Lofton v. Kearney: The United States District Court for the Southern District of Florida Holds Florida's Statutory Ban on Gay Adoption Is Not Offensive to the Constitution

I. INTRODUCTION

Steven Lofton, along with several other homosexual foster parents, filed an action against Florida state administrators challenging the constitutionality of a prohibition against gay adoption codified in Florida Statute section 63.042(3).[1] The plaintiffs alleged that the statute violated their rights to privacy, intimate association and family integrity, as well as their Fourteenth Amendment rights of Due Process and Equal Protection.[2] The action was originally filed in 1999 and included additional plaintiffs.[3] The district court, in granting in part the defendants' motion to dismiss, allowed Lofton's claim to stand, and dismissed the

1. *See* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1377 (S.D. Fla. 2001).

2. *Id.* The Florida statute in question provides for a per se ban on any homosexual from adopting a child. FLA. STAT. ANN. § 63.042(3) (West 1997); *see also Lofton*, 157 F. Supp. 2d at 1374 n.1.

Lofton, a registered pediatric nurse, has provided long-term foster care to three HIV-positive children since their infancy and received the "Outstanding Foster Parenting Award" from the Children's Home Society, a state registered child placement agency. *Lofton*, 157 F. Supp. 2d at 1375. His application to adopt was automatically disqualified because of his homosexuality. *See id.*

Houghton, another plaintiff in the original suit, is a clinical nurse specialist and has been the legal guardian of John Roe since Roe's biological father voluntarily surrendered him to Houghton when Roe was four years old. *Id.* Houghton sought to adopt Roe after Roe's biological father terminated his parental rights. *Id.* at 1375-76. Because of his homosexuality Houghton was denied a favorable home study evaluation as required by FLA. STAT. ANN. § 63.112(2)(b) (West 1997), and thereby precluded from adopting. *Id.* at 1376.

The application of Wayne Larue Smith and Daniel Skahen was similarly denied on the basis of their sexuality. *See id.*

3. *Lofton*, 157 F. Supp. 2d at 1376-77. The initial complaint was also filed on behalf of Brenda and Gregory Bradley and Angela Gilmore. *See id.* at 1376; *see also* Lofton v. Butterworth, 93 F. Supp. 2d 1343, 1348 (S.D. Fla. 2000).

remaining plaintiffs' claims without prejudice.[4] An amended complaint was filed, and it is around its dismissal that this case revolves.[5]

The defendants moved for final summary judgment, seeking the dismissal of all claims against them.[6] The United States District Court for the Southern District of Florida *held* that fundamental rights of familial privacy, intimate association, family integrity, and related Due Process and Equal Protection concerns do not extend to gay foster parents and therefore granted summary judgment. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1385 (S.D. Fla. 2001).

II. BACKGROUND

The noted case rests against a three-fold legal background: family law in the context of adoption and the rights of parents to direct the upbringing of their children; the judicial standard for reviewing statutory provisions directed toward economic and general social welfare regulation, or the rational basis standard of review; and the standard of review as to a constitutional challenge to a statutory scheme singling out homosexuals.

The parents' role in the raising and care of children was reaffirmed in *Stanley v. Illinois*, where the United States Supreme Court held that role to be a constitutionally protected right.[7] Grounds for protecting the family unit have been found to lie in the Fourteenth Amendment's Due Process and Equal Protection Clauses, as well as in the Ninth Amendment.[8] A state may invade this protected realm where a countervailing state interest exists; the private interest of the parent will prevail absent such a showing.[9] Consequently, as in *Stanley*, the Court found that a parent's marital status was an insufficient basis for a state to deny him custody of his children after their mother's death.[10] Moreover,

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4. With the exception of Lofton, none of the plaintiffs in *Butterworth* had filed an application to adopt, and were therefore dismissed for lack of standing. *Butterworth*, 93 F. Supp. 2d at 1346.

5. *See Lofton*, 157 F. Supp. 2d at 1377.

6. *Id.* at 1374. Summary judgment is appropriate where no material fact is presented and the movant is deserving of judgment as a matter of law. *Id.* at 1377 (citing FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

7. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). Illinois statutorily held a prima facie presumption of a father's unfitness when his children are born out of wedlock; the Court rejected this presumption because the standard was not uniform in its application and it denied the father access to a judicial determination of his fitness on the merits. *Id.* at 654-57.

8. *Id.* at 651.

9. *See id.*

10. *See id.* at 658.

the Court concluded that every parent has the right to a judicial hearing of fitness prior to the removal of his or her children by the state.[11]

Stanley is an outgrowth of precedent establishing that the rights of parents to raise a family and how best to do so is a fundamentally protected constitutional right.[12] Substantive due process provides protection from governmental restrictions on fundamental rights and liberty interests protected by the Due Process Clause of the Fourteenth Amendment.[13] Accordingly, the Supreme Court has interpreted the Due Process Clause as affording a fundamental right to have and oversee one's family, and it has similarly acknowledged that such due process protects the right to marry and to have children.[14] Within this realm, the Court has also held that parental rights to raise their children are constitutionally protected.[15] In this regard the Supreme Court has also reviewed constitutional challenges to zoning impositions on family residential arrangements, as well as statutory provisions regulating the removal of foster children from their foster parents by state agencies.[16]

In *Moore v. City of East Cleveland*, for example, the Court struck down an ordinance confining the living arrangements of families to the nuclear family model for violating the Fourteenth Amendment's Due Process Clause.[17] The Court asserted that due process guarantees are to

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11. *Id.*

12. *See id.* at 651 (stressing, inter alia, the essential nature of having and raising children (citing Meyers v. Nebraska, 262 U.S. 390, 399 (1923)) and the fundamental nature of that right (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))).

13. *See* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

14. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846-53 (1992) (affirming the constitutional right to have an abortion, and finding that Due Process protects decisions concerning individual dignity from unwarranted state interference); Loving v. Virginia, 388 U.S. 1 (1967) (holding that marriage is a liberty interest protected by substantive due process); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that Due Process protects the intimate relationships between a husband and wife from state interference); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the right of parents to marry, establish their home and raise their children is protected by the Due Process Clause of the Fourteenth Amendment).

15. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (finding that the Constitution protects parents in the raising of their children); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that Due Process protects parents and guardians in the rearing of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the Constitution protects parents in their decisions concerning the raising and education of their children).

16. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1976) (striking down, on substantive due process grounds, a municipal ordinance restricting family housing arrangements); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1976) (upholding state statutory provision allowing the removal of foster children from their foster homes).

17. *See* 431 U.S. 494, 505-06 (1976). East Cleveland enacted a complicated housing ordinance restricting the members of a household to a single, or nuclear, family. *See id.* at 495-96. The ordinance provided for criminal sanctions that were employed against Moore after she took her grandson into her home following the death of his mother. *Id.* at 496-97. The Court held

be measured on a continuum, where governmental action and governmental interest will be weighed against "freedom from all substantial arbitrary impositions and purposeless restraints."[18] Recognizing that families are not absolutely immune to governmental regulation, the Court, relying on its prior jurisprudence concerning the constitutionally protected "freedom of personal choice in matters of marriage and family life," determined that a governmental intrusion into family living arrangements requires a close examination of the government's professed interest.[19] Admiring the long history the extended family has served in coming together in times of peace and adversity in order to share in familial responsibility, the Court rejected the municipality's authority to "standard[ize] its children—and its adults—by forcing all to live in certain narrowly defined family patterns."[20]

Only weeks following *Moore*, a unanimous Court announced a realm in which families are within regulatory purview in *Smith v. Organization of Foster Families for Equality & Reform*.[21] Because the New York foster program is premised on the belief that foster care is a short-term remedy to protect the best interests of a child, the Court rejected the plaintiff's objections to the provisions, agreeing that when the city or state removes children from foster care it is acting in the children's best interest.[22] Because foster relationships are grounded in contract and sanctioned by statutory grant, protections afforded the family realm espoused in prior decisions, premised on the sanctity of the biological family, were not applicable in *Smith*.[23] Though strong emotional ties may arise out of such relationships, when "the State has been a partner from the outset" it may direct the entitlements derived from that relationship.[24] By finding that the foster parent had no guaranteed right preventing removal of foster children, the *Smith* Court

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that the city's interests respecting traffic and population congestion, albeit valid, were at best "marginally" served by the ordinance. *Id.* at 499-500.

18. *Id.* at 502 (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)).

19. *Id.* at 499 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

20. *Id.* at 504-06.

21. 431 U.S. 816 (1976). In *Smith*, a class action was filed seeking declaratory and injunctive relief against New York State and New York City with respect to the removal provisions employed by them in removing foster children from their foster families. *Id.* at 818-20. The respondents contended that, because some foster children are left in foster care for extended periods of time, and thus develop emotional ties to their foster families, a foster child deserves a hearing to determine whether removal is in the child's best interests. *See id.* at 839-40.

22. *See id.* at 829-33.

23. *See id.* at 842-45.

24. *See id.* at 845-46.

was able to circumvent the issues concerning fundamental constitutional guarantees granted the parent-child relationship.[25]

The Supreme Court has also recently revisited the extent to which governmental interference with a family is allowed under the Constitution, in *Troxel v. Granville*.[26] In striking down a broad-based Washington State statute, the Court applied heightened scrutiny as the basis for review of statutes dealing with the fundamental rights of the family.[27] The Court recognized that changes in American demographics require an adjustment of the Court's conception of the modern American family, where childcare giving extends beyond the nuclear family.[28] Building on expanding precedent that uses the heightened standard to review statutes affecting families, the Court held that "there will normally be no reason for the State to inject itself into the [family's] private realm."[29] The Court determined that the breadth of the statute and the enormous scope of its application unconstitutionally infringe on the fundamental right of a parent "to make decisions concerning the care, custody, and control" of her children.[30] The Court reaffirmed that the Fourteenth Amendment protects these fundamental rights from state intrusion so long as the parent is adequately caring for her child.[31]

The Court will apply a less searching standard when reviewing economic and social welfare regulations that do not infringe upon fundamental rights. In *City of Cleburne v. Cleburne Living Center*, the Supreme Court held that a zoning statute that created a regulatory bar to

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25. *Id.* at 847.

26. 530 U.S. 57 (2000). A Washington statute, challenged as violating Troxel's fundamental right to rear her children, allowed anyone to petition the state to seek visitation rights of a third party's children. *Id.* at 60-61 (citing WASH. REV. CODE ANN. § 26.10.160(3) (West 1997)).

27. *See id.* at 65-66 (citing Washington v. Glucksberg, 521 U.S. 702 (1997); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

28. *See id.* at 63-64.

29. *Id.* at 68. Because the Washington statute in question allowed anyone to seek visitation rights, the Court was not required to, as in the case at bar, give weight to the qualified parent's decision with respect to her children by excluding interaction with certain individuals. *See id.* at 69.

30. *Id.* at 72-73.

31. *See id.* at 66-69. The Fifth Circuit has similarly examined the right of nonfamilial relationships with children. *See* Wooley v. City of Baton Rouge, 211 F.3d 913 (5th Cir. 2000). Relying principally on *Smith*, the court in *Wooley* recognized that the concept of family encompasses relationships beyond the immediate familial framework found in the nuclear family. *Id.* at 921. According to the *Wooley* court, constitutional protections *do* extend beyond biological relationships to long-term adult child relationships where a strong bond has been forged, however, such protections will not extend to the far reaches of the foster parent-child relationship, as that relationship is a creation of the state. *Id.* at 922 (citing *Smith*, 431 U.S. 816; Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200 (5th Cir. 1977)).

obtaining a group home license for the mentally challenged by Cleburne, Texas was unconstitutional.[32] According to the Court, a mere inequality in political voice between different segments of the population, however, is insufficient for heightened scrutiny to apply.[33] In *Cleburne*, however, the zoning provision singled out the mentally challenged, requiring them to obtain a special permit, where no such requirement was imposed on any other group.[34] This particular classification, the Supreme Court determined, did not bear a reasonable relationship to the government's asserted goals.[35] The Court went on to state that, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a . . . proceeding, are not permissible bases for [disparate treatment]."[36] As such, a rationally attributable government purpose will not survive even the most lax level of scrutiny if the very statute that purports to further the government's interest is unevenly applied.[37]

The standard of review for sexuality based legislation is less clearly defined. The principal case relating to the standard of review in such instances is *Romer v. Evans*.[38] The *Romer* Court struck down "Amendment 2" to the Colorado Constitution because it diminished the private and public legal status of homosexuals as a class.[39] The Court seemingly intimated that the appropriate constitutional standard of review with respect to such a measure is the rational basis standard.[40] It went a step further, however, by referencing the nullification of various legal protections that Amendment 2 effected as against "this targeted class."[41] The Court did not explicitly announce a standard, however, because it was not necessary to do so; even under the most deferential standard Amendment 2 could not stand as it bore no rational relation to any governmental interest, and was motivated principally by "animus

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32. 473 U.S. 432 (1985). The Court, reluctant to expand the quasi-suspect classification to the mentally challenged, determined that rational basis is the proper standard of analysis. *See id.* at 442-43.

33. *See id.* at 445-46.

34. *See id.* at 447-48.

35. *See id.* at 446. These stated goals included fear that harassment against the group home residents might occur as well as concern of danger posed by its proximity to a flood plain. *See id.* at 448-49.

36. *Id.* at 448.

37. *Id.* at 450.

38. 517 U.S. 620 (1996).

39. *See id.* at 627.

40. *Id.* at 631-32.

41. *See id.* at 629.

toward the class it affects."[42] The principal foundation of our constitutional system, the Court held, is that all parts of that system remain open with impartiality to anyone who seeks its assistance.[43] The Court recognized that although certain statutes, by their very nature, may create an incidental imbalance in treatment among different groups, at a minimum they must further a legitimate public interest and not merely a "desire to harm a politically unpopular group."[44] Accordingly, the Court found that Amendment 2 was "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests."[45] Even under the most generous of judicial standards, absent such a nexus between the propounded state interest and the reality of the situation, Colorado's amendment was unsupportable under the Fourteenth Amendment.[46]

III. THE COURT'S DECISION

In the noted case, the United States District Court for the Southern District of Florida, relying heavily on the United States Supreme Court's decisions in *Smith* and *Romer*, ruled (1) that Florida's facially discriminatory adoption statute was to be reviewed under the rational basis standard[47] and (2) that homosexuals do not have a constitutionally protected right to adopt.[48] In essence, the court was faced with the issue of whether the per se ban on homosexual adoption imposed by Florida Statute section 63.042(3) deprived plaintiffs of their fundamental constitutional rights.[49] The court analyzed the issue in a two-prong approach: first, whether homosexuals, as a class, have a fundamental right to adopt children; and second, what standard to employ when addressing sexuality-based statutes.

The court first addressed whether plaintiffs' fundamental rights were violated by the homosexual adoption provision.[50] It considered whether the "fundamental liberty interests" of a parent in the care of her children should be extended to foster parents and legal guardians.[51] In

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42. *Id.* at 632. The Court went further, stating that laws such as Amendment 2 "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class . . . affected." *Id.* at 634.

43. *See id.* at 633.

44. *Id.* at 634 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

45. *Id.* at 635.

46. *See id.* at 635-36.

47. *Lofton*, 157 F. Supp. 2d at 1382.

48. *See id.* at 1379.

49. *Id.* at 1374.

50. *See id.* at 1378-80.

51. *Id.* at 1378 (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

keeping with precedent, the court acknowledged that families may be established by characteristics extending beyond blood relationships.[52] It accepted that families are rooted and based in significant part on the intimate emotional ties that develop between child and provider.[53] The court, however, found that the deep and loving relationship forged between the plaintiff-foster parents and their plaintiff foster-children was not in dispute, thus eliminating the need for a trial.[54] More specifically, the court determined that such a bond was not enough to establish "a fundamental right to family privacy, intimate association [or] family integrity."[55]

In *Smith*, the United States Supreme Court stated that families based on something other than a blood relationship require an expectation of an enduring relationship in order to be accorded constitutional protections; the court in the noted case held that foster relationships do not satisfy that expectation.[56] The court's holding was based on a view that the constitutional protection of families, though not limited to biological families, is necessarily limited by "certain basic elements traditionally recognized as characteristic of the family."[57] Distinguishing the judicial lineage of *Stanley v. Illinois* and *Moore v. City of East Cleveland*, holding that biological ties brought families into the ambit of the Fourteenth Amendment, the court in the noted case held that foster families are merely contractual constructions, based on state law, carrying no such expectation of permanency warranting constitutional protection.[58]

Because the plaintiffs entered into these contractual relationships with the knowledge that they were subject to state oversight and that these relationships would continue only at the behest of the state, the court reasoned that the foster parents could not thereby exclude the state from this relationship by claiming a constitutionally grounded liberty interest.[59] The court ruled that it was not in the interest of judicial restraint to expand fundamental rights at the risk of removing such matters "outside the arena of public debate and legislative action."[60]

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52. *Id.*

53. *See id.* at 1378 (citing Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977)).

54. *Id.* at 1379. The court accepted as fact that Lofton and Doe and Houghton and Roe had created significant interdependent emotional ties. *See id.*

55. *Id.* (citing *Smith*, 431 U.S. at 844).

56. *See id.* (citing *Smith*, 431 U.S. at 844).

57. *Id.* (citing *Wooley*, 211 F. 3d at 913).

58. *Id.* at 1379-80 (citations omitted).

59. *Id.* at 1380.

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

Upon its disposition of the first issue, the court next rejected the alleged violation of the Equal Protection Clause effected by Florida Statute section 63.042(3).[61] The court, employing rational basis review, stated that any plausible basis for the enactment of Florida Statute section 63.042(3) prevented it from entertaining a suspected Equal Protection violation, and thus dismissed the claim altogether.[62]

Given that the Equal Protection Clause prohibits governmental authorities from disparately treating individuals who are alike in all respects, when a policy discriminates between groups or classes, the nature of the group discriminated against determines the level of scrutiny the policy or legislation will receive.[63] In the noted case, the court, determining which standard of scrutiny to apply, rejected the proposition that homosexuals deserve suspect classification because of the statutory discrimination they face as a result of the Florida ban.[64] Recognizing the difficulty of the task before it, the court looked for Supreme Court guidance in *Romer v. Evans*.[65] *Romer* intimates that homosexuals are not a suspect or quasi-suspect class, and thereby homosexual-based legislation is only afforded rational basis review.[66] Further support for the court's ruling came from various circuit court rulings similarly holding that homosexuals will not be granted heightened scrutiny.[67]

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61. *Id.* at 1380-81.

62. *Id.* at 1385.

63. *Id.* at 1380-81 (citing Panama City Med. Diagnostic, Ltd. v. Williams, 13 F.3d 1541 (11th Cir. 1994); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).

64. *See id.* at 1381. Because the court had already dispensed with the question of whether the plaintiffs had a fundamental right to adopt (i.e., they do not), the only other basis on which heightened scrutiny could be afforded was upon a showing that homosexuals are a suspect or quasi-suspect class. *See id.*

65. *See id.* at 1381-82.

66. *See id.* at 1381. As noted by the court, it is only suggested in *Romer* that rational basis is always the proper standard for statutes singling out homosexuals. *Id.* at 1381-82; *see also Romer*, 517 U.S. at 630-32. The only affirmative announcement supporting this assertion, however, is in Justice Scalia's dissent, the only place in *Romer* explicitly stating that rational basis is the appropriate standard with respect to sexuality-based discriminatory statutes. *See Lofton*, 157 F. Supp. 2d at 1381-82 (citing *Romer*, 517 U.S. at 620 n.1 (Scalia, J., dissenting)). [sic] (The court erroneously cited to the Supreme Court reporter; footnote 1 of Justice Scalia's dissent is properly cited as *Romer*, 517 U.S. at 640 n.1 (Scalia, J., dissenting).)

67. *Lofton*, 157 F. Supp. 2d at 1382. The court was unable to rely on Eleventh Circuit precedent, as it stated that that circuit has not addressed the issue. *Id.* However, the court failed to note that the Eleventh Circuit had indeed held that homosexuals deserve heightened scrutiny and a constitutional right to privacy. *See* Hardwick v. Bowers, 760 F.2d 1202, 1211 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986). Further, only three of the cases cited by the court post-date *Romer*. *See Lofton*, 157 F. Supp. 2d at 1382.

To support its finding that rational basis review is the appropriate standard, the court cited: *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (holding that rational basis is the appropriate standard to review Congress's "don't ask, don't tell" policy); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984) (finding the structure of tax refunds viewed employing

The court in the noted case, by adopting the rational basis standard of review, announced that the Florida adoption provision will survive if there is any conceivable basis for the statute.[68] Defendants argued that the statute served two legitimate purposes: the first, that homosexuality is morally offensive in a legal tradition premised on Judeo-Christian beliefs, and that parenting by homosexuals would be equally offensive; the second, that marriage of parents is in the best interests of the child, providing "proper gender role modeling and minimiz[ing] social stigmatization," an interest of which homosexuals will necessarily deprive a child.[69] The court rejected the morality proposition as an improper basis for enacting legislation under any standard of review, but was receptive to the concern expressed that married parents afford superior gender identification and greater stability.[70]

The court dismissed the suggestion that the Florida statute was based on animus directed towards homosexuals.[71] It also dismissed the plaintiff's assertion that *City of Cleburne v. Cleburne Living Center, Inc.* requires the state to demonstrate "that homosexuals pose a unique threat to children that others similarly situated in relevant respects such as single parents do not."[72] The court, citing *Cleburne* as an example of a municipality's justifications that were nonsensical in light of the

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rational basis); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (reading *Romer v. Evans* as prescribing rational basis, and upholding a Cincinnati charter provision denying homosexuals special class status); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (basing its application of rational basis on *Bowers v. Hardwick* in upholding U.S. Army ban on homosexuals); *Richenberg v. Perry*, 97 F.3d 256 (7th Cir. 1996) (rejecting heightened scrutiny review of the military's "don't ask, don't tell" policy); *Holmes v. California National Guard*, 124 F.3d 1126 (9th Cir. 1997) (ruling that the military's "don't ask, don't tell" policy survives rational basis review); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) (holding that government interest in a strong military supercedes gay serviceman's right to privacy, if one exists); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (employing rational basis to uphold challenge to military's ban on homosexuality and Navy's dismissal of gay midshipman from the Naval Academy); and *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (rejecting challenge to gay ban of U.S. Navy by applying rational basis review and *Bowers v. Hardwick*). *See Lofton*, 157 F. Supp. 2d at 1382 n.14. It is not clear why the court cited *Town of Ball* to support its holding as it relates to neither homosexuals nor application of the 14th Amendment to them.

68. *See Lofton*, 157 F. Supp. 2d at 1383.

69. *Id.* at 1382-83.

70. *Id.* The court noted that these propositions were unchallenged by the plaintiffs. *Id.* at 1383-84.

71. *See id.* at 1383. Peculiarly, in dismissing plaintiffs' claims, the court stated that it would be improper to determine whether the conceived reason actually motivated passage. *See id.* (citing, inter alia, FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993)). Instead, what followed was an admonition for plaintiffs' failure to refute defendants' proffered rationales for the statute. *See id.* at 1383-84.

72. *Id.* at 1384 (footnote omitted).

treatment that other similarly situated groups received, distinguished the noted case and determined that homosexuals were not similarly situated with the balance of the population.[73] Ultimately, the court ruled that "[h]omosexuals are not similar in all relevant aspects to other nonmarried adults" because other nonmarried adults *can* get married.[74]

IV. ANALYSIS

In finding plausible reason for Florida's ban on homosexual adoption, albeit grounded in traditional stereotypes of gender roles and marriage, the court in the noted case dismissed the action.[75] The court's holding is an unfortunate example of judicial activism, whereby the court imprinted its political and moral seal of approval on a decades old statute that stands alone in state adoption laws.[76] Its refusal to allow the case to go to trial is based more on legal misinterpretation than application. In ruling that homosexuals are so dissimilar from the balance of the population, the court revealed what this author contends is its true belief: that in fact, the moral proposition first offered by the state officials, which the court purportedly rejected as impermissible, was the true basis for its decision.[77]

The court's approach to the constitutional questions posed in the noted case misinterpreted two distinct issues. The first and less disconcerting issue was a potential misreading of precedent relating to foster parents, the family, and the extension of constitutional protections afforded the family to foster parents. The second, and more disturbing prospect, was the court's Equal Protection analysis, and potential misapplication of *Romer* and *Cleburne*.

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73. *See id.* at 1384-85.

74. *Id.* at 1385.

75. *Id.*

76. *Id.* at 1374 n.1. In 1977, Florida became the first state to enact a ban on homosexual adoption and remains the only state to carry such a statute. *See id.* Other states have enacted limitations on homosexual adoption, such as Utah and Mississippi, where adoption by homosexual couples is forbidden. Dana Canedy, *Groups Fight Florida's Ban on Gay Adoptions*, N.Y. TIMES, Mar. 15, 2002, at A12. However these statutory limitations are not as sweeping as Florida's per se ban on all adoption attempts by a homosexual.

77. *Compare id.* at 1382-83, *with id.* at 1385. In response to the state's first proposition for validating the statute, that homosexuality is morally offensive to the common law's religious foundation, the court stated that Judeo-Christian morality is a constitutionally insufficient basis for the statute. *Id.* at 1383-84. But the court declared as a constitutionally valid basis that because homosexuals cannot marry, they cannot provide adequate role models. *Id.* at 1385. In effect, the court has at once rejected and accepted the state's religious- and morality-based proposition. While dismissing the state-advanced Judeo-Christian legal tradition argument it simultaneously embraces a concept of family that only marriage affords, itself a proposition grounded in the Judeo-Christian morality concept the court apparently dismissed.

The court's reliance on *Smith*, and its simultaneous failure to properly distinguish the instant case from *Smith*, is one point of flawed reasoning in the court's ultimate ruling. *Smith*, while stating that foster parents do not have a liberty interest protecting the fundamental rights associated with familial privacy, intimate association and family integrity because foster relationships are state contractual constructs, was premised on the ability of the state to remove the foster child from the foster parents.[78] The court failed to demonstrate how the limitations of that holding extend to the realm of attempted adoption addressed in the noted case, as none of the families in *Smith* sought adoptive rights.[79] *Smith* simply held that it is the right of the state to remove a child from a foster home.[80] In fact, there is no suggestion in Florida's statutes or in the court's decision that the state has any interest in removing the foster children from their homosexual foster parents.[81] To the contrary, in more than one instance, state officials have commended these foster parents for their abilities.[82] Further, because the court failed to review the statutes qualifying foster parents, it clearly missed an opportunity to address an irrational statutory inconsistency.[83]

Dissenting from one of the United States Supreme Court's darker moments, the elder Justice Harlan wrote brightly that "[o]ur Constitution . . . neither knows nor tolerates classes among citizens."[84] Justice Kennedy reiterated these very words when striking down the homosexuality-based deprivation amendment to the Colorado Constitution in *Romer*.[85] The court in the noted case ignored Justice Harlan's admonition, and Justice Kennedy's later recitation of it. Florida's ban is better described as a "status-based enactment" potentially "divorced from any factual context" than a valid exercise in governance.[86] The court's ruling seemingly approves a ban against homosexuals that is

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78. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1976).

79. *See generally id.* at 829 (addressing a constitutional challenge to removal of foster children from their foster homes by state agencies).

80. *Id.* at 845.

81. *See, e.g.*, FLA. STAT. ANN. § 435.045 (West Supp. 2001) (listing certain criminal acts, not homosexuality, as preclusive of individuals becoming foster parents); *id.* § 39.623 (finding homosexuality not preclusive of long-term foster situations); *id.* § 409.175(4)(a)(4) (West 1998) (specifying good moral character based upon education, training, and experience, not heterosexuality, as prerequisite to fostering).

82. *Lofton*, 157 F. Supp. 2d at 1375-76.

83. *Supra* note 81.

84. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

85. *Romer*, 517 U.S. at 623.

86. *See id.* at 635. Whether there exists a factual context for the Florida enactment will not be known as a result of the court's dismissal of the action. *See generally Lofton*, 157 F. Supp. 2d at 1384-85.

premised on animus toward a class; and the fact that the state openly posited a religious aversion as its primary basis for the statute suggests that animus is in fact its motivation.[87] Irrespective of possibilities limited only by the bounds of the court's imagination, the primary justification put forth by the state raises a clear question of fact better suited for trial on the merits than summary judgment.

The statute at issue in the noted case, and the court's ruling on it, can be interpreted in two ways: either (1) homosexuals *are* unfit parents—an unfitness premised on outmoded stereotypes with respect to gender roles, role models, and marriage—in which case, it follows, foster children are second-class citizens undeserving of protection from these unfit caregivers; or (2) homosexuals are equally situated with other nonmarried citizens to parent (as the fact that they may foster for extended periods of time suggests) and the Florida adoption statute is therefore principally based on animus.[88] The court would be wiser to recognize that "[t]he Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living."[89]

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87. *See Lofton*, 157 F. Supp. 2d at 1382-83.

88. The real harm from the statute may be the children trapped in foster homes; gay parents wishing to adopt can move to any one of the other forty-nine states that provide for homosexual adoption; the foster children cannot. Dan Savage, *Is No Adoption Really Better Than a Gay Adoption?*, N.Y. TIMES, Sept. 8, 2001, at A13.

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