Wyoming Law Review

Volume 4 | Number 2 Article 10

January 2004

Constitutional Law - Striking Down Anti-Sodomy Laws: A Bad Way to Reach a Good Decision

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CONSTITUTIONAL LAW – Striking Down Anti-Sodomy Laws: A Bad Way to Reach a Good Decision? *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

INTRODUCTION

On September 17, 1998, a police officer in Houston, Texas, entered the apartment of John Geddes Lawrence after receiving a report of a "weapons disturbance."[1] Instead of discovering that situation, the officer encountered Lawrence engaging in sexual conduct with another male, Tyron Garner.[2] The two men were arrested and charged with a misdemeanor, pursuant to a Texas anti-sodomy law, for engaging in "deviate sexual intercourse."[3] The statute imposed penalties on persons engaging in such behavior "with another individual of the same sex."[4]

The men chose to invoke their right to a trial.[5] They challenged the statute as violating the Equal Protection Clause of the United States Constitution, in addition to a similar provision of the constitution of Texas.[6] The court rejected their arguments.[7] They then pled no contest to the charges and were fined $200 each, plus court costs of $141.25.[8]

The petitioners appealed their case to the Texas Court of Appeals, arguing "that the statute invade[d] their right of privacy and preserved their contention that *Bowers v. Hardwick* . . . was wrongly decided."[9] After a hearing on June 8, 2000, the Texas Court of Appeals reversed petitioners'

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1. Brief for Petitioners at 2, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102) [hereinafter Petitioners' Brief].
2. Lawrence v. Texas, 123 S. Ct. 2472, 2475-76 (2003).
3. *Id.* at 2476. *See* TEX. PENAL CODE ANN. § 21.06 (2003).
4. TEX. PENAL CODE ANN. § 21.06(a) (2003). The statute provided: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor." *Id.* The definition of "deviate sexual intercourse" was: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01.
5. *Lawrence*, 123 S. Ct. at 2476.
6. *Id.* The Texas Constitution declares, "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST. art. I, § 3a. The United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
7. The Harris County Criminal Court decision was not reported. Petitioners' Brief at 2.
8. *Lawrence*, 123 S. Ct. at 2476.
9. Petitioners' Brief at 3. *Bowers v. Hardwick* is the most important case discussed in *Lawrence*. *See Lawrence*, 123 S. Ct. at 2477-84 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)). Its central holding is that the Constitution does not bestow a fundamental right upon homosexuals to engage in sodomy. *Bowers*, 478 U.S. at 191. Petitioners challenged the continuing validity of the case, and the primary issue addressed by the Court in *Lawrence* was whether *Bowers* should be overturned. *Lawrence*, 123 S. Ct. at 2476.

convictions.[10] That court later heard the case en banc and reinstated the convictions.[11] The court first considered petitioners' assertion that the Texas statute was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[12] The court rejected the contention, holding that "(1) there is no fundamental right to engage in sodomy, (2) homosexuals do not constitute a 'suspect class,' and (3) the prohibition of homosexual conduct advances a legitimate state interest and is rationally related thereto, namely, preserving public morals."[13] The court also rejected petitioners' due process contention because it found "no constitutional 'zone of privacy' shielding homosexual conduct from state interference."[14]

The Supreme Court granted certiorari to consider whether petitioners' convictions violated the Equal Protection Clause and the Due Process Clause and whether *Bowers v. Hardwick* should be overruled.[15] In a 6-3 decision, the Court overturned its decision in *Bowers v. Hardwick* and found the Texas statute to be unconstitutional because it violated the Due Process Clause of the Fourteenth Amendment.[16]

First, this case note examines the problems with the *Lawrence* decision, including the Court's treatment of substantive due process and *stare decisis*. Second, it discusses why a more preferable approach would have been to invalidate the Texas statute under the Equal Protection Clause rather than the Due Process Clause. Specifically, it explains how an Equal Protection approach would have allowed the democratic process to function properly by striking down only those statutes that outlawed sodomy only between homosexuals. In addition, the note shows how such an approach would not have damaged the ability of legislatures to enact morality-based legislation. Finally, it discusses how an Equal Protection approach could have helped to avoid a backlash generated by the opinion.

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10. This opinion was not reported. Petitioners' Brief at 2.
11. Lawrence v. State, 41 S.W.3d 349, 362 (Tex. App. 2001).
12. *Id.* at 350. The court gave the following explanation of equal protection analysis:

> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. The general rule gives way, however, when a statute classifies persons by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws separating persons according to these "suspect classifications" are subject to strict scrutiny. Accordingly, laws directed against a "suspect class," or which infringe upon a "fundamental right," will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. at 352.
13. *Id.* at 357.
14. *Id.* at 362.
15. Lawrence v. Texas, 123 S. Ct. 2472, 2476 (2003).
16. *Id.* at 2484.

BACKGROUND

The Supreme Court began to explore the substantive reach of the Due Process Clause with regard to personal liberty in the early twentieth century.[17] The Court first recognized a constitutional right of privacy within the marital relationship in *Griswold v. Connecticut*.[18] In that case, the Executive Director and the Medical Director of the Planned Parenthood League of Connecticut were arrested for advising married couples of methods of preventing pregnancy.[19] The petitioners challenged Connecticut contraception statutes that proscribed this conduct as violative of the Due Process Clause of the Fourteenth Amendment.[20] The Court noted that the specific guarantees in the Bill of Rights have "penumbras" containing certain rights.[21] The cases that articulated these rights "bear witness that the right of privacy which presses for recognition here is a legitimate one."[22] The Court found the statutes unconstitutional, noting that "[t]he present case . . . concerns a relationship lying within the zone of privacy created by [these] fundamental constitutional guarantees."[23]

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17. One of the first cases to do this was *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer*, the Court determined that a law prohibiting the teaching of any language other than English to students was unconstitutional because it violated the liberty guaranteed by the Due Process Clause. *Id.* at 399. Similarly, the Court found an Oregon statute making it a misdemeanor for a person to send a child to private school unconstitutional because it "unreasonably interfere[d] with the liberty of the parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

18. Griswold v. Connecticut, 381 U.S. 479 (1965). The Court has noted that "the right of privacy [was] first explicitly recognized in . . . *Griswold*." Carey v. Population Services International, 431 U.S. 678, 685 (1977).

19. *Griswold*, 381 U.S. at 480.

20. *Id.* The statutes provided the following: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." CONN. GEN. STAT. § 53-32 (1958). The statutes also made clear that "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." CONN. GEN. STAT. § 54-196 (1958).

21. *Griswold*, 381 U.S. at 484. According to the Court, "Various guarantees create zones of privacy," including the First Amendment (the right of association found in its penumbra), the Third Amendment (freedom from government mandates to quarter soldiers during peacetime), the Fourth Amendment (freedom from unreasonable searches and seizures), the Fifth Amendment (freedom from self-incrimination), and the Ninth Amendment (reservation of rights not specifically enumerated in the Constitution). *Id.*

22. *Id.* at 485. One scholar phrased the Court's argument as follows: "[S]ince the Constitution, in various 'specifics' of the Bill of Rights and in their penumbra, protects rights which partake of privacy, it protects other aspects of privacy as well, indeed it recognizes a general, complete right of privacy." Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421 (1974).

23. *Griswold*, 381 U.S. at 485. The Court considered the right of privacy to be "older than the Bill of Rights." *Id.* at 486. Marriage, which the Court considered to be "an association for as noble a purpose as any involved in our prior decisions," fell within this right of

The Court next visited the right of privacy issue in *Eisenstadt v. Baird*.[24] In that case, Appellee William Baird had been convicted under Massachusetts statutes for displaying and distributing certain contraceptives at a lecture on contraception at Boston University.[25] After his conviction by the Massachusetts Superior Court, the Massachusetts Supreme Judicial Court reversed his conviction for exhibiting contraception but sustained his conviction for giving away contraception.[26] In response, Baird filed a writ of habeas corpus, which was ultimately granted by the Court of Appeals for the First Circuit.[27] The sheriff of Suffolk County, Massachusetts appealed the First Circuit's decision to the Supreme Court, which considered the constitutionality of the statutes under the Equal Protection Clause.[28]

In explaining equal protection analysis, the Court noted that states are not prohibited from enacting legislation that treats "different classes of persons in different ways" under the Fourteenth Amendment.[29] However, the Court explained that if states do enact such legislation, the reason for a statute's disparate treatment of groups of people must not be "wholly unrelated to the objective of that statute."[30] The classification made by the statute "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[31]

However, this level of review, known as "rational basis" review, is not applied "when a statute classifies by race, alienage, or national origin."[32] Instead, these suspect classifications trigger a heightened form of scrutiny, known as "strict scrutiny." Laws subjected to strict scrutiny are "sustained only if they are suitably tailored to serve a compelling state interest."[33] In

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privacy. *Id.* The Court opined that the very idea that police might be allowed to "search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" is "repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485.

24. Eisenstadt v. Baird, 405 U.S. 438 (1972).

25. *Id.* at 440.

26. *Id.* at 441.

27. *Id.* at 440. The writ was initially denied by the Massachusetts District Court. *Id. See* Baird v. Eisenstadt, 310 F. Supp. 951 (D. Mass. 1970).

28. *Eisenstadt*, 405 U.S. at 440.

29. *Id.* at 446-47.

30. *Id.* at 447. Under equal protection analysis, legislation is assumed to be valid, and this assumption is upheld unless the statute's disparate treatment of different classes of persons is not "rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

31. *Eisenstadt*, 405 U.S. at 447 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

32. *Cleburne*, 473 U.S. at 440.

33. *Id.* The Court explained that legislation containing suspect classifications is subject to stricter scrutiny because "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Id.*

addition, gender classifications have been held to be quasi-suspect, which trigger a heightened form of scrutiny known as intermediate scrutiny.[34] None of these classifications were present in *Eisenstadt*, however; the statutes treated married and unmarried persons differently.[35] Thus, heightened scrutiny was not appropriate, and the Court applied rational basis review.[36]

Notwithstanding the fact that the statutes in question in *Eisenstadt* prohibited distribution of contraceptives only to unmarried persons, appellant asserted that the statutes passed constitutional muster because the state could assert a legitimate state interest of "promot[ing] marital fidelity as well as . . . discourag[ing] premarital sex" in enacting the statutes.[37] In affirming Baird's conviction for distributing the contraception, the Massachusetts Supreme Judicial Court had opined that the state interest was in "preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences."[38] The Court concluded that, regardless of whether either of these purposes were legitimate, neither promoting marital fidelity nor discouraging premarital sex could reasonably be regarded as the true purpose of the law.[39] Though the Court did not explain what it thought the true purpose was, it noted that because "distribution of contraceptives to married persons cannot be prohibited [under *Griswold*]," a ban on distribution to unmarried persons was "equally impermissible."[40] Therefore, the Court held the statutes unconstitutional under the Equal Pro-

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34. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (holding that an Oklahoma statute prohibiting the sale of beer to males ages eighteen to twenty violated the Equal Protection Clause); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (holding that the Equal Protection Clause forbade a state women's university from excluding a male who wished to enroll there). The Court in *Cleburne* summarized intermediate scrutiny as follows: "Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. A gender classification fails unless it is substantially related to a sufficiently important governmental interest." *Cleburne*, 432 U.S. at 440.

35. *Eisenstadt*, 405 U.S. at 447.

36. *Id.* The Court framed the issue as "whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under [the statutes]." *Id.*

37. *Eisenstadt*, 405 U.S. at 443.

38. Commonwealth v. Baird, 247 N.E.2d 574, 578 (Mass. 1969). The Supreme Judicial Court of Massachusetts did not explain what these "undesirable [or] dangerous physical consequences" were, although it did regard the interest in preventing such consequences as "legitimate." *Id.*

39. *Eisenstadt*, 405 U.S. at 447-52. The Court noted that, for a variety of reasons, the true purpose of the law could not be to deter fornication. *Id.* One of the reasons noted by the Court was the fact that fornication was a misdemeanor carrying a penalty of only ninety days in prison, whereas the statute at bar imposed a five-year sentence for distribution of contraceptives. *Id.* at 449. Likewise, the true purpose of the statute could not be the protection of health because, among other reasons, it appeared in a section entitled "Crimes Against Chastity, Morality, Decency and Good Order." *Id.* at 450.

40. *Id.* at 453. The Court explained that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." *Id.*

tection Clause.[41] Although this case was decided under the Equal Protection Clause, the Court also referred to the right of privacy discussed in *Griswold*, stating, "[I]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[42]

The Court affirmed once again that the right of privacy was protected by the Due Process Clause in *Roe v. Wade*.[43] In that case, Jane Roe challenged Texas anti-abortion statutes as unconstitutional because they invaded her right as a pregnant woman to choose to terminate her pregnancy.[44] The Court acknowledged that "the Constitution does not explicitly mention any right of privacy."[45] Nevertheless, the Court noted that it had previously "recognized that a right of personal privacy . . . does exist under the Constitution."[46] The right of privacy, the Court said, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" due to physical and mental harm that a mother could experience because of an unwanted pregnancy.[47] The Court noted that this right "is not absolute and is subject to some limitations."[48]

Thus, the Court recognized that the decision of whether to procure an abortion fell within the right of privacy, and it regarded the right to make

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41. *Id.* at 454-55. "We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the statutes] violate the Equal Protection Clause." *Id.*

42. *Id.* at 453. Although this language was dicta, the Court affirmed its importance in *Roe v. Wade* by citing *Eisenstadt* in a line of cases which "make it clear that the right [of privacy] has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." Roe v. Wade, 410 U.S. 113, 152 (1973) (internal citations omitted). The Court also quoted this passage in *Carey v. Population Services International*, another right of privacy case invalidating a New York statute prohibiting the sale of contraception to minors. Carey v. Population Services International, 431 U.S. 678, 685 (1977).

43. *Roe*, 410 U.S. at 152.

44. *Id.* at 129.

45. *Id.* at 152.

46. *Id.* The Court reviewed the various areas where it previously "had found at least the roots of that right." *Id.* These areas included the First Amendment, the Fourth Amendment, the Fifth Amendment, the Ninth Amendment, the "penumbras of the Bill of Rights," and "in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." *Roe*, 410 U.S. at 153. *See also* Stanley v. Georgia, 394 U.S. 557 (1969) (reversing a conviction for possession of obscene materials because it violated appellant's "right to receive information and ideas," which was guaranteed by the Constitution); Terry v. Ohio, 392 U.S. 1, 9 (1968) ("The Fourth Amendment protects people, not places, and wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free from unreasonable governmental intrusion."); Boyd v. United States, 116 U.S. 616 (1886) (finding a statute requiring appellant to produce incriminating evidence as unconstitutional); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

47. *Roe*, 410 U.S. at 153.

48. *Id.* at 155. *See infra*, note 54 and accompanying text.

this decision as fundamental.[49] This was important because this determination is the first step in the Supreme Court's established substantive due process analysis.[50] Under this analysis, if the legislation in question does not implicate a "fundamental liberty interest" it must be "rationally related to legitimate government interests."[51] If, however, a fundamental liberty interest is at stake, the statute is subjected to strict scrutiny and "may be justified only by a 'compelling state interest.'"[52] Thus, because a fundamental interest was at stake in *Roe*, the statute had to meet this more rigorous standard.[53] Based on its exhaustive review of medical information relating to abortion, the Court concluded that the state's interest in regulating abortion became compelling after the first trimester of a woman's pregnancy when considering the health of the mother and after the second trimester when considering the protection of the potential life of the unborn fetus.[54] Therefore, the Court found that "measured against these standards [the Texas statute] sweeps too broadly and cannot survive . . . constitutional attack."[55]

The Court found occasion to reaffirm *Roe* in *Planned Parenthood v. Casey*.[56] In that case several abortion clinics challenged the constitutionality of five Pennsylvania statutes relating to the regulation of abortion.[57] The

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49. *Id.*

50. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997). The Court outlined its substantive due process approach as follows:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.

Id. (internal citations omitted). The majority in *Glucksberg* acknowledged Justice Souter's preferred approach to substantive due process jurisprudence, which he outlined in his concurrence. *Id.* at 722, 752. That approach inquired whether the statute imposed "arbitrary impositions" or "purposeless restraints." *Id.* at 752. The Court noted that its approach was preferable because the "outlines of liberty" were "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." *Id.* at 722. Furthermore, it noted that its approach "avoid[ed] the need for complex balancing of competing interests in every case." *Id.*

51. *Id.* at 728.

52. *Roe*, 410 U.S. at 155 (citations omitted).

53. *Id.*

54. *Id.* at 163. The Court held, "[F]rom and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.*

55. *Id.* at 164.

56. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

57. *Id.* at 845. The statutes provided: First, a woman seeking an abortion was required to give her informed consent to the procedure. 18 PA. CONS. STAT. § 3203 (1990). Second, at least twenty-four hours prior to the procedure, the woman was to be provided with certain

Court acknowledged confusion among state and federal courts as to the application of *Roe* due to some of the Court's decisions since *Roe* that had "cast doubt upon [the] meaning and the reach of its holding."[58] Therefore, the Court reconsidered *Roe*'s continuing validity.[59]

To determine this validity, the Court considered: (1) whether the central rule of Roe had proven "unworkable;" (2) whether removing the state's power to regulate abortion would be detrimental to society because of reliance on the rule; (3) whether the development of law in the area had left the rule of *Roe* a "doctrinal anachronism discounted by society;" and (4) whether the facts upon which *Roe* was based had so changed as to "render its central holding somehow irrelevant or unjustifiable."[60] The Court concluded that the rule of *Roe* had in no way proven unworkable, that women relied upon their ability to obtain an abortion in the case of failed contraception, that there had been no development of law so significant as to render the central holding of *Roe* irrelevant, and that, while considerable medical and technological advances had been made since *Roe*'s decision, they had not been so dramatic as to leave the rule of *Roe* "obsolete."[61] The Court went on to explain that, because of the intensely divisive nature of the abortion controversy, to overrule *Roe* would cause "both profound and unnecessary damage to the Court's legitimacy."[62]

After reaffirming *Roe*, the *Casey* Court articulated the "undue burden" standard as a "means of reconciling the State's interest with the woman's constitutionally protected liberty."[63] An undue burden is found, the Court stated, when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[64] The Court went on to apply this standard to each of the Penn-

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medical information. *Id.* Third, a minor was not permitted to obtain an abortion without the consent of a parent or guardian unless the court of common pleas issued an order allowing the procedure. *Id.* § 3206. Fourth, a married woman was required to sign a statement indicating she had notified her husband of her intent to procure an abortion. *Id.* § 3209. Finally, clinics that performed abortions were required to comply with certain record-keeping requirements. *Id.* § 3207.

58. *Casey*, 505 U.S. at 845.

59. *Id.*

60. *Id.* at 855.

61. *Id.* at 855-61.

62. *Id.* at 869.

63. *Id.* at 874. "Only where state regulation imposes an undue burden on a woman's ability to [elect an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* In adopting this approach, the Court repudiated the trimester approach of *Roe*: "We reject the trimester framework, which we do not consider to be part of the essential holding of Roe." *Id.* at 873. The Court went on to explain that the approach was flawed because "in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life." *Id.*

64. *Id.* at 877. "Understood another way . . . a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability [is not] constitutional." *Id.*

sylvania statutes in question, with the result that only the marital notice requirement was found unconstitutional.[65]

In addition to the Court's reaffirmation of *Roe v. Wade* under its four-factor approach to *stare decisis* and its analysis of the Pennsylvania statutes under its newly-articulated "undue burden" standard, the Court reaffirmed the existence of the right of privacy, noting that the Constitution guarantees "that there is a realm of personal liberty which the government may not enter."[66] The Court reiterated that *Roe* concerned a woman's right to choose an abortion as an exercise of her liberty under the Due Process Clause.[67]

Carey v. Population Services International was one of the final cases shaping the right of privacy before *Bowers v. Hardwick* was decided.[68] In *Carey*, appellee Population Planning Associates, Inc., asserted that a New York statute prohibiting the sale or distribution of contraception to any person under the age of sixteen was unconstitutional.[69] The Court first concluded that Population Planning Associates, Inc., had standing to challenge the statutes "not only in its own right but also on behalf of its potential customers."[70] The Court then reviewed its decisions outlining a constitutionally protected zone of privacy.[71] The Court affirmed the opinion of the District Court of the Southern District of New York that struck down the laws as violative of the right of privacy guaranteed by the Due Process Clause.[72]

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65. *Id.* at 879-902. The marital notice requirement was found unconstitutional because it was "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry." *Id.* at 898. The Court noted the potential this requirement created for increased domestic violence by husbands against women in this situation. *Id.* at 887-94. Thus, the requirement would "impose a substantial obstacle" because the woman would wish to avoid physical abuse. *Id.* at 893-94.

66. *Id.* at 847.

67. *Id.* at 853.

68. Carey v. Population Services International, 431 U.S. 678 (1977).

69. *Id.* at 681. The statute provided:

> Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited.

N.Y. EDUC. LAW § 6811(8) (McKinney 1972).

70. *Carey*, 431 U.S. at 683. The Court concluded that the statute "inflicts [upon Population Planning Associates, Inc.] 'injury in fact' that satisfies Art. III's case-or-controversy requirement." *Id. See* Craig v. Boren, 429 U.S. 190, 192-97 (1976).

71. *See Carey*, 431 U.S. at 684-85. The Court stated that "the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" *Id.* at 685.

72. *Id.* at 682.

However, the Court could not reach a majority opinion regarding its reasons for doing so.[73] Nevertheless, the portion of its opinion discussing a constitutionally protected right of privacy enjoyed a majority of votes.[74]

Finally, in *Bowers v. Hardwick*, the Court considered the validity of a Georgia statute that prohibited the commission of "the offense of sodomy."[75] In 1982, Hardwick was charged with violating the statute for engaging in a sexual act with another male in the bedroom of his home.[76] After considering the evidence, the district attorney declined to pursue the matter further.[77] Hardwick nevertheless filed suit, claiming that the statute was unconstitutional.[78] The federal district court dismissed the case for failure to state a claim upon which relief could be granted.[79] The Court of Appeals for the Eleventh Circuit reversed the decision, citing the Supreme Court's decisions in *Eisenstadt*, *Griswold*, and *Roe*.[80] It held that, under the Ninth Amendment and the Due Process Clause, "the Georgia statute infringes upon the fundamental constitutional rights of Michael Hardwick."[81]

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73. Justice Brennan, who was joined by Justices Stewart, Marshall, and Blackmun, concluded that the right of privacy with regard to decisions about procreation extended to minors in addition to adults. *Id.* at 693-94. Justices Powell, White, and Stevens offered alternative explanations as to why the statutes were unconstitutional, and Justices Burger and Rehnquist dissented. *Id.* at 702-19.

74. *Id.* at 684-85. *Carey* has been continuously cited as authority for the Court's finding of a constitutionally protected right of privacy. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 847-48 (1992) (citing *Carey* in support of its proposition that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"); Maher v. Roe, 432 U.S. 464 (1977) (Brennan, J., dissenting) ("[*Carey*] squarely reaffirmed that the right of privacy was fundamental.").

75. Bowers v. Hardwick, 478 U.S. 186, 188 (1986). The statute provided for imprisonment for at least one and not more than twenty years for persons convicted of sodomy. GA. CODE ANN. § 16-6-2 (1984).

76. *Bowers*, 478 U.S. at 187-88.

77. *Id.* at 188.

78. *Id.*

79. *Id.* Though the federal district court opinion apparently was unreported, that court relied upon *Doe v. Commonwealth's Attorney for Richmond* in dismissing Hardwick's action. *Bowers*, 478 U.S. at 188 (citing Doe v. Commonwealth's Attorney for Richmond, 403 F.Supp. 1199 (E.D. Va. 1975)). In *Doe*, a Virginia court upheld a Virginia anti-sodomy law because it was rationally related to the legitimate government interest of suppressing crime. *Doe*, 403 F. Supp. at 1202. That opinion was summarily affirmed by the United States Supreme Court. Doe v. Commonwealth's Attorney for Richmond, 425 U.S. 901 (1976).

80. *Bowers*, 478 U.S. at 189.

81. Hardwick v. Bowers, 760 F.2d 1202, 1211 (11th Cir. 1985). The Eleventh Circuit Court of Appeals held:

> [T]he Supreme Court's analysis of the right to privacy [in *Griswold*, *Eisenstadt*, and *Stanley*] leads us to conclude that the Georgia sodomy statute implicates a fundamental right of Michael Hardwick. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation. Such a right is protected by the Ninth Amendment, and the notion of fundamental fairness embodied in the due process clause of the Fourteenth

The Supreme Court granted certiorari to consider "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[82] The Court first reviewed case law recognizing a constitutionally protected right of privacy and concluded that the right of homosexuals to engage in sodomy "bears [no] resemblance" to any of the rights found to exist in those cases.[83] The Court also noted that there was a history in the United States of laws outlawing sodomy.[84] Thus, "[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[85] Therefore, the Court declined to recognize a fundamental right to engage in homosexual sodomy under the Due Process Clause.[86] As a result, the statute was required only to bear a rational relationship to a legitimate government interest.[87] The Court found that promotion of morality was an interest sufficient to meet this standard.[88] Thus, the Court reversed the decision of the Eleventh Circuit and

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> Amendment. We therefore remand this case for trial, at which time the State must prove in order to prevail that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest.

Id. at 1213 (internal citations omitted).

82. *Bowers*, 478 U.S. at 190.

83. *Id.* at 190-91. The Court explained that the right to privacy which it had previously recognized concerned "child rearing and education, family relationships, procreation, marriage, contraception and abortion." *Id.* at 190.

84. *Id.* at 192-93. For example, all thirteen original states had laws outlawing sodomy at the time the Bill of Rights was ratified. *Id.* Thirty-two of thirty-seven states had such laws when the Fourteenth Amendment was ratified in 1868. *Id.* Until 1961, all fifty states had anti-sodomy laws, and at the time of the decision, twenty-four states and the District of Columbia still had such laws in effect. *Id.* at 193-94.

85. *Id.* at 194.

86. *Id.* at 191. Petitioner had argued that the Court should recognize this right under the Due Process Clause because the conduct occurred in private, thus entitling it to protection under *Stanley v. Georgia*, in which the Court had held that the Constitution prohibited a conviction for possession of obscene materials in the privacy of one's home. *Id.* at 195; *see* Stanley v. Georgia, 394 U.S. 557 (1969). The Court rejected this logic, reasoning that a person using drugs in the privacy of his home would be afforded no constitutional protection solely because he stayed in his home. *Bowers*, 478 U.S. at 195.

87. *Id.* at 196. *See supra* notes 49-52 and accompanying text for an explanation of the Court's substantive due process analysis.

88. *Bowers*, 478 U.S. at 196. The Court noted:

> [R]espondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.

Id.

held the statute constitutional.[89]

Aside from the cases dealing with a constitutionally protected right of privacy, *Romer v. Evans* is also of importance.[90] In this case, a group of individuals challenged the constitutionality of an amendment to the Constitution of Colorado that prohibited the Colorado government from protecting homosexuals from discrimination.[91] The state asserted that it had a legitimate interest in protecting "the liberties of landlords or employers who have personal or religious objections to homosexuality" and "in conserving resources to fight discrimination against other groups," thus satisfying the rational basis review standard.[92] The Court rejected these contentions because the effect of the amendment was to impose a disadvantage on a single named group of citizens and because the amendment swept so broadly that it could not possibly be thought to advance those interests, but rather was borne of "animus toward the class it affects."[93] Thus, the Court struck down the amendment as violative of the Equal Protection Clause.[94]

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89. *Id.*

90. Romer v. Evans, 517 U.S. 620 (1996).

91. *Id.* at 624. Amendment Two read as follows:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. amend. 2 (1992).

92. *Romer*, 517 U.S. at 635. *See supra* notes 29-34 and accompanying text for discussion of equal protection analysis.

93. *Id.* at 632. The Court explained:

> Amendment 2 fails, indeed defies, even this conventional inquiry [whether legislation bears a rational relationship to a legitimate government purpose]. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Id.

94. *Id.* at 635-36. The Court held:

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

The result in *Romer* was somewhat surprising because the Court invalidated the law under rational basis review.[95] Commentators have long noted that "judicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp."[96] The Court acknowledged this tendency to defer to the legislative process, even with seemingly improvident legislation.[97] Here, however, the Court said that the amendment "confounds this normal process of judicial review. It is at once too narrow and too broad."[98]

PRINCIPAL CASE

In *Lawrence*, the Court considered: (1) whether petitioners' sodomy convictions could be upheld under the Equal Protection Clause; (2) whether petitioners' convictions could be upheld under the Due Process Clause; and (3) whether *Bowers v. Hardwick* should be overruled.[99] The Court began its analysis by declaring that the case should be decided under the Due Process Clause.[100] It later returned to the Equal Protection Clause issue but gave it minimal consideration.[101]

Id.

95. *Id.*

96. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997).

97. *Romer*, 517 U.S. at 632. The Court acknowledged that "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.*

98. *Id.* at 633. The Court explained:

> [Amendment Two] identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

Id. (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928)). The Court went on to note:

> Respect for [the principle that government and each of its parts remain open on impartial terms to all who seek its assistance] explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Id.

99. Lawrence v. Texas, 123 S. Ct. 2472, 2476 (2003).

100. *Id.*

101. *Id.* at 2482. The Court stated:

The Court first reviewed relevant case law outlining the constitutionally protected right of privacy.[102] The Court chose *Griswold* as its starting point, noting that decision's "emphasis on the marriage relation and the protected space of the marital bedroom."[103] The Court went on to discuss *Eisenstadt*, *Roe*, and *Carey*, emphasizing the contribution of each case to the Court's right of privacy jurisprudence.[104] The latter three cases, the Court said, "confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults."[105]

The Court then turned to *Bowers v. Hardwick*.[106] As previously noted, the *Bowers* Court had considered the issue before it to be "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[107] The Court conceded that its statement of the issue in *Bowers* "demean[ed] the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[108] It admitted that it had read the issue in the case far too narrowly; it had "fail[ed] to appreciate the extent of the liberty at stake."[109] This liberty, the Court observed, allowed homosexuals to choose to enter into relationships without fear of prosecution.[110]

The Court then reviewed its claim in *Bowers* that "'[p]roscriptions

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> As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Id.

102. *Id.* at 2476.

103. *Id.* at 2477. See *supra* notes 18-23 and accompanying text for a discussion of *Griswold*.

104. *Id. See supra* notes 24-42, 43-55, and 68-74 and accompanying text, respectively, for a detailed discussion of these cases.

105. *Lawrence*, 123 S. Ct. at 2477.

106. *Id.*

107. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

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

109. *Id.*

110. *Id.* "The statutes . . . seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals." *Id.* The Court went on to warn against "attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." *Id.* The Court "acknowledge[d] 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." *Id.*

against [homosexual] conduct have ancient roots.'"[111] The Court attacked this notion by pointing out that the distinction between heterosexuals and homosexuals did not even come into being until the latter part of the nineteenth century.[112] Furthermore, it observed that laws against sodomy really were in place to prohibit conduct intended for purposes other than procreation, whether the conduct in question was between people of different sexes or of the same sex.[113]

In addition to the flawed historical background of anti-sodomy laws set forth in *Bowers*, the Court noted other problems surrounding the decision, such as the Court's failure to recognize the recommendation of the American Law Institute that states not implement such statutes.[114] The Court pointed out that anti-sodomy laws were rarely enforced at the time the decision was announced.[115] The Court observed that, five years prior to *Bowers*, a European court had decided a similar case and reached an opposite result.[116] The Court went on to declare that the deficiencies in the decision "became even more apparent in the years following its announcement," since nearly half of the states with such laws in 1986 had repealed them by 2003.[117]

The Court continued to attack the holding in *Bowers* by referring to *Casey* and *Romer*.[118] The Court explained that those cases "[eroded] the foundations of *Bowers*."[119] It noted that the decision had been subject to "substantial and continuing" criticism in the United States and that other nations around the world had declined to follow its logic.[120] The Court con-

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111. *Id.* (quoting *Bowers*, 478 U.S. at 192).

112. *Id.* at 2478-79. The Court noted that "early American sodomy laws" were directed at the prohibition of sodomy in general and, furthermore, that such laws were seldom enforced. *Id.* at 2479.

113. *Id.* at 2479.

114. *Id.* at 2480. *See* MODEL PENAL CODE § 213.2 cmt. 2 at 372 (1980). The Court noted that, in 1961, Illinois adopted the Model Penal Code and many other states soon did the same. *Lawrence*, 123 S. Ct. at 2481.

115. *Id.* The Court noted that the *Bowers* Court had observed that the Georgia statutes at issue had not been enforced for decades. *Id.*

116. *Id. See* Dudgeon v. United Kingdom, 45 Eur. Ct. H. R. 52 (1981). The European court in this case declared the anti-sodomy law in question to be in violation of the European Convention on Human Rights. *Id.*

117. *Lawrence*, 123 S. Ct. at 2481. *See infra* note 197 and accompanying text.

118. *Id.* at 2481-82.

119. *Id.* at 2483. *Casey* eroded *Bowers*' foundations by grounding the right to make important personal decisions in the Fourteenth Amendment. *Id.* at 2481. *See supra* notes 56-67 and accompanying text for a discussion of *Casey*. *Romer* eroded *Bowers*' foundations by striking down "class-based legislation directed at homosexuals." *Lawrence*, 123 S. Ct. at 2482. *See supra* notes 90-98 and accompanying text for a discussion of *Romer*.

120. *Id.* The Court cited several cases that had declined to follow the reasoning of *Bowers* "in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment." *Id.* at 2483. *See, e.g.*, Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002) (striking down an Arkansas anti-sodomy law as violative of the Arkansas Equal Rights

cluded that the decision "was not correct when it was decided, and it is not correct today. [It] should be and now is overruled."[121] The Court then declared:

> [Homosexuals] are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.[122]

Justice Sandra Day O'Connor delivered an opinion concurring in the judgment.[123] She agreed with the Court that the statute in question was unconstitutional but disagreed with how the majority invalidated it, reasoning that a better approach would have been to strike down the law because it violated the Equal Protection Clause.[124] She declined to join the Court in overturning *Bowers*, noting that the issue before the *Bowers* Court was whether the Due Process Clause "protected a right to engage in homosexual sodomy."[125] In contrast, she viewed the issue in *Lawrence* as whether moral disapproval of homosexuality was a legitimate government interest and, if so, whether the statute's criminalization of homosexual sodomy but not heterosexual sodomy was rationally related to that interest.[126]

Justice O'Connor then reviewed the Court's rational basis jurisprudence, noting the Court's tendency to uphold the constitutionality of "economic or tax legislation" in its cases.[127] She observed that the Court was much more likely to find legislation unconstitutional under rational basis when "the challenged legislation inhibits personal relationships."[128] She cited *Department of Agriculture v. Moreno* as one example of this tendency, in which the Court invalidated a food stamp law under rational basis review because its actual purpose was to "discriminate against hippies."[129] She also

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Amendment); Powell v. State, 510 S.E.2d 18 (Ga. 1998) (striking down the Georgia anti-sodomy statute upheld in *Bowers* as unconstitutional for violation of an individual's right of privacy guarantee by the Georgia constitution).

121. *Lawrence*, 123 S. Ct. at 2484.
122. *Id.* (internal citations omitted).
123. *Id.* at 2484 (O'Connor, J., concurring).
124. *Id.* (O'Connor, J., concurring).
125. *Id.* at 2486 (O'Connor, J., concurring).
126. *Id.* (O'Connor, J., concurring).
127. *Id.* at 2484-85 (O'Connor, J., concurring).
128. *Id.* at 2485 (O'Connor, J., concurring).
129. *Id.* (O'Connor, J., concurring) (citing Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)). The statute in question "exclude[d] from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household." *Moreno*, 413 U.S. at 529.

cited *City of Cleburne v. Cleburne Living Center, Inc.*, where the Court concluded that the city's requirement of a special-use permit for a group home for the mentally retarded was based "on an irrational prejudice" against that group.[130]

The Texas statute, Justice O'Connor observed, "treats the same conduct differently based solely on the participants."[131] She noted Texas' asserted state interest was "the promotion of morality."[132] However, she claimed that the state's actual interest was moral disapproval of homosexuals, which "cannot be a legitimate governmental interest under the Equal Protection Clause."[133] She noted that a state may not punish one group of people when that punishment does not apply to the rest of the state's citizens.[134] She concluded, therefore, that the Texas statute was unconstitutional under the Equal Protection Clause because the government did not have a legitimate interest in proscribing homosexual sodomy.[135] She also hinted that although her analysis might not render anti-sodomy statutes applying equally to heterosexuals and homosexuals invalid, such laws would probably "not long stand in our democratic society."[136]

Justice Scalia delivered a scathing dissenting opinion criticizing the majority's decision.[137] He first chastised the Court for its lackadaisical ap-

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130. *Lawrence*, 123 S.Ct. at 2485 (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985) (O'Connor, J., concurring)). A Texas municipal ordinance required that group homes for the mentally retarded obtain a special-use permit. *Cleburne*, 473 U.S. at 435. The Court could find no reason why the city denied the permit since the group home met "the federal square-footage-per-resident requirement" and stated that, although the mentally retarded "suffer disability not shared by others," this was no justification for imposing "a density regulation that others need not observe." *Id.* at 449-50.

131. *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).

132. *Id.* at 2486 (O'Connor, J., concurring).

133. *Id.* (O'Connor, J., concurring).

134. *Id.* at 2487 (O'Connor, J., concurring). Justice O'Connor noted that "Texas law confirms that the sodomy statute is directed toward homosexuals as a class" and that the state "admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal." *Id.*

135. *Id.* at 2488 (O'Connor, J., concurring).

136. *Id.* at 2487 (O'Connor, J., concurring). Justice O'Connor explained that

> the framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Id. at 2487 (quoting Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949)).

137. *Id.* at 2488 (Scalia, J., dissenting). Justices Rehnquist and Thomas joined Justice Scalia's dissent.

proach to *stare decisis* by pointing out the Court's failure to adhere to the approach set forth in *Planned Parenthood v. Casey*.[138] Nevertheless, he claimed that even under the Court's new approach, *Bowers* continued to be valid.[139] He maintained that the majority's "approach to *stare decisis* invites [the Court] to overrule an erroneously decided precedent (including an 'intensely divisive' decision) *if:* (1) its foundations have been 'eroded' by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning."[140] With regard to the first factor, Justice Scalia conceded that the foundations of *Bowers* had been eroded but noted that other decisions of the Court, such as *Roe v. Wade* and *Planned Parenthood v. Casey*, had also sustained erosion without being overruled by the Court.[141] Furthermore, he contended that the majority's claim that *Bowers* had been subjected to "substantial and continuing" criticism was largely unsupported.[142] Finally, he urged that *Bowers* had in fact induced "overwhelming" societal reliance, both in judicial opinions of the Supreme Court and many lower courts and in legislation across the country.[143] Thus, while critical of the majority's new approach to *stare decisis*, he maintained that *Bowers* still could have remained valid precedent under that approach.[144]

Justice Scalia next criticized the majority's failure to adhere to its substantive due process jurisprudence.[145] He noted the Court's failure to find a "fundamental right" or a "fundamental liberty interest" even though the Court was overruling *Bowers*, in which the Court had expressly declined to find such an interest.[146] He pointed out that the majority should have applied strict scrutiny to the law in question.[147] Because it did not, Scalia contended that the majority's "unheard-of form of rational-basis review [would] have far-reaching implications beyond this case."[148]

Justice Scalia also took issue with the premise of Justice O'Connor's concurring opinion by noting that, under equal protection analysis, the Texas

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138. *Id.* (Scalia, J., dissenting). Justice Scalia criticized the Court's "surprising readiness to reconsider [*Bowers*, which was] rendered a mere 17 years ago." *Id.* (Scalia, J., dissenting).
139. *Id.* at 2489 (Scalia, J., dissenting).
140. *Id.* (Scalia, J., dissenting) (internal citations omitted). Justice Scalia noted that, according to the majority's analysis, nothing stood in the way of also overturning *Roe v. Wade*. *Id.* (Scalia, J., dissenting).
141. *Id.* (Scalia, J., dissenting).
142. *Id.* at 2489-90 (Scalia, J., dissenting).
143. *Id.* at 2490 n.2 (Scalia, J., dissenting). Justice Scalia noted reliance upon *Bowers* in federal legislation and court decisions in a variety of jurisdictions. *Id.*
144. *Id.* at 2489 (Scalia, J., dissenting).
145. *Id.* at 2492 (Scalia, J., dissenting). *See supra* notes 49-52 and accompanying text for an explanation of the Court's traditional approach to substantive due process.
146. *Id.* (Scalia, J., dissenting).
147. *Id.* (Scalia, J., dissenting).
148. *Id.* at 2488 (Scalia, J., dissenting). Justice Scalia went so far as to declare that the majority opinion "laid waste the foundations of our rational-basis jurisprudence." *Id.* at 2497.

statutes would withstand attack under rational basis review.[149] He argued that the Texas statute was not facially discriminatory because the ban on same-sex sodomy was imposed equally upon men and women.[150] Therefore, he reasoned, the statute would need only to surpass rational basis review and that it did so because Texas could assert a legitimate state interest in prohibiting sexual conduct that society viewed as "immoral and unacceptable."[151] In closing, Justice Scalia bemoaned the Court's decision because he claimed that it opened the door for legalization of gay marriage.[152]

ANALYSIS

The Flaws in Lawrence

The Court took a bold approach to a volatile issue in *Lawrence v. Texas*. To be certain, the majority was aware that statements such as "[homosexuals] are entitled to respect for their private lives" and that states "cannot demean their existence or control their destiny by making their private sexual conduct a crime" would be controversial.[153] It is to be commended for such bravery. Nevertheless, the majority's opinion has certain fundamental flaws. In particular, the Court's failure to follow its established substantive due process review and its inconsistent approach to *stare decisis* render its decision far less persuasive than it could otherwise have been.

Aside from overturning *Bowers v. Hardwick*, the Court's holding was that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[154] As Justice Scalia alluded to throughout his dissenting opinion, this conclusion is strange when considering the rest of the majority opinion.[155] As noted previously, the Court outlined the approach of substantive due process review in *Washington v. Glucksberg*.[156] The Court in *Lawrence* stated that "the case should be resolved by determining whether the petitioners were free as

149. *Id.* at 2495 (Scalia, J., dissenting).
150. *Id.* (Scalia, J., dissenting).
151. *Id.* (Scalia, J., dissenting).
152. *Id.* at 2498 (Scalia, J., dissenting). Specifically, Justice Scalia asked:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), "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," what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution"?

Id. (Scalia, J., dissenting).
153. *Id.* at 2484.
154. *Id.*
155. *Id.* at 2488 (Scalia, J., dissenting).
156. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause."[157] This would lead the reader to believe that the Court would use the *Glucksberg* analysis to determine whether a fundamental right was at stake and, if so, subject the legislation to strict scrutiny.[158] As Justice Scalia noted, however, the Court failed to mention a fundamental right in the context of due process review at any point in its opinion.[159] This is especially troublesome when considering *Bowers*, which specifically declined to recognize a fundamental right to engage in homosexual sodomy.[160] The Court never addressed this conclusion in its opinion. Instead, it picked at *Bowers*' various deficiencies, overturned it, and then briefly mentioned that there was no legitimate state interest behind the Texas statute.[161]

It is of course possible that these inconsistencies can be explained by the Court's desire not to limit itself to the issue of homosexual sodomy. The Court seemed to suggest this when it recognized the *Bowers* Court's failure to "appreciate the extent of liberty at stake."[162] The Court seemed determined to make a broad statement about the individual rights of homosexuals to make decisions concerning their private lives.[163] There is nothing wrong with this, but it is unusual that the Court would speak so passionately about such rights but stop short of labeling any of them "fundamental," because under *Glucksberg* only "fundamental" rights qualify for protection under the Due Process Clause.[164] The Court's failure to recognize the rights of homosexuals to engage in private sexual conduct as "fundamental" or to explain its reasons for not labeling them as such effectively cheapens its declarations

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157. *Lawrence*, 123 S.Ct. at 2476.

158. *See supra* notes 49-52 and accompanying text for an explanation of the Court's traditional approach to substantive due process.

159. *Lawrence*, 123 S. Ct. at 2488.

160. Bowers v. Hardwick, 478 U.S. 186, 191 (1986). "Respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." *Id.*

161. *Lawrence*, 123 S. Ct. at 2484. *See supra* notes 106-21 and accompanying text for the majority's criticisms of *Bowers*.

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

163. The Court noted the "respect the Constitution demands for the autonomy of the person" in making certain choices. *Id.* at 2481. The Court went on to cite this passage from *Casey*:

> 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.

Id. (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)). The Court then declared: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence*, 123 S. Ct. at 2482.

164. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

about these rights because it seems to suggest that, while these rights are important, they are not important enough to be deemed "fundamental."

Notwithstanding this defect, statutes that do not implicate a fundamental liberty interest still must pass constitutional muster under rational basis review, which requires the statute to be rationally related to a legitimate state interest.[165] The Court simply asserted that no legitimate state interest could be found here.[166] Because rational basis traditionally is thought of as a "rubber stamp" approach, it is unusual that the Court would not spend time discussing why no legitimate state interest is present.[167] Texas did, after all, assert that it sought to promote morality by enacting the statute.[168] The Court did not even address whether this contention was valid or not. It seems that the Court's traditional deference to the legislative process would warrant at least some explanation of why this case was different.[169]

Thus, the *Lawrence* Court departed from its typical approach to due process analysis.[170] This leaves lower courts either to reach their own conclusions about how the approach fits within the classic due process framework, or to simply regard the opinion as an anomaly to be ignored when considering future due process questions. Neither result is appealing. If a court has to labor over what *Lawrence* really means, then the Supreme Court has not performed its stated function of "defin[ing] the liberty of all."[171] The same is true if a court simply ignores *Lawrence*, because a court that cannot rely upon the decision is in no better position to define the liberty of homosexuals than it would have been if *Lawrence* had not been decided at all. In such a scenario, it matters little that the Court feels that homosexuals "may seek autonomy . . . just as heterosexual persons do."[172]

The possibility exists that the majority was outlining a substantive due process approach it found preferable to the one outlined in *Gluckberg*.[173]

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165. *See supra* notes 49-52 and accompanying text for an explanation of the Court's traditional approach to substantive due process.

166. *Lawrence*, 123 S. Ct. at 2478. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 2484. The reader was not even told what the asserted state interest was until Justice O'Connor's concurring opinion; which explained that the asserted state interest was Texas' interest in "the promotion of morality." *Id.* at 2486 (O'Connor, J., concurring).

167. Under equal protection analysis, rational basis review is considered to be a strong presumption in favor of the legislation's validity. *See supra* notes 95-98 and accompanying text. Under substantive due process review, rational basis carries the same presumption of validity. For examples of laws that were "rubber-stamped" under substantive due process rational basis review, *see, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986); Washington v. Glucksberg, 521 U.S. 702 (1997).

168. *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

169. *See supra* notes 95-98, 127-30 and accompanying text.

170. *See supra* notes 49-52 and accompanying text.

171. Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

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

173. *See supra* note 50 and accompanying text.

The Court has departed from the *Glucksberg* approach before in *County of Sacramento v. Lewis*, noting that "the touchstone of due process is protection of the individual against arbitrary action of government."[174] The language of the opinion suggests that such an approach is more appropriate for situations involving executive, as opposed to legislative, action.[175] However, Justice Souter, who authored the *Lewis* majority opinion, had pressed for the imposition of this arbitrariness standard in his concurrence in *Glucksberg* as an alternative to the majority's approach, even though the *Glucksberg* Court was considering legislative action.[176] Thus, the argument that the *Lewis* standard might have some bearing on a situation involving legislative rather than executive action merits consideration.

Assuming then, *arguendo*, that the *Lawrence* Court was using an approach more analogous to that championed in *Lewis*, the *Lawrence* opinion is still left on shaky ground. If the majority was using an alternative substantive due process approach, it seems reasonable that it would have admitted to doing so because such an admission would have weakened Justice Scalia's attack on its failure to adhere to the Court's established substantive due process jurisprudence.[177] As alluded to previously, the majority's failure to address this argument casts doubt on the strength of the Court's statements about homosexuals' guaranteed rights to privacy.[178] Additionally, the substantive due process approach followed by the *Bowers* Court mirrors the approach outlined in *Glucksberg*.[179] One would expect that the Court, in

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174. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). The Court noted that arbitrary action by the government would be found only in "the most egregious [instances] of official conduct." *Id.* "The cognizable level of executive abuse of power [i]s that which shocks the conscience." *Id.*

175. *Id.* at 847 n.8. Justice Souter noted:

> [A] case challenging executive action on substantive due process grounds, like this one, presents an issue antecedent to any question about the need for historical examples of enforcing a liberty interest of the sort claimed. For executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. [Conversely,] the difference of opinion in *Glucksberg* [which involved legislative action] was about the need for historical examples of recognition of the claimed liberty protection at some appropriate level of specificity. In an executive action case, no such issue can arise if the conduct does not reach the degree of the egregious.

Id.

176. *See supra* note 50 and accompanying text.

177. *Lawrence*, 123 S. Ct. at 2492 (Scalia, J., dissenting). *See supra* notes 145-48 and accompanying text.

178. *See supra* notes 162-64 and accompanying text.

179. With regard to whether a fundamental liberty interest was at stake, the *Glucksberg* Court stated, "our decisions lead us to conclude that the asserted "right" to assistance in

overruling *Bowers*, would have noted that *Bowers* took the wrong approach to substantive due process analysis, especially since it was so eager to point out everything else that was wrong with the decision. Therefore, even if the *Lawrence* Court was using an alternative approach to the one outlined in *Glucksberg*, its failure to so note is puzzling since doing so would have strengthened its holding by weakening Justice Scalia's attack and by providing further support for its decision to overturn *Bowers*.

Aside from the *Lawrence* Court's treatment of substantive due process review, its approach to *stare decisis* is also worthy of some consideration, as the approach taken was markedly different from the one set forth in *Planned Parenthood v. Casey*.[180] When considering whether a case ought to continue as binding precedent, the *Casey* and *Lawrence* approaches are in accord on only one aspect – that societal reliance upon the standard articulated in the case should be considered.[181] Unlike the *Lawrence* Court approach, the *Casey* Court emphasized the factors of workability of the central rule, the change in underlying facts upon which the holding was based, and whether a change in the law had left the rule of the case as an irrelevant remnant of a bygone doctrine.[182] The *Lawrence* Court, in contrast, opined that erosion of the decision by subsequent decisions and the extent of criti-

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committing suicide is not a fundamental liberty interest protected by the Due Process Clause." Washington v. Glucksberg, 521 U.S. 702, 728 (1997). The Court went on to find that the statute prohibiting suicide was rationally related to the legitimate government interest in preserving human life. *Id.* at 728-29. Likewise, the *Bowers* Court declined to find a fundamental liberty interest to engage in homosexual sodomy. Bowers v. Hardwick, 478 U.S. 186, 191 (1986). It then held that the statute prohibiting sodomy was rationally related to the legitimate government interest in promoting morality. *Id.* at 196.

180. *See supra* note 60 and accompanying text.

181. *See* Planned Parenthood v. Casey, 505 U.S. 833, 855 (noting the importance of "enquir[ing] whether . . . the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it"); *Lawrence*, 123 S. Ct. at 2483 ("When a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.").

182. Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992). In *Casey*, the Court explained:

> [I]n this case we may enquire whether *Roe's* central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe's* central rule a doctrinal anachronism discounted by society; and whether *Roe's* premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

Id.

cism of the decision are of paramount importance.[183]

Whichever approach is the better one, the Court's new approach has confused the *stare decisis* issue. The *Lawrence* Court did not suggest that its approach was preferable to the one set forth in *Casey*; it did not even mention the *Casey* approach.[184] Further, the Court provided no guidance to lower courts as to which standard was better or, if it is assumed that the two are meant to co-exist, the proper circumstances under which to use each one. Perhaps the *Lawrence* approach is unique in that it represents a *stare decisis* rule to apply when a court feels that the decision being questioned was neither correct when it was decided nor correct in the current situation.[185] This view would leave the *Casey* approach for situations where a court feels that the decision was correct when it was decided but is not valid in the present.[186] Whether this or some other distinction between approaches was contemplated by the Court, its failure to distinguish may require future elaboration if confusion among lower courts results as to its application.[187]

Thus, the *Lawrence* Court rendered an opinion with brave aspirations but fundamentally flawed explanations. However, it is possible that the Court was forced into result-oriented jurisprudence in this case. Having ascertained that the proper result was to strike down the laws as unconstitutional, the majority may have been at a loss as how to properly reach that result in light of the restrictions imposed by its due process and *stare decisis* jurisprudence.[188] This problem could have been avoided, however, had the Court decided to invalidate the statute under the Equal Protection Clause.

The Equal Protection Argument

The majority conceded that the equal protection argument was "tenable" but expressed skepticism as to its propriety because states could

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183. *Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting). Justice Scalia summarized the majority's *stare decisis* approach as follows:

> Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) *if:* (1) its foundations have been "eroded" by subsequent decisions; (2) it has been subject to "substantial and continuing" criticism; and (3) it has not induced "individual or societal reliance" that counsels against overturning.

Id. (Scalia, J., dissenting) (internal citations omitted).

184. *See supra* note 60 and accompanying text.

185. The Court did note that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 123 S. Ct. at 2484.

186. Unlike the *Lawrence* Court, which felt that *Bowers* was never correct to begin with, the Court in *Casey* was concerned with whether *Roe* continued to be valid. *Casey*, 505 U.S. at 845.

187. Justice Scalia's dissent sharply criticizes the Court's approach. *See Lawrence*, 123 S. Ct. at 2488-91 (Scalia, J., dissenting).

188. *Id.* at 2484.

still enact legislation that prohibited sodomy for same-sex and different-sex couples alike.[189] Justice O'Connor thought, however, that such laws "would not long stand in our democratic society."[190] She advocated an approach similar to that taken in *Romer v. Evans*.[191] This would have required that the Court depart from its traditional "rubber stamp" approach because otherwise rational basis review would result in the statute passing constitutional muster.[192]

One of the most compelling arguments for an equal protection approach to this case is that it would have allowed for "representation reinforcement theory," which suggests that the Court should step in to help under-represented groups when the democratic process is defective in representing their interests.[193] Of course, the Court has arguably achieved this by deciding *Lawrence* the way it did in striking down anti-sodomy laws as unconstitutional.[194] However, underlying the theory is the idea that the Court should allow the democratic process to amend the undesirable laws to the greatest extent possible.[195] Had the Court invalidated only the laws applying to homosexual sodomy, the laws of nine states applying to all sodomy would

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189. *Lawrence*, 123 S. Ct. at 2482. *See supra* note 101 and accompanying text.
190. *Id.* at 2487.
191. *Id.* at 2484. See *supra* notes 90-94 and accompanying text.
192. *See supra* note 95-98 and accompanying text.
193. *See infra* note 195.
194. *Lawrence*, 123 S. Ct. at 2484.
195. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). Ely outlines his theory, which is directed at curing the defects in the American system of government in representing minorities, partially as follows:

> [R]ule in accord with the consent of a majority of those governed is the core of the American governmental system. [But] that cannot be the whole story, since a majority with untrammeled power . . . is in a position to deal itself benefits at the expense of the remaining minority even when there is no relevant difference between the two groups. The tricky task [is to devise] a way . . . of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule.

Id. at 7-8. In order to accomplish this, Ely claims that the Constitution is "overwhelmingly concerned . . . with procedural fairness in the resolution of individual disputes . . . and . . . with ensuring broad participation in the processes [of] government." *Id.* at 87. Ely sets forth a "representation-reinforcing approach to judicial review." *Id.* at 87. This approach, which focuses on "clearing the channels of political change" and "facilitating the representation of minorities,"

> [I]s not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy. . . . [Moreover,] such an approach . . . involves tasks that courts, as experts on process and . . . as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.

Id. at 88.

have remained.[196] These laws could have remained on the books because they would represent legislative decisions of an essentially moral nature. It would then be up to the people of those states to communicate to their legislators whether they desired to retain such laws.

The argument that these sodomy laws would have eventually been repealed is evidenced by the fact that the number of states with laws pertaining to sodomy was reduced from twenty-four at the time of *Bowers* to thirteen at the time of *Lawrence*.[197] The fact that any laws pertaining equally to same-sex and different-sex couples remained on the books may partially be explained by the "pattern of nonenforcement" of such laws.[198] If the laws were never enforced, it is possible that the citizens of those states never knew that their state even had such laws, thus, there would have been no petitioning of their legislators to repeal them. Had the Court struck down the laws pertaining only to homosexuals, this would have the effect of reinforcing the representation of homosexuals in the democratic process.

An approach by the Court that left alone those laws pertaining to heterosexual and homosexual sodomy would have allowed the democratic process to do its job because it would have forced legislatures to take a closer look at their respective state laws. If the purpose of the laws was "moral disapproval" of homosexuality, these laws would have to be repealed because, as Justice O'Connor noted, "moral disapproval" of a group cannot be a legitimate state interest.[199] On the other hand, if the purpose truly was to promote morality by preventing sodomy for all persons, legislators would have to consider whether the retention of such laws represented the true desires of their constituents. Furthermore, if the laws that were retained for "moral" reasons tended to be enforced only against homosexuals, such disproportionate treatment would invite closer judicial scrutiny, which could result in determinations that the morality argument offered by the legislature really was mere pretense and that the true purpose of the laws was moral disapproval of homosexuality, which would result in the laws being struck down.

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196. Prior to the *Lawrence* decision, thirteen states still had anti-sodomy laws. *See* Lambda Legal, Status of Striking Down Anti-Sodomy Laws, *available at* http://www.lamdalegal.org/binary-data/LAMBDA_PDF/pdf/173.pdf (last visited Oct. 5, 2003). Texas, Kansas, Missouri, and Oklahoma had statutes pertaining only to homosexual sodomy. Nancy J. Knauer, *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues*, 12 LAW & SEX 1, 26 n.124 (2003). Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia had laws outlawing sodomy for heterosexuals and homosexuals. *Id.*

197. *Lawrence*, 123 S. Ct. at 2481. The Court noted an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 2480.

198. *Id.* at 2481.

199. *Id.* at 2486 (O'Connor, J., concurring).

Had the Court struck down only the facially discriminatory sodomy laws, it could have refrained from "tak[ing] sides in the culture war."[200] While the Court may not have been concerned with being impartial, the potential for backlash to the *Lawrence* opinion suggests that it should have.[201] For example, in the wake of a Hawaii court ruling that required the state to show a compelling interest for its proscription of same-sex marriage, Congress enacted the Defense of Marriage Act in 1996, which defined a marital union as being between a man and a woman.[202] As a result of the *Lawrence* decision, it is possible that either the federal government or state governments, or both, will pass legislation that, for example, restricts the adoption rights of same-sex couples.[203] Along with such legislation may come increased anti-homosexual sentiment that hinders a growing acceptance of homosexuals, something the Court certainly was not advocating in *Lawrence*.[204] Though the Court's determination to recognize the "autonomy" of homosexual persons is admirable, it is possible that it will have the opposite effect on American culture.[205]

Another example of how judicial advancement of the rights of homosexuals can backfire was seen in President George W. Bush's most recent State of the Union Address.[206] The President took aim at "activist judges [that] have begun redefining marriage by court order."[207] He hinted that he would support a constitutional amendment that would limit marriage to a union between a man and a woman.[208] It is true that the Court in *Lawrence*

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

201. Knauer, *supra* note 196, at 51. Knauer notes: "Recent advances in gay civil rights have invigorated pro-family efforts to preserve their particular vision of morality and family, and the result has been numerous legal efforts designed to hold the line against what the pro-family organizations would characterize as the ever encroaching homosexual agenda." *Id.*

202. Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 LAW & SEX 119, 142-43 (2003). *See* 28 U.S.C.A. § 1738C (2002). The majority of states soon enacted legislation similar to the Defense of Marriage Act. Yatar, *supra*, at 143.

203. *See, e.g.*, Lofton v. Kearney, 157 F. Supp. 2d 1372, 1385 (S.D. Fla. 2001) (upholding a statute that denied homosexuals the right to adopt children).

204. *See generally* Yatar, *supra* note 202, at 135-41 (summarizing the changing social status of and attitudes towards homosexuals). Yatar notes that the "gradual liberalization of societal attitudes toward homosexuality and the greater acceptance of homosexual persons," due in large part to the work of various gay rights organizations, are reflected in various areas, including anti-sodomy law repeal, same-sex union recognition, family rights, and anti-discrimination legislation, among others. *Id.* at 137.

205. *See supra* note 163 and accompanying text.

206. President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.transcript.6/index.html (last visited Feb. 1, 2004).

207. *Id.*

208. *Id.* "On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage." *Id.* Presumably, Mr. Bush was referring to a recent Massachusetts decision, in which Massachusetts Supreme Judicial Court held that "barring an individual from the protections, bene-

was not advocating for recognition of same-sex marriage.[209] Nevertheless, the President's comments seem to suggest that the best way for homosexuals to gain equal rights is through the democratic process.[210] If Congress amends the Constitution in response to this issue, courts will have severely damaged homosexuals' chances at equality rather than improving them. It would be much more difficult for Congress to do something as drastic as amending the Constitution if action were taken by state legislatures rather than state courts. The will of the majority is not as easily disregarded as judicial activism.

Another criticism of *Lawrence*, emphasized by Justice Scalia in his dissent, is that it hinders the ability of legislatures to enact morality-based legislation.[211] The Court quoted Justice Stevens' dissenting opinion in *Bowers*: "The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[212] Justice Scalia declared that this reasoning "effectively decrees the end of all morals legislation."[213] He warned that the Court's position would leave other laws, such as those proscribing bigamy, incest, prostitution, and adultery, vulnerable to attack because they often are promulgated in the interest of promoting morality.[214] Had the Court chosen to invalidate the decision under the Equal Protection Clause, it could have asserted, as suggested by Justice O'Connor, that the actual purpose of the statute at issue was moral disapproval of homosexuality.[215] This would have allowed the Court to concede that the promotion of morality can be a legitimate state interest but that, in the present case, such an interest could not reasonably be regarded as the true purpose of the legislation.[216]

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fits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

209. Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003). The Court was careful to point out that "[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.*

210. *See supra* note 208.

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

212. *Id.* at 2483 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

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

214. *Id.* at 2490 (Scalia, J., dissenting). "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices." *Id.* (Scalia, J., dissenting).

215. *Id.* at 2486 (O'Connor, J., concurring).

216. *See* Romer v. Evans, 517 U.S. 620, 631-35 (1996). The *Romer* Court considered an amendment to the Constitution of Colorado, which prohibited the state from designating homosexuality as the basis for "minority status, quota preferences, protected status or claim of discrimination." *Id.* at 624. The state claimed that it had passed the amendment because of "respect for other citizens' freedom of association, and in particular the liberties of landlords

As a final note, it should be recognized that, had the Court chosen to use an equal protection approach similar to the one in *Romer v. Evans*, the opinion's precedential value might have been limited.[217] As previously discussed, taking an equal protection approach like the one taken in *Romer v. Evans* would seem to require the application of a "more searching form" of rational basis review.[218] However, since the type of review being applied would still be rational basis, a court considering a law affecting the rights of homosexuals could simply subject the law to typical "rubber stamp" rational basis review rather than the more protective form of rational basis suggested by Justice O'Connor.[219] Since laws reviewed under traditional rational basis review typically pass constitutional muster, a court could very easily uphold legislation that adversely affected the rights of homosexuals while still purporting to follow the opinion.[220] Thus, homosexuals would not benefit from the decision in *Lawrence*; its application would be limited to the narrow situation of anti-sodomy laws.

This result could have been overcome, however, if the Court had analyzed *Lawrence* under the Equal Protection Clause but decided, rather than striking down the law under rational basis review, to classify homosexuals as a "discrete and insular minority entitled to heightened protection."[221] Had the Court followed this approach and found homosexuals to be a suspect group, the level of scrutiny would be raised from rational basis to strict scrutiny, which would require a law to be narrowly tailored to achieve

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or employers who have personal or religious objections to homosexuality." *Id.* at 635. The Court stated:

> We cannot say that [the amendment] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

Id. For further discussion of *Romer*, *see supra* notes 90-98 and accompanying text.

217. *See, e.g.*, Patrick J. Norton, *Is Equality Foundation the Latest Chapter in America's Culture War?*, 48 CASE W. RES. 903, 913 (1998). Norton states:

> When the dust settles . . . *Romer* may not stand for very much. Ultimately, *Romer* stands for several unexceptional principles. First, homosexuals are not a suspect or quasi-suspect class. Second, legislation burdening homosexuals shall be analyzed using rational basis review. Third, legislation which is so broad as to be unexplainable by anything other than animus towards the group affected is not rational.

Id. Justice O'Connor's proposed approach in *Lawrence* is the same taken by the Court in *Romer*. *Lawrence*, 123 S. Ct. at 2484-88 (O'Connor, J., concurring).

218. *Id.* at 2485 (O'Connor, J., concurring).

219. *Id.*

220. *See supra* notes 95-98, 127-30 and accompanying text.

221. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21, at 1427 (2d ed. 1988).

a compelling state interest.[222] Alternatively, the Court could have recognized homosexuals as a quasi-suspect group, which would trigger intermediate scrutiny, requiring that the legislation in question be substantially related to an important state interest.[223] Under either level of review, the laws in question would be more closely scrutinized.[224] Thus, this approach would afford greater protection to the rights of homosexuals.

The Court's reasons for declining to recognize homosexuals as a suspect or quasi-suspect group are not entirely clear. However, the Court noted its hesitancy to analyze the issue under the Equal Protection Clause, lest the question arise as to whether statutes applying equally to heterosexuals and homosexuals were valid.[225] It seems reasonable to conclude from this concern that the Court wanted to afford the maximum possible protection to homosexual rights of privacy (even though the Court failed to recognize any "fundamental" rights).[226] However, as argued previously, the Court's concerns with statutes applying equally to homosexuals and heterosexuals could be addressed by the democratic process.[227] Although it could be argued in response to the equal protection arguments that the states that still had anti-sodomy laws applying to both same-sex and different-sex couples would be slow to change them, it must also be remembered that recognizing homosexuals as a discrete and insular minority would afford them rights in many areas, not just the right to have sexual relations.[228] The impact of this recognition would likely be far more advantageous to homosexuals than would be the abolition of nine states' sodomy laws. If homosexuals were classified as a discrete and insular minority, any law in any jurisdiction that drew lines based upon sexual orientation would have to satisfy intermediate scrutiny, whereas the abolition of nine states' anti-sodomy laws merely gives homosexuals the right to engage in sodomy and nothing more. Furthermore, the classification of homosexuals as a discrete and insular minority would have provided lower courts the opportunity to determine

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222. *See supra* notes 32-34 and accompanying text.

223. *See* Craig v. Boren, 429 U.S. 190 (1976). *Craig* "[o]penly adopt[ed] for the first time a judicial standard of review based on intermediate scrutiny." TRIBE, *supra* note 221, § 16-26, at 1564. This level of scrutiny requires that the legislation in question "serve important governmental objectives and . . . be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197. Intermediate scrutiny has been previously used when statutes make gender classifications. *See supra* note 34 and accompanying text.

224. Strict scrutiny encompasses the idea that some political choices "must be subjected to close analysis in order to preserve substantive values of equality and liberty." TRIBE, *supra* note 221, § 16-6, at 1451.

225. The Court noted: "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." Lawrence v. Texas, 123 S. Ct. 2472, 2482 (2003).

226. *See supra* note 163 and accompanying text.

227. *See supra* notes 193-99 and accompanying text.

228. *See supra* note 136 and accompanying text. Justice O'Connor believed that states *would* eventually change such laws. *Lawrence*, 123 S. Ct. at 2487.

the extent of these rights under the well-established equal protection framework. As we have seen, the *Lawrence* opinion, as it stands, hardly rests on such firm ground.

CONCLUSION

While the Court's ambitious opinion in *Lawrence* seeks to advance the interests of a typically under-represented class of citizens, it has the potential for unfortunate consequences because of its confusion of the substantive due process and *stare decisis* issues. In addition, a closer reading of the opinion leaves one to wonder about the actual definition of rights of homosexuals outlined in the opinion. This is particularly relevant in a time when the gay marriage issue looms large on America's political horizon. *Lawrence* will undoubtedly be looked to when that battle is fought in courts, and the opinion may very well lead to confusion that could have been avoided by a more careful treatment of the substantive due process question. In the alternative, an Equal Protection Clause approach would have allowed the Court to provide lower courts with a well-defined framework, which would have been helpful to courts wrestling with such difficult issues. The Court's failure to take either course of action is unfortunate, and only time will tell whether its treatment of the issues will cause a fragmented array of judicial opinions.

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