

**WHY ADOPTION IS NOT LIKE MARRIAGE: AN
AMATEUR'S REPLY TO PROFESSOR WOODHOUSE TO
KEEP WAITING FOR *LOVING***

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I appreciate the opportunity to comment on Professor Woodhouse's interesting and somewhat provocative thesis on recognizing a fundamental right to be adopted,¹ as a corollary of which all categorical exclusions of potential parents would be presumptively unconstitutional. Of course, I am not a family law scholar; my real field is constitutional law. But law is not like stained glass, which can only be viewed with appreciation from the inside. Sometimes outsiders can see things that insiders miss, and it is in that hope that I dare comment at all.

I do not think that adoption is at all comparable to marriage, even if they are both creative of a new family that is not dependent on blood but arises through bonds of affection and commitment.² At a visceral level, one can recall the repugnance with which the public greeted the news of Woody Allen's marrying his paramour's adoptive daughter, Soon-Yi Previn.³

Now why is that? I would argue that it is because parenting and marriage are fundamentally different categories, even though they are obviously related. But all relationships are not created equal. One basic difference between marriage and parenting is choice; you choose your spouse⁴ (indeed, the choice is mutual in our Western Judeo-Christian tradition), but you don't choose your parents. From the child's standpoint, which our legal standard of the "best interests of the child" assumes is the appropriate vantage point,⁵ "parents happen." There is no real choice for the child, and I would argue, consequently, no personally assertable right.

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¹ Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 300 (2006).

² *Id.* at 316–18.

³ See, e.g., Glenn Collins, *Mixed Reviews Greet Woody Allen Marriage*, N.Y. TIMES, Dec. 25, 1997, at B3.

⁴ Woodhouse, *supra* note 1, at 317.

⁵ See *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 810 (11th Cir. 2004) (citing *In re Adoption of H.Y.T.*, 458 So. 2d 1127, 1128 (Fla. 1984)), *cert. denied*, 125 S. Ct. 869 (2005).

Thus, categorical barriers to marriage, like a ban on interracial marriage, are and should be highly suspect under the Equal Protection Clause; and the Court in *Loving v. Virginia* so held.⁶ Because discrimination on the basis of race is the paradigm of a violation of equal protection, I suppose that an outright categorical ban on interracial adoption would be likewise highly suspect. I would argue, however, that a preference for same-race adoptions would and should be constitutional because of the significant, if not compelling, interest in the welfare of the children. I don't think courts were as troubled by these bans in the case of adoption as they were in the case of marriage.⁷ The paternalistic, *parens patriae* interest in government asserting the best interests of children⁸ is present in the case of adoption but not in the case of marriage.

Don't get me wrong. I am not arguing for the wisdom, prudence, or advisability of categorical barriers to adoption as public policy; rather, that they are constitutional as long as there is some reasonable basis. I think *Lofton v. Secretary of the Department of Children & Family Services* was correctly decided, although I am hardly impartial, as an expert witness for the government deposed by the ACLU in that case. The rational basis test was applied to Florida's prohibition of gay adoption;⁹ it is reasonable for legislatures to favor mother-father parenting, even if not in a totally consistent way.¹⁰ After all, homosexuals are not a protected class,¹¹ and adoption is not a fundamental right¹²—at least not yet.

What about Professor Woodhouse's argument that the right to be adopted should be viewed as fundamental, quite apart from implicating any suspect or quasi-suspect classification?¹³ Although well-intended, this seems problematic to me. The net effect of such a holding would be to render suspect and presumptively unconstitutional all discrimination against adoptive parents on the basis of, for example, marital status,

⁶ 388 U.S. 1, 11–12 (1967). If marriage is understood, as it generally has always been, as the union of a man and a woman, then the inherent impossibility of same-sex “marriage,” which is neither procreative nor does it provide children with a mother and a father, renders that aspect of marriage law fully constitutional.

⁷ See, e.g., Jay M. Zitter, Annotation, *Race as Factor in Adoption Proceedings*, 34 A.L.R. 4TH 167, 167–78 (1984).

⁸ *Troxel v. Granville*, 530 U.S. 57, 88 (2000).

⁹ *Lofton*, 358 F.3d at 817–20.

¹⁰ *Id.* at 819.

¹¹ *Id.* at 818.

¹² *Id.* at 811.

¹³ See Woodhouse, *supra* note 1, at 321.

physical or mental disability, age (as long as children wouldn't be adopting children, I suppose), and income. Nor is this an idle threat. As Josh Baker and Bill Duncan have written, "[F]ive states (Alabama, Kentucky, Maryland, New Jersey, and New York) explicitly ban marital status discrimination in adoption law, making it illegal for government agencies to place newborns with a married couple over a single individual or (in theory) an unmarried couple."¹⁴ Not to put too fine a point on it, I think that's nuts.

Maybe we can conduct a thought experiment. Imagine that we were orphaned. Deep down in our heart of hearts, would we rather be adopted (1) by a married mother and father, (2) a single parent, or (3) an unmarried couple (same-sex or opposite-sex)? I think we would probably choose Door Number One and prefer to be raised by a married mother and father, as much social science literature shows that it is optimal for children.¹⁵ The Golden Rule—to do unto others as we would have them do unto us—and a clear focus on the best interests of children, not of adults, would say that laws preferring some adoptive relations over others should be constitutional. If the standard is truly "best interests of the children," then marital preferences for adoption should be a no-brainer.¹⁶ These preferences would become suspect under the so-called fundamental right to be adopted.

There's an irony here. In arguing against categorical exclusions,¹⁷ Professor Woodhouse makes a strong case for the importance of particularized, individual determinations about adoption decisions. But in arguing for a strong application of the non-discrimination principle, she essentially is arguing for a one-size-fits-all approach to adoption—not a "best interests of the child" test, but a sort of "this'll be good enough" standard that is actually minimalist. Clearly, the "best interests of the child" is supposed to convey the optimal arrangement.

Adoption is a legal fiction, in my view the best kind of legal fiction, whose usefulness and value have been amply demonstrated throughout

¹⁴ Joshua K. Baker & William C. Duncan, *Marital Preferences in Adoption Law: A 50 State Review*, IMAPP POL'Y BRIEF (Inst. for Marriage & Pub. Policy, Manassas, Va.), Feb. 4, 2005, at 1, <http://www.marriagedebate.com/pdf/iMAPPmarriage.adoption.pdf>.

¹⁵ See, e.g., DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 25–48, 240–51 (1995); STEVEN E. RHOADS, *TAKING SEX DIFFERENCES SERIOUSLY* 79–85 (2004).

¹⁶ For a sustained argument on this point, see Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345 (2003).

¹⁷ Woodhouse, *supra* note 1, at 318.

history. But I do not think we should add another legal fiction on top of it, which would dictate that all adoptive relationships are equal, lest we create “nonsense upon stilts.”¹⁸ All prospective parents are not equal, though equal as persons in the eyes of the law. The anti-discrimination principle, if carried to its ultimate practical conclusion, oftentimes starts out by getting rid of categorical exclusions, then requires equal treatment, then results in affirmative action, which of course violates the anti-discrimination principle we started with.

I must also admit that I am skeptical of rights asserted only by third parties, as the so-called right to be adopted must be. It reminds me of the experience in Massachusetts with substituted judgment in the context of healthcare decisions: what someone would choose if they could choose.¹⁹ This is another legal fiction that disguises and hides value judgments by the real decisionmaker. It seems that the right to be adopted is actually more like a duty and is really a disguised right to adopt. If so, I believe that deep down this “right to be adopted” strategy, however well-intended, actually uses children to advance the social agenda of adults. In my view, we should resist these attempts to use children as some kind of trophies of adult self-affirmation. Rather, we should always and in every case put the best interests of children really, truly, and effectively in the forefront.

¹⁸ “Natural rights is simple nonsense . . . —nonsense upon stilts.” JEREMY BENTHAM, *ANARCHICAL FALLACIES* (1791), *reprinted in* *THE NATURE AND PROCESS OF LAW* 94, 96 (Patricia Smith ed., 1993).

¹⁹ *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 431 (Mass. 1977).