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# Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality

FRANCISCO VALDES\*

*Lawrence was decided exactly eighty years after the first liberty-privacy case, and in the midst of a fierce kulturkampf striving to roll back civil rights generally. In this Article, Professor Valdes situates Lawrence in the context formed both by these four score of liberty-privacy jurisprudence that precede it as well as by the politics of backlash that envelop it today. After canvassing the landmark rulings from Meyer in 1923 to Lawrence in 2003, in the process acknowledging both their emancipatory strengths and their traditionalist instrumentalism, Professor Valdes concludes that Lawrence is a long overdue recognition of the prior precedents and their actual outcomes. This belated recognition, entailing a repudiation of Bowers, reflects similar weaknesses and strengths but also effectively sets the stage for a resumption of jurisprudential developments under the Fourteenth Amendment interrupted by that 1986 anomaly. These pending developments, Professor Valdes concludes, logically and substantively point to the formal recognition of the individual right already protected under the eight decades of liberty, privacy and equality law preceding Lawrence. That right, Professor Valdes states, is properly denominated as the right to sexual self-determination, embedded principally in the liberty text of the Due Process Clause and buttressed by other provisions or sources of constitutional law.*

## I. INTRODUCTION

The United States Supreme Court's 2003 ruling in *Lawrence v. Texas*<sup>1</sup> demands attention in no small measure because it appears freighted with so much,

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\* Professor of Law, University of Miami; Co-Director, Center for Hispanic and Caribbean Legal Studies, University of Miami School of Law; Co-Chair, LatCrit, Inc. I begin with thanks to the five justices of the Supreme Court whose courage in *Lawrence v. Texas* secured the repudiation of *Bowers v. Hardwick*, and with the student editors and faculty at Ohio State University Moritz College of Law for conducting the symposium that permits us to assess the implications of this long-overdue act. In particular, I thank Editors Patrick Brodhead, Chris Geidner, and Chad Kaldor for their support in helping to produce an insightful contribution to this symposium, Professor Marc Spindelman for conceptualizing and organizing the symposium, and Dean Nancy Rogers for providing material and institutional support to these efforts. I dedicate this Article and its emancipatory ambitions to two pioneers: first, to Jerome McCristal Culp, Jr., a wonderful teacher, powerful scholar and loved friend who passed away just a few months after *Lawrence* was decided, and before its promise could begin to be realized; and second, to Mary Dunlap, a brilliant litigator, activist scholar and fierce trailblazer of sexual minority rights, who passed away six months before *Lawrence* finally buried *Bowers*. I will always remember and appreciate how both impressed and empowered me during the early 1990s with their strength and vigor, even as social and legal outsiders, when I apprehensively was entering law teaching in *Bowers*' cruel wake. As always, all errors roost with me.

and yet with so little, all at once. This duality stems in part from the apparent ambivalence in its elaboration of the “extent of the liberty interest at stake” in that case, a duality seen in the juxtaposition of passages signaling a potential recognition of the social value of the inchoate right to sexual self-determination with passages repeating and reifying traditionalist restrictions on sexual desires and relations. Most notably, in discussing “the right to define one’s own concept of . . . human life,” the *Lawrence* Court declares that: “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>2</sup> Then it quickly adds that this case did not, after all, involve “public conduct . . . [or] whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>3</sup> During this discussion, the Court begins with an expansive invocation of the right’s “spatial and more transcendent dimensions”<sup>4</sup> yet ends with a reminder that the case involved only “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”<sup>5</sup> While inviting controversy and contestation over ultimate meanings, this apparent ambivalence at a minimum establishes that adult same-sex couples may now “choose to enter upon [their] relationships in the confines of their homes and their own private lives and still retain their dignity as free persons.”<sup>6</sup> *Lawrence* thereby moves sexual minorities into an interstitial place in constitutional law—from the status of formal outlaws but shy of the status of formal recognition; a traditionally subordinated social group now to be tolerated, but not necessarily accepted. *Lawrence*, therefore, obviously need not entail an affirmation of pluralism as public policy in the uses of law to regulate and nourish or suppress intimate associations. It obviously need not produce any substantive change in judicial understanding, nor in the actual application, of other homophobic laws, as the lower courts’ actions already have amply demonstrated.<sup>7</sup>

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<sup>1</sup> 539 U.S. 558 (2003).

<sup>2</sup> *Id.* at 574.

<sup>3</sup> *Id.* at 578.

<sup>4</sup> *Id.* at 562.

<sup>5</sup> *Id.* at 578.

<sup>6</sup> *Id.* at 567.

<sup>7</sup> Both the commentary and case law issued during the brief period since the ruling was announced illustrate how *Lawrence* already has come to represent all *and* nothing. See, e.g., Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA. L.J. 95 (2003); Paris R. Baldacci, *Lawrence and Garner: The Love (or at Least Sexual Attraction) that Finally Dared Speak Its Name*, 10 CARDOZO WOMEN’S L.J. 289 (2004); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, Boston Univ. School of Law Working Paper No. 03-13 (July 16, 2003), available at <http://ssrn.com/abstract=422564> (last visited Oct. 19, 2004); Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004); Mary Anne Case, *Of “This” and*

"That" in *Lawrence v. Texas*, 2003 SUP. CT. REV. 75 (2003); Benjamin J. Cooper, *Loose Not the Floodgates*, 10 CARDOZO WOMEN'S L.J. 311 (2004); Paisley Currah, *The Other "Sex" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 321 (2004); William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004); James E. Fleming, *Lawrence's Republic*, 39 TULSA L.J. 563 (2004); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004); Bernard E. Harcourt, *"You Are Entering a Gay and Lesbian-Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers*, 94 J. CRIM. L. & CRIMINOLOGY 503 (2004); Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL RTS. J. 65 (2003); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2004); Pamela S. Karlan, *Loving Lawrence*, Stanford Public Law Working Paper No. 85. (Mar. 2004), available at <http://ssrn.com/abstract=512662> (last visited Oct. 19, 2004); Nancy J. Knauer, *Lawrence v. Texas: When "Profound and Deep Convictions" Collide With Liberty Interests*, 10 CARDOZO WOMEN'S L.J. 325 (2004); Andrew Koppelman, *Lawrence's Penumbra*, 88 MINN. L. REV. 1171 (2004); Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159 (2003); Nelson Robert Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, MICH. L. REV., forthcoming, available at <http://ssrn.com/abstract=534343> (last visited Oct. 19, 2004); Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337 (2004); Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2004); Richard D. Mohr, *The Shag-a-Delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 365 (2004); Ruthann Robson, *The Missing Word in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 397 (2004); Andrew J. Seligsohn, *Choosing Liberty Over Equality and Sacrificing Both: Equal Protection and Due Process in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 411 (2004); Edward Stein, *Introducing Lawrence v. Texas: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263 (2004); Mark Strasser, *Lawrence, Same-Sex Marriage and the Constitution: What is Protected and Why?*, 38 NEW ENG. L. REV. 667 (2004); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, (U. Chi. L. & Econ., Olin Working Paper No. 196, 2003), available at <http://ssrn.com/abstract=450160> (last visited Oct. 19, 2004); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare not Speak its Name*, 117 HARV. L. REV. 1893 (2004); Jami Weinstein & Toby DeMarco, *Challenging Dissent: The Ontology and Logic of Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 423 (2004); David Zucco, Introduction, *Symposium: Gay Rights After Lawrence v. Texas*, 88 MINN. L. REV. 1017 (2004).

The former and hopeful aspects of this remarkable ruling also are manifest in the joyous personal reactions from scholars and others around the country to the majority opinion's potential, including those moved to rare tears by this unexpected nod of respect from an institution that had become increasingly hostile over the past two decades. *See, e.g.*, Richard Kim, Comment, *U.S. Supreme Court Overturns Texas' Anti-Sodomy Laws*, THE NATION, July 21, 2003, at 5 (reporting "that gay people took to the streets in pride parades to celebrate the Court's repudiation of Bowers"). I understand this reaction because I grew up under *Bowers'* shadow and never thought I would see the day of its repudiation; I remain amazed and delighted by the experience of it. The latter is personified by the generation of sodomites and Queers whose lives flourished despite the formal outlawry that *Bowers* incited and licensed, in the process illustrating law's limits, including those that attend lawmaking by judicial fiat. A nationwide survey taken three years after *Bowers* was decided found many stable same-sex

This apparent ambivalence, however, also reflects the gains and shortcomings of the principal trio of precedents that *Lawrence* expressly affirms: *Griswold v. Connecticut*,<sup>8</sup> *Eisenstadt v. Baird*<sup>9</sup> and *Carey v. Population Services*

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relationships among Queer sodomites that resembled “traditional marriage” arrangements, in stark contrast to the justices’ contrary assertions in their *Bowers* opinion. *Couples Report Solid, Long-Lasting Relationships*, PARTNERS, May–June 1990, at 1, available at <http://www.buddybuddy.com/toc.html> (last visited Oct. 19, 2004) (reporting the findings of a national survey of same-sex couples tallying nearly 1749 responses, at that time “the largest such project in a decade”). More recently, another study of same-sex couples, this time in the nation’s capital, concluded that cross-sex unions “may have a lot to learn from gays.” Peter Freiberg, *Couples Study Shows Strengths*, WASH. BLADE, Mar. 16, 2001, at 1 (summarizing the findings of a 12-year research study comparing same-sex and cross-sex couples). I know this particular social group, for I have been one of them during *Bowers*’ seventeen-year reign.

This Article, in the limited space and time it allows, recognizes both the promise and warts of liberty-privacy as articulated by the judges in the eighty years between *Meyer* and *Lawrence*, even as the heterosexist status quo continues to operate fully in law and society. See, e.g., *In re Kandu*, 2004 WL 1854112, at \*10 (Bankr. W.D. Wash. Aug. 17, 2004) (citing to *Lawrence* while holding that a Canadian same-sex marriage could be denied effect in U.S. bankruptcies); *Lofton v. Secretary*, 358 F.3d 804, 817 (11th Cir. 2004) (citing to *Lawrence* while upholding an outright ban on “homosexual” individuals’ capacity to adopt children under Florida law); *Kansas v. Limon*, 83 P.3d 229, 234–35 (Kan. Ct. App. 2004) (vacated by *Lawrence* and, upon remand, citing to *Lawrence* while holding that Arkansas could impose differential punishment on minors for prohibited sexual relations on the basis of their sexual orientation). In each instance, the judges writing these opinions opted to emphasize the constrictive language in *Lawrence*, rather than its expansive passages, to distinguish the cases legally and factually. See *infra* note 12 (for more on these cases and their application—and circumvention—of *Lawrence*). These cases illustrate vividly the ways in which *Lawrence* can be reduced to nothing despite its reasoning and outcome, and regardless of eighty years of jurisprudence preceding it, beginning with the *Meyer* opinion in 1923. See *infra* notes 33–40 (on *Meyer*).

Finally, it bears mention at the outset that articulating the social functionality and legal worthiness of same-sex couples and families was an early accomplishment of Queer legal scholarship—an accomplishment also achieved under *Bowers*’ shadow and in spite of what (ignorant or prejudiced) judges opined to the contrary. See, e.g., Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992); Barbara J. Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J.L. & POL. 5 (1991); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 63 (1991); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); John D. Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can’t Fred Marry George—Or Mary and Alice at the Same Time?*, 10 J. CONTEMP. L. 33 (1984). This work continues. See, e.g., Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691 (1997); Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003).

<sup>8</sup> 381 U.S. 479 (1965).

<sup>9</sup> 405 U.S. 438 (1972).

*Int'l*.<sup>10</sup> While recognizing the social value of sexual autonomy beyond strictly traditional terms, this trio of cases—indeed the entire line of privacy cases they helped to constitute—pointedly have accepted and projected a traditionalist instrumentalism to explain the Constitution's protection of, first, marital and, then, individual “acts” and “decisions” relating to “family” and “home.” This emphasis, as discussed below, reflects mainly the factual scenarios presented by the cases, but they nonetheless have enabled controversy and contestation over ultimate meanings; their apparent ambivalence perhaps has been exaggerated for strategic effect in different social, political and legal venues.<sup>11</sup> *Lawrence*, it seems, now invites the same with its apparently similar ambivalence and

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<sup>10</sup> 431 U.S. 678 (1977). See *infra* notes 67–113 and accompanying text (on this key liberty-privacy trio). Apart from the joint operation of *Griswold*, *Eisenstadt* and *Bowers*, the *Lawrence* Court was acting in light of its recent precedents in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Romer v. Evans*, 517 U.S. 620 (1996). Both cases, decided after *Bowers*, represented a continuation of the culture wars in judicial contexts. Both cases represented examples of majorities exercising the power to legislate moralism licensed by *Bowers*. If *Bowers* stood for what it had literally dictated, both of those cases would result in judicial genuflection to the moralism of the “presumed majority” in Pennsylvania and Colorado, respectively, as reflected in the legislation enacted and challenged there. But they didn't; and this detail was portentous. See *infra* note 13 (on *Romer*) and *infra* notes 190–93 and accompanying text (on *Casey*).

<sup>11</sup> For a critical review of this instrumentalism in privacy jurisprudence, see Francisco Valdes, *Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the End of the Twentieth Century*, 1 J. GENDER RACE & JUST. 213 (1997) (critiquing the traditionalist instrumentalism of *Griswold* and similar privacy cases, which exalt “marriage and procreation” aspects of liberty-privacy in ways that enable their exploitation to limit equal liberty-privacy rights for all persons, regardless of marital status or procreational intent). See generally Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992) (critiquing privacy as confining rather than emancipatory for similar reasons); Yvonne L. Tharpes, Comment, *Bowers v. Hardwick and The Legitimization of Homophobia in America*, 30 HOW. L.J. 537 (1987) (discussing the role of law, including case law, to normalize and license prejudice socially in the wake of the infamous decision in *Bowers* embracing sodomy statutes).

The traditionalist aspects of the *Lawrence* precedents have been minimized in backlash political rhetoric against “judicial activism” to help mobilize the forces of reaction to New Deal and Civil Rights law that, in time, have become the culture wars of today; rather than emphasize how the judges valorized traditional marriage in these cases, backlashers decry their alleged “judicial activism” to undermine social acceptance of their legitimacy as constitutional law. Simultaneously, their traditionalist instrumentalism has been highlighted in the jurisprudence of backlash that serves as the juridical component of these culture wars precisely to help cabin liberty-privacy strictly around neocolonial traditions. For a more detailed presentation of this point, see Francisco Valdes, *Afterword—“We Have Held”*: Mapping the Jurisprudence of Backlash Kulturkampf, \_\_\_\_ VILL. L. REV. \_\_\_\_ (forthcoming 2004) [hereinafter, Valdes, *We Have Held*].

references to instrumentalist rationales for the Constitution's protection of liberty-privacy.<sup>12</sup>

Ultimately, this apparent ambivalence also reflects the demands and imperatives of the prevailing sociolegal zeitgeist: backlash kulturkampf.<sup>13</sup>

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<sup>12</sup> This fallout already is obvious, as illustrated by judges applying *Lawrence* to current cases. In *Kandu*, for instance, a bankruptcy judge quoted *Lawrence* to deny the validity of a Canadian same-sex marriage under federal law, noting that the *Lawrence* justices themselves had "explicitly stated that the case did not involved whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Kandu*, 2004 WL 1854112, at \*10. Similarly, in *Limon*, appellate state judges in Kansas cited and distinguished *Lawrence*, both "factually and legally" to uphold disparities in criminal sentencing based on sexual orientation: that case, said those judges, involved minors and Equal Protection, whereas *Lawrence* excluded minors from its holding and was based on liberty-privacy, rather than Equal Protection. *Limon*, 83 P.3d at 234. Finally, in *Lofton*, federal appellate judges upheld Florida's blanket ban on statutory adoption rights based on sexual orientation noting that the *Lawrence* opinion "itself stressed the limited factual situation it was addressing." *Lofton*, 358 F.3d at 818. For more on these cases, see *supra* note 7.

Thus, by strategically centering selective facts and/or doctrines, judges (and others) are able to skirt the reasoning laid out in *Lawrence* and its predecessors and circumvent their meaning, which uniformly have centered on the individual's choice of "destiny" as manifested or pursued through the "important decisions" protected by the "compendious notion" of liberty-privacy that professedly vests equally in all individuals regardless of marital status, age or other axes of identity.

<sup>13</sup> The terms "kulturkampf" and "culture wars" may be used to refer to various times and places, but here they refer only to the current social conflicts within the United States that have been explicitly denominated as such by the cultural warriors engaged in them. See Francisco Valdes, *Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship, Or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (1998) [hereinafter, Valdes, *Cultural Warriors*]. These "culture wars" of the past quarter century help to explain much of the reactionary turmoil surrounding the civil rights gains of the past half century. See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 31–128 (1991); JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR* (1994); see also *infra* note 18 and sources cited therein (discussing law and related aspects of kulturkampf).

The declaration of cultural warfare issued formally, and perhaps most conspicuously, from Republican Presidential contender Patrick Buchanan during his address to the 1992 Republican National Convention. See Chris Black, *Buchanan Beckons Conservatives to Come "Home,"* BOSTON GLOBE, Aug. 18, 1992, at A12; Paul Galloway, *Divided We Stand: Today's "Cultural War" Goes Deeper than Political Slogans*, CHI. TRIB., Oct. 28, 1992, at C1. Since then, this social conflict has been waged with a vengeance to "take back" the civil rights gains of the past century in the name of the "angry white male." See Grant Reeher & Joseph Cammarano, *In Search of the Angry White Male: Gender, Race and Issues in the 1994 Elections*, in MIDTERM: THE ELECTIONS OF 1994 IN CONTEXT 125 (Philip A. Klinkner ed., 1996). In recent years, critical legal scholars have noted the effects of cultural warfare on law and policy, especially regarding issues or areas related to antisubordination theory and praxis. See generally Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and*

Otherwise described as the culture wars, these terms describe a phenomenon characterized by heightened social conflict over the course of national development in the United States.<sup>14</sup> In this kulturkampf, “traditional values” are

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*Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991).

Though law and policy have been notably salient in the conception and implementation of backlash through kulturkampf, this ambitious redirection of national evolution backward toward the 1780s has required a multi-pronged campaign. The first prong has focused on electoral politics: when elections have failed to install amenable politicians or policies into power, backslashers have resorted to ‘direct democracy’ to do the job. Effective or formal control over legislative and executive branches sets the stage for the second prong: stacking the federal judiciary to clear away inconvenient precedents that empowered minorities or the federal government’s civil rights commitments, as well as to shield regressive executive and legislative actions that reintroduce subordination from any effective constitutional challenge. When all else has failed, and as a supplement to these two prongs, backslashers have turned to a third: control over the spending power, wielded to “starve” social lifelines to vulnerable communities, including women, racial and ethnic minorities, immigrants, poor persons and sexual minorities. These three prongs operate interactively though not always neatly, or even successfully. But operate furiously they do, as events since the 1970s have so sharply shown. See Valdes, *Cultural Warriors*, *supra*, at 1434–43.

This period, as well as the first prong of the culture wars, are perhaps best exemplified by the facts leading up to *Romer v. Evans*, a case decided a decade after *Bowers* that foreshadows, and is affirmed by, *Lawrence*. See *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, the Court considered a constitutional amendment to the state charter adopted by direct statewide referendum only a few years earlier, which had demarcated “sexual orientation” as an area of antidiscrimination lawmaking distinct from all other civil rights categories. *Id.* at 623–24. Amendment Two preempted municipal and local governments from enacting local antidiscrimination laws that embraced sexual orientation, thus making it impossible to include sexual minorities in antidiscrimination legislation that covered other traditionally subordinated social groups on the basis of racial, ethnic, gendered, religious and other kinds of identities. *Id.* at 624. Under Amendment Two, advocates of civil rights laws based on minority sexual orientation faced unique political obstacles, prompting both the state and federal supreme courts to hold that a state majority cannot legislate a categorical exclusion of a minority and its interests from the mainstream of society based on the majority’s “animosity toward the class of persons affected” or toward its perceived (or actual) way of life. *Id.* at 634–35.

<sup>14</sup> In this scheme, a combination of biases and prejudices—fairly described as a “Euro-heteropatriarchy”—predominates: a combination of supremacist ideologies that formed in Europe, in particular its northwestern environs, and was inflicted on the world via European conquest and Eurocentric commerce. See generally Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996) (describing some basic tenets of Euro-heteropatriarchal social ideologies). This combination favors the white European male who is both heterosexual and masculine. It favors European-identified cultures—customs, languages, religions. It combines, in sum, the racism, nativism, androsexism, heterosexism and cultural chauvinism of those regions, which in the centuries of colonialism were exported globally and, more recently, are being reinforced through the social, economic, cultural, legal and political processes of corporate globalization. See Francisco Valdes, *Identity Maneuvers in Law and Society*:



placed in opposition to claims for social justice posed by groups subordinated precisely by those traditions and values: during these ongoing culture wars, the salient groups have been, not coincidentally, women, nonwhites, and sexual minorities.<sup>15</sup> In this contestation, lawmaking has been a principal means of

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*Vignettes of a Euro-American Heteropatriarchy*, 71 U. MO. KAN. CITY L. REV. 377 (2002) (elaborating on Euro-heteropatriarchy) [hereinafter, Valdes, *Identity Maneuvers*]. In purpose and effect, the culture wars aim to reanimate the dominance of colonial-era traditions within the United States, interrupting anew a slow and troubled historical progression from formal subordination, to formal equality and antidiscrimination, to, perhaps some day, antisubordination and social transformation. See Francisco Valdes, *Culture, "Kulturkampf" and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 271 (Austin Sarat ed. 2004); see also Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435 (2003) (discussing antidiscrimination and antisubordination).

<sup>15</sup> While immigrants, women, racial/ethnic minorities, native Americans, the disabled, the poor, sexual minorities and other traditionally subordinated groups all feel the sting of retrenchment, they feel it "differently." See Valdes, *Cultural Warriors*, *supra* note 13, at 1434–43 n.102–36 (discussing the forms that kulturkampf has taken when waged against differently situated social groups); Nicolas Espiritu, *(E)Racing Youth: The Racialized Construction of California's Proposition 21 and the Development of Alternate Contestations*, 52 CLEV.-MARSHALL L. REV. \_\_\_\_ (forthcoming 2004) (focusing on cultural warfare against youth of color in California through the use of the proposition system in that state). As Bowers itself demonstrates, backlash jurisprudence began taking hold just as sexual minorities—specifically lesbians, gay men, and bisexuals—began to claim formal equality and antidiscrimination rights under existing laws or precedents. In effect, the historical moment for the surge of backlash kulturkampf and retrenchment occurred at roughly the same time as sexual minorities began seeking vindication of antidiscrimination rights in federal courts within the broader context of "civil rights." For sexual minorities in the mid-1980s, not even the liberal legacy of formal equality had ripened as a source of antidiscrimination leverage in response to the demands of backlash kulturkampf. Thus, for racial/ethnic minorities, backlash kulturkampf endeavors to roll back affirmative action programs whereas for sexual minorities the aim is to preclude the attachment of formal equality altogether. Of necessity, then, the backlash jurisprudential repertoire includes many techniques to retrench civil rights in law and society.

The patterns and techniques of backlash kulturkampf thereby illustrate and recall the "sameness" and "difference" discourse that has attracted the attention of many legal scholars. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 19–226 (1990); see also Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296.

The collective effort to mint concepts like antiessentialism, multiplicity, intersectionality, cosynthesis, wholism, interconnectivity, multidimensionality and the like also reflects a similar grappling with issues of sameness and difference in various genres of contemporary critical legal theory. See, e.g., Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11

implementing the politics of backlash unleashed by traditionalist reaction to the tentative but significant social changes that the New Deal and Civil Rights eras had facilitated during the Twentieth Century.<sup>16</sup> *Lawrence* issues under the

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WOMEN'S RTS. L. REP. 7 (1989); see also Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

Various RaceCrit and LatCrit scholars have continued to develop concepts and tools of critical legal theory to build on these foundational concepts, striving progressively to better capture the dynamics of "identity politics" in law and society. See, e.g., E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998) (on wholism); Berta Esperanza Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1991) (on multidimensionality); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (on multidimensionality); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997) (on cosynthesis); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995) (on interconnectivity) [hereinafter, Valdes, *Sex and Race*]; see also Charles R. Lawrence III, *Foreword—Race, Multiculturalism and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 834–35 (1995) (urging greater efforts along these lines to promote multifaceted projects of social transformation).

Though backlash techniques are obviously and of necessity tailored in part to group circumstance, see *infra* note 20, the social pattern of backlash jurisprudence is tightly consistent if tracked along the fault lines of the culture wars: when state power is used on behalf of outgroups or to uphold the "liberal" legacy of the Twentieth Century, the use is invalidated or narrowed, either directly through substantive pronouncements or indirectly through procedural and similar roadblocks; when state power is used on behalf of ingroups to retrench the "liberal" legacy, it is accommodated, congratulated, validated. The "losers" are: federal powers over the enforcement of all civil rights; women's equality and reproductive choice; immigrants' ability to build a dignified and secure life; gun control legislation to protect schools and schoolchildren; the environment; black children in elementary and secondary public schools and their parents; older workers; the criminally accused; the voting strength of African Americans, Latinas/os, Asian Americans and other racial/ethnic minorities; sexual minorities and our ability to cultivate without persecution our intimate relationships, families, careers and other basic elements of life; and the disabled and their opportunity to function socially with dignity. Thus, the pattern of winners and losers—the impact of these cases on ingroups and outgroups—provides the chief line of consistency in the jurisprudential mélange of the culture war cases since the mid-1970s. As a set and individually, the contorted opinions in culture war cases have thrown new roadblocks in the way of this nation's unfinished and acrimonious progression toward social equality under the Rule of Law. For a more extended discussion of "culture war cases" and backlashing techniques, see Valdes, *We Have Held*, *supra* note 11. See also *infra* notes 16–18 (elaborating the culture wars).

<sup>16</sup> A key strategic objective of backlash kulturkampf has been taking control of the federal judiciary to accomplish a dual aim: to re-deploy judicial review toward "rolling back" (rather than guiding the further development of) the New Deal and Civil Rights laws as much as possible, and to shield executive and legislative acts of retrenchment from challenge through judicial channels. The demand for "strict construction" specifically of federal powers and

shadows of this conflict; it cannot help but be embedded in its sociolegal context.<sup>17</sup> Yet *Lawrence* also stands out as an exception to the prevailing patterns of the culture war cases that have helped implement the kulturkampf agenda in the United States during the closing decades of the Twentieth Century.

This raging phenomenon, and the politics of backlash that fuel it, are exemplified perhaps most aptly by the notorious precedent that *Lawrence* emphatically sets to rest: *Bowers v. Hardwick*.<sup>18</sup> Coming after *Griswold*,

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individual rights was designed to clip the powers of government that had disrupted entrenched local hierarchies based on race and other sources of faction—local hierarchies that had captured and monopolized state and local governments during eras of *de jure* subordination. In this reversal of policymaking trajectories, the specific yet monumental task is undoing, as much as politically possible, the legal *and* social legacies both of the New Deal and Civil Rights eras. This undoing, in turn, sets the stage for a restoration of traditionalist hierarchies both legally and socially. *Bowers*, therefore, is the backlash ruling towering over the privacy and substantive Due Process rollback. In addition, however, the backlash cases can be seen in three other broad frames of doctrine: Equality and Antidiscrimination; Voting Rights and Democracy; and Federalism and Federal Legislative Power. Each is punctuated by highlights that help to employ the patterns and dynamics of this kulturkampf in jurisprudential terms. They span the decades of the culture wars, and are made possible by the court-packing prong of those wars. See Valdes, *We Have Held*, *supra* note 11.

<sup>17</sup> Backlash jurisprudence consequently comprises the juridical portion of this larger societal reaction to the mixed social and political gains secured to “outsiders” by the formal legal advances of the Civil Rights era. Notably, however, at no time does backlash jurisprudence formally confess its disdain for the national commitment to the antidiscrimination principle, nor openly admit its ideological commitment to reversing the historical trajectory toward antistatization. Valdes, *Jurisprudence of Backlash*, *supra* note 14, at 280. On the contrary, formal equality is formally upheld even as “states rights” that oftentimes serve to undermine it are expansively—aggressively—construed under the Tenth and Eleventh Amendments, and while individual rights and federal powers to protect them are construed “strictly” across the board. The former thus expand while the latter retrench.

<sup>18</sup> 478 U.S. 186 (1986). As one of the early culture war cases, the *Bowers* quintet’s opinion quickly became a foundational building block for the backlash proposition that “privacy” was an illegitimately conceived brainchild of liberal activist judges, and that “fundamental rights” more generally are dangerous to democracy. Under that view, judicial protection of “privacy” rights and liberties threaten society and the Rule of Law precisely because “the Court is most vulnerable and comes closest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Id.* at 194. To guard against that illegitimacy, the *Bowers* quintet had written, the Court had imposed on itself two disciplinary devices designed to “assure itself and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values on the States and the Federal Government.” *Id.* at 191. The first limits judges to “fundamental liberties that are implicit in the concept of ordered liberty” and the second limits judges to “liberties that are deeply rooted in this Nation’s history and tradition.” *Id.* at 191–92. Both of these ostensibly limiting formulations are obviously vulnerable to all kinds of manipulation, as are many rules of law: both of these shift the discretion of the judges to competing (and perhaps conflicting) descriptions of more-or-less analogous “histories and traditions” and personalized notions of “ordered liberty” but, as *Bowers* vividly proved, neither removes nor eliminates the ultimate

*Eisenstadt*, *Carey* and related privacy rulings, *Bowers* emphasized the traditionalist aspects of those cases to cast tight little jurisprudential nets around the “dots” represented by the particular decisions or choices of the preceding cases and to deny the existence of a coherent “field” or “zone” of constitutional protection.<sup>19</sup> Those tight little nets were constructed of varied jurisprudential techniques cumulatively designed to atomize the precedents and to suffocate, in time, privacy rights altogether.<sup>20</sup> For seventeen years those and other backlashing

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decisional discretion of willful judges bent on strategically emphasizing, or even inventing, “history and tradition” along the way to saying Yes or No in the name of the Constitution. After *Bowers*, the invocation of “morality and democracy” or of “history and tradition” increasingly became a tolling bell for the death of civil rights; the Fourteenth Amendment progressively became a dead letter as more and more potential litigants “got the message” and headed to state courts in search of respectful treatment, fair hearing and potential vindication of civil rights grievances. See Valdes, *Cultural Warriors*, *supra* note 13, at 1426–34 (discussing state alternatives to federal remedies in the pursuit of sexual minority civil rights during this time); see also Valdes, *We Have Held*, *supra* note 11.

<sup>19</sup> See *infra* notes 50–59 and 111–13 and accompanying text (on the “zones” versus the “dots” conceptions of liberty-privacy).

<sup>20</sup> Those techniques, as *Bowers* illustrates, included severely myopic assertions of “history and tradition” calculated to produce rejection of constitutional protection for individual rights and liberties in a technologically and demographically evolving society, coupled with formalistic intonations of formal democracy to license political practices like the legislation of “presumed morality”—a license to exercise nominally democratic power that the framers of the Constitution well might have described as the “tyranny of the majority.” In addition, backlash activism has included the aggressive review of precedent to narrow their civil rights reach; the heightening of procedural rules to block civil rights claims on technical grounds; the strict interpretation of legislative initiatives on behalf of civil rights communities under both principal instruments for doing so—the Commerce Clause and Section 5 of the Fourteenth Amendment; and, finally, a proactive and unilateral reinterpretation of the Tenth and Eleventh Amendments to expand “states’ rights” affirmatively under “fundamental postulates” based on the personal views and preferences mainly of five justices. For further discussion of backlash techniques, see Valdes, *We Have Held*, *supra* note 11; see also, Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (evaluating the current judges’ manipulation or disregard of precedent and canons of interpretation).

Of course, during the past two decades or so various scholars have documented how judges manipulate their discretion to achieve their preferred ideological outcomes, including their abuse of these and similar techniques. See, e.g., Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL’Y J. 547 (2003); Kevin M. Clermont and Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 970; William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1485–87 (1990) (focusing on retrenchment in that key term of the Supreme Court); Charles R. Lawrence, III, “Justice” or “Just Us”: *Racism and the Role of Ideology*, 35 STAN. L. REV. 831, 837–39 (1983) (focusing on race and White Supremacy); Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 321 (1989) (critiquing the interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, Jr., *Explaining Judicial*

techniques succeeded in cutting off almost all jurisprudential oxygen to the Fourteenth Amendment's Due Process Clause, and in particular to "privacy" as the most salient dimension of "modern" substantive Due Process. And then, in the midst of this raging conflict, *Lawrence* came around.

In affirming *Griswold*, *Eisenstadt* and *Carey*, *Lawrence* no doubt remains significantly moored in traditionalist instrumentalism. But in stressing their emancipatory values, and articulating them in a realist or functionalist manner, *Lawrence* effectively re-centers both critical analysis and antisubordination values in Fourteenth Amendment jurisprudence: *Lawrence* critically perceives the functional role of sodomy statutes and the interplay of formal criminality and social subordination they perpetrate; *Lawrence* critically perceives the interaction of various categories at multiple levels, ranging from "private" and "public" to formal and social. Indeed, *Lawrence* serves to remove from the arsenal of backlash politicians and judges the main weapon they had wielded for seventeen years with increasing arrogance and formal effectiveness: *Bowers* as mighty precedent.<sup>21</sup>

Recognizing *Lawrence*'s ambivalence and its shortcomings, this Article sketches some basic points on the line of cases establishing "the right of privacy embraced in the 'liberty' of the Due Process Clause"<sup>22</sup> to extract as much emancipatory punch as possible toward the realization of this ruling's potential. Beginning with doctrine, Part II charts the evolution of liberty-privacy during the eighty years of liberty, privacy and equality bracketed by the rulings in *Meyer v. Nebraska*<sup>23</sup> and *Lawrence v. Texas* to contextualize the creation of the "Equal Protection anomaly" that *Bowers* crowned and *Lawrence* brings to an end. Part III then briefly considers the institutional and other circumstances that may help to explain this ruling and its apparent dualities, proffering some speculation on the reasons for *Lawrence* and its timing, before closing with a short notation on the right to sexual self-determination already embedded in *Griswold* and progeny

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*Lawgivers*, 11 FLA. ST. U. L. REV. 153 (1983) (surveying techniques of judicial manipulation of facts and doctrine); Keith C. Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (critiquing the heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants); see also *supra* note 17 and sources cited therein on backlash and retrenchment.

<sup>21</sup> In addition, *Lawrence* helps to diminish the role of (1) "history and tradition" as a virtually insurmountable jurisprudential block to legal recognition of insights or lessons to be drawn from social experience—or history—subsequent to the 1780s and (2) "presumed morality" as a self-justifying phenomenon somehow automatically transmuted into presumed democratic lawmaking, to which judges of course must bow. The loss of these two weapons makes the task of backslashers more complicated, for they now must do more than simply wave the wands that these two weapons had become since *Bowers*. See *supra* note 20. Moreover, *Lawrence* validates antisubordination analysis and critical realism in liberty-privacy analysis. For a more extensive elaboration of these points, see Valdes, *We Have Held*, *supra* note 11.

<sup>22</sup> *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting).

<sup>23</sup> 262 U.S. 390 (1923).

despite their apparent ambivalence—a right sidelined by backslashers but which *Lawrence* now poises for overdue explicit recognition. This Article thus accepts that, especially in this era of unabated kulturkampf, *Lawrence* can indeed be bent to mean nothing even when it might be fashioned to mean all. This Article proceeds from the wary recognition that *Lawrence*'s apparent ambivalence can be manipulated to various ideological ends, as recent and current experience with other liberty-privacy precedents so vividly demonstrates.<sup>24</sup>

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<sup>24</sup> By way of background and context, this Article is the second of four elucidating backlash jurisprudence as part and parcel of the culture wars, a quartet of writings which in turn build on previous efforts. The first part of this quartet is Valdes, *Jurisprudence of Backlash*, *supra* note 11, which focuses broadly on three theoretical perspectives—backlash jurisprudence, liberal legalisms and critical outsider jurisprudence—to compare their approaches to equality law and policy. The second part, as just noted, is this Article, which focuses specifically on *Lawrence* and generally on liberty-privacy to sketch some basic patterns and points in this central doctrinal terrain of social and legal retrenchment. The third part of this series is Francisco Valdes, *Afterword—"We Have Held": Mapping the Jurisprudence of Backlash Kulturkampf*, \_\_\_ VILLA. L. REV. \_\_\_ (2005), which will address other doctrinal terrains of the culture wars and their associated techniques or patterns. The fourth and concluding part is Francisco Valdes, *Culture by Law: Jurisprudence as Kulturkampf—A Postcard from Amerika*, \_\_\_ FL. J. INT'L L. \_\_\_ (2005), which will explore two primary themes of backlash kulturkampf, both within and beyond the United States: Democracy and Tradition. This quartet, as mentioned above, in turn builds on prior and ongoing efforts to comprehend and chart the inter-connections, if any, of the legal devolutions that have swept across this country during the past two decades or so against immigrants, communities of color, sexual minorities, women and poor persons in order to craft structures and practices of resistance to this wholesale retrenchment. See Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65 (2003); Valdes, *Identity Maneuvers*, *supra* note 14; Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 LA RAZA L.J. 137 (2001); Francisco Valdes, *Race, Ethnicity and Hispanismo in Triangular Perspective: The "Essential Latina/o" and LatCrit Theory*, 48 UCLA L. REV. 305 (2000); Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831 (2000); Francisco Valdes, *Afterword—Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits, LatCrits*, 53 U. MIAMI L. REV. 1265 (1999); Francisco Valdes, *Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship—Or, Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (1998); Francisco Valdes, *Queer Margins: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of "Sexual Orientation"*, 48 HASTINGS L.J. 1193 (1997); Valdes, *Sex and Race*, *supra* note 15. In time, this work should produce a book, FRANCISCO VALDES, OF JUDGES AND THEIR PLEASURES: LAW AND SOCIAL ENGINEERING AT THE TURN OF A MILLENNIUM.

## II. PRIVACY AS LIBERTY: JUDGING THE FOURTEENTH AMENDMENT

Much has been made of the “equality” versus “privacy” angles of *Lawrence*, and the Court’s emphasis on “liberty” as the chief textual basis of its holding.<sup>25</sup> Indeed, this ado begins in the outcome of the case itself, wherein Justice O’Connor’s concurrence would direct our gaze toward a mirage based on Equal Protection. In that opinion, O’Connor posits that the Texas statute’s focus on same-sex intimacy triggers an Equal Protection problem because the statute, on its face, leaves mixed-sex intimacy untouched; this legislative differential treatment of sodomy, asserts O’Connor, violates the constitutional guarantees of the Equal Protection Clause because it permits the actual, or as *Bowers* put it, the “presumed” majority of a state to single out a particular class or classification within its population for a proscription or regulation that it does not apply to itself.<sup>26</sup> This analysis surely is on the mark, but noting this formal inequality at this late jurisprudential stage overlooks the equality anomaly that O’Connor herself, along with her four Brethren speaking for the Court in 1986, created and bequeathed to us.<sup>27</sup> That anomaly, as Justice Stevens pointed out in his *Bowers* dissent at the moment of its birthing, was created by the juxtaposition of *Bowers* with the line of precedents that had “made abundantly clear” (and expressly had not delimited) constitutional “privacy” rights up to that point.<sup>28</sup>

### A. *Before and After Bowers: The Privacy Cases and the Equality Anomaly*

Privacy jurisprudence of course extends back to the 1920s with *Meyer v. Nebraska*<sup>29</sup> and *Pierce v. Society of Sisters*<sup>30</sup> but *Griswold v. Connecticut*<sup>31</sup> in 1965 is usually taken as the beginning of “modern” privacy cases. Since then, this articulation usually has provided the point of departure for privacy analysis, as the *Lawrence* case itself shows by anchoring itself in *Griswold* and its three principal progeny: *Eisenstadt* in 1972, *Roe v. Wade*<sup>32</sup> in 1973, and *Carey* in 1977. Focusing in those dozen years increasingly though not exclusively on the text of the Fourteenth Amendment, these post-*Griswold* cases etched the frames of “privacy” around the Due Process protection of “liberty” and, later, around the

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<sup>25</sup> See *supra* note 7 and sources cited therein (commenting on *Lawrence*).

<sup>26</sup> *Lawrence*, 539 U.S. at 579–85 (O’Connor, J., concurring). For *Bowers*’ language, see *infra* notes 139–46 and accompanying text.

<sup>27</sup> See *infra* notes 166–71 and accompanying text (providing a further elaboration of this equality anomaly).

<sup>28</sup> 478 U.S. at 216 (Stevens, J., dissenting); see *infra* Part II.A.3.b (describing Stevens’ *Bowers* dissent).

<sup>29</sup> 262 U.S. 390 (1923).

<sup>30</sup> 268 U.S. 510 (1925).

<sup>31</sup> 381 U.S. 479 (1965).

<sup>32</sup> 410 U.S. 113 (1978).

corollary provision of “Equal Protection.” When *Bowers* arrived at the high Court’s steps in the mid-1980s, this evolving jurisprudence became scrambled almost beyond recognition in the juridical pursuit of the backlash agenda established by the culture wars.

1. *Before Griswold: Establishing the Parameters of Liberty-Privacy*

The cases leading up to *Griswold* establish or suggest a number of doctrinal points that backlash jurisprudence has occluded for the past seventeen years, beginning with *Bowers*. Most pertinent to this Article are the following three: (1) that “liberty” as used in the Due Process Clause of the Fourteenth Amendment is the textual source of individual privacy rights; (2) that liberty-privacy protects *individual* choices regarding education and other “personal” decisions which have one thing in common—whether the state or the individual will control the social destiny that those choices cumulatively would help to chart and accomplish for that individual; and (3) that the facts of those cases—and therefore the holdings and rationales—were illustrative and perhaps paradigmatic, but expressly not exhaustive, of the individual choices protected constitutionally by liberty-privacy. As a set, these precedents sometimes specified and sometimes illustrated the “compendious notion” of liberty-privacy established over the course of the nation’s history in the form of Due Process jurisprudence. In rejecting *Bowers*, *Lawrence* returns to these original roots and arrested trajectories.

*Meyer v. Nebraska*. In *Meyer*, a 1923 case, the Supreme Court considered the challenge of a German language teacher to a Nebraska statute imposing English-only education through the seventh grade.<sup>33</sup> In a 7-2 ruling, explicitly relying on the liberty text of the Fourteenth Amendment, the *Meyer* justices began by expressly noting that “this court has not attempted to define with exactness the liberty thus guaranteed.”<sup>34</sup> Then, citing to varied precedent spanning most of the Court’s history, the justices itemized key exemplars from past adjudications: liberty-privacy protects, in addition, to

freedom from bodily restraint . . . the right of the *individual* (emphasis added) to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>35</sup>

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<sup>33</sup> *Meyer*, 262 U.S. at 396–97.

<sup>34</sup> *Id.* at 399.

<sup>35</sup> *Id.* at 399 (emphasis added).



They then concluded that the teacher's "right thus to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the Amendment."<sup>36</sup>

In this foundational case, the justices unequivocally identified the "individual" as the bearer of liberty-privacy rights—in this instance, school teachers and parents or guardians of children.<sup>37</sup> And though their litany of precedential examples did not include a previously-stated "right to educational choice"—either for parents or for teachers—the *Meyer* justices had no difficulty discerning similarities that connected those cases with this one—similarities that they articulated two years later in their unanimous *Pierce* opinion. *Meyer*, moreover, shows that, from the beginning of liberty-privacy jurisprudence, the justices viewed and approached individuals' Due Process rights not as *ad hoc* fragments of law but as a flexible field of constitutional protection covered by the organizing principle of "liberty."

As in the cases before and since (with the notable exception of *Bowers*), the justices in *Meyer* focused on the claims and facts actually before them, and found liberty-privacy rights in scenarios where "marriage" or marital status were not at issue. Indeed, both *Meyer* and the precedents it itemized include a number of protected choices that extend beyond sexual expression or intimacy, or where neither sexuality nor procreation was factually at issue. Most significantly, perhaps, the justices in this foundational precedent began by expressly disclaiming any notion that the claims, facts and holdings of these cases—or their descriptions of them—constituted a juridical "attempt" to "define" or delimit the entirety of liberty-privacy under the Due Process Clause of the Fourteenth Amendment.<sup>38</sup> With the exception of *Bowers* and its progeny,<sup>39</sup> this flexible,

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<sup>36</sup> *Id.* at 400.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> The principal example of backlash jurisprudence specifically under *Bowers* and privacy is *Washington v. Glucksberg*, 521 U.S. 702 (1997), an exemplar of backslashers' efforts to use constitutional interpretation and majoritarian politics to freeze society in the mold of 1787. In brief, the justices in *Glucksberg* sought to demonstrate that the backlash approach to the Fourteenth Amendment generally, and to "history and tradition" specifically, that had been centered in *Bowers* represented authoritatively the state of the law, rather than being an anomalous and willful departure from evolving, yet firm, Fourteenth Amendment precedents from *Griswold* to *Carey*. *Glucksberg*, 521 U.S. at 723–28. In *Glucksberg*, a Washington statute criminalized the provision of information or assistance to terminally ill competent adults choosing to expedite, rather than retard, their eventual deaths. *Id.* at 706–07. Physicians and terminally ill competent adults in the state challenged the statute based on the Fourteenth Amendment's protection of liberty, claiming a "right to control" their final encounter with life and to "choose a humane, dignified death" over more painful or prolonged options coerced formally or constructively by medical regimes or family preferences. *Id.* at 708. The district court struck down the statute, and was affirmed on appeal en banc. *Id.* at 708–09. When the case reached the Supreme Court, the same bloc of five justices who have banded together since

open-ended approach to liberty-privacy would become characteristic of Due Process jurisprudence in the eighty years between *Meyer* and *Lawrence*.<sup>40</sup>

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1993 to implement backlash jurisprudence from that bench joined in yet another a 5-4 opinion that scrambled familiar jurisprudential lines to delimit individual rights and liberties. Issued by Chief Justice Rehnquist, the *Glucksberg* opinion overturned the lower courts' rulings with a text-book rendition of backlash jurisprudence. *See id.* at 735-36. *Glucksberg* is instructive in understanding *Lawrence* specifically, and backlash jurisprudence generally, both because it was *Bowers*' cousin in the area of liberty-privacy and because it epitomizes the ways and means of jurisprudential kulturkampf. For more on *Glucksberg* in the context of social and legal kulturkampf, see Valdes, *We Have Held*, *supra* note 11.

<sup>40</sup> This approach of course has enabled cries of "judicial activism" at each disposition of a case. Legitimate concerns over willful abuses of judicial discretion of course go back to the Constitution's framing, and have been perennial ever since. "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." THE FEDERALIST NO. 78, at 381 (Alexander Hamilton) (Terrence Bull ed., 2003). For incisive accounts of "original" concerns and exchanges regarding federal judicial power and its potential abuse by individuals appointed to be judges, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS IN THE MAKING OF THE CONSTITUTION (1996); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988). *See also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969). This legitimate historical concern erupted into the open most fully and dramatically in the first half of the Twentieth Century when politically conservative judges directed the powers of the judiciary to invalidate majoritarian lawmaking of the New Deal agenda on behalf of workers, consumers and other relatively under-privileged social groups. For notable accounts, see WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940 (1963); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court Packing" Plan*, 1966 SUP. CT. REV. 347. That opposition, anchored in the asserted liberty right of contract, repeatedly favored the interests of big business and employers, but required increasingly obvious judicial gyrations to maintain. *See, e.g., Lochner v. New York*, 198 U.S. 45, 53, 64-65 (1905) (striking down a state fair employment statute limiting the working day to no more than ten hours and the work week to no more than sixty hours on the grounds that this regulation "interferes with the right of contract between employer and employees" alike). By 1937, that prime historical example of the legitimate concern over judicial activism had become untenable, and came to an embarrassing end that continues to haunt and embarrass the institution, as its invocation in liberty-privacy cases ranging from *Griswold* to *Bowers* and *Casey* pointedly show. *See infra* notes 66-165 and 181-200 and accompanying text (discussing these cases and their concerns over judicial activism).

Today, as *Griswold* and progeny also show, the same basic notion—"liberty" protected by Due Process—is at the heart of privacy jurisprudence, and of the backlashing efforts to arrest it. This similarity—the focus on "liberty"—lends itself to superficial comparisons designed to promote backlash kulturkampf. In particular, as *Bowers* specifically illustrates, this similarity permits strategic but inapposite assertions that today's recognition of liberty-privacy is as much of an illegitimate judicial concoction as the "judicial activism" that blocked reform legislation two generations ago under the asserted liberty to enter into private commercial contracts. Even though some of the same judges articulated both the economic and the personal aspects of liberty during the 1920s, one key distinction between the jurisprudence delineating each is that personal liberty—the line of cases sketched here elaborating liberty-privacy from 1923 onward—now is the cumulative work-product of multiple judges across ideologies and generations, which cognizably "built" substantively on precedent, rather than the concentrated

*Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*. Two years later the justices next considered a factually and legally similar scenario: the challenge of private school operators to an Oregon law, this time enacted by popular referendum, which made public education compulsory up to the age of sixteen.<sup>41</sup> The unanimous *Pierce* justices relied explicitly on “the doctrine” of *Meyer* and, as in that case, concluded that the state action here “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and

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handiwork of a small cadre of judges single-handedly engineering an abrupt break from established jurisprudential patterns to promote a larger coordinated campaign aiming to redirect the long-term evolution of law and society. Judicial imposition of economic liberty, as the judges themselves have acknowledged, exemplified Hamilton’s concern over “judgment” and “will”—the latter, will, being a judge’s abuse of a court’s power to effectuate the judge’s preferred policy position. See Valdes, *We Have Held*, *supra* note 11.

For their part, since that embarrassing collision, the judges of the Supreme Court repeatedly have distinguished between “economic” liberty and “personal” liberty under substantive Due Process on the grounds that majoritarian efforts to regulate the former are no more than state management of the market while majoritarian efforts to regulate the latter amount to a state take-over of individual “destiny.” See *infra* notes 43–45 and accompanying text (discussing individual “destiny” as the liberty interest protected by privacy). This distinction substantively amounts to acknowledgement that the state has wide leeway in the regulation of individual participation in the “public” spheres of economic markets but narrow leeway in the regulation of intimate choices in the “private” spheres of education, relationships and lifestyle through which individuals typically endeavor to direct their social destiny in the course of living their everyday lives. See, e.g., *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) (upholding state regulation of working hours, noting that “if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision”); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949) (upholding state regulation of employment contracts while emphasizing that economic liberty is generally subject to intensive state regulation because such regulations “do not run afoul of some specific federal constitutional prohibition” and, in addition, it should be noted, because constitutional text and design grant the federal government extensive powers over commercial activities).

Of course, feminist and other scholars have amply demonstrated that the distinction between “public” and “private” spheres of law and society oftentimes is a tool to justify the subordination of women as a social group. See generally Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) (critiquing the gendered notions embedded in legal rules and doctrines); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) (surveying Feminist legal scholarship and the salient points of, or interconnections among, varied currents of feminism in legal theorizing); GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986) (providing a comprehensive historical account of gender roles and corresponding hierarchies). In this instance, this legitimate antisubordination concern over the application of this manipulable distinction seems absent because, in this context, as the cases from *Meyer* to *Lawrence* (with the exception of *Bowers*) show, the distinction shields otherwise extremely vulnerable social groups from majoritarian suppression though the force of law. See *supra* notes 33–40 and *infra* notes 41–165 (on the cases from *Meyer* to *Bowers* and their anti-majoritarian protection of unpopular or nonconformist individual choices in matters of education, relationships and lifestyle).

<sup>41</sup> *Pierce*, 268 U.S. at 530–31.

education of children under their control”—even though adopted by “popular” initiative.<sup>42</sup> Having thereby described the specific aspect of “liberty” that both *Meyer* and this case protected—educational choice and its social significance to individuals and those responsible for them—the justices then specified the commonalities that these two cases shared with the earlier cases they had itemized in *Meyer*: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power . . . to standardize” individual persons by controlling decisions that incrementally constitute an effort to exert choice over the course or direction of one’s life or personality.<sup>43</sup>

Applying this overarching rationale, the *Pierce* justices focused on the claims and facts before them to specify a core similarity they discerned between this aspect of liberty and those in the varied precedents they had itemized in *Meyer*: the “child is not the mere creature of the State . . . [and cannot] direct his destiny.”<sup>44</sup> The *Meyer-Pierce* cases thereby centered the key similarity or organizing principle that cohered the precedents on the liberty-privacy rights of individuals under the Fourteenth Amendment: absent a compelling public interest, the state may not “direct [individual] destiny” through a usurpation of the life choices that persons make to realize their individuation; Due Process prohibits state efforts to commandeer the ongoing human development of individuals through formal majoritarian decisions that proscribe or trump individuated choices over a range of elections that, cumulatively, amount to a person’s social “destiny.”<sup>45</sup> Moreover, the facts and outcome of *Pierce*, like those of *Meyer*, concretely illustrated from the very inception of this line of precedents that liberty-privacy inheres in individuals rather than “married couples” and constitutes a flexible field of robustly anti-majoritarian protection for personal choices that plainly extend beyond marital intimacies for procreational purposes.

*Poe v. Ullman*. Nearly four decades later, in 1961, the justices returned to *Meyer-Pierce* and related cases<sup>46</sup> to consider the challenge of married women to

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<sup>42</sup> *Id.* at 534–35.

<sup>43</sup> *Id.* at 535.

<sup>44</sup> *Id.* (emphasis added).

<sup>45</sup> *Id.*

<sup>46</sup> The principal related case is *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the Supreme Court struck down a state criminal statute imposing sterilization as punishment on Equal Protection grounds because of sentencing disparities between similar offenses. *Skinner*, 316 U.S. at 543. In arriving at this holding, however, the justices, in an opinion by Douglas, noted that “[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.” *Id.* at 541. Because the individual interest was so great—“fundamental”—the disparity in sentencing schemes under state law was constitutionally intolerable, the justices there concluded: “When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” *Id.*

Connecticut's anti-contraception statute—the same one challenged again in *Griswold*—which criminalized, without exception, the “use” of contraceptives within the state.<sup>47</sup> The *Poe* justices dismissed the case for lack of standing: citing a “lack of immediacy” to any prosecution of the plaintiffs for violation of the statute, the justices concluded that no justiciable constitutional question was properly presented.<sup>48</sup> The *Poe* justices thereby postponed a ruling on the merits, and on the meaning of liberty-privacy under those facts. The importance of this case consequently lies in the two dissents, filed by Douglas and Harlan, which, together with *Meyer* and *Pierce*, provided much of the basis for a disposition on the merits four years later when the same law and very similar facts were presented to the justices in the *Griswold* case.

The first *Poe* dissent, filed by Douglas, both embraces the precedents up to that point as well as presages *Griswold*. The Douglas dissent grounds privacy squarely in the liberty text of the Fourteenth Amendment—as *Meyer* and *Pierce* had—while also pointing out that “[l]iberty’ is a conception that sometimes gains content from the emanations of other specific guarantees” in the Constitution.<sup>49</sup> The second, Harlan’s highly-cited dissent, explains why the statute impinged on individual rights even if no immediate enforcement action had been threatened against a particular individual before setting out “to state the framework of Constitutional principles in which [liberty-privacy claims] must be judged.”<sup>50</sup> Both dissenters relied on *Meyer-Pierce* and related cases while focusing on the claims and facts actually before them, and hence framed their discussion around married persons and their contraceptive choices rather than around children, teachers or parents and their educational choices. But the Harlan dissent became the most substantively significant because its framework has been cited and applied by some of the justices in *Griswold*, and since. His proposed “framework” underscored three sets of points that, in Harlan’s words, consciously endeavored to “build”<sup>51</sup> on the liberty-privacy jurisprudence of the Fourteenth

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Because this Equal Protection ruling referred to the individual interests involved in “fundamental” terms, *Skinner* oftentimes is regarded as part of liberty-privacy jurisprudence.

<sup>47</sup> *Poe*, 367 U.S. at 498.

<sup>48</sup> *Id.* at 501–09. This very same factual and doctrinal scenario resurfaced in *Doe v. Commonwealth*, 403 F. Supp. 1199 (E.D. Va. 1975), a case with extremely weak grounds to find standing that the District Court nonetheless decided and rejected on the merits but which the Supreme Court in 1976 summarily affirmed without explanation as to the basis for its affirmance. See *Doe v. Commonwealth*, 425 U.S. 901 (1976). This ambiguity became central to liberty-privacy jurisprudence, making the factual and doctrinal similarities between *Poe* and *Doe* illuminating. See *infra* notes 100–04 and accompanying text (on *Doe* and this ambiguity).

<sup>49</sup> *Poe*, 367 U.S. at 517 (Douglas, J., dissenting). For Douglas, this latter point became predominant four years later, in his opinion for the Court in *Griswold*. See *infra* note 73 and accompanying text (discussing Douglas’ shift in emphasis).

<sup>50</sup> *Id.* at 539 (Harlan, J., dissenting).

<sup>51</sup> *Id.* at 546.

Amendment delineated in *Meyer-Pierce* and, even earlier, by their itemized precedents.

The first point is methodological, in which Harlan cites the early constitutional law landmark of *McCulloch v. Maryland*<sup>52</sup> and relies on the “sound construction” approach developed by Chief Justice Marshall in that and similar cases to dispel early strategic calls for “strict construction” of the Constitution.<sup>53</sup> Making this first point, Harlan writes that the liberty text of the Due Process Clause must be interpreted in a “rational” or flexible rather than a strict or formalist manner:

precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government.<sup>54</sup>

The second point of this influential dissent is doctrinal, in which Harlan notes that “[a]gain and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights.”<sup>55</sup> In making this second point, Harlan specifies that the Due Process Clause, approached in a “sound” and “rational” manner, must be recognized as “an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions” found

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<sup>52</sup> 17 U.S. 316 (1819).

<sup>53</sup> *Poe*, 367 U.S. at 540 (Harlan, J., dissenting) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)). In *McCulloch*, the Supreme Court upheld federal legislation chartering a federal bank even though the text of the Constitution does not expressly enumerate the power to charter corporations among those vested in the federal legislature. *McCulloch*, 17 U.S. at 317–18. In an opinion authored by Chief Justice Marshall, the Court juxtaposed two basic approaches to constitutional interpretation: the “just” or “sound” approach versus the “narrow” or “strict” approach. *Id.* at 401–37. Opting for the former, those judges reasoned that the latter would entail a “baneful influence” on the nation due to the “absolute impracticality of maintaining it without rendering the government incompetent to its great objects.” *Id.* at 417–18. This rendering is precisely the goal of cultural warfare and backlash activism, thus disabling the government from reforming locally and historically entrenched social hierarchies that were established in part by force of law in previous eras of formal subordination based on race, ethnicity, gender, sexual orientation and other forms of social stratification, and that now are structurally pervasive culturally and materially in law and society; historically dominant groups waging backlash kulturkampf calculate that their privilege and dominance *vis a vis* historically subordinated groups is best preserved, and perhaps amplified, by disabling the possibility of state power to reform historic injustices that have enriched and empowered them. For a more substantive articulation of this point, see Valdes, *We Have Held*, *supra* note 11.

<sup>54</sup> *Poe*, 367 U.S. at 539–40 (Harlan, J., dissenting).

<sup>55</sup> *Id.* at 541.

elsewhere in the Constitution.<sup>56</sup> The third and final point of this “framework” is conceptual, in which Harlan emphasizes that a sound and rational interpretation of liberty must recognize both the “traditions from which it developed as well as the traditions from which it broke”<sup>57</sup> in order to appreciate that “this liberty is not a series of isolated points pricked out [of the Constitution or the judges’ whims] . . . . [but rather] a rational continuum which, broadly speaking, includes a freedom from *all* substantial arbitrary impositions and purposeless restraints” enacted by the State through majoritarian lawmaking.<sup>58</sup> Quoting from *Pierce* and *Meyer*, Harlan then applies this framework to the *Poe* facts and “to the particular Constitutional claim in [that] case” to consider whether they fit within “the compendious notion of ‘liberty’ embraced in the Fourteenth Amendment.”<sup>59</sup>

Substantively, much has been made of Harlan’s distinction between “marriage” and “homosexuality” in the course of applying his framework in the second part of his *Poe* dissent.<sup>60</sup> And indeed he did. But Harlan refers to some version of same-sex relations three times in his dissent, and each time commingled with topics that, to Harlan, apparently were analogous, including fornication, abortion, sterilization and suicide.<sup>61</sup> Moreover, in each instance Harlan refers to same-sex sexuality as an illustration of a broader institutional or jurisprudential point: each of Harlan’s three broader points were designed to help situate his proposed—and dissenting—framework in that case as the principled sum of the precedents up to that point. These broader points, as a set, were designed to address institutional concerns of “judicial activism” likely to be raised by his emphasis on flexible, functional and open-ended Due Process adjudication under the governing principles of the framework he had elaborated in the first part of his dissent.

In the first instance, Harlan refers to “adult consensual homosexuality” as one example among various, including non-sexual examples, to illustrate the general

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<sup>56</sup> *Id.* at 542.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 543 (emphasis added).

<sup>59</sup> *Poe*, 367 U.S. at 544–46 (Harlan, J., dissenting). Harlan concludes the statute is unconstitutional, not because it seeks to impose procreation as policy but because the State cannot choose “obnoxiously intrusive means . . . to effectuate that policy.” *Id.* at 554. Like other parts of this generally influential dissent, Harlan’s conclusion on this point was flawed; it overlooked *Meyer*’s key precaution in explaining the constitutional values protected by liberty-privacy: that individuals are not “mere creatures” of the State, whose existence and destiny may be commandeered in the name of the majority to serve its preferred policy dictates. See *supra* notes 33–40 and accompanying text (discussing *Meyer*). Not surprisingly, then, Harlan’s premature conclusion in this part of his *Poe* dissent has been overtaken by liberty-privacy holdings like those in *Eisenstadt*, *Roe* and *Carey*. See *infra* notes 80–117 and accompanying text (discussing these subsequent cases). These contrary holdings echo the majority in *Meyer* rather than Harlan in dissent here. See *supra* notes 33–40 and accompanying text (on *Meyer*).

<sup>60</sup> See *Poe*, 367 U.S. at 552 (Harlan, J., dissenting).

<sup>61</sup> *Id.* at 546–547, 552, 553.

point that a particular social “judgment [on that topic] is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce . . . abortion, and sterilization or euthanasia and suicide.”<sup>62</sup> In this first reference, Harlan acknowledges that social views on these topics are subjective and evolutionary rather than natural or static—not surprisingly, a key aspect of the *Lawrence* ruling nearly half a century later—and that judges therefore should not displace majoritarian social policies merely on the basis of their personal politics or preferences. In the second instance, Harlan acknowledges a related point—that privacy is “not absolute”—and then he again provides illustrative examples, explaining that he, Harlan, was not then prepared to “suggest” as a justice that “homosexuality” is immune to “criminal enquiry” along with “adultery . . . fornication and incest.”<sup>63</sup> Thus, in the first two instances, Harlan’s point was that same-sex relations, like other fields of human life, are open to controversy and judges should exercise their power of review judiciously in light of this fluid social pluralism.

In the third instance, Harlan clarifies why, at that time, he would distinguish “adultery, homosexuality and the like” from “marriage” in his hypothetical application of this proposed framework: the former, he explains, are “extra-marital”<sup>64</sup> expressions of sexuality and thus form part of a larger categorical scheme in which Harlan regards “marital” and “non-marital” statuses as essentially different for constitutional purposes—a difference that his successors explicitly rejected later in *Eisenstadt*, *Carey*, *Roe* and other cases that follow from *Meyer-Pierce* and that, at times, even quote to Harlan’s dissent in the process of doing so. Indeed, the open-ended and flexible approach that Harlan laid out in his *Poe* dissent based on *Meyer-Pierce* recognized and helped to establish the basic methodology for precisely this sort of jurisprudential evolution over the generations, and in the tracks of social and societal evolution—the very kind of sociolegal evolution that the *Lawrence* majority opinion notes and illustrates. Thus, even though Harlan in dissent has influenced subsequent liberty-privacy law through the principles and methodology he set out in this case, his casual applications of the framework in *Poe* to the hypothesized scenarios he invoked by bare terms like “homosexuality” or “adult consensual homosexuality” or other forms of “extra-marital” choices had been rejected authoritatively, and repeatedly, long before five justices in *Bowers* belatedly attempted to resurrect and impose this very same constriction in the 1980s.

Thus, not much can be extrapolated from this abstract discussion to single out “homosexuality” from the other categories or examples with which Harlan had commingled it in his *Poe* dissent. Although his basic approach or methodology has been embraced and employed by other judges in subsequent

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<sup>62</sup> *Id.* at 547.

<sup>63</sup> *Id.* at 552.

<sup>64</sup> *Id.* at 553.



liberty-privacy cases, they have done so time and again to draw conclusions diametrically opposite to those that Harlan had hypothesized in this 1961 dissent. Indeed, the cases from *Griswold* in 1965 to *Hardwick* in 1985 make one fundamental point quite, and consistently, plain about Harlan's *Poe* dissent: despite his assertions to the contrary there, individual liberty-privacy rights emphatically do not depend on categorical divides or classifications based on social statuses, such as the "marital" versus "extramarital" categories that he had posited in his dissent's hypothetical discussion.

The disposition of *Poe* on standing grounds, coupled with the *Meyer-Pierce* precedents and the Douglas-Harlan dissents, established the general parameters of liberty-privacy as the 1960s commenced. By then, those rulings and opinions had made three foundational points clear: (1) privacy was a Due Process element of liberty under the Fourteenth Amendment; (2) it protects individual efforts to exert choice over the direction of destiny; and (3) the cases decided thus far did not represent an effort to "define" the limits of liberty-privacy. In addition, the Harlan dissent had set out a methodological "framework" based on the precedents to date that specifically rejected a strict or "literalistic" approach to future liberty-privacy cases, and that called for a sound and evolutionary jurisprudence recognizing and protecting what he termed the "compendious notion of 'liberty' embraced in the Fourteenth Amendment."<sup>65</sup>

## 2. *Griswold to Hardwick: Establishing the Equality of Liberty-Privacy*

With *Meyer, Pierce* and *Poe* in place, the "modern" era of liberty-privacy jurisprudence was set to dawn later that same decade—a time vibrating culturally and politically with calls for "sexual liberation." These calls found social expression in the various movements and communities spearheaded by women and sexual minorities during those times.<sup>66</sup> These calls, inevitably, also found legal expression in actions brought before federal courts on the basis of the precedents and opinions sketched above. Four years later, with the *Griswold* litigation having wound its way to them, the Supreme Court justices might well have been experiencing a goodly case of jurisprudential déjà vu.

*Griswold v. Connecticut.* In *Griswold*, personnel of the local Planned Parenthood clinic had been convicted as accessories under the Connecticut statute criminalizing the use of contraceptives; their crime had been to provide married persons with information to prevent conception.<sup>67</sup> The state and lower federal

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<sup>65</sup> *Poe*, 367 U.S. at 544 (Harlan, J., dissenting).

<sup>66</sup> See, e.g., KATE MILLET, *SEXUAL POLITICS* (1969) (focusing on cross-sex relations); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983) (focusing on same-sex relations); JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (1988) (providing a general historical account, and cited by the judges in *Lawrence*).

<sup>67</sup> *Griswold*, 381 U.S. at 480.

courts upheld the convictions.<sup>68</sup> On appeal to the Supreme Court, Justice Douglas wrote for five members of the Court holding that the statute invaded “privacy” rights reflected in various textual provisions in the Bill of Rights and their “penumbras,” specifically the text of the First, Third, Fourth, Fifth and Ninth Amendments, as well as precedents like *Pierce* and *Meyer*.<sup>69</sup> Justice Goldberg wrote for himself and two others, also specifically rooting “privacy” in the “liberty” provision of the Fourteenth Amendment’s Due Process Clause and its incorporation of other Bill of Rights protections while emphasizing equally the text and legislative history of the Ninth Amendment’s declaration that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>70</sup> Justice Harlan concurred in the judgment but, reflecting his *Poe* dissent, objected to its grounding in the Bill of Rights and their incorporation into the Fourteenth Amendment, writing that privacy “is not dependent on them or any of their radiations;” instead, Harlan reiterated, the Fourteenth Amendment’s Due Process Clause “stands . . . on its own bottom” to protect “basic values ‘implicit in the concept of ordered liberty.’”<sup>71</sup> Justice White, also concurring in the judgment, grounded privacy squarely in the liberty protection of the Fourteenth Amendment’s Due Process Clause, and on the *Pierce-Meyer* and related precedents.<sup>72</sup> Thus, of the four opinions, three emphasized the liberty provision of the Fourteenth Amendment;<sup>73</sup> while Douglas’ opinion for the Court enabled exaggerated attention to the “penumbras” of the Bill of Rights, the due process liberty text was central to the reasoning and conclusion of the majority that formed the *Griswold* holding. In addition, none sought to cabin privacy strictly or exclusively within marital scenarios, nor did any seek to contradict or qualify the open-ended or “compendious notion” of liberty-privacy that *Pierce-Meyer* had recognized in the 1920s and that Harlan’s dissent in *Poe* had named just four years earlier. To the contrary, though the justices focused on the facts actually before them—married persons seeking access to contraception—they did so to reject a majoritarian effort professedly aimed at defending married persons from the corruption of their intimacies as a matter of public policy. As in *Meyer* and *Pierce*, *Griswold* rejected majoritarian moralism in the form of public policy as sufficient justification for the regulation of individual liberty or choice relating to private relations, including the liberty to reject procreation as an imperative of married life.

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 481–86.

<sup>70</sup> *Id.* at 486–88 (Goldberg, J., concurring).

<sup>71</sup> *Id.* at 499–502 (Harlan, J., concurring) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>72</sup> *Id.* at 502–07 (White, J., concurring).

<sup>73</sup> Ironically, in light of his *Poe* concurrence expressly invoking liberty under due process, in *Griswold* all the opinions did likewise except for Douglas’—who here also wrote for the Court. See *supra* note 49 and accompanying text (discussing Douglas’ opinion in *Poe*).

*Loving v. Virginia*. Two years later, in *Loving v. Virginia*,<sup>74</sup> the Court again confronted majoritarian moralism packaged as public policy, this time in the form of a state statute prohibiting the marriage of persons classified as white to persons classified as nonwhite.<sup>75</sup> Reflecting the facts thus presented, the justices in *Loving* focused on marital choices, rather than, say, educational choices. But in applying to these facts the underlying purpose of liberty-privacy as set forth in the *Pierce-Meyer* precedents, the *Loving* justices recognized that control over personal choices was the gravamen of the claims here much as they had been in those precedents.<sup>76</sup> Framing their holding in *Loving* accordingly, the justices concluded that the right to make decisions regarding race and marriage “resides with the individual and cannot be infringed by the State” to trump their choices, even through formally democratic majoritarian lawmaking.<sup>77</sup> This statute, the justices quickly noted, transgressed both the right of choice as applied to marriage, which is protected by the Due Process Clause, as well as the right to equality protected by the Equal Protection Clause.<sup>78</sup> On both counts, the justices held, the Fourteenth Amendment barred this state effort to regulate, on the basis of race, the personal acts and choices of individuals relating to sexual intimacy and affectional bonding within the specific factual context of marriage.<sup>79</sup>

*Eisenstadt v. Baird*. Next, in *Eisenstadt v. Baird*,<sup>80</sup> the justices once again faced a majoritarian regulation of individual liberty or choice aimed at private relations or interactions, reviewing a Massachusetts statute that criminalized the provision of contraceptive devices and information to unmarried adults—a prohibition that, technically, fit within the letter or facts of *Griswold* because it implicated non-marital recreational sexuality.<sup>81</sup> When a lecturer was convicted under the statute after handing a container of contraceptive foam to a woman after a public event, the state courts and federal district court upheld the conviction.<sup>82</sup> However, by that time, 1972, the Supreme Court could not square differential treatment of individual liberty-privacy rights based on marital status with other provisions of the Constitution, even though the record of this case did not establish the marital status of the foam recipient.

Two justices did not participate in the adjudication of this case; of the remaining seven, four joined Justice Brennan’s plurality opinion focusing on equality of “privacy” as it had been defined in *Griswold*, and thus on the Equal

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<sup>74</sup> 388 U.S. 1 (1967).

<sup>75</sup> *Loving*, 388 U.S. at 2.

<sup>76</sup> *Id.* at 12.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 11–12.

<sup>79</sup> *Id.*

<sup>80</sup> 405 U.S. 438 (1972).

<sup>81</sup> *Id.* at 440.

<sup>82</sup> *Id.*

Protection Clause of the Fourteenth Amendment.<sup>83</sup> Justice Douglas' concurrence joined the Brennan opinion but additionally focused on the public aspects of the lecture in the case and on the "narrower ground" of First Amendment protection of expression.<sup>84</sup> Justice White also concurred, but on the grounds that the state's restriction on distribution and information regarding contraceptives "burdens the constitutional rights of married persons to use contraceptives."<sup>85</sup> Once again, therefore, the majority of the participating justices had pointed explicitly to the liberty text of the Fourteenth Amendment's Due Process Clause as the substantive basis for their privacy holdings, this time in conjunction with the equality text of that same Amendment. And once again, though some justices focused on marital status, the facts and outcome of the case confirmed that marriage and procreation did not cabin liberty-privacy.

The obvious and key question after *Griswold*, which *Eisenstadt* answered in the negative, was "whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons" in privacy cases.<sup>86</sup> In concluding not, *Eisenstadt* clarified the relationship between privacy and equality with the following formulation, and with emphasis in the original: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>87</sup> With this open-ended formulation and outcome, *Eisenstadt* expressly proffers the facts before it as one example of "decisions" that "fundamentally affect" an "individual" and that therefore are protected by "liberty" to allow individuated choices over individual destinies.

The *Eisenstadt* justices thus continued the open-ended and flexible approach to liberty-privacy established jurisprudentially in *Pierce-Meyer*, described initially by Harlan's dissent in *Poe*, and then continued substantively in *Griswold* and *Loving*. In *Eisenstadt*, as in all the cases before it, the justices made no effort to cabin Due Process strictly to the facts before them, even as they focused on them to articulate and apply the larger principles and concerns over social destiny that had shaped the precedents from inception. With this formulation, the justices in *Eisenstadt*, like those in *Meyer* and *Loving*, again explicitly identified the "individual" as the bearer of liberty-privacy rights and, responding to the facts before them, this time they also stressed that liberty-privacy rights vested whether the individual is "married or single."<sup>88</sup>

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<sup>83</sup> *Id.* at 446–55.

<sup>84</sup> *Id.* at 455–60 (Douglas, J., concurring).

<sup>85</sup> *Id.* at 460–65 (White, J., concurring).

<sup>86</sup> *Eisenstadt*, 405 U.S. at 447.

<sup>87</sup> *Id.* at 453.

<sup>88</sup> *Id.*

Thus, in *Eisenstadt*, the equality implications of liberty-privacy came into full view, and the inter-linked centrality of the Fourteenth Amendment's Due Process and Equal Protection Clauses to this liberty-privacy-equality analysis became substantially clear. In *Eisenstadt*, a plurality of the Court recognized that the privacy right of its *Griswold* ruling must be acknowledged as vesting in all individuals, regardless of marital status, because to do otherwise would create an Equal Protection anomaly in which the constitutional rights of otherwise identically situated individuals would turn on the fortuity of marital status: If "privacy" is an individual "liberty" that the state can regulate only through narrowly tailored means upon its showing of a compelling state interest, what could be the justification for a blanket exclusion from that right of all except the formally married?<sup>89</sup> Thus, under the joint operation of *Griswold* and *Eisenstadt*, the federal Constitution was held effectively and literally to shield the sexual intimacies of cross-sex couplings from most kinds of state interference, even if the couplings were constituted by unmarried individuals avowedly for non-procreational purposes.<sup>90</sup> The following year, 1973, the Court in *Roe v. Wade*<sup>91</sup> again focused on the Fourteenth Amendment's protection of "liberty" to elaborate "privacy" as an individual right protecting non-procreational choices and acts that vested in all individuals independently of marital status—in this instance, individual women constituting a distinct social group.<sup>92</sup>

*Roe v. Wade*. More so than the other "privacy" cases, *Roe v. Wade*<sup>93</sup> involved control over bodies, women's bodies. In *Roe*, the Court considered a physician's challenge of a Texas ban on abortions and overturned the law as an unwarranted majoritarian intrusion into the reproductive choices of women opting for the termination of their pregnancies.<sup>94</sup> The ruling, written by Justice Blackmun, canvassed and relied both on the history of abortion's regulation and on the

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<sup>89</sup> The *Eisenstadt* majority apparently understood that no other answer could be given to this question. Indeed, to answer this question positively would impose a formal inequality based on the fortuities of shifting statuses regarding formal marriage in an increasingly socially mobile society; in such a society, the *Eisenstadt* justices seem to have recognized, the application of sexual regulations cannot hinge on status as single, divorced or married. Ultimately, the *Eisenstadt* justices—unlike the *Bowers* justices—seem to have appreciated the oddness of creating an Equal Protection anomaly by judicial mandate. See *infra* notes 166–70 and accompanying text (discussing *Bowers*' creation of precisely this type of anomaly).

<sup>90</sup> In both *Griswold* and *Eisenstadt*, the protected individual choice was to opt *against* procreation. See *supra* notes 67–73 and 80–89 and accompanying text (discussing *Griswold* and *Eisenstadt*).

<sup>91</sup> 410 U.S. 113 (1973).

<sup>92</sup> While in *Eisenstadt* the justices had addressed marital status and in *Loving* they had addressed inter-racial marriage, the facts in this case, prompted the high Court, for the first time in the *Griswold* line, to focus on women as a cognizable, though internally diverse, identity group.

<sup>93</sup> 410 U.S. 113 (1973).

<sup>94</sup> *Roe*, 410 U.S. at 120.

rulings outlined here, and concluded: “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty . . . as we feel it is, or . . . in the Ninth [Amendment] . . . , is broad enough to encompass a woman’s decision whether or not to terminate *her* pregnancy.”<sup>95</sup> In so doing, *Roe* made the meaning of “liberty” under the Due Process Clause yet clearer: whether by intrusion, prohibition or other means, legislative majorities in control of the state cannot simply subordinate the individual’s capacity for free choice in matters of physical intimacy or personal autonomy to serve their own policy preferences, even if invoked under the rubric of morality or moral choices; choices that “fundamentally affect” destiny reside with the individual.

As with the preceding liberty-privacy cases, the opinions in *Roe* (and its companion case) continued the ongoing discussion among the justices over the grounding of privacy in varied provisions of the Constitution. For instance, both Chief Justice Burger<sup>96</sup> and Justice Stewart<sup>97</sup> filed concurrences grounded specifically in the Fourteenth Amendment’s liberty provision while Justice Douglas filed a concurrence emphasizing both the Ninth and Fourteenth Amendments, as well as other provisions of the Constitution.<sup>98</sup> In this way, *Roe* (and its companion) confirmed what the prior cases seemed to establish in varied factual settings: that control over one’s body was an aspect of liberty protected specifically by privacy under the Due Process Clause of the Fourteenth Amendment, a protection buttressed by other textual provisions of the Constitution and established sources of sound interpretation. As set forth in the cases from *Griswold* to *Roe*, the liberty provision of the Fourteenth Amendment provided the chief, but not exclusive, constitutional bulwark against the state commandeering the intimate life or personal autonomy of an individual to serve nominally majoritarian policy preferences. Five years later the Court would confirm precisely this point emphatically in *Carey v. Population Services*.<sup>99</sup>

*Doe v. Commonwealth*. In the interim, however, three years after *Roe*, the Supreme Court, in a summary affirmance, left standing the conclusion of a three-judge special district court upholding Virginia’s sodomy statute as applied to homosexual acts.<sup>100</sup> In *Doe v. Commonwealth*, a district court rejected sexual minority privacy claims based on the traditionalist focus on marriage and procreation found in the *Griswold* line of cases—and in apparent disregard<sup>101</sup> of

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<sup>95</sup> *Id.* at 153 (emphasis added).

<sup>96</sup> 410 U.S. 113, 207 (Burger, C.J., concurring).

<sup>97</sup> *Id.* at 167 (Stewart, J., concurring).

<sup>98</sup> *Id.* at 209 (Douglas, J., concurring).

<sup>99</sup> 431 U.S. 678 (1977). See *infra* notes 105–13 and accompanying text (discussing *Carey*).

<sup>100</sup> *Doe v. Commonwealth*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff’d*, 425 U.S. 901 (1976).

<sup>101</sup> See *id.* at 1200–03.

the facts and outcomes in *Eisenstadt* and *Roe*.<sup>102</sup> But in its rush to judgment, the district court also had strained the limits of standing law under extremely questionable facts akin to those that had prompted the Supreme Court to avert a ruling on the merits in *Poe* fifteen years earlier.<sup>103</sup> The Supreme Court's summary affirmance of *Doe*'s outcome on direct appeal, and in light of its then-fresh rulings in *Eisenstadt* and *Roe*, had left unclear the basis for its action: whether the summary upholding of *Doe*'s result was based on the Supreme Court's implicit conclusion that the *Doe* plaintiff had lacked standing despite the trial court's finding to the contrary—much like they had done in *Poe* fifteen years earlier when they concluded that standing lacked there on similar facts—or whether the summary upholding affirmed the district judges' rejection on the merits of the substantive Due Process claim presented there, based on their application of the liberty-privacy precedents decided thus far, including *Eisenstadt* and *Roe*. Under these circumstances—which later were to become significant—*Doe*'s precedential effect on Fourteenth Amendment jurisprudence was left in doubt.<sup>104</sup>

*Carey v. Population Services*. The next year, 1977, *Griswold*'s equality implications emerged again in the case that emphatically confirmed the “compendious notion” of Due Process undergirding liberty-privacy jurisprudence since at least the 1920s, and that made clear that the traditionalist passages of the precedents were reflections of factual scenarios and were not to be mistaken as affirmative restrictions on the protection of sexual privacy as an aspect of personal liberty. In *Carey*, a New York statute criminalized, among other things, the provision of contraceptives to persons under the age of sixteen, defined as minors.<sup>105</sup> An out-of-state corporation advertising contraceptives in New York

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<sup>102</sup> In this way, *Doe* illustrates the capacity of judges to exalt the traditionalist passages beckoned by the facts of those cases to elide the expansive passages that convey their emancipatory conclusions and holdings. This manipulation of the precedents is made possible, of course, by their apparent ambivalence. See *supra* notes 8–12 and accompanying text (discussing ambivalence in liberty-privacy jurisprudence).

<sup>103</sup> The plaintiffs there had not been arrested for violations of the statute, nor did they present any evidence of threatened prosecutions under the statute. At most, the plaintiffs had a “generalized grievance” regarding the statute. See *Hardwick v. Bowers*, 760 F.2d 1202, 1207 n.5 (11th Cir. 1985) (describing the *Doe* standing facts).

<sup>104</sup> Invoking canons of judicial interpretation, the Eleventh Circuit took *Doe* as an affirmance based on a lack of standing rather than based on a rejection of privacy:

Where, as in the *Doe* case, the facts of the case plainly reveal a basis for the lower court's decision more narrow than the issues listed in the jurisdictional statement, a lower court should presume that the Supreme Court decided the case on that narrow ground. We therefore construe *Doe* as an affirmance based on the plaintiffs' lack of standing and not controlling in this case.

*Id.* at 1208. See also *infra* notes 118–36 and accompanying text (discussing the Eleventh Circuit's ruling in *Hardwick*).

<sup>105</sup> 431 U.S. 678, 682 (1977).

periodicals, together with other plaintiffs, challenged the statute's constitutionality.<sup>106</sup> Another special three-judge federal district court clearly understood the logic of privacy and equality established by *Griswold*, *Eisenstadt* and *Roe*, and, relying on those precedents, held the New York Act unconstitutional under both the First and Fourteenth Amendments.<sup>107</sup>

On direct appeal to the Supreme Court, the state in effect argued that *Meyer-Pierce*, *Griswold*, *Eisenstadt* and *Roe* could not possibly mean what they had jointly and sometimes literally said: that privacy vests in the individual, regardless of marital status or procreational choice. Emphasizing *Eisenstadt*, the Court's response identified a "fatal fallacy" in the state's argument: "*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects *individual* decisions in matters of childbearing from unjustified intrusion by the State."<sup>108</sup> The justices once again were unable to agree on a single rationale or source for the grounding of liberty-privacy rights in the Constitution's text or design, prompting concurrences by White, Powell and Stevens, as well as a dissent by Rehnquist—joined by no other justice—that decried the ruling and attempted to cast *Doe*'s summary affirmance the previous year as a ruling on the merits that "definitively established" the exclusion of sexual minorities from liberty-privacy protection as a matter of law.

Nonetheless, seven of the nine justices agreed that the contraception ban on minors—including, apparently, unmarried minors<sup>109</sup>—was unconstitutional under the protection of liberty afforded by the Due Process Clause of the Fourteenth Amendment, thus affirming once again the centrality of the "liberty" text to privacy analysis and the open-ended methodology employed to preserve individual autonomy over personal decisions that, in social context, are likely to fundamentally affect the course of a person's destiny. The Court's opinion in *Carey*, penned by Justice Brennan, begins with the following observation:

[T]he Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is a "right of personal privacy, or a guarantee of certain areas or zones of privacy." This right of personal privacy includes "the interest in independence in making certain kinds of important

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<sup>106</sup> *Id.* at 682 n.2.

<sup>107</sup> *Id.* at 681

<sup>108</sup> *Id.* at 687 (emphasis added).

<sup>109</sup> Though the recited facts are not specific on this point, it appears the statute regulated minors without regard to their individuated marital status, and the justices clearly did not conclude that the liberty-privacy rights of minors under *Griswold* and its predecessors or progeny were constitutionally contingent upon their actual or formal personal status as married or unmarried individuals. Thus, liberty-equality apparently vests fully and equally even in unmarried minors to protect them from becoming "mere creatures" of the state or majoritarian policy preferences. See *supra* note 44–45 and accompanying text (discussing this point in *Meyer-Pierce*).



decisions.” While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions “relating to marriage, procreation, contraception, family relationships, and child rearing and education.”<sup>110</sup>

This formulation underscores the one in *Eisenstadt* in several key ways, and reinforces the same basic points established or illustrated by the precedents since the 1920s.

*Carey*'s formulation made clear that liberty-privacy constituted a “zone” of constitutional protection for “certain kinds of important decisions” cohered by constitutional protection of individual autonomy over personal destiny rather than—to return to Harlan's memorable description—merely “isolated points pricked out” by judges in random reaction to the facts of cases or to specific text in the Bill of Rights.<sup>111</sup> As in *Meyer-Pierce* and *Eisenstadt*, this language further made clear that “the outer limits of this [protection] have not been marked by the Court,” but that among these “important decisions” are the exemplars presented by the facts of the earlier cases: “personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.”<sup>112</sup> Grounding itself firmly in the facts and outcomes of the liberty-privacy precedents, *Carey* thus made clear yet again that liberty-privacy was rooted in the Due Process Clause, applied equally to all individuals regardless of marital status—including (unmarried) minors—and encompassed a coherent “zone” of constitutional protection for “important decisions” of a “personal” nature.

Of course, *Carey*, like *Griswold* and its other progeny, exalted traditional expressions of these “important decisions”—most ubiquitously, marriage—but, notably, did so to conclude that individuals hold privacy rights *qua* individuals, and independently of age or marital status. Thus, marriage and procreation indeed were oftentimes salient in the facts or rationales of those cases, but not to their outcome, which oftentimes struck down majoritarian actions putatively designed to protect conventional forms of marriage and associated traditions from any potentially corrupting source. As with its predecessors since *Griswold*, *Carey* therefore points to marriage and its adjuncts as the basic and most ubiquitous historical paradigm for the constitutional protection of personal liberty in sexual relations, but not as its exclusive setting. As a whole, this line of cases shows that, as with all constitutional principles, liberty-privacy exists beyond the specific

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<sup>110</sup> *Carey*, 431 U.S. at 684–85 (citations omitted).

<sup>111</sup> See *infra* note 113 (elaborating this flexible, “compendious notion” of liberty-privacy).

<sup>112</sup> *Carey*, 431 U.S. at 684–85 (citations omitted).

examples or “dots” that have helped to elucidate it in various factual and legal settings.<sup>113</sup>

Nonetheless, these cases also might be said to present an arguably or apparently ambivalent normative mix reminiscent of *Lawrence*'s own equivocations.<sup>114</sup> On the one hand, the cases recognized that privacy rights must inhere in all individuals equally to avoid Equal Protection anomalies. On the other hand, the cases oftentimes highlighted marriage and procreation in the process. Technically, *Griswold* and progeny perhaps had merely recognized constitutional protection of discrete “decisions” and “choices” regarding contraceptive “use” and “information” or “distribution” and “access” and expressly had not “definitively answered the difficult question whether and to what extent the Constitution [protects private consensual sexual behavior] among adults.”<sup>115</sup>

Yet *Griswold* and its progeny (up to *Bowers*) also had made quite plain that privacy and equality worked in tandem and that marriage was an illustrative exemplar, but not a condition precedent, to Equal Protection of privacy rights. In other words, the privacy rights illustrated in *Griswold* and progeny by the marriage relationship inhered in all individuals equally, including (unmarried) minors, and applied to all choices, including those that were not procreational. The same can be said about the pre-*Griswold* majority rulings of the 1920s that, in the form of precedent, had set the stage for liberty-privacy jurisprudential developments since. Up to this point, and despite the apparent ambivalence embedded in the facts and texts of these cases, the law's ongoing development consequently pointed toward a fairly consistent and coherent elaboration of liberty-privacy that accepted and employed the social and personal benefits conventionally associated with traditional marriage as a basic framework for

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<sup>113</sup> See *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting). This very point was made express early on in the liberty-privacy jurisprudence in Harlan's *Poe* dissent when laying out his framework for constitutional analysis, specifically, of the “compendious notion” of liberty-privacy he elaborated there. See *id.* at 544. Canvassing the precedents and noting that they represented a “continuum” of protected individual choices rather than “isolated points pricked out” from the Constitution's text or other sources of law, Harlan explains that the law's “general language should not, therefore, be necessarily confined . . . [Instead] [a] principle, to be vital, must be capable of wider application than the mischief which gave it birth.” *Id.* at 543, 551 (citations omitted). To do otherwise in this jurisprudential context, he reasoned, “would surely be an extreme instance of sacrificing substance to form.” *Id.* This sort of flexible interpretative approach to liberty-privacy mirrors John Marshall's earlier dismissal of “narrow” or “strict” construction of federal power in favor of a “just” or “sound” approach designed to ensure that governmental powers are able to accomplish their “great objects,” including, in the instance of civil rights, the power to promulgate and enforce equality. See Valdes, *We Have Held*, *supra* note 11.

<sup>114</sup> See *supra* notes 1–24 and accompanying text (discussing the case law's apparent ambivalence).

<sup>115</sup> *Carey*, 431 U.S. at 695 n.17.

making the accepted joys of that paradigm equally accessible to all individuals regardless, respectively, of their age, gender marital status, or race.<sup>116</sup>

This apparently ambivalent mix of traditional instrumentalism and social emancipation was the substantive state of liberty-privacy-equality law as the *Bowers* litigation worked its way through the federal court system. This mixture gave tremendous discretion—even license—to newly-installed justices keen on backlash, because it facilitated a strategic emphasis on marriage and procreation (and a corresponding neglect of contrary outcomes, language and logic) to alter jurisprudential trajectories diametrically.<sup>117</sup> The final result in *Bowers* willfully exploited this mix; as a relatively early exercise of might in the context of growing kulturkampf, the *Bowers* justices scrambled these jurisprudential lines almost beyond recognition.

*Hardwick v. Bowers*. In this litigation Michael Hardwick challenged a Georgia statute criminalizing “any sexual act involving the sex organs of one person and the mouth or anus of another.”<sup>118</sup> This definition of “sodomy” effectively prohibited all penises in Georgia from coming into any contact with the mouth or anus of another anywhere in Georgia, regardless of the sex or marital status of the bodies to which the mouth or anus might belong. The statute, in other words, completely banned both cross-sex and same-sex versions of intimacy other than “traditional” sexual intercourse. Although the antiquated statute remained largely unenforced, Hardwick had been arrested under the statute when a police officer entered his bedroom early one morning, ostensibly serving an arrest warrant based on a traffic ticket that in fact already had been paid, and stayed there unobserved long enough to witness oral sex between two adult men.<sup>119</sup> As a result, Hardwick challenged the statute, and was joined in that case by friends who were a cross-sex couple intending to engage in similar forms of proscribed sex but “chilled” from doing so by the fear of incarceration triggered by their friend’s arrest under the statute.<sup>120</sup>

The facts of this case thereby raised the equality question again, and pointedly:<sup>121</sup> whether *Eisentstadt*’s conclusion that “the right of the *individual*,

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<sup>116</sup> See *supra* notes 74–113 and accompanying text (discussing the cases from *Carey* back to *Loving*).

<sup>117</sup> This occurred in *Doe*. See *supra* notes 100–04 and accompanying text (discussing *Doe*).

<sup>118</sup> *Bowers v. Hardwick*, 478 U.S. 186, 187 n.1 (1986)

<sup>119</sup> For a widely noted account, see PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 379–403 (1988).

<sup>120</sup> *Bowers*, 478 U.S. at 187 n.2. (“John and Mary Doe . . . alleged . . . that they had been ‘chilled and deterred’ from engaging in such activity by both the existence of the statute and Hardwick’s arrest.”).

<sup>121</sup> The question, again, was whether marriage and procreation epitomized or delimited the liberty-privacy rights of the Due Process Clause and other constitutional provisions. See *supra* notes 29–117 and accompanying text (discussing the prior case law).

married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” really included all “individuals” equally.<sup>122</sup> *Eisenstadt* had answered the question positively when the question involved non-marital status and the activity was non-procreational.<sup>123</sup> Later, both *Carey* and *Roe* also had answered this question in the affirmative when the social groups were “minors” and “women” and the activity also was non-procreational.<sup>124</sup> *Loving* previously also had answered likewise when the classification implicated “race” in the choice of coupling.<sup>125</sup> But leaning on *Doe*<sup>126</sup>—while blithely disregarding the significance of *Eisenstadt*, *Roe* and *Carey*—the state in *Bowers* argued that the answer must be different when the social group is called “homosexuals” and the non-procreational choice or act is labeled “homosexual sodomy.”<sup>127</sup> This substantive state of the law is what led the Eleventh Circuit to correctly decide the *Hardwick* case in 1985, by citing to the then-recent and contrary explanation in *Carey* of *Griswold* and its liberty-privacy successors,<sup>128</sup> when that court rejected the state Attorney General’s attempt to impose a constrictive—and contrary—interpretation of *Griswold* and its progeny

Foreshadowing the Supreme Court’s belated self-correction in *Lawrence*,<sup>129</sup> the Eleventh Circuit’s ruling in the *Hardwick* litigation reasoned that “[e]ven if *Doe* had been resolved on the constitutional grounds now” being raised by *Hardwick*, doctrinal developments since 1976’s summary affirmance provided surer analytical footing.<sup>130</sup> Specifically, the Eleventh Circuit cited *Carey*—decided the year after *Doe*—and its line of privacy-liberty companions to conclude that “[t]he Constitution prevents the States from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society.”<sup>131</sup> To arrive at this conclusion the Eleventh Circuit undertook a laborious analysis of the case law, focusing on *Griswold*, *Eisenstadt* and *Carey* to observe that “[t]he intimate association protected against state interference does not exist in the

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<sup>122</sup> *Eisenstadt*, 405 U.S. at 453.

<sup>123</sup> *Id.* at 454.

<sup>124</sup> *Carey*, 431 U.S. at 702; *Roe v. Wade*, 410 U.S. 113 152–53 (1973).

<sup>125</sup> See *supra* notes 74–79 and accompanying text (discussing *Loving*).

<sup>126</sup> See *supra* notes 100–04 and accompanying text (discussing *Doe*).

<sup>127</sup> *Hardwick v. Bowers*, 760 F.2d 1202, 1211–12 (11th Cir. 1985).

<sup>128</sup> *Id.*

<sup>129</sup> Perhaps the notion of “self-correction” must be qualified, given the ways in which *Lawrence* and its predecessors exude instrumentalism based on “traditional marriage” and related symbols, which enable backlashing judges and politicians to circumvent the proper emancipatory potential of liberty-privacy. See *supra* notes 1–24 and accompanying text (discussing the ambivalence and manipulation of this jurisprudence).

<sup>130</sup> See *Hardwick*, 760 F.2d at 1208–10.

<sup>131</sup> *Id.* at 1211.

marriage relationship alone”<sup>132</sup>—a point already explicitly underscored and factually illustrated by *Eisenstadt*, *Roe* and *Carey*. Continuing, the Eleventh Circuit noted that, “[t]he benefits of marriage can inure to individuals outside the traditional marital relationship. For some, the sexual activity in question [in *Hardwick*] serves the same purpose as the intimacy of marriage.”<sup>133</sup> The Eleventh Circuit thereby correctly concluded that liberty-privacy rights do not turn on social identities, or on marital status or procreational intent, as the precedents up to that point had uniformly held and illustrated.

The Eleventh Circuit then focused on the spatial dimensions of privacy in that case. Analogizing to *Stanley v. Georgia*,<sup>134</sup> a First Amendment case prohibiting the criminalization of in-home use of pornography, the Eleventh Circuit continued:

In addition to the resemblance between *Hardwick*’s conduct and the intimate association of marriage, we pay heed to the fact that he plans to carry out his sexual activity in private. . . . [T]he constitutional protection of privacy reaches its height when the state attempts to regulate an activity in the home.<sup>135</sup>

Presaging *Lawrence*, the Eleventh Circuit in this passage made plain that the spatial dimension of privacy was “in addition” to the substantive protection of “personal autonomy” in intimate associations; thus, the Eleventh Circuit correctly recognized that the spatial element of privacy, like the marital element, does not serve as a delimitation of the right to personal liberty under the Fourteenth Amendment but rather operates as a “plus” factor reinforcing constitutional protection of privacy-liberty rights against majoritarian regulation.<sup>136</sup>

Thus, the Eleventh Circuit in *Hardwick* correctly discerned that *Griswold* and progeny jointly had (1) employed “marriage” and “procreation” as illustrative exemplars, not exhaustive listings, of the intimate associations or personal choices through which individuals enjoy equal liberty-privacy rights regardless of social identity or procreational intent; (2) employed the home as the quintessential but not required space in which sexual liberty rights may be enjoyed in private; (3)

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<sup>132</sup> *Id.* at 1212.

<sup>133</sup> *Id.*

<sup>134</sup> 394 U.S. 557 (1969).

<sup>135</sup> *Hardwick*, 760 F.2d at 1212.

<sup>136</sup> As *Griswold* itself vividly illustrates, the Fourth Amendment’s protection of the home against unreasonable searches and seizures and other coercive intrusions always has been a central aspect of liberty-privacy under the Fourteenth Amendment. *Griswold*, 381 U.S. at 484. This “spatial” dimension of privacy is rooted expressly in that Amendment, while the “autonomy” dimension of privacy is rooted chiefly in the Fourteenth Amendment, as supplemented by other provisions of the Bill of Rights and related sources of constitutional analysis, such as “history and tradition.” *Id.* at 481–85. For a more detailed review of “history and tradition” as a source of constitutional analysis in liberty-privacy jurisprudence, see Valdes, *We Have Held*, *supra* note 11.

employed constitutional text in the Bill of Rights and the Fourteenth Amendment to ground liberty-privacy; and (4) averted the construction of an equality anomaly by recognizing the equality of singles, minors, women and nonwhites as individuals holding privacy rights on par with “traditional” married couples. In every key respect, the *Lawrence* ruling tracks the Eleventh Circuit’s *Hardwick* ruling, and in doing so the current Supreme Court clarifies that the Eleventh Circuit’s comprehension of liberty-privacy under *Griswold* and progeny in 1985 was—and always has been—correct. Through *Lawrence*, even the Supreme Court now admits that the Eleventh Circuit had substantively applied the controlling precedents from above—*Griswold*, *Loving*, *Eisenstadt*, *Roe* and *Carey*—to arrive at the analytically correct, and judicially principled, bottom line.

### 3. *Bowers v. Hardwick: Disestablishing the Equality of Liberty-Privacy*

When *Hardwick*’s case arrived at the steps of the Supreme Court in the mid-1980s, the consequences of backlash kulturkampf in the politics of federal judicial appointments during the previous decade or two came sharply into view: four of the five justices in the bare *Bowers* majority were installed into power by politicians explicitly voicing their use of judicial appointments to cabin civil rights and expand “states rights” through strict construction of federal powers when they are deployed to help protect individual rights and liberties against encroachment by local and “traditional” elites in control of state and local governments.<sup>137</sup> These appointments generated a scandalously unsound decision that immediately and increasingly became notorious as a classic venting of societal and judicial homophobia under the guise of law. To do so, the *Bowers* majority undertook three principal maneuvers: (1) re-framing the plaintiff’s complaint to produce a focus on “homosexual sodomy” despite the statute’s application to cross-sex sodomy; (2) invoking “history and tradition” as a block to “judicial activism” in liberty-privacy jurisprudence; (3) centering the need for judicial deference to “democracy” and “presumed” moral beliefs enacted into law through majoritarian politics. Along the way, the five justices who ruled the day in *Bowers* also created the jurisprudential anomaly—entrenching formal inequality based on sexual orientation—that *Lawrence* now ends. Indeed, the five justices in *Bowers* used that case to attempt to bring a halt to, if not a reversal of, liberty-privacy cases under the Fourteenth Amendment’s Due Process Clause, which stretch back for the better part of a century since *Meyer*.

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<sup>137</sup> The four were Burger (Nixon), Rehnquist (Nixon), Powell (Nixon) and O’Connor (Reagan). For a review of judicial appointments and backlash kulturkampf, see Valdes, *Cultural Warriors*, *supra* note 13, at 1440–43 and sources cited therein (on same). See also HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988). For a remarkable insider’s account of the appointment to the Court of its current Chief Justice, see generally JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* (2002).

To get there, four members of the Court joined an opinion by Justice White framing the case in two parts, both of which are key to the jurisprudence of backlash that *Bowers* helped set into motion. The first part centered on cultural notions of homosexual identity, apparently harbored by the quintet of justices in the *Bowers* majority, and formed the core of their conclusions. The second trained attention on institutional concerns over judicial legitimacy when interpreting the Constitution in a society dedicated to democracy, and labors to provide additional rationale for their conclusions. The first enabled the justices to bootstrap into law their social perceptions and prejudices along the identity-rooted fault lines of the culture wars, whereas the second became a textbook example of, and precedent for, future jurisprudential plays of this sort in pursuit of backlash kulturkampf.<sup>138</sup> The first part of the *Bowers* ruling focused itself on whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,” and the second part focused itself on “the limits of the Court’s role in carrying out its constitutional mandate.”<sup>139</sup>

a. *The Justices’ Opinions in Bowers: The Arrest of the Law*

Justice White’s majority opinion began by re-describing the *Griswold* line of precedents, aiming specifically to “register [those five justices’] disagreement” with the Eleventh Circuit’s understanding of those cases.<sup>140</sup> Announcing that “the reach of this line of cases was sketched in *Carey*,” the *Bowers* justices endeavored to mark *Carey* itself as the final articulation, and final “reach,” of liberty-privacy under due process jurisprudence.<sup>141</sup> But rather than describe the due process precedents as *Meyer*, *Griswold*, *Eisenstadt* and *Carey* had—as a coherent yet flexible whole based chiefly on constitutional language that expressly did not attempt to delimit or mark the “outer limits” of liberty-privacy—the *Bowers* majority summarily recast them, in brief descriptive capsules, as atomized examples of discrete “decisions” and “isolated points” (or “dots”) to which protections had somehow attached, perhaps through mere judicial whim.<sup>142</sup> In a fairly aggressive effort to arrest the further development of liberty-privacy law, the *Bowers* quintet sought to deny what *Carey* and other opinions already had spelled out in express terms more than once: that “the reach of the line of cases” from *Meyer-Pierce* through *Griswold* and up to *Carey* were as yet unmarked, and that the factual examples of the precedents demonstrated, but did not delimit, this substantively coherent jurisprudential conception—“privacy”—based on the

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<sup>138</sup> See *supra* notes 13–18 and accompanying text (discussing the culture wars); see also *infra* Part II.A.3.a (discussing the *Bowers* majority’s identity-driven approach in their opinion).

<sup>139</sup> *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

<sup>140</sup> *Id.*

<sup>141</sup> See *id.*

<sup>142</sup> See *id.* at 190–91.

Fourteenth Amendment's due process liberty text and other recognized sources of constitutional law.<sup>143</sup>

After that brief (and obligatory) acknowledgement of precedent, the White opinion summarily (and disingenuously) asserted the following:

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . . No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . . Moreover, any claim that these cases nevertheless stand for [this kind of] proposition . . . is unsupportable.<sup>144</sup>

In the paragraphs following these identity-inflected assertions, the *Bowers* quintet generously sprinkled their opinion with other conclusory—and factually or substantively erroneous—assertions regarding history, tradition and precedent.<sup>145</sup> By the time they were done with the first part of their opinion, the substantive issues presented by that case—at least as the quintet had chosen to fix them in identity-based terms—had raised, in their view, “at best, facetious” claims to equal privacy and liberty.<sup>146</sup>

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<sup>143</sup> *Bowers*, 478 U.S. at 190.

<sup>144</sup> *Id.* at 190–91.

<sup>145</sup> For an early and notable example of legal scholarship documenting the historical errors asserted by the majority and the Burger concurrence, see Anne Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L. J. 1073 (1988).

<sup>146</sup> *Bowers*, 478 U.S. at 194. Then, in a maneuver that has come to characterize backlash jurisprudence, the *Bowers* justices asserted in the second part of the opinion that fears of institutional legitimacy also prevented their recognition of equal privacy rights: “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Id.* With this assertion, the *Bowers* justices strongly implied that liberty-privacy was an illegitimate judicial fabrication rather than an individual right rooted “in the language or design of the Constitution.” They sought to position themselves and their handiwork in *Bowers* as restrained—and hence “principled”—adjudication in contrast to the “liberal” precedents they had inherited. To do so they worked in that opinion to erase the steady grounding of privacy analysis squarely in the liberty text of the Fourteenth Amendment, despite the uniformity of precedents to the contrary. See *supra* Part II.A.2 (discussing the *Griswold* line of cases).

Later in their opinion, the majority turns to privacy's spatial dimension as it occurred in that case—the invasion of the bedroom. Rebuffing the spatial dimensions of privacy with equal alacrity, the *Bowers* quintet casually rejected *Stanley*'s relevance with the formalistic note that *Stanley* had been “firmly grounded in the First Amendment,” whereas “homosexual sodomy” was not similarly grounded in the text or design of the Constitution because, well, they themselves had just declared so a few paragraphs earlier in that remarkable opinion. *Bowers*, 478 U.S. at 195–96. Thus, the only way that the spatial dimension of privacy under *Bowers*' facts could be sustained, the quintet then asserted, was to confer special rights on homosexual



Tracking his colleagues' identity-driven (re)framing of the issues,<sup>147</sup> Chief Justice Burger not only joined the White opinion but also filed a separate concurrence "to underscore [his] view that in constitutional terms there is no such thing as a fundamental constitutional right to commit homosexual sodomy."<sup>148</sup> After much flipping and flopping, Justice Powell also concurred under the apparent sway of a Mormon clerk with an avid interest in the outcome of this case<sup>149</sup> but with a proviso that the Eighth Amendment's prohibition against cruel and unusual punishment might proscribe severe sentences for private, consensual acts of oral or anal sex.<sup>150</sup>

The four remaining justices dissented through an opinion authored by Justice Blackmun, objecting strongly to the majority's single-minded obsession with social identities while gliding over the facially sweeping provisions of the statute as written, and generally echoing the Eleventh Circuit's analysis and holding.<sup>151</sup> With similar objections, Justice Stevens also filed a separate dissent on behalf of himself and of Justices Brennan and Marshall, noting explicitly that *Bowers'* judicial approval of the selective application of this facially sweeping criminal statute produced a serious equality anomaly under the Equal Protection Clause of the Fourteenth Amendment. The Stevens dissent presciently warned that because privacy rights would henceforth be deemed formally unequal based on the sex or sexual orientation of the bodies involved in a coupling, *Bowers* created a glaring and logically untenable separation of liberty-privacy rights already explicitly recognized for all "individuals" in *Meyer*, *Griswold* and their progeny—an undue and belated jurisprudential anomaly in which identical acts are to be deemed constitutionally protected or not based solely on classifications like "heterosexual" or "homosexual."<sup>152</sup> With the *Bowers'* majority's decision, the meaning of "privacy" under "liberty" was thrown wide open to pave the way for a reordering of the jurisprudential developments since 1923, which most recently

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at-home activity "by [judicial] fiat." *Id.* at 195. In their own words, and without any sense of irony, those justices explained that "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest and other sexual crimes even though they are committed in the home." *Id.* at 195–96. In so doing, they also overlooked the deeply rooted relevance of privacy's spatial dimension in U.S. law under both the Fourteenth and Fourth Amendments; landmark cases like *Griswold* explicitly rely on both. See *supra* notes 69–73 and accompanying text.

<sup>147</sup> See *supra* notes 137–46 and accompanying text (discussing *Bowers'* identity-based issue framing).

<sup>148</sup> *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

<sup>149</sup> The clerk's interest and influence in the outcome of Michael Hardwick's case are recounted in Tribe, *supra* note 7, at 1953–55 (citing to private memorandum between Powell and the clerk). See also JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521–24 (1994) (describing Powell's oscillation and decision in *Bowers*).

<sup>150</sup> *Bowers*, 478 U.S. at 197 (Powell, J., concurring).

<sup>151</sup> See *id.* at 199 (Blackmun, J., dissenting).

<sup>152</sup> *Id.* at 214 (Stevens, J., dissenting).

had culminated in *Carey*'s rather plain explication of the liberty-privacy "zones" protected by the Due Process Clause.

As was clear to many observers back then,<sup>153</sup> and has become even more so in the intervening years, those five majority justices used *Bowers* mainly to bootstrap their own prejudices into the annals of constitutional law and to help engineer a rollback in the evolution of liberty-privacy jurisprudence specifically, and of civil rights law in general. As *Lawrence* has finally acknowledged, but as scholars pointed out immediately, the majority justices asserted false "history" to justify their personal predilections in that case.<sup>154</sup> As the *Bowers* dissenters had pointed out, rather than adjudicate justiciable issues as framed by the litigants and record before them, those five justices willfully reached out from their privileged perches to recycle homophobic superstitions from the witch-hunt days of our nation and its antecedents. Brushing aside *Griswold* and *Carey*, and claiming in conclusory fashion that Michael Hardwick's claim was "facetious" based on personal and societal prejudice, the *Bowers* quintet threw the evolution of privacy jurisprudence into disarray and erected the equality anomaly that *Eisenstadt* and the Eleventh Circuit had averted. For nearly two decades the justices in the *Bowers* majority managed to transmute their personal views and values into the form of constitutional law in order to arrest the development of liberty-privacy in ways that can never be fully measured—and all without any serious rebuke from the coequal branches of government, which likewise are in the grips of this kulturkampf.<sup>155</sup> Thus, apart from the scholarly scorn that the majority opinion and the concurrence so quickly and widely attracted,<sup>156</sup> the Stevens and

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<sup>153</sup> Specifically, Justice Stevens spelled it out back in 1986. See *infra* Part II.A.3.b (discussing the Stevens dissent in *Bowers*).

<sup>154</sup> See, e.g., Goldstein, *supra* note 145. Embraced mostly by backlashes, the *Bowers* ruling had been greeted with overwhelming skepticism or worse for this and similar reasons. As the *Lawrence* majority expressly noted: "In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions." *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). For one such contemporaneous criticism, see Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987) (attributing *Bowers* to the personal predilection of the quintet making that decision). See also Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987) (comparing *Bowers* to its liberty-privacy predecessors); Nan Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 53 (1992) (critiquing the identity politics of the majority opinion).

<sup>155</sup> See *supra* notes 13–21 and accompanying text (describing the culture wars).

<sup>156</sup> The *Bowers* maneuvers were of course recognized for their palpable willfulness from the outset. See, e.g., Stoddard, *supra* note 154. This over-reaching is epitomized by plainly false "history and tradition" intended to buttress those judges' imposition of their own policy preferences. See, e.g., Goldstein, *supra* note 145. It thus was an early example of backlash activism. See *supra* note 18. The extent of this widespread scorn and skepticism is reflected in the frank acknowledgement given to these reactions by the justices in *Lawrence*. 539 U.S. at 576.

Blackmun dissents stood as the principal challenge to the constitutional legitimacy of the backlash politics that *Bowers* had empowered and epitomized.

b. *The Stevens Dissent in Bowers: Getting the Law Right*

In *Bowers*, Justice Stevens succinctly observed the following:

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it . . . a proper analysis of its unconstitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing it will only enforce the law against homosexuals?<sup>157</sup>

In answering these two plain questions, Justice Stevens' dissent notes in turn that the *Griswold* line of cases makes two propositions "abundantly clear":

First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons. . . . The essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt* and *Carey*, surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.<sup>158</sup>

In this two-step application of the liberty-privacy precedents to the *Bowers* facts, Stevens necessarily confronts that each case of the *Griswold* line had involved legislation embodying the presumed (or even actual)<sup>159</sup> moral choices of majorities in Connecticut, Massachusetts, Texas, New York and other states. But the liberty-privacy interest under the protection of the Fourteenth Amendment did not permit those majoritarian choices to be imposed first on "married persons," then on "people of color," then on "unmarried individuals," then on "women" and, finally, on "minors." Consequently, concluded the Stevens dissent, "it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by" its sweeping sodomy statute: liberty-privacy jurisprudence already

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<sup>157</sup> *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting).

<sup>158</sup> *Id.* at 216–18 (citations omitted).

<sup>159</sup> See *supra* note 13 (discussing *Romer*).

stood in the way.<sup>160</sup> To make the point clear, the Stevens dissent noted that Georgia expressly conceded that “application of the statute to a married couple ‘would be unconstitutional’ because of the ‘right of marital privacy’ as identified by the Court in *Griswold*.”<sup>161</sup>

Stevens then continued to the second step of this analysis:

If the Georgia statute cannot be enforced as it is written—if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia’s citizens—the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interests in “liberty” that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.<sup>162</sup>

The Stevens dissent thereby brings out the two constitutional im/possibilities promoted by the *Bowers* majority:

The first possibility is plainly unacceptable. Although the meaning of the principle that “all men are created equal” is not always clear, it surely must mean that every free citizen has the same interest in “liberty” that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. . . . The Court has posited . . . “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” . . . [However,] the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.<sup>163</sup>

As the Stevens dissenters were subtly noting, it took five members of the nation’s highest court to “single out” sexual minorities for “special disfavored treatment” in 1986.<sup>164</sup> To do so, the *Bowers* quintet had to suffer the construction of the equality anomaly. Indeed, it is no coincidence that *Lawrence* not only closes this anomaly and discards *Bowers* in definitive terms, but that it also does so with an affirmative embrace of the “proper analysis” set forth so simply in

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<sup>160</sup> *Bowers*, 478 U.S. at 218 (Stevens, J., dissenting).

<sup>161</sup> *Id.* at 218 n.10.

<sup>162</sup> *Id.* at 218.

<sup>163</sup> *Id.* at 218–19 (citations omitted).

<sup>164</sup> *Id.* at 219.

Stevens' *Bowers* dissent.<sup>165</sup> In sum, as the three justices who signed onto the Stevens dissent incisively warned, and as the Attorney General of Georgia conceded on the record, the combined effects of *Griswold*, *Loving*, *Eisenstadt*, *Roe* and *Carey* prevented the logic that *Bowers* necessitated: constructing a special constitutional cordon around "married persons" and even "unmarried persons" (including "minors" and "women") unless those same persons also were classified as "homosexuals" or identified as such.

c. *The Bowers Effect: De Jure Inequality and the Equality Anomaly*

After *Bowers*, therefore, only same-sex intimacy was clearly an open target for "unwarranted intrusions." After *Bowers*, the only species of sodomy that a state could constitutionally target was the same-sex variety. After *Bowers* and until *Lawrence*, a conscientious state legislator wanting to enact anti-sodomy statutes would logically limit them to the only classification of persons and acts left out in the cold by *Bowers*' application of *Griswold* and its progeny, and by its conclusory re-interpretation of the Fourteenth Amendment. After *Bowers*, a responsible though heterosexist state legislature would seek to enact laws precisely akin to the one in force in Texas until *Lawrence*.<sup>166</sup>

This anomalous reconfiguration of substantive liberty-privacy law in *Bowers*' wake is made clear not only by the Stevens dissent and the Georgia Attorney General's concession, but also by the ways in which lower courts interpreted privacy law during the seventeen years between *Bowers* and now. An illustrative example is *Schochet v. Maryland*,<sup>167</sup> decided in 1990 under the Supreme Court's liberty-privacy cases outlined here, including *Bowers*. In *Schochet*, the Court of Appeals of Maryland reversed the conviction of a single man, holding on the basis of those cases that the state statute criminalizing fellatio was unconstitutional as applied to private and noncommercial sexual acts between consenting but unmarried *heterosexual* adults.<sup>168</sup> Indeed, when the State of Georgia attempted to enforce that statute against married persons a few years after *Bowers*—in 1989—the Georgia state courts invoked *Griswold* to invalidate the

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<sup>165</sup> In *Lawrence*, the majority concluded that "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here." *Lawrence*, 539 U.S. at 578.

<sup>166</sup> See TEX. PENAL CODE ANN. § 21.06(a) (2003). This sodomy statute predates *Lawrence* as well as *Bowers*, having been enacted in 1973. In carving out a legal ghetto for the containment and suppression of sexual minorities, the Texas legislature thus anticipated the *Bowers*' justices similar act of marginalization.

<sup>167</sup> 580 A.2d 176 (Md. App. 1990).

<sup>168</sup> *Id.* at 177 (emphasis added). For a more comprehensive survey of life for sexual minorities under *de jure* heterosexist supremacy in the years around and immediately after *Bowers*, see Valdes, *Cultural Warriors*, *supra* note 13, at 1423 n.57 and sources cited therein (surveying the social and legal condition of sexual minorities in the years before and after the *Bowers* ruling).

very same sodomy statute embraced by the *Bowers* justices in 1986.<sup>169</sup> By the end of the 1980s, as these and similar cases make clear, *Bowers*' equality anomaly had come into full bloom. And with it came a free license to the tyranny of majoritarian rule that had been judicially issued from the very portico that promises "Equal Justice for All."<sup>170</sup>

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<sup>169</sup> In *Moseley v. Esposito*, Georgia Superior Court Judge Robert Castellani set aside a conviction for sodomy between married couples and granted a writ of habeas corpus to secure the release of a married man imprisoned under the same statute challenged in *Bowers*. Citing *Bowers*, Judge Castellani proclaimed that "the petitioner's right to marital and domestic privacy has been violated by the sodomy law as applied to him." See Final Order, *Moseley v. Esposito*, Civ Action No. 89-6897-1, Ga. Sup. Ct., DeKalb at 4-5 (Ga. Sept. 6, 1989) (copy on file with author).

<sup>170</sup> The standard judicial line to *de jure* discrimination in the *Bowers* period is illustrated by the infamous opinion in *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987), an Equal Protection challenge to the FBI's anti-gay personnel policies. Referring to *Bowers*' blessing of Georgia's sodomy statute as applied to Michael Hardwick, the *Padula* court declared that "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.* at 103. If the *Bowers* justices were willing to bless the most "palpable discrimination" possible against sexual minorities, how could lower court judges do any less? Thus, *Bowers*' blessing of homophobic criminal statutes under substantive Due Process became an increasingly routine justification for blessing homophobic policies and practices under Equal Protection. That convenient bottom line was repeated time and again in various factual and doctrinal scenarios until federal courts became a recognized hostile environment for sexual minorities, and for civil rights claimants more generally. For a more complete discussion of this and related cases, see Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 384 (1994) (reviewing the cases blessing homophobic laws and policies based on the distinction between status and conduct). The historical (and current) vulnerability of members of sexual minorities to *de jure* discrimination is compiled in *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989); see also Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991) (describing tax code disparities based on the formal exclusion from marriage); Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986) (elaborating an early effort to dismantle the web of detriments flowing from the formal exclusion from marriage).

Over time, and in a remarkable display of federalism as anti-subordination practice, sexual minority advocates went before state courts to plead claims based on state constitutions and laws. See, e.g., Valdes, *Cultural Warriors*, *supra* note 13, at 1435 n.102-07 and sources cited therein (discussing state courts and battles in the culture wars). With increasing social activism and sophistication, sexual minorities accumulated cultural and legal gains in the form of legal reform and social accommodation despite the onslaughts of cultural warfare—a progression that *Lawrence* notes, and upon which it relies, to dispose of *Bowers* as relevant or viable law. See *Lawrence*, 539 U.S. at 570-77 (reviewing social and legal developments since *Bowers*). Like *Lawrence* itself, many of these gains are due, at least in part, to the efforts of the multifaceted sexual minority movements that arose in response to *Bowers* and other sources of societal homophobia. See *infra* note 197 and sources cited therein (discussing sexual minority activism before and after *Bowers*).

Thus, the “real” Equal Protection problem in *Lawrence* was not simply Texas’ statutory classification but the Court’s self-inflicted anomaly in *Bowers*, which virtually dictated that precise line of legislative classification. O’Connor’s concurrence focuses entirely on the former without accounting at all for the latter: when Texas outlawed specifically same-sex “sodomy” while giving cross-sex sodomy free rein in 1973, it was of course in gross violation of both the literal text and social values of the Equal Protection Clause; yet, in all fairness, by 1986, that was all left open to it by privacy’s fitful journey from *Griswold* to *Bowers*.<sup>171</sup> Unless the current justices simply intended to use *Lawrence* as a tactical opportunity to personally endorse and reiterate *Bowers* and further entrench the anomaly it had spawned, which they apparently could not bring themselves to do with a straight face, the substantive challenge facing the Court was this: whether to ratchet down constitutional protection for cross-sex relations on the basis of *Bowers*, or to ratchet them up for same-sex relations on the basis of *Griswold*, *Eisenstadt* and *Carey*. Either way, the effect would be to equalize the formal status of the majority and minority under the law, and to end the glaring anomaly bestowed by *Bowers*’ juxtaposition against *Griswold*, *Eisenstadt* and *Carey*. *Lawrence* thereby comes into view as an equality case in some irreducible and inevitable ways.

With this background in focus, it becomes clear that the “privacy” versus “equality” tensions embedded in the *Lawrence* opinions stem quite directly from the situation that *Bowers* set up and that *Eisenstadt* and *Carey* had avoided: if after *Griswold* and progeny the Constitution protected marital “privacy” because the acts taken within that relationship were deemed core identity-building choices and practices, then a withholding of Equal Protection of the law from similarly situated but unmarried persons would violate the Equal Protection Clause of the Fourteenth Amendment. And if the right acknowledged in *Griswold* therefore vests in all individuals, the next question of course becomes whether “all” really means all. The Eleventh Circuit in *Hardwick* had no difficulty in seeing the analytical pitfalls thus presented and avoided them by simply saying that, under the precedents at that time, all meant all. But the five members of the Supreme Court in *Bowers* who ruled to the contrary blinded themselves to those pitfalls, thereby giving rise to the anomaly faced finally in *Lawrence*. This was the jurisprudential thicket into which *Lawrence* self-consciously strode.

#### 4. *Ending the Anomaly: Restoring the Equality of Liberty-Privacy*

Under these circumstances, the granting of certiorari was bound to be hugely intriguing to all observers. Having agreed to hear *Lawrence*, the Court effectively required itself to confront the anomaly that some of its predecessors had foisted on the nation in 1986. In electing to face this situation, the current justices had

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<sup>171</sup> See *supra* note 166 (on the origins and enactment of the Texas statute).

two initial choices: first, simply to look the other way and ratify the embarrassing anomaly explicitly or, second, to revisit the juxtaposition of the key precedents that had created it. If the latter, the Court encountered a secondary set of choices: which of the key precedents would it revisit, and how? In these secondary choices, the *Lawrence* justices either would have to revisit *Griswold*, *Eisenstadt* and *Carey* to retract (some of) the constitutional immunity recognized in those cases for cross-sex relations and render them “equally” vulnerable to state regulation on par with same-sex relations, or alternatively, revisit *Bowers* to make same-sex relations equally “private” and invulnerable to state regulation on par with cross-sex relations. If the anomaly was to end at all, either cross-sex regulations must be adjusted downward to *Bowers*’ embrace of majoritarian moralism or same-sex regulations finally must give way to the privacy rights recognized in *Griswold* and *Eisenstadt* as vesting in all individuals. This was, in fact, the main point of the Stevens dissent in *Bowers*.<sup>172</sup>

All three of these possible choices came freighted with complexity, but it seems that the former was the least likely because the acute and increasing untenability of *Bowers*’ equality anomaly was apparent to all five justices who joined in the majority opinion. This recognition is indicated in their brief and cryptic response to O’Connor’s concurrence, in which Kennedy’s opinion for the Court explains that an Equal Protection analysis could not suffice under the circumstances of the case. Without providing specific reasoning, the Court responded to O’Connor by noting: “That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity.”<sup>173</sup> Two reasons, one implicit and one explicit, compelled that conclusion: the implicit one was avoiding aggravation of the equality anomaly, to which the *Lawrence* Court alludes, and the explicit one was acknowledging the social function of sodomy statutes, which *Lawrence* incisively details.<sup>174</sup> *Lawrence* effectively required the Court to declare conclusively whether the anomaly created by *Bowers* in light of *Griswold*, *Eisenstadt*, *Roe* and *Carey* “really” represented the substance of constitutional law. If so, Texas was right. If not, something about the Court’s own handiwork was wrong.

It therefore should be no big surprise that *Lawrence*’s main potential benefits correspond to its dismantlement of the *Bowers*’ regime. Most pertinent to this

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<sup>172</sup> See *supra* Part II.A.3.b (discussing Stevens’ *Bowers* dissent).

<sup>173</sup> *Lawrence*, 539 U.S. at 574–75.

<sup>174</sup> “Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.” *Id.* at 575. In other words, an Equal Protection holding would invite state actions precisely like Georgia’s facially neutral statute in *Bowers*, which had applied across the board despite the *Bowers*’ majority’s obsession with the same-sex variety. With that scenario before them, the sound and efficient course of action for the justices in *Lawrence* would be to do now what an Equal Protection ruling would require of them later.



outcome of course is the ending of the equality anomaly. But in so doing, the *Lawrence* justices more broadly have also vindicated the “compendious notion” of privacy displayed uniformly in the facts and outcomes of the liberty-privacy cases beginning in 1923 and denominated as such by Harlan’s *Poe* dissent in 1961. Moreover, in so doing, the *Lawrence* majority substantively and methodologically vindicated the flexible Due Process analysis that Harlan’s *Poe* framework had derived from the then-existing precedents, and which subsequent judges had employed to avoid literalistic pronouncements until *Bowers*’ abrupt interruption arrested further developments in liberty-privacy.<sup>175</sup> By wholly repudiating *Bowers*, *Lawrence* manages to breathe new life into both the Fourteenth Amendment as a viable constitutional provision and the Supreme Court as an institution capable of “building” due process jurisprudence coherently based on earlier liberty-privacy precedents.

If we forget about all of this quite relevant background, perhaps we can make sense of O’Connor’s insistent focus on equal protection in her *Lawrence* concurrence. But because O’Connor midwived the anomaly’s birthing in 1986, we must suppose that she personally remembers and knows about this background and its pitfalls.<sup>176</sup> Perhaps one day we will receive an explanation from Justice O’Connor for this odd maneuver in the same way that we received a belated explanation from Justice Powell for the odd result in *Bowers*.<sup>177</sup> For the moment, however, and in the midst of *Lawrence*’s apparent ambivalence, we can celebrate one solid gain both for the social good of sexual minorities and for the institutional legitimacy of the Supreme Court: *Lawrence* ends the glaring anomaly that *Bowers* created.<sup>178</sup>

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<sup>175</sup> See *supra* notes 50–65 and accompanying text (discussing Harlan’s *Poe* dissent).

<sup>176</sup> O’Connor was part of the *Bowers* majority in 1986 that constructed the Equal Protection anomaly described above. See *supra* Part II.A.3.a (discussing the *Bowers* majority and their opinion in that case).

<sup>177</sup> Even the story behind the *Bowers* decision made it increasingly a laughable artifact undermining the institutional legitimacy of the Court. The now-famous story begins with Justice Powell’s vote-switch to uphold the Georgia statute and his absurd rationale for that change of mind after voting the other way during the judge’s conference on the case—including, almost incredibly, his sincere belief that he had never met a homosexual during his life when, in fact, one of his law clerks at the time was a gay man. See JEFFRIES, *supra* note 149, at 521–24 (describing the decision); MURDOCH & PRICE, *infra* note 197, at 307–08. The story concludes, of course, with Powell’s courageous and candid post-retirement admission before a law student forum at New York University that he had erred in that fateful last-minute vote switch. See Aaron Epstein, *Ex-Justice Says He Erred in ’86 Gay Ruling*, MIAMI HERALD, Oct. 26, 1990, at 19A; *Ex-Justice Powell Regrets ’86 Ruling on Gays*, S.F. CHRON., Oct. 30, 1990, at A4; Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT. L.J., Nov. 5, 1990, at 3.

<sup>178</sup> Moreover, in the process of doing so, *Lawrence* further made plain that the state may unduly deprive “liberty” through discriminatory laws and selectively applied policies as well as through a blanket imposition of oppressive regulation on all: state action deprives persons of “liberty” either through a blanket impingement of rights and freedoms, such as those associated

### III. LESSONS FROM *LAWRENCE*: SOCIAL STRUGGLE, INSTITUTIONAL PREDICAMENT AND DOCTRINAL RE/CONSTRUCTION

Why now? Why, in the midst of unabated kulturkampf, should *Lawrence* come down as it did? Many possible reasons have been proffered,<sup>179</sup> and will continue to be. Until we hear credible explanations from institutional insiders,<sup>180</sup> we are left to speculation, inference, and the like. Here, then, I simply add my own to supplement others'. As with the other portions of this Article, the effort here is to help construct meanings for *Lawrence* that not only make social sense but also make for social justice.<sup>181</sup>

#### A. Cultural Evolution and Institutional Predicament

Before *Lawrence*, a growing crisis of near-cynicism had been inspired by the justices' pliant pose, if not outright complicity, in the face of intensifying kulturkampf. The crisis fed on a growing perception that the current justices had shown a remarkable incapacity to fulfill traditional notions of principled adjudication, and instead had set out to inscribe an "anti-antidiscrimination agenda" onto the pages of the U.S. Reports.<sup>182</sup> This sense of heightened judicial politicization in turn helped to prompt the emergence of a scholarly field based on the "attitudinal model" of adjudication—a model that tracks the ideology of judicial acts with the ideology of judicial actors to document an unmistakable—perhaps shocking—correlation between the two. The findings bring into open question whether any distinction in fact exists between "law" and "politics" even though much of judicial legitimacy in the United States depends on the perceived and actual existence of precisely this distinction.<sup>183</sup> Thus, by the end of the

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with "privacy," or through strategic or selective deprivations that impinge on "equality" interests. And these deprivations, *Lawrence* shows, take place whether the deprivation is deemed "fundamental" or not and regardless of the "level of scrutiny" described or applied. See generally Hunter, *Living with Lawrence*, *supra* note 7, at 1116–17.

<sup>179</sup> For a prominent and thoughtful example, see Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare not Speak its Name*, 117 HARV. L. REV. 1893 (2004).

<sup>180</sup> The main example most pertinent to this Article, of course, is Powell's rueful reflections on his decisive vote in *Bowers* after retiring from the Court. See *supra* note 177.

<sup>181</sup> See *supra* note 24 and accompanying text (discussing the limited but focused purposes of this Article).

<sup>182</sup> See Rubinfeld, *supra* note 20 (critiquing the current justices' "anti-antidiscrimination agenda").

<sup>183</sup> For a more substantive description of this "attitudinal model" for the analysis of judicial opinions, see generally Valdes, *Jurisprudence of Backlash*, *supra* note 14, at 275. The basic conclusions of this field were more recently corroborated by a study of the cases argued during the 2002 Supreme Court Term. Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004).

century, the bents and acts of the current backlash bloc on the high Court<sup>184</sup> increasingly seemed reminiscent to many observers of the conservative activism mounted in the 1930s by the justices in control of that tribunal two generations ago.<sup>185</sup>

Indeed, those five justices' unprecedented meddling in the presidential election of 2000 and their selection of one political candidate for installation into power had reversed the court-packing dynamics of the culture wars, wherein politicians pack the bench rather than the other way around.<sup>186</sup> The audacity of that spectacle generated reports of ruptured relations on the Supreme Court bench and, more telling, prompted mild mannered observers to conclude publicly that the justices had embarked on a campaign to name their own successors—to pack the Court themselves, so to speak.<sup>187</sup> When *Lawrence* presented itself in 2003, the Supreme Court was an institution arguably on the brink of crisis self-inflicted by the stunning string of willful pronouncements racked up by the same backlash bloc of five during the past decade,<sup>188</sup> as exemplified perhaps most chillingly by the incredible decision of those same five to hand-pick the next (and present) occupant of the White House.<sup>189</sup> These, and other increasingly acute concerns over institutional legitimacy aroused by patent judicial transgressions blurring conventional lines between politics and law, had to be known to them.

In fact, precisely those kinds of concerns evidently were uppermost in their minds eleven years earlier, in their 1992 opinions in *Planned Parenthood v. Casey*, when the very same set of justices (except for two) exchanged heated barbs regarding another front-burner issue of the culture wars: women's reproductive rights.<sup>190</sup> Likening the *Casey* ruling to the notorious approval of

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<sup>184</sup> The five members of the backlash bloc include: Rehnquist, Scalia, Thomas, O'Connor and Kennedy. For a more complete explication of this quintet as a bloc that drives backlash jurisprudence, see Valdes, *We Have Held*, *supra* note 11.

<sup>185</sup> See *supra* note 40 and sources cited therein (discussing the 1930s in light of today's backlash and retrenchment through judicial activism).

<sup>186</sup> See *supra* notes 13–21 and accompanying text (discussing the culture wars).

<sup>187</sup> Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48 (noting that the decision in the *Gore* litigation was “not the first time in history that the Supreme Court has made a decision that called its fundamental legitimacy into question,” but that this time was unique because of the direct meddling in electoral politics at the highest level).

<sup>188</sup> For a more detailed exposition of these cases and their patterns, see Valdes, *We Have Held*, *supra* note 11.

<sup>189</sup> *Bush v. Gore*, 531 U.S. 98 (2000); see also ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001).

<sup>190</sup> 505 U.S. 853 (1992). In *Casey*, the Pennsylvania legislature enacted a statute curbing the reproductive choices previously available to Pennsylvania women under *Roe v. Wade*, the 1974 ruling that recognized reproductive freedom as an element of the “privacy” right acknowledged in *Griswold* and *Eisenstadt*. See *supra* notes 93–99 and accompanying text (discussing *Roe*). Since 1974, as *Casey* illustrates, *Roe* has come to represent ground zero in the jurisprudential dimensions of the culture wars that define the environment in which these

slavery in the *Dred Scott* case, our friend Scalia savaged the joint opinion of the Court authored by his fellow Republican appointees—Kennedy, O’Connor and Souter—for failing to live up to their purpose; in other words, for failing to follow the culture wars’ script and, in that instance, (finally) overturn *Roe v. Wade* as constitutional precedent.<sup>191</sup> Drawing a line between the judicial obligation to “reasoned judgment” and their political acquiescence to the forces of backlash demanding *Roe*’s rejection, their response was to invoke the law/politics distinction.<sup>192</sup> Not coincidentally, those same justices were crucial to *Lawrence*.<sup>193</sup> In this instance, it seems, they felt the same extremist dynamics at work, and once again elected to buck the demands of backlash politics.

So *Lawrence* (partially) breaks the backlash pattern and agenda, but why? Perhaps *Bowers*’ venomous mean-spiritedness was just too much for them to stomach; the embodiment of its social ugliness in this case was too much for them to bless or, apparently, even to ignore. Perhaps *Lawrence* also can be seen, as with *Romer v. Evans*, as part of a typically fitful pattern in “normal” jurisprudential evolution, in which the arc formed by *Griswold* through *Carey* but interrupted by *Bowers* and other culture war cases is eventually resumed in cases like *Lawrence*.<sup>194</sup> Perhaps some combination of these and other factors explain this curious timing. Perhaps some truth resides in this speculation, and perhaps not. Perhaps one day, after retirement, some of today’s justices will provide a glimpse into these choices akin to Justice Powell’s in the case of his vote in *Bowers*.<sup>195</sup> In the meantime, social change and institutional predicament may provide some insight.

This account begins with a Court aware of its own limits and that it may have overstepped them based not only on the skeptical reactions to its aggressive activism in recent culture war cases since and including *Bowers*, but also on the changed social facts surrounding sexuality and its regulation through law recited in the ruling itself; these recitations display a Court keenly aware that the world

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controversies are litigated and adjudicated. Thus, Pennsylvania’s legislative act was a frontal challenge to that precedent—along with the similar acts of other state legislatures around the country. Not surprisingly, the Court was inveighed to view Pennsylvania’s action as the opportunity to jettison *Roe*. The justices pointedly declined, even though the legislature clearly had acted in the name of majoritarian morality, while also scaling back *Roe*’s protection of private reproductive choice. For further discussion, see Valdes, *We Have Held*, *supra* note 11. Ginsburg and Breyer, appointed in the following couple of years to succeed White and Blackmun, respectively, are the only personnel changes between the two cases.

<sup>191</sup> See *Casey*, 505 U.S. at 1001 (Scalia, J., dissenting).

<sup>192</sup> *Id.* at 849.

<sup>193</sup> In *Lawrence*, as in *Casey*, the two swing votes that oftentimes enable the triumph of backlash opted out of the bloc: Kennedy wrote the opinion of the Court in *Lawrence* while O’Connor concurred on equal protection grounds.

<sup>194</sup> See *supra* note 13 (discussing *Romer*).

<sup>195</sup> See *supra* note 177 and accompanying text (discussing Powell’s regrets over his tie-breaking vote in *Bowers*).

had literally changed around them, around and despite *Bowers*.<sup>196</sup> These social facts and changes in turn established the doctrinal basis for reconsidering *Bowers* as viable precedent under *Casey*'s analytical scheme; these social changes made *Bowers* increasingly an anachronism, depicting an out-of-touch tribunal rendering itself increasingly irrelevant to contemporary society by choosing to remain stuck in increasingly discredited dogmas. The changed social facts, of course, in turn had been brought about in great measure by the emergence of the multifaceted sexual minority social movement that struggled against *Bowers*' injustices with education, litigation, agitation and mobilization.<sup>197</sup> In this account, therefore,

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<sup>196</sup> *Lawrence*, 539 U.S. at 570–80.

<sup>197</sup> Since the celebrated Stonewall Riots of 1969 in New York City, sexual minorities of various stripes (lesbian, gay, bisexual, transgendered, etc.) have mounted a civil rights struggle for "equal rights" that vividly has helped to display on a daily basis the absurdity of *Bowers*' depiction of, and obsession with, homosexuals and our forms of sodomy—an embarrassment that also put on display the Court's own irrelevance in the construction of sexual minorities as viable social groups domestically and internationally. For a personalized account of the Stonewall Riots, see MARTIN DUBERMAN, *STONEWALL* (1993). For a more comprehensive account of the lesbian and gay "liberation movement" see ERIC MARCUS, *MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS, 1945–1990* (1992). See also GAY AMERICAN HISTORY: *LESBIANS AND GAY MEN IN THE U.S.A.* (Jonathan Katz ed. 1976) (compiling historical materials). See generally note 66 and sources cited therein (on sexual liberation politics). More recently, the successful campaign in Vermont for "civil unions" undertaken under *Bowers*' shadow serves as a microcosm of this larger, multifaceted and continuing sexual minority civil rights struggle. See DAVID MOATS, *CIVIL WARS: A BATTLE FOR GAY MARRIAGE* (2004). For a comprehensive account of this ongoing struggle focusing on the Supreme Court specifically, see JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* (2001). See also Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 36 n.86 (1995) (citing the literature extensively).

*Lawrence* thus displays the significance of coalitional legal and political work as methods toward constitutional reform and social transformation. The remarkably diverse array of amicus briefs submitted to the Court reflects the long years of hard work in coalition-building that took place in the seventeen years separating *Bowers* and *Lawrence*. Those briefs, and the sectors of society that they represented, made it more difficult than usual for insulated judges to opt for the comforts of formalistic distance from the lived realities presented by the cases. Those briefs, and the realistic understandings of the issues they projected, underscored for the judges that their predecessors' abuse of power in *Bowers* remained an unforgotten stain upon the reputation of the institution they had inherited and now controlled. Those briefs made plain that society had overtaken *Bowers* and had thereby raised the stakes for the Court in intellectual, cultural and political terms. See generally Harcourt, *supra* note 7, at 7 (discussing the "surprising coalitions, the telling alliances, [and] the strange bedfellows" in the *Lawrence* litigation, as reflected in the amicus briefs, "in order to properly understand *Lawrence*—and other sex and cultural wars").

Coalitional work, of course, has been a central aspect of many works produced in recent years by critical legal scholars. See, e.g., Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA.

social struggle—and the social changes it helped to catalyze—contributed substantially to the Court’s institutional predicament: how to free itself of acute embarrassments spanning multiple interests, yet all rooted in or exemplified by *Bowers* and its consequences—its text, its logic, and its subsequent application by judges and lawmakers from coast to coast.

In this account, *Casey* plays a crucial role because it had previously laid down four broad categories for “principled” reversals of Supreme Court precedents. Those four categories included precedents overtaken by changed social circumstances.<sup>198</sup> Here, the *Lawrence* Court explained, one of *Casey*’s categories applied to *Bowers*: “In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.”<sup>199</sup> In this instance, of course, it goes without saying that *Bowers* was not a precedent “recognizing a constitutional liberty interest” but rather, to the contrary, a precedent emphatically denying one.<sup>200</sup> As such, by definition it could not have induced any reliance on the consequently non-existent

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L. REV. 759 (2003) (discussing the important role of coalitions in civil rights struggles); Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101 (1997) (focusing on the challenges facing LatCrit theory regarding coalitional work); George A. Martinez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213 (1998) (urging Latinas/os, Blacks and other groups of color to coalesce around “race” and our collective, cumulative knowledge of white supremacy); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (urging antistatist analyses to “ask the other question” as a means of theorizing across single-axis group boundaries); Ediberto Roman, *Common Ground: Perspectives on Latina-Latino Diversities*, 2 HARV. LATINO L. REV. 483, 484–91 (1997) (elaborating commonalities upon which Latinas/os may build a sense of constructive collectivity and urging Latinas/os to focus on our similarities rather than our differences as a way of promoting intra-group justice and solidarity); Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 379 (Francisco Valdes et al. eds., 2002); Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 HARV. LATINO L. REV. 495 (1997) (analyzing inter-group grievances and relations among groups of color). With some irony, then, political, intellectual, cultural, legal and other aspects of the sexual minority movements inspired by *Bowers*’ insults and injuries aptly have illustrated the importance of social contestation and coalitional solidarity in the pursuit of social justice through legal reformation. As an example of coalitional work and its potential in a particular legal context—civil rights litigation and constitutional law—the *Lawrence* experience counsels more, much more, of the same—especially if we are to provide emancipatory coherence and antistatist meaning to *Lawrence* in the months and years to come.

<sup>198</sup> *Casey*, 505 U.S. at 854–61.

<sup>199</sup> *Lawrence*, 539 U.S. at 577.

<sup>200</sup> See *supra* Part II.A.3 (discussing *Bowers*’ outcome).

interest.<sup>201</sup> Instead, *Bowers* was a monument to a social ideology in decline: fundamentalist homophobia. Its ideology, as the social developments in the U.S. and Europe cited by *Lawrence* help to illustrate, steadily had been overtaken by social changes induced in great part, as already noted, by collective social struggle.<sup>202</sup> Under *Casey*, *Bowers* was a precedent that had become irrelevant and anachronistic both as an expression of constitutional principle and as a reflection of social reality. As the *Lawrence* majority seemingly recognized, there was, by this time, no saving *Bowers*—except by flagrant judicial fiat. Thus, under this account the *Lawrence* Court was embarrassed into action on cultural, institutional, political and intellectual circumstances that cumulatively and increasingly eroded its only source of authority: the actual and/or perceived legitimacy of its pronouncements as products of principle rather than politics. *Bowers* most definitely had both epitomized and fueled this institutional devolution under the sway of backlash jurisprudence.

Under this account, then, the Court was embarrassed in *cultural* terms by the social changes that overtook *Bowers*' quaint depiction, yet vicious trivialization, of sexual minority families.<sup>203</sup> In similar and related terms, the Court was *institutionally* embarrassed by the growing international spectacle of other nations and legal systems pointedly going in the opposite direction—notably, the ones in Europe, which are the only ones that North Americans consider equal or superior to their own—and effectively signaling their disassociation from *Bowers*' patent, even hysterical, homophobia.<sup>204</sup> The Court also was *politically* embarrassed by the increasingly fierce and unseemly experiments in structural bigotry through majoritarian policymaking that *Bowers* in fact had entrenched as a fixture of public life on scandalously thin grounds—experiments exemplified by Colorado's Amendment Two, which sought to declare sexual minorities permanent pariahs beyond the reach of any realistic law reform effort.<sup>205</sup> Whether or not these converging embarrassments cumulatively had any impact on the justices, it seems clear that *Bowers* had spawned an increasingly untenable institutional situation that left the current justices in a tightening predicament; most tellingly, the Court's own opinion exudes awareness of the gaping

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<sup>201</sup> The only type of reliance interest possible under these circumstances is reliance on a license to practice homophobia with social and legal impunity—hardly a “constitutional liberty interest.”

<sup>202</sup> See *supra* note 197 and accompanying text (on sexual minority activism in law and society). The social changes cited by the Court—and their doctrinal work—thus illustrate the salience of social struggle along multiple fronts, including litigation and agitation, in helping to bring about law reform, even at the constitutional plane.

<sup>203</sup> *Lawrence* acknowledges that *Bowers* “demeans” Queer lives, identities, relations and families. *Lawrence*, 539 U.S. at 567.

<sup>204</sup> See *id.* at 576–77.

<sup>205</sup> See *supra* note 13 (discussing *Romer* and Colorado's Amendment Two).

discontinuities between *Bowers* and just about every other source of knowledge or opinion on the matter.<sup>206</sup>

If so, the current Court perhaps was *intellectually* embarrassed by the “equality anomaly” that *Bowers* had constructed in its obsessive quest to shut down “fundamental rights” and gay rights in one fell swoop—an anomaly that effectively beckoned the kind of scenario confronted in *Lawrence*.<sup>207</sup> The brevity and certitude of its response to O’Connor’s equal protection analysis certainly indicates a keen sense of its fundamental inadequacy.<sup>208</sup> While necessarily inconclusive, the convergence of these embarrassments in this account compelled some kind of self-help, some kind of rescue action before the Court and its functions became increasingly suspect to all except the most diehard backlashes—yet the justices’ capacity to act was constrained by the politics and forces that they themselves enable and embody.<sup>209</sup> Though the inferences drawn in this sketch are necessarily open to further refinement, *Lawrence*, in this view, reads very much like an act of institutional self-correction to remove a major source of erosion in the legitimacy of that institution and its work product.

#### B. *Beyond Lawrence: Toward the Liberty of Desire—“Dignity” and Sexual Self-Determination?*

To the extent that *Lawrence* merely or mostly reflects the social changes of the past two decades, the case points both to the power of social action as well as to the limits of formal law as a tool of social justice: what *Bowers* had sought to preserve—the subordination and subjection of Queer identities and relations—was effectively repudiated by large segments of contemporary society in myriad cultural contexts and everyday circumstances.<sup>210</sup> Today’s justices now have withdrawn the Court’s doctrinaire opposition to social evolution and ratified the

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<sup>206</sup> As examples, *Lawrence* points to critiques of *Bowers* within the United States, international developments at odds with that case, and Justice Stevens’ *Bowers* dissent. *Lawrence*, 539 U.S. at 574–78.

<sup>207</sup> The Texas statute predates *Bowers*, but *Bowers*’ equality anomaly allows precisely only this type of sodomy criminal statute. See *supra* Part II.A.3.c.

<sup>208</sup> See *supra* notes 173–75 and accompanying text (discussing the majority’s response to the O’Connor concurrence).

<sup>209</sup> Hence, the ambivalence—whether apparent or actual. See *supra* notes 1–24 and accompanying text.

<sup>210</sup> This observation raises a question that is beyond the scope of this Article: How is it that “society” came to “tolerate” gays even as “democratic majorities” continued to legislate oppression through legislation and, sometimes, even referendum? This very query is brought into sharp relief by the adoption of anti-same-sex marriage rules by referendum during the 2004 electoral cycle. See, e.g., T.R. Reid, *Same-Sex Marriage Measures Succeed; Bans in Several States Supported by Wide Margins*, WASH. POST, Nov. 3, 2004, at A25; Sarah Kershaw, *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States*, N.Y. TIMES, Nov. 3, 2003, at P9.



cultural choice that took place while that institution had remained willfully stuck in *Bowers*' dogmas. In doing so, this Court has shown how law can learn from society.

Thus, perhaps what is most important from a substantive or doctrinal perspective is that *Lawrence* and its antecedents recognize—sometimes tacitly, sometimes explicitly—that sexuality and intimacy play fundamental and complex roles in the real-life formation of humanity and society. More than any others decided by the Supreme Court, these cases invite piercings of law's general negation of sexual desire and its expression as cognizable human interests quite apart from the traditionalist focus on procreation. The unmistakable recognition in these cases of sexual needs and relations as legitimate and, in some instances, even elemental, provides a jurisprudential platform from which to counter the legal profession's traditionally narrow focus on abstracted logic and ostensible reason. This platform is socially salutary because the law's standard narrowness oftentimes has trivialized other aspects, needs and interests of living human beings—complexities that in whole might be described as “personhood,” and that, in some key ways, still elude the capacity of reason to map or explain.<sup>211</sup>

Indeed, *Lawrence* responds to the regulation of sexuality with a recognition that real-life sexual relations are a fluid and perhaps extra-rational dimension of personhood. *Lawrence* recognizes sexuality as a means through which individuals in fact do “realize” themselves via their intimate interactions with consenting others of their choice. It is this life journey, the ongoing search for “meaning” and individual personhood, in part through sexual interaction that *Lawrence* acknowledges is protected by liberty.

The “liberty” encompassing “privacy” in *Lawrence*, therefore, is one that protects autonomy and privacy in individual choices over intimate relations, associations and experiences precisely in order to provide the social space for individuals to become individuated. *Lawrence* effectively emphasizes that the individual interest protected by “liberty” in the Due Process Clause of the Fourteenth Amendment cannot mean, in any realistic and socially functional way, merely the “final” arrival at the idealized destination of formal marriage to fulfill the obligation of procreation, but also the sometimes transitory relationships tested along every individual's search for companionship and fulfillment through sexual bondings with consenting others. In fact, the “relationship” in *Lawrence* was, on the record, perhaps a simple one-time encounter;<sup>212</sup> and even if so, as *Lawrence* demonstrates, its ephemeral qualities did not distinguish it from “marriage” because both—the “date” as well as the marriage—are every-day expressions of human bonding through sexual intimacy. At its best, *Lawrence* teaches that the initial or even casual encounter is as much a part of the human

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<sup>211</sup> See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (elaborating on the notion of personhood in relationship to privacy doctrine).

<sup>212</sup> For more on the facts of *Lawrence*, see Berta E. Hernandez-Truyol, *Querying Lawrence*, 65 Ohio St. L.J. 1151 (2004).

quest for self-meaning through intimate bonds as the long-term relationship that may, in time, ripen from it.

Thus *Lawrence*—though decidedly a product of the culture wars—emanates an apparent ambivalence because it does much of the same as *Grissold* and its progeny, but it does it very differently, hence producing a very different outcome as compared to *Bowers*. Its positive potential lies in this difference. Yes, *Lawrence* remains rhetorically moored to the traditionalist instrumentalism of privacy doctrine, even as it confirms the textual centrality of liberty in this analysis. As noted above, therein lie many of *Lawrence*'s significant limitations.<sup>213</sup> But *Lawrence* also substantively recognizes and embraces the social value of functionally equivalent “relationships”—including those of the same-sex variety—which *Bowers* refused even to contemplate. Rather than grant majoritarian license to demean Queer lives, *Lawrence* mandates the law's protection of Queer dignity.<sup>214</sup>

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<sup>213</sup> See *supra* notes 1–24 and accompanying text (discussing *Lawrence* and some of its predecessors, including their limitations).

<sup>214</sup> The choice of “dignity” to denote the individual interest protected by liberty-privacy is notable because this choice of terminology invokes the language of human rights, a discourse oftentimes excluded from “domestic” legal regimes, especially under the dictates of backlash jurisprudence. *Lawrence*, of course, is an exception to this exclusion in federal constitutional law. 539 U.S. at 574 (relying on decisions of the European Court of Human Rights). For another remarkable exception, this time in state constitutional law, see Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21–27 (2004) (tracing the Human Dignity provision of the 1972 Montana Constitution to a similar provision in the 1952 Constitution of Puerto Rico). The 1952 Constitution of Puerto Rico, in turn, incorporated the analogous provision in the 1948 Universal Declaration of Human Rights:

From the defeat of the Nazis, to international declarations of the centrality of human dignity, to a constitutionally anomalous territory becoming a commonwealth of the United States, to the State of Montana, the idea of a constitutional right to human dignity has traveled through a set of international and intra-national boundaries.

*Id.* at 26–27.

Given backlashers' domination of domestic law, Queer legal theorists have examined international law and venues as alternative or supplementary means of achieving inclusion, equality and dignity in formal as well as social terms. See, e.g., Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69 (1996); see also Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61 (1996); James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33 (1995); see generally THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT (Barry D. Adam et al. eds., 1999). For more on comparative constitutionalism under the rule of kulturkampf backlash in contemporary law and policy, see Valdes, *We Have Held*, *supra* note 11.

More remarkably and importantly, *Lawrence* does so on facts that, on the record, do not establish a “committed” or conventionally respectable relationship to have existed. Thus, despite rhetoric to the contrary in the opinion, a considered reading of the text and the facts strongly indicate that *Lawrence* does more than simply validate same-sex relationships that mimic traditional “marriages.” Instead, *Lawrence* recognizes, first, the central role that sexual desires and intimacies play in the development of individual personalities and, second, the importance of sexual experimentation and choice in individuals’ efforts to realize and secure their sense of self.<sup>215</sup> Though traditionally instrumentalist in their basic conceptions of privacy and liberty, the precedents from *Griswold* to *Lawrence*, and especially the latter, consequently provide the most proximate springboard for more egalitarian conceptions of interlinked Fourteenth Amendment rights sounding in privacy and liberty and equality to protect intimate associations from majoritarian commandeering in the name of morality, utility and/or democracy. *Lawrence*, as the progeny of *Griswold* and *Carey*, points to sexual self-determination as an integral component of liberty-privacy—a right to self-determination specifically in sexual relations freeing individuals from the policy regimes of moralistic majorities that would coerce “traditional” marriages and demand procreation in the putative service of the state.<sup>216</sup>

#### IV. Conclusion

*Lawrence* brings constitutional law on sexual orientation into coherence with the line and logic of cases decided pre-*Bowers*. Within the larger framing of the social, cultural, institutional, political and intellectual considerations reflected in

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<sup>215</sup> In this way, *Lawrence* does exude a libertarian sense of the relationship between the management of individuality and state power; *Lawrence* seems to recognize that *Bowers* was and is a jurisprudential failure because it attempted to prevent humans from forming intimate relationships with other consenting adults in “private” ways that prioritize self-realization over social imperative. See generally, Barnett, *supra* note 7. Cf. Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004). *Lawrence* thus concedes what society had recognized despite *Bowers*’ insistence: that persons need not live chiefly to procreate in satisfaction of coercive state preferences. *Lawrence* thereby makes possible what *Bowers* attempted to make impossible: legal recognition of human sexuality and expression of desire as substantive constitutional values—perhaps, even, the formal recognition of the right to sexual self-determination. This recognition, ultimately, may be the main benefit to be drawn from the meanings that *Lawrence*, over time, will take on. See *supra* Part III.A on sexual self-determination in and after *Lawrence*.

<sup>216</sup> For early and insightful descriptions of this right, see Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 SO. CAL. L. REV. 777 (1988); Mary C. Dunlap, *Toward Recognition of “A Right To Be Sexual”*, 7 WOMEN’S RTS. L. REP. 245 (1982); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). See also Patricia A. Cain, *“The Right To Be Sexual” (Revisited): Remembering Mary Dunlap*, 19 BERKELEY WOMEN’S L.J. 19 (2004) (memorializing Dunlap’s death six months after *Lawrence* buried *Bowers*, and in relationship to her long body of work on sexuality and the law).

the opinion, *Lawrence* represents an affirmation that privacy, liberty and equality indeed are fused by the Fourteenth Amendment, and that these values do indeed apply to all individuals *qua* individuals regardless of “presumed beliefs” about majoritarian moralism or current notions of “history and tradition.” The immediate result, therefore, is most welcome but significant portions of the reasoning should give pause. The apparent rhetorical ambivalence of the opinion is supremely susceptible to strategic manipulation because the expansive passages explaining the result set the stage for a newly robust protection of intimate associations freed of “traditional” bigotry and moralism while the constrictive passages exalting “the confines of the home” and “private life” simultaneously set the stage for “strict” interpretations of the opinion designed to curtail its emancipatory potential and to preserve, as much as possible, the historical hegemony of heterosexist supremacy in law and society.

In its more constrictive passages, *Lawrence* eerily echoes the traditionalist instrumentalism found in *Griswold* and *Eisenstadt*: in both of those cases, the justices justified their privacy rulings in terms that valorized the traditional marriage and the home in which it idyllically nested. Read literally, one might think that humans possess privacy rights only because marriage exists and must be perpetuated. Read strictly, those opinions gave little relief to diverse aspirations for alternative relationships or evolutionary arrangements. Moreover, the past and present injustices integral to that institution remained hidden in those opinions. But to give credence to the constrictive passages in *Lawrence* would repeat many of the same mistakes based on *Bowers* that *Lawrence* itself debunks in its more expansive passages.

In its more expansive passages, *Lawrence* sets the stage for future accomplishments in substantive terms. *Lawrence* makes clear that “privacy” is not a series of atomized dots marking isolated “acts” or “decisions” devoid of any connection to the real-life meaning of such acts and decisions to an individual’s “liberty” to construct a self-conception. Rather, *Lawrence* confirms that the “privacy” dots represented by *Meyer* and its successors provide the factual settings for the recognition of these due process rights, but they do not stand apart, in the form of “privacy,” from equality and liberty; instead, all three are interdependent. In plain and unequivocal terms enabled by critical method and antisubordination grounding, *Lawrence* makes clear that *Bowers*, not *Griswold* or *Carey*, was the discordant outlier in four score of Fourteenth Amendment jurisprudence.

Thus, while apparently ambivalent on many points, *Lawrence* potentially signals that, despite a decade or more of dormancy imposed by federal judges, equality and privacy are not dead constitutional fields after all. Instead, the previous privacy-liberty cases up to *Carey*, buttressed now by *Lawrence*, *Romer* and (even) *Casey*, can provide a sturdy enough platform for resuming the nation-building task interrupted by *Bowers* and its backlash brethren: liberating all humans from the socio-sexual regimentation that traditionalist elites would

enforce in perpetuity in the form of majoritarian bans like those challenged in those and similar cases. Despite its rhetorical warts, the most concrete benefit already accrued from *Lawrence* is the formal validation of *Griswold* and *Carey*, and the formal downfall of *Bowers*' tyranny, especially in the midst of the furies unleashed by two decades of ardent cultural warfare against traditionally vulnerable social groups, including sexual minorities.

*Lawrence* thus illustrates and embodies both the power and the potential as well as the limits and the pitfalls of law in a society formally committed to Equal Justice for All—and even more earnestly committed to seeing itself as just and good. *Lawrence*, as a result, can come to mean all or nothing. *Lawrence*, in the end, will come to mean whatever we—and the future members of the Supreme Court—decide, cumulatively, through our actions, writings and teachings. In the end, the difference between all and nothing—the difference between a substantively “compendious notion” of liberty-privacy and merely “isolated points” of constitutional protection for individual life choices—may turn on us.