

GAY SEX AND MARRIAGE, THE RECIPROCAL DISADVANTAGE PROBLEM, AND THE CRISIS IN LIBERAL CONSTITUTIONAL THEORY

LOUIS MICHAEL SEIDMAN*

There is nothing unusual about constitutional controversy, but some disagreements, typified by the argument over constitutional protection for gay sex and marriage, go beyond ordinary differences of opinion. Some opponents of constitutional protection for gay rights think that their adversaries are not just wrong, but have exceeded the bounds of respectable constitutional argument. They want to turn the defense of gay constitutional rights into a position that dare not speak its name.

Consider, for example, Justice Scalia. For him, the Supreme Court's defense of gay rights "employs a constitutional theory heretofore unknown"¹ and depends on "a novel and extravagant constitutional doctrine."² The Court's treatment of the gay community as a politically unpopular group worthy of constitutional protection is "nothing short of preposterous"³ and "insulting."⁴ A Court opinion striking down discrimination against gay men and lesbians "has no foundation in American constitutional law, and barely pretends to."⁵ Justice Scalia is not exactly known for understatement, but even for him, these are strong words. What, precisely, is he so upset about?

This brief Essay does not take a strong stand on whether the constitutional case for gay rights has been made. Instead, it at-

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. This Essay is drawn from a debate held at the 2007 National Federalist Society Student Symposium at Northwestern University School of Law. I have preserved the informal character of my original remarks. I am grateful to Lama Abu-Odeh and Chai Feldblum for commenting on a previous version of this Essay. I also had outstanding research assistance from James Branda and Richard Harris.

1. *Romer v. Evans*, 517 U.S. 620, 651 (1996) (Scalia, J., dissenting).

2. *Id.* at 652.

3. *Id.*

4. *Id.*

5. *Id.* at 653.

tempts to explain why Justice Scalia and his allies are wrong to think that the case for gay rights is outside the range of reasonable constitutional argument, and to speculate about why they nonetheless hold this view.

I.

Justice Scalia's core objection to constitutional protection for gay rights is that providing such protection requires the Court to "tak[e] sides in the culture war, departing from its role of assuring, as a neutral observer, that the democratic rules of engagement are observed."⁶ Any honest argument favoring constitutional protection for gay sex and marriage must begin with a concession: Justice Scalia is right when he insists that affording gay relationships constitutional protection takes one side on a currently contestable moral question.

This concession does not amount to much, however, because of what one might call the principle of reciprocal constitutional disadvantage. It is true, as Justice Scalia insists, that constitutional protection for gay sex and marriage implicates one set of moral views. The problem is that failing to provide constitutional protection for gay sex and marriage implicates a reciprocal set of moral views. The principle of reciprocal constitutional disadvantage means that the morality charge is a wash. The inability to separate constitutional law from nonconstitutional moral principles does indeed create a kind of crisis for standard forms of liberal constitutionalism, but it does not disadvantage proponents of constitutional protection for gay marriage. Courts are simply stuck taking a stand in the culture war whichever way they rule. Justice Scalia, therefore, will have to look beyond the supposed requirement of moral neutrality to justify his opposition.

This assertion is itself contested, but it follows more or less inevitably from the logic of the Equal Protection Clause.⁷ The

6. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

7. U.S. CONST. amend. XIV, § 1. Although Justice O'Connor relied upon the Equal Protection Clause in her concurring opinion in *Lawrence*, the opinion for the Court relied upon the liberty guaranteed by the Due Process Clause. Compare *Lawrence*, 539 U.S. at 564, with *id.* at 579 (O'Connor, J., concurring in the judgment). For ease of explication, this Essay's analysis focuses on equality. With some additional analysis, the same points could be made with reference to liberty.

reasons why are familiar,⁸ so I will simply sketch them here. Equal treatment is not the same as identical treatment. Equality means treating people similarly to the extent that they are the same, but differently to the extent that they are different. People, however, are similar and different across an infinite range of dimensions. Thus, making the equality norm operational requires a decision regarding which differences and similarities are relevant.

Relevance can be understood as either a moral or an instrumental virtue, although, for reasons outlined below, the instrumental version turns out to collapse into the moral version. The overtly moral version of relevance directs our attention to the attributes that matter according to a particular moral theory. For example, one might say that sex between individuals of different races cannot be outlawed because race is a morally irrelevant characteristic, at least when it comes to the flourishing derived from sexual intimacy.⁹ Sex between humans and nonhumans can be outlawed, for equal protection purposes, because species lines are relevant to sexual intimacy in a way that race is not.¹⁰ Are gender lines relevant? Perhaps there is a right answer to this question, but the answer depends upon one's conception of human flourishing—assuming that human flourishing is the appropriate moral standard for right action, which is itself contested.

It follows that if one adopts the moral version of relevance, arguments for or against a constitutional right to gay marriage suffer from reciprocal constitutional disadvantage. A ruling that gay marriage is either like or unlike interracial marriage requires a moral judgment. This result is hardly surprising, given that we have begun with a moral conception of relevance. It may come as more of a surprise that it is not possible to avoid reciprocal constitutional disadvantage by treating relevance as an instrumental virtue.

8. For one of the earliest and best explanations of the ideas set out below, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

9. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that prohibitions on interracial marriage violate the Fourteenth Amendment).

10. See, e.g., Stephen Macedo, *Reply to Critics*, 84 GEO. L.J. 329, 334 (1995) (defending gay marriage, but arguing that "sexual relations with animals are a deeply degrading form of sexual desperation").

On the instrumental theory, people are treated equally when the differentiating trait is instrumentally useful in advancing an end that the government legitimately can pursue. There are two problems with this version of relevance. First, it is not clear that this version corresponds to ordinary intuitions about equality. For example, the standard of instrumental relevance might be satisfied by a government program that inflicted very large losses on a small group of people in order to achieve trivial benefits for a majority.

The second, perhaps more serious, problem is that most of the work done by the instrumental formulation is accomplished by the requirement of a legitimate governmental end. Without this qualification, no differentiation could ever be instrumentally irrelevant, because any classification advances some end. For example, discrimination against gay men and lesbians is instrumentally rational if the aim is making the lives of gay men and lesbians as unhappy as possible.¹¹

How should the realm of legitimate governmental ends be limited? On one approach, the limitation is supplied by the Constitution, which provides the exclusive specification of the ends that the government may pursue.¹² The trouble with this

11. The Court has insisted that mere dislike of a group is not a sufficient justification for discrimination against it. *See, e.g., Lawrence*, 539 U.S. at 571; *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973). But in most cases, differential treatment is premised on disapproval of the behavior that a group engages in, rather than simple dislike of the group itself. The Court has made clear that moral disapproval of behavior is, at least in some circumstances, sufficient grounds for differential treatment. *See, e.g., Gonzales v. Carhart*, 127 S. Ct. 1610, 1633–34 (2007) (“Congress could . . . conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.”). Thus, the statement in the text might be revised by saying that discrimination against people who engage in gay sex is instrumentally rational if, for moral reasons, one wants to discourage gay sex.

12. The Court has taken this approach in the context of equality in educational funding:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1972).

approach is that it makes the Equal Protection Clause surplusage. If the Clause does no more than outlaw ends that are already outlawed, then it accomplishes nothing. The only way to give the Clause content, at least in its instrumental form, is to specify ends that the rest of the constitutional text does not prohibit, but that are nonetheless illegitimate bases for government differentiation. The only way to do that is to deploy some extra-constitutional moral theory.

Liberal constitutionalists typically make use of two escape hatches to avoid these disquieting conclusions. Some people, including Justice Scalia, argue that when constitutional judgments implicate contestable moral questions, the matter should be remitted to ordinary political processes.¹³ This assertion is made so frequently and with such assurance that it is often given credence that it does not deserve. A preference for the political process itself reflects a contestable moral judgment. It does not automatically follow from the fact of moral disagreement that the matter should be decided collectively and publicly. Widespread disagreement exists about the nature of God and about sensible child-rearing techniques. Few people think that these matters should therefore be settled through political processes. Instead, disagreement on the answers to these questions means that individuals should decide on appropriate answers for themselves.

Moreover, it is important to emphasize that a decision either for or against *every* equal protection claim rests on a moral judgment. The first escape hatch, therefore, would mean that equal protection questions should always be resolved by ordinary political processes. A strong reading of Section 5 of the Fourteenth Amendment and its drafting history might support the view that the Amendment was intended to grant power to Congress, rather than to the courts.¹⁴ Even on this reading,

13. See *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting) ("Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best."); *Romer*, 517 U.S. at 652 (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in this culture war."); *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) ("[I]t is up to the citizens of Missouri to decide" when treatment for terminally ill patients should be terminated).

14. Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. As originally drafted, the Amendment consisted solely of a similar version of this congressional power-granting provision. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 49 (1988).

however, courts would have to decide moral questions about equality in order to determine whether Congress had acted within its granted powers. Moreover, this is not the standard reading of the Amendment, and it is certainly not the reading adopted by Justice Scalia and his allies.¹⁵ On the standard reading, the Amendment defines judicially enforceable limits on political decision making. If one adopts the standard reading, the relegation of all moral questions to political decision making effectively ignores the Fourteenth Amendment's command, a position that itself would have to rest on some extra-constitutional moral judgment.

The second escape hatch conflates the command of the Equal Protection Clause with the particular moral conceptions of equality held by the Framers of the Constitution. Justice Scalia has also identified himself with this view,¹⁶ but the position is similarly untenable. The problems with this position are, once again, quite familiar. First, the Equal Protection Clause is written on a high level of generality. The Framers chose to constitutionalize equality, not a particular list of practices that they thought were inconsistent with equality.¹⁷ Second, the context in which the Framers worked suggests that this was a conscious choice. As the most astute student of the legislative history of the Fourteenth Amendment has written, one of the available explanations for the vagueness of the Fourteenth Amendment is that its draftsmen

were accustomed to thinking and speaking in the amorphous, moralistic, rhetorical categories of liberty and equality that

It was only toward the end of the drafting process that language was added that might be interpreted as providing for judicial enforcement, apparently out of a concern that future Congresses might repeal statutory protections. *See id.* at 55.

15. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress's Section 5 powers do not permit it to create substantive Fourteenth Amendment rights not recognized by the judiciary).

16. *See* *M.L.B. v. S.L.J.*, 519 U.S. 102, 138 (1996) (Thomas, J., joined by Scalia, J., dissenting) (condemning the majority for embracing "an equalizing notion of the Equal Protection Clause that would . . . have startled the Fourteenth Amendment's Framers"); *cf. Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (opinion by Scalia, J.) ("The Judiciary . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." (quotation marks omitted) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting))).

17. This point has been made most forcefully by Ronald Dworkin. *See, e.g.,* RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 133 (1977).

had brought them to power in 1860, [and] cared less about [the Amendment's] precise substantive content than about its well-rounded phraseology. Their concern was that the Constitution contain a declaration about protecting fundamental rights in a language inspiring respect for them, but they had never worked out precisely what the fundamental rights were and accordingly could not provide an exact list of them.¹⁸

Apart from the Amendment's language and its Framers' intent, the constitutionalization of the Framers' particular conception of equality would have results that virtually no one today would accept. If we were to adopt this course, gay marriage would be the least of our problems. Although a few scholars deny it,¹⁹ the overwhelming weight of scholarly opinion is that the Framers did not intend to outlaw segregated public schools.²⁰ More to the point, statutes prohibiting interracial marriage were common in postbellum America, and there is no indication that the Framers intended the Equal Protection Clause to jeopardize these laws.²¹

Even if the principle of reciprocal constitutional disadvantage is somehow wrong or exaggerated on the level of analytics, it is surely right on the level of sociology. It is just a fact, by now exceptionally well-documented, that changes in constitutional meaning track changes in conventional moral judgment. The Supreme Court held that segregated schools violated the equality norm in 1954 at least in part because roughly half of the country opposed the separate-but-equal regime, which was not true in 1896 when the Court upheld a system of segregated transportation.²² Between 1886, when the Court upheld a

18. NELSON, *supra* note 14, at 52.

19. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

20. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 102–03 (1977); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 26, 146 (2004).

21. See BERGER, *supra* note 20, at 241.

22. At the time *Plessy v. Ferguson*, 163 U.S. 537 (1896), was decided, southern whites strongly supported segregation and northern whites were accepting or indifferent. See KLARMAN, *supra* note 20, at 22–23. By 1954, public opinion had shifted dramatically. Indeed, Justice Jackson “treated such changes as constitutional justification for eliminating segregation.” *Id.* at 309. On the day it was decided, slightly more than half the country supported *Brown v. Board of Education*, 347 U.S. 483 (1954). KLARMAN, *supra* note 20, at 310.

state sodomy statute, and 2003, when it struck down a similar statute, public opinion concerning the rights of gay men and lesbians changed dramatically.²³ Demographic data suggest that additional change is on the way,²⁴ and, if history is any guide, this shift in popular moral judgments will produce further change in legal doctrine.

II.

It does not follow from the principle of reciprocal constitutional disadvantage that gay marriage should be constitutionally protected. The principle merely takes one argument against constitutional protection off the table. It remains open to the opponents of gay marriage to argue that the distinction between gay and straight sexual intimacy is morally relevant. What does follow, therefore, is that someone who wants to make a constitutional argument for gay marriage had better attend to the moral argument.

For this reason, the rest of this Essay is devoted to a sketch of a moral defense of gay marriage. Before embarking on this project, however, there are two qualifications. First, I do not intend to provide all the detail, analysis, and refutation of contrary positions that a full-scale argument would require. I provide the skeleton of an argument that would support a more comprehensive defense, but not the defense itself.²⁵ My only con-

23. Between *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003), public opinion went from opposing legalization of homosexual relations by a fifty-five percent to thirty-three percent margin to favoring legalization by a sixty percent to thirty-five percent margin. Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431, 443 (2005).

24. In a Gallup poll conducted in May 2007, respondents between eighteen and thirty-four years of age indicated that they thought homosexuality was an acceptable alternative lifestyle by a margin of seventy-five to twenty-three percent. Respondents over the age of fifty-five disagreed with the same proposition by a margin of fifty-one to forty-five percent. Lydia Saad, Tolerance for Gay Rights at High-Water Mark (May 29, 2007), available at <http://www.galluppoll.com/content/?ci=27694>; see also AM. ENTER. INST., ATTITUDES ABOUT HOMOSEXUALITY AND GAY MARRIAGE 3 (2006) (citing National Opinion Research Center polling data from 2002 finding that forty-eight percent of those between the ages of eighteen and twenty-nine and sixty-eight percent of those sixty and older believed that homosexual sexual relations were always wrong).

25. There is a large literature providing a moral defense of gay relationships. For some of the best work, see WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); Chai R. Feldblum, *Gay Is Good*:

tention here is that there is the possibility of a respectable moral argument for gay marriage,²⁶ and that this possibility, when taken in conjunction with the principle of reciprocal constitutional disadvantage, means that gay rights advocates should not be ashamed to make a constitutional argument.

Second, even if the moral argument were comprehensively fleshed out, it would not somehow compel the rejection of opposing views. Properly understood, moral argument does not work that way. Although it can provide reasons why a particular conclusion is plausible, it cannot force people to conclusions that they want to resist. This fact poses problems for the ambitions of liberal constitutionalism, but not for defenders of gay marriage. After all, moral argument can no more compel gay marriage defenders than gay marriage opponents. Reciprocal constitutional disadvantage means that neither moral nor constitutional argument will settle the gay marriage dispute by the force of brute logic, but it also means that constitutional rhetoric is available to both sides to influence the resolution.

What, then, is the moral case for gay marriage? The case begins with a tragic fact about the structure of our society. Our culture provides a limited number of social scripts that people are expected to follow to live a good life.²⁷ These scripts work for some people, and, for these people, they may be a good thing. Perhaps ordinary people are simply incapable of facing the virtually infinite range of choices theoretically available for how to live, and perhaps, if faced with a virtually infinite range of choices, people would make bad ones. Indeed, it is hard to imagine even in principle how people could start from scratch, choosing from an endless menu of cultures, social structures, and modes of living.

Unfortunately, however, the standard, off-the-shelf social scripts do not work for everyone. Personal lives are complicated, multifaceted, and endlessly varied. It is hardly surpris-

The Moral Case for Marriage Equality and More, 17 YALE J.L. & FEMINISM 139 (2005); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

26. Because my contention is limited in this way, I do not consider here criticisms of gay marriage from within the gay community. See *infra* note 40.

27. This criticism is a familiar feature of feminist jurisprudence. See, e.g., Wendy W. Williams, *Notes From A First Generation*, 1989 U. CHI. LEGAL F. 99, 107–08 (noting that “men and women come in many shapes, sizes, sexualities, aspirations, experiences, and life patterns”); cf. Feldblum, *supra* note 25, at 179 (asking why the state should “support *just* marriage partners—and not other intimate partnerships that equally support the development of the self”).

ing that the models that work for many people do not work for all people. When the standard models do not work, this failure produces needless misery. Either people try, generally unsuccessfully, to comply with social norms that do not fit their needs, or they are denied goods that would otherwise help them lead happy and productive lives. The costs of these failed attempts and deprivations can be measured in the currency of loneliness, anger, disappointment, sadness, and even suicide. The unavailability of alternative social scripts therefore prevents the pursuit of happiness in the most literal sense. This frustration of happiness, in turn, establishes a *prima facie* case for making available a variety of alternative scripts.

Of course, not just any alternative script is acceptable. For the reasons outlined above, placing outer limits on the possibility of truly eccentric choices may be justified. Moreover, there are modes of life that are selfish, harmful, or indifferent to social obligation.²⁸ It is a mistake, however, to confuse the case for alternative scripts with the case for self-indulgence. There is no *a priori* reason to believe that a given alternative script leads to less social commitment than a standard script. On the contrary, it is the very availability of life-fulfilling alternatives that tends to create social cohesion by giving as many people as possible a stake in social structures.²⁹

If the gay lifestyle followed a social script that was self-indulgent, harmful, or alienating, then there might be a case for discouraging or even prohibiting it. A defense of gay intimacy, therefore, requires a second strand to address the charge that gay sex is somehow inherently and inevitably destructive. For people who believe that any sexual intimacy not tied to reproduction (or to sex of the “reproductive type,” as some social conservatives phrase it)³⁰ is *per se* illegitimate, this second

28. Cf. Ball, *supra* note 25, at 1921 (explaining the perfectionist liberal view that “[a]lthough freedom is an intrinsic good . . . not all choices that are made through the exercise of that freedom are good”).

29. Cf. MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 105–07 (1996) (expressing doubt that gay rights can be grounded on liberal autonomy rights because “it is by no means clear that social cooperation can be secured on the strength of autonomy rights alone” and arguing instead for defense of gay relationships as a substantive good).

30. See Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 *GEO. L.J.* 301, 307 (1995) (referring to marriage as “a one-flesh communion of persons . . . consummated and actualized in the reproductive-type acts of spouses”).

strand will necessarily be unconvincing.³¹ But few people today hold this belief. In a world where use of birth control is widespread, even among Catholics and conservative Protestants, the contention that sexual intimacy must be tied to the possibility of pregnancy is no longer plausible. Moreover, even most opponents of birth control have no difficulty with sexual intimacy between married men and women even though, perhaps because of age or physical impairment, there is no prospect that their sex will produce children. It seems entirely arbitrary to characterize this as sex of the reproductive type, while insisting that sex between people of the same gender is not of the reproductive type.³² *A priori* taxonomy is not the same thing as argument.

Once one sees that sex that is not tied to reproduction is not evil, the ground is clear for an argument that gay sex is a good because it is a type of nonprocreative sex, and nonprocreative sex is, *prima facie*, a good. It is a *prima facie* good because it is pleasurable, and, holding everything else constant, pleasure is a good.³³ At this point, Justice Scalia deserves another concession. In his *Lawrence* dissent he offers a parade of horrors and lists state laws forbidding adult incest, fornication, and masturbation, which, he argues, are called into question by the decision in *Lawrence*.³⁴ To the extent that these forms of sex are pleasurable, they are indeed *prima facie* moral goods.

Of course, these judgments are only *prima facie*. If the pleasure is achieved at the expense of countervailing harm, then the *prima facie* case unravels. But opponents of pleasurable sex must make the case that it causes harm. At least with respect to gay sex, they have not made this case.

When considering intercourse between two or more people, as opposed to masturbation, the argument for sex as a good is even stronger.³⁵ Even when it is anonymous and impersonal, the good of sex is heightened by its capacity to provide pleasure by giving pleasure to another. Nor is it just any kind of

31. See, e.g., John M. Finnis, *Law, Morality and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1064–68 (1994); George & Bradley, *supra* note 30.

32. For a detailed argument along these lines, see Ball, *supra* note 25, at 1909–19 and Koppelman, *supra* note 25, at 57–70.

33. See Sara Ruddick, *On Sexual Morality*, in MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS 26 (James Rachels ed., 2d ed. 1975).

34. See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

35. The argument that follows is somewhat similar to that found in Thomas Nagel, *Sexual Perversion*, 66 J. PHIL. 5, 10–13 (1969); see also Ruddick, *supra* note 33, at 30.

pleasure. It is pleasure that derives from a linking of mind and body that is crucial to mental health.³⁶ Sex is similar to physical exercise in that it provides a heightened awareness that one's body belongs to oneself. In the case of sex, though, that awareness is coupled with the reflexive knowledge that someone else is getting pleasure from one's body even as one is getting pleasure from the other's body and that both are getting pleasure from the knowledge that the other is getting pleasure.

It is therefore appropriate that the Court in *Lawrence* granted constitutional protection even to entirely anonymous and casual sexual intimacy. Moreover, the case for gay marriage is actually on stronger footing than the case for the type of sex that *Lawrence* protects. When sex takes place in a continuing and intimate relationship, the good of sex is heightened still further because it involves emotional intimacy, trust, and connection in both the literal and metaphysical sense. It would be surprising indeed if the Court provided constitutional protection for a one night stand without providing similar protection for deep and continuing relationships.³⁷

None of this means that all sex is good or that sex is only a good. There is obviously a dark side to sex. It can also be about power, submission, and even hatred. Sex can be addictive and dangerous. It can and does destroy people's lives.

But if sex is at least potentially a good, then gay sex is especially a good because it provides a model for what sex might be like if it were disconnected from pervasive gender hierarchies.³⁸ It

36. See Ruddick, *supra* note 33, at 29–30.

37. Oddly, Justice Scalia recognized this idea in his *Lawrence* dissent:

If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring”; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.

Lawrence, 539 U.S. at 604–05 (Scalia, J., dissenting) (citations omitted).

38. See Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705, 727 (1998) (“[S]ame-sex marriage, unlike traditional marriage, has never been predicated on the presumed desirability of subordinating the female sex. . . . The difference is important because it carries the promised

is important to qualify this assertion in a number of ways. First, I am not making the ridiculous charge that all or even many instances of heterosexual intercourse are rape. Nor am I arguing that all homosexual interactions are disconnected from exploitation, dominance, submission, and power. Gay relationships, like straight relationships, can be pathological. Even when there are not differences in gender, there may be differences in power.

Although heterosexual sex is not always rape, it is always complicated by a pervasive gender hierarchy. This fact makes the sex act and the events leading up to the sex act more freighted, complicated, and difficult than they would be without the hierarchy. Conversely, some homosexual sex is exploitative, but the exploitation does not map directly and obviously onto pervasive social hierarchies. When sex is freed from these hierarchies, it can be less conflicted and more fun. Thus, straight people have something to learn from gay men and lesbians about the potential for sex if straight relationships could be freed from the curse of subjugation.

Of course, some find this possibility more terrifying than comforting. The stereotype of gay promiscuity fuels the fear that legitimizing gay relationships will jeopardize the sexual status quo in a fashion that will have unintended consequences, especially for the welfare of children.³⁹ These fears are greatly overstated. Perhaps there is a legitimate reason grounded in the fact of sexual hierarchy for fearing more male, heterosexual, promiscuity. In a world where men also have most of the wealth and power, the ability and willingness of heterosexual men to have more partners might create problems for women.

While this worry is understandable, it remains mysterious why it translates into fear of gay promiscuity which, by definition, does not involve gender hierarchy. Perhaps the point is that straight men will envy their gay brothers and copy their promiscuity without bothering to dismantle gender hierarchies first. This is a possibility, but it seems implausible that the decline in heterosexual monogamy (if indeed there has been a de-

potential to transform the very institution of marriage itself into a truly liberal and even egalitarian institution.”).

39. See, e.g., Maggie Gallagher, *What Is Marriage for? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 788–91 (2002); Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1064–71 (2005).

cline) is caused by gay sex. In fact, the movement favoring gay marriage reflects something like the opposite phenomenon. Rather than straights mimicking gay lifestyles, some gay men and lesbians insist on the kind of stability and commitment that straight individuals like to think characterize their relationships. Indeed, it is for just this reason that some members of the gay community oppose gay marriage.⁴⁰

For similar reasons, fears about the impact of gay marriage on children are hard to understand. Research indicates that the children of gay couples do at least as well as the children of straight couples.⁴¹ Oddly, opponents of gay marriage point to the pathologies in *straight* relationships as an argument against gay marriage. Children of single and divorced heterosexual parents seem to fare worse as a class than children in stable, two-parent households.⁴² Some opponents of gay marriage have used this data to speculate that children of gay parents might also do worse.⁴³ But the children of gay marriages and civil unions are not raised by a single caregiver and have not experienced the trauma of divorce. If one is serious about regulating parent-child relationships that are dysfunctional for children, gay relationships seem like an odd place to start. Why not regulate straight divorce and single parenting, the practices that research shows cause problems? In a world where even parents who have been convicted of serial child abuse have a

40. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 81–147 (1999); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *SEXUAL ORIENTATION AND THE LAW* 721 (William B. Rubenstein ed., 2d ed. 1997); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1546–50 (1993). Because my only contention is that there is a respectable case for gay marriage, it is not necessary to evaluate these arguments here. Chai Feldblum, however, is on the right track when she argues that “unless advocates of marriage for same-sex couples affirmatively *distance* themselves from the normative judgment that being married constitutes a better status than being unmarried, the simple act of seeking the right to enter the married status can well be understood as *acquiescing* in the normative judgment that marriage is better than other relationships.” Feldblum, *supra* note 25, at 154.

41. For a summary of the literature as of 1992, see Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1029–34 (1992). A more recent study strongly supports the same conclusion. See Jennifer L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 CHILD DEV. 1886 (2004).

42. For a summary of the literature, see JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 111–29 (2000).

43. See Wax, *supra* note 39, at 1087.

right to get married and to have children, it is hard to take seriously an argument that deep concern for the welfare of children precludes a gentle and loving gay couple from raising children in a two-parent home.

Moreover, it is worth remembering that children of gay couples would not necessarily find straight parents if gay and lesbian parents were unavailable. Many of them would grow up in orphanages or foster homes. In what sense are these children put in a worse position by the availability of gay relationships?

III.

It follows that there is a respectable moral case to be made for gay sex and marriage. This is hardly a case that would win over Pat Robertson, John Finnis, or Pope Benedict XVI. We live in a world of ineradicable—or at least very persistent—moral disagreement. But given the principle of reciprocal constitutional disadvantage, the demonstration that there is a respectable moral argument for gay sex and marriage also serves to show that there is a respectable constitutional argument for its protection.

Why, then, do people like Justice Scalia persist in asserting that the argument is not just wrong, but fundamentally illegitimate? No doubt, some people who take this position are motivated by animus towards gay men and lesbians. Justice Scalia says that he does not hate gay Americans,⁴⁴ and I am prepared to take him at his word, even though this is a courtesy he sometimes fails to extend to others.⁴⁵ Assuming that animus toward gay men and lesbians does not explain his reaction, what does? Although I cannot prove it, the best alternative explanation for this blindness to the principle of reciprocal constitutional disadvantage stems from very deep insecurities about the intellectual foundations of liberal constitutionalism. After all, if it is true that constitutional questions are inextricably tied to moral questions, and if it is also true that moral questions cannot be resolved by reasoned argument, then it

44. See *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (“Of course it is our moral heritage that one should not hate any human being or class of human beings.”).

45. See *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (“[T]he Court says that the present case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ . . . Do not believe it.”).

follows that constitutional questions cannot be so resolved either. But then it would be true that our polity is not founded on principles that all of our citizens are bound to respect and that the ambitions of liberal constitutionalism would have failed.

A concession of this sort would be a very big deal, especially for someone whose every official act depends on the principles of liberal constitutional theory for its legitimacy.⁴⁶ It is no surprise, then, that Justice Scalia is worried, or that these worries would cause him to lash out at people who, he perceives, are attacking the very foundations of the Republic, not to mention his self-conception of how he performs his job. This is not the place to attempt the large task of putting these worries to rest, if indeed it is possible to do so.⁴⁷ For now, it is enough to insist that they provide no excuse for projecting neurotic anxieties about constitutional legitimacy on innocent gay and lesbian citizens who want nothing more than to get on with their private lives.

46. One does not have to look very hard to see how this personal anxiety gets translated into constitutional doctrine. Consider, for example, the following remarkable passage:

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. . . . But if in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

47. For an attempt to put these worries to rest, see LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW (2001).