Little To Be Gay About: Few Protections in Florida Against Discrimination Based upon Sexual Orientation

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LITTLE TO BE GAY ABOUT: FEW PROTECTIONS IN FLORIDA AGAINST DISCRIMINATION BASED UPON SEXUAL ORIENTATION

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I. INTRODUCTION ........................................................................................................... 634

II. A SURVEY OF FLORIDA MUNICIPALITIES AND THEIR LEGISLATIVE EFFORTS TO EITHER SUPPORT OR HINDER THE ENACTMENT OF ORDINANCES WHICH PREVENT DISCRIMINATION BASED ON SEXUAL ORIENTATION .... 636

A. Ordinances Enacted to Protect Against Discrimination in Specific Areas ................................................................................................................................. 636
   1. Employment, Housing, and Public Accommodations ..... 637
   2. Telecommunications and Gas ........................................... 638
   3. The Sale and Procurement of Goods and Services .......... 638
   4. Ordinances Relating to Forms of Speech ......................... 639
   5. Ordinances Relating to Vehicular Services ...................... 639
   6. Miscellaneous..................................................................... 639

B. Ordinances Enacted Which Negatively Impact Efforts Against Discrimination .......................................................... 639
   1. The Definitional Clarifications of Pinellas County and Bradenton ................................................................. 640
   2. The Tumultuous Case of Alachua County ....................... 641

C. A Possible Explanation for the Disinclination of Municipalities to Enact Protective Ordinances ....................... 642

III. FLORIDA CASE LAW AND FEDERAL CASE LAW RELATING TO FLORIDA: A DISCUSSION OF CONSTITUTIONAL PROTECTIONS AGAINST DISCRIMINATION BASED UPON SEXUAL ORIENTATION ........................................................................ 643

A. Privacy Rights and Protection from Discrimination Based upon Sexual Orientation ......................................................... 643
   1. Florida Cases Exploring Florida Constitutional Protections ..................................................................................... 644
   2. The Federal Refusal to Strike down a Florida Law Under United States Constitutional Privacy Rights .... 646

B. The Florida Equal Protection Clause: A Dead End for Those Advocating the Extension of Heightened Protections Based upon Sexual Orientation ........................................... 647
   1. Woodard and Cox: Indications of Judicial Reluctance .... 647
   2. The Role of Judicial Deference ......................................... 649
IV. THE FLORIDA CIVIL RIGHTS ACT OF 1992: A PROPOSED AMENDMENT AND ATTEMPTS BY ADVOCATES OF HOMOSEXUAL RIGHTS TO GAIN PROTECTIONS UNDER THE FLORIDA CIVIL RIGHTS ACT OF 1992 THROUGH THE COURT SYSTEM

A. Innovative Efforts to Protect Against Discrimination Based upon Sexual Orientation

1. The Perception of Homosexuality as a Handicap or Disability

2. Social Stereotypes of HIV/AIDS, the Homosexual Community, and Efforts to Use Such Stereotypes to Advance Protections for Homosexual Persons Under Florida Law

V. A PROPOSED CONSTITUTIONAL AMENDMENT ON MARRIAGE

VI. CONCLUSION

I. INTRODUCTION

Fred Phelps is the pastor of the Westboro Baptist Church, whose members frequently protest at events across the United States which they perceive to be sympathetic to gay and lesbian rights, because they believe that the United States has become overly supportive of such rights.1 The following is a poem written by Fred Phelps, entitled "God Hates America,"2 which is sung to the tune of "God Bless America."

God hates America
Home of the fags
He abhors them
Deplores them
Day and night, all his might, all his days
From her mountains

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https://nsuworks.nova.edu/nlr/vol32/iss3/9
This homophobic attitude, held by individuals and segments of society that are sympathetic to Mr. Phelps' viewpoint, is one of the catalyzing forces behind the efforts of homosexual rights advocates. Sexual orientation is defined as "[a] person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality, homosexuality, or bisexuality." Generally, "[t]here has been a trend in recent years to make sexual orientation a protected class." With regard to Florida, there have been muted efforts in sporadic areas since the 1970s, which have met with little success. Part II of this article will examine how these efforts have played out on a local scale, by reviewing the minority of municipalities in Florida which have enacted ordinances relating to sexual orientation. Part III examines the dearth of case law that exists which provides protections against discrimination based upon sexual orientation in the Florida Constitution; Part III also examines whether or not the United States Constitution may be used to strike down Florida laws, which discriminate based upon a person's sexual orientation. Part IV examines the Florida Civil Rights Act of 1992, a proposed amendment to the Florida Civil Rights Act of 1992, which would grant explicit protections to gays and lesbians currently lacking in the statute, and innovative legal theories which have unsuccessfully attempted to find protections against discrimination based upon sexual orientation in the existing Florida Civil Rights Act of 1992. Part V discusses a proposed amendment to the Florida Constitution which would place a significant obstacle to the right of homosexual couples to enter into a marriage, or even legal relationships resembling a marriage. Part VI is a conclusion as to what the state of the law is in Florida with regard to protections existing against discrimination based upon sexual orientation and a recommendation as to what the status of the law should be.

3. Id. (emphasis added).
5. Id.
II. A SURVEY OF FLORIDA MUNICIPALITIES AND THEIR LEGISLATIVE EFFORTS TO EITHER SUPPORT OR HINDER THE ENACTMENT OF ORDINANCES WHICH PREVENT DISCRIMINATION BASED ON SEXUAL ORIENTATION

There are 301 listed municipalities in Florida, including counties, cities, villages, towns, and other similar affiliations. Beginning in the late 1970s, a small number of Florida municipalities began to enact ordinances against discrimination. Unfortunately for the gay and lesbian community, the subsequent decades bore out sporadic efforts meeting with limited success, rather than a concerted statewide push. During this time period, there have been occasional backlashes against gay and lesbian activists, and thus, legislative efforts with regard to sexual orientation can be divided into legislation that promotes gay and lesbian rights, or hinders gay and lesbian rights.

A. Ordinances Enacted to Protect Against Discrimination in Specific Areas

After conducting a survey of the ordinances of all 301 listed Florida municipalities, which includes counties, cities, towns, villages, and similar incorporations, it appears that only seventy-one have enacted ordinances that are intended to prevent or discourage discrimination based upon sexual orientation in very specific areas of concern, not merely generalized policies of non-discrimination. The distinction of being the first municipality in Florida to pass such an ordinance belongs to Miami-Dade County, which passed a protective ordinance on January 18, 1977. The number of municipalities offering protective legislation, while amounting to a sizeable percentage of the number of municipalities, is misleading if taken out of context because among the seventy-one that have enacted protective legislation, there is a splintering of priorities in all facets of life, with some municipalities enacting protective ordinances in multiple areas, and others enacting ordinances in only one area. Additionally, while any ordinance offering protections based upon sexual orientation benefits the gay and lesbian com-
community, many of the municipalities have enacted protections in relatively obscure areas which have little practical effect on the lives of gays and lesbians; while the communities which have enacted protections should be lauded for their efforts, the thin patchwork of existing Florida ordinances offers little in terms of a practical solution to discrimination against gays and lesbians. 15

1. Employment, Housing, and Public Accommodations

Eighteen Florida municipalities have enacted policies against discrimination based upon sexual orientation with regard to employment practices. 16 Thirty-one Florida municipalities offer some form of protection against discrimination based upon sexual orientation in the acquisition of housing, securing of credit, or a mortgage. 17 Ten Florida municipalities prohibit dis-

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15. See generally infra notes 16–28 and accompanying discussion.


crimination based upon sexual orientation in the realm of public accommoda-
tions. 18

2. Telecommunications and Gas

Daytona Beach Shores has an ordinance protecting against discrimina-
tion based upon sexual orientation with regard to access to gas lines. 19 Twenty-one municipalities have enacted ordinances which preclude tele-
communications or cable television companies from discriminating against
clients based upon their sexual orientation. 20

3. The Sale and Procurement of Goods and Services

It is illegal in Miami-Dade County to discriminate based upon sexual
orientation in the sale of goods, or to condone tipping based upon sexual
orientation. 21 Four municipalities in Florida have enacted statutes which
protect against discrimination based upon sexual orientation from occurring
in the procurement of goods and services by the municipality. 22

FLA., CODE § 13.056(e)(3) (2006); HILLSBOROUGH COUNTY, FLA., CODE OF LAWS AND
57.36(1)(b) (2008); BROWARD COUNTY, FLA., CODE § 16½-22(b)(1) (2007); GAINESVILLE,
FLA., CODE OF ORDINANCES § 8-67(a) (2007); GULFPORT FLA., CODE OF ORDINANCES § 26-40
(2007); MIAMI BEACH, FLA., CODE § 62-32 (2007); MIAMI-DADE COUNTY, FLA., CODE § 11A-
19 (2007); SARASOTA, FLA., CODE § 18-46(2) (2007); ST. PETERSBURG, FLA., CODE § 15-81

20. BAL HARBOUR, FLA., CODE § 7-11(13)(a) (2007); BELLEAIR BEACH, FLA., CITY CODE
§ 39(a) (2007); BOCA RATON, FLA., CODE OF ORDINANCES § 25-471 (2007); BROWARD
COUNTY, FLA., CODE § 20-465(a) (2007); CORAL SPRINGS, FLA., CODE OF ORDINANCES § 20-
4(7) (2007); DANIA BEACH, FLA., CODE OF ORDINANCES § 22-156(a) (2007); GAINESVILLE,
FLA., CODE OF ORDINANCES § 14.5-157(b) (2007); HOMESTEAD, FLA., CODE § 8-39(a) (2007);
LAUDERDALE-BY-THE-SEA, FLA., CODE OF ORDINANCES § 26-24(g)(1) (2007); NEW PORT
RICHEY, FLA., CODE § 13-539(a) (2007); ORANGE PARK, FLA., CODE § 27-33(a) (2007); PALM
BEACH, FLA., CODE OF ORDINANCES § 116-11 (2007); PALM BEACH COUNTY, FLA., CODE § 8-
15(e)(3) (2007); PASCO COUNTY, FLA., CODE OF ORDINANCES § 26-39(a) (2007); RIVIERA
BEACH, FLA., CODE OF ORDINANCES § 10-51(c) (2007); SURFSIDE, FLA., CODE § 22-17(b)
(2007); WILTON MANORS, FLA., CODE OF ORDINANCES § 5.5-104(g)(1) (2007); MARCO
ISLAND, FLA., CODE OF ORDINANCES § 46-50(a) (2006); N. LAUDERDALE, FLA., CODE OF
ORDINANCES § 20-4(g)(1) (2006); BAY HARBOR ISLANDS, FLA., CODE OF ORDINANCES § 5½-


22. LAKE PARK, FLA., CODE OF ORDINANCES § 2-255(a) (2007); MIRAMAR, FLA., CODE §
2-260.1 (2007); W. PALM BEACH, FLA., CODE OF ORDINANCES § 66-8 (2007); WILTON
MANORS, FLA., CODE OF ORDINANCES § 2-268(q) (2007).
4. Ordinances Relating to Forms of Speech

There are two municipalities within the state of Florida that have enacted ordinances precluding discrimination based upon sexual orientation in the disbursement of parade permits. Three municipalities have enacted ordinances which specifically declare that graffiti with messages that display prejudices based upon sexual orientation are unlawful. Three Florida municipalities have codified nonbinding campaign pledges to refrain from making sexual orientation an issue in political campaigns.

5. Ordinances Relating to Vehicular Services

Broward County has enacted barriers against discrimination based upon sexual orientation by taxi companies. North Miami prohibits towing companies from discriminating based upon sexual orientation.

6. Miscellaneous

Lake Worth, Florida has taken the unique approach of incorporating Florida’s state civil rights protections into a civil rights ordinance covering only the city of Lake Worth, but has explicitly included sexual orientation as a protected status.

B. Ordinances Enacted Which Negatively Impact Efforts Against Discrimination

Occasionally, attitudes unsupportive of homosexual rights that are held by lawmakers and their constituents are expressed through legislation. Two methods through which this can be accomplished are by enacting definitions

26. BROWARD COUNTY, FLA., CODE § 22½-7(g) (2007).
which explicitly exclude homosexual persons from protection,\textsuperscript{30} or through legislation actually attacking the rights of gays and lesbians.\textsuperscript{31} Perhaps the most famous example of the latter is the amendment to the \textit{Colorado Constitution} which was passed in order to ban "all legislative, executive, or judicial action at any level of state or local government designed to protect gay men and lesbians.\textsuperscript{32}"

The amendment was subsequently struck down by the United States Supreme Court in \textit{Romer v. Evans},\textsuperscript{33} because the Court found it unconstitutional that:

\begin{quote}
[h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres, \textit{and} the amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.\textsuperscript{34}
\end{quote}

The Court concluded that the amendment "\textit{classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A [s]tate cannot so deem a class of persons a stranger to its laws. [The amendment] violates the Equal Protection Clause.}\textsuperscript{35}\n
Two Florida municipalities have included definitional clarifications which are intended to prevent ordinances from being construed to offer protections based upon sexual orientation,\textsuperscript{36} and one municipality, in what could be considered Florida’s mini-replay of \textit{Romer}, enacted legislation hostile to the enactment of ordinances that would offer greater protections based upon a person’s sexual orientation.\textsuperscript{37}

1. The Definitional Clarifications of Pinellas County and Bradenton

Two municipalities in Florida, seemingly in order to avoid any possible misconstruing of their ordinances, have provided to the reader that the term "handicap" does not apply to a person because of their sexual orientation;

\begin{itemize}
\item \textsuperscript{30} \textit{See infra} note 38 and accompanying discussion.
\item \textsuperscript{31} \textit{See infra} notes 32–35, 39–46 and accompanying discussion.
\item \textsuperscript{32} RONNER, \textit{supra} note 29, at 10.
\item \textsuperscript{33} 517 U.S. 620 (1996).
\item \textsuperscript{34} \textit{Id.} at 627.
\item \textsuperscript{35} \textit{Id.} at 635.
\item \textsuperscript{36} \textit{See infra} note 38 and accompanying discussion.
\item \textsuperscript{37} \textit{See infra} notes 32–35, 39–46 and accompanying discussion.
\end{itemize}
this effectively prevents courts from interpreting imprecise ordinances as granting such protections. 38

2. The Tumultuous Case of Alachua County

Alachua County is unique among Florida municipalities in that it attempted to create a barrier to the enactment of protective ordinances by enacting an amendment to its county charter stating, “the board of county commissioners shall not adopt any ordinance creating classifications based upon sexual orientation, sexual preference, or similar characteristics, except as necessary to conform county ordinances to federal or state law.” 39 The impetus for passing the amendment began, ironically, with the attempt to pass a nondiscrimination ordinance which included protections against sexual orientation discrimination, which succeeded in March of 1993. 40 After this occurred, there was a backlash among Alachua County residents, and “[t]he Alachua County ordinance was repealed by the voters . . . in the Republican landslide general election of November 8, 1994.” 41 The amendment prohibiting the enactment of protective ordinances was also enacted in 1994 after a county referendum on the issue passed with fifty-seven percent of the vote. 42

The amendment prohibiting the enactment of protections based upon sexual orientation was challenged in a case filed in the Eighth Circuit Court of Florida, Morris v. Hill. 43 A final disposition was entered on the case in a summary judgment proceeding on November 22, 1996. 44 In Morris, the court considered the then recently decided Romer to be the controlling case law, stating that “[t]he issue presented to this court is whether Amendment 1, the 1994 amendment to . . . the Alachua County Home Rule Charter, violates the Equal Protection [C]lause of the Constitution of the United States as interpreted by the United States Supreme Court in Romer v. Evans.” 45 The court found that it was, explaining that:

39. ALACHUA COUNTY, FLA., CODE OF ORDINANCES § 2.2(D) (2007).
40. Terl, supra note 6, at 839.
41. Id. at 840; see also Adams, supra note 6, at 757–58.
44. Id. at 3.
45. Id. at 1.
Amendment 1 to the Alachua County Home Rule Charter, though narrower in many respects, suffers from the same constitutional infirmities as the Colorado amendment struck down in *Romer*. Amendment 1 singles out one characteristic, sexual orientation, [as] the basis for discrimination against homosexuals and bisexuals, and prevents the Alachua County Commission from passing any laws without a referendum, to provide protection against discrimination. It effectively restructures the local government so that those of homosexual and bi-sexual orientation are disabled from seeking safeguards that others may seek without constraint, placing homosexuals and bi-sexuals on an unequal footing from anyone else when it comes to seeking protection. . . . Under the analysis employed by the United States Supreme Court in *Romer*, there is no legitimate governmental interest that can support Amendment 1. Amendment 1’s focus on sexual orientation cannot be explained on any rational basis other than . . . a manifestation of the majority’s condemnation of homosexuality . . . and the desire to disable homosexuals and bi-sexuals from seeking protective legislation from the county commission.46

**C. A Possible Explanation for the Disinclination of Municipalities to Enact Protective Ordinances**

Beyond the outright hostility displayed in some legislative enactments against gays and lesbians, there is a potentially more damaging attitude towards homosexual rights that a legislature can adopt; this attitude is that their enactment will have no beneficial effects upon the rights of gays and lesbians, and therefore, there is no purpose in making such an enactment. The City of Hallandale Beach, Florida has displayed such an attitude with regard to discrimination ordinances in general, which may be one of the reasons it has not enacted an ordinance which grants protections based upon sexual orientation.47 In a meeting of the City Commission on April 2, 2002, there was a discussion relating to the creation of a Community Relations Board which would “foster harmony, work to improve communication, and address discrimination based [upon] race, religion, economic status, and other factors.”48 The proposed Community Relations Board was struck down because members of the City Commission felt that Hallandale Beach was too small, it

46. Id. at 2–3.
47. See Hallandale Beach, Fla. City Comm’n, Minutes of Regular Meeting (April 2, 2002) (on file with City Comm’n).
48. Id.
would impede the work of the police, and it was believed that citizens would be uninterested in such an effort.49

III. FLORIDA CASE LAW AND FEDERAL CASE LAW RELATING TO FLORIDA:
A DISCUSSION OF CONSTITUTIONAL PROTECTIONS AGAINST DISCRIMINATION BASED UPON SEXUAL ORIENTATION

The Florida Constitution offers protections to citizens of Florida in areas of privacy, as well as in equal protection areas.50 Furthermore, advocates of homosexual rights have argued in court proceedings that the United States Constitution precludes Florida from taking certain actions.51 One example of this is the attack on Florida statutory enactments using the United States Constitution.52 Generally, however, advocates of homosexual rights have met with extremely limited success in advancing protections based upon sexual orientation through cases advocating protections under the Florida Constitution, or attacking actions taken by Florida with the United States Constitution.53

A. Privacy Rights and Protection from Discrimination Based upon Sexual Orientation

The Florida Constitution states in Article I, section 23 that “[e]very natural person has a right to be let alone and free from governmental intrusion into [his] private life.”54 When adopted in 1980, it was thought that privacy protections would be substantially bolstered.55 For those advocating extending privacy protections to protect gays and lesbians from discrimination, it has been disappointing that Florida courts have shown an “overabundance of caution . . . [and] seem reluctant to take section 23’s straightforward command at face value.”56

49. Id.
50. See discussion infra Part III.
51. See discussion infra Part III.A1, B.
52. See discussion infra Part III.A2, B2.
53. See discussion infra Part III.
54. FLA. CONST. art. I, § 23.
56. Id.
1. Florida Cases Exploring Florida Constitutional Protections

One of the few Florida cases which discuss constitutional protections against discrimination based upon sexual orientation is a trial court case which extends limited protection from workplace discrimination based upon sexual orientation, *Woodard v. Gallagher.* In *Woodard*, a deputy sheriff was fired by the Sheriff of Orange County for homosexual conduct undertaken before the deputy sheriff began employment with the Sheriff’s office. The Sheriff became aware of the conduct only through an “accidental discovery of [the plaintiff’s] homosexual conduct prior to [the plaintiff] becoming a deputy sheriff and [the plaintiff’s] honest answers . . . posed to him by agents of the Sheriff about his sexual conduct and preference.” The court considered several constitutional arguments and determined that the Sheriff had violated the deputy sheriff’s right to privacy granted by the *Florida Constitution.*

In finding that the actions of the Sheriff violated the privacy rights of the plaintiff, the court in *Woodard* explained:

[t]here was no evidence that his job or public life was affected in any respect by [the plaintiff’s] homosexual conduct. Such conduct was not unlawful and there was no public rumor as to his involvement in any sexual conduct. Also, he stated that he . . . would even abstain from any personal homosexual relationships if that was required to keep his job.

The appropriate standard of review for analyzing Article I, section 23 claims is articulated in *Winfield v. Division of Pari-Mutuel Wagering.* In *Winfield*, the court stated that:

[s]ince the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged

58. Id. at 71,731.
59. Id.
60. Id.
61. Id.
62. 477 So. 2d 544, 547 (Fla. 1985).
regulation serves a compelling state interest and accomplishes its
goal through the use of the least intrusive means.63

In Woodard, while finding that the Sheriff had a legitimate, but not
compelling interest in gaining knowledge about the sexual orientation of
deputies so that he could “make use of the deputies’ aptitudes,” he could not
use this knowledge to punish the deputies.64

In Florida Department of Health and Rehabilitative Services v. Cox65
(Cox I), a case involving Florida’s refusal to allow the adoption of a child by
two homosexual men, a Florida appellate court had the opportunity to ad-
dress the issue of sexual orientation and privacy rights,66 but chose not to
decide directly as to whether or not sexual orientation is protected by the
Florida Constitution.67 Instead, when the court examined the facts of the
case and noted that the plaintiffs had voluntarily given the information that
they were homosexual,68 the court stated that “[the plaintiffs] voluntarily
admitted that they are homosexual. They cannot claim an expectation of
privacy concerning a fact that they have willingly disclosed.”69 The problem
with this logic is that:

[b]y putting the question on the form, the state demanded private
information about the applicants' background. Further, if Cox and
Jackman had not answered the question, one of two things would
have happened—they would have been presumed to be homosex-
ual, or HRS would have specifically inquired as to their sexual ori-
ientation.70

On appeal, in Cox v. Florida Department of Health & Rehabilitative
Services71 (Cox II), the Supreme Court of Florida affirmed the lower court’s
ruling with respect to the decision on whether the Florida Constitution grants
privacy protections to persons based upon their sexual orientation.72
2. The Federal Refusal to Strike down a Florida Law Under United States Constitutional Privacy Rights

In 2004, the Eleventh Circuit Court of Appeals heard *Lofton v. Secretary of the Department of Children and Family Services*, 73 in which a challenge to Florida’s refusal to allow homosexual persons to adopt children was again asserted. 74 The plaintiffs, in challenging a Florida statute prohibiting adoption by homosexual persons, 75 relied on *Lawrence v. Texas*, 76 a case in which the United States Supreme Court wrote an opinion reflecting the proposition that “the state cannot criminalize private, consensual, homosexual behavior.” 77 The statute which the plaintiffs challenged in *Lofton* reads “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.” 78 In *Lofton*, the plaintiffs argued that *Lawrence* “identified a hitherto unarticulated fundamental right to private sexual intimacy.” 79 The Eleventh Circuit did not address whether the *Florida Constitution* grants privacy protections based upon sexual orientation; instead, it distinguished *Lawrence*, and rejected the plaintiffs’ argument, stating:

[w]e conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right. Accordingly, we need not resolve the second prong of appellants’ fundamental-rights argument: whether exclusion from the statutory privilege of adoption because of appellants’ sexual conduct creates an impermissible burden on the exercise of their asserted right to private sexual intimacy. 80

While ultimately deciding that the plaintiffs’ interpretation of *Lawrence* was incorrect, the court did not definitively state that sexual orientation was not protected by constitutional privacy rights. 81 Instead, the court stated that “the holding of *Lawrence* does not control the present case . . . [and] cannot be extrapolated to create a right to adopt for homosexual persons.” 82 This

73. 358 F.3d 804 (11th Cir. 2004).
74. Id. at 808.
75. FLA. STAT. § 63.042(3) (2007).
76. 539 U.S. 558 (2003).
78. FLA. STAT. § 63.042(3).
79. *Lofton*, 358 F.3d at 815.
80. Id. at 817.
81. Id.
82. Id.
should be interpreted not as a definitively negative outcome for homosexual persons, but rather as a decision which reflects cautious judicial restraint, a sentiment expressed earlier in the opinion.83

B. The Florida Equal Protection Clause: A Dead End for Those Advocating the Extension of Heightened Protections Based upon Sexual Orientation

The Florida Constitution states: "[a]ll natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, [and] to pursue happiness."84 Florida courts have not designated sexual orientation as a suspect class; if they did so, it would offer a heightened level of protection.85 Florida courts interpret Article I, section 2 of the Florida Constitution as being equivalent to the Equal Protection Clause of the United States Constitution.86 Federal courts have declined to raise sexual orientation to the level of a suspect class.87 Florida courts have followed this example, and discrimination based upon sexual orientation receives rational basis review.88

1. Woodard and Cox: Indications of Judicial Reluctance

The court in Woodard, while extending privacy protections against discrimination based upon sexual orientation, balked at extending suspect class status based upon sexual orientation, stating that:

because of the turmoil in this area, I... shift the equal protection issue in this case and [do] not reach the decision of finding that homosexually oriented persons are entitled to heightened scrutiny as a class and that the Sheriff's actions are unconstitutional under equal protection standards. In light of [the extension of privacy protections to the plaintiff], the issue of heightened [equal] protec-

83. Id. at 815.
tion [rights] to homosexually oriented persons as a class need not be reached.\(^8\)

Despite this outcome, the court engaged in a lengthy discussion in dicta regarding discrimination based upon sexual orientation, in what reads as an indictment of higher courts and society:

\[\text{[t]his case brings into focus the fact that persons, both individually and as a class, can presently be . . . discriminated against by our government because of their homosexual orientation unless those persons can show [under the rational basis test] that such discrimination is completely arbitrary or irrational . . . [despite it being shown that] a rational basis test can be easily abused and used to hide prejudice behind constructed or pretextual reasons . . . [i]t appears that the only reason [homosexual persons] have not been granted heightened equal protection rights is because the difference in them touches most peoples' deeply ingrained heterosexual orientation both personally and culturally.}\(^9\)

The court in Cox I also addressed the issue of equal protection rights and sexual orientation, but in contrast to the hesitant language in Woodard, its decision squarely opposed granting equal protection rights based upon sexual orientation.\(^9\) The court explained that "neither the statutory privilege to adopt nor the choice to engage in homosexual activity involves a fundamental right. Thus, strict scrutiny can apply in this case only if homosexual activity creates a suspect classification."\(^9\) The court then concluded that there was no basis to create a new suspect class based upon sexual orientation, and declined to apply strict scrutiny to the case, applying instead rational basis review.\(^9\) Interestingly, the decision seems to suggest that the court may have been receptive to an argument for granting intermediate level review based upon sexual orientation, but "[t]he trial court did not rely upon an intermediate review [and] [t]he parties have neither argued for such a review nor provided case law from other courts adopting such an approach to homosexual activity."\(^9\)

While Cox I provides insight into how one Florida appellate court approaches questions of sexual orientation from an equal protection standpoint,

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89. Id. (dictum).
90. Id. at 71,731–32 (dictum).
91. Cox I, 627 So. 2d at 1218–19.
92. Id. at 1218.
93. Id. at 1219.
94. Id. at 1218.
unfortunately for those seeking authoritative law on the subject, it is no longer binding authority on this point of law because it was reversed on appeal in Cox II.\textsuperscript{95} In Cox II, the Supreme Court of Florida did not attack the legal reasoning of the court in Cox I, but instead found that the factual record was insufficient to come to a decision on the issue, stating that "[t]he record is insufficient to determine that this statute can be sustained against an attack as to its constitutional validity on the rational basis standard for equal protection under article I, section 2 of the Florida Constitution. A more complete record is necessary in order to determine this issue."\textsuperscript{96} The "case was voluntarily dismissed before the" case could be heard again to more thoroughly address the equal protection claims under the Florida Constitution.\textsuperscript{97} Because of this outcome, the question of whether or not sexual orientation demands a higher level of review than rational basis remains undetermined.\textsuperscript{98}

2. The Role of Judicial Deference

Because decisions extending constitutional protections based upon sexual orientation are embroiled in cultural controversy,\textsuperscript{99} it is unsurprising that decisions are often reached which avoid discussions of extending such protections. This reluctance is displayed when courts fall back on the philosophy of judicial restraint to avoid deciding cases on particular grounds, such as in Woodard, where the court stated that the decision to grant heightened levels of protection based upon sexual orientation "is best left to a higher court or our legislature."\textsuperscript{100} The Second District Court of Appeal expressed similar reservations in Cox I, stating that:

\begin{quote}
[t]he debate over the nature of homosexuality and the wisdom of the strictures that our society has historically placed upon homosexual activity cannot and should not be resolved today in this court. For purposes of governance, the legislature is the proper forum in which to conduct this debate so long as its decisions are permitted by the state and federal constitutions.\textsuperscript{101}
\end{quote}

\begin{footnotes}
95. See Cox II, 656 So. 2d at 903.
96. Id.
97. Terl, supra note 6, at 824; see also, Adams, supra note 6, at 766.
98. See Lee, supra note 70, at 167.
101. Cox I, 627 So. 2d at 1212.
\end{footnotes}
The court also pointed out that rational basis review is the test which is the most deferential to the legislature, stating that "[t]his test is intended to permit the legislature to make most public policy decisions without interference from the courts."\(^{102}\) In concluding, the court again made reference to the legislature by stating that "[i]t may be that the legislature should revisit this issue . . . but we cannot say that the limited research reflected in this record compels the judiciary to override the legislature’s reasoning."\(^{103}\)

*Lofton*, decided by a federal circuit court, also demonstrates an unwillingness to stray away from a position of judicial deference with regard to sexual orientation and constitutional protections.\(^{104}\) In *Lofton*, the court states that "[t]here is no precedent for appellants’ novel proposition . . . we decline appellants’ invitation to recognize a new fundamental right . . . [s]uch an expansion . . . would well exceed our judicial mandate as a lower federal court."\(^{105}\) Thus, because the Eleventh Circuit Court of Appeals has taken the position that they are too low of a court to recognize a new fundamental right, they have also taken the position that the United States Supreme Court is the only Court which may properly recognize new fundamental rights.\(^{106}\)

IV. THE FLORIDA CIVIL RIGHTS ACT OF 1992: A PROPOSED AMENDMENT AND ATTEMPTS BY ADVOCATES OF HOMOSEXUAL RIGHTS TO GAIN PROTECTIONS UNDER THE FLORIDA CIVIL RIGHTS ACT OF 1992 THROUGH THE COURT SYSTEM

Florida has codified a number of protections against discrimination based upon a person’s characteristics or status in what is known as the "Florida Civil Rights Act of 1992."\(^{107}\) The Florida Civil Rights Act of 1992 was "patterned after Title VII of the Civil Rights Act of 1964."\(^{108}\)

The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in

\(^{102}\) *Id.* at 1219.

\(^{103}\) *Id.* at 1220.

\(^{104}\) *See* *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 815 (11th Cir. 2004).

\(^{105}\) *Id.*

\(^{106}\) *See* *id.*

\(^{107}\) FLA. STAT. § 760.01(1) (2007).

personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state. 109

Recently, an amendment was proposed which would enlarge the scope of statuses protected by the Florida Civil Rights Act of 1992. 110 On March 20, 2007, Florida State Senator Ted Deutch proposed an amendment which would add "sexual orientation" and "familial status" to the list of protected statuses, and replace the term "handicap" with the term "disability" throughout the Florida Civil Rights Act of 1992, 111 and other sections relating to civil rights. The amendment would offer protections against discrimination based upon sexual orientation "in the areas of education, 112 employment, 113 housing, 114 public accommodations, 115 the affording of public lodging, 116 rental housing, 117 access to loans, 118 and development decisions. 119

A. Innovative Efforts to Protect Against Discrimination Based upon Sexual Orientation

Because the Florida Civil Rights Act of 1992 does not currently contain explicit protections against discrimination based upon sexual orientation, homosexual persons have attempted to find protections using innovative legal theories. 120 These legal theories have met with mixed success, and have forced homosexual persons to take positions that are often unpalatable. 121 Two legal theories which proponents of homosexual rights have attempted to use to extend protections, or could be argued to extend protections to homosexual persons, is arguing that homosexuality is a legal handicap, and argu-

109. Fla. Stat. § 760.01(2).
110. Fla. SB 2628 (2007); see also Fla. HB 639 (2007). HB 639 is the identical version of SB 2628 in the Florida House of Representatives.
111. Fla. SB 2628, § 1.
112. Id. § 4.
113. Id. § 6.
114. Id. § 9.
115. Id. § 5.
117. Id. § 9.
118. Id. § 11.
119. Id. § 12.
120. See infra discussion Part IV A.
121. See infra notes 129–32 and accompanying discussion.
ing that social stereotypes of HIV/AIDS afflictions among the homosexual community causes discrimination against homosexual persons.\textsuperscript{122}

1. The Perception of Homosexuality as a Handicap or Disability

The proposed amendment strikes the definition of “handicap” and replaces it with the word “disability,” and defines disability similarly to handicap.\textsuperscript{123} The definition of “disability” in the amendment is “[a] physical or mental impairment that a person has, has a record of having, or is regarded as having, that substantially limits one or more major life activities; or . . . [a] developmental disability.”\textsuperscript{124} The definition of “handicap” being stricken is “a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment.”\textsuperscript{125} These are somewhat expansive definitions, and it is foreseeable that some people may consider homosexuality to fall within them.\textsuperscript{126} Indeed, “[a]lthough most homosexuals likely would resist being considered disabled, some segments of society continue to view homosexuality as a handicap.”\textsuperscript{127} It is not outside the realm of possibilities that a clever attorney could argue that homosexuality is a legally protectable handicap; perhaps this is why Pinellas County and Bradenton, Florida, have enacted ordinances explicitly excluding homosexuality from the definition of “handicap.”\textsuperscript{128} The definition of “handicap” in Pinellas County, as an illustrative example, provides that “reference to ‘an individual with a handicap’ or to ‘handicap’ does not apply to an individual because of that individual’s sexual orientation or because that individual is a transvestite.”\textsuperscript{129}

Case law exists which demonstrates attempts to make a link between homosexuality and suffering from a handicap.\textsuperscript{130} In \textit{Blackwell v. United

\textsuperscript{122} See infra discussion Part IV A1–A2.
\textsuperscript{123} Fla. SB 2628, § 8.
\textsuperscript{124} Id.
\textsuperscript{125} FLA. STAT. § 760.22(7)(a) (2007).
\textsuperscript{127} Id.; see also Alan Medinger, \textit{Narrowing the Homosexual Problem, REGENERATION NEWS} (Regeneration Ministries, Baltimore, Md.) March-April 2005, at 2, http://www.regenerationministries.org/newsletters/200503.pdf (stating that “[u]nresolved homosexuality is a handicap, but others with far worse handicaps get on with productive lives,” and making further claims that homosexual persons have feelings of inadequacy).
\textsuperscript{129} PINELLAS COUNTY, FLA., CODE § 70-101.
\textsuperscript{130} See, e.g., \textit{Blackwell v. U.S. Dep’t of Treasury}, 830 F.2d 1183, 1184 (D.C. Cir. 1987).
States Department of Treasury, a transvestite sued for unlawful discrimination based upon his perceived sexual orientation when an interviewer perceived him to be homosexual based upon his status as a transvestite. Judge Ruth Bader Ginsburg, a judge for the United States District Court for the District of Columbia at the time, authored the court's opinion and stated that:

plaintiff-appellant . . . suffered discriminatory denial of a government employment opportunity because the supervisory officer who served as second interviewer, Mr. Strange, perceived Blackwell to be a homosexual. . . . [T]here is no precedent for holding that one's sexual orientation or preference is protected as a handicapped status, and furthermore . . . the liability of a government department . . . should not turn on the level of sophistication or ability to classify of the particular interviewing officer—in this case, on whether that officer knows that homosexuality and transvestism are not one and the same.

If Florida legislators do not pass an amendment to the Florida Civil Rights Act of 1992 in order to include sexual orientation as a protected category, it is possible that a homosexual person may attempt to argue that homosexuality is a "a physical or mental impairment that substantially limits one or more major life activities," in an argument similar to the one made in Blackwell. While the Florida Civil Rights Act of 1992 is generally interpreted similarly to Title VII claims, it is possible that Florida could diverge from federal courts that do not classify homosexuality as a handicap and allow protections to be extended based upon sexual orientation. According to the Fourth District Court of Appeal, which was interpreting the Florida Human Rights Act—the previous name of the Florida Civil Rights Act of 1992—

131. Id. at 1183.
132. Id. at 1183–84.
133. Id.
134. FLA. STAT. § 760.22(7)(a) (2007).
[The United States is a land of dual sovereigns. Citizens are subject to the sovereign power of the United States, but they are also subject to the sovereign power of the state in which they reside. Although designed to play different roles in our governmental scheme, the two sovereigns sometimes legislate on the same subject. If Congress does not intend for its legislation to displace state laws on the same subject, a citizen of a state may have rights under the federal law, and at the same time she may have rights under the state law.]

The court concluded by stating, "it is clear that a claim made under the one statute is not the same cause of action as a claim made under the other."

Further support for the possibility of homosexuality being interpreted as falling under the definition of "handicap" can be found in Smith v. City of Jacksonville Correctional Institution where the Florida Division of Administrative Hearings found that transsexualism was a handicap. Homosexual persons are considered to have a handicap by some portions of society. "Homosexuality and transsexuality [both] subvert norms and expectations about how women and men should live their lives as sexual beings, [and] [t]raditional notions of sex and gender are transgressed by both homosexuals and transsexuals." Additionally, some Florida judicial bodies have extended protections against discrimination to transsexuals, and therefore it should not seem outside the realm of possibility that judicial bodies in Florida may extend protections from discrimination based upon sexual orientation to homosexuals.

139. Andujar, 659 So. 2d at 1216.
140. Id. at 1217.
143. Nappen, supra note 126, at 111.
2. Social Stereotypes of HIV/AIDS, the Homosexual Community, and Efforts to Use Such Stereotypes to Advance Protections for Homosexual Persons Under Florida Law

Florida Statutes section 760.50 offers protections against discrimination based upon a person's HIV/AIDS status. It states in part that "[a] ny person with or perceived as having acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human immunodeficiency virus shall have every protection made available to handicapped persons." The Florida legislature found that such protections were necessary because:

persons infected or believed to be infected with human immunodeficiency virus have suffered and will continue to suffer irrational and scientifically unfounded discrimination. The legislature further finds and declares that society itself is harmed by this discrimination, as otherwise able-bodied persons are deprived of the means of supporting themselves, providing for their own health care, housing themselves, and participating in the opportunities otherwise available to them in society.

Unfortunately, negative stereotypes about homosexual persons pervade society, including the "stereotype that links homosexual orientation with AIDS." Because negative stereotypes linking HIV/AIDS to homosexual persons exist, and because discrimination against HIV/AIDS exists in society, homosexual persons have been discriminated against because of the belief that they have HIV/AIDS and have challenged this discrimination based upon this perceived status. In Cordero v. AMR Services Corp., the

146. FLA. STAT. § 760.50(2) (2007).
147. Id.
148. FLA. STAT. § 760.50(1).
150. Id.
151. FLA. STAT. § 760.50(1).
152. See, e.g., Cordero v. AMR Servs. Corp., 7 A.D. Cases 98, 98 (S.D. Fla. 1995).
[homosexual] plaintiff allege[d] that Defendant's stated reason for his discharge was pretextual. Plaintiff claims that Defendant terminated his employment in contravention of Florida Statutes §760.50 because he was perceived to carry... [HIV/AIDS]... or to have undergone HIV testing. Plaintiff has been tested for HIV, but does not carry the virus.\textsuperscript{154}

In \textit{Kaufman v. Checkers Drive-In Restaurants, Inc.},\textsuperscript{155} a claim was filed under Florida Statutes section 760.50 because an employee of Checker's Restaurant had anti-homosexual insults directed at him and references were made that implied the employee had contracted HIV/AIDS.\textsuperscript{156} \textit{Cordero} and \textit{Kaufman} both attempt to make a link between the perception of HIV/AIDS infection and discrimination based upon sexual orientation.\textsuperscript{157} If the Florida Legislature were to pass an amendment to the Florida Civil Rights Act of 1992—which granted explicit protections against discrimination based on sexual orientation—such an attempt would not be necessary because litigants could file suits based solely upon sexual orientation-based discrimination instead of attempting to make an attenuated link through HIV/AIDS discrimination.\textsuperscript{158}

V. A PROPOSED CONSTITUTIONAL AMENDMENT ON MARRIAGE

Recently, a vocal minority of Florida's populace succeeded in a years-long effort to place a referendum to amend the Florida Constitution; the aim of this referendum is to prevent any legislature in Florida from passing laws which allow homosexuals to marry, or even to enter into a substantially equivalent relationship.\textsuperscript{159} The proposed amendment states that "[i]nasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."\textsuperscript{160} By including the words "substantial equivalent," the proponents of the amendment seek to go further than banning only gay marriage; under an explanation section on their website entitled "The Amendment, Domestic Partnerships and Civil Unions," the

\textsuperscript{153} Id.
\textsuperscript{154} Id. at 98.
\textsuperscript{155} 122 F.3d 892 (11th Cir. 1997).
\textsuperscript{156} Id. at 893.
\textsuperscript{157} See Kaufman, 122 F.3d at 893; see also Cordero, 7 A.D. Cases at 98.
\textsuperscript{158} See generally FLA. STAT. § 760.50 (2007).
\textsuperscript{159} Alex Leary, Gay Marriage on Ballot, ST. PETE. TIMES, Feb. 2, 2008, at 1A.
\textsuperscript{160} Id.
proponents explain that they intend the amendment to invalidate “any other legal union that is treated as marriage.”

Broward County has codified a procedure in which gays and lesbians may obtain a domestic partnership, which provides numerous protections within Broward County.\textsuperscript{162} West Palm Beach has codified a similar domestic partnership ordinance.\textsuperscript{163} Besides the fact that Broward County and West Palm Beach refer to domestic partnership agreements, these domestic partnerships would seem to fall within the boundaries of the proposed constitutional amendment that seeks to ban the substantial equivalent of marriage otherwise; Broward County, for example, describes a relationship that certainly sounds akin to marriage, stating that “there are many individuals who establish and maintain a significant personal, emotional, and economic relationship with another individual. Individuals forming such domestic partnerships often live in a committed family relationship.”\textsuperscript{164} The constitutional amendment, therefore, has extremely important repercussions for those that have registered as living in a domestic partnership; their rights may be stripped. One organization that is campaigning against the amendment states that:

[t]he ballot language is written in very broad terms that will be interpreted by our courts. Possible scenarios can include the termination of all domestic partner registries in the state. Domestic Partner registries provide for hospital visitation rights. When the state of Michigan passed similar language, the Michigan Court of Appeals ruled that the state’s constitutional amendment banning same-sex marriage prevents public institutions from providing benefits to domestic partners employed by those institutions. In our own state, the Florida Legislature Office of Economic and Demographic Research clearly denotes the possibility of losing domestic partner registries, the loss of recognized common law marriages and other consequences affecting both same-sex and opposite sex couples.\textsuperscript{165}

The proponents of the amendment have sought to preempt arguments that the amendment will strip benefits granted through domestic partnership

\begin{footnotes}
\item[162] \textit{BROWARD COUNTY, FLA., CODE §§ 16½-151 to 16½-162} (2007).
\item[164] \textit{BROWARD COUNTY, FLA., CODE § 16½-151}.
\end{footnotes}
laws, by stating that "our amendment will not invalidate benefits granted from domestic partnerships or any other source."\textsuperscript{166} Explaining further, the proponents state that "[t]he [a]mendment does not affect benefits offered or contracted in the private sector . . . [or] prohibit the state or local government from passing laws which confer rights to unmarried persons."\textsuperscript{167} There is a glaring problem with their explanation that the amendment will not limit benefits or laws granting rights to unmarried persons, though; the proponents of the amendment accept a Government Accounting Office assessment that there are some 1134 rights conferred by marriage.\textsuperscript{168} Even if existing Domestic Partnerships are recognized as valid, while the proponents of the amendment helpfully inform the reader that the amendment will not strip privately bargained for contractual benefits, or prevent governments from passing laws which would grant rights to unmarried persons, they fail to acknowledge the obvious repercussion; if the amendment were ratified, there would need to be some combination of 1134 laws and contracts to grant the same amount of rights that one marriage certificate grants to heterosexual spouses.\textsuperscript{169}

VI. CONCLUSION

Clearly, the state of the law in Florida, with regard to existing protections against discrimination based upon sexual orientation, is both inconsistent and inadequate; some actions have been taken which are openly hostile to the rights of gays and lesbians. Across Florida, a few municipalities are enacting ordinances protecting against discrimination, while some have cho-

\textsuperscript{166} Fla. Coal. to Protect Marriage, Know Your Opponents Arguments, http://www.florida4marriage.org/defenders.html (last visited Apr. 20, 2008) [hereinafter Know Your Opponents Arguments].

\textsuperscript{167} Frequently Asked Questions, supra note 161.

\textsuperscript{168} Know Your Opponents Arguments, supra note 166.

\textsuperscript{169} Additionally, the language of the amendment portends further ominous possibilities: the denial of rights to those not only in same-sex domestic partnerships, but also to heterosexuals who do not wish to marry, but enter into a domestic partnership or similar union. Nat'l Pride at Work, Inc. v. Governor of Mich., 732 N.W.2d 139, 155 (Mich. Ct. App. 2007). The Michigan Court of Appeals, in interpreting a ratified state constitutional amendment with similar language to the proposed Florida amendment, stated that "[i]t is undisputed that under the marriage amendment, heterosexual couples who have not married also may not obtain employment benefits as a couple on the basis of an agreement." Id. Former United States Representative and Florida gubernatorial candidate Jim Davis opined that as applied to Florida, "[i]f [the amendment] passes, unmarried Floridians in committed relationships—especially seniors who may remain unmarried by choice—could lose their ability to share healthcare coverage." Jim Davis, 'Marriage Protection' an Unnecessary Burden, MIAMI HERALD, Mar. 11, 2008, at A18.
sen not to; among the municipalities that have, there is a decided lack of homogeneity in the extent of protections offered.\textsuperscript{170} Florida courts offer weak and inconsistent protections depending upon the level of court, and the portion of the \textit{Florida Constitution} being examined.\textsuperscript{171} Federal courts have not offered a clear guideline as to what legislative enactments by the states are unconstitutional under the \textit{United States Constitution}.\textsuperscript{172} The Florida legislature has thus far refused to enact explicit protections in the Florida Civil Rights Act of 1992;\textsuperscript{173} as a result, advocates of homosexual rights have attempted to find protections in innovative, but unsuccessful legal theories.\textsuperscript{174} Perhaps most disconcerting of all is the placement on the ballot of a proposed amendment to the \textit{Florida Constitution}, which would effectively ban gay marriage or substantial equivalents in Florida.\textsuperscript{175}

Because of the uneven application of protections through the court system, the Florida legislature should not ignore the issue of discrimination based upon sexual discrimination, and should take one of two positions. The legislature should either enact the proposed amendment to the Florida Civil Rights Act of 1992, and explicitly grant protections against discrimination based upon sexual orientation in order to avoid unexpected and uneven applications of protections by the court system; or take a different tack, and follow the examples of Pinellas County and Bradenton, Florida and explicitly define the terms in the Florida Civil Rights Act of 1992 to prevent protections from being granted based upon sexual orientation in order to achieve the same result as those counties. While this may strike some as unpalatable, it would provide a clear signal to the judiciary of the intent of the legislature, and would also provide a clear signal to municipalities that feel it is not an issue that is within their purview. Ideally, the legislature would pass the proposed amendment to the Florida Civil Rights Act of 1992, because it would provide protections much more evenly and quickly than indicating to the municipalities that they should pass ordinances on the issue. This, however, is not an ideal world; most likely, the issue will stagnate in the legislature, and the trend extending protections against discrimination based upon sexual orientation will continue in sporadic enactments of municipal ordinances. Unfortunately, the most enthusiastic groups involved in the issue of gay and lesbian rights seem to be those that oppose them; it remains to be seen whether the proposed amendment to the \textit{Florida Constitution} will result in a

\begin{flushleft}
\textsuperscript{170} See discussion \textit{supra} Part II.  \\
\textsuperscript{171} See discussion \textit{supra} Part III.  \\
\textsuperscript{172} See \textit{id}.  \\
\textsuperscript{173} See discussion \textit{supra} Part IV.  \\
\textsuperscript{174} See \textit{id}.  \\
\textsuperscript{175} See discussion \textit{supra} Part V.
\end{flushleft}
step backwards for gay and lesbian advocates, or the bittersweet victory of maintaining the status quo.

He added, [t]hat . . . [t]here was another Point which a little perplexed him at present. . . . I had already explained the Meaning of the Word; but he was at a Loss how it should come to pass, that the Law which was intended for every Man’s Preservation should be any Man’s Ruin.\textsuperscript{176}

\textsuperscript{176} JONATHAN SWIFT, GULLIVER’S TRAVELS 281 (1940).