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Fostering to Children's Needs or Fostering to Legislators' Personal Agendas.

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FOSTERING TO CHILDREN'S NEEDS OR FOSTERING TO LEGISLATORS' PERSONAL AGENDAS?

TRACY KASPAREK*

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* St. Mary's University School of Law, Candidate for J.D., May 2007; Southwestern University in Georgetown, B.A., Business, December 2003. I would like to start off by thanking my mom, Sharon Gentry, for her unwavering support, and for giving me the title to my comment. I would also like to thank my dad, Phil Kasperek, and my sister, Monica Kasperek for their guidance and support. I love you all very much. Finally, I would like to thank *The Scholar* editorial board for their unending help in the research and writing process. This comment is dedicated to homosexuals striving to achieve equality under the law.

I. INTRODUCTION

“[N]ow that blacks and women can vote, and now that blacks and women have equal rights—you turn your hatred to homosexuals and you still use your misguided reading of the Bible to justify your hatred. You want to pass this ridiculous amendment [banning same-sex couples from becoming foster parents] so you can go home and brag . . . brag about what? Declare that you saved the people of Texas from what?”¹

—Senfronia Thompspon, State Representative

With the 80th Texas Legislature in session, we can reflect on the recent history of bills dealing with abortion, school finance, and homosexuality for a glimpse of what is to be filed again this session. The past four Texas legislative sessions have yielded anti-family bills attempting to deny individuals and couples the right to provide foster care to children in Texas, specifically targeting same-sex couples. These bills gave the government the discretionary power to investigate private family lives, resulting in an unconstitutional invasion of privacy. The bills’ overly broad language, requiring inquiry into the sexuality of any foster parent applicant that is not married, unjustly discriminates against single parents by flagging them as potential homosexuals, and wastes considerable amounts of capital to investigate the sexuality of all single applicants.²

To gain insight as to Texas’ view on homosexuality, think back April 22, 2005 when Representative Talton was on a personal crusade to ban same-sex couples from being foster parents.³ In 2003, during a hearing on one of Representative Talton’s bills to ban gay foster parents, Talton stated, “I’d [prefer to] see children growing up in an orphanage, quite frankly, and learning the right ways . . . [rather] than grow up in a home teaching

1. See Senfronia Thompson, State Representative, Her Speech in Response to Marriage Equality Constitutional Amendment that passed in Texas, CCGLA, Apr. 25, 2005, <http://www.ccgla.org/political/txvoting.html> (arguing that although gay rights are not exactly analogous to civil rights, a bill that distinguishes homosexuals causes harm).

2. *Take Action: LGRL Launches Coalition for Texas Families*, LGRL, May 1, 2005 (on file with author) (asserting that the Amendment’s approval would misemploy Texas residents’ tax dollars for investigation of private family lives and inquisition of their sexual orientation, which could result in removal of children from foster homes). Richard Willing, *Kids in Legal Gray Area When Gay Couples Split*, USA TODAY, June 20, 2005, available at http://www.usatoday.com/news/nation/2005-06-20-custody_x.htm (stating that in the three California cases discussed, one of the arguments against considering a partner as a parent was that they had not adopted the children).

3. Amendment 60 - To Ban Gay, Lesbian and Bisexual Foster Parents in Texas, <http://www.ccgla.org/political/txvoting.html> (last visited Dec. 13, 2006) (referring to Amendment 60, disqualifying prospective foster parents who declared themselves a homosexual or bisexual).

them that homosexuality is OK.”⁴ Ironically for Representative Talton, if foster children were allowed to make the choice between living in a state-institution, or being sent to live with a loving same-sex couple, it is doubtful that many would choose the cold confines of an orphanage. Unfortunately, Representative Talton’s view appears to reflect the view of most Texans.

However, homosexuals fighting to gain rights as foster parents, are not completely alone. One State Representative, Senfronia Thompson, decided to stand up for same sex couples by attempting to persuade her colleagues to end the hateful discrimination against homosexuals. She openly opposed Amendment 60 to Senate Bill 6, which proposed to ban all homosexuals from being foster parents in Texas.

Members, this bill is about hate and fear and discrimination Today, you are playing to the lowest common denominator—you are putting aside the real issues of substance that we need to address so that you can instead play on the public’s fears and prejudices to deceive and manipulate voters into thinking that we have done something important Last week, Republicans used a political wedge issue to pull kids—sweet little vulnerable kids—out of the homes of loving parents and put them back in a state orphanage just because those parents are gay. That’s disgusting.⁵

In the Legislature, there are few that agree with Thompson’s view on homosexuals’ rights in regard to foster parenting. Hence, Thompson’s words of support give homosexuals a voice in their legal plight to gain rights as foster parents.

Not only is support sparse in the Legislature, but also in precedent. There are few cases in Texas that deal with same-sex parenting, and none specifically addressing the rights of same-sex couples to foster or adopt children. Texas law does not recognize a “psychological” or “de facto parent.” Therefore, any legal information dealing with homosexual foster parenting is found mostly in legislative history. The courts, thus far, have failed to act, refusing to delve into the sensitive area of same-sex parenting. Unfortunately, while the courts wait to take a stance, over 15,000

4. Ann Rostow, *Texas Lawmakers Kill Gay Foster Parent Ban*, PLANETOUT NETWORK, May 31, 2005, <http://www.planetout.com/news/article-print.html?2005/05/31/2> (referring to the “right ways” of human sexuality).

5. Senfronia Thompson, State Representative, Her Speech in Response to Marriage Equality Constitutional Amendment that passed in Texas, CCGLA, Apr. 25, 2005, <http://www.ccgla.org/political/txvoting.html> (criticizing the Marriage Equality Constitutional Amendment as heinous and against public policy). Representative Thompson compares homosexuals’ struggles to gain civil rights to that of African Americans’ struggles for civil rights. *Id.*

children in the Texas Department of Protective and Regulatory Services system wait to be put into loving homes.⁶ This comment will discuss the legal issues facing same-sex foster parents in Texas, specifically focusing on the last four Texas legislative sessions. Part II will highlight the nature and legislative history of same-sex bills considered in Texas in 1999, 2001, 2003, and 2005. Part III will deal with the impact these bills have on homosexuals, children in foster care, and Texas generally. Part IV will articulate the constitutionality of the proposed Bills against homosexuals. Part V will present three groundbreaking California cases, decided in August of 2005, which are likely to be used as a guide for other states addressing similar issues.⁷ Finally, part VI will advocate for the right of Texas homosexuals to be foster parents and will argue that Texas should replace the current standard used by courts in deciding whether to place a child in a home. The court should replace the “best interest test” with the “adverse impact test” and focus on a parent’s ability to care for a child, not the makeup the parents’ sexual orientation.⁸

II. LEGAL BACKGROUND

“The only stable state is the one in which all men are equal before the law.”⁹

—Aristotle

A. *The Beginning of the Ban on Same-sex Foster Parenting*

During the last four legislative sessions, the Texas Legislature has considered various bills which would prohibit same-sex couples from foster parenting. The introduction of such bills began after Rebecca Bledsoe, a Child Protective Services supervisor, removed a three-month old boy

6. Cari Hammerstrom, *Measure Would Ban Single Foster Parentst*, AUSTIN AM. STATESMAN, Apr. 22, 2003, at B5.

7. Richard Willing, *Kids in Legal Gray Area When Gay Couples Split*, USA TODAY, June 20, 2005, available at http://www.usatoday.com/news/nation/2005-06-20-custody_x.htm (stating that in the three California cases discussed, one of the common arguments against considering a partner as a parent was that they had not adopted the children). These cases will provide guidance for similar issues in other states, including Texas.

8. NAT’L CENTER FOR LESBIAN RIGHTS, AN INFORMATION SHEET: CUSTODY CASES INVOLVING LESBIAN AND GAY PARENTS 1 (2000), available at <http://www.nclrights.org/publications/pubs/cc1000.pdf> (stating that in the District of Columbia, custody is decided without regard to “race, color, national origin, political affiliation, sex or sexual orientation”).

9. See The Quotations Page, <http://www.quotationspage.com> (last visited Nov. 15, 2006).

from the custody of a lesbian couple in Dallas, Texas in 1997.¹⁰ Bledsoe relied upon her personal views on homosexuality in determining that the baby should be removed, and also specifically stated that “homosexual conduct is against the law in Texas.” Her attorney stated, “[j]ust as you wouldn’t put a child into a family where there were known shoplifters or worse, you shouldn’t put them into a place where they are expressly violating the law”¹¹ Bledsoe was ultimately demoted, not for her philosophy, but because she violated the standard procedures of Child Protective Services for removing a child from a foster home.¹²

Unfortunately for foster children, as well as same-sex foster parents, certain Texas representatives who share Bledsoe’s philosophy took notice of the incident and made it their mission to ban same-sex foster parenting in Texas. Disturbingly, there is still a huge need for foster parent applicants.¹³

When adoption first became a recognized legal concept, the goal was to provide a way for infertile, mostly caucasian couples, to have children of the same race.¹⁴ However, since the number of children in need of homes grew substantially, especially for minority and physically or mentally handicapped children, adoption and foster care agencies have broadened the range of people they will accept as foster or adoptive parents.¹⁵ In the mid-1990s conservative organizations made it their mission to create laws that would prevent homosexual individuals from foster-parenting or adopting.¹⁶ Texas was no different. In 1999, during the 76th regular session of the Texas Legislature, Representative Robert Talton sponsored House Bill 415, which required the automatic disqualifica-

10. Christopher Lee, *Bills Would Bar Gay Foster, Adoptive Homes; Opponents Say Kids May Lose Out*, DALLAS MORNING NEWS, Mar. 28, 1999, at A41 (noting that Governor George Bush’s words, “I think adoptions ought to be between a married man and woman[,]” along with the Rebecca Bledsoe incident, energized lawmakers to file legislation that would “ban state child welfare officials from placing kids in foster or adoptive homes in which a gay or lesbian lives”).

11. Barbara Kessler, *Agency Defends Placing Kids in Gay, Lesbian Homes; Worker Opposed to Policy Threatens Suit Over Demotion*, DALLAS MORNING NEWS, Nov. 11, 1997, at 21A (stating that Ms. Bledsoe did not think that homosexual behavior was the best model conduct for a boy as he grows up).

12. *Id.* (noting that “[t]hese procedures are set up to prevent a child from suffering emotionally, as can often happen when they’re moved from one place to another”).

13. *Id.* Linda Edwards, spokeswoman for the department, however, reiterated the need for the largest pool of foster parent applicants possible in order to get foster children out of state institutions. *Id.*

14. NAT’L CENTER FOR LESBIAN RIGHTS, AN INFORMATION SHEET: LESBIAN AND GAY MEN AS ADOPTIVE AND FOSTER PARENTS: AN INFORMATION SHEET (Oct. 1, 2000), available at <http://www.nclrights.org/publications/adoptive-information.htm>.

15. *Id.*

16. *Id.*

tion of certain persons from the pool of foster care applicants.¹⁷ The purpose of this bill was to prevent homosexual persons from providing foster care, thus mandating that the Department of Protective and Regulatory Services question each foster parent applicant about their sexuality and reject all homosexual or bisexual applicants.¹⁸ The formal version of House Bill 415 as introduced stated:

Foster parent disqualification:

- a) The department shall inquire of an applicant who is applying to serve as a foster parent or of a foster parent whose performance is being evaluated whether the applicant or foster parent is homosexual or bisexual
- b) If the answer to the inquiry required by Subsection (a) is affirmative, the department is prohibited from:
 - (1) allowing the applicant to serve as a foster parent; or
 - (2) placing a child or allowing a child to remain in foster care with the foster parent whose performance is being evaluated
 - (3) Notwithstanding a negative answer to the inquiry required by Subsection (a), if the department determines after a reasonable investigation that an applicant who is applying to serve as a foster parent or a foster parent whose performance is being evaluated is homosexual or bisexual, the department is prohibited from:
 - (1) allowing the applicant to serve as a foster parent; or
 - (2) placing a child or allowing a child to remain in foster care with the foster parent whose performance is being evaluated.¹⁹

Talton's bill died in committee.²⁰ The bill was put aside, due to a backlog in the House and Senate, which necessitated that the legislature focus on emergency issues only.

In 2003 and 2005, bills with the exact wording of House Bill 415 were again sponsored by Talton. The 2003 measure, House Bill 194, was referred to the Committee on Juvenile Justice and Family Issues on February 6, 2003. Because a public hearing never materialized for the

17. Tex. H.B. 415, 76th Leg., R.S. (1999).

18. HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 415, 76th Leg., R.S. (1999).

19. Tex. H.B. 415, 76th Leg., R.S. (1999).

20. *Fostering Trouble; Don't Reduce the Pool of Foster Parents*, DALLAS MORNING NEWS, Feb. 19, 2003, at 16A (stating that lawmakers should concentrate on "real problems where Texans expect real solutions – like the state's budget shortfall, the homeowners' insurance mess[,] and the fouled-up school finance system" instead of "ill-conceived legislation like Rep. Talton's").

proposal,²¹ lawmakers were unable to vote on the bill and it thus remained in committee without further action. In 2005, Talton again called for a law prohibiting homosexuals from foster parenting; however, this time Talton used a different strategy, and it worked.

In response to Child Protective Services' highly publicized blunders, which led to the tragic death of several Texas children, Senator Jane Nelson authored Senate Bill 6 during the 79th Regular Legislative Session. The bill called for the reformation of Child Protective Services in an effort to prevent future incidents where children, despite agency involvement, are left in situations of abuse and neglect.²² The bill passed in the Senate and moved to the floor of the Texas House. This is when Representative Talton decided to act. On the House floor, Talton filed an amendment banning same-sex foster parents. Doing so allowed Talton to accomplish what he had been unable to do in previous legislative sessions—survive a committee vote on his proposed amendment to Senate Bill 6.²³ The House overwhelmingly passed Senate Bill 6, with Amendment 60. The bill was then transferred to a 10-member conference committee, of which Talton was a member, to resolve the differences between the bill passed in the Senate and the one passed in the House.²⁴ Several members of the conference committee, as well as Texas Governor Rick Perry, recognized that Amendment 60 was a “distraction and an unnecessary expense and thus the amendment failed.”²⁵

While the bills attempting to ban homosexuals from foster parenting in Texas will be the primary focus of this comment, it is important to take a brief look at the other anti-homosexual bills that have been considered in the past four Texas legislative sessions.

B. *Discrimination of Homosexuals in Texas*

Problems facing same-sex foster parents are further complicated by the fact that Texas refuses to recognize same-sex marriages, and therefore,

21. Penny Weaver, *Anti-Gay Bills Disappear as Legislature Closes*, HOUSTON VOICE, June 13, 2003.

22. See HEALTH AND HUMAN SERVICES COMM., BILL ANALYSIS, Tex. S.B. 6, 79th Leg., R.S. (2005) (providing the background and purpose of the proposed bill). “These orders came in response to numerous cases in which children . . . were left in states of abuse or neglect, despite agency involvement, resulting in severe harm or even death.” *Id.*

23. Ann Rostow, *Texas Lawmakers Kill Gay Foster Parent Ban*, PLANETOUT NETWORK, May 31, 2005, <http://www.planetout.com/news/article-print.html?2005/05/31/2> (stating that “Talton’s attack on foster parents . . . never survived a committee vote”).

24. *Id.*

25. *Id.* (recognizing that “almost all the state newspapers editorialized against the amendment, calling it mean-spirited and questioning the loss of current and future foster homes”).

same-sex couples, unlike heterosexual couples, are not viewed as family units. In 2001, Representative Chisum filed House Bill 496 relating to the state's refusal to recognize same-sex marriages or civil unions.²⁶ The proposed bill would have kept gay couples from receiving benefits that heterosexual couples enjoy, such as health, tax, and survivor benefits. In addition, the bill impacted a same-sex couple's ability to adopt or provide foster care. House Bill 496 failed to pass, not because it was discriminatory, but because it was not scheduled for discussion before the Texas House of Representatives adjourned *sine die*.²⁷ In the following regular legislative session, several bills that challenged the right of homosexuals to foster parent, adopt, and marry were presented. During the 78th Legislative session, Talton filed House Bill 1911, in addition to House Bill 194, which prevented single individuals from providing foster care.²⁸ This was an underhanded attempt targeting gay and lesbian couples that went so far as to exclude, from the pool of potential foster parents, anyone not conforming to Talton's antiquated notion of a traditional family.²⁹ The bill was assigned to the State Affairs Committee where it never emerged.³⁰

Also in the same legislative session, Representative Sid Miller, filed a counterpart to Talton's House Bill 194.³¹ This bill was similar in purpose to House Bill 194, but instead focused on prohibiting homosexuals from adopting children in state custody, not foster parenting.³² House Bill 194 was also assigned to the State Affairs Committee where it subsequently stayed.³³ Fortunately, the majority of proposals drastically limiting the

26. Tex. H.B. 496, 77th Leg., R.S. (2001).

27. See Brian Shults, Editorial, *Student Goes to State Capitol to Fight Anti-Homosexual Legislation*, COLLEGIAN ONLINE, 2001, <http://www.tccd.edu/collegian/archive/articles/statecap.html> (arguing that the bill, if passed, would infringe on the rights granted to homosexuals in other states by prohibiting the recognition of same sex marriage or civil unions in Texas).

28. Tex. H.B. 1911, 78th Leg., R.S. (2003) (“[P]revent the placement of a child in a foster home with any unmarried individuals.”).

29. Cari Hammerstrom, *Measure Would Ban Single Foster Parents*, AUSTIN AM.-STATESMAN, Apr. 22, 2003, at B5 (reporting that because of House Bill 1911, “everyone that doesn't fit into the traditional family model” is excluded from the pool of potential foster parents). “As written, the bill could mean widowed and divorced Texans – and even married couples who have children or other unmarried people living with them – would not be allowed to serve as foster parents.” *Id.*

30. Cari Hammerstrom, *Measure Would Ban Single Foster Parents*, AUSTIN AM.-STATESMAN, Apr. 22, 2003, at B5.

31. *Id.*

32. *Id.*

33. Amy Smith, *Fostering Family Values*, Vol. 22 AUSTIN CHRON. No. 35, May 2, 2003 (describing that the bill was assigned to the State Affairs Committee rather than the Juvenile Justice and Family Issues Committee, where the Democrats controlled a majority).

rights of homosexuals failed in 2003. However, this success was temporary, and in 2005, the Texas Legislature approved a bill that radically affected homosexuals' rights as they pertain to family.

House Joint Resolution Bill 6 proposed a constitutional amendment banning same-sex marriages.³⁴ The resolution defined marriage in Texas as consisting of only "one man and one woman."³⁵ The resolution passed in both the Texas House and Senate and was overwhelmingly approved as Proposition 2, by the voters in November 2005.³⁶ The passage of the Texas Marriage Amendment is a setback in the struggle for equality for same-sex couples, but the legislature's opposition to similar proposals in the past four legislative sessions provides a glimmer of hope that the principles of equality, fairness, and justice will prevail.

III. BILL ANALYSIS

*"[Having] gay foster parents who are 'loving and caring' . . . [is] 'better than having the kids being abused, obviously' "*³⁷

—Governor Rick Perry

When examining a bill, it is best to look at the bill's analysis to understand the scope and purpose of the bill. Bill analysis offers important information about the bill in layman's terms, sets out the author's intent, and describes the objectives of the bill.³⁸ When Representatives Chisum, Talton, and Miller sponsored bills in the past that targeted homosexuals,

34. Elayne Mae Esterline, *Leaving the Party Disappointed; Social Conservatives Didn't Have the Legislative Session They Wanted*, THE TEX. OBSERVER, June 24, 2005, available at <http://www.texasobserver.org/showArticle.asp?ArticleID=1983> ("Fourteen other states have passed similar amendments. But the Texas measure goes much further. Beyond banning marriage, the broad language in HJR 6 also unconstitutionally bans civil unions . . .").

35. Tex. H.J.R. 6, 79th Leg., R.S. (2005) ("Marriage in this state shall consist only of the union of one man and one woman.").

36. Elayne Mae Esterline, *Leaving the Party Disappointed; Social Conservatives Didn't Have the Legislative Session They Wanted*, THE TEX. OBSERVER, June 26, 2005, <http://www.texasobserver.org/showArticle.asp?ArticleID=1983>. See Marjon Rostami, *Texas Passes Prop. 2*, THE DAILY TEXAN, Nov. 9, 2005, <http://www.dailytexanonline.com/media/storage/paper410/news/2005/11/09/TopStories/Texas.Passes.Prop.2-1050904.shtml?norewrite200612131655&sourcedomain=www.dailytexanonline.com> (noting that Proposition 2 passed with 76% of the vote, making Texas the "18th state to write a same-sex marriage ban into its constitution").

37. See Clay Robison, *The Legislature: CPS Fix Outranks Gay Issue, Perry Says*, HOUSTON CHRON., Apr. 29, 2005, at A1 (emphasizing "that in an 'ideal world' he would want foster children placed with 'a family that had a mom and a dad'").

38. *Bill Analysis*, SENATE RESEARCH CENTER, <http://www.senate.state.tx.us/SRC/BA.htm>. (last visited Dec. 12, 2006).

their intentions were clear; they wanted to stop homosexuals from marrying, foster parenting, or adopting.³⁹

Additionally, Talton's discriminatory feelings pervaded when he attempted to add an amendment banning same-sex foster parenting to Senator Jane Nelson's Senate Bill 6.⁴⁰ Senate Bill 6's objective was to reform Child Protective Services in an effort to protect vulnerable children and elderly persons. To accomplish this, the bill called for a reduction in the caseloads per worker, and increases in the health and safety of those that are in the state protective system.⁴¹ While the CPS reform bill ultimately passed, it did so without amendment 60.⁴² This occurred because no agreement could be reached regarding the amendment, and several lawmakers viewed the amendment as a mean-spirited, unnecessary distraction.⁴³ Questions remain about what would happen to Texas' foster children if such an amendment is passed. In reaching an answer, it is first necessary to understand the common views of those who opposed same-sex foster parenting.

39. See generally HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, TEX. H.B. 415, 76th R.S. (1999).

40. Tex. S.B. 6, 79th Leg., R.S. (2005). Amended to read as:

Sec. 264.1064. FOSTER PARENT DISQUALIFICATION.

- (a) The department shall require an applicant who is applying to serve as a foster parent or a foster parent whose performance is being evaluated by the department to state whether the applicant or foster parent is homosexual or bisexual.
- (b) If the applicant or foster parent states that the applicant or foster parent is homosexual or bisexual, the department may not:
 - (1) allow the applicant to serve as a foster parent;
 - (2) place a child with the foster parent; or
 - (3) allow a child to remain in foster care with the foster parent.
- (c) Notwithstanding an applicant's or foster parent's statement that the applicant or foster parent is not homosexual or bisexual, if the department determines after a reasonable investigation that an applicant or a foster parent is homosexual or bisexual, the department may not:
 - (1) allow the applicant to serve as a foster parent;
 - (2) place a child with the foster parent; or
 - (3) allow a child to remain in foster care with the foster parent. *Id.*

41. SENATE COMM. ON HUMAN SERVICES, BILL ANALYSIS, TEX. S.B. 6, 79th Leg., R.S. (2005) (stating the purpose of Senate Bill 6 as substituted).

Widespread problems have been documented in the State's existing systems for protecting children and vulnerable adults from abuse and neglect. The Legislature, the governor, and the agencies charged with providing child and adult protective services have recognized these problems and are committed to solving them through substantial reform of child and adult protective services. CSSB 6 is the result of recommendations on protective services reform received from numerous committees and other resources in the legislative, executive, and judicial branches of State government. *Id.*

42. Ann Rostow, *Texas Lawmakers Kill Gay Foster Parent Ban*, PLANETOUT NETWORK, May 31, 2005, <http://www.planetout.com/news/article-print.html?2005/05/31/2>.

43. *Id.*

A. *The Fear of Homosexual Foster Parents*

People who campaign against gay foster parenting share similar notions about homosexual parents. One common misconception is that homosexuals are mentally ill, and therefore unfit to provide foster care.⁴⁴ Another concern is that lesbians do not have the same maternal quality as heterosexual mothers. Another belief is that homosexual couples are so wrapped up in their own relationships that there would be no time to care for a child.⁴⁵ A fourth concern is that a child of homosexual parents is more prone to a sexual identity crisis, relationship difficulties, and behavioral problems.⁴⁶ Lastly, critics argue that homosexual parents turn their children gay.⁴⁷ Through an analysis of the economical, psychological, and health benefits of allowing homosexuals to foster parent, as well as a constitutional argument stressing a need for equality, the aforementioned beliefs will be disproved, and the foundation for allowing homosexuals to be foster parents will be established.

B. *Benefits of Same-Sex Foster Parenting to Foster Children*

Minority children comprise a majority of the children in foster care, and many have a history of abuse or neglect, a mental or physical handicap, including HIV, or some combination of these factors.⁴⁸ Homosexual couples tend to take the hardest children to place; the kids no one else wants.⁴⁹ Doctors, psychiatrists, and social professionals reiterate that

44. Ruth Ullmann Paige, *APA Policy Statement: Sexual Orientation, Parents, & Children*, AM. PSYCHOLOGICAL ASS'N (2005), available at <http://www.apa.org/pi/lgbcpolicy/parents.html> (noting that no empirical or scientific foundation exists for the claim that homosexuals are unfit parents). Research results illustrate that homosexual parents are as likely to provide a supportive and healthy environment for children as heterosexual parents. *Id.*

45. *Id.* (mentioning concerns that such children may be stigmatized and humiliated by their peers and are more likely to be molested by their parents or their friends). However, research results generally suggest that the development, wellbeing, and adjustment of children raised by gay and lesbian parents are no different than that of children raised by heterosexual parents. *Id.*

46. David Kirby, *The Second Generation*, N.Y. TIMES, June 7, 1998, at 1 (stating that such homophobic sentiment has even raised concerns among some gay parents that they may be complicating their children's lives by raising them in a homosexual household).

47. *Id.*

48. *Is Foster Parenting For You?*, HUM. RTS. CAMPAIGN FOUND., http://www.hrc.org/Template.cfm?Section=Foster_parenting1&CONTENTID=18396&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Dec. 15, 2006) (stating that children in foster care are "removed from homes broken by death, divorce, drugs, alcohol, physical or sexual abuse," and an increasing number of them suffer from some form of medical complication or physical handicap).

49. *Id.* (stressing the important role homosexual foster parents could play in the lives of homosexual teens and infants born with HIV that are currently in foster care).

homosexuals are equally qualified to serve as foster parents, and should not be banned from parenting simply because of their sexual orientation.⁵⁰

Any gay or lesbian parent who has woken six times in the night to help a baby get back to sleep knows that good parenting is something that emerges from a place far more basic than one's sexual orientation. It comes from the heart, and the heart cares little about issues of "identity."⁵¹

The numerous benefits that arise by affording homosexual individuals the opportunity to become foster parents exemplifies the need for laws recognizing, rather than forbidding, same-sex foster parenting.

1. Economical Benefit

The estimated cost for investigating sexuality among current and future foster parents, as well as removing children from the homes of homosexual foster parents reaches a staggering 16 million dollars per year.⁵² This amount of capital is sufficient to fund an additional 450 CPS workers to investigate real issues affecting foster children, like abuse and neglect.⁵³ Every dollar spent scrutinizing safe, stable homes is a dollar taken away from child abuse prevention services.⁵⁴ In 2000, "Texas had 18,236 children in foster care[,]” eighteen percent of which reside in institutions or

50. *Can Lesbian, Gay and Bisexual People Become Foster Parents?* HUM. RTS. CAMPAIGN FOUND., http://www.hrc.org/Template.cfm?Section=Foster_parenting1&CONTENTID=18398&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Dec. 15, 2006) (quoting the American Psychological Association's resolution that "[t]he sex, gender identity or sexual orientation of natural or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases"). Other organizations, such as the National Welfare League of America and the North American Council on Adoptive Children have maintained a similar stance on the issue of homosexual foster parents. *Id.*

51. *Can You Adopt?* HUM. RTS. CAMPAIGN FOUND., <http://www.hrc.org/Template.cfm?Section=Adoption&CONTENTID=18330&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Dec. 15, 2006).

Florida is the only state that explicitly prohibits adoption by gay and lesbian individuals and same-sex couples. Mississippi prohibits same-sex couples from adoption and second-parent adoption. Utah forbids adoption by any unmarried cohabiting couple, thereby discriminating against all same-sex couples. *Id.*

52. *See Fact Sheet on Talton's Amendment to SB 6: The Anti-Gay Foster Care Amendment*, LGRL Texas (on file with author) (reporting that Texas "faces a huge budget deficit in the coming biennium").

53. *Id.* (explaining how Talton's house amendment would burden an already overstrained foster system and waste taxpayer money).

54. *Take Action: LGRL Launches Coalition for Texas Families*, LGRL Texas, May 1, 2005 (on file with author) ("Texas has yet to fully fund our public schools. Why waste our money on . . . [the] unnecessary intrusion [into] private lives?").

group homes due to the shortage of foster parents.⁵⁵ As the population grows, so too will the number of children in need of a foster home.⁵⁶ Excluding homosexuals from the pool of potential foster parents reduces the likelihood that children will be placed in loving homes, ultimately costing the state substantially more money.

2. Psychological Benefit

The American Family Therapy Academy stresses that “public policies based on narrow definitions of what constitutes ‘the family’ are not relevant to the realities of family life in the United States and that the development of multiple family forms, in fact, is evidence of the family’s resilience and adaptability in our highly diverse, multicultural society.”⁵⁷ Children, whether growing up in a heterosexual or homosexual home, deserve the economic stability and emotional security that accompanies legal recognition of both their parents, including same-sex foster parents.⁵⁸ Research has shown that homosexuals parent as well as heterosexuals and that children of homosexuals are just as happy and healthy.⁵⁹ Furthermore, research has indicated that a child’s sexual identity, including sex role behavior, contains no variance when the child is raised in a homosexual, as compared to a heterosexual, environment.⁶⁰ Lastly, the majority of children raised by homosexual couples identify as heterosexuals in adulthood.⁶¹

55. Armando Villafranca, *Foster Parents Proposal Decried: “If the End Result is That They Have a More Stable Environment, It Will be Better in the Long Run for the Children,”* HOUSTON CHRON., Apr. 23, 2003, at A25 (reporting statewide foster care statistics relevant to the controversial amendment and noting that the total of foster children “was expected to increase by about 11,000 in 2001”).

56. *Id.* (emphasizing that the numbers of foster children needing adoptive parents will continue to grow).

57. Janine Roberts, Letter to the Editor, *Same-Sex Parenting*, 111 PEDIATRICS No.1, at 225 (Jan. 2003), available at <http://pediatrics.aappublications.org/cgi/content/full/111/1/225> (applauding the American Academy of Pediatrics for advocating the inclusion of same-sex couples in co-parent adoptions).

58. Committee on Psychological Aspects of Child and Family Health, *Co-parent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS No.2, at 339 (Feb. 2002), available at <http://aapolicy.aapublications.org/cgi/content/full/pediatrics%3b109/2/339> (discussing the benefits of same-sex co-parent adoption).

59. Susan Golombok, *Adoption by Lesbian Couples: Is it in the Best Interest of the Child?*, BMJ, June 15, 2002, available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?tool=pmcentrez&blobtype=pdf&artid=1123370> (arguing that support for adoption by same-sex couples is not unfounded, and that several national and international studies reveal that children adopted by same-sex parents are at no social disadvantage).

60. *Id.* (discussing specific studies highlighting the normality of children adopted by homosexual parents).

61. *Id.* (discussing a UK study concerned with evaluating adopted children’s behavior in adulthood).

As studies have conclusively established that homosexual couples parent equally as well as heterosexual couples, no plausible psychological reason exists to deny foster children the opportunity to live in a stable and loving home instead of a state institution.

3. Health Benefit

Through legal recognition, both parents in a heterosexual relationship can protect their parent-child relationship and ensure that their child is financially provided for upon separation or death.⁶² Because existing Texas law does not recognize same-sex marriage, children of same-sex parents cannot rely on both parents' consent to medical treatment in an emergency, child support in the event the couple separates, or Social Security survivor benefits from a parent not allowed to establish a legal bond.⁶³

62. Committee on Psychological Aspects of Child and Family Health, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 No. 2 PEDIATRICS 339, 339–40 (2002).

Children deserve to know that their relationships with both of their parents are stable and legally recognized. This applies to all children, whether their parents are of the same or opposite sex Children born or adopted into families headed by partners who are of the same sex usually have only 1 biological or adoptive legal parent. The other partner in a parental role is called the 'coparent' or 'second parent.' Because these families and children need the permanence and security that are provided by having 2 fully sanctioned and legally defined parents, the Academy supports the legal adoption of children by coparents or second parents. Denying legal parent status through adoption to coparents or second parents prevents these children from enjoying the psychological and legal security that comes from having 2 willing, capable, and loving parents Coparent or second-parent adoption protects the child's right to maintain continuing relationships with both parents. The legal sanction provided by coparent adoption establishes the following: 1) [g]uarantees that the second parent's custody rights and responsibilities will be protected if the first parent were to die or become incapacitated . . . ; 2) [p]rotects the second parent's rights to custody and visitation if the couple separated . . . ; 3) [e]stablishes the requirement for child support from both parents in the event of the parents' separation . . . ; 4) [e]nsures the child's eligibility for health benefits from both parents; 5) [p]rovides legal grounds from either parent to provide consent for medical care and to make education, health care, and other important decisions on behalf of the child; [and] 6) [c]reates the basis for financial security for children in the event of the death of either parent by ensuring eligibility to all appropriate entitlements, such as Social Security survivors benefits. *Id.*

63. Lisa Bennett & Gary Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents*, HUM. RTS. CAMPAIGN FOUND., Apr. 13, 2004, at 7 (stating that as a result of the 1996 Defense of Marriage Act and Texas laws which fail to recognize same-sex couples, children of these couples "cannot rely on: [b]oth their parents to be permitted to authorize medical treatment in and emergency; [s]upport from both parents in the event of their separation; or Social Security survivor benefits in the event of the death of the parent who was unable to establish a legal relationship with the child").

The two aspects that form the basis of parenting include physical custody, where the child lives, and legal custody, which involves the right to make major decisions for the child.⁶⁴ Children who can establish a legal relationship with only one parent are not entitled to coverage by the non-legal parent's insurance.⁶⁵ Lack of coverage often means that a child does not receive adequate health care. This lack of coverage can have significant, yet highly preventable ramifications on a child's health. Uninsured children generally experience stifled development and are at a higher overall risk for poorer health and premature death.⁶⁶ In addition, one or more uninsured persons in a family can cause tremendous financial strain on the family unit.⁶⁷

Furthermore, same-sex couples are excluded from coverage under the Family and Medical Leave Act of 1993, which allows employees who are dealing with childbirth, adoption, or foster parenting to take extended compensated leaves of absence from work.⁶⁸ Because Texas only recognizes one person in a same-sex couple as the legal foster parent, the non-legal parent would not be entitled to take a leave of absence to care for the foster child under this Act.⁶⁹ Consequently, the legally-recognized

64. *Custody and Visitation*, HUM.RTS. CAMPAIGN FOUND., http://www.hrc.org/Template.cfm?Section=Custody_Visitation&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=10299 (last visited Dec. 14, 2006).

Technically speaking, there are two aspects to custody: physical custody, meaning who has the right to have the child live with him or her, and legal custody, which designates who has the right to make major life decisions for the child around issues such as health care and education. These elements may be awarded in different ways. For example, one parent may win both legal and physical custody and the other none; or both may win legal custody while only one may be granted physical custody. Winning or losing custody, in short, may not be an all-or-nothing proposition. *Id.*

65. Lisa Bennett & Gary Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents*, HUM. RTS. CAMPAIGN FOUND., Apr. 13, 2004, at 9 ("Children of same-sex couples are also at high risk of being denied access to employer-sponsored health insurance. This is because most policies require that there be a legal relationship between the employee and any child to be added to the policy—and this legal relationship is frequently denied to same-sex parents nationwide . . .").

66. *Id.* ("[U]ninsured children and adults do not receive the care they need. Consequently, they suffer from poorer health and development, and are more likely to die prematurely than those with coverage; 18,000 unnecessary deaths are attributable to lack of health coverage every year.")

67. *Id.* ("Even one uninsured person in a family can put the financial stability and health of the whole family at risk.")

68. *Id.*, at 10 ("Under the Family and Medical Leave Act of 1993, legally married spouses are granted up to 12 weeks of unpaid leave from work to care for a seriously ill spouse, parent or child. It also allows employees to take leave when they have a child through birth, adoption, or foster care. But same-sex partners are not covered under this law . . .").

69. *Id.*

parent bears a greater burden than a similarly situated parent in a heterosexual couple because, while all parents are occasionally faced with having to care for a sick child, both heterosexual parents have the choice to take a compensated leave of absence.⁷⁰

At the end of the day, it is the children of Texas that will benefit most from the state's legal recognition of same-sex foster parents. The emotional and physical benefits to foster children that result from a solid relationship with their foster parents, whether heterosexual or homosexual, necessitates legal recognition of same-sex foster parents.

IV. CONSTITUTIONAL ANALYSIS

It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered or will imminently suffer, actual harm; it is not the role of the courts, but that of the political branches, to shape the institution of government in such a fashion as to comply with the laws and the Constitution.⁷¹

A. *Privacy: Strict Scrutiny Test*

The United States Constitution commands that all generations are to be protected from governmental interference in the private affairs of its citizens.⁷² The Supreme Court classifies the right to privacy as a fundamental right, meaning that the Constitution protects exceptionally per-

70. Lisa Bennett & Gary Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents*, HUM. RTS. CAMPAIGN FOUND., Apr. 13, 2004, at 10 (arguing that lack of coverage offered for same-sex parents makes it impossible “for some gay or lesbian employees to keep their jobs and be with their partners during times of medical need—or with their children in the first weeks of their lives.”).

71. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 314 (3rd ed., Aspen Publishers 2002).

72. See U.S. CONST. amend IX, § 1 (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”); see also U.S. CONST. amend XIV, § 2

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors or President or Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, excepted for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state. *Id.*

sonal activities, such as one's sexuality.⁷³ Three sources establish a fundamental right: the Constitution, history, and tradition. Privacy rights provided in the Constitution arise from the non-delegated rights of the Ninth Amendment and the Equal Protection and Due Process clauses of the Fourteenth Amendment. The right to privacy is notably present in American history and tradition through the concepts of ordered liberty and case law discussing such privacy issues as marriage, sex, and reproduction.⁷⁴ The government, therefore, is prohibited from encroaching upon an individual's right to privacy unless the intrusion passes the strict scrutiny test. The strict scrutiny test requires that the government have a compelling interest, and that the method used to accomplish such interest is the least intrusive means.⁷⁵ While it seems that the strict scrutiny standard *should* apply to the privacy of one's sexuality, *Lawrence v. Texas* instead establishes a rational basis standard of review.⁷⁶

B. Privacy – Rational Basis

Prior to the groundbreaking 2003 decision in *Lawrence v. Texas*,⁷⁷ the Supreme Court had entirely failed to protect the right of privacy as it pertains to one's sexuality. *Lawrence* abolished a Texas law criminalizing sodomy by reasoning that the law violated the Fourteenth Amendment Due Process Clause.⁷⁸ Justice Kennedy, in his opinion for the majority, stated that the liberty interests in the Constitution apply to all persons, including homosexuals.⁷⁹ He further stated that homosexuality is an individual's private and personal choice with which the government should

73. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 695 (2001) (listing "protecting family autonomy; procreation; sexual activity and sexual orientation; medical care decision making; travel; voting; and access to the courts" as fundamental rights).

74. *Id.* at 699, 701, 727, 730.

75. *Id.* at 695 (describing strict scrutiny analysis for fundamental constitutional rights).

76. E-mail from David Dittfurth, Constitutional Law Professor, St. Mary's University School of Law, to Tracy Kasperek, Law Student, St. Mary's University School of Law (Oct. 4, 2005, 6:30 CST) (on file with author) (commenting that "[t]he *Lawrence* decision most assuredly raises the level of scrutiny that a court should apply to questioning about sexual orientation").

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

78. *Id.* Adrienne Butcher, Note, *Selective Constitutional Analysis in Lawrence v. Texas: An Exercise in Judicial Restraint or a Willingness to Reconsider Equal Protection Classification for Homosexuals?*, 41 HOUS. L. REV. 1407, 1412 (2004) (discussing how *Lawrence* utilized the Due Process Clause). *Lawrence* concluded that people are "entitled to respect for their private lives' when engaging in private, consensual sodomy." *Id.*

79. Jessica A. Gonzales, Recent Development, *Decriminalizing Sexual Conduct: The Supreme Court Ruling in Lawrence v. Texas*, 35 ST. MARY'S L.J. 685, 695 (2004) (discussing the impact of *Lawrence v. Texas* on homosexuality).

not interfere.⁸⁰ Justice Kennedy recognized that moral and religious beliefs, no matter how prevalent, cannot sanction discrimination based on a protected liberty interest.⁸¹ Therefore, laws must first pass a rational basis review before invading one's privacy to determine their sexual orientation.

Following *Lawrence*, rational basis review, if not higher scrutiny, should also be applied in foster parenting cases where homosexuals are discriminated against in regard to their sexuality.⁸²

Regardless of whether a stricter scrutiny is applied, discrimination based on sexuality should fail to withstand even the rational basis standard of review, if the standard is properly applied.

C. *Lawrence* Applied to Gay Foster Parents

Legislation designed to prevent homosexuals from becoming foster parents by questioning their private life completely contradicts the rule of law established in *Lawrence*. Justice Brennan commented that homosexuals comprise a "significant and insular minority," and therefore, discrimination based on sexuality should be deemed suspect.⁸³ To be classified as suspect, a group must show both historical discrimination and political immobilization.⁸⁴ Historically, homosexuals have been subject to pervasive and insidious discrimination and have garnered diminutive political support over the years.⁸⁵ Hence, homosexuals should be treated as a sus-

80. *Id.* (explaining that Justice Kennedy reasoned that "Texas sought to control decisions affecting a personal relationship, and that these decisions are choices a person should be able to make without being punished as a criminal") *Id.* at 694–95.

81. *Id.* at 696. (recognizing Justice Kennedy's comparison to *Planned Parenthood v. Casey* in that no matter how influential religion is in one's personal life, the court's role is to "define the liberty of all, not to mandate . . . [their] own moral code").

82. *Id.* at 694–95. ("Justice Kennedy . . . recognized that the purposes and penalties [of sodomy crime statutes] are to affect private human conduct taking place in the home.").

83. *Lawrence v. Texas*, 539 U.S. 558 (2003); See Joyce F. Sims, Note, *Homosexuals Battling the Barriers of Mainstream Adoption-and Winning*, 23 T. MARSHALL L. REV. 551, 566–67 (1998) (discussing homosexuals as a suspect class and how under the suspect classification doctrine, "courts could exercise the power of judicial review in cases of alleged discrimination because of sexual orientation"). Additionally, the article points out that "there is a constitutional right to privacy which presumptively protects the ability of a person or persons to engage in certain activity" and that "a state must have a compelling reason to restrict or prohibit the exercise of this right[.]" *Id.*

84. See generally Joyce F. Sims, Note, *Homosexuals Battling the Barriers of Mainstream Adoption-and Winning*, 23 T. MARSHALL L. REV. 551, 566–67 (1998) (discussing homosexuals as a suspect class and the requirements for suspect class qualification under the Constitution).

85. See generally Senfronia Thompson, State Representative, Her Speech in Response to the Texas Passage of a Marriage Equality Constitutional Amendment, CCGLA, Apr. 25, 2005, <http://www.ccgla.org/political/txvoting.html> (discussing her contempt for the passage

pect class when the legal right to be foster parents is challenged. Yet, even if rational basis is applied, the state should fail to meet its burden because no correlation between homosexuality and bad parenting exists. Classifying foster parents as gay is not rationally related to the government's need to find non-abusive homes for foster children. Texas has already shown that the state can achieve the interest of finding safe homes for foster children by overhauling Child Protective Services, reducing the case load of each worker, and hiring more workers to keep tabs on abusive homes and foster homes.⁸⁶ The stated purpose of the Child Protective Services bill involves ensuring children get placed in non-abusive homes, and that children in the child protection system are regularly monitored so that tragic deaths can be avoided.⁸⁷ Under *Lawrence*, Texas can achieve this goal of placing foster children in non-abusive homes only through means rationally related to the end goals. Therefore, a law banning homosexuals from being foster parents will fail the rational basis test because there is no relevant link between sexual orientation and quality of parenting. The state would certainly deny this allegation by justifying the practice as looking out for the foster children and protecting them from supposed immoral behavior.⁸⁸ However, *Romer v. Evans* ruled that homosexuals cannot be discriminated against because some people view homosexuality as immoral.⁸⁹

Romer v. Evans is a landmark Supreme Court case which held for the first time that discrimination against homosexuals would not be tolerated.⁹⁰ In *Romer*, Colorado planned to rescind a statute that protected gays, lesbians, and bisexuals from discrimination because these groups were politically unpopular.⁹¹ The court, using the rational basis standard, held the law invalid because “[i]f the constitutional conception of ‘equal

of Texas legislation prohibiting gay marriage and mandating removal of foster children from same-sex homes).

86. SENATE COMM. ON HEALTH AND HUMAN SERVICES, BILL ANALYSIS, Tex. S.B. 6, 79th Leg., R.S. (2005) (presenting author's statement of intent regarding locating safe homes for foster children).

87. *Id.*

88. E-mail from David Dittfurth, Constitutional Law Professor, St. Mary's University School of Law, to Tracy Kasperek, Law Student, St. Mary's University School of Law (Oct. 4, 2005, 6:30 CST) (on file with author).

89. *Romer v. Evans*, 517 U.S. 624 (1996); E-mail from David Dittfurth, Constitutional Law Professor, St. Mary's University School of Law, to Tracy Kasperek, Law Student, St. Mary's University School of Law (Oct. 4, 2005, 6:30 CST) (on file with author) (discussing case law pertinent to whether sexual orientation should be a factor considered in determining whether someone qualifies as a foster parent).

90. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 694 (2001) (reviewing how national case law has moved toward providing stronger discrimination protection for homosexuals).

91. *Id.* at 447. (discussing the requirement that state law conform to standards outlined in the equal protection clause).

protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."⁹²

Texas uses the "best interest standard" when evaluating family law cases dealing with children.⁹³ When establishing what concerns the best interest of a child the court considers: 1) the sex and age of the child, 2) the quality of the surroundings, 3) a parent's attributes, 4) a parent's abilities and the steps they take toward fulfilling the different needs of the child, and 5) the health, security, and overall conscientiousness the parent provides to the child.⁹⁴ In theory, homosexuality, in and of itself, does not automatically disqualify someone from becoming a foster parent or preclude them from custody consideration. However, because the courts hold broad discretion determining the best interest of the child, they often hold homosexuality against a parent.⁹⁵ For example, a Harris County judge recently removed Bradyn, a three-and-a-half-month old boy, from Rudy Salinas and his roommate Scott Dowdle, against the recommendation of Child Protective Services.⁹⁶ The men maintained custody of the child since his birth because the boy's cocaine-addicted mother left Bradyn addicted at birth, and the father was in jail.⁹⁷ Bradyn and his half-sister were living well with the men, and it was Bradyn's mother's wish to have him live with Salinas and Dowdle until she could get her life back in order.⁹⁸ Child Protective Services, the child's thera-

92. *Romer v. Evans*, 517 U.S. 624 (1996) (referring to *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)).

93. TEX. FAM. CODE ANN. § 153.002 (Vernon 2006) (stating that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child").

94. Elizabeth Trainor, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 62 A.L.R. 5th 591 (1998) (arguing that "[t]he intimate cohabitation or relationship of a parent with another, be it heterosexual, homosexual, or lesbian in nature, is a proper and relevant factor to be considered by a court in making a custody determination"). However, "[h]omosexuality standing alone does not render a parent an unfit custodian, and a direct link must be shown between the parent's homosexuality and an adverse or negative affect upon the child in order for the custody to be denied." *Id.*

95. *Id.*

96. Aline McKenzie, *Men Turn Over Baby to CPS: IRoommate Says Judge's Order Won't End Fight*, DALLAS MORNING NEWS, Apr. 20, 1999, at 13A (reporting Child Protective Services' description of the men's mobile home northeast of Waxahachie as safe and appropriate).

97. *Id.* ("The baby's father . . . is in the county jail on charges of tampering with vehicle registration and violating his parole for a burglary conviction."). However, the father of the baby objects to Mr. Salinas' and Mr. Dowdle's upbringing of the baby and insists that either him or his mother should have custody of Bradyn. *Id.*

98. *Id.* (noting Bradyn's mother's approval of Bradyn's upbringing with the two men). In fact, Mr. Salinas reported his persistence to pursue the matter and seek guardianship of Bradyn. *Id.*

pist, and the child's court-appointed attorney recommended that Bradyn stay with Salinas and Dowdle, but the judge ruled otherwise.⁹⁹ Even though the men previously swore under oath that they were not involved in a homosexual relationship, the judge decided that it would not be in the best interest of a child to remain in a loving and healthy environment if there was any speculation of a homosexual relationship.¹⁰⁰ Victor Flatt, family law Professor at the University of Houston, stated that the judge's behavior indicated a potential breach of duty under the Texas Code of Judicial Conduct.¹⁰¹ The Code clearly states, "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . sexual orientation."¹⁰² The decision in this case clearly shows the judge's bias or prejudice.

Despite the judicial code guidelines, children have been removed from and kept out of the homes of homosexuals under the rationale that it is not in the best interest of the child.¹⁰³

A malpractice case demonstrated that the Texas State Board of Examiners of Psychologists, as early as 1994, did not consider homosexuality when deciding the best interest of a child. *Jeffrey v. Nutt* involved psychologist, John Jeffrey, who testified as an expert witness concerning the capacity of a homosexual couple to rear children in the 1994 unpublished child custody case *In the Interest of Leah Kristen Spruill and Jourdan Alaine Spruill*.¹⁰⁴ Jeffrey testified that children should be raised by a mother and a father and not by a homosexual male couple.¹⁰⁵ Timothy Spruill, who fathered the two children, filed a complaint with the Texas State Board of Examiners of Psychologists claiming that Jeffrey used his

99. *Id.* (noting that "the arrangement kept Brandyn with his half-sister, Mr. Salinas' 10-year-old daughter, who lives with the men"). "Mr. Salinas and the child's mother . . . split up years before Bradyn's birth." *Id.*

100. *Id.*

101. Robert Cowe, *Making a Case for Adoption: Gay Couples Face Hurdles as Judges Interpret the Law*, HOUSTON CHRON., June 25, 2004, at 29 MetFront (noting the fine line between discretion and discrimination). Professor Flatt made the comment when referencing a similar situation in another Harris County court like Salinas' experience. *Id.* In that case, a lesbian couple successfully adopted their daughter after being advised by a Harris County judge to find another judge due to his unwillingness to hear the matter. *Id.*

102. *Id.* (quoting TEX. CODE JUD. CONDUCT, Canon 3(6)).

103. Elizabeth Trainor, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 62 A.L.R.5th 591 (1998) (explaining that, ironically, such decisions are a complete contradiction with the stance the psychiatric board has taken for years).

104. *Jeffrey v. Nutt*, 1998 U.S. Dist. LEXIS 5811, 2 (N.D. Tex. Apr. 17, 1998) (involving a claim of alleged malpractice over disciplinary actions, and violations of constitutional rights under the First and Fourteenth Amendments).

105. *Id.* at 2. (citing *In the Interest of Leah Kristin Spruill and Jourdan Alaine Spruill*, Cause No. 92536-D. Petition P 6.2 (1994)).

personal bias against homosexuals, and not the clinical analysis of a psychologist when testifying in his children's custody case.¹⁰⁶ The Board investigated and issued thirty-four violations against Jeffrey, and while the violations were proven, the Board decided against pursuing Jeffrey.¹⁰⁷ The Texas Psychological Board instead proved a homosexual investigation was unnecessary in the determination of the best interest of the child. However, since the best interest standard has few parameters, it allows courts great latitude to disfavor, without any justification, the placement of foster children in the homes of homosexuals.

Under both *Lawrence* and *Romer*, Texas fails in showing the relevance of the inquiry into the sexual orientation of the foster parents and showing the relevance of the best interest of the child.¹⁰⁸ Since social science has established that homosexuality is a fundamentally immaterial factor for a qualified parent,¹⁰⁹ it is legally inappropriate to shut out homosexuals from fostering parenting. The governmental interest in banning gay foster parents is directly derived from the perception that homosexuals are inherently immoral. This conclusion coincides with the generalizations that the Supreme Court ruled unconstitutional in *Romers* and *Lawrence*.¹¹⁰

The State may try and argue that the Due Process Clause regarding privacy does not cover someone's right to foster parent because no one has a fundamental right to be a foster parent.¹¹¹ While this may be true,

106. *Id.* at 1–2. (citing *In the Interest of Leah Kristin Spruill and Jourdan Elaine Spruill*, Cause No. 92563-D. Petition P 6.4 (1994)). Per Article 4512c, Texas Revised Civil Statutes, the Board has exclusive authority to discipline and regulate its members. *Id.*

107. *Id.* (citing *In the Interest of Leah Kristin Spruill and Jourdan Elaine Spruill*, Cause No. 92536-D. Petition PP 6.5, 6.7, 6.8, 6.9 (1994)). The Board has the authority to impose administrative penalties, to conduct proceedings, to issue findings of fact, and to state conclusions of law. *Id.* at 3.

108. E-mail from David Dittfurth, Constitutional Law Professor, St. Mary's University School of Law, to Tracy Kasperek, Law Student, St. Mary's University School of Law (Oct. 4, 2005, 6:30 CST) (on file with author) (arguing that questioning a potential foster parent about their sexual orientation seems designed to give full effect to prejudice).

109. *Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, NAT'L CENTER FOR LESBIAN RTS., Jan. 2004 at 2 (stating that studies show that child-rearing practices of gays and lesbians do not materially differ from those of people who are not gay or lesbian). These studies show that "love, stability, patience, and time to spend with a child are far more critical factors in being a good parent than a person's gender or sexual orientation." *Id.*

110. E-mail from David Dittfurth, Constitutional Law Professor, St. Mary's University School of Law, to Tracy Kasperek, Law Student, St. Mary's University School of Law (Oct. 4, 2005, 6:30 CST) (on file with author) (arguing that if a person thinks that sexual orientation is relevant to a child's best interests, that argument is likely based on a questioning of the inherent morals of gay people).

111. *Id.* (arguing that, even if the state is able to successfully assert this proposition, it could be countered by other constitutional arguments).

Romer further established that equal protection of the laws requires the state to remove any barriers against homosexuals if the laws are explicitly founded on intolerance of one's sexual preference.¹¹² Banning homosexuals from foster parenting is an example of such intolerance. Under *Romer*, legislation banning homosexuals from foster parenting "has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation."¹¹³ The state should not question a foster parent's sexual orientation, and then, when finding out that the person is a homosexual, deny them the right to be a foster parent. While being a foster parent may not qualify as a fundamental right, the Due Process clause stands to prevent discrimination against a class of persons solely because of an immutable characteristic.¹¹⁴ Therefore, Texas legislation targeting homosexuals based only on their sexual orientation should most assuredly be struck down as unconstitutional.

V. CALIFORNIA CASES

California's Supreme Court recently decided three cases dealing with same-sex couple custody issues where they held that sexuality should no longer play a role in custody consideration.¹¹⁵ These groundbreaking cases should stand as a model for other states.¹¹⁶ The cases were spurred by technology that enables homosexual couples to engage in childbirth, only previously enjoyed by heterosexuals, because of donated eggs and sperm as well as in vitro fertilization.¹¹⁷ The law and rulemaking authorities are playing catch-up as procreation technology continues to develop and create new legal issues.¹¹⁸ So, while lawmaking authorities may not

112. *Romer v. Evans*, 517 U.S. 624 (1996); E-mail from David Dittfurth, Constitutional Law Professor, St. Mary's University School of Law, to Tracy Kasperek, Law Student, St. Mary's University School of Law (Oct. 4, 2005, 6:30 CST) (on file with author) (claiming that there is no right to foster parent under the Due Process Clause).

113. *Romer v. Evans*, 517 U.S. 624, 632 (1996).

114. E-mail from David Dittfurth, Constitutional Law Professor, St. Mary's University School of Law, to Tracy Kasperek, Law Student, St. Mary's University School of Law (Oct. 4, 2005, 6:30 CST) (on file with author).

115. Richard Willing, *Kids in Legal Gray Area When Gay Couples Split*, USA TODAY, June 20, 2005, available at http://usatoday.com/news/nation/2005-06-20-custody_x.htm (discussing three cases that went before the Supreme Court of California in May of 2005).

116. *Id.* (citing Professor Ed Stein from Cardozo Law School, stating that these cases will likely provide guidance to other states considering the issue).

117. *Id.* (describing the rapid increase in births resulting from assisted-reproduction in 2002). In 2002, "45,751 babies were born through assisted reproduction . . . - a 120% increase from 20,840 in 1996[.]" *Id.*

118. *Id.* (citing California attorney, Emily Duskow, who stated that developments in reproductive technology are causing the law to try and "keep up").

want to allow homosexuals to become parents, the reality is that technology has surpassed lawmakers' ability to make that choice for homosexuals. And thus, it is time for the courts and lawmakers to recognize that homosexuals hold the capacity to parent just as well as heterosexuals.¹¹⁹ The discussion of three California cases¹²⁰ illustrates that for the law to remain just and right, lawmakers and the judiciary must broaden parental rights to encompass homosexual and non-biological parents.¹²¹

The overall issue in the California cases is "to consider the parental rights and obligations, if any, of a woman with regard to a child born to her partner in a lesbian relationship."¹²² The court clearly stated that "both parents of a child can be women."¹²³ However, the facts of each case are very different, so it is important to give a brief summary of each.

A. *Elisa B. v. Emily B.*

Elisa B. v. Emily B. involved a lesbian couple who decided to have and raise children together, using the same donor for artificial insemination so the siblings would have the same biology.¹²⁴ The couple even went so far as to breast feed each other's babies.¹²⁵ Once the partnership broke up, Elisa, who was the financial supporter, took her child and cut off financial support to Emily, who was the stay-at-home caretaker.¹²⁶ Emily filed an action to gain child support while Elisa maintained that she owed nothing since she was not the biological parent who bore the two children.¹²⁷ The court reasoned that since Elisa held the children out as her own, and fi-

119. *Id.* (stating that unmarried same-sex couples are asking to be treated like heterosexual couples when handling matters of child custody).

120. *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673, (Cal. 2005), *reh'g denied* (Nov. 20, 2006).

121. Richard Willing, *Kids in Legal Gray Area When Gay Couples Split*, USA TODAY, at http://usatoday.com/news/nation/2005-06-20-custody_x.htm (last visited Nov. 20, 2006) (emphasizing Professor Ed Stein's view that "[s]ome justices seemed convinced that 'fairness' requires them to extend parental rights to gay, non-biological partners[,] while other justices, according to Stein, believe that extending parental rights actually strengthens families). *Id.*

122. *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005).

123. *Id.*

124. *Id.* at 663 (characterizing the donated genetic material from a sperm bank as creating biological siblings).

125. *Id.* (referring to the facts in the record that each had breastfed the other children).

126. *Id.* (identifying Elisa as the financial support for the family, while Emily was the homemaker). When Elisa and Emily separated, Elisa promised support for Emily and the twins she left in Emily's care. *Id.*

127. *Elisa B.*, 117 P.3d at 664 (classifying the term "parent" within the meaning of the Uniform Parentage Act). *See generally* Uniform Parentage Act. Cal. Fam. Code § 7600 et seq.

nancially, physically, and emotionally cared for them, she was required to pay child support.¹²⁸ The state emphasized that paternity determination (which in this case would be Emily) is not decided by biology, but by the “state’s interest in the welfare of the child and the integrity of the family.”¹²⁹ The court also reasoned that just because the parents are two women that does not mean a child should be denied the love and financial support of both parents.¹³⁰

B. K.M. v. E.G.

K.M. v. E.G. involved a lesbian couple where K.M. donated an egg to E.G. so that E.G. could have a child.¹³¹ K.M. sued for custody and visitation rights of the twins after E.G. denied her such after the couple separated.¹³² E.G. argued that K.M. was simply a donor as indicated by the donor release form K.M. signed.¹³³ However, K.M. argued that during the first two years of the twins’ lives, both K.M. and E.G. raised the children.¹³⁴ The court found that “genetic consanguinity” (K.M.’s egg provides the babies’ genes) can determine maternity just as in paternity cases,¹³⁵ meaning that both moms are recognized as the parents because one provided the genetic makeup and the other was the birth mother.¹³⁶ The court once again concluded that two mothers can constitute a family, just as a heterosexual couple, and that both moms share in the custody.¹³⁷

128. Elisa B., 117 P.3d at 667 (examining the court’s reasoning to “determine whether Elisa received the twins into her home and openly held them out as her natural children” with respect to the Uniform Parentage Act). The court held that Elisa presented the children to the public as her natural offspring. *Id.* at 670.

129. *Id.* at 668.

130. *Id.*

131. *K.M. v. E.G.*, 117 P.3d 673, 676 (Cal. 2005).

132. *See generally id.*

133. *Id.* at 682 (referring to a written agreement that ovum donees typically sign relinquishing parental rights to children born).

134. *See id.* at 679. (recognizing petitioner’s claim that equitable principles call for recognition of a parent-child relationship). “[A] man who donated semen that was used to impregnate a woman who was married to someone other than the donor would not be considered the father of the resulting child . . . [but] would be considered the father of the child, if the woman impregnated was unmarried.” *Id.*

135. *See id.* at 678. (discussing previous case law that held “genetic consanguinity” as the basis of a parent-child relationship).

136. *K.M. v. E.G.*, 117 P.3d at 679, 682.

137. *See id.* at 681–82. (“It is true that we said in *Johnson* that ‘for any child California law recognizes only one natural mother.’ But . . . [the] statement in *Johnson* . . . must be understood in . . . light of the issue in that case; ‘our decision in *Johnson* does not preclude a child from having two parents both of who[m] are women.’”).

C. Kristine H. v. Lisa R.

In the final California case, Kristine and Lisa planned to have children, and before Kristine gave birth, the couple made legal arrangements that officially asserted Lisa as the “father.”¹³⁸ Once the couple separated, Kristine wanted the court to vacate the previous orders that declared Lisa the father of her child.¹³⁹ The court reasoned that Kristine was estopped from denying Lisa fatherhood since she had asked the court in the first place to create parental rights for Lisa.¹⁴⁰ The court further concluded that it would be inequitable to Lisa and the child to deny them both the full rights accorded to heterosexual couples.¹⁴¹ The court also held that the state’s public policy prefers a child have two parents instead of one.¹⁴²

D. *Application to Foster Parenting*

While these cases involve lesbian partners who willingly established a family, and then had custody issues, there are a few key points that should generally apply to gay foster parenting. First, California now recognizes that a child can have two same-sex parents. Therefore, California put homosexuals and heterosexuals on the same level with regard to parenting and family. Second, biology is no longer the only factor that makes a parent. How a parent treats a child and holding them out as their child are now important factors. Finally, the state recognizes that, if possible, they prefer a child to have two loving parents which includes same-sex parents.

138. See *Kristine H. v. Lisa R.*, 117 P.3d 690, 692 (2005) (stating that the women involved in the case sought and received a declaratory judgment declaring that both women would be the expected child’s legal parents, with joint custody and legal responsibility).

139. *Id.* (explaining that “[o]n December 19, 2002 Kristine filed in the superior court a motion to set aside the stipulated judgment” from 2000 which named Lisa as one of the child’s legally recognized parents with all the responsibilities included in the definition).

140. *Id.* at 696. (“Given that the court had subject matter jurisdiction to determine the parentage of the unborn child, and that Kristine invoked that jurisdiction, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years, it would be unfair both to Lisa and the child to permit Kristine to challenge the validity of the judgment.”).

141. *Id.* (stating that it would be unjust to allow Kristine to challenge the judgment two years after she herself sought it).

142. *Id.* (enunciating the public policy “favoring that a child has two parents rather than one”).

VI. CONCLUSION

In 2003, the Texas Court of Appeals made a decision regarding custody of children of a same-sex relationship.¹⁴³ In *Coons-Anderson v. Anderson*, the court denied custody to a woman who, while not the biological parent, had planned with the biological mother to rear the child, and paid all the child's expenses including the donor insemination, medical bills, and all the basic necessities.¹⁴⁴ The court ignored the fact that the woman had cared for and loved the child for the first 18 months of the baby's life and refused to recognize that a lesbian mother, who was not biologically related, had any right to seek custody or visitation.¹⁴⁵ The court applied the best interest standard.

Using the best interest standard, Texas courts remain dependent upon a *per se* presumption against homosexuals in custody cases because the standard gives the court broad discretion in deciding the best interests of the child.¹⁴⁶ Unfortunately, this broad discretion is usually tainted with judges' personal biases against homosexuals.

The standard of Texas courts should instead be the majority adverse impact test. Using this standard, the courts must show a "clear connection between a parent's actions and harm to the child before a parent's sexual orientation . . . assumes any relevance in the custody determination."¹⁴⁷ This test analyzes the ability of homosexual to be foster parents, based on their ability to provide a safe and stable environment instead of their sexual preference. Only when the foster parent has taken actions that have adversely affected a foster child should a case worker be allowed to inquire into someone's sexuality to determine if that person's sexuality should disqualify them from being a foster parent.

In addition, the adverse impact test would force courts to look strictly to a person's past and present parenting record when deciding custody issues, and not merely the foster parent's sexuality. This would enable the best parent to gain custody without regard to their sexuality. Using this approach limits the court's discretion and reduces the likelihood that custody will be determined by judge's individual views on homosexuality.

It seems that adults, including judges and lawmakers, are the people that have trouble recognizing what a family is within the narrow confines

143. See generally *Coons-Anderson v. Anderson*, 104 S.W. 3d 630 (Tex. App.-Dallas 2003).

144. *Id.* at 632–35.

145. *Texas Has No Official Ban on Adoption or Foster Parenting by Gay, Bisexual, or Transgender Couples or Individuals*, PARENTING RIGHTS (on file with author).

146. *Fact Sheet: Custody Cases Involving Lesbian and Gay Parents*, NAT'L CENTER FOR LESBIAN RTS., <http://www.nclrights.org/publications/custody.htm> (last visited Dec. 14, 2006).

147. *Id.*

of their definition. An article recently posted on the Human Rights Campaign Foundation's website shows that children are not the ones having trouble with the same-sex family concept. The article describes that a grandmother was invited to her nine year old granddaughter's school for a picnic where other parents and grandparents were present as well.¹⁴⁸ One boy at the picnic had two moms, and the grandmother asked her granddaughter if the other kids viewed the boy's situation as "strange or different," and the granddaughter's reply was "why would it be strange, Grandma?"¹⁴⁹ While the grandma reassured her granddaughter that it was not, the grandmother took away a valuable lesson that day that lawmakers should also note.¹⁵⁰ If children are comfortable with the idea of having two same-sex parents, then why should foster children be denied the right to a loving family, and be placed instead, in a state institution? Homosexual foster parents should not be a moral political agenda for lawmakers. If lawmakers truly want to look after the best interest of foster children, then they should cease their attempts at banning the placement of foster children in same-sex households.

Homosexual parents carry the same parenting skills as heterosexual parents. A loving family fosters healthy child development which a state institution cannot provide. Homosexual foster parents, just as heterosexual foster parents, give children who are abused or neglected the opportunity to grow up in a nonviolent family environment, with the resources to provide them an education and a new outlook for their future. Through the passage of Proposition 2, Texas voters elected to limit the definition of marriage to a relationship between a man and a woman.¹⁵¹ There remains hope, however, that lawmakers will choose not to target homosexual foster parents. Representative Chisum, the sponsor of the marriage definition amendment, stated that he was not "about to go out

148. Carol Miller, *That's My Friend and He Has Two Moms*, HUMAN RIGHTS CAMPAIGN FOUND., Aug. 1, 2005, http://www.hrc.org/Content/ContentGroups/Stories4/2005_Stories/Thats_My_Friend_and_He_Has_Two_Moms.htm (showing that parents and children can accept a child with two mothers, even in a conservative city).

149. *Id.* (pointing out that the fact that the boy had two mothers made no difference to the boy, his classmates, or the other children's parents).

150. *Id.* (arguing that parents should teach their children to love and accept others despite differences).

151. W. Gardener Selby, *Gay Marriage Ban Affirmed*, AUSTIN AM.-STATESMAN, NOV. 9, 2005, at A1 (explaining that HJR 6 was approved by the Texas Legislature by a two-thirds vote). HJR 6 became known as Proposition 2 when it was put on the ballot to be approved by Texas voters. *Id.* Proposition 2 defined marriage as between a man and a woman and was approved as a constitutional amendment by a three-to-one ratio. *Id.* Texas became the nineteenth state to add a provision defining marriage to their state constitutional. *Id.*

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and beat up on the homosexual community. Some of them do a fabulous job of stepping in as foster parents when no one else will.”¹⁵²

152. *Id.* (acknowledging that the Texas House of Representatives approved a bill banning gay residents from being foster parents, however, the Senate never voted on the bill).