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FOREWORD: LOVING LAWRENCE

Pamela S. Karlan*

When you come to a fork in the road, take it.
— Lawrence Peter (Yogi) Berra

Two interracial couples. Two cases. Two clauses. In *Loving v. Virginia*,¹ the Supreme Court struck down a Virginia statute outlawing interracial marriage. In *Lawrence v. Texas*,² the Court struck down a Texas statute outlawing sexual activity between same-sex individuals. Each case raised challenges under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.

Loving marked the crystallization, a dozen years after *Brown*,³ of the antisubordination principle: Virginia's law ran afoul of the Equal Protection Clause because it reflected nothing more than arbitrary and invidious discrimination "designed to maintain White Supremacy."⁴ In reaching that conclusion, the Court employed a then-novel formulation: strict scrutiny.⁵ Chief Justice Warren noted that in cases

* Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. B.A. 1980, Yale University; M.A. 1984, Yale University; J.D. 1984, Yale University. — Ed. Some of the ideas in this essay grow out of my work on the constitutional law professors' amicus brief in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); those ideas were sharpened significantly by suggestions from my co-counsel Bill Rubenstein; from my clients; from Lawrence's lawyers, Ruth Harlow, Susan Sommer, Paul Smith, and Bill Hohengarten; and from Suzanne Goldberg, who also shared the draft of her article *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004). I also appreciate several helpful suggestions from Viola Canales, Alexi Lahav, Mike Seidman, and Kathleen Sullivan.

I have been thinking about many of the issues in this essay at least since I had the privilege of clerking for Justice Harry A. Blackmun and working on his dissent in *Bowers v. Hardwick*, 478 U.S. 186, 199-214 (1986). The genesis for this essay is in part the Justice's observation that the "parallel between *Loving*" and the argument surrounding the criminalization of gay sexual intimacy "is almost uncanny." *Id.* at 210 n.5. In the last paragraph of his dissent, the Justice expressed his hope that "the Court soon will reconsider its analysis and conclude that 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." *Id.* at 214. I am sorry that he did not live to see that hope triumph.

1. 388 U.S. 1 (1967).

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

3. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). For discussion of this crystallization, see Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

4. *Loving*, 388 U.S. at 11.

5. As my colleague Michael Klarman noted, *McLaughlin v. Florida*, 379 U.S. 184 (1964), which struck down a Florida law that criminalized interracial cohabitation, marked the first

“involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations”; by contrast, in cases involving racial classifications, the Equal Protection Clause imposes a “very heavy burden of justification.”⁶

But *Loving* was not simply an equal protection case. Rather, the case represents a turning point, as the Court moved from the completed project of imposing strict scrutiny on racial classifications toward a new project of applying strict scrutiny to limitations on fundamental rights. In its final two paragraphs, *Loving* marked the rebirth of substantive due process: Virginia, the Court declared, had “deprive[d] the Lovings of liberty without due process of law” by denying them the “freedom to marry [that] has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁷

Today, most courts and scholars see the Equal Protection and Due Process Clauses as discrete bases for strict scrutiny.⁸ But in *Loving*, the two clauses operated in tandem. For example, in articulating its Due Process Clause-based argument, the Court relied on *Skinner v. Oklahoma*,⁹ an equal protection decision, for the proposition that marriage “is one of the basic civil rights of man.”¹⁰ It explained that “[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so

time that the Court “both articulated *and* applied a more rigorous review standard to racial classifications.” Klarman, *supra* note 3, at 255. *Loving* marked the second. *See id.*

6. *Loving*, 388 U.S. at 9. As the Court explained:

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the “most rigid scrutiny,” and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

Id. at 11 (internal citations omitted).

The current formulation of the test is that racial classifications are constitutional “only if they are narrowly tailored to further compelling governmental interests.” *Grutter v. Bollinger*, 123 S. Ct. 2325, 2337-38 (2003). *Loving* is, of course, still frequently cited for this proposition. For recent examples, see *id.* at 2337 and *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

7. *Loving*, 388 U.S. at 12. Thus, *Loving* is seen today as a critical point in the revival of substantive due process. It is often cited for the proposition that laws that infringe on a fundamental liberty interest trigger strict scrutiny under the Due Process Clause. For recent examples, see *M.L.B. v. S.L.J.*, 519 U.S. 102, 115 (1996), and *Turner v. Safley*, 482 U.S. 78, 94-95 (1987).

8. I develop this point at length in Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002) [hereinafter Karlan, *The Stereoscopic Fourteenth Amendment*].

9. 316 U.S. 535 (1942).

10. *Loving*, 388 U.S. at 12 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."¹¹ This use of equal protection decisions to inform conceptions of liberty, and vice versa, was a hallmark of the Warren Court.¹²

In this Essay, I argue that *Lawrence* resembles *Loving* in important ways. Like *Loving*, *Lawrence* marks a crystallization of doctrine. Nearly forty years after *Griswold v. Connecticut*¹³ and *Loving*, the Court has clearly established the principle that "the substantive reach of liberty" under the Due Process Clause extends to the way individuals choose to conduct their intimate relationships.¹⁴ But just as *Loving* was a case about inequality that informed the jurisprudence of liberty, *Lawrence* is a case about liberty that has important implications for the jurisprudence of equality. In fact, liberty and equality are more intertwined in *Lawrence* than in *Loving*. The *Loving* Court could have rested its decision entirely on the unconstitutionality of racial subordination without looking at all at the importance of marriage; by contrast, the *Lawrence* Court's discussion of liberty would be incoherent without some underlying commitment to equality among groups. The Warren Court often espoused "substantive" equal protection; the *Lawrence* Court attacked a "suspect" deprivation of liberty.

Lawrence relates to *Loving* in yet another important way. *Loving* drew a clear distinction between rationality review and heightened scrutiny. *Lawrence*, by contrast, sidesteps this conventional doctrinal framework. *Loving* reflected the emergence of strict scrutiny under

11. *Id.*

12. *Loving* was decided the year after *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), in which the Court employed heightened scrutiny to strike down Virginia's imposition of a poll tax as a violation of the Equal Protection Clause, in part because the poll tax infringed upon the right to vote — "a fundamental matter in a free and democratic society." *Id.* at 667. Even today, the Court's voting rights cases continue to rest on a notion of "substantive equal protection" that looks very much like a species of fundamental liberty amenable to substantive due process review. See Karlan, *The Stereoscopic Fourteenth Amendment*, *supra* note 8; see also Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 992-93 (1979) (suggesting that most of the Warren Court's equal protection decisions seemed inextricably linked to the Court's concern with underlying substantive interests such as education, fairness in criminal proceedings, or the right to travel interstate).

13. 381 U.S. 479 (1965).

14. *Lawrence v. Texas*, 123 S. Ct. at 2476. In this sense, like *Loving*, *Lawrence* was a case whose time had come — indeed, was long overdue. As with *Loving*, the country had moved ahead of the Court. In the seventeen years since the Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), half the states that had then criminalized oral and anal sex repealed their laws, and the remaining states virtually never enforced them. See *Lawrence*, 123 S. Ct. at 2481. Even Justice Thomas in dissent described Texas's law as "uncommonly silly" and said that if he were a legislator, he would vote to repeal it. *Lawrence*, 123 S.Ct. at 2498 (Thomas, J., dissenting) (quoting *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting)).

both the Equal Protection and the Due Process Clauses; *Lawrence*, however, does to due process analysis something very similar to what the Court's previous gay-rights decision, *Romer v. Evans*,¹⁵ did to equal protection analysis: it undermines the traditional tiers of scrutiny altogether. This approach reflects more than simply the fact that the two opinions share the same author. Both *Lawrence* and *Romer v. Evans* express an "analogical crisis."¹⁶ Gay rights cases "just can't be steered readily onto the strict scrutiny or the rationality track,"¹⁷ let alone onto the due process/conduct or the equal protection/status track. Cases about race created the modern framework of heightened scrutiny; cases about sexual orientation may transform it.

I. THE SOLUTION *LAWRENCE* OFFERS

In prior substantive due process cases, the Supreme Court had stressed the importance of providing "a careful description of the asserted fundamental liberty interest."¹⁸ If the liberty interest is fundamental, then strict scrutiny applies: a reviewing court can uphold the government's restriction only if "the infringement is narrowly tailored to serve a compelling state interest."¹⁹ *Lawrence* marks a striking departure from this approach. First, with respect to the liberty interest at issue, the Court was magisterial but vague. Second, the Court never reached the question whether to apply strict scrutiny. At its core, the liberty interest at issue in *Lawrence* is the right of gay people to equal respect for their life choices. The reason the level of scrutiny did not matter is that laws that reflect nothing more than class-based animosity against gay people lack even a legitimate

15. 517 U.S. 620 (1996).

16. I take this concept from an essay by my colleague Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1993).

17. *Id.*

18. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted); see *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277-80 (1990). As Justice Thomas remarked in *Chavez v. Martinez*, 123 S. Ct. 1994 (2003), "vague generalities . . . will not suffice." *Id.* at 2006 (opinion of Thomas, J.).

October Term 2002 was quite a year for Justice Kennedy and substantive due process. His opinion for the Court in *State Farm Mutual Auto Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), further refined the Court's application of substantive due process (albeit not fundamental-rights substantive due process) to punitive damages cases. And in *Chavez v. Martinez*, Justice Kennedy argued that the manner in which the police had interrogated a wounded suspect violated his "fundamental right to liberty of the person." 123 S. Ct. at 2016 (Kennedy, J., concurring in part and dissenting in part).

19. *Glucksberg*, 521 U.S. at 721; *Flores*, 507 U.S. at 302.

government purpose²⁰ — a conclusion that, whatever the Court's doctrinal handle, sounds in equal protection.²¹

A logical starting point in thinking about the liberty interest upon which a law infringes is to look at the conduct the law forbids. In challenges to laws restricting abortion, for example, the fundamental liberty involved is usually treated as the right to terminate a pregnancy or to decide whether to bear a child. That was decidedly not the tack the Court took in *Lawrence*. Section 21.06 of the Texas Penal Code made it a crime for individuals of the same sex to engage in a specified list of sexual acts,²² but the Court vehemently rejected the view that the liberty interest at issue was “simply the right to engage in certain sexual conduct.”²³ That view, the Court declared:

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. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek 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.²⁴

Part of the Court's response was simply to ratchet up the level of generality at which the liberty interest was described: rather than having a constitutional right to engage in oral or anal sex, individuals have a constitutionally protected interest in creating a “personal relationship”²⁵ in which “sexuality finds overt expression in intimate conduct with another person.”²⁶ But the Court's approach was actually even more sweeping, as it straddled the conventional distinction

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

21. See *Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

22. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) made it a crime for a person to “engag[e] in deviate sexual intercourse with another individual of the same sex.” Another provision, section 21.01(1), defined “deviate sexual intercourse” to include “any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object.”

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

24. *Id.*

25. *Id.*

26. *Id.* To be sure, in cases like *Griswold* and *Roe*, the Court's motivation for finding a right to use contraception or to terminate a pregnancy rested on its sense of the importance of marital intimacy or the decision whether to bear a child to the more generalized interest in the overall contours of a person's life. But the right itself was defined narrowly.

between negative and positive conceptions of liberty.²⁷ Although the opinion's opening lines characterized liberty as "protect[ing] the person from unwarranted government intrusions into a dwelling or other private places,"²⁸ the opinion ranged far beyond treating liberty as merely the "absence of interference" by the state,²⁹ or "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."³⁰ Most of the opinion relied on a more positive notion of liberty as involving the ability to be "a doer — deciding, not being decided for, self-directed . . . [and capable] of playing a human role, that is, of conceiving goals and policies of [one's] own and realizing them."³¹ And so the Court described the liberty at issue as gay people's right to "control their destiny,"³² because "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."³³

By moving away from conceiving of liberty as involving distinct conduct, the Court recast the right as involving not just autonomy but equality as well. As a practical matter, the major effect of section 21.06 surely was not its interference with gay people's love lives. The law was virtually never enforced³⁴ — at least not against the kind of

27. I take these terms from ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122-34 (1969).

28. *Lawrence*, 123 S. Ct. at 2475.

29. BERLIN, *supra* note 27, at 127.

30. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

31. BERLIN, *supra* note 27, at 131.

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

33. *Id.* at 2481 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)). Mike Seidman noticed a positive cast to Justice Kennedy's approach in *Romer v. Evans*, 517 U.S. 620 (1996), as well. See Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 70 (suggesting that Justice Kennedy "used equal protection doctrine to attack constitutional law's traditional conservative bias in favor of negative rights"); *id.* at 82 (suggesting that one reading of *Romer* "seems to impose an affirmative constitutional requirement on jurisdictions to protect gay people from private discrimination, at least so long as they maintain comprehensive protection for other groups" as well as suggesting that "if gay people are entitled to affirmative protection, then surely they are entitled to negative freedom from government persecution as well").

In a recent email, Seidman commented to me that he didn't think that *Lawrence* could fairly be read to adopt a positive conception of liberty if that means that "the government ha[s] an affirmative obligation to provide gay people (or anyone else) with the means to achieve" control over their destiny. Email from Michael Seidman to the author (July 2, 2004) (on file with author). Seidman is clearly correct that the government need not provide all (or even most) of the tangible means necessary to control one's destiny. But I still think that *Lawrence* does at the very least suggest — in the same way that Seidman argues that *Romer* suggested — the possibility that the government must take at least some affirmative steps to provide gay people with the same liberties it provides to all others.

34. In an earlier civil action challenging section 21.06, the Texas Supreme Court had ruled that the plaintiffs lacked standing based on "the Attorney General's contention that §

behavior the Court was prepared to protect.³⁵ It's hard to imagine that the law had any activity-level effects on nonpublic, consensual behavior at all.³⁶ Statutes banning private, consensual sexual activity are thus quite different from the laws at issue in the Court's previous autonomy cases. A law banning the sale of contraceptives, like the laws at issue in *Griswold*³⁷ or *Eisenstadt v. Baird*,³⁸ or a law restricting the right to abortion, like the laws at issue in *Roe v. Wade*³⁹ or *Planned Parenthood v. Casey*,⁴⁰ is far more likely to interfere with individual behavior because it operates by deterring third parties — pharmacists, doctors, and medical institutions — from providing necessary goods or services. By contrast, the fact that states make virtually no effort to enforce criminal prohibitions on private gay sexual activity makes it implausible to see the statutes as actually directed at the acts themselves.⁴¹

The real problems with prohibitions on same-sex intimacy, then, come from the collateral consequences of such laws: the way in which they undergird “discrimination both in the public and in the private spheres”⁴² and tell gay people that their choices about how to live their lives are unworthy of respect. For example, public employers have refused to hire gay men and lesbians on the assumption that they are all lawbreakers, without regard to whether any individual applicant has actually been charged with, or convicted of, violating a prohibition

21.06 has not been, and in all probability will not be, enforced against private consensual conduct between adults.” *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994).

35. See *Lawrence*, 123 S. Ct. at 2484 (declaring that: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”).

36. According to the 2000 census, nearly 86,000 adults in Texas lived with a partner of the same sex. See WILLIAM B. RUBENSTEIN ET AL., SOME DEMOGRAPHIC CHARACTERISTICS OF THE GAY COMMUNITY IN THE UNITED STATES 3 (2003), <http://www1.law.ucla.edu/erg/pubs/GD/GayDemographics.pdf>. It therefore seems reasonable to assume that there were thousands of violations of the law every day.

37. 381 U.S. 479 (1965).

38. 405 U.S. 438 (1972).

39. 410 U.S. 113 (1973).

40. 505 U.S. 833 (1992).

41. Compare *Poe v. Ullman*, where Justice Harlan explained, in the context of a pre-*Griswold* challenge to Connecticut's ban on the sale of contraceptives, that

[t]o me the very circumstance that Connecticut has not chosen to press the enforcement of this statute against individual users, while it nevertheless persists in asserting its right to do so at any time — in effect a right to hold this statute as an imminent threat to the privacy of the households of the State — conduces to the inference either that it does not consider the policy of the statute a very important one, or that it does not regard the means it has chosen for its effectuation as appropriate or necessary.

367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

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

on same-sex intimacy.⁴³ Similarly, courts deciding custody issues have sometimes restricted gay men and lesbians' parental rights on the grounds that parents involved in same-sex relationships are presumptively engaging in illegal activity.⁴⁴

I suppose one could describe this problem as one of unconstitutional conditions — gay people should not have to sacrifice their right to love one another to get jobs or retain parental rights⁴⁵ — but that seems a strained and artificial way of understanding the connection between gay people's sex lives and the discrimination they face. It's hard to imagine that hostile government actors would be assuaged by a gay person's insistence that his or her sexual activity did not take precisely the form prohibited by a particular criminal statute. In *Shahar v. Bowers*,⁴⁶ for example, when the court of appeals upheld the Georgia attorney general's decision to rescind a job offer to an attorney who had participated in a religious marriage ceremony with her partner, the court found it unnecessary even to decide whether the plaintiff "has engaged in sodomy within the meaning of Georgia law" because "reasonable persons may suspect that having a Staff Attorney who is part of a same-sex 'marriage' is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy."⁴⁷

Ironically, the very passage in which the *Lawrence* majority explained why it was *not* reaching *Lawrence*'s equal protection claim shows the centrality of an equal protection sensibility to the Court's due process analysis:

43. See, e.g., *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc); *Dallas v. England*, 846 S.W.2d 957, 958 (Tex. App. 1993) (describing refusal of Dallas Police Department to hire gay people on the grounds they had violated the state's Homosexual Conduct Law); Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEXAS L. REV. 813, 828-33, 835-38 (2001) (discussing additional, similar cases); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000) (discussing the various ways in which formally unenforced sodomy statutes lead to discriminatory treatment of gay people generally).

44. See, e.g., *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998); *Tucker v. Tucker*, 910 P.2d 1209, 1213 (Utah 1996); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985). Notably, courts often take this position with respect to gay and lesbian parents even in states that have facially neutral prohibitions on oral or anal sex.

45. Elsewhere, I have suggested:

The state cannot demand that a person sacrifice the constitutionally protected freedom "to choose the form and nature of the intensely personal bonds" that "make individuals what they are" in order to enjoy "protections taken for granted by most people . . . against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."

Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun*, 26 HASTINGS CONST. L.Q. 59, 66 (1998) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 210 (1986) (Blackmun, J., dissenting), and *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

46. 114 F.3d 1097 (11th Cir. 1997) (en banc).

47. *Id.* at 1105 n.17.

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.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. 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.⁴⁸

The precise concern the Court identifies is the possibility that basing its decision solely on the Equal Protection Clause might permit states to reenact sweeping prohibitions on oral and anal sex that would continue to disadvantage gay people. But the Court's concern fails to understand the implications of an equal protection holding: if the Equal Protection Clause forbids states from criminalizing oral and anal sex between same-sex partners when it does not also criminalize oral and anal sex between different-sex partners, it must be because there is no constitutionally acceptable basis for differentiating the acts on the basis of the sex of the people performing them. But if this is true, then there would also be no constitutionally acceptable basis for *enforcing* a neutral statute only against gay people.⁴⁹

Nearly a quarter of the Court's analysis was devoted to an extensive discussion of the history of laws directed at sexual activity.⁵⁰ There, too, the Court's discussion of liberty bled almost seamlessly into an invocation of equality. A central problem with *Bowers v.*

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

49. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1886). As Justice Blackmun pointed out in his dissent in *Bowers v. Hardwick*, 478 U.S. 186, 202 n.2 (1986), a state's decision to prosecute only homosexual activity under a facially neutral statute where the sex of the participants is irrelevant to the legality of the acts would raise serious equal protection concerns completely independent of the question whether sexual orientation involves a suspect class. Perhaps all the Court was doing was trying to avoid potential problems in proving the impermissible motives and selective prosecutions that would occur under a facially neutral statute by outlawing prosecutions altogether.

50. Rhetorically, then, the Court's strategy in *Lawrence* was quite reminiscent of *Loving*. Compare *Lawrence*, 123 S. Ct. at 2480 ("In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated."), with *Loving*, 388 U.S. at 9 ("As for the various statements directly concerning the [racial-intermarriage views held by the drafters of the] Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources 'cast some light' they are not sufficient to resolve the problem; '[a]t best, they are inconclusive.' " (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954))).

Hardwick, the *Lawrence* Court suggested, lay in its assumption that because proscriptions against sodomy “have ancient roots,”⁵¹ gay people could not assert that their ability to choose the form and nature of their intimate lives implicated a fundamental liberty interest. The Court emphasized the absence of a “longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”⁵² Rather, the laws reflected “a general condemnation of nonprocreative sex.”⁵³ In short, history suggested that all individuals, straight and gay, had possessed equal (and for much of our history, equally limited) rights to engage in nonmarital, non-procreative sex.

The Court’s decisions in *Griswold*, *Eisenstadt v. Baird*, and *Roe* had dramatically expanded constitutionally protected autonomy. Ironically, these decisions, which removed barriers that disproportionately affected straight individuals, enhanced the possibility for a formal legal gap between the activities of straight and gay couples. At the oral argument in *Lawrence*, Paul Smith pointed out to the Court that while it had “left open for nearly 30 years the question of whether anybody . . . has a privacy right to engage in consensual sexual intimacy in the privacy of their home . . . the American people [had] moved on to the point where that right is taken for granted for everyone.”⁵⁴ The real question in *Lawrence* was whether gay people should be included in the idea of “everyone.” Far from being deeply rooted in this Nation’s history and tradition, then, “American laws targeting same-sex couples did not develop until the last third of the 20th century.”⁵⁵ Notice the Court’s language: the laws “target[ed] . . . couples.” This is the language of inequality, not the language of simple rights deprivation.⁵⁶

51. *Bowers*, 478 U.S. at 192.

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

53. *Id.* at 2479.

54. Oral Argument of Paul M. Smith at 24, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-102.pdf.

55. *Lawrence*, 123 S. Ct. at 2479.

56. The central insight of Justice Jackson’s concurrence in *Railway Express Agency, Inc. v. New York*, seems especially relevant here. Justice Jackson observed that

there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

336 U.S. 106, 112-13 (1949). Few states today formally treat gay and straight sexual activity differently. Given contemporary notions of privacy, it seems far more plausible that the straight majority would liberalize restrictions on gay sexual behavior so that gay people enjoy the same level of autonomy straight people possess than that states would impose new

The oscillation between equality- and liberty-based approaches in the generation since *Bowers v. Hardwick* reflects more than simply the tactical decisions of courts and litigators to use whichever clause seemed nearer to hand. The situation of gay people provokes an “analogical crisis”⁵⁷ because in some ways it involves regulation of particular acts in which gay people engage, and so seems most amenable to analysis under the liberty prong of the Due Process Clause, while in other ways it involves regulation of a group of people who are defined not so much by what they do in the privacy of their bedrooms, but by who they *are* in the public sphere. As the Court itself phrased the issue, “[w]hen homosexual *conduct* is made criminal . . . that declaration . . . is an invitation to subject homosexual *persons* to discrimination.”⁵⁸ It is hard to substitute other adjectives for “homosexual” and continue to have the sentence make sense. No one, for example, would modify both “conduct” and “persons” with words like “larcenous” or “perjurious” or even, although it might be less initially jarring, “violent.” As I shall suggest in a moment, this must be in part because homosexuality straddles the line between conduct and status in ways that make it hard to apply conventional constitutional doctrine. A state cannot make it a crime to “be gay” since the Eighth Amendment prohibits states from criminalizing a particular status in the absence of “any antisocial behavior.”⁵⁹ So a state that wants to express its disapproval of gay people must instead craft a law that makes it a crime to engage in behaviors connected in some way with being gay. But the fact that the law explicitly targets behavior and not persons does not mean that it is not also class legislation. In this regard, antisodomy statutes resemble late-nineteenth-century voter-eligibility statutes that states like Mississippi and Alabama enacted. In *Ratliff v. Beale*,⁶⁰ the Mississippi Supreme Court explained that the Fifteenth Amendment prohibited states from simply barring all blacks from voting. But, for a variety of reasons, blacks possessed “peculiarities of habit, of temperament, and of character, which clearly distinguished” them from whites,⁶¹ ranging from moving more frequently to committing certain crimes.⁶² Thus, the state

restrictions on straight sexual activity in order to continue their existing restrictions on gay sexual activity.

57. See Sullivan, *supra* note 16, at 297.

58. *Lawrence*, 123 S. Ct. at 2482 (emphasis added).

59. *Robinson v. California*, 370 U.S. 660, 666 (1962).

60. 20 So. 865 (Miss. 1896).

61. *Ratliff*, 20 So. at 868.

62. Many of the “distinctions” were based on crude sociological speculation that black lawbreakers were “given rather to furtive offenses than to the robust crimes of the whites.” *Id.*; see also *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (holding that an Alabama constitutional provision disenfranchising persons convicted of certain misdemeanors of

constitutional convention set eligibility standards for voting that relied on these distinctions: “Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.”⁶³ Even more than statutes that targeted migratory individuals or bigamists, statutes that target same-sex behavior are directed at a class whose primary characteristic is not its engagement in discrete acts but its existence as a subordinate social group.

In this sense, Justice Scalia’s hyperbolic dissent, with its warning that *Lawrence* casts doubt on laws prohibiting adult incest or bestiality,⁶⁴ misses the mark. While those laws unquestionably prevent some individuals from engaging in some behavior — perhaps even behavior that seems absolutely central to their definitions of themselves — that behavior is not tied as an empirical matter in contemporary America to membership in a recognized social group. By contrast, gay people in the United States do form a social group whose membership extends beyond their engaging in specific sexual acts. Paradoxically, it is precisely the fact that gay behavior does not take place solely within individuals’ bedrooms that may have led the Court to recognize gay people’s entitlement to constitutional protection. Protecting gay people’s choices within the intimacy of their homes serves essentially as a safeguard of their dignity in a more public sphere. That, whatever the Court chooses to call it, is as much a claim about equality as it is a claim about liberty.

II. THE PROBLEM *LAWRENCE* LEAVES

So what accounts for the Court’s resistance to grounding its decision in the Equal Protection Clause as well as the Due Process

moral turpitude violated the Equal Protection Clause because the list of disenfranchising misdemeanors was picked because they “were thought to be more commonly committed by blacks”). Ironically, in *Hunter*, among the crimes that triggered disenfranchisement were “sodomy” and “crimes against nature,” because nineteenth-century white planters believed that these were acts blacks were more likely to commit than were whites. See *Hunter*, 471 U.S. at 232.

63. *Ratliff*, 20 So. at 868. In *Williams v. Mississippi*, 170 U.S. 213, 222-24 (1898), the Supreme Court, in one of the most intellectually dishonest opinions in its history, relied on the Mississippi Supreme Court’s reasoning to hold that the Mississippi statutes did not violate the Fourteenth Amendment because the restrictions on the right to vote “reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which . . . refrains from crime.” *Id.* at 222. In this sense, Mississippi’s argument resembled Texas’s argument in *Lawrence* that the “facially neutral conduct prohibitions” of the Texas statute meant that “everyone in Texas is foreclosed from having deviate sexual intercourse with another person of the same sex.” Brief for Respondents at 34, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102).

64. *Lawrence*, 123 S. Ct. at 2490.

Clause, the way *Loving* did? The simplest explanation may be the Court's concern with the potential reach of an equal protection decision. Lurking only slightly under the surface in *Lawrence* was the question that *Loving* had finally addressed after a decade's evasion by a cautious Supreme Court:⁶⁵ what limitations does the Fourteenth Amendment impose on state decisions about who can marry whom? The Court seemed at pains to disclaim any implications of its decision for the question whether states could limit marriage to opposite-sex couples. Consider, for example, the number of hedges in this articulation of the nature of gay people's constitutionally protected liberty interest: statutes that regulate private, consensual sexual conduct

seek 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.

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.⁶⁶

The Court may have sensed that liberty interests can be analyzed individually, or at least one at a time: after all, the Court had recognized the right of married couples to use contraceptives a number of years before it recognized the right of unmarried

65. A decade before *Loving*, the Court had dodged precisely the same issue, disingenuously denying that a challenge to the Virginia law raised a federal question. See *Naim v. Naim*, 87 S.E.2d 749 (Va.), *vacated*, 350 U.S. 891 (1955), *on remand* 90 S.E.2d 849 (Va.), *appeal dismissed*, 350 U.S. 985 (1956). For discussions of *Naim* and the Court's decision, see, for example, William N. Eskridge, *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853, 875 (2001); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* cix-cx (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Klarman, *supra* note 3, at 243; David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 578 (1985). Apparently, at the time of *Naim*, the Court feared that addressing the politically incendiary question of interracial marriage would undercut its effectiveness in enforcing the broad principle of racial equality so recently announced in *Brown*. The fact that by 1967, another fourteen states had repealed their prohibitions on interracial marriage, leaving only a few reactionary outliers, perhaps reassured the Court that its ruling would reinforce rather than undermine its position on race discrimination generally. Cf. *Lawrence*, 123 S. Ct. at 2480-81 (noting that “[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13” as one of the factors suggesting “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”).

66. *Lawrence*, 123 S. Ct. at 2478 (emphasis added).

individuals to use them,⁶⁷ and the Court recognized the fundamental liberty interest in refusing medical treatment long before it implicitly recognized the fundamental right to palliative care.⁶⁸ Thus, even if “the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,”⁶⁹ the Court has not yet recognized — and almost certainly never will — that individuals have an absolute constitutionally protected interest in following their individually defined bliss. As an empirical matter, the Court is most likely to recognize rights which reflect the practices of large numbers of people whose lives the Court otherwise finds worthy of respect. And these rights are likely to expand incrementally, rather than dramatically.⁷⁰

By contrast to the incremental possibilities of fundamental rights/due process-based strict scrutiny, suspect classification/equal protection-based strict scrutiny seems far more binary: either a group is entitled to heightened scrutiny across the board or it isn’t. The Court may have feared that if it struck down Texas’s statute on the ground that it violated the Equal Protection Clause to treat gay people differently from straight people, this would require it to invalidate all laws that treat gay and straight couples differently, the most obvious of which are laws restricting the right to marry. Whatever “the consistency of the direction of change” with respect to laws targeting homosexual conduct over the last seventeen years,⁷¹ there has been no similar consistency with respect to the tremendous ferment over marriage laws.

Of course, as Justice O’Connor pointed out in her concurrence, which also carefully avoided the marriage question,⁷² Texas’s law could be analyzed, and struck down, without reaching the question

67. *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which extended the right to use contraceptives to unmarried individuals, was decided seven years after *Griswold v. Connecticut*, 381 U.S. 479 (1965), which recognized the right of married couples to use birth control.

68. *Compare Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990), with *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

70. Bill Eskridge makes a related point in a splendid essay. See William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1201-17 (2000).

71. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (relying on this factor in discerning the “national consensus” for purposes of the Eighth Amendment).

72. See *Lawrence*, 123 S. Ct. at 2488 (O’Connor, J., concurring) (“Unlike the moral disapproval of same-sex relations — the asserted state interest in this case — other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”) Notably, Justice O’Connor did not mention what those non-censorious reasons might be. Of course, there are many reasons to promote the institution of marriage; the real question is whether any of those reasons justifies restricting marriage to opposite-sex couples.

whether gay people constitute a suspect or quasi-suspect class. Given its almost complete non-enforcement as a conduct-based statute, section 21.06 served simply to express “negative attitudes, or fear” of gay people.⁷³ Even more than the provision struck down in *Romer v. Evans*, section 21.06 was “inexplicable by anything but animus toward the class it affects.”⁷⁴ Thus, the Texas law failed even rationality review, which requires, at the very least, that a state law be related to some legitimate interest: as the Supreme Court had held thirty years earlier with respect to a law that targeted hippies — a far more evanescent class than gay people — “a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁷⁵

Moreover, another decision handed down the same week as *Lawrence* suggests that even suspect-classification strict scrutiny may be more fluid than Gerald Gunther’s famous aphorism suggests.⁷⁶ In *Grutter v. Bollinger*,⁷⁷ the Court applied strict scrutiny and upheld the University of Michigan Law School’s race-conscious affirmative-action plan, holding that diversity was a compelling governmental interest and that the plan was tailored narrowly enough to justify its explicit reliance on race. The Court was clearly swayed by context: the bulk of the Court’s discussion of the state interest in diversity focused on issues of particular salience to elite institutions of higher education that train the nation’s future leaders. Similarly, in the race-conscious redistricting cases of the 1990s and early 2000s, the Supreme Court modified strict scrutiny both by narrowing the domain in which strict scrutiny comes into play at all and by broadening the constellation of interests that can justify using race as a factor in crafting electoral districts.⁷⁸ If the Court is moving toward a world in which tiered

73. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

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

75. *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). In *O’Connor v. Donaldson*, the Court observed:

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.

422 U.S. 563, 575 (1975).

76. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (suggesting that strict scrutiny has been “strict in theory, but fatal in fact”).

77. 123 S. Ct. 2325 (2003).

78. For an extensive treatment of this evolution, see Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569 (2002). For an exceptionally comprehensive discussion of the more general shift in heightened scrutiny, see Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

scrutiny no longer operates mechanically — a possibility raised by decisions ranging from *Romer v. Evans* and *Nguyen v. INS*⁷⁹ to the voting cases and *Grutter* — then we might expect equal protection scrutiny of laws that treat individuals differently based on their sexual orientations to be similarly contextual and incremental.

In any event, the Court cannot escape the question by grounding its decision in due process liberty interests rather than in equal protection anti-subordination concerns. Whatever else it may be, marriage is certainly a practice that defines many individuals' conceptions of their own existence.⁸⁰ Thus, either the Court or the political process ultimately will have to resolve the question whether gay people's fundamental liberty interest in strengthening "enduring" personal bonds⁸¹ includes a right to invoke the state's assistance through the institution of marriage.

The months since *Lawrence* have seen tremendous ferment on this issue, ranging from the Massachusetts Supreme Judicial Court's decisions requiring the state to permit same-sex couples to marry,⁸² to San Francisco's issuance of thousands of marriage licenses to gay couples,⁸³ to President Bush's proposal for a constitutional amendment

79. 533 U.S. 53 (2001). In *Nguyen*, the Supreme Court upheld the differential treatment of children born overseas to unmarried mothers who were U.S. citizens and unmarried fathers who were U.S. citizens based on its conclusion that the differential requirements for obtaining U.S. citizenship were justified by two important government interests, and thus that the statute survived intermediate scrutiny. I happen to think that the decision in *Nguyen* was incorrect, for precisely the reasons advanced by the dissent. But the broader point remains: in yet another case, the level of scrutiny did not mechanically control the outcome.

80. In *Lawrence*, the Court described the choices its decision protected in these terms:

In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

123 S. Ct. at 2481 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)). In *Griswold*, the Court described marriage in similar language:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

381 U.S. at 486.

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

82. See 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).

83. In *Lockyer v. City and County of San Francisco*, 2004 Cal. LEXIS 7238 (Cal. S. Ct. Aug. 12, 2004), the state supreme court held that the city's issuance of the licenses exceeded its authority, and hence that the marriages were void, but it expressly declined to address the question whether the existing state law restricting marriage to opposite-sex couples violated the state constitution.

restricting the definition of marriage to a union between one man and one woman. Whatever else can be said on the subject, it cannot be answered by resort to doctrinal categorization.

CONCLUSION

The reason the *Lawrence* Court could recognize that Texas's prohibition on same-sex intimacy violated the Due Process Clause was because it had already implicitly recognized that gay people are entitled to equal respect for their choices about how to live their lives. Thus *Lawrence* implicitly took the same "stereoscopic" approach to the Fourteenth Amendment that *Loving* had expressly used nearly forty years earlier, in which understandings of equality informed definitions of liberty. In important and perhaps unnoticed ways, *Lawrence* rests on the importance not just of loving, but also of *Loving*.