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Not on "Shaky Grounds": *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), and the Constitutionality of State DOMAs Such as Nebraska's Marriage Provision, NEB. CONST. art. I, § 29

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Note*

Not on “Shaky Grounds”¹: *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), and the Constitutionality of State DOMAs Such as Nebraska’s Marriage Provision, NEB. CONST. art. I, § 29

TABLE OF CONTENTS

I. Introduction	180
II. Background	181
A. Facts and Procedural Posture of <i>Lawrence</i>	181
B. Dealing with <i>Bowers v. Hardwick</i>	183
C. Recent State Trends Concerning Sodomy Laws	185
D. Nebraska’s Marriage Provision	186
III. Analysis	188
A. Language in <i>Lawrence</i> that Could Be Used in a Challenge to Nebraska’s DOMA	188
B. The Majority’s Discussion of Foreign Law	194
C. Due Process Analysis	200
1. Was a Fundamental Right to Sodomy Implicitly Identified in <i>Lawrence</i> ?	202
2. No Fundamental Right to Sodomy Identified in <i>Lawrence</i>	204
IV. <i>Lawrence</i> ’s Impact upon Nebraska’s Marriage Provision Should Be Minimal	205
A. Different Types of Laws	206
B. Historical Differences Between the Two Issues	209

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1. *Lawrence v. Texas*, 123 S. Ct. 2472, 2496 (2003) (Scalia, J., dissenting).

C. Preserving Traditional Marriage Advances	
Legitimate State Interests	213
D. The Supreme Court's Explicit Limiting of	
<i>Lawrence</i>	222
V. Conclusion	223

I. INTRODUCTION

In June 2003, the United States Supreme Court, in a 6–3 decision, struck down a controversial homosexual sodomy statute in *Lawrence v. Texas*.² The issue before the Court was whether the Due Process Clause of the Fourteenth Amendment permitted a state to criminalize private and consensual sexual activity between adults.³ The Court held that it did not.⁴

Since the decision, much of the public discourse has turned to the subject of marriage and whether or not existing state laws that exclude same-sex marriages from public recognition will be able to stand in light of *Lawrence*. People on both sides of the issue assert that *Lawrence* paves the way for future challenges to existing state marriage laws that define marriage as being between a man and a woman.⁵ Justice Scalia, in dissent, warned that “[s]tate laws against . . . same-sex marriage . . . [are] called into question by [the Court’s] decision,”⁶ and are left on “pretty shaky grounds” by reasoning in the concurrence.⁷ Many proponents of same-sex marriage hail *Lawrence* as a victory,⁸ while many proponents of the traditional-marriage concept bemoan its holding.⁹ Still others think that *Lawrence*’s impact upon the marriage issue will be minimal.¹⁰ Nebraskans might wonder if the constitutional provision found in Section 29 of Article I in Ne-

2. 123 S. Ct. 2472 (2003).

3. *Id.* at 2476.

4. *Id.* at 2484.

5. See, e.g., David G. Savage, *In Rulings, Echoes of 1992: The High Court Stuns Conservatives—Just As It Did More Than a Decade Ago*, 89 A.B.A. J. 21 (Aug. 2003) (“Both champions of family values and advocates of gay rights say the logic of *Lawrence* paves the way for legalizing marriages between gay couples.”).

6. *Lawrence*, 123 S. Ct. at 2490 (Scalia, J., dissenting).

7. *Id.* at 2496.

8. For example, Ruth Harlow, legal director at Lambda Legal Defense and Education Fund and a lead attorney in *Lawrence*, said that the decision gives gays and lesbians stronger footing to attack state legislation banning same-sex marriage. See Jan Crawford Greenburg, *Supreme Court Strikes Down Laws Against Homosexual Sex; 6–3 Ruling Affects Bans in 13 States*, CHI. TRIB., June 27, 2003, at 1.

9. For example, Jay Sekulow, chief counsel of the American Center for Law and Justice said, “By providing constitutional protection to same-sex sodomy, the Supreme Court strikes a damaging blow for the traditional family that will only intensify the legal battle to protect marriage and the traditional family.” *Id.*

10. For example, Jerry Kilgore, Virginia Attorney General, said that the ruling in *Lawrence* did not prevent states “from recognizing that marriage is fundamentally between a man and a woman.” Dean E. Murphy, *THE SUPREME COURT:*

braska's State Constitution,¹¹ which restricts marriage to opposite-sex relationships, is teetering on "shaky ground" or resting firm. A broad reading of *Lawrence* may suggest that Nebraska's provision and similar Defense of Marriage Acts ("DOMAs")¹² in other states are on shaky ground, while a narrow reading suggests that DOMAs are secure for now.

The purpose of this Note is to examine the U.S. Supreme Court's decision in *Lawrence* and to discuss what impact, if any, the Court's holding and reasoning might have on future constitutional challenges to Nebraska's marriage provision. First, Part II of this Note will review the background of *Lawrence*, describing the facts of the case and its procedural posture. The background section will also include a review of the holding in *Bowers v. Hardwick*,¹³ which the *Lawrence* Court overruled. The background section will conclude with an overview of Nebraska's marriage provision in Section 29 of the Nebraska Constitution. In Part III, this Note will examine some of the language in the majority and concurring opinions of *Lawrence* and how it might be employed in efforts to overturn Nebraska's DOMA. Next, the majority's use of foreign law will be discussed. Then, the due process analysis in *Lawrence* will be evaluated. Finally, in Part IV, this Note will argue that *Lawrence's* impact upon Nebraska's marriage provision and similar enactments in other states should be minimal, because the issues of sodomy and marriage are two different issues, state laws that restrict the definition of marriage to one man and woman are rationally related to a legitimate state interest, and the Court in *Lawrence* explicitly limited its holding to sodomy laws.

II. BACKGROUND

A. Facts and Procedural Posture of *Lawrence*

In response to a reported weapons disturbance, police officers were dispatched to a private residence in Houston, Texas. Upon entering the residence of John Lawrence, the officers observed Lawrence and another man, Tyron Garner, engaged in anal sex. The two men (petitioners in *Lawrence*) were arrested and held in custody overnight. They were later convicted of deviate sexual conduct under a Texas statute forbidding certain sexual acts between persons of the same sex

THE REACTION, Gays Celebrate, and Plan Campaign on Broader Rights, N.Y. TIMES, June 27, 2003, at A20.

11. NEB. CONST. art. I, § 29. In this Note, this provision will be referred to as "Nebraska's marriage provision," "Nebraska's DOMA," or "Section 29."
12. For a description of Nebraska's DOMA and those in other states, in addition to the federal DOMA, see *infra* section II.D.
13. 478 U.S. 186 (1986).

and each was fined \$200.¹⁴ At trial, Lawrence and Garner pleaded no contest to the charge, but challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and a similar provision in the Texas Constitution. Their challenge was rejected by the county criminal court.¹⁵

Next, Lawrence and Garner appealed to the Court of Appeals of Texas for the Fourteenth District.¹⁶ They contended that the state homosexual sodomy statute was a violation of both federal and state equal protection guarantees, because it discriminated on the basis of sexual orientation and gender.¹⁷ Their argument was rejected, however, because the court found that there is "no fundamental right to engage in sodomy," homosexuals are not a "suspect class," and the prohibition against homosexual conduct advanced was rationally related to the legitimate state interest of preserving public morals.¹⁸ Further, Lawrence and Garner argued that the statute violated their right to privacy.¹⁹ The court rejected this contention, because it could find no constitutional "zone of privacy."²⁰ Finally, the Texas appellate court dismissed the appellants' argument that Texas should join the states that had already legalized homosexual conduct by expressing concern that such a decision would usurp the role of the state Legislature to make or change the law.²¹

The U.S. Supreme Court granted certiorari to consider three questions: (1) whether the Texas sodomy statute violated the Equal Protection Clause of the Fourteenth Amendment because it criminalized sexual conduct between same-sex couples, but not different-sex couples; (2) whether the petitioners' interests in liberty and privacy under the Due Process Clause of the Fourteenth Amendment had been violated; and (3) whether *Bowers* should be overruled.²²

Ultimately, the Court overruled *Bowers* and held that the Texas statute violated the Due Process Clause, because it advanced "no legitimate state interest which can justify its intrusion into the personal and private life of the individual."²³ Justice Kennedy delivered the opinion of the Court, which was joined by Justices Breyer, Ginsburg, Souter, and Stevens. Justice O'Connor concurred in the judgment, but

14. The description of facts herein was derived from *Lawrence*, 123 S. Ct. at 2475-76, and *Lawrence v. State*, 41 S.W.3d 349, 350 (Tex. Ct. App. 2001) [*Lawrence (State)*].

15. *Lawrence*, 123 S. Ct. at 2476.

16. *Id.*

17. *Lawrence (State)*, 41 S.W.3d at 350.

18. *Id.* at 357.

19. *Id.* at 359.

20. *Id.* at 362.

21. *See id.*

22. *Lawrence v. Texas*, 123 S. Ct. 2472, 2476 (2003).

23. *Lawrence*, 123 S. Ct. at 2484.

would have struck down the Texas statute on equal protection grounds and would not have overruled *Bowers*. Justice Scalia filed a dissenting opinion, which was joined by Chief Justice Rehnquist and Justice Thomas. Justice Thomas also filed a separate dissenting opinion.

B. Dealing with *Bowers v. Hardwick*

In 1986, the Supreme Court upheld a state's criminal sodomy law in *Bowers v. Hardwick*.²⁴ The *Bowers* facts are similar to those in *Lawrence*. In *Bowers*, a man was charged with violating a Georgia statute that criminalized sodomy by committing sexual acts with another man.²⁵ Although the charge was dropped, a lawsuit was brought to challenge the constitutionality of the sodomy statute.²⁶ The Supreme Court framed the issue as whether there was a fundamental right under the Constitution to engage in homosexual sexual conduct.²⁷ The Court held that no such fundamental right existed, because the right to engage in homosexual activity was not "deeply rooted in this Nation's history and tradition."²⁸ Rather, the Court said that proscriptions against homosexual sodomy had ancient roots.²⁹ Thus, the Court upheld the validity of state sodomy laws in *Bowers*.

In *Lawrence*, the Court was faced with the controlling precedent of *Bowers*.³⁰ The dissenters would have followed the holding in *Bowers*.³¹ Justice O'Connor, concurring, wanted to distinguish *Bowers* from *Lawrence*.³² Instead, the majority overruled it. According to the majority, several pertinent cases decided before *Bowers* had expanded

24. 478 U.S. 186 (1986).

25. *Id.*

26. *Id.* at 188.

27. *Id.* at 190.

28. *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion)).

29. *Id.*

30. *Lawrence v. Texas*, 123 S. Ct. 2472, 2476 (2003).

31. *Lawrence*, 123 S. Ct. at 2488–98 (Scalia, J., dissenting). Justice Scalia believed that *Bowers* had been rightly decided, *id.* at 2492, and took issue with the majority's "surprising readiness to reconsider a decision rendered a mere 17 years ago." *Id.* at 2488. In Scalia's opinion, the majority had "revise[d] the standards of *stare decisis*." *Id.* at 2491.

32. *Id.* at 2484–88 (O'Connor, J., concurring). Justice O'Connor had voted with the majority in *Bowers* and did not join with the majority to overturn it in *Lawrence*. *Id.* at 2484. O'Connor would have struck down the Texas sodomy law under the Equal Protection Clause. *Id.* She distinguished *Lawrence* from *Bowers* because the statute in *Lawrence* "ban[ne]d homosexual sodomy, but not heterosexual," a discrimination against a group of persons not allowed by the Equal Protection Clause. *Id.* at 2486.

the "substantive reach of liberty under the Due Process Clause."³³ Many states had also abolished their criminal sodomy laws since *Bowers* was decided.³⁴

The Court said that decisions in *Planned Parenthood v. Casey*³⁵ and *Romer v. Evans*,³⁶ both decided after *Bowers*, had caused "serious erosion" to the foundations of *Bowers*.³⁷ In *Casey*, the Court reaffirmed the right of a woman to terminate her pregnancy under the substantive aspect of the Due Process Clause.³⁸ *Casey* was cited by the majority primarily for its dicta about personal autonomy in personal decisions.³⁹ The majority believed that *Bowers* was in conflict with *Casey*'s liberty principle, because it denied homosexuals the right to such autonomy.⁴⁰ The dissent, however, argued that *Casey*'s holding did not cast doubt upon the holding in *Bowers*, because the abortion right in *Casey*, decided after *Bowers*, was less expansive than the right in *Roe*, decided before *Bowers*.⁴¹ As for *Casey*'s "sweet-mystery-of-life" dictum, the *Lawrence* dissent believed it cast doubt upon "nothing at all."⁴²

In *Romer*, the Supreme Court held that the Equal Protection Clause of the U.S. Constitution had been violated by an amendment to Colorado's Constitution ("Amendment 2") adopted in a 1992 statewide referendum.⁴³ The amendment prohibited any legislative, executive, or judicial action at any level of state or local government that was designed to protect homosexuals, lesbians, or bisexuals from discrimination.⁴⁴ Colorado's amendment failed the Court's rational basis inquiry because its impact upon homosexual persons was too broad, and

33. *Id.* at 2476. The pertinent pre-*Bowers* cases the Court discussed were: *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding right of privacy in penumbras of constitutional provisions and invalidating state law forbidding the use of contraceptives because it intruded on the right of marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating state law that prohibited distribution of contraceptives to unmarried persons); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman has a right to abort her unborn child); and *Carey v. Population Services International*, 431 U.S. 678 (1977) (striking down state law that forbade the sale or distribution of contraceptive devices to children under the age of sixteen). See *Lawrence*, 123 S. Ct. at 2476-77.

34. See *infra* notes 51-53 and accompanying text.

35. 505 U.S. 833 (1992).

36. 517 U.S. 620 (1996).

37. *Lawrence*, 123 S. Ct. at 2482.

38. 505 U.S. at 846-47.

39. See *Lawrence*, 123 S. Ct. at 2481.

40. See *id.* at 2481-82.

41. *Id.* at 2489 (Scalia, J., dissenting).

42. *Id.*

43. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

44. *Id.* at 629.

further, the amendment's excessive breadth demonstrated that the action arose out of animus toward the burdened class.⁴⁵

According to the majority in *Lawrence*, *Romer* "weakened" the precedent in *Bowers*,⁴⁶ a point the dissent did not "quarrel" with.⁴⁷ Alternatively, in the concurring opinion, Justice O'Connor relied extensively on *Romer*'s equal protection analysis to say that the Equal Protection Clause would not permit Texas to "single[] out homosexuals 'for disfavored legal status.'"⁴⁸ Although the majority found the alternative equal protection argument "tenable," it concluded that it must deal with the due process holding in *Bowers* directly. By doing so, the *Lawrence* Court asserted that even if the Texas statute had prohibited both same-sex and different-sex participants from engaging in the specified sexual conduct (thus apparently satisfying equal protection), it would have nevertheless been invalid on substantive due process grounds.⁴⁹ Thus, *Bowers* was overruled.⁵⁰

C. Recent State Trends Concerning Sodomy Laws

The Court in *Lawrence* noted that there had been a recent trend of states abolishing their prohibitions on sodomy.⁵¹ Although all fifty states had outlawed sodomy before 1961, only twenty-four states and the District of Columbia still maintained sodomy laws in 1986 when the Court upheld their validity in *Bowers*.⁵² By 2003, that number had dwindled further to thirteen states, with four of those states directing their sodomy laws only against homosexual conduct.⁵³

This trend of state legislative action reflected different things to different justices in *Lawrence*. For the majority, the reduction of state sodomy laws demonstrated "an emerging awareness" that adults should be given liberty to decide how to conduct their private sexual lives.⁵⁴ For Justice Scalia, a *recent* trend or an "emerging awareness" by definition only proved that homosexual conduct was "not 'deeply rooted in this Nation's history and tradition[s],' as . . . 'fundamental

45. *Id.* at 632.

46. *Lawrence*, 123 S. Ct. at 2482.

47. *Id.* at 2489 (Scalia, J., dissenting). Here, in an interesting aside, Justice Scalia used his agreement that *Romer* had indeed "eroded" the holding in *Bowers* to assert that *Roe* and *Casey* (abortion cases) had been "equally 'eroded' by *Washington v. Glucksberg*," *id.* (citations omitted), presumably to posture a future argument on the abortion issue.

48. *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring) (quoting *Romer*, 517 U.S. at 633).

49. *Id.* at 2482.

50. *Lawrence*, 123 S. Ct. at 2484.

51. *Id.* at 2480.

52. *Lawrence*, 123 S. Ct. at 2481.

53. *Id.*

54. *Id.* at 2480.

right' status requires."⁵⁵ Implicit in Justice Thomas's dissent is the idea that recent legislative action showed that legislatures were doing what they were supposed to be doing—enacting and/or repealing laws—a job that the Court is “not empowered” to do.⁵⁶

Furthermore, the justices debated whether or not there had been significant enforcement of sodomy laws and what such enforcement or nonenforcement meant to their discussion. The majority stressed that prosecution against “consenting adults acting in private” under such laws had been infrequent. Because of this fact, the majority maintained that the criminalization of homosexual sex did not have “ancient roots.”⁵⁷ The dissenters, on the other hand, pointed out that *private* behavior would by its nature yield low enforcement numbers; yet they still provided evidence showing that prosecutions for consensual homosexual sodomy, though infrequent, were not uncommon.⁵⁸ These prosecutions, the dissenting opinion maintained, demonstrate that sexual conduct among homosexuals is “not a fundamental right ‘deeply rooted in this Nation’s history and tradition.’”⁵⁹ The concurring opinion stressed that, although rare, the prosecution in *Lawrence* was evidence that prosecutions under the Texas statute did occur, thus proving that homosexuals were made “unequal in the eyes of the law.”⁶⁰

D. Nebraska’s Marriage Provision

On November 7, 2000, Nebraska voters approved an amendment to the state constitution that provided:

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.⁶¹

The Nebraska marriage amendment (then called “Initiative Measure 416”) was approved by seventy percent of the voters.⁶² Nebraska is one of at least thirty-eight states that has adopted legislation or constitutional provisions reserving marriage to opposite-sex couples.⁶³

55. *Id.* at 2494 (Scalia, J., dissenting).

56. *See id.* at 2498 (Thomas, J., dissenting).

57. *See id.* at 2478–81.

58. *See id.* at 2494 (Scalia, J., dissenting).

59. *Id.*

60. *Id.* at 2485 (O’Connor, J., concurring).

61. NEB. CONST. art. I, § 29.

62. *See* Stephen Buttry & Leslie Reed, *Challenge is Ahead for 416*, OMAHA WORLD HERALD, Nov. 8, 2000, at 1A.

63. *See* ALASKA CONST. art. I, § 25; HAW. CONST. art. I, § 23; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; ALA. CODE § 30-1-19 (1998); ARIZ. REV. STAT. ANN. § 25-101 (West 2000); ARK. CODE ANN. § 9-11-109 (Michie 2002); CAL. FAM. CODE § 308.5 (West Supp. 2004); COLO. REV. STAT. ANN. § 14-2-104 (Lexis 2003); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. ANN. § 741.212 (West 1997); GA. CODE

These enactments are often referred to as "Defense of Marriage Acts" ("DOMAs"). In 1996, President Clinton signed a federal DOMA passed by Congress. The federal DOMA defines marriage, for federal purposes, as a male-female union and gives each state the authority to refuse to give effect to an act of another state that treats a same-sex relationship as a marriage.⁶⁴

The push for state DOMAs came about, in large part, as a response to court decisions in Alaska and Hawaii, where the exclusion of same-sex couples from state marriage schemes had been declared unconstitutional under the respective state constitutions.⁶⁵ Although both those decisions were subsequently overruled by state constitutional amendments,⁶⁶ many feared that in time another court would attempt to redefine marriage. This fear proved to be prophetic when the Massachusetts Supreme Court held that "limiting the protections, benefits and obligations of civil marriage to opposite-sex couples" violated the Massachusetts Constitution.⁶⁷ Additionally, the Vermont Supreme

ANN. § 19-3-3.1 (1999); HAW. REV. STAT. § 572-1 (1993); IDAHO CODE § 32-209 (Michie 1996); 750 ILL. COMP. STAT. ANN. § 5/212 (West 1999); IND. CODE ANN. § 31-11-1-1 (2003); IOWA CODE ANN. § 595.2 (West 2001); KAN. STAT. ANN. § 23-101 (1995); KY. REV. STAT. ANN. § 402.020 (Banks-Baldwin 1994); LA. CIV. CODE ANN. art. 89 (West 1999); ME. REV. STAT. ANN. tit. 19A, § 701 (West 1998); MICH. COMP. LAWS ANN. §§ 551.1, 551.271 (West 1988); MINN. STAT. ANN. § 517.01 (West 1990); MISS. CODE ANN. § 93-1-1 (1999); MO. ANN. STAT. § 451.022 (West 2003); MONT. CODE ANN. § 40-1-401 (2003); N.C. GEN. STAT. § 51-1.2 (2003); N.D. CENT. CODE ANN. § 14-03-01 (1997); 2004 Ohio Laws 61 (to be codified at OHIO REV. CODE ANN. § 3101.01); OKLA. STAT. ANN. tit. 43, §§ 3, 3.1 (West 2001); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Law. Co-op. 1976); S.D. CODIFIED LAWS § 25-1-1 (Michie 1999); TENN. CODE ANN. § 36-3-113 (2001); TEX. FAM. CODE ANN. § 6.204 (Vernon 1998); UTAH CODE ANN. § 30-1-2 (1998); VA. CODE ANN. § 20-45.2 (Michie 2000); WASH. REV. CODE ANN. § 26.04.010 (West 1997); W. VA. CODE ANN. § 48-2-603 (Michie 2001). Also, just before this Note went to press, voters in Missouri approved a state constitutional amendment defining marriage as a union between a man and a woman. See *Foes of Gay Marriages Savor Win*, OMAHA WORLD HERALD, Aug. 5, 2004, at 1A [hereinafter *Foes*].

64. The Federal DOMA is embodied in 1 U.S.C. § 7 (2000) (providing for federal purposes, "marriage" means only a legal union between one man and one woman as husband and wife, . . . 'spouse' refers only to a person of the opposite sex who is a husband or a wife") and 28 U.S.C. § 1738C (2000) (providing that a state is "not required to give effect" to any act or proceeding from another state that treats a same-sex relationship as a marriage).
65. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); *Baehr v. Lewin*, 852 P.2d 44, 75, 82 (Haw. 1993); *on remand Baehr v. Miike*, Civ. No. 91-3194, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).
66. See ALASKA CONST. art. I, § 25 ("marriage may exist only between one man and one woman"); HAW. CONST. art. 1, § 23 ("[the] legislature shall have the power to reserve marriage to opposite-sex couples"). In Hawaii, the state legislature later enacted legislation providing that a marriage contract can exist "only between a man and a woman." HAW. REV. STAT. § 572-1 (1993).
67. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

Court found it unconstitutional to exclude same-sex couples from the benefits and protections that flowed from marriage, but gave the state legislature the opportunity to create marriage equivalents called “civil unions.”⁶⁸ A civil union gives homosexual couples all the same rights, benefits, and protections that married couples enjoy.⁶⁹

Though Nebraska law has always presumed that marriage was a male–female union,⁷⁰ it did not explicitly define it as such⁷¹ before the year 2000. Consequently, it was conceivable that a homosexual couple would obtain a same-sex marriage or another union equivalent to marriage in another state and then try to get a Nebraska court to declare it valid in Nebraska.⁷² Thus, Nebraskans amended their state constitution, thereby reaffirming the traditional definition of marriage and ensuring that the state would not be forced to recognize same-sex marriages or purported marriage equivalents.

III. ANALYSIS

A. Language in *Lawrence* that Could Be Used in a Challenge to Nebraska’s DOMA

Although the *Lawrence* Court explicitly pressed for a limited reading of its holding,⁷³ there is language in both the majority and concurring opinions that conceivably could be cited as persuasive authority in a challenge to Nebraska’s DOMA or similar acts in other states. For instance, although the Court confined its holding to private conduct, a person with a broad reading of the majority opinion in *Lawrence* could argue that marriage falls into a “realm of personal liberty which the government may not enter”⁷⁴—meaning either that the gov-

68. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

69. As of July 1, 2000, “[p]arties to a civil union are given all the same benefits, protections and responsibilities under Vermont law, whether they derive from statute, administrative or court rule policy, common law or any other source of civil law, as are granted to spouses in a marriage.” OFFICE OF THE SECRETARY OF STATE, STATE OF VERMONT VERMONT GUIDE TO CIVIL UNIONS, at <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html#faq1> (last visited July 10, 2004).

70. *See, e.g.*, NEB. REV. STAT. § 42-102 (Reissue 1998) (requiring male to be seventeen years old and female to be seventeen years old); NEB. REV. STAT. § 42-206 (Reissue 1998) (“husband not liable for debts contracted by wife before marriage”).

71. *See* NEB. REV. STAT. § 42-101 (Reissue 1998) (“In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential.”).

72. For example, current data shows that less than a third of civil union registrants are Vermont citizens, which means that many couples travel to Vermont to obtain a civil union and then return to their home state. *See* Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 23 (2003).

73. *See infra* section IV.D.

74. 123 S. Ct. 2472 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)).

ernment cannot limit one's choices about whom to marry or that the government should not recognize marriages at all.⁷⁵ Borrowing language from *Casey*, the *Lawrence* Court asserted that "our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, *family relationships*, child rearing, and education"⁷⁶ and "the Constitution demands [respect] for the autonomy of the person in making these choices."⁷⁷ Such personal choices, the Court stated, are "central to personal dignity and autonomy, . . . [and] central to the liberty protected by the Fourteenth Amendment."⁷⁸ The Court opined that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do," but would be denied this right under *Bowers*.⁷⁹ The Court then went on to overturn *Bowers*.⁸⁰

Based on the Court's reasoning for overturning *Bowers*, it is at least arguable that if a state does not allow complete decisional autonomy in the life-matters mentioned by the Court (*i.e.*, marriage, procreation, contraception, family relationships, child rearing, and education) it is acting unconstitutionally. Similar-sounding reasoning was used recently by the Supreme Judicial Court of Massachusetts (in the context of a state constitutional decision). In *Goodridge v. Department of Public Health*,⁸¹ it was held that restricting marriage to opposite-sex couples violated the Massachusetts constitution. There, the passage of *Lawrence* discussed immediately *supra* was cited as an example of the proposition that "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family . . . are among the most basic of every individual's liberty and due process rights."⁸² These liberties would be hollow, according to the

75. Some people propose that government should not sanction any marriages; that is, marriage should be privatized. See, e.g., Michael Kinsley, *Abolish Marriage: Let's Really Get the Government Out of Our Bedrooms*, WASH. POST, July 3, 2003, at A23.

76. 123 S. Ct. at 2481 (emphasis added).

77. *Id.*

78. *Id.* (quoting *Casey*, 505 U.S. at 851). In this section of the opinion, the Court revived the following dictum from *Casey*:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. (quoting *Casey*, 505 U.S. at 847). Justice Scalia referred to this as the "famed sweet-mystery-of-life passage." *Id.* at 2489 (Scalia, J., dissenting).

79. *Lawrence*, 123 S. Ct. at 2482.

80. *Id.* at 2484.

81. 798 N.E.2d 941, 968 (Mass. 2003).

82. *Goodridge*, 798 N.E.2d at 959 (citing *Lawrence*, 123 S. Ct. at 2481).

court, if the state could foreclose a person from choosing a same-sex spouse.⁸³ Thus, at least one court has applied *Lawrence* dicta to its reasoning for redefining marriage.⁸⁴

However, in applying *Casey*'s "laundry list" of personal decisions to its reasoning for overruling *Bowers*, the *Lawrence* Court stretched the meaning of *Bowers* too far. *Bowers* cannot be fairly read as a denial of autonomy to homosexuals in the listed categories of personal decisions. *Casey*, an abortion case, may have involved some of these decisions, but *Bowers* did not. The narrow issue in *Bowers* was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,"⁸⁵ not whether gay or lesbian persons were denied autonomy in making decisions about marriage, procreation, contraception, family relationships, child rearing, or education. Although the Court framed the issue in *Lawrence*⁸⁶ differently than the issue in *Bowers*, the factual scenario before the Court was essentially the same. Accordingly, it is also a stretch to say that *Lawrence* now stands for the proposition that government cannot restrict a personal decision like whom to marry.

Certain aspects of each of the *Casey-Lawrence* "personal decisions" are governmentally regulated. "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."⁸⁷ Complete decisional autonomy is a fiction in a civilized society because the personal autonomy of everyone—heterosexuals and homosexuals—is intruded upon in some way by governmental oversight in these areas. For instance, in Nebraska, a twenty-five-year-old cannot marry a sixteen-year-old.⁸⁸ A woman cannot get an abortion after her unborn child reaches viability.⁸⁹ Certain contraceptives are not available without a written prescription.⁹⁰ Laws also restrict a person's decisionmaking freedom in the areas of family relationships and childrearing, such as needed

83. *See id.*

84. *But see* Standhardt v. Superior Court, 77 P.3d 451, 457 (Ariz. Ct. App. 2003) (expressing that the Court in *Lawrence* "did not intend by its comments to address same-sex marriages.").

85. 478 U.S. 186, 190 (1986).

86. The Court framed the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Lawrence*, 123 S. Ct. at 2476.

87. *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

88. *See* NEB. REV. STAT. § 42-102 (Reissue 1998).

89. *See, e.g.*, NEB. REV. STAT. § 28-329 (Reissue 1995) (prohibiting abortion after child reaches viability).

90. *See* NEB. ADMIN. CODE tit. 172, ch. 134, §§ 009.16, 009.16A (1996).

laws against child abuse.⁹¹ And to the chagrin of elementary students throughout Nebraska, a child does not have the *autonomy* to decide against schooling, nor does the parent have the liberty to decide that for the child.⁹²

Complete "autonomy of the person in making these choices"⁹³ is more a theoretical fiction than reality in a civilized society. Tragic results would follow if a concept of complete autonomy was taken to its logical conclusion. A peaceful society could not long survive if everyone truly had "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"⁹⁴ free of any objective boundaries. Civilization demands that we adhere to some objective standards and to some "compulsion of the State."⁹⁵

Moreover, contrary to the view of the *Lawrence* majority, even heterosexual people do not have "autonomy for these purposes"⁹⁶ when it comes to marriage. American law has a long-standing history of restricting the choices of a person when it comes to whom he or she can marry.⁹⁷ In Nebraska, no person has the liberty to marry whomever he might choose. For example, a person is not free to marry her

91. See NEB. REV. STAT. § 28-707 (Reissue 1995 & Cum. Supp. 2002). In fact, Article 7 of Chapter 28 in the *Nebraska Revised Statutes* is entitled "Offenses Involving the *Family Relation*" (emphasis added).

92. See, e.g., NEB. REV. STAT. § 79-201 (Reissue 2003) (requiring compulsory education for children between seven and sixteen years of age).

93. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

94. *Id.* at 2481 (quoting *Casey*, 505 U.S. at 847). The 1999 Columbine school shooting tragedy is an ominous example of this type of relativistic and "no absolute standards" philosophy taken to its literal extreme. An author of a book about that tragic day commented:

[The Columbine killers] proclaimed it was payback time when they entered the Columbine library. Feeling victimized and exacting revenge arises from the sense of being empowered to act upon one's own version of truth as the master of one's destiny. It gets messy, however, when one person, in mastering his personal destiny, cuts short the destiny of someone else.

...

... [C.S.] Lewis argues that when young people are reared in an environment that jettisons "objective value" (what he calls "the belief that certain attitudes are really true and others really false") the result is a system that creates young people bereft of magnanimity and driven by visceral cravings—his men without chests. . . . Lewis concludes: "The practical result of [such an] education . . . must be the destruction of the society which accepts it."

WENDY MURRAY ZOBA, *DAY OF RECKONING: COLUMBINE AND THE SEARCH FOR AMERICA'S SOUL* 76-77 (2000) (quoting C.S. LEWIS, *THE ABOLITION OF MAN* 12, 17 (1947)).

95. *Lawrence*, 123 S. Ct. at 2481 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

96. *Id.* at 2482.

97. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (upholding the constitutionality of anti-polygamy laws).

brother or a first cousin.⁹⁸ Someone already married cannot legally take a second spouse.⁹⁹ One cannot choose to marry *any* other person absent a marriage license and an official solemnization proceeding.¹⁰⁰ Thus, every person's marital choice is limited by the state's public policy and statutory scheme.

Although *Lawrence* was decided upon Due Process grounds, Justice O'Connor's concurring opinion could impact an Equal Protection challenge to Nebraska's marriage provision.¹⁰¹ O'Connor would have struck down the Texas sodomy statute under the Equal Protection Clause.¹⁰² She looked to equal protection cases such as *Department of Agriculture v. Moreno*¹⁰³ and *Romer v. Evans*¹⁰⁴ and declared that the Court had "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."¹⁰⁵ A challenge to Nebraska's DOMA brought under the theory that it unconstitutionally discriminates against a group of persons (*i.e.*, homosexuals) could attempt to use O'Connor's concurrence for persuasive support.¹⁰⁶ Nebraska's DOMA does withhold state recognition from same-sex relationships. However, the provision is not a mere expression of moral disapproval of homosexual relationships;¹⁰⁷

98. See NEB. REV. STAT. § 42-103 (Reissue 1998).

99. *Id.*

100. See NEB. REV. STAT. § 42-104 (Reissue 1998); *Ropken v. Ropken*, 169 Neb. 352, 354, 99 N.W.2d 480, 483 (1959) ("Common-law marriages are not recognized in Nebraska Cohabitation in Nebraska without a ceremonial marriage is meretricious.").

101. One of the alternative questions posed to the Court was whether the criminal convictions under the Texas sodomy law were a violation of the Equal Protection Clause. *Lawrence*, 123 S. Ct. at 2476. The majority's decision was based on due process grounds in order to overturn *Bowers*, but the *Lawrence* majority called the Equal Protection challenge "a tenable argument." *Id.* at 2482.

102. *Id.* at 2484 (O'Connor, J., concurring).

103. 413 U.S. 528 (1973) (holding that the unrelated person provision of the Food Stamp Act created an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment).

104. 517 U.S. 620 (1996) (holding that a Colorado state constitutional amendment, effectively repealing state and local provisions barring discrimination on the basis of sexual orientation, violated the Equal Protection Clause).

105. *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

106. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring) (citing O'Connor's concurring opinion in *Lawrence* to support notion that same sex couples are "deemed less worthy of social and legal recognition" by the state's opposite-sex marital laws).

107. In 2000, during the days leading up to the amendment vote in Nebraska, one opponent of Section 29 (then called "Initiative 416") said that "[i]t is intended only to attack the family relationships between lesbian and gay Nebraskans." Charlie Kauffman, *Lawyer Blasts Defense of Marriage Amendment*, DAILY NEBRASKAN, Oct. 2, 2002 (quoting attorney Evan Wolfson), available at http://www.dailynebraskan.com/vnews/display.v/ART/2000/10/02/39d7fbb78?in_archive=1. But see DAVE BYDALEK, FAMILY FIRST, *Initiative 416—It's All About Marriage*, in

rather, it is designed to "preserv[e] the traditional institution of marriage," which O'Connor affirmed *is* a legitimate state interest.¹⁰⁸

Furthermore, Justice O'Connor called for a "more searching form of rational basis review to strike down such laws under the Equal Protection Clause" if they "exhibit[] such a desire to harm a politically unpopular group."¹⁰⁹ Although Nebraska's DOMA was not enacted out of a desire to harm homosexuals, and laws like DOMA that neither target a suspect class nor infringe upon a fundamental right are given rational basis review, it is conceivable that litigants challenging the amendment would urge the application of O'Connor's "more searching form" of review. What such a review looks like, however, is not known. Justice Scalia criticized O'Connor for failing to explain what she meant by a "more searching" form of rational basis review and asserted that the cases O'Connor cited applied only the conventional rational basis analysis, not a "more searching" one.¹¹⁰ Scalia surmised that a review such as O'Connor's "must at least mean, however, that laws exhibiting 'a . . . desire to harm a politically unpopular group' are invalid *even though* there may be a conceivable rational basis to support them."¹¹¹ Scalia's concern was that such reasoning would leave state DOMA laws on "pretty shaky grounds."¹¹² But as will be discussed *infra*, there is a big difference between criminal laws targeting homosexuals and marriage laws that confer state endorsement upon an ideal type of relationship for purposes of civil marriage.¹¹³

Regarding the Texas sodomy statute, O'Connor wrote that "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas's sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."¹¹⁴ Similar reasoning could be used to argue that even though Nebraska's DOMA withholds state endorsement from certain conduct (*i.e.*, the uniting of persons in a same-sex relationship), it is "directed toward gay persons as a class" since such conduct is "closely correlated with

CAPITOL WATCH: A POLICY REPORT BY FAMILY FIRST (Oct. 2000) (stating that the purpose of the initiative "is not about bigotry and discrimination; it is about marriage. It simply recognizes the foundational role of marriage between one man and one woman in our society and the corresponding benefits and responsibilities exclusively afforded that relationship as a matter of state public policy."), at <http://www.familyfirst.org/capitolwatch/1000.pdf>.

108. *Lawrence*, 123 S. Ct. at 2487–88 (O'Connor, J., concurring).

109. *Id.* at 2485.

110. *Id.* at 2496 (Scalia, J., dissenting).

111. *Id.*

112. *Id.*

113. See *infra* section IV.A.

114. *Lawrence*, 123 S. Ct. at 2486–87.

being homosexual.”¹¹⁵ But the marriage provision is not directed toward gay persons. Instead, it relates to the advancement of certain state interests, some of which will be discussed in this Note.¹¹⁶

In short, language contained in the dicta of *Lawrence* could conceivably be used by litigants to support a challenge to Nebraska’s DOMA. Although the holding of any given case determines its precedential value, looking at the way the Court has arrived at its decision can be helpful in gauging how the Court might rule on other issues.

B. The Majority’s Discussion of Foreign Law

In *Lawrence*, the majority opinion cited foreign law to counter an assertion in *Bowers* by Chief Justice Burger that, essentially, homosexual conduct had been criminalized “throughout the history of Western civilization.”¹¹⁷ The *Lawrence* Court called Burger’s references to the history of Western civilization “sweeping” and commented that other authorities had “point[ed] in an opposite direction.”¹¹⁸ First, the *Lawrence* court noted that the British Parliament had repealed its laws punishing homosexual conduct in 1967.¹¹⁹ Next, several cases were cited out of the European Court of Human Rights, where laws forbidding homosexual conduct were invalidated under the European Convention on Human Rights.¹²⁰ To the *Lawrence* Court, these cases demonstrated that the holding of *Bowers* had been rejected in other nations where action was taken “consistent with an affirmation of the protected right of homosexual adults to engage in intimate consensual conduct.”¹²¹ The dissent responded by saying that the majority’s discussion of foreign views was “[d]angerous dicta . . . since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans.’”¹²²

The danger in the Court’s discussion of foreign law could be that lower courts will interpret *Lawrence* as giving them reason to consult foreign law. At least one district judge, reading into *Lawrence* that the Court “relied” on foreign experience and jurisprudence, cited *Lawrence* as persuasive support for considering “the experience of other nations which share our traditions in determining contemporary standards of decency.”¹²³ That judge is reading the foreign law discussion

115. *Id.*

116. *See infra* section IV.C.

117. *Lawrence*, 123 S. Ct. at 2480 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring)).

118. *Id.* at 2481.

119. *Id.*

120. *Id.* at 2481, 2483.

121. *Lawrence*, 123 S. Ct. at 2483.

122. *Id.* at 2495 (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990 n. (2002) (Thomas, J., concurring in denial of certiorari)).

123. *United States v. Sampson*, 275 F. Supp. 2d 49, 65–66 (D. Mass. 2003) (upholding the Federal Death Penalty Act).

in *Lawrence* too broadly, however. American courts should not interpret *Lawrence* as giving them license to use foreign jurisprudence to inform their decisions. Each time the majority discussed foreign law, it carefully qualified the discussion as a response to the "Western civilization" language of *Bowers*.¹²⁴

Is it common for the Supreme Court to consider foreign jurisprudence? Does the use of foreign law in *Lawrence* give the reader any insight as to whether or not state DOMA laws are on "shaky ground"? Although a full discussion of this issue is beyond the scope of this Note, these questions will be addressed briefly.

Throughout its history, the U.S. Supreme Court has been hesitant to give much credence to foreign legal experience.¹²⁵ Early on, Chief Justice Marshall¹²⁶ announced:

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.¹²⁷

When the Supreme Court has appealed to foreign and international sources, it has usually been in cases with direct international implications. Such, for example, was the situation in *The Paquete Habana*.¹²⁸ There, two Cuban fishing vessels sailing under the flag of Spain were captured as "prize[s] of war" and sold at an auction during

124. See *Lawrence*, 123 S. Ct. at 2481 (discussing British Parliament and European Court of Human Rights in response to the "sweeping references by Chief Justice Burger to the history of Western civilization"); *id.* at 2483 (discussing the European Court of Human Rights after noting "[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.").

125. See Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 410, 417-21 (2003); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation of "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 589 ("[T]he U.S. Supreme Court is resistant to considering foreign constitutional law."); Cody Moon, Note, *Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?*, 12 WASH. U. J.L. & POL'Y 229, 239 (2003) (arguing that the Supreme Court "has been reluctant to fully embrace" comparative constitutional analysis).

126. Chief Justice John Marshall served as the fourth Chief Justice of the U.S. Supreme Court from 1801 to 1835. See ADRIENNE SIEGEL, 2 THE SUPREME COURT IN AMERICAN LIFE: THE MARSHALL COURT 1801-1835 250 (1987).

127. *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812).

128. 175 U.S. 677 (1900).

the Spanish-American War.¹²⁹ The Court held that fishing vessels sailing under the flag of a nation at war with the United States could not be lawfully captured by armed U.S. ships.¹³⁰ In the opinion, the Court noted that "ancient usage among civilized nations" recognized the exemption of fishing boats, along with their cargoes and crew, from being captured as war prizes.¹³¹ A lengthy history of this international principle was then given, including descriptions of orders from foreign kings, treaties between other nations, writings from foreign jurists, and foreign court decisions.¹³² Given the situation, the discussion of the "law of nations" in *The Paquete Habana* was consistent with the Supreme Court's traditional usage of foreign jurisprudence "in resolving a special class of disputes at the intersection of commerce, warfare and diplomacy."¹³³ Accordingly, when the United States Supreme Court has looked to foreign sources as persuasive authority, it has normally been in cases that involved true international issues, such as navigable seas, war, national borders, or international commerce.¹³⁴

On the other hand, the use of foreign sources to inform an interpretation of the Constitution for a domestic issue has usually encountered chastisement from one or more of the justices of the Supreme Court. For instance, Justice Holmes scolded fellow jurists for citing English authority for a hearsay rule, reminding them that: "the English cases since the separation of the two countries do not bind us."¹³⁵ In *Stanford v. Kentucky*,¹³⁶ the Court refused to use the death penalty prac-

129. *Id.* at 679.

130. *Id.* at 714.

131. *Id.* at 686.

132. *Id.* at 686-709.

133. Antonin Scalia, *Commentary*, 40 *St. Louis U. L.J.* 1119, 1120 (1996).

134. See, e.g., *Wildenhus's Case*, *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 12, 18-19 (1887) (noting that courts in England and France had reached similar conclusions in deciding that a U.S. court had jurisdiction over a homicide that took place aboard a foreign merchant ship while harbored in a U.S. port); *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 633 (1985) (citing arbitration rules promulgated by Japan and the United Nations in an action involving international companies brought to compel arbitration under the Federal Arbitration Act and an international arbitration convention); *id.* at 660-61 (Stevens, J., dissenting) (discussing court decisions out of Belgium and Italy as well as public policy in Germany to illustrate that other signers to the convention had refused to enforce agreements); *United States v. Alvarez-Machain*, 504 U.S. 655, 678 (1992) (Stevens, J., dissenting) (referring to international charters to show a "consensus of international opinion that condemns one Nation's violation of the territorial integrity of a friendly neighbor" in a case where a citizen and resident of Mexico was kidnapped and flown to Texas, where he was arrested for his participation in the kidnapping and murder of a DEA agent and the agent's pilot).

135. *Donnelly v. United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting).

136. 492 U.S. 361 (1989) (holding that imposing death penalty on defendants who were sixteen and seventeen years of age at the time of the crime was not unconstitutional).

tice of other countries to interpret the Eighth Amendment's Cruel and Unusual Punishment Clause, and commented, "[I]t is *American* conceptions of decency that are dispositive."¹³⁷ In *Atkins v. Virginia*,¹³⁸ Chief Justice Rehnquist complained of "the Court's decision to place weight on foreign laws . . . [since] [t]he Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents."¹³⁹ Thus, the reliance on foreign jurisprudence in Supreme Court opinions has not been without controversy where the issue was of a domestic nature rather than an international one.¹⁴⁰

The current justices on the U.S. Supreme Court have differing views on whether to rely on foreign sources in their decisionmaking processes. Justice Breyer¹⁴¹ and Justice Stevens¹⁴² have occasionally appealed to foreign jurisprudence in their written opinions. Other justices have commented in out-of-Court settings that they may be inclined to look at foreign jurisprudence to assist them in their decisions. For instance, Justice Ginsburg has said, "Our island or lone ranger mentality is beginning to change [Justices] are becoming more open to comparative and international law perspectives."¹⁴³ Justice O'Connor predicts that she will probably look "more frequently to the decisions of other constitutional courts."¹⁴⁴ Although Chief Justice Rehnquist chided the *Atkins* majority for giving weight to foreign laws,¹⁴⁵ elsewhere he has stated that "now that constitutional law is

137. *Id.* at 369 n.1.

138. 536 U.S. 304 (2002) (holding that executing mentally retarded criminals is violative of the Eighth Amendment).

139. *Id.* at 322 (Rehnquist, C.J., dissenting).

140. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (responding to the dissent's citation of European sources by saying that "such comparative analysis [is] inappropriate to the task of interpreting a constitution" in a case holding the Brady Handgun Violence Prevention Act unconstitutional on federalism principles).

141. *Printz*, 521 U.S. at 977 (Breyer, J., dissenting) ("[Other nations'] experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.").

142. *Atkins*, 536 U.S. at 316 n.21 (referring to foreign laws); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (discussing relevance of death penalty laws in other countries).

143. Gina Holland, *Ginsburg: Int'l Law Shaped Court Rulings*, KANSAS CITY STAR at http://www.kansascity.com/mld/kansascity/news/breaking_news/6445859.htm?templat=co (Aug. 2, 2003). *See also* Hannelore Sudermann, *U.S. Courts Reflecting World, Ginsburg Says*, THE SPOKESMAN-REVIEW.COM, at <http://www.spokesmanreview.com/pf.asp?date=091903&ID=s1412843&cat=section.idaho> (Sept. 19, 2003) ("The U.S. court system can even learn from other nations on issues concerning human rights, [Ginsburg] said.").

144. Jackson, *supra* note 125, at 638 (quoting Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, 1997 Spring Meeting, American College of Trial Lawyers, reprinted in 4 INT'L JUD. OBSERVER, June 1997, at 2.).

145. 536 U.S. at 322 (Rehnquist, C.J., dissenting).

solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”¹⁴⁶ Justice Kennedy cited foreign law in *Lawrence*, but for the limited purpose of responding to the “Western civilization” language of *Bowers*.¹⁴⁷ Similarly, Justice Souter has discussed foreign law, but also in a limited manner.¹⁴⁸ For their part, Justice Scalia¹⁴⁹ and Justice Thomas¹⁵⁰ have expressed strong opposition to the use of foreign materials in Court deliberations.

Does the fact that some of the Court’s members appear at least willing to look to foreign jurisprudence say anything about how the Supreme Court might rule in a challenge to a state DOMA? Where might the Court look for guidance about state marriage laws and what would it find? As stated earlier, although in a measured response, the *Lawrence* Court cited cases out of the European Court of Human Rights.¹⁵¹ Based upon that, one could predict that a DOMA challenge might lead some members of the Court to look toward European law if they decide to consult foreign jurisprudential sources. Several countries in Northern and Western Europe have either already legalized or are moving in the direction of legalizing same-sex marriages.¹⁵² In

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146. Jackson, *supra* note 125, at 585 (quoting William Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993)).
147. See *Lawrence*, 123 S. Ct. at 2481, 2483–84.
148. See *Washington v. Glucksberg*, 521 U.S. 702, 785–87 (1997) (Souter, J., concurring). In *Glucksberg*, Justice Souter discussed physician-assisted suicide in the Netherlands, but the discussion was in response to a policy plan proposed by the Respondents, which the Netherlands had previously implemented. He went on to question “whether an independent front-line investigation into the facts of a foreign country’s legal administration can be soundly undertaken through American courtroom litigation,” *id.* at 787, deferring instead to state legislatures, which “have superior opportunities to obtain the facts necessary for a judgment about the present controversy.” *Id.* at 788.
149. See *supra* notes 122, 133, 137 and accompanying text.
150. See *supra* note 122 and accompanying text. See also *Knight v. Florida*, 528 U.S. 990 (1990) (Thomas, J., concurring in denial of certiorari) (disapproving petitioner’s reliance on “the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, [and] the Privy Council” when petitioner could not find support for his position in “our own jurisprudence”).
151. See *supra* note 120 and accompanying text. See generally MALCOLM N. SHAW, *INTERNATIONAL LAW* 263–67 (4th ed. 1997) (providing an overview of the European Court of Human Rights). That court’s authority extends to all cases involving the European Convention on Human Rights. *Id.* As of 1996, the court consisted of forty judges, equal to the number of member states in the Council of Europe. *Id.* at 263.
152. See *Developments in the Law—The Law of Marriage and Family, Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2007–08 (2003) [hereinafter *Developments in the Law*].

2001, the Netherlands legalized same-sex marriages, defining marriage as being between "two persons of different sex or of the same sex."¹⁵³ Belgium traveled down the same path in early 2003.¹⁵⁴ Furthermore, broad "Registered Partnerships"—conferring almost all the same rights and responsibilities on same-sex couples as opposite-sex married couples—have been enacted in Denmark, Norway, Sweden, Iceland, and Finland.¹⁵⁵ Less expansive forms of same-sex unions exist in Hungary, France, Germany and Portugal.¹⁵⁶

Similarly, jurisprudential activity in Canada makes it appear as if Canada might be traveling the same path as the European countries discussed above. In 2003, an Ontario court declared it unconstitutional under Canada's Federal Constitution to deny same-sex couples the right to marry, and a court in British Columbia approved the registration of same-sex couples in that province.¹⁵⁷ Incidentally, the Massachusetts Supreme Court compared its decision in *Goodridge* to that of Ontario's and "concur[red]" with the Ontario court's decision to "refine[] the common-law meaning of marriage."¹⁵⁸ Clearly, a court looking outside the United States for persuasive authority to grant governmental sanction of same-sex marriages will see a growing trend in Europe and Canada.

If the Supreme Court is willing to rely on foreign jurisprudence in a marriage law case, the trend in Europe and Canada could sway the Court against a state DOMA. On the other hand, if the Court looks to jurisprudence across *all* of the 192 independent nations of the world,¹⁵⁹ it might well conclude differently. Only two countries (the Netherlands and Denmark) have sanctioned homosexual marriages on a national level, and that has occurred only within the last three years.¹⁶⁰ Marriage has been a male–female institution across civilizations for thousands of years.

It remains to be seen whether foreign jurisprudence will come into play if and when the Court addresses the constitutionality of a state

153. *Id.* at 2007 (quoting the Dutch Act on the Opening up of Marriage for Same-Sex Partners (Kees Waaldijk trans.)).

154. *Id.* at 2007–08.

155. *Id.* at 2008.

156. *Id.*

157. Michelle Mann, *Will Canada Lead the Way in Same-Sex Marriages? Winds of Change in the United States May Come From Up North*, 2 No. 27 A.B.A. J. E-REPORT 5 (July 11, 2003).

158. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (citing *Halpern v. Toronto (City)*, 172 O.A.C. 276 (2003)).

159. See BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T OF STATE, FACT SHEET: INDEPENDENT STATES IN THE WORLD (Feb. 27, 2004), at <http://www.state.gov/s/intr/rls/4250.htm>.

160. See *Developments in the Law*, *supra* note 152, at 2004 ("[I]n 1989 . . . same-sex marriage was not legal anywhere in the world Same-sex marriage has been legal in the Netherlands since April 2001 and Belgium . . . [since] early 2003.").

DOMA, but its use in the preservation of marriage context is unlikely. In overruling *Bowers*, the majority in *Lawrence* cited actions of the British Parliament and decisions from the European Court of Human Rights.¹⁶¹ *Lawrence* should not be viewed, however, as establishing a precedent for appealing to foreign law, because *Lawrence* only discussed foreign law to counter the “Western civilization” language of *Bowers*. Moreover, the Supreme Court historically has been hesitant to appeal to foreign authority.¹⁶² If substantive due process fundamental rights analysis continues to focus on American history and tradition, foreign law and trends should be of little or no relevance.

C. Due Process Analysis

The *Lawrence* Court framed the issue as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”¹⁶³ The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹⁶⁴ The Supreme Court concluded that the right to liberty under this amendment gave the petitioners in *Lawrence* a right to engage in homosexual conduct without interference from the government.¹⁶⁵ Furthermore, the Court held that Texas could not justifiably forbid such conduct because it lacked a legitimate state interest in doing so.¹⁶⁶ The Court apparently found insufficient the state’s two professed purposes in promulgating the homosexual sodomy statute, which were (1) avoiding litigation based on a broader predecessor statute that impacted married couples, and (2) the promotion of morality,¹⁶⁷ as well as any other conceivable rationale for the statute.

This section will examine the Supreme Court’s substantive due process methodology generally, as well as the analysis undertaken by the Court in *Lawrence*. Discussing *Lawrence* in light of the Court’s traditional due process methodology, however, is a tricky task.¹⁶⁸ The due process analysis in *Lawrence* does not fit well with established Court patterns. Not much discussion is made in *Lawrence* about traditional due process concepts like “fundamental rights” or “state interests”; nor is a balancing of the asserted liberty interest against a state interest ever fleshed out. The Court simply announces, without

161. See *supra* notes 117–21 and accompanying text.

162. See *supra* note 125.

163. 123 S. Ct. 2472, 2476 (2003).

164. U.S. CONST. amend. XIV, § 1.

165. *Lawrence*, 123 S. Ct. at 2484.

166. *Id.*

167. See Respondent’s Brief at 41–42, *Lawrence* (No. 02-102).

168. See *infra* notes 179–201 and accompanying text.

explanation, that the sodomy law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."¹⁶⁹ Borrowing language from Gertrude Stein's description of Oakland, in *Lawrence* "[t]here is no there there."¹⁷⁰ *Lawrence* seems to be a result without reason, at least when lined up with the Court's established methodology in due process jurisprudence.

In general, the Supreme Court engages in substantive due process analysis in order to determine whether the liberty interest allegedly infringed upon is one that is protected by the Due Process Clause. The Court's method for substantive due process analysis is set out in *Washington v. Glucksberg*,¹⁷¹ a case in which the Court upheld state bans on assisted suicide. First, claimants wishing to receive heightened protection for an asserted right or liberty must meet a "threshold requirement" by showing that it is fundamental.¹⁷² Fundamental rights or liberties are those that are "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."¹⁷³ Second, the Court requires a "careful description of the asserted fundamental liberty interest."¹⁷⁴ That is, the claimant must show that the asserted right, described with specificity, is objectively deeply rooted in the history and tradition of the American people. The Court takes this two-step substantive due process approach "to rein in the subjective elements that are necessarily present in due-process judicial review."¹⁷⁵ The Court is reluctant to break new ground by declaring an asserted right as "fundamental," realizing that extending such Constitutional protection to an asserted liberty interest takes the matter, to a great extent, out of the arena of public debate and out of the hands of legislatures.¹⁷⁶

If these demanding criteria are met, the asserted liberty will receive heightened protection against governmental interference. To justify a state regulation restricting a fundamental liberty interest, the state must demonstrate that it has a *compelling* state interest and

169. 123 S. Ct. at 2484.

170. GERTRUDE STEIN, *EVERYBODY'S AUTOBIOGRAPHY* ch. 4 (1937), as quoted in BARTLETT'S FAMILIAR QUOTATIONS 627:13 (Justin Kaplan ed., 16th ed. 1992).

171. 521 U.S. 702 (1997). See Richard F. Duncan, *They Call Me "Eight Eyes": Hardwick's Respectability, Romer's Narrowness, and Same-Sex Marriage*, 32 CREIGHTON L. REV. 241, 246-48 (1998), and Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, for two excellent discussions on the due process method articulated in *Glucksberg*.

172. *Glucksberg*, 521 U.S. at 722.

173. *Id.* at 721 (internal citations omitted).

174. *Id.*

175. *Id.* at 722.

176. *Id.* at 720.

that the enactment is narrowly-tailored to achieve that interest.¹⁷⁷ On the other hand, if a law does not burden a fundamental right, the state need only show “a reasonable relation to a legitimate state interest to justify the action.”¹⁷⁸ This is called rational relationship or rational basis review.

1. *Was a Fundamental Right to Sodomy Implicitly Identified in Lawrence?*

Trying to line up *Lawrence*'s murky substantive due process analysis with the Court's traditional methodology is a difficult task. If a fundamental right to sodomy was identified in *Lawrence*, one would expect to find strict scrutiny in the opinion. What level of scrutiny was applied in *Lawrence*? It is hard to tell. In announcing its holding, the Court appeared to apply the rational basis test, concluding that the Texas sodomy statute did not further any legitimate state interest to justify its intrusion into an individual's privacy.¹⁷⁹ Application of the lowest level of scrutiny would imply that no fundamental right to engage in homosexual sodomy was identified. However, several aspects of the majority opinion make it appear as if the Court applied some form of heightened scrutiny and perhaps, discovered a new (but unannounced) fundamental right to sodomy and adult consensual sex.

First, the Court overruled *Bowers*, which had found no fundamental liberty interest in homosexual conduct. Also, in overruling *Bowers*, the Court questioned the historical analysis upon which *Bowers* was decided. An analysis of history is one of the main inquiries the Court makes when determining whether a right is fundamental. The Court described several instances in the “history of Western civilization” (at least since 1957) where “other authorities point[ed] in an opposite direction”¹⁸⁰ from the premise, relied on in *Bowers*, that homosexual conduct had historically been subjected to state intervention. A large portion of the *Lawrence* opinion details how reaction to homosexual conduct has changed over the years and how there is now “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹⁸¹ *Lawrence* includes a discussion of history in response to *Bowers*, but the Court never makes it clear whether it undertook this historical analysis for the purpose of defining a fundamental right under substantive due process.

The fact that recent trends and an “emerging awareness” were significant to the Court is a notable deviation from previous due process

177. See, e.g., *Roe v. Wade*, 410 U.S. 113, 156 (1973).

178. *Glucksberg*, 521 U.S. at 722.

179. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

180. *Id.* at 2481.

181. *Id.* at 2480.

inquiries. In *Glucksberg*, for example, Justice Souter maintained that "an *emerging issue* like assisted suicide" should be left to state legislatures for experimentation, factfinding, and consideration.¹⁸² Justice Scalia criticized the majority in *Lawrence* for disregarding proper substantive due process analysis, expressing that an "emerging awareness" by definition fails the "deeply rooted" query that "'fundamental right' status requires."¹⁸³

Also pointing to an implicit fundamental liberty interest in homosexual conduct is the fact that *Lawrence's* liberty interest in private conduct was an extension of the privacy rights announced in *Griswold*, *Eisenstadt*, *Roe*, and *Casey*. *Roe v. Wade* had previously posited a threshold where "only personal rights deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."¹⁸⁴ In *Lawrence*, the court brought homosexual conduct under this burgeoning umbrella of privacy rights.

Furthermore, if the Court had actually performed a rational basis review (as opposed to some form of heightened scrutiny), it seems unlikely that the Texas statute would have been struck down. Rational basis is the lowest level of scrutiny. It is the most deferential to a state's judgment. Under rational basis review, a state statute is presumptively constitutional.¹⁸⁵ The law in question will ordinarily be upheld if it advances *any* legitimate state interest, even if the Court itself thinks that the law represents bad or unwise policy.¹⁸⁶ Persons challenging legislation under rational basis review have the burden of showing not only that the state's purported interests are illegitimate, but also that *no conceivable basis* exists to support the legislation.¹⁸⁷

Under a true rational basis test, the Court likely would have found some conceivable state interest rationally related to the Texas legislature's decision to prohibit homosexual sex. For example, the Texas Physicians Resource Council filed an amicus brief in *Lawrence* arguing that the Texas homosexual sodomy statute advanced a legitimate state interest in public health.¹⁸⁸ The brief described evidence show-

182. 521 U.S. at 789 (emphasis added).

183. 123 S. Ct. at 2494 (Scalia, J., dissenting).

184. 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

185. See *Federal Communications v. Beach Communications*, 508 U.S. 307, 314 (1993).

186. See *Romer v. Evans*, 517 U.S. 620, 632 (1996).

187. See *Beach Communications*, 508 U.S. at 315.

188. See Brief of Amici Curiae Texas Physicians Resource Council et al., *Lawrence* (No. 02-102). After *Lawrence*, a state interest in public health was held to be rationally related to a Kansas statute which punished heterosexual sodomy between adults and children less severely than homosexual sodomy between adults and children because "[m]edical literature is replete with articles suggesting that certain health risks are more generally associated with homosexual activity than with heterosexual activity." *Kansas v. Limon*, 2004 WL 177649, at *8 (Kan. App. Jan. 30, 2004), *remanded from*, *Limon v. Kansas*, 123 S. Ct. 2472 (2003).

ing that anal sex causes more health complications than vaginal sex.¹⁸⁹ It also cited CDC studies that have “identified men who have sex with men as among the groups that ‘are most vulnerable to STDs and their consequences,’”¹⁹⁰ and reported that “[r]esearchers estimate that men who have sex with men . . . still account for 42 percent of new HIV infections annually in the United States and for 60 percent of all new HIV infections among men.”¹⁹¹ In addition to state interests in public health, an amicus brief by Texas legislators asserted that the sodomy statute was rationally related to the state’s interest in promoting marriage and procreation as one of many Texas statutes encouraging marriage and discouraging sex outside of it.¹⁹² Certainly public health (at the core of a state’s police power) and the encouragement of marriage would seem to be legitimate state interests under rational relationship review.

It seems reasonable to suggest that if the Court had actually engaged in its traditional rational basis review in *Lawrence*, it would have found a *reasonable* or *rational* relationship between the Texas sodomy statute and some legitimate state interest, even if the Supreme Court’s policy preferences differed from those of the people of Texas.¹⁹³ These aspects indicate that the majority may have applied some form of heightened scrutiny, implicitly announcing a fundamental right to sodomy, or in the alternative merely decided to second-guess the legislature and “veto” the law.

2. *No Fundamental Right to Sodomy Identified in Lawrence*

On the other hand, the holding of *Lawrence* is couched in classic rational basis language: “The Texas statute furthers no legitimate state interest.”¹⁹⁴ This suggests that no fundamental right to sodomy or adult consensual sex was identified. If it had been, strict scrutiny would have been applied.

Nowhere does the Court describe the liberty interest as fundamental.¹⁹⁵ Moreover, the Court did not implement the traditional due pro-

189. Brief of Amici Curiae Texas Physicians Resource Council et al. at 7–8, *Lawrence* (No. 02-102).

190. *Id.*

191. *Id.* at 16.

192. Brief of Amici Curiae Texas Legislators at 17–25, *Lawrence* (No. 02-102).

193. See 123 S. Ct. 2472, 2498 (2003) (Thomas, J., dissenting) (commenting that if Justice Thomas was “a member of the Texas Legislature” he “would vote to repeal it,” but noting the Constitution did not empower the Court to help the petitioners).

194. 123 S. Ct. at 2484.

195. *Id.* at 2488 (Scalia, J., dissenting); *Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (concluding that “it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right”); *Standhardt v. Superior Court*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003).

cess methodology, described in *Glucksberg*, used for identifying a fundamental right. The Eleventh Circuit has identified the points of analysis that the *Lawrence* court overlooked.¹⁹⁶ First, the *Lawrence* Court did not inquire whether protecting the right of homosexual sodomy or private sexual intimacy was deeply rooted in the history and tradition of this nation.¹⁹⁷ Although the Court did analyze history,¹⁹⁸ the purpose of that examination was to challenge the history set forth in *Bowers* and the focus was on laws directed against private homosexual conduct.¹⁹⁹ Second, a "careful description" of the liberty interest was never given. The Court chose instead to characterize the constitutional liberty interests with "sweeping generality."²⁰⁰

It is unlikely that a fundamental right to sodomy was identified in *Lawrence*. Yet, because of the Court's convoluted due process analysis, it is difficult to say with certainty one way or the other. There is just enough fodder in the opaque troughs of *Lawrence* to feed either side of the argument. If a fundamental right to homosexual conduct was discovered, why would the Court not express it? Why not look for whether Texas had a *compelling* (or even an *important*) interest for implementing the sodomy law? The Court might have been wary of the ramifications that such a finding could have for other issues like same-sex marriage.²⁰¹

IV. LAWRENCE'S IMPACT UPON NEBRASKA'S MARRIAGE PROVISION SHOULD BE MINIMAL

Any analysis of the repercussions *Lawrence* might have on the validity of Nebraska's DOMA must include the following questions: Is same-sex marriage a fundamental right? Can Nebraska demonstrate a greater state interest for restricting marriage to opposite-sex couples than Texas did for criminalizing sodomy? This Part argues that *Lawrence's* impact upon state DOMAs should be minimal, because whether a state can criminalize sodomy is a much different issue than whether a state is permitted to recognize only opposite-sex relationships for purposes of granting the benefits, protections, and responsibilities of marriage. First, criminal sodomy laws and marriage laws differ in their effect and in their history. Next, a state may not be able to show a legitimate state interest in criminalizing sodomy, but it can

196. *Lofton*, 358 F.3d 804.

197. *Lofton*, 358 F.3d at 817 n.15.

198. See *supra* notes 180–81 and accompanying text.

199. *Lofton*, 358 F.3d at 817 n.15.

200. *Id.* at 817 n.15.

201. In fact, days after the *Lawrence* decision two gay men in Arizona applied for a marriage license, asserting that *Lawrence* implicitly recognized a fundamental right to enter a same-sex marriage. *Standhardt*, 77 P.3d at 451 (holding no fundamental right to enter a same-sex marriage).

demonstrate a legitimate state interest in upholding traditional marriage. Finally, the Supreme Court explicitly limited its holding in *Lawrence* to sodomy laws, excluding any implications for existing marriage laws.

A. Different Types of Laws

The sodomy law struck down in *Lawrence* was a criminal prohibition. The *Lawrence* majority emphasized that whether or not a homosexual relationship is entitled to formal state recognition, a person should be able to choose such a relationship without being punished as a criminal.²⁰² Justice O'Connor said that the law "brand[ed] all homosexuals as criminals."²⁰³ In Texas, persons discovered by law enforcement in a sexual act with another person of the same sex were sent to jail.²⁰⁴ If convicted, an offender faced far-reaching consequences. For example, he or she would be subject to "sexual offender" registries in several states.²⁰⁵ A criminal record would follow the offender permanently, making job searches difficult.²⁰⁶ Moreover, a criminal offense in and of itself subjects an offender to discrimination in the public and private spheres.²⁰⁷

Nebraska's marriage amendment, on the other hand, does not subject any person to criminal prosecution. No same-sex couple can be jailed because of it. The amendment simply defines what type of relationship will receive formal recognition in Nebraska. It does not brand "all homosexuals as criminals" any more than it brands as criminals those who are unmarried, persons under the legal age to marry, or close relatives seeking to be married. Just because someone is ineligible to marry under the state definition of "marriage" does not put a criminal stigma on that person. A sixteen-year-old person who wishes to marry, but cannot legally do so until she is seventeen, is not a criminal, she just does not qualify to marry under state marriage policy.²⁰⁸

Furthermore, whereas Texas prohibited sexual relations between people of the same gender, Nebraska's DOMA does not prohibit gay, lesbian, or bisexual persons from having intimate relationships with one another. Neither does it prohibit such persons from having public ceremonies to express their love for one another. Rather, the amend-

202. *Lawrence v. Texas*, 123 S. Ct. 2472, 2478 (2003).

203. *Id.* at 2486 (O'Connor, J., concurring).

204. *Id.* at 2476 ("The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.")

205. *See id.* at 2482.

206. *Id.*

207. *Id.*

208. *See* NEB. REV. STAT. § 42-102 (Reissue 1998) ("At the time of the marriage the male must be of the age of seventeen years or upward, and the female of the age of seventeen years or upward.")

ment sets forth marriage between a man and woman as the preferred type of relationship, a relationship set apart for special state endorsement and protection.²⁰⁹ Marriage has always enjoyed a favored and protected status in our country. The Supreme Court has affirmed that "it is not unconstitutional for the State to give categorical preference" to the marriage relationship.²¹⁰

Additionally, the statute in *Lawrence* criminalized *private*, consensual sexual behavior. The Court made it clear that its decision was limited to *private* conduct made illegal by a criminal law. Texas provided no state interest legitimate enough to justify this intrusion into someone's personal and private life. The Court relied on several earlier cases where the right of privacy had been developed and expanded, thereby calling into question both the holding in *Bowers* and the Texas sodomy statute.²¹¹ Indeed, most people might be uncomfortable with the type of surveillance that would be needed for rigorous enforcement of a criminal sodomy law. The thought of government agents performing house-to-house searches for sodomy law violators conflicts with many Americans' concept of constitutional liberty. Americans probably generally feel that their private sexual conduct should not be intruded upon by the government, provided that such conduct is not a criminal act under existing laws meant to prevent the harming of another person.

Unlike the criminal statute in *Lawrence*, Nebraska's DOMA does not infringe upon anyone's right of privacy. No private act was jeopardized or exposed when the amendment was passed. As in *Lawrence*, homosexual persons in Nebraska "are entitled to respect for their private lives."²¹² That principle is not contravened by the state marriage amendment, since the amendment does not regulate what a person can or cannot do in private. It does not infringe upon a person's (married or unmarried) liberty to make "individual decisions . . . concern-

209. See Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 159 (1997).

210. Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (holding the California statute's presumption that husband of child's mother is child's father does not violate unwed putative father's rights under Due Process Clause of Fourteenth Amendment).

211. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (discussing that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("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."); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a Connecticut law prohibiting the use of contraceptives unconstitutionally intruded upon the right of marital privacy).

212. 123 S. Ct. 2472, 2484 (2003).

ing the intimacies of their physical relationship.”²¹³ Rather, Nebraska’s DOMA affirms traditional marriage as the ideal type of relationship for family formation while withholding *public* recognition of same-sex unions and other non-marital relationships. Those who would petition the state to grant them a formal endorsement of their same-sex relationship do not seek to protect their *privacy*, but instead are seeking *public* affirmation of their relationship.²¹⁴

Finally, Nebraska’s DOMA did not take away any existing rights or protections already enjoyed by homosexual persons. When a criminal law is enacted, it makes certain previously acceptable conduct instantly punishable.²¹⁵ However, the marriage amendment did not change the legal status of homosexuals in Nebraska. The first clause of the amendment merely codified the status quo as to the accepted definition of marriage in Nebraska. State marriage laws had already presumed that marriage was between a man and a woman.²¹⁶ Furthermore, no existing legislation or protections afforded homosexuals were altered or repealed under the second clause of Section 29.²¹⁷ For instance, state laws carrying civil and criminal penalties for violence or threats against a person based on his or her sexual orientation still have full effect.²¹⁸ Private entities are also unaffected by the amendment. Private corporations and non-profits can still choose to recognize same-sex relationships by extending benefits to partners of gay and lesbian employees. Religious organizations are free to recognize whatever relationships they choose. Thus, unlike the enactment of a

213. *Id.* at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

214. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 978 (Mass. 2003) (Spina, J., dissenting) (discussing privacy protection and noting that traditional state marriage provision respected the private lives of homosexual plaintiffs, but “[i]ronically, by extending the marriage laws [in Massachusetts] to same-sex couples the court has turned substantive due process on its head and used it to interject government into the plaintiffs’ lives”); *cf. Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (“[T]he asserted liberty interest [in adoption] is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition. Hence, we conclude that the *Lawrence* decision cannot be extrapolated to create a right to adopt for homosexual persons.”).

215. Although not a criminal statute, one of the problems with Colorado’s amendment in *Romer v. Evans* was that it took away already existing protections based on sexual orientation. The amendment’s effect on the legal status of homosexuals was “[s]weeping and comprehensive.” 517 U.S. 620, 627 (1996).

216. *See supra* note 70.

217. *See supra* note 61 and accompanying text.

218. *See, e.g., NEB. REV. STAT. § 28-110* (Cum. Supp. 2002) (a person has right to live free from violence or threats regardless of sexual orientation); *NEB. REV. STAT. § 28-111* (Cum. Supp. 2002) (enhanced penalty for enumerated criminal offenses against a person including because of sexual orientation); *NEB. REV. STAT. § 28-114* (Cum. Supp. 2002) (commission formed to monitor enumerated criminal offenses, including those based on sexual orientation).

criminal law, the legal status of homosexuals in Nebraska the day after the marriage amendment had passed remained the same as it had been the day before.²¹⁹

Therefore, the two laws—Nebraska's marriage amendment and the Texas sodomy statute—are two very different types of laws. Nebraska's marriage provision is not a criminal statute. In *Lawrence*, the Supreme Court recognized a distinction between state marriage laws and criminal sodomy regulations, emphasizing that *Lawrence* did not involve "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."²²⁰ Whether a state can grant favored status to a relationship is a very different question from whether a state can make "private sexual conduct a crime."²²¹ The effect of legalizing sodomy is to produce *permitted* behavior while the public recognition of same-sex unions would result in *preferred* behavior.²²² The issues addressed in a state sodomy statute are distinguishable from the issues addressed in a state DOMA. Thus, a decision regarding the validity of one should not impact the validity of the other.

B. Historical Differences Between the Two Issues

A significant historical difference exists between the issue addressed by a criminal sodomy law (*i.e.*, the criminalization of certain private sexual conduct) and the issue addressed by Nebraska's constitutional marriage provision (*i.e.*, the preservation of the definition of marriage). The majority and the dissent in *Lawrence* debated as to whether or not there had been a longstanding tradition of directing legislation against sodomy, and to the extent that there had been, whether or not such laws had actually been enforced.²²³ In response to an assertion in *Bowers* that "[p]roscriptions against [homosexual sodomy] ha[d] ancient roots,"²²⁴ the majority proposed that historically, sodomy laws were directed more at nonprocreative sex in general rather than at homosexual sex.²²⁵ Furthermore, to refute the

219. It is true that those wanting the State to confer marital recognition on same-sex relationship, now must first amend the state constitution. This aspect, however, does not lower the legal status of homosexuals. Those who oppose the marriage provision have the same opportunity to gather support and amend the constitution as any other group that would like to change some constitutional provision.

220. 123 S. Ct. 2472, 2484 (2003).

221. *Id.*

222. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 61.

223. *Compare Lawrence*, 123 S. Ct. at 2478–79, with *id.* at 2493–94 (Scalia, J., dissenting).

224. *Lawrence*, 123 S. Ct. at 2478 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)).

225. *Id.* at 2479.

premise of a concurring opinion in *Bowers* that government intervention against homosexual conduct had been existent throughout the history of Western civilization,²²⁶ the majority declared, “[i]n all events we think that our laws and traditions in the past half century are of most relevance here.”²²⁷ It then went on to discuss how sodomy laws had been repealed in most states and how other nations in the Western world had already decided against the criminalization of homosexual conduct.²²⁸

It may or may not be true that laws directed against homosexual conduct have a longstanding historical tradition. That determination is not the focus of this Note. It seems at least to be a debatable proposition, since proponents on either side produce evidence for their position.²²⁹ However, there is very little debate over the notion that marriage has a longstanding history of being a union between a man and a woman. Our legal tradition reflects this, defining marriage as the “legal union between a man and woman as husband and wife.”²³⁰ Marriage has been limited to a man and a woman throughout the history of our country.²³¹ In 1878, for example, the Supreme Court rejected an argument that religious practice was a sufficient justification for violating a polygamy law that restricted marriage to

226. *Id.* at 2480 (quoting *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring)).

227. *Id.* at 2480.

228. *Id.* at 2480–81.

229. See *supra* notes 54–60, 223 and accompanying text; see also, e.g., William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631 (suggesting that the *Bowers* analysis of sodomy laws had virtually no connection with the historical understanding of eighteenth or mid-nineteenth century regulators); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick* 97 YALE L.J. 1073, 1074–75 (1988) (asserting that “historical accounts” in *Bowers* “are certainly misleading, and, in some cases, inaccurate as well.”); but see, e.g., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986) (stating: “Current state laws prohibiting homosexual intercourse are ancient in origin.”); Edward P. Stegmann, Note, *Of History and Due Process*, 63 IND. L.J. 369, 381–86 (1988) (asserting that Western civilization has a history of condemning sodomy).

230. BLACK’S LAW DICTIONARY 986 (7th ed. 1999); see also *Dean v. District of Columbia*, 653 A.2d 307, 315 (D.C. 1995) (stating that the understanding of marriage in the early 1900s was of one man and one woman) (referring to BLACK’S LAW DICTIONARY 762 (2d ed. 1910)); Robin Cheryl Miller, Annotation, *Marriage Between Persons of Same Sex*, 81 A.L.R.5TH 1, § 2 (2000) (“Except for Vermont’s recently passed civil union act, existing statutory law reflects no such extension [of marriage to same-sex couples]: the courts that have addressed the issue have uniformly held that the marriage statutes . . . permit only opposite-sex marriage.”); Elisa Laird, Student Essay, *The Law is Straight and Narrow: How American Courts Define Families*, 9 CARDOZO WOMEN’S L.J. 221, 222–23 (2003) (“Heterosexual families have always been protected by the laws and enjoy the benefits—social and legal—bestowed by the larger system.”).

231. See generally, Wardle, *supra* note 222, at 32–37 (arguing that “[h]istory, experience, and precedent refute the same-sex marriage claim”).

just one man and one woman.²³² Historically, although cultures had varying criteria for marriage (e.g., some have permitted polygamy or endogamy), none recognized marriages between people of the same sex.²³³

As for recent history, the *Lawrence* Court examined laws and jurisprudence in the United States and other Western nations over the past fifty years and found an "emerging awareness" that homosexual conduct should not be punishable by criminal laws.²³⁴ Prior to *Lawrence*, states had been systematically abolishing legislation that criminalized sodomy.²³⁵ Nebraska, for instance, eliminated its sodomy law in 1978.²³⁶ Although all fifty states had outlawed sodomy before 1961, only thirteen states continued to prohibit such conduct in 2003. Four of those states had laws directed only against homosexual conduct.²³⁷ As discussed *supra*, the Court also found it persuasive that international courts and other nations had recently struck down laws prohibiting sexual activity between people of the same sex.²³⁸ Thus, the fact that recent public perception had changed so greatly over the past half-century was significant to the fact that Texas's sodomy statute was found unconstitutional.

Although recent trends before *Lawrence* might have shown a relaxing of public perception towards sexual conduct among gays and lesbians and a waning significance of laws that criminalized sodomy, quite the opposite is true when it comes to the notion of traditional marriage. Already deeply rooted in our nation's history, there has been a significant reaffirmation in recent years of the principle that marriage is a union between a man and a woman. In 1996, Congress passed the federal DOMA, defining marriage as a union between one man and one woman for federal purposes, and providing that a state may refuse to recognize a same-sex relationship treated as a marriage in another state.²³⁹ Additionally, at least thirty-eight states have passed legislation or constitutional amendments that preserve the

232. *Reynolds v. United States*, 98 U.S. 145 (1878).

233. See George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 583-84 (1999). *Contra* William N. Eskridge, Jr., *A History of Same-Sex Marriage* 79 VA. L. REV. 1419 (1993); but see Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 249-50 (1998) (criticizing Eskridge's article).

234. 123 S. Ct. 2472, 2480-81 (2003).

235. See *id.* at 2480; see also Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 480-81 (2001) ("More recently, the trend toward decriminalization [of sodomy] has resumed.").

236. Nebraska's sodomy statute (formerly NEB. REV. STAT. § 28-919 (Reissue 1975)) was repealed when a new criminal code was adopted in 1977, 1977 Neb. Laws 38 § 328, and made effective July 1, 1978, *id.* § 325.

237. *Lawrence*, 123 S. Ct. at 2481.

238. See *id.* at 2481, 2483.

239. See *supra* note 64.

definition of marriage to the traditional meaning of one man and one woman.²⁴⁰ It appears that this trend of state action is continuing.²⁴¹ Action such as this by the country's legislatures is perhaps the "clearest and most reliable objective evidence of contemporary values."²⁴²

Moreover, *Lawrence* highlights recent caselaw, whose holdings suggested that criminal sodomy statutes were going to fall. The majority in *Lawrence* discussed two post-*Bowers* decisions that had eroded the foundation of *Bowers*: *Casey* (emphasizing personal autonomy) and *Romer* (invalidating a state amendment directed at homosexuals because of its excessive breadth and because it was born out of animosity).²⁴³ The Court also noted that five state courts had refused to follow *Bowers* in state due process decisions.²⁴⁴

In contrast, if the Court was to look for caselaw regarding the issue of marriage, it would find that courts have mostly refused to alter the definition of marriage to include same-sex unions. Although the Supreme Court has not yet addressed the question of same-sex marriage, lower courts have consistently upheld the traditional notion of marriage. A wave of litigation failed during the 1970s in which homosexuals sought to invalidate statutes limiting marriage to opposite-sex couples.²⁴⁵ More recently, courts for the most part continue to uphold the validity of using the traditional definition of marriage in civil marriage provisions.²⁴⁶ Just days after *Lawrence* was decided, two homosexual men applied for a marriage license in Arizona. Upon being denied a license, the men challenged Arizona's prohibition of same-sex marriages arguing that *Lawrence* implicitly recognized a fundamental right to enter a same-sex marriage.²⁴⁷ An Arizona court rejected the

240. See *supra* note 63.

241. See NATIONAL SURVEY OF STATE LAWS 351 (Richard A. Leiter ed., 4th ed. 2003) ("[S]everal dozen states . . . have passed laws prohibiting same sex marriages. There are many states that currently have similar legislation pending."). See also *Foes*, *supra* note 63, at 1A.

242. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

243. See *Lawrence*, 123 S. Ct. at 2481–82.

244. *Lawrence*, 123 S. Ct. at 2483.

245. *Miller*, *supra* note 230. A case often cited from the 1970s is *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), which held that same-sex marriage was not authorized by state statutes nor compelled by the U.S. Constitution.

246. See, e.g., *Adams v. Howerton*, 486 F. Supp. 1119, 1122–23 (D. Cal. 1980); *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 310–31 (D.C. 1995); *Succession of Bacot*, 502 So. 2d 1118, 1130 (La. Ct. App. 1987); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 288 (N.Y. Sup. Ct. 1996); *In re Cooper*, 564 N.Y.S.2d 684, 685 (N.Y. Sur. Ct. 1990), *aff'd*, 592 N.Y.S.2d 797 (App. Div. 1993); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. 1987); *DeSanto v. Barnsley*, 476 A.2d 952, 955–56 (Pa. Super. Ct. 1984).

247. *Standhardt*, 77 P.3d at 451.

contention that *Lawrence* stood for such a proposition and upheld the state's marriage statutes.²⁴⁸

On the other hand, four state courts have recognized either a right to same-sex marriage or a marriage equivalent, all under state constitutional provisions.²⁴⁹ Two of those decisions (in Alaska and Hawaii) were subsequently overruled by state constitutional amendments.²⁵⁰ Vermont created same-sex "civil unions" and continues to reserve civil marriages to opposite-sex couples.²⁵¹ Massachusetts grants civil marriages to same-sex couples as of May 2004, but this policy could prove to be a short-lived, since lawmakers have already begun to move towards amending the state constitution—a process that would take about two years.²⁵² The situation in Massachusetts seems to be following a similar pattern as seen in Alaska, Hawaii, and Vermont—that when a court rules against a traditional marriage policy, the state legislature follows with some action aimed at overturning or tempering the court's ruling.

As noted, the few courts that have identified a right to same-sex marriage or some marriage-like union have done so under state constitutions. Since Nebraska's marriage provision is a part of the state constitution, any challenge to it would have to be brought under the U.S. Constitution. No court has yet held that the right to enter a same-sex marriage is a fundamental right under the U.S. Constitution. Accordingly, most courts continue to support the traditional definition of marriage and the state policies protecting that definition.

In summary, the history of marriage laws and the history of criminal sodomy laws are quite different. The historical acceptance of marriage as between a man and a woman is unquestioned, while the historical basis for criminal homosexual sodomy laws seems at least to be debatable. Whereas states tended to abolish criminal sodomy laws before *Lawrence*, overwhelming support for traditional marriage continues to be reaffirmed as exemplified in recent state constitutional amendments, federal and state legislation, and court cases. Consequently, *Lawrence*'s decision to strike down criminal sodomy laws does not cast doubt upon a state DOMA.

C. Preserving Traditional Marriage Advances Legitimate State Interests

A court reviewing the constitutionality of Nebraska's DOMA under either the Due Process Clause or the Equal Protection Clause of the

248. *Id.* at 457, 465.

249. *See supra* notes 65–69 and accompanying text.

250. *See supra* note 66.

251. *See supra* notes 68–69 and accompanying text.

252. *Court Again Backs Gay Marriages: Same-Sex Civil Unions Not Enough—Massachusetts Ruling*, OMAHA WORLD HERALD, Feb. 5, 2004, at 1A.

Fourteenth Amendment will most likely apply a deferential rational relationship review—meaning that the State of Nebraska will merely have to demonstrate that its marriage amendment is rationally related to some legitimate government interest. Minimal scrutiny will most likely be applied, because the Supreme Court is ordinarily deferential to states when it comes to regulations concerning family affairs²⁵³ and it has never expressly subjected any legislation impacting homosexual persons to heightened scrutiny. Homosexuality is neither a “suspect” classification (*e.g.*, race, ethnic, or religious classifications) nor a “quasi-suspect” classification. (*e.g.*, gender). Neither homosexual conduct²⁵⁴ nor same-sex marriages²⁵⁵ are considered fundamental rights.

Under *Glucksberg*, an alleged liberty interest in same-sex marriage would not receive heightened protection. First, the liberty interest must be articulated with specificity. In other words, one cannot simply argue that gays and lesbians have a right to marry. Rather, the question is whether there is a constitutional right to *same-sex* marriage. It cannot reasonably be said that same-sex marriage is a fundamental right. It is not deeply rooted within the traditions and longstanding history of our nation. Since same-sex marriage is not a fundamental right, a court would most likely apply the rational-basis test.

It is true that some legislation impacting gays and lesbians has failed rational relationship review, but Nebraska’s DOMA is not plagued by the same difficulties. In *Romer v. Evans*, for instance, the Colorado amendment in question failed rational relationship review

253. See *Developments in the Law*, *supra* note 152, at 2014.

254. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2492 (2003) (Scalia, J., dissenting) (holding that the Court has not described sexual conduct among homosexuals as a fundamental right or liberty interest and that the Texas sodomy law was not subjected to strict scrutiny); see generally Note, *Homosexuals’ Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193, 202–06 (1979) [hereinafter *Homosexuals’ Right to Marry*] (arguing that homosexuality is not a suspect classification).

255. See *Standhardt v. Superior Court*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003) (“The history of the law’s treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.”); *Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. 1995) (“[S]ame-sex marriage is not a ‘fundamental right’ protected by the due process clause.”); *Baehr v. Lewin*, 852 P.2d 44, 56 (Haw. 1993) (“[C]ase law demonstrates that the . . . fundamental right to marry . . . presently contemplates unions between men and women.”). See also *Wardle, supra* note 222, at 26 (arguing that “there is no constitutional right to same-sex marriage”); *Homosexuals’ Right to Marry, supra* note 254, at 200–02 (discussing the traditional definition of marriage and the Supreme Court’s decision in *Zablocki v. Redhail* and concluding that “same-sex marriage cannot realistically be regarded as a fundamental right”).

because of the law's excessive breadth and because it was inexplicable by anything but animus toward gays, lesbians, and bisexuals.²⁵⁶ Nebraska's provision, on the other hand, was not enacted with a desire to harm homosexual persons.²⁵⁷ It, like other state DOMAs, is also narrow enough for a court to perceive a reasonable relationship to its purported ends.²⁵⁸ In *Lawrence*, the sodomy statute failed rational relationship review, because it was too intrusive into private lives.²⁵⁹ In contrast, neither private conduct nor private relationships are intruded upon by Nebraska's DOMA.

When a court reviews a regulation under a rational relationship review, it does not decide whether, in the court's opinion, the law is wise or unwise, or whether the judges would have voted for it if they were legislators. Rather, a court looks to see if some legitimate governmental interest is advanced. So long as the law is rationally related to a conceivable legitimate state interest, it will be sustained, even if it seems to disadvantage a particular group.²⁶⁰ Hence, a court reviewing the constitutionality of Nebraska's DOMA will ask whether defining marriage as a dual-gender institution and withholding formal recognition to same-sex relationships advances any conceivable legitimate government interest. This section argues that Nebraska's marriage provision is rationally related to legitimate state interests.

Marriage (as between one man and one woman) enjoys a rich history and tradition in our society and the government has historically encouraged marriage through public policy.²⁶¹ "Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."²⁶² Recognizing the importance of marriage, the

256. 517 U.S. 620, 632 (1996).

257. Regarding a similar definitional provision found in the Federal DOMA, a scholar who argues for its unconstitutionality concedes that "[o]ne cannot confidently infer, simply by considering the definitional provision on its face, that [DOMA's] purpose is a desire to harm the group." Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 8 (1997) (arguing that the choice of law provision, not the marriage definition, makes federal DOMA unconstitutional). *But see* Evan Wolfson and Michael F. Melcher, *The Supreme Court's Decision in Romer v. Evans and Its Implications for the Defense of Marriage Act*, 16 QUINNIPIAC L. REV. 217 (1996) ("Because DOMA reflects the same animus, the same 'across the board' inequality, and the same attempt to create a disfavored class (of lawful marriages), it is unconstitutional.").

258. *See* Duncan, *supra* note 209, at 156.

259. *Lawrence*, 123 S. Ct. at 2484.

260. *Romer*, 517 U.S. at 632.

261. For a good discussion on why it is a valid interest for a state's public policy to foster, protect, and encourage marriage, see *Peden v. State*, 930 P.2d 1, 14-17 (Kan. 1996) (upholding state's tax schemes favoring married couples).

262. *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (discussing marriage in the context of criminal polygamy charge).

Supreme Court has upheld policies that promote marriage. The Court has reasoned:

[C]ertainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.²⁶³

Lawrence's invalidation of sodomy laws because no legitimate government interest was found does not cast doubt on the validity of laws protecting traditional marriage. Justice O'Connor, in her concurring opinion, affirmed the protection of traditional marriage as a legitimate state interest, because "[u]nlike the moral disapproval of same-sex relations—the asserted state interest in [*Lawrence*—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."²⁶⁴ Thus, the preservation of traditional marriage is constitutional, because it advances legitimate state objectives—objectives that are undiminished by the holding in *Lawrence*.

Many reasons have been asserted by judges, attorneys, and scholars as to why preserving the traditional definition of marriage advances legitimate state interests.²⁶⁵ Professor Wardle writes that:

[I]mportant public interests in and social purposes for traditional marriage . . . include (1) safe sexual relations; (2) responsible procreation; (3) optimal child rearing; (4) healthy human development; (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers; (6) securing the stability and integrity of the basic unit of society; (7) fostering civic virtue, democracy, and social order; and (8) facilitating interjurisdictional compatibility.²⁶⁶

Professor Dent adds that socializing adults and promoting personal happiness are also valid public interests connected to traditional marriage.²⁶⁷ There are many sources available that explain these purported interests in detail.²⁶⁸ This Note will briefly promote the idea that traditional, opposite-sex marriages advance valid state in-

263. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (discussing marriage in the context of upholding a statute disenfranchising polygamists).

264. 123 S. Ct. at 2488 (O'Connor, J., concurring).

265. See, e.g., *Standhardt v. Superior Court*, 77 P.3d 451, 463–64 (Ariz. App. 2003) (holding that "the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest").

266. Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 779–80 (2001).

267. Dent, *supra* note 233 at 603–07 (1999).

268. See, e.g., Dent, *supra* note 233; Duncan, *supra* note 209, at 156–65; Wardle, *supra* note 266.

terests in promoting responsible procreation and providing for the optimal childrearing setting.

Nebraska has an interest in preserving and encouraging traditional, opposite-sex marriages because of the link between procreation and marriage. Historically, procreation has been most facilitated by the institution of marriage.²⁶⁹ The U.S. Supreme Court has linked marriage and procreation—conferring a fundamental right on marriage primarily because of this link.²⁷⁰ The Court has declared that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”²⁷¹ Governments throughout history have “extolled the virtues of procreation as a way to furnish new workers, soldiers, and other useful members of society.”²⁷² States encourage the channeling of procreative activities into the institution of marriage to ensure that most children will be born into environments of stability, to committed parents able to support the burdens of newborn children. Surely the State is reasonable in giving a type of “favored” status to traditional marriage because of its connection to responsible procreation. The State has more of an interest in promoting procreative relationships than it does non-procreative relationships. Since the perpetuation of the human race is at least a rational (if not important or compelling) governmental interest, the institution linked inextricably to procreation—traditional marriage—should be protected.

The argument is often made that if the procreative aspect of marriage is reason to preclude homosexual persons from the State’s definition of marriage, then heterosexual couples who cannot (or choose not to) have children should not be permitted to marry either. There are several reasons why this argument fails. First of all, childless heterosexual married couples are the exception, not the norm.²⁷³ Saying that opposite-sex marriages should be preferred by the State because of an interest in the propagation of the human race expresses that marriage is the *ideal* setting for responsible procreation. It does not

269. For an excellent discussion on the historical link between marriage and procreation, see Wardle, *supra* note 266.

270. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Maynard v. Hill*, 125 U.S. 190 (1888). For further discussion, see *Dean v. District of Columbia*, 653 A.2d 307, 332–33 (D.C. 1995) and *Baehr v. Lewin*, 852 P.2d 44, 56–57 (Haw. 1993).

271. *Skinner*, 316 U.S. at 541.

272. *State v. Limon*, 83 P.3d 229, 237 (Kan. App. 2004).

273. See generally AMARA BACHU, U.S. CENSUS BUREAU, FERTILITY OF AMERICAN MEN 15–22 (1996) (displaying and analyzing statistics showing that 85 to 86 percent of married husbands and wives have children, while around 15 to 16 percent are childless; see also CENTERS FOR DISEASE CONTROL AND PREVENTION: NATIONAL CENTER FOR HEALTH STATISTICS, FERTILITY, FAMILY PLANNING AND WOMEN’S HEALTH: NEW DATA FROM THE 1995 NATIONAL SURVEY OF FAMILY GROWTH 7 (1997), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_019.pdf (only about 7.2 percent of married couples were infertile in 1995).

express that marriage is the *only* setting for procreation or that *every* married couple will procreate. Furthermore, reproduction requires a male–female union. Only the sexual union between a male and a female has the *potential* for reproduction. Inherently, no sexual act between two men or between two women will result in reproduction. So, although not all heterosexual couples have children, only a heterosexual couple can have sexual “acts which are reproductive *in type*, whether or not they are reproductive *in effect*.”²⁷⁴

Moreover, it would be inappropriate for the State to prohibit heterosexual couples from marrying based upon the inability or the lack of intent to procreate, because, outside of medical testing or extremely intrusive questioning, it would be impossible to tell which heterosexual couples should be denied marriage licenses.²⁷⁵ Many couples choose to wait until they are married to engage in sexual intercourse and thus do not know before they are married whether or not they can have children. Even assuming that a particular couple knows beforehand that they cannot (or will not) have any children, the State would be forced to pose incredibly invasive questions about fertility, sexual practices, and the couple’s future plans before it could issue a marriage license. These types of questions would most assuredly force the State to pierce the “realm of personal liberty which the government may not enter.”²⁷⁶ On the other hand, the State does not have to ask such privacy-invading questions to homosexual couples seeking to be married, because same-sex relationships, by their nature, are non-procreative.²⁷⁷ The fact that not all heterosexual marriages produce children, then, does not lessen the reasonableness of the State’s decision to restrict marriage to male–female unions.

Preserving the traditional institution of marriage also relates to the State’s valid purpose of encouraging an optimal family structure for childrearing. Just as the U.S. Supreme Court has linked marriage and procreation, it has also linked raising children with marriage. In *Meyer v. Nebraska*,²⁷⁸ (noted in *Lawrence* for its “broad statements of the substantive reach of liberty”²⁷⁹) the Court said that liberty under the Due Process Clause denoted, among other things, the right “to

274. Robert P. George, “Same-Sex Marriage” and “Moral Neutrality,” in *HOMOSEXUALITY AND AMERICAN PUBLIC LIFE* 141, 144 (Christopher Wolfe ed., 1999).

275. See *Adams v. Howerton*, 486 F. Supp. 1119, 1124–25 (D. Cal. 1980); *Duncan*, *supra* note 209, at 160–61. See also *Dent*, *supra* note 233, at 601–03 (discussing the significance of childless heterosexual couples).

276. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)). The Court, while discussing *Casey*, said that personal choice about procreation is an area central to “personal dignity,” protected by the Fourteenth Amendment. *Lawrence*, 123 S. Ct. at 2481.

277. See *Duncan*, *supra* note 209, at 161.

278. 262 U.S. 390 (1923).

279. 123 S. Ct. at 2476.

marry, establish a home and bring up children."²⁸⁰ Marriage was undeniably related to the Court's conception of rearing children and the Justices' notion of "marriage" almost certainly involved a male-female union.²⁸¹

Children develop best in homes with married parents where both the mother and father are actively involved in the parenting process.²⁸² The sad saga of large numbers of broken homes in the United States over the past half-century has shown that children ideally need both parents. Children of intact, two-parent families generally fare better than those of one-parent families under standards such as educational achievement, alcohol and drug use, criminality, and adult earnings.²⁸³ Because the father is often times missing from the parenting role (either because he is physically absent or just uninvolved), many initiatives have recently been undertaken to encourage fathers to get involved in their kids' lives.²⁸⁴ Such efforts reflect the realization that optimal child development and socialization involves the influence of both a father and a mother.²⁸⁵

Similarly, state public policy encourages and honors marriage, because it provides the optimal setting in which to raise children who will grow up to be productive citizens. In fact, "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society."²⁸⁶ Marriage binds mother and father together. The commit-

280. *Meyer*, 262 U.S. at 399.

281. The author of this Note performed a Lexis-Nexis search of Supreme Court cases from the 1920s dealing with the subject of marriage. Reading the context of the Court's use of the words "marry," "marriage," and "married" during that period reveals that when the Court discussed marriage, it was referring to the traditional male-female relationship.

282. See *Dent*, *supra* note 233, at 595; see also *Peden v. State*, 930 P.2d 1, 15-16 (Kan. 1996) (citing studies indicating that children fare better in homes with two married parents); Daniel Callahan, *Bioethics and Fatherhood*, 1992 UTAH L. REV. 735 (recognizing that both mothers and fathers play important roles in family relationships); Sharon S. Townsend, *Fatherhood: A Judicial Perspective—Unmarried Fathers and the Changing Role of the Family Court*, 41 FAM. CT. REV. 354, 356 (2003) ("[C]hildren appear better adjusted when they enjoy warm, positive relationships with two actively involved parents.").

283. *Dent*, *supra* note 233, at 594. See also *Wardle*, *supra* note 266, at 790-92 (discussing the disadvantages often faced by children in one-parent homes).

284. See, e.g., NATIONAL HEAD START ASSOCIATION, INTRODUCTION TO THE MALE AND FATHER-INVOLVEMENT INITIATIVE: RESPONDING TO THE NEED FOR MALE INVOLVEMENT IN CHILDREN'S AND FAMILIES' LIVES, at http://www.nhsa.org/parents/parents_father_intro.htm (last visited July 10, 2004); THE NATIONAL CENTER FOR FATHERING, at www.fathers.com (last visited July 10, 2004).

285. See generally, Townsend, *supra* note 282, at 355-57 (arguing that children develop best with active involvement from a mother and a father).

286. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004).

ments spouses make and the legal responsibilities they take on help ensure that children are raised in stable environments. The presence of a male and female role model in the home provides an ideal environment in which children can learn about life and the world and develop into well-rounded, stable, and productive adult citizens.

To say that the traditional male–female marriage provides the optimal setting for the rearing of children does not insinuate that children from single-parent homes or homes with homosexual parents cannot fare well. Many parents in unconventional or less-than-ideal settings do a terrific job of raising healthy and productive children. However, the issue for the State is about which type of family situation it should encourage most through its laws. For that decision, it turns to the ideal family structure for the rearing of children: one husband, one wife; one father, one mother. Given the vast research indicating that children fare better in homes where both mother and father are present, the State would be unwise to endorse a family structure that deliberately excludes one or the other. If “Heather has two mommies,”²⁸⁷ she does not have a daddy. If “Daddy’s roommate” is Frank, whose room does Mommy stay in?²⁸⁸

For long-term societal benefits, the State promotes and should continue to promote conventional dual-gender families. Former first lady and current U.S. Senator Hillary Rodham Clinton reminded Americans that “society requires a critical mass of families that fit the traditional ideal, both to meet the needs of most children and to serve as a model.”²⁸⁹ Some studies claim that gay and lesbian couples are equally suited for parenting as dual-gender, married couples, but such studies have been questioned by many because of small sampling populations, narrow time periods, and political motivations.²⁹⁰ Although alternative childrearing arrangements have been suggested, no model has been proven over centuries of time and across cultural

287. LESLEA NEWMAN, *HEATHER HAS TWO MOMMIES* (1989) (title of a children’s fiction book meant to introduce children to the idea of homosexual parents).

288. MICHAEL WILLHOITE, *DADDY’S ROOMMATE* (1990) (title of a children’s fiction book meant to introduce children to the idea of homosexual parents).

289. HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US* 50 (1996).

290. See, e.g., *Lofton*, 358 F.3d at 825 (“[The] legislature might be aware of the critiques of the studies . . . highlight[ing] significant flaws in the studies’ methodologies and conclusions.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 999 (Mass. 2003) (Cory, J., dissenting) (noting critiques of studies); Dent, *supra* note 233, at 595 (“Studies of children raised by gay parents are inconclusive, partly because samples have been so small.”); George Rekers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT U. L. REV. 343 (2001–02); Wardle, *supra* note 266, at 804 (“The evidence of how [being raised by same-sex couples] affects children is, at best, highly dubious and far from clearly positive.”).

divides to be superior to the traditional marital family structure.²⁹¹ Because Nebraska has a legitimate interest in promoting optimal child-rearing, it is rational to favor, promote, and protect traditional marital relationships.

In sum, the promotion of traditional marriage has historically been, and continues to be, related to legitimate state interests. Both federal and state governments bestow "favored" or "ideal" status upon marriages between one man and one woman. That is, the government encourages marriage (a preferred relationship) through laws which yield certain requirements, benefits, and protections only to married couples.²⁹² A policy fostering opposite-sex marriages does not mean that unconventional relationships are thereby disparaged or forbidden, however. It does not necessarily follow that when one type of relationship is recognized as the "ideal" type of family unit by state public policy, that all other types of relationships are disfavored or disparaged. People engage in many relationships everyday (*e.g.*, friend to friend, lawyer to client, brother to sister, professor to student) that do not qualify for "favored" or "preferred" status under the law. That does not mean, though, that those relationships are "disfavored" by the State. Public policy directs its attention to encouraging the ideal or the best, not the exceptional or the good. It promotes situations that best benefit a healthy, stable society. Nebraska's Section 29 reserves public recognition of marriage to opposite-sex couples, yet does not prohibit people from entering same-sex relationships.

Therefore, legitimate state interests are advanced by the promotion and preservation of traditional marriage in Nebraska's constitution. The institution of marriage best facilitates responsible procreation, which is necessary for society to flourish. Also, dual-gender marriages provide the optimal setting for the rearing of children by both a father and a mother—benefiting the State for years to come. The Supreme Court held that the sodomy statute in Texas furthered no legitimate state interests; yet it is unlikely that the Court's holding would be the same with regard to the constitutionality of Nebraska's marriage provision.

291. See *Lofton*, 358 F.3d at 819.

292. See, *e.g.*, NEB. CONST. art. III, § 19 (surviving spouse of public workers entitled to pension benefits); NEB. REV. STAT. § 12-1301 (Cum. Supp. 2002) (spouses of veterans provided with lots in Nebraska government cemeteries); NEB. REV. STAT. § 23-3522 (Reissue 1997) (both patient and patient's spouse jointly and severally liable for medical costs); NEB. REV. STAT. § 30-2302 (Reissue 1995) (surviving spouses have primary rights under intestate succession); NEB. REV. STAT. § 77-2715.02 (Reissue 2003) (married persons may file joint tax returns).

D. The Supreme Court's Explicit Limiting of *Lawrence*

Perhaps the strongest reason for believing that *Lawrence's* impact on the survival of Nebraska's marriage provision will be minimal is the Supreme Court's own words. The Court explicitly limited its holding to situations where private consensual sex between adults was made punishable under state criminal law. Just before announcing *Lawrence's* holding, the Court attempted to narrow its scope, making certain that other issues not before the Court would not be implicated. The Court declared:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. *It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.* The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. . . . The State cannot . . . mak[e] their private sexual conduct a crime.²⁹³

In another section of the majority opinion, the Court stated that people are free to choose homosexual relationships without being criminally punished, "whether or not [such relationships are] entitled to formal recognition in the law."²⁹⁴ Here again, the Court made clear that it was *not* deciding whether same-sex marriage or any other same-sex relationship was entitled to formal recognition.

Justice O'Connor asserted that just because a law banning private homosexual conduct "is unconstitutional . . . does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review."²⁹⁵ According to O'Connor, not only do homosexual sodomy laws address different issues than marriage laws, but unlike the forbidding of homosexual conduct, "preserving the traditional institution of marriage" is a legitimate state interest.²⁹⁶ Therefore, both the majority and the concurring justice went out of their way to limit their decisions in *Lawrence* to the issue of whether a state could criminalize certain sexual conduct, thereby excluding any implication to traditional marriage laws. Because of explicit language to the contrary, it cannot be fairly said that *Lawrence* covers the issue of same-sex marriage.

293. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (emphasis added). Cf. *United States v. Peterson*, 294 F. Supp. 2d 797, 803 (D. N.C. 2003) (rejecting argument that *Lawrence* extends due process protection to possessors of child pornography); *State v. Clark*, 588 S.E.2d 66, 68-69 (N.C. Ct. App. 2003) (rejecting argument that statutory rape case is controlled by *Lawrence*); *State v. Freeman*, 801 N.E.2d 906, 908-10 (Ohio Ct. App. 2003) (rejecting argument that *Lawrence* gives appellant a constitutionally protected right to engage in incest with his daughter).

294. *Lawrence*, 123 S. Ct. at 2478.

295. *Id.* at 2487 (O'Connor, J., concurring).

296. *Id.* at 2487-88 (O'Connor, J., concurring).

V. CONCLUSION

Will the marriage provision in Nebraska's constitution survive *Lawrence*? This Note argues that it will. In *Lawrence*, no legitimate state interests were found to justify the imposition of a criminal sodomy law. However, legitimate state purposes are advanced by Nebraska's decision to extend formal recognition solely to marriage relationships between a man and a woman.

The considerable contrast between criminal sodomy laws and traditional marriage laws is apparent. As criminal legislation, sodomy laws subjected offenders to criminal prosecution, punishment, and the negative stigma that follows a criminal conviction. Section 29, on the other hand, is meant to uphold marriage and to clearly define public policy as to the type of relationships upon which the State confers the "favored" status of marriage. It does not subject anyone to criminal punishment or stigmatization. From a historical perspective, most states had already abolished their sodomy laws before *Lawrence*. The criminalization of sodomy, whether between homosexuals or heterosexuals, was clearly on its way out. In contrast, most states have recently enacted laws that preserve the traditional institution of marriage, reaffirming a principle deeply rooted in the traditions and history of this nation.

Although challengers may try to incorporate dicta from *Lawrence* into a challenge of Nebraska's DOMA, they will have to get around the fact that the Court explicitly restricted its holding to criminal sodomy laws. *Lawrence* expressly did *not* cover the issue of whether states must give formal recognition to homosexual relationships. In fact, if such a challenge went before the U.S. Supreme Court today, it could well be that a majority would uphold the validity of state DOMAs. The three dissenting justices in *Lawrence*—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—would most likely uphold the right of the people to decide for themselves, through political processes, upon which relationships to confer formal marital recognition. The dissenting opinion emphasized that it was not the role of the court to *forbid* a state from criminalizing homosexual acts or to *require* a state to do so, but "it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best" (*i.e.*, the judiciary).²⁹⁷ The *Lawrence* dissenters would quite likely apply the same logic to the issue of same-sex marriage.²⁹⁸ Justice O'Connor's expression that the preservation

297. *Id.* at 2497 (Scalia, J., dissenting).

298. While Justice Scalia authored the particular dissenting opinion quoted in the preceding sentence, the other two justices who signed onto the dissent have expressed similar sentiments elsewhere about the right of the states to further legitimate state interests by democratic action without fear of a court overturning such action. For instance, Justice Thomas, in his own *Lawrence* dissent, stated

of traditional marriage is a legitimate state interest shows that she would most likely vote to uphold state DOMAs. The fifth vote could conceivably come from Justice Kennedy, the author of the Court's opinion in *Lawrence*. As discussed already, he tried hard to dissociate the issue of sodomy from the issue of formal recognition of same-sex relationships. This might be a tip of his hand—that while he believed that no legitimate interest was served by a state's criminalization of certain sexual acts, state DOMAs do not suffer from the same impairment. Indeed, some or even all of the other four justices may also support the traditional notion of marriage since they signed on to Kennedy's majority opinion. It's hard to tell with certainty which justices would vote in support of marriage, but it is quite probable that a majority exists to uphold state DOMA laws.

In 2001, Nebraskans overwhelmingly voted to amend the Constitution of Nebraska to solidify its definition of marriage as a union between a man and a woman, and to set forth its public policy of not extending recognition to same-sex marriages or other unions designed to be the equivalent of marriage. If the people of Nebraska want to change this policy, they are free to do so through the democratic amendment process. This Note has expressed only that the Supreme Court decision in *Lawrence* does not provide much support for a constitutional challenge to Nebraska's DOMA.

Kevin R. Corlew

that although the sodomy law "is uncommonly silly," and if he were a member of the Texas legislature, he would vote against it, as a Supreme Court Justice, he was not empowered to do so. *Id.* at 2498 (Thomas, J., dissenting). As for Chief Justice Rehnquist, his beliefs against the Court forming public policy might be summed up in the following quote: "Such an approach . . . would also arrogate to this Court functions of forming public policy, functions which, in the absence of congressional action, were left by the Framers of the Constitution to state legislatures." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 691 (1981) (Rehnquist, J., dissenting).