

EXAMINING THE CONSTITUTIONALITY OF HOMOSEXUAL ADOPTION BANS

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INTRODUCTION

Eleven year old Bert, born HIV-positive, has been with his “parents” since he was nine weeks old. Steven Lofton and his partner Roger Croteau have raised Bert and five other children with complex medical needs.¹ At the state’s request Steve quit his job to be with Bert and the other children to take care of their challenging needs. But Bert sero-reverted, meaning he no longer tests positive for HIV. Now he's considered a desirable child to adopt and the state of Florida continues to search for a new home for Bert, taking him away from the only two parents he's ever known.²

Bert is caught up in Florida’s statutory provision banning homosexuals from eligibility to adopt.³ Several states across the country are considering or have enacted adoption laws which ban homosexuals from eligibility, while permitting both single and married heterosexuals to adopt.⁴ As the laws banning homosexuals proliferate, and

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¹ See Aff. Steven K. Lofton ¶¶ 11, 21, 24, *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001); Let Him Stay, at <http://www.lethimstay.com>.

² *Id.*

³ FLA. STAT. § 63.042(3).

⁴ In addition to Florida’s categorical disqualification of gays and lesbians from being considered potential adoptive parents, Mississippi also prohibits adoption by same-sex couples. MISS. CODE § 93-17-3(2). Arkansas enacted a regulation that excludes families with gay household members from serving as foster parents, but not from adopting. Arkansas Minimum Licensing Standards for Child Welfare Agencies § 200.3.2. Utah prohibits adoption by any unmarried couple or individual. UTAH CODE ANN. § 78-30-1 (2002). Virginia states that social workers should look into the sexual orientation of applicants, but does not explicitly ban them. See “Virginia Dumps Bill Targeting Gay Adoptions,” 365Gay.com, 2/17/05, at <http://www.365gay.com/newscon05/02/021605vaAdopt.htm> (last visited 3/15/05). The Tennessee legislature is considering a ban on homosexual adoptions. See Maura Satchell, *Gay adoption ban receives heavy support*, THE DAILY NEWS JOURNAL, 2/24/05.

judicial challenges to these bans increase, a deeper understanding of the constitutional laws and challenges surrounding gay adoption bans is necessary.

Challenges to gay adoption bans are most often brought under substantive Due Process and Equal Protection grounds. This paper will focus on challenges under those two theories of Constitutional law. First, I will examine the potential violation of Due Process rights, both under strict scrutiny and a rational basis review. I will then explore the possible violations of the Equal Protection Clause under a heightened review as well as a rational basis review.

I. HOMOSEXUAL ADOPTION BANS AND FUNDAMENTAL DUE PROCESS RIGHTS TO SEXUAL PRIVACY

A. Substantive Due Process Clause Overview

The Constitution contains two Due Process Clauses, one in the Fifth Amendment and one in the Fourteenth Amendment. Because the former is a limit on the power of the national government and the latter is a restriction of state power, due process challenges to gay adoption laws are primarily brought under the Fourteenth Amendment. The limitations of the Due Process Clause are both procedural and substantive. For purposes of this paper we need only to concern ourselves with substantive due process, a theory which protects “life, liberty, and property.”

B. Standards of Review

Invariably a challenge to gay adoption bans will hinge on the standard of review. The doctrine of substantive due process requires that every law must address a legitimate governmental purpose.⁵ State laws must address a legitimate state interest in a way that

⁵ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

is rationally related to that interest.⁶ Therefore, any law challenging a right or liberty interest must survive rational-basis review. This “rational basis review” constitutes the first of two basic standards used to decide whether a law violates substantive due process.

The second standard of review – “strict scrutiny” – is generally applied when a fundamental liberty interest is implicated. The Supreme Court has found that some fundamental rights are protected as part of a right to privacy under the Due Process Clause, and that the legislature may only restrict these fundamental rights when the law is “narrowly tailored to serve a compelling state interest.”⁷ In some circumstances, such as abortion, the Court may employ a variation of the traditional strict scrutiny test.

I will first examine whether state adoption bans violate fundamental due process rights to sexual privacy. I will then assume no fundamental right is implicated and determine if the bans nevertheless violate substantive due process rights to sexual privacy under a rational basis review.

C. Did *Lawrence* affirm a fundamental right or liberty interest to engage in homosexual conduct?

In *Lawrence v. Texas*, the Supreme Court invalidated a Texas sodomy law and affirmed the right to sexual privacy, finding that private homosexual conduct is encompassed within it.⁸ In *Lawrence*, two men were charged with violating a Texas law criminalizing sodomy. The Court stated that the Due Process Clause gives consenting adults “the full right to engage in [private sexual] conduct without intervention of the government.”⁹ The Court made clear that this was the holding by stating that it had

⁶ *Id.*

⁷ *Zablocki v. Redhail*, 434 U.S. 374 (1978).

⁸ *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

⁹ *Id.* at 578.

granted certiorari specifically to consider “[w]hether Petitioner’s criminal convictions for *adult consensual sexual intimacy in the home* violate their *vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?*”¹⁰

Although the Court also granted certiorari to address whether Texas’s sodomy statute violated the Equal Protection Clause, the Court explicitly rested its holding on a substantive due process analysis.¹¹

After retracing some of its fundamental rights cases, the Court emphasized the breadth of their holdings regarding intimate physical relationships.¹² The *Lawrence* Court concluded that its prior decisions confirmed “that the protection of liberty under the Due Process Clause has a substantive dimension of *fundamental* significance in defining the rights of the person” and “that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”¹³

The right to privacy affirmed in *Lawrence* is more than “simply the right to engage in certain sexual conduct.”¹⁴ The Court made sure to note a “substantive dimension of fundamental significance” of the right to private, consensual sexual conduct.¹⁵ However, near the end of the *Lawrence* decision the Court determined the Texas sodomy law did not have a “legitimate state interest,” suggesting the law only needed to meet a rational basis review and therefore implying that the right was not

¹⁰ 539 U.S. 558, 564 (2003) (internal quotation marks and citation omitted) (emphasis added).

¹¹ 539 U.S. 558, 575 (2003). Justice O’Connor rested her concurring opinion on Equal Protection grounds (“The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction.”). *Id.* at 579.

¹² 539 U.S. 558, 564-567 (2003) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Services Int’l*, 431 U.S. 678 (1977)).

¹³ 539 U.S. 558, 565 (2003) (summarizing *Griswold*, *Eisenstadt*, *Roe*, and *Carey*) (emphasis added).

¹⁴ 539 U.S. 558, 567 (2003).

¹⁵ *Id.* at 565.

fundamental.¹⁶ This leads to confusion over whether the Court did in fact intend to recognize a fundamental right. But once the *Lawrence* Court found that the Texas sodomy statute restricted the petitioners' substantive right under the Due Process Clause, and that the law lacked any legitimate state purpose, it had no reason to proceed with heightened scrutiny. Since there was not even a conceivable legitimate state interest, the Court did not need to inquire further under a traditional fundamental right paradigm to note that there was not a compelling state interest either.

Others may argue that the *Lawrence* Court was simply trying to avoid the issue altogether. The Court's unwillingness to grant certiorari in an Alabama sex toy case involving similar issues adds weight to that notion.¹⁷ But the *Lawrence* Court clearly and explicitly overruled a decision in *Bowers v. Hardwick*,¹⁸ which did not acknowledge a fundamental right to consensual sodomy. In *Bowers* the Court held that the Due Process Clause does not confer "a fundamental right upon homosexuals to engage in sodomy."¹⁹ In specifically overruling that holding, the Supreme Court concluded that "*Bowers* was not correct when it was decided, and it is not correct today."²⁰ In sum, given the Court's statement that *Bowers* was not correct when it was decided, the *Lawrence* Court was arguably reiterating and recognizing the longstanding fundamental right of consenting adults to engage in private sexual conduct.

D. Are State adoption bans subject to heightened scrutiny because they significantly burden the right to sexual privacy?

¹⁶ 539 U.S. 558, 578 (2003).

¹⁷ See *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) (Alabama anti-vibrator statute lacked rational basis), *cert. denied*, 125 S.Ct. 1335 (2005).

¹⁸ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁹ *Id.* at 190.

²⁰ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

State adoption bans impose a direct burden on the right recognized in *Lawrence*, but does subject the bans to heightened scrutiny? The statutes force a choice between the right to participate in a consensual, private, intimate relationship and consideration for adoption. In most states banning homosexual adoption, homosexual men and women are denied from the very beginning, forcing them to relinquish the consideration given even to felons and child molesters in order to enjoy what is arguably a fundamental right protected by the Due Process Clause.²¹ When the government burdens a fundamental right or liberty interest, the law must satisfy heightened scrutiny.²² The heightened scrutiny requires that legislation be “narrowly drawn” to achieve a “compelling state interest.”²³

As Justice Souter indicated in *Washington v. Glucksberg*, this heightened protection sometimes applies regardless of whether the protected right is expressly labeled as “fundamental.”²⁴ The Supreme Court has “used various terms to refer to fundamental liberty interests,” including “basic liberty,” “constitutionally protected liberty interest,” and “right.”²⁵

Although adoption is a privilege and not a right under state law, state adoption laws that ban homosexuals must still satisfy heightened scrutiny. In *Shapiro v. Thompson*,²⁶ the Supreme Court invalidated a law that conditioned the receipt of welfare benefits, a statutory privilege, on a one-year residency requirement as an unconstitutional burden on the right to interstate travel. The Court concluded that “[t]his constitutional

²¹ See Section C, *supra*.

²² See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (heightened scrutiny applies to direct and substantial burdens on due process rights).

²³ 410 U.S. 113, 155 (1973).

²⁴ *Washington v. Glucksberg*, 521 U.S. 702, 768 n. 10 (1997) (Souter, J., concurring).

²⁵ *Id.*

²⁶ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

challenge cannot be answered by the argument that public assistance benefits are a ‘privilege’ and not a ‘right.’”²⁷ Because the law “penalized” the fundamental right to interstate travel, the Court asked whether the law was “necessary” to achieve a “compelling governmental interest.”²⁸

Therefore, the refusal to extend a statutory benefit or privilege on non-discriminatory terms may unconstitutionally burden the exercise of a fundamental right or liberty interest, thereby requiring a compelling state interest. State adoption bans may also impose a direct and substantial burden on the fundamental right to sexual privacy. The Constitution does not permit such a law unless, under heightened scrutiny, a compelling and narrowly tailored justification can be found.

E. Is Florida’s adoption bans is narrowly tailored to serve a compelling state interest

If state adoption bans impose a direct and substantial burden on the fundamental right to sexual privacy, the laws must be narrowly tailored to serve a compelling state interest. In Florida, the state’s asserted interest behind the ban was to protect the best interest of Florida’s children²⁹ because “families in which there is a mother and a father are considered important for the well-rounded growth and development of the child.”³⁰ In other words, Florida prohibits homosexuals from being considered adoptive parents because the state wishes to place children with married couples. But the statute itself offers no preference for married couples and even expressly permits adults who are not

²⁷ Id. at 627 n. 6 (1969).

²⁸ 394 U.S. 618, 634 (1969).

²⁹ See *Lofton v. Kearney*, 157 F.Supp. 2d 1372 (S.D. Fla. 2001). See also FLA. STAT. § 409.166(1) (“It is the intent of the Legislature to protect and promote every child’s right to the security and stability of a permanent family home.”).

³⁰ See FLA. ANN. CODE 56C-16.005(6)(f)(1).

married to adopt. This is a blanket exclusion of gay couples that is not found elsewhere in Florida family law, which otherwise provides that applicants are evaluated on a case-by-case basis.³¹

In *Zablocki v. Redhail*,³² the Supreme Court applied heightened scrutiny in striking down a civil law that prevented individuals who had not made child support payments from receiving a marriage license. The statute was enacted to make parents satisfy obligations to prior children before incurring additional debt in a new marriage. The Court concluded that the statute's intended scope was "grossly underinclusive" because it failed to limit new financial obligations other than those arising out of "the contemplated marriage."³³ The Court found that the government was unable to show that the law was justified by "sufficiently important state interests" or that it was "closely tailored to effectuate only those interests."³⁴

Similarly, many states' offered basis for the statutes are irrational and not related to the state's interest. One could argue the adoption ban is "grossly underinclusive" because, unlike the stated government interest, it has no preference for married couples and expressly permits adults who are not married to adopt.³⁵ Indeed in Florida, for instance, 25 percent of all adoptions are to single, heterosexual parents.³⁶ Thus, the statute's function completely fails to achieve its stated intent and arguably fails to justify the adoption ban's violation of fundamental Due Process rights to sexual privacy.

II. THE BANS' VIOLATION OF DUE PROCESS SURVIVES RATIONAL BASIS REVIEW

³¹ See FLA. STAT., ch. 63; § 63.125.

³² *Zablocki v. Redhail*, 434 U.S. 374 (1978).

³³ *Id.* at 390.

³⁴ *Id.* at 388.

³⁵ FLA. STAT. § 63.042(2)(b). The state also has no preference for married applicants. See FLA. ADMIN. CODE § 65C-16.005(6)(e).

³⁶ See *Lofton v. Kearney*, 157 F.Supp. 2d 1372 (S.D. Fla. 2001).

If a court determines a homosexual adoption ban burdens a fundamental Due Process right the review calls for strict scrutiny, but if a court fails to recognize a fundamental right, and thereby applies a rational basis review, judicial consistency requires a court should uphold the adoption ban. When a statute does not burden a fundamental right, it “must bear a rational relationship to a legitimate governmental purpose.”³⁷ But this rational basis review does not provide courts a license to judge “the wisdom, fairness, or logic of legislative choices.”³⁸

In *Romer*, a Colorado Constitutional amendment prohibiting governmental protection of homosexual persons was “inexplicable by anything but animus” because the amendment exceeded its rationale of “conserving resources to fight discrimination against other groups.”³⁹ Applying a rational basis review, the Court found that the amendment inflicts “immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”⁴⁰ Similarly, in *Eisenstadt v. Baird* the proffered state interest was “so riddled with exceptions” that the state’s asserted goal could not “reasonably be regarded as its aim.”⁴¹

Opponents of homosexual adoption bans may argue that the laws are not rationally related to legitimate government ends behind the statute, just as the statutes’ justifications in *Romer* and *Eisenstadt* failed to meet the Court’s rational basis review. States most often prohibit homosexuals from being considered adoptive parents because they wish to place children with married couples. But the statutes themselves typically

³⁷ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

³⁸ *Federal Comm’n v. Beach Comm’n.*, 508 U.S. 307 (1992).

³⁹ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

⁴⁰ *Id.*

⁴¹ *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (a state’s interest in premarital sex was irrationally related to a statute prohibiting contraceptives because married couples could use contraceptives for the same purpose).

offer no preference for married couples and often expressly permit adults who are not married to adopt, even if they do not intend to marry.⁴² This contradiction alone is enough for some to believe the state’s alleged reasons are “illogical to the point of irrationality.”⁴³

In addition to their failure to adequately distinguish homosexuals from single heterosexuals, the statutes may accomplish the opposite of their stated purpose of trying to “protect and promote every child’s right to the security and stability.”⁴⁴ Many children require great care and may be unsuitable or unwanted for adoption by most families. Older children in particular must sometimes wait years in foster care before finally being adopted, and a significant percent of children in foster care never get adopted at all. Many believe it is in the best interests of children like this to be adopted by a caring homosexual parent rather than languish alone and unwanted in a state institution of foster care. Moreover, opponents point to studies that suggest homosexuals are fit and capable parents.⁴⁵ Thus, according to opponents, the stated governmental function fails to achieve its goal of arranging what is in the best interest of children. Indeed, the statutes sometimes serve to obstruct, rather than encourage, the placement of a child into a permanent, loving family.

However, the legislature is given the benefit of the doubt and a strong presumption of validity so long as there is a “reasonably conceivable” situation that would constitute a rational basis for a statute.⁴⁶ The state has argued that homosexual

⁴² FLA. STAT. § 63.042(2)(b). The state also has no preference for married applicants. *See* FLA. ADMIN. CODE § 65C-16.005(6)(e).

⁴³ *Eisenstadt v. Baird*, 405 U.S. 438, 451 (1972).

⁴⁴ FLA. STAT. § 409.166(1).

⁴⁵ Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 *American Sociological Review* 159 (2001).

⁴⁶ *Heller v. Doe*, 509 U.S. 312, 320 (1993).

parents are not the optimal arrangement for children, and because the evidence to support the claim is still unsettled,⁴⁷ the courts must defer to the legislature and give it the benefit of the doubt. This deference must occur even if the law seems unwise or works to the disadvantage of a particular group.⁴⁸

Nevertheless, when a law is “inexplicable by anything but animus,”⁴⁹ the court will still overrule it under a rational basis review. In 1977, Florida became the first state to ban gay adoptions.⁵⁰ Florida law provides that, “[n]o person eligible to adopt under this statute may adopt if that person is homosexual.”⁵¹ Although the Florida Legislature passed the ban without any fact-finding regarding the advantages and disadvantages of homosexual adoption,⁵² the bill's sponsor, Senator Curtis N. Peterson, Jr., of Lakeland, Florida, was quite explicit about its purpose. The Senator told a newspaper that “[t]he problem in Florida has been that homosexuals are surfacing to such an extent that they're beginning to aggravate the ordinary folks, who have a few rights of their own.”⁵³ He added, “We're trying to send [homosexuals] a message, telling them: ‘We’re really tired of you. We wish you’d go back into the closet.’”⁵⁴ It is clear that the ban on homosexual adoptions, at least in Florida, is based in part on animus. One could argue that it is in fact the only justification offered by the law’s sponsor.

But there remains a rational basis in the minds of some legislators, no matter how unwise or unfair parts of the law may seem. For instance, some legislatures may believe

⁴⁷ Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 *American Sociological Review* 159 (2001).

⁴⁸ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

⁴⁹ *Id.* at 635.

⁵⁰ *See Lofton v. Kearney*, 157 F.Supp. 2d 1372, 1374 n. 1 (S.D. Fla. 2001).

⁵¹ FLA. STAT. § 63.042(3).

⁵² Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 *DUKE J. GENDER L. & POLICY* 207, 222 (1995).

⁵³ *GayBills Pass Both Chambers*, *FLORIDA TIMES UNION*, June 1, 1977.

⁵⁴ *Id.*

that adopted children of homosexuals are more likely to engage in homosexual acts themselves. They might further worry about unstable relationships among homosexuals, or an increased risk of abuse. While these concerns may be unfounded or unfair, they are nevertheless rational justifications. Again, courts are not provided the freedom to judge a law's wisdom, fairness, or logic unless a fundamental right is implicated.⁵⁵

Although the Court's *Lawrence* ruling may affirm a fundamental right to sexual privacy, and therefore make homosexual adoption bans unconstitutional, if a court determines there is no fundamental right, it seems duty bound to uphold the laws.

III. GAY ADOPTION BANS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.”⁵⁶ Generally, extensive deference is granted to the legislature due to the practical need to draw distinctions among groups.⁵⁷ However, statutes that target a suspect class or impinge upon a fundamental right will be subjected to strict scrutiny and sustained only if found “suitably tailored to serve a compelling state interest.”⁵⁸

Homosexual adoption bans are constitutional on Equal Protection grounds for two reasons. First, homosexually oriented individuals do not satisfy the necessary factors required for a more heightened review of legislation distinguishing their class. Second, the statute is rationally related to the states' purported interest to be validated under the Equal Protection Clause of the Fourteenth Amendment.

A. Laws targeting homosexuals do not require heightened review

⁵⁵ Federal Comm'n v. Beach Commun., 508 U.S. 307 (1992).

⁵⁶ *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (citing U.S. CONST. amend. XIV).

⁵⁷ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

⁵⁸ *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

Although the Supreme Court appears to be on the verge of extending heightened review to laws targeting homosexuals, it has yet to do so. The Supreme Court established several principles necessary to constitute suspect status. First, to warrant a more heightened review, the class must have suffered a “history of purposeful unequal treatment.”⁵⁹ Moreover, the class has to be defined by an immutable trait that “bears no relation to its ability to function in society.”⁶⁰ The last factor to be considered is the political weakness of the minority group.⁶¹

Similar to other suspect classes, homosexuals have experienced a “history of purposeful unequal treatment.”⁶² For example, Justice O’Connor has noted that homosexuals are branded as criminals based solely on their sexual status because the same sexual conduct is not illegal for people of the opposite sex.⁶³ As noted in the Due Process discussion *supra*, the sponsors of Florida’s adoption ban sought to “send [homosexuals] a message, telling them: ‘We’re really tired of you. We wish you’d go back into the closet.’”⁶⁴ Moreover, similar to other suspect classes, homosexuals have suffered unique disabilities on the basis of stereotyped characteristics “not indicative of their abilities.”⁶⁵ This type of “purposeful unequal treatment” suffered by homosexuals has historically forced some individuals to be silent about their sexual orientation.

However, homosexuals are not defined by a distinguishing characteristic that “bears no relation to their ability to contribute and perform in society.” The debate regarding the origin of homosexuality is ongoing. It is true that rather than resting on

⁵⁹ *Id.* at 441 (1985).

⁶⁰ *Id.*

⁶¹ 473 U.S. 432, 440 (1985).

⁶² 473 U.S. 432, 441 (1985).

⁶³ *Lawrence v. Texas*, 539 U.S. 558, 581 (2003) (O’Connor, J. concurring).

⁶⁴ *GayBills Pass Both Chambers*, FLORIDA TIMES UNION, June 1, 1977.

⁶⁵ *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985).

meaningful considerations, adoption bans often prohibit homosexually oriented people from adopting based on “outmoded notions of the relative capabilities” of the homosexual class.⁶⁶ But homosexuals lack an immutable characteristic such as skin color or eye color. Unless and until a genetic or biological cause of homosexuality is conclusively demonstrated, it is unlikely a court will determine the class has an immutable characteristic.

Nevertheless, homosexuals have generally been unable to attract the attention of lawmakers to legislate on their behalf. The continued existence of laws that discriminate against homosexuals demonstrates their political weakness. The Supreme Court has recently had to intervene on behalf of homosexuals because of the very fact they lack the political power necessary to overturn state and municipal laws.⁶⁷ Moreover, because of past stigmatization, many individuals in the legislature have been reluctant to speak out on behalf of homosexually oriented people. Unlike the mentally challenged, legislators’ unwillingness to repeal many discriminatory laws aimed at homosexuals proves they have yet to attain the political strength necessary to preclude them from suspect status.

In sum, homosexuals lack political power and have experienced a history of unequal treatment. But because homosexuality is not conclusively linked to an immutable characteristic, it is unlikely the Supreme Court will grant it suspect status. The Court has, in the past, abstained from extending suspect or quasi-suspect status to homosexuals, and it will likely continue to do so. In *Lawrence v. Texas*, discussed in the Due Process discussion *supra*, the Court overruled a Texas statute criminalizing same sex

⁶⁶ *Id.*

⁶⁷ *Romer v. Evans*, 517 U.S. 620, 635 (the Court determined a Colorado amendment, voted on by the citizens of Colorado which denied specific protections for person of homosexual orientation, unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment); *cf.* *Lawrence v. Texas*, 539 U.S. 558 (2004).

couples who engage in sodomy because the statute failed to criminalize the same conduct between people of the opposite sex.⁶⁸ Justice O'Connor acknowledged that a "more searching form of rational basis review is required" when a law exhibits such a desire to harm a politically unpopular group.⁶⁹ The Court's judgment implies a heightened scrutiny for laws discriminating against homosexually oriented individuals, but this implication was only stated in a concurrence, and was never explicitly held anywhere.

III. THE EQUAL PROTECTION CLAUSE UPHOLDS THE BANS UNDER A RATIONAL BASIS REVIEW

A statute is invalid when it inevitably infers animosity toward a politically unpopular class despite the valid presumption given to legislation under the rational basis test.⁷⁰ For instance, in *Romer* the Court struck down legislation solely aimed at limiting protections to "homosexuals."⁷¹ Applying the rational basis review, the court noted this type of legislation "inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."⁷² The Supreme Court has also invalidated legislation targeting the politically disadvantaged classes of hippies, unmarried couples and the mentally retarded.⁷³ This is because the statutes offended the "conventional and venerable principle" that a law must bear a rational relationship to a legitimate governmental purpose when animus is the motivation emanated by the legislation.⁷⁴

⁶⁸ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

⁶⁹ *Id.* at 580 (2003) (O'Connor, J., concurring).

⁷⁰ *Romer v. Evans*, 517 U.S. 620, 634; *cf.* *Lawrence v. Texas*, 539 U.S. 558 (2004).

⁷¹ 517 U.S. 620, 632.

⁷² *Id.* at 645.

⁷³ *Department of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973) (hippies); *Eisenstadt v. Baird*, 405 U.S. 438, 445-447 (1972) (state statute designating unmarried couples); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (municipal ordinance targeting the mentally retarded).

⁷⁴ *Romer v. Evans*, 517 U.S. 620, 635.

Similar to the cases cited above, state justifications for the categorical ban in of homosexuals are sometimes irrationally related to the best interest of children and leaves nothing to infer but animus and prejudice against homosexuals. The Florida law, for instance, has no preference for married couples and expressly permits adults who are not married to adopt.⁷⁵ As noted earlier, 25 percent of all adoptions are to single, heterosexual parents.⁷⁶ The implication becomes explicit in the words of Senator Curtis N. Peterson, Jr., the ban's sponsor in 1977, when he told a newspaper that "[t]he problem in Florida has been that homosexuals are surfacing to such an extent that they're beginning to aggravate the ordinary folks, who have a few rights of their own."⁷⁷ Again, he added, "We're trying to send [homosexuals] a message, telling them: 'We're really tired of you. We wish you'd go back into the closet.'"⁷⁸ Animus is not just implied, it is explicit.

But as noted *supra*, there remains a rational basis in minds of some legislators, and courts must defer to the legislature and give it the benefit of the doubt. This deference must occur even if the law seems unwise or works to the disadvantage of a particular group.⁷⁹

In essence, a court's hands are tied under a rational basis review. "Courts are compelled under a rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."⁸⁰ This rule specifically speaks to an Equal Protection analysis. There is certainly an imperfect fit between means and

⁷⁵ FLA. STAT. § 63.042(2)(b). The state also has no preference for married applicants. *See* FLA. ADMIN. CODE § 65C-16.005(6)(e).

⁷⁶ *See* Lofton v. Kearney, 157 F.Supp. 2d 1372 (S.D. Fla. 2001).

⁷⁷ *Gay Bills Pass Both Chambers*, FLORIDA TIMES UNION, June 1, 1977.

⁷⁸ *Id.*

⁷⁹ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

⁸⁰ *Heller v. Doe*, 509 U.S. 312, 333 (1993).

ends with most homosexual adoption bans, but the deference afforded to legislatures requires that courts accept this imperfect fit.

CONCLUSION

There appears to be no violation of equal protection rights with homosexual adoption bans. But if the Supreme Court's recent ruling in *Lawrence v. Texas* affirmed a fundamental due process right to private, consensual sex between adults, laws that ban homosexuals from adopting unduly burden this right. If this fundamental due process right is recognized, then, the laws may be overturned. However, if a court fails to recognize this as a fundamental right and examines the law under a rational basis review, the court should, and likely will, uphold homosexual adoptions bans.