Understanding *Lawrence v. Texas* after Fifty Years of *Brown v. Board*: A Response to Judge Reinhardt

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I. INTRODUCTION

At a recent conference on the current state of sexual orientation law, Judge Stephen Reinhardt[2] of the Ninth Circuit—considered by many to be the most liberal judge on the federal bench—addressed an influential audience comprised of many who are likely to shape the strategies and goals of what Judge Reinhardt refers to as the "gay rights movement"[3] in its fight for

[1] Fran Olsen, William Rubenstein, and Cheryl Harris each generously provided me with feedback that influenced the direction of the paper. Charles Williams helped make UCLA the best law school in the country to think about sexual orientation law. Ezekiel Webber and Eric Scarazzo patiently let me pitch my paper to them in its early form, and both helped focus my argument. Zeke, additionally, graciously provided me with an advance copy of Judge Reinhardt's speech, without which this paper would not be possible. I am particularly thankful to have known, and tremendously saddened to have lost, my friend Zeke. I could always count on him for a critical perspective unavailable to me elsewhere. I am certain his legacy will remain in me throughout my practice, and life, as I will continue to turn to Zeke's perspective whenever critique is demanded.

[2] Judge Stephen Reinhardt was the keynote speaker at the Williams Project Annual Update on Sexual Orientation Law and Policy at UCLA on February 6, 2004. In a 2005 symposium, the Stanford Law & Policy Review published Judge Reinhardt's address. Stephen Reinhardt, *Legal & Political Perspectives on the Battle over Same-Sex Marriage*, 16 STAN. L. & POL'Y REV. 11 (2005). Even though I challenge him in this paper, I am very appreciative that Judge Reinhardt was the key-note speaker at the 2004 Williams Project Update on Sexual Orientation Law and Policy.

[3] Reinhardt, *supra* note 2, at 16 (noting "the problems the gay rights movement confronts"). It should be noted that while the scope of sexual autonomy as discussed in Part III of this paper certainly includes the interest of protecting expressions of gender that disrupt a fixed male-female gender binary, this paper does not specifically address how *Lawrence* or Reinhardt's speech affect specific transcommunity movements. Transcommunities are very much involved in the struggle for sexual autonomy. To the extent that this paper discusses the pursuit of sexual autonomy by some within the gay rights movement, it is certainly not suggested that these efforts are to the exclusion of, or necessarily distinct from, those made by transcommunities. Indeed, these communities overlap and commingle; trying to draw a line between them would be foolish.

same-sex marriage. Long supportive of gay rights advocates, Judge Reinhardt, as early as 1986, condemned as prejudiced the majority holding in *Bowers v. Hardwick*,[4] predicting its ultimate demise.[5] Ten years later, dissenting in *Watson v. Cohen*, he argued that "sex is the elementary form of human activity and expression, and it provides the basis for the most important of human relationships."[6] He even went on to renounce the status/conduct distinction,[7] acknowledging that protecting homosexual status, without more, does little to accord meaningful protection of gays and lesbians. Considering Judge Reinhardt's concern for protecting the dignity and equality of gays and lesbians, his reputation as one of the gay and lesbian community's strongest allies on the bench, and his demonstrated awareness that sexual expression is itself a constitutive element of human relationships, I was surprised that his address resonated as a narrow, cautionary tale against pushing forward too quickly.

Rather than discuss the implications the recently decided *Lawrence v. Texas*[8] would have on expanded protection for non-normative sexual expression and conduct, Judge Reinhardt focused his address on the risky temptation provided by *Lawrence* to improvidently push for too much, too soon. Judge Reinhardt likened the struggle faced by the gay rights movement to the civil rights movement's struggle for racial justice.[9] Pushing this comparison, Judge Reinhardt opened his address with the bold, but indefinite statement that "*Lawrence v. Texas* may well prove to be the *Brown v. Board of*

[4] 478 U.S. 186 (1986).

[5] Reinhardt, *supra* note 2, at 11 ("Sixteen years ago, I wrote: '[H]istory will view *Hardwick* much as it views *Plessy v. Ferguson*. And I am confident that, in the long run, *Hardwick*, like *Plessy*, will be overruled by a wiser and more enlightened Court'") (citing *Watkins v. United States Army*, 837 F.2d 1428 (9th Cir. 1988)). *See also* Watson v. Cohen, 124 F.3d 1126, 1137-38 (9th Cir. 1996) (Reinhardt, J., dissenting) (expressing his hope that the overruling of *Bowers* was "not long in coming").

[6] *Watson*, 124 F.3d at 1137-38.

[7] *Id.* (explaining that sexual conduct is expressive and necessarily constitutive of human intimate relationships, Reinhardt asserts, "I believe the status/conduct distinction to be irrational and without substance").

[8] Lawrence v. Texas, 539 U.S. 558 (2003).

[9] Just as the term "gay rights movement" suggests a false monolithism within the so-called movement, the term civil rights movement is likewise troublesome. *See infra* note 10. *See generally* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 5-6 (1999) (examining "the emerging race-sexuality critiques of anti-racism and gay and lesbian discourses"); Devon Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000) (making explicit how de-raced appropriation of civil rights discourse privileges a white gay rights movement while making race itself invisible within sexual orientation discourse); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2159-61 (2002) (distinguishing the gay rights movement from gender and racial identity based social movements by noting that "[gay and lesbian] people's political and constitutional struggles have tended to be more like the politics of abortion than the politics of equal rights for women and people of color").

Education of the gay rights movement."[10] Drawing on similarities between *Lawrence* and *Brown v. Board of Education*,[11] Judge Reinhardt cautioned those in the gay rights movement toward a pragmatic strategy of incremental assimilationism,[12] warning that "the ultimate struggle must be to persuade Americans of the rightness of your cause."[13] Although it remains unclear what it means to "be" *Brown*, Judge Reinhardt points us in the right direction when he invites us to read *Lawrence* through *Brown*. This paper takes this cue, looking at the role of *Brown* within the civil rights movement to examine what lessons might be drawn from *Brown* and applied to our analysis of *Lawrence*.

In Part II, I first assert Reva Siegel's argument that the Court in *Brown* deliberately drafted a doctrinally ambiguous opinion in order to engage the public in a controversial national dialogue regarding racial desegregation. Next, I note doctrinal ambiguity in the *Lawrence* Court's substantive due process holding, identifying two possible constructions of the decision: one that protects a more narrow "private liberty" interest, and another that protects a broader "public equality" interest. I suggest that this doctrinal ambiguity in *Brown*, as in *Lawrence*, reflects a deliberate posture taken by the

[10] Reinhardt, *supra* note 2, at 11. This statement raises two important preliminary questions: First, what comprises the gay rights movement? Second, what does it mean to "be" *Brown* ? As to the first question, this paper assumes that, in fact, this so-called "gay rights movement" is not monolithic. However, for the purposes of this paper, the term "gay rights movement" is used in its broadest sense, to capture all who are working toward gender and sexual equality and liberty. To be clear, the gay rights movement, as used here, includes national gay rights organizations like Lambda Legal and the ACLU, as well as those who advocate for gay rights in the press, like Michael Warner, Andrew Sullivan, Evan Wolfson, and Jonathan Rauch. *See also* Lawrence Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) ("when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America"); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 ("some have gone so far as to label the decision in *Lawrence v. Texas* 'our *Brown*'"); Nan Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1126 (2004) ("The reversal of precedent and social direction that comes closest in tone to *Lawrence* is *Brown*").

[11] Brown v. Board of Education, 147 U.S. 483 (1954).

[12] Judge Reinhardt's speech advocates his vision of pragmatism, an incremental assimilationist strategy stressing that the gay rights movement should both seek to capture the "hearts and minds of Americans" (its assimilationist component), and proceed only as quickly as these hearts and minds are captured (its incrementalist component), noting that "change comes slowly in America." Reinhardt, *supra* note 2, at 12. This paper explicitly does not address what effect a non-assimilationist incremental approach might have on gay rights, but instead challenges the notion that any assimilationist strategy can lead incrementally beyond formal status-based equality for gays and lesbians. Reinhardt makes a strong argument for the possibility that an incrementalist approach may be the most pragmatic, and successful, approach to achieving formal status-based equality. This paper, however, seeks to identify the intrinsic limit to any incremental assimilationist approach. My use of the term "assimilationist strategy" throughout the paper refers specifically to this incremental assimilationist strategy.

[13] *Id.* at 21.

Court to engage public opinion.[14] From the lessons drawn from the post-verdict construction of *Brown*, I consider the role of the gay rights movement in influencing public opinion to construct the most favorable construction of *Lawrence*. I argue that, like integrationist camps within the civil rights movement following *Brown*, some within the gay rights movement are relying on assimilationist strategies in order to influence the culture in which courts will ultimately give *Lawrence* meaning.

In Part III, I question what comprises the gay rights movement, outlining two possible baseline goals pursued by different camps within the movement: a right to formal status-based equality,[15] and a right to sexual autonomy.[16] Attempting to influence public opinion, proponents of assimilation within the gay rights movement have engaged in a politics of respectability. This strategy reifies existing heteronormative ideology that privileges permanent, monogamous, gender-normative relationships over other forms of sexuality, relationships, intimacy, and gender performance. In addition to this reifying function, the strategy is creating new anti-queer ideology that separates the "good gays" from the "bad," deviating counter-normative sexuality as distinct from homosexuality.[17]

Finally, in Part IV, I map these goals onto the contest over the doctrinal construction of *Lawrence*, arguing that while the assimilationist strategy lauded by Reinhardt might further the formal status-based equality goal, this strategy will reify existing heteronormative ideology and construct new ideological constraints on any movement for sexual autonomy. To win the hearts and minds of Americans, some within the gay rights movement are tolerating as spokesmen Andrew Sullivan and Jonathan Rauch, authors who laud the virtuous effect the institution of marriage will have on otherwise deviant bad gays.[18] Relying on Derrick Bell's interest convergence theory,[19] I next note the ephemeral nature of the controversial coalitions likely to assemble as assimilationists seek same-sex marriage. I stress that these coali-

[14] *See generally* Robert C. Post, *Foreword: Fashioning The Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

[15] Referred to hereafter as the "formal status-based equality" goal, the right to formal status-based equality demands legalization of same-sex marriage, anti-discrimination laws to protect gay and lesbians from hate crimes and workplace discrimination, and an end to the Don't Ask, Don't Tell policy in the military, among other things.

[16] *See* MICHAEL WARNER, THE TROUBLE WITH NORMAL 1 (1999) (identifying the right to sexual autonomy as a goal for gay rights advocates).

[17] *See generally* JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2002).

[18] *See* Paul Robinson, QUEER WARS 44 (2005) (discussing the rising currency of gay conservatives among gay audiences, ultimately claiming that "Andrew Sullivan [is] the most influential gay public intellectual in the country").

[19] *See generally* Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

tions will fracture and disband as some gain formal rights, leaving subordinate elements of the coalition — i.e., those arguing for sexual autonomy — without the political power to continue advancing their own interests. Moreover, such interest convergence often produces lasting ideology that legitimates the interests of the dominant, privileged factions within the fleeting coalition. This ideological legacy attaches to any gains made by subordinate groups. To make this point explicit, I briefly engage Cheryl Harris's argument that an ideology of colorblind meritocracy emerged from *Brown*, which in turn legitimated a new form of white privilege by framing racial subordination as a question of ahistorical formal racial classification, thereby normalizing racial inequity of any other cause. I argue that similarly destructive ideology will likely attend any construction of *Lawrence* that reflects the converged interests of assimilationists and those to whom they appeal.

The role of interest convergence in the constitutional construction of *Brown* demonstrates that non-doctrinal ideology developed in the court of public opinion weighs heavily on the trajectory of a social movement. I conclude that to the extent that a broad construction of *Lawrence* might create a right to public equality for gays and lesbians, this right will be attended by a reified heteronormative ideology and a new, specifically anti-queer ideology, both of which will substantially limit any social movement for which sexual autonomy is a goal. Therefore, *Lawrence* requires those within the gay rights movement to carefully identify the goal they seek to achieve. *Lawrence* must be understood to create ideological and doctrinal space for either providing a right to sexual autonomy or formal status-based equality, but not both. An assimilationist strategy is therefore not a strategy that will incrementally achieve both goals; rather, it reflects a privileging of the formal status-based equality goal over, and at the cost of, the sexual autonomy goal.

II. The Ideological and Doctrinal Ambiguity of *Lawrence*

Judge Reinhardt's audience at the 2004 Annual Update on Sexual Orientation Law and Policy included some of the field's pre-eminent scholars and practicing attorneys.[20] Those in attendance certainly understood that by abolishing anti-sodomy laws, *Lawrence* immediately made America a much healthier and safer place for gay and lesbian people.[21] Beyond this,

[20] In attendance were scholars William Rubenstein, Brad Sears, and David Cruz, as well as attorneys from the ACLU (Martha Matthews), Lambda Legal (Jon Davidson), and dozens of other practicing attorneys.

[21] *See* Hunter, *supra* note 10, at 1137 ("Whatever its shortcomings, for lesbian and gay men, Lawrence is a breakthrough. It ends our wandering in law's wilderness, uncertain in each case whether we would be treated with respect or contempt").

however, no one at the conference definitively asserted what *Lawrence* actually means for the future of the gay rights movement. Like most scholars reading *Lawrence*, those attending the conference were unsure what the landmark case would come to stand for.[22]

Here, I first briefly discuss the similar function of the doctrinal ambiguity in *Lawrence* and in *Brown*. After identifying the ambiguity within *Lawrence*'s substantive due process holding, I argue that clarification of this ambiguity, and the ultimate construction of *Lawrence*, is contingent upon mainstream public opinion, which is itself influenced by the courts and the gay rights movement as both struggle to find meaning in *Lawrence*. In the following section, I discuss how this project is complicated by the internal contest among gay rights advocates over which goals the movement should serve.

A. *The Ambiguity*

Accepting Judge Reinhardt's invitation to read *Lawrence* with an eye to *Brown*, it is instructive to consider perhaps the most significant similarity between the two cases: both cases represent "a momentous intervention [by the Court] into a contested set of social arrangements."[23] In the same way that a deep national division over the appropriate moral and legal treatment of homosexuality likely influenced the *Lawrence* Court, similar national division over race relations militated against the *Brown* Court delivering a decisive, inflexible holding that would potentially risk backlash, civil (and state)

[22] *See id.* at 1139 ("The decision leaves enormous flexibility as to how broadly or narrowly future courts will interpret it. Perhaps the most important point to bear in mind is that the function of lower federal courts, scholars, and practitioners now will be not so much to find the meaning of *Lawrence* as to create it"). Lower court interpretations of *Lawrence* tend to construe the holding narrowly, with some disagreement as to its scope. *See* Burton v. York County Sheriff's Dept., 594 S.E.2d 888, 896 (S.C. App. 2004) (finding that the Supreme Court did not recognize any general right to engage in sexual activities in private because *Lawrence* only protects a narrow right of "two persons of the same sex to engage in certain intimate sexual conduct") (internal quotations omitted). *See also* Standhardt v. Superior Court ex rel. County of Maricopa, 77 P.3d 451, 453 (Ariz. Ct. App. 2003) (recognizing "homosexuals' liberty interest . . . to engage in private, consensual sexual activity without state intervention"); State v. Limon, 83 P.3d 229, 234 (Kan. Ct. App. 2004) ("the *Lawrence* holding is clearly apparent: No state may prohibit adults from engaging in private consensual sexual practices common to a homosexual lifestyle"). A slightly broader reading is found in the trial court decision in the case challenging the Solomon Amendment, which apparently does not limit the scope of *Lawrence* to homosexual practices. *See* Burt v. Rumsfeld, 354 F. Supp. 2d 156, 189 (D. Conn. 2005) ("[t]his Court reads *Lawrence* as limited to the most private of personal, sexual relationships between consenting adults"). Perhaps the most oddly, gay-friendly articulation of *Lawrence*'s holding can be found in a Louisiana decision, *State v. Thomas*, 891 So. 2d 1233, 1234 (La. 2005), holding that *Lawrence* does not limit regulation of prostitution and interestingly framing the *Lawrence* holding as generally prohibiting the state from trying to "control the[ ] destiny [of homosexuals] by making their private sexual conduct a crime").

[23] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004).

disobedience, or even a reactionary constitutional amendment.[24] Thus, the *Brown* Court offered a doctrinally ambiguous holding that could be construed narrowly to simply stand for a prohibition of de jure racial segregation in public education.[25] Scholars argue, however, that *Brown*'s doctrinal ambiguity reflects something more than the Court's interest in merely maintaining its legitimacy, suggesting instead that *Brown* reflects a deliberate move by the Court orchestrated to push contested values-questions before the public. Thus, the holding in *Brown* might be understood to reflect the Court's effort to "forge[ ] a constitutional principle that [could] compel the allegiance of the people whose lives it would constrain."[26]

1. *Lawrence*'s Ambiguous Substantive Due Process Doctrine

Just as some argue that the doctrinal ambiguity in *Brown* reflects a deliberate move by the Court, arguably the *Lawrence* majority, too, purposefully delivered a doctrinally ambiguous holding.[27] *Lawrence* opens with a broad statement of the liberty interest at stake in the case, taking care to stress that the implicated liberty extends "outside of the home," and explicitly states that "[t]he instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."[28] At first glance, this language is far from ambiguous; the Court explicitly states that the scope of the right is not spatially limited. Ambiguity remains, however, in what is included within these "more transcendent dimensions." Currently, two primary constructions of this liberty interest are emerging in the literature and

[24] *Cf.* Post, *supra* note 14, at 39 ("if the Court attempts to enforce constitutional principles that seriously diverge from popular constitutional beliefs, its authority will soon be challenged").

[25] *See* Siegel, *supra* note 23, at 1483 ("Apparently, the Justices determined that, in striking down segregated education, they were accomplishing quite enough for present purposes, and that the chances of obtaining cooperation from the rank and file of white Southerners would be reduced if the decisions should seem to touch even by implication on wider issues").

[26] *Id.* at 1470. Public debate instigated by *Brown* influenced the eventual legal and ideological meaning of the holding, which ultimately came to stand for the proposition that the state may not engage in racial segregation, a holding not explicitly manifest in *Brown* itself. *Id.* at 1480-81. Importantly, however, this broader construction of *Brown*, which although doctrinally available within the language of *Brown* would have demanded not only formal desegregation but also court-mandated guarantee of actual substantive equality, which would have required, for example, not just desegregation of schools, but the effectuation of substantively equal educational quality for all students. *See id.* at 1474-75 ("The understanding that anticlassification and antisubordination are competing principles that vindicate different complexes of values and justify different doctrinal regimes is an outgrowth of decades of struggle over *Brown*, and is not itself a ground of the decision").

[27] *See* Post, *supra* note 14, at 105 ("*Lawrence* deliberately retains, and even emphasizes, that rhetoric of the public-private distinction, with its attendant implication that liberty is to be especially protected within the private realm. By retaining this distinction, the Court reserves the option in future decisions to decline to use substantive due process to invalidate official refusals to accord public recognition to homosexual relationships").

[28] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

in the lower courts: a "private liberty" interest and a "public equality" interest.[29]

The more narrow reading of *Lawrence* claims that the decision "simply established that consensual homosexual sex is a private liberty interest that should be afforded constitutional protection."[30] To understand this reading of *Lawrence*, one need look no further than Justice Scalia's dissenting opinion, which asserts that the majority identifies nothing more than a private liberty interest in consensual private sodomy for which Texas offered no legitimate basis for infringement.[31] From the other side of the sexual-ideological spectrum, Katherine Franke similarly claims that *Lawrence* protects nothing more than a narrow domestic liberty interest, attended, perhaps, by a "public tolerance of the behavior, so long as it takes place in private and between two consenting adults in a relationship."[32] Such readings of *Lawrence* limit its doctrinal scope to protect only such homosexual conduct that the Court imagines constitutive of homosexual identity, but offers neither any broader privacy right inside the home, nor any public rights related to the protected private conduct.

Others, however, argue that *Lawrence* stands for something more — a broader holding that accords a right that exceeds the mere tolerance of which Franke speaks, a right to public equality grounded in substantive due process doctrine. From this perspective, to the extent that a private liberty interest is protected, any status associated with this protected liberty interest must also be protected.[33] The *Lawrence* majority itself acknowledges that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects . . . . If protected conduct is made criminal and the law which

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[29] Post, *supra* note 14, at 105 ("[*Lawrence*] creates genuine uncertainty whether the constitutional values at issue in the question of sexual orientation should involve liberty of private conduct or instead equality of public respect"). Interestingly, Judge Reinhardt does not acknowledge *Lawrence*'s doctrinal ambiguity, only indicating in his opening breath that *Lawrence* accords openly gay and lesbian people previously denied privacy rights, essentially recognizing a "private liberty" interest. *See* Reinhardt, *supra* note 2, at 11 ("Justice Kennedy signaled that Americans need not lose their privacy rights when they come out of the closet").

[30] Laura Miles-Valdez, Lawrence v. Texas: *A Student's Perspective*, 51 FED. LAW., Jan. 2004, at 11, 20. *See also* Franke, *supra* note 10, at 1404 ("[the] Court chose to invalidate the Texas sodomy law with a particular rights analysis—that of privatized liberty").

[31] *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) ("Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute 'furthers no legitimate state interest which can justify' its application to petitioners under rational-basis review").

[32] Franke, *supra* note 10, at 1411.

[33] Indeed, Post reads *Lawrence* to value particularly those private liberty interests which implicate public status. *See* Post, *supra* note 14, at 102 ("[t]he constitutional liberty interests recognized in *Lawrence* do not concern particular sexual acts, but instead the ability to form a personal relationship without the government defining the meaning of the relationship or setting its boundaries absent injury to a person or abuse of an institution the law protects") (internal quotations omitted).

does so remains unexamined for its substantive validity, its stigma might remain."[34] Meaningful protection of a private liberty interest in "enduring intimate relationships," therefore, requires protection of the associated public status of being gay, thereby requiring public status-based equality for gays and lesbians.[35]

B. *Post-Verdict Construction of Lawrence*

As was the case with *Brown*, the doctrinal ambiguity in *Lawrence* is contested; whether *Lawrence* comes to stand for a protected "private liberty" or "public equality" interest—or something else altogether—will be determined, as in *Brown*,[36] by the impact of post-verdict public opinion on lower court interpretation of *Lawrence*, and, ultimately, on future related Supreme Court decisions.[37] Robert Post understands this relationship between the courts and the public as a dialectical relationship between constitutional interpretation and what he calls "constitutional culture," essentially the value-made discursive position in which meaning is given to the Constitution.[38] While we must understand that "[u]nquestionably, *Lawrence* involved a value choice by the Court,"[39] this represents not an imposition of the Court's values upon the public, but rather "the opening bid in a conversation that the Court expects to hold with the American public."[40] Where

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[34] *Lawrence*, 539 U.S. at 575.

[35] Post, *supra* note 14, at 96 ("[*Lawrence*'s] legal and rhetorical energy seems directed elsewhere at a concern for the dignity of enduring intimate relationships and a refusal to permit 'stigma' to be imposed because of those relationships"). *See also id.* at 99 ("[*Lawrence*] does not state that a law prohibiting sodomy should be struck down because it would deprive all persons of the valuable liberty of engaging in sodomy, but instead asserts that such a statute is unconstitutional because it will invite discrimination both in the public and in the private spheres against a class of persons who are publicly associated with sodomy, which constitutes the group of homosexual persons") (internal quotations omitted).

[36] *Cf.* Siegel, *supra* note 23, at 1502 ("with the[ ] legal, political, and cultural developments [that followed *Brown*], the Court was ready to address the anti-miscegenation statutes that it had avoided in the 1950s").

[37] *See* Post, *supra* note 14, at 101 ("the Court . . . calibrate[s] its future decisions to the strength and quality of the public response"). *See also* Hunter, *supra* note 10, at 1139 ("[*Lawrence*] leaves enormous flexibility as to how broadly or narrowly future courts will interpret it. Perhaps the most significant point to bear in mind is that the function of the lower federal courts, scholars, and practitioners now will be not so much to find the meaning of *Lawrence* as to create it"). *Cf.* Tribe, *supra* note 10, at 1947 ("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* to *Loving v. Virginia*").

[38] Post, *supra* note 14, at 8 ("constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture").

[39] Erwin Chemerinsky, *October Term 2002: Value Choices by the Justices, Not Theory, Determine Constitutional Law*, 6 GREEN BAG 2D 367, 371 (2003).

[40] Post, *supra* note 14, at 104. *See also* Hunter, *supra* note 10, at 1130 (claiming that with *Lawrence* the Court has engaged the "second round of full-and-open debate on the [morality of

the values implicit in the Court's decision are consistent with mainstream public opinion, the legitimacy of the decision is not likely to be challenged. Where values are contested, however, the Court cannot explicitly privilege one contested position over another without risking its perceived legitimacy.[41] "Hence, for contested issues . . . the Court's incentive is to make no decisive doctrinal pronouncement until it is clear how cultural debate is going to be resolved."[42] It is in these moments of uncertainty that the Court employs a doctrinally ambiguous holding, engaging the public in constitutional dialecticism.[43] Thus, the ultimate legal authority of *Lawrence* will reflect the influence of constitutional culture upon the courts.[44]

Beyond the effect of the Court's initial opinion upon constitutional culture, broader forces, including the lower courts and those institutional actors who influence public opinion, must also be considered. Though Judge Reinhardt may not have considered the impact the gay rights movement will have on the actual doctrinal construction of *Lawrence*, his observation that the movement will impact public opinion adds a critical element to the analysis of a changing constitutional culture. Below I briefly explore the roles the courts and the gay rights movement play in influencing mainstream public opinion, thereby shaping the "constitutional culture" out of which the ultimate legal authority of *Lawrence* will emerge.

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homosexuality]" following the partial debates sparked by *Romer v. Evans*, 517 U.S. 620, 644-46 (1996), and *Boy Scouts of America v. Dale*, 530 U.S. 640, 661 (2000)).

[41] *See* Eskridge, *supra* note 9, at 2393 ("Where private citizens as well as elected officials mobilize against judicial remedies, courts will back down").

[42] *Id.* at 2394. *See also* Siegel, *supra* note 23, at 1477 ("The Constitution's authority—its capacity to speak to and for all—depends in significant measure on the ways it creates community in conflict and finds legitimacy under conditions of disagreement").

[43] *See* Post, *supra* note 14, at 107 ("[b]ecause the legitimacy of constitutional law is rooted in constitutional culture, the Court can transform the content of constitutional law in controversial ways only by simultaneously transforming constitutional culture"). William Eskridge similarly understands this relationship between doctrine and culture, and likewise argues that the Court punts on contested values cases by offering an ambiguous decision to be determined by post-verdict construction. *See* Eskridge, *supra* note 9, at 2191 ("the meaning of *Evans* depends on the balance of the cultural politics surrounding it. The Court learned a lesson from *Hardwick*: don't commit the Constitution to one of the contending camps prematurely. The strategy of the *Evans* Justices was not to overrule *Hardwick* or to embrace the full legal equality demanded by gay people's politics of recognition, but to distance themselves from the antigay discrimination seemingly accepted in *Hardwick* and to invite feedback before taking a firm position on gay rights").

[44] Post, *supra* note 14, at 11 ("[t]he legal authority of *Lawrence* will emerge as that conversation unfolds, both because of changes in constitutional culture and because of the progressive integration of *Lawrence* into the institutional practices of constitutional adjudication").

1. Shaping the Terms of a Dialogue with the Public: The Role of the Court

The courts play two key roles, according to Post, in developing "constitutional culture." First, the Court engages the public in the contest, setting the terms of the debate and initiating the dialogue by asserting a controversial, but not intractable position. Second, courts (including state and lower courts) place reigns upon the other actors that might influence public opinion. Each court that addresses the contested value question influences the strategic decisions of future litigants by favoring certain arguments over others and, perhaps more importantly, by discussing and identifying relevant facts to incorporate into the record.

In *Lawrence*, the Court fueled national dialogue about the appropriate legal and moral treatment of homosexuality by offering an opinion marked by strong rhetoric that conflicts with deeply held values of many Americans.[45] Acknowledging that the decision addresses such contested values, the Court cabins its decision in order to facilitate narrow construction of the holding in the event that the public rejects a broader reading.[46] With this safety mechanism in place, the Court aggressively tests, and pushes, the public, denouncing *Bowers v. Hardwick* as "demean[ing] the lives of homosexual persons."[47] As we know from *Brown*, the Court is well aware of the role it plays in influencing public opinion.[48] Thus, in *Lawrence*, the Court "advanced a powerful and passionate statement that is plainly designed to influence the ongoing national debate about the constitutional status of homosexuality."[49]

By instigating the debate, the Court defines the discursive framework in which the constitutional dialectic operates, thereby shaping the national debate. The challenge offered by *Lawrence*'s ambiguity allows public opinion to either embrace homosexuality in the public sphere or decide that homosexuality must be tolerated, but only behind closed doors. With its ruling,

[45] This technique is not limited to the majority opinion. Indeed, Justice Scalia made every effort in his vitriolic dissent to influence public opinion, employing such rhetorical scare tactics as to suggest that *Lawrence* might render unconstitutional state laws prohibiting bestiality, prostitution, and even masturbation. *See* Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J. dissenting).

[46] *Id.* at 578 ("[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

[47] *Id.* at 575.

[48] *See* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1751 n.196 (1993).

[49] Post, *supra* note 14, at 104-05. *See also id.* at 107 ("the impassioned rhetoric of Lawrence suggests that the Court well understands that the opinion's legal authority is connected to the Court's success in influencing public opinion").

the Court has pushed mainstream public opinion to, at a minimum, accept that homosexuality should not be a basis for denial of other individual rights.[50]

The second role that the courts play in shaping the gay rights movement strategy is demonstrated by the Massachusetts Supreme Court decision in *Goodridge v. Department of Public Health.* This case is marked by strong rhetoric similar in tone to that offered by *Lawrence*,[51] and is likewise tempered with ideological and doctrinal ambiguity. The court claims that "exclusion [of same-sex couples from the institution of marriage] is incompatible with the constitutional principles of respect for individual autonomy and equality under law."[52]

In the very next sentence, however, the court commences its entanglement with the politics of respectability, justifying its recognition of a right to same-sex marriage by describing the plaintiffs as deserving, tacitly contradicting its prior statement affirming "the dignity and equality of all individuals." By noting the length of the plaintiffs' relationships, and their status as parents and care-givers,[53] the court suggests that the rights of these plaintiffs are somehow bolstered by their respectable status. It is important to the court that same sex "couples . . . have children for the reasons others do—to love them, to care for them to nurture them."[54] The court further notes that "[t]he plaintiffs include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups."[55] This finding seems relevant only if the status of the petitioners somehow implies that these particular plaintiffs are deserving of equality, whereas others might not be. Thus, the Court presents equality as something that is earned rather than absolute; something that does not inhere in all individuals, but rather only in those who deserve to be equal because they have respectable jobs and share majority values about the reasons for child-rearing.

Additionally, *Goodridge* stresses that, "[i]f anything, extending civil marriage to same-sex couples reinforces the importance of marriage to indi-

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[50] *See* R. Bradley Sears, *If Gays Are OK, Job Bias Can't Be*, L.A. TIMES, Apr. 29, 2004, at B13 (discussing how conservatives arguing against gay marriage are now conceding that gay and lesbian people deserve dignity).

[51] *See Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003) ("[the] Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens").

[52] *Id.* at 949.

[53] *Id.* at 949-50.

[54] *Id.* at 963. I wonder if it is an accident that none of the plaintiffs are men who are parents of boys—my speculation is that this would be quite threatening to those who hold the prevalent perception of gay men as sexual predators of young boys.

[55] *Id.* at 949.

viduals and communities."[56] The court continues, celebrating the virtuous qualities of marriage, noting that the fact that "same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit."[57] The court's posture sends a message to advocates for the gay rights movement: if you wish to succeed in court, your strategy should comport with the politics of respectability.

2. Employing an Assimilationist Strategy: The Role of the "Gay Rights Movement"

In addition to court pressure on the gay rights movement to employ an assimilationist strategy to pursue formal status-based equality through marriage, some camps in the gay rights movement itself have long embraced such a strategy. Thus, in the contest to influence the constitutional culture out of which *Lawrence* will be constructed, both the courts and some within the gay rights movement have exerted pressure toward an assimilated construction of the sexualities and identities at stake.[58]

While I conclude below that an assimilationist strategy is not likely to effect incremental change beyond the goal of formal status-based equality, this observation is apparently not shared by some employing the strategy.[59] The rhetoric of assimilation is in fact very much tied up with, and justified by, the rhetoric of incremental change. Jonathan Rauch articulates this position in his recent book *Gay Marriage: Why it is Good for Gays, Good for*

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[56] *Id.* at 965.

[57] *Id.*

[58] This strategy, of course, is contested within the gay rights movement. For the purposes of this section, however, I am interested solely in the degree to which some advocates on behalf of gay rights are employing an assimilationist strategy and rhetoric.

[59] For example, consider Evan Wolfson's response to a question posed by a documentary filmmaker at an August 2, 2004 book signing tour at the Chateau Marmont in Los Angeles. The filmmaker asked Mr. Wolfson if he thought gay marriage would disrupt 'patriarchy'. While careful to avoid the imbroglio embedded in the term patriarchy, Wolfson answered that he believed gay marriage would be transformative regarding gender subordination. I disagree with Wolfson's conclusion. To the extent that winning gay marriage strategically demands the celebration of marriage as a core American institution, the institution is reified as is, with the only exception being the inclusion of homosexuals. I would argue, perhaps beyond the scope of this paper, that, in fact, the threat so-called homosexuals pose to 'patriarchy' is precisely why there exists such opposition to same-sex marriage. It is the possibility that the function of marriage will be changed that incites organized response (like the 11 state Constitutional amendments prohibiting same-sex marriage that passed in the November 2004 election cycle). If same-sex marriage is won with an assimilationist strategy, anti-queer ideology, which this paper argues will attend such victory, would bolster the existing gender normative functionality of marriage, rather than disrupt it. Therefore, while in the abstract same-sex marriage possesses a capacity for gender-disruptive functionality, this function will not manifest in a same-sex marriage that is attended by an anti-queer ideology, and that is the product of an interest convergence with the very Americans who are most concerned about maintaining the present functionality of marriage as a normalizing social institution.

Straights, and Good for America: "There is a right way and a wrong way to move to same-sex marriage. The right way is gradually, one state at a time. Same-sex marriage will work best when people accept and understand it, whereas a sudden national enactment, if that were somehow to happen, might spark a culture war on the order of the abortion battle."[60] Indeed, there is a driving fear for many within the gay rights movement of touching off a backlash, which likely encourages some to believe a strategy of assimilation is a less risky, and necessary, approach to change.[61]

I argue that assimilationist camps within the gay rights movement are employing two separate strategies to win slow change by influencing the hearts and minds of the people. The first such assimilationist strategy is a participation in a politics of respectability whereby those seeking formal status-based equality are portrayed as deserving, and in all relevant respects, indistinguishable from those who already enjoy full equality. Devon Carbado calls this a "but for" strategy.[62] The second, and related, strategy relies on drawing a bright line distinction between the "good gays" and the "bad gays,"[63] explicitly lauding the former while demeaning the latter. By deviating less norm-compliant sexuality, relationships, and expressions of intimacy, the assimilationist camp is creating a finite class of "good gays" who map onto the "but for" politics of respectability. Simultaneously, the assimilationist camp is developing an ideology that defines "homosexuality" as distinct from the sexual deviance engaged in by the so-called "bad gays."

a. The "But For" Gays and the Politics of Respectability

Professor Devon Carbado argues that in the contest over integration of gay and lesbian people into the military, advocates on behalf of integration were governed by the mandates of the politics of respectability, preferring plaintiffs most likely to appear respectable both to the Court, and to the

[60] RAUCH, *supra* note 17, at 6. Rauch is vice president of the Independent Gay Forum, a correspondent for *The Atlantic Monthly*, and a contributor to *The New Republic*, *The Economist*, *Harper's*, *Reason*, *Fortune*, *Slate*, *The New York Times*, *The Washington Post*, and *The Wall Street Journal*.

[61] Bruce Carrol, *A Fine Mess We're in Now*, WASH. BLADE, Apr. 23, 2004 ("[u]ntil the leaders of these radical gay groups come to grips that they have wasted precious years on counterproductive strategies, we will continue to face these predictable setbacks to gay marriage and other issues with increasing frequency. Until all of us start reaching out to mainstream Americans, instead of shouting in their faces, we will continue to be responsible for our own failures").

[62] *See* Carbado, *supra* note 9, at 1506 n. 149 (citing Ruthann Robson, *Convictions: Theorizing Lesbians and Criminal Justice*, in LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF LAW 180, 189 (Didi Herman, 1995) (discussing the primacy of "but for" lesbians in lesbian equality litigation)).

[63] My use of the terms "good gays" and "bad gays" draws from a chapter entitled "Men Behaving Badly" in Jonathan Rauch's *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America*. *See generally* RAUCH, *supra* note 17. *Cf.* Gayle Rubin, *Thinking Sex*, *in* PLEASURE AND DANGER 267 (Carole Vance ed., 1984)

broader public.[64] Carbado suggests: "The strategy was to present a "but for" gay man—a man, who, but for his sexual orientation, was just like everybody else, that is, just like every other white heterosexual person."[65] Though this strategy failed to effect the desired change in the military,[66] assimilationists within the gay rights movement persist in attempting to convince Americans that "but for" their sexual orientation, gay and lesbian people are just like other, normal Americans.

Above, I enumerated instances in which the *Goodridge* court encouraged advocates on behalf of the gay rights movement to employ a "but for" strategy. It is important to note, however, that it was not the court that entered the underlying facts into the record, but rather the advocates themselves. Savvy attorneys and activists from Lambda Legal, Parents and Friends of Lesbians and Gays ("PFLAG"), the Human Rights Campaign ("HRC"), and the American Civil Liberties Union ("ACLU"), among others, daily engage the "but for" strategy, stressing the similarities between same-sex couples and opposite sex couples. For example, HRC's webpage assures us that gay and lesbian people deserve the same rights as other people because they are not so different after all.[67] Indeed, we are told by assimilationists in the gay rights movement that not only do same-sex couples have children for the same reason opposite sex couples do, as *Goodridge* reminds us, but additionally, for same sex couples, "[t]rue love means, first and fore-

[64] Carbado, *supra* note 9, at 1513. Carbado claims that rather than gather behind Perry Watkins—a successful gay black soldier whose expulsion from the military gave rise to *Watkins*, 875 F.2d. at 701—the gay rights movement chose to put its support behind a clean-cut, white gay soldier. Watkins, in addition to being black, had a nose-ring, and had periodically performed in drag during his fifteen-year career in the military. Carbado explains: "Undoubtedly, it was easier for the gay rights proponents to sell white gay people to mainstream America—as well as to the gay and lesbian community—as civil rights icons than it would have been for them to sell a black gay man." *Id.* at 1515. Instead, the gay rights movement relied on a "but-for" soldier—a soldier who "but for" being gay, was just like any other respectable soldier in mainstream America's mind: "[Joseph Steffan was r]aised in the Midwest, Catholic, a choir boy in his local church. Steffan was the kid next door. Clean-cut, an excellent student, exceptional in track, he took as his date for the senior prom the high school's homecoming queen." *Id.*

[65] For more on the role of the racial tropes invoked in the politics of respectability employed in the fight to integrate gays and lesbians into the military, see *id.* at 1472. *Cf. id.* at 1519 ("In the context of the 'Don't Ask, Don't Tell' controversy, the politics of authenticity operated to exclude the identities and thus experiences of black gays and lesbians from black antiracist and gay rights agendas").

[66] It should be noted that Carbado's claim that a "but for" strategy was actually employed in the military sexual orientation integration context is contested. Carbado's analysis, however, even if inapplicable in the case of Perry Watkins, well describes the strategy employed by Lambda Legal and the other national gay rights organizations in their presentation of plaintiffs and poster-couples in the pursuit of formal status-based equality.

[67] *See* http://www.hrc.org/Template.cfm?Section=Partners&CONTENTID=17478&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited May 4, 2005) (quoting a gay citizen, "I've served in the military and paid my taxes. I've never had anything more than a speeding ticket. Why shouldn't I have this right [to marriage]? Why shouldn't we?").

most, a love which ends in lasting marriage."[68] But for the itsy-bitsy difference (we're gay), our love, intimacy, sexuality, romance, and families are just like yours! Thus, it was likely no accident that in San Francisco, the day before same-sex marriage was made generally available, five couples were married privately, the first of which was a lesbian couple who had been together for over fifty years. Anticipating litigation, the San Francisco mayor consulted with the ACLU before issuing licenses. These leaders engaged the politics of respectability, picking the perfect "but for" plaintiffs to be wed first.

b. Cleaving the 'Bad Gays" from the "Good Gays"

Part and parcel with the employment of the "but for" strategy is the strategy of un-deviating homosexuality by drawing a bright line between those who engage in homosexual sexuality, intimacy and relationships that comport with mainstream, heteronormative values and those who do not. "[P]eople sort good sex from bad by a series of hierarchies," which privilege sex that comports with heteronormative ideology over that which does not.[69] Under the heteronormative ideology, those expressions of sexuality, gender and intimacy which support reproduction of the traditional family structure are privileged over those expressions that transgress or subvert that family structure. Assimilationists repudiate all elements of "bad sex," except for homosexuality itself, thereby allowing the "good gays" to remove sexual orientation from the hierarchically arranged valuation of sexuality without disrupting the heteronormative ideology that is itself predicated on such hierarchies.[70]

Jonathan Rauch, a gay author, employs this strategy by identifying a "they," a third person plural of which he is not a part, understanding that without marriage "their world remains incomplete, unfinished . . . . perhaps full of sex but not as full of love."[71] In a chapter entitled "Men Behaving Badly," Rauch argues that contrary to popular belief, *all* gay men are not significantly more promiscuous than straight men; therefore, gays will not contaminate the institution of marriage with adultery. Acknowledging that *some* gay men — the "bad gays" — are substantially more promiscuous than others — the "good gays" — Rauch urges that promiscuity amongst those unlikely to marry — the "bad gays" — should be understood as unrelated to

[68] RAUCH, *supra* note 17, at 2.

[69] WARNER, *supra* note 16, at 25-26. *See also* JOHN D'EMILIO, MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 3-19 (1992).

[70] WARNER, *supra* note 16, at 31 ("[some gays and lesbians] try to protect their identities by repudiating mere sex").

[71] RAUCH, *supra* note 17, at 2-3.

any adulterous promiscuity amongst those likely to marry — "the good gays."[72]

In addition to cleaving the bad from the good, some assimilationists claim that same-sex marriage itself will cure gay men of their non-heteronormative behavior problems. The argument is twofold. Some contend that a psychic wound is inflicted upon gay children raised knowing that they can never marry — a wound that can be healed only with the availability of same-sex marriage.[73] Others assert a more behavioralist analysis by which the normalizing effects of same-sex marriage will directly curb bad behavior by encouraging monogamous commitment.[74] While the normative posture of these assimilationist forces within the gay rights movement should not obscure the internal contest within the gay rights movement as a whole, it is clear that the movement has taken its place at the table in the contest to shape *Lawrence*'s post-verdict constitutional culture.

III. Whose "Gay Rights Movement"? Status Equality vs. Sexual Autonomy

Having identified the key role that gay rights advocates will play in the development of the constitutional culture that will give meaning to *Lawrence*, the next few pages takes a closer look at the assumptions underlying what many—including Judge Reinhardt—seem to see as a monolithic gay rights movement. This section seeks to demonstrate that different camps within the gay rights movement have distinct and possibly competing baseline goals: the formal status-based equality goal and the sexual autonomy goal. While both goals are best achieved by capturing the broader "public equality" construction of *Lawrence*, the assimilationist strategy not only fails

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[72] *Id.* at 145. *See also* Warner, *supra* note 16, at 48 ("[t]oo often . . . gay and lesbian politics has been defensive and apologetic. Gay people, it is said, are not really so bad. It's just a few extremists giving a bad name to ordinary decent folk").

[73] *E.g.*, Andrew Sullivan, *Why The M Word Matters to Me*, Time, Feb. 16, 2004, at 104 ("I want above everything else to remember a young kid out there who may even be reading this now. I want to let him know that he doesn't have to choose between himself and his family anymore. I want him to know that his love has dignity, that he does indeed have a future as a full and equal part of the human race. Only marriage will do that. Only marriage can bring him home").

[74] Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 Harv. C.R.-C.L. Rev. 511, 512 n.6 (2003) (identifying the "behavioristic, moralistic call for monogamous commitment and a thorough rejection of promiscuity and multiple intimacies, often accompanied by connecting promiscuity to AIDS" that is employed by both centrists and conservatives in the gay rights movement). *See also, e.g.*, William N. Eskridge, Jr., The Case For Same-Sex Marriage: From Sexual Liberty to Civilized Commitment 9 (1996) (arguing that AIDS shows that gay and bisexual men are "in need of civilizing, [and] same-sex marriage could be a particularly useful commitment device for [them]"); Rauch, *supra* note 17, at 138 ("[by] giv[ing] people a home and a spouse and a marital sex life, [] they are probably not out on the street spreading germs").

to serve the sexual autonomy goal, but instead propagates ideology that conflicts with the achievement of that goal.

Professor William Eskridge identifies three subgroups that typically comprise an identity-based social movement: the majority, the integrationists and the radicals.[75] Because the majority within any minority social movement remains largely uninvolved, integrationists determine the movement's dominant goals while radicals present a less organized alternative position. In the gay rights movement it is easy to identify the dominant goal of securing formal status-based equality for members of a "homosexual" class. Emblemized by efforts to secure same-sex marriage, formal status-based equality is the goal most visibly pursued by the contemporary gay rights movement. The goal emerged as early activists embraced an identity-based politics by which "homosexuality" came to be understood as a minoritized identity.[76] The struggle for same-sex marriage reflects the ultimate battle in a long war for formal status-based equality.[77] Indeed, some in the gay rights movement believe that the achievement of same sex marriage would represent a complete victory, assuring formal equality, and allowing the gay rights movement to be shut down.[78]

Alternatively, queer theorists—understood by Eskridge as the radical prong in the movement—assert that a key goal for the gay rights movement should be one of protecting individual sexual autonomy.[79] From theorist Michael Warner's perspective, our sexual autonomy is limited by our partici-

[75] Eskridge, *supra* note 9, at 2394-95 ("[a]s a social movement takes shape to resist the regime, (1) most members of the minority group, the tories and bystanders, want nothing to do with it; (2) radicals want to transform society based on their identity-generated normative vision; and (3) integrationists want to be assimilated as equals into society and law. If the social movement gains momentum, usually through skirmishes with the state and publicity for its grievances, group 1 shrinks and group 3 grows, with group 2 fluctuating. Group 3 tends to assume disproportionate control of the IBSM, in large part because minority professionals are likely to be integrationist, and they have the leisure time, intelligence, money, and energy to work for the movement's advancement") (footnotes omitted).

[76] *See generally* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983).

[77] *See* Eskridge, *supra* note 9, at 2187 ("[t]he equality jackpot would be state recognition of same-sex marriages, the last refuge of compulsory heterosexuality in American family law").

[78] WARNER, *supra* note 16, at 61 (noting that Andrew Sullivan asserted in a New Republic article in 1993 that "'Following legalization of gay marriage and a couple of over things,' [Sullivan] has declared, 'I think we should have a party and close down the gay rights movement for good").

[79] *See* WARNER, *supra* note 16, at 1 ("shouldn't it be possible to allow everyone sexual autonomy, in a way consistent with everyone else's autonomy?"). With this goal in mind, it is interesting to contemplate Andrew Sullivan's complaint that "my parents and friends never asked the question they would have asked automatically if I were straight: So, when are you going to get married? When will we be able to celebrate it and affirm it and support it? In fact, no one—no one—has yet asked me that question." What Sullivan evidently does not ask himself is why he should have to measure his own dignity by an external metric—marriage—that might not represent his own values about sexuality, intimacy and relationships. *See* Sullivan, *supra* note 73, at 104.

pation in a culture of shame and stigma which denies individuals the opportunity to develop individualized sexuality and gender-identity.[80] Because sexuality is not fixed or immutable, protecting a specific identity-based status does not alone ensure that the necessary conditions for sexual autonomy are protected.[81] Thus for queer theorists, a goal of sexual autonomy demands disruption of false hierarchical binaries that discursively subordinate non-monogamy to monogamy, casual sex to sex in a relationship, vanilla sex to sadomasochistic sex, in addition to homosexuality to heterosexuality.[82] The sexual autonomy goal is, of course, in direct tension with the assimilationist strategy discussed above. By cleaving the "good gays" from the "bad gays," assimilationists seek to remove homosexuality from the ordered hierarchies without disrupting the others. Indeed, it is an interest in the very maintenance of these ordered hierarchies that likely will spur outside support of a formal status-based equality that does not further disrupt the deviation of non-normative relationships, sexuality and intimacy.

To this end, Warner explains that "current conflicts within the gay and lesbian movement, especially debates about public sex and gay marriage, are not so much . . . debates with shared assumptions as points of conflict and miscomprehension between increasingly divergent worlds."[83] When Reinhardt advises the gay rights movement as a whole to employ an assimilationist strategy that will pay off only in the long run,[84] we should not understand the long term pay off to include gains toward sexual autonomy.[85] Indeed,

[80] *See* WARNER, *supra* note 16, at 8-9, 11 ("the psychic dimensions of sex change as people develop new repertoires of fantasy and new social relations . . . not to mention new styles of gender and shifting balances of power between men and women. Through the long process of change, some desires too stigmatized to be thought about gradually gain legitimacy, such as the desire for a homosexual lover").

[81] *See id.* at 12 ("[c]onditions that prevent variation, or prevent the knowledge of such possibilities [as alternative sexualities] from circulating, undermine sexual autonomy").

[82] Gayle Rubin contrasts sexuality that is good, normal, natural, heterosexual, done in marriage, monogamous, procreative, noncommercial, done in pairs, done in a relationship, done between partners in the same generation, done in private, with no pornography, with bodies only, that is vanilla with sexuality that is bad, abnormal, unnatural, homosexual, done outside of marriage, promiscuous, nonprocreative, commercial, done alone or in groups, casual, cross-generational, done in public, with pornography or manufactured objects, or that is sadomasochistic. *See generally* Rubin, *supra* note 63, at 267.

[83] WARNER, *supra* note 16, at 71. *See also* Eskridge, *supra* note 9, at 2402 ("[an] important effect of integrationist victories is that they create deeper divisions within the minority group: some will benefit greatly from integration and will tend to assimilate into mainstream culture; others will remain marginalized . . . some will be even worse off than . . . before").

[84] Reinhardt, *supra* note 2, at 21 ("The ultimate struggle must be to persuade Americans of the rightness of your cause. This will require considerable patience and thoughtful planning").

[85] Nancy Levit, *A Different Kind of Sameness: Beyond the Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L. J. 867, 920 (2000) ("Sexual minorities in particular have reason to be apprehensive about assimilationist strategies. They are encouraged in some instances and coerced in others into 'converting' their sexual orientation, passing, or otherwise re-

Reinhardt speaks only with formal status-based equality in mind and, therefore, speaks meaningfully only to those within the gay rights movement who give this goal primacy. Thus, to those who consider formal equality without sexual autonomy to be a pyrrhic victory, Reinhardt's remarks seem inapposite.

IV. THE CONSEQUENCES OF EMPLOYING AN ASSIMILATIONIST STRATEGY: INTEREST CONVERGENCE AND THE POWER OF IDEOLOGICAL LEGACY

By returning to *Brown v. Board of Education* to examine the effects of the assimilationist strategy employed by the integrationists in the civil rights movement, we see that the assimilationist strategy not only fails to foster incremental change beyond the initially asserted goal,[86] but it breeds contrary ideology that itself undermines further goals. Relying on Derrick Bell's theory of interest convergence, this Part claims that doctrinal construction resulting from converged interests is attended by ideology that both is consistent with and supports the interests of socially, economically and politically dominant classes. This ideological legacy demands attention, and requires that strategic analysis regarding possible doctrinal constructions of *Lawrence* acknowledge that its doctrinal posture is situated in an emerging ideological framework that ultimately might bear more heavily on the goals of the gay rights movement than the doctrine itself.

A. *A Lesson from* Brown*: Interest Convergence Theory and the Limit of Incremental Change*

Judge Reinhardt asserts that "the United States has made substantial progress in expanding civil rights and [that] our nation is a better land because of *Brown*." He lauds the assimilationist model adopted by a pragmatic civil rights movement as a strategy the gay rights movement might seek to emulate.[87] Yet Reinhardt acknowledges the many failings of *Brown*, conceding that "the persistence of pervasive segregation in education and housing today demonstrates that all those efforts combined will not produce the ultimate victory unless and until society as a whole is persuaded to accept the fundamental changes necessary to establish a new and improved way of life."[88] But, as we shall see, the "ultimate victory" of which Reinhardt

maining invisible"). *See also generally* Kenji Yoshino, *Covering*, 111 YALE L. J. 769 (2002) (discussing the subordination involved in such personal assimilation).

[86] In the case of the civil rights movement, an end to formal de jure segregation, and in the case of the gay rights movement, formal status-based equality.

[87] Reinhardt, *supra* note 2, at 12-17.

[88] *Id.* at 15. *See also* Stephen Reinhart, *Guess Who's Not Coming to Dinner!!*, 91 MICH. L. REV. 1175, 1176-78 (1993) (describing the vast racial disparity that exists despite incremental advances,

speaks (substantive equality rather than mere formal equality), demands a construction of *Brown* and its progeny not originally pursued by the pragmatic civil rights movement. The movement successfully sought an end to de jure segregation—why Reinhardt expects that this pragmatic movement would secure an ultimate victory it did not set out to achieve is left unarticulated in his speech. This paper explores the seemingly predetermined shortfall of the assimilationist pursuit of formal equality, suggesting that the likely result of any gay rights assimilationist strategy that does not in its inception seek to secure rights to sexual autonomy will, like the civil rights movement for substantive equality, fall far short of achieving the 'ultimate victory.'

In understanding how *Brown* might inform the gay rights movement's approach to expounding *Lawrence*, it is useful to entertain the interest convergence argument that a dominant class will never accept fundamental change that strips that class of its privilege.[89] Derrick Bell argues that as long as race is salient as a privileging and deprivileging institution, "society as a whole" will never agree to the fundamental changes necessary to undo that mechanism.[90] Though Bell's theory of interest convergence is specifically situated to explain racial subordination, one can extract from his theory the principle that hegemonic disruption does not occur except when it is in the material interest of the dominant class for its own order to be disrupted. Essentially, when between a rock and a hard place, a dominant class will elect the less expensive, less disruptive option; it is in this moment only, however, that meaningful disruption occurs, and this moment lasts only so long as it benefits the dominant class. When examining the constitutional culture in which *Lawrence* will be constructed, therefore, we should acknowledge the applicability of Bell's warning that interests stay invested only so long as required. Despite Reinhardt's consolation that "in the long run, Americans usually come down on the side of fairness and equality,"[91]

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noting that "integration . . . may be subject to far greater limitations than we ever dreamt of in the years following *Brown v. Board of Education*"). *Cf.* Harris, *supra* note 48, at 1754 ("integration . . . has not led to the goal sought by Blacks: a quality education for Black children or, at least, minimum equity").

[89] Bell, *supra* note 19, at 523 ("'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

[90] *Id.* ("[the courts will not provide] racial equality for blacks [when doing so] threatens the superior societal status of middle and upper class whites").

[91] Reinhardt, *supra* note 2, at 21. Judge Reinhardt's comment reflects a strikingly inadequate consideration of power. Americans historically rarely, if ever, come down on the side of fairness and equality when it is not in the material or ideological interest of the dominant class to do so. This is the crux of Derrick Bell's interest-convergence theory discussed below. The pervasive racial segregation in housing and education that Reinhardt acknowledges in his speech suggests the fallacy of his assertion that a natural evolution will tend toward equality and fairness. *See also* Reinhardt, *supra* note 88, at 1176-78 (describing the vast racial disparity that exists in the United States

the movement must understand that the pursuit of formal status-based equality cannot be an incremental step toward protecting sexual autonomy.

The ability of the gay rights movement to win formal status-based equality through same-sex marriage lies in the hands of precisely those who are prepared to walk away from the gay rights movement upon victory. To capture the "hearts and minds of the people," assimilationist writers like Andrew Sullivan and Jonathan Rauch are incredibly useful. Such authors publish articles that further the formal status-based equality goal in reputable, national publications like *Time Magazine* and *The Economist*. Their conservatism garners trust and respect from scores who might otherwise shun gay rights. Thus, in the transient convergence of interests that might produce same-sex marriage, these assimilationists hold the cards. Some of these activists, however, claim that the gay rights movement should close shop upon winning formal status-based equality.[92] Therefore, we must heed Warner's warning:

> "Apologists for marriage often say that it would give the gay movement new power to demand further reforms. What they do not take into account . . . is the change that the campaign is likely to bring in the movement itself—as its enemies are repositioned, its battles redefined, its new leaders and spokespersons identified, and as millions of dollars of scarce resources are poured into fights that most of us would never have chosen."[93]

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despite incremental advances, noting that "integration . . . may be subject to far greater limitations than we ever dreamt of in the years following *Brown v. Board of Education*").

Individual Americans come down on the side of fairness and equality when doing so does not challenge their privileged status. To the extent that an American heteronormative ideology functions to legitimate macro-structural inequities (thereby maintaining a privileging macro-structure), in the context of the gay rights movement, Americans will come down on the side of fairness and equality only when doing so reifies this heteronormative ideology. Thus to the extent that the gay rights movement positions gay marriage within the rubric of the heteronormative ideology by advancing theories predicated on the benefits of marriage and other gender-normative values, one can expect that Americans might understand same-sex marriage to be mandated by principles of fairness and equality.

Fairness and equality, however, are subjective concepts, reflecting the discursive position of the individual considering the fairness and equality. Thus Americans for whom the heteronormative ideology is necessary to maintain privileged status will simply not understand their rejection of gay rights as unfair or unequal when recognizing such rights would threaten that ideology. To the extent that the goal for the gay rights movement might be sexual autonomy, a goal that contradicts the heteronormative ideology, it seems unlikely that Americans will just come down on the side of "fairness and equality."

[92] RAUCH, *supra* note 17, at 56 ("[gay marriage] closes the book on gay liberation: it liberates us from liberation, if you will. And that is good").

[93] WARNER, *supra* note 16, at 143-44.

B. *The Legacy of Colorblind Meritocratic Ideology Attending* Brown

Only as the Court and the civil rights movement shaped mainstream public opinion about segregation, shifting the constitutional culture in which *Brown* was doctrinally constructed, did *Brown*'s legal authority become clear. Previously nebulous distinctions like the tension between formal equality and substantive equality crystallized into opposition.[94] In order to accept *Brown*'s anti-classification principles and reject its anti-subordination posture, the legitimacy of the construction depended upon an attendant ideology that could reconcile the fact that de facto segregation following *Brown* maintained massive racial inequity. An ideology of colorblind meritocracy did the trick.[95] This ideology says, in America we pay no attention to race. In the land of opportunity, hard work pays; socioeconomic status reflects merit, not birthright. This ideology thus legitimates socioeconomic inequality by explaining it as the result of unequal merit—some work harder than others, obscuring the racial dimensions of poverty. Racism is condemned only to the extent that one transgresses the ideological mandate to ignore race. By understanding racism as a question of individual intent, however, any structural operation of race is rendered ideologically invisible. Thus the formal equality construction of *Brown* insists that racial harm occurs at the hands of a bad actor. Racial inequity not caused by a bad actor then is understood not as a question of racial harm, but rather as individual failure—legitimate meritocratic inequality, not illegitimate racial inequality.

As explained by Cheryl Harris, the construction of *Brown* ratified "the status quo of substantive disadvantage . . . as an accepted and acceptable baseline—a neutral state operating to the disadvantage of Blacks long after de jure segregation had ceased to do so."[96] Thus, when "the actual circumstances of racial disadvantage—unemployment, inadequate education, poverty, and political powerlessness—are to be regarded as mere unfortunate conditions, not as consequences of racial discrimination . . . [t]hose conditions are then readily rationalized."[97] The wide-spread invocation of "colorblind" justifications in contemporary American racial politics demonstrates the longevity of ideology that emerges from converged interests.[98]

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[94] *See* Siegel, *supra* note 23, at 1480-81 (discussing the crystallization of the anti-subordination and anti-classification positions as discussed above).

[95] The complex development and function of this ideology is well beyond the scope of this paper and warrants its own consideration. It seems to me, however, that colorblind meritocratic ideology is certainly linked to the meritocratic American Dream ideology emerging during the same period. Both ideologies, I think, must be understood in the context of a changing nationalist ideology necessary to legitimate class distinctions.

[96] Harris, *supra* note 48, at 1753.

[97] *Id.* at 1753 n.204 (quotations omitted).

[98] *See* Chemerinsky, *supra* note 39, at 368 (noting the role of the colorblind ideology in conservative analysis of the 2002 Supreme Court affirmative action cases *Grutter* and *Gratz*).

Richard Delgado and Jean Stefancic similarly identify *Brown*'s ideological legacy, noting that the anti-classification construction of the holding is attended by a colorblind ideology that impedes racial justice movements today. "Consider how today we no longer talk in terms of separateness as an inherent injury, of black schoolchildren as victims, or of racism as a harm whose injury 'is unlikely ever to be undone.' Instead, we speak of the need for formal neutrality, of the dangers affirmative action poses for innocent whites, and of the need for black Americans to look to their own resources."[99] Now, "Blacks' demands for justice are themselves [seen as] unjust, because they are a form of asking for special treatment and because they encroach on white privilege and settled expectations."[100] Rather than provide ideological support to efforts to secure meaningful substantive equality, today the colorblind ideology that emerged attending *Brown* affirmatively undermines these efforts by focusing attention on individual culpability, and away from structural forces that perniciously provide unequal distribution of opportunities.

Brown teaches us that it would be foolish to evaluate *Lawrence* without explicitly considering the ideology that is likely to attend potential constructions of the decision. Thus, I turn lastly to an examination of the ideology emerging from the assimilationist strategies and rhetoric already employed by those in the gay rights movement whose goal is formal status-based equality.[101]

C. *Ideology Attending the Doctrinal Construction of* Lawrence

Prior to *Lawrence*, the assimilationist strategy employed by the gay rights movement had substantially less impact on national ideology than it does today. We see from *Brown* that it is the joining of ideology and doctrine which in lock-step have powerful force, extending beyond the doctrinal reach into national values. To the extent that the ultimate doctrinal construction of *Lawrence* will emerge from a constitutional dialectic by which constitutional law draws its meaning from constitutional culture (a culture shaped by mainstream public opinion as influenced by the Court and advocates for gay rights), the meaning of *Lawrence* will ascribe institutional support to, and legitimation of, the underlying constitutional culture. Thus, the ideology that emerges from the public dialogue over contested values to legitimate the ultimate construction of *Lawrence* will pervasively attend the

[99] Richard Delgado & Jean Stefancic, *The Social Construction Of Brown v. Board Of Education: Law Reform And The Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 560 (1995).

[100] *Id.* at 563.

[101] A consideration of the ideology likely to attend the goal of sexual autonomy is beyond the scope of this paper.

values at stake and will be supported by the institutional legitimacy of the Court.

As discussed in Part II, some in the gay rights movement are already employing assimilationist strategies, with two key ideological effects. First, asserting a "but for" strategy reifies dominant heteronormative ideology by positioning homosexuality as within the gambit of that ideology rather than critiquing and disrupting the ideology for its historical deviation of homosexuality. Second, the cleaving of the "good gays" from the "bad" seeks to undeviate homosexuality by placing new primacy on a binary based on sexual behavior rather than sexual orientation, forging new anti-queer ideology to deviate the bad behavior.

Just as colorblind rhetoric preceded *Brown*,[102] anti-queer rhetoric is an old voice within the gay rights movement.[103] *Lawrence*, like *Brown*, gives this voice institutional support by grounding the doctrinal posture of the Court in the constitutional culture itself legitimated by anti-queer rhetoric. Thus, where, before *Lawrence*, anti-queer rhetoric merely repudiated the sexual autonomy goal, after *Lawrence*, anti-queer ideology will govern our national conception of sexuality, intimacy, gender, and relationships, affirmatively undermining movements to secure sexual autonomy. Prior to *Lawrence*, Michael Warner argued, "If the campaign for marriage requires such a massive repudiation of queer culture's best insights on intimate relations, sex, and the politics of stigma, then the campaign is doing more harm than marriage could ever be worth."[104] Those who advocate assimilationist strategy by arguing that broader rights to sexual autonomy will incrementally flow once formal status-based equality is secured must respond to Warner's claim. Not only can we expect that the loosely cohesive gay rights movement will radically fracture following the acquisition of a right to same sex marriage, but the larger coalitions that the gay rights movement currently participate in—the converged interests, if you will—are likely ephemeral. Moreover, the battle for sexual autonomy will be met with new anti-queer

[102] The term "colorblind" was injected into our national dialogue in 1896 in Justice Harlan's dissent in *Plessy v. Ferguson*, 167 U.S. 537 (1896).

[103] *See, e.g.*, LARRY KRAMER, FAGGOTS (1978) (condemning promiscuous homosexual sexuality as vacuous and spiritually toxic).

[104] WARNER, *supra* note 16, at 91. *Cf. id.* at 39-40 ("The organized gay movement . . . has in many ways lost [the] vision. The point of a movement is to bring about a time when the loathing for queer sex, or gender variance will no longer distort people's lives. In the meantime, we (or some of us, acting in the name of homosexuals) try to clean ourselves up as legitimate players in politics and the media. As a movement we resort to a temporary pretense: 'We're gay,' we say, 'but that has nothing to do with sex.' And then, too often, this stopgap pretense is mistaken for the desired utopia. 'No more sex! Free at last!'"); Eskridge, *supra* note 9, at 2400 ("A critical analysis of same-sex marriage, therefore, is that it would benefit a small number of the lesbigay community, would positively harm others, and would represent a sacrifice of the radical, transformative goals of the early movement").

ideology spawned by the aforementioned assimilationist strategies to secure formal status-based equality.

Interest convergence theory tells us that when a dominant class, or its ideological legitimacy, is put between a rock and a hard place, that class will join with advocates for change only so long as is necessary to elicit the least disruptive change possible. *Lawrence* presents mainstream America with just such a situation. A dominant American ideology, the heteronormative ideology, is threatened by a possible doctrinal construction which might shatter the way Americans think about relationships, family, sexuality, intimacy and gender. The implications of the fall of the heteronormative ideology are beyond the scope of this paper, but it is clear that the mere threat of its fall has created the transient moment where interests converge. Interest-convergence suggests that an assimilationist strategy may well succeed at capturing formal status-based equality for gays and lesbians in a moment like this, but with this victory comes attendant ideology. Just as the colorblind ideology that attended the formal equality meted out in *Brown* continues to undermine movements for racial justice today, ideology attending a construction of *Lawrence* which delivers formal status-based equality is likely to shape mainstream public opinion about sexuality and gender for years to come.[105]

V. CONCLUSION

Judge Reinhardt tells us that "*Lawrence* may be the *Brown v. Board of Education* for the gay rights movement." What *Brown* shows us is that that may not be a good thing. While I cannot balance the importance of formal status-based equality against that of the protection of sexual autonomy, I can conclude two things. First, doctrinal construction exists not in a vacuum, but rather is attended by ideology, which in the long run often bears more heavily on a social movement than the doctrine itself. Second, an assimilationist pursuit of the formal equality available in *Lawrence* will not incrementally lead to the protection of sexual autonomy. Instead, the emergence of an anti-queer national ideology, the collapse of the loosely cohesive gay rights movement, and the divergence of presently converged diverse interests will collectively shut the door on any current movement toward such a goal.

Today we do not know what *Lawrence* will come to mean. Reinhardt himself acknowledges that *Lawrence*'s role "is far from certain and the future

[105] Reflecting concerns that this ideology is already taking hold, playwright Paul Rudnick jokes, "Being gay and single is the new smoking. It won't be socially acceptable anymore, and you will have to go outside." Bob Morris, *Gay Marriage? How Straight*, N.Y. TIMES, March 7, 2004, at C.

is hard to predict."[106] Post tells us that *Lawrence*'s ultimate construction will arise out of a dialectical relationship between the law and the constitutional culture cultivated in public opinion by the Court and the gay rights movement. Where Post suggests that either a "private liberty" or "public equality" construction of substantive due process doctrine will eventually emerge, I assert that in choosing its strategies advocates for either of these constructions must also predict and analyze the ideology that will likely attend the ultimate construction of the desired legal doctrine. The role the gay rights movement plays in shaping the constitutional culture out of which *Lawrence* will be constructed endows those within the movement with agency to influence the ideology that will ultimately attend *Lawrence*. Those within the movement must explicitly privilege one goal over another. Pushed by the power of converging interests, most will choose formal status-based equality over sexual autonomy. If this is the case, this paper serves as a call to those within the movement who value sexual autonomy to continue to give that goal a voice.

[106] Reinhardt, *supra* note 2, at 11.