

WHEN HARRY MET *LAWRENCE*: ALLOWING GAYS AND LESBIANS TO ADOPT

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I. INTRODUCTION

*Lawrence v. Texas*¹ may have paved the way for gays and lesbians to experience the joys of parenthood. From the halls of equality the light of parenthood may now finally shine on everyone, regardless of their sexuality. It may no longer be constitutionally acceptable to burden gays and lesbians with the obligations of legal custody while simultaneously denying them the rights of adoption.

While courts allegedly inquire into the best interests of a child when determining whether to grant adoption,² children across the nation are being denied committed loving homes under the pretext that it is for their own best interest. Ironically, these pretextual reasons pervert the best interests of the child inquiry³ by preventing these children from growing up in stable homes with parents dedicated and able to provide the necessary elements of a safe and happy childhood.⁴ In some instances, courts that have categorically

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¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

² See N.J. STAT. ANN. § 9:3-40 (West 2003) (“In the selection of adoptive parents the standard shall be the best interests of the child.”). For a discussion of the best interests of the child standard, see *infra* Part II.

³ “The law’s unwillingness to recognize and preserve parent-child relationships in nontraditional families sacrifices the best interests of children in those families.” Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 573 (1990).

⁴ See David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 539 (1999) (citing AM. PSYCHOLOGICAL ASSOCIATION, LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS 8 (1995) (concluding, after a thorough review of forty-three empirical studies as well as other articles, that “not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents”)). For other results from studies performed, see *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2011 n.52 (2003) (rejecting the

denied adoption by gays and lesbians have, in other cases, considered the application for adoption by “substance abusers and perpetrators of domestic violence.”⁵ Given such inconsistencies, animosity towards gays and lesbians seems to be the only rationale for denying a child the benefits of a stable home environment with functional parents with whom the child has already developed strong emotional attachments.

In *Lawrence*, the United States Supreme Court departed from traditional Supreme Court jurisprudence and overturned the relatively recent decision of *Bowers v. Hardwick*,⁶ which upheld a Georgia law that made it a criminal violation to engage in sodomy.⁷ The *Lawrence* Court struck down a Texas law criminalizing conduct similar to that at issue in *Bowers* and expressly overruled *Bowers*.⁸ The majority relied on Fourteenth Amendment substantive due process analysis, while the concurrence engaged in a Fourteenth Amendment equal protection discussion.⁹ Both opinions ultimately found for the defendants, gay men involved in intimate relationships.¹⁰

This decision announces a shift in policy by the Supreme Court, a shift that appears to be more tolerant of gay and lesbian lifestyle

notion that same-sex partners are not as qualified as opposite-sex parents) (citing Norman Anderssen et al., *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 SCANDINAVIAN J. PSYCHOL. 335, 343, 349 (2002) (surveying twenty-three studies of children raised by lesbian mothers or gay fathers, all of which demonstrate that such children display no psychological or cognitive differences relative to other children); Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEVELOPMENTAL PSYCHOL. 20, 27-30 (2003) (finding positive parent-child relationships and well-adjusted emotional development in children raised by lesbian couples relative to those raised by two heterosexual parents or by single heterosexual mothers); Ellen C. Perrin et al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002) (noting evidence that children with gay or lesbian parents are no different emotionally, socially, or psychologically than children with heterosexual parents)). See also *Ex parte J.M.F.*, 730 So. 2d 1190, 1194 (Ala. 1998) (stating that studies have “determined that there is generally no significant difference in various factors between a child who has been reared by a heterosexual couple and one who has been reared by a homosexual couple”).

⁵ *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1385 n.18 (S.D. Fla. 2001); See *Ward v. Ward*, 742 So. 2d 250, 252 (Fla. Dist. Ct. App. 1996) (reversing custody from lesbian mother to child’s father who had been convicted of the second-degree murder of his first wife for which he served eight years in prison).

⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁷ *Id.*

⁸ *Lawrence*, 539 U.S. at 578.

⁹ *Id.* at 579.

¹⁰ *Id.* at 579, 585.

and conduct. But, does the shift signify an opportunity for gays and lesbians to convince the Court to apply a heightened level of scrutiny? Or at least adopt the more searching rational basis with “bite”¹¹ standard of review in the context of adoption?

This Comment discusses the possible effects of the *Lawrence* decision, specifically focusing on the potential applications to state laws and policies precluding adoption by gays and lesbians. Significantly, the movement in the United States is leading toward more widespread acceptance of gay and lesbian parents. That acceptance has become increasingly apparent in the fact that approximately one-half of the nation’s courts now are increasingly granting custody and visitation rights to such parents.¹² However, with approximately one-half of the states continuing to refuse to allow same-sex partners to adopt the children of their partners,¹³ gays and lesbians still have obstacles to confront.¹⁴ The *Lawrence* decision may provide significant ammunition for their fight.

Part II discusses the general law of adoption around the country, specifically addressing court standards used to determine whether or

¹¹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 659-62 (2d ed. 2002). Chemerinsky explains that under traditional rational basis review, the court will tolerate substantial underinclusiveness; however, when the Court looks more deeply into the government’s purported interest to find “nothing other than irrational prejudices,” it would “appear[] that there was more ‘bite’ to the Court’s approach than usual for this level of scrutiny.” *Id.* For examples of cases where the Court evaluated, under rational basis with “bite” review, a law classifying gays and lesbians, see *Romer v. Evans*, 517 U.S. 620, 634 (1996) (finding that the only apparent reason for an amendment to the Colorado State Constitution that singled out gays and lesbians for the denial of specific legal protection from discrimination was “animosity toward the class of persons affected”) and *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (holding that a city ordinance requiring a special permit to operate a group home for the mentally disabled when no such a permit was required for the operation of any other group facility served no rational purpose and thus, failed even rational basis review).

¹² See *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001) (reinstating trial court’s order allowing lesbian unrestricted overnight visitation with the couple’s older child); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (enforcing a visitation agreement between lesbian partners after the couple split up).

¹³ The most common way for a same-sex partner to request to adopt the child of his or her partner is to urge the court to extend a stepparent exception to reach same-sex partners. A stepparent exception allows a non-biological parent to adopt the child of his or her spouse without requiring the parent spouse to terminate existing rights over the child. Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 937 (2000).

¹⁴ See Lambda Legal Defense and Education Fund’s, Overview of State Adoption Laws [hereinafter Lambda Legal, State Adoption Laws], at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=399> (Aug. 27, 2002).

not to grant adoption and the arguments against granting adoption to certain applicants. This part then addresses the statutes and policies of certain states that prevent gays and lesbians from adopting. For example, states such as Florida, Mississippi, and Utah expressly prohibit adoption by gays and lesbians,¹⁵ while other states utilize their court systems to effectively restrict the options available to gays and lesbians with respect to adoption.¹⁶ Despite recent trends to the contrary, many courts across the nation exhibit general hostility toward gay and lesbian parents by adversely considering the sexuality of the parent when determining whether to grant custodial or visitation rights.¹⁷ Even more widespread, however, is the unwillingness of courts to extend a stepparent exception to same-sex partners.¹⁸ This tendency occurs even in states that are generally

¹⁵ FLA. STAT. ch. 63.042(3) (2003) (expressly prohibiting adoption by a "homosexual"); MISS. CODE ANN. § 93-17-3 (2003) (expressly prohibiting adoption by same-sex couples); UTAH CODE ANN. § 78-30-1(3)(b) (2003) (prohibiting adoption by unmarried individuals residing with, and sexually involved with, another person).

¹⁶ For a more detailed analysis of the adoption laws of individual states with respect to gays and lesbians, see *infra* Part II. See also Lambda Legal, State Adoption Laws, *supra* note 14.

¹⁷ See *Ex parte J.M.F.*, 730 So. 2d at 1194 (affirming the trial court's modification of custody agreement based on the "change in the mother's homosexual relationship, from a discreet affair to the creation of an openly homosexual home environment"); *Larson v. Larson*, 902 S.W.2d 254 (Ark. Ct. App. 1995) (affirming trial court's order changing primary custody based partially on lesbian mother's open relationship with same-sex partner); *Morris v. Morris*, 783 So. 2d 681 (Miss. 2001) (holding that although it may not be the sole factor, adverse consideration of gay or lesbian orientation is permitted in custody disputes); *Pulliam v. Smith*, 501 S.E.2d 898, 901-02 (N.C. 1998) (affirming the trial court's modification of custody agreement based on finding that due to the father's homosexuality, the mother was the "fit and proper person to exercise the exclusive care, custody and control of the . . . children"). But see *Downey v. Muffley*, 767 N.E.2d 1014, 1018 (Ind. Ct. App. 2002) (holding that "homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child"); *Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999) (reversing order banning visitation between gay father and his child in the presence of father's same-sex partner).

¹⁸ See *In re Adoption of T.K.J. and K.A.K.*, 931 P.2d 488 (Colo. Ct. App. 1996) (rejecting adoption applications by lesbian partners to adopt each other's natural children); *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002) (denying adoption by same-sex partner by refusing to extend stepparent exception to same-sex partner and requiring the biological parent to relinquish existing rights in order for the child to become eligible for adoption); *In re Adoption of Jane Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998) (holding that the stepparent exception did not apply to same-sex partners); *In re Lace*, 516 N.W.2d 678, 683 n.8 (Wis. 1994) (finding that while the adoption was in the best interests of the child, the stepparent exception did not apply to same-sex partners because the biological parent must terminate existing rights in order for the child to be eligible for adoption). But see *In re M.M.D. &*

tolerant of, or favorable toward, gay and lesbian parents in custody or visitation cases.¹⁹

Part III of this Comment analyzes the *Lawrence* decision. This part details the Court's reliance on substantive due process to invalidate the Texas anti-sodomy law. Further, this part focuses on the Court's decision to adopt a broad definition of liberty under the Due Process Clause of the Fourteenth Amendment.²⁰ Significantly, the Court illustrates a willingness to depart from traditional substantive due process analysis by addressing both foreign law²¹ and more current trends in American society.²²

Part III also examines the equal protection analysis employed by the concurrence to strike down the Texas law.²³ Specifically, this part focuses on the concurrence's application of a more searching inquiry – even under a rational basis standard of review – into the government interests offered by the state in defense of the legislation's classification based on homosexual conduct or homosexuality.²⁴ Importantly, the concurrence refused to defer to the state and subsequently held that “[a] legislative classification that

B.H.M., 662 A.2d 837, 859 (D.C. 1995) (holding that “unmarried couples, whether same-sex or opposite-sex, who are living together in a committed personal relationship, are eligible to file petitions for adoption”); *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (allowing joint adoption by lesbian partners where one was the natural mother of the child); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995) (extending stepparent exception to allow lesbian partner to adopt other partner's biological child); *In re Adoption of a Child by J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993) (finding that adoption by biological parent's same-sex partner was in the best interests of the child); *In re Jacob*, *In re Dana*, 660 N.E.2d 397, 405 n.4 (N.Y. 1995) (extending stepparent exception to same-sex partners on a case-by-case basis); *In re Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993) (holding that “when the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, terminating the natural mother's rights is unreasonable and unnecessary”).

¹⁹ Compare *In re Adoption of T.K.J. and K.A.K.*, 931 P.2d 488 (Colo. Ct. App. 1996) (refusing to allow second-parent adoptions by same-sex partners), with *In re Marriage of Dorworth*, 33 P.3d 1260, 1262 (Colo. Ct. App. 2001) (holding that the “court may not restrict parenting time merely because of a parent's sexual orientation”).

²⁰ *Lawrence*, 539 U.S. at 567.

²¹ *Id.* at 573 (looking at the laws of Great Britain and Ireland as well as those promulgated by the European Convention on Human Rights).

²² *Id.* at 572 (referring to “an emerging awareness that liberty gives substantial protection to adult persons deciding how to conduct their lives in matters pertaining to sex”).

²³ *Id.* at 579-85 (O'Connor, J., concurring).

²⁴ *Id.* at 580 (O'Connor, J., concurring).

threatens the creation of an underclass . . . cannot be reconciled with the Equal Protection Clause.”²⁵ In addition, this part addresses the concerns raised by the dissent about the possible future implications of both the Court’s holding²⁶ and the Court’s somewhat novel approach to substantive due process analysis.²⁷

Finally, Part IV analyzes the potential implications of the *Lawrence* decision on state laws and policies that prevent gays and lesbians from adopting. Specifically, this part considers the possible applications of *Lawrence* to challenges against those state laws or policies under both substantive due process and equal protection. Particularly important to this analysis is the trend in American society moving toward a greater acceptance of gays and lesbians. Part of this acceptance may include extending to homosexuals those rights enjoyed by similarly situated heterosexuals.

Using the substantive due process analysis employed in *Lawrence*, gays and lesbians may now argue that the expansive definition of liberty adopted by the Court encompasses a fundamental right to family autonomy broad enough to include even non-traditional family units, such as those with same-sex parents. Additionally, gays and lesbians may use the equal protection analysis adopted by Justice O’Connor’s concurrence, in order to argue for a more searching inquiry into the purported state interests offered in support of denying gays and lesbians the right to adopt while simultaneously granting those same rights to similarly situated heterosexuals. Even though the Court has not yet classified gays and lesbians as a suspect class, one can now argue that discriminating adoption laws create an underclass which, following *Lawrence*, should invoke at least a rational basis with “bite” review. The *Lawrence* Court exhibited a willingness to recognize that the fundamental right to privacy is broad enough to include even non-traditional lifestyles; the concurrence refused to simply defer to states that have enacted laws that discriminate against gays and lesbians based in large part on morality. Thus, *Lawrence* has provided an opportunity for gays and lesbians to petition the Court to protect their right to adopt.

²⁵ *Id.* at 584 (O’Connor, J., concurring) (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)) (internal quotations omitted).

²⁶ *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

²⁷ *Id.* at 594-98 (Scalia, J., dissenting).

II. ADOPTION

“Adoption is a creature of statute which endows the adoptive parents with all of the legal rights and responsibilities associated with parenthood”²⁸ In the United States, there is no common-law right to adopt; instead, adoption has been created by statute,²⁹ so individual laws vary from state to state. Most statutes, however, maintain common elements, namely, requiring the consent of certain parties, an agency-generated home study of prospective adoptive parents, and a finding by the court that the adoption will serve the best interests of the child.³⁰

Additionally, most adoption statutes require the termination of any existing parental rights – either voluntarily or by court order – before a child can become eligible for adoption.³¹ For example, a New Jersey statute provides:

Surrender of a child to an approved agency for the purpose of adoption . . . is a surrender of parental rights . . . and means the permanent end of the relationship and all contact between the parent and child . . . [and] shall constitute relinquishment of the [] parental rights in or guardianship or custody of the child³²

“Cut-off” provisions³³ ensure that the adoptive parents acquire *all* the rights and responsibilities associated with the child.³⁴

Traditionally, courts viewed adoption as a last resort, granting it

²⁸ 1 JOAN H. HOLLINGER ET AL., ADOPTION LAW AND PRACTICE 1-1 (2000).

²⁹ Schacter, *supra* note 13, at 936; *see In re Jacob, In re Dana*, 660 N.E.2d 397, 399 (N.Y. 1995) (citing *In re Eaton*, 111 N.E.2d 431, 432 (N.Y. 1953) (describing adoption as “solely the creature of . . . statute”).

³⁰ Schacter, *supra* note 13, at 936 (citation omitted).

³¹ *Id.* at 936-37. *See* N.J. STAT. ANN. § 9:3-50(c)(1) (West 2003) (“The entry of a judgment of adoption shall terminate all parental rights and responsibilities of the parent towards the adoptive child . . .”).

³² N.J. STAT. ANN. § 9:3-41(a). *See also, e.g.*, MASS. GEN. LAWS ANN. ch. 210, § 6 (West 2003) (“[A]ll rights, duties and other legal consequences of the natural relation of child and parent shall . . . terminate between the child so adopted and his natural parents and kindred.”); N.Y. DOM. REL. LAW § 117(1)(a) (Consol. 2003) (“After the making of an order of adoption the natural parents of the adoptive child . . . shall have no rights over such adoptive child or to his property by descent or succession.”); WIS. STAT. ANN. § 48.92(2) (West 2003) (“After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person’s birth parents . . . shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.”).

³³ Schacter, *supra* note 13, at 936.

³⁴ *Id.* at 937.

only when a perfect or near perfect match existed between the child and the prospective home.³⁵ Therefore, agencies maintained long lists of characteristics that needed to be similar in order to constitute a perfect match,³⁶ thus leaving many children without permanent homes.³⁷

More recently, with the growth in number of children awaiting placement in private homes, courts have begun to grant adoptions with increased frequency.³⁸ Courts now look at each child on a case-by-case basis, focusing more closely on the best interests of the child before the court in order to provide the child with a permanent home.³⁹

A. “Best Interests of the Child”

“The polestar by which courts . . . around the country have been guided is the best interest of the child to be adopted.”⁴⁰ Protecting and promoting the best interests of the child is the fundamental concern of all adoption statutes.⁴¹ The standard requires the court to engage in a careful balancing of numerous factors.⁴² Many statutes

³⁵ 1 HOLLINGER ET AL., *supra* note 28, § 3.06[1], at 3-40.

³⁶ *Id.* Personal characteristics including physical attributes, religion, intellectual ability and other characteristics were among those factors agencies deemed important in determining whether circumstances were ideal for adoption. *Id.*

³⁷ *Id.*

³⁸ Nancy D. Polikoff, *Recognizing Partners but Not Parents / Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 714-18 (2000) (citing Voluntary Cooperative Information System, Analysis of State Child Welfare Data: Survey Data from 1990-1994, *available at* <http://www.acf.dhhs.gov/programs/cb/dis/vcis/maintoc.htm>) (last visited Mar. 12, 2004).

³⁹ *Id.*

⁴⁰ *In re Adoption of Charles B.*, 552 N.E.2d 884, 886 (Ohio 1990).

⁴¹ Polikoff, *supra* note 3, at 542 (stating that in determining whether or not to grant an adoption, courts across the country seek to promote the best interests of the child). *See also, e.g.*, ALASKA STAT. § 25.23.005 (Michie 1999) (“This chapter shall be liberally construed to the end that the best interests of adopted children are promoted.”); FLA. STAT. ch. 63.022 (2003) (“It is the intent of the Legislature that in every adoption, the best interest of the child should govern and be of foremost concern in the court’s determination.”); N.J. STAT. ANN. § 9:3-37 (West 2003) (“This act shall be liberally construed to the end that the best interests of children be promoted and that the safety of children be of paramount concern.”); N.Y. DOM. REL. LAW § 114 (Consol. 2003) (stating that the judge shall grant the adoption “[i]f satisfied that the best interests of the adoptive child will be promoted”).

⁴² *See generally* the Uniform Marriage and Divorce Act (UMDA) (listing numerous factors to be considered in determining whether adoption is in the best interests of the child).

set forth specific factors for judges to consider,⁴³ but due to the sensitivity and subjectivity of the decision being made, courts evaluate the totality of all circumstances to determine what serves the best interests of the child before the court.⁴⁴

Under the guise of this standard, many courts have refused to grant an adoption to gay and lesbian parents. Indeed, some courts have revoked custody from natural parents as a result of gay or lesbian conduct.⁴⁵ For example, the highest state court in Alabama found that allowing a gay or lesbian parent to raise a child might deprive that child of “extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development.”⁴⁶ The court further explained that “the degree of harm to children from the homosexual conduct of a parent is uncertain . . . and the range of potential harm is enormous.”⁴⁷ Thus, the court affirmed the trial court’s order revoking the mother’s custody because the mother, by engaging in a homosexual relationship with another woman, had “chosen to expose the child continuously to a lifestyle that is . . . no[t] moral in the eyes of most of [the state’s] citizens.”⁴⁸

Similarly, in a custody dispute over two children, the Supreme Court of North Carolina found that homosexual activity between the children’s father and his same-sex partner “will likely create

⁴³ The UMDA includes the following provisions: (1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved. Uniform Marriage and Divorce Act § 402, 9A U.L.A. 561 (1987).

⁴⁴ Schacter, *supra* note 13, at 942-43 (discussing legislative intent to grant courts broad powers to make case by case determinations in deciding what arrangement would serve the best interests of the child).

⁴⁵ See cases cited *supra* note 17. Custody decisions are available in greater number and may provide a good basis for predicting the attitudes and views that gays and lesbians will confront when petitioning for adoption. See Lambda Legal, State Adoption Laws, *supra* note 14.

⁴⁶ *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998).

⁴⁷ *Id.* (quoting Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 895 (1997)) (internal quotations omitted).

⁴⁸ *Id.* (quoting *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998)) (internal quotations omitted). See also *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (revoking father’s visitation rights because “[t]he father’s continuous exposure of the child to his immoral and illicit [homosexual] relationship renders him an unfit and improper custodian as a matter of law”).

emotional difficulties for the two minor children.”⁴⁹ The court stated further that “the active homosexuality of the [father and his same-sex partner] is detrimental to the best interest and welfare of the two minor children.”⁵⁰ Thus, based in large part on the father’s homosexuality, the court concluded that the father could not provide a “fit and proper environment in which to rear the two minor children”⁵¹ and therefore affirmed the trial court’s order modifying the custody arrangement.⁵²

Courts have also invoked the best interests of the child standard to determine whether or not to grant adoption to a second parent when one parent continues to maintain existing parental rights. While most states incorporate a cut-off provision within their adoption laws, requiring the termination of *all* existing parental rights over the child before the child may become eligible for adoption,⁵³ numerous states allow for an exception. These states recognize the reality that in today’s society many adults divorce and remarry, thus creating a growing number of families consisting of biological parents and stepparents.⁵⁴ Thus, the exception enables a stepparent to become a legal parent of a spouse’s child without forcing the parent spouse to relinquish *any* existing parental rights.⁵⁵ Those states that utilize a stepparent exception appreciate “that children’s ties to the individuals who actually parent them – or who are committed to parenting them – deserve legal protection even if those ties are psychologically and socially constructed and not biologically rooted”⁵⁶

Although many states provide the means for a stepparent to adopt a spouse’s child, courts have been reluctant to extend such

⁴⁹ Pulliam v. Smith, 501 S.E.2d 898, 902 (N.C. 1998).

⁵⁰ *Id.*

⁵¹ *Id.* at 902.

⁵² *Id.* at 904.

⁵³ See *supra* notes 31-34.

⁵⁴ Stepparent adoptions constitute more than half of all adoptions. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 1400 (3d ed. 1991).

⁵⁵ See, e.g., N.J. STAT. ANN. § 9:3-50(c)(1) (West 2003) (“The entry of a judgment of adoption shall terminate all parental rights and responsibilities of the parent towards the adoptive child *except for a parent who is the spouse of the petitioner . . .*”) (emphasis added).

⁵⁶ Joan Heifetz Hollinger, *Adoption and Aspiration: The Uniform Adoption Act, The DeBoer-Schmidt Case, and the American Quest for the Ideal Family*, 2 DUKE J. GENDER L. & POL’Y 15, 17 (1995).

procedures to same-sex partners.⁵⁷ With the increased number of same-sex couples seeking to raise children together,⁵⁸ the demand for adoption among these couples has grown considerably.⁵⁹ The most common example involves a lesbian couple where one woman conceives the child – usually through artificial insemination – during the couple’s relationship,⁶⁰ and the other woman seeks to adopt the child, thereby becoming the child’s second legal parent.⁶¹

Stepparent exceptions, however, assume that the existing parent and the petitioning parent are married.⁶² This creates substantial difficulty for same-sex partners seeking to adopt one another’s children.⁶³ Nonetheless, gays and lesbians have continued to urge courts to broadly interpret stepparent exceptions in order to include same-sex couples.⁶⁴ While gays and lesbians have enjoyed positive results from some courts, the majority of courts have failed to extend the stepparent exception to same-sex partners.⁶⁵

B. *Statutory Prohibition*

While some courts have, on a case-by-case basis, refused to recognize the benefits of legally granting parental rights to an individual already in a caring, committed relationship with a

⁵⁷ See Lambda Legal, State Adoption Laws, *supra* note 14 (noting that twenty-six states have failed to allow any second-parent adoptions). See also sources cited *supra* note 18.

⁵⁸ Polikoff, *supra* note 3, at 465 n.13 (quoting A. Martin, The Planned Lesbian and Gay Family: Parenthood and Children 3 (paper delivered to the 1989 Annual Meeting of the American Psychological Association, New Orleans) (copy on file at *The Georgetown Law Journal*)). Dr. Martin stated:

What has become clear is that the 1980’s have witnessed the emergence of an entirely new family structure, unparalleled in human history. For the first time ever in any society we know about, gay people in large numbers are setting out consciously, deliberately, proudly, openly, to bear or adopt children.

Id.

⁵⁹ Schacter, *supra* note 13, at 935.

⁶⁰ Other examples include children born to one partner during the course of a previous marriage or other heterosexual relationship, or the legal adoption of the child by one partner. Chambers & Polikoff, *supra* note 4, at 532.

⁶¹ Schacter, *supra* note 13, at 935.

⁶² See, e.g., OHIO REV. CODE ANN. § 3107.03 (Anderson 2003) (setting forth a list of those eligible to adopt which includes a married couple and an unmarried individual, but not an unmarried couple).

⁶³ Polikoff, *supra* note 3, at 522.

⁶⁴ Schacter, *supra* note 13, at 935.

⁶⁵ See Lambda Legal, State Adoption Laws, *supra* note 14; see also sources cited *supra* note 18.

partner's child, the adoption statutes of states such as Florida, Mississippi and Utah have gone even further and categorically denied adoption rights to gays and lesbians.⁶⁶ Most notably, a Florida statute expressly states that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."⁶⁷ In 2001, in *Lofton v. Kearney*,⁶⁸ the United States District Court for the Southern District of Florida upheld the constitutionality of the law.⁶⁹ In that case, Steven Lofton, Douglas Houghton and other gay foster parents brought a lawsuit seeking to make permanent their parental rights over children in their care.⁷⁰ Lofton was a registered nurse raising three HIV-positive children for ten years (since their infancy).⁷¹ For his extraordinary care and dedication to these children, the Children's Home Society awarded Lofton the Outstanding Foster Parenting award.⁷² Upon the freeing of child John Roe for adoption, Lofton submitted an application to adopt him.⁷³ Due to his homosexuality, however, Lofton was automatically disqualified.⁷⁴

This instant disqualification seems even more troubling when one views Houghton's relationship to the child. Houghton was a clinical nurse-specialist raising child John Roe.⁷⁵ Houghton became Roe's legal guardian when Roe's biological father, "suffering from alcohol and inconsistent employment, voluntarily left him with Houghton."⁷⁶ Roe was four years old at that time.⁷⁷ Upon the decision of Roe's biological father to terminate his parental rights, Houghton decided to adopt Roe.⁷⁸ Since Roe was not a ward of the state, Houghton followed the procedures for private adoption, which required receipt of a "favorable preliminary home study evaluation"

⁶⁶ See sources cited *supra* note 15.

⁶⁷ FLA. STAT. ch. 63.042(3) (2003).

⁶⁸ *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001). During the writing of this Comment, the Court of Appeals for the Eleventh Circuit affirmed this decision. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

⁶⁹ *Lofton*, 157 F. Supp. 2d at 1372.

⁷⁰ *Id.* at 1375-76.

⁷¹ *Id.* at 1375.

⁷² *Id.* The Children's Home Society is a state licensed child placement agency.
Id.

⁷³ *Lofton*, 157 F. Supp. 2d at 1375.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Lofton*, 157 F. Supp. 2d at 1375-76.

prior to submitting a petition to the state circuit court.⁷⁹ However, because Houghton was gay, the interviewer refused to grant him a favorable home study evaluation.⁸⁰ Thus, due to his homosexuality, the Florida statute automatically precluded Houghton from even applying to adopt Roe.⁸¹

Houghton, along with other gay foster parents categorically denied the right to adopt, challenged the constitutionality of the Florida law.⁸² The court upheld the law under both substantive due process and equal protection analysis.⁸³ First, the court reasoned that since there was no fundamental right to adopt or to be adopted, there was no fundamental right to apply for adoption.⁸⁴ Next, the court rejected the notion that a relationship between foster parent and child “inherently grant[s] . . . a fundamental right to family privacy, intimate association and family integrity.”⁸⁵

The court then turned its focus to equal protection. Although the court adopted a rational basis standard of review for classifications based on homosexuality or homosexual conduct,⁸⁶ the court rejected the first interest offered by the state, that “moral disapproval of homosexuality [is] consistent with the legislature[']s right to legislate public morality.”⁸⁷ The court stated that “the government cannot merely justify singling out a group of citizens for disfavor simply because it morally disapproves of them.”⁸⁸ In

⁷⁹ *Id.* (citing FLA. STAT. ch. 63.112(2)(b)).

⁸⁰ *Id.* (“Houghton was informed that but for his homosexuality . . . he would have received a favorable preliminary home study evaluation.”).

⁸¹ *Id.*

⁸² *Id.* at 1377.

⁸³ *Lofton*, 157 F. Supp. 2d. 1380, 1385.

⁸⁴ *Id.* at 1380 (stating that “adoption is a privilege created by statute and not by common law”) (citing *In re Palmer’s Adoption*, 176 So. 537 (Fla. 1937); *Kyees v. County Dep’t of Pub. Welfare*, 600 F.2d 693 (7th Cir. 1979)).

⁸⁵ *Id.* at 1379-80 (finding that foster parent-child relationships “do not warrant justified expectations of family unit permanency”) (citing *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 845 (1977)).

⁸⁶ *Id.* at 1382 & n.14 (citing *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984); *Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Richenberg v. Perry*, 97 F.3d 256 (7th Cir. 1996); *Holmes v. Cal. Nat’l Guard*, 124 F.3d 1126 (9th Cir. 2000); *Rich v. Sec’y of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989)).

⁸⁷ *Id.* at 1382-83 (holding that “moral disapproval of homosexuals or homosexuality [does not] serve[] a legitimate state interest”).

⁸⁸ *Lofton*, 157 F. Supp. 2d. at 1383.

addressing the second interest offered, however, that the provision was in the best interests of the state's children, the court found that denying gays and lesbians the right to adopt was rationally related to the state's interest in having its children "raised in a home stabilized by marriage, in a family consisting of both a mother and a father."⁸⁹ Thus, the court held that Florida's "homosexual adoption provision" did not violate the Equal Protection Clause of the Fourteenth Amendment.⁹⁰

Like the Florida law, a Mississippi adoption law expressly denies gays and lesbians the right to adopt.⁹¹ Specifically, the law prohibits "[a]doption by couples of the same gender."⁹² What is most disturbing about the Mississippi law is that it was passed a mere three years ago on July 1, 2000.⁹³ Similarly, a Utah adoption law prohibits adoption "by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of [Utah]."⁹⁴

These refusals to allow gays and lesbians to adopt effectively deny children the numerous rights and benefits associated with having parents legally recognized by the courts.⁹⁵ The child may not have access to Social Security and life insurance benefits should a parent die or become disabled.⁹⁶ The child may not have the right to sue for the wrongful death of a parent or the right to inherit under the rules of intestacy.⁹⁷ The child may be denied coverage under his or her parents' health insurance policies.⁹⁸ The child may not have the security of financial support from both parents in the event of a breakup.⁹⁹ Additionally, the child's parents may be denied the right to make important decisions in a medical emergency, or be denied the right to sue for custody in the event of a split between the parents.¹⁰⁰ Thus, without the legal protection afforded by adoption,

⁸⁹ *Id.*

⁹⁰ *Id.* at 1385.

⁹¹ MISS. CODE ANN. § 93-17-3 (2003).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ UTAH CODE ANN. § 78-30-1(3)(b) (2003) (defining "cohabiting" as "residing with another person and being involved in a sexual relationship with that person"). This law, like Mississippi's, was just passed in 2000. *Id.*

⁹⁵ Polikoff, *supra* note 38, at 731.

⁹⁶ *In re Jacob, In re Dana* 660 N.E.2d 397, 399 (N.Y. 1995).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

both the child and the non-biological parent experience substantial risks and disadvantages. Rather than focusing on the sexual orientation of a parent, “[t]he question for these courts should be whether the child will receive the added legal, emotional and financial benefits that would result from acquiring a second legal (as opposed to merely functional) parent.”¹⁰¹

Although approximately half of the nation’s states view homosexuality negatively in the context of granting adoption,¹⁰² there has been a movement toward greater acceptance of gays and lesbians and same-sex couples.¹⁰³ This trend has become evident in mainstream America,¹⁰⁴ as well as in some of the highest courts in the land.¹⁰⁵

¹⁰¹ Schacter, *supra* note 13, at 942.

¹⁰² See Lambda Legal, State Adoption Laws, *supra* note 14; see also sources cited *supra* note 18.

¹⁰³ See *id.*

¹⁰⁴ See Leann Holt & Jennifer W. Sanchez, *Gays Wed in Bernalillo*, ALBUQUERQUE TRIB., Feb. 20, 2004, at A1 (reporting that a county clerk in New Mexico issued marriage licenses to approximately sixty-eight same-sex couples); Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24 (reporting that the city’s mayor urged the county clerk’s office to issue marriage licenses to same-sex couples); Dean E. Murphy, *San Francisco Judge Rules Gay Marriages Can Continue*, N.Y. TIMES, Feb. 21, 2004, at A8 (reporting that “a judge refused to block the issuance of same-sex marriage licenses”); Sabrina Tavernise & Thomas Crampton, *Gay Couples to Be Wed Today in New Paltz, Mayor Declares*, N.Y. TIMES, Feb. 27, 2004, at B2 (reporting that the mayor of the New York college town “expected to marry at least six same-sex couples today, in what appeared to be the first such ceremonies in New York State”); David Osborne, *Gay with Children*, NEW YORK, Nov. 3, 2003, at 28 (depicting the growing trend of gay adoption in New York City). But see Christine Hauser, *California Supreme Court Voids Gay Marriages in San Francisco*, N.Y. TIMES, Aug. 12, 2004 (ruling unanimously that San Francisco officials “overstepped their authority in issuing marriage licenses to same-sex couples” and voting 5 to 2 to void the more than 4,000 licenses that were given to gay and lesbian couples).

¹⁰⁵ See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that denying same-sex couples the right to marry violated the Massachusetts Constitution because the state could not show any rational basis for the prohibition); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (ruling that, pursuant to the Vermont Constitution, same-sex couples were entitled to the same benefits and protections afforded opposite-sex, married couples); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (finding that the state’s statutory barrier to same-sex marriage resulted in unconstitutional discrimination based on sex, thus requiring the state to demonstrate a compelling reason for limiting marriage to individuals of the opposite sex). Responding to *Lewin*, Hawaii amended the Constitution to enable the legislature to limit marriage to a man and a woman. See HAW. REV. STAT. § 572-1 (2003) (stating that a marriage contract “shall be only between a man and a woman . . .”).

III. THE COURT'S DECISION IN *LAWRENCE*

In 2003, the Court departed from traditional Supreme Court jurisprudence by overturning a decision rendered less than two decades ago.¹⁰⁶ In *Lawrence v. Texas*,¹⁰⁷ the Court struck down a Texas law that criminalized sodomy and expressly overruled *Bowers v. Hardwick*,¹⁰⁸ which had upheld a similar Georgia law.¹⁰⁹ In *Bowers*, the respondent Hardwick was charged with violating the Georgia law by engaging in sodomy with another male while in the bedroom of his own home.¹¹⁰ Since the conduct occurred between two consenting males, the *Bowers* Court narrowed the issue to “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”¹¹¹ The Court found that proscriptions against homosexual sodomy had ancient roots,¹¹² and thus, “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”¹¹³ Hardwick claimed, however, that the presumed views of a majority that homosexual sodomy is immoral and unacceptable does not provide a rational basis for the Georgia law.¹¹⁴ The *Bowers* Court responded by asserting that since notions of morality constantly provide bases for the law, it would create a heavy burden on the courts to invalidate, under the Due Process Clause, all laws that represented essentially moral choices.¹¹⁵ Accordingly, the *Bowers* Court upheld the constitutionality of the Georgia law.¹¹⁶

A. *The Majority*

In *Lawrence*, the Court overruled *Bowers*¹¹⁷ and struck down a

¹⁰⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰⁷ *Id.*

¹⁰⁸ 478 U.S. 186 (1986).

¹⁰⁹ *Id.* at 189.

¹¹⁰ *Id.* at 187-88.

¹¹¹ *Id.* at 190.

¹¹² *Id.* at 192.

¹¹³ *Id.* at 194 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

¹¹⁴ *Bowers*, 478 U.S. at 196.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Lawrence*, 539 U.S. at 578.

Texas law criminalizing conduct similar to that at issue in *Bowers*.¹¹⁸ The *Lawrence* Court evaluated the Texas law under substantive due process analysis. Rather than declaring a fundamental right to engage in homosexual sodomy, however, the Court rooted its decision in a broad definition of liberty under the Due Process Clause of the Fourteenth Amendment, which the Court has held to provide protection to adults in making decisions regarding sexual conduct within their private lives.¹¹⁹ First, the Court discussed the foundational cases developing the fundamental right to liberty¹²⁰ and ultimately concluded that liberty under the Due Process Clause has broad substantive reach.¹²¹ The discussion began with *Griswold v. Connecticut*,¹²² where the Court invalidated a state law that prohibited the use of contraceptive drugs or devices and counseling or aiding and abetting the use of contraceptives.¹²³ The *Griswold* Court described the protected interest as a right to privacy and placed particular emphasis on marriage and the protection afforded to married couples within their own bedrooms.¹²⁴

The *Lawrence* Court then explained that *Eisenstadt v. Baird*¹²⁵ expanded the “right to privacy” set forth in *Griswold* by extending to unmarried individuals the right to make certain decisions regarding sexual conduct.¹²⁶ In addressing *Griswold*, the *Eisenstadt* Court opined that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹²⁷

Turning next to *Roe v. Wade*,¹²⁸ the *Lawrence* Court asserted that “*Roe* . . . confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”¹²⁹ In *Roe*, the Court addressed a Texas law prohibiting abortion and held that, although a

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 572.

¹²⁰ *Id.* at 564-66.

¹²¹ *Id.* at 564.

¹²² 381 U.S. 479 (1965).

¹²³ *Lawrence*, 539 U.S. at 564-65.

¹²⁴ *Id.* at 565 (quoting *Griswold*, 381 U.S. at 485).

¹²⁵ 405 U.S. 438 (1972)

¹²⁶ *Lawrence*, 539 U.S. at 565.

¹²⁷ *Id.* (quoting *Eisenstadt*, 405 U.S. at 453) (emphasis in original).

¹²⁸ 410 U.S. 113 (1973).

¹²⁹ *Lawrence*, 539 U.S. at 565.

woman's rights were not absolute, her right to choose to have an abortion fell within the purview of the Due Process Clause.¹³⁰

Finally, the *Lawrence* Court pointed to *Carey v. Population Services International*,¹³¹ which expanded the right to privacy to include the rights of minors. *Carey* invalidated a New York law that prohibited the sale of contraceptives to minors under the age of sixteen.¹³² Through this analysis of Supreme Court precedent, the *Lawrence* Court ultimately concluded that liberty under the Due Process Clause could not be limited to protect the rights of only married adults.¹³³

Next, the Court analyzed the history and tradition surrounding the conduct addressed by the Texas anti-sodomy statute.¹³⁴ The Court examined, and then rejected, the analysis employed in *Bowers*.¹³⁵ The *Lawrence* Court chided the *Bowers* Court for failing to recognize the extent of the liberty at stake and for inappropriately narrowing the issue presented to "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."¹³⁶ The Court further explained that the *Bowers* Court misinterpreted the historical treatment of laws regarding sodomy.¹³⁷ Specifically, the Court found that the *Bowers* Court erroneously concluded that homosexual sodomy had been condemned throughout the history of our country.¹³⁸ The *Lawrence* Court expressly noted that historically, the laws of this country did not focus specifically on homosexual conduct or homosexuality.¹³⁹ Instead, the Court proposed that society condemned sodomy generally, rather than just between persons of the same sex.¹⁴⁰ The Court explained that anti-sodomy laws throughout history were considered applicable to both men and women.¹⁴¹ Moreover, anti-sodomy laws were not enforced against consenting adults acting in private.¹⁴² Instead, such laws aimed at

¹³⁰ *Id.*

¹³¹ 431 U.S. 678 (1977).

¹³² *Lawrence*, 539 U.S. at 566.

¹³³ *Id.*

¹³⁴ *Id.* at 566-71.

¹³⁵ *Id.* at 566-73.

¹³⁶ *Id.* at 566.

¹³⁷ *Id.* at 566-73.

¹³⁸ *Lawrence*, 539 U.S. at 567-70.

¹³⁹ *Id.* at 568.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 568-69.

¹⁴² *Id.* at 569-70.

protecting any person forced to endure such conduct unwillingly.¹⁴³ “[T]he concept of the homosexual as a distinct category of person did not emerge until the late 19th century.”¹⁴⁴ Further, up until the 1970s, no state had singled out homosexual conduct for criminal prosecution, and since then, only nine have done so.¹⁴⁵ Thus, the *Lawrence* Court concluded that the *Bowers* Court mistakenly considered in “religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family” when it contemplated the historical *legal* treatment of homosexual sodomy.¹⁴⁶ Relying on *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁴⁷ the *Lawrence* Court held that the majority of a state’s citizens might not use political power to impose moral beliefs on all citizens of that state through use of criminal power.¹⁴⁸ The Court stated, “Our obligation is to define the liberty of all, not to mandate our own moral code.”¹⁴⁹

Significantly, the Court considered our country’s *current* treatment of intimate relations between persons of the same sex.¹⁵⁰ The Court stated that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”¹⁵¹ Focusing on relatively recent laws and traditions in American society,¹⁵² the Court recognized “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹⁵³ In addressing the reaction to the *Bowers* decision, the Court noted that the number of states with laws prohibiting sodomy had halved since the *Bowers* decision (from 25 to 13), and those States that continued to ban the conduct failed to enforce the laws against consenting adults acting in private.¹⁵⁴

Moreover, in the decisions following *Bowers*, the Court itself has

¹⁴³ *Id.*

¹⁴⁴ *Lawrence*, 539 U.S. at 568 (citations omitted).

¹⁴⁵ *Id.* at 570.

¹⁴⁶ *Id.* at 571.

¹⁴⁷ 505 U.S. 833 (1992).

¹⁴⁸ *Lawrence*, 539 U.S. at 571.

¹⁴⁹ *Id.* (quoting *Casey*, 505 U.S. at 850).

¹⁵⁰ *Id.* at 572.

¹⁵¹ *Id.* at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Lawrence*, 539 U.S. at 573.

failed to impose the narrow definition of liberty set forth in *Bowers*.¹⁵⁵ For example, in *Casey*, the Court emphasized respect for individual autonomy in making personal choices and reaffirmed the magnitude of liberty under the Due Process Clause.¹⁵⁶ The *Casey* decision provided additional support for affording constitutional protection to various personal decisions including those related to family relationships.¹⁵⁷ Furthermore, in *Romer v. Evans*, the Court announced the unconstitutionality of an amendment to the Colorado constitution that deprived “persons who were homosexuals, lesbians, or bisexual either by ‘orientation, conduct, practices or relationships’”¹⁵⁸ of protection under state antidiscrimination laws. The *Romer* Court invalidated the amendment on the ground that it was “born of animosity toward the class affected” and thus, not rationally related to any legitimate government purpose.¹⁵⁹

Recognizing that the decisions in *Casey* and *Romer* tested the foundations of *Bowers*,¹⁶⁰ the *Lawrence* Court continued to review other sources of criticism. For example, the Court noted that five separate states had refused to follow *Bowers* in interpreting provisions in their own constitutions.¹⁶¹ Additionally, the Court took notice of the substantial legal scholarship that disapproved of numerous aspects of *Bowers*’ reasoning.¹⁶²

Further, the Court acknowledged recent decisions on similar issues by courts outside of the United States.¹⁶³ Referring to a case decided by the European Court of Human Rights that invalidated a law in Northern Ireland criminalizing consensual homosexual conduct,¹⁶⁴ the Court argued that, since the decision by the European Court of Human Rights was binding on all members of the Council

¹⁵⁵ *Id.* at 573-74.

¹⁵⁶ *Id.* at 574 (citing *Casey*, 505 U.S. at 851).

¹⁵⁷ *Id.* at 573-74 (citing *Casey*, 505 U.S. at 851) (emphasis added).

¹⁵⁸ *Id.* at 574 (quoting *Romer*, 517 U.S. at 624).

¹⁵⁹ *Id.* (quoting *Romer*, 517 U.S. at 634).

¹⁶⁰ *Lawrence*, 539 U.S. at 576.

¹⁶¹ *Id.* at 576 (citing *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)).

¹⁶² *Id.* (citing CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT* 81-84 (1991); RICHARD A. POSNER, *SEX AND REASON* 341-50 (1992)).

¹⁶³ *Id.* at 573.

¹⁶⁴ *Id.* (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) P 52).

of Europe, the *Bowers* Court wrongly concluded that Western civilization traditionally condemned homosexual sodomy.¹⁶⁵ The Court also noted that other nations have accepted, as an integral part of human freedom, the right of gay and lesbian adults to partake in consensual intimate conduct.¹⁶⁶

Thus, for the aforementioned reasons, the *Lawrence* Court overturned *Bowers* and found that the Texas law criminalizing homosexual sodomy unconstitutionally intruded upon the liberties protected by the Fourteenth Amendment.¹⁶⁷

B. Justice O'Connor's Concurrence

Justice O'Connor concurred in the judgment, but rather than relying on the Due Process Clause of the Fourteenth Amendment, the Justice used the Equal Protection Clause to find the Texas law unconstitutional.¹⁶⁸ Justice O'Connor first established that government legislation classifying individuals based on homosexuality or homosexual conduct should be scrutinized under rational basis review.¹⁶⁹ Justice O'Connor then determined, however, that the law's blatant objective to harm gays and lesbians demanded a more searching look into the state's defense of the equal protection challenge.¹⁷⁰ The Court has "consistently held [] that some objectives, such as a bare . . . desire to harm a politically unpopular group, are not legitimate state interests."¹⁷¹ Therefore, Justice O'Connor refused to defer to the state and, instead, determined that the state merely used the promotion of morality as a pretext for animosity towards gays and lesbians.¹⁷²

Justice O'Connor further explained that the Court has "been

¹⁶⁵ *Id.* (noting that at the time of the *Dudgeon* decision, there were twenty-one member nations of the Council of Europe; now there are forty-five).

¹⁶⁶ *Lawrence*, 539 U.S. at 576-77 (citing Brief for Mary Robinson et al. as Amici Curiae at 11-12).

¹⁶⁷ *Id.* at 578.

¹⁶⁸ *Id.* at 579.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

¹⁷¹ *Id.* (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotations omitted). To further support this proposition, Justice O'Connor also cited to *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985) and *Romer*, 517 U.S. at 632. *Id.*

¹⁷² *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.”¹⁷³ Justice O’Connor asserted that “[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”¹⁷⁴ Thus, Justice O’Connor found that the Texas law violated the Equal Protection Clause of the Fourteenth Amendment.¹⁷⁵

Finally, although Justice O’Connor found the Texas classification unconstitutional, the Justice pointed to a possible distinction between this particular legislation and other possible legislation that classified individuals on the basis of homosexuality or homosexual conduct.¹⁷⁶ Justice O’Connor seemed particularly concerned with the criminal conviction of gays and lesbians,¹⁷⁷ recognizing the detrimental consequences that would result from such a conviction.¹⁷⁸ Despite Justice O’Connor’s potential willingness to tolerate discrimination under certain circumstances, in this case, Justice O’Connor found that the law’s classification of gays and lesbians violated the Constitution.

C. Justice Scalia’s Dissent

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.¹⁷⁹ Discussing the importance of *stare decisis* and the difficult burden that must be met in order to depart from previous decisions, the dissent faulted the Court for overruling the *Bowers* decision.¹⁸⁰ Justice Scalia then criticized the Court for overruling the ultimate judgment in *Bowers*, while failing to declare a fundamental right to engage in homosexual sodomy.¹⁸¹ The dissent

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 582 (O’Connor, J., concurring).

¹⁷⁵ *Id.* at 581 (O’Connor, J., concurring) (“The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct – and only that conduct – subject to criminal sanction.”).

¹⁷⁶ *Id.* at 585 (O’Connor, J., concurring).

¹⁷⁷ *Id.* (“A law branding one class of persons as criminal solely based on the State’s moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.”).

¹⁷⁸ *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring).

¹⁷⁹ *Id.* at 586 (Scalia, J., dissenting).

¹⁸⁰ *Id.* at 586-92 (Scalia, J., dissenting).

¹⁸¹ *Id.* at 586 (Scalia, J., dissenting) (“Though there is discussion of fundamental

expressed considerable concern for the “massive disruption of the current social order . . . [that] the overruling of *Bowers* entails.”¹⁸²

Justice Scalia also rejected the Court’s analysis of the historical treatment of sodomy.¹⁸³ Disagreeing with the Court’s narrow approach,¹⁸⁴ the dissent, instead, suggested that the appropriate inquiry was whether *sodomy*, rather than *homosexual sodomy*, had been criminalized historically.¹⁸⁵

Next, Justice Scalia chided the Court for relying on current trends in American society and more specifically, the societies of other nations, thereby departing from traditional substantive due process analysis.¹⁸⁶ The dissent disputed the notion of relying on an emerging awareness within society as a factor in determining the constitutionality of a statute and argued that such an awareness does not establish a fundamental right.¹⁸⁷ Additionally, Justice Scalia adamantly rejected the application of foreign trends and laws to American laws and asserted that “[c]onstitutional entitlements do not spring into existence . . . as the Court seems to believe, because *foreign nations* decriminalize conduct.”¹⁸⁸

Noting the numerous departures from traditional Supreme Court jurisprudence, the dissent then accused the Court of supporting the “homosexual agenda.”¹⁸⁹ The dissent opined that “[i]t is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”¹⁹⁰

Finally, the dissent expressed concern about the far-reaching

propositions and fundamental decisions, nowhere does the Court’s opinion declare that homosexual sodomy is a fundamental right under the Due Process Clause”) (internal quotations omitted).

¹⁸² *Id.* at 591 (Scalia, J., dissenting).

¹⁸³ *Id.* at 590-91 (Scalia, J., dissenting).

¹⁸⁴ *Lawrence*, 539 U.S. at 591 (Scalia, J., dissenting).

¹⁸⁵ *Id.* at 596 (Scalia, J., dissenting) (“[O]ur Nation has a longstanding history of laws prohibiting *sodomy in general* – regardless of whether it was performed by same-sex or opposite-sex couples.”) (citing *Bowers*, 478 U.S. at 192-94) (emphasis in original).

¹⁸⁶ *Id.* at 593-98 (Scalia, J., dissenting).

¹⁸⁷ *Id.* at 598 (Scalia, J., dissenting).

¹⁸⁸ *Id.* “The Court’s discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans.’” *Id.* (quoting *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).

¹⁸⁹ *Id.* at 602 (Scalia, J., dissenting).

¹⁹⁰ *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

implications the Court's holding may potentially have on other laws that classify on similar grounds.¹⁹¹ Justice Scalia stated, "This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."¹⁹²

IV. USING *LAWRENCE* TO INVALIDATE PROHIBITIONS ON GAY AND LESBIAN ADOPTION

A. *Substantive Due Process*

"In a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad indeed."

– Justice Potter Stewart¹⁹³

The Due Process Clause of the Fourteenth Amendment prohibits state governments from depriving any individual of "life, liberty, or property without due process of law."¹⁹⁴ In coming to its decision, the *Lawrence* Court deviated substantially from traditional substantive due process analysis. The considerable changes in the Court's analysis may enable gays and lesbians to successfully convince the Court to declare that certain liberties pertaining to family, ordinarily denied to them, are fundamental.¹⁹⁵

In interpreting the Due Process Clause of the Fourteenth Amendment, the Court has proclaimed certain liberties "fundamental rights."¹⁹⁶ Once the Court makes such a proclamation, the Court analyzes under strict scrutiny any government intrusion

¹⁹¹ *Id.* at 601 (Scalia, J., dissenting).

¹⁹² *Id.*

¹⁹³ *Roe v. Wade*, 410 U.S. 113, 168 (1973) (Stewart, J., concurring).

¹⁹⁴ U.S. CONST. amend. XIV, § 1.

¹⁹⁵ The Court has already declared a broad right to family autonomy. *See Santosky v. Kramer*, 455 U.S. 745 (1982) (articulating that parents have a fundamental right to custody of their children); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (recognizing a broad fundamental right to keep a family together that includes an extended family); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (acknowledging a fundamental right to control the upbringing of one's children); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing the right to marry as a fundamental right); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (asserting a fundamental right to control the upbringing of one's children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (broadly defining "liberty" to protect basic aspects of family autonomy). With the current shift in substantive due process analysis, the Court may hesitate to find interests offered by the government compelling when those interests are rooted in discrimination against, and misconceptions of, gays and lesbians.

¹⁹⁶ CHEMERINSKY, *supra* note 11, at 762.

into these fundamental rights.¹⁹⁷ Thus, the government must “present a compelling interest to justify [the] infringement” as well as “show that the law is *necessary* to achieve [that] objective.”¹⁹⁸ Since this burden proves extraordinarily difficult to overcome,¹⁹⁹ the Court will invalidate almost all legislation infringing upon fundamental rights.

Traditionally, to declare a right fundamental, the Court has looked at whether that right was “deeply rooted in this Nation’s history and tradition.”²⁰⁰ Accordingly, the Court looks at our country’s historical legal and social treatment of the right at issue.²⁰¹ Occasionally, the Court will look at the historical treatment of a broader right in order to find a more narrow right “deeply rooted” in our country’s history.²⁰² Significantly, the Court has employed this form of analysis in more recent decisions.²⁰³ In *Griswold*, the Court focused on the broad right to privacy in marriage in order to find fundamental the more narrow right to use contraceptives.²⁰⁴ Similarly, in *Loving*, the Court focused on the broad right to marry in order to find fundamental the more narrow right to marry interracially.²⁰⁵ The Court has also implied that substantive due process should protect rights that ensure conditions favorable to an individual’s pursuit of happiness and secure an individual’s right to be let alone.²⁰⁶

Importantly, the Court looks to the Framers’ intent when expanding upon the protections guaranteed by the Constitution.²⁰⁷

¹⁹⁷ *Id.* Generally, all other rights not deemed fundamental will be analyzed under rational basis review. *Id.*

¹⁹⁸ *Id.* at 767 (emphasis in original).

¹⁹⁹ *Id.* at 645 n.17 (citing Professor Gerald Gunther as describing strict scrutiny as “strict in theory and fatal in fact.” *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

²⁰⁰ CHEMERINSKY, *supra* note 11, at 765 (quoting *Moore*, 431 U.S. at 503). See also *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (asserting that fundamental rights are those “rooted in the traditions and conscience of our people . . .”).

²⁰¹ *Moore*, 431 U.S. at 503 (“Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.’”) (quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)).

²⁰² See CHEMERINSKY, *supra* note 11, at 765 (discussing “the question of the abstraction at which the right is stated”).

²⁰³ See *Griswold*, 381 U.S. at 486; *Loving*, 388 U.S. at 12.

²⁰⁴ *Griswold*, 381 U.S. at 486.

²⁰⁵ *Loving*, 388 U.S. at 12.

²⁰⁶ *Griswold*, 381 U.S. at 494.

²⁰⁷ CHEMERINSKY, *supra* note 11, at 15-25.

The Framers drafted the U.S. Constitution on the fundamental underlying premise that individuals enjoy the freedom to choose for themselves how to lead their own lives and have “the right to be let alone.”²⁰⁸ Furthermore, as Chief Justice John Marshall explained, “We must never forget that it is a constitution we are expounding . . . [A] constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”²⁰⁹ Thus, while the Court must protect the integrity of the Constitution by refraining from acknowledging whimsical shifts in societal preferences, the Court must also be willing to incorporate authentic changes in American society into its interpretation of which liberties the Constitution protects.

The *Lawrence* decision illustrated the Court’s acknowledgment that such an authentic change is currently occurring in our society. The Court’s willingness to recognize that laws may be based upon nothing more than animosity borne of stereotypes and misconceptions toward gays and lesbians may enable them to successfully challenge, under substantive due process, laws denying them the fundamental right to family autonomy.²¹⁰

In *Lawrence*, the Court deviated substantially from traditional substantive due process analysis. Most significantly, the Court considered the *current* treatment of intimate relations between persons of the same sex.²¹¹ The Court asserted that while a look at history and tradition should begin a substantive due process inquiry, some cases require further analysis.²¹² Thus, the Court took notice of more recent laws and trends in American society.²¹³ The Court pointed to an emerging awareness in this country recognizing the significant protection provided by the Due Process Clause to the private lives of adults, particularly regarding matters pertaining to sex.²¹⁴

In another divergence from traditional Supreme Court jurisprudence, the Court addressed society’s reaction to the *Bowers*

²⁰⁸ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

²⁰⁹ CHEMERINSKY, *supra* note 11, at 15-16 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819)).

²¹⁰ For a discussion on Justice Scalia’s dissent, see *infra* Part III C.

²¹¹ *Lawrence*, 539 U.S. at 572.

²¹² *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998)).

²¹³ *Id.*

²¹⁴ *Id.*

decision.²¹⁵ For example, the Court noted that five separate states have refused to follow *Bowers* in interpreting provisions in their own state constitutions.²¹⁶ Additionally, the Court observed a significant decrease in the number of states with laws prohibiting sodomy.²¹⁷ Furthermore, since *Bowers*, the Court has failed to apply a narrow definition of liberty in substantive due process cases and has, instead, adopted a broader view. For example, in *Casey*, the Court emphasized the breadth of liberty and protected individual autonomy in making personal choices.²¹⁸ Agreeing with *Casey*, the *Lawrence* Court asserted that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”²¹⁹

The Court further departed from traditional substantive due process analysis by considering alternative authorities, such as legal scholarship criticizing the analysis employed in *Bowers*²²⁰ and recent decisions on similar issues by foreign courts.²²¹ The Court placed particular emphasis on the recognition, by these foreign nations, that the right of gay and lesbian adults to engage in consensual intimate conduct is “an integral part of human freedom.”²²² This reference to foreign law in undertaking a substantive due process analysis, however, significantly deviated from traditional Supreme Court jurisprudence.²²³ Previously, the Court had restricted fundamental

²¹⁵ *Id.* at 572-76.

²¹⁶ *Id.* at 576 (citing *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)).

²¹⁷ *Lawrence*, 539 U.S. at 572-73.

²¹⁸ *Id.* at 573-74 (citing *Casey*, 505 U.S. at 851) (“The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”). See also, e.g., *Romer*, 517 U.S. at 624, 634 (finding, under rational basis review, that the state’s purported interest in denying persons who were “homosexuals, lesbians, or bisexual” protection under state antidiscrimination laws was “born of animosity toward the class of persons affected” and thus, not rationally related to any legitimate government purpose).

²¹⁹ *Id.* at 574.

²²⁰ *Id.* at 576 (citing CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT* 81-84 (1991); RICHARD A. POSNER, *SEX AND REASON* 341-350 (1992)).

²²¹ *Id.* at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981)).

²²² *Id.* at 576-77 (citing Brief for Mary Robinson et al. as Amici Curiae at 11-12).

²²³ “While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court . . . should not impose foreign moods, fads, or fashions on Americans.” *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in denial of certiorari), quoted in *Lawrence*, 539 U.S. at 598 (Scalia, J.,

rights to “those liberties that are deeply rooted in *this Nation’s* history and tradition.”²²⁴

These significant changes in Supreme Court substantive due process analysis provide the opportunity for gays and lesbians to convince the Court to broadly define certain fundamental liberties pertaining to family ordinarily denied to them. Because fundamental status turns on whether the Court articulates the right broadly or narrowly,²²⁵ gays and lesbians should urge the Court to determine that the fundamental right to privacy includes a broad right to family autonomy that includes the unique situation of same-sex couples seeking to adopt.

The concept of privacy contemplates the moral view embracing individual autonomy over societal conformity.²²⁶ Thus, the Court “protect[s] the family because it contributes so powerfully to the happiness of the individual, not because of a preference for stereotypical households.”²²⁷ Specifically, the Court “protect[s] the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition, not because of demographic considerations or the Bible’s command to be fruitful and multiply.”²²⁸ Thus, the Court should protect the rights of gays and lesbians to choose the form and nature of the intimate

dissenting).

²²⁴ CHEMERINSKY, *supra* note 11, at 765 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)) (internal citations omitted) (emphasis added). *See also* *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (asserting that fundamental rights are those “rooted in the traditions and conscience of our people . . .”).

²²⁵ *See* CHEMERINSKY, *supra* note 11, at 765 (“At a sufficiently general level of abstraction, any liberty can be justified as consistent with the nation’s traditions. At a very specific level of abstraction, few nontextual rights would be justified.”). *See also* *Lawrence*, 539 U.S. at 571-72 (explaining that the *Bowers* Court defined too narrowly the right at issue); *Bowers*, 478 U.S. at 188, 199 (majority held that the narrow right to engage in homosexual sodomy was not fundamental, while the dissent defined the right at issue as the broader, fundamental right to “be let alone”); *Moore v. City of East Cleveland*, 431 U.S. 494, 549-50 (1977) (White, J., dissenting) (recognizing that the Court can only “estimate” what is “deeply rooted” in the Nation’s history and traditions and stating that “[w]hat the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable”); *Griswold v. Connecticut*, 381 U.S. 479, 486, 527 (1965) (majority defined the fundamental right to privacy broad enough to encompass the right to marriage, while the dissent defined the right at issue narrowly as the right to use contraceptives and thus, not fundamental).

²²⁶ *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting) (internal quotations omitted).

²²⁷ *Id.* at 205 (Blackmun, J., dissenting).

²²⁸ *Id.*

relationships that would constitute their families. The fact that these relationships may differ from the traditional concept of family should not enable states to deny gays and lesbians the freedom to choose for themselves. “[Freedom] to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”²²⁹ In a society as diverse as ours, there exist many ways to conduct relationships, and the richness of these relationships will come from “the freedom of an individual [] to *choose* the form and nature of these intensely personal bonds.”²³⁰ The decision in *Lawrence* depicts the Court’s understanding of the differences that exist in our country as well as the Court’s willingness to define fundamental rights broadly in order to protect these diversities. Therefore, the *Lawrence* decision should encourage gays and lesbians to urge the Court to recognize the fundamental interest *all* individuals have in controlling the nature of their personal relationships with others.

B. Equal Protection

“Our Constitution . . . neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”

– Justice John Harlan²³¹

Gays and lesbians looking to become adoptive parents may seek protection under the Equal Protection Clause of the Fourteenth Amendment.²³² While the Court has previously failed to categorize homosexuals as a suspect class,²³³ the Court’s decisions in *Romer*²³⁴ and *Lawrence*²³⁵ depict a move toward recognizing the rampant animosity toward those individuals. Thus, gays and lesbians may be able to persuade the Court to rethink its position on the classification of homosexuals as a group and the applicable level of scrutiny.

When engaging in equal protection analysis, the Court evaluates

²²⁹ *Id.* at 211 (Blackmun, J., dissenting) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943)).

²³⁰ *Id.* at 205 (Blackmun, J., dissenting) (emphasis in original).

²³¹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

²³² U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

²³³ *Lofton*, 157 F. Supp. 2d at 1382 (asserting that all circuits to address this issue have failed to articulate a suspect class for gays and lesbians).

²³⁴ *Romer*, 517 U.S. 620.

²³⁵ *Lawrence*, 539 U.S. 558.

laws classifying gays and lesbians under the rational basis test.²³⁶ Under rational basis review, the Court will uphold a law if it is “rationally related to a legitimate government purpose.”²³⁷ Almost always, rational basis review results in a loss for the challenger. This is due in large part to the extraordinary deference granted to the government under rational basis:

U.S. Const. amend. XIV permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.²³⁸

Despite this enormously deferential standard, the Court has recently used rational basis review to strike down laws classifying gays and lesbians.²³⁹ In *Romer*, the Court determined that a Colorado constitutional amendment furthered no purpose other than “animosity toward [gays and lesbians].”²⁴⁰ Therefore, the Court refused to accept as rational any of the justifications offered by the state. Likewise, the *Lawrence* Court invalidated a law that classified gays and lesbians.²⁴¹ Although the Court ultimately employed substantive due process analysis, the Court first acknowledged the possible invalidity of the Texas law under equal protection.²⁴² Though citing to *Romer*, the Court declined to strike down the Texas law on equal protection grounds due to fear that a new law might be drawn up differently to encompass all individuals while still

²³⁶ CHEMERINSKY, *supra* note 11, at 645-46 (“Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet. All laws not subjected to strict or intermediate scrutiny are evaluated under the rational basis test.”).

²³⁷ *Id.* at 518 (citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952)) (emphasis in original).

²³⁸ *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961), *quoted in* CHEMERINSKY, *supra* note 11, at 651.

²³⁹ *See, e.g., Romer*, 517 U.S. at 620; *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring).

²⁴⁰ *Romer*, 517 U.S. at 634.

²⁴¹ *Lawrence*, 539 U.S. 558.

²⁴² *Id.* at 574-75.

prohibiting the same conduct.²⁴³ In choosing to base its analysis in substantive due process, the Court recognized that “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”²⁴⁴ Thus, appreciating the “stigma [that] might remain even if [the law] were not enforceable as drawn for equal protection reasons,” the Court adopted a substantive due process approach.²⁴⁵

It was Justice O’Connor, in her concurring opinion in *Lawrence*, who used rational basis review to invalidate the Texas law.²⁴⁶ Instead of merely deferring to the state, Justice O’Connor determined that the Texas law demanded “a more searching” inquiry.²⁴⁷ The Justice explained that “[w]hen a law exhibits such a desire to harm a politically unpopular group, [the Court] ha[s] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”²⁴⁸ Thus, stating that the Court has “consistently held [] that some objectives, such as a bare . . . desire to harm a politically unpopular group, are not legitimate state interests,” Justice O’Connor evaluated the asserted government purpose and decided that the state merely used “the promotion of morality” as pretext for animosity toward gays and lesbians.²⁴⁹ Importantly, Justice O’Connor focused on the restraints the Texas law placed on “personal relationships,” asserting that the Court “ha[s] been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.”²⁵⁰

This recognition of the animosity and prejudice rooted in state laws classifying gays and lesbians lends support to them in the fight to gain rights within their families. What could possibly be a more “personal relationship” than that between a parent and a child? Regarding adoption laws, states argue that classifications are

²⁴³ *Id.* at 575.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 579 (O’Connor, J., concurring).

²⁴⁷ *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 582 (O’Connor, J., concurring) (quoting *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotations omitted). To further support this proposition, Justice O’Connor also cited to *Cleburne Living Center*, 473 U.S. at 446-47, and *Romer*, 517 U.S. at 632-33. *Id.* at 580 (O’Connor, J., concurring).

²⁵⁰ *Id.*

necessary to further the best interests of the child. Numerous studies, however, have shown that children raised by gays and lesbians show no appreciable differences from children raised by heterosexuals.²⁵¹ Moreover, many states, including those that withhold adoption rights from gays and lesbians, approve gays and lesbians as foster care parents.²⁵² The irony is extraordinary: These states find that having gays and lesbians as temporary care-givers serves the best interests of the child, but determine that allowing gays and lesbians to become full-time legal parents of those children threatens those same interests of the child.

Gays and lesbians seeking to become adoptive parents should argue that the laws denying them that opportunity “inhibit[] personal relationships.”²⁵³ Thus, the Court should find those laws unconstitutional even under rational basis review. As current research demonstrates, gays and lesbians are just as capable as heterosexuals of providing children with safe and stable homes.²⁵⁴ “Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a disease or disorder.”²⁵⁵ Children raised by gay or lesbian parents do not exhibit an increased likelihood of becoming gay or lesbian themselves.²⁵⁶ Children with gay and lesbian parents do not display any significant differences in psychological health from children with heterosexual parents.²⁵⁷ Children placed with gay or lesbian parents are not subject to increased risk of sexual abuse or molestation.²⁵⁸ Most importantly, homosexual conduct is no longer subject to criminal punishment.²⁵⁹

²⁵¹ See *supra* note 4.

²⁵² See *infra* Part II B.

²⁵³ *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring).

²⁵⁴ See *supra* note 4.

²⁵⁵ *Bowers*, 478 U.S. at 203 n.2 (Blackmun, J., dissenting) (internal quotations omitted). The American Psychiatric Association (APA) removed homosexuality from its list of mental disorders. See AMERICAN PSYCHIATRIC ASSOCIATION, D.S.M. III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 281-82, 380 (3d ed. 1980) (noting that homosexuality implies no impairment in judgment, stability, reliability or general social or vocational activities).

²⁵⁶ Polikoff, *supra* note 3, at 545. Further, without the stigma of immorality attached to being gay or lesbian, what would be so terrible about a child becoming gay or lesbian?

²⁵⁷ *Id.* at 561-67.

²⁵⁸ *Id.* at 545.

²⁵⁹ See *Lawrence*, 539 U.S. 558. Eliminating the possibility of criminal penalties for engaging in homosexual activity removes the stigma of immorality associated with such activity.

Therefore, any law or policy relying on one of these misconceptions as a basis for denying gays or lesbians the right to adopt has failed to show even a rational basis for such discrimination.

Further, many states admit that gays and lesbians serve the best interests of the child as temporary parents by approving them as foster care parents.²⁶⁰ States cannot offer any rational reason for approving gays and lesbians as foster parents and then simultaneously denying them the rights and responsibilities of full-time legal parents. Only animosity towards gays and lesbians can explain the blatant discrimination in which these laws engage. The Court cannot uphold laws that “exhibit[] such a desire to harm a politically unpopular group.”²⁶¹ Thus, even under rational basis review, the Court should reject government arguments that denying gays and lesbians the right to adopt serves the best interests of the child, and the Court should find those laws unconstitutional.

Alternatively, the Court could label gays and lesbians a suspect class, thereby subjecting to strict scrutiny any legislation classifying gays and lesbians.²⁶² Under strict scrutiny, the Court will uphold a law only “if it is necessary to achieve a compelling government purpose.”²⁶³ Originally adopting strict scrutiny for those laws that discriminated on the basis of race, “[t]he Court[] emphasized that the long history of racial discrimination makes it very likely that racial classifications will be based on stereotypes and prejudices.”²⁶⁴ In explaining the need for strict scrutiny, Chief Justice Burger wrote: “Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns.”²⁶⁵

Similarly situated, gays and lesbians could point out that many of the reasons used for discriminating against them are also rooted in stereotypes and prejudice.²⁶⁶ More and more studies have illustrated the breadth of misconceptions relied upon by legislatures and judges

²⁶⁰ See Lambda Legal, *State Adoption Laws*, *supra* note 14.

²⁶¹ *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring).

²⁶² See Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 975 (2003) (“One day, it is fair to speculate, our courts will hold that a legal disadvantage based on sexual orientation is a ‘suspect’ classification.”).

²⁶³ CHEMERINSKY, *supra* note 11, at 519 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Sherbert v. Verner*, 374 U.S. 398 (1963)) (emphasis in original).

²⁶⁴ *Id.* at 669.

²⁶⁵ *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

²⁶⁶ Polikoff, *supra* note 3, at 544.

in denying gays and lesbians the right to adopt.²⁶⁷ Judges have expressed concern that children raised by gay or lesbian parents will grow up to be gay²⁶⁸ or emotionally unstable.²⁶⁹ Other judges have voiced reservations about subjecting a child to an increased risk of sexual abuse or molestation by placing that child with gay or lesbian parents.²⁷⁰ The error in these views has been shown by the numerous scientific studies disputing and contradicting each of these misconceptions.²⁷¹ Most significant to this discussion, however, is that most judges that have viewed homosexuality negatively have focused on the criminality of the conduct in which the parent engaged.²⁷² After *Lawrence*, this can no longer be a factor in the analysis.

The sheer magnitude of legal scholars that find it necessary to dispute the same misconceptions time and time again illustrates that certain views regarding gays and lesbians result from widespread stereotypes and prejudices.²⁷³ While America did not develop laws specifically aimed at same-sex couples until the last third of the

²⁶⁷ See *supra* note 4.

²⁶⁸ See Opinion of the Justices, 525 A.2d 1095, 1099 (N.H. 1987) (“Although . . . a number of studies . . . find no correlation between a homosexual orientation of parents and the sexual orientation of their children, . . . given the reasonable possibility of environmental influences, we believe that the legislature can rationally act on the theory that a role model can influence the child’s developing sexual identity.”).

²⁶⁹ *Pulliam v. Smith*, 501 S.E.2d 898, 902 (N.C. 1998) (finding that homosexual activity between the children’s father and his same-sex partner “will likely create emotional difficulties for the two minor children”).

²⁷⁰ See *J.L.P.(H). v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) (affirming the denial of overnight visitation to a gay father and stating – contrary to the expert testimony produced at that trial – that “homosexual molestation is probably, on an absolute basis, more prevalent . . . [and] the father’s acknowledgment that he was living with an avowed homosexual certainly augurs for potential harm to the child . . .”). See also *In re Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830, 838 (Ariz. 1986) (addressing the trial court’s finding that there exists a “correlation between pedophiles and either heterosexuality or homosexuality”).

²⁷¹ See *supra* notes 255–258.

²⁷² See *Ex parte J.M.F.*, 730 So. 2d at 1196 n.5 (stating that “homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state”); *Pulliam*, 501 S.E.2d at 905 (Webb, J., dissenting) (explaining that “the majority opinion . . . recites actions by the [gay father] which the majority considers to be distasteful, immoral, or even illegal”); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (awarding custody to child’s grandparent rather than child’s lesbian mother based in part on fact that “[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth”).

²⁷³ Polikoff, *supra* note 3, at 544-45 (“The tenacity of these myths is evident from the continuous attention they receive in the scholarly legal literature concerning lesbian and gay parenting.”).

twentieth century,²⁷⁴ homosexual conduct has been condemned as immoral for centuries.²⁷⁵ This long history of animosity toward gays and lesbians “makes it very likely that [such] classifications will be based on stereotypes and prejudices.”²⁷⁶ Furthermore, many states have asserted the promotion of morality as a state interest supporting laws discriminating against gays and lesbians.²⁷⁷ Thus, “[c]lassifying persons according to their [sexuality] is more likely to reflect [] prejudice than legitimate public concerns.”²⁷⁸ This continuous reliance by society on stereotypes and fallacies offers ammunition to gays and lesbians looking to persuade the Court to create a suspect class.

Should the Court deem homosexuals a suspect class, any legislation or administration of legislation classifying gays and lesbians will have to overcome the rigorous hurdles of strict scrutiny.²⁷⁹ The Court will demand that the states show a compelling governmental interest for the classification and that the interest could not be achieved through any less discriminatory means.²⁸⁰ This level of scrutiny would prove fatal to almost all state legislation,²⁸¹ thus granting gays and lesbians a huge victory.

V. CONCLUSION

Courts purport to serve the best interests of the child. However, the families that these children belong to will not change simply because a court refuses to recognize one partner as a legal parent. These children will continue to live in the same homes as their same-sex parents, continue to develop relationships with their same-sex parents and continue, above all else, to consider their same-sex

²⁷⁴ *Lawrence*, 539 U.S. at 570.

²⁷⁵ *Id.* at 571.

²⁷⁶ CHEMERINSKY, *supra* note 11, at 669.

²⁷⁷ See *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) (“Texas attempts to justify its law, and the effects of the law, by arguing that the statute . . . furthers the legitimate governmental interest of the promotion of morality.”); *Bowers*, 478 U.S. at 196 (asserting “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable”); *Lofton*, 157 F. Supp. 2d at 1382 (“The first [asserted purpose] is that it reflects the State’s moral disapproval of homosexuality . . .”).

²⁷⁸ *Palmore*, 466 U.S. at 432 (1984).

²⁷⁹ CHEMERINSKY, *supra* note 11, at 645.

²⁸⁰ *Id.*

²⁸¹ *Id.* (citing Professor Gerald Gunther as describing strict scrutiny as “strict in theory and fatal in fact.” *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

parents their family. Any misgivings a court expresses, even in good faith, about allowing a gay or lesbian partner to adopt will continue to exist despite the lack of legal standing of one parent.

“The [c]ourts should not confuse what they can and cannot do.”²⁸² They cannot stop gays and lesbians from forming families.²⁸³ Instead, “[w]hat courts can do is make individualized determinations of the best interests of children in the cases that come before them. They should do this free of the ignorance, hatred, [and] prejudice”²⁸⁴ that underlie society’s stereotypes and misconceptions regarding gays and lesbians.

With the Supreme Court’s recent decisions and the analyses employed therein, gays and lesbians may finally have the opportunity to end the discrimination and double standards that have plagued them throughout the years. In a society as diverse as this nation’s, there exist many ways to conduct relationships. The strength of those relationships comes from the uninhibited ability of an individual to choose the form and nature of those personal bonds. The *Lawrence* decision depicts the Court’s understanding and willingness to protect the differences that exist in our country. Using the substantive due process analysis employed in *Lawrence*, gays and lesbians may now argue that the expansive definition of liberty adopted by the Court encompasses a fundamental right to family autonomy broad enough to include same-sex parents seeking to adopt.

Likewise, using the equal protection analysis adopted by the *Lawrence* concurrence, gays and lesbians may successfully urge the Court to employ a more searching inquiry into the purported state interests offered in support of denying gays and lesbians the right to adopt while simultaneously granting those same rights to similarly situated heterosexuals. As Justice O’Connor noted, the Court “ha[s] been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where . . . the challenged legislation inhibits personal relationships.”²⁸⁵

As depicted by *Lawrence*, the Court may be ready to acknowledge that the fundamental right to privacy is broad enough to include even non-traditional lifestyles. Further, the Court’s recognition that the discriminating law would not likely pass equal protection analysis

²⁸² Polikoff, *supra* note 3, at 572.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring).

as well as the concurrence's refusal to simply defer to the state signals that the Court may now apply a heightened standard of review to laws that discriminate against gays and lesbians based in large part on morality. Thus, the *Lawrence* Court's willingness to depart from traditional Supreme Court jurisprudence provides encouragement to gays and lesbians in their effort to convince the Court to invalidate adoption laws and policies denying them the right to adopt.