

LAWRENCE V. TEXAS AND FAMILY LAW: GAY PARENTS' CONSTITUTIONAL RIGHTS IN CHILD CUSTODY PROCEEDINGS

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Going into court to win custody of one's child is always a draining endeavor, and it can be an especially tricky affair for a gay parent.¹ Given the vast discretion that judges wield in child custody proceedings,² gay people often fear that homophobia or misinformation will determine custody and visitation awards. Experience has shown this fear to be well-founded: most gay parents have fared poorly in custody proceedings,³ with one court going as far as placing a girl with a convicted murderer to avoid putting her in the care of a gay parent.⁴ Whether due to the presumed criminality of gay parents in sodomy law states, the stigma that the children of gay

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1. Throughout this Note, the word “gay” is used as shorthand for the most inclusive definition of non-heterosexual orientation as possible, including lesbian, bisexual, transsexual, transgendered, queer, etc.

2. See, e.g., Mary Becker, *Judicial Discretion in Child Custody: The Wisdom of Solomon?*, 81 ILL. B.J. 650, 650–51 (1993) (“Judges in almost all U.S. jurisdictions are free to decide custody according to their view of which custodial arrangement will best serve the child’s interest in the future, an open-ended standard giving judges tremendous power to order whatever custodial arrangement seems best to them.”); Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 59 (1985) (“[W]hen faced with more than one fit and qualified claimant for custody, a prediction of which claimant would be most likely to provide what is best for the child is extremely difficult to make. Such a standard is extremely susceptible to a judge’s personal value judgments . . .”).

3. See *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 871 (Mo. Ct. App. 1982) (“In the majority of cases involving the award of custody where one parent is a homosexual, the courts have awarded custody to the non-homosexual parent . . .”); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 886 (1979) (ascribing the infrequency of custody suits by gays to the fact that “when gay parents sued for custody, they generally lost”); Kathryn Kendell, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and their Children*, 20 SUM. FAM. ADVOC. 21, 21 (1997) (“[L]esbian and gay parents continue to lose custody of their children in courts across this country.”).

4. See *Ward v. Ward*, 742 So. 2d 250 (Fla. Dist. Ct. App. 1996) (per curiam) (affirming transfer of child to custody of heterosexual father, who had spent eight years in prison for killing his first wife, citing child’s foul language, poor table

parents sometimes face, or a judge's simple distaste for gay sexuality, numerous gay parents who have litigated have lost custody of their children on account of being gay.

Is this constitutional? Most courts and commentators have apparently thought so, as citations to the Constitution infrequently appear in opinions and articles regarding gay parents and custody disputes.⁵ Perhaps this is because *Bowers v. Hardwick*⁶ was thought to put the Constitution out of gay parents' reach, or because custody proceedings have traditionally been deemed matters of state law.⁷ But no matter: this Note's goal is not to explain the anti-constitutional presumption in this area of law, but rather to challenge it. The argument is straightforward: although often ignored, principles of constitutional law properly apply to custody disputes and should operate to exclude a parent's sexual orientation from the judicial calculus that determines custody awards.

*Lawrence v. Texas*⁸ offers recent and powerful support for this argument. In overruling *Bowers*, *Lawrence* did more than simply strike down the thirteen sodomy laws in force at the time. The opinion more broadly announced a principle of constitutional respect for gay people and same-sex relationships that may eventually reverse most or all of the anti-gay reasoning in areas of law outside the bedroom. This Note takes up one such area—child custody

manners, and preference for cologne among signs of delinquency attributable to lesbian mother's bad parenting).

5. Most opinions and articles discussing this matter debate the veracity of empirical claims that a parent's homosexuality harms, in one way or another, the best interests of the child. For one of the few articles offering a constitutional examination of this issue, see Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989) (arguing that custody decisions based on a parent's sexual orientation employ sex classifications warranting heightened judicial scrutiny).

6. 478 U.S. 186 (1986) (upholding Georgia's sodomy statute on the ground of there being no constitutional right of same-sex sexual intimacy), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

7. See, e.g., PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 242–43 (1997) (discussing the federal courts' "deference to state judgments in family matters," based on the view that "states are the appropriate arbiters of family issues and [that] federal protection of family rights inappropriately fetters states' rights to control the exercise of local police power"); Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L.J. 885, 909–10 (2001) ("[C]ourts rarely consider the [federal] equal protection aspects of *any* custody case. . . . [C]ustody law has generally provided that equal protection principles are off the table."); Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 178 (2000) ("Judges, scholars and practitioners commonly assume that family law decisions are quintessentially matters of state law.").

8. 123 S. Ct. 2472 (2003).

proceedings where one parent is gay—and argues that *Lawrence* brings traditionally neglected constitutional principles into family law to shield gay parents from the biases they typically face in this area.

This argument may seem ambitious. Custody proceedings are governed by the exquisitely vague “best interests of the child” standard, meaning that judges resolving custody disputes routinely consider a constellation of factors.⁹ The logic seems to be that the opacity of the “best interests” standard is precisely what gives it utility. No statute can contemplate every circumstance that may arise in the motley world of child custody proceedings, and so judges find something very useful in a standard that offers the flexibility needed to craft well-tailored decisions. Given the importance our society places on ensuring that children are looked after, it seems at the very least reasonable to give a judge as much leeway as possible in seeing to a child’s welfare. What, then, is the big deal if a parent’s homosexuality is one of many factors in the porous deliberations that produce custody awards?

The big deal, this Note argues, is that such consideration violates the Constitution. It is true that states usually enjoy great latitude in settling their citizens’ custody disputes, but it is equally true that the Constitution pops up from time to time to draw a line. As Justice O’Connor has observed, states “are subject to constitutional constraints, and the Supreme Court has, when appropriate, struck down state laws that intrude on the core functions of the family or on the individual liberties of family members.”¹⁰ The cases articulating these constitutional constraining principles are among the first things this paper addresses. The Note concludes that factoring a parent’s sexual orientation into child custody proceedings violates

9. Judge Cardozo is credited with first articulating the best interests of the child standard in *Finlay v. Finlay*, stating that

[T]he chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *pater patriae* to do what is best for the interest of the child. He is to put himself in the position of a “wise, affectionate, and careful parent,” and make provision for the child accordingly.

Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (quoting *Queen v. Gyngall*, 2 Q.B. 232, 238 (1893)) (citation omitted).

10. Sandra Day O’Connor, *The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573, 575 (2001). See also Law, *supra* note 7, at 183–84 (“[S]tates do not have exclusive authority over the regulation of family law. . . . [T]hroughout the twentieth century, the Supreme Court interpreted the Constitution to limit state authority to regulate families.”).

the Due Process¹¹ and Equal Protection¹² Clauses of the Fourteenth Amendment. Since custody cases involving gay parents are numerous,¹³ this Note focuses on state supreme court decisions, borrowing from appellate opinions where helpful.

Part I lays the constitutional foundation of the Note. In detailing Supreme Court decisions on both gay rights and family law, this Part dispels the myth that the Constitution has no place in child custody decisions involving gay parents. Part I also sets out the constitutional principles that will later be applied to the rationales courts offer for considering a parent's sexual orientation. Each of the following Parts addresses a different argument flowing from a parent's homosexuality that courts make in denying custody or unrestricted visitation to gay parents.

Part II examines the claim that gay parents should be denied custody because homosexuality is immoral. This Part describes several representative cases, and argues that decisions in this category disfavor gay parents not on any showing of harm to the child, but merely out of hostility toward homosexuality. Applying the equal protection and substantive due process principles described earlier, this Part concludes that denying gay parents their children out of animus toward or moral disapproval of gay sexuality is unconstitutional.

Part III considers the claim that gay parents should be disfavored for the social stigma that sometimes confronts their children. In describing the cases in this category, this Part argues that courts' consideration of such stigma is nothing but acquiescence to homophobia. Applying the constitutional rule against giving effect to bigotry in custody cases, this Part concludes that whatever stigma may surround the children of gay parents is not a matter for judicial consideration.

Part IV analyzes the argument that gay parents should be penalized when they live with their lovers without being married. The Part discusses the disingenuousness of this tactic, arguing that it in

11. The Clause reads: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

12. The Clause reads in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

13. See PATRICIA M. LOGUE, LAMBDA LEGAL DEF. AND EDUC. FUND, INC., *THE RIGHTS OF LESBIAN AND GAY PARENTS AND THEIR CHILDREN* 3 (2001), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=990> ("Such cases have arisen across the country for many years and there is a relatively large body of case law . . .") (last visited Nov. 17, 2003); Courtney R. Baggett, *Sexual Orientation: Should it Affect Child Custody Rulings*, 16 *LAW & PSYCHOL. REV.* 189, 189 (1992) ("Child custody is the most litigated of gay and lesbian issues.").

fact punishes gay parents for being gay and impermissibly encroaches upon the fundamental right to parent.

Finally, this Note concludes that it is unconstitutional for courts to consider gay parents' sexual orientation when adjudicating child custody disputes.

I. CONSTITUTIONAL PRINCIPLES

A. *Gay Rights*

*Lawrence v. Texas*¹⁴ is now the leading Supreme Court decision involving the constitutional rights of gay people. The irony is that although the opinion might in places read like a "gay decision," it is hardly that. Rather than create a constitutional entitlement for gay people alone, the decision much more broadly announced a substantive due process right of adult sexual intimacy for all Americans. But since heterosexuals already enjoyed an unspoken right to lead sex lives safe from government intrusion,¹⁵ *Lawrence* is also a kind of equal protection ruling for extending this unofficial right to same-sex couples. This becomes clear after a walk through the opinion.

Operating on a false report of a weapons disturbance,¹⁶ Houston police officers entered John Geddes Lawrence's apartment to find him and Tyron Garner having sex. The men were arrested, jailed overnight, and convicted by a Justice of the Peace for violating Texas's sodomy statute.¹⁷ The statute made it a crime for two consenting adults to have oral or anal sex, but only, as also read the laws of three other states,¹⁸ if the participants were of the same sex. Exercising their right to a trial *de novo*, Lawrence and Garner challenged the statute in the Texas courts, losing there but being granted an appeal to the United States Supreme Court. The Court ruled in favor of Lawrence and Garner, finding Texas's law unconstitutional and overruling *Bowers v. Hardwick* in the process.

A five-justice majority invalidated the Texas law on substantive due process grounds. Rather than narrowly finding a "fundamental

14. 123 S. Ct. 2472 (2003).

15. See *infra* notes 65–71 and accompanying text.

16. A disgruntled neighbor had called the police and was later convicted of filing a false report. See Linda Greenhouse, *Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES, June 27, 2003, at A1.

17. See *Lawrence*, 123 S. Ct. at 2475–76.

18. The three other states were Kansas, Missouri, and Oklahoma. See Greenhouse, *supra* note 16.

right to engage in homosexual sodomy,”¹⁹ as the *Bowers* Court had erroneously characterized Michael Hardwick’s claim,²⁰ the *Lawrence* Court announced a broader right of sexual intimacy available to gay and straight adults alike. “Liberty protects the person,” wrote Justice Kennedy for the Court, “from unwarranted government intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”²¹ Focusing on the rights of a “person” rather than those of a “gay person,” the Court explicitly found that the liberty protected by the Due Process Clause includes the freedom to engage in “certain intimate conduct.”²²

This definitive recognition of a constitutional right of sexual intimacy was a long time coming. In its previous opinions on sexual liberty, the Court had never actually announced a right to have sex. This mattered little to heterosexuals, however, as many observers believed that the rights to use contraception, marry, and abort pregnancies logically implied a right to engage in sexual intercourse.²³ And logical implications aside, straight people were hardly, if ever, fired from their jobs, denied custody of their children, or refused residential leases on account of having sex lives. The same could not be said of gay people, who not only suffered the above-mentioned discrimination, but who could also be excluded from the Court’s sexual liberty protection because same-sex intercourse is non-procreative and same-sex relationships went unrecognized by government. *Bowers* stood as the prime example of legal reasoning working to wall gay people out of the Court’s sexual freedom jurisprudence. Said the *Bowers* Court:

[W]e think it evident, that none of the rights announced in [the sexual freedom] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.²⁴

19. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

20. See *infra* notes 24–26 and accompanying text.

21. *Lawrence*, 123 S. Ct. at 2475.

22. *Id.*

23. See, e.g., David B. Cruz, “The Sexual Freedom Cases”? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 300 (2000) (“[M]any constitutional scholars take the Court’s sexual freedom decisions to dictate logically the existence of a constitutional right to engage in sexual activities for purposes other than procreation . . .”).

24. *Bowers*, 478 U.S. at 190–91.

In that curt last sentence, *Bowers* foreclosed any claim that the right of sexual intimacy implicit in the Court's earlier decisions extended to gay people.

In disassembling *Bowers* piece by piece, *Lawrence* erased the division that *Bowers* had imposed between gay and straight sexuality, thereby lifting the legal opprobrium that had for seventeen years hung over gay people.

Lawrence first rejected the dismissive way *Bowers* had framed Hardwick's claim: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."²⁵ Sexual intimacy, like marriage, is about far more than hopping in the sack: when "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."²⁶ It was thus not simply a right to fornicate that Hardwick, *Lawrence*, and Garner wanted, but more generally the freedom to live sexual lives as could any straight adult, choosing partners out of love, lust, or some combination thereof. The right sought in *Bowers* and secured in *Lawrence* is a right properly belonging to any mature adult living in a free society. *Lawrence* acknowledged this: framing the issue not as one of base gratification, but of liberty, individuality, and autonomy.²⁷

The Court next corrected *Bowers*'s bad history. Contrary to *Bowers*'s assertions, wrote the Court,

there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. . . . [E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally. . . . [F]ar from possessing "ancient roots," American laws targeting same-sex couples did not develop until the last third of the 20th century.²⁸

In all, *Bowers*'s "historical premises are not without doubt and, at the very least, are overstated."²⁹

25. *Lawrence*, 123 S. Ct. at 2478.

26. *Id.*

27. *See id.* at 2475 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.")

28. *Id.* at 2478–29 (quoting *Bowers*, 478 U.S. at 192).

29. *Id.* at 2480.

Building on this point, the Court clarified that it did not mean to say that anti-gay feelings or policies were recent phenomena in American social life. The Court acknowledged that “for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”³⁰ “For many persons,” wrote the Court, “these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.”³¹ The simple point, however, is that “[t]hese considerations do not answer the question”³² put to the Court. Many people may dislike gay people or gay sexuality, but such dislike has no relevance in a judicial examination of whether the Constitution guarantees a right of sexual intimacy. “The issue,” wrote the Court, “is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”³³ The Court answered this in the negative, quoting Justice Stevens’s *Bowers* dissent to conclude that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”³⁴ In finding Texas’s sodomy statute unconstitutional under any rationale,³⁵ the Court decided that moral disapproval of gay sexuality is an inadequate basis on which to criminalize gay sex.

This conclusion of *Lawrence*’s, underplayed somewhat in the opinion’s language, is of immense significance to gay rights generally because it appears to settle the morality-versus-animus debate hashed out in *Romer v. Evans*.³⁶ In that case, the Court struck down a Colorado constitutional amendment that forbade enactment of any sexual orientation anti-discrimination laws. The amendment, concluded the Court, imposed a disadvantage on gay people that was “born of animosity toward the class of persons affected.”³⁷ The

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (internal quotation marks omitted)). *See id.* at 2484 (“Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here.”).

35. *See id.* at 2484 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

36. 517 U.S. 620 (1996).

37. *Id.* at 634.

amendment therefore failed to pass even the lenient rational basis review conducted in equal protection analyses, as “a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”³⁸ Justice Scalia, writing for himself and two others, dissented sharply. He castigated the majority for finding the Colorado amendment a product of animus without so much as a citation to *Bowers* and its holding that moral disapproval of homosexuality was a perfectly legitimate rationale for sodomy laws.³⁹ More to the point, Justice Scalia highlighted the dubious line between “animus” and “morality.” “I had thought,” he wrote, “that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct. Surely that is the only sort of ‘animus’ at issue here: moral disapproval of homosexual conduct.”⁴⁰ And so *Romer* generated a serious ambiguity: the majority invalidated the amendment for being a product of irrational hostility toward gay people, whereas the dissent saw the measure as an expression of legitimate moral disapproval. How were lower courts, applying *Romer*, supposed to tell the difference between impermissible animus and acceptable moral condemnation? Critics charged that the Court simply left this up to the consciences and personal views of individual judges.⁴¹

Lawrence put an end to this problem. The Court did not define Texas’s law simply as a product of irrational animus, but rather acknowledged that presumably reasonable “religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family”⁴² fueled the feelings underlying the statute. In characterizing the law this way, the Court took the matter out of the morality-versus-animus debate. Texas’s sodomy statute may have in-

38. *Id.* (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (emphasis in *Romer*)).

39. *See id.* at 640–41 (“The case most relevant to the issue before us today [*Bowers*] is not even mentioned in the Court’s opinion. . . . If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.”) (Scalia, J., dissenting).

40. *Id.* at 644.

41. *See, e.g.,* EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 137 (1999) (*Romer* “left gays and lesbians at the mercy of judges’ sentiments about fairness and morality.”); Hunter, *supra* note 7, at 902 (“Is there no distinction between ‘animus’ and ‘morality’ except the value judgments of a given court? . . . Animus and morality exist in the text of *Romer* as a dichotomous name game. . . . They are mutually exclusive labels for the same set of beliefs.”).

42. *Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003).

deed been an expression of moral disapproval of gay sexuality, but *Lawrence*'s crucial point is that such disapproval is no longer a constitutionally sufficient reason for disfavoring gay people. Courts hearing gay rights claims will therefore no longer have to play word games to reach a result, characterizing a particular measure as a product of "animus" or "morality." *Lawrence* makes clear that anti-gay policies claiming traditional morality as justification are no longer insulated from constitutional scrutiny.

Justice Scalia acknowledged this in his *Lawrence* dissent, writing that the Court's opinion "effectively decrees the end of all morals legislation."⁴³ The accuracy of this description aside, Justice Scalia was right to point out the new ambiguity that *Lawrence* creates. The decision may put an end to the morality-versus-animus name game, but its logic at least theoretically subjects any law based on popular morality—and therefore, just about any criminal law—to legal challenge. Justice Scalia envisioned *Lawrence* causing a "massive disruption of the current social order," in which "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . called into question."⁴⁴ Courts will no doubt hear challenges to a few of these laws in the future and will have to grapple with how *Lawrence* applies, but predicting or advocating particular results in such cases is not the project of this Note. In any event, Justice Scalia's criterion for acceptable lawmaking seems questionable. He found Texas's law constitutional in part because "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home."⁴⁵ This is certainly true, but determining the constitutionality of a law by reference to whether the targeted class is sufficiently disliked would reverse decades of civil rights jurisprudence. Despite the ambiguity that *Lawrence* creates with regard to other laws, its holding as to anti-gay measures is clear: moral disapproval of gay sexuality is no longer an acceptable justification for policies disadvantaging gay people.

This rule builds upon a line of Equal Protection Clause cases. In *United States Department of Agriculture v. Moreno*,⁴⁶ *City of Cleburne*,

43. *Id.* at 2495 (Scalia, J., dissenting).

44. *Id.* at 2490–91 (Scalia, J., dissenting).

45. *Id.* at 2497 (Scalia, J., dissenting).

46. 413 U.S. 528 (1973) (invalidating amendment to federal Food Stamp Act that excluded households of unrelated persons—in other words, hippies—from food stamp eligibility).

Texas v. Cleburne Living Center,⁴⁷ and *Romer*, the Court failed three government policies under the accommodating rational basis test because the policies were all products of irrational hostility toward the targeted social groups. Animus, said the Court, simply cannot justify state action.

As unremarkable as this principle sounds, the cases caused something of a doctrinal scandal. Commentators argued that *Moreno* and *Cleburne* employed a degree of judicial scrutiny more searching than the rationality review the cases claimed to undertake.⁴⁸ Rationality review is, after all, commonly understood to be no real review at all: laws examined under this deferential standard routinely pass constitutional muster.⁴⁹ Thus, the cases' "mouth[ing of] rationality language while surreptitiously substituting a heightened review standard"⁵⁰ created, said the commentators, considerable confusion for courts laboring to apply the proper level of scrutiny.

But even if cases like *Moreno* and *Cleburne* relied on a kind of "second order" rational-basis review⁵¹ more searching than the usual deference given non-suspect classifications, refusing to uphold animus-driven legislation that targets unpopular minorities is hardly incompatible with rational basis review. Gay people are not akin to milk cartons: rationality review may approve a measure dis-

47. 473 U.S. 432 (1985) (invalidating city ordinance that required homes for the mentally handicapped, but no others, to obtain special zoning permit prior to operating in residential neighborhood).

48. See, e.g., Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 234 (1991) ("[T]he last two decades of equal protection development are replete with instances in which the Court mouthed rationality language while surreptitiously substituting a heightened review standard, which sometimes was later openly espoused."); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 n.248 (1992) ("[D]e facto intermediate scrutiny occurs whenever the Court escalates nominal rationality review, see, e.g., *City of Cleburne*.").

49. See, e.g., *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) ("[T]he rational-basis standard . . . employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487–88 (1955) (A "law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

50. Klarman, *supra* note 48, at 234.

51. *Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part).

favoring the latter,⁵² but that does not mean it will tolerate mistreatment of the former. As one federal circuit judge has put it, the “usually deferential ‘rational basis’ test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination.”⁵³ Even though *Moreno*, *Cleburne*, and *Romer* declined to afford the various groups at issue suspect or quasi-suspect class status, the people involved—hippies, the mentally handicapped, and gay people—have certainly borne the brunt of social hostility over the years. In acting to protect those groups, the Court may have simply been giving voice to the principle that rationality review will be more searching when the welfare of disfavored though technically non-suspect groups is at stake.

Ultimately, the principle that government may not disfavor a group simply out of reflexive dislike remains “alive and well.”⁵⁴ Although *Lawrence* does not employ rationality review or an equal protection analysis, it echoes this point. If laws that target unpopular groups and invoke traditional morality to do so are not necessarily constitutional, then measures premised on irrational abhorrence of particular people are most surely illegal. *Lawrence* thus brings cases like *Moreno*, *Cleburne*, and *Romer* into the mainstream of constitutional law. They are no longer outliers or examples of the Court cheating in its rationality review. They instead stand for the simple proposition that instinctive dislike for a group cannot alone justify laws that disfavor the class.

The final aspect of *Lawrence* worth mentioning is the sheer breadth of its holding. The Court chose not to base its reasoning on equal protection grounds, as did Justice O’Connor in her concurrence, because such a holding would not have gone far enough. “Were we to hold the statute [which criminalized only same-sex intercourse] invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”⁵⁵ To obviate the possibility of Texas amending its

52. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding state law that banned the sale of milk in nonreturnable plastic cartons but permitted such sale in nonreturnable paperboard cartons).

53. *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring).

54. See Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 Ky. L.J. 591, 616 (2000) (“*Cleburne*, understood as a prohibition against classifications explainable by prejudice alone, is alive and well.”).

55. *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003).

law to prohibit, like nine other states at the time,⁵⁶ oral and anal sex between all couples, the Court chose a substantive due process holding that explicitly established a right of sexual intimacy for everyone. The Court was careful to mention that the announced right was not absolute, noting that:

the present case does not involve minors . . . , persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.⁵⁷

What “[t]he case does involve,” the Court wrote, is “two adults who, with full and mutual consent from each other, engaged in sexual practices”⁵⁸ common to gay sexuality. “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”⁵⁹ Ultimately, concluded the Court, the “right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”⁶⁰

This language is expansive. The passages quoted above and others throughout the opinion—speaking of “liberty of the person,”⁶¹ “dignity as free persons,”⁶² “human freedom,”⁶³ and “personal choice”⁶⁴—all underscore the magnitude of the decision. The petitioners may have been gay, but the right announced in *Lawrence* is hardly limited to gay people. It is rather an inclusive declaration of the freedom that all consenting adults possess to live their intimate lives as they see fit without fear of state intrusion or penalty.

Doctrinally, the Court chose to ground this freedom in the Due Process Clause, but the opinion was also a kind of equal protection ruling. The Court itself acknowledged as much,⁶⁵ and its

56. The nine states with sodomy statutes applying to both same- and opposite-sex couples were Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia. See *Greenhouse*, *supra* note 16.

57. *Lawrence*, 123 S. Ct. at 2484.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 2475.

62. *Id.* at 2478.

63. *Id.* at 2483.

64. *Id.*

65. See *id.* at 2482 (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are

synopsis of previous sexual liberty cases all but announced that a constitutional right of sexual intimacy—at least for heterosexuals—had already existed. “After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.”⁶⁶ Citing *Eisenstadt v. Baird*,⁶⁷ *Roe v. Wade*,⁶⁸ and *Carey v. Population Services International*,⁶⁹ the Court concluded that by 1986 there was “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁷⁰ “This emerging recognition,” wrote the Court, “should have been apparent when *Bowers* was decided.”⁷¹ So, in correcting the mistake that was *Bowers*, *Lawrence* corrected a mistake that had denied gay people the right of sexual intimacy that the Court’s earlier cases should have guaranteed them. In bringing gay people into the fold, *Lawrence* ensured that sexual freedom extends to all Americans on equal terms.

Moreover, it is clear that *Lawrence* is not only about the constitutionality of laws that regulate sexual behavior. Cognizant of *Bowers*’s effects in areas outside sexual liberty, *Lawrence* recognized that 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.”⁷² *Lawrence* highlighted the causal chain that links the “stigma” that a “criminal statute imposes” with that stigma’s “collateral consequences,” which included, for example, having to register as a sex offender in certain states.⁷³ The point the Court made was that *Bowers*’s logic radiated outwards to deny gay litigants’ claims in areas of employment, housing, and family law. *Lawrence* should, in removing the legal stigma of being gay, likewise radiate

linked in important respects, and a decision on the latter point advances both interests.”).

66. *Lawrence*, 123 S. Ct. at 2477 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state law that prohibited married couples from using contraceptives).

67. 405 U.S. 438 (1972) (invalidating state law that prohibited sale of contraceptives to unmarried people).

68. 410 U.S. 113 (1973) (announcing a substantive due process right to terminate a pregnancy).

69. 431 U.S. 678 (1977) (invalidating state law that prohibited sale of contraceptives to people under sixteen years of age).

70. *Lawrence*, 123 S. Ct. at 2480.

71. *Id.*

72. *Id.* at 2482.

73. *See id.*

out to various areas of the law, undoing the damage that *Bowers* did to gay rights.

To review, *Lawrence* rejected *Bowers*'s dismissive characterization of the sexual right sought, corrected *Bowers*'s bad history, and put an end to the morality-versus-animus debate by clarifying that even laws appealing to popular morality will not withstand constitutional scrutiny if they operate to demean and marginalize a particular social group. *Lawrence* instructs that gay people are not to be penalized for having sex. They possess, as do all adults, a constitutional right of sexual intimacy that may be exercised without fear of government reprisal. *Lawrence*'s characterization of gay people as entitled to all the sexual liberties that heterosexuals enjoy also counsels in favor of gay people having an equal claim to all the rights discussed below.

B. Family Law

The Constitution has for a long while applied to family matters despite the particular rights and duties of blood or legal relations being largely issues of state law.⁷⁴ The Supreme Court has found the Constitution to contain several rights bearing on family relationships, including the rights to engage in intimate sexual behavior,⁷⁵ marry,⁷⁶ raise children,⁷⁷ safeguard intimate family bonds,⁷⁸ use contraception,⁷⁹ and terminate pregnancies.⁸⁰ State law may supply the regulatory minutiae for matters such as marriage eligibility, child support payments, and abortion availability, but such legislation has at least some of its basis in—and is certainly limited by—constitutional principles.

74. See, e.g., *DAVIS*, *supra* note 7, at 112–13 (“The Reconstruction Congress directly addressed the abolitionists’ insistence that former slaves, and all other citizens, be secure in the parental relation . . . [M]embers of the Thirty-eighth Congress debating the Thirteenth Amendment repeatedly acknowledged the fundamental and inalienable character of rights of family.”).

75. See *Lawrence*, 123 S. Ct. 2472 (2003).

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

77. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 532 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

78. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–19 (1984); *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 545–46 (1986).

79. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

80. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

The most relevant principle of constitutional family law in this Note is what will be called, for simplicity's sake, the right to parent. In *Troxel v. Granville*,⁸¹ the Supreme Court observed that a parent's right to control the upbringing of his or her children "is perhaps the oldest of the fundamental liberty interests recognized by this Court."⁸² It "cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."⁸³

Given *Lawrence*, gay and straight parents are equally entitled to this right. "[P]ersonal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" are, wrote the *Lawrence* Court, "'central to personal dignity and autonomy.'"⁸⁴ In exercising "'the right to define one's own concept of existence,' . . . [p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."⁸⁵ Millions of gay people are parents,⁸⁶ and to fence them out of the constitutional rights guaranteed to parents generally would violate *Lawrence's* proscription against "demean[ing] the lives of homosexual persons."⁸⁷

But exactly what does the right to parent entail? The Court has not defined its boundaries,⁸⁸ and has not fashioned a precise

81. 530 U.S. 57 (2000) (plurality opinion) (invalidating state law that authorized courts to grant visitation rights to any person whose visits would serve a child's best interests).

82. *Id.* at 65.

83. *Id.* at 66.

84. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

85. *Id.* at 2481–82 (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

86. As of 1997, there were between six and ten million gay parents in the United States. See LAMBDA LEGAL DEF. AND EDUC. FUND, INC., LESBIAN & GAY PARENTING: A FACT SHEET (1997), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=31> (last visited Nov. 17, 2003).

87. *Lawrence*, 123 S. Ct. at 2482.

88. Patricia Logue has noted that

The Supreme Court has described this parental autonomy interest and the interest in family autonomy and privacy in broad terms, and as "fundamental," "deeply rooted" or "of basic importance." But the Court has made plain that "one size does not fit all" claims. Rather, the constitutional stakes vary with the extent and nature of the infringement at issue, and the interests of children and involved others.

LOGUE, *supra* note 13, at 14 (citations omitted).

doctrinal test for determining its violation.⁸⁹ One way of understanding the cases is to sort them into three categories, depending on who opposes a biological parent for custody or control of a child: the state, a non-parent caregiver, or the other biological parent. These divisions are not rigid,⁹⁰ and some cases fall into more than one category. At first blush, the constitutional protection of a biological parent's rights appears to narrow as the case law progresses through these categories. Despite this appearance, parents in all cases retain full protection against unconstitutional judicial decisionmaking.

The right to parent appears broadest in the first category of cases, where the state tries to seize the liberties that properly belong to a parent or even to seize the children themselves.⁹¹ Opinions in this category have struck down laws that interfere with how parents choose to educate their children,⁹² statutes that automatically remove children from an unwed parent,⁹³ and measures that require only a minimal showing of bad parenting to terminate parental rights.⁹⁴ One case even took the uncharacteristic step of fashioning

89. *See id.* ("The Court has not imposed a uniform test such as strict scrutiny or deferential rational basis review in assessing the constitutionality of . . . infringements on parental autonomy.") (citation omitted).

90. *See Troxel v. Granville*, 530 U.S. 57, at 78 (2000) ("Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.") (Souter, J., concurring).

91. States may take children either by assuming temporary custody and giving parents a chance to prove their fitness and win back their children, or by permanently terminating a parent's right to his or her child. "In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is 'irretrievabl[y] destructi[ve]' of the most fundamental family relationship." *M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

92. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (invalidating state law requiring children to attend public rather than private or religious grammar schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating state law prohibiting foreign language instruction in public grammar schools).

93. *See Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating state law making children of unwed single fathers wards of the state on the presumption that such fathers are unfit parents). Four justices, in addition to agreeing with the majority that Stanley had a due process right to a fitness hearing before being deprived of his children, further found an equal protection violation in "denying such a hearing to Stanley and those like him while granting it to other Illinois parents." *Id.* at 658.

94. *See Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring that states seeking to terminate parental rights produce clear and convincing evidence of parent's unfitness).

an entitlement for poor parents appealing termination of their parental rights.⁹⁵

The second category of cases, where parents oppose non-parents, contains fewer clear constitutional principles, although the Constitution remains relevant in all such proceedings.⁹⁶ Citations to the Constitution may dwindle, however, because the Constitution only constrains state action⁹⁷ and is therefore less relevant when two private individuals square off for custody of a child. But the state is the final decisionmaker in any judicial proceeding regardless of whether it is a party to the action,⁹⁸ and it is therefore always limited by constitutional principles. In the context of custody proceedings, this means that judges are bound to protect the fundamental right to parent. *Troxel*, for example, pitted a parent against a non-parent. The Court stated in clear terms that a fit biological parent is presumed to act in his or her child's best interests, and that a court therefore cannot grant visitation rights over a parent's objection even to closely related non-parents without first giving great deference to the parent's judgment.⁹⁹ An earlier opinion had also favored biology, striking down a law that let non-parents in

95. See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that states must provide indigent parents with a free trial record to enable appeal of parental rights terminations). *But see* *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (finding no substantive due process right to free counsel for indigent parents in parental rights termination proceedings).

96. See LOGUE, *supra* note 13, at 15 ("Granting custody to a nonparent is an extraordinary infringement on parental rights . . .").

97. See, e.g., *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 196 (1989) (The "purpose [of the Due Process Clause] was to protect the people from the State, not to ensure that the State protected them from each other."); *The Civil Rights Cases*, 109 U.S. 3, 10–11 (1883) (The Fourteenth Amendment "is prohibitory in its character, and prohibitory upon the States. . . . Individual invasion of individual rights is not the subject-matter of the amendment.").

98. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984) ("The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment.") (citations omitted).

99. The Court found that

[t]he decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. . . . [T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. *Troxel v. Granville*, 530 U.S. 57, 69, 72–73 (2000) (plurality opinion); *Id.* at 79 ("It would be anomalous . . . to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.") (Souter, J., concurring).

some circumstances adopt a child over one parent's objections.¹⁰⁰ On the other hand, some cases have permitted states to subordinate one biological parent's rights to those of the other parent's spouse.¹⁰¹ These cases might be distinguished, however, by the fact that the biological parents seeking enforcement of their rights had relatively insignificant relationships with their children.¹⁰² The cases might also be explained by the disadvantage, in light of the state's interest in marriage,¹⁰³ that the single parents

100. See *Caban v. Mohammed*, 441 U.S. 380 (1979) (invalidating state law giving unmarried mothers, but not unmarried fathers, power to block adoption of their child merely by withholding consent). In *Caban*, the biological mother's husband, who was not the child's father, had adopted the child over the biological father's objection. The case technically relied on the Equal Protection Clause, finding that the law at issue impermissibly favored women over men by making it much easier for mothers than for fathers to block the adoption of their children. Although the Court did not reach the father's substantive due process claim, *id.* at 394 n.16, the case was obviously bound up with the right to parent.

101. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding state law presuming child born to married woman to be the child of the woman's husband, thus operating to preclude biological father from gaining parental rights); *Lehr v. Robertson*, 463 U.S. 248 (1983) (approving state's failure to notify biological father of proceeding in which mother's husband adopted the father's child); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (approving mother's husband's adoption of illegitimate child over biological father's objection where father had little contact with child, had never legitimated child, and where adoption was found to be in child's best interests).

102. See *Michael H.*, 491 U.S. at 114–15 (plurality opinion) (stating that the biological father spent approximately eight months of his child's first three years with the mother and child); *Lehr*, 463 U.S. at 252, 262 (The biological father "did not live with [the mother and their child] after [the child's] birth, . . . has never provided them with any financial support, and . . . has never offered to marry [the mother]. . . . [The] biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. . . . If he fails to [grasp that opportunity], the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."); *Quilloin*, 434 U.S. at 256 (The biological father "has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.").

103. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."); *Newman v. Newman*, 653 P.2d 728, 731 (Colo. 1982) (en banc) ("The State of Colorado has an interest in marriage, and marriage is favored over less formalized relationships which exist without the benefit of marriage."); *Kavanaugh v. Carraway*, 435 So. 2d 697, 701 (Miss. 1983)

(This Court has always encouraged a strong family unit and society demands that this unit be an honorable estate of marriage between parties. They

shouldered in challenging married people.¹⁰⁴ Given these distinguishing points, a biological parent's constitutional rights appear less relevant when the parent opposes a non-parent who has a more substantial relationship with the child or is married to the other biological parent. Conversely, a biological parent's constitutional claims seem more compelling if he or she has a meaningful relationship with the child, or the opposing non-parent lacks a connection like marriage to the child's other biological parent.

In the third category of cases, where one biological parent opposes the other for visitation or custody of the child, little constitutional precedent exists. While the cases just mentioned spill over somewhat into this category by virtue of their pitting one parent against the other and his or her spouse, they center on disputes between a parent and non-parent spouse.¹⁰⁵ In the realm of pure parent-versus-parent custody fights, however, there seems to be only one Supreme Court case of constitutional relevance.

In *Palmore v. Sidoti*,¹⁰⁶ a white couple had divorced and the mother had won custody of the couple's young daughter. When the mother began living with a black man, the father sought and won custody of his daughter on the argument that if the girl were allowed to remain in a racially mixed household, she would "suffer from the social stigmatization that is sure to come."¹⁰⁷ The Supreme Court unanimously reversed, framing the question as

should not simply take up and begin living together without the benefit of marriage and this is particularly true when the parties have minor children living in the home with them. We do not condone such activities now and have never done so, on the contrary we highly condemn same.).

104. See *Michael H.*, 491 U.S. at 129 (plurality opinion) (Where a "child is born into an extant marital family, the natural father's unique opportunity [to establish a substantial relationship with his child] conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter."); *Lehr*, 463 U.S. at 250 (The mother "married [a man other than the biological father] eight months after [the child's] birth."); *Quilloin*, 434 U.S. at 256

([L]egal custody of children is, of course, a central aspect of the marital relationship Under any standard of review, the State was not foreclosed from recognizing this difference [between biological fathers who have married the mothers of their children and those biological fathers who have not married the mothers of their children] in the extent of commitment to the welfare of the child.).

105. In *Michael H.*, the biological father challenged the mother's husband's holding himself out as the father of the child. In both *Lehr* and *Quilloin*, a biological father challenged the mother's husband's adoption of his child.

106. 466 U.S. 429 (1984).

107. *Id.* at 431 (quoting App. to Pet. for Cert. 27).

whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them.¹⁰⁸

The problem, said the Court, was basing the custody order on the “risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.”¹⁰⁹ The Court decided that a mother who had competently cared for her daughter¹¹⁰ could not be stripped of custody simply because the child would encounter the vitriol of intolerant neighbors. “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹¹¹

The Constitution is therefore not inapplicable to parental disputes; it is merely less predominant because the particular interests it protects are often less relevant to the judges charged with resolving competing custody claims. Deciding a case in which the state tries to take a child from a fit parent is relatively easy: the right to parent will usually dispose of the issue.¹¹² In comparison, the right to parent is less useful in resolving disputes between parents because each party has a valid constitutional interest. As difficult as sorting the interests may be, a court must avoid violating either parent’s constitutional rights.

This obligation applies across the right-to-parent categories. Just as the state cannot transfer custody between two parents based on one’s fear of racial stigma,¹¹³ the state would be powerless to transfer a child from a mixed-race family to a single-race family solely on account of race. And just as the state cannot require a

108. *Id.* at 433.

109. *Id.*

110. *See id.* at 432 (The Florida Court “reject[ed] . . . any claim of petitioner’s unfitness to continue the custody of her child.”).

111. *Id.* at 433.

112. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (“[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents.”). Stripping an unfit parent of custody of course does no constitutional harm, as the right to parent is premised on the presumption that “a fit parent will act in the best interest of his or her child.” *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (plurality opinion).

113. *See Palmore*, 466 U.S. 429.

parent to send his or her child to public school,¹¹⁴ it would likewise be unable to resolve a custody dispute on the basis of one parent being especially enamored of public education.

Custody disputes are, of course, fact-sensitive inquires often boiling down to only a few issues, and in some cases to only a single issue. Judges should be free to consider as many relevant factors as possible in making their decisions. The fairly simple point of this section is that judges should not abandon the Constitution in so doing. It is true that constitutional principles appear less frequently as the cases progress toward pure parent-versus-parent disputes. But this is only because the interests the Constitution protects from state action are less often implicated, and not because the rules do not apply. Wielding broad discretion to conduct delicate inquiries into child welfare, judges must be mindful of what the Constitution forbids.

II. CAN COURTS DISFAVOR GAY PARENTS ON THE ARGUMENT THAT HOMOSEXUALITY IS IMMORAL?

One reason courts frequently offer for denying custody to gay parents is the claim that homosexuality is immoral. According to this argument, parents who violate a community's moral values forfeit the right to raise their children.¹¹⁵ This Part shows how disfavoring gay parents out of an aversion to homosexuality is nothing more than a judgment grounded in the kind of irrational hostility or moral condemnation that *Romer* and *Lawrence* remove as a permissible aspect of judicial decisionmaking.

In *Roe v. Roe*,¹¹⁶ the Supreme Court of Virginia reversed a joint custody award of a divorced couple's daughter and ordered that the heterosexual mother receive sole custody. The basis for this change was the gay father's cohabiting with his lover while in custody of his

114. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (invalidating state law requiring children to attend public rather than private or religious grammar schools).

115. One commentator has explained that there are times when the state tries to constrain moral choice without advancing a secular or public welfare rationale. There are times, that is, when it tries to impose . . . [what] we have come to call family values on the ground that they are values to which the people collectively subscribe—values in terms of which the political community wishes to define itself. DAVIS, *supra* note 7, at 227.

116. 324 S.E.2d 691 (Va. 1985) (en banc).

daughter. Although the court conceded that “there was no evidence that the father’s conduct had an adverse effect on the child,”¹¹⁷ the court concluded that the “father’s continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law.”¹¹⁸

In *Ex parte D.W.W.*,¹¹⁹ the Supreme Court of Alabama upheld a visitation restriction imposed on a lesbian mother that allowed her to see her children only in the children’s grandparents’ home under their supervision, and only if the mother’s lover was absent from such visits. The court justified the restriction partially on the basis of evidence that when the children were living with their mother and her lover, they “began using inappropriate and vulgar language,” and that one child “began having problems with manipulation and lying.”¹²⁰ Although the court did not offer a link that would connect such acting out to the mother’s sexual orientation, it ultimately found no need for one:

Even without this evidence . . . , the trial court would have been justified in restricting [the mother’s] visitation, in order to limit the children’s exposure to their mother’s lesbian lifestyle. . . . Exposing her children to such a lifestyle, one that is . . . immoral in the eyes of most of its citizens, could greatly traumatize them.¹²¹

In *Weigand v. Houghton*,¹²² the Supreme Court of Mississippi affirmed an order that denied a gay father custody of his son despite the son’s living in an emotionally abusive home.¹²³ The court weighed a number of considerations in reaching its decision, but acknowledged that “the moral fitness of the parents did cause the greatest concern.”¹²⁴ Specifically, it was the gay father’s “moral fitness” on which the court focused, describing the man as “an admitted homosexual who lives with and engages in sexual activities with another man on a day-to-day basis. . . . [Rather than] refraining from that activity, he merely retreats behind closed and locked

117. *Id.* at 692.

118. *Id.* at 694.

119. 717 So. 2d 793 (Ala. 1998).

120. *Id.* at 796.

121. *Id.*

122. 730 So. 2d 581 (Miss. 1999) (en banc).

123. The boy’s stepfather was not only a convicted felon when he met the boy’s mother, but was subsequently convicted of committing drunken acts of domestic violence against the mother in the boy’s presence. These incidents led to the boy calling the police, as well as the family being evicted from its apartment. *See id.* at 584–86.

124. *Id.* at 586.

doors.”¹²⁵ Finding that the father’s sexuality had caused his son no harm other than occasional embarrassment,¹²⁶ the court nonetheless concluded that exposure to the father’s “homosexual lifestyle” could have an unspecified “adverse effect” on the boy.¹²⁷

Different courts see different kinds of “adverse effects” threatening the children of gay parents. The various concerns include anxieties that the children will develop bad habits,¹²⁸ come to hold pro-gay views,¹²⁹ grow up to be gay,¹³⁰ or become confused about sex or traditional gender roles.¹³¹ Courts also worry about the so-

125. *Id.*

126. *See id.* at 584 (The son “acknowledged that he had been previously embarrassed when he appeared in public with both his father and [his father’s lover] ‘while here in the South.’”).

127. *See id.* at 586.

128. *See, e.g.,* *Ex Parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (observing that, while living with their lesbian mother and her lover, the “children began using inappropriate and vulgar language and required psychiatric counseling. . . . [The] daughter began having problems with manipulation and lying. . . . [T]his child also experiences problems dealing with anger and . . . sometimes acts violently.”); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (en banc) (stating that the child of a lesbian “uses vile language. He screams, holds his breath until he turns purple, and becomes emotionally upset when he must go to visit the mother.”).

129. *See, e.g.,* *Hertzler v. Hertzler*, 908 P.2d 946, 949 (Wyo. 1995) (affirming restrictions on lesbian mother’s visitation rights because of her “intensive and unrelenting efforts to immerse the children in her alternative lifestyle, seemingly to the point of indoctrination.” The mother, for example, “insisted upon fully informing the children as to her lifestyle,” allowed the children to lie in bed with her and her lover, marched with them in a gay pride parade, and involved them in her and her lover’s commitment ceremony.).

130. *See, e.g.,* *Marlow v. Marlow*, 702 N.E.2d 733, 737 (Ind. Ct. App. 1998) (quoting trial court’s concern that gay father had “a specific intent . . . to orient the children to the gay lifestyle”); *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio App. 1985) (mentioning state’s interest in “endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles”); *Chicoine v. Chicoine*, 479 N.W.2d 891, 894 (S.D. 1992) (reciting psychologist’s testimony to allay fears of the children receiving “adverse developmental messages [from their lesbian mother] in terms of their own sexual preferences”); *Black v. Black*, 1988 WL 22823, at *2 (Tenn. Ct. App.) (expressing concern over possible effects on children’s “young, pliable minds” were they to live with lesbian mother and her lover).

131. *See, e.g.,* *Ex parte J.M.F.*, 730 So. 2d 1190, 1193 (Ala. 1998) (describing testimony of “pastoral counselor” that lesbian’s daughter “touch[ed] herself ‘excessively’ in the genital area . . . [and] might have issues of anger and sexuality”); *Lundin v. Lundin*, 563 So. 2d 1273, 1277 (La. Ct. App. 1990) (“[W]here there have been open, indiscreet displays of affection [between gay lovers] beyond mere friendship and where the child is of an age where gender identity is being formed, the joint custody arrangement should award greater custodial time to the [heterosexual] father.”).

cial stigma of having a gay parent, which will be discussed in Part III.

None of the fears above hold up under scrutiny. As for children who exhibit bad habits, courts generally presume—rather than discover after consideration of competent evidence—a causal link between the gay parent’s sexual orientation and the children’s misbehavior. The fact is that a child’s acting out during his or her parents’ separation and legal battle may stem from any source, be it the pain of being fought over or unpopularity at school. Bad behavior genuinely attributable to a parent’s sexual orientation must be supported by credible evidence before being considered, and there appears to be no such evidence.¹³² Further, in those instances when a child clearly reacts negatively to a parent’s sexuality, such reaction tends to take the form of simple embarrassment,¹³³ which—given the universality of children being mortified by their parents at some time or another—is hardly worth consideration. This seems especially true in light of the right to parent. Infringing on this fundamental interest because a child feels awkward about a parent’s sexuality would be wildly out of step with precedent, which has sustained parental rights in the face of much weightier state arguments about what is in a child’s best interests. If the state cannot require children to attend school until they reach a certain age, for example,¹³⁴ then it seems unpersuasive to assert that a state may strip a parent of custody on account of the child’s feeling embarrassed in that parent’s presence. Finally, if there were evidence to support fears about children growing up gay or confusing gender

132. See, e.g., Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 653 (1996) (“Lesbians’ children who experience divorce exhibit the same behaviors as children of heterosexual parents who divorce: vulnerability, concern that basic needs will not be met, concern for the parent’s well-being, anger, and conflicted loyalties.”); Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 954 (1995) (“[E]mpirical studies indicate that children raised by lesbian or gay parents are no more likely to have emotional or psychological disorders than are children raised by heterosexual parents.”).

133. See, e.g., *Weigand v. Houghton*, 730 So. 2d 581, 584 (Miss. 1999) (en banc) (The son “acknowledged that he had been previously embarrassed when he appeared in public with both his father and [his father’s lover] ‘while here in the South.’”).

134. See *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (striking down state law requiring children to attend school until the age of sixteen as violative of Amish parents’ religious freedom as well as the right to parent).

roles—which there is not¹³⁵—there would remain the question of whether being gay or violating gender norms are bad things. Courts citing these fears of course refrain from asking this question because it challenges the presumption of homosexuality’s immorality on which the courts’ fears rely.

The fears described above all boil down to the same thing: a fear of gay sexuality premised on the belief that there is something wrong with it. Putting aside the fact that this fear is baseless in light of evidence that children fare just as well with gay parents as with straight ones,¹³⁶ disfavoring gay parents out of a fear of gay sexuality is simply unconstitutional.

135. See, e.g., Shapiro, *supra* note 132, at 651 (“Recent surveys of gender role studies of children show no significant differences between children of lesbian mothers and children in a control group. . . . The general consensus among researchers is that there is no correlation between a parent’s sexual orientation and the sexual orientation of the child.”); Timothy E. Lin, Note, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 776–77 (1999)

([T]he notion that the parents’ sexuality influences the child’s sexual orientation is firmly discounted by empirical studies that conclude that children in lesbian and gay families do not significantly differ in their psychological development from children raised by heterosexual parents. These studies indicate that that parents’ sexual orientation does not affect “(1) a child’s gender identity, or psychological identification as either a male or female; (2) a child’s gender role behavior, or conformity with ‘cultural norms of femininity and masculinity’; or (3) a child’s own sexual orientation.”)

(footnotes omitted).

136. See, e.g., AM. PSYCHOLOGICAL ASSOC., LESBIAN AND GAY PARENTING (1995); ELLEN C. PERRIN, AM. ACAD. OF PEDIATRICS, COPARENT OR SECOND-PARENT ADOPTION BY SAME-SEX PARENTS 341 (2002) (“[A] growing body of scientific literature demonstrates that children who grow up with one or two gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual.”); Mike Allen & Nancy Burrell, *Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research*, 32(2) J. HOMOSEXUALITY 19, 28 (1996) (reporting that studies “indicate no difference between homosexual and heterosexual parents The results fail to support the assumption of widespread differences, or any differences on the basis of the particulars studied, between parents on the basis of sexual orientation.”); Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL’Y 207, 211 (1995) (“No study has shown any harm to children raised by lesbian or gay parents.”); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1036 (1992) (“There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. . . . [N]ot a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.”). Compare Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 897 (“[S]ome of the research sug-

Given cases like *Lawrence* and *Romer*, can denying custody to a fit gay parent whose sexuality has caused no harm to the child be anything other than a “status-based enactment divorced from any factual context”¹³⁷ that “demeans the lives of homosexual persons?”¹³⁸ It is difficult to see how a statement penalizing a gay parent for the “abhorrence” surrounding an “immoral and illicit relationship” that “‘flies in the face of . . . society’s mores’”¹³⁹ is not the product of “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable”¹⁴⁰ in a child custody proceeding.

The “properly cognizable” factors are, of course, those that bear on a child’s welfare, and shrewder courts try to separate a parent’s homosexuality from its effects on the child, insisting that the former is ignored in judicial deliberation because only the latter is relevant to the child’s best interests. In *Marlow v. Marlow*,¹⁴¹ for example, the Indiana Court of Appeals affirmed an order forbidding a gay father from having any overnight guests while in custody of his children and precluding him from taking his children to any functions sponsored by pro-gay organizations. In rejecting the father’s argument that the restrictions violated the *Palmore* rule against giving effect to irrational prejudice when making custody decisions, the court claimed that *Palmore* was inapplicable because “the trial court’s foremost consideration in this case was the children’s best interests, not [the father’s] homosexuality.”¹⁴²

But in listing what the trial court had found adverse to the children’s best interests, the court betrayed its disingenuousness. The court agreed with the trial judge that the father had “a specific intent . . . to orient the children to the gay lifestyle . . . by taking them to gay religious services and ceremonies, gay social events, and gay artistic performances.”¹⁴³ The court also agreed with the trial judge

gests that there are some serious potential harms to children raised by homosexual parents.”), with Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 338 (“We have also taken issue with Wardle’s assessment of the social science research that has studied the children of gays and lesbians. . . . [The research] supports the view that the law should not *ex ante* make it more difficult for gay and lesbian individuals to assert parental rights.”).

137. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

138. *Lawrence v. Texas*, 539 U.S. 2472, 2482 (2003).

139. *Roe v. Roe*, 324 S.E.2d 691, 693–94 (Va. 1985) (citation omitted).

140. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).

141. 702 N.E.2d 733 (Ind. Ct. App. 1998).

142. *Id.* at 737.

143. *Id.*

that this upset the children's need for a "balanced environment both physically and emotionally stable, . . . in which they can find safe retreat from a complex world."¹⁴⁴ "Clearly," concluded the court, "the facts of this case are distinguishable from those in *Palmore* because the visitation restrictions were not based on a private bias."¹⁴⁵

This contention strains credulity. The *Marlow* court insisted that its decision was based on the children's best interests rather than homophobia, but it is only homophobia that can explain the finding that the children's interests were harmed at all. By "gay religious services" and "gay social events," one assumes that the court meant functions in which homosexuality was treated as a normal characteristic undeserving of scorn or sanction. The court never even hinted that these events were sexual in nature or otherwise meant for adults only,¹⁴⁶ which it surely would have done if that had been the case. Given this, the only other basis on which to object to such activities is simple hostility to homosexuality and pro-gay views. The court attempted to avoid this conclusion by asserting—as usual without any causal evidence—that the trips made the children develop behavioral problems.¹⁴⁷ More credible was the court's argument that the children were too young to be exposed to such activities,¹⁴⁸ but this is ultimately just an argument against exposing children to openly gay people. Such people—presumed too confusing, alien, or deviant for the young to comprehend—must under this logic be kept from children. Homosexuality thus reduces to an unpleasant reality in our "complex world" from which children require a "safe retreat" into the arms of heterosexuals.

This is precisely the kind of reasoning that the Constitution rules out of child custody proceedings. The logic not only evinces a hostility of which *Lawrence*, *Romer*, and *Palmore* disapprove, but it

144. *Id.*

145. *Id.*

146. The court specified certain activities to which the father took his children, including a "Liberty and Justice for All" conference and a performance by a lesbian choir. *See id.* at 736.

147. *See id.* ("After visit[ing] with [their father], the boys exhibited behavior consistent with emotional distress such as bed-wetting, difficulty sleeping, nightmares and general malaise."). The court did nothing, however, to rule out the possibilities of these being pre-existing problems, ones having nothing to do with the father's sexual orientation, or merely age-appropriate behavior.

148. *See id.* at 737 (agreeing with the trial judge that "it [is] in the children's best interest that the issue of sexuality and the discussion thereof should be delayed until each child reaches adolescence.") (alteration in original).

also justifies gross restrictions on the right to parent. Few courts would likely have the audacity to tell straight parents when it is appropriate to educate their children about sexuality, much less that they cannot bring their children to events chock-a-block with people of their own or any other sexual orientation. The *Marlow* court's so instructing the children's gay father thus displays an intrusiveness entirely incompatible with the father's right to parent¹⁴⁹ as well as his First Amendment liberties.¹⁵⁰ The right to parent has limits, of course, but there was no suggestion that the father in *Marlow* transgressed such bounds. All the father did was bring his children to events at which homosexuality was not considered abnormal, unhealthy, or sinful: a normalcy that heterosexuality enjoys at nearly all times and places. Exposing children to these affirmations of gay sexuality likely does far more to further their ability to navigate a "complex world" than hiding them away in the ignorance of a sanitized gay-free "safe retreat." And certainly, letting a gay father share aspects of his sexuality with his children as any straight parent would is far more in keeping with the right to parent than forcing him to closet himself away from his own children.

Court decisions claiming to ignore a parent's sexuality while focusing obsessively on the purported harms of responsibly expressing that sexuality therefore ring false. Far from being unconcerned with orientation, such opinions are often based solely on a condemnation of it. These decisions are unconstitutional for violating both equal protection and substantive due process principles.

149. Skidmore discusses the Supreme Court's right-to-parent jurisprudence:

When a court places heavy restrictions on [custody or] visitation based on the presumption that the homosexual conduct of a parent is detrimental to the child, with the attendant lack of evidence of detrimental effect on the child, it places an undue burden on the . . . parent in maintaining a relationship with that child. This burden "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of [their] children."

Kif Skidmore, Note, *A Family Affair: Constitutional and Prudential Interests Implicated when Homosexuals Seek to Preserve or Create Parent-Child Relationships*, 89 Ky. L.J. 1227, 1254 (2001) (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925)).

150. Ironically, a Supreme Court decision regarded as a loss for gay rights offers support here.

"[I]mplicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.

Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)).

Perhaps cognizant of this, a good number of courts concede that gay parents are not necessarily unfit,¹⁵¹ but allow trial judges to “consider a homosexual lifestyle as a factor relevant in the custody determination of the child, as long as it is not the sole factor.”¹⁵²

But this “one of many factors” approach begs the question: if a parent’s sexual orientation is by itself an illegitimate consideration in child custody cases, then how does weighing it along with other factors suddenly make the inquiry constitutional? If being gay should not be held against a child’s mother when it is the only factor distinguishing her from the father, then why should it instantly become relevant if she happens to be an alcoholic as well? A mother’s alcoholism clearly implicates her child’s welfare, but there seems to be no reason why the relevance of one characteristic should make an extraneous one fair game for examination. It is simply unconvincing to argue that the presence of truly valid considerations somehow dilutes the illegitimacy of weighing an improper factor: how, for example, does considering a father’s drug use, selfishness, or physical abusiveness detract from the error of penalizing him for his sexuality?

The problem with considering a parent’s sexuality when other factors are relevant is the risk that moral disapproval of gay sexuality will become the decisive element in a case. In *White v. Thompson*,¹⁵³ for example, the Supreme Court of Mississippi affirmed an order transferring custody of two children from their lesbian mother to their paternal grandparents. The decision was exceptional not only because it stripped the mother of custody in favor of the children’s grandparents—to whom the fundamental right to parent does not usually apply—but also because the grandparents had collaborated with the father in actually abducting the children.¹⁵⁴ In reaching its decision, the court acknowledged that “the

151. See, e.g., *J.A.D. v. F.J.D. III*, 978 S.W.2d 336, 339 (Mo. 1998) (en banc) (“A homosexual parent is not *ipso facto* unfit for custody of his or her child” (citing *T.C.H. v. K.M.H.*, 693 S.W.2d 802, 804-805 (Mo. 1985) (en banc))); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (en banc) (“[A] lesbian mother is not *per se* an unfit parent.”).

152. *Morris v. Morris*, 783 So. 2d 681, 693 (Miss. 2001). See also *J.A.D.*, 978 S.W.2d at 339–40 (“It is not error, however, to consider the impact of homosexual or heterosexual misconduct upon the children in making a custody determination.”); *Bottoms*, 457 S.E.2d at 108 (“Conduct inherent in lesbianism is . . . [an] important consideration in determining custody.”).

153. 569 So. 2d 1181 (Miss. 1990).

154. The Supreme Court of Mississippi recounted the facts of the case: [The father] suggested that he take the children out to eat and then keep them overnight. [The mother] agreed. The next day [the father’s] girlfriend

predominant issue in this case seems to have been [the mother's] lesbian relationship, and the chancellor may have relied almost entirely on this."¹⁵⁵ The court claimed, however, that there were other factors that justified the transfer. The court cited the chancellor's findings that the mother had smoked marijuana outside the presence of her children¹⁵⁶ and twice committed adultery while married to the children's father.¹⁵⁷ For these reasons, the court concluded that the mother was "unfit, morally and otherwise, to have custody of her children."¹⁵⁸

One justice dissented, finding that the mother's supposed "neglect" played little, if any, part in motivating [the grandparents] to bring this action. Their concern was their objection to [the mother's] lesbian relationship."¹⁵⁹ Acknowledging that the mother had not been a perfect caretaker, the justice found no more negligence on her part than "in any case where a twenty-four year old mother with but a high school diploma and no independent means has been in effect deserted by a drunken husband who has provided not a penny in support."¹⁶⁰ The justice noted the court's proffered reasons for its decision, but focused on the high burden a non-parent must satisfy to strip a natural parent of custody. "I have read this record," wrote the justice, "and do not find proof even approaching [this] standard."¹⁶¹ If the mother's lover "were a man to whom [the mother] was married and, if the facts of this case were otherwise wholly identical, I dare say that no court would dream of placing custody with these children's grandmother and step-grandfather."¹⁶² Ultimately, the justice concluded that the court had based its decision not on failings of the mother substantial enough to override her fundamental right to parent, but instead on "prudish prejudice."¹⁶³

came by the trailer to pick up some extra clothes for the children, which [the mother] gave to her. [The father] did not return the children to [the mother] and [the mother] did not know of their whereabouts for about a week. [The father] instead delivered the children to [the paternal grandparents] at [the grandmother's] request.

Id. at 1182-83

155. *Id.* at 1184.

156. *See id.* at 1183.

157. *See id.*

158. *Id.*

159. *Id.* at 1185 (Robertson, J., dissenting).

160. *Id.*

161. *Id.* at 1187.

162. *Id.*

163. *Id.* at 1186.

Simply put, the “one of many factors” approach can too easily serve as a smokescreen for decisions based on simple animus that abrogate the right to parent. The ultimate problem with this approach is that it can turn an unconstitutional consideration—merely by placing it alongside a number of inconsequential others—into a suddenly valid reason for keeping children from their gay parents. In this sidestepping of the law, the approach does no better by the Constitution than the usual court practice of simply ignoring the document when adjudicating custody disputes involving gay parents.

In sum, *Lawrence*, *Romer*, and similar cases instruct that government practices disfavoring gay people solely out of a moral aversion to homosexuality are not legitimate ends of public policy; they are instead the products of discriminatory biases that courts cannot constitutionally credit. The right to parent likewise instructs that the alleged misdeeds of a particular parent must be truly weighty enough to justify infringing that right. Relatively trivial parental failings should therefore not be trumped up in accordance with the anti-gay sentiment that pervades custody disputes like those discussed above. Courts that routinely invoke the “homosexuality is immoral” argument as the only or prevailing reason for denying gay parents custody or unfettered visitation violate the Constitution. The argument that gay parents are morally unfit caretakers because they are gay should carry no weight in child custody proceedings.

III.

CAN COURTS DISFAVOR GAY PARENTS ON THE ARGUMENT THAT THEIR CHILDREN FACE STIGMA?

A second reason for ruling against gay parents in custody and visitation disputes involves the social stigma that children of gay parents sometimes face. This justification stems from the “homosexuality is immoral” rationale by arguing that a community’s hostility to gay people should not be allowed to adversely affect gay people’s children. The way to shield children from such harm, goes the argument, is to keep them from their gay parents.

In *Jacobson v. Jacobson*,¹⁶⁴ the Supreme Court of North Dakota reversed a custody award to a lesbian mother partly because “living in the same house with their mother and her lover may well cause the children to ‘suffer from the slings and arrows of a disapproving society’ to a much greater extent than would an arrangement

164. 314 N.W.2d 78 (N.D. 1981).

wherein the children were placed in the custody of their [heterosexual] father.”¹⁶⁵ Although the court acknowledged that the children would have to “deal with the problem” of having a gay parent regardless of with whom they lived, it concluded that “requiring the children to live, day-to-day, in the same residence with the mother and her lover means that the children will have to confront the problem to a significantly greater degree than they would if living with their father.”¹⁶⁶

Similarly in *Roe v. Roe*,¹⁶⁷ the Supreme Court of Virginia stripped a gay father of joint custody of his daughter, placing her in sole custody of her heterosexual mother. In addition to disfavoring the father’s living openly with his lover, the court reasoned that the daughter’s living with her gay father would “impose an intolerable burden upon her by reason of the social condemnation” attached to homosexuality.¹⁶⁸ “The father’s unfitness is manifested,” concluded the court, “by his willingness to impose this burden upon [his daughter] in exchange for his own gratification.”¹⁶⁹

More recently in *Scott v. Scott*,¹⁷⁰ the Court of Appeals of Louisiana affirmed an order transferring custody of a divorced couple’s two sons from the lesbian mother to the heterosexual father. “Jimmy [one of the two children] is aware,” wrote the court, “of social situations both from what he hears at school and what he sees on television . . . Jimmy understands that men and women are supposed to hug and kiss each other.”¹⁷¹ Of concern to the court was the testimony of a psychologist the father hired to bolster his case. The psychologist testified that since Jimmy was aware of how men and women are “supposed” to behave, living with his lesbian mother and her lover might be “a destructive emotional event for Jimmy because he would . . . [be] placed into conflict with the ordinary morays [sic] of society.”¹⁷² The court also feared that living with his gay mother would be harmful for Jimmy on account of his attending a “private religious school which advocates Christian fundamentalist beliefs and teachings.”¹⁷³ The ridicule or condemnation that Jimmy might face in such a school made it all the more

165. *Id.* at 81 (quoting trial court without citation).

166. *Id.*

167. 324 S.E.2d 691 (Va. 1985) (en banc).

168. *Id.* at 694.

169. *Id.*

170. 665 So. 2d 760 (La. Ct. App. 1995).

171. *Id.* at 764.

172. *Id.*

173. *Id.* at 765.

important that he enjoy “a long period of stable predictable living . . . in a relatively conflict free environment.”¹⁷⁴

There is a clear constitutional problem with considering whatever stigma may attach to children of gay parents. *Palmore v. Sidoti*,¹⁷⁵ discussed in Part I, precludes courts from punishing gay parents for the bigotry their children sometimes face. Although the Court applied strict scrutiny—which is inapplicable to classifications based on sexual orientation—to the lower courts’ decision to remove a child from her mixed-race home,¹⁷⁶ the decision nonetheless operates to the benefit of gay parents litigating custody disputes. “The question,” said the Court, “is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.”¹⁷⁷ What thus irked the Court most was not merely taking a child from her interracial family, but doing so out of fear of the trouble that bigots might cause. Sustaining the trial judge’s capitulation to prejudice would have sent the wrongheaded message that courts are at the mercy of hatemongers. The Court rightly concluded that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹⁷⁸

The Court’s language was broad: it did not condemn only racial biases, but more generally “private” ones of presumably wide variety. It is likely, for example, that the Court would have reached the same result if the child had been taken from her home on account of her mother being unmarried, obese, or excessively messy. These characteristics do not warrant strict scrutiny, but any judge given the case would probably conclude that the distaste they evoke in some people is not a sufficient reason for taking a child from his or her home. *Palmore* stands for the proposition that race cannot determine a custody award, but only because the stigma that flows from race had been invoked to deny custody. The decision is therefore not only about race.¹⁷⁹ *Palmore*’s actual holding—that wishing

174. *Id.* (quoting the psychologist).

175. 466 U.S. 429 (1984).

176. *See id.* at 432 (The lower court “was entirely candid and made no effort to place its holding on any ground other than race. . . . Such classifications are subject to the most exacting scrutiny.”).

177. *Id.* at 433.

178. *Id.*

179. Indeed, courts have applied *Palmore* in custody proceedings where race was not implicated. *See, e.g.*, *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (applying *Palmore* where mother was gay); *Pater v. Pater*, 588 N.E.2d 794, 798 (Ohio 1992) (applying *Palmore* where mother was Jehovah’s Witness).

to shield a child from bigotry aimed at a parent is no reason to deny custody to that parent—is entirely applicable to cases where the parent is a member of other stigmatized groups. It was therefore not the mother’s being in an interracial relationship that won her case, but the trial judge’s deference to bigotry in issuing the custody order.

Punishing gay parents for the homophobia their children can face also violates another constitutional principle on which *Palmore* draws: the fundamental right to parent. Given the weightiness of this right, it seems a substantive due process violation for courts to infringe on it simply to shield the children of gay parents from the kind of barbs and taunts that countless other children face as they grow into adults. Why, for example, should a parent’s sexuality carry special weight when courts routinely overlook other sources of social opprobrium? Courts essentially never base custody awards on the ridicule or persecution children sometimes face on account of their parents’ being single, divorced, poorly educated, unemployed, welfare-dependent, overweight, or religious minorities. This could be because courts realize that the petty insults children hurl at each other on account of their parents are undeserving of judicial attention. Innumerable children have been taunted or picked on for their parents fitting in one or more of the categories above, and yet they are not removed from their homes because of this. Exactly what would courts have gay parents do? The parents cannot stop being gay although they can, as some courts would have them, abandon their sex lives.¹⁸⁰ But imposing such a requirement would both eviscerate the right of sexual intimacy and seriously undermine gay people’s rights as parents. The fundamental right to parent is too important to encumber merely because children often have to take some flak for who their parents are. Given that there is no indication of any greater bullying of the children of

180. One court noted that

living with another person of the same sex in a sexual relationship is not something beyond [the mother’s] control. It may be argued that to force her to dissolve her living relationship in order to retain custody of her children is too much to ask. However, we need no legal citation to note that concerned parents in many, many instances have made sacrifices of varying degrees for their children.

Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981). See also *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (en banc) (implying that gay father would not have lost joint custody but for “his willingness to impose this burden [the stigma of being gay] upon [his daughter] in exchange for his own gratification [namely, living openly with his lover].”).

gay parents,¹⁸¹ the stigma that these children might face deserves no greater consideration than that attributable to the other factors above. In practice, this means that such stigma deserves no consideration at all.

Finally, penalizing gay parents for being targets of discrimination runs counter to *Lawrence*. The Court was careful to note that Texas's statute was unconstitutional not merely for prohibiting private adult consensual behavior, but also because it made such behavior "a criminal offense with all that imports for the dignity of the persons charged."¹⁸² What the Court found especially objectionable about the law was not that its violation amounted to "a class C misdemeanor, a minor offense in the Texas legal system,"¹⁸³ but that it constituted "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."¹⁸⁴ This kind of invitation, spurred on by "[t]he central holding of *Bowers* . . . , demeans the lives of homosexual persons."¹⁸⁵ Given this, it is unlikely that the Court would affirm custody orders that rely on the very homophobia disapproved of in *Lawrence*. If the Court frowned upon gay people having to indicate on job applications that they had been convicted of breaking a homophobic law,¹⁸⁶ then it would probably also frown upon gay parents having to give up their children on the chance that homophobes might taunt their kids.

In light of *Palmore*, the right to parent, and *Lawrence*, there are numerous problems with disadvantaging gay parents in child custody disputes because of the stigma that their children sometimes

181. See, e.g., Baggett, *supra* note 13, at 199 ("A review of all reported custody and visitation cases involving a parent with a same sex orientation found only one instance of harassment, which took the form of teasing."). Another commentator finds that

empirical research dispels much of the fear that children with lesbian or gay parents will be socially stigmatized. . . . The empirical evidence indicates that this teasing does not have far-reaching effects on the child, and is not dissimilar to teasing and harassment "based on a child's physical appearance, race, religion, economic status, or any number of other factors."

Lin, *supra* note 135, at 779–80 (quoting Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 215 (1995)).

182. *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003).

183. *Id.*

184. *Id.*

185. *Id.*

186. See *id.* ("[T]he Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.").

face. This stigma should not be considered in child custody proceedings and should likewise not be counted as a valid factor justifying consideration of anti-gay biases under the “one of many factors” approach.

IV.
CAN COURTS DISFAVOR GAY PARENTS ON THE
ARGUMENT THAT UNMARRIED
COHABITATION IS IMMORAL?

A third reason for denying gay parents custody and unrestricted visitation of their children invokes the presumed immorality of unmarried cohabitation. According to this argument, unmarried lovers living together—whether gay or straight—set a bad moral example for children. A parent’s choice to live with a lover while in custody of a child should therefore count against that parent’s requests for custody or unfettered visitation.

*Taylor v. Taylor*¹⁸⁷ is a typical decision articulating this rationale. There, the Supreme Court of Arkansas affirmed imposition of a non-cohabitation restriction that conditioned a lesbian mother’s temporary custody of her children upon her lover’s moving out of their home.¹⁸⁸ The court explained that such a restriction “aids in structuring the home place so as to reduce the possibilities (or opportunities) where children may be present and subjected to a single parent’s sexual encounters, whether they be heterosexual or homosexual.”¹⁸⁹ Although the court allowed that “no evidence has been presented that [the mother] has engaged in promiscuous or illicit behavior with [her lover] in the presence of the children,” it found that such a fact “misses the point . . . [because] Arkansas case law simply has never condoned a parent’s unmarried cohabitation.”¹⁹⁰ On this basis, the court concluded that “it was not in the children’s best interests for their primary custodian to continue cohabitating [sic] with another adult with whom she admitted being romantically involved.”¹⁹¹

Likewise in *Tucker v. Tucker*,¹⁹² the Supreme Court of Utah approved a trial judge’s finding that “cohabitation without benefit of marriage in the same home with the minor child . . . demonstrates a

187. 47 S.W.3d 222 (Ark. 2001).

188. *Id.* at 225.

189. *Id.*

190. *Id.*

191. *Id.*

192. 910 P.2d 1209 (Utah 1996).

lack of moral example to the child and a lack of moral fitness.”¹⁹³ There, the court affirmed a trial judge’s order awarding custody of a couple’s daughter to the heterosexual father rather than the lesbian mother despite conceding both parents’ fitness.¹⁹⁴ The court dismissed the suggestion that the custody award was premised on the mother’s sexuality,¹⁹⁵ agreeing instead with the trial judge that the award issued from the mother’s choice “to act out her sexual preference by conducting a relationship with a woman companion involving cohabitation without benefit of marriage.”¹⁹⁶

In *Pulliam v. Smith*,¹⁹⁷ the Supreme Court of North Carolina affirmed an order stripping a gay father of custody of his two sons and placing them with their heterosexual mother, who lived in a different state. The father lived with his lover, and acknowledged that the two had sex behind their closed bedroom door while the children were home.¹⁹⁸ The court concluded that

activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct . . . , [and] allowing the children to see unmarried persons known by the children to be sexual partners in bed together . . . support the trial court’s findings of “improper influences.”¹⁹⁹

The preceding cases’ willingness to punish gay parents for not marrying the lovers with whom they live begs the question: is it fair to penalize a group of people for failing to do what the law forbids them? If gay lovers have no choice but to live together “without benefit of marriage”²⁰⁰ because states deny them the right to marry,²⁰¹ then is it intellectually honest for courts to assert that un-

193. *Id.* at 1213 (quoting trial court’s opinion without citation).

194. *See id.* at 1215 (“What was at issue was which of two basically good parents should have custody of the child.”).

195. *See id.* at 1213 (This matter “should be analyzed similarly to a situation involving cohabitation with a member of the opposite sex without benefit of marriage in the presence of a minor child.”) (quoting trial court’s opinion without citation).

196. *Id.*

197. 501 S.E.2d 898 (N.C. 1998).

198. *See id.* at 903 (The father and his lover “testified that both their bedroom door and the children’s bedroom door were open at all times, except when the two men engaged in sexual activity.”).

199. *Id.* at 904.

200. *Tucker*, 910 P.2d at 1213 (quoting trial court’s opinion without citation).

201. *But see Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding, under state constitution, that Massachusetts may not deny marriage to same-sex couples).

married cohabitation is a choice²⁰² for which gay parents deserve legal sanction? Cohabiting gay people who wish to marry but are prevented by law are surely not choosing a life of unmarried cohabitation. They are choosing to live together rather than apart, but punishing that choice makes sense only if it is in fact legitimate for courts to prefer marriage to unmarried cohabitation when making custody decisions.

The logic of favoring married over unmarried households rests on the assumption that marriage reflects the love and commitment between a couple that will serve a child's interests better than the presumably smaller quantum of dedication present in unmarried homes.²⁰³ In asking whether this presumption is fair to use in custody proceedings involving gay parents, a couple of objections immediately suggest themselves. First, the preference ignores the fact that unmarried gay couples can be just as loving and competent caregivers as married straight couples.²⁰⁴ Second, the preference disadvantages gay couples in every case because they currently cannot marry whereas straight couples always have that option. These objections are slightly different ways of saying the same thing: the marriage preference is unfair because, in using marriage as shorthand for good parenting, it systematically disfavors countless gay couples who are in fact excellent caregivers.²⁰⁵

202. See, e.g., *Ex Parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (finding lesbian mother "unable, while choosing to conduct an open cohabitation with her lesbian life partner," to provide the benefit of a loving home anchored by marriage); *Tucker*, 910 P.2d at 1213 (The lesbian mother "has chosen to act out her sexual preference by conducting a relationship with a woman companion involving cohabitation without benefit of marriage.") (quoting trial court's opinion without citation).

203. See *supra* note 103.

204. See, e.g., Shapiro, *supra* note 132, at 650 ("The literature emphatically demonstrates that there is no basis for any generalized concern about harm to children from being raised by lesbian and gay parents."); Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61, 80 (2000) ("Lesbian and gay parents, like other parents, provide home environments in which children can thrive."); Bruce D. Gill, Comment, *Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians*, 68 TENN. L. REV. 361, 390 (2001) ("Homosexual relationships are equally capable of including the love and commitment regarded as inherent in marriage."). See also citations listed *supra* in note 136.

205. Courts sometimes claim that this preference makes no distinction between gay and straight couples because it disfavors unmarried cohabitation regardless of sexual orientation. See, e.g., *In re Marriage of Diehl*, 582 N.E.2d 281, 292 (Ill. App. Ct. 1991) ("An intimate cohabitation relationship of a parent, be it heterosexual, homosexual or lesbian in nature, is a proper factor to be considered by the trial court in making a custody determination."). This claim is simply false:

As far as equal protection jurisprudence is concerned, however, this is not a problem. The Supreme Court has made it clear that under the rational basis review that state action affecting gay people currently receives, presumptions made for the sake of administrative convenience are not unconstitutional for being over- or under-inclusive.²⁰⁶ Treating marriage as a referent of competent parenting therefore does not violate the Equal Protection Clause merely for leaving out the numerous gay or otherwise unmarried parents who care for children as well as or better than their married counterparts.

But this does not settle the matter. Gay parents still possess a substantive due process right to raise their children, and it is in the context of this fundamental right that a presumption that consistently disadvantages gay parents violates the Constitution.

*Troxel v. Granville*²⁰⁷ is a powerful argument against the marriage preference. In that case, the Court invalidated a Washington state statute that permitted anyone to petition for—and a court to grant—visitation rights regarding any child on a showing that such visitation would be in the child's best interests. There, two sisters' paternal grandparents invoked the statute to seek visitation rights in excess of what the girls' mother thought appropriate. The Court ruled in favor of the mother, who was herself unmarried,²⁰⁸ finding that the case reduced to "nothing more than a simple disagreement between the Washington Superior Court and [the mother] concerning her children's best interests."²⁰⁹ The Court concluded that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions sim-

straight couples can access the benefit of a marriage preference whereas gay couples cannot. See, e.g., *Tucker v. Tucker*, 881 P.2d 948, 954 n.6 (Utah Ct. App. 1994), *rev'd* 910 P.2d 1209 (Utah 1996) ("[U]nder Utah law, homosexual couples, unlike heterosexual couples, cannot be married even if they so desire.").

206. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" (quoting *Phillips Chem. Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960))); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.").

207. 530 U.S. 57 (2000) (plurality opinion).

208. See *id.* at 60 ("Tommie Granville and Brad Troxel shared a relationship that ended in June 1991. The two never married, but they had two daughters.") (plurality opinion).

209. *Id.* at 72.

ply because a state judge believes a ‘better’ decision could be made.”²¹⁰

As far as the marriage preference is concerned, there is no conclusive empirical evidence that growing up in a married home is in most cases “better” for a child than living in an unmarried gay household.²¹¹ Even if there were, the marriage preference would reflect no more than a “simple disagreement”²¹² between a court and a gay parent about what is in a child’s best interests. Since such disagreements cannot justify infringing the right to parent, systematically disadvantaging gay parents by way of the marriage presumption violates the Due Process Clause.

A case decided thirty years before *Troxel* also counsels against punishing gay couples for unmarried cohabitation. In *Stanley v. Illinois*,²¹³ the Supreme Court invoked the right to parent to invalidate a state law that presumed unmarried fathers to be unfit parents. *Stanley*’s core rule is that “a presumption that distinguishes and burdens all unwed fathers” is “constitutionally repugnant.”²¹⁴

By its plain language, *Stanley* appears to prohibit not only presumptions against unmarried gay parents, but also any presumption—regardless of sexual orientation—that an unmarried parent is somehow less fit than a married one. Although *Stanley* may appear to be only about ensuring that some sort of adjudicative process occurs in custody determinations, it in fact speaks much more to the particular requirements of such proceedings. The decision draws on two basic propositions to reach a conclusion about how custody disputes must be handled. *Stanley* relies on both the due process right to parent as well as the common law rule that a child’s best interests are of primary importance in custody decisions. Accordingly, *Stanley* requires that some concrete showing of harm to the child by way of a parent’s misbehavior be shown before the parent is stripped of custody. The statute invalidated in *Stanley* failed constitutional inquiry because its presumption gave no consideration to the father’s rights or the actual effects of his parenting on his children.

Although the statute in *Stanley*, by automatically stripping fathers of custody solely on account of being unmarried, is a more extreme version of the disfavored status that attaches to unmarried parents in custody disputes, *Stanley* clearly renders presumptions of

210. *Id.* at 72–73.

211. *See supra* notes 136 and 103.

212. *Troxel*, 530 U.S. at 72 (plurality opinion).

213. 405 U.S. 645 (1972).

214. *Id.* at 649.

unfitness constitutionally suspect. Consequently, the burden that gay parents unequally bear for lacking a status the law denies them appears under *Stanley* to violate gay people's right to parent as well as their children's right not to be taken from them on a generalization.

Finally, *Lawrence* also counsels against the marriage preference. Although the Court did not decide that same-sex couples have the right to marry,²¹⁵ it also did not decide that being unable to marry permits the state to disfavor same-sex couples in other areas of law. The Court wrote that Texas's statute sought "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."²¹⁶ Same-sex couples may therefore not yet enjoy legal recognition through marriage, but that does not mean that they may be disfavored in other ways. *Lawrence* decided that gay people may not be treated unequally in criminal law, and there is no reason to think the decision's logic stops there. Indeed, the opinion's broad language suggests just the opposite, and Justice Scalia recognized as much:

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. . . . [W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"?²¹⁷

Regardless of whether the Court ever cites *Lawrence* to decide that same-sex couples can exercise the constitutional right to marry, *Lawrence* today stands for the proposition that gay couples, "whether or not entitled to formal recognition in the law,"²¹⁸ have the right to develop and maintain personal relationships without state intrusion or penalty. Gay parents should therefore not have to choose between their lovers and children: *Lawrence* guarantees their liberty to live with the former, and the right to parent safeguards their interests in caring for the latter.

None of this should imply that a parent's sexual behavior is off the table in child custody proceedings; courts should be free to inquire into any inappropriate sexual displays. The yardstick for

215. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (The decision "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

216. *Id.* at 2478.

217. *Id.* at 2497-98 (Scalia, J., dissenting) (citations omitted).

218. *Id.* at 2478.

inappropriateness, however, should be what is truly out of bounds regardless of orientation, rather than something as harmless as same-sex intimacy “behind closed and locked doors.”²¹⁹ In finding that same-sex couples “are entitled to respect for their private lives”²²⁰ just as heterosexuals have been, *Lawrence* protects gay parents from being penalized for displays of affection in which straight or married parents have always been free to indulge.

Troxel, *Stanley*, and *Lawrence* together instruct that using a marriage preference to systematically disadvantage gay parents in custody disputes is unconstitutional. Not only does presuming married homes superior to unmarried ones undermine the fact-sensitivity traditional to custody proceedings, but it also infringes the fundamental right to parent out of belief in a questionable empirical assertion. Such a presumption may be convenient, but it also violates gay parents’ substantive due process rights. Preferring married homes and thereby disfavoring unmarried cohabitation is thus a practice out of whack with the Constitution.

CONCLUSION

A court adjudicating a custody dispute clearly needs to be aware of factors that affect the best interests of the child. The question this Note has posed is whether a court may constitutionally consider a gay parent’s sexual orientation as one such factor. After surveying the constitutional principles relevant to gay rights and family law as well as the arguments courts invoke to deny gay parents’ custody claims, the answer is clearly no. Disfavoring gay parents out of a moral aversion to gay sexuality violates *Lawrence* and *Romer* by premising state action on homophobic sentiment. Punishing gay parents for the social stigma their children sometimes face violates *Palmore* by capitulating to bigotry, and infringes the right to parent by taking kids from their homes on speculative and relatively frivolous grounds. Sanctioning gay parents for living together without being married violates the right to parent by presuming such parents unfit, and runs counter to *Lawrence* by demeaning same-sex relationships that are due respect despite lacking legal recognition.

In concluding its opinion, the Court in *Lawrence* observed that if the drafters of the broadly-worded Fifth and Fourteenth Amendments had

known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to

219. *Weigand v. Houghton*, 730 So. 2d 581, 586 (Miss. 1999) (en banc).

220. *Lawrence*, 123 S. Ct. at 2484.

have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.²²¹

This mention of oppression evokes the language of *Loving v. Virginia*,²²² in which the Court struck down the nation's sixteen remaining anti-miscegenation statutes as "measures designed to maintain White Supremacy."²²³ Like *Loving*, the laws at issue in *Lawrence* were about power: specifically, the power to marginalize and subordinate a class of citizens thought inferior or deviant. In ruling that government "cannot demean" gay people's "existence or control their destiny by making their private sexual conduct a crime,"²²⁴ the *Lawrence* Court reaffirmed the principle that such degradation is never constitutional.

Judges hearing custody disputes should therefore remember that arguments regarding a gay parent's sexual orientation ultimately seek to debase: in presuming heterosexuality's normalcy and superiority, they penalize gay parents for being gay. These arguments grow out of fear, misunderstanding, and hate. They offend the Constitution, and should have no place in custody decisions.

221. *Id.*

222. 388 U.S. 1 (1967).

223. *Id.* at 11.

224. *Lawrence*, 123 S. Ct. at 2484.