

# WHAT'S GOOD FOR THE GOOSE SHOULD BE GOOD FOR THE GANDER: THE IMPLEMENTATION OF FUNDAMENTAL RIGHTS IN THE WAKE OF LOFTON

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In 1977, Florida became the first state to statutorily prohibit adoption by any “homosexual” person.<sup>1</sup> This statute automatically precludes gay and lesbian individuals from adopting based solely on their sexual preference.<sup>2</sup> In 1999, a registered pediatric nurse, Steven Lofton and his cohabitating partner, Roger Croteau, challenged this same-sex couple adoption provision.<sup>3</sup> Five years later, the Eleventh Circuit examined Florida’s law to determine whether it would withstand the constitutional challenges brought by the appellants in *Lofton*.<sup>4</sup> After a lengthy legal battle, Lofton and the other appellants<sup>5</sup> were unable to overturn the statute, and the court ultimately determined that Florida’s ban on adoption by the gay and lesbian community was constitutional.<sup>6</sup>

This article provides a background of *Lofton*, including each party’s legal argument. It also provides insight into the current status of same-sex couple adoption and foster parenting in the United States. This article analyzes the court’s decision in *Lofton*, explains the legal difference between adoption and fostering, and details how each should be treated.<sup>7</sup> It presents a new analysis under the Fourteenth Amendment, and argues that there exists a fundamental right to adopt. This article also explains why strict scrutiny should be applied to the newly identified fundamental right to adopt. Finally, this article discusses the flawed reasoning of the court’s decision against same-sex couple adoption, and summarizes the importance of a new analysis in light of our societal evolution.

## BACKGROUND

### BACKGROUND OF LOFTON

Steven Lofton and Roger Croteau raised three foster children who were HIV positive from birth.<sup>8</sup> Despite giving “exemplary”<sup>9</sup> care to these foster children and receiving the “Outstanding Foster Parenting”<sup>10</sup> award, Lofton’s adoption application was rejected in accordance with Florida’s statutory scheme. Lofton then filed suit challenging the constitutionality of the statute.<sup>11</sup>

The appellants relied on three main arguments in asserting that Florida’s statute was unconstitutional. First, the appellants claimed that the statute was a violation of their “rights to familial privacy, intimate association, and family integrity under the *Due Process Clause of the Fourteenth Amendment*.”<sup>12</sup> Further, they claimed that the Supreme Court’s decision in *Lawrence v. Texas*<sup>13</sup> “recognized a fundamental right to private sexual intimacy and that the Florida statute, by disallowing adoption by individuals who engage in homosexual activity, impermissibly burdens

the exercise of this right.”<sup>14</sup> Finally, the appellants asserted that Florida’s statute violates the Fourteenth Amendment’s Equal Protection Clause by prohibiting only gay and lesbian individuals from adopting children.<sup>15</sup>

The Eleventh Circuit found the appellants’ due process argument without merit,<sup>16</sup> and held that the appellants’ right-to-family-integrity argument failed to state a claim.<sup>17</sup> The court explained that fostering and adoption are statutorily created privileges,<sup>18</sup> and therefore the Department of Children and Family Services may remove a child from a household whenever it believes it is in the child’s best interest.<sup>19</sup> Finally, the Eleventh Circuit held that *Lawrence* did not create a fundamental right to private sexual intimacy so it did not apply to the case at hand.<sup>20</sup>

The court also invalidated the appellants’ equal protection challenge<sup>21</sup> by reiterating the Supreme Court’s holding in *Romer v. Evans*<sup>22</sup> stating, “[u]nless the challenged classification burdens a fundamental right or targets only a suspect class, the *Equal Protection Clause* requires only that the classification be rationally related to a legitimate state interest.”<sup>23</sup> The court in *Lofton* held both that Florida’s statute did not burden any fundamental right, and that lesbian and gay individuals were not considered a suspect class.<sup>24</sup> Thus, when viewed under the appropriate standard of rational basis review, Florida’s statute was deemed to be rationally related to Florida’s permissible government interest in “encouraging a stable and nurturing environment for the education and socialization of its adopted children.”<sup>25</sup>

### FOSTERING AND ADOPTING IN THE UNITED STATES

While the outcome of *Lofton* is troubling, the predicament that the gay and lesbian population continues facing across the country is not as bleak as many of *Lofton*’s critics attempt to portray. Currently, every state in the country allows gay and lesbian individuals to foster children.<sup>26</sup> Recent court decisions have found regulations and statutes that prohibit fostering by gay and lesbian individuals unconstitutional, indicating that courts are increasingly supporting the right of gay and lesbian individuals to foster children.<sup>27</sup> In June 2006, the Supreme Court of Arkansas upheld a challenge to a state regulation that prevented gay and lesbian individuals from becoming foster parents.<sup>28</sup> Simi-

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larly, a Missouri Circuit Court judge recently “overturned a Missouri Department of Social Services decision denying a woman’s application to become a foster parent because she is a lesbian.”<sup>29</sup>

Other states have demonstrated that, unlike the decision in *Lofton*, gay and lesbian individuals should be legally allowed to adopt. Aside from Florida, Utah,<sup>30</sup> and Mississippi,<sup>31</sup> no other state,<sup>32</sup> including the District of Columbia, has any specific provision precluding the gay and lesbian community from adopting.<sup>33</sup> California and Vermont have gone as far as to specifically provide statutory protection to gay and lesbian individuals seeking to adopt.<sup>34</sup> Tennessee gives foster parents preference to adopt their foster children, regardless of their sexual orientation.<sup>35</sup> States such as California, Vermont, and Tennessee demonstrate that *Lofton* represents the exception rather than the norm.<sup>36</sup> Recent court decisions, like the Virginia case of *Roe v. Roe*, seem to be moving away from restricting gay and lesbian individuals’ right to adopt.<sup>37</sup> Recent cases in Indiana, Massachusetts, New York, and Vermont provide examples of other courts’ progressive views of gay and lesbian adoption.<sup>38</sup>

Perhaps most encouraging, Florida’s views on gay and lesbian adoption appear to be changing. In 2002, eight former supporters of the anti-homosexual adoption law signed a proclamation stating, “in 1977, we were among the state legislators who helped pass Florida’s law prohibiting gay people from adopting children. We now realize that we were wrong. This discriminatory law prevents children from being adopted into loving, supportive homes—and we hope it will be overturned.”<sup>39</sup> More recently, both Florida’s House and Senate have proposed legislation that would eliminate the outright ban on homosexual adoption, and replace it with a clear and convincing standard of review, which gay and lesbian individuals would have to meet in order to adopt.<sup>40</sup>

## ANALYSIS

*Lofton* serves as a paradigm for the challenges of gay and lesbian adoption, and demonstrates the importance and necessity of prompt anti-discriminatory advancements in constitutional interpretation. “While this country has realized increased acceptance of homosexual adoption, morality concerns based on religious condemnation of homosexuality and the belief that a child is best raised in a traditional household, consisting of one mother and one father who are married, has set the backdrop for withholding gay adoption rights.”<sup>41</sup> Currently, only two states have anti-discrimination statutes in place,<sup>42</sup> leaving forty-five<sup>43</sup> states’ laws susceptible to discriminatory measures. For example, while Florida’s legislation to lift the homosexual adoption ban seems encouraging, it instead continues to impose a tremendous burden on gay and lesbian individuals wishing to adopt.<sup>44</sup>

### ANALYSIS OF LOFTON

The Florida Circuit Court in *Lofton* overshadowed the existing implied fundamental right to adopt by using the appellants’ inadequate arguments against them and by creatively utilizing

semantics to formulate the court’s decision.<sup>45</sup> The appellants made compelling constitutional arguments,<sup>46</sup> yet they conceded the argument that ultimately could have achieved their goals.<sup>47</sup> By agreeing that there is no fundamental right to adopt or to be adopted,<sup>48</sup> and that adoption is simply a state-created privilege, the parties in *Lofton*<sup>49</sup> conceded that “adoption is not a right, it is a statutory privilege.”<sup>50</sup>

In arriving at its decision, the court relied heavily on the Supreme Court decision in *Smith v. Org. of Foster Families for Equal. & Reform*.<sup>51</sup> *Smith* explored the right to familial privacy as it related to foster parents and foster children.<sup>52</sup> The Florida Circuit Court relied heavily on the Supreme Court’s comments in *Smith* that distinguished the foster family from the natural family.<sup>53</sup> In its application of this precedent however, the *Lofton* court went beyond the Supreme Court’s comments. Following *Smith*, the *Lofton* court determined that because adoption is a creation of the state, no such fundamental right exists.<sup>54</sup> This erroneous conclusion highlights the crucial difference between adoption and foster care.

Foster care is “a [temporary] child welfare service which provides substitute family care...when adoption is neither desirable nor possible.”<sup>55</sup> It is true that “whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset.”<sup>56</sup> Fostering is substantially akin to a contractual arrangement.<sup>57</sup> Similar to any ongoing performance contract, Florida may rescind the relationship at any time.<sup>58</sup> Additionally, fostering, by its very design under Florida law, is intended to be a means to an end while the state searches for a permanent adoptive home for the child.<sup>59</sup>

Adoption on the other hand, is not a contract.<sup>60</sup> Instead, adoption is the end that fostering seeks to achieve; it is the legal equivalent of biological parenthood.<sup>61</sup> As the Circuit Court stated in *Lofton*, potential adoptive parents are asking the state to confer official recognition on a relationship where no natural filial bond exists.<sup>62</sup> This recognition creates the highest level of constitutional insulation from subsequent state interference.<sup>63</sup> “In many cases, they also are asking the state to entrust into their permanent care a child for whom the state is currently serving as *in loco parentis*.”<sup>64</sup>

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Prospective adoptive parents seek creation of this filial bond from the state.<sup>65</sup> The Supreme Court has noted that liberty interests may result from positive law sources.<sup>66</sup> In adoption cases, while the state may continue to serve as *in loco parentis*, it instead chooses to place the child for adoption.<sup>67</sup> As a result, the Fourteenth Amendment is implicated and must ensure that “the state-created right is not arbitrarily abrogated.”<sup>68</sup>

## FUNDAMENTAL RIGHT TO ADOPT

One way to establish the right of gay and lesbian individuals to adopt is for the court to identify a fundamental right being impinged upon.<sup>69</sup> The Equal Protection Clause of the Fourteenth Amendment states that no state shall “deny to any person...the equal protection of the laws.”<sup>70</sup> The appellants in *Lofton* argued that the Equal Protection Clause required that gay and lesbian individuals be considered a suspect class, thus garnering strict scrutiny and not merely rational basis review.<sup>71</sup> Their primary basis for this argument was the Supreme Court’s decision in *Romer v. Evans*,<sup>72</sup> which invalidated a Colorado amendment as discriminating against the gay and lesbian population.<sup>73</sup>

The appellants in *Lofton* also unsuccessfully asserted that their Due Process rights had been violated.<sup>74</sup> The Due Process Clause of the Fourteenth Amendment asserts that no State shall “deprive any person of life, liberty, or property, without due process of law.”<sup>75</sup> This clause guarantees the right to pursue life with limited governmental intrusion, specifically with respect to

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### *The fundamental right to adopt violated in Lofton stems from a Due Process right*

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fundamental rights.<sup>76</sup> The appellants argued that *Lawrence*<sup>77</sup> established fundamental rights to both family integrity and private sexual intimacy.<sup>78</sup>

By finding that gay and lesbian individuals did not constitute a suspect class, the Eleventh Circuit Court dismissed appellants’ Equal Protection challenge.<sup>79</sup> The court also struck down appellants’ Due Process argument,<sup>80</sup> and focused instead on “the fact that the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational-basis grounds....”<sup>81</sup> In expressing its reluctance to create a new fundamental right, the Eleventh Circuit noted the Supreme Court’s statement in *Washington v. Glucksberg*<sup>82</sup> that the “‘utmost care [must be exercised] whenever [it is] asked to break new ground’ in the field of fundamental rights.”<sup>83</sup>

While adequate care must be given in cases where new fundamental rights will be granted, such caution is unnecessary in applying fundamental rights that are already in existence.<sup>84</sup> Not all fundamental rights are expressly listed in the Constitution. Implicit fundamental rights include protections of “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>85</sup> The fundamental right to adopt violated in *Lofton* stems from a Due Process right created through the Equal Protection Clause.<sup>86</sup> Although the appellants in *Lofton* could have prevailed on either their Due Process claim or their Equal Protection claim, they arguably would have prevailed had they combined the two.<sup>87</sup>

The Supreme Court specifically noted in *Washington v. Glucksberg*, “in a long line of cases, [it has been] held that, in

addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the [right] to have children.”<sup>88</sup> The existence of a fundamental right to have children however, cannot independently remedy the issue at hand. Because the *Lofton* court refused to recognize gay and lesbian individuals as a suspect class, applying this fundamental right is inadequate.<sup>89</sup> Thus, appellants would have to argue for the Court to define a new suspect class, namely men, in the context of the fundamental right to adopt.

Men should not universally be considered a suspect class. The suspect class should be applied to men in the specific context of adoption (or, the right to have children). In this context, men have an immutable characteristic that only carefully crafted jurisprudence can address in an equitable manner. The Equal Protection Clause purports to provide the benefits of the laws and rights equally and keep “governmental decisionmakers from treating differently persons who are in all relevant respects alike.”<sup>90</sup> Speaking for the Court in *Romer v. Evans*,<sup>91</sup> Justice Kennedy clearly indicated that it is constitutionally impermissible to identify persons by a single trait and then deny them protection of the laws.<sup>92</sup> *Lofton* typified exactly what *Romer* scorned. *Lofton* prevented men, albeit gay men, from realizing their fundamental right to have children.<sup>93</sup> Whether homosexuality should be considered a suspect class is irrelevant under this framework.

In modern times, with the advent of sperm banks, a woman can have a child independent of a man.<sup>94</sup> With the aid of a willing and able surrogate mother, an individual man or woman may have children.<sup>95</sup> Both conception and surrogacy require a woman to be actively involved in the process<sup>96</sup> yet only adoption provides a man the ability to parent a child without the involvement of a woman.<sup>97</sup>

Precedent supporting a man’s right to adopt under the Fourteenth Amendment’s Equal Protection Clause exists.<sup>98</sup> The Supreme Court has stated on multiple occasions, “it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a

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person as the decision whether to bear or beget a child.”<sup>99</sup> Analysis of the Supreme Court’s comments indicates that men deserve the right to have children as well. Most importantly, the Supreme Court indicated that this right belongs to an *individual*.<sup>100</sup> Further, the Court noted that this right entailed an individual’s decision to “bear or beget” a child.<sup>101</sup> The Court, recognizing that the right was due to all persons, used language that was applicable to women, “to bear,” and to men, “to beget,” rather than language applicable only to women, such as “to conceive.”<sup>102</sup> Since men cannot conceive, adoption becomes the most viable alternative, and therefore analysis should extend to

adoption. Thus, according to the Equal Protection Clause, men may not be denied a fundamental right simply because they cannot conceive.

### STANDARD OF REVIEW

Because the law restricting adoption to a certain class of people has now been shown to burden a fundamental right, rational basis review is no longer the appropriate standard.<sup>103</sup> Instead, the appropriate standard is strict scrutiny, whereby any infringement that might arise must be narrowly tailored to serve a compelling government interest.<sup>104</sup>

#### COMPELLING STATE INTERESTS

##### 1. MORALITY

As Florida did in *Lofton*, a state may assert that its legislation precluding gay and lesbian adoption is supported by morality interests.<sup>105</sup> Florida claimed that its moral disapproval of homosexuality was consistent with its right to legislate social morality.<sup>106</sup> However, the District Court invalidated this purpose as insufficient.<sup>107</sup> While states may legislate in order to achieve ends that they believe to be morally good,<sup>108</sup> they may not “be the decisive factor in holding up a statute.”<sup>109</sup>

In *Lofton*, prejudicial views of homosexuality as immoral prevented the appellants from adopting.<sup>110</sup> The Supreme Court has held that legislative decisions predicated upon prejudicial views may not be sustained.<sup>111</sup> For example, the Court in *Palmore v. Sidoti*<sup>112</sup> astutely remarked:

The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private...prejudice that they assume to be both widely and deeply held.<sup>113</sup>

The Court in *Palmore* also noted the potential negative impact of biases on children.<sup>114</sup> Although the decisions in *Lofton* and *Palmore* turned on different facts, the two cases can be reconciled. While *Palmore* dealt with a child whose parent married someone of another race,<sup>115</sup> it is analogous to a circumstance where a child would live with a parent of a specific sexual preference. The *Palmore* Court recognized that a child living with a “different” parent would encounter difficulties and pressures deriving from social biases.<sup>116</sup> It follows that similar social biases would exist for a child living in a gay or lesbian household. Regardless, the Court ruled that such prejudices could not justify the classification.<sup>117</sup>

Florida’s Department of Children and Family Services uses certain requirements and considerations to evaluate the parent hoping to adopt prior to finalizing an adoption.<sup>118</sup> One such mandate, which is impermissible under this new fundamental right analysis, requires prospective adoptive parents to sign an

affidavit of good moral character.<sup>119</sup> Michigan statutes, which identify the state’s “best interests” considerations, similarly require prospective adoptive parents to be morally fit.<sup>120</sup> When used to inflict prejudice toward the gay and lesbian community, such a requirement is unconstitutional under this new fundamental right analysis.<sup>121</sup>

Whether morality standards are accepted or condemned by the court, moral biases are implicit in restrictions and bans on gay and lesbian adoption. Although *Lawrence* does not apply

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specifically to gay and lesbian adoption,<sup>122</sup> the opinion stated that the obligation of the United States Supreme Court “is to define the liberty of all, not to mandate its own moral code.”<sup>123</sup> Accordingly, it is the obligation of all other courts to heed the Supreme Court’s message and not hinder gay and lesbian adoption on moral grounds.

##### 2. BEST INTERESTS OF THE CHILD

Independent of a fundamental right, another way to establish gay and lesbian parentage is from the standpoint of prospective adoptees. Courts must support litigants’ assertions that it is in the best interests of children to allow gay and lesbian individuals to adopt.<sup>124</sup>

Florida’s interest in providing adoption as evidenced in *Lofton*, is to “create adoptive homes that resemble the nuclear family as closely as possible.”<sup>125</sup> A state’s overriding interest in promoting adoption is to provide individuals with the opportunity to become parents.<sup>126</sup> The state may not identify those individuals whom it deems *most* capable of parenting an adoptive child, but rather those who are *adequately* capable of parenting the child in accordance with the proper guidelines.<sup>127</sup> The “best interests of the child” is the appropriate standard when determining whether a person is adequately capable of parenting an adoptive child.<sup>128</sup>

Although the right to adopt is fundamental in nature under this new analysis, it is still a public act rather than a private one.<sup>129</sup> “[P]rospective adoptive parents are electing to open their homes and their private lives to strict scrutiny by the state.”<sup>130</sup> The Supreme Court has not formulated a specific framework for determining adequacy in the context of an adoption proceeding, and due to the fact-driven nature of the “best interests” analysis, it cannot. However, it has indicated the importance of protecting the interests of children,<sup>131</sup> and has suggested the states should decide what factors are appropriate for the “best interests” standard.<sup>132</sup>

Some states merely indicate that the best interests of the child should govern in adoption placement, but do not specifically provide the factors to be considered.<sup>133</sup> Other states do provide specific factors as a guide.<sup>134</sup> For example, Florida’s

statute indicates a number of factors to consider in screening adoption applicants, including physical and mental health, income and financial status, and housing.<sup>135</sup> Nearly all other states with analogous guidelines<sup>136</sup> provide for the adequacy of the prospective adoptive parent's physical, mental, or emotional health.<sup>137</sup> Furthermore, those states typically conduct background checks to determine if the prospective parents have any history of abuse or criminal record.<sup>138</sup> Although no formal framework exists for the "best interests" standard, the standard is applicable<sup>139</sup> whether the proceeding is one for adoption, visitation, custody, or the like.<sup>140</sup> As such, it is insightful to look at another case involving children and examine the "best interests" analysis.

In 1994, the Supreme Court of South Dakota presided over *Van Driel v. Van Driel*,<sup>141</sup> a case involving the custody of an eight-year-old daughter and a five-year-old son.<sup>142</sup> The children's father sought a modification of the custody agreement, citing the mother's lesbian relationship as sufficient grounds for the change.<sup>143</sup> Appropriately, the court used the "best interests" standard to resolve the dispute.<sup>144</sup>

The court in *Van Driel* invalidated the husband's argument that the lesbian relationship of the children's mother *per se* contravened the best interests of the children.<sup>145</sup> The court explained that "immoral conduct by one parent does not automatically render that parent unfit to have custody of the [children]. The parent's conduct must be shown to have had some harmful effect on the children."<sup>146</sup> The court, echoing Justice Blackmun's dissent in *Bowers v. Hardwick*, subsequently stated that "[p]ersonal conceptions of morality... have no place in the resolution of this [type of] controversy."<sup>147</sup> The court held that because the record provided no indication of parental unfitness or harm to the children, there was no cause to modify the custody agreement.<sup>148</sup>

In 2000, the Supreme Court of New Jersey decided a custody dispute between the biological mother of twin children and her former domestic partner. In *V.C. v. M.J.B.*,<sup>149</sup> the former domestic partner claimed she was the psychological parent of the two children and, as such, deserved partial custody.<sup>150</sup> The court defined a psychological parent as "one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for an adult."<sup>151</sup> After applying both the four-step test delineating psychological parenthood and the "best interests" factors<sup>152</sup> in New Jersey's statutory scheme, the court found that each woman was a "fully capable, loving parent committed to the safety and welfare of the twins."<sup>153</sup> While the court ultimately denied joint custody to the mother's former partner, this determination was based solely on the duration of separation from the children and not her sexual preference.<sup>154</sup>

There is a considerable amount of information required to make a sufficient "best interests" determination in any case sur-

rounding children. For example, the court in *V.C.*, illustrated that sexual preference should have very little, if any, significance in the context of custody proceedings.<sup>155</sup> The Supreme Court of New Jersey acknowledged that the case revolved around a lesbian couple, but expressed that the standard was applicable to all similarly situated couples.<sup>156</sup> Ultimately, classifying gay and lesbian individuals to preclude them from adopting is not narrowly tailored enough to serve a compelling government interest.

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### 3. NARROW TAILORING

The Fourteenth Amendment ensures that "government may treat people differently because of [a single characteristic] only for the most compelling reasons."<sup>157</sup> Once the fundamental right to adopt is acknowledged, *Lofton* can easily be compared to *Palmore v. Sidoti*.<sup>158</sup> In *Palmore*, a state court divested a biological mother of the custody of her infant child because she remarried a person of a different race.<sup>159</sup> The Supreme Court reversed the decision, applying the "best interests" standard to find that there was no issue as to the mother's fitness.<sup>160</sup> Similarly, placing a child in an adoptive home using the best interest standard is a compelling government interest for purposes of the Equal Protection Clause.<sup>161</sup>

The Court in *Palmore* specifically noted that a primary objective of the Fourteenth Amendment was to eliminate racial discrimination.<sup>162</sup> Although the timing of the Fourteenth Amendment's ratification supports this claim,<sup>163</sup> it is now the amendment that stands for the purpose of eradicating discrimination on the basis of *any* single characteristic.<sup>164</sup>

Homosexuality is one such discriminatory characteristic against which the Fourteenth Amendment should safeguard. Homosexuality has never explicitly been considered a suspect class,<sup>165</sup> but in the context of a fundamental right and under the guise of the Fourteenth Amendment, it must garner such consideration.<sup>166</sup> As the *Romer* Court stated, "a classification of persons undertaken for its own sake, [is] something the Equal Protection Clause does not permit."<sup>167</sup> Precluding gay and lesbian individuals from adopting presents such a classification.

### COMMENTARY

There are many other reasons for allowing gay and lesbian individuals to adopt, aside from considering the right to adopt as a fundamental right. When the rational basis "rug" is pulled out from under Florida,<sup>168</sup> common sense illuminates just how tenuous Florida's "best interests" arguments are.

### THE NUCLEAR FAMILY

The image of the nuclear family has traditionally adhered to a certain framework. For example, the Supreme Court in *Lehr v. Robertson*<sup>169</sup> indicated that state laws have historically shown a preference for the concept of a formal, marital family.<sup>170</sup> In *Smith*, the Court held that "the usual understanding of 'family' implies biological relationships."<sup>171</sup> Following this traditional

framework, Florida contends that the purpose of its adoption policy is to “create adoptive homes that resemble the nuclear family as closely as possible.”<sup>172</sup>

While these statements are true, they represent only one historical notion of “family.”<sup>173</sup> Today it is increasingly difficult to define a nuclear family. In 2006, census data indicated that the traditional marital view of a family is no longer the norm.<sup>174</sup> Accordingly, the Supreme Court has recognized that the notion of family may change with the passage of time. *Moore v. City of East Cleveland*<sup>175</sup> showed that traditional notions of family should be expanded in particular circumstances.<sup>176</sup> Citing to *Moore*, the Court held in *Lehr* that “a recognized family unit is...entitled to constitutional protection.”<sup>177</sup>

Approximately twenty years after *Smith*, *Moore*, and *Lehr*, the Supreme Court specifically noted the evolution of the family structure in *Troxel v. Granville*.<sup>178</sup> In this noteworthy case, the Supreme Court held that “[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.”<sup>179</sup> Because of the flux in family structure,<sup>180</sup> efforts to place children in traditional nuclear families cannot be considered even rationally related to the state’s interest.<sup>181</sup>

#### HOUSEHOLD STABILITY

In *Lofton*, Florida’s Department of Children and Family Services (“DCFS”) asserted that homes with married mothers and fathers “provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal child development and socialization.”<sup>182</sup> The state offers no evidence to support its claim that the marital family structure is “more stable” than other household arrangements.<sup>183</sup> Under rational basis review, a state does not need evidentiary support to sustain its legislation.<sup>184</sup> However, under this new fundamental right analysis, the state has the impossible task of providing evidence to support its claim.<sup>185</sup>

No evidence exists to support the assertion that a home without a married mother and father does not provide an atmosphere for “optimal child development and socialization.” If a dual-parent household is so “critical,” it would not be in the best interests of a child to be in any other familial structure other than the one asserted by the DCFS. However, there exists no evidence that it is “critical.” In fact, if every household with both a mother and father was to be considered intrinsically stable, no child in a dual-parent household would ever be removed from his or her parent’s care. There are instances where a child is removed from a dual-parent household because remaining in the household would not be in the best interest of the child.

Just as there is no evidence to support the claim that dual-parent households are “optimal,” no evidence exists to support the opposite conclusion that single-parent households are unstable in all cases.<sup>186</sup> If this were true, all children in single-parent households would be removed because it would always be in the best interest of the child. Clearly this is a preposterous proposal as many single-parent households present high-functioning envi-

ronments for children. Similarly, a household composed of gay or lesbian individuals does not automatically equate to one of instability. If a gay or lesbian individual’s household was to be considered intrinsically unstable, it would be in the best interest to remove a child from a household containing at least one gay or lesbian parent. But to date, there is no pending legislation in Florida or any other state to this effect.

“Unprovable assumptions” previously provided a legitimate basis for upholding the adoption statute. Under strict scrutiny, these “unprovable assumptions” would be insufficient.<sup>187</sup> The determination of stability would necessarily be driven by the facts and circumstances of each individual case.<sup>188</sup> Adoption and prospective adoptive parents should be accorded the same treatment.

#### PARENTAL ABILITY

Florida contended that the decision to preclude homosexual adoption was permissible, and cited the importance of heterosexual mothers and fathers<sup>189</sup> as role models in shaping a child’s sexual and gender identity.<sup>190</sup> The state attempted to create a causal link between homosexuality and a lack of parenting ability, a connection that is patently irrational.

In legitimizing Florida’s preclusion of homosexual adoption, the Circuit Court in *Lofton* remarked:

It is chiefly from parental figures that children learn about the world and their place in it, and the formative influence of parents extends well beyond the years spent under their roof, shaping their children’s psychology, character, and personality for years to come.... The adage that “the hand that rocks the cradle rules the world” hardly overstates the ripple effect that parents have on the public good by virtue of their role in raising their children....<sup>191</sup>

Florida denies gay and lesbian individuals the right to adopt, but allows, and even encourages, the gay and lesbian community to “rock the cradle”<sup>192</sup> by fostering children.<sup>193</sup> This is a clear manifestation of the court’s contradictory view.<sup>194</sup>

Furthering their contradiction, it appears as though Florida courts prevent gay and lesbian individuals from adopting because they fear the child’s health or safety would be negatively impacted.<sup>195</sup> The *Lofton* court stated that a child’s best interests are served by his or her parent’s ability to personally relate to the child’s problems and “assist the child in the difficult transition to heterosexual adulthood.”<sup>196</sup> This does not account for

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scenarios where heterosexual parents have a lesbian or gay child. In those instances, would it be consistent with the “best interests” standard to remove the child from the parent’s care? The ability of a parent to relate to his or her child’s sexuality should not be the determining factor of whether that parent-child bond should be sustained.<sup>197</sup>

Given the existing allowable exposure to harm in our society,<sup>198</sup> it does not make sense to prevent children from being placed into adoptive homes absent a clear indication of harm.<sup>199</sup> Children are removed from their parent’s care if there is a current, short-term, showing of unfitness or gross misconduct.<sup>200</sup> It therefore stands to reason that if there is no showing of unfitness or gross misconduct, prospective parents should not be denied the custody of a child.

The Supreme Court in *Troxel* stated that “parents possess

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*Instead of sexual preference, the focus should be placed on the ability of the prospective parents to be parents...*

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what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>201</sup> Yet, there exists no test to serve as a precursor to parenthood that quantifies maturity; there is no minimum age before which parenting is prohibited; and there is no law precluding persons with a criminal background from having children. Although the Court’s statement in *Troxel* does not always hold true, these traits are far more worthy of focus than sexual preference. Instead of sexual preference, the focus should be placed on the ability of the prospective parents to be parents. A scheme already exists to determine proper placement into an adoptive home: the best interests of the child.<sup>202</sup> In 2005, the Eleventh Circuit Court heard *Behrens v. Reiger*,<sup>203</sup> a Florida adoption case that had no issues regarding sexual preference. Instead, *Behrens* was decided pursuant to the “best interests” factors outlined in Florida’s Administrative Code.<sup>204</sup>

The best interests of a child waiting to be adopted are served by looking predominantly at the fitness and character of the prospective parents.<sup>205</sup> If it is determined that sexual preference is a component of character and should therefore be looked at along with the plethora of other considerations, so be it. Nonetheless, there are two certainties regarding the “best interests” standard. First, a child’s best interests are served by placing the child in a loving and supportive home, or one where he or she will have the

opportunities to grow and prosper.<sup>206</sup> Second, such intent focus on the sexual preference of prospective adoptive parents is not in the best interests of a state’s “future citizens”<sup>207</sup> because its main impact is to bolster bigotry, continue closed-mindedness, and perpetuate prejudice.

## CONCLUSION

The status of the gay and lesbian community’s adoption is currently in a state of limbo.<sup>208</sup> Some states have passed legislation in favor of gay and lesbian adoption, some have allowed legislation against it, and others have left the topic unclear.<sup>209</sup> Meanwhile, year after year, state courts are forced to decide cases challenging various legislation and governmental policy related to the adoption of children by gay and lesbian individuals.<sup>210</sup> Unless the state legislatures can recognize the need to pass progressive legislation, a decision from the Supreme Court is imperative.

The *Lofton* court claimed that there was no precedent to sustain a constitutional challenge with respect to gay and lesbian adoption.<sup>211</sup> Regardless, a lack of precedent does not lead to an incontrovertible conclusion of correctness. As the Court said in *Casey*, referring to its decision in *Loving v. Virginia*,<sup>212</sup>

Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause.<sup>213</sup>

Furthermore, the Supreme Court in *Lawrence* expressly stated that “*Bowers* was not correct when it was decided, and it is not correct today.”<sup>214</sup> Accordingly, it can be seen that mere precedent does not always denote correctness, nor does a lack of precedent indicate that it should not exist. Precedent exists to make this decision. The evolution of our society over the last one hundred, two hundred, or even five hundred years, provides the appropriate precedent.

By utilizing this analysis and the level of scrutiny associated with a fundamental right to adopt, men, including gay men, may garner protection from the type of discriminatory legislation upheld in *Lofton*. Moreover, a decision by the Supreme Court implementing this analysis will clarify any ambiguity and insulate from further discrimination gay and lesbian individuals who merely wish to care for children.

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## ENDNOTES

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<sup>1</sup> See FLA. STAT. § 63.042(3) (2003) (stating that “no person eligible to adopt under this statute may adopt if that person is a homosexual”); *Lofton v. Kearney*,

157 F. Supp. 2d 1372, 1374 (S.D. Fla. 2001).

<sup>2</sup> See *Kearney*, 157 F. Supp. 2d at 1375; see also *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 807 (11th Cir. 2004) (arguing that Florida’s statute prevents adoption by *practicing* homosexuals, defined by Florida courts to include only those applicants “who are known to engage in current, voluntary homosexual conduct”); FLA. STAT. § 63.042(3) (mandating that “no person eligible to adopt under this statute may adopt if that person is a homosex-

- ual”).
- <sup>3</sup> See *Lofton v. Butterworth*, 93 F. Supp. 2d 1343, 1344 (S.D. Fla. 2000) (describing how Lofton and Croteau filed suit against the Department of Children and Families, and claimed that Fla. Stat. § 63.042(3) (2003), which prohibits adoption by homosexuals, violated their civil rights).
- <sup>4</sup> *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d at 809.
- <sup>5</sup> The other appellants were John Roe, an eleven year old; Roe’s guardian, Douglas E. Houghton, Jr., a clinical nurse specialist; Wayne LaRue Smith, an attorney; and his partner, Daniel Skahen, a real estate broker.
- <sup>6</sup> *Lofton*, 358 F.3d at 827.
- <sup>7</sup> This article asserts that *Lofton* was decided in a manner that bears stark similarity to the Court’s decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). This decision by the Supreme Court was not sound in accordance with proper constitutional analysis. Instead, the decision was outcome-driven rather than fact-driven because of the racist nature of our society at the time. The Court eventually remedied this injustice by overturning *Scott* through *Plessy v. Ferguson*, 163 U.S. 537 (1896) and ultimately, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954). In truth, the decision in *Lofton*, denying rights to homosexuals will “prove to be quite as pernicious” as the Supreme Court’s decision in *Scott* which denied rights to free blacks. See *Plessy*, 163 U.S. at 559. Plainly, the outcome in *Lofton* is unfair and inappropriate given our society’s proclivity for justice, impartiality, and tolerance.
- <sup>8</sup> *Lofton*, 358 F.3d at 807.
- <sup>9</sup> *Id.*
- <sup>10</sup> See *Kearney*, 157 F. Supp. 2d at 1375 (mentioning that Lofton received the award from the Children’s Home Society, a child placement agency licensed by Florida’s predecessor agency to the Department of Children and Families).
- <sup>11</sup> *Lofton*, 358 F.3d at 808.
- <sup>12</sup> *Id.* at 809.
- <sup>13</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).
- <sup>14</sup> *Lofton*, 358 F.3d at 809.
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.* at 817.
- <sup>17</sup> *Id.* at 815.
- <sup>18</sup> *Id.* at 811-12.
- <sup>19</sup> *Lofton*, 358 F.3d at 814.
- <sup>20</sup> *Id.* at 817. (distinguishing *Lofton* from *Lawrence* on two grounds, namely the court pointed out that *Lofton* involved minors whereas *Lawrence* did not, and the court pointed to the fact that *Lofton* dealt with a statutory privilege, rather than a criminal prohibition).
- <sup>21</sup> *Id.* at 826.
- <sup>22</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996).
- <sup>23</sup> *Lofton*, 358 F.3d at 818.
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.* at 819.
- <sup>26</sup> *Contra Elizabeth L. Maurer, Errors That Won’t Happen Twice: A Constitutional Glance at a Proposed Texas Statute That Will Ban Homosexuals From Foster Parent Eligibility*, 5 APPALACHIAN J. L. 171, 190 (Spring 2006).
- <sup>27</sup> See *infra* notes 28, 29.
- <sup>28</sup> *Dep’t of Human Servs. v. Howard*, No. 05-814, 2006 Ark. LEXIS 418, at \*2 (Ark. 2006) (finding the regulation unconstitutional because it violated the separation of powers doctrine, and stating that the regulation did “not promote the health, safety, or welfare of foster children but rather acts to exclude a set of individuals from becoming foster parents based upon morality and bias.”); *Id.* at \*12.
- <sup>29</sup> Press Release, American Civil Liberties Union, Missouri Judge Rules That Lesbian Can Be Foster Parent, (Feb. 17, 2006), available at <http://www.aclu.org/lgbt/parenting/24195prs20060217.html> (last visited Mar. 7, 2008).
- <sup>30</sup> UTAH CODE ANN. § 78-30-1 (2002) (prohibiting adoption by anyone, heterosexual or homosexual, who is cohabiting in a non-legally valid relationship).
- <sup>31</sup> MISS. CODE ANN. 93-17-3(2) (2000) (denying adoption to same-sex couples).
- <sup>32</sup> Maurer, *supra* note 26 at 171, 190 (commenting that currently, no state has a law preventing homosexuals from being foster parents, though Texas has proposed legislation to that effect. Texas’s proposed legislation seeks to impinge on the rights of homosexuals by banning homosexuals from foster parent eligibility, and thus, the legislation would likely precipitate an attack on Texas’s homosexual adoption laws); 2005 Tex. ALS 268 (2005).
- <sup>33</sup> ALA. CODE § 26-10A-5 (2007); ALASKA STAT. § 25.23.020 (2007); ARIZ. REV. STAT. § 8-103 (2006); ARK. CODE ANN. § 9-9-204 (2007); COLO. REV. STAT. § 19-5-202 (2007); CONN. GEN. STAT. § 45a-726a (2007) (Sexuality may be considered); 13 DEL. CODE § 951 (2007); D.C. CODE § 16-302 (2007); GA. CODE ANN. § 19-8-3 (2007); HAW. REV. STAT. § 578-1 (2007); IDAHO CODE ANN. § 16-1501 (2007); 750 ILL. COMP. STAT. 50/2 (2007); IND. CODE ANN. §§ 31-19-2-2 (2007); 31-19-2-3 (2007); IOWA CODE § 600.4 (2005); KAN. STAT. ANN. § 59-2113 (2007); KY. REV. STAT. ANN. § 199.470 (2007); LA. REV. STAT. ANN. § 9:461 (2007); Me. Rev. Stat. Ann tit. 18-A § 9-301 (2007); Md. CODE ANN., FAM. LAW § 5-3A-29 (2007); MASS. GEN. LAWS ch. 210, § 1 (2007); MICH. COMP. LAWS SERV. § 710.22 (2007); MINN. STAT. § 259.22 (2005); Mo. Rev. Stat. § 453.010 (2007); MONT. CODE ANN., § 42-1-106 (2007); NEB. REV. STAT. § 43-101 (2007); NEV. REV. STAT. ANN. § 127.190 (2007); N.H. REV. STAT. ANN § 170-B:4 (2007); N.J. STAT. ANN. § 9:3-43 (2007); N.M. STAT. ANN. § 32A-5-11 (2007); N.Y. DOM. REL. § 110 (2007); N.C. GEN. STAT. § 48-1-103 (2007); N.D. CENT. CODE, § 50-12-03 (2007); OHIO REV. CODE ANN. 3107.03 (2007); 10 OKL. STAT. § 7503-1.1 (2007); OR. REV. STAT § 109.309 (2007); 23 PA. CONS. STAT. ANN. § 2312; R.I. GEN. LAWS § 15-7-4 (2007); S.C. CODE ANN. § 20-7-1670 (2007); S.D. CODIFIED LAWS § 25-6-2 (2007); TENN. CODE ANN. § 36-1-115(a) (2007); TEX. FAM. CODE ANN. § 162.001 (2007); VA. CODE ANN. § 63.2-1201 (2007); WASH. REV. CODE § 26.33.140 (2007); W.VA. CODE § 48-22-201 (2007); WIS. STAT. § 48.82 (2007); WYO. STAT. ANN. § 1-22-103 (2007).
- <sup>34</sup> CAL. FAM. CODE § 9000(b) (2007), VT. STAT. ANN. TIT. 15A, § 1-102 (2007). (codifying anti-discrimination provisions for “all persons engaged in providing care and services to foster children [to] have fair and equal access to all available programs”); Cal. Welf. & Inst. Code § 16013(a) (2007).
- <sup>35</sup> TENN. CODE ANN. § 36-1-115(g)(1) (2006) (providing that foster parents get first preference to adopt the child so long as the child was in the foster home for at least twelve months). There is no indication in the Tennessee code that this provision would not equally apply to homosexuals, especially since Tennessee allows homosexuals to adopt.
- <sup>36</sup> *Lofton*, 358 F.3d 804.
- <sup>37</sup> *Roe v. Roe*, 324 S.E.2d 691, 694 (1985) (holding that a biological father’s “immoral and illicit relationship renders him an unfit and improper custodian as a matter of law [because] the conditions under which this child must live daily are not only unlawful, but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large”).
- <sup>38</sup> See *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004) (overturning the denial of appellant’s uncontested petition to adopt the biological children of her domestic partner); *Adoption of Tammy*, 619 N.E.2d 315 (1993) (concluding that the adoption of partner’s biological daughter was proper in accordance with the child’s best interests); *Adoption of B.L.V.B.*, A.2d 1271 (1993) (finding that all the requirements for the adoption had been met and the adoption was in the best interests of the children); *In re Jacob*, 660 N.E.2d 397 (1992) (reversing the denial of adoptive petitions because statutory law allowed for separated married adults, unmarried adults, and homosexuals to adopt).
- <sup>39</sup> Press Release, American Civil Liberties Union, ‘We Were Wrong,’ Say Former Legislators Who Voted For Florida Gay Adoption Ban Nearly 25 Years Ago (Mar. 7, 2002) available at <http://www.aclu.org/lgbt/parenting/11856prs20020307.html> (last visited Mar. 7, 2008); see also Melinda Young, *Discrimination for the Sake of the Children*, 44 WASHBURN L. J. 247, 250 (2004).
- <sup>40</sup> S.B. 172, 108th Reg. Sess. (Fl. 2006); H.B. 123, 108th Reg. Sess. (Fl. 2006) (alleging that the proposed legislation would require homosexuals to show by clear and convincing evidence that “the adoptee resides with the person proposing to adopt the adoptee, the adoptee recognizes the person as the adoptee’s parent, and granting the adoptee permanency in that home is more important to the adoptee’s developmental and psychological needs than maintaining the adoptee in a temporary placement”). Even so, this legislation died in committee due to lack of sufficient support.
- <sup>41</sup> Ethan M. Krasnoo, *Foster Care & Adoption*, 7 GEO. J. GENDER & L. 999, 1011 (2006) (discussing the policy reasons for banning adoptions based on sexual orientation) (internal citations omitted); see also Young, *supra* note 39, at 260 n.150 (citing that Appellant’s brief in *Lofton* illustrated twelve states whose laws discouraged the exposure of children to homosexuality).
- <sup>42</sup> CAL. FAM. CODE § 9000(b) (2007), VT. STAT. ANN. TIT. 15A, § 1-102 (2007).
- <sup>43</sup> Forty-five states include all those that do not have specific anti-discrimination statutes in effect (Vermont and California) or states which specifically discriminate against homosexuals (Florida, Utah & Mississippi); See note 33.
- <sup>44</sup> See S.B. 172, 108th Reg. Sess. (Fl. 2006); H.B. 123, 108th Reg. Sess. (Fl. 2006).
- <sup>45</sup> *Lofton*, 358 F.3d at 809; see also *infra* note 50.
- <sup>46</sup> *Id.* at 812, 815 (arguing that appellants are entitled to a constitutional liberty interest “because they share deeply loving emotional bonds that are as close as those between a natural parent and child”). The right to private sexual intimacy is impermissibly burdened by the Florida statute’s denying adoption to anyone choosing to engage in homosexual conduct. Florida’s legislation is not rationally related to a legitimate state interest; see also Young, *supra* note 39, at 253, 257 (repeating that “the families argued that in case after case, in which the legislative history revealed that a discriminatory law was enacted simply to express dislike for a group, the United States Supreme Court has invalidated the law,”

## ENDNOTES CONTINUED

and that “the families argued that Lawrence expressly rejected the State’s reliance on moral disapproval as a legitimate basis for discriminating against gays and lesbians”).

<sup>47</sup> See Young, *supra* note 39 at 260-61.

<sup>48</sup> Lofton, 358 F.3d at 811.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 809 (citing Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977) (reminding that “unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state”)); see also Krasnoo, *supra* note 41, at 1007.

<sup>51</sup> Smith, 431 U.S. 816 (1977).

<sup>52</sup> Smith, 431 U.S. at 842-47 (noting differences between the foster family and the natural family); see *cf.* Lofton, 358 F.3d at 813.

<sup>53</sup> See Lofton, 358 F.3d at 809 (citing Smith, 431 U.S. at 842-47) (stating, “unlike the natural family, which has ‘its origins entirely apart from the power of the State,’ the foster parent-child relationship ‘has its source in state law and contractual arrangements’”).

<sup>54</sup> See Lofton, 358 F.3d at 809 (“Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state”).

<sup>55</sup> Smith, 431 U.S. at 823.

<sup>56</sup> *Id.* at 845.

<sup>57</sup> *Id.*

<sup>58</sup> See Lofton, 358 F.3d at 814 (mentioning that the “DCF may remove a foster child anytime that it believes it to be in the child’s best interests”); see also Maurer, *supra* note 26, at 181 (clarifying that “a contractual right does not qualify as an ‘intrinsic human right’ to have a family”).

<sup>59</sup> Lofton, 358 F.3d at 814; See also Smith, 431 U.S. at 823.

<sup>60</sup> See *cf.* Smith, 431 U.S. at 823.

<sup>61</sup> *Id.* at 824, 845 n.51.

<sup>62</sup> See Lofton, 358 F.3d at 810.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See Discussion, *supra* Fostering and Adoption in the United States.

<sup>66</sup> Smith, 431 U.S. at 845 (citing Wolff v. McDonnell, 418 U.S. 539, 557 (1974)).

<sup>67</sup> See Young, *supra* note 39, at 257 n.126 (stating that “while adoption is a state-conferred privilege, it is nonetheless a parenting option available and denial of adoption to one class of persons and not another offends this country’s notions of fundamental fairness and substantive due process”) (internal citations omitted).

<sup>68</sup> Wolff, 418 U.S. at 557.

<sup>69</sup> See Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Lofton, 358 F.3d at 815, 818 (arguing that “unless the challenged classification burdens a fundamental right or targets a suspect class, the *Equal Protection Clause* requires only that the classification be rationally related to a legitimate state interest....As we have explained, Florida’s statute burdens no fundamental rights”); see also Maurer, *supra* note 26 at 177-78 (adding that “additionally, many gays and lesbians argue that the privacy rights surrounding homosexuals are fundamental rights that deserve stricter scrutiny than mere rational basis”).

<sup>70</sup> U.S. CONST. amend. XIV, § 1.

<sup>71</sup> Lofton, 358 F.3d at 820 (presenting the argument that the Florida statute was not rationally related to the state’s interest in promoting marital adoptive families).

<sup>72</sup> Romer, 517 U.S. at 620.

<sup>73</sup> *Id.* at 623-624. The amendment prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons.

<sup>74</sup> See *infra* notes 78, 80, 81.

<sup>75</sup> U.S. CONST. amend. XIV, § 1.

<sup>76</sup> See Young, *supra* note 39, at 252; see also Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (detailing that government may only infringe on fundamental liberty interests provided that “the infringement is narrowly tailored to serve a compelling state interest”) (internal quotations and citations omitted).

The Supreme Court has stated that respect is demanded by the Constitution for the autonomy of people making choices “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment...” *Lawrence*, 539 U.S. at 574 (2003) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

<sup>77</sup> *Lawrence*, 539 U.S. at 558.

<sup>78</sup> Lofton, 358 F.3d at 809.

<sup>79</sup> *Id.* at 818 (claiming, “all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class”).

<sup>80</sup> *Id.* at 815, 817.

<sup>81</sup> *Id.* at 817.

<sup>82</sup> *Washington v. Glucksberg*, 521 U.S. at 720.

<sup>83</sup> Lofton, 358 F.3d at 817.

<sup>84</sup> See *cf.* *id.*

<sup>85</sup> *Casey*, 505 U.S. at 851.

<sup>86</sup> See discussion *infra* Part III.B.

<sup>87</sup> *Id.*

<sup>88</sup> *Glucksberg*, 521 U.S. at 720 (internal citations omitted).

<sup>89</sup> See Lofton, 358 F.3d at 818; see also Romer, 517 U.S. at 631 (describing legislative classification as upheld “so long as it bears a rational relation to some legitimate end,” and determining that if, however, the law burdens a fundamental right or targets a suspect class, a higher level of scrutiny will be applied).

<sup>90</sup> Lofton, 358 F.3d at 818 (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).

<sup>91</sup> Romer, 517 U.S. 620.

<sup>92</sup> *Id.* at 633; see also Young, *supra* note, 39 at 257 n.126.

<sup>93</sup> Lofton, 358 F.3d at 827.

<sup>94</sup> Artificial insemination became widespread during the 1950’s. Marsha Garrison, *Law Making for Baby Making: an Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 845 (2002) (documenting that the first in-vitro fertilization baby was born in England in 1978); Genetics and Public Policy Center, available at <http://www.dnapolicy.org/genetics/chronology.jhtml.html>.

<sup>95</sup> Garrison, *supra* note 94, at 850 (informing that contracting surrogacy emerged in the United States in the late 1970’s).

<sup>96</sup> See Garrison, *supra* note 94, at 850.

<sup>97</sup> See *cf.* *id.*

<sup>98</sup> See Lehr v. Robertson, 463 U.S. 248, 265 (1983) (declaring that a sovereign “may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose”); see also Craig v. Boren, 429 U.S. 190 (1976) (holding that the gender-based differential that resulted from the Oklahoma statute invidiously discriminated and constituted a denial of the equal protection of the laws to males who were 18 to 20 years of age).

<sup>99</sup> See, e.g., *Lawrence*, 539 U.S. at 565 (emphasis in original); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original).

<sup>100</sup> See *Lawrence*, 539 U.S. at 565; *Eisenstadt*, 405 U.S. at 453.

<sup>101</sup> See *Lawrence*, 539 U.S. at 565; *Eisenstadt*, 405 U.S. at 453.

<sup>102</sup> Dictionary.com Home Page, <http://dictionary.reference.com/> (last visited Mar. 7, 2008) (defining “bear” as to give birth to, and explaining that only women can actually give birth, making it apparent that “to bear” is applicable to women; to “beget” is defined as to procreate (especially, a male parent); “conceive” is defined as: to become pregnant).

<sup>103</sup> See Lofton, 358 F.3d at 818 (claiming that the question can no longer be “whether the challenged legislation is rationally related to a legitimate state interest”).

<sup>104</sup> *Lawrence*, 539 U.S. at 593.

<sup>105</sup> *Kearney*, 157 F. Supp. 2d at 1375, 1382.

<sup>106</sup> See *id.*; Maurer, *supra* note 26 at 182.

<sup>107</sup> *Kearney*, 157 F. Supp. 2d at 1375, 1382 (citing Romer, 517 U.S. at 633 (1996)).

<sup>108</sup> *Id.* at 1382 (internal citations omitted) (arguing that the government may legislate “to achieve things which it believes is morally good[;] the government cannot merely justify singling out a group of citizens for disfavor simply because it morally disapproves of them”).

<sup>109</sup> Maurer, *supra* note 26, at 175 (citing Bowers v. Hardwick, 478 U.S. 186, 199 (1986), overruled, *Lawrence*, 539 U.S. 558 (Blackmun, Brennan, Marshall, & Stevens, JJ., dissenting)).

<sup>110</sup> See *Kearney*, 157 F. Supp. 2d at 1375, 1382; Maurer, *supra* note 26 at 182.

<sup>111</sup> See *infra* note 113.

<sup>112</sup> *Palmore v. Sidoti*, 466 U.S. 429 (1984).

<sup>113</sup> *Id.* at 433 (internal citations and quotations omitted).

<sup>114</sup> See *id.*

<sup>115</sup> *Id.* at 430.

<sup>116</sup> *Id.* at 433.

<sup>117</sup> *Palmore* 644 U.S. at 434.

<sup>118</sup> FLA. ADMIN. CODE ANN. r. 65C-16.005(3)(a)-(o) (2003).

<sup>119</sup> FLA. ADMIN. CODE ANN. r. 65C-16.005(3)(m) (2003); see also Lofton, 358 F.3d at 810.

<sup>120</sup> MICH. COMP. LAWS SERV. § 710.22(g)(vi) (2007).

<sup>121</sup> See Young, *supra* note 39 at 253-54 & n.83 (defining morality as not okay with respect to discrimination on the basis of interracial relationships, women working outside the home, unrelated persons living together, and the mentally disabled). Certain restrictions would be permissible under a strict scrutiny standard.

<sup>122</sup> See Lofton, 358 F.3d at 817.

<sup>123</sup> *Lawrence*, 539 U.S. at 571 (2003) (quoting *Casey*, 505 U.S. at 850).

<sup>124</sup> See discussion Part II.C.1.b.

<sup>125</sup> *Lofton*, 358 F.3d at 818. See also discussion *infra* Part III.A.

<sup>126</sup> *Contra Lofton*, 358 F.3d at 811.

<sup>127</sup> *Contra id.* at 810-11 (detailing that duty of the child’s welfare is borne by the state, acting *parens patriae* for children who have lost their natural parents).

<sup>128</sup> See *Lofton*, 358 F.3d at 810; see also *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (indicating a third-party visitation); *Lehr v. Robertson*, 463 U.S. 248, 248 (1983) (referring to a putative father who attempted to vacate an order of adoption); *Behrens v. Reiger*, 422 F.3d 1255, 1261 (deciding to place a child in a prospective adoptive home); *V.C. v. M.J.B.*, 163 N.J. 200, 227-28, 748 A.2d 539, 554 (2000) (custody and visitation).

<sup>129</sup> See *Lofton*, 358 F.3d at 810-11.

<sup>130</sup> See *id.*

<sup>131</sup> See *Palmore*, 466 U.S. at 433.

<sup>132</sup> See *Lehr*, 463 U.S. at 248 (stating that the outcome in adoption cases is determined by state law); see, e.g., *Behrens*, 422 F.3d at 1261.

<sup>133</sup> See, e.g., 13 DEL. CODE. § 915 (2007); MD. CODE ANN., FAM. LAW § 5-349 (a)(2) (2007); MONT. CODE ANN. § 42-1-102 (2007); R.I. GEN. LAWS § 15-7-2 (e) (2007); S.D. CODIFIED LAWS § 25-6-2 (2007); UTAH CODE ANN. § 78-30-1.5 (2007); VA. CODE ANN. § 63.2-1205 (2007); WASH. REV. CODE § 26.33.010 (2007).

<sup>134</sup> See, e.g., A.A.C § R6-5-6614(D) (2007) (taking into account wishes of the child’s birth parent, racial, cultural, and ethnic background of the child, placement of the child’s siblings); COLO. REV. STAT. § 19-5-210 (2007); 89 ILL. ADMIN. CODE 309.20 (2007) (looking at physical welfare and safety of the child, child’s sense of attachments, child’s community ties); MICH. COMP. LAWS. SERV. § 710.22(g) (2007) (considering desirability of maintaining continuity, permanence as a family unit of the proposed adoptive home, moral fitness, mental and physical health, ability to adopt adoptee’s siblings); MINN. STAT. § 260C.212 (2007) (pointing to a child’s health, safety, and welfare); N.M. STAT. ANN. § 32A-5-14.1 (2007) (including criminal history); 23 PA. CONS. STAT. § 2530 (2007) (considering home environment, family life, parenting skills, age, physical and mental health, social, cultural and religious background, facilities and resources of the adoptive parents and their ability to manage their resources, parental fitness).

<sup>135</sup> FLA. ADMIN. CODE ANN. r. 65C-16.005(3) (2003); *Lofton*, 358 F.3d at 810.

<sup>136</sup> See, e.g., ALASKA ADMIN. CODE r. 660-5-22-.03(6) (2007) (looking at age, marital status, criminal records check, motivation, financial stability, employment, health, residence, citizenship); IOWA CODE § 600.8(1)(a) (2007) (taking into account home environment, criminal background, emotional maturity, finances, health, relationships); KAN. STAT. ANN. § 38-1583(b) (2007) (considering health, disability, criminal background); S.C. CODE ANN. § 20-7-1740(1) (2007) (including home environment, emotional maturity, finances, health, relationships, criminal background).

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> The author recognizes the seeming irony of a standard which can be described as congruous yet have no formal structure. Nevertheless, by its very nature, the “best interests” standard is used for nearly all cases involving children.

<sup>140</sup> See *Lofton*, 358 F.3d at 810; see also, *Troxel*, 530 U.S. at 69; *Lehr v. Robertson*, 463 U.S. 248, 248 (1983) (describing the attempt by a putative father to vacate an order of adoption); *Behrens v. Reiger*, 422 F.3d 1255, 1261 (deciding to place a child in a prospective adoptive home); *V.C. v. M.J.B.*, 163 N.J. 200, 227-28, 748 A.2d 539, 554 (2000) (concluding custody and visitation).

<sup>141</sup> *Van Driel v. Van Driel*, 525 N.W.2d 37-38 (S.D. 1994).

<sup>142</sup> *Id.* at 38.

<sup>143</sup> *Id.* (holding that the mother was awarded primary physical custody).

<sup>144</sup> *Id.* at 39.

<sup>145</sup> *Id.*

<sup>146</sup> *Van Driel*, 525 N.W.2d at 37-38 .

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 39-40 (finding that the mother and partner were affectionate and attentive to children and discreet about their relationship, and that psychologist’s evaluation found no harm to children).

<sup>149</sup> *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

<sup>150</sup> *V.C.*, 748 A.2d at 541-42, 555 (stating that former partner sought joint legal custody for decision-making purposes, not joint physical custody); see generally *id.* at 218-26, 748 A.2d at 548-53 (discussing and analyzing generally the psychological parent).

<sup>151</sup> *V.C.*, 748 A.2d at 551 (internal citations omitted) (defining “one who...” as opposed to “a heterosexual who... indicates the court’s intent to treat sexual preference as irrelevant).

<sup>152</sup> See N.J. STAT. ANN. 9: 2-4 (2007) (enlisting “best interests” considerations in

the context of a custody dispute, and stating that these considerations are similar in nature if not in kind to those used in the context of adoption proceedings, such as parents’ ability to agree, communicate and cooperate in matters relating to the child, stability of the home environment offered, fitness of the parents).

<sup>153</sup> *V.C.*, 748 A.2d at 555.

<sup>154</sup> *Id.* at 555.

<sup>155</sup> *Id.* at 539, 542.

<sup>156</sup> *Id.*

<sup>157</sup> *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); see also *supra* note 94 (concluding that only individual characteristics which are associated with a fundamental right would require compelling reasons that would allow government to treat people differently).

<sup>158</sup> *Palmore*, 466 U.S. at 429.

<sup>159</sup> *Id.* at 430.

<sup>160</sup> *Id.* at 430, 432 (stating that “the child’s welfare was the controlling factor”).

<sup>161</sup> *Id.* at 433.

<sup>162</sup> *Id.* at 432 (referring to the “Constitution’s commitment to eradicating discrimination based on race,” and adding that “a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race”).

<sup>163</sup> The U.S. Constitution Online, <http://www.usconstitution.net/constamnotes.html#Am14> (last visited Mar. 7, 2008) (detailing that the Fourteenth Amendment was ratified in 1868, on the heels of the Civil War, and granted citizenship to former slaves and ensured that they would not be discriminated against based on their race).

<sup>164</sup> See Discussion, *supra* Fostering and Adoption in the United States (discussing the Equal Protection Clause).

<sup>165</sup> See *Lofton*, 358 F.3d at 818; *Kearney*, 157 F. Supp. 2d at 1381-82.

<sup>166</sup> See discussion *supra* Fostering and Adoption in the United States (arguing that the right to adopt cannot arbitrarily be denied to homosexuals, especially men).

<sup>167</sup> *Romer*, 517 U.S. at 635.

<sup>168</sup> See Discussion, *infra* in Parts III. A–D.

<sup>169</sup> *Lehr*, 463 U.S. 248.

<sup>170</sup> *Id.* at 257.

<sup>171</sup> *Lofton*, 358 F.3d at 812 (quoting *Smith*, 431 U.S. at 843 (internal citations omitted)).

<sup>172</sup> *Lofton*, 358 F.3d at 818.

<sup>173</sup> See, e.g., *Moore*, 431 U.S. 494 (reminding that the statute defined “family” as “a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited” to certain individuals); *Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974) (The ordinance defined family as: “one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family”).

<sup>174</sup> *Maurer*, *supra* note 26 at 187-88 & note 157.

<sup>175</sup> 431 U.S. 494 (1977).

<sup>176</sup> See generally *id.* (finding that a housing ordinance categorizing a second grandchild living in his grandmother’s home was found to violate the Due Process Clause of the Fourteenth Amendment).

<sup>177</sup> *Lehr*, 463 U.S. at 258 (emphasis added).

<sup>178</sup> *Troxel*, 530 U.S. at 60 (centering on the issue of grandparent visitation after the child’s father died); *Id.* at 65 (claiming that the petitioner grandparents sought to increase their visitation rights in accordance with a Washington statute permitting anyone to petition for visitation, if it was in the best interests of the child); *Id.* at 69-70 (holding that the statute violated the mother’s due process rights and the fundamental parental right to make decisions concerning the care, custody, and control of their children).

<sup>179</sup> *Id.* at 63.

<sup>180</sup> See *id.*

<sup>181</sup> See *Moore*, 431 U.S. at 504-05 (stating that “ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.... Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family”).

<sup>182</sup> *Lofton*, 358 F.3d at 818-19.

<sup>183</sup> *Id.* at 819 (emphasis added).

## ENDNOTES CONTINUED

<sup>184</sup> *Id.* at 818 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).  
<sup>185</sup> See Discussion, *supra* Standard of Review..  
<sup>186</sup> See *cf.*, *Van Driel*, 525 N.W.2d at 39.  
<sup>187</sup> *Lofton*, 358 F.3d at 819-20 (internal citations and quotations omitted).  
<sup>188</sup> See Discussion, *supra* Best Interests of the Child.  
<sup>189</sup> See *Lofton*, 358 F.3d at 818-819 (arguing that the fact that Florida felt compelled to specify *heterosexual* role models as opposed to role models in general shows the glaring nature of the underlying prejudice against homosexuals).  
<sup>190</sup> *Id.*  
<sup>191</sup> *Id.* at 819.  
<sup>192</sup> See Young, *supra* note 39 at 248 (commenting that Florida approached Lofton and Croteau on multiple occasions).  
<sup>193</sup> See *id.*  
<sup>194</sup> Compare *Lofton*, 358 F.3d at 819, with Young *supra* note 39, at 248.  
<sup>195</sup> See generally *Lofton*, 358 F.3d at 819-20 (predicting that a lack of stability of a dual-parent household would impair the ability to shape the child's sexual and gender identity).  
<sup>196</sup> *Id.* at 822 (quoting Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1220).  
<sup>197</sup> In actuality, Florida's decision to preclude homosexual adoption stems from a concern that children adopted by homosexual parents will be more likely to become homosexual themselves. See Jenni Hetzel-Gaynor, *What About the Children? The Fight for Homosexual Adoption After Lawrence and Lofton*, 51 WAYNE L. REV. 1271 (Fall 2005) (discussing generally public policy issues raised by gay adoption). Ultimately, if homosexuals as parents would have such

an adverse impact on the child, it would seem proper that the state remove the children of any homosexual parent, whether biological or otherwise.  
<sup>198</sup> See, e.g., *Lofton*, 358 F.3d at 819-20, 822.  
<sup>199</sup> See Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 80 (January 2006) (considering what rights are important to children of same-sex couples).  
<sup>200</sup> *V.C.*, 748 A.2d at 548-49.  
<sup>201</sup> *Troxel*, 530 U.S. 57, 68 (internal citations and quotations omitted).  
<sup>202</sup> See Discussion *supra* Best Interests of the Child.  
<sup>203</sup> *Behrens*, 422 F.3d 1255 .  
<sup>204</sup> FLA. ADMIN. CODE ANN. r. 65C-16.005(6) (2007).  
<sup>205</sup> See *Flynn v. May*, 157 Md. App. 389, 409 (Md. Ct. Spec. App. 2004).  
<sup>206</sup> *Alma Soc. v. Mellon*, 601 F.2d 1225, 1235 (1979); *Finstuen v. Edmondson*, 2006 U.S. Dist. LEXIS 32122, at \*28 (2006).  
<sup>207</sup> *Lofton*, 358 F.3d at 819.  
<sup>208</sup> See Discussion *supra* Background of Lofton..  
<sup>209</sup> *Id.*  
<sup>210</sup> See, e.g., *Butterworth*, 93 F. Supp. 2d at 1343-1344; *Howard* 2006 LEXIS 418 at \*2; Press Release, American Civil Liberties Union, Missouri Judge Rules That Lesbian Can Be Foster Parent, (Feb. 17, 2006), available at <http://www.aclu.org/lgbt/parenting/24195prs20060217.html> (last visited Mar. 7, 2008); *K.S.P.* 804 N.E.2d 1253.  
<sup>211</sup> *Lofton*, 358 F.3d at 811.  
<sup>212</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).  
<sup>213</sup> *Casey*, 505 U.S. at 847-48.  
<sup>214</sup> *Lawrence*, 539 U.S. at 578.

## CONGRATULATIONS

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