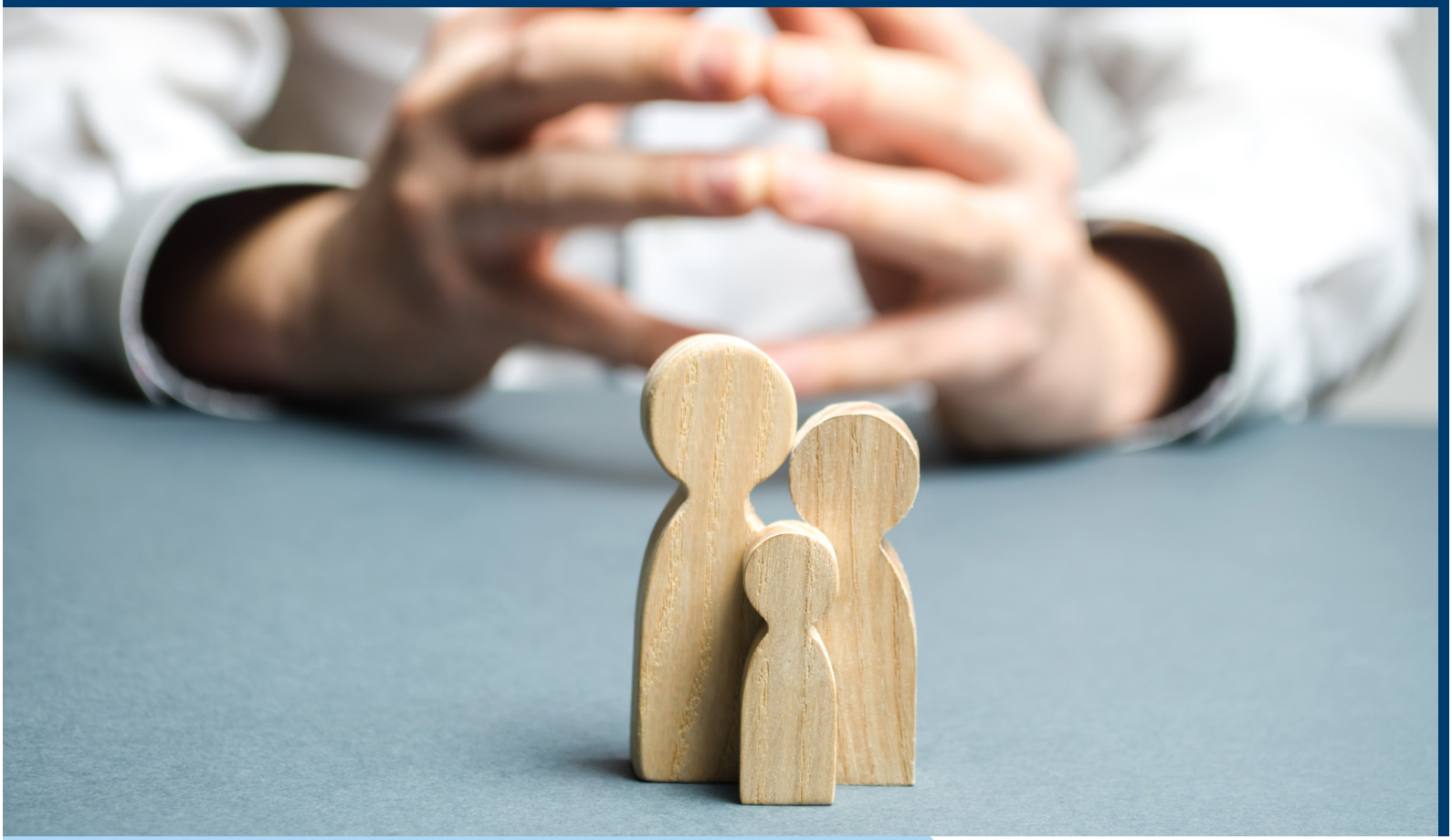
SIMPLIFYING ADOPTION RECORDS ACCESS PROCEDURES



by Andrew C. Brown, J.D., and Parker Stathatos

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Introduction

The U.S. Census Bureau estimates that 1.4 million adopted children are currently living in U.S. households (U.S. Census Bureau, 2020). Although there are commonalities in adoption processes, there is no such thing as a "typical" adoption experience due to the diversity among the individuals and families involved. Accordingly, policymaking on adoption and specifically on the rights of those involved in the adoption process, can be challenging.

Recent efforts by adoptees seeking to learn more about their personal histories by gaining the right to access their original birth certificates have shined a light on the tension that exists between the rights of adoptees and those of birth families. It has also called into question longstanding state adoption laws and practices surrounding confidentiality of records and sparked important conversations about identity, belonging, and openness in adoption.

Nearly every state, including Texas, restricts public access and seals documents related to adoption proceedings to ensure the privacy and confidentiality of birth families, adoptive children, and adoptive parents (Child Welfare Information Gateway [CWIG], 2020, p. 1; Texas Family Code, Section 162.021). There is considerable variation, however, in the ease with which states permit adult adoptees to access their adoption records, including original birth certificates. Generally speaking, adoptions in the United States fall into two categories: open and closed. An open adoption is one in which the birth and adoptive families agree to maintain contact with one another and share information about the adoption with the child (CWIG & OPA Clearinghouse, n.d., p. 2). Open adoptions are entered into based on the consent of the parties and vary in degree of openness depending on the wishes of the parties. By contrast, in a closed adoption, the birth and adoptive families remain strangers, do not share any identifying information, and have no communication (p. 4). Adoption records are sealed by the state, but certain nonidentifying information, such as "health, behavioral health, developmental, educational, and social histories," is shared with the adoptive family (CWIG, 2020, p. 2).

This paper seeks to provide background on the history and development of state adoption laws designed to protect the privacy of those involved with the "adoption triangle"—adoptees, adoptive parents, and birth parents—and review recent reform efforts intended to promote greater openness in American adoption practice. Specifically, this paper focuses on the challenges adult adoptees face when they wish to access their adoption records and original birth certificates. In doing so, we will discuss the impact of adoption on those involved and examine the various perspectives and rights that are often in tension with one another. Ultimately, we will consider policy solutions that will best allow adult adoptees to have easier access to information about their history while

Key Points

- Recent trends toward greater openness in adoption have shined new light on the tension that exists between the interests of adoptees and birth families.
- Adoptees have a legitimate interest in accessing their original birth certificate and adoption records.
- Likewise, birth parents have a legitimate interest in maintaining their privacy and having a say in whether or not they communicate with the child they placed for adoption.
- Current Texas law requires adult adoptees to get a court order upon a showing of "good cause" to obtain a copy of their original birth certificate.

protecting and preserving the rights of birth parents who have made the courageous and painful choice to place a child for adoption.

History of Adoption Privacy Statutes

Nearly all courts now seal adoption records after issuing an order, which has resulted in a "regime of secrecy" (Samuels, 2001, p. 368). However, initial state statutes on adoption procedures did not provide for the confidentiality of records. In fact, until the mid-19th century, adoption in the United States was largely unregulated by government, being accomplished primarily through informal agreements among the parties. This all changed in 1851 when Massachusetts became the first state to enact comprehensive legislation to recognize formal adoption agreements in state law (Silverman, 2001, p. 86).

Although four other states—Mississippi, Alabama, Texas, and Vermont—had previously enacted legislation dealing with adoption, Massachusetts' "An Act to Provide for the Adoption of Children" is widely recognized as the first "modern" adoption statute due to its detailed procedures for consummating an adoption through the courts (1851 Mass. Acts, Ch. 324; Guthrie & Grossman, 1999, pp. 236–37). The act is less than two pages but includes many features and protections that are still part of current adoption practice. For example, the Massachusetts act required that consent to the adoption be given by the child's living parents, next of kin (if there are no living parents), or the adoptee (if 14 or older). It also guaranteed the adoptee the same legal status as natural children for inheritance and succession purposes, which allowed an adopted child to inherit property from the adoptive parent to the same extent as a biological child. Today, the law treating adopted children the same as biological children is the norm, but this was not always the case historically.

The enactment of the Massachusetts statute marked what Papke calls the "emergence of modern American adoption," with more than 24 states passing similar legislation by 1876 (Papke, 1999, pp. 460–62). It is notable that neither the Massachusetts statute nor any of the original adoption statutes provided privacy protections for the parties involved. It was not until the early 20th century that state legislatures would begin enacting laws that placed limitations and restrictions on access to adoption records (Samuels, 2001, p. 369; Baran & Pannor, 1993, p. 119). The first such law was passed by Minnesota in 1917 (Reiss, 1998, p. 136). Minnesota's law (HF 1186, 1917) sealed adoption records from the general public but allowed inspection and copying of the "files and records of the court" by the "parties in interest," which includes the adoptee, birth parents, and adoptive parents. As observed by Baran and Pannor, the goal of early statutes limiting access to adoption records "was not to create anonymity between birthparents and adoptive parents or to keep secret from adopted children any information about their past" (Baran & Pannor, 1993, p. 119). Rather, their intent was to preserve the privacy of all parties to the adoption from public scrutiny (Sokoloff, 1993, p. 21).

In the 1920s, states began amending their adoption statutes to restrict even the parties to an adoption from accessing the records except in cases where a court finds "good cause" exists to permit access (Sokoloff, 1993, p. 21). It is believed that one of the main drivers of this policy shift was advocacy from social workers who saw it as a way to remove the "stigma of illegitimacy from children born out of wedlock" (p. 22). Evidence for this theory can be found in adoption best practice standards published around the time these changes were being popularized. For example, in 1938, the Child Welfare League of America (CWLA) published a document entitled *Minimum Safeguards in Adoption*, which enumerates various safeguards relating to adopted children, adopting families, and state governments (CWLA, 1938). Founded in the early 1920s, around the same time states were introducing more stringent standards governing the secrecy of adoption records, the CWLA was a pioneer in establishing national standards for child welfare services (Adoption History Project, 2012; CWLA, 2012). Among the various safeguards enumerated in its *Minimum Safeguards*, the CWLA included keeping the identity of the adoptive parents secret from the birth parents, protecting the adoption proceedings from "unnecessary publicity," and revising the birth records of the adoptive child to "shield him from unnecessary embarrassment in case of illegitimacy" (CWLA, 1938).

In 1949, the federal government formally endorsed the policy of secrecy in adoption when the U.S. Children's Bureau and National Office of Vital Statistics (1949) published a policy statement calling for "a Nation-wide policy on the confidential nature of birth records" (p. iii). While the policy statement was broadly focused on confidentiality of all birth records, regardless of the child's adoptive status, it included detailed discussions on how to handle the birth records of adopted children as well as those born out of wedlock or to unknown parents (pp. 4–7). Like the CWLA's *Minimum Safeguards*, this policy statement justified the need for confidentiality, in part, on a desire to protect the child and the parents from the disclosure of "embarrassing or harmful" information such as illegitimacy or unknown parentage (pp. 1, 7). It also advised that sealing adoption records promoted the "desirable" goal of ensuring that the birth parents and adopting parents "remain unknown to each other" (p. 7). Notably, however, the policy statement

did not contemplate restricting an adult adoptee's access to their original birth certificate as necessary or desirable for protecting the adoptee. In the section discussing how to handle birth records of legitimated and adopted children, the policy statement recommends, "the right to inspect or secure a certified copy of the *original birth certificate* of an adopted child should be restricted to the registrant, if of legal age; or upon a court order" (p. 7).

From the 1930s through the 1960s, states continued to enact measures to seal birth records and court documents relating to adoption proceedings (Samuels, 2001, p. 369). While some of these laws restricted adult adoptees' access to their original birth certificates, approximately 40% of states continued to provide unrestricted access as late as 1960. In the 1960s, an increasing number of states began passing laws to close birth records to adult adoptees, and by the 1980s, only three states still had laws allowing adult adoptees full access to their records.

Movement Toward Greater Openness and the Rights of Adoptees and Birth Parents

During the 1970s, a movement of adult adoptees began to coalesce, seeking unrestricted access to their birth records and arguing that such access was a constitutional right (Silverman, 2001, p. 87; Racine, 2002, p. 1437). This movement sparked tension, and a series of court cases, between adult adoptees asserting their "right to know" the details of their adoptions (Silverman, 2001, p. 87) and birth parents defending their right to maintain anonymity and the confidentiality of birth and adoption records under constitutional guarantees of privacy and freedom to contract (Racine, 2002, p. 1438).

The movement for greater openness in adoption gained momentum as more research was conducted on the psychological and sociological impacts of adoption. As previously explained, the original intent of closed adoption proceedings was not to maintain anonymity among members of the adoption triangle but rather to protect the privacy of adoptees, birth parents, and adoptive parents, from the public scrutiny of illegitimacy and other stigma related to adoption. Such concerns are less relevant today as there is considerably less stigma associated with illegitimacy and adoption than existed in the early 1900s.

Psychologists examining the impact of adoption on adult adoptees, birth parents, and adoptive parents found that the confidentiality and secrecy associated with closed adoption can negatively impact mental and emotional well-being (Pannor & Baran, 1984, p. 245; Baran & Pannor, 1993, p. 119). When a birth parent relinquishes their parental rights, for example, the birth parent can no longer communicate with their natural child. As a result, a birth parent cannot explain to the adoptee why the birth parent relinquished their rights. The inability of a birth parent to contact an adopted child, as well as the uncertainty of the adopted child's whereabouts and well-being, can make a birth parent feel guilty and powerless (Baran & Pannor, 1993, p. 120).

Sealed adoption records and original birth certificates also impede an adoptee's ability to develop a sense of identity and learn about their past (Pannor & Baran, 1984, p. 246; Baran & Pannor, 1993, p. 119). This may lead to an adoptee believing they were unwanted by their birth parent or that something is wrong with them. Baran and Pannor (1993) refer to adoption-related identity conflicts as "'identity lacunae,' which can lead to feelings of shame, embarrassment, and low self-esteem" (p. 120). Closed adoptions may lead adoptive parents to have similar feelings, including fear and uncertainty. As a result of closed adoptions, an adoptive parent "may be unable to answer truthfully their adoptive children's inevitable questions" (p. 120) about the child's upbringing and birth parents.

Yesterday's Children v. Kennedy

One of the earliest challenges to state laws restricting access to adoption records was filed in Illinois in 1975 by a group of eight adults who were adopted as infants and a nonprofit representing 6,000 adult adoptees known as Yesterday's Children (*Yesterday's Children v. Kennedy*, 1977, p. 431). The plaintiffs filed suit in federal district court alleging that two Illinois statutes restricting access to adoption records violated the First, Fifth, Ninth, Thirteenth, and Fourteenth Amendments to the U.S. Constitution. With respect to the Fourteenth Amendment claim, the plaintiffs argued that the Illinois statutes operated to deny them "equal protection of the laws by preventing their access to information concerning their background, based on the suspect classification of their status as adoptees" (p. 432). One of the plaintiffs' more novel assertions is that the Illinois statutes operated to effectively place them "into chattel status," violating their Thirteenth Amendment right "to be free from involuntary servitude" (p. 433). Unfortunately, neither the district court nor the U.S. Court of Appeals for the Seventh Circuit ruled on the merits of the case, instead finding that the judicial doctrine of abstention precluded them from issuing an opinion because Illinois state courts had not had sufficient opportunity to review and define the statutes (p. 436). The doctrine of abstention precludes federal courts from "exercising jurisdiction if applicable state law, which would be dispositive of the controversy, is unclear and a state court's interpretation of the state law might make resolving a federal constitutional issue unnecessary" (Congressional Research Service, n.d.).

Alma Society Inc. v. Mellon

A similar lawsuit was filed in 1978 in the U.S. District Court for the Southern District of New York, challenging New York statutes requiring the sealing of adoption records (*Alma Soc. Inc. v. Mellon*, 1979, pp. 1227–1229). The suit was filed by an association of adults who were adopted as infants and was known as the Adoptees' Liberty Movement Association. Like the plaintiffs in *Yesterday's Children v. Kennedy*, the plaintiffs in this case alleged that statutes restricting adult adoptees' access to their records were "facially invalid on Fourteenth Amendment Due Process and Equal Protection grounds," and also sought to invalidate the laws under the novel Thirteenth Amendment theory raised by the plaintiffs in *Yesterday's Children* (pp. 1227–1228). In briefs submitted to the court, the plaintiffs argued that restricting access to records

> *causes some of them serious psychological trauma and pain and suffering, may cause in them or their children medical problems or misdiagnoses for lack of history, may create in some persons a consciousness of danger of unwitting incest, and in others a 'crisis' of religious identity or … an impairment of religious freedom because they are unable to be reared in the religion of their natural parents.* (p. 1229)

Unlike *Yesterday's Children*, the district court in *Alma* actually reached the merits of the case, ultimately ruling against the plaintiffs and upholding the New York statutory scheme (*Alma Soc. Inc. v. Mellon*, 1979, p. 1229). Plaintiffs then appealed to the U.S. Court of Appeals for the Second Circuit, which upheld the lower court's ruling. In doing so, the Second Circuit observed that it was "dealing with the 'family' in general and with two families in particular—first the natural parent(s) who has (have) surrendered custody of the adoptee child … and second, the adopting family" (p. 1231). Given the various rights, interests, and choices involved in the adoption process, the Second Circuit found that the New York statutes "in providing for release of the information on a 'showing of good cause' do no more than to take these other relationships into account" (p. 1233). Plaintiffs appealed to the U.S. Supreme Court, which denied certiorari, effectively upholding the Second Circuit's decision.

In Re Christine

Attempts to unseal adoption records via court action have not solely been brought by adult adoptees. A 1979 Rhode Island Supreme Court case, known as *In Re Christine*, dealt with the right of a birth mother to contact the child she placed for adoption 11 years prior (*In Re Christine*, 1979, pp. 511–12). The mother, referred to only as "Christine" in court records, contacted the adoption agency and family court that handled the placement of her child, "seeking information about the child's welfare and asking that she be given an opportunity to visit the child" (p. 512). Although Christine's correspondence with the family court was informal, the judge "treated her communications as a petition for release of the names and address of the adoptive parents" (p. 512), held a hearing, and issued an order releasing the information to Christine. At the time of the order, adoption records in Rhode Island were confidential and a court order was needed for public inspection of the records. The adoption agency, Children's Friend and Service, petitioned the Supreme Court of Rhode Island to review the family court's order (p. 511).

Although the Rhode Island Supreme Court was sympathetic to Christine's love for the child she placed for adoption and her desire to know more about her and potentially develop a relationship with her, it ultimately reversed the family court's order (*In Re Christine*, 1979, pp. 513–14). Explaining its ruling, the court found that "the preservation of the statutory shield of confidentiality … benefits all parties to the adoption triangle" (p. 512–13). Accordingly, the court held that "a natural parent who hopes to lift the cloak of confidentiality, even just a bit, bears a heavy burden in establishing the requisite 'good cause'" (p. 513). By reversing the order of the lower family court, the Rhode Island Supreme Court affirmed the privacy of the adoptive parents and adopted child.

Doe v. Sundquist

Although attempts to achieve greater openness through court challenges to state confidentiality statutes have largely failed, these attempts have had more success through state legislative action. These statutes, like those that restricted access to records, have generally been upheld when challenged in court. One such law, enacted by the state of Tennessee in 1995, granted adopted individuals who are 21 or older full access to their adoption records (*Doe v. Sundquist*, 1999, p. 921). The law includes a provision known as a "contact veto" that allowed a "parent, sibling, spouse, lineal ancestor, or lineal descendant" to register with the state their desire not to be contacted by the adopted person (p. 921). Shortly before the law was scheduled to go into effect, the plaintiffs, two birth mothers, an adoptive couple, and a nonprofit child-placing agency, filed suits in both state and federal courts seeking an injunction to prevent the law from going into effect. In their respective suits, the plaintiffs argued that the new Tennessee statute was unconstitutional under privacy protections guaranteed by the U.S. Constitution and the Tennessee Constitution, as well as prohibitions against the enactment of "retrospective law[s], or law[s] impairing the obligations of contracts" contained in the Tennessee Constitution (*Doe v. Sundquist*, 1999, pp. 921, 923; 1997, pp. 704–05). In the federal suit, both the district

court and U.S. Court of Appeals for the Sixth Circuit ruled against the plaintiffs (*Doe v. Sundquist*, 1997, p. 704). At the state level, the trial court dismissed the plaintiffs' motion for injunctive relief but was overruled by the Court of Appeals (*Doe v. Sundquist*, 1999, p. 921). Ultimately, however, the Tennessee Supreme Court ruled against the plaintiffs and reinstated the trial court's original decision dismissing the suit (p. 921).

A significant portion of the Tennessee Supreme Court's opinion was devoted to a technical analysis of the Tennessee Constitution's prohibition against retrospective laws (*Doe v. Sundquist*, 1999, pp. 923–25). Since this aspect of the ruling mainly focused on how the Tennessee Supreme Court had historically interpreted this prohibition, it is unnecessary for us to enter into a detailed discussion of it. Suffice it to say, the Tennessee Supreme Court found that the new statutes were the product of the Tennessee Legislature's determination that updating the "methods and standards for disclosure" was necessary for balancing the best interests of the parties to the adoption (p. 925).

More important for our purposes is how both the Tennessee Supreme Court and the Sixth Circuit handled the plaintiffs' claim that the disclosure statutes violated constitutionally protected rights to privacy. Specifically, in both cases, the plaintiffs argued that the statutes ran afoul of the rights to familial privacy by restricting the ability of birth parents to freely make decisions concerning reproduction and raising a family (*Doe v. Sundquist,* 1997, p. 705; 1999, p. 926). While both the Tennessee Supreme Court and the Sixth Circuit recognized that privacy considerations come into play when determining the extent to which adoption records are subject to disclosure, the courts disagreed with the plaintiffs concerning the nature and extent of the privacy concerns at issue (*Doe v. Sundquist*, 1997, p. 705; 1999, p. 926).

In analyzing the nature of these privacy concerns, the Sixth Circuit noted that "a birth is simultaneously an intimate occasion and a public event," and governments have a legitimate interest in both maintaining birth records and disclosing their contents for a variety of purposes (*Doe v. Sundquist*, 1997, p. 705). This inherently brings the rights and interests of individuals into conflict. The Sixth Circuit found that rather than undermining privacy rights, the new Tennessee disclosure statutes were "a serious attempt to weigh and balance two frequently conflicting interests," namely the interest of adopted individuals to know and understand the circumstances of their birth and the interest of birth parents in their privacy and "the integrity of a sound adoption system" (pp. 705, 707).

Similarly, the Tennessee Supreme Court found that the privacy considerations at issue in adoption decisions did not rise to the level of a fundamental right deserving of state constitutional protection (*Doe v. Sundquist*, 1999, pp. 926–927). Like the Sixth Circuit, the Tennessee Supreme Court took note of the various competing interests at stake when it found that the disclosure statutes "reflect the legislature's determination that allowing limited access to adoption records is in the best interest of both adopted persons and the public" (p. 926). While the provisions do provide adoptees with greater access to their adoption records that include the disclosure of the birth parents' identifying information, the court noted that they "do not, however, allow unfettered access in disregard of the sensitivities and privacy interests involved" (p. 926). In support of this finding, the court pointed to the fact that access was limited to adopted individuals 21 or older or their legal representative, as well as the "contact veto" provisions that gave birth parents a tool for maintaining their privacy and minimizing the "risk that disclosure of identifying information will have a disruptive effect" on their lives (p. 926).

Does v. State & Oregon Measure 58

The Sixth Circuit's decision in *Doe v. Sundquist* informed the outcome of a similar lawsuit filed in Oregon barely one year later. In 1998, Oregon voters approved "Measure 58," which permitted "any adopted person 21 years of age or older born in the state of Oregon" to obtain a certified copy of their original birth certificate upon written request (*Does v. State*, 1999, p. 546). Shortly after the measure was enacted, a group of birth mothers who had surrendered their children for adoption between 1960 and 1994 filed suit, seeking to prevent Measure 58 from going into effect. The plaintiffs' arguments against the measure were similar to those made by the mothers in *Doe v. Sundquist*, namely that the measure violated their constitutionally protected right to privacy and impaired the freedom of contract. After losing at the trial court, the plaintiffs appealed to the Oregon Court of Appeals (p. 547). In dismissing the plaintiffs' contractual argument, the Oregon court found that although adoption contracts must conform to state law, they are not contracts in the traditional sense (p. 554). In addition, the state's role in the adoption process is regulatory in nature. The parties to the adoption agreement, the court found, "are free to enter into adoption agreements with each other, or not; however, if they choose to enter into such agreements, then those agreements must conform to the laws of the state" (p. 557). The mere fact that the state enacts laws and regulations governing the adoption process does not itself create an obligation of the state to the parties and, thus, the state is free to amend those regulations as necessary. With respect to the privacy challenge raised, the Oregon court followed much the same logic as the Sixth Circuit in *Doe v. Sundquist*, even quoting a portion of that opinion (p. 565–566). Finding that neither birth

nor adoption are purely private matters and the state has a legitimate interest in preserving and managing adoption records, the Oregon Court of Appeals determined that neither of these events were entitled to an "absolute cloak of secrecy" (p. 566). Although the court expressed sympathy for the legitimate interest of birth mothers in maintaining privacy surrounding the circumstances of their decision to surrender a child for adoption, it also recognized that the child has a legitimate interest in learning about their birth family. Noting that "legitimate interests…do not necessarily equate with fundamental rights," the Oregon Court of Appeals found that Measure 58, like the Tennessee statutes at issue in *Doe v. Sundquist*, was an appropriate exercise of the state's power to enact policies that "accommodate such competing interests" (p. 566).

State Policies on Access to Adoption Records

As the movement for greater openness in adoption has grown, many state legislatures have responded by reforming their disclosure statutes to make it easier for adult adoptees to access all or part of their adoption records while balancing this interest with those of birth and adoptive families. This has led to considerable variation among states in the type of information released, who has access, and the process for obtaining records. **Figure 1** shows some of the most common state policies governing the release of original birth certificates.

Nonidentifying information—like the adoptee's date and place of birth and demographic information about the birth parents—is the simplest to obtain, with nearly every state allowing adult adoptees to obtain this information (CWIG, 2020). Accessing identifying information is, understandably, much more complex. The majority of states will release identifying information if the party whose information is to be disclosed consents to the release. If consent has not been given, a court order granting the release of the information must be obtained, which usually requires the party requesting the information to demonstrate that they have "good cause" or a compelling reason for accessing the information. In about 30 states, consent is tracked through what is known as a "mutual consent registry," which is a database that registers whether or not a party to the adoption has informed the state that they consent to the release of their identifying information. While most states will not release information unless the party has communicated consent, eight states require parties who wish to keep their information confidential to file an affidavit requesting nondisclosure (p. 4).

Confidential Intermediary System

Obtaining consent for the release of information when it is not already on file can be tricky, especially when a long period of time has passed since the adoptive placement.

Figure 1

State Policies Governing Release of Adoptee's Original Birth Certificate

Policy	States
Court order with consent of all parties	Idaho and Mississippi
At the request of the adult adoptee	Alabama, Alaska, Arkansas, Connecticut, Illinois, Maine, Montana, New Jersey, New York, Pennsylvania
At request, unless birth parent has filed notice denying consent to the release of information	Colorado, Delaware, Illinois (for adoptees born on or after 1/1/1946), Maryland, Minnesota, Montana (for adoptions finalized on or after 10/1/1997), Nebraska, Ohio, Oklahoma, Washington
Requesting party must be found eligible to receive information through a state adoption registry	Indiana, Michigan, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia
Birth parent(s) consent to release information is on file	Missouri, Nebraska (for adoptions finalized on or after 9/1/1998), South Carolina, Utah (for adoptions finalized on or after 1/1/2016), Wisconsin

Note. Information on state birth certificate access policies shown in this table is from *Access to Adoption Records*, Child Welfare Information Gateway, 2020, p. 5 (https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/infoaccessap/).

Approximately 12 states[1] address this problem through the use of a confidential intermediary system. A confidential intermediary system includes a set of procedures that allows a private third party to inspect "sealed adoption records for the purpose of conducting a search for birth family members to obtain their consent for contact" (CWIG, 2020, p. 4). This process is similar to processes that allow members of the adoption triangle to complete a contact preference form. Confidential intermediaries are utilized for a variety of reasons, including to obtain updated medical records, obtain consent for contact, or contact family members that are not registered with a mutual consent registry.

In 2010, the North Carolina General Assembly passed House Bill 1463 (2010), which authorizes child-placing agencies to act as a confidential intermediary for an adoptee, birth parent, or other biological family of the adoptee. North Carolina does not require child-placing agencies to obtain a court order when the child-placing agency acts as a confidential intermediary. However, North Carolina does not permit confidential intermediaries to exchange personal identifying information among members of the adoption triangle without obtaining written consent from all parties involved in the contact.

The state of Michigan, likewise, has detailed procedures governing its confidential intermediary system. Michigan allows adult adoptees, birth relatives, and adoptive relatives to petition the court that granted the adoption order and request a confidential intermediary. Before a court approves a petitioner's request for a confidential intermediary, the court is required to contact the state's mutual consent registry and determine whether an individual has consented to the release of their personal identifying information. The court is allowed to appoint a confidential intermediary "If no denial of consent is currently on file for that individual." (Michigan Probate Code, Section 710.68b(2)). Whereas intermediaries in North Carolina must be a child-placing agency, Michigan allows individuals to serve as intermediaries. These intermediaries are required to receive court approval, take an oath of confidentiality, and complete a training before accessing sealed records from a child-placing agency.

Although the process for intermediary services in Michigan is more burdensome than in North Carolina, the state of Michigan allows the personal identifying information of a former family member to be released to an adult adoptee if a confidential intermediary is unable to make contact with the former family member within six months of an intermediary searching for the individual (Michigan Probate Code, Section 710.68b(6)).

Two key differences that distinguish the confidential intermediary systems in North Carolina and Michigan are the level of court involvement and the manner in which consent is obtained prior to the release of personal identifying information. Whereas Michigan requires an individual seeking the appointment of a confidential intermediary to petition the court for the appointment, no such court order is required in North Carolina. Prior to ruling on a request for appointment of a confidential intermediary, Michigan courts are required to first contact the state's central adoption registry to determine whether the individual whose information is sought for release has a consent denial on file. If there is no consent denial on file, the court is required to appoint a confidential intermediary. On the other hand, if a consent denial is on file, the court will not appoint the intermediary. By contrast, a confidential intermediary in North Carolina is permitted to contact the individual whose information is sought without the prior involvement of a court. However, a North Carolina confidential intermediary must still obtain the consent of the individual prior to sharing their information with the interested party. If the individual denies consent, the confidential intermediary is prohibited by law from releasing the information. To illustrate the differences in process, consider the following examples.

Scenario 1 – Michigan System
Birth Mom A relinquished her parental rights and placed her child for adoption shortly after the child was born. At the time of placement, Birth Mom A filed a consent denial with the Michigan central adoption registry. Twenty-five years later, Adoptee A, now an adult, files a petition with the court that entered the final decree of adoption for the appointment of a confidential intermediary to facilitate contact with Birth Mom A. The court contacts the central adoption registry and finds that the consent denial remains on file. The court rejects Adoptee A's petition.

Scenario 2 – North Carolina System
Adoptee B is an adult who was adopted at birth. Now 30, Adoptee B contacts a North Carolina licensed child placing agency that provides confidential intermediary services. After agreeing to take the case, the child placing agency begins searching for Adoptee B's birth mother. Upon locating Birth Mom B, the child placing agency asks her if she would like to have contact with Adoptee B. Birth Mom B consents to contact and the child placing agency shares her contact information with Adoptee B.

As these hypothetical scenarios illustrate, the North Carolina system, by not requiring a court order for the

1 Alabama, Colorado, Florida, Illinois, Michigan, Montana, North Carolina, North Dakota, Oklahoma, Virginia, Washington, and Wyoming.

appointment of a confidential intermediary, provides considerably more flexibility than the Michigan system. In addition, the Michigan system's prohibition on the appointment of a confidential intermediary if a consent denial is on file with the central adoption registry creates another barrier to the release of information. This does not necessarily mean that a birth mother's decision to file a consent denial at placement will act as a perpetual bar to contact as the mother can always change her mind and file notice with the registry at a later date that she consents to the release of her information. Unless and until the mother files this change, however, the original denial will prevent the appointment of the confidential intermediary. In this way, the North Carolina system's greater flexibility provides members of the adoption triangle with an easier opportunity to change their mind regarding whether to provide or deny consent as compared to the Michigan law.

Birth Certificates and Adoption Records in Texas

Once a court renders an adoption order in Texas, the original birth certificate of the adoptee is sealed (Texas Family Code, Section 162.021(a)), and the state registrar prepares a new birth certificate for the adoptee that reflects the names of the adoptive parents (Section 108.009(a)). An adult adoptee must petition the court that ordered their adoption to receive a noncertified copy of their original birth certificate and other documents related to their adoption (Texas Health and Safety Code, Section 192.008(d)). However, an adult adoptee is not required to obtain a court order if they know the identity of each of their birth parents (Texas Family Code, Section 192.008(f)). If an adult adoptee cannot identify the original court of jurisdiction that granted their adoption order, they must submit a *Request for Identity of Court of Adoption* to the Viral Statistics Section (Department of State Health Services [DSHS], 2020).

The court that ordered the adoption is also required to submit nearly all records pertaining to the adoption to the Vital Statistics Section (Texas Family Code, Section 108.003(a)). The Vital Statistics Section is part of the Department of State Health Services and maintains birth records, adoption orders, marriage and divorce records, and paternity information for Texas (DSHS, 2022). The record submitted to the Vital Statistics Section by the court must include, among other required information, the name and address of each person who consented to the adoption or relinquished their parental rights, the adoptee's new name following the adoption order, and the adoptee's birth date.

Texas Family Code, Sections 108.003(b) and 162.022, stipulate that adoption records maintained by the Vital Statistics Section and district courts are confidential and generally cannot be accessed without a court order or "good cause shown." "Good cause" is not defined in the Texas Family Code and only one Texas Supreme Court case, *Little v. Smith* (1997), discusses the standard, albeit briefly. In *Little*, the Texas Supreme Court considered the case of an adoptee who discovered the identities of her adopted parents and filed suit to assert her right of inheritance (pp. 415–16). In its opinion, the Court recognized "the difficulties adopted children may encounter in identifying their biological parents," including not knowing information essential for obtaining a court order such as where the adoption occurred (p. 418). Nevertheless, after detailing the procedures the Legislature put into place governing the disclosure of the identities of parties to the adoption, the Court found that the confidentiality of the parties, "is given a high priority in the legislative scheme" and is, therefore, difficult to overcome (p. 419). The Court's opinion did not detail what would constitute the "good cause" necessary to overcome the high priority of maintaining confidentiality other than to find that asserting inheritance rights was not sufficient. It also tacitly acknowledged the ambiguity inherent in the "good cause" standard by noting that "the fact that in this case a court opened Smith's records does not mean that a different judge would have done so or even that the same judge would have done so years earlier" (p. 418). Given the lack of substantial statutory or case law guidance, Texas adoptees remain virtually in the dark as to how to demonstrate that they have good cause to access their birth and adoption records.

Health, Social, Educational, and Genetic History

Unless a close family member adopts a child—either the child's grandparent, aunt, uncle, or stepparent—Texas law requires that available nonidentifying information about a child be collected and compiled into a report. Texas Family Code, Section 162.005(b), states:

> *Before placing a child for adoption, the Department of Family and Protective Services, a licensed child-placing agency, or the child's parent or guardian shall compile a report on the available health, social, educational, and genetic history of the child to be adopted.*

This report must include extensive information about the child being placed for adoption, including birth records, medical examinations, any history of the child's trauma or abuse, descriptions of the child's birth parents, details about the birth parents' health, and information on past and existing relationships among biological family and the child. However, the person or entity placing the child for adoption is required to protect the confidentiality and personal identifying information of the child's birth parents.

It is important to note that the person placing the child for adoption is only required to compile *available* information about the child. For example, Section 162.008(c) notes that, if "insufficient information [is] available to complete the report," a court may waive the requirement that the report is provided before a court issues an adoption order. Prospective adoptive parents may review the available information in the report when considering whether to adopt a child. After a court issues an adoption order, adult adoptees and adoptive parents are also entitled to the report's nonidentifying information.

Adoption Registries

Many states maintain a central adoption registry—also known as a mutual consent registry—that allows birth parents, adopted children, and biological family members to voluntarily locate each other and share personal identifying information (CWIG, 2020, p. 4). Adoption registries are databases maintained by the state or third-party agencies that contain the individual birth records and health information of adoptees and their biological parents. The Vital Statistics Section maintains Texas' "mutual consent voluntary central registry" (Texas Family Code, Section 162.402(13)). Agencies that are approved by the Department of Family and Protective Services to facilitate adoption placements are also permitted to operate their own "mutual consent voluntary adoption registry" (Section 162.403(b)), provided that the agency shares information from their private registry with the state's central registry.

An adoptee, the child's birth parents, and biological siblings may participate in a mutual consent registry by registering either with the Vital Statistics Section or a third-party entity that is approved to facilitate adoptions (Texas Family Code, Section 162.407). An individual who registers for participation in a mutual consent registry must be at least 18 years old and provide the registry administrator with proof of identity. Applicants to an adoption registry in Texas are required to participate in at least one hour of "postadoption counseling" (Texas Family Code, Section 162.412) before receiving access to confidential information. Arkansas, Mississippi, and South Carolina also require the adoptee to receive counseling in order to access an adoption registry (CWIG, 2020, p. 3).

Legislative Action

House Bill 2725 (2019) was filed during Texas' 86th Legislature and sought to grant adult adoptees access to their original birth certificate. This legislation would have required the state registrar to provide adult adoptees with a noncertified copy of their original birth certificate upon written request. The state registrar would have also been required to develop a contact preference form and a supplemental medical history form. Contact preference forms are a way for birth parents to indicate whether they would like to be contacted in the future by their child or a descendant of the child.

The contact preference form in HB 2725 (2019) would have allowed a birth parent to voluntarily submit a form to the state registrar, DFPS, or another child-placing agency that indicated whether they consented to receiving contact from the adoptee. The contact preference provided under HB 2725 would have allowed a birth parent to also identify an intermediary to facilitate communication between the birth parent and adoptee. The provision of an intermediary to facilitate communication among the parties is distinct from states' confidential intermediary systems as HB 2725 would have required a birth parent to consent to the use of an intermediary through the contact preference form. HB 2725 did not pass out of the Texas House of Representatives.

During the regular session of the 87th Texas Legislature, two identical bills (HB 1386, 2021; SB 1877, 2021) were filed that also sought to increase adoptees' access to their birth certificates. Although HB 1386 and SB 1877 were similar to legislation introduced during the previous regular session (HB 2725, 2019), they differed in substantial ways from the prior legislation.

Texas Health and Safety Code, Section 192.008(c), authorizes the commissioner of DFPS to adopt rules and procedures relating to adoptees' access to birth records. HB 1386 (2021) clarified the rulemaking authority of the commissioner by stating that the adopted rules and procedures must be "consistent with this section" (p. 1) of the Texas Health and Safety Code. HB 1386 also added the word "general" before the word "public" to the stipulation in Texas Health and Safety Code, Section 192.008(c), that the adopted rules and procedures ensure the confidentiality of adoption placements.

HB 1386 (2021) also did not include the option for birth parents to voluntarily complete a contact preference form or a medical history form; both options were provided in HB 2725 (2019). However, Texas law still permits members of the adoption triangle to participate in mutual consent registries and generally requires the preparation of a report containing a child's health, social, educational, and genetic history before an adoption is ordered. HB 1386 (2021) passed out of the House of Representatives but failed to be heard by a Senate committee. SB 1877 (2021) never received a hearing in the Texas Senate.

Policy Recommendations

Simplify the Process for Accessing Original Birth Certificates

The current Texas process is overly burdensome for adult adoptees who are interested in obtaining their original birth certificate and adoption records and should be simplified. However, in doing so, the Legislature must balance the interests of adult adoptees with the legitimate privacy interests of birth parents who may not wish to be contacted by the child they placed for adoption.

In most cases, Texas law (Texas Family Code, Chapter 162) currently requires adult adoptees to obtain a court order from the court that granted the adoption order in order to access a copy of their original birth certificate and confidential adoption records. Adoptees, adoptive parents, birth parents, and other biological family can receive confidential information about each other through a mutual consent adoption registry, which is maintained by the state and private adoption-placing agencies. Rather than requiring adult adoptees to go through the costly and burdensome process of identifying and petitioning the court that had jurisdiction over their adoption, adult adoptees should be able to access their records via the state's Vital Statistics Section, which maintains this information. The privacy interests of birth parents could be protected by using a contact preference form filed with the Vital Statistics Section.

The Legislature should also eliminate the current requirement that individuals complete at least one hour of post-adoption counseling before accessing their confidential information from a mutual consent registry. While counseling may be beneficial, the decision to obtain counseling is deeply personal and should be left to the individual rather than mandated by the state as a condition of obtaining adoption records.

Confidential Intermediary System

Finally, the Texas Legislature should implement a confidential intermediary system similar to the confidential intermediary procedures in North Carolina and Michigan. A confidential intermediary system would allow each member of the adoption triangle to consent to the release of their personal identifying information and facilitate contact among adoptees, birth parents, and adoptive parents. Although such systems would have a similar effect on maintaining mutual consent registries, confidential intermediary systems would not require as much government intervention and administrative oversight as the maintenance of mutual consent registries. It would also give parties who did not submit a contact preference form at the time of the placement, or who changed their mind about their contact preference, the opportunity to express their wishes.

Conclusion

Every individual deserves to know who they are and where they come from. Granting adult adoptees greater access to their identifying information, including their adoption records and original birth certificates, is commonsense policy that would help adoptees fully develop their identity.

Concurrently, the privacy of adoptees, adoptive parents, and birth parents must be respected, especially in cases where an individual does not consent to the release of their personal identifying information. Members of the adoption triangle deserve more ways to develop relationships when mutual consent is provided. While ensuring that the personal identifying information of individuals is protected, the Texas Legislature can still enact policies that grant adult adoptees greater access to their original birth certificates.

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ABOUT THE AUTHORS

Andrew C. Brown, **J.D.**, is the distinguished senior fellow of child and family policy at the Texas Public Policy Foundation.

Brown has dedicated his career to serving vulnerable children and strengthening families through community-focused, liberty-minded solutions. As an attorney, he has represented children in the child welfare system, advocated for the rights of parents, and helped build families through domestic and international adoption.

Andrew earned his BA magna cum laude in political science from Baylor University and his J.D. from Southern Methodist University Dedman School of Law. He is licensed to practice law in Texas and Virginia. His work on international adoption law and other child welfare issues has been published in leading legal journals and respected media outlets.

Parker Stathatos was a legislative fellow at the Foundation. Stathatos was a legislative director for a state representative in Texas' 87th Legislature. He managed a diverse bill package and helped pass 12 bills into law, including policies related to human trafficking, critical infrastructure, blockchain technology, virtual currency, civics education, criminal justice reform, and family welfare.

Prior to his time at the Texas Capitol, Stathatos participated in the fall 2020 White House Internship Program in the Office of the Senior Advisor for Policy. He was also previously an intern at the Foundation.

Stathatos has a B.A. in government and history from the University of Texas at Austin. In his spare time, he enjoys traveling, exploring new places, and spending time with his family and friends.

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