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Constitutional Law - Civil Rights: The Supreme Court Strikes down Sodomy Statute by Creating New Liberties and Invalidating Old Laws - Lawrence v. Texas

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CONSTITUTIONAL LAW—CIVIL RIGHTS: THE SUPREME COURT STRIKES DOWN SODOMY STATUTE BY CREATING NEW LIBERTIES AND INVALIDATING OLD LAWS

Lawrence v. Texas, 539 U.S. 558 (2003)

I. FACTS

Harris County Sheriff officers responded to a weapons disturbance report at the home of John Lawrence.[1] Upon entering the apartment and conducting a search for the weapons, the officers observed Lawrence engaging in sodomy with another male, Tyron Garner.[2] The officers then arrested and jailed Lawrence and Garner (petitioners) and held them in custody until the following day.[3]

The Texas Legislature revised its sodomy law in 1973 by making it a misdemeanor offense to engage in a deviate sexual act with another individual of the same sex.[4] In Texas, engaging in same-sex sodomy is a misdemeanor offense and punishable by a fine.[5]

The petitioners appealed for a trial de novo in the County Criminal Court after their conviction in the Justice of the Peace Court.[6] The County Criminal Court denied a motion by the petitioners to quash the charges.[7] In this motion the petitioners contended that the sodomy law violated the equal protection and privacy guarantees of the Fourteenth Amendment of the

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1. Lawrence v. Texas, 41 S.W.3d 349, 350 (Tex. App. 2001). The individual that reported the weapons disturbance said that there was "a black male . . . going crazy in the apartment and he was armed with a gun." Brief for Respondent at 2, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

2. *Lawrence*, 41 S.W.3d at 350. The individual who reported the weapons disturbance later admitted the allegations were false and was convicted of filing a false report. Brief for Petitioners at 2, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

3. Petitioner's Brief at 2 n.1, *Lawrence* (No. 02-102).

4. Respondent's Brief at 39, *Lawrence* (No. 02-102). Prior to 1973, the criminality of consensual sexual conduct did not differentiate between same-sex and different-sex conduct. Petitioners' Brief at 5, *Lawrence* (No. 02-102). Before 1973, Texas also criminalized fornication and adultery but repealed the statutes in 1973. *Id.* (describing the legislative history of TEX. PENAL CODE ANN. § 21.06 (Vernon 2003)). Deviate sexual intercourse is defined as any contact between any part of the genitals of one person and the mouth and anus of another person. *Id.* at 6 (citing TEX. PENAL CODE ANN. § 21.01 (Vernon 2003)).

5. Petitioner's Brief at 6 n.4, *Lawrence* (No. 02-102) (citing TEX. PENAL CODE ANN. § 12.23 (Vernon 2003)). The fine cannot exceed $500. *Id.*

6. *Id.* at 3.

7. *Id.*

United States Constitution and the Texas Constitution.[8] The petitioners asserted that the law violated their rights in its application and on its face.[9] After the petitioners pled *nolo contendere*, the court administered a fine and court costs.[10]

The petitioners appealed to the Court of Appeals for the Fourteenth District of Texas.[11] A panel of three judges held that the prosecution of the petitioners under Texas' sodomy law violated the Equal Rights Amendment of the Texas Constitution.[12] The State filed a motion to rehear the case *en banc* with the court.[13] The Court of Appeals granted the State's motion, and the *en banc* court reversed the panel's holding.[14] The sole question before the appeals court was whether Texas' prohibition of same-sex sodomy was facially unconstitutional.[15] The en banc court held that a state may legitimately exert, in the form of legislation, laws that "bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."[16] The court held that neither the state nor the federal constitutions contain express guarantees of privacy.[17] The court recognized that the Supreme Court has created some inferred rights to privacy that place certain limitations on governmental powers.[18] However, the court rejected applying these inferred privacy rights and stated that the Supreme Court has not created a privacy right for private sexual conduct, which is immune from state intervention.[19] The appeals court noted that "[w]hile a Legislature is not infallible in its moral and ethical judgments, it

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8. *Id.* The Texas Constitution states in relevant part: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST., art. 1 §3a (1997).

9. Petitioner's Brief at 3, *Lawrence* (No. 02-102).

10. *Id.* Under Texas' procedural rules, pleading *nolo contendere* preserves all previously asserted defenses. *Id.* (citing Tex. Code Crim. Proc. Ann. § 44.02 (Vernon 2003)). The Court fined each petitioner $200 and levied court costs of $141.25. *Id.* Since the petitioners entered pleas of *nolo contendere* at trial, the facts and circumstances of the offense are not in the subsequent court records. *Id.*

11. Brief for Respondent at 2, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102). In Texas, a ruling originating in a "Texas justice court to a county court may be further appealed to a court of appeals if the fine exceeds $100 or the sole issue is the constitutionality of the statute on which the conviction is based." *Id.* at 2 n.4. The petitioners did not contest, on appeal, the conduct of the police that lead to their discovery and arrest. Lawrence v. Texas, 41 S.W.3d 349, 350 (Tex. App. 2001).

12. Respondent's Brief at 2, *Lawrence* (No. 02-102).

13. *Id.*

14. Petitioner's Brief at 4, *Lawrence* (No. 02-102).

15. *Lawrence,* 41 S.W.3d at 350.

16. *Id.* at 359.

17. *Id.*

18. *Id.*

19. *Id.* at 360.

alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good."[20]

The petitioners then filed an appeal directly from the Fourteenth Circuit Court of Texas to the United States Supreme Court, and the Supreme Court granted a writ of certiorari.[21] The Court *held* that the petitioners had a "right to liberty under the Due Process Clause [that] gives them the full right to engage in their conduct without intervention from the government" and reversed the lower court.[22]

II. LEGAL BACKGROUND

When the United States Supreme Court addresses the constitutionality of an issue involving liberty, it must address several factors to determine its validity.[23] First, the Court must determine if the liberty attempting to be invoked is protected under the Fourteenth Amendment.[24] Second, the Court must examine whether this liberty is a fundamental right that requires heightened judicial scrutiny.[25] Third, the Court has to apply the appropriate level of scrutiny against the interest claimed by the state that is imposing the law.[26] Finally, the Court must balance its determination with the principle of *stare decisis* to determine if precedent guides the Court's determination and application.[27]

A. LIBERTY UNDER THE DUE PROCESS CLAUSE

The Due Process Clause found in the Fourteenth Amendment of the United States Constitution states that no person may be deprived of "life, liberty, or property, without due process of law."[28] The Supreme Court has held that the Due Process Clause guarantees more than a process and that the right to liberty encompasses more than the absence of physical restraint.[29]

A prima facie reading of the Due Process Clause may allow one to conclude that the Clause only focuses on the process by which life, liberty,

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20. *Id.* at 362.
21. Lawrence v. Texas, 539 U.S. 558 (2003).
22. *Id.* at 578.
23. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846-53 (1992).
24. Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986).
25. *Id.* at 191.
26. *Id.* at 196.
27. *Casey,* 505 U.S. at 854.
28. U.S. CONST. amend. XIV.
29. Washington v. Glucksberg, 521 U.S. 702, 719 (1997).

or property is taken.[30] However, the United States Supreme Court has determined that the Due Process Clause of the Fourteenth Amendment has "substantive content" that creates "subsuming rights that to a great extent are immune from federal or state regulation or proscription."[31] Subsuming rights are rights that are recognized through case law despite having little or no textual support in the Constitution.[32] The Federal Constitution protects these subsuming rights from invasion by the states because the Fourteenth Amendment applies to matters of substantive law as well as procedural matters.[33]

The Bill of Rights protects the most familiar substantive liberties, and the Fourteenth Amendment incorporates most of the rights enumerated by the Bill of Rights to the states.[34] The Supreme Court has never held that only the specific, enumerated rights found within the Constitution are protected.[35]

1. *Expansion of Liberties to Couples*

The Court first began to extend individual liberties under the Due Process Clause in *Griswold v. State of Connecticut*.[36] The Court stated that the implicit liberties under the Due Process Clause included the right to a zone of privacy that was free from government intrusion.[37] In *Griswold*, the Court held that there existed a zone of privacy, created by several fundamental constitutional guarantees, that precluded government intrusion into the private bedroom of married couples.[38]

The issue in *Griswold* was whether the State could ban the distribution of contraceptives to married individuals.[39] The Court cited the right of

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

31. *Id.* The Supreme Court originally decided that an individual enjoys liberties outside the enumeration of the constitution in 1887. *See generally* Mugler v. Kansas, 123 U.S. 623 (1887). The roots of liberty can be traced back to the Magna Carta's *per legem terrae*, which provided safeguards against usurpation and tyranny. Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J. dissenting) (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)).

32. *Bowers*, 478 U.S. 186, 191. Examples of subsuming rights that have no textual support in the constitution include the right to child rearing and education. Pierce v. Soc'y of Sisters, 268 U.S. 510, 530-36 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923). The right to privacy also has no textual support, but it also has been recognized as a constitutional right. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992); Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

33. *Casey*, 505 U.S. 846-47 (quoting Whitney v. California, 274 U.S. 357, 373 (1927)).

34. *Id.*

35. *Id.*

36. 381 U.S. 479 (1965).

37. *Griswold*, 381 U.S. at 483-84.

38. *Id.* at 485-86.

39. *Id.* at 485.

privacy for couples as the reason it struck down the law banning the distribution of contraceptives.[40]

The Court illustrated that the Constitution contained an implicit right to privacy by showing that the First Amendment contained a penumbra where privacy of one's associations was protected from governmental intrusion.[41] Similarly, the Third Amendment's prohibition against quartering of soldiers, the Fourth Amendment's prohibition of unlawful search and seizure, and the Fifth Amendment's guarantee against self-incrimination all have a penumbra of privacy.[42] This penumbra of privacy is no less important than any other right that is carefully and particularly reserved to the people.[43] Moreover, the Ninth Amendment guarantees that the Bill of Rights is not to be construed as exclusive of other rights retained by the people.[44] The Court held that the right to use contraceptives in a married bedroom was within the zone of privacy created by these guarantees.[45]

2. *Extension of Liberties to Individuals*

The Court extended the privacy rights of married couples, recognized in *Griswold,* to individuals who were not married in *Eisenstadt v. Baird.*[46] In *Eisenstadt*, the Court overturned a law which prohibited single individuals from obtaining contraceptives yet allowed married persons to obtain the same contraceptives.[47] The Court reasoned that the decision to beget children was so fundamentally basic that the right to privacy should protect individuals whether they were married or unmarried.[48]

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40. *Id.*

41. *Id.* at 483.

42. *Id.* at 484; *see* NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 462 (1958) (stating that people have a privacy in one's associations); *see also* Mapp v. Ohio, 367 U.S. 643, 656 (1961) (stating that a person's right to privacy is no less than any right particularly reserved to the people by the Bill of Rights).

43. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

44. *Id.* at 484.

45. *Id.* at 485-86.

46. 405 U.S. 438 (1972).

47. *Eisenstadt*, 405 U.S. at 453. The Court said that a "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.*

48. *Id.* at 453. The Founding Fathers "'sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.'" *Id.* at 453-54 n.10 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

3. *The Extension and Boundaries of the Right to Privacy*

The Court further extended the implicit right to privacy in *Roe v. Wade*.[49] In *Roe*, the Court held that a Texas criminal statute that prohibited abortions at any stage of pregnancy, except to save the life of the mother, violated a woman's implicit constitutional right of privacy.[50] The Court cited the due process reasoning found in *Griswold* and *Eisenstadt* as a justification for the extension of an individual's right to privacy from state intrusion.[51] The Court noted that the Constitution did not explicitly mention any right of privacy; however, as far back as 1891 the Court had recognized a right of personal privacy.[52] The Court determined that this right of privacy was broad enough to encompass a woman's decision to have an abortion.[53] However, the Court recognized that the right to privacy was not absolute, and that it had never recognized an unlimited right of privacy.[54]

4. *Supreme Court Affirmed the Existence of the Right to Privacy and its Boundaries*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[55] the Court not only reaffirmed the central holding of *Roe*, but also determined that certain procedural requirements, which had to be met before an abortion could be performed, were unconstitutional.[56] The Court concluded that women had the right to have an abortion under the Due Process Clause of the Fourteenth Amendment before viability without undue interference from the State.[57] In reaffirming the right of privacy, the Court noted that the right to terminate a pregnancy was neither defined by the Bill of Rights nor practiced by any state at the time the Fourteenth Amendment was adopted.[58] However, when defining a liberty not expressly stated in the Constitution, the Court must weigh the proposed individual liberty versus the liberties and demands of an organized society.[59] The Court emphasized

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49. 410 U.S. 113 (1973).
50. *Roe*, 410 U.S. at 152, 154.
51. *Id.* at 152-53.
52. *Id.* at 152 (citing Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).
53. *Id.* at 153.
54. *Id.* at 154 (citing Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905); Buck v. Bell, 274 U.S. 200, 208 (1927)).
55. 505 U.S. 833 (1992).
56. *Casey*, 505 U.S. at 833.
57. *Id.* at 834.
58. *Id.* at 835.
59. *Id.* at 834. The Court quoted Justice Harlan, stating:

that history has proved that other liberties created by the Court were undoubtedly correct.[60] The Court recognized that individuals of good conscience can disagree about certain profound and moral implications, but the Court has an obligation to define the liberty of all and not to mandate its own personal moral code.[61] Therefore, a state may not compel or enforce one view upon an individual and suppress that individual's constitutionally protected right.[62]

B. SCRUTINY

The Supreme Court has established a specific method in analyzing substantive due process questions.[63] This process is necessary because the Court has been reluctant to expand the concept of substantive due process in fear of moving into uncharted and open-ended areas.[64] The starting point for this analysis is whether the right is a fundamental right.[65]

1. *Scrutiny Under the Due Process Clause*

If a liberty is determined to be a fundamental right, a state must overcome a greater burden of legitimacy for its law in order to infringe on that right.[66] If it is not a fundamental right, the law must at least be rationally related to a legitimate government interest.[67]

The substantive portion of the Due Process Clause creates implicit liberties that are outside the bounds of the contextual Constitution.[68] The

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> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable search and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."

Id. at 848 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

60. *Id.* at 834. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12-13 (1967) (allowing interracial marriages); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (holding sterilization was against equal protection); Pierce v. Soc'y. of Sisters, 268 U.S. 510, 530-36 (1925) (holding parents had a right to send their children to private school versus a public school).

61. *Casey*, 505 U.S. at 850.

62. *Id.* at 851.

63. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

64. *Id.* at 720.

65. *Id.* at 720-21.

66. *Id.* at 719-20.

67. *Id.* at 727-80.

68. *Id.* at 720.

Court has created two different formulas to define such liberties.[69] First, the substantive Due Process Clause protects fundamental rights and liberties which are "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."[70] Second, in substantive-due process cases the Court has required a careful description of the asserted fundamental liberty interest.[71]

When the Court considers an interest a fundamental liberty, the Due Process Clause of the Fourteenth Amendment prohibits the government from infringing on those fundamental liberties "'unless the infringement is narrowly tailored to serve a compelling state interest.'"[72] Only those fundamental rights that are deeply rooted require heightened scrutiny under the analysis of the Due Process Clause.[73]

In *Washington v. Glucksberg*,[74] the question before the Court was whether individual liberties protected by the Due Process Clause included a right to commit suicide with the assistance of others.[75] The Court held that laws against suicide have been consistent and almost universal in tradition.[76] Therefore, since the right of suicide was not a fundamental right, the State of Washington only needed to provide a rational basis for the law.[77] The Court stated that Washington's ban on assisted suicide was at least reasonably related to the State's interest in protecting and promoting the life of its citizens.[78]

Therefore, only if a liberty is found to be a fundamental right will it be protected by a heightened level of judicial scrutiny.[79] If the liberty is not a fundamental right under the Due Process Clause, the lower level of scrutiny, rational basis, is applied by the Court.[80]

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69. *Id.* at 720-21.

70. *Id.* at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

71. *Id.*

72. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

73. *Flores*, 507 U.S. at 303.

74. 521 U.S. 702 (1997).

75. *Washington*, 521 U.S. at 723. The laws in question prohibited someone from knowingly aiding another in attempting suicide. *Id.* (citing WASH. REV. CODE § 9A.36.060(1) (2000)). Any attempt of assisting a suicide was punishable by up to five years in prison and up to a $10,000 fine. *Id.* at 705 (citing WASH. REV. CODE §§ 9A.36.060(2), 9A.20.021(1)(c) (2000)).

76. *Id.* at 723. The Court noted that almost every state has banned suicide. *Id.*

77. *Id.* at 735.

78. *Id.*

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

80. *Id.* at 196.

2. *Scrutiny Under the Equal Protection Clause*

The Equal Protection Clause requires that the classification of an individual rationally further a legitimate state interest.[81] A heightened review is only necessary if a classification jeopardizes the exercise of a fundamental right, or categorizes an individual on the basis of an inherently suspect characteristic.[82]

In *Romer v. Evans*,[83] the United States Supreme Court held an amendment to the Colorado State Constitution unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[84] The amendment prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination.[85] The Court noted that under the Equal Protection Clause a law must bear a rational relationship to a legitimate government purpose.[86] However, "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[87] Rational basis scrutiny allows laws that are enacted for broad and ambitious purposes to be upheld if legitimate public policies are demonstrated, despite the incidental disadvantages they may impose on certain persons.[88] The Court should sustain a state law if it advances "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."[89] However, the Colorado constitutional amendment did not further a proper legislative end; instead it made homosexuals unequal to everyone else.[90] Typically, the Court stated, a classification based on one's choice of sexual partners does not require heightened scrutiny because homosexuality is not a suspect classification.[91]

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81. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

82. *Id.*

83. 517 U.S. 620 (1996).

84. *Romer*, 517 U.S. at 620.

85. *Id.*

86. *Id.* at 635.

87. *Id.* at 634 (citing Dep't of Agric. v. Moreno, 413 U.S. 528, 543 (1973)).

88. *Id.* at 635.

89. *Id.* at 632. The reason scrutiny classifications are used by the courts is to provide "guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass, and it marks the limits of the [court's] own authority." *Id.* Therefore, "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

90. *Id.* at 635.

91. *Id.* A court upheld the Army's "Don't Ask, Don't Tell" policy as constitutional under the First Amendment. Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996) *cert. denied sub nom.* Richenberg v. Cohen, 522 U.S. 807 (1997). A court upheld the Navy's actions of releasing an individual because he was homosexual, stating that it was rationally related to a legitimate

3. *Determination If Sodomy is a Fundamental Right Under the Scrutiny Test*

To determine if sodomy is a liberty deeply rooted in the Nation's history and tradition, the Court must ascertain if sodomy has ancient roots in American law.[92] Courts typically do this by examining if sodomy practices have been condemned in Western civilization through Judeo-Christian moral and ethical standards.[93]

The history of prohibiting sodomy acts can be traced back to Biblical times and Hebraic law.[94] However, most scholars have concluded that sodomy was not an offense at the earliest common law.[95] The first indication of a formal statute prohibiting the practice of sodomy was in 1533 after the English Reformation transferred powers of the ecclesiastical courts to the temporal courts.[96] The Statute of Henry VIII, which came from the temporal court, famously coined the act as a "crime against nature."[97]

The common law established by the temporal court carried over to the original thirteen states.[98] At the time they ratified the Bill of Rights, all made sodomy a criminal offense at common law.[99] This continued throughout the nation, as every state in the union outlawed sodomy until 1961.[100]

In *Bowers v. Hardwick*,[101] the Court addressed whether the liberty to engage in sodomy was deeply rooted in America's history.[102] The Court

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purpose. Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). A court noted that a serviceman's discharge because of a fraudulent disclosure on his enlistment stating he was not a homosexual did not violate his substantive due process rights. Rich v. Sec'y of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984).

92. Bowers v. Hardwick, 478 U.S. 186, 191-93 (1986).

93. *Id.* at 196 (Burger, C.J., concurring).

94. Aimee D. Dayhoff, Comment, *Student Articles: Other Rising Legal Issues—Sodomy Laws: The Government's Vehicle to Impose the Majority's Social Values*, 27 WM. MITCHELL L. REV. 1863, 1865-66 (2001) (citing Harris v. State, 457 P.2d 638, 648 (1969)). *Harris* referred to the story of Sodom and Gomorrah and their destruction because of sexual immorality. *Harris*, 457 P.2d at 648. Other references in the Hebrew Testament referencing sodomy come from the translation of the Hebrew word *qadesh* or *qedeshim* as perverted persons, meaning ones who practice sodomy and prostitution in religious rituals. *See Deuteronomy* 23:17; 1 *Kings* 14:24, 15:12, 22:46; 2 *Kings* 23:7; *Job* 36:14 (New King James Version) (Thomas Nelson, Inc.); *see also Leviticus* 18:22; 20:13 (New King James Version).

95. *Harris*, 457 P.2d at 649.

96. *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring).

97. *Id.* The "crime against nature" statute was repealed during the reign of Bloody Mary, but was reenacted upon the rise of Elizabeth I. *Harris*, 457 P.2d. at 649 n.42.

98. *Id.* at 192.

99. *Id.*

100. *Id.* at 193.

101. 478 U.S. 186 (1986),

102. *Bowers*, 478 U.S. at 191-92.

rejected the contention that sodomy was a fundamental right and should be protected by a higher level of scrutiny against the States.[103] The Court stated that it was "facetious" to claim the right to engage in sodomy was deeply rooted or implicit in the concept of liberty because of the consistent prohibition of the act throughout American jurisprudence.[104]

C. STARE DECISIS

The Supreme Court must give deference to the doctrine of *stare decisis* when looking to overrule a prior case and its precedent.[105] The concept underlying *stare decisis* is that the judicial system requires conformity and continuity among decisions, but at the same time evolution and changing factual scenarios may require reversal if the prior ruling has become so clearly in error that its legitimate enforcement is in question.[106]

Since the rule of *stare decisis* is not absolute, a court must consider four factors when it reexamines a prior holding.[107] First, the court must ask if the prior rule has proven to be intolerable and not practicable.[108] Second, the court must balance the amount that society has relied upon and adjusted to the rule against the special hardships and consequences that may arise from overruling that rule.[109] Third, the old principal should be overruled if related principles of law "have left the old rule as no more than a remnant of abandoned doctrine."[110] Finally, a court must examine if the facts have changed or come to be seen so differently that the old rule is robbed of its significant application or justification.[111]

In *Casey*, the United States Supreme Court readdressed the central issue in *Roe v. Wade:* whether women have a protected liberty from state interference under the Due Process Clause of the Fourteenth Amendment.[112] The Court reaffirmed the holding of *Roe* even though the underpinnings of *Roe* had been severely criticized.[113] The Court reasoned that the central holding had not become unworkable despite a change in

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103. *Id.* at 192.
104. *Id.* at 194.
105. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992).
106. *Id.*
107. *Id.* at 854-55.
108. *Id.* at 854.
109. *Id. Stare decisis* is the "doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).
110. *Casey*, 505 U.S. at 855.
111. *Id.*
112. *Id.* at 846.
113. *Id.* at 860.

technology.[114] The Court noted that if the balance of interest does not tip within the normal bounds of *stare decisis*, precedent must still control despite some criticism of its premises and the movement of time and technological advancements.[115]

D. THE SUPREME COURT UPHOLDS A STATE LAW PROHIBITING THE PRACTICE OF SODOMY

In *Bowers*, the Supreme Court upheld a Georgia statute criminalizing sodomy.[116] The Court reversed the Eleventh Circuit Court of Appeals decision that held that the statute violated an individual's fundamental right[117]. The Eleventh Circuit found that because homosexual activity was a private and intimate association that the state cannot infringe upon by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.[118] The Court framed the issue as whether the Federal Constitution conferred a "fundamental right upon homosexuals to engage in sodomy."[119] The Court rejected the appellate court's holding that sodomy was similar to other fundamental rights identified by the Court such as family, marriage, and procreation.[120] The Court stated it was "quite unwilling" to announce that the right to engage in homosexual sodomy was a fundamental right.[121] The Court concluded that the right to engage in homosexual sodomy was not a fundamental right because the existence of proscriptions against such conduct was found throughout the Nation's history.[122]

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114. *Id.* The Court said the essential holding of *Roe* recognized a woman's right to choose an abortion before fetal viability, and that the undue burden test, rather than the trimester framework, should be used in evaluating abortion restrictions before viability. *Id.* at 844, 846.

115. *Id.* at 861.

116. Bowers v. Hardwick, 478 U.S. 186, 196 (1986). The Georgia statute prohibited sexual acts that involved the sex organs of one person and the mouth or anus of another. *Id.* at 188 n.1. The statute on its face did not discriminate against homosexuals or heterosexuals. *Id.* An individual convicted of the offense of sodomy was punished by imprisonment for one to twenty years. *Id.* at 188; GA. CODE ANN. § 16-6-2 (1998).

117. *Bowers*, 478 U.S. at 196.

118. *Id.* at 189. The respondent, Hardwick, was charged with violating the Georgia statute criminalizing sodomy by engaging in sodomy acts with another adult male in his home. *Id.* at 187-88. The respondent brought a suit in federal district court challenging the constitutionality of the statute because it placed him in imminent danger of arrest. *Id.* at 188. The district court dismissed for failure to state a claim. *Id.* The respondent appealed to the Court of Appeals for the Eleventh Circuit, which reversed the district court's ruling. *Id.* at 189.

119. *Id.* at 190.

120. *Id.* at 191.

121. *Id.*

122. *Id.* at 192-93. The Court noted that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights." *Id.* Also, in 1868, when the Fourteenth Amendment was ratified "all but five of the thirty seven States in the Union had criminal sodomy laws." *Id.* Each of the fifty states actually outlawed

The Court also rejected the respondent's contention that the Constitution protected the right to engage in sodomy because it occurred in the privacy of the home.[123] The Court stated that the Fourteenth Amendment did not protect otherwise illegal conduct just because it occurred in the home.[124]

Finally, the Court rejected the petitioner's contention that there was no rational basis for the law other than the majority of the electorate in Georgia believed that homosexual sodomy was immoral and unacceptable.[125] The Court stated that if it were to use the Due Process Clause to invalidate all laws that were enacted because a majority of a state's citizens believed the act was immoral, the court system would be "very busy."[126]

III. ANALYSIS

In *Lawrence v. Texas*,[127] Justice Kennedy delivered the majority opinion of the Court, in which Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer joined.[128] The majority overturned *Bowers* and held the Texas statute prohibiting same sex sodomy unconstitutional under the Due Process Clause of the Fourteenth Amendment.[129] Justice O'Connor filed an opinion concurring in the result; however, she would not have overruled *Bowers*.[130] Instead, she would have invalidated the Texas statute under Equal Protection grounds of the Fourteenth Amendment.[131] Justice Scalia wrote a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas.[132] Justice Thomas also filed a separate dissenting opinion.[133]

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sodomy until 1961, and at the time of the *Bowers'* decision, twenty-four states and the District of Columbia provided criminal penalties for acts of sodomy performed in private between consenting adults. *Id.* at 193-94.

123. *Id.* at 195.

124. *Id.* The Court cited other victimless crimes that included the possession and use of illegal drugs, firearms, and stolen goods and those things that happen in the privacy of a home. *Id.* The Court also stated that it would be "difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest and other sexual crimes even though they are committed in the home." *Id.* at 195-96.

125. *Id.* at 196.

126. *Id.*

127. 539 U.S. 558 (2003).

128. *Lawrence*, 539 U.S. at 561.

129. *Id.*

130. *Id.* at 579 (O'Connor, J., concurring).

131. *Id.*

132. *Id.* at 586 (Scalia, J., dissenting).

133. *Id.* at 605 (Thomas, J., dissenting).

A. MAJORITY OPINION

The Court concluded that the Texas statute infringed on an individual's privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment.[134] Because the question before the Court required the Court to determine whether the petitioners were free as adults to engage in private acts under the liberty of the Due Process Clause, the Court needed to reconsider the holding of *Bowers*.[135]

1. *The Extension of Privacy and Liberty Under the Due Process Clause*

The Court reasoned that the substantive reach of liberty under the Due Process Clause was broad and well established by the Court.[136] The Court referenced *Griswold* as a case that described and protected the interest of the right to privacy, evidenced by the protection extended to marriage relations and the protected space of the marital bedroom.[137] The Court also acknowledged that this right to privacy extended beyond the marital bedroom, as held in *Eisenstadt*.[138] Although the Court recognized that *Eisenstadt* was decided under the Equal Protection Clause, the Court stated that *Eisenstadt* recognized the fundamental proposition that married individuals and single individuals were entitled to the same liberties.[139]

The Court found that the "protection of liberty under the Due Process Clause had a substantive dimension of fundamental significance in defining the rights of the person."[140] The Court cited *Roe* for the proposition that a woman's right to an abortion was not absolute, but her right to elect an abortion was an exercise of her liberty under the Due Process Clause.[141]

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134. *Id.* at 564, 578

135. *Id.* at 564.

136. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Pierce v. Soc'y. of Sisters, 268 U.S. 510, 535-36 (1925); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923)).

137. *Id.* at 564-65 (citing *Griswold*, 381 U.S. at 485).

138. *Id.* at 565.

139. *Id.* The Court in *Lawrence* quoted *Eisenstadt* regarding the conflict between the state law and fundamental human rights:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship . . . . If 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."

Id. (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in original)).

140. *Id.*

141. *Id.*

2. *The Majority Criticizes the Holding in Bowers*

The Court stated that the factual circumstances between *Lawrence* and *Bowers* were similar; however, the statute in question in *Bowers* prohibited sodomy whether or not the participants were of the same sex, while the statute in *Lawrence* applied only to participants of the same sex.[142] The Court held that the *Bowers* decision failed to appreciate the extent of liberty at stake in the case.[143] The Court said the question in *Bowers* focused too heavily on whether an individual had the right to engage in a sodomy act.[144] The Court noted that this narrow interpretation of the question demeaned the individual's claim, just as it would have demeaned a married couple's assertion that marriage was simply about the right to have sexual intercourse.[145] The Court stated that the laws involved in both cases extended beyond more than just prohibiting sexual acts.[146] Instead, the penalties reached into and affected the most private of places, the home.[147]

3. *Bowers' Incorrect Assumption of Sodomy in American History*

The Court criticized *Bowers'* presumption that proscriptions against sodomy have ancient roots in America.[148] The Court noted that since the beginning of colonial times there was prohibition of sodomy that was derived from the English criminal laws.[149] The Court opined that early English common law interpreted the prohibition against sodomy to include acts between same and different sex couples.[150] The Court said this interpretation was followed in nineteenth-century America where sodomy, buggery, and crime-against-nature statutes also criminalized relations between men and women and between men and men.[151] The Court reasoned the aim of the prohibition of sodomy was toward nonprocreative sexual activity, not the regulation of immorality, since the categorization of sodomy did not depend on an individual's sex, along with the fact that homosexuals as a distinct category did not arise until the late nineteenth century.[152]

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142. *Id.*
143. *Id.* at 566.
144. *Id.* at 567.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 568-69. The early English law against sodomy included "relations between men and women as well as relations between men and men." *Id.* at 568 (citing King v. Wiseman, 92

Furthermore, the Court held that a substantial number of sodomy prosecutions did not happen within the confines of private homes, but instead were convictions for predatory acts against those who did not consent.[153] The laws typically prohibited acts against minors or victims of an assault in order to ensure a legal remedy if a predator committed a sexual assault that was not covered in a typical rape statute.[154]

The Court noted that even the evidentiary standards required for a same sex sodomy conviction indicated the common law's unwillingness to criminalize same sex sodomy.[155] The Court reasoned that this evidentiary rule contributed to the infrequency of prosecutions and made it difficult to determine whether society approved of rigorous and systematic punishment of the consensual acts committed in private by adults.[156] Therefore, the Court held that *Bowers* could not distinguish the longstanding criminal prohibition of homosexual conduct for nonprocreative sex and the prosecution for the immorality of the sexual act.[157]

The Court concluded that the movement to punish only homosexual sodomy in America did not develop until the last third of the twentieth century.[158] The Court stated that "it was not until the 1970's that any state singled out same-sex relations for criminal prosecution."[159] Nine states have criminalized homosexual sodomy since the 1970s, and several of those states have moved toward abolishing the law.[160] Therefore, the Court found

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Eng. Rep. 772, 775 (K.B. 1718)). The interpretation and the use of "mankind" in the Act of 1533 included woman and girls. *Wiseman*, 92 Eng. Rep. at 775.

153. Lawrence v. Texas, 539 U.S. 558, 569 (2003).

154. *Id.* The Court cited a nineteenth century treatise involving predatory acts of an adult man against a minor girl or minor boy. *Id.* (citing 2 J. Chitty, CRIMINAL LAW 47-50 (5th Am. ed. 1847). The treatise noted that "instead of targeting relations between consenting adults in private, the nineteenth-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals." *Id.*

155. *Id.* The Court said an example of this unwillingness was the fact that testamentary evidence could not be used from the consenting partner, because the individual was considered an accomplice in the crime. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* A significant number of prosecutions of consensual, homosexual sodomy between consenting adults in America between 1880 and 1995 involved conduct in a public place, not in the private home. *Id.*

159. *Id.*

160. *Id.* at 570-71. States that have criminalized homosexual sodomy since 1970 include: Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, Tennessee, Texas, and Oklahoma. *Id.* (citing 1977 Ark. Acts No. 828; 1983 Kan. Sess. Laws ch. 109, § 1; 1974 Ky. Acts ch. 406, § 90; 1977 Mo. Laws, S.B. 60; 1973 Mont. Laws § 1, ch. 513; 1977 Nev. Stat. 866, 1632; 1989 Tenn. Pub. Acts ch. 591, § 39-13-510; 1973 Tex. Gen. Laws ch. 399; Post v. State, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986) (invalidating sodomy law as applied only to heterosexual couples). States that have moved toward abolishing their laws include Arkansas, Montana, Tennessee, and Nevada. *Id.* at 571 (citing Jegley v. Picado, 80 S.W.3d 332, 353-54 (Ark. 2002); Grycazan v.

that the historical premise on which the majority relied in *Bowers* was more complex and overstated than the Justices in *Bowers* acknowledged.[161]

4. *States' Right to Enforce Morality*

The Court acknowledged that there have been powerful voices that condemn homosexual conduct as immoral, and that this condemnation has "been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."[162] However, the Court rejected the notion that these beliefs justified laws prohibiting sodomy.[163] Instead, the Court stated that the issue was "whether the majority may use the power of the State to enforce [its] views on the whole society through operation of the criminal law."[164] The Court held that it was a court's obligation to protect an individual's liberty, not set its own moral code.[165]

The Court reasoned that the statements by Chief Justice Burger and Justice White in *Bowers,* regarding the lengthy history of lawful state intervention relating to homosexual conduct, were incorrect.[166] The Court stated that not only was the conclusion in *Bower* regarding disapproval of sodomy in the Judeo-Christian society incorrect, but it was also irrelevant.[167] According to the Court, the law of the last half-century was the more appropriate starting point for any analysis of tradition.[168] Applying the traditions and trends over the last half century, the Court found a growing "awareness" that liberties give substantial protection to adult individuals "in deciding how to conduct their private lives in matters pertaining to sex."[169]

State, 942 P.2d 112, 126 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250, 265-66 (Tenn. App. 1996); Commonwealth v. Wasson, 842 S.W.2d 487, 502-03 (Ky. 1992); 1993 Nev. Stat. 518).

161. *Id.* at 571.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* (citing Planned Parenthood of Southwestern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

166. *Id.*

167. *Id.* The Court said that although history and tradition are the starting point in most cases, it is not the ending point in the substantive due process inquiry. *Id.* (citing County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

168. *Id.*

169. *Id.*

5. *Emerging Trends Not to Criminalize Homosexual Conduct*

The Court criticized *Bowers* for failing to recognize the trend not to criminalize homosexual conduct.[170] The Court noted that the American Law Institute's Model Penal Code recommended that consensual sexual activities conducted in private should not be criminally penalized.[171] In addition to the Model Penal Code, the Court took notice of a British Parliament committee recommendation, which was issued in 1957 and adopted ten years later, that all laws created by the British Parliament punishing homosexuality should be repealed.[172] The Court also noted that the European Court of Human Rights recently found that a law that criminalized sodomy was invalid under the European Convention on Human Rights.[173] Therefore, the Court concluded that these cases from Britain and the European Court proved that the contention made in *Bowers* was incorrect.[174]

The Court noted that the deficiencies in *Bowers* had become even more apparent in the years following the decision.[175] The Court stated that the twenty-five states *Bowers* cited as having sodomy laws was reduced to thirteen at the time of the *Lawrence* decision, and of those thirteen states, only four enforced their laws against homosexual conduct.[176]

6. *Protection of the Fourteenth Amendment*

The Court examined two cases, *Casey* and *Romer,* that defined the rights of an individual to engage in private sexual conduct under the Fourteenth Amendment.[177] The Court recognized that *Casey* "reaffirmed the

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170. *Id.*

171. *Id.* (citing MODEL PENAL CODE § 213.2 cmt. 2 at 372 (1980)). The justification for the ALI decision was based on three grounds: "(1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail." *Id.* The Court pointed out that all fifty states prohibited sodomy before 1961, and twenty-four states and the District of Columbia had sodomy laws at the time of *Bowers*. *Id.* However, Justice Powell noted in *Bowers* that these prohibitions often were being ignored. *Id.* The Court pointed to Georgia, which had not enforced its sodomy law for decades. *Id.* Additionally, as of 1994, the state of Texas had not prosecuted anyone under its sodomy laws for acts committed in private between consenting adults. *Id.* at 573.

172. *Id.* at 573 (citing generally COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (Stein & Day, 1963)).

173. *Id.* (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981)).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 573-74.

substantive force of the liberty protected by the Due Process Clause."[178] Thus, the Court held that the *Casey* decision "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[179] The Court stated that persons in a homosexual relationship may also seek these purposes, but *Bowers* would deny them that right.[180]

The Court concluded that under the Equal Protection Clause of the Fourteenth Amendment, laws that were no more than animosity toward a group cannot further any rational relation to a legitimate government purpose.[181] *Romer*, the Court noted, stands for the proposition that persons who were grouped as classes relating to their homosexual conduct were deprived of their protection under state anti-discrimination laws.[182] Despite the fact that *Romer* was decided under the Equal Protection Clause, the Court found the case was still relevant in showing that the holding of *Bowers* was in doubt.[183] The Court believed the Equal Protection Clause argument was persuasive because conduct and equality of treatment are linked, and one interest cannot be advanced without the other.[184]

7. *The Law's Stigma Against Homosexuals*

The Court stated that if a protected conduct was made into a criminal act, and the Court did not challenge its substantive validity, a stigma might remain despite its nonenforcement.[185] The Court noted the mere criminalization of sodomy by a state invited and subjected homosexual persons to discrimination in public and private spheres.[186] Therefore, the Court found that the holding in *Bowers* demeaned the lives of homosexuals, and that the stigma was not trivial.[187] The Court determined that although the penalty

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178. *Id.*

179. *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

180. *Id.* at 574. The Court stated:

> "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 *Casey*, 505 U.S. at 851).

181. *Id.*

182. *Id.* (citing Romer v. Evans, 517 U.S. 620, 634 (1996)).

183. *Id.* at 575.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

for the conviction of sodomy was minor, it remained a criminal offense with all the inferences that accompany a crime.[188] This stigma, the court claimed, would be personified because the conviction of consensual homosexual conduct under the Texas statute would require the individual to register as a sex offender in at least four states.[189] In addition to sexual offender registration, a conviction under the Texas criminal statute carried all other consequences associated with convictions, such as notations on job applications.[190]

8. *Stare Decisis*

The Court recognized that the doctrine of *stare decisis* was essential in our judicial system; however, the Court noted it was not an inexorable command.[191] The Court stated that individual or societal reliance on precedent should caution the Court against reversing its prior course when addressing a constitutional liberty interest.[192] However, the Court found that society had not relied upon the ruling in *Bowers* in such a way that it would cause a detrimental effect if *Bowers* were reversed.[193] The Court concluded this was because *Bowers* itself created uncertainty, which, combined with the Court's decisions following *Bowers*, made society hesitant to rely upon the holding in *Bowers*.[194] The Court stated, "*Bowers* was not correct when it was decided, and it is not correct today."[195]

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188. *Id.* In Texas, it is a Class C misdemeanor. *See* TEXAS PENAL CODE ANN. § 12.23 (Vernon 2003) (stating a Class C misdemeanor is publishable by a fine not exceeding $500).

189. Lawrence v. Texas, 539 U.S. 558, 575 (2003). The four States that would require registration as a sex offender include Idaho, Louisiana, Mississippi, and South Carolina. *Id.* (citing IDAHO CODE §§18-8301 to 18-8326 (Cum. Supp. 2002); LA. CODE CRIM. PROC. ANN. §§ 15:540-15:549 (West 2003); MISS. CODE ANN. §§ 45-33-21 to 45-33-57 (2003); S.C. CODE ANN. §§ 23-3-400 to 23-3-490 (Law. Co-op 2002)).

190. *Id.* at 576.

191. *Id.* at 577.

192. *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 855-56 (1992)).

193. *Id.*

194. *Id.* The Court quoted Justice Stevens' dissent in *Bowers* to show its uncertainty when *Bowers* was decided in saying:

> "Our prior cases make two propositions abundantly clear. First, 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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

Id. at 577-78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

195. *Id.* at 578.

Therefore, the Court overruled *Bowers* and declared its precedent no longer binding.[196]

B. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor agreed with the majority's holding that the Texas sodomy law was unconstitutional.[197] However, instead of overruling the statute and invalidating *Bowers* under the substantive part of the Due Process Clause of the Fourteenth Amendment, Justice O'Connor stated she would have invalidated the statute under the Equal Protection Clause of the Fourteenth Amendment and left *Bowers* as good law.[198]

Justice O'Connor stated that the Equal Protection Clause was the appropriate judicial scrutiny to apply because the Court has typically used the Clause when challenging legislation inhibiting personal relationships.[199] Justice O'Connor argued that the Court had frequently held that if the objective of a law was "a bare . . . desire to harm a politically unpopular group," that law did not further a state's legitimate interest.[200] Justice O'Connor stated that when a law exhibits characteristics harmful to a politically unpopular group, the Court applied a more searching form of rational basis review under the Equal Protection Clause.[201]

Justice O'Connor claimed that application of the Texas statute unfairly harmed individuals with a homosexual orientation while having no effect on heterosexual couples.[202] This discrimination, O'Connor argued, "makes homosexuals unequal in the eyes of the law."[203] She said that since that conduct, and only that conduct, was subject to criminal sanction, homosexuals are inherently treated differently than other members of society.[204] Justice O'Connor argued that this disparagement in treatment unfairly burdened those individuals because it would disqualify or restrict convicted persons to engage in many professions and would require them to register as sex offenders in Texas.[205] Beyond the tangible implications of conviction under the Texas statute, Justice O'Connor said the mere presence of the law branded all homosexuals as criminal because calling someone a

196. *Id.* at 578-79.
197. *Id.* at 579 (O'Connor, J., concurring).
198. *Id.*
199. *Id.* at 580.
200. *Id.* (quoting Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
201. *Id.*
202. *Id.* at 581.
203. *Id.*
204. *Id.*
205. *Id.* Those professions include medicine, athletic training, and interior design. *Id.* (citing TEX. OCC. CODE. ANN. §§ 164.051(a)(2)(B), 451.251(a)(1), 1053.252(2) (Vernon 2003)).

homosexual imputed that someone committed a crime, which would make it more difficult for homosexuals to be treated the same as everyone else.[206] She concluded that the Texas sodomy statute "subject[ed] homosexuals to 'a lifelong penalty and stigma.'"[207]

Justice O'Connor dismissed Texas' argument that the statute should survive rational basis review because it furthered the legitimate government interest of the promotion of morality.[208] Justice O'Connor also disagreed with Texas' claim that the holding in *Bowers* justified the state's position that moral disapproval can be a legitimate state interest that passes rational basis scrutiny.[209] She argued that the facts presented in *Lawrence* were different than *Bowers* because only homosexuals were prosecuted.[210] Furthermore, Justice O'Connor argued that the Court had never held that moral disapproval alone "is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."[211]

Justice O'Connor noted that the infrequency of prosecution under the sodomy law showed the laws were not in place to stop sodomy, but instead to serve as a statement of dislike and disapproval against homosexuals.[212] Justice O'Connor concluded that the sodomy law "rais[ed] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[213]

Justice O'Connor rejected Texas' assertion that the sodomy law did not discriminate against homosexual persons; but rather discriminated against homosexual conduct.[214] Justice O'Connor stated that when the conduct and persons were so closely related, the law targeted more than just conduct.[215] In fact, the law was "directed towards gay persons as a class," and since the act itself, which defines the class, was criminalized, the criminalization of that act discriminated against the class.[216]

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206. *Id.* at 583-84 (citing Plumley v. Landmark Chevrolet, Inc., 122 F.3d 308, 310 (5th Cir. 1997)).

207. *Id.* at 584 (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982)).

208. *Id.* at 585.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 634 (1996)).

214. *Id.*

215. *Id.*

216. *Id.* (quoting *Romer,* 517 U.S. at 641 (Scalia, J., dissenting)).

C. JUSTICE SCALIA'S DISSENT

Justice Scalia concluded that the Court gave into a crusade by individuals who wished to overrule *Bowers*.[217] He argued that the majority gave no deference to stability and that most of the majority's opinion had nothing to do with the question of whether the Texas statute actually furthered a legitimate state interest under rational basis scrutiny.[218]

Justice Scalia disagreed with the majority's discussion about whether sodomy was a fundamental right.[219] He also argued that the majority's failure to actually declare that sodomy was a fundamental right under the Due Process Clause fell short of typical judicial standards of review.[220] According to Justice Scalia, the majority did not apply the appropriate strict scrutiny standard of review when the Court concluded that sodomy was a fundamental right.[221] He submitted that because the Court failed to determine whether sodomy is a fundamental right, it left the central holding of *Bowers* unaddressed.[222] Instead, Justice Scalia reasoned that the Court rested its holding on the petitioner's right to engage in a liberty and protected this interest with an "unheard-of form of rational-basis review that will have far-reaching implications beyond this case."[223]

1. *Stare Decisis*

Justice Scalia criticized the majority for not adhering to the doctrine of *stare decisis*.[224] He argued that the Court failed to follow proper procedures to determine if the precedent in *Bowers* had become unworkable.[225] Justice Scalia stated that the proper test for *stare decisis* was to overrule an "erroneously decided precedent" if a case's foundation was eroded by subsequent decisions, and it had been subjected to substantial criticism.[226] Justice Scalia asserted that *Casey* did not contribute to the eroding of *Bowers'* precedent because it did not create a more expansive right to abortion than did *Roe*, which had been decided at the time of *Bowers*.[227] Justice Scalia agreed with the majority that the decision in *Romer* has "'eroded' the

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217. *Id.* at 586 (Scalia, J., dissenting).
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 587.
225. *Id.*
226. *Id.*
227. *Id.* at 588.

'foundations' of *Bowers*' rational basis holding;" however, he contrasted this with the fact that *Washington* equally eroded *Roe* and *Casey*, which are still good precedent.[228]

Second, Justice Scalia disagreed with the majority's contention that *Bowers* had been subjected to substantial and continuing criticism.[229] He criticized the majority's historical assumptions, which were based on two textbooks.[230] Justice Scalia argued that *Roe* and *Casey* had been subjected to as much or more criticism than had *Bowers*.[231]

Finally, under the *stare decisis* analysis, Justice Scalia asserted that there has been great social reliance on the fundamental holding of *Bowers*—that government can regulate morality.[232] Justice Scalia concluded that there had been "countless judicial decisions and legislative enactments" that were premised on the "ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[233] Justice Scalia contended that laws prohibiting "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" were only sustainable if *Bowers'* fundamental holding of a state's right to regulate morality was recognized.[234]

Justice Scalia argued that the overturning of *Bowers* would have a greater societal impact than overturning *Roe*.[235] He reasoned that overruling *Roe* would return society to the status quo holding of centuries of jurisprudence, while overturning *Bowers* would create new

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228. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 640-43 (1996)).

229. *Id.*

230. *Id.* (citing CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 81-84 (Simon & Shuster) (1991); RICHARD POSNER, SEX AND REASON 341-350 (Harvard Univ. Pr.) (1992)). Justice Scalia pointed out that Posner wrote that the decision of the *Bowers* Court was correct in stating that the right to participate in homosexual acts was not deeply rooted in America's history and tradition. *Id.* at 589 n.1 (citing POSNER, *supra* note 230, at 343).

231. *Id.* at 587.

232. *Id.*

233. *Id.* at 589-90 (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion, Scalia, J., concurring) (relying on *Bowers* to uphold a state's public indecency statute) Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001) (citing *Bowers* in upholding a law prohibiting the sale of sex toys); Milner v. Apfel, 148 F.3d 812, 814 (7th Cir. 1998) (relying on *Bowers* for the proposition that legislatures can regulate based on morality rather than just demonstrable harms); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) (relying on *Bowers* to ban homosexual conduct in the military); Owens v. State, 724 A.2d 43, 53 (Md. 1999) (relying on *Bowers* to hold that no one has the right to engage in sex outside of marriage); Sherman v. Henry, 928 S.W.2d 464, 469-473 (Tex. 1996) (relying on *Bowers* to state that there exists no constitutional right to engage in adultery).

234. *Id.*

235. *Id.* at 591.

jurisprudence.[236] Justice Scalia concluded that the Court's analysis, the same that was used in *Casey*, was completely result-oriented.[237]

2. *Scrutiny*

Justice Scalia disagreed with the majority's analysis about whether sodomy was a fundamental right,[238] and even if it was a fundamental right, the Constitution allowed for the prohibition of it so long as there was due process of the law.[239] Justice Scalia stated that there was no absolute right to liberty under the Due Process Clause.[240] He argued that the Fourteenth Amendment protected certain liberties, but the Amendment expressly allowed states to deprive their citizens of any liberties so long as the due process of law was followed.[241]

Justice Scalia noted that under the doctrine of substantive due process a state may infringe a fundamental liberty interest if it is narrowly tailored to serve a compelling State interest.[242] Justice Scalia noted that only fundamental rights, which are deeply rooted in this Nation's history and tradition, qualified for this form of heightened scrutiny.[243] Justice Scalia indicated that all other liberty interests may be enforced pursuant to a validly enacted state law if that law was rationally related to a legitimate State interest.[244]

Justice Scalia argued that *Bowers* rejected using a heightened scrutiny because sodomy was not a fundamental right.[245] Justice Scalia claimed that since the majority failed to declare sodomy a fundamental right, the majority left the core holding of *Bowers* unturned.[246]

3. *Bowers Had Support at the Time it Was Decided*

Justice Scalia asserted that the law at the time *Bowers* was decided supported its proposition.[247] Justice Scalia noted that *Griswold* and *Eisenstadt* did not premise their holdings on the doctrine of substantive due

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236. *Id.*
237. *Id.* at 592.
238. *Id.* at 593.
239. *Id.*
240. *Id.*
241. *Id.* The Fourteenth Amendment provides in pertinent part, "No state shall . . . deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV.
242. Lawrence v. Texas, 539 U.S. 558, 593 (2003) (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 594.
247. *Id.*

process[248] Furthermore, Scalia noted that *Roe* declared the right to an abortion was a fundamental right, unlike sodomy, and the decision in *Casey* rejected the notion that abortion laws must be narrowly tailored to serve a compelling state interest.[249]

4. *Historical Analysis of Bowers' Holding*

Justice Scalia reasoned that the majority's holding, that sodomy was not historically criminalized, was incorrect.[250] Justice Scalia noted that the majority conceded that sodomy was criminalized in America's history and that sodomy between same sex partners was not distinguished until later in history.[251] Justice Scalia contended that the only relevant point was that sodomy was criminalized in order to establish that homosexual sodomy was not deeply rooted and did not qualify for a fundamental right status.[252] Justice Scalia concluded that the majority did not dispute the facts on which *Bowers* actually relied.[253]

Justice Scalia disagreed with the majority's contention that sodomy performed in private was rarely prosecuted and that this was evidence that private sodomy was not what the law was intended to prohibit.[254] Justice Scalia disagreed and argued that private consensual sodomy was not often prosecuted because of the difficulty of proving such a crime rather than the fact that a state chose not to prosecute the crime.[255] Justice Scalia stated that there were 203 prosecutions for consensual adult homosexual sodomy from 1880 to 1995, along with twenty sodomy prosecutions and four executions during the colonial period.[256] Justice Scalia contended that these cases proved that homosexual sodomy was not deeply rooted and thus, the holding in *Bowers*, was "utterly unassailable."[257]

Justice Scalia then addressed the majority's assertion that "an emerging awareness" was happening in America in regards to determining how individuals may conduct their private lives in matters pertaining to sex.[258]

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248. *Id.* at 595.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 595-96.
253. *Id.* at 596.
254. *Id.*
255. *Id.*
256. *Id.* (citing WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 375 (Harvard Univ. Press) (1999) (reporting the number of prosecutions documented within state and national law reporters); JONATHAN KATZ, GAY/LESBIAN ALMANAC 29, 58, 663 (Carroll & Graff) (1983) (describing the number of prosecutions during the colonial period)).
257. *Id.*
258. *Id.*

Justice Scalia argued that an emerging awareness did not establish a fundamental right, and he criticized the majority for basing its premise on the Model Penal Code's reluctance to punish sodomy because these provisions of Code were actually "a point of resistance" by many states that considered adopting the Code.[259] Furthermore, Justice Scalia asserted that constitutional entitlements were not created because some states lessened or eliminated criminal sanctions on certain behavior.[260] Justice Scalia contended that foreign laws did even less to create constitutional entitlements and were meaningless dicta.[261]

5. *Rational Basis Scrutiny*

Justice Scalia examined the majority's main contention that there was no rational basis for the sodomy law.[262] He stated that the majority's opinion effectively ends all moral legislation.[263] Justice Scalia stated that such a declaration would invalidate laws against "fornication, bigamy, adultery, adult incest, bestiality, and obscenity."[264]

6. *Justice Scalia on the Concurrence*

Justice Scalia analyzed the concurring opinion of Justice O'Connor, who would have overturned the statute on equal protection grounds.[265] Justice Scalia contended that the statute applied equally to all persons, men and women, heterosexual and homosexual, on its face.[266] Justice Scalia conceded that the statute could only be violated with same sex partners; however, he claimed that this cannot itself be a denial of equal protection.[267] Justice Scalia pointed to the constitutionally valid state laws prohibiting marriage of same sex partners and determined that if the marriage law was valid, the sodomy law should similarly be valid.[268]

Justice Scalia disagreed with Justice O'Connor's claim that the law unequally discriminated because it discriminated regarding the "sexual proclivity" of the perpetrator of the crime.[269] Justice Scalia argued that even if

259. *Id.* at 598 (quoting ESKRIDGE, *supra* note 256, at 159.)
260. *Id.*
261. *Id.*
262. *Id.* at 599.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 600.

it was unequally discriminative, only a rational basis was needed, not "'a more searching form of rational basis review.'"[270]

7. *Scalia Said the Court Signed onto a Social Agenda*

Justice Scalia stated that the majority's holding effectively said that what many Americans believe as protecting family values from immoral and destructive influences was actually now discrimination.[271] To prove this assertion, Justice Scalia noted that the "anti-anti-homosexual" culture was not "mainstream," as indicated by Congress's repeated rejection of adding homosexuals to Title VII protection.[272]

Justice Scalia stated that citizens should have the right to persuade other fellow citizens to change the laws in favor of their cause.[273] Justice Scalia argued that the premise of the democratic system was for the people to create the rules, not the government.[274] Justice Scalia asserted that one reason for this premise was that people, as opposed to the courts, do not have to take things to their logical conclusion.[275] Justice Scalia determined that was why a society can maintain laws that prohibit same-sex marriages and justify criminalizing homosexual acts.[276] Therefore, Justice Scalia said that when the Court decrees a ruling like the one in *Lawrence*, any fundamental justification that prohibited laws against homosexual marriage were eroded away.[277] Justice Scalia argued that under the Court's analysis the right of the state to limit marriage to opposite-sex couples was shaky because those laws were also based on moral disapproval.[278]

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270. *Id.* at 601.

271. *Id.* Justice Scalia stated that "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home." *Id.* at 602.

272. *Id.* at 603.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 604.

277. *Id.*

278. *Id.* Justice Scalia noted that the

> [O]pinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. 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), [w]hen 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 "[t]he liberty protected by the Constitution."

Id. at 604-05 (citations omitted).

D. JUSTICE THOMAS'S DISSENT

Justice Thomas concluded that the Texas statute was "uncommonly silly," and that he would vote to repeal the law if he was a member of the Texas Legislature.[279] However, as a member of the Court his duty was to decide cases according to the Constitution and the laws of the United States.[280] Accordingly, he argued there was no right in the Constitution or Bill of Rights to a general right of privacy or liberty.[281] Therefore, Justice Thomas would have upheld the statute under a constitutional analysis.[282]

IV. IMPACT

The Supreme Court's decision in *Lawrence* has been called a historic decision with sweeping implications.[283] The ruling has created enormous political, social, and legal commentary on the ruling itself and its possible affects on other similarly premised laws.[284]

A. IMMEDIATE EFFECT

The decision struck down all laws that made homosexual sodomy a criminal act and effectively invalidated all sodomy laws criminalizing both homosexual and heterosexual sodomy.[285] States that had bans on homosexual sodomy included Texas, Arkansas, Oklahoma, Kansas, and Missouri.[286] States that banned different and same sex sodomy included Idaho, Utah, Louisiana, Mississippi, Massachusetts, Alabama, Florida, South Carolina, North Carolina, and Virginia.[287]

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279. *Id.* at 605 (Thomas, J., dissenting).

280. *Id.*

281. *Id.*

282. *Id.*

283. Editorial, *Staring Down Stare Decisis*, N.J. L. J., July 21, 2003, *available at* Westlaw, 003 N.J.L.J. 194; Jonathon Turley, *Sex and the Supreme Court*, RECORDER (San Francisco) July 25, 2003, at 5.

284. Turley, *supra* note 283, at 5.

285. *Id.*

286. Dayhoff, *supra* note 94, at 1894 n.8 (citing ARK. CODE ANN. § 5-14-122 (Michie 1997); KAN. STAT. ANN. § 21-3505 (1995); MO. ANN. STAT. § 566.090 (West 1999); OKLA. STAT. ANN. tit. 21, § 886 (West 2002); TEX. PENAL CODE ANN. § 21.06 (Vernon 2003)).

287. Dayhoff, *supra* note 94, at 1894 n.8 (citing ALA. CODE § 13A-6-65 (1994); FLA. STAT. ANN. § 800.02 (West 2000); IDAHO CODE § 18-6605 (Michie 1997); LA. REV. STAT. ANN. § 14:89 (West 2004); MASS. GEN. LAWS ANN. ch. 272, § 34 (West 2000); MICH. COMP. LAWS § 750.158 (1991); MISS. CODE ANN. § 97-29-59 (2000); N.C. GEN. STAT. § 14-177 (1999); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 2003); UTAH CODE ANN. § 76-5-403 (2003); VA. CODE ANN. § 18.2-361 (Michie 2003)).

B. POSSIBLE IMPACTS

However, the majority's decision created vagueness in jurisprudence by combining the implicit right of privacy and the explicit right of liberty.[288] This extension of explicit and implicit rights and liberties created not only the right to engage in a particular type of sexual activity, it gave credence to the argument that government should stay out of activities, sexual or otherwise, between consenting adults conducted in the privacy of their home.[289] This ruling may have brought into question any law that regulates private, consensual relationships between adults.[290] Because of the *Lawrence* decision, some commentators believe that not only is a legislature's ability to regulate private, consensual relationships between adults, including criminal statutes such as sodomy, bigamy, polygamy, incest and adultery, at risk, but also laws on child custody, adoption, military service, hiring practices, insurance provisions, nonprofit associations, and other incidences of daily living may also be unconstitutional.[291] Courts have already had to address whether *Lawrence* gives homosexual foster parents the right to adopt children, whether a parent has the constitutional right to engage in incest with his daughter, and whether a state's statutory rape statute is valid.[292] The ruling also brings the possibility of gay marriage to the forefront of public discussion.[293] The decision in *Lawrence* is likely to serve as a legal foundation for marriage between homosexual couples.[294]

The first major impact of the vague new jurisprudence created by *Lawrence* was found in *Goodridge v. Department of Public Health*,[295] a Massachusetts Supreme Court case.[296] The Massachusetts Supreme Court

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288. Editorial, *Judicial Activism in Pursuit of Social Policy*, DAILY RECORD (Baltimore), Aug. 18, 2003, (on file with North Dakota Law Review).

289. *Id.*

290. Robert Peters, *Morality: Is it the Business of Government*, July 16, 2003, *at* http://www.cultureandfamily.org/articledisplay.asp?id=4276&department=CFI&categoryid=cfreport (last visited Feb. 1, 2004).

291. A. Eric Johnston, *High Court Decree Ends Morals Legislation*, *at* www.sodomylaws.org/lawrence/lweditorials38.htm (last visited July 7, 2004).

292. *See* Lofton v. Sec'y of Dept. of Children & Family Services, 358 F.3d 804, 827 (11th Cir. 2004) (holding that homosexual foster parents did not have a constitutional right to adopt children in light of *Lawrence*); *see also* State v. Freeman, 801 N.E.2d 906, 908-10 (Ohio Ct. App. 2003) (holding *Lawrence* did not give a father the constitutional right to engage in incest with a daughter despite the fact she consented and was of legal age); *see also* State v. Clark, 588 S.E.2d 66, 67-69 (N.C. Ct. App. 2003) (holding that *Lawrence* did not give an adult male the right to engage in sexual relations with a twelve-year-old female despite the fact she consented).

293. Joseph N. Ducanto, *Supreme Court Shows Winds Shifting on Gay Marriage*, 26 CHI. LAW., Sept. 2003, *at* Westlaw, 9/03 CHIL 68.

294. *Id.*

295. 798 N.E.2d 941 (Mass. 2003).

296. *Goodridge*, 798 N.E.2d at 948-49.

held that a law prohibiting homosexuals to enter into a civil marriage violated their state constitutional guarantees of equality and liberty.[297] The Massachusetts Supreme Court cited *Lawrence,* saying that it was the courts obligation "to define the liberty of all, not to mandate our own moral code."[298] The Massachusetts Supreme Court opined that *Lawrence* left the question whether a state may bar same-sex couples from civil marriage open as a matter of federal law.[299] The Massachusetts court referenced *Lawrence* as defining that whom to marry and how to express sexual intimacy were among the most basic individual liberties and due process rights that an individual possessed.[300] Therefore, the Massachusetts court concluded that the ban on same-sex civil marriages did not meet the rational basis test for either due process or equal protection, and struck the ban down as unconstitutional.[301]

The *Lawrence* opinion is likely to cause great confusion and make the job of legislatures more difficult.[302] The majority's loose use of the term fundamental rights obscures the Courts true rationale for the decision.[303] The Court never truly decreed that sodomy, much less homosexual sodomy, was a fundamental right.[304] Proof that the majority never found sodomy as a fundamental right was its application of mere rational basis scrutiny.[305] Therefore, by applying only rational basis scrutiny, the Court implicitly said that the mere justification of perceived morality was not enough to meet legitimate state interests.[306] This conclusion seemed to depart from the traditional thoughts on what is law and what law does regulate, as laws often run parallel to morality.[307]

C. APPLICATION TO NORTH DAKOTA LAW

The United States Supreme Court's decision to strike down the Texas statute does not directly affect any North Dakota law because North Dakota

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297. *Id.* at 958-60.

298. *Id.* at 948 (citing Lawrence v. Texas 539 U.S. 558, 571 (2003)).

299. *Id.* at 949.

300. *Id.* at 959.

301. *Id.* at 961.

302. *Judicial Activism in Pursuit of Social Policy, supra* note 288, (on file with North Dakota Law Review).

303. *Id.*

304. Lawrence v. Texas, 539 U.S. 558, 594 (2003).

305. *Id.* at 578.

306. *Id.* at 590.

307. Harlan Grant, *The American Challenge to International Law: A Tentative Framework for Debate,* 28 YALE L.J. 551, 576 (2003).

no longer has any law prohibiting sodomy.[308] However, the implication of the Supreme Court's ruling could be felt in North Dakota. North Dakota does have laws prohibiting fornication, adultery, incest, deviate sexual acts, and bigamy.[309] These laws are the same laws that are based largely on societal morals whose durability in light of the decision in *Lawrence,* was questioned by Justice Scalia.[310] In addition, North Dakota only allows marriages between a man and a woman.[311] The issue of same-sex marriages was specifically addressed as not within the scope of the Court's decision, but Justice Scalia's dissent argued that the majority's opinion eroded away the legal premise of denying same-sex couples marriage rights.[312]

V. CONCLUSION

In *Lawrence*, the United States Supreme Court further extended the liberties of an individual and broadened an individual's right to privacy.[313] The Court held that a state did not have a legitimate interest in regulating private, sexual, conduct between consenting adults in the home.[314] Since a state does not have a legitimate interest in regulating one type of morality based law, the decision opened the door for more constitutionally based challenges of morally premised laws.[315]

Ryan M. Bernstein

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308. 1973 N.D. Laws ch. 117. The repealed statute stated:

> Every person who carnally knows . . . any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge . . . is guilty of sodomy and shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years, or in the county jail for not more than one year. Any sexual penetration however slight is sufficient to complete this crime.

N.D. REV. CODE § 12-2207 (1943) (repealed 1975).

309. N.D. CENT. CODE. §§ 12.1-20-08 to 09, and 11 to 13 (West 1997 & Supp. 2003).

310. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

311. N.D. CENT CODE § 14-03-01 (West Supp. 2003). North Dakota's definition of a marriage is:

> [A] personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. The marriage relation may be entered into, maintained, annulled, or dissolved only as provided by law. A spouse refers only to a person of the opposite sex who is a husband or a wife.

Id.

312. *Lawrence*, 539 U.S. at 586-94.

313. *Id.* at 558-87.

314. *Id.* at 578.

315. *Id.* at 589 (Scalia, J., dissenting).