Constitutional Law—Equal Protection & Due Process—Is the Arkansas Supreme Court Abandoning Judicial Federalism?

Alexander Justiss

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CONSTITUTIONAL LAW—EQUAL PROTECTION & DUE PROCESS—IS THE ARKANSAS SUPREME COURT ABANDONING JUDICIAL FEDERALISM?

I. INTRODUCTION

Judicial federalism is one of the most important and influential juri-sprudential developments in modern times. It is the process by which state courts may interpret their sovereign constitutions as protecting more individual rights than are mandatorily guaranteed by the United States Constitution which allows for an increased “ceiling” of rights that offers more protection than is required by the federal “floor.” This has led many states to adopt and continually use judicial federalism as an appropriate analytical model for protecting their own citizens where the federal government has failed to do so adequately. Not all states, however, are entirely consistent in that adoption, nor in adhering to its principled use.

This note will examine the history of judicial federalism by discussing the history of its use, as well as the analytical models that have been produced by its various adoptive jurisdictions. The development of these models has given courts much authority in determining the scope of individual rights within their respective jurisdictions. Further, a discussion follows that explores the criticisms directed at the use of such authority.

This note will then examine the Arkansas Supreme Court’s adoption and use of judicial federalism as a necessary safeguard against governmental infringements on individual rights, particularly those involving the right to privacy. Although such cases initially focused on consent-to-search issues,
they later extended to matters of intimate association. Next, this note will discuss *Department of Health and Human Services v. Howard* ("Howard II"), wherein affected individuals challenged the Arkansas prohibition on homosexual foster parents. It will then explain how the Arkansas Supreme Court did not apply its judicial federalism precedent to that case, despite the appropriateness of doing so. The court’s failure to utilize its precented jurisprudence puts the future of judicial federalism in question, and it places thousands of Arkansans at risk of further rights restrictions. Therefore, this note offers what would have been an appropriate judicial federalism analysis of *Howard II*, thereafter discussing the substantive result that could have been achieved through adherence to Arkansas precedent. Further, a commentary is offered on the groups at risk after the Arkansas Supreme Court failed to adhere to its precedent. Lastly, the note concludes with a proposal that offers a remedy for the Arkansas Supreme Court’s jurisprudential lapse.

II. BACKGROUND

State courts may rely upon declarations within their own constitutions to offer rights not available under the United States Constitution. This judicial federalism recognizes that a state court has the power to interpret its own sovereign and distinct constitution more expansively than the United States Supreme Court interprets the federal Constitution. Further, this proactive use of state constitutions to provide a broader avenue of accessing expansive rights has been called the most important modern development in jurisprudence.

Judicial federalism offers several advantages. Foremost among them is its functional purpose—to give state courts an analytical process by which rights unavailable through the federal Constitution can be made available.

9. See infra Part II.D.
11. See infra Part II.E.
12. See infra Part III.A.
15. See infra Part III.B–C.
16. See infra Part IV.
17. Tarr, supra note 3, at 1097.
19. Tarr, supra note 3, at 1112.
20. See infra Part II.
Also, whereas federal courts are constrained by reconciling the competing interests among its several sovereign jurisdictions, state courts may rule in the interests of their citizens alone. Further, this freedom of interpretation allows states to experiment with expanding rights, which may demonstrate the desirability of a broader interpretation to the United States Supreme Court if it decides an analogous issue. Finally, the localized effort of a state supreme court to implement constitutional rights can be more practically managed through local authorities than through a broad, nationalized pronouncement.

Yet judicial federalism can only be used responsibly through understanding its extensive historical development. This section details the evolution and use of judicial federalism as a model of rights expansion through its development at the national level, the analytical variations that have been produced through extensive use of judicial federalism, the persistent criticisms of its use, its eventual adoption by the Arkansas Supreme Court, as well as the possibility of its abrupt abandonment by that court.

A. The National Development of Judicial Federalism

Every state constitution included language intended to protect individual rights upon their respective adoptions. Each embodied a bill of rights enumerating those protections that the state was willing to enforce, which was typically more expansive than federal guarantees of rights. This was necessary because the United States Supreme Court had originally held that state actors did not have to abide by the federal Bill of Rights. Therefore,

22. Id. at xiii.
23. Id. at xiv.
25. See infra Part II.A.
26. See infra Part II.B.
27. See infra Part II.C.
28. See infra Part II.D.
29. See infra Part II.E.
32. Fitzpatrick, supra note 1, at 1836. “In 1833, the Supreme Court held in Barron v. City of Baltimore that the provisions of the federal Bill of Rights were inapplicable to the states; thus, as against actions by state officials, state constitutions were generally the only guarantors of individual rights . . . .” Id.
those seeking remedies to state restrictions on rights had to rely upon state constitutions to seek protection in the absence of federal aid.\textsuperscript{33}

These state constitutional rights became somewhat vestigial upon the 1868 ratification of the Fourteenth Amendment, which provided a way for the federal government to apply its Bill of Rights to the various states.\textsuperscript{34} Although many citizens had feared a strong federal government at the birth of the nation, the Civil War showed that the states could not always be trusted as an additional guarantor of their rights.\textsuperscript{35} This caused many to welcome the federal government's protection from states that had abdicated their duty of protection.\textsuperscript{36} Thus, the United States Supreme Court began the slow process of incorporating rights from the federal Bill of Rights to the states to implement this protection.\textsuperscript{37}

Incorporation had a steady but immense impact on federal and state constitutional law over the next one hundred years.\textsuperscript{38} The United States Supreme Court, acknowledging that many states had abandoned their duty to guarantee individual rights, applied the various provisions of the federal Bill of Rights to the states on a case-by-case basis.\textsuperscript{39} This imposition of federal law replaced individual state constitutional interpretation with federal interpretation and displaced state courts as additional protectors of individual rights.\textsuperscript{40}

The reasons for this displacement were two-fold: many state constitutional guarantees of rights suddenly appeared to be redundant, as they mir-

\begin{itemize}
\item \textsuperscript{33} Tarr, \textit{supra} note 3, at 1099. Most political leaders preferred this vacuum after the break from the tyrannous British Crown, believing that only a decentralized government could ensure that individual rights were protected. Bonnie Johnson, \textit{Note, Arkansas Joins Other States in a Revival of State Constitutions as Guardians of Individual Rights, Establishing New Protections for Arkansas Gays and Lesbians}, 25 U. ARK. LITTLE ROCK L. REV. 681, 687 (2003).
\item \textsuperscript{35} Id. Justice Brennan believed that this amendment embodied the “fundamental promises wrought by the blood of those who fought our War between the States.” William J. Brennan, Jr., \textit{State Constitutions and the Protection of Individual Rights}, 90 HARV. L. REV. 489, 490 (1977).
\item \textsuperscript{36} Brennan, \textit{supra} note 34, at 537.
\item \textsuperscript{37} Hodge, \textit{supra} note 30, at 841. Although the immediate need for protective state constitutions had been momentarily minimized, this ongoing exchange of civil liberties between the federal and state governments highlighted the importance of judicial federalism to ensure some degree of uninterrupted rights protection. Ronald K. L. Collins & Peter J. Galie, \textit{Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions}, 55 U. CIN. L. REV. 317, 317–18 (1986).
\item \textsuperscript{38} Collins & Galie, \textit{supra} note 37, at 322.
\item \textsuperscript{39} See Barry Friedman, \textit{A Revisionist Theory of Abstention}, 88 MICH. L. REV. 530, 539 (1989) (discussing federal courts’ “fundamental distrust of state courts to protect federal rights”).
\item \textsuperscript{40} Collins & Galie, \textit{supra} note 37, at 322.
\end{itemize}
ror these newly applicable federal rights. Further, states were compelled to deviate from their own precedent to abide by these newly applicable federal protections that would not have otherwise been adopted. Although a majority of the provisions of the federal Bill of Rights were not extended to the states until the 1960s, the profundity of incorporation affected virtually every aspect of American life. These decisions owe much to the United States Supreme Court under the leadership of Chief Justice Earl Warren. The Warren Court was responsible for an unprecedented surge in rights protection, handing down such landmark decisions as Brown I and II, Miranda v. Arizona, and Cooper v. Aaron. It was not long, however, before the federal government retreated from this rights-expanding venture, thus requiring the states to rediscover their proper roles as independent protectors of individual rights.

In 1969, President Richard Nixon appointed Warren E. Burger as Chief Justice of the United States Supreme Court in order to curtail the civil libertarian gains of the previous Warren Court and usher in a new conservative era. Chief Justice Burger wanted to move the Court "away from the attitude that everything unwise or wicked is unconstitutional and that if we but search, we will find some long-hidden meaning in [d]ue [p]rocess or [e]qual [p]rotection or whatnot." Almost immediately, the Burger Court began to construe individual rights more narrowly than ever before. Whereas state courts were once needed to protect individual rights because the federal government would not expansively protect rights, they were now needed to stifle the efforts of a Court eager to expansively limit those same rights.

41. Fitzpatrick, supra note 1, at 1837. For example, Justice Harlan noted that a majority of states had originally opposed rules requiring that criminals be advised of their constitutional right against self-incrimination ("Miranda Rights"), and that "[n]o State in the country ha[d] urged this Court to impose the newly announced rules, nor ha[d] any state chosen to go nearly so far on its own." Miranda v. Arizona, 384 U.S. 436 (1966) (Harlan, J., dissenting).
42. Brennan, supra note 35, at 493.
45. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955) (remanding to lower courts to enter orders necessary to admit affected parties to public schools on a non-discriminatory basis).
46. 384 U.S. 436 (1966) (holding that persons in police custody require procedural protections to safeguard privilege against self-incrimination prior to offering statements).
47. 358 U.S. 1 (1958) (holding that public schools in Little Rock, Arkansas must be racially desegregated).
48. Williams, supra note 18, at xix.
50. See Brennan, supra note 35, at 495–98.
51. Fitzpatrick, supra note 1, at 1838.
State courts wishing to prolong this period of civil libertarian gains thus sought new ways to protect the advances made by the Warren Court.52

State courts were not alone in their desire to further increase these gains. Justice William Brennan, a staunch supporter of the civil liberty advances achieved during his time with the Warren Court, made no secret of his desire to see the states return to their roles as independent protectors of individual rights.53 He authored a seminal article on judicial federalism that inaugurated this new era of granting expansive rights.54 Justice Brennan lauded this trend of rights expansion that had begun with incorporation and urged that states continue it by interpreting their constitutions as providing more protection than analogous federal provisions.55 Justice Brennan noted that numerous state courts were beginning to consider the merits of constitutional arguments solely on their state’s constitution in circumstances in which they found federal interpretation offered inadequate protection.56 Justice Brennan posited that this phenomenon “reflect[ed] a conclusion . . . that there exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors’ time.”57 Justice Brennan believed this feature of federalism was fundamentally necessary to protect individual rights from isolated and systematic violations that had already been perpetuated by the United States Supreme Court.58 Upon his pronouncement that the states’ duty to provide an additional and independent mode of protection was not satisfied by affording only the minimal rights of the federal Constitution, the states were thus left to devise their own analytical models to interpret their vital half of federalism.59

53. Tarr, supra note 3, at 1097. This is not to imply that Justice Brennan denigrated the utility of federal law. Rather, he felt that it was a vital part of federalism that “protect[ed] all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty.” Brennan, supra note 35, at 490. Further, he emphasized that federalism cannot function “when the federal half of that protection is crippled.” Id. at 503.
54. Williams, supra note 18, at xiv. This article is “among the most frequently cited law review articles of modern time.” Id.
55. See Brennan, supra note 35, at 495.
56. Id. at 500. Indeed, state courts have published over 700 opinions stating that the realities of state law are not sufficiently addressed by many federal interpretations of the Bill of Rights and Fourteenth Amendment. Hodge, supra note 30, at 842.
57. Brennan, supra note 35, at 495.
58. Id. at 503. More troublesome to Justice Brennan was that these violations were carried out “[u]nder the banner of the vague, undefined notions of equity, comity and federalism.” Id.
59. Id. at 491.
B. Analytical Models for Applying Judicial Federalism Principles

Although federal constitutional guarantees of rights are binding on the states, they represent only a national minimum or "federal floor" that may not be decreased through state interpretation. With only this minimal guideline, state courts are free to expand upon the protections that their respective constitutions offer. This section will discuss the two primary models of judicial federalism: the Equivalence Model and the Non-Equivalence Model. Each model is characterized primarily by its analytical process, as well as the degree to which that process produces a result similar to or different from federal interpretation of the United States Constitution.

1. Equivalence Model

The Equivalence Model is a "lockstep analysis" that generally interprets state constitutions as guaranteeing rights equivalent to analogous federal provisions. Despite state courts' ability to afford greater protection through judicial federalism, many feel more comfortable with a lockstep analysis that automatically presumes that the United States Supreme Court has accurately and finitely established the definition and scope of necessary individual rights. Advocates of the Equivalence Model justify this mirrored approach on two key grounds: the similarity often found between state and federal rights provisions requires respectful deference to federal interpretation; and, because state courts are a lower tier in the federalism hierarchy, their role should be to interpret constitutional questions as the United States Supreme Court hypothetically would in the same situation. Further, proponents of this analytical model claim that it is the most advantageous because it promotes uniformity among the states with federal interpretation and eases the burden of those seeking to understand the scope and application of the

60. Fitzpatrick, supra note 1, at 1842.
61. Robert L. Brown, Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way, 4 J. APP. PRAC. & PROCESS 499, 502-03 (2002). Emboldened courts went so far as to claim that "Supreme Court precedent is only persuasive authority to be scrutinized critically." Fitzpatrick, supra note 1, at 1845; see also Lincoln v. State, 285 Ark. 107, 110, 685 S.W.2d 166, 168 (1985) (Purtle, J., dissenting) ("I have never felt that this court is bound by the opinions of the United States Supreme Court in matters where our Constitution and laws are more protective of individual rights than are those of the United States.").
62. See Collins & Galie, supra note 37, at 338.
63. See Part II.B infra.
64. Tarr, supra note 3, at 1116.
65. Collins & Galie, supra note 37, at 323. Although not pervasive, some states follow this model to the extreme that state constitutional provisions should always be interpreted identically as parallel federal provisions. Id.
66. Id. at 323-24.
Therefore, equivalence interpretations of state constitutions vary little, if at all, from federal interpretations of analogous provisions of the United States Constitution.68

2. Non-Equivalence Model

Many courts prefer the Non-Equivalence Model and decline to utilize a lockstep analysis with the federal interpretation of the United States Constitution because of the difficulty it presents in granting more expansive individual rights.69 Non-Equivalence cases have had a widespread effect on state constitutional interpretation in those areas in which the United States Supreme Court has refused to recognize or grant protection of individual rights.70 Under this system, state courts have a duty to provide authoritative interpretation of their sovereign constitutions, which may not be abdicated through blind uniformity with federal interpretation.71 This provides a necessary ceiling of protection for individual rights because it can guarantee protection when the federal floor is lacking.72

The Non-Equivalence Model operates by using an analytically sound and independent analysis of the state's constitution based upon its text, structure, and historical intent.73 Advocates of the Non-Equivalence Model champion this alternate interpretive model because there are usually material differences between the text and history of many state constitutional provi-

68. Collins & Galie, supra note 37, at 324.
69. Fitzpatrick, supra note 1, at 1850. Some justices have not minced words in their declination to use a lockstep analysis, believing that it is anathema to the very principles of judicial federalism. Id. As an illustration:

[M]y colleagues have sunk this court to the lowest pitch of abject followership. They no longer believe in our state constitution as an act of fundamental self-government by the people of Louisiana. They no longer perceive this court to be the final arbiter of the meaning of that constitution. . . . Instead, for them, our state constitution is a blank parchment fit only as a copybook in which to record the lessons on the history of the Common Law that flow from Justice Scalia's pen.
70. Tarr, supra note 3, at 1118.
71. TARR, supra note 67, at 181. Further, state judges are obliged to rely upon their state's constitution because of the oaths they take to uphold it. Tarr, supra note 52, at 845.
72. TARR, supra note 67, at 181. This is particularly relevant where the texts are very dissimilar or in those instances where there is simply no analogue in the federal Constitution for the right offered in the state constitution. Collins & Galie, supra note 37, at 328.
73. Collins & Galie, supra note 37, at 328. This is not to imply that justices invoking this model are flawless in their attention to each individual factor; rather, some factors may be only casually analyzed, even when state courts expand the rights available within their constitutions beyond the federal boundaries. Id.
sions and their analogous federal counterparts. For example, state constitutional provisions typically guarantee rights in affirmative language that can more easily be expanded to protect individual rights, as opposed to the federal Constitution, in which rights provisions are couched in negative terms. But the importance of this duty suggests that an independent Non-Equivalence analysis of the state constitution should be conducted even where the relevant provisions are identical. It must be emphasized, however, that this analytical process will not produce a result different from federal interpretation simply because of a textual dissimilarity.

C. Criticisms

The reactions to judicial federalism have been mixed. Although its advocates assert that this more localized jurisprudence has brought much-needed attention to state constitutions and that such experimentation with offering greater rights can spur the United States Supreme Court to follow suit, some critics remain unconvinced. These critics typically disparage this jurisprudence because of two possible consequences of judicial federalism.

The first is a decrease in the public’s faith in the courts’ legitimacy or credibility. Critics charge that because of the shortage of state precedents on point, some courts engage in an “unprincipled, ideologically driven reac-


75. Fitzpatrick, supra note 1, at 1843–44. Compare Ark. Const. of 1874 art. II, § 6 (“The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions, is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such rights.”) with United States Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”).”

76. Fitzpatrick, supra note 1, at 1844. “State constitutions are not, after all, subsets of the federal Constitution; they are wholly independent documents serving as the charter for governance within a state’s borders.” Fitzpatrick, supra note 1, at 1844.

77. Collins & Galie, supra note 37, at 328.

78. One proponent stated that “uncritical adoption of Supreme Court precedent as a matter of state constitutional law is tantamount to conferring upon the Supreme Court the functional ability to amend the state constitution, which the Court has no authority to do.” Fitzpatrick, supra note 1, at 1844. However, some critics are much more vociferous: “state constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements. . . . [Its] discourse is impoverished and inadequate to the tasks that any constitutional discourse is designed to accomplish.” Williams, supra note 18, at xii.

79. Williams, supra note 18, at xxii.

80. See infra Part II.C.

81. Tarr, supra note 67, at 185.
tion to Supreme Court decisions with which [they] do not agree. 82 This precedent shortage is partially attributed to nationwide abandonment of state constitutional interpretation during the Warren Court era. 83

The second possible outcome is a consequence of the first. As courts have increasingly applied judicial federalism to state constitutions, average citizens have responded with their own interpretations of what individual rights should be extended to the people. 84 Unpopular opinions giving more rights to politically disfavored groups have led to numerous campaigns to amend state constitutions to curtail those newly afforded rights. 85 This reactive use of the political process has become increasingly common through popular initiatives and referenda. 86 Many critics, however, believe this avenue of recourse is necessary as such state decisions are insulated from federal intervention. 87

These criticisms, however, merely emphasize the care that state courts must use when utilizing a judicial federalism analysis. 88 It provides an impetus to state courts to use analytically sound methods when making their decisions. 89 Nevertheless, state courts must ensure that these analyses stipulate that they are being made in reliance on that state's constitution so as to avoid reversal on federal grounds. 90 In fact, the requirement that state su-

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82. Fitzpatrick, supra note 1, at 1847. Some allege, however, that this argument is increasingly being made by political conservatives who are being forced to engage in rights restrictions on multiple fronts instead of an otherwise one-state theater of war. See generally Earl M. Maltz, False Prophet—Justice Brennan and the Theory of State Constitutional Law, 15 Hastings Const. L.Q. 429 (1988) (proposing that courts only utilize judicial federalism principles to achieve liberal results).

83. James A. Gardner, The Failed Discourse of State Constitutional Law, 90 Mich. L. Rev. 761, 780–84 (1992). Professor James A. Gardner believes that the resulting confusion has created a “poverty of state constitutional discourse.” Id. at 766; see also Rodriguez, supra note 24, at 271 (“State constitutional theory remains a rather barren, mundane field, with little substantive controversy, creative thinking, or paradigm-shaking.”).

84. See Tarr, supra note 3, at 1099.

85. Id. at 1118. "The relative ease in amending state constitutions to overturn unpopular state constitutional decisions reveals a fundamental paradox of state constitutional law: [s]tate constitutions are, in theory, supposed to provide fundamental rights, yet those rights often can be overridden by majority vote." Fitzpatrick, supra note 1, at 1854. This is to effectuate the will of the legislature and voters to change political institutions, and not necessarily to align the constitution with federal interpretation of the United States Constitution. Rodriguez, supra note 24, at 277.


87. Fitzpatrick, supra note 1, at 1862. The United States Supreme Court may not alter holdings decided on independent and adequate state grounds. Id. at 1862.

88. See Collins & Galie, supra note 37, at 323.

89. See id.

90. See id.
preme courts must make a clear and plain statement of self-reliance on their own constitutions has spurred some jurisdictions into adopting judicial federalism.\textsuperscript{91}

D. Arkansas "Embraces" Judicial Federalism

The Arkansas Supreme Court has applied judicial federalism principles several times in the past decade.\textsuperscript{92} The court has shown its willingness to offer greater protections for individual rights under the Arkansas constitution than are offered under the United States Constitution by refraining from a lockstep analysis with federal interpretation.\textsuperscript{93} This section examines the Arkansas Supreme Court's preferred judicial federalism model, as well as its application to various areas of the law in which the court has enlarged the protection of individual rights beyond the federal minimum.\textsuperscript{94}

1. \textit{Equality Through Non-Equivalence}

The Arkansas Supreme Court applies the Non-Equivalence Model of judicial federalism when determining whether to grant greater protections for individual rights under the Arkansas constitution than are available under the United States Constitution.\textsuperscript{95} A particular nuance of the court's analyses has been to examine its traditional disposition on various cases and whether or not that disposition has historically differed from federal interpretation.\textsuperscript{96} Although the use of judicial federalism displays the court's willingness to assert its own independent protection, this examination and partial reliance upon past lockstep cases reveals the court's hesitancy to break from precedent parallel to federal interpretation without a principled analysis.\textsuperscript{97} Despite this tension, the court's tacit adoption and explicit application of the Non-Equivalence Model has provided abundant case law in a relative-

\textsuperscript{91} Hodge, \textit{supra} note 30, at 858.
\textsuperscript{92} \textit{Id.} at 851--59.
\textsuperscript{93} \textit{Id.} at 858--59.
\textsuperscript{94} For a discussion of the federal minimum, \textit{see supra} Part II.C.
\textsuperscript{95} Hodge, \textit{supra} note 30, at 859. Although no opinion makes mention of this model, the approach utilized in these cases is the same nonetheless. \textit{Id.} at 860.
\textsuperscript{97} \textit{See} Brown, \textit{supra} note 61, at 505. "If we place too much reliance on federal precedent, we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent." \textit{Id.} (quoting State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring)).
ly short amount of time, demonstrating the court’s desire to protect individual rights.98

2. The Arkansas Supreme Court’s Principled Application of Judicial Federalism

In the past decade, the Arkansas Supreme Court has applied the methodology of the Non-Equivalence model to numerous cases. These cases range from examining the constitutionality of warrantless searches of homes to analyzing the individual rights that must be afforded to homosexuals.99 However, each case contains a central theme: that the right to privacy is inherent in all bodies of Arkansas law and the utmost care must be taken to protect that right. Yet the Arkansas Supreme Court’s eagerness to provide such additional protection for its own citizens did not begin until it was rebuked by the highest court in the nation.100

a. Arkansas v. Sullivan

The United States Supreme Court decision in Arkansas v. Sullivan101 catalyzed the Arkansas Supreme Court’s utilization of judicial federalism.102 Kenneth Andrew Sullivan was arrested at a filling station in Arkansas after a police officer discovered narcotics in his possession.103 Sullivan later argued that the arresting officer’s intent demonstrated that the arrest was pretextually tainted because he was initially questioned for a traffic violation, which served as an excuse for searching him for drug paraphernalia.104 The Arkansas Supreme Court agreed and affirmed the trial court’s evidence suppression order, stating that the United States Supreme Court’s precedent indicating that the subjective intent of police officers was irrelevant in this area was

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98. Hodge, supra note 30, at 851. As this adoption has not always been explicit, it is sometimes unclear when exactly the Arkansas Supreme Court is utilizing the principles of judicial federalism. For example, litigation seeking equal access to monetary funds for public schools has been one of the most substantial areas of judicial federalism nationwide. Williams, supra note 18, at xxv. Yet the court in Lake View School District No. 25 of Phillips County v. Huckabee, Arkansas’s leading case in this area, never discussed the issue of enlarging rights beyond the federal minimum despite the issue being raised at the trial court level. See generally Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee, 351 Ark. 31, 91 S.W.3d 472 (2002).

99. See infra Part II.D.2.

100. Brown, supra note 61, at 501.


104. Id. at 317, 11 S.W.3d at 527.
mere dicta. Further, the court stated that it was free to interpret the United States Constitution more broadly than the Supreme Court in order to provide more rights. On certiorari to the United States Supreme Court, this decision was reversed as "flatly contrary to [the] Court's controlling precedent." The Court noted that the Arkansas holding contradicted its binding precedent in which it had refused to accept Fourth Amendment challenges based upon the subjective intent of arresting officers. Further, the Court reiterated that no state court may interpret the United States Constitution more restrictively than established federal precedent, but that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal Constitutional standards."

On remand from the United States Supreme Court, the Arkansas Supreme Court expressly relied upon the Arkansas constitution and expanded its available rights beyond the federal constitution to hold that pretextual arrests are unconstitutional under Arkansas law. The court chose to break its lockstep analysis with federal interpretation despite the near identity between the analogous federal and Arkansas provisions. The court supported this decision by noting that Arkansas courts traditionally have viewed pretextual arrests differently than their federal counterparts, as Arkansas case law has consistently demonstrated a concern that police officers will abuse their discretion in making arrests facilitated by pretextual conduct. This rebuke from the highest court of the land thus began a line of cases wherein the Arkansas Supreme Court recognized individual rights not offered through the United States Constitution.

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105. Id. at 318, 11 S.W.3d at 528.
106. Id.
108. Id. at 771–72.
111. Sullivan III, 348 Ark. at 651, 74 S.W.3d at 217–18.
112. Id., 74 S.W.3d at 218–20.
113. Brown, supra note 61, at 500.
b. *Griffin v. Arkansas*

In *Griffin v. Arkansas*, the Arkansas Supreme Court interpreted the Arkansas constitution as granting more rights than the United States Constitution in consent-to-search cases. In *Griffin*, four police officers approached the suspect's home during night-time hours and knocked on his door. Before anyone could respond, the officers began to search the home until the homeowner discovered them. Once detected, the officers obtained his consent to the search, although they did not advise the suspect of his right to refuse consent to the warrantless search. The individual was later arrested when the officers discovered drug paraphernalia within the residence. The court stated that it would depart from its previous lockstep analysis in this regard as the federal interpretation did not sufficiently address the needs of Arkansas citizens.

In making its determination, the *Griffin* court examined this search and seizure case under Arkansas law as expressed by its constitution, statutes, and cases. Although the *Griffin* court noted the similarity between article 2, section 15 of the Arkansas constitution and the Fourth Amendment, it stated that it possessed the authority to impose greater restrictions on police activities in Arkansas based upon state law than those the United States Supreme Court held to be necessary under federal constitutional standards. The court reasoned that individuals must be given an opportunity to offer or refuse consent before police officers conduct a warrantless search. As such a requirement was above the federal floor of requirements, the *Griffin* court expanded the rights afforded by the Arkansas constitution and held that warrantless searches conducted before obtaining consent violates the Arkansas constitution. This holding diverged from federal interpretation,

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115. Id. at 792, 67 S.W.3d at 584. It is interesting to note that the court decided *Griffin v. State* while *Sullivan II* was still pending on remand from the United States Supreme Court. Williams, supra note 102, at 887.
117. Id.
118. Id. at 796–97, 67 S.W.3d at 587.
119. Id. at 797, 67 S.W.3d at 587.
120. Id. at 801, 67 S.W.3d at 591 (Brown, J., concurring).
121. Id. at 791–95, 797–800, 67 S.W.3d at 584–87, 588–90.
122. *Griffin*, 347 Ark. at 792, 67 S.W.3d at 585.
123. Id. at 799–800, 67 S.W.3d at 589–90.
124. Id. at 800, 67 S.W.3d at 590. The court acknowledged that a liberal interpretation of federal law may have supported a similar finding but chose to base its decision solely on the Arkansas Constitution to ensure the holding's viability on any future review. Brown, supra note 61, at 510–11.
even though the relevant constitutional provisions textually mirrored one another.\textsuperscript{125}

c. \textit{State v. Brown}

In \textit{State v. Brown},\textsuperscript{126} the Arkansas Supreme Court advanced its holding in \textit{Griffin} by further expanding the rights afforded by the Arkansas constitution.\textsuperscript{127} Police officers received information that Jaye Brown was involved in illegal drug activity.\textsuperscript{128} The officers did not have a search warrant, but they provided Brown with a consent-to-search form that would give the officers permission to search her residence.\textsuperscript{129} The police officers did not advise Brown that she had a right to refuse consent to search her home.\textsuperscript{130} Upon signing the form, the officers conducted a search of the residence that produced evidence of drug manufacturing and use.\textsuperscript{131} The police officers arrested Brown on the basis of this evidence, although Brown later alleged they had conducted the search in violation of her privacy rights.\textsuperscript{132} The \textit{Brown} court agreed and established that the Arkansas constitution requires police officers to notify a homeowner of her right to refuse consent to search when utilizing the "knock and talk" procedure.\textsuperscript{133}

The \textit{Brown} court began its Non-Equivalence Model analysis of the Arkansas constitution by focusing on federal interpretation of the Fourth Amendment.\textsuperscript{134} The court noted that, although a warrantless entry into a private home is presumptively unreasonable under the Fourth Amendment, this presumption may be overcome if a homeowner gives the police officer his unequivocal, overt, and voluntary consent to conduct a warrantless search.\textsuperscript{135} The court noted that the Fourth Amendment requires, however, voluntariness to be determined from the totality of the circumstances.\textsuperscript{136} As such, the court had heretofore consistently held that the "knock and talk" procedure was not a per se violation of the Fourth Amendment.\textsuperscript{137}

As with its previous rights-expanding cases, the \textit{Brown} court proceeded to emphasize that, although it lacked the authority to extend the protections

\textsuperscript{125} \textit{Griffin}, 347 Ark. at 801, 67 S.W.3d at 591 (Brown, J., concurring).
\textsuperscript{126} 356 Ark. 460, 156 S.W.3d 722 (2004).
\textsuperscript{127} \textit{Id.} at 473, 156 S.W.3d at 731.
\textsuperscript{128} \textit{Id.} at 463, 156 S.W.3d at 724.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} at 464, 156 S.W.3d at 725.
\textsuperscript{132} \textit{Brown}, 356 Ark. at 464, 156 S.W.3d at 725.
\textsuperscript{133} \textit{Id.} at 462, 156 S.W.3d at 724.
\textsuperscript{134} \textit{See id.} at 466–67, 156 S.W.3d at 727.
\textsuperscript{135} \textit{Id.} at 467–68, 156 S.W.3d at 727–28.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} at 468–69, 156 S.W.3d at 728.
of the Fourth Amendment beyond the holdings of the United States Supreme Court, it was not bound by that federal interpretation when interpreting state law.\textsuperscript{138} Although the \textit{Brown} court emphasized that "a slavish following of federal precedent would render [its] opinions merely a mirror image of federal jurisprudence," the court expressed concern that deviating too greatly would lead to incoherent law within the state.\textsuperscript{139} Nevertheless, the court concluded that a break with federal precedent was warranted because of the state’s established history of protecting its citizens’ privacy rights.\textsuperscript{140} Therefore, the \textit{Brown} court increased the protections offered to Arkansans beyond the federal minimum and held that police officers must advise individuals of their right to refuse to consent to warrantless searches before one is commenced.\textsuperscript{141} As further credence to the advantages of judicial federalism, the United States Supreme Court later adopted and expanded upon the reasoning of the \textit{Brown} court and other courts in \textit{Hudson v. Michigan}.\textsuperscript{142}

d. \textit{Rikard v. State}

In \textit{Rikard v. State},\textsuperscript{143} the Arkansas Supreme Court refrained from expanding its ruling in \textit{Griffin} and held that a warrantless search of a garbage container left outside of a citizen’s residence does not violate privacy rights guaranteed by the Arkansas constitution.\textsuperscript{144} Police officers had suspected that Gwendolyn Rikard was both manufacturing and possessing methamphetamine.\textsuperscript{145} The officers conducted warrantless searches of her trash containers left near the curb of her residence and discovered drug paraphernalia associated with methamphetamine production and use.\textsuperscript{146} Rikard later appealed her conviction that was based upon this evidence, stating that the search violated her right to privacy under the Arkansas constitution.\textsuperscript{147} Although the \textit{Rikard} court conducted a judicial federalism analysis, it concluded that the case did not warrant a departure from federal interpretation of the United States Constitution because of the sufficiency of its protection.\textsuperscript{148}

\begin{itemize}
\item \textsuperscript{138} \textit{Brown}, 356 Ark. at 469–70, 156 S.W.3d at 728–29.
\item \textsuperscript{139} \textit{id}. at 470, 156 S.W.3d at 729.
\item \textsuperscript{140} \textit{id}.
\item \textsuperscript{141} \textit{id}. at 474, 156 S.W.3d at 732.
\item \textsuperscript{142} \textit{Cf. generally} Hudson v. Michigan, 126 S. Ct. 2159 (2006) (holding that violation of the “knock and talk” procedure does not require a per se suppression of evidence).
\item \textsuperscript{143} Rikard v. State, 354 Ark. 345, 123 S.W.3d 114 (2003).
\item \textsuperscript{144} \textit{id}. at 354–55, 123 S.W.3d at 119–20.
\item \textsuperscript{145} \textit{id}. at 348, 123 S.W.3d at 115.
\item \textsuperscript{146} \textit{id}.
\item \textsuperscript{147} \textit{id}. at 353, 123 S.W.3d at 118.
\item \textsuperscript{148} \textit{See id}. at 355, 123 S.W.3d at 119–20.
\end{itemize}
In making its decision, the Rikard court first noted the implicit privacy provisions under numerous provisions of Arkansas’s constitution and its statutory and case law.\(^{149}\) The court also commented upon its holding in Griffin, wherein it had relied upon Arkansas’s rich tradition of protecting the privacy of the home.\(^{150}\) Lastly, the Rikard court noted its past decision to examine the historical differences between federal and state interpretation when conducting a judicial federalism analysis.\(^{151}\)

The court, however, declined to expand the rights afforded under the Arkansas constitution beyond federal interpretation of the United States Constitution.\(^{152}\) The Rikard court noted the general symmetry between Arkansas and federal law regarding the expectation of privacy for garbage left outside the home for collection, stating that “[a] person who knowingly exposes an object to the public cannot expect the protection from unreasonable search and seizure” under the Arkansas or federal constitutions.\(^{153}\) Because Arkansas’s interpretation of the issue had not varied in the past from federal interpretation and because such interpretation sufficiently protected the privacy interests of Arkansas citizens, the Rikard court held that Arkansas citizens can have no reasonable expectation of privacy regarding garbage left outside of a residence.\(^{154}\)

e. Jegley v. Picado

In Jegley v. Picado,\(^{155}\) the Arkansas Supreme Court held that the state’s criminalization of sodomy violated Arkansans’ rights to privacy and equal protection, encompassing those rights under its own constitution.\(^{156}\) Elena Picado, along with six other gay and lesbian Arkansans, challenged Arkansas’s anti-sodomy law as unconstitutional.\(^{157}\) The petitioners claimed that the statute violated their fundamental right to privacy and right to equal protection under both the United States and Arkansas constitutions.\(^{158}\) The Arkans-

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\(^{149}\) Rikard, 354 Ark. at 354, 123 S.W.3d at 119.

\(^{150}\) Id.

\(^{151}\) Id.

\(^{152}\) Id. at 355, 123 S.W.3d at 119-20.

\(^{153}\) Id. at 354, 123 S.W.3d at 119.

\(^{154}\) Id. at 355, 123 S.W.3d at 119-20. While this case did not produce a result varying from federal interpretation, it is still an appropriate example of judicial federalism because of the analysis it employs. See supra Part II.B.2. See also Tarr, supra note 3, at 1116 (noting that “state judges may base their rulings on state constitutional provisions but interpret them as affording no greater protection” when conducting a judicial federalism analysis).

\(^{155}\) 349 Ark. 600, 80 S.W.3d 332 (2002).

\(^{156}\) Id. at 608, 80 S.W.3d at 334. This decision directly contradicted the United States Supreme Court’s then-existing precedent on the matter. See Bowers v. Hardwick, 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

\(^{157}\) Picado, 349 Ark. at 608-09, 80 S.W.3d at 334-35.

\(^{158}\) Id. at 608, 80 S.W.3d at 334.
sas Supreme Court agreed and extended the protections of the Arkansas constitution beyond its federal counterpart to protect the privacy and fundamental rights of its homosexual citizens.\textsuperscript{159}

The \textit{Picado} court justified this break from Arkansas and federal precedent on judicial federalism grounds.\textsuperscript{160} The court engaged in a Non-Equivalence Model analysis, comparing its constitution and the federal Constitution to decide whether it should once again grant rights not recognized by federal courts.\textsuperscript{161} The court specifically noted Article II of the Arkansas constitution, which "guarantees our citizens certain inherent and inalienable rights, including the enjoyment of life and liberty and the pursuit of happiness." Most importantly, section 29 of that article states that "[t]he rights enumerated in [the Arkansas] Constitution must not be construed in such a way as to deny or disparage other rights retained by the people."\textsuperscript{162}

The \textit{Picado} court also examined other Arkansas law to determine whether a break with federal precedent was warranted in order to recognize a fundamental right to privacy.\textsuperscript{163} The court noted that the legislature had essentially already done so, as the Arkansas General Assembly had recognized a right to privacy by enacting over eighty statutes designed to protect those rights.\textsuperscript{164} Further, the court acknowledged that it had declared that Arkansas citizens have a general right to privacy.\textsuperscript{165} This demonstrated to the court that Arkansas had a "rich and compelling tradition of protecting individual privacy" that necessitated finding a fundamental right to that privacy in the Arkansas constitution.\textsuperscript{166}

The court conducted a similar analysis in determining whether to find that the Arkansas anti-sodomy law violated Arkansans' right to equal protection.\textsuperscript{167} The court examined the Arkansas Equal Rights Amendment, which prohibits the general assembly from granting any privileges that are

\begin{itemize}
\item \textsuperscript{159} \textit{Id.} at 638, 80 S.W.3d at 353–54.
\item \textsuperscript{160} \textit{See generally id.}, 80 S.W.3d 332. The Arkansas Supreme Court expressly "reject[ed] Bowers v. Hardwick, in which the Supreme Court held that the right to privacy did not protect private, consensual, noncommercial sexual behavior." Brown, \textit{supra} note 61, at 516.
\item \textsuperscript{161} \textit{See generally Picado}, 349 Ark. 600, 80 S.W.3d 332.
\item \textsuperscript{162} \textit{Id.} at 627, 80 S.W.3d at 347.
\item \textsuperscript{163} \textit{Id.}, 80 S.W.3d at 346–47.
\item \textsuperscript{164} \textit{Id.} at 629–31, 80 S.W.3d at 348–49. The United States Supreme Court has held that some individual rights are so vital that they are "fundamental" and are thus inviolate, absent some compelling governmental interest that is necessarily achieved through limiting the fundamental right. \textbf{ERWIN CHEMERINKSY}, \textit{CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES} 792 (Vicki Been et al. eds., 2006).
\item \textsuperscript{165} \textit{Picado}, 349 Ark. at 628–31, 80 S.W.3d at 347–50.
\item \textsuperscript{166} \textit{Id.} at 631, 80 S.W.3d at 349–50.
\item \textsuperscript{167} \textit{Id.} at 631–32, 80 S.W.3d at 349–50.
\item \textsuperscript{168} \textit{Id.} at 632–38, 80 S.W.3d at 350–54.
\end{itemize}
not universally and equally granted to all Arkansas citizens. Because the
general assembly had clearly granted privileges not universally available,
the Arkansas Supreme Court conducted a rational basis review of the anti-
sodomy law. A statute is unconstitutional under this form of constitutional
review if it arbitrarily and capriciously discriminates against an identifiable
group without any relation to legitimate government objectives. The court
held that the state’s purported objective, to protect public morality, was
wholly illegitimate and inconsistent with the purpose of equal protection. The Picado court explained that, as a countermajoritarian branch, it was
charged with the protection of politically unpopular groups who have been
injured by the imposition of the morals of the majority. As there was no
rational basis for the Arkansas General Assembly to criminalize sodomy
only between persons of the same sex and not between all Arkansans, the
court concluded that the statute was based upon “illegitimate disapproval,
bases, and stereotypes.” Thus, the Arkansas Supreme Court recognized
homosexuals as a distinct and separate class entitled to protection under the
Arkansas constitution and struck down the anti-sodomy law on equal protec-
tion grounds. As with the Brown decision, the United States Supreme
Court later adopted the reasoning of the Picado court and other courts in
Lawrence v. Texas.

Commentators agree that judicial federalism clearly influenced this
change in the United States Supreme Court’s stance. Among those effec-
tuating this sweeping change was the Arkansas Supreme Court, which “took
a stand against the use of majoritarian moral standards to oppress politically

169. Id. at 632–33, 80 S.W.3d at 354–55.
170. Id. at 634–36, 80 S.W.3d at 350–52.
171. Picado, 349 Ark. at 636–38, 80 S.W.3d at 352–54.
172. Id. at 635, 80 S.W.3d at 352.
173. Id. at 638, 80 S.W.3d at 354–55.
174. Id. at 634, 80 S.W.3d at 351.
175. See id. at 638, 80 S.W.3d at 353. In a congratulatory concurrence, Justice Brown
lauded the court’s continued use of judicial federalism as a means to protect those beneath the
federal floor. See id. at 638, 80 S.W.3d at 354 (Brown, J., concurring). Justice Brown parti-
cularly felt this result was necessary in Picado because the anti-sodomy statute was inconsistent
with “the bedrock principles of independence, freedom, happiness, and security” guaranteed
by the Arkansas constitution. See id.
176. 539 U.S. 558 (2003) (holding that a fundamental right to privacy exists within the
United States Constitution, which encompasses noncommercial intimate relationships). For
example, judicial federalism may display the development and implementation of legal rules
that enhance the Supreme Court's understanding of the United States Constitution, such as
was seen in the period between Bowers v. Hardwick and Lawrence v. Texas. Fitzpatrick,
supra note 1, at 1872.
177. Fitzpatrick, supra note 1, at 1872. The Court believed that the massive state-driven
trend towards decriminalization was “worthy of consideration in its federal due process anal-
ysis.” Id. at 1855.
disadvantaged groups." This is not wholly surprising, as the subject of gay rights is now the most frequently debated issue in judicial federalism, which Arkansas appears to have embraced wholeheartedly. Further, Justice Brown seemed to be fully aware of the impact the landmark decision could have, noting that "the ripple effect of Picado may prove to be wide indeed." Justice Brown's prediction proved to be accurate, as a case filed while Picado was pending would soon test the Arkansas Supreme Court's adoption and continued use of judicial federalism.

E. A Failed Test Case for Continuing Judicial Federalism in Arkansas

The Arkansas Supreme Court had another opportunity to further its judicial federalism precedent in 2006 in *Howard II*, a case dealing with the state's categorical exclusion of homosexuals from the foster parent application process. This section begins by examining the facts giving rise to the eventual litigation and the circuit court's treatment of those facts, as it was heavily relied upon by the Arkansas Supreme Court on appeal. This section continues with the Arkansas Supreme Court's opinion, as well as the political reaction and consequences of that opinion.

1. Facts

In January 1999, the Child Welfare Agency Review Board of Arkansas (the "Board") approved a proposed regulation that would categorically exclude homosexuals from serving as foster parents. The Board, however, allowed for a public comment period whereby individuals from the community were invited to voice either support for or opposition to the proposed regulation. Among those concerned about the adverse effects of a possible

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180. Brown, *supra* note 61, at 517. "This seems to have stimulated very important legal literature, led by the groundbreaking article by Justice Robert Brown of the Arkansas Supreme Court." Williams, *supra* note 102, at 884–85.
183. See generally *Howard II*, No. 05-814, 2006 WL 1779467.
184. See *infra* Part II.E.1–2.a.
185. See *infra* Part II.E.2.b–3.
187. *Homosexuals Out as Foster Parents*, MEMPHIS COM. APPEAL, Feb. 26, 1999, at B2, available at 1999 WLNR 4517833. A foster home, for the purposes of this regulation, "means a private residence of one or more family members that receives from a child placement agency any minor child who is unattended by a parent or guardian in order to provide care, training, education, custody, or supervision on a twenty-four hour basis, not to include
regulation was Matthew Howard. Howard, a homosexual minister experienced in outreach programs for the gay and lesbian community, testified that such a categorical ban would be damaging not only to homosexuals, but also to children in Arkansas who were in desperate need of foster care because of the already meager supply of people willing to serve as foster parents.

Despite such testimony, on March 23, 1999, the Board enacted section 200.3.2 of its Minimum Licensing Standards ("Regulation"), which mandated that "homosexuals be excluded from the foster parent application process." Prior to the enactment, such excluded persons engaged in a screening process identical to all other Arkansans, and no complaints had been filed against a homosexual foster parent. The Board believed, however, that the enactment was necessary because several of its members were concerned that placing a child under the care of a homosexual foster parent would have an adverse effect upon the child's well-being.


188. Interview with Matthew Howard, in Little Rock, Ark. (Feb. 4, 2007).
190. Homosexuals Out as Foster Parents, MEMPHIS COM. APPEAL, Feb. 26, 1999, at B2. A homosexual, for the purposes of the Regulation, was one who "voluntarily and knowingly engaged in or submitted to any sexual contact involving the genitals of one person and the mouth or anus of another person of the same gender, and who has engaged in such activity after the foster home is approved or at a point in time that is reasonably close in time to the filing of the application to be a foster parent." Howard II, No. 05-814, 2006 WL 1779467, at *1 (Ark. June 29, 2006). Legal characterization targeted towards homosexuals is not new in Arkansas, which previously defined sodomy as the crime "called sometimes buggery, sometimes the offense against nature, and sometimes the horrible crime not fit to be named among Christians, being a carnal copulation by human beings with each other against nature, or with a beast," and "unnatural sexual relations between persons of the same sex, or with beasts, or between persons of different sex, but in an unnatural manner." Johnson, supra note 33, at 699.
192. Supplemental Abstract and Brief for Appellees/Cross-Appellants, at SC2, Howard II, No. 05-814 (Ark. June 29, 2006). This Regulation was passed despite the objections of the agency's attorney, who argued that the Board's pre-existing regulations and screening processes addressed any concerns related to the health, well-being, and safety of foster children in Arkansas. Supplemental Abstract and Brief for Appellees/Cross-Appellants, at SC2, Howard II, No. 05-814 (Ark. June 29, 2006). See also Stipulated Facts of Defendants' Stipulated Facts, Howard I, No. CV 1999-9881 (Cir. Ct. Ark. Dec. 29, 2004) (stipulating counsel's advice to provide a rational basis for the rule other than attempting to "backdoor out people who may be homosexual").
Within a matter of weeks, Matthew Howard applied to become a foster parent and was summarily denied because of his sexual orientation. Along with other similarly-situated applicants, he filed suit against the Department of Human Services (the "Department") and the Board. The petitioners contended that the Regulation was unconstitutional under the United States and Arkansas constitutions because it violated their right to equal protection, their fundamental rights to privacy and intimate association, and the Separation of Powers Doctrine.

2. Procedural Posture

This section examines the judicial treatment of Howard's claims, both the circuit court and on its eventual appeal to the Arkansas Supreme Court. The first subsection examines the lower court's opinion, particularly its discussion of the testimony proffered before it, as well as the court's substantive analysis of the facts. The second subsection examines the Arkansas Supreme Court's treatment of the facts, which did not address the substantive issues raised at the circuit court.

a. Howard I

At the circuit court level, both petitioners and respondents produced numerous witnesses who testified regarding homosexuals' fitness to serve as foster parents. The petitioners offered their own personal history and experiences with the application process and also supplied the court with expert testimony from practitioners within the social sciences and medical fields. The petitioners' experts offered scientific research to demonstrate that homosexuals are as mentally and physically fit to serve as foster parents as heterosexuals and that an applicant's sexual orientation should not be considered in foster care placement. Dr. Cheralyn Powers testified that

194. Howard II, 2006 WL 1779467, at *1. The personal histories of the additional petitioners represented the diverse array of people affected by the Regulation's broad exclusion: Craig Stoopes is an employee of the public library in Little Rock and is in a long-term relationship with Matthew Howard; Anne Shelley is a lesbian who serves as the director of a gay and lesbian advocacy group; and William Wagner is a heterosexual who, along with his wife, has cared for over eighty non-custodial children, but who could not serve as a foster parent because his eighteen-year-old son (who is a homosexual) lives in Wagner's home. Howard I, 2004 WL 3154530, at *2. See also Interview with Matthew Howard, in Little Rock, Ark. (Feb. 4, 2007).
196. Id. at *2-7.
197. Id.
198. Id.
there is no correlation between the sexual orientation or gender of a parent and the healthy development of a child.\textsuperscript{199} Dr. Frederick Berlin testified that homosexuality is not a mental disorder, that it is likely impossible for a person to change their sexual orientation, and that it would be unethical to attempt to have someone do so.\textsuperscript{200} Dr. Susan Cochran testified that homosexuality is not a predictor of whether or not a person is more likely to abuse or become dependent upon drugs or alcohol.\textsuperscript{201} Professor Judith Faust testified that foster child placement should be based upon individual evaluations.\textsuperscript{202} Dr. Pepper Schwartz testified that there was no statistically significant difference between quality and durability of same-sex and different-sex relationships and that many homosexuals enjoyed a higher quality of relationships than heterosexuals.\textsuperscript{203} Dr. Rebecca Martin stated that the application process existing before the Regulation adequately tested for the Human Immunodeficiency Virus (HIV), the transmission of which is commonly associated with sexual contact between homosexuals.\textsuperscript{204} Dr. Michael Lamb testified that being raised by gay parents does not cause any social, mental, behavioral, relational, scholastic, or sexual adjustment problems whatsoever.\textsuperscript{205}

In contrast, the circuit court noted that the opinions offered by the respondents' witnesses focused on personal views of public morality and the detrimental effects that exposure to a homosexual could possibly have upon the upbringing of a child.\textsuperscript{206} The respondents first introduced testimony from members of the Board, who described their personal animus towards homosexuality as their reason for enacting the Regulation.\textsuperscript{207} Robin Woodruff stated that she proposed the Regulation to the Board because she believes that homosexuality goes against Biblical doctrine.\textsuperscript{208} Woodruff also testified that she believed that the Board should address her belief through a categorical ban that excluded homosexuals.\textsuperscript{209} James Balcom stated that morality and religious beliefs primarily guided his decision to vote for the Regulation

\begin{itemize}
\item \textsuperscript{199} Id. at *3–4. Dr. Powers is a clinical psychologist. Id.
\item \textsuperscript{200} Id. at *6. Dr. Berlin is a psychiatrist and expert on sexual abuse. Id.
\item \textsuperscript{201} Howard I, 2004 WL 3154530, at *7. Dr. Cochran is a clinical psychologist and epidemiologist. Id.
\item \textsuperscript{202} Id. at *4–5. Professor Faust teaches at the University of Arkansas at Little Rock School of Social Work. Id. Professor Faust further testified that the chief professional organization that guides child welfare practices in the country is the Child Welfare League of America (of which the respondent is a member), and it has issued standards stating that foster parent applicants should not be denied solely because they are homosexual. Id. at *5.
\item \textsuperscript{203} Id. at *7. Dr. Schwartz is a sociologist. Id.
\item \textsuperscript{204} Id. at *4. Dr. Martin is a medical doctor and expert on infectious disease. Id.
\item \textsuperscript{205} Id. at *5–6. Dr. Lamb is a psychologist, whom the court described as "the most outstanding of the expert witnesses." Id.
\item \textsuperscript{206} Id. at *2–3, 6, 8.
\item \textsuperscript{207} Howard I, 2004 WL 3154530, at *2–3.
\item \textsuperscript{208} See id. at *2.
\item \textsuperscript{209} Id.
\end{itemize}
and that homosexuality is a choice encouraged through active recruitment by "gay militants."\textsuperscript{210} The respondents then offered testimony from their sole expert witness, Dr. George Rekers, who testified that any household that includes a homosexual cannot adequately address the needs and best interests of a foster child.\textsuperscript{211}

After evaluating the differences in the litigants' expert testimony, the circuit court first addressed whether the regulation was a violation of the Separation of Powers Doctrine.\textsuperscript{212} The court noted that the Arkansas General Assembly had delegated its power to the Board in order to promote the health, safety, and welfare of children through the promulgation of rules that would achieve that goal.\textsuperscript{213} The circuit court found, however, that the testimony and evidence brought before it unequivocally demonstrated that there was no logical relationship between the regulation and the general well-being of foster children and that any contrary evidence was based upon personal conviction without scientific foundation.\textsuperscript{214} The court was careful to emphasize that the Board's intent—to legislate public morality—was in fact a legitimate state interest.\textsuperscript{215} Yet the court ruled that the regulation violated the state constitution because the general assembly delegated the ability to legislate regarding matters relating to a foster child's health, but not the impact of the perceived public morality on that child.\textsuperscript{216} The circuit court found that the Board violated the Separation of Powers Doctrine because it unconstitutionally assumed a regulatory power beyond the scope of its authority.\textsuperscript{217}

\textsuperscript{210} Id. at *3.

\textsuperscript{211} Id. at *6. The circuit court took particular issue with this expert, Dr. George Rekers, so much so that Justice Fox devoted a portion of his opinion to admonish him for prioritizing his own personal agenda against homosexuality and undermining any assistance he might have otherwise been to the court. \textit{Howard I}, 2004 WL 3154530, at *8. The State, however, countered that its expert witness, who is also a Southern Baptist minister, did not inject his personal views into his testimony after he acknowledged his reliance upon the Bible as the infallible word of God. \textit{Gay Foster Parents Hurt, Witness Says—But Opponents Allege Bias in Professor's Trial Statements}, \textit{MEMPHIS COM. APPEAL}, Oct. 6, 2004, at B3. The State later refused to pay Dr. Rekers the "exorbitant" $200,000 he billed the Department for his testimony, whose representatives later admitted he had not been an expert on the issue of whether homosexuals may serve as fit parents. Charlotte Tubbs, \textit{Agency, Witness Tangling over Pay}, \textit{ARK. DEMOCRAT GAZETTE}, Dec. 30, 2006.


\textsuperscript{213} Id. at *9.

\textsuperscript{214} Id.

\textsuperscript{215} Id. (citing \textit{Virginia v. Black}, 538 U.S. 343 (2003)).

\textsuperscript{216} Id.

\textsuperscript{217} Id. Beyond its violation of the Arkansas constitution, the circuit court found that the expert testimony clearly indicated that the Regulation violated another of the Board's regula-
Next, the circuit court addressed the plaintiff's claim under the Equal Protection Clause of the United States Constitution. The court stated that homosexuals are not recognized as a protected or "suspect" class and are therefore only entitled to a rational basis standard, the lowest form of constitutional review. The court explained that, under rational basis, equal protection is violated only if there is evident discrimination without a legitimate governmental justification or one that does not bear a rational relationship to the discrimination. First, the circuit court stated that there was blatant discrimination because otherwise-qualified persons were wholly excluded from serving as foster parents. Yet the court also identified a legitimate state interest because all states have the duty to protect children. The court posited that the more difficult question was whether there was a rational relationship between the discrimination and the duty to protect. The court ultimately found that a supposed public morality served as the nexus between the two, stating that the blanket exclusion could further the public morality despite not furthering the interests of a foster child.

In regards to the petitioners' final claim—that the regulation violated their fundamental rights to privacy and intimate association—the circuit court adopted the reasoning of the Eleventh Circuit Court of Appeals in Lofton v. Secretary of the Department of Children & Family Services, and rejected the petitioners' contention. The petitioners in Lofton challenged a...
statute excluding homosexuals from the Florida adoption process.\textsuperscript{227} The Eleventh Circuit held that there was no precedent to support the appellants' claims that the ability to serve as a foster parent was constitutionally protected.\textsuperscript{228} Further, the \textit{Lofton} court held that there was no equal protection violation because the disparate treatment of heterosexuals and homosexuals by the State of Florida, while imperfect, was not significant enough to warrant a constitutional violation.\textsuperscript{229}

The circuit court entered judgment in favor of the petitioners on their separation of powers argument and found the Regulation unconstitutional.\textsuperscript{230} The state issued a statement one day after the judgment announcing that it would appeal the "erroneous ruling."\textsuperscript{231}

b. \textit{Howard II}

Justice Donald L. Corbin delivered the opinion of the Supreme Court of Arkansas in \textit{Howard II} on June 29, 2006, which affirmed the lower court's holding that the Department unconstitutionally violated the Separation of Powers Doctrine by excluding homosexuals from the foster parent application process.\textsuperscript{232} Justice Robert L. Brown wrote a concurring opinion addressing the additional constitutional issues discussed by the circuit court, though not by the majority.\textsuperscript{233}

i. \textit{Majority opinion}

On direct appeal from the circuit court, the \textit{Howard II} majority addressed the single issue of whether the appellant agency had unconstitution-
ally regulated beyond its delegated powers. In order to render its decision, the majority analyzed the constitutionality of the Regulation by examining the relationship between the exclusion and the statute's construction, the statutory delegation of authority given to the Department by the Arkansas General Assembly, as well as the expert testimony delivered before the circuit court.

The Arkansas Supreme Court's analysis began with an examination of the legislature's delegation of authority to the Board. Writing for the majority, Justice Corbin wrote that the essential authority and goal of the Board was to disseminate rules that would improve the health, safety, and welfare of children. As such, his analysis examined whether the Regulation and its impact was confined to those set parameters.

Justice Corbin began by explicating the court's limited standard of review when determining a regulation's validity, particularly emphasizing that no administrative agency has the authority to enact rules not in accordance with other law. Justice Corbin primarily relied upon the testimony prof fered to the circuit court to determine whether the Regulation could be reconciled with the Separation of Powers Doctrine by promoting the health, safety, and welfare of children. Just as the circuit court before it, the majority concluded that there was no correlation between the Regulation and the Board's purported goal of furthering the well being of children. The majority went on to discuss the cause of this unauthorized act, finding the Board's personal biases and view on morality at its source. Because the general assembly did not legislatively permit the Board to do so, the court

234. Id. at *6–7. The majority also addressed appellants' claims that the court did not have jurisdiction over the matter. Id. at *1. Although these issues were not raised at the trial level, the Arkansas Supreme Court was obligated to review them per its decision in Arkansas Department of Human Services v. Ishell, 360 Ark. 256, 200 S.W.3d 873 (2005) (raising subject-matter jurisdiction is appropriate at any time). The court dismissed as frivolous the appellants' claim that none of the appellees had standing before the court because they had not applied to become foster parents, as the appellees had in fact applied and were summarily denied as a result of the regulation. Howard II, 2006 WL 1779467, at *2. The appellants further argued that the court lacked jurisdiction to hear the matter because the appellees had not exhausted every available remedy at the administrative level. Id. at *2–3. However, the Arkansas Supreme Court found the rule that inadequate or futile remedies need not be sought was applicable to the appellants, stating that the blanket exclusion of their class of persons precluded the need to adjudicate the matter before a hostile administration. Id. at *3.

235. Id. at *3–5.
236. Id. at *3.
237. Id. at *3.
238. Id. at *4. Justice Corbin also noted that such a regulation may be found invalid if arbitrary, capricious, or enacted through an abuse of discretion. Id.

239. Id. at *4–5.
241. Id.
held that it had stepped beyond its delegated authority by regulating public morality and its effect upon children. 242  

Through this analysis, the court affirmed the circuit court’s holding that the Board unconstitutionally violated the Separation of Powers Doctrine by usurping the general assembly’s power to regulate public morality. The court declined to address the cross-appellants’ arguments, such as whether the regulation violated their rights under the equal protection provisions of the Arkansas and United States constitutions or their fundamental rights to privacy and intimate association.

ii. **Concurring opinion**

Justice Brown agreed with the majority’s holding that the Regulation violated the Separation of Powers Doctrine, but argued that the court should have addressed all of the constitutional issues discussed by the circuit court. 243 Justice Brown examined the regulation through an equal protection and privacy rights analysis, guided by Arkansas precedent. 244 His analysis concluded that the individual rights of the cross-appellants had been violated, and therefore he would have overruled the circuit court on equal protection and due process grounds. 245

Justice Brown began by detailing the effects of the Regulation on the privacy rights of homosexuals. 246 He opined that the Regulation clearly and substantially had an adverse effect upon an individual’s right to privacy in direct contravention to established precedent on the matter. 247 He stated that this burden manifested as an infirmity resulting from the denial of an opportunity to serve as foster parents for the thousands of neglected children in Arkansas. 248 Consequently, Justice Brown stated that it is those children who must also bear the loss of that burden by being forced to live as wards of the state. 249

Justice Brown then expressed his concern that the Child Welfare Agency Review Board also disregarded precedent established by the United States Supreme Court when it enacted the regulation solely out of moral disapproval. 250 He noted that the Supreme Court had clearly established the inadequacy of such a justification for delimiting equal protection of privacy

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242. *Id.*
243. *Id.* at *7 (Brown, J., concurring).
245. *Id.* at *7–8.
246. *Id.* at *8.
247. *Id.* (citing Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002)).
248. *Id.*
249. *Id.* at *7 (Brown, J., concurring).
Further, he reiterated the Court’s declaration that personal decisions relating to the private intimacies of interpersonal relationships cannot likewise be hindered by the government.\textsuperscript{252}

Justice Brown concluded by admonishing the Board for its prejudiced regulation.\textsuperscript{253} He believed that the constitutionally guaranteed rights of homosexuals had been unequivocally diminished by the actions of the government, and no permissible reason existed to justify it.\textsuperscript{254} For these reasons, Justice Brown concurred with the view of the majority but expressed belief that the Regulation should have also been found unconstitutional as a violation of the cross-appellants’ right to equal protection and fundamental right to privacy.\textsuperscript{255}

3. \textit{Political Reactions}

The political reaction to \textit{Howard II} was immediate and hostile, as political candidates who were courting voters for the upcoming election condemned the court’s decision in near-universal solidarity.\textsuperscript{256} Both of the front-running gubernatorial candidates quickly stated their support for a future legislative ban on homosexual foster parents.\textsuperscript{257} Mike Huckabee, the state’s then-governor and 2008 presidential candidate, wholly opposed the outcome and promised that a “solution” would be found.\textsuperscript{258} Both the Speaker of the House-designate and Senate Pro Tempore-designate for the 2007 legislative session announced their support for any such “solution.”\textsuperscript{259} Jim Holt, the Republican candidate for Lieutenant Governor, lamented that the “[Arkansas] Supreme Court [has] run over the will of the people.”\textsuperscript{260}

Yet, the will of the Arkansas people did not wholly parallel the political clamor. Numerous editorials and articles appeared in Arkansas’s newspapers espousing support for the Arkansas Supreme Court’s decision, how-

\textsuperscript{251} Id. (quoting Romer v. Evans, 517 U.S. 620, 634 (1996) (“[I]f the constitutional conception of ‘equal 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.”)).
\textsuperscript{252} Id. at *8 (quoting Lawrence v. Texas, 539 U.S. 558 (2003)).
\textsuperscript{253} Id.
\textsuperscript{254} Id.
\textsuperscript{255} Id. at *7–8 (Brown, J., concurring).
\textsuperscript{256} See Jake Bleed & Charlotte Tubbs, \textit{Legislation is Seen Rising from Ruling on Gays Giving Care}, \textsc{Ark. Democrat-Gazette}, July 1, 2006.
\textsuperscript{257} Bleed & Tubbs, \textit{supra} note 256. Mike Beebe, the current governor, would now only support such a ban if it is constitutionally written. \textit{Id}.
\textsuperscript{258} John Brummett, \textit{Getting the Gays, Quietly}, \textsc{Ark. Times}, July 13, 2006.
\textsuperscript{259} Bleed & Tubbs, \textit{supra} note 256.
\textsuperscript{260} Id. Bill Halter, the successful Democratic candidate for Lieutenant Governor, offered the solitary hope that no one “try to use this for any sort of political gain.” \textit{Id}.
ever limited its protective effect may have been.\textsuperscript{261} Further, a study conducted by the University of Arkansas revealed an interesting contradiction within Arkansans' voting practices.\textsuperscript{262} The study found that although a majority of Arkansans personally disapprove of homosexual foster parenting, they are evenly split on whether a legislative ban should give effect to that personal opinion.\textsuperscript{263} Regardless of that split, some of those victorious candidates attempted to make good on their campaign promises.

On March 5, 2007, Senator Shawn Womack filed Senate Bill 959\textsuperscript{264} with the Arkansas General Assembly, entitled "An Act To Protect the Children Who Are Most Vulnerable by Clarifying the Public Policy of the State of Arkansas Regarding the Placement of Children with an Adoptive or Foster Parent [and] to Authorize the Department of Health and Human Services to Promulgate Rules and Regulations."\textsuperscript{265} The bill not only prohibited all Arkansas homosexuals from serving as foster parents but also excluded them from adopting a child even if related by blood.\textsuperscript{266} Further, these exclusions were extended to all persons "residing with another person and being involved in a sexual relationship with that person."\textsuperscript{267} Last, it contained an emergency clause with a public policy provision:

\begin{quote}
[I]t is the public policy of the State of Arkansas to prohibit a homosexual adult from becoming an adoptive or foster parent, and that this act is immediately necessary to protect the children who are most vulnerable by clarifying the public policy of the state regarding the placement of children with an adoptive or foster parent. Therefore, an emergency is
\end{quote}


\textsuperscript{262} Press Release, University of Arkansas, Arkansas Poll Probes Election, Beyond (Oct. 26, 2006).

\textsuperscript{263} See Press Release, University of Arkansas, \textit{supra} note 262. The researchers partially attributed this result to a libertarian ideal held by many Arkansans. \textit{See id.} But this libertarian ideal has obvious limits, as Arkansas voters had recently passed an amendment to the Arkansas constitution defining marriage as "the union of one man and one woman." ARK. CONST. amend. LXXXIII, § 1.


\textsuperscript{265} \textit{Id.} Proponent Senator Dave Bisbee, R-Rogers, explained that it was necessary for the legislature to take action due to the "failure of society." Laura Kellams, \textit{Senate OK's Banning Foster Care, Adoption by State's Homosexuals}, ARK. DEMOCRAT-GAZETTE, Mar. 14, 2007.

\textsuperscript{266} S.959, 86th Gen. Assem., Reg-Sess. (Ark. 2007).

\textsuperscript{267} \textit{Id.} An exception was made for such "cohabiting" individuals, however, if the child in question was a sibling, step-child, grandchild, great-grandchild, or otherwise related by blood or marriage. \textit{Id.}
declared to exist [with] this act being immediately necessary for the pre-
servation of the public peace, health, and safety. . . .

Senator Womack stated that the Arkansas Supreme Court was very clear as to why the Regulation had been overturned and that “they said it was our job to set the policy.”

The bill met with vigorous debate on both sides of the issue. Opponents of the bill spoke out against its passage: Terri M. Beiner, a constitutional law professor at the University of Arkansas at Little Rock, testified that the government’s legitimate interest in protecting children was not advanced by a blanket exclusion of homosexuals; Senator Jim Argue also explained the numerous problematic privacy concerns that the bill raised. The Arkansas Family Council, which helped Senator Womack author the bill, sent two delegates to testify in favor of the bill: Martha Adcock, an attorney for the advocacy group, stated that “it was the state’s business to decide what’s in the best interest of children;” Jerry Cox, the council’s director, asked that if Florida could ban homosexual adoption through Lofton, “why can’t we?”

Reflecting the divisive nature of the bill, the Senate narrowly passed the bill, though not with enough votes to pass its emergency clause.

The bill, however, met with much more opposition upon its transmission to the House of Representatives. The bill was assigned to the House Judiciary Committee, which is typically more predisposed to examining the

268. Id. In part because of this clause, the bill was called “the legislative answer to [the] Arkansas Supreme Court ruling that struck down a state policy barring homosexuals from serving as foster parents.” See Laura Kellams, Gay Foster-Parent Ban Advances Hotly Contested Bill Also Bars Homosexuals from Adopting Kin, ARK. DEMOCRAT-GAZETTE, Mar. 13, 2007.

269. Kellams, supra note 265. Compare with Howard II (noting that “[t]he General Assembly did not include . . . the promotion of morality in its delegation of power to the Board. Consequently, the Board was acting outside its areas of responsibilities.”) Howard II, No. 05-814, 2006 WL 1779467, at *6. (Ark. June 29, 2006).

270. Kellams, supra note 265. Senator Argue asked Senator Womack if he was a homosexual or heterosexual, and if he could prove it one way or another. Id. When Senator Womack admitted to the difficulty in offering proof that he was “proudly heterosexual,” Senator Argue then asked if the bill proposed invading the privacy of the home to discern the truth, such as by “installing cameras in the bedroom.” Id.

271. See Kellams, supra note 265. Professor Beiner rejoined that the Arkansas situation was different from Florida’s, in part because of the unanimous decision in Howard II and its reliance upon the circuit court’s finding of facts in Howard I. See id. Senator Argue warned that if the bill passed, “then prejudice and discrimination will have trumped the best professional judgment available to us.” Id. Senator Womack, however, contented that professional organizations opposed to the bill were not members of the Legislature and that “[t]he court specifically said that this is a public-policy decision that needs to be made by the [General Assembly].”). Id.

272. Kellams, supra note 265.

possible constitutional problems of legislation. Representative Kathy Webb typified the sentiment of many of the committee members when she described the legislation as being motivated by discrimination and not a desire to protect children. The legislation failed to garner enough votes to win the committee’s approval, effectively ending any chance that Senate Bill 959 would pass in the 2007 legislative session.

III. PROPOSAL

In holding solely upon the separation of powers issue and ignoring the substantive matters, *Howard II* is more significant for its subtextual implication than for its actual holding. A proper analysis of the issues from a judicial federalism perspective reveals that the Arkansas Supreme Court, whether intentionally or obtusely, remained silent on the important substantive issues at hand and left the matter to be decided by hostile political actors. What follows is a proposal to suggest a remedy for this lapse in the Arkansas Supreme Court’s typical utilization of judicial federalism. Finally, this section concludes by examining those who are at risk as result of this departure.

A. The Arkansas Supreme Court Did Not Decide *Howard II* in Accordance with Its Judicial Federalism Precedent

This section of the note will demonstrate the appropriateness of applying judicial federalism principles to *Howard II*. First, it will show the similarity between *Howard II* and the other privacy cases to which the Arkansas Supreme Court applied judicial federalism analyses. Then, the note will

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274. See id. Jerry Cox of the Family council accused Gov. Beebe and House Speaker Benny Petrus of working “behind the scenes” to defeat the legislation by assigning it to an unfriendly committee. *Id.* Representative Harrelson, the Democratic majority leader in the House of Representatives, admitted that “[n]obody’s happier that it went to this committee than the governor. . . . That’s because he won’t be in the tough position of having to sign or veto legislation he believes is unconstitutional.” *Id.*

275. *Id.* Representative Webb is the only openly gay member of the General Assembly. *Id.*

276. Laura Kellams, *Bill to Ban Foster Care by Gays Dead-Ends in House Committee Votes Few for State Senate—Passed Measure*, ARK. DEMOCRAT-GAZETTE, Mar. 28, 2007. Rita Sklar, the American Civil Liberties Union attorney who primarily litigated *Howard I* and *II*, described the committee’s treatment as a “whupping.” *See also* Meredith Oakley, *Editorial, Bigotry Suffers a Blow*, ARK. DEMOCRAT-GAZETTE, Mar. 30, 2007 (describing the legislation’s failure as a blow to “institutionalized bigotry in Arkansas”).

277. *See infra* Part III.A–B.

278. *See infra* Part III.C.

279. *See infra* Part III.D.

conduct a judicial federalism analysis of *Howard II* as required by Arkansas precedent.\(^{281}\)

1. **Howard II was a Departure from Arkansas Judicial Federalism Cases**

*Sullivan III, Griffin, Brown, Rikard, and Picado* have several common features.\(^{282}\) The plaintiffs in each case specifically sought relief under the Arkansas constitution.\(^{283}\) All of the plaintiffs sought to have some form of a privacy interest protected through the Arkansas Supreme Court’s interpretation of that constitution.\(^{284}\) The claimants requested relief in this manner because of the inefficient federal protection offered at the time.\(^{285}\) In each case, the Arkansas Supreme Court relied upon its “rich and compelling history of protecting individual privacy” to determine whether greater individual rights should be offered through its own sovereign constitution than the federal constitution.\(^{286}\)

Yet the Arkansas Supreme Court chose to resolve *Howard II* on a separation of powers holding despite the near identity between the applicable law of *Howard II* and its preceding judicial federalism cases.\(^{287}\) Surprisingly, the Arkansas Supreme Court never engaged in a judicial federalism analysis in *Howard II*, even after having “wholeheartedly embraced” it so recently in previous analogous situations.\(^{288}\) As Justice Brown asserted, judicial federalism is concerned with the analytical process, not its result.\(^{289}\) Yet such a “mature approach” to judicial federalism cannot occur if the court does not even acknowledge that such a process exists or that it is being ignored.\(^{290}\)

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\(^{281}\) See infra Part III.A.2.

\(^{282}\) See supra Part II.D.

\(^{283}\) See supra Part II.D.

\(^{284}\) See supra Part II.D.

\(^{285}\) See supra Part II.D.

\(^{286}\) See supra Part II.D.

\(^{287}\) Compare supra Part II.D with supra Part II.E. By ruling solely on separation of powers grounds to moot the judicial federalism issues, the court’s disposal gives credence to the jaded view that “difficult cases are moot.” See David Currie, *Federal Courts: Cases and Materials* 77 n.3 (4th ed. 1990). Furthermore, former Justice Fogleman once decried this practice: “the constitutional question that has arisen in the instant litigation can, and probably will, arise again unless the issue is laid to rest. I see absolutely no point in bypassing this main question, and withholding a decision until another day. . . .” Wood v. Goodson, 253 Ark. 196, 205, 485 S.W.2d 213, 218 (1972) (Harris, C. J., concurring).

\(^{288}\) See Brown, supra note 61, at 507.

\(^{289}\) See Brown, supra note 61, at 504.

\(^{290}\) See Williams, supra note 102, at 888–89. This is particularly telling because the Arkansas Supreme Court has often discussed its ability to enlarge the guarantees of the Arkansas constitution, even when declining to do so, in privacy cases arising after the court adopted judicial federalism. See supra Part II.D; see also Scott v. State, 347 Ark. 767, 786,
Therefore, this section offers an appropriate judicial federalism analysis of *Howard II*. The following is an appropriate federalism analysis of *Howard II*, highlighting why the substantive results proposed in Justice Brown's concurrence should have been adopted by the *Howard II* majority.

2. *A Judicial Federalism Analysis of Howard II*

The cross-appellants in *Howard II* requested relief under the Arkansas constitution to have their individual rights protected more expansively than they would under current federal interpretation of homosexual privacy rights. A Non-Equivalence Model analysis of *Howard II* would have expanded the rights offered under the Arkansas constitution beyond the federal Constitution. This analysis requires a comparison of Arkansas and federal precedent on the issues as well as an examination of Arkansas’s traditional history in protecting privacy. Therefore, use of the Arkansas Supreme Court's preferred model of judicial federalism, the Non-Equivalence Model, is appropriate in order to protect the cross-appellants on their requested substantive grounds.

a. Arkansas has a rich and compelling history of protecting individual privacy

"Arkansas has a rich and compelling history of protecting individual privacy." The right to privacy is fundamental and must be strictly protected by the Arkansas government. Further, the fundamental right to privacy is penumbral, and thus encompasses several other fundamental rights. Among these is the fundamental right to intimate association, which embodies close interpersonal relationships. The inclusive fundamental right to privacy is demonstrative through the Arkansas constitution, Arkansas statutes, and Arkansas case law.

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293. *See supra* Part II.D.2. The Non-Equivalence Model is the Arkansas Supreme Court Court's preferred judicial federalism analysis, assuming that the court will continue to employ it. *See supra* Part II.D.2.
296. *See Picado*, 349 Ark. at 632, 80 S.W.3d at 350.
The Arkansas constitution is rife with provisions protecting an individual’s right to privacy. As a general guideline, the Arkansas constitution prohibits any construction that results in the denial or delimitation of individual rights. Accordingly, the constitution also guarantees that the rights granted therein will be provided to all citizens equally. Significantly, the Arkansas constitution explicitly proscribes any action by the general assembly that grants rights not equally available to all citizens. In particular, it guarantees every Arkansas citizen the right to enjoy life, liberty, and the pursuit of happiness. This right is explicitly extended to matters involving privacy of the home.

The general assembly of Arkansas has enacted a vast body of law dedicated to protecting Arkansans’ privacy. These laws protect some aspect of privacy that affects almost every aspect of Arkansans’ lives, such as business records classifications, student publications, criminal records, residential rights, consumer-bank communications, and records exempted from release under the Freedom of Information Act. The legislature has also promulgated rules governing the conduct of state actors to ensure that this fundamental right to privacy is protected.

298. Ark. Const. art. II, § 29. This explicit prohibition was so significant that the drafters further provided that “everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void.” Id.

299. Ark. Const. art. II, § 3 (“The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition.”). Put another way, “Everyone is entitled to the protection of our Constitution.” Rector v. State, 280 Ark. 385, 401, 659 S.W.2d 168, 176 (1983) (Purtle, J., concurring), cert. denied, 466 U.S. 988 (1984), aff’d sub nom. Rector v. Clark, 923 F.2d 570 (8th Cir. 1991).

300. Ark. Const. art. II, § 18 (“The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”).

301. Ark. Const. art. II, § 2 (“All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property, and reputation; and of pursuing their own happiness.”). Further, this right may no be limited “without due process of law.” Ark. Const. art. II, § 8.

302. Ark. Const. art. II, § 15 (“[T]he right of the people of this State to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”).


304. Id. at 629, 80 S.W.3d at 348.

305. Id.
The Arkansas Supreme Court has previously "recognized protection of individual rights greater than the federal floor in a number of cases." This recognition has typically manifested as several actionable forms of the tort of invasion of privacy. Other cases have expounded upon this right, however, and typically require that great deference be given to an individual's right to privacy when weighed against competing interests.

b. The inadequate federal floor of privacy rights for homosexuals

The Eleventh Circuit's decision in Lofton is currently the predominant federal guideline for analyzing the privacy rights of homosexuals. While the decision is not binding on the Arkansas Supreme Court, the Eleventh Circuit is the highest court in the nation to address the issue, and several jurisdictions have adhered to its holding, as the circuit court did in Howard I. The reasoning in Lofton represents a federal floor that cannot adequately address the privacy rights and needs of Arkansas's citizens.

Lofton essentially maintains that Lawrence did not announce a new fundamental right to privacy for homosexuals. The Lofton court's opinion was a sharply limiting interpretation of the holding in Lawrence, which the court construed as only forbidding criminal prohibitions on private homosexual conduct as violations of an individual's due process rights and not as reaffirming a fundamental right to privacy and intimate association.

306. Id. at 631, 80 S.W.3d at 349.
307. Id. at 631, 80 S.W.3d at 349. These forms include appropriation, intrusion, public disclosure of private facts, and false light in the public eye. Id.
308. See id.
311. Lofton v. Sec'y of the Dept. of Children and Family Servs., 377 F.3d 1275, 1306 (11th Cir. 2004). Further, Lofton maintains that such an interpretation could only result from a "strained and ultimately incorrect reading." Id. Laurence H. Tribe, one of the foremost constitutional scholars in the nation, seems to disagree: "[s]ome argue that Lawrence is merely about decriminalizing closeted consensual intimacies between same-sex partners . . . This argument, however, seems transparently weak. The Lawrence opinion not only denies that the Court's decision was just about sex but it also goes out of its way to equate the insult of reducing a same-sex intimate relationship to the sex acts committed within that relationship with the insult of reducing a marriage to heterosexual intercourse." Laurence H. Tribe, Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name, 117 HARV. L. REV. 1893, 1948 (2004).
312. Lofton, 377 F.3d at 1283. The Lofton majority largely based their reasoning on Justice Scalia's dissent in Lawrence ("it was Justice Scalia's suggestion that Lawrence only overruled the rational-basis aspect of Bower's holding, but left intact is fundamental-rights holding."), id. at 1284 (citing Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissent-
Lofton court justified its limited interpretation because it did not believe the United States Supreme Court had sufficiently clarified the "gray areas" of Lawrence's applicability. The Lofton court claimed that to do otherwise would require an "activist approach" and instead preferred to avoid expansive interpretation when analyzing fundamental rights.

Lofton further asserted, arguendo, that even if Lawrence established a fundamental right to privacy for homosexuals, such a right would still only be subject to rational basis review. The Lofton court maintained that many United States Supreme Court decisions involving substantive due process are too "cryptic" to be easily interpreted. The Lofton court concluded that even if the dicta in Lawrence acknowledged some abstract liberty interest in privacy for homosexuals, it did not satisfy the criteria to become a fundamental right.

c. The Arkansas ceiling of privacy rights for homosexuals

This new federal interpretation of Lawrence is wholly at odds with Pico. It denies that fundamental rights exist to protect homosexuals from laws tailored to make them second-class citizens, and it perpetuates a disparate treatment of homosexuals. Had the Arkansas Supreme Court conducted its precedent judicial federalism analysis, it would have discovered this disparity and subsequently conducted a concomitant substantive analysis to determine an appropriate outcome of Howard II under the Arkansas constitution. Instead, the majority opinion ignored such an analysis altogether.
A proper substantive due process analysis of *Howard II* under Arkansas precedent would have expanded the rights of homosexuals in accordance with the state's prior judicial federalism principles.

Substantive due process protects certain fundamental rights that are so entwined in tradition and history that they are "implicit in the concept of liberty." Some of these rights are encompassed within the right to privacy: for example, the federal minimum of interpretation of due process guarantees that this includes, at the very least, the right to make unencumbered decisions relating to family relationships and raising children without undue interference. These rights may not be restricted by the government without a necessary justification that could not have otherwise been achieved. This strict scrutiny review places an almost insurmountable burden on the government to demonstrate that its compelling goal can only be achieved through the legislation that is burdening the fundamental right. Because *Picado* established that there is a constitutionally protected right to privacy, and the Regulation penalized homosexuals who exercised that fundamental right by categorically excluding them from the foster parent application process, *Howard II* should have been evaluated on substantive due process grounds under a strict scrutiny review.

In *Howard II*, the Regulation disadvantaged a discrete group of people because of their intimate relationships: Arkansan homosexuals were wholly excluded from participating in the foster parent application process if they entered into an intimate relationship with one another. Further, the Regulation flatly discriminated against homosexuals on the basis of their sexual conduct, which the *Picado* court concluded was subject to strict constitutional protection under the fundamental right to privacy. Also, the Regulation violated the minimal federal guarantees of privacy by infringing on this group's right to make decisions regarding family and child-rearing without undue governmental interference. Instead of respecting this fundamental right to privacy, the Board chose instead to discriminate on that very basis through a blanket ban that excluded homosexuals from the foster parent application process. Indeed, as noted in Justice Brown's concurring opinion, "nothing that the [Board] presented to the trial court shows that it had a compelling state interest for doing what it did. Certainly, the Board's proffered reasons surrounding [the] best interest of the child are gossamer thin and have no foundation in objective research." Therefore, the Regulation

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320. *Lofton*, 377 F.3d at 1304.
322. See id.
323. Id.
violated the fundamental right to privacy under the Arkansas constitution on dual grounds: the government’s discriminatory actions burdened Arkansas’s gays’ and lesbians’ fundamental right to form intimate relationships because they exercised their constitutionally protected sexual conduct.

B. *Howard II* Is a Blueprint for Discrimination

The *Howard II* majority provided the Arkansas General Assembly with a set of instructions on how to perpetuate the discriminatory goal of the Board by departing from its judicial federalism precedent. The court did not conduct a judicial federalism analysis that would have led to a due process examination that, under Arkansas precedent, would have offered increased protections for homosexual Arkansans. Such a decision could shield them from unconstitutionally discriminatory laws similar to the Regulation and give them parity with other citizens. Even more troubling is that the majority made clear how the Regulation should be redrafted so that it could withstand a separation of powers analysis in the future: “[t]he General Assembly did not include . . . the promotion of morality in its delegation of power to the Board. Consequently, the Board was acting outside its areas of responsibilities when it enacted [the Regulation] and was in violation of the Separation of Powers Doctrine.” Thus, the *Howard II* Court instructed the general assembly by negative implication that it must only include promotion of public morality, no matter how discriminatory, in the Board’s authority. This outcome is almost perverse in its irony, as the Arkansas Supreme Court has offered a way to limit rights where it once championed their expansion. While the court’s reasons for doing so and discarding its judicial federalism precedent are not easily discernible, its adverse effect is clear.

325. The court did not do so even though its past members have made a similar mistake: in *Carter v. State*, the court refused to find Arkansas’s then-existing criminal sodomy act unconstitutional and instead chose to let the legislature determine whether sodomy between consenting adults was still condemned by society and deserving of criminalization. 255 Ark. 225, 231, 500 S.W.2d 368, 372 (1973), cert. denied, 416 U.S. 905 (1974). The general assembly did in fact repeal the criminal sodomy act (Act of Apr. 8, 1975, No. 928, 1975 Ark. Acts 2463 (repealing Ark. Stat. Ann. § 41-813 (Bobbs-Merrill 1947)); but when the Legislature reconvened in its next session, it drafted a new criminal sodomy act that only applied to homosexuals (Ark. Code Ann. § 5-14-122 (Michie Repl. 1997)).

326. *Howard II*, 2006 WL 1779467, at *6. Even those outside of the legal community have come to this obvious conclusion, as one journalist noted that it is “still open season on homosexuals. They’re one of the last minority groups it’s not politically incorrect to discriminate against—or at least campaign against.” Kane Webb, Editorial, *Mike Beebe’s Stonewall*, ARK. DEMOCRAT-GAZETTE, July 16, 2006.


328. An in-depth analysis or discussion conjecturing on the possible personal motivations behind *Howard II* are beyond the scope of this note; however, circumstances that have arisen in similar situations may be instructive. One possible reason for the decision could be the
C. The Need for Guidance

The analytical process that is fundamental to judicial federalism and supposedly "embraced" by the Arkansas Supreme Court must be used consistently or not at all. To do otherwise weaves a patchwork precedent that will leave practitioners at a loss as to how the court's decisions should be interpreted. Further, Arkansas practitioners need to be aware of whether the Arkansas constitution is still a viable vehicle for enlarging rights beyond the United States Constitution, or if that federal minimum is the best that can be hoped for.

Should a case analogous to Howard II arise again, the Arkansas Supreme Court would have the opportunity to conduct a judicial federalism analysis in consonance with its prior judicial federalism cases. Further, the court could greatly diminish the likelihood that a law similar to the Regulation would be enacted by using the due process analysis proposed herein. Doing so will offer homosexuals in Arkansas the level of protection they obviously need by demonstrating that any discriminatory legislation designed to hamper their rights will be judged just as if it affected any other group of citizens, and not a member of a politically unpopular group.

If the Arkansas Supreme Court has decided that judicial federalism has lost its utility, however, it must make that clear. If the makeup of the current court believes that the criticisms of judicial federalism are well-founded and that it should be permanently abandoned, it must make some clear pronouncement to that effect so that the litigators in this state may prepare accordingly. Without such guidance, litigators will be at a loss as to whether they should seek relief under the Arkansas constitution or whether their clients have any hope of being granted expanded rights therein.
D. An Uncertain Future

The Arkansas Supreme Court’s break with its judicial federalism precedent puts two distinct groups at risk: the gay and lesbian community in Arkansas as well as those children in the Arkansas foster care system. This departure places a sword of Damocles over these groups because of the uncertainty as to whether a member of the general assembly will be able to craft legislation that achieves the goal of the Regulation through the implicit guidance of the court.331 The first attempt at reviving that goal narrowly failed with Senate Bill 959. While its proponents miscalculated by drafting the legislation in accordance with the reasoning in Lofton, as well as including the public policy delegation suggested in Howard II, the advocacy group that helped author the bill has already announced plans to achieve this result through an initiated ballot measure in 2008.332 It is interesting to note that even though the Arkansas Supreme Court departed from its judicial federalism precedent in Howard II, voter-initiated referenda such as are being threatened by the Arkansas Family Council are commonly used to counter judicial federalism opinions that are unpopular with a group of citizens.333

The immediate, and obvious, group at risk is the gay and lesbian community in Arkansas. They must face the very real danger that some governmental action will return them to second-class citizenship, simply for enjoying their constitutional right to privacy. Although they are currently safe, there is no guarantee that the slim victory over Senate Bill 959 can be repeated.

The additional, and perhaps unintended, group at risk are the children in the Arkansas foster care system. While the citizens and elected officials of this state bicker over the morality and rights (or lack thereof) of homosexuals, thousands of Arkansas’s children are part of the foster care system, and hundreds of them have not been adopted because of a lack of volunteers.334 If some legislative progeny of the Regulation were enacted, that

331. This is similar to the facts that led to the Picado decision, wherein Justice Brown recognized the need for protecting homosexuals from the criminal sodomy statute because it hung “like a sword of Damocles over the heads of the plaintiffs, ready to fall at any moment.” Picado, 349 Ark. 600, 639, 80 S.W.3d 332, 354-55 (2002) (Brown, J., concurring).


333. See supra Part II.C.

pool would become even more limited. The more disturbing consequence of resurrecting the Regulation would be the harm to the hundreds of children who have already been placed in homes with a homosexual foster parent and formed stable familial relationships, who would have to be displaced into the pool of children who have no foster home at all.

IV. CONCLUSION

Howard II is a departure from the Arkansas Supreme Court’s judicial federalism precedent. Arkansans must now wait until the Arkansas Supreme Court advises the state as to what jurisprudential course it is now charting. If it is a return to the lockstep analyses of the past, then the at-risk groups discussed herein may no longer look to their sovereign state constitution as an additional guarantee of individual rights where federal protection is lacking. If it is a continuation of judicial federalism, then the court must act quickly to rectify its jurisprudential lapse in Howard II and perhaps explain why its “embraced” tradition was momentarily abandoned.

In a press release issued after Howard II, Chief Justice Hannah referred to the Arkansas Supreme Court as the “silent partner” to child welfare agencies charged with protecting children in foster care. Further, he noted that “courts play a critical role in the lives of a foster child.” He advocated that the foster care system should be improved to provide stability for foster children. Unfortunately, such stability will not likely be achieved by providing the framework to impair an already-struggling institution through limiting its meager volunteer base. Hopefully, the members of the Arkansas Supreme Court can find their voice once more and return to their rich tradition of expanding individual rights rather than leave the work to be done by those all too willing to limit those rights.

335. Yet, even if such a bill was never enacted, these children must still suffer. For those who are fortunate enough to have a loving parent who happens to be homosexual, the child will still be raised in a home by someone who is legally viewed as a second-class citizen.

336. See Gary Gates & M.V. Lee Badgett, Adoption and Foster Care by Gay and Lesbian Parents in the United States, THE WILLIAMS INSTITUTE, March 2007 at 20. For those who believe that such a situation would be better for Arkansas’s foster children, they may be more persuaded by knowing that the cost of such a change to the Arkansas foster care system is estimated at nearly half of a million dollars. Id.

337. Press Release, Jim Hannah, A Call to Action for Arkansas’s Foster Children (July 10, 2006).

338. Id.

339. Id.
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