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The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas

Carlos A. Ball†

In his majority opinion in Lawrence v. Texas,1 Justice Anthony Kennedy distinguished between the ability of the state, consistent with the Constitution, to criminalize same-gender sexual conduct, and the obligation of the state to recognize same-sex relationships.2 In striking down Texas’s sodomy statute as an impermissible infringement on the liberty interests protected by the Due Process Clause of the Fourteenth Amendment, Justice Kennedy was explicitly neutral on what he saw as the separate question of state recognition of same-sex relationships. He noted, for example, that sodomy “statutes... seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”3 For her part, Justice Sandra Day O’Connor, in her concurring opinion in Lawrence, similarly distinguished between criminalization of sexual conduct on the one hand and the legal recognition of intimate relationships on the other.4 Taking a completely dif-

† Professor of Law, Penn State University. I would like to thank the organizers of and participants in the Symposium. Nan Hunter, during the Symposium, put it nicely when she noted that we are now engaged in the crucial process of giving meaning to Lawrence. I would also like to thank Chai Feldblum, Andy Koppelman, and Richard Storrow for their very helpful comments on an earlier draft. A section of this Article was also presented at a panel discussion on Lawrence held at the 2004 AALS Annual Meeting in Atlanta, Georgia.

2. Id. at 2478. At the end of his opinion, Justice Kennedy noted again that the case did “not involve whether the government must give formal recognition to any relationships that homosexual persons seek to enter.” Id. at 2484.
3. Id. at 2478 (emphasis added).
4. Justice O'Connor would have struck down the sodomy statute on equal protection grounds. See id. at 2484 (O'Connor, J., concurring). In her concurring opinion, she argued that “[u]nlike the moral disapproval of
ferent view of the issue, Justice Antonin Scalia argued in his dissent that the Court’s opinion “dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”5 As Justice Scalia saw it, once the Court prohibited the state from criminalizing same-gender sexual conduct, the next “logical conclusion” is that the state should also be prohibited from barring same-sex marriages.6

I would posit that all three Justices are wrong in their assessment of the connection between Lawrence and same-sex marriage. Lawrence is neither irrelevant to the question of same-sex marriage (as Justices Kennedy and O’Connor contend) nor dispositive (as Justice Scalia suggests). Instead, the relationship between Lawrence and same-sex marriage falls somewhere in the middle.

Lawrence is helpful to those who argue that the right to marry, as protected by the Due Process Clause, includes within its ambit couples of the same gender because the opinion removes an important obstacle that has stood in the way of that argument, namely, that as long as the state was free to criminalize same-gender sexual conduct under Bowers v. Hardwick,7 it was also free to refuse to recognize the personal relationships that often accompany the underlying criminal acts.8 Now that

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5. Id. at 2496 (Scalia, J., dissenting).
6. See id. at 2497.
8. See Patrick J. Borchers, Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages, 32 CREIGHTON L. REV. 147, 151 (1998) (noting that “as long as Bowers v. Hardwick allows states to criminalize same-sex sex, the substantive arguments [in favor of same-sex marriage] face an impossibly uphill climb under the Federal Constitution”); Mark Strasser, Family, Definitions, and the Constitution: On the Antimiscegenation Analogy, 25 SUFFOLK U. L. REV. 981, 1019 (1991) (noting that “some theorists point to antisodomy laws, arguing that a state having such a law should not recognize same-sex marriages because the married couple would break the antisodomy law every time that they had marital relations”); see also Dean v. Dist. of Columbia, 653 A.2d 307, 363 n.5 (D.C. 1995) (Steadman, J., concurring) (arguing that “[i]f . . . the state [can] ban the commission of acts presumably to be expected in . . . a same-sex relationship, it is difficult to understand on what basis the state constitutionally could be forced to extend the recognition of marriage to that relationship”); cf. Shahar v. Bowers,
the state, after Lawrence, is no longer free to criminalize same-gender sexual conduct, the argument that the state is limited in its ability to refuse to recognize the relationships that often accompany that sexual conduct becomes considerably more viable.

It is not possible, however, as Justice Scalia suggests, to rely only on Lawrence to make the case for a due process right to same-sex marriage because the case did not directly address the issue of whether the state has an affirmative obligation to recognize the intimate relationships that can accompany the kind of sexual conduct that the Court held is constitutionally protected. Despite the fact that the Lawrence Court by no means settled the constitutionality of prohibitions against same-sex marriages, I argue in Part III that proponents of same-sex marriage can use the Court's reasoning to support arguments that the state has substantive due process obligations to recognize such marriages.

I do not in this Article aim to answer the ultimate question of whether there is a constitutional right to same-sex marriage. Instead, in Parts I and II, I explore the more limited issue of whether the fundamental right to marry, as understood by the Supreme Court, includes a corresponding obligation on the part of the state to make available the institution of marriage to opposite-sex couples. I explore, in other words, whether the fundamental right to marry includes within its ambit a positive component that places on the state obligations of recognition of marital relationships that go beyond noninterference with those relationships. If the answer to that question is no, then it would seem that the state does not, as a matter of substantive due process, have an obligation to recognize same-sex marriages. If the answer to that question is yes, however, then we will have removed an important second obstacle (with Bowers v. Hardwick being the first) in the struggle for the legal recognition of same-sex marriage, namely, the idea, implied in Justices Kennedy's and O'Connor's opinions in Lawrence, that in constitutional law there is (always) an important distinction between

114 F.3d 1097, 1105 n.17 (11th Cir. 1997) (arguing that the Georgia Attorney General was justified in withdrawing an offer to an attorney who participated in a same-sex commitment ceremony because, inter alia, “some reasonable persons may suspect that having a Staff Attorney who is part of a same-sex ‘marriage’ is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy”).

9. See supra notes 2–4 and accompanying text.
state interference with intimate relationships on the one hand and state recognition of those relationships on the other.

Specifically, in Part I, I review the Supreme Court cases that have discussed the fundamental right to marry and explain how some of them (especially those decided after Griswold v. Connecticut) stand for the proposition that the right to marry contains a positive component that imposes on the state obligations of recognition (as opposed to "mere" noninterference). In Part II, I explain why the positive component of the right to marry should be viewed as an exception to the view held by many judges that the Constitution only protects negative liberties. In Part III, I return to the Court's opinion in Lawrence to explore the ways in which it can be of assistance to supporters of same-sex marriage. I argue that Lawrence is helpful to supporters in three distinct ways. First, the Court in Lawrence interpreted the liberty interests protected by the Due Process Clause in an expansive way that not only looked to considerations of privacy in the home and the interests of individuals in choosing what type of sexual conduct to engage in, but also focused on the personal relationships that often accompany that conduct, as well as on the obligation of the state to respect the dignity and lives of lesbians and gay men. The fact that the Court addressed the interests of lesbians and gay men in personal relationships, and in having their dignity and lives respected by the state, should prove quite helpful to same-sex marriage proponents. Second, the Court held that majoritarian morality is an insufficient ground upon which to justify the state's regulation of sexual conduct and the relationships that arise from it, rendering suspect the argument that the ban on same-sex marriage can be justified solely on the basis of majoritarian morality. Third, the Court relied on the historical record relating to the regulation of same-gender sexual intimacy in both this country and in other Western nations in ways that should prove helpful to same-sex marriage advocates in responding to the objection that the Constitution does not mandate recognition of same-sex marriages because those marriages are not "deeply rooted in this Nation's history and tradi-

10. 381 U.S. 479 (1965).
11. See infra Part I.
12. See infra Part II.
13. See infra Part III.A.
14. See infra Part III.B.
There are two important issues that I need to raise before proceeding. First, I limit myself in this Article to an exploration of the right to marry under the Due Process Clause. I do not address equal protection issues. I do so not because I believe that due process necessarily provides a better framework for constitutional arguments on behalf of a right to same-sex marriage than does equality, but because Lawrence opens lines of argument in the due process area that were, as a practical matter, limited as long as Bowers v. Hardwick remained good law.

Although I here focus exclusively on due process issues, it is important to keep in mind the crucial role that considerations of equal protection can play in the area of state recognition of same-sex relationships. The crux of the equal protection


One area of equal protection jurisprudence that Lawrence should affect is whether lesbians and gay men constitute a suspect class (or, to put it somewhat differently, whether sexual orientation is a suspect classification). Some courts have relied on the fact that same-gender sexual intimacy could be criminalized under Bowers to deny lesbians and gay men a suspect class designation. If the State can criminalize the conduct that defines the class, the argument went, then the class should not receive heightened protection under the Equal Protection Clause. See, e.g., High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (noting that “if there is no fundamental right to engage in homosexual sodomy... it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment” (citations omitted)); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (arguing that “after Hardwick it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm” (citation omitted)). This argument is no longer viable after Lawrence.

17. For a debate on whether substantive due process or equality are better foundations for gay rights positions, compare Richard A. Epstein, Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights, 2002 U. CHI. LEGAL F. 73 (arguing on behalf of substantive due process), with Andrew Koppelman, The Right to Privacy?, 2002 U. CHI. LEGAL F. 105 (arguing on behalf of equality).

18. See supra notes 7–8 and accompanying text.
argument is that, regardless of questions regarding the scope of the fundamental right to marry and whether it covers same-sex relationships, once the state decides to recognize committed heterosexual relationships as marital, the failure to do the same for committed same-sex relationships constitutes impermissible discrimination. Equal protection arguments have so far been more successful than due process arguments in challenging prohibitions against same-sex marriage. One of the repercussions of Lawrence is that it brings back due process as a tool in the continued efforts to dismantle antigay state policies, including bans on same-sex marriage. Ultimately, one hopes, liberty arguments and equality arguments will work in tandem to challenge successfully the constitutionality of the bans.


20. See Baehr, 852 P.2d at 57–58, 67 (rejecting a due process challenge to the same-sex marriage ban, but holding that the equal protection provision of the state constitution requires the state to show compelling interest in order to justify the ban); Baker, 744 A.2d at 886 (striking down a same-sex marriage ban on equality grounds). But see Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998) (holding that a same-sex marriage ban interferes with the fundamental right to marry and requiring the state to show a compelling interest to justify the ban), superseded by ALASKA CONST. art. I, § 25 (amended 1999).

21. See Goodridge, 798 N.E.2d at 953 (arguing that “[i]n matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [of liberty and equality] frequently overlap, as they do here” (citations omitted)).

The Lawrence Court itself emphasized the ways in which considerations of liberty and equality are intertwined. “Equality of treatment,” the Court noted, “and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.” Lawrence v. Texas, 123 S. Ct. 2472, 2482 (2003). The Court proceeded to explain how the regulation of same-sex sodomy places a significant and unequal burden on lesbians and gay men. The Court pointed out that the mere criminalization of “homosexual conduct . . . is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” Id. The Court then elaborated on the kind of stigma that accompanies a conviction on a sodomy charge, including the need to register as a sex offender in some states and the negative consequences for job applications. See id. Justice O’Connor in her concurrence, which focused exclusively on the equal protection claim, also discussed at some length the unequal burden that a sex-specific sodomy statute places on lesbians and gay men. See id. at 2485–86 (O’Connor, J., concurring).
Second, my focus here will be on whether the Due Process Clause imposes on the state an obligation to recognize at least some intimate relationships as marital. I therefore limit myself in Parts I and II to arguing that the state has a constitutional obligation to recognize (heterosexual) marriage in some capacity without exploring what that recognition must include in terms of specific rights and obligations. Although I recognize that the substantive regime of marital rights and obligations is of great importance, my interest in Parts I and II is in the threshold issue of whether the state has to recognize (heterosexual) marriage at all. Similarly, I will not address the admittedly important issue of whether the state, in meeting what I will argue here constitutes a positive or affirmative obligation to recognize at least some intimate relationships, must recognize them as marital as opposed to through other legal institutions such as civil unions and domestic partnerships. The Supreme Court cases that I discuss in Part I are all marriage cases. Therefore, I think it makes sense to frame the issue in question as being whether the state has a positive obligation to recognize (heterosexual) marriage. I concede that it may be possible (although I do not address the issue here) that future

22. Professor Patricia Cain argues that given the Court's failure to provide any guidance as to which types of benefits and obligations must accompany marriage, it is not possible to glean a positive right to marriage from the Court's marriage jurisprudence. See Patricia A. Cain, Imagine There's No Marriage, 16 QUINNIPIAC L. REV. 27, 32 (1996). Although it is true that the Court has not provided such guidance, I do not believe that such a failure is dispositive on the question of whether there is a positive right to marry because the issue of which minimum benefits and obligations must accompany a legally recognized relationship in order to be deemed marital has not been before the Court. The cases that have come before the Court address the threshold question that I am interested in in this Article, namely, whether the state can refuse altogether to recognize (at least some) heterosexual relationships as marital. See infra Part I. It may very well be that if the Court were to ever address the issue of which rights and obligations must, as a constitutional matter, be part of marriage, it will choose to be highly deferential to state interests and priorities. That does not mean, however, that the same degree of deference is appropriate when the state refuses to recognize marriage altogether.

23. Again, my interest in this issue is based on the reasoning that if the state does not have a positive obligation to recognize opposite-sex marriages, then it is safe to conclude that it does not, as a matter of substantive due process, have a similar obligation to recognize same-sex ones. Whether the state has a constitutional obligation to recognize same-sex marriage because it already recognizes heterosexual marriage is a question of equal protection. As I already noted, I will in this Article limit myself to considerations of substantive due process.
courts will conclude that whatever positive obligation the state has to recognize intimate relationships may be met through legal institutions other than marriage.\textsuperscript{24}

I. THE POSITIVE IN THE FUNDAMENTAL RIGHT TO MARRY

In order to address the question of whether the state has a constitutional obligation to recognize (heterosexual) marriage, let me begin by posing the following hypothetical: Suppose that the Supreme Court of a fictitious state (we will call it Texarcana) is expected soon to issue an opinion striking down the state's prohibition against same-sex marriage as violative of the state constitution's equal protection clause. The Texarcana legislature, which is dominated by conservative legislators of both political parties and which is troubled by what it sees as the dangerous meddling by "activist" judges in the area of marriage, enacts a statute prospectively abolishing marriage. In doing so, the legislature seeks to turn public opinion against liberal judges and gay rights advocates, both of whom, the legislature hopes, will be blamed by the citizens of Texarcana for the abolition of marriage. The legislators hope to be able to reinstate the institution of marriage as soon as the liberal judges come to their senses and the gay rights activists are run out of the state. The marriage ban is promptly challenged in federal court by the ACLU, which argues that the abolition of marriage constitutes a violation of constitutionally protected liberty rights under the Due Process Clause of the Fourteenth Amendment.

Although the hypothetical may seem far-fetched (even by law professor standards), it should be noted that the Governor of Hawaii in 1996, when facing the possibility that the state supreme court would require the legal recognition of same-sex marriages, suggested that one of the options that should be explored was whether to eliminate the institution of marriage altogether and provide in its stead domestic partnership registration for both opposite- and same-sex couples.\textsuperscript{25} Regardless of

\textsuperscript{24}See Baker, 744 A.2d at 886 (suggesting alternatives to marital legal status as a way for the Vermont legislature to "craft an appropriate means" to carry out the Court's constitutional mandate). \textit{But see In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004)} (rejecting as unconstitutional a proposed bill that would prohibit same-sex couples from marrying but would allow them to form civil unions).

\textsuperscript{25}See Maura I. Strassberg, \textit{Distinction of Form or Substance: Monog-
how realistic the hypothetical is, however, it allows us to think through whether the fundamental right to marry as understood by the United States Supreme Court has a positive component to it that requires the state to make the institution of marriage available to interested (heterosexual) citizens. If there is such an obligation, then the action taken by the Texarcana legislature is unconstitutional.

The Court’s fundamental right to marry cases fall into two categories. The first category consists of what I will here call the “interference with marriage” cases. In these cases, the parties bringing the constitutional challenges claimed that the state was impermissibly interfering with their already existing marital relationships. The second group consists of the “failure to recognize” cases. These challenges were brought by individuals after the state refused to recognize their relationships as marital.

The first time that the Court described marriage as a fundamental right in a way that played a role in the outcome of the case was in *Skinner v. Oklahoma*.26 *Skinner* was neither explicitly about marriage nor was it a due process case. In *Skinner*, an Oklahoma statute that called for the sterilization of some habitual criminals (such as burglars) but not others (such as embezzlers) was the subject of an equal protection challenge.27 The Court was troubled by the equal protection implications of a statute that treated differently individuals who were similarly situated.28 Those who habitually stole from strangers, for example, were subject to sterilization while those who habitually embezzled money from their employers were

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26. 316 U.S. 535 (1942). The Court twenty years earlier had included marriage in a long list of liberty interests protected by the Fourteenth Amendment. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Court in *Meyer* stated that while it has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

27. See *Skinner*, 316 U.S. at 537.

28. See id. at 537–40.
not.\textsuperscript{29} The Court was also, however, concerned about the impact of the sterilization statute on fundamental rights. In striking down the law, the Court noted that "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."\textsuperscript{30}

It is not surprising that the Court, in assessing the constitutionality of the Oklahoma statute, raised the issue of its impact on marriage. The traditional view of marriage links the institution of marriage to the capabilities of spouses to procreate. One of the traditional purposes of marriage, in fact, has been to organize and channel reproductive capabilities.\textsuperscript{31} A statute that takes away the ability of some individuals to reproduce also takes away their ability to carry out what has traditionally been understood to be one of the primary functions of marriage. We do not know from the facts presented in the case whether Mr. Skinner was married. But given the broad scope of the statute (it could be applied to any habitual criminal who engaged in crimes of moral turpitude with only a few exceptions), the Court's concern about its impact on marital relationships was an understandable one.

\textit{Skinner}, then, can be viewed as the first "interference with marriage" case. The Oklahoma statute was constitutionally problematic, in part, because it interfered with the ability of already married prisoners to engage in procreative activities (presumably after release from prison).\textsuperscript{32} The statute also represented a threat to the procreative abilities of unmarried inmates who might marry after being released from prison.

The second "interference with marriage" case to reach the Supreme Court was \textit{Poe v. Ullman}.\textsuperscript{33} The plaintiffs in \textit{Poe} challenged the constitutionality of a Connecticut statute that prohibited the use of contraceptives. The plurality in \textit{Poe} held that the controversy did not present a justiciable question that was

\begin{itemize}
\item \textsuperscript{29} See id. at 539.
\item \textsuperscript{30} See id. at 541.
\item \textsuperscript{32} Since \textit{Skinner}, courts have held that there is neither a fundamental right to procreate while imprisoned, see Gerber v. Hickman, 291 F.3d 617, 621 (9th Cir. 2002) (holding that male prisoners do not have the right to artificially inseminate their wives), nor a right to conjugal visits, see, e.g., Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994); McCray v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1975).
\item \textsuperscript{33} 367 U.S. 497 (1961).
\end{itemize}
ripe for review and therefore did not reach the merits of the case. Justice Harlan, writing in dissent, concluded that the case did present a justiciable question and, as a result, proceeded to address the constitutional claim. Justice Harlan's opinion has become an important one because it presaged much of what the Court itself would do in the area of substantive due process in the years to come.

Justice Harlan in Poe did not question the general right of the state to enforce morality through the criminal law. He noted, for example, that laws forbidding adultery, fornication, and homosexuality were legitimate laws, in part because they involved "the State's rightful concern for its people's moral welfare." What troubled Justice Harlan was that the Connecticut contraception law intruded into the marital relationship and the marital home. It was this intrusion that entailed an unacceptable infringement on the right to privacy. It was the value and importance of marriage that allowed the privacy rights of spouses to trump the state's interests in promoting its view of morality. As Justice Harlan saw it, the Due Process Clause imposes on the state the obligation to respect the sexual intimacy that accompanies a particular kind of relationship, namely, the marital one.

Interestingly, Justice Harlan in his dissent argued that "the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected." The italicized por-

34. Id. at 508–09 (plurality opinion). Poe was a declaratory judgment case. Id. at 498. The Court concluded that it was extremely unlikely that the State would ever seek to enforce the anticontraception statute. See id. at 508–09.
35. See id. at 538–39 (Harlan, J., dissenting).
36. Id. at 552–53.
37. As Harlan put it, "it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." Id. at 552.
38. See id. Justice Douglas also dissented in Poe. Like Justice Harlan, Justice Douglas was concerned about the impact of the Connecticut statute on the marital relationship. See id. at 519–21 (Douglas, J., dissenting). Justice Douglas concluded that the statute violated the right to liberty under the Due Process Clause because the state regulation as applied in this case touches the relationship between man and wife. It reaches into the intimacies of the marriage relationship.... When the State makes "use" [of contraceptives] a crime and applies the criminal sanction to man and wife, the State has entered the innermost sanctum of the home.
39. Id. at 553 (Harlan, J. dissenting) (emphasis added).
tion of this sentence is intriguing because it suggests that the state cannot simply abolish the institution of marriage altogether. This position is consistent with Justice Harlan's understanding of the fundamental right at issue in the case because that right, as he saw it, emerged directly from the marital relationship, a relationship that must exist in order for the right to attach. If the state cannot interfere with the right to marital privacy by prohibiting married couples from using contraceptives, it would seem at least plausible that the state cannot abolish the institution that gives rise to that right.

It is interesting for our purposes, in assessing the constitutionality of what the State of Texarcana has done in our hypothetical, then, that Justice Harlan's opinion, in what is primarily an "interference with marriage" case, nonetheless suggests that the right at issue is not entirely a negative one, but is one that, at the very least, presumes that the state is allowing the institution of marriage to continue to exist. Although the issue of which relationships should be recognized as marital was not before the Court in Poe, and although we can safely surmise that the possibility that the state might abolish marriage never occurred to Justice Harlan, the right to privacy that he articulated in Poe depends on the assumption that the state makes available the institution of marriage to interested citizens.

The connection between a right to privacy and the institution of marriage is also present in Griswold v. Connecticut. In Griswold, unlike in Poe, the full Court reached the merits of the constitutionality of the Connecticut statute that prohibited the use of contraceptives. Although the majority opinion in Griswold found the bases for the fundamental right at stake in the penumbras of several provisions of the Bill of Rights (including the First, Fourth, Fifth, and Ninth Amendments) rather than, as Justice Harlan did in Poe, exclusively in the liberty interests protected by the Due Process Clause of the Fourteenth

40. It is possible to interpret Justice Harlan's comment about the state's obligation "to allow" the institution of marriage as constituting a negative obligation not to interfere with nongovernmental bodies (such as religious ones) that recognize certain relationships as marital according to their own criteria and beliefs. In speaking about the importance of marriage in the country's history and tradition, however, it is clear that Justice Harlan was referring to legally recognized civil marriages. See id.
41. 381 U.S. 479 (1965).
42. See id. at 485.
43. See id. at 482–85.
Amendment,\textsuperscript{44} it is clear that what led the \textit{Griswold} Court to strike down the statute was the burden it placed on marital relationships. The Court noted that by prohibiting the use of contraceptives, as opposed to their sale or manufacture, the State "seeks to achieve its goals by means having a maximum destructive impact upon th[e] [marital] relationship."\textsuperscript{45} The marital relationship, the Court added, in what has become a famous passage, is

older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.\textsuperscript{46}

The Court in \textit{Griswold}, like Justice Harlan in \textit{Poe}, linked the negative rights of individuals not to be interfered with by the state to the existence of the institution of marriage. According to the reasoning of \textit{Griswold}, the absence of the institution of marriage would have meant the absence of the right to privacy as recognized by the Court in that case. Although the Court, since \textit{Griswold}, has made it clear that fundamental rights involving sexual intimacy (and its consequences in terms of procreation and the begetting of children) extend beyond the marital relationship,\textsuperscript{47} the important point for our purposes is that the "interference with marriage" opinions (\textit{Skinner, Griswold, and Justice Harlan's dissent in Poe}) operate under the assumption that the state is making the institution available to interested citizens. In other words, even the "interference with marriage" cases, which are primarily (and necessarily) focused on the negative obligations of the state, depend, if only implicitly, on the prior positive steps taken by the state to recognize certain relationships as marital. This would suggest that the state's negative obligations with respect to marriage are not wholly separable from its positive steps of recognition.

The "interference with marriage" cases, then, are important, not because they clearly stand for the proposition that the state has a positive constitutional obligation to recognize at least certain relationships as marital, but because they suggest

\textsuperscript{44} See \textit{Poe}, 367 U.S. at 554 (Harlan, J., dissenting).
\textsuperscript{45} \textit{Griswold}, 381 U.S. at 485.
\textsuperscript{46} Id. at 486.
a link between the state's obligation of noninterference and its (prior) affirmative steps of recognition. The former would be inapplicable (and irrelevant) in the absence of the latter. Whether the recognition of marriages is constitutionally mandated, however, does not become clear until we shift from the "interference with marriage" cases to the "failure to recognize" cases.

Griswold, decided almost forty years ago, was the last "interference with marriage" case to reach the Supreme Court. The three marriage cases that the Court has decided since then have all been "failure to recognize" cases.\footnote{48. See Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).} The first such case was Loving v. Virginia, which challenged the constitutionality of Virginia's antimiscegenation law.\footnote{49. 388 U.S. 1 (1967).} Loving is primarily thought of as an equal protection case because the law prohibiting interracial marriages classified individuals on the basis of race.\footnote{50. See id. at 4.} Loving, however, is also an important due process marriage case because in it the Court for the first time addressed the significance of the marital relationship from the perspective of due process in the absence of considerations of privacy and the right to be left alone.\footnote{51. See id. at 12.} The crux of the constitutional claim in Griswold was that the state should leave married couples alone so that they can make important decisions, such as those that relate to the use of contraceptives, about the intimate components of their relationships.\footnote{52. See supra notes 45–46 and accompanying text.} The claimants in Loving, on the other hand, were not asking that the state leave them alone; instead, they were seeking state recognition (and by implication, state regulation) of their relationship. The Court concluded that the denial of that recognition, that is, the failure of the state to act, violated the claimants' fundamental right to marry.\footnote{53. See Loving, 388 U.S. at 12.}
the Court's opinion in Lawrence v. Texas.)54 Second, the failure of the state to act can constitute a violation of the fundamental right to marry.

If Loving were the only "failure to recognize" case decided by the Supreme Court, its holding could be limited to instances where the state, for race-based reasons, fails to recognize some relationships as marital. But Loving is only the first such case. The second case is Zablocki v. Redhail.55 Zablocki involved an equal protection and due process challenge to a Wisconsin statute that prohibited individuals who owed child support from marrying.56 The Court in Zablocki decided the case on equal protection grounds, focusing on the classification (made up of individuals who owed child support) created by the Wisconsin statute.57 The Court applied strict scrutiny because the classification burdened the fundamental right to marry.58 In discussing marriage cases such as Skinner, Griswold, and Loving, the Court pointed out that

[j]it is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.59

The classification created by the Wisconsin statute, the Court argued, significantly interfered with the fundamental right to marry because those who "lack the financial means to meet their support obligations or cannot prove that their children will not become public charges... are absolutely prevented from getting married."60 The Court then concluded that

54. See discussion infra Part III.A.
56. Id. at 375.
57. See id. at 383. Justice Stewart, in a concurring opinion, questioned the wisdom of deciding the case under the Equal Protection Clause rather than under the Due Process Clause. See id. at 392–95 (Stewart, J., concurring). The constitutional weakness of the Wisconsin statute, Justice Stewart argued, was not that it created a discriminatory classification, but that it constituted an "unwarranted encroachment upon a constitutionally protected freedom." Id. at 391–92.
58. See id. at 386–88.
59. Id. at 386. The Court added that "if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place." Id. (footnote omitted).
60. Id. at 387. The Court added that
the state's purported interests in support of the statute were insufficient to justify the interference with the right to marry.\textsuperscript{61}

Although the Court in \textit{Zablocki} explained the right to marry as being a part of a broader right to privacy,\textsuperscript{62} \textit{Zablocki} (like \textit{Loving}) can be distinguished from \textit{Griswold} in that it did not implicate the right to privacy in the traditional sense of demanding that the state leave individuals alone. The constitutional problem in \textit{Zablocki} was not what the state did in terms of actions (such as in \textit{Griswold}, where the state's goal was to punish those who used contraceptives), but in terms of its omission, that is, its refusal to recognize the plaintiff's relationship as marital. The harm alleged in \textit{Zablocki} did not, in the end, arise from state \textit{interference} with an intimate relationship; instead, the harm arose from the state's \textit{indifference} toward that relationship. If we view the right to marry only in terms of negative liberty, therefore, we are unable to explain fully the kind of affirmative obligation of recognition that the state is under as a result of the Court's ruling in \textit{Zablocki}.

I want to pause for a moment to make it clear that I am not denying that the \textit{Zablocki} Court's understanding of the fundamental right to marry contained a negative component to it. I am arguing instead that that understanding also included within it a limitation in the ability of the state to be indifferent toward at least some intimate relationships.

If \textit{Loving} and \textit{Zablocki} were the only "failure to recognize" cases decided by the Supreme Court, it could be argued that whatever positive obligation on the state to recognize marriage that can be gleaned from them is primarily based on equal pro-

\begin{itemize}
\item [61] See id. at 388–91. The State first argued that the statute provided an opportunity to counsel the marriage applicant on the need to pay his child support obligations. \textit{Id.} at 388. The Court noted, however, that the statute did not "expressly require or provide for any counseling whatsoever." \textit{Id.} The State's second purported interest was to promote the welfare of the children who were to benefit from the meeting of child support obligations. \textit{See id.} at 389. The Court rejected that argument as well, noting that "the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon the right to marry." \textit{Id.}
\item [62] See \textit{id.} at 384.
\end{itemize}
tection considerations rather than on substantive due process grounds. Zablocki, after all, was decided on equal protection grounds\(^{63}\) and Loving was primarily (though as we have seen, not exclusively) an equal protection case.\(^{64}\) It is for this reason that Turner v. Safley,\(^{65}\) the third (and last) "failure to recognize" case, is in many ways the most important Supreme Court case for the purpose of determining whether the Due Process Clause imposes on the state obligations to recognize at least some intimate relationships as marital. Turner involved a class action suit brought by prisoners living in Missouri correctional facilities who challenged a regulation that prohibited inmates from marrying unless the prison authorities first approved.\(^{66}\)

The inmates in Turner argued that the Missouri regulation impermissibly interfered with their fundamental right to marry, without (unlike the plaintiff in Zablocki) adding an equal protection claim to their substantive due process argument.\(^{67}\) Although the inmates could have raised equal protection objections to the regulation (given that Missouri law singled out prisoners and imposed on them a restriction on marriage that was not placed on the general population), they did not do so. None of the three courts, including the Supreme Court, that issued opinions in the case addressed equal protection issues. Instead, they all viewed the case solely from the perspective of due process and fundamental rights.\(^{68}\) For this reason, I believe Turner is the case that most clearly supports the proposition that the state has a due process obligation to recognize at least some relationships as marital independently of equal protection considerations that go to the issue of whether the state, once it recognizes some relationships as marital, has an equality-based obligation to recognize others in the same way.\(^{69}\)

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63. See supra note 57 and accompanying text.
64. See supra notes 50–52 and accompanying text.
66. Id. at 81–82. According to the testimony offered by the prison officials, "generally only pregnancy or birth of a child [was] considered a 'compelling reason' to approve a marriage." Id. at 96–97.
69. Professor Cain argues that Turner does not support the position that
The government in *Turner* did not argue that there was no fundamental right to marry (an untenable position after *Zablocki*); it argued instead that prisoners, because of their unique circumstances, could not avail themselves of that right. The Supreme Court rejected the state's attempt to exclude prisoners from the scope of the right to marry by noting the ways in which "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life." Those attributes include the "expressions of emotional support and public commitment [that] are an important and significant aspect of the marital relationship" and that survive imprisonment. The Court also pointed out that "many religions recognize marriage as having spiritual significance" and that as a result "for some inmates and their spouses, . . . the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication." Finally, the Court noted that marriage brings with it a panoply of legal privileges, such as Social Security benefits and inheritance rights, which are not affected by imprisonment. All of these elements of marriage, the Court concluded, "are sufficient to form a constitutionally protected marital relationship in the prison context."

The right to marry contains a positive component to it because the case is not what she calls a "pure" substantive due process case. See *Cain*, supra note 22, at 34–35. In her estimation, a "pure" substantive due process case would be one that addresses the constitutionality of a universal ban on marriage. See *id*. The fact that the regulation at issue burdened only one class of individuals (i.e., prisoners), Professor Cain suggests, means that the constitutional question in the case was at its core one of equality rather than one of due process. See *id*. I see it differently because, as already noted, the Court in *Turner*, unlike in *Zablocki*, did not address equal protection issues. The Court in *Turner* was not troubled by the classification created by the prison regulations; instead, it was solely concerned with the impact of the regulations on the substantive due process right to marry.

70. *See Turner*, 482 U.S. at 95.
71. *Id.*
72. *Id.* at 95–96.
73. *Id.* at 96. The Court added that most inmates are eventually released from prison "and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated." *Id.*
74. *Id.*
75. *Id.* The Court proceeded to strike down the regulation because it interfered with the plaintiffs' right to marry. *See id.* at 97–99. Even though a fundamental right was at issue in the case, the Court applied rational basis review because of the generally lower constitutional protections afforded to prisoners. *See id.* at 89. The Court concluded that the State's arguments in support for the marriage regulation, concerning issues of security and reha-
Although the Court, prior to *Turner*, had explained that the right to marry was part of a broader fundamental right to privacy, it is important to note that *Turner* by necessity delinks marriage from privacy. This is so because prisoners do not enjoy constitutionally protected privacy rights. If prisoners do not enjoy constitutionally protected rights to privacy, then their liberty interests in marriage must flow from considerations other than privacy. Furthermore, the fundamental right to marry applied in *Turner* even though there is no corresponding right of married individuals to engage in sexual intimacy while in prison. The right to marry that arises from *Turner*, therefore, cannot be grounded in an understanding of liberty that protects privacy interests through the enforcement of negative rights of noninterference. The right instead is better understood as a positive right that places on the state an affirmative obligation to recognize the relationships at issue in the case as marital.

The *Turner* Court's discussion of the importance of the marital relationship did not include any mention of negative liberty and the right to be left alone. *Turner* decouples marriage from the understanding of liberty that we see in *Griswold*, namely, liberty as protected by the right to be left alone to make important decisions about sexual intimacy within the marital relationship. The constitutionally protected liberty at issue in *Turner*, rather than driven by considerations of noninterference in the private sphere, was instead driven by the public components of marriage: the public expression of commitment by the partners to each other, the recognition and support
on the part of the community for the partners' relationship, and the legal rights and benefits that accompany marriage. These are the elements of marriage that survive imprisonment and that were crucial to the Turner Court's determination that the Missouri prison regulations impermissibly interfered with the fundamental right to marry.

Turner, then, even more clearly than either Loving or Zablocki, shows how the Due Process Clause limits the ability of the state to be indifferent toward at least some intimate relationships. The Due Process Clause, to put it differently, at least sometimes requires the state to recognize intimate relationships. This suggests that Justice Kennedy was incorrect when he implied in his majority opinion in Lawrence that there is (always) an important distinction between state interference with intimate relationships on the one hand and state recognition of those relationships on the other. As I have sought to demonstrate in this section of the Article, the Court's fundamental right to marry cases show that the distinction is not always tenable.

II. POSITIVE RIGHTS VS. NEGATIVE RIGHTS: THE CASE OF LIBERTY

The consensus among judges is that the Constitution primarily protects negative rights. The Supreme Court, when explicitly faced with the question of whether the Due Process Clause imposes affirmative obligations on the state "to protect the life, liberty, and property of its citizens against invasion by private actors," answered in the negative. There are some commentators who argue that positive rights in American constitutional law are more prevalent than many believe. I can-

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80. See supra notes 72–75 and accompanying text.
81. See supra notes 1–2 and accompanying text.
82. See Susan Bandes, The Negative Constitution: A Critique, 88 Mich. L. Rev. 2271, 2273 (1990) (arguing that "courts have steadfastly adhered" to the view that "the protections of the Constitution [are] largely . . . prohibitory constraints on the power of government, rather than affirmative duties with which government must comply" (footnote omitted)).
83. See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989); see also Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) ("The Constitution is a charter of negative rather than positive liberties.").
not here attempt to resolve the broader negative vs. positive rights dispute in U.S. constitutional law. My point is simply that even if the Due Process Clause primarily protects negative rights, the fundamental right to marry stands as an important exception.

Justice Kennedy in Lawrence noted that, according to the Court's precedents, the liberty protected by the Constitution "afford[s] . . . protection to personal decisions" in the following six areas: "marriage, procreation, contraception, family relationships, child rearing, and education." When individuals challenge state action in the last five areas noted by Justice Kennedy, they claim the right to keep the state from interfering with decisions that the Constitution holds are best made by individuals. Thus, in Roe v. Wade, the plaintiff asked that the state allow her to decide whether to procreate. In Carey v. Population Services International and Eisenstadt v. Baird, the plaintiffs asked that the state allow them to make the decision of whether to use contraceptives (in order to decide for themselves whether to procreate). In Moore v. City of East Cleveland, the plaintiff asked that the state allow her to decide with which family members to live. In Pierce v. Society of Sisters and Meyer v. Nebraska, the plaintiffs asked that the state allow them to make important decisions about the rearing and educating of their children. All of these cases represent successful invocations of negative rights to liberty under the Due Process Clause.

In the marriage context, as we have seen, constitutionally protected liberty is sometimes promoted through the invocation of negative rights that impose on the state obligations of inac-

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89. See Carey, 431 U.S. at 684–85; Eisenstadt, 405 U.S. at 440–42. Even though the Court decided Eisenstadt under the Equal Protection Clause and not under the Due Process Clause, it stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.
91. 268 U.S. 510 (1925).
92. 262 U.S. 390 (1923).
tion or restraint. The constitutional claim in *Griswold*, for example, sought to prohibit the state from regulating sexual intimacy within the marital relationship. As we have also seen, however, the three marriage cases that followed *Griswold* did not involve requests by plaintiffs to be left alone, but instead involved requests that the state act affirmatively by recognizing the plaintiffs' relationships as marital. In the "failure to recognize" cases, as we have seen, the state was not asked to stay away; in fact, in all three cases, the state unsuccessfully tried to stay away by refusing to recognize (and thus regulate) the relationships of interracial couples (*Loving*), individuals who owed child support (*Zablocki*), and prisoners (*Turner*).

The right to marry, then, is different from the rights applicable in the other five areas of governmental regulation noted by Justice Kennedy in *Lawrence* because it sometimes imposes positive obligations on the state to act. In contrast, the Supreme Court has never held that the liberty interests associated with contraceptives and education, for example, include positive obligations on the part of the state to make them available to individuals. In addition, the Supreme Court has explicitly held that there is no constitutional right to state-funded abortions.

The contrast between abortion and marriage, in fact, is illuminating because constitutionally protected liberty associated with the former, the Court has held, is sufficiently guaranteed through the enforcement of negative rights, while the liberty associated with the latter is protected through both negative and positive rights. The Constitution prohibits the state from unduly burdening a woman's right to choose an abortion, but it does not require the state to make abortion

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94. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). As noted above, even this negative claim related to marriage contains an unstated positive claim that precedes it and that requires the state to make the institution of marriage available. See *supra* notes 41–47 and accompanying text.

95. See *supra* notes 49–81 and accompanying text.

96. It can be argued, in fact, that the Court has explicitly held otherwise in the context of education. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

97. *Harris v. McRae*, 448 U.S. 297, 316 (1980); *see also* *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that the Constitution does not prohibit the State from encouraging childbirth by withholding public funds for abortions).

available to women. The Due Process Clause in the context of abortion, in other words, requires noninterference with the decision of whether to have an abortion, but not more. If all state-supported health care providers in the United States were to no longer provide abortion services to women, the fundamental right to decide whether to have an abortion would not be implicated. Abortion can and does take place in the absence of state support. Negative obligations of restraint imposed on the government by the Constitution, therefore, are enough (at least according to the Supreme Court) to protect constitutional liberty in the abortion context.

As far as the constitutionally protected liberty implicated by the right to marry is concerned, however, the individual is sometimes entitled to demand that the state not stay away. This is because, unlike abortion, civil marriage (at least as we have traditionally understood it in this country) cannot exist in the absence of state recognition. It is State action that creates the very institution that makes the exercise of the fundamental right to liberty in the context of marriage possible. There are constitutional limitations, therefore, in the ability of the state to refuse to recognize (heterosexual) marriage.

This is all bad news for the members of our hypothetical Texarcana legislature. It means that interested heterosexual couples in Texarcana, like the plaintiffs in Loving, Zablocki, and Turner, will be able to go to court to require the state to recognize their relationships as marital. It is hard to imagine, in fact, that Texarcana would be able to muster anything close to a compelling state interest to justify its decision to abolish marriage given that its intent was to create a backlash against same-sex marriage. If the state could not prevent deadbeat

99. See Harris, 448 U.S. at 316; Maher, 432 U.S. at 474.
100. "Simply put, the government creates civil marriage." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003). As one commentator notes,

Marriage is a legal relationship, entered into through a legal framework, and enforceable according to legal rules. Law stands at its very core. Due to this inherent "legalness" of marriage, the constitutional right to marry cannot be secured simply by removing legal barriers to something that exists outside of the law. Rather, the law itself must create the "thing" to which one has a right. As a result, the right to marry necessarily imposes an affirmative obligation on the state to establish this legal framework.

101. See supra p. 1191.
dads from marrying in *Zablocki*, and if it could not prevent convicted criminals from marrying in *Turner*, then surely it should not be able to prevent law-abiding heterosexual couples from marrying.

**III. LAWRENCE AND SAME-SEX MARRIAGE**

Given that it is unlikely that a state will any time soon ban heterosexual marriage, heterosexual couples who want to marry are more likely to be amused than relieved to learn that their right to marry cannot be taken away by state legislatures. The disputed issue, of course, is not heterosexual marriage but same-sex marriage. In order to argue convincingly that the state has a constitutional obligation under the Due Process Clause to recognize same-sex marriages, there are three hurdles that must be surmounted. The first is that the state must be prohibited from criminalizing same-gender sexual conduct. As noted in the introduction, as long as the state was constitutionally allowed to criminalize same-gender sexual conduct, it could be argued that it would be contradictory to require, as a matter of constitutional law, that the state recognize the personal relationships that can accompany that conduct.\(^2\) *Lawrence* allows gay rights proponents to surmount this first hurdle.

The second hurdle that must be surmounted is the idea that the fundamental right to marry imposes only negative obligations on the state (i.e., obligations of noninterference) and does not require the state to make the institution of marriage available (to anyone) to begin with. I have tried so far in this Article to argue that the constitutional right to marry has a positive component to it that places on the state, at the very least, the obligation to recognize some relationships as marital.

Even if these two hurdles can be surmounted, there remains for proponents of same-sex marriage a third hurdle, namely, the argument that even if there are constitutionally significant liberty interests that impose on the state a due process obligation to recognize heterosexual marriage, individuals in same-sex relationships do not enjoy similarly protected liberty interests. I cannot here present fully elaborated arguments in support of a due process obligation on the part of the state to recognize same-sex marriage. I can, however, end the Article with a discussion of three ways in which the *Law-

\(^{102}\) See *supra* notes 7–8 and accompanying text.
rence opinion can contribute to the formulation of those arguments. First, the Court in Lawrence interpreted the liberty interests protected by the Due Process Clause in an expansive way that not only looked to considerations of privacy in the home and the interests of individuals in choosing what type of sexual conduct to engage in, but also focused on the personal relationships that often accompany that conduct, as well as on the obligation of the state to respect the dignity and lives of lesbians and gay men. The fact that the Lawrence Court addressed the interests of lesbians and gay men in personal relationships, and in having their dignity and lives respected by the state, should prove quite helpful to same-sex marriage proponents. Second, the Court held that majoritarian morality is an insufficient ground upon which to justify the state's regulation of sexual conduct and the relationships that arise from it, rendering suspect the argument that the ban on same-sex marriage can be justified solely on the basis of majoritarian morality. Third, the Court relied on the historical record relating to the regulation of same-gender sexual intimacy in both this country and in other Western nations in ways that should prove helpful to same-sex marriage advocates in responding to the objection that the Constitution does not mandate recognition of same-sex marriages because those marriages are not "deeply rooted in this Nation's history and tradition."

A. LIBERTY AND SAME-SEX MARRIAGE

Of the three ways in which Lawrence can contribute to due process arguments on behalf of same-sex marriage, the most important one is its expansive understanding of the liberty interests at issue in the case. The Court, in striking down

103. See discussion infra Part III.A.
104. See discussion infra Part III.B.
106. The Court in Lawrence relied extensively on fundamental rights cases such as Carey v. Population Services International, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); and Griswold v. Connecticut, 381 U.S. 479 (1965), in striking down the Texas sodomy statute. See Lawrence v. Texas, 123 S. Ct. 2472, 2476–77 (2003). Lawrence, therefore, should be understood as a fundamental rights case. The Court, however, did not explicitly hold that it is. See id. at 2484. Although it would obviously be better from a gay rights perspective if future courts understood Lawrence as a fundamental rights case, the points that I make in this Article relating to the positive impact that Lawrence can have on due process arguments for same-sex marriage do not depend on
Texas's sodomy statute, concluded that lesbians and gay men, like all individuals, have liberty interests in the privacy of their homes, in making decisions regarding sexual conduct, in their personal relationships, and in having the state respect their dignity and their lives. In the first section, I briefly discuss each one of these liberty interests as understood by the Court in Lawrence. In the second section, I explain why the Court's understanding of the last two interests are especially relevant to the issue of same-sex marriage.

1. Lawrence and Liberty Interests

a. Privacy

The Court made clear in the very first sentence of the opinion that individuals need to be protected from "unwarranted government intrusions into a dwelling or other private places." The Court also emphasized that sodomy statutes "touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home." Furthermore, the Court recognized that its most important precedents in the area of constitutional protection of intimate relationships emphasized the importance of the right to privacy in the home. The Court, for example, explained that Griswold v. Connecticut "described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom."

One of the interesting areas to watch after Lawrence will be what effect it has on other criminal laws (such as those prohibiting solicitation and public lewdness) that have a public component to them and that have been used in the past to harass gay men. The fact that the Court emphasized that the de-

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such an understanding of the case, I therefore refer to the "liberty interests" rather than the "fundamental right" at issue in Lawrence. In doing so, however, I am not agreeing with Justice Scalia's position in dissent that Lawrence is not a fundamental rights case. See id. at 2491–92 (Scalia, J., dissenting).

107. Lawrence, 123 S. Ct. at 2475.

108. Id. at 2478; see also id. at 2475 (noting that "[i]t 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" (emphasis added)).

109. Id. at 2477 (emphasis added) (citing Griswold, 381 U.S. at 485).

110. See Robert L. Jacobson, Note, "Megan's Laws" Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 Geo. L.J. 2431, 2433–40 (1999) (describing the different techniques that police in the past have used to
fendants in the case were arrested in the privacy of their home at least raises the possibility that the outcome might have been different if the sodomy in question had taken place in a less private setting.

Although it is clear, then, that considerations of privacy play an important role in the opinion, it is also apparent that the Court was unwilling to limit its understanding of the liberty interests at issue in the case to considerations of spatial privacy. As the Court (also in the first paragraph) put it, "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions." Most of the discussion in the opinion, in fact, is not about spatial privacy, but is instead, as I explain below, about the constitutional implications of the Texas sodomy statute for the autonomy of individuals, and in particular its impact on the choices of individuals regarding sexual conduct and personal relationships. The fact that the Court was willing to go beyond the need to protect individuals from unwarranted governmental intrusion while in the special locus of the home is the first indication of the Court's expansive understanding of the liberty interests at issue in the case.

b. Decisions Regarding Sexual Conduct

So what, in addition to privacy in the home, did the Court understand was at stake in the case in terms of liberty? The second liberty interest elaborated on by the Court implicates the ability of individuals to make fundamental decisions about their lives, including what kind of sexual conduct to engage in. The Court, to go back to the first paragraph of the opinion, in listing the elements that make up constitutionally protected liberty, included "autonomy... [in] certain intimate conduct." The Court also, in reviewing its fundamental rights cases, noted the relatively broad way that its precedents (until Bowers v. Hardwick) understood the decisional component of constitutionally protected liberty. The Court noted that "[a]fter Griswold[,] it was established that the right to make certain

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identify and harass gay men).

111. Lawrence, 123 S. Ct. at 2475.
112. See infra Parts III.A.1.b–c.
113. Lawrence, 123 S. Ct. at 2475.
114. 478 U.S. 186 (1986), overruled by Lawrence, 123 S. Ct. 2472.
decisions regarding sexual conduct extends beyond the marital relationship." The Court then quoted the language from Eisenstadt v. Baird that states that the fundamental right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" applies to both married and unmarried individuals. The Lawrence Court also noted the way in which Roe v. Wade "recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."

For the Lawrence Court, the sum total of these precedents meant that the state is under an obligation not to interfere with the ability of individuals to make important decisions about sexual conduct and its consequences. The Court, in fact, was troubled by the way in which the Texas statute interfered with the ability of the defendants to "engage[] in sexual practices common to a homosexual lifestyle." The Court added that "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." The fact, therefore, that the Texas sodomy statute interfered with the decisional freedom of lesbians and gay men in matters of sexual conduct was one of the reasons that the statute was constitutionally impermissible.

c. Personal Relationships

In the same way that the Court was unwilling to limit its understanding of liberty for purposes of deciding the case to considerations of privacy in the home, however, it was also unwilling to limit itself to the freedom of individuals to make decisions about whether to engage in particular kinds of sexual conduct. In fact, the Court was forceful in its criticism of Bowers for that opinion's circumscribed understanding of the liberty interests at issue in that case. The Bowers Court had

115. Lawrence, 123 S. Ct. at 2477.
116. Id. (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
117. Id. (citing Roe v. Wade, 410 U.S. 113 (1973)).
118. Id. at 2484.
119. Id.
stated that the issue to be decided was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." Justice Kennedy in Lawrence objected to this way of characterizing the issue. The Bowers Court's statement of the issue, Justice Kennedy argued,

do[es]closes [at] Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.\(^\text{121}\)

The Court in Lawrence understood that the Texas sodomy statute implicated liberty interests associated with personal relationships as much as liberty interests associated with sexual conduct. For the Court, in fact, it made no sense to discuss the freedom to engage in sexual conduct without bringing into the liberty analysis the ability of individuals to form and maintain the kinds of personal relationships that often accompany that conduct. The impact of the Texas sodomy statute on the freedom of individuals to form and maintain personal relationships, in other words, was for the Court as important as the statute's impact on the freedom of individuals to make decisions about their sexual conduct without fear of criminal repercussions. This focus on relationships is particularly clear when Justice Kennedy (1) noted how the Court in Planned Parenthood of Southeastern Pennsylvania v. Casey reaffirmed "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education";\(^\text{122}\) (2) quoted the by now famous language from Casey that "[t]hese matters, involv[e]... choices central to personal dignity and autonomy" and that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life";\(^\text{123}\) and then, most crucially, (3) explained that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."\(^\text{124}\)

The Lawrence Court recognized that the criminalization of particular kinds of sexual intimacy not only limits the auton-

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121. Lawrence, 123 S. Ct. at 2478.
122. Id. at 2481 (citing Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).
123. Id. (quoting Casey, 505 U.S. at 851).
124. Id. at 2482.
omy of individuals to decide which kinds of sexual acts they want to engage in and with whom; it also, directly and necessarily, has an impact on the autonomy of individuals to build relationships that are based, in part, upon that sexual intimacy. Thus the Court, in one of the most important sentences in the opinion, noted that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 125

The Court in Lawrence understood that relationships are central to the dignity and autonomy of all individuals, including those who are lesbian or gay. As the Court saw it, what was ultimately at issue in the case was the ability of individuals to "retain their dignity as free persons" in the face of regulations such as Texas's sodomy statute that "seek to control...personal relationship[s]." 126 The crucial point is this: The Lawrence Court understood that there is more to lesbian and gay individuals than their interest in having sex and that there is more to gay rights positions than simply the right to have sex. 127

The Lawrence Court's approach to lesbian and gay relationships was the polar opposite of that taken by the Bowers Court. That Court concluded that there was "[n]o [demonstrated] connection between family, marriage, or procreation on the one hand and homosexual activity on the other." 128 The crucial link between sexual intimacy and personal relationships was, on the other hand, fully understood by the Lawrence Court. The failure to see this link, the Court concluded, constitutes a failure to respect the dignity of lesbians and gay men. It is for this reason that the Court in Lawrence concluded that the "continuance [of Bowers] as precedent demeans the lives of homosexual persons." 129

I view the Court's focus on personal relationships as indicative of its expansive understanding of the liberty interests at issue in the case. An argument can be made, however, that

125. Id. at 2478 (emphasis added).
126. Id. at 2478.
127. This is a point that many of us have been making for a long time. See, e.g., David A.J. Richards, Identity and the Case for Gay Rights 96-97 (1999); Carlos A. Ball, Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism, 85 Geo. L.J. 1871, 1912-15 (1997); Chai R. Feldblum, Sexual Orientation, Morality, and the Law: Devlin Revisited, 57 U. Pitt. L. Rev. 237, 331-35 (1996).
129. Lawrence, 123 S. Ct. at 2482.
an emphasis on personal relationships actually limits the scope of Lawrence because it suggests that sexual conduct in the absence of personal relationships somehow deserves less constitutional protection. It is in my estimation incorrect to view the role that personal relationships plays in the opinion in this limiting way. Given that the statute in question criminalized a particular kind of sexual act, and that the Court on several occasions refers to the liberty interests at issue in making decisions about sexual conduct, it should be clear that Lawrence is, in the first instance, a case about sexual freedom. We do not know, in fact, from the facts of the case, whether Mr. Lawrence and Mr. Garner, both of whom were arrested in the former's bedroom for having sex, were, at the time of their arrest, in an ongoing relationship. Whether they were or not is not dispositive in the case. The point that I want to emphasize is this: Given that the case involved a challenge to a sodomy statute, the Court could have limited its discussion of liberty to issues of sexual freedom only. The fact that the Court went beyond those issues and incorporated into its analysis considerations of same-sex relationships makes Lawrence, for reasons that I elaborate on below, a broad ruling with likely positive effects on the issue of same-sex marriage.

d. Respect and Dignity

There is, finally, a fourth component to the way in which the Court understood the liberty interests at issue in Lawrence, namely, that lesbians and gay men must be allowed, in the face of governmental regulation, to "retain their dignity as free persons." Lesbians and gay men, the Court emphasized, are "entitled to respect." As the majority saw it, the Texas sodomy statute was constitutionally problematic because it demeaned the dignity of lesbians and gay men. Furthermore, as already noted, the Court explained that to allow Bowers to continue as a valid precedent would continue to demean the lives of lesbi-

130. See supra Part III.A.1.b.
131. Lawrence, 123 S. Ct. at 2475–76.
132. See infra Part III.A.2. The positive impact of the opinion, as I also argue below, is already evident in the Massachusetts Supreme Judicial Court's decision in Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003). See infra notes 155–61 and accompanying text.
133. Lawrence, 123 S. Ct. at 2478.
134. Id. at 2484.
135. Id.
The Court's concern for the dignity of lesbians and gay men, as well as with the state's obligation to respect their lives, is not only striking (at least when compared to the dismissive attitude towards homosexuals taken by the Court in *Bowers*), but also illustrative of the expansive way in which the *Lawrence* Court viewed the liberty interests at stake in the case. The Court could have limited its analysis (as opposed to its holding) to the fact that the sexual conduct in the case was consensual and took place in the privacy of the home. The Court, to put it differently, could have applied a minimalist libertarian understanding of the Due Process Clause in matters of sexual intimacy by simply concluding that because the sexual acts at issue in the case were consensual, took place in the privacy of the home, and did not harm third parties, they were constitutionally protected. The Court, by bringing into the analysis notions of respect and dignity in the context of gay lives and relationships, went beyond such minimalism. Given the Court's reasoning and language noted in the previous paragraph and in the previous section, the state, after *Lawrence*, is under at least some obligations to respect the lives and relationships of lesbians and gay men. What those obligations entail, beyond the state's inability to criminalize sodomy, will, of course, be the subject of much debate in the years to come. In the next section I offer some thoughts on how the Court's expansive reading of the liberty interests at issue in the case should impact the debate over the constitutionality of prohibiting lesbians and gay men from marrying.

2. *Lawrence*'s Liberty Interests and Same-Sex Marriage

The fact that the Court in *Lawrence*, in assessing the constitutionality of Texas's sodomy statute, was willing to go beyond considerations of privacy in the home is relevant to the is-

136. *Id.*; see also supra notes 128–29 and accompanying text. The Court also argued that the way in which the *Bowers* Court framed the issue in that case—as whether there is a fundamental right to engage in a particular kind of sexual act—was demeaning to lesbians and gay men. *Lawrence*, 123 S. Ct. at 2478; see also supra notes 113–19 and accompanying text.

137. I distinguish between the Court's analysis and its holding because it can be argued that the latter is limited to consensual sexual conduct in the home, and thus, of limited impact on the issue of same-sex marriage. See infra notes 140–61 and accompanying text.

138. *See supra* notes 133–36 and accompanying text.

139. *See supra* notes 125–29 and accompanying text.
sue of same-sex marriage. The interest of individuals in avoiding governmental intrusion in the home represents a paradigmatic example of a negative right. The home is understood to be a special site where the interests of individuals in being left alone by the state are at their strongest. The fact that the Court understood that the liberty interests implicated in Lawrence went beyond issues of privacy in the home is significant for the elaboration of substantive due process arguments on behalf of same-sex marriage because those arguments cannot be grounded in the need to protect individuals from intrusive governmental regulation while at home. The debate over same-sex marriage implicates not only the freedom to engage in certain conduct in the privacy of one's home, but the consequences for liberty of the failure by the state to recognize committed same-sex relationships. The rights and obligations that pertain and give meaning to the marital relationship obviously apply outside of the home as well as inside of it. The argument that there are liberty interests implicated by the state's failure to recognize at least some committed relationships as marital must by necessity, therefore, bring the public sphere into the analysis.

If the liberty protected by the Due Process Clause in matters of sexual intimacy and relationships is limited to considerations of privacy—whether understood in terms of protecting the home from governmental intrusion, or, more broadly, in terms of protecting the right to be left alone and not to be interfered with by the state regardless of locus—that does not bode well for due process arguments on behalf of same-sex marriage. If the liberty protected by the Constitution in matters of sexual intimacy and relationships goes beyond considerations of privacy, as the Court in Lawrence suggests, that means that future courts may agree that those interests are implicated in cases, such as ones challenging bans on same-sex marriage, where considerations of privacy and of negative liberty are secondary to the positive or affirmative right to have one's committed relationship recognized by the state. In this way, Lawrence is entirely consistent with Loving v. Virginia and Turner v. Safley, which, as already noted, delink the constitu-

140. See Stanley v. Georgia, 394 U.S. 557, 565 (1969); see also United States v. Orito, 413 U.S. 139, 142 (1973) (noting that "[t]he Constitution extends special safeguards to the privacy of the home").
141. 388 U.S. 1 (1967).
tionally protected liberty under the Due Process Clause in matters relating to intimate relationships from privacy considerations and the right to be left alone.\(^1\)

For similar reasons, it is also important that the *Lawrence* Court, in its liberty analysis, went beyond the interests of individuals to make decisions about what kind of sexual conduct to engage in. The right to same-sex marriage obviously involves more than just the right to engage in the sexual conduct of one's choice. Protecting the right to make decisions regarding sexual intimacy is clearly important, but such a right, like the right to privacy in the home, is a negative right that imposes only obligations of noninterference on the state. That right will not, by itself, impose on the state obligations to recognize the personal relationships that can accompany the sexual conduct, which after *Lawrence*, is constitutionally protected. Just because the state has to allow certain sexual conduct to take place does not mean that it has to recognize the committed relationships that are sometimes constructed, in part, around that sexual intimacy.

The key to the Court's understanding of liberty in *Lawrence* for the issue of same-sex marriage, then, is found in the last two components of its liberty analysis discussed above, namely, the emphasis that the Court places on personal relationships and its position that the state has an obligation to respect the dignity and lives of lesbians and gay men. As we have seen, the fact that Texas's criminal regulation of same-sex sodomy affected the ability of lesbians and gay men to form and maintain intimate relationships with others mattered to the Court.\(^2\) The failure by the state to recognize the committed relationships of lesbians and gay men similarly has an impact on their ability to form and maintain intimate relationships. Although committed and loving relationships can, of course, exist outside of a legally recognized relationship such as the marital one, commitment "may be more comfortably sustained and reciprocating love more easily offered where personal feelings are reinforced and expectations are coordinated by social institutions."\(^3\) If the ability to form relationships defined by "personal bond[s] [that are] enduring" was constitutionally relevant in

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143. See *supra* notes 49–54, 65–81 and accompanying text.
144. See *supra* notes 120–32 and accompanying text.
Lawrence, then that ability should also be relevant to a discussion of the state's constitutional obligations in the area of marriage.

It is possible, in fact, to bring together the Court's reasoning on the role of personal relationships in matters of sexual intimacy, and its requirement that the state respect the dignity and lives of lesbians and gay men, in articulating arguments on behalf of state obligations that go beyond the mere noncriminalization of particular kinds of sexual acts. As I have argued elsewhere, a society that respects the human needs and capabilities of lesbians and gay men for sexual intimacy by not criminalizing same-gender sexual conduct goes a long way toward recognizing their basic humanity. There are, however, additional basic needs and capabilities, such as those associated with the caring for and loving of others, that lesbians and gay men share with all other human beings. These additional needs and capabilities are not sufficiently accounted for by a society that protects negative rights but refuses to provide affirmative recognition and support for the kinds of personal relationships (both intimate and familial) that are manifestations of basic human needs and capabilities for the caring for and loving of others. A society that fails to recognize the relationships and families of lesbians and gay men is a society that fails to respect their personal dignity and full humanity. In particular, our society, by depriving lesbians and gay men of the opportunity to avail themselves of marriage, the principal way in which it seeks to protect and promote basic human needs and capabilities associated with physical and emotional intimacy in long-term relationships, fails to recognize and provide for the full humanity of lesbians and gay men.

These are the kinds of arguments, that, given the way in which the Court in Lawrence expansively interpreted the liberty interests at issue in the case, can now be made in constitutional challenges to bans against same-sex marriage. There is an obligation arising from Lawrence for the state to respect the dignity of lesbians and gay men; that obligation, I believe, will

146. Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003); see supra notes 125-32 and accompanying text.
148. See id.; see also CARLOS A. BALL, Marriage, Same-Gender Relationships, and Human Needs and Capabilities, in MARRIAGE AND SAME-SEX UNIONS 137 (Lynn D. Wardle et al. eds., 2003).
149. See BALL, supra note 147, at 109-17.
remain unfulfilled until (at least) the state gives full recognition to their committed relationships.

There will be those, of course, who will object by arguing that the state, after Lawrence, is only required to not interfere with lesbian and gay relationships. The crucial question, then, is whether respect for the dignity of individuals in the context of personal relationships requires only omission and noninterference on the part of the state, or alternatively, whether respect, as I have argued here and elsewhere, requires more.

Two post-Lawrence same-sex marriage appellate court opinions answer this question in different ways. A few days after Lawrence was decided, two gay men in Arizona applied for a marriage license. After their application was denied, they sued the State, relying heavily on Lawrence. The Arizona Court of Appeals, concluding that the case only raised issues of law, took the case away from the trial court and issued an opinion rejecting the plaintiffs’ argument that Lawrence required the striking down of the State’s ban on same-sex marriage. Specifically, the court stated:

We view [Lawrence] as acknowledging a homosexual person’s right to define his or her own existence, and achieve the type of individual fulfillment that is a hallmark of a free society, by entering into a homosexual relationship. We do not view [Lawrence] as stating that such a right includes the choice to enter a state-sanctioned, same-sex marriage.

It seems to me that, despite the negative result (from a gay rights perspective) in the case, the first sentence in this passage shows the progress that Lawrence represents. The Arizona court in that sentence acknowledges that the ability of lesbians and gay men to enter into intimate relationships is constitutionally protected. The opinion, in fact, is the first example of how Lawrence can have an impact beyond issues associated solely with the criminalization of sexual conduct by providing at least some protection to the relationships of lesbians and gay men. State-promoted impediments to those relationships, after Lawrence, are constitutionally suspect.

What the Arizona court was unwilling to do, however, was to go beyond imposing on the State obligations of noninterference by requiring it to recognize same-sex relationships. Ac-
ccording to the court, the obligation on the State that accompanies the liberty right recognized in Lawrence is one of noninterference with relationships as opposed to one of recognition.\(^{154}\) The Massachusetts Supreme Judicial Court in Goodridge v. Department of Public Health saw the issue differently.\(^{155}\) The fact that the Supreme Court in Lawrence “affirmed that the core concept of common human dignity [is] protected by the Fourteenth Amendment” was, for the Massachusetts court, relevant to the constitutionality of the State’s prohibition against same-sex marriage.\(^{156}\) As the Massachusetts court saw it, to be excluded from the right to marry is to be “excluded from the full range of human experience.”\(^{157}\) The court argued that marriage “fulfills yearnings for security, safe haven, and connection that express our common humanity,” and that, as a result, the denial by the State of marriage rights entails a failure by the State to respect the dignity of lesbians and gay men as individuals.\(^{158}\) The Massachusetts court added that to be barred from the opportunity to marry is an “exclusion [that] is incompatible with the constitutional principles of respect for individual autonomy and equality under the law.”\(^{159}\)

Ultimately, the Massachusetts court had a more robust understanding of what principles of due process (and equality) require of the state in matters of committed intimate relationships than did the Arizona court. Those principles, the Massachusetts court concluded, impose both positive and negative obligations on the state. As the court put it, “[t]he individual liberty and equality safeguards of the Massachusetts Constitution protect both ‘freedom from’ unwarranted government intrusion into protected spheres of life and ‘freedom to’ partake in benefits created by the State for the common good.”\(^{160}\)

Given that the Massachusetts court decided the issue

\(^{154}\) See id. at 456–57.

\(^{155}\) See 798 N.E.2d 941, 948–49 (Mass. 2003).

\(^{156}\) Id. at 948 (citing Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003)); see also id. at 958 n.17 (noting that “[r]ecently, the United States Supreme Court [in Lawrence] has reaffirmed that the Constitution prohibits a State from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity”).

\(^{157}\) Id. at 957.

\(^{158}\) Id. at 955. “[T]he decision whether and whom to marry is among life’s momentous acts of self-definition.” Id.

\(^{159}\) Id. at 949.

\(^{160}\) Id. at 959 (citations omitted).
solely on state constitutional grounds, one has to be careful not to overemphasize the role that Lawrence played in its decision. It seems clear, however, that the tenor and reasoning of Lawrence influenced the way in which the Massachusetts court framed the constitutional issues in Goodridge. Lawrence encouraged the Massachusetts court to view the Massachusetts marriage statute, like the Supreme Court viewed the Texas sodomy statute, as inconsistent with the obligation of the state to respect the personal relationships and dignity of lesbians and gay men. In the end, the Massachusetts court concluded that full respect for the lives of lesbians and gay men demands state recognition and protection of their relationships. Such a conclusion is entirely consistent with the analysis and reasoning of the Supreme Court’s ruling in Lawrence.

B. THE ROLE OF MAJORITARIAN MORALITY

The first, and most important, contribution that Lawrence makes to the elaboration of substantive due process arguments in favor of same-sex marriage, then, is its expansive understanding of the liberty interests at issue in the case. Its second contribution is its holding that, when the liberty interests protected by the Fourteenth Amendment are at stake, morality by itself is an insufficient justification for state regulation. The Lawrence Court explicitly adopted Justice Stevens’s position in dissent in Bowers 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.” If majoritarian morality is an insufficient ground upon which to justify state regulation of sexual intimacy, then it is unclear why such morality should be deemed a sufficient justification for withholding state recognition of the relationships that can accompany that intimacy. As Justice

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161. See id. at 948–49.
162. See id.
164. I have argued elsewhere that notions of morality have a legitimate role to play in political and social debates about many gay rights issues. See BALL, supra note 147, at 1–14, 75–137; Ball, supra note 127, at 1926–42. It has never been my position, however, that majoritarian morality is a legitimate ground upon which to defend state laws and policies from constitutional attack, whether on the basis of the Due Process Clause or the Equal Protection Clause. Instead, I believe that, first, negative rights, including those associated with privacy and the right to be left alone, are insufficient to justify im-
Scalia rhetorically asked in his dissent in *Lawrence*, "[i]f moral disapprobation of homosexual conduct is ‘no legitimate State interest’ for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution’?"

The part of the *Lawrence* holding that relates to morality means that the state should not be allowed to rely on vague references to traditional and family values in defending the constitutionality of its exclusionary marital policy. References to the supposed immorality of homosexuality will also be constitutionally impermissible. In this sense, *Lawrence* (from the due process side) joins *Romer v. Evans* (from the equality side) in demanding that the state have some empirical basis for the targeting of lesbians and gay men through discriminatory policies.

Once majoritarian morality becomes an impermissible ground upon which to justify limiting marriage to heterosexual couples, the state will have to look elsewhere for justifications. Those justifications will likely center around the connection between procreation and children on the one hand and heterosexual marriage on the other. Although I cannot here address the validity of these alternative state justifications, it should be noted that several courts have recently been skeptical of their legitimacy.

posing on the government an *affirmative* obligation to recognize lesbian and gay relationships and families. And second, that, as a matter of political theory rather than of constitutional doctrine, it is not possible to make the case for the imposition of such an affirmative obligation on the state without addressing issues associated with the value, goodness, and yes, morality, of those relationships and families.

165. *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting) (citing majority opinion at 2484).


167. The Commonwealth of Massachusetts, in defending its ban against same-sex marriage, argued that the ban was justified by the connection between heterosexual marriage and reproduction. See Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003). It also argued that the ban ensured that children would be raised in what it contended was the optimal setting, namely, in a home with one parent of each sex. See id. The court rejected the first argument because neither reproduction nor fertility are requirements of marriage. As the court put it, "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." Id. As for the second argument, the court noted that the State did not show that forbidding same-sex marriage would lead more heterosexuals to have children. See id. at 963. Furthermore, the
C. HISTORY AND TRADITION

The third way in which the Lawrence opinion is helpful to advocates of same-sex marriage is the way in which it can be used to respond to the argument that same-sex marriages are not "deeply rooted in this Nation's history and tradition."168 The Court has in the past used this criterion in determining the scope of fundamental rights under the Due Process Clause.169 Those who oppose same-sex marriages have argued (and will surely continue to argue) that since American history and tradition do not include within them the legal recognition

State "readily concede[d] that people in same-sex couples may be 'excellent' parents." Id. As a result, it made no sense for the Commonwealth to place obstacles in the way of those parents which made it more difficult for them to provide good and reliable care to their children. As the court put it,

Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.

_id. at 964 (internal quotation and footnote omitted).

The State of Vermont, in defending its ban against same-sex marriage, similarly argued that limiting marriage to one man and one woman promotes the legitimate government "interest in furthering the link between procreation and child rearing." Baker v. State, 744 A.2d 864, 881 (Vt. 1999). The Supreme Court of Vermont rejected this argument by noting (1) that many married heterosexual couples decide to either not have children or to use assisted reproduction techniques where at least one of the parents has no genetic connection to the children, and (2) that many same-sex couples use assisted reproduction techniques in order to create a biological link between one of the parents and a child. See id. at 881–82. Furthermore, the court noted that "to the extent that the state's purpose in licensing civil marriage was, and is, to legitimize children and provide for their security," the prohibition against same-sex marriage undermines that purpose. Id. at 882. As the court pointed out, "[i]f anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against." Id. For its part, the State of Hawaii, in defending its ban against same-sex marriage, argued that limiting marriage to heterosexuals furthered its "interest in promoting the optimal development of children." Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996). After hearing the expert testimony presented by both sides, the trial court in Baehr concluded that "[t]he sexual orientation of parents is not in and of itself an indicator of parental fitness" and that "[g]ay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children." See id. at *17.

169. See id.
of same-sex marriages, courts should not mandate their recognition as a matter of constitutional law.\textsuperscript{170} It seems to me that the \textit{Lawrence} opinion provides advocates of same-sex marriage with at least three ways of responding to this argument.

First, the Court in \textit{Lawrence} explicitly noted that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.\textsuperscript{171} The opinion, arguably in its most eloquent passage, emphasized the crucial point that our understanding of the liberty protected by the Due Process Clause should not be tied rigidly to that of our predecessors:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.\textsuperscript{172}

For some in our country today, there is no more obvious truth than that marriage must be limited to a man and a woman. For some, the truth of such a proposition is so clear that it is difficult for them to even countenance the possibility that the union of two women or two men could ever be a marriage, much less that there is a constitutional right to enter into such a marriage.\textsuperscript{173} However, as so many of this country's past policies show—from slavery to segregated schools to anti-

\begin{itemize}
  \item \textsuperscript{170} See Standhardt v. Superior Court, 77 P.3d 451, 459 (Ariz. Ct. App. 2003) (arguing that "same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty" (citing \textit{Glucksberg}, 521 U.S. at 720–21)); \textit{Goodridge}, 798 N.E.2d at 987 (Cordy, J., dissenting) (arguing that "same-sex relationships, although becoming more accepted, are certainly not so 'deeply rooted in this Nation's history and tradition' as to warrant... enhanced constitutional protection" (quoting \textit{Moore}, 431 U.S. at 503)).
  \item \textsuperscript{171} Lawrence v. Texas, 123 S. Ct. 2472, 2480 (2003) (citing County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).
  \item \textsuperscript{172} See \textit{id}. at 2484.
  \item \textsuperscript{173} See Standhardt, 77 P.3d at 458 (asserting that "recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage'"); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (rejecting a challenge to a ban on same-sex marriage brought by a gay couple because "the relationship proposed by the appellants does not authorize the issuance of a marriage licence because what they propose is not a marriage"); Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974) (noting that "marriage, as a legal relationship, may exist only between one man and one woman").
\end{itemize}
miscegenation statutes to denying women the right to vote—what seems to one generation like legitimate State policies are, to future generations, nothing more than institutionalized discrimination.

Until recently, the idea that same-gender sexual intimacy could raise issues of dignity and respect for the individuals involved was met with derision and ridicule. Until recently, the idea that same-gender sexual intimacy could raise issues of dignity and respect for the individuals involved was met with derision and ridicule. The Court in Lawrence thought otherwise when it recognized that such intimacy can be part of “a personal bond that is . . . enduring.” Future courts, one hopes, will also recognize that there are implications for constitutionally protected liberty interests when a state refuses to recognize enduring personal bonds as they exist in lesbian and gay relationships.

The first response to the “deeply rooted” objection to the idea that the constitutional right to marry is broad enough to include lesbians and gay men within its scope, then, is that, as the Court in Lawrence recognized, history by itself cannot be the sole arbiter of the scope of constitutionally protected liberty. The second response is that regardless of the role (whether dispositive or not) that history should play in the elaboration of that liberty, history is not entirely on the side of opponents of same-sex marriage in the same way that the historical record is not clearly supportive of the idea that there has been in this country a tradition of expressing disapproval of same-gender sexual intimacy through sodomy statutes. As the Court in Lawrence recognized, the historical record on this latter point is (at the very least) more ambiguous than was suggested by Bowers. Justice White pointed out in his majority opinion in Bowers that sodomy was a criminal offense in “the original 13 States when they ratified the Bill of Rights” and that at the time the “Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.” This was enough for Justice White to conclude that the condemnation of same-gender sexual practices through the criminal law is deeply rooted in our country’s history.

174. See Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (arguing that the claim that there is a fundamental right to engage in same-gender sexual conduct is, “at best, facetious”), overruled by Lawrence, 123 S. Ct. 2472.
175. Lawrence, 123 S. Ct. at 2478.
177. See id. at 192–95. Chief Justice Burger, in his concurring opinion in Bowers, went even further back in history by linking Georgia’s sodomy statute, which was initially enacted in the early nineteenth century, to the condemnation of homosexual sodomy in Roman law and in post-Reformation Eng-
The Court in Lawrence pointed out, however, that it is not at all clear from the historical record that the sodomy statutes noted by Justice White in Bowers were primarily directed at same-gender sexual conduct in particular as opposed to all nonreproductive sexual activity, whether heterosexual or homosexual. In fact, the Lawrence Court noted that some scholars argue that "the concept of the homosexual as a distinct category of person did not emerge until the late 19th century."\(^7\)\(^8\) The Court also pointed out that sodomy prosecutions in the nineteenth century were not brought "against consenting individuals acting in private."\(^7\)\(^9\) Instead, prosecutions were largely limited to cases where adults had sex with minors (regardless of gender) or where force was used.\(^8\) In the end, although the Court did not seek to resolve definitively the disputes over the historical record about the meaning and scope of the enforcement of sodomy statutes in the eighteenth and nineteenth centuries, it did conclude definitively that the Bowers Court's review of that record was overstated and simplistic.\(^8\)

The Lawrence Court's refusal to rely on generalizations about American sodomy laws as representing long-standing and unequivocal expressions of disapproval of lesbians and gay men bodes well for future constitutional arguments on behalf of same-sex marriage. Future courts faced with the constitutionality of a ban against same-sex marriage will hopefully be as careful with the historical record as it relates to loving and committed same-sex intimate relationships in the United States as was the Lawrence Court with the historical record as it relates to the criminal regulation of same-gender sexual intimacy. Although it is true that same-sex relationships have not yet been recognized in any American jurisdiction as marital, it is also true that those relationships have existed and persevered even in the absence of such recognition. This is particularly the case "in the past half century," which the Lawrence Court argued is the historical period "of most relevance."\(^182\)

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178. Lawrence, 123 S. Ct. at 2479.
179. Id.
180. See id.
181. As the Lawrence Court put it, "the historical grounds relied upon in Bowers are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated." Id. at 2480.
182. Id. For discussions of committed lesbian and gay relationships, see, for example, CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS
The Court in *Lawrence* noted that there has been an "emerging awareness" in the last fifty years about the implications for liberty and privacy of sodomy statutes. There has also been, in roughly that same period of time, an "emerging recognition" that lesbians and gay men, in huge numbers, are as fully capable as heterosexuals of participating in loving and committed relationships. The results of the 2000 census show the large number of households in the United States that consist of same-sex couples. Several states and dozens of municipalities provide considerable legal benefits to same-sex couples. To say unequivocally, then, that committed same-gender relationships are not part of American history is as incorrect as


184. *Id.*
185. See sources cited supra note 182.
186. See Tavia Simmons & Grace O'Neill, U.S. Census Bureau, U.S. Dep't of Commerce, Households and Families: 2000, at 7 (2001) (noting that the 2000 census counted 5.5 million households headed by unmarried partners, 600,000 of which were same-sex partners). The 2000 census also found that 60,000 male couples (about twenty percent of all male couple households) were raising children and 96,000 female couples (about a third of all female couple households) were doing the same. See Ginia Bellafante, *Two Fathers, with One Happy to Stay at Home*, N.Y. TIMES, Jan. 12, 2004, at A1.

It is interesting that the Court in *Lawrence* found it relevant, in discussing the history of sodomy regulation in the United States, that the American Law Institute (ALI) in 1955 amended its Model Penal Code to eliminate consensual sodomy as a crime. See *Lawrence*, 123 S. Ct. at 2480. It should be also relevant to the issue of the legal recognition of same-sex relationships that the ALI has recently issued principles for the dissolution of relationships that acknowledge the existence and prevalence of same-sex relationships. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 cmt. a, at 930 (noting that "[a]t any given time, nearly half of gay men and more than half of lesbians report themselves 'in a relationship with a primary partner,' and many of them have exchanged rings or otherwise engaged in a commitment ceremony" (citation omitted)). The ALI's principles treat same-sex and opposite-sex domestic partners in the same way. See id. § 6.01(1) (defining domestic partners as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple").
it is to say unequivocally that sodomy statutes in the eighteenth and nineteenth centuries were meant to express disapproval of homosexual conduct in particular. Committed same-sex relationships have been part of the social fabric of this nation for a long time, and are increasingly becoming part of its legal fabric. To argue otherwise is to seek to erase the personal lives of millions of Americans, both living and dead.

The fact that the Court was willing to look to the laws and judicial decisions of other Western countries is the third way in which Lawrence can help proponents of same-sex marriage address the "deeply rooted" objection. To the extent that our history and traditions are part of a larger whole represented by Western civilization, the ways in which other Western nations have dealt with the criminalization of sodomy becomes relevant. Specifically, the Court looked to the experiences of other Western nations to determine whether the criminalization of same-gender sexual intimacy has been uniformly part of their traditions and practices, and, just as importantly, whether those countries have recognized that there are significant liberty interests at stake when sexual intimacy is criminalized. In conducting a review of how other countries have dealt with the criminalization of same-gender sexual intimacy, the Court pointedly noted that "to the extent Bowers relied on values we share with a wider civilization, . . . the reasoning and holding in Bowers have been rejected elsewhere." The Court explained that the criminalization of same-gender sexual conduct is not a widely shared tradition in the West and that "the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries." The Court in particular noted the impact of rulings by the European Court of Human Rights striking down the criminal regulations of same-gender sexual conduct by signatory nations of the European Convention on Human Rights.

If the Court were today to do a similar survey of other nations on the issue of same-sex marriage, it would find that three other Western countries, including Canada (arguably the nation that is most similar to our own), recognize same-sex

188. Lawrence, 123 S. Ct. at 2483.
189. Id.
marriages. By the time the same-sex marriage issue reaches the Supreme Court, it is likely that this list of nations will be even longer. It is also entirely possible that by the time the Court hears a same-sex marriage case, one or more of the American states will have recognized same-sex marriages. One state (Vermont) already recognizes civil unions while another (California) makes available to lesbian and gay couples a comprehensive domestic partnership regime of rights and obligations. As this Article goes to press, a third state (Massachusetts) seems poised to recognize same-sex marriages. Further developments in this area will only make it increasingly more difficult for opponents of same-sex marriages to argue that such marriages are entirely inconsistent with the traditions of either this country or of other Western nations.

To conclude the discussion of the "deeply rooted" objection, it is important to note that a due process constitutional analysis has to consist of more than simply whether the right in

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192. See CAL. FAM. CODE §§ 297–299.6 (West Supp. 2004); VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002). The California legislature recently enacted a law, effective in January 2005, that gives same-sex domestic partners the same rights and benefits available to married couples. See Gregg Jones & Nancy Vogel, Domestic Partners Law Expands Gay Rights, L.A. TIMES, Sept. 20, 2003, at A1. New Jersey has recently enacted legislation recognizing same-sex relationships and requiring, for example, insurance companies to provide insurance coverage to same-sex domestic partners that is comparable to that available to spouses and that allows the partners to make important medical decisions for each other. See Laura Mansnerus, New Jersey Senate Passes Bill Recognizing Same-Sex Unions, N.Y. TIMES, Jan. 9, 2004, at A17.

193. See Kathleen Burge, Licensing for Gay Marriage Planned but Romney Aide Says Word Is Premature, BOSTON GLOBE, Mar. 26, 2004, at A1 (reporting that the state notified "town and city clerks . . . that they will be trained to issue marriage licenses for same-sex couples"); see also Pam Belluck, Setback Is Dealt to Gay Marriage, N.Y. TIMES, Mar. 30, 2004, at A1 (reporting that the Massachusetts legislature approved a state constitutional amendment that would ban same-sex marriage in 2006 but that the Attorney General refused the Governor’s request that he seek a stay from the state supreme court of its order that same sex-marriages be recognized beginning on May 17, 2004).
question (narrowly understood) has been recognized as an important right throughout our history. If that were the standard that the Court has in the past applied to its fundamental rights jurisprudence, then neither the right to use contraceptives nor the right to an abortion, for example, would qualify as a fundamental right. It seems clear that the Court has approached fundamental rights cases (with the notable exception of Bowers v. Hardwick) not by framing the question narrowly, but rather from a broader perspective, namely, whether the legislation at issue is inconsistent with values and norms—such as privacy, autonomy, and respect for the choices of individuals in matters of self-definition and bodily integrity—which are deeply rooted in our nation's history and tradition. We need to remember, in fact, that the Court in Lawrence refused to frame the due process issue narrowly, that is, it refused to frame the constitutional question as being whether there is a fundamental right to engage in same-sex sodomy. Instead, as already noted, the Court approached the case not only from the perspective of determining the impact of the Texas statute on the right to make decisions about sexual conduct, but also from that of assessing its impact on the personal relationships of lesbians and gay men as well as on the obligation of the state to respect their lives and dignity. If courts were to approach the issue of same-sex marriage from a similar perspective, then the fact that same-sex marriages themselves have not (so far) been part of our history and tradition should not be dispositive of the issue of whether bans against same-sex marriage are inconsistent with the country's long-held values. As one court has noted in addressing the constitutionality of a ban on same-sex marriage from a due process perspective,

[the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. Though the choice of a partner is not left to the individual in some cultures, in ours it is no one else's to make. . . . The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own

197. See supra notes 120–32 and accompanying text.
198. See supra notes 132–39 and accompanying text.
life partner is so rooted in our traditions. 199

_Lawrence_, then, has much to contribute to the articulation of due process arguments on behalf of same-sex marriage. The way in which the Court interpreted the liberty interests at issue in the case, rejected the use of majoritarian morality as a justification for state action, and applied history and tradition in determining the rights protected by the Due Process Clause, all support the idea that the state has an obligation to recognize the committed relationships of lesbians and gay men.

**CONCLUSION**

In the same way that Governor Faubus in Arkansas in the 1950s and Governor Wallace in Alabama in the 1960s stood in front of schools and universities in order to protect them from what they saw as the potential harms brought about by the racial integration of those institutions, many opponents of same-sex marriage today view themselves as standing (if only symbolically) in front of the institution of marriage to protect it from the dangers posed by committed lesbian and gay relationships. It turns out, as I have explained in this Article, that the Constitution does not allow opponents of same-sex marriage to abolish the institution of marriage in order to “save” it, in the same way that the Constitution did not allow opponents of school integration during the civil rights era to close down schools in order to “save” them. 200 This has important constitutional ramifications for the same-sex marriage debate after the Supreme Court held in _Lawrence_ that a state may not criminalize same-gender sexual intimacy. This prohibition on criminalization, when coupled with a positive or affirmative obligation imposed on the state by the Constitution to recognize at least some relationships as marital, opens up the further possibility that the state has a due process constitutional obligation to recognize same-sex marriage. Although the Court in _Lawrence_ by no means settled the constitutionality of prohibitions against same-sex marriage, its expansive approach to the liberty interests protected by the Due Process Clause and its holding that majoritarian morality is an insufficient ground upon


200. See Griffin v. County Sch. Bd., 377 U.S. 218, 232 (1964) (striking down as unconstitutional effort by local government to close down all public schools in order not to integrate them).
which to justify the state's regulation of sexual intimacy and the personal relations that often accompany that intimacy, when coupled with its careful review of the historical record on homosexuality and of the practices and traditions of other Western nations, bode well for future constitutional claims that lesbians and gay men have the right to marry individuals of their choice.