

CLOSING THE CRUSADE: A BRIEF RESPONSE TO PROFESSOR WOODHOUSE

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“And I hope Anita Bryant never, ever does one of my songs, no, no, no.”
- Jimmy Buffet¹

Professor Barbara Bennett Woodhouse makes a strong case for striking down Florida’s ban on homosexual adoption.² Florida, after all, prohibits no other group from adopting children: “Married couples, single adults, adults with physical disabilities, divorced men and women, parents of a different race than the adoptive child—all may adopt. Even convicted felons are not categorically barred from adopting.”³ Coupled with Florida’s foster care crisis—children, on average, spend over three years in Florida’s foster care system⁴—categorically barring adoption on any basis is bizarre. If not for the suffering inflicted on children and de facto parents, one might even say Florida’s bar is silly.

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¹ JIMMY BUFFET, *Mañana*, on SON OF A SON OF A SAILOR (MCA Records 1978).

² See Barbara Bennett Woodhouse, *Waiting for Loving: The Child’s Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297 (2006).

³ Brief Amicus Curiae of the Child Welfare League of America in Support of Petitioners at 6, *Lofton v. Sec’y, Fla. Dep’t of Children & Families*, 125 S. Ct. 869 (2005) (No. 04-478) [hereinafter Brief Amicus Curiae] (citations omitted).

⁴ Michael T. Dolce, *A Better Day for Children: A Study of Florida’s Dependency System with Legislative Recommendations*, 25 NOVA L. REV. 547, 551–52 (2001) (observing that Florida’s average stay in foster care is almost three years). Anecdotal evidence suggests that Florida’s foster care system can be abusive. See, e.g., Susan Jacobson, *Sex-Abuse Suspect Walks into a Trap*, ORLANDO SENTINEL, July 17, 2003, at B1, available at <http://www.orlandosentinel.com> (follow “Archive” hyperlink; then search “Sex-Abuse Suspect Walks”) (describing allegations of sex abuse in Florida’s foster care system); Tonyaa Weathersbee, Op-Ed., *No Easy Answers in Sight for State Children’s Agency*, FLA. TIMES-UNION (Jacksonville), June 2, 2003, http://jacksonville.com/tu-online/stories/060203/new_12673733.shtml (describing children’s deaths at hands of foster parents).

The age-old problem is how to overcome entrenched bigotry. Growing up in Kentucky⁵ during the 1970s, I followed from afar Anita Bryant's "crusade" against homosexuality,⁶ which resulted in the passage of § 63.042(3) in 1977.⁷ Having taught law in Florida for almost twenty years beginning in the mid-1980s, I witnessed firsthand the Religious Right's hateful campaign against gays and lesbians. Although I believe that time will bring change to the Sunshine State, I suspect that Florida's reigning religious/political culture is not going to confess error quickly or quietly. Florida's battles over racial desegregation—which extended well into the 1970s, 1980s, and beyond⁸—illustrate the difficulty of unseating entrenched religious/cultural hierarchies. My guess is that equal rights advocates will continue for the foreseeable future to experience fierce resistance to their political efforts in Florida.⁹

⁵ Granted, the Kentucky of my youth was hardly a bastion of equality, *see, e.g.*, Pat Forde, *Legacy of Rupp Slow to Recede: Repercussions of 1966 Title Game Still Echo in Many Ears*, USA TODAY, Apr. 2, 1996, at 6C (detailing the legacy of allegedly racist University of Kentucky basketball coach Adolph Rupp), but at least Anita Bryant did not live there. *See infra* note 6.

⁶ Anita Bryant, a one-time Miss Oklahoma, was a recording celebrity in the 1970s who hawked Florida orange juice, Coca-Cola, and Tupperware. WIKIPEDIA, ANITA BRYANT, http://en.wikipedia.org/wiki/Anita_Bryant (last visited Nov. 14, 2005). Following Dade County's passage of a human rights ordinance banning discrimination based on sexual orientation, Bryant led a successful repeal effort steeped in Christian vitriol. *Id.* Bryant was quoted as saying, for example, that she would "lead such a crusade to stop [homosexuality] as this country has not seen before." Dennis A. Williams, *Anita Bryant's Crusade*, NEWSWEEK, Apr. 11, 1977, at 39. Bryant's ostensible concern over gays and lesbians "recruiting" and harming children inspired the name of her political organization, Save the Children, Inc. WIKIPEDIA, ANITA BRYANT, *supra*. Bryant asserted during the repeal campaign, "As a mother, I know that homosexuals cannot biologically reproduce children; therefore, they must recruit our children." *Id.*

⁷ *See* Act effective June 8, 1977, 1977 Fla. Laws 140 (codified at FLA. STAT. ANN. § 63.042 (West 2005)) (amending statute to prohibit adoption by homosexuals).

⁸ *See, e.g.*, Michael H. Sussman, *Discrimination: A Unitary Concept*, 80 MINN. L. REV. 875, 896–97 (1996) (arguing that in July 1990, Jacksonville school officials lacked the willpower to maintain desegregated schools).

⁹ This is not to say that political victories in Florida cannot be won in limited geographical areas. Dade County, for example, re-enacted its human rights ordinance (prohibiting discrimination based on sexual orientation) in 1998. WIKIPEDIA, ANITA BRYANT, *supra* note 6. Tampa, too, bans discrimination based on sexual orientation. TAMPA, FLA., CODE OF ORDINANCES ch. 12 (2005). Step outside urban areas like Miami and Tampa, however, and one finds the legal and religious terrain quite different. Hillsborough County (which is where Tampa is located), for instance, bars county government from even
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If Florida is to change in the immediate future, that change will likely have to come from the courts—whether state or federal. I thus applaud Professor Woodhouse’s attempt to fashion a thorough and cohesive constitutional challenge to § 63.042(3).¹⁰

Because I agree with her thesis—that nothing is gained by using bigoted stereotypes to ban adoptions¹¹—my response to Professor Woodhouse is short: I offer only one criticism, two cautions, and two suggestions for challenging § 63.042(3). Although my suggestions are by no means new (and obviously come as no surprise to Professor Woodhouse),¹² I believe they are sound and might someday prevail.

Professor Woodhouse argues that all “waiting children,” including those who have formed no intimate relationship with prospective parents, have a fundamental right to adoption.¹³ By waiting children, Professor Woodhouse means “children in state care who have no legal parents and who are waiting to be adopted.”¹⁴ So defined, Professor Woodhouse neatly avoids one of my concerns—the competing rights of a pre-adopted child’s biological parents.¹⁵ Extending rights to children that are independent of the rights of their parents invites extensive governmental intervention into existing family units.¹⁶ History teaches that caution is needed when the

acknowledging “gay pride” events. See Bill Varian & Kevin Graham, *Gay Pride Ban Protested, County Quashes Gay Issue*, ST. PETERSBURG TIMES, July 21, 2005, at B1, available at http://www.sptimes.com/2005/07/21/Hillsborough/County_quashes_gay_is.shtml.

¹⁰ See Woodhouse, *supra* note 2, at 304–06.

¹¹ *Id.* at 318.

¹² Equal protection, after all, was the focal argument in *Lofton v. Secretary of the Department of Children & Family Services*, 358 F.3d 804, 806 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005), and Professor Woodhouse (who participated in that case) is obviously well-versed in its promise (and limitations). See Woodhouse, *supra* note 2, at 304–06. Even though equal protection failed in *Lofton*, 358 F.3d at 806, I continue to believe it offers the most hope for setting aside homophobic laws like § 63.042(3). Having practiced a number of years before the Eleventh Circuit, I confess that I am not surprised by the result in *Lofton*. I suspect that the equal protection argument rejected by the Eleventh Circuit in *Lofton* will prove more persuasive in other courts.

¹³ See Woodhouse, *supra* note 2, at 300.

¹⁴ *Id.* at 301.

¹⁵ See generally *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (describing parents’ fundamental right to “the care, custody, and control of their children”).

¹⁶ See Emily Buss, *Children’s Associational Rights?: Why Less is More*, 11 WM. & MARY BILL RTS. J. 1101, 1103–04 (2003).

government attempts direct oversight of America's families,¹⁷ a worry not lost on modern commentators.¹⁸ Child-centered rights could hurt American families more than they assist homeless children.

Even when cabined by Professor Woodhouse's focus on children without families, I still worry about assigning fundamental rights directly to minors. As argued by Professor Guggenheim, the slippery slope of adoption rights could threaten existing families.¹⁹ The step from "no family" to "broken family" is not a large one.²⁰ If Professor Woodhouse's right is extended to broken families, the ramifications could be severe. My own fear is that children's rights might embolden states to needlessly "rescue" more children.²¹ As Professor Woodhouse notes, "Adoption, for better or worse, presents a tempting but dangerous opportunity for social engineering."²² Hence, my lone criticism of Professor Woodhouse's child-centered approach is that it risks disruption of the American family.

Assuming that the right to adoption is assigned to potential parents (and not children), it still encounters theoretical difficulties. The Supreme

¹⁷ See Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 915, 938–43 (2004) (describing history of governments removing children from their parents); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 348 (2002) (observing that government historically removed children from their parents for reasons other than child safety).

¹⁸ Modern commentators, like Margaret Brinig, have observed that extending constitutional rights to children could disrupt "the intimacy and autonomy necessary for families . . . to thrive." Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L.J. 733, 763 n.148, 764–65 (2001) (footnotes omitted). Emily Buss and Elizabeth Scott have similarly argued that granting constitutional rights to children could be counterproductive. See Buss, *supra* note 16, at 1102, 1115–16; Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1100 (2003). While he is not necessarily convinced, Professor David Meyer agrees that these three commentators raise "substantial concerns." David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1125 (2003).

¹⁹ Martin Guggenheim, Professor, N.Y. Univ. Coll. of Law, Address at the Capital University Law School Wells Conference on Adoption Law: Preventing Adoption of Foster Children by Preventing Placement in Foster Care (Apr. 1, 2005).

²⁰ *Id.*

²¹ See Brown, *supra* note 17, at 987–89 (arguing that Florida needlessly rescues—and thereby injures—too many children).

²² Woodhouse, *supra* note 2, at 302.

Court, in *DeShaney v. Winnebago County Department of Social Services*,²³ observed that the federal Constitution protects people from government; it does not demand that government volunteer protection or services.²⁴ If it were any other way—if the Constitution guaranteed affirmative rights and protections—judicial activism at the federal level would skyrocket. Most constitutional scholars question the wisdom of having federal courts manage affirmative governmental obligations.²⁵ Even if federal courts could competently perform such a task, the cloak of affirmative constitutional duty could cause states to invade familial privacy.²⁶ I would not say that the *DeShaney* problem is indistinguishable or insurmountable,²⁷ but I believe *DeShaney* clouds Professor Woodhouse's proposed constitutional right.

Assuming that *DeShaney* can be overcome, another irksome issue rests in the details of Professor Woodhouse's proposed constitutional right. Marriage offers a useful illustration. Short of declaring marriage a fundamental right,²⁸ the Supreme Court has done remarkably little with marriage's constitutional details. Fundamental rights, of course, are ordinarily entitled to the protections of strict scrutiny, which means that state regulations will not survive unless narrowly tailored to achieve

²³ 489 U.S. 189 (1989) (holding that the county was under no affirmative constitutional duty to protect child from his abusive father).

²⁴ *Id.* at 195–97; *see also* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810–11 (2005) (holding that government was under no affirmative constitutional obligation to protect a woman from her estranged husband even though she was awarded a restraining order).

²⁵ *See, e.g.*, Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1486 (2001) (book review).

²⁶ *See id.*

To suggest that the state should not be mindful of the line between public and private is to invite the state into the homes of thousands of women with children; it is to invite the state to bring with it classed and raced notions of proper parenting; and it is to invite the state to decide that a battered woman should not be able to retain custody of her children because she does not meet the state's standard of good parenting.

Id.

²⁷ To the extent that children are taken into state custody, for example, the state has affirmative obligations to provide and protect. *See DeShaney*, 489 U.S. at 198–200.

²⁸ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

compelling interests.²⁹ In the context of marriage, however, the Court often employs only rationality review.³⁰ Rather than striking down laws that deter, encourage, and regulate marriage, the Court has commonly sustained them.³¹ Government thus continues to regulate marriage in all sorts of ways. Prohibitions on polygamy³² and incest³³ are universal. Filing fees, age restrictions, and waiting periods are not uncommon.³⁴ None of these restrictions are narrowly tailored to achieve compelling interests,³⁵ and yet all are constitutional. Simply put, the Supreme Court's marriage precedents do not fit into an understandable constitutional model.

²⁹ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 687 (7th ed. 2004). “[T]he Court often employs the strict scrutiny compelling interest test in reviewing legislation which limits fundamental constitutional rights.” *Id.*

³⁰ *E.g.*, *Califano v. Boles*, 443 U.S. 282, 294–97 (1979) (upholding Social Security Act provision that afforded greater benefits to spouse of retired wage earner than to divorcee); *Califano v. Jobst*, 434 U.S. 47, 58 (1977) (sustaining termination of social security benefits upon marriage).

³¹ *See* cases cited *supra* note 30.

³² *E.g.*, *Potter v. Murray City*, 760 F.2d 1065, 1067, 1071 (10th Cir. 1985) (holding police officer's termination because of his practice of plural marriage permissible under the First and Fourteenth Amendments).

³³ *E.g.*, *Smith v. State*, 6 S.W.3d 512, 518–19 (Tenn. Crim. App. 1999) (upholding Tennessee incest statute against Fourteenth Amendment challenge).

³⁴ *See Zablocki v. Redhail*, 434 U.S. 374, 392 (1978) (Stewart, J., concurring). In *Zablocki*, Justice Stewart complained about the use of fundamental rights jurisprudence in the context of marriage:

I do not agree . . . that there is a “right to marry” in the constitutional sense. . . . Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife.

Id. Justice Powell also complained along similar lines. *Id.* at 396–99 (Powell, J., concurring).

³⁵ Some might argue that the bans on incest and polygamy survive strict scrutiny, *see, e.g.*, *Potter*, 760 F.2d at 1068–70 (concluding that Utah's ban on plural marriage was justified by a compelling interest), but I really don't see how. Prohibitions on incest, for example, were put in place by leaders of “stratified societies to prevent wealth and power from accumulating in families, which could be future rivals.” STEVEN PINKER, *HOW THE MIND WORKS* 440 (1997). Far from being directed at brothers marrying sisters—“brothers and sisters don't want to marry to begin with”—these taboos targeted matings between distant relations that could then jeopardize existing power structures. *Id.* Polygamy—or
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Casting adoption as a fundamental right risks a similar fate. Like the right to marry, adoption would likely end up as a fundamental—yet empty—right. States would still be free to regulate the adoption process, and courts would have little guidance on when (and when not) to intervene. As a result, federal courts could find themselves blindly engineering the American adoptive family.

The better path, I believe, is to focus *equality* principles on *adults*, rather than attempt assignments of fundamental rights to children. Justice Jackson explained the constitutional allure of the Equal Protection Clause:

Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the [E]qual [P]rotection [C]lause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of the regulation. . . .

. . . Hence, for my part, I am more receptive to attack on local ordinances for denial of equal protection than for denial of due process³⁶

Loving v. Virginia,³⁷ in particular, is best understood as an equality case. Virginia's anti-miscegenation statute was unconstitutional because it

better yet, polygyny, since polyandry is rare—has existed “in more than eighty percent of human cultures.” *Id.* at 476. “Jews practiced it until Christian times and outlawed it only in the tenth century. Mormons encouraged it until it was outlawed by the U.S. government in the late nineteenth century” *Id.* Applying micro-economic market principles, some have argued that “polygyny is not necessarily bad for women.” *Id.* at 477. “Legal monogamy historically has been an agreement between more and less powerful men, not between men and women.” *Id.* at 478. I am not arguing in favor of polygamy and incest, let alone that they should be constitutionally protected. My point is only that the practices (unlike, say, racial discrimination) are not *so loathsome* that government has a compelling interest in eradicating them. I believe that the prohibitions on incest and polygamy are certainly rational, and for that reason alone they both survive constitutional scrutiny.

³⁶ *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

³⁷ 388 U.S. 1 (1967).

discriminated based on race, not because it interfered with marriage.³⁸ Similarly, adoption laws should not be re-written by courts, but should be measured by traditional equality principles. Those that discriminate against “suspect” and “quasi-suspect” classes are presumably invalid.³⁹ States are free to extend⁴⁰ or retract their adoption benefits, but the end result must be equal.⁴¹

Of course, my assumption is that sexual orientation will someday be judged as a suspect (or quasi-suspect) class. Until that happens, there can be no assurance that laws discriminating against gays and lesbians violate equal protection. The Supreme Court, for its part, has sent mixed signals. In *Romer v. Evans*,⁴² the Court concluded only that Colorado’s voter initiative (repealing several cities’ anti-discrimination measures) ran afoul of equal protection;⁴³ it did not convincingly explain why. *Lawrence v. Texas*,⁴⁴ which invalidated Texas’s criminal prohibition on homosexual sodomy,⁴⁵ used the Due Process Clause rather than equal protection.⁴⁶

In contrast to these successes, the Supreme Court, in *Boy Scouts of America v. Dale*,⁴⁷ ruled that private groups, like the Boy Scouts, have a constitutional right to discriminate based on sexual orientation.⁴⁸ Because the Court has been far more solicitous of race-based⁴⁹ and gender-based⁵⁰

³⁸ See *id.* at 11–12.

³⁹ See NOWAK & ROTUNDA, *supra* note 29, at 687–88.

⁴⁰ Of course, my hope is that adoption rights will be extended and not retracted.

⁴¹ As in *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971), which sustained Jackson, Mississippi’s closure of its public swimming pools, states could simply repeal their adoption laws. But I doubt this would happen.

⁴² 517 U.S. 620 (1996).

⁴³ See *id.* at 623–25.

⁴⁴ 539 U.S. 558 (2003).

⁴⁵ *Id.* at 578–79.

⁴⁶ See *id.* at 564, 578–79.

⁴⁷ 530 U.S. 640 (2000) (striking down New Jersey public accommodations law to the extent that it prohibited Boy Scouts from discriminating based on sexual orientation).

⁴⁸ See *id.* at 661.

⁴⁹ See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (concluding that compelling interest in eradicating racial discrimination overcame university’s First Amendment right to discriminate); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia’s anti-miscegenation statute).

⁵⁰ See, e.g., *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 4, 18 (1988) (upholding application of local public accommodations law to private clubs); *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 549 (1987) (upholding application of local public accommodations law to Rotary); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612, 630–31

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claims in related associational contexts, it appears that the Court may not yet be ready to elevate sexual orientation to suspect or quasi-suspect status. But even so, the *Romer* Court's equal protection-guided "rationality-with-bite" approach⁵¹ would seem to offer a better challenge to § 63.042(3) than an argument grounded in fundamental rights.⁵²

For constitutional eggheads (like me) who seek to ground constitutional decisions in constitutional theory, it would seem that the most obvious anchor for striking down homophobic laws is the First Amendment.⁵³ If the lone reason for punishing homosexuals is, "God says so,"⁵⁴ the Establishment Clause must surely be violated.⁵⁵ Even if one

(1984) (upholding Minnesota law prohibiting gender discrimination in public accommodations as applied to Jaycees).

⁵¹ *Romer v. Evans*, 517 U.S. 620, 631–36 (1996).

⁵² Although the Court's fundamental rights approach in *Lawrence v. Texas*, 539 U.S. 558, 565–67 (2003), resembles *Romer*'s equal protection analysis, 517 U.S. at 631–36, for the reasons discussed above, I am not sure it would prove as productive in a challenge to § 63.042(3).

⁵³ "Congress shall make no law respecting an establishment of religion, . . ." U.S. CONST. amend. I. See generally *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down state law supplementing parochial school teachers' salaries and stating a three-part test: first, the law must have a secular purpose; second, its primary effect cannot advance or inhibit religion; and third, it must not foster government's excessive entanglement with religion).

⁵⁴ Of course, a God worth worshipping would not say anything of the sort. See JOHN SHELBY SPONG, *THE SINS OF SCRIPTURE: EXPOSING THE BIBLE'S TEXTS OF HATE TO REVEAL THE GOD OF LOVE* 121–42 (2005). It must be, as Bishop Spong points out, that humans are responsible for the hateful rhetoric that masquerades as the "word of God," see *id.* at 123, just as humans were responsible for interpreting the Bible's Old Testament to require slavery and segregation. See, e.g., *Loving*, 388 U.S. at 3 (quoting the Virginia high court as stating that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. [Absent] interference with his arrangement there would be no cause for [interracial] marriages. The fact that he separated the races shows that he did not intend for the races to mix"); *State ex rel. Hawkins v. Bd. of Control*, 83 So. 2d 20, 28 (Fla. 1955) (Terrell, J., concurring) ("[W]hen God created man, he allotted each race to his own continent according to color, . . . but we are now advised that God's plan was in error."). Fundamentalists often point to Leviticus, verses 18:22 and 20:13 (found in the Bible's Old Testament) to support God's alleged condemnation of homosexuality. SPONG, *supra*, at 121–24. Leviticus literally states that one "shall not lie with a male as with a woman," *Leviticus* 18:22, and prescribes death for those who have committed such an "abomination." *Leviticus* 20:13. This part of what later became the Torah was designed by its Jewish authors to distinguish Jews from their Babylonian captors, and included commands to keep the Sabbath, remain kosher, and suffer
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concludes that government has some constitutional space to advance mono-theism,⁵⁶ the government has no room to prefer one religion's tenets

circumcision. SPONG, *supra*, at 122–23. Leviticus also warns, “You shall not round off the hair on your temples or mar the edges of your beard,” *Leviticus* 19:27, and also prohibits the interbreeding of livestock. *Leviticus* 19:19. Leviticus does not even mention lesbians. SPONG, *supra*, at 124. Far from being a heavenly death sentence for gays and lesbians, Leviticus's condemnation of male homosexuality was a cultural command or “ethnic marker.” *See id.* at 122–23; *see also* PINKER, *supra* note 35, at 385 (1997) (arguing that Jewish dietary restrictions were designed to deter Jews “from becoming intimate with the enemy”). Unless one is willing to follow *all* of the commands in the Bible literally—meaning no more advances in animal husbandry, *Leviticus* 19:19, no milk with meat, *Exodus* 23:19, and mandatory genital mutilation, *Leviticus* 12:3—it is impossible to assign divine status to the few words that condemn “[lying] with a male as with a woman.” *Leviticus* 18:22. No divine literary logic directs picking and choosing from Leviticus's list, and I am aware of no further divine guidance on the matter (the Pope notwithstanding). Because it is difficult to cull from this isolated passage any fixed heavenly hate for homosexuals—as opposed to, say, Labradoodles—the motivation behind homophobia must be human. The Book of Genesis suffers similar interpretive difficulties. *See* SPONG, *supra*, at 127–33. The story of Sodom and Gomorrah introduces a vindictive, bargaining God who looks favorably on Lot's offering his twin virgin daughters for rape and debauchery. *Id.* at 130–31. This morose tale concludes with the daughters becoming pregnant by Lot and thereby producing two future leaders of Israel. *Id.* at 131–32.

This ancient biblical narrative features a view of God so primitive that this God does not know what is going on in the world and has to send divine emissaries to bring back firsthand intelligence. . . . This biblical narrative is one in which a father, in order to protect the Middle Eastern code of hospitality, can offer his virgin daughters to be gang-raped and still be regarded by both God and the author of this story as righteous and deserving of divine protection.

Id. at 132. “How is all of that possible unless prejudice overwhelms rationality and moral judgment?” *Id.* The story's craziness, as Bishop Spong explains, belies any heavenly inspiration. *See id.* at 132–33. Similarly, Paul's letters, often pointed to by Catholics as condemning homosexuality, are ambiguous at best. *See* GARRY WILLS, *PAPAL SIN: STRUCTURES OF DECEIT* 198–200 (2000) (arguing that Paul's letters condemn “pederasty—which is not a condemnation of homosexuality in general”). Even if one reads the letters as showing contempt for homosexuals, they trace their lineage to the Old Testament, *see* SPONG, *supra*, at 136 (“Paul, as a rabbinical student . . . surely knew well the passages from *Leviticus* and *Genesis*.”), which condemns many benign and innocent practices. *See supra*.

⁵⁵ *See* *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (striking down state law authorizing “voluntary prayer” in public schools because of sectarian purpose).

⁵⁶ *See* *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2753 (2005) (Scalia, J., dissenting) (“[T]here is a distance between the acknowledgment of a single Creator and the

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over another's.⁵⁷ Because “[t]he first line of defense used by those who want to condemn homosexuality appears now to be the Bible[, and i]t is evident in Western society today that the major negativity against gay and lesbian people emanates from conservative Christian churches, both Catholic and Protestant,”⁵⁸ laws targeting gays and lesbians are surely suspect under this First Amendment prohibition. Codifying conservative Christian animosity toward gays and lesbians is simply not a legitimate governmental objective under the Establishment Clause.⁵⁹

I recognize that this argument has not proven very successful.⁶⁰ The problem is that homophobia has both religious and secular roots. As with Sunday closing laws⁶¹ and abortion regulations,⁶² a secular purpose can sometimes save governmental action under the First Amendment.⁶³ The

establishment of a religion.”). The Supreme Court majority in *McCreary County* rejected Justice Scalia’s argument. *Id.* at 2744–45. Hence, the Court continues to recognize that a religious purpose will invalidate state action, even when that religious purpose is monotheistic.

⁵⁷ See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 708–10 (1994) (striking down state’s creation of special school district for religious groups).

⁵⁸ SPONG, *supra* note 54, at 123.

⁵⁹ In *Romer v. Evans*, the Supreme Court reached a similar conclusion about group-based animosity under the Equal Protection Clause. 517 U.S. 620, 634–36 (1996). Justice Kennedy, writing for the majority, stated that

laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”

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

⁶⁰ See, e.g., *Stewart v. United States*, 364 A.2d 1205, 1209 (D.C. 1976) (rejecting argument that sodomy statute violated Establishment Clause).

⁶¹ See *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing law as supported by a secular purpose).

⁶² See *Harris v. McRae*, 448 U.S. 297, 326–27 (1980) (rejecting argument that prohibition on abortion funding violated Establishment Clause).

⁶³ See *Wallace v. Jaffree*, 472 U.S. 38, 55–56 (1985) (explaining that a law must have a secular purpose to pass muster under the Establishment Clause). The Supreme Court’s recent decisions upholding the placement of the Ten Commandments in *Van Orden v. Perry*, 125 S. Ct. 2854, 2863–64 (2005), and invalidating their placement in *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2727–28 (2005), follow this same logic.

question is whether laws like § 63.042(3) have rational and legitimate secular groundings.

Bigots know no bounds when it comes to rationalizing their hatred. In addition to complaining about the desecration of God's plan,⁶⁴ Virginians argued in 1967 that interracial couples were unnatural,⁶⁵ bad for children,⁶⁶ destructive of racial identity,⁶⁷ and inimical to western civilization.⁶⁸ Similarly, Anita Bryant—whose organization, Save the Children, Inc., was instrumental to Florida's passage of § 63.042(3)—argued in 1977 that homosexuality not only contradicts Biblical teachings, it threatens children and risks social chaos.⁶⁹ Bryant claimed during her crusade that because “homosexuals cannot biologically reproduce children . . . they must recruit our children.”⁷⁰ “If gays are granted rights, next we'll have to give rights to prostitutes and to people who sleep with St. Bernards and to nailbiters.”⁷¹

As Professor Woodhouse's wonderful amicus brief in *Lofton v. Secretary, Florida Department of Children & Families*⁷² demonstrates, Bryant's claims cannot be taken seriously.⁷³ Homosexual couples can (and do) raise happy, well-adjusted families.⁷⁴ Discriminating against gays and lesbians does not preserve social order by deterring prostitution,

⁶⁴ See *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting the trial judge).

⁶⁵ Brief and Appendix on Behalf of Appellee at 48–49, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) [hereinafter Brief of Appellee].

⁶⁶ *Id.* at 35.

⁶⁷ *Loving*, 388 U.S. at 7.

⁶⁸ See Brief of Appellee, *supra* note 65, at 33.

⁶⁹ See WIKIPEDIA, ANITA BRYANT, *supra* note 6.

⁷⁰ *Id.* The common claim that homosexuals are pedophiles out to “get” or “recruit” children is, of course, ridiculous. As is true of heterosexuals, a very small percentage of homosexuals are pedophiles. “The vast majority of child molestation acts in this country, including those perpetrated on boys, are perpetrated by heterosexual men.” Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 307 (1998). Unless one is willing to ban heterosexual adoption, which is far more likely to lead to child molestation, it makes no sense to ban homosexual adoption for fear of pedophilia. See *id.*

⁷¹ WIKIPEDIA, ANITA BRYANT, *supra* note 6. Following her successful campaign, Bryant stated, “In victory, we shall not be vindictive. We shall continue to seek help and change for homosexuals, whose sick and sad values belie the word “gay” which they pathetically use to cover their unhappy lives.” *Id.*

⁷² 125 S. Ct. 869 (2005).

⁷³ See Brief Amicus Curiae, *supra* note 3, at 10–20.

⁷⁴ *Id.*

beastiality, or nailbiting. None of these secular rationalizations make sense. They were absurd in *Loving* and they are ridiculous today. Once this secular subterfuge is discarded, the religious motivation for homophobia becomes clear. Only religion is powerful enough to make people hate their own sons, daughters, sisters, and brothers⁷⁵ for no reason other than sexual preference.⁷⁶ No secular explanation exists.⁷⁷ The homophobia reflected in § 63.042(3) must come from religious fervor. And religious crusades cannot be made the law of the land.⁷⁸

⁷⁵ Steven Pinker points out that throughout history, religious organizations, “from early Christianity to the Moonies,” have “always demand[ed] a new loyalty ‘higher’ than, and contrary to, family ties.” PINKER, *supra* note 35, at 439.

⁷⁶ Bishop Spong relates a heart-wrenching story of a terminally ill man who finally decided to reveal his homosexuality to his parents. SPONG, *supra* note 54, at 124–25. Hoping to draw comfort from his parents, the young man wrote to them of his terminal illness (AIDS) and sexual orientation. *Id.* at 125. Several days later he received an envelope from his parents containing only the torn pieces of his birth certificate. *Id.*

⁷⁷ I believe that religious values—even inexplicable ones—are sometimes rational. But even when rational, they cannot be constitutionally codified into law. The ancient Jews’ secular fear of assimilation, for example, may rationally explain the prohibitions spelled out in Leviticus. See *supra* note 54. Still, in modern America these prohibitions cannot be codified as the law of the land without a secular purpose. See *supra* notes 61–63 and accompanying text. The charge that it is “in the Bible” clearly does not satisfy this requirement, even if the initial prohibition can be rationally explained as an ancient people’s attempt at maintaining a distinct cultural identity. See *supra* note 54. Conservative Christian organizations’ misreadings of Old Testament passages as divine authority for punishing homosexuality thus cannot justify homophobic laws.

⁷⁸ I recognize that some, like Justice Scalia, believe that discrimination against gays and lesbians is part of a secular culture war. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“The Court has mistaken a Kulturkampf for a fit of spite.”). But I believe that when the layers of this so-called Kulturkampf are peeled back, religion is at the core.

