CASE NOTES

Lawrence v. Texas: Court of Appeals of Texas Holds Texas Ban on Homosexual Sodomy Does Not Invidiously Discriminate Against Homosexuals Under Federal and State Constitutions

I. INTRODUCTION

John Geddes Lawrence and Tyron Garner (Appellants) were convicted of violating section 21.06 of the Texas Penal Code by engaging in homosexual sodomy and fined two hundred dollars.[1] The appellants contended that the statute violated principles of equal protection and privacy guaranteed by the federal and Texas constitutions.[2] Subsequent to their conviction by the trial court, Lawrence and Garner appealed.[3] On rehearing, the Fourteenth District of the Court of Appeals of Texas *held* that Texas Penal Code Section 21.06 did not violate the equal protection clauses of either the federal or Texas Constitutions nor the Texas Equal Rights Amendment, and the statute also did not infringe upon any right to privacy. *Lawrence v. Texas*, 41 S.W.3d 349, 361-62 (Tex. App. 2001) (en banc).

II. BACKGROUND

This case confronts three separate legal issues: (1) the appropriate standard of review for statutes based on sexual orientation; (2) the heightened standard of review as applied to those provisions which

1. Lawrence v. Texas, 41 S.W.3d 349, 350 (Tex. App. 2001) (en banc). Police discovered Lawrence and Garner engaging in homosexual sodomy when they lawfully entered a home to investigate a report of a "weapons disturbance." *Id.*; *see also* TEX. PENAL CODE ANN. § 21.06 (Vernon 1994) (warranting a Class C misdemeanor when a person engages "in deviate sexual intercourse with another individual of the same sex").

2. *Lawrence*, 41 S.W.3d at 350. At trial and on appeal the appellants did not contest the validity of the police conduct prior to their discovery and arrest, but instead chose to concentrate on the constitutionality of the statute. *Id.*

3. *Id.* at 349.

discriminate on the basis of gender; and (3) the right of privacy with regard to the conduct of consenting adults in private settings.

The United States Supreme Court has not determined sexual orientation to be a suspect class, and has by default applied a rational basis standard to legislation based upon an individual's sexuality, as it did in *Romer v. Evans*.[4] In *Romer*, the Court struck down Colorado's Amendment 2 as unfairly discriminatory against homosexuals as a class.[5] While the Court did not specifically state that legislation based on sexual orientation automatically warrants rational basis review, it found that a higher standard was unnecessary because Amendment 2 failed even rational basis analysis, the most deferential standard of review.[6] The Court outright rejected Colorado's defense of Amendment 2, which stated its purpose was to place homosexuals in the same legal position as all other citizens.[7] Instead, the Court interpreted the amendment as actually denying homosexuals their proper safeguard against discrimination because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[8] The Court reiterated that the purpose of its rational basis analysis is to protect against classifications that specifically burden disadvantaged classes.[9] More importantly, a classification must not be based upon animosity against a particular group because a "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest" within the concept of "equal protection of the laws."[10] Thus, Amendment 2 could not be accepted as constitutional even under rational basis review because the legislation did not equalize homosexuals within society, but deprived

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4. 517 U.S. 620, 624 (1996).

5. *Id.* at 635. Amendment 2 prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect the named class . . . refer[red] to as homosexual persons or gays and lesbians." *Id.*

6. *See id.* at 632 (stating that "Amendment 2 fails, indeed defies, even this conventional inquiry . . . . [I]t lacks a rational relationship to legitimate state interests"); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (defining the rule of rational basis as "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest").

7. *Romer*, 517 U.S. at 626.

8. *Id.* at 627.

9. *See id.* at 633 (noting that "[a] law declaring that . . . it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense"); *see also City of Cleburne*, 473 U.S. at 450 (holding that a zoning ordinance violated the equal protection clause because its regulation appeared to be based on an irrational prejudice against the mentally handicapped).

10. *Romer*, 517 U.S. at 634 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

them of proper access to the law based on an unwarranted animosity toward them as a group.[11]

Although sexual orientation has not been deemed a suspect class by the Supreme Court, legislation based on gender does warrant heightened scrutiny. In *Craig v. Boren*, the Court noted that gender-based classifications must be measured under a standard located between strict scrutiny and rational basis scrutiny, and will survive only if they "serve important governmental objectives and [are] substantially related to achievement of those objectives."[12] The *Craig* Court then applied the intermediate scrutiny standard to strike down an Oklahoma statute that prohibited the sale of 3.2% alcoholic beer to women under the age of twenty-one and males under the age of eighteen.[13] According to the Court, this gender-based differential invidiously discriminated against males between the ages of eighteen and twenty-one because it was not substantially related to Oklahoma's objective of promoting traffic safety.[14]

The Court reaffirmed its intermediate scrutiny standard for gender-based discrimination in *Mississippi Univ. for Women v. Hogan* when it held that the university could not prohibit Hogan from its nursing school solely due to his gender.[15] Although the school justified the exclusion as compensatory for past discrimination against women, the Court rejected this argument due to a lack of evidence exemplifying lost opportunities by women within the field of nursing.[16]

At the state level, the Texas Constitution recognizes gender as a "suspect class" reviewed under strict scrutiny.[17] In the case of *In re McLean*, the Texas Supreme Court applied strict scrutiny to render unconstitutional a statutory gender-based distinction based on fathers' parental rights to their children born out of wedlock.[18] The Texas Supreme Court reasoned that the Texas Equal Rights Amendment regards sex as a suspect class because it is "clearly listed in the amendment along with other classification afforded maximum

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11. *Id.* at 635.
12. 429 U.S. 190, 197 (1976).
13. *Id.*
14. *Id.* at 204.
15. 458 U.S. 718, 724 (1981).
16. *Id.* at 729.
17. Barber v. Colorado Indep. Sch. Dist., 901 S.W.2d 447, 452 (Tex.1995); TEX. CONST. art. I, § 3a (providing that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin").
18. 725 S.W.2d 696, 698 (Tex. 1987).

constitutional protection."[19] This standard under the Texas Constitution is more exacting than that of the U.S. Supreme Court with regard to legislation containing a gender-based distinction.[20]

Although classifications based on sexual orientation and gender do not warrant strict scrutiny, the Supreme Court has ruled that certain unenumerated fundamental rights within the Constitution are entitled to strict scrutiny. In *Griswold v. Connecticut*, the Court for the first time recognized a fundamental right to privacy in order to strike down legislation prohibiting the use of contraceptives by married couples.[21] While the Court acknowledged that the right to privacy was not expressly granted by the Constitution, it reasoned that explicit guarantees in the Bill of Rights led to the inference and formation of certain constitutionally protected "zones of privacy."[22] The Court then supported its formulation of the fundamental right to privacy by analyzing that the government cannot regulate the use of contraceptives because a legitimate purpose "to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[23]

However, the Supreme Court has not issued a blanket constitutional zone of privacy with regard to sexual activity. In *Bowers v. Hardwick*, the Court cut short its expanding list of fundamental rights and ruled that no zone of privacy exists with regard to consensual homosexual sodomy.[24] The Court found that homosexual sodomy did not satisfy its previous qualifications to constitute a fundamental liberty as "implicit in the concept of ordered liberty" and was not "deeply rooted in this Nation's history and tradition."[25] The Court rejected the argument that homosexual conduct should be protected when it occurs within the privacy of the home, reasoning that no illegal activity, such as prohibited drug use, is protected solely because it is conducted inside a private

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19. *Id.* The court further reasoned that "the [Texas] Equal Rights Amendment is more extensive and provides more specific protection than both the United States and Texas due process and equal protection guarantees." *Id.*

20. *See id.*

21. 381 U.S. 479 (1964).

22. *Id.* at 485.

23. *Id.* (quoting NAACP v. Ala., 377 U.S. 288, 307 (1964)).

24. 478 U.S. 186, 191 (1985) (noting that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . by respondent").

25. *Id.* at 191-92 (quoting Palko v. Conn., 302 U.S. 319, 325 (1937); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

dwelling.[26] Thus, the Court accepted the rationale that the homosexual sodomy ban should be upheld because sodomy is "immoral and unacceptable" in the eyes of the majority of the Georgia electorate.[27] The Court relied heavily on the notion that preserving morality is an acceptable justification that is rationally related to the legitimacy of a law banning homosexual sodomy, and thus declined to include such conduct as a protected fundamental right.[28]

Furthermore, the Texas Supreme Court has also determined that while the Texas Constitution does not provide an explicit right of privacy, "constitutionally protected zones of privacy emanat[e] from several sections of article I of the Texas Constitution."[29] In *City of Sherman v. Henry*, the Texas Supreme Court applied the *Hardwick* Court's holding with regard to homosexual sodomy in determining that no right to privacy could exist to protect adulterous activity.[30] Adultery, according to the court, was analogous to homosexual sodomy under the federal Constitution because it "is the very antithesis of marriage and family" and "[p]rohibitions against adultery have ancient roots."[31] Therefore, it concluded that the Texas Constitution does not provide a fundamental right to privacy for a police officer who was denied a promotion solely due to his involvement in an adulterous affair with the wife of another police officer.[32] However, the Texas Supreme Court has yet to rule on a case specifically directed at the fundamental right to privacy protecting homosexual sodomy under the Texas Constitution.

III. THE COURT'S DECISION

In the noted case, the Texas Court of Appeals confronted the issue of whether section 21.06 of the Texas Penal Code is unconstitutional under both state and federal law.[33] The court held that no constitutional infringement existed at either the state or federal level, based on its analysis that there is no equal protection infringement with regard to both

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26. *See id.* at 195; *see also* Stanley v. Ga., 394 U.S. 557 (1969) (holding that the State cannot prohibit what a person may view in the privacy of his home under the First Amendment, but that this holding is limited and does not apply to illegal activities).
27. *Hardwick*, 478 U.S. at 196.
28. *See id.*
29. City of Sherman v. Henry, 928 S.W.2d 464, 472 (Tex. 1996); *see* TEX. CONST. art. I.
30. *Henry*, 928 S.W.2d at 470.
31. *Id.*
32. *Id.* at 474.
33. Lawrence v. Texas, 41 S.W.3d 349, 350 (Tex. App. 2001).

sexual orientation and gender, and that no fundamental right of privacy exists concerning consensual homosexual sodomy.[34]

The court first considered whether section 21.06 discriminated against the appellants based on their sexual orientation.[35] The court confronted the issue of whether the statute specifically addressed persons on the basis of sexual orientation.[36] The court concluded that no facial discrimination existed because section 21.06 was directed toward homosexual sodomy as *conduct*, and did not mention one's sexual *orientation*.[37] However, the court furthered its evaluation by noting that although no facial discrimination existed, a statute could still be unconstitutional if based on an underlying animosity toward a certain group and resulted in a discriminatory effect.[38] Appellants contended that the statute was in fact motivated by animosity, and cited the legislative history of repealing the prohibition only on heterosexual, but not homosexual, sodomy in 1973 as evidence of hostility toward homosexuals as a group.[39] The court did not accept this distinction as a valid means of supporting an equal protection claim, concluding that homosexual sodomy must be measured under rational basis review because sexual orientation is not considered a suspect class by either the United States Supreme Court or the Texas Supreme Court.[40] The court continued its analysis by noting that Texas supported its statute with the legitimate state interest of "preserving public morals."[41] The court accepted this contention as legitimate and noted that the "fundamental purpose of government is 'to conserve the moral forces of society,'" a power which has been utilized throughout history.[42]

Although the appellants relied on *Romer* to argue that morality cannot be used as a disguised justification for hostility, the court ultimately rejected this argument as a broad interpretation without merit.[43] The court narrowly interpreted *Romer* to only apply to those *seeking* legislative protection, and provided no added safeguards against

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34. *Id.* at 353.
35. *Id.*
36. *Id.*
37. *Id.*
38. *See id.* (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)).
39. *Id.*
40. *Id.* at 353-54; *see also id.* at 354 n.8 (citing federal court of appeals cases that categorize homosexuals as a non-suspect class entitled only to rational basis scrutiny).
41. *Id.* at 354.
42. *Id.* (quoting Grigsby v. Reib, 153 S.W. 1124, 1129 (Tex. 1913)).
43. *Id.*

legislation based on animosity toward a particular class.[44] In addition, the court quickly deferred to the public morality justification, noting that its "power to review the moral justification for a legislative act is extremely limited" because it did not want to overstep its boundaries and appropriate rule-making authority from the legislature.[45]

However, in his dissent, Justice Anderson vigorously opposed the court's analysis of *Romer* and maintained that while rational basis may be the applicable level of scrutiny, section 21.06 must fail even this most deferential standard.[46] In an extensive analysis, Justice Anderson concluded that the present case is fully analogous to the facts of *Romer*: appellants argued they had been discriminated against because of an unjustified animosity towards them based upon their sexual orientation, and the State defended its claim by maintaining that the legislation was enacted to preserve traditional moral norms and family values within society.[47] Justice Anderson followed the Court's reasoning in *Romer* and succinctly contended that the State's justifications of morality preservation are "nothing more than politically-charged, thinly-veiled, animus-driven clichés."[48] Thus, Justice Anderson concluded that section 21.06, much like Amendment 2 in *Romer*, is "arbitrary and irrational," and should be struck down because it failed even rational basis analysis.[49]

Furthermore, Justice Anderson continued his argument by noting that section 21.06 should also be deemed unconstitutional based on the Supreme Court's analysis in *City of Cleburne v. Cleburne Living Ctr.*[50] Specifically, the dissent noted that the present case is similar to the city zoning ordinance denying access to the mentally handicapped in *City of Cleburne*.[51] Justice Anderson reasoned in the present case that "[i]t makes no sense for the State to contend that morals are preserved by criminalizing homosexual sodomy while supporting sodomy by heterosexual couples, including unmarried persons."[52] Thus, he concluded that the only rational basis for the legislation was "merely a

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44. *See id.* at 355 (quoting *Romer*, 517 U.S. at 633).
45. *Id.*
46. *Id.* at 376 (Anderson, J., dissenting).
47. *Id.* (Anderson, J., dissenting).
48. *Id.* at 378 (Anderson, J., dissenting).
49. *Id.* (Anderson, J., dissenting).
50. *Id.* at 379 (Anderson, J., dissenting). In *City of Cleburne*, the United States Supreme Court noted that none of the many justifications proffered by the State even rationally justified why the mentally retarded were singled out as a group in light of how the city treated other similarly situated groups. *Id.* (Anderson, J., dissenting) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985)).
51. *Id.* (Anderson, J., dissenting).
52. *Id.* (Anderson, J., dissenting).

continuation of the stereotyped reaction to a traditionally disfavored group," which is *not* constitutionally permissible under either federal or state law.[53] Furthermore, Justice Anderson purported that section 21.06 should be struck down even under rational basis review due to the underlying hostility exemplified in its legislative history.[54] The dissent noted that the court is entitled, if not *required*, to declare legislative enactments unconstitutional in order to protect the will of its people, and thus rejected the court's contention that its power is extremely limited when dealing with morality justifications.[55]

The court continued its equal protection analysis by considering whether section 21.06 discriminated on the basis of gender.[56] Appellants contended that section 21.06 actually discriminated on the "basis of sex because criminal conduct is determined to some degree by the gender of the actors."[57] Texas defended against the appellants' assertion by maintaining that the statute is not gender-dependent because it applies equally to both males and females.[58] Appellants then raised the Supreme Court's decision in *Loving v. Virginia* as an analogous defense to the State's claim.[59] In *Loving*, the Court struck down Virginia's miscegenation statute because its purpose was ultimately to maintain segregation and further the notion of white supremacy.[60] Although Virginia attempted to defend its statute by stating that racial discrimination was not present because the law applied equally to both blacks and whites, the Court did not accept this rationale due to the statute's "clear and central purpose" of "invidious racial discrimination."[61] The Texas Court of Appeals did not accept the appellants' analogy in the present case, though, and instead differentiated between the two situations on the basis that section 21.06 was not enacted to promote superiority of one gender over the other, nor to further any hostility or inequality between males and females.[62] Thus, the court interestingly concluded that gender discrimination was not a

53. *Id.* at 380 (Anderson, J., dissenting).
54. *Id.* at 375 (Anderson, J., dissenting). In 1974 the Texas Legislature removed the prohibition of heterosexual sodomy from Section 21.06, which "cannot, in [the dissent's] view, be explained by anything but animus toward the persons it affected." *Id.* (Anderson, J., dissenting).
55. *Id.* at 384 (Anderson, J., dissenting).
56. *Id.* at 357.
57. *Id.*
58. *Id.*
59. *Id.* (citing 388 U.S. 1, 9 (1967)).
60. Loving v. Virginia, 388 U.S. 1 (1967).
61. *Id.* at 10.
62. Lawrence v. Texas, 41 S.W.3d 349, 358 (Tex. App. 2001).

legitimate claim, even if homosexuals did suffer a "disparate impact" under section 21.06.[63]

In his dissent, Justice Anderson also vigorously opposed the court's viewpoint with regard to gender discrimination.[64] According to the dissent, section 21.06 contains gender discrimination because the crime depends solely upon the gender of the one committing sodomy.[65] The dissent supported the analogy to *Loving* and reasoned that just as the United States Supreme Court had struck down the miscegenation statute because it utilized a person's race as the sole factor to determine whether a crime had been committed, section 21.06 implemented "the sex of the individual, not the conduct, [as] the sole determinant of the criminality of the conduct."[66] Justice Anderson stressed the importance of the *Loving* analogy due to the standard of review for legislation containing gender discrimination.[67] Unlike classifications based on sexual orientation, gender classifications are measured under heightened scrutiny under the federal Constitution.[68] Most importantly the dissent contended that penalizing homosexual sodomy with a monetary fine in no way furthers the State's justification of "promotion of family values and discouragement of immoral behavior."[69] Furthermore, Justice Anderson continued that sodomy cannot be discouraged for one class within society, but not for other classes.[70] Thus, the State's justifications did not survive intermediate scrutiny because "[w]here, as here, the proponent of a gender-based statutory classification fails to establish the requisite relationship between the objective and the means used to achieve it, the statute is invalid."[71]

Moreover, Justice Anderson also noted that while gender discrimination warrants intermediate scrutiny under the federal Constitution, the Texas Constitution requires strict scrutiny, the highest standard.[72] Because article I, section 3a of the Texas Constitution specifically lists

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63. *Id.* at 359.

64. *See id.* at 368 (Anderson, J., dissenting).

65. *Id.* (Anderson, J., dissenting). Justice Anderson reasoned that while it is lawful for a woman to engage in "deviate sexual intercourse" with a man, it is unlawful for a man to engage in the same type of sex act with a man. *Id.* (Anderson, J., dissenting). Thus, the gender of the person engaging in the sex act determines whether or not a crime has been committed under section 21.06, constituting gender discrimination. *Id.* (Anderson, J., dissenting).

66. *Id.* at 370 (Anderson, J., dissenting).

67. *Id.* (Anderson, J., dissenting).

68. *See id.* at 371 (Anderson, J., dissenting).

69. *Id.* at 374 (Anderson, J., dissenting).

70. *Id.* (Anderson, J., dissenting).

71. *Id.* at 375 (Anderson, J., dissenting) (citing *Mississippi Univ. for Women*, 458 U.S. at 730).

72. *Id.* at 367 (Anderson, J., dissenting) (citing In re McLean, 725 U.S. 696 (Tex. 1987).

gender as a suspect classification, the State possesses the burden to produce a compelling interest for its legislation and prove that "there is no other manner to protect the state's compelling interest."[73] Justice Anderson previously demonstrated how section 21.06 would fail both rational basis analysis and intermediate scrutiny, and thus reasoned that the legislation would similarly fail strict scrutiny because Texas would not be able to satisfy its burden.[74] The dissent concluded that the court so vehemently rejected section 21.06 as discriminatory with regard to gender because it realized the sheer difficulty of upholding a gender-based classification under both federal and Texas law.[75]

In addition to the equal protection claims, the court also considered appellants' contention that section 21.06 infringed upon their fundamental right to privacy implicitly guaranteed by both the federal and state constitutions.[76] Relying on the United States Supreme Court's decision in *Hardwick*, the court concluded that the Ninth Amendment's guarantee of privacy does not include consensual homosexual sodomy.[77] Furthermore, the Texas Supreme Court has never defined homosexual sodomy as a constitutionally protected privacy interest, but has held that even heterosexual adulterous conduct is also not afforded any privacy protection under the Texas Constitution.[78] Thus, the entire court followed both state and federal precedent to conclude that it would not extend the right of privacy to include homosexual sodomy.[79] The majority acknowledged the modern trend of many states that have repealed their statutes to legalize homosexual conduct, but declined to follow suit so as to not "usurp[] the role of the Legislature," and instead chose to follow the judicial precedents of the U.S. and Texas Supreme Courts.[80]

IV. ANALYSIS

In the noted case, the court ultimately issued a blanket restriction against homosexual sodomy under both the federal and Texas Constitutions.[81] While state and federal precedents accurately control

73. *Id.* (Anderson, J., dissenting).
74. *See id.* (Anderson, J., dissenting).
75. *Id.* at 375 (Anderson, J., dissenting).
76. *Id.* at 359.
77. *Id.* at 360 (citing Bowers v. Hardwick, 478 U.S. 186, 191 (1985)).
78. *Id.* (citing City of Sherman v. Henry, 928 S.W.2d 464, 465 (Tex. 1996)). Moreover, the dissent agreed that the Supreme Court's ruling in *Hardwick* controls and would have also reached the same conclusion as the court with regard to the Texas Constitution. *Id.* at 366-67 (Anderson, J., dissenting).
79. *See id.*(Anderson, J., dissenting).
80. *Id.* at 362.
81. *Id.* at 349.

portions of the court's analysis, it is evident to both the dissent and the author that other analyses are founded upon weak, irrational, and outdated reasoning.[82]

Notably, the court correctly decided that the appellants' challenge under the fundamental right to privacy could not be extended based on the Supreme Court's explicit analysis in *Hardwick*.[83] Similarly, Texas case law has relied heavily upon this precedent, making it difficult for the court to enact its own interpretation of the fundamental right to privacy as applied to homosexual conduct.[84] Thus, the court accurately acted within its limits when it declined to extend a right not granted by the highest courts of both the state and nation.[85]

The court's analysis, however, lost credibility when it evaluated the appellants' equal protection claims. For instance, the court relied heavily on *Romer* to find that sexual orientation should not be deemed a suspect class and should be measured under a rational basis standard.[86] However, the dissent accurately demonstrated that the court failed to fully apply *Romer* and should have concluded that even if rational basis was the appropriate analysis, section 21.06 would still be rendered unconstitutional based on its underlying historical animosity and hostility directed solely at homosexuals as a group.[87] The court failed to recognize that animosity may be the underlying rationale disguised as "morality" and simply stated that appellants' "broad interpretation of *Romer* is not supported by the text or rationale of the Court's opinion,"[88] even though Justice Anderson provided a detailed comparison of the noted case to the *Romer* facts.[89] Furthermore, the Supreme Court's holding in *City of Cleburne* supports the contention that legislation should be struck down when based upon an irrational hostility toward a particular group.[90] Although the court accepted the fact that section 21.06 could discriminate specifically against homosexuals because it furthered the State's justification to preserve morality and family values, the legislative history repealing heterosexual sodomy contravened the court's definition of what actually constitutes moral behavior.[91]

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82. *See id.* at 366-67 (Anderson, J., dissenting).
83. *Id.* at 362.
84. *Id.* at 360.
85. *Id.*
86. *Id.* at 354-55 n.8.
87. *See id.* at 376 (Anderson, J., dissenting).
88. *See id.* at 354.
89. *See id.* at 375-79 (Anderson, J. dissenting).
90. *Id.* at 379 (Anderson, J., dissenting) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).
91. *Id.* (Anderson, J., dissenting).

In addition, the court summarily disregarded appellants' argument that section 21.06 was gender-based when it abruptly maintained that the U.S. Supreme Court's holding in *Loving* was not analogous to gender discrimination because the history of the statute was not to promote the superiority of one gender over another.[92] Justice Anderson's analysis of *Loving* seemed more apt when he noted that "the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior."[93] The dissent not only exposed cracks in the court's reasoning to dismiss the *Loving* analysis, but also noted how such a gender-based classification would be affected under the heightened scrutiny of the federal system and the most exacting scrutiny under the Texas Constitution.[94]

Ultimately, section 21.06 could not be successfully challenged under a constitutional privacy guarantee without the backing of U.S. Supreme Court precedent allowing consensual homosexual conduct as a fundamentally protected right under the federal Constitution. However, the court appeared to have misinterpreted the equal protection analyses outlined by the Supreme Court with regard to sexual orientation.[95] The largest obstacle seemed to be the court's allowance of "morality" as a legitimate state justification because modern national trends do not adequately correspond with the seemingly outdated notions of what actually constitutes morality and family values.[96] However, the court regrettably chose the more dated analysis when it accepted morality as a legitimate governmental justification for discrimination against individuals solely due to their sexual orientation and failed to view this justification as nothing more than mere animosity based on archaic notions of hostility against a particular class.

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92. *Id.* at 358.
93. *Id.* at 370 (Anderson, J., dissenting).
94. *Id.* at 373 (Anderson, J., dissenting).
95. *See id.* at 353-57.
96. *See id.* at 362.