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Does *lawrence v. Texas* Provide Constitutional Support For Same-Sex Marriage?

Andrei Mărăşoiu
(aim3gd@virginia.edu), "Nicolae Kretzulescu" Superior Commercial School

This essay explores the extent to which *Lawrence v. Texas* provides constitutional support for same-sex marriage. The Introduction gives an overview of the paper, presents the relevant details in *Lawrence*, and points to the two defenses in favor of decriminalizing homosexual conduct in *Lawrence*: a fundamental right to privacy and equal protection. In §1, I make the *caveat* that a legitimate state interest or rational basis could be invoked to uphold the constitutionality of a statute even when that statute may questionably be opposed to the fundamental right to privacy or to unqualified equal protection. When such a legitimate state interest cannot be provided, the fundamental right to privacy, as construed in constitutional law, protects US citizens from both state and federal interference in their private lives. §2 analyzes the fundamental right to privacy, and whether its invocation in *Lawrence* can be extended to defend same-sex marriage. I argue there are two construals of the fundamental right to privacy, a spatial construal, protecting citizens against unwarranted searches and use of evidence obtained unlawfully, and a decisional construal, according to which privacy is conceived of as individual autonomy with respect to those decisions that affect the core of an individual's life, including decisions regarding intimate, enduring relationships. In §3 I argue that, on its decisional construal, the fundamental right to privacy conceptualized in *Lawrence* not only can, but should be invoked in favor of same-sex marriage. §4 answers an objection according to which the individual's fundamental right to privacy provides constitutional support for at most private relationships, not for marriage. §5 answers an objection according to which the right to privacy constitutionally supports only civil partnerships, and not marriage.

Introduction: *Lawrence v. Texas* and same-sex marriage

Lawrence was a momentous case, both from a practical point of view (it asserted liberties and rights for the homosexual minority) and from a theoretical standpoint (it lead to an enriched understanding of the fundamental right to privacy). In *Lawrence*, private adult consensual homosexual conduct was

decriminalized. To what extent can a similar constitutional argument be made in favor of same-sex marriage? The answer I will provide in this essay will be that given a particular understanding of the right to privacy, *Lawrence* not only can, but should be construed as a precedent if and when statutes against same-sex marriage appear in front of the Supreme Court.

The thesis that will be defended throughout the essay may receive a first formulation as follows: in certain conditions and on a particular interpretation, the decision in *Lawrence* can be interpreted as also supporting the constitutionality of same-sex marriage. One condition involves appealing to the fundamental right to privacy, the interpretation of which should be wide enough as to include, besides protection against unwarranted searches, also the right of the individual to autonomously decide in issues central to one's life, such as entering in a stable relationship.

This paper will be concerned with understanding and interpreting the fundamental right to privacy, and will explore the ramifications that right has for homosexuality, both private homosexual conduct and same-sex marriage. A precondition for such a project is accepting as starting points the Constitution and the Supreme Court decisions that have followed and further articulated it. These starting points will be used as standards in evaluating the claim to constitutionality that same-sex marriage has. No separate discussion about the morality of same-sex marriage will be made except for whatever moral support the Constitution may have. In this paper, considerations of morality will give way to considerations of constitutionality.[1]

This essay purports to use decisions of the Supreme Court and the constitutional texts on which they rely to make an argument in favor of same-sex marriage. Throughout this paper, I will use the phrase "constitutional support" as describing the relation between decisions of the Supreme Court, especially *Lawrence*, and same-sex marriage. How should the phrase "constitutional support" be understood? There are two cases I am mainly considering. In the first case, the Supreme Court would in the future have to decide whether a statute prohibiting same-sex marriage is constitutional or not. *Lawrence*, or other previous decisions, would provide constitutional support if the Court decided that same-sex-marriage was constitutional, and if the grounding of the Court considered *Lawrence* or similar previous decisions as legal precedents. This is a constitutional argument, and it will be the main argument elaborated in this paper. In the second case, if public debate were to engage possible justifications of same-sex marriage, and if public discourse were to invoke *Lawrence* as the precedent to be followed, then it could be said, in a broader fashion that is not legally binding, that *Lawrence* provides constitutional support for same-sex marriage. This situation could arise in a legally informed public debate.

[1] Is the Constitution itself, or the judicial decisions that clarify it, morally correct when it comes to homosexuality? The objector might deny this. Such a denial is beyond the scope of this paper.

The thesis of the essay is that *Lawrence* can indeed be construed as providing constitutional support for same-sex marriage. The plan of the paper closely follows the argument made in favor of this thesis. §1 makes the *caveat* that the application of both the fundamental right to privacy and of the equal protection clause is conditional upon rejecting the legitimate interests that the state upholding the statute provides as tentative rational bases. Provided those interests are discarded as being in breach of either the fundamental right to privacy or the equal protection clause, both constitutional clauses take priority over any federal or state legislation.

This paper explores the application of the fundamental right to privacy. This naturally leads to an inquiry into how the fundamental right to privacy should be conceived in the context of *Lawrence*, and if this can be extended to same-sex marriage. This enterprise is undertaken in §2, where I distinguish a spatial and a decisional construal of the right to privacy, only the latter being extendible to a defense of same-sex marriage. §3 contains the central argument of the paper: that a decisional understanding of the fundamental right to privacy provides constitutional support for same-sex marriage. §4 attempts to deflect an objection, according to which the argument in *Lawrence* can only apply to private homosexual relationships, not to marriage. I answer the objection by discussing the main differences between a relationship and a marriage, namely, the public and legal character of marriage, and the social benefits associated with it. §5 answers a similar objection, according to which the right to privacy, as understood in *Lawrence*, can only be extended to civil partnership, not to marriage. I answer the objection by pointing out that the objection misconstrues the political function of the institution of marriage.

A final qualification: if there is an argument from *Lawrence* to same-sex marriage, does that argument extend to other sexual offences? Does it extend to incest, fornication, adultery, pornography, polygamy? Judicial opinions on the matter differ.[2] The debate concerning sexual offences is beyond the scope of this paper. For example, whether a case in favor of polygamy or adultery can be made starting from the fundamental right to privacy as articulated in *Lawrence* is a question this essay leaves open.

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[2] Justice Scalia, in his dissenting opinion in *Lawrence*, qualified the Court's decision as "uncabined", giving way to an invocation of the due process clause of the 14th Amendment in trials involving all sexual offences: "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of this decision to exclude them from its holding. … This effectively decrees the end of all morals legislation" (*Lawrence*, pp.598-599). Same-sex marriage has been classed together with sexual offences only by its detractors, not by its supporters. Thus, in *Goodridge*, "the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law" (p.337).

§1. Two constitutional defenses: fundamental right and equal protection

In *Lawrence v. Texas*, the defendant Lawrence contested the constitutionality of a Texas Penal Code statute that considered sodomy a criminal offence, a misdemeanor of category C. Lawrence argued that the constitutional right to privacy in his own home held priority over the Texas statute. Lawrence's attack on the constitutionality of the statute was two-pronged. One prong concerned Lawrence's fundamental right to privacy, a penumbral right as defined in *Griswold v. Connecticut* (1965). A second prong concerned the equal protection clause ("All men are born equal").

Both the equal protection clause and the fundamental right to privacy under the due process clause have the following status. Although typically they disavow discriminatory policies and ensure equal protection of fundamental liberties, both clauses may fail to apply to a challenged statute when that statute proves, by the lights of the Court, to have a "rational basis." The phrase "rational basis" does not concern philosophical theories of rationality, nor "the reasonable man standard," i.e. what is deemed rational or reasonable by the so-called "everyman." The "rational basis" test is construed from the narrow point of view of the state: there is a rational basis for a statute if the state whose legislature has adopted the statute in question has a "legitimate interest" in upholding the statute. "Legitimate interest" is, again, a specifically legal phrase. The interest of the state has to be legitimate in the eyes of the state, not of philosophical argument or of popular approval. However, the state also has to prove that the restrictions imposed by the challenged statute are the most "narrow means" of effecting the state's interest. If the state manages to hold that it has a legitimate interest in this sense, then the equal protection clause and the fundamental right to privacy cease to apply.

In *Lawrence*, the Court admitted both lines of constitutional attack: there is a fundamental right to privacy that Lawrence had when engaging in homosexual conduct within the privacy of his home, and equal protection requires not discriminating homosexual conduct from heterosexual conduct when performed by adults who consent, in the privacy of their homes. For Lawrence to win, it was only necessary for the Court to admit either of the two constitutional arguments. The novelty and importance of *Lawrence* was the fact that the Court accepted that Lawrence was exercising his fundamental right to privacy. This will be the object of the next two sections of this paper. For now, I would like to focus on one implication of the fact that the Court also accepted the equal protection line of argument.

The implication of accepting the due process and the equal protection arguments was that Texas was considered to have had no rational basis in enforcing the statute against Lawrence and those in his position. Had the Court admitted any of the several reasons put forth by Texas or mentioned by the dissenting opinions, Lawrence would have lost. Consider one such state interest

deemed legitimate, namely, avoiding social instability by not opposing the allegedly moral disapproval with which the heterosexual majority regards the homosexual minority. Justice O'Connor dismissed this interest: "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review" (*Lawrence*, p.582). What O'Connor seems to be implying by admitting that Texas had no legitimate state interest in enforcing the statute against homosexuals is that even though discussion of whether there is a rational basis for the statute has to be made, the outcome need not necessarily be one denying the liberty to homosexual conduct (or, *mutatis mutandis,* to same-sex marriage).

The difference between the equal protection clause and the fundamental right to privacy implicit in the due process clause is not a difference between upholding discrimination and rejecting it: it is a difference between kinds of justification when a discriminatory policy is to be assessed.[3] The justificatory difference does not imply a difference in constitutional status. The fundamental right to privacy can fail to apply when the state makes the proof of a legitimate interest. However, in practical circumstances, the standards set by the Court are so high that it is rare for the interest invoked by the state to be considered a sufficient rational basis for upholding the statute. The fundamental right to privacy is absolute, but its application to any given case is defeasible by the particulars of that case. Thus, Justice Blackmun writes in *Roe*, with application not to homosexuality but to abortion: "the right of personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation" (*Roe*, p.154). And Justice Scalia, in his dissent from *Lawrence*, asserts that "the ground on which the Court squarely rests its holding [of decriminalizing private homosexual conduct] is the contention that there is no rational basis for the law here under attack" (*Lawrence*, p.599).

In this paper, the application of the fundamental right to privacy to the case of same-sex marriage is explored. The following strategy is pursued in §3: it has to be proved that the fundamental right of privacy articulated in *Lawrence* and applied there to homosexual intimacy is involved, for the same reasons and at least to the same extent, in same-sex marriage. If this were the case, then the

[3] It may legitimately be asked if a clear-cut difference can be drawn between the equal protection and the due process clauses in all cases. In his dissent from *Bowers* (pp.218-219), Justice Stevens writes: "Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome." What Justice Stevens seems to be saying is that there is great overlap between the two clauses in their application. The inquiry in this essay will methodologically distinguish between the applicability of one clause from the applicability of the other, but in practice the two will often converge in their results.

reasoning the Court accepted in *Lawrence* would, on pain of inconsistency, have to be rehearsed if the Court were to rule in a case discussing the unconstitutionality of same-sex marriage. This argument could be resisted by trying to formulate legitimate state interests that could block the application of the fundamental right to privacy to the case of same-sex marriage. I analyze and reject some of these proposals in §4 and §5.

§2. A spatial and a decisional construal of the fundamental right to privacy

The existence of a fundamental right to privacy. The thesis of this paper crucially depends on how the fundamental right to privacy is conceived. The matter is not purely philosophical: it bears on the constitutional justification of homosexual conduct performed in private and the possibility of invoking a right to privacy in favor of same-sex-marriage. An articulate conception of the fundamental right to privacy is laid out in *Griswold* (pp. 484-485):

[S]pecific guarantees in the *Bill of Rights* have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Fourth and Fifth Amendments protect against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." We have had many controversies over these penumbral rights of "privacy and repose." These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

If the existence of a right to privacy is undeniable, there are two questions that nevertheless remain open: what is the meaning of the right to privacy and to what kinds of cases does it apply? Justice Black, in his dissent in *Griswold*, expresses these worries:

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. "Privacy" is a broad, abstract and ambiguous concept

which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. (*Griswold*, p.509)

Justice Black's concern is with the meaning of the right to privacy, and how it should be understood. But a separate concern regards the cases to which the right will be applied, and this is not always connected to how the right is understood. Justice Stewart makes this point in *Roe* (p.168, italics) by approvingly quoting Justice Harlan in *Poe v. Ullman*:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

This section will be concerned with clarifying the meaning of the right to privacy as related to homosexuality. Whether cases differing from homosexual intimacy and homosexual marriage count as exercises of the right to privacy is beyond the scope of this paper.

Not only does a fundamental right to privacy generally exist, but it was what made the Court in *Lawrence* decriminalize private consensual homosexual intercourse. That there was a clear and general application of the fundamental right to privacy in *Lawrence* is clear on reflection of a methodological principle at play in the Court's decision. As Justice Rehnquist had put it in *Roe* (pp.177-178): "My understanding of past practice is that a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply 'struck down' but is, instead, declared unconstitutional as applied to the fact situation before the Court." This did not happen in *Lawrence*. It was not the specific details in Lawrence's case that were under the Court's scrutiny, but the general practice of considering private homosexual conduct to be an object of criminal law. This gives weight to the claim that the fundamental right to privacy was seen as applying in its full generality, not merely because of specifics in Lawrence's "fact situation."[4]

[4] Thus *Lawrence*'s reversal of *Bowers* hinges on reconceiving the fundamental right at stake: not the right to sodomy, but the right to privacy, regardless of how individuals may choose to exercise that right. This overturns Justice White's Court opinion: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy" (*Bowers*, p.190)

The fundamental right to privacy has a spatial and a decisional construal. The dichotomy between a spatial and a decisional construal of the right to privacy is introduced by Justice Blackmun in his dissent from *Bowers* (pp. 203-204). The criterion which allows for the distinction to be made appears at p.206, where Blackmun cites Justice Powell, dissenting in *California v. Ciraolo*: "the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'"

According to the spatial construal of the fundamental right to privacy, it is this right that is alluded to in the Fourth Amendment where searches without warrant, trespassing and invoking unlawful evidence are suggested to infringe it. On this conception, a person is entitled to privacy in his or her home; as soon as one exits the perimeter of one's residence, the right to privacy no longer applies, as one is no longer "in private." The spatial construal is at play, e.g., in *Bowers*, where Justice White invokes *Stanley v. Georgia*, a 1969 case where Stanley was charged with watching pornography in "the privacy of one's home", and Stanley's acquittal relied on a right to privacy that was spatially construed to refer to the premises of one's residence. The spatial understanding of privacy is also at play in some formulations of the Court's opinion in *Griswold*, for example in Justice Douglas' rhetorical question: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" (*Griswold*, p.485).

According to the decisional construal of the fundamental right to privacy, it is not a particular *place* that the individual has the right to privacy in; rather the individual can invoke or exercise a right to privacy irrespective of her whereabouts. On this understanding, what is private is the individual's right to choose her course of action and beliefs in what concerns certain core aspects of human life. In delivering the Court's opinion, Justice Kennedy quotes *Casey* (*Lawrence*, p.574):

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. … Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.

This decisional understanding of the right to privacy has been at play in holding that the private use of contraceptives (*Griswold*, 1965), abortion in the first trimester (*Roe*, 1973), and homosexuality (*Lawrence,* 2003) are constitutionally protected.

The spatial construal of the right to privacy cannot support same-sex marriage. The use of the fundamental right to privacy in *Lawrence* can be understood in both the spatial and the decisional way. The decisional reading will be explored in the next section. On the spatial reading, Lawrence had a right to privacy that was breached when he was arrested and charged for sodomy carried out within the limits of his own home. On this spatial construal on the right to privacy, *Lawrence* cannot provide constitutional support for same-sex marriage because Lawrence was exercising the right to privacy within the confines of his home. But marriage, as a publicly sanctioned institution, has the same binding force and the same legal benefits when the spouses are in their home as well as when they are in a public place: they are married by a state and their marriage is valid throughout the state.

§3. The decisional right to privacy and enduring relationships

In this section, I argue that the decisional reading of the fundamental right to privacy, as applied to *Lawrence*, provides constitutional support for same-sex marriage. The strategy will be to show that both marriage and private homosexual conduct are possibly conducive to establishing or continuing relationships that are important to an individual's life, changing her future course of actions, beliefs and values. Given the important decisions they involve, both marriage and private adult consensual sex (whether either occurs in homosexual or heterosexual couples) instantiate the fundamental right to privacy. Since both marriage and private homosexual conduct turn out to instantiate the same constitutional right for the same reason (entering or staying in relationships), this provides constitutional support for same-sex marriage, which conjoins the two, adding private same-sex intimate conduct to marriage.

I begin by pointing out that a link between homosexual conduct and marriage is prefigured in *Bowers v. Hardwick*, a case that upheld the constitutionality of a statute incriminating homosexuality. Justice White presented, as perhaps the foremost argument in favor of the Court's decision, the claim that "No connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other, has been demonstrated" (*Bowers*, p.191). I propose, possibly contrary to Justice White's intentions, to read his claim contrapositively, and counterfactually: had a connection between marriage and family, on the one hand, and homosexuality, on the other hand, been found, then the fundamental right to privacy which had been seen to apply in *Griswold* would have applied to *Bowers* as well. If the Court in *Bowers* had judged that homosexuals can and should be permitted to form families, then homosexuality should have been decriminalized as early as *Bowers* and long before *Lawrence*, a delay the Court in *Lawrence* looked upon with regret.

The general argument of the paper - operative in both marriage and same-sex private conduct - is that marriage and intimacy are acts which may lead or give expression to private relationships. Some of those relationships may be enduring, and may deeply affect the lives of the individuals involved, defining them in the sense of having important consequences on their future courses of action, beliefs and values. This makes those relationships crucial to the social life of individuals, and entering or staying in such relationships are acts that come to be considered as *exercises of the constitutional right to privacy* (1), as that right was articulated in a series of Supreme Court decisions, including *Griswold, Loving, Roe, Casey* and *Lawrence*.

In both the case of marriage and that of private homosexual conduct, what matters is entering or staying in the relationship, and the effects that marriage or sexual intimacy have on the relationship. But entering or staying in a relationship are essentially decisions of the individuals who form the couple. It logically follows that the right to privacy exercised in either marriage or intimate conduct has to be *understood decisionally* (2).[5]

The third step in the general argument for same-sex marriage is deductive. Given that both marriage and intimate conduct have properties (1) and (2) - i.e. both are instances of the right to privacy understood decisionally and being exercised in order to enter or stay in relationships which may turn out to be enduring – then same-sex marriage has properties (1) and (2). Since (1) is none other than the exercise of a constitutional right, the right to privacy, it follows that there is constitutional support for same-sex marriage.

This essay explores how *Lawrence* can be used to provide constitutional support for same-sex marriage. Lawrence only addresses private homosexual conduct, not marriage. The reason I focus on *Lawrence* is because the decision of the Court in that case extended to private homosexual conduct the fundamental right to privacy that already applied to heterosexual marriage since *Griswold*. *Griswold* has to be seen as operative in the genesis of *Lawrence*, and the Court decision in both cases articulated the constitutional right to privacy as it is employed in this paper.

Privacy and the possibility of a relationship in **Lawrence.** According to Justice Kennedy, delivering the opinion of the Court in *Lawrence* (p.567):

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. 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. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

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[5] This does not preclude a spatial understanding of the right to privacy in both marriage and intimate conduct. What matters is that a decisional understanding is not only permissible, but also recommended, given that the decision to form a couple is essential to the formation and persistence of the couple.

It may be said that there is a spatial construal of the right to privacy in Kennedy's opinion. He explicitly mentions that homosexuals "may choose to enter upon this relationship in the confines of their homes", and the upshot of this phrasing is that homosexuals may not engage in intercourse in public. But this is not surprising, since neither can heterosexual married couples engage in intercourse in public, so this does not distinguish or discriminate against homosexuals in any way. Kennedy is also careful to extend the protection against abuse (battery, assault, sexual exploitation etc) as he mentions that "adults may choose to enter upon this relationship … and still retain their dignity as free persons", that is, still retain all the rights and protection that the law provides against wrongdoings.

The key element in Kennedy's statement is what follows: "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." Here, Justice Kennedy sees homosexual intimacy as an act that accompanies what may become, or may already be, an enduring relationship. It is clear that many relationships are ephemeral, and many sexual acts do not even amount to ephemeral relationships. In fact, Lawrence and his partner were having a one-night stand. What mattered for the Court was not so much the specifics in Lawrence's case, but providing for the possibility of enduring homosexual couples. The reasoning suggested by Kennedy seems to be that episodic sexual encounters such as Lawrence's have to be permitted, or else the right to privacy and to engage in enduring relationships would be denied to more lasting homosexual couples. What mattered for the Court seems to be to provide for the general possibility of entering or staying in an enduring relationship.

Kennedy continues by suggesting that the reason why homosexual intimacy was decriminalized in *Lawrence* was to allow homosexuals to enter into enduring relationships without fear of legal repercussions, and protected by the constitutional right to privacy, just like heterosexual citizens: "The liberty protected by the Constitution allows homosexual persons the right to make this choice." Decriminalizing homosexual intimacy is necessary for this: a typical heterosexual couple is legally allowed to consummate the relationship (or the marriage), and could otherwise choose to terminate the relationship, and so a homosexual couple should be allowed to do the same, given that the constitutional right to privacy does not depend on the sexual orientation of the citizens.

There are two distinctive elements with which *Lawrence* articulates the constitutional right to privacy. First, there is a clear implication of the decisional understanding of that right: homosexuals have a right to *decide* whether to enter in a relationship which may turn out to be enduring or not. Second, the ordinary meaning of "private" is amended and changed in the context of the Constitution. Ordinarily, something is typically said to be private if it is hidden from others, or done in one's home. But the right to privacy is exercised in homosexual intimacy

only because this may lead to an enduring relationship, and relationships persist when the couple leave their home and enter public space. On this understanding of privacy, which I will expatiate on in §4, privacy comes to be understood as autonomy of the individual in making the "choice" or the decision to enter a homosexual relationship unconstrained by anti-homosexual legislation.

***Privacy and the possibility of a relationship in* Griswold.** It is worth emphasizing that Justice Kennedy, in delivering the opinion in *Lawrence*, construes *Griswold* as a precedent (*Lawrence*, p.565), and this suggests that he believes the right to privacy is operative in both the decision to engage in homosexual intimacy (as in *Lawrence*) and in a married couple's decisions related to family planning and the use of contraceptives (as in *Griswold*).

The fundamental right to privacy as exercised in the institution of marriage is emphasized by Justice Goldberg in his concurring opinion in *Griswold* (p.495):

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

There is a spatial understanding of the right to privacy in *Griswold*. The couple was not found guilty for using contraceptives as the evidence collected would have been unlawfully obtained, given the "sacred precincts" of the "marital bedroom." However, Goldberg's comment reveals decisional aspects of the right to privacy exercised in marriage. Marrying and raising a family are decisions. So is deciding whether to have a child or not, and that decision is implicit in the use of contraceptives. Justice Douglas, delivering the Court's opinion in *Griswold*, also suggests a decisional understanding when he says (p.567):

We deal with a right of privacy older than the *Bill of Rights* - older than our political parties, older than our school system. 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.

Douglas speaks of a "way of life" - one involving "loyalty" - that presumably holds both within and outside the marital dormitory, and of an "association" that can only be the result of the spouses' individual decisions.

The association Douglas speaks of in discussing marriage is the "hopefully enduring" relationship that the spouses enter into. Analogously, Kennedy says in *Lawrence* (p.567 quoted above) that homosexual intimacy "can be but one element in a personal bond that is more enduring". Kennedy's reference to *Griswold* as a precedent is not only due to the general right to privacy, but to its motivation: that of seeking enduring relationships.

I conclude this section by pointing out that both *Lawrence* and *Griswold* present cases in which the fundamental right to privacy is exercised in decisions

which may lead to enduring relationships. In *Lawrence* the right is exercised in relation to homosexual intimacy, in *Griswold* it is exercised in relation to marriage. The argument of this paper conjoins these two cases, and argues that same-sex marriage is constitutionally supported by the fundamental right to privacy. The right to privacy supports same-sex marriage because same-sex marriage involves the decision to enter a "hopefully enduring" relationship with a partner of the same sex with which one may engage in intimacy, and that decision ought to be private, i.e. autonomously made by each of the homosexuals seeking marriage.

§4. Private relationship or public marriage?

The argument sketched in the preceding section in favor of same-sex marriage may be met with an objection: private adult consensual sex is private, marriage is public, and no insistence that both may lead to enduring relationships helps bridge the gap between private and public. This section is devoted to answering the objection.

Uses of the word "private." Houlgate (1998, p.142) distinguishes three uses of the word "private." In one use, "private" is synonymous with "hidden": something is private to an agent if it is kept beyond the reach of knowledge for all other agents. In a second use, "private" is synonymous with "within the confines of one's home": some action is private to an agent if the agent can only carry out that action in one's own home. In a third use, "private" is synonymous with "immune to state interference:" some action is private to an agent if the agent is free to carry out that action if and when she decides to do so, and no law can prohibit her doing the action. In this third use, the agent may be said to be "autonomous."

I will now apply this threefold usage of the word "private" to the argument in this paper. In the preceding section, I have argued that what has to be considered as private or public is not intercourse, but the relationship which it may give rise to. Let us assume that we have a same-sex couple, and a heterosexual married couple. In both cases, the relationship may be hidden: both the heterosexual and the homosexual couple may choose not to disclose their relationship to third parties. In both cases, the relationship persists when the couple leaves the perimeter of their home; a couple cannot engage in a relationship that ends once they leave one house, and starts afresh when they enter another house. So both a heterosexual married couple and a homosexual unmarried couple can have the same options with respect to the first two uses of the word "private": both can be either hidden or public, and both have to persist when leaving their homes.

The important point is that both a heterosexual marriage and a homosexual unmarried couple have the same right to privacy in the third use of the word

"private". In both cases, decisions of the Supreme Court have guaranteed the right to privacy. In *Griswold* (1965) the Court held that the right to privacy is exercised in marriage, and in *Lawrence* (2003) the Court held that the right to privacy is exercised in engaging in homosexual relationships that may involve sexual intimacy. The fact that the sexual intimacy has to take place within the confines on one's home does not alter the fact that homosexuals can, as a consequence of their fundamental right to privacy, engage in relationships that persist beyond the confines of their homes. Given that both marriage and a homosexual relationship are exercises of the fundamental right to privacy, both are beyond the reach of constitutionally legitimate state interference, and so both are "private" in the third use of the word.

Given the parity of the behavior of heterosexual marriage and homosexual relationships with respect to all of the three uses of the word "private", there is no relevant dissimilarity between the two cases in what concerns privacy. This is the objection answered in the general case, and the following two subsections reject attempts to flesh out two particular aspects of the public/private objection. Both of these aspects are implicit in Justice Cordy's dissent from *Goodridge* (p.395):

[T]his case is not about government intrusions into matters of personal liberty. It is not about the right of same-sex couples to choose to live together, or to be intimate with each other, or to adopt and raise children together. It is about whether the State must endorse and support their choices by changing the institution of civil marriage to make its benefits, obligations and responsibilities applicable to them.[6]

The two aspects Cordy mentions are "the institution of civil marriage" and "its benefits". The "institution", i.e. marriage law, would have to be changed because it currently allows only for heterosexual marriage. If it were to allow for same-sex marriage as well, the social benefits would have to be granted to same-sex couples as well.

The state as part of the marriage contract. The thesis of this paper is that the justification given by the Court in *Lawrence* can be used, given the qualifications in §2 and in §3, as constitutional support for same-sex marriage. But the public/private objection can also invoke the fact that in US marriage law, the state is part of the marriage contract together with the two spouses. Unlike unmarried couples, which only involve individuals, a marriage also involves the state. This may be a relevant dissimilarity between marriage and homosexual relationships, one warranting rejection of the argument for same-sex marriage made in this paper. Saying that same-sex marriage should be legal seems to

[6] Justice Cordy is in agreement with Justice Blackmun in *Bowers* (p.213): "Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations."

involve, according to the objector, forcing the state to be a part of homosexual marriage contracts, when the state should, on the contrary, be free to choose whether to be part of them or not.

There are several weaknesses in this objection. First, although it is true that marriage is traditionally conceived of as a contract (Brake 2010, p.304), it is false that marriage is, properly speaking, a regular contract. A few features of contracts are the following: contracts are negotiable, they may last for a finite amount of time, the parties to the contract are obliged to understand the terms of the contract. According to Brake (2010, p.308), none of these features applies in the case of marriage. Whether marriage *should* be understood more on the model of a contract is an issue in political and moral philosophy, not in constitutional law (Wedgwood 1999, p.225). Marriage may be partially understood on the model of a regular contract, but it is not, strictly speaking, a contract.

An important feature distinguishing contracts from marriages is that one may choose whom to sign contracts with; but if two citizens of the US wish to marry, they cannot unless the state participates. The state's participation in the marriage contract is legally mandatory. As a consequence, saying that the state is free to decide whether to enter in a marriage contract or not amounts to saying that the state is free to decide whether two of its citizens will marry or not.[7]

As has been argued in §3, marrying is an exercise of the fundamental right to privacy, which enjoys "various constitutional guarantees" (*Griswold* 1965). And the fundamental right to privacy takes priority over any federal or state law, including marriage law. Consequently, whether two citizens of the US choose to marry or not should be entirely up to them.

It follows that if the state denies marriage to a homosexual couple formed of two citizens of the US (who, by their citizenship, enjoy the fundamental right to privacy), then the state is deliberately ignoring a judicial understanding of a fundamental right provided by the US Constitution, and gives priority to marriage law, whose legal force ought to be secondary to the Constitution. This conclusion is *not* a moral conclusion that marriage law ought, in view of promoting overall utility, or justice, or virtues, to be changed; this conclusion is a legal conclusion pointing at the logical incompatibility between a marriage law that prohibits same-sex marriage and a constitutional right that allows it.

State sponsorship. The objection can be modified to avoid this conclusion of logical incompatibility, by invoking a legitimate state interest in the distribution of benefits. Current marriage law contains clauses regarding the social benefits spouses enjoy. The objection to same-sex marriage could be modified to say that,

[7] If the state can decide which couples can get married and which not, what justifies the state's decision? As Houlgate (1998, p.151) argues, not any state decision interferes in private life; the state decisions that do not constitute interference are the decisions taken to legally marry all and only those individuals who have autonomously decided to marry.

based on their fundamental right, a homosexual couple may wish to have their relationship recognized by the state, but they cannot force the state into giving them the substantial social benefits associated with marriage. Here are some of these benefits, enumerated by Mary Ann Case (quoted in Brake (2010, p.306)):

Marriage entails rights "to be on each others' health, disability, life insurance, and pension plans," "jointly [to] own real and personal property, an arrangement which protects their marital estate from each other's creditors," and to automatic inheritance if a spouse dies intestate. Spouses have rights in one another's property in marriage and on divorce. They are designated next of kin "in case of death, medical emergency, or mental incapacity" and for prison visitation and military personnel arrangements. They qualify for special tax and immigration status and survivor, disability, Social Security, and veterans' benefits. Marital status is implicated throughout U.S. federal law—in "Indian" affairs, homestead rights, taxes, trade and commerce, financial disclosure and conflict of interest, federal family violence law, immigration, employment benefits, federal natural resources law, federal loans and guarantees, and payments in agriculture. Marital status also confers parental rights and responsibilities—assignment of legal paternity, joint parenting and adoption rights, and legal status with regard to stepchildren.

It seems to me that this modified objection is misguided: the distribution of the social benefits of marriage, that has to conform the equal protection clause of the Fourteenth Amendment, cannot be invoked to deny the exercise of a fundamental US constitutional right to US citizens. Not only would this institute a group of "second-class citizens" (Tribe and Parker 2004, p.586) who are denied a constitutional right by their state, but it would *additionally* discriminate against those citizens in the distribution of social benefits. It seems the modified objection only aggravates the conflict between the constitutional right to privacy and marriage law. Given that the Constitution takes priority over any other law, the constitutional argument in favor of same-sex marriage cannot be attacked by referring to marriage law.

Changing the meaning of "marriage"? The objector's attempts to play the private against the public suggest a picture in which homosexual couples who wish to marry are confronted with the actuality of heterosexual marriage law. This picture is mistaken, because marriage is an exercise of the fundamental right to privacy, and same-sex marriage is a species of marriage. Hence homosexual citizens have the same right to marry as heterosexual citizens do, namely, the right that follows from the right to privacy afforded by the Constitution, as interpreted in *Griswold* and *Lawrence*. Invoking marriage law in defense of heterosexual-only marriage only deepens the rift between marriage law and the Constitution.

But is same-sex marriage a species of marriage? It may be objected that the argument in this paper equivocates between two uses of the word "marriage": the first is in agreement with both constitutional law and marriage law, while the

latter covers same-sex marriage as well, and hence has a more scarce support in current marriage law.

It is useful, in answering this objection, to recapitulate the argument so far. In §2, I have pointed out that both homosexual conduct in private and (heterosexual) marriage are exercises of the fundamental right to privacy. In §3, I have pointed out that in both private homosexual conduct and (heterosexual) marriage the fundamental right to privacy can be understood decisionally, because in both cases citizens can autonomously *decide* to engage in relationships which may involve sexual intimacy or could lead to marriage. The conclusion of the argument is the following: since both homosexual conduct in private and marriage exercise the same constitutional right (privacy) for the same judicially acknowledged reason (the possibility of entering or staying in relationships), same sex-marriage (which is the conjunction of private homosexual conduct and marriage) is constitutionally supported.

In §3, I was drawing an analogy between private homosexual conduct and heterosexual marriage; here I am arguing for same-sex marriage: is there an equivocation in the meaning of "marriage"? To say that such a equivocation occurs amounts to saying that marriage is essentially heterosexual. This claim is discussed and dismissed by Ralph Wedgwood (1999, pp.230-239). What sort of claim would it be? If it were a claim in political or moral philosophy, then it does not affect the present paper. If it is a claim in constitutional law, then the burden of proof is on the objector to show that only a narrow heterosexual reading of "marriage" is implied in constitutional law.

§5. Civil partnership or marriage?

In this section, I attempt to answer an objection according to which the most that has been proven in §4 is not that *Lawrence* gives constitutional support to same-sex marriage, but only that *Lawrence* supports a case in favor of civil partnerships, and that it is a legitimate state interest to reserve the term "marriage" for heterosexual couples who with to form a union. In reply to the objection, I will distinguish two aspects of the issue: the practical aspect and the theoretical aspect. The practical aspect concerns a prediction of what the Supreme Court will in fact do, given the present political circumstances. The theoretical aspect concerns what the Court should do if it were to give priority to its reasoning in *Lawrence*.

Practical or theoretical? The practical worry is the following: suppose a case involving same-sex marriage did appear before the Court, and that the Court did decide to consider it legal and constitutional. What if the reaction on the part of the general public would be erosion of trust in the Court? The support for such practical worries comes from two very similar situations, that of Alaska and Hawaii, where the respective Courts decided to legalize same-sex marriage, and

the public opinion and the legislature joined forces in reinstating heterosexual marriage and reversing what the respective Courts had held (Tribe and Parker 2004, p.583). The practical worry is acutely felt in constitutional law. Given the tradition of the Living Constitution, it is overwhelmingly clear that political as well as judicial factors will enter into the decision of the Supreme Court in such a case, and Parker is partially correct when claiming that "lawyers often "forget" that it is politics that drives and legitimizes changes in the law, not vice versa. At bottom, even judge-made law is in and of politics" (Tribe and Parker 2004, p.584).

Given such worries, civil partnership has been proposed as a compromise solution, leaving the word "marriage" and some substantial state benefits only to heterosexual couples, and granting some form of legal union and some benefits to homosexual couples. "There is no doubt that the Civil Partnership Act 2004 should be recognized as representing progress" (Beresford and Falkus, p.11). But even if civil partnership were an optimal practical compromise, this would not alter its unstable and intermediary status. In the UK,

The contorted conceptual objective of Civil Partnership appears to have been how to 'make it look like marriage' without it being named marriage and preserving he distinct institution of marriage for heterosexuals. By continuing to withhold legal marriage to same sex couples, the State is denying those couples 'the highest social status and approval', and has formally created a hierarchy of legal recognition, placing same sex couples beneath that of opposite sex couples. (Beresford and Falkus 2009, p.5)

It is actually questionable whether civil partnership as a compromise could be optimal. Leaving aside the question of what it would mean for a compromise accepting limitations on the fundamental right to privacy to be optimal, Hartley and Watson discuss Ralph Wedgwood's views, according to which:

The basic idea is that, in some contexts, the availability of a publicly recognized marital status is central to equal citizenship. The legal recognition of a variety of relationships as marital (same-sex, heterosexual, monogamous and, perhaps, polygamous) could both confer legitimacy on relationships which are subject to private discrimination and convey a recognizable social meaning for such relationships. (Hartley and Watson 2011, p.22)

The symbolic status of marriage. What this essay is concerned with, and what it claims, is that *if* same-sex marriage will come to be legalized by a decision of the Supreme Court, and *if Lawrence* will be invoked as a precedent, then the most reliable reasoning in *Lawrence* is the one which appeals to a fundamental right to privacy, understood broadly enough as to cover the important decisions in an individual's life (entering relationships, marriage, abortion, child upbringing etc.) The issue this essay is concerned with is theoretical, not practical: the issue is given rise by the way in which the fundamental right to privacy was used in *Lawrence*, a way which would *a fortiori* apply to same-sex marriage, *if only* this were the only consideration at play in reaching a decision

concerning same-sex marriage. From am practical point of view, many considerations will count, and the remaining issue is one in legal reasoning: in the consistency of the Court with its precedents, and in how the right to privacy should subsequently be understood if the Court were to deny the constitutionality of same-sex marriage in spite of *Lawrence*.

It may be thought that admission of same-sex-marriage would revolutionize the social institution of marriage. This is denied by Chief Justice Marshall, in *Goodridge*:

Alarms about the imminent erosion of the "natural" order of marriage were sounded over the demise of anti-miscegenation laws, the expansion of the rights of married women, and the introduction of the "no-fault" divorce. Marriage has survived all of these transformations … Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. *If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities.* That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit. (*Goodridge*, p.340, my italics)

This is a constructive reinterpretation of the symbolic message of the statute of marriage, opposed to its narrow heterosexual reading offered by Justice Stevens in *Bowers* (p.219). As Beresford and Falkus (2009, p.2) claim: "Marriage is a flawed institution, but it has deep symbolic and religious meaning to many people". Attainment of the symbolic status of married persons is part of the homosexual desire to have same-sex marriage legalized.

Conclusion

The thesis of this essay is that the fundamental right to privacy, as has been construed in *Lawrence v. Texas*, can serve as constitutional support for same-sex-marriage. Among the two lines of defense for decriminalizing homosexuality advanced in *Lawrence*, this paper focuses on the fundamental right to privacy. §1 argued that the fundamental right to privacy is given constitutional priority over both federal and state legislation, provided it outweighs all legitimate interests advanced by the state as rational bases for upholding the statute.

It might seem that the right to privacy could not be invoked in relation to same-sex marriage because marriage is public, not private. To diffuse this objection, in §2, I distinguish a spatial and a decisional construal of the right to privacy, both invoked in cases appearing before the Supreme Court. According to the spatial construal of the right to privacy, one is private only in one's home, while according to the decisional construal, one is private in making certain

decisions which crucially affect one's life, and which one is entitled to make without the interference of either federal or state legislation.

In §3, the argument for the main thesis of the paper is developed: I argue that it is only the decisional construal of the right to privacy that makes it suitable to be invoked in the context of same-sex marriage. The thesis is further clarified in §4, where an objection is answered. The objection contrasts the privacy of relationships with the publicity of marriage, ranging from the fact that the state is part of the marriage contract to the fact that spouses enjoy considerable state benefits. I answer the objection by clarifying the use of the word "private" as it occurs in the context of the constitutional interpretations of the right to privacy in *Lawrence* and similar cases.

Can the fundamental right to privacy that the Court admitted in *Lawrence v. Texas* be invoked, without qualifications and to the same extent in relation to an argument in favor of same-sex marriage? §5 presents another objection. The objection distinguishes between marriage and civil partnership, and argues that *Lawrence* and the right to privacy that it articulates can only justify civil partnerships, not marriage of homosexual couples. In agreement with Beresford and Falkus (2009, p.2), I answer the objection by pointing out that the difference between civil partnership and marriage presupposed by the objector may be relevant in practical contexts, but it is theoretically doubtful, as it misconstrues the function of the political institution of marriage.

REFERENCES

Beresford, S. & Falkus, C. (2009) Abolishing Marriage: Can Civil Partnership Cover it? *Liverpool Law Review* 30, pp. 1-12.

Brake, E. (2010) Minimal Marriage: What Political Liberalism Implies for Marriage Law. *Ethics* 120, pp.302-337.

Hartley, Chr. & Watson, L. (2011) Political Liberalism, Marriage, and the Family. *Law and Philosophy*. Online first, published Sept.7. Accessed at: http://www.springerlink.com/content/v53116282w445032/

Houlgate, L. (1998) What is Legal Intervention in the Family? Family Law and Family Privacy. *Law and Philosophy* 17, pp. 141-158.

Tribe L. & Parker, R. (2010) Judicial Activism and Gay Marriage: A Debate. In J. Arthur & W.H. Shaw (eds.), *Readings in the Philosophy of Law* (5th ed., pp. 584-588). Boston: Prentice Hall.

Wedgwood, R. (1999) The Fundamental Argument for Same-Sex Marriage. *The Journal of Political Philosophy* 7, pp.225-242.

*** (1965) Griswold v. Connecticut. 381 U.S. 479-531. Accessed from: http://supreme.justia.com/us/381/479/case.html

*** (1973) Roe v. Wade. 410 U.S. 113-178. Accessed from: http://supreme.justia.com/us/410/113/case.html

*** (1986) Bowers v. Hardwick. 478 U.S. 186-220. Accessed from: http://supreme.justia.com/us/478/186/case.html

*** (2003) Goodridge v. Massachusetts Department of Public Health. 440 Mass. 309-395. Accessed from: http://masscases.com/cases/sjc/440/440mass309.html

*** (2003) Lawrence v. Texas. 539 U.S. 558-606. Accessed from: http://supreme.justia.com/us/539/558/case.html