
77 Wis. Stat. § 48.84 (1) (describing specific preadoption preparation requirements)
78 Wis. Stat. § 48.84 (3) (requiring that proposed adoptive parents pay costs of preadoption requirements).
79 Wis. Stat. § 48.84 (1) (“The preparation shall be provided by a licensed child welfare agency, a licensed private adoption agency, the state adoption information exchange under s. 48.55, the state adoption center under s. 48.55, a state-funded foster care and adoption resource center, a state-funded postadoption resource center, a technical college district school, or an institution or college campus within the University of Wisconsin.”)
80 See generally §§ 48.01 (13) (2009) (defining a parent as either a biological parent or an adoptive parent); 48.84 (requiring only proposed adoptive parents to undergo preadoption requirements).
81 Wis. Stat. § 48.41 (describing the process for voluntarily terminating parental rights).
adoptive parent. A parent in this seeking to adopt his/her biological child is subject to all preadoption preparation requirements as an adoptive parent.

B. Christian J.W. Demonstrates How Same-Sex Couples Can Each Legally Obtain Parental Rights to One Partner’s Biological Child

The process used in Christian J.W. meets all legal requirements for adoption. Wisconsin permits parents to terminate parental rights to a child, gain adoptive rights to that child immediately following a termination of parental rights, and do so simultaneously with another unmarried adult. Although the appellate court conceded “the law [of same-sex couple adoption] is not settled,” it effectively rendered the practice legally permissible.

Christian’s adoption was legal because 1) he was eligible to be adopted, and 2) both Leslie and Shelly were eligible to adopt. Even though Leslie, the non-biological mother, could not adopt Christian as a stepparent under section

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82 See Christian J.W., 2011 WI App 121, ¶ 4; Preadoption requirements apply to proposed adoptive parents. WIS. STAT. § 48.84 (1) (emphasis added).

83 See supra note 82.


85 After noting that the biological mother’s petition to vacate the original termination and parental rights was denied on procedural grounds, the appellate court noted that “[i]t is too late for this request.” Christian J.W., 2011 WI App 121, ¶ 34. Thus, the court effectively denied any chance that the procedure adoptive procedure originally utilized by Shelly J. and Leslie W. could be challenged in court, as the likelihood of such a challenge occurring within the one-year timeframe is unlikely, given the nature of the process. See supra note 17 and accompanying text.

86 The appellate court denied the biological mother’s appeal because she failed to bring the appeal within a reasonable time. Christian J.W., 2011 WI App 121, ¶ 36 (citing WIS. STAT. § 806.07). Only if the biological mother who lost her appeal seeks and receives another appeal to the Wisconsin Supreme Court will this issue receive any more judicial attention. See Christian J.W., 2011 WI App 121, ¶ 36. Given the Christian J.W. precedent, no other same-sex couple will have the same chance to appeal such a scenario unless they do so within one year of the adoption. Id.

87 See supra note 85.

48.82 (1)(a), she did qualify as “an unmarried adult” under section 48.82 (1)(b). However, she could not adopt Shelly’s biological son, Christian, until Christian had no legal parents. Thus, when Shelly terminated her parental rights, Christian became eligible for adoption.

Christian’s adoption also satisfied the best interests of the child standard. A court must give paramount consideration to the best interests of the child in any adoption and termination of parental rights case. A court determines the best interests of the child by considering several statutory factors. The relevant factors in Christian J.W. include:

(c) whether the child has substantial relationships with the parent…

(f) whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination.

Reasonable consideration of these factors suggests that Christian’s best were met by terminating the parental rights of his biological mother to allow not one but two loving parents to separately petition for his adoption. After the

89 Wis. Stat. § 48.82 (1)(b) (permits only married couples to jointly adopt).

90 Wis. Stat. § 48.82 (1)(a) (allows unmarried adults to adopt).

91 See Wis. Stat. § 48.81 (only those children with no legal parents or one legal parent who is married to the proposed adoptive parent can be adopted).

92 See id.

93 Wis. Stat. §§ 48.01 (1) (intro.), (f), (gg) (describing the purpose of the Children’s Code, which includes assuring that prospective adoptive children are sent to fit parents in stable families).

94 In Interest of Nadia S., Sallie T. v. Milwaukee County Dept. of Health and Human Services, 219 Wis. 2d. 296, 311, 581 N.W.2d 182, 188 (Wis. 1998).

95 Wis. Stat. § 48.426 (3) (describing the factors that comprise the best interests of the child).
termination, Christian entered into a more stable family relationship.\textsuperscript{96} His living situation did not change from the termination,\textsuperscript{97} but he ended up in a more stable and permanent family relationship based on the legal benefits he received with two legal parents: for example, Christian was able to receive economic support, social security benefits, medical benefits, and educational benefits from two parents instead of one.\textsuperscript{98} Christian also held intestacy benefits in the case that either parent did not have a valid will.\textsuperscript{99} The termination fulfilled factor (f) of the best interests of the child standard.\textsuperscript{100}

The biological mother’s plan to immediately adopt her own child after termination of parental rights rendered factor (c) of the best interests standard irrelevant. Shelly did not actually sever ties with her minor child. Thus, while on its face, the termination of parental rights purports to sever all ties with the minor child, in this situation, the relationship of the mother and child remained intact.\textsuperscript{101} The only potential change in Christian’s life that affected the best interests standard was factor (f). Therefore, the termination met the standard.

\textsuperscript{96} \textit{Christian J.W.}, 2011 WI App 121, ¶¶ 4-5, 36.

\textsuperscript{97} This assumption is that the couple would remain together raising the child with or without each obtaining parental rights.


\textsuperscript{99} \textit{See} \textit{Wis. Stat.} § 852.01 (1) (b) (2009).

\textsuperscript{100} \textit{Wis. Stat.} § 48.426 (3).

Finally, Shelly was not precluded from gaining adoptive parental rights to Christian after she terminated her biological parental rights. 102 Shelly’s termination of parental rights was valid if she and the district court complied with the statutory termination requirements.103 Shelly then qualified as an unmarried adult, eligible to adopt. 104 If Shelly completed all necessary preadoption preparation requirements, then she could adopt her own biological child. 105 This preadoption preparation distinguishes adoptive parental rights from biological parental rights. 106 Even though a termination of parental rights is ostensibly final,107 a parent like Shelly who terminates parental rights is not precluded from regaining adoptive parental rights as an unmarried adult through adoption.108

C. The Process Employed in Christian J.W. Is Currently The Only Permissible Method Available for Same-Sex Unmarried Couples to Each Adopt the Same Child.

Although Christian J.W. demonstrated a legal separate adoption, neither the Wisconsin adoption statutes nor case law support allowing a same-sex couple to jointly adopt a biological child of one parent.109 The Wisconsin legislature

102 See Part II.A.3.

103 Wis. Stat. § 48.41 (2). (A court may only accept a petition to voluntarily terminate his/her parental rights if the parent is present in court, if the judge explains the effect of the termination.).

104 Wis. Stat. § 48.82 (1) (b) (permitting an unmarried adult to adopt).

105 Wis. Stat. § 48.84 (1) (describing preadoption requirements for proposed adoptive parents).

106 See id.

107 See Wis. Stat. § 48.40 (2) (defining “termination of parental rights” as the permanent severance of all rights, powers, privileges, immunities, duties, and obligations already existing between parent and child).

108 See Wis. Stat. § 48.84 (1).

109 See supra note 2.
clearly defined three categories of persons who may adopt: a husband and wife *jointly*, the husband or wife of the child’s biological parent, or *an* unmarried person.\(^\text{110}\) The Wisconsin Constitution defines a marriage as the relationship between one man and one woman.\(^\text{111}\) Under Wisconsin law, a husband and wife cannot be two persons of the same sex.\(^\text{112}\) Therefore, the Legislature does not authorize same-sex couples to *jointly* adopt.\(^\text{113}\) In Wisconsin, two circuit courts are known to permit same-sex couples to separately petition for the adoption of the same child, actively utilizing the plain language of the statutes.\(^\text{114}\)

In addition to describing who can adopt, the statutes clearly describe those categories of factors for which the court may not deny someone the ability to adopt.\(^\text{115}\) Those categories include race, color, ancestry, national origin, deafness, blindness, physical handicap, or one’s “belief in the use of spiritual means through prayer for healing.”\(^\text{116}\) The Legislature did not include homosexual partners in the category of persons whose rights under this statute will be protected and preserved.\(^\text{117}\) Only if same-sex couples individually petition for

\(^{110}\) The statutes do not prohibit “an unmarried adult” from adopting a child at the same time as “an[other] unmarried adult. *See* WIS. STAT. § 48.82 (1) (b).

\(^{111}\) *Wis. Const.* art. XII, § 13.

\(^{112}\) *Id.*

\(^{113}\) *Id.*

\(^{114}\) *Id.*

\(^{115}\) *Wis. Stat.* § 48.82 (4)-(6).

\(^{116}\) *Id.*

\(^{117}\) *Id.*
adoption of the same couple can they each adopt that child; the Legislature did not contemplate same-sex couple joint adoption.\(^{118}\)

Courts have decided to use standards other than marriage to prevent same-sex couples from jointly adopting. The court of appeals noted that the “parent-like relationship” standard, the standard used to determine equitable visitation between parents, cannot be used as a stand-alone test to justify allowing same-sex couples to jointly adopt one partner’s biological child(ren).\(^{119}\) A “parent-like relationship” occurs under the following circumstances: 1) the actual, legal parent fostered a similar relationship between the child and the like-parent, 2) the child and the like-parent lived together, 3) the like-parent assumed parenthood responsibilities, and 4) the like-parent acted as a parent for a sufficient period of time to establish the relationship with the child.\(^{120}\) Even if a person establishes a parent-like relationship with the biological child of his or her same-sex partner, this is independently insufficient for that partner to jointly adopt the child.

\(D.\) The Equal Protection Clause of the United States Constitution Applies to All Wisconsin Adoption Laws

The U.S. Constitution requires that no State deny equal protection of its laws to any person.\(^{121}\) Under traditional Equal Protection doctrine, laws enacted that impose disadvantages on certain persons will only be upheld as constitutional

\(^{118}\) See supra notes 94-96.

\(^{119}\) Christian R.H., 2011 WI App. 2, ¶ 13, 331 Wis. 2d at 166, 794 N.W.2d at 233. Courts may grant an equitable visitation arrangement, awarding reasonably equal periods of time to both parents, as a term of a co-parental agreement. Custody of H.S.H.-K., 193 Wis. 2d 649, 659, 533 N.W.2d 419, 433 (Wis. 1995).

\(^{120}\) H.S.H.-K., 193 Wis. 2d at 694-95, 533 N.W.2d at 435-36.

\(^{121}\) U.S. CONST. amend. XIV, § 1.
if they can be explained by legitimate public policies.\textsuperscript{122} The U.S. Supreme Court has recognized that most laws create a disadvantage to various individuals or groups,\textsuperscript{123} but only some are struck down as unconstitutional.\textsuperscript{124} This section describes the Equal Protection standards that may apply to different groups of people with regard to Wisconsin adoption laws.

1. WISCONSIN ADOPTION LAWS THAT TREAT ANYONE UNEQUALLY ARE SUBJECT TO RATIONAL BASIS ANALYSIS

In \textit{Romer v. Evans},\textsuperscript{125} the Supreme Court applied the rational basis test—the most lenient Equal Protection standard.\textsuperscript{126} The rational basis test reconciles the Equal Protection Clause with the reality that most laws will disadvantage someone.\textsuperscript{127} When the court applies this test, it will only strike down legislation if it does not bear a rational relation to some legitimate end.\textsuperscript{128} If a Wisconsin adoption law bore no relation to some legitimate governmental end, it would fail rational basis review under the Equal Protection Clause.\textsuperscript{129}

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\textsuperscript{125} 517 U.S. 620 (1996).

\textsuperscript{126} See id. at 632.

\textsuperscript{127} Id. at 631 (citing \textit{Heller v. Doe}, 509 U.S. 312, 319-20 (1993)).

\textsuperscript{128} Id. (citing \textit{Heller}, 509 U.S. at 319-20).

\textsuperscript{129} Id. (citing \textit{Heller}, 509 U.S. at 319-20).
\end{flushleft}
The Court applies the strictest scrutiny when analyzing laws that affect suspect classes of individuals. When the Court strikes down laws under the Equal Protection Clause using the strict scrutiny standard, it looks to see whether a law was passed with discriminatory intent. A court can determine whether discriminatory intent was present in the passage of particular legislation by analyzing the totality of the circumstances surrounding its enactment. A court should look to the disproportionate impact of the law on the protected class, whether the law evinces a departure from normal procedures, specific antecedent events, and contemporary statements by decisionmakers to determine whether discriminatory intent is present. If a court were to find discriminatory intent with regard to the passage of a Wisconsin adoption law subject to strict scrutiny, the law must be struck down as inconsistent with the Equal Protection Clause.

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132 See generally Ricci v. DeStefano, 557 U.S. 557, 129 S. Ct. 2658, 270 (2009) (Ginsburg, J., dissenting) (noting that “[t]he Equal Protection Clause, this Court has held, prohibits only intentional discrimination.”)


134 Arlington Heights, 429 U.S. at 267.

135 Id.
III. **Why the Current State of Inequality for Adoption by Same-Sex Couples Should Not Stand**

Same-sex couples seeking to adopt the same child jointly have only one method available to achieve this end. This must change for several reasons. First, the limited means available to only one subgroup of society raises Equal Protection concerns. Second, the law makes it more difficult to achieve public policy, which supports two-parent households. Finally, this situation wastes unnecessary resources. The Legislature should change the law to allow same-sex couples more legal methods to each obtain parental rights to the same child.

**A. Wisconsin's Adoption Laws with Regard to Same-Sex Couples Raise Equal Protection Concerns**

Same-sex couples seeking to adopt the biological child of one partner face a far greater burden than do their heterosexual counterparts seeking to do the same. The State requires a proposed adoptive parent to complete preadoption preparation. This preparation includes completion of an established number of course hours provided by a licensed or approved agency or program. The potential adoptive parent must pay all the costs of the preadoption preparation and

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136 *See supra* note 2.

137 *See infra* Part III.A.

138 *See infra* Part III.B.

139 *See infra* Part III.C.

140 *See* Wis. Stat. §§ 48.82 (1), 48.84 (1).

141 *Wis. Stat.* § 48.84 (1).

142 *Wis. Stat.* § 48.84 (1), (2).
the legal fees associated with the adoption.\textsuperscript{143} Stepparents seeking to adopt their partners’ biological child(ren) must meet these requirements.\textsuperscript{144} However, the biological parent is not subject to these preadoption preparation requirements when his or her opposite-sex partner seeks to adopt a child as a stepparent.\textsuperscript{145}

In contrast with heterosexual couples, a biological mother in a same-sex relationship must pay the costs and time of preadoption preparation requirements if her same-sex partner seeks to adopt her child.\textsuperscript{146} Two same-sex partners can only obtain parental rights to the same child if the biological parent voluntarily terminates parental rights and then each partner separately petitions for adoption as an unmarried adult.\textsuperscript{147} Accordingly, same-sex couples must pay double the cost and time of preadoption preparation than their heterosexual counterparts to each obtain parental rights of one partner’s biological child.\textsuperscript{148}

In \textit{Romer}, the U.S. Supreme Court invalidated a Colorado law that classified homosexuals.\textsuperscript{149} The law prevented any individual from seeking relief for discrimination based on sexual orientation.\textsuperscript{150} In doing so, the law treated

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{144}] WIS. STAT. §§ 48.82 (1), 48.84 (1).
\item[\textsuperscript{145}] See WIS. STAT. §§ 48.82 (1), 48.84 (1). Additionally, a biological parent is never subject to these requirements unless his or her parental rights were previously terminated. See WIS. STAT. §§ 48.82 (1), 48.84 (1).
\item[\textsuperscript{146}] See WIS. STAT. §§ 48.82 (1), 48.84 (1).
\item[\textsuperscript{147}] See WIS. STAT. §§ 48.41 (1)-(2), 48.82 (1), 48.84 (1); see also supra note 2.
\item[\textsuperscript{148}] See supra notes 146-47 and accompanying text.
\item[\textsuperscript{149}] See supra note 148.
\item[\textsuperscript{150}] Romer v. Evans, 517 U.S. at 635-36.
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homosexuals adversely, denying them protection from discrimination in the workforce, education, housing, public accommodations, and health and welfare services.\textsuperscript{151} The Court found this discrimination was imposed without advancing any governmental interest, failing the rational basis test and making it unconstitutional.\textsuperscript{152} In concluding his opinion, Justice Breyer wrote, “[a] State cannot so deem a class of persons a stranger to its laws.”\textsuperscript{153}

Wisconsin’s adoption laws do not explicitly classify potential same-sex parents as the law classified homosexuals.\textsuperscript{154} However, like the Colorado law in \textit{Romer}, Wisconsin’s adoption laws impose a distinct burden on same-sex couples alone.\textsuperscript{155} Namely, same-sex couples have only one expensive and tedious option if they seek to each adopt one partner’s biological child.\textsuperscript{156}

The \textit{Romer} Court noted that the absence discriminatory intent against homosexuals did not end the Equal Protection query.\textsuperscript{157} Instead, the \textit{Romer} Court reasoned that the Colorado laws “[did] more than to deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon

\textsuperscript{151} \textit{Id.} at 624.

\textsuperscript{152} \textit{Id.} at 635-36.

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.} at 629; see generally Wis. STAT. §§ 48.81-48.975; \textit{Angel Lace}, 184 Wis. 2d 492.

\textsuperscript{155} See generally Wis. STAT. §§ 48.81-48.975; \textit{Angel Lace}, 184 Wis. 2d 492.

\textsuperscript{156} Opposite-sex couples can get married without subjecting the biological parent to preadoption requirements if both partners seek to gain parental rights. \textit{See supra} note 2.

\textsuperscript{157} \textit{Romer v. Evans}, 517 U.S. at 630-31.
those persons alone.”¹⁵⁸ In Wisconsin, same-sex couples who wish to each adopt one partner’s biological child endure a more rigid and costly preadoption preparation requirement than do their heterosexual counterparts.¹⁵⁹

1. WISCONSIN ADOPTION LAWS FAIL RATIONAL BASIS ANALYSIS

Wisconsin’s adoption laws, which prevent same-sex couples from jointly adopting the same child and impose unique burdens on same-sex couples,¹⁶⁰ may fail rational basis review if challenged on Equal Protection grounds. The U.S. Supreme Court previously struck down legislation that specifically targeted the homosexual community under the Equal Protection Clause.¹⁶¹ The Court found that the Colorado law at issue in Romer singled out a certain class of citizens because of animosity toward the homosexual community.¹⁶² The Court found that the law was not directed at the State’s proffered rationales¹⁶³ and found them unconstitutional under the rational basis test.¹⁶⁴

Wisconsin’s adoption laws evince a similar discriminatory effect as the laws in Romer. Wisconsin’s adoption laws do not explicitly classify same-sex

¹⁵⁸ Id. at 631.

¹⁵⁹ See Wis. Stat. §§ 48.41 (1)-(2), 48.82 (1), 48.84 (1).

¹⁶⁰ See supra note 2.

¹⁶¹ Romer v. Evans, 517 U.S. at 634.

¹⁶² Id.

¹⁶³ The Court rejected “respect for other citizens’ freedom of association” and the conservation of “resources to fight discrimination against other groups” as viable justifications for Colorado’s law banning discrimination claims based on sexual orientation. Id. at 635.

¹⁶⁴ The State offered as rationale “respect for other citizens’ freedom of association,” and “conservation of resource to fight discrimination against other groups.” Id.
couples as Amendment 2 classified homosexuals, but like the Colorado law, Wisconsin’s laws impose a special disability on same-sex couples alone. The Romer Court noted that the absence of evidence of intent to discriminate against homosexuals did not end the Equal Protection query. Instead, the Romer Court reasoned that the Colorado laws “[did] more than to deprive homosexuals of special rights. To the contrary, the amendment impose[d] a special disability upon those persons alone.” In Wisconsin, same-sex couples who wish to each adopt one partner’s biological child endure a more rigid and costly preadoption preparation requirement than do their heterosexual counterparts. The law imposes a special disability on this class of individuals.

Given that the Wisconsin adoption laws affect homosexual couples differently, those laws may fail the rational basis test as not justified by any legitimate government rationale. The Wisconsin Supreme Court interpreted the adoption statutes to permit adoption by an unmarried adult only if the child has no

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165 Romer v. Evans, 517 U.S. at 629; see generally Wis. Stat. §§ 48.81-48.975; Angel Lace, 184 Wis. 2d 492.

166 See generally Wis. Stat. §§ 48.81-48.975 (These sections comprise Subchapter XIX of the Children’s Code that deals with adoption and guardianship.); Angel Lace, 184 Wis. 2d 492.


168 The “special disability” imposed on homosexuals was the inability to bring a discrimination claim based on sexual orientation—a disability felt by the homosexual community alone. Romer v. Evans, 517 U.S. at 631.

169 Id.

170 See Wis. Stat. §§ 48.41 (1)-(2), 48.82 (1), 48.84 (1).

171 On Equal Protection grounds, the Supreme Court previously struck laws that denied access to particular public schools because of the race of the students because such classification was not imposed to advance any compelling governmental interest. Cf. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 723 (2007).
legal parents.\textsuperscript{172} It did so to prevent complete strangers from petitioning to adopt a minor child with one legal parent.\textsuperscript{173} This line of reasoning does not clearly justify forcing same-sex couples to endure special burdens, because this rationale is as tenuous as the rationales proffered and rejected in \textit{Romer}.\textsuperscript{174} \textit{Romer} rejected “respect for other citizens’ freedom of association” and the conservation of “resources to fight discrimination against other groups” as justifications for the Colorado law because “the breadth of the [law] is so far removed from these particular justifications that find it impossible to credit them.”\textsuperscript{175}

The Wisconsin Supreme Court’s declaration that same-sex couples must bear a special burden simply to prevent “stranger”\textsuperscript{176} adoption is as equally far-removed as the rationale proffered in \textit{Romer}. Pragmatically, forcing a special burden on same-sex couples does not prevent a stranger from seeking to adopt a child in court, even if such a scenario could or would ever occur in reality. In \textit{Romer}, Justice Kennedy wrote that the “shear breadth [of the law] is so discontinuous with the reasons offered for it that the [law] is inexplicable as anything but animus toward the class it affects.”\textsuperscript{177} The “stranger” rationale seems as far-fetched as the “freedom of association” rationale rejected in \textit{Romer}.\textsuperscript{178}

\textsuperscript{172} \textit{Angel Lace}, 184 Wis. 2d at 509, 516 N.W.2d at 682-83.

\textsuperscript{173} \textit{Id}.

\textsuperscript{174} \textit{Romer v. Evans}, 517 U.S. at 635.

\textsuperscript{175} \textit{Id}.

\textsuperscript{176} \textit{Angel Lace}, 184 Wis. 2d at 509, 516 N.W.2d at 682-83.

\textsuperscript{177} \textit{Romer v. Evans}, 517 U.S. at 632.

\textsuperscript{178} \textit{See id}. at 635; \textit{Angel Lace}, 184 Wis. 2d at 509, 516 N.W.2d at 682-83.
The Legislature could simply create a statute that allows same-sex couples each adopt one partner’s biological child by proving that one partner, the non-biological parent, is capable of parenting the child. The Legislature could extend the stepparent adoption procedure to unmarried couples. The Legislature could simply use the “like-parent” standard to determine who should be allowed to adopt. The Legislature would not have to permit same-sex marriage, and it would not have to reinvent any new procedures for adoption. Thus, with such a simple, non-discriminatory solution available to prevent “stranger” adoptions, it demonstrates that the rationale is not closely related to the decision to discriminate against same-sex couples, if it is related at all. Therefore, Wisconsin’s adoption laws could surely fail rational basis review.

Not only is the rationale for Wisconsin adoption laws far removed from a legitimate governmental interest, the policies supported by the laws actually conflict with themselves. Wisconsin clearly allows an unmarried homosexual adult to adopt a child. Wisconsin also clearly favors two-parent households. Thus, disallowing joint adoptions by homosexual couples cannot simultaneously support the policies that allow homosexual adults to adopt and also favor two-parent households. If Christian J.W. wrongly permitted two homosexual parents

179 See Wis. Stat. §§ 48.82 (1)(a) (allowing stepparents to adopt); § 48.84 (preadoption preparation for proposed adoptive parents).

180 H.S.H.-K., 193 Wis. 2d at 694-95, 533 N.W.2d at 435-36.

181 See Romer v. Evans, 517 U.S. at 635.

182 Wis. Stat. § 48.82 (1) (b); Angel Lace, 184 Wis. 2d at 508.

183 See infra Part III.B.
to adopting the same child, then that error only creates an additional conflict of interest between two established State policies. This conflict of policies further demonstrates that the unequal treatment of same-sex couples is not rationally related to a governmental interest, and it could fail an Equal Protection challenge.

A plausible rationale that Wisconsin could offer to survive rational basis review would be to declare, for some rational reason, that homosexuals should not adopt or raise children. Under rational basis review, statutory classifications are presumed valid if the law-enacting body can identify some legitimate purpose that might be advanced by the law.\textsuperscript{184} If Wisconsin wished to defend its unequal treatment of same-sex couples who wish to adopt, it might claim that it does not want same-sex couples to marry or to raise children, for whatever reason.\textsuperscript{185} The State passed its ban on gay marriage as a constitutional amendment in 2006, but the purpose of the amendment is limited as “to preserve the legal status of marriage as between only one man and one woman.”\textsuperscript{186} Thus, the State only presented a reason to treat same-sex couples differently with regard to marriage, not adoption. If it chose to prevent homosexuals from adoption, presumably, it could do so. However, Florida is the only state that currently denies homosexuals from adopting or raising children, and that decision is being challenged on Equal


\textsuperscript{185} Ultimately, the unequal treatment of same-sex couples with regard to adoption is a result of their inability to marry. \textit{See Wis. Const.} art. XIII, § 13.

\textsuperscript{186} \textit{Wis. Const.} art. XIII, § 13.
Protection grounds.\footnote{Amy D. Ronner, When Courts Let Insane Delusions Pass the Rational Basis Test: The Newest Challenge to Florida’s Exclusion of Homosexuals from Adoption, 21 U. FL.A. J.L. & PUB. POL’Y 1, 3 (2010).} The State has not proffered a legitimate reason to prevent same-sex couples from jointly adopting, and this potential rationale may not survive an Equal Protection challenge, anyway.\footnote{See supra notes 176-78 and accompanying text.}

2. WISCONSIN ADOPTION LAWS MAY FAIL STRICT SCRUNTY ANALYSIS

Even though the Court applied the rational basis test to the Colorado laws in \textit{Romer v. Evans},\footnote{Romer v. Evans, 517 U.S. at 635.} the language of the opinion suggests that the Court could or may in the future apply a higher level of scrutiny to laws that treat homosexuals differently than heterosexuals. The Court noted that the law “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”\footnote{Id.} The Court added, “[the law] is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”\footnote{Id.} The Court did not define homosexuals as a suspect class that deserves heightened protection under Equal Protection analysis.\footnote{See id.} The Court grants suspect class status to racial minorities and persons with disabilities because these groups are more likely to be marginalized by the political process.\footnote{Suzanne B. Goldberg, Equality Without Tiers, 77 S. CAL. L. REV. 481, 554 (2004)}
Kennedy characterized Amendment 2 as a law that classified homosexuals, marginalizing them from the mainstream majority.\textsuperscript{194} In the future, the Court may grant homosexuals a higher level of protection under the Equal Protection Clause.

The Wisconsin adoption laws may fail an Equal Protection challenge under strict scrutiny if the Court ever grants that level of protection to homosexuals. The totality of the circumstances\textsuperscript{195} surrounding the state of adoptive laws as they pertain to same-sex couples may allow a court to infer discriminatory intent that would render the laws unconstitutional.\textsuperscript{196} Specifically, the adoption laws have a disparate impact on same-sex couples in comparison to opposite-sex couples who have multiple options available to jointly adopt a child.\textsuperscript{197} Additionally, the adoption laws depart from the norm in adoptions: preference for children to have two legal parents.\textsuperscript{198}

However, opponents may argue that two same-sex parents is a departure from the norm.\textsuperscript{199} Opponents may also argue that there is no discriminatory intent

\textsuperscript{194} See Romer v. Evans, 517 U.S. at 635.

\textsuperscript{195} This is the scope of evidence to be considered under strict scrutiny review. Arlington Heights, 429 U.S. at 267.

\textsuperscript{196} The Wisconsin adoption laws do not explicitly discriminate against same-sex couples. Instead, it is the combination of the adoption statutes, the ban on gay marriage, and the Angel Lace decision that act together to discriminate against same-sex couples. See Wis. Const. art. XIII, §13; Wis. Stat. §§ 48.81, 48.82; Angel Lace, 184 Wis. 2d at 507, 516 N.W.2d at 681-82. Thus, the analysis in this situation would be different than the analysis done in other strict scrutiny cases that looked at statutes only. See, e.g., supra note 125 and accompanying text.

\textsuperscript{197} See supra note 2.

\textsuperscript{198} See Part III.B.

\textsuperscript{199} Constitutional philosopher and political philosopher Harry Jaffa believes homosexuality is wrong because it “violates the order of nature.” Stephen Macedo, Homosexuality and the Conservative Mind, 84 Geo. L.J. 261, 265 (1995)
because the Legislature did not explicitly classify same-sex partners for disparate treatment.\textsuperscript{200} These counterarguments, when considered within the totality of the circumstances, may not outweigh the evidence for which a court may infer discriminatory intent that would render Wisconsin’s adoption laws unconstitutional.

\textbf{B. Wisconsin’s Adoption Laws with Regard to Same-Sex Couples Run Contrary to the Public Policy That Supports Two Parents Per Child}

Wisconsin statutes reveal that the Legislature already values two-parent households.\textsuperscript{201} The Family Code likewise reveals that the Legislature feels that stable two-adult households are preferred over one-parent homes with regard to raising children.\textsuperscript{202} The clearest example appears, unsurprisingly, in the termination of parental rights statute.\textsuperscript{203} There, the Legislature states that the best interests of the child is the primary factor a court should consider when adjudicating such a proceeding.\textsuperscript{204} The factors of this standard include “[w]hether the child will be able to enter a more stable and permanent \textit{family} relationship.”\textsuperscript{205}

\textsuperscript{200} See Wis. Stat. §§ 48.81, 48.82.

\textsuperscript{201} See, e.g., Wis. Stat. §§ 48.01 (stating that the children’s code was enacted to “preserve the unity of the family, whenever appropriate, by strengthening family life through assisting parents and the expectant mothers of unborn children, whenever appropriate, in fulfilling their responsibilities as parents or expectant mothers”), 48.82 (1) (a) (allowing married couples to adopt).

\textsuperscript{202} Wis. Stat. §§ 48.01 (intro.), (f), (gg) (describing the purpose of the Children’s Code, which includes assuring that prospective adoptive children are sent to fit parents in stable families).

\textsuperscript{203} Wis. Stat. § 48.426 (2), (3).

\textsuperscript{204} Wis. Stat. § 48.426 (2).

\textsuperscript{205} Wis. Stat. § 48.426 (3) (f) (emphasis added); “Immediate family” is repeatedly defined as to include an individual and his/her spouse and siblings, parents, and children. Thus, family is always defined as to include two heads of household whenever applicable. See generally Wis. Stat. §§ 350.01 (3m); 146.82 (4) (a) 1.; 19.42 (7); 199.03 (8); 254.64 (4) (a) 2.
The legislature defines “family” as to include an individual and his/her spouse, siblings, parents, and children,\textsuperscript{206} and therefore, the Legislature assumes multiple-person households are in the best interests of the child.

The divorce statutes also reveal that, even if parents are unmarried, Wisconsin public policy prefers that each child have two parents. If parents divorce, a court is to presume that joint legal custody\textsuperscript{207} is in the best interests of any child(ren).\textsuperscript{208} Thus, the Legislature prefers that a child has two parents, even if those parents are not married.\textsuperscript{209}

Another example where the Legislature supports two parent households appears in the marriage statute.\textsuperscript{210} Here, the legislature explicitly notes that it aims to promote “the stability and best interests of the marriage and \textit{family[,]}” and that “[e]ach spouse has an equal obligation . . . to contribute money or services . . . for the adequate support and maintenance of his or her minor children.”\textsuperscript{211} Since the Legislature assumes each parent shares an equal role in childrearing, it logically follows that the Legislature believes two parents can provide better quality care than one parent could alone.

\textsuperscript{206} \textit{See supra} note 205.

\textsuperscript{207} \textsc{Wis. Stat.} § 767.001 (1s) (2007) (defines “joint legal custody” as “the condition under which both parties share legal custody and neither party's legal custody rights are superior, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order”).

\textsuperscript{208} \textsc{Wis. Stat.} § 767.41 (2) (am) (2007) (stating that unless one parent has engaged in battery or domestic abuse, a court is to presume that joint legal custody is in the best interests of the child).

\textsuperscript{209} \textit{See} \textsc{Wis. Stat.} § 767.41 (2) (am).

\textsuperscript{210} \textsc{Wis. Stat.} § 765.001 (2) (describes the intent of the Family Code as to promote the stability and best interests of the family).

\textsuperscript{211} \textit{Id.}
With regard to child-rearing, the marriage statute cannot be construed to suggest that only spouses can contribute to the best interests of a family.\textsuperscript{212} In Wisconsin, homosexual couples cannot marry.\textsuperscript{213} However, the right to marry is not a prerequisite to the right to raise children.\textsuperscript{214} The Legislature clearly allows one unmarried adult to adopt children.\textsuperscript{215} Thus, the fact that gay couples cannot marry does not preclude them from raising children, nor should it prevent them from promoting public policy that favors two-parent households.

The Legislature obviously supports the public policy that each child has two parents,\textsuperscript{216} so arguments against allowing same-sex couples to raise children are contrary to public policy. Same-sex couples cannot jointly adopt the biological child of one partner because, according to the state’s supreme court, the Legislature has not explicitly authorized this type of couple to jointly adopt.\textsuperscript{217} The Legislature authorized only married couples, unmarried individuals, and stepparents to adopt.\textsuperscript{218} Same-sex couples are unmarried individuals, and as such, are ineligible to jointly adopt the same child.\textsuperscript{219} The Wisconsin Supreme Court

\textsuperscript{212} \textit{See} \textsc{Wis. Stat.} § 765.001 (2).

\textsuperscript{213} \textsc{Wis. Const.} art. 13, §13.

\textsuperscript{214} \textit{See} \textsc{Wis. Stat.} § 48.82 (describing who may adopt).

\textsuperscript{215} \textsc{Wis. Stat.} § 48.82 (1) (b).

\textsuperscript{216} \textit{See supra} notes 201-11 and accompanying text.

\textsuperscript{217} \textit{Angel Lace}, 184 Wis. 2d at 507, 516 N.W.2d at 681-82.

\textsuperscript{218} \textsc{Wis. Stat.} §48.82 (1).

\textsuperscript{219} \textit{Angel Lace}, 184 Wis. 2d at 507, 516 N.W.2d at 681-82; \textsc{Wis. Stat.} §48.82 (1) (b). The same-sex couples can separately petition for the individual adoption of the same child if that child is also eligible for adoption. \textit{See supra} note 3.
employed a plain meaning interpretation of the statute when it denied a same-sex couple’s desire to jointly adopt one child.\textsuperscript{220} This plain meaning interpretation does not mean that the law necessarily complies with public policy. The Legislature, without explanation, prefers that adoptive children go to a one-parent homosexual household rather than a two-parent homosexual household.

In addition to the Legislature’s conflicting interests, the increased availability of legal protections for children supports the argument that a two-parent, same-sex couple can properly raise a child.\textsuperscript{221} A child with two legal parents has two adults to speak for the child’s best interests.\textsuperscript{222} Legal children of same-sex couples have access to both parents’ employer-provided insurance programs, the ability to visit both parents in hospitals as next-of-kin, access to life insurance, visitation rights after the dissolution of the parents’ relationship, and access to such federal programs as Medicare and Medicaid.\textsuperscript{223} Even if same-sex couples continue to raise a child without each obtaining parental rights, a child with two legal parents is better protected than a child with only one.

Finally, scientific research does not show that children raised by either unmarried couples or same-sex couples suffer any adverse consequences as a result of their parentage. Three decades of studies failed to find significant psychological differences in children raised by heterosexual and homosexual

\textsuperscript{220} Angel Lace, 184 Wis. 2d at 507, 516 N.W.2d at 681-82.

\textsuperscript{221} James G. Pawelski, M.S., et al., The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children, 118 Pediatrics 349, 356-63 (July 2006).

\textsuperscript{222} Id. at 356-57.

\textsuperscript{223} Id. at 357.
parents. A compilation of research found no discernible differences in heterosexual and homosexual parents’ effects on their children’s self-esteem, psychological adjustment, and attitudes toward their own child rearing.

Conflicting literature exists to refute those studies, but such literature is not based on scientific research studies. Instead, the authors that suggest that children raised in homes with homosexual parents suffer in comparison to their peers with heterosexual parents base their results on the “moral reality” that families are naturally constructed through the union of a man and a woman. Such “moral reality” fails to hold any weight in the actual reality.

Not only does the research fail to show that same-sex couples or unmarried couples cannot raise children effectively, research exists to suggest that same-sex parents might actually be the “best” parents. A Clark University study revealed that gay parents tend to be more motivated because they specifically choose to be parents, and specific intent is sometimes absent from heterosexual

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225 Id.

226 Sheriff Girgis et al., What is Marriage?, 34 HARV. J. L. & PUBLIC POLICY 245, 245-87 (Winter 2010) (stating simply that the protective act of marriage reinforces that children will understand a safe and secure environment, an argument that would lack weight if same-sex couples were also allowed to marry).

227 Id. at 252.

228 See Pawelski, supra note 221, at 357.

parents.\textsuperscript{230} Intent to become a parent resulted in good parenting, judged by the mental health, social functioning, school performance, and other life-success measures of the children studied.\textsuperscript{231} In the same study, researchers found that children from same-sex parent households showed only one discernable difference from those raised by heterosexual parents: a greater tolerance for diversity.\textsuperscript{232} Obviously, these studies do not suggest that children from opposite-sex parent households cannot show the same tolerance, but it does show that same-sex parents are just as capable at raising children as opposite-sex parents.

Wisconsin adoption laws promote conflicted public policies. Public policy supports two parent households, two-parents provide more legal protections for child, and same-sex couples are effective parents. Therefore, public policy should support allowing same-sex couples to jointly adopt a minor child.

\textbf{C. Wisconsin’s Adoption Laws Unnecessarily Waste Resources}

The current economic climate in Wisconsin does not welcome the need to spend more money, nor does it embrace spending money on publically funded entities.\textsuperscript{233} In December 2011, Wisconsin’s unemployment rate was 7.1 percent.\textsuperscript{234} Although this rate constituted a six-month low, the unemployment rate

\begin{itemize}
  \item \textsuperscript{230} \textit{Id.}
  \item \textsuperscript{231} \textit{Id.}
  \item \textsuperscript{232} \textit{Id.}
  \item \textsuperscript{233} \textit{See Part III.C.2.}
  \item \textsuperscript{234} U.S. DEPT. OF LABOR BUREAU OF LABOR STATISTICS, ECONOMY AT A GLANCE: WISCONSIN (2012), \textit{at} http://www.bls.gov/eag/eag.wi.htm.
\end{itemize}
sat close to five percent from 2001 to 2009.\textsuperscript{235} Despite higher unemployment in Wisconsin, the cost of goods and services continued to rise.\textsuperscript{236} Specifically, in the Milwaukee-Racine corridor, which represents 87 percent of Wisconsin consumer spending, food prices rose 2.4 percent in 2011.\textsuperscript{237} During the same year, energy prices rose 5.4 percent, medical care costs increased by 6.5 percent, the cost for shelter went up by 1.1 percent, and educational costs rose three percent.\textsuperscript{238}

To combat rising costs and unemployment, the Republican governor and Republican-led Assembly and Senate advanced policies in 2011 that limited spending on public and government programs.\textsuperscript{239} Specifically, state public school spending decreased by ten percent in the 2011-12 school year in comparison to the previous year.\textsuperscript{240} In total, the budget cut over $1 billion from educational and local government programs.\textsuperscript{241} According to Governor Scott Walker, he initiated these policies to spur job growth and help the state’s economy.\textsuperscript{242}

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\textsuperscript{237} Id.

\textsuperscript{238} Id.

\textsuperscript{239} See generally 2011 Wisconsin Act 10.


\textsuperscript{242} Id.
\end{flushleft}
Forcing same-sex partners to spend more money to adopt than heterosexual parents in government or government-licensed programs seems counterintuitive to the current trends of higher unemployment, higher costs of living, and decreased government spending.\textsuperscript{243} Independent adoptions, such as those by same-sex couples seeking to adopt one partner’s biological child, typically cost at least $8,000, and they can cost more than $40,000.\textsuperscript{244} These costs include both legal fees and the preadoption preparation requirements.\textsuperscript{245} Adults petitioning for adoption must pay the costs of these course hours.\textsuperscript{246} Further, all of the acceptable programs that offer these course hours, except one, are publically funded.\textsuperscript{247} Thus, forcing the biological mother to spend money at a state-funded entity to allow both her and her partner to gain parental rights to her child wastes unnecessary money in a manner and economic climate that does not condone such waste.

\textsuperscript{243} See \textit{Wis. Stat.} § 48.84 (3); see also supra notes 2, 232-42 and accompanying text.


\textsuperscript{245} See \textit{Wis. Stat.} § 48.84 (1); see also infra note 246.

\textsuperscript{246} \textit{Wis. Stat.} § 48.84 (3); The cost of this type of adoption ranges from $8,000 to over $40,000. U.S. DEPT. HEALTH \& HUMAN SERVICES, FUNDING ADOPTION: ADOPTION PACKET 2 (February 2011), available at http://www.childwelfare.gov/pubs/adoption_gip_two.pdf.

\textsuperscript{247} Even though the adoptive parent must pay the cost, the State must first employ the worker. \textit{Wis. Stat.} § 48.84 (1) (“The preparation shall be provided by a licensed child welfare agency, a licensed private adoption agency, the state adoption information exchange under s. 48.55, the state adoption center under s. 48.55, a state-funded foster care and adoption resource center, a state-funded postadoption resource center, a technical college district school, or an institution or college campus within the University of Wisconsin.”).
IV. CONCLUSION: THE LEGISLATURE SHOULD CREATE A METHOD FOR SAME-SEX COUPLES TO JOINTLY ADOPT A MINOR CHILD

The legislature should explicitly codify a method for which same-sex couples can jointly adopt the same child. The Legislature is the proper body to rectify this adoption law inequality. The principal function of a legislature is to make laws that establish the policies of a state. Accordingly, the Legislature must evaluate both the public policy considerations and the fairness of any law. It is not the role of the judiciary to determine what a law ought to be, but rather to simply apply the law as the Legislature intended. The judge’s actions in Christian J.W. highlighted a hole in the statutes that remains unfilled. The Wisconsin Legislature should now act to remedy the unresolved area of law.

In order to equalize Wisconsin’s adoptive laws, the Legislature would not have to embark on a monumental task; in fact, the job would be quite simple. Currently, stepparents may adopt the biological children of their spouses. To do so, these stepparents must undergo all preadoption requirements, just as any other unrelated adoptive parent. The current process by which same-sex couples may each gain parental rights to one child requires both the biological parent and the


\[\text{\textsuperscript{249}} \text{Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087, 1093 (7th Cir. 1999) (citations omitted).}\]

\[\text{\textsuperscript{250}} \text{Id.}\]

\[\text{\textsuperscript{251}} \text{Wis. Stat. § 48.81 (1) (a).}\]

\[\text{\textsuperscript{252}} \text{Wis. Stat. § 48.84 (describing preadoption preparation for proposed adoptive parents).}\]
adoptive parent to undergo these preadoption requirements.\textsuperscript{253} Thus, to make this process equal for all, the Legislature would simply need to make the stepparent adoption process available to same-sex couples.\textsuperscript{254} The Legislature would not need to permit same-sex marriage, nor would it be forced to invent a new statutory procedure. There is a simple fix available for a complex and discriminatory problem. The Legislature can and should take that simple action to stop discrimination against same-sex couples in Wisconsin, and more importantly, to stop discrimination against the children of those same-sex couples. Christian does not deserve losing a parent simply because he has two moms.

\textsuperscript{253} See supra note 2.

\textsuperscript{254} See supra notes 179-81 and accompanying text.