

Comment

Giving *Lawrence* Its Due: How the Eleventh Circuit Underestimated the Due Process Implications of *Lawrence v. Texas* in *Lofton v. Secretary of the Department of Children & Family Services*

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In many respects, John Doe is a very lucky thirteen-year-old boy, though his life did not begin that way. He was born an orphan, HIV-positive, and addicted to cocaine. John's life changed immediately when Steven Lofton, a pediatric nurse, brought him home to join Lofton's family. Today, John is happy, healthy, and thriving in his foster home. He has two foster parents who unconditionally love and guide him and four siblings, two of whom have been in his family since the day he was born. But John has no assurance that the State will allow him to remain with the only family he has ever known. Although John calls his foster father "Dad," that will never be Steven Lofton's legal title. John's foster father is gay, and their relationship is governed by the only state where being gay stands as an absolute bar to adoption: Florida.

John and his father brought suit in federal court against Florida's Department of Children and Family Services to challenge Florida Statute section 63.042(3),¹ the state law that prohibits gays from adopting, on equal protection and due process grounds.² The district court granted summary judgment for the

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1. FLA. STAT. ANN. § 63.042(3) (West 2005).

2. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1374 (S.D. Fla. 2001), *aff'd sub nom. Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

Department of Children & Family Services, upholding section 63.042(3).³ Doe and Lofton appealed. The Court of Appeals for the Eleventh Circuit affirmed,⁴ but it did so only after misinterpreting relevant precedent, most notably the Supreme Court's recent decision in *Lawrence v. Texas*.⁵

This Comment will focus on the *Lofton* plaintiffs' argument that a law categorically denying them the right to adopt children because they are gay violates their substantive due process right to form intimate relationships as recognized in *Lawrence*.⁶ The U.S. Supreme Court recently denied the American Civil Liberties Union's (ACLU) petition to consider the *Lofton* case.⁷ Thus, it is imperative that future courts recognize the errors of the Eleventh Circuit in *Lofton*. The Eleventh Circuit underestimated the import of *Lawrence* when it decided *Lofton*, and future courts should decline to follow the reasoning of the *Lofton* decision.

Part I of this Comment summarizes the Supreme Court's due process jurisprudence as it existed when the Eleventh Circuit handed down *Lofton*. This jurisprudence includes the Court's landmark decision in *Lawrence v. Texas*. Part II discusses Florida Statute section 63.042(3) and the *Lofton* case in depth. Part III argues that the *Lofton* court erred in holding that *Lawrence* did not involve a fundamental right and upholding section 63.042(3). It describes the analysis that the Eleventh Circuit should have undertaken and concludes that section 63.042(3) impermissibly burdens a fundamental right of the gay plaintiffs in *Lofton*.

3. *Id.* at 1385.

4. *Lofton*, 358 F.3d at 806.

5. 539 U.S. 558 (2003).

6. This Comment will not fully address the court's error with respect to the *Lofton* plaintiffs' equal protection arguments, though several critics have set forth strong arguments to that end. See *Lofton v. Sec'y of the Dep't of Children & Family Serv's*, 377 F.3d 1275, 1291–1303 (11th Cir. 2004) (Barkett, J., dissenting) (arguing that the rational basis test established in *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), requires invalidation of § 63.042(3)); Christopher D. Jozwiak, Comment, *Lofton v. Secretary of the Department of Children & Family Services: Florida's Gay Adoption Ban Under Irrational Equal Protection Analysis*, 23 LAW & INEQ. 407, 418–27 (2005); Ann M. Reding, Note, *Lofton v. Kearney: Equal Protection Mandates Equal Adoption Rights*, 36 U.C. DAVIS L. REV. 1285, 1300–12 (2003).

7. *Lofton v. Sec'y, Fla. Dep't of Children & Families*, 125 S. Ct. 869 (2005), *denying cert. to Lofton*, 358 F.3d 804.

I. THE STATE OF SUBSTANTIVE DUE PROCESS
LEADING UP TO *LOFTON*: PROTECTING FUNDAMENTAL
RIGHTS FROM STATE INTRUSION

The Due Process Clause of the Fourteenth Amendment to the Constitution protects most individual rights guaranteed by the Bill of Rights, plus those rights deemed “fundamental,” from undue state interference.⁸ Laws that burden fundamental rights are subjected to strict judicial scrutiny; to be upheld, they must be narrowly tailored to achieving a compelling state interest.⁹ Laws that do not burden a fundamental right must only be rationally related to achieving a legitimate state interest for the courts to deem them constitutional.¹⁰ This standard of review is quite deferential to lawmakers.¹¹ Contemporary substantive due process jurisprudence has asked: Which rights are fundamental?

A. FUNDAMENTAL RIGHTS ARE THOSE DEEPLY ROOTED IN
HISTORY AND TRADITION

For the past forty years, the Supreme Court has been forming and reforming its substantive due process jurisprudence in a number of cases that have considered the fundamental nature of a variety of deeply personal issues.¹² Fundamental rights have been described as those “implicit in the concept of ordered liberty”¹³ or those “deeply rooted in this Nation’s history and tradition.”¹⁴ While the Court has generally retained the “history and traditions” inquiry when determining the exist-

8. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 147–49 (1968).

9. See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427 (1983), *overruled on other grounds by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Lofton*, 358 F.3d at 815.

10. See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Reno v. Flores*, 507 U.S. 292, 303 (1993).

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

12. See Cass R. Sunstein, *What Did Lawrence Hold?: Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 37–39 (summarizing the Supreme Court’s substantive due process jurisprudence prior to *Lawrence*). See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 638–710 (1997) (discussing the Court’s substantive due process cases and their public policy implications).

13. *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969)).

14. *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

tence of a fundamental right, the analysis has proven malleable. The Court has, however, developed a pattern of protecting decisions it considers private or “central to personal dignity and autonomy.”¹⁵

The Supreme Court has invoked substantive due process to protect a number of rights central to the family, such as the right to marry, from state intervention.¹⁶ The Court has also recognized that parents have a fundamental right to make decisions concerning the care, custody, and control of their children—one of the oldest fundamental rights recognized by the Court.¹⁷

The Court has also applied substantive due process protection to personal matters traditionally respected less than marriage and child rearing. In the *Griswold-Eisenstadt-Roe* line of cases, the Supreme Court crafted a fundamental “right to privacy” that protected from state intervention a married couple’s right to contraception,¹⁸ the right of an unmarried couple to the same,¹⁹ and a woman’s right to terminate her pregnancy before viability,²⁰ respectively. *Griswold v. Connecticut*, in striking down a state law prohibiting the use of contraception, infamously located the fundamental right to privacy in “penumbras, formed by emanations” from several specific guarantees found in the Bill of Rights.²¹ *Eisenstadt v. Baird* applied *Gris-*

15. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

16. *See Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978). In *Zablocki*, the Court struck down a state law requiring noncustodial parents to obtain court approval in order to marry, which would only be given if the applicants had fulfilled obligations to pay child support. *Id.* at 387–91. The Court held that the right to marry was fundamental and could not be interfered with so “directly and substantially,” despite the State’s interest in providing for its children. *Id.* at 386–87; *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down state miscegenation laws on both equal protection and due process grounds).

17. *Troxel v. Granville*, 530 U.S. 57, 65–68 (2000) (reversing a state court decision granting visitation rights to children’s grandparents over the objection of their mother because it violated the mother’s due process right to oversee her children); *see also Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–535 (1925) (holding that parents and guardians have a right “to direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (holding that the Due Process Clause protects the right of parents to “establish a home and bring up children” and “to control the education of their own”).

18. *Griswold*, 381 U.S. at 485–86.

19. *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

20. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

21. 381 U.S. at 484. *Griswold* also placed an emphasis on marriage in

would to unmarried individuals and struck down a state law that allowed the distribution of contraceptives to prevent pregnancy only to married individuals.²² Though it based its decision on the Equal Protection Clause, the Court stated, “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”²³

The landmark *Roe v. Wade* decision went a step beyond protecting a person’s decision to use contraception.²⁴ The Court faced a challenge to a Texas abortion law that prohibited abortion at any stage of pregnancy unless it was medically necessary to save the life of the mother.²⁵ The plaintiff was an unmarried woman who wanted to terminate an unwanted pregnancy.²⁶ She was unable to do so legally in Texas and could not afford to travel to a jurisdiction that permitted abortions.²⁷ Justice Blackmun, writing for the Court, observed that while no “right to privacy” is explicit in the Constitution, the Court’s past decisions found such a right implicit in several constitutional provisions, including the Due Process Clause of the Fourteenth Amendment.²⁸ He further noted that whatever the source of the right to privacy, it is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”²⁹ The right, however, is not unqualified. The Court determined that at the end of the first trimester, the State’s interest in protecting the mother’s health becomes compelling and overrides her right to privacy, and at the point of the fetus’s viability, the State’s interest in protecting life becomes compelling and overrides the mother’s right to privacy.³⁰

Roe has withstood significant criticism. Twenty years after *Roe*, the Court decided *Planned Parenthood of Southeastern*

striking down a Connecticut law prohibiting the use of contraceptives. *Id.* at 485 (suggesting that it would be impermissible to allow police “to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives”).

22. 405 U.S. at 454–55.

23. *Id.* at 453.

24. 410 U.S. 113.

25. *Id.* at 117–18.

26. *Id.* at 124.

27. *Id.*

28. *See id.* at 152–53.

29. *Id.* at 153.

30. *Id.* at 163–64.

Pennsylvania v. Casey.³¹ *Casey* transformed *Roe*'s right to privacy into, simply, "liberty,"³² which, unlike a "right to privacy," is expressly located in the Due Process Clause.³³ *Casey* made no mention of a fundamental right, though it recognized the centrality of personal decisions to the "liberty protected by the Fourteenth Amendment."³⁴ The decision then upheld *Roe* and struck down a state abortion law.³⁵ The Court in *Casey* also indicated that public opinion about the supposed immorality of an activity would not enter its due process analysis, stating, "Our obligation is to define the liberty of all, not to mandate our own moral code."³⁶ *Casey* reiterated the *Griswold-Eisenstadt-Roe* principle that the Due Process Clause protects the right of individuals to make personal decisions concerning certain private matters without government intrusion.³⁷

In *Washington v. Glucksberg*,³⁸ the Court returned to a more traditional fundamental rights analysis after an arguable departure in *Casey*.³⁹ *Glucksberg* considered whether a state law banning assisted suicide violated the due process rights of terminally ill patients to end their lives.⁴⁰ In its opinion, the

31. 505 U.S. 833 (1992).

32. *Id.* at 846–48. Some commentators cheer this break from traditional fundamental rights analysis. See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1931 (2004) (arguing that reducing substantive due process claims to one's ability to narrowly categorize the right at issue "in a misguided hunt for a tradition of social and legal protection sufficiently specific and enduring to warrant awarding those acts a special seal of constitutional approval" is flawed); see also Nan D. Hunter, *Living With Lawrence*, 88 MINN. L. REV. 1103, 1117 (2004). *But see* Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1151 (2004) (observing that *Casey*'s break from the traditional analysis was temporary, as the Court returned to a more traditional analysis in *Washington v. Glucksberg*).

33. U.S. CONST. amend. XIV, § 1. One criticism of the "right to privacy" cases has been that the right is not actually located in the Constitution. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 97, 113–26 (1990); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 927–37 (1973) (arguing that *Roe v. Wade* lacks constitutional support). This may have been one reason for the Court's shift to a right to "liberty" in *Casey*.

34. 505 U.S. at 851.

35. See *id.* at 879–901.

36. *Id.* at 850.

37. *Id.* at 851.

38. 521 U.S. 702 (1997).

39. See Carpenter, *supra* note 32, at 1151.

40. 521 U.S. at 708.

Court propagated a two-featured model of substantive due process analysis.⁴¹ First, the Due Process Clause protects fundamental rights that are “deeply rooted in this Nation’s history and tradition.”⁴² Second, a “careful description” of the right is required to determine whether it is, in fact, fundamental.⁴³ The Court concluded that there has been no “history and tradition” of protecting the “right to commit suicide,” as it carefully described the right at issue.⁴⁴ It went on to apply rational basis review to the law and ultimately upheld it.⁴⁵

B. *LAWRENCE V. TEXAS* AND THE FUNDAMENTAL RIGHT TO LIBERTY ENCOMPASSING PRIVATE SEXUAL INTIMACY

The Supreme Court’s substantive due process jurisprudence has specifically examined the privacy rights of gay individuals in two principal cases. First, in *Bowers v. Hardwick*, the Supreme Court considered a due process challenge to a Georgia statute criminalizing sodomy.⁴⁶ According to the Court, the asserted liberty interest was a “fundamental right to engage in homosexual sodomy.”⁴⁷ The Court not only found no “history and tradition” of protecting such a right, it found a contrary tradition of criminalizing homosexual sodomy.⁴⁸ The Court upheld the law under rational basis review, holding that

41. *Id.* at 720–21.

42. *Id.* (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

43. *Id.* at 721.

44. *Id.* at 723. Compare *id.* (concluding that the asserted liberty interest in suicide did not find refuge in substantive due process precedent), with *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278–79 (1990) (holding that the Due Process Clause protects the right of a competent person to “refuse lifesaving hydration and nutrition”).

45. *Glucksberg*, 521 U.S. at 735.

46. 478 U.S. 186, 188 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

47. *Id.* at 191.

48. *Id.* at 191–94 (noting that twenty-four States and the District of Columbia criminalized sodomy at the time). The Court also quickly dispensed with any similarities between the right at issue in and the rights protected in its prior substantive due process cases. *Id.* at 190–91. For a response to the Court’s reasoning on this point, see Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 533–37 (1989), reprinted in part in WILLIAM B. RUBENSTEIN, *SEXUAL ORIENTATION AND THE LAW* 266, 266–68 (2d ed. 1997), arguing that homosexual relationships are identical to heterosexual relationships in that they both “reflect the choices of autonomous selves” and are valuable for both the individuals involved and society, *id.* at 534.

the right at issue was not fundamental and that the State had a legitimate interest in promoting morality.⁴⁹

Bowers controlled for nearly seventeen years until the court overruled it in *Lawrence v. Texas*.⁵⁰ *Lawrence* involved a constitutional challenge to a Texas law prohibiting same-sex sodomy.⁵¹ The plaintiffs were engaged in “a sexual act” in John Lawrence’s apartment when the police entered the apartment and observed them.⁵² The police arrested the two men, took them into custody, held them overnight, and charged them with sodomy.⁵³ After a justice of the peace convicted them, they exercised their right to trial in Harris County Criminal Court; however, the court rejected their constitutional challenges to the Texas law.⁵⁴ The Texas Court of Appeals affirmed, relying on *Bowers* to answer the substantive due process questions.⁵⁵ The U.S. Supreme Court granted certiorari and proceeded to extend to gay individuals the right to privacy in intimate relationships already implicitly available to heterosexuals.⁵⁶

The *Lawrence* Court began by summarizing the Supreme Court’s earlier due process “right to privacy” cases, beginning with *Griswold*.⁵⁷ When it came to *Bowers*, the Court engaged in a detailed review and harsh criticism.⁵⁸ First, *Bowers* had mischaracterized the right at issue: “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct

49. *Bowers*, 478 U.S. at 196. *Bowers* was a 5-4 decision. Justice Powell—later reflected that *Bowers* was “the one error he believed he had made while on the Court.” Tribe, *supra* note 32, at 1953–54; accord JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 518–30 (1994) (describing exchanges between the Justices throughout the course of rendering the *Bowers* decision and conversations between Justice Powell and his law clerks illustrating his difficulty with the case).

50. *Lawrence*, 539 U.S. at 578.

51. *Id.* at 562.

52. *Id.* at 562–63.

53. *Id.* at 563.

54. *Id.*

55. *Id.*

56. *Id.* at 574; see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992).

57. *Lawrence*, 539 U.S. at 564–66. The Court discussed *Griswold*, *Eisenstadt*, *Roe*, and *Carey v. Population Services International*, 431 U.S. 678 (1977), to paint a picture of “the state of the law with respect to some of the most relevant cases when the Court considered [*Bowers*].” *Lawrence*, 539 U.S. at 566.

58. *Lawrence*, 539 U.S. at 566–78.

demeans the claim the individual put forward”⁵⁹ The *Lawrence* Court instead referred simply to a “right to liberty”⁶⁰ reminiscent of the Court’s language in *Casey*. Second, the *Lawrence* Court noted that the *Bowers* Court erred in its treatment of history when it concluded that laws against homosexual sodomy had “ancient roots,” and thus there could be no fundamental right to engage in the practice sufficiently rooted in history and tradition.⁶¹ In fact, according to *Lawrence*, early laws prohibiting sodomy were not targeted at same-sex behavior.⁶² Instead, they prohibited the act of sodomy in general.⁶³ Same-sex sodomy was not singled out legally until the 1970s, so the “ancient roots” relied upon in *Bowers* were false.⁶⁴ Besides, the Court noted, many of the sodomy laws once in effect had been repealed or had ceased to be enforced, and an “emerging awareness” recognized that liberty includes private sexual intimacy.⁶⁵ Not only history, but also this emerging awareness, both in the U.S. and abroad, dictated that *Bowers* was incorrect.⁶⁶

Finally, the Court examined two subsequent cases that had weakened *Bowers*’s precedential value even further.⁶⁷ In *Casey*, the Court affirmed that the Constitution protects personal decisions regarding intimate relationships.⁶⁸ And in *Romer v. Evans*,⁶⁹ the Court struck down Colorado’s Amendment 2, an amendment to repeal local ordinances that prohibited discrimination on the basis of “homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships,”⁷⁰ because a law “born of animosity toward [a] class of persons affected” would not even survive rational basis review.⁷¹ The *Lawrence* Court an-

59. *Id.* at 567.

60. *Id.* at 564.

61. *Id.* at 567–73.

62. *Id.* at 569–71.

63. *See id.*

64. *Id.* at 570.

65. *Id.* at 572.

66. *Id.* at 572–73. The Court noted that many U.S. States, as well as both the British Parliament and the European Court of Human Rights, had decriminalized homosexual sodomy. *Id.*

67. *Id.* at 573–75.

68. *Id.* at 573–74 (discussing *Casey*, 505 U.S. at 851).

69. 517 U.S. 620 (1996).

70. *Id.* at 624.

71. *Lawrence*, 539 U.S. at 574–75 (quoting *Romer*, 517 U.S. at 634). *Romer* was a decisive victory for gays in their quest for legal rights. Though *Romer* did not expressly determine whether gays were a suspect class for equal protection purposes (a label that would have required application of height-

nounced, “*Bowers* was not correct when it was decided, and it is not correct today *Bowers v. Hardwick* should be and now is overruled.”⁷² The Court proceeded to strike down the Texas sodomy law as a violation of substantive due process.⁷³

Significantly, the Court expressly declined to strike down the law on equal protection grounds,⁷⁴ rejecting the proposal Justice O’Connor advocated in her concurring opinion.⁷⁵ The majority may have feared that, were it to do so, a differently-drawn prohibition on sodomy—one that criminalized the act between heterosexual as well as homosexual partners—would stand after *Lawrence*.⁷⁶ Such a prohibition would be a mere loophole, as it would undoubtedly be enforced against gays more often than it would be enforced against heterosexuals engaged in sodomy.⁷⁷ The Court noted, “When homosexual conduct is made criminal by the law of the State, that declaration

ened scrutiny to any law that classified people based on sexual orientation), it held that Amendment 2 could not withstand even rational basis review. *See Romer*, 517 U.S. at 631–32. The law was “at once too narrow and too broad” and thus not rationally related to any legitimate state interest. *Id.* at 633. The Court also inferred from this incongruity that the amendment had been motivated by animosity toward gays and lesbians, thus violating the Equal Protection Clause. *Id.* at 634–35. The Court stated, “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* at 634 (alteration in original) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

72. *Lawrence*, 539 U.S. at 578; *cf.* *Carpenter*, *supra* note 32, at 1149 (“Page after page of the majority decision is devoted to a harsh critique of [*Bowers*] for being wrong about history, wrong about doctrine, wrong about precedent, and wrong about facts. It is an extended and heartfelt apology to gays for the harm done.”).

73. *See Lawrence*, 539 U.S. at 578–79.

74. *Id.* at 574–75.

75. Justice O’Connor, detecting the animus that inspired Texas’s sodomy law and acknowledging the personal relationships involved, applied a “more searching” rational basis review in her equal protection analysis. *Id.* at 579–81 (O’Connor, J., concurring). Since moral disapproval was an illegitimate state interest under *Romer*, Justice O’Connor argued, the Texas law could be struck down on narrower and more manageable equal protection grounds. *See id.* at 583–84.

76. *See id.* at 575 (majority opinion).

77. *See id.* at 573 (noting that of the thirteen States with sodomy laws at the time *Lawrence* was decided, four enforced their laws exclusively against gays); *cf.* *Hunter*, *supra* note 32, at 1133 (noting the “indirect” enforcement of sodomy laws in “the denial of custody or other parental rights to gay parents or by exclusions from certain jobs” based on “the logical connection between homosexuality and violation of a sodomy law, even though the litigants had never been convicted of illegal conduct”).

in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.⁷⁸ Explicitly overruling *Bowers* was a necessary step in deterring such discrimination. Referencing Justice Stevens's dissent in *Bowers*, the Court also directed that morality alone should no longer be considered a rational basis for upholding a law.⁷⁹

As Justice Scalia pointed out in his scathing dissent,⁸⁰ *Lawrence* lacks traditional due process language: description of the right at issue, characterization of the right as "fundamental," and application of one doctrinal test or another.⁸¹ Much debate has focused on the nature of the right that *Lawrence* recognized and whether *Lawrence* deemed that right "fundamental." Some critics focus their analysis on a single statement near the end of the majority opinion: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."⁸² They insist that the Court applied rational basis review to a law that burdened no fundamental right,⁸³ and assert that the words "legitimate state interest" provide evidence of such a standard,⁸⁴ though the majority never used the words "rational basis" or "rationally related."

Others argue that the Court adhered to precedent, treating *Lawrence* as a fundamental "right to privacy" case.⁸⁵ According

78. *Lawrence*, 539 U.S. at 575; see also Danaya C. Wright, *The Logic and Experience of Law: Lawrence v. Texas and the Politics of Privacy*, 15 U. FLA. J.L. & PUB. POL'Y 403, 404–05 (2004).

79. *Lawrence*, 539 U.S. at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); cf. *id.* at 599 (Scalia, J., dissenting) (lamenting that the majority's holding "decrees the end of all morals legislation").

80. *Id.* at 586–605 (Scalia, J., dissenting).

81. See *id.* at 586, 594.

82. *Id.* at 578 (majority opinion).

83. See *id.* at 594 (Scalia, J., dissenting); see also *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004), cert. denied, 125 S. Ct. 869 (2005). But see *Carpenter*, supra note 32, at 1151 (arguing that this statement by the Court "is best understood as a comment only on the comparative weakness of the morality claim against the strong interests of [the plaintiffs]" and does not constitute evidence sufficient to conclude that the Court was engaging in rational basis review).

84. See *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) (quoting *id.* at 578 (majority opinion) and referring to the majority's "rational-basis holding"); *Lofton*, 358 F.3d at 817 (quoting *Lawrence*, 539 U.S. at 578, and concluding that the *Lawrence* Court invalidated the Texas law on rational basis grounds).

85. See generally *Carpenter*, supra note 32 (arguing that a broad libertarian reading of *Lawrence* is incorrect and that the right at issue in *Lawrence*

to these scholars, the language used to overrule *Bowers* and describe a profound respect for the importance of relational privacy suggests that the Court was not addressing a right it considered less than fundamental. The Court's discussion of precedent also indicates that it was not subjecting the Texas law to rational basis review;⁸⁶ most of the cases cited by the Court were fundamental right to privacy cases, with the exception of *Romer*, which was a recent and notable victory for gays decided on equal protection grounds.⁸⁷ There is no reason why the Court would discuss fundamental rights cases, comparing *Lawrence* rather than distinguishing it, and treat gay relationships with such apologetic reverence if it did not consider the right in *Lawrence* fundamental as well.

Others read *Lawrence* as a "right to liberty" case,⁸⁸ and the most extreme of them predict an upcoming libertarian revolution in the Court's due process jurisprudence.⁸⁹ This reading argues that the Court's failure to announce a fundamental right, rather than triggering rational basis review, signaled a complete abandonment of the traditional tiers of fundamental rights analysis in favor of a presumption of liberty.⁹⁰ Under this libertarian view, where any liberty interest is involved, the Court will force the government to justify its intrusion on that interest rather than place the burden on the individual to prove that the liberty interest is "fundamental."⁹¹ Few governmental justifications will suffice, short of preventing individuals from

was a fundamental right to privacy). For an argument that *Lawrence* recognized a fundamental right to privacy but was primarily concerned with familial relations rather than sexual privacy, see David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 460–65, 480–85 (2004). Cf. Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1208 n.106 (2004) (noting that the *Lawrence* Court's use of precedent dictates that it should be read as a fundamental rights case).

86. See Sunstein, *supra* note 12, at 39–42, 45–47; see also Ball, *supra* note 85, at 1208 n.106.

87. See *Lawrence*, 539 U.S. at 564–66.

88. See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, in *CATO SUPREME COURT REVIEW 2002–2003*, at 21, 21 (James L. Swanson ed., 2003); cf. Hunter, *supra* note 32, at 1104–17 (arguing that *Lawrence* replaces a right to "privacy" with a right to "liberty" and revises the traditional fundamental rights analysis, yet remains somewhat embedded in that framework).

89. See Barnett, *supra* note 88, at 21.

90. *Id.* at 35–37.

91. See *id.* at 36; Hunter, *supra* note 32, at 1115–16.

infringing on others' rights.⁹²

Whatever the nature of the right at issue, the *Lawrence* Court displayed a much more respectful, evolved perception of gay men and lesbians than the *Bowers* Court had. Where *Bowers* focused on the act of sodomy, *Lawrence* focused on the personal relationship that precedes and permeates that act, observing that “[w]hen 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.”⁹³ *Lawrence* also engages in a detailed discussion of the “emerging [national and international] awareness” that liberty allows adults to make decisions about their private sexuality.⁹⁴ As one scholar observed, “Having gone out of its way to insult gay Americans in *Bowers v. Hardwick*, the Court in *Lawrence* went out of its way to assist gays in the quest for full citizenship.”⁹⁵

When the Supreme Court handed down *Lawrence*, *Lofton v. Secretary of the Department of Children & Family Services*⁹⁶ was pending before the Court of Appeals for the Eleventh Circuit. *Lofton* would be the first lower court case to apply *Lawrence* to a substantive due process question and to attempt to extract workable precedent from *Lawrence*'s complex language. As the *Lofton* decision demonstrates, interpreting *Lawrence* is not a straightforward task, and courts have made and may continue to make mistakes in doing so.

II. LOFTON V. SECRETARY OF THE DEPARTMENT OF CHILDREN & FAMILY SERVICES

John Doe was born an HIV-positive cocaine baby on April 29, 1991.⁹⁷ Steven Lofton was a pediatric nurse with extensive experience caring for HIV-positive patients.⁹⁸ He was also certified as a long-term foster parent.⁹⁹ Shortly after Doe's birth,

92. See Barnett, *supra* note 88, at 37; Hunter, *supra* note 32, at 1115–16.

93. 539 U.S. 558, 567 (2003).

94. *Id.* at 571–73; see also Sunstein, *supra* note 12, at 39–42, 53–60 (arguing that erosion of public support for antigay policy played a significant part in the outcome of *Lawrence*).

95. Carpenter, *supra* note 32, at 1148.

96. 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

97. *Id.* at 807.

98. *Id.*

99. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1375 (S.D. Fla. 2001), *aff'd sub nom. Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

Lofton took Doe into foster care with the blessing of the State of Florida.¹⁰⁰ At the time Doe joined the family, Lofton and his partner, Roger Croteau, had been in a committed relationship for approximately eight years.¹⁰¹ They have cared for six foster children, all born HIV-positive, on a long-term basis.¹⁰² The children think of themselves as siblings, and they call Lofton “Dad.”¹⁰³ Lofton and Croteau have been exemplary foster parents. At the State’s insistence, Lofton stopped working as a pediatric nurse to care for the children and their medical needs full-time.¹⁰⁴ In 1998, the Children’s Home Society created an award for the outstanding foster parent of the year, which it named the “Lofton-Croteau Award,” and presented the first award to Lofton and Croteau.¹⁰⁵

At eighteen months, Doe seroreverted; he remains HIV-negative.¹⁰⁶ Doe’s changed health status made him eligible for adoption in 1994, and Lofton applied to adopt him.¹⁰⁷ The State of Florida denied the application because Lofton failed to check either the “yes” or the “no” box adjacent to the following state-

100. ACLU Lesbian & Gay Rights Project, *The Lofton-Croteau Family: The Kids*, http://www.lethimstay.com/loftons_kids.html (last visited Dec. 1, 2005) [hereinafter *Lofton-Croteau Family*].

101. Affidavit of Steven K. Lofton ¶¶ 2, 7, *Lofton*, 157 F. Supp. 2d 1372 (No. 99-10058-CIV-KING).

102. *See Lofton-Croteau Family*, *supra* note 100. Croteau and his partner had three foster children—Frank, Tracy, and Ginger—when John Doe was placed in their home. *See id.* Ginger had been quite sick from birth due to HIV and the addictive drugs in her body. *See id.* She died at age six from AIDS-related complications, devastating the family. *Id.* The family moved to Oregon in the late 1990s. *Id.* A caseworker in Portland, after hearing from the family’s pediatrician about Lofton’s and Croteau’s parenting skills, approached them about taking two more HIV-positive foster children who had been difficult to place. *Id.* And so the family grew by two more, and Wayne and Ernie “came home to live with the Lofton-Croteau family.” *Id.*

103. Appellant’s Brief at 8–9, *Lofton*, 358 F.3d 804 (No. 01-16723-DD).

104. *Id.* at 7.

105. *Id.*

106. *Lofton*, 358 F.3d at 807. Seroreversion occurs—either spontaneously or in response to therapy—when an individual ceases to test positive for the presence of HIV antibodies. On-Line Medical Dictionary, Dep’t of Med. Oncology, Univ. of Newcastle upon Tyne, <http://cancerweb.ncl.ac.uk/omd/index.html> (search for “seroreversion” and “serology”) (last visited Dec. 1, 2005).

107. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1375 (S.D. Fla. 2001), *aff’d sub nom. Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005). Lofton had the support and encouragement of several state caseworkers and Doe’s attorney *ad litem* in filing his adoption application. Appellant’s Brief, *supra* note 103, at 9.

ment on the adoption application form: I am a homosexual.¹⁰⁸ Though Lofton did not disclose his sexual orientation on the adoption form, Florida's Department of Children and Families (DCF) conceded that it denied Lofton's application because he is gay.¹⁰⁹

That question is included on Florida's adoption application form because Florida Statute section 63.042(3) prohibits gay men and lesbians from adopting.¹¹⁰ It was enacted in 1977, months after Anita Bryant—a singer, former Miss Oklahoma, and Florida Orange Juice spokeswoman—launched an antigay campaign called “Save Our Children.”¹¹¹ Bryant's campaign combined newspaper advertisements with political speeches disguised as singing engagements in an effort to convince Floridians that gay people were dangerous to children and that Dade County's recently passed gay rights law ought to be repealed.¹¹² The campaign paved the way for legislation like section 63.042(3), which passed overwhelmingly in the Florida legislature.¹¹³ After the law passed, its primary sponsor, Senator Curtis Peterson, stated:

The problem in Florida has been that homosexuals are surfacing to such an extent that they're beginning to aggravate the ordinary folk, who have a few rights of their own. We're trying to send them a message, telling them: “We're really tired of you. We wish you'd go back into the closet.”¹¹⁴

108. See *Lofton*, 157 F. Supp. 2d at 1375 n.3. See generally FLORIDA DEPARTMENT OF CHILDREN & FAMILIES, ADOPTIVE HOME APPLICATION CFOP 175-54, <http://www.dcf.state.fl.us/publications/eforms/fsp5071.pdf> (last visited Jan. 3, 2006).

109. *Lofton*, 157 F. Supp. 2d at 1375 n.3.

110. FLA. STAT. ANN. § 63.042(3) (West 2005). Mississippi and Utah have implemented similarly restrictive adoption statutes, though neither law explicitly prohibits all gay individuals from adopting, as does the Florida statute. See MISS. CODE ANN. § 93-17-3(2) (2004) (prohibiting “[a]doption by couples of the same gender”); UTAH CODE ANN. § 78-30-1(3)(b) (2002) (prohibiting adoption “by a person who is cohabiting in a relationship that is not a legally valid and binding marriage”).

111. ACLU LESBIAN & GAY RIGHTS PROJECT, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 6–7 (2005).

112. *Id.* Dade County's gay rights law was repealed days before the governor signed section 63.042(3) into law. See *id.* at 7–8.

113. *Id.* Only one Florida Senator, Donald Chamberlin, “spoke out against [section 63.042(3)], saying that in adoption ‘all other concerns should yield to the concern for the child. But the heart of this bill is not the subject matter of adoptions—it is discrimination.’” *Id.* at 7.

114. *Id.* at 8.

Section 63.042(3) states: “No person eligible to adopt under this statute may adopt if that person is a homosexual.”¹¹⁵ “Homosexuals” have been defined, for purposes of the statute, as “applicants who are known to engage in current, voluntary homosexual activity.”¹¹⁶ Florida legislators have made several unsuccessful attempts to repeal the statute.¹¹⁷

Though the DCF had rejected Lofton’s adoption application, the agency later offered to grant Lofton legal guardianship over Doe.¹¹⁸ Legal guardianship would have removed Doe from the foster care system and DCF supervision, but Lofton rejected the offer and continued to seek adoption of Doe.¹¹⁹ The guardianship arrangement “would have cost Lofton over \$300 a month in lost foster care subsidies and would have jeopardized Doe’s Medicaid coverage” without providing the benefits of adoption.¹²⁰ Also, it was simply important to Doe to be adopted, and Lofton wanted Doe finally to enjoy the emotional security that accompanies adoption.¹²¹ Lofton and Doe filed suit in federal court against the Secretary and District Administrator of the DCF.¹²² They were joined by Douglas Houghton, a gay man;¹²³ John Roe, a child under Houghton’s legal guardianship;¹²⁴ and Wayne Larue Smith and Daniel Skahen, whose adoption application was denied because of their sexual orientation.¹²⁵

115. § 63.042(3).

116. Dep’t of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1214 (Fla. Dist. Ct. App. 1993).

117. Lofton v. Sec’y of the Dep’t of Children & Family Servs., 358 F.3d 804, 807 & n.2 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005); *see* S. 752, 1995 Reg. Sess. § 19 (Fla. 1995); H.R. 349, 1995 Reg. Sess. § 19 (Fla. 1995); H.R. 1461, 1993 Reg. Sess. (Fla. 1993).

118. *Lofton*, 358 F.3d at 808; *see also* Letter from Andrea K. Owes, Family Servs. Counselor, Fla. Dep’t of Children & Family Servs., to Steven Lofton (June 20, 2000) (on file with author).

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

120. *Id.*

121. Affidavit of Steven K. Lofton, *supra* note 101, ¶ 21.

122. Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001), *aff’d sub nom.* Lofton v. Sec’y of the Dep’t of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

123. *Id.* at 1375–76.

124. *Id.* Roe’s alcoholic biological father left him in Houghton’s care when Roe was four years old. *Id.* at 1375. Houghton became Roe’s legal guardian, and a few years later, when Roe’s father terminated his parental rights, Houghton attempted to adopt Roe. *Id.* at 1375–76. Houghton was unsuccessful because he is gay. *Id.* at 1376.

125. *Id.* at 1376. When Lofton and the other plaintiffs originally filed suit,

Lofton and his fellow plaintiffs alleged that section 63.042(3) violated (1) their fundamental rights to “familial privacy, intimate association and family integrity protected by the First Amendment and the Due Process Clause of the 14th Amendment to the United States Constitution” and (2) “their rights to equal protection guaranteed by the 14th Amendment.”¹²⁶ The federal district court granted summary judgment in favor of the DCF on reasoning later adopted by the appellate court, as discussed below.¹²⁷

The plaintiffs appealed to a panel of the Eleventh Circuit.¹²⁸ In light of the Supreme Court’s recent decision in *Lawrence v. Texas*,¹²⁹ the *Lofton* plaintiffs added a third argument on appeal: *Lawrence* “recognized a fundamental right to private sexual intimacy and [section 63.042(3)], by disallowing adoption by individuals who engage in homosexual activity, impermissibly burdens the exercise of this right.”¹³⁰

Before reaching the arguments, the Eleventh Circuit noted in its decision that under Florida law, adoption is a privilege rather than a right, and a public act, not a private one.¹³¹ Because the best interests of the child override all other factors in an adoption proceeding, the State is allowed greater leeway to make classifications for adoption purposes than it would be allowed in other areas of law.¹³² In fact, the court noted that no federal precedent existed in which an adoption scheme had

they were joined by Brenda and Gregory Bradley and Angela Gilmore. *Id.* The Bradleys claimed that they intended to designate a homosexual relative to be the adoptive parent of their children in the event of their deaths. *Id.* Gilmore said she was a lesbian and desired to adopt, but she had not applied to adopt. *See id.* at 1376–77. The district court dismissed the claims of these plaintiffs for lack of standing. *Id.* at 1377.

126. *Id.* at 1377. The District Court for the Southern District of Florida issued its opinion on August 30, 2001, *id.* at 1372, almost two years before the United States Supreme Court handed down *Lawrence v. Texas*. Therefore, neither the plaintiffs’ allegations nor the court’s opinion took *Lawrence* into account.

127. *Id.* at 1385; see Recent Case, *Eleventh Circuit Upholds Florida Statute Barring Gays from Adopting*: Lofton v. Secretary of the Department of Children & Family Services, 358 F.3d 804 (11th Cir. 2004), 117 HARV. L. REV. 2791, 2793–94 (2004).

128. Lofton v. Sec’y of the Dep’t of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

129. 539 U.S. 558 (2003).

130. *Lofton*, 358 F.3d at 809.

131. *Id.* at 809–11 (quoting Dep’t of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1216 (Fla. Dist. Ct. App. 1993)).

132. *Id.* at 810.

been successfully challenged on constitutional grounds by any individual other than a natural parent.¹³³

The court then turned to the plaintiffs' first claim, that section 63.042(3) violates their First Amendment and due process rights to familial privacy, intimate association, and family integrity.¹³⁴ In responding to the claim, the court discussed only the plaintiffs' claimed right to family integrity and held that they had none.¹³⁵ While parents have a fundamental right to make decisions regarding their children, the court found no precedent for treating foster families or guardian-ward relationships like biological families.¹³⁶ Though they share an emotional bond, the plaintiffs had no reasonable expectation of permanency in their familial arrangements, which is required for a fundamental right to family integrity.¹³⁷ The court declined to "recognize a new fundamental right" to family integrity for groups of individuals who have merely formed loving and interdependent relationships.¹³⁸

The court's equal protection analysis began by noting that since the Florida law burdened no fundamental rights and homosexuals have never been treated as a suspect class, rational basis review would apply.¹³⁹ As a result, the court only had to conclude that the law's classification was rationally related to a legitimate state interest.¹⁴⁰ Florida asserted a state interest in advancing the best interests of children by placing them in homes with a married mother and father.¹⁴¹ The nuclear familial arrangement, the State argued, promoted heterosexual role

133. *Id.* at 811.

134. *Id.*

135. *Id.* at 815.

136. *Id.* at 812-15.

137. *Id.* at 814.

138. *Id.* at 815.

139. *Id.* at 818.

140. *Id.*; *see also* *Romer v. Evans*, 517 U.S. 620, 631 (1996).

141. *Lofton*, 358 F.3d at 818. In a footnote, the court mentioned that Florida also asserted an interest in promoting public morality. *Id.* at 819 n.17. The plaintiffs argued that morality could not be a legitimate state interest under *Romer* and *Lawrence*. *See id.*; Supplemental Brief for Appellants at 5, *Lofton*, 358 F.3d 804 (No. 01-16723-DD). The court disagreed, finding support in two Supreme Court cases decided prior to both *Romer* and *Lawrence*. *Lofton*, 358 F.3d at 819 n.17. The court stated that the furtherance of public morality *could* be a legitimate state interest. *Id.* However, the court concluded that it was unnecessary to resolve the question, as it had found that Florida's asserted interest in placing children in homes with married parents provided a rational basis for the law. *Id.*

modeling and appropriate shaping of gender identity, in addition to the general stability that a marriage offers.¹⁴² The court found that this asserted interest provided a rational basis for the law.¹⁴³

The *Lofton* plaintiffs argued that, while the State may have a legitimate interest in placing adoptive children with marital families, the means employed—categorically excluding gay men and lesbians from adopting—are not rationally related to those ends.¹⁴⁴ The plaintiffs argued that section 63.042(3) could not withstand rational basis review under *Romer v. Evans* because of the loose connection between the law's means and its end. Coupled with history, this loose means-ends fit indicated that the law was prompted by animus.¹⁴⁵ The court noted that rational basis review does not require a perfect means-ends fit, and thus over- or under-inclusiveness does not render a statute unconstitutional.¹⁴⁶ Accordingly, it held that the plaintiffs' rights to equal protection had not been violated.¹⁴⁷

The *Lofton* plaintiffs' third argument, that *Lawrence* had announced a fundamental right to private sexual intimacy and section 63.042(3) impermissibly burdened that right, was also not well received. The court concluded that *Lawrence* had not announced a fundamental right at all, so it need not look any

142. *Lofton*, 358 F.3d at 818–19.

143. *Id.* at 819 n.17. The court stated:

It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society—particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*.

Id. at 819.

144. *See id.* at 820.

145. *See id.* at 826–27. The court distinguished section 63.042(3) from the amendment at issue in *Romer* in that section 63.042(3) is restricted to only one area of law and has a rational relationship with the State's asserted interest. *Id.* At least one scholar argues that section 63.042(3) is even more suspect under *Romer* than the law at issue in *Romer* itself, as section 63.042(3) is “more historically connected with class legislation than was the Colorado initiative . . . , and Florida's antigay policies create a class of people denied family-oriented protections even more basic than those denied by the Colorado initiative.” WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 212 (1999).

146. *Lofton*, 358 F.3d at 822–23.

147. *Id.* at 826–27.

further at *Lawrence*'s implications for the *Lofton* plaintiffs.¹⁴⁸ The court noted that the *Lawrence* Court did not explicitly characterize the right in question in *Lawrence* as "fundamental," citing Justice Scalia's dissent, nor did the *Lawrence* Court specifically locate the right in a particular constitutional clause.¹⁴⁹ The court went on to observe that the *Lawrence* Court broke from established fundamental rights analysis by failing to determine whether the right in question was "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty,"¹⁵⁰ and failing to provide a "careful description" of the fundamental right.¹⁵¹ The *Lofton* Court reasoned that these steps necessarily would have been taken had the court recognized a fundamental right.¹⁵² Finally, the court noted that the *Lawrence* Court did not explicitly apply strict scrutiny to the challenged statute, which would have been required had a fundamental right had been at stake, and instead invalidated the law applying rational basis review.¹⁵³

This combination of factors led the *Lofton* Court to "conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right."¹⁵⁴ And, it continued, regardless of the type of right announced, *Lawrence* would not affect the outcome in *Lofton*.¹⁵⁵ According to the *Lofton* court, the *Lawrence* Court itself stressed the narrow factual situation to which the decision applied, and the facts of *Lofton* fell outside that realm.¹⁵⁶ Unlike the situation in *Lawrence*, *this* one involved children.¹⁵⁷ Thus,

148. *Id.* at 817.

149. *Id.* at 816.

150. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

151. *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

152. *Id.*

153. *Id.* at 817.

154. *Id.*

155. *See id.*

156. *Id.*

157. *See id.* The *Lofton* court was referring to the following passage in *Lawrence*:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence v. Texas, 539 U.S. 558, 578 (2003). This passage was probably not intended to foreclose *Lawrence*'s application to any situation in which children are remotely involved. Rather, it likely served to prevent attempts to use the

the Court of Appeals for the Eleventh Circuit unanimously affirmed the district court and subsequently denied the *Lofton* plaintiffs' petition for rehearing en banc.¹⁵⁸ The ACLU petitioned the Supreme Court to grant certiorari to review the decision;¹⁵⁹ however, the Court denied the petition without comment.¹⁶⁰

III. FLORIDA STATUTE SECTION 63.042(3) IS UNCONSTITUTIONAL UNDER *LAWRENCE V. TEXAS* AND CONTRARY TO THE BEST INTERESTS OF CHILDREN

The Eleventh Circuit erred in upholding section 63.042(3). In doing so, it undermined the very principle on which it claimed to base its decision: adoption law is guided by the best interests of children. Florida's DCF considers the best interests of the child on a case-by-case basis in every single adoption.¹⁶¹

decision to claim constitutional protection for sexual conduct less protected than the relationship involved in the case, such as child abuse, sexual assault upon the disabled, public indecency, and prostitution. The last sentence was probably intended to calm those who would read *Lawrence* as an automatic blessing on gay marriage—a hotly debated topic on which the Court was not yet prepared to choose sides—though Justice Scalia reads the majority opinion as doing just that. *Id.* at 601 (Scalia, J., dissenting). The next passage in the opinion states, “The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.” *Id.* at 578 (majority opinion). This passage is fully applicable to the facts of *Lofton*, and the *Lofton* court should have recognized that.

158. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1275 (11th Cir. 2004), *denying reh’g en banc* to 358 F.3d 804. The court denied rehearing without significant comment. *Id.* Judge Barkett wrote a lengthy opinion dissenting from the denial of rehearing en banc, arguing that section 63.042(3) should be held unconstitutional on both due process and equal protection grounds. *Id.* at 1290–1313 (Barkett, J., dissenting). Two judges agreed with Judge Barkett that section 63.042(3) should be invalidated under the Equal Protection Clause and dissented for that reason. *Id.* at 1290 (Anderson, J., dissenting). Three others dissented on the grounds that the case raised important constitutional questions deserving of rehearing en banc. *Id.* at 1313 (Marcus, J., dissenting).

159. Petition for Writ of Certiorari, *Lofton*, 358 F.3d 804 (No. 04-478).

160. *Lofton v. Sec’y, Fla. Dep’t of Children & Families*, 125 S. Ct. 869 (2005), *denying cert.* to 358 F.3d 804; *see also* Linda Greenhouse, *Justices Refuse to Consider Law Banning Gay Adoption*, N.Y. TIMES, Jan. 11, 2005, at A14; Press Release, Am. Civil Liberties Union (ACLU), 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/LesbianGayRights.cfm?ID=17292&c=104>.

161. *See* FLA. STAT. ANN. § 63.125 (West 2005) (describing the procedure for home investigations prior to finalization of any adoption); Petition for Writ of Certiorari, *supra* note 159, at 3 (“This individualized evaluation process

Upholding Florida's blanket exclusion of gays from the pool of adoptive parents makes it impossible to respect the best interests of children for whom the best outcome is to be adopted by their gay foster parents. The *Lofton* court had an opportunity to recognize this fact and to apply settled constitutional doctrine to strike down section 63.042(3). But, as discussed below, the *Lofton* court failed to acknowledge the significant import of *Lawrence v. Texas* to the case before it. It misinterpreted and underestimated the *Lawrence* opinion in a manner that could set damaging precedent in the Eleventh Circuit and nationally, as lower courts continue to grapple with the application of *Lawrence* to substantive due process issues.

A. FLORIDA STATUTE SECTION 63.042(3) IMPERMISSIBLY BURDENS THE FUNDAMENTAL RIGHT TO FORM INTIMATE RELATIONSHIPS RECOGNIZED IN *LAWRENCE V. TEXAS*

Professor Laurence Tribe remarks that “when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board of Gay and Lesbian America*.”¹⁶² *Lawrence* was handed down while *Lofton* was being presented to the Eleventh Circuit, which subsequently failed to give *Lawrence* its due consideration. The Eleventh Circuit should have concluded that *Lawrence* did recognize a fundamental right and proceeded to apply strict scrutiny to section 63.042(3). Then, the court should have held that section 63.042(3) impermissibly burdens both *Lofton*'s and *Houghton*'s fundamental right to liberty under the Due Process Clause of the Fourteenth Amendment and invalidated the law as unconstitutional.

1. The Supreme Court Announced a Fundamental Right in *Lawrence v. Texas*

Even a cursory reading of *Lawrence* reveals that the Supreme Court does not relegate gay individuals to second-class citizenship. The Court respects gay relationships as central to autonomy, as passage after passage in *Lawrence* demonstrates. *Lawrence* pulled the following language from *Casey* and applied it with equal force to gay relationships:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and

aims to find adoptive parents who are able to meet the unique needs of each child.”).

162. Tribe, *supra* note 32, at 1895.

autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁶³

After making such a statement, the Court would not have concluded in the same opinion that intimate acts between gay men or lesbians deserve any less stringent constitutional protection than intimate acts between a man and a woman. And, since the privacy cases from *Griswold* to *Casey* create a fundamental right to private sexual intimacy for straight individuals, *Lawrence* provides the same to gay individuals. As the Court stated, "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."¹⁶⁴ As Judge Barkett stated in her dissent from the Eleventh Circuit's denial of rehearing en banc, "The only way to avoid the conclusion that *Lawrence* recognized a fundamental right . . . is to deliberately refuse to give meaning to the overwhelming bulk of the words, phrases, sentences, and paragraphs used in *Lawrence*."¹⁶⁵

The recognition of a fundamental right is implied in the *Lawrence* Court's use of precedent. *Griswold* was a "pertinent beginning point,"¹⁶⁶ and every precedent the court discussed in depth involved a fundamental right, until the Court reached and discredited *Bowers*.¹⁶⁷ Most involved a fundamental right to privacy.¹⁶⁸ The Court "emphasized the breadth of their holdings as involving private decisions regarding intimate physical relationships"¹⁶⁹ and compared, rather than distinguished, the facts of the case before it.¹⁷⁰ Its treatment of precedent lends itself to the conclusion that the Court intended for *Lawrence* to be next in this line of fundamental rights cases.

163. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

164. *Id.*; cf. Wright, *supra* note 78, at 408–09 (urging that, while *Lawrence* may be read to protect private conduct, the decision should be used as a catalyst for mobilizing a demand for *public* recognition of intimate relationships and respect for homosexuality generally).

165. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 377 F.3d 1275, 1310 (11th Cir. 2004) (Barkett, J., dissenting).

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

167. *See id.* at 564–66.

168. *See id.*

169. *Lofton*, 377 F.3d at 1305 (Barkett, J., dissenting).

170. *See* Sunstein, *supra* note 12, at 47.

The Court could have reached its result without explicitly overruling *Bowers*. The statute at issue in *Bowers* was distinguishable from the one at issue in *Lawrence* in that it facially applied to both heterosexual and homosexual sodomy.¹⁷¹ The *Lawrence* Court could have used equal protection grounds to strike down the Texas law while leaving *Bowers* intact. The fact that the Court chose to apply substantive due process doctrine is significant. In reversing its earlier decision and consequently invalidating all sodomy laws, the Court arguably “remove[d] a foundation, indeed some may argue the primary foundation, for all laws that place homosexuals at a disadvantage.”¹⁷² Rather than invalidating the law on equal protection grounds, the Court chose the doctrine with more punch. It did not want to risk a law redrawn to survive on equal protection grounds continuing to impose the stigma that the Texas law did.¹⁷³ It wanted to ensure that gays would be protected from egregious legislation and discrimination in both public and private life, which required the recognition of a fundamental due process right to engage in the intimate conduct that defines gay individuals.¹⁷⁴

To conclude that *Lawrence* applied rational basis review to the Texas sodomy law, the *Lofton* court relied on a single phrase and closed its eyes to the rest of the opinion. After the *Lawrence* Court had applied fundamental rights precedent, spoken in tones of great respect for the liberty owed to the intimate acts in question and forcefully struck down *Bowers* on due process grounds, it mentioned that there could be no “legitimate state interest” to justify Texas’s intrusion into the lives of the individuals involved.¹⁷⁵ The Court never said that it was applying rational basis review, and the paragraph surrounding the language in question contains discussion of *Casey*, which involved a fundamental right.¹⁷⁶ As Professor Cass Sunstein points out, the phrase “no legitimate state interest” was followed by reference to “the personal and private life of the individual,” for which the Court had just spent pages proving it

171. See Tribe, *supra* note 32, at 1907–08.

172. Martin R. Gardner, *Adoption by Homosexuals in the Wake of Lawrence v. Texas*, 6 J.L. & FAM. STUD. 19, 20 (2004).

173. See *Lawrence*, 539 U.S. at 575.

174. See *id.*

175. *Id.* at 578.

176. See Sunstein, *supra* note 12, at 47.

had the utmost respect.¹⁷⁷ Thus, the statement containing the words “legitimate state interest” can and should be interpreted to mean that the liberty interest involved is so worthy of protection that the law burdening it could not *even* be upheld on rational basis review because the intrusion was too great.¹⁷⁸

Lawrence does not refer expressly to the “fundamental right” it is protecting or the “strict scrutiny” it is applying in striking down Texas’s sodomy law. The *Lofton* court used this absence to support the interpretation that the Court was applying rational basis review.¹⁷⁹ But the fundamental nature of the right, though not characterized as such expressly, is evident in several passages of *Lawrence*.¹⁸⁰ For example, the Court stated that “the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”¹⁸¹ The *Lofton* court also erred in insinuating that a right not proven to be “deeply rooted in history and tradition” could not be fundamental under *Glucksberg*.¹⁸² Again, the court ignored *Lawrence*’s words, which describe a movement away from such a rigid requirement, directing that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”¹⁸³

Perhaps the advocates of a libertarian approach are correct, and *Lawrence* signaled a retreat from traditional substantive due process analysis in favor of a scheme that recognizes “liberty interests” and engages in an “interactive, dynamic, and even political analysis.”¹⁸⁴ Under this approach, section 63.042(3) would still be invalidated, for, as the law applies in the *Lofton* case, it infringes upon a liberty interest of the plaintiffs without demonstrating infringement of the rights of others. John Doe’s rights are arguably infringed more while the law is upheld than they would be if he were allowed to be

177. *Id.*

178. *See id.*; Carpenter, *supra* note 32, at 1151.

179. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 816–17 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

180. *See Tribe, supra* note 32, at 1916–17.

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

182. *See Lofton*, 358 F.3d at 816.

183. *Lawrence*, 539 U.S. at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

184. *See Recent Case, supra* note 127, at 2796.

adopted by his father and remain in his home. However, it is doubtful that the Supreme Court purported to “adopt a sliding scale of analysis without saying so,”¹⁸⁵ and lower courts should be hesitant to assume that it has done so without express word from the Court.¹⁸⁶

It is more likely that the Court purported to acknowledge a fundamental right in line with those recognized in the *Griswold-Eisenstadt-Roe* line of cases, as discussed above. The recognition of a fundamental right requires application of strict scrutiny to section 63.042(3), which burdens that right. In order to be upheld, the law must be narrowly tailored to the achievement of a compelling state interest.

2. Section 63.042(3) Burdens a Fundamental Right and Is Not Narrowly Tailored to Achieving a Compelling State Interest

Section 63.042(3) burdens the fundamental right to privacy described in *Lawrence*, which includes the right of two adults to engage in private, noncommercial, sexual intimacy. It forces gay individuals to choose between their sexuality and being considered as an adoptive parent. The law, then, can only withstand fundamental rights analysis if it is narrowly tailored to the achievement of a compelling state interest. Rarely do laws withstand strict scrutiny, and section 63.042(3) is no exception.

The primary interest asserted by the State in *Lofton* is to further the best interests of adoptive children by placing them in homes with a married mother and father.¹⁸⁷ Serving the best interests of adoptive children is unquestionably compelling, but it is debatable whether exclusively placing children in homes with a married mother and father always furthers that interest. It would be difficult to argue that remaining with Steven Lofton, the only father he has known in his thirteen years, is not in John Doe’s best interest.¹⁸⁸ Doe has committed parents, siblings, and a home in which his friends are welcome and he is loved.¹⁸⁹ The DCF has recognized this fact, and even the *Lofton*

185. Sunstein, *supra* note 12, at 48.

186. See Carpenter, *supra* note 32, at 1152 (“A Court about to embark on a new and highly controversial adventure into judicially mandated laissez-faire economics would at least drop a hint.”).

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

188. See Mark Strasser, *Adoption and the Best Interests of the Child: On the Use and Abuse of Studies*, 38 NEW ENG. L. REV. 629, 634–35 (2004).

189. See Petition for Writ of Certiorari, *supra* note 159, at 10.

court recognized that “Lofton’s efforts in caring for [his] children have been exemplary.”¹⁹⁰

Assuming, for the purpose of argument, that the interest asserted by the State is compelling, the means employed by the State must still be narrowly tailored to that interest for the law to be upheld under strict scrutiny.¹⁹¹ In this case, the law is not narrowly tailored to the interest asserted. There are more children in foster care in Florida than there are married couples wishing to adopt,¹⁹² and taking gays out of the equation does not create additional married couples—it only increases the disparity. Moreover, section 63.042(3) is underinclusive, as the State allows single, straight parents to adopt,¹⁹³ which does not further the State’s asserted goal of placing them with married parents. No other class of people is categorically excluded by the law, including disabled people, people who have had children removed from their care, substance abusers, and those with a history of domestic violence.¹⁹⁴ Section 63.042(3) is also overinclusive, as it excludes adoption by gay couples in stable, marriage-like relationships, which will, in many cases, better serve the best interests of an adopted child. Both under- and overinclusive, section 63.042(3) is not narrowly tailored toward achieving the State’s asserted interest. Thus, section 63.042(3) cannot survive the strict scrutiny required for laws burdening a fundamental right, which renders it unconstitutional under *Lawrence*.

190. *Lofton*, 358 F.3d at 807.

191. See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427 (1983), *overruled on other grounds* by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); see also *Roe v. Wade*, 410 U.S. 113, 155 (1973).

192. See Appellant’s Brief, *supra* note 103, at 29 (“[D]espite all the recruitment and all the adoptions by single parents that result, there remain over three thousand children eligible for adoption with no placements at all.”); Petition for Writ of Certiorari, *supra* note 159, at 7 (stating that when the *Lofton* case was dismissed by the district court “there were over 3,400 children in Florida . . . for whom there were no adoptive parents available”); ACLU LESBIAN & GAY RIGHTS PROJECT, *supra* note 111, at 9 (“[Florida] does everything it can to get married couples to adopt, and still falls far short of the number of parents it needs.”).

193. See ACLU LESBIAN & GAY RIGHTS PROJECT, *supra* note 111, at 11 (stating that twenty-five percent of Florida children adopted out of foster care are placed with single parents).

194. Petition for Writ of Certiorari, *supra* note 159, at 4–5. These individuals are given an opportunity to apply to be adoptive parents, though they may be denied through a screening process if the State deems them “incapable of meeting a child’s needs.” *Id.* at 5–6.

B. EVEN IF *LAWRENCE* DID NOT ANNOUNCE A FUNDAMENTAL RIGHT, SECTION 63.042(3) CANNOT STAND UNDER RATIONAL BASIS REVIEW

The State of Florida and the Eleventh Circuit got one point right: adoption law is guided by the best interests of the child. Florida's primary asserted interest was in furthering the best interests of adopted children by placing them in homes with married mothers and fathers.¹⁹⁵ It also asserted an interest in promoting public morality.¹⁹⁶ Even if, as the *Lofton* court found, *Lawrence* did not involve a fundamental right that would subject section 63.042(3) to strict scrutiny, the law must still be rationally related to achieving a legitimate state interest. Rational basis review is certainly a deferential standard, but it is not completely toothless.¹⁹⁷ The Supreme Court has invalidated statutes applying rational basis review.¹⁹⁸ Because section 63.042(3) is not rationally related to achieving the State's first interest, and the second is not a legitimate interest, the law should not stand even under a rational basis review.

1. Section 63.042(3) Is Not Rationally Related to Furthering the Best Interests of Adoptive Children

There are thousands of children in Florida awaiting adoption into permanent homes.¹⁹⁹ While the State seeks homes with married parents, these children languish in foster care. Many will "age-out" of the system after living in several foster homes without ever having been adopted. It is not rational to

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

196. *Id.* at 819 n.17.

197. See *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

198. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (finding no rational basis for requiring a special-use permit for a home for mentally handicapped adults and noting that the requirement appeared to be based on an irrational prejudice against the mentally disabled); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (striking down a dividend distribution plan because the State had shown no interest rationally advanced by its distinction between citizens who had become residents prior to 1959 and all other citizens); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 529, 538 (1973) (striking down a provision of the Federal Food Stamp Act limiting eligibility for the food stamp program to households in which all individuals were related to one another, because the provision had no rational basis).

199. *Lofton*, 358 F.3d at 823 (estimating that there are 3,000 children in foster care in Florida); Scott D. Ryan et al., *Florida's Gay Adoption Ban: What Do Floridians Think?*, 15 U. FLA. J.L. & PUB. POL'Y 261, 262 (2004) (estimating that there are 5,000 children in need of homes in Florida).

think that excluding gays from adoption will somehow increase the number of married couples desiring to adopt. Excluding gays from adopting simply cannot advance the State's asserted interest in placing children with married parents.²⁰⁰ Rather, it keeps children from being adopted by gay couples in committed relationships who would serve their best interests much more than would remaining in foster care. Adoption by gay parents is more rationally related to the presumed purpose of Florida's asserted interest in finding married homes for its children, which is finding stable, loving homes for those children. This is especially true for older children who are less likely to be adopted at all.²⁰¹ The State knows of no child who has been placed in foster care because of any harm associated with having gay parents.²⁰² However, the State has extensive experience with the behavior of substance abusers and child abusers resulting in their children being placed in foster care, yet it does not categorically exclude these individuals from applying to adopt.²⁰³

In *Lofton*, the State of Florida showed concern for the effects of gay parenting on the development of a child's "sexual and gender identity" and "socialization."²⁰⁴ Several studies have investigated the effects of a gay parent on child development and parent-child relationships. Sociologists Judith Stacey and Timothy Biblarz compiled and summarized the findings of twenty-one of them. Overwhelmingly, the data indicates that being raised by a gay parent has no detrimental effect on children.²⁰⁵ Gay parents are as devoted to their children as straight

200. Some opponents of gay marriage argue that gay individuals *do* have the right to marry, as long as they marry a person of the opposite sex. See Strasser, *supra* note 188, at 636. It follows from this argument that since gay people can marry legally, they can further the State's interest in placing children with married parents, just as heterosexual singles can. See *id.* While it is true that gay people are less likely to enter into legally recognized marriages, Florida does not inquire into the likelihood that adoption applicants will marry. See *id.* at 637.

201. See Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 668 (1999).

202. Petition for Writ of Certiorari, *supra* note 159, at 6.

203. See *id.* at 5–6.

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

205. See Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 160 (2001); see also Motion of the Child Welfare League of America for Leave to File Brief Amicus Curiae in Support of Petitioners and Brief Amicus Curiae at 16–17, *Lofton v. Sec'y, Fla. Dep't of Children & Families*, 125 S. Ct. 869 (2005) (No. 04-478) [hereinafter

parents.²⁰⁶ They perform as well on “every measure of parenting skills.”²⁰⁷ Children of gay parents are emotionally, behaviorally, developmentally, and cognitively similar to children of straight parents.²⁰⁸ Though having gay parents may increase the likelihood that a child would be more open to considering a gay relationship, studies conclude that it does not increase the likelihood that the child will self-identify as gay.²⁰⁹

The few perceived differences that exist between children of gay parents and children of straight parents are not necessarily negative.²¹⁰ For example, research reveals that daughters of lesbians are more likely to consider nontraditional gender occupations, such as being an astronaut or a doctor.²¹¹ A compilation of studies on children of lesbian mothers found that children of lesbians had slightly *better* mental health than other children.²¹² Lesbian mothers also fared better than divorced fathers and stepfathers at maintaining healthy and open relationships with their children.²¹³ Not one reliable study has identified any negative risk to children caused by gay parenting.²¹⁴

Reputed child advocacy groups, including the Child Welfare League of America, the American Academy of Pediatrics, the American Psychiatric Association, and the American Psychological Association, have made statements in support of al-

Amicus Brief of the CWLA]. *But see* Lynn D. Wardle, *Considering the Impacts of Children and Society of “Lesbigay” Parenting*, 23 QUINNIPIAC L. REV. 541, 543 (2004) (asserting that “children are most benefited and most protected when they are raised by their mother and father who are married to each other[,]” so “[l]ogically, it is not unreasonable to expect that lesbigay parenting will not prove to be as beneficial for children or for society”).

206. *See* Amicus Brief of the CWLA, *supra* note 205, at 15–20.

207. *Id.* at 16.

208. *See id.* at 16–17.

209. *See* Stacey & Biblarz, *supra* note 205, at 170–71.

210. *See* Amicus Brief of the CWLA, *supra* note 205, at 15–19; *see also, e.g.*, Stacey & Biblarz, *supra* note 205, at 168–70.

211. *See* Stacey & Biblarz, *supra* note 205, at 168.

212. *See, e.g., id.* at 171–72 n.11.

213. *See id.* at 175.

214. It should be noted that few, if any, of the existing studies on gay parenting were conducted using ideal scientific methods. Stacey and Biblarz argue that hetero-normative convictions lead to biased research. *Id.* at 162. Also, categorizing “gay” subjects is complex, and sample sizes are small, nonrandom, and unrepresentative. *See id.* at 164–66; *see also* Wardle, *supra* note 205, at 550–56.

lowing gay adoption.²¹⁵ Florida's own policies regarding foster care indicate that DCF officials agree with the research and professional opinion. The State places children with gay foster parents and legal guardians,²¹⁶ which are arrangements that should also be made "in the best interest of the child."²¹⁷ When Steven Lofton relocated to Oregon in 1998, the DCF gave him permission to relocate Doe, agreeing that it was in Doe's "manifest best interest" to stay with Lofton.²¹⁸ When Florida's leading official overseeing adoption policy was deposed prior to the *Lofton* case, she was asked, "Do you know of any child-welfare reason at all for excluding gay people from adopting children?"²¹⁹ She answered, "No."²²⁰ Social science research demonstrates and the DCF's actions indicate that its officials agree that gay individuals are just as capable of being outstanding parents as heterosexuals. Thus, Florida's blanket exclusion is not rationally related to the State's interest in furthering the best interests of children.

Florida has expressed through legislation that its goal for all of its foster children is adoption.²²¹ It is well established that children who are adopted out of foster care are more successful than children who remain in foster care until majority.²²² The story of Steven Lofton and John Doe is a case in point that adoption by gay parents is decidedly better than remaining in foster care, at least for some children.²²³ Also, section 63.042(3) prevents the adoption of children by a gay or les-

215. See Amicus Brief of the CWLA, *supra* note 205, at 11–15; ACLU LESBIAN & GAY RIGHTS PROJECT, *supra* note 111, at 25–30.

216. See Petition for Writ of Certiorari, *supra* note 159, at 6.

217. Laura A. Turbe, Comment, *Florida's Inconsistent Use of the Best Interests of the Child Standard*, 33 STETSON L. REV. 369, 382 (2003) (quoting FLA. STAT. § 39.45(2) (2002)).

218. Affidavit of Steven K. Lofton, *supra* note 101, ¶ 19.

219. ACLU LESBIAN & GAY RIGHTS PROJECT, *supra* note 111, at 11 (quoting from the deposition of Carol Hutchinson).

220. *Id.*

221. Cf. FLA. STAT. ANN. § 63.022(1)(a), (c) (West 2005) ("The [S]tate has a compelling interest in providing stable and permanent homes for adoptive children," and "[a]doptive children have the right to permanence and stability in adoptive placements.>").

222. See Amicus Brief of the CWLA, *supra* note 205, at 3–4; see also Gardner, *supra* note 172, at 26.

223. Cf. Strasser, *supra* note 188, at 635 ("It is difficult to understand how a law that dictates th[e] result [in *Lofton*] could be construed as promoting the best interests of children.>").

bian relative, a person with whom the child is usually familiar, which lessens the trauma of a new caregiver.²²⁴ A relative would also be more likely to encourage the child to maintain relationships with other family members.²²⁵ Placement with a gay relative would likely be in the best interest of some adoptive children, but section 63.042(3) precludes the possibility.

In every potential adoption, the DCF screens adoption applicants and employs additional policies and procedures to ensure that a placement is in the child's best interests.²²⁶ Thus, if the purpose of section 63.042(3) truly is to strive for placements in the best interests of children, it is redundant and unnecessary. If there are legitimate reasons for denying some gays permission to adopt, which will be the same reasons for denying certain people generally permission to adopt, those individuals will be eliminated through the standard screening process. The fact that a law is unnecessary does not make it irrational, but section 63.042(3), by categorically excluding gay adoption applicants, prevents courts from making case-by-case determinations, which, in the *Lofton* case particularly, would be in the best interests of the child.²²⁷ As Mark Strasser argues:

The point . . . is not that it is bad for children to be raised by a father and mother but merely that many kinds of parents can provide homes in which children may thrive and we should not pretend otherwise. To do so does a disservice both to society and to the children themselves.²²⁸

Section 63.042(3) is not rationally related to furthering the best interests of every child, as the *Lofton* case aptly demonstrates. Therefore, it cannot be upheld even under rational basis review.

224. Amicus Brief of the CWLA, *supra* note 205, at 7.

225. *Id.*

226. *Cf.* § 63.125 (describing the procedure for home investigations prior to finalization of any adoption); Petition for Writ of Certiorari, *supra* note 159, at 3 ("This individualized evaluation process aims to find adoptive parents who are able to meet the unique needs of each child.").

227. *But see* Erica Gesing, Note, *The Fight to be a Parent: How Courts Have Restricted the Constitutionally-Based Challenges Available to Homosexuals*, 38 NEW ENG. L. REV. 841, 849–50 (2004) (pointing out that even if bans on gay and lesbian adoption were lifted, the best interests of the child standard would allow for substantial flexibility on the part of judges, and many homosexuals still might be precluded from adoption if a judge were unwilling to accept the concept of the evolving definition of family).

228. Strasser, *supra* note 188, at 641.

2. Promoting Public Morality Is Not a Legitimate State Interest

Though the *Lofton* court glossed over it, Florida asserted an interest in furthering public morality with section 63.042(3).²²⁹ This can only mean that the State considers being gay “immoral.” As *Romer* makes clear, advancing the moral beliefs of a majority and expressing disapproval of a class of people cannot be a legitimate interest.²³⁰ The *Lofton* court cited two Supreme Court cases to support its “unnecessary” conclusion that morality is a legitimate state interest, both decided prior to *Romer* and *Lawrence* and no longer good law.²³¹ Florida’s interest in furthering public morality cannot be a legitimate state interest on which to base its adoption law.

Not only should the *Lofton* court have held that this asserted state interest was not legitimate, it should have recognized that, as the State impliedly admits and is clear from the legislative history, the purpose of enacting and continually enforcing section 63.042(3) was to express moral disapproval of gays.²³² It is irrational to uphold a law that categorically excludes a class of people on the grounds that it serves the “best interests of children,” when an alternative exists that refrains from discriminating against a class of people and leaves children equally well-off. The only possible reason for Florida to retain the law is that the State’s purpose is to express disapproval of gays. In *Romer v. Evans*, the Court struck down a state constitutional amendment because its means were so irrationally related to its ends that a motivation of animus was implied.²³³ Section 63.042(3) involves an even clearer history of animus than did Amendment 2 in *Romer*.²³⁴ Moreover,

229. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 819 n.17 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005); *see also supra* note 141 (discussing Florida’s asserted interest in promoting public morality and the Eleventh Circuit’s response).

230. *See Romer v. Evans*, 517 U.S. 620, 634 (1996).

231. *Lofton*, 358 F.3d at 819 n.17 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991), and *Gregg v. Georgia*, 428 U.S. 153, 175 (1976)).

232. *See* ACLU LESBIAN & GAY RIGHTS PROJECT, *supra* note 111, at 7–8 (discussing the antigay bases behind the passage of section 63.042(3)); *id.* at 11 (noting that a DCF representative could advance not one child-welfare-related reason why gays should be excluded from adoption); *see also* Affidavit of Steven K. Lofton, *supra* note 101, ¶ 19 (discussing the DCF’s acknowledgment that remaining with Lofton was in Doe’s best interest).

233. 517 U.S. at 634–35; *see also supra* note 71.

234. *See supra* note 71 (discussing the animus involved in Colorado’s Amendment 2).

Amendment 2 revoked protection against discrimination against gays primarily in economic contexts, while Section 63.042(3) deals with a part of human life even more central to personhood, adoption of and caring for a child.²³⁵

Despite the fact that *Romer* was based on the Equal Protection Clause and applied rational basis review while *Lawrence* was grounded in the Due Process Clause, *Lawrence* discussed *Romer* as instructive precedent of “principal relevance.”²³⁶ The *Lawrence* Court then went on to praise Justice Stevens’s *Bowers* dissent, which asserted that advancing the moral code of the majority was not a sufficient justification for upholding a law.²³⁷ It invoked *Romer* and the *Bowers* dissent to further illustrate the mistake of *Bowers* and likely to ensure protection for gay individuals from future infringement on rights not deemed fundamental. Thus, the directive in *Romer* is arguably mandatory for rational basis review in a due process analysis as well as in an equal protection analysis.²³⁸ Section 63.042(3) is so irrationally related to achieving the State’s “legitimate” interest in placing children with married parents that animus should be inferred. Also, the State’s asserted interest in public morality, as well as the legislative history of the law, indicates that it was enacted out of animus toward gays. Such motivations are impermissible grounds for legislation, and section 63.042(3) should be struck down under *Lawrence* and *Romer*, even on rational basis review.

CONCLUSION

Lofton v. Secretary of the Department of Children & Family Services constituted a costly error by the Eleventh Circuit. Not only will the decision potentially remove a boy from his father, his siblings, and the only home he has ever known, it also takes a step back from the progress made in *Lawrence* toward bestowing upon gay relationships the recognition and security they deserve. Forcing Steven Lofton to choose between his

235. See ESKRIDGE, *supra* note 145, at 212.

236. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

237. See *id.* at 577–78 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

238. See Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171, 1180 (2004) (arguing that the one clear rule that emerges from *Lawrence* is that if a State singles out gays for harsh treatment or encourages prejudice against them, the Court will presume a bare desire to harm gays, rather than mere moral disapproval).

partner of over twenty years and adopting his son impermissibly burdens his constitutional right to liberty—his right to intimate relationships on which the State should be forbidden from trampling.

The Supreme Court handed down a puzzle with *Lawrence*, but lower courts, including the Court of Appeals for the Eleventh Circuit, should arrange the pieces into a picture of liberty, not of tolerance for irrational discrimination. The *Lawrence* Court's deliberate use of language, precedent, and stringent substantive due process doctrine indicate that the Court recognized a fundamental right to form intimate relationships, a right that had long been extended to heterosexuals and was overdue to be extended to gays. Florida Statute section 63.042(3) impermissibly burdens the gay *Lofton* plaintiffs' fundamental rights, and *Lawrence* required that strict scrutiny be applied. As the law is not narrowly tailored to achieving a compelling state interest, section 63.042(3) cannot stand, and the *Lofton* court should have struck it down. Alternatively, even if *Lawrence* did not recognize a fundamental right, section 63.042(3) is not rationally related to achieving a legitimate state interest in furthering the best interests of children, and promoting public morality is not a legitimate state interest under *Lawrence*. Thus, section 63.042(3) cannot stand even on rational basis review. The *Lofton* court evaded *Lawrence*, but the next court to consider the law ought not to repeat that mistake. A law that impermissibly burdens the fundamental rights of gays and undermines the best interests of children like John Doe should not remain on Florida's books.