NOTE

Lofton v. Kearney: Equal Protection Mandates Equal Adoption Rights

Ann M. Reding[*]

TABLE OF CONTENTS

---

[*] Notes & Comments Editor, U.C. Davis Law Review, Volume 36. J.D. Candidate, U.C. Davis School of Law, 2003. B.A., Columbia University, 2000. Thanks to Tiffany King, Melanie Shender, Liz Ferrall, Lauren Arnault, and other members of the U.C. Davis Law Review for their helpful edits and suggestions. Special thanks to my family and friends for their love and support.

INTRODUCTION

Steven Lofton (Lofton), a Floridian, is a registered pediatric nurse and a certified long-term foster parent.[1] Lofton has been a compassionate and loving father to his three foster children, all of whom tested positive for HIV at birth.[2] One of the children, John Doe (Doe), successfully sero-converted[3] during infancy, meaning he no longer tests positive for HIV. The state acknowledged Lofton's phenomenal parenting achievements by granting him an Outstanding Foster Parenting Award. Lofton wants to adopt Doe, now ten years old, but Florida's laws prohibit this. Why would the state deny a man from adopting a child he has raised since infancy? Because Lofton is gay and Florida does not allow homosexuals to adopt.[4]

This Note will address the equal protection issues that arise in gay adoption cases. The Equal Protection Clause of the Fourteenth Amendment demands that constitutional rights apply equally to all persons under like circumstances.[5] It concerns state action that has the effect of singling out certain persons or groups of people for special benefits or burdens.[6] Generally, the state must justify both why a group

---

[1] These facts are based on *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

[2] HIV, or Human Immunodeficiency Virus, is a retrovirus and the etiologic agent of acquired immunodeficiency syndrome, or AIDS. *See* STEDMAN'S MEDICAL DICTIONARY 1942-43 (26th ed. 1995).

[3] Sero-conversion is the development of detectable specific antibodies in blood serum of the body as the result of infection or immunization. *See* MEDICAL DICTIONARY, *supra* note 2, at 1602.

[4] *See* FLA. STAT. ANN. § 63.042(3) (West 2003).

[5] *See* U.S. CONST. amend. XIV, § 1; *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 681 (1966) (Harlan, J., dissenting) (stating that Equal Protection Clause "prevents States from arbitrarily treating people differently under their laws"); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (holding that all persons similarly situated be treated alike); Hayes v. Missouri, 120 U.S. 68, 71-72 (1887) (stating that Equal Protection Clause "requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed"). *But see* Tigner v. Texas, 310 U.S. 141, 147 (1940) (stating that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.").

[6] *See, e.g.*, Romer v. Evans, 517 U.S 620, 621 (1996) (stating that Court will uphold laws

receives special treatment and the importance of the state interest involved.[7] The courts have used the Equal Protection Clause to protect individuals against discrimination based upon race, gender, and more recently, sexual orientation.[8] The clause has allowed more leeway, and has had more "bite" in the area of gay rights, than its Due Process Clause counterpart.[9] In addition, the Equal Protection Clause potentially offers minority groups a "constitutional jackpot," enabling these groups to challenge discriminatory policies across the board.[10]

Part I of this Note summarizes the history and evolution of the Equal Protection Clause and explores Florida's treatment of homosexuals in the area of adoption. Part II discusses the facts, procedure, and the court's reasoning in *Lofton v. Kearney*. Part III argues that the *Lofton* court erred in upholding Florida's law prohibiting homosexuals from adoption because the statute violates the Equal Protection Clause.

---

that neither target suspect classes nor burden fundamental rights); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (explaining that when legislation classifies by race, national origin, and alienage, courts subject such laws to strict scrutiny and sustain them only if they are sufficiently tailored to serve compelling state interests); *see also* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 245 (1997) (stating that under traditional Equal Protection Clause doctrine, states bear certain burdens of justification when singling out certain people).

[7] *See, e.g., Romer*, 517 U.S. at 621; Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that gender classifications must serve important government objectives and must be substantially related to achieve those objectives); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (holding that laws that classify on basis of race are subject to strict scrutiny and will be sustained only if they are suitably tailored to serve compelling state interest).

[8] *See, e.g., Romer*, 517 U.S. at 631-32, 635 (using Equal Protection Clause to invalidate Colorado amendment that discriminated against homosexuals); *Craig*, 429 U.S. at 210 (using Equal Protection Clause to invalidate statute that discriminated based on gender); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (using Equal Protection Clause to end racial segregation of schools).

[9] *See* William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1215-16 (explaining that Equal Protection Clause offers tremendous reward for groups that can persuade judges that classification defining their group is suspect). Specifically, homosexuals have successfully used the Equal Protection Clause as a tool to secure rights. *See, e.g., Romer*, 517 U.S. at 631-32, 635 (using Equal Protection Clause to strike down Colorado amendment that discriminated against homosexuals). For examples of the use of state equal protection provisions, see Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (finding equal protection violation of state constitution based on gender, in denial of same-sex marriages); Baker v. State, 744 A.2d 864, 867 (Vt. 1999) (holding that exclusion of same-sex couples from benefits and protections of marriage violates common benefits clause of state constitution).

[10] *See* Eskridge, *supra* note 9, at 1216.

I. LEGAL BACKGROUND

A. Equal Protection Clause

In 1868, Congress enacted the Equal Protection Clause of the Fourteenth Amendment to protect the rights of the newly freed slaves and their descendants, and to discourage class legislation.[11] Initially, the Equal Protection Clause did not create revolutionary change in the area of class-based discrimination.[12] Instead, the Clause evolved over the years into a more general protection of minority groups who suffer from discrimination.[13] Section one of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[14]

Section five of the Fourteenth Amendment gives Congress the power to enforce this provision.[15] Since the Amendment's adoption, the United States Supreme Court has developed three levels of judicial review[16] for Equal Protection cases: (1) strict scrutiny,[17] (2) heightened scrutiny,[18] and

---

[11] *See id.* at 1215 (citing Kenneth L. Karst, *The Supreme Court, 1976 Term-Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 11-17; Saunders, *supra* note 6, at 245).

[12] *See id.* at 1192-1200; *see also*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) (stating that Fourteenth Amendment was not originally understood to apply to suffrage, jury service, anti-miscegenation, or segregation).

[13] The Framers of the Constitution drafted the Fourteenth Amendment for the purpose of bridging the gap between the white majority and the newly freed African-American slaves. *See* Slaughter House Cases, 83 U.S. 36, 71-72 (1873). However, beginning in the 1940s, the Supreme Court began interpreting the Equal Protection Clause with the view of assuring all persons "the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1996). *See, e.g., Brown*, 347 U.S. at 490-94; Shelley v. Kraemer, 334 U.S. 1, 8-14 (1948).

[14] U.S. CONST. amend. XIV, § 1.

[15] *See id.* § 5.

[16] Judicial review is a court's power to review the factual or legal findings of lower courts and invalidate legislation and executive actions as unconstitutional. *See* BLACK'S LAW DICTIONARY 852 (7th ed. 1999).

[17] *See, e.g., Brown*, 347 U.S. at 492-93 (using strict scrutiny to desegregate schools); Korematsu v. United States, 323 U.S. 214, 216 (1944) (using strict scrutiny to uphold military order excluding all persons of Japanese ancestry from certain areas of West Coast).

[18] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197-98 (1976) (applying intermediate level

(3) rational basis.[19]

B. Three Levels of Judicial Review

1. Strict Scrutiny

When a challenged provision infringes on a "fundamental right," or a right explicitly set forth in the Constitution, the courts will subject the provision to strict scrutiny.[20] Courts will only uphold these laws if they are necessary to promote a compelling governmental interest.[21] Furthermore, courts will strike down these provisions unless the government can demonstrate that there is no less restrictive means of achieving the same compelling governmental purpose.[22]

Courts also apply strict scrutiny to legislation that affects a suspect class.[23] The Supreme Court takes several factors into consideration when it determines whether a group is "suspect." First, the Court considers if

---

review to strike down Oklahoma statute which forbade sale of 3.2% beer to males under twenty-one and to females under eighteen); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (using heightened level of review to strike down statute that preferred men over women as administrators of estates).

[19] *See, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 898 (1985) (applying rational basis test to invalidate Alabama statute that taxed out-of-state insurance companies at higher rate than in-state companies); Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) (upholding regulation restricting placement of advertising on vehicles using rational basis test).

[20] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 567-68 (1996) (stating that strict scrutiny applies to classifications affecting fundamental rights); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (stating that strict scrutiny applies to statutes that reflect fundamental rights).

[21] *See, e.g.*, Watkins v. United States Army, 875 F.2d 699, 728 (9th Cir. 1989) (Norris, J., concurring) (stating that the court may only uphold regulations that are necessary to promote compelling governmental interests); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that racial classifications are only constitutional if they further compelling government interests and are narrowly tailored); Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion) (stating that government must have compelling governmental interest for law to withstand strict scrutiny).

[22] *See, e.g., Bakke*, 438 U.S. at 357; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).

[23] *See, e.g.*, Michael M. v. Super. Ct., 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting) (stating that racial classifications are subject to strict scrutiny and presumed invalid because "there is seldom, if ever, any legitimate reason for treating citizens differently because of their race"); Korematsu v. United States, 323 U.S. 214, 216 (1944) (stating that courts must subject racial classifications to "most rigid scrutiny"). *But see* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (holding that mental retardation is not quasi-suspect classification).

the group has suffered a history of purposeful discrimination.[24] Second, the Court determines whether the discrimination embodies a gross unfairness that amounts to invidious discrimination.[25] Here the Court considers three factors: (1) whether the class is defined by a trait that does not bear a relation to the class's ability to perform or contribute to society;[26] (2) whether the class experiences unique disabilities because of prejudice or inaccurate stereotypes;[27] and (3) whether the trait defining the class is immutable.[28] Finally, the Court considers whether the group lacks the political power necessary to obtain redress from the government.[29] Thus far, the Supreme Court has deemed race, national origin, and alienage "suspect" classifications.[30]

The first cases interpreting the Fourteenth Amendment illustrated a narrow class-based approach.[31] Gradually, the Court applied strict scrutiny to legislation that reflected prejudice against discrete and insular minorities.[32] The Court emphasized that equal protection extended beyond the classification of African-Americans, and applied to

---

[24] *See Watkins*, 847 F.2d at 1345 (holding that homosexuals had suffered history of discrimination) (citing *Cleburne*, 473 U.S. at 441 (using history of discrimination as a reason why mentally disabled are protected); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (declining to treat classification based on age as suspect class); *Rodriguez*, 411 U.S. at 28 (holding that members of class had not been subjected to history of purposeful unequal treatment); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (plurality opinion) (identifying gender as suspect classification).

[25] *See Watkins*, 847 F.2d at 1345-46; *Rodriguez*, 411 U.S. at 17 (stating that state law must be examined to determine whether it rationally furthers some legitimate state goal and does not constitute invidious discrimination).

[26] *See Watkins*, 847 F.2d. at 1346 (quoting *Frontiero*, 411 U.S. at 686); *see also Cleburne*, 473 U.S. at 440-41 (stating that laws classifying by gender merit heightened scrutiny because sex does not bear relation to how people contribute to society).

[27] *See Murgia*, 427 U.S. at 313; *Rodriguez*, 411 U.S. at 28; *Watkins*, 847 F.2d at 1346.

[28] *See Watkins*, 847 F.2d at 1346 (citing *Cleburne*, 473 U.S. at 440-44; Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982); *Murgia*, 427 U.S. at 313; *Frontiero*, 411 U.S. at 685-87).

[29] *See id.* at 1348 (citing *Cleburne*, 473 U.S. at 441; *Plyler*, 457 U.S. at 216 n.14; *Rodriguez*, 411 U.S. at 28).

[30] *See Cleburne*, 473 U.S. at 440, *cited in* John Charles Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After* Bowers v. Hardwick, 31 B.C. L. REV. 375, 412 (1990); *see also* Trimble v. Gordon, 430 U.S. 762, 780-81 (1977) (Rehnquist, J., dissenting); *Frontiero*, 411 U.S. at 682.

[31] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 548-49 (1896) (upholding Louisiana law that required separate but equal accommodations on railroad trains traveling within state); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (holding city ordinance violated Equal Protection Clause because of its discriminatory impact on Chinese laundry owners).

[32] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). In *Carolene Products*, Justice Stone argued that states might be improperly infringing on constitutional rights when they restrict access to the political process or single out a group for disadvantageous treatment. *See id.*

other racial and ethnic groups as well.[33] Eventually, the Supreme Court expanded equal protection to protect against segregation of children in public schools[34] and to invalidate anti-miscegenation laws.[35] In 1967, the Supreme Court stated that the clear and central purpose of the Fourteenth Amendment was to eliminate all official sources of invidious racial discrimination in the United States.[36] The Court held that strict scrutiny applies whenever a statute affects a suspect class; if it does so, the state must have a compelling interest that makes the statute necessary.[37]

In *Palmore v. Sidoti*, the Supreme Court applied strict scrutiny to a child custody case.[38] In *Palmore*, a state court granted custody of a child to her white father because her white mother had remarried an African-American man.[39] The state argued that if the child remained with her mother and her African-American husband, she would suffer social stigmatization and be vulnerable to peer pressure.[40] The Supreme Court, however, reversed, holding that the law may not directly, or indirectly, give effect to such private prejudices.[41] The Court stated that racial prejudice cannot justify removing a child from her home.[42]

---

[33] *See id.*; *see also* Hayes, *supra* note 30, at 419-20 (noting that footnote four of *Carolene Products* also applied to prejudice against religious, national, and racial minorities).

[34] *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 441-42 (1968) (finding that maintaining segregated public schools post-*Brown* violates Constitution); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (using Equal Protection Clause to desegregate schools). This more progressive approach to equal protection only came about after apartheid had become a national embarrassment to the government and to whites. *See* Eskridge, *supra* note 9, at 1190 (citing Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997); Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980)).

[35] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding anti-miscegenation statute unconstitutionally infringed on right to marry). In *Loving*, the Court held that there was no compelling interest and the objective of the statute was to maintain white supremacy. *See id.* at 11.

[36] *See id.* at 10.

[37] *See id.* The statute in question must be necessary to a permissible state objective independent of discrimination. *Id.* at 11; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that racial classifications are only constitutional if narrowly tailored and further compelling government interests); Richmond v. J.A. Croson Co., 488 U.S 469, 494 (1989) (plurality opinion) (stating that government must have compelling governmental interest for law to withstand strict scrutiny).

[38] *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

[39] *See id.* at 430-31.

[40] *See id.*

[41] *See id.* at 433-34.

[42] *See id.* at 434.

2. Heightened Scrutiny

Quasi-suspect classifications are subject to an intermediate level of scrutiny.[43] The classification must be "substantially related" to an important state objective.[44] Courts often subject classifications based on gender and illegitimacy to this intermediate level of scrutiny.[45] The government clearly violates the Constitution when it invidiously classifies similarly situated people on the basis of immutable characteristics.[46] Therefore, racial classifications violate the Constitution because people of different races are often similarly situated.[47] On the other hand, while detrimental gender classifications are often unconstitutional, the Court recognizes they do not always violate the Constitution because there are some differences between males and females.[48]

Although the Supreme Court has repeatedly used strict scrutiny for racial classifications,[49] the Court generally applies heightened scrutiny to gender-based discrimination claims.[50] The Court has stated that the

---

[43] *See, e.g.*, J.E.B. v. Alabama, 511 U.S 127, 136 (1994) (holding that all gender-based classifications warrant heightened scrutiny); Reed v. Reed, 404 U.S. 71, 75 (1971) (subjecting gender-based classifications to heightened scrutiny). *But see* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-46 (1985) (holding that classification based on mental disabilities is not subject to heightened scrutiny).

[44] *See, e.g., Cleburne*, 473 U.S. at 440-46; Craig v. Boren, 429 U.S. 190, 199-200 (1976) (holding that classification by gender must be substantially related to achievement of important governmental objectives).

[45] *See J.E.B.*, 511 U.S at 136; *Cleburne*, 473 U.S. at 440; *Craig*, 429 U.S. at 199-200.

[46] *See, e.g.*, Michael M. v. Super. Ct., 450 U.S. 464, 477-78 (1981) (Stewart, J., concurring) (explaining that racial classifications by government always violate Constitution); *Cleburne*, 473 U.S. at 472 n.24 (stating that many immutable characteristics, such as height or blindness, are valid bases of governmental action under some circumstances).

[47] *See Michael M.*, 450 U.S. at 478 (citing Fullilove v. Klutznick, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting)).

[48] *See Michael M.*, 450 U.S. at 478.

[49] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny to invalidate anti-miscegenation statute); *Brown*, 347 U.S. at 483 (using strict scrutiny to desegregate schools); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to uphold military order excluding all persons of Japanese ancestry from certain areas of the West Coast).

[50] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (using quasi-scrutiny in holding that publicly operated men-only military academy violated equal protection); Craig v. Boren, 429 U.S. 190 (1976) (using quasi-suspect classification to strike down Oklahoma statute that prohibited sale of 3.2% beer to males under twenty-one and females under eighteen). In some gender cases, the Court has invalidated state statutes under the rational basis test. *See* Reed v. Reed, 404 U.S. 71 (1971). In others, the Court has been unclear in their test altogether. *See, e.g.* Rostker v. Goldberg, 453 U.S. 57 (1981) (excluding

enforcement of the Equal Protection Clause is necessary to prevent invidious discriminatory treatment.[51] Moreover, the Court does not tolerate sex-based classifications motivated by policies ridden with stereotypes and male supremacy.[52]

United States v. Virginia was the leading gender discrimination case of the 1990s.[53] In applying the equal protection analysis to *Virginia*, the Supreme Court held that the Virginia Military Institute, an all male college, must admit female cadets and afford women an equal opportunity, or shut its doors.[54] The Court held that only an "exceedingly persuasive justification" could justify gender-based discrimination.[55] The Court further stated that the justification for the classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[56]

3. Rational Basis Test

Courts apply minimal scrutiny to most classifications under the Fourteenth Amendment as long as the regulation "rationally furthers some legitimate state purpose."[57] Under the rational basis test, courts defer to legislative classifications unless the court cannot conceive any grounds on which to justify them.[58] Here, courts grant considerable

---

women from draft registration); *Michael M.*, 450 U.S. at 464 (holding California's statutory rape law did not unlawfully discriminate on the basis of gender).

[51] *See Craig*, 429 U.S. at 208; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (stating that state law must be examined to determine whether it rationally furthers some legitimate state goal and does not constitute invidious discrimination).

[52] *See* J.E.B. v. Alabama, 511 U.S 127, 140 n.11 (1994) (holding that classifications that rest on impermissible stereotypes violate Equal Protection Clause); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (stating that sex-based generalizations both reflect and reinforce "fixed notions concerning the roles and abilities of males and females"); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 208 (1999) (stating that Court in *Craig v. Boren* concluded that gender-based classifications demand quasi-scrutiny because they often reflect irrational stereotypes about men and women).

[53] United States v. Virginia, 518 U.S at 515.

[54] *See id.* at 557-58.

[55] *Id.* at 531. The Supreme Court used the "exceedingly persuasive justification" standard in the case of *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), where the Court adhered to the intermediate level of scrutiny established in *Craig* to sustain a male applicant's challenge to the State's policy of excluding men from the Mississippi University for Women School of Nursing.

[56] *Virginia*, 518 U.S. at 533.

[57] *See, e.g.*, Reed v. Reed, 404 U.S. 71, 75-76 (1971); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[58] *See* Harris M. Miller, Note, *An Argument for the Application of Equal Protection*

deference to the government.[59] Most general social welfare and economic legislation falls into this category of review.[60]

Following the adoption of the Fourteenth Amendment in 1868, the Supreme Court applied the Equal Protection Clause to laws that subjected classes of citizens to unjustified discrimination based on natural differences.[61] First, the Supreme Court analyzed the Equal Protection Clause as it applied to race-based and class-based discrimination and applied strict scrutiny.[62] Second, the Court applied the Equal Protection Clause to gender-based discrimination, often using quasi-suspect scrutiny.[63] Third, in recent years, the Court has applied equal protection analysis to cases of sexual orientation-based discrimination.[64] Although the Court has not clearly determined whether or not homosexuals are a suspect or quasi-suspect class, the history of the Court's treatment of the Equal Protection Clause illustrates how the Court may rule on issues concerning homosexuality.[65]

Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. 797, 808 (1984) (citing McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969)); *see also* Michael M. v. Super. Ct., 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting) (stating that courts often presume that economic classifications are valid because they are "necessary component of most regulatory programs").

[59] *See* Mathews v. Lucas, 427 U.S. 495, 510 (1976) (stating that rational basis test, although deferential, is not "toothless"); Strauder v. West Virginia, 100 U.S. 303, 306-08 (1879) (holding that states must create laws that treat blacks and whites equally).

[60] *See, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (using rational basis to invalidate tax law); Ry. Express Agency v. New York, 336 U.S. 106 (1949) (using rational basis to uphold traffic regulation).

[61] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding city ordinance violates Equal Protection Clause because of its discriminatory impact on Chinese laundry owners); Strauder v. West Virginia, 100 U.S. 303 (1879) (striking down state statute that provides only white males can serve as jurors).

[62] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483 (1954); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Plessy v. Ferguson, 163 U.S. 537 (1896).

[63] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Craig v. Boren, 429 U.S. 190 (1976).

[64] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (using Equal Protection Clause to strike down Colorado amendment that discriminated against homosexuals).

[65] The Supreme Court appeared to apply the rational basis test in *Romer v. Evans*, but it is unclear if courts will follow this approach. *Id.*

C. Sexuality-Based Discrimination

Courts have just begun hearing sexuality-based discrimination cases.[66] Proponents of gay rights have argued that sexual orientation is a suspect classification, like race, or a quasi-suspect classification, like gender.[67] In addition, gay rights advocates argue that morality-based defenses of antigay laws are as inappropriate as racism and sexism.[68]

The Supreme Court made history in *Romer v. Evans* when it held that the desire to harm homosexuals cannot constitute a legitimate governmental interest.[69] In *Romer*, the Court invalidated an amendment to Colorado's Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexuals from discrimination.[70] The Court held that a law making it more difficult for one group of citizens to seek aid from the government then for all other citizens violates equal protection.[71] Although this opinion was silent on whether sexuality is a suspect classification, the Court seemed to apply the rational basis test.[72] It held that the initiative did not further a proper legislative end but only denied homosexuals equal protection of Colorado's laws.[73] *Romer* stressed the initiative's impermissible premise: animus, or a feeling of bitter hostility and active hatred, against homosexuals.[74]

In addition, some state supreme courts have used their state constitutions' equal protection provisions to challenge initiatives that discriminate on the basis of sexual orientation.[75] For example, the Hawaii Supreme Court held that the exclusion of same-sex couples from

---

[66] *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 63-67 (Haw. 1993) (finding equal protection violation of state constitution based on gender, in denial of same-sex marriages); Baker v. State, 744 A.2d 864, 880-86 (Vt. 1999) (holding that exclusion of same-sex couples from benefits and protections violates state constitution's equal protection clause). The most recent gay rights case heard by the Supreme Court was *Romer v. Evans*, 517 U.S. 620 (1996).

[67] *See* ESKRIDGE, *supra* note 52, at 208 (stating that lawyers have argued that morality-based defenses of anti-homosexual laws equate to same kind of prohibited stereotyping or prejudice as racism and sexism).

[68] *See id.*

[69] *See Romer*, 517 U.S. at 634.

[70] *See id.* at 620.

[71] *See id.* at 634.

[72] *See id.* at 631-35.

[73] *See id.* at 635.

[74] *See* ESKRIDGE, *supra* note 52, at 208-09.

[75] *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 63-67 (Haw. 1993) (finding equal protection violation of state constitution based on gender, in denial of same-sex marriages); Baker v. State, 744 A.2d 864, 880-86 (Vt. 1999) (holding that exclusion of same-sex couples from benefits and protections of marriage violates common benefits clause of state constitution).

marriage constituted sex discrimination.[76] Similarly, the Vermont Supreme Court ruled that the same exclusion was sexual orientation discrimination and that it failed the state's rational basis test.[77]

Another noteworthy case, which was subsequently vacated, is *Watkins v. United States Army*, in which the Ninth Circuit held that homosexuals are a suspect class.[78] The court held that the U.S. Army's regulations barring homosexuals from military service violated the Equal Protection Clause.[79] The court stated that the Army's regulations were not necessary to promote a compelling governmental interest.[80] In finding that homosexuals are a suspect class, the court determined that homosexuals have suffered a history of purposeful discrimination and lack the political power necessary to obtain redress from the government.[81] In addition, the court determined that discrimination against homosexuals is invidious and that sexual orientation is an immutable characteristic for the purposes of equal protection analysis.[82] Although this case provides an excellent example of the equal protection analysis as applied to homosexuals, the Ninth Circuit vacated it on other grounds.[83]

Many courts, pre- and post-*Romer*, have demanded equal protection for homosexuals.[84] Although some states have changed their laws in

---

[76] *See Baehr*, 852 P.2d at 68 (remanding to determine validity of state's justifications). *Baehr* is particularly important because it was the first decision in the United States to hold that discrimination against same-sex couples is sex discrimination. *Id.* See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 202 (1994) (arguing that discrimination against gays and lesbians is sex discrimination).

[77] *See Baker*, 744 A.2d at 883-86. However, the court in *Baker* remanded the case to the legislature to equalize benefits and obligations through a same-sex partnership or marriage. *Id.*

[78] *See* Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988), *opinion withdrawn on rehearing by* 875 F.2d 699 (9th Cir. 1989).

[79] *See id.* at 1352.

[80] *See id.*

[81] *See id.* at 1345-49.

[82] *See id.*

[83] *See* Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (addressing only the issue of whether the Army may deny reenlistment to Watkins solely because of his acknowledged homosexuality).

[84] *See, e.g.*, Quinn v. Nassau County Police Dept., 53 F. Supp. 2d 347, 356 (E.D.N.Y. 1999) (holding that individuals have constitutional right under Equal Protection Clause to be free from sexual orientation discrimination causing hostile work environment in public employment); Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 599 (Cal. 1979) (using rational basis analysis in interpreting its constitution, California Supreme Court found that public utility could not arbitrarily deny employment opportunities to qualified homosexuals); Baehr v. Lewin, 852 P.2d 44, 67-68 (Haw. 1993) (applying strict scrutiny

pace with the times,[85] Florida has not.[86] Florida is especially conservative in matters of adoption.[87]

D. Florida's Prohibition of Adoption by Homosexuals

1. Florida's Adoption Statute

In 1977, the Florida legislature amended its adoption statute to include the following provision: "No person eligible to adopt under this statute may adopt if that person is a homosexual."[88] The statute reflects a broad purpose of protecting and promoting the well being of adopted children and their biological and adoptive parents.[89] The statute also demonstrates the legislature's aspiration to provide all children with a permanent family life and to maintain sibling groups.[90] Although the Florida courts have generally upheld this statute, gay rights activists have repeatedly challenged the provision.[91]

2. Florida's Adoption Cases

One small victory for gay rights activists occurred in 1991 in *Seebol v. Farie*.[92] In *Seebol*, a Florida circuit court judge held that the Florida adoption statute violated a homosexual's right to privacy and equal protection.[93] The trial court struck down the challenged law in Monroe

---

analysis and finding equal protection violation of state constitution, based upon gender, in denial of same-gender marriages); Commonwealth v. Wasson, 842 S.W.2d 487, 492-502 (Ky. 1992) (holding that state sodomy statute violated Equal Protection Clause of the Kentucky Constitution).

[85] For example, Alaska, California, Colorado, Hawaii, Massachusetts, and Oregon are some of the states that do not have an anti-gay child custody or adoption rule. *See* ESKRIDGE, *supra* note 52, at 362-71.

[86] In 1982 and 1977, Florida adopted a ban on same-sex marriages FLA. STAT. ch. 741.04 (1982); FLA. STAT. ch. 741.212(3) (1997). Also in 1997, Florida adopted a nonrecognition of same-sex marriages statute FLA. STAT. ch. 741.212(1)-(2) (1997), and the anti-gay child adoption statute FLA. STAT. ch. 63.042(3) (2003).

[87] *See* FLA. STAT. ANN. § 63.042(3) (West 2003). Florida was the first state to ban adoption by homosexuals when it enacted the homosexual adoption provision in 1977.

[88] *Id.*

[89] *See* FLA. STAT. ANN. § 63.022(1) (West Supp. 1996).

[90] *See id.*

[91] *See, e.g.*, Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001); Cox v. Florida Dep't of Health and Rehabilitative Serv., 656 So. 2d 902 (Fla. 1995); Seebol v. Farie, *reprinted in* Florida Dep't of Health and Rehabilitative Serv. v. Cox, 627 So.2d 1210, 1221-29 (1991).

[92] *See Seebol, reprinted in* 627 So.2d at 1221.

[93] *See id.* at 1221, 1223, 1225-27.

County, and Seebol, a gay male and guardian ad litem for the state of Florida, became eligible to adopt.[94] Although only a trial court decision, this opinion offered hope for homosexuals seeking to adopt in Florida.

In *Cox v. State Department of Health and Rehabilitative Services*, James W. Cox, a gay man, and his partner, sought to adopt a special needs child.[95] The state, however, denied Cox and his partner the opportunity to attend pre-adoption parenting classes because they were gay.[96] The Florida Supreme Court remanded the case to the trial court to consider the equal protection claim on a rational basis standard.[97] Exhausted, Cox voluntarily dropped the case, and the trial did not proceed.[98]

II. *LOFTON V. KEARNEY*

A. Factual Background

In *Lofton v. Kearney*, a district court for the Southern District of Florida upheld a Florida law prohibiting adoptions by homosexuals.[99] *Lofton* involved three sets of plaintiffs.[100] Plaintiff Steven Lofton (Lofton), a registered pediatric nurse and a certified long-term foster parent, raised three foster children, including child Plaintiff John Doe (Doe).[101] The three children all tested positive for HIV at birth.[102] Doe successfully sero-converted[103] during infancy and no longer tested positive for HIV.[104]

---

[94] *See id.* at 1221, 1223.

[95] *Cox*, 656 So. 2d at 902-03 (defining special needs child as "one considered difficult to place for adoption because of factors that may include racial background, physical or mental disability, or the fact that the child is older.").

[96] *See id.* at 903.

[97] *See id.*

[98] *See* William E. Adams, Jr., *Whose Family Is It Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 620 (1996) (stating that Cox decided to dismiss trial because he and his partner were exhausted from harassment and delays they experienced during litigation).

[99] *See* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1384-85 (S.D. Fla. 2001). In 1977, Florida became the first state to statutorily ban adoption by gay or lesbian adults by enacting the homosexual adoption provision. The statute states: "No person eligible to adopt under this statute may adopt if that person is a homosexual." FLA. STAT. ANN. § 63.042(3) (West 2003).

[100] There were three sets of plaintiffs in *Lofton*: (1) Steven Lofton and child John Doe, (2) Douglas E. Houghton, Jr. and John Roe, and (3) Wayne Larue Smith and Daniel Skahen.

[101] *See Lofton*, 157 F. Supp. 2d at 1375.

[102] *See id.*

[103] Sero-conversion is the development of detectable specific antibodies in blood serum of the body as the result of infection or immunization. *See* MEDICAL DICTIONARY, *supra* note 2, at 1602.

For ten years Lofton cared for his foster children full time, providing medications and tending to their illnesses.[105] The Children's Home Society awarded Lofton the Outstanding Foster Parenting award for his parenting efforts.[106] Shortly after Doe was eligible for adoption, Lofton sought to adopt him.[107] The Department of Children and Families (DCF), however, automatically disqualified Lofton from adopting because he was gay.[108]

Florida's homosexual adoption provision also prohibited Plaintiff Douglas E. Houghton, Jr. (Houghton), a clinical nurse specialist and legal guardian of child Plaintiff John Roe (Roe), from adopting Roe.[109] Houghton cared for Roe since Roe's biological father voluntarily left him with Houghton when Roe was four years old.[110] As part of the Roe adoption process, Houghton received a preliminary home study evaluation.[111] The state informed Houghton that but for his homosexuality and the homosexual adoption provision, it would have given him a favorable home study evaluation.[112] Government procedures precluded Houghton from filing an adoption petition for Roe in the state circuit court because he did not successfully obtain a favorable evaluation.[113]

Plaintiffs Wayne Larue Smith (Smith) and Daniel Skahen (Skahen) were already a licensed DCF family foster home and foster parents of three children when they submitted at-large adoption applications with DCF.[114] On the adoption application, both Smith and Skahen indicated that they were gay men.[115] DCF denied their adoption applications on the basis of the homosexual adoption provision.[116]

---

[104] *See Lofton*,157 F. Supp. 2d at 1375.

[105] *See id.*

[106] *See id.* The Children's Home Society is a child placement agency licensed by Florida's predecessor agency to the Department of Children and Families ("DCF").

[107] *See id.*

[108] *See id.*

[109] *See id.* at 1375-76.

[110] *See id.* at 1375.

[111] *See id.* at 1376. Roe was not in DCF custody, therefore Houghton had to file his adoption petition in a state circuit court. *See id.* Florida law further required that Houghton receive a favorable preliminary home study evaluation prior to filing his adoption petition. *See id.*

[112] *See id.*

[113] *See id.*

[114] *See id.*

[115] *See id.*

[116] *See id.*

B. Procedural Setting

On May 26, 1999, plaintiffs sued defendants, Kathleen A. Kearney (Kearney), the Secretary of Florida's DCF, and Charles Auslander (Auslander), the District Administrator of Florida's DCF, for enforcing the adoption provision.[117] The plaintiffs alleged that the statute violated their rights to equal protection under the Fourteenth Amendment because the statute prohibited only gays and lesbians from adopting children.[118] The defendants moved for summary judgment on all of the plaintiffs' claims.[119] The court granted defendants' motion for summary judgment on the equal protection claim.[120]

C. The Court's Rationale

The *Lofton* court analyzed the plaintiffs' equal protection claim under rational basis scrutiny.[121] The court agreed that the homosexual adoption provision was rationally related to a legitimate state interest.[122] The defendants alleged that the homosexual adoption provision served the best interests of Florida's children.[123] The court held that the government had no obligation to produce evidence that the statutory classification was rational.[124] The court stated that as a matter of law it was unnecessary and improper for the court to determine whether the legislature was motivated by animus towards homosexuals.[125]

III. ANALYSIS OF *LOFTON V. KEARNEY*

Florida's law denying gays and lesbians the right to adopt violates the Equal Protection Clause of the Fourteenth Amendment. The provision fails under all three equal protection analysis tests. First, the *Lofton* court erred by refusing to recognize sexual orientation as a "suspect" classification. Second, the court erred by not using the heightened scrutiny test in its analysis. Finally, even if it were the correct standard, the court incorrectly applied the rational basis test.

---

[117] *See id.*

[118] *See id.* at 1377. Plaintiffs also alleged due process violations, which will not be discussed in this Note.

[119] *See Lofton*, 157 F. Supp. 2d at 1377.

[120] *See id.* at 1385.

[121] *See id.* at 1384-85.

[122] *See id.* at 1384.

[123] *See id.* at 1383.

[124] *See id.* at 1384-85.

[125] *See id.* at 1383.

A. The Court Erred by Failing to Classify Homosexuals as a "Suspect" Class

The *Lofton* court erred when it applied the rational basis test in its equal protection analysis. The court should have recognized homosexuals as a suspect class and applied a heightened level of scrutiny. To determine whether a group is a "suspect" class, the Supreme Court has traditionally considered the following factors: (1) whether the group has suffered a history of purposeful discrimination;[126] (2) whether the discrimination is invidious;[127] and (3) whether the group is politically disempowered.[128] Had the *Lofton* court applied these three factors, the court would have concluded that homosexuals are a suspect class. Accordingly, the court should have applied strict scrutiny to the Florida statute.

1. History of Discrimination

Courts have recognized the long history of discrimination against homosexuals.[129] The Supreme Court specifically stated that "homosexuals have historically been the object of pernicious and sustained hostility."[130] In addition, homosexuals are often the victims of hate crimes and violence,[131] and employers frequently exclude homosexuals from job opportunities based on their sexual orientation.[132]

---

[126] *See* Watkins v. United States Army, 847 F.2d 1329, 1345 (9th Cir. 1988) (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973)).

[127] *See Watkins*, 847 F.2d at 1346.

[128] *See id.* at 1348 (citing *Cleburne*, 473 U.S. at 441; Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982); *Rodriguez*, 411 U.S. at 28).

[129] *See, e.g.*, Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.) (arguing that homosexuals have been "the object of pernicious and sustained hostility"); High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 376-77 (9th Cir. 1990) (holding that homosexuals have suffered history of discrimination).

[130] Watkins, 847 F.2d at 1345 (quoting *Rowland*, 470 U.S. at 1014).

[131] *See* Hayes, *supra* note 30, at 386 (citing *Developments in the Law — Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1541 (1989)). *See generally* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209 (1994); Scott D. McCoy, *The Homosexual — Advance Defense and Hate Crime Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629 (2001).

[132] *See* Hayes, *supra* note 30, at 387 (citing Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987)); *cf.* Gay Law Students Ass'n v. Pac. Tel. & Tel., 24 Cal. 3d 458, 469 (1979) (ruling that California law precludes state from excluding homosexual class from employment opportunities); Alan W. Richardson, *Sexual Orientation Rights in the Workplace: A Proposal for Revising and Reconsidering California's Assembly Bill 101*, 26 U.C. DAVIS L. REV. 429, 438 (1993).

The false stereotypes regarding homosexuals also reflect a history of discrimination against gays and lesbians in American society. Homosexuals are often depicted as mentally ill,[133] or as child molesters.[134] Even the slang terms for homosexuals demonstrates the discrimination against these men and women.[135] Terms such as "homo," "fag," "queer," "fairy," and "dyke" are meant to demean and stigmatize gays and lesbians.[136] Demonstrably, homosexuals have experienced a long-standing history of discrimination.[137]

2. Invidious Discrimination

The second factor used to evaluate a group's status as a suspect class is whether a group suffers invidious discrimination.[138] The Supreme Court considers several factors in this evaluation. The Court first considers if the disadvantaged class is defined by a trait that often has no relation to whether the members of the class contribute to society;[139] second, whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes;[140] and third, whether the trait defining the class is immutable.[141] Courts use these three factors to determine whether a group suffers invidious discrimination.[142]

---

[133] *See* Eric A. Roberts, *Heightened Scrutiny Under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation*, 42 DRAKE L. REV. 485, 500 (1993) (citing RICHARD D. MOHR, GAYS/JUSTICE 23 (1988)).

[134] *See* Shaista-Parveen Ali, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1018 (1989) (stating that many courts presume homosexuals molest their children); Miller, *supra* note 58, at 822-23 (identifying molester as most offensive homosexual stereotype); Roberts, *supra* note 133, at 500 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)).

[135] *See* Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 741 n.10 (1999); Roberts, *supra* note 133, at 499 (citing THEODORE SARBIN & KENNETH KAROLS, NONCONFORMING SEXUAL ORIENTATIONS AND MILITARY SUITABILITY app. B at 18 (1988), *in* GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS 3, 82-83 (Kate Dyer ed., 1990)).

[136] *See* Roberts, *supra* note 133, at 499.

[137] *See, e.g.*, Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

[138] *See supra* note 25 and accompanying text.

[139] *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Watkins v. United States Army, 847 F.2d 1329, 1346 (9th Cir. 1988).

[140] *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); *Watkins*, 847 F.2d at 1346.

[141] *See Watkins*, 847 F.2d at 1346 (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-44 (1985); *Plyler*, 457 U.S. at 216 n.14 (1982); *Murgia*, 427 U.S. at 313; *Frontiero*, 411 U.S. at 685-87)).

[142] *See, e.g.*, Watkins, 847 F.2d at 1346.

Applying the first factor, the sexual orientation of individuals does not bear any relation to their ability to perform or contribute to society.[143] For example, in *Watkins*, the court recognized that sexual orientation has no relevance to a person's ability to perform military duties.[144] Sergeant Watkins had an exemplary record of military service and his superiors spoke highly of his achievements.[145] In addition, they felt that his homosexuality did not adversely affect his military peers.[146]

Similarly, homosexuality does not prevent men and women from contributing to society as parents. Lofton won the Outstanding Foster Parenting award from the Children's Home Society for his parenting efforts.[147] Adoption officials told plaintiff Houghton that but for his homosexuality he would have received a favorable preliminary home study evaluation.[148]

After considering whether homosexuals as a class contribute to society, the court then determines whether homosexuals suffer from inaccurate prejudice and stereotypes.[149] Justice Brennan stated, "discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'"[150] Homosexuals face enormous prejudice and are often subjects of violence and hate speech.[151] The fact that so many homosexuals choose not to disclose their sexual orientation also reflects their fear of discrimination.[152]

---

[143] *See Watkins* 875 F.2d at 725; Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 36-37 (D.C. 1987) (stating that sexual orientation bears no relation to person's ability to contribute to society); Roberts, *supra* note 133, at 502 (arguing that according to research, homosexuals live well adjusted lives and are no more likely to engage in anti-social behavior than heterosexuals).

[144] *See Watkins*, 847 F.2d at 1331.

[145] *See id.*

[146] *See id.*

[147] *See* Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

[148] *See id.*

[149] *See supra* note 25 and accompanying text.

[150] *See* Watkins v. United States Army, 847 F.2d 1329, 1346 (9th Cir. 1989) (quoting Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.)).

[151] *See* Roberts, *supra* note 133, at 503 (stating that homosexuals that risk coming "out of the closet" are often subject to psychological scarring as result of hate speech); Hayes, *supra* note 30, at 385-86 (stating that homosexuals are probably the most frequently victimized minority group in United States).

[152] *See* Roberts, *supra* note 133, at 503 (stating that many homosexuals are forced to keep their personal lives private from friends and family members as to not be judged and prejudiced).

Finally, there has been much debate about homosexuality as an immutable characteristic.[153] According to *Watkins*, the Supreme Court has never meant immutability to mean that members of a class must be physically unable to change the trait defining their class.[154] For example, the Supreme Court considers alienage to be an immutable characteristic, yet non-citizens can eventually become citizens.[155] Immutability merely refers to traits "so central to a person's identity that it would be abhorrent for [the] government to penalize a person for refusing to change them."[156] Therefore, even if sexuality is a matter of choice and not biological in nature, it still satisfies the immutability requirement.

3. Political Powerlessness

The final factor courts consider in determining whether a class warrants strict scrutiny as a suspect classification is the political powerlessness of a group.[157] Homosexuals constitute a minority group and lack the political power to redress the discrimination that they endure because they are pressured into concealing their sexuality for fear of discrimination.[158] In determining whether a group is politically underrepresented, courts have paid considerable attention to whether the class is a "discrete and insular minority."[159] According to one federal court, homosexuals attempting to form political and social associations constitute a discrete and insular minority warranting special

---

[153] *See, e.g.*, Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442, n.10 (1985) (casting doubt on immutability theory); *id.* at 440-41 (stating characteristics of suspect classes without mentioning immutability); Parham v. Hughes, 441 U.S. 347, 351 (1979) (describing race, national origin, illegitimacy, gender, and alienage as immutable).

[154] *See Watkins*, 847 F.2d at 1347 (stating that Supreme Court has not held that only classes with immutable characteristics can be deemed suspect).

[155] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (holding that illegal aliens may not be barred from free state education); Kahn v. Shevin, 416 U.S. 351, 357 (1974) (stating that alienage is subject to strict scrutiny because it focuses on immutable characteristics).

[156] *See* Roberts, *supra* note 133, at 506 (citing Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 498 U.S. 957 (1990)).

[157] *See Watkins*, 847 F.2d at 1348 (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985); *Plyler*, 457 U.S. at 216 n.14; San Antonio Indep. Sch. Indep. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

[158] *See Watkins*, 847 F.2d at 1348 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST, 163-64 (1980)).

[159] *See Watkins*, 847 F.2d at 1348 (citing Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); Examining Bd. v. Flores de Otero, 426 U.S. 572, 602 (1976)); *see generally* United States v. Carolene Prods., 304 U.S. 144, 152-53 n. 4 (1938) (stating that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

protection.[160]

Even if homosexuals overcome the fear of prejudice enough to participate openly in politics, the general animus towards gays and lesbians may make this participation ineffective.[161] In addition, public officials are often unresponsive to the needs of homosexuals and do not support gay rights legislation.[162] This is largely because politicians fear damage to their political careers if they advocate gay rights.[163]

Homosexuals constitute a suspect class under the Equal Protection Clause because they meet all of the relevant tests considered by the Supreme Court in deciding whether a classification warrants strict scrutiny. Therefore, the *Lofton* court erred by not subjecting the Florida homosexual anti-adoption provision to strict scrutiny. If the court had subjected the law to strict scrutiny, it would only have been upheld if it was necessary to promote a compelling governmental interest.[164]

In *Lofton*, the government argued that the homosexual adoption provision served the best interests of Florida's children.[165] According to Florida, "married heterosexual family units provide adopted children with proper gender role modeling and minimize social stigmatization."[166] The plaintiffs argued that the state's true motive in preventing homosexuals from adopting was animus against

---

[160] *See Watkins*, 847 F.2d at 1348 n. 28, (citing Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 209 n.24 (N.D. Cal. 1983)). The Supreme Court, however, has never held homosexuals to be a discrete and insular minority. *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Dahl v. Sec. of the United States Navy, 830 F. Supp. 1319, 1323-25 (E.D. Cal. 1993).

[161] *See* Roberts, *supra* note 133, at 508 (arguing that homosexuals lack political power partly because many public figures disregard their needs).

[162] *See id.* (stating that conservative groups that feel gays and lesbians are not worthy of legislative assistance pressure politicians into denying homosexuals political support); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1808 (1996) (arguing that politicians will never form coalitions with gay groups if comparable groups with visible differentiating characteristics can be found); Hillary E. Ware, *Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for "Outed" Celebrities*, 32 HARV. C.R.-C.L. L. REV. 449, 452-53 (1997) (stating that gay activists began to out prominent politicians in effort to pressure them to "challenge the stigmatization of homosexuality").

[163] *See Watkins*, 847 F.2d at 1347 (citing *The Constitutional Status of Sexual Orientation — Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1304 n.96 (1985)); *see also* Roberts, *supra* note 133 at 508; Yoshino, *supra* note 162, at 1808.

[164] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (applying strict scrutiny to classifications penalizing right to travel); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (holding that university could not use racial quota system in its admissions process).

[165] *See* Lofton v. Kearney, 157 F. Supp. 2d. 1372, 1383 (S.D. Fla. 2001).

[166] *Id.*

homosexuals.[167] The *Lofton* court, however, declined to evaluate whether the government's statements were correct because the rational basis test does not require the government to produce supporting evidence to sustain the rationality of a statutory classification.[168]

In *Palmore v. Sidoti*, the state granted custody of a child to her father because her white mother had remarried an African-American man.[169] The state argued that despite improvements in race relations, the child was likely to suffer social stigmatization if her parents were of different races.[170] A unanimous Supreme Court reversed, stating that the private biases and the possible injury they might inflict are not permissible considerations for removing a child from the custody of her mother.[171] The majority stated that the law cannot, directly or indirectly, give private biases effect.[172]

Similarly, Florida cannot embrace homophobia as a state policy. The provision banning homosexuals from adopting is simply an effort by the state to make a symbolic statement of animus against homosexuals.[173] Several empirical studies have compared the development of children raised by heterosexual parents with that of children raised by homosexual parents. Most of these studies conclude that there is no difference between the two.[174] Children raised in homosexual households do not differ significantly from children raised in heterosexual households in areas such as self-esteem, adjustment to new

---

[167] *See id.*

[168] *See id.* at 1384 (citing Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1547 (11th Cir. 1994) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 320 (1993)).

[169] *See Watkins*, 847 F.2d at 1351 (citing Palmore v. Sidoti, 466 U.S. 429 (1984)).

[170] *See id.*

[171] *See id.* (citing *Palmore*, 466 U.S. at 433).

[172] *See id.*

[173] *See* ESKRIDGE, *supra* note 52, at 213; Lin, *supra* note 135, at 762; *see cf,* Romer v. Evans, 517 U.S. 620, 632 (1996) (finding Amendment 2 "seems inexplicable by anything but animus toward the class that it affects").

[174] *See* ESKRIDGE, *supra* note 52, at 213 (citing Charlotte Patterson, *Adoption of Minor Children by Lesbian and Gay Adults*, 2 DUKE J. GENDER L. & POLY. 191 (1995)). Leading studies include Patricia Falk, *"Lesbian Mothers: Psychosocial Assumptions in Family Law,"* 44 AM. PSYCHOL. 941 (1989); Susan Golombok et al., *Children in Lesbian and Single Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCHIATRY 551 (1983); David Kleber et al., *The Impact of Parental Homosexuality in Child Custody Cases*, BULL. AM. ACADEMY PSYCHOL. & LAW 81 (1986); Mary Hotvedt and Jane Barclay Mandel, *Children of Lesbian Mothers*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 275, 282 (William Paul et al. eds., 1982)); *see also*, Mike Allen and Nancy Burrell, *Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research*, 32 J. HOMOSEXUALITY 19, 28-30 (1996) (supports rules that do not take sexual orientation into account when making custody and visitation decisions).

circumstances, and emotional disorder.[175] These studies demonstrate that Florida's homosexual adoption provision is not necessary to further the best interests of the state's children. Therefore, the provision would fail strict scrutiny and homosexuals would be allowed to adopt in Florida. The provision would also fail if the *Lofton* Court had decided to consider homosexuals as a quasi-suspect class instead.

Opponents of gay rights legislation often cite *Bowers v. Hardwick*, a United States Supreme Court decision holding that states may proscribe homosexual sodomy without violating substantive due process.[176] Bowers, a homosexual, challenged a Georgia statute prohibiting certain sexual conduct. The statute made it criminal to perform or submit to any sexual act involving the sex organs of one person and the mouth or anus of another.[177] The Court held that homosexual sodomy was not a fundamental right protected by the Constitution.[178] Although *Bowers* concerned the Due Process Clause instead of the Equal Protection Clause, the case is repeatedly cited in support of anti-homosexual arguments.[179] In his dissent in *Romer*, Justice Scalia argued that the majority's opinion was inconsistent with *Bowers*.[180] Scalia reasoned: "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct."[181]

Courts, however, should not apply the reasoning in *Bowers* to Equal Protection Clause arguments.[182] The Court in *Bowers* did not explicitly

---

[175] *See* ESKRIDGE, *supra* note 52, at 213 (suggesting that "fantasized gay predation" underlies anti-gay adoption policies); *see also* Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 179-82 (1998) (stating that studies show that the children of lesbian mothers do not differ statistically from children of heterosexuals with respect to gender role, sexual orientation, self-esteem, gender identity, social adjustment, and psychological health); Lin, *supra* note 135, at 777 n.192 (arguing that there is no difference between children in same-sex families and children in heterosexual families in areas of behavioral and emotional problems and psychological disturbances).

[176] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

[177] *See id.* at 187-88.

[178] *See id.* at 190-92.

[179] *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454, 454-56 (7th Cir. 1989) (holding that if homosexual conduct may constitutionally be criminalized under *Bowers*, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (holding that after *Bowers* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm).

[180] *See* Romer v. Evans, 517 U.S. 620, 636 (1996).

[181] *See id.* at 641.

[182] *See* Bowers v. Hardwick, 478 U.S. 186, 202 (1986) (Blackmun, J., dissenting) (stating that the Court refused to consider Equal Protection Clause); High Tech Gays v. Def. Indus.

decide the question of whether or not the Georgia sodomy statute violated the Equal Protection Clause.[183] In addition, nothing in *Bowers* suggests that the state may penalize homosexuals for their sexual orientation because the case deals solely with sexual conduct.[184]

B. The Court Erred by not Considering an Intermediate-Scrutiny Test

Even if strict scrutiny is inapplicable, the *Lofton* court should have at least applied heightened scrutiny. Quasi-suspect classes are subject to an intermediate level of scrutiny under which the classification must be "substantially related" to an important state objective.[185] Generally, the Supreme Court invokes this intermediate level of scrutiny with classifications based on gender and illegitimacy.[186]

The *Lofton* court relied on Justice Scalia's dissent in *Romer* in deciding not to classify homosexuals as a suspect or a quasi-suspect class.[187] The court stated that the Eleventh Circuit had not yet weighed in on the classification of homosexuals.[188] However, many justices have stated that homosexual classifications should be suspect or quasi-suspect.[189]

Sec. Clearance Office, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting) (holding that *Hardwick* is not controlling on issue of suspect classification for homosexuals).

[183] *See Bowers*, 478 U.S. at 202 (Blackmun, J., dissenting) (stating that Court refused to consider Equal Protection Clause).

[184] *See* Watkins v. U.S. Army, 847 F.2d 1329, 1340 (1988) (citing Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir. 1986) ("Although . . . the Supreme Court's recent decision in *Bowers v. Hardwick* [held] that homosexual *conduct* is not constitutionally protected, the Court did not reach the different issue of whether an agency of the federal government can discriminate against individuals merely because of sexual *orientation*" (footnotes omitted and emphasis in the original)), *cert. granted sub nom.* Webster v. Doe, 482 U.S. 913 (1987); Swift v. United States, 649 F. Supp. 596, 601 (D.D.C. 1986) ("this Circuit has declined to read [*Hardwick*] as barring claims of discrimination based on sexual preference"). *But cf.* Padula v. Webster, 822 F.2d 97 (D.C. Cir.1987) ("reasoning in *Hardwick* forecloses . . . suspect class status for practicing homosexuals").

[185] *See* J.E.B. v. Alabama, 511 U.S. 127, 136 (1994); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-46 (1985); Craig v. Boren, 429 U.S. 190, 199-200 (1976); Reed v. Reed, 404 U.S. 71, 92 (1971).

[186] *See J.E.B.*, 511 U.S at 136; Cleburne, 473 U.S. at 440; Craig, 429 U.S. at 199-200.

[187] *See* Lofton v. Kearney, 157 F. Supp. 1372, 1381-82 (S.D. Fla. 2001) (citing Romer v. Evans, 517 U.S. 620, 620 n. 1 (1996) (Scalia, J., dissenting) (stating that "rational basis — the normal test for compliance with the Equal Protection Clause — [to be] the governing standard" in such cases)).

[188] *See id.*

[189] *See, e.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting) (holding that homosexual status should trigger strict scrutiny when government discriminates); Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati, 860 F. Supp. 417, 440 (1994) (Spiegel, J.) (concluding that gays, lesbians and bisexuals meet criteria for quasi-suspect status), *rev'd* and *vacated*, Equal. Found. of Greater

Scholars have argued that provisions that discriminate against homosexuals demand the same scrutiny as provisions that discriminate against women, that is, intermediate scrutiny.[190] In addition, some argue that legislation that discriminates against homosexuals reinforces the hierarchy of males over females, a hierarchy the courts use the Equal Protection Clause to defeat.[191] According to the Supreme Court, a group seeking to uphold a statute that classifies individuals based on gender must show an exceedingly persuasive justification for that classification.[192] Furthermore, the classification must serve important governmental objectives and substantially relate to achieving those objectives.[193] Courts must hold laws that discriminate against gays to the same standards applied to other gender-based classifications.[194]

The Supreme Court has consistently struck down statutes whose purpose was to impose traditional gender roles.[195] In subjecting gender-based classifications to heightened scrutiny, the Court has refused to uphold gender-based classifications resting on stereotypes about the proper roles of the sexes.[196] Provisions that discriminate against

---

Cincinnati, Inc. v. Cincinnati, 54 F.3d 261 (1995); Watkins v. United States Army, 847 F.2d 1329, 1352 (1988) (holding homosexuals are suspect class), *opinion withdrawn*, Watkins v. United States Army, 875 F.2d 699 (1989).

[190] *See generally*, Koppelman, *supra* note 76 (arguing that discrimination against gays and lesbians is sex discrimination). For example, legislation often assumes that sex with women is appropriate for men, but not women. *See id.* at 211-12.

[191] *See id.* at 198; *see also*, J.E.B. v. Alabama, 511 U.S 127, 130-31 (1971) (holding that gender-based discrimination "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women" and violate the Equal Protection Clause); Orr v. Orr, 440 U.S. 268, 283 (1979) (holding that classifications which "distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection").

[192] *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979)).

[193] *See Miss. Univ. for Women*, 458 U.S. at 724 (1982) (invalidating state nursing school's policy of denying admission to males); Craig v. Boren, 429 U.S. 190, 197 (1976).

[194] *See generally*, Koppelman, *supra* note 76 (arguing that discrimination against gays and lesbians is sex discrimination).

[195] *See Miss. Univ. for Women*, 458 U.S. at 718 (1982) (invalidating state nursing school's policy of denying admission to males), *cited in* Koppelman, *supra* note 76, at 216-17; Orr v. Orr, 440 U.S. 268 (1979) (invalidating law permitting alimony payments to be imposed only on husbands upon divorce); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating Social Security provision granting survivor's benefits to widowers in lesser amounts than those granted to widows).

[196] *See* Koppelman, *supra* note 76, at 218 (noting that Court has not been tolerant of normative stereotyping when interpreting Civil Rights Act of 1964) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that employer who acts on basis of belief that women cannot or should not be aggressive has acted on basis of gender for

homosexuals are also based on a stereotype that certain behavior is appropriate for men and women.[197] Therefore, laws that discriminate against gays, such as the Florida homosexual adoption provision, cannot survive even heightened scrutiny.[198]

C. *The Court Failed to Apply the Rational Basis Test Correctly*

Assuming *arguendo* that the *Lofton* court appropriately selected rational basis scrutiny, the court failed to apply the test correctly. The rational basis test asks whether a regulation rationally furthers some legitimate state purpose.[199] The court incorrectly assumed that the state had a legitimate purpose for discriminating against homosexuals. Excluding all homosexuals from adoption does not rationally advance the state's interest in promoting adoptions of the state's children because it is over-inclusive.[200] Florida's legislation assumes that all homosexuals are unfit to be parents.[201] Yet by preventing all homosexuals from adopting, Florida excludes perfectly capable homosexuals, such as the plaintiffs in *Lofton*, from becoming parents.

The *Lofton* court correctly held that Florida has a legitimate stake in protecting the best interests of its children.[202] However, as discussed above, there are no significant differences between children who have been raised by homosexual parents and those who have been raised by heterosexual parents. In general, lesbian and gay parents are as fit and loving as heterosexual parents.[203] Therefore, there is no legitimate rationale to support adoption policies such as Florida's.

The government in *Lofton* suggested that it is in a child's best interest to be raised in a home stabilized by marriage.[204] However, the *Lofton* court noted that homosexuals are not similar in all relevant aspects to

---

purposes of Title IV)).

[197] *See id.* at 211-12.

[198] *See id.*

[199] *See, e.g.*, Reed v. Reed, 404 U.S. 71, 75-76 (1971); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Strauder v. West Virginia, 100 U.S. 303, 306-08 (1879).

[200] The statute has an over-inclusive reach because it applies to all homosexuals without taking into account child-rearing ability. Similarly, by only discriminating against homosexuals, Florida implies that all heterosexuals are fit for parenting. *See* FLA. STAT. ANN. § 63.042 (West 2001).

[201] *See* FLA. STAT. ANN. § 63.042(3) (West 2003).

[202] *See* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1381-84 (S.D. Fla. 2001).

[203] *See* ESKRIDGE, *supra* note 52, at 214 (quoting Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996)).

[204] *See Lofton*, 157 F. Supp. 2d at 1383.

other non-married adults.[205] Namely, homosexuals, unlike heterosexuals, are legally unable to marry.[206] Florida does not recognize homosexual couples as a marital unit. Therefore, homosexuals cannot meet the state's requirement that a child is to be raised in a home stabilized by marriage.[207] Because same-sex couples are not legally able to marry in Florida, penalizing them for failing to do so is irrational. This analysis is best demonstrated by recent legislation in California.

In 2001, the California legislature passed Assembly Bill 25 which grants homosexual partners several benefits regularly enjoyed by heterosexual spouses, including standing in wrongful death actions.[208] The purpose of this legislation was to eliminate the barrier that the prohibition of same-sex marriages in California presented to the right of homosexuals to bring an action for wrongful death of his or her partner.[209] Similarly, Florida's adoption provision shoud be extended to eliminate discrimination against homosexuals who cannot legally marry, and therefore cannot adopt.[210]

Another argument against gay rights legislation is that courts should not involve themselves in legislative matters.[211] Justice Scalia, in his dissent in *Romer v. Evans*, specifically stated that the Supreme Court has no business imposing its view on all Americans that animosity towards homosexuality is evil.[212] Justice Scalia argued that the legislature should resolve laws such as the Colorado amendment through normal democratic means free from court interference.[213]

However, "rather than frustrating the democratic process," the Equal Protection Clause plays an important role in perfecting the process.[214] The clause requires an evenhandedness that safeguards minorities from being oppressed by the majority.[215] This evenhandedness also

---

[205] *See id.* at 1385.

[206] *See id.*

[207] *See id.* at 1383-85.

[208] California Assembly Bill 25, 2001-2002 Leg. Assem., Reg. Sess. (Cal. 2001).

[209] *See* Smith v. Knoller, No. 319532, at 3 (Cal. Super. Ct. Aug. 9, 2001) (order overruling defendants' demurrer and denying defendants' motion to strike and granting woman standing in wrongful death action on behalf of lesbian partner).

[210] In 1997, Florida adopted a non-recognition of same-sex marriages statute. *See* FLA. STAT. Ann. § 741.212(1)-(2) (West 2003).

[211] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 636 (1996).

[212] *See id.* at 636.

[213] *See id.*

[214] *See* Watkins v. United States Army, 847 F.2d 1329, 1341 (1988); ELY, *supra* note 158, at ch.5 (arguing that Equal Protection Clause protects democratic process through judicial review).

[215] *See Watkins*, 847 F.2d at 1341; *see also* Vacco v. Quill, 521 U.S. 793, 800 (1997) (holding

encourages minority representation, thereby facilitating successful representative democracy.[216]

CONCLUSION

The *Lofton* court erred when it upheld Florida's anti-homosexual adoption provision. The decision should be reversed because the statute violates the Equal Protection Clause under all standards of judicial review. The discrimination suffered by homosexuals is fundamentally unfair because it unjustly burdens them in matters unrelated to sexual orientation.[217] In addition, there is no existing data suggesting any negative results for children raised by homosexual parents.[218] Plaintiffs in *Lofton*, like millions of homosexuals, deserve the same constitutional rights and protections as all other American citizens.

---

that laws that apply to all individuals evenhandedly "unquestionably comply" with Equal Protection Clause).

[216] *See Watkins*, 847 F.2d at 1341 (citing ELY, *supra* note 158, at 101-02); *see also*, Daniel J. Garfield, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 703 (1995) (stating that Equal Protection Clause safeguards against excesses of pluralism).

[217] *See* Roberts, *supra* note 133, at 504 (arguing that homosexuals are identified with characteristics that are so far from equal protection ideals that they may be called "invidious").

[218] *See* Jeremy Manier, *Doctors Support Gay Adoption: Pediatrics Group Urges New Laws*, CHIC. TRIB., Feb. 4, 2002, at CN1.