

BEYOND *ROMER* AND *LAWRENCE*: THE RIGHT TO PRIVACY COMES OUT OF THE CLOSET

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Great concepts like . . . “liberty” were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.¹

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.²

On Independence Day weekend, 2005, Justice Sandra Day O’Connor took much of the legal world by surprise by announcing her

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¹ Nat’l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

² Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

retirement from the Supreme Court.³ Two months later, Chief Justice Rehnquist's death left another vacancy on the Supreme Court. O'Connor's presumed replacement, John Roberts, was immediately named as Rehnquist's replacement and the new Chief Justice of the United States Supreme Court. With the dramatic changes on its bench, the Supreme Court is at a historic crossroads, warranting a retrospective examination of the paths the Court has taken previous to and during the Rehnquist Court era, and the bridges it may cross in the time to come. In particular, this Article examines the significant developments in the Court's privacy rights jurisprudence with a look ahead toward the future of privacy rights and liberty interests under a new Supreme Court.

As the Rehnquist era comes to a close, it promises to leave a legacy which includes surprisingly strong protections for liberty and equality. The Rehnquist Court has issued a series of forceful opinions affirming substantial Fourteenth Amendment protections for individual autonomy in recent years, culminating with the gay rights decisions *Romer v. Evans*⁴ and *Lawrence v. Texas*.⁵

The Court's recognition of the right to self-determination in *Romer* and *Lawrence* is founded upon principles of both privacy rights⁶ and equal liberty in the public realm.⁷ In striking down sodomy bans in *Lawrence*, the Court found that such bans violate a "due process right to demand respect for conduct protected by the substantive guarantee of liberty,"⁸ which precludes state-imposed stigma and restrictions on personal relationships "absent injury to a person or abuse of an institution the law protects."⁹ In so holding, the Court indicated that the Fourteenth Amendment's privacy and liberty protections include not only a negative right to be let alone, but also an affirmative right to equal respect and autonomy in intimate relationships that transcends the spatial spheres of the home.¹⁰ Such public dimensions of

³ Until that weekend, it had been largely expected that Chief Justice William Rehnquist would be the first to retire, in light of his ailing health at the time.

⁴ 517 U.S. 620 (1996) (striking down a constitutional amendment prohibiting civil rights protections for gays and bisexuals).

⁵ 539 U.S. 558 (2003) (striking down Texas sodomy ban and overturning the even more controversial decision of *Bowers v. Hardwick*, 478 U.S. 186 (1986), *reh'g denied*, 478 U.S. 1039 (1986)).

⁶ See *id.* at 564-67, 572, 578; see also discussion *infra* Section I.C.

⁷ See *Romer*, 517 U.S. at 633-34; see also *infra* Section II.D.

⁸ *Lawrence*, 539 U.S. at 575.

⁹ *Id.* at 567. One case following *Lawrence* has interpreted this language as affirming the protection of rights "that free people possess in activities where there are no victims." *United States v. Peterson*, 294 F. Supp. 2d 797, 803 (D. S.C. 2003).

¹⁰ *Lawrence*, 539 U.S. at 562.

Fourteenth Amendment protections played a similar role in the Court's previous *Romer v. Evans* decision. In *Romer*, the Court applied a heightened form of rational basis review to strike down a state constitutional amendment which singled out gay and bisexual citizens for the denial of civil rights protections.¹¹ The Court in *Romer* concluded that equal protection guarantees include both freedom from government discrimination and the affirmative right to equal access to state legal protections.¹² Representing the culmination of a series of "rational basis plus" cases linked by a common element of government animus,¹³ the *Romer* decision focused on the danger that government-endorsed stigma poses to the citizenship rights of those individuals being subjected to discrimination.¹⁴

This Article claims that, through *Romer* and *Lawrence*, the right to privacy has come out of the closet as a powerful liberty interest embracing guarantees of autonomy and respect for intimate life choices in public as well as private contexts, demanding freedom in and beyond the spatial dimensions of the home. This transformation of privacy into a more potent liberty protection has been enabled by the collective strength that *Romer* and *Lawrence* lend to individual rights protections through their parallel discussions of animus, stigma, respect, and dignity. Just as *Romer* prohibits state-imposed animus or stigma toward gays and bisexuals, *Lawrence* establishes the right of gay and bisexual people to be affirmatively accorded respect and dignity. The two cases represent an evolution of the right to privacy in one's intimate life choices from a negative right to be left alone to a more comprehensive affirmative liberty interest in self-determination, autonomy, and respect, which implicates the "active liberty" and "equal citizenship" doctrines endorsed by some members of the Court.

In addition to the significant substantive evolution of liberty interest protections resulting from *Romer* and *Lawrence*, this Article further claims that *Romer* and *Lawrence* represent a historic evolution of Fourteenth Amendment jurisprudence on a procedural level. Viewed together, the cases have dramatically expanded the focus and strengthened the standards of

¹¹ *Romer*, 517 U.S. at 620 (affirming constitutional protections for non-heterosexual individuals).

¹² *Id.* at 632-35.

¹³ See *infra* Section II.A. (describing *Romer*'s links to *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), *Plyler v. Doe*, 457 U.S. 202 (1982), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)).

¹⁴ *Romer*, 517 U.S. at 635 (holding that "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense"). See *infra* Section II.D.1.

Fourteenth Amendment procedural review. While *Romer* adds teeth to rational basis equal protection analysis, *Lawrence* reciprocally strengthens the liberty guarantees of substantive due process. Together, the two cases strengthen the overall protections of the Fourteenth Amendment by focusing on the substantive rights at stake rather than allowing strict nomenclatures or narrow classifications to determine the results of cases preemptively. Revealing a critical evolution in the application of tier review standards in Fourteenth Amendment cases, the Court in *Romer* and *Lawrence* rejected past rigid dichotomous prerequisites in the application of strict scrutiny, instead following a more searching scrutiny for cases involving suspect government motives and sweeping invasions of personal autonomy and rights.

The Court's increased protection of the fundamental liberty interests inherent in intimate life choices may seem enigmatic. After all, the Rehnquist Court is also known for its decisions striking down civil rights statutory protections;¹⁵ upholding the right of organizations to exclude gays;¹⁶ and substantially limiting (if not overruling) the holding of *Roe v. Wade*.¹⁷ In addition, the "right to privacy" has been a controversial doctrine throughout the Rehnquist era. Scholars and jurists have disagreed about the origins and limitations of such a right,¹⁸ with *Roe v. Wade* frequently a

¹⁵ See, e.g., *Bd. of Tr. of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (prohibiting suits against states under Title I of the Americans with Disabilities Act of 1990); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down sections of the Violence Against Women Act providing federal civil remedy for gender bias victims); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (prohibiting suits against states under Age Discrimination in Employment Act); *Alden v. Maine*, 527 U.S. 706 (1999) (prohibiting certain suits against states under the Fair Labor Standards Act of 1938).

¹⁶ *Boy Scouts v. Dale*, 530 U.S. 640 (2000) (holding that Boy Scouts may exclude gays); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that a parade is not public accommodation, therefore it does not have to include gays).

¹⁷ 410 U.S. 113 (1973). The Court failed to overrule *Roe* by only one vote in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), while implicitly overruling *Roe* in *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989), by a 5-4 vote (four of the five calling their treatment of *Roe* a "narrow[ing]," *id.* at 512, and Scalia calling it an explicit "overruling," *id.* at 532). However, since *Casey*, one of the anti-*Roe* voters, Justice White, has retired and been replaced by Justice Ginsburg.

¹⁸ Most notably, the Supreme Court's new Chief Justice, John Roberts, is on record as calling, in his role as attorney for the Reagan administration, the right to privacy as "the so-called 'right to privacy,'" and describing it as an "amorphous right" not found in the Constitution. John Aloysius Farrell, *Sifting Roberts' Views on Women's Issues*, DENV. POST, Sept. 4, 2005, at E1. See also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (declining to find privacy protections for adult sexual behavior), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe*, 410 U.S. at 171-72 (Rehnquist, J., dissenting) (disputing the existence of a right to privacy as applied to abortion); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 99-100 (1990) [hereinafter BORK, *THE TEMPTING OF AMERICA*] (arguing that the right to privacy has no basis in the Constitution); Stanley H.

target of privacy rights criticisms.¹⁹ The Court's treatment of privacy rights remains heavily in the spotlight as the Rehnquist era comes to a close, with *Lawrence* joining *Roe* as the target of criticism by those who oppose expanding protections for privacy rights and liberty interests.²⁰ This Article makes the case, however, that the seeds of such a broad liberty interest, encompassing both negative privacy guarantees and affirmative citizenship rights, were planted long ago.²¹ The growing branches of personal liberty protections, this Article contends, are stronger than ever after *Romer* and *Lawrence*.

This Article begins by tracing the historic roots of the right to privacy. Section I describes the original intent of the Constitution's drafters to establish an evolving constitution with inalienable and unenumerated individual rights. In addition to describing the general origins of such rights, this section explains how the Court's recognition of fundamental rights has come to incorporate the dual dimensions of the right to privacy as both a right to be let alone and as an affirmative liberty interest in autonomy. Section II connects the evolution of privacy rights to similarly evolving Fourteenth Amendment standards of review, noting the contributions of *Romer* and *Lawrence* to the procedural aspects of Supreme Court jurisprudence. Exploring the equal citizenship and active liberty doctrines implicit in *Romer* and *Lawrence*, this section describes how the two cases strengthen the substantive meaning of privacy and liberty rights, contrary to

Friedelbaum, *The Quest for Privacy: State Courts and an Elusive Right*, 65 ALB. L. REV. 945, 945 (2002) ("If a right to privacy can hardly be considered a newfound concept, the meanings ascribed to it have long taken on an ever-changing, chameleonic cast."); Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy*, 16 YALE L.J. & FEMINISM 1, 6 (2004) ("The thirty years between the issuance of these opinions has been a time of heated political, social, and academic debate over the limits of judicial interpretation of the Constitution with privacy rights as the focal point."); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (engaging in a comparative privacy law analysis).

¹⁹ See, e.g., BORK, *THE TEMPTING OF AMERICA*, *supra* note 18, at 110-26; Seth F. Kreimer, Essay, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey and the Right to Die*, 44 AM. U. L. REV. 803, 808 (1995); Harry F. Tepker, Jr., *Abortion, Privacy, and State Constitutional Law: A Speculation If (Or When) Roe v. Wade is Overturned*, 2 EMERGING ISSUES ST. CONST. L. 173, 175-76 (1989).

²⁰ See, e.g., Gary L. McDowell, *The Perverse Paradox of Privacy*, in A COUNTRY I DO NOT RECOGNIZE, 20, 73-76 (Robert H. Bork ed., 2005); George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419 (2004); Robert P. George & David L. Tubbs, *Redefining Marriage Away*, CITY J., Summer 2004, at 26; David M. Wagner, *Hints, Not Holdings: Use of Precedent in Lawrence v. Texas*, 18 BYU J. PUB. L. 681 (2004); Lynn D. Wardle, *The Curious Case of the Missing Legal Analysis*, 18 BYU J. PUB. L. 309, 348-50 (2004).

²¹ See *infra* Section I.A-C.

the more constrained reading of Fourteenth Amendment substantive rights protections attributed to cases such as *Washington v. Glucksberg*.²² Finally, Section III explores the potential application of *Romer* and *Lawrence* to a possible future United States Supreme Court same-sex marriage case. This section examines lower court opinions in same-sex marriage decisions that have either followed or distinguished *Romer* and *Lawrence*. This section explores in detail the roles of tradition, government interests, stigma, and political participation in same-sex marriage cases, explaining how each of these overlapping issues relates back to the larger constitutional themes of equal citizenship and active liberty. With even the opponents of same-sex marriage conceding that the Court may have established sufficient precedent for a future affirmation of same-sex marriage rights,²³ this Article similarly suggests that after *Romer* and *Lawrence*, the recognition of same-sex marriage may be inevitable. At the very least, it concludes that the more general liberty protections affirmed in *Romer* and *Lawrence* are stronger than ever, even with the pending changes on the Supreme Court bench.

I. THE AMERICAN TRADITION OF UNENUMERATED RIGHTS AND THE PROTECTION OF PRIVACY

The right to privacy is rooted in the American tradition of honoring inherent individual rights. Such rights are not always enumerated in the text of the Constitution, and for good reason. The original authors of the Constitution recognized that a constitution cannot list in complete detail every reserved individual right and still maintain its structure as a broad framework for a limited government. Further, the Constitution's drafters established the importance of a living, evolving constitution, since no generation of lawmakers can be omniscient and predict all the knowledge pertinent to constitutional rights that may be gained by future generations. The Supreme Court, however, has consistently recognized certain principles as fundamental from the Constitution's earliest history, including liberty, equality, and the right to self-determination. While the lack of an enumerated right to privacy in the Federal Constitution (as opposed to state

²² 521 U.S. 702 (1997) (holding that there is no fundamental right to assisted suicide).

²³ See *Federal Marriage Amendment (The Musgrave Amendment): Hearing on H.J.R. 56 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 18th Cong. 16, 24-27 (2004). The sponsor of the Federal Marriage Amendment explained that she sponsored the federal bills banning recognition of same-sex marriage and related benefits to prevent the Supreme Court from "overstepping its bounds" in affirming marriage, as she claims the Massachusetts Supreme Court did. *Id.* Justice Scalia's dissent in *Lawrence* also predicts that equal marriage rights are inevitable after *Romer* and *Lawrence*, and same-sex marriage opponents are rushing to pass state and federal constitutional amendments banning same-sex marriage in anticipation of such future judicial rulings. *Lawrence v. Texas*, 539 U.S. 558, 601-05 (2003) (Scalia, J., dissenting). See also discussion *infra* Sections III.A-B.

constitutions)²⁴ may pose more of a problem for those seeking to identify the constitutional roots of such a privacy right, this section details how the right of privacy is rooted in the larger principles and protections of the U.S. Constitution, both enumerated and not.

A. Change and Stasis: The Original Foundation of Unenumerated Rights

The history of the Constitution's birth reflects a tradition of embracing inherent individual rights and liberties as fundamental to a constitutional democracy. The roots of unenumerated rights and liberties can be traced back as far as the Magna Carta of 1215 and the Mayflower Compact of 1620.²⁵ Even before the Declaration of Independence's affirmation of the inalienable rights to life, liberty, and the pursuit of happiness,²⁶ the first permanent state constitution, that of Virginia, opened with a Declaration of Rights proclaiming "[t]hat all men are by nature equally free and independent, and have certain inherent rights"; it went on to state that such rights include "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."²⁷ Other states followed suit, with most state constitutions including promises of "inherent" or "inalienable" rights.²⁸

The existence of such inherent, inalienable individual rights were so widely assumed at the time of the Federal Constitution's adoption in 1787 that a Bill of Rights was not even included in the Constitution as originally ratified. In Federalist Paper 84, Alexander Hamilton argued that a Bill of Rights was not necessary because unenumerated rights remain reserved to the people, not to the government.²⁹ Quoting the Preamble's reminder that the Constitution was written by "WE, THE PEOPLE of the United States,

²⁴ See *infra* note 81 and accompanying text.

²⁵ MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 8 (2001). See *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (describing the guarantees of due process as "having their roots in Magna Carta's 'per legem terrae'").

²⁶ The Declaration of Independence para. 2 (U.S. 1776).

²⁷ VIRGINIA BILL OF RIGHTS, *reprinted in* AM. JUR. 2d Desk Book, Item No. 185 (2d ed. 1979).

²⁸ Northern states were more inclined to also add "free and equal" clauses. See William E. Forbath, *Lincoln, The Declaration, And The "Grisly, Undying Corpse Of States' Rights": History, Memory And Imagination In The Constitution Of A Southern Liberal*, 92 GEO. L.J. 709, 720-21 (2004).

²⁹ THE FEDERALIST NO. 84, at 512-13 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

to secure the blessings of liberty to ourselves and our posterity," Hamilton concluded that, "[h]ere, in strictness, the people surrender nothing; and as they attain everything they have no need of particular reservations."³⁰ An explicit reservation of further rights was not required, Hamilton felt, because the Constitution was not intended "to regulate . . . every species of personal and private concerns."³¹ Hamilton additionally warned that the inclusion of specific named rights would be dangerous, providing a pretext for the denial of other rights not so specifically enumerated.³²

In contrast with Hamilton, James Madison felt that the enactment of a Bill of Rights was necessary to protect "the great rights" of the individual, including the "liberty of conscience."³³ Nonetheless, Madison respected Hamilton's concern that including enumerated rights could be interpreted as precluding other rights as "one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system."³⁴ Madison consequently worked to ensure that, when the Bill of Rights was added to the Constitution, the Ninth Amendment was included, the text of which ensures that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."³⁵ It was Madison's hope that the Ninth Amendment's reservation of unenumerated rights to the people would "quiet expressed [Hamiltonian] fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected."³⁶

³⁰ *Id.* at 512.

³¹ *Id.*

³² *Id.* at 513 (warning that "bills of rights . . . are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted" and posing the question, "why declare that things shall not be done [by the government] which there is no power to do?"). As Hamilton might ask of today's privacy rights skeptics, where exactly does the Constitution spell out the government's right to interfere with the private, consensual activities of its citizens?

³³ Konvitz, *supra* note 25, at 8 (quoting IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGINS AND MEANING* 45 (1965)).

³⁴ See *Griswold v. Connecticut*, 381 U.S. 479, 489-90 (1965) (Goldberg, J., concurring) (citing 1 *Annals of Congress* 439 (Gales and Seaton ed., 1834)).

³⁵ U.S. CONST. amend. IX.

³⁶ *Griswold*, 381 U.S. at 488-89 (Goldberg, J., concurring) (citing *THE FEDERALIST* NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961) ("[N]o language is so copious as to supply words and phrases for every complex idea . . .")); see also *THE FEDERALIST* NO. 84, at 490 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The text of the Ninth Amendment could not be more explicit in its reservation of unenumerated rights. As explained more recently by Justice Breyer, the Constitution's framers added the Ninth Amendment's reservation of unenumerated rights to the people "to make clear that 'rights, like law itself, should never be fixed, frozen, that new dangers and needs will emerge, and that to respond to these dangers and needs, rights must be newly specified to protect the individual's integrity and inherent dignity.'"³⁷

Despite such efforts by the Constitution's drafters to make as explicit as possible the reservation of unenumerated rights to the people, the debate over unenumerated rights has raged fiercely since then, with the Ninth Amendment rarely raising its head to mediate the dispute.³⁸ In *Griswold v. Connecticut*, Justice Goldberg noted that only three Supreme Court cases prior to *Griswold* mention the Ninth Amendment.³⁹ Nonetheless, Goldberg stressed, the Ninth Amendment has always included protections for fundamental unenumerated rights, including marital privacy.⁴⁰ As Goldberg wrote, constitutional liberty protects fundamental rights "not confined to the specific terms of the Bill of Rights,"⁴¹ since the Ninth Amendment's language and history reveal that the Constitution's framers "believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."⁴²

As Justice Harlan similarly remarked in his famous *Poe v. Ullman* dissent, the character of the Constitution's provisions must be determined by looking at a particular provision's broader context, which includes not just words but history and intent as well, as the full scope of due process liberty "cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."⁴³

³⁷ Stephen Breyer, *Our Constitutional Democracy*, 77 N.Y.U. L. REV. 245, 269-70 (2002) (quoting Bernard Bailyn, Remarks at the First Millennium Evening at the White House (Feb. 11, 1998), available at <http://clinton4.nara.gov/Initiatives/Millennium/bbailyn.html>); see also U.S. CONST. amend. IX.

³⁸ For discussion of why and how the Ninth Amendment has failed to be a more recognized source of fundamental rights, see discussion *infra* Section I.B.

³⁹ *Griswold*, 381 U.S. at 490-97, 491 n.6 (Goldberg, J., concurring).

⁴⁰ *Id.* at 490-97.

⁴¹ *Id.* at 487.

⁴² *Id.* at 488.

⁴³ 367 U.S. 497, 542-44 (1961) (Harlan, J., dissenting).

Some modern resistance to the concepts of unenumerated rights and a living constitution has been articulated in the name of “originalism,”⁴⁴ or in the context of advocating a “regime of static law.”⁴⁵ However, an originalist reading of the Constitution should take into account Madison’s and Hamilton’s strict admonitions that the people retain inalienable rights both enumerated and not. Originalists should also heed Thomas Jefferson’s advice to future generations that they not be bound by the original traditions of the Constitution’s framers, but rather respect the need to accommodate evolutions in law and society over time. As Jefferson once remarked (and as etched on the ceiling of the Jefferson Memorial in Washington, D.C.):

I am not an advocate for frequent changes in law and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.⁴⁶

Jefferson’s admonition that future generations should be willing to “shed the regimens of barbarous ancestors” may seem paradoxical, in that it demands an understanding of originalism not unduly restrained by past generations’ legal interpretations and institutions. In other words, to be a

⁴⁴ See, e.g., Justice Scalia’s elaboration of this tradition and text-based theory of constitution interpretation:

[I]t is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts. More specifically, it is my view that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”

United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (quoting Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)).

⁴⁵ See, e.g., Warren Richey, *One Justice’s Vision Of Role Of The Courts*, CHRISTIAN SCIENCE MONITOR, Nov. 16, 2004 at 1, available at <http://www.csmonitor.com/2004/1116/p01s03-usju.html> (describing Justice Scalia’s resistance to living constitutionalism); see also *Lawrence v. Texas*, 539 U.S. 558, 594-98 (2003) (Scalia, J., dissenting) (critiquing the majority opinion’s recognition of the Court’s “emerging awareness” of increased rights to autonomy).

⁴⁶ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), available at <http://www.exploredc.org/index.php?id=127&m=visitor>.

Jeffersonian originalist, one must be willing to transcend the original times and traditions of the Constitution's Framers.

The concept of a living constitution, as required by Jeffersonian originalism, has proved essential to constitutional democracy. Under a reading of the Constitution that ignores the original intent of its drafters to establish a flexible, evolving foundation for democratic protections, *Plessy v. Ferguson*⁴⁷ would still be good law, miscegenation laws would be enforced, and other forms of state-imposed segregation would still be in place.⁴⁸

Over time, the Court has echoed the Jeffersonian principles of an evolving constitution. The Court has proclaimed, for instance, that the rights guaranteed by the Constitution "must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society,"⁴⁹ and that constitutional protections may "acquire meaning as public opinion becomes enlightened with humane justice."⁵⁰ Addressing statutory and constitutional interpretation, the Court has explained that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used," acknowledging that such interpretations appropriately evolve with the passage of time.⁵¹

The Constitution was designed to protect the intrinsic rights of the individual. A truly originalist reading of the Constitution recognizes that constitutional interpretation must mature over time to accommodate future generations' increasingly enlightened understanding of the individual rights that the Constitution protects.

B. The Fourteenth Amendment's Protection of Fundamental Rights

Consistent with the emphasis the Constitution's drafters placed on inherent individual rights, the early Supreme Court affirmed unenumerated

⁴⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896). See discussion *infra* Section I.B.

⁴⁸ See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 311 (2nd ed. 2004) ("There is almost no constitutional scholar who believes the Framers of the Fourteenth Amendment expected the Equal Protection Clause to be lethal to miscegenation statutes.").

⁴⁹ *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). See also *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁵⁰ *Weems v. United States*, 217 U.S. 349, 378 (1910).

⁵¹ *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (citing *Lamar v. United States*, 240 U.S. 60, 65 (1916)).

rights on several occasions.⁵² Yet, despite the Founders' efforts to establish the Ninth Amendment as the home of unenumerated individual rights, the Ninth Amendment has not played a prominent role in the Court's subsequent individual rights decisions.

Part of the Court's hesitation to base individual rights decisions on the Ninth Amendment may be related to the uncertainty inherent in identifying which such rights are reserved to the people. As constitutional scholar Charles Black describes the problem with the Ninth Amendment, "the only hitch is, in short, that the rights not enumerated are not enumerated."⁵³ Instead, the Fourteenth Amendment, adopted in 1868 to more clearly protect the rights previously denied to former slaves, consequently came to replace the Ninth Amendment as the primary home of unenumerated and fundamental individual rights.

While it appeared briefly that privacy and liberty rights might find their home in the Privileges and Immunities Clause of the newly enacted Fourteenth Amendment, the Supreme Court's first interpretation of the Fourteenth Amendment in the *Slaughter-House Cases* quickly halted such a development by severely limiting the application of the Privileges and Immunities Clause.⁵⁴ Yet, the (perhaps only temporary)⁵⁵ shutting of the Privileges and Immunities door by the *Slaughter-House Cases* may have resulted in the opening of another. The Court's limitation of the Privileges and Immunities Clause has led to its alternative and frequent reliance on the Fourteenth Amendment's Due Process Clause as a significant source of substantive rights.⁵⁶

⁵² In *Loan Ass'n v. Topeka*, 87 U.S. 655, 663 (1875), for example, the Court recognized that "[t]here are limitations on [government] power which grow out of the essential nature of all free governments." See also *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825); *Calder v. Bull*, 3 U.S. 386, 386-95 (1798).

⁵³ CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 14 (1997).

⁵⁴ *In re Slaughter-House Cases*, 83 U.S. 36, 37 (1872). Charles Black in later years designated the *Slaughter-House* ruling as "the worst holding, in its effect on human rights, ever uttered by the Supreme Court," bemoaning the failure of the Court to confirm the human rights guarantees secured by the Ninth Amendment and the Declaration of Independence, as well as the Privileges and Immunities Clause. BLACK, *supra* note 53, at 55.

⁵⁵ The door may have been cracked open by the recent decision of *Saenz v. Roe*, 526 U.S. 489 (1999), which invoked the Privileges and Immunities Clause in the context of a fundamental right to travel, although the case is the only recent example of the Supreme Court basing fundamental rights on the Privileges and Immunities Clause.

⁵⁶ See *Glucksberg v. Washington*, 521 U.S. 702, 760 n.6 (1997) (Souter, J., concurring) ("The *Slaughter-House Cases* are, of course, important for their holding that the Privileges and Immunities Clause was no source of any but a specific handful of substantive rights. To a degree, then, that decision may have led the Court to look to the Due Process Clause as a source of substantive rights."). Also enlightening is Justice Harlan's explanation

The first such case establishing substantive due process as a basis for unenumerated rights came fifteen years after the *Slaughter-House Cases* in the 1887 Supreme Court case, *Mugler v. Kansas*.⁵⁷ In *Mugler*, Justice Harlan wrote that “courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.”⁵⁸

In its early application, the Due Process Clause was invoked primarily to protect economic rights. In the first such case, *Allgeyer v. Louisiana*,⁵⁹ the Court described due process liberty guarantees in terms of personal autonomy, explaining that Fourteenth Amendment liberty includes

of the appropriateness of the Due Process Clause as protecting substantive as well as procedural rights:

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.

Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

⁵⁷ *Mugler v. Kansas*, 123 U.S. 623 (1887) (affirming the state’s power to control the manufacture and sale of alcohol as a valid exercise of police power). Some, including Justice Scalia and Robert Bork, have identified *Dred Scott* as the first “substantive due process” case, and have grouped *Dred Scott* and *Roe* together as constitutionally infirm cases due to their identical reliance on substantive due process. See BORK, *TEMPTING OF AMERICA*, *supra* note 18 at 31 (describing *Dred Scott*’s “transformation of the due process clause from a procedural to a substantive requirement” as a “momentous sham, for this was the first appearance in American constitutional law of the concept of ‘substantive due process,’ and that concept has been used countless times since by judges who want to write their personal beliefs into [the Constitution]”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting). But, although *Dred Scott* cited the Fifth Amendment’s Due Process Clause, the concept of *substantive* due process did not come to fruition for another twenty years, and *Dred Scott* was devoid of the broader principles of equal liberty emphasized in modern substantive due process cases. See James W. Ely, *The Oxymoron Reconsidered: Myth And Reality In The Origins Of Substantive Due Process*, 16 CONST. COMMENT. 315, 317-18 (1999) (“Bork is simply wrong in identifying *Dred Scott* as the fountainhead of substantive due process.”); Jamin B. Raskin, *Roe v. Wade And The Dred Scott Decision: Justice Scalia’s Peculiar Analogy in Planned Parenthood v. Casey*, 1 AM. U. J. GENDER & L. 61, 64 n.54 (1993) (distinguishing *Dred Scott*, which was based on narrow originalism, from *Roe*, which represented a specific vision of justice that honors freedom as the organizing spirit of the Constitution); Edward J. Sullivan & Nicholas Cropp, *Making It Up—“Original Intent” And Federal Takings Jurisprudence*, 35 URB. LAW 203, 234 (2003) (“Justice Scalia’s apparent attempt to distinguish *Dred Scott* from the originalist analysis by claiming the case to be a ‘substantive due process’ decision appears misplaced.”).

⁵⁸ *Mugler*, 123 U.S. at 661.

⁵⁹ 165 U.S. 578 (1897) (striking down interstate insurance regulation as interfering with freedom of contract).

not just freedom from bodily restraint, but also the rights of a citizen "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways."⁶⁰ Such broad liberty interests, the Court concluded, entail autonomy in a person's decisions regarding his or her livelihood, avocation, and formation of contracts.⁶¹ The Court's economic due process jurisprudence continued through 1937 (often dubbed the "*Lochner* era"),⁶² during which period the Court struck down federal or state regulations in nearly two hundred cases.⁶³

In 1937, the political tension resulting from the Court's application of substantive due process to invalidate Roosevelt's 1930s "New Deal" legislation reached a climax. Foreshadowing modern attacks on the right to privacy, critics charged the Court with judicial activism in creating a "new" right to contract unsupported by the text of the Constitution.⁶⁴ After Roosevelt threatened to pack the Court with Justices who would support his legislation, common lore tells us,⁶⁵ the Court reversed its apparent anti-regulation position and began upholding New Deal legislation.

Following the Court's abandonment of a *Lochner*ian, economic-focused substantive due process, the landmark 1937 decision *Palko v. Connecticut*⁶⁶ set the tone for modern justice-focused due process. In *Palko* the Court held that substantive due process prohibits laws that violate "a principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."⁶⁷ Echoing *Allgeyer's* emphasis on autonomy, the *Palko* Court linked its justice-based formulation of substantive due process to the principle of self-determination, ruling that the

⁶⁰ *Id.* at 589.

⁶¹ *Id.*

⁶² This was named after the famous 1905 decision, *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court struck down a law restricting the hours of bakery workers.

⁶³ See Konvitz, *supra* note 26, at 108 n.12.

⁶⁴ See, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 3-4 (1993).

⁶⁵ The story of *Lochner* may not be as simple as its common telling. Many *Lochner* "revisionists" have painted a different picture of this controversial era. See, e.g., *id.* (arguing that the *Lochner* era cases reflected traditional police powers jurisprudence and a response to what it viewed as invalid class-based legislation, and noting that today's conservatives have used the *Lochner* folklore to attack the modern Court's recognition of fundamental rights in a civil rights context due to a misreading of *Lochner*ian cases); Barry Cushman, *Rethinking The New Deal Court*, 80 VA. L. REV. 201 (1994) (disputing that the Court was politically motivated by Roosevelt's court-packing threat).

⁶⁶ 302 U.S. 319 (1937) (finding no due process violation in allowing states to appeal acquittals), *overruled in part by* Benton v. Maryland, 395 U.S. 784 (1969).

⁶⁷ *Id.* at 325.

Fourteenth Amendment protects “liberty of the mind as well as liberty of action.”⁶⁸

As the Court later recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶⁹ the Court’s increased awareness of the need for economic regulations to protect members of society allowed the Court to reject its past Lochnerian “laissez-faire” economic-focused framework in favor of substantive due process in cases such as *Palko* and *West Coast Hotel Co. v. Parrish*,⁷⁰ as well as in later cases.⁷¹ It was through a justice-focused approach to substantive due process, the *Casey* opinion noted, that the Court was able, in *Brown v. Board of Education*⁷² to overturn its past pro-segregation *Plessy v. Ferguson*⁷³ decision. It did so by relying on a newfound factual understanding of the concrete harms imposed by segregation.⁷⁴

The Court’s substantive due process jurisprudence has evolved substantially since *Lochner* and *Plessy*, reflecting changes in societal and judicial understandings of the harms caused by social injustices and court-sanctioned inequality. Following decisions such as *Palko*, *West Coast Hotel*, and *Brown*, the Court in *Lawrence v. Texas* continued to apply a justice-based substantive due process approach which allowed for an evolving application of constitutional law that appropriately changed to reflect the growing understanding over time of the societal impact of harmful laws. While not explicitly addressing the Lochnerian history of substantive due process, *Lawrence*’s holding depended on the Court’s overruling of *Bowers v. Hardwick*.⁷⁵ In turn, confronting *Bowers* meant confronting the ghost of *Lochner*, which the *Bowers* majority had used as a shield to justify its

⁶⁸ *Id.* at 327.

⁶⁹ 505 U.S. 833 (1992).

⁷⁰ 300 U.S. 379 (1937)

⁷¹ *Casey*, 505 U.S. at 861-62 (citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

⁷² 347 U.S. 483 (1954).

⁷³ 163 U.S. 537 (1896).

⁷⁴ *Casey*, 505 U.S. at 863-64 (describing *West Coast Hotel* and *Brown* as based on a newfound understanding of facts, which countered what had been accepted justifications for segregation, explaining that “[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court’s constitutional duty”).

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

refusal to “expand” substantive due process.⁷⁶ The *Lawrence* majority was able to overcome such hurdles by invoking the precedents of substantive due process cases that came after *Lochner*, and which, unlike *Lochner*, adopted a justice-based due process approach to protecting fundamental individual rights.

Ironically, while those who, a century ago, had charged the *Lochner* era Court with engaging in judicial activism and creating “new rights” in the name of substantive due process were more politically liberal, today those making similar charges are on the other side of the political fence, targeting Court decisions protecting individual rights in the context of controversial social issues such as abortion and gay rights. Having explained the lengthy historical and constitutional support for unenumerated rights and an evolving constitution, this Article contends that cries of protest against substantive due process, which focus on the apparent novelty of the right at issue, are fundamentally misguided.

To those suggesting that modern substantive due process is no more valid than the *Lochnerian* right to contract, this Article further argues that modern substantive due process more truly fulfills the promises of the Constitution by ensuring individual justice and the prevention of harms to individuals seeking to live autonomous, self-determined lives. *Lawrence*’s powerfully articulated recognition of “liberty of the person both in its spatial and more transcendent dimensions,”⁷⁷ as necessarily limited by the harm principle,⁷⁸ was lacking in the *Lochnerian* cases which limited workplace protections against harms to workers.

If the confident tone of *Lawrence* is any predictor of future substantive due process decisions, the Court will likely continue to apply an expansive approach to unenumerated fundamental liberty interests and rights in future cases, no longer haunted by the ghost of *Lochner*.

C. The Right to Privacy, the Heart of Liberty, and the Synthesis of Negative and Positive Liberty Protections

The ghost of *Lochner* has not been the only impediment to universal respect for the right to privacy. As with unenumerated rights in general, efforts to clarify the meaning of privacy rights have met with an

⁷⁶ *Id.* at 194-95 (declining to “discover new fundamental rights” under the Due Process Clause due to the Court’s vulnerability when dealing with unenumerated rights, which, the *Bowers* Court stated, “was painfully demonstrated by the face-off between the Executive and the Court in the 1930’s. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.”).

⁷⁷ *Lawrence*, 539 U.S. at 562.

⁷⁸ *Id.* at 567.

undercurrent of tension and dissent.⁷⁹ The problems intrinsic to identifying such rights are compounded by the Federal Constitution's failure to name a "right to privacy" explicitly,⁸⁰ while many state constitutions do contain explicit privacy rights clauses. A number of states have consequently found that their state constitutions afford greater privacy protections to individuals than does the Federal Constitution.⁸¹ Despite the lack of similar enumeration in the Federal Constitution, however, the Court has consistently recognized a right to privacy.

1. The Early History of Privacy Rights

Through the end of the *Lochner* era, the Court acknowledged privacy rights largely in the context of economic freedom and the corporation's right to be free from government interference. However, the privacy and autonomy rights of individuals have a strong history dating from before end of the nineteenth century.

In an 1890 article simply named *The Right to Privacy*, Samuel Warren and Louis Brandeis described the evolution of privacy rights as

⁷⁹ See *supra* notes 19-20.

⁸⁰ But c.f. Blackmun dissent in *Bowers v. Hardwick*, disputing the majority opinion's claim that the right to privacy has no textual support in the Constitution:

"The right of the people to be secure in their . . . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . . . support in the text of the Constitution."

Bowers v. Hardwick, 478 U.S. 186, 208 (1986) (Blackmun, J., dissenting) (alteration in original) (quoting Justice White's majority opinion).

⁸¹ Ten states have explicit privacy clauses in their constitutions: ALASKA CONST. art. I § 22, ARIZ. CONST. art. II, § 8, CAL. CONST. art. I, § 1, FLA. CONST. art. I, § 23, HAW. CONST. art. I, § 6, ILL. CONST. art. I, § 12, LA. CONST. art. I, § 5, MONT. CONST. art. II, § 10, S.C. CONST. art. I, § 10, WASH. CONST. art. I, § 7. Courts in these and other states have held that their state constitutions protect liberties, including reproductive choice, to a greater extent than the federal constitution. See, e.g., *State v. Planned Parenthood of Alaska, Inc.*, 38 P.3d 904 (Alaska 2001); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); *N. Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003); *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003); *Planned Parenthood League of Mass., Inc. v. Attorney General*, 677 N.E.2d 101 (Mass. 1997); *Women of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000); *New Mexico Rt. to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Planned Parenthood Ass'n v. Dept. of Human Resources*, 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd on other grounds*, 687 P.2d 785 (Or. 1984); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000); *Women's Health Ctr. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993).

rooted in the law's early protections against physical interference with individual property and life, and gradually expanding in scope to include liberty protections for extensive civil privileges beyond just the right to be let alone.⁸² In their privacy treatise, Brandeis and Warren tied together the threads of privacy contained in past Supreme Court cases while advocating further protections of intellectual, emotional, and spiritual autonomy.

Appointed to the Supreme Court in 1916, Justice Brandeis had occasion to reinforce the broad reach of "the right to be let alone" in the context of later cases. In his dissent in *Olmstead v. United States*⁸³ (the majority opinion of which was ultimately overruled in part, arguably vindicating Brandeis' position), Brandeis described the intent of the Constitution's drafters to protect citizens in their thoughts, beliefs, emotions, and sensations, recognizing that the right to pursue happiness necessarily encompasses such protections.⁸⁴ Brandeis famously concluded that "[t]hey conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."⁸⁵

Brandeis' treatise is but one example. The right to privacy is so entrenched in constitutional history that the Court described the right as "older than the Bill of Rights"⁸⁶ in *Griswold v. Connecticut*, citing a line of cases dating as far back as 1886⁸⁷ which "bear witness that the right of privacy . . . is a legitimate one."⁸⁸

The right of privacy also has a long history of being recognized by the Court as extending beyond a mere freedom from physical interference. In *Allgeyer v. Louisiana*,⁸⁹ the first economic due process case, the Court recognized that Fourteenth Amendment liberty "means not only the right of the citizen to be free from the mere physical restraint of his person, as by

⁸² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁸³ 277 U.S. 438 (1928) (search and seizure case), *overruled in part by* *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967).

⁸⁴ *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

⁸⁵ *Id.*

⁸⁶ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

⁸⁷ *Id.* at 484 (citing *Boyd v. United States*, 116 U.S. 616 (1886)). *See also id.* at 483-85 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952); *Monroe v. Pape*, 365 U.S. 167 (1961); *Lanza v. New York*, 370 U.S. 139 (1962); *Frank v. Maryland*, 359 U.S. 360 (1959); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

⁸⁸ *Griswold*, 381 U.S. at 485.

⁸⁹ 165 U.S. 578 (1897).

incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties.”⁹⁰ Elaborating further on the theme of autonomy in the first post-*Lochner* era substantive due process case, *Palko v. Connecticut*,⁹¹ the Court enunciated a substantive right to liberty of the mind, as well as liberty of action.⁹² In *Meyer v. Nebraska*, recognizing marriage as a fundamental right and liberty interest, including a right to privacy and autonomy, the Court noted that the term “liberty” denotes not just freedom from bodily restraint, but also the rights to contract, to employment, to marry and raise a family, to be assured freedom in one’s religious practices, “and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁹³ In *Bolling v. Sharpe*, the Court similarly held that “liberty” transcends issues of mere physical restriction: “Although the Court has not assumed to define ‘liberty’ with any great precision, that term is not confined to mere freedom from bodily restraint.”⁹⁴ In a more recent case, Justice O’Connor explained that “our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination”⁹⁵ The Court’s frequent articulation of the right to privacy in such terms of broad autonomy underscore the history of privacy rights as encompassing strong liberty protections, beyond the mere right to be left alone.

The right to privacy consequently has a long history of affirmation by the Court, which has recognized privacy rights as encompassing protections for autonomy in one’s intellect, emotions, and beliefs, not just an absence of physical restraint.

2. From Marital Rights to Procreative Freedom

The Court’s decisions in the latter half of the twentieth century enumerated more explicitly the privacy rights and liberty interests in cases involving personal life choices and emphasized the overlapping principles of privacy, liberty, equality, and autonomy. Following *Meyer*’s application

⁹⁰ *Id.* at 589.

⁹¹ 302 U.S. 319 (1937).

⁹² *Id.* at 327.

⁹³ 262 U.S. 390, 399 (1923) (emphasis added) (citations omitted).

⁹⁴ 347 U.S. 497, 499 (1954) (D.C. segregation case).

⁹⁵ *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring). See also *id.* at 342 (Stevens, J., dissenting) (quoting O’Connor concurrence); *Washington v. Harper*, 494 U.S. 210, 221 (1990); *Winston v. Lee*, 470 U.S. 753, 759 (1985); *Parham v. J.R.*, 442 U.S. 584, 600 (1979); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

of a longstanding privacy rights doctrine to marital privacy, later decisions affirmed the privacy rights and liberty interests in marital relationships, while engaging both equal protection and due process principles. In *Skinner v. Oklahoma ex. rel. Williamson*,⁹⁶ a forced sterilization case, the Court emphasized the fundamental nature of individual procreative choice for the first time, linking reproductive liberty to fundamental marital rights, notably, in an equal protection context.⁹⁷ *Poe v. Ullman*,⁹⁸ which involved a state birth control ban, was the second Fourteenth Amendment case focused on marital privacy interests in a reproductive rights context. While the plurality in *Poe* did not reach the merits of the case, the dissenting opinions by Justices Douglas and Harlan found the law at issue to be an unconstitutional violation of the Fourteenth Amendment's guarantee of privacy rights.⁹⁹ Following *Poe*, other marriage rights cases applied principles of equal protection as well as substantive due process to uphold individual rights, including *Loving v. Virginia*,¹⁰⁰ *Zablocki v. Redhail*,¹⁰¹ and *Turner v. Safley*.¹⁰²

The Court also affirmed that fundamental privacy rights in intimate life choices are not dependent on the marital status of the litigants. For example, even before the Court struck down interracial marriage bans in *Loving v. Virginia*, the Court struck down bans on interracial cohabitation of unmarried individuals in *McLaughlin v. Florida*.¹⁰³ In *Eisenstadt v. Baird*,¹⁰⁴ the Court similarly ruled that the right to have access to contraceptive devices extends to unmarried individuals as well as to married couples. Extending its recognition of such intimate life choices to the context of unconventional family structures, the Court in *Moore v. City of East Cleveland*¹⁰⁵ explicitly stated that Fourteenth Amendment "freedom of

⁹⁶ 316 U.S. 535 (1942).

⁹⁷ *Id.* at 541.

⁹⁸ 367 U.S. 497 (1961).

⁹⁹ *Id.* at 520-22 (Douglas, J., dissenting), 536 (Harlan, J., dissenting).

¹⁰⁰ 388 U.S. 1 (1967).

¹⁰¹ 434 U.S. 374 (1978).

¹⁰² 482 U.S. 78 (1987).

¹⁰³ 379 U.S. 184 (1964).

¹⁰⁴ 405 U.S. 438 (1972).

¹⁰⁵ 431 U.S. 494 (1977).

personal choice in matters of marriage and family life” extends to non-traditional families, not just married couples.¹⁰⁶

Finally, in *Griswold v. Connecticut*¹⁰⁷ and *Roe v. Wade*,¹⁰⁸ the Court recognized that such privacy rights include the protection of fundamental reproductive freedoms. In *Griswold*, the predecessor to *Eisenstadt*, the Court struck down prohibitions on birth control for married couples explicitly recognizing the right to privacy as rooted in various constitutional provisions, including the Ninth Amendment’s guarantee of unreserved, unenumerated rights of the people; the penumbras and emanations of the Bill of Rights, and the Fourteenth Amendment due process liberty guarantees. *Roe*, striking down abortion bans, similarly traced the Court’s historic recognition of the right to privacy in a line of decisions beginning in the nineteenth century¹⁰⁹ and affirmed once again that the right to privacy, although not enumerated, has long been recognized by the Court as rooted in various constitutional amendments. The court concluded that “[t]his right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹¹⁰

The significance of this line of cases recognizing that the Constitution’s privacy protections for personal choices extends beyond marital privacy lies not only in broadening the context of privacy protections over time, but also in the connection made by the line of cases between the right to privacy as a right to be let alone and as a more affirmative freedom of autonomy.

¹⁰⁶ *Id.* at 499 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974), *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925)).

¹⁰⁷ 381 U.S. 479 (1965).

¹⁰⁸ 410 U.S. 113 (1973).

¹⁰⁹ *Id.* at 152 (citing *Eisenstadt v. Baird*, 405 U.S. at 460, 463-65 (White, J., concurring); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. at 484-86; *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *Boyd v. United States*, 116 U.S. 616 (1886)).

¹¹⁰ *Roe*, 410 U.S. at 153.

3. Affirming the “Heart of Liberty”: Casey, Lawrence, and the Renaming of Modern Privacy Rights

The Court’s line of cases affirming constitutional liberty protections of privacy and autonomy rights played a prominent role in *Lawrence v. Texas*. In *Lawrence*, the Court began its substantive due process analysis by observing liberty interests in cases such as the 1923 case, *Meyer v. Nebraska*,¹¹¹ and the 1925 case, *Pierce v. Society of Sisters*.¹¹² However, the Court designated *Griswold v. Connecticut*¹¹³ as the “most pertinent beginning point” of its substantive due process analysis and highlighted *Griswold*’s naming of a right to privacy.¹¹⁴ Tracing the history of reproductive rights cases, the *Lawrence* opinion observed that the seminal *Roe* decision “cited cases that protect spatial freedom and cases that go well beyond it . . . and recognized the right of a woman to make certain fundamental decisions affecting her destiny.”¹¹⁵ As it explored the role of autonomy as an important aspect of liberty, the *Lawrence* majority highlighted the following passage from *Planned Parenthood of Southeastern Pennsylvania v. Casey*:¹¹⁶

“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At 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.”¹¹⁷

The *Roe* and *Casey* passages quoted in *Lawrence* describe the broad reach of privacy rights in the context of intimate decision making, and clarify the central role autonomy plays in the protection of constitutional liberty guarantees. Ironically, *Casey*’s “heart of liberty” dicta, as reaffirmed by *Lawrence*, came in the context of a case which overruled key aspects of *Roe*

¹¹¹ 262 U.S. 390 (1923).

¹¹² 268 U.S. 410 (1925).

¹¹³ 381 U.S. 479.

¹¹⁴ *Lawrence v. Texas*, 539 U.S. 558, 564-65 (2003) (citing *Griswold*, 381 U.S. at 485).

¹¹⁵ *Id.* at 565 (citing *Roe*, 410 U.S. at 113).

¹¹⁶ 505 U.S. 833 (1992).

¹¹⁷ *Lawrence*, 539 U.S. at 564-65 (quoting *Casey*, 505 U.S. at 851). The “heart of liberty” Section I of the *Casey* plurality opinion by O’Connor, Kennedy, and Souter was also signed onto in separate concurrences by Stevens and Blackmun.

by allowing various first trimester restrictions on abortion.¹¹⁸ Yet, while *Casey* did have the immediate effect of limiting *Roe* and allowing new restrictions on abortion, in a broader and more critical aspect, *Casey* simultaneously strengthened Fourteenth Amendment protections by emphasizing the strength of substantive due process liberty guarantees in terms of a powerful right to autonomy and self-determination.¹¹⁹

Casey's "heart of liberty" provides a critical bridge between the Court's historic recognition of "negative" privacy rights and its more recent cases, such as *Romer v. Evans* and *Lawrence v. Texas*, which reinforce the principle that individual rights and liberty interests encompass affirmative and public dimensions. It is no small accomplishment for the Court to reunite the negative (privacy/right to be let alone) and affirmative (right to self-government/autonomy) elements of the interrelated privacy rights and liberty interests guaranteed by the Fourteenth Amendment. As Isaiah Berlin noted in *Two Concepts of Liberty*,¹²⁰ a historic essay on the development of negative and affirmative liberty rights since the Renaissance and Reformation periods, negative and positive liberty interests in privacy and in autonomy/self-government, respectively, have historically been at war with each other.

Whether the Court ever explicitly acknowledges its journey from a more limited privacy jurisprudence to a comprehensive approach including positive and negative liberty, its journey into a stronger land of liberty promises to provide more comprehensive Fourteenth Amendment protections in the future. While cases such as *Casey*, *Romer*, and *Lawrence* may result in lively dissent both on and off the judicial bench, the majority of the Court has begun the process of bridging interrelated privacy and autonomy doctrines, displaying its willingness to unite both sides of the liberty bridge in *Casey*, *Romer*, and *Lawrence*. As a result of this evolution in the Court's privacy and liberty jurisprudence, Fourteenth Amendment

¹¹⁸ A majority in *Casey* (plurality represented by O'Connor, Kennedy, and Souter, with Rehnquist, Scalia and Thomas concurring with the Court's upholding of state abortion restrictions, a notably different majority than the line-up of the "heart of liberty" concurrences) upheld state scripted counseling requirements, waiting periods, parental consent, and reporting requirements. *Casey*, 505 U.S. at 838-39, 874. A plurality agreed to replace *Roe*'s trimester framework with the "undue burden" test first advocated by Justice O'Connor in *Webster v. Reproductive Health Services*, 417 U.S. at 490, 519-520 (1989).

¹¹⁹ *C.f.* ESKRIDGE & HUNTER, *supra* note 48, at 93 (comparing the "[s]oaring [r]hetoric, [w]eak [d]octrine" of *Lawrence*, the powerful language that Hunter and Eskridge argue may be weakened by its failure to employ "fundamental rights" terminology—but *c.f.* Section II.C., *infra*—with *Casey*, which Hunter and Eskridge describe as weakening the standard of review for abortion cases even while speaking eloquently of liberty interests and upholding *Roe*).

¹²⁰ Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121 (1969).

protections for individual liberty, already deeply rooted in constitutional traditions and history, have become stronger than ever.

II. EVOLUTION OF FOURTEENTH AMENDMENT PRIVACY RIGHTS THOUGH ROMER AND LAWRENCE

Among the long line of cases the Court cited in *Lawrence*, *Romer v. Evans*¹²¹ has the most uniquely symbiotic relationship with *Lawrence*. The fact that *Romer* and *Lawrence* were the first “gay rights” victories at the Supreme Court level is almost incidental, compared to the broader procedural and substantive developments that the two cases represent. On the one hand, both cases symbolize a significant procedural evolution in the Court’s Fourteenth Amendment analysis, away from dichotomous, classification-based systems of review. On the other hand, the two cases add teeth to Fourteenth Amendment jurisprudence, by uniting principles of liberty and equality with the private and public dimensions of a justice-based Fourteenth Amendment jurisprudence that demands respect and freedom from stigma for all citizens under the protections of the Constitution.

A. Changing Standards of Review: Rational Basis Bites Back

For much of the twentieth century, Fourteenth Amendment equal protection cases generally employed a classification-based review. The Court applied either “rational basis” or “heightened” scrutiny to the government actions and laws being challenged, depending on the classification of discrimination at issue. In early applications of Fourteenth Amendment heightened scrutiny, the plaintiff class had to qualify as a “discrete and insular minority,” as noted in *Carolene Products*’ “footnote four” criteria,¹²² before the Court would apply a searching form of scrutiny in an equal protection challenge. The *Carolene Products* decision eventually led to the Court’s construction of a two-tier system of review in which it applied “strict scrutiny” review to claims involving “suspect classifications” or fundamental rights but “rational basis” to other cases.¹²³

¹²¹ 517 U.S. 620 (1996).

¹²² *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

¹²³ See *Shapiro v. Thompson*, 394 U.S. 618, 658-59 (1969) (Harlan, J., dissenting) (tracing the evolution of the “compelling interest” standard of review to suspect classifications, originating with *Korematsu v. United States*, 323 U.S. 214 (1944), and to cases involving fundamental rights, beginning with *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

A year before *Roe v. Wade*, Gerald Gunther denounced the “rigid two tier attitude of the Supreme Court”¹²⁴ in what has been called the “most heavily cited law review article of all time.”¹²⁵ Gunther’s famous description of the Warren Court’s two-tier system recognized that “some situations evoked the aggressive ‘new’ equal protection, with scrutiny that was “‘strict’ in theory and fatal in fact; in other contexts, the deferential ‘old’ equal protection reigned, with minimal scrutiny in theory and virtually none in fact.”¹²⁶ Gunther observed that in some cases, all of which involved fundamental rights, gender, or illegitimacy, the Court seemed willing to grant Fourteenth Amendment claims without applying strict scrutiny.¹²⁷ It was Gunther’s prediction that such cases might indicate a future willingness of the Court to develop an equal protection doctrine with more “bite,” in contrast with the Court’s history of applying a “traditionally toothless minimal scrutiny standard.”¹²⁸

The Court eventually formalized its heightened scrutiny standards for the “quasi-suspect” classes of gender and illegitimacy, creating a third tier of “intermediate scrutiny” review for such cases.¹²⁹ But it was only through the *Romer* and *Lawrence* decisions that a distinct pattern became clear: the two cases represent the culmination of a larger series of cases in which the Court has transcended the rigid tiered review systems of the past, applying instead a heightened form of rational basis scrutiny where it deems appropriate.

In *Romer*, the Court struck down a Colorado constitutional amendment which prohibited civil rights protections for lesbians, gays, and bisexuals, holding that sexual minorities are entitled to protection against animus-driven legislation which would deny their access to state legal protections and impose state-sanctioned stigma upon them.¹³⁰ Deciding the case on equal protection grounds, with sexual orientation not recognized as a suspect, or even quasi-suspect, classification, the Court only applied rational basis in its review. Rather than deferring to the State, the Court held

¹²⁴ Gerald Gunther, Foreword, *In Search Of Evolving Doctrine On A Changing Court: A Model For Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

¹²⁵ See, e.g., Robert J. Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261 (1989).

¹²⁶ Gunther, *supra* note 124, at 8.

¹²⁷ *Id.* at 18-19.

¹²⁸ *Id.*

¹²⁹ *Clark v. Jeter*, 486 U.S. 456 (1988) (illegitimacy); *Craig v. Boren*, 429 U.S. 190 (1976) (gender). See also *United States v. Virginia*, 518 U.S. 515 (1996) (establishing “exceedingly persuasive” standard of review for gender cases).

¹³⁰ *Romer v. Evans*, 517 U.S. 620, 632-35 (1996).

that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."¹³¹ The *Romer* majority established that state actions motivated by animus are unconstitutional under any standard of review, ruling "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."¹³²

The *Romer* decision did not focus on whether the classification of gays and bisexuals met the *Carolene Products* "suspect classification" criteria for heightened scrutiny. Rather, the *Romer* decision shifted the focus of equal protection review to the substantive rights at stake, as well as the government's motive in singling out a class of persons for the denial of legal protections. By applying a less deferential form of rational basis review based on suspect government motives, *Romer v. Evans* united a line of cases which employed a type of rational basis with bite—*City of Cleburne v. Cleburne Living Center*,¹³³ *Plyler v. Doe*,¹³⁴ and *Department of Agriculture v. Moreno*¹³⁵—all of which, like *Romer*, struck down discriminatory government acts even under the historically deferential rational basis review.

Expanding upon such precedents, the *Romer* Court held that laws which single out a group of persons to make them unequal raise the inference of animus-motivated legislation.¹³⁶ The Court concluded that the amendment challenged in *Romer* impermissibly targeted gay citizens for the legislative purpose of denying them equal rights.¹³⁷ "This Colorado cannot do," *Romer* ruled; "[a] State cannot so deem a class of persons a stranger to its laws."¹³⁸

These key themes of *Romer* were revisited by the *Lawrence* Court in a substantive due process context. Like the *Romer* majority, the

¹³¹ *Id.* at 634 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

¹³² *Id.*; 517 U.S. at 633.

¹³³ 473 U.S. 432 (1985) (striking down a zoning ordinance targeting individuals with disabilities).

¹³⁴ 457 U.S. 202 (1982) (striking down a law denying education to undocumented aliens).

¹³⁵ 413 U.S. 528 (striking down the denial of food stamps to unrelated persons, due to animus toward "hippies" driving the legislation).

¹³⁶ *Romer*, 517 U.S. at 634-35.

¹³⁷ *Id.* (quoting *Moreno*, 413 U.S. at 534).

¹³⁸ *Id.* at 635.

Lawrence majority was not hindered by deference to strict tiers of review. Instead, the Court focused on the substance of the claims, treating with little deference anti-gay legislation that would deny equal citizenship rights to those stigmatized by such laws.¹³⁹

In this respect, the Court's language in *Romer* parallels its later ruling in *Lawrence* that the state cannot single out one identifiable class of citizens for punishment with moral disapproval as the only asserted state interest for such a law. The Court stated that "[t]he Texas sodomy statute subjects homosexuals to 'a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with' the Equal Protection Clause."¹⁴⁰

While the majority opinion did not name the standard of review it applied, Justice O'Connor's concurrence in *Lawrence* indicates that the Court was employing at the very least a *Romer*-like heightened scrutiny, commenting that both *Romer* and *Lawrence*, like *Moreno*, *Plyler*, and *Cleburne*, called for a "more searching form of rational basis" due to the illegitimate government objectives common to the cases.¹⁴¹ O'Connor additionally explained that in such cases, as well as in the reproductive rights case *Eisenstadt v. Baird*,¹⁴² the personal nature of the relationship being targeted will more likely result in a successful claim under the normally deferential rational basis standard of review.¹⁴³

Although the evidence of animus in *Romer* was extensive especially given the breadth of the constitutional amendment being challenged, in *Lawrence*, the illegitimate government motive was implicit in the State's articulation of traditional and moral disapproval of homosexual conduct. In both cases, the Court refused to accept the discriminatory motives of the State as legitimate interests, establishing legislation based on animus or traditional disapproval as unconstitutional under any tier of review.

Romer and *Lawrence* have made historic contributions to the procedural evolution of rational Fourteenth Amendment review. Together, the two cases have established that regardless of the classification at issue or level of scrutiny applied, there are certain liberties that are too critical to be infringed and certain motives of the government too suspect to be granted deference by the Court. In so doing, they have strengthened rational

¹³⁹ See *Lawrence v. Texas*, 539 U.S. 558, 557-78 (2003). See also discussion *infra* Section II.D.2.

¹⁴⁰ *Id.* at 584 (quoting *Plyler v. Doe*, 457 U.S. at 239) (Powell, J., concurring).

¹⁴¹ *Id.* at 580 (O'Connor, J., concurring).

¹⁴² 405 U.S. 438 (1973).

¹⁴³ *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

basis review, as well as the substantive Fourteenth Amendment guarantees of liberty and equal protection for all.

B. The Marriage of Equal Protection and Due Process

Gunther's call for rational basis with bite appears to have finally been answered by the Court's loosening of stringent tier review standards, but another tension remains in Fourteenth Amendment review: the occasional dichotomous competition between approaches to individual rights favoring either equal protection or due process as a preferred focus.

Prior to *Lawrence*, some Fourteenth Amendment cases applied a "double helix"¹⁴⁴ analysis, merging due process and equal protection.¹⁴⁵ On other occasions, however, the Court seemed to abandon one of the two doctrines in favor of the other. Kenneth Karst has noted, for example, that the Warren Court shunned substantive due process after the *Lochner* era, while the Burger Court, in contrast, turned to substantive due process to avoid being accused of an overly expansive reading of the Equal Protection Clause.¹⁴⁶ The Court's alternating focus between the two doctrines brings to mind the metaphor of a revolving door, which never closes completely on either equal protection or due process, but whose resting spot in any given moment is difficult to predict.

Often, when the Court appears to favor one doctrine to the exclusion of the other, it is criticized for choosing the wrong approach. For example, the Court's primary focus on due process in abortion rights cases has been critiqued by those who claim that reproductive rights might be stronger today if the Court had placed more emphasis after *Griswold* on equal protection.¹⁴⁷ Other scholars have made broader criticisms of the

¹⁴⁴ Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) ("[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix.").

¹⁴⁵ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

¹⁴⁶ Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 33 n.185 (1977) [hereinafter Karst, *Equal Citizenship*] (noting "irony in the fact that the Court seems to be turning to substantive due process as a way of avoiding expansion of the [E]qual [P]rotection [C]lause, much as the Warren Court did just the opposite").

¹⁴⁷ See, e.g., CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184-94 (1989) [hereinafter FEMINIST THEORY OF THE STATE]; Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age and Class*, 41 DUKE L.J. 324, 356-57 (1991); Ruth Bader Ginsburg, *Some Thoughts On*

Court's substantive due process analyses as laying a shaky foundation for fundamental rights,¹⁴⁸ and some members of the Supreme Court have voiced similar concerns about substantive due process. In *Moore v. City of East Cleveland*, for example, the majority opinion invoked the ghost of *Lochner* in noting that "substantive due process has at times been a treacherous field for this Court."¹⁴⁹ Justice White's dissent in *Moore* advised in even stronger terms against expanding constitutional protections through substantive due process, noting that "[t]he Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."¹⁵⁰ White continued with the warning that "[w]henver the Judiciary does so, it unavoidably preempts for itself another part of the governance of the country without express constitutional authority."¹⁵¹

In contrast, some scholars have advised against relying too heavily on equal protection rather than substantive due process. Laurence Tribe, for example, has warned judges to "resist the temptation, in the name of minimalism, to reach for the silver bullet of equal protection: always check first whether the bullet is a blank."¹⁵² William Eskridge has concurred that the equal protection bullet too often emerges as a blank, notably in the context of challenges to anti-gay discrimination.¹⁵³

Such criticisms of employing one doctrine at the expense of the other cannot fairly be made of the majority opinion of *Lawrence*, which

Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. REV. 375 (1985); Karst, *Equal Citizenship*, *supra* note 146, at 53-59.

¹⁴⁸ See, e.g., BLACK, *supra* note 53, at 3 (This paradoxical, even oxymoronic phrase—"substantive due process"—has been inflated into a patched and leaky tire on which precariously rides the load of some substantive human rights not named in the Constitution.); *id.* at 100-01 ("[T]his non-concept rests on insufficient commitment, and has too little firm meaning (if it has any at all) to beget the kind of confidence, in judges or in others, that ought to underlie the regime of human rights . . ."). For critiques of due process emphasis in reproductive rights cases, see, e.g., MACKINNON, *FEMINIST THEORY OF THE STATE*, *supra* note 147, at 184-94; Colker, *supra* note 147, at 356-57; Ginsburg, *supra* note 147, at 386; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984).

¹⁴⁹ 431 U.S. 494, 502 (1977).

¹⁵⁰ *Id.* at 544 (White, J., dissenting).

¹⁵¹ *Id.*

¹⁵² Tribe, *supra* note 144, at 1916.

¹⁵³ See, e.g., William N. Eskridge, *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1212-13 (2000).

recognized that equal protection and due process are “linked in important respects, and a decision on the latter point [of due process] advances both interests.”¹⁵⁴ In other words, a significant step toward greater substantive due process liberty protections is simultaneously a giant leap for equality.

It is through the combined strength of the overlapping doctrines of equal protection and substantive due process that the related rights and liberty interests of the Fourteenth Amendment may be most fully protected. The interrelated due process and equal protection analyses of *Lawrence* and *Romer* have laid the groundwork for future decisions affirming the symbiotic protections of equal protection and due process, and for the further strengthening of Fourteenth Amendment jurisprudence in future cases.

C. The *Glucksberg* Problem: Personal Autonomy as a “Fundamental Right”

The substantive contributions *Romer* and *Lawrence* have made to Fourteenth Amendment jurisprudence are as critical as the procedural contributions they have made to constitutional methodology, if not more so. *Lawrence*’s articulation of liberty interests as transcending a merely physical right to be left alone complements *Romer*’s promises of equal affirmative access to the law. Together, the two cases reinforce principles of autonomy dating back to the Declaration of Independence’s original promises of life, liberty, and the right to pursue happiness.¹⁵⁵

Despite the Court’s longstanding recognition of a right to autonomy, there remain unresolved questions about the identity of autonomy as a “fundamental right.” In *Washington v. Glucksberg*,¹⁵⁶ the Court, in declining to strike down a state ban on assisted suicide, fell short of recognizing a fundamental autonomy right as applied to such cases, noting “[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”¹⁵⁷

¹⁵⁴ *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

¹⁵⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See also supra* Section I.A.

¹⁵⁶ 521 U.S. 702 (1997).

¹⁵⁷ *Id.* at 727 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1972) (declining to find a fundamental right to education guaranteed by the Constitution, which *Glucksberg* interprets as a limitation on *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992))). This passage of *Glucksberg* highlighted by Scalia is distinguishable from gay rights cases, since it did not address autonomy in intimate life choices, but was rather a rejection of education as a fundamental right. The *Glucksberg* Court arguably distinguished *Rodriguez* by addressing it separately from cases involving a more intimate right to choose, including *Moore*, *Griswold*, *Loving*, *Turner*, *Pierce*, *Roe*, and *Meyer* (i.e., the

In *Glucksberg*, the Court articulated a two step test, emphasizing that 1) the Due Process Clause “specially” protects rights and liberties deeply rooted in tradition and implicit in the concept of ordered liberty; and 2) a “careful description” of the asserted fundamental liberty interest is required.¹⁵⁸

Justice Scalia’s dissent in *Lawrence v. Texas* relies heavily on *Glucksberg*, which Justice Scalia cites for the proposition that “only fundamental rights which are ‘deeply rooted in this Nation’s history and tradition’ qualify for anything other than rational basis scrutiny under the doctrine of ‘substantive due process.’”¹⁵⁹ Justice Scalia’s dissent adds, “I do not quarrel with the Court’s claim that *Romer v. Evans* ‘eroded’ the ‘foundations’ of *Bowers*’ rational-basis holding. But *Roe* and *Casey* have been equally ‘eroded’ by *Washington v. Glucksberg*.”¹⁶⁰ Thus, applying a reading of *Glucksberg* which he argues “erodes” *Casey*, Scalia concludes that *Lawrence*’s reliance on *Casey* is misplaced and charges that the overruling of *Bowers* by *Lawrence* will result in a “massive disruption of social order.”¹⁶¹

Others have posited that despite the powerful “liberty interest” language of the *Lawrence* majority opinion, the absence of “fundamental rights” language in the decision might detract from its overall potency.¹⁶² In addition to such observations by constitutional scholars, the Eleventh Circuit has cited *Glucksberg*’s fundamental rights analysis as justifying narrow readings of *Lawrence* in two cases, *Lofton v. Secretary of*

line of cases cited by *Lawrence* in its own recognition of fundamental liberty interests protecting the right to privacy and autonomy in intimate life choices). Compare *Glucksberg* 521 U.S. at 727 n.19, with *Lawrence*, 539 U.S. at 564-66.

¹⁵⁸ *Glucksberg*, 521 U.S. at 720-21.

¹⁵⁹ *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

¹⁶⁰ *Id.* Scalia also charges *Roe* and *Casey* with applying heightened scrutiny without first establishing a “freedom to abort” that is rooted in tradition. *Id.*

¹⁶¹ *Id.* at 588, 591.

¹⁶² ESKRIDGE & HUNTER, *supra* note 48, at 93. The authors describe *Lawrence* as engaging “soaring rhetoric” while applying “weak doctrine,” and note that

[t]he power of the rhetoric in *Lawrence* makes it easy to lose sight of the fact that, unlike in the contraception or abortion cases from the 1960s and 1970s, there is no *fundamental* right recognized as such. Thus there is no duty on the state to demonstrate a compelling interest in sustaining its law.

Id.

*Department of Children and Family Services*¹⁶³ and *Williams v. Attorney General of Alabama*.¹⁶⁴

In *Lofton*, the Eleventh Circuit upheld a Florida statutory ban on adoption by individuals who engage in “homosexual conduct,” in the process accusing the *Lawrence* majority of failing to follow the model of *Glucksberg*. The *Lofton* court described any right to sexual intimacy established by *Lawrence* as limited, since, according to the Eleventh Circuit, *Lawrence* involved a criminal, not civil law, and since “[n]owhere, . . . did the Court characterize this right as fundamental. Nor did the Court locate this right directly in the Constitution, but instead treated it as the by-product of several different constitutional principles and liberty interests.”¹⁶⁵ The Eleventh Circuit accused the *Lawrence* Court of “declining” *Glucksberg*’s “invitation” to “‘exercise the utmost care whenever [it is] asked to break new ground’ in the field of fundamental rights,” and concluded by saying that “[w]e are particularly hesitant to infer a new fundamental liberty interest from [the *Lawrence*] opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis.”¹⁶⁶ Such critical language by the Eleventh Circuit displays an unusually open disdain for Supreme Court precedent and a clear preference of the Court’s earlier *Glucksberg* decision over *Lawrence*.

The Court repeated its criticism of *Lawrence* in *Williams*, decided by the same court six months later. In that case, the Eleventh Circuit upheld an Alabama ban on the sale of sex toys, rejecting a substantive due process challenge to the law and declining to find the violation of any fundamental rights posed by the ban.¹⁶⁷ The Eleventh Circuit once again narrowly interpreted *Lawrence* and condemned it for not strictly following the precedent of *Glucksberg*, reiterating that it was “not prepared to infer a new fundamental right from an opinion that never employed the usual *Glucksberg* analysis for identifying such rights.”¹⁶⁸ The court continued disparaging *Lawrence* for allegedly failing to follow *Glucksberg*,

¹⁶³ 358 F.3d 804, 817 (11th Cir. 2004) (upholding a Florida statutory ban on adoption by individuals engaging in “homosexual conduct”), *reh’g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, No. 04-478, 73 U.S.L.W. 3399 (U.S. Jan. 10, 2005).

¹⁶⁴ 378 F.3d 1232, 1236 (11th Cir. 2004) (upholding Alabama ban on the sale of sex toys, holding that “‘it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right’—whether to homosexual sodomy specifically, or more broadly, to all forms of sexual intimacy”) (quoting *Lofton*, 358 F.3d at 817).

¹⁶⁵ *Lofton*, 358 F.3d at 816 (internal quotations and citations omitted).

¹⁶⁶ *Id.* at 817 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

¹⁶⁷ *Williams*, 378 F.3d at 1235, 1250.

¹⁶⁸ *Id.* at 1237-38.

concluding; “[W]e decline to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny. To do so would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that never invoked strict scrutiny.”¹⁶⁹ In *Williams*, as in *Lofton*, the Eleventh Circuit’s rejection of *Lawrence* as binding precedent was consequently framed in terms of favoring a *Glucksberg* approach to due process analysis.

This alleged conflict between *Glucksberg* and *Lawrence* may be addressed in a future case if the Supreme Court is asked whether its *Glucksberg* decision precluded applying heightened scrutiny to infringements of individual liberty interests in autonomy either 1) absent “fundamental rights” nomenclature, or 2) prior to the establishment that the particular conduct at issue is supported by history and tradition. Both questions should be answered in the negative. Most importantly, those arguing for strict classifications and nomenclatures as predetermining the standards of reviews—and consequently the results of a case—have failed to acknowledge that even under rational basis, the Court is no longer blindly deferential to standards of review, but is according more teeth to protections of equality and justice under any standard of review.

1. A “Fundamental Right” By Any Other Name . . .

A reading of *Glucksberg* which concludes that, absent specific “fundamental rights” nomenclature, heightened scrutiny may not be applied in a substantive due process case (including *Lawrence v. Texas* and cases following its precedent) is flawed in two primary respects.

First, it is not evident that the *Lawrence* majority failed to invoke fundamental rights. While the *Lawrence* Court did not use the specific phrase “fundamental rights” in reference to the liberty interests it addressed, its decision was grounded in fundamental rights values. The *Lawrence* majority opinion observed that “[i]n *Eisenstadt v. Baird*, the Court . . . quoted from the statement of the Court of Appeals finding the law to be in conflict with *fundamental human rights*.”¹⁷⁰ Quoting *Eisenstadt*, the *Lawrence* opinion added, “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁷¹ *Lawrence* continued with a reminder that “*Roe* recognized the right of a woman to make certain

¹⁶⁹ *Id.*

¹⁷⁰ *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (citations omitted) (emphasis added).

¹⁷¹ *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (original emphasis omitted) (emphasis added)).

fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”¹⁷² *Lawrence*’s explicit reliance on these and other reproductive rights cases which use “fundamental rights” language¹⁷³ underscores the fundamental nature of the rights described in *Lawrence*.

It is also of no small significance that, in overruling *Bowers*, the *Lawrence* Court overruled a case which refused to find a fundamental right protecting intimate sexual conduct. Rejecting *Bowers*’ formulation of the issue as whether there is a fundamental right of homosexuals to engage in sodomy, the *Lawrence* Court criticized *Bowers* for such a narrow formulation, which disclosed the *Bowers* majority’s “failure to appreciate the extent of the liberty at stake.”¹⁷⁴ The *Lawrence* Court elaborated, “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.”¹⁷⁵ While this language in *Lawrence* may reject the specific nomenclature and central holding of *Bowers*, it does not follow that by focusing on liberty interests rather than a specific right, the *Lawrence* Court failed to recognize a fundamental right at all.

Second, the Court in *Glucksberg* did not require such specific “fundamental rights” language as a prerequisite to applying heightened scrutiny. Rather, *Glucksberg* at times used the phrases “fundamental rights” and “liberty interests” interchangeably. For example, *Glucksberg* noted the historic “special” protection for “those fundamental rights *and liberties* which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . we have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental *liberty interest*,”¹⁷⁶ and held that the Due Process Clause “provides heightened protection against

¹⁷² *Id.* (emphasis added).

¹⁷³ See, e.g., *Carey v. Population Servs. Int’l*, 431 U.S. 678, 679 (1977) (describing the right to privacy in reproductive freedom cases as a “fundamental right”). See also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992); *Eisenstadt*, 405 U.S. at 453 (invoking a long line of cases recognizing “the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,” and affirming *Roe*’s fundamental right to privacy).

¹⁷⁴ *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. 186, 190 (1986)).

¹⁷⁵ *Id.* (quoting *Bowers*, 478 U.S. at 190).

¹⁷⁶ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted) (emphasis added).

government interference with certain fundamental rights *and liberty interests*.”¹⁷⁷

The *Glucksberg* Court also acknowledged a line of cases which applied heightened scrutiny while invoking either fundamental rights or liberty interests.¹⁷⁸ For example, the *Glucksberg* Court cited *Meyer v. Nebraska*,¹⁷⁹ which invoked both “liberty” and “fundamental rights” in holding that

[t]he ‘liberty’ guaranteed by the due process clause of the fourteenth amendment . . . may not be interfered with [by] legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to affect . . . the individual has certain fundamental rights which must be respected.¹⁸⁰

Similarly, in his concurrence to a 1927 case, Justice Brandeis observed that “all fundamental rights *comprised within the term liberty* are protected by the Federal Constitution from invasion by the states.”¹⁸¹ Even in *Roe v. Wade*, while noting that privacy rights are rooted in various constitutional provisions, the Court described the right to privacy as ultimately “founded upon the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.”¹⁸²

The Court has admitted its failure to clarify the difference between “liberty interests” and “fundamental rights.” In a later reproductive rights decision, the Court noted that “there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a ‘fundamental right’ to abortion, . . . a ‘limited fundamental constitutional right’. . . or a liberty interest protected by the Due Process Clause, which we believe it to be.”¹⁸³

¹⁷⁷ *Id.* at 720 (citations omitted) (emphasis added).

¹⁷⁸ *Id.* (citing *Casey*, 505 U.S. at 851; *Eisenstadt*, 405 U.S. 438; *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 US 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

¹⁷⁹ *Meyer*, 262 U.S. at 390.

¹⁸⁰ *Id.* at 399.

¹⁸¹ *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (emphasis added), *overruled by* *Brandenburg v. Ohio* 395 U.S. 444 (1969).

¹⁸² *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹⁸³ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989) (internal citations omitted).

Justice Souter's concurrence in *Glucksberg* acknowledges and further details this history of the Court's use of a myriad of related phrases to refer to liberty interests and fundamental rights. Reviewing the Court's varying terminology, Souter noted that "[o]ur cases have used various terms to refer to fundamental liberty interests," with the Court having at times applied different language to refer to the same types of rights.¹⁸⁴

In a separate *Glucksberg* concurrence, Justice Stevens provided another piece of the puzzle, explaining that the Court has addressed cases evaluating the liberty interests at stake in intimate life decisions "as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and traditions."¹⁸⁵ What such cases have in common, despite varying terminology, Stevens found, was a recurring emphasis on "the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his life intolerable."¹⁸⁶

Such descriptions of "fundamental rights" as intertwined with a broader concept of "liberty" illuminate the close relationship between the two terms. When one examines the Court's history of using the phrases "liberty interests" and "rights" interchangeably, a narrow reading of *Glucksberg* as requiring "fundamental rights" nomenclature seems to miss the broader point. The designation of a liberty interest or right at stake need not be established *a priori* as a "fundamental right" before a government limitation of it is subjected to heightened or more searching constitutional scrutiny.

The importance some have placed on the particular phrase "fundamental rights" is relatively recent. In 1976, Kenneth Karst noted the Court's tendency during that era of reserving special treatment for "fundamental interests."¹⁸⁷ Karst predicted that, with the evolution of heightened scrutiny, the particular use of the phrase "fundamental interests"

¹⁸⁴ *Washington v. Glucksberg*, 521 U.S. 702, 768 n.10 (1997) (Souter, J., concurring) (citing *Poe v. Ullman*, 367 U.S. 479, 545 (1961) (Harlan, J., dissenting) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)) ("basic liberty"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("protected liberty"); *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) ("constitutionally protected liberty interest"); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) ("substantive liberty interests"); *Poe v. Ullman*, 367 U.S. 479, 543 (1961) ("certain interests require particularly careful scrutiny")). See also *Glucksberg*, 521 U.S. at 768 ("[A]t times we have also called such an interest a 'right' even before balancing it against the government's interest . . .") (citing *Roe v. Wade*, 410 U.S. 113, 153-54 (1973); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 668, 688 n.5 (1977)).

¹⁸⁵ *Glucksberg*, 521 U.S. at 744-45 (Stevens, J., concurring) (quoting *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975) (citations omitted).

¹⁸⁶ *Id.*

¹⁸⁷ Karst, *Equal Citizenship*, *supra* note 146, at 33.

would not always be the determinative factor of substantive due process decisions.¹⁸⁸ Karst's prediction that the door to substantive protections will continue to open through the Court's embrace of substantive values over semantic formalism has arguably come to fruition. Such strict semantic prerequisites requiring "fundamental rights" or "fundamental interests" nomenclature did not bind the Court prior to *Glucksberg*, or after it in *Lawrence*.

Finally, as previously demonstrated, *Romer* has significantly strengthened equal protection review, establishing that litigants no longer need to appeal to suspect classifications or fundamental rights to successfully challenge discriminatory state actions, even where "rational basis" scrutiny is applied. Even if one were to conclude that the *Lawrence* Court must have been applying rational basis since no "fundamental right" was specifically invoked, the Court's review had more teeth than a traditionally deferential form of rational basis review. This is consistent with the Court's trend toward loosening the standards of review in the face of particularly grave liberty violations or suspect government motives.

Even absent a formal strict scrutiny review, as at least one court has concluded that *Lawrence* did apply a searching form of heightened scrutiny. In *United States v. Marcum*,¹⁸⁹ the United States Court of Appeals for the Armed Forces applied *Lawrence* in its constitutional analysis of the military's sodomy ban.¹⁹⁰ One issue addressed by the *Marcum* court was whether *Lawrence* established a fundamental right of adults to make private decisions regarding consensual sexual conduct, including sodomy, and consequently, whether strict scrutiny applies to cases involving laws similar to those at issue in *Lawrence* and *Marcum*.¹⁹¹ While the *Marcum* opinion observed that *Lawrence* did not apply strict scrutiny nomenclature, it noted: "On the other hand, the Supreme Court placed *Lawrence* within its liberty line of cases resting on the *Griswold* foundation. These cases treated aspects of liberty and privacy as fundamental rights, thereby, subjecting them to the compelling interest analysis."¹⁹² Acknowledging the ambiguous identification of a fundamental right in *Lawrence*, the *Marcum* court, while not "presum[ing] the existence of such a fundamental right in the military

¹⁸⁸ *Id.* (predicting that in time, the Court will continue expanding protections for interests that "come to be seen as implicating the same substantive values[] Whether or not the Court uses the language of fundamental interests on those occasions, it will be reopening the door that Rodriguez purported to slam shut.").

¹⁸⁹ 60 M.J. 198 (C.A.A.F. 2004) (addressing the constitutionality of the Military Sodomy provision, Article 125).

¹⁹⁰ *Id.* at 208.

¹⁹¹ *Id.* at 204.

¹⁹² *Id.* (citations omitted).

environment,” concluded that “[w]hat *Lawrence* requires is searching constitutional inquiry.”¹⁹³

While ultimately holding that the non-consensual conduct of the appellant in *Marcum* fell outside the scope of *Lawrence*, the *Marcum* court emphasized the Supreme Court’s admonition in *Lawrence* “that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹⁹⁴

The *Marcum* court’s reading of *Lawrence* as requiring a searching form of scrutiny is consistent with the Supreme Court’s strengthening of rational basis review in recent years. Notably, *Marcum*’s interpretation of *Lawrence* as requiring a more “searching” form of constitutional scrutiny is strikingly similar to Justice O’Connor’s concurrence in that case, in which O’Connor wrote that *Romer* and *Lawrence* call for a “more searching form of rational basis” due to the suspect nature of the government “interests” in those cases.¹⁹⁵

If a government action fails rational basis, as it more likely will after *Romer* and *Lawrence*, there is no need to inquire into the potential application of heightened forms of scrutiny. The new strength of rational basis review does not preclude the application of higher standards of review in cases implicating autonomy rights and liberty interests, but the infringement of such rights is now less likely to be tolerated, even under lower levels of scrutiny. Consequently, even if *Glucksberg* does represent an attempt by the Court to limit the reach of substantive due process, it is a “failed bid”¹⁹⁶ to do so. *Lawrence*’s affirmation of strong substantive due process protections, even absent “fundamental rights” nomenclature, is now the rule of law.

2. *The Growing and Evolving Roots of Tradition*

The “tradition” prong of the *Glucksberg* test does not limit due process protections to traditionally accepted practices, despite the claims of those applying a narrow reading of *Glucksberg*.¹⁹⁷ The Court’s *Glucksberg* opinion does not preclude continued recognition of constitutional history as a fluid concept or continued acknowledgement that traditions change over time.¹⁹⁸ By opening its discussion of the role of history in due process cases

¹⁹³ *Id.* at 205.

¹⁹⁴ *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 572 (2003)).

¹⁹⁵ *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring).

¹⁹⁶ See *Tribe*, *supra* note 144, at 1925.

¹⁹⁷ See, e.g., description of Scalia’s dissent in *Lawrence* invoking the “tradition” prong of *Glucksberg*, *supra* note 159.

¹⁹⁸ See *supra* Section I.

with citations to *Moore*, *Cruzan*, and *Casey*, cases decided in the context of changing traditions,¹⁹⁹ the *Glucksberg* majority affirmed the principle of a living constitution which reflects evolving traditions.

The *Moore* plurality, for example, quoted Justice Harlan's *Poe v. Ullman*²⁰⁰ dissent to emphasize that the Court must have "regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."²⁰¹ Additionally, the case cited in *Glucksberg* as establishing special protections for rights deeply rooted in history was *Palko v. Connecticut*.²⁰² *Palko* itself epitomizes such tradition-breaking, being the 1937 case that broke with past Lochnerian traditions, "enlarging" and "extending" substantive due process "to include liberty of the mind as well as liberty of action" and charting a new direction for justice-based substantive due process.²⁰³ The *Glucksberg* majority's citation of these cases which reflect changing traditions is consistent with the Court's historic recognition of the evolving right to self-determination in intimate life choices.²⁰⁴

Most pertinent in *Glucksberg*'s reliance on *Palko* is *Palko*'s establishment of the role of tradition in substantive due process protections against laws which violate "a principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."²⁰⁵ The

¹⁹⁹ *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (citations omitted).

²⁰⁰ *Poe v. Ullman*, 367 U.S. 497 (1961).

²⁰¹ *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977) (citing *Ullman*, 367 U.S. at 542-43 (Harlan, J., dissenting)). Ironically, while Harlan's dissent, reflecting an evolving constitution jurisprudence that honors traditions both longstanding and changing, serves as the backbone for the establishment of today's substantive rights to sexual autonomy in cases such as *Lawrence v. Texas*, Harlan on several occasions throughout his dissent expressed his preference that states continue to be allowed to keep homosexual conduct illegal, as well as other private and consensual sexual acts that were at Harlan's time subject to popular condemnation and criminalization. See, e.g., *Ullman*, 367 U.S. at 546, 547, 552 (Harlan, J., dissenting).

²⁰² 302 U.S. 319, 325 (1937) (finding no due process violation in allowing states to appeal acquittals), *overruled in part by* *Benton v. Maryland*, 395 U.S. 784 (1969).

²⁰³ *Id.* at 326-27. See *supra* notes 1-2 and accompanying text; see also *supra* Section I.A.

²⁰⁴ *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting) (explaining that the Court's jurisprudence in such cases has been "[g]uided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system") (quoting *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 720 (7th Cir. 1975)).

²⁰⁵ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 219 U.S. 97, 105 (1934)).

traditions of justice-based principles, not act-specific practices, should be the focus of substantive due process inquiries.

As such, while there may be some history of sexual repression in this country, superseding such history is the Court's tradition of honoring individual freedom in matters of privacy, autonomy, and self-definition. The Court's longstanding history of embracing the primacy of individual autonomy is what should delineate the confines of a substantive due process "tradition" analysis, not the specific mores of a given era. When examining tradition as a basis for substantive rights, the Court has recognized that the inquiry is whether "the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"²⁰⁶

The *Lawrence* majority consequently declared that "the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."²⁰⁷ Identifying autonomy as a protected liberty interest, the Court endorsed Justice Stevens' dissent in *Bowers*,²⁰⁸ which recognized that issues of sexual autonomy deal "with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition."²⁰⁹

While in *Lawrence v. Texas*, the majority opinion casts doubt on the traditional basis for prohibiting gay sex,²¹⁰ more significantly, by reframing the appropriate breadth of tradition inquiries to acknowledge the importance of changing traditions, the opinion reflects the Court's evolved understanding of the equal humanity of gays and bisexuals and of the need for broader applications of constitutional protections as demanded by the lessons of time. The majority opinion further displays the Court's willingness to apply a broad, rather than overly narrow, definition of tradition itself, which focuses on overarching justice-based principles

²⁰⁶ *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

²⁰⁷ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

²⁰⁸ *Bowers*, 478 U.S. at 214-20; see also *Lawrence*, 539 U.S. at 578-79 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and it should control here.").

²⁰⁹ *Bowers*, 478 U.S. at 217 (quoting *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975)).

²¹⁰ Noting, for example, that laws against homosexual sodomy are recent, relative to the longer history of sex-regulating laws in this country which have historically targeted predatory and non-procreative sex, while only recently and in some states singling out same-sex activities for criminalization. *Lawrence*, 539 U.S. at 568-71.

historically protected by the constitution rather than on specific actions or applications of traditional protections. The Court in *Lawrence* did not reject tradition itself as an important element of due process review, but only rejected the validity of invoking specific traditions of prejudice as legitimate bases for denying rights.

The *Lawrence* majority opinion reflects the Court's traditional recognition of the historic "origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his life intolerable."²¹¹ Concluding that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,"²¹² the *Lawrence* Court supplemented, rather than contradicted, its *Glucksberg* ruling.

Finally, nowhere in the *Lawrence* majority opinion did the Court reject the potential applicability of heightened scrutiny to the analysis at hand, nor preclude its ability to apply heightened scrutiny in future cases involving issues of personal autonomy in intimate life choices and acts. While focusing on the broad liberty protections of the Fourteenth Amendment rather than on the particular act-focused right at stake or the classification of litigants (e.g., as "suspect," triggering heightened scrutiny), the Court did not preclude similar cases being decided in more explicitly "fundamental rights" or "heightened scrutiny" terms.

3. The Dangers of Act-Specific Fundamental Rights Nomenclature

There is an additional danger inherent in applying strict semantic requirements to due process analyses. The approach of defining substantive rights in act-specific terms may inappropriately divert the focus of constitutional inquiries away from the broader principles at stake, reinforcing the harms caused by a State's failure to honor such principles. The awareness of such dangers of act-defined substantive due process underscored the *Lawrence* Court's overruling of *Bowers*. One of the criticisms that the *Lawrence* Court made of *Bowers* was that the *Bowers* Court's articulation of the interest at issue as a "fundamental right to sodomy" demeaned the claims of the litigants and revealed the majority's failure to appreciate the liberty interests implicated.²¹³ The approach to defining the substantive right at issue constitutes the most significant difference between *Glucksberg* and *Lawrence*.

²¹¹ *Washington v. Glucksberg*, 521 U.S. 702, 744-45 (Stevens, J., dissenting) (quoting *Fitzgerald*, 523 F.2d at 720 (7th Cir. 1975)) (citations omitted).

²¹² *Lawrence*, 539 U.S. at 572 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

²¹³ *Lawrence*, 539 U.S. at 566-67. See *supra* note 175 and accompanying text.

In *Glucksberg*, the majority opinion pointedly rejected the respondents' articulation of the broad right at stake as the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference," instead renaming the interest in more narrow Bowers-like terms, namely, "whether the protections of the Due Process Clause include a right to commit suicide with another's assistance."²¹⁴

By confining the definition of a substantive right in terms of specific acts, the *Bowers* and *Glucksberg* decisions warrant criticism for trivializing the liberty claims of those invoking substantive due process.²¹⁵ In addition to demeaning individual claimants and undermining their liberty interests, the definitional approaches of *Bowers* and *Glucksberg* are not supported by history or constitutional tradition. As early as 1823, the Court recognized liberty interests as defined by broader principles, not act-specific limitations. The Court's earliest decision addressing unenumerated rights, *Corfield v. Coryell*,²¹⁶ involved the specific question of whether one state was required under the Constitution to allow citizens of another state to fish for shellfish in its waters. In *Corfield*, the Court recognized that the broader right at stake was not a "right to fish for shellfish," but rather the Constitution's guarantee of fundamental citizenship rights involving trade and travel.²¹⁷

It was consequently consistent with the Court's traditional approach to substantive rights that *Lawrence v. Texas* rejected a short-lived trend of limiting substantive due process to its most trivial and act-specific formula. By not phrasing the liberty interest at stake narrowly as a "fundamental right to engage in homosexual sodomy," which phraseology allowed the *Bowers* Court "to deride Hardwick's position as 'at best, facetious,'"²¹⁸ the *Lawrence* Court endorsed the broader liberty claims involved in intimate life choices.²¹⁹

The Court's principle-focused approach to substantive rights nomenclature in *Corfield* and *Lawrence*—as opposed to the narrow act-focused approach of *Bowers* and *Glucksberg*—reflects a tradition of respect

²¹⁴ *Glucksberg*, 521 U.S. at 724.

²¹⁵ See, e.g., Tribe, *supra* note 144, at 1922 (arguing that such a "naming game" approach to identifying fundamental rights reduces such rights to triviality). See also *id.* at 1936 (proposing that *Lawrence*'s broader focus on liberty interests has superceded "the 'Trivial Pursuit' version of the due process 'name that liberty' game arguably validated by *Glucksberg*").

²¹⁶ 6 F. Cas. 546 (C.C.E.D. Pa. 1825).

²¹⁷ *Id.*

²¹⁸ *Lawrence v. Texas*, 539 U.S. 558, 596 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

²¹⁹ *Id.*

for broad principles despite historic condemnation of specific acts. As Judge Barkett pointed out in her dissent to *Williams v. Attorney General of Alabama*, “[i]n cases solely involving adult consensual sexual privacy [the Supreme] Court has never required that there be a long-standing history of affirmative legal protection of specific conduct before a right can be recognized under the Due Process Clause.”²²⁰ Rather, Barkett has pointed out, “because of the fundamental nature of this liberty interest, this right has been protected by the Court despite historical, legislative restrictions on private sexual conduct.”²²¹

An approach to substantive rights which defines such rights in terms of broad principles of liberty is consistent with Justice Harlan’s analysis in his *Poe v. Ullman* dissent, which noted that the full scope of due process liberty is not confined to the specific, enumerated rights in the Constitution, nor is it “a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on.”²²² Rather, “[i]t is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.”²²³ *Lawrence*’s embrace of liberty’s overarching principles and its rejection of semantic games endorse Harlan’s broad approach to substantive due process outlined in *Poe v. Ullman*. By addressing the right at stake in terms of the overarching principles of autonomy, dignity, and respect, rather than defining it as a “fundamental right to engage in homosexual sodomy,” the *Lawrence* decision established that the right to autonomy in one’s private and intimate life choices was part of the broader continuum of liberty, as historically recognized by the Court.

Together, *Romer* and *Lawrence* have played a critical role in the evolution of Fourteenth Amendment jurisprudence. After *Romer*, equal protection rational basis review is no longer impotent and the Court is no longer bound by the strict procedural tier-review limitations of the past. After *Lawrence*, substantive due process similarly protects the intimate decisions of gay, bisexual, and straight individuals alike, regardless of the articulation of a “fundamental right” or the establishment of traditional “moral” support for a particular act. When these newly strengthened doctrines of equal protection and substantive due process are considered in conjunction with each other, it becomes clear that *Romer* and *Lawrence*

²²⁰ 378 F.3d 1232, 1251 (11th Cir. 2004) (Barkett, J., dissenting) (citing *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 133, 139 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

²²¹ *Id.*

²²² *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

²²³ *Id.*

have made a tremendous impact on the evolution of Fourteenth Amendment jurisprudence by shifting the focus of procedural review from narrow classifications and nomenclature restrictions to a broader focus on the substantive principles and rights at stake.

D. Privacy Comes Out of the Closet: Equal Citizenship and Active Liberty

Having established that the broader liberty principles of substantive rights take precedence over the particular classification or act at issue, *Lawrence* and *Romer* together reveal a fundamental transformation of the right to privacy that has been in the works for years. Today's right to privacy has evolved into a more *public* freedom of choice which incorporates traditional American principles of self-determination and autonomy. As described in this section, the Court's recent affirmations of broad and active liberty protections based upon principles of equal citizenship illustrate the public aspects of the right to autonomy in one's private choices.

1. The Transcendent Dimensions of Privacy Rights: Romer and Lawrence Open the Closet Door

The principle that Fourteenth Amendment liberty includes an affirmative freedom of autonomy, as well as the right to be let alone, has long been a part of the Court's privacy rights jurisprudence.²²⁴ The Court has described the dual nature of the right to privacy as including "at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."²²⁵

Continuing a history of affirming the primacy of individual choice in privacy protections, *Lawrence v. Texas* sheds light on the right to privacy's existence as a broader liberty interest that incorporates a more affirmative—and public—freedom of autonomy in one's personal life choices. *Lawrence* brings the right to privacy out of the closet by shifting the focus of permissible government limitations in privacy cases from a strictly public-private differentiation, to a more "transcendent" sphere of autonomy defined by the personal nature of the intimate decision at stake:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other

²²⁴ See *supra* Section I.C.

²²⁵ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (discussing the requirement that doctors disclose patient records).

spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. 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.²²⁶

In the ensuing analysis of *Lawrence*, this “transcendent” liberty interest is described as including both private and public dimensions: a right to autonomy as well as a right to be let alone. The *Lawrence* opinion extensively cites past reproductive rights cases which affirmed the right to privacy as an affirmative right to autonomy, not just freedom from physical restraint, noting, for example, that after *Griswold*, which involved the commercial sales of contraceptives in a public setting, “it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”²²⁷ Other reproductive rights cases cited in *Lawrence* included *Roe v. Wade*, *Carey v. Population Services International*, and *Eisenstadt v. Baird*, all of which affirmed the right to autonomy in personal decisions regarding sexual conduct.²²⁸ *Planned Parenthood v. Casey*²²⁹ played an especially prominent role in *Lawrence*, bridging the connections between liberty, privacy, and autonomy.²³⁰ Using the language of liberty where the Court had traditionally, in reproductive rights cases, invoked the right to privacy, the plurality opinion of *Casey* described intimate life choices as central to personal dignity and autonomy, and identified these decisions as being at “the heart of [the] liberty” interest protected by the Fourteenth Amendment.²³¹ Citing broad liberty interests

²²⁶ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

²²⁷ *Id.* at 565-66 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

²²⁸ *Id.* See *Carey v. Population Services Int'l*, 431 U.S. 678, 684-85 (1977) (“While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, procreation, contraception, family relations, and child rearing and education.’”) (citing *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (White, J., concurring); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)). See also *Eisenstadt*, 405 U.S. at 453 (holding that the Fourteenth Amendment protects the right to be free from government intrusions in decisions “fundamentally affecting a person”).

²²⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²³⁰ See also *supra* Section I.C.

²³¹ *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). See also *Casey*, 505 U.S. at 933 (Blackmun, J., concurring in part, dissenting in part); *Casey*, 505 U.S. at 916 (Stevens, J., concurring in part, dissenting in part)

and quoting *Casey*'s fundamental "right to define one's concept of existence, of meaning, of the universe, and of the mystery of human life," *Lawrence* applied *Casey* to conclude that "persons in homosexual relationships may seek autonomy for these purposes, just as heterosexuals do."²³²

Lawrence's affirmation of autonomy protections for personal life choices brings the right to privacy into a more public, transcendent realm in another respect: the decision also recognizes a more public and potent right to dignity and respect.²³³ Strikingly, the Court recognized in *Lawrence* a "due process right to *demand* respect for conduct protected by the substantive guarantee of liberty."²³⁴ The specific contours of this right to demand respect remain to be established. On the one hand, the right to demand respect can be connected to the freedom from stigma guaranteed by *Romer*, and to an underlying Rawlsian recognition that equal liberty is a critical component for maintaining justice and structuring a polity.²³⁵ On the other hand, the right to demand respect may be interpreted as requiring equal legal validation of same-sex partnerships, such as through marriage.²³⁶

At the very least, the right to demand respect implies an affirmative protection from public stigmatization. The Court in *Lawrence* established that, by targeting gay individuals and reducing them to a single stigmatized act, sodomy bans "locked an entire segment of the population into a subordinate status and often forced such individuals either to transform or suppress important dimensions of their identities in order to escape second-class treatment in the public realm."²³⁷ While the majority opinion of *Bowers v. Hardwick* had allowed majority "notions of morality" to trump the privacy rights of gays and bisexuals,²³⁸ *Lawrence* rejected *Bowers*'s

(stating that "[d]ecisional autonomy must limit the State's power"); *Casey*, 505 U.S. at 927 (Blackmun, J., concurring in part, dissenting in part) ("[P]ersonal decisions that profoundly affect bodily integrity, identity and destiny should be largely beyond the reach of the government.").

²³² *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

²³³ *See id.* at 574-79.

²³⁴ *Id.* at 575 (emphasis added).

²³⁵ *See* Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 748-49, 753 (2004) (describing *Lawrence* in terms of John Rawls' proposition that each person is entitled to equal rights in the protection of their liberty interests).

²³⁶ *See infra* Section III.

²³⁷ Schacter, *supra* note 235, at 745-76.

²³⁸ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

favoring of majority will over individual privacy rights, demanding instead respect for such intimate, consensual choices, despite moral condemnation by some elements of society.²³⁹ The Court in *Lawrence* concluded that “[p]etitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making private sexual conduct a crime.”²⁴⁰

Lawrence’s language prohibiting government-imposed stigma and second-class treatment of a segment of the population parallels that used by the Court in the 1984 *Palmore v. Sidoti* decision.²⁴¹ In *Palmore*, the Court, striking down a judicial determination that a “best interest” requirement precluded awarding custody to a parent in an interracial relationship, held that “the Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”²⁴² It also parallels the holding of *Romer*, that such state-imposed stigma and second-class treatment constitutes a *per se* equal protection violation and that “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” The three cases each illustrate the Court’s clear condemnation of state-sanctioned prejudice resulting in second-class status or stigma as anathema to the constitutional rights of citizens.²⁴³

Finally, the Court’s recognition in both *Romer* and *Lawrence* that state-imposed stigma impermissibly demotes its victims to second-class citizenship status not only establishes the public nature of privacy rights, but also reveals stigma to be the antithesis of the rights to respect and autonomy required by both the liberty and equality guarantees of the Fourteenth Amendment.²⁴⁴ The right to demand respect and the reciprocal freedom from stigma enumerated in *Romer* and *Lawrence* offer more affirmative protections than merely the right to be left alone.

²³⁹ *Lawrence*, 539 U.S. at 571-72.

²⁴⁰ *Id.* at 578.

²⁴¹ 466 U.S. 429 (1984) (interpreting the Fourteenth Amendment).

²⁴² *Id.* at 433, cited with approval in *Albright v. Morton*, 321 F. Supp.2d 130 (D. Mass. 2004) and *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

²⁴³ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

²⁴⁴ For further discussion of how *Lawrence* united the principles of equality and liberty, see ESKRIDGE & HUNTER, *supra* note 48, at 95 (describing liberty as the “major chord” of *Lawrence* and principles of respect and stigma as the “minor chord,” and noting that “[t]he combination of these two discursive chords yields a complementarity of individualist liberty and equality, a cultural and political zone where the new libertarians and the neo-egalitarians of the early twenty-first century can meet”).

On this point, gays and bisexuals could receive guidance from a recent affirmative action decision, *Grutter v. Bollinger*,²⁴⁵ which recognized the affirmative promotion of diversity as an appropriate remedial response to past harms tied to second-class citizenship treatment. In *Grutter*, the Court held that diversity may be a compelling interest justifying affirmative action programs in an educational context “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry.”²⁴⁶ The Court’s embrace of diversity was arguably based on its recognition that the Constitution demands full equality and inclusion in society that extends beyond mere tokenism.²⁴⁷ As an affirmative action case, *Grutter* may be read narrowly as limited to an educational context. It may also be read, though, as part of a longer line of cases including *Romer* and *Lawrence* that represent a more expansive form of democratic constitutionalism that protects the right of individuals to participate fully in society as autonomous citizens free of subordination.²⁴⁸ As such, sexual minorities may invoke *Grutter* for its affirmation of the importance of a diverse citizenry as part of the Constitution’s guarantee of equal liberty and citizenship. Without diversity, after all, the stigma of segregation will continue to stain the integrity of a constitutional democracy.

Justice Blackmun’s dissent in *Bowers* similarly addressed diversity in terms of its interrelationship with autonomy as an element of liberty in democracy, noting that “in a Nation as diverse as ours, . . . there may be many ‘right’ ways of conducting [intimate] relationships,” and that “much

²⁴⁵ 539 U.S. 306 (2003).

²⁴⁶ *Id.* at 331-32.

²⁴⁷ See Linda S. Greene, *The Constitution and Racial Equality after Gratz and Grutter*, 43 WASHBURN L.J. 253, 282 (2004). Greene states:

Justice O’Connor’s *Grutter* opinion draws on the civic and citizenship dimensions of constitutional equality articulated in *McLaurin*, *Sweatt*, and *Brown*. The Court’s approval of diversity as a compelling interest is grounded in the Court’s recognition that the full enjoyment of equal citizenship—as well as the legitimacy of American institutions—includes both a right of non-token inclusion in the most prestigious institutions as well as inclusion in the ranks of leadership and power.

Id.

²⁴⁸ As Professor Jane Schacter argues,

each of these cases deploy [sic], or at least take steps toward deploying, Fourteenth Amendment values in service of an inclusive and respectful democratic culture. The democratic culture that these cases further, moreover, is one that is structured to permit all citizens to participate meaningfully in the broad enterprise of collective self-government. These cases thus show some attentiveness to the subtle ways in which democracy can be compromised by dynamics of subordination and social exclusion.

Schacter, *supra* note 235, at 734.

of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.”²⁴⁹ Blackmun quoted the 1943 Supreme Court decision, *West Virginia Board of Education v. Barnette*, in which the Court applied the Constitution “with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization,”²⁵⁰ and also referred to Karst’s similar admonition that “freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”²⁵¹ Noting the parallels in the issues raised by *Bowers*, Blackmun concluded that “[i]t is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.”²⁵² In overturning *Bowers*, the *Lawrence* Court adopted these principles to establish broader and more affirmative protections of liberty and autonomy in personal life choices, demanding a corresponding freedom from stigma in public spheres.

Through the pivotal rulings of *Lawrence* and *Romer*, the Court has revealed the true nature of the intertwining rights to privacy and autonomy as being part of a broader umbrella of liberty, while simultaneously recognizing stigma as anathema to such fundamental Fourteenth Amendment protections. By uniting these interrelated principles, the Court has embraced a freedom of choice that encompasses both private and public elements and demands respect for one’s most intimate life choices.

2. Affirmative Privacy Rights and Active Liberty

As *Romer* and *Lawrence* established, liberty has both public and private dimensions. The public dimensions of liberty rights as affirmed by *Lawrence* similarly encompass both a freedom from government-sanctioned stigma that prevents a class of persons from fully participating in society as equal citizens, as well as a corresponding “due process right to demand respect for conduct protected by the substantive guarantee of liberty.”²⁵³

²⁴⁹ *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627 (1980)) [hereinafter *Intimate Association*].

²⁵⁰ *Id.* at 211 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943)).

²⁵¹ Karst, *Intimate Association*, *supra* note 249, at 637.

²⁵² *Bowers*, 478 U.S. at 211.

²⁵³ *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

While it remains to be seen how the Court in future decisions will clarify the meaning and boundaries of the rights of gays and bisexuals to “demand respect,” its articulation of such an affirmative right in the context of denouncing the imposition of de facto second class citizenship invokes both the equality and due process aspects of Fourteenth Amendment liberty guarantees. Consequently, while the Privileges and Immunities Clause may no longer be the emphasis of Fourteenth Amendment cases,²⁵⁴ its promise of equal citizenship continues to be fulfilled through the protections of the Due Process and Equal Protection Clauses.

The right of citizens to live free, self-determined lives is deeply rooted in American history, as acknowledged by Justice Stevens’s dissent in *Bowers*, who described “the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable” as central to “the origins of the American heritage of freedom.”²⁵⁵ Tracing the American tradition of freedom back to the earliest words of the Declaration of Independence, Stevens’s dissent explained that every citizen, regardless of sexual orientation, is entitled to the same equal liberty protections from state intrusion since “the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.”²⁵⁶

The majority in *Lawrence* adopted Stevens’s analysis, and took it a step farther, recognizing that privacy rights transcend spatial dimensions and are linked to both the due process right to demand respect, and to *Romer*’s broader promises of full citizenship participation rights.²⁵⁷

The Court’s union of the fundamental principles of autonomy, equality, and liberty in the context of both privacy rights and the more public citizenship guarantees in *Lawrence* and *Romer* arguably incorporates in part the philosophy of constitutional scholar Kenneth Karst, who has emphasized “equal citizenship” as a bedrock of Fourteenth Amendment

²⁵⁴ See *supra* note 56 and accompanying text.

²⁵⁵ *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting), (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716, 720 (7th Cir. 1975)). See also *supra* Sections I.B and I.C.

²⁵⁶ *Bowers*, 478 U.S. at 218-19.

²⁵⁷ See *Lawrence*, 539 U.S. at 562, 578; *Romer v. Evans*, 517 U.S. 560, 562, 584 (1996). For alternative analysis of *Lawrence* as reflecting “the Supreme Court’s recognition that American democratic pluralism must meet the lesbian, gay, bisexual, and transgendered (LGBT) rights movement at least halfway” while not necessarily guaranteeing affirmative treatment of LGBT individuals beyond tolerance, see William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004).

jurisprudence.²⁵⁸ Karst has posited that “[t]he substantive core of the [Fourteenth A]mendment, and of the equal protection clause in particular, 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.”²⁵⁹ The essence of Karst’s equal citizenship theory, foreshadowing the holding of *Lawrence v. Texas* and *Romer v. Evans*, “is the dignity of full membership in the society. . . . Accordingly, the principle guards against degradation or imposition of stigma. . . . These concerns for stigma and stereotype go to the heart of the principle of equal citizenship.”²⁶⁰ In his article, Karst cited a number of cases adopting principles of equal citizenship.²⁶¹ In such cases, Karst claims, broader principles of autonomy, rather than the specific acts at issue, define fundamental rights; “[t]he focus of equal citizenship here is not a right of access to contraceptives, or a right to an abortion, but a right to take responsibility for choosing one’s own future . . . [and] to be an active participant in society rather than an object.”²⁶²

Such equal citizenship principles espoused by Karst have been explicitly endorsed by members of the Supreme Court. Before her appointment to the Supreme Court, Justice Ruth Bader Ginsburg wrote that, in abortion rights cases, it “is a woman’s autonomous charge of her full life’s course—as Professor Karst put it, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen” that is at stake.²⁶³ In *Casey*, three other Justices—O’Connor, Kennedy and Souter—voiced similar support for women’s autonomy in terms of equal citizenship, writing that “[t]he ability of women to participate equally in the

²⁵⁸ Karst, *Equal Citizenship*, *supra* note 146.

²⁵⁹ *Id.* at 4.

²⁶⁰ *Id.* at 5, 6, 23.

²⁶¹ *E.g.*, *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (characterizing the right to privacy as including an interest in independence in making certain kinds of important decisions); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 n.76 (1973) (describing reproductive choice as founded on the right to privacy); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (describing the right to privacy as including an interest in independence in making certain kinds of important decisions). For earlier cases on this issue, see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Strauder v. West Virginia*, 100 U.S. 303 (1880).

²⁶² Karst, *Equal Citizenship*, *supra* note 146, at 58 (citing Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974)).

²⁶³ Ginsburg, *supra* note 147, at 383 n.62 (citing Karst, *Equal Citizenship*, *supra* note 146, at 57-59).

economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”²⁶⁴

Equal citizenship also plays an important role in Justice Breyer’s doctrine of “active liberty,” first articulated in his 2001 Madison Lecture.²⁶⁵ According to Breyer’s account of constitutional jurisprudence, the United States was founded on principles of liberty which include both a “modern liberty” principle of independence from government restrictions and the more affirmative “liberty of the ancients,” consisting of an “active and constant participation in collective power.”²⁶⁶ The primacy of the citizen in America’s constitutional democracy, Breyer noted, was emphasized by Thomas Jefferson, who “spoke directly of the rights of the citizen as ‘a participator in the government of affairs,’ and by John Adams “[who] referred to the importance of ensuring that all citizens have a ‘positive passion for the public good.’”²⁶⁷ In later years, Breyer explained, the Court embraced “active liberty” principles by replacing the *Lochner* era’s emphasis on property rights with a new focus on the citizenship rights of African Americans, “thereby expanding the scope of democratic self-government.”²⁶⁸ Breyer argues that a new focus on active liberty should guide the Court onto a better path of constitutional law “that will promote government solutions consistent with individual dignity and community need.”²⁶⁹

In his 2005 book on the subject, entitled *Active Liberty*,²⁷⁰ Justice Breyer explains the doctrine of active liberty in depth, emphasizing that “liberty means not only freedom from government coercion but also the freedom to participate in the government itself.”²⁷¹ He compares the two

²⁶⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992). See also Schacter, *supra* note 235, at 759 (describing the *Casey* plurality’s discussion of equal participation in the reproductive rights context as a form of horizontal democracy placing reproductive autonomy in realm of citizenship as well as social participation).

²⁶⁵ Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002) [hereinafter Breyer, *Madison Lecture*].

²⁶⁶ *Id.* at 245-46 (citing Benjamin Constant, *The Liberty of the Ancients Compared with that of the Moderns*, in *POLITICAL WRITING* 309, 309-28 (Biancamaria Fontana trans. & ed., 1988)).

²⁶⁷ *Id.* at 246 (quoting Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), in *THE FOUNDERS’ CONSTITUTION* 142 (Philip B. Kurland & Ralph Lerner eds., 1987); Letter from John Adams to Mercy Warren (Apr. 16, 1776), in *THE FOUNDERS’ CONSTITUTION*, *supra*, at 670).

²⁶⁸ Breyer, *Madison Lecture*, *supra* note 265, at 258.

²⁶⁹ *Id.* at 246.

²⁷⁰ STEPHEN BREYER, *ACTIVE LIBERTY* (2005).

²⁷¹ *Id.* at 3.

halves of liberty—liberty of the ancients (active liberty) and modern liberty (freedom from government interference)—to the negative and positive liberties described by Isaiah Berlin,²⁷² emphasizing throughout his book the important role positive, or active, liberty plays in the protection of constitutional democracy.

Suggesting that the Constitution should be viewed “through a more democratic lens,”²⁷³ Justice Breyer posits that the democratic Constitution that governs our legal system requires equal respect for all citizens and demands the nurturing of connections between citizens and their government. This broader democratic framework enables the responsibility, participation, and capacity of citizens to engage in the self-government that the Constitution’s founders intended.²⁷⁴ Breyer explains that an approach to constitutional and statutory interpretation embracing principles of active liberty is consistent with the history of the Constitution, with its numerous safeguards against majority tyranny and oppression of individual liberties.²⁷⁵ He describes the Framers’ establishment of a structurally complex framework of representative democracy developed to protect self-government under a constitutional democracy while reciprocally protecting individuals from factions and majority tyranny.²⁷⁶ Noting that the Constitution as originally drafted was “insufficient,”²⁷⁷ not having extended democratic protections of full citizenship to women or people of color, Breyer concludes that the original Constitution still “sowed the democratic seed,”²⁷⁸ which in modern society should take root as a foundation for equal and active liberties for all citizens.

Justice Breyer provides examples of different contexts²⁷⁹ in which a focus on the democratic principles central to the Constitution’s purpose can aid judicial inquiries. These examples emphasize the importance of equal citizenship principles in constitutional law. Furthermore, Breyer’s emphasis on the consequences of statutes and the congressional intent behind

²⁷² *Id.* at 3-7.

²⁷³ *Id.* at 7.

²⁷⁴ *Id.* at 15, 16.

²⁷⁵ *Id.* at 21-32.

²⁷⁶ *Id.* at 29.

²⁷⁷ *Id.* at 32.

²⁷⁸ *Id.* at 33.

²⁷⁹ *E.g.*, speech, *id.* at 39-56; federalism, *id.* at 56-66; statutory interpretation, *id.* at 85-101; and administrative law, *id.* at 102-08; *c.f. id.* at 66-74 (examining privacy, although with a focus on modern problems posed by technological developments in surveillance, computer data, etc., as opposed to the type of privacy cases upon which this Article focuses).

legislation encourages a more meaningful approach to judicial interpretation than strict textualism by affirming the constitutional tradition of recognizing the importance of protecting the freedom to participate fully and meaningfully in the democratic process, not just freedom from government interference with specific enumerated rights.

Justice Breyer's "active liberty" doctrine illustrates the critical importance of respect, dignity, and autonomy to the protection of equal citizenship rights, as well as the public dimensions of the liberties and rights protected by the Fourteenth Amendment. The Supreme Court's *Romer* and *Lawrence* decisions can be viewed as similarly uniting such key principles of active liberty, establishing the importance of equal citizenship and self-government as fundamental liberty interests protected by the Fourteenth Amendment. By emphasizing the Constitution's fundamental liberty guarantees of full citizenship rights, including dignity, respect and autonomy for individuals of all sexual orientations, both cases invoke active liberty principles, protecting freedom of choice in both private and public contexts.

The Court's rejection of government-imposed stigma in *Romer*, *Lawrence*, and the cases leading up to these landmark decisions demonstrates tremendous progress from the jurisprudence of past eras. Today, the Court has shed the coat of barbarous ancestors²⁸⁰ who condoned slavery and other forms of past inequities, and replaced it with a more enlightened blanket of active liberty and equal citizenship protections, woven together with the essential and interrelated threads of diversity, self-government, and respect. By integrating such core constitutional principles and promises, the Court has illuminated the essential public elements of the fundamental rights to privacy and autonomy, lighting the path for their future protection.

III. THE FUTURE OF PERSONAL AUTONOMY AND PRIVACY RIGHTS IN A POST-REHNQUIST ERA

A. Why Same-Sex Marriage?

The precedents of *Romer* and *Lawrence* are likely to be invoked in future Supreme Court cases, including abortion, affirmative action, and numerous other civil rights cases. *Romer* and *Lawrence* will serve as especially critical precedents in future gay rights cases, particularly those involving same-sex marriage. While the illegality of gay sex has served as a pretext for past restrictions of equal rights for gays and bisexuals,²⁸¹ the

²⁸⁰ See *supra* note 46 and accompanying text.

²⁸¹ E.g., the military's "Don't Ask, Don't Tell" policy. See, e.g., *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1996); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); but see *Cook v. Rumsfeld*, Case No. 04-12546 GAO (D. Mass., Dec. 6, 2004), available at <http://www.sldn.org/templates/law/>

Supreme Court in *Romer* and *Lawrence* has established that the past stigma and prohibitions of “gay sex” should play no further legitimate role in the denial of civil rights to gays and bisexuals. The Court’s decisions in these cases raise the pressing question of how such precedents will be interpreted in future cases decided by post-Rehnquist courts, and, in particular, whether such equal rights guaranteed by *Romer* and *Lawrence* extend to same-sex marriage.²⁸²

Until the issue of same-sex marriage is resolved, one of the excuses for denying gays equal rights will remain, with lower courts divided over the constitutionality of such pretexts. In *Lofton v. Secretary of Department of Children and Family Services*,²⁸³ the Eleventh Circuit accepted the State’s argument that the inability of same-sex couples to marry is itself a “rational basis” for denying them the right to adopt, agreeing that the adoption ban was “rationally related to Florida’s interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers.”²⁸⁴ Applying circular logic and apparent disregard for the justice-based precedents of *Romer* and *Lawrence*, the Eleventh Circuit compounded the injustice to the *Lofton* litigants and underscored the importance of resolving the issue of same-sex marriage.

Just as anti-gay discrimination was used to rationalize the illegality of gay sex prior to *Lawrence*, opponents of gay rights, no longer able to invoke *Bowers* for such purposes, may follow the lead of *Lofton* to base denials of other rights on the continued illegal status of same-sex marriage. There may soon be a split among lower courts as future decisions address the argument that the inability of same-sex couples to marry justifies the denial of their equal rights in other respects.

In Oregon, for example, an appellate court recently rejected a state university’s rationale that same-sex couples’ inability to marry is itself justification for denying them domestic partnership benefits in *Tanner v. Oregon Health Sciences University*.²⁸⁵ The court applied strict scrutiny

record.html?section=92&record=1864 (asserting a federal constitutional challenge to the military’s “Don’t Ask, Don’t Tell” policy based on the precedent of *Lawrence v. Texas*).

²⁸² See, e.g., *McGriff v. McGriff*, 99 P.3d 111 (Idaho 2004) (applying *Lawrence* to hold that homosexuality cannot be grounds for a change in custody).

²⁸³ 358 F.3d 804 (11th Cir. 2004) (upholding a Florida statutory ban on adoption by individuals engaging in “homosexual conduct”), *reh. en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *petition for cert. denied*, 125 S. Ct. 869 (2005).

²⁸⁴ *Id.* at 818. See also *id.* at 822 (accepting Florida’s rationale of prohibiting gays, but not straight singles, from adopting, and stating that “[i]t is not irrational to think that heterosexual singles have a markedly greater probability of eventually establishing a married household and, thus, providing their adopted children with a stable, dual-gender parenting environment”).

²⁸⁵ 157 Or. App. 502 (1998).

analysis under the Oregon constitution to strike down the denial of benefits to homosexuals (whom the court found to be a suspect class). Specifically, the court held that the university's defense that any married employee, regardless of sexual orientation, was entitled to insurance benefits "misses the point," since "[h]omosexual couples may not marry. Accordingly, the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility."²⁸⁶

Tanner was decided under the Privileges and Immunities Clause of a state constitution rather than under the Federal Constitution's Fourteenth Amendment, but it may be indicative of other courts' willingness in future challenges (under either federal or state constitutions) to reject the argument that the unmarried status of same-sex couples itself justifies the denial of other legal rights, benefits, and responsibilities. As such, *Tanner* and *Lofton* stand on opposite sides of the ring, as the constitutional role of marriage—both as a denied right and as a justification for denying other rights to same-sex couples—plays out in future challenges. The divide between such contrasting approaches to same-sex partnership benefits and recognition is certain to grow as more courts address similar issues.

For this reason, it is imperative that the Court clarify whether, in fact, today's bans on same-sex marriage are as unconstitutional as were yesterday's bans on same-sex sex. The resolution of the marriage issue will decide other issues in which the inability of same-sex couples to marry is invoked as justification for denying them the many rights associated with marriage, in turn resolving what will otherwise likely evolve into a growing split among the courts.

Not only is it important for the Court to hear a same-sex marriage case, it appears inevitable. While the Court has denied certiorari to hear *Lofton*,²⁸⁷ a future Supreme Court same-sex marriage case is likely in the light of the voluminous legislation and litigation surrounding the issue in recent years. While legal challenges to same-sex marriage bans date back to the 1970s, when couples in several states brought unsuccessful challenges to prohibitions on same-sex marriage,²⁸⁸ the issue has since in both state and federal courts.²⁸⁹

²⁸⁶ *Id.* at 523-25. See also *Watkins v. U.S. Army*, 847 F.2d 1329, 1349 (9th Cir. 1988) (holding that homosexuals constitute a suspect class), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989).

²⁸⁷ *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 125 S.Ct. 869 (2005).

²⁸⁸ See, e.g., *Baker v. Nelson*, 291 Minn. 310 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (failing to reach merits of the case); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

²⁸⁹ Most of the ensuing litigation has arisen in state, not federal, courts, and is consequently not indicative of the immediacy of an actual U.S. Supreme Court case. Within the history of same-sex marriage litigation, state and federal claims and precedents have

In 1993, the historic Hawaii Supreme Court decision *Baehr v. Lewin*²⁹⁰ struck down a ban on same-sex marriage. After the *Baehr* decision was rendered void by a subsequent state constitutional amendment allowing legislative bans on same-sex marriage, and thus was later reversed by the Hawaii Supreme Court,²⁹¹ challenges to marriage bans continued unsuccessfully in other states for the next six years.²⁹² Then, in 1999, the Vermont Supreme Court decided *Baker v. State*, which required Vermont to provide same-sex couples the same statutory benefits and protections as married couples, although the ruling did not extend to the recognition of full marriage rights.²⁹³

Other states have granted rights to same-sex couples short of, but similar to marriage, without being so prompted by a court order. In January 2005, the California Domestic Partner Rights and Responsibilities Act²⁹⁴ took effect, extending most of the rights and duties of marriage to couples registered as domestic partners and making California the fourth state to offer domestic partnerships to same-sex couples.²⁹⁵ Most recently, in April 2004, Connecticut enacted a civil union Act,²⁹⁶ providing essentially the same state protections and rights spouses receive to same-sex partners who register their unions through the state.

In addition to being the year the California Domestic Partner Rights and Responsibilities Act was passed, 2003 also marked the first year a state supreme court affirmed a constitutional right to marry since the Hawaii Supreme Court's *Baehr v. Lewin* decision. In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Court held that same-sex couples in Massachusetts were guaranteed equal marriage rights by the

often been intertwined in same-sex marriage cases, warranting a comprehensive look at its developments in both state and federal court.

²⁹⁰ 852 P.2d 44 (Haw. 1993), *superceded by* Haw. Const. Art. I, § 23.

²⁹¹ *Baehr v. Miki*, 994 P.2d 566 (Haw. 1999).

²⁹² See, e.g., *Brause v. State, Dep't of Health and Human Servs.*, 21 P.3d 357 (Alaska 2001) (upholding the dismissal on procedural grounds); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (holding that there is no fundamental right to same-sex marriage).

²⁹³ 744 A.2d 864 (Vt. 1999).

²⁹⁴ 2003 Cal. Stat. 421.

²⁹⁵ Other states with domestic partnership laws include Hawaii, HAW. REV. STAT. § 31-572C (1997), Maine, ME. REV. STAT. ANN. tit. 22, § 2710 (2004), and New Jersey, N.J. STAT. ANN. § 26:8A (2004). The District of Columbia, D.C. CODE § 32-701-710 (1992), also offers domestic partnerships.

²⁹⁶ An Act Concerning Civil Unions, Pub. Act No. 05-10 (2005).

equal protection and due process clauses of the state constitution.²⁹⁷ Invoking principles of liberty and due process, the Court ruled that “[c]entral to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations.”²⁹⁸

Inspired by *Goodridge*, localities in other states began issuing marriage licenses to same-sex couples, prompting additional legal opinions in the form of state attorney general opinions, some of which recognized the validity of marriages already performed.²⁹⁹ Same-sex marriages performed in Seattle, Washington were upheld as valid in an order issued by the mayor of Seattle, and a state court in Washington subsequently agreed that same-sex couples in Washington must be allowed to marry.³⁰⁰ Other state courts came to the same conclusion, including the Supreme Court for the County of New York, which in a February 4, 2005 order held that the state’s equal protection and due process clauses require that same-sex couples in New York County must be allowed to marry.³⁰¹ This decision was later reversed, however.

The opposition to such developments has been widespread and varied. In the November 2004 elections, voters in eleven states approved state constitutional amendments banning same-sex marriage and/or civil unions,³⁰² bringing the tally at that point to forty states that ban same-sex

²⁹⁷ 798 N.E.2d 941 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

²⁹⁸ *Goodridge*, 798 N.E.2d at 959.

²⁹⁹ See, e.g., Letter from Caitlin Halligan, New York Solicitor General, to Darrin B. Derosia, Corporate Counsel, City of Cohoes, and Peter Case Graham, City Attorney, City of Olive (Mar. 3, 2004) available at http://www.oag.state.ny.us/press/2004/mar/mar03a_04.html (follow link for opinion of the AG) (referencing New York Attorney General’s informal opinion granting recognition to same-sex marriages legally performed in other jurisdictions). Additionally, after the Oregon Attorney General’s opinion, a state court judge halted future marriages but recognized as valid the 3,000 marriages already performed. See Oregon Marriage/Relationship Recognition Law, <http://www.hrc.org> (click on the “marriage” hyperlink under the “get informed” list; then click on the “Oregon” hyperlink) (last visited Oct. 23, 2005).

³⁰⁰ See *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. 2004). See also Washington Marriage/Relationship Recognition Law, www.hrc.org/template.cfm?Section=Center&CONTENTID=21697&TEMPLATE=/ContentManagement/ContentDisplay.cfm (follow the Washington State hyperlink) (last visited Oct. 30, 2005).

³⁰¹ *Hernandez v. Robles*, 794 N.Y.S.2d 579, 593 (N.Y. Sup. Ct. 2005), *rev’d*, 2005 N.Y. Slip Op. 9436 (App. Div. 1st Dep’t Dec. 8, 2005).

³⁰² See Election 2004: Governor & Ballot Measures, CNN.COM, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/> (last visited Oct. 11, 2005) (Voters approved ballot initiatives in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Utah, and Oregon. Four other states, Alaska, Hawaii, Nebraska, and Nevada, had previously enacted such constitutional amendments).

marriage or civil unions, either through constitutional amendments or state statutes.³⁰³ In Virginia, the Marriage Affirmation Act of 2004³⁰⁴ broadly prohibits any contracts between same-sex couples which might bestow any of the privileges or obligations of marriage; ironically raising *Lochner*-like freedom of contract implications.

At the federal level, Congress enacted the Defense of Marriage Act ("DOMA") in 1996 to prohibit states which allow same-sex marriages from requiring other states to recognize such marriages,³⁰⁵ and to prohibit federal benefits for same-sex marriages.³⁰⁶ Congress is currently considering a federal constitutional amendment to ban both same-sex marriage "and all legal incidents thereof,"³⁰⁷ and President Bush voiced his support for the proposed amendment in his 2005 State of the Union address.³⁰⁸ In May 2004, one organization opposing same-sex marriage brought an unsuccessful federal suit against the Massachusetts Supreme Court in an attempt to have *Goodridge* overruled; the United States Supreme Court denied certiorari on November 29, 2004, without comment.³⁰⁹

There are currently numerous challenges to same-sex marriage bans pending in state³¹⁰ and federal³¹¹ courts across the country.³¹² Litigants

³⁰³ See *id.*; Background: State Laws and Proposed Amendments to State Constitutions to Deny Civil Rights to Same Sex Couples, <http://www.lamdalegal.org/cgi-bin/iowa/news/fact.html?record=1530> (last visited Oct. 11, 2005); Kavan Peterson, *Fifty-State Rundown on Gay Marriage Laws*, STATELINE.ORG, Nov. 3, 2004, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576>.

³⁰⁴ VA. CODE ANN. § 20-45.3 (2004).

³⁰⁵ 28 U.S.C.A. § 1738C (2005).

³⁰⁶ 1 U.S.C.A. § 7 (2005).

³⁰⁷ H.R.J. Res. 56, 108th Cong. (2003) (as reported by H. Subcomm. on the Constitution, May 13, 2004); S.R.J. Res. 26, 108th Cong. (2003).

³⁰⁸ George W. Bush, U.S. President, State of the Union Address (Feb. 2, 2005) available at http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_020205.html (Discussing the constitutional amendment, President Bush stated: "Because marriage is a sacred institution and the foundation of society, it should not be redefined by activist judges. For the good of families, children and society, I support a constitutional amendment to protect the institution of marriage.").

³⁰⁹ *Largess v. Sup. Jud. Ct.*, 317 F. Supp. 2d 77 (D. Mass. 2004), *aff'd*, 373 F.3d 219 (1st Cir. 2004), *cert. denied*, 125 S.Ct. 618 (2004). One might surmise that the Court denied *cert.* because the organization arguably lacked standing, but the Court offered no explanation. The denial of certiorari in this case is no clear predictor of future decisions to hear same-sex marriage cases.

³¹⁰ See, e.g., *San Francisco v. Lockyer*, 128 Cal. App. 4th 1030 (2005) (challenging the State definition of marriage and addressing the constitutional questions raised by the voiding of over 4,000 marriages performed in the summer of 2004); *Kerrigan v. Connecticut*

challenging state and federal marriage laws include couples legally married in Canada or Massachusetts who seek to have their marriages recognized by other states, and couples challenging their own state laws.

It is difficult to predict the exact form a same-sex marriage case heard by the Supreme Court will eventually take, from which jurisdiction it will originate, which law will be challenged, and on what grounds. While, to date, most same-sex marriage cases have been filed in state courts, as more states pass constitutional amendments banning same-sex marriage, those challenging such bans will necessarily rely on federal courts and claims. Barring the enactment of a federal constitutional amendment prohibiting same-sex marriage, from which there would likely be no relief in court, the Supreme Court for the time being will remain the court of last resort for challenges of same-sex marriage bans. When such a case is finally heard by the Supreme Court, *Romer* and *Lawrence* will serve as crucial precedents.

B. Interpretations of *Romer* and *Lawrence* in Same-Sex Marriage Cases

In *Lawrence*, the majority opinion was pointedly ambiguous about the case's application to same-sex marriage, stating that "[the present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."³¹³ O'Connor's concurrence was less ambiguous, stating that her concurring vote to strike down sodomy bans should not indicate that a challenge same-sex marriage bans would similarly succeed. In O'Connor's view, *Lawrence* does not preclude the Court from accepting legitimate state interests supporting

Dept. of Pub. Health, Case No. CV-04-4001813S (New Haven Super. Ct. filed Aug. 25, 2004) (challenging definition of marriage in Connecticut); *Deane and Polyak v. Conaway*, No. 24-C-04-005390 (Baltimore City Cir. Ct. filed July 7, 2004) (challenging state ban on same-sex marriage); *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005), *overruled by Hernandez v. Robles*, 2005 N.Y. Slip Op. 9436 (App. Div. 1st Dep't Dec. 8, 2005) (finding the New York ban on same-sex marriage to be violation of equal protection and due process).

³¹¹ See, e.g., *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (Cal. 2005); *Citizens for Equal Protect., Inc. v. Bruning*, 290 F. Supp. 2d 1004 (D. Neb. 2003) (federal challenge to a Nebraska constitutional ban on government recognition of same-sex couples).

³¹² For a more complete list of past and pending same-sex marriage cases, see DOMAwatch Index of Cases, http://domawatch.org/case_names_index.html (last visited Dec. 20, 2005).

³¹³ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); see also *id.* at 567 ("This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of a relationship or to set its boundaries absent injury to a person or *abuse of an institution the law protects.*") (emphasis added). This italicized language might be interpreted as referring to marriage, though any harm to marriage posed by granting equal rights to same-sex couples is arguably nonexistent.

marriage bans “such as . . . preserving the traditional institution of marriage. 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.”³¹⁴ While O’Connor is unlikely to still be on the bench when a same-sex marriage case is ultimately decided by the Court, her concurrence does raise questions about whether other justices might similarly rule that same-sex marriage bans could be upheld in the name of tradition or other legitimate state interests.

Other passages of *Lawrence* indicate that a majority of the Court, even after the retirements of Justices O’Connor and Rehnquist, may be open to a same-sex marriage claim in the future. The six to three majority opinion recognized that the overall liberty interest at stake in *Lawrence* involved autonomy in forming intimate relationships, not just a right to sex. In rebuking the *Bowers* decision for articulating the right solely in terms of sexual conduct, the *Lawrence* Court noted that the *Bowers* decision “demean[ed] the claim the individual put forward, just as it would demean a married couple were it said to be married is simply about the right to have sexual intercourse,” and continued its description of same-sex relationships in similar terms to marriage, stating, “[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.”³¹⁵

Similarly, the language of the *Lawrence* opinion recognizing a “[d]ue [p]rocess right to demand respect for conduct protected by the substantive guarantee of liberty”³¹⁶ acknowledged that some public form of affirmation is due to the intimate partnerships formed by same-sex couples,³¹⁷ as is due to all individuals participating in society. The forceful language affirming a right to *demand* respect leaves open the possibility that the consummation of such a right may include the formal acknowledgement of same-sex partnerships through the institution of marriage.

While *Lawrence* requires respect for and protection of liberty interests in intimate choices and partnerships beyond the mere sex act, the language of *Lawrence* is open-ended enough that lower courts have been divided in ascertaining its application to marriage.

³¹⁴ *Id.* at 585 (Ginsburg, J., concurring).

³¹⁵ *Id.* at 567.

³¹⁶ *Id.* at 575.

³¹⁷ *Id.* at 562, 574-79.

1. The Role of Tradition in Same-Sex Marriage Cases

In *Goodridge v. Department of Public Health*,³¹⁸ the Massachusetts Supreme Court observed that *Lawrence* did not explicitly resolve the constitutional questions surrounding same-sex marriage bans.³¹⁹ However, the Court noted that *Lawrence* affirmed “that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one’s choice of an intimate partner” and that the decision to marry plays a “central role . . . in shaping one’s identity.”³²⁰ Applying these affirmations of *Lawrence* and the Massachusetts Constitution’s own protections, the court eventually upheld a constitutional right to same-sex marriage in Massachusetts.

In contrast, a state appellate court in Arizona interpreted *Lawrence* more narrowly in its rejection of a constitutional claim to same-sex marriage. In *Standhardt v. Superior Court*, the Arizona appeals court rejected both substantive due process and equal protection claims, despite acknowledging the existence of a fundamental right to marry.³²¹ The *Standhardt* court refused to apply the right equally to members of same-sex couples since, it concluded, same-sex marriage is not “deeply rooted” in the nation’s history.³²² *Standhardt* cited *Glucksberg* along with Scalia’s dissent in *Lawrence* to conclude that, since *Lawrence* did not apply strict scrutiny or specifically use the phrase “fundamental rights,”³²³ it did not establish relevant precedent upon which to affirm a right to same-sex marriage under either the state or federal constitution.³²⁴

Standhardt’s narrow interpretation of substantive due process as demanding specific “fundamental rights” nomenclature or traditional support for a particular act is flawed for the reasons cited in this Article’s

³¹⁸ 798 N.E.2d 941 (Mass. 2003) (striking down a prohibition on same-sex marriage under state equal protection and substantive due process, and affirming principles of dignity and autonomy as central to constitutional liberty).

³¹⁹ *Id.* at 948.

³²⁰ *Id.*

³²¹ 77 P.3d 451 (Ariz. Ct. App. 2003).

³²² *Id.* at 459.

³²³ However, the *Standhardt* opinion, unlike Scalia’s *Lawrence* dissent, acknowledged that *Glucksberg* allows heightened scrutiny for liberty interests as well as fundamental rights. The court paraphrased the holding of *Glucksberg* as “stating that unless interest is fundamental liberty interest protected by Due Process Clause, law must only be rationally related to legitimate government interests.” *Id.* at 454. *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 586 (Scalia, J., dissenting) (discussed *supra* Section II.C.1).

³²⁴ *Standhardt*, 77 P.3d at 453.

earlier *Glucksberg* analysis.³²⁵ In addition, while there may be a definitional understanding of marriage as historically characterized by a one man-one woman structure, there is a more fundamental tradition that is served by extending marriage protections beyond opposite-sex unions. The Court has long recognized that self-determination in intimate life choices including marriage is at “the heart of liberty,” since the Fourteenth Amendment protects a fundamental “right to define one’s concept of existence, of meaning, of the universe, and of the mystery of human life.”³²⁶ In *Goodridge*, the Massachusetts Supreme Court, applying the precedent of *Loving v. Virginia*, relied on such traditional principles of autonomy in concluding that “the right to marry means little if it does not include the right to marry the person of one’s choice.”³²⁷ The *Goodridge* court consequently ruled that the fundamental right to marry necessarily included a right to marry one’s partner of choice. Just as miscegenation bans of the past had violated constitutional promises of autonomy, so too do bans on same-sex marriage.

Standhardt also failed to heed the Supreme Court’s admonition in *Lawrence* that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”³²⁸ As recognized in *Lawrence*, traditions change as societies evolve over time. *Lawrence* held that, even if it has been a traditional basis for oppression, the moral prejudice of even a majority of the populace does not justify ongoing denials of liberty. In so ruling, *Lawrence*, quoting *Casey*, emphasized that *Bowers*’ rationalization of unequal treatment of gays due to a historic condemnation of homosexual conduct as immoral was invalid, since “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”³²⁹

In the context of intimate family choices generally, the Court has concluded that “[t]he demographic changes of the past century make it difficult to speak of an average American family,”³³⁰ and has granted Fourteenth Amendment protections for “freedom of personal choice in

³²⁵ See *supra* Section II.C.1.

³²⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

³²⁷ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003).

³²⁸ *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). See also *supra* Section II.C.2.

³²⁹ *Lawrence*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850).

³³⁰ *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

matters of marriage and family life”³³¹ extending beyond traditional norms in family definition.³³² The definition of marriage, particularly, has evolved significantly over the years, from expanding the rights of wives beyond mere property status to recognizing equal rights to marriage, regardless of the characteristics of those seeking to marry.³³³

While the definition of marriage has evolved over time, the concept of marriage as a fundamental right deeply rooted in the nation’s history has been consistently reinforced by the Court since the earliest days of substantive due process. The right to marry, the Court has recognized in a solid line of precedents, is protected by both equal protection and due process guarantees, which ensure not just non-interference, but also affirmative respect from the government regardless of certain individual classifications.

One such case establishing an equal and affirmative right to marry, not just protection from invasions of marital privacy, was *Loving v. Virginia*,³³⁴ which banned miscegenation laws and affirmed the right to interracial marriage. While recognizing that there may not have been traditional support for interracial marriage at the time the Fourteenth Amendment was adopted, the Court in *Loving* once again reaffirmed the role of tradition in Fourteenth Amendment analysis as being more properly understood in terms of the “the broader, organic purpose of a constitutional amendment,” rather than specific traditions of hostility to equal rights.³³⁵ Following *Loving*, the Court recognized the same affirmative right to marry in *Zablocki v. Redhail*³³⁶ (regardless of poverty) and *Turner v. Safley*³³⁷ (regardless of prisoner status).

These cases will be particularly difficult to distinguish if cited in a future same-sex marriage case, since they affirm an equal fundamental right to marry, regardless of one’s classification or procreative ability,³³⁸ and

³³¹ *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925)).

³³² *Moore*, 431 U.S. at 506.

³³³ See generally *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 966-67 (Mass. 2003) (citations omitted).

³³⁴ *Loving v. Virginia*, 388 U.S. 1 (1967).

³³⁵ *Id.* at 9.

³³⁶ 434 U.S. 374 (1978).

³³⁷ 482 U.S. 78 (1987).

³³⁸ *Turner v. Safley* again illustrates the absurdity of the procreation argument. Same-sex couples are much more likely to have and raise children than couples who are separated by prison bars.

despite past traditions of denying marriage rights to certain classes of persons. Nonetheless, it is far from guaranteed that the Court will acknowledge the same broad “fundamental right to marry” in a same-sex marriage case as it has acknowledged in past cases. The Court may frame the issue more narrowly in terms of a “fundamental right to same-sex marriage.” *Anderson v. King County*,³³⁹ a Washington Superior Court case, has already recognized the importance in distinguishing and explaining which label should properly be applied to the right involved in same-sex marriage, noting that “[t]here is a fundamental difference in the parties’ approach to identifying the putative fundamental right upon which this analysis should focus. Should the Court focus on the broad right to marry or should it, instead, focus on the more narrowly drawn right to marry someone of the same sex?”³⁴⁰ As the *Anderson* court explained, its focus on the broader right was well based on Supreme Court precedent:

There was no deeply rooted tradition of interracial marriage at the time of the U.S. Supreme Court’s consideration of anti-miscegenation statutes in *Loving v. Virginia*; yet, the Court analyzed the issue of their constitutionality in terms of the broad right to marry and found that right to have been infringed. There was no deeply rooted tradition of marriage while delinquent in child support payments at the time of the U.S. Supreme Court’s consideration of statutes prohibiting this in *Zablocki v. Redhail*; yet, the Court analyzed the issue of their constitutionality in terms of the broad right to marry and found that right to have been infringed. There was no deeply rooted tradition of inmate marriage at the time of the U.S. Supreme Court’s consideration of statutes restricting this in *Turner v. Safley*; yet, the Court analyzed the issue of their constitutionality in terms of the broad right to marry and found that right to have been infringed. . . . In *Turner*, it was specifically argued that the Court should focus its attention on “inmate marriage” as opposed to the broader right to marry. The Court rejected this approach.³⁴¹

Additionally, citing the precedents of *Casey*, *Lawrence*, and *Romer*, which embraced broader Fourteenth Amendment principles while rejecting narrow articulations of fundamental rights, the Washington court concluded

³³⁹ *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *2 (Wash. Super. Ct. Aug. 4, 2004) (deciding a same-sex marriage case under the state constitution, but noting the “obvious significance” of *Lawrence* and the binding precedents of U.S. Supreme Court cases generally as establishing the minimum protections required for individual rights).

³⁴⁰ *Id.* at *5.

³⁴¹ *Id.* at *5-6 (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987)).

that the proper nomenclature to use in same-sex marriage cases is the same autonomous “fundamental right to marry” engaged in past cases which employed strict scrutiny to strike down bans on other classifications of persons marrying the person of their choice.³⁴²

Based on these and other precedents, the Court can define a fundamental right to marry as applied to same-sex couples in similarly broad terms. Applying an analysis such as that employed in *Loving*, *Goodridge*, and *Anderson*, the Court should integrate the privacy, liberty, and autonomy principles of *Lawrence* with the issue of fundamental rights. The right should be framed in terms of a “right to marry the person of one’s choice,”³⁴³ “the right to choose to marry,”³⁴⁴ or even a fundamental right to marry “entitled to due process protection, both as a liberty right, generally, and more specifically, as a privacy right.”³⁴⁵

2. Procreation, Childrearing, and Illegitimate State Purposes

Regardless of the exact language used by the Court, its ability to find a constitutionally protected fundamental right and apply strict scrutiny review in such a case would be well-grounded in analogous precedents recognizing a broad fundamental right to marry the person of one’s choosing. However, even if the Court were to apply a deferential form of rational basis in a same-sex marriage case, which requires the State to articulate only a “legitimate” interest rationally related to same-sex marriage bans, such a nexus would be difficult for a government to establish.

Two of the most commonly articulated justifications states have offered for same-sex marriage bans have been the interrelated alleged government interests in supporting procreation and “child-rearing within the stable environment traditionally associated with marriage.”³⁴⁶ Even cases that have upheld same-sex marriage bans, however, have recognized the fallibility of such justifications for the denial of same-sex marriage rights.

Regarding the issue of childrearing, numerous studies and reports support the equal ability of same-sex partners to be good parents and

³⁴² *Id.* at *7.

³⁴³ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003).

³⁴⁴ *Id.* at 957.

³⁴⁵ *Hernandez v. Robles*, 794 N.Y.S.2d 579, 593 (N.Y. Sup. Ct. 2005), *rev’d*, 2005 N.Y. Slip Op. 9436 (App. Div. 1st Dep’t Dec. 8, 2005).

³⁴⁶ *Standhardt v. Superior Court*, 77 P.3d 451, 461 (Ariz. Ct. App. 2003) *See also* *Wilson v. Ake*, 354 F. Supp.2d 1298 (M. D. Fla. 2005); *Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. 1995) (accepting the State’s articulated interest in procreation, and upholding the federal Defense of Marriage Act).

provide a stable home for their children.³⁴⁷ These studies will inevitably be instrumental in a rational basis inquiry into the justifications for marriage bans in future cases. Consequently, the Supreme Court has adequate grounds to conclude, as the Massachusetts Supreme Court did in *Goodridge*, that, while protecting the welfare of children may be a legitimate state interest, “[r]estricting marriage to opposite-sex couples . . . cannot plausibly further this policy.”³⁴⁸ It would, in fact, thwart the principles behind such a policy, since “the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws.”³⁴⁹ Such a

³⁴⁷ See, e.g., American Academy of Pediatrics Committee on Psychosocial Aspects of Child and Family Health, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 2, 339-40 (2002), available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics%3b109/2/339>. The article cites a “considerable body of professional literature provid[ing] evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual,” including LAURA BENJOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PRARENTS (1994); C.A. Parks, *Lesbian Parenthood: A Review of the Literature*, 68 AM. J. ORTHOPSYCHIATRY, 376 (1998); C.J. Patterson, *Children of Lesbian and Gay Parents*, 19 ADVANCES CLINICAL CHILD PSYCHOL. 235 (1997); Ellen C. Perrin, *Children Whose Parents Are Lesbian or Gay*, 15 CONTEMP. PEDIATRICS 113 (1998); Ellen C. Perrin & Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-parent Adoption by Same-sex Parents* 109 PEDIATRICS 341-44 (2002); Fiona Tasker, *Children in Lesbian-Led Families: A Review*, 4 CLINICAL CHILD PSYCHOL. AND PSYCHIATRY 153 (1999). See also Kristen Kreisher, *Gay Adoption*, CHILDREN’S VOICE MAG., Jan. 2002, available at <http://www.cwla.org/articles/cv0201gayadopt.htm> (describing “[s]tudies examining children raised by a gay parent or parents [that] have shown no difference in developmental outcomes as compared with children raised by heterosexual parents”); Statement on Marriage and the Family from the American Anthropological Association, <http://www.aaanet.org/stmts/marriage.htm> (last visited Nov. 8, 2005) (“The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution.”); American Medical Association, *Parenting Rights for Same-Sex Couples Advanced* (2004), available at <http://fortpride.org/pages/AMA-parenting.html>; American Psychological Association, *On Parenting* (2004), available at <http://hrc.org/Template.cfm?Section=Parenting&Template=/ContentManagement/ContentDisplay.cfm&ContentID=7773> (“Psychological research on relationships and couples provides no evidence to justify discrimination against same-sex couples.”); AACAP, *Gay, Lesbian and Bisexual Parents* (1999), available at <http://aacap.org/publications/policy/ps46.htm> (citing recent studies supporting stability of families headed by same-sex couples).

³⁴⁸ *Goodridge*, 798 N.E.2d at 962.

³⁴⁹ *Id.* at 963. See also *Baker v. State*, 744 A.2d 864, 881-82 (Vt. 1999) (noting that since opposite-sex couples marry for reasons not related to procreation, and since both opposite-sex and same-sex couples utilize non-traditional means of conception, a purpose of banning same-sex couples from marriage based on the link between marriage, procreation, and childrearing is “significantly under-inclusive” and lacks a reasonable basis for denying same-sex marriage).

ruling would be consistent with the Court's *Palmore v. Sidoti*³⁵⁰ decision, which held that in child custody determinations, the protections of a child's best interests is a valid government interest, but a court may not deny custody to a parent based on the way private prejudice toward a parent's interracial relationship might affect the child's best interests.³⁵¹

In confronting the issue of procreation, courts in *Standhardt, Morrison v. Sadler*,³⁵² and the pre-*Lawrence* decision, *Dean v. District of Columbia*,³⁵³ acknowledged the logical flaws in connecting procreation to marriage bans, even while ultimately accepting such articulated interests as legitimate and rationally connected to marriage prohibitions. While the court in *Dean* acknowledged that same-sex couples "can and do have children through adoption, surrogacy, and artificial insemination," and noted that not all opposite-sex couples have the desire or ability to procreate, the court still concluded that same-sex couples may be denied the right to marry based on the nexus between marriage and procreation.³⁵⁴

In *Morrison v. Sadler*, the Indiana appellate court attempted to reason its way through the lack of a close means-end fit between procreation and marriage by a surprising and novel analysis that cited the excellent parenting ability of same-sex couples as itself being a legitimate justification for denying them equal marriage rights. The court rather ironically concluded that, *because* same-sex couples who create families through artificial reproduction or adoption "have invested the significant time, effort, and expense" to do so, they are more likely to provide a stable environment for their children without the protections of marriage.³⁵⁵ In contrast, the court pointed out, opposite-sex "procreation by 'natural' reproduction may occur without any thought for the future," giving states legitimate cause for favoring opposite-sex marriage "in order to encourage male-female couples to procreate within the legitimacy and stability of a State-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse." It also allows the state to encourage married couples to stay together, since in opposite-sex intercourse, "accidents do happen."³⁵⁶

³⁵⁰ 466 U.S. 429 (1984).

³⁵¹ *Id.* at 433. See also *supra* note 241 and accompanying text.

³⁵² 821 N.E.2d 15 (Ind. Ct. App. 2005).

³⁵³ 653 A.2d 307 (D.C. App. 1995).

³⁵⁴ *Id.* at 333 (citations omitted).

³⁵⁵ *Morrison*, 821 N.E.2d at 24-25.

³⁵⁶ *Id.*

In *Standhardt*, the court acknowledged that the petitioners' challenge to the marriage-procreation link was well supported, even in Scalia's dissent, which noted that even "the sterile and the elderly are allowed to marry."³⁵⁷ While recognizing the procreation argument's fallacies, the *Standhardt* court did not offer a creative justification, such as the one later offered in *Morrison v. Sadler*, but rather weakly concluded that "[a] perfect fit is not required' under the rational basis test, and [the court] will not overturn a statute 'merely because it is not made with 'mathematical nicety, or because in practice it results in some inequality.'"³⁵⁸

While excusing a logically fallible procreation justification for exclusionary marriage laws, *Standhardt* concluded that mathematical "nicety" is not required in a rational basis analysis. However, one should reach a different conclusion in applying the Supreme Court precedent of *Romer v. Evans*, which requires a more precise fit than *Standhardt* might indicate. In *Romer*, the Court struck down a constitutional amendment for being "at once too narrow and too broad, identifying persons by a single trait and then denying them the possibility of protection across the board."³⁵⁹ A ban on same-sex marriage justified by a procreation rationale is similarly both too narrow and too broad, even under rational basis review, since such bans narrowly target only one set of non-procreative partners, depriving them of a broad myriad of legal rights, while allowing others to wed.

Standhardt's endorsement of same-sex marriage restrictions, even in the face of the procreation argument's flaws, disregarded the substantive

³⁵⁷ *Standhardt v. Superior Court*, 77 P.3d 451, 462 n.16 (Ariz. Ct. App. 2003) (citing *Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting) (dismissing procreating as a rational basis for same-sex marriage ban because other non-procreative marriages are allowed)). See *infra* note 372 and accompanying text.

³⁵⁸ *Id.* at 462 (citing *Big D Constr. Corp. v. Court of Appeals*, 789 P.2d 1061, 1067 (Ariz. 1990)). It is significant that *Standhardt* was a case that arose in Arizona, one of five states with specific exceptions to its statutory bans on cousins marrying, allowing those cousins who are either sterile or over a certain age (and thereby presumably sterile) to marry each other. See ARIZ. REV. STAT. ANN. § 25-101(2004); 750 ILL. COMP. STAT. ANN. 5/212 (2005); IND. CODE § 31-11-1-2 (2005); UTAH CODE ANN. § 30-1-1 (2005); WIS. STAT. § 765.03 (2005). Such marriage statutes consequently seem to reflect a state policy *against* procreation in certain marriages, undermining the procreation justification for banning same-sex marriages. Ironically, each of these states, like Arizona, also bans same-sex marriage either explicitly, in the cases of Arizona, Illinois, Indiana, and Utah, or implicitly, in the case of Wisconsin, which defines marriage as only occurring between a "husband" and a "wife." WIS. STAT. § 765.03 (2005). Such language which would appear to conflict with the state's claim to have enacted a marriage law rationally connected to an interest in promoting procreation. However, this issue was not addressed at all by the *Standhardt* Court.

³⁵⁹ *Romer v. Evans*, 517 U.S. 620, 621 (1996).

roots of marital rights acknowledged in Supreme Court cases; the Court has a tradition of respect for the fundamental right to privacy and autonomy in one's intimate relations. As the Court recognized in *Griswold v. Connecticut*, a case that affirmed a married couple's right to use contraceptives, the marital right to privacy is not dependent upon procreative purposes, but is based on larger constitutional principles.³⁶⁰ *Griswold* described the right to marry as a sacred and intimate "right of privacy older than the Bill of Rights" and as "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."³⁶¹ Such a noble purpose, as elucidated by the language of the Court in *Griswold*, is clearly not procreative, but more profound, and is connected to the right to form meaningful intimate associations that are protected from the political or moralistic judgments of society.

The *Standhardt* Court similarly disregarded the parallel precedents of *Zablocki v. Redhail* and *Turner v. Safley*, which, like *Loving*, affirmed a positive fundamental right to marry despite traditions to the contrary for particular classifications of persons. In addition to providing strong precedent for any future right to marry litigation, this line of cases is significant in that they, like *Romer* and *Lawrence*, illuminate both the private and public, the negative "freedom from" and positive "freedom to" elements of liberty.³⁶² In each of these cases the Court recognized the right to marry as entailing not just a right to be let alone in the sanctity of one's marital relationship, but also the affirmative right to marry in the first place. In so holding, the Court reinforced the same duality of the right to privacy generally. Just as the right to privacy extends beyond a right to be let alone, and also incorporates an affirmative element of self-determination, so too does the right to marry incorporate both private and public, and both negative and affirmative aspects of liberty.

Loving, *Zablocki*, and *Turner* further illustrate how the issue of affirmative marriage rights integrates principles of equality with principles of substantive due process. While all three cases employed both equal protection and due process principles, *Loving* uniquely parallels the issue of same-sex marriage. On a literal level, same-sex couples are denied the right to marry on the basis of the gender of their partner,³⁶³ just as, prior to

³⁶⁰ 381 U.S. 479 (1965).

³⁶¹ *Id.* at 486.

³⁶² See *supra* Section I.C.

³⁶³ See also discussion of gender in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Consider also the example of the bisexual who might be denied the right to marry a same-sex partner while granted the right to marry an opposite sex partner, revealing gender, not sexual orientation, to be the true basis of discrimination. In cases of transsexual marriages,

Loving v. Virginia, interracial couples were once denied the right to marry based on the race of their partner. While some courts have held a same-sex marriage ban “does not discriminate on the basis of sex because it treats women and men equally,”³⁶⁴ a parallel defense of miscegenation bans was offered by the State in *Loving v. Virginia*. In *Loving*, the State similarly argued that “because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race.”³⁶⁵ The Supreme Court rejected that argument, holding that “equal application” of a statute does not render the statute constitutionally valid.³⁶⁶ Similarly, in the case of same-sex marriage, the Court should apply *Loving* to find that, regardless of whether a same-sex marriage ban is applied equally to both sexes, the statute is drawn according to sex and is consequently subject to heightened scrutiny.³⁶⁷

Consequently, just as *McLaughlin v. Florida*,³⁶⁸ a case striking down bans on interracial cohabitation, led to the *Loving* decision striking down bans on interracial marriage, so too may *Lawrence*, striking down bans on sodomy, lead to a future case striking down bans on same-sex marriage. In doing so, it would follow key precedents such as *Loving*, *Zablocki*, and *Turner* and acknowledge both the substantive due process and equal protection rights at stake.

The equal protection issues raised by same-sex marriage bans are further illuminated by *Romer*’s holding that a state constitution may not single out gays and bisexuals for exclusion from state protections. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything,” the Court held in *Romer*, “it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”³⁶⁹ While *Romer* addressed sexual orientation, rather

courts have generally upheld same-sex marriages where the sex of one partner is post-sex reassignment surgery the same as the spouse, illustrating the absurdity of limiting marriage by “sex.” See, e.g., *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *In re Ladrach*, 32 Ohio Misc. 2d 6 (Ohio 1987).

³⁶⁴ *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005) (citing *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004)).

³⁶⁵ *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

³⁶⁶ *Id.* at 8-10.

³⁶⁷ See *Standhardt v. Superior Court*, 77 P.3d 451, 464 (Ariz. Ct. App. 2003) (implying that identification of gender as the classification of discrimination in that case might have elevated its equal protection review to heightened scrutiny).

³⁶⁸ 379 U.S. 184 (1964).

³⁶⁹ *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

than gender, as the target classification of an equal protection violation and even if same-sex marriage bans are viewed as discrimination on the basis of gender, to the extent that such bans are based on animus, the precedent of *Romer* would still warrant a heightened form of rational basis.

Citing this aspect of *Romer*'s holding in his *Lawrence* dissent, Justice Scalia helps establish the potential inevitability of same-sex marriage. In his dissent, Scalia acknowledges that "preserving the traditional institution of marriage is just a kinder way of describing the state's moral disapproval of same-sex couples."³⁷⁰ He argues that the *Lawrence* holding leaves "on pretty shaky grounds state laws limiting marriage to opposite-sex couples."³⁷¹ Scalia's dissent accused the majority of silently laying the framework for same sex marriage:

[T]he Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to 'personal decisions related to *marriage*, procreation, contraception, family relationships, child rearing and education,' and then declares that '[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.' Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples . . .? Surely not the encouragement of procreation, since the sterile and elderly are allowed to marry.³⁷²

Consequently, as Scalia acknowledges, the holdings of *Romer* and *Lawrence* have together laid the groundwork for the Court's inevitable ruling in a future same-sex marriage case that neither moral disapproval of homosexuality, nor pretexts such as the protection of procreation, constitute a legitimate government basis for the denial of equal marriage rights.

Justice Scalia's elaborate articulation of the possible future grounds for striking down same-sex marriage bans under the precedents of *Romer*

³⁷⁰ *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) (emphasis and internal quotation marks omitted).

³⁷¹ *Id.*

³⁷² *Id.* at 604-05 (Scalia, J., dissenting) (citations omitted) (second alteration in original).

and *Lawrence* may seem puzzling. One possible explanation is that, while there may be numerous grounds for striking down same-sex marriage bans, by framing the issue in terms of the illegitimacy of an animus-driven legislature targeting individuals based on their sexual orientation, Scalia may be shifting the focus of the discourse away from fundamental rights and gender-based discrimination. If the issue of same-sex marriage is framed solely as an equal protection claim involving discrimination on the basis of sexual orientation, not gender, then the applicable standard of scrutiny is arguably lowered to rational basis (as opposed to the strict scrutiny required for fundamental rights claims, or the intermediate scrutiny required for gender discrimination claims). Framing the issue solely in terms of *Romer*'s prohibition of animus-driven legislation could place the burden of proof with the litigants, who must then complete the difficult task of factually establishing government intent. If a higher standard of review were employed, the burden would lie with the government to more aggressively defend its purported interests under heightened scrutiny challenges. Regardless of Scalia's actual motive in writing the above passage, it does at least set forth one aspect in which *Romer* and *Lawrence* pave the path for the Court's eventual recognition of same-sex marriage rights, should it choose to go down that road.

3. Respect, Stigma and Political Access: Same-Sex Marriage as Equal Citizenship and Active Liberty

While Scalia's dissent delineates the *Romer*-based grounds for overturning same-sex marriage bans as illegitimately motivated by government-endorsed prejudice or subjective "moral" opinions,³⁷³ the strongest case for equal marriage rights will integrate substantive due process principles as well, as was done in *Loving*, *Turner*, and *Zablocki*. Although each doctrine has grown over time, due process and equal protection on their own may lack the teeth to fully protect the rights of all individuals equally. Even equal citizenship arguments alone do not

³⁷³ Scalia's dissent further explains why the Court, which is led by logic and reason, is the proper vehicle for protecting the constitutional rights of same-sex couples, rather than the majority populace which is led less by logic and more by feelings of animus, or "disapprobation":

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly.

Id. at 604.

automatically lead to equal marriage rights.³⁷⁴ Rather, the issue of same-sex marriage necessarily implicates various interrelated doctrines of Fourteenth Amendment jurisprudence.

Marriage, after all, represents the integration of privacy rights, equal citizenship, and active liberty. Just as these related doctrines have been brought together by *Romer* and *Lawrence*, they are united again in marriage. The issue of same-sex marriage is an inevitable synthesis of these overlapping principles of Fourteenth Amendment doctrine. Joining that hand is another: the interrelationship between the negative privacy right to be let alone and the affirmative public rights to active liberty and equal citizenship. As the *Goodridge* Court explained in joining principles of liberty and privacy to affirm same-sex marriage rights, “the United States Supreme Court has described the right to marry as ‘of fundamental importance for all individuals’ and as ‘part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.’”³⁷⁵ Echoing *Lawrence*’s description of due process and equal protection as “linked in important respects,”³⁷⁶ the Massachusetts Supreme Judicial Court demonstrated in *Goodridge* that, especially “in matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do [in the case of same-sex marriage].”³⁷⁷ The precedents most applicable to same-sex marriage are thus those cases that apply both equal protection and substantive due process analyses in affirming a positive, fundamental and equal right to marry—*Loving v. Virginia*,³⁷⁸ *Zablocki v. Redhail*,³⁷⁹ and *Turner v. Safley*.³⁸⁰

³⁷⁴ See *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (rejecting a Fifth Amendment argument that denial of marriage rights deprived the litigants of constitutionally guarantees of full U.S. citizenship rights). *In re Kandu* was the first reported federal case involving a challenge to DOMA by litigants from a foreign country. But see William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 *FORDHAM L. REV.* 1721, 1738-42 (2001) (arguing for a Karstian citizenship focused normative valuation of marriage as incorporating both civic rights and obligations, in turn uniting the equal protection and due process doctrinal approaches to marriage, and concluding that gays and bisexuals “are not fully citizens until they are equally obligated as well as equally entitled in their citizenship. The duties and benefits described in this article [including marriage] are both badges and burdens of citizenship.”).

³⁷⁵ *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 957 (Mass. 2003) (citations omitted).

³⁷⁶ *Lawrence*, 539 U.S. at 575.

³⁷⁷ *Goodridge*, 798 N.E. at 953 (citations omitted).

³⁷⁸ 388 U.S. 1 (1967).

³⁷⁹ 434 U.S. 374 (1978).

³⁸⁰ 482 U.S. 78 (1987).

Such cases illustrate how the combination of equal protection and due process results in affirmative rights to full participation in society, beyond mere protection from discrimination or government interference. Marriage, by its nature, integrates the private and public dimensions of active liberty. Just as the Court in *Loving*, *Zablocki*, and *Turner* established that marriage is a fundamental right both related to privacy and also requiring affirmative public recognition, the Court in *Griswold v. Connecticut*³⁸¹ similarly held that marital privacy rights include an affirmative right to purchase birth control, despite the public dimensions of such a commercial transaction.

After *Lawrence* and *Romer*, the parameters of permissible government action are no longer defined so much by place (e.g., home vs. public arena) or classification (e.g., men vs. women, straights vs. gays), but rather by the intimate and fundamental nature of the choice at issue. There are certain decisions too intimate to be decided for individuals by the government; after *Lawrence*, individuals may demand affirmative respect from the government for such private choices.

The same-sex marriage issue implicates this fundamental freedom of choice in both private and public contexts. While rooted in a fundamental right to privacy, the right to marry is essentially a public right as well. The *Goodridge* court noted the broad public nature of the rights guaranteed by marriage, observing that “[w]ithout the right to marry—or more properly the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one’s ‘avowed commitment to an intimate and lasting human relationship.’”³⁸² Further, mirroring Scalia’s *Lawrence* dissent, the Massachusetts Supreme Judicial Court quoted *Romer* in its conclusion that the same-sex marriage ban at issue “impermissibly ‘identifies persons by a single trait and then denies them protection across the board.’”³⁸³ It therefore found that the State’s denial of same-sex marriage rights “confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.”³⁸⁴

These observations of the public nature of the fundamental right to marry implicate the doctrines of active liberty and equal citizenship, and call to mind the promises of *Romer* and *Lawrence* that gays and bisexuals

³⁸¹ 381 U.S. 479 (1965) cited with approval in *Lawrence*, 539 U.S. at 575 (providing the “most pertinent beginning point” for *Lawrence*’s due process analysis).

³⁸² *Goodridge*, 798 N.E.2d at 957 (quoting *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999)).

³⁸³ *Id.* at 962 (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

³⁸⁴ *Id.*

may no longer be subjected to categorical inequality based on their former status as de facto criminals and second class citizens.³⁸⁵ The constitutional protections of active liberty additionally demand that intimate life choices be accorded affirmative respect and that individuals be given the opportunity to actively claim full citizenship rights in their intimate partnerships, which arguably extends to the right to marry.

The critical role of respect as an aspect of fundamental active liberty is illustrated by a Florida federal district court's recent rejection of *Lawrence* as providing grounds for striking down the federal Defense of Marriage Act. In *Wilson v. Ake*, the plaintiff pointed out the illogical and incongruous nature of "sanctioning same-sex sex and then not allowing a formal same-sex marriage based on love and commitment."³⁸⁶ The court rejected that argument as flawed because, the court explained, *Lawrence* only narrowly ruled against the criminalization of private consensual sexual conduct, but did not establish an "affirmative right to receive official and public recognition."³⁸⁷ However, nowhere in its analysis did the court in *Wilson* acknowledge that *Lawrence* does in fact demand respect for intimate choices beyond the private spatial spheres in the bedroom. This aspect of *Lawrence*'s holding conflicts with the *Wilson* court's distinction between the rights secured by *Lawrence* and the affirmative right to public recognition.

In contrast to the *Wilson* court, the District Court of Nebraska, in *Citizens for Equal Protection v. Bruning*,³⁸⁸ did recognize that, under the precedents of *Romer* and *Lawrence*, a constitutional ban on state recognition of same-sex unions does violate the Federal Constitution's protections of the right to associate and participate in the political process free of government animus under the First and Fourteenth Amendments as well as under the Constitution's prohibitions of bills of attainder.³⁸⁹ While the *Bruning* court agreed with the plaintiffs that their case paralleled the injustices posed by the broad state constitutional amendment singling out gays and bisexuals for the denial of rights in *Romer*,³⁹⁰ the court's analysis

³⁸⁵ For a discussion of categorical inequality as imposed by *Bowers* and lifted by *Lawrence*, see Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1531 (2004).

³⁸⁶ *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307 n.10 (M.D. Fla. 2005).

³⁸⁷ *Id.* (quoting *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004)).

³⁸⁸ 368 F. Supp. 2d 980 (D. Neb. 2005).

³⁸⁹ Notably, the *Bruning* court did not, nor was it asked to, rule on whether a fundamental right to same-sex marriage exists.

³⁹⁰ *Bruning*, 368 F. Supp. 2d at 1001-03.

went further. Moving beyond the equal protection focus of the litigants, the *Bruning* court linked the associational rights and liberties of the First and Fourteenth Amendments to the overall constitutional right to political participation violated by a constitutional ban on state recognition of same-sex unions. Citing *Lawrence*'s holding that the fact that a governing majority has traditionally viewed a particular practice as immoral is not sufficient grounds for the denial of equal rights,³⁹¹ and *Romer*'s holding affirming a right to participate equally in the political process,³⁹² the *Bruning* Court concluded that a constitutional amendment barring access of gay and bisexual citizens to legal protections for their unions is unconstitutional. As the court in *Bruning* recognized, the respect demanded by *Lawrence* and the Constitution's promises of equal citizenship require freedom from the type of stigma prohibited by *Romer*.

The stigma imposed on same-sex couples by denying their equal status as citizens with the fundamental right to marry cannot be alleviated by "separate but equal" remedies such as separate domestic partnership or civil union laws. Also important is that there are many benefits of marriage that cannot be granted through other means. A 2004 General Accounting Office Report to Congress detailed 1,138 separate statutory provisions in which rights, privileges, or benefits were affected by marital status.³⁹³ This list did not even include the multitude of marital benefits at the state level, including inheritance and other death benefits transferred to spouses, family leave, shared health and other insurance, retirement funds, housing benefits, the rights obtained through legal divorce, the shield of legal privilege from forced testimony, the ability to file joint taxes, and the legal benefits of parenting rights which are often tied to marital status.³⁹⁴

Following the initial *Goodridge* decision, the state legislature asked the Massachusetts Supreme Court to clarify whether a bill limiting marriage to opposite sex couples, but allowing same-sex couples to form civil unions with "all the benefits, protections, rights and responsibilities of marriage"

³⁹¹ *Id.* at 994.

³⁹² *Id.* at 994-95 (noting that "[s]uch a structuring of the political process undoubtedly is contrary to the notion . . . that the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . .") (quoting *Evans v. Romer*, 854 P.2d 1270, 1282, 1285 (Colo. 1993) ("*Evans I*"), *aff'd on other grounds*, 517 U.S. 620 (1996) (alteration in original)).

³⁹³ Letter from Dayna K. Shah, Associate General Counsel, U.S. General Accounting Office, to Bill Frist, Majority Leader, United States Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

³⁹⁴ See *Goodridge v. Dep't of. Pub. Health*, 798 N.E.2d 941, 955-57 (Mass. 2003) (listing numerous benefits linked to marriage). See also *id.* at 941 (concluding that limiting the protections, benefits, and obligations of marriage to opposite-sex couples violates equal protection and due process guarantees).

would still be unconstitutional.³⁹⁵ The court's separate opinion on that issue cited both federal and state precedents in explaining that creating a separate civil union institution for same-sex partners unconstitutionally segregates same-sex from opposite-sex unions, "continu[ing] to relegate same-sex couples to a different status. . . . The history of our nation has demonstrated that separate is seldom, if ever, equal."³⁹⁶

Consequently, anything short of full marriage rights continues to deny same-sex couples equal citizenship and equal protection of their active liberty interests and fundamental rights. By creating a "separate but equal" status for same-sex unions, the government only perpetuates the second-class citizenship of gays and bisexuals, violating the Constitution's prohibition of government sanctioned stigma. As the Court held in *Palmore v. Sidoti*, "the Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."³⁹⁷

In the end, the future recognition of same-sex marriage rights by the Supreme Court may rest on any number of principles, with strong equal protection and due process claims both likely to be presented in such a case. The Court may recognize, as it did in *Loving*, the strength of combining these overlapping Fourteenth Amendment doctrines, taking the opportunity to paint a clearer picture of the relationship between equality and liberty in constitutional jurisprudence. Further, in accordance with its past decisions invoking autonomy in intimate life choices, the Court may recognize a marriage case as the ideal vehicle for continuing down the path of uniting the related principles of autonomy, equal citizenship, and active liberty affirmed by *Romer* and *Lawrence*. The context of same-sex marriage provides the additional opportunity for the Court to integrate such overlapping principles with their relationship to the right of privacy, which is historically recognized as an essential source of the right to marry.

The stage is thus set for the Court's recognition of same-sex marriage rights under the Constitution. The Court has consistently upheld the equal and fundamental rights of individuals to autonomy in intimate life choices and affirmed the right of equal access to fundamental rights regardless of classification. Building upon this historic foundation of constitutional respect for libertarian self-determination, *Romer* and *Lawrence* can be read as affirming that the Fourteenth Amendment, at its core, guarantees each individual's right to be treated as an autonomous, equal, respected and participating member of society.

³⁹⁵ Opinions of the Justices to the Senate, 802 N.E.2d 565, 568 (Mass. 2004).

³⁹⁶ *Id.* at 569-70 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

³⁹⁷ *Id.* at 433, cited with approval in *Albright v. Morton*, 321 F. Supp. 2d (D. Mass. 2004) (following *Lawrence*).

After *Romer*, *Lawrence*, and the long line of cases leading to these landmark decisions, it is evident that today's freedom of choice includes not just a negative privacy right to be left alone, but an affirmative right to autonomy with public dimensions as well, which protects individuals against state-imposed stigma and unequal applications of the law that result in second class citizenship. Casting a comprehensive net of constitutional protections for all individuals in a multitude of contexts, this autonomy-focused child of equal citizenship and active liberty has alleviated past tensions between privacy, equality, and liberty, and in doing so has opened the door to equal marriage rights for individuals of all sexual orientations.

Ultimately, it is the Court's choice whether and how to walk through the door. Should the Court fail to recognize the equal rights of gays and bisexuals to marry the person of their choice, it will do so at the cost of casting a dark cloud of doubt on past decisions affirming strong Fourteenth Amendment protections against discrimination and infringements of autonomy in personal life choices.

IV. CONCLUSION: THE PIVOTAL ROLE OF PRIVACY RIGHTS IN THE CHANGING OF THE SUPREME COURT GUARD

Will the recent changes on the Supreme Court alter the likelihood of success for a future claim to marriage equality and for future liberty and privacy rights claims in other contexts? Not necessarily. While the replacement of Chief Justice Rehnquist by Chief Justice Roberts may worry those who focus on Roberts' one-time disparaging reference to a "so-called right to privacy,"³⁹⁸ the jury is still out on the new Chief Justice, whose confirmation process also triggered the concerns of gay rights opponents due to Roberts' role as a consultant for gay rights organizations in *Romer v. Evans*.³⁹⁹ In addition, during Roberts's confirmation hearing, he retracted his previous description of the right to privacy as a "so-called" right, attributing such phraseology to his attempt to capture another's views. Instead, he described the right to privacy, as established by various constitutional amendments and as a recognized component of substantive due process liberty in the past eighty years of Supreme Court jurisprudence, as "not limited to freedom from physical restraint and . . . not simply [a] procedural[], but . . . a substantive matter as well."⁴⁰⁰

³⁹⁸ See *supra* note 18 and accompanying text.

³⁹⁹ See Sheryl Gay Stolberg & David D. Kirkpatrick, *Court Nominee Advised Group on Gay Rights*, N.Y. TIMES, Aug. 5, 2005, at A1.

⁴⁰⁰ *Nomination of John G. Roberts: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005), available at <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=1> (follow hyperlink to page 4 for above quoted dialogue). See also *id.* (follow hyperlink to page 65) for Roberts' response to Senator Feinstein:

Even if Justice O'Connor's replacement is more hostile to such principles, the majority of the Court should continue to show the strong respect for equality principles embodied by *Romer* and *Lawrence*, both cases reflecting 6-3 decisions.

Ironically, the potential margin for marriage equality would be even larger should the Court abide by its own precedent in an analogous case, *Turner v. Safley*.⁴⁰¹ In *Turner*, the Court upheld the right of prisoners to get married despite the generally decreased citizenship rights of prisoners, recognizing the fundamental importance of marriage in providing a means of emotional support and in displaying public commitment, as well as its spiritual significance to those seeking to marry.⁴⁰² Decided in 1987, the first full year after Rehnquist's appointment as Chief Justice, *Turner* has clear precedential value for a future same-sex marriage case. Especially significant is the Court's unanimity in the holding: Justices Scalia and Stevens (as well as O'Connor and Rehnquist) signed on to the undivided opinion. While the Court has since become known for its 5-4 partisan-seeming opinions in socially controversial cases,⁴⁰³ the sitting Justices who signed onto *Turner v. Safley* may be hard-pressed after *Lawrence* and *Romer* to distinguish a future same-sex marriage case from *Turner*. To do so, they would have to find a constitutional basis for granting individuals in same-sex unions even fewer active liberties and citizenship rights than convicted criminals.

The precedent of *Turner v. Safley* aside, it appears likely from the 6-3 majorities of the central *Lawrence* and *Romer* holdings that it would take the retirement of more than just Chief Justice Rehnquist and Justice O'Connor to reverse the Court's trend of recognizing strong privacy and liberty interests for individuals of all sexual orientations in their personal and public lives, whether or not such rights are recognized as including same-sex marriage in the near future. Since Justice Rehnquist had a

FEINSTEIN: In response to the chairman's question this morning about the right to privacy, you answered that you believed that there is an implied right to privacy in the Constitution, that it's been there for some 80 years, and that a number of provisions in the Constitution support this right. And you enumerated them this morning. Do you then believe that this implied right of privacy applies to the beginning of life and the end of life?

ROBERTS: Well, Senator, first of all, I don't necessarily regard it as an implied right. It is the part of the liberty that is protected under the due process clause. That liberty is enumerated.

⁴⁰¹ *Turner v. Safley*, 482 U.S. 78 (1987).

⁴⁰² *Id.* at 95-96.

⁴⁰³ See, e.g., *Boy Scouts v. Dale*, 530 U.S. 640 (2000); *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

prolonged record of opposition to privacy rights,⁴⁰⁴ his replacement will only maintain the status quo toward privacy rights, if not make the Court more receptive to equal citizenship and active liberty claims of individuals asserting constitutional rights in their most intimate life choices. The other two consistent opponents of privacy rights, Justices Scalia and Thomas, have shown no indication of approaching imminent retirement.⁴⁰⁵ It is similarly unlikely that Justice Souter (whose *Glucksberg* dissent reflected a broader approach to fundamental rights than Rehnquist's majority opinion), Justice Breyer (whose principles of active liberty will be around for quite a while, Breyer being the Court's most junior Justice), or Justice Kennedy (who authored *Romer* and *Lawrence*) will be retiring soon. It would consequently take yet another retirement, by Justice Ginsburg or Stevens,⁴⁰⁶ filled with a privacy rights opponent, to shift the balance of the Court dramatically enough to significantly threaten the precedents of *Romer*, *Lawrence*, and other past privacy rights decisions.⁴⁰⁷ For now, the precedents of *Romer*, *Lawrence*, and the long line of privacy and active liberty cases leading up to these seminal cases remain strongly in force.

If the Court were to recognize that the fundamental right to marriage applies to same-sex couples as well as to opposite-sex couples,

⁴⁰⁴ In *Roe v. Wade*, Justice Rehnquist wrote a dissent denying a right to privacy as applicable to abortion. 410 U.S. 113, 171-72 (1973) (Rehnquist, J., dissenting). Justice Rehnquist's opposition to privacy rights continued in other reproductive rights and intimate autonomy cases, including *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261 (1990); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977), and, as noted throughout this Article, in *Bowers*, *Lawrence*, and *Romer*.

⁴⁰⁵ Both of these justices have consistently voted with Rehnquist in opposition to extended liberty interests and privacy rights in cases such as *Cruzan*, *Lawrence*, *Romer*, and various reproductive rights cases, including *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), in which both Thomas and Scalia voted to overrule *Roe*. Prior to Thomas's appointment, Scalia was also the only Justice who voted to explicitly overrule *Roe* in *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989), and Justice Scalia has called the case "synonymous with judicial activism." See Warren Richey, *One Justice's View of Role of the Courts*, CHRISTIAN SCIENCE MONITOR, Nov. 16, 2004, at 1, available at <http://www.csmonitor.com/2004/1116/p01s03-usju.html>. See also *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (comparing the majority's decision to strike down the abortion ban to *Dred Scott*).

⁴⁰⁶ Both have been rumored to be retiring soon based on their age or past health conditions. See, e.g., Bart Jansen, *Storm Front Moves Over Congress*, PORTLAND PRESS HERALD, Dec. 26, 2004, at C2. Arguably, however, it would only take two vacancies to shift the Court enough to doom a same-sex marriage claim, since O'Connor's *Lawrence* concurrence indicates her unwillingness to support same-sex marriage rights at this point.

⁴⁰⁷ The right to privacy is likely to be a contentious issue in future Supreme Court confirmation hearings as it has been in past hearings, most notably that of Robert Bork. Bork's skepticism toward privacy rights resulted in fierce opposition to, and ultimately defeat of, his nomination in 1987. See Tribe, *supra* note 144, at 1901 n.28.

such a decision might be revolutionary, but only in the literal sense. In such a case the Court would have come full circle, returning to the original marital context of justice-based substantive due process.

The right to privacy in the context of intimate life choices originated with *Meyer v. Nebraska*, which affirmed marriage as a fundamental right and liberty interest protected by substantive due process. Marriage, too, was the contextual basis of the *Griswold* decision, which *Lawrence* invoked as critical precedent in its due process analysis.

The Court's privacy rights jurisprudence has evolved into a more comprehensive intertwining of liberty and equality protections for a broader array of intimate life choices, including and extending past the sexual. Just as *Eisenstadt* broadened sexual privacy rights beyond the marital bedroom and to the bedroom of every individual regardless of marital status, *Lawrence* simply acknowledged such rights apply to individuals of all sexual orientations. After *Lawrence*, gays and bisexuals who raise the issue of marriage are revolutionary only in the sense that they are asking the Court to complete the circle and return to the original roots of modern substantive due process, thereby uniting principles of due process and equal protection.

By moving from marriage to sex and back to marriage again,⁴⁰⁸ such a (r)evolution of privacy rights would continue the union of many intimately related principles of Supreme Court jurisprudence. *Lawrence's* invocation of the broad "spheres" of liberty protections has brought the evolution of privacy rights, through its many equal protection and due process apparitions, to a point where the right to privacy can step outside the revolving door of its closet and join its sister doctrines of equal citizenship and active liberty.

Romer and *Lawrence* together represent a significant metamorphosis. Through their precedents, the right to privacy, once a quiet and meek right with contested roots, has become a lioness of liberty, demanding full constitutional protections of autonomy, dignity, and respect for all individuals. Future decisions following these cases must ensure not just the privacy of individuals in their intimate life choices, but the autonomy of all individuals in their self-identities and in intimate partnerships, both in public as well as private contexts. Today's right to privacy—in its traditional incarnation as the right to be let alone and in its modern "freedom of choice" formulation—is alive, well, out of the closet, past the bedroom, and on its way to the full recognition it has always deserved.

⁴⁰⁸ *Loving*, marriage, even.