

Tulsa Law Review

Volume 40
Number 3 *The Legislative Backlash to
Advances in Rights for Same-Sex Couples*

Volume 40 | Number 3

Spring 2005

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Recommended Citation

Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 Tulsa L. Rev. 421 (2013).

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REBELLION IN THE ELEVENTH CIRCUIT: ON *LAWRENCE*, *LOFTON*, AND THE BEST INTERESTS OF CHILDREN

Mark Strasser*

I. INTRODUCTION

In *Lofton v. Secretary of the Department of Children and Family Services*,¹ the Eleventh Circuit upheld Florida's ban on adoptions by "any 'homosexual' person."² The decision was striking in its reasoning, emphasizing certain points as if they had great importance and then ignoring them in the analysis of the relevant issues. Yet the most striking aspect of the decision was that it was issued after the United States Supreme Court decided *Lawrence v. Texas*,³ and it seemed almost willful in its refusal to follow *Lawrence*. Basically, it is as if the Eleventh Circuit was throwing down the gauntlet and challenging the Court to either stand by or repudiate *Lawrence*.

Part II of this article examines the background of *Lofton* and discusses why it is implausible to believe that prohibiting adoption by gays and lesbians would in fact promote the interests of children and, especially, why refusing to permit the adoption at issue in *Lofton* had nothing to do with promoting the best interests of a child. Part III discusses *Lawrence* and how the *Lofton* court mischaracterized and misapplied both equal protection and due process jurisprudence in its desire to uphold a plainly unconstitutional statute. The article concludes by suggesting that the U.S. Supreme Court should have heard and reversed *Lofton*. By denying certiorari,⁴ the Court missed a great opportunity not only to protect very important interests but also to maintain its own credibility.

II. *LOFTON* AND THE BEST INTERESTS OF THE CHILD

In *Lofton*, the Eleventh Circuit upheld a Florida statute prohibiting gays and lesbians from adopting.⁵ The decision was especially surprising given that the state's paramount interest—promoting the best interests of the child—would have

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1. 358 F.3d 804 (11th Cir. 2004).

2. *Id.* at 807.

3. 539 U.S. 558 (2003).

4. 125 S. Ct. 869 (2005).

5. 358 F.3d at 806.

been promoted by permitting the adoption in this case.⁶ Best interests of the child notwithstanding, the Eleventh Circuit upheld the Florida law, making clear that both the court and the state are willing to sacrifice the interests of children to promote other objectives.

A. Background

Florida law prohibits adoptions by individuals otherwise qualified if those individuals are sexually active “homosexuals,”⁷ although the state does not prohibit members of the lesbian, gay, bisexual, and transgender (“LGBT”) community from being foster parents.⁸ The plaintiff, Steve Lofton, served as a foster parent for several children who had tested positive for HIV at birth.⁹ He petitioned to adopt a child (John Doe) he had been foster parenting since 1991.¹⁰ When his petition was rejected,¹¹ he challenged the Florida statute prohibiting his adoption of Doe.

The absurdity of Florida’s refusal to permit Lofton to adopt cannot be appreciated until one considers some of the particulars of the case. For example, Lofton’s parenting was “exemplary”¹² and, indeed, he had received an Outstanding Foster Parenting award.¹³ Lofton’s excellent parenting skills notwithstanding, the state was implicitly if not explicitly recommending that Doe be removed from the home in which he had lived for almost all of his thirteen plus years¹⁴ so that he could live with someone else. Even if a single individual or couple was willing to adopt Doe, it is hard to imagine that it would be better for him to be uprooted at this stage of his life from the only parents and family that he had ever known so that he could live with strangers.¹⁵ Yet that was what Florida was implicitly claiming would promote the best interests of Doe, a claim that on its face suggested that Doe’s interests were not the state’s foremost concern.

Apparently the state realized that it would be better for the child to remain with Lofton, because it offered to make him the child’s legal guardian.¹⁶ This indicates that Florida did not really want Doe removed from Lofton’s home, which may be just as well, given the difficulties in placing older children in

6. See *id.* at 810.

7. Fla. Stat. Ann. § 63.042(3) (West 2002) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”). For a discussion of the sexual activity requirement, see *infra* nn. 128-32.

8. *Lofton*, 358 F.3d at 823 (noting that Florida law does not prohibit gays and lesbians from being foster parents).

9. *Id.* at 807.

10. *Id.*

11. *Id.* at 808.

12. *Id.* at 807.

13. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1375 (S.D. Fla. 2001).

14. *Lofton*, 358 F.3d at 807 (noting that Doe was born on April 29, 1991).

15. Cf. Kari E. Hong, *Parens Patriarchy: Adoption, Eugenics and Same-Sex Couples*, 40 Cal. W. L. Rev. 1, 75 (2003) (“Florida’s assertions that a child will benefit from being raised by a married couple is rendered irrelevant in the consideration of whether Florida may remove Bert from his home of ten years, two parents, and four siblings.”).

16. See *Lofton*, 358 F.3d at 808.

adoptive homes.¹⁷ Yet that makes the state's policy all the more hypocritical. The state of Florida trumpeted "the primacy of the welfare of the child"¹⁸ while, for reasons having nothing to do with the child's welfare,¹⁹ denied Doe the benefits and permanency of adoption²⁰ by a parent who had cared for him since shortly after his birth²¹ and who wanted to cement his relationship with Doe. Given all of this, it is difficult to understand how the Eleventh Circuit could even credit Florida's claim that it had Doe's interests at heart.

B. *The Legal Right to Adopt*

As an initial matter, it might be unclear why the state is given so much deference when it comes to adoption.²² After all, as the U.S. Supreme Court recognized in *Washington v. Glucksberg*,²³ the Fourteenth Amendment protects the right to have children.²⁴ Yet as the *Lofton* court correctly noted, "there is no fundamental right to adopt, nor any fundamental right to be adopted."²⁵ Thus, the fundamental interest which parents have in the care and custody of their children²⁶ does not extend to the interest that a would-be parent has in adopting a child.²⁷ It is a different matter once an individual has adopted a child,²⁸ but at issue here was whether Lofton could adopt Doe, rather than the rights and responsibilities that would come into being once such a relationship had been legally established.

That said, however, the *Lofton* court may have overstated the matter when it noted that "adoption is wholly a creature of the state"²⁹ and implied that there was no liberty interest created by a foster care relationship. In *Smith v. Organization of Foster Families for Equality and Reform* ("OFFER"),³⁰ the U.S. Supreme Court

17. Cf. Lisa Carpenter, Student Author, *Changing the Balance: Rhode Island's Amended Termination of Parental Rights Statute*, 50 Wash. U. J. Urb. & Contemp. L. 153, 201 (1996) ("A child's chances of being adopted diminish as the child grows older.").

18. *Lofton*, 358 F.3d at 810.

19. See *Lofton v. Sec. of the Dept. of Children & Fam. Servs.*, 377 F.3d 1275, 1296 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing en banc) ("Florida's proffered justifications for the categorical ban here are false, do not rationally relate to the best interests of children, and are simply pretexts for impermissible animus and prejudice against homosexuals.").

20. See *Lofton*, 358 F.3d at 824 (noting that "foster care and guardianship have neither the permanence nor the societal, cultural, and legal significance as does adoptive parenthood, which is the legal equivalent of natural parenthood").

21. *Id.* at 807.

22. *Id.* at 810 (noting that "the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas").

23. 521 U.S. 702 (1997).

24. *Id.* at 720 (citing *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535 (1942)).

25. *Lofton*, 358 F.3d at 811.

26. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

27. See *Mullins v. Or.*, 57 F.3d 789, 794 (9th Cir. 1995) ("[W]hatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest.").

28. See *Lofton*, 358 F.3d at 824 (noting that "adoptive parenthood . . . is the legal equivalent of natural parenthood").

29. *Id.* at 809.

30. 431 U.S. 816 (1977) [hereinafter *OFFER*].

contrasted foster relationships with blood or adoptive relationships, reasoning that the former must give way to the latter.³¹ Yet the Court was not thereby suggesting that no liberty interest was implicated in foster relationships but, instead, that the implicated liberty interest was outweighed by the relationship with the natural or adoptive parents.

The *OFFER* Court noted that children in foster care were often placed there voluntarily by the natural/adoptive parents with the understanding that the children would be returned on a specified date or when a specified event had occurred.³² The foster parents would then be on notice that the relationship was to be temporary and thus would have no justified expectation of permanence.³³ Indeed, the *Lofton* court noted that “under Florida law neither a foster parent nor a legal guardian could have a justifiable expectation of a permanent relationship with his or her child free from state oversight or intervention,” since “foster care is designed to be a short-term arrangement while the state attempts to find a permanent adoptive home.”³⁴ Needless to say, the arrangement at issue here could hardly be characterized as “short-term,” having lasted more than thirteen years. At the very least, the state should not have been allowed to argue that *Lofton* could be precluded from adopting *Doe* because foster care is a short-term arrangement, given the number of years that this “short-term” arrangement had already involved.

C. *The Lofton Court’s Analysis of the Best Interests of Children*

The *Lofton* court noted that “in the adoption context, the state’s overriding interest is the best interests of the children whom it is seeking to place with adoptive families.”³⁵ Yet it is not as if there were numerous suitable families competing to adopt *Doe*. Here, the state was refusing to permit an adoption (1) by an exemplary parent (2) with whom the thirteen-year-old had lived since shortly after his birth (3) when there was no evidence of anyone else even expressing an interest in adopting the child.

Indeed, it is precisely because there was no other competing prospective adoptive family that the court’s analysis rings so hollow. The court made clear that the paramount concern was the child’s rather than the would-be parent’s interest—“the state’s overriding interest is not providing individuals the opportunity to become parents, but rather identifying those individuals whom it deems most capable of parenting adoptive children and providing them with a secure family environment.”³⁶ Yet in the case at issue, the child had grown up in a

31. *Id.* at 846.

32. *Id.* at 825.

33. Mark Strasser, *Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results*, 5 J.L. & Fam. Stud. 297, 302 (2003).

34. 358 F.3d at 814.

35. *Id.* at 810.

36. *Id.* at 811.

secure family environment for nearly all of his life and the state was refusing to give legal recognition to that family.

To support its analysis of the liberty interests implicated in foster family relationships, the *Lofton* court cited several cases that allegedly supported its position. For example, the court discussed *Drummond v. Fulton County Department of Family and Children's Services*,³⁷ in which the Fifth Circuit upheld a lower court's refusal to permit white foster parents to adopt a mixed-race child whom they had parented for two years.³⁸ Yet the *Lofton* court failed to mention several important differences between what was at issue in *Drummond* and what was at issue in *Lofton*. For example, while two years of foster parenting is certainly a significant amount of time, *Lofton* involved a relationship that had lasted more than six times that long. Further, in *Drummond*, there was another couple seeking to adopt the child³⁹ and the lower court was deciding which couple would promote the best interests of the child. In contrast, no other couple was seeking to adopt the child in *Lofton*, and the state and the court were implicitly suggesting that it would be better for the child not to be adopted at all than to be adopted by the individual whose parenting had been exemplary for the past thirteen years. Finally, the *Drummond* court made clear that it was permissible to consider race not as an "automatic" factor but as one among many.⁴⁰ In contrast, one factor was an automatic bar to adoption in *Lofton*, and the individual barred was someone whom the court and the state admitted was an exemplary parent.

The *Lofton* court also mentioned *Mullins v. Oregon*,⁴¹ in which the Ninth Circuit rejected the claim that a biological grandparent has a protected liberty interest in adopting her grandchildren.⁴² Yet the grandparents in that case did not have a parent-child relationship with those children, much less one of over thirteen years duration.⁴³ If a biological parent having no relationship with his child does not have a protected liberty interest in that relationship,⁴⁴ one certainly would not expect a grandparent to have a more privileged position. This merely underscores the importance of having an established relationship with the child, which *Lofton* clearly had.

37. 563 F.2d 1200 (5th Cir. 1977) (en banc).

38. See *Lofton*, 358 F.3d at 813 (discussing *Drummond*, 563 F.2d 1200).

39. *Drummond*, 563 F.2d at 1205 ("But can race be taken into account, perhaps decisively if it is the factor which tips the balance between two potential families, where it is not used automatically?").

40. *Id.* at 1204-05.

41. 57 F.3d 789 (1995) (cited in *Lofton*, 358 F.3d at 814).

42. The grandmother's husband was the children's step-grandfather. *Id.* at 791.

43. *Id.* ("[B]y their own admission, the Mullinses never have had more than minimal contact with their grandchildren, seeing them only occasionally and even then only for a few hours at a time").

44. See *Lehr v. Robertson*, 463 U.S. 248, 262 (1983):

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

In *Procopio v. Johnson*,⁴⁵ the Seventh Circuit upheld a decision to return a child to her biological parents over the objections of the child's foster parents.⁴⁶ While one might disagree with the decision to return the child to her biological parents given the circumstances,⁴⁷ *Procopio* is not particularly relevant in a context in which the foster and biological parents are not competing and, indeed, no suitable parent was competing to adopt the child in *Lofton*.

The *Lofton* court suggested that Florida "has a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children,"⁴⁸ citing the Supreme Court's decision in *Palmore v. Sidoti*⁴⁹ for support. Yet *Palmore* provides support for Lofton's position rather than the state's, as is clear when one considers the facts of the case. Linda Sidoti Palmore and Anthony Sidoti divorced, and Linda was awarded custody of their daughter, Melanie.⁵⁰ About a year and a half later, Anthony filed for a modification of custody because Linda was cohabiting with someone of a different race whom she subsequently married.⁵¹ The Florida court hearing the case concluded that Melanie's best interests would be served were she to live with her father.⁵²

The *Palmore* Court noted approvingly that the trial court had recognized that the child's welfare was the controlling factor.⁵³ However, the Supreme Court explained that the trial court "was entirely candid and made no effort to place its holding on any ground other than race,"⁵⁴ at least in the sense that the court took into account what it perceived would be the likely result if Melanie were to continue living with her mother and her mother's new husband. The Florida Supreme Court believed that:

[D]espite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.⁵⁵

Thus, the Florida court suggested that individuals (or their children) who did not approve of the mother's choice of a mate might manifest their disapproval in ways that would adversely affect Melanie, e.g., by teasing her about her mother's husband.

45. 994 F.2d 325 (7th Cir. 1993) (cited in *Lofton*, 358 F.3d at 814).

46. *Id.* at 333.

47. For example, the parents saw the child rather infrequently, *see id.* at 327 n. 2, and two of the mother's other children had been taken into protective custody after she had been charged with abandoning them. *Id.* at 327.

48. *Lofton*, 358 F.3d at 819.

49. 466 U.S. 429 (1984).

50. *Id.* at 430.

51. The Sidotis were divorced in May of 1980 and Anthony Sidoti filed for a modification of custody in September 1981. *Id.* at 430.

52. *Id.* at 431.

53. *See id.* at 432.

54. *Palmore*, 466 U.S. at 432.

55. *Id.* at 431 (emphasis omitted).

The *Palmore* Court agreed that the state “has a duty of the highest order to protect the interests of minor children, particularly those of tender years.”⁵⁶ Further, the Court believed that Melanie might well be subjected to certain pressures if she resided with her mother to which she would not be subjected if she resided with her father, since it “would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated.”⁵⁷ Recognizing the “risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin,”⁵⁸ the Court understood that, all else being equal, it might be better for Melanie to live in an environment free of these pressures and stresses.

While agreeing with the lower court’s analysis of what would promote Melanie’s best interests, the *Palmore* Court did not therefore say that Melanie should live with her father rather than her mother. Rather, the Court suggested that “the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother.”⁵⁹ Thus, the Court was unwilling to permit the irrational prejudices of others to come between a mother and her child.

The *Palmore* Court stated that the “Constitution cannot control such prejudices but neither can it tolerate them.”⁶⁰ When suggesting that such attitudes could not be tolerated, the Court was not saying that people could be punished for having such views. On the contrary, the Court suggested that such biases were “outside the reach of the law.”⁶¹ That said, however, the Court clearly stated that the “law cannot, directly or indirectly, give them effect,”⁶² i.e., the state could not allow these possible biases to enter into a calculation of which parent’s custody of Melanie would promote her best interests. The Court refused to permit an analogue of the “heckler’s veto” in the modification of custody context.⁶³

Palmore suggests that the best interests test should be understood in a particular way, namely, free from private biases. Yet *Lofton* involved biases which are even less closely related to the welfare of children than did *Palmore*, since Doe’s best interests would have been promoted by remaining with the individual, Lofton, who had parented him for the first thirteen years of his life.⁶⁴

56. *Id.* at 433.

57. *Id.*

58. *Id.*

59. *Palmore*, 466 U.S. at 433.

60. *Id.*

61. *Id.*

62. *Id.*

63. See Alafair S.R. Burke, *A Few Straight Men: Homosexuals in the Military and Equal Protection*, 6 *Stan. L. & Policy Rev.* 109, 116 (1994) (discussing *Palmore* as an analogue of heckler’s veto jurisprudence); Vincent J. Samar, *Autonomy, Gay Rights and Human Self-Fulfillment: An Argument for Modified Liberalism in Public Education*, 10 *Wm. & Mary J. Women & L.* 137, 191 (2004) (offering a kind of heckler’s veto analysis of *Palmore*).

64. *Lofton*, 358 F.3d at 808 (“[I]n light of the length of Doe’s stay in Lofton’s household[,] DCF offered Lofton the compromise of becoming Doe’s legal guardian.”).

Thus, at issue here was not the claim that Doe would have been better off living elsewhere, for example, because he would be teased if he lived with Lofton.⁶⁵ Rather, what was at issue here was whether the adoption would be permitted, *given that it would promote Doe's best interests by remaining with Lofton*. Because of motivations having nothing to do with the best interests of children,⁶⁶ the *Lofton* court upheld a statute which undermined Doe's best interests.

The *Lofton* court claimed: "Because of the primacy of the welfare of the child, the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas."⁶⁷ Yet here, the state's classification *undermined* rather than promoted the welfare of the child at issue, so it was especially difficult to understand why the policy passed muster. Thus, not only was the classification itself one which likely did not pass constitutional muster,⁶⁸ but even deferential rational basis review would suggest that the classification at issue was not rationally related to the goal articulated by the state.

III. LAWRENCE AND THE CONSTITUTIONALITY OF THE FLORIDA ADOPTION STATUTE

One of the remarkable aspects of *Lofton* was its treatment of *Lawrence v. Texas*. The tone of the *Lofton* decision was that of an appellate court rebuking a lower court rather than that of a lower court attempting in good faith to implement the law as made clear by the U.S. Supreme Court. For that reason among others, the *Lofton* decision almost demands review.

A. Lawrence v. Texas

In *Lawrence*, the Court struck down Texas's same-sex sodomy ban on due process grounds.⁶⁹ The Court suggested that "there are other spheres of our lives and existence . . . where the State should not be a dominant presence."⁷⁰ Within that protected sphere are "freedom of thought, belief, expression, and certain intimate conduct,"⁷¹ including the conduct at issue before the *Lawrence* Court.

The *Lawrence* Court understood that *Bowers v. Hardwick*⁷² had held that the Due Process Clause does not protect the right to engage in same-sex relations.⁷³ While the Court might nonetheless have struck down the Texas statute on equal protection grounds,⁷⁴ the Court instead wrote, "*Bowers* was not correct when it

65. This was rejected as a possible basis for denying homosexuals the right to adopt in *State Department of Health and Rehabilitative Services v. Cox*, 627 So. 2d 1210, 1220 n. 10 (Fla. 2d Dist. App. 1993), *rev'd on other grounds*, 656 So. 2d 902 (Fla. 1995).

66. *Supra* n. 19 and accompanying text.

67. *Lofton*, 358 F.3d at 810.

68. *See infra* pt. III(C).

69. *Id.* at 578.

70. *Id.* at 562.

71. *Id.*

72. 478 U.S. 186.

73. *Lawrence*, 539 U.S. at 573-74; *Bowers*, 478 U.S. at 196.

74. *See Lawrence*, 539 U.S. at 579-85 (O'Connor, J., concurring) (suggesting that the Texas statute violates equal protection rather than due process guarantees).

was decided, and it is not correct today.”⁷⁵ Certainly, one might understand how the *Bowers* holding was vitiated by subsequent cases, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁷⁶ and *Romer v. Evans*,⁷⁷ and in fact the *Lawrence* Court said as much.⁷⁸ Yet the *Lawrence* Court was making a stronger claim when suggesting that *Bowers* was incorrectly decided, namely, that a different result should have been reached given the then-existing precedent.

To help explain why *Bowers* was incorrectly decided, the *Lawrence* Court started out by noting that there “are broad statements of the substantive reach of the liberty under the Due Process Clause in earlier cases.”⁷⁹ The Court mentioned two early cases in particular—*Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*⁸⁰ and *Meyer v. Nebraska*.⁸¹ While the Court did not discuss *Pierce* and *Meyer* but instead began its analysis with *Griswold v. Connecticut*,⁸² it is worth noting that both *Pierce* and *Meyer* have been described as protecting fundamental interests. For example, in *Glucksberg*, the Court noted that the Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests,”⁸³ and then explained that “the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one’s children,”⁸⁴ citing *Meyer* and *Pierce* for support.⁸⁵

While the importance of the interests implicated in *Meyer* and *Pierce* is firmly established, one reading the opinions themselves would not infer that those interests are particularly significant. In *Pierce*, the Court did not describe the right to direct one’s child’s education as fundamental.⁸⁶ Rather, the Court merely noted that “the Act of 1922 [requiring children between certain ages to attend public school] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control,”⁸⁷ and then further explained that “rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.”⁸⁸ By the same token, the *Meyer* Court struck down a law prohibiting the teaching of German to pupils who had not yet passed the eighth grade.⁸⁹ The *Meyer* Court did not talk about a fundamental right to direct

75. *Id.* at 578 (majority).

76. 505 U.S. 833 (1992).

77. 517 U.S. 620 (1996).

78. See *Lawrence*, 539 U.S. at 576 (“The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*.”).

79. *Id.* at 564.

80. 268 U.S. 510 (1925).

81. 262 U.S. 390 (1923).

82. 381 U.S. 479 (1965).

83. 521 U.S. at 720.

84. *Id.*

85. *Id.*

86. See generally 268 U.S. 510.

87. *Id.* at 534-35.

88. *Id.* at 535.

89. *Meyer*, 262 U.S. at 396-97.

the education of one's children⁹⁰ but merely suggested that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."⁹¹ Both of these decisions used language which might now be associated with rational basis review—the laws were arbitrary or lacking a reasonable relationship to a legitimate state purpose—and yet both decisions are cited for the proposition that parents have a fundamental interest implicated in matters related to the raising of their children.

The *Lawrence* Court described *Griswold* as "the most pertinent beginning point"⁹² for its analysis of which liberties were protected by the Due Process Clause, so a brief analysis of *Griswold* is in order. The *Griswold* Court suggested that the case before it "concern[ed] a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."⁹³ Indeed, the Court eloquently described marriage as:

[A] coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects . . . [which is] for as noble a purpose as any involved in our prior decisions.⁹⁴

The Court thus made clear that marriage was protected by the Constitution, its not being expressly mentioned anywhere in the Constitution notwithstanding.⁹⁵

One difficulty with this analysis, however, is that while the *Griswold* Court was offering an idealistic and romanticized view of marriage, Connecticut law was not addressing marriage as such.⁹⁶ Thus, *Griswold* was not about whether particular individuals could marry or even whether individuals who had married would have their marriages recognized in other jurisdictions but, rather, whether a Connecticut law prohibiting the use of contraceptives was constitutional.⁹⁷ Acknowledgment of the importance of marriage notwithstanding, the Court does not suggest anywhere in the opinion that the right to use contraception is fundamental.

In the next case discussed by the *Lawrence* Court, *Eisenstadt v. Baird*,⁹⁸ the Supreme Court held that Massachusetts could not prohibit unmarried individuals

90. The *Meyer* Court did suggest that "the individual has certain fundamental rights which must be respected," *id.* at 401, but nowhere did it state that the right to learn German or perhaps to have one's child learn German, was among them. Instead, the Court merely stated that "the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state." *Id.* at 403.

91. *Id.* at 399-400.

92. *Lawrence*, 539 U.S. at 564.

93. *Griswold*, 381 U.S. at 485.

94. *Id.* at 486.

95. See *Harris v. McRae*, 448 U.S. 297, 312 (1980) ("[T]he 'liberty' protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life.").

96. See *Griswold*, 381 U.S. at 480.

97. See *id.*

98. 405 U.S. 438 (1972) (cited in *Lawrence*, 539 U.S. at 565-66).

from having access to contraception. The Court did not say that individuals have a fundamental right to have access to contraception but, instead, that the Massachusetts law violated the Equal Protection Clause.⁹⁹ Indeed, rather than affirm the First Circuit's holding that there is a fundamental right to have access to contraception,¹⁰⁰ the Court refused to address that issue, instead saying, "We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."¹⁰¹ The *Eisenstadt* Court noted that it did not need to analyze whether the purpose behind the Massachusetts statute was "necessary to the achievement of a compelling state interest . . . because the law fails to satisfy even the more lenient equal protection standard."¹⁰² By striking down the statute using a less demanding form of review, the Court did not thereby establish that the right to access contraception was not fundamental—that issue the Court expressly refused to decide—but merely that the justification for the statute was sufficiently implausible that it could not withstand even more deferential review.

After discussing *Eisenstadt*, the *Lawrence* Court addressed *Roe v. Wade*¹⁰³ and *Carey v. Population Services International*.¹⁰⁴ In *Lawrence*, the Court explained that *Roe* "recognized the right of a woman to make certain fundamental decisions affecting her destiny"¹⁰⁵ and *Carey* struck down a law "forbidding sale or distribution of contraceptive devices to persons under 16 years of age."¹⁰⁶ Needless to say, it would indeed have been very difficult to establish that abortion rights were deeply rooted in this Nation's history and tradition at the time *Roe* was decided,¹⁰⁷ or that the right of minors to have access to contraception was deeply rooted in our history and tradition at the time *Carey* was decided.¹⁰⁸

After analyzing all these cases, the *Lawrence* Court addressed *Bowers*, explaining why it had been incorrectly decided at the time.¹⁰⁹ The point here is not to dispute that the rights and interests in these cases fall within the right to privacy and are fundamental, but merely to point out that the Court often did not describe them as fundamental in the very decisions in which they were found to be protected by the Fourteenth Amendment. One would have inferred otherwise from reading the *Lofton* decision.

99. *Id.* at 453.

100. *See id.* at 452-53 (describing the First Circuit's holding).

101. *Id.* at 453.

102. *Id.* at 447 n. 7 (emphasis in original).

103. 410 U.S. 113 (1973) (cited in *Lawrence*, 539 U.S. at 565).

104. 431 U.S. 678 (1977) (cited in *Lawrence*, 539 U.S. at 566).

105. *Lawrence*, 539 U.S. at 565.

106. *Id.* at 566.

107. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

108. *Eisenstadt* had been decided a mere five years before *Carey*, and *Griswold* had been decided a mere seven years before *Eisenstadt*. Prior to *Griswold*, states could prevent married couples from having access to contraception and could prevent minors from having such access too.

109. *See Lawrence*, 539 U.S. at 565-74.

The *Lofton* court recognized that *Lawrence* held that “substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct.”¹¹⁰ However, the court also noted that the *Lawrence* Court did not characterize this right as “fundamental,”¹¹¹ and was unwilling to read *Lawrence* as involving anything more than rational basis review. Indeed, the *Lofton* court was “particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis.”¹¹²

To establish that *Lawrence* was inconsistent with standard fundamental-rights analysis, the *Lofton* court noted that:

[T]he *Lawrence* opinion contains virtually no inquiry into the question of whether the petitioner’s asserted right is one of “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”¹¹³

Certainly, the Eleventh Circuit’s observation in *Lofton* is accurate—the *Lawrence* Court did not attempt to establish that same-sex sodomy was a liberty deeply rooted in the Nation’s history and tradition or implicit in the concept of ordered liberty. Yet the *Lofton* court failed to note that other interests recognized by the Court as fundamental also could not meet that test. For example, the rights to contraception, abortion, or even the right to marry someone of another race¹¹⁴ also would fail to meet that test.¹¹⁵ Thus, even bracketing *Lawrence*, the test articulated by the *Lofton* court simply is not the correct test, at least insofar as one wishes to provide a test which will pick out those interests which have been recognized as fundamental by the Supreme Court.

The *Lofton* court’s claim that fundamental rights must be deeply rooted in the Nation’s history and traditions is especially surprising because *Lawrence* rejected that such a test should be used to determine which interests were fundamental. In *Lawrence*, the Court expressly noted that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress,”¹¹⁶ and seemed to invite challenges to laws that once would have been thought clearly constitutional when it said, “As the

110. *Lofton*, 358 F.3d at 815.

111. *Id.* at 816.

112. *Id.*

113. *Id.* (quoting *Glucksberg*, 521 U.S. at 720-21).

114. See *Casey*, 505 U.S. at 847-48 (“Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century.”).

115. See Mark Strasser, *Sodomy, Adultery, and Same-Sex Marriage: On Legal Analysis and Fundamental Interests*, 8 UCLA Women’s L.J. 313, 319 (1998) (“[A]pplication of these criteria would suggest that no fundamental interests would be implicated if laws were passed prohibiting contraception, abortion, or interracial marriage, Supreme Court rulings to the contrary notwithstanding.”).

116. *Lawrence*, 539 U.S. at 579.

Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”¹¹⁷

When analyzing substantive due process guarantees in light of the insights of later generations, the *Lawrence* Court rejected the history and traditions test to which the *Lofton* court referred and instead embraced a kind of contemporaneous understanding model of substantive due process.¹¹⁸ A Court accepting that individuals in each generation can invoke the principles of the Constitution in the search for *greater* freedom¹¹⁹ and that liberties may be constitutionally protected once later generations understand that laws prohibiting the exercise of such liberties serve only to oppress¹²⁰ is of course rejecting that the content of the substantive due process guarantees is determined by that which has historically and traditionally been protected.¹²¹

For the *Lofton* court, the most significant reason to reject that same-sex relations implicate a fundamental interest:

[I]s 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, holding that it “furthers no legitimate state interests which can justify its intrusion into the personal and private life of the individual.”¹²²

Yet there are several reasons that the *Lofton* analysis is unpersuasive, especially in light of the very cases cited in *Lawrence* in which numerous interests, now considered fundamental, were held constitutionally protected without the Court employing strict scrutiny.¹²³ The *Lawrence* analysis mirrors the kinds of analyses offered in *Pierce* and *Meyer*—basically, the Court suggested in all of these cases that the state’s legitimate interests did not justify the intrusion imposed by the statute.¹²⁴ Further, as illustrated by *Eisenstadt*, the *Lofton* court’s analysis is faulty for yet another reason—simply because a statute fails to pass muster when a lesser level of scrutiny is employed does not establish that the interest at issue is not fundamental.¹²⁵

When analyzing whether the liberty protected under the Fourteenth Amendment includes the liberty to engage in adult, consensual, same-sex relations, the *Lawrence* Court noted: “When sexuality finds overt expression in

117. *Id.*

118. Cf. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1937 (2004) (noting that “*Lawrence* . . . looks beyond the American historical experience for insight both contemporary and cross-cultural”).

119. *See id.* at 1944.

120. *See Lawrence*, 539 U.S. at 578-79.

121. *See Constitutional Law—Substantive Due Process—Eleventh Circuit Upholds Florida Statute Barring Gays from Adopting.—Lofton v. Secretary of the Department of Children and Family Services*, 117 Harv. L. Rev. 2791, 2794 (2004) (“The *Lofton* court mistakenly refused to recognize the alteration in substantive due process analysis wrought by the Supreme Court in *Lawrence*.”).

122. *Lofton*, 358 F.3d at 817 (quoting *Lawrence*, 539 U.S. at 560).

123. *See supra* nn. 80-91 and accompanying text.

124. *See supra* nn. 86-90 and accompanying text.

125. *See supra* n. 93 and accompanying text.

intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”¹²⁶ The Court’s explanation that the Constitution protects “this choice” is ambiguous in that the choice might refer to the choice to engage in intimate conduct or, instead, the choice to enter into a personal bond that is more enduring. *Lawrence* has implications for the constitutionality of the Florida adoption statute no matter what interpretation is adopted, although the *Lofton* court seemed to ignore those implications almost willfully.

*B. The Florida Adoption Statute*¹²⁷

When first considering the constitutionality of the Florida statute, it might not be apparent why *Lawrence* is even implicated. However, that becomes exceedingly clear when the content of the statute is examined, since the Florida statute makes sexual relations a central focus of concern.

The *Lofton* court explained that the Florida statute prohibiting “adoption by any ‘homosexual’ person”¹²⁸ was “limited to applicants who are known to engage in current, voluntary homosexual activity.”¹²⁹ This qualification was thought to be important because it drew “a distinction between homosexual orientation and homosexual activity,”¹³⁰ and only imposed a burden on the latter. Thus, the statute was not designed to prevent those with a same-sex orientation from adopting,¹³¹ but only those who had voluntarily engaged in same-sex relations during the past year.¹³²

The *Lofton* court understood that *Lawrence* might pose difficulties for the Florida statute, explaining that “[l]aws that burden the exercise of a fundamental right require strict scrutiny and are sustained only if narrowly tailored to further a compelling government interest.”¹³³ As illustrated above,¹³⁴ the *Lofton* court then gave short shrift to the *Lawrence* analysis and holding, concluding that it was a “strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.”¹³⁵ Yet the *Lawrence* Court had grouped consensual adult relations with other liberties such as raising one’s children and having access

126. *Lawrence*, 539 U.S. at 567.

127. Fla. Stat. Ann. § 63.042(3) (West 2002).

128. *Lofton*, 358 F.3d at 806-07.

129. *Id.* at 807 (citing *Cox*, 627 So. 2d at 1215).

130. *Id.*

131. See *Lofton*, 377 F.3d at 1291 (Barkett, J., dissenting from the denial of rehearing en banc) (“Under Florida law, for example, single persons who are homosexuals but ‘not practicing’ may adopt.”)

132. A separate question involves what evidence must be presented to establish that the would-be adoptive parent had indeed voluntarily engaged in sexual relations during the past year. The court did not expressly state what disqualified Lofton from adopting. However, it did mention that he was cohabiting with a same-sex partner and that “his application was rejected pursuant to the homosexual adoption provision.” *Id.* at 808.

133. *Id.* at 815 (citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)).

134. See *supra* nn. 110-22 and accompanying text.

135. *Lofton*, 358 F.3d at 817.

to contraception and abortion. If the *Lofton* court had considered what the Court had both said and implied in *Lawrence*, it would not have so cavalierly dismissed the constitutional protections afforded to same-sex sodomy.

Perhaps conscious of the speciousness of its own arguments, the *Lofton* court tried to show why the statute should be upheld even if the proffered analysis of *Lawrence* was in error. The *Lofton* court stated that the “Court itself stressed the limited factual situation it was addressing in *Lawrence*: ‘The present case does not involve minors. . . . It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,’”¹³⁶ and then the court noted:

Here, the involved actors are not only consenting adults, but minors as well. The relevant state action is not criminal prohibition, but grant of a statutory privilege. And the asserted liberty interest is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition. Hence, we conclude that the *Lawrence* decision cannot be extrapolated to create a right to adopt for homosexual persons.¹³⁷

This analysis only compounds the errors in *Lofton* because the *Lawrence* limitations had nothing to do with the purposes for which the *Lofton* court wanted to use them. First, it is important to understand what the *Lawrence* Court was doing when it offered these limitations. Basically, the Court suggested that the right to engage in adult consensual relations does not entail a right to have sexual relations with minors, and that the right to engage in sexual relations with a same-sex partner without state interference does not entail a right to marry a same-sex partner.¹³⁸ Yet to say that *Lawrence* does not stand for the proposition that the Federal Constitution protects the right to have sexual relations with minors is not to say, for example, that those with a same-sex orientation can be precluded from having any contact with minors or, for that matter, adopting. By the same token, to say that *Lawrence* does not stand for the proposition that same-sex couples can marry is not to say that those with a same-sex orientation can be precluded from being accorded any statutory privileges, e.g., denied a driver’s license or, for that matter, the privilege to adopt.

It is of course true that *Lawrence* does not address whether members of the LGBT community can adopt. Nonetheless, *Lawrence* is relevant, especially when one considers the content of Florida’s adoption ban. Gay and lesbian would-be parents are not seeking “special treatment,” e.g., the right to adopt when other would-be parents do not have such a right. On the contrary, gay and lesbian would-be parents are merely seeking to be treated equally so that they, too, will be

136. *Id.* (quoting *Lawrence*, 539 U.S. at 578).

137. *Id.*

138. While the Court is correct that the right to engage in sexual relations does not entail a right to marry, that does not end the inquiry. The right to privacy jurisprudence privileges marital over non-marital relations and will have to be substantially altered if the right to marry a same-sex partner is not held protected by the Federal Constitution. See generally Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 *Brook. L. Rev.* 1003 (2004).

considered potential adoptive parents. It thus is important to consider the *Lofton* court's equal protection analysis, because one of the prongs of the challenge to Florida's adoption prohibition is that it offends the guarantees offered by the Equal Protection Clause of the Fourteenth Amendment.

C. *Lawrence and Equal Protection*

The *Lofton* court began its analysis by noting that same-sex orientation is not a suspect classification¹³⁹ and then explained that the Florida statute would be examined with rational basis review, which is "a paradigm of judicial restraint."¹⁴⁰ The court argued that "[u]nder this deferential standard, a legislative classification 'is accorded a strong presumption of validity' and 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'"¹⁴¹

Yet this seems to be at best an incomplete picture of rational basis review. As Justice O'Connor's concurrence stated in *Lawrence*:

[S]ome objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, . . . [the Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."¹⁴²

Thus, according to Justice O'Connor, even rational basis review is not as straightforward as the *Lofton* court would have one believe.

As support for her claim that the Court sometimes employs heightened rational basis review,¹⁴³ Justice O'Connor cited *City of Cleburne v. Cleburne Living Center, Inc.*¹⁴⁴ The *Lofton* court apparently did not understand her point, since it read *Cleburne* as "reassert[ing] the unremarkable principle that, when a statute imposes a classification on a particular group, its failure to impose the same classification on 'other groups similarly situated in relevant respects' can be probative of a lack of a rational basis."¹⁴⁵ Yet there are a number of reasons that this does not capture *Cleburne*.

At issue in *Cleburne* was the denial of a special use permit which would allow the operation of a group home for the mentally handicapped.¹⁴⁶ In *Cleburne*, the Court expressly rejected that "mental retardation [is] a quasi-suspect classification calling for a more exacting standard of judicial review than is

139. *Lofton*, 358 F.3d at 818.

140. *Id.* (citing *FCC v. Beach Commun., Inc.*, 508 U.S. 307, 313-14 (1993)).

141. *Id.* at 818 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

142. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (citations omitted).

143. *See id.* (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985)). Justice O'Connor also cited *Romer and United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). *See id.*

144. 473 U.S. 432 (1985).

145. *Lofton*, 358 F.3d at 821 (quoting *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n. 4 (2001)).

146. *Cleburne*, 473 U.S. at 436.

normally accorded economic and social legislation.”¹⁴⁷ Thus, the *Cleburne* Court acknowledged that it was using the rational basis test and, further, that the “general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”¹⁴⁸ Yet the Court nonetheless struck down the ordinance as applied,¹⁴⁹ which puts into question when a statute will be found rationally related to a legitimate state interest or, perhaps, what must be shown to defeat the presumption of constitutionality accorded to statutes that are being examined in light of the rational basis test.

The *Cleburne* Court understood that there were “real and undeniable differences between the retarded and others”¹⁵⁰ and, further, that “the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit.”¹⁵¹ The Court then remarked that “this difference is *largely* irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.”¹⁵² Yet to say that a difference is largely irrelevant is not to say that it is completely irrelevant. Insofar as the difference is *somewhat* relevant, one would expect a court using the rational basis test to defer to the state with respect to which zoning regulations were appropriate or how they should be applied.

When striking down the zoning restriction, the *Cleburne* Court explained: “Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city’s legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.”¹⁵³ Yet according to the *Lofton* court, when the rational basis test is used, the state has no obligation to produce *any* evidence to sustain the rationality of its classification, and the burden is on the one attacking the statute to disprove every conceivable supporting basis.¹⁵⁴ The fact that there was no evidence in the *Cleburne* record establishing that the home in question posed a special risk to the city’s legitimate interests would not establish the illegitimacy of the regulation in light of the test described by the *Lofton* court. Thus, were the deferential rational basis test being used, the fact that the *Cleburne* Court could not discern the basis for distinguishing between the groups requiring a permit and those not requiring one would hardly establish the unconstitutionality of the regulation.

147. *Id.* at 442.

148. *Id.* at 440.

149. *Id.* at 450.

150. *Id.* at 444.

151. *Cleburne*, 473 U.S. at 448.

152. *Id.* (emphasis added).

153. *Id.*

154. *See Lofton*, 358 F.3d at 818.

The point here is not that *Cleburne* was wrongly decided but merely that the *Lofton* reading of it is implausible. Even were it true that the “purported justifications for the ordinance made no sense in light of how it treated other groups similarly situated,”¹⁵⁵ that would hardly establish the unconstitutionality of the regulation in light of the rational basis test described by the *Lofton* Court.¹⁵⁶ Indeed, Justice Marshall noted in *Cleburne* that “*Cleburne*’s ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny.”¹⁵⁷ Justice Marshall was not insisting that the relevant standard was heightened scrutiny. He pointed out that “the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called ‘second order’ rational-basis review rather than ‘heightened scrutiny.’”¹⁵⁸ However, Justice Marshall made quite clear that whether called heightened scrutiny, second-order rational basis review or heightened rational basis review, “the rational basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*,”¹⁵⁹ i.e., the deferential rational basis test. Even if the Eleventh Circuit had used the heightened rational basis test¹⁶⁰ from *Romer*, the court would presumably have reached a different result.

D. *The Justifications for the Statute*

The *Lofton* court explained why it believed the Florida statute passes constitutional muster, apparently accepting some of the reasons offered by the state, e.g., that “the statute is rationally related to Florida’s interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers,”¹⁶¹ and that “[s]uch homes, Florida asserts, provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization.”¹⁶² Apparently, Florida had emphasized the “vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling,”¹⁶³ and further had “argu[ed] that disallowing adoption into homosexual households, which are necessarily motherless or fatherless and lack the stability that comes with marriage, is a rational means of furthering Florida’s interest in promoting adopting by marital families.”¹⁶⁴

155. *Id.* at 821.

156. *See supra* nn. 139-41 and accompanying text.

157. *Cleburne*, 473 U.S. at 458 (concurring in part and dissenting in part).

158. *Id.*

159. *Id.*

160. *See Lawrence*, 539 U.S. at 580 (O’ Connor, J., concurring) (suggesting that *Romer* involves heightened rational basis review).

161. *Lofton*, 358 F.3d at 818.

162. *Id.*

163. *Id.*

164. *Id.* at 818-19.

The state's explanation would have been more plausible had it restricted adoption to married couples. However, Florida law permits singles to adopt.¹⁶⁵ By permitting such adoptions, the state undercuts its commitment to (1) providing the stability that marriage allegedly affords,¹⁶⁶ (2) assuring that there be dual-gender parenting, or even (3) avoiding homes which may be fatherless or motherless.

The court did not seem to understand that the credibility of the state's claims was undermined by its policy of permitting singles to adopt. The court seemed satisfied by the claim that "heterosexual singles have a markedly greater probability of eventually establishing a married household and, thus, providing their adopted children with a stable, dual-gender parenting environment."¹⁶⁷ Yet it was implausible to believe that the state really cared about the marital prospects of the would-be adoptive parent. For example, the state made no inquiries about current or long-term plans to marry.¹⁶⁸ Further, not only might adopting a child make it much less likely that a single individual would eventually marry,¹⁶⁹ but some single individuals might have a very low probability of remarrying whether or not they adopt a child, and they nonetheless would not be precluded by law from adopting. Finally, even if a single would-be adoptive parent were not only interested in marrying but fortunate enough to find someone that she/he wanted to marry who also wanted to marry him/her, that marriage might not occur until well after the opportunity for role-modeling had passed.

Studies suggest that children are better served by having two parents rather than one, whether those parents are of the same-sex or of different sexes.¹⁷⁰ Further, studies also suggest that children raised by same-sex parents are thriving.¹⁷¹ The *Lofton* court understood that there was empirical data suggesting that the vital roles played by different-sex couples are played as well by same-sex couples,¹⁷² but dismissed that evidence by suggesting that the Florida legislature could choose not to believe those studies if it so chose.¹⁷³ The *Lofton* court also underplayed those studies suggesting that children living with same-sex couples do

165. *Lofton*, 377 F.3d at 1290-91 (Barkett, J., dissenting from the denial of rehearing en banc) ("Florida's adoption statute expressly provides for single persons to adopt.").

166. *See id.* at 1298 (noting that "it is not marriage that guarantees a stable, caring environment for children but the character of the individual caregiver").

167. *Lofton*, 358 F.3d at 822.

168. *See Lofton*, 377 F.3d at 1297 (Barkett, J., dissenting from the denial of rehearing en banc).

169. *See id.* at 1298 ("[E]xperience leads one to believe that single heterosexuals who adopt are less likely to marry in the future, not more likely.").

170. *See* Mary L. Bonauto, *Civil Marriage as a Locus of Civil Rights Struggles*, 30 *Human Rights Q.* 3, 7 (Summer 2003) ("[C]hild rearing experts in the American Academy of Pediatrics, the American Psychiatric Association, and the American Psychological Association . . . point to thirty-five years of studies showing that children of gay and lesbian parents are normal and healthy on every measure of child development.").

171. *Id.*

172. *See* Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 *Va. J. Soc. Policy & L.* 291, 321 (2001) (noting that "all of the evidence shows that children raised by gay parents develop just as well as children raised by heterosexual couples").

173. 358 F.3d at 826.

better than children living with single parents,¹⁷⁴ suggesting that even if that is so the court's analysis would not be altered.¹⁷⁵

Florida has an overabundance of children in need of adoption.¹⁷⁶ The *Lofton* court reasoned that "the legislature could rationally act on the theory that not placing adoptees in homosexual households increases the probability that these children eventually will be placed with married-couple families, thus furthering the state's goal of optimal placement."¹⁷⁷ Yet such a policy virtually assures that some of these children will never be adopted, a result which simply cannot be viewed as promoting their interests. It is thus especially disappointing that the Florida policy is allegedly designed to promote the best interests of those very children whom Florida is assuring will never be adopted and will instead remain within the Florida system, which has received national attention for the harms that children in its care have received.¹⁷⁸ It is difficult to believe that either the court or the state has the best interests of Florida's children at heart.

E. The Justifications Examined in Light of the Statute

Even if the Florida statute were designed to assure that children would have dual-gendered parenting, it would not be credible to believe that Florida would be putting the best interests of its children above all else. Too many children would thereby be deprived of loving families. The statute is not designed to promote the aims described by the court and thus the court should have recognized that the statute is irrational even under its own analysis.

The Florida statute does not preclude those with a same-sex orientation from adopting.¹⁷⁹ For example, a gay or lesbian individual would not be prohibited by law from adopting as long as that individual had been celibate for the past year. Even were there evidence that those with a different-sex orientation could somehow be better role models for children,¹⁸⁰ that would hardly

174. See June Carbone, *Has the Gender Divide Become Unbridgeable? The Implications for Social Equality*, 5 J. Gender, Race & Just. 31, 61 (2001) (discussing the "mountain of data" [indicating] that children are better off with two parents than one").

175. 358 F.3d at 822.

176. See *id.* at 823.

177. *Id.*

178. See e.g. Deborah Sharp, *Florida Cases Symbolize Meltdown of Child Welfare; Suits in a Dozen States Allege Trauma, Abuse*, USA Today A18 (June 14, 2002) (discussing the story of a Florida boy who died as a result of a failure of Florida's system).

179. See *Lofton*, 377 F.3d at 1291 (Barkett, J., dissenting from the denial of rehearing en banc).

180. But see *id.* at 1298 (revealing that no explanation is offered "why it is rational to believe that homosexuals, as a class, are unable to provide stable homes and appropriate role models for children"). The *Lofton* court accepted without argument that gay or lesbian parents are less able to "provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence." See *Lofton*, 358 F.3d at 822. Yet LGBT individuals would also understand what it is like, for example, to be strongly attracted to someone and would be able to relate to their children with respect to those issues. Further, many LGBT individuals discover their orientation later in life and would be aware of what it was like to be attracted to someone of a different sex during adolescence (as if that were the most important thing that a person could teach his or her child). In any event, this consideration does not really seem to be as important to the state as it is purported to be, since the state does nothing, for example, to make sure that would-be adoptive parents have the allegedly essential experience.

justify only prohibiting adoptions by those who had been sexually active over the past year with a same-sex partner. Indeed, it seems clear that the *Lofton* court forgot what the statute it was upholding said. The court wrote: “For our present purposes, it is sufficient that these considerations provide a reasonably conceivable rationale for Florida to preclude all homosexuals, but not all heterosexual singles, from adopting.”¹⁸¹ Given that the statute does not do what the court described, one might justly wonder what the *Lofton* court’s purposes were.

Rather than target orientation, the statute targets same-sex activity or, perhaps, those in same-sex relationships. This cannot be thought to promote good public policy. Given the data suggesting that two parents are better than one whether the parents are of the same sex or different sexes,¹⁸² it hardly promotes the interests of children to prevent adoptions by individuals with a same-sex orientation who are members of same-sex couples but not by individuals who, for example, are celibate and not coupled with anyone. The state should be focusing on finding would-be adoptive parents, whether single or coupled, who can provide loving and nurturing homes for children in need rather than on spiting its own children so that it can give effect to irrational biases.

The *Lawrence* Court noted: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”¹⁸³ The Court suggested that one of the reasons that the same-sex conduct is protected is that when “sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”¹⁸⁴ Indeed, some commentators read the *Lawrence* Court to be saying that same-sex relations are protected precisely because of their role in same-sex relationships.¹⁸⁵

Here, Florida is either targeting protected conduct, namely, same-sex relations, or same-sex relationships. In either event, the state is burdening something protected by the United States Constitution. Regardless of whether *Lawrence* is read to be protecting same-sex relations or same-sex relationships, *Lofton* cannot stand. A statute which precludes only those who engage in same-sex relations from adopting cannot pass constitutional muster, given the lack of a connection between such a criterion and the welfare of children.

181. See *Lofton*, 358 F.3d at 822.

182. See Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better than One*, 2001 U. Ill. L. Rev. 1, 52 (“Although children are doubtless better off living in households with two parents, the empirical evidence does not suggest that one parent must be a man and the other a woman for children to flourish.”).

183. *Lawrence*, 539 U.S. at 575.

184. *Id.* at 567.

185. See Tribe, *supra* n. 118, at 1904 (suggesting that same-sex relations are protected precisely because of their role in relationships).

IV. CONCLUSION

The Florida statute prohibiting adoption by those who have had voluntary same-sex relations over the past year violates both equal protection and due process guarantees. It is not rationally connected to the welfare of children, the state's purported interest. Instead, it sacrifices the interests of children to give effect to biases held by the Florida Legislature and, presumably, some Floridians.

Given the lack of a connection between the best interests of children and whether voluntary same-sex relations had taken place over the past year, the statute should have been struck down years ago. Yet given its incompatibility with *Lawrence*, the Florida adoption ban is even more clearly unconstitutional now. Indeed, the *Lofton* court might as well have issued a direct challenge to the U.S. Supreme Court either to stand by its *Lawrence* decision or to repudiate it.

Regrettably, the Court chose not to hear the *Lofton* appeal, perhaps waiting until the circuits had had more of a chance to consider *Lawrence*. This was a great mistake. Not only might states now be more tempted to follow Florida's lead, thereby causing even more children to be parentless, but the Court's own credibility and prestige have been harmed. One cannot make sense of *Lawrence* if the statute at issue in *Lofton* passes constitutional muster and the Court has now extended an invitation to states to pass the kind of legislation which the *Lawrence* Court warned would not be tolerated. As Justice Scalia has warned in a different context, "this is no way to run a legal system."¹⁸⁶ One can only hope that the Court will grant certiorari in the next *Lofton*-like appeal so that it can correct the mistaken analysis and prevent even greater harm from occurring.

186. See *Roper v. Simmons*, 125 S. Ct. 1183, 1230 (2005) (Scalia, J., dissenting).