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Recognition of the Rights of Homosexuals: Implications of Lawrence v. Texas

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NOTE

RECOGNITION OF THE RIGHTS OF HOMOSEXUALS: IMPLICATIONS OF *LAWRENCE v. TEXAS*

"I Do Not Like Thee, Dr. Fell; the Reason Why I Cannot Tell."[1]

I. INTRODUCTION

Imagine that you are in the "privacy" of your own home and you and another person are engaged in the most intimate physical act with one another—sex. Now imagine that it just happens to be either oral sex or anal sex. Before you know what is happening, the police barge into your home. When they see what the two of you are doing, you are arrested. Next, the officers drive you to the police station where you are fingerprinted and booked. The two of you are forced to spend the rest of the night in jail and are not released until the next day.

You wonder why the police entered your home in the first place. What was it that you did wrong? Later you find out that your neighbor does not approve of you or your behavior. So, she called the police, falsely claiming that someone at your house was causing trouble and was armed with a weapon. Also, imagine that, because you took part in this consensual, intimate conduct, you are convicted of the "crime" of engaging in "deviate sexual intercourse" and are subsequently fined. As a result, four states consider you a sex offender and you are obligated to register as such with law enforcement.[2] Consequently, this conviction forbids you from becoming a doctor, an athletic trainer, a bus driver, or one of several other professions.[3]

You may think that this whole scenario seems absurd or ridiculous, but this story is John Geddes Lawrence's and Tyron Garner's reality. On the night of September 17, 1998, police officers entered Lawrence's home and intruded upon Lawrence and Garner having sex.[4] The men were jailed and were not released until the following day.[5] They were convicted of violating a statute that makes it a crime in Texas to engage in deviate sexual inter-

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1. E.J. Graff, *Scalia on Gay Rights; Breyer on 17th-Century Poetry; and More on Oral Arguments in the Texas Sodomy Case*, The American Prospect, *at* http://www.sodomylaws.org/lawrence/lwnews037.htm (Mar. 27, 2003) (quoting Justice Breyer during Oral Arguments, in which Breyer quoted a seventeenth century poem by an Oxford student about his dislike of a particular dean).

2. Petitioners' Brief at 27, Lawrence v. Texas, 41 S.W.3d 349 (Tex. Crim. App. 2001) (No. 02-102), *cert. granted*, 123 S. Ct. 661 (Dec. 2, 2002).

3. *Id.*

4. *Id.* at 2.

5. *Id.*

course with a member of the same sex. Several lengthy appeals followed, resulting in an appearance before the United States Supreme Court and culminating in a landmark decision having a significant impact on gay rights. This Note analyzes the Supreme Court's opinion in *Lawrence v. Texas*[6] and addresses the implications the case will have on other legal issues concerning homosexuals.

After the Introduction in Part I, Part II examines relevant case law regarding this case, including *Bowers v. Hardwick*,[7] *Romer v. Evans*,[8] and *City of Cleburne v. Cleburne Living Center*.[9] Part III will discuss the *Lawrence v. Texas* opinions from both the Texas Appeals Court and the United States Supreme Court. Part IV scrutinizes O'Connor's concurrence regarding the Equal Protection argument, taking a closer look at the analysis she applied and the effect this will have on future opinions. Part V explores the impact the *Lawrence* decision has on other areas concerning gay rights. Part VI concludes the analysis.

II. RELEVANT CASES LEADING TO *LAWRENCE*

A. Bowers v. Hardwick

In *Bowers v. Hardwick*, the United States Supreme Court held that there is no fundamental right to engage in homosexual sodomy.[10] The defendant, Hardwick, was charged with violating Georgia's anti-sodomy statute after engaging in sodomy with another adult male in his home.[11] Although the statute applied equally to homosexual and heterosexual sodomy, the court only evaluated the statute as it applied to homosexual sodomy.[12]

The defendants used *Griswold v. Connecticut*,[13] and other decisions recognizing "reproductive rights," to argue that the Ninth Amendment creates a zone of privacy regarding consensual sexual activity, including homosexual sodomy.[14] However, all of these cases involved marriage, family, and procreation, and the Supreme Court majority found that these cases did not bear "any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."[15] The Court said, "[T]he proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[16] The United States Supreme Court also reasoned that a state may regulate morality through its police

6. 123 S. Ct. 2472 (2003).
7. 478 U.S. 186 (1986).
8. 517 U.S. 620 (1996).
9. 473 U.S. 432 (1985).
10. *Bowers*, 478 U.S. at 192.
11. *Id.* at 187-88.
12. *Id.* at 190.
13. 381 U.S. 479 (1965).
14. *Bowers*, 478 U.S. at 190.
15. *Id.* at 190-91.
16. *Id.* at 191.

power.[17] However, the Court did not say whether there was a rational foundation for the moral belief.[18]

The Supreme Court has outlined a test to determine "the rights qualifying for heightened judicial protection."[19] A fundamental right is one that is "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if it were sacrificed.'"[20] Fundamental liberties are also "characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.'"[21] In *Bowers*, the Court did not explain why sodomy did not fit into these two definitions other than to say: "[I]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[22] The Court then recounted the history of sodomy laws and concluded that it was not "inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause."[23]

In his dissent, Justice Blackmun disagreed with the narrow question presented, indicating that the "case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[24] Blackmun also felt that Hardwick may have had Eighth Amendment or Equal Protection Clause claims, and that Georgia's anti-sodomy statute "interferes with constitutionally protected interests in privacy and freedom of intimate association."[25] The State asserted that individuals who engage in the conduct prohibited by Georgia's statute interfere with the "right . . . to maintain a decent society."[26] Justice Blackmun noted, however, that "[n]o matter how uncomfortable a certain group may make the majority of this Court, we have held that '[mere] public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'"[27]

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17. *Id.* at 196.

18. Christopher Wolfe, *Forum on Public Morality: Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 76-77 (2000) ("Demonstrating a rational basis for a public morality statute is particularly important, in light of one argument against such statutes: that they violate separation of Church and State, since they constitute an imposition of sectarian doctrine.").

19. *Bowers*, 478 U.S. at 191.

20. *Id.* at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)).

21. *Id.* at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

22. *Id. But cf.* Graff, *supra* note 1 ("This Court has insisted that 'liberty' means you get to decide what to do with your body, your home and your family—that if the Constitution stands for anything, it stands for protecting your private life from the state (unless the state has a pretty darn good reason to interfere).").

23. *Bowers*, 478 U.S. at 192-94.

24. *Id.* at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1982) (Brandeis, J., dissenting)).

25. *Id.* at 202.

26. *Id.* at 210 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59-60 (1973)).

27. *Id.* at 212 (Blackmun, J., dissenting) (quoting O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)).

B. Romer v. Evans

In *Romer v. Evans*,[28] the United States Supreme Court held that a Colorado constitutional amendment, Amendment 2, prohibiting official protection from discrimination on the basis of sexual orientation violated the Fourteenth Amendment's Equal Protection Clause.[29] Using a rational basis standard of review, the most deferential test, the Court invalidated Amendment 2, which first, contained a classification of "homosexuals," and second, withdrew "from homosexuals, but no others, . . . legal protection from . . . discrimination, and [prohibited] reinstatement of these laws and policies."[30] The State's primary rationale for the Amendment was "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[31]

The Court noted that homosexuals as a class were singled out by Amendment 2 and were accorded less protection under the law because of their membership in the class.[32] Although the Court utilized a rational basis standard for its analysis, Amendment 2 still failed this most deferential standard because the Court found the amendment advanced no legitimate governmental interest.[33] The Court realized that the Amendment made homosexuals unequal to all other people and did not further a proper legislative end.[34]

C. City of Cleburne v. Cleburne Living Center

In *City of Cleburne v. Cleburne Living Center*,[35] the Supreme Court struck down a city zoning ordinance requiring a special use permit for a home for the mentally retarded, but exempting other uses from this permit requirement, such as apartment houses, fraternity houses, apartment hotels, hospitals, private clubs and other specified uses.[36] The Equal Protection issue presented was: "May the city require [a] permit for this facility when other care and multiple-dwelling facilities are freely permitted?"[37] The Supreme Court agreed with the lower courts that "'[if] the potential residents of the . . . home were not mentally retarded, but the home was the same in all other respects,'" its use would be authorized under the zoning ordinance.[38]

The city presented several bases on which to support the ordinance, such as the fear and negative attitudes of residents living near the facility, lo-

28. 517 U.S. 620 (1996).
29. *Id.* at 623.
30. *Id.* at 627.
31. *Id.* at 635.
32. *Id.*
33. *Id.*
34. *Id.*
35. 473 U.S. 432 (1985).
36. *Id.* at 447-48.
37. *Id.* at 448.
38. *Id.* at 449-50 (alteration in original) (citation omitted).

cation of the home in a flood plain, the size of the home, and the number of people who would occupy it.[39] The Court demonstrated that each of these factors did not apply because of how the city treated other groups similarly situated.[40] The Supreme Court concluded that the City's requirement of a permit was based on an irrational prejudice against the mentally retarded.[41]

The Court was willing to look closer at whether the ordinance was reasonably related to the State's goals. Usually economic and commercial legislation "will be upheld if rationally related to any conceivable, legitimate governmental purpose," and as long as there is a legitimate governmental purpose, the court will presume that the ordinance is valid.[42] Although the Court would have been expected to uphold the ordinance using such an analysis, it has been argued that the Court struck down the ordinance by applying a "less forgiving rational basis standard."[43] Under this type of scrutiny, instead of giving deference, "the Court . . . more closely examine[s] the statute at issue to ensure that it bears a reasonable relation to the asserted state goals."[44]

III. THE CASE—*LAWRENCE v. TEXAS*

A. Texas Court of Appeals Opinion

1. The Majority

John Geddes Lawrence and Tyron Garner were convicted of engaging in homosexual conduct and were each fined two hundred dollars.[45] On appeal, they challenged the constitutionality of the law under which they were convicted.[46] Section 21.06 of the Texas Penal Code makes it a misdemeanor in Texas for a person to engage "in deviate sexual intercourse with another individual of the same sex."[47] Texas defines "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object."[48] Lawrence and Garner contended that this section of the Texas Penal Code violated their right to Equal Protection and

39. *Id.* at 448-49.

40. *Id.* at 449-50.

41. *Id.* at 450.

42. Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 939-40 (2000).

43. *Id.* at 940; *see also* Steven J. Eagle, *Symposium: When Does Retroactivity Cross the Line?: Winstar, Eastern Enterprises and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1026 (2000) (the Court's review has been labeled as "covertly heightened scrutiny") (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 769, 1612 (2d ed. 1988)).

44. Strasser, *supra* note 42, at 940-41.

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

46. *Id.*

47. TEX. PENAL CODE ANN. § 21.06 (Vernon 1994); *see also* Graff, *supra* note 1 (the Texas law is actually named the "Homosexual Conduct" law).

48. TEX. PENAL CODE ANN. § 21.01 (Vernon 1994).

their right to privacy guaranteed by the state and federal constitutions.[49]

Police were investigating a reported "weapons disturbance," which turned out to be false,[50] when they entered Lawrence's home and observed Lawrence and Garner engaged in a sexual act.[51] Because appellants did not challenge at trial or on appeal the conduct of the police leading to appellants' discovery and arrest, the issue presented to the court was simply "whether Section 21.06 is facially unconstitutional."[52]

First, the Texas appeals court indicated that neither the United States Supreme Court, nor any Texas court, has identified sexual orientation as a suspect or protected class and therefore the statute is constitutional as long as it is "rationally related to a legitimate state interest."[53] The statute's prohibition of sodomy was held to further the state's interest in preserving public morals.[54]

The court then rejected appellants' argument that Section 21.06 unconstitutionally discriminated on the basis of gender.[55] Lawrence and Garner contended that the statute discriminated on the basis of sex because "the physical act is not unlawful as between a man and woman, [but] it is unlawful when performed between two men or two women."[56] However, Texas claimed the statute did not discriminate on the basis of gender because it "applies equally to men and women, i.e., two men engaged in homosexual conduct face the same sanctions as two women."[57] Appellants then pointed out that a "similar rationale was expressly rejected in the context of racial discrimination."[58] However, the Texas court was not willing to equate the miscegenation statute with criminalizing homosexual conduct because there is "nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender."[59]

The statute did not give one gender an advantage over the other, nor burden one gender more than the other.[60] Although there was disproportionate impact between heterosexuals and homosexuals, there was not dispropor-

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

50. Petitioners' Brief at 2, *Lawrence* (No. 02-102) (stating that the person who called in the report later admitted his allegations were false and he was convicted of filing a false report).

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

52. *Id.*

53. *Id.* at 353-54.

54. *Id.* at 357.

55. *Id.* at 357-58.

56. *Id.* at 357.

57. *Id.*

58. *Id.* (citing Loving v. Virginia, 388 U.S. 1, 9 (1967) (holding a miscegenation statute unconstitutional, despite the argument that the statute did not discriminate on the basis of race because it applied equally to whites and blacks)).

59. *Lawrence*, 41 S.W.3d at 357-58.

60. *Id.* at 359.

tionate impact between men and women.[61] Therefore, the court concluded, the state statute was only subject to rational basis review and is still supported by a legitimate state interest.[62] Section 21.06 did not violate the right to privacy because "there is no constitutional 'zone of privacy' shielding homosexual conduct from state interference."[63] The court indicated that although there is no explicit guarantee of privacy in state or federal constitutions, "both constitutions contain express limitations on governmental power from which 'zones of privacy' may be inferred."[64]

"[H]omosexual conduct is not a right that is 'implicit in the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition.'"[65] The court reasoned "that the legislature, in the exercise of its police power, has authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral."[66]

2. The Dissent

Justice Anderson, in his dissent, disagreed with the "majority's Herculean effort to justify the discriminatory classification of *section 21.06 of the Penal Code* despite the clear prohibitions on such discrimination contained in the Equal Protection Clause of the United States Constitution and the Texas Equal Rights Amendment in the Bill of Rights of the Texas Constitution."[67] The dissent maintained that:

> Under the Fourteenth Amendment, the statute must fail because even applying the most deferential standard, the rational basis standard, the statute cannot be justified on the majority's sole asserted basis of preserving public morality, where the same conduct, defined as "deviate sexual intercourse" is criminalized for same sex participants but not for heterosexuals.[68]

The dissent also argued that the statute should be analyzed under the heightened intermediate scrutiny standard of review because it is not gender neutral.[69] The dissent reasoned that there is no persuasive justification for the classification and no showing that the statute is narrowly tailored to support a government interest.[70] Similarly, section 21.06 cannot withstand height-

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61. *Id.*

62. *Id.*; *see* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 303 (1997) ("[T]he Court applies intermediate scrutiny to those classifications it considers 'semi-suspect'—such as those based on gender or illegitimacy.").

63. *Lawrence*, 41 S.W.3d at 362.

64. *Id.* at 359.

65. *Id.* at 361.

66. *Id.* at 362.

67. *Id.* at 366.

68. *Id.* at 367.

69. *Id.* at 368.

70. *Id.*

ened scrutiny under the Texas Constitution because section 21.06 discriminates on the basis of gender, thus violating Texas's Equal Rights Amendment, and statutes that contravene anything in the Texas Bill of Rights are *per se* void under Texas state law.[71] The dissent cited *In re McLean,*[72] to show that the State has the burden to support the statute and the State has failed to make the required showing to defeat a challenge.[73]

The United States Supreme Court granted certiorari on this case;[74] oral arguments were presented on March 26, 2003.

B. The Supreme Court Opinion

1. The Majority

In a majority opinion written by Justice Kennedy, the Supreme Court in *Lawrence v. Texas* reversed the Texas Court of Appeals decision.[75] The Court overruled *Bowers v. Hardwick* and held that the Texas statute criminalizing intimate sexual conduct for persons of the same sex violated the right to liberty under the Due Process Clause of the Fourteenth Amendment.[76]

First, the Court reconsidered the holding in *Bowers*, relying on earlier cases including *Griswold v. Connecticut*,[77] *Eisenstadt v. Baird*,[78] *Roe v. Wade*[79] and *Carey v. Population Services, Int'l*[80] for the proposition that the right to privacy in the bedroom is not restricted to married persons.[81] Next, the Court indicated that the issue in *Bowers* was incorrectly framed, and stated that asking whether there is a fundamental right to homosexual sodomy is as demeaning as asking whether marriage is about the right to engage in sexual intercourse.[82] Liberty instead includes the right of individuals to enter into relationships in their own homes and private lives, where intimate conduct is only one aspect of these relationships.[83]

The Court then investigated the *Bowers* Court's claim that prohibitions on sodomy had "ancient roots."[84] Although there were early laws criminalizing sodomy, there was no indication that these laws were directed at homosexuals and were not "enforced against consenting adults acting in pri-

71. *Id.*
72. 725 S.W.2d 696 (Tex. 1987).
73. *Lawrence*, 41 S.W.3d at 367.
74. Lawrence v. Texas, 537 U.S. 1044 (Dec. 2, 2002) (No. 02-102).
75. Lawrence v. Texas, 123 S. Ct. 2472 (2003).
76. *Id.* at 2484.
77. 381 U.S. 479 (1965).
78. 405 U.S. 438 (1972).
79. 410 U.S. 113 (1973).
80. 431 U.S. 678 (1977).
81. *Id.* at 2477.
82. *Id.* at 2478.
83. *Id.*
84. *Id.* (citing Bowers v. Hardwick, 478 U.S. 186, 192 (1986)).

vate."[85] Though the *Bowers* Court overstated the historical foundations, the Court here acknowledged the point made by the *Bowers* Court that, for centuries, homosexual conduct was viewed as immoral.[86] However, the Court noted that its "obligation is to define the liberty of all, not mandate [its] own moral code."[87]

The majority continued to invalidate the rationale of *Bowers,* in which the *Bowers* Court made "sweeping references" to the history of Western civilization and Judeo-Christian views of morality.[88] However, the *Lawrence* Court focused on other authorities regarding laws on homosexual conduct, including British Parliament recommendations, reports, and laws, and the European Convention of Human Rights, which all held views contrary to *Bowers.*[89] The decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Romer v. Evans* also cut against the holding in *Bowers.*[90] *Casey* reinforced the constitutional protection given to personal decisions regarding "marriage, procreation, contraception, family relationships, child rearing, and education."[91] *Romer* held that "class-based legislation directed at homosexuals [is] a violation of the Equal Protection Clause."[92]

Next, the Court emphasized the "stigma" that homosexuals are subjected to as a result of the Texas statute.[93] Although the charge is a class C misdemeanor, it is still part of an individual's criminal record.[94] Those convicted must register as sex offenders in at least four states, and the conviction must be documented on job applications.[95] Relying on these reasons, and taken together with the substantial amount of criticism *Bowers* has received in the United States and by the European Court of Human Rights, the Court found compelling reasons to overturn *Bowers.*[96]

Justice Kennedy summed up the majority opinion by stressing several points made by Justice Stevens in his dissent in *Bowers.* Prohibiting certain acts cannot be justified simply because a state has traditionally viewed the practice as immoral.[97] Decisions concerning physical relationships, "even when not intended to produce offspring . . . extends to intimate choices by unmarried as well as married persons."[98] Finally, the Court stressed that "[t]he State cannot demean [homosexuals'] existence or control their destiny

85. *Id.* at 2479.
86. *Id.* at 2480.
87. *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).
88. *Id.* at 2481.
89. *Id.*
90. *Id.* at 2481-82.
91. *Id.* (citing *Casey,* 505 U.S. at 851).
92. *Id.* at 2482.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 2483.
97. *Id.*
98. *Id.* at 2483 (citing Bowers v. Hardwick, 478 U.S. 186, 216 (1986)).

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."[99]

2. *Justice O'Connor's Concurrence*

Although Justice O'Connor agreed that the Texas statute was unconstitutional, she based her decision on the Equal Protection Clause of the Fourteenth Amendment and did not join in overruling *Bowers*.[100] Justice O'Connor noted that Texas' statute does not apply to individuals equally because only participants of the same-sex are harmed by the law.[101]

Like the majority, Justice O'Connor discussed the practical consequences that section 21.06 has for homosexuals, including restrictions on employment choices and having to register as sex offenders.[102] She also stated, "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."[103] Justice O'Connor indicated that morality, without any other state interest, is not a rational basis for discriminating against a particular group.[104] She distinguished *Bowers*, pointing out that there the Court only addressed whether there was a right to engage in homosexual sodomy under the Due Process Clause, not whether "moral disapproval of a group" is a rational basis to criminalize same-sex sodomy under the Equal Protection Clause.[105]

Justice O'Connor discredited Texas' argument that the statute only applies to homosexual *conduct* and not homosexuals personally, because the conduct is so closely associated with being homosexual; it is impossible to separate the conduct from the individual.[106] The law targets "gay persons as a class."[107] A state cannot punish only one class of citizens if it does not punish everyone, especially if the only rationale is moral disapproval.[108] However, Justice O'Connor was careful to note that other reasons may exist, such as promotion of marriage, which would provide a rational basis for distinguishing between homosexuals and heterosexuals.[109]

3. *Justice Scalia's Dissent*

Justice Scalia began his dissent by reiterating the ruling of *Bowers*, that

99. *Id.* at 2484.
100. *Id.* (O'Connor, J., concurring).
101. *Id.* at 2485.
102. *Id.* at 2485-86.
103. *Id.* at 2486.
104. *Id.*
105. *Id.*
106. *Id.* at 2486-87.
107. *Id.* at 2487.
108. *Id.*
109. *Id.* at 2487-88.

homosexual sodomy is not a fundamental right under the Due Process Clause.[110] He criticized the majority for stating instead that Lawrence and Garner's conduct is "an exercise of their liberty."[111] Then Justice Scalia attacked the majority's application of the doctrine of stare decisis, arguing that the majority should be consistent in applying the doctrine.[112] He claimed that the Court in *Casey* argued that "intensely divisive controversy" was a reason not to overrule *Roe*, but now in *Lawrence*, the Court is using the same argument as grounds to overrule *Bowers*.[113] However, Justice Scalia did agree that *Romer* had cast the *Bowers* holding into doubt.[114]

Justice Scalia questioned the majority's assertion that there has been "substantial and continuing" disapproval of the *Bowers* reasoning because, in his view, the Court did not indicate precisely what criticisms they had with the historical basis for *Bowers*.[115] His dissent declared that morality has always driven the law and that if these laws are "invalidated under the Due Process Clause, the courts will be very busy, indeed."[116]

Next Justice Scalia attacked the majority's claim that there is a right to liberty under the Due Process Clause.[117] He admitted that the Texas statute did in fact restrict liberty, but claimed that the State is able to do this "as long as due process is provided."[118] In his view, no *fundamental right* was implicated because fundamental rights are those that are "deeply rooted in this Nation's history and tradition."[119] Therefore, the state statute must only be rationally related to a legitimate state interest.

The dissent then turned to the contention that there was no rational basis for the Texas law. Justice Scalia claimed that the reason for the statute was to "further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable.'"[120] While this was considered a legitimate state interest in *Bowers*, it was not accepted by the *Lawrence* majority. As a result, Justice Scalia believed the effect would be that morality can no longer be used as a rationale for legislation.[121]

Finally, Justice Scalia took on the Equal Protection claim, arguing that the law only applied to conduct and not to the individual involved.[122] He further claimed that even if the Texas statute did deny equal protection, it was fully justified by "notions of sexual morality."[123] Justice Scalia also criti-

110. *Id.* at 2488 (Scalia, J., dissenting).
111. *Id.*
112. *Id.* at 2488-89.
113. *Id.* at 2488 (quoting *Casey*, 505 U.S. at 866-67).
114. *Id.* at 2489.
115. *Id.*
116. *Id.* at 2490 (citing *Bowers*, 478 U.S. at 196).
117. *Id.* at 2491.
118. *Id.*
119. *Id.* at 2491-92 (citing *Bowers*, 478 U.S. at 196).
120. *Id.* at 2495 (citing *Bowers*, 478 U.S. at 196).
121. *Id.*
122. *Id.* at 2496.
123. *Id.*

cized the majority's use of an "unheard-of form of rational-basis review,"[124] and Justice O'Connor's concurrence for its failure to explain what "a more searching form of rational basis review" meant, and he asserted that the cases she cited did not support her claim.[125] Despite Justice O'Connor's claim that preserving marriage may still be a legitimate state interest, Scalia believed her reasoning placed laws prohibiting same-sex marriage on "pretty shaky grounds."[126] His dissent concluded by labeling the majority's opinion the "product of a Court . . . that has largely signed on to the so-called homosexual agenda."[127]

Justice Thomas, who joined in Justice Scalia's dissent, wrote separately to indicate that if he were a member of the Texas Legislature he would repeal the law.[128] However, he believed that there was no general right to privacy in the Bill of Rights or any part of the Constitution and therefore thought the statute should have been upheld.[129]

IV. EQUAL PROTECTION AND THE RATIONAL BASIS WITH BITE STANDARD OF REVIEW

Justice O'Connor's concurrence in *Lawrence* indicated that a more searching form of rational basis review has emerged in Equal Protection cases. In several cases, the Supreme Court has applied a standard of review that has become known as "rational basis with bite."[130] Under this standard, the Court has found policies invalid that would be valid under the traditional rational basis test.[131] Finding these regulations "unconstitutional under rational basis review implies that the Court [is using] a more searching scrutiny."[132] Customarily, courts apply only the most deferential standard of review in an Equal Protection case where there is a challenge to legislation that implicates neither a suspect classification nor a fundamental right. However, courts may be moving away from this usual practice.[133]

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124. *Id.* at 2488.

125. *Id.* at 2496.

126. *Id.*

127. *Id.*

128. *Id.* at 2498.

129. *Id.*

130. Victor Rosenblum of Northwestern University Law School has called this standard of review "rational basis with teeth." Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779 n.11 (1987); Steven J. Eagle calls it "meaningful scrutiny," stating: "The term 'meaningful scrutiny' is used here because it conveys my intent, because it is not a term of art in the Supreme Court's lexicon, and because the existing terms of art are increasingly fuzzy." Eagle, *supra* note 43, at 1024.

131. Pettinga, *supra* note 130, at 779.

132. *Id.*

133. *Id.*; *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). There, the Supreme Court reviewed the constitutionality of a federal food stamp program that amended and redefined the term household from "related or non-related individuals" to only related individuals. *Id.* at 529-30. Congress' objective in creating the Act was to "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-

The rational basis test usually presumes legislation is constitutional; thus, the court will uphold the law if the classification drawn by the statute is rationally related to a legitimate state interest.[134] It has been suggested that the rational basis with bite standard is an effort to "reach perceived injustices that otherwise lie beyond constitutional reach."[135] Courts also use this test "where classifications are apt to stigmatize or come close to trenching on protected rights."[136]

It is difficult to tell from the language of Justice O'Connor's concurrence if she was using a traditional rational basis standard of review or the rational basis with bite standard. In *Lawrence*, the result would have been the same regardless of which standard was applied. However, a problem will arise when courts try to apply this reasoning to future cases. In *Lawrence*, O'Connor contended that "when a law exhibits such a desire to harm a politically unpopular group, [the Supreme Court] ha[s] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[137] In his dissent, Justice Scalia criticized this statement, claiming that Justice O'Connor did not explain exactly what this standard is, and contended that the cases Justice O'Connor cited did not support this reasoning.[138] However, Justice O'Connor's assertion reiterates what scholars have been contending for the past several years—that the Supreme Court has been carving out a subsection under the traditional rational basis standard of scrutiny to help unpopular groups that are subject to discrimination.[139]

Justice O'Connor pointed out that traditional rational basis still applies when dealing with economic or tax legislation because it is presumed that these decisions will be worked out through the democratic process.[140] How-

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income households." *Id.* at 533. The Court recognized that individuals' relation to one another in a household are not rationally related to the proposed goal of the Act, which was to prevent food stamp fraud. *Id.* Legislative history suggested that the real motive behind the amendment was to prevent "hippies" from benefiting from the program. *Id.* at 534. In Zobel v. Williams, 457 U.S. 55 (1982), the Supreme Court held unconstitutional an Alaska law that pro-rated benefits from state oil revenues among residents according to length of residency. Pettinga, *supra* note 130, at 785 (citing *Zobel*, 457 U.S. at 56). The Court found that the statute violated equal protection because it created "fixed, permanent distinctions between . . . classes of concededly bona fide residents." *Id.* (citing *Zobel*, 457 U.S. at 59).

134. Pettinga, *supra* note 130, at 783 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981); Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

135. *Id.* at 780 (quoting Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112 (1985)).

136. Eagle, *supra* note 43, at 1025 (citing Richard A. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 316-17 (1993)).

137. Lawrence v. Texas, 123 S. Ct. 2472, 2485 (2003) (emphasis added).

138. *Id.* at 2496.

139. *See* Eagle, *supra* note 43, at 1026 (the Court's review has been labeled as "covertly heightened scrutiny") (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 769, 1612 (2d ed. 1988)); *see also* Pettinga, *supra* note 130, at 785; Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 303 (1997).

140. *Lawrence*, 123 S. Ct. at 2484-85.

ever, in cases like *Lawrence*, where one's sexual orientation subjects one to discrimination, courts must look deeper into the legislature's purpose for the laws it enacts.

Justice O'Connor ended her concurrence by asserting that "[a] law branding one *class* of persons as criminal solely based on the State's moral disapproval of that *class* and the conduct associated with that *class* runs contrary to the values of the Constitution and the Equal Protection Clause, under *any* standard of review."[141] This language implies that Justice O'Connor applied traditional rational basis review by her use of the phrase "any standard."[142] However, she referred to gays and lesbians as "a class," which usually implies heightened scrutiny.[143] Then again, it seems that rational basis with bite has been used when challenged legislation harms a class of individuals.[144] Therefore, it is unclear whether this language refers to hyper-rational review or to merely the rational basis standard.

At oral arguments, appellants requested rational basis review when asked by Justice O'Connor if they sought heightened scrutiny of this law.[145] Counsel for appellants also stated that Texas' only reason for the anti-sodomy law was that it was "'a symbolic expression of disapproval.'"[146] Texas limited the statute to homosexual sodomy, showing that it did not totally disapprove of sodomy; it only morally disapproved of sodomy when it is conducted by same-sex partners.

Nonetheless, Texas contended that the Legislature did not purposefully discriminate against persons engaging in homosexual conduct.[147] They argued that there was a rational basis for the statute because Texas had a "legitimate state interest in legislatively expressing the long-standing moral traditions of the State against homosexual conduct, and in discouraging its citizens—whether they be homosexual, bisexual or heterosexual—from choosing to engage in what is still perceived to be immoral conduct."[148] However, if the State of Texas truly saw the *conduct* as immoral, then the

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141. *Id.* at 2488 (emphasis added).

142. *Id.*

143. Scholars have suggested that courts should do away with the three-tiered structure altogether because courts spend more time determining whether certain individuals are a suspect class than they do looking closely at the purpose of the challenged legislation. *See* Todd M. Hughes, Symposium, *Towards a Radical and Plural Democracy: Making Romer Work*, 33 CAL. W. L. REV. 169, 174-75 (1997). "[S]trict scrutiny is an artificial and outdated form of judicial review, a part of the traditional liberal view of the law that, for the most part, no longer serves any useful purpose and should be discarded." *Id.*

144. *Lawrence*, 123 S. Ct. at 2486 (noting that "a bare [congressional] desire to harm a politically unpopular group" is not a *legitimate* state interest) (citing United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47 (1985); Romer v. Evans, 517 U.S. 620, 632-33 (1996)).

145. Graff, *supra* note 1 ("So Smith told O'Connor that nope, regular 'rational basis' scrutiny—which means that the state can toss up any old justification for a law so long as it has some rational relationship to its goal—is fine.").

146. *Id.*

147. Respondent's Brief at 26-27, Lawrence v. Texas, 41 S.W.3d 349 (Tex. Crim. App. 2001) (No. 02-102), *cert. granted*, 123 S. Ct. 661 (Dec. 2, 2002).

148. *Id.*

conduct would be illegal for heterosexuals as well as homosexuals. Texas put forth that Section 21.06 rationally furthered its goal because it exemplified the State's moral disapproval of sodomy between same-sex couples and it created an incentive against such conduct.[149]

Texas believed that rational basis analysis was consistent with *Bowers*, even though the State acknowledged that *Bowers* "stands alone as the only modern case in which this Court has approved moral tradition as a submitted rational basis for legislation."[150] However, applying the cases that have used "rational basis with bite," "moral tradition" is not enough to justify the statute. It also appears that moral tradition will not even satisfy the toothless rule of reason test without an additional legitimate state interest.[151] Notions of morality alone do not justify legislation. It seems that Justice O'Connor's concurrence may be saying that although the court has applied a more searching scrutiny in other cases and it *could* have been used here, regular rational basis review suffices because regulating morality is not a legitimate state interest.

V. IMPLICATIONS OF THE DECISION

A. Will Lawrence *End Discrimination Against Gays and Lesbians?*

Lawrence v. Texas has been called the "most important court decision on the rights of gay and lesbian Americans in a generation."[152] This is not because massive numbers of homosexuals have been arrested for sodomy, but because they are assumed to be criminals without actually being charged with or convicted of a crime.

Sodomy laws have sent a message that homosexuality is unacceptable. "Perpetrators of violence against gay men and lesbians rationalize their violence as vigilante enforcement of sodomy laws."[153] Homosexuals have also been afraid to report anti-gay crimes committed against them because they may be prosecuted under sodomy statutes.[154] *Lawrence* changes this. Individuals can no longer justify their violent acts against gays and lesbians by claiming that they are simply retaliating against criminals. There is also more incentive for the victims of these crimes to come forward. Thus, legal protection from hate crimes should now be more readily available to gays and lesbians.

Legislators have used *Bowers* in order to exclude gays and lesbians from legal protection, rationalizing that homosexuals are "immoral criminals

149. Graff, *supra* note 1.

150. Respondent's Brief at 27, *Lawrence*, (No. 02-102).

151. *Lawrence*, 123 S. Ct. at 2487-88.

152. *Sodomy Case Will Have Wide Impact*, The Data Lounge, *at* http://www.datalounge.com/datalounge/news.record/html?record=20628 (Mar. 26, 2003) [hereinafter Impact Article].

153. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 124 (2000).

154. *Id.* at 125.

deserving of punishment."[155] This may have been true under *Bowers*—homosexuals engaged in sodomy were breaking the law—but *Lawrence* held that sodomy is no longer a crime. Therefore, if lawmakers try to exclude gays and lesbians from legal protection, they will have to provide justifications other than their previous argument that homosexuals are criminals.

B. Are Laws Limiting Same-Sex Marriage Really on "Shaky Ground"?

Now that *Lawrence* has been decided, gays and lesbians are turning their focus to the debate over same-sex marriage. The *Bowers* decision remained one of the strongest obstacles to same-sex marriage because it justified state-sanctioned discrimination.[156] Conservatives feel that invalidation of the Texas sodomy statute will change family status and undermine the "favored treatment of male-female marriage by state lawmakers."[157] Justice Breyer stated in oral arguments that *Bowers* did not understand the relationship between sodomy and families.[158] By this he means that homosexual couples should not be defined in terms of what type of sex they have, in the same way we do not define heterosexual couples and families in terms of what type of sex they choose to have. Justice Kennedy emphasized this point in *Lawrence*, explaining that asking whether there is a fundamental right to homosexual sodomy is as demeaning as asking whether marriage is about the right to engage in sexual intercourse.[159]

There are thousands of gay families in America today.[160] Although Texas made same-sex sodomy illegal, it obviously felt that homosexuals could form families because adoption by lesbians and gays is legal in the state.[161] It appears Justice Scalia may have provided the most persuasive justification for same-sex marriage. It has been argued that the Texas statute prohibiting same-sex sodomy applies equally to men and women: men can only violate the law with other men and women with other women and therefore does not deny equal protection.[162] Although the statute only applies to homosexual *conduct*, it does target homosexuals personally, because the conduct is so closely associated with being homosexual.[163] This rationale

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155. *Id.* at 126 (citing Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 232 (1994)).

156. Comment, *Developments in the Law: II. Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2006 (2003).

157. Impact Article, *supra* note 148 (this case could have "broad implications . . . for the marriage laws in every state").

158. Graff, *supra* note 1.

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

160. Stephen Henderson, *At High Court, Antigay Case Looks Weak*, PHILADELPHIA INQUIRER, *at* http://www.philly.com/mld/inquirer/news/nation/5490151.htm (Mar. 27, 2003).

161. Graff, *supra* note 1. According to Justice Ginsberg, if the state thinks homosexuals could be proper guardians of children, then "they should be free to have intimate relations." *Id.*

162. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

163. *Id.* at 2486-87 (O'Connor, J., concurring).

applies to same-sex marriage—men cannot marry men and women cannot marry women. Justice Scalia, however, noted that if this rationale does not support homosexual sodomy laws, it will not protect state laws prohibiting marriage with members of the same sex.[164]

Scalia also contended that the *Bowers* rationale—that some forms of sexual behavior are "immoral and unacceptable"[165]—has justified many laws regulating sexual behavior relating to the identity of the partner,[166] including laws regulating marriage.[167] However, *Lawrence* specifically rejects the rationale that notions of morality justify legislation. Justice Scalia even stated that this leaves state laws against same-sex marriage on "shaky grounds."[168] Although Justice O'Connor believes there may be a legitimate state interest in "preserving the traditional institution of marriage," Justice Scalia insists this is "just a kinder way of describing the State's *moral disapproval* of same-sex couples."[169]

The most persuasive argument for the legalization of same-sex marriage comes at the end of Justice Scalia's dissent. Although the majority opinion says that *Lawrence* does not address whether there should be formal recognition of homosexual relationships,[170] Justice Scalia warns us "not [to] believe it."[171] He believes that the majority's rationale regarding "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" applies to homosexual relationships.[172] Allowing gays and lesbians to express themselves intimately in the same way heterosexuals do leaves supporters of limitations on same-sex marriage with little possible justification for "denying the benefits of marriage to homosexual couples."[173] Whether Scalia's dissent will come back to haunt him in gay rights cases remains to be seen.

C. Will Gays in the Military Have to Continue to "Keep Their Mouths Shut" About Their Sexuality?

Under the military's "don't ask, don't tell" policy, members of the armed forces "can be dismissed for engaging in homosexual acts, openly asserting that they are gay or lesbian or proclaiming a same-sex marriage."[174]

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

165. *Id.* (citing *Bowers*, 478 U.S. at 196).

166. *Id.* Scalia notes that the "identity" of a partner has been used to justify laws regarding adultery, fornication, and adult incest. However, the "identity" of all of these participants has nothing to do with the sex or gender of the participants. It is based specifically on who the person is. *Id.*

167. *Id.* at 2495-96.

168. *Id.* at 2496.

169. *Id.*

170. *Id.* at 2497-98.

171. *Id.* at 2498.

172. *Id.*

173. *Id.*

174. George Edmonson, *Lawsuit Challenges Military's Gay Policy*, ATLANTA JOURNAL

One of the main justifications for the military's policy is moral disapproval of homosexuals.[175] This is an area where O'Connor's failure to clearly articulate whether she was using a rational or a hyper-rational standard may pose a problem.

Courts have often deferred to the military regarding internal discipline and national security.[176] Courts usually give deference to legislation under rational basis review, but as stated earlier, under rational basis with bite, courts will look closer to see if the means of the legislation support the purported goal. "[W]hen judging the rationality of a regulation in the military context, we owe even more special deference to the 'considered professional judgment' of 'appropriate military officials.'"[177] If lower courts are unsure how to apply the rational basis standard, they will most likely give deference to the military's policy without looking closer to see if its policy meets its alleged goals. The Supreme Court may decline to review cases on this issue while the implications of the *Lawrence* decision work their way through the lower courts.

Another obstacle standing in the way of overturning the "don't ask, don't tell" policy is that the armed forces are governed by the Uniformed Code of Military Justice (UCMJ).[178] *Lawrence* may not be legally binding on the UCMJ's sodomy law because that law is based on Article 1, Section 8 of the Constitution.[179] The rationale supporting the military law is that members of the armed forces are often in close living quarters with almost little or no privacy.[180] *Lawrence* says that gays and lesbians have a right to liberty in their private, consensual, intimate conduct. The military's policy claims only to prevent homosexuals from openly claiming they are gay. The military will argue that its rationale is based on more than simply the moral disapproval that *Lawrence* prohibits.

D. After Lawrence, *Do We Still Teach Students Reading, Writing and Abstinence?*

Although there is much hype over what impact *Lawrence* will have on same-sex marriage and the military's "don't ask, don't tell" policy, there are other areas of importance that are not receiving as much attention. There are

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CONSTITUTION, *at* http://www.ajc.com/news/content/news/0703/20dontask.html (July 20, 2003).

175. *Id.*

176. Alfonso Madrid, Comment, *Rational Basis Review Goes Back to the Dentist's Chair: Can the Toothless Test of* Heller v. Doe *Keep Gays in the Military*, 4 TEMP. POL. & CIV. RTS. L. REV. 167, 181 (1994); *see also* Edmonson, *supra* note 170.

177. Steffan v. Perry, 41 F.3d 677, 684 (D.C. Cir. 1994) (citing Goldman v. Weinberger, 475 U.S. 503, 509 (1986)).

178. Lawrence *Decision Launches Military "Gay" Ban Challenges,* Concerned Women for America, *available at* http://www.cultureand family.org/articledisplay.asp?ed=4275& department=CFI&categoryid=cfreport (July 16, 2003).

179. *Id.*

180. *Id.*

still many statutes on the books that bias gays and lesbians that will not be removed immediately.[181] Education is one area in which this is a particular problem.[182] "Even though *Lawrence* declares homosexuals should have the same respect and rights as heterosexuals, don't expect school districts to change [their] curriculum."[183]

Many states have statutes that require schools to teach abstinence from sex until marriage.[184] Oklahoma law presently requires teachers to instruct public school students that "engaging in *homosexual activity*, promiscuous sexual activity, intravenous drug use, or contact with contaminated blood products is primarily responsible for HIV infection" and that "avoiding these activities is the only method of preventing the spread of the virus."[185] Several California statutes stress abstinence and require course material to discuss the emotional and psychological consequences of intercourse outside of marriage.[186] Statutes also mandate that "honor and respect for monogamous *heterosexual* marriage" be taught.[187] Course material should be "free of racial, ethnic and gender biases;" however, these statutes do not state that the law should be free from bias against homosexuals.[188]

The rationale behind these education laws does not apply to gay and lesbian students because same-sex marriages are not legal.[189] Gay and lesbian students are given the impression that they do not "count and that they must remain sexually abstinent for life."[190] If schools want to make gay and lesbian students feel that they are not wrong because of their orientation, these statutes need to be changed. Otherwise, homosexual teenagers will continue to feel like outsiders, or even criminals.

VI. CONCLUSION

The Supreme Court decision in *Lawrence v. Texas* has been extremely meaningful for gay and lesbian individuals everywhere. This was exemplified here in San Diego and at other Gay Pride parades around the nation, where people joyously waved banners and displayed signs with the names of Lawrence and Garner written on them.

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181. Robert DeKoven, *State Laws Require States to Ignore GLBTs*, GAY & LESBIAN TIMES, Aug. 21, 2003, at 35 (discussing how *Lawrence* should apply to state laws that require schools to teach that gay relations are illegal).

182. This section is not meant to be a comprehensive analysis on the presence of biased laws in education. It is simply noting that these laws still exist and will continue to affect gay and lesbian students.

183. DeKoven, *supra* note 177.

184. *See* Mary E. Clark, *AIDS Prevention: Legislative Options*, 16 AM. J. L. AND MED. 107, 116 (1990).

185. *Id.* at 117 (emphasis added).

186. CAL. ED. CODE § 51553 (2003); CAL. ED. CODE § 51229 (2003).

187. CAL. ED. CODE § 51553 (2003) (emphasis added).

188. *Id.*

189. DeKoven, *supra* note 177.

190. *Id.*

Views on homosexuality have evolved since *Bowers* was decided,[191] even though the state of Texas has claimed otherwise.[192] The Supreme Court no longer recognizes morality alone as justification for laws, especially when the only objective is to discriminate against a specific group of individuals. Simply not liking someone because of what he or she does in his or her own bedroom cannot be used as a reason to deny individuals equal protection of the laws.

Lawrence has a direct impact on states that have sodomy laws. The decision will provide strong precedent for an argument defending same-sex marriage and possibly serve as an additional rationale to strike down the military's "don't ask, don't tell" policy. Although *Lawrence* is a great triumph for the gay rights movement, statutes will continue to exist that serve to discriminate against homosexuals, especially in education. The struggle for equality for gays and lesbians will continue. However, *Lawrence* stands for the proposition that "unequal law and its broad harms are intolerable in this country."[193]

TracyLee Schimelfenig[*]

191. Graff, *supra* note 1 (The decision was decided "17 years ago, and there has been a cultural revolution since then, a transformation of American attitudes toward lesbians and gay men."); Henderson, *supra* note 156 (Smith, counsel for respondent, "could not clarify . . . how the law fit with evolving cultural views on homosexuality").

192. Respondents' Brief at 27, *Bowers* (No. 02-102) ("Nothing has changed in the sixteen years since Bowers to justify abandonment of its conclusion").

193. Petitioners' Brief at 34, *Lawrence* (No. 02-102).

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