

*Sex, Gender and the Constitution: A Retrospective Analysis since Lawrence v. Texas
and Romer v. Evans*

Outline of Proposed Remarks
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Panel on Gender Identity and the Constitution – June 4, 2008

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- I. Right to Privacy and Equality for Sex and Gender Minorities, Promises and Disappointments.
 - A. Lawrence – reversing Bowers; a robust concept of liberty and privacy, but no proclamation that homosexuality, practiced in the privacy of one’s home is a “fundamental right.”
 - B. Relationship between Lawrence v. Texas and Romer v. Evans; Lawrence rejecting equality basis for nullifying oppressive state legislation; in the background the decision of Romer v. Evans, promising judicial review of state laws bearing a blatant discriminatory intent against LGBTs as members of “unpopular social group.”
 1. Lawrence, Discrimination flowing from sodomy laws, and the quest for equality
 2. Romer, Targeted state legislation against sexual and gender minority nullified under equal protection analysis.
 - C. From Bowers to Romer to Lawrence – Did the Court further the movement for expanded rights for the sexual/gender minority? Get our Definitions Straight: **Gender identity** invokes the notion of **a)** the historic struggle for women’s liberation and equal rights despite their gender, in a male dominated society; **b)** other sex and gender minorities who depart from heterosexist gender norms with respect to sexuality; **c)** still other persons who proclaim a right to choose a gender identity different from

the male/female sex born with, or to keep a biologically/socially “confused” gender identity (in a hetero-patriarchal society), i.e., intersexuals.

- II. The Quest for “Queer Citizenship and the Court’s Gender/Sex/Sexuality Jurisprudence
 - A. What does Citizenship Mean for the sex/gender minority?
 - 1. Sex?
 - 2. Marriage and Family (custody, adoption, etc.)
 - 3. Openly gay/lesbian and in public service (military, Don’t Ask Don’t Tell)
 - B. Obvious that the general rules governing judicial review make the Court a poor place for resolving the questions for queer citizenship, therefore, ultimately court decisions don’t matter.
 - 1. Story of conversation with lesbian friend just after Lawrence v. Texas (“I don’t trust this”) (hmmm. Scalia’s dissent in Lawrence).
 - 2. The Court rules while the states legislate – Sodomy laws and marriage laws; is S.Ct. doctrine or federal law ultimately irrelevant?
- III. The federal legal architecture of discrimination in the area of family law and marriage and military service;
 - A. Federal D.O.M.A. (state mini-Domas)
 - B. Don’t Ask Don’t Tell – 15 years later it’s worse than predicted by the movement that opposed DADT;
 - C. No matter what they do, “we’re pushing for marriage rights.”
The movement for same-sex marriages, civil unions, domestic partnerships,
 - 1. Vermont and Massachusetts
 - 2. Other states and local government
 - D. State enforced discrimination in the liberty of a U.S./queer citizen to adopt or foster children; minorities –

1. Texas
 2. Florida
- E. Transgenderism and the movement for Lesbian and Gay Rights: Together or in conflict?
1. ENDA, a proposed amendment to 14th amendment based anti-discrimination laws
 2. The Politics of Sexuality and the Law; is there a threat to the quest for sexual equality rights from the heretofore “invisible” gender? Is the conflict the product of majoritarian heterosexual power and politics squelching the voice of the gender minority?
- IV. Concluding Remarks: Gender (and sex) is a social construction. It includes not only the biological male/female sexes, but also the full range of sexualities and gender identities defined in our society. It’s ultimately too complicated for the courts to figure out in a rational manner.
- A. Examples from the Difference Debate on Gender by Feminists and Historians.
 - B. The breadth of diversity in state legislation falling into the “backlash” version of responses to the Court’s decisions or reflecting “cooperative federalism.” (e.g., anti same-sex marriage laws, anti gay adoption or fostering of children)
 - C. Comparing our progress in extending civil rights to the sex and gender minority to other parts of the world (same-sex marriage, transgenders and reconstructing a gender identity, military service, and other public sphere interest of the lesbian, gay, bisexual, transgender, i.e., “queer” identity.
 - D. A final note and remark on Scalia’s dissent in Lawrence and his snide reference to the “culture wars.”