WAITING FOR *LOVING*: THE CHILD'S FUNDAMENTAL RIGHT TO ADOPTION

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I. LOVING V. VIRGINIA AND THE FUNDAMENTAL RIGHT TO FORM A FAMILY

The title of this article, "Waiting for Loving," has a double meaning. The "Loving" in my title refers to the case of *Loving v. Virginia*. In 1967, the Supreme Court in Loving invalidated a law of the State of Virginia that categorically prohibited marriage between people of different races.² The plaintiffs, Richard and Mildred Loving-a white man and a black woman—were high school sweethearts³ who had been forced to flee from Virginia after their arrest for the crime of having married a person of the wrong color.⁴ The plaintiffs went to the Supreme Court to seek the right to live as a legal family in their home state.⁵ The couple prevailed, making the curiously apt case name "Loving" synonymous with the right to marry.⁶ According to the Supreme Court, anti-miscegenation laws were unconstitutional on two counts. First, despite their deep historical roots and widespread acceptance, these laws violated the individual's right to equal protection of the law.⁷ Second, these laws impinged on the fundamental right to marry and to form a family.⁸

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¹ 388 U.S. 1 (1967).

² *Id.* at 4, 12.

 $^{^3}$ Phyl Newbeck, Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving 9–10 (2004).

⁴ Loving, 388 U.S. at 2–3.

⁵ *Id.* at 3–4.

⁶ *Id.* at 12. The Court recognized that the freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* In *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), the Court cited *Loving* as the leading decision on the right to marry.

⁷ Loving, 388 U.S. at 7–12. During the early colonial period, Virginia placed legal penalties on miscegenation by publicly whipping violators and requiring church penance. Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191 (1966). More than three centuries later, when the (continued)

The Court held that marriage was so fundamental that it was a constitutionally protected liberty under the Fourteenth Amendment of the United States Constitution.⁹ The State of Virginia could not assert an untrammeled right to decide which individuals would be permitted to enter into this intimate human relationship.¹⁰ State marriage laws that substantially interfered with the right to marry would have to be justified by a sufficiently important state purpose.¹¹

This courageous decision had been a long time coming. For decades, the Court had found pretexts to avoid challenging these laws, afraid of the backlash that would follow a ruling on such a socially divisive issue.¹²

Court decided *Loving*, sixteen states prohibited and punished interracial marriages. *Loving*, 388 U.S. at 6. Even so, the Court clearly held that restricting the freedom to marry based on racial classifications violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 12.

⁸ Loving, 388 U.S. at 12. The Court also held that Virginia's anti-miscegenation law violated the Due Process Clause of the Fourteenth Amendment because it deprived people of the liberty "to marry, or not marry, a person of another race." *Id.* In addition, the Court cited to *Maynard v. Hill*, 125 U.S. 190, 204–05 (1888), which characterized marriage as the foundation of family and society. *Loving*, 388 U.S. at 12.

¹¹ *Id.* at 11. The racial classification in a criminal anti-miscegenation law must be "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination" to pass constitutional scrutiny. *Id.* The Court in *Zablocki* reaffirmed that state laws significantly interfering with fundamental rights, like marriage, must be given "critical examination," 434 U.S. at 383 (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (per curiam)), and justified "by sufficiently important state interests." *Id.* at 388.

¹² See Pace v. Alabama, 106 U.S. 583, 585 (1883) (holding that the challenged statute did not violate the Equal Protection Clause because the punishment applied equally to both black and white offenders and therefore the statute did not discriminate on the basis of race, but rather that the punishment was "directed against the offense designated"); Jackson v. State, 72 So. 2d 114, 114–15 (Ala. Ct. App. 1954) (upholding Alabama's antimiscegenation statute), cert denied, 348 U.S. 888 (1954); McLaughlin v. State, 153 So. 2d 1, 3 (Fla. 1963) (relying on the doctrine of stare decisis and the decision in Pace to uphold Florida's anti-miscegenation statute), rev'd, 379 U.S. 184, 187–88, 196 (1964) (questioning Pace and invalidating Florida's anti-miscegenation law without addressing the validity of prohibiting interracial marriage); Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) (holding that Virginia's anti-miscegenation statute did not violate the Fourteenth Amendment or "any other provision" of the Constitution), vacated, 350 U.S. 891, 891 (1955) (expressing that more information was needed concerning the parties' relationship to Virginia at the time of their marriage in another state), remanded to 90 S.E.2d 849 (Va. 1956), petition to (continued)

⁹ Loving, 388 U.S. at 12.

¹⁰ See id.

Meanwhile, interracial couples lived in fear and were prevented from enjoying the rights and responsibilities of a legal marriage. For every couple like Richard and Mildred, who fell in love and formed a family together despite these laws, countless others were kept apart, deterred from forming loving relationships in the first place by the legal barriers and social stigma that they so powerfully conveyed.

As a child growing up in New York in the 1940s, I knew about these laws from overhearing my parents' discussions of them. My parents' best friends, Karl and Nellie Baker, as well as my Aunt Mercedes, had married across the color line. When I think of anti-miscegenation laws and the shadow these laws cast on the families that they touched, I think about the snapshot in our family album of my father and uncles all in World War II military uniform, posing with their proud wives, sisters, and kids. Just by standing on a street corner, even in New York City, these men and women, with their African-American spouses and multiracial children, were exposing themselves to social rejection and animosity. These individuals could not travel to the nation's capital because they would have had to pass through hostile states. Even in the North, I know the discomfort was often palpable, even (or maybe especially) to a child.

Loving is now celebrated as a landmark case and has been extended to laws that barred disabled, indigent, and incarcerated people from marrying. Racial equality principles were extended, in *Palmore v. Sidoti*, to bar courts in custody cases from treating social stigma against parents' interracial relationships as a dispositive factor in determining the child's best interests. The racial equality aspects of *Palmore* have been extended to the adoption context in decisions and legislation prohibiting

recall mandate denied, 350 U.S. 985 (1956) (explaining that a federal question had not been properly presented).

¹³ See Turner v. Safley, 482 U.S. 78, 82, 96, 99 (1987) (holding that Missouri's prison regulation, which restricted inmates from marrying unless they received approval from a prison official who needed a compelling reason to do so, was facially invalid and violated prisoners' constitutionally protected right to marry); Zablocki, 434 U.S. at 375, 390–91 (invalidating a Wisconsin law that required certain persons—those under an obligation to support minor children not in their custody—to submit proof of compliance with such support before they could be granted permission to marry); LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW § 9.01, at 455–56 & n.3 (2d ed. 1997) (stating that no current law or judicial decision prohibits marriage on the basis of physical disabilities, while some laws still restrict marriage on the basis of mental disabilities, and also noting that such prohibitions have sometimes been challenged under the Americans with Disabilities Act).

¹⁴ 466 U.S. 429 (1984).

¹⁵ *Id.* at 433–34.

the delay or denial of adoptions based on race.¹⁶ While families that cross the color line still face special challenges, I am glad to know that a new generation of children born and adopted into interracial families has grown to adulthood with the stability and security of belonging to a legally recognized family unit.¹⁷ These children can now take for granted the right to form families of their own.

II. EXTENDING LOVING TO CHILDREN AWAITING ADOPTION

What does the case of *Loving v. Virginia* have to do with adoption or illuminating the child's perspective on adoption, the topic of this symposium? Today, hundreds of thousands of children are still waiting for the fundamental right that was secured to adults in *Loving*—the fundamental right to form a legally sanctioned family bond and the liberty to be free of undue state interference and discrimination in forging one's most intimate relationships. When I say these children are "waiting" for *Loving*, I mean that quite literally. These children indeed are waiting for the chance to enjoy loving families of their own. They are waiting not only for the *Loving* legal precedent to be extended to them, but also waiting, pure and simple, for the loving permanent relationships that every child needs in order to flourish.

¹⁶ See, e.g., Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977) (finding that considerations of race in an adoption proceeding are permissible, as long as race does not automatically bar prospective parents from adopting); McLaughlin v. Pernsley, 693 F. Supp. 318, 324 (E.D. Pa. 1988) (holding that the city's decision to place a child in foster care solely on the basis of race is unconstitutional and a denial of equal protection), aff'd, 876 F.2d 308 (3d Cir. 1989); see also Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382 § 553(a)(1), 108 Stat. 4056, 4056 (codified at 42 U.S.C. § 5115a (1994)) (repealed 1996). For a detailed examination and explanation of the Multiethnic Placement Act, see JOAN HEIFETZ HOLLINGER & THE AM. BAR ASS'N CTR. ON CHILDREN & THE LAW, NAT'L RES. CTR. ON LEGAL & COURT ISSUES, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996 (1998).

¹⁷ In 1990, there were roughly 59,500 nonrelative adoptions in the United States. Of these, approximately 1,000 to 2,000 were transracial adoptions, and 7,088 children were adopted from other countries. National Adoption Information Clearinghouse, U.S. Department of Health & Human Services, Transracial and Transcultural Adoptions (1994), http://naic.acf.hhs.gov/pubs/f_trans.cfm. Therefore, more than 14% of nonrelative adoptions were transracial or transcultural. *Id.* For a personal account of transracial adoption and a mother's experiences learning about race through her daughter, see SHARON E. RUSH, LOVING ACROSS THE COLOR LINE: A WHITE ADOPTIVE MOTHER LEARNS ABOUT RACE *passim* (2000).

The term "waiting children" has a double meaning. It is a term of art in adoption and child welfare policy, used to designate the hundred thousand or more children in state care who have no legal parents and who are waiting to be adopted. Each year, many children lose their parents through death, abandonment, termination of parental rights, and incarceration. Many of these children are "special needs children." When I adopted my son over thirty years ago, these special needs children were called by a less euphemistic name: "hard to place." Some children, like my son, were hard to place because of medical disabilities. Other children were hard to place because they were too old, were part of a sibling group, or were members of a minority racial or ethnic group.

In 2003, approximately half a million children were in foster care and were wards of the state.²⁴ In many cases, the state actually terminates the legal relationship between these children and their parents.²⁵ In his autobiography, Malcolm X, who lost his mother to mental illness and grew up in foster care, called himself and his siblings "state children."²⁶

¹⁸ Children's Bureau, U.S. Department of Health & Human Services, The AFCARS Report: Preliminary FY 2003 Estimates as of April 2005 (10), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.htm. In 2003, there were approximately 119,000 children waiting to be adopted. *Id.* "Waiting children" are defined as children who have a goal of adoption or children whose parents have had their parental rights terminated. *Id.*

¹⁹ In 2003, there were approximately 68,000 children in foster care with terminated parental rights nationwide. *Id*.

²⁰ See Judith K. McKenzie, Adoption of Children with Special Needs, FUTURE CHILD., Spring 1993, at 62, 62.

²¹ Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493, 2495–96 (1995) (describing son's graduation ceremony from U.S. Army basic training, the feelings evoked by this event, and the memory that her son was once labeled "high risk" and "hard to place").

²² McKenzie, *supra* note 20, at 62.

 $^{^{23}}$ Id.

²⁴ See Children's Bureau, supra note 18 (citing at least 523,000 children in the foster care system).

²⁵ Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 121–22 (1995).

²⁶ See MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X 25 (Ballantine Books 1992) (1964). Malcolm X described that as a foster child a judge "had authority over me and all of my brothers and sisters. We were 'state children,' court wards; (continued)

According to Malcolm X, being a state child meant being at the mercy of an unfeeling and often hostile bureaucracy, and having no family and no home of his own.²⁷

Of course, foster care can be a tremendous boon to a child when his or her family is in crisis or he or she is in danger of serious harm. Scholars like my colleague, Martin Guggenheim, have argued, however, that too many children are being permanently separated from their families, and a disproportionate percentage of them are children of color. This situation should raise alarm in the hearts of Americans who are committed to liberty. Few situations could be more antithetical to a free society than having thousands of children growing up as wards of the state, deprived of the privacy of living in a family and home of their own, and subject to state intrusion in every aspect of their intimate family relationships.

Adoption, for better or worse, presents a tempting but dangerous opportunity for social engineering.³⁰ As I have argued elsewhere, adoption in the child welfare system provides a mechanism to shift the burdens of children in poverty from the public back to the private sector.³¹ The

he had the full say-so over us." *Id.*; *cf.* Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 UTAH L. REV. 569, 600 [hereinafter Woodhouse, It All Depends] (suggesting that the state should treat children under its care with nurturing and affection, instead of treating children as "state" children and objects of charity); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1814–15 (1993) [hereinafter Woodhouse, *Hatching the Egg*] (proposing that generational justice should publicly and privately place the needs of children as the primary concern).

³¹ See Barbara Bennett Woodhouse, Making Poor Mothers Fungible: The Privatization of Foster Care, in CHILD CARE AND INEQUALITY: RETHINKING CAREWORK FOR CHILDREN AND YOUTH 83, 85 (Francesca M. Cancian et al. eds., 2002) (arguing that the Adoption and Safe Families Act of 1997 (ASFA) encompasses a shift toward privatizing child welfare and "represents a radical turn away from subsidizing the care of poor children," and noting that the ASFA also "reduces the role of 'public' fostering of children while incentivizing formation of 'private' adoptive families to take on the parenting role, supplanting the original parents"); accord Marsha Garrison, Parents' Rights vs. Children's Interests: The Case of the Foster Child, in FAMILIES BY LAW: AN ADOPTION READER 108, 108–09 (Naomi

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²⁷ See MALCOLM X & HALEY, supra note 26, at 26–27.

²⁸ See Sara J. Klein, Note, Protecting the Rights of Foster Children: Suing Under § 1983 to Enforce Federal Child Welfare Law, 26 CARDOZO L. REV. 2611, 2613 n.16 (2005).

²⁹ Guggenheim, *supra* note 25, at 134.

³⁰ See id.

Adoption and Safe Families Act of 1997 (ASFA)³² requires state agencies to petition for termination of parental rights once a child has been in state care for fifteen out of the last twenty-two months.³³ This reform signaled a shift toward privatizing child welfare and, in my view, "represents a radical turn away" from a long history of "subsidizing the care of poor children."³⁴ ASFA "reduces the role of 'public' fostering of children while incentivizing formation of 'private' adoptive families to take on the parenting role."³⁵

While this policy shift reduces "foster care drift" and promotes permanency for children,³⁶ it may do so at the expense of poor families. Formerly, poor parents encountering housing, marital, economic, or health crises had foster care as a "safety net" to provide temporary substitute care at public expense while they got back on their feet.³⁷ Now, even voluntary placements by good parents in difficult times can rapidly lead to disintegration of a family and permanent loss of family ties.

R. Cahn & Joan Heifetz Hollinger eds., 2004) (offering the comparative costs of adoption and foster care as one reason why adoption has been the preferred goal, and explaining that when a "child is adopted by parents who can afford to pay his keep, he costs the state nothing, and even subsidized adoption is cheaper than foster care"); Dorothy E. Roberts, Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy, 2 U. PA. J. CONST. L. 112, 132 (1999) (suggesting that "Itlhe rejection of public aid to poor families in favor of private solutions to poverty," as demonstrated by the passage of the ASFA, developed out of "national race and class conflicts . . . and welfare reform's retraction of the federal safety net for poor children"); cf. RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES 131, 142-43 (1996) (recognizing the vast expense of the foster care system and policymakers' desires for reform, but blaming the inadequacies of the system on the failure to place children's need for protection above reunification); Richard J. Gelles & Ira Schwartz, Children and the Child Welfare System, 2 U. PA. J. CONST. L. 95, 96 (1999) (arguing that the ASFA was passed partly in response to the imbalance within the child welfare system, "almost always tilted in favor of the parents' rights at the expense of a child's protection").

 $^{^{32}}$ Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 2 U.S.C. and 42 U.S.C.).

³³ 42 U.S.C. § 675(5)(E) (2000).

³⁴ Woodhouse, *supra* note 31, at 85.

³⁵ *Id*.

³⁶ See id. The term foster care drift refers to the tendency of children to remain too long in foster care without review of their status. See Martin Guggenheim, Child Welfare Policy and Practice in the United States 1950–2000, in Cross Currents: Family Law and Policy in the United States and England 547, 561 (Sanford N. Katz et al. eds., 2000).

³⁷ See Woodhouse, supra note 31, at 83.

III. LOFTON V. SECRETARY, FLORIDA DEPARTMENT OF CHILDREN & FAMILIES: CHALLENGING UNCONSTITUTIONAL BARRIERS TO ADOPTION

Despite my concerns about state and federal policies that treat adoption as the silver bullet for families in crisis, I continue to believe that adoption is clearly in the best interest of thousands of abandoned, abused, and neglected children who cannot safely return to their families and communities of origin. I nevertheless fear that the states' monopoly on legal adoption³⁸ is being misused as a means to convey a particular code of moral and religious values that are unrelated to empirical evidence of the best interests of these children.

During the Supreme Court's 2004 term, a writ of certiorari petition was filed and denied raising such concerns. In the case of *Lofton v. Secretary of the Department of Children & Family Services*,³⁹ the Eleventh Circuit upheld the State of Florida's categorical ban on adoption by homosexuals.⁴⁰ In doing so, it rejected challenges based on rights to family integrity and rights to privacy in intimate relationships.⁴¹ This case involved a child, born in 1991, who was raised from infancy by a gay foster father but could not be adopted by him because Florida prohibited adoptions by homosexuals.⁴² It was an especially poignant case because the child had been HIV positive when he was placed in the foster home.⁴³ The foster father, a registered pediatric nurse, had taken in several HIV positive infants and had provided them all with exemplary care.⁴⁴

I know this case as an advocate as well as a teacher because I was privileged to work with Stuart Delery and his colleagues at Wilmer Cutler Pickering Hale and Dorr, in writing an amicus brief submitted on behalf of the Child Welfare League of America.⁴⁵ The brief urged the Supreme

 $^{^{38}}$ See Morton L. Leavy & Roy D. Weinberg, Law of Adoption, at v (Irving J. Sloan ed., 4th ed. 1979).

³⁹ 358 F.3d 804 (11th Cir. 2004), *cert. denied sub nom.* Lofton v. Sec'y, Fla. Dep't of Children & Families, 125 S. Ct. 869 (2005).

⁴⁰ See id. at 827.

⁴¹ See id. at 809.

⁴² Id. at 806-08.

⁴³ *Id.* at 807.

⁴⁴ *Id*.

⁴⁵ Motion of the Child Welfare League of America for Leave to File Brief Amicus Curiae in Support of Petitioners, Lofton v. Sec'y, Fla. Dep't of Children & Families, 125 S. Ct. 869 (2005) (No. 04-478); Brief Amicus Curiae of the Child Welfare League of America in Support of Petitioners, Lofton v. Sec'y, Fla. Dep't of Children & Families, 125 S. Ct. (continued)

Court to grant certiorari in the *Lofton* case and to reverse the Circuit Court's decision. For whatever reasons—procedural, precedential, or prudential—the Court declined to grant certiorari in the case. It remains to be seen whether we will hear from the Court on the constitutionality of these laws. The issue may die a natural death if Florida, as I hope it will, rejects this categorical ban as unfair to children and as bad adoption policy. As

869 (2005) (No. 04-478) [hereinafter Brief Amicus Curiae]. The authors of the motion and brief included: Stuart F. Delery, counsel of record, along with Elizabeth L. Mitchell, Carrie Wofford, and Steven P. Lehotsky of Wilmer Cutler Pickering Hale and Dorr LLP, and Barbara Bennett Woodhouse, director of the Center on Children and the Law at the University of Florida, along with Cathy Ambersley, Jenna Partin, Corinne Stashuk, and Whitney Untiedt, fellows for the Center on Children and the Law. Our part in the brief was quite modest compared to the skillful research and writing of our Wilmer & Hale colleagues.

- ⁴⁶ Brief Amicus Curiae, *supra* note 45, at 1–2.
- ⁴⁷ Lofton v. Sec'y, Fla. Dep't of Children & Families, 125 S. Ct. 869 (2005).

⁴⁸ In 2004, the Family Law Section of the Florida Bar and the Public Interest Law Section of the Florida Bar jointly advocated for a repeal of Fla. Stat. ch. 63.024(3)'s prohibition against adoptions by homosexuals and replacement with the best interest of the child standard to determine who is eligible to adopt. The Family Law Section of the Florida Bar, Adoption Reform, http://www.familylawfla.org/Adoption/index.asp (last visited Sept. 10, 2005). During the Florida Senate's 2004 session, Senator M. Mandy Dawson introduced Senate Bill 2538 encompassing these adoption reforms; unfortunately, this bill died in the Committee on Children and Families. The Florida Senate, Senate 2538: Relating to Adoption, http://www.flsenate.gov/session (under "Jump to Bill" enter "2004" for Session and "2538" for Bill #. Click "Go") (last visited Sept. 10, 2005). However, for the upcoming 2006 legislative session, both the Florida Senate and the Florida House have proposed bills that would allow homosexuals to adopt if they meet special enumerated circumstances by clear and convincing evidence. The Florida Senate, Senate 0172: Relating to Adoption, http://flsenate.gov/session (Under "Jump to Bill" enter "2006" for Session and "0172" for Bill #. Click "Go") (last visited Nov. 4, 2005); The Florida House of Representatives, HB 123 - Adoption, http://www.myfloridahouse.gov/Sections/Bills/ billsdetail.aspx?BillId=31618& (last visited Sept. 10, 2005). The bills state that a homosexual is not eligible to adopt unless

a court finds, by clear and convincing evidence, that the adoptee resides with the person proposing to adopt the adoptee, the adoptee recognizes the person as the adoptee's parent, and granting the adoptee permanency in that home is more important to the adoptee's developmental and psychological needs than maintaining the adoptee in a temporary placement.

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As we worked on the *Lofton* petition, I was driven by a fear that other states would be emboldened to enact similar laws and perhaps to extend them to single parents, divorced parents, older parents, parents who lacked three bedroom houses, and so on down the line. Some of my concerns about homophobia were well-founded. As this article goes to press, "[e]fforts 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." As of February 2006, efforts were underway in at least sixteen states to enact bans on adoption or to secure ballot initiatives or constitutional amendments barring adoption by homosexuals. Throughout the country, other anti-gay policies have been enacted, including the Food and Drug Administration's guidance to sperm banks recommending that they forbid donations from homosexual men, and a Florida county's ordinance that requires the local government to abstain from supporting gay pride recognition or events.

Yet some recent developments seem to suggest that it will be increasingly difficult for opponents of gay adoption to gain support for punitive legislation as homosexual families become more visible and gain greater acceptance and voice among their neighbors and elected representatives. In Massachusetts in 2004, opponents of gay rights, enraged at the Supreme Judicial Court's ruling that struck down bans on same-sex marriage under the state constitution, vowed to amend the state constitution. Those politicians and citizens have now changed their tune. After seeing so many people in same-sex relationships raising children and living ordinary lives, they are loath to destroy these family relationships.

H.R. 123, 2006 Leg., Reg. Sess. (Fla. 2006); S. 172, 2006 Leg., Reg. Sess. (Fla. 2006).

⁴⁹ Andrea Stone, *Drives to Ban Gay Adoption Heat Up*, USA TODAY, Feb. 21, 2006, at A1 (identifying initiatives in Alabama, Alaska, Arizona, Georgia, Indiana, Kansas, Kentucky, Michigan, Missouri, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Vermont and West Virginia).

⁵⁰ *Id*.

⁵¹ David Plotz, Op-Ed., Who's Your Daddy?, N.Y. TIMES, May 19, 2005, at A27.

⁵² Lynn Waddell, *Florida County Ending Official Support of Gay Events*, N.Y. TIMES, June 26, 2005, § 1, at 15. Also, on November 2, 2004, voters in eleven out of eleven states overwhelmingly supported state constitutional amendments defining marriage as between a man and a woman. Charisse Jones, *States Nix Gay Marriage; Winner Takes All Survives in Colo.*, USA TODAY, Nov. 3, 2004, at 18A.

⁵³ See Editorial, The Normality of Gay Marriages, N.Y. TIMES, Sept. 17, 2005, at A26.

⁵⁴ See id.

⁵⁵ See id.

IV. ARTICULATING A CHILD'S FUNDAMENTAL RIGHT TO ADOPTION

While one may hope that discriminatory laws on adoption will be rejected through the democratic process, the arguments in favor of a child's constitutional right to adoption may still be a necessary prod to repeal existing or future bans. Therefore, in order to make my case for adoption as a child's right, I will have to expand upon the arguments made unsuccessfully in *Lofton* and more fully articulate the child's perspective. Courts generally give short shrift to rights of children and focus on adults' rights.⁵⁶ Judges tend to take at face value the argument that the rights of adults and children are symmetrical or mirror images.⁵⁷ The rationale for rejecting an adult's right to adopt has generally been assumed to extend to a child's right to be adopted. The Lofton courts, both at the trial and appellate levels, rejected the notion that potential adoptive parents or children had any "right" to adoption.⁵⁸ These courts analyzed adoption as a creature of state law and not as a fundamental aspect of human social relations.⁵⁹ They concluded that even when the social science evidence offered to support the state's policy was firmly established, the state's decisions about children's best interests should be given great deference.⁶⁰ I believe these arguments are flawed.

⁵⁶ See Laurence D. Houlgate, Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory, 2 U. PA. J. CONST. L. 77, 78–79 (1999).

⁵⁷ See Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (anticipating the extreme likelihood that "to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation"); Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (plurality opinion) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, [the child's] claim must fail.").

⁵⁸ See Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 811 (11th Cir. 2004), cert denied sub nom. Lofton v. Sec'y, Fla. Dep't of Children & Families, 125 S. Ct. 869 (2005); Lofton v. Kearney, 157 F. Supp. 2d 1372, 1380 (S.D. Fla. 2001), aff'd sub nom. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004).

⁵⁹ Lofton, 358 F.3d at 811–12; Lofton, 157 F. Supp. 2d at 1380.

⁶⁰ *Lofton*, 358 F.3d at 825, 827 (affirming the trial court's grant of summary judgment to the state and explaining that social science research is not required to support the legislature's decisions, but rather such evidence needs to be "so well established and so far beyond dispute that it would" disprove the rationality of the Florida legislature); *Lofton*, 157 F. Supp. 2d at 1383–84.

A. Adoption Is a Basic Family Relationship, not a State-Created Privilege

First, let me address the notion that adoption is a privilege while marriage is a right. Advocates for this position argue that adoption is a modern concept created by statute.⁶¹ Marriage, by contrast, is a "natural" right.⁶² I teach family law, and in this course I spend at least a week concentrating on the Florida state law of marriage. Believe me, if you do not follow the rules set forth in the Florida statutes, you are not legally married.⁶³ As with marriage, the state has a monopoly on creation of the legal parent-child relationship and on dissolution of that relationship.⁶⁴ In cases like *Turner v. Safley*⁶⁵ and *Boddie v. Connecticut*,⁶⁶ the Court has held that the legitimate role of the state in setting the rules for entry into and exit from marriage does not give it plenary power to decide who may marry and divorce.⁶⁷ It should be the same with adoption.

I believe a strong case can be made that adoption, like marriage, is grounded in ancient customs surrounding the creation of socially recognized family relationships, reduced only in relatively modern times to statutory schemes of law. I would argue that formal adoption laws, on closer inspection, should be seen not as the "creation" of a new form of parent-child relationship, but as the statutory recognition of a customary relationship, which gives it formal legal status.

⁶¹ E.g., Lofton, 358 F.3d at 809.

⁶² See John E. Wallace, Comment, The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem, 29 SEATTLE U. L. REV. 243, 247 (2005) (stating that there has been a historical belief that marriage is derived from a natural right possessed by humans). Compare Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[M]arriage is one of the 'basic civil rights of man.'"), with Kenyon Bunch, If Racial Desegregation, Then Same-Sex Marriage?: Originalism and the Supreme Court's Fourteenth Amendment, 28 HARV. J.L. & PUB. POL'Y 781, 795 (2005) (noting that historically, "civil rights" have been equated with "natural rights").

⁶³ Honorable Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory Reform*, 26 FLA. St. U. L. Rev. 219, 230 n.42 (1999). As an aside, Florida stopped recognizing common law marriage about the time of *Loving v. Virginia*.

⁶⁴ See Leavy & Weinberg, supra note 38, at v.

^{65 482} U.S. 78 (1987).

⁶⁶ 401 U.S. 371 (1971).

⁶⁷ See Turner, 482 U.S. at 99; Boddie, 401 U.S. at 383.

Courts and scholars often describe the history and development of adoption in America as "purely statutory". and "in derogation of the common law." Such descriptions would be accurate if adoption laws, like the 1851 Massachusetts statute, actually *created* the concept of adoption. However, instead of creating parent-child relationships, the adoption laws of early America merely *formalized* already existing methods of establishing families. Furthermore, the origins and practices of adoption can be traced back hundreds of thousands of years and can be found among many nations and cultures.

Anthropologists and sociobiologists studying prehistoric peoples have discovered evidence that mothers of the Pleistocene Epoch had substantial help raising their children from so-called "allomothers" comprised of grandmothers, great-aunts, older children, as well as the men who thought that they were the father.⁷³ The use of allomothers, as a form of collective

⁶⁸ Meeks v. Cornelius, 14 So. 2d 145, 146 (Ala. 1943); Louis Quarles, *The Law of Adoption—A Legal Anomaly*, 32 MARQ. L. REV. 237, 237, 241 (1949).

⁶⁹ *Meeks*, 14 So. 2d at 146; *In re* Estate of Levy, 141 So. 2d 803, 805 (Fla. Dist. Ct. App. 1962); *In re* Adams, 473 N.W.2d 712, 714 (Mich. Ct. App. 1991); Long v. Dufur, 113 P. 59, 62 (Or. 1911).

⁷⁰ Act to Provide for the Adoption of Children, 1851 Mass. Acts, *reprinted in* Families By Law: An Adoption Reader 9, 9–10 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

⁷¹ MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 269-71 (1985) (describing the numerous legislative bills used by Massachusetts to change a child's name as "no doubt finalizing an informal assumption of parent-child relations," and referring to the private act allowing a seven-yearold girl to be adopted as a "statute [that] merely formalized their relations"); LEAVY & WEINBERG, supra note 38, at 2 (arguing that adoption statutes were passed in order to "make public record[s] of private [adoption agreements]"); JAMIL S. ZAINALDIN, LAW IN ANTEBELLUM SOCIETY: LEGAL CHANGE AND ECONOMIC EXPANSION 70 (1983) (noting that adoption procedures had been "formalized[] by legislation"); Naomi Cahn, Perfect Substitutes or the Real Thing?, 52 DUKE L.J. 1077, 1104, 1115, 1117 (2003) (discussing the history of American adoption and suggesting that adoption statutes "were part of the process of clarifying and regularizing the status" of parent-child relations and that "adoption statutes legitimized an increasingly popular method of family formation"); Joan Heifetz Hollinger, Introduction to Adoption Law and Practice, in 1 ADOPTION LAW AND PRACTICE § 1.02[2], at 1-20 (Joan Heifetz Hollinger ed., 1988 & Supp. 2005) (recognizing that adoption was not created by statute, but rather that statutes "legitimized the numerous informal transfers of parental rights").

⁷² See Leavy & Weinberg, supra note 38, at 1.

⁷³ Sarah Blaffer, *Mothers and Others*, *in* APPLYING ANTHROLOGY: AN INTRODUCTORY READER 25, 26 (Aaron Podolefsky & Peter J. Brown eds., 7th ed. 2003). The Efe Pygmies (*continued*)

breeding, allowed pre-historic people to reduce the costs of child rearing, to give birth to children at shorter intervals, and to spread more swiftly into new habitats.⁷⁴ Predictably, adoption and multiple parenthood are common in the animal kingdom as well. Dolphins, polar bears, raccoons, geese, deer, kangaroos, and sheep have all been discovered practicing adoption.⁷⁵

In recorded human history, references to adoption are found in ancient codes, laws, and writings of the Babylonians, Romans, Hindus, Japanese, Hebrews, and Egyptians. In Sir Henry Sumner Maine's analysis of the laws of ancient societies, he asserts that static societies progress through a "period of Customary Law" into an "era of Codes." These codes are not new legislation but rather "a reduction to writing of the rules already established by custom." Some of the earliest examples of customs reduced to code include the Babylonian Code of Hammurabi, the Hindu Laws of Manu, and the Roman Justinian Code, all of which reference the practice of adoption.

of central Africa have on average fourteen allomothers as caretakers, and Efe and Aka Pygmy infants spend 40% of their time with allomothers by the time they are three weeks old. *Id.*

⁷⁴ *Id*.

⁷⁵ Evan Eisenberg, *The Adoption Paradox*, DISCOVER, Jan. 2001, at 80, 82; Sharon Levy, *Parenting Paradox*, NATIONAL WILDLIFE, Aug./Sept. 2002, at 52, 54–58. Adoption in the animal kingdom is especially more common in animals like seals, bats, and gulls because they have breeding colonies and in animals like wolves, coyotes, and lions because they live in packs. Levy, *supra*, at 54, 58.

⁷⁶ See LEAVY & WEINBERG, supra note 38, at 1; Leo Albert Huard, The Law of Adoption: Ancient and Modern, 9 VAND. L. REV. 743, 744 (1956); Quarles, supra note 68, at 239–40; John Francis Brosnan, Comment, The Law of Adoption, 22 COLUM. L. REV. 332, 333–34 (1922).

⁷⁷ HENRY SUMNER MAINE, ANCIENT LAW 14 (Transaction Publishers 2002) (1866). Maine identified six stages in the development of law including Themistes, Customary Laws, Codes, Legal Fictions, Equity, and Legislation. *Id.* at 1–43.

⁷⁸ LON L. FULLER, ANATOMY OF THE LAW 82 (1968) (reviewing Maine's account of legal anthropology and discussing the role of implicit law and made law in legal history); *see also* MAINE, *supra* note 77, at 15.

⁷⁹ See Huard, supra note 76, at 744; Brosnan, supra note 76, at 332–34. Roughly 2,000 years before the birth of Christ, the Code of Hammurabi stated: "If a man take a child in his name, adopt and rear him as a son, this grown up son may not be demanded back." Huard, supra note 76, at 744; Quarles, supra note 68, at 240.

Prior to codification, the Romans extensively practiced and accepted a system of adoptions. Adoptions in Rome served many purposes, but most importantly, adoptions maintained a continuous family line. To provide himself with heirs, sometimes a man would adopt his daughter's husband, or if he had a large family, he would allow a childless family to adopt one of his sons. By using adoptions to perpetuate the family, someone could inherit family property and perform the religious rites of the family.

The concepts of inheritance and worship also play an important role in the adoption customs of the Japanese and the Hindus. The Japanese Emperor claims to be a direct descendant of the sun with an unbroken family succession for thousands of years. Adoption explains how this is possible (at least with respect to the unbroken chain). Shinto, an ancient religion of Japan, considers ancestors as divine, and adoption helps to assure that someone will be worshiping the ancestral tablets.

⁸⁰ Quarles, *supra* note 68, at 240. There were two forms of adoptions practiced in Rome. *Id.*; Huard, *supra* note 76, at 745. One type of adoption was *arrogatio*, which generally applied to the adoptions of independent, or *sui juris*, adults; the other type was *adoption proper*, which applied to people still under the power of their father, or *alieni juris*. Huard, *supra* note 76, at 745; Quarles, *supra* note 68, at 240.

⁸¹ Huard, *supra* note 76, at 745; Brosnan, *supra* note 76, at 332. Adoption also had political purposes "related to the notion that a candidate for public office was better if he had children, or had more of them, than his opponent." LEAVY & WEINBERG, *supra* note 38, at 1.

⁸² LEAVY & WEINBERG, *supra* note 38, at 1; *cf.* E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 284 (1954) (describing patrilineal groups of Indonesia that also adopted their daughter's husbands to have a "son" to continue the paternal line).

⁸³ Huard, *supra* note 76, at 745; Brosnan, *supra* note 76, at 332. In this context, the main interests served by adoption were those of the people adopting, not necessarily those of the person being adopted. Hollinger, *supra* note 71, § 1.02[2], at 1-19. While Hollinger has suggested that the relationship between Roman and American adoption practices are "tenuous at best," because although inheritance has always been one purpose behind adoptions in America, it has not been the sole purpose (nor has religious worship been a noteworthy factor), *id.*, I would argue that the meaning of adoption, like that of marriage, has shifted over time. Adoption, like parenthood and marriage, has become more of an emotional commitment than an economic transaction.

⁸⁴ See Quarles, supra note 68, at 239.

⁸⁵ *Id*.

⁸⁶ Id.

⁸⁷ Brosnan, *supra* note 76, at 334.

civilizations, inheritance and worship were intimately connected because the proper relation was needed to perform religious rites for the deceased in order to inherit any property.⁸⁸

Scriptures of the Bible also indicate that Hebrews and Egyptians practiced adoptions. The Pharaoh's daughter rescued a Hebrew baby from the Nile River, adopted the baby, and named him Moses.⁸⁹ When the father and mother of Esther died, a cousin, Mordecai, took Esther in as his own.⁹⁰ After an angel appeared to Joseph in a dream, Joseph decided to take Mary as his wife and become the parent of her unborn son, Jesus.⁹¹

Civilizations and cultures occupying lands that are now American soil also recognized the practice of adoptions. Sometimes, an Iroquois mother who had lost a son would adopt a prisoner captured in war. The Comanche tribe practiced a similar form of adoption; however, the captors of this tribe incorporated their prisoners into the families as adopted "brothers" and "sons." Today, when Eskimo/Inuit mothers cannot nurse or care for multiple children, they are often adopted by childless couples needing to pass on a family name or seeking security in their later years.

In Hawaii, adoption was originally based upon oral agreements and ancient customs.⁹⁵ The absence of clear proof of these adoptions caused difficulties with inheritance.⁹⁶ In 1841, the Hawaii legislature attempted to

⁸⁸ See Quarles, supra note 68, at 239.

⁸⁹ Exodus 2:5-10.

⁹⁰ Esther 2:7.

⁹¹ Matthew 1:24-25.

⁹² E. Sidney Hartland, Primitive Law 36 (Kennikat Press 1970) (1924). These prisoners were adopted through a tribal rite in which they were formally admitted into the Iroquois tribe, thereby losing any status within their birth tribe. *Id.* While courts have recognized certain tribal customs of indigenous people, such as marriage ceremonies, the practice of adoption has not been recognized because it is "a custom which does not conform to the statutory requirements." Brosnan, *supra* note 76, at 334–35.

⁹³ HOEBEL, *supra* note 82, at 136–37. Girls captured during war were also admitted into the Comanche tribe, but this usually occurred through marriage to their captors as opposed to adoption. *Id*.

⁹⁴ *Id.* at 74–75. Most adoptive parents agree to care for the child in exchange for some form of compensation. *Id.* at 75. Unfortunately, when no one is able to care for an Inuit child, it may become the victim of infanticide. *Id.*

⁹⁵ O'Brien v. Walker, 35 Haw. 104, 118–25 (1939) (recounting the origins of Hawaiian adoption law through history and judicial decisions, and finding that the Hawaiian custom and usage of adoption existed prior to the written laws of Hawaii), *aff'd*, 115 F.2d 956 (9th Cir. 1940); Brosnan, *supra* note 76, at 335.

⁹⁶ O'Brien, 35 Haw. at 119.

correct this problem by enacting its first written law of adoption, which clarified the methods to write and record adoption agreements. Several opinions of the Hawaii Supreme Court have acknowledged the historical fact that adoption is a part of Hawaiian customs, and that the customs that previously formed adoptions "have the same force of law as those subsequently passed and incorporated [into] Code."

During the period of American slavery, an "extensive informal adoption network" existed among blacks. Dlack families were easily broken up when sold by the slave masters, and as a result, relatives and fictive "aunts" and "uncles" cared for many children. This also led to "networks of mutual obligation" within slave communities that extended beyond blood or marital relationships. Even after the Civil War, exslaves raised black children that were excluded from the benefits of formal adoption. The origins of the black extended family may, however, be attributed to more than family separation during slavery. Scholars have found that patterns of extended families and informal adoption closely correspond to family patterns of African tribes.

Today, it is still a widespread practice of the Baatombu people of West Africa for children to be raised by people other than their biological parents. Between ages three and six, the duties accompanying parenthood are transferred from the child's biological parents to the child's

⁹⁷ See id.

⁹⁸ *Id.* at 120–25.

⁹⁹ *Id.* at 122 (quoting *In re* Estate of Nakuapa, 3 Haw. 342, 342 (1872)). "The adoption of a child as heir, clearly and definitely made according to Hawaiian custom and usages prior to the written law, I hold to be valid under existing laws" *Id.* at 124 (quoting *Nakuapa*, 3 Haw. at 348 (Widemann, J., concurring)).

¹⁰⁰ ROBERT B. HILL, NAT'L URBAN LEAGUE RES. DEP'T, INFORMAL ADOPTION AMONG BLACK FAMILIES 22 (1977).

¹⁰¹ DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 53 (1997) (depicting the struggles facing black families during slavery and noting that "slaves created a broad notion of family that incorporated extended kin and non-kin relationships"); Woodhouse, *It All Depends*, *supra* note 26, at 602.

¹⁰² ROBERTS, *supra* note 101, at 53.

¹⁰³ *Id.* at 53–54.

¹⁰⁴ See HILL, supra note 100, at 29.

¹⁰⁵ Erdmute Alber, "The Real Parents Are the Foster Parents": Social Parenthood Among the Baatombu in Northern Benin, in CROSS-CULTURAL APPROACHES TO ADOPTION 35, 36 (Fiona Bowie ed., 2004). See generally CROSS-CULTURAL APPROACHES TO ADOPTION, supra (exploring the wide range of child rearing methods found among societies in Africa, Oceania, Asia, and South and Central America).

"social parent." A social parent is an individual adult of the same sex as the child; thus, even when social parents are married, the woman is responsible for her social daughter and the man is responsible for his social son. Marriages of the Baatombu people are unstable, but the exclusive responsibility social parents exercise over "their" social child continues even after divorce and helps to reduce "the emotional impact of divorce." In a similar vein, because marriage is not highly valued by the Batouri women of East Cameroon, the Batouri people often engage in informal marital relationships. Instead of practicing social parenting, however, the family structure of the Kako people, an ethnic group that are considered natives of Batouri, is a matrilineage. In order to continue the maternal line of descent, grandmothers often claim the children of their daughters and eventually find ways to list the mother's brother, father, or deceased husband as the child's father on the birth certificate.

Like the grandmothers of Batouri children, the English and American courts participated in a similar fiction of identifying fathers. English courts have upheld the presumption that a child born to a marriage was the legitimate child of the mother's husband. This common law presumption was adopted in statutes throughout the United States, giving legal effect to the child's functional nuclear family. 113

¹⁰⁶ Alber, *supra* note 105, at 36.

¹⁰⁷ *Id.* at 36–37. Typically, someone related to the father raises the first child born to a marriage. *Id.* at 39. The second child belongs to the mother's social mother and in cases where the second child is a boy, a male relative of the mother's social mother will raise the child. *Id.* A relative of the father usually raises the third child and the biological parents have the right to keep the fourth child born to their marriage. *Id.*

¹⁰⁸ *Id.* at 36–37. This also allows the biological mother to re-marry without having to care for her biological children, although she may have a social daughter for whom it is entirely her own responsibility to provide care. *See id.* at 37.

¹⁰⁹ Catrien Notermans, Fosterage and the Politics of Marriage and Kinship in East Cameroon, in Cross-Cultural Approaches to Adoption, supra note 105, at 48, 53.

¹¹⁰ See id. at 52–53.

¹¹¹ *Id.* at 54. Original birth certificates are often destroyed and the new birth certificates list a male relative of the mother as the child's father. *Id.*

held to be legitimate even though the woman's husband had been out to sea for nearly three years. *Id.* Still more remarkably, the story of Grace of Saleby reveals that she was considered the legitimate child of Thomas of Saleby and his wife, even though neither was the child's natural parent. *Id.*

¹¹³ See Woodhouse, Hatching the Egg, supra note 26, at 1791.

Other practices of a "quasi-adoptive" character took root in colonial America. 114 These practices included apprenticeships and indenture, which were borrowed from England, as well as homegrown American childsaving efforts.¹¹⁵ In apprenticeships and indentures, children were transferred or contracted to provide services for their masters in exchange for training, schooling, shelter, food, and other parental services. 116 These practices "created a [family-like] legal tie in which apprentices assumed the role of family members and masters held the title of surrogate parents."117 In some instances, when permitted to select between their father and their master, children decided to remain indentured. 118 America's conception of childhood began to shift toward notions of innocence and the need to prolong childhood, a manufacturing economy with independent labor also began to emerge. 119 A combination of these factors made apprenticeships and indentures more analogous to economic relationships than familial relationships. 120

In the mid-nineteenth century, child-saving organizations such as the New York Children's Aid Society sought to remove children from a life of poverty, vagrancy, and neglect by placing them with "women devoted to charity" or families out west that needed an extra hand. 121 Within the first five years of operation, the Worcester Children's Friend Society had placed sixty-two children in foster care with high expectations for adoptions, several of which were placements with the women involved in

¹¹⁴ Hollinger, *supra* note 71, § 1.02[1], at 1-19.

¹¹⁵ See id. § 1.02[2], at 1-20; GROSSBERG, supra note 71, at 259–68; LEAVY & WEINBERG, supra note 38, at 1; Cahn, supra note 71, at 1091, 1106–07, 1110–11.

¹¹⁶ GROSSBERG, *supra* note 71, at 259; LEAVY & WEINBERG, *supra* note 38, at 1; Cahn, *supra* note 71, at 1110.

¹¹⁷ GROSSBERG, *supra* note 71, at 259.

¹¹⁸ ZAINALDIN, *supra* note 71, at 232. In a New York case, the father of two boys sought to void the indentures; however, the court allowed the boys to choose, and they wished to remain indentured. *Id.* (discussing *In re* M'Dowle, 8 Johns. 328 (N.Y. Sup. Ct. 1811)).

¹¹⁹ See GROSSBERG, supra note 71, at 259–60; ZAINALDIN, supra note 71, at 70–71; see also Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 Wm. & MARY L. REV. 995, 1056–57 (1992).

¹²⁰ See GROSSBERG, supra note 71, at 259. The introduction of public schooling also led to a decreased importance in practical training. *Id.* at 259–60.

¹²¹ Cahn, *supra* note 71, at 1091. Professor Cahn also points out that while the goal of these charitable organizations may have been to provide suitable homes for needy children, the practice of the organizations did not always amount to this standard. *Id.* at 1092.

these charities.¹²² The focus of child-saving organizations eventually shifted to temporary placements while helping families get through difficult times, such as the death of a parent, the child's need for education and training, or a parent's search for a new job.¹²³ Similar concerns for the welfare of children, previously voiced by child-saving organizations, such as finding the "proper" person and assuring that they were "treated in a 'suitable' manner," trickled over into the Massachusetts adoption law of 1851.¹²⁴ Other motives behind the enactment of new adoption statutes stemmed from numerous legislative bills granting private petitions of adoption and name changes.¹²⁵

The widespread practice of adoption throughout time, around the world, and in nature suggests that adoption is deeply entrenched in human society. Like marriage, adoption should take its place "on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships." The American adoption statutes did not create a new form of parent-child relationships. Rather, they provided a formal means of making public records of the private parent-child relationships already in existence and they formalized the process of creation of such relationships. Adoption is not a benefit created for and conferred by the state, subject to whatever terms and conditions the state may choose to impose; it is the statutory recognition of a fundamental family relationship.

B. Adoption Is No Less Fundamental because It Is Based on Choice rather than Blood Ties

It is illogical to distinguish adoption from other family relationships because adoptive relationships are not based on blood ties. Marriage is not based on blood. When future Supreme Court Justice David J. Brewer sat on the Kansas Supreme Court he declared that "[i]t is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of

¹²² Id. at 1107 & n.121.

¹²³ See id. at 1092–93.

¹²⁴ *Id.* at 1107.

 $^{^{125}}$ Grossberg, *supra* note 71, at 269–70. From 1781 to 1851, "101 [private] bills altering the domestic status of children" were passed in Massachusetts alone. *Id.* at 269.

¹²⁶ Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

¹²⁷ Supra note 71 and accompanying text.

time; and the prosperity and welfare of the child depend[. . .]on the ability to do all which the prompting of these ties compel." ¹²⁸

Another argument against treating adoption as a child's right might be based on an autonomy principle. Spouses "choose" their mates beforehand, one might argue, while adopted children's parents are chosen for them—in cases of "waiting children," the state chooses their parents for them. Again, this formalistic account reduces the diverse reality of children's experiences to a simplistic level. It also gives too little weight to the child's agency. Many waiting children have already "chosen" a parent—a foster parent or other caregiver with whom they have formed strong bonds of love. 130

Adoption, like marriage, is not only about people already in love but about the opportunity to love. As adoptive parents know, commitment to an unknown future beloved often precedes and is essential to the decision to adopt, much as it is to the decision to seek a marriage partner. The deep attachments that define the parent-child relationship grow out of the adoptive parent's commitment to meet the needs of the child. The involvement of third parties in the matching process does not make marriage less important as a relationship. The tradition of having an elder

 $^{^{128}}$ Grossberg, supra note 71, at 257 (quoting Chapsky v. Wood, 26 Kan. 650, 653 (1881)).

¹²⁹ See supra note 18 and accompanying text.

¹³⁰ See DAVID M. BRODZINSKY ET AL., BEING ADOPTED: THE LIFELONG SEARCH FOR SELF 32 (1992) (distinguishing between "bonding" and "attachment" and explaining that while bonding occurs within a few hours after birth and is linked to biological factors, attachment "is an emotional relationship that develops gradually, after weeks and months of daily contact, conversation, caregiving, and cuddling"); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 16–17, 22–26, 31–32 (new ed. 1979) (discussing the child-parent relationship and bonding between children and their biological, adoptive, and foster parents and emphasizing the need for continuity of relationships); Arlene Skolnick, Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory, and the Best Interests Standard, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 236, 243–49 (Mary Ann Mason et al. eds., 1998) (analyzing the ideas of psychological parenthood and attachment theory by briefly addressing each concept's influence, assumptions, and empirical research); Woodhouse, supra note 21, at 2499 n.17.

¹³¹ See Brodzinsky et al., supra note 130, at 32. Literature on adoption carefully distinguishes between the popular notion of "bonding" as something that happens instantly at birth, if not in utero, and the clinically observed process of psychological "attachment." *Id.* The infant's or older child's attachment to a caregiver develops over weeks and months of daily interaction with an adult who is committed to meeting the child's needs. *Id.*

choose one's marriage mate is still common around the world.¹³² Whether online or through village marriage brokers, match-making is alive and well today in marriage,¹³³ just as it is in the matching of adoptive parents seeking children and children waiting to be adopted.¹³⁴ Categorical bans on who may adopt, much like categorical bans on who may marry, substantially interfere with the freedom to form family relationships.

Adoptive parents would flatly reject the notion that relationships created through adoption are somehow less "fundamental" than marriages. If anything, the parent-child relationship is even more fundamental in the social order than the relationship between spouses. Many scholars have observed that the parent-child relationship has now become the most stable and central relationship in American family law. Spouses may commit to remain together for life, but up to half of these "permanent" bondings end in divorce. Parent-child relationships are expected to and generally

¹³² Margaret F. Brinig, *In Search of Prince Charming*, 4 J. GENDER RACE & JUST. 321, 333 (2001).

¹³³ See Reena Jana, Arranged Marriages, Minus the Parents, N.Y. TIMES, Aug. 17, 2000, at G1.

¹³⁴ See Brian Paul Gill, Adoption Agencies and the Search for the Ideal Family, 1918–1965, in Families By Law: An Adoption Reader, supra note 70, at 64, 66–67.

¹³⁵ See June Carbone, From Partners to Parents: The Second Revolution in Family Law 239 (2000) (acknowledging the shift from "societally imposed status relationships to matters resting to a far greater degree on private choice" and claiming that "parenthood now stands in its own right as the public status on which the law is rebuilding family obligation"); Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 3 (1995) (comparing the duration of marriage to that of parent-child relations, and suggesting that while marriage is "easily terminated," the parent-child relationship "tend[s] to last").

¹³⁶ PAUL D. SUTTON & MARTHA L. MUNSON, U.S. DEP'T OF HEALTH & HUMAN SERVS., BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR JANUARY 2005, at 1 tbl. A (2005), available at http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_01.pdf. In August 2005, the National Center for Health Statistics reported that the national divorce rate was approximately 3.7 per 1,000 population, with a population base of 293.9 million. *Id.* Currently, 40%–50% of all marriages end in divorce. *See* Iran Mark Ellman et al., Family Law: Cases, Text, Problems 234–35 (4th ed. 2004). Cohabitations are more fragile than marriages, with half ending within one year or less. *Id.* at 870. In contrast, the disruption rates of adoptions—where the adoption ends after the child is placed in the home and before legal finalization—usually range 10%–25% and dissolution rates of adoptions—where the adoption ends after legal finalization—only range 1%–10%. Nat'l Adoption Info. Clearinghouse, U.S. Dep't of Health & Human Servs., Adoption Disruption and Dissolution: Numbers and Trends 1–2 (2004), available at http://naic.acf.hhs.gov/pubs/s_disrup.pdf.

do last a lifetime. As I tell my students, you can divorce your spouse but you are not free to divorce your child, except in the most extreme situations and when the child's best interests will be served thereby. ¹³⁷ Not all adoptions last forever. ¹³⁸ However, while adoption advocates worry about how to reduce the numbers of disrupted adoptions, the rate of failed adoptions is quite small compared to the rate of failed marriages.

C. Children, Like Adults, Have a Fundamental Right to Form a Family

At their core, the distinctions we draw between the state's power to interfere in adoption and the state's power to interfere in marriage are based on outdated notions of the child as property. As I have argued elsewhere, doctrines of parental rights, developed during a period in which children were still treated as quasi-property, tend to tilt our constitutional rhetoric in the United States away from recognition of children's human and constitutional rights. 139 Under laws long since discarded, children could be indentured, 140 sold, 141 put to work as wage laborers, 142 or bequeathed by testamentary devise, 143 regardless of their wishes and interests. Burdened by the legacy of such traditions, children, like pets and other sentient chattels, have enjoyed starkly diminished rights. 144 Their owners, or the state when they are wards of the state, can too often make and break their intimate relationships with impunity. While adults even in state custody—for example the incarcerated prisoner in Turner v. Safley¹⁴⁵—are treated as persons, laws that create categorical bars to adoption treat parentless children as if they were property of the state rather than wards to whom the state owes a high fiduciary duty.

A number of courts, like the federal courts in *Lofton*, have treated children's rights in adoption as the mirror image of adults' rights—or lack

¹³⁷ See 43 C.J.S. Infants § 21 (2004).

¹³⁸ See Nat'l Adoption Info. Clearinghouse, supra note 136, at 1–3.

¹³⁹ Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 28–29 (1999).

¹⁴⁰ Woodhouse, *Hatching the Egg*, *supra* note 26, at 1777.

¹⁴¹ See Woodhouse, supra note 119, at 1041–42.

¹⁴² See id. at 1059-68.

¹⁴³ Woodhouse, *Hatching the Egg*, *supra* note 26, at 1777.

¹⁴⁴ Woodhouse, *supra* note 139, at 8–9.

¹⁴⁵ 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *cf.* Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("When a person is institutionalized—and wholly dependent on the state—it is conceded by petitioners that a duty to provide certain services and care does exist").

thereof. 146 If the adult has no right to adopt the child, then the court assumes the child has no right to be adopted. Even assuming, for the sake of argument, that adults have no right to adopt, does it necessarily follow that children have no right to be adopted? I have seen the argument that childless adults have other choices besides adoption to form intimate family relationships. Adults can procreate through assisted reproductive technology using surrogate mothers, third-party sperm donors, and even surrogate eggs. 148 Parentless children do not have the same range of options. From a child's perspective, state laws on adoption are no different from state laws on marriage and procreation in the lives of adults. They are the gateway into the most significant legal relationship in a minor child's life. As the Court has often recognized, state laws on parentage, divorce, legitimacy, and the like, do not create the parent-child relationship. 149 Nor are relationships between parents and children defined solely by blood. 150 Blood relationship is only one of the elements in a matrix of intangibles like attachment and tangibles like support that define the parent-child relationship. While laws on marriage and adoption do not create a family, they do have the power to confer or withhold precious benefits and protections.

I have argued that children have a liberty interest in protection of their attachment relationships, as the Supreme Court implied in *Smith v*.

¹⁴⁶ E.g., Troxel v. Granville, 530 U.S. 57, 88 (2000); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 811–12 (11th Cir. 2004), *cert denied sub nom.* Lofton v. Sec'y, Fla. Dep't of Children & Families, 125 S. Ct. 869 (2005).

¹⁴⁷ See Lofton, 358 F.3d at 811; Mullins v. Oregon, 57 F.3d 789, 794 (9th Cir. 1995).

¹⁴⁸ In 1985, the number of babies born from parents that used assisted reproductive technology was about 260; by the year 2001, this number drastically increased to 40,687. Anna Mulrine, *Making Babies*, U.S. News & World Rep., Sept. 27, 2004, at 61, 61. One in every 100 babies born today is conceived using some form of assisted reproductive technology ranging from in vitro fertilization and surrogate mothers to ovarian aspiration and embryo transfers. *Id.* at 61–62. Assisted reproductive technologies have become so familiar that there is a magazine, *Conceive*, that is entirely dedicated to issues of fertility. Katy Kelly, *Conceiving Ideas*, U.S. News & World Rep., Feb. 21, 2005, at 54, 54. In Florida, gays and lesbians are also seeking alternative forms of creating families, which include using artificial insemination, completing private adoptions in other states, and possibly completing illegal private adoptions within Florida. Lynn Waddell, *Gays in Florida Seek Adoption Alternatives*, N.Y. TIMES, Jan. 21, 2005, at A20.

¹⁴⁹ See, e.g., Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 842–43 (1977).

¹⁵⁰ See id. at 843–44 (recognizing parent-child-like relationships can be formed without a biological link).

Organization of Foster Families for Equality & Reform. I argued this position in amicus briefs in the Baby Jessica Case¹⁵¹ and in the adoptive parents' brief in the *Baby Richard Case*¹⁵² in the 1990s. Certiorari was denied in the *Baby Richard Case*, ¹⁵³ and an application to stay the decision of the Supreme Court of Michigan was denied in the *Baby Jessica Case*. 154 Despite the denials, the arguments put forth in the Baby Jessica Case garnered dissents by several of the justices¹⁵⁵ and were also alluded to by several justices discussing bonds of children with grandparents in *Troxel v*. Granville. 156 I believe these arguments will eventually be adopted by the Court as it considers cases of children who have already formed primary parent bonds with longtime caretakers. The argument I am making here, however, does not depend on the existence of an already formed intimate relationship of parent and child. If the principles behind marriage precedents like Loving v. Virginia and Turner v. Safley extend equally to a child's right to form an intimate family relationship through adoption, then this right attaches to children who have already formed de facto parentchild relationships with would-be adoptive parents. But it also applies with equal force to the "waiting children" who are prevented from finding permanent and stable families of their own by the unconstitutional barriers erected by state adoption laws. In connection with the anti-miscegenation laws, the evil lay not only in separating hearts that had been joined together, but also in the laws' deterrent effect on the formation of loving relationships.

If adoption is a fundamental right, then any law or policy that creates categorical barriers based on criteria such as the potential adoptive parent's marital status, sexual orientation, age, religion, race, or ethnicity is presumptively unconstitutional. Such laws must be given the same strict scrutiny and critical examination of means and ends as other laws that place categorical burdens on entry into and recognition of fundamental family relationships.

¹⁵¹ In re Clausen, 502 N.W.2d 649 (Mich. 1993).

¹⁵² In re Kirchner, 649 N.E.2d 324 (Ill. 1995).

¹⁵³ Doe v. Kirchner, 515 U.S. 1152 (1995).

¹⁵⁴ DeBoer v. DeBoer, 509 U.S. 938 (1993).

O'Connor, dissented from the denial of the application for stay describing Jessica as "a child of tender years who for her entire life has been nurtured by the DeBoers" and proclaiming that he was "not willing to wash [his] hands of this case at this stage, with the personal vulnerability of the child so much at risk." *Id.*

¹⁵⁶ 530 U.S. 57, 88 (2000).

V. THE LOFTON AMICUS BRIEF AND RATIONAL BASIS ARGUMENTS

But wait! The arguments I am making above are relatively new and untested arguments. Did I argue that we should advance these theories in the amicus brief in *Lofton*? No I did not. My colleagues and I discussed these arguments at length as we explored the possible theories behind the brief, but the issue of the child's constitutional right to be adopted was not directly raised in the proceedings below, so this was neither the time nor the place to debut such novel arguments.

Instead, we assumed that the Florida ban would not survive even minimal scrutiny. We argued that Florida's policy was arbitrary and capricious because it denied thousands of children the opportunity to be adopted by loving, capable, and willing parents. Citing the 1972 case of *Stanley v. Illinois*, which gave protection to relationships of unmarried fathers and their children, we contended that "Florida spite[d] its own articulated goal[], of serving the best interests of Florida's adoptive children through provision of [a] permanent home[] suited to their individual needs."

There is no doubt as a matter of policy that adoption by a loving and capable parent is in the best interests of many children whose biological parents either cannot or will not take care of them. Both state and federal laws have identified adoption as the "primary permanency option" for a child who cannot be reunited with his or her biological parents. Additionally, the Adoption and Safe Families Act of 1997 created federal incentives to place children in permanent adoptive homes. 162

¹⁵⁷ Brief Amicus Curiae, *supra* note 45, at 1–2.

^{158 405} U.S. 645 (1972).

¹⁵⁹ *Id.* at 658.

¹⁶⁰ Brief Amicus Curiae, *supra* note 45, at 2–3 (second alteration in original) (citation omitted) (quoting *Stanley*, 405 U.S. at 653).

¹⁶¹ E.g., Fla. Stat. § 39.621(2) (2005) (stressing that once reunification is determined to be inappropriate, adoption is "the primary permanency option available to the court"); *see also* Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, sec. 221, § 101(h), 110 Stat. 3063, 3091 (codified at 42 U.S.C. § 670 note (2000) (Abandoned Infants Assistance)) (amending the Abandoned Infants Assistance Act of 1988, Pub. L. No. 100-505, 102 Stat. 2533, and requiring the Secretary of Health and Human Services to "give priority to applicants located in States that have developed and implemented procedures for expedited termination of parental rights and placement for adoption of infants determined to be abandoned under State law" when awarding grants).

Pub. L. No. 105-89, § 201, 111 Stat. 2115, 2122–25 (codified as amended at 42 U.S.C. § 673b (2000)); see also Woodhouse, supra note 31, at 87–95 (summarizing the (continued))

As we pointed out in our *Lofton* brief, experts have concluded that adopted children

function more adequately at the personal, social, and economic level compared with those who were formerly fostered and, particularly, those who grew up for a large part of their lives in institutions. . . . [A]doption facilitates the development of an attachment relationship—a reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver. Attachment relationships form the cornerstone for healthy psychological adjustment, affecting development not only in infancy and childhood but in adulthood as well. ¹⁶³

Because adoption provides security and stability for the child, it is the placement option most likely to foster strong attachment relationships for children whose biological parents are unavailable and unable to care for them.

The alternatives to adoption, even permanent guardianship, are less secure than adoption and place children at risk of multiple placements. "Multiple placements mean multiple caregivers and can prevent a child from forming a lasting attachment to a nurturing, caring adult." In addition to lacking the stability of adoption, foster care and legal guardianship do not—as the Court of Appeals in *Lofton* recognized—have

basic goals of the ASFA including "adoption incentive payments" that states receive—such as \$4,000 for each additional adoption after exceeding the baseline quota for adoptions—as well as examining both the positive and negative aspects of the ASFA).

¹⁶³ Brief Amicus Curiae, *supra* note 45, at 3 (citations and internal quotation marks omitted).

164 *Id.* at 4. Two paramount concerns in a young child's life are the "need for continuity with their primary attachment figures and a sense of permanence that is enhanced when placement is stable." Comm. on Early Childhood, Adoption & Dependent Care, Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics 1145, 1145–46 (2000) [hereinafter *Developmental Issues*]. When multiple placements or disruptions occur, children can experience emotional disturbances such as anxiety, inability to trust, and attachment disorders. *Id.* at 1146. "Multiple placements [are] painful and demoralizing experiences" for children of all ages. Daniel Pilowsky, *Psychopathology Among Children Placed in Family Foster Care*, 46 PSYCHIATRIC SERVICES 906, 909 (1995); *accord* GOLDSTEIN ET AL., *supra* note 130, at 32–34 (detailing the various consequences of disrupting continuity at different ages—for example, children around the age of five may experience a "breakdown[] in toilet training" and a reduced ability to communicate verbally); *Developmental Issues*, *supra*, at 1146.

"the societal, cultural, and legal significance [of] . . . adoptive parenthood, which is the legal equivalent of natural parenthood." From the waiting child's perspective, being adopted means having a "real" home and a "real" family. Foreclosing or limiting adoption as an option for those children in foster care for whom adoption is the best alternative, clearly deprives them of something of great value.

The history of adoption law and policy confirms this analysis. "Over the past 30 years, the States have moved decisively away from" categorical limitations on adoption. Historically, agencies demanded "ideal families:" defined as young, middle-class, same race, same religion, married couples. "Until the 1960s and 1970s, many States excluded adoption applicants who fell short of that ideal, such as adults with physical disabilities, single adults, older couples, and low-income families." At one time, according to Joan Hollinger (my coauthor on the *Baby Jessica Case* brief and the preeminent authority on American adoption law), many states and adoption agencies "thought it better to leave a child in foster or institutional care without an adoptive home rather than to place the child in a "mismatched" home." These beliefs have been set aside in light of modern knowledge of child development and the importance of attachment relationships.

"By broadening the pool of prospective adoptive parents to include" categories of persons that had previously been excluded, states enhanced child welfare experts' ability to apply a best interest standard to match each child's individual needs with the strengths and skills offered by each potential adoptive parent.¹⁷¹ "No two children (or adults [wishing to adopt them]) are exactly alike"¹⁷² Consider a special needs child like John Doe in the *Lofton* case. As an HIV positive infant, he had medical

¹⁶⁵ Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 824 (11th Cir. 2004), *cert denied sub nom.* Lofton v. Sec'y, Fla. Dep't of Children & Families, 125 S. Ct. 869 (2005).

¹⁶⁶ Brief Amicus Curiae, *supra* note 45, at 4–5.

¹⁶⁷ See id.

¹⁶⁸ *Id.* at 5.

¹⁶⁹ *Id.* (quoting James B. Baskey & Joan Heifetz Hollinger, *Placing Children for Adoption, in* 1 Adoption Law and Practice, *supra* note 71, § 3.06[1], at 3-39 to 3-40).

¹⁷⁰ See id.

¹⁷¹ *Id*.

¹⁷² *Id*.

problems that called for a parent with medical expertise.¹⁷³ Because Florida did not ban foster parenting by gay men,¹⁷⁴ the state was able to place the infant John Doe with the pediatric nurse Stephen Lofton, who gave him exceptional care.¹⁷⁵ All other things being equal, the more potential adoptive parents that are available, the greater the likelihood that those state actors entrusted with promoting the child's welfare will be able to make a placement that truly serves the child's best interests.

"Florida has generally followed the trend toward permanent placement based on individual evaluations and away from excluding entire groups from the pool of adoptive parents." Like most other states, The Florida "conducts a detailed evaluation of each candidate's fitness to parent a particular child. . . . Married couples, single adults, adults with physical disabilities, divorced men and women, [and] parents of a different race than the adoptive child" were all permitted to adopt. Florida's ban on adoption by gay and lesbian parents stood out as a stark exception to a general rule against categorical exclusions. As we pointed out in the brief, "[e]ven convicted felons [were] not categorically barred from adopting" in Florida. Florida's "categorical exclusion of gay men and lesbians [was] . . . a striking departure from an otherwise consistent and coherent scheme to match the needs of individual children with the abilities and circumstances of individual adults."

Categorical bans on adoption prevent child welfare experts from making the best individual child-parent match where a gay or lesbian parent can best meet the needs of a child. For example, a child who might be most effectively placed with a relative can find that the relative is disqualified because of a categorical ban. The harm is most starkly

¹⁷³ See Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 807 (11th Cir. 2004), cert denied sub nom. Lofton v. Sec'y, Fla. Dep't of Children & Families, 125 S. Ct. 869 (2005).

¹⁷⁴ Id. at 823.

¹⁷⁵ See id. at 807.

¹⁷⁶ Brief Amicus Curiae, *supra* note 45, at 5.

Findlaw for the Public, Adopting a Child—Checklist, http://print.family.findlaw.com/adoption/adoption_guide/adoption_checklist.html (last visited Jan. 8, 2006).

¹⁷⁸ Brief Amicus Curiae, *supra* note 45, at 6.

¹⁷⁹ Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1290 (11th Cir. 2004) (Barkett, J., dissenting).

¹⁸⁰ Brief Amicus Curiae, *supra* note 45, at 6.

¹⁸¹ *Id*. at 6–7.

¹⁸² *Id.* at 7.

¹⁸³ *Id*.

illustrated in cases like *Lofton* where a categorical ban prevents permanent placement with a familiar and loving foster parent or guardian who is not only willing and well-suited to take care of the child, but also bonded to the child. Nationwide, 62% of adopted children are adopted by foster parents. If states adopt categorical bans, they will have to extend them to qualifications for foster parents or risk removing children from bonded foster homes in order to create a permanent relationship.

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. Is 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 fiscal year 2002." Many of these children will wait in vain and will "age out" of the system into homelessness and joblessness. They "will never experience the love and support of a permanent family." Is I have the system into homelessness and joblessness.

Because of the inadequate number of adoptive parents, even children who eventually find homes with "approved" adoptive parents may be harmed by unnecessary delays in placement. They may spend years in foster placements or other temporary care awaiting adoption.

The length of a child's stay in [foster] care has a significant negative impact upon the child's psychological and social development. The longer a child remains in foster care, the greater the likelihood the child's attachment relationships will be qualitatively inferior and, hence, that any psychological or social problems will be irreversible.¹⁹¹

¹⁸⁴ Id.

¹⁸⁵ See Children's Bureau, supra note 18.

¹⁸⁶ Brief Amicus Curiae, *supra* note 45, at 8.

¹⁸⁷ *Id.* (citing Children's Bureau, U.S. Department of Health & Human Services, FY 1998, 1999, FY 2000, FY 2001, and FY 2002 Foster Care: Children Waiting for Adoption, http://www.acf.hhs.gov/programs/cb/dis/tables/waiting2002.htm (last visited Sept. 10, 2005)).

¹⁸⁸ *Id*.

¹⁸⁹ *Id*.

¹⁹⁰ *Id.* at 9.

¹⁹¹ *Id*.

Special needs children also suffer disproportionately from categorical barriers to adoption. Remember that special 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. Although no other state at the time of the certiorari petition categorically prohibited gays and lesbians from adopting, allowing the circuit court's decision in *Lofton* to stand could encourage other states to enact such bans, and thereby worsen the national shortage of adults willing and able to adopt the 119,000 children awaiting adoption nationwide. Once again quoting *Stanley v. Illinois*, we argued that the Florida law "foreclos[es] the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities[;] it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

Unfortunately, our position did not carry the day. I hope that the arguments articulated by my colleagues in the *Lofton* brief, as well as the more novel constitutional arguments I raised above, will provide a foundation for understanding what is wrong, from the child's perspective, with categorical bans on adoption. Every child deserves an individualized assessment of his or her best interests. While I look forward to the day when adoption takes its place as a fundamental right, I will settle for rational basis with teeth.¹⁹⁷ Many court watchers have identified a trend away from new categories of fundamental rights or suspect classes and toward a toughening of the "rational basis test" so that it really does protect vulnerable minorities from ill treatment and discrimination.

¹⁹² McKenzie, *supra* note 20, at 62.

¹⁹³ Brief Amicus Curiae, *supra* note 45, at 9.

¹⁹⁴ *Id.* at 2.

¹⁹⁵ See Children's Bureau, supra note 18 (finding that of the 119,000 children waiting to be adopted in 2003, approximately 25% were less than a year old, 36% were between the ages of one and five, 29% were between the ages of six and ten, 10% were between the ages of eleven and fifteen, and about 0% were sixteen and older when they were removed from their primary caretakers).

¹⁹⁶ Brief Amicus Curiae, *supra* note 45, at 10 (alterations in original) (quoting Stanley v. Illinois, 405 U.S. 645, 657 (1972)).

¹⁹⁷ See Romer v. Evans, 517 U.S. 620 (1996) (using rational basis test to invalidate a state law that prohibited homosexuals from receiving any benefit under anti-discrimination laws).

CONCLUSION

Adoption is a fundamental family relationship and not simply a privilege created by state law. Adoption has been a part of human society since prehistoric days and fulfills a key function in knitting together the fabric of parent-child relationships, especially in times of need. Like marriage, adoption is a means of family formation that is no less fundamental because it is characterized by choice and commitment rather than blood ties and procreation. Adoption is as crucial to children seeking parents as marriage is to adults seeking partners. While state law may play an important and beneficial role in regulating the process of adoption to assure that adopted children are protected from harm and exploitation, state-created barriers that significantly burden access to adoption must be carefully scrutinized. Categorical barriers purportedly based on inadequacies or risks posed by entire categories of would-be parents are especially suspect, because adoption laws already provide for an individualized case-by-case examination of the child's best interest in each adoption.

Although I believe that the one hundred thousand children currently waiting for families of their own have a fundamental right to be adopted, I realize that such a novel right may encounter resistance from a Court that is wary of identifying new "rights" under the substantive due process theories that gave us not only widely acclaimed cases like Loving but controversial cases like Roe v. Wade. 198 Should the Court balk at articulating additional family rights, I am confident that existing case law provides ample precedent for a careful examination of claims by states seeking to restrict access to adoption that categorical bans, such as that at issue in *Lofton*, bear a rational relation to legitimate state interests. One need not utilize strict scrutiny to successfully challenge such barriers. The Supreme Court should follow its own guidance in the case of City of Cleburne v. Cleburne Living Center, Inc., 199 a case that struck down pretextual barriers imposed by zoning laws that prevented the building of a home for mentally retarded persons. 200 To paraphrase Stuart Delery's words in the Lofton Amicus Brief, any law that keeps children from having a home of their own because of irrational fears of people who are

¹⁹⁸ 410 U.S. 113 (1973).

¹⁹⁹ 473 U.S. 432 (1985).

²⁰⁰ Id. at 450.

"different" is a law that runs rough shod over children's rights and is a law that should not stand. $^{201}\,$

²⁰¹ See Brief Amicus Curiae, supra note 45, at 10.