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# Lawrence's Stealth Constitutionalism and Same-Sex Marriage Litigation

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# *LAWRENCE*'S STEALTH CONSTITUTIONALISM AND SAME-SEX MARRIAGE LITIGATION

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ABSTRACT

Constitutional law scholarship often focuses on two taxonomies: doctrinal categories and interpretive methodologies. Consequently, constitutional scholars sometimes neglect other important facets of constitutional decisionmaking, particularly extra-doctrinal stealth determinations that courts render frequently in constitutional opinions. The U.S. Supreme Court regularly confronts the questions underlying these determinations, but despite their centrality to constitutional decisionmaking, these issues often escape careful scrutiny.

*Lawrence v. Texas* exemplifies the phenomenon. *Lawrence* framed its central question at a broad level of generality; relied on hybrid reasoning, using equal-protection rationales to support a substantive due process holding; declined to identify a level of scrutiny; and invoked changing public opinion. Each of these moves helped the Court reach its outcome, but, significantly, the Court inadequately theorized each, leaving considerable doubt about how it would approach similar inquiries in future cases. The result is legal uncertainty. For example, cases challenging the constitutionality of state same-sex marriage bans will likely confront many of the same sub-doctrinal determinations that *Lawrence* purported to resolve. However, because *Lawrence* did so little to justify its resolution of those determinations, the Court has little to guide it when confronting those determinations again in a marriage case—or any case.

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Such opacity threatens judicial transparency, consistency, and predictability. That being said, stealth determinations, paradoxically, also can help reinforce judicial legitimacy by accounting for cultural norms and providing the Court with flexibility while still preserving the appearance of impartiality. Stealth determinations, then, can simultaneously undermine and fortify judicial legitimacy, thus reflecting deep tensions in the Court's approach to constitutional adjudication.



## INTRODUCTION

Constitutional scholars often focus on two dominant taxonomies. The first is straightforward doctrinal categorization. Courts, casebooks, and treatises organize cases by the constitutional provision they address.[1] Hence, we have a commerce clause doctrine, an equal protection doctrine, a free speech doctrine. The second

[1] *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (4th ed. 2011) (organizing constitutional law by different doctrines).

well-known constitutional taxonomy organizes different interpretive approaches, what Philip Bobbitt calls "modalities."[2] These modalities include arguments rooted in constitutional history, text, structure, precedent, and so on.[3]

Both these taxonomies are useful ways of organizing issues of constitutional law and interpretation. However, because they tend to think about the Constitution through these categories, judges and even constitutional scholars have often neglected other important facets of constitutional decisionmaking. In particular, they have paid inadequate attention to sub-doctrinal determinations that courts, especially the U.S. Supreme Court, render frequently in constitutional opinions. These determinations have received short shrift from both judges and scholars, yet they play a crucial role in courts' efforts to decide constitutional cases across various substantive doctrines.

*Lawrence v. Texas*[4] is a prime example of a case relying on many of these stealth determinations. *Lawrence* famously held unconstitutional Texas's law criminalizing same-sex sodomy.[5] But though *Lawrence*'s holding is clear, its implications are not.[6] A decade after *Lawrence*, the Court is now confronting a new generation of gay-rights cases, involving the constitutionality of states' same-sex marriage bans and portions of the federal Defense of Marriage Act (DOMA).[7] One would be forgiven for thinking that *Lawrence*, probably the Court's most prominent gay-rights case, should hold clues about how the Court will approach these cases. On closer view, however, *Lawrence* turned on a series of under-theorized, stealth determinations. It framed the question at a broad level of generality; relied on hybrid reasoning, using equal protection rationales to support a due process holding; declined to identify a level of scrutiny; and invoked changing public opinion.[8] Each of these moves helped the Court reach its

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[2] *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

[3] *See id.* at 12–13.

[4] 539 U.S. 558 (2003).

[5] *See id.* at 578–79.

[6] *See* Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1585 (2004) ("[T]he most salient characteristic of *Lawrence* is the impossibility of determining what it means . . . .").

[7] *See* 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006); *infra* Part II.A.

[8] *See Lawrence*, 539 U.S. 558. One perhaps could add to the list the fact that *Lawrence* overruled existing constitutional precedent, *Bowers v. Hardwick*, 478 U.S. 186 (1986), without sufficient explanation. *See Lawrence*, 539 U.S. at 577–78; *see also id.* at 587–88 (Scalia, J., dissenting). However, while the Court's discussion of stare decisis is hardly satisfying, it is more thorough than the Court's analysis of the other determinations discussed here. Indeed, while the Court's approach to constitutional precedent is inconsistent, its treatment of the matter, however controversial, is sufficiently developed in places that it probably does not fall within the spectrum of stealthiness examined here. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–56 (1992). This is certainly not to say that the Court's approach to constitutional precedent is beyond reproach or not worthy of sustained analysis, but rather to suggest that stare decisis determinations are of a somewhat different character than the stealth determinations this Article examines. *See generally* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2008).

outcome, but, significantly, the Court inadequately explained each, leaving considerable doubt about how it would approach similar determinations in future cases.

The point here is not to condemn *Lawrence*'s outcome, which I believe was correct, but rather to use it to illustrate a broader phenomenon in constitutional decisionmaking. Indeed, *Lawrence*'s reliance on these stealth determinations was hardly anomalous. To the contrary, such determinations arise frequently in constitutional cases, and, indeed, are inherent in many cases the Court confronts.[9] Yet, despite their common recurrence, the Supreme Court often fails to explain thoroughly its reasoning when it renders these determinations.[10] Consequently, the Court usually fails to reflect these determinations in black-letter doctrine (such as the tiers of scrutiny, the substantial effects test, and so on).[11] It also fails to reconcile adequately these determinations across cases.[12] As a result, its approach to a given determination in one case often lacks precedential effect, even when the Court confronts a similar determination in a similar case.[13] The Court moreover often fails to explain just how central these determinations are to the resolution of some cases.[14] Consequently, it is very difficult for litigants, lower courts, and even future Justices to know how to handle these kinds of determinations in a predictable manner. Indeed, it is hard to say the extent to which they enjoy the status of law.[15]

In exploring this area, one must distinguish between the questions underlying these stealth determinations and the Court's explanations for the determinations it renders. The questions underlying these determinations are often inherent in the cases and the doctrine itself. For example, substantive due process cases often force courts to decide (implicitly or explicitly) the level of generality at which courts should construe an asserted unenumerated liberty.[16] In that sense, the level-of-generality determination is an often under-examined facet of the Court's substantive due process analysis. In another sense, though, the Court's explanations for its level-of-generality determinations—and other stealth determinations—are so under-developed that they should be conceived of as distinct from the doctrines they modify. Indeed, it is the Court's failure to address these questions in consistent, rigorous ways that renders them stealthy.

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[9] *See* Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465 (2013).

[10] *Id.* at 469–71.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Cf.* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1909–11 (2011) (questioning whether principles of statutory interpretation enjoy the status of law). *See generally* LON L. FULLER, THE MORALITY OF LAW 33–44 (2d ed. 1969); JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210, 212–19 (1979).

[16] *See infra* Parts I.B.1 & II.B.1.

Of course, some of these determinations are stealthier than others, so we should conceive of "stealth" as existing on a continuum with varying degrees of explication. Sometimes the Court fails to identify a determination altogether; other times, it acknowledges the determination but fails to explain adequately its resolution. Significantly, though, whether invisible or opaque, the Court's analysis often confidently proceeds without reference to the kinds of professional legal norms that usually guide judicial decisionmaking in other areas.[17]

The Court's recent interest in gay rights provides good reason to revisit *Lawrence*'s opacity on a number of these issues. As this Article entered production, the Court had just granted certiorari in two prominent gay rights cases: *Hollingsworth v. Perry*,[18] which considers the constitutionality of California's Proposition 8,[19] and *United States v. Windsor*,[20] which considers the constitutionality of Section 3 of DOMA. These cases could turn on numerous issues, many only tangentially related to *Lawrence*. But both cases also present many of the same kinds of sub-doctrinal questions that arose in *Lawrence*, especially *Perry*, in which the Court conceivably could resolve the constitutionality of same-sex marriage bans.[21]

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[17] *See* LIEF H. CARTER & THOMAS F. BURKE, REASON IN LAW 146 (8th ed. 2010) (arguing that the rule of law requires judges to consult factors "outside [their] own will for criteria of judgment"); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 40–41 (2005) (discussing professional legal norms that usually guide judicial decisionmaking); *see also* Berger, *supra* note 9, at 470.

[18] *See* 133 S. Ct. 786 (2012) (granting certiorari).

[19] In *Perry*, the Ninth Circuit affirmed a district court ruling striking down as unconstitutional California's Proposition 8. *See* Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012). Proposition 8, a 2008 California ballot initiative, had amended the state constitution to provide that "only marriage between a man and a woman is valid or recognized in California," CAL. CONST. art. 1, § 7.5, thereby overriding a California Supreme Court decision ruling that same-sex marriage prohibitions were unconstitutional under state constitutional law. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, Cal. Const. art. 1, § 7.5. Though the Court could use *Perry* to decide the constitutionality of all same-sex marriage bans, it could avoid the substantive issue by holding that Proposition 8's proponents lack Article III standing. *See Perry,* 133 S. Ct. 786 (requiring parties to brief the standing issue). Even if the Court does reach the substantive merits, it could still decide the case on narrow grounds, as did the Ninth Circuit, which emphasized that Proposition 8 was unconstitutional because it withdrew, without a legitimate reason, same-sex marriage rights to people who already possessed that right and enjoyed all the attendant benefits of marriage under California law. *See Perry*, 671 F.3d at 1063. In all events, whether in *Perry* or elsewhere, the Court will likely eventually address whether a state can constitutionally deny same-sex marriage. Such consideration will probably force the Court to turn to some of the same kinds of sub-doctrinal determinations it left undeveloped in *Lawrence*. *See infra* Part II.

[20] *See* 133 S. Ct. 786 (2012) (granting certiorari).

[21] It is probably more likely that the Court will decide *Perry* on either justiciability grounds or narrow substantive grounds, though the Court certainly could choose to resolve the larger question. *See supra* note 19.

Indeed, whether in *Perry* or a subsequent case, the Court is likely to decide the constitutionality of same-sex marriage bans in the not-so-distant future, and, when it does, it will have to decide how seriously to take *Lawrence*'s stealth determinations. For example, as in *Lawrence*, the Court deciding a same-sex marriage case will need to decide at what level of generality to frame the question. At a high level of generality, the issue may be framed as whether one has the right to marry the person of one's choosing. At a narrower level, the right may be understood to extend only to one unmarried man and one unmarried woman.[22] *Lawrence* framed its question at a broad level, but because it offered sparse justification for why that framing was appropriate, it is hard to know what should guide the level of generality in other cases.[23] This is just one example. As discussed below, many of *Lawrence*'s sub-doctrinal questions are likely to recur in a same-sex marriage case, and yet the Court has said little about how to approach each question.

Indeterminacy, of course, is part of constitutional law. Even black-letter doctrine can be maddeningly unpredictable and easily manipulated.[24] Nevertheless, black-letter doctrine is at least typically guided by more predictable inquiries within various doctrinal categories.[25] By contrast, the Court does not even make clear what factors it considers when it renders these stealth determinations.

Stealth determinations are of obvious interest to the pragmatic litigator, who will want to know what unarticulated factors help drive the Court's decisionmaking. But they are also important to the constitutional theorist, because they obscure important constitutional meta-issues simmering beneath the surface of many cases. For instance, framing an inquiry broadly will typically make it easier for a court to protect an asserted right. Accordingly, underlying the level-of-generality determination is a broader issue about whether our Constitution generally privileges unenumerated individual liberties or democratic rule when the two collide. Similarly, questions about whether and how courts consider public opinion during their constitutional deliberations implicate whether courts generally should construe the Constitution largely to track majoritarian preferences. And questions about whether to apply the tiers of scrutiny or blur doctrinal categories into hybrid rights raise questions about how formalistically judges should apply constitutional doctrine.

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[22] *See infra* Part II.B.1.

[23] *See infra* Part I.B.1.

[24] *See, e.g.*, Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 291, 294–95 (2005) (explaining his decision to stop writing his treatise on constitutional law by arguing that "no treatise . . . can be true to this moment in our constitutional history").

[25] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994) (declaring content-discriminatory speech restrictions subject to strict scrutiny); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (identifying injury, causation, and redressability as the elements of Article III standing); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (determining that any discrimination based on race triggers strict scrutiny); Katzenbach v. McClung, 379 U.S. 294, 301–02 (1964) (applying the substantial effects test to find Congress did have commerce clause authority for passing the Civil Rights Act).

Strikingly, the Court does not carefully discuss these issues in *Lawrence* or elsewhere. These may be difficult questions, but, like the doctrines and modalities, they are at the heart of constitutional decisionmaking. Indeed, the Court often dismisses these determinations as minor points in a larger legal analysis, even though they shape constitutional outcomes in overarching, fundamental ways. By failing to grapple with these recurring determinations in a thoughtful, principled manner, judges not only create great legal uncertainty but also fail to develop a coherent, rigorous constitutional vision.[26]

There are, of course, explanations for this stealth, both in *Lawrence* and more generally.[27] One explanation might pin *Lawrence*'s stealth determinations on its author, Justice Kennedy, but these under-developed determinations recur across many constitutional cases, so the phenomenon cannot be pinned solely on one judicial author.[28] Another explanation is that the Court uses stealth determinations to help preserve its flexibility. By failing to develop their reasoning, Justices avoid tying their hands in future cases.[29] Under-theorized opinions can also help secure the votes of a majority of Justices, who may agree on an outcome but not the underlying reasoning.[30] Stealth determinations, furthermore, may reflect courts' efforts to reconcile cultural trends with doctrinal obstacles.[31] By 2003, large portions of the American public deemed anti-sodomy laws morally unacceptable,[32] but preexisting doctrine, especially *Bowers v. Hardwick*,[33] still made *Lawrence* a challenging case. On this account, stealth determinations helped the Court take account of changing cultural norms, weave around doctrinal obstacles, and still craft an opinion that sounded (more or less) like law.

The Court, then, has understandable reasons for its practices, but the phenomenon's costs and benefits still deserve careful scrutiny. In one sense, these determinations undermine the rule of law; it is, quite simply, unclear whether a determination in one case carries any precedential value in another. Indeed, the Court's erratic and non-transparent approach to these determinations gives the impression that constitutional law is mostly ad hoc, shaped on a case-by-case basis by results-oriented judges.

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[26] *See infra* Part III.A; *cf.* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[27] *See infra* Part III.B.

[28] For example, as I have explored elsewhere, the Court has failed to offer a coherent, consistent approach to its institutionally based deference determinations. *See, e.g.*, Berger, *supra* note 9, at 470–82.

[29] *See* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996) (arguing that judicial minimalism reduces "the costs of decision and the costs of mistake").

[30] *See* Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1771 (1995) ("A key task for a legal system is to enable people who disagree on first principles to converge on outcomes in particular cases. Incompletely theorized agreements help to produce judgments on relative particulars amidst conflict on relative abstractions.").

[31] *See infra* Parts III.B & III.C.2.

[32] *See infra* Part I.A.

[33] 478 U.S. 186 (1986).

In another sense, however, stealth determinations also help provide the Court with the tools it feels it needs to resolve cases wisely.[34] The Court's use of stealth determinations may deprive its decisions of consistency, predictability, and transparency, but they also may make it easier for the Court to craft law reflecting contemporary cultural norms.[35] Of course, the Court could still explain these determinations more candidly, but such candor, for all its advantages, would also have costs. The illusion that there are impartial principles guiding courts' decisionmaking is part of what attracts people to judicial dispute resolution, and blunt candor may shatter that myth.[36] Paradoxically, then, stealth determinations may simultaneously undermine and reinforce judicial legitimacy, on the one hand rendering constitutional law even more indeterminate than it already is, on the other hand accounting for societal pressures while preserving legal language's appearance of impartiality.

Part I of this Article illustrates the concept of stealth determinations by exploring several sub-doctrinal decisions that the Court insufficiently justified in *Lawrence*. Part II examines how those determinations create great legal uncertainty in the related area of same-sex marriage. Part III considers explanations for, and implications of, these stealth determinations and contends that they reflect deep tensions in our legal system. Indeed, stealth constitutional determinations, paradoxically, may both undermine and reinforce judicial legitimacy.

## I. *LAWRENCE*'S STEALTH DETERMINATIONS

### *A. The Easiness and Difficulty of* Lawrence

*Lawrence* was simultaneously a hard case and an exceptionally easy one. In one sense, its outcome seems inevitable. By 2003, a criminal ban on sodomy was out of step with contemporary American norms.[37] Police rarely enforced the law against acts committed in the home.[38] In fact, in the entire 143-year history of the Texas sodomy law, no publicly reported court case involved the enforcement of the law against

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[34] *Cf.* Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 902 (2009) ("Emotional common sense represents one way in which law may pass contentious judgments of value *on* by passing them *off* as uncontestable matters of fact.").

[35] *Cf.* Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 33–39 (outlining the advantages and disadvantages of following the *Bowers*'s precedent in *Lawrence*).

[36] *See* Keith J. Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, *in* WHAT'S LAW GOT TO DO WITH IT? 306, 314 (Charles Gardner Geyh ed., 2011); *infra* Part III.C.

[37] *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 443 (2005) ("*Lawrence* . . . came in the wake of extraordinary changes in attitudes and practices regarding homosexuality."); Sunstein, *supra* note 35, at 73 ("[A] criminal ban on sodomy [was] hopelessly out of accord with contemporary convictions.").

[38] *See* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 8 (2012).

consensual sex between adults in private.[39] Moreover, a large segment of Americans found such laws repulsive and contrary to basic conceptions of liberty.[40] Indeed, by 2003, most states had repealed their anti-sodomy laws, and only four had statutes singling out homosexual sodomy for criminal punishment.[41]

By these measures, anti-sodomy laws quite simply lacked "a plausible foundation in widely shared moral commitments."[42] Laws of this sort are problematic both because they are out of step with cultural norms, and also because they give police and prosecutors great authority to selectively enforce widely disregarded laws.[43] Thus, as Professor Cass Sunstein has argued, *Lawrence* in this regard reflects the old English concept of desuetude, under which "due process principles requiring fair notice, and banning arbitrary action, are violated if criminal prosecution is brought on the basis of moral judgments lacking public support."[44]

Moreover, anti-sodomy laws imposed harsh burdens on homosexuals extending far beyond the prohibition of particular sexual acts. Texas's statute branded homosexuals as presumptive criminals, making it much more difficult for them to be treated like other members of society.[45] A conviction for violation of a sodomy statute further would restrict a person's "ability to engage in a variety of professions, including medicine, athletic training, and interior design."[46] It would also require that person to register as a sex offender in some states.[47] To the extent *Lawrence* invalidated a legal regime that was unpopular, anachronistic, rarely enforced, and astoundingly cruel, it was unusually easy as Supreme Court constitutional cases go.

In another sense, though, *Lawrence* was not easy at all. Doctrinal obstacles posed serious problems for the petitioners, most notably *Bowers v. Hardwick*, which had upheld a similar law seventeen years earlier.[48] The majority may have felt that it had no other choice than to invalidate the statute, but it also knew that striking down the statute, especially on substantive due process grounds, may create potentially unwelcome doctrinal ripples.[49]

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[39] *Id.* at 13.

[40] *See* Klarman, *supra* note 37, at 443.

[41] *See* Lawrence v. Texas, 539 U.S. 558, 573 (2003); Sunstein, *supra* note 35, at 40 (referencing the low number of states that forbid homosexual conduct as evidence of an emerging awareness that liberty protects an adult's right to decide how to conduct his or her private life).

[42] Sunstein, *supra* note 35, at 73.

[43] *See, e.g.*, CARPENTER, *supra* note 38, at xiv.

[44] Sunstein, *supra* note 35, at 27–28.

[45] *See Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring).

[46] *Id.*

[47] *See id.*

[48] *See* Bowers v. Hardwick, 478 U.S. 186, 190, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); Klarman, *supra* note 37, at 432–39.

[49] *See* Klarman, *supra* note 37, at 436–37; Sunstein, *supra* note 35, at 34 ("For the majority, a central problem was to develop a rationale that would strike down the Texas statute without producing an unintended revolution in the law.").

Instead of candidly addressing these pressures, the Court simply avoided explaining many of the moves it made.[50] The decision rests on a series of stealth, under-theorized determinations. These determinations are not formally part of the black-letter doctrine, but they were a central part of the Court's reasoning, and they shed light not only on *Lawrence* itself but also on the nature of judicial constitutional decisionmaking more generally.[51]

### *B. Stealth Determinations in* Lawrence

This Part explores four of *Lawrence*'s stealth determinations that were inadequately explained yet important to the outcome of the case. The point here is not to critique *Lawrence*'s outcome but rather to use its under-developed reasoning to illustrate various examples of stealth determinations. Of course, the Court relies on stealth determinations in many other cases. *Lawrence*, however, relies especially heavily on them and therefore nicely illustrates the broader phenomenon.[52]

#### 1. Levels of Generality

*Lawrence* turned substantially on the level of generality at which the Court characterized the issues involved. At one level, this determination does not seem stealthy insofar as the Court expressly rejected *Bowers*'s selected level of generality. *Bowers*, the Court explained, had asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[53] Such a formulation was inappropriate. "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct," *Lawrence* explained, "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."[54]

This decision to reject *Bowers*'s narrow framing reshaped the case. Under *Bowers*'s approach, the respondent did not stand a chance, because it would be virtually impossible to establish that homosexual sodomy was a "fundamental right [that is] 'deeply

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[50] *Cf.* Sunstein, *supra* note 35, at 46 ("The conventional doctrinal categories and terms are simply missing [in *Lawrence*]."); Laurence H. Tribe, Essay, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (noting that *Lawrence* leaves "a good bit . . . to the reader's imagination").

[51] For ease of presentation, this Article addresses each determination separately, though they do overlap and interact in important ways.

[52] I have begun to explore these stealth determinations in other contexts elsewhere, *see generally* Berger, *supra* note 9, and will continue to do so in future work.

[53] Lawrence v. Texas, 539 U.S. 558, 566–67 (2003) (quoting *Bowers*, 478 U.S. at 190).

[54] *Id.* at 567.

rooted in this Nation's history and tradition.'"[55] *Lawrence*, by contrast, declined to say precisely what right was at issue or whether it was fundamental. Instead, it emphasized that the case was about liberty more generally, essentially dooming the challenged law. Thus, the Court adopted a "presumption of liberty," requiring the government to justify its restriction on liberty, rather than placing the burden on the individual to establish that the liberty asserted is "fundamental."[56] Such a libertarian presumption may be justifiable,[57] but it also conflicts with a prominent strain of substantive due process analysis, which asks whether an asserted right is "deeply rooted in [the] Nation's history and tradition."[58] It also discourages democratic deliberation insofar as it invites courts to announce new rights, thus removing some issues from the sphere of political debate.[59] It is therefore striking that the Court treated the level-of-generality determination almost casually without acknowledging its potential import.

Indeed, though the Court expressly rejected *Bowers*'s selected level of generality, it provided minimal guidance on precisely how the question should be framed and why a broader framing was appropriate. The Court did emphasize that the challenged law had "far-reaching consequences,"[60] but it is unclear why the consequences of a statute necessarily should affect the level of generality at which it is reviewed. Many statutes that prohibit certain behavior have "far-reaching consequences" not immediately evident on the law's face,[61] but that fact does not always dictate that the right asserted

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[55] *Bowers*, 478 U.S. at 191–92. Even though *Bowers* failed to recognize that early sodomy laws were not directed at homosexuals specifically but rather all non-procreative sexual activity, *see Lawrence*, 539 U.S. at 568; WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 26–34 (1999), a more historically accurate analysis would have been unlikely to suggest that homosexual sodomy was a fundamental right deeply rooted in American history.

[56] *See* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 32–35 (noting that *Lawrence* demonstrates not that sexual liberty is a fundamental right but rather that "same-sex sexual freedom is a legitimate aspect of liberty").

[57] *See generally id.*

[58] Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); *see, e.g.*, Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

[59] *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1281 (2005) ("Deliberation by elected legislators is more reliable and more legitimate in solving problems and accommodating groups than deliberation by unelected judges.").

[60] *Lawrence*, 539 U.S. at 567.

[61] *See* Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 870–71 (2010) (arguing that recent regulations requiring pharmacies to sell the essential ingredients of methamphetamine behind the counter may have led meth laboratories to shift their strategies with some pernicious results); Amanda Moghaddam, *Popular Politics and Unintended Consequences: The Punitive Effect of Sex Offender Residency Statutes from an Empirical Perspective*, 40 SW. L. REV. 223, 225 (2010) (arguing that the unintended

be framed broadly. *Washington v. Glucksberg*,[62] for instance, framed the liberty at issue narrowly as "a right to commit suicide which itself includes a right to assistance in doing so."[63] Laws prohibiting the assistance of suicide surely have "far-reaching consequences," including the prolonged physical and psychological suffering of the terminally ill, the prolonged hardship of the patient's family, and increased health care costs for private families and society more generally.[64] Nevertheless, the Court stuck with its narrow question—a right to physician assisted suicide—rather than a broader liberty, such as the right to make one's own health decisions or even the right to be free from arbitrary restraint.[65] *Glucksberg* justified its selected level of generality no more persuasively than did *Lawrence*, but nevertheless, in light of *Glucksberg*, *Lawrence*'s suggestion that the level of generality turns on a proscription's consequences is unconvincing.

*Lawrence* also suggested that a broader level of generality was appropriate because the challenged statute touched "upon the most private human conduct, sexual behavior, and in the most private of places, the home."[66] This explanation makes more sense, given that the Court has previously protected both sexual decisionmaking and privacy in the home.[67] Nevertheless, the Court nowhere explained why those issues should affect how a question is framed, as opposed to the degree of rigor with which the challenged policy is reviewed. Nor did the Court rely on that argument to explicitly reject the tradition-based strand of substantive due process in favor of a more libertarian personal-autonomy strand.[68] To be sure, this explanation is coherent, but the Court does not develop its precise place in the doctrinal reasoning.

In short, *Lawrence* purported to correct *Bowers*'s erroneously parsimonious level of generality,[69] but it offered no theory for thinking about levels of generality more

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consequences of sex offender residency statutes include homelessness, unenforceability, and psychological harm).

[62] 521 U.S. 702 (1997).

[63] *Id.* at 723.

[64] *Cf. id.* at 772 (Souter, J., concurring) (discussing the problem of levels of generality).

[65] *See id.* at 752.

[66] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[67] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001) (holding that information obtained from thermal imaging of marijuana plants growing in a home constituted a search and implicated expectations of privacy in the home); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) (discussing bodily integrity and decisional autonomy); Stanley v. Georgia, 394 U.S. 557, 566–67 (1969) (striking down laws forbidding private possession of obscenity).

[68] *Compare* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . ." (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977))), *with Casey*, 505 U.S. at 857 (recognizing a "personal autonomy" strand of substantive due process).

[69] *See Lawrence*, 539 U.S. at 567 (arguing that *Bowers* "misapprehended the claim of liberty there presented to it").

generally.[70] Nor did it acknowledge that underlying its selected level of generality was a fundamental decision about how to approach unenumerated individual liberties more generally.[71] *Lawrence* may well be correct that courts should frame questions involving such rights broadly,[72] but, if so, it should have defended such a libertarian approach and tried to reconcile, or at least acknowledge, conflicting precedent like *Glucksberg*.[73] The Court's failure to engage with these issues adequately here is hardly anomalous. To the extent *Glucksberg* adopted a presumption of constitutionality rather than of liberty, it, too, inadequately justified its choice from among competing theories of substantive due process.[74] Indeed, many liberty cases turn on the level of generality at which the Court considers the question,[75] and yet, the Court often accepts a particular framing without carefully explaining why that approach is more appropriate than an alternative.[76] Of course, it is difficult to develop an approach that will operate satisfactorily across cases, especially in the individual-rights setting, in which each case will present particulars the Court will want to examine on a case-by-case basis. The Court presumably shies away from a broader theory of levels of generality precisely because it wants flexibility in future cases.[77] It is still noteworthy, however, that in correcting

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[70] For a scholarly theory, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1059 (1990) ("[T]he search for unenumerated rights should proceed by interpolation and extrapolation from the enumerated rights. . . . [A] typical judicial opinion distinguishes between *essential* and *non-essential* facts, and . . . by paying attention to such distinctions, judges trained in the method of the common law can generalize from prior cases without merely imposing their own values.").

[71] *See infra* Part III.A.

[72] *But see* Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989) (Scalia, J., plurality) (proposing that the most value-neutral method of framing questions of generality is "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified").

[73] *See Glucksberg*, 521 U.S. at 720 ("We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." (citations omitted) (internal quotation marks omitted)); Tribe, *supra* note 50, at 1923 (explaining that *Glucksberg* "zeroed in only on the specific 'act' of prescribing or providing a terminally ill patient with a deliberately lethal dose of a drug with the intent not of ameliorating his pain but of helping the patient to hasten his death").

[74] *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66–68 (2006) (contrasting three theories of substantive due process, including a "theory of historical tradition," a "theory of reasoned judgment," and a "theory of evolving national values").

[75] *See* Thomas More Law Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring) ("Level of generality is destiny in interpretive disputes . . . ."); Tribe & Dorf, *supra* note 70, at 1058.

[76] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (failing to justify its decision characterizing the State's interest as having the Amish go to school until they are 16 rather than an interest in education more generally).

[77] *See infra* Part III.B.

what it identifies as *Bowers*'s chief failing, the *Lawrence* Court made only a minimal effort to explain precisely when and why broader levels of generality are appropriate.

2. Doctrinal Categorization and Hybrid Constitutional Rights

Though the Court purported to decide *Lawrence* as a substantive due process case (with Justice O'Connor concurring on equal protection grounds),[78] in reality it combined due process and equal protection reasoning.[79] Rather than treating the case solely as a liberty issue, the Court blurred doctrinal categories, intertwining liberty and equality arguments. In so doing, it emphasized the stigmatic effects of the Texas law and petitioners' dignity interests,[80] neither of which fit neatly into pre-existing substantive due process doctrine.[81]

Indeed, though we typically think of liberty and equality as doctrinally distinct, they naturally complement each other, especially in this context.[82] As Professor Pam Karlan has argued, "sometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself."[83] Because states rarely enforce laws against private sexual conduct, the real problem of such laws targeting specifically homosexual conduct is that they "undergird" discrimination, sending the message to "gay people that their choices . . . are unworthy of respect."[84] The Texas statute, then, singled out homosexuals for a particular deprivation of liberty and dignity, thereby imposing other far-reaching stigmatic effects on their lives.[85]

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[78] *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003) (stating that the case should be resolved under the Due Process Clause of the Fourteenth Amendment); *id.* at 579 (O'Connor, J., concurring) ("I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.").

[79] *See id.* at 575 (majority opinion) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects . . . .").

[80] *Id.* (emphasizing that the law "demeans the lives of homosexual persons"); *see also id.* ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

[81] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776–87 (2011) (discussing liberty-based dignity arguments).

[82] *See* Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1458 (2004) (arguing that *Lawrence* was "as much a claim about equality as it is a claim about liberty"); Tribe, *supra* note 50, at 1898 ("[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."); Yoshino, *supra* note 81, at 779 ("*Lawrence* was not a simple liberty case, but one with undertones of equality.").

[83] Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002).

[84] Karlan, *supra* note 82, at 1453.

[85] *See Lawrence*, 539 U.S. at 581–82 (O'Connor, J., concurring) (arguing that the Texas statute "brands all homosexuals as criminals, thereby making it more difficult for homosexuals

*Lawrence*, thus, must be understood through the lens of this discrimination, which identified homosexuals as a class of citizens deserving of social subordination.[86] Because more traditional due process analyses would have had more difficulty emphasizing these dignity and stigma claims, a hybrid analysis captured the essence of the harm in a way that traditional doctrinal inquiries could not.[87]

More rigid due process or equal protection analyses, by contrast, each faced substantial doctrinal obstacles that would have made it more difficult to invalidate the Texas law. Due process case law sometimes roots liberty claims in historical tradition,[88] and the petitioners would have had a hard time claiming that same-sex sodomy was "deeply rooted in this Nation's history and tradition."[89] *Bowers*, indeed, rejected this very argument.[90] Moreover, had the Court approached *Lawrence* solely on liberty grounds, it would have been more difficult to strike down the statute without announcing a new fundamental right, something the Court is often reluctant to do.[91] Similarly, while precedent like *Planned Parenthood of Southeastern Pennsylvania v. Casey*[92] may support a constitutional right to personal autonomy for life's most intimate decisions, the Court could not have relied primarily on that doctrinal strain without explaining why it should apply instead of *Bowers*'s tradition-based approach to due process.

Straightforward equal protection analysis was probably the easier doctrinal route to strike down the Texas law, given that the statute on its face, unlike the Georgia law at issue in *Bowers*, prohibited homosexual but not heterosexual sodomy. Nevertheless, the equal protection argument also presented difficulties, and, perhaps consequently, only Justice O'Connor sought to resolve the case solely on equality grounds.[93] For one, an equal protection holding would have preserved *Bowers*, thus affirming the dubious principle that the state may intrude on consenting adults in their bedrooms, an outcome likely contrary to many Americans' norms.[94]

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to be treated in the same manner as everyone else"); *see also* Karlan, *supra* note 82, at 1453–54 (explaining that the law treated homosexuals as presumptive criminals).

[86] *See* Robert C. Post, *The Supreme Court, 2012 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 98 (2003) (emphasizing that the Texas statute imposed a second class citizenship on a class of persons); Sunstein, *supra* note 35, at 32 (arguing that *Lawrence* cannot be understood without reference to the social subordination imposed by the Texas law on gays and lesbians); Tribe, *supra* note 50, at 1943 (arguing that sodomy prohibitions "locked an entire segment of the population into a subordinate status").

[87] *See* Yoshino, *supra* note 81, at 749–50.

[88] *See* Conkle, *supra* note 74, at 83–98 (describing the "theory of historical tradition" that guides some, but hardly all, substantive due process decisions).

[89] *See supra* notes 56–58 and accompanying text.

[90] *See supra* notes 49–50, 54–69 and accompanying text.

[91] *See* Klarman, *supra* note 37, at 437 (indicating that Justices O'Connor and Kennedy usually avoid announcing new fundamental rights).

[92] 505 U.S. 833 (1992).

[93] *See* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

[94] *See supra* Part I.A.

Moreover, a holding resting only on equal protection may have had to contend with a deferential level of scrutiny.[95] In *Romer v. Evans*,[96] the Court applied only rational basis review to a law burdening homosexuals, albeit, most observers agree, "rational basis with bite."[97] Admittedly, *Romer* said nothing to foreclose the application of a higher level of scrutiny to classifications on the basis of sexuality, but the Court has generally been disinclined to identify new suspect classes.[98]

Of course, rational-basis review would not necessarily have been fatal to the petitioners' case in *Lawrence*.[99] There are certainly strong arguments that anti-sodomy laws are irrational.[100] These arguments are even stronger when the prohibitions apply only to one unpopular segment of the population.[101] Nevertheless, as Professor Michael

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[95] *See* Post, *supra* note 86, at 100 (arguing that by relying on due process, the Court in *Lawrence* avoided having to decide whether classifications based on sexual orientation trigger heightened scrutiny).

[96] 517 U.S. 620 (1996).

[97] *See id.* at 631–32; Yoshino, *supra* note 81, at 761–62 (discussing *Romer* and other cases ostensibly applying "rational basis with bite").

[98] *See* Yoshino, *supra* note 81, at 755–63 (arguing that the Court tries to avoid granting a new classification for the benefit of heightened scrutiny due to "pluralism anxiety").

[99] There is, in fact, an argument that *Lawrence* silently applied rational basis review. *See infra* Part I.B.3.

[100] Morality might be one ostensibly "rational" justification for such a law, but, as *Lawrence* itself indicated, moral disapproval, without more, is a flimsy rationale for prohibiting behavior that harms no one. *See Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (noting that *Lawrence* signaled the demise of legislation resting solely on society's moral opprobrium); Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1979–80 (2006) (noting that *Lawrence* deviated from *Bowers*'s declaration that homosexuality was rightfully the subject of moral disapproval but did not acknowledge that it had done so). Moreover, given that sodomy laws were out of step with most Americans' values by 2003, it is not even clear that morality adequately justified the law. *See supra* Part I.A. Another ostensibly rational basis for supporting the law is that same-sex sodomy creates public health risks, such as the spread of diseases like HIV. *See* Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 104 n.54 (1995). This argument is also weak, because anti-sodomy laws were very rarely enforced. *E.g.*, CARPENTER, *supra* note 38, at 8. Were the statute in question a genuine health regulation, the state, presumably, would seek to actually enforce it. Moreover, such a public health regulation would have been simultaneously terrifically over-broad (because the law would sweep in many healthy, monogamous same-sex couples whose behavior in no way risked the spread of disease) and under-broad (because the law ignored vast amounts of other behavior, including heterosexual sexual activity, creating public health risks). That over-breadth and under-breath collectively signal that this was not really a health regulation, but rather a law announcing and perpetuating the inferior status of an unpopular social group. Such laws do not enjoy the benefit of the most deferential form of rational basis review. *See Romer*, 517 U.S. at 634 ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

[101] *See* Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable

Klarman points out, courts often extend "extreme deference" in rational basis cases.[102] This characterization might somewhat overstate the point—the most deferential rational basis review typically occurs in cases involving economic regulations[103]—but, even so, it is certainly more difficult to invalidate a law applying an ostensibly deferential level of scrutiny.

Instead of confronting the doctrinal limitations posed by "pure" due process and equal protection analyses, the Court linked the two analyses together. This conflation seems normatively and logically persuasive in *Lawrence* itself, but the Court did not explain when such "stereoscopic" inquiries are appropriate.[104] The Court has previously suggested that rights working in tandem may amount to something more than either right would on its own,[105] but it has not provided guidance for thinking about what factors justify escaping more conventional doctrinal categorization. *Lawrence*, then, teaches us that liberty and equality can interact with each other in important ways, but it tells us very little about when and how such constitutional borrowing is appropriate.[106]

### 3. Tiers of Scrutiny

Many constitutional cases turn on the tier of scrutiny. The old adage that strict scrutiny is "strict in theory and fatal in fact"[107] is an overstatement,[108] but the level of scrutiny certainly can play a large role in shaping a case's outcome.[109] This is certainly

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government than to require that the principles of law which officials would impose upon a minority must be imposed generally."); Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 98 CALIF. L. REV. 697, 701 (2010) ("The Equal Protection Clause forces the majority to treat the minority the same way it treats itself.").

[102] Klarman, *supra* note 37, at 437.

[103] *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); *Ry. Express*, 336 U.S. at 110.

[104] *See* Karlan, *supra* note 83, at 477; Jean C. Love, *The Synergistic Evolution of Liberty and Equality in the Marriage Cases Brought by Same-Sex Couples in State Courts*, 13 J. GENDER RACE & JUST. 275, 276 (2010) (arguing that by focusing on liberty and equality simultaneously, gay rights litigators "have sparked a synergistic evolution of both liberty and equality").

[105] *See* Emp't Div. v. Smith, 494 U.S. 872, 881 (1990) (distinguishing *Yoder* as a hybrid case about both free exercise and the right to direct the education of one's children).

[106] *See generally* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

[107] Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[108] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) (upholding challenged policy despite application of strict scrutiny).

[109] *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) ("The key move in litigation under a two-tier [scrutiny] system is steering the case onto the preferred track. The genius of this tracking device is that outcomes can be determined at the threshold without the need for messy balancing.").

true in equal protection and due process cases, both of which frequently turn to the tiers of scrutiny to organize their analysis.[110] It is therefore especially striking that *Lawrence*, a case about both liberty and equality, declined to identify a tier of scrutiny at all.[111]

Whereas the Court's treatments of levels of generality and hybrid rights were stealthy insofar as the Court did not adequately justify its determinations, its treatment of the tiers of scrutiny was even stealthier, because it avoided acknowledging the issue altogether. As a result, it is difficult to know whether *Lawrence* silently applied some level of scrutiny or whether it rejected the tiers-of-scrutiny framework entirely.[112] If the Court did abandon the tiers, it is hard to know whether that move signals a broader disavowal of the tiers or a case-specific determination. Alternatively, if *Lawrence* did silently apply a tier of scrutiny, it does not tell us what tier to apply to similar infringements of liberty or other laws discriminating against homosexuals. As a result, it is extremely difficult to know how to apply *Lawrence* to future cases.[113]

4. The Role of Public Opinion

Finally, *Lawrence* relied quite explicitly on changed public opinion to justify striking down the Texas statute.[114] As with its level-of-generality determination, this determination was overt, but nevertheless stealthy insofar as it failed to theorize why and how changing public opinion is relevant to constitutional interpretation. It further failed to explain how public opinion should be measured. Complicating the analysis still further, the Court also asserted that "*Bowers* was not correct when it was decided,"[115] thus undermining the relevance of the very cultural norms that the Court purported to gauge.

*Lawrence* devoted considerable space to changes in public opinion. For example, it explained that "[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct."[116] It also added that "courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment."[117] In light of this evidence, the Court concluded that public support for *Bowers* was lacking.[118]

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[110] *See, e.g.*, *id.* at 295–96.

[111] *See* Tribe, *supra* note 50, at 1916 ("One aspect of *Lawrence* that was bound to draw criticism . . . is the absence of any explicit statement in the majority opinion about the standard of review . . . .").

[112] Sunstein, *supra* note 35, at 48; *see also* Karlan, *supra* note 82, at 1450 (arguing that *Lawrence* "undermines" the tiers of scrutiny).

[113] *See* Sunstein, *supra* note 35, at 46 (explaining that much "opacity" in *Lawrence* stems from the failure to identify a level of scrutiny); *infra* Part II.B.

[114] *See* Lawrence v. Texas, 539 U.S. 558, 576 (2003).

[115] *Id.* at 578.

[116] *Id.* at 573.

[117] *See id.* at 576 (citing state court cases).

[118] *Id.* at 576–77.

In many ways, *Lawrence*'s reliance on changing cultural norms is unremarkable. Recent constitutional scholarship contends that the Court, far from being countermajoritarian, actually follows public opinion in many ways. Professor Barry Friedman's *The Will of the People*, for example, explains how cultural norms help shape Supreme Court constitutional decisions,[119] and other scholars similarly explore the complicated interaction of popular will and constitutional meaning.[120] This attention to public opinion is understandable, both generally and specifically in cases like *Lawrence*. As Professor Suzanne Goldberg has argued, courts must make factual judgments about social groups, and those judgments will necessarily be shaped by changes in popular judgments about those groups.[121] Even if one believes that the judges should decide cases by interpreting legal texts and precedents without reference to changing cultural norms,[122] the Court realizes that it bucks societal norms at its own peril.[123] Lacking its own enforcement power, the Supreme Court knows that it ought not stray too far from mainstream public opinion lest its rulings go ignored and its institutional legitimacy erode.[124]

From this perspective, it seems reasonable for the Court to point to evidence of changed social attitudes to help justify its decision in *Lawrence*.[125] But though *Lawrence* at least acknowledges the role of social change, it does very little to explain why

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[119] *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 367–68 (2009) ("Over time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values.").

[120] *See generally* Klarman, *supra* note 37; Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113 (2012); Post, *supra* note 86; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

[121] *See* Goldberg, *supra* note 100, at 1961.

[122] *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1104–05 (1975) ("Of course, [the ideal judge's] techniques may sometimes require a decision that opposes popular morality on some issue. . . . Individuals have a right to the consistent enforcement of the principles upon which their institutions rely. It is this institutional right, as defined by the community's constitutional morality, that [the ideal judge] must defend against any inconsistent opinion however popular.").

[123] *See, e.g.*, FRIEDMAN, *supra* note 119, at 384 ("[R]eal change, when it comes, . . . stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus." (internal quotation marks omitted) (quoting Justice O'Connor)).

[124] *See* Lain, *supra* note 120, at 162–63.

[125] The Court also regularly acknowledges the role of changing public opinion in Eighth Amendment cases, where the constitutional prohibition on "cruel and unusual punishment" is understood to incorporate "evolving standards of decency that mark the progress of a maturing society." Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012). However, even within just this narrow class of cases, the Court's measure and use of public opinion is inconsistent. *See, e.g.*, Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 14–18 (2010) (discussing the Court's inconsistent approaches to counting states as a measure of public opinion).

and how those factors should help shape constitutional meaning. Given that one important role of the Constitution is to check potentially tyrannical majorities,[126] the Court's failure to justify its attention to majoritarian values is striking. Perhaps this attention is primarily defensive, and the Court does not want to admit that it must worry about its institutional legitimacy and the potential embarrassment that would ensue if the political branches ignored its judgments.[127] Perhaps the Court does not want to adopt a theory of popular constitutionalism,[128] thereby turning itself into a kind of polling station and ceding its self-proclaimed hegemony over constitutional meaning.[129] These may be legitimate concerns, but the Court's invocation of social attitudes without sufficient explanation of their precise role in constitutional interpretation creates great uncertainty about the relevance of such data in future cases.

The Court also does not adequately explain how it assesses public opinion. Indeed, some of the data it relies on seems weak. For example, *Lawrence* explained that five state courts no longer follow *Bowers* in interpreting their own state constitutional analogs to the Due Process Clause.[130] The views of five state courts seem beside the point; even elected state judges hardly seem the best measure of public opinion. Moreover, even if state judicial views were relevant, the fact that only five states rejected the rule from *Bowers*, if anything, would seem to undermine the Court's certainty that public opinion had shifted so dramatically.

None of this is to say that *Lawrence* got the issue of public opinion wrong. To the contrary, as explained above, it probably got it right.[131] But if public opinion is truly important to the Court's analysis, it is strange that it did not offer more data and explanation of the constitutional relevance of that data. By not engaging in careful analysis of these figures, the Court raises large questions about how public opinion will be determined and weighed in future cases in which popular norms are more closely contested.[132]

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[126] *See* THE FEDERALIST NO. 78, at 406 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (arguing that the independence of courts is essential to prevent "momentary inclination" that may lead majorities to favor policies "incompatible with the provisions in the existing constitution").

[127] *See supra* notes 119–26 and accompanying text.

[128] *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004).

[129] *See* Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

[130] *See* Lawrence v. Texas, 539 U.S. 558, 576 (2003).

[131] *See* Goldberg, *supra* note 100, at 1984 (arguing that in light of significant shifts in American attitudes towards homosexuality, judicial "norm declaration" in *Lawrence* was "relatively safe"); Klarman, *supra* note 37, at 443; Sunstein, *supra* note 35, at 51–52; *supra* Part I.A. *But see Public Approval of Major Court Decisions*, N.Y. TIMES, July 18, 2012, http://www.nytimes.com/interactive/2012/07/19/us/public-approval-of-major-court-decisions.html (indicating that only 40% of respondents in 2003 poll agreed with Court's decision in *Lawrence*).

[132] *See infra* Part II.B.4.

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By relying on these stealth determinations, the Court avoided deciding *Lawrence* on conventional doctrinal grounds. The Court did, of course, explicitly overrule *Bowers*, but its substantive due process analysis was fuzzy. *Bowers* had held that same-sex sodomy was not a fundamental right deeply rooted in our nation's history and therefore did not enjoy heightened constitutional protection.[133] As explained above, *Lawrence* did reject *Bowers*'s narrow framing of the right, but though various doctrinal arguments could have justified its holding, the Court did not explicitly embrace any particular doctrinal path.[134] For example, *Lawrence* could have identified what right *was* at issue and then declared that right fundamental and deserving of strict scrutiny. It did not follow this path. *Lawrence* also could have simply struck down the Texas statute as irrational. Though the opinion may imply that conclusion, it did not explicitly follow that path either. *Lawrence* also could have explicitly rejected *Bowers*'s concern with tradition in favor of the personal autonomy strain of substantive due process instead.[135] Though the Court appealed to such libertarian values,[136] it did not wrestle with how the autonomy-based and tradition-based threads of the doctrine should interact with each other. This is not to contend that doctrine does not matter at all, but it is to say that *Lawrence* rested its analysis more on undeveloped, sub-doctrinal determinations than black-letter doctrine. The result is significant uncertainty about its legal implications.

### *C. A Continuum of Stealth*

It should be apparent by now that though the determinations identified here share much in common, the Court's resolution of the underlying issues are stealthy in somewhat different ways and to somewhat different degrees. The stealthiest determination in *Lawrence* was probably the Court's failure to identify a tier of scrutiny, because the Court was altogether silent on the matter. The Court did announce other determinations in *Lawrence* more explicitly but nevertheless proceeded stealthily in that it failed to justify such determinations adequately or at all. The Court *said* that it was framing the case at a broader level of generality than *Bowers* had used; that equality norms were relevant to the library analysis; and that changed public opinion figured into its reasoning. Nevertheless, it inadequately explained and justified each of these moves.[137]

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[133] *See* Bowers v. Hardwick, 478 U.S. 186, 194–96 (1986), *overruled by Lawrence*, 539 U.S. 558.

[134] *See supra* Part I.B.1.

[135] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992).

[136] *See, e.g.*, Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 1000 (2011) ("Justice Kennedy's majority opinion demonstrated that the Court's precedents carved out a sphere of liberty and autonomy in intimate personal choices that necessarily encompasses the freedom to define one's personal relationships, including the sexual aspect of those relationships.").

[137] *See supra* Parts I.B.1, I.B.4, & I.B.5.

Such opacity proffers assertions rather than explanations, as though the resolution of the underlying determinations is more or less obvious.[138] In all events, whether the Court's analysis is incomplete or absent, its self-assured tone masks deep constitutional issues with which it fails to grapple.

## II. SAME-SEX MARRIAGE AND CONSTITUTIONAL CONFUSION

### *A. Developments Since* Lawrence

#### 1. Legal and Cultural Changes

Because of these stealth determinations, *Lawrence*'s implications are very unclear. *Lawrence* could prove to be a case with far-reaching or relatively minor doctrinal consequences.[139] The issue of same-sex marriage highlights this uncertainty.[140] *Lawrence* purported not to address the marriage question,[141] but it was clearly an issue lurking in the background.[142]

In the years since *Lawrence*, the legal regime pertaining to gay rights generally and same-sex marriage specifically has changed dramatically. When the Court decided *Lawrence* in 2003, no state permitted same-sex couples to marry. As of January 2013, nine states and the District of Columbia do.[143] Three of those states (New Hampshire, Vermont, and New York) and the District of Columbia permit same-sex marriage by statute.[144] Voters in three other states (Maine, Maryland, and Washington) recently adopted same-sex marriage in November 2012 ballot referenda.[145] (Minnesota voters during the same election rejected a proposal to amend the state constitution to define

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[138] *Cf.* Maroney, *supra* note 34, at 869–77 (discussing the Supreme Court's use of "emotional common sense" which is often confidently asserted but not always empirically accurate).

[139] *See* Sunstein, *supra* note 35, at 60.

[140] *Lawrence*'s impact is also unclear in other areas, including litigation challenging the constitutionality of Section 3 of DOMA. *See infra* Parts II.A.2 & III.A.

[141] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (stating that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

[142] *See id.* at 604 (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.").

[143] David Cole, *Getting Nearer and Nearer*, N.Y. REV. BOOKS, Jan. 10, 2013, http://www.nybooks.com/articles/archives/2013/jan/10/getting-nearer-and-nearer/?pagination=false.

[144] *See, e.g.*, D.C. CODE § 46-401 (2012); N.H. REV. STAT. ANN. § 457:1-a (2012); N.Y. DOM. REL. LAW § 10-a (McKinney 2012); VT. STAT. ANN. tit. 15, § 8 (2012).

[145] *See* Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality*, THE ATLANTIC, Dec. 11, 2012, http://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865/#; Erik Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer 'Milestone Year*,*'* N.Y. TIMES, Nov. 7, 2012, http://www.nytimes.com/2012/11/08/us/same-sex-marriage-gains-cheer-gay-rights-advocates.html.

marriage as between one man and one woman.)[146] State courts in the remaining three states (Massachusetts, Connecticut, and Iowa) have held that the denial of marriage rights for same-sex couples violates state constitutional provisions.[147] Nine more states that do not currently extend marriage to same-sex couples do offer those couples separate legal statuses (usually "civil unions" or "domestic partnerships") that extend to such couples many or all of the benefits and obligations of marriage.[148] Rhode Island does not yet grant same-sex marriages but recognizes such marriages created in other states.[149]

This extraordinary growth of support for same-sex marriage will likely continue to grow. Polls indicate that more than half of Americans today support same-sex marriage, that young people are particularly supportive of same-sex marriage rights, and that people typically do not become more conservative on this issue as they age.[150] Indeed, the statistician Nate Silver projects that by 2014, a majority of people in a majority of states will support same-sex marriage, and that by 2016, only states in the Deep South will still have majorities opposing it.[151] In short, the rapid cultural transformation on this issue in the decade since *Lawrence* has been so remarkable that Professor David Cole has said that the gay rights movement "has achieved, more swiftly than any other individual rights movement in history, not merely the impossible, but the unthinkable."[152]

Still, while nationwide momentum clearly favors same-sex marriage in the long run, the movement has also suffered defeats along the way, and the issue is still percolating in legislatures, courts, and public discourse. As of fall 2012, thirty-one state constitutional amendments explicitly banned the legal recognition of same-sex marriage.[153]

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[146] *See* Eckholm, *supra* note 145, at P7.

[147] *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[148] *See* Cole, *supra* note 143, at 27; *Same-Sex Relationship Recognition Laws: State by State*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/entry/same-sex-relationship-recognition-laws-state-by-state (last visited Mar. 15, 2013) [hereinafter *Recognition Laws*].

[149] *See Recognition Laws*, *supra* note 148.

[150] *See* ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 127–28, 402–06 (2010) (summarizing several studies finding a "rapid, massive reversal of attitudes toward gays" and adding that "[g]iven generational differences in views toward gay marriage, acceptance of homosexual nuptials will likely keep growing"); Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP POL. (May 20, 2011), http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx (noting that 53% of Americans support same-sex marriage and that support is especially high among younger generations); Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP POL. (May 8, 2012), http://www.gallup.com/poll/154529/half-americans-support-legal-gay-marriage.aspx; *infra* notes 267–69 and accompanying text.

[151] *See* Cole, *supra* note 143, at 27. If anyone doubts the quality of Silver's work, it is worth remembering that he correctly projected the outcome of every state in the 2012 presidential election. *See id.*

[152] *Id.*

[153] *See Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/issues-research/human-services/same

In three states (Hawaii, Alaska, and California), court-ordered gay marriage has been overturned by referendum.[154] When the Iowa Supreme Court held that a same-sex marriage ban violated the state constitution, voters ousted three state Supreme Court justices in the next election.[155] Moreover, prior to the November 2012 elections, opponents of same-sex marriage had won 32 of 33 ballot measures.[156] While the November 2012 elections signal a profound shift in societal attitudes, these earlier results demonstrate that in at least some parts of the country, there remains significant opposition to same-sex marriage.

2. Pending Cases

With several prominent cases pending, the legal landscape is likely to continue to change quickly. As noted above, the Supreme Court recently granted certiorari in *Hollingsworth v. Perry*, which challenges the constitutionality of Proposition 8, the California ballot initiative that overturned the California Supreme Court's ruling that same-sex couples could not be denied the right to marry under the California Constitution.[157] A federal trial found Proposition 8 unconstitutional,[158] and the Ninth Circuit affirmed.[159] The Ninth Circuit's reasoning was narrow, relying primarily on *Romer* to hold unconstitutional the revocation of marriage rights in a state that had once offered such rights and still offers domestic partnership.[160] Should the Supreme Court choose to avoid the momentous substantive question of whether the U.S. Constitution categorically forbids states from banning same-sex marriage, it could instead resolve *Perry* on standing grounds or narrow substantive grounds dealing only with California's

-sex-marriage-overview.aspx (last visited Mar. 15, 2013) (listing all thirty-one states that have state law or constitutional provisions prohibiting same-sex marriage); *North Carolina Passes Same-Sex Marriage Ban, CNN Projects*, CNN (May 11, 2012), http://www.cnn.com/2012/05/08/politics/north-carolina-marriage/index.html (noting that North Carolina became the thirty-first state to ban same-sex marriage).

[154] Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1384 (2010).

[155] *See* Cole, *supra* note 143, at 27.

[156] *See* Charles Mahtesian, *The Map of Gay Marriage*, POLITICO (May 4, 2012, 10:54 PM), http://www.politico.com/blogs/charlie-mahtesian/2012/05/the-map-of-gay-marriage-122535.html.

[157] *See* Jay Strozdas, *Trendlines: Court Decisions, Proposed Legislation, and Their Likely Impact on Binational Same-Sex Families*, 44 LOY. L.A. L. REV. 1339, 1364 (2011); *supra* note 19.

[158] *See* Perry v. Schwarzenegger, 704 F. Supp. 2d. 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012).

[159] *See Perry*, 671 F.3d 1052, *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012).

[160] *See Perry*, 671 F.3d at 1096 ("By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause.").

unique circumstances.[161] Eventually, however, whether in *Perry* or elsewhere, the Court is likely to address the larger question of whether the Constitution effectively requires all states to extend marriage to same-sex couples.

In addition to *Perry*, the Supreme Court also granted certiorari in *United States v. Windsor*, in which the U.S. Court of Appeals for the Second Circuit struck down Section 3 of DOMA, which denies federal economic and other benefits to lawfully married same-sex couples and to surviving spouses from those marriages.[162] DOMA, of course, presents a different legal issue than *Perry*. Were the Court to affirm the Second Circuit, its ruling would only require the federal government to recognize same-sex marriages that were valid under state law; it would not require states to grant same-sex marriage. Nevertheless, DOMA litigation obviously raises related questions about legal regimes treating same-sex couples differently from opposite-sex couples. To this extent, if the Court were to decide *Windsor* on the merits but dispose of *Perry* on justiciability or narrow substantive grounds, its analysis of DOMA would likely be very pertinent to a possible future same-sex marriage case.

### *B. Same-Sex Marriage Litigation and Stealth Constitutional Determinations*

Though the demographic trends favor same-sex marriage in the long run,[163] it is far less clear that the Supreme Court, given the opportunity, would hold that the Constitution requires all states to permit such marriages. There are certainly good theoretical arguments for why *Lawrence should* lead to same-sex marriage. As the Massachusetts Supreme Judicial Court explained in *Goodridge v. Department of Public Health*,[164] once *Lawrence* removed moral disapproval as an acceptable justification for laws discriminating against homosexuals, it became difficult to find another justification for treating gay and straight people differently for marriage or any other purposes.[165] Obviously, the tier of scrutiny might have a bearing on the analysis, but if moral disapproval is not a permissible justification for a law, then laws prohibiting same-sex marriage may be vulnerable even under rational basis review.[166]

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[161] *See supra* note 19.

[162] Section 3 of DOMA reads:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2006).

[163] *See supra* notes 143–52 and accompanying text.

[164] 798 N.E.2d 941 (Mass. 2003).

[165] *See id.* 967–68 (finding that the marriage ban was insufficiently justified by the supposed "community consensus that homosexual conduct is immoral"); Tribe, *supra* note 50, at 1946.

[166] *See Goodridge*, 798 N.E. 2d at 961 (finding the Massachusetts same-sex marriage ban "does not survive rational basis review"); *infra* Part II.B.3.

Nevertheless, as we shall see, *Lawrence* contains many points of analysis that should be relevant to same-sex marriage litigation, yet the Court's opacity in that case obfuscates precisely how they might apply. To be clear, the point here is not that a same-sex marriage case will turn on *Lawrence*.[167] Other cases involving liberty,[168] equality,[169] marriage,[170] association,[171] and other issues may well figure more prominently into the Court's calculus.

*Lawrence*, however, provides an interesting lens through which to examine same-sex marriage, not so much because of what it says but because of how little it says. *Lawrence* ostensibly resolved many of the stealth determinations likely to arise again in a marriage case. *Lawrence*'s importance to same-sex marriage, then, is less doctrinal and more sub-doctrinal, insofar as it confronted (however unsatisfactorily) questions regarding levels of generality, hybrid rights, tiers of scrutiny, and public opinion. These issues are all relevant to same-sex marriage litigation, and yet *Lawrence* offers minimal guidance for a Court now confronting similar inquiries again.[172]

1. Levels of Generality

As in *Lawrence*, same-sex marriage cases force courts to select between a broad and a narrow level of generality.[173] If broadly framed, "marriage" would encompass both same-sex and opposite-sex couples. Under this formulation, same-sex couples seeking marriage rights would probably win, because the Court has already said that "marriage" constitutes a "fundamental right," and fundamental rights typically trigger heightened constitutional protection.[174] If the Court, however, framed "marriage"

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[167] *Cf.* Pamela S. Karlan, *The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage*, 2010 SUP. CT. REV. 159, 164 (discussing recent cases with potential implications for same-sex marriage, including *Hollingsworth v. Perry*, *Doe v. Reed*, and *Christian Legal Society v. Martinez*).

[168] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 834 (1992).

[169] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); *see also* United States v. Windsor,133 S. Ct. 786 (2012) (granting certiorari).

[170] *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

[171] M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society.'" (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971))).

[172] The following four subsections each deal with a separate determination that may well arise in a same-sex marriage case. As with the discussion of *Lawrence* in Part I, many of these determinations are interconnected, but this Article treats them separately for ease of presentation.

[173] *See supra* Part I.B.1.

[174] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 926–27 (1992) (Blackmun, J., concurring) ("[T]his Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as . . . marriage . . . ."); *Zablocki*, 434 U.S. at 384 ("[T]he right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause . . . ." (citations omitted));

narrowly as extending only to one man and one woman, plaintiffs would face a steep, uphill battle.

The choice here between construing the right at a broad level of generality—the right to marry—and a narrow level of generality—the right of an unmarried person to marry an unmarried person of the opposite sex—is in some ways reflective of the Court's choices in *Bowers* and *Lawrence*. Admittedly, the parallel is not exact. Whereas *Lawrence* needed to decide the level of abstraction at which the asserted right would be formulated, a same-sex marriage case presents a *definitional* question regarding what constitutes marriage. Nevertheless, though conceptually distinct, both inquiries require the Court to select the relevant level of generality, a determination that will significantly affect the outcome of the case.

One possible way to decide upon a definition would be to turn to state codes, many of which define marriage to apply only to opposite-sex couples.[175] Relying on state law to determine whether the fundamental right to "marriage" can extend to same-sex couples may seem tautological, as it consults the very law that is being challenged to determine the scope of the constitutional right. But state codes have traditionally defined "marriage" and there is little else to guide the Court towards a definition, so it is certainly conceivable that the Court would so frame the issue.[176] Such an approach, however, would seem to disrespect *Lawrence*'s preference for the broader level of generality. If the Court were to select the narrow definition of marriage, it should at least explain why it chose not to follow *Lawrence*'s broader level.[177]

An alternative approach would be to construe the right broadly, because *Lawrence* did so and the cases are similar in important ways. Bans on sodomy and same-sex marriage both discriminate against and stigmatize homosexuals, indicating that society does not value their life choices.[178] Both legal regimes similarly interfere with a person's

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*Loving*, 388 U.S. at 12 ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))).

[175] *See* Baker v. Nelson, 191 N.W.2d 185, 185–86 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (construing the marriage statute to apply only to opposite-sex marriages); *Legal Definitions of Marriage in the United States*, CENTER FOR LESBIAN & GAY STUD. RELIGION & MINISTRY, http://www.clgs.org/marriage/state-definitions (last visited Mar. 15, 2013) (listing states with state laws or constitutional amendments limiting marriage to one man and one woman).

[176] *See* Chad Muir, Note, Perry v. Schwarzenegger: *A Judicial Attack on Traditional Marriage*, 22 U. FLA. J.L. & PUB. POL'Y 145, 159 (2011) (noting that the definition of marriage "has always been entrusted to the people acting through state governments" (quoting Brief for States of Indiana et al. as Amici Curiae Supporting Appellants at 2, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292VRW))); Lynn D. Wardle, *The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage*, 50 WASHBURN L.J. 79, 99 (2010) ("Undeniably, the Constitution was intended to preserve the regulation of family law for state, not national, regulation.").

[177] *See supra* Part I.B.1.

[178] *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject

most personal life choices regarding their sexual and life partners.[179] From this perspective, it seems sensible for the Court simply to follow *Lawrence*'s lead.

However, there are also important differences that complicate the picture. Most obviously, as mentioned above, the level of generality at which a liberty interest is construed is not entirely akin to how an existing institution is defined. Even assuming, however, that the inquiries are similar enough to render *Lawrence* relevant, that case did not indicate that the Court should *always* select the broader level of generality in an individual rights case. Instead, *Lawrence* specifically faulted *Bowers* for not recognizing the statute's deep harmful effects.[180] It is unclear, though, that marriage bans' effects are always as pernicious and far reaching as anti-sodomy laws' effects. As Justice O'Connor explained in *Lawrence*, Texas's law branded homosexuals as presumptive criminals,[181] affecting their employment and housing options, as well as their ability to adopt children (or even raise their own).[182] Had the Court upheld the petitioners' convictions, some jurisdictions would even require them to register as sex offenders.[183] These are exceedingly harsh penalties.[184]

By contrast, while the denial of marriage can also carry serious legal consequences, the scope of those consequences depends on the jurisdiction. Marriage bans can deny members of same-sex couples various entitlements under both state and federal law, including hospital visitation rights, tax benefits, immigration visas, access to health insurance, pension benefits, inheritance rights, and more.[185] (If the Court invalidates

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homosexual persons to discrimination both in the public and in the private spheres."); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 161 (1996); Francisco Valdes, *Testing Democracy: Marriage Equality, Citizen-Lawmaking and Constitutional Structure*, 19 S. CAL. REV. L. & SOC. JUST. 3, 33 (2010) ("[Proposition 8] aims, in short, to stigmatize a minority through the use of law to create differentiation—to reinforce an invidious construction of 'difference' within a purportedly democratic society committed to equality."). *See generally* Marc R. Poirier, *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, 41 CONN. L. REV. 1425 (2009) (discussing how even withholding the term "marriage" in place of the term "civil union" stigmatizes homosexuals).

[179] *See* Laurence H. Tribe & Joshua Matz, Essay, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 489 (2012) ("[I]f our Constitution's promises of liberty, equality, and dignity are to be realized for the millions of Americans whose most intimate lives are degraded by laws that set their love, their enduring commitments to one another, and their very sense of personhood apart as little more than second-class, then in the end the Justices must do their duty and recognize same-sex marriage rights.").

[180] *See Lawrence*, 539 U.S. at 567.

[181] *See id.* at 584 (O'Connor, J., concurring).

[182] *See id.* at 581–82.

[183] *See id.* at 581.

[184] *Cf.* Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Powell, J., concurring) ("[A] prison sentence for [sodomy]—certainly a sentence of long duration—would create a serious Eighth Amendment issue.").

[185] *See* Varnum v. Brien 763 N.W. 2d 862, 873 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955–56 (Mass. 2003); Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of* Romer v. Evans, 32 NEW ENG. L. REV. 263,

DOMA in *Windsor*, as seems likely, legally married same-sex couples will enjoy the federal benefits accruing to married opposite-sex couples.)[186] The denial of marriage rights can also injure a same-sex couple's children, who "reap a measure of family stability and economic security" when their parental figures are able to and do marry each other.[187] The denial of marriage benefits, then, results in serious deprivations. Perhaps they are not quite as offensive and damaging as Texas's criminal law was, but the legal consequences of the two regimes are arguably similar enough to justify a broad framing in a marriage case under a *Lawrence* analysis.

However, not all states prohibiting gay marriage deny committed same-sex couples these benefits. For example, California, even after Proposition 8, offers all the attendant benefits of marriage under state law, so that same-sex couples entering domestic partnerships enjoy the same benefits and obligations of marriage enjoyed by married opposite-sex couples in California.[188] Several other states offer similar benefits.[189] In these states, same-sex couples are denied primarily the right to call their commitment "marriage."[190] As those couples have forcefully (and, in *Perry*, thus far, successfully) argued,[191] the denial of the "marriage" label causes real injury by treating the members of those couples as second-class citizens. The stigmatic effects of this label should not be underestimated.[192] Nevertheless, in states offering same-sex couples all or most of the tangible benefits of marriage, it is harder to analogize the hardships suffered by those couples to the far-reaching harm imposed by anti-sodomy laws. To the extent *Lawrence* indicated that a broad level of generality was appropriate because of those far-reaching consequences,[193] a same-sex marriage ban in a state offering same-sex

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300 (1997) ("By stating that the federal government will not recognize marriages of same-sex couples, DOMA denies a vast number of federal benefits and entitlements to married same-sex couples."(footnote omitted)); *An Overview of Federal Rights and Protections Granted to Married Couples*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples (last visited Mar. 15, 2013).

[186] *See supra* Part II.A.2.

[187] *Goodridge*, 798 N.E. 2d at 956–57.

[188] *See Recognition Laws*, *supra* note 148.

[189] *See supra* note 148 and accompanying text.

[190] *See* Richard A. Posner, *The Law and Economics of Gay Marriage*, THE BECKER-POSNER BLOG (July 17, 2005, 7:19 PM), http://www.becker-posner-blog.com/2005/07/the-law-and-economics-of-gay-marriage%C3%A4%C3%AEposner.html (last visited Mar. 15, 2013) ("The most remarkable aspect of the current controversy is that it is mainly about a word, 'marriage.'").

[191] *See supra* notes 18–21, 160 and accompanying text.

[192] *See* Perry v. Brown, 671 F.3d 1052, 1093 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012); Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 ALB. GOV'T L. REV. 552 (2012) (discussing the social implications of the word "marriage").

[193] *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("[The] penalties and purposes [of the laws at issue] have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do 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.").

couples all the benefits of marriage might not require an analogously broad level of generality. Of course, this reasoning is contrary to the Ninth Circuit's *Perry* ruling, which indicated that Proposition 8 was unconstitutional partially because it could not serve legitimate state interests given that "it changes the law far too little to have any of the effects it purportedly was intended to yield."[194] One could turn this argument on its head, however, and contend that the existence of civil unions or domestic partnerships substantially (though not entirely) mitigates the far-reaching harm flowing from a same-sex marriage ban.

Further complicating the matter is the fact that framing the right to marry at too broad a level of generality would be absurd. Most Americans believe the right to marry only permits one unmarried adult to marry another unmarried adult. "People do not have a right to marry their dog, their house, their refrigerator, July 21, or a rose petal."[195] Nor do they enjoy the right to marry a seven-year-old or eleven people at once.

This is all obvious enough, but it complicates selecting a broad level of generality, because we must determine a principled way to select a framing that is broad enough to encompass same-sex couples, but not too broad.[196] Opponents of same-sex marriage use this wrinkle to press the absurdity of extending marriage beyond "one man, one woman." This objection to same-sex marriage is hardly convincing, especially because it ignores extensive psychological research concluding that same-sex couples resemble, in most important respects, opposite-sex couples.[197] Other formulations of marriage (to

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[194] *Perry*, 671 F.3d at 1095. For example, Proposition 8 did not modify state laws granting same-sex couples the right to form and raise a family, thus undermining the contention that the proposition advances an interest in responsible child-rearing. *See id.* at 1086.

[195] Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2083 (2005).

[196] *See generally* RONALD DWORKIN, LAW'S EMPIRE 225–74 (1986) (comparing constitutional and common law interpretation to writing a chain novel in which the judge "knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be").

[197] *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 874 (Iowa 2009) ("There is no scientific evidence that parenting effectiveness is related to parental sexual orientation: Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for children." (quoting Am. Psychological Ass'n Council of Representatives, Am. Psychological Ass'n, *Resolution on Sexual Orientation, Parents, and Children* (2004), *in* Ruth Ullmann Paige, *Proceedings of American Psychological Association for Legislative Year 2004: Minutes of the Council of Representatives July 28 & 30, 2004 Honolulu, HI*, 60 AM. PSYCHOLOGIST 436–511 (July–August 2005))); Brief Am. Psychological Ass'n et al. as Amici Curiae Supporting Plaintiffs-Appellees at 14–17, Conaway v. Deane, 932 A.2d 571 (Md. Ct. App. 2006) ("Heterosexual and same-sex couples alike face similar challenges concerning issues such as intimacy, love, equity, loyalty, and stability, and they go through similar processes to address those challenges."); Lawrence A. Kurdek, *Are Gay and Lesbian Cohabiting Couples* Really *Different from Heterosexual Married Couples?*, 66 J. MARRIAGE & FAM. 880 (2004); *see also* Lawrence A. Kurdek, *Differences Between Heterosexual-Nonparent Couples and Gay, Lesbian, and Heterosexual-Parent Couples*, 22 J. FAM. ISSUES 727 (2001); Richard A. Mackey et al., *Psychological Intimacy in the Lasting Relationships of Heterosexual and Same-Gender Couples*, 43 SEX ROLES 201 (2000). *See generally* Letitia Anne Peplau & Leah R. Spalding,

eleven people, a cat, my house, a seven-year-old, or July 21) do not share that important similarity. Nevertheless, if one accepts that the right should not be framed at either its broadest or narrowest level of abstraction, it is not easy to devise neutral principles for selecting a level of generality somewhere in between. As a result, courts sometimes select the level of generality without any justification more than a tautology.[198]

2. Doctrinal Categorization and Hybrid Constitutional Rights

Like *Lawrence*, a same-sex marriage case implicates both liberty and equality concerns, and much will turn on how the Court characterizes and categorizes the asserted injury. On the equal protection front, plaintiffs have at least three separate plausible arguments. Plaintiffs can argue that prohibitions on same-sex marriage discriminate on the basis of sexuality, thus denying homosexuals the equal protection of the laws. They can also argue that such prohibitions discriminate on the basis of sex, because the laws prohibit a man from marrying another man (though he could marry a woman). Finally, they can argue that such prohibitions deny equal protection in the context of the fundamental right to marry—that is, through the fundamental rights strand of the equal protection doctrine.[199] On the substantive due process front, they can argue that denying homosexuals the right to marry the person of their choice deprives them of the fundamental right to marriage[200] and further interferes with their rights to define their family and raise their children how they see fit.[201]

Each of these approaches is a plausible, non-frivolous attack on laws prohibiting same-sex marriage, but each also faces substantial doctrinal obstacles. An equal protection claim based on sexual orientation, for example, faces a tier-of-scrutiny problem. Though *Romer* did not foreclose heightened scrutiny, it applied only rational basis review, albeit, most commentators agree, rational basis with bite.[202] While it may be

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*The Close Relationships of Lesbians, Gay Men and Bisexuals*, *in* CLOSE RELATIONSHIPS 111, 114 (Clyde Hendrick & Susan S. Hendrick eds., 2000).

[198] *See* Jackson v. Abercrombie, No. 11-00734, 2012 WL 3255201, at *25 (D. Haw. Aug. 8, 2012) (contrasting *Loving*, which considered "the long recognized right to marry," with a case presenting "a different right, the right to marry someone of the same sex").

[199] *See* Tebbe & Widiss, *supra* note 154, at 1377 ("[I]n the same-sex marriage context, courts and commentators have failed to appreciate the extent to which fundamental interest claims under the Equal Protection Clause require separate analysis.").

[200] *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967).

[201] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (holding that a city may not cut "off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding unconstitutional a state law requiring children to attend public schools); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (finding a statute prohibiting teaching of foreign languages in schools violated the right of parents to make decisions for their children).

[202] *See* CHEMERINSKY, *supra* note 1, at 807 (noting that the Supreme Court has not yet ruled as to whether discrimination on the basis of sexual orientation triggers heightened scrutiny); *supra* notes 100–01 and accompanying text.

possible to invalidate a same-sex marriage ban as irrational,[203] that more deferential level of scrutiny would obviously make the plaintiffs' job more difficult.[204]

Plaintiffs, of course, can argue that classifications on the basis of sexuality deserve heightened scrutiny. Under constitutional doctrine, courts considering whether a group should be considered a suspect class look to whether the group has endured a history of invidious discrimination;[205] whether the characteristics distinguishing the group actually implicate the group members' ability to contribute to society;[206] whether the distinguishing characteristic is "immutable" beyond the class members' control,[207] or highly resistant to change;[208] and the political power of the suspect class.[209] Homosexual plaintiffs would certainly satisfy the first two inquiries and, though there is some lingering scientific debate, probably the third as well.[210] In some states, they may also have a good argument that they should satisfy the fourth, though homosexuals' relative "political power" may depend on what political sphere a judge considers relevant.[211]

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[203] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.").

[204] *See* Klarman, *supra* note 37, at 437 (noting that invalidating laws under "rationality review is difficult to justify, given the extreme deference the Court has traditionally shown when applying that standard").

[205] *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) ("Close relatives are not a 'suspect' or 'quasi-suspect' class. As a historical matter, they have not been subjected to discrimination . . . ."); Frontiero v. Richardson, 411 U.S. 677, 682–84 (1973) (discussing this nation's "long and unfortunate history of sex discrimination" and concluding that on this basis, "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination").

[206] *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) ("While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of *stereotyped characteristics not truly indicative of their abilities*." (emphasis added)).

[207] *See* Plyler v. Doe, 457 U.S. 202, 223–24 (1982) ("In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims."); *Frontiero*, 411 U.S. at 686 ("Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .'" (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972))).

[208] *See* Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009).

[209] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985) ("[T]he legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.").

[210] *See Varnum*, 763 N.W.2d at 893 (acknowledging controversy but concluding that in all events sexual orientation is "highly resistant to change").

[211] *See* Yoshino, *supra* note 81, at 762 n.104 ("In grappling with the challenge of how to define political powerlessness, the Justices have cycled among various tests that have led to inconsistent results.").

The Court has not sufficiently clarified how these separate inquiries interact,[212] but homosexuals probably satisfy enough of them so that the Court should find they constitute a suspect class.[213] Such an approach would trigger heightened scrutiny and almost certainly invalidate the marriage ban.

Nevertheless, as Professor Kenji Yoshino has argued, attempts to convince courts to label a group "suspect" "have an increasingly antiquated air in federal constitutional litigation."[214] Indeed, the Supreme Court has not accorded heightened scrutiny to a new classification since 1977, when it did so on the basis of non-marital parentage.[215] Moreover, while some state courts have determined that sexual orientation classifications are presumptively suspect,[216] more have afforded rational basis review to such classifications.[217] It is therefore far from clear that the Court would hold that sexual orientation classifications trigger heightened scrutiny.

An equal protection claim based on sex discrimination poses a separate kind of problem. Sex discrimination triggers at least intermediate scrutiny,[218] and perhaps even something higher.[219] To this extent, an equal protection claim charging sex discrimination, rather than sexual orientation discrimination, would seem to have a better chance of success.[220] However, while important, the tier of scrutiny is not everything, and, here the argument seems to mischaracterize the real nature of the plaintiffs' grievance. It is true that same-sex marriage bans treat people differently on account of their sex, insofar as they prevent, say, a woman from marrying the person of her choice if that person is a woman—but not if that person is a man. However, in other senses, marriage bans do not seem to fit within the conventional sex-discrimination paradigm. For one, they apply equally to men and women; gay men are no more entitled to marry their

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[212] *See id.*

[213] *See, e.g.*, Windsor v. United States, 699 F.3d 169, 180–85 (2d. Cir. 2012) (finding that homosexuals as a group satisfied each of the four inquiries), *cert. granted*, 133 S. Ct. 786 (2012).

[214] Yoshino, *supra* note 81, at 757.

[215] *See* Trimble v. Gordon, 430 U.S. 762, 766–76 (1977).

[216] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 906–07 (Iowa 2009).

[217] *See, e.g.*, Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Conaway v. Deane, 932 A.2d 571 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006); *see also* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 9–11 (1st. Cir. 2012) (invalidating Section 3 of DOMA under rational basis review).

[218] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." (citing Reed v. Reed, 404 U.S. 71, 75 (1971))).

[219] *See* United States v. Virginia, 518 U.S. 515, 534 (1996) (holding that the Virginia Military Institute failed to show an "exceedingly persuasive justification" for its policy of excluding women).

[220] *See, e.g.*, Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 535 (2001) (explaining the "analytic strength" of the sex discrimination argument).

same-sex partners than lesbians are. Furthermore, same-sex marriage bans do not treat either men or women as second-class citizens on account of their sex. These laws penalize and stigmatize homosexuals of both sexes.[221] To this extent, while a sex discrimination claim is not frivolous, it seems to miss the essence of the harm.[222] Unsurprisingly, then, courts have been generally unreceptive to this line of argument.[223]

Another doctrinal argument in favor of same-sex marriage is via the fundamental-rights branch of equal protection law. Professors Nelson Tebbe and Deborah Widiss have highlighted this argument, arguing that once conferred, "the right to marry in a legally recognized ceremony is fundamental: if a government decides to recognize and support civil marriage, it cannot exclude same-sex couples without providing an adequate justification."[224] Once again, though, there are obstacles. Most obviously, the argument depends on a broad definition of marriage. If the Court selects a definition of marriage limiting the institution to one man and one woman, this argument loses its traction, because no fundamental right will have been denied.[225] Additionally, the fundamental-rights branch of the Equal Protection Clause is narrow, focusing almost

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[221] *See* Caroline J. Lindberg, Lisa Grant v. South-West Trains*: The Limited Utility of Sex Discrimination Arguments in Securing Lesbian and Gay Rights*, 12 TEMP. INT'L & COMP. L.J. 403, 421 n.137 (1998) (describing this as an "equality in misery" argument); Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 951–52 (2002) ("Men and women enjoy equal rights with respect to the right of marriage. Both men and women may marry a member of the opposite sex; neither may marry a member of the same sex."). *But see* Baker v. Vermont, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring) ("Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex . . . . This is sex discrimination.").

[222] *Cf.* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3rd Cir. 2001) (holding that a male homosexual employee who claimed that he was discriminated against because of his sexual orientation did not establish that he was discriminated against because of his sex, as required to prove sexual harassment claim under Title VII); Swift v. Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011) (holding that employer's alleged comments about employee's sexual orientation did not constitute discrimination based on gender).

[223] *See* Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 927 (2011) ("When courts have rejected the sex discrimination argument—instead of avoiding it—they have typically followed the dissent's argument in *Baehr*, reasoning that laws against same-sex marriage do not discriminate based on sex because they apply equally to both sexes."); Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J. L. & GENDER 461, 462 (2007) ("[N]o state high court since *Baehr* has found that denying a same-sex couple the right to marry successfully states a sex discrimination claim. Rather, the subsequent decisions have either ignored or rejected sex discrimination arguments."). *But see* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (treating Hawaii's marriage statute as a sex-based classification subject to heightened scrutiny under the state constitution's equal protection provision).

[224] Tebbe & Widiss, *supra* note 154, at 1380.

[225] *See supra* Part II.B.1.

exclusively on the right to vote and the right to access judicial process.[226] While it may be true that the right to marriage shares similarities to these other rights,[227] the Court may be unlikely to broaden this doctrine, especially over something as controversial as same-sex marriage.[228] Indeed, there are important differences between the right to marriage, on the one hand, and the rights to vote and access judicial process, on the other. Whereas voting and access to courts are essential to our democracy, marriage, however important to society, is not part of our governmental structure. It is therefore hardly certain that this argument would be successful under current constitutional doctrine.

Finally, a substantive due process argument also has doctrinal weaknesses. First, as noted above, much substantive due process doctrine roots fundamental rights in the nation's tradition.[229] While plaintiffs will seek to define marriage broadly, the doctrine's interest in historical practice may well militate for a traditionally narrow view of marriage, limited to one man and one woman.[230] Tethering rights so closely to historical practices necessarily disadvantages plaintiffs seeking the recognition of new rights. Of course, as *Lawrence* and other cases like *Roe v. Wade*[231] have demonstrated, the Court does not rigidly adhere to tradition in all substantive due process cases. Nevertheless, because *Lawrence* provided no guidance on when it is appropriate to ignore that framework, one can only guess whether it would apply in a same-sex marriage case. Second, the constitutional right to marriage itself flows from the obsolete view that marriage is the only lawful means for realizing other constitutionally protected liberty interests in procreation and sexual intimacy.[232] Given that procreation and sexual intimacy commonly occur today outside of marriage, the need to constitutionalize the right to marry has lost some urgency. Third, marriage in many ways seems less about liberty than about accessing government created benefits and publicly announcing mutual commitment.[233] Same-sex marriage bans undoubtedly injure same-sex couples who wish to marry, but it is not entirely clear that it is those individuals' *liberty* that is invaded. After all, those couples can still live together and do most of the things that married couples do. Indeed, in states granting all the attendant benefits of marriage,

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[226] *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 654 (17th ed. 2010) ("[T]he Court has developed this line of cases in only a very few areas.").

[227] *See* Tebbe & Widdis, *supra* note 154, at 1414 ("Civil marriage, like voting and criminal appeals, is a discretionary government program that nevertheless carries enormous social and legal importance and that likewise sits at a nexus of equality and liberty concerns.").

[228] *See* Sunstein, *supra* note 195, at 2097 (noting that whereas equality is inherent in the right to vote itself, the same is probably not true of the right to marry).

[229] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' that direct and restrain our exposition of the Due Process Clause." (citation omitted) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992))).

[230] *See supra* Part I.B.1.

[231] 410 U.S. 113 (1973).

[232] Tebbe & Widiss, *supra* note 154, at 1395.

[233] *Id.*

the primary deprivation appears to be the symbolic status of marriage and in that regard may be conceived of as expressive.[234] This deprivation is an injury, no doubt, but it is not clear that it is one sounding in liberty.[235]

Lawyers will likely press several or all of these doctrinal options, but the Court nevertheless will enjoy substantial leeway to address the questions it chooses in the manner it wishes.[236] One approach would simply be to reject each doctrinal argument and hold that there is no right to same-sex marriage. Such an approach, however, would fail to recognize the hybrid analysis *Lawrence* invites and the ways in which the liberty, equality, and even possibly free speech norms complement each other in this setting.[237] To this extent, a more synergistic approach combining constitutional rights seems more appropriate and respectful of *Lawrence*'s "stereoscopic" spirit.[238] *Lawrence* itself, however, provides inadequate guidance on when and how to engage in such hybrid analyses. To this extent, *Lawrence* suggests a potential path for plaintiffs in these cases but does little to illuminate that path.

3. Tiers of Scrutiny

After *Lawrence*, it is also unclear whether the tiers-of-scrutiny analysis that has been the center of many equal protection and substantive due process cases applies at all. As noted above, *Lawrence* might be read as doing away with the tiers of scrutiny altogether, or silently applying heightened scrutiny, or even rejecting the Texas statute as irrational.[239] *Lawrence*'s silence on these matters, of course, further complicates same-sex marriage litigation, in which the tier of scrutiny (if applied) may go a long way to determining the outcome of the case.

Even if the Court settles on a tier of scrutiny, it would then have to decide how to apply it. The tiers, in practice, function more like a spectrum than discrete categories,[240]

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[234] It is unlikely that the Court would evaluate same-sex marriage bans under free speech doctrine, but in states granting civil unions but not marriage to same-sex couples, the state may be thought of as providing an expressive forum for opposite-sex couples, but not same-sex couples, to announce their mutual commitment.

[235] *See* Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1074 (2004) ("If certain people are told that they cannot marry, the real objection lies not in due process, but in a possible violation of the Equal Protection Clause.").

[236] *See* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 683–711 (2012) (discussing the Court's "agenda-setting freedom").

[237] *See supra* note 82–87 and accompanying text.

[238] *See* Karlan, *supra* note 83, at 474. In striking down DOMA, the First Circuit offered a different sort of hybrid analysis, noting that federalism concerns "somewhat" diminished the deference ordinarily accorded Congress, even though neither the Tenth Amendment nor Spending Clause arguments independently invalidated the law. *See* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 11–12 (1st Cir. 2012).

[239] *See supra* Part I.B.3.

[240] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) ("[T]his Court . . . has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause."); CHEMERINSKY, *supra* note 1, at 689

so each tier can operate with varying degrees of rigor. Rational basis review, for instance, can be extremely deferential, as when economic regulations are reviewed,[241] or applied with considerable bite, as in *Romer* where the Court perceived that the challenged amendment had the effect of penalizing an unpopular group.[242] These different variants of rational basis can produce different outcomes. In *Goodridge*, for instance, both the majority and dissent agreed that rational basis review was appropriate, but they disagreed on how it should be applied.[243] The majority emphasized that "rational basis analysis requires that statutes bear[ ] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."[244] Thus, "[n]ot every asserted rational relationship is a conceivable one, and rationality review is not toothless."[245] Having found that rational basis review has some real bite, the court continued to find that the same-sex marriage ban did not meet rational basis review. By contrast, the dissent argued that the issue is whether the state "satisfies a minimal threshold of rationality," a seemingly more deferential level it found had been satisfied.[246] These variations are hardly confined to rational basis review; intermediate and strict scrutiny, too, sometimes have varying degrees of rigor.[247]

These different approaches to all the tiers of scrutiny further complicate same-sex marriage litigation. It is hard to predict, for instance, how a court applying rational basis review would determine whether the legislature is entitled to believe rationally that limiting marriage to opposite-sex couples furthers the well-being of children. The argument appears weak. Children being raised by same-sex couples would benefit from their parental figures' marriage to each other, especially in states that do not already extend to same-sex couples marriage's attendant benefits. Even in states already extending such benefits, marriage recognition would help children by removing the stigma of non-recognition currently hanging over their parents' relationship. Moreover, psychological research concludes that there is no scientific basis for concluding that gay and lesbian parents are any less capable than heterosexual parents or that their

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(summarizing critics contending that "although the Court speaks in terms of three tiers of review, in reality there is a spectrum of standards of review").

[241] *See supra* note 103 and accompanying text.

[242] *See* Romer v. Evans, 517 U.S. 620, 632 (1996); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447 (1985); Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973); *supra* note 101 and accompanying text.

[243] *Compare* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 960 (Mass. 2003), *with id.* at 978 (Sosman, J., dissenting).

[244] *Id.* at 960 (majority opinion) (quoting Coffee-Rich, Inc. v. Comm'r of Pub. Health, 204 N.E.2d 281 (1965)) (internal quotation marks omitted).

[245] *Id.* at 960 n.20 (internal quotation marks omitted) (citing Murphy v. Comm'r of the Dep't of Indus. Accidents, 612 N.E.2d 1149 (1993)).

[246] *Id.* at 978–82 (Sosman, J., dissenting); *see also id.* at 1003 (Cordy, J., dissenting).

[247] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 350 (2003) (Thomas, J., dissenting) (accusing the majority of watering down strict scrutiny); United States v. Virginia, 518 U.S. 515, 571–72 (1996) (Scalia, J., dissenting) (accusing the majority of increasing the rigor of intermediate scrutiny).

children are any less psychologically healthy or well adjusted.[248] Under rational basis review with any degree of bite, then, a court should reject the argument that children benefit if marriage is limited to opposite-sex couples. If rational basis review, however, is reduced to its most deferential variant, some judges may find it difficult to say that it is *irrational* for the legislature to believe that opposite-sex couples provide the optimal setting for child-rearing, especially given that psychological research in this area is still ongoing.[249]

Moreover, defenders of same-sex marriage bans might try to defend such laws in more general terms. One such contention might be that it is rational for the state to preserve the traditional understanding of marriage during a period of rapid social change.[250] Another such argument, particularly relevant in a case like *Perry* involving a voter referendum displacing a court decision, may be that measures like Proposition 8 are rational as a means to express opposition to judicial interference with democratically enacted laws.[251] Neither of these arguments grapple directly with why same-sex marriage bans harm some individuals, but under an especially deferential form of rational basis review, either may be sufficient to persuade some Justices to uphold a marriage ban like Proposition 8.

Of course, given that same-sex marriage bans penalize an unpopular group, the Court should, at a minimum, apply heightened rational basis review of the sort used in *Romer, City of Cleburne v. Cleburne Living Center, Inc.*,[252] and *U.S. Department of Agriculture v. Moreno*.[253] But though other courts construing Supreme Court precedent have been able to tease out a general approach for when heightened rational basis review is appropriate,[254] the Court itself has never committed to a clear formula, leaving considerable uncertainty in its wake. Indeed, just as *Lawrence* failed to identify a tier of scrutiny at all, so too have other cases insufficiently offered guidance for which variant of scrutiny to apply within a selected tier.

Clearly, the Court has felt that it needs some flexibility in using these tiers to arrive at sensible outcomes, at the expense of developing a systematic approach.[255]

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[248] *See* Brief Am. Psychological Ass'n et al. as Amici Curiae in Support of Plaintiffs-Appellees at 32–44, Conaway v. Deane, 932 A.2d 571 (Md. Ct. App. 2006) (summarizing extensive psychological research); *see also Goodridge*, 798 N.E.2d at 964 ("It cannot be rational under our laws . . . to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.").

[249] *See, e.g.*, *Goodridge*, 798 N.E.2d at 998–1002 (Cordy, J., dissenting).

[250] *See, e.g.*, Brief of Petitioners at 48–55, Hollingsworth v. Perry, No. 12-144 (U.S. filed Jan. 23, 2013).

[251] *See, e.g.*, *id.* at 55–61.

[252] 473 U.S. 432 (1985).

[253] 413 U.S. 528 (1973).

[254] *See, e.g.*, Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 10–11 (1st Cir. 2012) (noting in a DOMA case that *Moreno*, *Cleburne*, and *Romer* all "stressed the historic patterns of disadvantage suffered by the group adversely affected by the statute" and consequently applied heightened rational basis review).

[255] *See* Berger, *supra* note 9, at 481–82.

The tiers of scrutiny ostensibly function as black-letter doctrine, recited in case law and treatises, but in practice, the factors governing their application are murky. As the Second Circuit noted recently, "[t]he Supreme Court has not expressly sanctioned such modulation" within the tiers of scrutiny, thus resulting in "some doctrinal instability in this area."[256] To this extent, the stealth, once again, highlights the Court's discomfort with its own doctrine. *Lawrence* is hardly anomalous in this regard, though by failing to identify a level of scrutiny at all, it approached these questions with an even greater degree of stealth than usual.

4. The Role of Public Opinion

The Court's methodology for discerning public opinion and its use of that opinion may be one of the most important factors in a same-sex marriage case. Five or more Justices may very well believe that there is no legitimate reason for denying same-sex couples the right to marry, and they may well further believe that that denial seriously harms those couples, their children, and homosexuals more generally. But if those Justices also perceive that they are too far ahead of public opinion, they may decline to invalidate state marriage bans. Even Justice Ginsburg, who worked on women's legal issues for the ACLU earlier in her career,[257] has said that *Roe v. Wade*, in light of the fierce, decades-long backlash it provoked,[258] "ventured too far in the change it ordered."[259] Some Justices sympathetic to same-sex marriage as a policy matter, then, may still worry about provoking a substantial backlash that undermines the Court's institutional legitimacy.[260] Even if such Justices would not vote to uphold a same-sex marriage ban, they may try to dispose of the case without reaching the merits.[261]

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[256] Windsor v. United States, 699 F.3d 169, 180–81 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012).

[257] *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, AM. CIV. LIBERTIES UNION (Mar. 7, 2006), http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff.

[258] *See, e.g.*, Robert Post & Reva Siegl, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 388–402 (2007) (summarizing scholarship about backlash to constitutional decisions); *cf.* Eskridge, *supra* note 59, at 1294; Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

[259] Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985).

[260] *See* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 48–155 (2013) (detailing several instances of societal backlash against state court rulings in favor of same-sex marriage); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1183–97 (2009) (discussing backlash after court decisions requiring same-sex marriage).

[261] The Court may have been animated by these concerns in *Perry* when it asked the parties to brief whether Proposition 8's supporters had standing in the case. *See* Hollingsworth v. Perry, 133 S. Ct. 786 (2012).

A great deal therefore turns on how the Court perceives and weighs public opinion on this issue.[262] Though these issues were explicit in *Lawrence*,[263] that case still left unclear both how the Court should measure cultural norms and what weight to give those norms in its decisionmaking. The Court, as discussed above, referenced state statutory regimes, noting that by 2003 only four states had laws singling out homosexual sodomy for criminal penalty.[264] If state counting were the primary measure of public opinion on same-sex marriage, the plaintiffs would likely lose. Fewer than ten states currently extend marriage to same-sex couples.[265] Whereas a significant majority of states had repealed anti-sodomy laws by 2003, most states today still prohibit same-sex marriage. Indeed, as of January 2013, thirty-seven states had statutory or constitutional provisions limiting marriage to one man and one woman.[266]

State counting, however, is but one measure of public opinion, and *Lawrence* does not indicate that it is exclusive or even primary. Public opinion polls arguably provide a better indication of public views on contentious issues, and, viewed through this lens, same-sex marriage enjoys far greater support.[267] According to recent polling data, slightly over half of Americans today support same-sex marriage.[268] The trend, furthermore, is clearly in favor of same-sex marriage; in just the last half-dozen years, support for gay marriage has risen substantially.[269] Moreover, 70% of people aged 18 to 34 favor same-sex marriage, indicating that the demographics clearly favor gay marriage in the long run, especially given that this is not an issue about which people become

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[262] *See generally* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365 (2009) (exploring the Court's practice of consulting the majority of the states to identify and apply constitutional norms).

[263] *See supra* Part I.B.4.

[264] *See* Lawrence v. Texas, 539 U.S. 558, 573 (2003).

[265] *See supra* notes 143–56 and accompanying text.

[266] *See Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last visited Mar. 15, 2013). A few states had no statutory or constitutional provisions dealing with same-sex marriage one way or another. *See id.*; *see also supra* Part II.A.1.

[267] *See, e.g.*, Steve Sanders, *Same-Sex Marriage Symposium: Gay Marriage, Democracy, and Judicial Review*, SCOTUSBLOG (Sept. 18, 2012, 10:30 AM), http://www.scotusblog.com/2012/09/same-sex-marriage-symposium-gay-marriage-democracy-and-judicial-review/ (arguing that ballot initiatives on gay marriage are misleading indicators of public opinion because an under-informed electorate often misunderstands the question presented on the ballot and because conservative religious groups are overrepresented at the polls, thus "resulting in policies that may be incongruent with general public attitudes").

[268] *See* Margaret Talbot, Comment, *Wedding Bells*, NEW YORKER, May 21, 2012, at 19 (noting that 53% of Americans in 2012 support gay marriage); *AP–National Constitution Center Poll, Aug. 16–20, 2012*, POLLINGREPORT.COM, http://www.pollingreport.com/civil.htm (last visited Mar. 15, 2013) (providing poll results in which 53% of people said they believed it should be legal for gay and lesbian couples to get married).

[269] *See* Talbot, *supra* note 268, at 19.

more conservative as they age.[270] Other recent events, such as the repeal of the military's "Don't Ask, Don't Tell" policy,[271] further indicate that the nation is moving quickly towards increased respect for homosexuals and homosexual relationships.

The question, then, is how the Court should make sense of complicated, conflicting social attitudes towards homosexuality generally and same-sex marriage more specifically. One theory is that the Court should care only about suppressing outliers, policing only state legal regimes that threaten individual rights in ways that are incompatible with nationwide legal norms.[272] The judiciary's role, on this view, is not to spur social change but to bring laggard states up to contemporary norms so that their anachronistic policies do not continue to harm unpopular groups who happen to live within those states' borders. *Lawrence* easily fits this model,[273] but a same-sex marriage case in 2013 probably would not.

A different approach seeks to anticipate social trends.[274] As Professor Klarman argues, while racial equality and gay rights were highly contentious issues when *Lawrence* and *Brown v. Board of Education*[275] were decided, "future trends were not difficult to predict."[276] Consideration of future trends makes sense to the extent that the Court cares not just about immediate reactions to its decisions but also its long-term legitimacy in an evolving cultural landscape. The Court, then, must fear not only getting too far ahead of cultural norms, as it arguably did in *Roe*, but also issuing a decision that in short time may be regarded as medieval, as it arguably did in *Bowers*.[277]

*Lawrence*, unfortunately, does little to help navigate these tricky waters. It failed to explain how the Court should measure public opinion, citing some evidence that domestic and international norms had shifted against anti-sodomy laws without explaining the sources' relative weight or conceding their shortcomings. It also failed to justify doctrinally why cultural norms should inform constitutional meaning at all, especially given its claim that *Bowers* had been wrong all along.[278] Nor did *Lawrence* address the seeming paradox of protecting minority rights by reference to majoritarian norms.[279] It is therefore entirely unclear exactly how social norms help determine the existence and scope of constitutional rights.

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[270] *See id.*; *see also* Schacter, *supra* note 260, at 1220 (noting that same-sex marriage polls reflect greater support over time because younger people are "far more likely" to support it).

[271] *See* Elisabeth Bumiller, *A Final Phase for Ending 'Don't Ask, Don't Tell*,*'* N.Y. TIMES, July 23, 2011, at A13.

[272] *See* Klarman, *supra* note 37, at 483.

[273] Sunstein, *supra* note 35, at 27 (arguing that the law at issue in *Lawrence* was "hopelessly out of touch with existing social convictions").

[274] *See generally* FRIEDMAN, *supra* note 119.

[275] 347 U.S. 483 (1954).

[276] Klarman, *supra* note 37, at 483.

[277] *Cf.* Lain, *supra* note 120, at 132–33.

[278] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[279] *See supra* Part I.B.4.

Given the importance of public opinion, it could very well be that a same-sex marriage case may turn primarily on when the Court decides the case. If the Court were to determine the constitutionality of all same-sex marriage bans in *Perry*, it likely would be considering the matter when fewer than twenty percent of all states grant same-sex marriage rights. Were the Court to wait another five or ten years, the landscape would likely look very different. The legal background also would likely change. The Court may choose not to resolve the marriage question definitively in *Perry*, but its treatment of the issues in that case and in *Windsor* obviously could have a substantial impact on its future legal analysis as well as on public opinion itself.[280]

The Court's awareness of these long-term issues may figure into its short-term calculations.[281] In particular, Justices supporting a constitutional right to same-sex marriage might prefer to dispose of *Perry* on standing or narrow substantive grounds, because it would be harder to declare same-sex marriage a federal constitutional right when fewer than ten states permit it. This is, of course, all speculation, and surely many other factors figure into the Justices' thought processes. Nevertheless, given that some of the Justices seem influenced by public opinion, it is certainly possible that various Justices' perceptions of these trends may affect their approaches to *Perry* and other related cases.

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It should be clear by now that the Court's approach to same-sex marriage is hard to predict, not just because this is a doctrinal question of first impression,[282] but also because the Court has offered so little guidance on many of the inquiries likely to arise. The legal uncertainty resulting from *Lawrence*'s stealth determinations is hardly confined to same-sex marriage cases. Cases like *Windsor*, challenging DOMA, for instance, also will turn partially on how the Court frames the issue, selects the tier of scrutiny, evaluates public opinion, and so on.[283] Similarly, cases presenting less weighty matters, such as those involving the constitutionality of sex-toy bans, have also spawned confusion as lower courts struggle to determine how to apply *Lawrence*.[284]

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[280] *See* William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 877 (2001) ("[L]aw cannot liberalize unless public opinion moves, but public attitudes can be influenced by changes in the law."); *supra* Part I.B.4.

[281] *See supra* notes 18–21.

[282] It is highly unlikely that the Court will consider its summary dismissal of the appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), binding or even persuasive in a contemporary same-sex marriage case. In *Baker*, the Minnesota Supreme Court held that the U.S. Constitution does not protect the right for same-sex couples to marry. *See* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). The U.S. Supreme Court upheld that ruling, dismissing the appeal, without explanation, "for want of [a] substantial federal question." *Baker*, 409 U.S. at 810.

[283] *See* Windsor v. United States, 699 F.3d 169 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012); Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1 (1st Cir. 2012).

[284] *Compare* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1233, 1236–38 (11th Cir. 2004) (upholding an Alabama law prohibiting the sale of sex toys), *with* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 743–47 (5th Cir. 2008) (relying on *Lawrence* to hold unconstitutional

Indeed, though they disagree on *Lawrence*'s meaning, lower courts do seem to agree that *Lawrence* is "broad and vague"[285] and offers little instruction on how to proceed.

## III. EXPLANATIONS AND IMPLICATIONS

### *A. Stealth Determinations and Meta-Constitutionalism*

It is important to emphasize that stealth determinations are not merely litigation strategies to be exploited by savvy advocates and partisan judges. Underlying many of these determinations are much larger constitutional principles that recur across constitutional cases. The Court, for instance, will often have to determine how broadly or narrowly to construe an asserted right. As we have seen, the Court has failed to approach this issue consistently,[286] sometimes construing the right broadly, sometimes narrowly. This inconsistency is significant, because at stake is a much broader principle of whether our Constitution ultimately favors individual liberties or democratic mandates when the two collide in close cases.[287] The U.S. Constitution stands for both principles of liberty and democracy.[288] Some cases, like *Lawrence*, ostensibly pit these two principles against each other, because a democratically enacted law invades the unenumerated liberty of certain people. In such cases, the Court must ultimately decide whether to impose its own vision of liberty or to allow majority rule to prevail. The first approach risks short-circuiting important democratic deliberation and potentially triggering a backlash.[289] The second risks depriving individuals of important liberty interests and harming unpopular social groups. Both sides in such cases can point to the Constitution to support their position, and yet the Court has offered no systematic way for thinking about resolving this collision. Because the Court resolves stealthily questions about the appropriate level of generality, we have minimal guidance from the Court about whether, in a close case, liberty or democracy should break an apparent tie.[290] Of course, in some ways, fundamental rights are particularly suited

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a Texas statute making it a crime to promote or sell sexual devices). As Professor Strader noted, "[t]he battle over *Lawrence*'s meaning could not be more clearly framed than it is in the sex toy circuit split." J. Kelly Strader, Lawrence's *Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 99 (2011).

[285] Reliable Consultants, Inc. v. Earle, 538 F.3d 355, 356 (5th Cir. 2008) (Jones, C.J., dissenting from denial of rehearing en banc).

[286] *See supra* Parts I.B.1 & II.B.1.

[287] *See* Tribe & Dorf, *supra* note 70, at 1058 ("The more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection.").

[288] *Cf.* Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 754 (2004) ("[T]he Constitution equally helps to shape democracy when it singles out for protection ideas like equality, liberty, and citizenship—core democratic concepts that are enshrined in the Fourteenth Amendment.").

[289] *See generally* Eskridge, *supra* note 59, at 1293–318.

[290] *See* HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY xvi–xvii (2009) (describing Justice Kennedy's approach to resolving of conflicts between government and individual liberties).

to case-by-case adjudication, so it is understandable that the Court would not want to issue precise instructions that would bind it in future cases. That being said, more careful attention to how the Court determines the level of generality could still add greater consistency to this area without irrevocably tying its hands in all future substantive due process cases.

Different stealth determinations obscure other meta-issues. When the Court decides whether to apply the tiers of scrutiny or whether to blur doctrinal categories into hybrid rights, it is implicitly making judgments about how formalistically judges should apply constitutional doctrine. Similarly, when the Court measures public opinion, it is considering more broadly how majoritarian our courts should be when they interpret the Constitution. These are fundamental constitutional questions, and yet the Court's stealth determinations usually only brusquely allude to them in passing. It is true that these are difficult questions, and a one-size-fits-all approach to them would likely be inadequate. That said, these questions can shape constitutional outcomes in significant ways, so by failing to grapple with them in a thoughtful, honest way, judges not only create great legal uncertainty for future important cases like same-sex marriage but also neglect to develop a coherent, rigorous constitutional vision.

Of course, were the Court to reduce any of these determinations down to more law-like analyses and tests, Justices would then enjoy flexibility in how to apply *those* tests. In this sense, calls for more careful treatment of stealth determinations might result in an endless, Escher-like reduction of analyses fleshing out prior analyses. But it is important to note that we are nowhere near that point. The Court's failings in these areas are not minute, but broad and global. These are big-picture meta-questions that animate many constitutional cases, and yet the Court casually offers answers that do not begin to explore the larger issues at stake. To that extent, the Court could shed considerable light on these matters by discussing the general considerations it brings to such determinations without laying down rigid rules that might unduly constrain it in future cases.

### *B. Explanations*

There are, of course, explanations for the Court's failure to theorize these stealth determinations more carefully. First, these stealth determinations may reflect the Court's preference to keep its options open in future cases.[291] More rigorous explication

[291] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–11 (1999) (arguing in favor of constitutional doctrines in which courts decide cases narrowly); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 363–64 (2006) ("In many domains, sensible people take small steps in order to preserve their options, aware as they are that large steps can have unintended bad consequences, particularly if they are difficult to reverse. In law, wide rulings might produce outcomes that judges will come to regret."); Sunstein, *supra* note 29, at 7 (arguing that judicial minimalism reduces the costs of decision and the costs of mistake).

of certain determinations can sometimes inadvertently tie the judiciary's hands in future cases. Short term minimalism, in other words, enhances long-term flexibility. Judges value this flexibility in all cases, but it is arguably especially important in the area of individual rights, because different cases present different considerations for which rigid doctrinal structures do not always account sufficiently. In *Glucksberg*, for instance, several concurring Justices noted that while they were unwilling to invalidate Washington's prohibition on assisted suicide, similar laws might be unconstitutional in different circumstances.[292] Judges, in other words, will be wary of erecting doctrine that deprives them of the authority to weigh properly the various nuances presented in each case.

Second, sometimes the Justice writing the majority opinion muddies the analysis to retain five votes. Five (or more) Justices may sometimes agree on an outcome in a case without agreeing on the underlying reasoning. As Professor Sunstein has argued, under-theorized agreements provide a coalition of Justices with a way of holding together such fragile majorities.[293]

Third, the Court simply does not have the time or space to address each determination in detail. U.S. Supreme Court opinions already tend to be long. Were the Court to explain carefully its resolution of each determination rendered en route to its holding, its opinions would be even longer, a result that may further decrease its already shrinking docket. Moreover, an additional intricate web of "sub-doctrine" dealing with matters like levels of generality and public opinion may add still more confusion to constitutional law, an area already criticized for indeterminancy.[294]

Fourth, stealth determinations may reflect the peculiarities of a particular Justice's style. This charge is perhaps especially relevant for *Lawrence*, which was authored by Justice Kennedy, whose *Lawrence* opinion has often been criticized for analytical imprecision.[295] There is some fairness to the argument; some of *Lawrence*'s ambiguities may be attributable to Justice Kennedy.[296] Similarly, the opinion's attention to

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[292] *See* Washington v. Glucksberg, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring); *id.* at 739 (Stevens, J., concurring); *id.* at 791 (Breyer, J., concurring).

[293] *See* Sunstein, *supra* note 30, at 1171 ("Incompletely theorized agreements help to produce judgments on relative particulars amidst conflict on relative abstractions.").

[294] *See, e.g.*, MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5–6 (2004) (referring to constitutional law as "generally quite indeterminate").

[295] *See* Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power To Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 151 (2003) ("It would be difficult to over-criticize the disorganization and lack of clarity of Justice Kennedy's majority opinion [in *Lawrence*]."); Lund & McGinnis, *supra* note 6, at 1585.

[296] *See* Neal Devins, *Ideological Cohesion and Precedent (or Why the Court Only Cares About Precedent When Most Justices Agree with Each Other)*, 86 N.C. L. REV. 1399, 1410 (2008) ("[T]he competing decisionmaking styles of Justices Kennedy and O'Connor were on full display in *Lawrence*."); Heather K. Gerken, *Larry and* Lawrence, 42 TULSA L. REV. 843, 847 (2007) ("Justice Kennedy's penchant for abstraction conceals some analytic slippage that

dignity, while certainly justifiable,[297] reflects Justice Kennedy's defensible but rather idiosyncratic constitutionalism.[298] However, one should not overstate the Kennedy factor.[299] Stealth determinations, after all, recur across cases, including many authored by different Justices.[300]

Fifth, insofar as stealth determinations lead to less doctrinalized opinions, they also may help the Court speak to a broader audience than usual. *Lawrence* reads like a hybrid document, part legal decision, part human rights manifesto. It seems directed as much at *New York Times* readers as at judges and lawyers.[301] Though we tend not to think of judicial opinions' broad audience, it makes sense that the Court would think in these terms in certain cases. As Professor Robert Post has argued, the Court's "success in influencing public opinion" helps determine its legal authority.[302] *Lawrence* involved easily understood but highly contested norms. It is quite possible, then, that the Court wanted to speak about these issues to a broad audience using accessible language less encumbered by doctrinal technicalities. Relatedly, to the extent the Court emphasized the dignity argument, it advanced points that did not fit easily within existing case law.[303]

Finally, and along similar lines, stealth determinations may enable the Court to vindicate public norms in a way that a more straightforward doctrinal approach might not. The *Lawrence* Court ultimately seems to have been most persuaded that cultural changes had seriously eroded the "foundations of *Bowers*."[304] These cultural shifts are not mere intellectual abstractions but also shape the Justices' own life experiences. Whereas Justice Powell in 1986 did not believe he had ever met a homosexual,[305]

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would have been evident had the [*Lawrence*] opinion been written in the finest tradition of common law judging."). Readers respond to this style differently. *Compare* Barnett, *supra* note 56, at 40 (describing *Lawrence* as a "simple, indeed elegant, ruling"), *and* Sherry, *supra* note 136, at 1000 (arguing that *Lawrence* "perfectly exemplifies . . . sound constitutional doctrine"), *with* Lund & McGinnis, *supra* note 6, at 1557 (referring to *Lawrence* as "a tissue of sophistries embroidered with a bit of sophomoric philosophizing").

[297] *See* Yoshino, *supra* note 81, at 749–50.

[298] *See* Monaghan, *supra* note 236, at 716 n.294 (noting that Justice Kennedy seems to have taken up the "human dignity" mantle); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1736–45 (2008) (noting that dignity is an important constitutional value for Justice Kennedy).

[299] *Cf.* Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 22–23 (1979) (arguing that "collectivity" is an aspect of the Court's work but that each opinion also reflects the views of the authoring Justice).

[300] *See, e.g.*, Berger, *supra* note 9, at 525–26, 530.

[301] I thank Pam Karlan for this observation.

[302] *See* Post, *supra* note 86, at 107.

[303] *See* Yoshino, *supra* note 81, at 749–50 (arguing that because of the "formal distinction" between liberty and equality claims, the Court undervalued dignity values); *supra* Part I.B.2.

[304] Lawrence v. Texas, 539 U.S. 558, 576 (2003).

[305] *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521 (1994). In reality, Justice Powell said this to a closeted gay clerk. *Id.*

by 2003, the Justices all likely knew openly gay people.[306] This shift in personal experience was likely to change the Justices' collective attitudes and increase hostility towards anti-gay legislation.[307] These non-legal factors necessarily helped shape the outcome in *Lawrence*. As Oliver Wendell Holmes, Jr. once observed:

> [t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[308]

### *C. Stealth Determinations, Rule of Law, and Judicial Legitimacy*

#### 1. Transparency, Candor, and Rule-of-Law Problems

However convincing we find the explanations for stealth determinations, we must also consider their costs and benefits. Stealth determinations undermine norms commonly associated with the rule of law like transparency, consistency and predictability. These determinations are opaque, inadequately justified, and erratically applied. The Supreme Court has no consistent methodology for considering levels of generality, the role of public opinion, or the interaction of different constitutional norms like liberty and equality. It has said more about the tiers of scrutiny, but in *Lawrence* it dispensed with that analysis altogether. The Court's approach to these determinations, then, follows no clear, consistent approach, and thus creates great legal uncertainty.[309]

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[306] *See* Linda Greenhouse, *What Got into the Court? What Happens Next?*, 57 ME. L. REV. 1, 8 (2005) (explaining that *Lawrence* reflects not just changes in American society since *Bowers* but also changes within the Court including openly gay Supreme Court law clerks and employees).

[307] Psychological research demonstrates that prejudice against minorities, including gay people, decreases significantly when members of the majority knowingly have contact with that minority group. *See, e.g.*, STEPHEN L. FRANZOI, SOCIAL PSYCHOLOGY 266–68 (3d ed. 2003); KENNETH J. GERGEN & MARY M. GERGEN, SOCIAL PSYCHOLOGY 141 (1981); *Familiarity Encourages Acceptance*, 11 PUB. PERSPECTIVE 31 (2000); Gregory M. Herek & Eric K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey*, 30 J. SEX RES. 239 (1993); Gregory M. Herek & John P. Capitanio, *"Some of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 412 (1996); Thomas F. Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice?*, *in* REDUCING PREJUDICE AND DISCRIMINATION 93, 109–10 (Stuart Oskamp ed., 2000).

[308] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown, & Co. 1881).

[309] *See* Berger, *supra* note 9, at 470–82; *supra* Parts I.B & II.B.

Legal philosophers disagree on how to define and describe the "rule of law,"[310] but many agree that the processes through which law is made should be open and that the law itself should be accessible, understandable, relatively stable, and consistent with other laws.[311] While many discussions of the "rule of law" often focus on the creation of statutes and rules, the same principles of openness, stability, and consistency can also apply to Supreme Court constitutional decisionmaking, which, for better or worse, creates much of the substance of our constitutional law.[312]

Admittedly, given that our constitutional text is short and that many provisions are ambiguous and/or vague, some uncertainty is inevitable.[313] Some judicial discretion, then, is inescapable in our system. Still, the Court's unpredictable, inconsistent, under-theorized approach to these determinations in *Lawrence* and elsewhere injects more uncertainty and judicial discretion to an area of law already prone to judicial manipulation.[314] *Lawrence*, for instance, did not articulate the tier of scrutiny at all, notwithstanding the tiers' centrality to equal-protection and substantive due process analysis. Nor did it even acknowledge departing from the typical doctrinal framework. *Lawrence* similarly failed to elucidate the factors guiding the level of generality or the relevance of cultural norms to constitutional meaning. As a result of this opacity, it is hard to "foresee with fair certainty" how the Court will approach these kinds of determinations in future cases and, consequently, constitutional law more generally.[315]

To be clear, stealth determinations go well past the point of judicial minimalism, which some scholars have championed as a means of promoting democracy by deciding

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[310] *See generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1–3 (1997) (arguing that scholars use the phrase "rule of law" in very different ways).

[311] *See* FULLER, *supra* note 15, at 39; RAZ, *supra* note 15, at 213. Professor Raz has been critical of Fuller's principles of legality, *see, e.g.*, RAZ, *supra* note 15, at 224, but the intricacies of the disagreement are beyond the scope of this Article.

[312] *Cf.* Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41, 43 (1994) (explaining that judicial law making by an appellate court "is typically stated in general terms, and its authority is intended to extend beyond the confines of its own particular facts to other like cases").

[313] *See* Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 124 (2011) (discussing the fact that judges must make interpretive decisions when deciding constitutional issues).

[314] *See* ERIC J. SEGALL, SUPREME MYTHS 4 (2012) (arguing that the Supreme Court's criteria in constitutional cases "are much more about subjectivity and taste than logic and reason").

[315] FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944) ("[G]overnment in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."); *see also* Fuller, *supra* note 15, at 63 ("[C]larity represents one of the most essential ingredients of legality."); Oliver Wendell Holmes Jr., *The Path of Law*, 10 HARV. L. REV. 457, 457 (1897) (arguing that the object of legal study "is prediction, the prediction of the incidence of the public force through the instrumentality of the courts").

cases modestly.[316] It is one thing to decide cases narrowly so as not to answer substantive questions that can be left for another day. It is something quite different to decline to explain the resolution of numerous quasi-methodological questions almost certain to recur, thereby obfuscating the interpretive methods and techniques that commonly determine constitutional meaning and application.[317]

The Court's failure to approach these determinations with even general standards, let alone precise rules,[318] suggests that it is not providing a candid, transparent account of its reasoning behind some decisions.[319] As a result, critical readers are likely to suspect that the Court's written opinions do not fully acknowledge the norms actually driving the case's outcome.[320] Were *Lawrence*, for instance, really guided by its level-of-generality or public-opinion determinations, we would expect more careful explication of those determinations, which would help guide future courts confronted with similar questions.[321] That the Court obscured rather than elucidated its reasoning may suggest that norms, rather than legal principles, were driving the decision.[322]

To some extent, the Court's inclination to conceal the powerful role of norms in its decisionmaking is understandable.[323] Normative choices, after all, are more contestable than factual or legal ones, so a candid acknowledgment that individual values and perceptions of cultural trends weighed heavily in a decision would raise serious

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[316] *See* SUNSTEIN, *supra* note 291, at 3–74.

[317] *Cf.* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) ("[T]here is an obligation to decide in some cases; there is a limit beyond which avoidance devices cannot be pressed and constitutional dicta cannot be urged without enervating principle to an impermissible degree.").

[318] *See generally* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

[319] *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2097–98 (2011) (discussing judicial candor); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988) ("Because a coherent rationale for the intermittent invocation of stare decisis has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations.").

[320] *Cf.* Goldberg, *supra* note 100, at 1962 ("[J]udicial focus on facts and elision of normative judgments obscures, but does not eliminate, the influence of social norms on both the analysis and outcomes.").

[321] *Cf.* DWORKIN, *supra* note 196, at 228–32 (analogizing judicial interpretation to a "chain novel" in which the author must make "[j]udgments about textual coherence and integrity").

[322] *Cf.* Posner, *supra* note 17, at 40 ("[O]nly on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms.").

[323] *See* Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 594 (2006) (discussing judicial reluctance to explicitly balance normative factors); Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 228 (2012) ("While judges . . . may . . . acknowledge multivariate influences on judicial decision making privately or even in stage whispers, they do so openly at [their] peril . . . .").

questions about whether the Court actually is governed by the law.[324] Nevertheless, many critics contend that judges owe society precisely that sort of candor.[325] Only open explanations for judicial decisions can bind the judge in the next case, and decisions that cannot bind the judge are of questionable legal value. As Professor Charles Fried puts it:

> The wise judge . . . tries to judge in an objective, not personal, way. That is why he presses himself to explain, to be candid, to lay out all that went into his conclusion. In explaining, he opens himself to criticism, to refutation, but he also offers up hostages to the future—today's explanation binds him to explain why today's reasons are not also good tomorrow.[326]

When courts obscure their normative influences with stealth determinations, the resulting lack of transparency is problematic, because it suggests that we cannot trust the Court's own explanations.[327] Perhaps even more disturbingly, it suggests that the Court may not fully believe its explanations itself.[328] Collectively, stealth determinations, then, create the impression that the Court's explanations for their constitutional decisions are mere "fig lea[ves] deployed to obscure partisan purposes."[329]

This impression raises still more rule-of-law questions. Many scholars, after all, contend that the rule of law depends on people looking "outside [their] own will for criteria of judgment."[330] Rule of law, in other words, depends partially on governance by impartial legal principles rather than individual normative or political judgments.[331] We expect that judges will make decisions based on neutral principles with "confident evaluation on the basis of professional legal norms."[332] If judges depart too noticeably

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[324] *See* SEGALL, *supra* note 314, at ix (arguing that the Supreme Court does not behave like a court).

[325] *See, e.g.*, Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1043 (2011); Gillian E. Metzger, *Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?*, 64 N.Y.U ANN. SURV. AM. L. 459, 466 (2009) (criticizing the Court's lack of "overt, normative engagement with the real issues involved").

[326] Fried, *supra* note 325, at 1043.

[327] *See* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 44 (2009) ("While a single bad opinion may not have immediate concrete consequences, the cumulative effect of a run of unreasoned decisions on a court's legitimacy may reduce its actual authority . . . .").

[328] *Cf.* Monaghan, *supra* note 299, at 25 ("If justifications cannot be stated in the opinion, they should not be relied upon in entering the judgment.").

[329] KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT 35 (2010).

[330] CARTER & BURKE, *supra* note 17, at 146.

[331] *See id.* at 147–49; *see also* RAZ, *supra* note 15, at 219 (contrasting the rule of law with arbitrary power); Bybee, *supra* 36, at 306 (discussing Carter and Burke).

[332] Posner, *supra* note 17, at 40–41; *see also* Wechsler, *supra* note 26.

from neutral decision-making processes, that departure has adverse consequences not just for scholars' abstract conceptions of the rule of law but also possibly for popular trust in the judiciary. Even if our expectations for judges to divorce their legal judgments from their own normative values are unrealistic,[333] the public's respect for the judiciary may suffer if it perceives that judges approach many determinations instrumentally to further their own partisan preferences.

Judicial adherence (or lack thereof) to the rule-of-law principles discussed here, then, plays some role, albeit perhaps a limited one, in popular conceptions of and reactions to our court system. On this score, the Court's non-transparent use of stealth determinations likely plays into public perception that judges are guided by partisan politics as much as abstract legal principles.[334] Admittedly, the general public usually pays more attention to cases' outcomes than reasoning, so one should not overstate stealth determinations' effect on popular attitudes towards the judiciary. Nevertheless, collectively these stealth determinations help create the perception that judges make up constitutional law as they go.[335] This perception that constitutional law is not constrained by consistent principles, in turn, further contributes to the suspicion that judges vote their policy preferences, a perception reinforced (whether fairly or not) by cases like *Bush v. Gore*.[336] Public opinion polls, indeed, routinely show that substantial majorities of Americans believe that judges are influenced by their own political preferences.[337] That sentiment surely seeps into our popular discourse about the Court. Though they may not like to admit it, Justices, judges, and (some) scholars need to start taking seriously the fact the Court's approach to resolving many constitutional

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[333] *See* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 671–72 (1990) (arguing that values necessarily infiltrate even a good-faith interpreter's "pre-understandings" of legal precedent, text, and "the ongoing story of law"); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 203–04 (1989) (discussing the effect that personal views necessarily have on a judge's decisions). *See generally* HANS-GEORG GADAMER, TRUTH AND METHOD 235–40 (Joel Weinsheimer & Donald G. Marshall trans., 2d Rev. ed. 2004).

[334] *Cf.* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (arguing that Justices often vote in ways consistent with their political ideology).

[335] *Cf.* BYBEE, *supra* note 329, at 5 ("Public confidence in the judiciary ultimately depends not only on the substance of court rulings but also on the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle.").

[336] 531 U.S. 98 (2000); *see also* Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Countermajoritarian Problem*, 73 UMKC L. REV. 53, 68 (2004) (describing the Court's opinion in *Bush v. Gore* as predictably split along party lines and raising questions of the Court's impartiality); William G. Ross, Bush v. Gore *and the Prestige of the Supreme Court: A "Self-Inflicted Wound?*," JURIST (Dec. 13, 2000), http://web.archive.org/web/20120426010902/http:/jurist.law.pitt.edu/election/electionross5.htm (commenting that "[e]ach of the Justices moreover favored a position on federalism that is ostensibly contrary to his or her usual position").

[337] Bybee, *supra* note 36, at 308 (citing a Maxwell Poll in which 82% of Americans surveyed believed that partisan background of judges influences judicial decisionmaking).

cases fundamentally undermines the public's confidence in our system of resolving disputes about constitutional meaning.[338]

2. Cultural Norms and the Paradoxes of Judicial Legitimacy

That all being said, it is important to acknowledge that stealth determinations, paradoxically, may also serve important purposes. The Court's legal authority derives, in substantial part, from the general public's willingness to accept its judgment.[339] Had the Court in *Lawrence* only considered existing doctrinal structures, it would have been substantially more difficult to reach the outcome it did, especially on liberty grounds. The Court explicitly stated that the country's values on homosexuality had shifted dramatically since *Bowers* was decided,[340] and, importantly, many Justices by 2003 held different views on the subject than they and their predecessors had held in 1986.[341] The Court made use of stealth determinations to steer around doctrinal obstacles and reach an outcome some Justices likely felt they needed to reach.[342] From this perspective, constitutional doctrine may not always provide the Court with effective resources to adequately resolve the problems it confronts, and stealth determinations give the Court flexibility to address important issues the doctrine obscures. On this account, the Court can use stealth determinations to avoid mindless formalism. This is not to say that the Constitution can mean anything, but it is to acknowledge that constitutional law's legitimacy rests partially on decisions that reflect in various respects the values of the people themselves. The Constitution, in other words, must rely partially on the people's attachment to it.[343]

To this extent, the Court recognizes that public perception helps determine its institutional legitimacy.[344] While many people's views of the judiciary are likely shaped by more than simply whether they like particular results,[345] the Court must be attuned

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[338] *See* WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION 126 (2007) ("When people know that the law is uncertain, a façade of certainty is an affront to the audience's intelligence and sense of fair play.").

[339] *See* Post, *supra* note 86, at 10 ("[C]onstitutional law could not plausibly proceed without incorporating the values and beliefs of nonjudicial actors.").

[340] *See* Lawrence v. Texas, 539 U.S. 558, 570 (2003).

[341] *See* CARPENTER, *supra* note 38, at 180–208.

[342] *See supra* Parts I.A, I.B.4, II.B.4, & III.B.

[343] *See, e.g.*, Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 815, 846–47 (arguing that the American Constitution's legitimacy stems in part from the people's attachment to it).

[344] *Cf.* Geyh, *supra* note 323, at 228.

[345] *See* James G. Gimpel & Lewis S. Ringel, *Understanding Court Nominee Evaluation and Approval: Mass Opinion in the Bork and Thomas Cases*, 17 POL. BEHAVIOR 135, 137 (1995) (listing five categories the public uses to evaluate Justices, including specific issues, ideological orientation, competence, institutional deference, and nonpolitical characteristics, such as integrity or character); Marla N. Greenstein, *Maintaining Public Confidence in the Integrity*

to cultural values to retain its institutional legitimacy, especially in a case as normatively charged as *Lawrence*.[346] Cultural norms, then, not only help explain why the Court resorts to stealth determinations,[347] but also may help the Court arrive at rulings that enhance its own legitimacy.

By adding an additional layer of uncertainty to constitutional law, the Court's stealth determinations also may incidentally protect courts from overreaching by allowing some questions to percolate in the political branches. When constitutional questions remain unanswered, the political branches and the general public can debate constitutional meaning. While such engagement can sometimes result in tyranny of the majority, it also typically produces results that are more democratically legitimate than those issued by unelected judges in the first instance.[348] Some Americans disliked the *Lawrence* decision, but even they may have taken solace in the fact that the Court's muddy analysis left open for debate many important, related questions, both substantive (such as the constitutional status of same-sex marriage bans) and methodological (such as the role of public opinion in constitutional adjudication). Admittedly, this kind of popular constitutional discourse may often happen anyway, and courts hewing more closely to the doctrinal path can also craft narrow decisions. Nevertheless, because stealth determinations leave unanswered so many constitutional questions, they implicitly punt more issues back to the political branches and the people.

Interestingly, though, while *Lawrence* appears highly cognizant of cultural trends and seems to direct some of its discussion to a broad lay audience,[349] it does not entirely abandon more technical legal language. In addition to the more accessible language discussed above, *Lawrence* also included less accessible terms like "levels of generality," "stare decisis," and "substantive due process."[350] These terms *sound* arid and law-like. This is no accident. While the Court's opinion does speak in places to the general public, its use of more technical terms also strengthens its own control over constitutional content. By rooting its analysis in ostensibly impartial, legal language the Court asserts its own hegemony over constitutional meaning.[351]

The Court's approach in *Lawrence*, thus, simultaneously advances and obstructs judicial legitimacy. The Court's ad hoc treatment of various recurring sub-doctrinal

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*and Impartiality of the Courts*, 48 JUDGES' J. 40 (2009) (identifying public confidence in the impartiality of courts as an important aspect of public approval).

[346] *Cf.* Post, *supra* note 86, at 76 (arguing that the Court's constitutional law "draws inspiration . . . and legitimacy from constitutional culture").

[347] *See supra* notes 301–08 and accompanying text.

[348] *See supra* note 59 and accompanying text.

[349] *See supra* Part III.B.

[350] Lawrence v. Texas, 539 U.S. 558 (2003).

[351] *Cf.* Post, *supra* note 86, at 58 ("By deliberately formulating the question of constitutionality in this technical legal way, which is conspicuously impervious to the terms [of] the debate . . . in constitutional culture, the Court facilitates its own control over [constitutional meaning].").

questions undermines legal consistency and faith in a predictable, impartial legal system, but its attention to cultural norms nevertheless helps bolster popular support for the its decisions. Its reliance on concepts like dignity, which the doctrine undervalued, helps speak to a broader audience, but its retention of legalese also helps it maintain control over constitutional meaning. Its ostensible "resolution" of stealth determinations pretends to be law-like and principled, but it also draws heavily and, in places, openly on values and politics.

Stealth determinations, then, illustrate Professor Keith Bybee's observation that judges' work can simultaneously "sustain and undermine their claims to legitimacy."[352] These determinations' ostensible impartiality can help retain faith in judicial dispute resolution. Legal language's appearance of impartiality, after all, is part of what attracts people to the judicial system for resolving their disputes.[353] But it is nevertheless impossible for impartial principles to guide the law alone. Cultural norms will necessarily color the way people, including judges, view justice and the law. However impartial they try to be, judges, as human beings, cannot wholly divorce their own values from their rulings, especially in close cases about which reasonable people can differ on the correct legal outcome.[354] As Holmes once observed, "[t]he language of judicial decision is mainly the language of logic. . . . [But] [b]ehind the logical form lies a judgment as to the relative worth and importance of competing [principles], often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[355]

The Court's stealth determinations reflect these inarticulate judgments. They may corrode trust in the judiciary insofar as they suggest that judges are making up the law to suit their normative preferences, but they can also reinforce judicial legitimacy by allowing the Court to echo popular norms while ostensibly grounding decisions in legal language. Stealth determinations certainly do not do this perfectly. Many of *Lawrence*'s determinations are easily criticized,[356] and as the Court now (perhaps) takes up same-sex marriage in *Perry*, attention to *Lawrence*'s (and other cases') opacity helps highlight just how many points of analysis are open to debate. We should therefore not be surprised that the general public is skeptical of judicial impartiality.[357] Nevertheless,

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[352] Bybee, *supra* note 36, at 314.

[353] *See* BYBEE, *supra* note 329, at 4.

[354] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324, 345–53 (1990) (discussing the hermeneutical and practical traditions in legal interpretations and the fact that "different values will pull the interpreter in different directions"); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 305 (2004) (finding that in many areas "the political party of the appointing president is a fairly good predictor of how individual judges will vote").

[355] Holmes, *supra* note 315, at 465–66.

[356] *See, e.g.*, Lund & McGinnis, *supra* note 6, at 1557 (describing *Lawrence* as "a paragon of the most anticonstitutional branch of constitutional law").

[357] *See* Bybee, *supra* note 36, at 306.

stealth determinations' ultimate impact on popular views of the judiciary is more complicated. Indeed, many of the same polls indicating that people believe judges to be partisan also show, paradoxically, that Americans believe in the impartiality of judges.[358]

Stealth determinations, then, reflect the paradoxes of a judicial system that is an arena of both principle and of bias.[359] They embody what Professor Thurman Arnold identified decades ago as a contradictory judicial system consisting at once of political decisionmaking and impartial legal principles,[360] helping illuminate and explain the contradictory views Americans have about the Supreme Court's constitutional judgments. At the end of the day, these determinations' cost to the rule of law may outweigh their benefits. They are so haphazard, ad hoc, and unpredictable that observers are likely to point to them to argue that the Justices invent constitutional law to serve their partisan values. Still, they also provide the Justices with breathing space to account for real world considerations and reach decisions they deem wise, and that flexibility may sometimes fortify the very judicial legitimacy they simultaneously undermine, especially on matters about which the country has reached a rough consensus.[361]

## CONCLUSION

Students of constitutional law typically learn the subject through doctrinal categories organized according to the Constitution's various textual provisions. However, much of the Supreme Court's constitutional decisionmaking occurs not within these well-known doctrinal structures, but through stealth determinations, which shape the outcome of many cases but lack consistent, theorized explanations. We have no volume systematically considering these stealth determinations, but perhaps we should.

Because stealth determinations play such an important role in the Court's constitutional decisionmaking, it is sometimes hard to know both the implications of particular Court decisions and the answer to fundamental interpretive questions. *Lawrence v. Texas* nicely illustrates the phenomenon. In that case, the Court rendered several stealth determinations, obscuring most of its reasoning. Consequently, it is very difficult to know how that opinion affects future cases, such as same-sex marriage litigation, which will likely require the resolution of similar determinations. Indeed, examined through the lens of stealth determinations, *Lawrence* sheds remarkably little light on the pending *Perry* case, or much of anything else. Of course, it would be impractical and probably unwise to try to resolve these determinations with code-like specificity, but greater methodological explication, consistency, and self-consciousness would improve the status quo while still retaining ample flexibility for the Court.

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[358] *See id.* at 307.

[359] *See* BYBEE, *supra* note 329, at 6–10.

[360] *See* THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 8–9 (1935); Bybee, *supra* note 36, at 319 (discussing Arnold's *The Symbols of Government*).

[361] *Cf.* DAVID A. STRAUSS, THE LIVING CONSTITUTION 34 (2010) ("American constitutional law is about precedents, and when the precedents leave off, it is about commonsense notions of fairness and good policy.").

Stealth determinations, then, add even more uncertainty to constitutional law, an area already known for indeterminacy. Interestingly, in so doing, these determinations simultaneously undermine and reinforce judicial legitimacy. On the one hand, these determinations contribute to the widespread belief that partisan preferences rather than impartial legal principles dictate the outcomes of many Supreme Court constitutional cases. On the other hand, these determinations can also help reinforce judicial legitimacy by helping Justices account for public norms and emphasize arguments likely to appeal to lay audiences. Stealth determinations, then, play an important but contradictory role in the Court's constitutional decisionmaking.