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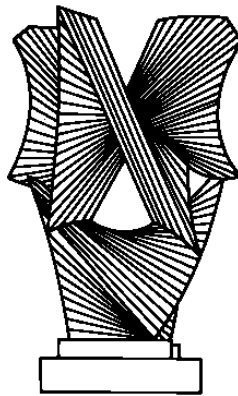
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Forthcoming Supreme Court Review

What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage

Cass R. Sunstein*

Abstract

The Supreme Court's decision in Lawrence v. Texas is best seen as a cousin to Griswold v. Connecticut, invalidating a ban on the use of contraception within marriage, and Reed v. Reed, invalidating a preference for men over women in the administration of estates. In both cases, the Court struck down an anachronistic law palpably out of step with existing public convictions. Lawrence should be understood in the same terms, as rooted in a distinctly American-style doctrine of desuetude. The central principle is that at least if certain interests are involved, criminal statutes may not be invoked against citizens when the underlying moral judgments have become anachronistic, as demonstrated by a pattern of nonenforcement. A key problem here is procedural; it involves an absence of fair notice and arbitrary exercise of discretion. This understanding of the decision has implications for the many imaginable constitutional challenges to other laws involving sex and sexual orientation. After Lawrence, states are certainly prohibited from banning fornication; they are almost certainly forbidden to ban use of sexual devices. Bans on prostitution, incest, and adultery stand on firmer grounds, though even here responsible challenges can be imagined. After Lawrence, the Constitution almost certainly forbids public discrimination against those who have engaged in homosexual conduct, at least outside of certain specialized contexts (most notably the military). The hardest cases involve the failure to recognize same-sex marriages. The ban on same-sex marriages cannot be said to be an anachronism, even though it is not easy, in principle, to reject the law struck down in Lawrence while permitting states to deny gays and lesbians the right to marry. One general lesson, underlined by Lawrence, is that political and social change is usually a precondition for changed interpretation of the Constitution.

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In 1900, Mr. Dooley famously said that “[n]o matter whether th’ constitution follows th’ flag or not, th’ supreme court follows th’ election returns.”¹ The Court doesn’t really do that. But members of the Supreme Court live in society, and they are inevitably influenced by what society appears to think.² My principal suggestion here is that the Court’s remarkable decision in *Lawrence v. Texas*³ is best seen as a successor to *Griswold v. Connecticut*⁴⁵: judicial invalidation of a law that had become hopelessly out of touch with existing social convictions. So understood, *Lawrence*, like *Griswold*, reflects an American variation on the old English idea of desuetude. Put too simply, the basic idea is that when constitutionally important interests are at stake, due process principles requiring fair notice, and banning arbitrary action, are violated when criminal prosecution is brought on the basis of moral judgments lacking public support, as exemplified by exceedingly rare enforcement activity.⁶

In *Griswold*, it will be recalled, the Court invalidated a Connecticut law forbidding married people to use contraceptives—a law that was ludicrously inconsistent with public convictions in Connecticut and throughout the nation.⁷ *Griswold* was decided in the midst of a substantial national rethinking of issues of sex and morality. Whatever the outcome of that rethinking, it was clear, by 1965, that reasonable people would no longer support bans on the use of contraceptives within marriage. In this respect, *Griswold* was quite similar to *Reed v. Reed*.⁸ There the Court struck down an Idaho statute giving a preference to men over women in the administration of estates of decedents who had died intestate—a law that was unquestionably a holdover from views about sex roles that were widely regarded as obsolete. *Reed* was decided in the midst of a substantial rethinking of gender roles; whatever the outcome of that rethinking, it was clear, by 1971, that a flat presumption in favor of men over women in employment would no longer be acceptable in principle.⁹ *Lawrence* belongs in the same family. In the area of

¹Peter Dunne, *The Supreme Court’s Decisions, in Mr. Dooley’s Opinions* 26 (1900).

² Robert Dahl made this argument nearly a half-century ago, before much of the work of the Warren Court. Notwithstanding the passage of decades, his argument stands up well. See Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *Journal of Public Law* 279 (1957).

³ 123 S. Ct. 2472 (2003).

⁴ 381 U.S. 479 (1965).

⁵ 404 U.S. 71 (1971).

⁶ I specify this brief statement below.

⁷ 381 U.S. 479 (1965).

⁸ 404 U.S. 71 (1971).

⁹ The Court has shown special sensitivity to changing public convictions in the death penalty context. *Furman v. Georgia*, 408 US 238 (1972), invalidated certain capital sentences, in a complex set of opinions that seemed to presage the end of capital punishment in the United States. At least in retrospect, *Furman* is best seen as a kind of “remand” to state legislatures, asking for a new assessment of whether capital punishment was consistent with contemporary values. The result of the “remand” was a new affirmation of public support for capital punishment, to which the Court subsequently deferred, see *Gregg v. Georgia*, 428 US 153 (1976). In *Coker v. Georgia*, 433 U.S. 584 (1977), and *Enmund v. Florida*, 458 U.S. 782, 789-793 (1982), the Court relied heavily on contemporary practices in striking down death sentences for rape and for a defendant who did not take or intend to take life. More recently, the Court ruled that the Constitution forbids application to capital punishment to the mentally retarded, see *Atkins v. Virginia*, 536 US 304 (2002); in so ruling, the Court relied heavily on what it saw as changing social values. In a theme echoed in *Lawrence*, the Court wrote, A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was

sexual orientation, America is in the midst of a civil rights revolution -- one that has moved, in an extraordinarily short time, toward delegitimizing prejudice against and hatred for homosexuals. *Lawrence* was made possible by that revolution, of which it is now a part.

In making this argument, my principal goal is not to evaluate *Lawrence*, but instead to obtain an understanding of its scope and of its relationship to other apparently dramatic decisions in the Court's past. But even if my argument is correct, it must be acknowledged that the Court's remarkably opaque opinion has three principal strands.¹⁰ Each of those strands supports a different understanding of the Court's holding and the principle that supports it.

1. Autonomy. A tempting reading of *Lawrence* is straightforward: A criminal prohibition on sodomy is unconstitutional because it intrudes on private sexual conduct that does not harm third parties. On this view, the Court has endorsed a quite general principle: Without a compelling justification, the state cannot interfere with consensual sexual behavior, at least if that behavior is noncommercial. On this view, consensual sexual behavior counts as a fundamental right for purposes of the due process clause. The state is forbidden to intrude into the domain of consensual sexual behavior unless it can show that its intrusion is the least restrictive means of achieving a compelling state interest—a showing that will be impossible to make, at least most of the time.
2. Rational basis. An alternative reading of *Lawrence*, also quite broad, would take the Court to have held, not that sexual behavior counts as a fundamental right requiring compelling justification, but that the criminal prohibition on sodomy is unconstitutional because it is not supported by a legitimate state interest. The principle here is that the government cannot interfere with consensual sexual behavior if it is attempting to do so for only moral reasons, unaccompanied by a risk of actual harm. The implications of this reading are not so different from those of the first; both are Millian in nature.¹¹ But the two readings are nonetheless different, because the second depends not on the fundamental nature of the right to engage in sexual activity, but instead on the absence of even plausibly legitimate grounds for interfering with that right in the context of consensual sodomy. On this reading,

adopted, but rather by those that currently prevail.” Id. at 311. In a key passage, the Court suggested: “It is not so much the number of these States [abolishing the death penalty for the mentally retarded] that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.” Id. at 315. Note also that the Court emphasized that even in states that authorized the death penalty to those with mental retardation, few were actually willing to impose that punishment, an idea with clear links to the rationale in *Lawrence*.

¹⁰ In this respect, the decision is akin to *Plyler v. Doe*, 457 US 202 (1982), in which the Court struck down a law requiring children of illegal aliens to pay for public education; there too the Court's opinion was an amalgam of considerations, without a clear doctrinal foundation.

¹¹ John Stuart Mill, *On Liberty* (Currin V. Shields ed., Liberal Arts Press 1956) (1859).

Lawrence is rooted in a form of “rational basis” review, one that dooms a great deal of legislation.

3. Desuetude, American-style. A narrower reading of *Lawrence*, my emphasis here, would take the following form: The criminal prohibition on sodomy is unconstitutional because it intrudes on private sexual conduct without having a strong or even legitimate moral grounding in existing public commitments. If this is the Court’s holding, it is undergirded by a more general principle: Without a strong justification, the state cannot bring the criminal law to bear on consensual sexual behavior if enforcement of the relevant law can no longer claim to have strong moral support in the enforcing state or the nation as a whole. This aspect of the opinion is rooted in the old idea of desuetude. It suggests that, at least in some circumstances, involving certain kinds of interests, a criminal law cannot be enforced if it has lost public support.

It should be clear that while all three principles are potentially broad, the first and the second are the most far-reaching. And there is actually a fourth understanding of the opinion, one that cannot be characterized as the Court’s holding, but one that is perhaps a subtext:

4. Equality. Sodomy laws are unconstitutional because they demean the lives of gays and lesbians and thus offend the Constitution’s equality principle. The underlying principle is that as a general rule, there is no legitimate basis for treating homosexuals differently than heterosexuals. On this view, *Lawrence* is really a case about the social subordination of gays and lesbians, whatever the rhetoric about sexual freedom in general. *Lawrence*’s words sound in due process, but much of its music involves equal protection.

Each of the four ideas can be found in *Lawrence*, a claim that I hope to establish here. But I want to draw special attention to the third, which is, I believe, central to the Court’s own analysis, and a key to the development of substantive due process over the past decades. In fact something like a desuetude principle is part and parcel of the *Lawrence* Court’s treatment of the state’s interest, showing why that interest counts as illegitimate, and also of the Court’s explanation of why the case cannot be distinguished from *Griswold* and its successors. When the Court asserts the absence of a “legitimate state interest which can justify its intrusion into the personal and private life of an individual,”¹² it is best understood to be saying that the moral claim that underlies the intrusion has become hopelessly anachronistic. And the anachronistic nature of that moral claim has everything to do with the Court’s rejection, not of moral claims in general, but of the particular moral claim that underlies criminal prohibitions on same-sex sodomy.

Lawrence might be read broadly as an effort to enact some version of John Stuart Mill’s *On Liberty*¹³, requiring respect for individual choices (at least with respect to sex) unless there is some kind of harm to others. But it is reasonable to understand the Court’s

¹² 123 S. Ct. at 2484.

¹³ John Stuart Mill, *On Liberty* (Currin V. Shields ed., Liberal Arts Press 1956) (1859).

decision more narrowly, as a ruling that forbids invocation of generally unenforced criminal law on the basis of a moral justification that has become anachronistic -- at least when a constitutionally important interest is involved and when the absence of significant enforcement activity can be explained only by reference to the anachronistic nature of the relevant moral justification. This reading also helps clarify what made the decision possible and its future fate. If I am correct, *Lawrence* was possible not because the Court reached, all on its own, an ambitious and novel view of the nature of constitutional liberty, or because it attempted to read a controversial view of autonomy into the due process clause. The decision was possible only because of the ludicrously poor fit between the sodomy prohibition and the society in which the justices live. And if I am correct, *Lawrence* will have broad implications only if and to the extent that those broad implications receive general public support. For example, the Supreme Court may or may not read *Lawrence* to require state to recognize gay and lesbian marriages. But if it does so, it will be following public opinion, not leading it. Political and social change was a precondition for *Lawrence*, whose future reach will depend on the nature and extent of that change.

While I will spend most of my time on the Court's due process ruling, my own view is that the proper course in Lawrence was sketched by Justice O'Connor in her concurring opinion.¹⁴ Rather than invalidating the Texas statute on grounds of substantive due process, the Court should have invoked the equal protection clause to strike down, as irrational, the state's decision to ban homosexual sodomy but not heterosexual sodomy. This approach would have been more cautious than the Court's own. It would have had the large advantage of making it unnecessary to overrule any precedent.¹⁵ At the same time, an equal protection ruling would have recognized the fact, established by the Court's opinions, that the equal protection clause does not build on longstanding traditions, but instead rejects them insofar as they attempt to devalue or humiliate certain social groups.¹⁶ The problem in Lawrence is not adequately understood without reference to the social subordination of gays and lesbians, not least through the use of the criminal law. Hence Justice O'Connor's approach suggests, lightly to be sure, the plausibility of rationale (4) above, a rationale that seems to me essentially correct. And if states are required to punish heterosexual sodomy if they are attempting to punish homosexual sodomy, I believe that it is quite implausible to think that any form of sodomy would be subject to criminal prosecution; political safeguards are far too strong to permit significant numbers of arrests and prosecutions of heterosexuals for engaging in conduct that is quite widespread.

¹⁴ 123 S. Ct. at 2485 (O'Connor, J., concurring).

¹⁵ I do not engage here the debate over whether principles of stare decisis required the Court to refuse to overrule *Bowers v. Hardwick*. My only suggestion is that the Court should not have overruled that decision when it was unnecessary to do so in order to decide *Lawrence*. A possible objection to the equal protection approach, one that I also cannot engage here, is that this approach is actually broader than that taken by the majority, above all because it would seem to require states to recognize same-sex marriages. It is true that an equal protection ruling would raise questions about bans on such marriages. But as we shall see, a due process ruling has the same effect.

¹⁶ See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996).

For all these reasons, invalidation on equal protection grounds would have been preferable to the substantive due process route. But if the due process clause is to be invoked, the idea of desuetude provides a method for understanding, disciplining, and narrowing what the Court did. This reading of *Lawrence* prevents the opinion from being a simple invocation of “liberty”; it also helps explain what made the *Lawrence* decision possible from a generally conservative Supreme Court. Best of all, it has considerable independent appeal.¹⁷

This Article comes in four parts. The first explores the Court’s dilemma in *Lawrence*—the state of pre-*Lawrence* law, the available options, and the difficulties with those options. The second discusses *Lawrence* itself, emphasizing the various strands to which I have referred. The third discusses possible readings of the decision and tries to unpack them. Here I draw attention to the more narrow reading of the opinion, suggesting that if understood in a way that emphasizes the anachronistic and almost never enforced nature of the Texas statute, the *Lawrence* decision can claim a strong foundation in both democratic values and the rule of law. The fourth explores the implications of the *Lawrence* decision for constitutional attacks on laws regulating sexual relationships, constitutional attacks on government discrimination against gays and lesbians, and constitutional attacks on laws refusing to recognize same-sex marriages.

I. The Court’s Dilemma

The facts of *Lawrence* were exceedingly simple. Police officers in Houston, Texas responded to a private report of a weapons disturbance in a private residence. They entered the residence, owned by John Geddes Lawrence. On entering, they did not see any weapons. But they did see Lawrence, engaging in a sexual act with Tyron Garner. Lawrence and Garner were arrested, held in custody, and convicted of the crime of “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).”¹⁸ They were each fined \$200.¹⁹ Deviate sexual intercourse is defined 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.”²⁰ The Texas law was challenged on equal protection and due process grounds.²¹

The *Lawrence* Court had three options. It could have invalidated the Texas statute on equal protection grounds. It could have invalidated that law on due process grounds. Or it could have upheld the law against both challenges. As we will see, the Court faced a serious difficulty in *Lawrence*: a majority believed, in my view correctly, that the Texas statute had to be invalidated -- but any rationale for invalidation would inevitably raise serious doubts about practices, including the ban on same-sex marriages, that the majority did not want to question. For the majority, a central problem was to develop a rationale

¹⁷ See Guido Calabresi, Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores), 105 Harv. L. 80 (1991); Cass R. Sunstein, One Case At A Time (1999).

¹⁸ 123 S. Ct. at 2475-76.

¹⁹ 41 S.W.3d at 349.

²⁰ *Id.* at 2476 (citing Tex. Penal Code Ann. § 21.01(1)).

²¹ *Id.*

that would strike down the Texas statute without producing an unintended revolution in the law. Let us investigate the Court's options in light of preexisting law.

A. Equal Protection

1. Heightened scrutiny. The Equal Protection Clause might have been used to strike down the Texas law under decisions calling for "heightened scrutiny" of laws that discriminate against traditionally disadvantaged groups. The paradigm examples of such groups are, of course, African-Americans and women.²² Perhaps laws discriminating against gays and lesbians should be subject to similarly skeptical judicial scrutiny.²³ To say the least, the Court has not laid down a clear test for deciding when such scrutiny will be applied; instead it has pointed to a series of considerations, including a history of discrimination, a circumstance of immutability, and political powerlessness.²⁴ Probably the best way of making sense of the doctrine is to say that heightened scrutiny is applied when the relevant discrimination is peculiarly likely to reflect prejudice and hostility rather than legitimate interests. In the context of race, for example, the problem is not that skin color is immutable, but that discrimination against African-Americans is usually based on illicit considerations; heightened scrutiny is a way of testing whether other, public-spirited justifications can actually be brought forward in defense of the relevant law. Discrimination against homosexuals can be understood in analogous terms. Suppose, for example, that a school forbids homosexuals from becoming teachers,²⁵ or that a police department refuses to hire gays them.²⁶ If heightened scrutiny were applied, a ban on same-sex sodomy would be extremely difficult to defend.

As a matter of precedent, the problem is that the Court has never suggested that gays and lesbians are entitled to heightened scrutiny. In fact it has been extremely reluctant to expand the class of groups so entitled—ruling, for example, that rational basis review applies to discrimination against handicapped people²⁷ and elderly people.²⁸ These are not decisive problems, to be sure; a ruling that required heightened scrutiny is not foreclosed by existing decisions. But such a ruling would certainly be an innovation.

An alternative route to heightened scrutiny would be to contend that discrimination against homosexuals *is* a kind of discrimination on the basis of sex.²⁹ Here it might be suggested that if a law punishes same-sex sodomy, it is punishing people who would not be punished if their gender were different. But this view raises a number of

²² See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Loving v. Virginia*, 388 U.S. 1 (1967).

²³ See David Richards, *Sexual Preference as a Suspect (Religious) Classification*, 55 Ohio St. L.J. 491 (1994); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 8 (1994).

²⁴ See, e.g., *Frontiero v. Richardson*, 411 US 677 (1973) (plurality opinion).

²⁵ *Glover v. Williamsburg Local School District Board of Education*, 20 F.Supp.2d 1160 (U.S. District Court, S.D.Ohio, 1998).

²⁶ See, e.g., *Childers v. Dallas Police Department*, 513 F.Supp. 134 (U.S. District Court, N.D. Texas, 1981)

²⁷ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

²⁸ *Massachusetts v. Murgia*, 427 U.S. 307 (1981).

²⁹ See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994).

complexities.³⁰ It would also seem to have broad implications, essentially treating all discrimination against gays and lesbians as indistinguishable from, because literally identical to, discrimination against women.³¹

2. Rationality review. When rational basis review is applied, statutes are almost always upheld under the equal protection clause.³² But three cases provided a plausible backdrop for the plaintiffs' challenge in *Lawrence*. Taken together, the three cases suggest that a bare "desire to harm a politically unpopular group"³³ is constitutionally unacceptable. Texas' prohibition of homosexual sodomy, not affecting heterosexual sodomy, could be challenged as reflecting such a bare desire.

The problem in *United States Department of Agriculture v. Moreno* arose from Congress' decision to exclude from the food stamp program any household containing an individual who was unrelated to any other member of the household.³⁴ Thus the statute required that any household receiving food stamps must consist solely of "related" individuals.³⁵ The Court invalidated the statute. The Court noted that the legislative history suggested a congressional desire to exclude "hippies" and "hippie communes."³⁶ To this the Court said: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"³⁷ This idea was extended in the *Cleburne* case, in which the plaintiffs challenged a city's denial of a special use permit for the operation of a group home for the mentally retarded.³⁸ Applying rational basis review, the Court admonished that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for"³⁹ unequal treatment. Thus the Court concluded that the discriminatory action under review was based "on an irrational prejudice."⁴⁰ And in *Romer v. Evans*, the Court struck down a Colorado law forbidding localities from including gays and lesbians within the protection of laws prohibiting discrimination.⁴¹ The Court held that the law violated rational basis review because it was based not on a legitimate public purpose but on a form of "animus"—with the apparent suggestion that statutes rooted in "animus" represent core offenses of the equal protection guarantee. The Court said that the law stands (and falls) as "a status-based classification of persons undertaken for its own sake."⁴²

³⁰ See *id.* for detailed discussion.

³¹ See *id.*; I essentially accept this claim in Sunstein, *supra* note 16.

³² See, e.g., *id.*; Lalli v. Lalli, 429 U.S. 259 (1978).

³³ United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

³⁴ See *id.*

³⁵ *Id.* at 530.

³⁶ *Id.* at 534.

³⁷ *Id.*

³⁸ 473 U.S. 432.

³⁹ *Id.* at 448.

⁴⁰ *Id.* at 450.

⁴¹ 517 U.S. 620 (1996).

⁴² *Id.* at 621.

An equal protection ruling in *Lawrence*, based on these cases, would have had a great deal of appeal. It would have made it unnecessary for the Court to reconsider *Bowers v. Hardwick*⁴³. It would have built carefully on *Romer v. Evans*. In these ways, such a ruling would have been narrow, converting the *Moreno-Cleburne-Romer* trilogy into the *Moreno-Cleburne-Romer-Lawrence* quartet. On the other hand, it is not clear that such a ruling would have had more limited consequences than a due process ruling. An invalidation of the line between homosexual and heterosexual sodomy would have raised questions about a host of other discriminatory practices. Is the state permitted not to recognize gay marriages? To discriminate against homosexuals in its employment practices? If the Court wanted to cabin the reach of its ruling, and not to create anything like a revolution in the law, these were important (and difficult) questions to answer.

B. Due Process

The modern story of substantive due process begins in 1965, when the Court invalidated a Connecticut law forbidding the use of contraceptives by married people.⁴⁴ After that decision, the Court decided a set of cases protecting certain decisions involving sex, reproduction, the family, and other areas that appeared to be intimate and private.⁴⁵ The cases turned out to be quite unruly, and there was no clear line between what was protected and what was not.⁴⁶

A possible view would be that since *Bowers*, or at least since *Washington v. Glucksberg*,⁴⁷ the Court has said something like this: “Thus far, but no further!” Since 1985, the Court has been extremely reluctant to use the idea of substantive due process to strike down legislation, and before *Lawrence*, the Court seemed unwilling to add to the list even if the logic of the prior cases suggested that it ought to do so.⁴⁸ On this view, the Court’s refusal to overrule *Roe v. Wade*⁴⁹ reflects not approval of that decision, and much less a willingness to extend its logic, but a kind of temporal dividing line between permissible and prohibited uses of substantive due process.⁵⁰ In other words, the continuing validity of *Roe* suggests not that the Court will try to follow the logic of the privacy cases, but that the Court will refuse to overrule its precedents while also failing to build on their logic.

If we sought to bring more principled order to the Court’s decisions, we might invoke the Court’s own words and insist that any asserted right must have a strong foundation in Anglo-American traditions. This was the limiting principle invoked in both *Bowers* and *Glucksberg*. In *Bowers*, the Court, quoting Justice Powell, emphasized the

⁴³ 478 U.S. 186 (1986) (holding that there is no fundamental right to engage in homosexual sodomy).

⁴⁴ *Griswold*, 381 U.S. 479.

⁴⁵ *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁶ For a general discussion, *see* Cass R. Sunstein, *The Right to Die*, 106 *Yale L.J.* 1123 (1997).

⁴⁷ 521 U.S. 702 (1997) (holding that there is no fundamental right to assistance in committing suicide).

⁴⁸ The most obvious example here is *Glucksberg*, *id.*

⁴⁹ 410 U.S. 113.

⁵⁰ *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (upholding some state restrictions on abortion).

need to ask whether the relevant liberties “are ‘deeply rooted in this Nation’s history and tradition.’”⁵¹ In *Glucksberg*, the Court said that “the development of this Court’s substantive-due-process jurisprudence . . . has been...carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.”⁵² The Court stressed that this historical test tended “to rein in the subjective elements”⁵³ and to avoid “the need for complex balancing of competing interests in every case.”⁵⁴ The historical approach might have the advantage of disciplining judicial discretion, but it has the disadvantage of fitting extremely poorly with some of the cases. It is not at all clear, for example, that the right to choose abortion has a strong foundation in tradition. Nonetheless, it would hardly be implausible, before *Lawrence v. Texas*, to argue that henceforth, the line between protected and unprotected interests would turn largely on history.

II. What the Court Did

A. Substantive Due Process Reborn

The heart of the Court’s opinion in *Lawrence* began with a dramatic reading of precedent, stating, for the first time in the Court’s history, that the Constitution recognizes a right to make sexual choices free from state control. Putting *Griswold* together with *Eisenstadt*, the Court said that “the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”⁵⁵ Taken by itself, this statement equivocates between two readings: the state may not punish sexual activity through the particular *means* of the threatening unwanted pregnancy⁵⁶; or the state may not punish sexual activity at all. But the Court clearly endorsed the broader reading. In speaking of homosexual activity in particular, the Court said that the government was seeking “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.”⁵⁷ Thus the Court suggested that the state could not intrude on sexual liberty “absent injury to a person or abuse of an institution the law protects.”⁵⁸ Here, then, is the foundation for a reading of *Lawrence* as rooted in a general principle of sexual autonomy.

⁵¹ 478 U.S. at 194.

⁵² 521 U.S. at 722.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 123 S. Ct. at 2477.

⁵⁶ Thus it would have been possible to read the contraception cases as holding, not that the state may not punish consensual sexual activity, but that it cannot do so through the indirect and discriminatory means of threatening childbirth. The early privacy cases did not involve bans on sexual activity; instead they involved efforts to control such activity by prohibiting the use of contraception. A narrow reading of the cases would suggest that there is no right to immunity from state regulation of sex, but instead a right not to be subject to regulation through the indirect method of risking unwanted pregnancy. See Cass R. Sunstein, *Designing Democracy* (2002).

⁵⁷ 123 S. Ct. at 2478.

⁵⁸ *Id.*

The Court then turned from its precedents to an investigation of the suggestion in *Bowers* that prohibitions on same-sex sodomy “have ancient roots.”⁵⁹ Rejecting that conclusion, the Court emphasized the complexity of American traditions on this count. In a lengthy discussion, the Court undermined the suggestion that there has been an unbroken path of hostility to same-sex sodomy. But the Court freely conceded that there is no history of accepting that practice; it did not contend that traditions affirmatively support a constitutional right to sexual freedom in that domain. On the contrary, and in a dramatic departure from both *Bowers* and *Glucksberg*, the Court said that longstanding traditions were not decisive. What were important were current convictions, not old ones. “[W]e think that our laws and traditions in the past half century are of most relevance here.”⁶⁰ Hence the Court stressed an “emerging recognition that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁶¹

The emerging recognition could be seen in many places. First, the Model Penal Code did not endorse criminal penalties on consensual sexual activities conducted in private; and several states specifically changed their laws in response to the Model Penal Code.⁶² Second, fewer than half the states (24) outlawed sodomy even in 1986, and the statutory prohibition went largely unenforced even in those states.⁶³ Third, the practices of Western nations were increasingly opposed to the criminal punishment of homosexual conduct. Britain repealed its law forbidding homosexual conduct in 1967,⁶⁴ and the European Court of Human Rights concluded that laws banning consensual homosexual conduct are invalid under the European Convention on Human Rights.⁶⁵ Fourth, only thirteen states now forbid such conduct, and of these just four have laws that discriminate only against homosexual conduct.⁶⁶ “In those states where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.”⁶⁷

The Court added that it had issued two decisions casting the holding of *Hardwick* “into even more doubt.”⁶⁸ In *Casey*, the Court had reaffirmed not only *Roe* but also its commitment to substantive due process, emphasizing “that our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”⁶⁹ Thus the Court read *Casey* as an endorsement of the ideas underlying *Roe*, and not simply as a refusal to reject a decision on which the nation had come to rely. And in *Romer v. Evans*, the Court

⁵⁹ 478 U.S. at 192.

⁶⁰ 123 S. Ct. at 2480.

⁶¹ *Id.*

⁶² *Id.* at 2480-81.

⁶³ *Id.* at 2481 (citing *Bowers*, 478 U.S. at 192-93).

⁶⁴ *Id.* (citing Sexual Offences Act, 1967, c. 60, § 1).

⁶⁵ *Id.* (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)). The use of materials from other nations, for the interpretation of the United States Constitution, raises many complexities, which I cannot explore here.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* (citing *Casey*, 505 U.S. at 851).

struck down a law “born of animosity toward the class of persons affected.”⁷⁰ These decisions made *Bowers* decreasingly plausible.

The Court acknowledged that the plaintiff’s equal protection challenge, based on *Romer*, was “tenable.”⁷¹ But the Court said that “the instant case requires us to address whether *Bowers* itself has continuing validity.”⁷² (This is remarkable because the instant case “required” no such thing; it would have been fully possible to resolve the case without addressing *Bowers*.) The Court explained that if the Texas statute were invalidated on equal protection grounds, it would remain unclear whether a statute could forbid both same-sex and different-sex sodomy.⁷³ The Court added 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.”⁷⁴ In the Court’s view, the continued validity of *Bowers* “demeans the lives of homosexual persons.”⁷⁵ Here the Court emphasized the stigma imposed by the law, coming not only from the fact that the act is a misdemeanor but also because of “all that imports for the dignity of the persons charged.”⁷⁶ The collateral consequences of the criminal conviction could not be avoided.

At this point the Court emphasized that *Bowers* had been eroded not only by *Casey* and *Romer*, but also by independent sources. Academics had widely criticized the decision.⁷⁷ Five different state courts had refused to follow it in interpreting their own state constitutions.⁷⁸ The European Court of Human Rights, along with other nations, had rejected the *Bowers* approach, a relevant fact “to the extent that Bowers relied on values we share with a wider civilization.”⁷⁹ Stare decisis was relevant but not conclusive, for the *Bowers* decision did not produce detrimental reliance “comparable to some instances where recognized individual rights are involved.”⁸⁰ The Court concluded that “*Bowers* was not correct when it was decided, and it is not correct today.”⁸¹

The Court was aware of the potential breadth of its ruling, and it took steps to clarify its scope. “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that

⁷⁰ *Id.* at 2482 (quoting *Romer*, 517 U.S. at 634).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 2483 (citing C. Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 81-84 (1991); R. Posner, *Sex and Reason* 341-50 (1992)).

⁷⁸ *Id.* (citing *Jegley v. Picado*, 349 Ark. 600 (2002); *Powell v. State*, 270 Ga. 327 (1998); *Gryczan v. State*, 283 Mont. 433 (1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 2484.

homosexual persons seek to enter.”⁸² What was involved instead was “full and mutual consent” to engage in “sexual practices common to a homosexual lifestyle. . . . The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”⁸³ In a closing word, the Court said that the Texas law “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”⁸⁴

B. Other Voices

I will return to the complexities in the opinion shortly. For the moment, let us explore the views of the three other justices who wrote in *Lawrence*.

1. Equal protection and Justice O’Connor. Justice O’Connor rejected the Court’s due process holding and urged the equal protection route. Building on the *Moreno-Cleburne-Romer* trilogy, she contended that when a law is based on “a desire to harm a politically unpopular group,” the Court has applied “a more searching form of rational basis review.”⁸⁵ She added that invalidation, via rational basis review, is more likely when the challenged legislation “inhibits personal relationships.”⁸⁶

To be sure, Texas had justified its law as a means of promoting morality, and that kind of justification had been found sufficient in *Bowers*, which Justice O’Connor did not seek to disturb. But *Bowers* was decided under the due process clause. *Lawrence* was different, because it presented the not-yet-decided question “whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy.”⁸⁷ She concluded that it is not. Under rational basis review, moral disapproval is not a sufficient basis for discriminating among groups of persons. “Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy.”⁸⁸ And because the law is enforced so infrequently, “the law serves more as a statement of dislike and disapproval than as a tool to stop criminal behavior.”⁸⁹

Aware of the potentially broad implications of the equal protection argument, Justice O’Connor urged that her analysis would not doom all distinctions between homosexuals and heterosexuals. With her eye firmly on the military and on family law, she said that “Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage.”⁹⁰ In the latter context,

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 2485 (O’Connor, J., concurring).

⁸⁶ *Id.* (O’Connor, J., concurring).

⁸⁷ *Id.* at 2486 (O’Connor, J., concurring).

⁸⁸ *Id.* (O’Connor, J., concurring).

⁸⁹ *Id.* (O’Connor, J., concurring).

⁹⁰ *Id.* at 2487-88 (O’Connor, J., concurring).

“other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”⁹¹

2. Scalia, the slippery slope, and “a massive disruption of the current social order.” Justice Scalia’s argument had three elements. First, he chastised the Court for what he saw as its palpable inconsistency on the issue of stare decisis. Invoking stare decisis, the Court had refused to overrule *Roe*, a nineteen-year-old ruling, in its *Casey* decision in 1992.⁹² The same Court was now willing to overrule *Bowers*, decided seventeen years previously. Justice Scalia saw no justification for the differential treatment. Second, Justice Scalia urged that the Court’s ruling would have extremely large implications. “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” can be upheld “only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision.”⁹³ The Court’s decision therefore entails “a massive disruption of the current social order”⁹⁴ (something that could not have been said about a decision to overrule *Roe*). Thus Justice Scalia urged that the Court’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.”⁹⁵

Justice Scalia’s third argument involved the proper interpretation of the Constitution in principle. After doubting that the due process clause is a substantive safeguard at all, he urged that as it has developed, the idea of substantive due process has been disciplined by asking whether the relevant rights are “deeply rooted in this Nation’s history and tradition.”⁹⁶ Justice Scalia questioned the idea that there is an “emerging awareness”⁹⁷ that consensual homosexual activity should be protected; but his more basic objection was that any emerging awareness was irrelevant. “Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior.”⁹⁸ Justice Scalia saw the Court as holding that the moral views underlying the Texas statute did not provide a legitimate basis for it. Here his objection was exceedingly simple: “This effectively decrees the end of all morals legislation.”⁹⁹ With respect to equal protection, Justice Scalia urged that a rational basis was what was required, and that as for due process purposes, “the enforcement of traditional notions of sexual morality” provided the rational basis.¹⁰⁰

3. Thomas and the uncommonly silly law. Justice Thomas’ short dissenting opinion emphasizes that as a member of the Texas legislature, he would vote to repeal the

⁹¹ *Id.* at 2488 (O’Connor, J., concurring).

⁹² *Id.* (Scalia, J., dissenting) (citing *Casey*, 505 U.S. at 844).

⁹³ *Id.* at 2490 (Scalia, J., dissenting).

⁹⁴ *Id.* at 2491 (Scalia, J., dissenting).

⁹⁵ *Id.* at 2498 (Scalia, J., dissenting).

⁹⁶ *Id.* at 2492 (Scalia, J., dissenting).

⁹⁷ *Id.* at 2494 (Scalia, J., dissenting) (internal citation omitted).

⁹⁸ *Id.* (Scalia, J., dissenting).

⁹⁹ *Id.* at 2495 (Scalia, J., dissenting).

¹⁰⁰ *Id.* at 2496 (Scalia, J., dissenting).

relevant law. “Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.”¹⁰¹ Invoking Justice Stewart’s concurrence in *Griswold*, he contended that the law is “uncommonly silly,”¹⁰² but that nothing in the Constitution forbids it.¹⁰³

III. Interpretive Puzzles

I will suggest that *Lawrence* is best understood as responsive to what the Court saw as an emerging national awareness, reflected in a pattern of nonenforcement, that it is illegitimate to punish people because of homosexual conduct -- and that the decision therefore embodies a kind of American-style desuetude. But to support this suggestion, it will be necessary to unpack the Court’s opaque opinion, which raises a number of puzzles. Let us begin with the simplest.

A. A Fundamental Right or Rational Basis Review?

Was *Lawrence* based on rational basis review, or instead on something else? It is astonishing but true that this question is exceedingly difficult to answer.

If the Court had attempted to write a conventional due process opinion, it would have taken one of two routes. First, the Court might have said that the right to engage in consensual sexual activity qualifies as fundamental, so that the government may not interfere with that right unless it has a compelling justification.¹⁰⁴ Second, the Court might have said that whether or not the relevant right qualifies as fundamental, the state cannot interfere with it, simply because it lacks a legitimate reason to justify the interference. But the Court said neither, at least not in plain terms. The Court did not unambiguously identify any “fundamental interest” on the part of the plaintiffs that would support its ruling. In fact it did not use the “fundamental interest” formulation at any point in its analysis. Moreover, the Court did not say that the Texas statute lacked a “rational basis.” In fact it did not use the “rational basis” formulation at any point in its analysis. Much of the opacity of the Court’s opinion stems from its failure to specify what kind of review it was applying to the Texas statute.

To be sure, the Court did end its opinion with a reference to the absence of any “legitimate interest” on the state’s part.¹⁰⁵ Justice Scalia seized on this point to urge that the Court issued a rational basis opinion after all¹⁰⁶—a characterization to which the Court (revealingly?) does not specifically object. Thus Justice Scalia contends that much of the Court’s opinion “has no relevance to its actual holding,”¹⁰⁷ which was that the statute failed rational basis review. Justice Scalia’s reading cannot be said to be senseless;

¹⁰¹ *Id.* at 2498 (Thomas, J., dissenting).

¹⁰² *Id.* (Thomas, J., dissenting) (quoting *Griswold*, 381 U.S. at 527 (Stewart, J., concurring)).

¹⁰³ *Id.* (Thomas, J., dissenting).

¹⁰⁴ *See, e.g., Roe*, 410 U.S. 113.

¹⁰⁵ 123 S. Ct. at 2484.

¹⁰⁶ *Id.* at 2488 (Scalia, J., dissenting).

¹⁰⁷ *Id.* (Scalia, J., dissenting).

it is not demonstrably wrong. But I believe that it is incorrect, and that in the end the Court's opinion treats the relevant right as a fundamental one. Begin with the most relevant part of the Court's opinion:

“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’ The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”¹⁰⁸

The Court immediately follows its reference to “no legitimate state interest”¹⁰⁹ with the phrase, “which can justify its intrusion into the personal and private life of the individual.”¹¹⁰ The Court's emphasis on “respect for their private lives,”¹¹¹ on “control [of] their destiny”¹¹², and on “personal and private life”¹¹³ suggests that the interest involved is not an ordinary one -- and that the Court is demanding something more than a rational basis. The same point is strongly suggested by the Court's reference, in this paragraph, to *Casey*¹¹⁴, which of course involved a fundamental right, not a rational basis test.

But there is a more basic reason for seeing the Court's opinion as finding the relevant interest to be fundamental. The Court begins with an effort to assimilate the issue in *Lawrence* to the issues in *Griswold*, *Eisenstadt*, *Roe*, *Carey*, and *Casey* -- all of which are now taken, by the Court, to suggest a fundamental right in the domain of sex and reproduction. Hence the Court refers to “the right to make certain decisions regarding sexual conduct,”¹¹⁵ to the individual's interest in making “certain fundamental decisions affecting her destiny,”¹¹⁶ and to the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹¹⁷ These statements would be unintelligible if *Lawrence* were based solely on rational basis review. Indeed, much of the Court's opinion would be dicta. In the end, *Lawrence* is not plausibly a rational basis decision.

An alternative reading is that the Court deliberately refused to specify its “tier” of analysis because it was rejecting the idea of tiers altogether. Perhaps the Court was signaling its adoption of a kind of sliding scale, matching the strength of the interest to the demand for state justification, without formally requiring identification of a

¹⁰⁸ *Id.* at 2484 (quoting *Casey*, 505 U.S. at 847) (internal citation omitted).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* (citing *Casey*, 505 U.S. at 847).

¹¹⁵ *Id.* at 2477.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2480.

fundamental right. And indeed, some of the Court's decisions do suggest a partial collapse of the traditional tiers approach to judicial review.¹¹⁸ For many years, Justice Marshall complained of the rigidity of the usual tiers, urging a more open-ended form of balancing.¹¹⁹ Justice Marshall's views appeared to fall on deaf ears. But perhaps *Lawrence* reflects some appreciation of the difficulties in fitting all cases within the traditional framework. This is not a wholly implausible reading, but it would be quite surprising if the Court meant to adopt a sliding-scale of analysis without saying so. The more natural interpretation is simpler: The Court's assimilation of the *Lawrence* problem to that in *Griswold* and its successors suggests that a fundamental right was involved.

B. Autonomy Simpliciter, or Desuetude-Informed Autonomy?

But why, exactly, does the relevant interest count as a fundamental one? There are two possibilities. The first is that the right to engage in consensual sex counts, simply as a matter of principle, as part of the liberty that the due process clause substantively protects. On this view, in *Lawrence* the Court accepted, to this extent, John Stuart Mill's view in *On Liberty*,¹²⁰ holding that the government may not interfere with (certain) private choices unless there is harm to others. The second and narrower idea is that this particular *kind* of sex—homosexual sex between consenting adults—counts as fundamental. It does so because of major changes in social values in the last half-century. On this view, *Lawrence* finds a fundamental right as a result of existing public convictions, with which the Texas statute cannot be squared, simply because sodomy prosecutions are so hopelessly out of step with them.

Lawrence could be read in either way. But the second interpretation is far more plausible. A simple autonomy reading would have consequences that the Court did not likely intend. As Justice Scalia suggests, it would raise serious questions about prohibitions on adult incest, prostitution, adultery, fornication, bestiality, and obscenity.¹²¹ (I do not mention his suggestion that the Court has questioned laws forbidding masturbation,¹²² for one reason: There are no laws forbidding masturbation!) Now it might be possible, even under the autonomy reading, to justify most or all of those prohibitions on the ground that they counteract concrete harms, sufficient to support the intrusion on a presumptively protected right. (I return to this question below.) And cases involving commercial activity probably must be analyzed in a way that gives the government more room to maneuver. But it would be remarkable if *Lawrence* were understood to require a careful inquiry into the adequacy of government justifications for banning (say) adult incest and bestiality.

¹¹⁸ See, e.g., the heightened approach to rational basis review in *Romer*, 517 U.S. 620, and *Cleburne*, 473 U.S. 432, and the softened approach to strict scrutiny in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

¹¹⁹ See *Dandridge v. Williams*, 397 U.S. 471 (1970) (Marshall, J., dissenting); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (Marshall, J., dissenting).

¹²⁰ See Mill, *supra* note 11.

¹²¹ 123 S. Ct. at 2490 (Scalia, J., dissenting).

¹²² *Id.* (Scalia, J., dissenting). There are of course laws forbidding public masturbation, but that is a different matter. Nothing in *Lawrence* suggests that states are banned from regulating sexual conduct that occurs in public view.

In any case, a simple autonomy reading would make the Court's apparently pivotal discussion of "emerging awareness" into an irrelevancy. Recall that the Court rejected *Bowers* in large part by pointing to a range of indications that bans on homosexual sodomy were out of step with existing values.¹²³ Hence two factors were emphasized in the Court's ruling: only thirteen states prohibited sodomy; and the sodomy laws were rarely enforced, through criminal prosecution, even in those states.¹²⁴ It does appear that the Court was responding to, and requiring, an evolution in public opinion—something like a broad consensus that the practice at issue should not be punished.

These points suggest that the Court's decision was less about sexual autonomy, as a freestanding idea, and closer to a kind of due process variation on the old common law idea of desuetude.¹²⁵ According to that concept, laws that are hardly ever enforced are said, by courts, to have lapsed, simply because they lack public support.¹²⁶ The rationale here is that unenforced laws lack support in public convictions, and may not be brought to bear, in an unpredictable and essentially arbitrary way, against private citizens.¹²⁷ Most American courts do not accept that idea in express terms.¹²⁸ But long ago, Alexander Bickel invoked the notion of desuetude to help account for *Griswold*.¹²⁹ The simple idea is that the ban on use of contraceptives by married people had become hopelessly out of touch with existing convictions—so much so that the ban could rarely if ever be invoked as a basis for actual prosecutions. The public would not accept a situation in which married people were actually convicted of that crime. In those circumstances, the statutory ban was a recipe for arbitrary and even discriminatory action, in a way that does violence to democratic ideals and even the rule of law. It does violence to democratic ideals because a law plainly lacking public support is nonetheless invoked to regulate private conduct. It violates the rule of law because a measure of this kind lacks, in practice, the kind of generality and predictability on which the rule of law depends.¹³⁰

If anything, a ban on sodomy is even worse than the Connecticut law struck down in *Griswold*. Such a ban is used, not for frequent arrests or convictions, but for rare and unpredictable harassment by the police. An advantage of this reading is that it mutes the apparent roots of *Lawrence* in substantive due process. The idea of desuetude is, in a sense, a procedural one. There is a procedural problem: a lack of fair notice combined with denial of equal treatment, a problem that is inevitable in a system in which criminal prosecutions are rare and episodic. In fact, the idea of desuetude forbids criminal

¹²³ *Id.* at 2479-2482.

¹²⁴ *Id.* at 2481.

¹²⁵ See, e.g., J.R. Philip, *Some Reflections on Desuetude*, 43 *Juridical Review* 260 (1931); Linda Rogers and William Rogers, *Desuetude as a Defense*, 52 *Iowa Law Review* 1 (1966).

¹²⁶ Mortimer Kadish and Sanford Kadish, *Discretion to Disobey: A Study of Lawful Departures From Legal Rules* 129-31 (1973).

¹²⁷ *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (quoting *Nashville, C. & St. L.R. Co. v. Browning*, 310 U.S. 362, 369 (1940)).

¹²⁸ For discussion, see Kadish and Kadish, *supra* note 116, at 127-140; John Chipman Gray, *Desuetude of Statutes in the United States, in The Nature and Sources of Law* 189-97, 329-34, (2nd ed. 1921); Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 *Iowa Law Review* 389 (1964).

¹²⁹ See Alexander Bickel, *The Least Dangerous Branch* 155 (1965).

¹³⁰ See Lon Fuller, *The Morality of Law* (1962).

punishment not in spite of public values but in their service—a claim that the *Lawrence* Court makes explicitly.¹³¹

Of course this interpretation of *Lawrence* raises its own problems; a desuetude-informed reading is far from simple and straightforward. The decision should not be read to say that each and every criminal statute becomes unenforceable if it is rarely enforced; that reading would be far too broad. At a minimum, it is also necessary to say that the rarity of enforcement is a product of the anachronistic nature of the moral judgment that underlies it.¹³² Building on this idea, the notion of desuetude might be applied whenever a criminal statute is rarely invoked because the public no longer supports the moral argument that lies behind it. Let us call this the broad version of the basic idea. But it is true that the Court is not well-equipped to say when statutes are anachronistic, and any use of desuetude, under the due process clause, is likely to be limited to certain interests that have a threshold of importance. Thus *Lawrence* must be understood as involving another, less ambitious version of the idea, suggesting that when those interests are implicated, the state may not rely on a justification that has lost public support. Let us call this the narrow version of the idea.

Because of its modesty, the narrow version is obviously preferable; the Court should not be read to have gone as far as the broad version suggests. But there is an evident problem with the narrow version. For it to operate, we must have an antecedent way, to some extent independent of public convictions, to determine whether an interest has some kind of constitutional status. Without that independent way, the narrow version dissolves into the broader one: Any interest on which the public no longer wants to intrude becomes a fundamental one by definition. (Is this true of the right to use marijuana within the home? Of the right of sixteen-year-olds to drink alcohol within the home?) In the end, the *Lawrence* Court must have concluded that as a matter of principle, the right to engage in same-sex relations had a special status in light of the Court's precedents taken along with emerging public convictions -- and that the moral arguments that supported the ban were no longer sufficient to justify it.

In this sense, the “emerging public awareness” emphasized by the Court operated at two levels. First, it served to discredit the particular moral justification for the law, in a conventional use of the idea of desuetude. Second, it helped to inform the Court's judgment that the interest at stake could not be distinguished, in principle, from those involved in *Griswold*, *Eisenstadt*, *Carey*, and *Roe*. Hence some idea about autonomy is an inescapable part of the analysis. This second use of public convictions is not a use of the idea of desuetude; but it does belong in the same family. There are a number of complexities here, and I shall return to the shortly.

¹³¹ 123 S. Ct. at 2480.

¹³² A freestanding desuetude argument would raise questions about many statutes, including those forbidding the private possession of marijuana. In that latter case, the ban does not affect a constitutionally fundamental interest, and hence a serious due process objection would be hard to mount.

C. The Dog That Barked Very Quietly: Equal Protection

Lawrence was rooted in the due process clause, not the equal protection clause.¹³³ But it defies belief to say that it is not, in a sense, an equal protection ruling. Everyone knows that the case was about sexual orientation. When Justice Scalia urges that the Court “has largely signed on to the so-called homosexual agenda,”¹³⁴ he is correct in an important sense: The Court was not willing to legitimate, or to deem legitimate, “the moral opprobrium that has traditionally attached to homosexual conduct.”¹³⁵ I have questioned Justice Scalia’s broader suggestion that the Court meant to say that a moral position, unaccompanied by convincing evidence of tangible harm, is an illegitimate basis for law. The Court was concerned not to excise moral grounds from law, but instead to excise a *particular* moral ground, that is, the moral ground that underlies criminal prohibitions on same-sex relationships. The Court’s judgment to this effect had a great deal to do with considerations of equality.

It is not hard to find support for this claim in the Court’s opinion. In many places, the Court suggested that equality, and a particular sort of moral claim, were pivotal to the outcome. Consider this suggestion: “Persons in a homosexual relationship may seek autonomy . . . just as heterosexual persons do.”¹³⁶ Or this: “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 in both the public and in the private spheres.”¹³⁷ Or this: “[A]dults may choose to enter upon this relationship . . . and still retain their dignity as free persons. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice.”¹³⁸ Now delete, from the sentences just quoted, the word “homosexual,” and replace it with the word “adulterous,” or “bigamous,” or “incestuous.” Somehow the sentences do not work. The Court’s due process decision was powerfully influenced by a claim of equality.

D. What *Lawrence* Did, with an Evaluation

If we emphasize the *Lawrence* Court’s reliance on “emerging awareness,” we will see the decision as most closely analogous to *Griswold* and *Reed*. When the Court held that married people could not be prohibited from using contraceptives¹³⁹, it was using the due process clause to forbid the invocation of a law that could not be fit with current values. When the Court began to invalidate sex discrimination of the most arbitrary kinds¹⁴⁰, it was not making a revolution on its own. *Lawrence* is in the same spirit. To the extent that the *Lawrence* Court treated homosexual sodomy as equivalent, in principle, to opposite-sex relationships, it was responding to the fact that with respect to the invocation of the criminal law, the American public had come to the same conclusion. To

¹³³ *Id.* at 2482.

¹³⁴ *Id.* at 2496 (Scalia, J., dissenting).

¹³⁵ *Id.* (Scalia, J., dissenting).

¹³⁶ *Id.* at 2482.

¹³⁷ *Id.*

¹³⁸ *Id.* at 2478.

¹³⁹ *Griswold*, 381 U.S. 479.

¹⁴⁰ *Reed*, 404 U.S. 71.

the extent that the Court held that no legitimate state interest justified the ban on same-sex relationships, it was acting in the service of widely held convictions. Judges do not interpret the Constitution to please majorities. But widespread social convictions are likely to influence anyone who lives in society. Judges live in society. *Lawrence* is a testimonial to this process of influence.

If *Lawrence* is understood in these terms, should it be applauded or deplored? I do not intend to answer that question fully here. An obvious issue is: Compared to what? I do believe that Justice O'Connor's equal protection argument would have been better and simpler—better because of its fit with precedent, simpler because analytically in the same line with *Moreno*, *Cleburne*, and *Romer*.¹⁴¹ But what of the other alternatives? I have urged that if *Lawrence* is a kind of American-style desuetude, it can claim to be rooted in a form of procedural due process. A law of the sort that the Court invalidated is a violation of the rule of law; it does not provide fair notice; and it invites arbitrary and unpredictable enforcement, of just the sort that occurred in the case itself. Such a law also lacks a democratic pedigree. It is able to persist only because it is enforced so rarely.

1. Specifying desuetude, American-style. If a desuetude-type rationale is accepted, it is necessary to know when, exactly, it will be triggered. We can imagine many possibilities. The *Lawrence* Court emphasized two separate points: few states now forbid consensual sodomy; and even in states in which a ban is in place, prosecution is rare. The first point stresses the problem of states-as-outliers; the second is a more standard point about intrajurisdictional desuetude. In *Lawrence* itself, the two points marched hand-in-hand, but they could easily be pulled apart. A law might fit with existing social values in one state, but those values might be rejected in the rest of the union.¹⁴² This would not be a simple case of desuetude, because the statute would, by hypothesis, receive support within the relevant state. By contrast, a state-specific analysis, based on more conventional ideas about desuetude, would emphasize the ideas of fair notice and arbitrariness and suggest that at least when certain interests are involved, a state may not bring the criminal law to bear when the values that underlie those laws have been anachronistic in that very state. Certainly the standard desuetude idea cannot be invoked in a state in which the law in question is actively enforced. For the Supreme Court, the easiest cases are *Lawrence* and *Griswold*: those in which the relevant values lack support both in the enforcing state and in the nation as a whole. My emphasis here is not on national outliers, but on the fact that in Texas itself, the sodomy statute, hardly ever enforced, created problems of both unpredictability and arbitrariness.¹⁴³

¹⁴¹ To say this is not to deny that Justice O'Connor's approach would raise complexities of its own. For example, it is not so easily to limit its reach; the approach would seem to raise doubts about bans on same-sex marriage, no less than the substantive due process approach. As I have suggested, one of the difficulties for the *Lawrence* Court was that any invalidation of the Texas law, which seemed constitutionally intolerable, would inevitably raise questions about practices that, whether or not constitutionally tolerable, the Court would not like to doubt for prudential reasons at least.

¹⁴² The role of the Court in disciplining practices that are out of step with national values is stressed in Richard A. Posner, *Sex and Reason* 327-28 (1992).

¹⁴³ It should be noted that we do not quite know whether some kind of coherent pattern underlay enforcement of the law in Texas. The facts of *Lawrence* suggest one possibility: Perhaps prosecutors would

2. Too little? But for many defenders of the outcome in *Lawrence*, this interpretation will give the plaintiffs far too little. One obvious alternative is a more critical approach to conventional morality, one that does not define liberty by identifying society's "emerging awareness" as if it were a kind of fact for judicial use, but that attempts to define the idea of liberty, and the legitimacy of intrusions on it, by reference to an account that is independent of whatever views now happen to prevail. For those who prefer this more critical approach, the problem with a desuetude-type interpretation is that it would allow states to have sodomy laws, or adultery laws, or fornication laws, so long as those laws are taken seriously and actually brought to bear against the citizenry. Wouldn't that situation be worse rather than better?

In fact it is possible to understand the Court's opinion in this more critical and evaluative way. Certainly the Court's use of the word "awareness" suggests that it believes the emerging view to be worth attention because it is right. Consider too the Court's suggest that the framers "knew 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."¹⁴⁴ Perhaps we might build on the Court's reference to "truths" and what happens "in fact" to suggest its endorsement of a more independent and critical approach to public convictions.

If the Court's judgments on the appropriate content of liberty could be said to be reliable, then a more critical approach would have much to be said in its favor. But even those who endorse that approach might agree that *Lawrence*, read in the way that I have suggested, has the advantage of comparative modesty—and that it does not foreclose use of the critical approach for the future. And for those who endorse the critical approach, there are three reasons for caution. The first is the simple risk of judicial error. Unmoored from public convictions, there is a risk that the Court's conception of liberty will be confused or indefensible. (Recall *Dred Scott v. Sandford*¹⁴⁵ and *Lochner v. New York*¹⁴⁶.) The second problem is the danger of unintended bad consequences. Even if the Court has the right conception of liberty, it may not do much good by insisting on it when the nation strongly disagrees. If the Court had held, in 1980, that the due process clause requires states to recognize same-sex marriage, it would (in my view) have been responding to the right conception of liberty. But it would undoubtedly have produced a large-scale social backlash, and very likely a constitutional amendment, that would have made same-sex marriage impossible. The simple point is that judicial impositions may do little good and considerable harm, even from the standpoint of the causes that the Court

not invade private domains to ferret out unlawful sodomy, but perhaps they would arrest people if the relevant acts were plainly visible. If so, one kind of arbitrariness would be avoided, for arrests would not be invidiously motivated or entirely random. But as the facts of *Lawrence* also show, a kind of randomness will be an inevitable result of this very policy. In any case a problem of unpredictability exists even if the policy of arrest and prosecution follows some kind of pattern: The defendants in *Lawrence* had no reason to know that they would fall within that pattern.

¹⁴⁴ 123 S. Ct. at 2484 (emphases added).

¹⁴⁵ 60 U.S. 393 (1856) (holding that African-Americans were not citizens contemplated by the Constitution).

¹⁴⁶ 198 U.S. 45 (1905) (holding unconstitutional a state statute establishing maximum working hours).

hopes to promote. To be sure, these points are cautionary notes and no more. But at the very least, they suggest that where the Court is in a position to choose, a desuetude-type ruling, building on widespread convictions, has considerable advantages over a ruling that is based on the Court's own conception of autonomy.

3. Too much? Of course *Lawrence*, read in the way I have suggested, might be criticized from other directions. Perhaps a better alternative is Thayerism: An approach that would uphold any intrusion on liberty unless it lacks even a minimally rational basis.¹⁴⁷ This approach might be defended on the ground that a judicial judgment about emerging public convictions is not very reliable, and certainly less so than the evidence provided by actual legislation. If there is a serious risk in judicial effort, why not require people to resort to their political remedies? I believe that the idea of desuetude provides a partial answer. If legislation is infrequently enforced, most citizens can treat it as effectively dead. They have nothing to worry about. At least in clear cases, it seems plausible, and inoffensive to democratic values, to use the Due Process Clause to forbid criminal prosecutions in cases of this kind. Both *Griswold* and *Lawrence* are defining examples.

But perhaps the Court would have done better, in *Lawrence*, to continue on the path marked out by *Bowers* and *Glucksberg*, and hence to uphold any intrusion on liberty unless it runs afoul of Anglo-American traditions. Due process traditionalism might be supported on the ground that federal judges are not especially good at evaluating our practices, and that if a practice has endured there is good reason to support it, if only because many people have endorsed it, or at least not seen fit to change it. Constitutional traditionalism therefore makes decisions simpler at the same time that it makes them less likely to go wrong. If economic terminology is thought to be helpful here, the use of traditions by imperfect human beings might not be perfect, but it is the best way to go because it minimizes both "decision costs," taken as the burdens of deciding what to do, and "error costs," taken as the problems introduced by making mistakes.

A central question is whether tradition-bound judges will make more or fewer errors than judges who depart from traditions and pay a great deal of attention to conventional morality. At least some of those who are skeptical about substantive due process might endorse traditionalism as a possible source of law, but also conclude that it is proper for the Court to strike down statutes that lack support in popular convictions. In other words, the desuetude-type approach of the *Lawrence* Court might be a supplement to due process traditionalism, rooted in similar concerns. Indeed, a desuetude-type approach has the advantage of underlining the procedural features of procedural due process. As we have seen, a statute like that invalidated in *Lawrence* fails to provide predictability, and it is a recipe for arbitrary enforcement. The Court's refusal to permit criminal convictions, under these circumstances, is not radically inconsistent with democratic ideals. In a sense, it helps to vindicate them.

¹⁴⁷ See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

4. Coherence, optimal deterrence, and expressive condemnation. Another response is possible, one that would raise questions about the coherence of any approach that draws on the idea of desuetude. For governments, there is a tradeoff between the magnitude and the frequency of punishment. A government might decide to lessen the deterrent signal simply by scaling back enforcement. In the context of conduct that a state would like to deter, but not greatly, the sensible strategy might be to maintain a prohibition but to enforce it rarely. It is easy to imagine a city taking this approach with respect to non-flagrant speeding (driving, say, ten miles over the speed limit), or certain parking offenses (giving tickets rarely in certain places, for example), or certain alcohol or drug offenses (rarely arresting or convicting teenagers for use of alcohol, or infrequently arresting or convicting people for marijuana use). In fact many prohibitions are rarely enforced. Is this situation unconstitutional? Why is a state banned from making this particular tradeoff between severity and probability of sanction? In any case the *ex ante* deterrent effect of a rarely enforced law, including the sodomy law in Texas, applies equally to all those subject to it. Isn't this *ex ante* equality a sufficient response to the objection of unpredictability?

To answer this objection, it is necessary to narrow the due process ruling in *Lawrence*. The problem with the sodomy law was not only the fact that it was enforced rarely; infrequent enforcement stemmed from the particular fact that the moral claim that underlay it could no longer claim public support. The same cannot be said in the examples just described; in those cases, there is public ambivalence about arrest and conviction, but not because of a widespread belief that the prohibition is itself outmoded. But *Lawrence* does not depend on this factor alone. It is also important that the interest at stake is similar, in principle, to those protected by earlier cases. In these circumstances, the state is required to produce, by way of justification, something other than a moral position that no longer fits with public convictions. To be sure, the effect of a rarely-enforced law is similar to that of a lottery, and in that respect there is a degree of *ex ante* equality. But people are punished *ex post*, not *ex ante*, and it is the *ex post* randomness that supports the Court's ruling, at least in the light of the particular interest involved.

Consider a final argument. One purpose of the criminal law is to permit expressive condemnation. For some conduct, the social judgment is in favor of such condemnation but opposed to much in the way of actual prosecution. As examples, consider laws forbidding adultery or the consumption of alcohol by sixteen-year-olds. Rare enforcement reflects a belief that the law, operating in conjunction with social norms, will deter misconduct optimally—and that criminal prosecution would be too heavy-handed, at least in most cases. Does it follow, from *Lawrence*, that states are forbidden from adopting the strategy of expressive condemnation with rare prosecution? Why isn't that strategy the most sensible one in some circumstances? The answer is that when certain interests are involved,¹⁴⁸ states are indeed forbidden from following that strategy, and the reason has to do with the lack of fair notice and the inevitability of randomness. As I have emphasized, these are the conventional (procedural) concerns of the due process clause.

¹⁴⁸ Consumption of liquor does not fall within the category of protected interests; on adultery, see below,

IV. Implications

What are the implications of *Lawrence*? Because of the opacity of the Court's opinion, this is not an easy question to answer. In the fullness of time, it is imaginable that *Lawrence* will be a sport, a decision with no descendents, one in which the Court struck down a law that shocked its conscience but that proved unable to generate further doctrine. But it is no less imaginable that *Lawrence* will turn out to have broad consequences for regulation of sexual relationships, in a way that vindicates a quite general interest in sexual autonomy. *Bowers* had stopped a number of potential doctrinal innovations here; *Bowers* is no longer good law. And it is wholly imaginable that *Lawrence* will draw into question many forms of discrimination against gays and lesbians. If my basic argument is correct, the eventual path of the law will have a great deal to do with public convictions over time. I am concerned in this section with the logic of the Court's opinion and with its bearing on issues that the Court did not resolve.

A. Sex

Justice Scalia urged that *Lawrence* decrees an end to “morals” legislation¹⁴⁹, and in the aftermath of the decision, it is natural to wonder about the constitutionality of laws forbidding sexual harassment, prostitution, adultery, fornication, obscenity, polygamy, and incest. Before *Lawrence*, such laws seemed quite secure. The Court had made clear that substantive due process would be used only to protect rights well-recognized by tradition¹⁵⁰; and in any event the privacy cases had originally been defined with close reference to reproduction and its control, not to sex itself.¹⁵¹ But after *Lawrence*, it would be possible to contend that many statutory restrictions impose unconstitutional barriers to consensual sexual activity. And in each of these cases, it would be possible to urge both that the relevant right is a fundamental one and that the state lacks a legitimate basis for interfering with consensual activity. Let us see how the underlying issues might be assessed.

1. Coercion. The easiest cases involve coercion. In such cases, the predicate for *Lawrence*—consent—is absent. If consensual sex is not involved, there is no fundamental right that would require the state to provide a compelling justification. And for the same reason, the state has a perfectly legitimate, even compelling, reason to impose a restriction. In cases of sexual harassment, coercion of one or another sort is generally involved¹⁵², and hence a legal ban is perfectly acceptable. The same is true for many and

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

¹⁵⁰ This was the key point in lower court decisions rejecting constitutional challenges to decisions to punish (for example) adultery, *see* *Mercure v. Van Buren Township*, 81 F.Supp.2d 814 (E.D. Mich. 2000); *Commonwealth v. Stowell*, 449 N.E.2d 357 (Mass. 1983); *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996); and incest, *see* *Smith v. State*, 6 S.W.3d 512 (Tenn. Crim. App. 1999); *State v. Buck*, 757 P.2d 861 (Or. Ct. App. 1988).

¹⁵¹ *See, e.g.*, *Griswold*, 381 U.S. 479; *Roe*, 410 U.S. 113.

¹⁵² *See, e.g.*, *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992).

perhaps most cases involving incest, which involve minors unable to give legal consent.¹⁵³ The interest in preventing coerced sex is sufficient.

But somewhat harder cases are imaginable even here. Suppose, for example, that under a public university's sexual harassment policy, a teacher and a graduate student are banned from having a consensual relationship, even though the teacher is not (and will not be) in a supervisory position over the student. Or suppose that the incestuous relations are between adults—first cousins, let us say. If an “as applied” challenge were product, these would be genuinely difficult after *Lawrence*. If real consent is found in either case, a fundamental right might well be involved. But it would be possible to defend the broad sexual harassment prohibition as a way of reducing risks and introducing clarity for all. And it would be possible to defend the ban on incest among adults as a way of eliminating certain psychological pressures and protecting any children who might result from medical risk.¹⁵⁴ In neither case can it be said that the prohibitions run afoul of some emerging national awareness. These are far weaker cases for invalidation than *Lawrence*, but some of the underlying logic of the case seems to raise doubts in imaginable applications.

2. Commerce. Other easy cases involve commerce. In the case of prostitution, it is hard to urge that a fundamental right is involved.¹⁵⁵ Under *Lawrence*, commercial sex is to be treated differently.¹⁵⁶ The outcome is easy; but the analysis is not. Why the sharp distinction between commercial and noncommercial sex? Why are sexual relations unprotected, or less protected, if dollars are exchanged? Books, after all, are protected, whether they are given away or sold. Part of the analysis here might be that commercial sex should not be treated more protectively than any other kind of commercial interaction, now subject to rational basis review.¹⁵⁷ But if sexual relationships have a special constitutional status, this distinction is far from obvious. The more basic claim must be that special constitutional status attaches to sexual intimacy, not to sexual relationships,¹⁵⁸ and that intimacy in the relevant sense is not involved when sex is exchanged for cash.¹⁵⁹ Hence no fundamental right is involved. To be sure, this argument is not entirely convincing. Many sexual relationships (including many that fall within the category protected by *Lawrence*) do not involve intimacy (except by definition). But perhaps the Court can be said to be suggesting that noncommercial sex involves intimacy frequently enough to justify protection of the overall class, whereas the opposite is true of sex-for-money.

¹⁵³ See, e.g., *Richardson v. State*, 353 S.E.2d 342 (Ga. 1987); *Commonwealth v. Arnold*, 514 A.2d 890 (Pa. Super. Ct. 1986).

¹⁵⁴ See, e.g., *In re Tiffany Nicole M.*, 571 N.W.2d 872 (Wis. Ct. App. 1997); *but see In re Termination of Parental Rights to Zachary B.*, 662 N.W.2d 360 (Wis. Ct. App. 2003).

¹⁵⁵ See, e.g., *J.B.K., Inc. v. Caron*, 600 F.2d 710 (8th Cir. 1979); *Morgan v. Detroit*, 389 F.Supp. 922 (E.D. Mich. 1975); *State v. Allen*, 424 A.2d 651 (Conn. Super. Ct. 1980); *Blyther v. United States*, 577 A.2d 1154 (D.C. 1990).

¹⁵⁶ 123 S. Ct. at 2484.

¹⁵⁷ See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹⁵⁸ The case of bestiality should be understood similarly. It would be frivolous to argue that bans on bestiality eliminate the kind of intimate relationship protected by *Lawrence*.

¹⁵⁹ See *Commonwealth v. Walter*, 446 N.E.2d 707, 710 (Mass. 1983); *State v. Price*, 446 N.W.2d 813, 818 (Iowa 1976).

But what justification does the state have for forbidding prostitution? It is probably sufficient here to point to the adverse effects of prostitution on the lives of prostitutes; the risk of exploitation (and worse) is real and serious.¹⁶⁰ Nor are moral justifications, pointing to the corrosive effects of prostitution on sexuality and sex equality,¹⁶¹ ruled off-limits by *Lawrence*. I am not taking a position on the complex and disputed question whether and how prostitution should be outlawed. My suggestion is only that under rational basis review, restrictions on prostitution are easily defensible. The ban on the sale of obscenity should be understood in similar terms¹⁶²; the use of obscenity raises different issues.¹⁶³

3. Without coercion and without commerce. For the state, the most serious problems, post-*Lawrence*, come in cases challenging restrictions on genuinely consensual and noncommercial practices. Begin with what might seem an intermediate case: bans on sexual devices.¹⁶⁴ Following the previous discussion, we should distinguish here between sale on the one hand and use on the other. Perhaps the state could ban the sale itself, urging that it is attempting to regulate a commercial enterprise, and that it is permitted to do so in light of the commercial-noncommercial distinction just made. Even this is not entirely clear.¹⁶⁵ And could the state make it a crime for people to use such devices? The right to do so might well fall within the protection of fundamental interests. In any case what is the state's justification for banning such use? It is easy to imagine an as-applied challenge, in which a married couple attacks a ban on either the sale or the use of sexual devices with reference to *Griswold* itself.¹⁶⁶ The difference is that in *Griswold*, the ban on use of contraceptives was an effort to prevent non-procreative sex, whereas in the hypothetical case, the state is banning devices that are designed to increase sexual pleasure. But why, exactly, would it seek to do that? Is there something wrong with certain sources of sexual pleasure within constitutionally protected relationships? Perhaps the answer would be affirmative if real harms were involved, as for example through sadomasochistic practices. Almost certainly the state could justify a prohibition on the public display of such devices. But we are not now speaking of these questions. At first

¹⁶⁰ See, e.g., *People v. Mason*, 642 P.2d 8, 12 (Colo. 1982); *People v. Johnson*, 376 N.E.2d 381, 386 (Ill. App. Ct. 1978). Of course some of the risk stems from the very fact that prostitution is unlawful.

¹⁶¹ See *Bell v. United States*, 349 U.S. 81, 84 (1955) (Minton, J., dissenting); *People v. Warren*, 535 N.W.2d 173, 177 (Mich. 1995) (Levin, J., dissenting); *State v. Wright*, 561 A.2d 659, 662 (N.J. Super. Ct. App. Div. 1989).

¹⁶² See, e.g., *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 58-59 (1973).

¹⁶³ The use can be banned under *Miller*, by reference to moral objections, though *Stanley v. Georgia*, US, protects the use of obscenity within the home. A different and in my view better analysis would point to actual harms, see Catharine MacKinnon, *Feminism Unmodified* (1986); Cass R. Sunstein, *Pornography and the First Amendment*, *Duke LJ* (1996).

¹⁶⁴ See, e.g., *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988 (7th Cir. 2002) (remanding for consideration of whether a ban on sexual devices violated a fundamental right to privacy).

¹⁶⁵ Recall that the constitutional protection given to the use of contraceptives was extended to the sale of contraceptives. See *Carey*, *supra*. If a ban on the sale of contraceptives cannot be justified, it is not clear, after *Lawrence*, how the state can justify a ban on the sale of sexual devices. Before *Lawrence*, it might have been said that the privacy cases did not protect sexual activity as such, but merely banned the state from punishing that activity through the indirect and discriminatory means of risking unwanted pregnancy. But *Lawrence* forbids this narrow reading of the cases.

¹⁶⁶ See *Williams, id.* at 952-53 (suggesting that an as-applied challenge is plausible).

glance, individuals have a fundamental interest here, and the state seems to lack a legitimate basis for intruding on that interest.

If there were laws forbidding masturbation, *Lawrence* would indeed raise extremely serious questions about them. Fortunately, there are no such laws.¹⁶⁷ What about laws forbidding fornication, understood to mean non-adulterous sex outside of marriage?¹⁶⁸ *Lawrence* creates serious doubts, simply because coercion and consent are not present. In any case, there seems to be an emerging social awareness that fornication is not a proper basis for criminal punishment.¹⁶⁹ And with respect to consenting adults, it is not easy to produce a legitimate ground for interfering with non-adulterous sex.¹⁷⁰ As I have noted, fully consensual incest is a somewhat harder case. In the case of adult brothers and sisters, it might be urged that the goal is to prevent harms to any children who might result, or psychological difficulties that would predictably produce and accompany any such relationships. Certainly the ban on sexual relations within the family cannot be said to be anachronistic. There is no “emerging public awareness” that such relations should be accepted. But imagine, for example, that sex is banned among first cousins, in circumstances in which any harms are highly speculative. Rational basis review would be satisfied. But *Lawrence* does not apply rational basis review, and in some applications, the ruling would seem to throw legal prohibitions on incest into considerable doubt.

The most difficult cases involve laws forbidding adultery.¹⁷¹ We could imagine actual adultery prosecutions¹⁷²; we could also imagine cases in which government takes adverse employment action against those involved in adulterous relationships.¹⁷³ Here as in other contexts, it would be possible to urge that a consensual relationship is involved, one with which the state may not interfere on purely moral grounds. On the other hand, it is possible to justify prohibitions on adultery by reference to harms to third parties: children, in many cases, and the betrayed spouse, in many more cases. The adultery laws can be seen as an effort to protect the marital relationship, involving persons and interests, including those of children, that are harmed if adultery occurs.¹⁷⁴ Marriage can and often is understood as an exchange of commitments, which have individual and social value; and a prohibition on adultery, moral and legal, operates in the service of

¹⁶⁷ As I have noted, *Lawrence* raises no questions about laws forbidding public masturbation. The most plausible objection would be that mere offense is not a legitimate basis for regulating noncoercive sex; and indeed Justice Scalia seems to read the Court’s opinion to have that implication. But the Court’s rejection of the moral basis of the ban on sodomy should not be taken to forbid governments from protecting people from unwanted viewing of other people’s sex lives.

¹⁶⁸ See, e.g., *Jarrett v. Jarrett*, 449 U.S. 927, 929 n. 2 (citing Ill. Rev. Stat. ch. 38, § 11-8 (1977)).

¹⁶⁹ See, e.g., *id.*; *In re J.M.*, 575 S.E.2d 441, 444 (Ga. 2003); *State v. Saunders*, 381 A.2d 333, 339 (N.J. 1977).

¹⁷⁰ Admittedly, rational basis review might be satisfied if, for example, the state urged that it was attempting to reduce the risks of unwanted pregnancy and venereal disease. But after *Lawrence*, rational basis review is unlikely to be applied here.

¹⁷¹ See *Marcum v. MacWharther*, 308 U.S. 635 (2002).

¹⁷² See *Commonwealth v. Stowell*, 449 N.E.2d 357 (Mass. 1983).

¹⁷³ See *Oliverson v. West Valley City*, 875 F.Supp. 1465 (D. Utah 1995); *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996).

¹⁷⁴ See *Oliverson, id.*, at 1477.

those commitments. If rational basis review is involved, prohibitions on adultery should certainly be acceptable—except, perhaps, in cases in which the married couple has agreed to non-exclusivity (in which case criminal prosecution would be especially surprising).

The difficulty here is that in the context of adultery, criminal prosecutions are extremely unusual, at least as rare as criminal prosecutions for sodomy. There is a good argument that criminal prosecutions, in this context, are inconsistent with emerging social values. This is not because adultery is thought to be morally acceptable; it is not. It is because adultery is not thought to be a proper basis for the use of the criminal law. Perhaps it could be said that *Lawrence* turned at least in part on the Court’s evident desire to ensure against practices that would “demean[] the lives of homosexual persons.”¹⁷⁵ It is not plausible to say that the Court should take special steps to ensure against practices that would “demean the lives of” adulterers. But in the end, it is not so easy to distinguish an adultery prosecution from the sodomy prosecution forbidden in *Lawrence*.¹⁷⁶

B. Sexual Orientation, Employment, and Marriage

1. Employment. May a public employer discharge or punish an employee because of his sexual orientation? Before *Lawrence*, the lower courts were divided on the issue.¹⁷⁷ The logic of *Bowers* supported the decisions upholding such discharges, at least against due process challenges. And it was possible to urge that because homosexual activity is not protected by the Constitution, government employees are permitted to discriminate against those who engage in that activity. At first glance, however, *Lawrence* resolves that question the other way. A public employer is not permitted to discharge an employee because she has exercised a constitutional right (an oversimplification to which I shall return). If an employee has converted to Catholicism, or voted for a Republican, she may not be adversely affected for that reason. So too if an employee has exercised a right protected by the due process clause. A state may not refuse to hire a secretary who has used contraception or had an abortion. Under *Lawrence*, government may not refuse to hire people who have engaged in same-sex relations. It could perhaps be argued that a criminal punishment is worse than a civil disability, and hence that the prohibition on

¹⁷⁵ 123 S. Ct. at 2482.

¹⁷⁶ Employment discrimination by the state against adulterers raises further complexities. On a standard analysis, protection against criminal prosecution, if it exists, is conclusive on the issue of public employment, forbidding discrimination against people who have engaged in constitutionally protected activity. One exception would apply when the government can invoke distinctive employment-related grounds for the discrimination. A public university’s admissions office need not hire, as director of admissions, people who speak out in favor of race discrimination; perhaps discrimination against adulterers can, in some contexts, be similarly justified. In any case everything turns on the reason for a due process ruling. If adultery prosecutions were banned on the basis of a rationale tied to the illegitimacy of using the criminal law, perhaps civil disabilities, as through employment discrimination, would be permissible.

¹⁷⁷ See *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979) (holding that homosexuals are not a protected class under Title VII); *Childers v. Dallas Police Dep’t*, 513 F.Supp. 134 (N.D. Tex. 1981) (holding that a police department could refuse to hire a gay activist because of doubts about his character). Compare *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F.Supp.2d 1160 (S.D. Ohio 1998) (finding no rational basis for a decision not to renew the contract of a homosexual teacher); *Weaver v. Nebo Sch. Dist.*, 29 F.Supp.2d 1279 (D. Utah 1998) (to the same effect).

criminal prosecution does not entail an equivalent prohibition on adverse employment actions. But the cases just described should be sufficient response to that argument.

Most cases of adverse employment action, prompted by homosexual activity, are easy after *Lawrence*. But there are some possible responses. One would emphasize the reading I have emphasized here: *Lawrence* turned not simply on a finding of a fundamental right, but more importantly on the Court's conclusion that the Texas law was no longer supported by public convictions. If desuetude is involved, then perhaps employment discrimination is permitted even if criminal prosecution is not. This argument is not implausible or incoherent; if we emphasize the idea of desuetude, then a moral judgment might be permissible in the employment context even if it cannot be invoked as a basis for criminal prosecution. But this approach reads *Lawrence* a bit too finely. The Court is best read to have found a fundamental interest, whatever its reason for doing so; and if so, states may not refuse to hire people who have engaged in the relevant behavior.

Another response would emphasize that the government sometimes may indeed refuse to hire people for engaging in constitutionally protected activity. The President is permitted to fail to employ, as Secretary of State, someone who has publicly criticized his policies; so too, a public university is allowed not to hire, or even to fire, an admissions officer who has said that women should not go to college, or that it is best for African-Americans to attend vocational school. In such cases, the university can claim, plausibly, that it is not trying to censor anyone, or to punish them for exercising constitutional right, but instead to accomplish the substantive task that it has set for itself.¹⁷⁸ Might discrimination against gays and lesbians be similarly justified? This is not entirely unimaginable, but it is hard to see. Unless the state is to capitulate to private prejudice, as it is generally forbidden from doing,¹⁷⁹ it cannot easily invoke a distinct, employment-related reason to discriminate on the basis of sexual orientation.

It also follows that the "don't ask, don't tell" policy, in the military setting, is under new pressure. It is no longer possible to defend that policy simply by citing *Bowers*. If the policy is to be upheld, it is because courts should give great deference to military judgments, applying a form of rational basis review to them. I believe that federal courts are not likely to interfere with military judgments here, and that there is good reason for a general posture of deference to such judgments. In principle, however, it is extremely difficult to defend "don't ask, don't tell" against constitutional challenge, and this appears to be one of the exceedingly rare settings in which judicial interference with military judgments would be justified.¹⁸⁰

2. Marriage. Of course the largest issue is the fate of same-sex marriage. Under *Lawrence*, must states recognize such marriages? I have suggested that *Lawrence* is akin to *Griswold*; but *Griswold* led to *Roe*. Perhaps *Lawrence* will lead to its own *Roe*, in the

¹⁷⁸ See *Pickering v. Board of Educ.*, 391 US 563 (1968), for the basic framework.

¹⁷⁹ See *Palmore v. Sidoti*, 466 US 429 (1984).

¹⁸⁰ For an argument to this effect before *Lawrence* was decided, see Cass R. Sunstein, *Designing Democracy* (2002).

form of a requirement that states allow gays and lesbians, not less than heterosexuals, to marry.

The issue is exceedingly complex. At first glance, *Lawrence* has nothing at all to do with same-sex marriage. It involved sodomy prosecutions, brought under anachronistic laws, and the due process challenge to those prosecutions need not draw into doubt the still-universal practice of defining marriage to involve one man and one woman. In any case, the most natural challenge to laws rejecting such marriages is rooted in the equal protection clause; and *Lawrence* said nothing about the equal protection clause (perhaps because it sought to avoid the marriage issue). To the extent that the Court was emphasizing an “emerging awareness,” its decision does not touch prohibitions on same-sex marriage—and will not do so unless and until such prohibitions seem as outmoded as bans on homosexual sodomy do today. Existing practice suggests universal opposition to same-sex marriage,¹⁸¹ and polling evidence suggests that most Americans support existing practice.¹⁸²

But under existing law, the issue cannot be disposed of so readily. In *Loving v. Virginia*¹⁸³ (probably the best-named case in all of constitutional law), the Court struck down a ban on racial intermarriage on two grounds. The first is the familiar equal protection ground, seeing that ban as a form of racial discrimination. But in a separate ruling, the Court also held that the ban violated the due process clause. In the Court’s words, “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”¹⁸⁴ It added that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”¹⁸⁵ The *Loving* Court’s due process ruling was not free from ambiguity; the problem of racial discrimination played a large role. But subsequent cases confirm that the right to marry counts as fundamental for due process purposes—and is sufficient by itself to take the analysis into the domain of heightened scrutiny.

In *Zablocki v. Redhail*, the Court struck down a Wisconsin law forbidding people under child support obligations to remarry unless they had obtained a judicial determination that they had met those obligations and that their children were not likely to become public charges.¹⁸⁶ The Court insisted that “the right to marry is of fundamental importance for all individuals,”¹⁸⁷ and 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.”¹⁸⁸ The Court said that it would uphold “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship.”¹⁸⁹ But any direct and substantial interference with the right to marry would be strictly

¹⁸¹ Civil unions are a different matter, but they hardly can claim even strong minority support.

¹⁸² See the summary at <http://www.bpnews.org/bpnews.asp?ID=16337>.

¹⁸³ 388 U.S. 1 (1968).

¹⁸⁴ *Id.* at 12.

¹⁸⁵ *Id.* (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

¹⁸⁶ 434 U.S. 374 (1978).

¹⁸⁷ *Id.* at 384.

¹⁸⁸ *Id.* at 386.

¹⁸⁹ *Id.* at 386-87 (citing *Califano v. Jobst*, 434 U.S. 47 (1977)).

scrutinized. In a concurring opinion, Justice Stevens underlined the point, urging that the Constitution would cast serious doubt on any “classification which determines who may lawfully enter into the marriage relationship.”¹⁹⁰

In this light a prohibition on same-sex marriage is not so easy to defend in the aftermath of *Lawrence*. Under the Court’s decisions, a fundamental right does seem to be involved, one with which the state can defend only by pointing to a countervailing interest that is not merely legitimate but also compelling. In the context of same-sex marriage, what might that interest be? What sorts of social harms would follow from recognizing marriages between people of the same sex? It is conventional to argue that the refusal to recognize same-sex marriage is a way of protecting the marital institution itself. But this is very puzzling; how do same-sex marriages threaten the institution of marriage? Or perhaps the state can legitimately reserve the idea of marriage to men and women for expressive reasons. Perhaps the state can urge that it does not want to give the same expressive support to same-sex unions as to opposite-sex unions. But why not? As compared to a ban on same-sex marriages, a prohibition on adultery seems easy to justify. Such a prohibition is likely, in numerous cases, to protect one or even both spouses, and to protect children besides. If, as I have suggested, *Lawrence* draws prohibitions on adultery into some doubt, it would seem to raise extremely serious questions about prohibitions on same-sex marriage.

But perhaps criminal punishment is special. Perhaps such punishment is quite different from, and to be assessed more skeptically than, a statute that confers the benefits of marriage to some but not to all. Perhaps *Lawrence* forbids the state from using the heavy artillery of the criminal law—but without raising questions about civil rights and civil duties. It would not be at all implausible to say that the *Lawrence* Court was responsive to the assortment of disabilities associated with criminal punishment—a set of disabilities that might be thought unique. But *Loving* and *Zablocki* themselves raise questions for this kind of distinction. Neither case involved a criminal prohibition. Both applied careful judicial scrutiny to laws saying that certain people could not enter into the marital relationship.

Perhaps we could read *Loving* and *Zablocki* more narrowly.¹⁹¹ Notwithstanding the Court’s rhetoric, it is quite doubtful that the Court really meant to raise serious questions about *all* state laws dictating who may enter into a marital relationship. People are not permitted to marry dogs or cats. They are banned from marrying their first cousins or their aunts. They cannot marry two people, or three, or twenty. Must these restrictions be justified by showing that they are the least restrictive means of achieving a compelling state interest? If so, at least some of them would be in serious trouble. Perhaps the ban on incestuous marriages could be defended by pointing to the risk of coercion and the danger to any children who would result. But as we have seen, it is easy to imagine some cases in which any such defense would be weak—as, for example, where the would-be spouses

¹⁹⁰ *Id.* at 404.

¹⁹¹ It would also be possible to deny that the right to marry has a constitutional status—to urge that *Loving* and *Zablocki* were really equal protection cases. This view would have some appeal, especially to skeptics about substantive due process; but it does not fit with current law.

are both adults and do not plan to have children. Perhaps bans on polygamy could be defended by pointing to the risk of exploitation, especially of the women involved. But we might doubt whether *Loving* and *Zablocki* should be read to require a careful judicial inquiry into that question.

A possible opinion would urge that by deeming the right to marry fundamental, the Court did not mean to suggest that it would strictly scrutinize any law that departed from the traditional idea that a marriage is between (one) woman and (one) man. It meant only to say that when a man and a woman seek to marry, the state must have good reasons for putting significant barriers in their path. This rationale has the advantage of fitting with both *Loving* and *Zablocki*. The problem is that it seems somewhat arbitrary and opportunistic. Why, exactly, should a marriage be defined in this way? Why, in any case, should the definition be such as to allow the state not to recognize same-sex marriages?

It is not at all easy to answer this question. In my view, the only difference between *Lawrence* and a ban on same-sex marriage is that the sodomy law no longer fits with widespread public convictions, whereas the public does not (yet) support same-sex marriages. If we rely heavily on the desuetude-type passages of the Court's opinion, then it would be possible to sketch an opinion upholding the ban on same-sex marriages while also invalidating any state law that punishes consensual sodomy. Such an opinion would read *Loving* and *Zablocki* in the narrow way just suggested, with reference to slippery slope problems, and conclude that a rational basis is all that is required for a law that restricts the institution of marriage to one woman and one man. This opinion would certainly be plausible. The problem is a general one with any approach that relies on public convictions: they might not be principled. The public might have gone this far, and no further; but there may be no good reason for it not to have gone further. I cannot see a principled distinction, aside from public convictions, between what the Court did in Lawrence and what a court would do in striking down a state's failure to recognize same-sex marriages.

C. A Summary

The discussion thus far has gone briskly over a considerable amount of territory. For those who find tabular summaries useful, consider the following:

	Valid	Invalid	Probably Valid	Probably Invalid
Sexual Harassment	X (coercive)			
Prostitution	X (commercial)			
Incest			X (coercive; but some hard issues in imaginable applications)	
Adultery				X (but perhaps defensible by reference to harms to third parties)
Fornication		X		
Use of sexual devices		X		
Polygamy	X			
Employment discrimination against gays and lesbians		X (except for military)	X (military)	
Bans on same-sex marriage			X (for now?)	

Conclusion

The *Lawrence* decision is susceptible to two broad readings. The Court’s ruling could easily be seen as a recognition of the constitutionally fundamental character of sexual liberty, disabling the state from controlling the acts of consenting adults without an extremely powerful justification. Alternatively, it could be seen as a rational basis holding with a strong Millian foundation—a holding that invalidates “morals” legislation, requiring harm to third parties whenever government is regulating private sexual conduct. In practice, these two readings would not be terribly far apart; they would use different doctrinal avenues to similar results.

I have suggested the possibility of a third and narrower reading, one that stresses, as the Court did, that a criminal ban on sodomy is hopelessly out of accord with contemporary convictions. Thus understood, the due process principle of *Lawrence* asserts a constitutional objection to statutes that are rarely enforced and that interfere with important human interests without anything like a justification in contemporary values. Such statutes are a recipe for unpredictable and discriminatory enforcement practices; they do violence to both democratic values and the rule of law. I have stressed the roots

of *Lawrence* in a narrow, American-style version of the idea of desuetude -- not because the broader readings are entirely implausible, but because the Court would have been extremely unlikely to rule as it did if not for its perception that the Texas law could not claim a plausible foundation in widely shared moral commitments. I believe that an equal protection ruling, of the sort sketched by Justice O'Connor, would have been preferable, not least because it would have emphasized what should be clear to all: The problem in Lawrence had everything to do with the social subordination of gays and lesbians. But a due process ruling, understood in the relatively narrow terms outlined here, has considerable appeal.

What is the reach of *Lawrence*? Restrictions on sex that is nonconsensual or commercial are surely valid. By contrast, laws forbidding fornication (defined as extramarital but non-adulterous sex) are surely invalid. The Constitution probably forbids government from punishing, either criminally or civilly, those who have used sexual devices. The state is almost certainly banned from discriminating against those who have engaged in homosexual conduct, at least outside of certain specialized contexts (most notably the military). In some applications, bans on incest and adultery could be subject to serious constitutional challenge.

The hardest cases involve the failure to recognize same-sex marriages. If *Lawrence* is put together with *Loving* and *Zablocki*, it would seem clear that the government would have to produce a compelling justification for refusing to recognize such marriages, and compelling justifications are not easy to find. If we emphasize an equality rationale, the subtext of Lawrence, then bans on same-sex marriages are in serious constitutional trouble. On the other hand, the ban on same-sex marriages cannot, at this point in time, be regarded as an anachronism, or as conspicuously out of touch with emerging social values; and there are strong prudential reasons for the Court to hesitate in this domain. The marriage issue, more than any other, will test the question whether *Lawrence* is this generation's *Griswold*—or the start of something far more ambitious.

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