

# SUFFER NOT THE LITTLE CHILDREN<sup>1</sup>: PRIORITIZING CHILDREN'S RIGHTS IN CONSTITUTIONAL CHALLENGES TO "SAME-SEX ADOPTION BANS"

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## I. INTRODUCTION

Placement bans that prohibit adoption by gays and lesbians operate to prevent orphans, particularly special needs children,<sup>2</sup> from enjoying the

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<sup>1</sup> *Mark* 10:14 (King James) ("Suffer the little children to come unto me, and forbid them not . . .").

<sup>2</sup> Barbara Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 *CAP. U. L. REV.* 297, 326–27 (2005). Special needs children's prospects for permanent placement are uniquely challenged. *Id.* They "suffer disproportionately from categorical barriers to adoption. . . . [S]pecial needs children include not only disabled and older children, but also children of color. These are the 'toughest children to place in adoptive homes' and they 'often wait the longest before being adopted.'" *Id.*

Supposedly, "in post-racial" America, following President Obama's election, some states are considering excluding children of color from the special needs category on the grounds that their racial identity no longer qualifies them as experiencing placement difficulties. *See generally* David A. Hollinger, *Obama, the Instability of Color Lines, and the Promise of a Postethnic Future*, 31 *CALLALOO* 1033 (2008). This exclusion is not supported by research suggesting that orphans of color are no longer placement-challenged. *See Special Needs Adoptions: How States Define Special Needs*, NATIONAL RESOURCE CENTER FOR ADOPTION, <http://www.nrcadoption.org/resources/prac/SpecialNeedsAdoption.pdf> (last visited Nov. 18, 2010).

Despite the fact that children who are members of racial or ethnic minorities make up only about 32% of the general population age 18 and under, they represent more than 66% of children waiting to be adopted. . . . Nine states make no mention of race, ethnicity, or minority status in their definitions of special needs. One state considers "minority background," but only if that, in addition to other special needs, would prevent adoption without subsidy.

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advantages of the most beneficial placement option—adoption.<sup>3</sup> These prohibitions constitute an unconscionable and unconstitutional violation of children’s rights.<sup>4</sup> Despite the substantial and devastating impact of placement bans on the lives of children waiting to be adopted, the individual rights of prospective gay and lesbian parents have been the focus of most equal protection and substantive due process challenges of these bans.<sup>5</sup> The constitutional rights of children, though often asserted as the basis for separate constitutional challenges,<sup>6</sup> have been largely eclipsed in an analysis of adoption bans that centers on the discrimination these bans perpetuate against gay and lesbian prospective parents.<sup>7</sup> Even the name by which these enactments are known, same-sex adoption bans,<sup>8</sup> highlights the impact on prospective parents and obscures the adverse

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The remaining 40 states and the District of Columbia all identify some type of minority status in their special needs definitions . . . . *Id.*

<sup>3</sup> Compare Woodhouse, *supra* note 2, at 326 (“In the face of a shortage of adoptive parents, categorical bans actually ensure that some children will never have a family of their own. . . . According to the United States Department of Health and Human Services, 8,126 children were awaiting adoptions in Florida during the fiscal year 2002.” (citation omitted)), with FLA. STAT. § 63.042(3) (2008) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”).

<sup>4</sup> See, e.g., *In re Adoption of John & James Doe (Gill)*, No. 06-CV-33881, 2008 WL 5006172, at \*29 (Fla. Cir. Ct. Nov. 25, 2008), *aff’d* 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

<sup>5</sup> See, e.g., *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 806, 812 (11th Cir. 2004). Recent challenges, however, have asserted child-centered challenges to placement bans in addition to equal protection and substantive due process challenges by prospective parents. See, e.g., *Gill*, 2008 WL 5006172, at \*21–24; Complaint at 3, *Cole v. Arkansas*, No. 200-CV-14284 (Ark. Cir. Ct. filed Dec. 30, 2008).

<sup>6</sup> See, e.g., *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (asserting the child’s constitutional right under the Establishment Clause); *Payne-Barahona v. Gonzales*, 474 F.3d 1 (1st Cir. 2007) (asserting the child’s right to have both parents residing in the United States); *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990) (asserting the child’s affirmative due process right to freedom from unreasonable harm), *cert. denied*, 498 U.S. 867 (1990).

<sup>7</sup> See, e.g., *Lofton*, 358 F.3d at 806, 812.

<sup>8</sup> See Tanya Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 6 (2009); Dana Rudolph, *Florida Won’t Enforce Same-Sex Adoption Ban*, WINDY CITY TIMES, Sept. 9, 2010, at 4, available at <http://www.windycitymediagroup.com/images/publications/wct/2010-09-29/current.pdf>; *Same-Sex Adoption Ban Urged*, EVANSVILLE COURIER & PRESS, May 12, 2006, at B12.

effects of placement bans on one of America's most vulnerable demographics—orphans.

Despite the moral force of the individual rights argument, it is challenged by two legal realities: (1) courts have not recognized a constitutional right to adopt<sup>9</sup> and (2) federal courts have not recognized gays and lesbians as a suspect class entitled to heightened constitutional protection.<sup>10</sup> Child-centered constitutional challenges to placement bans carry greater constitutional weight because a child for whom the State assumes custody is entitled to care by the State consistent with the continued preservation and protection of the child's best interests.<sup>11</sup> The State owes no comparable duty to prospective parents.

The "best interests of the child," which has been recognized as a "substantial governmental interest," defines the content of the State's fiduciary duty to the child within its care and custody.<sup>12</sup> Accordingly, the best interests of the child should operate as a restraint on the State's exercise of its *parens patriae* power.<sup>13</sup> The Supreme Court recognized "[t]he State[s] . . . duty of the highest order to protect the interests of minor children,"<sup>14</sup> an acknowledgement that is particularly relevant in the adoption context where the State is acting *qua* parent. State action—

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<sup>9</sup> See *Lofton*, 358 F.3d at 811 ("Neither party disputes that there is no fundamental right to adopt, nor any fundamental right to be adopted.").

<sup>10</sup> See *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) ("Neither the Supreme Court nor this court has recognized sexual orientation as a suspect classification . . .").

The Supreme Court has identified only three suspect classes: racial status, *Loving v. Virginia*, *Strauder v. West Virginia*; national ancestry and ethnic origin, *Korematsu v. United States*, *Strauder v. West Virginia*; and alienage, *Graham v. Richardson*. Two other classifications have been identified by the Court as quasi-suspect: gender, *Mississippi Univ. for Women v. Hogan*, and illegitimacy, *Lalli v. Lalli*. . . . Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature.

*Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (citations omitted).

<sup>11</sup> See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

<sup>12</sup> See *id.*

<sup>13</sup> See *Santosky v. Kramer*, 455 U.S. 745, 766–70, 780–81 (1982).

<sup>14</sup> *Palmore*, 466 U.S. at 433.

enactment of placement bans—that categorically forecloses the most beneficial placement option for children violates their substantive due process rights<sup>15</sup> by depriving them of the placement option that research identifies as serving their best interests.<sup>16</sup> Furthermore, enactment and enforcement of placement bans essentially ensures that some children, particularly special needs children, will experience the documented harms associated with extended temporary and institutional care.<sup>17</sup> This result constitutes a breach of the State’s fiduciary duty to preserve and protect children’s best interests.<sup>18</sup>

The State of Florida has the distinction of having been the first state to enact legislation that explicitly prohibits homosexuals from adopting.<sup>19</sup>

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<sup>15</sup> Children’s substantive due process rights are protected by the United States Constitution. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”); *In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

<sup>16</sup> See Woodhouse, *supra* note 2, at 326–27.

<sup>17</sup> *Id.*

<sup>18</sup> See *In re Adoption of John & James Doe (Gill)*, No. 06-CV-33881, 2008 WL 5006172, at \*23–24 (Fla. Cir. Ct. Nov. 25, 2008) (“[B]ased on the robust nature of the evidence available in this field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of the children are not preserved by prohibiting homosexual adoption.”), *aff’d* 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

<sup>19</sup> See 1977 FLA. LAWS ch. 77-140 § 1 (current version at FLA. STAT. § 63.042(3) (2008)).

Florida, which has the distinction of being the first state to prohibit adoptions by same-sex couples and gay and lesbian individuals, allows foster care placements with gays and lesbians. More draconian bans, which would also prohibit gays and lesbians from providing foster care, are being considered by legislatures in other states. The specific nature of placement bans vary considerably among the states, but all bans contract the already insufficient pool of prospective adoptive parents, thereby committing greater numbers of orphans to extended temporary and institutional care. Even in the absence of legislation or a state policy against foster care and permanent placements with gay and lesbian couples and individuals, there is significant evidence of de facto discrimination against this demographic of prospective parents.

Washington, *supra* note 8, at 11–12 (footnotes omitted).

The statute provides, in pertinent part: “No person eligible to adopt under this statute may adopt if that person is a homosexual.”<sup>20</sup> The Florida placement ban has withstood significant challenges to its constitutionality;<sup>21</sup> however, two recent challenges, *In re Adoption of John Doe*<sup>22</sup> and *In re Adoption of John Doe and James Doe (Gill)*,<sup>23</sup> have produced judicial determinations that the ban is unconstitutional.<sup>24</sup> This article focuses on the *Gill* decision and considers whether the court’s use of available social science data and constitutional analysis prioritized or subordinated children’s rights and their equal protection and substantive due process challenges to Florida’s placement ban. The outcome in *Gill* certainly represents a step toward highlighting the harmful impact of these bans on waiting children as a basis for a constitutional challenge.<sup>25</sup> The decision also reflects adherence to the best interests of the child as the controlling standard in placement determinations and identifies children’s best interests as the constitutional measurement for the legitimacy of the State’s ban.<sup>26</sup> However, several important aspects of the decision and the court’s analysis reflect diminished consideration of children’s constitutional rights and the extent to which placement bans infringe upon those rights.<sup>27</sup>

Part II of this article proposes that these prohibitions could more accurately be designated as “orphan placement bans,” which could strengthen children’s rights centered constitutional challenges and offer some political advantages in the court of public opinion. Part III of this article addresses the *Lofton v. Secretary of the Department of Children and Family Services*<sup>28</sup> case, which provides the analytical framework within which the constitutionality of Florida’s placement bans was decided in *Gill* and establishes the constitutional relevance of social science research to support challenges to placement bans. This section of the article also considers the constitutional consequences of utilizing a prospective parent-

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<sup>20</sup> FLA. STAT. § 63.042(3), *declared unconstitutional by Gill*, 2008 WL 5006172, at \*29.

<sup>21</sup> *See, e.g., Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

<sup>22</sup> No. Redacted, 2008 WL 5070056 (Fla. Cir. Ct. Aug. 29, 2008).

<sup>23</sup> No. 06-CV-33881, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008), *aff’d* 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

<sup>24</sup> *Adoption of John Doe*, 2008 WL 5070056, at \*1; *Gill*, 2008 WL 5006172, at \*29.

<sup>25</sup> *See Gill*, 2008 WL 5006172, at \*24.

<sup>26</sup> *See id.* at \*23.

<sup>27</sup> *See discussion infra* Part V.

<sup>28</sup> 358 F.3d 804 (11th Cir. 2004).

centered comparative harm framework to analyze the effect of these bans on children's interests. Part IV of the article presents an overview of the facts in the *Gill* case and examines the court's considerable treatment of available relevant social science research in support of its determination that the Florida ban violates the constitutional rights of children and prospective parents.

Part V highlights several analytic deficiencies that mitigated the constitutional force of the children's equal protection and substantive due process challenges to the ban that result from the court's characterization of children's and prospective parents' interests as "co-extensive."<sup>29</sup> This section of the article also explores the constitutional consequences of that characterization. Part VI examines the recent appellate court decision upholding *Gill's* determination as to the unconstitutionality of Florida's ban and addresses how that holding further diminishes the significance of the affected children's rights and constitutional challenges. The article concludes with the following query: To what extent does the *Gill* decision, which holds that placement bans unconstitutionally infringe upon children's substantive due process and equal protection rights, cloak parental interests in children's rights clothing?

## II. "SAME-SEX ADOPTION BANS": A THORN BY ANY OTHER NAME<sup>30</sup>

So called same-sex adoption bans should be referred to in terms that highlight their adverse impact on the orphans they purport to protect. Accordingly, they will be referred to throughout this article as "orphan placement bans."<sup>31</sup> This is not merely a semantic choice. The framing of

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<sup>29</sup> *Gill*, 2008 WL 5006172, at \*22.

<sup>30</sup> See Washington, *supra* note 8, at 5–7 (2009), for another article where this author uses the term "orphan placement ban" and includes a similar section explaining the reason for the use of this term.

<sup>31</sup> By using the term orphan to refer to all children within the care and custody of the state, including those in foster care

I am not suggesting that children in foster care, despite the termination of parental rights, do not or cannot maintain an emotional bond and relationship with their parents, which is not possible for children whose parents have died. However, those who are orphaned by the death of their parents and those who are orphaned under the law, by virtue of the termination of parental rights, share the reality of non-existent parental care and protection. To the extent that children in foster and institutional care have no personal advocate to secure

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an issue and its analysis begins with the language used to describe it and the picture it evokes in the minds of those to whom it is presented.<sup>32</sup> Calling these prohibitions same-sex adoption bans casts them as protection for children against the perceived harms inherent in parenting by homosexuals and highlights the individual rights of those seeking to adopt. In contrast, describing these bans in terms that depict how they operate to categorically foreclose the most beneficial placement option for orphans, in contravention of their best interests, highlights the ways in which these placement bans impair children's interests. The depiction of these prohibitions as placement bans informs the constitutional analysis, which measures the legitimacy of the State's interest in placement bans according to whether they serve or subvert children's interests.

In addition to the legal advantages of referring to these bans as placement bans, there are political advantages to framing them in terms reflective of their harmful impact on orphans. These prohibitions have provided and continue to provide a platform for political parties and candidates who parade the moral high ground asserting family values and the protection of children as justifications for their opposition to adoption by gays and lesbians.<sup>33</sup> Addressing these bans according to their adverse effect on the lives of children can focus public discourse on children's rights and can motivate the public to consider the utility and wisdom of these prohibitions, and to focus upon their harmful effect on children.

### III. THE LOFTON FRAMEWORK: THE RELEVANCE OF SOCIAL SCIENCE EVIDENCE TO THE CONSTITUTIONALITY OF STATE INTERESTS

Before turning to the facts of the *Gill* decision, it is important to understand how its analysis was informed by the most significant prior ruling on the constitutionality of the Florida ban in *Lofton*. In 2004, the Eleventh Circuit Court of Appeals upheld Florida's ban as a constitutional exercise of the State's authority to preserve and protect the interests of

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the protection of their rights and interests, they are functionally orphans . . . .

*Id.* at 2 n.5

<sup>32</sup> Peter Loge, *How to Talk Crime and Influence People: Language and the Politics of Criminal Justice Policy*, 53 *DRAKE L. REV.* 693, 694 (2005).

<sup>33</sup> Andrea Stone, *Drives to Ban Gay Adoption Heat Up*, *USA TODAY*, Feb. 21, 2006, at A1 ("Efforts to ban gays and lesbians from adopting children are emerging across the USA as a second front in the culture wars that began during the 2004 elections over same-sex marriage. . . . Social conservatives view family makeup as the next battleground after passing marriage amendments in 11 states in 2004.").

children and to preserve public morality.<sup>34</sup> While the State framed its justification for the ban in terms of children's best interests, appellants—gay prospective parents—asserted federal substantive due process and equal protection claims, which centered principally on their constitutional rights as prospective parents.<sup>35</sup> Appellants' assertion of rights to "familial privacy, intimate association, and family integrity under the Due Process Clause of the Fourteenth Amendment"<sup>36</sup> included consideration of a corresponding and affirmative right children have to a permanent familial unit.<sup>37</sup> Children's rights were, however, ancillary considerations.<sup>38</sup> Appellants did present social science research citing "studies show[ing] that the parenting skills of homosexual parents are at least equivalent to those of heterosexual parents and that children raised by homosexual parents suffer no adverse outcomes."<sup>39</sup> They also presented data reflecting the surplus of waiting children and the deficit of available prospective adoptive parents in support of their argument that it is irrational for the State to compound Florida's child welfare crisis by increasing the backlog of orphans.<sup>40</sup>

Of particular relevance to the focus of this article is the *Lofton* court's characterization of the substance of the social science research presented and its acknowledgment of the relevance of that evidence to the constitutionality of the State's asserted interest in the ban.<sup>41</sup> Finding no

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<sup>34</sup> *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (upholding the district court's grant of summary judgment recognizing the constitutionality of the Florida ban and its enforcement).

<sup>35</sup> *Id.* at 809–11 ("Appellants assert three constitutional arguments on appeal. First, appellants argue that the statute violates [the children's and their] rights to familial privacy, intimate association, and family integrity under the Due Process Clause of the Fourteenth Amendment. Second, appellants argue that the Supreme Court's recent decision in *Lawrence v. Texas*, recognized a fundamental right to private sexual intimacy and that the Florida statute, by disallowing adoption by individuals who engage in homosexual activity, impermissibly burdens the exercise of this right. Third, appellants allege that, by categorically prohibiting only homosexual persons from adopting children, the statute violates the Equal Protection Clause of the Fourteenth Amendment. Each of these challenges raises questions of first impression in this circuit." (citation omitted)).

<sup>36</sup> *Id.*

<sup>37</sup> *See id.* at 811–17.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.* at 824.

<sup>40</sup> *Id.* at 823.

<sup>41</sup> *Id.* at 824–25.

infringement of a fundamental right<sup>42</sup> and determining that gay and lesbian prospective parents do not constitute a suspect class, the court applied the rational basis test.<sup>43</sup> The rational basis test provides the most deferential level of constitutional scrutiny.<sup>44</sup> It presumes that state action rationally serves a legitimate state interest and burdens the party challenging the constitutionality of the state action with rebutting the presumption.<sup>45</sup> The court considered the social science research presented by appellants and explained its constitutional relevance stating:

Appellants cite recent social science research and the opinion of mental health professionals and child welfare organizations as evidence that there is no child welfare basis for excluding homosexuals from adopting. *They argue that the cited studies show that the parenting skills of homosexual parents are at least equivalent to those of heterosexual parents and that children raised by homosexual parents suffer no adverse outcomes.*

In considering appellants' argument, we must ask not whether the latest in social science research and professional opinion *support* the decision of the Florida legislature, but whether the evidence is so well established and so far beyond dispute that it would be irrational for the Florida legislature to believe that the interests of its

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<sup>42</sup> *Id.* at 815–17 (“Appellants argue that the Supreme Court’s recent decision in *Lawrence v. Texas* . . . identified a hitherto unarticulated fundamental right to private sexual intimacy. They contend that the Florida statute, by disallowing adoption to any individual who chooses to engage in homosexual conduct, impermissibly burdens the exercise of this right. . . . We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right. . . . Hence, we conclude that the *Lawrence* decision cannot be extrapolated to create a right to adopt for homosexual persons.” (citation omitted)).

<sup>43</sup> *Id.* at 817–18 (“As we have explained, Florida’s statute burdens no fundamental rights. Moreover, all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class. Because the present case involves neither a fundamental right nor a suspect class, we review the Florida statute under the rational-basis standard.” (footnote omitted)).

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* (“Under this deferential standard, a legislative classification ‘is accorded a strong presumption of validity,’ and ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification . . . .’” (citations omitted)).

children are best served by not permitting homosexual adoption. Also, we must credit any conceivable rational reason that the legislature might have for choosing not to alter its statutory scheme in response to this recent social science research.<sup>46</sup>

The *Lofton* court gauged the relevance of the social science research according to its tendency to prove or disprove the legitimacy of the State's asserted governmental interest in protecting children's interests.<sup>47</sup> The court considered social science evidence within comparative frameworks that contrasted the parenting skills of homosexual and heterosexual parents and contrasted outcomes for children placed with homosexual and heterosexual parents.<sup>48</sup> These frameworks are relevant to an equality based, antidiscrimination focused, parent's rights argument.<sup>49</sup> They have diminished relevance to children's best interests because the reality for many waiting children does not provide for an option between homosexual and heterosexual adoptive parents.<sup>50</sup> Rather, the choice is between permanent placement with homosexual parents and nonpermanent placement.<sup>51</sup> In light of child welfare realities characterized by a surplus of waiting children and a deficit of available prospective parents,<sup>52</sup> the appropriate comparative framework would contrast outcomes for children placed with homosexual adoptive parents with outcomes for children who experience the documented harms associated with extended temporary and institutional care before aging out of the child welfare system.<sup>53</sup> Such a

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<sup>46</sup> *Id.* at 824–25 (emphasis added) (footnote omitted). See Dep't of Health Rehab. Serv. v. Cox, 627 So. 2d 1210, 1213 (Fla. Cir. Ct. 1993), for another case where a court emphasized the constitutional relevance of social science evidence bearing on the extent to which children's best interests were served or impaired by placing them with homosexual parents.

<sup>47</sup> See *Lofton*, 358 F.3d at 819–26.

<sup>48</sup> *Id.* at 824–26.

<sup>49</sup> See *id.*

<sup>50</sup> Washington, *supra* note 8, at 2–5.

<sup>51</sup> See *id.*

<sup>52</sup> *In re Adoption of John & James Doe (Gill)*, No. 06-CV-33881, 2008 WL 5006172, at \*18, \*24 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd* 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton and the Best Interests of Children*, 40 TULSA L. REV. 421, 440 (2005).

<sup>53</sup> See, e.g., Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified in scattered sections of 42 U.S.C.).

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framework highlights the rights and interests of waiting children and the effect of categorical placement bans on those interests and rights. The use of comparative frameworks that focus on the equality interests of gay and lesbian prospective parents was not without consequence. It provided grounds for the *Lofton* court to reason that “the legislature could rationally act on the theory that not placing adoptees in homosexual households increases the probability that these children eventually will be placed with married-couple families, thus furthering the state’s goal of optimal placement” and motivated the court to determine “that Florida’s current foster care backlog does not render the statute irrational.”<sup>54</sup> Accordingly, the court concluded, “[A]ppellants’ proffered social science evidence does not disprove the rational basis of the Florida statute” and upheld its constitutionality.<sup>55</sup>

A critical strength of the *Gill* decision is that it followed the *Lofton* court’s instructions and considered the body of available social science research regarding child welfare outcomes for children placed in adoptive homes as relevant to the rationality of the Florida placement ban as a child welfare measure.<sup>56</sup> However, despite the fact that it reached a different conclusion as to the constitutionality of the statute,<sup>57</sup> it did the analysis within the same parent-focused comparative harm framework that the

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In another adoption context, transracial adoption, Congress identified the delay or denial of permanent placements for children of color as the harmful effect of placement policies and practices prohibiting transracial placement (i.e., placing an orphan with an adoptive parent of a different race). Congress, which was not persuaded by arguments that the purpose of such practices and policies was to protect orphans of color from the harms of transracial placements, enacted the Howard Metzenbaum Multiethnic Placement Act of 1994 (“MEPA”), which was later amended to preclude any consideration of race in making adoption determinations. . . . Congress determined the harm of non-placement to outweigh any harm caused by transracial placement. Implicit in the amendment of MEPA to preclude any consideration of race in placement determinations is an acknowledgment of the primacy of permanent placement over delayed or non-[permanent] placement.

Washington, *supra* note 8, at 47–49 (footnotes omitted).

<sup>54</sup> *Lofton*, 358 F.3d at 823.

<sup>55</sup> *Id.* at 826–27.

<sup>56</sup> Compare *id.* at 824–26, with *Gill*, 2008 WL 5006172, at \*28.

<sup>57</sup> *Gill*, 2008 WL 5006172, at \*29.

*Lofton* court used.<sup>58</sup> Accordingly, it reinforced the illusion that children's options are between permanent placement with homosexual or heterosexual adoptive parents, thereby, subverting children's rights and undermining their constitutional challenges to these bans.

#### IV. THE *DOE* DECISION: WINNING THE WAR BUT LOSING THE BATTLE

##### A. *The Persuasive Power of Sympathetic Petitioners*

The plight of the two children at the heart of the *Gill* case, John and James Doe, is particularly moving.<sup>59</sup> The facts of this case, when viewed in light of child welfare realities in Florida,<sup>60</sup> provide the ideal context for a successful constitutional challenge that measures the legitimacy of the State's interest in a categorical placement ban according to the extent to which it serves or disservices orphans' interests. In 2004, John and James Doe, at the age of four years and four months respectively, were placed with foster parent Martin Gill (Martin).<sup>61</sup> As African American boys and a sibling set, and with John exhibiting signs of delayed development,<sup>62</sup> both John and James qualified as "special needs" children, who the State acknowledged as facing unique placement challenges.<sup>63</sup> Compounding these placement challenges was the reality that Florida's child welfare system is characterized by a surplus of waiting children and a deficiency of available potential parents, making adoption prospects for special needs children particularly slim.<sup>64</sup> When the children were initially placed with

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<sup>58</sup> *See id.* at \*28.

<sup>59</sup> The facts of *Lofton* were similarly poignant; however, in that case the challenge to Florida's orphan placement ban was focused on the individual rights of the parents not the constitutional rights of the child. *See Lofton*, 358 F.3d at 807–09.

<sup>60</sup> *Gill*, 2008 WL 5006172, at \*18, \*24; Strasser, *supra* note 52, at 440.

<sup>61</sup> *Gill*, 2008 WL 5006172, at \*1.

<sup>62</sup> *Id.* at \*2, \*19.

<sup>63</sup> *See* FLA. STAT. § 409.166(2)(a) (2009) (defining children with special needs as children with "significant emotional ties" with a foster parent or relative caregiver, children who are eight years or older, children who are mentally, physically, or emotionally handicapped, children who are black or have racially mixed heritage, or children who are members of a sibling group being placed for adoption as a unit).

<sup>64</sup> *See Gill*, 2008 WL 5006172, at \*18, \*24 ("Florida has set up several programs to increase the pool of potential adoptive parents. . . . At any given point, there are about 900 to 1,000 children in Florida who need adoptive parents to be recruited for them. [One hundred and sixty-five] children in Florida aged out of the system in 2006 without ever being adopted. . . . DCF agrees that the shortage of adoptive parents is a serious problem. DCF agrees that having a bigger pool of qualified adoptive parents would help DCF find

(continued)

Martin and his long-term partner Tom Roe (Tom), both boys had significant health problems and exhibited symptoms of severe emotional abuse and neglect.<sup>65</sup> Additionally, John's early education was deficient and inconsistent.<sup>66</sup>

The Department of Children and Families (DCF) was aware that Martin and Tom were a same-sex couple at the time of the foster care placement;<sup>67</sup> however ironically, Florida law allows gays and lesbians to serve as foster parents.<sup>68</sup> Two years into their foster placement, both boys' health had improved,<sup>69</sup> they were bonded to their foster parents and foster brother, they had established relationships with Martin's and Tom's extended families, they created relationships in their neighborhood and schools,<sup>70</sup> and they were being provided "a safe, healthy, stable and nurturing home . . . [which met] their physical, emotional, social, and educational needs."<sup>71</sup> One supervising caseworker described the couple as "model foster parents throughout the duration of the dependency case" and reported, "There should be more foster parents of this quality and caliber."<sup>72</sup> Judge Lederman, who authored the *Gill* opinion, expressed the following opinion of the care provided to the children: "This Court has presided over 58 hearings in [James' and John's] case and has had the opportunity to observe the children, [Martin,] and the growing relationship between them. It is clear to this Court that [Martin] is an exceptional parent to John and James who have healed in his care and are now thriving."<sup>73</sup>

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families for medically involved children, teens, large sibling groups and children with mental health problems." (citations omitted); *see also* Woodhouse, *supra* note 2, at 326 ("If adoptive parents were waiting in line to adopt special needs children the situation might be less damaging. The sad truth is that there are far more children than homes." (footnote omitted)).

<sup>65</sup> *See Gill*, 2008 WL 5006172, at \*2.

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* at \*19 (stipulated fact No. 46).

<sup>68</sup> *Id.* at \*17 (stipulated fact No. 24). Petitioner, an openly gay man, was a "licensed foster caregiver" in the state of Florida. *Id.* at \*1.

<sup>69</sup> *Id.* at \*2, \*5. Upon arriving at the petitioner's home, both John and James Doe suffered from various untreated illnesses. *Id.* at \*2. The guardian ad litem noted during the hearing that both John and James are in "excellent health." *Id.* at \*5.

<sup>70</sup> *Id.* at \*2-3.

<sup>71</sup> *Id.* at \*19 (stipulated fact No. 52).

<sup>72</sup> *Id.* at \*20 (stipulated fact No. 56).

<sup>73</sup> *Id.* at \*21.

During the two years that James and John lived with Martin and Tom, no prospective parents filed adoption petitions seeking to provide them with a permanent adoptive home.<sup>74</sup> Though the foster placement was intended to be temporary, after termination of their birth parents' rights, Martin petitioned to adopt John and James.<sup>75</sup> As was customary, the Center for Family and Child Enrichment (CFCE)<sup>76</sup> evaluated Martin and Tom to determine their parental fitness and competency to provide a stable, healthy, and nurturing home environment for John and James.<sup>77</sup> The preliminary home study results were positive; however, CFCE did not recommend approval, and DCF subsequently denied Martin's application for adoption.<sup>78</sup> DCF cited Florida's categorical placement ban as the sole basis for denying the adoption petition.<sup>79</sup> In response, Martin brought claims asserting that the categorical exclusion violates his equal protection and substantive due process rights guaranteed by Article I, Section 2 of the Florida Constitution.<sup>80</sup> Through their guardian ad litem, who determined that adoption by Martin was "in the boys' best interest,"<sup>81</sup> the children also asserted equal protection and substantive due process challenges to the constitutionality of the placement ban.<sup>82</sup>

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<sup>74</sup> *Id.* at \*1.

<sup>75</sup> *Id.* Gill and Tom "made a strategic decision that only [Martin] should petition to adopt John and James, believing a two-parent gay adoption would be impossible. If [Martin's] petition to adopt is successful, [Tom] plans to initiate a second parent adoption at a later date." *Id.* at \*2.

<sup>76</sup> The Center for Family and Child Enrichment is an agency under contract with DCF to facilitate foster and adoptive placements of children in State custody. *Id.* at \*19 (stipulated fact No. 48).

<sup>77</sup> *Id.* (stipulated fact No. 49). "Before DCF or its agents approve an applicant seeking to adopt a child, that applicant is individually screened to ensure that he or she can provide a safe, healthy, stable, nurturing, environment for a child." *Id.* at \*17 (stipulated fact No. 19).

<sup>78</sup> *Id.* at \*19 ("CFCE conducted a preliminary home study in October 2006. CFCE's home study report included the results of criminal and child abuse registry checks and reference checks as well as an assessment of Petitioner and Tom's character, health, relationship, ability to care for children and home environment. CFCE's home study report stated that although the caregiver meets suitability requirements, he lives an alternative lifestyle, which by Florida Statutes, precludes him from becoming an adoptive parent." (stipulated fact No. 49)).

<sup>79</sup> *Id.* (stipulated fact No. 50).

<sup>80</sup> *Id.* at \*21, \*25.

<sup>81</sup> *Id.* at \*19 (stipulated fact No. 55).

<sup>82</sup> *Id.* at \*21.

The substance of the children's due process claim asserted that Florida's placement ban infringed on an affirmative constitutional right to permanency—the optimal placement option.<sup>83</sup> The basis for Martin's substantive due process challenge was unclear in light of the fact that courts have consistently rejected a constitutional right to adopt.<sup>84</sup> Nevertheless, the court may have implicitly acknowledged the existence of a right to be adopted when it described a child's rights as "co-extensive with an adult's rights," and thereby, interpreting a child's right to permanency as creating a corresponding right for parents to create a permanent family unit.<sup>85</sup> This right would also be infringed upon by the placement ban.<sup>86</sup> The court also considered the equal protection challenges presented by Martin and the children to be co-extensive.<sup>87</sup> Those challenges expressed an argument that homosexual prospective parents and orphans placed with homosexual parents are treated differently under the Florida placement ban from heterosexual prospective parents and orphans placed with heterosexual parents.<sup>88</sup> Within both the equal protection and substantive due process frameworks, the State must provide a legitimate or compelling governmental interest in the prohibition for the ban to withstand constitutional scrutiny.<sup>89</sup>

DCF moved to dismiss the action asserting that legitimate state interests—the protection of children and the maintenance of societal morality—justify the infringement caused by the ban, such that it would survive both substantive due process and equal protection challenges.<sup>90</sup>

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<sup>83</sup> *Id.* at \*22, \*24.

<sup>84</sup> *See, e.g.,* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 809 (11th Cir. 2004).

<sup>85</sup> *See Gill*, 2008 WL 5006172, at \*22.

<sup>86</sup> *See Lofton*, 358 F.3d at 811–15.

<sup>87</sup> *Gill*, 2008 WL 5006172, at \*25–29 (considering the equal protection arguments of both the petitioner and the children together rather than separate).

<sup>88</sup> *Id.* at \*25 ("Petitioner and the Children argue that the statute violates their right to equal protection under the law because it singles out homosexuals and children raised by homosexual caregivers for unequal treatment without serving a rational basis. Similarly, the Children posit they are not offered equal protection because one class of children placed by the state with heterosexual caregivers have the potential to be adopted by their caregivers, while other children who are also adoptable, but placed by the state with lesbians and gay men cannot be adopted by their caregivers.").

<sup>89</sup> *Id.* at \*22, \*24.

<sup>90</sup> *Id.* at \*1, \*6.

The trial court denied the motion, finding its bases unpersuasive.<sup>91</sup> The case then proceeded to a hearing where the parties presented witnesses, expert testimony, social science research, and arguments relevant to a determination of the constitutionality of Florida's placement ban.<sup>92</sup> Judge Lederman held that Florida's placement ban violated the equal protection and substantive due process rights of orphans and prospective gay and lesbian parents.<sup>93</sup> The court used an analytic framework that highlighted how the placement ban violates children's rights to permanency, which serves their best interests, and used social science research to interrogate the legitimacy of the asserted government interests in the prohibition.<sup>94</sup> The holding, its emphasis on children's statutory and constitutional rights, and the acknowledgment of social science research as an essential aspect of the constitutional analysis should inform litigation strategy for future challenges to similar bans.

*B. Spotlighting Children's Rights in the Constitutional Analysis*

The first step in the *Gill* court's analysis was to identify the best interests of the child as the controlling consideration in placement determinations and to determine what serves children's best interests in the child welfare context.<sup>95</sup> Highlighting the child's best interests as the governing standard in adoption decisions, the court explained:

[T]he petition for adoption should be determined on the basis of the fitness of a petitioner who is petitioning to adopt the child and whether the adoptive home that would be provided for the child by that petitioner is suitable for the child so that the child can grow up in a stable, permanent, and loving environment. It is within those criteria that the determination as to the *best interests of the child* is to be made with regard to an adoption petition.<sup>96</sup>

Having identified the controlling standard, the court then acknowledged adoption as the placement option that best serves the interests of children within state custody as an evidentiary, statutory, and constitutional

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at \*29.

<sup>94</sup> *See id.* at \*21–29.

<sup>95</sup> *Id.* at \*21–23.

<sup>96</sup> *Id.* at \*23 (quoting *G.S. v. T.B.*, 985 So. 2d 978, 983 (Fla. Dist. Ct. App. 2008) (emphasis added)).

matter.<sup>97</sup> The court considered expert testimony offered by (1) a licensed clinical social worker and professor of social work at Florida State University, (2) a licensing foster care specialist, and (3) the chief of Welfare Services and Training in the Family Safety Program Office for the State of Florida in support of its conclusion that permanency serves a child's best interest.<sup>98</sup> Specifically, the following expert opinions informed the court's acknowledgment of the primacy of permanency:

[I]n Florida, foster care is meant to be a temporary environment for a child. The next stage of permanency, a permanent guardianship, is more stable but should not be the preferred option. . . . [I]n the eyes of a child, true permanency is always through reunification or adoption.<sup>99</sup>

. . . .

Where reunification with birth family is not possible, adoption—not guardianship—is the optimal goal for the child.<sup>100</sup>

. . . .

. . . [A]doption is preferred over guardianship because of the physical and emotional stability, legality, inheritance and familial relationship benefits afforded to adoptees. . . . [A]dopted children perceive themselves differently than children in guardianship because adoptees feel a stronger sense of belonging and a legal connection to their parents that children in lesser forms of permanency can never truly feel.<sup>101</sup>

The court also found support for its acknowledgment of adoption as the optimal placement option for waiting children in Florida and congressional legislative enactments.<sup>102</sup> The court opined:

Chapter 39 of the Florida Statutes requires the State to provide all dependent children with a stable and permanent

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at \*14–15.

<sup>99</sup> *Id.* at \*15.

<sup>100</sup> *Id.* at \*18 (stipulated fact No. 41).

<sup>101</sup> *Id.* at \*15.

<sup>102</sup> *Id.* at \*21–22.

home. The aim is to ensure that every child in foster care is placed in a permanent home as soon as possible. The law also provides that adoption is the preferred permanency option for children who cannot be returned to their biological families. Furthermore, the federal Adoption and Safe Families Act of 1997, sets strict time limits for states to make certain children achieve permanency to prevent them from lingering in foster care.

Florida's statutory framework is explicit that dependent children have the right to permanency and stability in adoptive placements. The law is also explicit that there is a compelling state interest in providing such permanent, adoptive placement as rapidly as possible.<sup>103</sup>

In addition to legislative support for the primacy of permanency, the court also found constitutional grounds for orphans' entitlement to adoption as the preferred placement option noting, "[T]he substance of state and federal decisions . . . declare a child's constitutional right to a true home, and in the case of a foster child, to a permanent adoptive home. . . . [']Minors, as well as adults, are protected by the Constitution and possess constitutional rights.'"<sup>104</sup> The court embraced the argument that children have affirmative rights with respect to permanency and recognized a "foster child's right to an adoptive home when the child is available for adoption."<sup>105</sup> The court also implicitly recognized a negative liberty interest, which is reflected in its acknowledgment of "a child's fundamental right to be free from unnecessary restraint."<sup>106</sup> The claim at the heart of the negative liberty interest argument is that "orphans should be considered to possess an interest in being free from government action that categorically forecloses the opportunity for permanent placement, in favor of the less preferred (and more harmful) option of extended institutional or foster care."<sup>107</sup>

The affirmative rights and negative liberty interest arguments offer complementary grounds for effective constitutional challenges to orphan placement bans. The negative liberty interest argument, however, does not

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<sup>103</sup> *Id.* (citations omitted).

<sup>104</sup> *Id.* at \*22 (citations omitted).

<sup>105</sup> *Id.* at \*24.

<sup>106</sup> *Id.* at \*22.

<sup>107</sup> Washington, *supra* note 8, at 30 (footnote omitted).

depend upon a “right to be adopted.”<sup>108</sup> As such, it does not generate a corresponding parental right to adopt.<sup>109</sup> Additionally, the affirmative rights argument may be frustrated by the dearth of available permanent placements because, in light of “supply-demand” realities, one can argue that the State cannot be burdened with an obligation to place every (or any) child. The negative liberty interest argument, however, is focused on state action that frustrates the *pursuit* of permanency in breach of the State’s fiduciary duty to orphans, even if the goal of permanency cannot be achieved due to child welfare realities.<sup>110</sup> The negative liberty interest argument emphasizes that action that serves the best interests of children within the care and custody of the State defines the State’s fiduciary duty.<sup>111</sup> The court described the State’s fiduciary obligation to children when it is acting in its *parens patriae* authority thusly:

A law such as the blanket ban on adoptions by homosexuals infringes on the foster child’s right to be free from undue restraint and to be expeditiously placed in an adoptive home that serves the child’s best permanency interests. Indeed, a law that subverts judicial process and imposes on the court the burden of taking action harmful to the child should be immediately suspect because the injury it imposes contradicts the legislative purpose and constitutional basis of the child’s having been taken into custody by the State in the first place.<sup>112</sup>

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<sup>108</sup> See, e.g., *Lindley v. Sullivan*, 889 F.2d 124, 128–32 (7th Cir. 1989) (holding an adopted child had standing to bring an action challenging the denial of insurance benefits to the adopted parents even though the court recognized no right to be adopted).

<sup>109</sup> See *id.* at 132–33.

<sup>110</sup> See *Gill*, 2008 WL 5006172, at \*24.

<sup>111</sup> See *Washington*, *supra* note 8, at 37–38 (“A fact-specific examination of what serves the best interests of the child (i.e., her emotional, mental and physical well-being and development) must guide the determination as to the appropriateness of a particular placement. Permanency is consistently regarded as serving children’s best interests, has been consistently acknowledged as the optimal placement option for orphans, and is the least restrictive and least harmful option for orphans. Accordingly, the state’s fiduciary duty should require care that facilitates rather than categorically forecloses permanent placement, and orphans should be considered to have a liberty interest in freedom from state action that forecloses, rather than facilitates, permanent placement.” (footnotes omitted)).

<sup>112</sup> *Gill*, 2008 WL 5006172, at \*22.

....

... The very premise of Florida's dependency law following termination of parental rights must be consistent with the *parens patriae* responsibility of the state to achieve adoption for foster children unless their best interests are demonstrably shown to be otherwise.<sup>113</sup>

Although it may be unclear whether the court intended to characterize a child's right with respect to permanency as an affirmative right to permanent placement or as a negative liberty interest in freedom from categorical placement bans that foreclose the optimal placement option, the court clearly recognizes the right to be fundamental.<sup>114</sup>

*C. The Relevance of Social Science Research in Constitutional Challenges to Placement Bans*

After establishing the primacy of permanency, the court then turned its attention to the mountain of social science evidence presented by the parties to support and challenge the constitutional legitimacy of the State's interest in Florida's ban.<sup>115</sup> Although the *Lofton* court noted the dearth of available, relevant social science data relating to parenting by heterosexuals at the time of its decision,<sup>116</sup> the *Gill* court opined:

[T]oday, based on the developments in the fields of social science, psychology, human sexuality, social work and medicine, the existence of additional studies, the re-analysis and peer review of prior studies, the endorsements by the major psychological, psychiatry, child welfare and social work associations, and the now, consensus based on widely accepted results of respected studies by qualified

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<sup>113</sup> *Id.* \*24.

<sup>114</sup> *Id.* ("The declared foster child's right to an adoptive home when the child is available for adoption is a fundamental right.")

<sup>115</sup> *Id.* at \*21, \*28.

<sup>116</sup> *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 825–26 (11th Cir. 2004) ("Openly homosexual households represent a very recent phenomenon, and sufficient time has not yet passed to permit any scientific study of how children raised in these households fare as adults. Scientific attempts to study homosexual parenting in general are still in their nascent stages and so far have yielded inconclusive and conflicting results. Thus, it is hardly surprising that the question of the effects of homosexual parenting on childhood development is one on which even experts of good faith reasonably disagree.")

experts, the issue of whether [the Florida ban] violates the equal protection of homosexuals and children adoptable by homosexuals, is again ripe for consideration.<sup>117</sup>

The constitutional relevance of social science research has been confirmed by its use in many cases<sup>118</sup> including the landmark civil rights decision *Brown v. Board of Education*,<sup>119</sup> which represents one of the most publicized judicial uses of forensic social science research.<sup>120</sup> In the trial court proceedings, Dr. Kenneth Clark, the plaintiff's leading expert, provided testimony including studies reporting the harmful effects of segregation on black children's self-esteem and ability to learn.<sup>121</sup> The appellants in *Brown* included a "Social Science Statement," summarizing the available research on the consequences of segregation and the predicted effects of desegregation in an appendix to their Supreme Court brief.<sup>122</sup> Dr. Clark and approximately thirty other reputable social scientists prepared the statement.<sup>123</sup> The Court relied on this "modern authority" to

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<sup>117</sup> *Gill*, 2008 WL 5006172, at \*27.

<sup>118</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 726 (2007) (using statistics on race and performance in school in deciding the constitutionality of using racial classification in student assignment); *Grutter v. Bollinger*, 539 U.S. 330, 308 (2003) (using social science data to determine the educational relevance of racial diversity); *Hodgson v. Minnesota*, 497 U.S. 417, 439 (1990) (citing statistics of domestic violence in deciding the constitutionality of a required two-parent notice for minors seeking abortions); *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987) (considering social science to determine whether the race of the defendant and the race of the victim informed the likelihood of the administration of the death penalty); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995–1002 (N.D. Cal. 2010) (considering an extensive body of social science research to determine the rationality of the State's interest in banning same-sex marriage).

<sup>119</sup> 347 U.S. 483 (1954).

<sup>120</sup> See *id.* at 494 n.11; Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 138–39 (1997).

<sup>121</sup> Wallace D. Loh, *In Quest of Brown's Promise: Social Research and Social Values in School Desegregation*, 58 WASH. L. REV. 129, 133 n.24 (1982) ("Clark presented white and brown dolls to sixteen black children aged six to nine years in Clarendon County, South Carolina, where the trial was held. He found that most of the children identified with and preferred the white doll, even though they recognized that the brown doll was more like themselves. From this result, Clark inferred that the children had feelings of self-rejection and inferiority.").

<sup>122</sup> Brief for Appellants at Appendix: The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), reprinted in 37 MINN. L. REV. 427 (1953).

<sup>123</sup> *Id.* at 427.

support its finding that segregation adversely impacts black school children and to support its important holding that segregationist laws violate children's equal protection rights.<sup>124</sup>

Petitioners in *Gill* borrowed a page from the *Brown* litigation playbook and presented extensive social science research to confront the State's assertion that placement bans serve to protect the interests of the children subject to its *parens patriae* authority.<sup>125</sup> The *Gill* court, like the Supreme Court in *Brown*, relied heavily on modern authority in support of its determination that Florida's placement ban operated to subvert, rather than serve, the best interests of children and was in violation of their constitutional rights.<sup>126</sup> It is likely the *Gill* opinion, like the opinion in *Brown*, will be criticized for judicial reliance on and use of social science research in its constitutional analysis.<sup>127</sup> However, if one regards social science as playing mainly a "heuristic role in policy matters, educating the

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<sup>124</sup> *Brown*, 347 U.S. at 493–95 ("We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. . . . We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.") (footnotes omitted).

<sup>125</sup> *In re Adoption of John & James Doe (Gill)*, No. 06-CV-33881, 2008 WL 5006172, at \*3–15 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd* 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

<sup>126</sup> *See id.* at \*21–25.

<sup>127</sup> *Cf.* Hashimoto, *supra* note 120, at 138–39 ("Scholars probably have devoted the largest amount of commentary to the Court's famous citation to sociological studies in footnote 11 of *Brown v. Board of Education*. . . . Scholars have overemphasized the significance of this citation as evidence of the Court's deliberative process. As the Chief Justice's remark indicated, the footnote did not signify that the Court's decision turned on this empirical finding. The Court's decision in *Brown* really depended on a broader social understanding that '[s]eparate educational facilities are inherently unequal.' The general experience of members of the Court, and not particular empirical data, provided the basis for the Court's opinion on this matter. The Court's citation to empirical studies was what it literally appeared to be—merely a passing nod to persuasive support. . . . Footnote 11 in *Brown* has been described as 'the most controversial . . . in American constitutional law.' The empirical studies of schoolchildren by Professor Kenneth Clark, cited in that footnote, were subsequently heavily criticized . . .") (footnotes omitted).

courts and society at large about the factual dimensions of the issue at stake,” its utility and limits in judicial decision making become apparent.<sup>128</sup> Social science research “can expose the varied facets of social problems and stimulate further reflection on the adequacy of one’s preconceptions,” and “it can inform and make more responsible the exercise of judgment, even though it should not and cannot displace the act of judging itself.”<sup>129</sup> Social science may be particularly relevant to analysis focused on something about the amorphous nature of the best interest of the child standard and trying to arrive at a concrete sense as to the extent to which it is being achieved.

The *Gill* court used social science research appropriately to determine the kind and quality of care that serves the best interests of children within State custody. As the best interests of the child constitutes the controlling consideration in placement decisions,<sup>130</sup> identifying and comparing the kind and quality of care afforded by different placement options and determining whether care is consistent with the child’s best interests goes to the heart of both the substantive due process and equal protection analysis. Both constitutional frameworks require a determination as to whether the State’s interests in Florida’s placement ban serve or sabotage children’s best interests and whether the ban’s categorical prohibition satisfies or breaches the State’s *parens patriae* obligations.<sup>131</sup> The *Gill* court answered these critical constitutional queries using relevant, available social science research.<sup>132</sup>

The court conducted a thorough examination of the social science evidence presented by the parties to test the legitimacy of the State’s interest in categorically prohibiting placements of orphans with gay and lesbian parents.<sup>133</sup> DCF, in defense of the placement ban, offered two legitimate interests served by the placement ban. First, it asserted, “[T]he homosexual adoption restriction serves the legitimate state interest of promoting the well-being of minor children.”<sup>134</sup> Second, it asserted that the ban serves “broader, societal morality interests.”<sup>135</sup> Much of the four-

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<sup>128</sup> Loh, *supra* note 121, at 174 (footnote omitted).

<sup>129</sup> *Id.* (footnote omitted).

<sup>130</sup> *See Gill*, 2008 WL 5006172, at \*23.

<sup>131</sup> *See id.* at \*22–24, \*28 (recognizing the relevance in a substantive due process analysis and an equal protection analysis).

<sup>132</sup> *See id.* at \*5–15, \*20, \*28.

<sup>133</sup> *See id.*

<sup>134</sup> *Id.* at \*6.

<sup>135</sup> *Id.*

day hearing in *Gill* was devoted to testimony by national experts relating to the social, psychological, interpersonal, and physical effects of same-sex relationships on individuals, families, children, and society.<sup>136</sup> DCF's chief witness, Dr. George Rekers, who is a clinical psychologist and behavioral scientist, an expert in clinical psychology and behavioral science, and an ordained Baptist minister,<sup>137</sup> provided testimony supporting DCF's position:

[T]he law's restriction serves the best interests of children because when compared to heterosexual behaving individuals, homosexual behaving individuals experience: (1) a lifetime prevalence of significantly increased psychiatric disorders; (2) higher levels of alcohol and substance abuse; (3) higher levels of major depression; (4) higher levels of affective disorder; (5) four times higher levels of suicide attempts; and (6) substantially increased rates of relationship instability and breakup.<sup>138</sup>

Dr. Rekers has authored several books relevant to his qualifications as a State expert.<sup>139</sup> In his book, *The Christian in an Age of Sexual Eclipse*, he wrote:

Could it be that the wholesale American abandonment of the God ordained male and female roles has brought upon our families a destructive force that will ultimately disintegrate marriage and family, if not soon reversed. I believe that the family will self destruct in direct proportion to its retreat from the biblically defined male and female roles.

....

... Non-Christian psychologists often encourage their clients to ... form their own values regarding sexual expression. In doing so, they mistakenly assume that they are providing the most appropriate and sensitive counsel. In reality they are tacitly creating an impression that the universe was constructed with no moral law inherent to the

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at \*10.

<sup>138</sup> *Id.* at \*6.

<sup>139</sup> *Id.* at \*12.

system, but God has spoken. God has given us explicit instruction as to what his moral laws are.

. . . .

. . . What happens if scholars deliberately discard all moral evidence as irrelevant to their professional judgments? Roman's describes the consequences in suppressing truth revealed by the creator. . . . Those verses indicate that the existence of God is evident within each person, so psychologists and psychiatrists who proceed as though he does not exist are deliberately suppressing truth. To search for truth about homosexuality in psychology and psychiatry, while ignoring God, will result in futile and foolish speculations.<sup>140</sup>

The court described Dr. Rekers' testimony as "far from a neutral and unbiased recitation of the relevant scientific evidence."<sup>141</sup> The court concluded, "Dr. Rekers' beliefs are motivated by his strong ideological and theological convictions that are not consistent with science. Based on his testimony and demeanor at trial, the court can not consider his testimony to be credible nor worthy of forming the basis of public policy."<sup>142</sup>

The court also considered the testimony of Dr. Walter Schumm, an associate professor of family studies at Kansas State University, who the State tendered as an expert in family child development, empirical and theoretical family studies, and research methodology.<sup>143</sup> The court drew a comparison between his work and that of Dr. Rekers' and observed, "Dr. Schumm also integrates his religious and ideological beliefs into his research."<sup>144</sup> The court considered Dr. Schumm's methodological analysis of the works of psychologists researching homosexual parenting. It highlighted Dr. Schumm's admission that "he applies statistical standards that depart from conventions in the field" and "that much of the scientific community disagrees with his conclusions . . . that there are statistically

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<sup>140</sup> *Id.* at \*12 n.25 (quoting MICHAEL BRAUN & GEORGE REKERS, *THE CHRISTIAN IN AN AGE OF SEXUAL ECLIPSE* 12, 14, 54–56 (1981)).

<sup>141</sup> *Id.* at \*12.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* ("In an article he published in the *Journal of Psychology and Theology* he wrote, 'With respect to the integration of faith and research, I have been trying to use statistics to highlight the truth of Scripture.'").

significant differences between children of gay and lesbian parents as compared to children of heterosexual parents.”<sup>145</sup>

In support of their constitutional challenges to Florida’s orphan placement ban, petitioners’ experts countered the State’s assertion that placement bans serve a legitimate state interest in protecting children from the perceived harms of parenting by homosexuals.<sup>146</sup> They testified generally that:

(1) homosexually behaving individuals are no more susceptible to mental health or psychological disorders than their heterosexual counterparts; (2) both heterosexual and homosexual parents can provide nurturing, safe, healthy environments for children; and (3) children of homosexual parents are no more at risk of maladjustment than their counterparts with heterosexual parents.<sup>147</sup>

Petitioners’ experts included: (1) Dr. Latitia Peplau, professor of psychology at the University of California;<sup>148</sup> (2) Dr. Susan Cochran, professor of epidemiology and statistics at the University of California;<sup>149</sup> (3) Dr. Michael Lamb, professor of psychology at the University of Cambridge;<sup>150</sup> (4) Dr. Margaret Fischl, professor of medicine at the University of Miami School of Medicine, director of the AIDS Clinical Research Unit, and co-director of the Center for AIDS;<sup>151</sup> and (5) Dr. Frederick Berlin, associate professor at Johns Hopkins University School

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<sup>145</sup> *Id.* The court also noted that Dr. Schumm offered an opinion that did not entirely support the State’s categorical placement ban. *See id.* “Candidly, the witness does not agree with Dr. Rekers that homosexuals should be banned from adopting but rather states that gay parents can be good foster parents, and opines that the decision to permit homosexuals to adopt is best made by the judiciary on a case by case basis.” *Id.*

<sup>146</sup> *Id.* at \*6.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (testifying “as an expert in psychology with a specialization in couple relationships, same-sex couple relationships, and violence within relationships”).

<sup>149</sup> *Id.* at \*7 (testifying “as an expert in psychology and epidemiology with a specialization in health disparities among minority communities . . . and in the use of statistical analysis in social science research”).

<sup>150</sup> *Id.* at \*8 (testifying “as an expert witness in psychology with a specialization in the development and adjustment of children, including children of gay and lesbian parents”).

<sup>151</sup> *Id.* at \*13 (testifying “as an expert in the diagnosis and treatment of human immunodeficiency virus (HIV) and other STDs”).

of Medicine.<sup>152</sup> Petitioners also offered some testimony highlighting supply-demand realities inherent in the Florida child welfare system that could support a comparative harm analysis focused on the relative harms of placement with homosexual parents versus extended temporary and institutional care.<sup>153</sup>

After careful consideration of the evidence presented by both sets of experts, the court concluded:

Based on the evidence presented from experts all over this country and abroad, it is clear that sexual orientation is not a predictor of a person's ability to parent. . . . The most important factor in ensuring a well adjusted child is the quality of parenting.

. . . .

The quality and breadth of research available, as well as the results of the studies performed about gay parenting and children of gay parents, is robust and has provided the basis for consensus in the field. Many well renowned, regarded and respected professionals have reduced methodologically sound longitudinal and cross-sectional studies into hundreds of reports. . . . The studies and reports are published in many well respected peer reviewed journals including the Journal of Child Development, the Journal of Family Psychology, the Journal of Child Psychology, and the Journal of Child Psychiatry.

In addition to the volume, the body of research is broad . . . . These reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children. . . . As a result, based on the robust nature of the evidence available in the field, this

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<sup>152</sup> *Id.* (testifying "as an expert in human sexuality").

<sup>153</sup> *See id.* at \*10–15. One witness testified, "[T]he exclusion hurts children by reducing the number of capable and appropriate parents available and willing to adopt." *Id.* at \*14. Another witness testified, "Florida's categorical exclusion of homosexuals would reduce the number of potential qualified applicants, . . . results in multiple placements of children, [and] causes children to suffer attachment disorder or age out of foster care." *Id.* Another witness admitted, "[T]he ban of homosexuals as adoptive parents interferes with the Department's ability to find qualified adoptive parents." *Id.* at \*15.

Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interest of children are not preserved by prohibiting homosexual adoption.<sup>154</sup>

The court conducted a thorough examination of the available social science research identifying permanency as the placement option that serves a child's best interests and investigating the State's contention that homosexual parents are less competent than heterosexual parents to provide for the emotional, physical, and psychological needs of a child.<sup>155</sup> Per the *Lofton* framework, this research was relevant to a determination of the constitutionality of the State's enactment of the placement ban because as the *Gill* court explained, "[W]hen it exercises its *parens patriae* authority to remove a child, the State's actions must be in accordance with that child's best interest in achieving a permanent adoptive home."<sup>156</sup> The court found that the available evidence overwhelmingly identified the primacy of permanent placement as providing for the best interests of children in the custody of the State. It also characterized the justifications for the categorical prohibition of permanent placements with homosexual parents as irrational, unsupported by credible research findings, and reflective of bigoted religious beliefs rather than legitimate concerns for the welfare of children.<sup>157</sup> Informed by the *Lofton* court's acknowledgment of the relevance of social science data to the constitutionality of orphan placement bans, the *Gill* court situated its analysis and conclusions within the context of the rich body of available research.

This article now turns to an examination of the court's application of these research findings to the petitioners' substantive due process and equal protection challenges and the analytic deficiencies that impaired the strength of the children's constitutional arguments presented in the case.

#### V. *GILL*'S ACHILLES' HEEL

The court properly relied on research findings to answer the constitutional question at the heart of both the equal protection and due process analyses—whether the State's interest in Florida's ban is

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<sup>154</sup> *Id.* at \*20.

<sup>155</sup> *See id.* at \*5–15.

<sup>156</sup> *Id.* at \*22; *see also* *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 824–25 (11th Cir. 2004).

<sup>157</sup> *See Gill*, 2008 WL 5006172, at \*20.

consistent with that which serves the interests of the children<sup>158</sup> to whom the State owes a fiduciary duty.<sup>159</sup> The social science data provided support for the court's conclusion that the placement ban is constitutionally indefensible.<sup>160</sup> However, its treatment of the children's and prospective parents' rights as "co-extensive" in both the equal protection and substantive due process contexts<sup>161</sup> led it to commit several analytic errors.

First, the court contradicted its acknowledgement of the children's interest in permanency as "fundamental"<sup>162</sup> by applying the rational basis test instead of strict scrutiny review.<sup>163</sup> Second, the court's negligible consideration of a substantial body of social science data reporting the harms associated with extended temporary and institutional care in Florida and its failure to situate its constitutional analysis within the context of child welfare realities in Florida<sup>164</sup>—a surplus of waiting children and deficit of prospective parents<sup>165</sup>—obscured the reality that for many waiting children the choice is between permanent placement with homosexual parents and nonpermanent placement.<sup>166</sup> Third, the court, informed by the *Lofton* court's constitutional framework, utilized a prospective parent-centered comparative harm analysis rather than a framework that would compare outcomes for children placed in adoptive homes with outcomes for children confined to extended temporary and institutional care.<sup>167</sup> Finally, the court acknowledged the State's interest in "public morality" as a governmental interest relevant to the children's constitutional challenges<sup>168</sup> in contradiction of its determination that the

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<sup>158</sup> See *Smith v. Org. of Foster Families*, 431 U.S. 816, 860 (1977) (Steward, J., concurring) ("[T]he protection that foster children have is . . . the requirement of state law that decisions about their placement be determined in light of their best interest.").

<sup>159</sup> See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The State . . . has a duty of the highest order to protect the interests of minor children."); *Lofton*, 358 F.3d at 809–10.

<sup>160</sup> See *Gill*, 2008 WL 5006172, at \*6–15, \*20.

<sup>161</sup> *Id.* at \*21–29.

<sup>162</sup> *Id.* at \*24 ("The declared foster child's right to an adoptive home when the child is available for adoption is a fundamental right.").

<sup>163</sup> *Id.* at \*27 ("This matter does not involve a fundamental right or a suspect class and is thus reviewed under the rational basis test.").

<sup>164</sup> See *id.* at \*25–29 (failing to discuss the social science research and child welfare realities as a consideration in the rational basis analysis).

<sup>165</sup> *Id.* at \*18, \*24; Strasser, *supra* note 52, at 440.

<sup>166</sup> Washington, *supra* note 8, at 2–5.

<sup>167</sup> See *Gill*, 2008 WL 5006172, at \*25–29.

<sup>168</sup> *Id.* at \*29.

State's *parens patriae* power must be exercised in a manner consistent with what serves a child's best interests.<sup>169</sup>

A. *Appropriate Constitutional Standards of Review*

Though the constitutional tests used in the context of substantive due process and equal protection are identical—rational basis and strict scrutiny—the constitutional rights provided and protected by each provision embody distinct doctrinal principles. Substantive due process violations arise when state action impairs a constitutional right or a constitutionally protected liberty interest.<sup>170</sup> Equal protection violations arise when state action impairs a fundamental right or targets similarly situated persons for differential treatment.<sup>171</sup>

Constitutional protection against substantive due process violations extends to affirmative rights, liberty interests, and negative liberty interests alike.<sup>172</sup> Within the substantive due process context, state action that infringes upon a fundamental right will be subject to strict scrutiny, and the State bears the burden of proving that its action is narrowly tailored to achieve a compelling governmental interest.<sup>173</sup> State action that infringes upon non-fundamental interests will be subject to rational basis review, which is a far more deferential standard and presumes state action to be rationally related to a legitimate governmental interest.<sup>174</sup> Even under the more permissive standard of review, however, the Supreme Court has held that liberty interests may not be infringed “under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.”<sup>175</sup> The Supreme Court has also excluded animus against an unpopular group as providing a constitutionally legitimate justification for

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<sup>169</sup> *Id.* at \*22 (“[W]hen [the State] exercises its *parens patriae* authority to remove a child, the State’s actions must be in accordance with the child’s best interest in achieving a permanent adoptive home.”).

<sup>170</sup> See U.S. CONST. amend. XIV; FLA. CONST. art. I, § 9 (“No person shall be deprived of life, liberty or property without due process of law.”).

<sup>171</sup> See U.S. CONST. amend. XIV; FLA. CONST. art. I, § 2 (“All natural persons, female and male alike, are equal before the law . . .”).

<sup>172</sup> See *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989); *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

<sup>173</sup> *Lawrence v. Texas*, 539 U.S. 558, 598–99 (2003).

<sup>174</sup> *Id.*

<sup>175</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

state action.<sup>176</sup> In the context of equal protection, if state action infringes a fundamental right or the category of persons targeted for differential treatment constitutes a “suspect class,” then strict scrutiny is the applicable constitutional test.<sup>177</sup> If the alleged equal protection infringement does not qualify for strict scrutiny, generally it will be subject to rational basis review.<sup>178</sup>

The adjudication of a right as fundamental, which determines the applicable level of constitutional scrutiny within both the equal protection and substantive due process contexts, is centered on identifying whether the right is one “implicit in the concept of ordered liberty”<sup>179</sup> such that “neither liberty nor justice would exist if [it was] sacrificed” or is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>180</sup> The *Gill* court’s adjudication of the foster child’s affirmative right to a permanent placement as fundamental in character is explicit in its announcement, “The declared foster child’s right to an adoptive home when the child is available for adoption is a fundamental right.”<sup>181</sup> The court cites authority identifying strict scrutiny as the constitutional test applicable to laws that burden fundamental rights.<sup>182</sup> Accordingly, recognition of children’s rights to permanency should have triggered strict scrutiny review. Instead, the court conflated the prospective parent’s challenges, which are subject to rational basis review because there is no infringement of a fundamental right nor do they

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<sup>176</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1966) (“[A state amendment’s] sheer breadth is so discontinuous with the reasons offered for it that . . . the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”).

<sup>177</sup> *Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (“Unquestionably we have held that a government practice or statute which . . . contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ . . .”).

<sup>178</sup> See, e.g., *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004) (“When no suspect class is involved and no fundamental right is burdened, we apply a rational basis test to determine the legitimacy of the classifications.”).

<sup>179</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>180</sup> *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>181</sup> See *In re Adoption of John & James Doe (Gill)*, No. 06-CV-33881, 2008 WL 5006172, at \*24 (Fla. Cir. Ct. Nov. 25, 2008), *aff’d* 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

<sup>182</sup> *Id.* at \*22 (“[L]aws that burden fundamental rights protected by the substantive due process clause are subject to strict scrutiny.” (citation omitted)).

constitute a suspect class, and the children's equal protection challenges.<sup>183</sup> This led the court to determine, "This matter does not involve a fundamental right or a suspect class and is thus reviewed under the rational basis test."<sup>184</sup> The court's explanation for its decision to apply rational basis review reveals that it ignored its own acknowledgment of the children's independent, fundamental right to permanency in its analysis and centered its determination of the applicable standard of review on the rights of prospective parents.<sup>185</sup> The court explained:

In *People v. Garcia*, the California Supreme Court held that homosexuals comprise a suspect class deserving of strict scrutiny analysis in the equal protection context. In reaching its conclusion the *Garcia* court found in order to establish a case of impermissible exclusion for equal protection purposes, the party must show that he was a member of a "cognizable group" and that the exclusion of members of that group was systematic. . . . The *Garcia* court further determined that lesbians and gay men qualify under this standard and "share a history of persecution comparable to that of Blacks and women. . . ." This Court finds the foregoing persuasive[,] but ultimately that based on Florida precedent, the statute in the case at bar fails qualification under the strict scrutiny test.<sup>186</sup>

In light of the court's explicit characterization of the children's rights at issue as fundamental,<sup>187</sup> the court should have separated its consideration of the prospective parent's equal protection challenge from the children's challenge and applied strict scrutiny to the latter and rational basis to the former. Its lack of consideration of children's rights in determining the applicable constitutional test suggests that the decision was focused on the rights of the prospective parents, which undermined the children's constitutional challenges.

#### *B. Comparing Apples and Oranges*

The focus of the *Gill* court's analysis of the children's constitutional claim was to determine whether, in light of the relevant research, the ban

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<sup>183</sup> See *id.* at \*27.

<sup>184</sup> *Id.* (citation omitted).

<sup>185</sup> *Id.* at \*24, \*27.

<sup>186</sup> *Id.* at \*27 n.36 (citations omitted).

<sup>187</sup> *Id.* at \*24.

serves children's best interests in securing a permanent placement, which is within the competency of the State as *parens patriae* to provide, or whether it subverts children's interests by categorically foreclosing the optimal placement option.<sup>188</sup> The court characterized the "homosexual exclusion [as] diametrically contrary to the permanency goal" and held:

[The Florida ban] violates the Children's rights by burdening liberty interests by unduly restraining them in State custody on one hand and simultaneously operating to deny them a permanent adoptive placement that is in their best interests on the other. This Court cannot permit such a double-edged sword to continue to lie dormant in our state law, to the peril of children like John and James, without review. The challenged statute, in precluding otherwise qualified homosexuals from adopting available children, does not promote the interests of children and in effect, causes harm to the children it is meant to protect. Both the state and federal governments recognize the critical nature of adoption to the well-being of children who cannot be raised by their biological parents.<sup>189</sup>

Despite the court's acknowledgment of an analytic framework that is centered on children's best interests being served by permanent placement,<sup>190</sup> the comparative harm framework it used as a context for its analysis was centered on a comparison of the parental competencies of homosexual and heterosexual parents and a contrast of the consequences to children's well-being according to their placement with homosexual or heterosexual parents.<sup>191</sup> This parent-centered comparative framework is identical to the one the *Lofton* court used in its constitutional analysis of Florida's placement ban.<sup>192</sup> The *Gill* court's use of this framework obscured the realities that characterize Florida's child welfare system—a surplus of waiting children available for adoption and a deficit of

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<sup>188</sup> See *id.* at \*22 (“[W]hen it exercises its *parens patriae* authority to remove a child, the State's actions must be in accordance with that child's best interest in achieving a permanent adoptive home.”).

<sup>189</sup> *Id.* at \*25.

<sup>190</sup> *Id.* at \*21–25.

<sup>191</sup> *Id.* at \*27–28.

<sup>192</sup> Compare *id.* at \*26–28, with *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 824–26 (11th Cir. 2004).

prospective adoptive parents.<sup>193</sup> The court did note, “[T]he exclusion exacerbates the shortage of adoptive families . . . leaving more children, especially dependent children, without a legal family at all.”<sup>194</sup> However, given the constitutional relevance of outcomes for children confined to extended temporary and institutional care,<sup>195</sup> the harmful consequences of Florida’s categorical placement ban deserved far greater consideration.

Indeed, the court’s use of this framework responds to the way the State frames its interests and responds to the framing of petitioners’ constitutional challenges, which were centered on establishing equivalence between parenting by homosexual and heterosexual parents.<sup>196</sup> Martin’s equal protection challenge was focused on homosexual prospective parents being treated differently from heterosexual prospective parents.<sup>197</sup> The children’s equal protection challenge was centered on the differential treatment of children placed with gay foster parents, who cannot be adopted by their foster parents under the ban, and those placed with straight foster parents, who can be adopted by their foster parents.<sup>198</sup> The children’s equal protection challenge was framed in terms of the deprivation of the permanent placement option for children who are not placed with available, qualified gay and lesbian foster parents.<sup>199</sup> However, its focus was on the ability of homosexual parents to provide parenting comparable to that provided by heterosexual parents, rather than on the comparative harms of permanent placement with a homosexual parent versus confinement to extended temporary and institutional care.<sup>200</sup>

A child-centered comparative harm analysis would have motivated the court to consider closely the body of available research documenting the harms associated with extended temporary and institutional care for children. The child-centered comparative analysis would dispel the delusion that children available for adoption have a choice between placement with heterosexual or homosexual parents. Furthermore, the analysis would have provided greater support for the conclusion that the State’s categorical ban violates children’s rights and constitutes a breach of the State’s fiduciary duty to children by condemning them to experience

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<sup>193</sup> *Gill*, 2008 WL 5006172, at \*18, \*24.

<sup>194</sup> *Id.* at \*25.

<sup>195</sup> *Id.*

<sup>196</sup> *See id.* at \*6.

<sup>197</sup> *Id.* at \*25.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See id.* at \*25–29.

the harms associated with the least beneficial placement option. The harms associated with extended temporary and institutional care, to which the *Gill* court turned a blind eye, are well documented and include:

Studies [that] report inferior outcomes for foster children in the areas of educational performance, employment rates, income, and incarceration rates. . . . [I]n Florida foster youth score substantially lower on the Florida Comprehensive Achievement Test, with fewer than 22% performing at grade level in reading and math; are nearly twice as likely to have to repeat a grade in school; are five times more likely to change schools; are more likely to be diagnosed with learning disabilities; are twice as likely to have school disciplinary problems that qualify them for dropout prevention policies; and are more likely to experience teen homelessness. Foster youth in Florida are less likely to attend post-secondary schools; typically earn only one-fourth the median wage of the same-age population; are more likely to receive public assistance; and are three times more likely to be in prison or on probation than are non-foster care youth.<sup>201</sup>

Although the court did acknowledge that the “the blanket exclusion of gay applicants defeats Florida’s goal of providing dependent children a permanent family through adoption . . . [which] causes some children to be deprived of a permanent placement with a family that is best suited to meet their needs,”<sup>202</sup> the children’s substantive due process challenge invited more than a passing reference to the consequences of Florida’s placement ban. The *Gill* opinion did not express a child-centered comparative harm analysis,<sup>203</sup> which would have supported an argument that by categorically foreclosing the best placement option for children, the State is virtually ensuring that some children will experience the significant harms associated with the least beneficial placement options—extended temporary and institutional care. State action that effectively guarantees that some children will experience the harms associated with the least

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<sup>201</sup> Washington, *supra* note 8, at 13 (citing OPPAGA OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENT ACCOUNTABILITY, REPORT NO. 05-61, IMPROVEMENTS IN INDEPENDENT LIVING SERVICES WILL BETTER ASSIST STATE’S STRUGGLING YOUTH 4–5 (2005)).

<sup>202</sup> *Gill*, 2008 WL 5006172, at \*25.

<sup>203</sup> *See id.* at \*27–28 (showing the *Gill* court’s parent-centered analysis).

beneficial placement option cannot serve the best interests of children, and therefore, is neither rationally related nor narrowly tailored to the State's asserted interest in protecting children. A child-centered analysis would have provided greater force to the conclusion that the State's categorical ban breaches its fiduciary duty to children, reinforcing children's rights as the principle basis for invalidating the ban. The *Gill* court's failure in this regard undermined the children's constitutional claims.

### C. The Relevance of "Morality"

The *Gill* court acknowledges the fiduciary duty the State owes to children within its care and custody.<sup>204</sup> The State argues that Florida's ban serves to protect the "societal moral interests of the child."<sup>205</sup> It is unclear what interests a child has in preserving a societal standard of morality when the preservation of the standard is gained at the expense of the child's interest in securing a permanent placement. The court properly characterizes the State's interest as irrelevant explaining, "[A] public morality interest is inapplicable in the adoption context."<sup>206</sup> The *Gill* court acknowledged that the State's authority to remove the child is grounded in its power to act to secure the child's best interests;<sup>207</sup> therefore, after assuming legal and physical custody of the child, its action with respect to the child should be limited to that which serves the child's best interest.<sup>208</sup> Where the State is acting *qua* parent, an interest in preserving a morality standard is not a viable governmental interest if it does not serve a child's best interests.<sup>209</sup> When the pursuit of morality is at odds with the State's adherence to its fiduciary duty to children pursuant to its *parens patriae* authority, the best interests of the child should operate to limit state action to that which serves the best interests of the child. When the State is acting

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<sup>204</sup> *See id.* at \*22.

<sup>205</sup> *Id.* at \*27.

<sup>206</sup> *Id.* at \*29.

<sup>207</sup> *Id.* at \*22.

<sup>208</sup> *Id.* ("Indeed a law that subverts judicial process and imposes on the court the burden of taking action harmful to a child should be immediately suspect because the injury it imposes contradicts the legislative purpose and constitutional basis of the child's having been taken into custody by the State in the first place.").

<sup>209</sup> *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360–61 (N.D. Ga. 2005) ("[A] child's liberty interests continue to be at stake even after the child is placed in state custody. At that point, a 'special relationship' is created that gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm." (citation omitted)).

*qua* state, however, as it is in relation to prospective parents to whom the State has no special duty, maintaining a moral standard is a permissible, though in the context of placement bans, irrational governmental goal.<sup>210</sup>

Children's constitutional challenges, whether they are subject to strict scrutiny or rational basis, offer the advantage of limiting state action that can qualify as serving legitimate or compelling ends to that which serves children's best interests because "[a]s *parens patriae*, the State's goal is to provide the child with a permanent home."<sup>211</sup> No such limiting principle applies to constitutional challenges by prospective parents, and there is no special responsibility inherent in the relationship between prospective homosexual parents and the State.<sup>212</sup> Had the court analyzed the children's and prospective parent's challenges separately it could have emphasized that when there is a conflict between the State's obligations *qua* parent and its responsibilities *qua* state, the best interests of the child standard and the State's fiduciary duty as *parens patriae* limit state action to that which serves the child's interests. In the adoption context, children's welfare should be the relevant and controlling consideration, not the public

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<sup>210</sup> Importantly, the State failed to establish, as an evidentiary matter, that gay adoption is immoral and so the court did not consider it to qualify as a legitimate state interest. See *Gill*, 2008 WL 5006172, at \*29. The court held:

[T]here can be no rationally related public morality interest differentiating in the State's support of a homosexual's long-term foster care relationship with a child and a denial of their legal relationship through adoption. . . . The contradiction between the adoption and foster care statutes defeats the public morality argument and is thus not rationally related to serving a governmental interest.

*Id.* (citation omitted). The court's reasoning on this point was emphasized by the appeals court. Fla. Dep't of Children & Families v. *In re* Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 91 (Fla. Dist. Ct. App. 2010). It observed:

The Department argues that placement of children with homosexuals presents a risk of discrimination and societal stigma. . . . Florida already allows placement of children in foster care and guardianships with homosexual persons. This factor does not provide an argument for allowing such placements while prohibiting adoption. We reject the Department's remaining arguments for the same reason: they do not provide a reasonable basis for allowing homosexual foster parenting or guardianships while imposing a prohibition on adoption. *Id.*

<sup>211</sup> *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

<sup>212</sup> See, e.g., *Gill*, 2008 WL 5006172, at \*26.

welfare. The morality interest provides neither a legitimate nor a compelling justification for the ban. Pursuit of a morality standard breaches the State's fiduciary duty to children because it categorically forecloses the optimal placement option.

#### VI. THE APPELLATE DECISION: REINFORCING PROSPECTIVE PARENT'S RIGHTS AS THE FOCUS OF PLACEMENT BAN CHALLENGES

In September 2010, Florida's Third District Court of Appeals upheld the *Gill* court's determination that the statute is unconstitutional.<sup>213</sup> Although the appeals court recognized that the children and Martin raised equal protection claims at trial, it ignored their substantive due process claims, and its holding focused exclusively on the parent's equal protection claim.<sup>214</sup> The court opined:

F.G. successfully argued in the trial court that the statute treated him unequally in violation of the constitutional provision because the statute creates an absolute-prohibition on adoption by homosexual persons . . . .

When this case was pending in trial court, the parties and trial court agreed that this case does not involve a fundamental right or suspect class, so the case was decided under the rational basis test. That being so, we have considered this appeal only under that test.<sup>215</sup>

. . . .

In addition to the volume, the body of research is broad . . . . **These reports and studies find that there**

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<sup>213</sup> *X.X.G. & N.R.G.*, 45 So. 3d at 92 (“[W]e affirm the declaration of unconstitutionality on the ground that there is an equal protection violation under the Florida Constitution . . .”).

<sup>214</sup> *See id.* at 83–84, 87–90. The appeals court, focusing exclusively on the rights of prospective parents, framed the issue before it thusly, “[T]he Florida Adoption Act categorically excludes a homosexual person from adopting. The question is whether there is a rational basis for the difference in treatment.” *Id.* at 85. Had the children's constitutional claim been at the forefront of the trial court's analysis, the appellate court could have characterized the Florida Adoption Act as prohibiting children from being adopted by homosexual parents.

<sup>215</sup> *Id.* at 83.

**are no differences in the parenting of homosexuals or the adjustment of their children.**<sup>216</sup>

....

... Because we affirm the judgment on account of the violation of F.G's equal protection rights, we need not reach the claim of violation of the children's equal protection rights.<sup>217</sup>

Had the appeals court framed the ban as prohibiting placement of orphans with homosexual persons rather than as prohibiting adoption by homosexual persons, it could have turned the focus toward the impact of these bans on children, which may have motivated it to consider the children's constitutional challenges to the ban on appeal. Instead, the court ignored the children's claims and ignored the trial court's adjudication of the children's right to permanency as fundamental.<sup>218</sup> Furthermore, its analysis of the evidence presented at trial to prove the ban's irrationality focused on parenting differences between heterosexual and homosexual parents rather than on the comparative harm of permanent placement versus nonpermanent placement.<sup>219</sup> The appeals court failing to even consider the children's constitutional claims, misreading the character of the children's rights infringed by the Florida placement ban, and framing of the analysis to focus exclusively on the prospective parents' claim further marginalizes children's rights and diminishes the value of their constitutional challenges.

## VII. CONCLUSION

Claims asserting that placement bans violate the constitutional rights of children should not be treated as referenda on gay and lesbian parenting competencies. Child-centered objections to these bans complement the antidiscrimination focused objections at the heart of prospective parent-centered challenges.<sup>220</sup> Although the parental fitness of a particular gay or lesbian prospective parent is relevant to whether a placement serves the best interest of a child,<sup>221</sup> children's interests in permanency should lead

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<sup>216</sup> *Id.* at 87 (emphasis in original).

<sup>217</sup> *Id.* at 91.

<sup>218</sup> *See id.*

<sup>219</sup> *See id.* at 83–91.

<sup>220</sup> *See* Washington, *supra* 8, at 47–48.

<sup>221</sup> *See, e.g.,* G.S. v. T.B., 985 So. 2d 978, 983 (Fla. 2008).

courts to focus on whether placement with gay adoptive parents would better serve the interests of the children than extended temporary and institutional care. In *Gill*, the fact that no one tried to adopt Joe and James during their time in foster care with Martin<sup>222</sup> reflects the reality that many children, particularly special needs children like Joe and James, do not have a choice between heterosexual parents and homosexual parents.<sup>223</sup> It is within the context of this reality that the court should have conducted its constitutional analysis. Orphan placement bans operate to condemn children to experience the documented harms of extended temporary and institutional care in breach of the State's fiduciary duty as *parens patriae* and in violation of children's constitutional rights.

The best interests of children in the care and custody of the State should not be an afterthought. Children's rights and the contravention of their rights by placement bans provide a strong basis for viable constitutional challenges to these prohibitions.<sup>224</sup> Orphan placement bans unconstitutionally and unconscionably infringe upon children's constitutional rights to be free from state action that impairs their best interests. The tragic consequences these bans cause children deserve more consideration.

Fortunately, there is a happy ending for James and John Doe. On January 19, 2011, Martin and Tom legally adopted them,<sup>225</sup> allowing the boys to experience the stability and security of a permanent home with loving parents. The fact that the story ends well for James and John Doe does not mitigate the importance of ensuring that future challenges to orphan placement bans prioritize children's rights. As President Nelson Mandela insightfully observed, "There can be no keener revelation of a society's soul than the way in which it treats its children."<sup>226</sup> When the State, acting as parent, categorically forecloses the placement option that *it* has identified as optimal for the child by enacting bans that harm children, we should all be moved to reflect upon the measure of our society's soul.

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<sup>222</sup> *In re Adoption of John & James Doe (Gill)*, No. 06-CV-33881, 2008 WL 5006172, at \*1 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd* 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

<sup>223</sup> See Washington, *supra* note 8, at 2–5.

<sup>224</sup> See *supra* Part IV.B.

<sup>225</sup> *Gay Fla. Man Who Fought Adoption Ban Adopts 2*, CBS NEWS (Jan. 19, 2011), <http://www.cbsnews.com/stories/2011/01/19/national/main7262861.shtml>.

<sup>226</sup> Nelson Mandela, President of South Africa, Speech at the Launch of the Nelson Mandela Children's Fund (May 8, 1995), in *NELSON IN HIS OWN WORDS MANDELA* 421 (2003).