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David D. Meyer
David.Meyer@chicagounbound.edu

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Domesticating Lawrence

David D. Meyer†

The Supreme Court’s decision in Lawrence v Texas has been widely described, by supporters and detractors alike, as “shocking,” “stunning,” and potentially “revolutionary.” Much of the commentary in the popular press has remained confined to the factual context in which Lawrence arose, focusing on the decision’s likely impact on the “culture war” over equality for gays and lesbians. Many legal scholars, on the other hand, have concerned themselves with Lawrence’s broader implications for constitutional theory and have debated whether the decision may signal a fundamental transformation of the Court’s approach to substantive due process, well beyond matters relating to sexuality.

Given that Justice Kennedy’s opinion for the majority eschews traditional doctrinal formulas, several quite different understandings of the Court’s holding have emerged, each with its own set of possible ramifications. Justice Scalia, on the assumption that Lawrence implicitly classified the relevant liberty interest as non-“fundamental,” rails that the decision has “laid waste the foundations of our rational basis jurisprudence.” Randy Barnett takes what might be considered the opposite tack, contending that the decision effectively jettisons the distinctive category of “fundamental rights” and instead embraces an across-the-board presumption against any governmental incur-
sion on "liberty," fundamental or otherwise. If either Justice Scalia or Professor Barnett is correct, and if the Court means to apply its principles faithfully in future controversies, Lawrence's implications are indeed seismic.

Cass Sunstein, from another perspective, readily agrees that Lawrence can be read broadly in ways that unsettle basic understandings of substantive due process. But he advances an alternative understanding of the case that is capable of "narrowing" and "disciplining" Lawrence's otherwise expansive implications.

Sunstein proposes that Lawrence's judgment was predicated on the fact that sodomy laws, like the prohibitions on marital contraception invalidated in Griswold v Connecticut, had fallen into desuetude. By this understanding, Lawrence's reach might be confined to other relatively odd circumstances in which wide scale non-enforcement signals that the moral judgment underlying a law has become "hopelessly out of touch with existing convictions."

Each of these readings of Lawrence is plausible and finds support in the Court's opinion, but I wish to advance a different view. I am skeptical that Lawrence transforms substantive due process, remaking rational basis review or substituting a generalized "right of liberty" for the fundamental right of privacy, primarily because the opinion expends so much effort to position the case within the Court's established privacy framework. At the same time, I am doubtful that Lawrence can be confined, as Sunstein suggests, to instances of "American-style desuetude." Instead, I believe that Lawrence is best understood as expanding the boundaries of the fundamental right of privacy, and that the linchpin of this expansion is a broadening conception of family. By this view, Texas's sodomy law fell not because it intruded upon individual "liberty" or "autonomy" per se, but because it intruded upon constitutionally valued family relations. Although there is expansive language in the Court's opinion in Lawrence that might suggest open-ended constitutional protection for in-

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7 Barnett, Cato S Ct Rev at 21 (cited in note 4).
9 Id at 6.
10 381 US 479 (1965).
11 Sunstein, What Did Lawrence Hold? at 18 (cited in note 8).
12 Id at 15.
timate relations or conduct—a proposition that would carry potentially profound consequences for much of family law—the Court ultimately appeared to link constitutional protection to contemporary society's acceptance of the legitimacy of the family bonds constructed by gays and lesbians.

This, of course, is no small feat, and its implications are broader than those of the desuetude-centered understanding advanced by Sunstein. Most obviously, this understanding of Lawrence would—more clearly than Sunstein’s—mandate heightened constitutional scrutiny of laws prohibiting same-sex marriage. Yet, locating the trigger for judicial intervention in public consensus about the meaning of family cabins Lawrence’s broad, libertarian assertion of individual liberty, and—crucially—avoids reading Lawrence to require a fundamental rethinking of the post-New Deal approach to substantive due process. Indeed, by tying protection to contemporary understandings of the scope of family, this reading of Lawrence in fact fits comfortably, and somewhat ironically, within the constitutional methodology of Bowers v Hardwick itself.

I. DID LAWRENCE RECOGNIZE A FUNDAMENTAL RIGHT?

To comprehend Lawrence’s implications, it is first necessary to determine how the decision squares with the Court’s established framework for analyzing substantive due process claims. For more than six decades, since the demise of the Lochner era, substantive due process analysis has turned on a threshold classification of an asserted liberty interest as “fundamental” or “non-fundamental.” If the interest asserted is deemed “fundamental,” as the Court found in cases involving childrearing, for example, the state’s intrusion

13 Compare Sunstein, What Did Lawrence Hold? at 32-33 (cited in note 8) (suggesting ways in which a desuetude-oriented understanding of Lawrence would permit courts to distinguish and sustain laws banning same-sex marriage).
18 See Zablocki v Redhail, 434 US 374, 383-85 (1978) (characterizing marriage as a
is presumed unconstitutional. The judicial scrutiny of incursions on fundamental rights is usually described as strict, imposing on the state the burden of demonstrating that the challenged law is narrowly tailored to a compelling state interest. In truth, as I will recount in greater depth later in this Article, the Court has often applied a somewhat less rigid form of scrutiny in cases involving incursions on fundamental rights of family privacy. But in all events, if the claimed right ranks as fundamental, courts will apply some form of heightened scrutiny and insist upon a demonstration of exceptional public need for the incursion. By contrast, if the burdened interest is classified merely as an ordinary or non-fundamental aspect of liberty, the state's incursion is presumed to be constitutional, subject only to the minimal demands of rational basis review.

Justice Kennedy's opinion for the Court in Lawrence conspicuously fails to label the private interest at stake as "fundamental." Indeed, Kennedy's opinion does not expressly state that the sodomy law burdened the "right of privacy" or any other right previously identified as fundamental. Adding to the mystery, the Court fails to employ a readily recognizable standard of constitutional scrutiny. The protection afforded the petitioners' "claim of liberty" is described as "substantial," implying something greater than traditional rationality review; but the Court concludes that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," a summation which seems to track the usual language of rational basis review.

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21 See notes 84-92 and 195-97 and accompanying text.
23 See Glucksberg, 521 US at 728.
24 Lawrence, 123 S Ct at 2478.
25 Id at 2480.
26 Id at 2484.
A. Rationality Review and the Breadth of “Liberty”

Justice Scalia, focusing especially on the Court’s reference to the absence of a “legitimate state interest,” seizes upon these ambiguities to insist that the Court implicitly rejected the proposition that the case presented a fundamental right. Scalia wrote:

[N]owhere does the Court’s opinion declare that homosexual sodomy is a “fundamental right” under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a “fundamental right.” Thus, while overruling the outcome of Bowers, the Court leaves strangely untouched its central legal conclusion: “[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”

On the understanding that Lawrence classified the petitioners’ liberty interest as non-fundamental, then, Justice Scalia contends that the striking of Texas’s sodomy law resulted from the renegade application of “an unheard-of form of rational-basis review.”

In attempting to wrestle the Court’s opinion in Lawrence into the pigeonhole of rational basis review, Justice Scalia’s dissent is essentially an exercise in damage control. Spinning Lawrence as a rational basis case has several significant advantages from Justice Scalia’s perspective. First, it avoids adding to the list of unenumerated fundamental rights recognized by the Court—something Justice Scalia has resisted even in far more conventional contexts. Second, it leaves other state regulations of sexual conduct insulated by a presumption of constitutionality and sustainable, at least nominally, under the most forgiving constitutional standard available. Finally, it effectively marginalizes Lawrence’s relevance for ongoing debates over the proper

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27 See id at 2488 (Scalia dissenting).
28 Lawrence, 123 S Ct at 2488, quoting Bowers, 478 US at 191.
29 Id.
30 In Troxel, for example, Justice Scalia was alone among the Justices in refusing to recognize a “theory of unenumerated parental rights,” even though the fundamental childrearing right of parents at issue there is surely the oldest and least controversial of all modern privacy rights. Troxel, 530 US at 91-93 (Scalia dissenting).
framing and validation of fundamental rights claims. If *Lawrence* held nothing more than that the sodomy law failed the rational basis test, then the case could not be wielded as authority to recognize other fundamental rights lacking support in constitutional text and specific historical practices. In effect, *Lawrence* could be made to look like *Romer v Evans,* in which the Court invalidated a state constitutional amendment blocking the enactment of measures intended to prohibit discrimination on the basis of sexual orientation without first finding that the law trenching upon a fundamental right or a suspect class.

Of course, Justice Scalia’s damage control strategy carries a risk of backfiring. After all, characterizing *Lawrence* as a rational basis case expands the scope of its relevance and ensures that every state intrusion on liberty is potentially subject to *Lawrence*-style review. If the Court were to apply the same “unheard-of form of rational-basis review,” Justice Scalia was quick to emphasize, there would be “far-reaching implications beyond this case,” beginning with the fall of “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.” Yet, Justice Scalia’s strategic assumption may have been that the implications of such an aggressive conception of rational basis review would be unsustainable as a practical matter, leaving *Lawrence* as more of a curiosity than a landmark. After all, *Romer* had little discernable impact beyond its facts—at least until *Lawrence* cited it as support for overturning *Bowers.* Faced with a potential disaster, Justice Scalia’s best hope was that *Lawrence* might be received, like *Romer, Plyler v Doe,* and *City of Cleburne v Cleburne Living Center,* as an outlier. In fact, Justice

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32 Id at 635.
33 *Lawrence,* 123 S Ct at 2488 (Scalia dissenting).
34 Id at 2490.
35 Compare Sunstein, *What Did Lawrence Hold?* at 25 (cited in note 8) (“In the fullness of time, it is imaginable that *Lawrence* will be a sport, a decision with no descendants, one in which the Court struck down a law that shocked its conscience but that proved unable to generate further doctrine.”).
36 See *Lawrence,* 123 S Ct at 2482.
38 473 US 432, 450 (1985) (holding unconstitutional, nominally under rational basis review, a zoning ordinance that barred a group home for the mentally disabled).
39 See Erwin Chemerinsky, *Constitutional Law* at 646-47 (cited in note 20) (describing *Plyler* as a case which in fact applied intermediate scrutiny and *Romer* as a case in
O'Connor's concurring opinion coincided nicely with this effort: she favored an equal protection analysis that would have placed Lawrence shoulder-to-shoulder with Romer and Cleburne as an exceptional case in which the Court “applied a more searching form of rational basis review” to legislation that “inhibit[ed] personal relationships” and arose out of a bare “desire to harm a politically unpopular group.”

Randy Barnett looks to the same ambiguities in Lawrence noted by Justice Scalia, but arrives at what might be seen as the opposite conclusion. He infers from the Court’s failure to describe the asserted liberty interest as “fundamental” not that the interest is non-fundamental, but rather than the distinction between fundamental and non-fundamental rights has been abandoned altogether. Emphasizing the Court’s failure to describe the petitioners’ interest explicitly as a “privacy” right, and its repeated use instead of the more general term “liberty,” Barnett contends that Lawrence has effectively inverted the presumption of constitutionality that, since the demise of the Lochner era, has been the starting premise of substantive due process review:

Although he never acknowledges it, Justice Kennedy [in Lawrence] is employing . . . a “presumption of liberty” that requires the government to justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow “fundamental.”

In Barnett’s view, therefore, the “potentially revolutionary significance” of Lawrence is its “shift from privacy to liberty, and away from the New Deal-induced tension between the presumption of constitutionality and fundamental rights.” Henceforth, the description of a right as “fundamental” will cease to carry any particular doctrinal significance because any deprivation of liberty, fundamental or otherwise, will be presumptively unconstitutional, subject to redemption only if the government can

which the Court applied “a test with more ‘bite’ than the customarily very deferential rational basis review”).

40 See Lawrence, 123 S Ct at 2485 (O'Connor concurring).
41 See id at 2484-85, citing United States Department of Agriculture v Moreno, 413 US 528, 534 (1973).
42 See Barnett, Cato Sup Ct Rev at 36 (cited in note 4).
43 Id (footnote omitted).
44 Id at 32.
45 Id at 41.
carry the burden of demonstrating that the challenged incursion is “necessary and proper.”

In a sense, Justice Scalia and Professor Barnett share the same understanding of Lawrence’s basic outlines: the majority invalidated the sodomy law on the basis of an ambiguous scrutiny that is tougher than traditional rational basis review without first finding that the statute burdened a fundamental right. But, whereas Scalia seeks to push the case back toward the baseline of rational basis review, characterizing the case as a strange misuse of rationality review in defense of a non-fundamental right, Barnett would push the case in the opposite direction, characterizing it as transplanting all aspects of “liberty” within the privileged sphere formerly reserved for fundamental rights. Whereas Scalia hopes to make Lawrence into a constitutional oddity, Barnett hopes to turn it into the norm.

B. Privacy and the “Heart” of Liberty

Either of these understandings of Lawrence might be correct, but I believe it is far more plausible to read Lawrence as having premised its judgment on a finding that Texas’s sodomy law impinged upon the petitioners’ fundamental right of privacy. Justice Kennedy started his analysis of the petitioners’ substantive due process claims not with United States v Carolene Products Co, Williamson v Lee Optical of Oklahoma, Inc, or any other case emblematic of rational-basis review, but instead with Pierce v Society of Sisters and Meyer v Nebraska, now taken to be the foundational cases of modern fundamental rights analysis. Indeed, “the most pertinent beginning point” for resolving the petitioners’ claim, the Court insisted, was Griswold, the case in

46 Barnett, Cato Sup Ct Rev at 41 (cited in note 4).
47 304 US 144 (1938).
49 268 US 510, 534-35 (1925) (recognizing a due process right of parents to send their children to the school of their choice).
50 262 US 390, 390-91 (1923) (recognizing a due process right of parents to choose to instruct their children in a foreign language).
51 Lawrence, 123 S Ct at 2476. For an example of a discussion of Meyer and Pierce as foundational fundamental rights cases, see Jed Rubenfeld, The Right of Privacy, 102 Harv L Rev 737, 785 (1989) (describing Meyer and Pierce as “the true progenitors of the privacy decisions”).
52 Lawrence, 123 S Ct at 2476.
which the Court famously first recognized a fundamental constitutional right of "privacy."\footnote{Griswold, 381 US at 483.}

From there, the majority proceeded to recount the gradual expansion of the boundaries of constitutional "privacy" over the decades that followed. Whereas Griswold had justified its recognition of a privacy right with reference to "the marriage relation and the protected space of the marital bedroom,"\footnote{Lawrence, 123 S Ct at 2477.} subsequent cases "confirmed that the reasoning of Griswold could not be confined to the protection of rights of married adults."\footnote{Id.} In Eisenstadt \textit{v} Baird,\footnote{405 US 438 (1972).} as Justice Kennedy recalled, the Court held, seven years after Griswold, that "[i]f the right of privacy means anything, it is the right of the \textit{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."\footnote{Lawrence, 123 S Ct at 2477, quoting Eisenstadt, 405 US at 453 (emphasis in Eisenstadt).} And the next year, in \textit{Roe v Wade},\footnote{410 US 113 (1973).} the Court had extended the privacy right to the context of abortion in recognizing "the right of a woman to make certain fundamental decisions affecting her destiny."\footnote{Lawrence, 123 S Ct at 2478.}

The Court in \textit{Lawrence} considered this recitation of the development of the privacy cases to be essential to its reevaluation of Bowers, a reevaluation that in turn it deemed necessary to resolving the privacy claim in \textit{Lawrence}.\footnote{See id at 2477 and 2482.} In launching that reconsideration, Justice Kennedy immediately criticized the way in which the Court in Bowers had framed Michael Hardwick's claim of a fundamental right. Conceiving of Hardwick's claim as asserting "a fundamental right [of] homosexuals to engage in sodomy,"\footnote{Bowers, 478 US at 190.} Justice Kennedy wrote, "discloses the [Bowers] Court's own failure to appreciate the extent of the liberty [interest] at stake."\footnote{Lawrence, 123 S Ct at 2478.} To explain the way in which Bowers had distorted the constitutional interest asserted in the case, Justice Kennedy drew a direct analogy to Griswold's recognition of privacy protection for "the marriage relation and the protected space of the
marital bedroom," reasoning: "To say that the issue in Bowers was simply the right to engage in certain sexual conduct de-
means the claim the individual put forward, just as it would de-
mean a married couple were it to be said marriage is simply
about the right to have sexual intercourse."64

In criticizing the crabbed manner in which Bowers had
framed the asserted liberty interest, Justice Kennedy's opinion
was implicitly engaging the long-running debate within the
Court over the appropriate level of specificity or generality to use
in evaluating assertions of fundamental rights.65 Justice White's
opinion for the Court in Bowers, Justice Kennedy suggested, had
effectively killed Hardwick's privacy claim at the threshold by
characterizing his interest in excessively narrow and specific
terms.66 A broader perspective would have led the Court properly
to see that Hardwick's claim—and Lawrence's—fit comfortably
within the prior cases, particularly in light of the fact that the
challenged law involved "the most private human conduct, sexual
behavior, and in the most private of places, the home."67

As Justice Scalia himself recognizes, this extended foray into
the Court's past privacy cases and Justice Kennedy's consider-
able effort to position Lawrence within that line of authority
would be entirely beside the point if Lawrence involved only an

63 Id at 2477.
64 Id at 2478.
65 See, for example, the debate among the justices in Michael H v Gerald D, 491 US
110 (1989). In a portion of Justice Scalia's plurality opinion joined only by Chief Justice
Rehnquist, Justice Scalia contended that in framing a claimed right and testing to see
whether a "right to engage in such conduct is 'deeply rooted in this Nation's history and
tradition,'" id at 127 n 6 (quoting Bowers, 478 US at 194), it is appropriate to "refer to the
most specific level at which a relevant tradition protecting, or denying protection to, the
asserted right can be identified." Michael H., 491 US at 127 n 6. Scalia expressly cited
Bowers as reflecting an appropriately specific orientation. Id. Justice Brennan, by con-
trast, answered that an approach to fundamental rights analysis that turned on "whether
the specific interest under consideration had been traditionally protected" was both
"novel" and "misguided." Id at 139-40 (Brennan dissenting). Finally, Justices O'Connor
and Kennedy, who otherwise joined Justice Scalia's plurality opinion, expressly refused to
join in his footnote endorsing a highly specific approach to rights framing. Instead, in a
separate opinion joined by Justice Kennedy, Justice O'Connor observed that the analytic
methodology urged by Justice Scalia "may be somewhat inconsistent with our past deci-
sions in this area." Id at 132 (O'Connor concurring in part), citing Griswold, 381 US 479,
and Eisenstadt, 405 US 438. "On occasion," she noted, "the Court has characterized rele-
vant traditions protecting asserted rights at levels of generality that might not be 'the
most specific level' available." Id. Consider Laurence H. Tribe and Michael C. Dorf, On
66 Lawrence, 123 S Ct at 2478.
67 Id.
application of the rational basis test. Similarly, Professor Barnett's thesis that Lawrence implicitly jettisoned fundamental rights analysis for a new substantive due process regime protective of "liberty" generally seems hard to square with the Court's labored effort to explain why the interest asserted by the petitioners fit within the ambit of "choices central to personal dignity and autonomy" which are given privileged status by the Due Process Clause. If the Constitution shifted the burden to the state to justify its action on the bare finding that the statute impinged upon "liberty," there was no need for a drawn-out exploration of the boundaries of constitutional privacy. Even Justice Scalia, after all, readily agreed that the sodomy law "undoubtedly" represented a deprivation of "liberty"; the real dispute was whether that liberty carried privileged rank. On this point, Lawrence justified the special measure of protection given to "choices central to personal dignity and autonomy," including those made by "[p]ersons in a homosexual relationship," by recounting Casey's characterization of these choices as "central to the liberty protected by the Fourteenth Amendment." By describing the liberty interests at issue in Lawrence and Casey as "central to" or "at the heart of" individual liberty, the Court suggested some differentiation among various aspects of liberty in the course of defining the quality of constitutional protection.

Indeed, if Lawrence considered it irrelevant to ascertain whether petitioners' liberty interest ranked as "fundamental," it is difficult to imagine why the Court felt impelled to criticize the methodology that Bowers employed in rejecting such a claim. Lawrence's readiness to weigh in on the most contentious unresolved controversies relating to fundamental rights analysis, including the proper framing of the right and the relevance of his-

68 See id at 2488 (Scalia dissenting) ("Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute 'furthers no legitimate state interest which can justify' its application to petitioners under rational-basis review"). See also Sunstein, working paper at 16 (cited in note 8) (noting that the Court's references to prior privacy cases "would be unintelligible if Lawrence were based solely on rational basis review").


70 Lawrence, 123 S Ct at 2488 (Scalia dissenting).

71 Id at 2481, quoting Casey, 505 US at 851.

72 Id at 2482.

73 Id at 2481, quoting Casey, 505 US at 851.

74 Lawrence, 123 S Ct at 2481, quoting Casey, 505 US at 851.
tory and tradition in validating a claim of right,\textsuperscript{75} suggests some continuing relevance of the enterprise.

Finally, although Professor Barnett emphasizes Lawrence's failure to characterize the petitioners' right as one of "privacy," that conclusion strikes me as implicit in the Court's opinion. The Court opened its opinion with the observation that "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places" and also "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."\textsuperscript{76} That is a tidy summation of the central themes in past cases recognizing a constitutional right of privacy, cribbing almost directly from Justice Blackmun's dissent in Bowers.\textsuperscript{77} Having set out the two foci of past privacy cases, Lawrence then states that "[t]he instant case involves liberty of the person both in its spatial and more transcendent dimensions."\textsuperscript{78}

After undertaking, in the main body of the opinion, to demonstrate how the claim in Lawrence follows ineluctably from the Court's prior cases protecting constitutional "privacy,"\textsuperscript{79} the Court quotes Justice Stevens's dissent in Bowers—a statement of principles which "should have been controlling in Bowers and should control here."\textsuperscript{80} The relevant portion of Stevens's opinion asserted "two propositions" central to his interpretation of the Fourteenth Amendment: first, that traditional morality is not a sufficient reason for intrusive government regulation; and second, citing Griswold, Eisenstadt, and Carey, that the Due Process Clause protects the liberty of married and unmarried persons

\textsuperscript{75} See id at 2478-80.
\textsuperscript{76} Id at 2475.
\textsuperscript{77} As Justice Blackmun recounted in his Bowers dissent:

In construing the right to privacy, the Court has proceeded along two somewhat distinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain decisions that are properly for the individual to make. Second, it has recognized a privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged.

\textsuperscript{78} Lawrence, 123 S Ct at 2475. Here, too, Justice Kennedy's opinion parallels Justice Blackmun's Bowers dissent. After similarly laying out the dual concerns of constitutional privacy, Justice Blackmun concluded: "The case before us implicates both the decisional and the spatial aspects of the right to privacy." Bowers, 478 US at 204.

\textsuperscript{79} See notes 48-63 and accompanying text.
\textsuperscript{80} Lawrence, 123 S Ct at 2483-84.
alike to make basic decisions "concerning the intimacies of their physical relationship[s]." In a subsequent paragraph of the Bowers dissent, not quoted in Lawrence, Justice Stevens acknowledged that the Court's past cases in this vein had described the individual interest as one of "privacy," though he thought it more accurate to describe the cases as resting on a "fundamental" liberty interest relating to individual autonomy. Regardless, however, of whether the word "liberty" is substituted for the word "privacy," there is little doubt that Justice Stevens in Bowers—and the Court in Lawrence—considered the private conduct at issue to implicate a "fundamental" aspect of individual liberty, one described in past cases as falling within the fundamental right of privacy. Indeed, it was on this basis that Lawrence expressly located the petitioners' claim within the "realm of personal liberty which the government may not enter," a phrase borrowed from earlier opinions defining the sphere of constitutional privacy.

II. PRECISELY WHAT PRIVACY RIGHT DID LAWRENCE RECOGNIZE?

Having made the case that Lawrence did in fact recognize a fundamental privacy right, it is next necessary to consider more precisely what that right is. This, in turn, requires confronting another fundamental ambiguity in the Court's opinion. On one account, Lawrence can be understood to articulate a grand and expansive right of individual autonomy. Even if the right does not encompass every aspect of human "liberty," it might at least be understood to extend to all matters of profound significance to the individual—let us call it a fundamental right of intimate self-realization. This reading of Lawrence would significantly reconceive the Court's approach to constitutional privacy; it would

81 Bowers, 478 US at 216 (Stevens dissenting). See Lawrence, 123 S Ct at 2483.
82 Bowers, 478 US at 217 (Stevens dissenting). Quoting one of his earlier opinions as a Circuit Judge, Justice Stevens observed that Griswold, Carey, Eisenstadt, and the Court's other so-called "privacy" cases in fact "do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny." Id, quoting Fitzgerald v Porter Memorial Hospital, 523 F2d 716, 719-20 (7th Cir 1975).
83 Lawrence, 123 S Ct at 2484, quoting Casey, 505 US at 847. See Moore v City of East Cleveland, 431 US 494, 499 (1977) ("A host of cases, tracing their lineage to Meyer v Nebraska, 262 US 390, 399-401 (1923), and Pierce v Society of Sisters, 268 US 510, 534-535 (1925), have consistently acknowledged a 'private realm of family life which the state cannot enter.'"), quoting Prince v Massachusetts, 321 US 158, 166 (1944); Smith v Organization of Foster Families for Equality and Reform, 431 US 816, 842 (1977).
also carry potentially large—and, in my view, regrettable—implications for broad expanses of family law. Yet it is also possible to read Lawrence more narrowly, in a way that would preserve the basic outlines of the Court’s preexisting family-privacy jurisprudence and avoid effecting a contractarian revolution in family law.

A. A Right of Intimate Self-Realization?

On its broadest and perhaps most natural reading, Lawrence spells a dramatic shift in the Court’s approach to constitutional privacy. Lawrence situates the petitioners’ right squarely within the line of prior cases recognizing fundamental rights of family privacy. In doing so, however, the Court can be understood to have fundamentally redefined the sort of intimacy valued by the Constitution.

Before Lawrence, constitutional protection for family privacy proceeded on two tracks. Persons who asserted an interest in an accepted conception of family life, such as traditional marriage, procreation, and childrearing, received substantial protection against state interference.84 Even if courts did not always apply strict scrutiny in such cases, they demanded some exceptional demonstration of public need for encroachments on established family prerogatives. On the other hand, persons who asserted an unconventional understanding of family life often received only trifling protection. As in Bowers, courts placed these claimants outside the protected bounds of “family” and, accordingly, sustained even draconian government incursions on a mere showing of rationality.85

Within this framework, of course, there has always been some inconsistency over what counts as an “accepted conception of family life.” Sometimes, the Court has looked to traditional notions of family. In Moore v City of East Cleveland,86 for example, Justice Powell asserted that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”87 And, so, Justice Powell looked to traditional social understand-

84 See notes 16-18 and accompanying text.
85 See Bowers, 478 US at 191 (finding “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other”). On the law’s treatment of foster families, see also notes 114-16 and accompanying text.
87 Moore, 431 US at 503 (plurality).
ings of "family" in concluding that a grandmother's interest in establishing a common household with her grandchildren warranted heightened constitutional protection: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."

Powell contrasted this arrangement with one involving persons unrelated by "blood, adoption, or marriage," an association which would not be considered "family" by traditional understandings and therefore would not share in the heightened constitutional protection reserved for family privacy. Following the same approach, the plurality in *Michael H v Gerald D* held that the relationship between a father and the child he sired in an extramarital relationship with a still-married woman was not entitled to heightened constitutional protection because it was not regarded "as a protected family unit under the historic practices of our society."

On other occasions, however, the Court has looked to modern consensus about the scope of family or valued intimacy. In *Loving v Virginia* and *Eisenstadt*, for example, the Court extended fundamental privacy protection to intimate pairings that could not claim traditional societal veneration. Similarly, in a series of cases protecting the familial interests of unwed fathers, the Court looked past traditional social condemnation to validate the constitutional claim to family privacy. In all events, though,

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88 Id at 504.
90 *Moore*, 431 US at 498 (distinguishing *Boraas*, in which the Court sustained, under rational basis review, a zoning law that prohibited households composed of unrelated individuals).
93 388 US 1, 12 (1967) (holding that an interracial couple had a fundamental right to marry).
94 *Eisenstadt*, 405 US at 453 (concluding that the "right of privacy" recognized in *Griswold* must be extended to unmarried partners as well).
95 See, for example, *Stanley v Illinois*, 405 US 645 (1972); *Caban v Mohammed*, 441
the key to substantial constitutional protection has been, in some manner, social validation—either historical or contemporary—of the private claim to family or family-like intimacy.

At least at face value, Lawrence might be seen to defy this premise. In ruling that Texas’s sodomy law violated John Lawrence’s right of privacy, the Court suggested that the Constitution embodies a “general rule . . . against attempts by the State, or a court, to define the meaning of [an intimate] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”96 Moreover, the Court specifically excluded tradition and popular notions of morality as grounds for regulating intimate conduct. According to the Court, neither “respect for the traditional family,” nor majoritarian “conceptions of right and acceptable behavior”97 can justify laws interfering with the self-defining choices of individuals respecting sexual intimacy.98

Lawrence therefore seems to reject the idea that an individual’s claim to protection for intimate conduct turns on some social validation of the asserted interest. Instead, it implies that private conceptions of intimate conduct are entitled to public deference unless the government can demonstrate some palpable injury to others. By this understanding, the “intimacy” protected by the Constitution is essentially open ended. It is not cabined by tradition or even by modern social consensus; rather, it is expandable with the imagination of the individual pursuit of self-realization, limited only by the duty to avoid injury to others.

Such a Millian conception of state power would represent a substantial departure from past assumptions in both constitutional and family law.99 Although family law has moved steadily and significantly in recent decades toward private ordering of family relationships, it has stopped well short of ceding primary power to private individuals to define the substance and bounda-

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96 Lawrence, 123 S Ct at 2478.
97 Id at 2480.
98 See id.
ries of “family” intimacy. And the courts have been still less receptive to private control over the meaning of family in the context of constitutional law. After all, if taken seriously, such an approach might require public deference to highly idiosyncratic personal preferences bearing no discernable connection with, or perhaps even antithetical to, widely shared understandings of family. Even in the context of the First Amendment’s express guarantee of religious liberty, the Supreme Court’s deference to individual conceptions of “religion” has not been total or limited solely by the concept of harmfulness. The notion of conferring heightened constitutional protection, without textual warrant, on individual conduct regarded as unworthy of that protection by both historical and contemporary social consensus raises serious and difficult questions of judicial legitimacy.

Obviously, the implications of reading Lawrence to extend heightened constitutional protection to all forms of intimate self-realization absent some demonstrable “injury to a person or abuse of an institution the law protects” depend heavily on what sort of “injury” or “abuse” will be sufficient to take the private conduct outside the scope of constitutional privilege. If harm is conceived broadly to include any public assessment of social detriment, then the scope of constitutional protection will not have been significantly enlarged—for society has deemed many intimate choices to be socially detrimental.

But Lawrence, like Mill, clearly did not have in mind such a broad conception of harm. As Lawrence briefly acknowledged, laws penalizing homosexual conduct often reflect “profound and

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101 See Meyer, 86 Minn L Rev at 804-10 (cited in note 100).

102 Compare Regan, Family Law at 135-36 (cited in note 100) (noting that Justice Brennan’s dissent in Michael H “assumed that the state must be agnostic” among competing conceptions of family life, even if one conception involved adultery and betrayal).

103 Meyer, 86 Minn L Rev at 812-16, 829-31 (cited in note 100); Wisconsin v Yoder, 406 US 205, 215-16 (1972) (suggesting that sincere and deeply felt “philosophical and personal” belief systems do not qualify for protection under the Free Exercise Clause unless genuinely “religious”).

104 Lawrence, 123 S Ct at 2478.

105 See Mill, On Liberty, at 100-01 (cited in note 99) (rejecting invocation of an expansive notion of “constructive injury” to justify state regulation of “conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself”).
deep convictions" that such conduct is corrosive of important social values and hurtful to the moral and psychological well-being of those who engage in such conduct.\textsuperscript{106} And yet \textit{Lawrence} was emphatic that \textit{moral harm} is not a cognizable "injury" in this context: "[T]he majority may [not] use the power of the State to enforce [its moral] views on the whole society through operation of the criminal law."\textsuperscript{107} Instead, it seems that the injury asserted must be more concrete, objectively verifiable, and less contestable.

My concern is that in defining the sort of "injury" contemplated by \textit{Lawrence}, courts may turn to the understanding of "harm" developed elsewhere in family-privacy caselaw. For example, many state courts have held that constitutional protection for the parent-child relationship requires the state to demonstrate that any intrusion upon parental liberty is necessary to prevent harm to the child.\textsuperscript{108} Though the Supreme Court expressly declined, in \textit{Troxel v Granville},\textsuperscript{109} to consider whether proof of harm to the child is constitutionally necessary to justify state action overriding parental preferences with respect to


\textsuperscript{107} \textit{Lawrence}, 123 S Ct at 2480.

\textsuperscript{108} See, for example, \textit{Sullivan v Sapp}, 866 S2d 28, 35-38 (Fla 2004) ([E]very statute considered by this Court involving visitation or custody of a child by a grandparent has been deemed unconstitutional because none included harm to the child as the required standard."); \textit{Griffin v Griffin}, 581 SE2d 899, 902-03 (Va App 2003) (finding that a court may not interfere with a parent's wishes concerning custody or visitation absent clear and convincing proof that the parent's wishes would inflict "actual harm" on the child); \textit{Hall v Bookout}, 87 SW3d 80, 86 (Tenn App 2002) (holding that a parent is constitutionally entitled to reclaim custody from a non-parent custodian in the absence of "clear and convincing evidence that the child will be exposed to substantial harm if placed in the custody of the biological parent"); \textit{Scott v Scott}, 80 SW3d 447, 451 (Ky App 2002) ("Absent a showing of harm to the child, there is no compelling state interest in intervention into the affairs of an autonomous family and any statute which authorizes such intervention violates the parents' liberty interest under the Fourteenth Amendment.") (citations omitted); \textit{In re Baby Girl L}, 51 P3d 544, 558 (Okla 2002) (finding that the Constitution would permit prospective adoptive parents to retain custody of child, as against a fit biological parent, only upon "a demonstration of a compelling state interest in the form of specific findings of existing or threatened harm to the child"). See also David D. Meyer, \textit{What Constitutional Law Can Learn from the ALI Principles of Family Dissolution}, 2001 BYU L Rev 1075, 1082-85 (describing ways in which state courts have demanded proof of harm to children before permitting state intervention curtailing parents' custodial or childrearing wishes).

\textsuperscript{109} 530 US 57 (2000).
childrearing," many courts since *Troxel* have moved to embrace just such a standard.

In applying the "harm" test for state intervention into the parent-child relationship, courts typically demand that the harm threatened to a child be "substantial" or even "severe." Courts regularly uphold, for example, the right of parents to wrest custody from longtime caregivers, and thereafter to sever contact with the child's former caregivers, even when the parent has little or no pre-existing emotional relationship with the child. While acknowledging that such upheavals may cause children to "grieve the loss of the emotional attachment," courts are often reluctant to conclude that such disruptions count as "harm" capable of overcoming a fundamental constitutional liberty. Given the courts' reluctance to find cognizable "harm"

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110 Id at 73 (declining to "consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation"). See also id at 94 (Kennedy dissenting) (rejecting the state supreme court's holding that the Constitution imposes "a harm to the child standard" to justify court-ordered visitation).

111 See, for example, *Sullivan*, 866 So2d at 35-38; *Roth v Weston*, 789 A2d 431 (Conn 2002); *Scott*, 80 SW3d at 447; *Rideout v Riedeau*, 761 A2d 291, 300-01 (Me 2000).

112 See *Beck v Beck*, 865 So2d 446, 449 (Ala Civ App 2003); *Roth*, 789 A2d at 447; *Hall*, 87 SW3d at 85-86; *In re Askew*, 993 SW2d 1, 3 (Tenn 1999).

113 See *In re Custody of Smith*, 969 P2d 21, 30 (Wash 1998), affd on other grounds as *Troxel v Granville*, 530 US 57 (2000).

114 See *Meyer*, 41 Ariz L Rev at 753-56 and n 5 (cited in note 95).

115 *Griffin*, 581 SE2d at 903. In *Griffin*, a mother had led her husband to believe that he was the father of a child born during the marriage. Id at 900. Consequently, the "husband treated the child as his own and participated in his early development." Id. Even when paternity tests, ordered in connection with a later dissolution proceeding, established that the husband was not the father of the boy, he continued to treat the child as his own, and the boy referred to him as "Daddy." Id at 901. When the mother later sought to terminate all contact between the boy and the only father he had known (the biological father disavowed any interest in an emotional relationship with the child), the court held that she was constitutionally entitled to do so:

The evidence in this case, at its best, goes no further than supporting the inference that the child would grieve the loss of the emotional attachment he has for his mother's estranged husband and "could be" emotionally hurt if visitation with him ended. While that might satisfy a trial court's "subjective notions of 'best interests of the child,'" it falls far short of satisfying by clear and convincing evidence the actual-harm test.

*Griffin*, 581 SE2d at 903 (citation omitted).

116 For example, in the prominent Baby Richard case, when the Illinois Supreme Court ordered an immediate transfer of custody of a four-year-old boy from the family who had raised him since birth to the biological father he had never known, Justice James Heiple expressed confidence that the boy's emotional trauma would "work itself out in the fullness of time." *In re Petition of Doe*, 638 NE2d 181, 190 (Ill 1994) (Heiple concurring). In another case, a Virginia court held that a father, united with his four-
in these contexts, there might be reason to expect courts to give a similarly narrow cast to the “injury” exception suggested by Lawrence.\textsuperscript{117}

In that event, the scope of fundamental “liberty” relating to family and other intimacy would be significantly enlarged. For one thing, the bogeymen of Justice Scalia’s dissent, including polygamy and incest, would not obviously fall outside the scope of constitutional protection.\textsuperscript{118} Indeed, a Utah man recently imprisoned for bigamy is seeking to overturn his conviction on the authority of Lawrence.\textsuperscript{119} Of course, to the extent that polygamous or incestuous relationships involve coercion or sexual exploita-

\textsuperscript{117} Some scholars suggest that courts systematically discount the interests of children in assessing the constitutional rights of parents. See, for example, Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents’ Rights, 14 Cardozo L Rev 1747, 1809-10 (1993) (analyzing cases favoring the claims of genetic over “gestational” parents and concluding that, “[a]lthough giving lip service to children’s interests, they fail to reflect children’s experience of reality”); Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children’s Perspectives and the Law, 36 Ariz L Rev 11 (1994). John Stuart Mill observed the same tendency in the public attitudes of his own day: “It is in the case of children, that misapplied notions of liberty are a real obstacle to the fulfillment by the State of its duties. One would almost think that a man’s children were supposed to be literally, and not metaphorically, a part of himself, so jealous is opinion of the smallest interference of law with his absolute and exclusive control over them.” Mill, On Liberty, at 128 (cited in note 99).

\textsuperscript{118} Two months before Lawrence was handed down, U.S. Senator Rick Santorum ignited a brief firestorm of public controversy when he remarked, “If the Supreme Court says that you have the right to consensual sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery.” See Sean Loughlin, Santorum Defends Comments on Homosexuality, available online at \url{http://www.cnn.com/2003/ALLPOLITICS/04/23/santorum.gays/index.html} (visited May 1, 2004). His comments were widely denounced as insulting and “completely out of bounds,” and sparked calls by several prominent organizations, including the Democratic Senatorial Campaign Committee, that Santorum give up his Senate leadership post. Id; Associated Press Online, Dems Call for Santorum to Resign Post, 2003 WL 19161369 (Apr 22, 2003). In truth, however, the line-drawing problem he suggested is not absurd.

\textsuperscript{119} See Associated Press, Polygamist Invokes Ruling on Gay Sex, available online at \url{http://www.cnn.com/2003/US/West/12/02/prosecuting.polygamy.ap} (visited May 1, 2004).
tion of children, they can plainly be prohibited as injurious. But the case for the harmfulness of polygamous and incestuous relationships among consenting adults would be more difficult. Recent scientific evidence, for example, suggests that the genetic risks from childbearing among first cousins are actually quite small. Legal prohibitions against these relationships are, of course, supported by cultural taboos and deeply felt moral objections, even with respect to consensual polygamous or incestuous relationships. This tradition of popular revulsion has in the past provided a complete and sufficient basis for sustaining incest and polygamy prohibitions against constitutional attack. But Lawrence appears to take a different view, asserting that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Strict incest taboos may be useful in discouraging any opening of the door to the sexualization of family relationships, but it is not certain whether this construction of social harm would be considered too attenuated to constitute "injury to a person" in the sense contemplated by Lawrence.

120 See State v Freeman, 801 NE2d 906, 910 (Ohio App 2003) (distinguishing Lawrence and upholding a conviction for incest where a daughter had filed a police report asserting that intercourse with her father was not consensual); State v Clark, 588 SE2d 66, 67-68 (NC App 2003) (distinguishing Lawrence and upholding a conviction for statutory rape); United States v Peterson, 294 F Supp 2d 797, 803 (D SC 2003) (distinguishing Lawrence and upholding a conviction for possession of child pornography).

121 See Robin L. Bennett et al, Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors, 11 J of Genetic Counseling 97 (2002).

122 See Reynolds v United States, 98 US 145 (1878) (upholding ban on polygamy); Potter v Murray City, 760 F2d 1065 (10th Cir 1985) (same); Smith v State, 6 SW3d 512 (Tenn Crim App 1999) (upholding criminal prohibition of incest); In re Tiffany Nicole M, 571 NW2d 872 (Wis App 1997) (upholding termination of parental rights based on parents' incestuous relationship).

123 Lawrence, 123 S Ct at 2483, quoting Bowers, 478 US at 216 (Stevens dissenting).

124 Lawrence, 123 S Ct at 2478. An Ohio court, after Lawrence, recently accepted that "protecting the family unit" is a legitimate state interest supporting criminal incest prohibitions, although it did so in the context of a case involving an allegation of non-consensual intercourse between a father and daughter. See Freeman, 801 NE2d at 909. By contrast, twenty-five years before Lawrence, the Colorado Supreme Court rejected a "family harmony" justification for prohibitions of incestuous marriage as irrational, at least as applied to marriage among adoptive siblings. See Israel v Allen, 577 P2d 762, 763 (Colo 1978).
More generally, and more significantly, family law’s “channeling” function might be imperiled even in conventional contexts by an expansive understanding of Lawrence as recognizing a fundamental right of intimate self-realization. One of the vital functions of family law has been not simply the facilitation of private ordering, but the idealization and encouragement of certain modes of intimate interaction thought to be specially beneficial to society and to individuals. The channeling function reflects a belief that law’s purpose is not simply the passive accommodation of private behavior. Rather, law may shape behavior in complex ways through its affirmation or condemnation of various types of conduct.

The very point of this function, then, is to exert pressure on individual choice, to steer the private construction of intimacy toward models reflective of public norms. In doing so, the state in the end may actually enhance individual freedom, by creating conditions under which individuals may construct intimate lives with genuinely transformative potential. As Milton Regan has argued, family law, through the status-based imposition of roles and obligations, can ultimately lead individuals to a richer and more satisfying intimate life by safeguarding emotional vulnerability and by “constitut[ing] a social self, whose mooring in communal norms enhances a sense of stable identity that is the prerequisite for intimate commitment.”

Yet, if the state were truly required to adopt a position of moral neutrality toward private intimate conduct absent some demonstrable social injury, it is not clear how far the state could go to promote normative models of family organization and conduct. The imposition of obligations on the basis of family status, and the identification of those who hold that status, is of course, in Lawrence’s words, an “attempt[] by the State . . . to define the meaning of [an intimate] relationship [and] to set its boundaries.” An expansive right to control the composition of one’s family—and to set one’s own terms for family relations—presumably includes the power to disavow unwanted entangle-

127 Regan, Family Law at 136 (cited in note 100).
128 Id at 117.
130 Lawrence, 123 S Ct at 2478.
ments. As Martha Minow has cogently observed, "[t]he danger of an expansive, functional voluntarist view of family—in which people can pick and choose what kinds of family ties that they want to have—is that people will choose to walk out when it gets tough and to avoid responsibilities when it is no longer fun."\(^{131}\) This conviction has led many to recognize that even as the concept of "family" expands to encompass a broader diversity of forms, it must continue to reflect certain constitutive moral values.\(^{132}\)

Indeed, an understanding that excluded any role for public morality would be deeply problematic. First, there is arguably a certain incoherence in understanding *Lawrence* as having embraced an autonomy principle founded on the view that the state is forbidden to endorse one conception of morality over another. Such a decision would itself constitute state endorsement of a particular conception of morality since, as Carlos Ball has observed, "the paradigmatic right to privacy in matters of sexual intimacy . . . is most convincingly grounded on a moral conception of the potential for human flourishing that inheres in the exercise of self-determination or autonomy."\(^{133}\)

Second, mandating unqualified deference to individual conceptions of desirable intimacy or family life might imperil the very idea of family. The triumph of a liberalism in which each individual is unfettered in the pursuit of self-gratification through chosen relationships would ultimately frustrate what William Eskridge has called the "need for human inter-connection that impels people to form families in the first place."\(^{134}\) As Regan explains, the withdrawal of the state from the enforcement of family obligation in the service of individual free-

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Family status "provides a distinctive form within the social world that we take as embodying abstract concepts such as altruism and commitment." Society's understanding of family form may change over time, he notes, but

[w]hat is important . . . is that there be some distinctive social form that is seen as embodying th[el]se attitudes. A world in which this is absent, a world characterized by the individually crafted "close relationship," is one in which the culture provides negligible support for those who wish to live out a commitment to an intimate relationship with another. This is not to say that individuals cannot fashion such relationships. The heightened sense of their contingency, however, combined with the ethos of modern consumer culture, may make commitment difficult to sustain. The constitution of family through status may be a way of acknowledging "our collective demand that the social order restrict the overwhelming universe of interpersonal possibility, and that it present this restriction to us disguised as 'nature.'"

Although there is surely a widely shared conviction that the definition and enforcement of public expectations concerning the content and conduct of family life is both individually and collectively enriching, it is not a foregone conclusion that this sense would be deemed sufficient to curtail an all-encompassing fundamental right of intimate choice. In the context of childrearing, for example, courts have been emphatic that the failure of parents to make welfare-maximizing choices for their children does not constitute "harm" sufficient to curtail parental liberty; the Constitution is understood, in other words, to guarantee parents the freedom to make sub-optimal choices, so long as those choices do not inflict palpable and grievous injury. It is not inconceiv-
able, therefore, that Lawrence might be construed to recognize a similar liberty of individuals with respect to a broader range of intimate choices and to disable the state from acting to constrain individual choice in order to promote optimal conditions for the development of intimacy.

In the past, it has seemed to me that the Supreme Court defined “family” too narrowly for constitutional purposes, often by focusing too rigidly on tradition or on bright-line categories like marriage and parenthood. Now, on a reading of Lawrence that would subsume heightened protection for family within a broader right of intimate self-realization, I find myself worrying that the Court might be tilting too far in the other direction. The danger is that effectively expanding the “family” protected by the Constitution to include all conceptions of intimacy that cannot be deemed “harmful” will ultimately sap family of its distinctive value and vitality. If society is disabled from channeling intimate conduct into relationships reflective of durable commitment, the fulfillment of dependency, and other basic aspirational values commonly associated with family, human interaction may drift toward more self-centered, unstable, and transient forms. And, as Mary Ann Glendon pointed out a quarter-century ago when she first observed a creeping reorientation of social organization away from family, alternative outlets for human connection are likely to prove pale substitutes, both for the individual and for society.

B. Lawrence and the Principle of Desuetude

Lawrence’s potentially breathtaking implications for constitutional theory and family law immediately prompted some courts and scholars to search for alternative constructions capable of wrestling the Court’s holding into more manageable proportions. Among the most promising is the theory offered by Cass shown that the visitation is necessary to prevent harm to the child); Scott, 80 SW3d at 450 (emphasizing that “mere improvement in [the] quality of [a child’s] life” is not a sufficient basis for state interference). See also Troxel, 530 US at 96 (Kennedy dissenting) (“While it might be argued as an abstract matter that in some sense the child is always harmed if his or her best interests are not considered, the law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child.”).


Sunstein in which he proposes “the idea of desuetude [as] a
method for understanding, disciplining, and narrowing what the
Court did” in Lawrence.¹⁴¹ According to this theory, the Court’s
intervention in Lawrence depended upon a combination of two
essential facts: first, the case involved a criminal statute that
was “hardly ever enforced, creat[ing] problems of both unpredict-
ability and arbitrariness”;¹⁴² and, second, the statute’s “infre-
frequent enforcement stemmed from the particular fact that the
moral claim that underlay [the interference] could no longer
claim public support.”¹⁴³ By this view, the criminal prosecution in
Lawrence was unconstitutional because it amounted to a spring-
ing trap that shocked not only the two men arrested but the en-
tire people of Texas. As Sunstein states, “[t]he Court’s refusal to
permit criminal convictions, under these circumstances, is not
radically inconsistent with democratic ideals. In a sense, it helps
to vindicate them.”¹⁴⁴

An advantage of this approach, Sunstein suggests, is its
“comparative modesty.” It would permit a court to extend consti-
tutional protection narrowly in step with specific public convic-
tions—for example, concluding that criminal penalties for pri-
ivate, consensual adult sexual conduct have become morally un-
supportable—without pushing an abstract right to the outer lim-
its of its logic.¹⁴⁵ By this view, Lawrence’s invalidation of criminal
 sodomy laws would not necessarily require a court to strike down
barriers to same-sex marriage, or even subject them to a height-
ened burden of justification, because public consensus does not
yet regard such laws as similarly anachronistic.¹⁴⁶

Sunstein’s focus on desuetude provides a plausible, and in
some ways very attractive, theory for limiting Lawrence. Indeed,
the outcome of a recent Arizona case seems consistent with this
approach, although it lacks Sunstein’s theoretical sophistication.

¹⁴¹ See Sunstein, What Did Lawrence Hold? at 6 (cited in note 8).
¹⁴² Id at 21.
¹⁴³ Id at 24.
¹⁴⁴ Id at 23.
¹⁴⁵ Sunstein, What Did Lawrence Hold? at 22-23 (cited in note 8).
¹⁴⁶ See id at 33. As William Eskridge has observed, “even as our national political
equilibrium in favor of jailing gay people has collapsed, there is still a consensus against
recognizing same-sex unions.” William N. Eskridge, Jr., Destabilizing Due Process and
Evolutive Equal Protection, 47 UCLA L Rev 1183, 1217 (2000). Recent public opinion polls
confirm this assessment. See Katharine Q. Seelye and Janet Elder, Strong Support Is
Found for Ban on Gay Marriage, NY Times A1 (Dec 21, 2003); Ken Fireman, Poll: Gay
Marriage Polarizes Public, Newsday A18 (Nov 20, 2003).
In *Standhardt v Superior Court*, an Arizona appellate court sustained that state's ban on same-sex marriage, distinguishing *Lawrence* on the straightforward ground that "society's evolving acceptance of same-sex unions" had certainly not gone so far as to embrace marriage.

I have some skepticism, however, that Sunstein's focus on desuetude fully credits *Lawrence*’s description of the liberty interest at stake. First, as Sunstein himself readily acknowledges, there is a good deal of language in the Court's opinion that seems to cast doubt on *any* public condemnation of homosexuality, not solely state action rooted in the surprise application of a rarely enforced criminal prohibition. The Court, for instance, implies that the Constitution is offended by any state action that serves as "an invitation to subject homosexual persons to discrimination . . . in the public and in the private spheres." Second, and more to the point, *Lawrence* seems to assume that the constitutional defect it recognizes would be present *even if* the people of Texas had consistently and vigorously enforced the state's sodomy law. After acknowledging the existence of "profound and deep convictions" on the part of many in society that homosexuality is immoral, the Court states flatly that "the majority may [not] use the power of the State to enforce these views on the whole society through operation of the criminal law." Nothing in the Court's analysis suggested that "the majority" lost its power to condemn solely because of prolonged disuse.

Certainly, none of these observations refutes Sunstein's thesis. As he himself emphasizes, the Court's opinion is sufficiently opaque that no single understanding of the decision is untroubled by seemingly contradictory language. Yet, I believe there is another way of understanding the decision that may fulfill Sun-
stein's goal of cabining Lawrence's due process holding while providing a better fit with its language and themes.

C. Lawrence's Family Values

In this Part, I wish to advance yet another possible understanding of Lawrence. This reading locates the trigger for constitutional protection not generally in sexuality or the individual quest for self-realization, nor narrowly in the state's longtime failure to enforce a relevant criminal prohibition, but rather in the private interest in an intimate relationship sharing in the essential goodness of family.

Understanding Lawrence as a "family privacy" case would help to integrate the decision more easily into existing substantive due process doctrine and avoid unintended upheavals for constitutional theory and family law. At the same time, this approach admittedly has difficulties of its own, including portions of the Court's opinion that seem to assign constitutional value to individual freedom well beyond the confines of family life.

This seems to me the essential puzzle of Lawrence. Parts of Justice Kennedy's opinion, including its dramatic and thematic opening paragraph, celebrate "an autonomy of self" and the "dignity of the person" in pursuit of personal meaning. In this, the opinion seems to complete the turn toward an individualistic conception of constitutional privacy begun with Eisenstadt. As Lawrence itself recounts, Eisenstadt reoriented the locus of privacy protection from the family collectively—the parent-child bond in Meyer and Pierce or the marital couple in Griswold—to its individual constituents:

It is true that in Griswold the right of privacy in question inhered in the martial relationship. . . . 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

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152 Id at 2475, 2481 (discussing constitutional protection for "the autonomy of the person").

153 Id at 2482, 2478 ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

a person as the decision whether to bear or beget a child.\textsuperscript{155}

This reorientation is potentially significant for at least two reasons. First, it invites the possibility that constitutional privacy will be invoked by one family member against another in intrafamily disputes.\textsuperscript{156} Second, it opens the door to the possibility that privacy protection might extend beyond the family to other individual interests of great personal import.\textsuperscript{157} \textit{Lawrence} seems to lend support to this idea when it recalls approvingly \textit{Casey}'s articulation of the ultimate value of privacy protection as individual autonomy in making life-defining choices.\textsuperscript{158}

Yet, elsewhere, \textit{Lawrence} takes considerable care to tie constitutional protection to the individual's interest in forming an essentially honorable and family-like relationship. In castigating \textit{Bowers} for having characterized the privacy interest at stake as one of "homosexual sodomy," \textit{Lawrence} insisted that Justice White's opinion in \textit{Bowers} had failed to appreciate the full import of the private interests. At stake was not merely the individual's ability to engage in "a particular sexual act," but something "more far-reaching"—namely, the ability of persons to form "a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."\textsuperscript{159}

In explaining why this "personal relationship" was entitled to heightened constitutional protection, the Court looked to its promise of durable, emotional, \textit{family-like} intimacy. The Constitution, the Court suggested, protects sexual conduct not as an end in itself, but because "[sexual] conduct can be but one element in a personal bond that is more enduring."\textsuperscript{160} Indeed, Justice Kennedy's opinion expressly analogized the bonds of same-sex couples to the marital bond exalted in \textit{Griswold}: "To say that the issue in \textit{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 mar-

\textsuperscript{155} \textit{Lawrence}, 123 S Ct at 2477, quoting \textit{Eisenstadt}, 405 US at 453.
\textsuperscript{156} See Meyer, 48 UCLA L Rev at 1176-80 (cited in note 139).
\textsuperscript{157} See Regan, \textit{Family Law} at 135 (cited in note 100) (discussing difference between a "relational approach [to family privacy] . . . and a more individualistic analysis").
\textsuperscript{158} See \textit{Lawrence}, 123 S Ct at 2481.
\textsuperscript{159} Id at 2478.
\textsuperscript{160} Id.
riage is simply about the right to have sexual intercourse."\textsuperscript{161} This analogy suggests that the ultimate object of privacy protection in \textit{Lawrence}, as in \textit{Griswold}, is not sexual gratification, but the family context within which sexuality finds higher expression.

Significantly, the Court buttressed the linkage between same-sex intimacy and more traditional family relations by pointing to "an emerging awareness" in society of the legitimacy of gay and lesbian relationships.\textsuperscript{162} This emerging consensus, evident in the rapid retreat of laws policing private sexuality in the United States and abroad, accepted that—even if society was not ready to grant full and equal status through marriage—gay and lesbian partners are at least "entitled to respect for their private lives."\textsuperscript{163}

Even though the Court was not explicit in linking this "emerging recognition"\textsuperscript{164} to the family status of same-sex relationships—the public consensus identified by the Court might, for instance, be construed more narrowly to recognize only the illegitimacy of incarcerating people for consensual sex—the linkage is suggested clearly enough by the context in which the Court's discussion appears. First, the Court recalled \textit{Casey}'s affirmation of "constitutional protection [for] personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"\textsuperscript{165} and concluded that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."\textsuperscript{166} Second, the Court's insistence that majoritarian preferences for "the traditional family" cannot be imposed on the whole society implies that the non-conforming relationships at issue are, indeed, \textit{families}, albeit non-traditional ones.\textsuperscript{167} Likewise, the Court's care at the conclusion of its opinion to reserve the question of whether the government must give "formal recognition" to same-sex relationships implicitly acknowledges the claim to family status.\textsuperscript{168}

\begin{thebibliography}{9}
\bibitem{161} Id.
\bibitem{162} \textit{Lawrence}, 123 S Ct at 2480.
\bibitem{163} See id at 2484.
\bibitem{164} Id at 2480.
\bibitem{165} Id at 2481.
\bibitem{166} \textit{Lawrence}, 123 S Ct at 2482.
\bibitem{167} See id at 2480 (emphasis added).
\bibitem{168} See id at 2484.
\end{thebibliography}
Understanding *Lawrence* as resting on a recognition of the familial potential of same-sex relationships is made even more plausible by an appreciation of the recent trajectory of the Court’s family-privacy decisions. For some decades, the Court has acknowledged that “the importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association.” In the 1970s and 1980s, this recognition led the Court to extend privacy protection beyond the traditional confines of the marital family to the developed bonds between unwed fathers and their children, and to reserve at least the possibility that privacy protection might extend as well to emotional ties within foster families.

By the conclusion of the 1990s, the Court expressed even more acute awareness that “the intimacy of daily association” took place in an ever-expanding diversity of family forms. In *Troxel*, the Court’s most recent family-privacy case prior to *Lawrence*, Justice O’Connor’s plurality opinion began by acknowledging that “[t]he demographic changes of the past century make it difficult to speak of an average American family,” and that “[t]he composition of families varies greatly from household to household.” Writing separately, Justice Stevens also suggested that constitutional protection for family must take account of “[t]he almost infinite variety of family relationships that pervade our ever-changing society.” And finally, Justice Kennedy likewise agreed that constitutional privacy cannot be modeled on an assumption of the universality of “the conventional nuclear family,” because “[f]or many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood.”

These statements were made to explain why the constitutional rights of traditional parents should be qualified to preserve competing familial interests, rather than directly for the purpose of extending constitutional protection to non-

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171 *Troxel*, 530 US at 63 (plurality).

172 Id at 90 (Stevens dissenting).

173 Id at 98 (Kennedy dissenting).
conventional family ties. But they demonstrate the Justices’ considerable sensitivity to the growing pluralism of modern family life, and illuminate Lawrence’s insistence that “the traditional family” may not serve as the only acceptable conception of family life. Given this context, and the Court’s assertion in Lawrence that “[p]ersons in a homosexual relationship” are entitled to autonomy in decisionmaking about the construction of their “family relationships,” it is eminently plausible to read Lawrence as premising constitutional protection on public recognition that homosexual intimacy may find expression within relationships that share in the essential values of family.

It is true, of course, that the liaisons at issue in Lawrence and Bowers do not appear to have taken place within the context of durable, family-like relationships. To the contrary, it appears that both were transitory encounters. This fact has led John Garvey, for example, to ridicule the disjunction between the lofty rhetoric of Justice Blackmun’s Bowers dissent—attributing constitutional protection to, in Garvey’s words, “a kind of closeness, caring, and sharing typical of people who are in love”—and the less majestic facts of the case.

But the Court’s willingness to protect sexual conduct outside the context of family life does not make ridiculous an understanding of Lawrence that traces constitutional protection to respect for family. The Court may well have appreciated the difficulty of articulating and applying a rule that would confine constitutional protection to sexual conduct in family-like intimate relationships. Obviously, marriage could not serve as a bright line marker after Eisenstadt. And any effort to differentiate case-

175 See Lawrence, 123 S Ct at 2482.
176 Id.
177 For factual background on Bowers, see Joyce Murdoch and Deb Price, Courting Justice 278-79 (Basic Books 2001).
178 Garvey, What Are Freedoms For? at 24-25 (cited in note 132). Garvey writes:

Hardwick’s sexual partner was a one-night stand—a schoolteacher from North Carolina who pleaded guilty to reduced charges and left town. The courts showed little interest in him. Hardwick’s complaint was equally casual. It merely declared that Hardwick was “a practicing homosexual who regularly engages in private homosexual acts and will do so in the future.” The acts of sodomy were the focus; the identity of the other actor didn’t matter.

Id.
by-case—to determine, for instance, whether a particular intimate relationship was sufficiently close to warrant constitutional protection—would lead courts to make deeply intrusive inquiries that might be constitutionally troubling in their own right. Just as the Court in Griswold recoiled at thought of “police . . . search[ing] the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives,” the Court in Lawrence may have been alert to the importance of drawing the line at a place sure to encompass all constitutionally valued intimacies without requiring meddlesome factual inquiries.

Indeed, it might be possible to draw a rough analogy to the way in which the Court drew the boundaries of First Amendment protection in New York Times v Sullivan. In that case, the Court construed First Amendment protection very broadly in defamation actions, immunizing even false statements directed against public officials unless malice could be proven, in order to create “breathing space” for the development of high-value speech. The rationale was that “while false statements may be unprotected for their own sake, ‘[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.’” So, too, the Court’s extension of privacy in Lawrence might be necessary to allow a protected space within which truly valuable intimacy might develop.

III. THE IMPLICATIONS OF A FAMILY-CENTERED UNDERSTANDING OF LAWRENCE

In the preceding Part, I suggested that it is plausible to read Lawrence as having grounded constitutional privacy protection in the facilitation of human relationships sharing in the core values that, by modern social consensus, define our understanding of family. In this Part, I consider the implications of such an understanding and suggest its potential advantages.

First, in contrast to the broader reading of Lawrence as recognizing an individual right of intimate self-definition, this understanding would leave greater room for public moral judgment about the nature of family and other valued intimacy; indeed, the

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179 Griswold, 381 US at 485.
claim to constitutional protection would rest directly upon such a judgment. In my view, this is a significant advantage of a family-centered understanding. An open-ended commitment to individual autonomy in the intimate realm would cast doubt on a broad range of measures intended to foster widely shared values relating to family life, such as selflessness, durable commitment, and the fulfillment of dependency.\footnote{See notes 126-40 and accompanying text.} The family-centered approach, which would look to these very values to identify the boundaries of privacy protection, would not.\footnote{See Krause and Meyer, 50 Am J Comp L at 116-20 (cited in note 132).}

At the same time, in contrast to Professor Sunstein’s desuetude-centered theory, this understanding of Lawrence would be more likely to require that laws prohibiting same-sex marriage be subjected to some form of heightened scrutiny. By the approach advocated here, the threshold determination of whether such laws would trigger heightened scrutiny would turn not on whether the laws were actively enforced, but on a judgment about whether the relationship of same-sex couples desiring marriage is characterized by the essential elements that define the moral good of family. Carlos Ball, among others, has made a sophisticated and powerful case that it is.\footnote{See Ball, The Morality of Gay Rights at 1-273 (cited in note 131). See Regan, Family Law at 122 (cited in note 100) (noting that “[a]n argument for same-sex marriage based on the ethic of relational obligation offers some advantages over an argument based on a right to autonomy or choice in intimate settings”); William N. Eskridge, Jr., The Case for Same-Sex Marriage at 1-13 (Free Press 1996) (arguing that same-sex marriage will benefit gays and lesbians because they will be integrated into society, and will benefit straights because it will reduce homophobia and foster family values).} But that alone is not enough. For constitutional purposes, under the view of Lawrence advanced here, this crucial moral judgment must be traceable not merely to the judges who announce it, but ultimately to modern social consensus.\footnote{Professor Ball, I should hasten to add, expressly acknowledged that there is a difference “between legal/constitutional arguments for gay rights positions on the one hand and justifications for those positions that are grounded on moral and political philosophy on the other,” and noted that the focus of his argument was on the latter. See Ball, The Morality of Gay Rights at 5 (cited in note 132).}

I am convinced that there is indeed “an emerging awareness” in society that committed gay and lesbian partners and their children share in the essential values that define family. Although there remains powerful (and, since Lawrence, perhaps even hardening) public opposition to the idea of same-sex marriage, there appears to be wide acceptance of the idea that per-
sons in stable, committed same-sex relationships are living as families. Laws or policies extending employment-related or other benefits normally reserved for family members to “domestic partners,” including same-sex partners, now number more than 7,000 and are proliferating at the rate of three per day. More than 140 newspapers, including The New York Times, Boston Globe, and other flagships of mainstream journalism, publish announcements of same-sex commitment ceremonies alongside those of traditional weddings and engagements. News reports regularly chronicle the growing visibility and acceptance of “gay families,” even in ostensibly conservative, Bible-belt suburbs. More significantly, the emerging consensus acknowledging the family status of same-sex partnerships is implicit in polling data and referenda showing a willingness of many to accept compromise measures such as those embraced by California, Hawaii, and Vermont, conferring most of the public benefits of marriage on committed same-sex couples while withholding the formal status of marriage. It is also reflected, finally, in a host of so-

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187 According to a report by the Human Rights Campaign, as of December 31, 2003, 7,149 private companies, universities, colleges, and governments provide benefits to the domestic partners of their employees in the same manner provided to spouses and other family members; this number includes 175 cities and counties and 40 percent of corporations listed in the Fortune 500. See Human Rights Campaign Foundation, The State of the Workplace for Lesbian, Gay, Bisexual, and Transgender Americans 2003 5-6 (2004), available online at <http://www.hrc.org/Content/ContentGroups/PublicationsIState_of_the_Workplace/SOTW_03.pdf> (visited May 24, 2004). Indeed, domestic partnership laws have become common enough that they have generated litigation based on claims of conflict-preemption. See S.D. Myers, Inc v City and County of San Francisco, 336 F3d 1174 (9th Cir 2003) (upholding San Francisco ordinance requiring city contractors to provide benefits to employees’ partners against claim that ordinance was preempted by California state law creating a domestic-partner registry). For discussions of the rise and scope of domestic partnership laws, see, for example, William C. Duncan, Domestic Partnership Laws in the United States: A Review and Critique, 2001 BYU L Rev 961; Chad Byse, Comment, Pulling the Lilly from the Pond? Minneapolis Wades Into Domestic Partner Benefits Legislation Once Again, 30 Wm Mitchell L Rev 931 (2004).

188 See James M. Donovan, Same-Sex Union Announcements: Whether Newspapers Must Publish Them, and Why We Should Care, 68 Brooklyn L Rev 721, 723-24 and n 6 (2003).


190 See, for example, Richard Morin and Claudia Deane, Poll Finds Growing Support for Gay Civil Unions, Wash Post A6 (Mar 10, 2004); Associated Press, Poll: Americans Support Rights for Gay Partners, Portland Press Herald 7A (June 1, 2000) (reporting that an AP poll found that while most Americans oppose same-sex marriage, “just as many say gay partners should have some legal rights of a married couple—such as inheritance, Social Security benefits and health insurance”); Meyer, 86 Minn L Rev at 799-800 and n
cial, political, and legal changes legitimating and facilitating the rearing of children in households headed by same-sex partners. ¹⁹¹ Not only have states moved broadly to permit homosexuals to adopt children, but in roughly half the states, courts have permitted same-sex partners to join together in “second-parent” adoptions.¹⁹² Even in the absence of a formal adoption, courts are increasingly willing to treat same-sex partners of biological parents as “de facto parents” for purposes of assessing their entitlement to custody or visitation and their liability for child support.¹⁹³ Courts have likewise cleared the path for families headed by same-sex partners to adopt a common surname, turning aside the suggestion that public policy would be offended by the official declaration of family identity.¹⁹⁴ Because modern social consensus acknowledges that same-sex relationships may share in the core values that define family, any state action that significantly intrudes upon that constitutionally valued intimacy should be subject to heightened review. This would not mean necessarily that state laws restricting marriage to opposite-sex couples would be unsustainable. It would mean only that the state would have to offer a strong justification for such an intrusion on family

³⁵ (cited in note 100) (reviewing data).

¹⁹¹ See Ryiah Lilith, Caring for the Ten Percent’s 2.4: Lesbian and Gay Parents’ Access to Parental Benefits, 16 Wis Women’s L J 125 (2001).

¹⁹² See Gilgoff, The Rise of the Gay Family, at 40-41 (cited in note 189); Jane Schacter, Constructing Families in a Democracy: Courts, Legislatures, and Second-Parent Adoptions, 75 Chi Kent L Rev 933, 934 (2000) (“In the last several years, courts in at least twenty-one states have authorized [second-parent] adoption, and appellate courts in five states and the District of Columbia have affirmed the second-parent adoption theory.”). For a reflection of how much progress that represents in a short period, compare Nancy Polikoff, This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Georgetown L J 459 (1990). Although the trend is clear and dramatic, it is not without exceptions. In 2004, a federal appellate court upheld the constitutionality of a Florida statute prohibiting homosexuals from adopting, see Lofton v Secretary of Dept of Children and Fam Servs, 358 F3d 804 (11th Cir 2004), and Oklahoma enacted new legislation barring the recognition within Oklahoma of out-of-state adoptions by same-sex couples, see Amy Fagan, Same-Sex Adoption Negated in State, Wash Times A5 (May 7, 2004).

¹⁹³ See, for example, In re Parentage of LB, 89 P3d 271 (Wash App May 7, 2004) (custody and visitation); CEW v DEW, 845 A2d 1146 (Me 2004) (custody); LSK v HAN, 813 A2d 872 (Pa Super 2002) (child support); TB v LRM, 786 A2d 913 (Pa 2001) (custody); Rubano v DiCenzo, 759 A2d 959 (RI 2000) (visitation); VC v MJB, 748 A2d 539 (NJ 2000) (visitation); ENO v LMM, 711 NE2d 886 (Mass 1999) (visitation). Here too, of course, there are contrary examples. See Janis C v Christine T, 742 NYS2d 381 (App Div 2002); In re CBL, 723 NE2d 316 (Ill App 1999); In re Thompson, 11 SW3d 913 (Tenn App 1999).

¹⁹⁴ See In re Bicknell, 771 NE2d 846 (Ohio 2002); In re Application of Bacharach, 780 A2d 579 (NJ Super 2001). See also In re Miller, 824 A2d 1207 (Pa Super 2003) (following Bicknell and Bacharach, and recognizing woman’s right to change her name to that of her “life partner,” without requiring her to specify her partner’s gender).
life. As I have argued extensively elsewhere, I do not believe that the applicable standard of constitutional review in this context is genuinely "strict." Rather, the Supreme Court almost invariably has applied a more flexible and variable form of review. Under that review, it would be relevant to consider the magnitude of the state intrusion on the protected relationship, the degree to which affected family members are united in resisting the state's incursion, and the extent to which the challenged state regulation reflects traditional public values.

I shall not repeat my defense of those considerations here, but only observe that their application would make the constitutional validity of same-sex marriage laws a close question. The affected couple would, presumably, be united in opposition to the state's regulation, enhancing the state's justificatory burden. The magnitude of the state's incursion, in turn, would depend upon whether the forum state offered some form of domestic partnership to same-sex couples. In states such as Vermont, Hawaii, or California, which offer marriage-like substitutes for same-sex couples, the burden would be mostly expressive, withholding from same-sex couples a full measure of public validation and acceptance. That burden, of course, is by no means insignificant. In most other states, however, the incursion would impose still further disadvantages, including a denial of access to public benefits, exclusion from intestate succession laws, and potentially heavier tax burdens. On the other hand, laws excluding same-sex couples from marriage plainly enjoy broad historical and contemporary support, mitigating somewhat the state's burden of justification.

Whether a state ultimately could carry its burden under this standard of demonstrating strong public reasons for a ban on

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195 See, for example, Meyer, 48 UCLA L Rev at 1177-81 (cited in note 139); Meyer, 53 Vand L Rev at 536-54 (cited in note 139).
196 See id.
198 See David L. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich L Rev 447, 450 (1996) (acknowledging that the chief significance of the debate over same-sex marriage, for many supporters and opponents alike, is that "permission for same-sex couples to marry under the law would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted"); Carlos A. Ball, Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism, 85 Georgetown L J 1871, 1876-77 (1997).
199 See notes 146 and 190.
same-sex marriage is uncertain. Quite apart from the outcome, however, there would be value in extending privacy protection to cover all socially-acknowledged families and putting the state to the task of justifying its incursion. For one thing, this understanding would offer greater affirmation of the intimacy falling within the scope of privacy protection by basing that protection upon an assessment of the values implicit in the intimacy, rather than upon a simple edict of neutrality toward private choice. For another, it would encourage public debate—in the courts and elsewhere—over what should be considered the core, defining values of “family.” That debate could itself add to the channeling effect of family law, distinguishing (to borrow Barbara Woodhouse’s helpful terms) between “kinships of responsibility” and mere “associations of choice”—and encouraging private investment in intimacy that is potentially ennobling to its constituents and enriching to the community.

Finally, and most significantly, by linking protection to social consensus, this approach has a greater claim to democratic legitimacy. The value choices constraining democratic action—for example, the threshold judgment that the intimacy targeted by the state shares in the defining values of family—are those, at least putatively, of the people, rather than of the justices or the individual claimants. Needless to say, this methodology hardly removes the need for normative judgment by judges or eliminates the danger of judicial error or bias in making an assessment of public attitudes. But the aspiration to ground constitutional protection in public consensus about the bounds of family, as best as honest judges can determine it, provides a stronger claim to legitimacy than many leading alternatives.

This leads me to a final irony: on closer examination, this understanding of Lawrence actually shares a good deal in common with Bowers. Justice Kennedy in Lawrence sharply criticizes Justice White’s reasoning in Bowers, taking him to task for “misapprehend[ing] the claim of liberty” at issue and for relying on a

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202 See Regan, Family Law at 136 (cited in note 100).
crude reading of history to reject it.\textsuperscript{204} But in fact, history was not the sole basis upon which Justice White’s opinion rejected Hardwick’s privacy claim: neither historical nor then-contemporary social consensus regarded same-sex intimacy as bearing an essential connection with family intimacy. \textit{Bowers} observed that “[p]roscriptions against [homosexual] conduct have ancient roots,”\textsuperscript{205} but also that half the states “continue[d] to provide criminal penalties for sodomy performed in private and between consenting adults.”\textsuperscript{206} This helped support the Court’s confident judgment that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”\textsuperscript{207} At bottom, the Court thought it “evident” that there was no essential “resemblance” between same-sex intimacy and the sorts of relationships previously recognized as within the realm of family.\textsuperscript{208} This approach, acknowledging the relevance of both historical and contemporary social consensus in defining the boundaries of constitutional protection, was consistent with Justice White’s approach to the right of privacy in other cases as well.\textsuperscript{209}

Moreover, it is essentially consistent with the Court’s approach in \textit{Lawrence}. Justice Kennedy criticizes White’s reliance on history at some length,\textsuperscript{210} but the import of that criticism is unclear. Although \textit{Lawrence} emphasizes that laws regulating sexuality did not traditionally distinguish between homosexual and heterosexual sodomy,\textsuperscript{211} White’s opinion had not relied on any such distinction. As Justice Scalia rightly points out, \textit{Bowers} had instead relied upon the long existence of general sodomy prohibitions—prohibitions which did indeed criminalize same-sex conduct along with other activities.\textsuperscript{212}

Justice Kennedy did not claim that history was \textit{irrelevant} to the constitutional claim, only that it was not determinative. Indeed, he summed up his discussion of the historical record with the assertion that, “[i]n all events we think that our laws and

\textsuperscript{204} \textit{Lawrence}, 123 S Ct at 2478.
\textsuperscript{205} \textit{Bowers}, 478 US at 192.
\textsuperscript{206} Id at 194.
\textsuperscript{207} See id at 191.
\textsuperscript{208} See id at 190-91.
\textsuperscript{209} See Meyer, 52 Cath U L Rev at 934-42 (cited in note 203).
\textsuperscript{210} See \textit{Lawrence}, 123 S Ct at 2478-80.
\textsuperscript{211} See id at 2478-79.
\textsuperscript{212} See \textit{Lawrence}, 123 S Ct at 2493-94 (Scalia dissenting).
traditions in the past half century are of most relevance here.\textsuperscript{213} Yet that view also is basically compatible with Bowers. Although White's opinion noted that sodomy laws dated back to the ratification of the Bill of Rights and before, it moved briskly to consider more recent times, noting that "until 1961, all 50 States outlawed sodomy, and, today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults."\textsuperscript{214} For White in Bowers, then, as for Kennedy in Lawrence, modern societal consensus stood shoulder-to-shoulder with historical social attitudes in determining the legitimacy of the claim to constitutional protection.

Of course, Lawrence and Bowers disagreed in the ultimate and crucial assessment of whether the intimate relationships of gays and lesbians bore an essential "resemblance" to conventional families. But, on this score, crucial facts had changed. Although Lawrence stated that the "emerging recognition" of the essential legitimacy of same-sex relationships "should have been apparent when Bowers was decided,"\textsuperscript{215} the most convincing evidence of public consensus was found in legal and political developments that post-dated Bowers. In the years between 1986 and 2003, "[t]he 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision [were] reduced...to 13,"\textsuperscript{216} slightly fewer than the number of jurisdictions with antimiscegenation laws at the time of Loving.\textsuperscript{217} That movement, ef-

\textsuperscript{213} Id at 2480.
\textsuperscript{214} Bowers, 478 US at 193-94.
\textsuperscript{215} Lawrence, 123 S Ct at 2480. Some of the evidence cited by the Court for this proposition does not seem persuasive. First, Lawrence noted the movement of some states, starting with Illinois in 1961, to repeal their criminal sodomy laws. Yet, as of the time Bowers was decided, roughly as many states clung to their sodomy laws as had abandoned them. See id at 2480-81. Second, the Court pointed to the history of non-enforcement of sodomy laws against private, consenting partners, see id at 2481, yet elsewhere acknowledged that "one reason for this [might be] the very private nature of the conduct." Id at 2479. Third, the Court pointed to the issuance of the Wolfenden Report in 1957, urging decriminalization of sodomy in Great Britain. See Lawrence, 123 S Ct at 2481. As Carlos Ball has observed, however, "the issuance of the Wolfenden Committee Report was barely noticed by the mainstream American press," Ball, The Morality of Gay Rights at 2 (cited in note 132), strongly undercutting the claim that it reflected a public consensus among Americans. That leaves, then, only the issuance of a contrary decision by the European Court of Human Rights not quite five years before Bowers interpreted the European Convention on Human Rights. See Lawrence, 123 S Ct at 2481, citing Dudgeon v United Kingdom, 45 Eur Ct H R ¶52 (1981).
\textsuperscript{216} Lawrence, 123 S Ct at 2481.
\textsuperscript{217} At the time Loving was decided, sixteen states had laws prohibiting interracial marriage. See Loving, 388 US at 6 and n 5. In the fifteen years leading up to the Court's
fected both through legislative repeal and court action invalidating sodomy laws on state constitutional grounds, is persuasive of the emergence of a public consensus, particularly when combined with other developments recognizing the family status of gay and lesbian partners and parents. The information is highly relevant to the constitutional methodology shared by both Lawrence and Bowers; whether it would have been enough to persuade Justice White personally is another matter—although I do not think it inconceivable. In this way, Lawrence’s recognition of a privacy right founded upon a modern social consensus that includes same-sex intimacy within the understanding of family affirms Bowers’s constitutional methodology even as it overrules Bowers’s result.

CONCLUSION

Lawrence is indeed a momentous case. There is much to celebrate in a decision that extends the boundaries of privacy to thousands of American families whose claims to protection under a tradition-focused understanding of substantive due process were, at best, insecure. And yet, there is reason to be wary of reading Lawrence broadly, as exalting the individual’s fundamental freedom to define his or her own conception of intimacy. Such a reading, if extended to its logical conclusion, might well undermine society’s ability to express and encourage any normative model of family life. And a decision that disabled society from expressing its aspirations about the values that ought to define family—commitment, durability, the fulfillment of dependency, among others—would be too momentous.

Yet Lawrence can be read in a way that avoids these unintended consequences. Understanding Lawrence as a case about family—as grounding its constitutional intervention in society’s modern acceptance that same-sex intimacy shares in the essential values that define family life—is perfectly consistent with Justice Kennedy’s opinion and would fit the decision more com-
fortably within the Court's established privacy jurisprudence. A benefit of this approach, moreover, is that it encourages greater public debate over the core values of family intimacy. In addition, by tracing constitutional protection to social judgments about the core values of family, this approach can make a stronger claim to democratic legitimacy, thereby providing a more secure foundation for judicial intervention in the years to come.