Being Seen, Heard, and Placed: The Best Interests of Prospective Adoptees as a Constitutional Bulwark Against Same-Sex Adoption Bans

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Recent years have heralded a proliferation of legislation limiting, to various degrees, the ability of gay and lesbian couples and individuals to provide homes for children available for adoption. To date, the litigation challenging same-sex adoption bans has centered on the individual rights of those targeted by the bans, with ancillary consideration devoted to the extent to which potential adoptees' constitutional rights are prejudiced by these prohibitions. Despite the moral force of the individual rights argument, it has failed to provide effective ammunition for a successful constitutional challenge to same-sex adoption bans because within the equal protection context, gay and lesbian persons are not considered to be members of a suspect class, and within the substantive due process context, there is no constitutional right to adopt. This paper presents a basis for a more constitutionally sound challenge to same-sex adoption bans from the perspective of prospective adoptees, who I assert, have a liberty interest in being free from state action that compromises their best interests. In support of this central argument, I present the best interest of the child standard as a limitation on the state's parens patriae authority and characterize same-sex adoption bans as an ultra vires exercise of that authority.