Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics

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A Houston neighbor of John Geddes Lawrence complained to the Harris County sheriff's office that a suspicious black man had entered Lawrence's apartment.[1] Jumping to the conclusion that the man was a burglar, the sheriff's office swiftly dispatched a team of police to Lawrence's apartment. The officers entered the apartment, where they found Lawrence and Tyron Garner, the alleged "burglar," engaged in consensual anal sex. The shocked officers arrested the couple, humiliated them, and jailed them for twenty-four hours. By these petty actions, Harris County handed Lambda Legal Education and Defense Fund the case everyone supporting gay rights had been waiting for—the application of a state sodomy law to intercourse by consenting adults within the home.

The precise result of these police shenanigans was litigation challenging the constitutionality of the Texas Homosexual Conduct Law, which makes it a misdemeanor for two consenting adults to commit "deviate sexual intercourse," but only if the two adults are of the same sex.[2] The Texas courts denied

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1. The statement of facts is taken from the Respondent's Brief, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102). *See also* Lawrence v. State, 41 S.W.3d 349, 350 (Tex. App. 2001), *rev'd sub nom.* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

2. TEX. PENAL CODE § 21.06(a) (Vernon 2003) (declared unconstitutional by *Lawrence*, 123 S. Ct. 2472). Deviate sexual intercourse is defined to include both oral and anal sex. *Id.* § 21.01(1). Deviate sexual intercourse between two people of different sexes was completely legal in Texas so long as they were

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Lawrence and Garner's constitutional challenge, and the U.S. Supreme Court took review in *Lawrence v. Texas*.[3]

As had been widely expected among legal experts, the Court overruled *Bowers v. Hardwick*,[4] a 1986 decision which had rejected right to privacy challenges to Georgia's consensual sodomy law.[5] No one, however, anticipated the breadth of the Court's opinion. Scholars had exposed historical as well as logical problems with Justice Byron White's surly opinion in *Hardwick*. Writing for five Justices in *Lawrence*, Justice Kennedy explored those flaws and duly noted that American courts, as well as commentators from a variety of perspectives, had overwhelmingly disapproved of *Hardwick* (almost unheard-of in our system).[6] Courts in Europe had also rejected *Hardwick's* understanding of personal privacy.[7] More surprisingly, however, Justice Kennedy announced that the disrespect shown to the lives and liberties of gay people was the greatest flaw of *Hardwick*. By treating gay people as presumptive outlaws rather than as citizens, *Hardwick* was wrong the day it was decided.[8] The Supreme Court almost never says that. Most surprisingly, Kennedy's opinion emphasized the ways in which *Hardwick* had been deployed to deprive gay people of an array of rights and freedoms.[9] His assumption was that gay people presumptively deserve to be treated as equal citizens and not as outlaws.

Concurring in the Court's judgment, but not in overruling *Hardwick*, Justice O'Connor relied on the Equal Protection Clause as her basis for invalidating the Texas Homosexual Conduct Law.[10] Joined by the Chief Justice and Justice Thomas, Justice Scalia vigorously dissented.[11] These concurring and dissenting opinions raise a number of serious questions about the Court's holding and its reasoning.

History. The Due Process Clause gives special protection to

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both adults, both consented, and it occurred within the home or another private place.

3. 123 S. Ct. 2472 (2003).
4. 478 U.S. 186 (1986), *overruled by Lawrence*, 123 S. Ct. at 2472 (2003).
5. *Id.* at 196.
6. *Lawrence*, 123 S. Ct. at 2480–83.
7. *Id.* at 2483.
8. *Id.* at 2478, 2484–86.
9. *Id.* at 2482.
10. *Id.* at 2484–88 (O'Connor, J., concurring in the judgment).
11. *Id.* at 2488–98 (Scalia, J., dissenting).

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liberties traditionally recognized as beyond the state's regulation. The Court in *Lawrence* protected a liberty interest that *Hardwick* had found "facetious" in light of historic Anglo-American criminalization of sodomy. Can *Lawrence*'s liberty interest be squared with the history of state sodomy regulation? With the original intent of the Framers of the Fourteenth Amendment? Does *Lawrence* reflect a new approach to substantive due process protection?[12]

Stare Decisis. Justice Scalia's dissent accused the Court of playing fast and loose with stare decisis, the presumptive respect that the Court's precedents are supposed to enjoy. Can *Lawrence* be squared with principles of stare decisis? Relevant to that inquiry is the fact that the Court could have struck down the Texas sodomy law on the ground that it violated the equal protection of "homosexuals," as Justice O'Connor's concurring opinion urged. Instead, the Court took the broader path, overruling *Hardwick*. Why did the Court go out of its way to overrule a leading constitutional precedent, when an excellent but narrower ground presented itself?[13]

Countermajoritarian Judicial Activism. The dissenters suggested that the Court's decision was contrary to both history and precedent—making the decision lawless. They also suggested that it was undemocratic. The Court not only nullified the Texas statute, but also nullified consensual sodomy laws in thirteen other states: Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.[14] If, as the Court seemed to think, such laws are outdated legal relics, should the Court not have left them to state legislative processes to repeal? Such a broad, and arguably unnecessary, ruling exposes the countermajoritarian nature of the Court's exercise of power.

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12. *See* discussion *infra* Part II.

13. *See* discussion *infra* Part III.

14. *See* ALA. CODE § 13A-6-65 (1994); FLA. STAT. ANN. § 800.02 (West 1992); IDAHO CODE § 18-6605 (Michie 1997); KAN. STAT. ANN. § 21-3505 (1995); LA. REV. STAT. ANN. § 14:89 (West 1986); MICH. COMP. LAWS ANN. § 750.158 (West 1991); MISS. CODE ANN. § 97-29-59 (2000); MO. ANN. STAT. § 566.090 (West 1999); N.C. GEN. STAT. § 14-177 (2003); OKLA. STAT. ANN. tit. 21, § 886 (West 2002); S.C. CODE ANN. § 16-15-120 (West 2003); UTAH CODE ANN. § 76-5-403 (2003); VA. CODE ANN. § 18.2-361 (Michie 1996); *see also* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET app. at 362–71 (1999) [hereinafter ESKRIDGE, GAYLAW] (outlining state and federal statutes discriminating on the basis of sexual or gender variation).

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Can this be defended under democratic premises?[15]

The End of Morals Legislation? Justice Scalia's dissenting opinion sounded an alarm that *Lawrence* means the end of state morals legislation—including laws criminalizing incest, fornication, bestiality, adultery, etc. Thus, the assertedly lawless and undemocratic nature of the Court's decision is not limited just to sodomy laws; all morals laws are now in play, the dissenters maintained. To sweep them away in their entirety would be a dramatically undemocratic display of judicial activism. To leave some in place (ultimately) would involve line-drawing best left to the democratic process.[16]

Complete Homo Equality? The dissent went much further in its accusations. Justice Scalia also claimed that the majority was, in essence, adopting the entire "homosexual agenda." Hence, *Lawrence* spells *finis* for the armed forces' exclusion of lesbians, gay men, and bisexuals and requires states to recognize same-sex marriages. Many gay people agree with the dissent—the Constitution does require states to recognize same-sex unions and does require the federal government to allow openly gay people to serve in the armed forces. Most Americans still do not support full homo equality, however. For some, full equality for gays would be identity shattering. Can the judiciary foist the entire gay rights program on an unwilling America?[17]

What Is Motivating the Justices? Perhaps the biggest mystery of all is the only one the dissenters failed to mention: What is motivating the majority Justices? At the very least, there was much play in the history and the precedents, but the fact remains that a majority of the Justices serving on the very conservative Rehnquist Court rejected the main legal authority on point (*Hardwick*) when it ruled that states cannot criminalize private consensual sodomy. Why would these jurists go out of their way to discover constitutional rights for gay people, and with soaring rhetoric found only in a handful of Supreme Court decisions? It is implausible to think, as Justice Scalia suggests, that Justices Kennedy and O'Connor are moles for homo equality. But then what explains their boldness?[18]

This Article shall answer these questions, starting with the

15. *See* discussion *infra* Part IV.
16. *See* discussion *infra* Part V.
17. *See* discussion *infra* Part VI.
18. *See* discussion *infra* Parts I & IV.

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last one and then considering each of the foregoing questions from the beginning. The key to understanding *Lawrence*—and all its doctrinal complexities—is the Supreme Court's recognition that American democratic pluralism must meet the lesbian, gay, bisexual, and transgendered (LGBT) rights movement at least halfway. After a century of discrimination and persecution, lesbians, gay men, and bisexuals have demonstrated through their lives that traditional state antigay discrimination and persecution were unjust. Through their political activism, these Americans have claimed the right to be considered equal citizens and not presumptive outlaws. They have asserted that they can no longer be denigrated in public discourse—and that a Supreme Court that denigrates them is a Court wounding itself as well as America. But contrary to the dissenters, *Lawrence* only sets a new floor for gay people, and not the same floor that straight Americans can take for granted. *Lawrence* gives us nothing less than, but also nothing more than, a jurisprudence of tolerance. This means that traditionalists can no longer deploy the state to hurt gay people or render them presumptive criminals, but room remains for the state to signal the majority's preference for heterosexuality, marriage, and traditional family values.

The jurisprudence of tolerance is a conservative theory of judicial review, and it is the theory that best justifies, and perhaps inspires, the positions taken by the Court in *Lawrence* and other recent gay rights cases. Ironically, it is a theory that justifies a fair amount of activist judicial review—not just the invalidation of consensual sodomy laws in *Lawrence*, but also the Court's ruling that a sexual orientation antidiscrimination law could not constitutionally be applied to require the Boy Scouts to retain an openly gay scoutmaster.[19] What the cases share is the Court's commitment to *lowering the stakes* of identity politics. The LGBT social movement wants to persuade America that gay is good, while the traditional family values (TFV) countermovement wants to persuade America that many gay rights would undermine the family, marriage, and other cherished institutions. This is a fine debate for America to have. The Court is simply insisting that the players not hit below the belt and turn a fair fight into a brawl.

The flip side of the jurisprudence of tolerance is that there are limits to the Court's activism. Even progay Justices realize

19. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

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that a Court that can insist on *tolerance* cannot insist on *acceptance* if the country is not willing to go along. Contrary to the *Lawrence* dissent, the Rehnquist Court will not, anytime soon, impose same-sex marriage on unwilling states, at least in part because such a ruling would raise the stakes of politics in this culture clash. Instead, the Court's strategy is to defer the most divisive issues to other parts of our federal system: Individual states will be left to struggle with the issue of same-sex marriage, and the national legislature and executive will continue to deliberate the armed forces' exclusion of LGBT people. But the Court will remain as a productive referee for other fundamental antigay discriminations, including some that remain in state criminal, family, and employment law.

I. *LAWRENCE*, SOCIAL MOVEMENTS, AND REGIME SHIFTS IN CONSTITUTIONAL LAW

The Supreme Court is responsive to the constitutional politics of social movements. In earlier work, I have identified the way the process of mutual influence developed between the Court and the great identity-based social movements of the twentieth century.[20] The civil rights movement is the exemplar. American law systematically disadvantaged citizens based upon their race and ethnicity. The various forms of legal discrimination, and the violence associated with them, ensured that people of color would be second-class citizens. During the twentieth century, a steadily increasing number of such people objected to this discrimination and cooperated in a mass social movement for their civil rights.[21]

At first, normative civil-rights politics focused on the most immediate physical aggressions of the state against African-Americans. Thus, the NAACP's *politics of protection* main-

20. *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) [hereinafter Eskridge, *Twentieth Century*].

21. Classic accounts include DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984). For a shorter and more popular account, see ADAM FAIRCLOUGH, BETTER DAY COMING: BLACKS AND EQUALITY 1890–2000 (2001).

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tained that racial variation did not justify state brutalization of people of color through the criminal process and police misconduct. This politics found expression in the protections of the Due Process Clause, which the NAACP persuaded even conservative Justices to construe to provide a national code of criminal procedure to protect citizens from police brutality and abusive arrest and prosecution.[22] Once black people made some progress on the protection front, and energized more people of all colors to support equal rights, the movement's politics expanded. The NAACP's *politics of recognition* came front and center in the 1940s, when its litigating arm, the Legal Defense and Educational Fund, Inc. (Inc. Fund), took aim at apartheid, the system of interlocking discriminations and exclusions that defined people of color as second-class citizens.[23] This politics found expression in the Equal Protection Clause. *Brown v. Board of Education*[24] and subsequent cases illustrate the Supreme Court's acceptance of the NAACP's recognition politics. Once the main de jure exclusions had been swept away, the civil rights movement shifted toward a serious *politics of remediation*, focused mostly in the political process.

Why did the Supreme Court substantially accept the constitutional politics of the civil rights movement in the twentieth century? One way of thinking about this question is to consider the strategies that social movement deployed to motivate judges to decide cases in their favor. *Naive strategies* assumed that judges would (more or less) neutrally apply the law and sought to present an expanded factual and normative context within which even a skeptical but open-minded judge would feel logically compelled to recognize the rights of a minority within the governing legal or constitutional framework. Thus, in dozens of criminal procedure cases, from the 1920s through the 1960s, lawyers for black defendants presented the Court

22. *See* 1 CHARLES FLINT KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (1967) (discussing early NAACP protective litigation).

23. Nancy Fraser inspires the term "politics of recognition," even though she uses it somewhat differently from the way I do. On the politics of recognition for the civil rights movement, see KLUGER, *supra* note 21 (providing a detailed examination of the NAACP's antiapartheid litigation campaign); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987) (similar); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1 (1979).

24. 347 U.S. 483 (1954).

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with factually frightening scenarios where the Justices did not see their choice as being doctrinal innovation versus stare decisis; instead, they saw their choice as applying the Constitution to serve its underlying rule of law purposes versus tolerating a state of nature in the South.[25] Once the Justices had decided these cases, the NAACP could cite them as precedent for regulating less-frightening scenarios and for framing broader constitutional rules. The Inc. Fund's famous decades-long litigation campaign to end apartheid was the apotheosis of the case-by-case approach taken by the same lawyers in the criminal procedure cases.[26] Viewing the evolution of doctrine from case to case provides many examples of how judges from a range of perspectives could agree with minority claims when presented in the context of outrageous facts or new developments in formal law.

A limitation of naive strategies was that the new fact situations and novel angles on old issues allowed judges to create favorable doctrine but did not compel them to do so. Accordingly, the Inc. Fund and allied attorneys also followed *sophisticated strategies*, which assumed that judges' decisions were influenced by their own political preferences, and sought to mold or appeal to those preferences. The Justices appointed by Presidents Roosevelt, Truman, and Eisenhower were committed to a democratic pluralism, whereby all groups would, at least as a formal matter, have a fair chance to sway public opinion and participate in government.[27] Civil rights lawyers could argue that deprivation of political and civil rights (voting and jury exclusions, segregation) to minorities was inconsistent with the open and pluralistic features of American democracy that set it apart from Nazi and Communist totalitarianism. The uncomfortable echoes of Nazi racism or Communist totalitarianism in the race cases outraged some of the Justices and made even the least sympathetic Justices reluctant to oppose

25. *See* Eskridge, *Twentieth Century*, *supra* note 20, at 2073–82, 2202–35 (providing detailed analysis of the NAACP's criminal procedure and habeas corpus cases); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (giving a close examination of the earliest NAACP criminal procedure cases).

26. *See supra* note 21 (listing the classic and popular accounts of the litigation campaign).

27. *See* RICHARD PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 177–233 (1999); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 197–217, 235–66 (1973).

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any relief whatsoever.[28]

It is important to understand that the civil rights movement was far more than strategic—it was overwhelmingly normative from the beginning. Its foundational politics was to change public norms away from understanding racial variation (nonwhite) as malignant, toward understanding racial variation as completely benign.[29] To the extent that the movement was successful in moving public opinion and political discourse in the benign variation direction, that success had payoffs in constitutional litigation as well. Once Justices realized that the audience for their opinions included many critics who viewed people of color as just as important to the body politic as white people, the Justices changed the tone of their writing and made an effort to understand and appear responsive to minority claims. Thus, even the conservative Eisenhower appointees (like Harlan and Stewart) were willing to join more liberal Justices (like Douglas and Warren) in aggressively interpreting the Constitution to protect people of color against hostile or discriminatory state action.

Cynical strategies assume that Justices are partisan and essentially just part of the political process. The most obvious punch line for this strategy is to fight for your allies to be appointed to the Court and to oppose appointment of known enemies. It was very important for the civil rights movement when Thurgood Marshall was appointed to the Court, not just because he could be expected to vote for their interests and articulate their politics of recognition, but also because his mere presence in conference discredited extremist arguments and undermined some moderate arguments deployed by the politics of preservation. Conversely, all four twentieth-century judges nominated for the Court but defeated by a Senate vote were opposed mainly by the NAACP and their allies, who viewed the nominees as prejudiced against minorities.[30] Even the most

28. *See* David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at* United States v. Classic, 90 YALE L.J. 741, 761–79 (1981).

29. *See* Appendix to Appellants' Briefs, "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement," Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Oct. Term, 1952, No. 8).

30. *See* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989) (discussing the defeat of Reagan's nominee Judge Bork); JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 57–61, 92–95 (1991) (discussing the defeat of Nixon's nominee Judge Haynsworth); *id.* at 100–17 (discussing the defeat of Nixon's

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conservative Presidents have been forced to take account of the civil rights movement in their efforts to reshape the Court.[31]

A very similar phenomenon can be observed in the Supreme Court's response to women's rights movements. The birth control movement, the pro-choice movement, and the equal rights for women (or ERA) movement followed the same kind of naive, sophisticated, and cynical strategies followed by the Inc. Fund and other civil rights litigation groups.[32] Even many of the players were the same; the ACLU was important in both civil rights and women's rights constitutional litigation, for example. And the Court was supremely responsive, although it generally has filtered the demands of social movements through the lens of its own institutional interests and the ideologies of the Justices. Legal bars to women's reproductive and other freedoms and to their equal opportunities could not be sustained once women started seriously to assert their equal citizenship as participants in the national political process.

Ironically, the Burger Court, populated with more conservative, "strict constructionist" Justices than the Warren Court,

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nominee Judge Carswell); KENNETH W. GOINGS, "THE NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN PARKER (1990) (discussing the defeat of Hoover's nominee Judge Parker).

31. Accordingly, the dominant strategy for conservative Republican Presidents has been to nominate conservatives who can be said to "represent" traditionally Democratic minority groups with whom Republicans are seeking inroads—women (Justice O'Connor), Catholics (Scalia and Kennedy), people of color (Thomas), bachelors (Souter), and Latinos (presumably the group from which the second President Bush would draw for a nomination). This strategy has yielded a Supreme Court that is both ideologically conservative and demographically diverse. The current Court is a veritable Rainbow Coalition compared to the U.S. Senate, for example.

32. *See generally* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994). On the birth control movement, see generally ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA (1992); DAVID KENNEDY, BIRTH CONTROL IN AMERICA: THE CAREER OF MARGARET SANGER (1970); JAMES REED, THE BIRTH CONTROL MOVEMENT AND AMERICAN SOCIETY: FROM PRIVATE VICE TO PUBLIC VIRTUE (1984). On the pro-choice movement, see generally KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); ROSEMARY NOSSIFF, BEFORE *ROE*: ABORTION POLICY IN THE STATES (2001); SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT (1991). On the women's equal rights movement, see generally CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–1968 (1988); RUTH ROSEN, THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA (2000).

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handed down most of the constitutional precedents that women's rights groups had been seeking. In doing so, they expanded constitutional text, ignored precedent, and danced around original intent as they announced one pathbreaking decision after another. Even conservatives in the new generation of lawyers understood, from their own experiences or the experiences of women close to them, that modern women were no longer willing to live within baselines that had been set by men. They were sexually active and demanded control over the possibility of pregnancy and childbirth; they were educated and demanded integration of public colleges and universities; they were working outside the home and insisted that their workplaces not be hostile or discriminatory.

The landmark constitutional victories for women's rights—*Roe v. Wade*[33] and *Craig v. Boren*[34]—came much more quickly than the analogous victories for the civil rights movement—*Brown* and the criminal procedure revolution associated with *Miranda v. Arizona*[35] and other precedents. One reason that women won quicker courtroom victories was their potentially enormous political clout, but also important was the timing: the women's rights movement followed the civil rights one. The example of African-Americans inspired women of all stations and colors to imagine that they could be equal citizens with control over their bodies. Because people of color had been able to achieve much of their politics of protection and recognition through assertion of constitutional due process and equal protection rights, women closely followed the Inc. Fund's model.[36]

Not least important, the success of the civil rights movement provided even conservative Justices with reasons to accept women's constitutional claims (or at least meet them halfway). The Justices were understandably proud of what they had done in *Brown* and *Loving v. Virginia*,[37] decisions universally acclaimed by law professors and soon accepted as axio-

33. 410 U.S. 113 (1973).

34. 429 U.S. 190 (1976) (announcing an intermediate level of scrutiny for sex-based classifications).

35. 384 U.S. 436 (1966); *see also* Jerold Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982) (providing an excellent survey of the criminal procedure decisions of the 1960s).

36. *See* Serena Mayeri, Note, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045 (2001) (comparing the historical contexts of the civil rights and feminist movements).

37. 388 U.S. 1 (1967) (holding miscegenation laws unconstitutional).

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matic among Americans of all political preferences. Reasoning by analogy from the civil rights precedents, women's rights counsel were asking the Court to add to its acclaim and were implicitly suggesting that the Court would be subject to criticism if it did not extend the reasoning of civil rights precedents to women's claims.[38] The question of women's rights could no longer be avoided on the ground that the Court did not enforce the Due Process and Equal Protection Clauses aggressively—the Court had done precisely that in *Brown* and *Loving*, decisions women were asking the Court to extend to their claims. The Burger Court complied.

Inspired by the foregoing precedents, gay people in the 1960s and 1970s asserted both equality claims and privacy claims. In contrast to the politics of the earlier social movements, the central aim of gay people's politics of *both* protection *and* recognition was the same legal reform—nullification of sodomy laws.[39] Such laws were a situs for state violence against gay and bisexual men, many of whom went to prison for consensual activities and many more of whom were subjected to police and private harassment because of their presumptive outlaw status. Hence, gay people's politics of protection required sodomy reform. Their outlaw status as presumptive sodomites also undergirded many state discriminations, hence gay people's politics of recognition asserted that they could not be genuinely equal citizens unless their characteristic sexual activities were decriminalized. Indeed, many state antigay presumptions and discriminations were expressly grounded upon

38. Thus, the Equal Protection Clause requires the state to justify denying a benefit to person A that it gives to person B. The Court's willingness to help people of color (group B) by sweeping away race-based discriminations created expectations on the part of women (group A) that sex-based discriminations against them would be similarly swept away. One can imagine several justifications the Court could have used to treat groups B and A differently—but the point is that the Justices would have felt pressure to treat them the same and would have had to produce exceedingly persuasive reasons not to do so. Realizing that the relevant audience for constitutional decisions regarding citizenship and equality was increasingly women as well as men, few Justices would have been willing to make the effort.

39. *See* Eskridge, *Twentieth Century*, *supra* note 20, at 2159–79 (describing the evolution of gay rights politics). The civil rights movement's politics of protection focused on criminal procedure and the racist operation of the death penalty, while its politics of recognition challenged rules of race-based segregation. *See id.* at 2072–96. Women's politics of protection focused on rape reform, the availability of birth control materials and devices, and abortion; their politics of recognition challenged sex classifications resting upon archaic stereotypes. *See id.* at 2113–38.

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the illegal conduct that defined the class.

Before 1986, the Supreme Court was completely unreceptive to these arguments. Most of the Justices operated under the widely accepted social norm that homosexuality is a *malignant sexual variation*.[40] Based upon this assumption, the Justices ruled (or left in place rulings) that Congress can bar gay immigrants from entering the country,[41] states can send gay men to jail for long periods of time for engaging in consensual oral sex in private places,[42] states can deny marriage licenses to same-sex couples,[43] local school boards can fire teachers or counselors if they are "outed" as lesbigay,[44] and municipalities can arrest men and women for dressing in the attire of the other sex.[45]

While the Court was tolerating each and every antigay ruling that came before it, gay people were engaged in a politics of

40. The Justices did not have to explain how homosexuality might be malignant, for that was widely accepted as a social fact. Several explanations showed up in Supreme Court opinions. (1) Homosexuality entails conduct that was an "abomination" to religious Americans, Leviticus 13:20, and disgusting to an even wider range. *See* Manual Enters. v. Day, 370 U.S. 478, 526 (1962) (Clark, J., dissenting) (expressing disgust that the Court would allow the mailing of male physique magazines that homosexuals could use as "sex stimulants"). (2) Homosexuality is a mental illness. For many doctors as well as lawyers, homosexuality was one example of "sexual psychopathy." *See* Boutilier v. INS, 387 U.S. 118, 124 (1967) (interpreting an immigration exclusion for people "afflicted with psychopathic personality" to include "those having homosexual and perverted characteristics"). (3) Homosexuality is predatory or contagious. If exposed to homosexuality, youth might become infected. *See* Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., joined by Blackmun, J., dissenting from the denial of certiorari) (comparing homosexuality to contagious measles and arguing that the state ought to be able to "quarantine" homosexuals in its colleges and universities, lest young people be exposed to it). For anecdotal evidence that individual Justices operated under these norms, see JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT (2001).

41. *Boutilier*, 387 U.S. 118 (1967).

42. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975); Enslin v. State, 425 U.S. 903 (1976), *denying cert. to* 214 S.E.2d 318 (N.C. Ct. App. 1975) (upholding state felony conviction and one-year prison sentence for consensual oral sex).

43. Baker v. Nelson, 409 U.S. 810 (1972), *dismissing appeal from* 191 N.W.2d 185 (Minn. 1971).

44. Rowland v. Mad River Sch. Dist., 470 U.S. 1009 (1985), *denying cert. to* 703 F.2d 444 (6th Cir. 1984).

45. Mayes v. Texas, 416 U.S. 909 (1974) (denying certiorari to Harris County Criminal Court at Law No. 4 decision); *see Unheard, "No-Merit" Ruling: Supreme Court Upholds Drag Ban*, THE ADVOCATE, Apr. 24, 1974, at 10 (noting that Texas defended the cross-dressing law as protecting the survival of the human race by banning "homosexual disguises").

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recognition at the state level. Americans in the Northeast, Great Lakes region, and West Coast by and large accepted LGBT people's claims that they and their private conduct did not pose threats to the community. States in those regions not only repealed their consensual sodomy laws, but in some cases adopted laws making it illegal for employers, schools, or public accommodations to discriminate on the basis of sexual orientation. This was a signal that social norms were changing: Once universally accepted as malignant, homosexuality was now understood as a tolerable variation from the norm (still heterosexuality).

When the Supreme Court took review in *Hardwick*, there was hope that the Court would sweep away the remaining sodomy laws. Several *amicus* briefs argued that homosexuality is in no way pathological and that consensual sodomy is important to the psychological health of individuals and to their intimate relationships, whether homosexual or heterosexual.[46] The state responded that the statute reflected the moral judgments of the people of Georgia, and the Court could not legitimately interfere with those judgments unless required by constitutional text or well-established precedent. Justice White's perfunctory opinion for the Court agreed with the state, concluding that it was illegitimate for the unelected Justices to overturn the state legislature's moral judgment that sodomy is wrong, without a firmer basis in constitutional text or tradition.[47] Even within that framework, however, White's obsessive focus on "homosexual sodomy," notwithstanding the statute's inclusion of sodomy of all kinds, exposed the Court to criticism that it was not treating gay people impartially.[48]

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46. *See* Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents *passim*, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140); *see also* Brief *Amicus Curiae* for Lesbian Rights Project et al. *passim*, *Hardwick* (No. 85-140) (making a similar argument, plus noting that sodomy laws contribute to rampant discrimination against gay people in particular).

47. *Hardwick*, 478 U.S. at 194–95; *see also id.* at 191–94 (stating that the argument that "homosexual sodomy" is protected by the nation's libertarian tradition is, "at best, facetious").

48. *Compare id.* at 190, 191, 192, 196 (limiting the decision to "homosexual sodomy"), *and id.* at 196–97 (Burger, C.J., concurring) (similar), *with id.* at 200–01 (Blackmun, J., dissenting) (suggesting that it is morally arbitrary for the Court to insist that only "homosexual sodomy" is at stake when the challenged statute covers all kinds of sodomy), *and id.* at 215–16 & 215 n.6 (Stevens, J., dissenting) (noting that the Georgia legislature deliberately expanded its sodomy law to include all different-sex sodomy).

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Four dissenting Justices not only questioned the Court's analysis, but recognized the link among LGBT people's equal citizenship and a constitutional insistence on a more tolerant approach to benign sexual variation:

> Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive key relationship of human existence, central to family life, community welfare, and the development of human personality." The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.[49]

The dissenters also contrasted the Court's passivity in *Hardwick* with its productive activism in *Brown*, *Loving*, and *Roe*, all of which have been cogently criticized for expanding constitutional freedoms beyond the boundaries suggested by constitutional text and original intent.[50]

While *Hardwick* marked the Supreme Court's rejection of gay people's constitutional politics, it came just as gay people's normative politics was starting to show some success—persuading many Americans that homosexuality was at least a *tolerable variation* from the norm, one that ought not be the basis for criminalization.[51] Gay people's politics also persuaded

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49. *Id.* at 205 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)) (citations omitted).

50. *Id.* at 210–11 & 210 n.5 (Blackmun, J., dissenting).

51. The Roper Center for Public Opinion Research, associated with the University of Connecticut, found in September 1985 that 31% of a national sample agreed that "homosexuality should be considered an acceptable lifestyle," with 62% saying it is "basically wrong." Roper Center for Public Opinion Research, Univ. of Ct., *The Roper Report* (Sept. 1985) (on file with author). This suggests a minority accepting homosexuality as a *benign* variation, and a large majority seeing it as something less than benign. A more nuanced poll conducted by Mark Clement Research for *Glamour* in the summer of 1986 reported that 800 women responded to the statement, "Homosexuality should be an accepted alternative lifestyle," in this way:

18% Strongly Agree
28% Slightly Agree
13% Slightly Disagree
38% Strongly Disagree
4% No Opinion

This suggests, to me, that a large middle group (41%) found homosexuality a *tolerable* variation, with a small minority (18%) accepting the *benign* variation view of gay rights supporters and a bigger minority (38%) accepting the *malign* variation view adopted in *Hardwick*. Data from the study was published in *Glamour*'s January 1987 issue. *See How Women's Minds Have Changed in the Last Five Years, 1987 Women's Views Survey*, GLAMOUR, Jan. 1987, at 168

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some Americans that homosexuality is a *benign variation* and that gay people are normal and good citizens. Most important, public opinion polls in 1985 suggested that a majority of Americans believed that, in the long term, homosexuality "will be widely acceptable."[52] Thus, the normative underpinnings of the Supreme Court's decision (that states are free to deem homosexuality a malignant variation) stood in direct tension with the new equilibrium in public opinion (homosexuality is at least a tolerable variation).

Under this state of affairs, *Hardwick* was more disastrous for the Court than it was for gay people. Justice White's opinion was subjected to a level of academic, popular, and judicial scrutiny that virtually no Supreme Court opinion could survive.[53] The opinion carried with it many self-inflicted errors, and news reports of hysterical lobbying by the Chief Justice and of Justice Powell's homo-ignorant anguishing over his vote deepened the bad odor of *Hardwick*.[54] Many Americans, gay and straight alike, read the result and rhetoric of *Hardwick* as suggesting that the judiciary was not a neutral forum for gay people to

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(data set on file with author).

52. Roper Center for Public Opinion Research, Univ. of Ct., *The Roper Report* 85–86 (June 1985) (finding that 52% of a national sample of 2000 respondents agreed with the statement in the text; 40% disagreed) (on file with author). According to the Roper Center, a Gallup Poll asking the same question found 53% agreeing, 34% disagreeing.

53. *Hardwick* generated more universal negative comment than any other decision *upholding* a statute in the Court's history. For a sampling of the intense criticisms, see CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRST HAND ACCOUNT 81–84 (1991) (poorly reasoned); RICHARD A. POSNER, SEX AND REASON 341–47 (1992) (factually ignorant); EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 70–75 (1990) (manipulative); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21, at 1422 (2d ed. 1988) (inconsistent with precedent); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1102–03 (1988) (historically inaccurate); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 197–200 (antifeminist); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1496 (1987) (authoritarian); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 747–50 (1989) (authoritarian); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1461 (1992) (violent). *See generally* Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 645 n.95 (1990) (citing thirty-three law review articles and comments criticizing *Hardwick*).

54. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 514–30 (1994) (providing a comprehensive account of Justice Powell's vacillation on the sodomy issue); Al Kamen, *Powell Changed Vote in Sodomy Case*, WASH. POST, July 13, 1986, at A1; Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3.

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present their constitutional and other claims.

In the abstract, the Court could have lived with the public criticism of *Hardwick* if it could have moved on to other issues. But *Hardwick* would not go away. Everywhere the Justices turned, there were openly lesbian and gay attorneys, law professors, citizens—and (gasp!) even law clerks within their own building. Everywhere the Justices went in the world, people asked them how they could demonize gay people as they had in *Hardwick*. And every year dozens of new antigay discriminations popped up all over the United States—justified by reading *Hardwick* to suggest that open homosexuals, presumptive outlaws, were essentially outside the protection of the Constitution. At some point, the Justices were bound to call a halt to this.

The case that attracted their attention arose in Colorado. Alarmed by local antidiscrimination laws "promoting" homosexuality, Colorado for Family Values (CFV) proposed to amend the state constitution in 1992 to preempt any state or municipal law or policy whereby homosexuality could be the basis for "any minority status, quota preferences, protected status or claim of discrimination." In its campaign for voter ratification, CFV argued that overprivileged (high-income) lesbigay people did not need the "special rights" that cities were giving them and that special rights for "homosexuals and lesbians" threatened to deprive ordinary citizens of their rights to speak freely, worship as they choose, associate with whom they choose, and control the education of their children.[55] After the voters adopted the proposed amendment, gay people challenged it as a violation of the Equal Protection Clause. Colorado defended the law as within its rights under the regime of *Hardwick*. If the state can make homosexual sodomites common criminals, which Colorado did not, then surely they could impose some civil discriminations on them. "Coloradans are largely tolerant of homosexuality, yet unwilling to support governmental action

55. COLORADO FOR FAMILY VALUES, EQUAL RIGHTS—NOT SPECIAL RIGHTS! (1992) (the official ballot materials distributed to voters as an explanation of the proposed amendment), *reprinted in* Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS J. 167, app. A at 191–99 (1997); *see* STEPHEN BRANSFORD, GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2, at 36–40, app. C at 241–44 (1994) (giving an insider's account of the CFV campaign themes); *cf.* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 19–21 (1993) (describing a similar Oregon antigay initiative).

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which confers benefits on a relatively privileged group at the expense of the less-privileged."[56]

In *Romer v. Evans*, the Supreme Court ruled that the antigay amendment was invalid.[57] That amendment's invalidity owed something to its breadth, for it effectively authorized employers, landlords, and public accommodations to discriminate against gay people, but left straight people with a remedy if they were objects of sexual orientation discrimination. The Court could therefore have issued a very narrow ruling: Broadly excluding one class of people from the ordinary protections of the rule of law is a core violation of the requirement that the state afford "the equal protection of the law."[58] Justice Kennedy's opinion for the Court, however, was unprecedented in the extent to which it paid tribute to LGBT people's politics of recognition. The opinion not only referred to the respondents respectfully as gay men, lesbians, and bisexuals, but articulated the protections served by antidiscrimination laws as "normal" protections everyone else either takes for granted or enjoys—and not as the "special rights" claimed by the state and the dissenting opinion.[59] Justice Kennedy also openly recognized that much of the support of the amendment was inspired by antigay "animus," again a striking contrast with the dissent's emphasis on Coloradan tolerance.[60]

Most strikingly, the six-Justice majority ignored *Hardwick*, a silence stressed by Justice Scalia in dissent.[61] *Romer* left *Hardwick* in constitutional limbo, but *Hardwick* in turn cast some doubt on how broadly the Court was prepared to read *Romer*. This left the lower courts to their own devices. Generally speaking, *Romer* coincided with, and probably contributed to, a strong progay shift in state court decisions affecting LGBT

56. Reply Brief of Petitioners at 15, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039). The state reported polling data showing that large majorities of Coloradans believed that "homosexuals are not really different from anyone else" and should be allowed to serve in the military and engage in private intimacy with consenting adults. *Id.* at 15 n.24.

57. *Romer*, 517 U.S. at 635.

58. *Id.*

59. *Compare id.* at 630–31 (majority opinion), *with id.* at 638 (Scalia, J., dissenting). On the deployment of "special rights" rhetoric by anti-civil rights as well as antigay groups, see Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 288–91 (1994).

60. *Compare Romer*, 517 U.S. at 632, 634–35 (majority opinion), *with id.* at 645 (Scalia, J., dissenting).

61. *Id.* at 640–43 (Scalia, J., dissenting).

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people. After 1996, a number of state courts in the Northeast, Midwest, and West Coast handed down landmark rulings in favor of same-sex marriage, second-parent adoptions, and equal employment benefits.[62] Starting from antigay baselines, courts in the South, Border States, and Rocky Mountain States did not go that far, but after *Romer* many of them did retreat from disrespectful and openly discriminatory treatment of lesbian and gay parents. More significantly, judges in these states issued a series of decisions invalidating consensual sodomy laws under their state constitutions—in striking contrast to the Supreme Court's rejection of Hardwick's privacy challenge.[63] Only in Louisiana and Texas did judges refuse invitations to strike down state sodomy laws after *Romer*.[64] The Texas case, of course, was the occasion for the Supreme Court to revisit either *Hardwick* or *Romer*.

As it turned out, *Lawrence* provided the Justices with an opportunity to revisit both *Hardwick* and *Romer*—overruling the first precedent and reading the second precedent expansively.[65] Formally, *Lawrence* confirmed the view that antigay sentiment was no more a rational basis under the Due Process Clause than it had been under the Equal Protection Clause. The state cannot discriminate against gay people simply because of their sexual orientation; invoking "morality" does not save such discrimination. *Lawrence* also nullified consensual sodomy laws. This holding negated a powerful argument states had been using to justify antigay presumptions in family law, state employment, and public education.[66]

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62. *See* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 283–97, 1081–82, 1553–63 (2d ed. 2004) (same-sex marriages); *id.* at 1199–1224 (parenting and second-parent adoption cases); *id.* at 879–84, 1048–62 (employment benefits for domestic partners).

63. The first such decision was before *Romer*. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 500 (Ky. 1992). For decisions striking down consensual sodomy laws under state constitutions after *Romer*, see *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996), *appeal denied*, (June 10, 1996), *Gryczan v. Montana*, 942 P.2d 112, 127 (Mont. 1997), *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (the *Hardwick* law), *State v. Cogshell*, 997 S.W.2d 534, 537 (Mo. Ct. App. 1999), *reh'g denied*, (Oct. 1, 2002), and *Jegley v. Picado*, 80 S.W.2d 332, 353–54 (Ark. 2002).

64. State v. Smith, 766 So. 2d 501, 512 (La. 2000); Lawrence v. State, 41 S.W.3d 349, 362 (Tex. Ct. App. 2001) (en banc), *rev'd sub nom.* Lawrence v. Texas, 123 S.Ct. 2472 (2003).

65. Lawrence v. Texas, 123 S. Ct. 2472, 2482–84 (2003).

66. The sodomy argument for antigay discrimination goes something like this: (1) This lesbian presumptively engages in illegal sodomy. (2) The state can prefer law-abiding citizens to law-breaking citizens in deciding who gets

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Rhetorically, *Lawrence* confirmed that *Romer* was no fluke. Six Justices were committed to the proposition that lesbian, gay, and bisexual Americans must be treated with respect by legislators as well as judges. The respect paid to gay people was complemented by the disrespect paid to *Hardwick*. Justice Kennedy's opinion opened with the statement that the previous precedent "fail[ed] to appreciate the extent of the liberty at stake" and phrased the issue presented in a way "that demean[ed] the claim the individual put forward."[67] He then examined the historiographical criticisms of *Hardwick* and its universal rejection in national and international public opinion.[68] The Court concluded that "*Hardwick* was not correct when it was decided, and it is not correct today."[69] Never in its history has the Supreme Court so pointedly repudiated a precedent. With this rebuke, an era in constitutional history ended.

Read together, *Romer* and *Lawrence* represent a regime shift for gay people analogous to the regime shift that *Brown* and *Loving* represented for people of color and that *Roe*[70] and *Craig*[71] represented for women. In all three sets of cases, the Court announced a new constitutional baseline that was substantially closer to the norms espoused by an identity-based social movement, albeit with some interesting differences among the three pairs of cases. In *Brown/Loving*, the Court accepted the norm that racial variation is benign as a matter of fact and ought to be treated as irrelevant as a matter of law. In *Roe/Craig*, the Court accepted the norm that sex variation is wonderful as a matter of fact and ought to be treated as substantially irrelevant as a matter of law. In *Romer/Lawrence*, the Court accepted the norm that sexual variation is tolerable as a matter of fact and ought to be treated as presumptively irrelevant as a matter of law.

In each of the realigning pairs of precedents, the Court viewed the long-term action of the law on social minorities at

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custody of children after the demise of a marriage, whom the state should hire as police officers or prosecuting attorneys, or who can be foster or adoptive parents. (3) Therefore, the state can prefer the law-abiding heterosexual to the law-breaking lesbian.

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

68. *Id.* at 2478–83.

69. *Id.* at 2484.

70. Roe v. Wade, 410 U.S. 113, 153 (1973).

71. Craig v. Boren, 429 U.S. 190, 204 (1976).

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least partially through the eyes of the minorities and spoke to them as *equal citizens* who have to be treated with respect and dignity—and not as *outcasts* (people of color) or *housekeepers* (women) or *outlaws* (gay people). In my view, the Court had no choice but to make these moves if it were to retain the aura of neutrality that is essential for its legitimacy. But I also believe that at least some of the Justices were motivated by something more than institutional self-interest. The time had come, they understood, for America to move beyond discriminatory rules that the objects of the discrimination would no longer accept.

This regime shift does not entail radical changes in the law overnight. To the contrary, each regime shift has come deliberately, even slowly, and certainly incompletely from the social movement's point of view. The Court declined to order immediate desegregation after *Brown I*; the "all deliberate speed" formula of *Brown II* had little bite until the Great Society.[72] And it took the Court thirteen years after *Brown* to muster the courage to nullify miscegenation laws in *Loving*.[73] Because resistance was much lower to ending sex discrimination, the Court moved more swiftly on that front, while at the same time retreating from *Roe* when it encountered resurgent opposition to its broad protections for pregnant women.[74] Like the *Brown* Court, the *Romer/Lawrence* Court will probably leave it to local state and federal judges to decide which antigay discriminations stand or fall. Like the *Casey* Court,[75] the Court ten or twenty years hence may retreat from some of the sweeping rhetoric of *Romer/Lawrence*. Or, like the *VMI* Court, it may give it deeper bite.[76] What is certain is that the Supreme Court in *Romer/Lawrence* sees itself as having swept away the prior constitutional regime of *Hardwick* and initiated a new constitutional regime where tolerance of LGBT people is a floor below which state policy cannot fall.

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72. *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) ("all deliberate speed" formula); J. HARVIE WILKINSON, III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 (1979) (nonenforcement of *Brown II* until 1960s).

73. Loving v. Virginia, 388 U.S. 1, 12 (1967).

74. *See* Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77 (1995); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025 (1994).

75. Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992) (plurality opinion).

76. United States v. Virginia, 518 U.S. 515, 536–37 (1996).

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II. *LAWRENCE*, ORIGINAL INTENT, AND CONSTITUTIONAL REGIME SHIFTS

The *Lawrence* dissenters objected that shifting regimes to require tolerance of a previously despised minority group is a political judgment that should be left to the legislature.[77] To the extent it is a constitutional judgment, it is one properly left to "We the People" acting through an amendment to the Constitution. In short, it is not a legal judgment to be made by the Supreme Court. The Court said nothing in direct response. One answer to such an objection is that the Supreme Court's individual rights jurisprudence for the twentieth century stands against it.[78] The process for amending the Constitution is moribund. For the Court to abandon almost 100 years of activism, and to use LGBT people as the victims to accomplish that volteface, would be a daring and surely futile move.[79]

Another answer is that regime shifts are not only possible, but are sometimes required of the Supreme Court as the interpreter of the Fourteenth Amendment. An underlying debate in *Lawrence* relates to the methodology by which the Court ought to be interpreting the Reconstruction Amendments. Although the dissenting Justices are much more certain that their original meaning approach is the only legitimate one for constitutional interpretation, I believe *Lawrence* illustrates the desirability of an equally distinguished tradition, rooted in legal process theory.

A. *HARDWICK* AND THE JURISPRUDENCE OF ORIGINAL MEANING

Justice Scalia's central complaint is that the *Lawrence* Court was departing from constitutional text, original meaning, and precedent when it overruled *Hardwick*—and that the Court was doing that for an illegitimate politically correct reason: to impose the "homosexual agenda" supported by intellec-

77. Lawrence v. Texas, 123 S. Ct. 2472, 2497 (2003).

78. This is the argument extensively documented in Eskridge, *Twentieth Century*, *supra* note 20, at 2375–89.

79. The move would be futile because whatever the Court were to do in gay rights cases, it would still be tempted to engage in the same amendment-denying activism in other cases, such as affirmative action, redistricting, takings, and federalism cases for die-hard conservatives, and women's rights, racial segregation, death penalty, and abortion cases for moderates. For both camps, they would include speech and freedom-of-association cases. For an obviously activist Court to deny most minimal rights to gay people—and them alone—would ultimately destroy that Court's appearance of neutrality.

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tuals and elites on an unwilling populace.[80] There is legal bite to Scalia's critique. In his understanding, the Constitution is our social contract, a historically powerful one in which "We the People" actually participated in ratifying the permanent framework for governance. Because the legitimacy of the social contract is democratic and participatory, the contract should be interpreted and applied by judges according to its original meaning—the meaning that it would have had for the white men ratifying the original document or any of its twenty-seven amendments. Conversely, it is a violation of the social contract for unelected judges to read their own values into the Constitution, thereby trumping the values woven into the document by our ancestors, as well as those more recently adopted by our elected officials.

This classic jurisprudence of original intent is inspired by many worthy values, including the rule of law, democracy, and deliberation. If judges follow an objectively determinable original meaning, they are imbuing constitutional law with the rule of law values of objectivity, transparency, and predictability. Although such original meaning will sometimes trump the will of current majorities, it is ultimately consistent with democracy because it reflects the will of engaged supermajorities. Not least important, the Constitution of 1787, the Bill of Rights, and the Reconstruction Amendments were the products of an active and alert citizenry deliberating in the most intelligent way about the enduring structure of American governance.

If judges ignore or misapply original constitutional meaning, they are sacrificing the virtues of a rule of law, democracy, and deliberation. The sacrifice is doubly harmful—and completely indefensible—if judges substitute their own will or preferences for those of the Framers. This was the point Byron White was trying to make in *Hardwick*, and a point that would have been made more effectively without the gratuitously anti-homosexual language. There is no right of sexual privacy in the constitutional text, nor was one ever mentioned in the constitutional deliberations. The Due Process Clause does protect "liberty," but primarily by assuring persons that the state will follow appropriate procedures if it threatens to deprive them of liberties. A line of precedent also gives a substantive, anti-arbitrariness protection to certain kinds of liberties—those that

80. *Lawrence*, 123 S. Ct. at 2496–98 (Scalia, J., dissenting).

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are "implicit in the concept of ordered liberty."[81] If this test were nothing more than an abstract exercise, it would amount to the codification of judicial preferences. To avoid the pall of judicial legislation, Justice White reasoned, the Court has typically applied the test by an historical inquiry: Has this liberty been one which has traditionally been considered beyond state regulation in Anglo-American history?

This line of "substantive due process" cases was the basis for the Court's decisions assuring women substantial freedom of choice to use contraceptives and to have abortions.[82] Intelligent judges and commentators criticized those decisions as inconsistent with the original meaning of the Reconstruction Amendments, which were adopted in a period when the states were regulating the availability of contraceptives and prohibiting abortions. Without some affirmative basis for believing that the Framers of the Fourteenth Amendment meant to protect people's decisions relating to procreation and childbirth, the interpreter should assume that the Framers did not mean to displace existing regulations of such activities. Such should have been the assumption in *Eisenstadt* and *Roe*, which were, by Justice White's standards, wrongly decided.[83] They were illegitimate judicial legislation, because they represented the Justices' personal views that contraception and abortion were fundamental to women's lives. The Court had substituted its own value system for those of both the historical Framers and current legislators, and that kind of judicial arrogance was the height of illegitimacy.

For Justice White then, *Hardwick* presented the Court with a choice of *either* expanding the illegitimate reasoning of *Eisenstadt* and *Roe*, *or* limiting the damage those precedents had on judicial legitimacy by narrowing their holdings to their particular factual settings (decisions not to have children). Jus-

81. Palko v. Connecticut, 302 U.S. 319, 325 (1937); Poe v. Ullman, 367 U.S. 497, 544–49 (1961) (Harlan, J., dissenting). As Justice Cardozo said in *Palko*, the Due Process Clause protects freedom of thought and speech against state regulation because they constitute a "matrix, the indispensable condition, of nearly every other form of freedom." 302 U.S. at 327.

82. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

83. Justice White concurred in the *Griswold* judgment on narrow grounds and did not reach the general right to privacy discussion entailed in the opinions of Justices Douglas (for the Court), Goldberg, and Harlan. *Griswold*, 381 U.S. at 502–05. White concurred in the result in *Eisenstadt* and dissented in *Roe*. *Eisenstadt*, 405 U.S. at 460; *Roe*, 410 U.S. at 221.

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tice White preferred the latter course of action, but remained open to the possibility that Anglo-American tradition considered consensual sodomy an activity that should not be regulated. Unfortunately, he framed the inquiry in a biased and anachronistic way by asking only whether "homosexual sodomy" was historically protected. He concluded the inquiry in a dismissive manner when he said that gay people's liberty claim was "at best, facetious."[84]

If one can edit out the antihomosexual slant, the inquiry itself was consistent with the jurisprudence of original meaning. Justice White could easily have written a more judicious opinion upholding the Georgia sodomy law. Such an opinion would have started with the presumption that the burden is on the challenger, Mr. Hardwick, to demonstrate through historical as well as logical evidence, that consensual sodomy is an activity implicit in the concept of ordered liberty according to our legal tradition. The fact that almost all the states made the crime against nature a serious offense in their earlier criminal codes would render Hardwick's burden even higher. One might contrast marriage, strongly protected against state intrusion in the nineteenth century, with nonmarital sodomy, regulated in almost all the states. Marriage is a zone of privacy implicit in the Anglo-American traditions of ordered liberty, and this provides a sufficient justification for the privacy protected in *Griswold*. Hardwick's case was not as clear, and was at best doubtful—the Court needs a clearer historical record to invalidate state legislation under the Due Process Clause. This approach would have yielded the same result: Statute upheld; *Eisenstadt* and *Roe* limited to their particular facts.

B. *LAWRENCE* AS A CRITIQUE OF ORIGINAL MEANING JURISPRUDENCE

Even a more judiciously written original meaning opinion would have been problematic in *Hardwick*, however. Indeed, *Hardwick* illustrates several of the problems with originalism as a constitutional methodology.[85] It does not constrain judicial

84. *See* Bowers v. Hardwick, 478 U.S. 186, 194 (1986), *overruled by Lawrence*, 123 S. Ct. 2472.

85. For criticisms of original meaning jurisprudence, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96

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discretion, poses unanswerable questions, and is not the most legitimate means for discerning constitutional meaning in a polity where the citizenship line has been socially redrawn.

1. Indeterminacy

One problem with original meaning jurisprudence is its indeterminacy; an indeterminate methodology does not constrain the interpreter. The historical *mise en scène* for 1868 (and even more for 1789) is very hard for historians to reconstruct in all its complexity. It is even harder for Supreme Court Justices, who are, at best, amateur historians. *Hardwick* reflects the genuine risks of historical error when judges engage in law-office history. Law-office history typically searches for historical fragments supporting one side or another of a legal dispute. This is an inherently bad way of doing history. As Professor Martin Flaherty insists, competent legal history is not possible unless the interpreter understands the intellectual context of the period as well as the on-point details.[86]

Drawing from *amicus* briefs filed by the Cato Institute and by several eminent historians of sexuality, *Lawrence* concluded that *Hardwick* reflected a poor job of historical analysis.[87] For example, *Hardwick* was wrong to view "homosexual sodomy" as the trans-historical object of Anglo-American crime against nature laws. Not only were male-female relations regulated by such laws, but female-female relations were not subject to sodomy laws anywhere in the English-speaking world until the twentieth century. Indeed, the concept of "homosexual" anything did not emerge in western civilization until the end of the nineteenth century.[88] Almost all of the reported sodomy prose-

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HARV. L. REV. 781 (1983). Responses to these criticisms and newer defenses of originalism include Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

86. Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 550–56 (1995); *see also* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1747–55 (1996) (applying a rigorous historicism to criticize amateur superficial accounts by leading legal scholars).

87. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2477–82 (2003); Brief for the Cato Institute as Amicus Curiae in Support of Petitioners at 9–17, 22–30, *Lawrence* (No. 02-102) [hereinafter Cato Brief]; Brief of Amici Curiae Professors of History in Support of Petitioners at 3–19, *id.* [hereinafter Historians' Brief].

88. *Lawrence*, 123 S. Ct. at 2478–79; *see* Historians' Brief, *supra* note 87,

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cutions from the nineteenth century involved nonconsensual or public conduct by men preying on weaker children, women, or other men.[89] In short, the focus of crime against nature laws was neither homosexual nor consensual activities as far as one can discern from the historical record. Thus, Justice White's "strong" claim that American laws criminalizing consensual "homosexual sodomy" have "ancient roots" was, "at best, facetious" as a matter of serious historiography.

As Justice Kennedy concluded, the historical analysis in *Hardwick* was "overstated."[90] He then recognized that there are powerful moral authorities that condemn homosexual behavior as "immoral," including authorities in the Roman Catholic Church, the Justice's own faith.[91] But the duty of the Court, Justice Kennedy opined, is "'to define the liberty of all, not to mandate our own moral code.'"[92] His subtle point was that Justice White was using history as a mechanism for writing his own moral code into the Due Process Clause.[93]

Significantly, Justice Scalia's scorched earth dissenting opinion said nothing substantial in defense of the falsified history in *Hardwick*. Instead, he argued that none of the falsified history was material, for the only relevant fact is that sodomy, of all sorts, was traditionally a crime in American history.[94] Even a jurist as careful as Justice Scalia missed a few points in the historical record, such as the fact that conduct between two women was not a crime in the nineteenth century, did not become a crime in most states until well into the twentieth century, and was almost never enforced even after it technically

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at 6–11; Cato Brief, *supra* note 87, at 9–10. The Cato Brief also noted that before 1879, no state sodomy law regulated the oral sex Michael Hardwick was charged with committing. Cato Brief, *supra* note 87, at 12.

89. *Lawrence*, 123 S. Ct. at 2479; *see* Cato Brief, *supra* note 87, at 10–12.

90. *Lawrence*, 123 S. Ct. at 2480.

91. *Id.*

92. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (plurality opinion)).

93. This subtle point is made clearer by the next paragraph in Justice Kennedy's opinion, which quotes Chief Justice Burger's concurring opinion and its invocation of "Judeao-Christian moral and ethical standards." Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 123 S.Ct. 2472. As he did with Justice White, Justice Kennedy delivered a double rebuke to the former Chief Justice: His sweeping historical statements were both inaccurate and sectarian. Because its materials are so pliable, originalism not only fails to constrain the biased judge, but also can be a mechanism for importing bias into constitutional decision making. *See Lawrence*, 123 S. Ct. at 2480.

94. *Lawrence*, 123 S. Ct. at 2493–95 (Scalia, J., dissenting).

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became a crime in most states.[95] Again, the search for a preferred result blinded even the brightest jurist to the evidence.

There is another problem with the ability of original meaning to constrain subsequent interpreters. Originalism's deployment depends upon the level of generality at which one interrogates the past. Even in the case of consensual sodomy, one can get whatever answer one wants by how one poses the question. In *Lawrence*, Harris County, Texas asked: Would the Framers of the Fourteenth Amendment have intended that consensual sodomy be a protected liberty under their amendment?[96] No. The Cato Institute's Brief asked a different question. The Fourteenth Amendment was designed to give Americans clear notice of what duties the law required of them, to protect their freedom of the body and of the home, and to avoid class legislation. Did Texas undermine these purposes by arresting Lawrence and Garner?[97] Yes.

Which question is "truer" to original meaning? I am not sure. Authors of directives intend that agents carry out their specific expectations, but they also intend that agents apply their directives with an eye to the purpose of those directives. The practice of the Court has often been to pose original meaning questions at a high level of generality. If you ask the question with the level of specificity Harris County did, *Brown* and *Griswold* were wrongly decided. No one is willing to overrule these cases, and almost no one is willing to deny that they were constitutional triumphs. So how can an original meaning theorist tell the rest of us when to deploy his theory instead of deploying a *Brown*-like approach?

2. Changed Circumstances

Eminent constitutional thinkers have taken the position that the Framers of the Constitution and the Reconstruction Amendments did not "mean" to bind future generations to the specific expectations they had when their work was ratified by "We the People."[98] The Framers understood and accepted that

95. *See* Cato Brief, *supra* note 87, at 10–12.

96. Brief for Respondent Harris County, Texas at 8–12, *Lawrence* (No. 02-102). The State of Texas, the nominal defendant in the case, did not file a brief.

97. Cato Brief, *supra* note 87, at 18–30.

98. CHARLES L. BLACK JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7–30 (1969); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 170–71 (1990); Alexander

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future generations would find their constitutional purposes best fulfilled in unpredictable and unforeseen settings. This suggests a second problem with originalism—the inevitability of significantly changed circumstances. Once social, economic, or normative conditions have changed in ways that affect an issue, not only is originalism less attractive, it is also unworkable. There is no longer any possibility of posing the questions neutrally, and the methodology becomes both incapable of constraining interpreters (as argued above) and quite capable of constitutional wackiness.

In 1868, there was no concept of homosexuality, and it was possible to believe that only a few demonic individuals were sodomites. In 2003, we are all sodomites, and homosexuality is now understood as a sexual orientation and not a terrible moral or medical disease. These new social facts have got to affect the issue posed in *Hardwick* and *Lawrence*. For precisely this reason, an originalist can coherently pose Harris County's question in ways that generate the Cato Brief's answer: If the Framers knew that America would become a nation of well-functioning sodomites and openly gay citizens, would they have wanted the government to remain free to pry into these people's bedrooms? Would the Framers believe that sodomy laws comport with "due process of law" if the experts were all agreed that such laws had no effect on the level of sodomy in a jurisdiction, were used primarily as excuses for police brutality and private blackmail, and created a terror regime for responsible and productive citizens of the community? If the Framers had known that in the twentieth century sodomy laws would justify the antihomosexual American Kulturkampf of 1946–69 (a precise parallel to the antihomosexual Nazi Kulturkampf of 1933–45), would they have believed the laws were a valid exercise of state power? Surely not.

Conversely, if you present the changed circumstances differently from the way I have, you can pose the Cato Institute's question in a way that generates Harris County's result. Traditionalists would say that in 2003 too many of us are sodomites—but most are ashamed of that fact; homosexuality is at best an unfortunate condition, like alcoholism. Many traditionalists also consider homosexuality contagious in some way. Unless the polity takes a strong moral (and criminal) stance

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M. Bickel, *The Original Understanding of the Segregation Decisions*, 69 HARV. L. REV. 1, 62–65 (1955); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903–04 (1985).

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against bad conduct, it will spread to vulnerable Americans, especially young people.[99] If our updated Framers believed those new "facts," they might say "no" to the question whether Americans ought to be free to engage in consensual intimacies with other adults in their own homes. The general purpose of the Fourteenth Amendment, they can argue, was *not* to protect people whose conduct undermines the fabric of society.

There is no end to this mind game called original meaning.

3. Legitimacy and Evolving Citizenship

The third problem with originalism has to do with the legitimacy of state action. The Framers assumed as universal human truths some propositions that are now considered morally squalid, and not binding on us today. Chief Justice Taney's opinion in *Dred Scott* is a classic application of original meaning, but it has been discredited because it applied or found a squalid original intent—the immoral institution of slavery.[100] To be sure, *Dred Scott* was overridden by the Reconstruction Amendments, but the Framers of those amendments assumed that de jure racial segregation was required by the nature of things, and that women should not participate in the public sector and should tend to their natural duties of raising children. Those propositions are no longer morally or politically acceptable.

This argument is not simply an iteration of the changed circumstances problem, for it goes to the normative foundation of neutral judicial review, not just to its attainability. *Dred Scott* held that people of color do not count for purposes of American constitutionalism, and *Plessy v. Ferguson* and related apartheid precedents amounted to almost the same thing.[101] The Court in *Bradwell v. Illinois* assumed that women do not count for purposes of American constitutionalism.[102] Once people of color and women asserted serious claims to equal citizenship, and American politics substantially accepted those claims,

99. *Cf.* Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting from the denial of certiorari) (analogizing homosexuality to "measles" and suggesting that people afflicted with "homosexuality," like people afflicted with measles, can be constitutionally subjected to "quarantine regulations" to protect "others who do not presently have" the condition).

100. Dred Scott v. Sandford, 60 U.S. 393, 406–13 (1857).

101. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

102. 83 U.S. 130, 132–33 (1872) (upholding a statute that barred women from practicing law).

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an overruling of *Plessy* and *Bradwell* was not only constitutionally acceptable but was constitutionally necessary. The composition of whom the Supreme Court recognized as "We the People" had to change. For reasons explored below, a national politics where people of color and women are participants cannot tolerate laws segregating people on grounds of race or sex.

Once people of color and women successfully insisted upon being considered citizens participating in our nation's pluralism, the normative foundation for following the narrow view of the Framers' original meaning was undermined. The Framers of the Fourteenth Amendment accepted separate sphere norms for both women and people of color—women to assure the perpetuation of humankind and people of color to assure the purity of the white race. Such an ideology cannot survive the flourishing of women and people of color as equal citizens whose engagement in the public sphere is welcome and productive. Thus, one might conclude that once an identity-based social movement has achieved some success in transforming norms related to its group members, the original expectations of long-departed constitutional Framers become at least partially obsolete. For this reason, the Supreme Court has openly abandoned an original intent methodology in the race and sex discrimination cases. Should it do the same in LGBT rights cases?

C. *LAWRENCE* AND A LEGAL PROCESS ROLE FOR HISTORY IN CONSTITUTIONAL INTERPRETATION

None of the Justices in *Lawrence* took the position that history becomes irrelevant once identity norms have changed. A wide array of progressive or liberal, as well as conservative, constitutional scholars would agree. They have coined an assortment of metaphors for thinking about original constitutional meaning once norms as well as other circumstances have changed. Bruce Ackerman calls the process *synthesis*: The current interpreter must synthesize the original meaning of the Fourteenth Amendment with the transformative constitutional moment of the New Deal.[103] Mark Tushnet terms the process *translation*: The current interpreter must translate the nineteenth century norms of equal protection and liberty into the

103. Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 YALE L.J. 453, 527–36 (1989) (explaining the notion of synthesis and applying it to *Brown* and *Plessy*).

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modern regulatory state era.[104]

A more traditional legal approach that explains Justice Kennedy's use of history in *Lawrence* is legal process theory. Synthesizing jurisprudence of the New Deal period and the advent of the modern regulatory state, Professors Henry Hart and Albert Sacks maintained that legal interpreters should apply a law to carry out its purpose, unless inconsistent with the text or binding precedent.[105] The legal process approach, as they articulated it, is both descriptive and normative. It seeks to understand the purpose of a particular legal enterprise, as its authors understood it.[106] It also applies that purpose to current circumstances with a critical eye: Which application best carries out the legal purpose? (This is the core *purposive* inquiry.) Which fits best with other developments in the law?[107] (This is a *coherence* inquiry.) Is the best application one that the text and precedent can support?[108] (This is a *rule of law* inquiry.)

Justice Kennedy, an alumnus of the Hart and Sacks Legal Process course, followed this methodology in *Lawrence*.[109] One primary purpose of the Due Process Clause, as the Framers saw it and as the Court has applied it, is to protect people from "unwarranted government intrusions into a dwelling or other private places," and to assure people "an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct."[110] It is deeply inconsistent with this Fourteenth Amendment *liberty principle* for the state to intrude into

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104. Tushnet, *supra* note 85, at 800–01; *see* Brest, *supra* note 85; Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171 n.32 (1993) (listing constitutional scholars who deploy the translation metaphor).

105. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1124–25, 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (tentative ed. 1958). Hart and Sacks developed their theory as a matter of statutory interpretation, but both contemporary and subsequent scholars applied the same philosophy to generate theories of judicial review. *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* THE LEGAL PROCESS, *in id.* at civ–cxxxiv (discussing constitutional theories applying the legal process approach).

106. HART & SACKS, *supra* note 105, at 1377–80.

107. *Id.* at 1376–77, 1380.

108. *Id.* at 1374–76 (text); *id.* at 1379 (precedent).

109. Five Justices of the current Court are alumni or alumnae of the Hart and Sacks Legal Process course at Harvard: Scalia, Kennedy, Souter, Ginsburg, and Breyer.

110. Lawrence v. Texas, 123 S. Ct. 2472, 2475 (2003); *see* Cato Brief, *supra* note 87, at 5–8 (providing an explication of freedom for intrusion as the purpose the Framers of the Fourteenth Amendment espoused).

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the bedrooms of consenting adults engaged in intimate activities. Another purpose of the Fourteenth Amendment is to monitor the tendency of states to create social outcasts.[111] Justice O'Connor applied this *anti-caste principle* to invalidate a law that had dozens of collateral effects for lesbians, gay men, and bisexuals in Texas. "'A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with' the Equal Protection Clause."[112] Justice Kennedy recognized the seriousness of Justice O'Connor's analysis and suggested that the liberty and anti-caste principles were interconnected in *Lawrence*.[113] The anti-caste principle could not be deeply enforced without also enforcing the liberty principle to divest the nation of consensual sodomy laws.[114]

In light of the original purposes of the Fourteenth Amendment, *Hardwick* is doubly problematic. A majority of the *Hardwick* Justices were unable to understand how the sexual intimacies entailed in sodomy were important for gay people, just as the nonprocreative intimacies were important to the married couple in *Griswold*. Once LGBT people are recognized as decent citizens whose lives count in our society, there is no good reason why the Fourteenth Amendment's liberty principle should not protect their intimacies just as it protects the intimacies of married (*Griswold*) and unmarried (*Eisenstadt*) straight couples. If *Hardwick* was wrong in applying the liberty principle, its mistake was compounded by its reasons. By unnecessarily focusing on "homosexual sodomy," Justice White's

111. On the anti-caste principle as key to the Framers' original expectations, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 13–39 (1988).

112. *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring in the judgment) (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring)). "Our Constitution . . . neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *quoted in* Romer v. Evans, 517 U.S. 620, 623 (1996); *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring in the judgment).

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

114. Justice Kennedy reasoned:

> If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

Id.

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opinion not only revealed a bias in its application of the liberty principle, but sanctioned (and perhaps encouraged) state and private discrimination that exacerbated sodomy laws' tension with the Fourteenth Amendment's anti-caste principle.

None of this reasoning was persuasive to Justice Scalia (himself an alumnus of the Legal Process class at Harvard). He abandoned Justice White's biased rhetoric and error-laden history, but strongly disputed the majority's historiography. The historical debate between Justices Kennedy and Scalia is, on the whole, not a debate over the facts.[115] Like the majority, the dissent provides what I consider an honest account, along the following lines: However you reinterpret the history of sodomy laws, it is apparent that nonprocreative sex was not something that Americans accepted as valuable or fundamental at the time of Reconstruction.[116] Even during the twentieth century, when Americans came to accept contraception as a valid means of avoiding the procreative consequences of penile-vaginal sex, there remained a normative aversion to other forms of nonprocreative sex, namely anal sex (traditional "sodomy") and oral sex (added to state sodomy laws after 1879). Indeed, there were 203 reported prosecutions for consensual adult homosexual sodomy between 1880 and 1995, the same period when contraception, and even abortion, became commonplace in American society.[117]

Justice Kennedy's account is, in my opinion, equally honest and has the added virtue of understanding the history of sodomy laws through the purposive framework of the Fourteenth Amendment.[118] When the amendment was adopted in 1868, crime against nature laws were *not* in violation of the Fourteenth Amendment's core principles and purposes. The laws did not clash with the liberty principle because they were applied

115. Indeed, like Justice Kennedy, Justice Scalia closely follows the factual account developed in the Cato Brief, *supra* note 87, at 9–17, which was in turn taken from William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, *cited in Lawrence*, 123 S. Ct. at 2480, and ESKRIDGE, GAYLAW, *supra* note 14, *cited in Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting).

116. The account in the text is drawn from *Lawrence*, 123 S. Ct. at 2492–94 (Scalia, J., dissenting).

117. ESKRIDGE, GAYLAW, *supra* note 14, at 375, *cited in Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting).

118. The account in the text is drawn from *Lawrence*, 123 S. Ct. at 2477–82, which is the opinion of the Court.

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almost exclusively to coercive sexuality.[119] The laws were originally not at odds with the anti-caste principle because they were not associated with any class of people. It was not until well into the twentieth century that sodomy became a metonym for a new category of person, the "homosexual," and that sodomy laws were widely applied to activities between consenting adults, in increasing violation of the liberty principle.[120] Indeed, sodomy laws were a basis for a massive antihomosexual Kulturkampf during the McCarthy era, a state campaign eerily reminiscent of the Nazi's persecution of gay people and entirely at odds with the anti-caste principle.[121]

The core historical disagreement within the Court entailed the Justices' different interpretations of the Kulturkampf and its aftermath. Justice Kennedy was attentive to the state's increasing, and historically recent, persecution of consenting gay adults as the focus of sodomy laws.[122] He also found relevant the judgment of neutral legal experts—the American Law Institute (recommended in 1955) and the Wolfenden Committee (recommended in 1957)—that the more modern trend of enforcing sodomy laws against consenting adults violated the liberty principle and had malign rule-of-law effects as well.[123] In short, this state-led campaign of persecution hurt good people for no good reason. Justice Scalia understood the Kulturkampf period as a confirmation of *Hardwick's* "conclusion that homosexual sodomy is not a fundamental right 'deeply rooted in this Nation's history and tradition.'"[124]

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119. The laws presented a due process problem of adequate notice because they only named the "abominable and detestable crime against nature" as their object. Wainwright v. Stone, 414 U.S. 21, 21 (1973) (per curiam). The statutory language had well-accepted common law meanings, however, suggesting that these notice problems were not fatal. *Id.* Note that the accepted common law gloss on the crime against nature further ensured that the laws would not be applied to consensual encounters in private places. Cato Brief, *supra* note 87, at 12, *followed in Lawrence*, 123 S. Ct. at 2479. A man could not be convicted of the crime against nature without evidence of penetration by his penis into another man's anus. *Id.* Moreover, such evidence could not be based upon the testimony of a sexual partner who was his legal "accomplice." *Id.* Conversely, a man could be convicted by evidence presented by a sexual partner who did not consent (such as a woman or man being anally raped) or who was incapable of consent (a minor girl or boy). *See id.* at 11–12.

120. *See* Cato Brief, *supra* note 87, at 12–14.

121. *See id.* at 13; ESKRIDGE, GAYLAW, *supra* note 14, at 57–97.

122. *Lawrence*, 123 S. Ct. at 2479–80.

123. *Id.* at 2480–81.

124. *Id.* at 2494 (Scalia, J., dissenting).

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Both Justices Kennedy and Scalia not only engaged the history of sodomy law evolution both factually and judiciously, but were also able to get (partly) beyond the level-of-generality debate noted above. Does a due process claim have to show that a particular conduct was considered off-limits to state regulation in 1868? Or can the claimant rely on American law's protection of a more general category of conduct?[125] In *Lawrence*, Justice Kennedy does not claim that consensual sodomy is a "fundamental right" affirmatively supported by traditional legal protection, nor does Justice Scalia dispute that consensual sodomy in private places was unregulated until well into the twentieth century. Their dispute is openly normative: Given a history as to which there is now much agreement, how should it be read? Does the history justify, or help justify, overruling not only a precedent of the Court, but also invalidating consensual sodomy laws in thirteen states?

The norm on which one's reading of the history turns is, ultimately, the proper status of people who presumptively commit the "homosexual sodomy" that Texas criminalized. While it may be too simple to say that Justice Kennedy read the history from the perspective of gay people, and Justice Scalia read it from the perspective of TFV people, it helps frame their different approaches to the same legal materials. Following *Hardwick*, Justice Scalia read the history in a way that helped explain why Texas might rationally have adopted the Homosexual Conduct Law. His baseline was the deference to the normal political process the Court usually affords economic and much social or morals legislation.[126] Following *Romer*, Justice Kennedy's baseline was the norm of tolerable sexual variation, a norm largely adopted in American politics and law in response to the LGBT social movement.[127]

The foregoing contrast shows yet another way that the Court's reading of history contributed to its case that the Homosexual Conduct Law violates the original meaning of the

125. This was the debate in *Michael H. v. Gerard D.*, 491 U.S. 110, 124–30 (1989). In *Lawrence*, the debate would have been something like this: As he did in *Michael H.*, Justice Scalia would have gone to the most specific level available and argued that sodomy of any kind cannot be a "fundamental right" because it was regulated in 1868. *See id.* at 127 & n.6. As he and Justice O'Connor did in *Michael H.*, Justice Kennedy would have been open to considering a broader category, like "conduct in the home that does not harm third parties." *See id.* at 132 (O'Connor, J., concurring in part).

126. *See Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

127. *See id.* at 2482.

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Fourteenth Amendment: If, as a matter of social fact, homosexuality is a tolerable condition that poses no discernible threat to the community, then the nineteenth-century history of sodomy nonenforcement outside of predatory contexts had it right, and the twentieth century's episodically hysterical enforcement was profoundly unproductive. Once gay people are understood as rather normal folks who engage in sexual conduct for most of the same reasons that straight people do, then it is hard to say that they should not have the same protection from state intrusion into their homes and relations that straight people enjoy. Thus, the Texas law was inconsistent with the liberty principle of the Fourteenth Amendment. Likewise, Texas's focus on "homosexual conduct" alone, and the extensive civil consequences of being a presumptive "homosexual sodomite," is invidious as well as unproductive—a cheap way for Texas to send a moral message against sodomy, but without subjecting mainstream heterosexual sodomites to potential penalties. Demonizing a decent group of citizens is inconsistent with the anti-caste principle of the Fourteenth Amendment.

My account of how history can support *Lawrence* is similar to the accounts that others have posited for the Court's race and sex discrimination cases. Unlike *Lawrence*, *Brown v. Board of Education*[128] dodged the historical issues. Most historians have been skeptical that the original meaning of the Fourteenth Amendment supported *Brown*, largely because the Reconstruction Congress and legislators, by their words and by their statutes, seemed to accept segregated schools and other institutions.[129] Pressed by Justice Frankfurter to provide some historical justification, his law clerk Alex Bickel examined the evidence and concluded that the Framers did not expect racial segregation to end immediately but were open to its ending after the country assimilated the freed slaves as equal citizens.[130] Bickel's account of the history has been an appealing one, even to constitutional conservatives, because it provides a link between the Fourteenth Amendment's original meaning and America's normative consensus that racial variation is benign

128. 347 U.S. 483 (1954).

129. *E.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 22–27, 117–27 (1977); EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869 (1990).

130. Bickel, *supra* note 98; *see also* BORK, *supra* note 98 (agreeing that *Brown* was inconsistent with the Framers' specific intent, but not their general intent, i.e., the overall equality purpose of the Fourteenth Amendment).

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and, therefore, that it is irrational to use race as a reason to segregate people as a matter of law.

III. *LAWRENCE*, REGIME SHIFTS, AND STARE DECISIS

The previous part argued that a regime shift such as that initiated in *Romer* and completed in *Lawrence* requires the Court to apply the Fourteenth Amendment's original meaning with some attention to the perspective and citizenship of the newly recognized social group. I now suggest a similar proposition for the role of stare decisis: Once a regime shift has occurred, previous decisions must be reconceived or even reconsidered if they are tainted by the rejected norm. If a social fact or norm is the starting point or a key premise in precedents A–F, and the Supreme Court finds in precedent G that the social fact is false or the norm has been superseded, then stare decisis does not apply with much or any force for precedents A–F, even if they are not overruled in the new precedent.[131] Indeed, lower courts—ordinarily required to follow the reasoning as well as results of Supreme Court opinions—will sometimes ignore or read those opinions narrowly once the Court has announced a regime shift. On the other hand, it might be the case that the social fact or norm is a necessary assumption only of precedent A, and that precedents B–F can survive, but perhaps in narrowed form.

Brown did not explicitly overrule any precedent of the Court, but it implicitly (and unmistakably) rejected a foundational proposition followed by a number of the Court's earlier precedents, namely, that the states could treat racial variation as so malignant or should treat it as significant, such that they could order different races to be segregated.[132] *Brown* treated

131. This analysis is consistent with standard accounts of stare decisis and the conditions under which precedent can be overruled. *See* HART & SACKS, *supra* note 105, at 545–629. *See generally* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (describing the process of overruling precedents).

132. Chief Justice Warren's opinion in *Brown* rejected "[a]ny language in *Plessy*" inconsistent with the Court's analysis. *Brown*, 347 U.S. at 494–95. Warren did not have to say more because *Plessy*'s holding had already been overruled in *Henderson v. United States*, 339 U.S. 816 (1950), which interpreted the Interstate Commerce Act to prohibit race discrimination, including segregation, on railroad trains. *Brown* surely had the effect of overruling cases like *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), and *Gong Lum v. Rice*, 275 U.S. 78 (1927), both of which assumed the legality of state segregation in allowing local discretion to make decisions about local segregated schools. As became clear in the wake of *Brown*, Warren's opinion

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African-Americans as equal citizens entitled to dignified and equal treatment as participants in the political community. Once that norm became the law of the land, in a unanimous Supreme Court decision, the constitutional world changed. Lower courts understood that their duty was to reason from the *Brown* norm even if it meant departing from circuit court or even Supreme Court precedent. Although its formal reasoning focused almost entirely on segregated education, it is for this reason that lower courts treated *Brown* as cutting deeply against any form of apartheid.[133]

The Supreme Court itself applied that idea in *McLaughlin v. Florida*.[134] Florida made it a crime for an unmarried couple of different races to cohabit.[135] The state defended its law by reference to *Pace v. Alabama*,[136] where the Supreme Court had upheld a law enhancing penalties for adultery and fornication when the couple was of different races.[137] Justice White's *McLaughlin* opinion gave short shrift to *Pace* on the ground that it "represent[ed] a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court."[138] The subsequent decisions were, essentially, *Brown*. Once the Court had signaled that racial variation was not, itself, a rational basis for state policy and that third-party effects could not be a rational basis if they were based on racial prejudice, then *Pace* lost all its stare decisis effect. The Court's landmark decision in *Loving v. Virginia*[139] became a constitutional gimme.

The Court repeated the same pattern in the sex discrimination cases. Before 1971, the Court had never struck down statutory sex discrimination on equal protection grounds. Responding directly to the women's rights movement and its

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also effectively abrogated state and federal circuit court decisions allowing racial segregation outside the education context. *See infra* note 133 and accompanying text.

133. In a series of per curiam opinions, the Supreme Court summarily affirmed lower court judgments striking down race-based segregation in public beaches, Mayor of Balt. City v. Dawson, 350 U.S. 877 (1955) (mem.), municipal golf courses, Holmes v. City of Atlanta, 350 U.S. 879 (1955) (mem.), city buses, Gayle v. Browder, 352 U.S. 903 (1956) (mem.), and so forth.

134. 379 U.S. 184 (1964).

135. *Id.* at 184.

136. 106 U.S. 583 (1883).

137. *Id.* at 585.

138. *McLaughlin*, 379 U.S. at 188.

139. 388 U.S. 1 (1967) (striking down laws barring different-race marriages).

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overwhelming political success, the Court did so frequently in the 1970s. The new norm was that sex is usually not a rational basis for state policies. The old norm allowing states to recognize separate spheres for women and men was repudiated, but without overruling prior precedents. With one exception,[140] the Court just ignored the earlier precedents.[141] The lower courts got the message, and the earlier decisions disappeared. They died and went to precedent Hell.

A notable feature of Justice Kennedy's *Lawrence* opinion is that *Hardwick* got a more decent burial than *Pace* and the pre-1971 sex discrimination precedents had received. This is good. *McLaughlin* would have been a much stronger decision if Justice White had explained how *Brown* repudiated as false and pernicious *Pace*'s essential social norm, that racial variation or mixing can be malignant.[142] Once it was accepted as a matter of normative fact that different-race relationships were benign and had no public effects beyond the illegitimate consequences of private prejudice, it was a serious violation of the Fourteenth Amendment's liberty principle to make them a crime. Once it was accepted as a matter of normative fact that people of color are equal citizens and that white racial purity is an irrational state goal, the Fourteenth Amendment's anti-caste principle required the invalidation of *McLaughlin*'s discrimination. Under the proper analysis, therefore, *Pace* was no longer tenable as a precedent, and was even inconsistent with the original purposes of the Fourteenth Amendment, as understood in light of current social facts and norms.

Justice Scalia's dissenting opinion in *Lawrence* heartily objected to the majority's treatment of precedent. His main claim was that Justices Kennedy, Stevens, and Souter gave none of the stare decisis benefit to *Hardwick* that they had given a decade before to save *Roe*.[143] He was right about that, and he was

140. In *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975), Justice White's opinion for the Court overruled *Hoyt v. Florida*, 368 U.S. 57 (1961), but with little more reasoning than his opinion in *McLaughlin* had given for rejecting *Pace*.

141. *E.g.*, Craig v. Boren, 429 U.S. 190 (1976) (invalidating a statute prohibiting bars from serving 3.2% beer to eighteen- to twenty-year-old males but not to females). *Craig* ignored but implicitly overruled *Goesaert v. Cleary*, 335 U.S. 464 (1948), which allowed Michigan to bar women from serving as bartenders. *Craig*, 429 U.S. at 20 & n.23.

142. *See supra* note 132 and accompanying text.

143. Lawrence v. Texas, 123 S. Ct. 2472, 2488–91 (2003) (Scalia, J., dissenting). Justice Scalia included Justice O'Connor in his charge that the majority was hypocritically ignoring *Casey*'s analysis of stare decisis. That inclu-

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even righter when he complained that *Hardwick* had generated a fair amount of social and legislative reliance that the Court ignored.[144] It was also fair to complain that the *Lawrence* Court jettisoned one of the key points made in *Casey*. The joint opinion in *Casey* announced that stare decisis carries *greater* weight "whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[145] *Hardwick* can easily be said to call the contending sides of a national controversy to accept the mandate that it is up to the states to decide whether to criminalize consensual sodomy.

Good for Justice Scalia. But he missed the take-home point made by the *Casey* joint opinion, both in its reasoning and in its result: Stare decisis in identity politics cases is a function of the social consensus as regards the trait or conduct involved in the case.[146] The *Casey* joint opinion contrasted the *Brown* Court's willingness to abrogate the reasoning in *Plessy* with its own unwillingness to overrule *Roe*.[147] As I have argued above, *Plessy* lost its precedential force once public norms had shifted in the United States.[148] If racial variation is or must be understood as benign, it is no longer rational for the state to require racial segregation. There was no comparable norm shift from *Roe* to *Casey*. If anything, the norm that women are equal citizens whose interests must be taken into account by constitutional law was even stronger in 1992 than it had been in 1973, and

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sion was patently unfair, as Justice O'Connor, alone on the Court, was scrupulous about stare decisis. Consistent with *Casey*, she declined to overrule *Hardwick*. *Id.* at 2484 (O'Connor, J., concurring in the judgment). Consistent with *Romer*, however, she voted to strike down the Texas law on equal protection grounds. *Id.* at 2484–87.

144. *See id.* at 2490–91 & n.2 (Scalia, J., dissenting). Not only was the Clinton Administration's statutory exclusion of gay people from military service in 1993 explicitly premised and defended on the ground that gay people are prone to commit illegal consensual sodomy, *see* 10 U.S.C. § 654(b) (Supp. 1994); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1129 & n.4, 1136 (9th Cir. 1997), but state antigay hiring policies, presumptions against child custody, and adoption rules have been premised and defended on the same basis, *see* ESKRIDGE & HUNTER, *supra* note 62, at 786–800, 869–72, 879–82 (providing extensive documentation of antigay employment rules and their defenses); *id.* at 1163–76, 1188–94 (documenting antigay family law rules).

145. Planned Parenthood v. Casey, 505 U.S. 833, 866–67 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

146. *See* ESKRIDGE & HUNTER, *supra* note 62, at 863–64.

147. *Id.* at 862–64.

148. *See supra* notes 132–33 and accompanying text.

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the right to choose an abortion had gained a powerful new constitutional dimension: Not only do women have a liberty interest in controlling the timing of their childbearing, they also have an equality interest because this decision bears upon them in ways that it can never bear upon, or be understood by, men.[149]

Sympathetically understood, the *Casey* analysis lends support to Justice Kennedy's thoughtful revisiting of *Hardwick*. Like *Brown* and unlike *Casey*, *Lawrence* overruled a precedent that had been overtaken by a normative revolution in the United States. Like *Brown* and unlike *Casey*, *Lawrence* was a moment when the Court was engaging in a regime shift that in fact *required* it to overrule precedent. That is what a regime shift is all about. Indeed, this is the reason why the Court was right to confront *Hardwick* head on and not to accept Justice O'Connor's attractive invitation to respect both stare decisis and equal gay citizenship by striking down the Texas Homosexual Conduct Law on equal protection rather than due process grounds. Justice O'Connor's approach would not only have left most sodomy laws on the books, but would have left *Hardwick* in place as a symbol of permanent gay inequality. *Hardwick*'s "continuance as precedent demeans the lives of homosexual persons."[150] It also demeaned the Court, whose legitimacy was perpetually stained so long as *Hardwick* was on the books.[151]

So *Brown*, *Casey*, and *Lawrence* are all consistent with a meta-principle of stare decisis in identity-politics cases: Once national citizenship has expanded to include a new identity group, and social norms have changed to accept the group's defining trait as at least tolerable, the Court ought to presume in favor of expanding the liberties and contracting the exclusions suffered by the once-denigrated group. The Court should do this not simply because it is just, or even simply because it contributes to the orderly evolution of our pluralist system—but the Court must do this for its own survival as a neutral arbiter of the rule of law. A Court perceived as racist, sexist, or (now) homophobic is a Court that cannot do the business the Constitution charges it with and cannot command the respect of the lower court judges under its supervision. It will be a Court be-

149. *Casey*, 505 U.S. at 868–69.
150. Lawrence v. Texas, 123 S. Ct. 2472, 2482 (2003).
151. *Id.* at 2482–83.

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set with nasty charges, political attacks, and mutinies by lower court judges, until it accommodates the new group.

The foregoing analysis leaves some questions unanswered. An important qualification is that identity politics entails more than just long-subordinated minority groups. Every identity-based social movement has generated a countermovement that is equally identity based—the states' rights and white supremacy politics in the wake of *Brown*,[152] the anti-ERA and pro-life politics following *Roe*,[153] and the TFV politics responding to the LGBT rights movement.[154] Social movement theory also provides a way to understand both the content and the passion of Justice Scalia's *Lawrence* dissent: There are powerful issues of citizenship and identity on both sides of the case, and in such instances the Court should leave culture clashes to the political process.[155] Anything more is illegitimate judicial activism that will harm the minority groups the Justices are trying to protect.

Indeed, the political fallout from both *Brown* and *Roe* suggests that even regime-shifting precedents cannot implement new norms when identity politics is evenly balanced. In *Brown II*, the Court rejected the Inc. Fund's request for immediate implementation of the antiapartheid rule of *Brown I*.[156] Although the Court gave greater bite to *Brown II* remedies between 1963 and 1971, after 1971 a Court more responsive to Northern opposition to busing curtailed *Brown II* remedies.[157] A moderate politics of preservation has been able to limit federal court regulation of local public education.[158] One consequence of lim-

152. *See* Eskridge, *Twentieth Century*, *supra* note 20, at 2096–2113.

153. *See id.* at 2138–59.

154. *See id.* at 2179–94.

155. *See Lawrence*, 123 S. Ct. at 2496–97 (Scalia, J., dissenting) (explaining that homosexuals should "promot[e] their agenda through normal democractic means").

156. Brown v. Bd. of Educ., 349 U.S. 294, 300–01 (1955).

157. For examples of the Court expanding *Brown II* remedies see *McDaniel v. Baresi*, 402 U.S. 309 (1971) and *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). For examples of the Court curtailing *Brown II* remedies see *Crawford v. Board of Education of Los Angeles*, 458 U.S. 527 (1982) and *Milliken v. Bradley*, 418 U.S. 717 (1974).

158. The moderate version of the politics of preservation rejects explicitly racist rhetoric but favors policies that allow either segregation or resegregation as a matter of private choices. Richard Nixon was elected President essentially on this platform. *See* DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 326–31, 349–51, 386–99 (1995);

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ited judicial intervention and patterns of white flight has been a steady resegregation of American public education.[159]

The reactions to *Roe* were even more dramatic. The Supreme Court's decision gave a tremendous boost to the nascent pro-life social movement.[160] Although that countermovement has not been able to persuade Americans that the fetus is a human person, it has persuaded most Americans that the choice to have an abortion is one that the state can regulate in many respects.[161] The success of the pro-life movement was apparent in *Casey*. Although the joint opinion reaffirmed the "essential holding" of *Roe*, it abandoned the trimester framework and applied Justice O'Connor's undue burden test to uphold a state law requiring waiting periods, informational disclosures, and (for minors) parental consent before exercising one's choice to have an abortion.[162]

IV. *LAWRENCE* AND A CONSERVATIVE JURISPRUDENCE OF TOLERANCE

This part considers exactly what the Court was accomplishing as a normative matter. The answer involves an inquiry

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DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS 15–43 (2001). Nixon's four appointments to the Court (Burger, Blackmun, Powell, and Rehnquist, JJ.) implemented that platform limiting *Brown II* remedies after 1973. *See* JEFFRIES, *supra* note 54, at 302–331.

159. *See* GARY ORFIELD & JOHN T. YUN, CIVIL RIGHTS PROJECT, HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS (1999), http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American_Schools99.pdf.

160. *See* DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIREY PROTEST 51–60 (1994).

161. "Americans in general have embraced both the right to abortion declared by the Court as well as many restrictions *Roe v. Wade* allowed." GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1996, at 114 (1997); *see id.* at 112 (noting that at least 70% of respondents favored waiting periods, required disclosures, parental consent, and spousal notification for women seeking abortions); GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 2002, at 20 (2003) (noting that 78% of respondents said abortion laws should remain the same or be more strict).

162. The joint opinion authored by Justices O'Connor, Kennedy, and Souter was joined by Justices Blackmun and Stevens in reaffirming the essential holding of *Roe* and striking down the state spousal notification law. Planned Parenthood v. Casey, 505 U.S. 833, 911–22 (1992) (Stevens, J., concurring in part and dissenting in part); *id.* at 922 (Blackmun, J., concurring in part, concurring in judgment, and dissenting in part). The Chief Justice and Justices White, Scalia, and Thomas joined the joint opinion in upholding the remainder of the law, as described in the text accompanying this note. *Id.* at 944–79 (Rehnquist, White, Scalia, Thomas, JJ., concurring in the judgment in part and dissenting in part).

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into toleration. The new constitutional floor set by the *Romer/Lawrence* regime shift is that states must treat homosexuality as a *tolerable variation*; implicitly, this new floor does not require that states treat homosexuality as equivalent to heterosexuality, but it does veto state discretion to treat LGBT people as outlaws or degenerates. The political philosophy supporting that new floor is a *jurisprudence of tolerance*. Underlying that jurisprudence is not only the moral philosophy notion of tolerable variation, but also the political philosophy notion that mutual toleration is necessary for the flourishing (or even the survival) of a pluralist democracy.

A. *LAWRENCE* AND THE NORM OF TOLERABLE VARIATION

The results in *Romer* and *Lawrence* are consistent with the norm that homosexuality is a tolerable sexual variation, and their reasoning is more consistent with this norm than with the more gay-friendly idea that homosexuality is a benign sexual variation. Libertarian analyses of sodomy laws, from Jeremy Bentham through H.L.A. Hart and Richard Posner, have traditionally distanced the protected conduct from standards of morality.[163] Thus, a lot of disapproved conduct can be tolerated, especially if it does not hurt other people. Justice Kennedy's opinion in *Lawrence* treats homosexual conduct with careful respect, but also considerable moral distance.

A contrast makes this point. Justice Douglas's opinion for the Court in *Griswold* protected the right of married couples to use contraceptives. His opinion concluded with a lavish ode to heterosexual marriage:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[164]

Justice Kennedy's opinion in *Lawrence* concluded on a flatter tone: "The present case does not involve minors. It does not involve [lack of consent]. It does not involve public conduct or prostitution . . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual

163. *See, e.g.*, Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 535–38 (1989) (explaining how moral views are separated from protected conduct).

164. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

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practices common to a homosexual lifestyle."[165] This is the tone of both tolerance and moral distance. To some it is a tone of condescension: Straights have "sacred" and "noble" marriage; "homosexuals" have a "lifestyle."

The distinction between tolerable and benign variation also helps us to situate *Romer* and *Lawrence* in our constitutional history and to understand the magnitude of the regime shift these decisions created. Two rough analogies come to mind, and they complement one another. The first analogy is to *Roe*, the second is to *Brown*.

Like the Court's opinion in *Lawrence*, the *Roe* opinion protected the freedom of Americans to make sexual choices and took no moral position on the value of different choices. The pro-life movement vigorously maintained that *Roe* was wrongly decided and that abortion was a *malignant* moral choice, essentially murder.[166] That countermovement was not able to persuade Americans that abortion is equivalent to murder; most Americans agreed that an abortion was a *tolerable* moral choice, such that the state could ordinarily not make it a crime. But many or most agreed with the critics that abortion was not a *benign* or *good* moral choice, such that the state must support or "promote" it. In *Maher v. Roe*,[167] the Supreme Court ruled that it is perfectly constitutional for state medicaid programs to exclude abortions even if they fund childbirths. Justice Powell's opinion for the Court interpreted *Roe* as protecting women against "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"—a freedom from state "compulsion" that did not entitle women to have their abortions paid for by the state.[168] "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with

165. Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).

166. *See* BLANCHARD, *supra* note 160.

167. 432 U.S. 464, 480 (1977). See also *Maher*'s companion cases, Poelker v. Doe, 432 U.S. 519, 521 (1977) (per curiam) (a municipal hospital providing childbirth services was not constitutionally required to provide abortion services) and Beal v. Doe, 432 U.S. 438, 447 (1977) (interpreting Title XIX of the Social Security Act to allow states to participate in Medicaid without funding abortions). The Court followed and applied *Maher* to uphold a federal bar to spending federal monies on abortions in *Harris v. McRae*, 448 U.S. 297, 326 (1980).

168. *Maher*, 432 U.S. at 473–74 (citing Whalen v. Roe, 429 U.S. 589, 599–600 (1977)).

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legislative policy."[169] The state has wide latitude not to "promote abortion" by funding it, and Powell's opinion concluded that this is precisely the sort of policy issue best left to the democratically elected legislators.[170]

Maher encouraged pro-life activists to press for laws discouraging abortion as a choice, including requirements that abortions be performed only after doctors obtain the written consent of their patients,[171] and that the consent be "informed" by pro-life information the doctors were required to provide. The Supreme Court rebuffed early efforts but acquiesced in *Casey*. Although the joint opinion reaffirmed the "essential holding" of *Roe*, it applied the *Maher* undue burden test to uphold a state law requiring waiting periods, informational disclosures, and (for minors) parental consent before exercising one's choice to have an abortion.[172]

It is only in retrospect that we can understand *Brown* as representing the triumph of the NAACP's norm of benign racial variation. Chief Justice Warren's decision tightly focused on the importance of public education as a training ground for citizenship and the dignitary harms visited on black schoolchildren who were the obvious targets of segregation.[173] The decision said nothing about race as a presumptively inadmissible classification across the board.[174] Immediately after *Brown*, the Court had an opportunity to take that step. In *Naim v. Naim*, the Virginia Supreme Court upheld that state's law making different-race marriage a crime. The Supreme Court remanded the case for the state court to reconsider in light of *Brown*.[175] Virginia stuck to its original position, which was that different-race marriage would yield a "mongrel race" and dilute the

169. *Id.* at 475. Powell contrasted a law barring schools from teaching German, invalidated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), with a policy of prescribing a curriculum that included English and excluded German without imposing a criminal sanction on those who do not follow such a prescribed curriculum. *Maher*, 432 U.S. at 476–77.

170. *Id.* at 479–80; *see id.* at 481–82 (Burger, C.J., concurring) (same).

171. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 67, 85 (1976) (containing Missouri's version of such a law).

172. *See supra* note 162.

173. Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954).

174. The Court simply held that "in the field of *public education* the doctrine of 'separate but equal' has no place." *Id.* at 495 (emphasis added).

175. Naim v. Naim, 350 U.S. 891 (1955) (per curiam), *vacating and remanding* 87 S.E.2d 749 (Va. 1955).

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white race.[176] There could have been no clearer repudiation of the idea that racial variation is benign, yet the Supreme Court allowed the decision to stand. The apparent reason was the furious reaction in the South to *Brown* and the equivocal support the Court was receiving from Congress and the President.

As time passed, however, the country moved toward the NAACP's point of view. During the Kennedy-Johnson Administration, the high tide of liberalism in the United States, the Court constitutionalized the norm that racial variation is benign. In *McLaughlin v. Florida*,[177] the Court struck down a law making it a crime for an unmarried couple of different races to cohabit. The Court's landmark decision in *Loving v. Virginia*[178] finally disposed of the issue the Court had ducked in *Naim v. Naim*. Chief Justice Warren's opinion not only ruled that the state could not prohibit different-race marriage, but also established once and for all that race is a suspect classification.[179] This latter point was a corollary of the Inc. Fund's view: If racial variation is benign, then state policy based on it is fishy and presumptively derived from the racist philosophy of "white supremacy," the announced policy of the Virginia miscegenation law.

Romer and *Lawrence* accomplished for LGBT people essentially what *Brown* accomplished for people of color and *Roe* accomplished for women: Homosexuality is a tolerable sexual variation, and homosexual sodomy is tolerable conduct. Thus, the state can neither declare that gay people are an outlaw class, nor enforce an apartheid regime upon gay people.[180] What

176. Naim v. Naim, 90 S.E.2d 849, 850 (Va. 1956) (per curiam), *appeal dismissed*, 350 U.S. 985 (1956).

177. 379 U.S. 184 (1964).

178. 388 U.S. 1 (1967).

179. *Id.* at 12.

180. The term in the text does not suggest that the state's denial of jobs and parental rights to LGBT people is equivalent to the violent regime of apartheid in the South. I am using the term "apartheid" in its literal sense, as an interlocking regime of legally enforced segregations. Women in the twentieth century were subjected to an apartheid of the household: The state made it hard for them to obtain university educations and find well-paying jobs and legally made it much more advantageous for the average woman to marry a man—with the result that women were largely segregated from public life. Gay people suffered under what I call an "apartheid of the closet," whereby the state enforced a code of not only silence, but also forced performances of heterosexuality in its rules against sodomy, state employment of or military service by "homosexuals and other sex perverts," and custody by gay parents over their own children. This argument is developed in ESKRIDGE, GAYLAW, *supra* note 14, at 17–80.

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comes next is not predictable. Parallel to the claims made by people of color and their representatives in the NAACP, LGBT communities and their representatives in Lambda Legal and the ACLU maintain that homosexuality is a benign sexual variation and that homosexual sodomy is benign conduct. Gay is Good, not just Tolerable. *Brown* offers gay people hope that this moral vision will prevail. Parallel to the claims made by pro-life people and moderate segregationists, TFV communities and their legal representatives maintain that homosexuality and homosexual conduct are either bad or unfortunate variations from an excellent norm, procreative marriage. Gay is God Awful and at most Tolerable. No promo homo. *Casey* offers traditionalists hope that this moral vision can prevail.

B. POLITICAL THEORY AND JUDICIAL REVIEW

The *Lawrence* majority had a good handle on traditional legal materials, including original meaning and precedent. There are two sides to the rule-of-law issues, however, and Justice Scalia capably articulated the dissenting point of view. At the very least, the majority was exercising some discretion in how it read the materials, with Justice O'Connor reading them more narrowly and Justice Kennedy more broadly—but both much more broadly in favor of gay rights than Justice Scalia. Broad readings of the Fourteenth Amendment always put the Supreme Court at some risk, and premature enunciations of constitutional rights (as in *Roe*) can roil the political and the judicial process for generations. On the other hand, excessively stingy readings also put the Court at risk, for dismissive treatment of rights important to an increasingly significant minority can embroil the Court in never-ending controversy (as in *Hardwick*). In short, the Court in these identity-politics cases must steer a careful course between Scylla (*Roe*) and Charybdis (*Hardwick*).

So we return to the question: Why would the *Lawrence* majority read the legal materials in such a progay way? Were they simply protecting a group because they and their elite friends are wild about homosexuals as the cause du jour? Justice Scalia says that this is exactly what the Court is doing.[181] Don't believe it. There is no reason to think that Sandra Day O'Connor and Anthony Kennedy, staunchly conservative Republicans,

181. Lawrence v. Texas, 123 S. Ct. 2472, 2496–97 (2003) (Scalia, J., dissenting).

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are pimps for the "homosexual agenda." A better theory is that these Justices are apostles of toleration, and that they read the Fourteenth Amendment to support that norm for a social group consisting of decent Americans who have traditionally been despised by their neighbors and mistreated by the state. The best theory, and one that complements the second, is a political theory, rooted in American history. It is not only consistent with, but is suggested by, the original purposes of the Fourteenth Amendment. This theory provides a compass for the Supreme Court to avoid both Scylla and Charybdis. The central point of the political theory is that the Court should operate to lower the stakes of identity politics and culture clashes. The Court's moderating role is especially important when warring identity groups threaten to radicalize politics.

The modern Constitution is premised upon the operation of a democratic pluralism. Three features of our government are key. One is that elected representatives who are accountable to voters make most public policy, the *representation feature*. At the state and national level, representatives in two different (and differently accountable) chambers have to approve proposals before they can become law. A second feature is the importance of groups. Parties contend for votes and loyalty, but so do other kinds of groups, including identity-based groups like LGBT people and TFV people. This is the *pluralism feature* of our government. Finally, our representative democracy is enriched by the fact that most policy making is accomplished at the state and local level. This *federalism feature* means that at any given time people deeply unhappy with the policies followed by their home jurisdiction will have the opportunity to move to friendlier states or cities.

Before the New Deal, most accounts of judicial review assumed that the Supreme Court and the judiciary had little or no role to play in the operation of the democratic process.[182] Responding to the NAACP's stream of criminal procedure and voting cases, the New Deal Court suggested that it was prepared to be a referee for the political process, not only (1) when the process violated individual rights clearly protected in the Constitution, but also (2) when local political elites sought to

182. Most theories simply focused on the Court's enforcement of objectively identifiable rights. The most sophisticated theory focusing on judicial review and the democratic process maintained that any kind of judicial activism weakened the democratic process. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

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lock in their power by excluding minorities from participation, or (3) when laws were motivated by "prejudice against discrete and insular minorities" such that the ordinary political process could not be relied on.[183] This theory suggests that the Supreme Court should generally *not* strike down statutes that are the product of a normally functioning democratic process, one where all relevant groups participate freely (even if not with equal success). Judicial review, under this theory, should be exceptional, limited to cases involving self-perpetuating majorities and minorities that are systematically excluded.

Such a representation-reinforcing theory of judicial review could support invalidating the Texas Homosexual Conduct Law.[184] The law imposed unique disabilities on a discrete and insular minority (gay people) who have long been demonized in the Texas political process. Before 1973, Texas made it a felony for anyone to engage in consensual sodomy.[185] By 1973, it was apparent to some legislators that sodomy, oral sex in particular, was widespread in the state, but almost no one would admit to such conduct, for religious or social shame reasons. There were relatively few gay people in the state, and so their interests could be entirely ignored. Under such circumstances, it was a natural compromise to do what Texas did in 1973—decriminalize consensual heterosexual sodomy and maintain consensual homosexual sodomy as a crime.[186] This sent a politically acceptable set of signals, but at the expense of a minority. The product of an unrepresentative process, the Homosexual Conduct Law could remain in effect not just because it is hard for any group to repeal legislation, but also because the private and public discrimination that the law encouraged against openly gay people kept most of them in the closet, and thereby politically marginalized them even more effectively.

This is a dysfunctional process, and its dysfunctions bear some similarity to those that disadvantaged African-Americans in the twentieth century. Just as apartheid was a legal signal that people of color were social outcasts, so the Homosexual

183. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see* Bixby, *supra* note 28. The famous *Carolene Products* footnote 4 was the basis for the equally famous "representation-reinforcing" theory of judicial review defended in JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). Ely also suggested the referee model for judicial review. *Id.* at 73–104.

184. TEX. PENAL CODE ANN. § 21.06 (Vernon 2003).

185. 1943 Tex. Gen. Laws ch. 112 (making it a felony to engage in nonprocreative "carnal copulation").

186. 1973 Tex. Gen. Laws ch. 399 § 21.06.

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Conduct Law was a legal signal that gay people were outlaws. Both groups were unfairly treated as pariah groups, and the laws key to their pariah status exemplify the kinds of cases where a representation-reinforcing Court might intervene. "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[187]

The foregoing account is one way to justify *Lawrence* against Justice Scalia's charge that the Court should have left the matter to the Texas legislature. But the argument lends more support to Justice O'Connor's proposition that the Texas law be invalidated on equal protection grounds, than to Justice Kennedy's proposition that all consensual sodomy laws violate due process protections. So not only does Justice O'Connor's position best reflect the constraints of stare decisis, but it is also most faithful to representation-reinforcement theories of judicial review.

There is another way of thinking about judicial review that lends more support to Justice Kennedy's opinion. In addition to local lock-ins and prejudice-based discriminations, a third problem with pluralist democracy is that its stakes can get too high. This is a particular problem when groups hate or demonize one another, the classic culture-clash scenario. In the modern regulatory state, an early impulse of a dominant social group that hates a minority group is to deploy the apparatus of the state against the minority. One brutal example of this scenario is the Kulturkampf, where the state seeks to erase a minority or coerce it into conformity through a campaign of terror, criminal prosecutions, and forfeitures for disobedience.[188] Less brutal examples involve interference with the minority's institutions or harassment of individuals in the minority.

It is dangerous for the state to take such decisive sides in culture clashes. By brutalizing or even just harassing minorities, the state feeds their anger, which can be embittering for

187. Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

188. The original Kulturkampf was Chancellor Bismarck's effort to domesticate the Roman Catholic Church in Imperial Germany. *See* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2414 (1997). At about the same time, the United States was involved in a Kulturkampf against the Church of Jesus Christ of the Latter-Day Saints. *Id.*

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the minority, dangerous for the majority (because it feeds their moral smugness), and destabilizing for the democracy. Angry minorities will tend to go outside the political process to vent their anger against the majority, or the state itself. Violence becomes a stronger possibility. The nightmare result is the Game of Chicken, where each group keeps raising the stakes of their conflict, with disastrous results for both sides (and the general public).[189] From a social point of view, this is a very bad game for Americans to be engaged in. If played repeatedly, it raises the stakes and the costs of culture clashes exponentially. If the escalation is not stopped, the Game of Chicken can destroy the conditions for democracy itself.[190]

C. THE JURISPRUDENCE OF TOLERANCE

Going beyond representation-reinforcement theory, one might speculate that the Supreme Court might play a constructive role in managing culture clashes to minimize their threat to pluralist democracy. To understand how this is a conservative political theory that would be attractive to Justices Kennedy and O'Connor, we need to expand our horizon beyond *Lawrence* and *Romer* and examine other instances of vigorous judicial activism that Justices Kennedy and O'Connor (and Scalia) willingly joined.

In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*,[191] a unanimous Supreme Court ruled that a Massachusetts law barring sexual orientation discrimination by public accommodations could not constitutionally be applied to the Boston St. Patrick's Day Parade. The parade organizers sought to present a particular, generally traditionalist point of view, and the presence of an openly lesbian, gay, and bisexual marching group would detract from that point of view.[192] Accordingly, the Court held that the law, as applied, violated the Speech

189. In the classic Game of Chicken, two young males with more testosterone than brains drive hot rods on a collision course toward one another, at escalating speeds. The first to swerve is the "loser." If both swerve, they are both "losers." If neither swerves, they are both "totaled."

190. *Cf.* ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 26–37 (1991) (noting that democracy is a self-enforcing equilibrium only so long as all groups see themselves better off under democracy than they would be under a state of nature).

191. 515 U.S. 557 (1995).

192. *See id.* at 572–73.

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Clause of the First Amendment.[193] In *Boy Scouts of America v. Dale*,[194] a divided Court extended *Hurley* to invalidate the application of a similar antidiscrimination law to the Boy Scouts. Chief Justice Rehnquist's opinion for the Court found that the Boy Scouts were an expressive association whose normative "no promo homo" message would be undermined by the presence of an openly gay man as an assistant scoutmaster.[195] In short, the First Amendment protects the rights of private parades (*Hurley*) and associations (*Dale*) to express TFV attitudes through excluding gays.

To understand the jurisprudence of Justices Kennedy and O'Connor, one must understand *Dale* and *Hurley* as well as *Lawrence* and *Romer*.[196] A Court that decides *Dale* and *Hurley* is not a Court that has swallowed the "homosexual agenda." But a Court that decides *Romer* and *Lawrence* as well as *Hurley* and *Dale* is a Court that has accepted an activist role in managing culture clashes. I now maintain that this is a productive role for the Court.[197]

All four decisions can be justified by a theory drawn from a

193. *See id.* at 581.

194. 530 U.S. 640 (2000).

195. The Boy Scouts' message did not become clear until their reply brief was filed with the Supreme Court. There, the Scouts opined that they did not want to "promote homosexual conduct as a legitimate form of behavior" to their charges, and that having an openly gay scoutmaster would send that message. Reply Brief for Petitioners at 5, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699); *see* Brief for Petitioners at 21, *id.* (describing the Boy Scouts' original message was that it wanted to be completely neutral, neither "anti-gay" nor conveying "approval of homosexual conduct either"). Justice Stevens's dissenting opinion found the Scouts' message too unclear to merit First Amendment protection. *See Dale*, 530 U.S. at 665–78 (Stevens, J., dissenting).

196. Justices O'Connor and Kennedy were the only members of the Court in the majority for all four cases. Justices Stevens, Souter, Ginsburg, and Breyer were in the majority of all but *Dale*. Chief Justice Rehnquist and Justices Scalia and Thomas voted against rights for gay people in each of the four cases.

197. I should note that I have reservations about the reasoning in *Hurley*, and both the result and the reasoning in *Dale*. These decisions reflect a most imperial First Amendment, but as precedents of the Court, they are of course the law of the land. Moreover, context makes a big difference. If read only with *Hardwick* as background, *Hurley* and (especially) *Dale* can easily be read to reflect a Court that is simply hostile to gay people—allowing intolerant states to put them in jail and deny them all manner of civil rights, and thwarting the efforts of tolerant states to assure gay people access to public accommodations. Once *Lawrence* and *Romer* replace *Hardwick* as the relevant background, however, *Hurley* and (even) *Dale* can be read as signals that the Court will protect both gay people and traditionalists where the Constitution requires.

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legal process reading of the Fourteenth Amendment's original meaning. Recall that the original purposes of the Fourteenth Amendment were to guarantee the rule of law for all persons, to recognize a libertarian presumption against state intrusion into our privacy, and to militate against class or caste legislation. Rather than thinking about these purposes in the context of gay people's emergence as an accepted identity group in American politics, as I did above, consider how these purposes help us think about the constitutional politics of culture clashes.

These Fourteenth Amendment principles suggest a conservative judicial strategy for dealing with culture clashes when they involve state action. Judicial review enforcing these principles is not only faithful to the Framers' design, but plays a productive role in the political management of culture clashes. Under what I call a jurisprudence of tolerance, the role of judicial review is threefold: (1) to lower the political stakes of culture clashes; (2) to assure each group an opportunity to flourish and, indeed, to demonstrate that its normative program is a good one; and (3) to channel group disputes through the state rather than through private violence.

1. Lowering the Stakes of Identity Politics

Culture clashes threaten to raise the stakes of politics, allowing the (temporarily) dominant group not only to enshrine its philosophy into public policy, but also to impose deep and harmful costs on the minority. The Fourteenth Amendment is fundamentally set against this. Its rule of law and anti-caste purposes promise all groups that laws will be applied generally, evenly, and fairly. Laws motivated by a desire to hurt a group are inconsistent with these values and lack even a rational basis. Moreover, the libertarian principle in the Fourteenth Amendment augurs against legislation that deprives a minority of important freedoms without strong justification in the legitimate needs of the overall community.

A Supreme Court that firmly but evenhandedly enforces these purposes can lower the stakes of culture-clash politics. Some traditionalists despise gay people, and many traditionalists wish there were fewer openly gay people in the public culture, but the Court in *Romer* told them, "You cannot take away these people's basic civil rights." In *Lawrence*, the Court told them, "You cannot put these people in jail or treat them as presumptive outlaws." But the *Dale* Court told them, "And neither

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can gay people do bad things to you. Your youth group is a safe place for you to express and inculcate your values, and it goes without saying that your home, your church, your parochial school, your other normative associations are all enclaves where the state cannot impose politically correct or progay values on you." To LGBT people who do not like the result in *Dale*, the Court has this to say, "You wouldn't like it if the state required your newspapers, churches, and bars to be completely open to traditionalists. Give them their space—and then try to persuade your local community that youth groups should not be afraid of gay leaders."

This jurisprudence lowers the stakes of identity politics in several ways. First, it takes away big weapons from the combatants. Each group is disabled from using the state to harm people in the other group at a deep level. Second, it prevents people in each group from feeling frustrated that they are prevented from getting out their message. Third, these cases press each group toward arguments and rhetoric that emphasize the positive (here is what we believe) rather than the negative (those people are squalid). By lowering the stakes of politics, the Court is creating spaces in which two conflicting groups can coexist, and maybe learn to tolerate one another. If they never learn to tolerate one another, the Court will not let them hurt one another, especially through state action.

Consider a homely analogy, the family. Assume religious parents who teach all their children that marriage is the only proper forum for sexual expression. One of their six children is a lesbian and explains her situation to the family. The parents might counsel her and might even engage in subtle pressure for her to consider dating boys.[198] But it would be very bad parenting for them to expel the lesbian daughter from their house, to lock her up in the basement until she "changes" her sexual orientation or agrees to undergo reparative therapy, or even to stigmatize the daughter as a disappointment in contrast to the straight kids.

The last point is the hardest to justify, but the most important. By stigmatizing the lesbian daughter, the parents are not only hurting her, they are hurting the family's harmony and

198. For example, if the lesbian's sister marries a man, the parents might not only put on a fabulous religious wedding, but also donate a generous wedding gift to the bride and groom. The suggestion could be that the lesbian sister will not receive such a remunerative send-off if she marries or cohabits with another woman.

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probably their straight children as well. The other children will tend to take sides, and depending on the intensity of the parents' disapproval, they will harbor bitterness toward one another. Child A, who follows the parents' wishes, will become estranged from his sister. Child B, who values the lesbian sister, may become estranged from Child A and embittered at his parents for subjecting the sister to their disapproval. Child C may turn her rage on the lesbian sister. And so forth. Intolerance turns this hypothetical family into a hornet's nest of resentments and hurt.

Most successful families operate upon a principle of tolerance that takes the edge off of normative disagreements within the family. "She is my sister, and I love her, even though I do not understand her lifestyle" is an attitude that ennobles both persons and enables them to contribute to the welfare of the family. Tolerance is an admirable trait. An instrumentalist justification for tolerance is that it enables different people to cooperate productively with one another in an institutional setting—not just the family, but also the state.

2. Protecting Normative Groups and Their Ability to Proselytize

A corollary of the first idea (lowering the stakes of identity politics) is to assure each clashing group an opportunity to persuade the community of its normative agenda. Here, the Fourteenth Amendment values complement established First Amendment values.[199] The libertarian norm of the Fourteenth Amendment works with the anticensorship presumption of the First Amendment to create a "super norm" that states cannot limit identity speech and cannot cut off the flow of ideas, even if contentious. When the state is forcing a particular viewpoint through its censorship, the Constitution is especially vigilant, even as to some state spending programs as well as criminal laws. Here, the anti-caste norm of the Fourteenth Amendment reinforces the First Amendment rule against viewpoint discrimination, even in cases where the state can engage in some content regulation.

Last but not least important, the Fourteenth Amendment's rule-of-law norm finds the happiest of parallels in the First

199. Of course, the First Amendment's Speech Clause was one of the first provisions of the Bill of Rights to be incorporated into the Due Process Clause. *See* Gitlow v. New York, 268 U.S. 652 (1925).

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Amendment, which has on the whole been a model of neutral constitutionalism. The lesbian is happy that she can read feminist theory and can join with other women and gay men in associations that have meaning for her, all without state censorship and harassment. The Baptist is happy that she can read biblical works and can join with other religious people to worship and share the Word, also without state meddling. Each might be tempted to regulate the other: The lesbian finds the Baptist's denunciation of homosexuality as "an abomination to God" hate speech that sets a bad example for her children; the Baptist finds the lesbian's open cohabitation with another woman to be sinful conduct that sets a bad example for her children. Yet each accepts that her own freedom requires her to respect the freedom of her sister. One might say that the twentieth century produced a huge First Amendment logroll where everyone is most delighted that he or she can speak out and associate freely and accepts the same freedoms for speech and association he or she does not like.

3. Channeling Group Disputes and Domesticating Culture Clashes

The core rule-of-law role for the state is to maintain order and to prevent the havoc characteristic in a state of nature. Having an independent judiciary contributes to this conservative project by channeling group disputes into government processes rather than into private ones (like feuds and other institutions characteristic of the dreaded state of nature). For channeling to work, each group in a normative contest must believe that judges will not be biased against its members and will give it a fair shake.

Channeling works at the level of rhetoric as well as conduct. Activist (but not *too* activist) judicial review can help *domesticate culture clashes*. By requiring each group in a culture clash to tone down its denigrating rhetoric, judicial review domesticates their conflict insofar as it occurs in the political arena. The domestication of culture clashes is important in maintaining the advantages of political pluralism—moderation, stability, and the peaceful resolution of disputes. Judicial review helps social groups avoid mutually destructive Games of Chicken. This is a big boon for the modern regulatory state.

This triple role of judicial review—lowering stakes, protecting expression, and channeling—helps us understand why *Hardwick* was such a bad decision. It raised the stakes of poli-

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tics because it reaffirmed the power of the state to brand homosexuals as criminals, and did so in an opinion that went out of its way to disrespect gay people.[200] The collateral consequences of presumptive criminality were quite significant in some states. Together, this was a legal regime designed to marginalize gay people socially and politically by keeping them out of those states or confining them to the closet. Given the greater tolerance they had come to expect from modern government in Canada, the United States, and Europe, gay people were angered by *Hardwick*. Its transparently antigay motivation threatened the neutrality of the Court in matters of sexuality, gender, and the law.

Just as the jurisprudence of tolerance supports *Lawrence*, so too does it lend support to both *Hurley* and *Dale*. A state that tells a traditionalist association whom it can admit and what message it sends is a state that is raising the stakes of politics. Even (or especially) politically correct censorship generates anger, and the Court was right to erase the censorship. When the state imposes a conformist agenda on people's core liberties—private sexual activities, associational freedoms, self-expression, the practice of religion—it poses great risks of raising the stakes of the culture clash, of preventing one group from having a fair chance to make its case to Americans, and of driving some groups or some members to private violence.

A corollary of the jurisprudence of tolerance is that there are strong limits to judicial activism. Indeed, the jurisprudence of tolerance cautions against hasty or premature activism that raises rather than lowers the stakes of politics. This was the central problem with *Roe*. Although its protection of a woman's right to choose an abortion was supported by both the libertarian and anti-caste norms of the Fourteenth Amendment, the sweeping nature and the early timing of the Court's opinion

200. Justice White's most obvious sin was his obsessive, and unfounded, focus on "homosexual sodomy," but more deeply insulting to LGBT people was his dismissal of their heartfelt and deep normative claims as, "at best, facetious." Bowers v. Hardwick, 478 U.S. 186, 194 (1986), *overruled by* Lawrence v. Texas, 123 S.Ct. 2472 (2003). That White's dismissal came at the end of a historical discussion that was factually erroneous and analytically sloppy signaled not just that the Court was biased against gays, but that it was smug in its confidence that it did not even have to explore gay people's constitutional arguments and history with any degree of seriousness. "Of course we're ignorant of those people's history. Why should we waste our time?" This was a deeply unprofessional message for the Court to be sending to a group that had been persecuted by the state, but was demonstrating to America that its members were productive citizens whose claims had to be taken seriously.

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struck many as inconsistent with the rule-of-law norm and the orderly operation of the democratic process.[201] In 1973, more than a dozen states had just liberalized their nineteenth-century abortion laws, and four of those states had completely deregulated abortion.[202] Most other states were considering abortion law reform, and there is every reason to believe that a large majority of states would have accomplished reform in the 1970s—on their own and without any direct pressure from the Supreme Court.[203]

It is not clear that Texas would have modernized its law, which was the law reviewed in *Roe*. Adopted in the nineteenth century (before women had the right to vote), the Texas law was the most sweeping in the country, making abortion a crime unless necessary to save the life of the pregnant woman. Justice Blackmun's initial draft opinion would have invalidated the law on vagueness grounds; it gave neither doctors nor patients adequate guidance as to when they could perform the procedure.[204] Although his colleagues insisted that Justice Blackmun draft a more substantive opinion, my theory of the Fourteenth Amendment suggests that the initial draft was the better one, for it would have swept away the most obsolescent laws without foreclosing state reregulation that could then have been reviewed upon a more complete record. In short, it would not have raised the stakes of abortion politics and in fact would have returned that politics to state legislatures, which would have reached a series of compromises and accommodations.

By taking most abortion-related policy issues away from the political process and disrespecting the pro-life position, the Court raised the stakes (the intensity) of pro-life politics even more than *Hardwick* would do in the next decade. Mark this

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201. *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 27–29 (1975); BORK, *supra* note 98, at 111–16.

202. Mary C. Segers & Timothy A. Byrnes, *Introduction* to ABORTION POLITICS IN AMERICAN STATES 1, 2–4 (Mary C. Segers & Timothy A. Byrnes eds., 1995).

203. *See generally* GARROW, *supra* note 32, at 335–88 (describing state developments in abortion law reform before *Roe*).

204. *See* Drafts and Memorandum regarding *Roe v. Wade* (on file at the Library of Congress, Madison Building, Papers of William O. Douglas, Container 1590) (including Justice Douglas's notes on the first *Roe* conference, as well as Justice Blackmun's original draft vagueness opinion and Justice White's strong dissent, and memos from the other majority Justices urging Blackmun to go beyond the vagueness rationale).

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irony. Richard Nixon appointed the Burger Court Justices as strict constructionists who would avoid the activism of the Warren Court. Falling athwart both Scylla (*Roe*) and Charybdis (*Hardwick*), the Burger Court was one of the politically clumsiest Courts in our nation's history. Led by Justices O'Connor and Kennedy, the Rehnquist Court has been politically much more adept, just as it has been even more activist. *Casey* undid some of the pluralism damage of *Roe*—affirming a substantial leeway for the states to regulate abortions even as a majority symbolically reaffirmed the essential holding of *Roe*. *Lawrence* and *Romer* undid most of the pluralism damage of *Hardwick*—but without making the mistake of getting too far ahead of the country. These Justices have charted a successful course, so far, between Scylla and Charybdis.

Shoals lurk in murky waters ahead, however. The judiciary ought not, and really cannot for an extended period of time, disrupt a nationwide normative equilibrium on important political issues. Thus, if almost all Americans despise and fear "homosexuals," as they did in the 1950s, the courts cannot change that hatred and fear and cannot impose a regime of equal treatment of the despised minority, though they can slow down any deployment of state apparatus to destroy the minority. The country's ho-hum reaction to the demise of sodomy laws supports the universal surmise that these old antigay attitudes have changed, but the alarm in most of the country to the possibility of same-sex marriage suggests that public attitudes have not completely reversed themselves.

The current political equilibrium in the United States is that homosexuality is not a malignant condition and is, in fact, a tolerable variation. But it is a tolerable variation from the norm of heterosexuality, which for most Americans is clearly the best sexual orientation and one the state should favor. These are not attitudes that the judiciary can change, and judicial challenges to these attitudes would be futile, perhaps even counterproductive. If most Americans believe that gay people are harmless misfits but not qualified for the elevated status of civil marriage, the judiciary not only cannot, but ought not, impose same-sex marriage on the hesitant body politic. To do so would inflame the culture clash and raise the stakes of politics.

V. REGIME SHIFTS AND SLIPPERY SLOPES: THE END OF MORALS REGULATION?

Every regime shift threatens a slippery slope. Once the

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Court calls a prior normative understanding into constitutional question, once-settled issues will be open for rethinking and relitigation. This includes not just obvious issues, but also collateral issues, because lawyers have every incentive to press any envelope that the Court might reopen. So *Brown* not only opened up two generations of litigation over racial segregation in public schools, but also triggered constitutional challenges to racial segregation of other state and municipal facilities and services, to state laws barring or criminalizing different-race sexual relations and marriage, to state and federal race-based remedial policies such as affirmative action in state employment and contracting, and so forth. And *Brown* inspired other groups to bring their own challenges to systematic state discrimination against them—not just women, but also nonmarital children and gay people in the 1960s and 1970s, elderly folks and people in poverty in the 1970s and 1980s, people with disabilities in the 1980s and 1990s, and others sure to come.

This phenomenon inspired Justice Scalia's charge that *Lawrence* would mean the end of all laws regulating public morals—or at least those that clash with the mores of five Justices. The following morals laws are now dead, Scalia opined: laws criminalizing fornication, adultery, incest, obscenity, bestiality, prostitution, and masturbation(!).[205] This is an old argument. In the United Kingdom a generation ago, Lord Patrick Devlin assailed the Wolfenden Report's recommendation that consensual sodomy be decriminalized with the argument that one of the chief ends of government is to regulate social morality.[206] His Lordship worried that if consensual sodomy were deregulated, there would be no neutral reason not to decriminalize other reprehensible behaviors such as adultery, bestiality, incest, cockfighting, and fornication.[207]

Is *Lawrence* the end of morals legislation in the United States? Don't believe it. England did not fall down Lord Devlin's slippery slope after it decriminalized consensual sodomy in

205. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2490 (2003) (Scalia, J., dissenting) (arguing that laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are "sustainable only in light of *Bowers*' validation of laws based on moral choices"); *id.* at 2495 (same charge as to "laws against fornication, bigamy, adult incest, bestiality, and obscenity"); *id.* at 2496 (same charge as to laws against adultery, fornication, adult incest, and same-sex marriage).

206. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1968).

207. *See id.* at 1–25.

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1967,[208] and there is no reason the United States will fall down Scalia's slipperier slope. *Lawrence* does, however, clarify the constitutional status of morals laws, and the academic debate will clarify their status even more. Consider three different, but complementary, ways of thinking about the Devlin-Scalia criticism.

One response to this criticism is libertarian. A distinguished body of moral philosophy maintains that the state cannot restrict important liberties of its citizens just because other citizens disapprove of their exercise. The state has no moral or political authority to restrict such important liberties, except when their exercise tangibly harms third parties.[209] *Lawrence* might be read to establish such a strong libertarian baseline for state regulation of sexual activities.[210] That is a principle that links *Lawrence* comfortably with *Griswold*, *Eisenstadt*, and *Roe*. In her commentary on *Lawrence*, Professor Suzanne Goldberg maintains that Supreme Court majorities in the last 100 years have almost never sustained state regulation of morality without some credible evidence that assertedly immoral conduct harmed third parties.[211]

Indeed, Professor Goldberg's analysis of *Lawrence* and previous cases suggests that the Devlin-Scalia criticism is not so much wrong as it is obsolete—and obsolete before Lord Devlin

208. Sexual Offences Act 1967, c. 60 (Eng. & Wales).

209. *See, e.g.*, JOHN STUART MILL, *On Liberty*, *in* PREFACES TO LIBERTY 241 (Bernard Wishy ed., Beacon Press 1959) (1859) (presenting the classic statement of libertarian philosophy); JEREMY BENTHAM, *Paederasty (pts. 1 & 2)*, *reprinted in* 3 J. HOMOSEXUALTY 383 (Louis Crompton ed., 1978) *and* 4 J. HOMOSEXUALITY 91 (Louis Crompton ed., 1978) (1785) (arguing against state regulation of consensual sodomy because it limits the pleasure available to sodomites without preventing harm to third parties); *see also* H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963) (responding to Lord Devlin with a mild version of Mill's libertarian philosophy); POSNER, *supra* note 53 (taking a pragmatic libertarian approach to America's many sex laws).

210. Some of the language of Justice Kennedy's opinion has a whiff of Mill. *E.g.*, *Lawrence*, 123 S. Ct. at 2484 (contrasting sodomy between consenting adults in the home with other conduct having third-party effects—rape, sex with minors (who cannot consent), public sexual conduct (that would harm captive audiences)). Randy Barnett reads *Lawrence* to encode Mill's libertarian philosophy within the Due Process Clause, a reading disputed by Dale Carpenter. *Compare* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution*: Lawrence v. Texas, *in* CATO SUPREME COURT REVIEW 2002–2003 21, 33–37, 39 (James L. Swanson ed., 2003), *with* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1148–70 (2004).

211. *See* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1261–83 (2004).

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rendered it. The Supreme Court's reasoning in morals-regulation cases closely tracks Max Weber's famous theory about what distinguishes a modern society from a premodern one.[212] What marks the transition from premodern to modern law and society is a movement from enforcement of status distinctions through regulation of status-expressing conduct toward instrumentalist regulation of conduct because of its consequences for other people or the public.

For example, one staple of premodern thinking is that it is very important to reaffirm the different statuses of being male and being female by adopting legal regulations of nonconforming dress and conduct. So traditionalist societies actually impose legal penalties on women and men who transgress sometimes quite complicated dress rules. Modern society can have morals legislation just as premodern society can, but it has to be justified along socially instrumental lines. For example, American cities and states have traditionally made it a crime to cross-dress.[213] Although originally adopted as expressions of a biblical or natural law philosophy, these laws were rejustified and enforced in the twentieth century as a means of policing deviant behavior by gay men and, especially, lesbians. That instrumentalist justification collapsed after Stonewall, and one jurisdiction after another repealed its cross-dressing laws or saw them invalidated by courts.[214]

Although cross-dressing laws have died in modern America, most other morals regulations have survived because they have been modernized.[215] Under premodern premises, a father's sexual assault on his daughter is wrongful because it violates

212. *See* 3 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 998–1002 (Guenther Roth & Claus Wittich eds., 1968). For applications of Weber's ideas, see ROSEMARY PRINGLE, SECRETARIES TALK 85–89 (Verso 1989) (1988); ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977).

213. *See* ESKRIDGE, GAYLAW, *supra* note 14, at 338–41. Cross-dressing regulations are classic premodern legal forms. *See, e.g.*, Deuteronomy 22:5 (stating that cross-dressing is "abhorrent to the Lord").

214. *See* ESKRIDGE, GAYLAW, *supra* note 14, at 27–29, 111, 338–41 (detailing the rise and fall of cross-dressing laws).

215. *See* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000) (showing the modernization and sedimentation of justifications for antigay status rules); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (arguing that traditional status categories can survive and even prosper because their justifications are modernized).

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the natural law (or God's law) rule of no sex outside of marriage. In the modern era, this conduct is even more deeply immoral, not because it is contrary to natural law, but rather because it has catastrophic effects on a particularly vulnerable third party. Under premodern premises, a husband's adultery is wrongful because it is a betrayal of the natural law (God's) institution of marriage. In the modern era, this justification has taken a back seat to the notion that adultery violates the promise the husband made to remain faithful to his wedded wife. Notwithstanding this modernized justification, however, adultery is only a crime in twenty-five states, and usually a misdemeanor in those jurisdictions.[216]

So the list of morals laws that would fall under a strongly libertarian reading of *Lawrence* is shorter than Justice Scalia says. Even bestiality laws might be sustained under a libertarian philosophy. Under my updated Weberian theory, the Court would eschew or downplay a rationale emphasizing how disgusting sex with animals is to the reasonable American and would emphasize some instrumental rationale. Some studies suggest that bestiality is linked to sexual assault on children and, if believed, that could be a respectable modern rationale.[217] My point is not that bestiality laws should be upheld (I really don't care). Rather, it is that such laws can be and would be defended on libertarian grounds that would be admissible even under Justice Scalia's broad reading of the *Lawrence* majority.

A second way to respond to Justice Scalia is substantive. The state can have morals legislation, but it cannot condemn or criminalize conduct that is deeply moral to many productive Americans. More than forty years ago, in a pre-*Griswold* contraception case, Yale Professor Fowler Harper suggested to the Supreme Court that sexual pleasure is an important end in itself, and frustration of one's preferred sexual outlet, by the

216. ESKRIDGE & HUNTER, *supra* note 62, at 100 & n.i (listing state laws as of 2003).

217. For studies providing a tentative empirical link between sexual abuse of animals and sexual assault generally, see William M. Fleming et al., *Characteristics of Juvenile Offenders Admitting to Sexual Activity with Nonhuman Animals*, 10 SOC'Y & ANIMALS 31, 36–37 (2002); Robert K. Ressler et al., *Murderers Who Rape and Mutilate*, 1 J. INTERPERSONAL VIOLENCE 273, 277–78 (1986). *See also* Carol J. Adams, *Bestiality: The Unmentioned Abuse*, THE ANIMALS' AGENDA Nov./Dec. 1995, at 29 (finding the zoophile's view of the world is similar to that of the rapist and child abuser); Carol J. Adams, *Bringing Peace Home: A Feminist Philosophical Perspective on the Abuse of Women, Children, and Pet Animals*, HYPATIA Spring 1994, at 63 (noting that child abusers may abuse animals to enhance the abuse of child victims).

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state or otherwise, is psychologically harmful to the individual as well as the family.[218] "'[W]hile in the lower animals sexual pleasure is primarily a means to an end, in human beings it is not only a means to an end but also a very important end in itself,'" and suppressing sexual pleasure through a regimen of continence "'is harmful to the personality'" and even risks emotional turmoil that gives rise to "'pathological expression.'"[219]

A fundamental feature of the LGBT politics of recognition is the notion that homosexual intimacy is a human good, meaningful to gay people for the same reasons that penile-vaginal (and other forms of) intercourse are meaningful to straight people.[220] I think this proposition is a defensible and indeed correct corollary to Professor Harper's advice a generation earlier. But *Lawrence* does not, and should not be read to, embrace this excellent moral point. Justice Kennedy's opinion offers Lawrence and Garner "respect for their private lives"[221] and affirms their freedom to enter into a "personal bond" that entails sexual intercourse.[222] But that is as far as he goes. The theme of his opinion is *tolerance* of private homosexual intimacy and not *equivalence* of such intimacy with the intimacies of marriage or even heterosexual intimacies outside of marriage.[223]

Given the current normative equilibrium in the United States, Justice Kennedy made the right call, one that gay people can understand and accept. Middle America can accept that homosexuality is a tolerable variation from the "norm," namely heterosexuality. To affirm that norm and render it a constitutional floor lowers the stakes of politics for gay people, who can no longer be jailed for their private activities or treated as open

218. *See* Brief for Appellants at 29–31, Poe v. Ullman, 367 U.S. 497 (1961) (1960 Term, No. 60) (harm of sexual abstinence to the individual); *id.* at 31–33 (harm to family life).

219. *Id.* at 29–30 (quoting Karl Menninger, *Psychiatric Aspects of Contraception*, 7 BULL. MENNINGER CLINIC 36 (1943)).

220. *See* CARLOS BALL, THE MORALITY OF GAY RIGHTS 4 (2003) (noting that the gay rights movement is increasingly seeking societal recognition and support, and not merely to be left alone); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 331–36 (1996) (drawing on this idea as a response to Lord Devlin); *see also* Sandel, *supra* note 163, at 534–38 (discussing the substantive claim that homosexual intimacy, like heterosexual intimacy, is a good).

221. Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).

222. *Id.* at 2478.

223. *See id.* at 2484 ("The right to liberty under the Due Process Clause gives [Lawrence and Garner] the full right to engage in their conduct without intervention by the government.").

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outlaws by the state. To affirm that norm, without seeking to elevate homosexuality to the same normative level as heterosexuality, is a signal to traditionalists that their core values and lifestyles should not be threatened.[224] The further, and implicit, message of Justice Kennedy's opinion is that it is up to LGBT people and their normative politics of recognition to move public opinion from the tolerable variation norm to the norm that homosexuality is a benign variation (and there is no single norm for sexual orientation).[225]

A third way to respond to Justice Scalia is to focus on social consensus. Courts might evaluate statutes that limit people's freedom to engage in conduct that they enjoy more leniently if it appears that most Americans still consider the regulated conduct morally harmful. Conversely, the same kind of statutes would fall if it appears that Americans no longer consider the regulated conduct morally harmful. So the Justices may have been influenced by objective indications as to how successful the LGBT rights movement had been in persuading neutral observers that homosexual sodomy was not such terrible conduct that it ought to be a crime.[226] As Justice Kennedy emphasized, all but thirteen states had repealed their consensual sodomy laws by 2003, and courts abroad and even in our nation's most traditionalist jurisdictions had found consensual sodomy to be a constitutionally protected liberty.[227]

Indeed, such a finger-to-gauge-the-winds-of-change approach suggests a way to reconcile *Hardwick* and *Lawrence*. In 1986, when *Hardwick* was handed down, the political signals

224. The strategy of the dissenting opinion was to announce that, in fact, the majority was raising the stakes of politics for traditionalists: Today the "homosexuals" get out of jail; tomorrow they will be legally wed. *Id.* at 2498 (Scalia, J., dissenting). This charge was wrong as a matter of fact, and it was unproductive as a matter of the Court's institutional legitimacy. That the Chief Justice of the United States joined such a provocative dissent is unfortunate. (Contrast Justice Thomas's sober and responsible dissent. *Id.* at 2498 (Thomas, J., dissenting).)

225. *See id.* at 2484 ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to express.").

226. In Eighth Amendment cases, the Court has relied on state and even foreign statutory trends toward mercy, as a strong reason to reevaluate the application of the death penalty to certain classes of defendants. *See* Atkins v. Virginia, 122 S. Ct. 2242, 2248–50 (2002) (considering the application of the death penalty to mentally disabled defendants); Thompson v. Oklahoma, 487 U.S. 815, 826–31 (1988) (juveniles).

227. *Lawrence*, 123 S. Ct. at 2481–83 (citing cases).

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were much more mixed. Twenty-four states still had consensual sodomy laws, as did the District of Columbia.[228] Indeed, in 1981 the District had repealed its consensual sodomy law as part of a modernization of its sex crime laws—but the reform had been assailed by the Reverend Jerry Falwell's Moral Majority and by the Roman Catholic Bishop of Washington, James Hickey.[229] Arguing that the reform law would promote immoral homosexuality, Falwell and Hickey stampeded the U.S. House of Representatives to veto the District's law by a bipartisan 281-119 vote.[230] Only one state (Wisconsin) deregulated consensual sodomy in the decade after that House action.[231] Thus, the *Hardwick* Court might have reasonably believed that there was a lot of support for consensual sodomy laws in the 1980s—a belief that would not have been reasonable in 2003.

So social movements reemerge as central, to the extent that they actually change social norms in the country. Laws against fornication were dead letters before *Lawrence*. In the wake of the sexual revolution of the 1960s, most Americans are sodomites and fornicators as well (many are both). Like consensual sodomy laws, laws against fornication have dried up at the state level and are almost never enforced against consenting adults in the privacy of the home. If they were not already unconstitutional under *Eisenstadt*, they surely are after *Lawrence*.

The foregoing three ways of responding to the Devlin-Scalia position not only undermine the notion that *Lawrence* is the constitutional death of all morals regulations, but also suggest how those regulations should be evaluated. Recall the three principles at the core of the Fourteenth Amendment that inform the jurisprudence of tolerance: (1) the rule of law, with particular attention to the coherence of a policy or law with

228. Bowers v. Hardwick, 478 U.S. 186, 193–94 (1986), *overruled by Lawrence*, 123 S. Ct. at 2472.

229. *See* 127 CONG. REC. 22,762–63 (statement of Rep. Philip M. Crane) (reading letter from Archbishop Hickey expressing that the D.C. legislation "weakened" the "fabric of society"); *id.* at 22,768 (statement of Rep. McKinney) (quoting a *Washington Post* editorial citing Reverend Jerry Falwell as calling the D.C. act "perverted").

230. *Id.* at 22,770, 22,778–79 (Oct. 1, 1981) (roll call vote on House Resolution 208). Among those voting for the Resolution were Representatives Richard Cheney of Wyoming, Geraldine Ferraro of New York, Richard Gephardt of Missouri, Newt Gingrich of Georgia, Albert Gore of Tennessee, and Steve Gunderson of Wisconsin. *Id.*

231. 1983 Wis. Laws 17 § 5.

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other policies or laws today (and not just the distant past); (2) the libertarian presumption and the harm principle; and (3) the rule against class legislation, with particular attention to whether a social movement has successfully called into question a traditional moral rule.

These constitutional principles and responses to Devlin-Scalia can be synthesized into doctrinal variables—features of a liberty-infringing policy that render it more or less constitutionally vulnerable under the Fourteenth Amendment. So a morals law that prohibits conduct that (1) is no longer widely criminalized and (2) does not seem to impose harm on third parties but (3) is important to a coherent and well-organized social group, is most constitutionally objectionable. For the reasons suggested above, fornication easily fits within this unregulable core: Most states have decriminalized it, there is virtually no evidence of third-party harms, and a whole generation (the baby boomers) considers the right to fornicate important to their lives, or formative experiences in their youths. Masturbation is an even easier call from Scalia's list, as it is not a crime anywhere in the United States, and it does not harm anyone.[232]

Conversely, laws criminalizing conduct that (1) is still a crime in a large majority of states, (2) demonstrably harms third parties or the community, and (3) has not become the focus of a social movement, are easy calls in the other direction—the state has substantial freedom to criminalize or regulate. Most of the items on Scalia's list fall within this category of currently permissible state regulation: adultery, which violates a promise of fidelity and often imposes reliance and other costs on the innocent spouse; public prostitution, which remains universally regulated and is associated with nuisances of various sorts; child pornography, which is universally regulated and has properly been upheld on the ground that participation in it harms children; and incest involving minors, which is universally regulated and has not become the focus of a social movement. By the way, since 1900, most morals regulations have been laws protecting children against a variety of sexual knowledges and experiences.[233] One may debate the wisdom of

232. *See* Geoffrey P. Miller, *Law, Self-Pollution, and the Management of Social Anxiety*, 7 MICH. J. GENDER & L. 221, 261–89 (2001) (describing the cultural and legal history of masturbation regulation).

233. *See, e.g.*, Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383 (1988) (discussing a Virginia law criminalizing the commercial display of sexually explicit materials in a manner whereby juveniles could peruse or examine

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this wide array of laws, and many of them have proven vulnerable under the First Amendment,[234] but neither *Lawrence* nor the jurisprudence of tolerance poses any constitutional threat to them.

The hardest calls are some of the adult incest cases, including sex between first cousins and siblings by affinity (marriage) rather than blood. Although adult incest between siblings is criminal almost everywhere, many states do not include siblings by affinity, and most do not make it a crime for first cousins to have sex.[235] If the reported cases are any guide, these statutes are almost never enforced in cases involving consensual intercourse. The harm of adult incest seems speculative but plausible: If close relatives (cousins) or people raised together (siblings by affinity) could engage in sex once they became adults, the family as a sexually "safe" place would be undermined. On the other hand, there are none of the collateral consequences for adult incestophiles that *Lawrence* found troubling for homosexual sodomy laws. Additionally, no social movement has formed to persuade America that adult incest is okay. In large part because the social and normative stakes of adult incest among cousins or siblings by affinity are so low, *Lawrence* and its (or my) jurisprudence of tolerance do not at this time require that even these statutes violate the Fourteenth Amendment.

VI. *LAWRENCE* AND HOMO EQUALITY

Justice Scalia's slipperiest slope—and his biggest fear—is that *Lawrence* now requires the Court, and the nation, to swallow the entire "homosexual agenda."[236] That agenda includes service of openly gay or bisexual Americans in the armed forces

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them).

234. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 827 (2000) (holding a statute requiring that television channels "primarily dedicated to sexually oriented programming" be fully scrambled or blocked during the day, when children could likely view them, as unnecessarily restrictive content-based speech regulation in violation of the First Amendment).

235. *See* Martha Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21, 26–29 (1993); Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. (forthcoming 2004) (post-*Lawrence* analysis); Christine McNiece Metteer, *Some "Incest" Is Harmless Incest*, 10 KAN. J.L. & PUB. POL'Y 262 (2000) (arguing that laws denying the right to marry to adults related by affinity may be constitutionally suspect).

236. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2496–97 (2003) (Scalia, J., dissenting).

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and state recognition of same-sex marriage.[237] I think that the LGBT rights movement will someday persuade most Americans that these gay-friendly reforms represent good, and not just tolerable, public policy. But the Supreme Court in *Lawrence* did not create a *constitutional* regime that goes this far. With due respect to Justice Scalia's excellent powers of analysis, he is being more provocative than persuasive in asserting that *Lawrence* logically or inferentially requires open gays in the military and same-sex marriage.

I would be the first to say that the case for same-sex marriage is a normatively compelling one, as excluding same-sex couples is a hard-to-justify discrimination.[238] But the case for same-sex marriage is not one that the jurisprudence of tolerance will now impose on all the states as a constitutional matter. Even if Massachusetts starts issuing marriage licenses to same-sex couples in May 2004, the other forty-nine states and the District of Columbia still limit *marriage* to one man and one woman. Thirty-eight states have statutes or constitutional amendments barring recognition in those states of same-sex marriages validly entered elsewhere.[239] Most Americans would be disturbed by recognition of same-sex marriages in their states, and for many Americans the limitation of marriage to people of different sexes is at the core of their religious identi-

237. *See id.*

238. *See* CHESHIRE CALHOUN, FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT 107–15 (2000); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 87–122 (1996); MORRIS B. KAPLAN, SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP AND THE POLITICS OF DESIRE 207–38 (1997); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1872, 1930–42 (1997); Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 257–65 (1998).

239. States with same-sex marriage nonrecognition statutes, as of January 2004, are (with the dates of enactment): Alabama (1998), Alaska (1996), Arizona (1996), Arkansas (1997), California (2000), Colorado (2000), Delaware (1996), Florida (1997), Georgia (1996), Hawaii (1998), Idaho (1996), Illinois (1996), Indiana (1997), Iowa (1998), Kansas (1996), Kentucky (1998), Louisiana (1999), Maine (1997), Michigan (1996), Minnesota (1997), Mississippi (1997), Missouri (1996), Montana (1997), Nebraska (2000), Nevada (2002), North Carolina (1996), North Dakota (1997), Ohio (2004), Oklahoma (1996), Pennsylvania (1996), South Carolina (1996), South Dakota (1996), Tennessee (1996), Texas (1973), Utah (1995), Virginia (1997), Washington (1998), and West Virginia (2000). National Gay and Lesbian Task Force, *Specific Anti-Same-Sex Marriage Laws in the U.S.*, *at* http://www.ngltf.org/downloads/marriagemap.pdf (Jan. 2004). Most of these states also have definition of marriage statutes, usually adopted in the same legislation.

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ties.[240] *Roe* was a more compelling case for constitutional intervention on the part of the Supreme Court. My critique that *Roe* raised rather than lowered the stakes of politics would apply with even greater force to a Supreme Court decision requiring same-sex marriage in 2004.

Does *Lawrence* then have no implications for LGBT equality rights? Return one final time to the three goals of the Fourteenth Amendment, rule of law (coherence), the libertarian presumption, and the anti-caste principle. These three goals can be applied to various antigay discriminations through the lens of tolerance now required by *Lawrence*. A constitutional right to same-sex marriage is supported by the anti-caste principle, for lesbian and gay couples will not be fully equal citizens until they have the same choices for state recognition of their relationships that straight couples have. But the state's limitation of marriage to different-sex couples does not much implicate the liberty principle. The coherence principle cuts strongly against same-sex marriage at this time: Not only have the states traditionally not recognized same-sex unions as marriage, but no state does today, and there are few on the horizon.

So the case for same-sex marriage as a constitutional matter is powerfully debatable. Under such circumstances, the politics of tolerance strongly counsels that the Supreme Court do nothing for the time being. Either rejecting or endorsing the constitutionality of same-sex marriage bars would immediately raise the stakes of national politics. The reason is that the issue of same-sex marriage not only remains divisive, but divides in ways that cut to the core of people's identities.

Under these circumstances, the Court's best strategy is to leave the matter to the states, the famous laboratories of experimentation. Indeed, this is the strategy the Court took, with success, in the right-to-die case, *Washington v. Glucksberg*.[241] Although the Chief Justice's opinion for the Court rejected any constitutional right to die, five Justices took the position that the matter was not ripe for complete resolution and pronounced themselves open to future claims.[242] Meanwhile, the states are

240. DIDI HERMAN, THE ANTI-GAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 60–91 (1997).

241. 521 U.S. 702, 735–36 (1997).

242. Five Justices were open to a "constitutionally cognizable interest in controlling the circumstances of his or her imminent death," but felt that it was premature to decide one way or another in 1997. *Id.* at 736–38 (O'Connor, J.); *see id.* at 738–52 (Stevens, J.), 752–89 (Souter, J.), 789 (Ginsburg, J.), 789–

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free to recognize a right to die, and the experience from those states (and from abroad) will provide valuable information for other states and for the courts in future cases.

Like the right-to-die issue, same-sex marriage is an issue that would benefit from state experimentation. A great thing about federalism is that some states are open to gay people's politics of full recognition: Homosexuality is not just a tolerable variation, but is benign in the same way that race is—it ought to make no difference in the state's treatment of a person. Same-sex marriage has been the testing ground for this proposition. Prompted by a state supreme court decision, Vermont's legislature debated this issue in 2000 and revealed its population to be open to recognition of lesbian and gay unions.[243] In 2003, California extended its domestic partnership law to provide almost all the benefits and obligations of marriage to same-sex couples.[244] These states were providing something close to full and equal citizenship for lesbian and gay families, and they did so through the democratic process. Their experience will be instructive for other states considering the next step, one that Massachusetts is prepared to take in May 2004.

So the jurisprudence of tolerance does not give the nation same-sex marriage, but it does provide strong arguments against other antigay state discriminations. Consider a few:

1. Criminal Sentencing Discrimination. Kansas's criminal code makes it a very serious crime for anyone to have oral or anal sex with a minor who is 14–16 years old;[245] punishment for a first offense is 55–61 months in prison, with a range of 89–100 months for a second offense and 206–228 months for a third offense.[246] The state has a Romeo and Juliet exception to

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92 (Breyer, J.).

243. 2000 Vt. Acts & Resolves No. 91 (responding to *Baker v. State*, 744 A.2d 864 (Vt. 1999)). *See generally* WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 43–82 (2002) (detailing the *Baker* litigation and the legislative debates over the civil unions law).

244. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stats. 2586. Finding that same-sex couples form "lasting, committed, and caring relationships," *id.* § 1(b), the California Legislature extended almost all the rights, benefits, duties, and obligations of married spouses to registered domestic partners, *id.* § 4(a). There is a long transition period, so that current domestic partners can end their relationships if they do not welcome the new duties and obligations; the 2003 law goes into effect on January 1, 2005. *Id.* § 14.

245. KAN. STAT. ANN. § 21-3505(a)(2) (1995).

246. *Id.* § 21-3505(c) (severity level 3); KAN. STAT. ANN. § 21-4704 (Supp.

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this high level of punishment if the defendant is less than 19 years old, the age difference between the defendant and the partner is less than four years, the defendant and the partner are the only parties involved, and the teenagers are of the "opposite sex."[247] There is no Romeo and Mercutio exception.

Under the Romeo and Juliet exception, punishment for a first or second offense is presumptively probation; punishment for a third offense is no more than fifteen months in prison.[248] Eighteen-year-old Matthew Limon performed oral sex on a fifteen-year-old male partner in a residential school for developmentally disabled youth.[249] The state stipulated that the oral sex was consensual but refused Limon the benefit of the Romeo and Juliet penalties because the partners were of the same sex.[250] Limon was sentenced to 206 months (over seventeen years) in prison, followed by 60 months (five years) of post-release supervision.[251] A day after *Lawrence*, the Supreme Court vacated the Kansas appellate judgments upholding this sentencing disparity and remanded the case for reconsideration.[252]

Although the Kansas Court of Appeals has reaffirmed this discrimination,[253] *Lawrence* and its associated jurisprudence require that the sentencing disparity be overturned. The Romeo and Juliet rule represents a mercy exception to the steep sentences otherwise required for sex with minors. To limit the rule to heterosexual sodomy is a core violation of the Fourteenth Amendment. Like Kansas, a lot of states exempt teenager-teenager sex from their sex-with-minors laws. Few states, however, limit their exemptions to straights only.[254] So this is a novel and still-rare discrimination against gay people. The liberty consequences of the discrimination are significantly worse than those suffered by Messrs. Lawrence and Garner: They were in jail for a day; Limon will remain in prison for seventeen years. This is a steep price to pay for being gay. It is at least as

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2002).

247. KAN. STAT. ANN. § 21-3522 (Supp. 2002).

248. *Id.* § 21-3522(2) (severity level 9); *id.* § 21-4704.

249. State v. Limon, 83 P.3d 229, 232 (Kan. Ct. App. 2004).

250. *See id.* at 233.

251. *Id.* at 232.

252. Limon v. Kansas, 123 S. Ct. 2638 (2003).

253. *Limon*, 83 P.3d at 232.

254. One of the few laws limiting this kind of exemption to teenagers of different sexes is TEX. PENAL CODE § 21.11(b)(1) (Vernon 2003).

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deep an affront to gay people's equal citizenship as the Texas Homosexual Sodomy Law was.

Thus, much more than same-sex marriage bars and somewhat more than homosexual sodomy laws, Romeo and Juliet exceptions are strongly inconsistent with the principles and purposes of the Fourteenth Amendment, once that amendment's protections are viewed as applying fully to LGBT people. Judicial invalidation is warranted, and the jurisprudence of tolerance strongly suggests that this would be a productive and parsimonious use of the Court's political capital. These exceptions are relatively novel, and it is hard to imagine that even a fundamentalist Christian would find his identity implicated in maintaining this discrimination to the same extent that his identity is implicated in maintaining the same-sex marriage bar. The Court would not be raising the stakes of politics in the least by striking down the discrimination in *Limon*, and it would confirm the message of *Lawrence* in the context of teen sexuality.

2. Antigay Presumptions in Child Custody Cases. After she came out of the closet as an open lesbian, R.W. divorced her husband, D.W.W., in 1996. The divorce was acrimonious. The husband won custody of the couple's two minor children, and the Alabama trial judge restricted the mother's visitation to every other weekend and to the maternal grandparents' home under their supervision. The Alabama Supreme Court affirmed this humiliating order in *Ex parte D.W.W.*[255] One justification for the custody order was the trial judge's finding that R.W. was a bad mother. She and her partner were "active in the homosexual community," went to gay bars and a "homosexual church," and "openly display affection in the children's presence."[256] The judge also found that after R.W. commenced cohabitation with her female partner, the children "began using inappropriate and vulgar language and required psychiatric counseling."[257] The daughter started to lie and manipulate others.[258] Chief Justice Moore reasoned further:

> Even without this evidence that the children have been adversely affected by their mother's relationship, the trial court would have been justified in restricting R.W.'s visitation, in order to limit the children's exposure to their mother's lesbian lifestyle. . . . Restrictions such as

255. 717 So. 2d 793, 796 (Ala. 1998).
256. *Id.*
257. *Id.*
258. *Id.*

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> those at issue here are common tools used to shield a child from the harmful effects of a parent's illicit sexual relationships—heterosexual or homosexual. Moreover, the conduct inherent in lesbianism is illegal in Alabama. R.W., therefore, is continually engaging in conduct that violates the criminal law of this state. Exposing the children to such a lifestyle, one that is illegal under the laws of this state and immoral in the eyes of most of its citizens, could greatly traumatize them.[259]

Clearly, the reasoning and, probably, the judgment in *D.W.W.* cannot survive *Lawrence*. The invocation of the Alabama sodomy law to punish the lesbian mother is the kind of collateral effect that both Justices Kennedy and O'Connor found troubling in *Lawrence*.[260] One effect of *Lawrence* will be to press state judges away from sweeping antigay rhetoric such as that in *D.W.W.*, but many judges will nonetheless discriminate against lesbian parents. Post-*Lawrence*, their justification will have to rest upon findings that the lesbian parent is a bad mother. In *D.W.W.*, however, there was strong evidence that the lesbian was a pretty good mother, and a much better parent than the straight father. Dissenting justices in *D.W.W.* noted the "serious alcohol abuse and violence" of the father.[261] Among other escapades, the father totaled his car while driving drunk with his daughter in the car unrestrained by a safety belt, was charged on several occasions with domestic abuse, once closed his infant son in a clothes dryer, threatened to kill R.W. and the children, and was in financial default for some obligations toward his children.[262] The dissenting justices also charged that the majority ignored evidence that the children had excelled in school over the year and a half they were in their mother's custody, and that the mother's partner, a child guidance counselor, had spent many hours working with the daughter to improve her skills and learning abilities.[263]

Denying a lesbian mother custody over or, especially, visitation with her own children because of her sexual orientation is another core violation of the Fourteenth Amendment. To comply faithfully with that amendment, trial judges must focus on the best interests of the particular child, without any pre-

259. *Id.* (citations omitted).

260. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2486 (2003) (O'Connor, J., concurring in the judgment) (referring to antigay discrimination flowing from the Texas sodomy law in the fields of employment and family law); *cf. id.* at 2482 (opinion of the Court) (discussing generally the collateral consequences flowing from the sodomy law).

261. *D.W.W.*, 717 So. 2d at 797 (Kennedy, J., dissenting).

262. *Id.* at 797–98.

263. *Id.* at 798.

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sumption based on sexual orientation. One hopes that the Supreme Court will not have to take cases to enforce this obvious corollary of *Lawrence*. Most states have abandoned strong presumptions against custody by LGBT parents, and even states in the South (the most traditionalist region) have been moving in that direction.[264] This issue is one best left to state courts for the time being, with the assumption that they will internalize the lessons of *Lawrence*. If they do not, then the Supreme Court should intervene to protect the interests of children and their gay parents.

A harder issue is whether a trial judge can consider potential harms to the child based upon community negativity toward his lesbian or gay parent. This is not a permissible consideration when the negativity is racist in nature,[265] and in my view should ultimately not be a permissible consideration when homophobia is the source of the negativity. The jurisprudence of tolerance, however, would counsel against the Supreme Court reaching out aggressively on this issue. This is precisely the sort of issue that should be left to state courts to flesh out and debate for the time being, and state judges all over the country are increasingly willing and capable of handling these custody disputes in a neutral way.[266]

3. Employment Discriminations. Also questionable in the wake of *Lawrence* would be state and local government policies or practices discriminating against employing LGBT people as

264. For examples where southern appeals courts have overturned trial judge denials of custody or even restrictive visitations based, explicitly or inferentially, on a parent's bisexual or homosexual orientation, see *Taylor v. Taylor*, 110 S.W.3d 731, 739–40 (Ark. 2003), *Packard v. Packard*, 697 So. 2d 1292, 1293 (Fla. Dist. Ct. App. 1997), In re *R.E.W.*, 471 S.E.2d 6, 8–9 (Ga. Ct. App. 1996); Fulk v. Fulk, 827 So. 2d 736, 742 (Miss. Ct. App. 2002); McDonald v. McDonald, 850 So. 2d 1182, 1185 (Miss. Ct. App. 2002). *See also In re* Parsons, 914 S.W.2d 889, 894–95 (Tenn. Ct. App. 1995) (upholding trial court's decision to grant custody to a mother living with her partner).

265. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (overturning a Florida court's custody decision to remove a child from a racially mixed household).

266. In *Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000), for example, a Florida appeals court overturned a trial court order denying custody to a lesbian mother. The appellate court ruled that in order for a parent's sexual orientation to influence the custody decision, it must be shown that her conduct had "a direct effect or impact upon the children." *Id.* at 413. Citing and quoting *Palmore v. Sidoti*, 466 U.S. 429 (1984), the appeals court held that the trial court's reliance upon social stigma or societal prejudice in determining the best interests of the child was unfounded and inappropriate, because "the law cannot give effect to private biases." *Id.* (citing *Palmore*, 466 U.S. at 433).

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civil servants, police officers, and teachers. Some of these cases would be closer calls than the earlier examples. Consider *Shahar v. Bowers*.[267]

The Georgia Attorney General's office offered a job to Robin Brown, a top graduate of the Emory Law School.[268] Although she had indicated on her application form that she was planning to marry another woman, this detail did not come to the attention of Attorney General Michael Bowers (yes, the same guy) until after the offer of employment was made.[269] After her wedding, and her change of name to Robin Shahar, Bowers withdrew the offer, based only upon the "purported marriage between you and another woman. As the chief legal officer of this state inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper functioning of this office."[270] Shahar filed a constitutional lawsuit. Bowers defended his action on two grounds: the Supreme Court's precedents gave him a wide discretion to choose personnel who fit well with the needs of his office, and *Hardwick* provided a more than sufficient reason why a law enforcement office could not hire an openly lesbian attorney.[271]

Sitting en banc, the Eleventh Circuit upheld the discrimination. Dissenting judges argued that the discrimination was based solely on Shahar's sexual orientation (or, in the alternative, her protected First Amendment expression of her commitment to another woman) and therefore reflected the same kind of antigay "animus" that had been fatal in *Romer*.[272] Invoking *Hardwick* as important background context, the majority responded that it was reasonable for the Attorney General to interpret Shahar's same-sex marriage:

> [A]s having a realistic likelihood to affect her (and, therefore, the Department's) credibility, to interfere with the Department's ability to handle certain kinds of controversial matters (such as claims to same sex marriage licenses, homosexual parental rights, employee benefits, insurance coverage of "domestic partners"), to interfere with the Department's efforts to enforce Georgia's laws against homosexual sodomy, and to create other difficulties within the Department which

267. 114 F.3d 1097 (11th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1049 (1998).

268. *Id.* at 1100.

269. *Id.* at 1100–01.

270. *Id.* at 1101.

271. *Id.*

272. *Id.* at 1125 (Kravitch, J., dissenting); *id.* at 1126–27 (Birch, J., dissenting).

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would be likely to harm the public perception of the Department.[273]

Unlike *Limon* and *D.W.W.*, the role of *Bowers v. Hardwick* in supporting this discrimination is less direct. Neither the Attorney General nor the court said that Shahar was disqualified because she was a presumptive criminal. Instead, both said that she was disqualified because the public would lose confidence in the state's chief law enforcement office if it were widely known that an open lesbian was an employee there.[274] *Shahar* is a harder case than the earlier ones because the state is not invading Shahar's liberty as deeply and because of the public context, where federal courts defer to judgments of state officials. So there are good arguments for allowing the discrimination, even after *Lawrence*.

On the other hand, now that Georgia can no longer consider Robin Shahar a presumptive criminal, is it legitimate for the state to penalize her because some of its citizens continue to do so? Could the Attorney General have denied Shahar a job based upon his perception that the people of Georgia would lose confidence in an office staffed with Jews? Surely not. One might say, with Justice White, that antigay sentiment is more pervasive in Georgia than anti-Semitism, but I am dubious. Georgia was the situs for the most violent anti-Semitic incident in the United States of the twentieth century, the lynching of Leo Frank by a bigoted mob,[275] and my relatives in Atlanta report that anti-Semitic sentiments are still openly expressed in country clubs and boardrooms of that state. Also, the antihomosexual views Justice White attributed to Georgians were surely overstated. When the Georgia Supreme Court struck down its consensual sodomy law as a violation of the state constitution in 1998, there was scarcely a ripple of protests from traditionalists.[276]

Shahar remains a close case. I find more merit in the dissenters' approach, and *Lawrence* certainly provides them with additional support. In 1998, the Supreme Court denied Shahar's petition for certiorari, which I think was the best approach. For now, the issue of job discrimination, especially in law enforcement and education, is best handled by state courts and federal circuit courts applying *Romer* and *Lawrence*. In my

273. *Id.* at 1105 (majority opinion).

274. *Id.* at 1101.

275. *See* LEONARD DINNERSTEIN, THE LEO FRANK CASE (1968); ROBERT SEITZ FREY & NANCY THOMPSON-FREY, THE SILENT AND THE DAMNED (1988).

276. Powell v. State, 510 S.E.2d 18 (Ga. 1998).

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view, there is an emerging consensus that sexual orientation ought not be a relevant job criterion for either state or private employment. Once (or if) that consensus becomes clearer, the Supreme Court would then be well advised to settle the matter in favor of the antidiscrimination norm.

Constitutional Vulnerability of Specific Antigay Policies, USA, 2004

Policy	*Rule of Law (Novelty and Coherence)*	*Libertarian Presumption*	*Rule Against Class Legislation*	*Raising the Stakes of Politics?*	*Status under the U.S. Constitution*
Antidiscrimination Law Applied to a TFV Ass'n	Cuts against constitutionality	Cuts against	Cuts for	Cuts against	Unconstitutional (*Dale*)
Romeo and Juliet Exemption from Sex with Minors Criminal Law	Cuts against	Cuts against	Cuts against	Cuts against	Unconstitutional (*Limon*)
Presumption Against Child Custody by LGBT Parents	Cuts against	Depends on how court views best interests of child	Cuts against	Cuts weakly against	Unconstitutional (*D.W.W.*)
State Employment Discriminations	Weakly cuts for	Weakly cuts for	Cuts against	Cuts both ways for some jobs in some states	Moving toward Unconsitutional (*Shahar*)
Don't Ask, Don't Tell Military Policy	Weakly cuts for	Depends on how intrusively enforced	Cuts against	Cuts for	Not vulnerable now (Leave to Political Process)
Same-Sex Marriage Bar	Cuts for	Cuts both ways, but generally for	Cuts both ways, but increasingly against	Cuts for	Not vulnerable now (Leave to States)

The table on this page sums up the implications of *Lawrence* and its jurisprudence of tolerance for the most important remaining discriminations against LGBT people. The table's conclusions are provisional because several of the variables are

dynamic—they will change over time. Most obviously dynamic is the horizontal coherence feature of the rule of law: A policy coherent with other policies in the same and other jurisdictions today may not be coherent twenty years from now. For example, *Hardwick* was decided in a more defensible context for allowing consensual sodomy laws than *Lawrence* because half the states and the District of Columbia still had such laws in 1986, while at most fourteen states did in 2003.

The libertarian assumption contains a less obvious dynamic component: Whether there are third-party harms often depends critically on changing social understandings of the world. A generation ago, most Americans believed that "homosexuals" were more likely to molest children than heterosexuals.[277] In that social context, judges would inevitably be skeptical of leaving custody of children with lesbian or gay parents, because custody might be harmful to children. Traditionalists still trot out this justification for opposing such custody,[278] but social scientists have shown it to be a complete canard.[279]

The most dynamic element of the table is, of course, the judgment about whether Supreme Court intervention setting a constitutional floor will lower or raise the stakes of politics in the LGBT/TFV culture clash. In America today, an authoritative judicial decision either requiring or rebuffing same-sex marriage would raise the stakes of such politics, and that alone is reason for the Court to avoid decision. Twenty years from now, if public opinion has become more accepting of gay people

277. *See, e.g.*, ALBERT D. KLASSEN ET AL., SEX AND MORALITY IN THE U.S.: AN EMPIRICAL INQUIRY UNDER THE AUSPICES OF THE KINSEY INSTITUTE 178 tbl.7-7 (Hubert J. O'Gorman ed., 1989) (synthesizing a 1970 public opinion poll finding that over 70% of respondents strongly or somewhat agree with the statements that "[h]omosexuals try to play sexually with children if they cannot get a partner" and that "[h]omosexuals are dangerous as teachers or youth leaders, because they try to get sexually involved with children").

278. *See* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 865–66 & 866 n.180. *But see* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (collecting social science data that refute Professor Wardle's assertion that LGBT parents are more prone to molest their children than straight parents).

279. Straight males are the group most likely to molest children; the groups least likely to abuse them are lesbians and straight women; gay men fall somewhere in between, but openly gay men are also lowest risk in this regard. *Cf.* Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 41 (1994) (describing results from a study of the medical records of abused children indicating that the children were unlikely to have been abused by homosexuals).

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and the consensus norm is that homosexuality and heterosexuality are both benign traits, then same-sex marriage will be a constitutional given. So long as the country is not only intensely divided on the issue, but also divided along identity-constituting lines, this is not an issue the judiciary can resolve.

That same-sex marriage is irresolvable by the U.S. Supreme Court does not mean that state supreme courts cannot address it. The key variable is how much (if any) normative progress the LGBT rights movement has made in that jurisdiction. In *Goodridge v. Department of Public Health*,[280] the Massachusetts Supreme Judicial Court suggested that its citizens had reached that point. By postponing the effect of its judgment for six months, the Court invited those citizens to think about same-sex marriage and engage their legislators in that debate. As a law professor, I have no useful judgment as to whether the court's perception was accurate, but its approach was procedurally correct. My one prediction is that when same-sex marriage comes to Massachusetts, it will not be the Armageddon that opponents fear, nor will it be the great social upheaval that many proponents espouse. The reason is that by that time it will be clear that local norms have accommodated the complete equal citizenship of LGBT people.

280. 798 N.E.2d 941 (Mass. 2003) (invalidating the same-sex marriage bar under the Massachusetts Constitution but postponing the effect of the judgment for 180 days so that the legislature can take appropriate action).

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