WAITING FOR LOVING:
THE CHILD’S FUNDAMENTAL RIGHT TO ADOPTION

Barbara Bennett Woodhouse, University of Florida, U.S.A.
with assistance of Katie Jenkins, University of Florida, U.S.A.

The title of this article, “Waiting for Loving”, has a double meaning. The Loving in my title refers to the case of Loving v. Virginia. Handed down by the Supreme Court in 1967, the case of Loving invalidated a law of the State of Virginia that categorically prohibited marriage between people of different races. The plaintiffs, Richard and Mildred Loving, a white man and a black woman, were high school sweethearts who had been forced to flee Virginia after their arrest for the crime of having married a person of the wrong color. They went to the Supreme Court seeking the right to live as a legal family in their home state. And they won, making the curiously apt case named “Loving” synonymous with the right to marry.

According to the Supreme Court, anti-miscegenation laws were wrong on two counts. First, despite their deep historical roots and widespread acceptance, they violated the individual’s right to equal protection of the law. Second, these laws impinged on the fundamental right to marry and form a family.

In Loving, the Court held that the marriage relationship was so fundamental as to be a constitutionally protected liberty, under the Fourteenth Amendment. The state could not assert an untrammeled right to decide which individuals would be permitted entry into this most intimate human relationship. State marriage laws that substantially interfered with the right to marry would have to be justified by a compelling state purpose.

The Court’s courageous decision had been a long time coming. For decades, the Court had found pretexts to avoid challenging these laws, afraid of the backlash that

1 338 U.S. 1 (1967).
2 The Court recognized that the freedom to marry is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” Id. at 12. In Zablocki v. Redhail, 434 U.S. 374, 383 (1978) the Court cited Loving as the leading decision on the right to marry.
3 During the early colonial period, Virginia placed legal penalties on miscegenation, by publicly whipping violators and requiring church penance. Walter Waldington, The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective, 52 VA. L. REV. 1189, 1191 (1966). More than three centuries later, when the Court decided Loving, 16 States prohibited and punished interracial marriages. 338 U.S. at 6. Even so, the Court clearly held that restricting the freedom to marry based on racial classifications violates the Equal Protection Clause of the Fourteenth Amendment. Id. at 12.
4 The Court also held that Virginia’s anti-miscegenation law violated the Due Process Clause of the Fourteenth Amendment because it deprived people of the liberty “to marry or not marry, a person of another race” without due process of law. Id. In addition, the Court cited to Maynard v. Hill, 125 U.S. 190 (1884), which characterizes marriage as the foundation of family and society. Loving, 338 U.S. at 12.
5 Necessary to achieve a compelling state interest? Id. at 11 (necessary to accomplish permissible state objective) See also Zablocki, 434 U.S. at 388.
would follow a ruling on such a socially divisive issue. Meanwhile, interracial couples lived in fear, prevented from enjoying the rights and responsibilities of a legal marriage. For every couple like Richard and Mildred, who fell in love and formed a family together despite these laws, countless others were kept apart, deterred from forming loving relationships in the first place by the legal barriers and social stigma they so powerfully conveyed. As a child growing up in New York in the nineteen-forties, I knew about these laws from overhearing my parents discussions of them. My parents’ best friends, Karl and Nellie Baker, had married across the color line, as had my Aunt Mercedes. When I think of miscegenation laws and the shadow they cast on families that they touched, I think about the snapshot in our family album of my father and uncles all in World War II military uniform, posing with their proud wives and sisters and kids. Just by standing on a street corner, even in New York City, these men and women and their African American spouses and multiracial children were exposing themselves to social rejection and animosity. They could not travel to the Nation’s Capitol because they would have to pass through the hostile states. Even in the North, I know the discomfort was often palpable, even (or maybe especially) to a child.

*Loving* is now celebrated as a landmark and has been extended to laws that barred disabled, indigent and incarcerated people from marrying. Its racial equality principles were extended, in Palmore v. Sidoti, to bar courts in custody cases from treating social stigma against parents’ interracial relationships as a dispositive factor in determining the child’s best interest. The racial equality aspects of Palmore have been extended to the adoption context, in decisions and into legislation that prohibits the delay or denial of adoptions based on race. While families that cross the color line still face special challenges, I am glad to know that new generation of children born and adopted into interracial families has grown to adulthood with the stability and security of belonging to a legally recognized family unit. These children now take for granted the right to form marital families of their own.

---


10 In 1990 there were roughly 8,500 transracial or transcultural adoptions and about 59,500 nonrelative adoptions in the United States. Therefore more than 14 percent of nonrelative adoptions were transracial or transcultural. See Children’s Bureau, U.S. Dep’t of Health & Human Servs. (HHIS), at http://naic.acf.hhs.gov/pubs/f_trans.cfm (last visited June 6, 2005). For a personal account of transracial adoption see Sharon E. Rush, LOVING ACROSS THE COLOR LINE (2000) passim.
What does the case of Loving v. Virginia have to do with adoption or with illuminating the child’s perspective on adoption? Today, hundreds of thousands of children are still waiting for the fundamental right that was secured to adults in Loving. I refer to the fundamental right to form a legally sanctioned family bond and the liberty to be free of undue state interference and discrimination in forging one’s most intimate relationships. When I say these children are “waiting” for Loving, I mean that quite literally. They are indeed “waiting” for the chance to enjoy loving families of their own. And they are waiting, not only for Loving, the legal precedent to be extended to them. They are waiting, pure and simple, for the loving permanent relationships that every child needs to flourish.

The term “waiting children” also has a double meaning. It is a term of art in adoption policy. We use it to designate the children in state care who have no legal parents and who are waiting to be adopted. Each year, many children lose their parents through death, abandonment, termination of parental rights, and incarceration. Many of these children are what we now call “special needs children.” When I adopted my son over thirty years ago, they were called by a less euphemistic name -- “hard to place.” Some, like my son, were hard to place because of medical disabilities. Others were hard to place because they were too old, were part of a sibling group or are members of a minority racial or ethnic group.

In 2003, some half a million children annually enter foster care and become wards of the state. In many cases the state actually terminates the legal relationship between these children and their parents. In his autobiography, Malcolm X, who lost his mother to mental illness and grew up in foster care, called himself and his siblings “state children.” Being a state child, to Malcolm X, meant being at the mercy of an unfeeling and often hostile bureaucracy, having no family and no home of one’s own.

Of course, foster care can be a tremendous boon to a child when her family is in crisis or she is in danger of serious harm. But, as scholars like my colleague Martin Guggenheim have argued, too many children are being permanently separated from their families and a disproportionate percentage of waiting children are children of color. This situation should raise alarm bells in the hearts of Americans who are committed to liberty. Few situations could be more antithetical to a free society than having thousands of

---

12 In 2002, there were approximately 67,000 terminations of parental rights nationwide. See id at 5.
14 See Children’s Bureau supra note 11, at 1 (citing at least 532,000 children in the foster care system).
15 See ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 21 (1964). Malcolm X described that as a foster child a judge “had authority over me and all of my brothers and sister. We were ‘state children,’ court wards; he had full say-so over us.”); See also Barbara Bennett Woodhouse, “It All Depends On What You Mean By Home”: Toward A Communitarian Theory of the “Nontraditional” Family, 1996 UTAH L. REV. 569, 600 (1996) (suggesting that the state should treat children under their care with nurturing and affection, instead of treating children as “state” children and objects of charity); Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents’ Rights, 14 CARDOZO L. REV. 1747 (1993).
children growing up as wards of the state, deprived of the privacy of living in a family and home of their own and subject to state intrusion in every aspect of their intimate family relationships.

Adoption, for better or worse, presents a tempting but dangerous opportunity for social engineering. As I have argued elsewhere, adoption in the child welfare system is providing a mechanism to shift the burdens of children in poverty from the public back to the private sector.\(^\text{16}\) [expand a little bit with a paraphrase from my discussions].

I also worry that adoption is being misused as means to convey a particular code of values unrelated to empirical evidence of children’s best interests. During the Supreme Court’s 2004 Term, a certiorari petition was filed and denied raising just such concerns. In the case of \textit{Lofton v. Florida Department of Children and Families}, the Eleventh Circuit upheld the State of Florida’s categorical ban on adoption by homosexuals against challenges based on rights to adoption and rights to privacy in intimate relationships. This case involved a child who had lived all his life (and he was about ten or eleven) with a gay couple but could not be adopted by them because Florida prohibited any and all adoptions by gays or lesbian people. [add more facts from various sources].

I know this case first hand because I was privileged to work with Stuart Delery and his colleagues at Wilmer Cutler Pickering Hale and Doar, in writing an amicus brief submitted on behalf of the Child Welfare League of America.\(^\text{17}\) The brief urged the Supreme Court to grant certiorari in the Lofton case, and to reverse. For whatever reasons, procedural, precedential or prudential, the Court declined take the case. [I should think about this and expand a little – comments from the press at the time might be helpful] It remains to be seen whether we will hear from the Court on the constitutionality of such laws. The issue may die a natural death if Florida, as I hope it will, rejects this categorical ban as unfair to children and as bad adoption policy.\(^\text{18}\)

There is danger, however, that other states will be emboldened to enact similar laws and perhaps to extend them to single parents, divorced parents, older parents, and so

\(^\text{16}\) See Barbara Bennett Woodhouse, \textit{Making Poor Mothers Fungible: The Privatization of Foster Care, in CHILD CARE AND INEQUALITY RETHINKING CAREWORK FOR CHILDREN AND YOUTH} 6 (Cancain ed., 2002); Marsha Garrison, \textit{Parent’s Rights vs. Children’s Interests: The Case of the Foster Child, in CHILD CARE AND INEQUALITY RETHINKING CAREWORK FOR CHILDREN AND YOUTH} 108-9 (Cancain ed., 2002) (offering the comparative costs of adoption and foster care as one reason why adoption has been the preferred goal, and explaining that when a “child is adopted by parents who can afford to pay his keep, he costs the state nothing, and even subsidized adoption is cheaper than foster care.”); \textit{IS THERE JUSTICE IN CHILDREN’S RIGHTS?: THE CRITIQUE OF FED. FAM. PRESERVATION POLICY}; and Richard Gelles & Ira Schwartz \textit{CHILDREN AND THE WELFARE SYSTEM; The Book of David Gelles} p. 131 and 163 predicting shift?

\(^\text{17}\) See Motion Of The Child Welfare League Of America For Leave To File Brief Amicus Curiae In Support Of Petitioners And Brief Amicus Curiae, Lofton v. Secretary, Fla. Dep‘t of Children and Families, et al. 358 F.3d 804 (11th Cir. 2004) (No. 04-478). The authors of this brief included: Stuart F. Delery, counsel of record, along with Elizabeth L. Mitchell, Carrie Wofford, and Steven P. Lehotsky of Wilmer Cutler Pickering Hale and Dorr LLP, and Barbara Bennett Woodhouse, director of the Center On Children And The Law at the University of Florida, along with Cathy Ambersley, Jenna Partin, Corinne Stashuk, and Whitney Untiedt, fellows for the Center On Children and The Law. Cite to brief and name all authors. Center on Children and Families Fellows [names] also assisted. Our part in the brief was quite modest compared to the skillful research and writing of our Wilmer & Hale colleagues.

\(^\text{18}\) Update status of opposition – I know the Florida bar declined this but the family section is active.
on down the line. In the past year [add in materials on anti gay initiatives in various places.]

In order to make my case for adoption as a child’s right, I will have to deal with the arguments made unsuccessfully in Lofton. Courts generally give short shrift to rights of children, and focus on adults’ rights. Judges tend to take at face value the argument that the rights of the adults and the children are symmetrical or mirror images. The rationale for rejecting adults’ rights to adopt has generally been assumed to extend to children’s rights to be adopted. The Lofton courts, both at the trial and appellate levels, rejected the notion that would be adoptive parents or children had any “right” to access to adoption. They analyzed adoption as a creature of state law and not as a fundamental aspect of human social relations. They also concluded that even when the social science evidence offered to support the state’s policy was in equipoise, the state’s decisions about children’s best interest should be given great deference.

I believe these arguments are flawed. First, let me address the notion that adoption is a privilege while marriage is a right. Advocates for this position argue that adoption is a modern concept created by statute. Marriage, by contrast, is a “natural” right. I teach family law and I spend at least a week on the Florida state law of marriage. Believe me, if you do not follow the rules set forth in the Florida statutes, you are not legally married—and by the way Florida stopped recognizing common law marriage about the time of Loving v. Virginia. As with marriage, the state has a monopoly on creation of the legal parent child relationship and on dissolution of that relationship. In cases like Turner and Boddie, the Court has held that the legitimate role of the state in setting the rules does not give it plenary power over the status of marriage. It should be the same with adoption.

While I have yet to complete my historical research, I believe I can make a strong case that adoption and marriage are both grounded in ancient customs surrounding the creation of socially recognized family relationships, reduced only in relatively modern times to statutory schemes of law. I suspect that formal adoption laws would be revealed on historical examination to be not the “creation” of this form of parent/child relationship but the statutory recognition of the relationship as a status.

Courts and scholars often describe the history and development of adoption in America as “purely statutory” and “in derogation of common law.” Such descriptions would be accurate if adoption laws, like the 1851 Massachusetts statute, actually created adoption. However, instead of creating parent-child relationships, the adoption laws of

---

19 Michael H v. Gerald D., 491 U.S. 110, 130 (1989) (noting that “[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, Victoria's claim must fail.”); Miller v. Miller; Troxel v. Granville, 530 U.S. 57, 80 (2000) (STEVENS dissenting).
Colonial America merely formalized already existing method of establishing families. Furthermore, the origins and practices of adoption can be traced back hundreds of thousands of years and can be found among many nations and cultures.

Anthropologists and sociobiologists studying prehistoric people have discovered evidence that mothers of the Pleistocene Epoch had substantial help raising their children from so-called “allomothers” comprised of the men who thought they were the father, grandmothers, great-aunts, and older children. The use of allomothers, as a form of collective breeding, allowed pre-historic people to reduce the costs of child rearing, to give birth to children at shorter intervals, and to spread more swiftly into new habitats. Adoption and multiple parenthood are common in the animal kingdom as well.

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

23 Michael Grossberg, Governing The Hearth: Law And The Family In Nineteenth-Century America 269-71 (1985) (describing the numerous legislative bills used to change a child’s name as “no doubt finalizing an informal assumption of parent-child relations” and referring to the private act allowing a seven-year-old girl to be adopted as a “statute [that] merely formalized their relations.”); Jamil Zainaldin, Law In Antebellum Society: Legal Change And Economic Expansion 69 (1983) (noting that adoption procedures had been “formalized, by legislation.”); Naomi Cahn, Perfect Substitute Or The Real Thing? 52 D.U. L.J. 1007, 1104, 1110, 1115, 1117 (2003) (discussing the history of American adoption and suggesting that adoption statutes “were part of the process of clarifying and regularizing the status” of parent-child relations and that “adoption statutes legitimized an increasingly popular method of family formation.”); J. H. Hollinger, Adoption Law And Practice 1-20 (1991) (recognizing that adoption was not created by statute, but rather that statutes “legitimized the numerous informal transfers of parental rights.”); Morton I. Leavy & Roy D. Weinberg, Law Of Adoption 2 (1979) (arguing that adoption statutes were passed in order to make public records of private adoption agreements.).

24 Sarah Blaffer Hrdy, Mothers and Others, in Applying Anthropology: An Introductory Reader 26 (2003). The Efe and Aka Pygmies of central Africa have on average 14 allomothers as caretakers and by the time infants are eighteen weeks old they spend more than 40% of their time with allomothers.

25 Id.

26 Dolphins, polar bears, raccoons, geese, deer, kangaroos, and sheep have all been discovered practicing adoption. Adoption in the animal kingdom is especially more common in animals like seals, bats, and gulls, because they have breeding colonies and in animals like wolves, coyotes, and lions because they live in packs. See Sharon Levy, Parenting Paradox, National Wildlife Magazine, Aug./Sept. 2002; Evan Eisenberg, The Adoption Paradox, Discover, Jan., 2001.

27 See Leo Albert Huard, The Law of Adoption: Ancient And Modern 9 Vand. L. Rev. 743, 744 (1956); John Francis Brosnan, The Law of Adoption 22 Colum. L. Rev. 332, 333-34 (1922); Quarles, supra note 21, at 239-40; Leavy supra note 23, at 1.


29 Lon L. Fuller, Anatomy Of The Law 51 (1968) (reviewing Maine’s account of legal anthropology and discussing the role of implicit law and made law in legal history), see also Maine at 15.

30 See Huard supra note 27. Roughly 2,000 before the birth of Christ, The Code of Hammurabi stated: “If a man take a child in his name, adopt and rear him as a son, this grown up son may not be demanded back.” Id. See also Quarles supra note 21, at 240; Brosnan supra note 27, at 333.
Prior to codification, the Romans extensively practiced and accepted a system of adoptions. Adoptions in Rome served many purposes, but most importantly, adoptions maintained a continuous family line. To provide heirs, sometimes a man would adopt his daughter’s husband or if he had a large family, he would allow a childless relative to adopt one of his sons. By using adoptions to perpetuate the family, someone could inherit family property and perform the religious rites of the family.

The concepts of inheritance and worship also play an important role in the adoption customs of the Japanese and the Hindus. The Japanese Emperor claims to be a direct descendant of the sun with an unbroken family succession for thousands of years. Adoption explains how this is possible (at least with respect to the unbroken chain). Shinto, an ancient religion of Japan, considers ancestors as divine and adoption helps to assure that someone will be worshiping the ancestral tablets. In Hindu civilizations, inheritance and worship were intimately connected, because the proper person needed to perform religious rites for the deceased in order to inherit any property.

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

Civilizations and cultures occupying lands that are now American soil also recognized the practice of adoptions. Sometimes, an Iroquois mother that had lost a son would adopt a prisoner captured in war. The Comanche tribes practiced a similar form

31 See Huard supra note 27; Quarles supra note 21, at 240. There were two forms of adoptions practiced in Rome. One type of adoption was arrogatio, which generally applied to the adoptions of independent, or sui juris, adults. The other type of adoption was adoption, which applied to people still under the power of their father, or alieni juris. See id.

32 See Huard supra note 27; Brosnan supra note 27, at 332; Adoption also had political purposes related “to the notion that a candidates for public office was better if he had children, or more of them, than his opponent.” LEAVY supra note 23, at 1.

33 See LEAVY supra note 23, at 1; see also E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE DYNAMICS 284 (1954) (describing patrilineal groups of Indonesia that also adopted their daughter’s husbands to have a “son” to continue the paternal line).

34 See Huard supra note 27; Brosnan supra note 27, at 332; LEAVY supra note 23, at 1. In this context, the main interests served by adoption were those of the people adopting, not necessarily those of the person being adopted. See HOLLINGER supra note 23, at 1-19. (suggesting that the relationship between Roman and American adoption practices are “tenuous at best” because although inheritance has always been one purpose behind adoptions in America, it has not been the sole purpose, nor has religious worship been a noteworthy factor).

35 See Quarles supra note 21, at 239.

36 See Leav.

37 See Leav.

38 See Brosnan supra note 27, at 334.

39 See id.

40 Exodus 2:5-10

41 Esther 2:7

42 Matthew 1:24-5; Luke 2:27-33

43 See E. SIDNEY HARTLAND, PRIMITIVE LAW 36 (1924). Such prisoners were adopted through a tribal rite in which they were formally admitted into the Iroquois tribe and thereby losing any status within their birth tribe. Id. While courts have recognized certain tribal customs of Native Americans/Indigenous people, such as marriage
of adoption; however, the captors of this tribe incorporated their prisoners into the families as adopted brothers, as well as sons.\footnote{See Hoebel supra note 33, 137. Girls captured during war were also admitted into the Comanche tribes, but this usually occurred through marriage to their captors as opposed to adoption. Id.} When Eskimo/Inuit mothers cannot nurse or care for multiple children, they are often adopted by childless couples in need of passing on a family name or security in their later years.\footnote{See id. at 74-5. Most adoptive parents agree to care for the child in exchange for some form of compensation. Unfortunately, when no one is able to care for an Eskimo/Inuit child, it may become the victim of infanticide. Id.}

In Hawaii, adoption was originally based upon oral agreements and ancient customs.\footnote{See Brosnan supra note 27, at 335; Ray J. O’Brien and Hawaiian Trust Company, Limited v. Thomas Walker, 35 Haw. 104, 9 (1939) (recounting the origins of Hawaiian adoption law through history and judicial decisions, and finding that the Hawaiian custom and usage of adoption existed prior to the written laws of Hawaii). Id at 12.} However, clear proof of such adoptions caused difficulties with inheritance.\footnote{See Walker, supra note 46, at 9.} In 1841, the Hawaiian legislature attempted to correct this problem by enacted its first written law of adoption that clarified the methods to write and record adoption agreements.\footnote{See Brosnan supra note 27, at 335; Id. at 11 (“The adoption of a child as heir, clearly and definitely made according to Hawaiian custom and usages prior to written law, I hold to be valid under existing laws” quoting Estate of Nakuapa, 3 Haw. 342.} Several opinions of the Hawaiian Supreme Court have acknowledged the historical fact that adoption is a part of Hawaiian custom, and that the customs that previously formed adoptions “have the same force of law as those subsequently passed and incorporated into Code.”\footnote{Id. at 11 (“The adoption of a child as heir, clearly and definitely made according to Hawaiian custom and usages prior to written law, I hold to be valid under existing laws” quoting Estate of Nakuapa, 3 Haw. 342.)}

During the period of American slavery, an “extensive informal adoption network” existed among blacks.\footnote{Robert B. Hill, Informal Adoption Among Black Families 22 (1977).} Black families were easily broken up when sold by the slave masters and as a result, relatives and fictive “aunts” and “uncles” cared for many children.\footnote{See Dorothy Roberts, Killing The Black Body 53 (1997) (depicting the struggles facing black families during slavery and noting that “slaves created a broad notion of family that incorporated extended kin and non-kin relationships.”).} This also led to “networks of mutual obligation” within slave communities that extended beyond blood or marriage relationships.\footnote{Id.} Even after the Civil War, ex-slaves raised black children that were excluded from the benefits of formal adoption.\footnote{See id. at 53-4.} The origins of the black extended family may however, be attributed to more than family separation during slavery. Scholars have found that patterns of extended families and informal adoption closely correspond to family patterns of African tribes.\footnote{See Hill supra note 50, at 29.}

Today, it is still a widespread practice of the Baatombu people of West Africa to raise children by people other than their biological parents.\footnote{See Erdmute Alber, “The real parents are the foster parents” Social Parenthood among the Baatombu in Northern Benin, in Cross-Cultural Approaches To Adoption 36 (2004) (exploring the wide range of child-rearing methods found among societies in Africa, Oceania, Asia, and South and Central America).} Between ages three and six, the duties accompanying parenthood are transferred from the child’s biological parent to ceremonies, the practice of adoption has not been recognized because it is “a custom which does not conform to the statutory requirements.” Brosnan supra note 27, at 335.
the child’s “social parent.”\textsuperscript{56} A social parent is an individual adult of the same sex as the child, thus even when social parents are married, the women is responsible for her social daughter and the man is responsible for his social son.\textsuperscript{57} Marriages of the Baatombu people are unstable, but the exclusive responsibility social parents exercise over “their” social child continues even after divorce and helps to lessen the emotional impact of divorce.\textsuperscript{58} In a similar vein, marriage is not highly valued by the Batouri women of East Cameroon, consequently the Batouri people often engage in informal marital relationships.\textsuperscript{59} However, instead of practicing social parenting, the family structure of the Batouri people is a matrilineage.\textsuperscript{60} In order to continue the maternal line of descent, grandmothers often claim the children of their daughters and eventually find ways to list the mother’s brother, father, or deceased husband as the child’s father on the birth certificate.\textsuperscript{61}

Like the grandmothers of Batouri children, the courts of England and America participated in a similar fiction of identifying fathers. English courts have upheld the presumption that a child born to a marriage was the legitimate child of the mother’s husband.\textsuperscript{62} Yet, other more convincing practices of a “quasi-adoptive” character have taken root in America.\textsuperscript{63}

These practices included apprenticeships and indenture, which were borrowed from England, and child-saving efforts.\textsuperscript{64} In apprenticeships and indentures, children were transferred or contracted to provide services for their masters in exchange for training, schooling, shelter, food, and other parental services.\textsuperscript{65} These practices “created a familylike legal tie in which apprentices assumed the role of family members and masters held the title of surrogate parents.”\textsuperscript{66} In some instances, when permitted to select between their father and their master, children have decided to remain indentured.\textsuperscript{67} As America’s
conception of childhood began to shift towards notions of innocence and the need to prolong childhood, a manufacturing economy with independent labor also began to emerge.  

A combination of these factors made apprenticeships and indentures more analogous to economic relationships than familial relationships.

In the mid-nineteenth century, child-saving organizations such as the New York Children’s Aid Society, sought to remove children from a life of poverty, vagrancy, and neglect by placing them with “women devoted to charity” or families out west that needed the an extra hand. Within the few five years of operation, the Worcester Children’s Friend Society had placed sixty-two children in foster care with high expectations for adoptions, several of which were placements with the women involved in these charities. Eventually the focus of child-saving organizations shifted to temporary placements while helping families get through difficult times, such as the death of a parent, the child’s need for education and training, or a parent’s search for a new job.

Similar concerns for the welfare of children, previously voiced by child-saving organization, such as finding the “proper” person and “suitable” homes, trickled over into the Massachusetts adoption law of 1851. Other motives behind the enactment of the new adoption statutes stem from the numerous legislative bill passed granting private petitions of adoption and name changes. The widespread practice of adoption throughout time, around the world, and in nature suggests that adoption is deeply entrenched in humanity. Therefore, the American adoption statutes did not create a new form of parent-child relations, but rather they merely provided a formal means of making public records of the private parent-child relations already in existence.

It is also illogical to distinguish adoption from other family relationships because adoptive relationships are not based on blood ties. Marriage is not based on blood. When Supreme Court Justice David J. Brewer sat on the Kansas Supreme Court he declared that “[i]t is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the ability to do all which the prompting of these ties compel.”

Another argument against treating adoption as a child’s right might be based on an autonomy principle. Spouse’s “choose” their mates beforehand while adopted children’s parents are chosen for them—and in cases of those “waiting children”, the

---

68 See ZAINALDIN supra note 23, at 70; GROSSBERG supra note 23, at 259.
69 The introduction of public schooling also led to a decreased importance in practical training. See GROSSBERG supra note 23, at 259-60.
70 Cahn supra note 23, at 1091. Professor Cahn also points out that while the goal of these charitable organizations may have been to provide suitable homes for needy children; the practice of the organizations did not always amount to this standard. Id. at 1092.
71 Id. at 1107.
72 See id. at 1092-3.
73 Id. at 1107.
74 From 1781 to 1851, 101 private bills “altering the domestic status of children” were passed in Massachusetts alone. GROSSBERG supra note 23, at 269.
75 GROSSBERG supra note 23, at 257 (quoting Justice Brewer in Chapsky v. Wood (Kan. 1881)).
state chooses their parents for them. Again, this formalistic account reduces the diverse reality of children’s experiences to a simplistic level. For one thing, many of the waiting children have already “chosen” a parent—a foster parent or other caregiver with whom they have formed strong bonds of love. [use the research on bonding here]

In addition, marriage, like adoption is not only about couples already in love but about the opportunity to find love. As adoptive parents know, commitment often precedes choice. The tradition of having an elder choose one’s marriage mate is still common around the world. The involvement of third parties in the matching process does not make marriage less important as a relationship. Whether on line or through village marriage brokers, match making is alive and well today in marriage, just as it is in the matching of adoptive parents seeking children and children waiting to be adopted.

Adoptive parents would flatly reject the notion that relationships created through adoption are somehow less “fundamental” than marriages. If anything, the parent child relationship is even more fundamental in the social order than the relationship of spouses. Many scholars have observed that the parent child relationship has now become the most stable and central in American family law. Spouses may commit to remain together for life, but up to half of these “permanent” bondings end in divorce. Parent child relations are expected to and generally do last a lifetime. As I tell my students, you can divorce your spouse but you are not free to divorce your child except in the most extreme situations and when the child’s best interest will be served thereby. Not all adoptions last forever. But, while adoption advocates worry about how to reduce the numbers of disrupted adoptions, the rate of failed adoptions is quite small compared to the rate of failed marriages.

At their core, the distinctions we draw between the state’s power to interfere in adoption and the state’s power to interfere in marriage are based on outdated notions of the child as property. [add some discussion from Who Own the Child to explain what I mean] Burdened by the legacy of such traditions, children, like pets and other sentient chattels, have starkly diminished rights. Their owners, or the state when they are wards of the state, can make and break their intimate relationships with impunity. While adults even in state custody—for example the incarcerated prisoner in Turner v. Safley, are treated as persons, laws that create categorical bars to adoption treat parentless children

77 citeto psych studies
79 Stats on divorce and on disrupted or failed adoptions Wrongful Adoptions could fit here too: claims in fraud and negligence by parents and also by adopted children p. 51
80 482 U.S. 78 (1987) NEED PINPOINT
as if they were property of the state, rather than wards to whom the state owes a high fiduciary duty.

A number of courts, like the federal courts in *Lofton*, have treated children’s rights in adoption as the mirror image of adults’ rights—or lack of rights.\(^{81}\) Even assuming, for sake of argument, that adults have no right to adopt, does it necessarily follow that children have no right to be adopted? I have seen the argument that childless adults have other choices and options besides adoption, to form intimate family relationships. Adults can procreate through reproductive technology using surrogate mothers, third party sperm donors and even surrogate eggs.\(^ {82}\) Parentless children do not have the same range of options. From a child’s perspective, state laws on adoption are no different from state laws on marriage and procreation in the lives of adults. They are the gateway into the most significant legal relationship in a minor child’s life. As the Court has often recognized, state laws on parentage, divorce, legitimacy and the like, do not create the parent/child relationship. Nor are relationships between parents and children defined by blood. Blood relationship is only one of the elements in a matrix of intangibles like attachment and tangibles like support that define the parent/child relationship. While laws on marriage and adoption do not create a family, they do have the power to confer or withhold precious benefits and protections.

In the past I have argued that children have a liberty interest in protection of their bonded relationships, as the Supreme Court implied in *Smith v. Organization of Foster Families for Equality and Reform*. I argued this position in amicus briefs in the Baby Jessica case and in the adoptive parents brief in the Baby Richard case in the 1990s. Cert was denied in these cases but at least we got dissents from denial by several of the justices. The argument I am making today, however, does not depend on the existence of an already formed intimate relationship of parent and child. If the principles behind marriage precedents like [*Loving v. Virginia*](https://www.law.cornell.edu/supct/cases/1967/69) and *Turner v. Safley* extend equally to a child’s right to form an intimate family relationship through adoption, this right attaches not only to children who have already formed de facto parent child relationships with would be adoptive parents. It applies with equal force to the “waiting children” who are prevented from finding permanent and stable families of their own by the unconstitutional barriers erected by state adoption laws. As noted in connection with the miscegenation laws, the evil lay not only in separating hearts that had been joined together, but in the laws’ deterrent effect on the formation of loving relationships.

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

---

\(^{81}\) *Micheal H v. Gerald D.*, supra note 19.

\(^{82}\) [discussion and cites DOROTHY ROBERTS, *KILLING THE BLACK BODY*.](https://www.law.cornell.edu/supct/cases/1967/69)
But wait! These are radical arguments. Did I argue that we should advance these arguments in the amicus brief in Lofton? No I did not. I and my colleagues discussed these arguments at length as we explored the possible theories behind the brief, but the issues were not directly raised in the proceedings below so this was neither the time nor place to debut such novel arguments.

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

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

As we pointed out in our Lofton brief, experts have concluded that adopted children “function more adequately at the personal, social, and economic level compared with those who were formerly fostered and, particularly, those who grew up for a large part of their lives in institutions.” Adoption facilitates the development of an attachment relationship—a “reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver.” And attachment relationships form “the cornerstone for healthy psychological adjustment, affecting development not only in infancy and childhood but in adulthood as well.” Because adoption provides security and stability for the child, it is the placement option most likely to foster strong attachment relationships for children whose biological parents are unavailable and therefore unable to care for them.

The alternatives to adoption, even permanent guardianship, are less secure than adoption and place children at risk of multiple placements. Multiple placements mean multiple caregivers and can prevent a child from forming a lasting attachment to a nurturing, caring adult. In addition to lacking the stability of adoption, foster care and legal guardianship do not—as the Court of Appeals in Lofton recognized—have “the societal, cultural, and legal significance [of] adoptive parenthood, which is the legal equivalent of natural parenthood.” From waiting the child’s perspective, being adopted means having a “real” home and a “real” family. Foreclosing or limiting adoption as an option for those children in foster care for whom adoption is the best alternative, clearly deprives them of something of great value.

83 FED. ASFA and Fla. Stat. §39.621
84 CITE THE ASFA AND RELATED LITERATURE
85 CITE STUDY FROM LOFTON BRIEF and see also Beyond the Best Interest of the Child starting on p. 32 On continuity at different points in children’s lives.
The history of adoption law and policy confirms this analysis. Over the past 30 years, the states have moved decisively away from the categorical limitations on adoption. In the olden days, agencies demanded “ideal families”: defined as young, middle-class, same race, same religion, married couples. Until the 1960s and 1970s, many states excluded adoption applicants who fell short of that ideal, such as adults with physical disabilities, single adults, older couples, and low-income families. At one time, according to Joan Hollinger (my coauthor on the Bay Jessica brief and the preeminent authority on American adoption law, we “thought it better to leave a child in foster or institutional care without an adoptive home rather than to place the child in a ‘mismatched’ home.”) These beliefs have been set aside in light of modern knowledge of child development and the importance of attachment relationships.

By broadening the pool of prospective adoptive parents to include categories of persons that had previously been excluded, states freed child welfare experts applying a best interest standard to match each child’s individual needs with the strengths and skills offered by each potential adoptive parent. No two children (or adults wishing to adopt them) are exactly alike. Consider a special needs child like John Doe in Lofton case. He had medical problems that called for an adoptive parent with medical expertise. All other things being equal, the more potential adoptive parents, the greater the likelihood that those entrusted with promoting the child’s welfare will be able to make a placement that truly serves the child’s best interests.

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

Categorical bans on adoption prevent child welfare experts from making the best individual child-parent match where a gay or lesbian parent can best meet the needs of a child (as Petitioners have for their children). For example, a child whose best adoptive placement might be with a relative can find the relative is disqualified because of a categorical ban. The harm is most starkly illustrated in cases like Lofton where a categorical ban prevents permanent placement with a familiar and loving foster parent or guardian who is not only willing and well-suited to take care of the child but bonded to the child. Nationwide, 61% of adopted children are adopted by foster parents. If states adopt categorical bans, they will have to extend them to qualifications for foster parents or risk removing children from bonded foster homes in order to create a permanent relationship.
If adoptive parents were waiting in line to adopt special needs children, the situation might be less damaging. But the sad truth is that there are far more children than homes. In the face of a shortage of adoptive parents, categorical bans actually ensure that some children will never have a family of their own. According to the United States Department of Health and Human Services, 8,126 children were awaiting adoptions in Florida during fiscal year 2002. Many of these children will wait in vain and will “age out” of the system into homelessness and joblessness. They will never experience the love and support of a permanent family.

Due to the shortage of adoptive parents, even children who eventually find homes with “approved” adoptive parents, may be harmed by unnecessary delays in placement. They may spend years in foster or other temporary care awaiting adoption. The length of a child’s stay in foster care has a significant negative impact upon the child’s psychological and social development. The longer a child remains in foster care, the greater the likelihood the child’s attachment relationships will be qualitatively inferior and, hence, that any psychological or social problems will be irreversible.

Special needs children also suffer disproportionately from categorical barriers to adoption. Remember that special needs children include not only disabled and older children but all children of color. These are the toughest children to place in adoptive homes and they often wait the longest before being adopted. Although no other state at present categorically prohibits gay men and lesbians from adopting, we expressed concern in our brief in Lofton that allowing the decision in Lofton to stand could encourage other states to enact such bans, and thereby worsen the national shortage of adults willing and able to adopt the 126,000 children awaiting adoption nationwide. Once again quoting from Stanley v, Illinois, we argued that the Florida “forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities[;] it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.”

Well, our position did not carry the day. But I hope these arguments will provide a foundation for understanding what is wrong, from the child’s perspective, with categorical bans on adoption. Every child deserves an individualized assessment of his or her best interests. While I look forward to the day when adoption takes its place as a fundamental right, I will settle for rational basis with teeth. In fact, many court watchers have identified a trend away from new categories of fundamental rights or suspect classes and towards a toughening of the “rational basis test” so that it really does protect vulnerable minorities from ill treatment and discrimination. The Supreme Court should follow its own guidance in the case of Cleburne v, City of Cleburne, a case that struck down barriers to building a home for mentally retarded children. Any law that keeps children from having a home of their own because of irrational fears of people who are “different” is a law that runs roughshod over children’s interests and is a law that cannot stand.

To be Added:
Section on equal protection arguments

Conclusion