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Disadvantage Problem, and the Crisis in
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Louis Michael Seidman
Georgetown University Law Center, seidman@law.georgetown.edu

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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, the case of Justice Scalia. For him, the 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

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center.

This essay is drawn from a debate held at the 2007 Federalist Society Student Symposium at Northwestern University School of Law. I have preserved the informal character of my original remarks.

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

² Id., at 652.

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?

In this brief essay, I do not take a strong stand on whether the constitutional case for gay rights has been made out. Instead, I attempt 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.

As Justice Scalia has made abundantly clear, his core objection to constitutional protection for gay rights is that providing such protection requires the Court to “take[] sides in the culture war, departing from its role of assuring, as 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 a holding that the Constitution protects gay relationships takes one side on a contestable moral question – or at least on a moral question that is currently contested.

This is a concession, but not much of one. The concession does not amount to much because of what might be called the principle of reciprocal constitutional disadvantage. It is

³ Id.

⁴ Id.

⁵ Id., at 653.

⁶ Id., at 652.

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 another, reciprocal set of moral views. The principle of reciprocal disadvantage means that the “morality charge” is a wash. Our inability to separate constitutional law from nonconstitutional moral principles does indeed create a kind of crisis for standard forms of liberal constitutionalism, but it is not a problem that disadvantages proponents of constitutional protection for gay marriage. Courts are simply stuck taking a stand in the “culture war” whichever way they rule. Justice Scalia will therefore have to look beyond the supposed requirement of moral neutrality to justify his anger.

Of course, this claim is itself contested, but, it seems to me to follow more or less inevitably from the logic of the equal protection clause.⁷ The reasons why are familiar,⁸ so I will do no more than sketch them here. Equal treatment is not the same thing 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. But people are similar and different across an infinite range of dimensions. It follows that to make the equality norm operational, we must decide which differences and similarities are relevant.

Relevance can be understood as either a moral or instrumental virtue, although for reasons outlined below the instrumental version turns out to collapse into the moral version. The

⁷ Although Justice O’Connor relied upon the equal protection clause in her concurring opinion in *Lawrence v. Texas*, the opinion for the Court relied upon the liberty guaranteed in the due process clause. *Compare* *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) *with id.*, at 579 (O’Connor, J., concurring). For ease of explication, my analysis focuses on equality. With some additional pulling and hauling, the same points could be made with reference to liberty.

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

overtly moral version of relevance directs our attention to the attributes that matter according to a particular moral theory. So, 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 (at least for equal protection purposes) because species lines are relevant to sexual intimacy in a way that race is not, or at least so most people believe.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, of course, that human flourishing is the appropriate moral standard for right action, which, itself, is contested.

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

On the instrumental theory, people are treated equally when the trait that is used to differentiate between them is instrumentally useful in advancing an end that the government can legitimately pursue. There are two difficulties with this version of relevance. First, it is not at all clear that this version corresponds to ordinary intuitions about equality. For example, the

⁹ See *Loving v. Virginia*, 388 U.S. 1 (1967).

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.”)

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.

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

How, then, are we to limit the realm of “legitimate” government ends? On one approach, the limitation is supplied by the rest of the Constitution, which provides the exclusive specification of the ends that the government may pursue.¹² The trouble with this approach is

¹¹ The Court has insisted that mere dislike of a group is not a sufficient justification for discrimination against it. *See* *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973); *Romer v. Evans*, 517 U.S. 620, 634-35 (1995); *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). 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* *Gonzales v. Carhart*, 127 S. Ct. 1610, 1647 (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 text might be slightly revised and complexified 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 *Cf.* *San Antonio Independent School Dist v. Rodriguez*, 411 U.S. 1, 33 (1972):

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 relative society 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.

that it makes the equal protection clause surplusage. If the clause does no more than outlaw ends that are already outlawed, 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. And the only way to do that is to deploy some sort of moral theory.

Typically, liberal constitutionalists make use of two escape hatches to avoid these disquieting conclusions. Some people, Justice Scalia among them, 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. Sometimes, we think just the opposite – that moral disagreement requires leaving the matter for private resolution. There is widespread disagreement about the nature of God and about sensible childrearing techniques. Few people think that these matters should therefore be settled through political processes. Instead, we say that because we cannot agree on the answers to these questions, individuals should decide on appropriate answers for themselves.

¹³ See *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (“it is up to the citizens of Missouri to decide” on when treatment for terminally ill should be terminated); *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (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 v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“it is no business of the courts (as opposed to the political branches) to take sides in this culture war.”)

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 would therefore mean that equal protection questions should always be resolved according to ordinary political processes. A strong reading of section 5 of the fourteenth amendment and its drafting history might support the view that it was intended to grant power to Congress, rather than to the courts.¹⁴ Even on this reading, though, 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 decisionmaking. If one adopts the standard reading, the relegation of all moral questions to political decisionmaking effectively ignores the fourteenth amendment's command – a position that, itself, would have to rest on some nontextual moral judgment.

The second method of escape conflates the command of the equal protection clause with the particular moral conceptions of equality held by the framers. Justice Scalia has also identified himself with this view,¹⁶ but the position is similarly untenable. The problems with

¹⁴ Section 5 provides that “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” As originally drafted, the amendment consisted solely of this congressional power granting provision. *See* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM PRINCIPLE TO JUDICIAL DOCTRINE* 49 (1988). 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 majority for embracing “an equalizing notion of the Equal Protection

the 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 inconsistent with equality.¹⁷ Second, everything we know about the intent of the framers suggests that this was a conscious choice. As our 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 had brought them to power in 1860, [and] cared less about [section one'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 this argument drawn from the amendment's language and the 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

Clause that would . . . have startled the Fourteenth Amendment's Framers.") Cf. Michael H. v. Gerald D., 491 U.S. 110, 122 (1991) (Scalia, J.) (judiciary "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") (quoting Moore v. East Cleveland, 431 U.S. 494, 544 (White, J., dissenting)).

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

¹⁸ WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM PRINCIPLE TO JUDICIAL DOCTRINE 51-52 (1988).

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

²⁰ See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME

point, statutes prohibiting interracial marriage were common in post-bellum 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 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 that found that segregated schools violated the equality norm in 1954 did so at least in part because roughly half the country opposed the separate-but-equal regime – something that was not true in 1896, when the Court upheld a system of segregated transportation.²² Between 1986, when the Court upheld a state sodomy statute and 2003 when it struck down a similar a statute, there was an extraordinary change in public opinion concerning the rights of gay men and lesbians.²³ Demographic data suggest that dramatic additional change in public views about gay sex and marriage is on the way,²⁴ and, if

COURT AND THE STRUGGLE FOR RACIAL EQUALITY 26, 146 (2004); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 102-03 (1977).

²¹ See RAUL BERGER, GOVERNMENT BY JUDICIARY, note 20, *supra*, at 241.

²² At the time *Plessy* was decided, southern whites strongly supported segregation and northern whites were accepting or indifferent. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, note 20, *supra*, 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*. *Id.*, at 310.

²³ According to Michael Klarman, between *Bowers* and *Lawrence*, public opinion went from opposition to 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, 443-44 (2005).

²⁴ In a Gallup poll conducted in May 2007, eighteen to thirty four year olds indicated that they thought homosexuality was an acceptable alternative life-style by a margin of 75% to 25%. Respondents over the age of fifty five disagreed with the same proposition by a margin of 51% to 45%. See Lydia Saad, *Tolerance for Gay Rights at High-Water Mark*,

history is any guide, this change in popular moral judgments will produce further change in legal doctrine.

Of course, it does not follow from the principle of reciprocal disadvantage that gay marriage should be constitutionally protected. All the principle does is take 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.

II.

For this reason, I will devote the rest of this essay to a sketch of a moral defense of gay marriage. Before embarking on this project, though, I want to introduce two qualifications. First, it is not necessary for my purposes to provide all the detail, analysis, and refutation of contrary positions that a full-scale argument would require. I have provided the skeleton of an argument that, I believe, would support a more comprehensive defense, but not the defense itself.²⁵ My claim here is only that there is the possibility of respectable moral argument for gay

<http://www.galluppoll.com/content/?ci=27694> (site last visited 6/18/07); *see also* AEI Studies in Public Opinion, Attitudes about Homosexuality and Gay Marriage 3 (2006) (citing National Opinion Research Center polling data from 2002 finding that 48% of those between the ages of 18 and 29 and 68% of those sixty and over thought 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: The Moral Case for Marriage Equality and More*, 17 *YALE J. L. & FEM.* 139 (2005); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 *AM. J. JURIS.* 51 (1997).

marriage,²⁶ and that this possibility, when taken in conjunction with the principle of reciprocal disadvantage means that gay rights advocates need not be ashamed to make a constitutional argument as well.

Second, even if the moral argument were comprehensively fleshed out, I do not believe that it would somehow compel the rejection of opposing views. Properly understood, moral argument simply does not work that way. Although it can provide reasons why a particular conclusion is plausible, it cannot force people, kicking and screaming as it were, to conclusions that they want to resist. This fact poses big problems for the ambitions of liberal constitutionalism, but not for defenders of gay marriage. After all, gay marriage defenders can no more be compelled by moral argument than gay marriage opponents. Reciprocal 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 in order to influence the resolution.

What, then, is the moral case for gay marriage? For me, 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 in order 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

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

²⁷ This criticism is a familiar feature of feminist jurisprudence. *See, e.g.,* Wendy A. Williams, *Notes from A First Generation*, 1989 U. CHI. LEGAL FOR. 99, 107-08 (noting that “men and women come in many shapes, sizes, sexualities, aspirations, experiences, and life patterns”). *Cf.* Chai Feldblum, *Gay is Good: The Moral Case for Marriage Equality – and More*, note 25, *supra*, at 179 (asking why the state should “support just marriage partners – and not other intimate partnerships that equally support the development of the self.”)

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 a modes of living.

Unfortunately, however, the standard, off-the-shelf social scripts do not work for everyone. Personal lives are complicated, multifaceted, and come in endless variations. It is hardly surprising, then, that models that work for many people do not work for all people. When the standard models do not work, their 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 to 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, there may be something to be said for placing outer limits on the possibility of truly eccentric choice. Moreover, there are modes of life that are selfish, harmful, or indifferent to social obligation.²⁸ It is a large 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

²⁸ Cf. Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, note 25, *supra*, at 11921 (explaining 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.”)

to less social commitment than a standard script. On the contrary, it is the very availability of life-fulfilling alternatives that tends toward 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 the argument 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 strand will necessarily be unconvincing.³¹ But there are very few people today who hold this belief. In a world where use of birth control is widespread, even among Catholics and conservative Protestants, the claim that sexual intimacy must be tied to the possibility of pregnancy is no longer very plausible. Moreover, even most opponents of birth control have no difficulty with sexual intimacy and marriage between men and women even though there is no prospect that their unprotected sex will produce children. It seems entirely arbitrary to characterize this as sex “of the reproductive type” while insisting that sex between

²⁹*Cf.* See 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 substantive good).

³⁰ See Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 *GEO. L. J.* 301, 308 (1995) (referring to marriage as “a one-flesh communion of persons . . . consummated and actualized in the reproductive-type acts of spouses”).

³¹ See, e.g., *Id.*; John Finnis, *Law, Morality and ‘Sexual Orientation,’* 69 *NOTRE DAME L. REV.* 1049 (1994).

people of the same gender is not “of the reproductive type.”³² A priori taxonomy is not the same thing as argument.

Once the possibility-of-pregnancy position is off the table, we can see that gay sex is a good because it is a type of sex, and sex is, *prima facie*, a good. It is a *prima facie* good, first, because it is pleasurable and, holding everything else constant, pleasure is a good.³³ At this point, we owe Justice Scalia another concession. In his *Lawrence* dissent he trots out a parade of horrors, including adult incest, fornication, and (perish the thought!) masturbation as entitled to constitutional protection according to the logic of the majority.³⁴ To the extent that these forms of sex are pleasurable, they are indeed *prima facie* moral goods. What, after all, is so horrible about that?

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. With respect to gay sex, they have not done so.

When we are talking about intercourse between two or more people, as opposed to masturbation, the argument for sex as a good strengthened.³⁵ Even when it is anonymous and

³² For a detailed argument along these lines, see Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, note 25, *supra*, at 57-70; Carlos Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, note 25, *supra*, at 1909-1919.

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. OF PHIL.* 5, 10-13 (1966). See also Sara Ruddick, “On Sexual Morality,” note 32, *supra* at 30.

impersonal, the good of sex is heightened by its capacity to provide pleasure by giving pleasure to another. Nor is it any kind of 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 my body belongs to me. In the case of sex, though, that awareness is coupled with the reflexive knowledge that someone else is getting pleasure from this body that is mine, even as I am getting pleasure from a body that is hers and that we are both getting pleasure from the knowledge that our partner is getting pleasure.

It is therefore altogether appropriate that the *Lawrence* Court grants constitutional protection even to entirely anonymous and casual sexual intimacy. It is important to emphasize, though, that the case for gay marriage is actually on stronger footing than the case for the sort of sex that *Lawrence* protected. When we are talking about sex in a continuing and intimate relationship, then 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 the one night stand without providing similar protection for deep and continuing relationships.³⁷

³⁶ See *id.*, at 29-30.

³⁷ Oddly, Justice Scalia recognizes this fact 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.

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 (is necessarily also 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, it seems to me, that 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 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 claiming that all cases of homosexual intercourse are disconnected from exploitation, dominance, submission, and power. Gay, like straight relationships can be pathological. Even when there are not differences in gender, there may be differences in power.

Still, although heterosexual sex is not always rape, it is always complicated by 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 otherwise be. Similarly, although some homosexual sex is exploitative, the exploitation does not map directly and obviously onto pervasive social hierarchies. When sex is freed from these hierarchies, it can be less conflicted, freer, and more fun. Thus, straight people have something to learn from gay men and lesbians about the potential for sex if we could only free ourselves from the curse of subjugation.

Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

³⁸ Cf. Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 Fla. St. U. L. Rev. 705, 727 (1998) (“same-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 potential to transform the very institution of marriage itself into a truly liberal and even egalitarian institution.”)

Of course, there are some who find this possibility more terrifying than comforting. It is at this point that the charge of self-indulgence reappears. The stereotype of gay promiscuity fuels the fear that legitimization of gay relationships will jeopardize the sexual status quo in a fashion that will have unintended consequences, especially for the welfare of children.³⁹

I believe that these fears are greatly overstated, although I must confess that my position is at least influenced by the belief that the sexual status quo needs to be shaken up. Suppose, though, that one holds that the sexual status quo ought to be maintained. It remains hard work to derive opposition to gay marriage from this position. There is, to be sure, a legitimate reason grounded in the fact of sexual hierarchy for fearing a change in the sexual status quo. More male promiscuity in a world where men also have most of the wealth and power might spell big trouble for women. I can understand this worry, but it is quite mysterious why it translates into fear of gay promiscuity which, by definition, does not involve intergender hierarchy.

Perhaps the point is that straight men will envy their gay brothers and, so, copy their promiscuity without bothering to dismantle gender hierarchies first. This is, of course, a possibility, but it seems deeply implausible that the decline in heterosexual monogomy (if indeed there has been a decline) is caused by gay sex. In fact, the movement favoring gay marriage reflects something like the opposite phenomenon. Rather than straights mimicking gay life styles, some gay men and lesbians are insisting on the kind of stability and commitment that

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

straights like to think characterize their relationship. 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. What research there is 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. It does seem to be true that children of single and divorced heterosexual parents 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 do worse also.⁴³ But the children of gay marriages and civil unions

⁴⁰ See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 81-147 (1999); 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 (1993); Paula Ettelbrick, “Since When Is Marriage a Path to Liberation,” in *SEXUAL ORIENTATION AND THE LAW* 721 (WILLIAM B. RUBENSTEIN ED., 2D ED. 1997).

Because my only claim is that there is a respectable case for gay marriage, it is not necessary to evaluate these arguments here. For what it is worth, though, I think that Chai Feldblum 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.” Chai Feldblum, *supra* note 25, at 153-54.

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

⁴² For a summary of the literature, see JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 111-129 (2000).

⁴³ See Amy L. Wax, *The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, note 38, *supra*, at 1081-87.

are not raised by a single care-giver and have not experienced the trauma of divorce. If we are 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 we know cause problems? In a world where even parents who have been convicted of serial child abuse have a right to get married and 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 doing so.

Moreover, it is worth remembering that children of gay couples would not somehow find straight parents if gay and lesbians parents were unavailable. Many of them would grow up in orphanages or foster homes. Others would not exist at all. In what sense are they made worse off by the availability of gay relationships?

III.

It follows, I think, that there is at least a respectable moral case to be made for gay sex and marriage. Is this a case that would win over Pat Robertson, John Finnis, or Pope Benedict? Hardly. We live in a world of ineradicable – or at least very persistent – moral disagreement. But given the principle of reciprocal 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 claiming that the argument is not just wrong, but fundamentally illegitimate? One cannot dismiss the possibility that the vehemence of their objection stems from a deep hatred of gay Americans – for who they are and for what they do. If one loved the Constitution but hated gays, the well known mechanism of cognitive dissonance could easily produce an extreme reaction to constitutional arguments for gay rights.

Justice Scalia says that he does not hate gay Americans,³⁴⁴ 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, I believe that the best alternative explanation for this blindness to the principle of reciprocal 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 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 for its legitimacy on the claims of liberal constitutional theory⁴⁶. It is no

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) (“the 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.”)

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

surprise, then, that Justice Scalia is worried or that these worries cause him to lash out at people who, he perceives, are attacking the very foundations of the republic. 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 there is no excuse for inflicting neurotic anxieties about constitutional legitimacy on innocent gay citizens who want nothing more than to get on with their private lives.

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 Southeastern Pennsylvania v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting)

⁴⁷ For anyone interested in my attempt to put the worries to rest, see LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM and JUDICIAL REVIEW* (2001).