

Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric

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I. Introduction

In Lawrence v. Texas,¹ the United States Supreme Court struck down Texas's sodomy law. The majority was careful to make clear that it was not deciding whether the right to marry a same sex partner was constitutionally protected, instead focusing on the criminal aspects of the prohibition at issue. Justice Scalia implied in dissent that the Court had abandoned principled constitutional interpretation and might well eventually recognize the right of same-sex couples to marry. While it is not at all clear that the Court will recognize such a right, it is worth noting that the right of same-sex couples to marry followed from the existing right-to-marry jurisprudence even before Lawrence was decided. Lawrence is important, not because it recognized a right to same-sex marriage, but because it overruled a decision which had falsely been thought to be a bar to the right to marry a same-sex partner. This Article will examine Lawrence in light of McLaughlin v. Florida,² Loving v. Virginia,³ and the right to marry jurisprudence more generally, concluding that Lawrence makes even clearer that same-sex marriage is protected by the United States Constitution, even if the current Court is unlikely to recognize that.

Part II of this Article will examine Lawrence, contrasting it with Bowers v. Hardwick,⁴ and discussing what Lawrence says and does not say about the right to marry a same-sex partner. Part III discusses the equal protection and due process issues implicated by same-sex marriage bans, suggesting that such prohibitions should be struck

down on both due process and equal protection grounds. The Article concludes by suggesting that Lawrence is important for a variety of reasons, not least of which is the rather startling admission by the dissent that the current constitutional jurisprudence requires the recognition of same-sex marriages. Admission notwithstanding, however, it is at best unclear whether this Court will recognize what the Constitution requires in this regard or whether, instead, that recognition will not take place until sometime in the perhaps distant future.

II. Lawrence v. Texas

In Lawrence v. Texas,⁵ the Court examined a statute that criminalized intimate, same-sex conduct.⁶ The statute was challenged as a violation of both equal protection and due process guarantees of the Fourteenth Amendment to the United States Constitution,⁷ and the Court struck it down as a violation of the latter.⁸ The decision is likely to be viewed as a watershed in the movement to secure equal rights for the lesbian, gay, bisexual, and transgendered (LGBT) community, although commentators will long disagree about what the decision means and why it is important.

A. Lawrence as Response to Bowers v. Hardwick

One way to understand Lawrence v. Texas is to see it as a response to Bowers v. Hardwick⁹ both substantively and symbolically. Lawrence removes some of the underpinnings provided by Hardwick upon which discrimination against the LGBT community has been rationalized. At the same time, it recognizes the dignity of same-sex relationships and offers hope that the LGBT community will someday enjoy the same rights that others in the United States enjoy.

At issue in Lawrence was Tex. Penal Code Ann. Sec. 21.06(a), which prohibited sexual intercourse between individuals of the same sex involving contact between the genitals of one person and the mouth or anus of another or the penetration of the genitals or the anus of another person with an object.¹⁰ The state did not criminalize the same activity if performed by members of different sexes.¹¹ Not surprisingly, the statute was challenged on both equal protection and due process grounds.¹²

While the Court ultimately struck down the statute as a violation of Fourteenth Amendment due process guarantees,¹³ the Court seemed to take the equal protection challenge seriously as well, describing that argument as “tenable.”¹⁴ However, the Court believed it very important to address Bowers v. Hardwick¹⁵ directly,¹⁶ since “[i]ts continuance as precedent demeans the lives of homosexual persons.”¹⁷

At issue in Bowers was a Georgia statute which prohibited sexual acts involving the sex organs of one person and the mouth or anus of another.¹⁸ The statute did not distinguish based on the sexes of the parties involved or on their marital status.¹⁹ Indeed, the statute was initially challenged by a married couple as well as by Hardwick,²⁰ although the couple was dismissed for lack of standing.²¹

The statute was challenged as a violation of the Due Process Clause of the Fourteenth Amendment.²² The Bowers Court understood that an existing line of cases protected the right of privacy²³ and, further, that some of the right of privacy cases recognized rights that “have little or no textual support in the constitutional language.”²⁴ The Court claimed, however, that it could “identify the nature of the rights qualifying for heightened judicial protection,”²⁵ namely, those “liberties that are ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were

sacrificed,”²⁶ or “those liberties that are ‘deeply rooted in this Nation’s history and tradition.’”²⁷ The Court concluded that because “neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy,”²⁸ the right to privacy obviously did not include the right to engage in same-sex relations.

Yet, the Court failed to point out that those rights already recognized as falling within the right to privacy also would not have met the test articulated by the Court. For example, the statute at issue in Griswold v. Connecticut,²⁹ which prohibited using “any drug, medicinal article or instrument for the purpose of preventing contraception,”³⁰ had been on the books for over eighty years³¹ and thus the right to use contraception could not plausibly have been described as either implicit in the concept of ordered liberty or deeply rooted in this Nation’s history and tradition. The statute prohibiting abortion at issue in Roe v. Wade³² was typical of statutes that had been on the books for a century³³ and thus the right to abort could hardly be thought deeply rooted in the Nation’s history and tradition.³⁴ The point here is not to suggest that Griswold and Roe were wrongly decided but merely to suggest that the Court offered the wrong test in Bowers for determining whether something falls within the right to privacy.

The Bowers Court at least implicitly offered another test for determining whether a particular liberty falls within the right to privacy, construing the protected zone as involving family-related decisions and then suggesting, “No connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated.”³⁵ The Lawrence Court accepted that family-related decisions are within that protected zone, reaffirming that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family

relationships, child rearing and education.”³⁶ However, the Lawrence Court differed from the Bowers Court in that the former but not the latter recognized that those with a same-sex orientation can and do have relationships worthy of protection. Indeed, the Lawrence Court criticized the Bowers Court by noting that the latter had mischaracterized the relevant issue—“To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”³⁷ The Lawrence Court noted that “[w]hen 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,”³⁸ thereby recognizing that those with a same-sex orientation like those with a different-sex orientation may not merely perform isolated sexual acts but, in addition, have relationships and find meaning, purpose, and dignity in those relationships.³⁹

The Lawrence Court outlined some of the pernicious effects of Bowers, explaining that “[w]hen 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.”⁴⁰ Indeed, the state of Texas had itself “previously acknowledged the collateral effects of the law, stipulating . . . that the law ‘legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,’ including in the areas of ‘employment, family issues, and housing.’”⁴¹ As an additional point, the Court noted some of the direct effects of a conviction under the statute at issue, which were not trivial by any means.⁴² For example, as Justice O’Connor noted in her concurring opinion, a conviction would

restrict the ability of an individual to pursue various professions in Texas and might require that individual to register as a sex offender were he or she to move to another state.⁴³

In overruling Bowers, the Lawrence Court prevents the imposition of some of the harms outlined above and undermines the purported justification for others. Thus, not only is there no longer the possibility of a conviction in circumstances like these, but those who argue that discrimination against the LGBT community is somehow justified because of the permissibility of criminalizing sodomitical relations must now offer another ground upon which to rationalize their desired discrimination.

A separate but related point is that individuals who wish to deny equal rights to members of the LGBT community will no longer be able to point to the Court's tone when addressing orientation issues as support for denying equal rights.⁴⁴ Thus, some of the harm caused by Bowers was not its substantive holding but its tone, which might felicitously be described as having been contemptuous towards those with a same-sex orientation.⁴⁵ The Lawrence Court was respectful rather than contemptuous, acknowledging that "adults may choose to enter upon this [same-sex] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."⁴⁶ While hardly offering a full-fledged endorsement, the Court nonetheless accords a kind of respectability to LGBT people and relationships that had not been accorded in previous decisions.

The Lawrence Court addressed the concern that sodomitical behavior is viewed by some as violating religious and moral principles, discussing "powerful voices . . . [that] condemn homosexual conduct as immoral."⁴⁷ The Court understood that such

views were “shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for traditional family,”⁴⁸ but noted that “the issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”⁴⁹ Concluding that the majority may not, the Court struck down the statute.⁵⁰

Of course, Lawrence has implications for those not in the LGBT community as well. By holding that the activity at issue was protected by the Due Process Clause, the Lawrence Court is presumably invalidating any fornication statutes remaining on the books.⁵¹ A separate question is whether statutes prohibiting adultery or prostitution are also at risk,⁵² although the majority made clear that the case before it did not involve prostitution,⁵³ and offered language suggesting how the case before it might be distinguished from one involving adultery.⁵⁴ Thus, state statutes regulating sexual conduct may now have to undergo reexamination with some being quite vulnerable to constitutional challenge but others being quite likely to withstand an attack on federal constitutional grounds.

Further, a more general point might be made about how the Due Process Clause may be construed in future. The Lawrence Court eschewed the Bowers history-and-traditions approach and instead suggested that “those who drew and ratified the Due Process Clauses of the Fifth Amendment [and] the Fourteenth Amendment . . . [understood that] times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”⁵⁵ The Court understood that this would mean that challenges which might once have been dismissed out of hand by one generation might well be taken seriously by another, and noted that

“[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”⁵⁶ Here, the Lawrence Court makes clear that it rejects the static approach to due process guarantees sometimes advocated and leaves open the possibility that a variety of liberties will be found protected which once would have been described as appropriately subject to state regulation.

B. Lawrence and the Right to Marry a Same-Sex Partner

Commentators discussing whether the United States Constitution protects the right of same-sex couples to marry will debate both whether and why Lawrence plays an important role in that analysis. Certainly, Justice Scalia suggested in his Lawrence dissent that the decision provides the basis for recognizing same-sex marriage,⁵⁷ but there are a number of reasons to doubt that the Court is ready to take this step.

Same-sex marriage is mentioned or alluded to in several places in Lawrence.⁵⁸ However, nowhere in the opinion is there a suggestion that members of the Court believe that such a right is protected by the United States Constitution and in several places there are suggestions that some members of the Court do not believe that it is.

The majority opinion alludes to same-sex unions but refuses to express an opinion about whether they are protected. For example, the Court noted that the Texas criminal statute seeks to “control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”⁵⁹ Thus, some members of the Court may believe that the Constitution precludes criminalizing voluntary, adult, same-sex relations but does not also require that same-sex unions be given legal recognition. Certainly, this seems to be the view which

Justice O'Connor now holds,⁶⁰ and it is simply unclear how many other members of the Court share that view.

The Lawrence majority offered a general rule that states should not attempt to set boundaries to relationships “absent injury to a person or abuse of an institution the law protects.”⁶¹ The Court did not make clear what it had in mind when discussing abuse of an institution protected by the law. Perhaps the Court had marriage in mind and was suggesting that adulterous relationships are not protected by the right to privacy because they tend to undermine marriages.⁶² Or, perhaps the Court was suggesting that it believes that recognizing same-sex marriage would involve an abuse of the institution of marriage, notwithstanding that other countries permit such unions to be celebrated.⁶³

The Lawrence Court made quite clear that the case before it did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁶⁴ That said, however, the Court did offer some very encouraging language in the opinion. For example, the Court noted that 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.”⁶⁵ Yet, the same point might be made about refusing to recognize same-sex marriages—such a policy is an invitation to discriminate because it says that such couples are somehow unworthy. Indeed, if, as the Court has suggested in Romer v. Evans,⁶⁶ an act is unconstitutional “when it classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else,”⁶⁷ and, as Justice Scalia suggests in his Lawrence dissent, “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s moral disapproval of same-sex

couples,” then one might expect the Court to recognize the unconstitutionality of same-sex marriage bans.

In criticizing Bowers, the Lawrence Court noted that the “longstanding criminal prohibition of homosexual sodomy upon which the Bowers decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.”⁶⁸ The Court thereby tried to undercut the suggestion that the law had traditionally intentionally and specifically imposed unique disabilities on the LGBT community, although it might nonetheless be said that laws that were aimed at nonprocreative acts generally have been used to justify the imposition of special burdens on those with a same-sex orientation. For example, the law at issue in Bowers was not aimed at those with a same-sex orientation in particular⁶⁹ but its having been upheld was claimed by some to justify imposing unique disabilities on the LGBT community.⁷⁰

It is worth noting that an analogous approach has been used to justify same-sex marriage bans. Thus, the inability of same-sex couples to have a child has been cited as a reason not to allow them to marry,⁷¹ even though others unable to have children are not similarly precluded from marrying.

Lawrence suggests that the Court will look askance at state attempts to impose a disability on one group and not another if the groups are similarly situated. As Justice Scalia suggests, the nonprocreation argument is not a plausible rationale for precluding same-sex couples from marrying, given that the sterile and elderly are allowed to marry.⁷² Indeed, it is even more implausible than Justice Scalia seems willing to admit. Given that

LGBT couples are having and raising children,⁷³ the procreation argument supports rather than undermines that same-sex couples should be allowed to marry.

In any event, Lawrence cannot be cited for the proposition that same-sex marriage is protected by the United States Constitution. While some of the language of the opinion is promising, the members of the Court have been careful either to express no opinion or to suggest that there is no constitutional right to marry a same-sex partner. It may be helpful, then, to see whether a case can be made for a constitutionally protected right to marry a same-sex partner, given that Lawrence leaves the question open rather than decides the issue.

III. Same-Sex Marriage and the Fourteenth Amendment

The right to marry jurisprudence has been evolving since the Court in Loving v. Virginia⁷⁴ described it as “one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁷⁵ The Court has recognized the right’s importance, both for society as a whole and for the individuals themselves. At least one question, then, is whether the individual and societal interests served by different-sex marriages would also be served by same-sex marriages.

A. Setting the Stage for Loving

One of the most important marriage decisions was Loving v. Virginia⁷⁶ in which the Court struck down Virginia’s antimiscegenation laws. The Loving Court suggested that the laws at issue violated both equal protection⁷⁷ and due process guarantees.⁷⁸ Yet, a mere three years earlier in McLaughlin v. Florida,⁷⁹ the Court had been unwilling to express an opinion about the constitutionality of interracial marriage bans.

In McLaughlin, the Court examined a Florida statute making interracial fornication and adultery a separate crime.⁸⁰ The state justified its law as an attempt to “prevent breaches of the basic concept of sexual decency.”⁸¹ The Court did not quarrel with the state’s contention that it had a legitimate interest in preventing “illicit extramarital and premarital promiscuity,”⁸² but suggested that the state’s purposes could be served by statutes of “general application.”⁸³

The state of Florida offered another justification for the statute, however, pointing to its interracial marriage ban and arguing that its interracial cohabitation law was “ancillary to and serv[ing] the same purpose as the miscegenation law itself.”⁸⁴ The Court rejected this argument “without reaching the question of the validity of the State’s prohibition against interracial marriage.”⁸⁵ The Court noted that “even if we posit the constitutionality of the ban against marriage of a Negro and a white, it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment.”⁸⁶ The Court subjected the cohabitation law to this independent examination and found it constitutionally wanting.

In McLaughlin, the Court did not strike down cohabitation laws generally but only those that were specifically directed at interracial couples. In Lawrence, the Court did not only strike down laws criminalizing same-sex sodomy, but struck down all sodomy laws.⁸⁷ It is simply unclear whether the Court will someday follow Lawrence with a decision striking same-sex marriage prohibitions as the Court followed McLaughlin with Loving.

B. The Right to Privacy

In Lawrence, the Court suggested that Griswold v. Connecticut⁸⁸ was “the most pertinent beginning point”⁸⁹ for an analysis of the constitutionality of Texas’s sodomy law. The Lawrence Court noted that in Griswold a Connecticut law “prohibiting the use of drugs or devices of contraception,” even by married couples, was struck down.⁹⁰ The Griswold Court had “described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.”⁹¹ Of course, relying on marital privacy would not seem to be of much help for those challenging Texas’s sodomy statute, given that the statute only applied to non-marital relations.⁹² However, the Lawrence Court suggested that “[a]fter Griswold, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”⁹³ The Court was apparently reading Eisenstadt v. Baird⁹⁴ as protecting not only the right of unmarried individuals to have access to contraception but also to engage in sexual relations,⁹⁵ at least if the individuals are adult and their relations are consensual.⁹⁶

Commentators may well express surprise that Justice Scalia did not focus more on Justice Goldberg’s concurrence in Griswold in which he wrote that “it should be said of the Court’s holding today that it in no way interferes with a State’s proper regulation of sexual promiscuity or misconduct,”⁹⁷ and in which he and two other members of the Court⁹⁸ cited Justice Harlan’s dissent in Poe v. Ullman⁹⁹ with approval.¹⁰⁰ In his Poe dissent, Justice Harlan argued that the “right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.”¹⁰¹

Yet, there may well be a reason that Justice Scalia did not focus on the Griswold concurrence and Poe dissent, as may become clear when Justice Harlan's analysis is discussed more fully. Justice Harlan suggested that the

laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.¹⁰²

Here, it is clear that Justice Harlan was envisioning a world in which same-sex relations did not occur within the context of a family setting but, instead, outside of one. Whether or not that was an accurate picture at the time, however, it certainly is not currently, given how much the concept of family has expanded over the past several decades. Same-sex couples are now living together as families.¹⁰³ Sometimes they have children that they are raising and sometimes they do not, but it simply is not true that same-sex relations must take place outside of families rather than within them. If the family setting is what is paradigmatic of what is protected by the Due Process Clause, that LGBT families should also be protected.

A further point might be noted. Justice Harlan suggested that the constitutional doctrine which provides bulwarks against state interference must begin with the family. That does not suggest that the constitutional doctrine must end there. Rather, what is suggested is that a prioritization has been offered. Family relationships must be protected

even if sexual activity by those not within a family is not. However, that hardly means that the latter cannot or should not also be protected.

The Lawrence Court noted, “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.”¹⁰⁴ Here, the Court recognizes that same-sex relations may take place within the context of a relationship, and implies that such relationships are included within the family relationships that must be given protection under the Due Process Clause.

In his Poe dissent, Justice Harlan distinguished between the State’s “power either to forbid extra-marital sexuality altogether, or to say who may marry” and the State’s power “when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.”¹⁰⁵ Yet, it is not as if the state has absolute discretion with respect to regulating who may marry whom. As the Loving Court made clear a mere six years later, state marital restrictions must not violate constitutional guarantees.

It might be thought that Loving does very little to limit the power of the states to decide who can marry and that the states have free reign in this regard as long as they do not classify on the basis of race. Such a view has not been borne out in the subsequent jurisprudence.

In Zablocki v. Redhail,¹⁰⁶ the Court examined a Wisconsin statute which precluded certain Wisconsin residents from marrying without court permission.¹⁰⁷ The courts were directed not to permit noncustodial parents to marry unless they could show that they were meeting and would continue to meet their child support obligations.¹⁰⁸ The

statute was challenged by Redhail, an indigent who wished to marry but who was unable to pay court-ordered support for a child that he had fathered out of wedlock.¹⁰⁹

The Zablocki Court noted that the “leading decision of this court on the right to marry is Loving v. Virginia,”¹¹⁰ and explained, “Although Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.”¹¹¹ The Court did not limit the class for whom this right was so fundamental by excluding, e.g, those either unwilling or unable to have children or those with a same-sex orientation, but said that it was important for everyone. Indeed, Justice Powell in his Zablocki concurrence suggested that the decision would have implications for those with a same-sex orientation.¹¹²

The Zablocki Court did not merely announce that the “right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause,”¹¹³ but instead tried to explain why that was so by putting it in the context of those rights which had already been recognized as falling within the right to privacy. The Court noted, “It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships,”¹¹⁴ since “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”¹¹⁵ While accepting that Wisconsin had “legitimate and substantial interests” which were served by the statute,¹¹⁶ the Court nonetheless struck down the statute because “the means selected by the State for achieving these interests unnecessarily impinge on the right to marry.”¹¹⁷

Zablocki would seem to be very persuasive if not dispositive in the context under discussion here, given that LGBT couples are having and raising children. If, as Zablocki suggests, it makes little sense to recognize a right of privacy with respect to other matters of family life but not to marriage, then it makes no sense to refuse to recognize the right of same-sex couples to marry.

In Adams v. Howerton,¹¹⁸ a federal district court addressed the validity of a same-sex marriage between an American and an Australian national. In holding that the marriage was invalid, the court discussed the equal protection challenge, given that marriages were “sanctioned between couples who are sterile because of age or physical infirmity, and between couples who make clear that they have chosen not to have children.”¹¹⁹ The Adams court explained that “if the classification of the group who may validly marry is overinclusive, it does not affect the validity of the classification.”¹²⁰ Yet, the court failed to understand that this is one of the reasons that same-sex marriages must be recognized regardless of whether a particular same-sex couple plans to have or raise children. Even were it true that the sole reason to permit members of a class to marry was to enable them to provide a more stable environment in which children might be born and raised, that still would provide justification for recognizing same-sex marriages. The fact that there are numerous reasons to recognize marriages, which are equally applicable to same- and to different-sex couples, e.g., to make happier and more productive citizens or to relieve financial burdens on the state, makes the equal protection difficulties posed by same-sex marriage bans all the more glaring.

In Turner v. Safley,¹²¹ the Court discussed some of the constitutionally significant interests implicated in marriage. Marriages are “expressions of emotional support and

public commitment.”¹²² Further, “the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”¹²³ Finally, marriage “often is a precondition to the receipt of government benefits.”¹²⁴ Given that all of these interests are also implicated for same-sex couples¹²⁵ and the right to marry is of fundamental importance for all individuals, the right to marry a same-sex partner should be held to be constitutionally protected even bracketing Lawrence.

Lawrence does add something to the debate, however. If, as suggested in Bowers and reaffirmed by Lawrence, the central focus of the substantive due process protections involve family-related matters like marriage, having and raising children, etc., then one would expect that if sexual relations for different-sex and same-sex couples are protected even when occurring outside of the family context, then families involving same-sex partners should certainly be protected. It may be that Justice Scalia did not want to point to the prioritization which has been adopted by the Court precisely because this would mean that the existing jurisprudence protects same-sex marriage, especially after Lawrence. Thus, the claim would not be that same-sex marriage might be recognized because the Court has given up all reasoning but that the Court’s previous jurisprudence compels the legal recognition of such unions. Indeed, Justice Scalia admits as much when he suggests that after Lawrence no distinction can “be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”¹²⁶

While Justice Scalia is correct that after Lawrence there is no constitutionally viable distinction between the right to marry a same- versus a different-sex partner, he is incorrect insofar as he is implying that there was a constitutionally viable distinction before Lawrence.¹²⁷ Even were the state permitted to criminalize sodomy outside of

marriage, that would not imply that it could criminalize sodomy within marriage.¹²⁸ Thus, even were Bowers still good law, that would not imply that a same-sex couple who had married could be prohibited from engaging in sexual relations. Nor would it mean that the state could prevent same-sex couples from marrying to prevent them from engaging in “criminal” sodomitical acts. Nonetheless, now that Bowers has been overruled, those specious arguments are no longer even tempting to make.

C. Equal Protection

The argument above is focused on the substantive due process protections offered by the Fourteenth Amendment. A separate question is whether same-sex marriage bans violate equal protection guarantees. The comments offered by Justices O’Connor and Scalia in Lawrence suggest that at least four members of the Court are unlikely to accept the equal protection argument,¹²⁹ although these comments also suggest that the Court is going to have to modify its equal protection jurisprudence in order to avoid striking down same-sex marriage bans on that basis.

Justice O’Connor made clear in her concurrence that she would have struck down the Texas statute on equal protection rather than substantive due process grounds.¹³⁰ She suggests that rational basis review itself has tiers. Because “some objectives, such as ‘a bare . . . desire to harm a politically unpopular group,’ are not legitimate state interests,”¹³¹ the Court will apply “a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”¹³² Because of this more searching form of rational basis review, the Texas statute could not pass constitutional muster.

Justice O'Connor was unwilling to join the Court in overruling Bowers.¹³³ She suggested that the promotion of morality was a rational basis for law for substantive due process purposes,¹³⁴ even if not for equal protection purposes. She explained, "Moral disapproval of this group [those with a same-sex orientation], like a bare desire to harm the group, is an interest that is insufficient to satisfy the rational basis review under the Equal Protection Clause."¹³⁵ She thus would have struck down the Texas statute but would have reserved for another day whether the Due Process Clause precluded a neutral sodomy law.¹³⁶

Justice O'Connor recognized that the Texas sodomy statute criminalized conduct and thus might be argued not to have been discriminating against persons.¹³⁷ However, she reasoned that the statute was "directed toward gay persons as a class"¹³⁸ and thus was unconstitutional.¹³⁹ Justice O'Connor made clear, however, that she would view a challenge to same-sex marriage statutes somewhat differently. She suggested that "[u]nlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond moral disapproval of an excluded group."¹⁴⁰ Justice O'Connor failed to elaborate what those reasons might be, and the question to be answered at some future time is whether, as Justice Scalia suggests, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."¹⁴¹ If Justice Scalia is correct, then it may well be very difficult indeed to provide any legitimate rationale for same-sex marriage bans.

At least two points might be made about Justice O'Connor's apparent willingness to uphold same-sex marriage bans. First, the Wisconsin statute at issue in Zablocki was

struck down on equal protection grounds.¹⁴² There, the state had legitimate and substantial reasons for its statute,¹⁴³ which nonetheless did not suffice to save it. The class of individuals adversely affected by the statute—the indigent—was not suspect or quasi-suspect.¹⁴⁴ Thus, even if the state were to have a legitimate reason for its same-sex marriage ban which was not simply the wish to express its moral disapproval of same-sex couples, it is not at all clear that the reason would allow the statute to pass constitutional muster, given the existing jurisprudence.

Second, it is not at all clear that rational basis would be the appropriate test when examining this equal protection challenge. Justice Scalia’s comments in his Lawrence dissent are suggestive of why this is so, especially once his misleading analysis of Loving is explained and a more accurate analysis is considered in its stead.

Justice Scalia recognized in his Lawrence dissent that the Texas “statute does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women.”¹⁴⁵ However, he concluded, “this cannot itself be a denial of equal protection, since its is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.”¹⁴⁶

Let us bracket his conclusion about whether the Texas statute passes muster under the Equal Protection Clause, especially since a majority of the Court seems to believe that it failed to pass muster even under the rational basis test.¹⁴⁷ Let us also bracket his conclusory statement about whether same-sex marriage bans pass constitutional muster,

since that is the matter at issue, and examine why he believes that heightened scrutiny would not be required when examining the constitutionality of such statutes.

Justice Scalia realizes that both the Texas sodomy statute and same-sex marriage bans¹⁴⁸ facially discriminate on the basis of sex, but argues that heightened scrutiny is not necessary for either. He understands that the antimiscegenation laws at issue in Loving v. Virginia¹⁴⁹ would seem to be a clear counter-example to his analysis of whether same-sex marriage bans trigger heightened scrutiny, since the laws at issue in Loving “similarly were applicable to whites and black alike, and only distinguished between the races insofar as the partner was concerned.”¹⁵⁰ However, he argues, the Court in Loving “correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was ‘designed to maintain White Supremacy.’”¹⁵¹

Certainly, he is correct that the Loving Court found that the statutes at issue were designed to promote White Supremacy.¹⁵² However, the important issues are whether closer scrutiny was required to discover this invidious motivation and what would have happened had there been no such finding.

Consider the analysis offered by the Court in City of Richmond v. J. A. Croson Co.¹⁵³ The Court explained, “Absent searching inquiry into . . . race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”¹⁵⁴ While some members of the Court have argued convincingly that it is sometimes possible to distinguish between benign and malicious discrimination,¹⁵⁵ the discrimination at issue in Loving and, for that matter, at issue in same-sex marriage bans can hardly be characterized as benign and, in any event, one would not expect Justice

Scalia to rely on the purpose of the discriminator when deciding whether exacting scrutiny should be employed for a racial classification.¹⁵⁶

Justice Scalia's analysis is even more misleading because he mischaracterizes the Loving decision itself. The Loving Court made clear that even had there been no purpose to promote White Supremacy, the antimiscegenation statutes still would have been struck down.¹⁵⁷ Further, even had the Loving Court not expressed this explicitly, the jurisprudence as it has since developed requires that "all racial classifications, imposed by whatever federal, state, or local actor, must be analyzed by a reviewing court under strict scrutiny."¹⁵⁸

The lesson of Loving is not that racial classifications will be examined closely only when they are designed to promote White Supremacy, but that racial classifications will be examined closely to root out invidious discrimination. Indeed, the Court had already made that lesson clear. In McLaughlin v. Florida,¹⁵⁹ there was no showing that the state was trying to promote the superiority of one race over another, and the Court nonetheless struck down the statute expressly classifying on the basis of race.¹⁶⁰ The McLaughlin Court made quite clear that "[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation."¹⁶¹ Rather, the "courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose."¹⁶²

The claim here is not that marriage statutes which expressly classify on the basis of sex will be treated in the same way as will statutes that expressly classify on the basis of race. The former classifications are subjected to a lower level of scrutiny than are the

latter.¹⁶³ Nonetheless, the claims are that sex-based classifications should not be subjected to a rational basis test and that, as Justice Scalia suggests in his Lawrence dissent, same-sex marriage bans involve sex-based classifications.

Perhaps the Court will ultimately find that same-sex marriage bans pass constitutional muster. However, unless the Court is going to modify its current jurisprudence,¹⁶⁴ Justice Scalia is incorrect that a statute disadvantaging same-sex couples which expressly classifies on the basis of sex does “not need to be justified by anything more than a rational basis, which . . . is satisfied by the enforcement of traditional notions of sexual morality.”¹⁶⁵ Rather than pass the rational basis test, which merely requires that the “classification drawn by the statute . . . [be] rationally related to a legitimate state interest,”¹⁶⁶ such a classification must “serve important government objectives and . . . the discriminatory means employed . . . [must be] substantially related to the achievement of those objectives.”¹⁶⁷

To establish the constitutionality of a sex-based classification, it will not suffice merely to establish that the classification was not motivated out of animus towards one sex or the other. As the Court made clear in United States v. Virginia,¹⁶⁸ “a party seeking to uphold government action based on sex must establish an exceedingly persuasive justification’ for the classification.”¹⁶⁹ Indeed, the classification at issue in Virginia which, arguably, was not motivated by animus,¹⁷⁰ was nonetheless held not to pass constitutional muster.¹⁷¹

It is unclear whether same-sex marriage bans could survive heightened scrutiny. However, it might be noted that the Vermont Supreme Court in Baker v. State¹⁷² was employing a scrutiny less exacting than heightened scrutiny¹⁷³ and the Baker court

nonetheless held that the state constitution's analog of equal protection guarantees¹⁷⁴ had been violated by the state's refusal to accord (qualifying) same-sex couples the benefits accorded to married couples.¹⁷⁵ It is at best unlikely that same-sex marriage bans could withstand heightened scrutiny.

IV. Conclusion

In his Lawrence dissent, Justice Scalia suggests that the Lawrence opinion “‘does not involve’ homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”¹⁷⁶ It is worth thinking about why Justice Scalia believes that Lawrence “involves” same-sex marriage when the Texas statute challenged was Tex. Penal Code Ann. Sec. 21.06(a)¹⁷⁷ rather than Tex. Family Code sec. 2.001.¹⁷⁸

A. Lawrence and the Pre-existing Priorities in Due Process Jurisprudence

Lawrence is important to consider for a number of reasons. It strikes down sodomy laws generally, which not only precludes states from criminalizing adult, voluntary, same-sex relations but also has important implications if the Court is going to adhere to the priorities that it has already articulated as being important in substantive due process jurisprudence. The Court has already made clear that relationships are privileged over relations and that family matters are at the core of what is protected by substantive due process guarantees. If the right to engage in same-sex and different-sex non-marital relations is protected, then certainly the right to have one's family relationships not impinged upon by the state is also protected, whether or not one is a member of the LGBT community. This protection not only extends to one's children but to one's life partner as well. If the previous jurisprudence is not suddenly going to undergo

transformation, then Lawrence suggests that the right to marry a same-sex partner is protected by substantive due process guarantees.

B. Lawrence as Representing an Evolution in Attitude

As a separate but related point, Lawrence represents a significant change in tone. Romer v. Evans¹⁷⁹ was an improvement over Bowers, because Romer struck down an amendment which disfavorably classified those with a same-sex orientation “not to further a proper legislative end but to make them unequal to everyone else.”¹⁸⁰ The Romer Court made clear that it “is not within our constitutional tradition to enact laws of this sort.”¹⁸¹

Yet, Romer was ambiguous in that it was difficult to determine whether the amendment was unconstitutional precisely because “its sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed].”¹⁸² Were that the amendment’s fatal flaw, then one might expect that the electorate could have achieved a similar result if only it had been more patient and had adopted a piecemeal approach rather than tried to do everything in one fell swoop.¹⁸³ If that was all that Romer stood for, then it would not be particularly supportive of the LGBT community except, perhaps, as a statement that it is impermissible for the state to make members of the LGBT community into pariahs.¹⁸⁴

Lawrence does not lend itself to the same kind of minimalist interpretation. While the Court is mysterious about what it will say with respect to the constitutionality of same-sex marriage bans, its tone of acceptance of and respect for members of the LGBT community seems hard to mistake. That change in tone is important if only

because it indicates that the Court no longer believes that LGBT individuals are second-class citizens deserving less protection than other United States citizens.

C. Lawrence as Laying Bare the Invidiousness of Bowers

The Lawrence Court implied that Bowers had invidious effects.¹⁸⁵ Yet, the Lawrence dissent suggests something much stronger. Apparently, some members of the Court have taken Bowers to hold as a matter of law that second-class status may be imposed upon an entire group because of moral disapproval of that group. This casts a whole new light on the majority and dissenting opinions in Bowers, Romer, and Lawrence.

In his Bowers dissent, Justice Blackmun suggested, “Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in ways that would not be tolerated if it limited the choices of those other citizens.”¹⁸⁶ One might have thought that Justice Blackmun was engaging in rhetorical exaggeration. While the Bowers Court had held that same-sex sodomy did not implicate a right deeply rooted in the Nation’s history and tradition¹⁸⁷ and hence was not protected by the Due Process Clause, the same analysis applied equally to different-sex sodomy¹⁸⁸ as well as adultery, fornication, and a host of other activities.¹⁸⁹ Thus, the decision, although disappointing and arguably wrong,¹⁹⁰ need not have been doing anything invidious.

Certainly, lack of invidiousness does not excuse the Court’s having offered a cramped¹⁹¹ and willfully blind¹⁹² reading of the case, the issue before it, and the past jurisprudence, thereby having created an arbitrary limit on the reach of substantive due process guarantees which undercut the Nation’s long-cherished values.¹⁹³ Nonetheless,

such a result, although deeply regrettable, is hardly the equivalent of a holding that those with a same-sex orientation can be “singled out for unfavorable treatment.”¹⁹⁴

Yet, Justice Blackmun may not have been engaging in rhetorical exuberance after all. To see that it is important to consider Romer and then Lawrence.

Romer v. Evans¹⁹⁵ might seem to be a surprising case to discuss when seeking to get the “proper” interpretation of Bowers. At issue in Romer was an amendment to the Colorado Constitution (Amendment 2) which precluded those with a same-sex orientation from receiving protected status.¹⁹⁶ The Colorado Supreme Court had struck down the amendment on electoral process grounds,¹⁹⁷ and the Romer Court affirmed but on different grounds,¹⁹⁸ namely, that the amendment violated equal protection guarantees.¹⁹⁹

Of interest here is not whether the amendment should have been struck down as a violation of equal protection or, instead, electoral process guarantees²⁰⁰ but, rather, on why Justice Scalia argued that the case “most relevant” to the issue before the Romer Court was Bowers.²⁰¹ After all, as Justice Scalia noted in his dissent, Colorado had repealed its sodomy law.²⁰² Yet, according to Justice Scalia, the fact of the repeal was irrelevant, since if “it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact laws merely disfavoring homosexual conduct.”²⁰³ What kind of laws? Those precluding the extension of protected status or, presumably, those precluding marriage.²⁰⁴

To see how breathtaking this view is, consider adultery, a practice that is likely not protected even after Lawrence.²⁰⁵ Consider further that, unlike its action with respect to sodomy, the Colorado Legislature has not repealed its statute prohibiting adultery.²⁰⁶

One would expect that Justice Scalia would suggest that heavy civil penalties could be imposed on adulterers or even on those who had an adulterous “orientation,”²⁰⁷ e.g., those married individuals who would kiss or embrace a non-spouse or, perhaps, who had a “tendency or desire to do so.”²⁰⁸ An individual burdened by such a statute might bring an as-applied challenge to establish that he or she had never engaged in adulterous behavior but the statute itself, allegedly, would pass constitutional muster.²⁰⁹

Let us focus on a particular possible civil penalty, namely, not being able to marry. Not so long ago, adulterers were precluded from marrying their paramours²¹⁰ or, sometimes, marrying at all.²¹¹ Yet, very few if any jurists and commentators in this day and age would suggest that a state could constitutionally preclude adulterers, much less those with an adulterous orientation, from remarrying. After all, the Zablocki Court struck down the Wisconsin statute at issue precisely because it absolutely prevented some from marrying and in effect coerced others into forgoing their right to marry.²¹² Yet, Justice Scalia’s Romer and Bowers analyses would imply that adulterers could be precluded from marrying or remarrying.

Suppose that we apply Justice Scalia’s approach to a different class of individuals, namely, those who are fornicators or who have an “orientation” to fornicate. Presumably, Justice Scalia would suggest that it is within the power of the state to preclude fornicators from marrying. Those with such an orientation would be allowed to marry if successful in their as-applied challenge, but the statute itself could withstand constitutional scrutiny. Basically, this statute would impose possibly severe²¹³ penalties on those unwilling to delay having sexual relations until after marriage, and Justice Scalia would suggest that such matters are best left to the wisdom of the Legislature.

Consider how the Lawrence dissenters might address a case, Rablocki v. Zedhail, involving facts similar to those of Zablocki. Justice Scalia would point out that Zedhail had had a child out of wedlock.²¹⁴ He would note that while Wisconsin does not have a law against fornication per se,²¹⁵ it could have such a law without offending the Constitution, because fornication is neither implicit in the concept of ordered liberty nor a right which is deeply rooted in the Nation's history and tradition. Justice Scalia would further point out that in Wisconsin the failure to pay child support can result in a felony conviction.²¹⁶ He would then suggest that if "it is constitutional to make . . . conduct [involving nonsupport] criminal, then surely it is constitutionally permissible for a state to enact other laws merely disfavoring . . . conduct [involving nonsupport]."²¹⁷ He would conclude that Wisconsin could preclude Redhail from marrying, past jurisprudence to the contrary notwithstanding. Justice Rehnquist would either join Justice Scalia's opinion or would write a separate one suggesting that the right to marry is not the sort of right which invariably triggers strict scrutiny.²¹⁸ Justice Thomas might join either of those opinions or, perhaps, write his own in which he not only rejected the fundamental right to marry but that there is a general right to privacy.²¹⁹

Needless to say, these views are not in accord with the current right-to-marry jurisprudence. Certainly, that jurisprudence does not require the Court to strike down any and all restrictions on marriage. As the Court made clear in Zablocki, "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."²²⁰ For example, in Sosna v. Iowa,²²¹ the Court upheld Iowa's one-year residency requirement for divorce.²²² However, that was precisely because the statute at issue did not deprive the appellant of the right to marry

but merely delayed its exercise.²²³ Here, we are postulating a complete deprivation of the right to marry. The current jurisprudence simply does not permit the deprivation of that right unless the statute at issue “is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”²²⁴

There are two distinct issues which must not be conflated. One involves the refusal of the Lawrence dissenters to accept or apply current privacy or right-to-marry jurisprudence. Another involves their apparent belief that Bowers permits same-sex marriage bans in particular because, allegedly, Bowers stands for the proposition that those with a same-sex orientation can be singled out for unfavorable treatment,²²⁵ notwithstanding the explicit disavowal in Bowers that equal protection issues were even being addressed.²²⁶

It should be little wonder that Justice Scalia suggested in his Romer dissent that the amendment at issue was merely “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of its laws.”²²⁷ On his view, Bowers made it permissible for the states to impose any of a number of disabilities on members of the LGBT community and Colorado had not chosen to exercise that power as fully as it might have.

When the Romer Court suggested that a state cannot “deem a class of persons a stranger to its laws,”²²⁸ it seems to have been rejecting a view that the Lawrence and Romer dissenters actually hold, namely, that Bowers permits a kind of open season on members of the LGBT community.²²⁹ The Romer and Lawrence dissenters should be commended for their forthrightness. They do not merely suggest with a wink and a nod

that a neutral law might slyly be applied in a way that would disadvantage a particular group without running afoul of Yick Wo limitations.²³⁰ Rather the Romer dissent boldly argues that Bowers permits members of the LGBT community to be singled out for unfavorable treatment and the Lawrence dissent implies that discrimination against the LGBT community in particular is legitimate and a constitutional right.²³¹ Rather than engaging in rhetorical exaggeration, the Bowers dissents and the Romer and Lawrence majority decisions almost understate the view that they are opposing. If that opposing view is not invidious, it seems difficult to imagine what would qualify.

D. Lawrence and Same-Sex Marriage

Even before Lawrence, the constitutionally significant interests established in the right-to marry jurisprudence were equally applicable to same-sex and different-sex couples. Both types of couples may have children to raise, and may consider marriage as an expression of emotional support, public commitment, and religious faith. Some commentators would explain the apparent anomaly in the failure to recognize the unconstitutionality of same-sex marriage bans by talking about a “gay exception,”²³² while others would simply claim that this is a refusal to accord same-sex couples “special rights.”²³³ In his Lawrence dissent, Justice Scalia helps to settle that debate. Basically, he suggests in his Romer dissent and, more explicitly, in his Lawrence dissent that same-sex marriages are constitutionally protected, not if members of the LGBT community are accorded special rights, but simply if they are accorded the same rights as everyone else. Apparently, Justice Scalia’s complaint is that by overruling Bowers and thereby making clear that the LGBT community cannot be singled out for unfavorable treatment, the Lawrence Court makes it impossible to offer a constitutionally viable argument justifying

same-sex marriage bans. Of course, neither the Lawrence majority nor the Lawrence concurrence believe that the Constitution permits states to create the kind of second-class citizenship which three members of the Court apparently believe would pass constitutional muster, and it remains to be seen what implications, if any, this newly announced equality will have.

The Lawrence majority recognized that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”²³⁴ It is simply unclear whether the current Court can recognize what Justice Scalia and two other members of the Court admit—the current equal protection and due process jurisprudence require the recognition of same-sex marriage. We shall simply have to wait and see how many generations of Supreme Court Justices are required before the Court can see that same-sex marriage bans are neither necessary nor proper but in fact serve only to oppress.

NOTES

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- ¹ 123 S.Ct. 2472 (2003)
- ² 379 U.S. 184 (1964).
- ³ 388 U.S. 1 (1967).
- ⁴ 478 U.S. 186 (1986)
- ⁵ 123 S.Ct. 2472 (2003)
- ⁶ Id. at 2475.
- ⁷ Id. at 2476.
- ⁸ See id. at 2476.
- ⁹ 478 U.S. 186 (1986)
- ¹⁰ See Lawrence, 123 S. Ct. at 2476.
- ¹¹ See id. at 2485 (O'Connor, J., concurring).
- ¹² Id. at 2476.
- ¹³ See id.
- ¹⁴ Id. at 2482.
- ¹⁵ 478 U.S. 186 (1986)
- ¹⁶ Lawrence, 123 S. Ct. at 2482.
- ¹⁷ Id. at 2482.
- ¹⁸ See Bowers, 478 U.S. at 188 n.1.
- ¹⁹ See id. at 200 (Blackmun, J., dissenting) ("The sex or status of the persons who engage in the act is irrelevant as a matter of state law.")
- ²⁰ See id. at 188 n.2.
- ²¹ See id. n.2.
- ²² Id. at 189.
- ²³ Id. at 190
- ²⁴ Id. at 191.
- ²⁵ Id.
- ²⁶ Id. at 191-92 (citing Palko v. Connecticut, 302 U.S. 319, 326, 326 (1937))
- ²⁷ Id. at 192 (citing More v. City of East Cleveland, 431 U.S., 494, 503 (1977)).
- ²⁸ Id.
- ²⁹ 381 U.S. 497 (1961).
- ³⁰ See id. at 480
- ³¹ See Poe v. Ullman, 367 U.S. 497, 501 (1961) ("The Connecticut law prohibiting the use of contraceptives has been on the books since 1879.")
- ³² 410 U.S. 113 (1973).
- ³³ See id. at 174 (Rehnquist, J., dissenting)
- ³⁴ See Lawrence, 123 S. Ct. at 2493 (Scalia, J. dissenting) (noting that the Roe Court had not even attempted to establish that a right to abortion was deeply rooted in the Nation's history and tradition).
- ³⁵ Bowers, 478 U.S. at 191.
- ³⁶ Lawrence, 123 S. Ct. at 2481.
- ³⁷ Id. at 2478
- ³⁸ Id.
- ³⁹ Id. at 2481-82.
- ⁴⁰ Id. at 2482.
- ⁴¹ See id. at 2486 (O'Connor, J., concurring) (citing State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992).
- ⁴² Id. at 2482.
- ⁴³ See id. at 2485-86 (O'Connor, J., concurring).
- ⁴⁴ Romer v. Evans, 517 U.S. 620 (1996) also adopted a different tone, although the Court's denial of certiorari in Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001 (1996) made Romer somewhat difficult to interpret, since the language of the referendum

proposition in Equality Foundation bore a strong resemblance to the language in the referendum proposition in Romer which the Court held violated constitutional guarantees.

⁴⁵ See Neill v. Gibson, 278 F.3d 1044, 1066 (10th Cir. 2001) (Lucero, J., dissenting) (discussing the Bowers Court's contempt towards lesbians and gays); Watkins v. U.S. Army, 837 F.2d 1428, 1453 (9th Cir. 1988) (Reinhardt, J., dissenting), superceded by 847 F. 329 (9th Cir. 1988), withdrawn on rehearing by 875 F.2d 699 (9th Cir. 1989) ("the anti-homosexual thrust of Hardwick, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear").

⁴⁶ Lawrence, 123 S. Ct. at 2478.

⁴⁷ Id. at 2480

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ See id. at 2484.

⁵¹ See **D.C. Stat.** sec. 22-1602 (up to six months or \$300 for committing fornication); **Idaho Stat.** sec 18-6603 (same)

⁵² See Lawrence, 123 S. Ct. at 2490 (Scalia, J. dissenting).

⁵³ See id. at 2484.

⁵⁴ See id. at 2478 (suggesting that the state should not set boundaries on relationships "absent injury to a person or abuse of an institution the law protects.") For a discussion of adultery as an abuse of marriage, see City of Sherman v. Henry, 928 S.W.2d 464, 470 (Tex. 1996) ("Adultery by its very nature undermines the marital relationship and often rips apart families.")

⁵⁵ Id. at 2484.

⁵⁶ Id.

⁵⁷ Id. at 2498 (Scalia, J., dissenting)

⁵⁸ Id. at 2478, 2484, 2487-88 (O' Connor, J., concurring in the judgment), 2490 (Scalia, J., dissenting), 2495-98 (Scalia, J., dissenting).

⁵⁹ Id. at 2478.

⁶⁰ See id. at 2484 (O'Connor, J., concurring in the judgment) ("Texas' statute banning same-sex sodomy is unconstitutional.") and id. at 2487-88 (O'Connor, J., concurring in the judgment)

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage.

⁶¹ Id. at 2478.

⁶² See note 54 supra.

⁶³ See Michael Paulson, Vatican Warns on Same-Sex Marriage Broad Edict Has Message for Catholic Politicians, **Boston Globe**, 8/01/03 at A1 (noting that Belgium and the Netherlands recognize same-sex marriage and that such marriages have been recognized in Ontario and British Columbia, Canada).

⁶⁴ Lawrence, 123 S. Ct. at 2484.

⁶⁵ Id. at 2482.

⁶⁶ 517 U.S. 620 (1996)

⁶⁷ Id. at 635.

⁶⁸ Lawrence 123 S. Ct. at 2479.

⁶⁹ See Bowers, 478 U.S. at 200 (Blackmun, J., dissenting) ("The sex or status of the persons who engage in the act is irrelevant as a matter of state law.")

⁷⁰ See Romer, 517 U.S. at 636 (Scalia, J., dissenting) (suggesting that Bowers justifies the imposition of unique disabilities on those with a same-sex orientation).

⁷¹ See Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal 1980) ("if propagation of the race is basic to the concept of marriage and its legal attributes, 'marriage' is again impossible and unthinkable between persons of the same sex.")

⁷² Lawrence, 123 S. Ct. at 2498 (Scalia, J., dissenting).

⁷³ See Chuck Colbert, Gay Catholics Refuse to Go Away or Be Quiet, **Boston Globe**, at 3, 12/31/00 2000 WL 32058228 discussing Catholic lesbian and gay baby boom).

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- ⁷⁴ 388 U.S. 1 (1967)
- ⁷⁵ Id. at 12 .
- ⁷⁶ 388 U.S. 1 (1967).
- ⁷⁷ See id. at 12 “There can be no doubt that restricting the freedom of marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”)
- ⁷⁸ See id. (“These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”)
- ⁷⁹ 379 U.S. 184 (1964).
- ⁸⁰ See id. at 184.
- ⁸¹ See id. at 193.
- ⁸² Id.
- ⁸³ Id. at 193-94.
- ⁸⁴ Id. at 195.
- ⁸⁵ Id.
- ⁸⁶ Id.
- ⁸⁷ See Lawrence, 123 S. Ct. at 2482 (“Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different sex participants.”)
- ⁸⁸ 381 U.S. 479 (1965).
- ⁸⁹ See Lawrence, 13 S. Ct. at 2476 (discussing Griswold v. Connecticut, 381 U.S. 479 (1965)).
- ⁹⁰ See id. at 2476
- ⁹¹ See id. at 2477 (citing Griswold, 381 U.S. at 485).
- ⁹² Because same-sex couples are not allowed to marry in Texas, the prohibited relations would presumably be performed by a non-marital couple. See Texas Family Code sec. 2.001.
- ⁹³ See Lawrence, 123 S. Ct. at 2477.
- ⁹⁴ 405 U.S. 438 (1972).
- ⁹⁵ See Lawrence, 123 S. Ct. at 2477 (discussing Eisenstadt)
- ⁹⁶ See id. at 2484 (noting that the “present case does not involve minors. It does not involve persons who might be injured or coerced or who are situation in relationships where consent might not easily be refused.”)
- ⁹⁷ See Griswold, 381 U.S. at 498-99 (Goldberg, concurring)
- ⁹⁸ Justice Brennan and Chief Justice Warren joined Goldberg's concurrence. See Griswold, 381 U.S. at 486.
- ⁹⁹ 367 U.S. 497 (1961).
- ¹⁰⁰ See id. at 499 (Goldberg, J., concurring)
- ¹⁰¹ Poe, 367 U.S. at 552 (Harlan J., dissenting)
- ¹⁰² Id. at 546 (Harlan J., dissenting)
- ¹⁰³ See Braschi v. Stahl Associates Company, 543 N.E.2d 49 (N.Y. 1989).
- ¹⁰⁴ Lawrence, 123 S. Ct. at 2478
- ¹⁰⁵ Poe, 367 U.S. at 553 (Harlan J., dissenting)
- ¹⁰⁶ 434 U.S. 374 (1978).
- ¹⁰⁷ See id. at 375
- ¹⁰⁸ See id.
- ¹⁰⁹ See id. at 378.
- ¹¹⁰ Id. at 383
- ¹¹¹ Id. at 384.
- ¹¹² Id. at 399 (Powell, J. concurring).
- ¹¹³ Id. at 384.
- ¹¹⁴ Id. at 386.
- ¹¹⁵ Id.
- ¹¹⁶ See id. at 388
- ¹¹⁷ Id.
- ¹¹⁸ 486 F.Supp 1119 (C.D. Cal. 1980).
- ¹¹⁹ Id. at 1124
- ¹²⁰ Id.

¹²¹ 482 U.S. 78 (1987).

¹²² Id. at 95.

¹²³ Id. at 96

¹²⁴ Id.

¹²⁵ Some religions recognize same-sex marriages. See Edward Brumby, Note, What Is in a Name: Why the European Same-Sex Partnership Acts Create a Valid Marital Relationship, 28 Ga. J. Int'l & Comp. L. 145, 162 (1999) ("A growing number of religions recognize same-sex relationships as a legitimate form of marriage.")

¹²⁶ Lawrence, 123 S. Ct. at 2498 (Scalia, J., dissenting).

¹²⁷ See id. (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.")

¹²⁸ See Bowers, 478 U.S. at 216 ("individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.")

¹²⁹ Chief Justice Rehnquist and Justice Thomas both joined Justice Scalia's opinion. See Lawrence, 123 S. Ct. at 2488.

¹³⁰ Id. at 2484. (O'Connor, J., concurring in the judgment)

¹³¹ Id. at 2485. (O'Connor, J., concurring in the judgment) (citing Dept of Agriculture v. Moreno, 413 U.S. 528, 534 (1973))

¹³² Id. at 2484. (O'Connor, J., concurring in the judgment)

¹³³ See id. at 2484. (O'Connor, J., concurring in the judgment)

¹³⁴ Id. at 2486. (O'Connor, J., concurring in the judgment)

¹³⁵ Id. at 2484. (O'Connor, J., concurring in the judgment)

¹³⁶ See id. at 2487 (O'Connor, J., concurring in the judgment) ("Whether a sodomy law that is neutral both in effect and application [citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)] would violate the substantive component of the Due Process Clause is an issue that need not be decided today.")

¹³⁷ See id. at 2484. (O'Connor, J., concurring in the judgment) (discussing Texas's claims)

¹³⁸ Id. at 2487 (O'Connor, J., concurring in the judgment)

¹³⁹ Id. at 2488. (O'Connor, J., concurring in the judgment)

¹⁴⁰ Id. (O'Connor, J., concurring in the judgment).

¹⁴¹ Id. at 2496 (Scalia, J., dissenting)

¹⁴² See Zablocki, 434 U.S. at 382.

¹⁴³ See id. at 388

¹⁴⁴ See San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (poverty not a suspect or quasi-suspect classification).

¹⁴⁵ Lawrence, 123 S. Ct. at 2495 (Scalia, J., dissenting)

¹⁴⁶ Id. at 2495 (Scalia, J., dissenting)

¹⁴⁷ See id. at 2482 (describing the equal protection argument as "tenable") and id. at 2484. (O'Connor, J., concurring in the judgment) (suggesting that the statute is unconstitutional on equal protection grounds).

¹⁴⁸ For an example of such a ban, see **Tex. Family Code** sec. 2.001.

¹⁴⁹ 388 U.S. 1 (1967).

¹⁵⁰ Lawrence 123 S. Ct. at 2495 (Scalia, J., dissenting)

¹⁵¹ Id. at 2495 (Scalia, J., dissenting) (citing Loving, 388 U.S. at 6, 11).

¹⁵² See Loving, 388 U.S. at 11.

¹⁵³ 488 U.S. 469 (1989).

¹⁵⁴ Id. at 489.

¹⁵⁵ See Adarand Constructors Inc. v. Pena, 515 U.S. 200, 243 (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.")

¹⁵⁶ Cf. Croson, 488 U.S. at 520 (Scalia, J., concurring in the judgment) ("strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'")

¹⁵⁷ See Loving, 388 U.S. at 11 n.11 (“we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed purpose to protect the ‘integrity’ of all races.”)

¹⁵⁸ Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

¹⁵⁹ 379 U.S. 184 (1964).

¹⁶⁰ See id. at 196.

¹⁶¹ See id. at 191.

¹⁶² See id.

¹⁶³ But see United States v. Virginia, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting) (suggesting that the Court in United States v. Virginia had offered “a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny.”)

¹⁶⁴ In order for the Court to uphold the constitutionality of same-sex marriage bans, it will have to modify current constitutional jurisprudence in a number of respects. See generally **Mark Strasser, On Same-Sex Marriage, Civil Unions, and the Rule of Law: Constitutional Interpretation at the Crossroads** (Greenwich, CT: Praeger Publishers, 2002)

¹⁶⁵ Lawrence, 123 S. Ct. at 2496 (Scalia, J., dissenting)

¹⁶⁶ See id. at 2484 (O’Connor, J., concurring) (citing Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985)).

¹⁶⁷ United States v. Virginia, 518 U.S. 515, 524 (1996) (quoting Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982)).

¹⁶⁸ 518 U.S. 515 (1996).

¹⁶⁹ Id. at 524 (quoting Hogan, 458 U.S. at 724).

¹⁷⁰ See id. at 580 (Scalia, J., dissenting) (arguing that the “claim that VMI has elected to maintain its all-male student-body composition for some misogynistic reason” has been utterly refuted.)

¹⁷¹ Id. at 558.

¹⁷² 744 A.2d 864 (1999).

¹⁷³ See id. at 860 n.13 (heightened scrutiny would be more difficult to withstand than the scrutiny applied).

¹⁷⁴ The Common Benefits Clause in the Vermont Constitution is the analog of the Equal Protection Clause in the United States Constitution. See id. at 870.

¹⁷⁵ See id.

¹⁷⁶ Lawrence, 123 S. Ct. at 2498 (Scalia, J., dissenting)

¹⁷⁷ This is the statute that criminalized certain sexual relations between members of the same sex.

¹⁷⁸ This is the statute which precludes same-sex couples from getting married.

¹⁷⁹ 517 U.S. 620 (1996).

¹⁸⁰ Id. at 635

¹⁸¹ Id. at 633.

¹⁸² Id. at 632

¹⁸³ See Lynn A. Baker, The Missing Pages of the Majority Opinion in Romer v. Evans, 68 U. Colo. L. Rev. 387, 408 (1997) (suggesting that the piecemeal approach would be permissible).

¹⁸⁴ For this view, see Daniel Farber & Suzanna Sherry, The Pariah Principle, 13 **Const. Commentary** 257, 266-70 (1996).

¹⁸⁵ See Lawrence, 123 S. Ct. at 2482 (Bowers “continuance as precedent demeans the lives of homosexual persons.”)

¹⁸⁶ See Bowers, 478 U.S. at 200 (Blackmun, J., dissenting)

¹⁸⁷ By using merely, there is no intent here to minimize either the effect of a conviction or the indirect harms that have been imposed and then justified by pointing to the permissibility of criminalizing sodomy.

¹⁸⁸ See Lawrence, 123 S. Ct. at 2479 (suggesting that the longstanding prohibitions of sodomy could be explained in terms of a disapproval of nonprocreative acts)

¹⁸⁹ See id. at 2496 (Scalia, J., dissenting) (suggesting that the rationale supporting sodomy statutes also supported a host of other statutes including those prohibiting fornication and adultery).

¹⁹⁰ See id. at 2477 (suggesting that Bowers was wrongly decided at the time the decision was handed down).

¹⁹¹ See Bowers, 478 U.S. at 202 (Blackmun, J., dissenting) (discussing the Court's "cramped reading").

¹⁹² See id. (Blackmun, J., dissenting) (suggesting that the Court was willfully blinding itself to the issue before it).

¹⁹³ Cf. id. at 214 (Blackmun, J., dissenting) ("depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.")

¹⁹⁴ Apparently, Justice Scalia reads Bowers to have held this. See Romer, 517 U.S. at 636 (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision . . . pronounced only 10 years ago [namely Bowers].")

¹⁹⁵ 517 U.S. 620 (1996).

¹⁹⁶ The amendment read:

No Protected Status Based on Homosexual, Lesbian, o Bisexual Orientation.
Neither the State of Colorado, though any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

See Romer, 517 U.S. at 624

¹⁹⁷ See id. at 625

¹⁹⁸ Id. at 626.

¹⁹⁹ Id. at 635.

²⁰⁰ For a discussion of why the electoral process analysis was an eminently sensible approach, see generally Mark Strasser, From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda, 36 Hous. L. Rev. 1193 (1999)

²⁰¹ Romer, 517 U.S. at 640 (Scalia, J., dissenting)

²⁰² Id. at 645 (Scalia, J., dissenting) ("Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so.")

²⁰³ Id. at 641.

²⁰⁴ See Lawrence, 123 S. Ct. at 2498 (Scalia, J., dissenting) (suggesting that by overruling Bowers, the Lawrence Court makes it impossible to constitutionally justify same sex marriage bans).

²⁰⁵ See note 54 and accompanying text supra.

²⁰⁶ See Colo. Stat. sec. 18-6-501.

²⁰⁷ For Justice Scalia's discussion of those with a same-sex orientation, see Romer, 517 U.S. at 642 (Scalia, J., dissenting)

²⁰⁸ See id. (Scalia, J., dissenting)

²⁰⁹ See id. at 643 (Scalia, J., dissenting).

²¹⁰ See In re Lenherr's Estate, 314 A.2d 255, 257 (Pa. 1974) (discussing Pennsylvania law prohibiting adulterers from marrying their paramours during the life of the innocent ex-spouse).

²¹¹ See Chirelstein v. Chirelstein, 79 A.2d 884, 890 (N.J. App. 1951) (discussing New York law precluding adulterers from remarrying while the innocent ex-spouse was still alive).

²¹² See Zablocki, 434 U.S. at 386.

²¹³ Those uninterested in marrying might not consider this a severe penalty.

²¹⁴ See Zablocki, 434 U.S. at 377-78.

²¹⁵ The state does have a law against public fornication. See Wis. Stat. sec. 944.15.

²¹⁶ See Wis. Stat. sec. 948.22 (specifying conditions under which failure to pay child support is a felony)

²¹⁷ See Romer, 517 U.S. at 641 (Scalia, J., dissenting)

²¹⁸ See Zablocki, 434 U.S. at 407 (Rehnquist, J., dissenting)

²¹⁹ See Lawrence, 123 S. Ct. at 2498 (Thomas, J., dissenting)

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- ²²⁰ See Zablocki, 434 U.S. at 386.
- ²²¹ 419 U.S. 393 (1975).
- ²²² See id. at 410
- ²²³ See id.
- ²²⁴ See Zablocki, 434 U.S. at 388.
- ²²⁵ See Romer, 517 U.S. at 636 (Scalia, J., dissenting)
- ²²⁶ See Bowers, 478 U.S. at 196 n.8 (“Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.”) See also Lawrence, 123 S. Ct. at 2486 (O’Connor, J., concurring in the judgment) (“The only question in front of the Court in Bowers was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. Bowers did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize sodomy when heterosexual sodomy is not punished.”)
- ²²⁷ Romer, 517 U.S. at 636 (Scalia, J., dissenting)
- ²²⁸ Id.
- ²²⁹ See Stephen E. Gottlieb, The Philosophical Gulf on the Rehnquist Court, 29 Rutgers L.J. 1, 16 (1997) (reading Romer as saying that open season on the LGBT community is unsupportable).
- ²³⁰ See Lawrence, 123 S. Ct. at 2487 (O’Connor, J., concurring in the judgment) (discussing Yick Wo limitations on the application of facially neutral laws).
- ²³¹ See id. at 2497 (Scalia, J., dissenting)
- ²³² See Paula L. Etlebrick, Wedlock Alert: A Comment on Lesbian and Gay Family Recognition, 5 J.L. & Pol’y 107, 162 (1996) (discussing a “gay exception to family law rules”).
- ²³³ Cf. Lino Graglia, Judicial Review, Wrong in Principle, A Disaster in Practice, 21 Miss. C.L. Rev. 243, 249 (2002) (“The Court has recently overturned the decision by the people of Colorado made by referendum to preclude the grant of special rights to homosexuals.”)
- ²³⁴ Lawrence, 123 S. Ct. at 2484.