CHOOSING LIBERTY OVER EQUALITY AND SACRIFICING BOTH: EQUAL PROTECTION AND DUE PROCESS IN *LAWRENCE V. TEXAS*

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I. LIBERTY AND EQUALITY

No one really believes that liberty and equality are, as such, in conflict. Even those political and economic thinkers typically associated with this view do not actually hold it. Isaiah Berlin, for example, does argue that liberty and equality are clashing values—but only when equality is conceived as material equality or equality of condition.[1] Similarly, Milton Friedman, a longstanding opponent of government efforts to promote equality, carefully delimits his position by saying that equality understood as equality before the law (or even equality of opportunity) is consistent with individual freedom.[2]

Indeed, for liberal thinkers such as Berlin and Friedman, equality and liberty are mutually reinforcing, insofar as they are elements of the establishment of a liberal constitutional order. Equality before the law, for both thinkers, is an essential guarantor of personal liberty. Similarly, personal freedom as a political good must be distributed to all in equal shares. At the same time, once the equality conditions of the liberal constitutional order are met, both Berlin and Friedman see additional efforts at promoting equality as necessarily threatening to liberty. They draw different conclusions about the legitimacy of such efforts, but both see efforts to produce equality of condition as relying on the limitation of freedom.

Liberals, then, find themselves advocating greater equality only when the basic conditions of a legitimate political order are not yet met. For example, liberals argued for greater equality in the face of legal slavery. Slavery was, from their perspective, inconsistent with the principles of liberalism, and a movement toward equality was necessary—and was possible without any threat to liberty.[3] From the liberal perspective, the elimination

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[1] Isaiah Berlin, *Equality, in* CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS 81-102 (Henry Hardy ed., Penguin Books 1979).

[2] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 195 (University of Chicago Press 1962).

[3] *Compare*, for example, William Lloyd Garrison's, *The Governing Passion of My Soul, with* his

of slavery produced gains in both liberty and equality. On the other hand, where liberals see a fully-formed liberal constitutional order—free of such pre-liberal elements as slavery—they will respond suspiciously to efforts to expand equality for fear that those efforts will be paid for in liberty.[4]

What does this brief discussion of the compatibility of liberty and equality claims have to do with *Lawrence v. Texas*?[5] In *Lawrence*, the Court was forced to choose between liberty and equality. It was not forced to do so because of a substantive clash between them. Indeed, gays and lesbians are in a position with respect to the liberal constitutional order that is analogous to the position of slaves. Like slaves, gays and lesbians exist in a pre-liberal legal universe. The situation, of course, is not as extreme as it was for slaves. There has been no *Dred Scott* for gays and lesbians—even *Bowers v. Hardwick*[6] does not qualify.[7] But because legal discrimination against gays and lesbians has been permitted by courts, gays and lesbians are still in a position to forward basic equality claims in a way that is fully consistent with liberalism's demands for personal liberty.

Theoretical consistency alone, then, would not have prevented the Court from choosing liberty *and* equality. Legal convention, of course, is another matter. For conventional reasons, courts go no further than articulating a sufficient ground for striking down a statute. Having located such a ground, they do not continue to search for any and all possible grounds. As Philip Bobbitt has characterized it, judges engage in a prudential form of reasoning, limiting their claims as much as possible in order to protect the judiciary from avoidable external pressure.[8] Each additional increment of breadth in the grounds upon which a decision is based yields a corresponding increase in the number and variety of people who will be upset. If the judiciary is to remain independent, it is prudent for

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speech entitled, *To the Public.* In, *The Governing Passion of My Soul,* given in Charleston, South Carolina, Garrison equates the elimination of slavery with liberty by asking, "[a]bolitionism, what is it? Liberty. What is liberty? Abolitionism." *See* William Lloyd Garrison, *The Governing Passion of My Soul at,* http://douglassarchives.org/garr_a27.htm (last modified Sept. 1, 1996). In his speech, *To the Public,* Garrison grounds the anti-slavery argument in the natural equality of all persons asserted in the Declaration of Independence. *See* William Lloyd Garrison, *To the Public, in* WILLIAM LLOYD GARRISON AND THE FIGHT AGAINST SLAVERY: SELECTIONS FORM THE LIBERATOR 70 (William E. Cain ed., Bedford/St. Martin's 1995). Thus, for Garrison, perhaps the leading exponent of abolitionism, it was quite natural to move back and forth between liberty-based and equality-based arguments against slavery.

4 FRIEDMAN, *supra* note 2, at 7-21.

5 123 S. Ct. 2472 (2003).

6 478 U.S. 186 (1986).

7 *See* Scott v. Sanford, 60 U.S. 393 (1857). While *Bowers* dealt a severe blow to both the liberty and equality of gays and lesbians, it did not establish, as *Dred Scott* did for African-Americans, that gays and lesbians were utterly without rights that United States courts are bound to respect.

8 *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 59-73 (Oxford University Press 1982).

judges to achieve the ends dictated by the law in ways that will upset the narrowest possible range of citizens. There is nothing cynical about this posture, particularly if one values the independence of the judiciary. But it is worth remembering that the reasoning in *Lawrence* is based on neither law nor justice but politics. When the Court is faced with a case in which it might choose either or both of two possible grounds for its decision, we may legitimately ask whether the political gains made by keeping the scope of the ruling narrow justify the costs of failing to assume the un-chosen ground.

In *Lawrence*, the Court was presented with two distinct arguments for why the Texas statute should be struck down. One relied on the liberty interest protected under the Due Process Clause of the Fourteenth Amendment. The other relied on the equality interest protected under the Equal Protection Clause. Although the two arguments are fully compatible with each other, the majority nonetheless chose just one. Philosophers are free to have both; judges feel themselves forced to choose.

The Court, of course, chose liberty. In this essay, I examine the implications of this choice. I will make two separate arguments. First, by failing to embrace equality for gays and lesbians, the Court's decision fails to address the genuine harm faced by the petitioners in the case. In that most fundamental sense, the Court failed to replace injustice with justice. Because of this failure, the majority also failed to establish any principle that will continue to bring gays and lesbians into the liberal constitutional order. Second, by relying on the doctrine of substantive due process, the Justices established the limited freedom they affirmed on a shaky foundation. Substantive due process remains an incoherent doctrine, and, as Justice Scalia was eager to point out, the Court's application of the doctrine was itself open to question.[9] The qualified equality of gays and lesbians achieved in *Lawrence* now relies on a fundamentally unstable doctrine of liberty. In light of what *might* have been in this case, this outcome represents a major failure by the Court.

II. EQUALITY

The Texas anti-sodomy statute prohibited anal and oral sex for same-sex couples while permitting it for mixed-sex couples.[10] That is, it prohibited specific conduct for some people while allowing the same conduct for other people. That is enough to raise suspicions about the justice of the statute and its compatibility with liberal constitutionalism. In fact, though, there is more. The group against whom the statute discriminated also faces a wide variety of other forms of discrimination. Some of these forms are widespread

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[9] *See Lawrence*, 123 S. Ct. at 2491 (Scalia, J., dissenting).

[10] TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).

but illegal, such as gay-bashing. Other forms are widespread and legal but are considered private, such as employment and housing discrimination. But some forms of discrimination against gays and lesbians are public. The most obvious example is the discriminatory character of marriage as a state institution, but there are other examples, such as state unemployment insurance policies.[11] In other words, the Texas anti-sodomy statute was not merely discriminatory; it was a component of a broad system of inequality, discrimination and exclusion that faces gays and lesbians—to varying degrees and in different ways—in every state and locality in the United States.

In short, the central problem with the Texas statute was that, in light of the character of the statute and the political context in which it was situated, it was not consistent with basic principles of equality, including those embodied in the Equal Protection Clause. The Court, of course, did not affirm that position. In his majority opinion, Justice Kennedy presumes from the outset that the question to be decided was one about liberty. The case, he says, "involves liberty of the person both in its spatial and more transcendent dimensions."[12] As we know from the Court's opinion in *Bowers*, what question the Court imagines itself to be answering can make all the difference. In 1986, things might have turned out quite differently had the Court not concluded that the question before it was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[13]

The question the *Lawrence* Court takes itself to be answering is whether a state may legitimately regulate non-commercial sexual conduct undertaken between consenting adults in a private home.[14] To be sure, the Court's question is broader than the strange question invented by Justice White and the *Bowers* Court.[15] For example, it is a question not about what rights are conferred upon some limited group, "homosexuals" in White's reckoning, but about what liberty attaches to all persons. But despite its greater breadth, the question the Court asks is still limited in crucial respects. To begin with, the Court's question does not allow them to address constitutional questions about the Texas statute's differentiation between straights, on the one hand, and gays and lesbians, on the other. While the

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[11] *See* Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 970 (Mass. 2003) (holding that restriction of marriage rights to heterosexual couples violates liberty and equality guarantees in the Massachusetts Constitution). This case represents a recognition of the discriminatory character of prohibitions against same-sex marriage. The public reaction to *Goodridge*, including the initiation of an effort to amend the United States Constitution to prohibit same-sex marriage, indicates that the decision of the Supreme Judicial Court of Massachusetts does not signal the beginning of the end of public discrimination against gays and lesbians.

[12] *Lawrence*, 123 S. Ct. at 2475.

[13] *Bowers*, 478 U.S. at 190; *see also Lawrence*, 123 S. Ct. at 2478.

[14] *See Lawrence*, 123 S. Ct. at 2476.

[15] *See Bowers*, 478 U.S. at 190.

Court may discuss the resultant differential treatment, such discussions will necessarily remain peripheral to the central question it must resolve. Indeed, the Court *does* discuss the fact of differential treatment, but it is unable to render any legal judgment thereabout. Kennedy concludes that were the majority to base its decision on equal protection grounds, it would invite the conclusion that a statute that banned all anal and oral sex would be acceptable.[16] It is hardly worth mentioning that this argument makes sense only in the context of the assumption that a court cannot base a decision on two conceptually independent but factually intertwined grounds.

The problem, of course, is that the Court must operate in the discursive space defined in part by the decision in *Bowers*. We can see how *Bowers* led the *Lawrence* Court astray by performing the following thought experiment. Imagine that *Bowers* had never been argued. In this scenario, *Lawrence* would be the first case testing the constitutionality of sodomy laws. How, then, would the Court have analyzed the question? In all likelihood, it would have looked back to *Eisenstadt v. Baird*[17] and its precursor, *Griswold v. Connecticut*.[18] The Court would have said that *Griswold* established the principle of a domain of sexual privacy.[19] *Eisenstadt*, it would have continued, established that the relevant domain exists for all people, regardless of marital status, a conclusion, the Court would have noted, that was based on the Equal Protection Clause.[20] Its conclusion in *Lawrence* would then have been obvious. Just as *Eisenstadt* was a case about equality, the point about privacy having already been established, so *Lawrence* would have been understood as a case about equality. The extrapolation of the principle announced in *Griswold*, a process that had been begun in *Eisenstadt*, would have continued in *Lawrence*.

Only the deviation known as *Bowers* made some other way of approaching *Lawrence* seem sensible. The fact that the *Bowers* Court took the position that the *liberty* of gays and lesbians may be restricted led the *Lawrence* Court to the conclusion that the central issue of the case was liberty. Somehow, the *Lawrence* Court failed to recognize that the point in *Bowers* was that the liberty *of gays and lesbians* may be restricted. It did not reject the reasoning in *Griswold*. It did not even reject the reasoning in *Eisenstadt*, although it acted as if that case had never occurred.[21] On the contrary, the *Bowers* Court, just like the Texas legislature, took the straightforward position

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16 *See Lawrence*, 123 S. Ct. at 2482.

17 405 U.S. 438 (1972).

18 381 U.S. 479 (1965).

19 *See Griswold*, 381 U.S. at 486.

20 *See Eisenstadt*, 405 U.S. at 445.

21 *See Lawrence*, 123 S. Ct. at 2477. The Court discusses *Eisenstadt* merely as background to its discussion of *Bowers*. It does not acknowledge the independent significance of *Eisenstadt* with respect to the Equal Protection Clause.

that well established constitutional principles apply to everyone other than gays and lesbians. As has been widely discussed, the *Bowers* Court was so eager to reach this conclusion that it ignored the fact that the Georgia statute before them made no distinction based on sexual orientation.[22]

Surely, it was right for the *Lawrence* Court to overturn *Bowers*. But it should not have stopped there, for merely clearing the way of *Bowers* does not provide adequate affirmative grounds on which to decide *Lawrence*. This point is among the persuasive arguments presented by Scalia.[23] He points out that the majority never really explained the reasoning behind its conclusion that the Texas statute was unconstitutional. Having declared *Bowers* null and void, it folds up its tent, leaving unanswered the core question: what principle requires that gays and lesbians receive the same consideration with regard to privacy and liberty as do heterosexuals?

Kennedy's opinion gestures in the direction of an answer. He quotes Justice Stevens' dissent in *Bowers*, which makes three key points. First, Stevens says that the mere fact that a majority has for a long time taken a particular practice to be immoral does not shield laws prohibiting that practice from judicial scrutiny.[24] That must be true, but it says nothing about whether any particular statute ought to be struck down. Second, the quoted passage says that decisions by married people concerning sexual matters fall within the liberty protected by the Due Process Clause.[25] Scalia raises questions about the accuracy of this claim in his dissent, pointing out that the *Griswold* Court did not ground the right of privacy in the Due Process Clause.[26] Whether right or wrong, however, Stevens' point gives us nothing that would settle *Lawrence*. Third, the quotation from Stevens says that the protection afforded to decisions about sex extends to unmarried persons.[27] That third point is based on *Eisenstadt*, and in that case it was explicitly tied to the Equal Protection Clause.[28] It is the third point that gives Stevens' quote relevance in *Lawrence* because it provides a basis for asking whether a protection that has been applied to married and unmarried straight people may constitutionally be denied to gays and lesbians. Put that way, it is difficult to see how the Court could have avoided an analysis of the application of the Equal Protection Clause.

How, then, should the Court have analyzed the Texas statute under the Equal Protection Clause? One possibility, of course, is provided by Justice

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22 *See Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

23 *See Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

24 *See id.* at 2483 (quoting *Bowers*, 478 U.S. at 216) (Stevens, J., dissenting).

25 *See id.*

26 *See id.* at 2493 (Stevens, J., dissenting).

27 *See id.* at 2483.

28 *See Eisenstadt*, 405 U.S. 438.

O'Connor's concurring opinion. O'Connor argues that the Court should have subjected the Texas statute to rational basis review under the Equal Protection Clause and should have concluded that "[m]oral disapproval of a group cannot be a legitimate governmental interest."[29] Her argument is that criminalizing the conduct of a group based on disapproval of that group indicates that there is no basis for the statute other than a desire to harm the group. The Equal Protection Clause, she contends, exists precisely to prevent one group from using the law as a mechanism for harming a group against which it has an animus.[30]

The problem with O'Connor's argument is that it misidentifies Texas's motives (or possible motives) for criminalizing same-sex anal and oral sex. It seems quite possible that members of the Texas legislature really took themselves to be criminalizing conduct of which they disapproved because they found the conduct itself immoral, regardless of who might carry it out. O'Connor's argument relies not only on there being a sharp line between gay and straight identities but also on there being general agreement that there is such a sharp line. But those who dedicate themselves to persuading gays and lesbians to "reform" themselves may genuinely believe that the conduct of which they disapprove is quite independent of the people whom they seek to persuade. Whether they are right or wrong is, in this context, immaterial. The point is just that the legislature may genuinely have wished to prevent everyone in Texas from engaging in same-sex anal and oral sex because it finds such conduct immoral.

As with the majority opinion, O'Connor's concurrence seeks to find an unobtrusive way to strike down the Texas statute. Here again, the result is that Scalia can reveal a fundamental flaw in the reasoning. The prohibition of any conduct deemed immoral, he points out, will burden the group that wishes to engage in that conduct. According to O'Connor's reasoning, that would allow the Court to reject on Equal Protection grounds any legislation passed in an effort to prohibit conduct judged immoral by the legislature. Scalia argues that O'Connor's argument would nullify a wide range of legislation not obviously targeted at a defined social group.[31] Again, his argument is persuasive.

At the same time, countering Scalia's argument would not have been difficult had the Court grounded its decision in the broad social reality confronting gays and lesbians. Sexual orientation, seen in that light, would be identified as a suspect classification. As Scalia is all too willing to point out, gays and lesbians have faced discrimination for centuries and continue to do so. As he points out, discrimination against gays and lesbians is not

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

[30] *See id.*

[31] *See id.* at 2496 (Scalia, J., dissenting).

only permitted under state and federal laws but is mandated under them. Furthermore, as he points out, attempts at protecting gays and lesbians through Congressional legislation have failed. In other words, in more than superficial ways, the situation of gays and lesbians in 2003 resembles that of African-Americans before the passage of the civil rights legislation of the 1960s and, even more, before *Brown v. Board of Education*.[32] While gays and lesbians may not be a "discrete and insular minority," they are clearly a minority, and by identifying a "homosexual agenda" Scalia suggests that gays and lesbians might be a discrete minority.[33] Scalia's description of the legal situation of gays and lesbians makes clear that they are a minority that has consistently found itself on the losing end of political battles; frequently those battles involve efforts to subject them to discrimination, punishment, and political disability.[34] The Equal Protection Clause exists to prevent just such classification schemes.

Had the Court found sexual orientation to be a suspect classification, the conclusions would have been easily reached. While Scalia's argument about the distinction between prohibiting conduct and disadvantaging a group should save the statute under rational basis review, it would not under strict scrutiny. Promoting the majority's view of morality is not a compelling state interest, even if it might be a legitimate one. At the very least, strict scrutiny would rule out anti-sodomy statutes that target only same-sex acts. In all likelihood, it would also rule out evenhanded statutes since these would disproportionately burden gays and lesbians.

In addition, such a determination by the Court would have borne witness to the social reality of sexual orientation in the United States. In *Lawrence*, the Court achieved a result favorable to gays and lesbians without coming to terms with the real harm wrought by the statute under review. In *Brown*, the Court articulated what segregated schools mean in the context of a racist society.[35] In so doing, the Court augmented its legal arguments with a profound moral argument for ending segregation. While the decision produced a backlash, it also helped build a coalition for opposing that backlash and illegal discrimination more generally. *Lawrence* is already producing its backlash, but the Court has not supplied a rationale for standing up for gay and lesbian equality.[36] Instead, it tried to finesse the

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[32] 347 U.S. 483 (1954).

[33] *See Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting); *see also* U.S. v. Carolene Prods., 304 U.S. 144 (1938). *Carolene Products* provides the foundation for a special claim on judicial attention of discrete and insular minorities. While attempting to argue that gays and lesbians deserve no special judicial attention, Scalia inadvertently strengthens the opposing argument by citing a long history of persistent discrimination against gays and lesbians and by identifying an "agenda" that is allegedly shared by gays and lesbians.

[34] *See Lawrence*, 123 S. Ct. 2496 (Scalia, J., dissenting).

[35] *See generally* Brown v. Board of Education, 347 U.S. 483 (1954).

[36] For example, poll data indicates that opposition to gay and lesbian equality among

issue by relying on the application of established principles of liberty. Unfortunately, as I will discuss in the next section, those principles have problems of their own.

III. LIBERTY

While Scalia is undoubtedly the Court's worst sociologist, he is perhaps its best logician. His paranoid fantasies about the political power of gays and lesbians make his opinions in *Romer* and *Lawrence* appear absurd, but he raises serious challenges to the majority's reasoning that should not be dismissed. The most telling of these challenges is his critique of the Court's application of the doctrine of substantive due process.[37]

As Scalia notes, the Court repeatedly invokes the idea of a right to liberty under the Due Process Clause. He points out, however, that the Due Process Clause does not guarantee a right to liberty.[38] On the contrary, the Due Process Clause indicates the specific condition under which the state can deny its citizens liberty: when they have been provided due process of law. According to Scalia, the Court's jurisprudence indicates that the only liberties protected under the Due Process Clause are those the Court takes to be fundamental.[39] Even these are not entirely beyond the reach of state power; the state may infringe upon them if it does so in pursuit of a compelling state interest using means narrowly tailored to achieve it.

Scalia's argument here is that the Court never showed that the liberty interest at stake in *Lawrence* was a fundamental interest. In the absence of such a showing, he says, the liberty of Lawrence and Garner may be violated as long as due process was provided. If that were the only problem with the Court's reliance on substantive due process, the Court's decision could be rather easily tweaked to meet the objection. The notion that the right to privacy might be fundamental is hardly far-fetched. Only Scalia's insistence that the right at issue is the right to "homosexual sodomy" muddies the waters. If the right to privacy is fundamental and is taken to include within its scope decisions about sex between consenting adults in their own homes, then the Court could have asserted a fundamental right that would have justified strict scrutiny, which the Texas law could not have survived.

There is, however, a more fundamental problem with the Court's reliance on the doctrine of substantive due process, one that is hinted at by Scalia's objections. Scalia points out that the text of the Due Process Clause

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United States residents increased in the immediate aftermath of the Court's decision. *See Law and Civil Rights, available at* http://www.pollingreport.com/civil.htm (last visited Sept. 15, 2003); *see also*, Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003 (Magazine), at 48.

37 *See Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

38 *See id.* at 2491.

39 *Id.* at 2491-92.

indicates that liberty may be denied as long as due process is provided.[40] He stops short of applying this text in thoroughgoing fashion. If he had stayed close to the text of the Fourteenth Amendment, he could have made the following argument: the idea that certain fundamental interests are beyond the reach of government *even if due process is provided* is itself without textual foundation. So even if the Court were to make explicit the fundamental status of the relevant privacy right, that would not show that the Due Process Clause prevents Texas from regulating sex in whatever way it wants. The Constitutional text says that no state shall deny its citizens life, liberty or property without due process of law.[41] Here no one has argued that Lawrence and Garner did not receive due process of law. So it is difficult to see how their liberty was denied *without due process of law.*

To anyone who has completed a legal education, the point I am making will sound like the simplistic objection of a first-year law student not yet properly schooled in the doctrine of substantive due process. That is precisely my point. The legal doctrine of substantive due process bears almost no relation to the text of the Due Process Clause, a fact that is immediately obvious to every undergraduate student encountering the doctrine for the first time. It is not just that the clause has to be interpreted in order to yield the doctrine. If that were the case, that would be no argument against the doctrine, since all legal texts require interpretation in the process of application. The problem is that in order to squeeze the doctrine of substantive due process from the Due Process Clause, what is necessary is not interpretation but *misapprehension.* The text of the Due Process Clause just does not say what the doctrine of substantive due process alleges that it says.

This point, of course, is not mine. It was made most eloquently in Charles L. Black's 1997 book, *A New Birth of Freedom.*[42] My argument is just a specific application of Black's general argument. Black's central claim is that the structure of American human rights law is unstable as long as it sits upon the shaky foundation of an incoherent doctrine.[43] The point is not that the doctrine will immediately collapse because it does not square with the language of the Constitution. If judges rarely overturn precedent, they almost never reject a doctrine on the basis of which a long chain of cases has been decided. Black's point is that the legitimacy of all human rights decisions premised on substantive due process is diminished by the fact that

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[40] *Id.*

[41] U.S. CONST. amend. XIV, § 1.

[42] *See* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 87-106 (Grosset/Putnam 1997).

[43] *See id.*

the real reasons for these decisions can never quite be explained.[44] In the long run, this diminution in legitimacy makes it easier for judges eventually to disavow both specific outcomes of the doctrine and the doctrine itself.[45]

If this possibility seems far-fetched, one need only consider the strange history of economic substantive due process.[46] That doctrine surely seemed firmly established in the first few decades of the twentieth century. By the end of the 1930s, of course, it was dead. In the end, there is nothing fundamentally sounder about substantive due process as applied to restrictions on sexual activity than substantive due process as applied to restrictions on economic activity. Both rely on the same impossible reading of the language of the Fourteenth Amendment. Moreover, just as in the 1930s there was a determined opposition to the Court's substantive due process jurisprudence, so today there is a determined opposition, and there is some evidence that the decision in *Lawrence* is already providing an effective focal point for efforts to mobilize that opposition.[47] In short, while there is no reason to believe that the doctrine of substantive due process will be disavowed by the Court in the short run, there is good reason to believe that grounding gay and lesbian sexual freedom in substantive due process renders that freedom vulnerable.

IV. WHAT MIGHT HAVE BEEN

Because they were presented with a discriminatory law restricting the freedom of homosexuals but not heterosexuals, the members of the Court had the opportunity to extend the promise of liberal constitutionalism to a previously excluded group. They did not do that, at least not in any clear way. Doing so would have required treating the case as an equal protection case and identifying sexual orientation as a suspect classification. In reaching for another way to decide the case, the majority added yet another level to the house of cards consisting of the cases decided on the basis of substantive due process. When the Court's critics complain publicly that the Court's opinion has little to do with the plain language of the Constitution, supporters of gay and lesbian equality will have little to say.

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44 *See id.*

45 *See id.*

46 Around the turn of the nineteenth to the twentieth centuries, the Supreme Court interpreted the Due Process Clause as a severe limit on state regulation of economic activities. *See* Lochner v. New York, 198 U.S. 45 (1905) (holding that state regulations of working conditions of bakers violate the liberty of contract guaranteed under the Due Process Clause of the 14th Amendment). The Court subsequently rejected this view. *See* West Coast Hotel v. Parris, 300 U.S. 379 (1937) (holding that state restrictions on wages do not violate the Due Process Clause of the 14th Amendment).

47 *See* Rosen, *supra* note 36, at 48.

It is not difficult to understand why this happened. The Court was eager to avoid the implication that it would look unfavorably on other forms of discrimination against gays and lesbians, especially same-sex marriage. Indeed, the specter of same-sex marriage loomed large in the adjudication of *Lawrence*. O'Connor went to great lengths to distinguish *Lawrence* not from past cases but from possible future cases involving marriage.[48] Her reasoning was not especially persuasive, but she provided an account (suitable for later use) of why discriminatory anti-sodomy laws violate the Equal Protection Clause while discriminatory marriage laws probably do not.

There would be, of course, a degree of danger in rejecting substantive due process and grounding the liberty of gays and lesbians on an equality argument. As Kennedy suggests, it is possible that a later court would interpret any decision resting on equal protection grounds as permitting evenhanded anti-sodomy legislation.[49] And moving away from the doctrine of substantive due process would undoubtedly create turmoil in the area of sexual and reproductive privacy. My contention is that when the payoff is the application of widely shared principles of equality to a group of people who have faced consistent legal and illegal discrimination since the founding of the republic, the price is well worth it. In addition to providing justice in the face of unjust inequality, such an application would provide a far more coherent and persuasive basis for eliminating anti-sodomy laws than the one provided in *Lawrence*.

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[48] *See Lawrence*, 123 S. Ct. at 2488 (O'Connor, J., concurring).

[49] On the other hand, a Court willing to articulate two sufficient grounds for its judgment could avoid this outcome. In addition, the identification of sexual orientation as a suspect classification would provide the foundation for showing that evenhanded anti-sodomy legislation would burden gays and lesbians unequally.