

# CASE NOTES

## *Lawrence v. Texas*: Dignity, A New Standard for Substantive Rational Basis Review?

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### I. INTRODUCTION

Appellants John Geddes Lawrence and Tyron Garner were convicted of homosexual sodomy in violation of the Texas Penal Code Section 21.06(a).<sup>1</sup> Appellants contended that the statute was unconstitutional under the Equal Protection and Due Process clauses of the federal and Texas constitutions.<sup>2</sup> Both the trial court and the of the Court of Appeals for the Texas Fourteenth District rejected their arguments.<sup>3</sup> Choosing to decide the case under substantive due process and using rational basis review, the United States Supreme Court overruled *Bowers v. Hardwick* and *held* that the Texas law was an unconstitutional encroachment on the liberty interest protected by the Fourteenth Amendment. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

### II. BACKGROUND

As early as 1923, the Supreme Court had espoused the doctrine that many nonenumerated rights were protected under the Due Process Clause of the Fourteenth Amendment from state legislation not reasonably related to a legitimate government interest.<sup>4</sup> Among the liberties then recognized as protected by the Due Process Clause were the right to contract, to educate one’s self and one’s children, to worship God

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1. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2475-76 (2003). Harris County Police lawfully entered Lawrence’s apartment on suspicions of a weapons disturbance when they discovered Lawrence and Garner engaging in homosexual sodomy. *Id.* at 2475; see also TEX. PENAL CODE ANN. § 21.06(a) (2003) (making “deviate sexual intercourse with another individual of the same sex” a Class C misdemeanor).

2. See *Lawrence*, 123 S. Ct. at 2476.

3. See *id.*

4. See *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925). The relevant parts of the Fourteenth Amendment read: “nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

as one wished, and to “generally . . . enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>5</sup>

Two early and still-cited examples of rights found in the vague language of the Due Process Clause are *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. In the 1923 *Meyer* decision the Supreme Court struck down a Nebraska law forbidding primary school instruction in languages other than English.<sup>6</sup> Two years later in *Pierce* the Supreme Court held unconstitutional a state law requiring attendance at public schools and prohibiting attendance at private schools.<sup>7</sup> In both cases the Court characterized the protected right as that of parents to control the education of their children, of the pupils to acquire knowledge, and of teachers and private schools to conduct their occupation or businesses.<sup>8</sup> Essentially, *Meyer*, *Pierce*, and other early precedents established that the Due Process Clause, though seeming to guarantee only procedural protections, had a substantive reach requiring courts to strike down types of lawmaking that go beyond any proper sphere of government activity.<sup>9</sup> The implicit justification for this doctrine was that any life, liberty, or property limited by such a law can only have been taken without due process because the Constitution never granted the government the ability to pass such a law.<sup>10</sup> Obviously, this justification allows the Supreme Court to enforce a vision of what is and is not compatible with our democratic system of government and individual liberty, which is precisely why the substantive due process doctrine is and has been subject to continuing and vehement criticism.<sup>11</sup>

The classic example of the Court’s misapplication of substantive due process is the period from 1905 to 1937, known as the *Lochner* era,

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5. *Meyer*, 262 U.S. at 399.

6. *See id.* at 403.

7. *See Pierce*, 268 U.S. at 534-35.

8. *See id.*; *see also Meyer*, 262 U.S. at 391.

9. *See Washington v. Glucksberg*, 521 U.S. 702, 761-67 (1997) (Souter, J., concurring) (tracing the history of substantive due process).

10. Substantive due process assumes that laws can do more than simply provide for a deprivation, that they themselves can be a deprivation and that this deprivation can contravene the protection of life, liberty, and property contained in the Due Process Clause. *See Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (stating that laws affecting a person’s ability to be “free in the enjoyment of all his faculties” can violate the Due Process Clause).

11. *See id.*; *see also Glucksberg*, 521 U.S. at 760 (discussing the *Allgeyer* interpretation of liberty and the scope of judicial competency the *Allgeyer* Court took on); *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (stating that “were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three”).

when the Court maintained that the substantive due process doctrine did not allow states to interfere with economic liberty because regulating the ways in which individuals could contract was not a permissible governmental activity.<sup>12</sup> The position that the judiciary was ultimately responsible for determining the value of economic policies continually forced the Court to determine which legislation rationally promoted legitimate economic goals and which had to be declared arbitrary.<sup>13</sup> In *West Coast Hotel Co. v. Parrish* this position was recognized as untenable and the Court wholly abandoned the principle that the judiciary was to police the economic role of the government.<sup>14</sup>

In the decades after the *Lochner* era, the Court restrained the application of substantive due process by developing two principle levels of review: strict scrutiny and rational basis review.<sup>15</sup> Strict scrutiny applies only to laws affecting fundamental rights, whether enumerated in the Constitution or developed by the Court through case law, and asks whether such a law has been narrowly tailored to a compelling government interest.<sup>16</sup> Rational basis review applies to nonfundamental rights and asks simply whether a law is rationally related to a legitimate state interest.<sup>17</sup> Under this most minimal standard of review, if a law is said to be rationally related to a government purpose and that government purpose is legitimate, then the Court will uphold the law even if it thinks the law to be unwise.<sup>18</sup>

In the early 1960s, the Supreme Court began crafting a fundamental right to privacy based on the Due Process Clause. Early privacy cases were constitutionally significant because the Court robustly applied the

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12. See *Lochner v. New York*, 198 U.S. 45, 58 (1905) (holding that the Due Process Clauses of the Fifth and Fourteenth Amendments protect liberty of contract and private property against unwarranted government interference).

13. See *Glucksberg*, 521 U.S. at 760-61 (Souter, J., concurring) (describing the “devious economic due process cases of the *Lochner* era”); see, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (invalidating laws that prohibit employers to require employees to agree not to join a union); *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (upholding a law establishing maximum hours worked during employment for women); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928) (invalidating a law limiting entry into the pharmacy business to pharmacists).

14. 300 U.S. 379 (1937); see also *United States v. Darby*, 312 U.S. 100 (1941) (rejecting a substantive due process challenge to a law establishing maximum hours and minimum wages); *Phelps Dodge Corp. v. Nat’l Labor Relations Bd.*, 313 U.S. 177 (1941) (upholding a law declaring employer discouragement of union membership an unfair labor practice); *Lincoln Fed. Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (upholding a state right-to-work law prohibiting closed shops).

15. See *Poe*, 367 U.S. at 548 (Harlan, J., dissenting) (consolidating the development of the levels of review for the due process doctrine).

16. See *id.*

17. See *id.* at 543, 545, 548.

18. *Id.*

central principle in *Pierce* and *Meyer*: that the Due Process Clause has a substantive arm with respect to social/noneconomic issues.<sup>19</sup> *Griswold v. Connecticut* was the first case to formulate a right to privacy under substantive due process, though not without strong and continuing criticism.<sup>20</sup> Justice Black's comments in his *Griswold* dissent are exemplary, negatively characterizing the *Meyer/Pierce* reasoning as a return to the *Lochner* era when judges struck down all laws they thought unwise, dangerous, or irrational.<sup>21</sup>

*Griswold* held a Connecticut law forbidding the use of contraceptives by married couples unconstitutional because marriage is a relation, and the marital bedroom is a space, protected by a general right to privacy.<sup>22</sup> The *Griswold* majority derived this privacy right from penumbras, or zones of privacy, emanating from several constitutional provisions.<sup>23</sup> Justice Harlan concurred but maintained that the right to marital privacy is a function of the Due Process Clause itself rather than a derivation from several enumerated rights.<sup>24</sup> In either case, the Court for the first time articulated a fundamental right to privacy.<sup>25</sup>

The Court subsequently extended the privacy interest in contraceptive freedom to unmarried persons in *Eisenstadt v. Baird*, when the Court invalidated a law prohibiting the distribution of contraceptives

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19. See *Glucksberg*, 521 U.S. at 762.

20. 381 U.S. 479, 483 (1965).

21. See *id.* at 515, 517 n.10, 522 (Black, J., dissenting). Justice Black says in his *Griswold* dissent:

I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down . . . state law. The Due Process clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. That formula, based on subjective considerations of "natural justice" is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means to striking down state legislation, to rest. . . .

*Id.* at 522 (Black, J., dissenting) (citations omitted).

22. See *id.* at 485.

23. See *id.* at 482.

24. *Id.* at 500 (Harlan, J., concurring). Justice Harlan states that the Connecticut law "violates basic values 'implicit in the concept of ordered liberty.'" *Id.* (Harlan, J., concurring). For Justice Harlan, the marital privacy right protected by the Fourteenth Amendment does not depend on the rights enumerated in the Bill of Rights but rather depends on rights encompassed by the substantive arm of the Due Process clause of the Fourteenth Amendment. See *id.* (Harlan, J., concurring). Justice Harlan considers grounding the right this way less susceptible to attack of the sort levied by the Justice Black in dissent. See *id.* (Harlan, J., concurring).

25. *Id.* (Harlan, J., concurring).

to the unmarried.<sup>26</sup> Ultimately, the Court extended this right to unmarried persons as a function of the equal protection doctrine.<sup>27</sup> However, the Court's explanation that even though "in *Griswold* the right of privacy in question inhered in the marital relationship," the more general basis for the privacy right was the intimate and life-defining nature of the decision, which is important for substantive due process doctrine.<sup>28</sup>

In 1973, *Roe v. Wade* adopted, and further, expanded the reasoning in *Griswold* and *Eisenstadt*. *Roe* declared that the right to privacy necessarily entails a limited right to abortion.<sup>29</sup> The *Roe* Court adopted the reasoning in *Griswold* and *Eisenstadt*, stating that the right recognized in those cases, the right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the right to bear or beget a child, "necessarily includes the right of a woman to decide whether or not to terminate her pregnancy."<sup>30</sup> Almost twenty years later, the Supreme Court affirmed its *Roe* decision with *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>31</sup> *Casey* also reaffirmed the Court's commitment to afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.<sup>32</sup>

However, in 1986 the Court's decision in *Bowers v. Hardwick* failed to extend constitutional protection to an individual's decision to engage in homosexual conduct.<sup>33</sup> The issue in *Bowers* was whether the right to privacy protected homosexuals from a Georgia law prohibiting all sodomy, both heterosexual and homosexual.<sup>34</sup> The Court declined to protect a homosexual plaintiff from a Georgia law prohibiting sodomy and characterized the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."<sup>35</sup> The Court found that homosexual sodomy was neither "implicit in the concept of ordered liberty" nor "deeply rooted in the Nation's history and tradition," and thus did not satisfy the requirements for protection as a

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26. 405 U.S. 438, 453 (1972). The Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. *Id.*

27. *See id.* at 454.

28. *Id.* at 453.

29. 410 U.S. 113, 155-56, 170 (1973).

30. *Id.* at 170.

31. 505 U.S. 833, 846 (1992).

32. *See id.* at 851.

33. 478 U.S. 186 (1986).

34. *See id.* at 188-89.

35. *Id.* at 190. The Georgia law did not distinguish between "homosexual" and "heterosexual" sodomy. *See id.*

fundamental right.<sup>36</sup> The Court applied rational basis review and found that preserving public morality was a legitimate state interest under a substantive review and that the law was rationally related to that interest.<sup>37</sup>

Equal application of the law is a constitutional principle distinct from substantive due process and is founded upon the Equal Protection Clause of the Fourteenth Amendment. Rational basis review under equal protection doctrine includes the holdings of several Supreme Court cases relating to the constitutionality of laws making classifications based on relationships among people.<sup>38</sup>

In *Department of Agriculture v. Moreno*, the Court applied rational basis review and struck down a law prohibiting households containing unrelated residents from receiving food stamps because the Court found the purpose of the law was to discriminate against hippies.<sup>39</sup> In *Cleburne v. Cleburne Living Center*, the Court held that requiring a home for the mentally disabled to obtain a special-use permit when fraternity houses and apartments were not so required was born of irrational prejudice of the mentally disabled and violated the most minimal requirements of the Equal Protection Clause.<sup>40</sup> In *Romer v. Evans*, the Court struck down a provision in Colorado's constitution because it was discriminatory against homosexuals as a class.<sup>41</sup> The provision characterized as a class individuals who were homosexuals by "orientation, conduct, practices or relationships" and denied protection to this class under state anti-discrimination laws.<sup>42</sup> The holdings of these cases establish that a "bare . . . desire to harm a politically unpopular group" was not a legitimate state interest for rational review purposes under an equal protection analysis.<sup>43</sup>

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

37. *Id.* at 196.

38. Classifications, according to race, sex, or nationality are reviewed under heightened scrutiny, but most classifications are subject to rational basis review, where a court implicitly asks whether (1) a law classifies people into different groups and applies the law differently to those groups, (2) any such classification is a legitimate state interest, and (3) the classification and disparate application is rationally related to the legitimate state interests. *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

39. *Id.*

40. 473 U.S. 432, 446-47.

41. 517 U.S. 620, 632-33 (1996). The Court found that investigating the provision under a higher standard was unnecessary because it failed rational basis review. *See id.* However, the Court did not specifically decide that homosexual classifications in legislation demand a particular level of scrutiny. *See id.*

42. *Id.* at 624 (quoting COLO. CONST. art. II, § 30b).

43. *Moreno*, 413 U.S. at 534; *see also Cleburne*, 473 U.S. at 446-47; *Romer*, 517 U.S. at 632.

## III. THE COURT'S DECISION

In the noted case, the Supreme Court considered (1) whether the Texas law, in criminalizing homosexual but not heterosexual sodomy, violated the Equal Protection Clause of the Fourteenth Amendment; (2) whether the Texas law, in criminalizing some forms of adult consensual sexual activity, violated the liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment; and (3) whether the Court's previous holding in *Bowers* should be overruled.<sup>44</sup> The Court overruled *Bowers* to the extent it held that laws criminalizing sodomy pass rational basis review.<sup>45</sup> Instead, the Court in the noted case held that a law criminalizing sodomy cannot pass rational basis review under the substantive arm of the Due Process Clause because such a law serves only to demean and stigmatize a particular group and this was pursuant to no legitimate government interest.<sup>46</sup>

In specifically assessing the faults of the *Bowers* opinion, the Court's main contention was that the *Bowers* Court failed to correctly formulate the right in issue.<sup>47</sup> The Court reasoned that formulating the issue, as the *Bowers* Court did, as simply whether the Constitution confers upon homosexuals a fundamental right to engage in sodomy demeans the actual claim of right put forward.<sup>48</sup> According to the *Lawrence* Court, it is this failure to "appreciate the extent of the liberty at stake" that led the *Bowers* Court to decide the case incorrectly.<sup>49</sup>

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

45. *See id.* at 2484 ("The Texas statute furthers no legitimate state interests which can justify its intrusion into the personal and private life of the individual."). The Court seems to agree with the *Bowers* Court to the extent that homosexual sodomy is not part of the fundamental right to privacy. *See id.*

46. *See id.* at 2478, 2484.

47. *See id.* The Court also faults the *Bowers* Court for its assumptions that proscriptions against sodomy are overwhelmingly supported by the historical record. *See id.* at 2478-81. After assessing its own historical sources, the Court concludes that the premises of the *Bowers* Court "are not without doubt and, at the very least, . . . overstated." *Id.* at 2480. However, the Court is clear that whatever the criminal status of sodomy in history, it is most concerned with more contemporary legal pronouncements about sodomy and sex. *See id.* at 2480. The Court notes each of the following: that the Model Penal Code since its creation in 1955 has counseled against criminal penalties for consensual private relations conducted in private; that state laws outlawing sodomy had declined from all fifty in 1961 to only twenty-four at the time the *Bowers* Court rendered its decision and only thirteen at the time of the noted decision; that state laws outlawing sodomy are generally ignored and not enforced; that the British Parliament repealed law prohibiting homosexual conduct in 1967; and finally, that the European Court of Human Rights, authoritative in the forty-five nations in the Council of Europe, held laws proscribing homosexual conduct invalid in 1981. *See id.* at 2480-81.

48. *See id.* at 2478.

49. *Id.*

In contrast to *Bowers*, the Court characterized the claim as the right of adults to define the meaning of their relationships.<sup>50</sup> The Court reasoned that sexual freedoms in heterosexual relationships are protected not because individuals have a fundamental right to sexual freedoms like contraception and abortion, but rather because freely choosing and conducting intimate relations is a requirement for liberty and dignity.<sup>51</sup> Because this truth applies equally to heterosexual and homosexual relations, the *Bowers* Court erred when it characterized the claim as simply a question of whether homosexuals have a fundamental right to sodomy.<sup>52</sup> According to the Court, laws prohibiting sodomy purport to be protecting public morality, but their effect and purpose is to strip from the people whom the law affects their dignity as free people.<sup>53</sup>

The Court supported its differing formulation of the claim by reviewing dicta in the holdings of earlier Supreme Court cases and by referencing contemporary evidence at home and abroad.<sup>54</sup> Regarding their previous case law, the Court first noted that *Pierce* and *Meyer* characterize the substantive reach of the Due Process Clause as including very broad social protections.<sup>55</sup> The Court then characterized *Griswold* as holding that a privacy right, derived from the liberty guaranteed by the Due Process Clause, protects the marital relation and the marital bedroom from unwarranted government interference.<sup>56</sup> *Eisenstadt*, reasoned the Court, stands for the proposition that the relation-centered and space-centered privacy right found in *Griswold* applies equally to nonmarital relationships.<sup>57</sup> Even though the holding in *Eisenstadt* was decided on equal protection grounds, the *Lawrence* Court extensively quoted language from *Eisenstadt* that explicitly reaffirmed the basic commitment made in *Griswold*: the rights protected by the Fourteenth Amendment include the right to make decisions concerning the most intimate and personal of choices—those that serve to define a person and her relationships and those needed to retain autonomy and dignity.<sup>58</sup> The Court noted that *Roe* further developed this doctrine.<sup>59</sup> Additionally, the

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50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See supra* note 47.

55. *Id.* at 2476.

56. *Id.* at 2477.

57. *Id.*

58. *Id.*

59. *Id.*



Court cited *Casey* as post-*Bowers* case law directly supporting this conception of Fourteenth Amendment protection.<sup>60</sup>

The Court in the noted case declined to base its holding on the more narrow grounds of equal protection because the stigma and demeaning nature of the sodomy proscription would remain if invalidated only for equal protection reasons and not examined for substantive validity.<sup>61</sup> The majority was emphatic that the central holding of *Bowers* was at issue and not only the equal protection issue.<sup>62</sup> However, Justice O'Connor wrote separately in a concurrence to make clear that, while she agreed that the Texas law is unconstitutional, her reasoning was based not on rational basis review under substantive due process but on rational basis review under equal protection and that *Bowers* is not overruled by her reasoning.<sup>63</sup>

Justice O'Connor focused on the fact that the Texas law made only homosexual, not heterosexual, sodomy illegal.<sup>64</sup> She noted that this standard is very minimal and the reasons that states provide for their laws will usually fulfill its requirements.<sup>65</sup> However, Justice O'Connor also noted that a more searching form of rational basis review is used to strike down state law under the Equal Protection Clause when the law embodies a naked animosity toward a particular group.<sup>66</sup> Citing *Moreno*, *Eisenstadt*, *Cleburne*, and *Romer*, Justice O'Connor noted that the Court has been most ready to invalidate a state law under the Equal Protection Clause when the law restricts personal relationships.<sup>67</sup> Justice O'Connor stated that moral disapproval of a *group* will not satisfy rational basis review under an Equal Protection inquiry even though moral disapproval of a *practice*, if applied to all groups equally, will satisfy rational basis review under a substantive due process inquiry, as it did with *Bowers*.<sup>68</sup>

Justice Scalia wrote a dissent, joined by Justices Rehnquist and Thomas, criticizing the majority for overruling precedent in an unprincipled manner.<sup>69</sup> Justice Scalia considered the majority opinion to have "laid waste the foundations of our rational-basis jurisprudence" and

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60. *Id.*

61. *See id.* at 2482 (recognizing the pitfalls of an equal protection analysis, which would allow a law prohibiting deviate sexual conduct as long as it applied to homosexual and heterosexual conduct).

62. *Id.*

63. *Id.* at 2484-85 (O'Connor, J., concurring).

64. *See id.* at 2485 (O'Connor, J., concurring).

65. *See id.* at 2484 (O'Connor, J., concurring).

66. *See id.* (O'Connor, J., concurring).

67. *See id.* (O'Connor, J., concurring).

68. *See id.* at 2486-87 (O'Connor, J., concurring).

69. *See id.* at 2488 (Scalia, J., dissenting).

concluded that, if the majority opinion is taken to its logical end, there can be no basis in constitutional law for morals legislation, including laws prohibiting homosexual marriage.<sup>70</sup>

#### IV. ANALYSIS

*Lawrence v. Texas* formulates novel reasoning that may prove important for homosexual causes and for the substantive due process doctrine itself. However, before assessing what the *Lawrence* majority did, it is important to note what the justices did not do. Considering prior case law both at the time of the *Bowers* decision and today, the natural conclusion would have been to strike down laws proscribing particular sexual acts in the same way the laws proscribing contraception and abortion were struck down. The *Lawrence* Court, however, was restrained by the strict scrutiny/fundamental rights contained in the *Bowers* opinion; the *Bowers* Court effectively captured the terms of the debate when it cast the issue not in terms of privacy, dignity, or relationships, but as whether or not homosexuals have a fundamental right to sodomy. The importance of the noted case is the application of a fairly novel form of rational basis review and the repudiation of the *Bowers* formulation of this issue, but it is also significant that the *Lawrence* majority was not willing to tackle the *Bowers* opinion on its own terms, which could have been straightforward considering the early case law regarding privacy.

Still, the *Lawrence* form of rational basis review may represent an emerging doctrine where laws cannot be said to be drawn to a legitimate state interest if their primary effect and purpose is to demean, stigmatize, and control private and intimate relationships.<sup>71</sup> Essentially, demeaning and stigmatizing are not legitimate state interests and laws found to have these purposes or effects will not pass the most minimal substantive review.

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70. *Id.* at 2497-98 (Scalia, J., dissenting).

71. *Id.* at 2485 (O'Connor, J., concurring). The majority makes this clear near the end of the opinion:

The case [involves] two adults, who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government . . . . The Texas statute furthers no legitimate state interest which can justify intrusion into the personal and private life of the individual.

*Id.* at 2484.

The majority's commitment to this reasoning is evidenced by the fact that it could have adopted Justice O'Connor's equal protection reasoning, which the majority admitted was "tenable" and which has the end result of invalidating the Texas law.<sup>72</sup> However, the majority was clear that it would not leave in place any suggestion that legitimate state interests include laws that demean or stigmatize individuals because any such suggestion would invite public and private discrimination against homosexuals.<sup>73</sup>

For homosexual causes, the question remains whether it would have been better if the majority had adopted Justice O'Connor's reasoning. Justice O'Connor decided this case on the narrowest possible grounds, saying that it was not necessary to overrule *Bowers* because it is not necessary to decide whether a law prohibiting all sodomy violates substantive due process.<sup>74</sup> Instead, Justice O'Connor put great, and not misplaced, faith in the moral force of the principle that laws should apply equally to all persons and was confident that any such law applying equally to homosexuals and heterosexuals would not long stand.<sup>75</sup> However, Justice O'Connor was careful to disclaim that her reasoning does not mean that other laws distinguishing between homosexuals and heterosexuals, such as laws pertaining to homosexual marriage, would not pass rational basis review and stopped far short of implying that homosexuals are a protected class to which intermediate or heightened scrutiny must be applied.<sup>76</sup> Justice O'Connor explicitly stated that other reasons could be invoked in favor of preserving traditional marriage, implying that these other reasons are legitimate state interests.<sup>77</sup> This position assumes that laws proscribing homosexual marriage are not motivated by bare, moral animosity toward homosexuals as a class, or at least are motivated by animosity as well as some additional interests that are legitimate. In support of her position, Justice O'Connor stated that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."<sup>78</sup>

Justice O'Connor's protestations to the contrary aside, it is possible that her reasoning would be more helpful to homosexual causes, even more helpful than the majority's reasoning. Developing the limits of rational basis review under an equal protection calculus, as Justice

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72. *Id.* at 2482.

73. *Id.*

74. *Id.* at 2487 (O'Connor, J., concurring).

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

76. *Id.* at 2487-88 (O'Connor, J., concurring).

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

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

O'Connor does, may lead to greater gains than doing the same under a substantive due process calculus, as the majority does. It is likely that both the majority, in its criticism of the demeaning nature of the Texas law, and Justice O'Connor, in deciding the issue on the narrowest grounds possible and making her decision heavily fact dependent, have ignored the moral and intellectual power of the principle that laws must be applied equally to all. Homosexual advocates should not let Justice O'Connor's disclaimer make them wary of using equal protection arguments, nor should they congratulate the majority too much on deciding the case on the seemingly more broad substantive grounds.

In an important sense, the foundational principle of equal protection is much more universal and demanding than substantive review, which is always dependent on the subjective impressions of the judges making the decision. It will be difficult to argue that laws restricting gay marriage are unconstitutional under the majority's reasoning because marriage laws are state-created rights, and denying them to a group is not necessarily demeaning or stigmatizing. However, under Justice O'Connor's reasoning, to deny homosexual marriage rights one presumably needs to show that no legitimate state interest for the denial exists and thus it must *only* be born of animosity. That there are no legitimate state interests involved in denying homosexuals the right to marry is the sort of thing that can be shown empirically, with which not even the most skeptical judge can argue.

Jeffrey Goehring