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Living with Lawrence

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The Supreme Court's decision in *Lawrence v. Texas*[1] is easy to read, but difficult to pin down. Much like the opinion of the Court in *Romer v. Evans*,[2] also written by Justice Kennedy, *Lawrence* is powerful and important and will have a profound impact on the law and especially on the lives of lesbian and gay Americans. Exactly what it means for state regulation of sexuality beyond the elimination of sodomy laws, however, is less clear; it is heavier on rhetoric than on clarity.

The primary reason that the *Lawrence* opinion is so difficult to grasp is also one of its strengths as a coherent cultural document: it weaves together substantive due process and equal protection doctrine into a holistic analysis of the cultural weight of the individual rights involved. Liberty and equality are the two chords of the opinion. While its holding is unambiguously about the scope of liberty protected by the Due Process Clause, the explication of the right to liberty is layered with culturally resonant invocations of the dignity due to the group of people—lesbians and gay men—who exercise that right in a particular way. In the story that the opinion tells, one senses that the "why" behind the decision is explained not only by the "what" of the action, but also by the "who" of the *dramatis personae*.

How to sort out this mixture—and how lower courts will decode what is essential and what is dicta in the opinion—will drive the federal law of substantive due process and equal protection for many years. But the opinion is too rich to rest one's

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† Professor of Law, Brooklyn Law School. I am grateful for the comments by my fellow participants in the Minnesota Law Review Symposium, as well as for feedback by those who heard presentations at American University Law School, the Association of American Law Schools Conference, and William and Mary Law School. Thanks for research assistance to Robin Fukuyama and Emily Kern and for a summer research stipend to the Brooklyn Law School.

1. 123 S. Ct. 2472 (2003).
2. 517 U.S. 620 (1996).

interpretation with law alone. At a deeper level, we can analyze the opinion's location in political and cultural discourse, to identify what work this opinion performs in the ongoing interaction among the state, civil society, and the culture's notions of sexuality.

This Article will proceed in three steps. First, I will examine the Court's treatment of liberty. I see *Lawrence* as marking the emergence of a new approach to substantive due process analysis, one that has been simmering in the concurring opinions of Justices Souter, Stevens, and Kennedy for the last decade. These three Justices apparently now have a majority for extending meaningful constitutional protection to liberty interests without denominating them as fundamental rights. They also appear to be jettisoning, at least prospectively, a special category for privacy rights. Second, I will turn my attention to the ramifications of *Lawrence*'s equality subtext. The only equal protection opinion per se is the concurring opinion of Justice O'Connor, which is significant for its elaboration and clarification of the heightened rational-basis review standard the Court used in *Romer v. Evans*. Justice O'Connor's opinion explicitly adopts a new form of rational-basis review triggered by indicia of animus toward the group being subjected to adverse treatment. Third, I aspire to read between all its lines and unravel the larger meanings of the liberty-equality dialogue embedded in the decision. In my view, the *Lawrence* opinion is in perfect tune with its times, articulating a new principle of equal liberty and resonating with a neoliberal political vision of civil rights.

I. DECONSTRUCTING LIBERTY

"Liberty" is the Court's major chord. *Lawrence* begins with "liberty" and ends with "freedom,"[3] and those word choices are not a fluke. The opening paragraph defines *Lawrence* as a case about realms where government should not go. The first four sentences of the opinion declare:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds.[4]

3. 123 S. Ct. at 2475, 2484.
4. *Id.* at 2475.

Later, the opinion returns to the same theme: The petitioners'

> right to liberty under the Due Process Clause gives them the full right to engage in their [sexual] conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[5]

Thus, one plausible reading of *Lawrence* is that it is simply, forthrightly anti-statist. One powerful, but partial, way to understand *Lawrence* is as a libertarian anthem.[6] In my view, however, a better understanding of this opinion sees the convergence of various strands of a new approach to substantive due process, not yet a full-blown theory, but one which gels in this opinion more fully than it has before. How the Court answers two core questions—what is the scope of the right at issue, and is that right fundamental—both reveal the new approach.

A. WHAT IS THE SCOPE OF THIS LIBERTY RIGHT?

Lawrence is seemingly the culmination of a line of cases—*Griswold v. Connecticut*,[7] *Eisenstadt v. Baird*,[8] and *Roe v. Wade*[9]—that collectively have become known as forming the core of a right of privacy recognized under the rubric of substantive due process. The Court's opinion in *Bowers v. Hardwick*[10] described them as "the privacy cases from *Griswold* to *Carey*."[11] One would expect, then, that the *Lawrence* opinion would be easy to categorize as a privacy case. The fact that there is any question about this elementary aspect of it indicates the elusiveness of reaching a confident interpretation.

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5. *Id.* at 2484 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992)).

6. Randy Barnett makes the fullest argument to this effect. *See* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas (Boston Univ. Sch. of Law, Working Paper Series, Public Law & Legal Theory, Working Paper No. 03-13, July 16, 2003), http://www.bu.edu/law/faculty/papers/BarnettR071603aabstract.html. For an extended response to Professor Barnett's arguments, see Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1142–48 (2004).

7. 381 U.S. 479 (1965).

8. 405 U.S. 438 (1972).

9. 410 U.S. 113 (1973).

10. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

11. *Id.* at 191.

There are many references to "private" sexual conduct in the decision, but nowhere does the Court describe the right at issue here as "privacy." The *only* use of the word "privacy" in the majority opinion, outside of a quotation, is where the Court acknowledges that *Griswold* used that word to describe the relevant liberty interest.[12] Perhaps the Court, while sounding like it is writing to praise privacy, has secretly come to bury it, by shifting in a subtle way back to the underlying concept of liberty, which—unlike privacy—has an unambiguous mooring in constitutional text.

It is difficult to know how much to make of this absence, or whether "privacy" as such will reappear in future decisions. Perhaps the nonuse of a particular word is merely fortuitous, or perhaps it is a byproduct of the proclivities of the author, rather than a signal of any broader shift. It would certainly be ironic if *Lawrence* marked the end of a right of privacy in formal constitutional taxonomy. Moreover, the word has achieved such widespread popular usage and appeal that it may be impossible for the Court to put this cat back into the constitutional bag, even if the majority wanted to.

Still, something seems to be afoot. Note that in the course of reversing *Bowers v. Hardwick*, the Court resuscitates not the classic defense of privacy in Justice Blackmun's dissent, but the liberty analysis of Justice Stevens.[13] Although both dissents in *Hardwick*,[14] like the concurring opinion in *Lawrence*,[15] reject majoritarian moralism as a sufficient basis for criminal prohibition,[16] there are differences between the one chosen and the one not chosen that may signal a move away from one jurisprudential approach and toward another.

The Blackmun dissent in *Hardwick* responds to the mandate that "we must analyze . . . Hardwick's claim in the light of the values that underlie the constitutional right to privacy."[17] Although the dissent touches on many aspects of that right, two themes dominate, which are reflected in Blackmun's description of Hardwick's claim as centering on "his privacy and his

12. *Lawrence*, 123 S. Ct. at 2477.

13. *See id.* at 2484.

14. *Hardwick*, 478 U.S. at 199–220 (Blackmun, J., and Stevens, J., dissenting).

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

16. *See id.* at 2487; *see also Hardwick*, 478 U.S. at 199–220 (Blackmun, J., and Stevens, J., dissenting).

17. *Hardwick*, 478 U.S. at 199 (Blackmun, J., dissenting).

right of intimate association."[18] The first theme frames the privacy line of cases as about matters that constitute identity or personhood: "[T]he issue raised by this case touches the heart of what makes individuals what they are."[19] The second theme stresses the associational freedom necessary for such identity formation: "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others . . . ."[20]

Justice Blackmun's dissent alternates between a universalist concept of privacy and an identity-based concept. The universalist theme is certainly there: he begins by rejecting the majority's framing of the case as about homosexual sodomy rather than about "'the right to be let alone,'"[21] and argues instead that "what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[22] Despite his protestations, however, implicit in the logic of the Blackmun dissent is the acceptance of the majority's frame. When he argues that the law touches on acts that are central to identity and self-definition, he, too, is using homosexuality as his reference point. It seems unlikely that Blackmun would have argued that sexual conduct was self-definitional if the case had been about heterosexual conduct.

Justice Stevens's dissent in *Hardwick*, by contrast, invokes many of the same universalist themes as the Blackmun dissent but conceptualizes them in a somewhat different way. The primary logic of his dissent operates in three steps. Sodomy cannot be prohibited for married persons under *Griswold*,[23] nor for unmarried persons (apparently presumed to be heterosexual) under *Eisenstadt*.[24] Thus, because the state cannot impose burdens unequally without good reason, sodomy cannot be prohibited for homosexuals either.[25]

To reach this conclusion, Stevens deploys the same idea of autonomy that Blackmun used, but claiming the full liberty

18. *Id.* at 201.
19. *Id.* at 211.
20. *Id.* at 205.
21. *Id.* at 199 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
22. *Id.* at 206.
23. *Id.* at 216 (Stevens, J., dissenting).
24. *Id.* at 216.
25. *Id.* at 218.

clause as its foundation. Stevens explicitly rejects a privacy paradigm, which he characterizes narrowly as "'the individual's interest in protection from unwarranted public attention, comment or exploitation.'"[26] Instead, he reads the *Griswold-Eisenstadt-Carey* line as "actually . . . animated by an even more fundamental concern[:] . . . 'the individual's right to make certain unusually important decisions that will affect his own or his family's, destiny.'"[27] This is Stevens's explanation for "[t]he essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey*."[28]

Stevens's extolling of liberty sounds almost like a repetition of Justice Blackmun's language about self-definition and autonomy, with the semantic substitution of "liberty" for "privacy." I believe that it is conceptually different, however, in ways that foreshadow the opinion in *Lawrence*. Justice Stevens's opinion weaves together privacy and equality themes in a more seamless way than Blackmun's opinion does. Stevens's central move is to extend the *Eisenstadt* logic[29] one step further, implicitly invoking the famous Brennan formulation of privacy plus equal protection: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion . . . ."[30] In this way, Justice Stevens makes equal treatment under the law the logical fulcrum of his dissent; it is the critical insertion of the equal protection point which extends the liberty (privacy) right to Michael Hardwick. At the same time, Stevens's dissent eschews an interpretation of either liberty or equality that is contingent on Hardwick's identity. The same quality of interwoven doctrine is the hallmark of *Lawrence*.[31]

Justice Stevens's foreswearing of privacy talk in *Hardwick* not only foreshadowed *Lawrence*, but marked the beginning of a split in the pro-choice wing of the Court into a "liberty" branch and a "privacy" branch. The joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*[32] reads very much like *Lawrence* if one is engaged in a hunt

26. *Id.* at 217 (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719 (7th Cir. 1975)).

27. *Id.* (quoting *Fitzgerald*, 523 F.2d at 719–20).

28. *Id.* at 218.

29. *See infra* text accompanying notes 47–48.

30. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

31. *See infra* Part III.A.

32. 505 U.S. 833 (1992).

for "privacy." References to "privacy" are as rare in the joint opinion as they are in *Lawrence*. Instead, multiple references to "liberty" underlie the Court's conclusion that a "woman's right to terminate her pregnancy before viability is . . . a component of liberty we cannot renounce."[33] By comparison, Justice Blackmun's opinion is almost poignant in its repeated use of "privacy," as if he could resuscitate the *Griswold-Roe* formulation by simply declaring that the majority was using it.[34]

Whether the right is denominated as "liberty" or "privacy," the logic of *Lawrence* will reverberate in future substantive due process cases touching on marriage and morality. As to the former, one ramification is clear: *Lawrence* eliminates the last vestiges of marriage as the only zone of permissible expression for any and all forms of sexual practices. For that reason, the liberty analysis in *Lawrence* has major ramifications for the law of marriage—not for gay marriage, as public reaction to the decision would suggest, but for that other kind.[35]

Historically, marriage determined the lawfulness of sexual conduct. Sexual acts might be unlawful outside of marriage for wildly variant reasons—if they resulted from force or if they were categorized as per se immoral, for example—but the same acts of intercourse were shielded within marriage.[36] Both parties in *Lawrence* framed the case clearly around this aspect of marriage. At oral argument, the first sentences spoken by each of the opposing counsel revealed that the question of the freedom to engage in sexual conduct undefined by marriage was central to their claims.[37] The attorney for the Petitioners began

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33. *Id.* at 871.

34. *Id.* at 926–29 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

35. Any significant impact on the right of same-sex couples to marry will flow from equality analysis. *See infra* Part II.C.

36. The same Model Penal Code proposal adopted in 1962 that incorporated a decriminalization of sodomy also retained the exemption for marital rape. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 1278 (2d ed. 2004). Despite some court decisions striking down such exemptions and much refinement of them by state legislatures, approximately half of the states still maintain some different elements for proving rape committed by a spouse than for any other rape. *See id.* at 1283–86. Although the Georgia sodomy statute at issue in *Hardwick* made no exception for married persons, the state's attorney conceded the point at oral argument that it would be unconstitutional as applied to a married couple. Oral Argument of Michael E. Hobbs, on Behalf of the Petitioner, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), *at* 1986 U.S. Trans. LEXIS 74, at *6.

37. Oral Argument of Paul M. Smith, on Behalf of the Petitioners, and Oral Argument of Charles A. Rosenthal, Jr., on Behalf of the Respondent,

his argument by asserting that Texas "claims the right to criminally punish any unmarried adult couple" for certain forms of sexual conduct.[38] The attorney for Texas began his response by arguing that the sodomy law was constitutional "because this Court has never recognized a fundamental right to engage in extramarital sexual conduct."[39]

As part of the delinking of sex and marriage, the Court's opinion in *Lawrence* readjusted the interpretation of the earlier cases. *Griswold*, *Eisenstadt*, *Carey*, and *Roe* became known in retrospect as cases about procreation and procreative decision making, about "the decision whether to bear or beget a child,"[40] not about sexual conduct. In *Lawrence*, the Court modified the meaning of those cases to focus more on sexual conduct, another move anticipated in Justice Stevens's opinion in *Hardwick*, where he used less euphemistic language than Justice Blackmun did about the matter before the Court, referring not only to life-shaping decisions but also to "the intimacies of [married persons'] physical relationship."[41]

Although the Court in *Lawrence* treats its discussion of the early cases as merely descriptive, it subtly regrounds those cases with a greater acknowledgment that what had been before the Court was sexual activity, not simply decisions about whether to become a parent. The Court wrote that in *Griswold*, "[t]he Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. After *Griswold*, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."[42] Consider the shift reflected in those terms from the Court's description of the same two cases eleven years earlier: "In *Griswold*, we held that the Constitution does not permit a State to forbid a married couple to use contraceptives. That same freedom was later guaranteed . . . for unmarried couples. See *Eisenstadt v. Baird*."[43] Both descriptions are correct, but they are different.

Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102), *at* 2003 WL 1702534, at *3, *26.

38. *Id.* at *3.

39. *Id.* at *26.

40. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

41. *Hardwick*, 478 U.S. at 216 (Stevens, J., dissenting), *overruled by Lawrence*, 123 S. Ct. at 2472.

42. *Lawrence*, 123 S. Ct. at 2477 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

43. Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992).

The Court's somewhat franker description in *Lawrence* is a closer fit to what *Griswold* actually said. *Griswold* contains many euphemistic references to sexual conduct, many more than its allusions to the decision to parent.[44] Accordingly, Justice Goldberg noted that "it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy."[45] The statute at issue did not prohibit spouses from having sex, but its practical import, by barring the use of contraceptives, was to force couples to limit the frequency of sexual intercourse. Analyzing *Griswold*, Professor Harry H. Wellington wrote that "the state has undertaken to sponsor one institution that has at its core the love-sex relationship. That relationship demands liberty in the practice of the sexual act."[46] Under the law, marriage was not so much limited to procreation, as procreation and, by necessary implication, sex, were limited to marriage.

The moment in *Eisenstadt* when the text turns from the privacy right established in *Griswold* to the factual situation before the Court—unmarried couples seeking to remove the risk of procreation from intercourse—is precisely the moment when the Equal Protection Clause is invoked to supersede due process questions. The point of juncture is the "[i]f the right of privacy means anything" language.[47] This invocation provided an escape hatch from the Court's having to rule that a right to "marital relations" extended also to the unmarried. Moreover, the culmination of the phrase in "the decision whether to bear or beget a child"[48] provided the platform from which the Court could, in the following year, extend the procreative decision-making right to encompass abortion.[49] That one sentence in

44. For example: the "intimate relation of husband and wife," *Griswold*, 381 U.S. at 482; "the sacred precincts of marital bedrooms," *id.* at 485; "'it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations,'" *id.* at 495 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)); "'the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage,'" *id.* at 499 (Goldberg, J., concurring) (quoting *Poe*, 367 U.S. at 553 (Harlan, J., dissenting)); "the intimacies of the marriage relationship," *id.* at 502–03 (White, J., concurring).

45. *Id.* at 497 (Goldberg, J., concurring).

46. Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 292 (1973).

47. *Eisenstadt*, 405 U.S. at 453.

48. *Id.*

49. Although the decisions were issued in two different terms, the cases were before the Court simultaneously. *Eisenstadt* was argued on November 17

Justice Brennan's opinion, serving so many crucial purposes, must surely rank as one of the most brilliant political moves in the Court's history.

In *Lawrence*, the Court tied up the loose ends of this project. By invoking and enacting the multidimensional texts of *Griswold* and *Eisenstadt*, the Court made explicit that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."[50] Its definitive delinking of sex and marriage makes clear that no form of sex between consenting adults can be prohibited on the ground that they are not married (with the possible exception of when one or both are married to someone else). *Lawrence* removes the last obstacle to the paradigm of consent, rather than the institution of matrimony, controlling the definition of when sex is presumptively legal.

Lurking beneath the sex-and-marriage question is the issue of morality. Where the Court in *Eisenstadt* had sidestepped the question of whether morality was a permissible state interest, in *Lawrence* the Court adopted Justice Stevens's *Hardwick* formulation: "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"[51]

By finding that morality alone cannot justify a prohibition, the Court did not seal the fate of all the various statutes thought of as morals laws. Rather, a state must now demonstrate some other rationale for such laws, presumably some form of objectively harmful effects. Fornication laws are clearly now impermissible, although criminal laws against adultery may not be; one could argue about whether their efficacy in protecting marriage or preventing emotional harm is more than an illusion. Prostitution laws will probably not be struck down, since the Court seems to have accepted that commercialization of sexual conduct creates harmful secondary effects.[52] Most in-

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and 18, 1971. 405 U.S. at 438. *Roe* was first argued less than a month later, on December 13, 1971. Roe v. Wade, 410 U.S. 113, 113 (1973). *Roe* was held over for reargument during the following term. *Id.*

50. Lawrence v. Texas, 123 S. Ct. 2472, 2477 (2003).

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

52. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (upholding city ordinance banning public nudity; finding that the city's interest in preventing harmful secondary effects associated with adult entertainment establishments was not related to the suppression of the exotic message conveyed

cest laws will remain in place, although in a few situations of relations between adults without close blood ties, they may be in jeopardy.[53]

In sum, the *Lawrence* opinion extends the scope of liberty under the Due Process Clause to encompass the individual's agency rights to make decisions about which avenues of sexual expression to pursue, at least in private between two adults not married to someone else. State assertions that the law could nonetheless prohibit that conduct—if it were commercial, for example—will require demonstration of rationales other than moral disapproval. But by withholding the label of privacy from this right, the Court sent its first signal that it reached this result by a different path than most observers expected.

B. IS THIS LIBERTY INTEREST A *FUNDAMENTAL* RIGHT UNDER THE DUE PROCESS CLAUSE?

The second signal came in the Court's answer to a question closely tied to the question of scope: Is this right fundamental? The Court in *Lawrence* strikes down the Texas law without characterizing its test for doing so, after concluding that Americans have a liberty interest in private sexual conduct and that Texas has no sound basis for criminalizing such conduct. Justice Scalia is correct to observe there is no fundamental right denominated as such.[54] The Court imposes no duty on the state to demonstrate a compelling interest in sustaining its law; rather, it finds that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[55]

One cannot simply conclude that the *Lawrence* test is one of rational basis. The rational-basis test, however, as we have known it, will almost never lead to the invalidation of a state law. "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."[56]

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by nude dancing).

53. Margaret M. Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21 (1993); Christine McNiece Metteer, *Some Incest Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL'Y 262 (2000).

54. *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

55. *Id.* at 2484.

56. Heller v. Doe, 509 U.S. 312, 319 (1993).

Nor does the Court analyze the Texas sodomy law in the deferential manner that it uses when only a rational basis is required. Not all liberty is equal; the Court said in *Washington v. Glucksberg* that "the Due Process Clause *specially* protects . . . fundamental rights and liberties."[57] The recognition of a liberty interest not categorized as fundamental leads only to a balancing of the individual's interests and the government's, not to any presumption against the statute in question.[58] Moreover, the Court has recognized that the state can abridge even "significant liberty interest[s]" by showing a legitimate, not necessarily compelling, need to do so.[59]

Using a rational-basis test, if that is what it is, makes the Court's conclusion in *Lawrence* even more powerful in certain respects—the interests proffered by Texas are found to be not even rational, much less compelling. It also lowers the stakes for describing the individual's right; the Court's text makes clear that it is somehow a core right, but never crosses the line into denominating it as fundamental, with the attendant consequence of heightened scrutiny. At the same time, however, using a rational-basis test makes a strong decision potentially easier to distinguish in future cases—the Court can always return to an approach that gives much greater deference to state laws, as the typical rational-basis test does, without stepping outside of precedent.[60]

Although the Court does not label the right of the parties in *Lawrence* as fundamental, the analogic reasoning in its holding relies on a series of cases in which the Court did recognize a fundamental right: *Griswold*, *Eisenstadt*, *Roe*, and *Casey*. The Court in *Lawrence* relies for its holding primarily on the protection established in those cases for choice, control of one's "destiny,"[61] and the principle of "autonomy."[62] The individual's right of "choice" and to "choose" —words used three times in five sentences[63]—connects *Lawrence* to the *Griswold*-to-*Casey* line of

57. 521 U.S. 702, 720 (1997) (emphasis added).

58. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

59. Washington v. Harper, 494 U.S. 210, 221–22 (1990).

60. The first appellate courts to interpret *Lawrence* used rational-basis review in just this way. Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); State v. Limon, 83 P.3d 229 (Kan. Ct. App. 2004); Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003).

61. Lawrence v. Texas, 123 S. Ct. 2472, 2477 (2003).

62. *Id.* at 2481.

63. *Id.* at 2478.

The statutes do seek to control a personal relationship that, whether

cases. If the liberty interest recognized by *Lawrence* implicates the full range of autonomy decisions, as it seems to, then it must surely be fundamental. But if the Court really intends it to be fundamental, why didn't they say so? If this isn't merely a game, what is going on?

One aspect of the Court's approach in *Lawrence* is that it looked primarily at the legitimacy of the government's action. Alongside its recognition of the destiny interests of the individuals involved, the decision focuses on the action of the state, as well as on the conduct of the persons subject to prosecution. Similar to the way that the Court in *Romer v. Evans* focused more on the classification than on the characteristics of the group being classified,[64] the *Lawrence* opinion frames the central question as "whether the majority may use the power of the State to enforce [ethical and moral] views on the whole society through operation of the criminal law."[65]

Such an approach could be read simply as libertarian. On a libertarian theory taken to its fullest conclusion, government cannot step into intimate zones of life, absent demonstrated harm to others, regardless of whether the conduct in question comprises a fundamental right.[66] Brushing your teeth cannot be the target of detailed codes of governmental regulation as to how the brushing can and cannot be done. To successfully challenge such a law, one should not have to argue that brushing

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> or not entitled to formal recognition in the law, is within the liberty of persons to *choose* without being punished as criminals.
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> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may *choose* to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this *choice*.

Id. (emphasis added).

64. Janet Halley concluded that "if the same discrimination were inflicted on blondes or burglars, the same conclusion would follow." Janet E. Halley, Romer *v.* Hardwick, 68 U. COLO. L. REV. 429, 441 (1997); *see also* Nan D. Hunter, *Proportional Equality: Readings of* Romer, 89 KY. L.J. 885, 889–90 (2001).

65. 123 S. Ct. at 2480.

66. This argument was presented to the Court in *Lawrence* by the amicus brief of the Institute of Justice. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioners at 12–13, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102), *available at* 2003 WL 164140.

your teeth is a component of bodily integrity or that a particular method of brushing is central to one's personhood.

The *Lawrence* opinion may resemble that approach, but its logic remains embedded in a substantive due process framework. The Court held that by enacting its sodomy law, the state was acting out of bounds, a conclusion buttressed by the fact that its actions impeded decisions implicating some of the deepest concerns of autonomy and destiny. Because government crossed the line of impermissible action, a line drawn in part by the understanding that private sexual conduct is a zone of decision making entitled to respect, the exact nature of the right being traversed—i.e., fundamental and entitled to "special" protection, or not—was a question that the Court did not have to reach.

Not having to reach that question signals the emergence of a different approach to substantive due process claims. In prior decisions on challenges to sodomy laws, courts have asked first whether the right claimed was fundamental; based on the answer to that question, the next inquiry was whether the state's interest was compelling or whether it had a rational basis. The state had to demonstrate that its law served some harm-reduction goal only if the individual right was classified as fundamental; otherwise, an interest in promoting morality was found to be sufficient. Both courts that have upheld,[67] and courts that have struck down,[68] sodomy laws have used that decisional model.

In *Lawrence*, the approach was different. The Court found that the state's intrusion into private sexual life was impermissible absent a showing by the state that it was justified by more than the desire to promote certain concepts of morality. The Court's conspicuous failure to use any of the terms that we have come to expect in sodomy cases—"fundamental right" or "compelling state interest," for example, in addition to "privacy"—tells us that the Court found the applicability of those terms to be irrelevant. By asking the question of whether the governmental action had a legitimate basis first, and concluding that it did not, the Court did not need to then ask whether the individual was seeking to exercise a fundamental right,

67. *See, e.g.*, Missouri v. Walsh, 713 S.W.2d 508, 511 (Mo. 1986) (en banc) (upholding statute prohibiting deviate sexual intercourse between persons of the same sex).

68. *See, e.g.*, Jegley v. Picado, 80 S.W.3d 332, 350 (Ark. 2002) (holding that sodomy statute infringed on fundamental right of privacy).

such that the state's action would have had to satisfy a compelling interest test.

The *Lawrence* decision's structure—of finding that Texas had breached the negative liberty limits on state power in a context where basic autonomy rights were at issue—does not resolve the question of whether the rights involved are "fundamental." But the Court's reasoning renders that absence largely a matter of only technical import. The Court drew analogies that connected decisions about private sexual intimacy not only to the *Griswold* line of cases, but also, even more profoundly, to an individual's "freedom of thought, belief [and] expression."[69]

What is significant for future interpretation is that the Court characterized the sexual rights at issue in *Lawrence* as *equivalent* to those previously established as fundamental. On this point, *Casey* provides the best explanatory text for *Lawrence*. In *Casey*, as in *Lawrence*, the Court did not use fundamental rights or strict scrutiny language per se,[70] but it did nonetheless continue to protect the right to choose abortion by drawing on the logic of the contraception cases and *Roe v. Wade* and by analogizing between abortion and contraception.[71] Similarly, the Court in *Lawrence*, by quoting *Casey* as to the deeper meanings of liberty for an individual's personal destiny,[72] said in effect that choices about private intimate behavior are "in some critical respects . . . of the same character"[73] as the decisions that lay behind the desire to use contraception or to obtain an abortion. In both *Casey* and *Lawrence*, the Court eschewed direct use of fundamental rights language, but made clear that the rights being compared were equivalent and therefore entitled, by whatever standard of review, to equivalent protection.

C. THE SHIFT TO ARBITRARINESS REVIEW

If in fact *Lawrence* marks the beginning of a substantive due process jurisprudence that examines negative liberty limits on state power before, or instead of, articulating a specific standard of review, where did this come from? And where are

69. *Lawrence*, 123 S. Ct. at 2475.
70. Planned Parenthood v. Casey, 505 U.S. 833, 878–79 (1992).
71. *Id.* at 852–53.
72. *Lawrence*, 123 S. Ct. at 2481–82 (quoting *Casey*, 505 U.S. at 851).
73. *Casey*, 505 U.S. at 852.

we headed? This inquiry will lead us back to the year of the first repeal of a sodomy law[74] and Justice Harlan's dissent in *Poe v. Ullman*.[75]

Justices Kennedy, Stevens, and Souter are moving the Court to a more flexible analytical structure for evaluating substantive due process claims. Just as the Court has essentially frozen the kinds of classifications that it will subject to heightened scrutiny under the Equal Protection Clause,[76] the current Court appears to be beginning the project of holding substantive due process rights subject to strict scrutiny at the status quo. At the same time, it is developing a new mode of analysis to deploy for some substantive due process claims.

Lawrence marks the first time that a majority of the Court has articulated this new approach, but not its first appearance.[77] Greater elasticity in substantive due process analysis had its origins in the abortion cases. There, the Court has not retrenched from most of the effect of *Roe v. Wade*, which held that a woman's right to choose to have an abortion falls within the right of privacy and is fundamental; "only personal rights that can be deemed 'fundamental' . . . are included in this guarantee of personal privacy."[78] But it has altered the terms of analysis. In *Casey*, the Court declared that *Roe v. Wade* would not be overruled,[79] and the Court did not explicitly find that the woman's right was less than fundamental. However, in addition to implicitly repudiating "privacy," the Court also substituted "undue burden" for "strict scrutiny" as the standard of review to be used in assessing restrictions on abortion.[80] The

74. *See infra* note 111.

75. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

76. The Court articulated its rationale for utilizing heightened scrutiny in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440–42 (1985). The Court in that case declined to apply heightened scrutiny to classifications based on mental disability. *Id.* The Court has not identified a new classification requiring such scrutiny since then.

77. Justice Kennedy also used a similar approach for an equal protection analysis of Colorado's Amendment 2, which barred that state's antidiscrimination statutes from including sexual orientation, in *Romer v. Evans*. In *Romer*, the Court invalidated an amendment to the Colorado state constitution which barred adoption or enforcement of antidiscrimination provisions protecting homosexuals, absent further amendment of the constitution, saying that it "fail[ed], indeed defie[d], even [the rational basis standard]." 517 U.S. 620, 632 (1996).

78. 410 U.S. 113, 152 (1973).

79. Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

80. *Id.* at 875–78.

Court downshifted into a more lenient standard of review even as it preserved *Roe v. Wade*.

Staking out a liberty interest as a fundamental right was once a mechanism for insuring it greater protection against state intrusion, as in the privacy cases until *Casey*. More recently, however, the conservative wing of the Court has fought to enshrine the category of fundamental rights as a containment device. In *Glucksberg*, where the Court upheld state bans on physician-assisted suicide against a challenge asserting a liberty interest on the part of all terminally ill patients, Chief Justice Rehnquist wrote that the limitations on finding any asserted right to be fundamental operated as a way to "rein in" judicial activism in substantive due process analysis.[81] Rehnquist defined as fundamental, rights "'deeply rooted in this Nation's history and tradition,'" and so essential to "'the concept of ordered liberty' . . . that 'neither liberty nor justice would exist if they were sacrificed.'"[82] This use of history and tradition drew on and modified the proposed definition advanced by Justice Scalia, who, in an earlier plurality opinion, sought to limit the category of fundamental rights to those interests that have a "tradition" of being protected.[83]

Under the *Glucksberg* approach, fundamental rights constituted a frozen category and a limiting principle that operated to bar any meaningful protection for interests that could not meet its eligibility criteria.[84] At several points during oral argument in *Lawrence*, Justices Rehnquist and Scalia sought to redirect the questioning to force exploration of the due process issues into the *Glucksberg* frame.[85] The resistance by other Jus-

81. Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

82. *Id.* at 721 (citations omitted).

83. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989).

84. "[T]he majority opinion [in *Glucksberg*] offered an analysis of fundamental rights that suggested that there would be few such announcements in the future." John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 568 (2002). As McGinnis correctly argues, the right to abortion could not have met the *Glucksberg* test, had it been in effect at the time of *Roe v. Wade*. *Id.* at 569.

85. Chief Justice Rehnquist addressed Petitioners' attorney, Paul M. Smith: "[I] think our case is like *Glucksberg*, say, if you're talking about a right that is going to be sustained, it has to have been recognized for a long time. And that simply isn't so." Oral Argument of Paul M. Smith, on Behalf of the Petitioners, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102), *at* 2003 WL 1702534, at *4. Justice Scalia also addressed Petitioners' attorney: "Really what's at issue in this case is whether we're going to adhere to . . . what we said in . . . *Glucksberg*, mainly that before we find a substan-

tices to its limitations did not coalesce into a viable alternative theory of due process until the Court's opinion in *Lawrence*, which shows the first signs of the emergence of a new majority.

Before *Lawrence*, there had been a series of skirmishes about the tightness and exclusivity of the fundamental rights approach. In *Troxel v. Granville*,[86] for example, Justice O'Connor's plurality opinion for the Court analyzed the right of parents to control with whom their children had visitation as fundamental, based on the long line of cases protecting a parent's interest in controlling the upbringing of children,[87] but found the law unconstitutional without applying strict scrutiny.[88] Both the concurring opinion of Justice Souter[89] and the dissent of Justice Kennedy[90] avoided either describing the right as fundamental or applying strict scrutiny. All three of these opinions drew a rebuke from Justice Thomas, who accused them of not applying strict scrutiny for incursions on a fundamental right; "curiously, none of them articulates the appropriate standard of review."[91] In *Chicago v. Morales*,[92] in which the Court ruled that a Chicago ordinance prohibiting loitering by members of street gangs was unconstitutionally vague, Justice Stevens noted in his plurality opinion for the Court that "liberty interests" could be identified that were not necessarily fundamental.[93] This also drew responses from Justices Scalia[94] and Thomas,[95] who countered that no "right to loiter" could possibly pass the *Glucksberg* history and tradition test, given the long existence of antiloitering laws, and therefore, there could be no substantive due process protection for this activity. The dispute was tangential, however, because the Court's holding turned on other grounds.[96]

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tive due process right, a fundamental liberty, we have to assure ourselves that that liberty was objectively deeply rooted in this Nation's history and tradition." *Id.* at *8–9. Justice Scalia's dissent also stresses that the majority erred by not following the *Glucksberg* analysis. *Lawrence*, 123 S. Ct. at 2491–92 (Scalia, J., dissenting).

86. 530 U.S. 57 (2000) (plurality opinion).
87. *Id.* at 65–66.
88. *Id.* at 72–73.
89. *Id.* at 75–77 (Souter, J., concurring).
90. *Id.* at 95–96 (Kennedy, J., dissenting).
91. *Id.* at 80 (Thomas, J., concurring).
92. 527 U.S. 41 (1999) (plurality opinion).
93. *Id.* at 53 n.19.
94. *Id.* at 84–86 (Scalia, J., dissenting).
95. *Id.* at 102–03 (Thomas, J., dissenting).
96. *Id.* at 87 (O'Connor, J., concurring).

The fullest explication of an alternative position, now largely adopted through *Lawrence*, came in Justice Souter's concurring opinion in *Glucksberg*. Justice Souter drew extensively from Justice Harlan's dissent in *Poe v. Ullman*[97] and formulated a standard of whether the statute "sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause."[98] Justice Souter's method for answering that question recognized that "the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual."[99] As he explained:

> [T]he business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people . . . . Thus informed, judicial review still has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable.[100]

None of the other concurring opinions in *Glucksberg* formulated an alternative method of substantive due process analysis. Justice O'Connor wrote that because the statutes at issue there did not block a terminal patient experiencing great pain from obtaining medications that would hasten death, the Court did not have the occasion to consider whether such an individual had a constitutionally protected right to control the circumstances of death.[101] Justice Ginsburg stated only her substantial agreement with Justice O'Connor's approach.[102] Justice Breyer suggested that the person described by Justice O'Connor might have a fundamental right, tying that to Justice Harlan's dissent in *Poe*, as explicated by Justice Souter.[103] Justice Stevens wrote that some applications of the statutes at issue in *Glucksberg* might be unconstitutional, reminding the Court that its opinion in *Cruzan v. Missouri Department of Health*[104] had found a protected liberty interest in a terminally ill patient's

97. 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting).

98. Washington v. Glucksberg, 521 U.S. 702, 752 (1997) (Souter, J., concurring) (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

99. *Id.* at 762.

100. *Id.* at 764.

101. *Id.* at 736–37 (O'Connor, J., concurring).

102. *Id.* at 736.

103. *Id.* at 790–91 (Breyer, J., concurring).

104. 497 U.S. 261 (1990).

right to refuse treatment.[105] The *Glucksberg* cacophany illustrated the fractured and uncertain nature of the opposition on the Court to the Rehnquist-Scalia-Thomas approach to substantive due process analysis.

The *Lawrence* opinion marks a new majority for Harlan's arbitrariness review, in substance if not in name. Justice Kennedy (who had joined Chief Justice Rehnquist's opinion in *Glucksberg*) extended substantive due process protection without declaring that the right at issue was fundamental, although the opinion details at great length the ambiguity surrounding the legal history associated with sodomy laws. The logic of the analysis in *Lawrence* largely tracks that of Justice Souter's concurring opinion in *Glucksberg*, combining the inquiry into whether the government's justification was reasonable with consideration of the nature and the weight of the individual interests asserted. The most direct and explicit adoption of prior analysis, of course, came from Justice Stevens's dissent in *Hardwick*.[106] There, the majority had relied heavily on tradition and superficial understandings of history; in response, Stevens articulated a non-strict-scrutiny skepticism of government intrusion in certain zones of life. Although he did not cite Harlan or elaborate on method, the Stevens dissent in *Hardwick* was thoroughly consistent with Harlan's dissent in *Poe*.[107]

The new majority on the Court has reinvigorated the protection of liberty enabled by substantive due process analysis. However, it is also still struggling to formulate a more coherent articulation of the difference between drawing boundaries for

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105. *Glucksberg*, 521 U.S. at 742–45 (1997) (Stevens, J., concurring).

106. Bowers v. Hardwick, 478 U.S. 186, 214–20 (1986) (Stevens, J., dissenting), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

107. Justice Harlan famously described liberty as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citations omitted). Justice Stevens in *Hardwick* described:

> the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.

Hardwick, 478 U.S. at 217 (Stevens, J., dissenting) (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719–20 (7th Cir. 1975)).

the legislative branch and second guessing it. In a sense, the majority has engaged in a strategic retreat, specifically to the ground of Justice Harlan's dissent in *Poe*, the strongest point from which to defend substantive due process. If my analysis is correct, the current line of privacy cases will remain essentially undisturbed. However, the Court's future forays into substantive due process interpretation will not follow the path of privacy jurisprudence that the *Griswold* court began, but will depart from *Poe* anew on a nearby but different trajectory.

II. DECONSTRUCTING EQUALITY

In some respects, recognition of the individual liberty of adults to engage in consensual sexual acts in private seems merely the long overdue culmination of principles that the Model Penal Code[108] and The Wolfenden Report,[109] both documents from the 1950s, drew from John Stuart Mill.[110] The Court has settled a very old and narrow debate about consensual homosexual conduct between adults in private; the same outcome could have occurred during the Eisenhower or Kennedy eras.[111] And while this description might accurately summarize the Court's liberty holding, it would not capture the full import of the case, because it would ignore the opinion's powerful minor chord of equality.

The civil-rights-style rhetoric that enriches the opinion suggests that this is liberty with a new inflection, where the desire to erect a buffer against government may be the primary, but is not the sole, driving force. Certainly it sounds nothing like the language of those 1950s texts, which assumed

108. The American Law Institute project to draft a model criminal law began in the 1950s. Tentative drafts of the proposed Model Penal Code, which decriminalized consensual sodomy between adults, began circulating in 1955. PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 136–37 (2000). The final proposal was adopted by the ALI in 1962. *Id.* at 137.

109. COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (authorized American ed., Stein & Day 1963) (Her Majesty's Stationary Office, London 1957) [hereinafter WOLFENDEN REPORT].

110. JOHN STUART MILL, ON LIBERTY 75–94 (Alburey Castell ed., F.S. Crofts & Co. 1947) (1859).

111. Illinois took the first step to decriminalization in the United States in 1961, when it adopted the recommendation for decriminalization contained in what were then still drafts of the Model Penal Code. CAIN, *supra* note 108, at 137. New York changed sodomy from a felony to a misdemeanor in 1965. *Id.* Connecticut became the second state to decriminalize sodomy in 1969. *Id.*

that homosexuality was repugnant and sought only to argue that criminal law was not the best method for deterring it.[112] In *Lawrence*, we have a Court opposed to the existence of sodomy laws because they "demean[]" gay people and create "stigma" for a group that deserves "respect" for the "choices" made in their "private lives."[113]

The Court also spoke in major and minor chords in *Hardwick*, but in a way that used references to the conduct and the class to create a discursive double bind. In *Hardwick*, the Court used a rhetorical structure of condemning certain conduct because gay people engaged in it and condemning gay people because they engaged in such conduct. Or, as Janet Halley de-

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112. "[H]omosexuality rank[s] high in the kingdom of evils." Karl Menninger, *Introduction* to WOLFENDEN REPORT, *supra* note 109, at 5. The text of the Wolfenden Report contains numerous examples of language indicating the repugnancy of homosexuality: "It is almost impossible to compare the incidence of homosexual behavior with the incidence of other forms of sexual irregularity, most of which are outside the purview of the criminal law and are therefore not recorded in criminal statistics . . . ." WOLFENDEN REPORT, *supra* note 109, § 46, at 41.

> We have had no reasons shown to us which would lead us to believe that homosexual behavior between males inflicts any greater damage on family life than adultery, fornication or lesbian behavior. These practices are all reprehensible from the point of view of harm to the family, but it is difficult to see why on this ground male homosexual behavior alone among them should be a criminal offense. This argument is not to be taken as saying that society should condone or approve male homosexual behavior. But where adultery, fornication and lesbian behavior are not criminal offenses there seems to us to be no valid ground, on the basis of damage to the family, for so regarding homosexual behavior between men.

Id. § 55, at 44–45.

> It seems to us that the law itself probably makes little difference to the amount of homosexual behavior which actually occurs; whatever the law may be there will always be strong social forces opposed to homosexual behavior. It is highly improbable that the man to whom homosexual behavior is repugnant would find it any less repugnant because the law permitted it in certain circumstances . . . .

Id. § 58, at 47.

> Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to emphasize the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.

Id. § 61, at 48.

113. Lawrence v. Texas, 123 S. Ct. 2472, 2480–82 (2003).

scribed the reasoning, criminalization of acts committed by homosexuals required no strict scrutiny because they (i.e., those acts committed by those people) fell outside the bounds of traditional concepts of liberty, and thus criminalization could be justified by the state's presumptively rational determination of the immorality of homosexual identity.[114]

In *Lawrence*, the double bind itself is flipped, and the two voices reinforce tolerance rather than condemnation. "Equality of treatment and . . . due process right[s] . . . are linked in important respects, and a decision on the latter point advances both interests. . . . [The sodomy law] in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[115]

A. A REVERSAL OF MORE THAN LAW

One reason for the intensity of the *Lawrence* opinion is that the Court does more than reverse *Hardwick*. Reversals by the Court are highly atypical, but hardly unheard of. In *Lawrence*, however, the Court reconstructs not only the law but also the social meaning of homosexuality.

Even radical changes in law are sometimes accompanied by bland language. Some of the most important reversals of constitutional understandings have been bloodless, at least on the page. In *Erie Railroad v. Tompkins*,[116] for example, the Court overturned a century's worth of reliance on the principle that federal courts could reason toward a shared national common law by issuing binding interpretations of the common law of the states. Its significance was not widely known, however; it received public attention only after Justice Stone wrote to Arthur Krock of the *New York Times* that it was "the most important opinion since I have been on the court."[117]

When the Court has reversed itself in areas of important political and social conflict, authors of such turning-point opinions have been more likely than in other cases to mobilize eloquence to justify the about-face. Still, although many of those texts have been stirring, even in cases touching on contentious social questions, decisions have usually been cast in fairly im-

114. Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993).

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

116. 304 U.S. 64 (1938).

117. Irving Younger, *What Happened in* Erie, 56 TEX. L. REV. 1011, 1029 (1978).

personal terms. In *West Virginia v. Barnette*[118] and in *West Coast Hotel Co. v. Parrish*,[119] the Court reversed prior diametrically opposite holdings announced less than fifteen years earlier. In both, the Court used eloquent invocations of grand principles to justify the new results, but the text centered on abstractions, rather than on giving voice to the schoolchildren or women laborers whose interests were before the Court.

The reversal of both precedent and social direction that comes closest in tone to *Lawrence* is *Brown v. Board of Education*.[120] Its text contains a more personal voice in one famous passage: "To separate [children] . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[121] Similar language in *Lawrence* addresses the issue of stigma: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[122]

Even compared to *Brown*, however, *Lawrence* is rhetorically more powerful. In *Lawrence*, the Court holds that the reasoning in *Hardwick* was not just incorrect, but irrational. The Court dissects the *Hardwick* opinion at length, seemingly with the goal not just of discarding it, but eradicating it. Chief Justice Warren's opinion for the Court in *Brown* did not carry the rhetorical burden of having to overcome simultaneously dissenting voices from within, so perhaps one factor at work was that Justice Kennedy had to work harder to muster a commanding tone. Whatever the reason, when one reads *Lawrence*'s demolition of *Hardwick* alongside the Court's rejection of *Adkins v. Children's Hospital*[123] in *West Coast Hotel v. Parrish*,[124] or of *Minersville School District v. Gobitis*[125] in *West Vir-*

118. 319 U.S. 624 (1943) (striking down a board of education requirement that all students and teachers participate in the flag salute).

119. 300 U.S. 379 (1937) (upholding a state minimum wage law for women).

120. 347 U.S. 483 (1954).

121. *Id.* at 494.

122. Lawrence v. Texas, 123 S. Ct. 2472, 2482 (2003).

123. 261 U.S. 525 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S 379 (1937).

124. 300 U.S. 379 (1937).

> The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most

ginia Board of Education v. Barnette,[126] or of *Plessy v. Ferguson*[127] in *Brown*,[128] the contrast is stunning. One senses that this Court was removing a stain as well as a precedent.

Moreover, the *Lawrence* opinion sounds as if the Court is describing an entirely different group of people than the group

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felt, it is not to be overthrown because there are other instances to which it might have been applied." There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case *of Adkins v. Children's Hospital* . . . should be, and it is, overruled.

Id. at 400 (citations omitted).

125. 310 U.S. 586 (1940), *overruled by* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

126. 319 U.S. 624 (1943).

Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.

. . . .

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . .

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is *Affirmed.*

Id. at 640, 642 (citation omitted).

127. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S 483 (1954).

128. *Brown*, 347 U.S. at 483.

"Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

Id. at 494–95 (quoting lower court opinion) (alterations in original).

with which it was concerned in *Hardwick*. The language carries a stronger personal valence than in other jurisprudentially comparable opinions, employing a voice that seems to defend the people as well as the principle before the Court. In addition to the stigma passage, the Court in *Lawrence* speaks in an empathic register when it describes the two gay men before it as "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny . . . ."[129]

This tone makes the tenor of the opinion more of an index of social change than the holding. Consider the example of the current military policy on exclusion of openly lesbian and gay service members. *Lawrence* makes no new outcome inevitable in challenges to that policy, but it does presumptively invalidate (or at a minimum, cast strong doubt on the constitutionality of) the prohibition against sodomy in the Uniform Code of Military Justice, which covers both same-sex and opposite-sex acts.[130] To the extent that the exclusionary policy is based on a propensity to commit the crime of sodomy, it will be weakened by decriminalization.

The primary rationale for Don't Ask, Don't Tell, though, is unit cohesion and morale, i.e., the asserted harm to morale that would result from the known presence of lesbian or gay troops.[131] Even this justification, however, is weakened by removal of the imprimatur for antigay stigma provided by sodomy law. *Lawrence* renders antigay animus more culturally isolated and more obviously irrational. More by logic than by law, it has strengthened the argument that the courts can properly insist that the military abide by constitutional norms and eliminate policies based on irrational prejudice.

B. JUSTICE O'CONNOR: "[T]O BE TREATED IN THE SAME MANNER AS EVERYONE ELSE"[132]

Although the majority opinion's equality rhetoric is extraordinary, for any substantive analysis of equal protection one must turn to Justice O'Connor's concurring opinion.

129. Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).
130. 10 U.S.C. § 925 (2000).
131. 10 U.S.C. § 654(a)(14) (2000).
132. *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

O'Connor's opinion in *Lawrence* marks the first time in her two decades as a Supreme Court Justice that she has written any decision—majority, dissent, or concurrence—in a gay rights case. From Justice Scalia's point of view, her endorsement of rational basis with bite in the field of equal protection review must have added insult to the injury of Justice Kennedy's majority opinion, which used what seemed like rational basis on steroids for analyzing a substantive due process claim.

O'Connor's concurring opinion repeats the proportionality principle of *Romer v. Evans*. The law cannot target a group of persons for a broad range of disfavored treatment based on a single characteristic bearing little or no relationship to the particular policies at issue.[133] O'Connor's opinion notes the multifarious collateral consequences of the Texas sodomy law and declares that the law cannot single out one group for "underclass" status based on its members having engaged in conduct which is not illegal when others engage in it.[134]

She also takes the *Romer* opinion one logical step further, by finding that "[m]oral disapproval of a group cannot be a legitimate governmental interest."[135] In *Romer*, Colorado (which had long ago repealed its sodomy law) did not claim morality as a state interest in support of Amendment 2, so the Court had no occasion to declare whether morality could comprise a proper basis for such a law.[136] Here, Texas did claim morality, and only morality, as the interest behind its sodomy law.[137] It seemed clear even at the time of *Romer*—and is obvious now—that the six-Justice majority in that case would have found morality alone an insufficient basis for legislation. So O'Connor's reasoning is not a surprise, but it does provide an explicit completion of the logic of the *Romer* analysis.

Justice Kennedy's opinion for the Court in *Lawrence* mentions morality only in passing, to say that however genuinely held, moral beliefs cannot provide the basis for police actions by the state.[138] That leaves O'Connor's opinion as the only one from the Court's majority that actually takes up the morality question as such. As a result, Scalia's arguments about moral-

133. Romer v. Evans, 517 U.S. 620 (1996). *See generally* Hunter, *supra* note 64 (discussing *Romer v. Evans*).

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

135. *Id.* at 2486.

136. *See* 517 U.S. at 635.

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

138. *Id.* at 2483–84.

ity (as opposed to his points about *stare decisis*, for example) emerge more sharply in response to O'Connor than to the majority.[139] The upshot of this pairing is that the morality debate in *Lawrence* is framed as much more about a group of persons, the context for O'Connor's equal protection analysis, than about a form of conduct.

Ironically, such was also the case in *Hardwick*,[140] even though the Georgia statute should have called forth an analysis based on conduct rather than class, since it prohibited sodomy by both opposite- and same-sex couples.[141] In *Lawrence*, by contrast, the majority used a more universalist liberty analysis for a statute which, unlike the Georgia law, actually did prohibit *only* same-sex sodomy. It seems that either way, regardless of what the statute before the Court actually says or how the majority frames it, a debate on the morality of homosexuality will ensue. This was the second round of full-and-open debate on that point in the Supreme Court.[142] One firm prediction (you heard it here first): It won't be the last.

Combining the majority opinion with O'Connor's concurrence further highlights the shift to more flexible standards for review. In just this one case, the Court scrambled two traditional standards of review: the majority striking down a prohibition of sexual conduct without explicitly finding that it infringed a fundamental right, and Justice O'Connor striking down a classification without finding it to be suspect or meriting heightened scrutiny. In the same week, her opinion for the Court had upheld the University of Michigan Law School's affirmative action policy, even though it did utilize a suspect classification (race),[143] because its remedial purpose justified a somewhat differential application of strict scrutiny. The neat, if mechanical, tiers of review in constitutional analysis seem to be

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

140. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by Lawrence*, 123 S. Ct. at 2472.

141. *See id.* at 188 n.1 (noting the text of the Georgia statute).

142. There have been other partial debates. Justice Scalia argued the immorality of homosexuality in his dissent in *Romer v. Evans*, 517 U.S. 620, 644–46 (1996). The majority, however, did not engage the point since Colorado did not argue it. In *Boy Scouts of America v. Dale*, both the majority and dissenting opinions sidestepped the issue, concluding that the validity of any one view of morality was irrelevant to a proper resolution of the issues before it. 530 U.S. 640, 661, 686, 702 (2000). Moral arguments, however, formed a backdrop to the case.

143. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2347 (2003).

collapsing.

Why they are collapsing merits more thought than this Article allows. At least one reason, though, may lie in the fact that since *United States v. Carolene Products Co.*,[144] the central justification for countermajoritarian intervention by the courts to strike down discriminatory laws has been the lack of political power on the part of the disadvantaged minority.[145] The complexities of political power, oppression, and resistance in contemporary U.S. society have now grown too byzantine to support the rigid rankings that emerged, particularly in equal protection law. As Suzanne Goldberg has pointed out, Justice Stevens has long called for an alternative to the rank ordering of tiers of scrutiny, as Justice Marshall did before him.[146] Whether either a single standard or a sliding scale approach will now start to emerge, and whether it will be workable if it does, may form an important part of the decisional matrix for all forms of equal protection questions post-*Lawrence* and post-*Grutter*.

C. APPLICATIONS OF EQUALITY

Equality provides the melody behind the words for the majority opinion in *Lawrence* and the theme for Justice O'Connor's concurrence. But there is one issue of equal treatment that the majority strenuously avoids: whether lesbians and gay men can marry on the same terms as all other Americans. Thus, the court pairs its strangely worded admonition against "abuse of an institution the law protects"[147] with recognition that a gay or lesbian relationship cannot be criminalized, "*whether or not* [it is] entitled to formal recognition in the law."[148] Justice O'Connor believes that "preserving the traditional institution of marriage" *is* a legitimate state interest and presumably would satisfy the rational-basis test that would be used to decide a gay marriage case.[149]

Justice Scalia, whose gifts to gay rights advocates can include over-reading holdings with which he disagrees, declares

144. 304 U.S. 144, 152 n.4 (1938).

145. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 438, 445–46 (1985).

146. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. (forthcoming 2004).

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

148. *Id.* at 2478 (emphasis added).

149. *Id.* at 2488 (O'Connor, J., concurring).

that nothing stands between *Lawrence* and gay marriage, unless illogical distinctions are drawn.[150] In particular, he finds that Justice O'Connor's "preservation" is simply a euphemism for expressing moral disapproval of homosexuality, which he reads the majority opinion as having taken out of play in constitutional analysis.[151] Justice Scalia also dismisses procreation as the central purpose of marriage, noting that opposite-sex couples who cannot procreate are nonetheless entitled to marry.[152]

Here again, as with military policy, the impact of *Lawrence* is likely to be more on the logic and tenor of the debate about homosexuality than on the legal validity of marriage laws. The right to marry is already a fundamental right as a matter of substantive due process, and the Court has shown no signs of protecting it less, whatever it is labeled.[153] *Lawrence* alters neither the due process aspects of marriage nor the equal protection standards for classifications based on sexual orientation.

The legal status of gay family bonds—whether between adults or between parent and child—has already shifted from one of universal exclusion from the protections of law to one of segregated systems. Legal inventions such as civil unions, domestic partnerships, and second-parent adoptions provide an assortment of methods for states to recognize and regulate gay families while still barring gay couples from exercising the option to marry.[154] Future courts analyzing the marriage issue will have to confront the question of whether the segregated systems now proliferating in family law derive from anything more than moral disapproval of gay people, or, if they do have a rational basis, whether the classification should be subject to heightened scrutiny.[155] As states increasingly adopt systems

150. *Id.* at 2498 (Scalia, J., dissenting).

151. *Id.* at 2496.

152. *Id.* at 2498.

153. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (protecting the fundamental right of parents to rear their children); *see also supra* notes 40–50 and accompanying text.

154. As this Article goes to press, it appears that Massachusetts will become the first jurisdiction in the United States where same-sex couples can legally marry. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). For a comprehensive survey of the legal issues, see LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenæs eds., 2001).

155. Courts that consider whether to apply heightened scrutiny will have to assess which equal protection analogy should govern. Segregation based on

which basically duplicate marriage, the stranger it seems to preserve segregation qua segregation.

As to other, less dramatic but more numerous kinds of equality challenges, the Court also gave little in specific predictiveness. It was striking that there was no mention in the majority decision of the primary method by which sodomy laws have been used to silence and penalize gay people, which has been in the context of family and employment law. The Court noted that sodomy law *convictions* have far-reaching consequences, using those examples as illustrations of why even a misdemeanor can be significant.[156] But sodomy laws have been most frequently enforced indirectly, not directly, by the denial of custody or other parental rights to gay parents or by exclusions from certain jobs.[157] The ensuing ruptured families and lost employment opportunities resulted from the logical connection between homosexuality and violation of a sodomy law, even though the litigants had never been convicted of illegal conduct.

The omission of any reference to this body of case law in the majority opinion strongly suggests that all five Justices who joined the opinion were not ready to rule that homosexuality is irrelevant in all those contexts. Cases involving children appear to raise some of the most difficult issues for courts. Two questions during oral argument in *Lawrence* illustrate the range of views. Justice Ginsburg asked the State's lawyer whether gay Texans can adopt children.[158] Chief Justice Rehnquist asked Lawrence's lawyer whether, if he prevailed, states could prefer heterosexuals to homosexuals to teach kin-

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race has been abolished, but various systems remain segregated by gender because of cultural constructs about the salience and realness of gender difference. Demands for same-sex marriage call into question whether gender difference is an essential ingredient of marriage and whether sex-based distinctions are presumptively unconstitutional because they discriminate against either women or men as a group, or because they perpetuate different statuses under the law which are defined by gender.

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

157. *See, e.g.*, Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (employment), *cert. denied* 522 U.S. 1049 (1998); Weigand v. Houghton, 730 So. 2d 581, 586–87 (Miss. 1999) (custody); *Ex parte* J.M.F., 730 So. 2d 1190, 1196 n.5 (Ala. 1998) (custody); *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998) (visitation). *See generally* Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813 (2001) (describing how sodomy laws have been used to disadvantage homosexuals in several areas of law).

158. Oral Argument of Charles A. Rosenthal, Jr., on Behalf of the Respondent, *Lawrence*, 123 S. Ct. at 2472 (No. 02-102), *at* 2003 WL 1702534, at *35.

dergarten.[159] By contrast to the majority opinion, Justice O'Connor's opinion did acknowledge the full range of indirect effects of the sodomy laws, not just from convictions but also from the mere existence of the laws, which "mak[e] it more difficult for homosexuals to be treated in the same manner as everyone else."[160]

What is likely to happen next is a period during which courts will choose between either rejecting any relevance of homosexual orientation out of hand, or tackling specific, case-by-case fact-finding projects in order to assess what relevance there may be in each given situation.[161] Either way, lesbian and gay parents and job seekers will be far more likely to prevail now than they were prior to *Lawrence*, especially in states where there had been sodomy statutes. But such cases will still need to be litigated.

III. RECONSTRUCTING MEANINGS

A. THE PRINCIPLE OF EQUAL LIBERTIES

The Court's combination of liberty and equality produces an opinion that seems more holistic and connected to social experience and practice than likely would have been the case if the Court had separated its analyses of substantive due process and equal protection into distinct segments. The Court recognized the synergy between the two doctrines, but did not attempt to draw broader ramifications from it.[162] However, an appreciation of the mutual reinforcement of equality and liberty principles has been gradually increasing for some time in the Court's constitutional jurisprudence.

This developing understanding of the interdependence of liberty and equality also can be traced to the abortion cases. The Court has maintained its original framing of the right to

159. Oral Argument of Paul M. Smith, on Behalf of the Petitioners, *Lawrence*, 123 S. Ct. at 2472 (No. 02-102), *at* 2003 WL 1702534, at *20.

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

161. Adultery law provides a handy comparison. Courts have debated, for example, whether firing a law enforcement officer because he engaged in an adulterous relationship would always be justified because the law prohibited adultery, or whether it would have to be related to a specific factual context, such as the impact on the workplace of the fact that his adulterous relationship was with the wife of a fellow officer. *See, e.g.*, Marcum v. McWhorter, 308 F.3d 635 (6th Cir. 2002).

162. *See Lawrence*, 123 S. Ct. at 2482.

an abortion as guaranteed by the substantive component of due process, but has strengthened its language to fortify that right with an understanding of the ramifications for women of lacking control over pregnancy.[163] The liberty right of procreative control has thus acquired a strong equality inflection.

In cases where the Court has confronted claims of not-quite-deprivation of liberty, as experienced by persons in not-quite-suspect classes, it has in practice displayed a willingness to take into account a kind of cross-doctrinal cumulative weighting of the interests involved and the consequences of adverse legal treatment. For example, where a parent whose parental rights had been terminated sought leave to appeal without paying the cost of having a transcript prepared, the Court ruled that indigency could not bar an individual from pursuing an appeal, even though there is no general right to appeal and the liberty interest involved did not entitle a litigant to the assistance of counsel at public expense.[164]

It is not clear whether the pairing of such claims in a mutually reinforcing way will affect the Court's explicit methodology or standard for judicial review. Rebecca Brown has argued that although the theoretical underpinnings of judicial review have differed in liberty and equality cases, they should be understood cohesively to constrain courts from invalidating democratically enacted laws except in one circumstance: when representative democracy has malfunctioned, such that differential burdens are imposed that have the effect of impairing "important liberties."[165] "[B]oth representation-reinforcement

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163. In *Roe v. Wade*, the Court recognized

> the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

410 U.S. 113, 165–66 (1973). In later cases, the Court restated the central holding of *Roe* in language that gave primary weight to the woman's moral agency and bodily integrity. Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977). Eventually the Court described the impact that having a right to choose abortion has on the capacity of women to function as equals in the society. *See* Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

164. M.L.B. v. S.L.J., 519 U.S. 102 (1996); *see also* Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1239–48.

165. Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491,

theory and deliberative democracy theory . . . come full circle to demand the same thing of representative government[:] . . . that majoritarian policymaking bodies offer legitimate reasons for their laws restricting liberty."[166]

In nations where the controlling law has more of a human rights, and less of a negative liberty, foundation, the melding of these principles has focused more explicitly on the dignitarian norms suggested in the language of *Lawrence*. In his concurring opinion to the ruling of the South African Constitutional Court invalidating that nation's sodomy law, Justice Sachs wrote that "the *motif* which links and unites equality and privacy . . . is dignity."[167] "Dignity" is an explicit component of the South African Constitution (distinct from equal treatment and privacy), one which "requires . . . acknowledg[ment of] the value and worth of all individuals as members of our society."[168]

Justice Kennedy's opinion in *Lawrence* goes to some length to acknowledge the value and worth of lesbian and gay Americans, beyond traditional liberty language about, for example, "the right to be let alone."[169] His opinion reinvigorates liberty theory, by its recognition that autonomy is not just an abstract ideal, but a highly contingent reality, the effectuation of which depends as much on imbalances of power among citizens as the imbalance between citizen and government. We may eventually look back on *Lawrence* as the moment of inauguration for a new principle of equal liberty,[170] one which carries potentially powerful constitutional meanings.

1550 (2002).

166. *Id.* at 1541.

167. Nat'l Coalition for Gay & Lesbian Equal. v. Minister of Justice, 1999 (1) SA 6, 62 (CC) (Sachs, J., concurring).

168. *Id.* at 28 (majority opinion). In the South African constitutional scheme, "[t]he central notion is not that of autonomy, but that of dignity," a principle of both negative and positive liberty, which South Africans drew from the Vienna Conference on Human Rights. A.L. Sachs, *The Challenges of Post-Apartheid South Africa*, 7 GREEN BAG 2D 63, 65 (2003).

169. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

170. Robert C. Post identifies the same development less as a melding of equal protection and due process than as an alteration of the latter: "Themes of respect and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine." Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97 (2003).

B. POLITICS AND CULTURE

As I read *Lawrence*, it joins three distinct streams of political philosophy and jurisprudence: individualism, antipathy toward the state, and the ideal of equality. Correlatively, where government does not intrude or impede, liberty as this Court understands it is not threatened. Certainly nothing in this decision undermines the logic of *Harris v. McRae*[171] or *Maher v. Roe*,[172] the two decisions which held that the government is not obligated to include abortion among the services covered by the Medicaid program.

This combination of moderate libertarianism and individualist equality reproduces norms consistent with both the American civil rights tradition and with neoliberalism. Neoliberalism is a political and cultural paradigm that stresses deregulation and greater market freedom more generally: privatization of public functions in order to achieve the assertedly greater efficiencies of private markets and individual responsibility.[173] Unlike more traditional forms of conservative politics, however, neoliberalism is not allergic to equality.[174] Indeed, there is nothing inconsistent between neoliberalism and civil rights, at least so long as achievement of civil rights denotes the end of prejudice and economically irrational discrimination, and not redistributive policies. A neoliberal civil rights paradigm produces a system in which liberty rights modeled on contract and property become open to all, and in which the state has become formally neutral toward the group in question. Neoliberal civil rights is negative liberty incarnate.

Whatever its shortcomings, for lesbians and gay men, *Lawrence* is a breakthrough. It ends our wandering in law's wilderness, uncertain in each case whether we would be treated with respect or contempt. At bottom, *Lawrence* made lesbians and gay men citizens instead of criminals. We are the newly naturalized, even if native-born, Americans. For the gay civil rights movement, *Lawrence* is the end of the beginning.

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171. 448 U.S. 297 (1980).

172. 432 U.S. 464 (1977).

173. See Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 115, 118–27 (2000), for an astute application of the political science literature on neoliberalism, most of it concerning international trade practices, to domestic political issues in the United States.

174. *See* LISA DUGGAN, THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY xviii–xix (2003).

Is *Lawrence* the end of antigay oppression? Of course not. Also like *Brown v. Board of Education*, its full implementation is likely to proceed at less than warp speed. Massive social structures do not change easily or quickly, especially when the mandate for change is a work in progress rather than a final command. What will come next in the broader political and legal culture is difficult to assess. The equality which is possible in a neoliberal political culture will likely provoke demands for renorming. In the economic sphere, renorming will not come easily. One should not expect a neoliberal model of gay civil rights to include mandates for employers to incur the expenses of accommodating difference (e.g., extension of insurance benefits to same-sex partners) or for government to move toward deprivatization of social costs (e.g., universal access to health care).

Culturally as well as economically, state policies operate in the context of a baseline. The cultural baseline for the state's regulation of sexuality is a privileging of heterosexual relations and the social norms that have grown up around them, and specifically around marriage. Accepting gay people into that normative universe requires both a shift in the prevailing norm so that it is stretched to include homosexuality and residence by gay people within its new boundaries.

A move into the mainstream inevitably results in a degree of assimilation, with both gains and losses for the newly arrived group, as well as for their long-established neighbors. In this case, one such gain and loss is the strengthening by extension, albeit with modifications, of conventional social norms regarding sexuality. As Kendall Thomas has pointed out, segments of the *Lawrence* opinion embody the heteronormative impulses of a court struggling to position the gay men before it as comparable to married persons, even though neither the record nor their attorneys suggested that John Lawrence and Tyron Garner had anything other than a mutually desired fleeting encounter.[175]

Many lesbian and gay Americans want nothing as much as they want the freedom to achieve precisely that kind of assimilation, with the attendant protections and comfort that such status carries. They are certainly correct to understand their

175. Kendall Thomas, *Our* Brown*?: Reading* Lawrence v. Texas (Jan. 4, 2004) (unpublished manuscript, on file with author); *see also* Lawrence v. Texas, 123 S. Ct. 2472, 2478, 2481–82 (2003).

exclusion from marriage and similar social institutions as evidence of a breathtaking assertion of superiority by those who would perpetuate the exclusion. But being allowed into the institution, and even changing it in the process, will not suffice as freedom for those who object to organizing virtually all of a society's laws regarding intimate adult relationships around marriage.

The fact that *Lawrence* is consistent with this model of neoliberal civil rights does not mean, of course, that it is inherently or necessarily limited in these ways. The adjudication of *Lawrence* required no consideration of issues beyond the reach of neoliberal equality; indeed the sweep of the Court's opinion was surprising for its breadth, not its limits. It is simply important not to overstate the zone of freedom that it establishes. The decision leaves enormous flexibility as to how broadly or narrowly future courts will interpret it. Perhaps the most significant point to bear in mind is that the function of lower federal courts, scholars, and practitioners now will be not so much to find the meaning of *Lawrence* as to create it.