Lawrence v. Texas and the Refinement of Substantive Due Process

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INTRODUCTION

Lawrence v. Texas was a major victory for the ongoing effort to end discrimination based on sexual orientation. Lawrence prohibited sodomy laws, which, whether they applied just to gay people like Texas’s law or on their face applied to everyone, have long been used as a tool for discrimination against gay people. Lawrence also overturned Bowers v. Hardwick, which had been a
major obstacle to any constitutional claim involving gay people. *Bowers* was a
due process case, but many courts read it as dispositive of unrelated
constitutional questions about gay people. Most particularly, *Bowers* was said
to answer questions about both the standard of review and the permissible
justifications for discrimination under the Equal Protection Clause.4 It is no
understatement to say that in the 1980s and 1990s, sodomy laws and *Bowers v.*
*Hardwick* were the primary legal obstacles to progress in the fight for equality
for gay people.

Important as all this is, fairly applied, *Lawrence* is likely to be at least as
important for what it brings to constitutional law as it is for what it removes.
*Lawrence* reestablishes a critical substantive due process principle that *Bowers*
had put in doubt—the principle that while history is a crucial (perhaps the
crucial) guide to the contours of what rights are implicitly protected by due
process, it is not a guide to who gets to exercise those rights.

Second, and equally important, *Lawrence* is an important step in the
refinement of due process analysis. The structure of two rigid “tests,” one
derferential to the government (rational basis review) and one almost impossible
for the government to meet (strict scrutiny), is slowly but surely giving way to
a more sophisticated approach. That approach will generate an analysis that
will likely take into account not just whether a right is basic, or, to use the old
terminology, “fundamental,” but how seriously the government is interfering
with that right. It will look not only at what the government’s interests are, but
also at whether they are truly and carefully advanced by what the government
wants to do. Ultimately, the Court will judge the constitutionality of what the
government does with a balancing test—a test that will not only give the
government room to regulate, but that will also demand more than speculation
about what such regulation will do. That kind of approach could significantly
improve the protection of individual rights.

Today, laws that truly do limit implicit rights are too often treated as if
they had no impact on a constitutional right at all. That treatment arises because
courts recognize that if they hold that a law involves a fundamental right, the
result is a form of analysis—strict scrutiny—which virtually no law can
survive. If you apply strict scrutiny to every law that has an impact on a right,
many laws that are aimed at important government interests, and not at
suppressing rights, will be struck down. Courts avoid the test by saying the
right is not “directly” or “significantly” burdened. Under a rigid two-tier
system, the consequence of not subjecting a law to strict scrutiny is that even


895 F.2d 563, 576 (9th Cir. 1990); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).
though the law does impact a protected right, it receives what amounts to no real review at all—traditional rational basis review. But if courts had a meaningful balancing test—a test that allowed them to examine whether the law in fact was aimed at a legitimate purpose, and how seriously it would impact the right—they could and likely would use it with laws that entirely escape real review now. Thus, in the long run, a more sensitive balancing review is likely to provide far more protection to implicit rights than does the current structure.

*Lawrence* is an important step in the refinement of due process analysis because it is the first case to bring the doctrine that has supported careful due process review of implicit rights—the fundamental rights doctrine—together with the due process balancing cases, which look more closely at both individual and government interests than do the fundamental rights cases. But *Lawrence*, like many groundbreaking Supreme Court cases, does not announce its refinement of due process analysis; it does not even announce in so many words the kind of due process analysis it uses. And *Lawrence* does not discuss the proper role of history in due process much at all. Part I of this Article will explain just why the Court held that the Texas law violated the Due Process Clause and will show how the Court’s explanation of its holding draws on both “fundamental rights” cases and due process balancing cases. From there, Part II analyzes how *Lawrence* is part of the development of a more sophisticated doctrine of implicit rights due process. Finally, Part III discusses how the Court restores the proper role of history in that doctrine.

I. THE DUE PROCESS ANALYSIS USED IN *LAWRENCE v. TEXAS*5

A. The Scheme of Substantive Due Process Analysis

The conventional wisdom is that government rules that sufficiently interfere with a “fundamental right” implicitly protected by the Due Process Clause call for strict scrutiny. In the classic formulation, that means the law will be upheld only if it is “necessary” to achieve a compelling interest and is “narrowly tailored” to that end.6 All other cases receive a rational basis test.

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5. At various points, substantive due process, particularly when it is used to protect implicit rights, has had such a shady constitutional reputation that the best place to start might be with a defense of its legitimacy. See *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting); see also *Troxel v. Granville*, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting); *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 293-4 (1990) (Scalia, J., dissenting). In my mind, substantive due process is nothing more or less than insisting on the rule of law in the legislative process.

6. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973). Sometimes “necessity” disappears, and sometimes the idea merges with “narrow tailoring,” although these are two distinct ideas—that the law should be the only way to vindicate the state’s important interest and that it should be designed, as much as possible, to do no more than that.
Laws subject to the rational basis test carry a presumption of constitutionality and will be upheld as long as a rational legislator could think they would promote some legitimate aim. The aim need not be the real aim of the law, and there need be no evidence that the law will actually work toward this aim as long as one could "rationally" think that it might.\(^7\)

At their core, both tests ask the same question: what is the connection between the regulation and a constitutionally permissible government purpose? Strict scrutiny asks the question in a way that makes it very difficult for the government to win; the state must prove that the law is essential to a very important goal. Conversely, rational basis asks the question in a way that makes it difficult for the challenger to win.

There is, however, a third group of substantive due process cases that considers the same connection question in a distinctly less loaded and more careful way. These decisions say that the Court's job is to "balance" the state's interest in regulation against the individual's interest in freedom, and to look at both interests in greater detail than the two other groups of due process cases typically do. The best of these cases look not just at the state's interest, but also at the state's ability to show that the interest will in fact be significantly advanced by the regulation and that the regulation is carefully focused on the goal. They look not only at what the individual's interest is, but also at how significantly the regulation would limit it. The best of these cases then lay out fairly detailed standards for striking the balance. For example, in Youngberg v. Romeo, the Supreme Court held that a mentally disabled man, who was involuntarily committed by his parent, had protected liberty interests in "personal security" and "liberty from restraint."\(^8\) According to the Court, to decide if those liberty interests had been violated, a court would have to "balance" them against the state's "legitimate" interest in running an institution. In decisions about restraints on, and protection of, a mentally disabled man committed to state care, the Court said that due process requires decisions to be made by qualified mental health professionals. If such professionals make the decisions, the decisions are "presumptively valid" unless they are a radical departure from the standards in the field.\(^9\)

In these balancing cases, the Court typically talks about "protected liberty" instead of "fundamental rights." These "protected liberty" cases rarely refer to "fundamental rights" cases, and vice versa. These two strands of substantive due process seem almost to stand apart from each other. In fact, some judges

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8. 457 U.S. 307, 315-16, 320-24 (1982); see also Sell v. United States, 539 U.S. 166, 178-79 (2003) (finding "a constitutionally protected liberty interest in 'avoiding involuntary administration of antipsychotic drugs'—an interest that only an 'essential' or 'overriding' state interest might overcome" (internal citations omitted)).
seem completely unaware of the balancing cases. But Youngberg is hardly an isolated case. The Court has used the same "protected liberty" analysis in cases involving the right to refuse medication or life-sustaining nourishment and, to an extent, in cases involving abortion. In the abortion cases in particular, the Court began to suggest that we should think of all substantive due process cases involving implicit rights as "protected liberty" cases. Something like the old strict scrutiny analysis should be used when the government attempts to completely prohibit the exercise of a protected implicit right. A less exacting balancing test applies to less severe intrusions on the rights that are driven by legitimate government concerns.

B. The Lawrence Holding & its Terminology: Rational Basis, Strict Scrutiny, or Protected Liberty?

In terms of doctrinal meaning, the most important elements in a case are how the Court actually rules on the precise issue before it and how it explains what it does. There are at least two passages in which the Lawrence Court makes a square holding, actually striking down the Texas law. The one that most clearly strikes down the Texas law reads as follows: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."12

Several judges have pointed to the word "legitimate" and, noting that the word "legitimate" is usually part of rational basis terminology, have insisted that this sentence shows that Lawrence is a rational basis case. These judges go on to say that Lawrence's failure to use the term "fundamental right" confirms that it must be a rational basis case.13

It is certainly true that the Lawrence opinion does not use the term "fundamental right" (although the Court gets close a few times),14 and that it says Texas cannot justify its intrusion into the "personal and private" life of the individual with a "legitimate interest," instead of saying that the intrusion is not justified by a "compelling interest." One ought to be careful, though, about attaching too much significance to particular words; the Court has hardly been rigid with its terminology, even in strict scrutiny cases. For example, while

10. See infra note 39 and accompanying text. Justice Scalia and Judge Birch of the 11th Circuit insist that "rational basis" and "fundamental rights, strict scrutiny" are the only two forms of substantive due process analysis. See Lawrence v. Texas, 539 U.S. 558, 592-94 (2003) (Scalia, J., dissenting); Lofton v. Sec. of Dep't of Children & Family Servs., 358 F.3d 804, 816 (11th Cir. 2004).
12. Lawrence, 539 U.S. at 578.
13. See Lawrence, 539 U.S. at 586, 599 (Scalia, J., dissenting); see also Lofton, 358 F.3d at 816; Williams v. Pryor, 41 F. Supp. 2d 1257 (N.D. Ala. 1999).
Justice Douglas's lead opinion in *Griswold v. Connecticut*15 says a “zone of privacy” is created by “several fundamental constitutional guarantees,” it never says the “right of privacy” itself is “fundamental.” In fact, it refers to it as “legitimate.”16 In *Troxel v. Granville*, the Court struck down a Washington “grandparent visitation” law as an “unconstitutional” interference with the “fundamental right of parents to make decisions” about visitation.17 In doing so, the Court never mentioned “compelling”—or even “legitimate”—interests, “narrow tailoring,” or even “strict scrutiny.” It just said that the law gave insufficient “deference” to the parents’ views.18 There are many other examples of the Court not using traditional strict scrutiny terminology under the Due Process Clause and under other strict scrutiny tests.19

Still, *Lawrence* arguably does not read as a traditional strict scrutiny case. It would be, at the least, odd for the Court to decide a “fundamental rights” strict scrutiny case without ever using either of those terms or referring to “compelling interests” or “narrow tailoring.” And it would not have been a doctrinal stretch for the Court to have held that the Texas law was unconstitutional because the only interests the state could offer for it were not legitimate. The “morality” justification Texas offered was not moral disapproval of sodomy. Sodomy was perfectly acceptable when practiced by ninety to ninety-six percent of Texans (depending on whose estimate of the gay population you adopt).20 For Texas, sodomy—not the classic definition, but

15. 381 U.S. 479 (1965).
16. Id. at 485. Justice Goldberg, writing for Chief Justice Warren, Justice Brennan, and himself, joins the lead opinion, but in his concurrence he uses the term “fundamental right.” Id. at 486-99 (Goldberg, J.). Justices White and Harlan, concurring in the result but not in the lead opinion, do not. They instead talk about protected liberty. Id. at 499-502 (Harlan, J., concurring), 502-07 (White, J., concurring).
18. Id. *Troxel* is a plurality opinion. Justice Souter, who concurred in the judgment, also said the law was unconstitutional without using any of the terminology of strict scrutiny. Justice Thomas objected to the failure of the plurality and Justice Souter to articulate a test. He said that he would apply strict scrutiny and said that the statute would fail for lack of a “legitimate” government interest. Id. at 80 (Thomas, J., concurring). To be fair to Justice Thomas, he acknowledged that the test usually requires a compelling interest and said it lacked a legitimate one to make a rhetorical point about how weak the state’s case was. But one could say much the same thing for the Court’s opinion in *Lawrence*. To say that a state does not have a legitimate interest that would outweigh that of the individual is to say that it could not possibly have a compelling one. That is not the same thing as saying an interest that was legitimate but not compelling would be sufficient.

19. See, for example, the confusing and at times contradictory rhetoric in *Griswold v. Connecticut*, 381 U.S. 479 (1965), outlined *infra* note 42. See also *Hurley v. Irish Am. Gay Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) (“To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong.”).

20. Although Alfred Kinsey never said 10% of the population was gay, he is widely said to have said it—this, for the purposes of popular culture, is probably better than actually having said it. Most scholars in the field think three to five percent is a better estimate. See S.
oral as well as anal sex—was not wrong in itself. It was wrong only when performed by same-sex couples. Under the circumstances, Texas could not claim that it sought to discourage sodomy by disadvantaging those who perform it. It could say only that it sought to disadvantage a small portion of the people who might engage in it: gay people.

As Justice O’Connor pointed out in her concurring opinion in Lawrence, the most basic principle of equal protection is that the government cannot classify a group of citizens in order to disadvantage them.\(^{21}\) To do that would be, as the Court put it in Romer v. Evans, “a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”\(^{22}\) Saying that you want to disadvantage a group because you disapprove of them, even on a “moral” basis does not help. When the state discriminates against a group of citizens because it does not like the group, it usually says that its dislike is justified by “morality.” “Morality” has been used to justify discrimination based on race, sex, and mental disability and has also been used against “hippies.”\(^{23}\) As Justice O’Connor summed it up, moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.” \(^{24}\)

Since Texas essentially had nothing other than its “moral disapproval” of gay people to support the law,\(^ {25}\) the Court could easily have based its decision in Lawrence on this well-established equal protection rule against allowing a classification to be its justification. And it probably could have made much the same ruling under due process, since dislike or fear of persons is probably not a legitimate purpose in due process analysis.

Just as it would have been odd for the Court to decide a strict scrutiny case

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22. 517 U.S. at 635. As I have pointed out elsewhere, this rule against accepting a classification as its own justification follows directly from the central idea of equality itself. See Matthew Coles, The Meaning of Romer v. Evans, 48 HASTINGS L.J. 1343 (1997).


25. Id.
without using the conventional terminology, it would be odd for the Court to decide a rational basis, "minimum scrutiny" case without ever using either of those terms or the words "arbitrary" or "irrational" or referring to a "strong presumption of validity." But none of those words appears in Lawrence either.\(^{26}\) The key is to get back to what Lawrence does say. Again, the crucial sentence striking down the Texas law says, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."\(^{27}\)

The key here is not the word "legitimate," but the word "justify." Instead of saying that Texas's interests were not legitimate, the Court said the law furthered no legitimate state interest that was sufficient to "justify" the "intrusion into the personal and private life of the individual."\(^{28}\) Traditional rational basis asks not if the government's interest is sufficient to justify the limitation on the individual; it asks merely if one could think the law might achieve a legitimate purpose.\(^{29}\) No attention whatsoever is paid to the interest of the individual. Even under "rational basis with bite," a form of analysis that may or may not exist in equal protection (and so may or may not exist in due process) the issue would be whether, in fact, the law has some real connection to the state's interest.\(^{30}\) Assessing whether the state's interest is significant enough to vindicate what the state has done—balancing the state's interest against that of the individual—is not rational basis review. It is, however, typical of protected liberty cases; so is the terminology the Court uses.

The language problem in Lawrence is not with the Court, but with its critics. Lawrence fails to use the words of established due process analysis only if one accepts Justice Scalia's insistence that all substantive due process cases are either "fundamental rights," strict scrutiny, or rational basis.\(^{31}\) But the "protected liberty" line of substantive due process cases uses neither the language of strict scrutiny nor rational basis. Those cases do discuss "protected


\(^{27}\) Lawrence v. Texas, 539 U.S. 558, 578 (2003).

\(^{28}\) Id.

\(^{29}\) See, e.g., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955) (rejecting a due process challenge under a rational basis test, noting that the "legislature might have concluded" that the challenged statute furthered various legitimate interests).

\(^{30}\) See, e.g., Gerald Gunther, Forward—In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972). Professor Gunther's idea was that the Supreme Court was evolving a model of equal protection in which even the most deferential form of review would be based not on speculation, but on evidence about purposes and connection.

\(^{31}\) See Lawrence, 539 U.S. at 591-94. It is interesting that while Justice Scalia invokes many cases in support of his point that "fundamental rights" must be given strict scrutiny, he offers nothing in support of the critical proposition that completes his system—that all other substantive due process cases are rational basis cases. See Lawrence, 539 U.S. at 593. Justice Scalia never mentions the "protected liberty" cases at all.
liberty,” and “legitimate” or “important” state interests, and they explicitly balance the government’s interests against those of the individual. Those cases, in short, use much the same terminology as Lawrence, and balance the parties’ interests in much the same way that Lawrence does. But Lawrence does not fit neatly into the “protected liberty” line of cases either.

C. The Court’s Explanation in Lawrence: Rational Basis, Strict Scrutiny, or Protected Liberty?

As I said before, there are two passages in which the Lawrence Court makes a square holding. In the second, Lawrence overrules Bowers v. Hardwick, which it had to do in order to strike down the Texas law. Lawrence overruled Bowers with these four sentences: “Justice Stevens’ analysis, in our view, should have been controlling in Bowers and should control here. Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.”

In this passage, the Court tells us not just what it holds about Bowers—that it was wrong when it was decided and is wrong now—but why: Justice Stevens’s analysis in his Bowers dissent “should control here.” It explains not only why Bowers was wrong, but why the Court reaches the opposite result in Lawrence.

Just before saying that Justice Stevens’s analysis should have been controlling in Bowers, the Court quotes part of his analysis. In the quoted passage, Stevens says that “prior cases” make “two propositions abundantly clear.” First, the cases establish that the belief of a majority of people that a practice is immoral is not enough to uphold a law banning it. For that principle, Justice Stevens relies on Loving v. Virginia, the decision that struck down Virginia’s law against interracial marriage. The Loving decision rested on two independent constitutional grounds. The Court held that the law violated the Equal Protection Clause because it categorized couples by race. Apart from that, the Court held that the law violated the Due Process Clause by restricting access to the fundamental right to marry. For our purposes, the critical point is that Stevens rests the first of his two-point analysis on a case with two holdings: one, a strict scrutiny equal protection holding, and the other,

33. Lawrence, 539 U.S. at 578.
34. Id.
35. Bowers, 478 U.S. at 216 (Stevens, J., dissenting).
36. Id.; see also Loving v. Virginia, 388 U.S. 1 (1967).
37. See Loving, 388 U.S. at 7-12.
38. Id. at 12.
a strict scrutiny due process holding.\(^{39}\)

In the passage quoted by the *Lawrence* opinion, Stevens goes on to say that the other point established by prior cases is that decisions made by married couples about "the intimacies of their physical relationship" are protected by the Due Process Clause of the Fourteenth Amendment.\(^{40}\) For that principle, Stevens relies on *Griswold v. Connecticut*, which used strict scrutiny to strike down a ban on the use of contraceptives.\(^{41}\) Stevens goes on to point out that under *Carey v. Population Services*\(^{42}\) and *Eisenstadt v. Baird*,\(^{43}\) that protection applies to unmarried couples as well.\(^{44}\)

All of the due process cases on which Justice Stevens relied are strict scrutiny cases.\(^{45}\) Thus, the "controlling" analysis which required that *Lawrence* overrule *Bowers v. Hardwick* is based on strict scrutiny due process. Those who see *Lawrence* as a rational basis case argues that despite all this, *Lawrence* cannot be a strict scrutiny case because it fails to include an evaluation of whether the right it enforces is firmly rooted in American history and tradition. After the Court’s decision in *Washington v. Glucksberg*,\(^{46}\) the critics say, only rights that are "deeply rooted in this nation's history and tradition" qualify for any form of "heightened scrutiny."\(^{47}\)

It is a pity that the *Lawrence* decision does not address this objection directly, as there are several good responses. The right of two adults to decide how they will be sexually intimate is "deeply rooted" in American history and tradition. As the American Civil Liberties Union, the Cato Institute, and a group of history professors led by George Chauncey all argued to the Court in

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40. *Id.*
41. 381 U.S. 479 (1965).
42. 431 U.S. 678 (1977).
43. 405 U.S. 438 (1972).
44. *Id.* There is room for a little argument about whether *Griswold* is truly a strict scrutiny case, a protected liberty case, or something of a mix. Justice Douglas’s opinion for the Court uses something like a "narrowly tailored" analysis to strike the law down, but he never speaks of compelling interests. *Griswold*, 381 U.S. at 485. Justice Goldberg, writing for Chief Justice Warren, Justice Brennan, and himself, uses the language of traditional strict scrutiny. *Id.* at 497-98. Justice White’s words are maddeningly confusing. When he speaks of what the Constitution requires of the state, he says the interest must be "compelling." When he speaks of what it will take for the state to meet the test, he speaks of a "legitimate and substantial interest" and a law which is not "arbitrary and capricious," pretty well rolling the rhetoric of strict scrutiny and rational basis together. *Id.* at 504. Justice Harlan incorporates his dissent in *Poe v. Ullman*, 367 U.S. 497, 554 (1961), to explain his view. In *Poe*, he says that a "rational basis" would not be enough to uphold the law and that he thinks the state itself does not think its interest is "very important" or the means used to effectuate it "appropriate or necessary." *Poe*, 367 U.S. at 554.
45. *Eisenstadt*, 405 U.S. at 438, is an equal protection case.
Lawrence, American history shows that while many, perhaps even most, forms of mutual non-procreative sex were prohibited by the law everywhere in the United States, people were virtually never prosecuted for it.48

The Lawrence Court used this evidence to demolish the claim made in Bowers that the existence of laws against non-procreative sexuality foreclosed any claim that it was protected by the Due Process Clause. But Lawrence did not say that the virtually uniform failure to use the laws against adult couples in fact demonstrated that their private behavior was beyond the reach of the law. Justice Scalia says non-enforcement could not be the basis for finding that there is a history and tradition of leaving alone adults who want to be together in the bedroom.49 But why not?50 The consistent refusal of a society to invoke a law against some of the conduct to which it facially applies powerfully suggests a consensus that this conduct is off limits.51 Laws against battery—any harmful touching, no matter how slight—contain no exception for mild or moderate corporal punishment inflicted on children by their parents. Does it follow that the fundamental right to raise children does not include the right to administer physical punishment? Or does it instead follow that it is so well understood that the right does include the right to physical punishment that no statutory exception has ever been thought necessary?

The nonuse of the sodomy laws did not “occur” in a vacuum. The “hands off” treatment of adults at home in post-Revolutionary America reflects a widespread, fervent belief that the government had no place in the home and, in particular, no place in the bedroom.52 Justice Scalia would like to have the Court say that only those rights that have historically been protected by positive law are fundamental. This view is a critical part of his long-running campaign to bring substantive due process back to its Lochner era roots by making it a break against change in the law.53 But the Court has steadfastly refused to go along with Justice Scalia’s analysis—statutory law is not the only important tradition from which we derive fundamental rights.54

While the Lawrence Court probably could have shown that the right of adults to decide how to be sexually intimate is “deeply rooted” in American

48. Brief of Amicus Curiae The American Civil Liberties Union, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Amicus Curiae Cato Institute, Lawrence (No. 02-102); Brief of Amicus Curiae History Professors, Lawrence (No. 02-102).
49. Lawrence, 539 U.S. at 597 (Scalia, J., dissenting).
50. The suggestion that the laws were not enforced because it was impossible to find evidence of violations will not hold up. Remorseful, angry, and spiteful co-participants are always a possibility, as are the prying neighbors who could certainly provide “probable cause.” See, e.g., JOHN D’EMILIO & ESTELLE FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 27, 29 (1988).
52. See D’EMILIO & FREEDMAN, supra note 50.
53. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 123 (1989). This is a longer discussion for another day.
history and tradition, the Court was right not to do so. The Lawrence Court did not find a new constitutional right; it simply applied a right it had protected long ago to a new context. And the application of an existing due process right to a new situation does not require a new "history and tradition" analysis.

When the Court in Troxel decided whether a judge could overrule the decision of a fit parent about when a child would see her grandparents, it did no historical analysis to see if the traditional right to raise children included a right not to be second-guessed by courts on decisions about visitation with grandparents—a question it had never answered before. When the Court decided that the "fundamental right to marry" applied to prisoners, it did no new historical analysis, even though it had never decided if the right applied in prison before. When the Court decided that the fundamental right to "personal choice in matters of marriage and family life" included the right of a woman to live with her son, his child, and the son of another of her children, it did no new historical analysis, even though it had never decided if the right to family life included the right of grandchildren who were cousins to live with their grandmother. No new right; no new analysis.

The Court in Lawrence is rather clear that it does not see itself describing a new right. It says the "most pertinent beginning point" for its analysis is its 1965 decision in Griswold v. Connecticut. After a short paragraph describing the case, it sums up its understanding of what Griswold means in a sentence describing the holding in Eisenstadt v. Baird: "After Griswold it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."

That sentence telegraphs what the Court will hold expressly a few paragraphs later: the simmering dispute about whether Griswold is more properly understood to be about the right of a married couple to decide to have non-procreative sex or their right to decide not to have children—contraception—is over. Griswold is about sex and relationships.

That certainly was what the language of Griswold itself seemed to say. The lead opinion in Griswold spoke of a "relationship" protected by a zone of privacy. It described the right of privacy as "older than the Bill of Rights" and then said that "marriage" is "intimate to the degree of being sacred." "It is," the Court said, "an association for as noble a purpose as any involved in our prior decisions." It was not contraception that was sacred or dedicated to a noble purpose; it was the relationship of two people who married. The Court asked rhetorically: "Would we allow the police to search the sacred precincts of

60. Lawrence, 539 U.S. at 565.
marital bedrooms for telltale signs of the use of contraceptives?” The Court further stated that “[t]he very idea [of a search of the ‘sacred precincts’ for evidence] is repulsive to the notions of privacy surrounding” not contraception, but “the marriage relationship.”

The idea that Griswold was about contraception, and not the relationship of two married adults, was set up, oddly enough, by Eisenstadt v. Baird. In what is probably dicta in its equal protection decision extending the Griswold right to unmarried couples, the Court famously said, “If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

Note the Court did not say the right involved was the right to be free from interference with decisions about childbearing. It said it was the right to be free from “intrusion into matters so fundamentally affecting a person” as the decision to have children. It cited three cases. Skinner v. Oklahoma addressed a state’s power to take away the ability to decide to have children. Stanley v. Georgia and Jacobson v. Massachusetts, while about privacy, did not. Eisenstadt held that contraception for everyone was included in the Griswold right. It did not say that was the entire scope of the right.

In what was probably an effort to prevent Griswold from being read narrowly to apply only to people who were married or in marriage-like relationships, the Court insisted in Carey v. Population Services International that the right covered decisions about childbearing generally, relying on Eisenstadt. That description was then used in Bowers v. Hardwick to suggest that Griswold, Eisenstadt, and Carey were only about childbearing. That does not make much sense as an interpretation of Griswold. After all, Connecticut did not say (at least, not in this particular law) that married couples had to have children or that they could not decide not to have children. The state only said that married couples could not have sexual intercourse unless it was aimed at,
or at least took the risk of, procreation. Connecticut did not mandate childbearing; it limited sexual intercourse.

But to understand Griswold as a case about sexual intercourse is also to miss the point. As the Griswold court itself said, the problem was policing the “sacred precincts” of the “marital bedroom.” The vice in the Connecticut law in Griswold lay in its attempt to police “a coming together” of two people, “hopefully enduring” and “intimate to the degree of being sacred,” an “association” for a “noble purpose.”68

A very similar failure to get the point was the problem with Bowers. Bowers, the Lawrence Court tells us, “failed to appreciate the extent of the liberty at stake.” Bowers was no more about a “right to engage in certain sexual conduct,” Lawrence insists, than a case about a married couple—like Griswold—could properly be said to be “about the right to have sexual intercourse.”69 The intimate relationship of two adults who decide to participate in “the most private human conduct, sexual behavior” is the thing the law protects.70 The laws involved in Bowers and Lawrence, the Lawrence Court tells us—like the law involved in Griswold—“purport to do no more than prohibit a particular sexual act.” But, in fact, they “seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”71

Griswold, broadened by Eisenstadt and Carey and reaffirmed by Casey, says that the Constitution protects the relationship of two adults who are sexually intimate and limits the power of the state to interfere with the conduct that is a part of that intimacy.72 What is at stake in Lawrence, then, is not whether the court will read the federal Constitution to “confer” a new “fundamental right upon homosexuals to engage in sodomy.”73 It is whether gay people have the same right to intimate relationships recognized in Griswold. The answer, quite simply, is yes.

It suffices for us to acknowledge that adults may choose to enter into this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.74

Putting together what the Court says, gay people have the right to choose

70. Id. at 567.
71. Id.
72. Id. at 564-67.
74. Lawrence, 539 U.S. at 567.
"this choice") to enter personal relationships ("this relationship") in which the "most private human conduct, sexual behavior," occurs. That relationship, which is what the laws of Texas and Georgia "[sought] to control," is protected by the Constitution, for gay people just as it is for heterosexuals, just as it is at its root for married couples. I am not saying that it wasn't possible to write Lawrence in a way that would have walked us through the doctrine more simply. But taken at its words, the meaning of the Lawrence opinion is clear enough. People have the right to form intimate relationships involving sex. That is not a new right; the Supreme Court recognized it forty years ago in Griswold. Gay people have that right as much as anyone else.

II. REFINING SUBSTANTIVE DUE PROCESS

A. Toward a More Sophisticated Substantive Due Process Analysis

If Lawrence is based on the same fundamental right that Griswold found, we are still left with something of a puzzle. Why, in this brilliantly rich opinion, does the Court use "protected liberty" rhetoric to describe the right at issue and use "protected liberty" balancing analysis to decide the outcome, while invoking "fundamental rights" case law and holding that a "fundamental rights" analysis from another case (Stevens's dissent in Bowers) is "controlling"?

I suspect that the Court is in the process of collapsing the two lines of case law into one. For some time, the Court has been dissatisfied with the relatively inflexible doctrine it created for both due process and equal protection. Both systems have a lower standard "deferential" in name, but most of the time, despite the Court's occasional insistence to the contrary, this standard is pretty toothless in fact. While lower level equal protection review at least has a few tools to root out real inequality in contexts that are not suspect, minimum scrutiny due process really does not. The upper standard under both systems, as Gerald Gunther said, is notoriously "strict" in theory but fatal in fact. The middle tier under equal protection neutralized the adjectives so that it is not clear at the start who will win, but has failed to develop much to explain in a principled way how it is supposed to work. And it has not seemed to work so well.

The "protected liberty" due process cases, on the other hand, have been more sophisticated from the start. In Youngberg v. Romeo, for example, the

75. Id.

Court said it did not want to simply leave balancing individual interests against the state's interests to the "unguided discretion" of lower courts. In assessing the individual interest at stake, the Court said that a committed individual's interest in freedom from restraint and in personal safety were somewhat in tension. In evaluating the state's interest, the Court took into account the difficulties of running a state home for people who are mentally ill. Out of those two inquiries, the Court put together a rather specific set of balancing rules: judgments about restraint have to be made by medical professionals; so long as they are, they are entitled to a "presumption of correctness," subject to being overturned only if the decision was a "substantial departure from accepted professional judgment."  

Just a few days before it handed down its decision in Lawrence, the Court decided another "protected liberty" case, Sell v. United States. In Sell, the Court set out standards for deciding when a person can be forced to take anti-psychotropic drugs in order to stand trial. Sell lays out a four-part analysis that focuses the Court's evaluation on individual and state interests. First, the Court has to look closely at the state's interest. The state has a legitimate interest in prosecution, but if the crime did not involve violence, it may not be quite so compelling. If the result of refusing the drugs is a long incarceration, that may diminish the state's interest in prosecuting a criminal case as well. Second, the Court needs to ask if the drugs will really advance the state's interest. Some drugs could so interfere with perception that a trial would not be fair. Third, the Court insists that there be no less intrusive alternatives that would achieve the same results. Finally, the court must decide that the drugs are in the patient's best medical interest, which may depend on the drug.

Sell is the toughest of the Court's three cases on forced administration of psychotropic drugs. Washington v. Harper, which involved forced drugging for safety in prison, is the most deferential to the state. Riggins v. Nevada, which involves drugging so that a defendant could stand trial for murder, sets up a tougher standard than Harper does, but not one as tough as that of Sell. In Harper, the Court is clearly more deferential because there is a safety-to-self issue, which somewhat compromises the individual interest in refusing the drug, and because of the prison context, which gives the state significantly

78. Id. at 321-22, 324. I admit Youngberg is a somewhat arbitrary place to begin; the due process "freedom from restraint" idea can be traced further back.
80. See id. at 179-82. Interestingly, although Sell was decided just 10 days before Lawrence, and although it plainly uses the Court's "protected liberty" due process analysis, Justice Scalia dissents only on the basis that the underlying decision was not final. He does not insist, as he does in Lawrence, that there is no "protected liberty" due process analysis and that all substantive due process cases are either strict scrutiny or rational basis decisions.
more power.\textsuperscript{83} \textit{Sell} is clearly less deferential than \textit{Riggins} because it thinks the charges—which stem from fraudulent medical claims as opposed to murder—and the fact that refusing the drug may result in longer incarceration, reduce the state's interest.\textsuperscript{84}

\textit{Youngberg}, \textit{Harper}, \textit{Riggins}, and \textit{Sell} remind me of the Court's approach to free expression. It has always seemed that at the core, most First Amendment cases turn on the Court's examination of four things: the way the government is attempting to limit expression (viewpoint, content, secondary effect, etc.); the extent to which expression will be seriously curtailed (prior restraint, criminal conviction, chilling effect, time and place); the importance of the government's interest; and the extent to which the government needs the limitation it seeks to achieve its aim. Looking again and again at groups of similar cases, the Court has evolved quite a few refined First Amendment balancing analyses: clear and present danger; compelling interest (in its somewhat different content and viewpoint formulations); the \textit{O'Brien} test; and the time, place, and manner test, for example.\textsuperscript{85}

This may even be a clumsy oversimplification of freedom of expression analysis. Nonetheless, it offers a far richer analytic framework than the rigid three-tier equal protection system and the even more rigid two-tier due process analysis Justice Scalia advocates. Under the First Amendment, we look with much more care both at the ways individuals are affected by state regulation and at the state's asserted need for the regulation and its care in crafting it. Free expression is the most mature body of rights law, so it makes sense that it would be the most sophisticated. But it also makes sense that equal protection and due process ought to evolve toward a more sophisticated approach. Equal protection analysis, for example, ought to have the capacity to evaluate government actions that violate the central concept of equality outside the context of historically suspect classifications. Due process analysis, for example, ought to have the capacity to evaluate government actions that put real disincentives on a protected activity without treating them either as if they were an outright ban or of no significance to the protected right at all. That kind of evolution, it seems to me, is just what the Court has been working toward.

\textit{Lawrence} was not the first time the Court used the language of "protected liberty" in a case not involving forced medication of someone in state custody. \textit{Cruzan v. Missouri Department of Health} described the right involved there—to refuse life sustaining nourishment—as a "protected liberty interest" under the Due Process Clause, a right evaluated by "balancing" the individual's

\begin{itemize}
\item \textsuperscript{83} \textit{Harper}, 494 U.S. at 223.
\item \textsuperscript{84} \textit{Sell}, 539 U.S. at 179-182. \textit{Sell} has its problems analytically. While the Court explains how to figure out when the state can forcibly medicate, it never discusses why this framework is required by the Due Process Clause.
\end{itemize}
interest against those of the state. Perhaps more importantly, in Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court, while saying that it was reaffirming the central holding of Roe v. Wade, virtually abandoned “fundamental rights” terminology. “The controlling word in the cases before us,” the Court said near the start of its opinion, “is 'liberty.'” From that point on, the Court framed its decision in terms of “the substantive liberties protected by the Fourteenth Amendment.”

The Casey decision reaffirms that any attempt by a state to prevent a woman from terminating a pregnancy before viability would be subject to strict scrutiny and would be, as the Court candidly admits, struck down. But, the Court says, some laws aimed at other things which may have an incidental impact on the ability to end a pregnancy should not have to pass so tough a test. Moreover, the Court says, the state has a legitimate interest in trying to protect potential life—an interest that ought to allow it to attempt to dissuade a woman from having an abortion as long as it is not really trying to block her from obtaining the procedure.

Whatever one thinks of the outcome in Casey, it is a clear attempt at a more sophisticated approach. It is not just that the state is having an impact on a woman’s bodily integrity that a court should examine—it is the extent to which the regulation the state proposes would limit a woman’s control. A substantial limitation will trigger the Roe analysis. Something less will not. And while the state’s interest in preserving potential life is not sufficient to allow it to prevent an abortion, it is strong enough to let the state try to persuade a woman not to abort, as long as it does not actually erect a substantial barrier.

Due process analysis in abortion cases remained rather rigid after Casey; with “substantial obstacles,” or, as the Court calls them, “undue burdens,” old-fashioned strict scrutiny applies. Otherwise, the state wins. But Casey does more than just shift back the line established by Roe. It begins to take account of the more complex ways in which “protected liberty” questions arise and refines the approach based on a closer look at the state’s interests and the ways in which the individual’s rights are limited. At least in terms of the factors it takes into account, Casey begins to look more like First Amendment analysis.

Lawrence is the critical next step because it brings the balancing analysis of “protected liberty” cases into a case that the Court finds to fall squarely within the “fundamental rights” doctrine. This suggests that the Court would like to eliminate the term “fundamental right” completely and start speaking of all “heightened scrutiny” due process cases as cases about “liberty.” I suspect

87. Casey, 505 U.S. at 846-49.
88. Id. at 869-877.
89. Id. at 877.
90. Id. at 878.
that the Court would like to use the balancing approach of the "protected liberty" cases in all substantive due process cases that involve implicitly protected rights and ask not only whether a "fundamental right" is implicated by a case, but also how much the government has focused on the right itself as the thing it wants to limit and how seriously the right would be limited if the government were to prevail. I think the Court would like to ask why the government wants to regulate and be more demanding in terms of both the importance of the goal and the evidence that the particular means will help achieve the goal. Like the First Amendment, substantive due process could develop a series of balancing tests, keeping strict scrutiny and rational basis at the extremes, while developing a directed but sensitive group of analyses in between.

An approach like this would go a long way toward solving one of the persistent problems of the "two-tier," all or nothing approach in substantive due process: courts, particularly lower courts, often pretend that protected interests are not involved in cases where they really are. For example, courts treat both benefit programs that use marriage to determine eligibility and anti-nepotism cases as not involving enough of a "direct and substantial" burden on the right to marry to call upon strict scrutiny. But there is a vast difference between a program that uses a relationship in an attempt to make a reasonable assessment about living arrangements, like the benefit programs do, and one that treats the protected relationships as a problem. It borders on the absurd to say that anti-nepotism policies do not have a direct impact on family relationships.

The rigid "two-tier" approach also leaves out what are often the most important considerations in evaluating the way a policy impacts a protected interest. It may be that the best argument for the use of family relationships in benefit plans is that the impact on protected relationships is, at most, incidental. But it is also significant that the government's interest is completely unrelated to controlling the protected activity. The best argument for anti-nepotism policies is probably that relationships do, in some circumstances, interfere with the smooth functioning of the workplace. The "direct and substantial" line ignores almost all of this. All of these considerations would be taken into account in the kind of balancing approach the Court typically does under the First Amendment.

A sophisticated balancing approach will give greater protection to rights implicitly protected by due process because it will allow courts to examine limitations short of outright prohibitions without having always to strike them down. Such an approach will give greater flexibility to the government to undertake limited regulation that is not aimed at effectively forbidding the exercise of the right. If this is where the Court is headed, it makes sense that Lawrence would use "protected liberty" terminology and balancing interests in

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a case that is controlled by *Griswold* strict scrutiny. Strict scrutiny is now just
one form of due process balancing. But why didn’t *Lawrence* then take a
closer look at the state and individual interests involved?

The answer, I think, is that Texas did not give the Court much with which
to work. Its device—a criminal prohibition that gets used mostly as a civil
disability—is on the heavy-handed end of the spectrum. Its “interest,” on the
other hand, could not have been less respectable. While the state said its
interest was the preservation of morality, in the end all it had was the “moral”
view that sexual intimacy is bad when gay people engage in it, but not when
straight people do so. Using the law to express the idea that some people are
immoral, as explained above, is improper. Thus, *Lawrence* presented state
interference with a core—fundamental, if you will—due process liberty with
nothing in the way of a legitimate, much less compelling, explanation as to
why.93

If the Court is moving toward a more First Amendment-like analysis for
due process cases, one that uses a strict scrutiny balancing analysis in some
cases, and other balancing approaches for devices which do not intrude so
starkly on core rights and that reflect serious state concerns, *Lawrence* was not
much of a vehicle for laying out the new approach. It simply was not rich
enough. Under the circumstances, it probably made the most sense to do what
the Court did: reinforce the “liberty” terminology, invoke the existing right that
in fact applied, and do a balance without saying much more.

B. Reestablishing the Proper Role of History in Identifying Protected Liberty

If anything, the *Lawrence* opinion is even less clear about the second
critical change it makes to due process: restoring the proper role of history in
defining the scope of implicitly protected rights.

While the Court’s decisions prior to *Bowers v. Hardwick* made history and
tradition a—and perhaps the—critical factor in deciding what interests are
protected by the Due Process Clause, it never accepted traditional restrictions
on who was able to exercise the rights that history identified. On the contrary,
many of the Court’s important due process liberty decisions could not have
been decided as they were had the Court restricted the rights it identifies
through history to those who had the historical right to exercise them.

At common law, a child born out of wedlock was “nullis fillius, the son
[sic] of no one.”94 Most American states changed that, so that “illegitimates”
were the children of their mothers. They were not, however, the children of

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93. Respondent’s Brief at 26-7, 42-8, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-
102).
94. Hughes v. Decker, 38 Me. 153 (1854); see also Wright v. Wright, 2 Mass. 109, 110
(1806) (Parsons, J.).
their fathers, who generally had no legal connection to them at all. But in Stanley v. Illinois, the Court took it as virtually axiomatic that the relationship of children to a father who had never married their mother, nor otherwise "legitimated" them, was covered by the "cardinal" due process right of parents to care for and raise the children they create.

As of 1948, thirty states banned interracial marriages, and six states had those bans in their state constitutions. Sixteen of those bans were still on the books in 1967 when the U.S. Supreme Court said that miscegenation laws violated the fundamental right to marry, guaranteed by the Due Process Clause. As slaves, African-Americans had no right to family at all and could be separated from partners, parents, and children at the whim of their "owners." Needless to say, there was no American "history and tradition" of allowing interracial marriage.

True, Loving was about race, the ultimate suspect classification. But the Loving decision took care to say that it was independently based on both equal protection, because the law used an impermissible race classification, and on due process, because the restriction limited the exercise of the fundamental right to marry. In Zablocki v. Redhail, eleven years later, the Court called Loving its "leading decision" on "the right to marry" and explained that "[a]lthough Loving arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."

Moreover, neither Zablocki itself nor Boddie v. Connecticut could have been decided as they were if history and tradition dictated not just what is protected by due process, but also who can exercise the rights it protects. Zablocki was about a Wisconsin law that forbade remarriage after a divorce unless the parent was current in his child support payments and had a court order certifying the fact. The Court held that both requirements interfered with

97. See Loving v. Virginia, 388 U.S. 1, 6 & n.5 (1967). The Loving decision says that 16 states had laws against interracial marriage when it was decided, and that 14 more had repealed theirs "over the past fifteen years." Actually, states began to eliminate their laws in 1948, four years earlier. See Perez v. Sharp, 32 Cal.2d 711 (1948). At least one of the dissenters in Perez agreed with the Loving Court's count. See id. at 747 (Schenk, J., dissenting). The six states with constitutional bans were Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee. See also R.A. Lenhardt, Understanding the Mark: Race, Stigma and Equality in Context, 79 N.Y.U. L. REV. 803, 855-6 (2004).
the fundamental right to marry and were not justified by any sufficient countervailing state interest. Boddie was a challenge to a Connecticut law that refused to waive mandatory filing fees for indigent people who wanted to divorce. The Court also struck that law down as an impermissible interference with the right to marry.

But we have no firmly rooted tradition of requiring that the government allow either easy divorce or remarriage. England was, with a few rare exceptions, a "divorceless" society until 1857. In southern states, divorce was rare or nonexistent until the mid-nineteenth century. The northern states allowed divorce for reasons such as abandonment, adultery, and "gross misbehavior and wickedness," but it remained rare, and the only form of consensual divorce was the collusive divorce designed to get around the law when both parties wanted out of the relationship.

We may pride ourselves on a history and tradition of protecting freedom from "bodily restraint" and say that this most basic freedom is at the "core of the liberty protected by the Due Process Clause." We do not have a long history and tradition, however, of recognizing that the mentally disabled have a right to freedom from restraint. Nevertheless, in the end the Court had no difficulty concluding that the Due Process Clause protects them as well.

But unlike the rest of modern substantive due process cases, Bowers did not draw a who line and say that a right fundamental to some Americans was unavailable to others. The Bowers Court was not about to limit the right of privacy found in Griswold and Eisenstadt to certain acts and hold that the "sacred precincts" of marital and non-marital bedrooms could now be searched for evidence of sodomy (which, by the way, is exactly what happened to Michael Hardwick). Thus, it said the issue was not whether Americans had a right to any form of non-procreative sexuality (or the one at hand), but was instead "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ."

The issue for the Court was whether gay people had the same right to privacy that other Americans had. So the Court had to come up with some

100. Zablocki, 434 U.S. at 388-91.
107. The fundamental problem with this view of the case was that Georgia's law did
way of explaining why the constitutional right to privacy was limited to heterosexuals. Brushing aside its own precedents as not on point, the Court turned to history to find the scope of the fundamental right. History, the Court said, made it "obvious" that the Constitution did not "extend a fundamental right to homosexuals to engage in acts of sodomy." That conclusion followed, the Court said, from the criminal proscriptions on sodomy, which made any claim that the right was "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty . . . at best, facetious."  

There were two problems with this argument. First, the Court failed to give any reason why, in this case alone, a fundamental right should be limited to those who had historically been allowed to exercise it. Second, and as a practical matter more serious, the "traditional" line the Court wanted to draw did not exist in history at all. America had no tradition of outlawing "homosexual sodomy." As the Lawrence Court pointed out, it was not until the 1970s that any state singled out same-sex intimacy in its criminal laws. The historical record simply gave the Court no basis for drawing the line at heterosexuality. Worse, the historic practice of not applying sodomy statutes to adults in their own homes—perhaps the best argument for Griswold and the right to privacy it found—did not distinguish between gay people and straight people.  

Apart from the unexplained and, in a principled way, probably inexplicable result in Bowers, it has seemed almost obvious to the Court that once the Court has identified a protected right, the right belongs to everyone. Remember the insistence in Eisenstadt that "if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or begat a child."  

Still, if Bowers was flawed because it offered no theoretical justification for limiting a fundamental right to some Americans, there ought to be a theoretical justification for insisting that the liberties protected by the Due Process Clause are the liberties of all Americans and not just those who had not say that homosexuals could not commit sodomy. Georgia said no one could. See Ga. Code Ann. § 16-6-2 (2004). The Court simply ignores that detail and says that Georgia's law was about disapproval of "homosexual sodomy." See Bowers, 478 U.S. at 190.  

108. Id. at 190-94.  
110. See supra notes 50-54 and accompanying text (explaining that in post-Revolutionary America, laws about sex were never invoked against couples, straight or gay, who were intimate in their own homes). The failure to apply these laws to conduct facially encompassed within them powerfully suggests a widespread understanding that private sexuality was beyond the reach of the law. That widespread understanding may be the best justification for Griswold's holding that private sexuality is implicitly protected as a basic liberty under the Due Process Clause. But, of course, that history suggests the understanding, and hence the right, belonged to all adults, not just heterosexuals.  

them historically. There is. The two great principles upon which this nation was founded are liberty and equality. They are not in conflict—at least not as they are understood in American law—and due process should not vindicate one at the expense of the other. Others will have to figure out why the protection of life and liberty made it from the Declaration of Independence into the Bill of Rights, while the cherished notion that all men are created equal did not—at least not in so many words. Maybe equality was one of the basic “natural” rights to which the Ninth Amendment refers. Maybe the politics of slavery and union made using the word “equality” too much of a hot button. But perhaps the most compelling explanation is that equality is implicit in due process itself. The most basic component of due process, the rule of law, very much embodies the notion of equal justice and a single rule of law for all. That would certainly be consistent with the Court’s notion that discrimination can be a violation of due process, and, most recently, its notion that the equality requirement implicit in due process is indistinguishable from the equality guaranteed by the Equal Protection Clause.

Certainly the Lawrence Court seemed to think equality was a central element of due process. In a somewhat unusual passage, the Court explained why it chose to rest its decision on the Due Process Clause instead of the Equal Protection Clause. The Court said it was worried that an equal protection ruling might bring about two undesirable results: first, that a law which applied to gay and straight couples might be thought valid, and second, that the stigma of Texas’s law would remain. Either of those things, the Court said, would be “an invitation to subject homosexual persons to discrimination both in the public and private spheres.” The fear that an equal protection decision would continue to allow discrimination against gay people led the Court to strike the law down on due process grounds. That was constitutionally appropriate, the Court explained, because “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty

112. See DECLARATION OF INDEPENDENCE (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.”); see also President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (“Fourscore and seven years ago our forefathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal.”).


115. On the Court’s evolving attitude toward equality and due process, compare Bolling, 347 U.S. at 497 (while equal protection and due process are not interchangeable, discrimination can be so arbitrary as to violate due process) with Buckley v. Valeo, 424 U.S. 1, 93 (1976) (equality requirements of due process and equal protection are the same).

116. Lawrence v. Texas, 539 U.S. 558, 575 (2003). The parties took some pains to show the Court that facially “neutral” sodomy laws had in fact been used in all sorts of ways to discriminate against gay people. See Brief of Amicus Curiae American Civil Liberties Union at 7-17, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).
are linked in important respects, and a decision on the latter point advances both interests.” The Court decided on the basis of the Due Process Clause because a due process decision would serve the constitutional interest in equality and here, the Court thought, would in practice serve that constitutional interest in equality more effectively than would an equality-based decision.

Still, if Lawrence is a straightforward application of the existing Griswold right, why did it seem so clear to some of the Justices at the time that Griswold would not apply to homosexuality? In his famous dissent in Poe v. Ullman, Justice Harlan wrote:

Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State’s rightful concern for its people’s moral welfare. But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.

Justice Goldberg effectively adopted these words in his concurring opinion four years later in Griswold. Is the evolution from Griswold to Lawrence an example of the kind of evolving notions of due process that drive the historical purists to distraction? Maybe, but more likely, it is an example of our evolving notions of what it means to be a human being. To return to an example, it seemed perfectly plain to Oliver Wendell Holmes that forcibly sterilizing someone who was mentally disabled did not violate due process. At one time, public officials saw nothing wrong with confining for years mentally disabled individuals who posed no threat to anyone. And of course, there are the more obvious examples. At one time, due process was no bar to treating African Americans as property. Indeed, the Court said that when the government decided a slave was no longer property, that violated due process. Those ideas changed because our ideas of what it means to be human changed.

At one time, American lawyers thought of intimacy with another person of the same sex as just one bad choice that anyone was capable of making—a bad choice like a lawyer deciding to go along with a fraudulent accounting practice. This concept of sexual acts as being simply what a person does, and not a reflection of an important part of personality, probably reflects the pre-

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117. Lawrence, 539 U.S. at 575.
119. Griswold v. Connecticut, 381 U.S. 479, 498-99 (1965). Oddly enough, in his own opinion concurring in the Griswold judgment, Justice Harlan did not either make the point again or even allude to what he had said about homosexuality in Poe. Id. at 499-502.
twentieth century understanding that sexuality was not an importantly distinct or defining part of human personality. In any event, it seems clear that after World War II, the cultural notion that there is a group of people who find fulfillment in primary relationships with members of the same sex began to emerge. I say began to emerge, because by 1965 the idea that there were gay people who built primary intimate relationships with members of the same sex was just beginning to gain recognition.\textsuperscript{122}

The passage from Griswold to Lawrence is one way to map the arc of the gay rights movement in America. In 1965, three of the most progressive Justices saw homosexuality as "promiscuity or misconduct." Thirty-eight years later, a majority of the Court saw it as a "personal relationship" parallel to the intimate relationships of heterosexuals and parallel to marriages. Once it is clear that being gay or lesbian is not about giving in to an urge for a different but dangerous taste, like corn whiskey, but is instead a different way of building a life—once it is plain that homosexuality is the right way for some to build a fulfilling existence—Lawrence follows Griswold as day follows night. The movement has been about changing the understanding of what it means to be gay and of how being gay changes the way human beings live.\textsuperscript{123}

Lawrence itself sees the progression from Griswold not as an evolution in due process, but as an evolution in human understanding. In the very last passage, Justice Kennedy tells us:

\begin{quote}
[The authors of the Fifth and Fourteenth Amendments] 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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.\textsuperscript{124}
\end{quote}

Time has taught us that much of what we once "knew" about gay people was wrong, just as time taught us that immemorial "truths" about women, Asians, black and brown people, the Irish, Italians, and Jews, and others were not true.\textsuperscript{125} Time has taught us that gay people are people and are thus entitled to constitutional protections the Court found almost forty years ago for heterosexuals.

\textsuperscript{122} DAVID M. HALPERN, ONE HUNDRED YEARS OF HOMOSEXUALITY (1990); ALAN BERUBE, COMING OUT UNDER FIRE (1990).

\textsuperscript{123} Lawrence v. Texas, 539 U.S. 558, 567 (2003); Griswold, 381 U.S. at 498-99 (Goldberg, J., concurring). There is at least a small irony here in that the key to the constitutional right which will make assimilation easier was to establish a basic difference.

\textsuperscript{124} Lawrence, 539 U.S. at 579.

The *Lawrence* decision arrived just over two weeks after the Ontario Court of Appeals ruled that same-sex couples could no longer be excluded from marriage.\(^{126}\) The *Lawrence* opinions all address the marriage issue in one way or another. The majority is studiously noncommittal. When explaining how the Texas law does more than make an act a crime, the Court observes: “[Sodomy laws] seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”\(^{127}\) In closing, the Court again says that it has nothing to say about marriage, because the issue is not before it.\(^{128}\)

Justice Scalia will have none of it; “Do not believe it,” he cries. The opinion of the Court “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.”\(^{129}\)

Does it? Not really, because there was never a “structure of constitutional law” of that sort. The exclusion of same-sex couples from marriage could never have withstood equal protection or due process analysis fairly applied. But *Lawrence* did take away the illusion of a principled basis for upholding the exclusion, and in so doing, it has made federal constitutional attacks on the exclusion a real possibility.\(^{130}\)

The most obvious constitutional problem with the exclusion of same-sex couples from marriage is that it interferes with the federal constitutional right to marry. Unlike most aspects of “protected liberty” due process, which often look like Justice Brandeis’s proverbial “right to be let alone,”\(^{131}\) the right to marry is an affirmative right to receive very important benefits from the government. As mentioned earlier, the Supreme Court has used it to strike down laws against interracial marriage, laws banning marriage by prisoners, laws that made poor people pay fees to be divorced, and laws that said parents could not remarry if they were behind in child support.\(^{132}\) *Loving*, the interracial marriage case, suggests that the Due Process Clause requires limitations on the right to marry to meet the highest constitutional standards, the “fundamental rights,” strict

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128. *Id.* at 578. Justice O’Connor in her concurring opinion makes it fairly clear that she does not think laws excluding same-sex couples from marriage would violate the equal protection analysis she would have used to strike down the Texas law in *Lawrence*.
129. *Id.* at 604 (Scalia, J., dissenting).
130. To say that federal constitutional attacks on the marriage exclusion are now possible is not the same thing as to say that they are, in the short term, a good idea.
scrutiny test. Zablocki, the "deadbeat dad" case, says limitations on who can marry have to meet a similarly exacting strict scrutiny equal protection test.

Defenders of the exclusion never argue that it can meet either test, for reasons that will become apparent. Instead they insist that while there may be a right to marry, there is no right for same-sex couples to marry, and they point to the fact that only one American state has ever allowed it. But this is the who/what protected liberty issue which I discussed earlier. The Court's "protected liberty" due process cases look to history to decide what liberties are protected, but not who gets to exercise them. As I pointed out earlier, if the Court restricted a protected liberty to those who traditionally possessed it, many of the Court's "protected liberty" cases—including at least three of its major marriage cases—would have come out the other way. And not incidentally, the doctrine would ignore the constitutional guarantee of equality, in itself a cardinal due process principle.

Bowers v. Hardwick could never have provided a serious constitutional justification for limiting the fundamental right to marry to heterosexuals because Bowers had no serious constitutional justification for limiting the right to autonomy to heterosexuals. But Justice Scalia's Lawrence dissent was right to a degree; Bowers may never have provided a principled reason for limiting the right to marry, but with Bowers gone, there is no longer even an excuse for limiting the right. But while Bowers may be gone, we should not forget it. The Court showed us in Bowers that under the right circumstances, it was willing to use raw power to make a case come out as it wished, without regard to its prior cases or constitutional theories. The Court could use that same raw power to limit the right to marry.

If it does not, recognition that the fundamental right to marry belongs to gay people is fatal to the exclusion. For even apart from the fundamental right to marry, most explanations of the exclusion are either "irrational," as several courts have said, or face a heightened scrutiny review (that the explanations cannot pass) for other reasons. Those who defend the exclusion have only offered three reasonably conceivable purposes for keeping gay couples out of

133. Loving, 388 U.S. at 12.
134. Zablocki, 474 U.S. at 388.
136. See supra notes 103-120 and accompanying text, where the text explains that, apart from Bowers, the Court has never limited basic liberties implicitly protected by the Due Process Clause to those who traditionally got to exercise them. Limiting due process rights in that manner would offend the core concept of equality implicit in due process itself.
marriage: tradition; the creation and raising of children; and most recently, the possibility that heterosexuals will stop marrying if same-sex couples start.\(^{139}\) In making these arguments, these individuals typically ignore the obvious, real purpose of marriage: making the law reflect the reality of what is, for most adults, one of the most central relationships in their lives.

The critical thing to do with all three of these rationales is to spin them out—to ask precisely how it is that excluding same-sex couples from marriage might be thought to achieve the suggested aim. Like most rationalizations for prejudice, they all appear to have something to do with the subject, in this case marriage, but in the end prove to have little or nothing to do with even a conceivably legitimate reason for discrimination, in this case keeping same-sex couples out of marriage.

As I mentioned earlier, the cardinal principle of equal protection is that a classification can never be its own justification. If a state can be said to treat people "equally" though it treats them differently, it must be because it can fairly be said (or thought on a rational basis) that treating them differently will achieve some legitimate aim of the law (or a conceivable aim on a rational basis). As the Court put it in \textit{Romer v. Evans}, the classification has to promote a purpose "independent" of the classification itself.\(^{140}\) And it is on this cardinal principle that "tradition" as a legitimate purpose comes to grief.

Saying that we want to draw the line at opposite-sex couples because we have long drawn the line there is not much different than saying we want to draw the line at opposite-sex couples because we want to draw it there now. Tradition is not a purpose independent of the line, but rather a purpose that embodies the line, albeit with time added. But the addition of time cannot possibly, without more, be a sufficient independent purpose. If it were, every classification would survive rational basis review as long as it were not a new invention. A bare desire to harm a politically unpopular group, to use the language of \textit{Department of Agriculture v. Moreno},\(^{141}\) would be a sufficient purpose as long as the group's unpopularity were not a new thing.

I am not suggesting that maintaining tradition is not a legitimate reason for having a law. For due process purposes, it doubtless is. Morality and aesthetics are legitimate purposes.\(^{142}\) Surely tradition may be a legitimate purpose as well. But equal protection demands that our traditions, like our moralities and our aesthetics, be neutral. To uphold a "tradition" of treating one group of Americans differently, we must have something more than a habit of doing so.


\(^{140}\) 517 U.S. 620, 633 (1996); \textit{see also} Coles, \textit{supra} note 22, at 1434.

\(^{141}\) 413 U.S. 528, 534 (1973).

We must have some plausible argument that doing so has some consequence (or conceivably could), which achieves (or conceivably might achieve) a legitimate aim.\textsuperscript{143} We tend to think, at least generally, that traditions are good. But we have to demand a little more from a "tradition" of exclusion and ask what independent good that kind of tradition achieves if it is to be anything other than a classification for its own durable sake.

That brings us to the first of the "tradition plus" arguments: creating and raising children. There are two variations on the "children" argument. In one, the argument is that the stability marriage gives to adult relationships creates a good framework for raising children. That is certainly plausible; indeed, it is probably true. But it hardly explains how excluding gay people serves this aim. Gay people have and raise children too. How are children helped, in any conceivable way, by denying marriage to same-sex couples? It does nothing for the children of heterosexual couples, and, if marriage is good for children, the exclusion is harmful to the children of same-sex couples. That the stability of marriage is good for children is a plausible (if incomplete) explanation of marriage; it is not an explanation for why same-sex couples are excluded.

Another variation tries to make a connection between children and the exclusion. This argument theorizes that couples made up of men and women do a better job raising children than do same-sex couples. Thus, excluding same-sex couples from marriage serves the supposed purpose of promoting the raising of children by keeping out those who are not as good at parenting. Although this claim at least provides a rational link between the exclusion and the goal, the connection it provides requires heightened scrutiny. The "link" is based on the assumption that gay people as a group are less capable of being good parents than heterosexuals. Unsubstantiated assumptions of group incapacity are simply not permissible purposes for equal protection. They have to be supported.\textsuperscript{144} Even more critically, people have a constitutionally protected right to have and raise children who are legally theirs.\textsuperscript{145} To actively discourage such activity by denying some couples all of the legal protections of marriage, the state would require more than a rational basis. The state would have prove, at a minimum, that gay people are not as good at parenting and probably also that they pose some harm to their children.\textsuperscript{146} But there is no


\textsuperscript{144} This is the holding of the \textit{Cleburne} case, and, a bit less clearly, of \textit{Moreno}. Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Moreno, 413 U.S. at 536–38. In \textit{Cleburne}, the Court said the "fears" and "negative attitudes" of neighbors, "unsubstantiated by factors which are properly cognizable in a zoning proceeding," were not a permissible justification for discrimination. Cleburne, 473 U.S. at 448. The Court of Appeals opinion makes it clearer that the "negative attitudes" took the form of claims that mentally disabled people would disrupt the peace of the neighborhood, and engage in "dangerous" activities. Cleburne Living Ctr. v. Cleburne, 726 F.2d 191, 201 (5th Cir. 1984).


\textsuperscript{146} See \textit{Troxel}, 530 U.S. at 75; \textit{Bellotti v. Baird}, 443 U.S. 622 (1979). What the
reliable evidence of this at all. Instead, the best the defenders of the exclusion can do is to say that the proof that gay people are as good at parenting as heterosexuals is inconclusive. But you do not need to prove your merit to keep a constitutional right; the state needs to prove your lack of merit to take it away.

The idea that heterosexuals will stop getting married if same-sex couples marry is new, advanced not with logic but supposedly with empirical evidence. The idea, mainly pushed by Stanley Kurtz, is based on statistics from Denmark, Norway, and Sweden, which have had registered same-sex partnerships since 1989, 1993, and 1994, respectively. In all three countries, marriage numbers are down and cohabitation is up, as are the number of couples bearing and raising children outside of marriage.

Unfortunately for Kurtz’s thesis, all three trends apparently long predate the registered partnerships (a fact which he sometimes grudgingly admits). Kurtz suggests that ending the exclusion was accepted in these three countries because couples were having children without getting married and that this made it more plausible to see marriage as being about the couple and not just about raising children. I suppose it is remotely, conceivably possible to think that the decision of some heterosexuals to raise children without marriage led people to see that marriage was not necessarily about raising children, although neither Kurtz nor anyone else has offered any evidence that it did or that people did not see that rather obvious fact long ago. But this hypothesis makes ending the exclusion the result of declining marriage rates, not its cause. Kurtz tries to solve that problem by suggesting that the existence of married same-sex couples will “lock in” the notion that marriage is not just about raising children and over time will make it even more unlikely that heterosexuals will marry. However, he is unable to suggest any reason why this would be so—any reason at all why the existence of same-sex married couples will keep heterosexual couples away. The only one that comes to mind—that heterosexuals do not

want to be a part of an institution that gay people belong to—is not adequate for equal protection purposes.\textsuperscript{152}

The exclusion fares no better if we look to the obvious, real purpose of marriage laws. One of the two untenable propositions that are often taken very seriously in the marriage debate is the idea that the law of marriage is a bundle of privileges designed to induce people to marry. However, almost no one marries to get the advantages of the legal status. People marry because they want to share their lives with each other. The urge to go through life with someone else is a fundamental human desire, not a legal construct. Marriage laws do not induce the relationship; they reflect it. We treat married couples as a single economic unit because that is how they function. We identify a spouse as the person most likely to know a person’s wishes in a medical emergency because it is a reasonable assumption. Marriage laws are the legal reflection of the reality of the way committed couples live.\textsuperscript{153}

Like the “child” rationale, the idea that the purpose of marriage laws is to have the law accurately reflect the relationships of committed couples is a plausible explanation of marriage. It is no explanation of the exclusion at all unless you assume that same-sex couples are different, that they don’t have the kind of relationships that heterosexual couples do. But that would be another assumption of incapacity that would call for proof.\textsuperscript{154} Given the incredible variety of heterosexual relationships, all of which qualify for marriage, it seems a difficult—or rather, impossible—one to prove.

Having covered the modern laws that exclude same-sex couples from marriage, let us turn to the old laws—laws which were passed when it doubtless had not occurred to anyone that same-sex couples even existed. These were probably laws of inclusion, laws that meant to take in everyone who might be in a couple, and also those who might as a couple have and raise children. As an inclusion from another time, the line makes rudimentary—and thus probably rational basis—sense both in terms of couples and children.

Some of those laws are not explicitly gendered, so one way to respond to belated recognition that same-sex couples do exist would be simply to let them marry. Typically, though, courts say that these laws do not allow same-sex marriage because the legislature did not intend to allow it, or would not have if counterfeit $20 bills devalue currency. Timothy Dailey, The Slippery Slope of Same-Sex Marriage, Family Research Council (2005), available at http://www.frc.org/get.cfm?i=BC04C02 (last visited Mar. 16, 2005). The underlying assumption—that the relationships of gay people are unworthy—at a minimum requires heightened scrutiny.

152. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

153. The other untenable idea is that marriage as an institution is mostly about raising children. Certainly marriage plays an important role in creating and raising children. But the relationship of two individuals is at the center of what marriage is about. Kurtz and the Family Research Council may want to consider the ceremonies used for marriage. I believe these ceremonies may be reinforcing the idea that the couple is at the center of marriage.

the idea had come up. Interpret that way, the laws are not laws of inclusion, so they have the same problem that the modern laws have. And laws reenacted after the legislature is plainly aware that same-sex couples do exist seem to me to become exclusions as well.

Tempting though it might be to decide the constitutionality of the marriage exclusion with a rational basis analysis, it really should be analyzed under the right to marry. Since the right to marry applies to gay people, the right to marry is the appropriate analysis. The exclusion cannot help but fail a right to marry analysis. Under heightened scrutiny, it does not matter whether the exclusion was written as an inclusion. Tradition is plainly inadequate—we had a tradition of banning interracial marriage. The "gays are bad parents" argument would need the proof it does not have.

The fact that the exclusion of same-sex couples from marriage is unconstitutional does not necessarily mean it is good idea to bring lawsuits to encourage courts to strike it down. If it is a necessary conclusion that we use history to decide the what but not the who of protected rights, Lawrence is the first case that comes close to explicitly acknowledging the idea and discussing it. When the law is this underdeveloped, it is quite possible for hostile or even overly cautious judges to find ways around applying the Constitution fairly. Look at Bowers v. Hardwick. Whenever you have to spin out a rationale to show that it does not make sense, you run the risk that the Court will just go with its instinct and uphold the law. Look at the last rational basis part of Bowers, which, to support a who limitation in a law that the law did not have, postulates a who driven purpose to the public. Besides, it is notoriously difficult to get past the idea that, fairly applied, anything passes rational basis review.

Moreover, losing at the Supreme Court might not be the worst problem for those who want to end the exclusion. Winning a Supreme Court decision that required that every state allow same-sex couples to marry could well put

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156. Consider legislative districts in Alabama. When drawn in 1900, they may have reflected the legislature’s (accurate) perception of where people lived, and thus would have been constitutional. But as population shifted (shifts obvious to the legislature) and the legislature held to the same lines, they became unconstitutional. See Reynolds v. Sims, 377 U.S. 533 (1964).
157. As explained supra notes 97-98 and accompanying text, over 60% of the states banned interracial marriage until the mid-twentieth century, and until slavery was abolished, African-Americans were not permitted to marry anyone in much of the United States.
159. Id. at 196.
160. See, e.g., LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 16-2, 16-3, 1439-1446 (2d ed., 1988). Although Professor Tribe says the rational basis test amounts to "a strong presumption of constitutionality," he labels virtually every instance of the Court striking down a law under rational basis as "covertly heightened scrutiny." Id.
enough steam behind a proposal to amend the Federal Constitution to exclude same-sex couples from marriage in every state—enough steam, that is, to send it out to the states.

The courts have a somewhat undeserved reputation for bringing change to society, for making it more equal and fair. But they are far better at striking down attempts to fence those seeking change out of the political process and at making recalcitrant parts of society accept change that has already come to most of the country. Thirty states banned interracial marriage when the California Supreme Court struck down that state’s law.\textsuperscript{161} Only sixteen states still had bans in place nineteen years later when the Supreme Court struck down all laws prohibiting interracial marriage.\textsuperscript{162} Twenty-four states had “sodomy” laws when \textit{Bowers} was decided. Thirteen states did when \textit{Lawrence} was decided.\textsuperscript{163} \textit{Roe v. Wade}\textsuperscript{164} may be the great exception to the rule, but it is an exception that proves the crucial point: you cannot make enduring change in America unless you can persuade people to accept it.

\textit{Lawrence}, fairly applied, makes the end of the marriage exclusion constitutionally inevitable, unless the Court abandons its approach to the protection of implicit rights or creates an unprincipled exception like it did in \textit{Bowers}. But the legacy of \textit{Roe} says that \textit{Lawrence} is likely to take down the exclusion after most states have already abandoned it. That does not mean \textit{Lawrence} is unimportant to the marriage debate, just that \textit{Lawrence} is far more important for the political question it put to America than for the eventual legal consequence of its holding. If same-sex relationships cannot be made a crime, \textit{Lawrence} asks, then shouldn’t they be recognized by society? In the immediate wake of \textit{Lawrence}, public opinion polls about same-sex relationships, marriage, and civil unions fluctuated wildly. That is because questions that had been abstract until then—questions about the proper place of gay people in American society—were suddenly real.

The Court posed the question. It is now up to the political process to supply the answer.

\textsuperscript{161} Perez v. Sharp, 198 P.2d 17, 38 (Cal. 1948) (Schenk, J., dissenting).
\textsuperscript{162} Loving v. Virginia, 388 U.S. 1, 6 (1967).
\textsuperscript{163} Lawrence v. Texas, 539 U.S. 558, 573 (2003); \textit{Bowers}, 478 U.S. at 193-94.
\textsuperscript{164} 410 U.S. 113 (1973).