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Lawrence and Same-Sex Marriage Bans

ON CONSTITUTIONAL INTERPRETATION AND SOPHISTICAL RHETORIC*

Mark Strasser[†]

I. INTRODUCTION

In *Lawrence v. Texas*,¹ the United States Supreme Court struck down Texas's sodomy law. The majority carefully made clear that it was not deciding whether the right to marry a same-sex partner was constitutionally protected, but instead was focusing on the criminal aspects of the prohibition at issue. Justice Scalia implied in dissent that the Court had abandoned principled constitutional interpretation and might well eventually recognize the right of same-sex couples to marry. While the Court is unlikely to recognize such a right in the near future, the right of same-sex couples to marry follows from the right-to-marry jurisprudence existing prior to *Lawrence*. *Lawrence* is important not because it recognized a right to same-sex marriage but because it overruled a decision² that had falsely been thought to bar the right to marry a same-sex partner. This Article examines *Lawrence* in light of *McLaughlin v. Florida*,³ *Loving v. Virginia*,⁴ and the right-to-

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¹ 539 U.S. 558, 123 S. Ct. 2472 (2003) [hereinafter *Lawrence*].

² *Bowers v. Hardwick*, 478 U.S. 186 (1986) [hereinafter *Bowers*].

³ 379 U.S. 184 (1964).

⁴ 388 U.S. 1 (1967).

marry jurisprudence more generally, concluding that *Lawrence* makes even clearer that the Constitution protects same-sex marriage, even if the current Court is unlikely to recognize that.

Part II of this Article examines *Lawrence*, contrasting it with *Bowers v. Hardwick*⁵ and discussing what *Lawrence* says and does not say about the right to marry a same-sex partner. This part ultimately concludes that although *Lawrence* undermines the argument against gay marriage, it does not expressly recognize that right. Part III examines the jurisprudence existing prior to *Lawrence*. It discusses the equal protection and due process issues implicated by same-sex marriage bans, suggesting that such prohibitions should be struck down on both due process and equal protection grounds. Part IV explains why *Lawrence* might be thought to involve "marriage," notwithstanding the explicit refusal of the *Lawrence* majority to address that issue. The Article concludes by suggesting that although same-sex marriage bans violate both equal protection and due process guarantees, it is at best unclear whether this Court will recognize what the Constitution requires in this regard or whether, instead, that recognition will not take place until sometime in the perhaps distant future.

II. *LAWRENCE V. TEXAS*

In *Lawrence v. Texas*,⁶ the plaintiffs challenged a statute that criminalized intimate, same-sex conduct⁷ as a violation of both the equal protection and due process guarantees of the Fourteenth Amendment,⁸ and the Court struck it down as a violation of the latter.⁹ The decision is likely to be viewed as a watershed in the movement to secure equal rights for the lesbian, gay, bisexual, and transgendered (LGBT) community, although commentators will long disagree about what the decision means and why it is important.¹⁰

⁵ 478 U.S. 186 (1986).

⁶ 123 S. Ct. 2472 (2003).

⁷ 123 S. Ct. at 2475.

⁸ *Id.* at 2476.

⁹ *See id.* at 2476, 2484.

¹⁰ Compare Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 REGENT U. L. REV. 121, 122 (2003) (asserting that *Lawrence* has little if any impact with respect to whether same-sex marriage is constitutionally protected), with *The Supreme Court, 2002 Term: Leading Cases: I. Constitutional Law*,

A. *Lawrence as Response to Bowers v. Hardwick*

One way to understand *Lawrence v. Texas* is as a substantive and symbolic response to *Bowers v. Hardwick*.¹¹ *Lawrence* removes some of the underpinnings provided by *Bowers* upon which discrimination against the LGBT community has been rationalized. At the same time, it recognizes the dignity of same-sex relationships and offers hope that the LGBT community will someday enjoy the same rights that others in the United States enjoy.

At issue in *Lawrence* was Tex. Penal Code Ann. § 21.06(a), which prohibited sexual relations between members of the same sex involving contact between the genitals of one person and the mouth or anus of another, or the penetration of the genitals or the anus of another person with an object.¹² The state did not criminalize the same activities if performed by members of different sexes.¹³

While the Court ultimately struck down the statute as a violation of Fourteenth Amendment due process guarantees,¹⁴ the Court seemed to take the equal protection challenge seriously as well, describing that argument as “tenable.”¹⁵ However, the Court believed it very important to address *Bowers* directly,¹⁶ since “[i]ts continuance as precedent demeans the lives of homosexual persons.”¹⁷

The dispute in *Bowers* concerned a Georgia statute that prohibited sexual acts “involving the sex organs of one person and the mouth or anus of another.”¹⁸ The statute did not distinguish based on either the sexes of the parties involved or their marital status.¹⁹ Indeed, initially, a married couple as well

2. *Intimate Personal Relationships*, 117 HARV. L. REV. 297, 298 (2003) (asserting that after *Lawrence*, same-sex marriage bans will only be upheld if narrowly tailored to promote compelling state interests).

¹¹ 478 U.S. 186 (1986).

¹² See *Lawrence*, 123 S. Ct. at 2476.

¹³ See *id.* at 2485 (O'Connor, J., concurring).

¹⁴ See *id.* at 2476, 2484.

¹⁵ *Id.* at 2482.

¹⁶ *Lawrence*, 123 S. Ct. at 2482.

¹⁷ *Id.*

¹⁸ See *Bowers*, 478 U.S. at 188 n.1.

¹⁹ See *id.* at 200 (Blackmun, J., dissenting) (“The sex or status of the persons who engage in the act is irrelevant as a matter of state law.”).

as Hardwick challenged the statute,²⁰ although the couple was dismissed for lack of standing.²¹

Hardwick challenged the statute as a violation of the Due Process Clause of the Fourteenth Amendment.²² The *Bowers* Court understood that an existing line of cases protected the right of privacy²³ and, further, that some of the right of privacy cases recognized rights that "have little or no textual support in the constitutional language."²⁴ The Court claimed, however, that it could "identify the nature of the rights qualifying for heightened judicial protection,"²⁵ namely, those "liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed,'"²⁶ or "those liberties that are 'deeply rooted in this Nation's history and tradition.'"²⁷ The Court concluded that because "neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy,"²⁸ the right to privacy did not include the right to engage in same-sex relations.

Yet the Court failed to point out that those rights already recognized as falling within the right to privacy also would not have met the test articulated by the Court. For example, the statute at issue in *Griswold v. Connecticut*,²⁹ which prohibited using "any drug, medicinal article or instrument for the purpose of preventing contraception,"³⁰ had been on the books for over eighty years;³¹ thus the right to use contraception could not plausibly have been described as either implicit in the concept of ordered liberty or deeply rooted in this nation's history and tradition. The statute prohibiting abortion at issue in *Roe v. Wade*³² typified statutes that had

²⁰ See *id.* at 188 n.2.

²¹ See *id.*

²² *Id.* at 189.

²³ *Bowers*, 478 U.S. at 190.

²⁴ *Id.* at 191.

²⁵ *Id.*

²⁶ *Id.* at 191-92 (citing *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

²⁷ *Id.* at 192 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

²⁸ *Id.*

²⁹ 381 U.S. 479 (1965).

³⁰ See *id.* at 480.

³¹ See *Poe v. Ullman*, 367 U.S. 497, 501 (1961) ("The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879.").

³² 410 U.S. 113 (1973).

been on the books for a century,³³ thus the right to abort could hardly be thought deeply rooted in the nation's history and tradition.³⁴ The point here is not to suggest that *Griswold* and *Roe* were wrongly decided but merely to suggest that the Court offered the wrong test in *Bowers* for determining whether something falls within the constitutional right to privacy.

The *Bowers* Court at least implicitly offered another test for determining whether a particular liberty falls within the right to privacy, construing the protected zone as involving family-related decisions and then suggesting that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."³⁵ The *Lawrence* Court accepted that family-related decisions are within that protected zone, reaffirming that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."³⁶ However, the *Lawrence* Court differed from the *Bowers* Court in recognizing that same-sex couples can and do have relationships worthy of protection. Indeed, the *Lawrence* Court criticized the *Bowers* Court by noting that the latter had mischaracterized the relevant issue: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."³⁷ The *Lawrence* Court noted that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,"³⁸ thereby recognizing that same-sex couples, like different-sex couples, may not merely perform isolated sexual acts but may have relationships in which they find meaning, purpose, and dignity.³⁹

³³ See *id.* at 174 (Rehnquist, J., dissenting).

³⁴ See *Lawrence*, 123 S. Ct. at 2493 (Scalia, J., dissenting) (noting that the *Roe v. Wade* Court had not even attempted to establish that a right to abortion was deeply rooted in the nation's history and tradition).

³⁵ *Bowers*, 478 U.S. 186, 191 (1986).

³⁶ *Lawrence*, 123 S. Ct. at 2481 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)).

³⁷ *Id.* at 2478.

³⁸ *Id.*

³⁹ *Id.* at 2482.

The *Lawrence* Court outlined some of the pernicious effects of *Bowers*, explaining that “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”⁴⁰ As the Court noted, “Indeed, Texas itself previously acknowledged the collateral effects of the law, stipulating . . . 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.’”⁴¹ As an additional point, the Court noted some of the direct and significant effects of a conviction under the statute.⁴² For example, as Justice O’Connor noted in her concurring opinion, a conviction would restrict the ability of an individual to pursue various professions in Texas and might require that individual to register as a sex offender were he or she to move to another state.⁴³

In overruling *Bowers*, the *Lawrence* Court prevented the imposition of some of the harms outlined above and undermined the purported justification for others. Thus, not only may a state no longer seek a conviction under sodomy laws in circumstances like these, but those who once justified discrimination against the LGBT community by arguing that adult, consensual sodomitical relations could be criminalized must now offer another ground upon which to rationalize their desired discrimination.

A separate but related point is that individuals who wish to deny equal rights to members of the LGBT community can no longer support their position by pointing to the Court’s tone when addressing sexual orientation issues.⁴⁴ Some of the harm *Bowers* caused was not a result of its substantive holding but rather its tone, which might felicitously be described as

⁴⁰ *Id.*

⁴¹ *See id.* at 2486 (O’Connor, J., concurring) (citing *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992).

⁴² *Id.* at 2482.

⁴³ *See id.* at 2485-86 (O’Connor, J., concurring).

⁴⁴ *Romer v. Evans*, 517 U.S. 620 (1996), also adopted a different tone, although the Court’s denial of certiorari in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943 (1998), made *Romer* somewhat difficult to interpret since the language of the referendum proposition in *Equality Foundation* bore a strong resemblance to the language in the referendum proposition in *Romer*, which the Court held violated constitutional guarantees. 525 U.S. at 943-44 n.2; 517 U.S. at 624.

contemptuous towards those with a same-sex orientation.⁴⁵ By contrast, the *Lawrence* Court showed respect rather than contempt, acknowledging that “adults may choose to enter upon this [same-sex] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”⁴⁶ While hardly offering a full-fledged endorsement, the Court nonetheless accords a kind of respectability to LGBT people and relationships not accorded in previous decisions.

The *Lawrence* Court addressed the concern that some view sodomitical behavior as violating religious and moral principles, discussing “powerful voices . . . [that] condemn homosexual conduct as immoral.”⁴⁷ The Court understood that such views were “shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for traditional family,”⁴⁸ but noted that “the issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”⁴⁹ Concluding that the majority may not, the Court struck down the statute.⁵⁰

Of course, *Lawrence* also has implications for those not in the LGBT community. By holding that the Due Process Clause protects sodomy, the *Lawrence* Court is presumably invalidating any fornication statutes remaining on the books.⁵¹ A separate question is whether statutes prohibiting adultery or prostitution are also at risk,⁵² although the majority made clear that the case before it did not involve prostitution⁵³ and offered language suggesting how the case before it might be distinguished from one involving adultery.⁵⁴ Thus, state statutes

⁴⁵ See *Neill v. Gibson*, 278 F.3d 1044, 1066 (10th Cir. 2001) (Lucero, J., dissenting) (discussing the *Bowers* Court’s contempt towards lesbians and gays); *Watkins v. U.S. Army*, 837 F.2d 1428, 1453 (9th Cir. 1988) (Reinhardt, J., dissenting), *superceded by* 847 F.2d 1329 (9th Cir. 1988), *withdrawn on reh’g by* 875 F.2d 699 (9th Cir. 1989) (“[T]he anti-homosexual thrust of *Hardwick*, and the Court’s willingness to condone anti-homosexual animus in the actions of the government, are clear.”).

⁴⁶ *Lawrence*, 123 S. Ct. at 2478.

⁴⁷ *Id.* at 2480.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See *id.* at 2484.

⁵¹ See D.C. CODE ANN. § 22-1602 (2004) (up to six months or \$300 for committing fornication); IDAHO CODE § 18-6603 (Michie 2004) (same).

⁵² See *Lawrence*, 123 S. Ct. at 2490 (Scalia, J. dissenting).

⁵³ See *id.* at 2484.

⁵⁴ See *id.* at 2478 (suggesting that the state should not set boundaries on relationships “absent injury to a person or abuse of an institution the law protects”). For a discussion of adultery as an abuse of marriage, see *City of Sherman v. Henry*,

regulating sexual conduct may now have to undergo reexamination, with some being quite vulnerable to constitutional challenge but others being quite likely to withstand an attack on federal constitutional grounds.

Further, a more general point might be made about how the Due Process Clause may be construed in the future. The *Lawrence* Court eschewed the *Bowers* history-and-traditions approach and instead suggested that "those who drew and ratified the Due Process Clauses of the Fifth Amendment [and] the Fourteenth Amendment . . . [understood that] times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."⁵⁵ The Court understood that this would mean that challenges that might once have been dismissed out of hand by one generation might well be taken seriously by another, and noted that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."⁵⁶ Here, the *Lawrence* Court demonstrates that it rejects the static approach to due process analysis, leaving open the possibility that a variety of liberties once considered appropriately subject to state regulation may now be constitutionally protected.

B. *Lawrence and the Right to Marry a Same-Sex Partner*

Commentators discussing whether the United States Constitution protects the right of same-sex couples to marry will debate both whether and why *Lawrence* plays an important role in that analysis. Although Justice Scalia suggested in his *Lawrence* dissent that the decision provides the basis for recognizing same-sex marriage,⁵⁷ there are a number of reasons to doubt that the Court is ready to take this step. *Lawrence* mentions or alludes to same-sex marriage in several places.⁵⁸ However, nowhere in the opinion is there a suggestion that members of the Court believe the Constitution protects such a right. Moreover, the opinion does contain

928 S.W.2d 464, 470 (Tex. 1996) ("Adultery by its very nature undermines the marital relationship and often rips apart families.").

⁵⁵ *Id.* at 2484.

⁵⁶ *Id.*

⁵⁷ *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting).

⁵⁸ *Id.* at 2478; *id.* at 2487-88 (O'Connor, J., concurring); *id.* at 2490, 2495-98 (Scalia, J., dissenting).

evidence in several places that some members of the Court do not believe the right is protected.

The majority opinion alludes to same-sex unions but refuses to express an opinion about their constitutional status. For example, the Court noted that the Texas criminal statute seeks to “control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”⁵⁹ Thus, some members of the Court may believe that the Constitution precludes criminalizing voluntary, adult, same-sex relations but does not also require that same-sex unions be given legal recognition. Certainly, this seems to be the view that Justice O’Connor now holds,⁶⁰ and it is simply unclear how many other members of the Court share that view.

The *Lawrence* majority offered a general rule that states should not attempt to set boundaries on relationships “absent injury to a person or abuse of an institution the law protects.”⁶¹ The Court did not clarify what it had in mind when discussing abuse of a legally protected institution. Perhaps the Court was thinking of marriage and was suggesting that adulterous relationships are not protected by the right to privacy because they tend to undermine marriages.⁶² Or, perhaps the Court was suggesting that recognizing same-sex marriage would involve an abuse of the institution of marriage, notwithstanding that other countries permit such unions to be celebrated.⁶³

The *Lawrence* Court made quite clear that the case before it did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁶⁴ That said, however, the Court did offer some

⁵⁹ *Id.* at 2478.

⁶⁰ *See id.* at 2484 (O’Connor, J., concurring) (“Texas’ statute banning same-sex sodomy is unconstitutional.”).

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage.

Id. at 2487-88 (O’Connor, J., concurring).

⁶¹ *Id.* at 2478.

⁶² *See supra* note 54.

⁶³ *See* Michael Paulson, *Vatican Warns on Same-Sex Marriage Broad Edict Has Message for Catholic Politicians*, BOSTON GLOBE, Aug. 1, 2003, at A1 (noting that Belgium and the Netherlands recognize same-sex marriage and that such marriages have been recognized in Ontario and British Columbia, Canada).

⁶⁴ *Lawrence*, 123 S. Ct. at 2484.

very encouraging language in the opinion. For example, the Court noted that when "homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."⁶⁵ The same point might be made about refusing to recognize same-sex marriages – such a policy is an invitation to discriminate because it says that same-sex couples are somehow unworthy. Indeed, if, as the Court said in *Romer v. Evans*,⁶⁶ an act is unconstitutional when it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else,"⁶⁷ and, as Justice Scalia suggests in his *Lawrence* dissent, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples,"⁶⁸ then one might expect the Court to recognize the unconstitutionality of same-sex marriage bans.

In criticizing *Bowers*, the *Lawrence* Court noted that the "longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character."⁶⁹ The Court thereby tried to undercut the suggestion that traditionally the law had intentionally and specifically imposed unique disabilities on the LGBT community, although one might nonetheless point out that laws aimed generally at nonprocreative acts have been used to justify the imposition of special burdens on those with a same-sex orientation. For example, the law upheld in *Bowers* was not aimed at the LGBT community in particular,⁷⁰ but some claimed that the Court's decision in that case justified imposing unique disabilities on that community.⁷¹ It is worth noting that an analogous approach has been used to justify same-sex marriage bans. The inability of same-sex couples to have a child through their union has been cited as a reason not to

⁶⁵ *Id.* at 2482.

⁶⁶ 517 U.S. 620 (1996).

⁶⁷ *Id.* at 635.

⁶⁸ *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting).

⁶⁹ *Id.* at 2479.

⁷⁰ See *Bowers*, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting) ("The sex or status of the persons who engage in the act is irrelevant as a matter of state law.").

⁷¹ See *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (suggesting that *Bowers* justifies the imposition of unique disabilities on those with a same-sex orientation).

allow them to marry,⁷² even though others unable to have children are not similarly precluded from marrying.

Lawrence suggests that the Court will look askance at state attempts to impose a disability on one group and not another if the groups are similarly situated. As Justice Scalia suggests in his dissent, the nonprocreation argument is not a plausible rationale for precluding same-sex couples from marrying, given that the sterile and elderly are allowed to marry.⁷³ Indeed, it is even more implausible than Justice Scalia seems willing to admit. Given that LGBT couples are having and raising children,⁷⁴ the procreation argument supports rather than undermines the claim that same-sex couples should be allowed to marry.

While some of the language and reasoning of the *Lawrence* opinion is very promising, the decision cannot be cited for the proposition that the Constitution protects same-sex marriage. The members of the Court have been careful either to express no opinion on this subject or to suggest that there is no constitutional right to marry a same-sex partner. Given that *Lawrence* leaves open rather than decides this issue, it may be helpful to see whether a case can be made from the jurisprudence existing prior to *Lawrence* for a constitutionally protected right to marry a same-sex partner.

III. SAME-SEX MARRIAGE AND THE FOURTEENTH AMENDMENT

The right-to-marry jurisprudence has been evolving since the Court in *Loving v. Virginia*⁷⁵ described it as “one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁷⁶ The Court has recognized the right’s importance, both for society as a whole and for the individuals themselves. One key question, then, is whether same-sex

⁷² See *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal 1980) (“[I]f propagation of the race is basic to the concept of marriage and its legal attributes, ‘marriage’ is again impossible and unthinkable between persons of the same sex.”).

⁷³ *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting).

⁷⁴ See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 964 (Mass. 2003) (“In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license.”); Chuck Colbert, *Gay Catholics Refuse to Go Away or Be Quiet*, BOSTON GLOBE, Dec. 31, 2000, at 3 (discussing Catholic lesbian and gay baby boom).

⁷⁵ 388 U.S. 1 (1967).

⁷⁶ *Id.* at 12.

marriage would serve the individual and societal interests that different-sex marriages serve.

A. *Setting the Stage for Loving*

In *Loving*, one of the most important marriage decisions, the Court struck down anti-miscegenation laws in Virginia.⁷⁷ The *Loving* Court suggested that the laws violated both equal protection⁷⁸ and due process guarantees.⁷⁹ Yet a mere three years earlier in *McLaughlin v. Florida*,⁸⁰ the Court had been unwilling to express an opinion about the constitutionality of interracial marriage bans.

In *McLaughlin*, the Court examined a Florida statute making interracial fornication and adultery a separate crime.⁸¹ The state justified its law as an attempt to "prevent breaches of the basic concept of sexual decency."⁸² While not quarrelling with the state's contention that it had a legitimate interest in preventing "illicit extramarital and premarital promiscuity,"⁸³ the Court suggested that the state's purposes could be served by statutes of "general application."⁸⁴

The state of Florida offered another justification for the statute, however, pointing to its interracial marriage ban and arguing that its interracial cohabitation law was "ancillary to and serv[ing] the same purpose as the miscegenation law itself."⁸⁵ The Court rejected this argument "without reaching the question of the validity of the State's prohibition against interracial marriage."⁸⁶ The Court noted that "even if we posit the constitutionality of the ban against the marriage of a Negro and a white, it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment."⁸⁷ The Court subjected the

⁷⁷ 388 U.S. 1 (1967).

⁷⁸ See *id.* at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

⁷⁹ See *id.* ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.").

⁸⁰ 379 U.S. 184 (1964).

⁸¹ See *id.* at 184.

⁸² See *id.* at 193.

⁸³ *Id.*

⁸⁴ *Id.* at 194.

⁸⁵ *McLaughlin*, 379 U.S. at 195.

⁸⁶ *Id.*

⁸⁷ *Id.*

cohabitation law to this independent examination and found it constitutionally wanting.

In *McLaughlin*, the Court did not strike down cohabitation laws generally, but only those specifically directed at interracial couples. In *Lawrence*, the Court struck down not just laws criminalizing same-sex sodomy, but all sodomy laws.⁸⁸ It is simply unclear whether the Court will someday follow *Lawrence* with a decision striking same-sex marriage prohibitions as the Court followed *McLaughlin* with *Loving*. However, the past constitutional jurisprudence has privileged marital over non-marital relations and the *Lawrence* Court suggests that adult, non-marital, consensual relations⁸⁹ are protected. Unless the Court is going to invert the traditional priorities and say that same-sex non-marital relations are protected but that same-sex marriage is not, the holding in *Lawrence* suggests that same-sex marriage may also be protected by the right to privacy.

B. *The Right to Privacy*

In *Lawrence*, the Court suggested that *Griswold v. Connecticut*⁹⁰ was “the most pertinent beginning point”⁹¹ for an analysis of the constitutionality of Texas’s sodomy law. The Court noted that *Griswold* struck down a Connecticut law “prohibiting the use of drugs or devices of contraception” even by married couples.⁹² The *Griswold* Court had “described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.”⁹³ Of course, relying on marital privacy would not seem to be of much help for those challenging Texas’s sodomy statute, given that the statute only applied to non-marital relations.⁹⁴ However, the *Lawrence* Court wrote that “[a]fter *Griswold*, it was established that the right to make certain

⁸⁸ See *Lawrence*, 123 S. Ct. 2472, 2482 (2003) (“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.”).

⁸⁹ There may well be an exception for adulterous relations. See *supra* note 62.

⁹⁰ 381 U.S. 479 (1965).

⁹¹ See *Lawrence*, 13 S. Ct. at 2476 (discussing *Griswold*, 381 U.S. 479 (1965)).

⁹² See *id.* at 2476.

⁹³ See *id.* at 2477 (citing *Griswold*, 381 U.S. at 485).

⁹⁴ Because same-sex couples are not allowed to marry in Texas, the prohibited relations would presumably be performed by a non-marital couple. See TEX. FAM. CODE ANN. § 2.001 (Vernon 2003).

decisions regarding sexual conduct extends beyond the marital relationship.⁹⁵ Here, the Court was presumably referring to *Eisenstadt v. Baird*,⁹⁶ a case that the Court apparently read as protecting not only the right of unmarried individuals to have access to contraception but also to engage in sexual relations,⁹⁷ at least if the individuals are adult and their relations are consensual.⁹⁸

It may seem surprising that Justice Scalia did not focus more on the first concurrence in *Griswold*, in which Justice Goldberg wrote that "it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct,"⁹⁹ and in which he and two other members of the Court¹⁰⁰ cited Justice Harlan's dissent in *Poe v. Ullman*¹⁰¹ with approval.¹⁰² In his *Poe* dissent, Justice Harlan argued that the "right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced."¹⁰³

Yet there may well be a reason that Justice Scalia did not focus on the *Griswold* concurrence and *Poe* dissent, which a fuller discussion of Justice Harlan's analysis will bring to light. Justice Harlan argued that the

laws regarding marriage which provide both when the sexual powers may be used and the legal and *societal context in which children are born and brought up*, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.¹⁰⁴

Here, it is clear that Justice Harlan was envisioning a world in which same-sex relations did not occur within the

⁹⁵ See *Lawrence*, 123 S. Ct. at 2477.

⁹⁶ 405 U.S. 438 (1972).

⁹⁷ See *Lawrence*, 123 S. Ct. at 2477 (discussing *Eisenstadt*).

⁹⁸ See *id.* at 2484 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.")

⁹⁹ See *Griswold v. Connecticut*, 381 U.S. 479, 498-99 (1965) (Goldberg, concurring).

¹⁰⁰ Justice Brennan and Chief Justice Warren joined Goldberg's concurrence. See *Griswold*, 381 U.S. at 486.

¹⁰¹ 367 U.S. 497 (1961).

¹⁰² See *Griswold*, 381 U.S. at 499.

¹⁰³ *Poe*, 367 U.S. at 552 (Harlan, J., dissenting).

¹⁰⁴ *Id.* at 546 (Harlan J., dissenting) (emphasis added).

context of a family setting but, instead, outside of one. Whether that was an accurate picture at the time is unclear, but it certainly is not accurate today, given various developments over the past several decades. Same-sex couples are now living together as families.¹⁰⁵ Sometimes they raise children and sometimes they do not, but in any case it simply is not true that same-sex relations must take place outside of families rather than within them. If the Due Process Clause paradigmatically protects families, then it should also protect LGBT families.

A further point might be noted. Justice Harlan suggested that the constitutional doctrine that provides bulwarks against state interference must *begin* with the family. That does not suggest that the constitutional doctrine must end there. Rather, Harlan offers a prioritization. Family relationships must be protected even if sexual activity by those outside of a family is not. However, that hardly means that the latter cannot or should not also be protected.

The *Lawrence* Court noted, "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."¹⁰⁶ Here, the Court recognizes that same-sex relations may take place within the context of a relationship, and implies that such relationships are included within the family relationships protected under the Due Process Clause.

In his *Poe* dissent, Justice Harlan distinguished between the state's "power either to forbid extra-marital sexuality altogether, or to say who may marry" and the State's power "when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."¹⁰⁷ Yet, it is not as if the state has absolute discretion with respect to regulating who may marry whom. As the *Loving* Court made clear a mere six years later, state marital restrictions must not violate constitutional guarantees.

One might think that *Loving* does very little to limit the power of the states to decide who can marry and that the states have free reign in this regard as long as they do not classify on the basis of race. Such a view has not been borne out in the

¹⁰⁵ See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989).

¹⁰⁶ *Lawrence*, 123 S. Ct. 2472, 2478 (2003).

¹⁰⁷ *Poe*, 367 U.S. at 553 (Harlan J., dissenting).

subsequent jurisprudence. In *Zablocki v. Redhail*,¹⁰⁸ the Court examined a Wisconsin statute that precluded certain Wisconsin residents from marrying without court permission.¹⁰⁹ The state required courts to deny noncustodial parents permission to marry unless they could show that they were meeting and would continue to meet their child support obligations.¹¹⁰ Redhail, an indigent who wished to marry but who was unable to pay court-ordered support for a child that he had fathered out of wedlock, challenged the statute.¹¹¹

The *Zablocki* Court noted that the "leading decision of this Court on the right to marry is *Loving v. Virginia*,"¹¹² and explained that "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."¹¹³ The Court did not limit the class for whom this right was so fundamental by excluding, for example, those either unwilling or unable to have children or those with a same-sex orientation, but said that it was important for everyone. Indeed, Justice Powell in his *Zablocki* concurrence suggested that the decision would have implications for those with a same-sex orientation.¹¹⁴

The *Zablocki* Court did not merely announce that the "right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause,"¹¹⁵ but instead tried to explain why that was so by putting it in the context of those rights that had already been recognized as falling within the right to privacy. The Court noted, "It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships,"¹¹⁶ since "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."¹¹⁷ While accepting that Wisconsin had

¹⁰⁸ 434 U.S. 374 (1978).

¹⁰⁹ See *id.* at 375.

¹¹⁰ See *id.*

¹¹¹ See *id.* at 378.

¹¹² *Id.* at 383.

¹¹³ *Zablocki*, 434 U.S. at 384.

¹¹⁴ *Id.* at 399 (Powell, J. concurring).

¹¹⁵ *Id.* at 384.

¹¹⁶ *Id.* at 386.

¹¹⁷ *Id.*

“legitimate and substantial interests” that the statute served,¹¹⁸ the Court nonetheless struck down the statute because “the means selected by the State for achieving these interests unnecessarily impinge on the right to marry.”¹¹⁹

Zablocki would seem to be very persuasive if not dispositive in the context under discussion here, given that LGBT couples are having and raising children.¹²⁰ If, as *Zablocki* states, it makes little sense to recognize a right of privacy with respect to other matters of family life but not to marriage, then it makes no sense to refuse to recognize the right of same-sex couples to marry.

In *Adams v. Howerton*,¹²¹ a federal district court addressed the validity of a same-sex marriage between an American and an Australian national. The court held that the marriage was invalid even though marriages were “sanctioned between couples who are sterile because of age or physical infirmity, and between couples who make clear that they have chosen not to have children.”¹²² The *Adams* court explained that “if the classification of the group who may validly marry is overinclusive, it does not affect the validity of the classification.”¹²³ Yet the court failed to understand that this is one of the reasons that same-sex marriages must be recognized regardless of whether a particular same-sex couple plans to have or raise children. Even were it true that the sole reason to permit members of a class to marry was to enable them to provide a more stable environment in which children might be born and raised, that still would provide justification for recognizing same-sex marriages. The interests implicated in being able to provide a stable, marital home for children apply to both same-sex and different-sex couples, and if those interests ground the right of different-sex couples to marry, they also should ground the right of same-sex couples to marry.

In *Turner v. Safley*,¹²⁴ the Court discussed some of the constitutionally significant interests implicated in marriage. Marriages are “expressions of emotional support and public

¹¹⁸ *Zablocki*, 434 U.S. at 388.

¹¹⁹ *Id.*

¹²⁰ See *supra* note 74 and accompanying text.

¹²¹ 486 F. Supp 1119 (C.D. Cal. 1980).

¹²² *Id.* at 1124.

¹²³ *Id.*

¹²⁴ 482 U.S. 78 (1987).

commitment.”¹²⁵ Furthermore, “the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”¹²⁶ Finally, marriage “often is a precondition to the receipt of government benefits.”¹²⁷ Given that all of these interests are also implicated for same-sex couples¹²⁸ and the right to marry is of fundamental importance for all individuals, the right to marry a same-sex partner should be held to be constitutionally protected even bracketing *Lawrence*.

Lawrence does add something to the debate, however. If, as suggested in *Bowers* and reaffirmed in *Lawrence*, the central focus of the substantive due process protections involve family-related matters, such as marriage and having and raising children, then one would expect that if sexual relations for different-sex and same-sex couples are protected even when occurring outside of the family context, then families comprised of same-sex partners should certainly be protected. It may be that Justice Scalia did not want to point to the prioritization that the Court has adopted precisely because this would mean that the existing jurisprudence protects same-sex marriage, especially after *Lawrence*. Thus, the claim would not be that same-sex marriage might be recognized because the Court has given up all reasoning but rather that the Court’s previous jurisprudence compels the legal recognition of such unions. Indeed, Justice Scalia admits as much when he suggests that after *Lawrence* no distinction can “be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”¹²⁹

While Justice Scalia is correct that after *Lawrence* there is no constitutionally viable distinction between the right to marry a same- versus a different-sex partner, he is incorrect insofar as he is implying that there was a constitutionally viable distinction before *Lawrence*.¹³⁰ Even were the state

¹²⁵ *Id.* at 95.

¹²⁶ *Id.* at 96.

¹²⁷ *Id.*

¹²⁸ Some religions recognize same-sex marriages. See Edward Brumby, Note, *What Is in a Name: Why the European Same-Sex Partnership Acts Create a Valid Marital Relationship*, 28 GA. J. INT’L & COMP. L. 145, 162 (1999) (“A growing number of religions recognize same-sex relationships as a legitimate form of marriage.”).

¹²⁹ *Lawrence*, 123 S. Ct. 2472, 2498 (2003) (Scalia, J., dissenting).

¹³⁰ See *id.* (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual

permitted to criminalize sodomy outside of marriage, that would not imply that it could criminalize sodomy within marriage.¹³¹ Thus, even were *Bowers* still good law, that would not imply that a same-sex couple who had married could be prohibited from engaging in sexual relations. Nor would it mean that the state could prevent same-sex couples from marrying to prevent them from engaging in "criminal" sodomitical acts. Nonetheless, now that *Bowers* has been overruled, those specious arguments are no longer even tempting to make.

C. *Equal Protection*

The argument above focuses on the substantive due process protections provided by the Fourteenth Amendment. A separate question is whether same-sex marriage bans violate equal protection guarantees. The comments offered by Justices O'Connor and Scalia in *Lawrence* suggest that at least four members of the Court are unlikely to accept the equal protection argument,¹³² although these comments also suggest that the Court is going to have to modify its equal protection jurisprudence in order to avoid striking down same-sex marriage bans on that basis.

Justice O'Connor made clear in her concurrence that she would have struck down the Texas statute on equal protection rather than substantive due process grounds.¹³³ She suggested that rational basis review itself has tiers. Because "some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests,"¹³⁴ the Court will apply "a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."¹³⁵ Under this more searching form of rational basis review, the Texas statute could not pass constitutional muster.

and homosexual unions, insofar as formal recognition in marriage is concerned.") (emphasis added).

¹³¹ See *Bowers*, 478 U.S. 186, 216 (1986) ("[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.").

¹³² Chief Justice Rehnquist and Justice Thomas both joined Justice Scalia's opinion. See *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

¹³³ *Id.* at 2484. (O'Connor, J., concurring).

¹³⁴ *Id.* at 2485. (O'Connor, J., concurring) (citing *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

¹³⁵ *Id.* at 2485 (O'Connor, J., concurring).

Justice O'Connor did not join the Court in overruling *Bowers*.¹³⁶ She suggested that the promotion of morality was a rational basis for substantive due process purposes,¹³⁷ even if not for equal protection purposes. She explained, "Moral disapproval of this group [those with a same-sex orientation], like a bare desire to harm the group, is an interest that is insufficient to satisfy the rational basis review under the Equal Protection Clause."¹³⁸ She thus would have struck down the Texas statute but would have reserved for another day whether the Due Process Clause precluded a neutral sodomy law.¹³⁹

Justice O'Connor recognized that because the Texas sodomy statute criminalized conduct one might argue that it did not discriminate against persons.¹⁴⁰ However, she reasoned that the statute was "directed toward gay persons as a class"¹⁴¹ and thus was unconstitutional.¹⁴² Justice O'Connor noted, however, that she would view a challenge to same-sex marriage statutes somewhat differently. She suggested that "[u]nlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond moral disapproval of an excluded group."¹⁴³ Justice O'Connor failed to elaborate what those reasons might be, and the question to be answered at some future time is whether, as Justice Scalia suggests, "preserving the traditional institution of marriage" is just a kinder way of describing the State's moral disapproval of same-sex couples.¹⁴⁴ If Justice Scalia is correct, then it may well be very difficult indeed to provide any legitimate rationale for same-sex marriage bans.

At least two points might be made about Justice O'Connor's apparent willingness to uphold same-sex marriage bans. First, the Wisconsin statute at issue in *Zablocki* was

¹³⁶ See *id.* at 2484 (O'Connor, J., concurring).

¹³⁷ *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

¹³⁸ *Id.* (O'Connor, J., concurring).

¹³⁹ See *id.* at 2487 (O'Connor, J., concurring) ("Whether a sodomy law that is neutral both in effect and application [citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)] would violate the substantive component of the Due Process Clause is an issue that need not be decided today.").

¹⁴⁰ See *id.* at 2485 (O'Connor, J., concurring) (discussing Texas's claims).

¹⁴¹ *Id.* at 2487 (O'Connor, J., concurring).

¹⁴² *Lawrence*, 123 S. Ct. at 2488 (O'Connor, J., concurring).

¹⁴³ *Id.* (O'Connor, J., concurring).

¹⁴⁴ *Id.* at 2496 (Scalia, J., dissenting).

struck down on equal protection grounds.¹⁴⁵ There, the state had legitimate and substantial reasons for its statute,¹⁴⁶ which nonetheless did not suffice to save it. The class of individuals adversely affected by the statute – the indigent – was not suspect or quasi-suspect.¹⁴⁷ Thus, even if the state were to have a legitimate reason for its same-sex marriage ban and was not simply wishing to express its moral disapproval of same-sex couples, it is not at all clear that the reason would suffice in light of the existing jurisprudence.

Second, it is not at all clear that rational basis review would be appropriate when examining this equal protection challenge. Justice Scalia's comments in his *Lawrence* dissent suggest why this is so, especially once his misleading analysis of *Loving* is explained and a more accurate analysis is considered in its stead. Justice Scalia recognized in his *Lawrence* dissent that the Texas "statute 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."¹⁴⁸ However, he concluded, "this cannot itself be a denial of equal protection, since its 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."¹⁴⁹

Let us bracket his conclusion about whether the Texas statute passes muster under the Equal Protection Clause, especially since a majority of the Court seems to believe that it failed to pass muster even under the rational basis test.¹⁵⁰ Let us also bracket his conclusory statement about whether same-sex marriage bans pass constitutional muster,¹⁵¹ since that is the matter at issue, and examine why he believes that

¹⁴⁵ See *Zablocki v. Redhail*, 434 U.S. 374, 382 (1978).

¹⁴⁶ See *id.* at 388.

¹⁴⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that poverty is not a suspect or quasi-suspect classification).

¹⁴⁸ *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

¹⁴⁹ *Id.* at 2495 (Scalia, J., dissenting).

¹⁵⁰ See *id.* at 2482 (describing the equal protection argument as "tenable"); *id.* at 2484-85 (O'Connor, J., concurring) (suggesting the statute is unconstitutional on equal protection grounds).

¹⁵¹ Justice Scalia suggests that the same-sex sodomy ban cannot be unconstitutional because it incorporates the same distinction as the same-sex marriage ban. See *id.* at 2496 (Scalia, J., dissenting). His statement only makes sense if the same-sex marriage ban does not pass muster, although he does not provide reasons to support its constitutionality.

heightened scrutiny would not be required when examining the constitutionality of such statutes.

Justice Scalia realizes that both the Texas sodomy statute and same-sex marriage bans¹⁵² facially discriminate on the basis of sex, but argues that heightened scrutiny is not necessary for either. He understands that the anti-miscegenation laws at issue in *Loving v. Virginia*¹⁵³ would seem to be a clear counter-example to his analysis of whether same-sex marriage bans trigger heightened scrutiny, since the laws at issue in *Loving* "similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the partner was concerned."¹⁵⁴ However, he argues, the Court in *Loving* "correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was 'designed to maintain White Supremacy.'"¹⁵⁵

Certainly, he is correct that the *Loving* Court found that the statutes at issue were designed to promote white supremacy.¹⁵⁶ However, the important issues are whether closer scrutiny was required to discover this invidious motivation and what would have happened had there been no such finding. Consider the Court's analysis in *City of Richmond v. J. A. Croson Co.*¹⁵⁷ The Court explained, "Absent searching judicial inquiry into . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."¹⁵⁸ While some members of the Court have argued convincingly that it is sometimes possible to distinguish between benign and malicious discrimination,¹⁵⁹ the discrimination at issue in *Loving* and, for that matter, at issue in same-sex marriage

¹⁵² For an example of such a ban, see TEX. FAM. CODE ANN. § 2.001 (Vernon 2003).

¹⁵³ 388 U.S. 1 (1967).

¹⁵⁴ *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

¹⁵⁵ *Id.* at 2495 (Scalia, J., dissenting) (citing *Loving*, 388 U.S. at 6, 11).

¹⁵⁶ See *Loving*, 388 U.S. at 11.

¹⁵⁷ 488 U.S. 469 (1989) [hereinafter *Croson*].

¹⁵⁸ *Id.* at 493.

¹⁵⁹ See *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.").

bans, can hardly be characterized as benign.¹⁶⁰ In any event, one would not expect Justice Scalia to rely on the purpose of the discriminator when deciding whether exacting scrutiny should be employed for a racial classification.¹⁶¹

Justice Scalia's analysis is even more misleading because he mischaracterizes the *Loving* decision itself. The *Loving* Court made clear that even had there been no purpose to promote white supremacy, the anti-miscegenation statutes still would have been struck down.¹⁶² Further, even had the *Loving* Court not expressed this explicitly, the jurisprudence as it has since developed requires that "all racial classifications, imposed by whatever federal, state, or local actor, must be analyzed by a reviewing court under strict scrutiny."¹⁶³

The lesson of *Loving* is not that racial classifications will be examined closely only when designed to promote white supremacy, but that racial classifications will be examined closely to root out invidious discrimination. Indeed, the Court had already made that lesson clear. In *McLaughlin v. Florida*,¹⁶⁴ there was no showing that the state was trying to promote the superiority of one race over another, and the Court nonetheless struck down the statute expressly classifying on the basis of race.¹⁶⁵ The *McLaughlin* Court made quite clear that "[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation."¹⁶⁶ Rather, the "courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose."¹⁶⁷

The claim here is not that marriage statutes that expressly classify on the basis of sex will be treated in the same way as will statutes that expressly classify on the basis of race.

¹⁶⁰ For a discussion of some of the important interests implicated in marriage that would be denied to same-sex couples were they denied the right to marry, see *supra* notes 125-28 and accompanying text.

¹⁶¹ *Cf. Croson*, 488 U.S. at 520 (Scalia, J., concurring) ("[S]trict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'").

¹⁶² See *Loving v. Virginia*, 388 U.S. 1, 12 n.11 (1967) ("[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed purpose to protect the 'integrity' of all races.").

¹⁶³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

¹⁶⁴ 379 U.S. 184 (1964).

¹⁶⁵ See *id.* at 196.

¹⁶⁶ See *id.* at 191.

¹⁶⁷ See *id.*

The former classifications are subjected to a lower level of scrutiny than are the latter.¹⁶⁸ Nonetheless, the claims are that sex-based classifications should not be subjected to a rational basis test and that, as Justice Scalia himself acknowledges in his *Lawrence* dissent, same-sex marriage bans involve sex-based classifications.¹⁶⁹

Perhaps the Court will ultimately find that same-sex marriage bans pass constitutional muster. However, unless the Court is going to modify its current jurisprudence,¹⁷⁰ Justice Scalia is incorrect that a statute disadvantaging same-sex couples and expressly classifying on the basis of sex does "not need to be justified by anything more than a rational basis, which . . . is satisfied by the enforcement of traditional notions of sexual morality."¹⁷¹ Rather than pass the rational basis test, which merely requires that the "classification drawn by the statute [be] rationally related to a legitimate state interest,"¹⁷² such a classification must serve "important governmental objectives and . . . the discriminatory means employed . . . [must be] substantially related to the achievement of those objectives."¹⁷³

To establish the constitutionality of a sex-based classification, it will not suffice merely to establish that the classification was not motivated out of animus towards one sex or the other. As the Court made clear in *United States v. Virginia*,¹⁷⁴ "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification."¹⁷⁵ Indeed, the classification at issue in

¹⁶⁸ But see *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting) (suggesting that the majority had offered "a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny").

¹⁶⁹ See *supra* note 148 and accompanying text.

¹⁷⁰ In order for the Court to uphold the constitutionality of same-sex marriage bans, it will have to modify current constitutional jurisprudence in a number of respects. See generally MARK STRASSER, ON SAME-SEX MARRIAGE, CIVIL UNIONS, AND THE RULE OF LAW: CONSTITUTIONAL INTERPRETATION AT THE CROSSROADS (2002).

¹⁷¹ *Lawrence*, 123 S. Ct. 2472, 2496 (2003) (Scalia, J., dissenting).

¹⁷² See *id.* at 2484 (O'Connor, J., concurring) (citing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

¹⁷³ *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (internal quotes omitted).

¹⁷⁴ 518 U.S. 515 (1996).

¹⁷⁵ *Id.* at 524 (quoting *Hogan*, 458 U.S. at 724).

Virginia, which arguably was not motivated by animus,¹⁷⁶ nonetheless failed to pass constitutional muster.¹⁷⁷

It is unclear whether same-sex marriage bans could survive heightened scrutiny. However, in *Baker v. Vermont*¹⁷⁸ the Vermont Supreme Court employed something less than heightened scrutiny¹⁷⁹ and nonetheless held that the state constitution's equal protection analog¹⁸⁰ prevented the state from refusing to accord qualifying same-sex couples the benefits accorded to married couples.¹⁸¹ By the same token, in *Goodridge v. Dept. of Public Health*,¹⁸² the Supreme Judicial Court of Massachusetts struck down that state's same-sex marriage ban using a possibly heightened rational basis test.¹⁸³ While these are state supreme courts interpreting their own constitutions, their striking down the statutes under heightened rational basis tests makes it seem at best unlikely that same-sex marriage bans could withstand heightened scrutiny.

IV. WHY DOES *LAWRENCE* "INVOLVE" SAME-SEX MARRIAGE?

In his *Lawrence* dissent, Justice Scalia suggests that the majority opinion "does not involve' homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."¹⁸⁴ It is worth thinking about why Justice Scalia believes that *Lawrence* "involves" same-sex marriage when the Texas statute

¹⁷⁶ See *id.* at 580 (Scalia, J., dissenting) (arguing that the "claim that VMI has elected to maintain its all-male student-body composition for some misogynistic reason" has been utterly refuted).

¹⁷⁷ *Id.* at 558.

¹⁷⁸ 744 A.2d 864 (1999).

¹⁷⁹ See *id.* at 880 n.13 (suggesting that heightened scrutiny would be more difficult to withstand than the scrutiny applied).

¹⁸⁰ The Common Benefits Clause in the Vermont Constitution is the analog of the Equal Protection Clause in the United States Constitution. See *id.* at 870.

¹⁸¹ See *id.* at 889.

¹⁸² 798 N.E.2d 941 (Mass. 2003).

¹⁸³ See *id.* at 961 ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection."); *id.* at 959 ("The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution.").

¹⁸⁴ *Lawrence*, 123 S. Ct. 2472, 2498 (2003) (Scalia, J., dissenting).

challenged was Section 21.06(a) of the Texas Penal Code¹⁸⁵ rather than Section 2.001 of the Texas Family Code.¹⁸⁶

A. *Lawrence and the Pre-existing Priorities in Due Process Jurisprudence*

Lawrence is important to consider for a number of reasons. It strikes down sodomy laws generally, which not only precludes states from criminalizing adult, voluntary, same-sex relations but also has important implications if the Court is going to adhere to the priorities that it has already articulated as being important in substantive due process jurisprudence. The Court has already made clear that relationships are privileged over relations and that family matters are at the core of what due process protects.¹⁸⁷ If the Constitution protects the right to engage in non-marital sexual relations regardless of the respective sexes of the participants, then it certainly also protects family relationships from state impingement, regardless of whether the family is made up of members of the LGBT community. This protection not only extends to one's children but to one's life partner as well. If the previous jurisprudence is not suddenly going to undergo transformation, then *Lawrence* suggests that substantive due process protects the right to marry a same-sex partner.

B. *Lawrence as Representing an Evolution in Attitude*

As a separate but related point, *Lawrence* represents a significant change in tone. *Romer v. Evans*¹⁸⁸ was an improvement over *Bowers* because *Romer* struck down an amendment that disfavorably classified those with a same-sex orientation "not to further a proper legislative end but to make them unequal to everyone else."¹⁸⁹ The *Romer* Court made clear that it "is not within our constitutional tradition to enact laws of this sort."¹⁹⁰

¹⁸⁵ TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). This is the statute that criminalized certain sexual relations between members of the same sex.

¹⁸⁶ TEX. FAM. CODE ANN. § 2.001 (Vernon 2003). This is the statute which precludes same-sex couples from getting married.

¹⁸⁷ See *supra* notes 93-131 and accompanying text.

¹⁸⁸ 517 U.S. 620 (1996).

¹⁸⁹ *Id.* at 635.

¹⁹⁰ *Id.* at 633.

Yet *Romer* was ambiguous in that it was difficult to determine whether the amendment was unconstitutional precisely because “its sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed].”¹⁹¹ Were that the amendment’s fatal flaw, then one might expect that the electorate could have achieved a similar result if only it had been more patient and had adopted a piecemeal approach rather than tried to do everything in one fell swoop.¹⁹² If that was all that *Romer* stood for, then it would not be particularly supportive of the LGBT community except, perhaps, as a statement that it is impermissible for the state to make members of the LGBT community into pariahs.¹⁹³

Lawrence does not lend itself to the same kind of minimalist interpretation. While the Court is mysterious about what it will say with respect to the constitutionality of same-sex marriage bans, its tone of acceptance of and respect for members of the LGBT community seems hard to mistake. That change in tone is important if only because it indicates that the Court no longer believes that LGBT individuals are second-class citizens deserving less protection than others.

C. Lawrence as *Laying Bare the Invidiousness of Bowers*

The *Lawrence* Court implied that *Bowers* had invidious effects.¹⁹⁴ Yet the *Lawrence* dissent suggests something much stronger. Apparently, some members of the Court have taken *Bowers* to hold as a matter of law that second-class status may be imposed upon an entire group because of moral disapproval of that group.¹⁹⁵ This casts a whole new light on the majority and dissenting opinions in *Bowers*, *Romer*, and *Lawrence*.

In his *Bowers* dissent, Justice Blackmun suggested, “Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in ways that would

¹⁹¹ *Id.* at 632.

¹⁹² See Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387, 408 (1997) (suggesting that the piecemeal approach would be permissible).

¹⁹³ For this view, see Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 266-70 (1996).

¹⁹⁴ See *Lawrence*, 123 S. Ct. 2472, 2482 (2003) (holding that continuing *Bowers* “as precedent demeans the lives of homosexual persons”).

¹⁹⁵ See *infra* notes 196-242 and accompanying text.

not be tolerated if it limited the choices of those other citizens.¹⁹⁶ One might have thought that Justice Blackmun was engaging in rhetorical exaggeration. While the *Bowers* Court had held that same-sex sodomy did not implicate a right deeply rooted in the nation's history and tradition and hence was not protected by the Due Process Clause, the same analysis applied equally to different-sex sodomy¹⁹⁷ as well as to adultery, fornication, and a host of other activities.¹⁹⁸ Thus, the decision, although disappointing and arguably wrong,¹⁹⁹ need not have been doing anything invidious.

Certainly, lack of invidiousness does not excuse the Court's having offered a cramped²⁰⁰ and willfully blind²⁰¹ reading of the case, the issue before it, and the past jurisprudence, thereby creating an arbitrary limit on the reach of substantive due process guarantees that undercut the nation's long-cherished values.²⁰² Nonetheless, such a result, although deeply regrettable, is hardly the equivalent of a holding that those with a same-sex orientation can be singled out for unfavorable treatment.²⁰³

Yet, Justice Blackmun may not have been engaging in rhetorical exuberance after all. To see that, it is important to consider *Romer* and then *Lawrence*. *Romer* might seem to be a surprising case to discuss when seeking to get at the "proper" interpretation of *Bowers*. At issue in *Romer* was an amendment to the Colorado Constitution (Amendment 2) that precluded

¹⁹⁶ See *Bowers*, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting).

¹⁹⁷ See *Lawrence*, 123 S. Ct. at 2479 (suggesting that the longstanding prohibitions of sodomy could be explained in terms of a disapproval of nonprocreative acts).

¹⁹⁸ See *id.* at 2496 (Scalia, J., dissenting) (suggesting that the rationale supporting sodomy statutes also supported a host of other statutes including those prohibiting fornication and adultery).

¹⁹⁹ See *id.* at 2478 (suggesting that *Bowers* was wrongly decided at the time the decision was handed down).

²⁰⁰ See *Bowers*, 478 U.S. at 202-03 (Blackmun, J., dissenting) (discussing the Court's "cramped reading").

²⁰¹ See *id.* at 201-02, 205 (Blackmun, J., dissenting) (suggesting that the Court was willfully blinding itself to the issue before it).

²⁰² Cf. *id.* at 214 (Blackmun, J., dissenting) ("[D]epriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.").

²⁰³ Apparently, Justice Scalia reads *Bowers* to have held this. See *Romer v. Evans*, 517 U.S. 618, 636 (1996) (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision . . . pronounced only 10 years ago [namely *Bowers*].").

gays, lesbians and bisexuals from receiving protected status.²⁰⁴ The Colorado Supreme Court had struck down the amendment on electoral process grounds,²⁰⁵ and the *Romer* Court affirmed but on a different ground,²⁰⁶ namely, that the amendment violated equal protection guarantees.²⁰⁷ Of interest here is not whether the amendment should have been struck down as a violation of equal protection or electoral process guarantees²⁰⁸ but, rather, why Justice Scalia argued that the case “most relevant” to the issue before the *Romer* Court was *Bowers*.²⁰⁹ After all, as Justice Scalia noted in his dissent, Colorado had repealed its sodomy law.²¹⁰ Yet, according to Justice Scalia, the fact of the repeal was irrelevant, since if “it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.”²¹¹ What kind of laws? Those precluding the extension of protected status or, presumably, those precluding marriage.²¹²

To see how breathtaking this view is, consider adultery, a practice that is likely not protected even after *Lawrence*.²¹³ Consider further that, unlike its action with respect to sodomy, the Colorado Legislature has not repealed its statute prohibiting adultery.²¹⁴ One would expect that Justice Scalia

²⁰⁴ The amendment read:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

See *Romer*, 517 U.S. at 624.

²⁰⁵ See *id.* at 625-26.

²⁰⁶ *Id.* at 626.

²⁰⁷ *Id.* at 635.

²⁰⁸ For a discussion of why the electoral process analysis was an eminently sensible approach, see generally Mark Strasser, *From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda*, 36 HOUS. L. REV. 1193 (1999).

²⁰⁹ *Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

²¹⁰ *Id.* at 645 (Scalia, J., dissenting) (“Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so.”).

²¹¹ *Id.* at 641.

²¹² See *Lawrence*, 123 S. Ct. 2472, 2498 (2003) (Scalia, J., dissenting) (suggesting that by overruling *Bowers*, the *Lawrence* Court makes it impossible to constitutionally justify same sex marriage bans).

²¹³ See *supra* note 54 and accompanying text.

²¹⁴ See COLO. REV. STAT. § 18-6-501 (2003).

would suggest that heavy civil penalties could be imposed on adulterers or even on those who had an adulterous "orientation,"²¹⁵ such as those married individuals who would kiss or embrace a non-spouse or, perhaps, who had a "tendency or desire to do so."²¹⁶ An individual burdened by such a statute might bring an as-applied challenge to establish that he or she had never engaged in adulterous behavior but the statute itself, allegedly, would pass constitutional muster.²¹⁷

Let us focus on a particular possible civil penalty, namely, not being able to marry. Not so long ago, adulterers were precluded from marrying their paramours²¹⁸ or, sometimes, marrying at all.²¹⁹ Yet very few if any jurists and commentators in this day and age would suggest that a state could constitutionally preclude adulterers, much less those with an adulterous orientation, from remarrying. After all, the *Zablocki* Court struck down the Wisconsin statute at issue precisely because it absolutely prevented some from marrying and in effect coerced others into forgoing their right to marry.²²⁰ Yet Justice Scalia's *Romer* and *Bowers* analyses would imply that adulterers could be precluded from marrying or remarrying.

Suppose that we apply Justice Scalia's approach to the class of fornicators and those who have an "orientation" to fornicate. Presumably, Justice Scalia would suggest that states have the power to preclude fornicators from marrying.²²¹ Those with such an orientation would be allowed to marry if successful in their as-applied challenge, that is, if they could establish that they had not in fact fornicated, but the statute itself could withstand constitutional scrutiny. Basically, this statute would impose possibly severe²²² penalties on those

²¹⁵ For Justice Scalia's discussion of those with a same-sex orientation, see *Romer*, 517 U.S. at 642 (Scalia, J., dissenting).

²¹⁶ See *id.* (Scalia, J., dissenting).

²¹⁷ See *id.* at 643 (Scalia, J., dissenting).

²¹⁸ See *In re Estate of Lenherr*, 314 A.2d 255, 257 (Pa. 1974) (discussing Pennsylvania law prohibiting adulterers from marrying their paramours during the life of the innocent ex-spouse).

²¹⁹ See *Chirelstein v. Chirelstein*, 79 A.2d 884, 890 (N.J. Super. Ct. App. Div. 1951) (discussing New York law precluding adulterers from remarrying while the innocent ex-spouse was still alive).

²²⁰ See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

²²¹ For an example of a fornication statute, see VA. CODE ANN. § 18.2-344 (Michie 2003) (classifying fornication as a Class 4 misdemeanor). Presumably, such a statute is unenforceable after *Laurence*. See text accompanying *supra* note 53.

²²² Those uninterested in marrying might not consider this a severe penalty.

unwilling to delay having sexual relations until after marriage, and Justice Scalia would suggest that such matters are best left to the wisdom of the legislature.

Consider how the *Lawrence* dissenters might address a hypothetical case, *Rablocki v. Zedhail*, involving facts similar to those of *Zablocki*. Justice Scalia would point out that Zedhail had fathered a child out of wedlock.²²³ He would note that while Wisconsin does not have a law against fornication per se,²²⁴ it could have such a law without offending the Constitution, because fornication is neither implicit in the concept of ordered liberty nor a right that is deeply rooted in the nation's history and tradition. Justice Scalia would further point out that in Wisconsin the failure to pay child support can result in a felony conviction.²²⁵ He would then suggest that if "it is constitutionally permissible for a State to make . . . conduct [involving nonsupport] criminal, then surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* . . . conduct [involving nonsupport]."²²⁶ He would conclude that Wisconsin could preclude Zedhail from marrying, past jurisprudence to the contrary notwithstanding. Justice Rehnquist would either join Justice Scalia's opinion or would write a separate one suggesting that the right to marry is not the sort of right that invariably triggers strict scrutiny.²²⁷ Justice Thomas might join either of those opinions or, perhaps, write his own in which he not only rejected the fundamental right to marry but also the general right to privacy.²²⁸

These views contradict the current right-to-marry jurisprudence, although that jurisprudence does not require the Court to strike down any and all restrictions on marriage. As the Court made clear in *Zablocki*, "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."²²⁹ For example, in *Sosna v. Iowa*,²³⁰ the Court upheld Iowa's one-year

²²³ See *Zablocki*, 434 U.S. at 377-78.

²²⁴ The state does have a law against public fornication. See WIS. STAT. § 944.15 (2003).

²²⁵ See WIS. STAT. § 948.22 (2003) (specifying conditions under which failure to pay child support is a felony).

²²⁶ See *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting).

²²⁷ See *Zablocki*, 434 U.S. at 407 (Rehnquist, J., dissenting).

²²⁸ See *Lawrence*, 123 S. Ct. 2472, 2498 (2003) (Thomas, J., dissenting).

²²⁹ See *Zablocki*, 434 U.S. at 386.

²³⁰ 419 U.S. 393 (1975).

residency requirement for divorce.²³¹ However, that was precisely because the statute at issue did not deprive the appellant of the right to marry but merely delayed its exercise.²³² Here, we are postulating a complete deprivation of the right to marry. The current due process jurisprudence simply does not permit the deprivation of that right unless the statute at issue "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."²³³

There are two distinct issues that must not be conflated. One involves the refusal of the *Lawrence* dissenters to accept or apply current privacy or right-to-marry jurisprudence. Another involves their apparent belief that *Bowers* permits same-sex marriage bans in particular because, allegedly, *Bowers* stands for the proposition that those with a same-sex orientation can be singled out for disfavorable treatment,²³⁴ notwithstanding the explicit disavowal in *Bowers* that equal protection issues were even being addressed.²³⁵

It should be little wonder that Justice Scalia suggested in his *Romer* dissent that the challenged amendment was merely "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."²³⁶ On his view, *Bowers* established that it was permissible for the states to impose any of a number of disabilities on members of the LGBT community, and Colorado had not chosen to exercise that power as fully as it might have.

When the *Romer* Court wrote that a state cannot "deem a class of persons a stranger to its laws,"²³⁷ it was rejecting a view that the *Lawrence* and *Romer* dissenters actually seem to hold, namely, that *Bowers* permits a kind of open season on

²³¹ See *id.* at 410.

²³² See *id.*

²³³ See *Zablocki*, 434 U.S. at 388.

²³⁴ See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

²³⁵ See *Bowers*, 478 U.S. 186, 196 n.8 (1986) ("Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment."). See also *Lawrence*, 123 S. Ct. 2472, 2486 (2003) (O'Connor, J., concurring) ("The only question in front of the Court in *Bowers* was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. *Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.") (citation omitted).

²³⁶ *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

²³⁷ *Id.* at 635-36 (Scalia, J., dissenting).

members of the LGBT community.²³⁸ The *Romer* and *Lawrence* dissenters should be commended for their forthrightness. They do not merely suggest with a wink and a nod that a neutral law might slyly be applied in a way that would disadvantage a particular group without running afoul of *Yick Wo* limitations.²³⁹ Rather the *Romer* dissent boldly argues that *Bowers* permits members of the LGBT community to be singled out for unfavorable treatment and the *Lawrence* dissent implies that discrimination against the LGBT community in particular is legitimate and a constitutional right.²⁴⁰ Rather than engaging in rhetorical exaggeration, the *Bowers* dissents and the *Romer* and *Lawrence* majority decisions almost understate the view that they are opposing. If that opposing view is not invidious, it seems difficult to imagine what would qualify.

D. *Lawrence and Same-Sex Marriage*

Even before *Lawrence*, the constitutionally significant interests established in the right-to marry jurisprudence were equally applicable to same-sex and different-sex couples. Both types of couples may have children to raise and may consider marriage as an expression of emotional support, public commitment, and religious faith. Some commentators would explain the apparent anomaly in the failure to recognize the unconstitutionality of same-sex marriage bans by talking about a “gay exception,”²⁴¹ while others would simply claim that this is a refusal to accord same-sex couples “special rights.”²⁴² Justice Scalia helps to settle that debate in his *Romer* and *Lawrence* dissents, where he suggests that same-sex marriages are constitutionally protected not if members of the LGBT

²³⁸ See Stephen E. Gottlieb, *The Philosophical Gulf on the Rehnquist Court*, 29 RUTGERS L.J. 1, 16 (1997) (reading *Romer* as saying that open season on the LGBT community is unsupportable).

²³⁹ See *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring) (discussing limitations of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), on the application of facially neutral laws).

²⁴⁰ See *id.* at 2497 (Scalia, J., dissenting).

²⁴¹ See Paula L. Ettlebrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 162 (1996) (discussing a “gay exception to family law rules”).

²⁴² Cf. Lino A. Graglia, *Judicial Review: Wrong in Principle, A Disaster in Practice*, 21 MISS. C. L. REV. 243, 249 (2002) (“The Court has recently overturned the decision by the people of Colorado made by referendum to preclude the grant of special rights to homosexuals.”).

community are accorded special rights, but simply if they are accorded the same rights as everyone else. Apparently, Justice Scalia's complaint is that by overruling *Bowers* and thereby making clear that the LGBT community cannot be singled out for disfavorable treatment, the *Lawrence* Court makes it impossible to offer a constitutionally viable argument justifying same-sex marriage bans. Of course, neither the *Lawrence* majority nor the *Lawrence* concurrence believes that the Constitution permits states to create the kind of second-class citizenship that three members of the Court apparently believe would pass constitutional muster, and it remains to be seen what implications, if any, this newly announced equality will have.

V. CONCLUSION

Lawrence is important for a number of reasons. It suggests that adult, consensual, non-marital relations are protected by the Due Process Clause. It also suggests that tests turning on history and tradition and the concept of ordered liberty should not be used to determine what the Due Process Clause protects. The decision adopts a much more respectful tone towards members of the LGBT community and may provide the basis for someday recognizing a right to marry a same-sex partner.

The *Lawrence* majority recognized that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."²⁴³ It is simply unclear whether the current Court can recognize what Justice Scalia and two other members of the Court admit – the current equal protection and due process guarantees require the recognition of same-sex marriage. We shall simply have to wait and see how many generations of Supreme Court Justices are required before the Court can see that same-sex marriage bans are neither necessary nor proper but in fact serve only to oppress.

²⁴³ *Lawrence*, 123 S. Ct. at 2484.