ESSAY

LAWRENCE V. TEXAS: THE "FUNDAMENTAL RIGHT" THAT DARE NOT SPEAK ITS NAME

Laurence H. Tribe

TABLE OF CONTENTS

INTRODUCTION 1894
I. *LAWRENCE*, *BOWERS*, AND RIGHTS WITHOUT NAMES 1900
A. The Substantive Due Process–Equal Protection Synthesis 1902
B. The Inadequacy of Equal Protection 1907
C. The Court's "Mysterious" Standard of Review 1916
II. CONSTITUTIONAL LIBERTY AND THE PATH TO *LAWRENCE* 1918
A. Substantive Due Process and the Jurisprudence of Life and Death 1918
1. Lawrence *and* Glucksberg 1921
2. Lawrence *and* Casey 1925
B. The Bill of Rights as a Litany of Wrongs 1932
III. SUBSTANTIVE DUE PROCESS AFTER *LAWRENCE* 1933
IV. BEYOND *LAWRENCE*: A GLIMPSE AT SAME-SEX MARRIAGE AND OTHER POSSIBLE FUTURES 1945
V. A BRIEF LOOK BACK: LITIGATING *BOWERS* 1951
CONCLUSION 1955

* Indicates page numbering from journal of original publication — 117 Harvard Law Review 1893 (2004).

ESSAY

LAWRENCE V. TEXAS: THE "FUNDAMENTAL RIGHT" THAT DARE NOT SPEAK ITS NAME

*Laurence H. Tribe**

Blackstone described the infamous *crime against nature* as . . . a heinous act . . . not fit to be named.[1]

[I]t could happen that all properties of nameless objects that we can express . . . are shared by named objects.[2]

(love's a universe beyond obey
or command,reality or un-)[3]

Situations can be described but not *given names*.
(Names are like points; propositions like arrows — they have sense.)[4]

INTRODUCTION

It seems only fitting, if perhaps late in the day, that *Lawrence v. Texas*[5] should have been handed down just a year before the fiftieth

* Ralph S. Tyler, Jr., Professor of Constitutional Law, Harvard Law School. I am grateful to Randy Kozel, J.D. candidate, Harvard Law School, 2004, and Sonja Starr, J.D., Yale Law School, 1999, for their outstanding editing and research assistance. I also thank the participants in the Harvard Law School Conference on Constitutional Law (Nov. 15, 2003) for their helpful comments on an earlier draft of this Essay and extend my gratitude particularly to Martin Lederman, my colleague on several ongoing projects, for his astute reading of an early draft and for suggestions that improved this Essay throughout. Finally, I am indebted to the able group of research assistants in the Harvard Law School Classes of 2004 and 2005 who reacted with a number of constructive suggestions to the first draft of this Essay (Jessica Ring Amunson, Gabe Bell, Adam Cederbaum, Chris Egleson, Michael Fertik, and Sam Spital) and to the more than 2750 law students whom I have had the privilege of teaching, and from whom I have learned much, in the courses on constitutional law that I have offered at Harvard Law School from the time I first began to explore in earnest the issues addressed here (several years before I took on *Bowers v. Hardwick*) through the fall semester of 2003.

[1] Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215) (internal quotation marks omitted).

[2] W.V. QUINE, *Ontological Relativity*, *in* ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 26, 65 (1969).

[3] E.E. CUMMINGS, *nothing false and possible is love*, *in* 100 SELECTED POEMS 97, 97 (Grove Weidenfeld 1959).

[4] LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 23 (D.F. Pears & B.F. McGuinness trans., Routledge & Kegan Paul 1961) (1921).

[5] 123 S. Ct. 2472 (2003). I represented the ACLU, writing the amicus brief it filed in the Supreme Court on behalf of the petitioners in *Lawrence*. *See generally* Brief of Amici Curiae the American Civil Liberties Union and the ACLU of Texas in Support of Petitioner, *Lawrence* (No. 02-102), *available at* http://archive.aclu.org/court/garner.pdf.

anniversary of *Brown v. Board of Education*.[6] For when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America. But one of the lessons of *Brown* is that we cannot assume that society's acceptance of such watershed decisions — decisions that mediate revolutions in the entrenched social order — will be a straightforward and predictable process. Will our political, cultural, and jurisprudential experience with *Brown* — the net contribution of which has been overwhelmingly positive despite the disappointments along the way[7] — provide a reliable roadmap for our experience with *Lawrence*? Will the ways in which *Roe v. Wade*[8] unintentionally strengthened the political hand of the religious right,[9] even as it contributed to the gradual emancipation of women from male subordination in American society,[10] provide a better predictor of the journey *Lawrence* will launch? Or do the various environments into which *Lawrence* was borne and from which it arose promise to make our collective experience with this pathmarking decision fundamentally different from what we experienced with either *Brown* or *Roe* — the only two decisions since 1937 that seem remotely comparable to *Lawrence* in their cultural significance? Even with the benefit of hindsight, it will be a daunting task at the midpoint of the twenty-first century to evaluate the differences *Lawrence* will have made; scholars, after all, still vigorously debate the effects of *Brown* and *Roe*. Lacking such second sight, the best we can do now is take the measure of *Lawrence* as a landmark in its own right by placing its logic in the context of the larger project of elaborating, organizing, and bringing to maturity the Constitution's elusive but unquestionably central protections of liberty, equality, and — underlying both — respect for human dignity.

---

[6] 347 U.S. 483 (1954).

[7] *See, e.g.*, Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 90 VA. L. REV. 7, 77–85 (1994) (supporting the view that *Brown* effected a transformation of the social order). For a more skeptical take on *Brown*, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 49–54, 107–56 (1991), which argues that many scholars have overrated *Brown*'s impact. *But see* David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 151–57 (1994) (rejecting Rosenberg's account as "wholly unpersuasive"). For a recent collection of perspectives on the *Brown* journey, see Symposium, Brown *at Fifty*, 117 HARV. L. REV. 1301 (2004).

[8] 410 U.S. 113 (1973).

[9] *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 139–96, 237–42 (1990). For an opposing view, see William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001), which argues that *Roe* can be understood as "hardwiring the political process against pro-life people: after *Roe*, they could not persuade any legislature to reinstate old abortion bars." *Id.* at 519.

[10] *Cf.* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

Lawrence is a multilayered story. Only on its surface is it a story about removing the sanction of criminal punishment from those who commit sodomy. Given that the criminal laws in this field have notoriously been honored in the breach and, almost from the start, have languished without enforcement, *Lawrence* quickly becomes a story about how the very *fact* of criminalization, even unaccompanied by any appreciable number of prosecutions,[11] can cast already misunderstood or despised individuals into grossly stereotyped roles, which become the source and justification for treating those individuals less well than others. The outlawed acts — visualized in ways that obscure their similarity to what most sexually active adults themselves routinely do — come to represent human identities, and this reductionist conflation of ostracized identity with outlawed act in turn reinforces the vicious cycle of distancing and stigma that preserves the equilibrium of oppression in one of the several distinct dynamics at play in the legal construction of social hierarchy.[12] *Lawrence* is a story, too, of shifting societal attitudes toward homosexuality, sex, and gender — a story of cultural upheaval that is related to law roughly as the chicken is to the proverbial egg.[13] But, perhaps more than anything else, *Law-*

[11] Irrelevant to this analysis is the practice, fairly common prior to *Lawrence*'s invalidation of all statutes prohibiting consensual sodomy, of using consensual sodomy in charge bargaining — that is, of charging defendants prosecuted for forcible rape or sexual assault with consensual sodomy, to which they might plead guilty in exchange for a prosecutor's agreement to drop the more serious charge rather than to make the uphill attempt to prove absence of consent.

[12] Not every facet of social hierarchy is maintained in this way, of course. Male dominance, for example, has been (would that I could say had been!) preserved largely through restrictions on the reproductive freedom of women. Such restrictions, in turn, have reinforced the network of legal regimes that separated the private from the public sphere and assigned women roles principally in the former. *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 140–41 (1873) (Bradley, J., concurring in the judgment) (rejecting the argument that "it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment" on the ground that "the civil law, as well as nature herself" recognizes that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother"). The resulting regime was rationalized by celebrating the cage in which it enclosed women as though it were a pedestal. *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) (noting that, traditionally, sex discrimination had been "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage"). The dynamics of gender hierarchy are importantly linked to the dynamics that have helped to create and to maintain heterosexual dominance. Part of this link is defined by the sex-role-differentiated structure of such institutions as opposite-sex marriage; the desire to preserve this structure no doubt explains at least some of the force with which opponents of same-sex marriage resist its advent. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187, 188–96 (arguing that "disapprobation of homosexual behavior is a reaction to the violation of gender norms").

[13] *See* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (exploring the "dialectical relationship" through which "constitutional law both arises from and in turn regulates culture").

rence is a story of what "substantive due process," that stubborn old oxymoron,[14] has meant in American life and law.

There is a certain conventional understanding, largely unexamined and too often uncritically accepted, of what it means for the state to deprive someone of "liberty" without "due process of law" in the substantive sense of that phrase. According to this understanding, courts more or less passively identify a set of personal activities in which individuals may engage free of government regulation. This list derives from American constitutional text and tradition, fixed, if not at the nation's founding, then, at the very latest, at the time of the post–Civil War constitutional upheaval that left its textual mark principally in the Fourteenth Amendment. To name the activities on that list is to know what substantive areas are marked off as presumptively beyond the reach of governmental power, both state and federal. And, according to that understanding, if one is to broaden the vistas of freedom beyond the list, one must turn from the properly conservative and suitably backward-looking domain of substantive due process to the domain of a norm focused more on the present and the future — the more aspirational domain of equal protection. Indeed, proponents of this theory emphasize, it is in the name of equal protection that judges since the late nineteenth century have taken the crucially progressive steps toward first racial and then gender equality,[15] steps that broke sharply with history and tradition precisely because the Equal Protection Clause was understood from the beginning to call for the rejection of certain received ways of doing things.[16]

But this sketch tells at best a half-truth. Trying to make sense of the conclusions judges have reached by attending carefully to the rulings they have actually rendered in the name of substantive due proc-

---

[14] *Compare* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("'[S]ubstantive due process' is a contradiction in terms — sort of like 'green pastel redness.'"), *with* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1333 (3d ed. 2000) ("It should be remembered . . . that the phrase that follows 'due process' is '*of law*,' and there is a reasonable historical argument that, by 1868, a recognized meaning of the qualifying phrase 'of law' was substantive.").

[15] The development dates, according to this understanding, to the first invocation of the Equal Protection Clause to strike down the exclusion of racial minorities from juries that try criminal cases, *see* Strauder v. West Virginia, 100 U.S. 303, 310 (1880), even though such exclusion was widespread when the Fourteenth Amendment was ratified in 1868. The fact that the Court later attributed the same antidiscrimination content to the Due Process Clause of the Fifth Amendment in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), the companion case to *Brown* that struck down de jure racial segregation of schoolchildren in the District of Columbia, presents something of a puzzle for any backward-looking understanding of substantive due process (inasmuch as slavery had yet to be outlawed when the Fifth Amendment was ratified in 1791). But those who champion the conventional understanding simply attribute *Bolling* to the Court's recognition that it would have been unthinkable to desegregate the schools of Topeka, Kansas, but not those of the nation's capital.

[16] *See infra* note 78.

ess reveals a very different narrative. It is a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity. This tale centers on a quest for genuine self-government of groups small and large, from the most intimate to the most impersonal. It reflects the fact that within any group, the project of self-government is necessarily a process that extends over time (and, at times, even across generations) as the group's experiences, and typically its membership, evolve.

By recounting this narrative — necessarily in abbreviated form — I hope to shed light on how certain fundamental facets of freedom have won fierce protection under our Constitution even when they have defied easy labeling and enumeration or one-dimensional characterization in terms of such primary human activities as "speech" or "assembly" or "bearing arms" — indeed, even when they have resisted being named at all.

Lawrence, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty. The "liberty" of which the Court spoke was as much about equal dignity and respect as it was about freedom of action — more so, in fact. And the Court left no doubt that it was protecting the equal liberty and dignity not of atomistic individuals torn from their social contexts, but of people as they relate to, and interact with, one another. Although this concept of liberty far transcends the enumerated "specifics" of the Bill of Rights, *Lawrence*, when viewed through the lens of the Constitution as a framework for individual and group self-government,[17] has much to teach about what those "specific" provisions represent and protect and about how they operate. To be sure, the broad and bold strokes with which the Court painted in *Lawrence* left a good bit of this picture to the reader's imagination, but this mode of exposition hardly seems inapt for a decision laying down a landmark that opens vistas rather than enclosing them.

In particular, the Court gave short shrift to the notion that it was under some obligation to confine its implementation of substantive due process to the largely mechanical exercise of isolating "fundamental rights" as though they were a historically given set of data points on a two-dimensional grid, with one dimension representing time and the other representing a carefully defined and circumscribed sequence of protected primary activities (speaking, praying, raising children, using contraceptives in the privacy of the marital bedroom, and the like).

[17] *See infra* Part III, pp. 1933–45.

By implicitly rejecting the notion that its task was simply to name the specific activities textually or historically treated as protected, the Court lifted the discussion to a different and potentially more instructive plane. It treated the substantive due process precedents invoked by one side or the other not as a record of the inclusion of various activities in — and the exclusion of other activities from — a fixed list defined by tradition, but as reflections of a deeper pattern involving the allocation of decisionmaking roles, not always fully understood at the time each precedent was added to the array. The Court, it seems, understood that the unfolding logic of this pattern is constructed as much as it is discovered. Constructing that logic is in some ways akin to deriving a regression line from a scatter diagram, keeping in mind, of course, that the choice of one method of extrapolation over another is, at least in part, a subjective one. As if to demonstrate the inevitable dependence of the diagram upon the diagrammer, the *Lawrence* Court, beyond overruling *Bowers v. Hardwick*,[18] took the *Bowers* Court to task for the very way it had formulated the question posed for decision. In doing so, *Lawrence* significantly altered the historical trajectory of substantive due process and thus of liberty.

This Essay charts that trajectory, from *Bowers* to *Lawrence* and beyond. The Essay begins with a description of the *Bowers* and *Lawrence* decisions themselves, highlighting differences in method as well as in substance. Next, the Essay examines the evolution of the law between those bookends, observing how the Court's intervening substantive due process jurisprudence influenced — and, in some instances, ultimately gave way to — the decision in *Lawrence*. The Essay then ventures a glimpse into the future, assessing the implications of *Lawrence* for such issues as same-sex marriage. In doing so, the Essay returns to a scholarly project I began some three decades ago by relating the approach the Court took in *Lawrence* to the overarching concepts of individual and collective self-government — that is, to the ways in which the commitments we make to our principles and to one another, in the context of associations ranging from the most intimate to those with the polity as a whole, constitute the essential core of constitutionalism and the cornerstone of American liberty. Finally, the Essay takes a look back at the path thereby traversed, from the perspective of my own experience in litigating *Bowers*, the case with which the Essay's journey began.

The central contribution of *Lawrence* to American constitutional law does not arise from the questions the Supreme Court answered —

---

[18] 478 U.S. 186 (1986). I represented respondent Michael Hardwick, briefing and arguing his case in the Supreme Court. *See generally* Brief for Respondent, *Bowers*, 478 U.S. 186 (1986) (No. 85-140), *available in* 1986 WL 720442.

although, to be sure, some of the Court's answers were of more than passing interest. Rather, the core contribution of *Lawrence* comes from the manner in which the Court framed the question of how best to provide content to substantive due process rights. I write this Essay in the same spirit: while I hope that I can provide some helpful answers along the way, my true aim is to present a better model for framing the many questions that remain.

I. *LAWRENCE*, *BOWERS*, AND RIGHTS WITHOUT NAMES

The Georgia statute upheld in *Bowers* outlawed *all* "sodomy,"[19] regardless of whether the participants were of the same sex or of opposite sexes. Yet the Supreme Court went out of its way to recast the plaintiff's claim to substantive protection under the Due Process Clause for his private sexual relationships as an asserted "fundamental right to engage in *homosexual sodomy*."[20] Georgia's brief had encour-

---

[19] Georgia law at the time defined the crime of "sodomy," a felony punishable by up to twenty years in prison, as "any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 26-2002 (1983). *But cf.* TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) ("A person commits an offense if he engages in deviate sexual intercourse with another of the same sex."), *quoted in Lawrence*, 123 S. Ct. at 2476.

[20] *Bowers*, 478 U.S. at 191 (emphasis added). The court below had found the state statute to infringe a fundamental right of "intimate association" that encompasses consensual "sexual activity" that "[f]or some . . . serves the same purpose as the intimacy of marriage." Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985). That court had accordingly remanded the case for a trial at which the state would have to "demonstrate a compelling interest in restricting this right" and to show that its "sodomy statute [was] a properly restrained method of safeguarding its interests." *Id.* at 1211. Declining to go beyond the record, the court of appeals did not presume to draw a distinction between same-sex and opposite-sex sodomy — a distinction that neither the state legislature, *see supra* note 19, nor Hardwick, in his federal complaint, had drawn. In contrast, the Supreme Court's assertion that Hardwick had been charged with committing sodomy "with another adult male," *Bowers*, 478 U.S. at 188, was ungrounded in the record, which was completely silent as to the sex of the person with whom Hardwick was engaged in oral sex at the time of his arrest. *See generally* Joint Appendix, *Bowers*, 478 U.S. 186 (1986) (No. 85-140). The Court's assumption that the other person was male appears to have been based on the allegation in Hardwick's complaint, made in order to buttress his standing to obtain prospective relief, that, like other "practicing homosexuals," he was in "imminent danger of arrest, prosecution and imprisonment" by virtue of how the state's sodomy law was routinely "administered and enforced by defendants." *Id.* at 4–5. The Court may have concluded — or, more likely, simply took for granted — that Hardwick's self-description as a "practicing homosexual" necessarily implied that he was sexually attracted to, and sexually active with, only men — as though any man who was sexually active with women as well as men certainly wouldn't have described himself the way Hardwick did. But any such assumption would ignore the complexity of the relationships among sex, gender, sexual preferences and practices, and sexual self-identification. *Cf.* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 361–62 (2000) (exploring the distorting phenomenon of "bisexual invisibility" and arguing that it arises from a social erasure perpetrated by an "epistemic contract" between self-identified straights and self-identified gays and resulting from their shared investment in that erasure). The Court was abetted in supplying the sex of Hardwick's companion by the state's none-too-subtle attacks on "homosexual sodomy" as a form of "sexual deviancy express[ing] no ideas," Brief of Petitioner at 27, *Bowers*, 478 U.S. 186 (1986) (No. 85-140), *available in* 1985 WL 667939, as "purely an unnatural means of satisfying

aged the Court's recasting of the right at issue, denouncing homosexual sodomy as "purely an unnatural means of satisfying an unnatural lust."[21] This description was no doubt calculated to evoke the Court's decision less than a year earlier in *Brockett v. Spokane Arcades, Inc.*,[22] which held that the state's power to prosecute consenting adults for the sale or consumption of otherwise obscene magazines or movies depends on whether those materials "appeal[] to . . . abnormal sexual appetites,"[23] as opposed to arousing a "'good, old fashioned, healthy' interest in sex."[24] The Court in *Brockett* had deemed such "old fashioned" responses "normal," "rather than . . . shameful or morbid," forms of lust,[25] and had held words and pictures that arouse only such "normal sexual appetites" to be protected by the Free Speech Clause of the First Amendment.[26] Thus, it was a "fundamental right" to satisfy a specifically "shameful" and "morbid" "lust" — a lust whose mere arousal by verbal or visual signals would strip otherwise protected speech of its First Amendment shield — that the state, and in the end the Supreme Court, implausibly described Hardwick as claiming.

Seventeen years later, the Court deciding *Lawrence* was composed of a set of Justices who seemed more likely to hold bans on same-sex sodomy unconstitutional,[27] and the social backdrop had become considerably more receptive to homosexuality.[28] But while it seemed

---

an unnatural lust," *id.*, and as "the anathema of the basic units of our society — marriage and the family," *id.* at 37. Nevertheless, the state's brief never actually mentioned the sex of Hardwick's companion — not even in making these attacks. *See generally* Joint Appendix, *supra.*

[21] Brief of Petitioner, *supra* note 20, at 27.

[22] 472 U.S. 491 (1985).

[23] *Id.* at 507.

[24] *Id.* at 499 (quoting *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 492 (9th Cir. 1984)).

[25] *Id.*

[26] *See id.* at 504–05.

[27] Relevant shifts in the Court's composition included the retirement of the author of *Bowers*, Byron R. White, a substantive due process conservative and a traditionalist on matters lying at the intersection of sex and law who was appointed by President John F. Kennedy in 1962, and his replacement by Ruth Bader Ginsburg, a pioneer in the movement for gender equality who was appointed by President William Jefferson Clinton in 1993. Indeed, Ginsburg had argued *Frontiero v. Richardson*, 411 U.S. 677 (1973), before the Supreme Court on behalf of the ACLU. Ginsburg won the case and in so doing both contributed significantly to the liberation of women from their cagelike pedestal and laid the groundwork for her own elevation to the Court.

[28] Between 1986 and 2003, the nation witnessed a marked shift in popular attitudes toward homosexuality, a shift that the Court itself, speaking through Chief Justice Rehnquist, acknowledged in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The Chief Justice wrote: "Justice Stevens' dissent makes much of its observation that the public perception of homosexuality in this country has changed. Indeed, it appears that homosexuality has gained greater social acceptance." *Id.* at 660 (citations omitted). This change was spurred in part by *Bowers* itself, which energized gay rights activists almost as much as *Roe v. Wade* had energized the Christian right and the Catholic bishops a little more than a dozen years earlier. *Cf.* Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 108 (2002) ("Despite the fact that *Hardwick* may have foreclosed constitutional protections for same-sex sexual conduct, the visibility of gay and lesbian identity — in politics and public life in the United States — has vastly increased in the fifteen

likely that the Court would strike down the Texas statute and possibly overrule *Bowers* in the process, it was by no means assured that in doing so the Court would go out of its way to hold that even a statute "drawn . . . to prohibit the conduct both between same-sex and different-sex participants"[29] would "demean [the] existence" and "control [the] destiny" of "adults who . . . engage[] in sexual practices common to a homosexual lifestyle"[30] and would thereby violate the "due process right to demand respect for conduct protected by the substantive guarantee of liberty."[31]

A. The Substantive Due Process–Equal Protection Synthesis

The *Lawrence* Court's blend of equal protection and substantive due process themes was neither unprecedented nor accidental:[32]

---

years after the case was handed down."). The culture shift was also spurred in part by the avalanche of favorable television exposure for openly gay media stars like Ellen DeGeneres, whose coming out was surely the most public in history; in part by the popularity of programs like *Will and Grace*; and in part, too, by the barbaric slaughter of Matthew Shepard.

One can't help wondering how much that shift may have contributed to, and how much it was accelerated by, the tectonic shift beneath the legal landscape that took place as much of the nation sat glued to its television screens in 1987 for a week-long seminar on constitutional law during the Senate Judiciary Committee's confirmation hearings for Robert Bork, who was nominated by President Ronald Reagan to fill the Supreme Court vacancy created by the retirement of Justice Lewis F. Powell, Jr. This seminar became a virtual national referendum on the Constitution and on its protection for such "unenumerated rights" as sexual privacy and autonomy. *See generally* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); MARK GITTENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992). For those who were too young in 1987 to have followed that drama closely, it may be worth adding that it is only in hindsight that the Bork nomination seems to have been fated to fail. At the time of the Senate hearing, the conventional wisdom was that Bork — former Solicitor General of the United States, a former judge of the D.C. Circuit, and a hero to, and virtual standard-bearer of, the political right in America — would ultimately win the confirmation battle in the Senate. My own decision to testify against Robert Bork's confirmation — a decision I knew would put me on the list of those for whom it would always remain "payback time" as far as Bork's many supporters were concerned (a short list different from any I would ever have chosen) — did not represent a gamble that, by saying what I believed about the extreme character of Bork's constitutional philosophy, I might be instrumental in keeping him off the Court. On the contrary, I believed that the Senate was overwhelmingly likely to confirm Judge Bork and that the price of my candid assessment of how Bork would discharge his role as a Justice would be having to argue for decades in front of a Court on which Justice Bork, whose memory of the hearings would not soon die, would play a prominent role.

[29] *Lawrence*, 123 S. Ct. at 2482.

[30] *Id.* at 2484.

[31] *Id.* at 2482.

[32] Indeed, the more closely one looks at the principal cases dealing with rights surrounding reproduction (including both the capacity to choose it and the capacity to choose sexual intimacies without it), parenting (as in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)), marriage (as in *Loving v. Virginia*, 388 U.S. 1 (1967), and *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978)), family (as in *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977)), and intimate association outside marriage (as in *Eisenstadt v. Baird*, 405 U.S. 438 (1972)), the more one sees equal protection and substantive due process as regularly interlocking

"Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects," Justice Kennedy wrote for the Court, "and a decision on the latter point advances both interests."[33] How might we unpack this rather cryptic statement to view more vividly what was driving the majority in *Lawrence*? It seems to me that two crucial and interrelated concepts are bound up in Justice Kennedy's thesis:

First. The vice of the Texas prohibition of same-sex sodomy was not principally, as some have argued, the cruelty of punishing some people for the only mode of sexual gratification available to them.[34]

---

and powerfully complementary sources of protection. For example, in the compulsory sterilization case, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court regarded the likely inequality in the way government would wield the surgeon's scalpel if given the power to control the choice of who may have offspring and who must be prevented from leaving a genetic trace in succeeding generations as an important factor in the judicial decision to treat the underlying liberty as fundamental. The stark illustration of that inequality by the very statute at issue in *Skinner* — an Oklahoma law under which recidivist embezzlers were spared the knife while recidivist chicken thieves and muggers were sterilized, *id.* at 538–539 — perhaps caught the Court's attention. Accordingly, the Court invoked the fundamental character of the liberty at issue to justify strict scrutiny of the lines government drew between those offenders it would sterilize and those it would not. *See id.* at 541. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice White noted in his concurring opinion that any contraceptive ban that would prohibit doctors from providing advice about birth control to married couples would have a discriminatory impact on the poor. *See id.* at 503 (White, J., concurring). *Eisenstadt* relied on equal protection to extend the liberty holding of *Griswold* to unmarried persons. *See Eisenstadt*, 405 U.S. at 453. *Roe v. Wade*, as one cannot avoid noticing after reading *Casey*, was driven in part by the enormous inequality of using women's bodies against their will to incubate our young. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service . . . ."). And in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), Justice Ginsburg, for the Court, drew equally on due process and equal protection precedents to justify extending the free criminal transcript and free appellate counsel cases from the realm of criminal law to the context of parental rights. *See id.* at 110–13 (citing, among other cases, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), which concerned access to trial transcripts needed to file a meaningful appeal in the criminal context, and *Douglas v. California*, 372 U.S. 353, 357 (1963), which obligated states, with respect to appeals of right, to provide and pay for appellate counsel to indigent defendants faced with incarceration).

[33] *Lawrence*, 123 S. Ct. at 2482.

[34] The specter of such punishment appears to have motivated Justice Powell to suggest that the actual imposition of a prison term on someone in Michael Hardwick's situation — someone for whom sexual abstinence was, it seemed to Justice Powell, the only alternative — "would create a serious Eighth Amendment issue." Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Powell, J., concurring); *see* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 519 (1994) ("It seemed to him senseless and cruel that persons afflicted — that was how he thought of it — with homosexuality should be condemned as criminals."); *cf.* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Eighth Amendment, applied to states through the Fourteenth Amendment's Due Process Clause, forbids criminally punishing someone for the status of having a particular illness). Justice Powell, however, noted that Hardwick had "not been tried, much less convicted and sentenced" and that there had been "no reported . . . prosecution for private homosexual sodomy under [the Georgia] statute for several decades." *Bowers*, 478 U.S. at 198 & n.2 (Powell, J., concurring).

Nor was it principally the lack of "fair notice" and the danger of "arbitrary and unpredictable enforcement" in dealing with a law that either had become moribund or never was seriously enforced and that, in either case, was "able to persist only because it [was] enforced so rarely."[35] Rather, the prohibition's principal vice was its stigmatization of intimate personal relationships between people of the same sex: the Court concluded that these relationships deserve to be protected in the same way that nonprocreative intimate relationships between opposite-sex adult couples — whether marital or nonmarital, lifelong or ephemeral — are protected. Focusing on the centrality of the relationship in which intimate conduct occurs rather than on the nature of the intimate conduct itself, the Court emphasized its view that "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[36] Justice Scalia, dissenting, evidently thought he had scored a major point by parsing the majority opinion and concluding, triumphantly: "Not once does it describe homosexual sodomy as a 'fundamental right' or a 'fundamental liberty interest.'"[37] Of course not! How can one put it more clearly? Try this: "It's not the *sodomy*. It's the *relationship*!"

And what kind of relationship was it? Apparently, it was quite fleeting, lasting only one night and lacking any semblance of permanence or exclusivity. The Court nonetheless spoke in relational terms: "When sexuality finds overt expression in intimate conduct with another person," Justice Kennedy wrote, "the conduct can be but one

---

[35] Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. (forthcoming) (manuscript at 20–21, on file with the Harvard Law School Library). Sunstein describes such laws as "lack[ing] a democratic pedigree." *Id.* at 21. Some time ago, I argued in favor of a theory of democratic legitimacy that would require something like a continuing test of whether a law still has meaningful popular support. *See* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 290–321 (1975) (exploring the theory's political and institutional-process premises and applying it to abortion, the death penalty, custody disputes, and rules regarding employment restrictions on pregnant women).

[36] *Lawrence*, 123 S. Ct. at 2478. The *Lawrence* Court's hypothetical illustration of how marriage would be demeaned if reduced to a mere site for lawful sexual intercourse need not have been entirely hypothetical. At least once the Court has come close to endorsing such a view. *See Zablocki*, 434 U.S. at 386 & n.11 (citing WIS. STAT. § 944.15 (1973) (current version at WIS. STAT. § 944.16 (2002))) (referencing Wisconsin statute defining nonmarital intercourse as a criminal offense; concluding that "if [the] right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place"; and invalidating, on equal protection and due process grounds, a state statute precluding any resident with child support obligations from marrying without court approval). *But see* Turner v. Safley, 482 U.S. 78, 95–96 (1987) (holding, without assuming that prisoners have any right to conjugal visits, that prisoners have a right to marry).

[37] *Lawrence*, 123 S. Ct. at 2492 (Scalia, J., dissenting).

element in a personal bond that is more enduring."[38] The Court clearly proceeded from a strong constitutional presumption against allowing government, including its judicial branch, "to define the meaning of [any given personal] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[39] And in unflinchingly applying that presumption despite the seemingly casual character of the encounter involved, the Court evidently recognized an obligation to extend constitutional protection to some brief interactions that might not ripen into meaningful connections over time — even to some that might be chosen precisely for their fleeting and superficial character and their lack of emotional involvement. Had the Court done otherwise, it would have ceded to the state the power to determine what count as meaningful relationships and to decide when and how individuals might enter into such relationships. Doing so would have drained those relationships of their unique significance as expressions of self-government.[40]

Second. The stigmatization of same-sex relationships is concretized and aggravated by the law's denunciation as criminal of virtually the only ways of consummating sexual intimacy possible in such relationships.[41] For although "sodomy" is by no means a "gays only" act, the term has come to carry a strong cultural association with gay male, and to a much lesser extent lesbian, sexual activities — an association that the *Bowers* Court's conflation of sodomy with gay sex both underscored and helped to perpetuate. Many heterosexuals, even those who regularly engage in one or another form of opposite-sex sodomy, no doubt associate "sodomy" with acts that strike them as perverse and alien. Even worse, in their eyes such acts might uncomfortably resemble their own intimacies, simultaneously caricaturing or demeaning these intimacies and inspiring fear of suppressed homosexual proclivities and desires.[42] It follows that even if the Texas law, like the Georgia law at issue in *Bowers*, had been applied to opposite-sex as

---

[38] *Lawrence*, 123 S. Ct. at 2478.

[39] *Id.*

[40] *Cf.* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (recognizing that beliefs derived from "the right to define one's own concept of existence [and] of meaning . . . could not define the attributes of personhood were they formed under compulsion of the State").

[41] This step in the Court's reasoning should be distinguished from the claim that prosecuting, convicting, and imprisoning gay men and lesbians for "doing what comes naturally" is cruel and unusual punishment. *See supra* note 34. That argument could, of course, be countered by merely striking down a sodomy ban as applied, rather than invalidating the ban on its face, in the rare case in which it is actually enforced by criminal prosecution and conviction.

[42] For an intriguing analysis of this phenomenon, see Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993), which discusses the Freudian concept of the "narciss[is]m of minor differences." *Id.* at 1662–63.

well as same-sex sodomy and had been enforced equally against both (or not enforced at all), it would still have been "anti-gay" in terms of both its practical impact and its cultural significance.

This cultural conflation of sodomy with "homosexual" sodomy, however out of sync with social reality it may be, means that *any* law banning sodomy, even if it reaches opposite-sex sodomy, "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[43] That was, indeed, the principal point of Justice Scalia's vitriolic dissent from the Court's decision in *Romer v. Evans*.[44] His contention was that although *Bowers* wasn't so much as "*mentioned* in the Court's opinion," it remained good law at the time, and since it was good law, it obviously made everything that the majority deemed "discrimination" at least *rational*: "If it is rational to *criminalize* the conduct, surely it is rational to deny special . . . protection to those with a self-avowed tendency or desire to *engage* in the conduct. Indeed, where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct."[45]

Of course, this was precisely the metonymic logic[46] the majority sought to counter in *Lawrence*: Holding that sodomy may *not* be

---

[43] *Lawrence*, 123 S. Ct. at 2482.

[44] 517 U.S. 620 (1996). Under the Equal Protection Clause, *Romer* invalidated Colorado's infamous Amendment 2, pursuant to which homosexuals and those with proclivities or relationships founded on sexual attraction to persons of their own sex became the only group in the state that was relegated exclusively to general-purpose antidiscrimination and equal accommodation measures.

[45] *Id.* at 640–42 (Scalia, J., dissenting) (emphasis added). Though in *Romer* Justice Scalia was quick to reduce a class of persons (those of homosexual orientation) to a single behavior that is culturally linked with, but not unique to, the class, in an earlier case he had pointed out that constructing a class solely by reference to its members' shared desire to engage in a particular act is nothing more than a "definitional ploy." *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269 (1993) (noting that the term "class" in 42 U.S.C. § 1985(3) "unquestionably connotes something more than a group of individuals who share a desire to engage in conduct[, because] . . . [o]therwise, innumerable tort plaintiffs would be able to assert causes of action . . . by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with," and further contending that "[t]his definitional ploy would convert the statute into the 'general federal tort law' it was the very purpose of the animus requirement to avoid"). In *Romer*, Justice Scalia put that very ploy into play by arguing that the permissibility of criminalizing homosexual conduct translated into a general license to discriminate against those of homosexual orientation, by making that identity a "stand-in" or substitute for the disdained act.

[46] For a now-classic critique of this type of logic, see MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION 42–44 (Robert Hurley trans., Vintage Books 1990) (1978), which sought to decouple acts from identities by historicizing and exposing the regulatory and normalizing processes that conflated the two. Foucault observes that "[a]s defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them." *Id.* at 43. Only in "[t]he nineteenth-century [does the] homosexual became a personage, a past, [and] a case history," and only then did "sexuality [become] . . . everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle." *Id.*

criminalized defeats the principal argument that what *Romer* had called "discrimination" was entirely "rational" because it merely involved giving less favorable treatment to people who one could assume were more likely to be guilty of criminal conduct (or conduct that the state could properly criminalize if it chose to do so). And, given the "pattern of nonenforcement with respect to consenting adults acting in private" in "those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct,"[47] the constitutional poison injected by these laws into the body politic cannot be neutralized merely by making "a sodomy law . . . apply equally to the private consensual conduct of homosexuals and heterosexuals alike."[48] To the contrary, that poison works its insidious effects even in the "absence of prosecutions,"[49] automatically branding gays and lesbians, and their intimate relationships, as less worthy than their heterosexual brothers and sisters and their intimate relationships. This branding of gays and lesbians "demean[s] their existence [and] control[s] their destiny" by the simple expedient of continuing to label "their private sexual conduct a crime."[50] In *The Curvature of Constitutional Space*,[51] an article that I wrote some fifteen years ago, I reflected on some of the ways in which the complex of legal texts and rules can alter what one might call the "geometry" of the cultural and social terrain every bit as strongly as a massive body can bend the space-time continuum around it.[52] Lo and behold, in the unfolding of events from *Bowers* to *Lawrence*, we have a vivid, technicolor example of this seemingly obscure mode of path dependence: the social and cultural meaning of any ban on sodomy, gender-neutral or otherwise, particularly given *Bowers*, is that being gay or lesbian *means* being a *sodomite*, which in turn means being a *criminal.*

It follows not only that the dissenting Justices in *Lawrence* missed the majority's point, but also that the dissenters made the majority's point for it by themselves invoking the mere fact of sodomy's criminalization to justify turning society's gays and lesbians into outcasts.[53]

B. The Inadequacy of Equal Protection

From the same point, it follows too that the very retention of *Bowers* as precedent and the likely continuance of gender-neutral anti-

---

[47] *Lawrence*, 123 S. Ct. at 2481.

[48] *Id.* at 2487 (O'Connor, J., concurring in the judgment) (accepting the equal protection challenge only and declining to reach the issue whether *Bowers* should be overruled).

[49] *Lawrence*, 123 S. Ct. at 2479.

[50] *Id.* at 2484.

[51] Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

[52] *See id.* at 5–17.

[53] *See Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

sodomy statutes as the law of the land (in some states, at least) would have continued to subordinate the self-governing choices of gays and lesbians and the relationships they form to the culturally dominant group's determination of how liberty within such relationships should, in all decency, be exercised.[54] Because the *Bowers* judgment and opinion (and their consequences) contributed to the social and cultural construction of stigmatized gay and lesbian identities,[55] the "baby step" of holding the Texas ban on same-sex sodomy unconstitutional on purportedly narrower equal protection grounds,[56] though logically avail-

---

[54] *See Lawrence*, 123 S. Ct. at 2482 (stating that the very "continuance [of *Bowers*] as precedent demeans the lives of homosexual persons").

[55] The dynamics of the process through which *Bowers* did so have been the subject of a powerful body of scholarship, much of which my colleague Janet Halley has authored. *See, e.g.*, Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993). For a useful synthesis of other relevant literature, see JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 94–101 (2002). For an illuminating and appreciative but ultimately critical appraisal of Cohen's work, expressing doubt that it does indeed point to a "new paradigm," see Michael C. Dorf, *The Domain of Reflexive Law*, 103 COLUM. L. REV. 384 (2003), which offers a "friendly amendment" to the Cohen approach and contrasts its contribution to "a more optimistic sort of pragmatism" with Judge Richard Posner's "pragmatism-as-instrumentalism." *Id.* at 400–01. Although this is not the place to elaborate on the point, I am drawn to Cohen's incremental, experience-based, and feedback-directed framework for decision as amended by Dorf partly out of a sense of the familiar. For a similar attempt to sketch a model of self-correcting processes of values-definition, see Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1326–27, 1338–41, 1346 (1974). That article wasn't really about plastic trees or about environmental law. That may have something to do with why nobody working in constitutional theory seems to have read it. There is a lesson here: if you're too cute when you name your work, it will serve you right if it disappears without a trace, or ends up being cited repeatedly but in contexts you hadn't meant to address.

[56] Whether an equal protection invalidation of the ban on same-sex sodomy would indeed be narrower than an overruling of *Bowers* is far from clear. If one discards the equal protection rationale put forth in Justice O'Connor's concurring opinion in *Lawrence*, *see* 123 S. Ct. at 2484–88 (O'Connor, J., concurring) — a rationale that collapses into question-begging circularity, *see infra* p. 1911 — then there remains only the following alternative equal protection argument, which proves to be at least as far-reaching as the liberty holding of *Lawrence*: that a same-sex sodomy ban discriminates without sufficient justification against gay men as *males* by ruling out male sex partners for them solely because they are men, and against lesbians as *females* by ruling out female sex partners for them solely because they are women — even though it cannot be said that the ban makes men as a group worse off than women, or women as a group worse off than men. That argument, which closely resembles the racial analysis in *McLaughlin v. Florida*, 397 U.S. 184 (1964), leads to a constitutional right to same-sex marriage (just as *McLaughlin* led to *Loving v. Virginia*, 388 U.S. 1 (1967)) and to the unconstitutionality of still extant discrimination against homosexuals in such fields as employment, housing, and adoption even more swiftly and inexorably than does *Lawrence* itself. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 60, 68 (Haw. 1993) (finding that Hawaii's marriage statute regulates access to marital status on the basis of the applicant's sex, therefore triggering strict scrutiny under the state's equal protection provision), *superseded by* HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."); Goodridge v. Dep't of Health, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring) (finding that the state's marriage statutes "create a statutory classification based on the sex of the two people who wish to marry," such that only the sex of the plaintiffs prevents them from marrying their chosen partners). *But see* Lofton v. Sec'y of Dep't of Children & Family

able to the *Lawrence* Court, would have been woefully inadequate with respect to the twin constitutional commitments of equal respect and equal dignity. Indeed, one should probably read the Court's apology for its predecessors in error as deliberately echoing the statement in *Casey* that *Plessy* was "wrong the day it was decided,"[57] a statement

---

Servs., No. 01-16723, 2004 WL 161275, at *10 (11th Cir. Jan. 28, 2004) (declining to treat homosexuals as a semi-suspect class for purposes of equal protection analysis, neglecting to consider the suspect sex-based classification that underlies discrimination against homosexuals, and subsequently applying an essentially question-begging and circular version of rational basis scrutiny in upholding a Florida law prohibiting adoptions by homosexuals). Even if courts in future cases misguidedly follow *Lofton* instead of *Goodridge* and *Baehr*, there remain reasons for believing that the *Lawrence* holding likewise leads to a constitutional requirement that marriage and other privileges be as available to same-sex couples as to opposite-sex couples. On this point, see pp. 1945–49.

The sex-based equal protection argument also appears to doom the so-called Romeo and Juliet laws punishing a consensual sex act with a minor more severely when the minor is of the same sex as the perpetrator. *See, e.g.*, Limon v. State, 41 P.3d 303 (Kan. Ct. App. 2002) (decision without published opinion), *cert. granted, judgment vacated, and remanded*, 123 S. Ct. 2638 (2003) (mem.). *Limon* concerned a challenge to the imposition of a seventeen-year sentence instead of the fifteen-month maximum that the state would have imposed had the defendant and the fourteen-year-old male victim been of opposite sex. *See* Charles Lane, *Gay Rights Ruling Affects Kan. Case*, WASH. POST, June 28, 2003, at A8. On remand to the Court of Appeals of Kansas, however, the sentencing law in *Limon* was again upheld in a truly bizarre 2–1 decision in which the court refused to apply heightened scrutiny despite the law's use of a semi-suspect sex classification, and upheld, under rational basis scrutiny, the drastic disparity between the penalty imposed for same-sex sodomy with a minor and that imposed for opposite-sex sodomy with a minor. *See* State v. Limon, No. 85,898, 2004 WL 177649, at *7–10 (Kan. Ct. App. Jan. 30, 2004) (suggesting a rational link between the Kansas legislature's distinction between same-sex and opposite-sex sodomy and its stated interests in preventing the spread of disease, encouraging marriage and procreation, and avoiding the incarceration of either of an infant's parents).

This use of the sex equality and sex classification precedents to analyze discrimination against same-sex coupling, same-sex couples, and same-sex marriage is distinguishable from arguments that link the regulation of homosexual relationships to the social construction of gender hierarchy. Those arguments begin by deconstructing the state's claims that many societies, most emphatically including ours, depend on the social unit of the "family" for their viability and stability; that families must pivot around the primordial social bond of the male-female couple linked by marriage; and that a married couple can remain a viable social unit only if, to oversimplify a bit, the male runs the show while the female obeys and nurtures. *See* Law, *supra* note 12, at 196, 218–33 (observing that "when homosexual people build relationships of caring and commitment, they deny the traditional belief and prescription that stable relationships require the hierarchy and reciprocity of male/female polarity" inasmuch as in "homosexual relationships authority cannot be premised on the traditional criteria of gender," with the result that "lesbian and gay couples who create stable loving relationships are far more threatening to conservative values than individuals who simply violate the ban against non-marital or non-procreative sex"); *see also* Case, *supra* note 42, at 1663–68 (discussing "the ambivalence with which courts view visible gay couples and some reasons that may account for this").

57 *Lawrence*, 123 S. Ct. at 2484. *Compare id.* ("Bowers was not correct when it was decided, and it is not correct today."), *with* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 863 (1992) ("*Plessy* was wrong the day it was decided . . . ."). Central to Justice Kennedy's jurisprudence is his view of *Plessy* as the incarnation of a class-based society in which power and prestige are fixed by law in terms of characteristics that the Constitution mandates treating as morally neutral. This view of *Plessy* is evident in his opinion for the Court in *Romer*, which opened with

that finally stripped away the fig leaf *Brown* had offered.[58]

Justice O'Connor apparently recognized this point, though she nevertheless opted for the constitutional "halfway house" of striking down the Texas ban on homosexual sodomy on equal protection grounds alone. She argued that a prohibition of sodomy, *even when not criminally enforced* (or, if enforced, even when enforced even-handedly), "brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."[59] Such a ban, Justice O'Connor continued, "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law, including in the areas of employment, family issues, and housing,"[60] thereby "threaten[ing] the creation of an underclass."[61]

Justice O'Connor's decision to rely solely on equal protection, despite her awareness that the approach would leave in place the discrimination against and stigmatization of gays and lesbians that even a sex-neutral sodomy ban invites, may well have been motivated by her "confiden[ce] . . . that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society."[62] Such confidence, however, seems misplaced. Like the fabled Sword of Damocles that does its awful work not by beheading its victim but simply by dangling above its victim's neck, even a sex-neutral ban on sodomy, especially one blessed by the Court, demeans intimate homosexual relationships at the same time that its virtually complete nonenforcement greatly reduces the incentive of heterosexuals, who are *not* demeaned by such a ban, to agitate for its repeal.[63]

---

the familiar excerpt from Justice Harlan's *Plessy* dissent. *See* Romer v. Evans, 517 U.S. 620, 623 (1996) ("[T]he Constitution neither knows nor tolerates classes among citizens." (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (internal quotation marks omitted))).

[58] *See infra* note 74.

[59] *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring in the judgment).

[60] *Id.* (alteration in original) (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)) (internal quotation marks omitted).

[61] *Id.* at 2487 (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)) (internal quotation marks omitted). To be sure, Justice O'Connor makes this concession only with respect to a law banning *only* same-sex sodomy, but *that* feature of an anti-sodomy law is irrelevant to her argument that, by banning the form of conduct in which homosexuals are "more likely to engage," *id.* at 2485, and indeed *must* engage if fully active sexually, an anti-sodomy law automatically "brands all homosexuals as criminals," *id.* at 2486. The stigmatizing effect of anti-sodomy laws also explains why those who want to treat *Lawrence* as essentially a quasi-procedural decision about desuetude — about the unfairness of letting prosecutors resurrect laws that are almost never enforced — are barking up a barren tree: the best a desuetude doctrine can achieve is the reversal of convictions, a largely irrelevant remedy when convictions are not the problem.

[62] *Id.* at 2487.

[63] It is, of course, not denied (and it seems undeniable) that the unchanging pattern of nonenforcement would continue to blunt political pressure for the ban's repeal in the same way that

In any event, Justice O'Connor's compromise is question-begging. For, as Justice Scalia pointed out, if the Court had stopped short of holding that a ban on sodomy defined without regard to sex would be unconstitutional, then any state *could* freely prohibit or attach other negative consequences to the sexual intimacies to which homosexuals in particular are distinctively drawn as long as it prohibited or similarly penalized the same acts when committed by opposite-sex couples.[64] Whether a state took the step of formally condemning such intimacies or refrained from doing so because of the high enforcement costs, it would be in a position to justify withholding employment, parenting, or other opportunities from those it labeled "homosexual," and permitting private individuals and other entities to do the same, on the now-familiar rationale that gays and lesbians, unless sexually inactive, may be assumed to engage in conduct that the state is entitled to discourage and to denounce whereas no such assumption need be made about heterosexuals. The net effect would be to establish the *legitimacy* — and certainly the rationality, at minimum — of what Justice O'Connor labeled "discrimination" against those whose sexual desires pull them toward erotic fulfillment exclusively with lovers of their own sex.[65]

From the perspective of the dissenters in *Lawrence*, it is altogether fitting that anti-sodomy laws, however formally neutral, make outlaws, or at least outcasts, of homosexuals but not heterosexuals for the obvious reason that heterosexuals have other (read: more "normal" and less morally questionable) intimate physical outlets for their lust and their love. And *of course* such laws may well lead to what the *Lawrence* majority decried as "discrimination both in the public and the private spheres" against "homosexual persons,"[66] and to making those "who have a same-sex sexual orientation" (in Justice O'Connor's words) into a class of persons "unequal in the eyes of the law."[67] But what's wrong with that? In the dissenters' internally consistent view, the resulting stigma is constitutionally unobjectionable precisely because it is just fine to "discriminate" against lawbreakers and those with lawbreaking proclivities but not to equate a proclivity to break the law (or, in a state that has chosen to denounce and discourage sodomy

---

Justice O'Connor recognizes that a ban limited to same-sex sodomy would blunt such pressure. *See id.*

[64] *See id.* at 2495–98 (Scalia, J., dissenting).

[65] *See, e.g.*, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (observing that the Court has "consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn"); Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.").

[66] *Lawrence*, 123 S. Ct. at 2482.

[67] *Id.* at 2485 (O'Connor, J., concurring in the judgment).

without actually criminalizing it, a proclivity to engage in behavior that the state is constitutionally entitled to condemn) with some morally neutral characteristic like race or eye color.[68]

There can be no objection, as the dissenters see it, to disadvantaging those who "are more likely to engage in behavior prohibited by [the Texas statute],"[69] *whether or not that statute is rendered sex-neutral.* "Of course," Justice Scalia argued, "the same could be said of any law. A law against public nudity targets 'the conduct closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class.'"[70] Q.E.D. One can be thankful that the dissent at least made its tautological point through the relatively innocuous example of public nudity — a topic on which Justice Scalia has previously had some side-splitting (and revealing) things to say[71] — rather than pedophilia or some other equally odious compari-

---

[68] If a state opts to classify its citizens by race, sex, gender, sexual orientation, or any other set of categories it chooses to construct and into which it assigns people either as they identify themselves or as it decides to identify them, and elects to assign distinct and even subordinate roles or to allocate unequal access to various benefits or opportunities to those belonging to some of these categories, that state may be acting on the basis of mistaken and self-serving "we/they" generalizations about various characteristics of the people so classified. To the degree such a danger exists and may be shown to be systematically resistant to correction from within the political process, a strong case can be made for heightened scrutiny of a process-based, representation-reinforcing sort. *See generally* ELY, *supra* note 14. But at least as frequently, state actions of this sort — say, a state policy of excluding those it classifies as "gay" or "lesbian" from positions as teachers in grades K–12, or a state choice to regard individuals whom it labels "bisexual" as less worthy of protection from adverse private decisions in employment, housing, and adoption placements — reflect nothing that one could call a "mistake" or a "process" failure without stretching those concepts beyond recognition. Whether to regard the people whom the state designates as not "white" or those it identifies as "gay" as minorities whose deliberate disadvantaging by law presumptively violates equal protection or instead to view those groups as *belonging* in a subordinate role is a question about the *substantive* norms that the Equal Protection and Due Process Clauses impose on government, *not* a question about how well or how poorly the processes of government perform their interest-satisfying, preference-respecting mission.

This point recapitulates one I made long ago in expressing puzzlement at the circularity that lies at the heart of those theories of constitutional law that purport to justify nondeferential judicial scrutiny of certain laws on the ground that those laws may be deemed suspect on the purely "procedural" basis that they are recognizably the products of flawed political processes — flawed because they improperly fail to represent the interests of certain "minorities" — while never having to make controversial *substantive* judgments about the values such laws embody. *See generally* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

[69] *Id.* As shown above, *see supra* p. 1906, the dissenters' analysis would apply even in a state that had chosen not to outlaw the behavior in question.

[70] *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting).

[71] In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court upheld an Indiana statute making it a misdemeanor for any person to appear "knowingly or intentionally" in a "state of nudity" in a public place, and accordingly sustained a conviction of the owner of a bar featuring female "go-go" dancers. *Id.* at 569. The plurality upheld the statute through application of *O'Brien* scrutiny. *See id.* at 570–72 (plurality opinion); *see also* United States v. O'Brien, 391 U.S. 367, 377 (1968) (upholding as consistent with the First Amendment a federal statute criminalizing deliberate destruction of draft cards, and announcing that content-neutral restrictions of behavior not

son with same-sex intimacy. But any such comparison serves to draw a closed circle of legally permissible discrimination in the sphere of consensual adult relationships around a "class" constructed in significant part by the law's transmutation of objects of desire or of love into varieties of offense. This logic demeans those relationships in precisely

---

customarily understood as a form of, or vehicle for, speech are constitutional if they are narrowly tailored to the achievement of a legitimate government objective unrelated to the suppression of expression). Justice Scalia, concurring only in the judgment in *Barnes*, objected to the invocation of *O'Brien* scrutiny, arguing that the Court had *never* struck down an application of a speech-neutral rule under such scrutiny and that the pretense of giving First Amendment protection to violations of such a rule ought to be abandoned. *See Barnes*, 501 U.S. at 576–81 (Scalia, J., concurring in the judgment).

Indiana did not, after all, target "only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools." *Id.* at 574. Thus, one could not say that "what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct." *Id.* Tracking the logic in his opinion for the Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), Justice Scalia argued that, just as a law of general applicability should not trigger Free Exercise Clause scrutiny simply because the conduct to which the law is applied happens to constitute a religious exercise, *id.* at 878–82, so too "a general law regulating conduct and not specifically directed at expression," *Barnes*, 501 U.S. at 572 (Scalia, J., concurring in the judgment), should not trigger Free Speech Clause scrutiny just because the conduct to which the law is applied happens to be expressive. Replying to the dissent's points "that the purpose of restricting nudity in public places in general is to protect nonconsenting parties from offense" and that, because *Barnes* involved only "consenting, admission-paying patrons" who could hardly have been offended, "the only remaining purpose must relate to the communicative elements of the performance," *id.* at 574 (summarizing the argument of the dissent), Justice Scalia was quick to retort that another purpose was entirely plausible — to wit, the condemnation on moral grounds of shameful activity: "The purpose of Indiana's nudity law would be violated . . . if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd." *Id.* at 575. Tellingly, Justice Scalia relied specifically on *Bowers* and *Paris Adult Theatre* to conclude this point by noting that prosecuting the naked Hoosiers for whom such reciprocal exposure was a turn-on would be akin to prosecuting "sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, *and sodomy*." *Id.* (emphasis added) (citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973)).

Justice Scalia's example, for all its characteristic wit, betrays a reductive and trivializing view of relationships that happen to include oral sex (or any number of sexual activities other than conventional intercourse between husband and wife). This view strips away all elements of association and commitment as inessential, laying bare only the quivering genitals of the people involved. The use of *Bowers* and *Paris Adult Theatre* as the frame for the picture of those "60,000 fully consenting adults" engaged in an orgy of mutual exhibitionism could hardly have been more revealing. In the worldview of the Scalia concurrence in *Barnes*, the claims of Michael Hardwick and of John Lawrence and Tyron Garner (the man with whom Lawrence was arrested) were fundamentally indistinguishable from the claims of people masturbating in one another's presence in a darkened theater. By lumping *Barnes* together with a case in which people were engaged in solitary, atomistic acts having nothing to do with human relationships (whether intimate or not), Scalia's argument treats decisions like *Bowers* and *Lawrence* as though they were merely cases about achieving sexual gratification by acting out in private precisely the kind of performance whose on-screen visual depiction the state could criminalize as obscene under *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (discussed *supra* p. 1901). To invoke *Bowers* as support for the state's interest in forbidding a public orgy in which everyone strips but no one touches is to reveal that one simply does not see the couples, only the coupling. For an eye-opening meditation on the difference, consult Case, *supra* note 42.

the way that defining "homosexuals" as persons who engage in "homosexual sodomy" demeans the individuals involved: recall the Court's observation comparing such a definitional move with the reductionist and demeaning move of defining a marriage as the setting where the law permits heterosexual intercourse to take place.[72]

Thus the majority's implicit rejoinder to Justice Scalia's reductionism was to focus on how the social and cultural meaning of the ban on sodomy operates to deny the equal worth and equal liberty of "adults who . . . engage[] in sexual practices common to a homosexual lifestyle."[73] To those in the majority, the imperative of according equal worth and liberty to such adults and their same-sex relationships, far from showing their analysis to have been circular, plainly implied that overturning bans on same-sex sodomy would not suffice. Nothing short of overturning *Bowers* and declaring it to have been wrong from the start would do.[74] The very fact that the majority in *Lawrence* took

---

[72] *See Lawrence*, 123 S. Ct. at 2478.

[73] *Id.* at 2484.

[74] The Court might also have considered an intermediate option: overruling *Bowers* without insisting that it was manifestly wrongheaded at the time it was decided. There are probably fewer than a dozen constitutional rulings in which the Court has repudiated a prior decision without offering at least a fig leaf of changed circumstances, more experience, or altered perceptions of fact, making it possible to think that the Court didn't necessarily get it wrong the first time but that fidelity to the same principles that perhaps permitted a different result earlier permits that result no longer. The Court has offered its predecessors a fig leaf — if never quite an entire fig tree — in such landmark cases as *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). *West Coast Hotel* upheld a state minimum wage law for women in an opinion that emphasized the way in which "recent economic experience" made plain that the exploitation of workers who were relatively defenseless because of their unequal bargaining power "cast[] a direct burden for their support upon the community" and therefore gave rise to a public interest in enforcing a minimum wage. *West Coast Hotel*, 300 U.S. at 399. Even *Brown v. Board of Education*, 347 U.S. 483 (1954), justified its departure from *Plessy v. Ferguson*, 163 U.S. 537 (1896), which it did not explicitly overrule, by pointing to the changed role of public education in the nation's life since 1896 and by invoking contemporary studies demonstrating the adverse psychological effects of state-mandated racial segregation upon black children. *See Brown*, 347 U.S. at 492–95 & nn.10–11. It became plain enough that this was only a fig leaf when an avalanche of unexplained per curiam one-liners invalidating racial segregation in public golf courses, municipal swimming pools, and other public institutions followed close on the heels of *Brown*.

That the Justices in the *Lawrence* majority went out of their way to scold their *Bowers* predecessors makes the case different from those cases in which the Court simply put forth reasons in support of its decision and said that the original precedent was therefore overruled, *see, e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)), and different even from those in which the Court has said, usually quite matter-of-factly, that a more clear-eyed view of principles and facts that should have been evident all along has since undermined the ground on which a precedent initially stood, *see, e.g.*, Jones v. Mayer, 392 U.S. 409, 441–43 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)); Katz v. United States, 389 U.S. 347, 353 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928); and *Goldman v. United States*, 316 U.S. 129 (1942)). The fact that Justice Kennedy's majority opinion in *Lawrence* is more dramatic in its denunciation of *Bowers* may be partly a function of personal style, but much more than style seemed to be at work when the *Law-*

this position, even without elaboration, speaks volumes. For, as this Essay later argues, the only premises on which this position makes sense are highly revealing. First, the Court's failure to name particular body parts and combinations thereof or to pinpoint an American tradition of recognizing a "fundamental right" to bring those specific anatomical elements into sexual contact was no reflection either of forgetfulness or of modesty. Rather, it reflects the Court's recognition that it was not attaching rights to spatial intersections or to configurations of body parts; instead, the Court was protecting the right of adults to define for themselves the borders and contents of deeply personal human relationships.[75] Second, the Court's rejection of all bans on consensual sodomy because of their demeaning effects on the lives of "adults who . . . engage in sexual practices common to a homosexual lifestyle" reveals that the Court understood itself to be protecting the right to dignity and self-respect of those who enter into such relationships.[76]

The equal protection technique that Justice O'Connor employed brushed right past these two premises in its rush to reach what appears, at least at first, to be a tidy, contained solution. But those who think equal protection arguments are more modest and hence preferable to the heavy artillery of substantive due process as a matter of ju-

---

rence majority carefully recounted not only the American and European decisions that pointedly declined to follow *Bowers*, *see Lawrence*, 123 S. Ct. at 2483 (citing decisions of five states declining to follow *Bowers* in interpreting parallel due process provisions in their own constitutions); *id.* (citing decisions of the European Court of Human Rights in 1988, 1993, and 2001), but also the influential American and European authorities that in effect anticipated *Lawrence* even before *Bowers*, *see id.* at 2480 (noting the position of the American Law Institute in 1980); *id.* at 2481 (citing a European Court of Human Rights ruling in a case arising in Ireland and decided by the ECHR "almost five years before *Bowers* was decided"). This unusually elaborate demonstration that the precedent being overruled was not simply mistaken but misbegotten would seem to reflect the Court's conviction that the very "continuance as precedent" of *Bowers* "demeans the lives of homosexual persons." *Id.* at 2482. Only such a conviction can explain the vehemence with which the *Lawrence* majority tore *Bowers* from the constitutional landscape root and branch, as though nothing short of such a dramatic uprooting could begin to repair the damage and distortion *Bowers* had wrought.

[75] *See Lawrence*, 123 S. Ct. at 2478 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."). The ease with which the Court equated the role of sexual intimacy in the lives of those involved in same-sex relationships with its role in the lives of married couples underscores the Court's disinterest in the particular anatomical configuration or gender combination any given sexual coupling entails. The Court's approach here recalls Justice Blackmun's dissent in *Bowers*, expressing bafflement at the majority's "almost obsessive focus on homosexual activity" despite "the broad language Georgia [had] used" and despite the fact that Hardwick's argument that Georgia's statute "involve[d] an unconstitutional intrusion into his privacy and his right of intimate association [did] not depend in any way on his sexual orientation." *Bowers*, 478 U.S. at 200–01 (Blackmun, J., dissenting).

[76] *Lawrence*, 123 S. Ct. at 2484.

dicial statecraft[77] should learn a lesson from the dead end into which Justice O'Connor's effort to follow that path would have led. Just as economists are fond of pointing out that second-best solutions are sometimes not solutions at all, so too should judges resist the temptation, in the name of minimalism, to reach for the silver bullet of equal protection: always check first whether the bullet is a blank.[78]

C. The Court's "Mysterious" Standard of Review

One aspect of *Lawrence* that was bound to draw criticism and is likely to generate confusion unless promptly put in proper perspective is the absence of any explicit statement in the majority opinion about the standard of review the Court employed to assess the constitutionality of the law at issue.[79] The practice of announcing such a standard — naming a point somewhere on the spectrum from minimum rationality to per se prohibition in order to signal the appropriate level of judicial deference to the legislature and the proper degree of care the legislature should expect of itself — is of relatively recent vintage, is often more conclusory than informative, has frequently been subjected to cogent criticism,[80] and has not shown itself worthy of being enshrined

---

[77] *See, e.g.*, Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) (urging the use of equal protection rather than substantive due process to invalidate laws on the ground that a successful due process challenge "leaves ungoverned and ungovernable conduct which many people find objectionable"); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (arguing that reliance on the Equal Protection Clause rather than the Due Process Clause to limit how far a state may go to force people to undergo life-prolonging procedures would not portend oppressive interference with decisions to refuse such unwanted procedures because the Equal Protection Clause "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me").

[78] This is especially true if one believes that substantive due process invalidation should be reserved for the stray backwater statute that is wholly out of touch with today's consensus while equal protection invalidation should be the weapon of choice in pushing the edge of the envelope. *See, e.g.*, Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994) (arguing that equal protection is better suited than substantive due process for an "attack on traditions"); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) (describing the Due Process Clause as backward-looking and the Equal Protection Clause as forward-looking); *cf.* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 375–76 (1985) (arguing that *Roe v. Wade* should have been decided under the Equal Protection Clause — on grounds of sex discrimination — rather than under the Due Process Clause).

[79] *See Lawrence*, 123 S. Ct. at 2488, 2491–92 (Scalia, J., dissenting) (criticizing the *Lawrence* majority for failing to announce explicitly the specific standard of review animating its holding).

[80] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) (criticizing two-tiered analysis of equal protection claims and stressing that "[t]here is only one Equal Protection Clause," and that "[i]t does not direct the courts to apply one standard of review in some cases and a different standard in other cases"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 93 (1973) (Marshall, J., dissenting) ("So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination — whatever the standard of equal protection analysis employed.").

as a permanent fixture in the armament of constitutional analysis. In any event, the strictness of the Court's standard in *Lawrence*, however articulated, could hardly have been more obvious. That much follows not only from what the Court *did* but from what it *said* in declaring *Griswold v. Connecticut*[81] "the most pertinent beginning point" for its analysis[82] and then proceeding to invoke precedents such as *Roe*.[83] To search for the magic words proclaiming the right protected in *Lawrence* to be "fundamental," and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice. Moreover, it requires overlooking passage after passage in which the Court's opinion indeed invoked the talismanic verbal formula of substantive due process but did so by putting the key words in one unusual sequence or another — as in the Court's declaration that it was dealing with a "protection of *liberty* under the Due Process Clause [that] has a *substantive* dimension of *fundamental* significance in defining the rights of the person."[84]

---

[81] 381 U.S. 479 (1965).

[82] *Lawrence*, 123 S. Ct. at 2476. In *Griswold*, too, no "standard" was announced by the Court, but what we would today call "strict scrutiny" was plainly at work.

[83] *See id.* at 2477. The strictness of the scrutiny employed in *Roe* was explicit. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (invoking the need for a "compelling state interest" and for narrow tailoring — the twin signifiers of strict scrutiny — in order for the Texas abortion statute to survive constitutional challenge (citations omitted) (internal quotation marks omitted)). To be sure, the *Lawrence* Court did use language suggestive of rational basis review as well when it proclaimed that the law before it "furthers no legitimate state interest," 123 S. Ct. at 2484, the phrase cited by Justice Scalia as proof that the Court was applying rational basis review, *see id.* at 2495 (Scalia, J., dissenting), albeit of an "unheard-of form," *see id.* at 2488. Far from implying that *any* "legitimate state interest" would have sufficed, however, the Court's reference was to a "legitimate state interest *which can justify its intrusion* into the personal and private life of the individual," *Lawrence*, 123 S. Ct. at 2484 (emphasis added) — an intrusion the Court had already concluded was of great significance.

[84] *Lawrence*, 123 S. Ct. at 2477 (emphases added); *see also id.* at 2476–77 (finding *Griswold* to be "the most pertinent beginning point" for determining the substantive reach of liberty under the Due Process Clause and noting that, in invalidating the law prohibiting the distribution of contraceptives to unmarried persons, the *Eisenstadt* Court "state[d] the fundamental proposition that the law impaired the exercise of *personal rights*" (emphasis added) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972))); *id.* at 2477 (noting that the law in *Eisenstadt* was found to be "in conflict with *fundamental human rights*" (emphasis added)); *id.* at 2481 (noting that *Bowers* was "cast into even more doubt" by *Casey*'s protection of "choices *central to personal dignity and autonomy*" (emphasis added) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)) (internal quotation marks omitted)); *id.* at 2483 ("The right the petitioners seek in this case has been accepted as an *integral part of human freedom* in many other countries." (emphasis added)).

II. CONSTITUTIONAL LIBERTY AND THE PATH TO *LAWRENCE*

A. Substantive Due Process and the Jurisprudence of Life and Death

Two major substantive due process decisions, employing conspicuously different approaches to the problem of identifying realms of fundamental liberty, intervened between *Bowers* and *Lawrence*, which all but ripped *Bowers* from the pages of history.[85]

Of that pair, the less far-reaching but nevertheless illuminating decision was *Washington v. Glucksberg*,[86] in which, together with a companion ruling in *Vacco v. Quill*,[87] the Court rejected a claim that a state ban on physician-assisted suicide, as applied to the entire class of mentally competent, terminally ill patients,[88] deprived those patients of liberty without due process of law.[89] Farther reaching was *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[90] which reaffirmed on the merits the Court's understanding in *Roe v. Wade*[91] of the unique relationship between a pregnant woman and the fetus she is carrying.[92] This relationship, *Casey* held, implicates so fundamental a dimension of liberty that the choice between carrying her pregnancy to term and terminating it is ultimately the pregnant woman's to make;

---

[85] *See Lawrence*, 123 S. Ct. at 2484 ("*Bowers* was not correct when it was decided, and it is not correct today.").

[86] 521 U.S. 702 (1997).

[87] 521 U.S. 793 (1997). I briefed and argued the case on behalf of Quill in the Supreme Court. *See generally* Brief for Respondents, *Quill* (No. 95-1858), *available in* 1996 WL 708912.

[88] *See Glucksberg*, 521 U.S. at 709 n.6. It is noteworthy that Justice O'Connor, *see id.* at 736–37 (O'Connor, J., concurring), Justice Stevens, *see id.* at 739–40 (Stevens, J., concurring in the judgments), and Justices Ginsburg and Breyer, inasmuch as they endorsed Justice O'Connor's interpretation, *see id.* at 789 (Ginsburg, J., concurring in the judgments); *id.* at 789–90 (Breyer, J., concurring in the judgments), treated the Court as having rejected only a sweeping facial attack, and that the majority opinion, while disagreeing on the appropriate terminology, *see Glucksberg*, 521 U.S. at 709 n.6, agreed that its holding "would not 'foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge,'" *id.* at 735 n.24 (quoting *id.* at 750 (Stevens, J., concurring in the judgments)).

[89] *Id.* at 705–06. In *Quill*, the Court held that a similar state ban on physician-assisted suicide did not deprive a similarly defined class of individuals of equal protection notwithstanding the state's recognition and protection of the right of each patient in the class to refuse even lifesaving medical treatment. *See Quill*, 521 U.S. at 796–97. *Quill*, like *Glucksberg*, splintered the Court in a way that required the majority opinion to acknowledge that the Court's holding left open "the possibility that some applications of the [state] statute may impose an intolerable intrusion on the patient's freedom." *Id.* at 809 n.13 (quoting *Glucksberg*, 521 U.S. at 751–52 (Stevens, J., concurring in the judgments)) (internal quotation marks omitted).

[90] 505 U.S. 833 (1992).

[91] 410 U.S. 113 (1973).

[92] *See Casey*, 505 U.S. at 851–53.

only an especially weighty countervailing interest can justify the state's displacement of the woman by any other decisionmaker.[93]

What made both of these decisions so uniquely difficult at the time, and what causes them to remain so persistently controversial today, has not, I think, been the occasional resurfacing of the view that "due process of law" protects "liberty" only from *procedurally unfair* government deprivation (with the possible exception of protections, some procedural and some substantive, long deemed to have been "incorporated" or borrowed from the Bill of Rights for use against the states).[94] Nor has the continuing controversy over the decisions reflected a conviction that the "liberty" interest asserted in these cases — whether protected by the Due Process Clause only procedurally or substantively as well — is insufficiently weighty as a constitutional matter to warrant requiring the government to provide an unusually convincing justification for any abridgment of such protections. On the contrary, the ferocity of the debate surrounding these decisions is, if anything, fueled by the profound significance of the special relationships each of the decisions involves — in *Roe* and *Casey*, the unique relationships among a woman, the fetus developing within her body, and the biological father;[95] in *Glucksberg* and *Quill*, the delicate and often tragic relationships between a person at the end of life's journey and the constellation of relatives, caregivers, and medical professionals who oversee his care and whose assistance he seeks in order to "die with dignity."[96]

---

[93] Justice Stevens discussed the relative strengths of certain interests in his partial concurrence. *See id.* at 914–18 (Stevens, J., concurring in part and dissenting in part).

[94] *See, e.g.*, ELY, *supra* note 14, at 18 (noting the supposed oxymoronic quality of the very concept of "substantive due process"). Even on the Supreme Court, this minority view retains adherents — two as of this writing. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment) (suggesting readiness to reconsider "our substantive due process cases" as inconsistent with "the original understanding of the Due Process Clause"); Albright v. Oliver, 510 U.S. 266, 275–76 (1994) (Scalia, J., concurring) (accepting "certain explicit substantive protections of the Bill of Rights" as guaranteed by the Due Process Clause because the extension of such protections "is both long established and narrowly limited," but otherwise reading the Clause as "merely guarantee[ing] certain procedures as a prerequisite to deprivation of liberty" while acknowledging "this Court's current jurisprudence [to be] otherwise"); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 470 (1993) (Scalia, J., joined by Thomas, J., concurring in the judgment).

[95] *See Casey*, 505 U.S. at 852 ("Abortion is a unique act. It is fraught with consequences for others.").

[96] *Glucksberg*, 521 U.S. at 790 (Breyer, J., concurring in the judgments) (internal quotation marks omitted). When I say that there was little doubt about the significance of the "liberty" interest in the underlying relationships implicated in these cases, and in the ability of the woman in the case of pregnancy or of the patient in the case of impending death to exercise the ultimate choice of exit from the relationship, I refer to the attitudes of the populace at large and to the surrounding culture. Within constitutional discourse among lawyers, legal scholars, and judges, however, there has been persistent controversy about the status of the "liberty" interest, sometimes because such observers have thought it impossible to define that "liberty" in a manner independ-

The most distinctive aspect of the Supreme Court's abortion and right-to-die decisions — a dimension that goes beyond even the profound cultural and religious divisions the underlying controversies continue to engage — is a complication that unites these two otherwise quite disparate disputes, makes their resolution endlessly perplexing, and sharply limits their relevance to the problem of deciding which other facets of liberty — both individual and relational — are entitled to special constitutional solicitude. That source of complication is the set of singularly potent countervailing interests in protecting innocent and helpless human life — whether at the dawn of a lifetime that might yet lie ahead or in the twilight of a lifetime already lived.[97]

---

ent of the death that its exercise causes, *see infra* note 97 and accompanying text, pp. 1923–24, p. 1926, p. 1930, and sometimes because of a jurisprudential resistance to giving substantive content to "liberty" beyond freedom from legally unauthorized coercion and from assault, augmented by the particular constraints enumerated in the Bill of Rights, *see supra* note 94. As to the first reason, I think the point is well taken with regard to the right-to-die context but not with regard to the abortion context, because the relationship between the deliberate termination of a pregnancy and the death of the fetus is purely contingent and depends, among other things, upon the state of medical technology and the resources one is willing to expend on nurturing the fetus after its removal from the uterus — if it indeed ever was located in a human uterus rather than having been grown in a laboratory following in vitro fertilization of an extracted ovum by a sperm. Such contingencies show how the "viability" line drawn in *Roe* exemplifies the way any number of laws might have to be structured if those laws are to be made permeable to changing values and priorities as well as to expanding technological options while honoring rights of equal liberty and respect. Indeed, such laws must be so structured if they are to avoid the hypocrisy of acting in accord with the values we profess (like the pricelessness of every innocent human life, born or unborn) only so long as the costs of respecting those values are borne by those with relatively little political power (such as pregnant women) rather than by the taxpaying public at large. For further development of this theme, see Tribe, *supra* note 35, at 297. In the right-to-die context, the parallel principle is that of "double effect," which draws a distinction between administering medication to relieve pain (even when one knows death will result as an inevitable side effect) and administering medication for the specific purpose of hastening death. If the underlying liberty is only that of *exit* from one's pain and includes nothing about the dignity and burdens of one's condition thereafter (as one wastes away, presumably), then an effective decoupling is possible. But if the underlying liberty has a more complex structure and involves the way one writes life's final chapter, then the right of exit is analytically inseparable from a right to die.

[97] *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 925, 935 (1973) (discussing the conflict between "the liberty [of a woman to choose an abortion] . . . [and] a desire to preserve the fetus's existence"); *see also* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT 77–81 (1991); TRIBE, *supra* note 9, at 113–38. When the underlying "liberty" claim is conceptualized in terms of an ostensible "right" specifically to override those countervailing interests — defining the abortion right, for example, as a *right to destroy* a developing fetus — the absence of a convincing constitutional argument for *that* to count as a "right" seems plain. The mistake to be avoided is equating the Constitution's silence on the question of a claimed right to bring about a fetus's death, *see* FRIED, *supra*, at 78; Ely, *supra*, at 927 — or even its arguable silence on the point at which the state's interest in protecting a fetus trumps the rights of the woman that are at stake — with an imagined silence on the question whether the *woman* in the picture has any fundamental rights at stake with respect to the choice of whether she is to remain pregnant with child (or, more precisely, whether putting that choice in the hands of the state — either by compelling her to abort or by preventing her from doing so — without a showing of compelling necessity in terms of

This set of countervailing interests — seemingly unique to the abortion and right-to-die decisions — is plainly of such great moment that, like an enormous mass that collapses into a black hole warping the very space-time continuum around it, it is likely to generate discontinuities in discourse so deep that importing to other contexts the Court's precise resolutions of the conflicting interests at play in those cases seems ill-advised. I suspect we err if we extrapolate very much *either* from the Court's willingness, when asked at what point the state's interest in unborn life trumps the woman's relationship to her own body and to the life she bears within her, to respond by naming the point in a fetus's development at which it could, if necessary, survive outside her body, *or* from the Court's unwillingness or inability thus far to offer a similarly definitive response upon being asked when the state's role as protector of life becomes a usurpation of a dying person's right to be the author of his autobiography's final chapter. But if we focus instead on the Court's reluctance to shut the door on the dying patient's fundamental claim to dignity in *Glucksberg* and *Quill*, and the Court's underlying affirmation of the woman's fundamental liberty in *Casey*, then we are more likely to frame the inquiry in a way that makes the demise of *Bowers* in the wake of these intervening decisions seem, if not quite inevitable, then at least entirely natural.

1. Lawrence *and* Glucksberg. — Arguing that *Lawrence* unravels if one takes considerations of stare decisis seriously, Justice Scalia pointed most vehemently to *Casey* in denouncing *Lawrence* as internally inconsistent. He argued that, by paying homage to stare decisis when it leaned on *Casey* as an important precedent, the *Lawrence* majority destroyed the very ground on which it stood the moment it tossed stare decisis to the winds in overruling *Bowers*.[98] Justice Scalia

values or interests that command general if not universal assent would abridge or interfere with any of her rights).

[98] *See Lawrence*, 123 S. Ct. at 2488–91 (Scalia, J., dissenting). The dissent's argument was that *Casey*'s "preservation of judicially invented abortion rights," *id.* at 2488, rested on a determination to reaffirm *Roe* partly because it had come under "widespread criticism," *id.*, whereas the *Lawrence* majority treated "widespread opposition" to *Bowers* as a reason to overrule it, *id.* at 2489. Furthermore, the dissent argued that the *Lawrence* majority was wrong in denying that there had been the kind of reliance on *Bowers* (analogous to the reliance on *Roe*) that counseled against its overturning. *Id.* at 2489–91. In fact, however, the only facet of *Casey* that relied on a decision not to reconsider *Roe* afresh was *Casey*'s retention of "viability" as the line beyond which states could not merely discourage abortion but ban it outright (subject to a life and health exception), *see Casey*, 505 U.S. at 846, *not* the facet that treated the woman's "liberty" to govern her own reproductive life as a right specially protected by the Due Process Clause, *see id.* at 853. Moreover, the kind of reliance that the *Lawrence* dissent ascribed to the retention of laws against "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity," 123 S. Ct. at 2490 (Scalia, J., dissenting) — laws the dissent insisted were all "called into question" by *Lawrence*, *id.* — is obviously distinguishable from the kind of reliance to which *Casey* referred. Indeed, while the *Lawrence* dissenters referred to a peculiarly negative type of reliance — that upon the continued non-recognition of a right — *Casey* focused on the

also pointed to *Glucksberg*, which he viewed as having held that before the Court may treat a substantive realm of liberty as presumptively immune to the kind of government control routinely allowed under minimum rationality, the Court must name an activity and find its protected status to be "deeply rooted in this Nation's history and tradition."[99] Only then may the right to engage in that activity be deemed "fundamental," and it is the state's infringements of such fundamental rights and *only* such infringements that "qualify for anything other than rational basis scrutiny under the doctrine of 'substantive due process.'"[100] The argument is simple: *Glucksberg* required naming, *Lawrence* did not and could not name, so *Lawrence* violates principles of stare decisis.

But this simple argument leads to an equally simple rejoinder: the Court's application of the Due Process Clause to give substantive protection to "liberty" is not and has never in truth been a naming game, and it would take more than language in *Glucksberg* to demote it to one. The Court in *Bowers* did indeed reduce to triviality the claim that intimate sexual relations between consenting adults, at least when conducted in private and outside any commercial context, occupy a fundamental place in our lives, in the ways we express ourselves and — especially but not exclusively in the case of lasting relationships — in the ways we learn from one another and reshape the ideas and values with which we entered into those relationships. The claim that *Lawrence* must be understood to have accepted is not that a *specific configuration* of body parts is in itself beyond the state's regulatory authority, or that the freedom to engage in a *particular sequence* of actions so as to achieve sexual stimulation or release is a fundamental human right akin to freedom of speech or of religious worship. Rather, the claim *Lawrence* accepted — the claim that had been pressed on the Court as long ago as *Bowers* — is that intimate relations may not be micromanaged or overtaken by the state. When the *Bowers* majority nonetheless transmuted that claim as advanced by Michael Hardwick into a "fundamental right to engage in homosexual sodomy,"[101] it became easier to deride Hardwick's position as "at best, facetious."[102] But that transparent transmutation also made it easier for the *Lawrence* Court to conclude that the *Bowers* majority had in-

---

positive reliance by a generation or more of women on their ability to control their reproductive lives and thereby to assume social, economic, and political roles on a plane more nearly equal to that of men, *Casey*, 505 U.S. at 855–56. Thus the dissent's claim of self-destruction seems greatly exaggerated.

[99] *Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting) (quoting *Glucksberg*, 521 U.S. at 721) (internal quotation marks omitted).

[100] *Id.*

[101] Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

[102] *Id.* at 194.

advertently "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake."[103]

Nothing in *Glucksberg* can fairly be understood to have cemented the *Bowers* transmutation into our constitutional law. Eager to extract from *Glucksberg* as strong a sign as possible that the days of substantive due process are numbered, some observers skip over the fine print and, taking no note of just how much the Court's holding leaves open even with regard to decisions about dying,[104] express satisfaction with the *Glucksberg* Court's narrow way of recasting the Court's prior substantive due process decisions. These observers rightly note that the Court in *Glucksberg* did not zero in on any broad realm of self-governing autonomy, either with respect to the contours of one's own life or with respect to an intimate or otherwise constitutionally significant relationship; rather, the Court zeroed in only on the specific "act" of prescribing or providing a terminally ill patient with a deliberately lethal dose of a drug with the intent not of ameliorating his pain but of helping the patient to hasten his death. Moreover, such observers note that the Court ultimately cast its rejection of the claim before it in the form of a finding that this death-hastening "act" bore a close resemblance to the act of helping a despondent but healthy adult to commit suicide. The Court's reluctance to treat any such act as presumptively protected, such observers emphasize, stemmed partly from concern that according privileged status to that act would entail difficult-to-control risks that highly dependent, vulnerable (and possibly no longer even fully conscious and articulate) people could be killed against their wishes, putting society on a slippery slope toward involuntary euthanasia. It stemmed also from a conviction that activities akin to hastening the death of another person, including a person who is healthy but finds life unbearable, could not claim the pedigree in our "history and traditions" and in "our concept of constitutionally ordered liberty" that alone would warrant special protection as a matter of substantive due process.[105]

It would be fruitless to deny that Chief Justice Rehnquist's opinion for the Court in *Glucksberg* contains activity-listing language.[106] But it seems equally fruitless to pretend that his opinion's use of that language is anything more than a gambit toward hacking away not just at substantive due process but also at the nature of liberty itself. If the

---

[103] *Lawrence*, 123 S. Ct. at 2478. A more fitting noun than "extent" might have been "character" or "structure." "Extent" suggests a one-dimensional vector; part of what the *Lawrence* opinion recognizes is that the "liberty" protected by the Fifth and Fourteenth Amendments is multidimensional, intertemporal, and nearly always interpersonal.

[104] *See supra* notes 88–89.

[105] Washington v. Glucksberg, 521 U.S. 702, 727 (1997).

[106] *See, e.g., id.* (mentioning at one point "activities . . . that this Court has identified").

liberty claimed by the dying patients in *Glucksberg* could be flattened into an ostensible "right" to an overdose of some barbiturate, then the claim in the flag-burning cases (in which Justice Scalia, but not Chief Justice Rehnquist, joined[107]) could be flattened into a putative right to set fire to a painted cloth. And, in precisely the same way, the claim in the case of the racist cross-burner whose First Amendment rights Justice Scalia eloquently vindicated in an opinion for the Court,[108] could be reductively trivialized.

There is nothing about constitutional claims dealing with who is to decide how someone shall exit life once the possibilities for meaningfully prolonging it have been exhausted — or, for that matter, about any other class of claims pressed in the name of substantive due process, including those dealing with intimate association — that differentiates them from First Amendment claims in this critical respect: the Constitution is not Flatland, and rights arising under it have an architecture that resists the reductionism that Justice Scalia's use of *Glucksberg* would unleash. The *Glucksberg* opinion does indeed put forth an effort to collapse claims of liberty into the unidimensional and binary business of determining which personal activities belong to the historically venerated catalog of privileged acts and which do not, but the existence of that effort must not draw the focus of our attention away from the more germane question of who, as between the state and the individuals who are subject to its law, should be entrusted to make choices about the shape of an individual's life and of the relationships that may fulfill it.

That the *Glucksberg* gambit should not be allowed to succeed does not mean that it might not have succeeded. If Chief Justice Rehnquist had had his way, the *Glucksberg* decision might have become the forerunner of a general retreat from the jurisprudence of decisions like *Roe* and *Casey*, which are themselves the culmination of a long line of holdings beginning with the parental control decisions of the 1920s.[109]

---

[107] *See generally* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

[108] *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[109] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (striking down a state law prohibiting teaching foreign languages to young children because such a law, among other things, interfered with the power of parents to control their children's education); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (invalidating an Oregon law requiring children to attend public schools because it interfered with the liberty of parents to raise their children); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (employing heightened equal protection scrutiny to invalidate a sterilization law affecting people convicted of certain types of crimes because the punishment touched on marriage and procreation, which the Court termed a "basic liberty" despite the absence of explicit constitutional recognition); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (overturning a conviction for distributing contraceptives to a married couple on the ground that prohibiting use of contraceptives violated the married couple's privacy right in their intimate relationship); Eisen-

Such a development would have left a single path, upon which *Bowers* would fit much more comfortably. Indeed, there is more than a faint resemblance between the morbidly narrow and synchronic focus of *Glucksberg* on the *particular acts* that would in some instances have been shielded by a holding more solicitous of the substantive due process claim pressed in that case, and the almost voyeuristic focus of *Bowers* on the *specific acts of same-sex sodomy* that led to Michael Hardwick's arrest. Both cases instead would have benefited from a broader, diachronic focus on the intimate relationships that the challenged law placed within the state's regulatory jurisdiction. But two points, such as those established by *Glucksberg* and *Bowers*, define a unique line only on a Euclidian plane. In more complex geometries — and the geometry of constitutional law is nothing if not complex — as on the surface of a sphere, two points may lie on an infinite number of distinct lines. A third point, however, can determine which of those lines has been singled out.

Such a singling out was at stake in *Lawrence*. For the core questions the Court was asked to resolve were indeed fundamental: Would the trajectory of substantive due process treat *Bowers* and *Glucksberg* as charting a new and more modest course for constitutional law, thereby isolating decisions such as *Roe* and *Casey* (and perhaps some of their antecedents) as errant excursions driven by a misguided abortion rights agenda and best cabined if they could not be forthrightly overruled? Did *Bowers* and *Glucksberg* properly mark points at which the reach for "liberty" had simply exceeded the Constitution's grasp because the particular *activities* involved in those cases did not match the scatter diagram of specific actions traditionally considered beyond the government's grasp? Or would *Glucksberg* be regarded as a failed bid by Chief Justice Rehnquist to curb the reach of substantive due process, with a careful reading of *Glucksberg* itself signaling that even a possible "right to die with dignity" cannot be categorically declared to lie beyond liberty's proper path? Was *Bowers* destined to be regarded as an outlier, to be relegated to the dustbin of discarded judicial blunders once fear of the "other" ceased to "blind us to certain truths" about how "laws once thought necessary and proper in fact serve only to oppress"?[110]

2. Lawrence *and* Casey. — A close look at *Casey* might reveal whether it was only a matter of time before a case like *Lawrence* arose to put *Bowers* in its proper place — that dustbin of constitutional blunders. The structure of *Casey*'s conception of "liberty," such a look

---

stadt v. Baird, 405 U.S. 438, 454 (1972) (extending *Griswold* to invalidate a state law against distributing contraceptives to an unmarried person).

[110] *Lawrence*, 123 S. Ct. at 2484.

reveals, was too complex and firmly grounded to be so easily dispatched. Over the forceful but ultimately futile protests of Chief Justice Rehnquist and of Justice Scalia in their separate dissents,[111] *Casey* made a point of going beyond the question whether any specific instance of "pregnancy termination" was an action protected by the Constitution. *Casey* instead split that question into several distinct components: *first*, the "recognition afforded by the Constitution to the woman's liberty" — her "interest in deciding whether to bear and beget a child";[112] *second*, "the strength of the state interest in fetal protection,"[113] an interest that the Court said exists from conception and comes into its own at viability, provided always that any state restriction of abortion to vindicate that interest "contains exceptions for pregnancies which endanger the woman's life or health";[114] *third*, the force of the state's interest in "creat[ing] a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn";[115] and *fourth*, the Constitution's "rejection of the common-law understanding of a woman's role within the family,"[116] entailing the conclusion that "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children,"[117] notwithstanding "a husband['s] . . . deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying."[118]

---

111 *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 980 n.1 (Scalia, J., concurring in the judgment in part and dissenting in part).

112 *Casey*, 505 U.S. at 858–59.

113 *Id.* at 858.

114 *Id.* at 846; *see also id.* at 850–51 (suggesting that exceptions must also be made for pregnancies resulting from rape or incest, seemingly without regard to how late in pregnancy the abortion is sought). In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court invalidated a ban on a particular abortion procedure sometimes described as "partial birth abortion" in part because it failed to contain exceptions for the situation in which, even if it is not "the pregnancy . . . itself [that] creates a threat to health," *id.* at 931, extreme circumstances (such as a birth defect that will prevent the newborn infant from living longer than a few hours after delivery) lead the woman's attending physician to conclude that the forbidden procedure is the safest for the woman and the least likely to render her incapable of having healthy babies in the future. *See id.* at 930–31 (relying on *Casey* for the proposition that "a risk to a [woman's] health is the same whether it happens to arise from regulating a particular method of abortion or from barring abortion entirely").

115 *Casey*, 505 U.S. at 877 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). This interest extends even to the point of attempting to "persuade [the woman] to choose childbirth over abortion," *id.* at 878, at a point in pregnancy too early for the state's interest in fetal life to "override[] the rights of the woman," *id.* at 870, and through which the state may "ensure that [the woman's] choice is [otherwise] thoughtful and informed," *id.* at 872.

116 *Casey*, 505 U.S. at 897.

117 *Id.* at 898.

118 *Id.* at 895 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976)) (second omission in original) (internal quotation marks omitted).

The approach of the *Casey* Court to resolving the clash of interests and values at stake in laws regulating abortion, like the Court's approach to nearly all the cases involving facets of Fourteenth Amendment "liberty" not spelled out elsewhere in the Constitution, did not focus on whether the *acts* of abortion or of giving birth in particular circumstances were on the constitutionally protected side of some sort of private/public boundary, with the locus of each act vis-à-vis that boundary being a function of whether the act in question has been privileged as a matter of unbroken American tradition. Instead, the *Casey* Court focused on how pervasively the state's assertion of jurisdiction over the matter "touche[s] . . . upon the private sphere of the family [and] upon the . . . bodily integrity of the pregnant woman."[119] In a revealing reminder that, as I have argued at length elsewhere, the principles governing the constitutional assignment of fundamental rights and liberties are, at bottom, principles concerning the allocation of decisionmaking roles among individuals, associations, and other public and private entities,[120] the plurality opinion in *Casey* — after making clear its recognition that abortion "is an act fraught with consequences for others" including "the spouse, family, and society . . . and, depending on one's beliefs, for the life or potential life that is aborted"[121] — staked its basic agreement with *Roe* on the recognition that the woman's "bond of love," her "sacrifice," and her "suffering [are] too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[122]

With that observation, the Court finally relocated its jurisprudence of reproductive liberty from a realm that, in *Roe*, had been cast in largely medical and technocratic terms, to a very different realm defined by the war against the insidious transmutation of anatomy into destiny.[123] No longer could an analysis of liberty and of power over

---

[119] *Id.* at 896.

[120] *See generally* Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003).

[121] *Casey*, 505 U.S. at 852.

[122] *Id.*

[123] It was a war that had permitted generation upon generation to ignore David Hume's dictum that no "ought" may be derived simply from an "is" and to slip mindlessly from the descriptive observation that one or another condition is a biological given, or is the "law of nature" (for example, that women risk pregnancy when they engage in heterosexual intercourse while men do not) to the normative conclusion that the law of our society may opt freely to mirror that "natural" reality (for example, by banning abortion whenever the woman consented to the sex act that caused her pregnancy) without having to justify itself before the bar of the Constitution. For a richer discussion of this point, see my chapter entitled "Reorienting the Mirror of Justice: Gender, Economics, and the Illusion of the 'Natural,'" in LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 238, 240 (1985).

the unborn simply ignore the driving force of gender inequity. In turn, no satisfying recognition of the driving force of gender inequity could leave out, or sanitize in abstract analyses of sexual liberty, the ways in which allocations of decisionmaking power and responsibility shape such realities as gender hierarchy, on the one hand, and the life or death of the fetus, on the other.

In a passage explaining why it was only as to "the strength of the state interest in fetal protection"[124] that the Court felt the need to lean on the precedent set in *Roe* and to rely on the force of stare decisis, the Court (and not a mere plurality on this point) contended that, if the factors pointing to the woman as the final decisionmaker prior to fetal viability were "*not* . . . recognized as in *Roe*" — that is, if those factors were *not* deemed to establish at least the fundamental force of the woman's claim to exercise the decisive role — then "the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions."[125]

Justice Scalia's rejoinder to this argument drawing on the symmetry of choice was familiar. First he invoked tradition, defined at the most specific available level of generality, to determine whether a type of action — there, abortion — is entitled to constitutional protection as the exercise of a fundamental right.[126] Second, he insisted that *Roe* "sought to establish — in the teeth of a clear, contrary tradition [against killing] — a value found nowhere in the constitutional text," that of permitting abortion, while "[t]here is, of course, no comparable tradition barring recognition of a 'liberty interest' in carrying one's child to term free from state efforts to kill it."[127] He continued:

> For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court's contention . . . that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.[128]

But Justice Scalia's rejoinder missed the core of *Casey*. The plurality's argument was *not* that "the only way *to protect childbirth* is to *protect abortion*."[129] Indeed, the *Casey* plurality specified that the lib-

---

[124] *Casey*, 505 U.S. at 858.

[125] *Id.* at 859 (emphasis added) (reciting cases in which courts relied upon *Roe* to conclude that "government officials violate the Constitution by coercing a minor to have an abortion").

[126] *See id.* at 980 (Scalia, J., concurring in the judgment in part and dissenting in part).

[127] *Id.* at 980 n.1.

[128] *Id.*

[129] *Id.* (emphasis added).

erty at stake was not a one-sided right to abort a fetus but involved, instead, the assignment to the mother, as a matter of fundamental liberty, of the role and responsibility for choosing *whether or not* to abort.[130] It would be entirely consistent with that passage for one to reach the following two conclusions. First, although the assignment of the decisionmaking role to the woman reflects fundamental constitutional norms and cannot be overridden by the state without a compelling countervailing interest, such an interest in fact does exist, albeit only late in a pregnancy: protecting the fetus once "there is a realistic possibility of maintaining and nourishing a life outside the womb . . . can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[131] Second, no such compelling countervailing interest can be shown to exist merely by pointing to the desideratum of "population control[] or eugenics."[132] Thus, the Constitution might, indeed, *continue* to protect women, their unborn children, and the process of begetting and bearing a child from attempts by government to *compel* a woman to abort a pregnancy even if *Roe* were to be overruled and the Constitution were no longer to protect that same woman's decision to *terminate* her pregnancy with an abortion. If that were so, however, the reason would *not* be that the underlying liberty is impossible to disentangle from the impact of the woman's exercise of that liberty on the fetus. The reason would simply be that, although the underlying liberty *is* in principle separable from the impact on the fetus, and although that underlying liberty is fundamental whether government is intervening to *mandate* an abortion or to *prevent* one, the exercise of that liberty in the given circumstances would have consequences that could not be prevented without preventing the abortion itself — consequences that might properly be deemed sufficiently grave to satisfy the demands of strict scrutiny.

Thus it is a sure sign of analytic confusion for anyone to say that looking "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body."[133] "Effects," not only upon other people but upon all manner of things, certainly count in deciding whether one may properly be penalized, burdened, or deterred by the state through a particular regulatory regime. But it's one thing to look at an act's effects at the *end* of a constitutional analysis that centers not on the act *per se* but on the allegedly pro-

130 *See Casey*, 505 U.S. at 858–59.

131 *Id.* at 870 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

132 *Casey*, 505 U.S. at 859.

133 Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (1989) (plurality opinion).

tected choice or relationship in the context of which the act takes place. It's something else altogether to look at the act's effects at the *beginning* of the analysis, viewing the act as an instance of conduct *removed* from its allegedly protected context and then begging the question of government power by front-loading all of the reasons for government intervention in the threshold definition of the "liberty" at stake. Unlike the first approach, this second approach implies the actor had claimed not a right to make a certain kind of choice or to enter a certain kind of relationship absent a compelling contrary interest but, rather, had claimed the "right" to defeat that very interest by choosing an act that does just that. Allocating to a woman the power to choose whether or not to continue a pregnancy certainly need not mean giving her the power to ensure the *death* of the fetus if that fetus could, for example, be brought to term in a surrogate mother or in an artificial womb.[134] To say that recognizing a right of reproductive freedom is tantamount to conferring an affirmative right to kill a fetus is to forget, among other things, that embryos can now be frozen; it would be quite a leap beyond *Roe* and *Casey* to posit that such an embryo's genetic mother has a right to ensure its destruction.[135]

I have paid what may seem an inordinate amount of attention to this aspect of the abortion right in an essay about intimate same-sex

---

[134] To take another simple example, suppose a journalist receives a set of tape recordings of conversations among strangers. Her freedom of speech certainly encompasses the right to decide which recordings she will broadcast and which ones she will toss out. This freedom might, however, be overcome by proof that, for example, she knowingly caused the recordings that she chose to broadcast to be made in violation of an anti-eavesdropping statute. *See* Bartnicki v. Vopper, 532 U.S. 514, 538 (2001) (Breyer, J., concurring) (distinguishing between direct and indirect participation in the illegal interception of phone communications and the subsequent publication by a media defendant of communications known to have been obtained illegally). It would seriously distort the subsequent First Amendment analysis to assess the case in which alleged eavesdropping had occurred as though the journalist had claimed not a right to decide which tapes to broadcast (a right that might be overcome in certain circumstances) but a right to broadcast a tape that she had hired an eavesdropper to make by violating the anti-eavesdropping law. When allocating a power of choice to decisionmaker X rather than decisionmaker Y *necessarily* produces a particular set of results R, arbitrarily *excluding* R from one's overall consideration of whether the power should indeed be allocated to X rather than to Y is just a parlor trick. But when that allocation to X produces R only *contingently* and only in circumstances C, it is no less a parlor trick arbitrarily to *include* R and to insist that X cannot even get to first base in demanding that the state prove that its regime is needed in order to avoid R because X must first establish that the *right to produce R* has been protected by an unbroken tradition in our society, something that X has not in fact asserted.

[135] If there were such a right, it would seem difficult not to recognize an equally basic, conceptually parallel right of the embryo's genetic father to ensure its survival — or, indeed, a right on the genetic mother's part to insist on the embryo's survival and a parallel right on the genetic father's part to insist on its destruction. But the parallelism of these "rights" is a geometric illusion. For, unlike parallel lines, these supposed "rights" obviously intersect and, at their point of intersection, cancel one another out. Any "right" whose recognition would automatically generate two pairs of equal and diametrically opposed rights surely must be rejected.

relationships not because I think that *Lawrence*, *Roe*, and *Casey* must stand or fall together. On the contrary, it seems clear that one could believe that *Roe* was an awful blunder and that *Bowers* was just as wrong — a combination of views held by any number of distinguished constitutional thinkers, including my colleague Charles Fried.[136] Instead, my reason for having explored here the structure of the liberty recognized by *Roe* and *Casey* was to expose the logical fallacy of reducing claims about the constitutional allocation of decisionmaking roles to propositions regarding the constitutional status of certain acts in a misguided hunt for a tradition of social and legal protection sufficiently specific and enduring to warrant awarding those acts a special seal of constitutional approval.

There can be no doubt, as even the briefest examination of the *Lawrence* opinion makes plain, that the Court in that case steadfastly resisted anything like this reductionist procedure. Instead, in order to assess the constitutionality of the state's preferred allocation of roles, the Court traversed time and space, encompassing contemporary as well as historical understandings and "values we share with a wider civilization."[137] In its latitudinal comparison, the Court relied in part on a reference (exceedingly rare for our Supreme Court) to foreign court decisions (by the European Court of Human Rights, among other institutions) to support the notion that the "right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[138] Although the library of sources the Court consulted was less Americentric than usual, a departure that the dissent especially deplored,[139] the Court's basic approach placed it squarely in the tradition of the substantive due process jurisprudence that links the surviving *Lochner*-era precedents of *Meyer* and *Pierce* — decisions in which the Court employed a crude form of comparative constitutional analysis by contrasting childrearing in Sparta with childrearing in Athens — with the line of decisions leading to, and extending past, *Casey*.

---

136 *See* FRIED, *supra* note 97, at 81–84 (sharply criticizing *Bowers* and arguing that the state in that case was essentially punishing "an act of private association and communication," rendering "[t]he fact that sexuality is implicated . . . an anatomical irrelevance"); *id.* at 75 (describing *Roe* as "a prime example of twisted judging"); *id.* at 80–81 (setting forth the position that the Court's *Roe* "decision is a relentless series of non sequiturs and ipse dixits").

137 *Lawrence*, 123 S. Ct. at 2483.

138 *Id.*

139 *See id.* at 2494–95 (Scalia, J., dissenting) (finding outlandish the majority's reliance on the fact that "*foreign nations* decriminalize [the] conduct" in question and dismissing as "meaningless dicta" the Court's movement toward "impos[ing] foreign moods, fads, or fashions on Americans" (quoting *Foster v. Florida*, 537 U.S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari) (internal quotation marks omitted).

B. The Bill of Rights as a Litany of Wrongs

No one should suppose that it is only in the high-flying and anxiety-ridden world of liberties (and of role allocations) that deal with matters of life and death — and, after *Lawrence*, with intimate relationships that *may* involve parenting and even reproduction but that necessarily sever the link between sexual intimacy and procreation — that one finds rights with structures not reducible to the simple, one-dimensional form treated as canonical by Chief Justice Rehnquist in *Glucksberg*,[140] by Justice Scalia in his *Casey* dissent,[141] and by Justice White in *Bowers*.[142] On the contrary, the way constitutional law has long treated rights in general, including those that find their home snugly in the Bill of Rights, has not been as flattened-out collections of private acts, or even as specific groups of private actions, that are identified as protected from government prohibition or undue restriction. They have been treated as the reflections, in the lives of individuals and groups, of constitutional principles with a more complex architecture, centrally concerned with the ways we have determined that government must not dictate the kinds of people we may become or the kinds of relationships we may form. The Court recently had occasion to remind us of this very point in the cross-burning case from St. Paul, Minnesota.[143] There, Justice Scalia's opinion for the majority insisted, I think rightly, that supposedly "unprotected" speech like "fighting words" or "obscenity" is not *categorically invisible* to the First Amendment,[144] which embodies not a simple rule about some communications being protected and others not, but a set of principles about the role of government, including a principle that bars viewpoint-based government restrictions on communicative conduct.

The Court has issued similar reminders in connection with semi-protected categories like "commercial speech." For example, in the newsracks case from Cincinnati, Ohio,[145] it held that speech proposing commercial transactions is subject to more pervasive (and more deferentially reviewed) regulation by the state only with respect to the distinctively commercial risks that such speech poses to consumers — not with respect to aesthetic or other matters as to which its commercial character is immaterial.[146] The doctrines surrounding such phenom-

---

140 Washington v. Glucksberg, 521 U.S. 702, 723–28 (1997).

141 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

142 Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986).

143 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

144 *See id.* at 383.

145 City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

146 *See id.* at 418–20.

ena as "prior restraints" in the form of anti-speech injunctions,[147] or administrative licensing arrangements,[148] and the many implementing doctrines[149] that mediate between general free speech values and particular ways in which state law might vindicate competing interests (like the doctrine of *New York Times Co. v. Sullivan*[150]) support the same point. And, of course, other parts of the First Amendment, like the Establishment Clause, specifically address what we might call intergovernmental relations and the interplay between secular and religious centers of power, and thus are notoriously difficult to translate into individual rights at all, unless one talks in terms of an "individual" right to live in a polity that maintains certain separations between religious and secular authority and that possesses a number of other such structural features.[151]

In each of these examples, the relevant consideration is that the scope and contours of the constitutional rights at issue are very different from what the model of "protected acts" would suggest.

III. SUBSTANTIVE DUE PROCESS AFTER *LAWRENCE*

In controversies over aspects of liberty not implicating such ultimate matters as those at stake in *Casey* and *Glucksberg*, either side

---

[147] *See, e.g.*, New York Times Co. v. United States (The Pentagon Papers Case), 403 U.S. 713 (1971) (per curiam).

[148] *See, e.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002) (invalidating municipality's permit requirement for door-to-door proselytizers); Thomas v. Chi. Park Dist., 534 U.S. 316 (2002) (holding that First Amendment requirements for film licensing do not apply to municipal park ordinance requiring individuals to obtain permits before conducting large-scale public assemblies, parades, picnics, and the like).

[149] *See generally* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970) (discussing the broad principles that limit governmental activity affecting freedom of speech).

[150] 376 U.S. 254, 279–80 (1964) (holding that public officials cannot receive damages for defamation without proving defendant was guilty of deliberate or reckless falsehood); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (concluding that a public figure must meet the *Sullivan* test in order to recover for the tort of intentional infliction of emotional distress based on a parody no reasonable reader would have taken literally).

[151] The question whether a right belongs to individuals as such or is strictly ancillary to a government institution or practice, *see* TRIBE, *supra* note 9, at 894–903 & n.211 (discussing this question in the context of the "right to bear arms" and its relationship to state militias), is distinct from the question whether a particular right is a right to achieve or to avoid a certain end (for example, the Third Amendment right to keep "Soldier[s] . . . [from] be[ing] quartered in any house, without the consent of the Owner"), or is instead a right to make choices of a certain kind (for example, the First Amendment right that the government not "abridg[e] the freedom of speech"). By this design, rights to *choose* are characteristically symmetrical (for example, freedom to choose what to say embraces freedom to choose what *not* to say) whereas rights to bring about, preserve, or prevent particular ends or conditions normally are not (for example, there is no right to have federal troops occupy and guard one's house upon request). *See generally* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641 (2001).

may still score rhetorical points by invoking the Court's work in this pair of cases. But the facet of the decisions about abortion and about the right to die that seems to me most relevant in connection with these other controversies is the foolishness of attempting to define the dimensions of human liberty that give rise to elevated scrutiny by enumerating a catalog of private actions that might (or might not) fall on the protected side of a constitutional line drawn to identify the sorts of individual acts that are presumptively beyond the state's authority to control.

The *Lawrence* Court's explicit recognition of the "due process *right to demand respect* for conduct protected by the substantive guarantee of liberty" and of the way in which that right is linked to "[e]quality of treatment"[152] was an obviously important doctrinal innovation. But the Court developed its substantive due process jurisprudence in a way that connected *Lawrence* with the long line of decisions that described the protected liberties at higher levels of generality[153] than any "protected activities" catalog could plausibly accommodate, and typically did so in temporally extended, relationship-focused terms rather than in strictly solitary, atomistic terms. Thus *Meyer* and *Pierce*, the two sturdiest pillars of the substantive due process temple — both survivors of the largely discredited *Lochner* era — described what they were protecting from the standardizing hand of the state in language that spoke of the family as a center of value-formation and value-transmission that was not to be commandeered by state power. Their language bespoke the authority of parents to make basic choices directing the upbringing of their children.[154] Those judicial decisions did not describe what they were protecting merely as the personal activities of sending one's child to a religious school (*Pierce v. Society of Sisters*) or a private military academy (*Pierce v. Hill Military Academy*[155]) or of hiring a teacher to educate one's child in the German language (*Meyer*).[156]

In much the same way, *Lawrence* makes clear, if only by conspicuous omission, that any such exercise in enumeration is a fool's errand that misconceives the structure of liberty and of the constitutional doc-

---

[152] *Lawrence*, 123 S. Ct. at 2482 (emphasis added).

[153] *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (exploring ways to determine whether a right is "fundamental").

[154] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923).

[155] 268 U.S. 510 (1925). *Hill Military* was decided jointly with *Society of Sisters*.

[156] To be sure, these decisions did rely in part on the rights of the parents, the nonpublic schools, and the teachers to make contracts regarding the use of their property and the disposition of their labor. But even that dose of economic due process involved the recognition of constitutional protection for a network of interpersonal arrangements.

trines that provide its contents. Indeed, *Lawrence* is likely to endure in large part because it highlights the futility of describing liberty in so one-dimensional a manner. The Court left no doubt about *its* understanding of the fundamental claim to "liberty" being advanced in *Lawrence* and in *Bowers* alike: at stake in both cases were claims that a state may not undertake to "control a personal relationship" in the way that Georgia had in *Bowers* and Texas had in *Lawrence*. And *Lawrence* tells us, ironically echoing the Court's holding three years earlier in *Boy Scouts of America v. Dale*,[157] that once a "severe intrusion" into a protected "freedom of association" is established, not even a neutral rule of general applicability narrowly protecting an otherwise weighty state interest — like that of eliminating what the state views as unjustified discrimination or some other moral scourge — can save the state's usurpation of the association's autonomy from condemnation as an infringement of substantive due process.[158]

In *Boy Scouts*, as in *Lawrence*, the Court's holding rested on the "sever[ity]" of the affront to "expressive association"[159] engendered by the state law in question — either as applied, as in *Boy Scouts*, or on its face, as in *Lawrence* — rather than on any asserted illegitimacy or insufficiency of state action in pursuit of "moral" rather than tangible or strictly utilitarian objectives. Indeed, far from questioning the legitimacy of state efforts driven by moral judgments — such as the moral judgment underlying New Jersey's attempts to eradicate discrimination based on sexual orientation — the *Boy Scouts* Court treated the associational rights of the Boy Scouts as simply *trumping* the state's interest in pursuing its conflicting moral vision. Neither *Boy Scouts* nor *Lawrence* suggests, contrary to the forebodings expressed in Justice Scalia's dissent in *Lawrence*,[160] that all state laws predicated on "morality" are ipso facto constitutionally vulnerable. Each of these decisions suggests, rather, that *associational rights* — whether involving "associat[ion] for the purpose of engaging [in]

---

[157] 530 U.S. 640, 661 (2000) (holding that a state statute prohibiting discrimination based on sexual orientation in places of public accommodation infringed First Amendment freedom of association as applied to compel the Boy Scouts to accept an "avowed homosexual" as a scoutmaster); *see* Tribe, *supra* note 151, at 644–45, 651–60 (defending the result but criticizing the reasoning of *Boy Scouts*). Having acknowledged that "homosexuality has gained greater societal acceptance," *Boy Scouts*, 530 U.S. at 660, the Court left no doubt in *Boy Scouts* about its conviction that "this [was] scarcely an argument for denying First Amendment protection to those who refuse to accept these views." *Id.* Fair enough. With the freedom of association "shoe" on the other foot just three years later, however, what went around came around: the shoe fit, and the *Lawrence* Court wore it. But the Chief Justice and Justices Scalia and Thomas, members of the *Boy Scouts* majority, evidently found the fit a bit too tight; the three Justices dissented in *Lawrence*, opting for their more traditional and comfortable slippers.

[158] *See Boy Scouts*, 530 U.S. at 659–61.

[159] *Id.* at 659.

[160] *See Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

. . . speech, assembly, petition [, or] . . . religion," or association in the context of "enter[ing] into and maintain[ing] . . . [the] intimate human relationships" that play a "role . . . in safeguarding the individual freedom that is central to our constitutional scheme"[161] — cannot be subordinated to, or "balanced" away in the name of, generalized societal interests, however legitimate and even weighty those interests might otherwise be.

This is not to say that every gathering of persons — from Justice Scalia's 60,000 naked "adults crowded into the Hoosier Dome"[162] to the adult and teenage dance hall "patrons [who] may number 1,000 on any given night"[163] — is shielded by a freedom of association whose restriction by an otherwise valid regulation calls for more than rational basis scrutiny,[164] much less to say that it calls for scrutiny under an "intermediate standard of review."[165] It is to say only that claims of associational autonomy that are solidly grounded either in "expressive" association[166] or in "intimate" association[167] are shielded in this way. In *Boy Scouts*, the associational claim was grounded in both kinds of association, for it related both to the message the Boy Scouts sought to express to the world at large and to the Boy Scouts' role as an extension of the parent-child relationship.[168] So, too, the associational claim in *Lawrence* entails both an intimate, inward-looking dimension as well as expressive dimensions that are both internal to the relationship itself and profoundly private, and integral to how the partners in that relationship choose to present themselves to the world.[169]

Lawrence's focus on the role of self-regulating relationships in American liberty suggests that the "Trivial Pursuit" version of the due process "name that liberty" game arguably validated by *Glucksberg* has finally given way to a focus on the underlying pattern of self-government (rather than of state micromanagement) defined by the rights enumerated or implicit in the Constitution or recognized by the landmark decisions construing it. It's always possible to persuade oneself that data points lying along a great arc are in fact just so many isolated points — to see the dots but not the path that passes through

---

161 Roberts v. United States Jaycees, 468 U.S. 609, 617–18 (1984).

162 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring); *see supra* note 71.

163 City of Dallas v. Stranglin, 490 U.S. 19, 24 (1989).

164 *See id.* (holding that rational basis sufficed for city's restriction on minors' mingling with adults in public dance halls).

165 Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (holding that intermediate scrutiny was too lax a standard for reviewing an application of the state's antidiscrimination statute to the Boy Scouts' choice of adult leaders to mentor children in scout camps and clubs).

166 *Id.*

167 Roberts v. United States Jaycees, 468 U.S. 609, 617–18 (1984).

168 *See* Tribe, *supra* note 151, at 644–45, 649, 655.

169 *See infra* pp. 1939–40 and note 181.

them. *Bowers* might not seem aberrant to someone of that sort — someone who collects and categorizes the continuous stream of rulings about human freedom as though cataloging so many discrete data points rather than searching for and constructing a regression line that satisfyingly explains the relationship of the points to one another and to liberty as a whole. Count them, if you will: one data point for the right to become a parent (*Skinner*); several more points marking the rights of parents to direct the upbringing of their children (*Meyer*, *Pierce*, *Troxel*); a pair of points for the right to keep one's children safe from the distractions and temptations of a too-diverse world, coupled with a right either to inculcate one's religion (*Yoder*) or to transmit one's views of morality (*Boy Scouts*); yet another point for the rights of married couples to have sexual intercourse without risking pregnancy and parenthood (*Griswold*); another pair for the rights of individuals (married or unmarried) not to risk unwanted pregnancy or sexually transmitted disease as penalties inflicted (without trial!) for breaking the state's codes of sexual conduct (*Eisenstadt*, *Carey*); two points more to mark the rights of pregnant women to end their pregnancies (*Roe*, *Casey*) or, if they wish, to continue their pregnancies to term (*Casey*); and three last points celebrating the rights of straight couples to marry without restrictions based on race (*Loving*), poverty (*Zablocki*), or imprisonment (*Turner*). So many points, so many disconnected dots!

Lawrence eschewed such isolated point-plotting. The whole of substantive due process, *Lawrence* teaches us, is larger than, and conceptually different from, the sum of its parts. *Lawrence* contrasts with Justice Harlan's justly celebrated "rational continuum" that purported to connect the Bill of Rights with a discourse defined by our society's specific historical experience and that led Justice Harlan, dissenting in *Poe v. Ullman*, to put intimate marital relations on a pedestal and to relegate fornication and homosexuality to a disconnected netherworld.[170] Justice Kennedy's opinion for the Court in *Lawrence* instead suggests the globally unifying theme of shielding from state control *value-forming* and *value-transmitting* relationships, procreative and nonprocreative alike, drawing from *Griswold* a right to decouple sex from conception in an intimate marital relationship and from *Eisenstadt* a right to an intimate sexual relationship distinct from marriage. *Lawrence* also suggests this theme when it looks beyond the American historical experience for insight both contemporary and cross-cultural into the range of relationships through which individuals might seek to transcend the boundaries of the self.

From the late nineteenth century to the present, the architecture of substantive due process doctrine and of the "unenumerated" liberties

[170] *See* Poe v. Ullman, 367 U.S. 497, 543, 545 (1961) (Harlan, J., dissenting).

that the doctrine has protected has been no exception to the broad proposition that the Constitution generally safeguards rights through government-limiting strategies that focus on honoring self-governing interpersonal commitments and choices and on assuring equal dignity and respect. In the Lochnerian heyday of liberty of contract,[171] the Due Process Clause was understood to treat as presumptively privileged from legislative displacement a kind of self-government through privately created regimes of governance. Such regimes are constructed pursuant to agreements voluntarily made within a set of background rules telling the parties which agreements would be deemed binding, which would be deemed void as against public policy, which terms would be read into various agreements unless the parties expressly opted out of those terms by mutual consent, which terms would be read into them notwithstanding what the parties might actually want, and which enforcement devices would be available to hold parties to their binding agreements.[172] It is no wonder that when Justice Holmes, famously dissenting from *Lochner* itself, complained that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"[173] he did not instead (or in addition) proclaim that it fails to enact John Stuart Mill's *On Liberty*. To say *that* would have challenged none of the *Lochner* majority's premises, for nothing in the Fourteenth Amendment has ever been confused by any Court majority, in or out of the *Lochner* era, with a charter of pure liberal individualism.[174]

---

[171] *See* Lochner v. New York, 198 U.S. 45, 53 (1905) (holding that a state law setting a sixty-hour-per-week and ten-hour-per-day limit on work in a bakery deprived both bakery owners and employees of liberty and property without due process of law). *Lochner* became the infamous symbol of an entire era of economic due process jurisprudence lasting from roughly 1895 until 1937.

[172] For the seminal discussion of contract as private law, see Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937). *See also* Hills, *supra* note 120; *cf.* John H. Garvey, *Private Power and the Constitution*, 10 CONST. COMMENT. 311 (1993). On the doctrinal structure and content of the *Lochner* era generally, see TRIBE, *supra* note 14, at 1332–57.

[173] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[174] One can expect libertarians and other champions of liberal individualism to claim *Lawrence* as a victory for their camp and to trumpet it as a first salvo in a new war on government regulation generally, waged under the banner of a general presumption against the validity of *any* government restriction of *any* facet of liberty — economic, sexual, or social — beyond the restrictions needed to prevent palpable physical injury to others. But while Justice Scalia's dissent in *Lawrence* does attribute to the majority a theory that "effectively decrees the end of all morals legislation," *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting), that interpretation seems dubious, predicated as it is on little beyond the Court's refusal to name a particular set of acts that it deemed presumptively protected as "fundamental rights," and dependent as it is on willfully ignoring the distinctive way in which the Court's freedom of association jurisprudence elevates rights of expressive association and rights of intimate association over otherwise valid state interests. *See supra* pp. 1935–36. The Court might well have wanted to avoid getting trapped in the self-contradictory process of enumerating the unenumerated rights as categories of activity. *See supra* section II.B, pp. 1932–33.

Lochner, we all know, collapsed with the growing awareness that the impersonal kind of contractual "self-government" that great inequalities of wealth and bargaining power too often generated was government of, by, and for the more powerful party — a mockery, more than a model, of the democratic self-government to which the ideal spoke.[175] Not surprisingly, therefore, when the ghost of *Lochner* was reborn in the guise of *Griswold v. Connecticut*,[176] it was the supposed sanctity of another and more personal version of self-government, that of the marriage contract, that gave the Court its rhetorical (and philosophical) entrée. And even though the Court shortly thereafter, in *Eisenstadt v. Baird*,[177] wrote conspicuously of 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,"[178] and disclaimed any attribution of rights to the marital unit as a single juridical entity,[179] the Court was plainly engaged in the protection of intimate personal *relationships*. Moreover, the Court seemed committed to enabling the individuals involved in those relationships — and in other associational forms that are less personal in character but that are still primarily engaged in shaping, expressing, or imparting values either vertically (within the association, typically across the generations) or horizontally (to the world at large) — to govern for themselves and to choose the contours, sexual and otherwise, of their personal association rather than be treated as little more than footsoldiers, directed by the state as a commanding general might direct the moves, and orchestrate the relationship among the parts, of an army battalion on the march.[180]

In the end, what anchors all of these decisions — from *Meyer* and *Pierce* to *Griswold* and *Lawrence* — most firmly in the Constitution's explicit text and not solely in the premise of self-rule implicit in the entire constitutional edifice is probably the First Amendment's ban on government abridgements of "speech" and "peacabl[e] . . . assembl[y],"

---

[175] *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937); *see also supra* note 74.

[176] 381 U.S. 479 (1965).

[177] 405 U.S. 438 (1972).

[178] *Id.* at 453.

[179] *See id.* ("Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.").

[180] For a discussion of how the "anticommandeering" principle that the Court has inferred from the structure of federalism — a principle that constrains the posture of the national government vis-à-vis the states as self-governing polities — parallels the anticommandeering principle that constrains the posture of government generally vis-à-vis private relationships (once one accepts self-government as the overarching theme of a constitutional regime), see Laurence H. Tribe, *The Supreme Court, 1998 Term—Comment:* Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future —Or Reveal the Structure of the Present?* , 113 HARV. L. REV. 110, 137–40, 141–44, 147–52, 156–58, 160–72, 173–81, 185–91 (1999).

taking those terms in their most capacious sense. For what are speech and the peaceful commingling of separate selves but facets of the eternal quest for such boundary-crossing — for exchanging emotions, values, and ideas both expressible in words and wordless in the search for something larger than, and different from, the merely additive, utility-aggregating collection of separate selves? And what is government doing but abridging that communication and communion when it insists on dictating the kinds of consensual relationships adults may enter and on channeling all such relationships, to the degree they become inwardly physically intimate or outwardly expressive, into some gender-specified or anatomically correct form?[181] What is government doing but abridging the freedoms of speech and peaceable assembly when it insists that the language of love remain platonic or be reserved for making babies (or when that is impossible, at least going through the standard baby-making motions)? Justice Thomas, dissenting in *Lawrence*, may have said more than he intended when he described the judgment on review in that case as one that punished Lawrence "for *expressing* his sexual preference through noncommercial consensual conduct with another adult."[182]

In a series of articles written more than thirty years ago, I sketched a theory of why human relationships beyond the purely instrumental — and the expressive dimensions and mutual commitments they entail — are indispensable to the process of transmitting and transmuting values in an intergenerational, cross-social progression that keeps faith

---

[181] Indeed, advocates for extending marital rights to same-sex couples on an equal basis have argued that state efforts to channel the lifelong commitments of same-sex couples into "compromise" categories like the civil union do just that — compromise the speech and assembly rights of same-sex couples by denying those couples the ability to express their commitment formally through legal identification with civil marriage and all of its cultural and legal accoutrements. *See, e.g.*, Brief of Amici Curiae Professors of Constitutional Law and American Legal History at 28 & n.32, Opinions of the Justices to the Senate (Mass. Feb. 3, 2004) (No. SJC-09163) (authored by Laurence H. Tribe, Martin S. Lederman, and Hale and Dorr LLP, and joined by ninety professors of constitutional law and legal history); Brief of Amicus Curiae Professors of Expression and Constitutional Law et al. in Support of Appellant's Brief at 14 n.6, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (arguing that the extension of "non-marriage" status to same-sex couples, such as Vermont's "civil union" alternative, creates a "separate and unequal [status] 'parallel'" to civil marriage that deprives same-sex couples of equality of expressive opportunity by withholding "*the crucial symbolic benefit* of sharing the cultural and semiotic status of the marital estate and its surrounding history and ethos" (quoting David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 956 n.168 (2001) (quoting Posting of Laurence H. Tribe, larry@tribelaw.com, to CONLAWPROF@listserv.ucla.edu (May 12, 2000) (copy on file with author))) (internal quotation marks omitted)), *available at* http://www.glad.org/marriage/Expression_Brief.pdf; Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654 (1980) ("When two people marry . . . they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags.").

[182] *Lawrence*, 123 S. Ct. at 2498 (Thomas, J., dissenting) (emphasis added).

with a starting set of basic democratic undertakings while remaining open to evolution in the direction of greater empathy, inclusion, and respect.[183] No doubt, other dimensions of protection against tyrannical power and oppressive government are required, many of them corresponding to principally procedural provisions of our Bill of Rights. But I argued that the essence of the freedom that such texts as the Bill of Rights define is, paradoxically, not the absence of constraint and obligation[184] — following Kant, I dismissed the utility-maximizing ideal of frenzied pursuit of ever-changing and never-chosen ends as but a parody of freedom[185] — but the self-governing experience of making, expressing, and renewing one's commitments, all the way from one's choices with respect to intimate relationships to one's choices as a participating member of a self-governing polity.[186] Part of that notion en-

---

183 *See generally* Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1972) [hereinafter Tribe, *Policy Science*]; Tribe, *supra* note 35; Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973) [hereinafter Tribe, *Technology Assessment*]; Tribe, *supra* note 120; Tribe, *supra* note 55.

184 *See* Tribe, *supra* note 55, at 1326 ("We can be truly free to pursue our ends only if we act out of obligation, the seeming antithesis of freedom.").

185 *See* Tribe, *Technology Assessment*, *supra* note 183, at 651 ("[I]f the set of ultimate ends that defines a person must be perceived as the shifting product of the instrumental choices to which his subjective desires point from moment to moment, have we not abandoned any integrated notion of the person as a self with a continuing identity over time and any possible conception of persons as selves sharing in a community of ends?").

186 *See* Tribe, *Policy Science*, *supra* note 183, at 99 ("[T]he whole point of personal or social choice in many situations is not to implement a given system of values in the light of the perceived facts, but rather to define, and sometimes deliberately to reshape, the values — and hence the identity — of the *individual or community that is engaged in the process of choosing*." (emphasis added)); Tribe, *supra* note 180, at 158, 186–88 (noting that the "individual rights" provisions of the Constitution are, like the states' rights provisions, "constitutive of government because they determine relations between the state and individual which are as central to the character and structure of governance as is the manner in which the organs of government themselves are constructed and relate to one another"; observing that "'voting with one's feet' to select the legal system by which one wishes to be governed from among the fifty-one such systems available in the United States . . . and voting on a one person, one vote basis within one's chosen legal system, are but two special cases of binding oneself, through a self-defining and enduring commitment, to a community of individuals and a system of values"; and arguing that "[h]owever different it might at first appear substantively, choosing a marital partner with whom to share one's life is ultimately just another illustration of self-binding self-definition and hence of personal self-government, as is choosing whether to care for a child, deciding whether to have one's own biological baby, or making any of several other constitutive choices through which all of us construct our identities and, in every meaningful sense, govern ourselves as individuals" (footnotes omitted)); *see also* Tribe, *supra* note 55, at 1326–27 ("To be free is to choose what we shall want, what we shall value, and therefore what we shall be. But to make such choices without losing the thread of continuity that integrates us over time and imparts a sense of our wholeness in history, we must be able to reason about what to choose — to choose in terms of commitments we have made to bodies of principle which we perceive as external to our choices and by which we feel bound, bodies of principle that can define a coherent and integrative system even as they evolve with our changing selves." (footnotes omitted)); *cf.* Hills, *supra* note 120, at 181 ("Our autonomy is

tailed a concept of "structural due process," one that imposes certain constraints on the ways in which law is made in the ongoing process of being applied[187] — constraints premised on the belief that the institutional design of a society organized with our constitutional aspirations must be flexible and permeable enough to accommodate new ways of experiencing connection and growth both within personal relationships and within associations whose size may preclude calling them "personal" but whose purposes remain grounded in the formation and transmission of norms and ways of being, as opposed to the mere maximization of utility as measured by a fixed set of preexisting ends.[188] It would be an understatement to say that the project I began in that series of articles is still on the drawing board.[189] Its elaboration would have to specify with greater precision the limiting principles suggested in this Essay for the rights that the theory would defend; without realistically realizable limits, the resulting vision of rights — including rights to enter into every imaginable sort of relationship, economic as well as social, instrumental as well as expressive — would

importantly constituted by our capacity to play different roles with craft and zeal in different contexts.").

187 *See generally* Tribe, *supra* note 35 (proposing structural due process as a supplement to procedural and substantive due process).

188 *See id.* at 290 ("In some areas, once the likely *process* of policy-formation comes into focus, it will be arguable that — for a time, at least — government ought to have no policy at all, in the sense that it ought to leave the area entirely to private ordering and choice."); *see also* Tribe, *Technology Assessment*, *supra* note 183, at 651 n.118 ("*Continuity over time* requires a unifying thread that the shifting set of momentary wants cannot provide, while *community among persons* demands more than a merely accidental or haphazard coincidence among the ends they individually seek."); *cf.* Tribe, *Policy Science*, *supra* note 183, at 79 ("From many perspectives, the *procedures* that shape individual and social activity have significance independent of the final products they generate.").

189 In the intervening years, other scholars have set forth more elaborate versions of what, if I read them correctly, is much the same theory. *See, e.g.*, JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 145 (2001) ("Commitmentarian democracy holds that a people, understood as an agent existing over time, across generations, is the proper subject of democratic self-government."). I should add the caveat that I do not think the mode of analysis I share with Rubenfeld can necessarily be derived by analogizing the promises that define a particular polity to the promises one makes to oneself, or even to one's *future* self — an analogy Rubenfeld cautiously invokes — because commitment to other persons encompasses dimensions that cannot be fully captured in the paradigm of commitment to oneself, a fact that accounts for the centrality, in my theory at least, of private association and private, as well as political, self-governance. For an attempt to replace intertemporal with purely contemporary commitment, see CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 130–35 (2001). Rubenfeld and Eisgruber have recently debated the comparative merits of their approaches. *Compare* Jed Rubenfeld, *Of Constitutional Self-Government*, 71 FORDHAM L. REV. 1749, 1760 (2003) ("The self that aspires to self-government . . . does not aspire to a state of pure ungovernedness. This self aspires to be *governed* . . . by self-given commitments."), *with* Christopher L. Eisgruber, *Dimensions of Democracy*, 71 FORDHAM L. REV. 1723, 1746 (2003) ("I believe that the Constitution and judicial review are best justified on the ground that they help the people to govern on the basis of their best [current] judgments about justice.").

indeed threaten to be one "that ate the rule of law."[190] But what I have already said should indicate the ability of the kind of theory I have sketched to point to constitutionally grounded limits on its reach — limits akin to those now familiar in the jurisprudence of free speech and of expressive association. And I remain committed to the theory's understanding of self-government and relational rights as defining the core of liberty, as well as to the theory's recognition of coercion, and of using others as mere means to the maximization of one's own ends, as setting the limit to liberty's reach.

Notably, this theory stakes out a vision not far removed from that of the penultimate paragraph of the *Lawrence* opinion, which recognized that "those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . might have been more specific" had they "known the components of liberty in its manifold possibilities," but, having the wisdom not to "presume to have this insight" and knowing that "times can blind us to certain truths," they bequeathed us a text open to the recognition by "later generations" that certain "laws once thought necessary and proper in fact serve only to oppress."[191] In deciding that the laws banning sodomy should be so regarded, the *Lawrence* majority did not articulate a doctrinal "test" as such, or even a specific mode of analysis, but — as perhaps befits a Court more comfortable with the exposition of common law than with the construction of theory — it laid down markers that future courts might retrace and extend less through abstract speculation than by the light of unfolding experience. For its part, the *Lawrence* majority manifestly drew on its observations of — indeed, its immersion in — a social reality, both within the United States and, in an increasingly shared culture, in Canada and Europe as well, that exposed an ugly dynamic of oppression concretely at work in the prohibition of sodomy. Such a prohibition, whether or not cast in terms that expressly singled out same-sex relationships, operated to stigmatize those relationships in particular by reducing them to a forbidden sexual act. The result was to brand as less worthy than others those individuals who did no more than seek fulfillment as human beings by forming voluntary intimate relationships with others of the same sex. This stigmatization locked an entire segment of the population into a subordinate status and often forced such individuals either to transform[192] or to suppress[193] important dimensions of their identities in order to escape second-class treatment in the public realm.

---

[190] *Cf. Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting).

[191] *Lawrence*, 123 S. Ct. at 2484.

[192] *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 784–811 (2002) (discussing the phenomenon of gay "conversion").

[193] *See id.* at 811–49 (describing gay "passing").

Critics of the *Lawrence* approach often advance hypotheticals about the decriminalization of adult incest or bigamy to suggest the supposedly illimitable effects of decriminalizing sodomy.[194] When confronted with such hypotheticals, we need only ask whether it is at all plausible to imagine the dynamic sketched above — a dynamic constituted by violent intolerance toward those open about their intimate relations and by equally devastating self-erasure by those closeted about their sexual orientations — at work in these other, very different, contexts. Incest laws draw circles around individuals, defining the finite set of family members so closely tied by blood or adoption that sexual intimacy becomes too dangerous or volatile for society to sanction. These restrictions no doubt inflict a heavy burden on particular hapless individuals whose misfortune it is to lust after or to fall in love with a family member, but such tightly drawn circles bear no real resemblance to the broad lines cutting oppressively across society to rule half the adult population off limits as sexual or marital partners for a distinct and despised minority. So, too, the circles that our adultery and bigamy laws have drawn around married couples have established partitions that fall with an undeniably cruel weight upon individuals who fall in love or lust with someone else's spouse. But these laws — special instances, in a sense, of the customary bans on interference with beneficial contractual relations — likewise cut no wide swath through the population to limit the options open to any particular oppressed minority.

There may be times and places where bans on incest, adultery, or bigamy would bear more of a resemblance to a ban on sodomy in terms of their contribution to the systematic oppression of entire subcultures, but ours certainly is not such a time or a place. There will be opportunity enough to consider the possible application of the principles of *Lawrence* to such cases if and when such circumstances arise. For now, it seems reasonable to proceed one step at a time and to say, with the Court, that the Framers of the Due Process Clauses, by making it possible for "persons in every generation [to] invoke [their] principles in their own search for greater freedom,"[195] created a template for a self-regenerating search for the deeper meaning of commitments that, for better or for worse, the Constitution's often open-textured provisions make in our name as "We the People." No such vision is compatible with commitments that become frozen in the image of narrowly and specifically identifiable human activities any more than the

---

[194] *See Lawrence*, 123 S. Ct. at 2490, 2495 (Scalia, J., dissenting).

[195] *Lawrence*, 123 S. Ct. at 2484.

basic ideas of federalism could be reconciled with a static set of supposedly quintessential attributes of state sovereignty.[196]

IV. BEYOND *LAWRENCE*: A GLIMPSE AT SAME-SEX MARRIAGE AND OTHER POSSIBLE FUTURES

Viewed in this light, the Court's holding in *Lawrence* is hard to reconcile with retaining the state's authority to ban the distribution to adults of sexually explicit materials identified by, among other things, their supposed appeal to what those in power regard as "unhealthy"[197] lust, or the state's power to punish adults for enjoying such materials in private, whether alone[198] or in the company of other adults. But the most distinctive facet of *Lawrence* is surely the decision's focus on the right to dignity and equal respect for people involved in intimate relationships, whether or not they choose to keep those relationships closeted — a right beyond any that can be secured just by locking the state's police and prosecutors out of people's bedrooms. From the liberty of contract, now properly subject to the pruning of exploitative excesses and distributive inequalities that destroy the premise of consent,[199] to the liberties of reproductive choice and self-willed death, to the liberties of marriage and of relations occupying a place akin to marriage, the watchwords in the future should be the equal liberty of all, a reflection and outgrowth of the combination of due process and equal protection that drove the Court's decision in *Lawrence*.

The values heralded by *Lawrence* may not reach certain pockets of the nation any time soon. Perhaps the military, with its claims to deference, will be among the last bastions to fall. But gone forever is the time when policies calculated to drive those involved in intimate relationships with members of the same sex into hiding their sexual proclivities through devices like the military's "don't ask, don't tell" rule could be defended on the basis that the thing the military wishes to closet is a propensity to commit an act or enter into a relationship that may be made a crime.

Same-sex marriage, as Justice Scalia predicted in his outraged dissent,[200] is bound to follow; it is only a question of time.[201] For what,

---

196 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545–47 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

197 *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985); *see also supra* p. 1901 (discussing the *Brockett* Court's identification of obscene materials by their appeal to "abnormal sexual appetites").

198 *See generally* Stanley v. Georgia, 394 U.S. 557 (1969).

199 *See supra* p. 1939.

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

201 In Massachusetts, it may be a question of only a few months. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003) (holding, in an opinion dated November 18, 2003, that the exclusion of same-sex couples from access to civil marriage violates the Massachu-

after all, could be the rationale for permitting an otherwise eligible same-sex couple to enjoy the tangible benefits and assume the legal obligations of some version of civil union but withholding from them that final measure of respect — that whole that plainly exceeds the mere sum of its component legal parts? What could be the rationale for refusing two men or two women the full symbolic benefits of civil marriage so long as the state remains in the business of licensing within secular, civil law a status that no doubt piggybacks on its non-secular counterparts in *religious* marriage? Plainly, the rationale must be the state's disapproval of the same-sex couple's expression of dissatisfaction with a second-class version of the marital bond; the rationale must be to demand for opposite-sex couples complete dominion over the last vestiges of gender privilege in civil law. As Justice Scalia rightly recognized, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples."[202]

In a sense, this issue mirrors the one addressed in *Boddie v. Connecticut*.[203] There, the Court considered whether a state may limit access to its divorce courts by charging fees that effectively bar the poor from dissolving an existing marital bond or from forming another; it held that, given the fundamental nature of the marriage relationship and the concomitant state monopolization of the means of dissolving that relationship, the state deprived the poor of liberty without due

---

setts Constitution, and staying the entry of judgment for 180 days — until, as it happens, the fiftieth anniversary to the day of *Brown v. Board of Education* — "to permit the Legislature to take such action as it may deem appropriate in light of this opinion"). The Supreme Judicial Court of Massachusetts recently clarified its *Goodridge* holding in response to the state senate's request for an advisory opinion on the question whether Senate No. 2175, a provision that would prohibit same-sex couples from entering into marriage but would allow them to form civil unions and to enjoy the benefits, protections, rights, and responsibilities of marriage, complies with the *Goodridge* mandate. The court's unequivocal response, "No," eliminated any doubt that a "separate but equal" civil union law would *not* satisfy the equal protection and due process requirements of the Massachusetts Constitution. *See* Opinions of the Justices to the Senate, No. SJC-09163, slip op. at 2, 14 (Mass. Feb. 3, 2004) ("Senate No. 2175 violates the equal protection and due process requirements of the Constitution of the Commonwealth and the Massachusetts Declaration of Rights. . . . The bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples."). If, as some have urged, the Massachusetts Constitution is amended in November 2006 (the earliest possible time) to rule out same-sex marriage, that decision would probably violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment under the reasoning of *Lawrence* — even if, as the reasoning of *Goodridge* itself requires as a matter of state constitutional law, otherwise eligible same-sex couples were to remain entitled to all the legal incidents of marriage notwithstanding such an amendment. And applying any such amendment retroactively to demote same-sex married couples to some lesser relationship would amount to an involuntary annulment of a three-way contract among the spouses and the state in violation of the Contracts Clause of Article I, Section 10.

[202] *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting) (quoting *id.* at 2488 (O'Connor, J., concurring)).

[203] 401 U.S. 371 (1971).

process of law when it failed to waive unaffordable divorce filing fees.[204] If this de facto discrimination against the poor with respect to dissolving a civil marriage is unconstitutional, how is one to defend de jure discrimination against gays and lesbians with respect to entering such a marriage?

The process that might move the Supreme Court from *Lawrence* to the invalidation of restrictions on same-sex marriage might not be a speedy one. It took the Supreme Court thirteen years to move from *Brown v. Board of Education*[205] to *Loving v. Virginia*,[206] and in the interim the Court's silence was deafening. Perhaps that glacial pace was understandable; there is only so far an institution famously lacking both the sword and the purse can push without incurring either lawful defiance in the form of a campaign to amend the Constitution or unlawful defiance in the form of violent resistance. But setting aside these political considerations, the principle behind *Loving* now seems clear. Similar arguments resting on fear for unit-cohesion and morale were made to keep military units racially separate and to keep women in the lower, noncombat ranks. Eventually, the thinness of that rationale became apparent. It is hard to imagine that the trajectory of same-sex marriage rights will not follow the same path.[207]

---

[204] *See id.* at 374. If *Boddie* were extended to all instances in which access to court was foreclosed by virtue of a litigant's inability to afford the entrance fee, *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1337 & n.50, § 16-35, at 1626 & n.4, § 16-44, at 1639–40 & 1639 n.8, § 18-5, at 1706–07 & n.6 (2d ed. 1988) (principally crediting the writings of Frank Michelman for the argument), then it would become a weak precedent for the argument made in the text above. Inasmuch as *Boddie* has not been so extended, *see id.* § 16-51, at 1647–52 and cases cited therein, its force as precedent in the marital context for this analysis is obviously magnified. *See also* Zablocki v. Redhail, 434 U.S. 374, 387 (1978). That *Boddie* rested on due process while *Zablocki* rested on equal protection is further proof of the intertwining of the two sources of constitutional law with respect to basic personal relationships.

[205] 347 U.S. 483 (1954).

[206] 388 U.S. 1, 11–12 (1967) (striking down as a matter of equal protection and substantive due process a Virginia law criminalizing marriage between whites and blacks).

[207] In *Goodridge*, 798 N.E.2d 941 (Mass. 2003), the Supreme Judicial Court of Massachusetts, in a masterful opinion by Chief Justice Margaret Marshall, held that the state's legislative refusal to give full and equal recognition to same-sex civil marriages is a violation of the state constitution's due process and equal protection provisions. *See id.* at 969; *see also supra* note 201. The majority opinion relied heavily on the equal respect dimension of the *Lawrence* analysis. *See Goodridge*, 798 N.E.2d at 948, 953. A concurring opinion by Justice Greaney found the state's discrimination against same-sex marriage to be a straightforward instance of sex discrimination that the state had insufficiently justified. *See id.* at 971–72 (Greaney, J., concurring). The court divided 4–3, but the fact that an essentially conservative court would take so bold a step so soon after *Lawrence* is at least some indication of which way the jurisprudential wind is blowing.

A breeze in the opposite direction swept through when the Eleventh Circuit in *Lofton v. Secretary of the Department of Children & Family Services*, No. 01-16723, 2004 WL 161275 (11th Cir. Jan. 28, 2004), upheld a Florida statute flatly prohibiting adoption by "homosexuals," a category the state defined to mean those "who are known to engage in current, voluntary homosexual activity," *id.* at *3. According to the *Lofton* court, *Lawrence*'s holding that the state may not prosecute homosexuals criminally for their "private consensual homosexual conduct" had no bearing on

Some argue that *Lawrence* is merely about decriminalizing closeted consensual intimacies between same-sex partners, while same-sex marriage or same-sex adoption would entail affirmative and public state blessing of such unions. This argument, however, seems transparently weak. The *Lawrence* opinion not only denies that the Court's decision was just about sex, it also goes out of its way to equate the insult of reducing a same-sex intimate relationship to the sex acts committed within that relationship with the insult of reducing a marriage to heterosexual intercourse.[208] Besides, as we have seen, the evil targeted by the Court in *Lawrence* wasn't criminal prosecution and punishment of same-sex sodomy, but the disrespect for those the Court identified as "homosexuals" that labeling such conduct as criminal helped to excuse.[209] And it is noteworthy that the *Loving* Court treated its holding as if it all but followed automatically from the conclusion in *McLaughlin v. Florida*,[210] in which the Court struck down a state law making open and notorious interracial cohabitation a more serious offense than open and notorious cohabitation between unmarried adults of the

---

whether the state could subject homosexuals to civil disabilities in family law matters such as adoption. *Id.* at *9. Having thus explained its decision not to employ heightened scrutiny, the Eleventh Circuit proceeded to uphold the Florida ban on grounds that cannot survive under the most toothless rationality standard imaginable — grounds that utterly fail to fit the state's bizarre focus on whether the prospective gay parent is sexually active but that proceed instead as though the Florida statute were written in terms of ensuring adopted children homes that have both a mother and a father. *See id.* at *11. At bottom, *Lofton* rests on the rationale that a state is entitled to *assume* that gays and lesbians would make unfit parents simply because their sex lives mark them as morally inferior in the state's eyes.

If the holding in *Lawrence* had rested on a theory peculiar to the criminal context, *see supra* note 34, then one might be able to credit the *Lofton* court's contention that *Lawrence* did not speak to the problem of making sexually active gays and lesbians ineligible for the privileges and responsibilities of adopting a child, notwithstanding the standard doctrine that states are no freer to withdraw a privilege for the exercise of a right than they are to make its exercise a crime. But *Lawrence* obviously rested on no such theory, emphasizing, on the contrary, that even an essentially unenforced ban on consensual sodomy violates the rights of homosexuals precisely because it "demeans [their] lives" and constitutes "an invitation to subject [them] to discrimination both in the public and private sphere," *Lawrence*, 123 S. Ct. at 2482. Justice O'Connor likewise left no doubt about her view that the evil of the Texas ban on same-sex sodomy lies in how it "legally sanctions discrimination against [homosexuals] in a variety of ways . . . including in . . . family issues," *id.* at 2486 (alteration in original) (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)) (internal quotation marks omitted). A holding that states may not criminalize sodomy because doing so excuses and encourages discrimination against gays and lesbians in contexts like adoption surely cannot be deemed irrelevant in those very contexts. Nor can the fact that *Lawrence* failed to "announce a new fundamental right," *Lofton*, 2004 WL 1612, at *9, to engage in "homosexual sodomy," *id.* at *9 n.15, and did not say that it was applying "strict scrutiny," *id.* at *9, be taken to mean that the same Court that reached out to overrule *Bowers* in order to eliminate discrimination against homosexuals in the civil sphere would countenance precisely such discrimination by subjecting it to the lightest possible form of rationality review. Candor requires me to disclose that I am co-counsel for the (so far) losing appellants in *Lofton*.

208 *See Lawrence*, 123 S. Ct. at 2478.

209 *See supra* pp. 1903–05.

210 379 U.S. 184 (1964).

same race.[211] Similarly, by denying a same-sex couple a civil marriage license that it would have given them if only they were of opposite sexes, a state tells the couple that they should keep their love behind closed doors rather than "flaunt" that love by proclaiming marital intentions or pronouncing marriage vows. By imposing this lopsided regime — telling a same-sex couple that its members are guilty of unseemly display when they say and do in public no more than what, for a mixed-sex couple, would be described as displaying reassuring signs of affection and symbols of enduring commitment — the state engages in what amounts to discriminatory, viewpoint-based suppression of expression.[212]

While I have argued that the underlying theory and most important passages of *Lawrence* suggest ready (though not immediate) applicability of the holding to same-sex marriage, and to the entire public realm of how gays, lesbians, bisexuals, and the differently gendered are treated in housing, employment, adoption, and the like, it would be a mistake to ignore the abundant language in the majority's opinion that might be taken to cut against such a reading. For example, the majority noted several times the private character of the proscribed conduct and its spatial dimensions, emphasizing that the Texas statute implicated not only "the most private human conduct, sexual behavior," but also "the most private of places, the home."[213] Such an emphasis on private acts in the confines of one's home might be taken to suggest that the sort of formal, public recognition that is bound up with granting marital rights and adoption rights, or the sorts of public concerns that are bound up with open displays of affection or with public solicitation of an intimate relationship, may not be "private" enough to bring within *Lawrence*'s purview same-sex marriage, same-sex public displays of romantic attachment or attraction, or solicitation of a

---

[211] *See id.* at 187.

[212] Considerations of space prevent me from developing the argument, suggested in the text here and at p. 1939–40, that the entire line of decisions from *Griswold* through *Lawrence* (with the exceptions of *Roe* and *Casey*) may be understood in terms of the First Amendment's protection for freedom of expression. I argue this not because it can be shown in general (as I believe it can be with respect to same-sex marriage) that the state's prohibition targets a specific public message, but because the only cognizable difference between the conduct that the state permits in each instance and the conduct that the state forbids (for example, permitting procreative heterosexual intercourse but forbidding lovemaking for its own sake) is a difference in the content of the "messages," broadly defined, that the parties to the sexual encounter at issue communicate to one another, whether through visual, aural, or tactile means. To that degree, Justice Scalia's comparison between the partners who engaged in oral sex in *Bowers* and the 60,000 naked Hoosiers, *see supra* note 71, was right on the money, even though he erred in seeing nothing "expressive" about the public nudity that Indiana banned. The "language of love" is far more than a metaphor, as the line of precedent from *Griswold* to *Lawrence* demonstrates. For a leading early analysis along somewhat similar lines, see Karst, *supra* note 181.

[213] *Lawrence*, 123 S. Ct. at 2478.

stranger for a same-sex encounter, and that a state's discrimination against anyone whom it identifies as other than "straight" is unaffected by *Lawrence*.

As for everything short of same-sex marriage, I find myself agnostic on how direct might be the path from *Lawrence* to the protection of the public face of gay and lesbian relations. I do know, though, that I cannot bring myself to join the veritable cottage industry that I see developing out of the unremarkable observation that *Lawrence* might in the end prove to be as halting and limited a step forward as *Bowers* ultimately proved to be a self-limiting and temporary step backward. Maybe, maybe not. But I for one don't feel swept up in the eagerness to sing such notes of caution, while throwing caution to the winds when it comes to courting the risk of making self-fulfilling prophesies.

As for marriage between same-sex partners, the principal basis for resisting the logic that points from *Lawrence* in that precise direction appears to be the *Lawrence* Court's observation that the case before it did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,"[214] and involved no "injury to a person or abuse of an institution the law protects."[215] But the Court's conception of how marriage as an institution might indeed be subjected to "injury" or to "abuse" seems hard to square with the sorts of "harms" to marriage and to married couples that opponents of same-sex marriage identify as sources of concern. Such opponents suggest that the crucial role of marriage in our social fabric might be jeopardized if the institution were to lose its distinctive character as a union between a man and a woman. They argue that it would in essence *demean* a married couple to tell them that a same-sex couple can have a relationship with identical legal and symbolic importance. It would seem implausible, however, for this Court to accept such a theory, since its one and only reference to what would "demean" those who are married was that "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[216] The obvious implication of this blunt statement is that marriage is not (only) about sex, but also about intimacy, companion-

---

[214] *Id.* at 2484.

[215] *Id.* at 2478. It must be said, however, that jurists who adhere to *Boddie*, 401 U.S. 371 (1971), who joined the majority opinion in *Lawrence*, and who therefore regard neither divorce nor sexual intimacy outside marriage as "abuses" of that institution would be unlikely to speak of same-sex marriages as "abuses" either, particularly in a sentence that pairs "injury to a person" with "abuse of an institution the law protects." In a multiple choice exam asking whether, to someone with these views, the institution of marriage is "abused" by (a) adultery, (b) Britney Spears's getting hitched and then promptly unhitched during a long weekend in Las Vegas, or (c) marriage to a same-sex spouse, I would wager that not much credit would be likely to go to (c).

[216] *Lawrence*, 123 S. Ct. at 2478.

ship, and love[217] — phenomena that have a public no less than a private face. Just as the *Loving* Court came to realize that racial boundaries cannot define such a relationship, so this Court ought to come to a similar conclusion with respect to sexual orientation.

Of course, the point to which the legal and moral logic of a position might in principle ultimately lead, and the point to which the position in fact brings us, can be separated by an open space whose navigation depends on far too many contingencies to make prediction a very useful sport. Just as the elevation to the Supreme Court of Anthony Kennedy proved to be the pivot on which the fate of *Bowers v. Hardwick* turned (as the following Part will make plain), something no less adventitious and quirky may be the decisive event in determining how long it takes to extend *Loving v. Virginia* to its overdue companion ruling for gays and lesbians in America.

V. A BRIEF LOOK BACK: LITIGATING *BOWERS*

It was within the broad frame of reference sketched above that I approached the challenge of persuading the Court in *Bowers* that the state had usurped a role presumptively reserved under the Constitution to the adult parties consenting to intimate sexual relationships.

I hadn't regarded *Bowers* as an opportunity to make a case against the targeting of gays and lesbians for discriminatory arrest and prosecution. I was obviously aware of how even facially gender-neutral antisodomy laws like Georgia's were used principally to harass — and to justify refusals to employ, promote, or extend benefits to gay men (and to a lesser but still troublesome extent, lesbians). I also knew that many of my gay friends and many gay rights advocates saw Michael Hardwick's lawsuit as an ideal opportunity to topple a major source of the "straight world's" oppression of gays, lesbians, and bisexuals. But the Supreme Court that was sitting in 1986 seemed most unlikely to think of a man getting oral sex from another *man* as no different from a man getting oral sex from a *woman* — even if the Georgia legislature saw fit to outlaw both acts in a single breath. If a majority of the Justices were inclined to think of the two acts as intrinsically and profoundly different, persuading them that a facially neutral law was being used to *treat* homosexuals differently was unlikely to dent their disposition to uphold the law. Only a sea change in the culture, from which no judge can wholly escape, could do that.

It followed that the only hope of prevailing was to shift the Court's gaze from the same-sex applications of the statute to its opposite-sex

---

[217] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 81, 95 (1987) (protecting prisoners' right to marry without implying any right to conjugal visitation, and noting that "inmate marriages, like others, are expressions of emotional support and public commitment").

applications. The statute was, after all, written to operate without regard to anyone's gender. It would apply to me and my wife, or to a Supreme Court Justice and her husband, should any of us visit Georgia, no less than to Michael Hardwick and the person with whom he violated its terms.[218] The fact that the claim filed by the married couple who joined Hardwick in the underlying § 1983 action had been dismissed for want of any "immediate danger of sustaining . . . direct injury from the enforcement of the statute"[219] did not, I thought, deprive Hardwick of the right to challenge the law at the level of generality deliberately chosen by the state legislature. The legislature chose to punish "sexual activities defined solely by the parts of the body they involve, no matter who engages in them, with whom, or where . . . even if engaged in by two willing adults — whether married or unmarried, heterosexual or homosexual — who have secluded themselves behind closed bedroom doors in their own home, as Michael Hardwick did."[220] Because that was precisely how Hardwick had cast his complaint — never once mentioning the sex of the person with whom he was arrested by the police officer who had followed the couple to Hardwick's home (and who had announced his presence only after he had seen enough through the bedroom door to be sure that oral sex was underway)[221] — that was how I thought the case ought to be presented.

But I was far less sanguine than my client, who thought that his salvation lay in making common cause with straight men who enjoyed having oral sex with straight women,[222] and who let himself imagine that "[a]ll you gotta do . . . is make 'em realize it affects them, too" in-

---

218 The record contained nothing about that other person's sex, *see supra* note 20, although Hardwick identified himself in his complaint as a "practicing homosexual" and alleged that a pattern of police enforcement against gay men coupled with his pattern of sexual behavior put him in sufficient jeopardy of future arrest and prosecution to give him standing to obtain prospective relief.

219 Bowers v. Hardwick, 478 U.S. 186, 188 n.2 (1986). That dismissal by the district court was affirmed by the Court of Appeals, in a holding not challenged by the married couple. *Id.*

220 Brief for Respondent, *supra* note 18, at 5.

221 Although these facts were not in the record, newspaper accounts reported that Hardwick, a bartender at a gay bar, had in fact taken another man home with him on the evening of the arrest for what was apparently a one-night stand that neither man had any idea might be observed through the slightly ajar door to Hardwick's bedroom. How Hardwick's partner that night, a schoolteacher from North Carolina, would have described *his* sexual orientation is unclear: fearing that his teaching job as well as his marriage might collapse if his tryst with Hardwick were disclosed, he begged the arresting officer not to tell his wife or anyone else, and eventually "pleaded to lesser charges and split." Art Harris, *The Unintended Battle of Michael Hardwick*, WASH. POST, Aug. 21, 1986, at C1.

222 The strategy illustrated what was later to be described as an "alliance of sodomites." Halley, *supra* note 55, at 1771.

stead of thinking "sodomy is . . . some crazy, unnatural act."[223] What that fond hope failed to take into account was the danger that, by implicitly stressing the *similarity* between what I assume most of the Court's members do occasionally in their own bedrooms and what they imagine gays and lesbians do all the time, we might be offending those on the Court who found the very thought of same-sex sodomy repulsive. To the degree that the conduct of gays and lesbians struck the members of the Court as parodying their own "normal" and "healthy" intimate relations, those members might react all the more impulsively against protecting such conduct.[224] I saw that risk from the outset, and there is every reason to suppose that the risk ultimately became reality, but the only course that seemed viable to me was to highlight the scary reach of Big Brother's gaze and of his long, accusing arm into the most private of places and most intimate of relationships — relationships whose physical details I thought it best to leave out of the picture altogether.

In the end, Justice Powell cast the decisive vote against Hardwick's claim, joining an opinion by Justice White that recast the claim into something it had never been — an asserted "fundamental right to engage in homosexual sodomy"[225] — and that, having thus recast the claim, proceeded to dismiss it as "at best, facetious."[226] Notably, Justice Powell had voted right after oral argument to *affirm* the Eleventh Circuit's ruling in Hardwick's favor, but he changed his mind a few days later, providing Justice White with a narrow majority.[227] Powell publicly announced shortly after his retirement that his vote in *Bowers* was the one error he believed he had made while on the Court. But the memo he gave his law clerk, Mike Mosman, on the morning of the oral argument quoted a passage from my brief about the sanctity of the home and of the physical expressions of love that take place there. That memo made clear just how "insensitive" and even "repellent" Justice Powell thought it was to compare what he obviously regarded as the sordid encounter between Hardwick and another man with the sweet embrace of husband and wife in the marital bedroom of what truly deserved to be called a "home." "'Home,'" the Justice told his

---

223 Case, *supra* note 42, at 1681 n.169 (first omission in original) (quoting Harris, *supra* note 221).

224 *See id.* Mary Ann Case has invoked Freud's "narciss[is]m of minor differences" to "help to explain why both gay sex and gay marriage provoke such hostile reactions." *Id.* at 1662. Noting that this Freudian conception refers to both an individual and group phenomenon, *see id.* at 1662–63, Case argues that "[b]oth gay sex and gay marriage most sharply throw into relief the similarities and differences between couples of the same and of different sexes; they force heterosexuals to give some consideration to their own way of doing things." *Id.* at 1663.

225 Bowers v. Hardwick, 478 U.S. 186, 191 (1986); *see supra* note 20 and accompanying text.

226 *Bowers*, 478 U.S. at 194.

227 *See* JEFFRIES, *supra* note 34, 522–24.

law clerk, "is one of the most beautiful words in the English language. It usually connotes family, husband and wife, and children — although, of course, single persons, widows and widowers, and others also have genuine homes."[228] The very comparison between his own experience and what he imagined Michael Hardwick to have been doing — a comparison that Justice Powell dismissed as typical of "Professor Tribe, with his usual overblown rhetoric"[229] — provoked Powell's evident need to distance himself from, and to perceive as *other*, what I was implicitly asking him to see as akin to his own experience.[230]

When President Ronald Reagan nominated Anthony Kennedy for the seat Powell had vacated, I accepted the Senate Judiciary Committee's invitation to testify at his confirmation hearing. Having testified against the confirmation of Judge Robert Bork to fill the Powell vacancy, I was particularly struck by the dramatic contrast between Bork's two swashbuckling opinions in the case of a petty officer discharged from the U.S. Navy for homosexual conduct and Kennedy's far more tentative opinion: Kennedy reached the same result, but by a route much more sympathetic to the line of thought linking the rights at issue with the Supreme Court's jurisprudence of family relationships and reproductive autonomy.[231] To me, the contrast suggested that with someone like Kennedy on the Court, the eventual overruling of *Bowers v. Hardwick* was nearly a foregone conclusion; only the timing and tenor of the overruling decision were uncertain, because the increasing rarity of criminal convictions for consensual sodomy, except in cases involving guilty pleas where the state had initially charged but could not prove a nonconsensual sex act,[232] meant finding a suitable vehicle would be difficult. Yet the frequency with which I had repeated that prognosis, both in print and to my students, led me to worry that rumors of *Bowers*'s impending demise might be premature.

Whatever the fate of the unfortunate *Bowers* precedent was destined to be, it seemed plain from Kennedy's approach to the Navy discharge cases that he was no doctrinaire Borkian (not to be confused

---

[228] Memorandum from Justice Lewis F. Powell, Jr., to law clerk Mike Mosman 6 (Mar. 31, 1986) (on file with the Harvard Law School Library).

[229] *Id.* at 3.

[230] Powell's reaction to my argument seems particularly natural when viewed through the lens of Mary Anne Case's discussion of Freud's "narcissism of minor differences" with respect to gay sex and gay marriage. *See supra* notes 42, 224. It is clear that Justice Powell's personal experience with the "other" was limited and uncomfortable. "I don't believe I've ever met a homosexual," Justice Powell's biographer reports him saying to his other two law clerks, including one who was gay but still closeted at the time. JEFFRIES, *supra* note 34, at 521.

[231] *Compare* Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (Bork, J.), *and* Dronenburg v. Zech, 746 F.2d 1579 (D.C. Cir. 1984) (Bork, J., joined by Scalia, J., concurring in denial of rehearing en banc), *with* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) (Kennedy, J.).

[232] *See supra* note 11.

with Burkian) opponent of the post-1965 string of substantive due process decisions, from *Griswold v. Connecticut*[233] through *Moore v. City of East Cleveland*,[234] including perhaps even *Roe v. Wade*.[235] Even more significantly, Kennedy's approach to the Navy's treatment of same-sex intimacy revealed an appreciation — even in a military setting where judicial deference is at its peak — for the complex and relational *structure* of the rights and liberties implicated by any government decision to disadvantage such behavior or to penalize the sexual proclivities it might be thought to indicate. Although I would not, of course, have testified in support of the Kennedy nomination solely because of my admiration for the subtlety of his apparent approach to these issues, that admiration added considerably to my comfort with the nomination and to my sense that Kennedy was an auspicious choice.

CONCLUSION

This Essay began by noting that the story of *Lawrence* is a multifaceted one. But the decision's unmistakable heart is an understanding that liberty is centered in equal respect and dignity for both conventional and unconventional human relationships. *Lawrence* made explicit what was latent in decisions like *Roe* and *Casey* and resurrected what was ignored and confused in decisions like *Glucksberg* and, of course, *Bowers*. After *Lawrence*, it can no longer be claimed that substantive due process turns on an ad hoc naming game focused on identifying discrete and essentially unconnected individual rights corresponding to the private activities our legal system has traditionally valued (or at least tolerated). What is truly "fundamental" in substantive due process, *Lawrence* tells us, is not the *set of specific acts* that have been found to merit constitutional protection, but rather the *relationships* and *self-governing commitments* out of which those acts arise — the network of human connection over time that makes genuine freedom possible.

---

[233] 381 U.S. 479 (1965) (contraception).

[234] 431 U.S. 494 (1977) (plurality opinion) (composition of family living in one house).

[235] 410 U.S. 113 (1973) (abortion).