Lofton v. Secretary of the Department of Children & Family Services: Florida's Gay Adoption Ban Under Irrational Equal Protection Analysis

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> The Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living.[1]

Introduction

Amidst a President calling for an amendment that would write discrimination against gays and lesbians into the Constitution,[2] a U.S. Supreme Court legitimizing the privacy rights of gays and lesbians,[3] and a state supreme court legalizing gay "marriage" rather than a civil union substitute,[4] gays and lesbians find themselves in an uncertain, distinct, and historic moment. In Florida, a single gay man or woman cannot adopt a child, whereas a single heterosexual man or woman can.[5] Florida is the only state in the union that categorically disqualifies otherwise eligible gay men and lesbians from the adoption process.[6] In 1999, Steven Lofton and other gay and lesbian

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1. Moore v. City of E. Cleveland, 431 U.S. 494, 508 (1976) (Brennan, J., concurring).

2. *See* Remarks Calling for a Constitutional Amendment Defining and Protecting Marriage, 40 WEEKLY COMP. PRES. DOC. 276, 277 (Feb. 24, 2004).

3. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

4. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

5. *See infra* Part II.

6. *See* Petition for Writ of Certiorari at 3 n.3, Lofton v. Sec'y of the Fla. Dep't of Children & Families, 2004 WL 2289198 (U.S.) (No. 04-478) (explaining that Mississippi prohibits adoptions by gay and lesbian couples and Arkansas excludes gay household members from serving as foster parents, but that Florida is the only

individuals denied the chance to adopt challenged the ban in federal district court, to no avail.[7] The plaintiffs appealed and, in *Lofton v. Secretary of the Department of Children & Family Services*,[8] the Court of Appeals for the Eleventh Circuit upheld the state's ban.[9] A good portion of the opinion responds to the appellants' allegation that the state's ban is a denial of substantive due process.[10] Although the due process analysis that the court espouses is certainly ripe for criticism, the focus of this Article is instead on the court's conclusion that the adoption ban does not constitute a denial of the equal protection of the law.[11]

The court in *Lofton* held that Florida's blanket ban on gay adoption is constitutional because "there are plausible . . . reasons for the disparate treatment of homosexuals and heterosexual singles,"[12] and the "legislative choice to treat foster care and guardianships differently than adoption . . . is not an irrational one."[13] Rejecting these assertions, this Article argues that the Eleventh Circuit should have invalidated the statute on equal protection grounds because it does not survive rational basis review. The statute is nothing more than an instance of animus directed at a classification of persons and is therefore unconstitutional.

Importantly, the Supreme Court recently denied the petition for certiorari that Steven Lofton and appellants brought in 2004.[14] The petition was denied without comment, although some argue the current political culture is too rife with emotional turmoil over gay rights issues for the Court to lay down any ruling.[15] Practically, the denial of certiorari means gays and lesbians will continue to be categorically denied participation in adoption

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state to categorically exclude homosexuals from single parent adoption).

7. *See* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1375-76, 1385 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804 (11th Cir. 2004). The plaintiffs also included one of Lofton's foster children. *See infra* note 28 and accompanying text.

8. 358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

9. *Id.* at 820-23.

10. *See id.* at 811-20.

11. *See id.* at 817-27.

12. *Id.* at 823.

13. *Id.* at 824.

14. Lofton v. Sec'y, Fla. Dep't of Children & Families, 125 S. Ct. 869 (2005) (mem.); Petition for Writ of Certiorari, Lofton v. Sec'y of the Fla. Dep't of Children & Families, 2004 WL 2289198 (U.S.) (No. 04-478).

15. *See* Charles Lane, *Gay-Adoption Ban in Florida to Stand*, WASH. POST, Jan. 11, 2005, at A4.

procedures in Florida.[16] By refusing to hear the case, the Supreme Court has allowed the foster children of gay families in Florida to remain in limbo, without a sense of the permanency or a feeling of what is "home."[17]

The first part of this Article lays out the facts of *Lofton* and provides the procedural history of the case.[18] Second, this Article examines Florida's adoption and foster care law affecting gays and lesbians.[19] The third part of this Article looks at the Equal Protection Clause and its role in protecting the rights and interests of gays and lesbians.[20] Finally, this Article argues that the *Lofton* court incorrectly determined that Florida's treatment of gays and lesbians is not a denial of equal protection.[21] Three arguments are presented in order to demonstrate that Florida's adoption law is unconstitutional: the law's disparate treatment of homosexual and heterosexual singles is both underinclusive and overinclusive;[22] Florida's inclusion of homosexuals in the foster care system and simultaneous exclusion of them from adoption is irrational;[23] and the adoption law is directed at status, not conduct.[24]

I. Florida Denied Steven Lofton the Right to Adopt His Foster Child Because Lofton Is Gay

Steven Lofton and his long-term partner, Roger Croteau, are financially stable, model caregivers, and, most importantly, loving parents to five foster children.[25] Recently, Steven Lofton was honored with the Outstanding Foster Parenting Award from a local child placement agency.[26] His parenting is certainly

16. *See* Press Release, American Civil Liberties Union, ACLU Disappointed the Supreme Court Will Not Hear an Appeal in Case Challenging Florida's Anti-Gay Adoption Law (Jan. 10, 2005), http://www.aclu.org/LesbianGayRights (last visited Feb. 7, 2005).

17. *See id.*

18. *See infra* Part I.

19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part IV.

22. *See infra* Part IV.A.

23. *See infra* Part IV.B.

24. *See infra* Part IV.C.

25. *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 807 (11th Cir. 2004) (praising Lofton for his parenting and claiming that by all accounts Lofton's care of his foster children has been exemplary), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

26. Lofton v. Kearney, 157 F. Supp. 2d 1372, 1375 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804 (11th Cir. 2004); *see also* Petition for Writ of Certiorari at 10, Lofton v.

commendable. At the time of the litigation, Lofton was a certified long-term foster parent for three children, all diagnosed with HIV at birth, and raised them while administering their medications and tending to their illnesses.[27] John Doe is one of the couple's foster children, and he is named as a party in the litigation.[28] Doe has been with Lofton and Croteau since birth.[29] The state agency responsible for foster care and adoption, the Department of Children & Families (DCF), was well aware of Lofton's sexual identity when he became Doe's foster parent, but since Florida allows gays and lesbians to be foster parents, it was not an impediment to the process.[30]

In his infancy, Doe seroreverted and tested negative for HIV.[31] Doe's change in health put him in a position to be formally adopted, and Lofton immediately tried to adopt his foster son.[32] While filling out the adoption application, Lofton omitted to mark the application box that asked him about his sexual orientation and omitted information with regard to his cohabitating partner.[33] DCF requested the information, but Lofton, knowing the inevitable outcome, would not meet its requests.[34] Then the agency, pursuant to chapter 63.042(3) of Florida Statutes, denied the adoption application based on what it knew to be his sexual identity.[35] The provision states that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."[36]

Steven Lofton and others similarly situated[37] sued the head

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Sec'y of the Fla. Dep't of Children & Families, 2004 WL 2289198 (U.S.) (No. 04-478) (highlighting the fact that the agency that placed the foster children with Lofton and Croteau, the Children's Home Society, have since named the annual honor the "Lofton-Croteau" award).

27. *Kearney*, 157 F. Supp. 2d at 1375; *see also* Petition for Cert. at 8 (explaining that since 1988 Lofton and Croteau have been foster parents to eight children with either HIV or AIDS and that three of the children have been with them since they were infants—they are now thirteen, sixteen, and seventeen and think of themselves as brothers and sisters).

28. *Lofton*, 358 F.3d at 807 (panel).

29. Petition for Cert. at 8; Gail Epstein Nieves, *U.S. Judge Upholds Florida's Ban on Homosexual Adoptions*, MIAMI HERALD, Aug. 31, 2001, Lexis-Nexis.

30. *See Kearney*, 157 F. Supp. 2d at 1375 n.3 (noting that a foster parent's sexual identity is usually discussed either during the placement procedure or when DCF conducts the many family visits that are required to maintain certification as a foster parent).

31. *Lofton*, 358 F.3d at 807 (panel).

32. *See id.*

33. *Id.* at 808.

34. *Id.*

35. *See Kearney*, 157 F. Supp. 2d at 1375 n.3.

36. FLA. STAT. ANN. § 63.042(3) (West Supp. 2005).

37. *See Kearney*, 157 F. Supp. 2d at 1376 (noting that Douglas Houghton,

of DCF, Kathleen Kearney.[38] In the complaint, the plaintiffs claimed the treatment they received under the Florida statute violated their right "to familial privacy, intimate association, and family integrity protected by . . . the Due Process Clause . . . [and] their rights to equal protection guaranteed by the 14th Amendment."[39] The district court rejected their claims.[40] As to the due process claim, the court found that since "there is no fundamental right to adopt or to be adopted, there can be no fundamental right to apply for adoption," and that the plaintiffs "have no expectation of permanency and, therefore, no right to exclude the State from their family lives."[41]

As to the equal protection claim, the district court found that since gays are not a suspect class, and the right to adopt a child is not fundamental, the court would only examine whether the law was rational.[42] The court rejected one of the state's given reasons for the legislation, which was to express its moral disapproval of homosexuality,[43] but upheld the statute based on the state's argument that the law served the best interests of Florida's children.[44] Florida argued that it is best for children to have married heterosexual parents in order to "provide proper gender role modeling and to minimize social stigmatization."[45] To the plaintiffs' charge that this assertion was merely a pretext for animus, the court responded that "[w]hether this reasoning in fact underl[ies] the legislative decision is irrelevant."[46] Finally, the court asserted that the legislature should receive broad deference if there is any conceivable basis for social policy decisions, that "[h]omosexuals are not similar in all relevant aspects to other nonmarried adults," and that because gays and lesbians cannot

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Wayne Smith, and Daniel Skahen all sought adoption rights but were rejected on the basis of their sexual identity and that three other plaintiffs were dismissed due to lack of an actual injury).

38. *Id.* at 1375.

39. *Id.* at 1377.

40. *See id.* at 1378-85.

41. *Id.* at 1380.

42. *See id.* at 1380-85.

43. *See id.* at 1382-83. This explanation is mirrored in the statute's legislative history. *See* Laura A. Turbe, *Florida's Inconsistent Use of the Best Interests of the Child Standard*, 33 STETSON L. REV. 369, 376 (2003) (noting that the bill's sponsor in the Florida Senate stated that the goal of the legislation was to send a message to homosexuals that Florida is tired of them and wishes they would go back in the closet).

44. *See Kearney*, 157 F. Supp. 2d at 1383-85.

45. *Id.* at 1383.

46. *Id.*

marry, they cannot meet the State's asserted interest.[47]

The plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit.[48] Although the arguments on appeal essentially mirrored those made to the district court, the plaintiff's due process argument was enhanced by the Supreme Court's decision in *Lawrence v. Texas*,[49] which struck down Texas's statute criminalizing sodomy.[50] Even with this added weight to the plaintiffs' due process claim, the argument was not successful.[51] With respect to the equal protection claim, the *Lofton* panel applied a deferential rational basis test, again finding that there was no fundamental right at stake, and that "all of our sister circuits that have considered the question [of whether or not gays should receive heightened scrutiny] have declined to treat homosexuals as a suspect class."[52] Accordingly, the court found Florida's rationale that the ban on homosexual adoption is in the best interests of the child was "one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action."[53] The appellants argued that the statute is not rationally related to its stated purpose.[54] The court disagreed on all arguments, finding instead the disparate treatment of homosexual and heterosexual singles within the statute to be justifiable,[55] the disparate treatment of homosexuals within foster care law and adoption law to be rational,[56] and the discrimination present in Florida's law not sweeping enough to show it was

47. *Id.* at 1385.

48. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

49. 539 U.S. 558 (2003).

50. *Id.* at 577-78; *Lofton*, 358 F.3d 809 (panel) (noting argument on appeal that Florida ban violates sexual intimacy rights established under *Lawrence*).

51. *See id.* at 811-17. Scholars have criticized the court for underplaying the significance of *Lawrence* in deciding the due process claim. *See* David L. Hudson, Jr., *Court Won't Tie* Lawrence *to Gay Adoption Law: 11th Circuit Rejects Arguments by Florida Foster Parents*, 3 A.B.A. J. EREPORT 1 (2004) (noting that the Eleventh Circuit's decision was based on decisions that rely on *Bowers v. Hardwick*, 478 U.S. 186 (1986), which *Lawrence* overturned); Lofton v. Secretary of the Department of Children and Family Services, 117 HARV. L. REV. 2791, 2796 (2004) ("The *Lofton* court wrongly evaluated *Lawrence* as if it formed a part of a traditionalist . . . substantive due process approach rather than on its own terms as a replacement for that approach.").

52. *See Lofton*, 358 F.3d at 818 (panel).

53. *Id.* at 819-20.

54. *Id.* at 820.

55. *See id.* at 823.

56. *See id.* at 824.

motivated by animus.[57]

When appellants applied for rehearing, the petition was denied.[58] Judge Birch, who wrote the unanimous decision for the panel,[59] specially concurred in the denial, arguing that, under a deferential form of rational basis analysis, Florida's ban on gay adoption is a permissible legislative action and that Florida's rationale is legitimate.[60] In a blistering dissent, Judge Barkett argued that Florida's law should be invalidated under both the Equal Protection Clause and substantive due process doctrine, and thus warranted en banc review.[61]

II. Florida's Differential Treatment of Homosexuals Within Foster Care and Adoption Procedures

In all proceedings related to children, Florida claims to employ the best interests of the child standard.[62] Florida uses this standard in an effort to "provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development . . . and to promote the health and well-being of all children under the state's care."[63] The state, however, applies this standard to homosexuals in an inconsistent manner. Florida finds gay and lesbian parents are in the best interests of children under foster care law and, at the same time, claims gay and lesbian parents inherently are not in the best interests of children under adoption law.

Steven Lofton was able to become John Doe's foster parent because Florida does not discriminate against gays and lesbians under the state's foster care law. The foster care system in Florida

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57. *See id.* at 826.

58. Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

59. *See Lofton*, 358 F.3d at 806 (panel).

60. *See Lofton*, 377 F.3d at 1276 (Birch, J., specially concurring in denial of rehearing en banc).

61. *See id.* at 1291 (Barkett, J., dissenting from denial of rehearing en banc). Two other judges concurred with Judge Barkett's conclusion regarding equal protection analysis. *See id.* at 1290 (Anderson, J., dissenting from denial of rehearing en banc). Another three judges also dissented, claiming there was a "serious and substantial question" as to whether the statute could survive a rational basis test. *See id.* at 1313 (Marcus, J., dissenting from denial of rehearing en banc).

62. *See* Turbe, *supra* note 43, at 384 n.124. *See generally* Jodi L. Bell, *Prohibiting Adoption by Same-Sex Couples: Is It in the "Best Interests of the Child?"* 49 DRAKE L. REV. 345, 357-58 (2001) (explaining the best interests of the child standard).

63. FLA. STAT. ANN. § 39.001(1)(a) (West Supp. 2005) (listing purposes of laws governing proceedings relating to children).

readily places children with gay and lesbian families, as long as they meet the state standards for foster parenting.[64] A prospective foster family must be financially stable and able to provide food, clothing, and education for the foster child.[65] The foster family must also be able to promote a child's health and well-being.[66] All foster parents undergo a screening, with an emphasis on whether the applicant demonstrates good moral character.[67] With respect to all of these standards, Florida's foster care system treats gays and lesbians similar to straight applicants.[68] Regardless of sexual identity, the state "requires each foster parent to be qualified, certified, and registered."[69] By endorsing gay and lesbian families as foster families, the state has "entrusted such individuals with tremendous responsibility. . . at a time that is crucial in the child's life."[70] Florida's placement of children in the foster homes of gays and lesbians demonstrates the state's confidence that homosexual families can serve the best interests of children.[71]

While Florida also uses the best interests standard in its adoption law, the state applies the standard to gays and lesbians differently than it does in foster care.[72] The provision in the statute denying adoption rights to homosexuals prevents all gays and lesbians from adopting, regardless of whether the placement has already been determined to be in the child's best interests.[73] Florida adoption law otherwise provides that applicants are evaluated on a case-by-case basis.[74] The per se adoption ban

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64. *See id.* § 409.175(5)(a) (listing criteria for operation of foster homes and omitting sexual orientation of potential foster parents).

65. *See id.* § 409.175(5)(a)(2), .175(5)(a)(8).

66. *See id.* § 409.175(1)(a).

67. *See id.* § 409.175(5)(a)(5).

68. *See* Talia Cohen, *Protecting or Dismantling the Family: A Look at Foster Families and Homosexual Parents After* Lofton v. Kearney, 13 TEMP. POL. & CIV. RTS. L. REV. 227, 245 (2003) (highlighting the clear and unequivocal endorsement of homosexuals as foster parents by the state of Florida).

69. *Id.*

70. *Id.*

71. *See id.*

72. *See* Turbe, *supra* note 43, at 385.

73. *See* FLA. STAT. ANN. § 63.042(3) (West Supp. 2005); *see also* Petition for Writ of Certiorari at 3, Lofton v. Sec'y of the Fla. Dep't of Children & Families, 2004 WL 2289198 (U.S.) (No. 04-478) (explaining that all nonhomosexual adoption petitions are evaluated on a case-by-case basis, considering foremost the needs of each child).

74. *See* FLA. STAT. ANN. § 63.125 (listing factors that must be considered in the final home investigation, including "[a]ny other information relevant to the suitability of the intended adoptive home"); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 821 n.18 (11th Cir. 2004) *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005); Petition for Cert. at

disallows DCF from merely considering homosexuality as a factor in the placement decision.[75] Instead, Florida categorically removes homosexuals from the adoptive parent pool before gay and lesbian families have the opportunity to be considered by DCF. Ironically, homosexuals are "the very people which the State frequently relies upon to provide [foster care]."[76]

It is important to understand how the Eleventh Circuit defines "homosexuals" with respect to the adoption ban. The Florida statute explicitly denies eligibility to adopt to any person who is "homosexual," but does not define the term.[77] The *Lofton* court noted that the law purportedly targets "individuals who 'engage in current, voluntary homosexual activity,'"[78] echoing the language from a Florida state court decision which defined a homosexual as someone who was "known to engage in current, voluntary homosexual activity."[79] The court finds this definition important because it demonstrates that the law is directed at an activity, rather than targeting an identity.[80]

III. The Equal Protection Clause Has Historically Protected Politically Unpopular Groups

The Equal Protection Clause of the U.S. Constitution demands that "no person shall be denied the equal protection of the law."[81] If a law being challenged involves a class but neither burdens a fundamental right nor targets a suspect class, the law will generally be upheld "so long as it bears a rational relation to

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75. *But see* Carolyn S. Grigsby, Lofton v. Kearney*: Discrimination Declared Constitutional in Florida*, 21 ST. LOUIS U. PUB. L. REV. 199, 228-29 (2002) (arguing that the best interests of the child standard could include sexual orientation as a factor in rare cases). Gays and lesbians face discrimination in adoption even in the absence of total bans. *See* Molly Cooper, *What Makes a Family? Addressing the Issue of Gay and Lesbian Adoption*, 42 FAM. CT. REV. 178, 182 (2004) (surveying state adoption laws and decisions which limit but do not ban entirely adoptions by gays and lesbians); Erica Gesing, *The Fight to Be a Parent: How Courts Have Restricted the Constitutional-Based Challenges Available to Homosexuals*, 38 NEW ENG. L. REV. 841, 850 (2004) (pointing out that the discretionary nature of the best interests of the child standard may prevent gays and lesbians from adopting "if the judge is not willing to accept the concept of the evolving definition of family").

76. Turbe, *supra* note 43, at 391.

77. *See* FLA. STAT. ANN. § 63.042(3).

78. *Lofton*, 358 F.3d at 827 (panel) (quoting Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1215 (Fla. Dist. Ct. App. 1993)).

79. *Cox*, 627 So. 2d at 1215.

80. *Lofton*, 358 F.3d at 827 (panel).

81. U.S. CONST. amend. XIV, § 1.

some legitimate end."[82] Many gay and lesbian legal advocates argue that homosexuals are a suspect class,[83] although few courts have agreed.[84] Similarly, others argue that the privacy rights surrounding gays and lesbians are fundamental rights that deserve stricter scrutiny than mere rational basis.[85] Even under a deferential rational basis standard, a court will inquire into the relationship between the statutory classification and the government's interest.[86] Under this standard, a law is "sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group."[87] The presence of a rational basis in any law is important because it serves to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[88] If a law carries the pretext of legitimately targeting an

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82. Romer v. Evans, 517 U.S. 620, 631 (1996).

83. *See, e.g.*, Eric A. Roberts, *Heightened Scrutiny Under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation*, 42 DRAKE L. REV. 485 (1993) (arguing for the applicability of heightened scrutiny under the Equal Protection Clause as a remedy to the invidious discrimination gays have experienced); *cf.* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (arguing that discriminatory statutes deserve heightened scrutiny because they are directed at one's gender and therefore should be afforded intermediate scrutiny).

84. *See* Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292 n.1 (6th Cir. 1997) (holding that neither suspect nor quasi-suspect class is burdened by amendment to Cincinnati's charter removing homosexuals from the protection of antidiscrimination ordinances); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997) (assuming "homosexuals do not constitute a suspect or quasi-suspect class" in upholding the military's "don't ask, don't tell" policy); Thomasson v. Perry, 80 F.3d 915, 928-29 (4th Cir. 1996) (holding that no suspect classification is implicated by "don't ask, don't tell"); High Tech Gays v. Def. Indust. Sec. Clearance Office, 895 F.2d 563, 573-34 (9th Cir. 1990) (finding that homosexuals meet one but not all of the criteria of suspect or quasi-suspect classes); Watkins v. U.S. Army, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring) (finding homosexuals a suspect class).

85. *See* EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 67-98 (2004) (surveying cases involving marriage and finding a constitutionally protected fundamental right to marry that includes the right to marry one's same-sex partner); Edward Stein, *Introducing* Lawrence v. Texas*: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 275-80 (2004) (suggesting that *Lawrence v. Texas* strengthens the argument for a fundamental right to marry for gays and lesbians).

86. *See Romer*, 517 U.S. at 632.

87. *Id. But see* Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1292 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc) (arguing that a more searching form of rational basis has been used in cases involving personal relationships, such as *Lawrence*), *cert. denied*, 125 S. Ct. 869 (2005).

88. *Romer*, 517 U.S. at 633; *see also* R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) (arguing that a law's impartiality is suspect if the apparent aim of the legislature is the adverse impact on a disfavored class).

activity, but is designed to harm a particular class of people, the law is considered to be the product of animus and is unconstitutional.[89]

Some courts use equal protection analysis in cases of sexual orientation-based discrimination.[90] In *Romer v. Evans*,[91] the Supreme Court employed the Equal Protection Clause to strike down a state constitutional amendment in Colorado that discriminated against homosexuals.[92] While some argue the holding in *Romer* is particular to a finding of animus,[93] others see the field of equal protection, and how it applies to gays and lesbians, as yet underdetermined.[94] After the Supreme Court's ruling in *Lawrence v. Texas*, questions remain about whether such a positive outcome for gay and lesbian rights under due process will affect equal protection jurisprudence.[95] Justice O'Connor's concurrence in *Lawrence* gives hope to those wanting to utilize the Equal Protection Clause as a tool to end discrimination based on sexual orientation. She argues that the constitutionality of the

89. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down facially neutral law prohibiting laundries made out of wood as discriminatory against Chinese laundries).

90. *See* Ann M. Reding, Lofton v. Kearney*: Equal Protection Mandates Equal Adoption Rights*, 36 U.C. DAVIS L. REV. 1285, 1296 n.84 (collecting cases on the Equal Protection Clause as applied to homosexuals); Stein, *supra* note 85, at 282-88 (examining current litigation with respect to sexual orientation and the accompanying equal protection arguments in light of *Lawrence*).

91. 517 U.S. 620 (1996).

92. *See id* at 635-36.

93. *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 826-27 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005); Lofton v. Kearney, 157 F. Supp. 2d 1372, 1385 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804 (11th Cir. 2004).

94. *See* William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1217 (2000) (arguing that greater political power on the part of gays and lesbians may lead the Supreme Court to strike down some discriminatory laws); Gesing, *supra* note 75, at 841 (arguing the impact of *Romer* is still unclear and that homosexuals may end up being deemed a suspect class entitled to equal protection); Lofton v. Kearney, 115 HARV. L. REV. 1259, 1259 (2002) (noting that the court's analysis "avoided considering the ramifications of its broad reading of *Romer*"); Stein, *supra* note 85, at 282 (arguing that *Lawrence* does not address the validity of an equal protection challenge to sexual orientation discrimination).

95. *Compare* Andrew Koppelman, Lawrence*'s Penumbra*, 88 MINN. L. REV. 1171, 1180 (2004) (arguing the one clear rule that emerges from *Lawrence* is that "if a state singles out gays for unprecedentedly harsh treatment the Court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval" (emphasis omitted)), *with* Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 SUP. CT. REV. 75 (explaining that the potential of *Lawrence* as a progressive text is difficult to predict because the opinion is filled with ambiguity and that any effort to declare a certain aspect of the decision as definitive is premature).

sodomy law at issue would best be decided on equal protection grounds.[96] Importantly, some argue that *Lawrence* signifies the end of morality-based legislation, the sort of lawmaking which often treats homosexuals differently than heterosexuals.[97]

IV. The Disparate Treatment of Homosexuals in the Florida Adoption Statute Is Unconstitutional and Can Only Be Explained by Animus

A. The Florida Statute Is Not Rational Because It Is Both Underinclusive and Overinclusive

Florida's adoption law casts too wide a net over gays and lesbians while simultaneously ignoring many categories of people that pose direct harm to children. In other words, the law is both too overinclusive and too underinclusive to be rationally related to the legitimate interest articulated by the state of Florida. The only possible reason to exclude homosexuals from the process of adoption is the very reason Florida first proffered in the district court's hearing of *Lofton*: to convey its disapproval of homosexuals.[98] Animus of this kind is unconstitutional.[99]

A state law banning all homosexuals from applying for adoption, without consideration of any other criteria, is overinclusive because it defines, and makes assumptions about, a class of people based on a single characteristic.[100] Unmarried

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96. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

97. *See id.* at 589-90 (Scalia, J., dissenting) (arguing that the *Lawrence* majority stands to undermine the proposition that a governing body's sense of morality is a rational basis for regulating a certain class); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1129 (2004) (arguing that Justice O'Connor's concurring opinion is good news for gay rights advocates because it goes a step further than *Romer* by claiming that "[m]oral disapproval of a group cannot be a legitimate governmental interest" (citing *Lawrence*, 539 U.S. at 2486 (O'Connor, J., concurring)). *But see* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1234 n.8 (2004) (noting that a conservative reading of *Lawrence* would limit its reach to restrictions on "the conduct of private, consensual, noncommercial sexual relationships between two adults"); Stein, *supra* note 85, at 281 (finding Justice Scalia's concerns about morality possibly well founded, but that the slope is not so slippery because it has a stopping point with respect to consent and third party harms).

98. *See supra* note 43 and accompanying text.

99. *See supra* notes 88-89 and accompanying text.

100. *See* Petition for Writ of Certiorari at 6, Lofton v. Sec'y of the Fla. Dep't. of Children & Families, 2004 WL 2289198 (U.S.) (No. 04-478) (explaining how Florida's law conclusively treats all members of the class as inherently unfit, without making an inquiry into individual ability, family ties to the child, or any other circumstances); Bell, *supra* note 62, at 362 (arguing that a strict statutory

heterosexuals and homosexuals who are in all other ways similarly situated are not treated equally under Florida's law.[101] Single heterosexual applicants are allowed to go through a screening process while applications from single homosexuals are denied before any review process even begins.[102] The Florida law does not ask if the homosexual applicant has a criminal history, is able to provide for the child financially, or has the kind of stable lifestyle that a child needs while growing up.[103] Disqualifications based on those criteria would be permissible limitations on the ability of anyone to adopt.[104] Indeed, when placing a child with an applicant, it makes sense to exclude a candidate based on that person's capabilities, home environment, and moral character.[105] A blanket exclusion on gay adoption, in the words of one commentator, "seems to involve a rather straightforward equal protection violation."[106]

Florida's adoption law is akin to the Colorado constitutional amendment struck down by the Supreme Court in *Romer v. Evans*. There, the amendment prohibited homosexuals from having access to redress if they were discriminated against because of their sexual identity.[107] Colorado presented two reasons for the law.[108] The State argued that the amendment respected other citizens' freedom of association, and that it conserved resources, allowing Colorado to fight discrimination against other groups.[109] The Court in *Romer* found the amendment unconstitutional because it "is at once too narrow and too broad," and "identifies persons by a

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prohibition against same-sex couples from adopting is problematic because it refuses to consider an individual's ability to parent).

101. *See supra* notes 72-76 and accompanying text.

102. *See supra* notes 72-76 and accompanying text.

103. *See* FLA. ADMIN. CODE ANN. r. 65C-16.002, .004, .005 (2003); *see also* Petition for Cert. at 6 (pointing out Florida doesn't allow for any review of homosexual applicants on their own merits).

104. *Cf.* Petition for Cert. at 4 (noting that Florida's statute prohibits the exclusion of disabled applicants from the adoption process unless the disability renders them unable to be an effective parent).

105. *See supra* note 74 and accompanying text.

106. Mark Strasser, *Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results*, 5 J.L. & FAM. STUD. 297, 299 (2003).

107. Romer v. Evans, 517 U.S. 620, 624 (1996) (explaining that amendment precluded all "legislative, executive, or judicial action at any level of state or local government designed to protect [the status of persons based on their sexual orientation]").

108. *See id.* at 635.

109. *Id.* at 622.

single trait and then denies them protection across the board."[110]

The court in *Lofton* responds to *Romer* by stating that its "unique factual situation and narrow holding are inapposite to [the case at hand]."[111] The court quickly dismisses the case without any thorough analysis.[112] The *Lofton* court opines that Florida's law does not have as discontinuous a relationship with its purpose as did the amendment in *Romer*; however, this response fails to address the fact that the discontinuity suggests animus, and this, "not the discontinuity itself, [is what] violate[s] the Constitution."[113] Although the amendment in *Romer* targeted more rights, the statute in *Lofton* is similarly flawed because "there is no legitimate rational relationship between Florida's proffered justifications and its sweeping categorical adoption ban against homosexuals."[114] The degree to which both cases are overinclusive is significant: in both cases homosexuals are categorically singled out and denied protection of the law, other similarly situated minorities are not targeted, and there is ample evidence that the impetus for the law was moral disapproval of homosexuality.[115] Under this analysis, the cases are apposite and the ruling in *Romer* should have been determinative in *Lofton*.[116]

The court in *Lofton* states that it is permissible for Florida to exclude only homosexuals in such a broad manner because "[i]t is not irrational to think that heterosexual singles have a markedly greater probability of eventually establishing a married household

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110. *Id.* at 633.

111. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 827 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

112. *See id.* at 826-27.

113. Petition for Writ of Certiorari at 23, Lofton v. Sec'y of the Fla. Dep't. of Children & Families, 2004 WL 2289198 (U.S.) (No. 04-478) (arguing that the *Lofton* court fails to address the overinclusive and underinclusive problem in a substantive manner); *see also Lofton*, 377 F.3d 1275, 1296-1301 (Barkett, J., dissenting from denial of rehearing en banc) (arguing emphatically that there is no legitimate rational relationship between Florida's proffered justifications and its sweeping categorical adoption ban against homosexuals), *cert. denied*, 125 S. Ct. 869 (2005).

114. *Lofton*, 377 F.3d at 1296 (Barkett, J., dissenting from denial of rehearing en banc).

115. *See id.* at 1295-1301 (Barkett, J., dissenting from denial of rehearing en banc); Timothy P.F. Crowley, Lofton v. Kearney*: The United States District Court for the Southern District of Florida Holds Florida's Statutory Ban on Gay Adoption is Not Offensive to the Constitution*, 11 LAW & SEXUALITY 253 (2002) (arguing that the court was wrong to not find the Florida statute as motivated by animus).

116. *See* Petition for Cert. at 19-23 (arguing that the *Lofton* court goes to great lengths to subvert the ruling in *Romer*, creating a set of interpretations that would make the Supreme Court's holdings so narrow that they would be limited only to the peculiar facts of each decision).

and, thus, providing their adopted children with a stable, dual-gender parenting environment."[117] The problem with this logic is that it does not capture how the law actually operates. Florida allows heterosexual singles to adopt, demonstrating the fact that "it is not marriage that guarantees a stable, caring environment for children but the character of the individual caregiver."[118] Also, the statute does not contain any preference for married couples.[119] Because neither a heterosexual who has no intention of ever marrying nor a homosexual who is already married (to someone of the opposite sex) will be barred from adopting, the statute cannot possibly be designed "to place children in stable [heterosexual] homes with two parents."[120] Instead, the statute is "designed to preclude gays and lesbians from adopting, interests of the children notwithstanding."[121] The *Lofton* court goes on to say that, even if heterosexual singles never marry, it is rational to think they "are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence."[122] The

117. *Lofton*, 358 F.3d at 822 (panel).

118. *Lofton*, 377 F.3d at 1298 (Barkett, J., dissenting from denial of rehearing en banc).

119. *See id.* at 1297-98 (Barkett, J., dissenting from denial of rehearing en banc) (explaining how evaluations of prospective parents are not based on projected marital status and that Florida does not ask applicants for a commitment of plans to marry).

120. Strasser, *supra* note 106, at 307; *see also Lofton*, at 1297-98 (Barkett, J., dissenting from denial of rehearing en banc) (pointing out that Florida does not require heterosexual applicants to disclose future marriage plans or prospects in order to achieve its proffered objective).

121. Strasser, *supra* note 106, at 307.

122. *Lofton*, 358 F.3d at 822 (panel); *cf.* Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345, 377-380 (2003) (arguing that children should be raised by a father and mother and criticizing studies showing no difference between children raised by heterosexuals and those raised by homosexuals). *But cf.* Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 694, 724-47 (2003) (arguing in part that "the need to avoid gender role nonconformity and to promote what it takes to be proper gender identity among children as a justification for prohibiting lesbians and gay men from adopting fails to pass constitutional muster under the Equal Protection Clause"); Cooper, *supra* note 75, at 185 (pointing out that recently the American Academy of Pediatrics announced its support of co-parent and second-parent adoptions by homosexuals and that current studies answer conclusively many of the previous criticisms regarding such adoptions); Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 57-59 (2003) (arguing research does not support a link between having heterosexual parents and "traditional gender roles"); Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 205 (1995) (noting that social science research shows that "the sexual orientation of adoptive parents should be considered irrelevant"); Judith Stacey & Timothy J. Biblarz,

Lofton decision boils down to the court's belief that the law is rational because the awkward and emotional experience of heterosexual development would be foreign to gay people who could not appropriately guide a teenager through such a period.[123] With this misguided assumption, the *Lofton* court completely avoids a thorough analysis of the means and ends, and instead injects its own dogma.[124] Here, the court also fails to address the fact that, as foster parents throughout the state of Florida, gays and lesbians are already effectively raising children during their teenage years.[125]

The Florida law is also underinclusive because the law's proposed aim is to protect the best interests of the child, but homosexuals are the only category specifically targeted in this effort.[126] The Florida law does not provide for a blanket disqualification of any other category of persons.[127] It does not, for instance, categorically disqualify substance abusers or people with a history of domestic violence.[128] Florida administers a special review process to consider the applicants who have a history of mistreating children and does not categorically deny them the privilege of adoption.[129] To better achieve the purported goal of finding parents who are in the best interests of the child, the law might categorically exclude those who have a criminal history, a record of child neglect or abuse, or those who have been denied access to the foster care system, rather than homosexuals.[130]

(How) Does the Sexual Orientation of Parents Matter?, 66 AM. SOC. REV. 159, 176-79 (2001) (refuting the claim that there are no differences between the children of heterosexual parents and children of gay parents but endorsing the view that social science research provides no ground for taking sexual orientation into account with respect to parental rights).

123. *See Lofton*, 358 F.3d at 822 (panel).

124. *See Lofton*, 377 F.3d at 1299-1300 (Barkett, J., dissenting from denial of rehearing en banc) (arguing that not only is the argument that gays will not know how to talk to their kids about puberty ridiculous, but that it is akin to preventing a white family from adopting a black child or an American family from adopting an immigrant child).

125. *See supra* text accompanying notes 29-30.

126. *See supra* Part II.

127. *See supra* note 74 and accompanying text; *cf.* Strasser, *supra* note 106, at 300 (pointing out that the policy permits singles to adopt even though the state justifies barring certain unmarried couples from the adoption process based on a preference for marriage).

128. *See* FLA. STAT. ANN. § 63 (West Supp. 2005); Petition for Writ of Certiorari at 5, Lofton v. Sec'y of the Fla. Dep't of Children & Families, 2004 WL 2289198 (U.S.) (No. 04-478).

129. *See* Petition for Cert. at 5.

130. *See id.* (explaining how the Florida law allows individuals with a history of substance abuse, and even child abuse, an opportunity to be considered as adoptive

While legislatures can deal with problems in a piecemeal fashion, the law must still be constitutional and not be the product of animus.

B. *The Florida Law Is Not Rational Because It Is Not in the Best Interests of Children*

Contrary to its position on adoption, Florida permits homosexuals to be foster parents and legal guardians.[131] Florida state law also employs the best interests of the child standard to govern its operations with respect to foster care.[132] The Department of Children & Families places children in homosexual foster homes every year under the understanding that children will have a caring and stable foundation in these homes.[133] Yet, Florida maintains that homosexual parents do not meet the best interests of the state's children who are up for adoption.[134] This inconsistency between the foster care system and the adoption system is irrational because the two operations serve similar purposes and often work hand-in-hand.[135] Because Florida prevents adoptions by gays and lesbians "even where the adoptions would promote the best interests of children, the state's commitment to bettering children's lives is open to question."[136] Not granting adoption rights, which are legally greater parental rights than foster care rights, to gays and lesbians can only be explained by animus towards homosexuals.[137]

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parents).

131. *See supra* notes 65-71 and accompanying text.

132. *See supra* notes 64-67 and accompanying text.

133. In some cases, foster agencies acknowledge the superiority of gay and lesbian families as foster parents. *See* Gesing, *supra* note 75, at 855-56 (noting that "various foster agencies have made special efforts to place homosexual children, as well as those struggling with issues of their sexuality, in gay and lesbian foster homes," and that this practice has increased after many homosexual foster children were ridiculed or punished by their heterosexual foster families).

134. *See supra* notes 72-76 and accompanying text.

135. *See* Turbe, *supra* note 43, at 384-90 (explaining that Florida applies the best interests of the child standard to all proceedings involving child welfare, except for when homosexuals would like to adopt, and that this inconsistency is purely discriminatory).

136. Strasser, *supra* note 106, at 300; *see also* Grigsby, *supra* note 75, at 225 (suggesting that anti-homosexual policies are not in the child's best interests); Nicole Sheppe, *Georgia's Children on Our Minds . . .*, 55 MERCER L. REV. 1415, 1450 (2004) (pointing out that preventing homosexual adoptions by both parents may not be in the best interests of the child because a nonrecognized parent would not be subject to duties like child support).

137. *Compare* FLA. STAT. ANN. § 63.032(2) (West Supp. 2005) *with id.* § 409.175(2)(e) (defining "adoption" and "family foster home" respectively and describing some of the legal rights that accompany those terms).

John Doe's experience with Florida's adoption system is not unique.[138] Children who are not immediately able to enter the adoption process are first put in foster care.[139] Often, these children have special needs.[140] "In the years between 1986 and 1996, reports indicate that . . . [o]f those children lucky enough to be adopted, 65% of them were adopted from former foster care parents."[141] Furthermore, about "25,000 children leave the foster care system every year, not because they have been adopted out, but rather because they have been 'aged out of the system' when they reach the age of 18."[142] At the time Steven Lofton sought review of the Eleventh Circuit's decision, he and his partner had been foster parents to John Doe for thirteen years[143] but were denied the ability to adopt him. After years of developing a close and stable relationship with their foster son,[144] they could do nothing if the state decided to take Doe away and place him with heterosexual parents. Organizations involved with children's issues have lamented the irrationality of these inconsistent policies.[145]

The court in *Lofton* claims the difference afforded to the foster care system is permissible because "foster care and guardianship have neither the permanence nor the societal, cultural, and legal significance as does adoptive parenthood."[146] This reasoning, however, ignores what is actually happening to Florida's children, whose interests are supposedly being protected by the law.[147] The court's approval of the state's irrational judgment on the moral acceptability of certain households reflects a failure to consider the emotional needs and interests of Florida's children.[148] "The pretextual nature of [Florida's] presumptions is

138. *See supra* Part I.

139. *See* Cooper, *supra* note 75, at 181 (noting that the current system places "hard-to-place" children in the foster care system).

140. *Id.*

141. *Id.* at 180.

142. *Id.*

143. Petition for Cert. at 8; Nieves, *supra* note 29.

144. Lofton v. Kearney, 157 F. Supp. 2d 1372, 1379 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804 (11th Cir. 2004).

145. *See* Press Release, American Civil Liberties Union, *supra* note 16.

146. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 824 (11th Cir. 2004).

147. *See* Strasser, *supra* note 106, at 307 (arguing Florida claims that it wants to promote stability for children and place them in homes that are in their best interests, but that the state's actions suggest that its real commitment is to something else); *supra* notes 132-134 and accompanying text.

148. *See supra* notes 132-134 and accompanying text.

supported by the substantial gap between [its] antigay policy and the best interests of the child, which suggests that hysteria about or obsession with fantasized gay predation still underlies the policies."[149] This is "precisely the problem found unconstitutionally irrational" in *Romer*.[150]

The disparity of the two systems is suspicious because of the differing legal value accorded each privilege. In effect, the state of Florida is recognizing a limited legal right for a certain category of persons while denying them broader rights, all the while using the same standard to determine eligibility in either category. The state, not wanting to grant legal parental rights to gays and lesbians, but desperately needing foster homes, denies legal parental rights to gays while simultaneously employing them as parents to take care of Florida's foster children.[151] These are the precise makings of animus. When the state establishes a pretext for the purpose of wanting to harm a minority, the state operates under animus.[152] The *Lofton* court is wrong to gloss over the disparity in the system and seems to do so because a thorough analysis would demonstrate that the rationale proffered for the law is irrational.

C. *The Florida Law Is Not Rational Because It Is Directed at Homosexuality as an Identity Rather than at Homosexual Activity*

The final problem with the *Lofton* court's analysis is the way it discusses the difference between homosexual conduct and homosexual identity. In an apparent effort to distance the case at hand from *Romer*, the court in *Lofton* argues that the Florida law is permissible in comparison to Colorado's amendment, because it is directed at homosexual conduct and not status.[153] The court's distinction, that the law is permissible because it targets only those who participate in homosexual conduct and not those who

149. WILLIAM N. ESKRIDGE, JR., GAYLAW 213 (1999).

150. *Id.*

151. *Cf.* Hong, *supra* note 122, at 38 (arguing the goal of some legislators in enacting bans on gay adoption is to administer a preemptive strike against gay marriage, because many consider the right of gay marriage to be naturally conferred to gay families that have the right to legally adopt children).

152. *See* ESKRIDGE, *supra* note 149, at 213 (arguing that "[a]ny effort by the state to use children to make a symbolic statement of animus against gay people is more vicious than the [*Romer*] initiative, unless a parent's sodomy can be cogently tied to the child's best interests by a nonhysterical, nonnarcissistic, nonobsessional chain of factual reasoning").

153. *See supra* notes 78-80.

identify as homosexual, is quite meaningless.[154] The court seems to be suggesting that a homosexual who does not practice homosexual activities could be an adoptive parent, or at least would not be within the class of people distinguished in Florida's law.[155] As a threshold matter, it is not workable to demand celibacy from a potential homosexual applicant in exchange for a child. More importantly, the court's distinction does not match the actual application of the law.

When participating in Florida's adoption process, an applicant is required to check a box that states whether or not she or he is a homosexual.[156] If the box is checked, then DCF automatically denies the application.[157] Surprisingly, the adoption form does not have a box for a nonpracticing homosexual.[158] To the dismay of anyone interested in participating in a "don't ask, don't tell" adoption policy, it appears the law targets homosexuals based on homosexual identity, regardless of sexual activities.[159] Furthermore, house visits required for adoption candidates work to deny homosexuals access to adoption rights, even if they lied about their sexual identity in order to adopt.[160]

The act of punishing an identity with the pretext of only punishing an activity is a standard equal protection problem and represents the exact ingredients of animus.[161] Interestingly, the Eleventh Circuit goes to great lengths to demonstrate that Florida

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154. *See* Dep't of Health & Rehabilitative Servs., v. Cox, 627 So. 2d, 1210, 1215 (Fla. Dist. Ct. App. 1993) (recognizing that the distinction between homosexual orientation and homosexual activity is unreasonable because the activity is nothing more than the mere expression of the orientation); *see also* Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1299 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc) (pointing out that *Lawrence v. Texas* makes the distinction in Florida's law impermissible), *cert. denied*, 125 S. Ct. 869 (2005).

155. *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 827 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

156. *See* Fla. Dep't of Children & Families, CF-FSP 5071, Adoptive Home Application (2003), http://www.dcf.state.fl.us/publications/eforms/fsp5071.pdf (last visited Mar. 3, 2005) [hereinafter *Adoptive Home Application*]; *supra* notes 33-34 and accompanying text.

157. *See supra* notes 35-36 and accompanying text.

158. *See Adoptive Home Application*, *supra* note 156.

159. *See* Strasser, *supra* note 106, at 300-01.

160. *See* Petition for Writ of Certiorari, Lofton v. Sec'y of the Fla. Dep't of Children & Families at 11, 2004 WL 2289198 (U.S.) (No. 04-478) (explaining the factual history of Doug Houghton, a co-plaintiff, who experienced a favorable home study but then had the evaluator tell him that, by law, he was not qualified to adopt the child of whom he was the legal guardian).

161. *See supra* note 89 and accompanying text.

is not punishing homosexual identity.[162] The court simply proves too much. Its awkward awareness of its own bigotry is akin to Justice Scalia's claim in his *Lawrence* dissent—neither claim to have anything against gay people exercising some limited set of rights, they just don't want them to have the same protection of the law that heterosexuals do.[163] Instead, "Florida's ban is better described as a 'status-based enactment' potentially 'divorced from any factual context' than a valid exercise in governance."[164]

Even if the identity/activity distinction and justification is accepted, the *Lofton* court does not address the fact that it is not constitutional after *Lawrence* to criminalize homosexual activity.[165] While the court argues under a due process analysis that *Lawrence* does not guarantee a fundamental right to sodomy, this does not respond to the problem that the Florida statute is denying a privilege to a single category of persons based solely on their practice of a legal activity. After *Lawrence*, this is unacceptable. Even if *Lawrence* does not represent the end to all "morality" legislation,[166] it certainly does not allow the government to disadvantage people engaging in a constitutionally protected practice.

If the state desires to target a class of people and deny that class rights based on a specific legal activity, then Florida needs to deny adoption privileges to all of those who practice sodomy, homosexual or heterosexual. Justice O'Connor's concurrence in *Lawrence* should be instructive to the court in *Lofton*.[167] Under that analysis, a discriminatory law that is only directed at homosexuals and not heterosexuals, even though both groups practice the same activity, violates the Equal Protection Clause.[168] Justice O'Connor invokes the basic tenet of the Equal Protection Clause that the *Lofton* court cannot seem to fathom—that the Constitution "neither knows nor tolerates classes among citizens."[169]

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162. *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 827 (11th Cir. 2004).

163. *See* Lawrence v. Texas, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

164. Crowley, *supra* note 115, at 264 (citing Romer v. Evans, 517 U.S. 620, 623 (1996)).

165. *See Lawrence*, 539 U.S. at 578 (Texas has no right to criminalize private, consensual, sexual conduct among adults).

166. *See supra* note 97 and accompanying text.

167. *See supra* note 96 and accompanying text.

168. *See supra* note 96 and accompanying text.

169. *See Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

Conclusion

Steven Lofton should be granted the same rights as any heterosexual citizen of Florida who is capable and deserving enough to raise an adopted child. He and other gay persons should be allowed to apply to be adoptive parents, be subject to the scrutiny of the Department of Children & Familes, and be granted the right to adopt their foster children if an evaluation shows they meet state standards. The plaintiffs in *Lofton* are not asking for special rights or considerations. Steven Lofton and thousands of other gays and lesbians are asking to be treated like their heterosexual friends and neighbors. Most importantly, the best interests of Florida's children are served if gays and lesbians are afforded equal rights.

The court in *Lofton* is wrong in finding the Florida adoption ban constitutional. By employing a test that goes far beyond deferential rational basis review, the court tacitly approves of the animus that led to the enactment of Florida's adoption law. In doing so, the court ignores the inexcusable gap between the law's means and ends, ignores the disparity between the foster care and adoption systems, and ignores the thin pretext that serves as a justification for animus. These errors are too blatant to be excusable.