UCLA LAW REVIEW DISCOURSE

Reflections on Sexual Liberty and Equality: "Through Seneca Falls and Selma and Stonewall"

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ABSTRACT

This Essay uses the opportunity to examine *Roe v. Wade* forty years after it was decided and *Lawrence v. Texas* ten years after it was decided as a platform from which to analyze the status of the civil rights paradigm in American law. A comparison of the two decisions illustrates an important and new point about how civil rights law is deployed to achieve very different goals.

What civil rights movements and arguments framed under the rubric of equality do best, and a project for which the law is perfectly suited, is ending de jure exclusions and categorical inequalities. The U.S. Supreme Court did precisely that in *Lawrence* and it may do that again in a marriage case in the near or distant future. What civil rights movements and equality arguments do not do so well is dismantling hierarchies. *Roe* is importantly different from *Lawrence* in part because it involved a far messier, more complex set of hierarchies than were present in the challenge to sodomy laws.

The decision in *Roe* triggered a massive countermobilization by antichoice advocates both inside and outside of the legal system. Claims of reproductive rights now seemingly languish in a political stalemate that has changed little in forty years. By contrast, *Lawrence* was litigated narrowly, carefully avoiding a challenge to other laws that criminalize consensual adult sexual acts. No conservatives are demanding its reversal, but lower courts have seized on the narrowness of its holding, making it less powerful in challenges to anti LGBT discrimination than was expected when the decision was announced. This Essay adds to the legal literature an explication of these points, and argues that the exclusion-hierarchy distinction provides a partial explanation of why today *Lawrence* seems a safe precedent, while *Roe* remains wobbly.

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INTRODUCTION

> We, the people, declare today that the most evident of truths—that all of us are created equal—is the star that guides us still; just as it guided our forebears through Seneca Falls, and Selma, and Stonewall; just as it guided all those men and women, sung and unsung, who left footprints along this great Mall, to hear a preacher say that we cannot walk alone; to hear a King proclaim that our individual freedom is inextricably bound to the freedom of every soul on Earth.
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> —Barack H. Obama, Second Inaugural Address, January 21, 2013[1]

Today, forty years after *Roe v. Wade*[2] and ten years after *Lawrence v. Texas*,[3] we can connect the dots, as President Obama suggested, linking these watershed U.S. Supreme Court decisions and the social movements that fueled them to the full panoply of claims for equality under law. *Roe* and *Lawrence* fit comfortably in the heritage of American civil rights culture because they fulfill the noblest aspirations of that ethos: to force the state to extend the full moral agency of citizenship to a disadvantaged social group. That reading stakes their claim to greatness. But the decisions also differ in an important way. They illustrate two distinct functions of civil rights movements: to end categorical de jure inequalities, and to dismantle de facto hierarchies.

Lawrence exemplifies the goal of ending categorical inequality, often manifested in the form of blanket exclusion. The antiexclusion aspect of the civil rights paradigm arose directly and organically from the movement to challenge Jim Crow segregation laws in the South, the most famous products of which were *Brown v. Board of Education*[4] and the federal civil rights statutes enacted in the 1960s.

Roe v. Wade, by comparison, illustrates a different and more complex version of the civil rights paradigm. The very nature of the statute that was struck down—the criminalization of certain decisions regarding pregnancy—functioned as a proxy for the subordination of women. The Court in *Roe* addressed an exclusion that was more de facto than de jure, but the gendering intrinsic to an-

1. President Barack H. Obama, Inaugural Address by President Barack Obama (Jan. 21, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.
2. 410 U.S. 113 (1973).
3. 539 U.S. 558 (2003).
4. 347 U.S. 483 (1954).

tiabortion laws was essential to their foundational harm, which was a soft form of state coercion of motherhood.[5]

The double anniversary of *Roe* and *Lawrence* provides an apt moment to ask what the history of the two decisions can tell us about the relationship between the civil rights paradigm and sexuality, how the legacies of *Roe* and *Lawrence* illustrate the differing functions of civil rights claims, and how future legal developments related to law and sexuality may (or may not) produce greater justice for sexual minorities.

Additionally, the coincidence of the two anniversaries invites comparison of the social movements behind each decision. Specifically, today is a prime moment to ask—in light of what we know about the possibilities, limits, and perils of the civil rights paradigm—why the political contingency of *Roe* has persisted for forty years, even as the controversy over the criminalization at issue in *Lawrence* ten years ago has disappeared from public debate. Assertions of reproductive rights now seemingly languish in a political and legal coma, while popular support for lesbian, gay, bisexual, and transgender (LGBT) rights appears to grow at almost miraculous speed.[6]

I. THE CIVIL RIGHTS PARADIGM

Whatever the shortcomings of a formal equality model,[7] there is an important cultural reality to the sense of hope and longing that often arises from invocation of aspirational equality, of which President Obama's speech is merely one of many examples. Its significance animates Wendy Brown's paraphrasing of Gayatri Spivak: Civil rights protection is "that which we cannot not want."[8] In the United States, advocates for racial justice created a cultural frame for the idea of civil rights as well as a doctrinal foundation. In addition to legal arguments, the civil rights movement produced a scripture-like narrative of triumph and re-

5. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 788–91 (1989).

6. *See, e.g.*, Marjorie Connelly, *Support for Gay Marriage Growing, but U.S. Remains Divided*, N.Y. TIMES, Dec. 7, 2012, http://www.nytimes.com/2012/12/08/us/justices-consider-same-sex-marriage-cases-for-docket.html ("In a Pew poll conducted in October, 49 percent of respondents said they favored allowing gays and lesbians to marry legally and 40 percent were opposed. Four years earlier, in August 2008, the numbers were just about reversed: 39 percent in favor and 52 percent opposed.").

7. *See, e.g.*, Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 719–23 (2011).

8. Wendy Brown, *Suffering the Paradoxes of Rights*, *in* LEFT LEGALISM/LEFT CRITIQUE 420, 420 (Wendy Brown & Janet Halley eds., 2002) (internal quotation marks omitted).

demption that has inspired every American campaign for social justice since the middle of the twentieth century.[9]

This narrative now attaches to LGBT rights. Even as older movements continue the effort to eliminate obstacles based on such factors as race or sex, LGBT equality is frequently described in such terms as the civil rights question of our time.[10] Indeed, it was this premise that gave such power to how the president phrased his support for LGBT equality in his second inaugural address, even though he was repeating a position that he had stated earlier.[11] The president's speech places LGBT rights squarely in the civil rights heritage, in implicit equivalence to its forebears, and reinforces the idea that LGBT issues are, for better and for worse, a new generation's most emblematic civil rights claim.

What civil rights movements and arguments framed under the rubric of equality do best, and a project for which the law is perfectly suited, is ending de jure exclusions and categorical inequalities. The Supreme Court did precisely that in *Lawrence* and it may do that again in a marriage case in the near or distant future. In the past, when a challenged statute has contained an exclusion or other absolutist result, the Court has sometimes found a law unconstitutional under even a weak constitutional standard.[12]

What civil rights movements and equality arguments do not do so well is dismantling hierarchies. Social hierarchies often incorporate exclusions, but they are more complex and more enduring. Reva Siegel conceptualized the resilience of stratification systems as "preservation through transformation," a process by which a legal reform that ends the categorical inequality that is fundamental to a status regime—such as racial segregation—will nonetheless permit the modern-

9. *Cf.* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 2–4, 139–140 (2011) (describing what Balkin calls "the Great Progressive Narrative").

10. *E.g.*, Emily Bazelon, *The Civil Rights Case of Our Generation*, SLATE (Dec. 7, 2012, 4:56 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/supreme_court_to_hear_gay_marriage_cases_the_justices_agree_to_hear_windsor.html (reporting on the Supreme Court's decision to hear two same-sex marriage cases); *see, e.g.*, Editorial, *Next Civil Rights Landmark*, N.Y. TIMES, Dec. 7, 2012, http://www.nytimes.com/2012/12/08/opinion/next-civil-rights-landmark.html; Chris Good & Pierre Thomas, *Eric Holder: Gay Marriage Is the Next Civil Rights Issue*, ABC NEWS (Feb. 28, 2013, 7:00 AM), http://abcnews.go.com/blogs/politics/2013/02/eric-holder-gay-marriage-is-the-next-civil-rights-issue (quoting Attorney General Eric Holder); Susan Kelleher, *Gregoire: Same-Sex Marriage "the Civil Rights Issue of This Generation,"* SEATTLE TIMES (Nov. 6, 2012, 9:50 PM), http://blogs.seattletimes.com/politicsnorthwest/2012/11/06/gregoire-same-sex-marriage-the-civil-rights-issue-of-this-generation.

11. *See, e.g.*, Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES, May 9, 2012, http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html.

12. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (precluding equal treatment for gays and lesbians unless state constitution was amended); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (excluding children not legally in the United States from public schools).

ization of rationales for inequality, and thus preserve the inequality itself.[13] Blaming disadvantage on cultural factors, such as single-parent households, is an example of such a modernization. The result is that much of the structure of racial hierarchy can remain in place, even though the arguments for why such hierarchy is natural have shifted and narrowed from biological inferiority to the inferiority of social arrangements.

If we measure the state of sexual freedom by the ending exclusions prong of the civil rights paradigm, it is in terrific shape. In fact, possibly the greatest gift from the quasi-mythologized history of civil rights in the 1960s is the sense of the inevitability of victory over irrational bias. The idea of an American march of progress toward equality for all now incorporates LGBT issues, to the point that the single question in the gay marriage debate about which the largest number of people agree is probably the eventual outcome: Nationwide legalization is inevitable.[14] The most solid evidence for the claim of inevitability may be demographic data showing high levels of support among younger age groups,[15] but the frame of inevitability for the achievement of formal equality was crucially shaped by the American experience of a succession of earlier civil rights movements, especially those seeking to end discrimination based on race, sex, and disability.

If, however, we measure the state of sexual freedom in anti-hierarchy terms, the conclusion is far less optimistic. The fragility of abortion rights is illustrative. The Court's decision in *Roe*, even as reconfigured somewhat more along women's equality principles in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[16] triggered less an end to exclusion than a protracted forward-backward dance over how much autonomy women have to make decisions as to the procreative dimensions of their lives. The result is a weakened form of subordination. As a formal matter, women can choose to have abortions and the state cannot absolutely prohibit abortion in all circumstances. Access to care, however, remains highly contested, so that low-income and African-American women, who are most likely to have an abortion,[17] remain at the bottom of this dimension in the hierarchy of sexuality.

13. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2175–78 (1996) (internal quotation marks omitted).
14. *See* David von Drehle, *How Gay Marriage Won*, TIME, Mar. 28, 2013, http://swampland.time.com/2013/03/28/how-gay-marriage-won (describing, in part, the selection of gay marriage as the *Time* cover story for that week).
15. *See, e.g.*, Connelly, *supra* note 6 (noting that "[i]n a Gallup poll conducted [November 2012], 73 percent of people between 18 and 29 years old said they favored [same-sex marriage]").
16. 505 U.S. 833, 856 (1992).
17. STANLEY K. HENSHAW & KATHRYN KOST, GUTTMACHER INST., TRENDS IN THE CHARACTERISTICS OF WOMEN OBTAINING ABORTIONS, 1974 TO 2004, at 12, 14 (2008), http://www.guttmacher.org/pubs/2008/09/18/Report_Trends_Women_Obtaining_Abortions.pdf;

The dynamics of claiming a subordinated identity creates a process that is more complex than a linear march to justice. A group's mobilization for civil rights claims leads directly to legal challenges to formal classifications by the state that discriminate against the group. As these efforts become more successful, a parallel social process occurs in which the excluded group or identity is increasingly normalized, becoming more widely viewed as acceptable. Perversely, the elimination of a dramatic exclusion can make the residual hierarchy appear more, rather than less, legitimate because the problem of the former irrational exclusion has been fixed. Thus, for example, the invalidation of sodomy laws may enhance the apparent reasonableness of laws criminalizing other consensual sexual conduct—such as nonrisky sex by persons with HIV.

A failure to differentiate these two different projects—ending exclusions and dismantling hierarchy—can only muddy critical analysis of civil rights campaigns and equality principles. By understanding the limits of each discourse, scholars and advocates could avoid both naïve expectations and underappreciated achievements.

II. COMPARING *ROE* AND *LAWRENCE*

The two cases whose anniversaries we consider illustrate these points. *Lawrence* stands as an example of ending a specific exclusion. In that case, the Supreme Court ruled that states could not criminalize the sexual conduct that largely defines homosexuality, thus reversing *Bowers v. Hardwick*.[18] The sodomy laws struck down in *Lawrence* had been the basis for courts to rule that, if it was permissible for a state to criminalize this form of sexual conduct, governments could surely engage in less draconian forms of adverse treatment, including job discrimination and denial of custody rights.[19] On that reasoning, gay people stood as almost by definition unequal before the law, lacking in many ways the essential criterion of citizenship, "the right to have rights."[20]

The ruling in *Lawrence* is based on protection of liberty under the Due Process Clause and not on guarantees under the Equal Protection Clause, but its most powerful social message has been legitimation of equality for gay people.

Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–2001*, 34 PERSP. ON SEXUAL & REPRODUCTIVE HEALTH 226, 231–32 (2002), http://www.guttmacher.org/pubs/journals/3422602.pdf.

18. 478 U.S. 186 (1986); *see* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

19. *Lawrence*, 539 U.S. at 581–84 (O'Connor, J., concurring).

20. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

Despite the Court's eschewing of an equal protection rationale,[21] LGBT rights organizations successfully framed *Lawrence* as a declaration of equality.[22] The fact that it formed a political, although not doctrinal, bridge to the first ruling by a state's highest court that same-sex couples must be granted the right to marry cemented that popular understanding.[23] *Lawrence* remains the high watermark of the LGBT equal rights movement to date.

Much like *Lawrence*, *Roe v. Wade* is also a liberty/equality compound. *Roe*'s holding that the liberty-based right to privacy encompasses the decision whether to have an abortion stemmed from the Due Process Clause, rather than the Equal Protection Clause, but it is understood socially as central to women's equality. By the time *Roe* was decided, the abortion rights movement had migrated from its historical origins in the efforts to legalize birth control dating from the early twentieth century to serving as a key component of the mobilization of women for the second wave of feminism.[24] The Supreme Court opinion in *Roe*, even cabined as it was by concern for physician decisionmaking, established the social understanding that a woman's right to choose was at stake, not merely the de-criminalization of a medical procedure. As the Court itself recognized in the *Casey* opinion that reaffirmed much of *Roe*, control of one's reproductive capacity is essential for women's ability to realize other life choices, whether as individuals, workers, or citizens.[25]

Roe, however, differs from *Lawrence* in important ways, because it involved a far messier, more complex set of hierarchies than were present in the challenge to sodomy laws. At issue in the abortion litigation was not just gender hierarchy but also hierarchies of religious and professional medical authority. One marker of the complexity of *Roe*'s backstory is the broad range of legal arguments in the amicus briefs filed in the case. These included arguments that prohibitions on abortion constituted sex discrimination and discrimination based on poverty,[26] as

21. *Lawrence*, 539 U.S. at 575.
22. Nicholas Pedriana, *Intimate Equality: The Lesbian, Gay, Bisexual, and Transgender Movement's Legal Framing of Sodomy Laws in the* Lawrence v. Texas *Case*, *in* QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 52 (Scott Barclay et al. eds., 2009).
23. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *cf.* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1947 n.207 (2004) (noting that the Massachusetts Supreme Judicial Court "relied heavily on the equal respect dimension of the *Lawrence* analysis").
24. *Cf., e.g.*, JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 314–15 (1988); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2042–46 (2011).
25. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 852 (1992).
26. See LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE* (2012), *available at* http://documents.law.yale.edu/sites/default/files/BeforeRoe2ndEd_1.pdf, for a collection of the briefs

well as Thirteenth Amendment and Establishment Clause arguments.[27] The Supreme Court did not rely on, or even acknowledge, any of these amicus briefs, but the decision *sub silentio* disturbed multiple hierarchies, especially those involving medical and religious establishments, in addition to the gendered control of reproduction.

By contrast, *Lawrence* was litigated narrowly, carefully constructed to avoid a challenge even to adultery laws, much less to laws banning prostitution or other socially disfavored but consensual sexual acts.[28] In one hierarchy of sexualities (including queer and heterosexual identities), anthropologist Gayle Rubin placed sex workers, transgender people, and consensual sadomasochist activists at the bottom.[29] The reality of this stratification remains in place post-*Lawrence*, and, with the exception of transgender people, the groups who reside at the bottom have moved very little if at all.

Lower federal courts have expanded the lacunae in the *Lawrence* opinion. For example, the Eleventh Circuit interpreted the Supreme Court's statement in *Lawrence* that the decision did not involve children to justify holding that the liberty interest upheld in *Lawrence* was irrelevant to whether adoption rights could be made contingent on whether the prospective parents engaged in homosexual sex.[30] Other courts have relied on the same language in *Lawrence* to find that laws prohibiting commercial sexual acts are constitutionally permissible.[31]

Although *Roe* has been dogged by the problems associated with challenges to hierarchy, I do not mean to argue that this one characteristic of *Roe* provides the sole explanation for why it remains a political lightning rod forty years later. That phenomenon is truly overdetermined, given that *Roe* was decided during an extraordinarily turbulent historical moment. It was decided during a period that was marked by the convergence of massive change in multiple arenas: a revolution in the nonmarital sexual practices of young adults, the end of the Warren

filed in *Roe*, including a brief arguing that a prohibition on abortion was an unconstitutional discrimination based on poverty, *id.* at 324–28.

27. *See, e.g.*, *id.* at 339–46.

28. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 184–89, 193–96 (2012).

29. *See* GAYLE S. RUBIN, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* DEVIATIONS: A GAYLE RUBIN READER 137, 153 (2011).

30. *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004), *reh'g denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

31. State v. Freitag, 130 P.3d 544, 545–46 (Ariz. Ct. App. 2006) (holding that the defendant "reads *Lawrence* too broadly"); People v. Williams, 811 N.E.2d 1197, 1198 (Ill. App. Ct. 2004) (holding that a prostitution statute does not violate any fundamental right); State v. Thomas, 891 So. 2d 1233, 1237 (La. 2005) (stating that "there is no protected privacy interest in public, commercial sexual conduct"). *See generally* J. Kelly Strader, *Lawrence*'s Criminal Law, 16 BERKELEY J. CRIM. L. 41 (2011).

Court, the dawning realization that in Vietnam the United States had for the first time lost a major military conflict, and the beginning of a realignment in electoral politics driven by the Republican Party campaign to build a then-new coalition of southern whites and northern social conservatives, including opponents of abortion.[32]

There is no way to prove the precise mechanisms through which these various issues interacted, to such powerful effect. But the fact that demands to reverse *Roe v. Wade* became so dominant in, and instrumental to, the rise of conservative politics in the 1980s should tell us that its social meaning and resonance far exceeded the bounds of a debate over decriminalization of a particular act or even how to categorize fetal forms of life.

CONCLUSION

The Supreme Court today appears to understand the ending of exclusions to be apex of its authority to conduct judicial review under the Equal Protection Clause. It seems far less bothered than it once was by stark social hierarchy, and more likely to accept that the benign operation of political and economic markets will lead to the optimal point of resolution for contestations over status. The rollback in affirmative action protections is merely one example. Judicial discourse in the past thirty years has contributed to, rather than inhibited, the strangling of egalitarian idealism in American culture.

This anti–civil rights tendency, however, is not written in stone. The last thirty years is not the next thirty years. There are historical moments when social and doctrinal change accelerates. For example, when the Court decided *Roe* in 1973, it had been only twelve years since it had ruled that a Florida law allowing women to opt out easily from jury service rationally reflected women's predominantly domestic role in society.[33] In 2003, the Court reversed a constitutional precedent of only seventeen years' standing when it decided *Lawrence*.

Today, it has been seventeen years since Congress enacted the Defense of Marriage Act (DOMA), prohibiting federal recognition of same-sex marriages that are valid under state law.[34] Perhaps the Court will resuscitate the charmed

32. *See, e.g.*, D'EMILIO & FREEDMAN, *supra* note 24, at 330–32, 347–49; Greenhouse & Siegel, *supra* note 24, at 2052–67.

33. *See* Hoyt v. Florida, 368 U.S. 57, 62 (1961) ("We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.").

34. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

rhythm of the *Hardwick-Lawrence* sequence and rule this year that DOMA is unconstitutional.[35] If it does, another unjust exclusion will fall.

Even if that occurs, however, it will remain an uphill battle for social justice advocates to dismantle the remaining hierarchy of sexualities and to achieve a fuller legal and social understanding that the freedom to define and practice one's sexuality is a civil right.

35. See Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *cert. granted,* 133 S. Ct. 786 (2012), which may produce an opinion analyzing whether the Defense of Marriage Act is constitutional.