What *Lawrence* Should Have Said: Reconstructing an Equality Approach

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Abstract

Despite being widely hailed as "the Brown *of the gay rights movement,"* Lawrence v. Texas *has had remarkably little impact on subsequent lesbian and gay rights litigation. This Comment begins by looking at why* Lawrence *has not had the substantial impact on subsequent same-sex marriage litigation that many hoped (and others feared) it would. Next, it describes some of the dangers and limitations that characterize the* Lawrence *opinion, apart from its relative inapplicability to subsequent gay rights litigation. The Comment then offers a discussion of equal protection theory and situates an alternative, sex equality approach to* Lawrence *in equal protection doctrine. The Comment contends that the proposed, alternative equal protection resolution to* Lawrence *could illuminate contemporary litigation over same-sex marriage by highlighting the centrality of sex inequality to lesbian and gay oppression. In conclusion, the Comment argues that while a fertile opportunity was lost when the* Lawrence *Court avoided issues of sex discrimination (and as a result, cases over same-sex marriage are mired in a impoverished discourse), the chance to develop a substantive discussion of overlooked sex equality issues in same-sex marriage litigation still exists and should be aggressively pursued.*

INTRODUCTION

Lawrence is best interpreted as an opening bid in a conversation between the Court and the American public. The legal authority of *Lawrence* will emerge as that conversation unfolds, both because of

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> changes in constitutional culture and because of the progressive integration of *Lawrence* into the institutional practices of constitutional adjudication . . . . Judges and lawyers will continue to appeal to the autonomy of constitutional law, however, precisely to the extent that they believe that an independent and determinate constitutional law is the necessary foundation for judicial authority to constrain democratic legislation.[1]
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> Robert C. Post

In *Lawrence v. Texas*, the United States Supreme Court struck down a Texas same-sex sodomy prohibition and with it the remaining sodomy laws across the country. *Lawrence* invalidated these laws for violating individuals' rights under the Due Process Clause of the Fourteenth Amendment. Relying heavily on concepts of liberty and autonomy, the Court extended existing protection from governmental intrusion, punishment, and constraint to same-sex sexual activity. Although heralded as the lesbian and gay rights movement's *Brown v. Board of Education*,[2] *Lawrence* has had almost no

1. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11 (2003).

2. The association of *Lawrence* with *Brown* has been widespread and wide-ranging. The comparisons are based on different assumptions about, among other things, the efficacy and legacy of *Brown*, the rhetorical impact of the decisions, and their roles in generating backlash or counter-mobilization. *See* Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 717 (2005) ("*Lawrence* can be read as the *Brown* decision for gay rights: it represents an attempt by the Court to enshrine the rights of gays in the name of a collective sense of justice and dignity."); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004) [hereinafter Franke, *Domesticated Liberty*]; Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 237 (2006) ("[*Lawrence*] has been widely referred to in the lesbian and gay legal community as 'our *Brown*,' referring to the landmark 1954 desegregation decision *Brown v. Board of Education*. By this, of course, it is meant that *Lawrence* would usher in a civil rights revolution for gay men and lesbians in a fashion equivalent to the civil rights movement inaugurated by *Brown*."); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1138 (2004) ("Is *Lawrence* the end of antigay oppression? Of course not. Also like *Brown v. Board of Education*, its full implementation is likely to proceed at less than warp speed."); Michael J. Klarman, *Brown* and *Lawrence* (and *Goodridge*), 104 MICH. L. REV. 431, 451 (2005) ("[J]ust as *Brown* led inexorably, albeit gradually, to a presumptive judicial ban on all racial classifications, so is *Lawrence* likely to lead eventually to a presumptive judicial ban on all classifications based on sexual orientation."); Stephen Reinhardt, *Legal & Political Perspectives on the Battle over Same-Sex Marriage*, 16 STAN. L. & POL'Y REV. 11, 11 (2005) ("With sweeping rhetoric that is unusual for the conservatives who dominate today's Supreme Court, Justice Kennedy signaled that Americans need not lose their privacy rights when they come out of the closet. *Lawrence v. Texas* may well prove to be the *Brown v. Board of Education* of the gay rights movement. But that is far from certain, and the future is always hard to predict."); A. Jean Thomas, *The Hard Edge of* Kulturkampf*: Cultural Violence, Political Backlashes and Judicial Resistance to* Lawrence *and* Brown, 23 QUINNIPIAC L. REV. 707, 708 (2004) ("[I]n removing the most damaging badge of modern 'queerdom,' the *Lawrence* court fueled a judicial, political, and legislative backlash that is strikingly similar to the backlash that followed *Brown*."); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1894-95 (2004) ("It seems only fitting, if perhaps late in the day, that *Lawrence v. Texas* should have been handed down just a year before the fiftieth anniversary of *Brown v. Board of Education*. For when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of

discernable impact on subsequent same-sex marriage litigation. I argue that both the litigants' and the Court's unwillingness to embrace an equal protection rationale to invalidate Texas's law against same-sex sodomy has blunted the case's potential to advance lesbian and gay equality. Before offering an alternative basis on which *Lawrence* should have been decided, this Comment will consider the dangers, limitations, and implications of the privacy strategy that prevailed. I will then argue that a sex equality approach to *Lawrence* should have been adopted by the Court. A sex equality approach is preferable because it is free of the hazards of the privacy rationale; moreover, it offers greater potential to advance lesbian and gay rights in future struggles by beginning a legal discourse that addresses the foundations of lesbian and gay inequality, a discourse directly applicable to the current controversy over same-sex marriage.

I
LITIGATING SODOMY

> Litigation is an elite, class-based strategy for change. It is premised on the notion that it is easier to persuade similarly educated and wealthy lawyers who happen to be judges of certain liberal principles than to organize everyday citizens. That might be true but without broad citizen support change will not occur. Litigation substitutes symbols for substance.[3]
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> Gerald N. Rosenberg

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gay and lesbian America."); Danaya C. Wright, *The Logic and Experience of Law:* Lawrence v. Texas *and the Politics of Privacy*, 15 U. FLA. J.L. & PUB. POL'Y 403, 403 (2004) ("The U.S. Supreme Court's June 2003 decision in *Lawrence v. Texas* may prove to be one of the most important civil rights cases of the twenty-first century. It may do for gay and lesbian people what *Brown v. Board of Education* did for African-Americans and *Roe v. Wade* did for women."); Phong Duong, Note, *A Survey of Gay Rights Culminating in* Lawrence v. Texas, 39 GONZ. L. REV. 539, 540 (2004) ("*Lawrence v. Texas* has the potential to do for gay men and lesbians what *Brown v. Board of Education* did for African-Americans and *Frontiero v. Richardson* did for women, that is, to make gay men and lesbians equal to heterosexuals in the eyes of the law and, through influence, the eyes of society."); Nancy Gibbs, *A Yea for Gays*, TIME, July 7, 2003, at 38. ("Gay-rights activists eclared *Lawrence* a victory on the scale of the *Brown v. Board of Education* decision . . . ."); E.J. Graff, Op-Ed., *The High Court Finally Gets It Right*, BOSTON GLOBE, June 29, 2003, at D11 ("*Lawrence* is our *Brown v. Board of Education*, declaring us full citizens, entitled to all the rights and freedoms held by our siblings, colleagues, and friends."); Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine), at 50 ([*Lawrence* is] "the 2003 decision striking down sodomy laws, which many liberals consider the *Brown v. Board of Education* of the gay rights movement . . . ."). One important parallel, of course, is that *Brown* evaded the question of interracial marriage as *Lawrence* did that of same-sex marriage. Two general observations on the comparison of *Lawrence* to *Brown* are worth noting. First, the majority of such analogies are made to illustrate the great social change *Lawrence* will bring about. Second, for all the harm and discrimination they visited upon lesbians and gay men, it seems clear to me that sodomy laws did not hold the same place in their lives as state-enforced segregated education did in the lives of blacks before *Brown*.

3. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 813 (2006) (footnote omitted).

Although far from the only source of disadvantage and disempowerment for lesbian women and gay men in modern America,[4] law plays an important role in expressing and reinforcing heteronormativity, which subordinates lesbians and gays along with those perceived to be lesbian or gay.[5] In the United States today, gay men and lesbian women can legally be denied citizenship, and, in certain jurisdictions, employment or housing; excluded from serving in their own country's armed forces; deprived of custody of or contact with their children; denied a legal family with a partner of their choice; and murdered with impunity (where the gay panic defense to a homicide prosecution remains viable).

A. Sodomy Laws Prior to Lawrence

Until recently, gay men and lesbian women could also be prosecuted for sex acts that are legal or effectively permitted for others.[6] Sodomy laws took a variety of state-specific forms, usually varying in the acts they proscribed, the existence of exemptions for married couples, the inclusion of provisions regarding bestiality, and their specificity to homosexual (same-sex) conduct or

4. In contemporary America, sexual orientation is primarily defined by the sex object choice; that is, the sex of the person(s) one desires. However, it should be mentioned that to discuss "gays" or "lesbians" raises unsettled issues about the definition of the phenomenon in question. Sexuality in much of Western civilization was defined not by sex object choice, but by the distinctions of active/passive or penetrative/receptive (that is, defined by gender, as the real cleavage was between active men and penetrated/passive women *and men*). The modern categories of homosexuality, heterosexuality, gay, lesbian, straight, etc. are historical, social, and cultural constructs, and contain significant ambiguity even in twentieth and twenty-first century America. *See* Michel Foucault, The History of Sexuality (Robert Hurley trans., Pantheon Books 1978); Forms of Desire: Sexual Orientation and the Social Constructionist Controversy (Edward Stein ed., 1990); David M. Halperin, One Hundred Years of Homosexuality and Other Essays on Greek Love (1990); Jonathan Ned Katz, Gay/Lesbian Almanac (1983); George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58-59 Salmagundi 114 (1982). Although our modern categories of sexuality are dictated primarily by sex-object choice, they are multidimensional and generally thought to involve (1) same-sex sexual desire, (2) same-sex sexual behavior, (3) same-sex identification, or some combination of the three. *See* Edward O. Laumann et al., The Social Organization of Sexuality 283-320 (1994). The inherent ambiguity in these categories and individual perceptions of what defines (sexual) identity impacts how "lesbian" and "gay" litigation proceeds, how courts respond to such litigation, and the relative effectiveness of the strategies. However, it is important to remember that while "lesbian," "gay," or "bisexual" are categories/identities without fixed and settled meaning, this in no way prevents people whose primary passionate, sexual and intimate relationships and identifications are with members of their own sex from being stigmatized, persecuted, and denigrated.

5. Cathy Cohen defines "heteronormativity" as "both those localized practices and those centralized institutions which legitimize and privilege heterosexuality and heterosexual relationships as fundamental and 'natural' within society." Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ 437, 440 (1997).

6. For a concise introduction to the history of sodomy laws in America, see Brief of Professors of History as Amici Curiae Supporting Petitioners at 10-19, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

applicability to both heterosexual and homosexual sodomy.[7] Whether specific to same-sex conduct or applicable to opposite-sex conduct as well, sodomy laws have been used to justify a host of legal discriminations against lesbians and gays.[8] The collateral damage of sodomy laws is largely related to the ways in which specific sexual acts have been tied to lesbian and gay identity. There is often an immediate socio-legal association of lesbian and gays with same-sex sexuality commonly assumed and understood to be defined through actions. In this way, lesbian women and gay men are sexually defined and reduced to their sexuality in a way that those presumed to be heterosexual are not.[9] Thus, once sodomy laws criminalized certain actions, gays and lesbians were ipso facto criminals, and a significant amount of anti-gay discrimination found rationalization (if partial and post-hoc) in its reliance on the automatic criminality of anyone who identifies as lesbian or gay.

Legal challenges to the treatment of lesbians and gays have a long history.[10] For reasons beyond the scope of this Comment, at the end of the twentieth century, the legal arm of the modern lesbian and gay rights movement rose to prominence and the law became a major tool of choice for the empowerment of lesbian and gay individuals.[11] Within the broad turn to the

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7. When using my own voice, I will generally use "lesbian women and gay men" or "lesbians and gay men" for two reasons. First, most people who self-identify as such prefer these terms over "homosexual," which has been spurned by most lesbians and gay men because of its pathologizing connotation. Second, keeping "lesbians and gay men" linguistically distinct is more compatible with my analysis of how discrimination affects lesbians both as women and as distinct from gay men. Lumping lesbians and gay men together under the terms "gay" or "queer" or "homosexual" *in part erases these important sex-specific experiences and social positions.* For an uncompromising discussion of the often distinct interests between lesbian feminism and gay male liberation or queer politics see Sheila Jeffreys, Unpacking Queer Politics (2003).

8. *See* Joseph Landau, *Ripple Effect: Sodomy Statutes as Weapons*, New Republic, June 23, 2003, at 12.

9. Along with others, Sheila Jeffreys makes this point about women, suggesting that "[w]omen are the sex that is sex." Sheila Jeffreys, The Lesbian Heresy 45 (1993).

10. For example, the Washington Mattachine Society, in conjunction with the ACLU, challenged federal employment discrimination through legal avenues in the early 1960s. Successful legal efforts were also mounted in the early 1960s against raids on gay bars in New York City. *See* John D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970, at 149-75 (2d ed. 1998); *see also* George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940 (1994).

11. Referring to the general trend toward assimilation and integration based on an ethnic model of identity present in the mainstreaming of lesbian and gay politics, Cathy Cohen argues:

> [T]here seem to be at least two conditions that make such strategies seem especially appropriate to this historical moment. First is the development of a visible and seemingly successful middle class among lesbians and gay men . . . . Second, the increasing prevalence of ethnic strategies for inclusion also seems to be tied to the dominant conservative political climate which currently [in the late 20th century] pervades the country.

Cathy J. Cohen, *Straight Gay Politics: The Limits of an Ethnic Model of Inclusion, in* Ethnicity and Group Rights (Nomos XXXIX) 572, 574 (Ian Shapiro & Will Kymlicka eds., 1997). Cohen goes on to argue that this shift is not without consequences:

> The real difficulty or contradiction inherent in using the ethnic model as a strategy for

courts for redress, legal advocates have used a variety of strategies to confront the wide array of harms that lesbians and gays suffer. The most popular legal arguments among opponents of sodomy laws were based on the concept of privacy, which finds its legal basis in the rubric of substantive due process. Privacy seeks to define an inviolable sphere of safety and secrecy in which everyone can be sexual and express their personal identities intimately without state intrusion, punishment, or constraint.

Between 1962 and 2003, twenty-six states and the District of Columbia repealed their sodomy laws, and in a process that began in 1974, state courts struck down an additional ten, leaving fourteen states and Puerto Rico with sodomy laws on the books when *Lawrence* arrived at the Supreme Court.[12] By the time litigants began challenging sodomy laws, the doctrine of substantive due process had been established (or at least involved) in rulings that protected the right to marital privacy and non-procreative sex within marriage,[13] to consume pornography in the home (whereas the sale, display, and consumption of identical materials could be prohibited in public),[14] for unmarried individuals to engage in private, non-procreative sex,[15] and for a woman to terminate her pregnancy.[16]

The 1986 Supreme Court decision in *Bowers v. Hardwick*[17] played an important role in shaping later challenges to sodomy statutes. In *Bowers*, the Court found that, contrary to privacy arguments, the Federal Constitution affords no right of homosexual sodomy to its citizens. Before *Bowers*, sodomy statutes could be challenged as violating both the Federal and State Constitutions, but *Bowers* precluded later arguments based on the Federal Constitution.[18]

> inclusion rests in the distance between the lived experience of so many marginal group members and the image that groups are required to put forth for inclusion . . . . [S]trategies for inclusion, based on the ethnic model of rights and recognition—with its necessary indigenous policing—affect and, more importantly, constrain the political decision making and activity of marginal groups.

Id. at 577, 579.

12. Ten states (Alabama, Florida, Idaho, Louisiana, Michigan, Mississippi, North Carolina, South Caroline, Utah, and Virginia) had sex-neutral sodomy laws and four states (Kansas, Missouri, Oklahoma, and Texas) had same-sex specific sodomy laws.

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

14. Stanley v. Georgia, 394 U.S. 557 (1969).

15. Eisenstadt v. Baird, 405 U.S. 438 (1972).

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

17. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

18. Sodomy laws were judicially invalidated in three states before *Bowers*: Massachusetts in *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974), New York in *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), and Pennsylvania in *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980). After *Bowers* was handed down, litigation against sodomy statutes that used privacy strategies shifted focus exclusively to state constitutions. At the state level, successful challenges to sodomy statutes were brought in Arkansas in *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002), Georgia in *Powell v. State*, 510 S.E.2d 18 (Ga. 1998), Kentucky in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), Minnesota in *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001), Montana in *Gryczan v. State*, 942 P.2d 112 (Mont. 1997), and Tennessee

B. The Texas "Homosexual Conduct" Law

Differing from the sex-neutral law at issue in *Bowers*, the Texas "homosexual conduct" law in question in *Lawrence* stated that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex" and defined "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."[19]

John Lawrence and the late Tyron Garner, the two men convicted under the Texas sodomy statute, challenged the law on both federal and state constitutional grounds, arguing that the statue violated equal protection and privacy guarantees in both constitutions. Responding favorably to these arguments, the Court of Appeals of Texas ruled that a sex discrimination argument under the Texas Equal Rights Amendment was dispositive.[20] Essentially, the Texas court accepted the argument that the statute

> violates the Texas ERA because the same behavior, sodomy, is legal when performed by members of the opposite sex, but illegal when performed by members of the same sex. Thus, the statute criminalizes the conduct solely on the basis of the sex of the participants, thereby violating the Texas ERA prohibition against denying equality under the law on the basis of sex.[21]

The court rejected as discredited sophistry the state's reply that the statute did not discriminate on the basis of sex because of its applicability to both men and women. The dissenting justice argued that the sodomy law should be upheld because "the people of this state [did not intend] to decriminalize homosexual conduct when they approved the Texas Equal Rights Amendment"[22] and because its equal applicability to men and women meant that it did not discriminate on the basis of sex. The dissent further concluded that because the statute only discriminated against homosexuals (who did not enjoy suspect or quasi-suspect classification) and not on the basis of sex, the state needed only to show a rational relation between the sodomy statute and any legitimate state interest, such as the promotion of morals.

The Court of Appeals reviewed this decision en banc and rejected the claims that the Texas statute discriminated on the basis of sexual orientation or

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in *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996). There were also numerous unsuccessful challenges at the state level post-*Bowers*.

19. *Lawrence*, 539 U.S. at 563 (quoting Tex. Penal Code Ann. §§ 21.06(a), 21.01(1) (Vernon 2003)).

20. The Texas ERA provides, "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Tex. Const. art. 1, § 3a.

21. Lawrence v. State, No. 14-99-00109-CR, slip op. at 4 (Tex. App. June 8, 2000), http://www.14thcoa.courts.state.tx.us/case/opinions/060800/990109f.PDF, *withdrawn and superseded on reh'g*, 41 S.W.3d 349 (Tex. App. 2001) (en banc), *rev'd*, 539 U.S. 558 (2003).

22. *Id.* at 10 (Hudson, J., dissenting).

sex, and the assertion that it violated the right to privacy. Regarding sexual orientation, the en banc court held that:

> On its face, the statute makes no classification on the basis of sexual orientation; rather, the statute is expressly directed at conduct. While homosexuals may be disproportionately affected by the statute, we cannot assume homosexual conduct is limited only to those possessing a homosexual 'orientation.' Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct. . . . [T]he prohibition of homosexual conduct advances a legitimate state interest and is rationally related thereto, namely, preserving public morals . . . .[23]

Similarly unconvinced by the argument that the statute discriminates on the basis of sex, the Court wrote:

> [The sodomy law] does not discriminate on the basis of gender because it applies equally to men and women. Appellants' contend the argument was discredited by *Loving* and should not be followed here. But while the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct.[24]

The court went on to dismiss the right to privacy argument as usurping the legislature's proper role in government and as a matter already settled by *Bowers*.

C. *The* Lawrence *Decision*

The Supreme Court granted certiorari in *Lawrence* to consider:

> 1. Whether petitioners' criminal convictions under the Texas "Homosexual Conduct" law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws.
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> 2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
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> 3. Whether *Bowers v. Hardwick* . . . should be overruled?[25]

The *Lawrence* Court struck down the Texas sodomy law by a vote of six to three. Five justices joined the majority opinion written by Justice Kennedy and Justice O'Connor wrote a concurring opinion of her own. At its core, the

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23. Lawrence v. State, 41 S.W. 3d 349, 353, 357 (Tex. App. 2001) (en banc) (footnote omitted), *rev'd*, 539 U.S. 558 (2003).

24. *Id.* at 357.

25. *Lawrence*, 539 U.S. at 564.

majority opinion relied primarily upon notions of autonomy, liberty, and privacy in striking down Texas's law. Justice Kennedy wrote that "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."[26] Construing the question before the Court as the validity of a statute criminalizing intimate sexual conduct between two adults of the same sex, the majority wrote that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[27] Overruling *Bowers*, the Court declared that gays and lesbians were entitled to respect for their private lives, and that "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[28]

The Court also addressed the argument that *Romer v. Evans*, which struck down an amendment to Colorado's constitution that sought to deprive homosexuals, lesbians, or bisexuals of protection under state antidiscrimination laws, provided a basis for declaring the Texas statue invalid under the Equal Protection Clause. Kennedy held that such an approach was

> a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.[29]

Thus, the equal protection issue that the majority saw—that of classification and treatment based on sexual orientation—was left undecided in order to protect opposite-sex participants in sodomy from state regulation.

Justice O'Connor's concurrence decided *Lawrence* on different grounds. Instead of relying on a substantive interpretation of the Fourteenth Amendment's Due Process Clause, she based her conclusions on equal protection.[30] Although sexual orientation is not a classification that officially receives any heightened scrutiny under equal protection jurisprudence,[31]

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26. *Id.* at 562.
27. *Id.* at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).
28. *Id.* at 578.
29. *Id.* at 574-75.
30. *Id.* at 579-85 (O'Connor, J., concurring).
31. Suspect classifications such as race, alienage, and nationality demand strict scrutiny, meaning that a law must be necessary to further a compelling governmental interest; quasi-suspect classification (generally reserved for sex but also applied to mental retardation, illegitimacy, and

O'Connor's opinion cited a line of cases establishing the notion that because a bare desire to harm a politically unpopular group cannot constitute a legitimate state interest, even a rational basis standard of review can strike down such discriminatory laws.[32] Thus, she signaled her intent to use an analysis known as "rational review with bite" or "animus-based rational review," stating that in order to protect politically unpopular groups, the Court previously had applied a more searching form of rational basis review under the Equal Protection Clause.[33]

Explaining the equal protection issue she saw, O'Connor noted,

> Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by § 21.06. The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. . . . Texas argues, however, that the sodomy law does not discriminate against homosexual persons. . . . It is instead directed toward gay persons as a class.[34]

O'Connor dealt with the consequences of criminal prosecutions from sodomy laws like the majority did, but also addressed the legal conflation of act and identity, which the majority ignored, she recognized, and they both reified. She wrote that

> Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law 'legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,' including in the areas of 'employment, family issues, and housing.' . . . The State has admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal.[35]

Justice Scalia's dissent argued that the majority's opinion was incoherent for failing to describe homosexual sodomy as a fundamental right, and thus did not subject the statute to the strict scrutiny that would have been necessary if the Court had taken this step. Without establishing sodomy as a fundamental right, he reasoned it should be subject only to a rational review, and because the

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recent arrival in a state) triggers intermediate scrutiny, meaning that a law must be substantially related to an important governmental objective. This standard derives principally from *Craig v. Boren*, 429 U.S. 190, 197 (1976) and seems to be the most stable formulation of the equal protection test for sex-based classifications, despite the gestures toward a higher level of scrutiny in *United States v. Virginia*, 518 U.S. 515 (1996) and *Nguyen v. INS*, 533 U.S. 53 (2001). For classifications that do not enjoy elevated protections, laws must only pass the rational relation test, which merely requires that they be rationally related to a legitimate governmental purpose.

32. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

33. *Lawrence*, 539 U.S at 580 (O'Connor, J., concurring).

34. *Id.* at 581, 583 (O'Connor, J., concurring).

35. *Id.* at 581-82, 584 (O'Connor, J., concurring).

law promoted a legitimate governmental interest—the enforcement of morality—it should have been upheld. Responding to the equal protection challenge accepted in O'Connor's concurrence, Scalia wrote that both she and the majority ignored that

> §21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, §21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex. . . . [Contrary to the miscegenation statues struck down in *Loving v. Virginia*,] [n]o purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies.[36]

Wavering on the issue of where sodomy stands in defining lesbian and gay personhood, Scalia wrote that even if the Texas statute were directed at a *class* of persons, those targeted in this instance did not enjoy suspect classification. Laws discriminating against them therefore could be justified under rational basis alone, which was satisfied by the state's desire to enforce traditional notions of sexual morality.[37]

While the majority, concurring, and dissenting opinions provide different perspectives on how the statute in question operated, whom it affected, and its constitutional standing, all of the opinions left several major issues and concepts unaddressed. Notably, the Court declined to invalidate the statute on equal protection grounds, although certiorari was granted on whether the Texas statute violated the Equal Protection Clause, and equality arguments were made during litigation.[38] More specifically, the statute's facial classification–sex–went almost completely unmentioned.[39]

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36. *Id.* at 599-600 (Scalia, J., dissenting).

37. *Id.* at 589 (Scalia, J., dissenting).

38. In support of *Lawrence*, many briefs argued that the statute should be invalidated as a violation of equal protection of the laws on the basis of sexual orientation. Even sodomy laws that are facially neutral as to the parties committing prohibited acts are typically selectively enforced against gay men and lesbian women. *See* Brief of Petitioners at 32, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Constitutional Law Professors as Amici Curiae Supporting Petitioners at 10-11, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Human Rights Campaign et al. as Amici Curiae Supporting Petitioners at 15, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Mary Robinson et al. as Amici Curiae Supporting Petitioners at 22-23, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

39. Several briefs at least mention the sex discrimination argument. *See* Brief of National Lesbian & Gay Law Ass'n et al. as Amici Curiae Supporting Petitioners at 7, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of NOW Legal Defense & Education Fund as Amicus Curiae Supporting Petitioners *passim*, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102);

II
LITIGATING MARRIAGE

> [J]ust as *Brown* led inexorably, albeit gradually, to a presumptive judicial ban on all racial classifications, so is *Lawrence* likely to lead eventually to a presumptive judicial ban on all classifications based on sexual orientation.[40]
>
> Michael J. Klarman

From the earliest days of gay liberation, some activists demanded the right to marry. In the 1970s, marriage licenses were requested by same-sex couples in Minnesota, Illinois, Kentucky, Florida, and Connecticut. In response to the ensuing litigation, which proceeded by pointing out that the existing state marriage laws did not restrict marriage to a man and a woman, between 1973 and 1978, fifteen states passed legislation to limit marriage to heterosexual couples.

As of January 2008, only one state has legalized same-sex marriage,[41] six states have created institutions providing same-sex couples with the equivalent of state-level spousal rights, and three further states, as well as the District of Columbia, have enacted laws affording same-sex couples some measure of relationship recognition and the legal consequences thereof.[42] Twenty-six states have amended their constitutions to ban same-sex marriage,[43] nineteen states have enacted legislation defining marriage as between a man and a woman (and some states have both constitutional and statutory guards against same-sex

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Brief of the American Center for Law & Justice as Amicus Curiae Supporting Respondent at 13, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief of Texas Eagle Forum et al. as Amici Curiae Supporting Respondent at 5-12, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

40. Michael J. Klarman, *Brown* and *Lawrence* (and *Goodridge*), 104 Mich. L. Rev. 431, 451 (2005).

41. Same-sex marriage is legal in Massachusetts, although such marriages do not enjoy the federal benefits afforded to opposite-sex marriages because of the federal Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2000) & 28 U.S.C. § 1738C (2000)).

42. The six states providing the equivalent of spousal rights are California, Connecticut, New Hampshire, New Jersey, Oregon, and Vermont. Jurisdictions providing some spousal rights are the District of Columbia, Hawaii, Maine, and Washington. The relationship recognition schemes in the latter four jurisdictions vary in the precise scope of the rights, privileges, benefits, and obligations they confer.

43. The state constitutions of Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin prohibit same-sex marriage. *See* Ala. Const. amend. 774; Alaska Const. art. I, § 25; Ark. Const. amend. 83; Colo. Const. art. II, § 31; Ga. Const. art. I, § IV; Idaho Const. art. III, § 28; Kan. Const. art. 15, §16; Ky. Const. § 233a; La. Const. art. XII, § 15; Mich. Const. art. I, § 25; Miss. Const. art. 14, § 263A; Mo. Const. art. 1, § 33; Mont. Const. art. XIII, § 7; Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.D. Const. art. XI, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. 2, § 35; Or. Const. art. XV, § 5a; S.C. Const. art. XVII, § 15; S.D. Const. art. XXI, § 9; Tenn. Const. art. XI, § 18; Tex. Const. art. 1, § 32; Utah Const. art. I, § 29; Va. Const. art. I, § 15-A; Wis. Const. art. XIII, § 13.

marriage),[44] while five states and the District of Columbia currently have no legal definition limiting marriage to a union between one man and one woman.[45] Although courts are currently the venue of choice[46] for advocates of same-sex marriage, the legal concepts involved in same-sex marriage cases differ widely and have been variously received.[47]

A. A Brief History of Same-Sex Marriage Litigation

While marriage has been understood to implicate rights and freedoms enshrined at the federal level in the United States Constitution,[48] jurisprudential and pragmatic reasons exist for bringing litigation for same-sex marriage in state rather than federal courts. Marriage in the United States has historically

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44. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming have enacted legislation either defining marriage as between a man and a woman or against the issuance of same-sex marriage licenses. (Hawaii is often mistaken as having a constitutional amendment prohibiting marriage for same-sex couples. However, the 1998 amendment to the constitution only empowered the legislature to enact such a ban, which it promptly did). *See* Ala. Code § 30-1-19 (Lexis Nexis Supp 2006); Alaska Stat. § 25.05.013 (2006); Ariz. Rev. Stat. Ann. §§ 25-101, -112 (2000); Ark. Code Ann. §§ 9-11-107, -208 (2002 & Supp. 2007); Cal. Fam. Code § 308.5 (West 2004); Colo. Rev. Stat. § 14-2-104 (2006); Conn. Gen. Stat. Ann. § 46a-81r (West 2004); Del. Code Ann. tit. 13, § 101 (1999); Fla. Stat. Ann. §§ 741.04, .212 (West 2005); Ga. Code Ann. § 19-3-3.1 (2004); Haw. Rev. Stat. Ann. § 572-1 (LexisNexis 2005); Idaho Code Ann. § 32-209 (1996); 750 Ill. Comp. Stat. Ann. 5/212, /213.1 (West 1999 & Supp. 2007); Ind. Code Ann. § 31-11-1-1 (West 1999); Iowa Code Ann. § 595.2 (West 2001); Kan. Stat. Ann. § 23-101 (1995 & Supp. 2006); KY. REV. STAT. ANN. §§ 402.020-.045 (LexisNexis 1999); La. Civ. Code Ann. art. 96 (1999); *id.* art. 3520 (1994 & Supp. 2007); ME. REV. STAT. ANN. tit. 19-A, § 701 (1998); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2006); MICH. COMP. LAWS ANN. §§ 551.1, .271 (West 2005); Minn. Stat. Ann. § 517.03 (West 1990 & Supp. 2006); Miss. Code Ann. § 93-1-1 (2004); MO. ANN. STAT. § 451.022 (West 2003); MONT. CODE ANN. §§ 40-1-103, -401 (2007); N.H. REV. STAT. ANN. §§ 457:1-3 (LexisNexis 2007); N.C. GEN. STAT. § 51-1.2 (2005); N.D. CENT. CODE §§ 14-03-01, -03-08 (2004); OHIO REV. CODE ANN. § 3101.01 (LexisNexis 2003 & Supp. 2007); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001); OR. REV. STAT. § 106.010 (2005); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. §§ 20-1-10 to -15 (Supp. 2006); S.D. CODIFIED LAWS §§ 25-1-1, -38 (2004); TENN. CODE ANN. § 36-3-113 (2005); TEX. FAM. CODE ANN. §§ 2.001, 6.204 (Vernon 2006); UTAH CODE ANN. § 30-1-2 (1998 & Supp. 2007); VT. STAT. ANN. tit. 15, § 1201 (2002); VA. CODE ANN. §§ 20-45.2, -45.3 (2004); WASH. REV. CODE ANN. § 26.04.010 (West 2005); W. VA. CODE ANN. § 48-2-603 (LexisNexis 2004); WIS. STAT. ANN. §§ 765.001, .01, .04 (West 2001); WYO. STAT. ANN. § 20-1-101 (2007).

45. The jurisdictions lacking either constitutional or legislative definitions of marriage are New Jersey, New Mexico, New York, Massachusetts, Rhode Island, and the District of Columbia.

46. Although certainly not exclusively so. For example, the California legislature has twice passed inclusive marriage legislation, only to have it vetoed by the governor. *See* Dean E. Murphy, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. Times, Sept. 8, 2005, at A18.

47. Cases that analyze arguments about a right to same-sex marriage date from 1971, but litigation around this issue increased substantially at the beginning of the twenty-first century. *See* George Chauncey, Why Marriage? 137-44 (2004).

48. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978).

been an institution recognized and regulated at the state, rather than federal, level, which explains in part why the majority of legal claims for same-sex marriage have been grounded in state-specific law.[49] In addition, in 1971 two men unsuccessfully sought to obtain a Minnesota marriage license, giving rise to the case of *Baker v. Nelson*. The U.S. Supreme Court dismissed *Baker* for lack of a federal question, creating a binding precedent that helped foreclose further federal litigation on the subject.[50] Also, some legal concepts invoked by advocates of same-sex marriage have a longer and more stable history at the state than the federal level because, unlike the Federal Constitution, certain state constitutions provide for their explicit guarantee.[51] In other instances, even familiar and settled legal concepts at the federal level may receive different treatment in state law. For example, whereas sex is a quasi-suspect classification under the Federal Constitution and receives intermediate scrutiny,[52] some states consider sex a suspect classification that triggers the federal equivalent of strict scrutiny.[53]

Within this state-centered context, proponents of same-sex marriage have crafted and advanced legal arguments claiming primarily that prohibitions on same-sex marriage violate states' constitutional due process, privacy, and equal protection guarantees.[54] Depending on context and local precedent, these arguments have been made simultaneously, in isolation, or in various combinations. Due process arguments come in the forms of the right to marry and the right to privacy. The former holds that marriage is a fundamental right located in individuals regardless of the sex of the persons they seek to marry;

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49. *See* William N. Eskridge, Jr. & Nan D. Hunter, Sexuality, Gender, and the Law 1063-1101 (2d ed. 2004).

50. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

51. For example, although the Federal Constitution lacks explicit guarantees of privacy, ten state constitutions unambiguously provide for its protection. *See* Alaska Const. art. I, § 22; Ariz. Const. art. II, § 8; Cal. Const. art. I, § 1; Fla. Const. art. I, §§ 12, 23; Haw. Const. art. I, §§ 6, 7; Ill. Const. art. I, §§ 6, 12; La. Const. art. I, § 5; Mont. Const. art. II, § 10; S.C. Const. art. I, § 10; Wash. Const. art. I, § 7. Of course, even successful cases at the state level are subject to political backlash and/or legislative decisions regarding their implementation. The effect is often that something less than same-sex marriage is established in response to a decision (e.g. civil unions or domestic partnership laws) or legislative reaction to a decision involves a state constitutional amendment banning same-sex marriage, effectively voiding the judicial finding. *See, e.g.*, Haw. Const. art. I, § 23, which followed Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

52. *See Craig*, 429 U.S. at 197.

53. *See, e.g.*, Sail'er Inn, Inc. v. Kirby, 485 P.2d 529 (Cal. 1971).

54. Courts have utilized myriad legal arguments both for and against same-sex marriage. *See, e.g.*, Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003); *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *petition for review granted*, 149 P.3d 737 (Cal. 2006); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Li v. State, 110 P.3d 91 (Or. 2005); Baker v. State, 744 A.2d 864 (Vt. 1999); Andersen v. King County, 138 P.3d 963 (Wash. 2006); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

the latter seeks to include same-sex marriage in an inviolable sphere in which everyone can make fundamental choices about their lives and identities without state intrusion, punishment, or constraint.[55] Equal protection challenges object to the sex-based classifications employed by same-sex marriage prohibitions and/or argue that the laws in question discriminate against lesbians and gays.[56]

In defending marriage restrictions against these challenges, states have advanced various combinations of the following claims: that the fundamental right to marriage exists definitionally between two people of the opposite sex; that laws restricting marriage to opposite-sex couples do not employ sex-based classifications and therefore are not subject to heightened scrutiny; that the laws in question do not discriminate against lesbians and gays, and even if they did, this would only trigger rational-basis review; and that the state has a strong interest in preserving opposite-sex marriage because it promotes procreation, child rearing, and "properly" (which is to say, opposite-sex—and hopefully appropriate and opposite-gender as well) headed families.

B. The Inapplicability of Lawrence *to Marriage Litigation*

Same-sex marriage litigation continues to evolve as new arguments are advanced and rejected, and contains considerable local variation. Yet one can readily observe that the litigation in support of same-sex marriage has not changed much since June of 2003 when *Lawrence* was handed down. That is, such litigation has not been more or less successful, nor has it met a markedly more or less receptive audience. For all of its sweeping language and in spite of its ecstatic reception by so many, *Lawrence* has had virtually no discernable impact on the on-going wave of litigation around same-sex marriage. *Lawrence* has not been used as a basis for any marriage decisions since it came down. It has been referenced, but far from dispositive. Whether or not it was emphasized by litigants, *Lawrence* has been at best cited by courts in an attempt to establish a changed perspective on the status and treatment of gay men and lesbian women, and at worst ignored altogether (that is, unmentioned or summarily distinguished). It should be noted that there is little correlation between the numbers of citations to and reliance on *Lawrence* and whether a court ultimately finds the exclusion of same-sex couples from marriage to be a constitutional violation or the nature of the proper remedy if such a violation is found.[57]

Since *Lawrence* was decided, courts of varying levels of authority have

55. *See* Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004) (deciding case on substantive due process grounds), *rev'd*, 138 P.3d 963 (Wash. 2006).

56. *See Baehr*, 852 P.2d at 44 (deciding case on equal protection grounds).

57. *Cf. Goodridge*, 798 N.E.2d at 941 (citing *Lawrence* for dicta, restatements of earlier holdings, abstract principles, and the lack of federal guidance on same-sex marriage in a case that vindicated a right to marriage for same-sex couples).

issued opinions in same-sex marriage cases in Arizona, California, Connecticut, Indiana, Iowa, Maryland, Massachusetts, New Jersey, New York, Oregon, and Washington.[58] It is striking how little the opinions that rule against the exclusion of same-sex couples from marriage (including those that require an alternative, parallel institution for same-sex couples) have relied on *Lawrence*. Similarly, the courts that uphold the exclusion of same-sex couples from marriage do not find that *Lawrence* suggests, let alone requires, a different outcome.[59]

Marriage cases have held *Lawrence* inapplicable, or at least not controlling, for a variety of reasons. In rejecting claims for same-sex marriage, courts have held that *Lawrence* did not recognize a fundamental right[60] and that *Lawrence* did not itself apply or require any type of heightened review that would be appropriate in a marriage context. Furthermore, they have declined (Justice Scalia's dissent notwithstanding) to read the *Lawrence* opinion so broadly as to include the right to marry a same-sex spouse within the fundamental right to marriage.[61] Aside from these doctrinal considerations, state courts seeking to evade recognizing a right to marriage for same-sex couples have repeatedly latched onto the numerous passages in *Lawrence* where the Court explicitly qualified its holding. These instances include the *Lawrence* Court's careful note that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,"[62] and O'Connor's assurance that her

58. *See* Standhardt, 77 P.3d 451 (upholding Arizona's ban on same-sex marriage); *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (upholding California's ban on same-sex marriage), *petition for review granted*, 149 P.3d 737 (Cal. 2006); Kerrigan v. State, 909 A.2d 89 (Conn. Super. Ct. 2006) (upholding Connecticut's ban on same-sex marriage) (appeal pending); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005) (upholding Indiana's ban on same-sex marriage); Varnum v. Brien, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007) (invalidating Iowa's ban on same-sex marriage on both due process and equal protection bases) (appeal pending); Conaway v. Deane, 932 A.2d 571 (Md. 2007) (upholding Maryland's ban on same-sex marriage); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (finding that limiting marriage to individuals of the opposite sex lacked a rational basis and violated state equal protection principles); *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566-72 (Mass. 2004) (clarifying the scope of *Goodridge* by holding that only marriage, and not a parallel institution, would remedy the violation); Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (finding exclusion of same-sex couples from the rights and benefits of marriage violates equal protection guarantees of the New Jersey constitution); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (upholding New York's ban on same-sex marriage); Li v. Oregon, 110 P.3d 91 (Or. 2005) (upholding Oregon's ban on same-sex marriage); Andersen v. King County, 138 P.3d 963 (Wash. 2006) (upholding Washington's ban on same-sex marriage).

59. For a representative case that relies especially heavily on *Lawrence* to justify its validation of same-sex marriage prohibitions, see Conaway v. Deane, 932 A.2d 571 (Md. 2007).

60. For an in-depth analysis of this feature, among others, of *Lawrence*, *see* Tribe, *supra* note 2.

61. As mentioned above, the closest the *Lawrence* majority came to endorsing any kind of heightened review for lesbians and gays and classifications based on sexual orientation was to describe the sexual orientation classification approach based on *Romer* as "tenable."

62. *Lawrence*, 539 U.S. at 578.

Equal Protection Clause invalidation of Texas's law "does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. . . . Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[63] The fact that the Court so circumscribed its analysis to stop short of marriage has been repeatedly held to be reason enough to avoid a full engagement with *Lawrence's* theoretical underpinnings.[64]

While courts that have recognized a right to marriage for same-sex couples may cite *Lawrence*, they have not done so because they find the case to be controlling.[65] Indeed, to the extent that courts deem bans on same-sex marriage to be without rational basis, *Lawrence* must be *distinguished* because of its implication (and in the case of O'Connor's concurrence, explicit statement) that reasons sufficient to justify limiting marriage to opposite-sex couples *do* exist. And marriage is not the only legal area unaffected by *Lawrence*. To take just one example, Florida's categorical ban on lesbian and gay men adopting children has survived a post-*Lawrence* challenge, and other discriminatory laws that suffer from constitutional infirmities similar to those

63. *Id.* at 585 (O'Connor, J., concurring).

64. The limitation that the Court placed on *Lawrence* with regard to marriage is, of course, not the holding's only troubling aspect. For a discussion of the way *Lawrence* reinforces a public/private divide, see Franke, *Domesticated Liberty*, *supra* note 2. *Cf.* Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in* Lawrence v. Texas, 65 Ohio St. L.J. 1081, 1090 (2004); Marc Spindelman, *Surviving* Lawrence v. Texas, 102 Mich. L. Rev. 1615, 1633-56 (2004) (analyzing the harms that are allowed to flourish as a result of vindicating—here, in a same-sex context—the sexual as a realm of privacy and negative liberty). Robert Post provides an illuminating discussion of how *Lawrence* mixes equal protection and due process concerns in a way that makes its attempt to restrict its decision along the public-private divide unpersuasive and untenable:

> *Lawrence* thus breaks with both the traditional and autonomy approaches to substantive due process. Its legal and rhetorical energy seems directed elsewhere, at a concern for the dignity of enduring intimate relationships and a refusal to permit "stigma" to be imposed because of those relationships. *Lawrence* notably refers to "the due process right to demand respect for conduct protected by the substantive guarantee of liberty," and it affirms that the "petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." Themes of respect and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine. They signal that the Court is concerned with constitutional values that have not heretofore found their natural home in the Due Process Clause. . . . The difficulty, however, is that the logic of *Lawrence* undercuts the public-private distinction that *Lawrence* uses to underwrite the space for this flexibility.

Post, *supra* note 1, at 97-98, 102 (footnotes omitted). Kenneth Karst agrees that both liberty and equality animate *Lawrence*, but argues that the interpenetration of due process and equal protection has occurred since at least 1965. *See* Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. Rev. 99, 123-47 (2007) [hereinafter Karst, *Liberties of Equal Citizens*].

65. This is one other significant difference between *Lawrence* and *Brown*. Following Brown, the Supreme Court decided other issues having to do with racial segregation and inequality unrelated to state-enforced racially segregated *education* by simply citing *Brown* as controlling.

of the Texas sodomy law remain in place.[66] This is an important reply to Kenneth Karst's claim that "today's substantive due process does require the government to offer persuasive justifications for an invasion of liberty that stigmatizes an identifiable social group, denying its members the status of respected equal citizens."[67] For if concerns of stigma, equality, and citizenship centrally animated *Lawrence* and truly delimit its reach, Florida's ban on gay adoption would have been a prime candidate to fall under its scope.

In contrast to *Lawrence*, factors and forces that do, on my reading, appear to influence the outcome of same-sex marriage cases include, inter alia: a state's position on same-sex relationships and parenting expressed in public policy and family law; the relative presence or absence in a state's laws of unique legal principles routinely invoked on behalf of the recognition of same-sex marriage; the presence of prior legislation governing relationship recognition; and a state's willingness to embrace the arguments of the more extreme opponents of same-sex marriage.

III
PRIVACY VERSUS EQUALITY

> [F]reedom before equality, freedom before justice, will only further liberate the power of the powerful and will never free what is most in need of expression.[68]
>
> Catharine A. MacKinnon

If *Lawrence* is not playing much of a role in same-sex marriage litigation, is there another area where its impact may be felt? In this Part, I argue that the specific way *Lawrence* vindicated lesbian and gay rights—by relying centrally on liberty and autonomy to the exclusion of an equality analysis—may hinder legal intervention to prevent sexual abuse. That is, the logic of *Lawrence* blindly advances potentially harmful notions of privacy in the context of sexual conduct.

A. A Critique of Privacy in Lawrence

Although the text of the *Lawrence* opinion relies more on the language of "liberty" and "autonomy" than "privacy," these concepts are inextricably linked in substantive due process jurisprudence. The holding in *Lawrence*, for all its concern with liberty, fundamentally hinges on and does not extend beyond the private. Thus, an analysis of privacy in sexual relations goes to the heart of

66. *See, e.g.*, Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004) (upholding law prohibiting homosexuals from adopting children). Exclusions from the military under the "Don't Ask, Don't Tell" policy are another obvious example of a prominent public policy that has yet to feel the impact of *Lawrence*.

67. Karst, *Liberties of Equal Citizens*, *supra* note 64, at 141.

68. Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 15 (1987).

Lawrence. Privacy, in purporting to allow for individual choice and expression free from constraint and outside oversight, operates to create zones where power may be exercised unrestrained.[69] Part of the rationale for privacy is the need to protect a vulnerable area (e.g., the home, the family, zones of sexual expression and relations) from an outside power (i.e., the state, its power expressed in part through law). This protective rationale is based on the rarely-stated assumption that without state intervention, what goes on in that which is considered "private" is free and allows for human flourishing, diversity, freedom of thought, and other positive experiences, behaviors, and growth. However, the problem with this assumption is that there is substantial sex-based inequality in the areas, places, practices, and institutions that privacy protects. This can (and indeed very often does) lead to abuses of power in "the private" that are unremedied because of the hands-off, negative-liberty (liberty to be free *from* something) protection privacy provides.[70]

This observation about how privacy operates does not in any way minimize the benefits that surely do exist in protecting sexual decisions and relations from some forms of state regulation. For example, privacy rationales may support (a limited degree of) freedom for women to control their reproductive choices, and the possibility of experiencing sexual intimacy without intrusion by morally-based state policies. However, there is also a dark side to privacy's protection of sexual conduct. Feminists have documented and described exactly what plays out in these guarded, private zones. In granting the protections and freedoms it claims to bestow on all, privacy works to protect, and therefore generate, massive amounts of sexual abuse. There is a substantial empirical literature on the pervasiveness of sexual abuse of women (and some men) by men, most of which happens in "private," and therefore receives, to varying extents, protection from public intervention.[71]

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69. Awareness of the abuses that the unchecked, private operation of power can lead to, including torture, has become more common since the "War on Terror" has brought discussions of secret prisons, torture, and various interrogation tactics onto the public stage. For a feminist analysis of the gendered nature of and eligibility for torture, as well as an explanation why men have suddenly become concerned with the operation of unchecked power in (some) private settings, see Catharine A. MacKinnon, *On Torture: A Feminist Perspective on Human Rights*, *in* Human Rights in the Twenty-first Century: A Global Challenge 21 (Kathleen E. Mahoney and Paul Mahoney, eds., 1993).

70. For a concise feminist analysis of the relationship between privacy and equality see Catharine A. MacKinnon, *Privacy and Equality: Notes on Their Tension*, 21 Tocqueville Rev. 77, 78 (2000) ("The private may even be inequality's crucible.").

71. For introduction to the empirical grounding for this claim see Ctr. for Women Policy Studies, Violence Against Women as Bias Motivated Hate Crime: Defining the Issues (1991). *See also* Margaret T. Gordon & Stephanie Riger, The Female Fear: The Social Cost of Rape (1991); Lawrence A. Greenfeld et al., U.S. Dep't of Justice, Violence by Intimates (1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf; Stephen T. Holmes & Ronald M. Holmes, Sex Crimes: Patterns and Behavior (2d ed. 2002); Lynda Lytle Holmstrom & Ann Wolbert Burgess, The Victim of Rape (Transaction Books 1983); Mary P. Koss et al., No Safe Haven: Male Violence Against Women at Home, at Work, and in the Community (1994); Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, Prevalence, Incidence, and Consequences of Violence

Wholesale protection for sexual freedom in private ignores the ways this may obscure hierarchy, cover up coercion, and legitimize force in sexual relations. Because privacy protects the existing distribution of power and resources within the "private sphere," the privacy/autonomy argument against sodomy laws is dangerous for the way it implicitly embraces the false norms of equality thought to characterize heterosexuality.[72] Thus, the right to privacy, described as cultivating progress, dignity, and agency in *Lawrence,* may in reality be a double-edged sword for lesbian and gay victims of sexual abuse in much the same way it has been for female victims of male violence.[73]

When the *Lawrence* Court says that the law can no longer demean the existence of lesbian women and gay men,[74] it assumes that the law currently affords all heterosexuals meaningful dignity through a right to privacy, when in reality the law's ineffectiveness to remedy sexual violence strongly suggests otherwise. This is not to suggest that being denied one's rights to privacy (as gays were in *Bowers*) is preferable to being recognized as deserving privacy. Indeed, after *Lawrence* the victim of same-sex sexual abuse

> is no longer in the legal position of a prostitute who claims he or she was raped . . . i.e., someone subject to prosecution for engaging in the conduct that gave rise to the victimization. This is a major change for the better. Yet the same legal system that did not care about inequalities in sexual relationships still does not.[75]

It is the *Lawrence* Court's blindness to issues of sex equality that leads to its unquestioning endorsement of privacy and the negative repercussions that come with it.

Marc Spindelman characterizes many of the arguments made by various parties opposing the Texas sodomy statute in *Lawrence* as stemming from and embodying the simple proposition that gays are just like heterosexuals: "If gays are just like heterosexuals, the 'like straight' notion typically goes, gays should have all the same rights that heterosexuals do, and for the same reasons. The peril here," he continues, "is that heterosexuality and its laws have long

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Against Women: Findings From the National Violence Against Women Survey (1998), *available at* http://www.ncjrs.gov/pdffiles/172837.pdf; Steven Bennett Weisburd & Brian Levin, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, Stan. L. & Pol'y Rev., Spring 1994, at 21.

72. Just as dominance-based sex equality discourse is absent in *Lawrence,* so too is the queer-theoretical desire to protect opportunities for varied forms of sexual performance and experimentation/improvisation with "wantedness." *See* Janet Halley, *Sexuality Harassment, in* Left Legalism/Left Critique 80 (Wendy Brown & Janet Halley eds. 2002). However, much queer theory ignores the dangers of inequalities in the sexual realm to the peril of victims of sexual and sexualized violence. That is, there exists a strong tendency in queer theory to celebrate, rather than critique, power in its sexual forms. For a response to the trend in queer theory to disregard the harms of sexualized hierarchy, see Marc Spindelman, *Sex Equality Panic*, 13 Colum. J. Gender & L. 1 (2004).

73. Here I am using male and female in the biological sense, to be distinguished from the ways in which sexual violence is *socially* male and its victims, through its occurrence, feminized.

74. *Lawrence*, 539 U.S. at 578 .

75. MacKinnon, *supra* note 64, at 1090.

rationalized and concealed sexual violence and silenced its victims."[76] Because of the significant amount of sexual abuse documented (and denied) within "private" heterosexuality, extending the legal norms that foster such abuse to lesbians and gay men raises serious concerns.[77]

The way in which a right to sexual autonomy in private is incarnated in *Lawrence* is unsettling, considering how privacy has historically been and continues to be connected to male dominance. When norms of equality are thought not to apply to the private sphere (the home, the family, and especially the bedroom), sexual abuse, exploitation, and subordination can flourish outside the purview of the state.[78] To take just one relevant example, as of 2002 a majority of states still retain some form of the common law marital rape exemption. Most states "criminalize a narrower range of offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for martial rape prosecutions."[79] Considering the pervasive nature of sexual subordination of women and some men, the idea that freedom from public intervention will

76. Marc Spindelman, *Sodomy Politics in* Lawrence v. Texas, Jurist, June 12, 2003, http://jurist.law.pitt.edu/forum/forumnew115.php.

77. Empirical investigations into sexual subordination document not only the male violence committed against women, but also the sexualized dimensions of the homophobic violence lesbians and gay men face that is perpetrated overwhelmingly by men. The myth of the exceptionality of sexual violence is sustained, in part, through the non-enforcement and under-enforcement of laws that are supposed to protect individuals against gender-based violence, whether same-sex or opposite sex. *See* Michael Scarce, Male on Male Rape: The Hidden Toll of Stigma and Shame (1997); Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 Hastings L.J. 1465 (2003); *Developments in the Law—Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1551-73 (1993) (discussing changing attitudes and suits challenging the responsiveness of state institutions). Crucially, not all jurisdictions have gender-neutral rape or sexual assault laws. Jurisdictions that have not gender-neutralized their rape laws include: Alabama, Ala. Code § 13A-6-61 (LexisNexis 2005); Georgia, Ga. Code Ann. § 16-6-1 (2003 & Supp. 2006); Idaho, Idaho Code Ann. § 18-6101 (1997 & Supp. 2003); Indiana, Ind. Code Ann. § 35-42-4-1 (West 2004); Kansas, Kan. Stat. Ann. §§ 21-3501 to -3502 (1995 & Supp. 2006); Kentucky, Ky. Rev. Stat. Ann. §§ 510.010, .040 (LexisNexis 1999), Maryland, Md. Code Ann., Crim. Law § 3-303 (LexisNexis 2002 & Supp. 2006); Missouri, Mo. Ann. Stat. §§ 566.010, .030 (West 1999 & Supp. 2007); New York, N.Y. Penal Law §§ 130.00, .25-.35 (McKinney 2004 & Supp. 2007); North Carolina, N.C. Gen. Stat. §§ 14-27.2 to .3 (2006); and Oregon, Or. Rev. Stat. §§ 163.305, .355-.375 (2005).

78. For a pioneering analysis of how the Western philosophical tradition fails to apply notions of justice to that which is considered private (in particular, the family) see Susan Moller Okin, Justice, Gender, and the Family (1989).

79. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev. 1373, 1375 (2000). Together with the public/private divide, the marital rape exemption has been justified on religious and philosophical bases. A few of the concrete ways the common law marital rape exemption persists even in states where the categorical exemption has been eliminated include: prompt complaint rules; corroboration requirements; reduced penalties; exemption from prosecution for first-degree rape; exemption of rapes that do not involve force or threat of force; and/or the requirement that the couple was living apart, legally separated, had filed for divorce, or had filed for an order of protection. Even when marital rape is recognized as a crime, husbands are rarely prosecuted and convicted.

deliver equality is dubious at best and irresponsibly optimistic at worst. Once inequality is understood as systemic and legally supported, it becomes clear that true equality in "the private" will require intervention, entitlements, and positive rights, not the type of negative liberty that the privacy and autonomy rationales promote. In this light, the victory in *Lawrence* merely extends the kind of privacy that protects sexual abuse in heterosexual settings to the sphere of same-sex relations.[80]

Catharine MacKinnon argues, employing an especially apt metaphor, that, like homosexuality, heterosexuality has a "closet" where it keeps sexual abuse hidden from public view. The inviolability of this particular closet is guarded, *inter alia*, by the law, norm, and discourse of privacy, which is enforced by *Lawrence*.[81] For victims of same-sex sexual abuse, then, what *Lawrence* means is that in the eyes of the law they will move from homosexuality's closet to the closet the law has already built for heterosexuality, the (not unrelated) closets each hidden and unspeakable in their own way. For gay men and lesbian women victims of same-sex sexual abuse—of whom there are undoubtedly many—the dignity discussed in but not delivered by *Lawrence* remains elusive.[82]

Indeed, neither the *Lawrence* Court nor gay rights litigators involved in the case acknowledged the existence of the victims of same-sex sexual violence. In the larger picture, this might not be very significant or telling, except that the victims' existence was explicitly in front of the Court and the parties throughout the litigation. The Court's total silence on the impact that their decision may have on sexual abuse is striking considering that the majority decision states that:

> A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. . . . 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults

80. *See* MacKinnon, *supra* note 64, at 1089-90.

81. *See id.* at 1090-91.

82. Estimates of same-sex sexual violence have at times found that its prevalence rivals that of opposite-sex sexual violence. In addition, these studies concede that there may be additional social taboos even beyond those that exist for opposite-sex sexual violence that create systematic underestimations in the same-sex context. *See, e.g.*, Nat'l Coal. of Anti-Violence Programs, Lesbian, Gay, Bisexual and Transgender Domestic Violence in 2001, at 2-3 (Rachel E. Baum & Clarence Patton eds., 2002). However, at this point, little is definitively known because official statistics on same-sex intimate partner violence are not collected by law enforcement or other government agencies. *See* Patricia Tjaden et al., *Comparing Violence over the Life Span in Samples of Same-Sex and Opposite-Sex Cohabitants*, 14 Violence & Victims 413, 415 (1999). Existing studies, however, do support the finding that gay men are more likely victims of domestic violence than heterosexual men. *Id.*

> involving force, relations between adults implicating disparity in status, or relations between men and animals.[83]

The Court uses this historical evidence to argue that the current use of sodomy laws against consensual sexual activity is of recent vintage, instead of established in American history and traditions. While this is true (and a welcome corrective to the poor history of the *Bowers* majority), the historical and continuing purpose of sodomy laws as a backstop for ineffective rape laws drops out of the picture.[84] There is no acknowledgement on the part of the historians who filed their brief on behalf of *Lawrence* or the Court that by uncritically endorsing privacy, the sexual abuse that was and still is (imperfectly) targeted by sodomy laws will now go *entirely* unaddressed. Indeed, because of the considerable role that heterosexuality's inequalities play in defining sexuality, the male-dominant norms bound up in practices of sexual abuse can and do sexualize hierarchy in same-sex as well as non-same-sex settings.[85]

While criminal sodomy laws surely violate privacy rights, privacy-based attacks such as that advanced in *Lawrence* sweep too broadly, making sexual abuse (along with non-abusive sex) off-limits to wanted relief as well as unwanted intrusion. Where they existed, sodomy laws were at times the only legal tools available to victims of sexual abuse (either opposite or same-sex) because rape laws were ineffective at preventing or redressing unwanted sex.[86] This does not mean that sodomy laws should be upheld and always enforced against the acts they criminalize, but it does indicate that once they are off the books in a way that gives same-sex couples the same right to sexual conduct *in private* as opposite-sex partners have, same-sex sexual conduct is free to be characterized by the same rates of violence and abuse that characterize

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83. *Lawrence*, 539 U.S. at 569.

84. In many instances, sodomy laws acted as statutory rape laws still do: as a form of strict liability when forcible rape cannot be proven because of the flaws and biases of rape law. For an example in the statutory rape context, *see, e.g.*, Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding California's then-sex-specific statutory rape law). The facts in *Michael M.* were likely insufficient to prove forcible rape, although they included the repeated "slugging" in the face of a 16-year-old who said "no" and "stop" before giving up her resistance and acquiescing in sex. Put differently, if rape law worked, there would be no need for statutory rape laws.

85. For an analysis of how gay male pornography explicitly casts subordinate men in feminized positions, eroticizing these postures and associations with female sexual violation, see Christopher N. Kendall, Gay Male Pornography (2004). Martha Nussbaum makes a similar point about gay male sexuality, as illustrated by gay male pornography, when she writes:

> Male norms of objectification and domination are very powerful; it would be surprising if queer culture had simply thrown them off. After all, adult queer men are, almost all of them, brought up to be heterosexual men; it would be startling indeed if they had not internalized the norms of 'straight' culture regarding women and the use of people as things.

Martha C. Nussbaum, *Experiments in Living*, New Republic, Jan. 3, 2000, at 31 (reviewing Michael Warner, The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life (1999)).

86. *See, e.g.*, Powell v. State, 510 S.E.2d 18 (Ga. 1998) (overturning Georgia's sodomy law as violating the right of privacy guaranteed by the Georgia Constitution in a case where the sodomy law was used to prosecute a man who sexually abused his wife's niece).

opposite-sex sexual conduct.

Again, none of this is to suggest that the statute in *Lawrence* should have been upheld. However, it is to question whether the dignity and recognition that the Court seeks to grant lesbians women and gay men in *Lawrence* cannot be extended without the negative repercussions of endorsing privacy in such an uncritical manner. I believe a sex discrimination approach to Texas's sodomy law would do just that. In the next section, such an approach will be situated in a broader theoretical framework of equal protection jurisprudence.

B. An Equal Protection Alternative

The *Lawrence* holding thus has two serious shortcomings: first, it has failed to promote equality for lesbians and gay men in subsequent litigation; and second, it collaborates with the forces that hide and protect sexual abuse. Together, these deficiencies demand an alternative. Yet before outlining an alternative approach to *Lawrence* based on federal equality guarantees that could apply in the marriage context (and many others), it is useful to explore what the federal Equal Protection Clause has been interpreted to mean, the principles it has been said to embody, and, consequently, the realities against which it can effectively intervene.

Cass Sunstein has argued that equal protection guarantees are more suited to protect novel rights for groups than substantive due process doctrine, in part because substantive due process protects values that are rooted in tradition, while equal protection law can protect *against* those same traditions.[87] The Due Process Clause looks backward and considers relevant whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice in question.[88] By contrast,

> the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. The two clauses therefore operate along different tracks. . . . [The Equal Protection Clause] does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted.[89]

Thus while courts may be incredulous about recognizing a right to same-sex sexual conduct or marriage in a substantive due process analysis that is deeply concerned with history and tradition, the Equal Protection Clause's aspirational nature makes it more congenial to recognizing inequality where before none was thought to exist.

Sunstein's forward-looking characterization of the Clause is consistent with theories offered by other equal protection theorists. Kenneth Karst, for

87. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161 (1988).

88. *Id.* at 1163.

89. *Id.* at 1163, 1174.

example, believes that it is unnecessary to demonstrate that the framers of the Equal Protection Clause explicitly acknowledged all future implications of the equal citizenship principle that guides the Clause, because they purposefully adopted a principle that is "capable of growth."[90] Likewise, John Hart Ely's theory of the Equal Protection Clause posits that the framers' intention was to state a general ideal whose specific applications would be supplied by posterity.[91] While there is disagreement over Sunstein's characterization of the relationship between the Due Process and Equal Protection Clause,[92] his theory does help make sense of the outcomes of litigation over same-sex marriage. If same-sex marriage is thought to be outlawed at least in part for tradition's sake, arguments drawn from the Equal Protection Clause may provide a more effective vehicle for change.

Great diversity exists among the principles offered to guide the interpretations and application of the Equal Protection Clause, but scholars have tended to loosely divide theories of the Equal Protection Clause into "anticlassification" and "antisubordination" camps. Generally put, the former is fundamentally concerned with legal classifications and is therefore more formal and procedural; the latter focuses less on legal classification and more centrally on the creation or perpetuation of inequality, disadvantage, or subordination, and is therefore more substantive and consequential.[93] Reva Siegel argues that the anticlassification versus antisubordination dichotomy is false and that these two principles and approaches originate from a common concern: the end of racial apartheid. In the era following the adoption of the Fourteenth Amendment, the exact same law would be invalid under either an anticlassification or an antisubordination approach, because racial inequality was largely achieved through de jure segregation and classification. For example, cases such as *Brown* and *Loving* contain both anticlassification and antisubordination holdings because it was an explicit racial *classification* at issue in each case that expressed and generated *inequality*.

However, the common origin of the anticlassification and antisubordination principles has been obscured by a process Siegel refers to as

90. Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 17 (1977) (quoting Alexander Bickel's expression of the framers' attitude toward section I of the Fourteenth Amendment generally) [hereinafter Karst, *The Supreme Court*]. The equal citizenship theory "presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member." *Id.* at 4.

91. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 119 (1980).

92. For a thorough disagreement with Sunstein see William N. Eskridge, Jr., *A Tribute to Kenneth L. Karst—Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. Rev. 1183 (2000). *See also* Karst, *Liberties of Equal Citizens*, *supra* note 64, at 123 (siding with Eskridge's notion that "due process doctrine has been 'destabilizing' to various long-standing hierarchies in American society, paving the way for subordinated groups to succeed with claims of equal citizenship" and arguing that *Lawrence* typifies this destabilizing potential).

93. *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470 (2004).

"preservation-through-transformation," in which relations of inequality evolve and transform over time so that there is no stable form of status-enforcing state action (such as de facto exclusion and segregation).[94] In other words, modern Equal Protection jurisprudence crystallized at a time when anticlassification and antisubordination principles were unified. Language of anticlassification was often the rhetoric of choice for pragmatic reasons, and as the Court, shifting to the right since the 1980s, has been increasingly rigid in its adherence to this language, confusion has ensued about the meaning and purpose of the Equal Protection Clause.[95]

The continuing struggles over the legacy and meaning of *Brown*, vividly on display in the most recent affirmative action cases,[96] alert us to the "many ways in which antisubordination and anticlassification are friends as well as antagonists. History shows that antisubordination values live at the root of the anticlassification principle . . . . [They] are not foreign to the modern equal protection tradition, but a founding part of it . . . ."[97] In the case of *Brown*, the anticlassification understanding is due in part to classification being coextensive with substantive subordination, and the anticlassification element became more popular as a politically expedient response to criticisms of judicial illegitimacy.[98]

In the context of sex, the Court has implicitly recognized the relationship between classification and subordination: "classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination."[99] The interrelation of anticlassification and antisubordination is visible in the Supreme Court's gender jurisprudence because it "deemed classification a constitutional wrong in significant part because it might enforce or perpetuate the 'inferiority' of women as a group."[100]

Indeed, reading prominent works on the Equal Protection Clause through the lens of Siegel's argument reveals that many theories and interpretations contain elements of *both* anticlassification and antisubordination. Three

94. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1119-20 (1997).

95. *See* Siegel, *supra* note 93, at 1478-99.

96. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007). Writing for the majority in the Seattle case, Chief Justice Roberts concluded that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." 127 S.Ct. at 2768. Justice Stevens, in a dissenting opinion, described the majority opinion's recourse to *Brown v. Board of Education* as a "cruel irony" eviscerating the underlying spirit of *Brown* as well as the Supreme Court's subsequent antisubordination understanding of it, which permitted voluntary programs of the sort the majority invalidated. 127 S.Ct. at 2797 (Stevens, J., dissenting).

97. Siegel, *supra* note 93, at 1477.

98. *See id.* at 1498-99.

99. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (holding that a statutory classification between veterans and non-veterans that disparately impacted women was a neutral, constitutional classification).

100. Siegel, *supra* note 93, at 1538.

scholars' discussions of antidiscrimination illustrate this tension. First, Paul Brest argues that the antidiscrimination principle lying at the core of the Equal Protection Clause "disfavors race-dependent decisions and conduct" which are decisions and conduct "that would have been different but for the race of those benefited or disadvantaged by them."[101] While this seems to be a purely procedural and formal approach to Equal Protection analysis, Brest identifies the material and stigmatic harms such classifications create as rationales for the antidiscrimination principle. In other words, Brest links classification to subordination without explicitly noting that his approach takes this step.[102]

Kenneth Karst formulates the Equal Protection Clause as a guarantee of equal citizenship, positing that the substantive core of the Equal Protection Clause "is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."[103] Karst writes,

> The essence of equal citizenship is the dignity of full membership in the society. Thus, the principle not only demands a measure of equality of legal status, but also promotes a greater equality of that other kind of status which is a social fact—namely, one's rank on a scale defined by degrees of deference or regard. The principle embodies 'an ethic of mutual respect and self-esteem'; it often bears its fruits in those regions where symbol becomes substance.[104]

In this passage Karst interprets the equal citizenship principle as encompassing discriminatory classifications, but he also strongly emphasizes the effects of laws beyond their text, in a way similar to Siegel. Indeed, Karst's discussion of the law's role in promoting and perpetuating stigma captures the interrelated concepts of stereotype and subordination, which he argues bear a close relationship to suspect classifications and "go to the heart of the principle of equal citizenship."[105]

Finally, Owen Fiss's proposal that a group-disadvantaging principle should guide the Equal Protection Clause is likewise neither purely about subordination nor classification.[106] The very way that Fiss defines group membership is based on the paradigm case of African Americans, and reveals a concern with the law's classificatory powers to stigmatize and reproduce the dynamics that define groups' social status, treatment, and existence.[107]

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101. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 6 (1976).

102. *Id.* at 8-12.

103. Karst, *The Supreme Court, supra* note 90, at 4.

104. *Id.* at 5-6 (footnotes omitted) (quoting John Rawls, A Theory of Justice 256 (1971)).

105. *Id.* at 24.

106. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 147-77 (1976). Fiss describes this principle as "clearly and explicitly asymmetrical, one that talks about substantive ends, and not fit, and one that recognizes the existence and importance of groups, not just individuals." *Id.* at 136.

107. *Id.* at 147-54.

Although the Supreme Court has privileged the anticlassification understanding of the Equal Protection Clause for several decades, the antisubordination strand remains alive, to an extent, within the anticlassification approach, waiting to be resuscitated.[108] Given this background, how do the interactive and mutually informing principles of anticlassification and antisubordination apply to the Texas sodomy law in a way that might be meaningful to subsequent litigation for lesbian and gay equality?

IV
AN EQUALITY APPROACH TO *LAWRENCE*

> The sodomy laws have an affirmative side, rich in meaning and persuasive power. Do not fuck men as if they are women; it is an abomination. The imperative is communicated, in the blank spaces as it were, to fuck women as if women are women: carnal chattel of men; proper objects for the lust of domination. The abomination is to do to men what is normally done to women . . . . [The sodomy laws] protect men as a class from the violation of penetration; men's bodies have unbreachable boundaries.[109]
>
> Andrea Dworkin

While the *Lawrence* majority did not dispute that the concurrence identified a viable equal protection basis on which to resolve the case,[110] both overlooked a theoretically cogent challenge to the Texas sodomy law: that the statute is unconstitutionally sex discriminatory, enforcing the inequality of the sexes by endorsing stereotypes and conduct that perpetuate male dominance. To support this approach, I will discuss the overlooked sex discrimination issues, sketch what a sex discrimination challenge to the Texas sodomy statute would have looked like, and demonstrate why such an approach is preferable to that advanced by either the majority or concurring opinions.

Writing for the majority, Justice Kennedy described as "tenable" the argument that the Texas sodomy statute was unconstitutional because it failed to provide equal protection of the laws to individuals with a same-sex sexual

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108. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) illustrates the rise of the formalistic anticlassification understanding of equal protection. In *Adarand*, the Court equated laws designed to subjugate a race with laws designed to redistribute benefits on the basis of race and held that all racial classifications imposed by any government actor are subject to strict scrutiny. However, Justice Stevens gave voice in his dissent to the antisubordination theory of equal protection, stating that there is no moral or constitutional equivalency between invidious and remedial uses of race. 515 U.S. at 243. This conversation continues through Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); and Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007).

109. Andrea Dworkin, Intercourse 155-56 (1987).

110. The equal protection analysis in O'Connor's concurrence was based on a sexual orientation discrimination challenge to the Texas statute derived from *Romer*. *See supra* Part I.

orientation, but instead chose to strike down the sodomy statute on privacy grounds.[111] The idea that the statute was a violation of equal protection based on sex was left unaddressed by the majority. Justice O'Connor argued that the Texas statute was a violation of the Fourteenth Amendment's Equal Protection Clause because "Texas treats the same conduct differently based solely on the participants."[112] Her construction of the statute in question misses that it was actually an instance of facial sex discrimination. O'Connor construes the Texas statute to discriminate based "solely on the participants," but conspicuously leaves out the element that determines criminality in the statute: the *sex* of the participants. In other words, sex (in the biological male or female sense, rather than the act) is that which defines criminality in the eyes of the law, making the statute *facially* sex discriminatory.

A. Unconstitutional Stereotyping

The only brief in front of the Court to challenge the Texas law on a sex discrimination rationale was submitted by the National Organization for Women (NOW), which argued that the Texas law "perpetuates gender stereotypes by dictating the roles that men and women must assume in intimate relationships, [and is therefore] a harmful affront to gender equality."[113] As NOW recognized, although gender norms operate to subordinate women—limiting their options, restricting their possibilities, subjecting them to violence, enforcing their vulnerability, sexualizing their bodies, and denying their full humanity—*deviation* from gender norms can subordinate men as well as women.[114] Men who do not behave in ways understood to be genuinely male, which includes effeminate gender performance and same-sex sexuality, are subject to a variety of social, physical, psychological, and legal harms.[115]

111. *Lawrence*, 539 U.S. at 574.

112. *Id.* at 581 (O'Connor, J., concurring).

113. Brief of NOW Legal Defense & Education Fund as Amicus Curiae Supporting Petitioners at 1, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

114. When distinguishing the biological from the social or cultural is analytically useful, I share Mary Anne Case's understanding that "gender is for adjectives, sex is for nouns;" gender refers to masculinity and femininity, sex to man and woman. *See* Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: the Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 9-17 (1995). However, to describe something as "male" also means that it is consistent with social notions of masculinity (as socially inculcated in boys from birth), just as to describe something as female means that it is consistent with social notions of femininity (as socially inculcated in girls from birth). "Male," in this sense, has a more complex, subtle, socio-political meaning, referring not to biological sex or a demographic group of people, but rather something that exhibits or contributes to male dominance as a political system. That is, "male" means something the structure, values, and behaviors of which are driven by a politics, ideology, and philosophy predicated on an epistemic angle of vision based on the concrete status location of the (biological) male sex in society, members of which, with variations, occupy a superior position in gender hierarchy. *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 636 n.3 (1983).

115. On the importance of men dissenting from masculinity see John Stoltenberg, Refusing to Be a Man: Essays on Sex and Justice (rev. ed. 2000).

Similarly, women who violate socially-prescribed gender norms are subject to injury and denigration in society and under law. Although these harms are different from those suffered by gender-conforming, stereotypically feminine women, they can be traced to the same source.[116]

Gender non-conformity and same-sex sexuality are mutually implicative.[117] As such, same-sex sodomy is fundamentally gender transgressive, and thus opposed by the same ideology that enforces women's gender conformity. Just as the sociolegal interdiction of same-sex sodomy was based on a desire to maintain gender roles central to the hierarchy of men over women, so same-sex marriage prohibitions express male dominance by subordinating anyone who challenges the notions of gender on which such dominance relies. As explicated by Andrew Koppelman, gender non-conformity can be as viciously punished as same-sex sexuality, and same-sex sexuality is thought to be fundamentally inconsistent with socially-prescribed notions of gender.[118]

The price for deviation from gender norms is the accusation of homosexuality, and "[t]he two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other."[119] In other words, gender is sexualized and sexuality is

116. Not surprisingly, negative attitudes toward lesbian and gay people correlate strongly with traditional, sexist concepts about the appropriate roles of men and women. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 221.

117. The Radicalesbians recognized this as early as 1970 when they wrote:

> [W]omen and person are contradictory terms. For a lesbian is not considered a 'real woman.' And yet, in popular thinking, there is really only one essential difference between a lesbian and other women: that of sexual orientation—which is to say, when you strip off all the packaging, you must finally realize that the essence of being a 'woman' is to get fucked by men.

Radicalesbians, *The Woman Identified Woman*, *in* Notes from the Third Year 81 (Anne Koedt et al. eds., 1971), *reprinted in* The Second Wave: A Reader in Feminist Theory 153, 154 (Linda Nicholson ed., 1997).

118. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 235 (1994) [hereinafter Koppelman, *Why Discrimination*]. For an engaging conversation debating the sex discrimination approach to lesbian and gay rights compare Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. Rev. 471 (2001), with Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J. L. & Pol'y 397 (2001), and Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. Rev. 519 (2001). Stein's principle objections to the sex discrimination argument center around how anti-gay laws, while impacting women more than men, impact lesbians, gays, and bisexuals most of all. Stein raises the concern that laws can immunize themselves from challenges based on sex by explicitly discriminating on the basis of sexual orientation. As my analysis illustrates, however, these objections ignore that sexual orientation (when defined in law) is necessarily sex-based. Furthermore, precedents against sex-role stereotyping and an investigation into the origins of anti-gay animus explain and uniquely respond to the fact that lesbians, gays, and bisexuals are most impacted by these laws. Far from subsuming lesbian, gay, and bisexual oppression under a less accurate challenge based on sex, the sex discrimination approach works to reveal and target the root of that oppression no matter how the laws are formally drawn.

119. Koppelman, *Why Discrimination*, *supra* note 118, at 235.

deeply gendered such that sexuality affirms social understandings of gender. Unpacking this observation, Sylvia Law explains that "[t]he presumption and prescription that erotic interests are exclusively directed to the opposite sex define an important aspect of masculinity and femininity. Real men are and should be sexually attracted to women, and real women invite and enjoy that attraction."[120] Put another way, sex with women in part makes biological men social men, yet the same act renders a biological women neither social men nor social women. Similarly, sex with men makes biological women social women, while it socially feminizes biological men in the sense that their actions are associated with women and inconsistent with masculinity as it is socially inculcated.

B. Unconstitutional Hierarchies

The values and principles underlying the Equal Protection Clause hold, in part, that laws based on gender stereotypes are unconstitutional because they rest on unjust generalizations that deprive individuals of access to opportunities, such civic participation, employment, or education. But the jobs, schools, places and roles women are forced to occupy through "separate sphere" ideology;[121] the gendered division of labor;[122] and sex stereotyping have been found unconstitutional not simply because they are different, but because they are unequal. A cursory glance at the way sex stereotyping has operated—forbidding women from becoming lawyers,[123] excusing them from jury duty on the grounds that they should be at home being mothers,[124] or keeping them out of the Virginia Military Institute[125]—reveals that it expresses

120. Law, *supra* note 116, at 196.

121. *See* Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA Women's L.J. 1, 2 (1993) (noting that if a woman met the ideal of "True Womanhood" in her behavior and demeanor, she would be "sheltered from the harshness of the public sphere;" however, only certain races and classes of women—however dependent on men—could even hope of attaining such a status). Jean-Jacques Rousseau's Emile is an example of how one prominent Enlightenment political philosopher thought boys and girls should be educated in order to maintain their complementarity. Jean-Jacques Rousseau, Emile or On Education 358 (Allan Bloom trans., 1979) ("A perfect woman and a perfect man ought not to resemble each other in mind any more than in looks, and perfection is not susceptible of more or less. In the union of the sexes each contributes equally to the common aim, but not in the same way. From this diversity arises the first assignable difference in the moral relations of the two sexes. One ought to be active and strong, the other passive and weak. One must necessarily will and be able; it suffices that the other put up little resistance. Once this principle is established, it follows that woman is made specially to please man.")

122. *See* Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, *in* Toward an Anthropology of Women 157 (Rayna R. Reiter ed., 1975).

123. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (ruling that a state has the right to exclude women from practicing law).

124. Hoyt v. Florida, 368 U.S. 57, 62 (1961) (upholding a Florida rule that made it far less likely for women than men to be called for jury service on the grounds that a woman is still regarded as the center of home and family life).

125. United States v. Virginia, 518 U.S. 515 (1996) (affirming that the male-only

and enforces a hierarchy of men over women, or more accurately, the properly masculine over the properly feminine.[126]

Just as the Equal Protection Clause forbids society from imposing on women what it deems an appropriate job, educational environment, or dependency status, so too does the Clause forbid the criminal enforcement of what society deems proper intimate conduct for a given sex. A sex discrimination approach to *Lawrence* would recognize and build on this fact. As NOW put it, "Texas's prohibition of same-sex intimacy prescribes a gendered standard of sexual behavior and proscribes deviation therefrom: men must not do what women are expected to do (engage in sexual intimacy with men), and women must not do what men are expected to do (engage in sexual intimacy with women)."[127] The sex stereotypes present in *Lawrence* derive from and express the same ideology as other stereotypes already invalidated by the Supreme Court, albeit in a more gender-paradigmatic setting.[128] Therefore, challenging the Texas law as sex discrimination would have allowed the Court to strike down the sodomy statute on the grounds that the Equal Protection Clause does not allow states to require adherence by either men or women to gender stereotypes.

The sex discrimination approach derives considerable precedent from *Loving v. Virginia*,[129] which invalidated anti-miscegenation laws on the grounds that such statutes maintained "White Supremacy" and unconstitutionally classified on the basis of race. Indeed, the sex discrimination

admissions policy of the state-supported Virginia Military Institute violates the Fourteenth Amendment).

126. While only one of these examples found the laws in question to be invalid expressions of stereotyping, all three cases illustrate the historical legacy of law's implication in gender stereotypes. My point is, of course, not that law can only be and is always in the business of enforcing unequal gender roles, but rather that law is deeply implicated in sex inequality while simultaneously possessing potential to bring about social change. As was mentioned in Part III, *supra*, in the context of race, the law's commitment to these principles is always—and especially at the dawn of the twenty-first century—unstable. For cases illustrating the instability of legal commitments to anti-subordination principles vis-à-vis gender stereotyping in the Title VII sex context, *compare* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (finding that sex stereotyping in promotion decisions violates Title VII's prohibition on sex discrimination) with Jesperson v. Harrah's Operating Company, Inc., 444 F.3d 1104 (9th Cir. 2006) (en banc) (rejecting sex-discriminatory and sex-specifically-burdensome make-up and grooming standards for casino workers).

127. Brief of NOW Legal Defense & Education Fund as Amicus Curiae Supporting Petitioners at 12-13, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

128. Sexuality is one of the two areas (the other being war, defined as physical combat and its modern equivalents) that Wendy Williams identified in 1982 as cultural limitations on realizing sex equality. That is, sex and war are paradigmatically understood to so deeply embody cultural notions of masculine and feminine roles that they define the boundaries beyond which sex equality jurisprudence cannot easily reach. *See* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts. L. Rep. 175 (1982). The persistence of the female combat exclusion and the fact that *Lawrence* was decided more than two decades after Williams made these arguments testifies to their enduring validity.

129. 388 U.S. 1 (1967).

argument explicitly analogizes to rulings against anti-miscegenation statutes. Laws against sexual intimacy between members of the same sex impermissibly discriminate on the basis of sex in the same way as laws prohibiting sexual intimacy between members of the different races unlawfully discriminate on the basis of race.

The Court of Appeals of Texas rejected this approach on the grounds that the Texas law "applies equally to men and women" and that it was not "intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender."[130] Similarly, Justice Scalia wrote in his dissent that the issues in *Lawrence* were distinguishable from those implicated by miscegenation prohibitions because "[n]o purpose to discriminate against men or women as a class can be gleaned from the Texas law."[131] Scalia further stated that the Texas law could not be sex discrimination because marriage restrictions which also employ sex classifications are not sex discrimination.[132]

Doctrinally, these arguments are flawed. As an initial matter, insisting that the basis for invalidating anti-miscegenation laws in *Loving* was solely a concern over White Supremacy ignores both that Loving had both a due process and equal protection basis for its holding and that other decisions striking down de facto anti-miscegenation laws, such as *McLaughlin v. Florida*, did so with no mention of White Supremacy.[133] Moreover, constitutional sex discrimination doctrine has increasingly become more centrally concerned with the use of a *classification*, not with advantage, disadvantage, domination, or subordination based on sex or gender.[134] As the Supreme Court directly stated, "all gender-based classifications" warrant "heightened scrutiny."[135] On this classification-sensitive approach, the law at issue in *Lawrence* is not, as Scalia saw it, an example of "no sex discrimination."[136] Instead, the way it

130. Lawrence v. State, 41 S.W. 3d 349, 357-58 (Tex. App. 2001) (en banc).

131. *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting).

132. *Id.*

133. 379 U.S. 184 (1964). Importantly, the Florida law at issue in *McLaughlin* prohibited cohabitation between two people of the opposite sex if one was white and the other black. It did *not* prohibit cohabitation of two people of the opposite sex if they were different non-white races. That is, just as Virginia's law in *Loving* did not prohibit, for example, the marriage of individuals who were black and Native American, Florida's law in *McLaughlin* did not prohibit the cohabitation of blacks and Native Americans of the opposite sex. The Supreme Court, therefore, certainly had every opportunity to mention White Supremacy when striking down the Florida law.

134. Indeed, many liberals in the legal academy have criticized Supreme Court equal protection jurisprudence for just this reason. It is the decontextual, ahistorical, procedural concern with classification that leads to, for example, affirmative action being as constitutionally suspect as the facial segregation of members of historically powerless and excluded groups.

135. J.E.B. v. Alabama, 511 U.S. 127, 136 (1994).

136. Far from persuasive, Scalia's argument that sodomy laws cannot be sex discrimination because marriage laws are not sex discrimination merely points to *another* body of law yet to be subjected to serious sex equality analysis. *See* Justin Reinheimer, *Same-Sex Marriage Through the Equal Protection Clause: A Gender-Conscious Analysis*, 21 Berkeley J. Gender L. & Just. 213 (2006).

discriminates against both men and women on the basis of sex simultaneously means that "it is sex-based twice over."[137] *Loving* is the most famous rejection of the idea that "equal discrimination" amounts to no discrimination at all, and these arguments have been rejected in both the areas of race and sex in other instances as well.[138] Constitutional jurisprudence repeatedly acknowledges the straightforward idea that if a statute defines prohibited conduct by reference to a characteristic, then the statute is in no sense neutral with respect to that characteristic.[139]

A closer examination of the substance of the miscegenation analogy reveals why it is both compelling and appropriate in the context of sodomy statutes. In *Loving*, the Court invalidated anti-miscegenation laws on the grounds that they unconstitutionally classified on the basis of race in the maintenance and furtherance of White Supremacy.[140] To argue that bans on same-sex sodomy do not discriminate on the basis of sex is to adopt the reasoning of an entirely contrary (and discredited) case, *Pace v. Alabama*.[141] In *Pace* the Court held that penalties for interracial sex did not deny equal protection of the laws even when those penalties were more severe than those imposed for adultery or fornication between persons of the same race.[142] *Pace* was later overruled by *McLaughlin v. Florida*, which invalidated a statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night.[143] The Court held the statute in question to be a denial of equal protection of the laws on the basis of race.[144] Again, *McLaughlin* stands for the notion that a law which defines criminality in relation to a characteristic simply cannot seriously be said to be neutral with respect to that characteristic. In the same-sex sodomy context therefore, to say that women and men alike are prohibited from participating in same-sex conduct is tantamount to no response at all—this merely doubles the discrimination, ignores the use of sex to classify, and refuses to interrogate the structures and ideology supporting the law.

Stereotyping is not merely inaccurate or constraining (although it is both), but gender stereotypes are also ordered hierarchically in a way that creates, maintains, enforces, and perpetuates the dominance of (appropriately masculine) men over all women and over men who dissent from masculinity.[145]

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137. MacKinnon, *supra* note 64, at 1083.

138. *See, e.g.*, Califano v. Westcott, 443 U.S. 76, 84 (1979).

139. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

140. *Loving*, 388 U.S. at 11-12.

141. 106 U.S. 583 (1883), *overruled by McLaughlin*, 379 U.S. at 184.

142. *Id.* at 585.

143. *McLaughlin*, 379 U.S. at 188-90.

144. *Id.*

145. The second-class status and stigma socially assigned to women (and that which is considered or associated with women) in society follows women who do not conform to stereotypes, just as it attaches to effeminate men (those who are associated with women). For an example of this dynamic in the employment context, see Barbara F. Reskin & Patricia A. Roos,

The question for Texas to answer, under a sex equality argument, becomes *why* it has prohibited same-sex sodomy—what are the law's origins, what purpose does it serve, how does it function in reality, and what attitudes keep it on the books?

Hierarchy is often achieved through processes of differentiation and polarization. This has been chronicled in the context of race, perhaps best exemplified by the "one-drop rule."[146] Similarly, the hierarchy of males over females is maintained by extreme differentiation of the sexes. The stereotypes embodied by sodomy laws[147] (and prohibitions on same-sex marriage) are built on a paradigm of inequality that associates men with superiority and dominance and devalues women. Anti-miscegenation laws helped to maintain the boundary between the races on which the system of racism in part depends. In a similar dynamic, then, "the hierarchy of whites over blacks is greatly strengthened by extreme differentiation of the races, [just as] the hierarchy of males over females is greatly strengthened by extreme differentiation of the sexes" so that "the prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women."[148] By challenging laws whose most obvious targets may be lesbian women and gay men, the sex discrimination strategy brings into courts what activists have long seen: the sexism embedded in and fundamental to heterosexism.[149]

Loving was certainly about differentiation and polarization of race, but it was also about sex. White men were not only worried about preserving the purity of the race; they were also concerned about black men having sex with white women, and losing their own sexual access to black women. Although white men assumed black women's sexual availability to them under slavery (and long after),[150] the slightest interest by a black man in a white woman was enough to incite a lynch mob. White women were thought to denigrate themselves if they had sex with a black man, and black men were despised for

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Job Queues, Gender Queues: Explaining Women's Inroads into Male Occupations 11-15 (1990). For an illustration of this dynamic in the academy, see *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1343 (9th Cir. 1981) The court found that a denial of tenure to a female scholar in women's studies was sex discrimination because "[a] disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women."

146. The "one-drop rule" refers to the notion that a person with even a tiny portion of non-white ancestry ("one drop of non-white blood") should not be classified as "white," especially legally for purposes of interracial marriage.

147. Both those that criminalized only same-sex sodomy and, because of their selective enforcement against same-sex participants, those that were sex neutral.

148. Koppelman, *Why Discrimination*, *supra* note 118, at 257, 202.

149. *See* Suzanne Pharr, Homophobia: A Weapon of Sexism (1988); Stoltenberg, *supra* note 115.

150. *See* We Are Your Sisters: Black Women in the Nineteenth Century 18-43 (Dorothy Sterling ed., 1984) (documenting the sexual exploitation and abuse of black women under slavery).

what they did to what were and are seen as white men's women.[151] Similarly, gender nonconformists, such as lesbians and gays—men who have sex with men the way only women are meant to be had sex with, men who allow themselves to be used as women, women who reject the need for men in sex at all—are demeaned and their sexual expression seen as threatening to male dominance.[152]

The outrage directed at male gender-nonconformity results in a man being reduced to the status of a woman, which is understood to be degrading. Just as miscegenation called into question the distinctive and superior status of being white, so does the gender nonconformity of same-sex relations (including but not limited to sexual) threaten the distinctive and superior status of being male. Thus, "[m]ale homosexuals and lesbians, respectively, are understood to be guilty of one aspect of the dual crime of the miscegenating white woman: self-degradation and insubordination."[153] Gender role anxiety substantively discriminates against both sexes: against women by reinforcing traditional sex stereotypes, doubly oppressing lesbians with contempt for their challenge to gender conformity; and against gay men because they threaten to puncture the gender polarization on which male dominance relies.

The prohibition of same-sex sexuality reproduces sex inequality by enforcing a rigid distinction between the sexes (and genders) by requiring women to have sex only with men, their social unequals, which contributes not only to the perpetuation of hierarchical stereotypes, but also to conditions in which sexual abuse can flourish. As the National Organization for Women (NOW) put it:

> By legally prohibiting men from being sexually intimate with other men, the state effectively enforces the notion that men must not 'act like women' in a way that undermines the predominant view that men are fundamentally different from, and superior to, women. By legally prohibiting women from being sexually intimate with other women, the state effectively enforces the notion that female sexuality exists solely for men and that women must not assume 'masculine' roles that challenge the traditional view that they are naturally dependent on and subservient to men.[154]

By connecting the proscription of same-sex sexual conduct, the social stigma of gender nonconformity, and the gendered nature of homophobia, male dominance is exposed as the common source of sexism and heterosexism.

In the context of *Lawrence*, it is clear that same-sex sodomy challenges the rigidly dichotomous view of gender required for hierarchal arrangement.

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151. *See* Patricia Hill Collins, Black Sexual Politics: African Americans, Gender, and the New Racism 262 (2004).

152. *See* Koppelman, *Why Discrimination*, *supra* note 118, at 234-36.

153. *Id.* at 236.

154. Brief of NOW Legal Defense & Education Fund as Amicus Curiae Supporting Petitioners at 14-15, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

Indeed, "[t]he very characterization of sodomy as a 'crime against nature' implies that men and women were created to fulfill their respective procreative roles, and that their sexual options should be restricted accordingly."[155] If same-sex sexual intimacy was not proscribed and stigma not assigned to nonconformity, traditional notions of gender would be undermined. The result would be a shift in the direction of sex equality, because in a society with a history of subordinating women, the preservation of traditional gender roles disproportionately disadvantages women.[156]

On a more practical level, under *Griswold v. Connecticut*, it is clear (and was admitted during the *Bowers* oral arguments) that sex-neutral sodomy statutes are unconstitutional as applied to married couples. Accordingly, "men may commit sodomitic sex acts with women if they marry them. But because every state forbids gay couples to marry, they cannot escape the prohibition of sodomy. The only basis of this discrimination is sex."[157] Therefore, Justice Kennedy's reluctance to strike down the Texas law on substantive due process grounds for fear that laws drawn differently (sex-neutrally) may be valid is a concern that the sex discrimination approach can handle. Although the test for evaluating facially gender-neutral statutes that have a disparate impact involves an intent requirement by which purposeful discrimination must be shown,[158] the justifications offered by states for keeping such laws on the books (such as disapproval and stigma of homosexual acts, explicitly offered in *Bowers* to defend Georgia's sex-neutral sodomy law) clearly meet this requirement. If sexism and heterosexism are understood to stem from the single ideology of male dominance, and sodomy laws in turn are understood to be an expression of this ideology, then a legal strategy targeting the single source of both will be most effective in dismantling the oppression sodomy laws express, support, and re-create.

V

APPLICATION OF THE EQUALITY ALTERNATIVE TO MARRIAGE LITIGATION

As both sides of same-sex marriage litigation acknowledge, marriage is a powerful social institution that confers both dignitary and material benefits on its participants.[159] In part, marriage legitimizes relationships through state

155. Editors of the Harvard Law Review, Sexual Orientation and the Law 17-18 (1989).

156. *Id.* at 19-20.

157. Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L.J. 145, 152 (1988).

158. The intent requirement for discrimination under the Equal Protection Clause established in *Washington v. Davis*, 426 U.S. 229 (1976), was heightened in *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

159. *See generally* George Chauncey, Why Marriage?: The History Shaping Today's Debate over Gay Equality (2004) (providing a concise historical analysis of the social forces that led to changes in the institution of marriage and the pursuit of same-sex marriage by lesbians and gay men).

recognition that provides a vast array of automatic legal and economic benefits, privileges, and obligations ranging from hospital visitation to wrongful death claims, employment leave to child visitation, and health care to inheritance.[160] Because states confer legal entitlements and social goods to recognized marriages, the denial of the right to marry deprives those individuals and couples excluded from the institution of marriage from myriad entitlements.[161] In order to analyze the logic and underpinnings of same-sex marriage bans, it is first necessary to understand more about the prohibitions on same-sex marriage themselves.

Like the Texas sodomy law at issue in *Lawrence*, all state legislation and constitutional amendments prohibiting same-sex marriage employ the categories of sex or gender to accomplish their goal.[162] While media and popular discourse refer to "gay marriage" and "same-sex marriage" interchangeably, it is important to note that the legal prohibitions rely exclusively on "sex" or "gender" (rather than categories such as gay, lesbian, homosexual, etc.). No state law or constitutional amendment banning same-sex marriage uses the terms homosexuality, gay, lesbian or bisexual to do so.[163] However, to the extent that sexuality is sex-based and lesbian women and gay men are prohibited from entering into their chosen marriages by a same-sex marriage prohibition, these laws discriminate against lesbian women and gay men both as individuals and as members of their sex group on the basis of sex. And yet, as in *Lawrence*, sex discrimination arguments (even of the procedural variety that observe formal, statistical gender stereotypes) have received surprisingly relatively little attention in same-sex marriage litigation.[164]

Women of all sexualities are, as a group, disproportionately impacted by marriage given the institution's role in maintaining and enforcing sex inequality.[165] That is, their role as inferior dependency workers in marriages in which the roles of breadwinner and caregiver are defined by sex make women vulnerable to poverty, physical, emotional, and sexual abuse, and inferior status. This disparate impact argument is doctrinally viable because the state interests advanced in same-sex marriage fulfill the level of intent set out in

160. *Id.* at 71-77.

161. For an analysis of the ways in which state-sanctioned recognition of relationships, same-sex or otherwise, harms those outside such relationships and the queer-theoretical basis for opposing such state recognition, see Warner, *supra* note 85.

162. *See supra* notes 43 and 44.

163. *Id.*

164. Although under a sex equality analysis they are highly visible in between the lines in many same-sex marriage *decisions* and help frame what arguments judges find persuasive. *See, e.g.*, Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (universal non-recognition of the sex discriminatory nature of the laws at issue among all litigants and the court).

165. I refer here generally to a variety of phenomena including the role of domestic labor performed by women in marriage, the economic status of women in marriage, the frequent economic devastation that befalls them by leaving it, and the realm of marital privacy that seals impunity for abuse within marriage. For analyses of issues of vulnerability within marriage and the family see *supra* notes 78 and 79.

Feeney:[166] that a particular course of action must be chosen "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[167] Even if legislative history does not explicitly demonstrate that same-sex marriage prohibitions were enacted to subordinate women, the state's reliance on concepts such as gender complementarity, as well as the hierarchy and asymmetry it implies, indicates that these laws are grounded in prohibited sex-role stereotyping. And yet, many courts remain blind to the procedural sex discrimination and substantive sex inequality that *Lawrence* could have exposed; they continue to reject sex-based equal protection challenges to bans on same-sex marriage.[168] Some courts, in an Aristotelian dodge, deny that there is a sex classification at all, while others grant that while there may be a classification, there is no unequal burden or harmful discrimination that would trigger equal protection concerns.

If *Lawrence* had acknowledged the facial sex discrimination in the Texas law, the facial sex classification that often goes unnoticed in debates about same-sex marriage would be called into question for precisely the same reasons it would have been in *Lawrence*, that is, the gender imposition behind the classification. Under existing doctrine, recognizing that same-sex marriage bans employ a prohibited classification would obligate courts to interrogate the state interests behind these laws through burden shifting, inquiries into justifications, and questions of "fit" between classification and purpose. When the burden of justification under the equal protection tiers of scrutiny is shifted in an inquiry into governmental purpose, substantive inequalities may be exposed that further require invalidation of these bans. This approach allows the incorporation of insights about the relationship between the censure of same-sex sexuality and gender inequality without becoming mired in the complicated definitional issues involved in dealing with lesbian and gay identity, because the marriage statutes classify on the basis of sex. In this way, the bans' reliance on forbidden classifications to target lesbians and gays begins an inquiry into why and how the category of sex is used to regulate those who self-identify as or are perceived to be lesbian or gay.

An approach that recognizes the sex discrimination employed in marriage laws shifts the burden of justification to the state, and thus begins a more searching inquiry into the interests and reasons behind the sex-discriminatory laws.[169] Once a sex-based classification is found, the law in question would be subject to intermediate review, under which the sex classification must be shown to be substantially related to important governmental interests in order

166. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

167. *Id.*

168. *See* Hernandez v. Robles, 855 N.E.2d 1, 10-11 (N.Y. 2006) ("By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike . . . .").

169. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

to survive.[170] Because it forces the state to provide a strong defense for its marriage law, the sex discrimination strategy confronts both the source and function of the laws it interrogates. Following from the sex discrimination analysis of *Lawrence* offered above, such an inquiry could begin by analogizing same-sex marriage prohibitions to antimiscegenation statutes.[171]

Just as it was clear to the *Loving* Court that it was sophistry to claim an antimiscegenation law constituted equal treatment, so a few courts have found that same-sex marriage prohibitions do in fact discriminate on the basis of sex. In *Brause v. Bureau of Vital Statistics*, the court opined about Alaska's opposite-sex only marriage law:

> That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.[172]

Similarly, a concurring opinion in *Baker v. State*, a lawsuit challenging the constitutionality of Vermont's exclusion of same-sex couples from marriage, saw sex discrimination where *Brause* did—and where the *Baker* majority did not.[173] The concurrence argued that:

> A woman is denied the right to marry another woman because her would-be partner is a woman . . . . Similarly, a man is denied the right to marry another man because his would-be partner is a man . . . . Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex . . . .[174]

In the context of same-sex marriage, as it was with regard to same-sex sodomy, it is no response to say that women and men alike are prohibited from same-sex marriage; this merely doubles the discrimination, ignores the use of sex to classify, and refuses to examine the structures and ideology supporting the law.[175] Most recently, an Iowa trial court refused to distinguish *Loving* and held

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170. *Id.* In *J.E.B. v. Alabama* ex rel. *T.B.* the Court emphasizes that it is the classification itself that triggers heightened review. *See* 511 U.S. 127, 136 (1994); *see also id.* at 141-42 (holding that the government exercise of peremptory challenges on the basis of gender constitutes impermissible sex discrimination even though based on gender stereotyping of both men and women).

171. *See generally* Koppelman, *Why Discrimination*, *supra* note 118.

172. No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

173. 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part). *See also* Baehr v. Miike, 1996 WL 694235 (Haw. 1996) (recognizing the dispositive nature of a sex discrimination challenge).

174. *Id.*

175. In much the same way opponents to the Fourteenth Amendment said it would require interracial marriage, opponents of the federal Equal Rights Amendment said it would require same-sex marriage. Defenders in both instances incorrectly denied the charge. *See* Note, *The Legality of Homosexual Marriage*, 82 Yale L.J. 573, 583-88 (discussing ERA advocates' denial that the ERA would require same-sex marriage). This Note cites a letter by Professor Thomas Emerson of Yale Law School in which he "expressed his belief that the Equal Rights Amendment

that:

> Sex-role conformity remains embedded in Iowa marriage law. As a condition of marriage in Iowa, male Plaintiffs must conform to the State's view that men should fall in love with, be intimate with and marry only women, while female Plaintiffs must conform to the State's view that women should fall in love with, be intimate with and marry only men . . . The Plaintiffs' own sex precludes them from marrying an individual of their choosing. Such a classification is sex-based.[176]

Such holdings are, however, relatively rare. In most cases, courts have rejected litigants' sex discrimination arguments. In addition to the "equal application" logic mentioned above, some courts balk at the implications of the notion that sex classifications themselves trigger heightened equal protection analysis, and rely instead on an antisubordination rejection of the claim for marriage equality (a position tenable only if one accepts the questionable premise that marriage plays no part in sex inequality).[177]

Despite the promising passages from *Baehr* and *Brause* mentioned above, *Loving's* insight that the racial segregation and polarization embodied in anti-miscegenation statutes was an expression of White Supremacy has not yet been extended to the same-sex marriage context. While some opinions that invalidate same-sex marriage bans employ a sex discrimination analysis consistent with *Loving*, they have not gone beyond a formal, procedural analysis of sex discrimination.[178] Application of *Loving* in same-sex marriage cases has stopped short of engaging in an inquiry into what structures, dynamics, or ideologies the classification in question supports or expresses.[179] A more appropriate response to laws prohibiting same-sex marriage requires extending the *Loving* analogy in a way that exposes the substantive objection to these laws: they are part of a system that subordinates both women and men on the basis of gender.

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was not intended to force the states to grant marriage licenses to homosexual couples and would not be so construed by the courts." *Id.* at 584 n.50. Catharine MacKinnon has publicly stated that before his death, Professor Emerson told her that he never wrote such a letter. Catharine A. MacKinnon, Keynote Address at the Moritz College of Law Symposium on *Lawrence v. Texas* (Nov. 7, 2003) (webcast available at http://moritzlaw.osu.edu/news/webcasts.php). On Fourteenth Amendment advocates' denial that it would require interracial marriage see Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 Va. L. Rev. 1224 (1966).

176. Varnum v. Brien, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007) (slip op. at 40, 47).

177. These courts, of course, adopt a position that requires a law to be *both* facially discriminatory and subordinating rather than a genuine antisubordination approach which is not obsessed with questions of classification. For a representative rejection of a sex discrimination argument because of a failure to perceive any "discrimination between men and women as classes" (following Scalia's logic in *Lawrence*), see Conaway v. Deane, 932 A.2d 571 (Md. 2007).

178. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 63-67 (Haw. 1993); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

179. *See* Baehr, 852 P.2d at 63.

An analysis of states' purposes and interests in defending bans on same-sex marriage helps to illuminate the need for a substantive level of sex equality analysis. In *Goodridge v. Department of Public Health*, Massachusetts' rationales for prohibiting same-sex couples from marrying included the need to provide a "favorable setting for procreation" and to ensure the optimal setting for child rearing, defined as "a two-parent family with one parent of each sex."[180] As justifications for its restrictive marriage laws, Vermont argued that it had an interest in "uniting men and women to celebrate the 'complementarity' (sic) of the sexes and providing male and female role models for children." Vermont went on to contend that

> (1) marriage unites the rich physical and psychological differences between the sexes; (2) sex differences strengthen and stabilize a marriage; (3) each sex contributes differently to a family unit and to society; and (4) uniting the different male and female qualities and contributions in the same institution instructs the young of the value of such a union.[181]

When a state offers stereotypes and antiquated gender norms that enforce inequality in response to an equal protection challenge, it raises issues that go beyond a procedural sex equality analysis. The Supreme Court has made plain that gender differentiations in the definition of marital obligations are unconstitutional, unless they are shown to be closely related to important state objectives.[182] For example, in *Stanton v. Stanton* the Court invalidated a statue requiring parents to support their sons until age twenty-one, but their daughters only until age eighteen.[183] The state defended this law as necessary because men need an education and training to provide a home, a responsibility that women do not have.[184] The Court dismissed this argument, holding that a distinction based on "old notions" could not survive an equal protection challenge.[185]

Judge Johnson's concurring and dissenting opinion in *Baker* begins to move the sex discrimination analysis beyond its purely procedural context, gesturing toward the greater possibilities of a substantive equality analysis. The opinion states that the state's attempts to justify its marriage laws are "unrelated to any valid purpose, but rather [are] a vestige of sex-role stereotyping that applies to both men and women, [and therefore] the classification is still unlawful sex discrimination even if it applies equally to men and women."[186] It follows from this analysis that just as other gender stereotypes are subject to

180. 798 N.E.2d 941, 961 (Mass. 2003).

181. Baker v. State, 744 A.2d 864, 909 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

182. *See* Orr v. Orr, 440 U.S. 268, 278-79 (1979).

183. 421 U.S. 7, 17 (1975).

184. *Id.* at 14.

185. *Id.* at 17.

186. *Baker*, 744 A.2d at 906 (Johnson, J., concurring in part and dissenting in part).

heightened scrutiny under the Equal Protection Clause, so too should an element of sex inequality in marriage undergo the same level of scrutiny.

An equality approach to opposite-sex marriage laws affirms that just as the Equal Protection Clause forbids the imposition of what society deems a sex-appropriate job, educational environment, or appearance, so too does it forbid the legislation of what is deemed the proper sex for a marital partner. Recently, sex-stereotypes in same-sex marriage cases have emphasized the potential for accidental "heterosexual" procreation and the corresponding need to corral irresponsible heterosexual procreative activity.[187] That is, cases that deny a right to marry for individuals of the same-sex also have relied on arguments about the fragility of opposite-sex sexuality and the need to protect and incentivize stable opposite-sex relationships because of their potential for accidental procreation.[188] Perhaps the most direct statement of this justification came in *Morrison v. Sadler*, when an Indiana court wrote: "opposite-sex marriage is recognized and supported by law in large part to encourage 'responsible procreation' by opposite-sex couples, who are the only ones who can, in fact, procreate 'by accident' . . . ."[189] The *Morrison* court explicitly drew inspiration from the dissent in *Goodridge*, which had suggested that marriage "'systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized[,]'" and that marriage is necessary to "formally bind[] the husband-father to his wife and child, and impos[e] on him the responsibilities of fatherhood."[190]

Yet, the notion that the sexes are bipolar, discrete, and opposite (and that exposing children to these traditional gender roles is a good thing) has not disappeared in this new formulation. However, the new valence it has taken on is to rely on notions of the elimination of (female) vulnerability and the need to tame male sexuality. The New York Court of Appeals held in *Hernandez v. Robles* that it was rational for the legislature to "proceed on the common-sense premise that children will do best with a mother and father in the home."[191] To

187. *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

188. Standhardt v. Superior Court, 77 P.3d 451, 461 (Ariz. Ct. App. 2003).

189. 821 N.E.2d 15, 30 (Ind. Ct. App. 2005).

190. *Id.* at 25-26 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting)). In his *Goodridge* dissent, Justice Cordy goes on to say (seemingly oblivious to the realities of surrogacy and the many ways assisted reproductive technology complicate parentage) that:

> Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood.

Goodridge, 798 N.E.2d at 996 (Cordy, J., dissenting) (footnote omitted).

191. *Id.* at 8. For another example of a court's willingness to indulge the legislature's

support this assertion, the court pointed to "[i]ntuition and experience," which were deemed to support the idea that "a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like" (something the court assumes can only be accomplished via opposite-sex marriage and parenting).[192] Arguments regarding the natural, innate complementarity of the sexes have also been widely repeated in briefs filed in nearly all same-sex marriage cases, including in instances where the state has explicitly declined to defend or advance such arguments because they run counter to well-established state public policies of non-discrimination in the context of sexual orientation and sex equality.[193] Furthermore, the notion that marriage is needed to save (straight) men and women from lawless sex (that is, sex separated from childbirth and proper commitment to one person of the opposite sex and children) operates in much the same way as the use of state-level Defense of Marriage Acts to invalidate domestic violence protections for the unmarried. That is, it serves to highlight some of the true motivations and beliefs about the abject inferiority of relationships outside of marriage on the part of the defenders of "traditional" marriage, to the extent that they do not even deserve freedom from abuse, because they are already definitionally wrong.[194]

Against this backdrop of sex discrimination, classification, stereotyping, and inequality the concurring opinion in Vermont's *Baker* opinion represents significant progress in moving toward a substantive, antisubordination analysis of same-sex marriage prohibitions. However, it does not fully expose the historical and continuing *inequality* of sex stereotyping. Only when seen in this light does discrimination against lesbian women and gay men become part of a larger structure of male dominance and structural sex inequality. As their defenses make clear, states continue to understand marriage as inextricably

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preference for opposite-sex parents (following a refusal to find a violation of the state Equal Rights Amendment), see *Andersen v. King County*, 138 P.2d 963, 983 (Wash. 2006).

192. *Hernandez*, 855 N.E.2d at 7.

193. *See In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 724 n.33 (Cal. Ct. App. 2006) (observing that the California Attorney General expressly disavowed amici's arguments suggesting families headed by opposite-sex parents are better for children.), *petition for review granted*, 149 P.3d 737 (Cal. 2006). New Jersey also explicitly did not argue that limiting marriage to opposite-sex couples encouraged responsible procreation or created an optimal environment for child development. *See* Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

194. *See* Marc Spindelman, *The Honeymoon's Over*, Legal Times, June 12, 2006, at 66. In an earlier article, Spindelman describes how sweeping state DOMAs, designed to eliminate all marital protections for same-sex couples, were used to invalidate (thankfully not conclusively) domestic violence protections for all those but the married:

> Eliminating domestic violence protections that unmarried victims of intimate partner abuse, including (more recently) same-sex partner abuse, receive, constructs these relations as lawless, the violence that punctuates them without redress, the wages of sin, eminently avoidable through marriage, where domestic violence—if it can be proved to have happened—is formally not tolerated under law.

Marc Spindelman, *Homosexuality's Horizon*, 54 Emory L.J. 1361, 1394 (2005) (footnote omitted).

linked to sex, child-rearing, and the maintenance of gender dichotomies through forced realization of complementarity. Proscribing same-sex marriage maintains gender dichotomies, socially coded as difference, and treats the dichotomies as hierarchically-ordered inequality.

Marriage restrictions are an instance of sex discrimination that enforces harmful gender norms. The compulsory heterosexuality expressed in same-sex marriage bans encourages women to enter (and stay in) relationships with their social unequals, men.[195] Just as restrictions on interracial sex sought to maintain racial hierarchy in a way that helped to construct white women's, black men's, and black women's sexualities in popular consciousness, so too do prohibitions on same-sex marriage contribute to a pernicious construction of gender and sexuality.[196] Just like sodomy laws, prohibitions of same-sex marital unions impose a dangerous and hierarchical construction of gender on women and men.[197]

The restriction, non-recognition, and stigmatization of same-sex sexuality reproduces gender hierarchy by enforcing a rigid distinction and inequality between the genders, which can create conditions of dependency, exploitation, abuse, and vulnerability.[198] As Dorothy Roberts has written, "[t]he separate spheres ideology gave women a place, a role, and importance in the home, while preserving male dominance over women."[199] On the other hand, same-sex relationships, because neither party can be automatically assumed to be the other's unequal on a sex basis, oppose, or can oppose, gender hierarchy.[200]

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195. *See supra* notes 117-123 and accompanying text.

196. For a pioneering and authoritative account of the ways in which sexuality is gendered and gender is sexualized, see Catharine A. MacKinnon, Toward a Feminist Theory of the State 126-54 (1989); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 Signs 515 (1982).

197. While same-sex marriage prohibitions are facially sex-based, they are often animated by gender anxiety in that those who oppose same-sex marriage do so because they endorse the roles and constructs of gender itself. Such persons generally also oppose same-gender relationships as well as relationships in which sex and gender do not correspond to social expectations (that is, relationships where a man plays a socially female role or a woman plays a socially male role). There is, however, some support for a sex/gender distinction in law such that marriage adjudication should focus on sex instead of gender—*see* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting, endorsing a dichotomy between sex and gender); Corbett v. Corbett, 2 W.L.R. 1306 (1970) (UK judge using a person's "true sex" according to "individual body cells" to test the validity of a marriage). However, part of my argument is that because gender is sex-based and sex roles are gendered, the two are inseparable in reality.

198. For an analysis of why right-wing women make a rational choice to align themselves with male power, risking and enduring these conditions, in exchange for shelter, rules, form and love see Andrea Dworkin, Right-Wing Women (1983).

199. Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 Yale J.L. & Feminism 51, 55 (1997).

200. On the increased egalitarianism that can characterize same-sex relationships see Susan Moller Okin, *Sexual Orientation and Gender: Dichotomizing Differences, in* Sex, Preference, and Family 44, 54-56 (David M. Estlund & Martha C. Nussbaum eds., 1997) (arguing that the greater economic equality in same-sex families can be a model for the generation of equality in families

Thus, traditional marriage laws substantively discriminate against men and women based on sex, only permitting them to marry someone who, on a sex basis, has more or less power than they do.

CONCLUSION

The *Lawrence* decision was undoubtedly a victory for the lesbian and gay rights movement. However, the approach of those challenging Texas' law, and the path that the Court ultimately used to strike down the statute, did not consider the implications of privacy as it relates to sexual relations for the victims of sexual abuse. The sex discrimination approach to *Lawrence* is instructive not only because the legal structures it invokes force a discussion of the role of sodomy laws, and by extension, same-sex marriage prohibitions in sex inequality, but also because it illustrates a more accurate understanding of the privacy violation in *Lawrence*. That is, the Texas law was a *sex-discriminatory* violation of the right to privacy, just as laws limiting marriage to individuals of the opposite sex are sex-discriminatory violations of the right to marry. However, it is not therefore true that "equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked . . . and a decision on the latter points advances both interests."[201] The consequences of deciding *Lawrence* on a liberty/privacy basis, rather than an equality rationale, highlight both the tension between freedom and equality when substantively analyzed and a lacuna in those theories of the relationship between due process and equal protection that claim each doctrine embodies and expresses the other.

Understanding the conduct prohibited in Texas's law and in laws prohibiting same-sex marriage as gender nonconformity allows for an analysis that works backwards to strengthen the interpretation of same-sex marriage bans as mechanisms of sex inequality.[202] Laws that encourage the marriage of gender unequals by discouraging the marital union of gender equals help to preserve the dynamics of sexual polarization and differentiation in ways that subordinate on the basis of sex and the stigmatized association therewith.

Supporting same-sex marriage on a sex equality analysis is but one small part of the acknowledgment that realizing sex equality requires changes in

more generally). *But see* MacKinnon, *supra* note 64, at 1088-95 (noting, in part, the overlooked sex equality issues of sexual subordination in same-sex settings); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 Va. L. Rev. 1535, 1538-40 (1993) (noting historical and anthropological evidence that suggests that gender and its fundamental hierarchies can persist in same-sex relationships).

201. *Lawrence*, 539 U.S. at 575.

202. Of course, the admission of same-sex couples into the institution of marriage will not *necessarily* transform the institution. *See supra* note 200 and accompanying text. I regard both the question of whether the admission of same-sex couples to the institution will transform the institution or the couples and if the same-sex couples are characterized by a greater level of egalitarianism as a significantly empirical one that awaits further investigation.

structures and practices where inequality has long gone unnoticed and unquestioned. Same-sex marriage cases present an opportunity to advance our collective understanding and conversation about what sex equality looks like and means while developing in our jurisprudence a more substantive notion of equality as such.