University of Dayton Law Review

Volume 29 | Number 3 Article 4

5-1-2004

Right Decision, Wrong Constitutional Law: Taking the Better Path with Equal Protection Jurisprudence — Lawrence v. Texas, 123 S. Ct. 2472 (2003)

H. John Proud
University of Dayton

Right Decision, Wrong Constitutional Law: Taking the Better Path with Equal Protection Jurisprudence — Lawrence v. Texas, 123 S. Ct. 2472 (2003)

Cover Page Footnote

The author would like to thank his wife, Debbie, and his sons for their encouragement and support throughout law school, his Executive Editor for Notes & Comments Tara-Ann Topputo for her help and dedication to excellence, and Editor-in-Chief Dale Riedel for his encouragement to join the Law Review.

RIGHT DECISION, WRONG CONSTITUTIONAL LAW: TAKING THE BETTER PATH WITH EQUAL PROTECTION JURISPRUDENCE—*LAWRENCE V. TEXAS*, 123 S. CT. 2472 (2003)

H. John Proud[*]

I. INTRODUCTION

When John Lawrence invited an adult male friend to his Houston, Texas apartment he could not have guessed that their consensual decision to have sex would attach his name forever to a U.S. Supreme Court decision, resulting in a new direction for interpreting the U.S. Constitution.[1]

Our country has often struggled with the inherent constitutional tension associated with efforts by the majority of society to impose its moral values on the rest of society by criminalizing certain types of private sexual activity.[2] While all laws are essentially based on fundamental morality,[3] when does the law's strict adherence to a relatively widespread moral belief become an intolerable restriction on the personal and private rights of those who do not share that belief? In deciding John Lawrence's case, the Supreme Court dramatically changed its answer to that question.

In its landmark decision in *Lawrence v. Texas*, the Supreme Court properly held that all consenting adults, whether heterosexual or homosexual, enjoy the same level of personal freedom in the privacy of their own bedrooms.[4] The process the Court employed in reaching its conclusion, however, was unnecessarily overreaching.

The Supreme Court majority based its decision in *Lawrence* on the Due

---

[*] Staff Writer, 2003-04, University of Dayton Law Review. J. D. expected May 2004, University of Dayton School of Law; B.A., 1970, University of Dayton. The author would like to thank his wife Debbie and his sons for their encouragement and support throughout law school, his Executive Editor for Notes & Comments Tara-Ann Topputo for her help and dedication to excellence, and Editor-in-Chief Dale Riedel for his encouragement to join the Law Review.

[1] *Lawrence v. Tex.*, 123 S. Ct. 2472 (2003).

[2] *See e.g. Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 844 (1992). In reaffirming but also limiting *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court majority noted that in the nineteen years that followed the *Roe* decision, the United States, acting as amicus curiae, joined no less than five suits before the Court seeking a reversal of its holding. *Id*.

[3] *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Barnes v. Glen Theatre, Inc*., 501 U.S. 560, 569 (1991) (stating "[t]he traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."); *Lawrence v. State*, 41 S.W.3d 349, 354 (Tex. Crim. App. 14th Dist. 2001) ("In fact, the legislature has outlawed behavior ranging from murder to prostitution precisely because it has deemed these activities to be immoral. Even our civil law rests on concepts of fairness derived from a moral understanding of right and wrong.").

[4] 123 S. Ct. at 2484.

Process Clause[5] and, due to an individual's fundamental right to privacy, held that the government has no right to impose any legislation to regulate what consenting adults do in the privacy of their bedrooms.[6] In the *Lawrence* ruling, the Court expressly overturned its earlier holding in *Bowers v. Hardwick*,[7] which held that a sovereign state does have the inherent constitutional authority to determine legal behavior based on the moral beliefs of the majority of its citizens, as represented by the state's legislature.[8] The Court employed rather expansive language to ensure that after *Lawrence* a legislature may not enact laws that ban sodomy, an integral part of male homosexual sex, or presumably any other mode of sexual expression when performed in private by consenting adults.[9] While John Lawrence's appeal also raised equal protection arguments, the Court expressly chose the due process argument to preemptively ensure that legislatures could not impose their collective morality on the populace by banning certain private sexual acts equally for both same-sex and opposite-sex participants.[10]

This Note argues that Justice O'Connor's concurring opinion, based on the Fourteenth Amendment's Equal Protection Clause,[11] should have been the basis for the majority decision. Section II of this Note examines the background of *Lawrence v. Texas*, providing a factual and procedural summary of the case and a brief analysis of the majority and concurring opinions. Section III presents the reasons why the Supreme Court majority should have based its holding on the Equal Protection Clause, and the benefits that would have resulted if it had. Section IV concludes with a prediction of a plethora of challenges to longstanding legal principles that will result from the majority decision.

---

[5] U.S. Const. amend XIV, § 1. (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

[6] *Lawrence*, 123 S. Ct. at 2477.

[7] *Id.* at 2484.

[8] *Bowers*, 478 U.S. at 196.

[9] *Lawrence*, 123 S. Ct. at 2482.

[10] *Id.* at 2487-88 (O'Connor, J., concurring).

[11] U.S. Const. amend. XIV, § 1 (stating "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws").

II. BACKGROUND

A. The Facts and Procedural History of Lawrence

Lawrence v. Texas began one Houston night in 1998 when police officers were dispatched to the private residence of John Lawrence ("Lawrence") in response to a purported weapons disturbance.[12] They entered Lawrence's apartment and proceeded to his bedroom where they observed him engaged in a consensual sex act with another adult man, Tyron Garner ("Garner").[13] The police arrested and charged Lawrence and Garner with "deviate sexual intercourse, namely anal sex."[14] Under Texas law, in effect at that time, homosexual sodomy was a criminal offense.[15] Specifically, Texas law stated "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[16] The statute includes a definition of "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."[17]

Lawrence was convicted in the Justice of the Peace Court and promptly filed an appeal for a trial *de novo* in the Harris County Court of Common Pleas.[18] In his pre-trial motions, Lawrence challenged the law as a violation of the Equal Protection Clause of the Fourteenth Amendment and a violation of a similar provision in the Texas Constitution, but his motions were denied.[19] Thereafter, he entered a no contest plea, was found guilty of the charge, and was fined $200.[20] Lawrence filed an appeal with the Texas Criminal Appellate Court, where a panel of judges heard his appeal.[21] He

---

[12] 123 S. Ct. at 2475; Br. of Petr. at 2, *Lawrence*, 123 S. Ct. 2472; *available at* 2002 U.S. Briefs 102 (stating that the report of a weapons discharge was false).

[13] *Lawrence*, 123 S. Ct. at 2475.

[14] *Id*. at 2476.

[15] Tex. Penal Code Ann. § 21.06(a) (2003). Homosexual sodomy was a Class C Misdemeanor. *Id*. at § 21.06(b). At the time of this writing, the Texas Legislature has not yet officially removed or modified the statute to reflect the Court's decision in *Lawrence.*

[16] *Id*. at § 21.06(a).

[17] *Id*. From the text of the statute it is clear that sodomy was only a crime in Texas if it was engaged in by homosexual couples and was not a crime if engaged in by heterosexual partners.

[18] *Lawrence*, 123 S. Ct. at 2476.

[19] *Id*.

[20] *Id*.

[21] Br. of Petr. at 3, *Lawrence*, 123 S. Ct. 2472.

based his appeal on his original equal protection argument and added a second argument based on the Due Process Clause.[22] The appellate court panel held that the Texas statute violated the Texas Constitution's Equal Protection Clause and reversed the lower court's decision.[23] The Texas Criminal Appellate Court, however, then agreed to a rehearing *en banc*, after which it denied both constitutional arguments, reversed the three judge panel's decision, and reaffirmed Lawrence's conviction.[24]

The *en banc* Texas Criminal Appellate Court held that the anti-sodomy statute did not violate either the Texas or the U.S. Constitutions' Equal Protection Clauses because "there is no fundamental right to engage in homosexual sodomy, homosexuals do not constitute a suspect class and, the prohibition of homosexual conduct advances a legitimate state interest and is rationally related . . . to preserving public morals."[25] The *en banc* appellate court's majority opinion indicated reliance on *Bowers v. Hardwick* as a controlling precedent in denying Lawrence's due process argument.[26] In *Bowers*, the Supreme Court upheld a facially neutral Georgia statute that prohibited sodomy regardless of whether the participants were same-sex or opposite-sex couples.[27] Lawrence appealed to the U.S. Supreme Court, which granted certiorari, heard the case, and rendered its decision in July 2003.[28]

B. The Supreme Court's Holding in Lawrence

Justice Kennedy, writing for the majority, authored an expansive ruling that focused almost exclusively on the due process argument, overturned *Bowers v. Hardwick*, and held the Texas anti-sodomy statute unconstitutional.[29] The majority decision advanced two primary ideas. First, the Court held that in matters pertaining to sex, regardless of the moral beliefs of the majority, a state may not proscribe certain conduct as illegal due to the level of personal liberty and privacy that consenting adults hold in a private residence. In making its ruling, the Court reaffirmed the Due Process Clause guarantee of a person's fundamental right of privacy.[30] As

---

[22] *Id*.

[23] *Id*. at 4.

[24] *Lawrence*, 123 S. Ct. at 2476.

[25] *Lawrence*, 41 S.W.3d at 357.

[26] *Id*. at 354.

[27] *Bowers*, 478 U.S. 186.

[28] *Lawrence*, 123 S. Ct. 2472.

[29] *Id*. at 2475, 2484.

[30] *Id*. at 2483-84.

an integral part of its decision, the Supreme Court overruled its prior inapposite holding in *Bowers*.[31] Second, the Court observed, in dicta, that the Texas statute was likely unconstitutional under an Equal Protection Clause argument. However, the Court elected to use the Due Process Clause to proactively prohibit a state from enacting laws about sexual practices which are based on the moral beliefs of the majority and applied equally to all its citizens.[32]

C. Justice O'Connor's Concurrence in Lawrence*, Based On Equal Protection*

Justice O'Connor concurred in the judgment finding Texas's statute banning same-sex sodomy unconstitutional. However, she based her opinion on the Fourteenth Amendment's Equal Protection Clause[33] and refrained from joining the majority in overruling *Bowers*.[34] Justice O'Connor's opinion states that given the specific facts of *Lawrence*, equal protection was the appropriate body of law to be used in determining the constitutionality of Texas's anti-sodomy law.[35] She further stated that "moral disapproval [by the majority is not] a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy"[36] and, therefore, the Texas statute fails to "satisfy rational basis review under the Equal Protection Clause."[37] She noted that homosexuals are a class of individuals specifically targeted by the statute[38] and "a state cannot single out one identifiable class of citizens for punishment that does not apply to everyone else."[39] Justice O'Connor added that the due process question of whether a state can enact an anti-sodomy law that applies equally to consenting homosexuals and heterosexuals was not at issue in the *Lawrence* case and, therefore, was not before the Court.[40]

---

[31] *Id*. at 2484; *see supra* n. 27 and accompanying text.

[32] *Lawrence*, 123 S. Ct. at 2482.

[33] *Id*. at 2484 (O'Connor, J., concurring).

[34] *Id*.

[35] *See generally id*. at 2484.

[36] *Id*. at 2486.

[37] *Id*.

[38] *Id*. at 2487.

[39] *Id*.

[40] *Id*.

III. ARGUMENT

The Supreme Court had a major choice to make and it made the wrong one. Faced with the task of evaluating the constitutionality of Texas's anti-sodomy law, the Court surely must have discussed several essential questions. First, should the decision be limited to the specific facts of *Lawrence* or should an expansive opinion be written that makes new law? Second, should the Court follow the principles of stare decisis or side-step them? Third, should the Court exercise judicial restraint so as not to encroach on the role of the Congress, nor put into question numerous other long standing and settled state laws based on the moral beliefs of the majority? At each possible decision point, the Court's majority chose the wrong direction, leading them to base their decision in *Lawrence* on the Due Process Clause, when a decision based on the Equal Protection Clause was the more appropriate and sound direction.

A. The Specific Facts of Lawrence *Require a Decision Based on Equal Protection*

The Supreme Court is "bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[41]

A review of the specific facts of *Lawrence* directly gives rise to an equal protection analysis in an adjudication of the case. Lawrence and Garner were arrested and convicted under a state law that only applies to a minority segment of the state's population.[42] The Texas statute clearly permits sodomy between married or unmarried heterosexuals, while criminalizing it only when it is engaged in by same-sex couples.[43] It is facially discriminatory under the Equal Protection Clause because it focuses exclusively on a minority class of the population and may only be constitutional if it is rationally related to a legitimate state interest.[44] Lawrence's motions in the common pleas court and in his original appeal

---

[41] *Liverpool, N.Y. & Phila. S.S. Co. v. Commrs. of Emigration*, 113 U.S. 33, 39 (1885); *see also* Lisa Kloppenberg, *Measured Constitutional Steps*, 71 Ind. L.J. 297, 298 (1996); *U.S. v. Raines*, 362 U.S. 17, 21 (1960); *Renne v. Geary*, 501 U.S. 312, 330 (1991).

[42] *See supra* nn. 15-17 (describing Texas's Penal Code, which criminalized sodomy only when practiced by same-sex partners).

[43] *Lawrence*, 41 S.W.3d at 353.

[44] *Lawrence*, 123 S. Ct. at 2484 (O'Connor, J., concurring).

argued that Texas's statute violated the Equal Protection Clause and violated his fundamental right to privacy under the Due Process Clause.[45] The first appellate court decision in his favor agreed with his contention that the statute violated his equal protection rights and held the statute unconstitutional.[46]

As Justice O'Connor held in her concurring Supreme Court opinion, under the facts of *Lawrence***,** Texas does not have a legitimate state interest in support of its facially discriminatory anti-sodomy statute and, therefore, the statute is unconstitutional.[47] In her opinion, *Lawrence* should have been decided using the Equal Protection Clause, therefore, leaving the Court with no legitimate need to consider the case under the broader Due Process Clause.[48] Even the majority acknowledged that declaring the Texas statute invalid under the Equal Protection Clause is a tenable argument.[49]

The Supreme Court would have achieved a better result if it had followed its own judicial rule to limit its decision to the facts of the case before it. It would have resolved Lawrence's issue in his favor while advancing important equal protection jurisprudence. By adhering to its own policy of judicial behavior, it would have provided an excellent example of judicial restraint for lower federal courts to stick to the facts of the case before them. Finally, it would have bolstered the legitimacy of an independent judiciary by insulating it from charges of inappropriate political activism.

B. A Decision Based on Equal Protection Preserves the Principle of Stare Decisis, Finds the Texas Statute Unconstitutional, and Neutralizes Bowers *by Reinterpreting it on that Basis*

Had the Supreme Court decided *Lawrence* under equal protection jurisprudence, it would have followed stare decisis, an important rule of judicial interpretation and decision-making. Had the Court done so, it would still have found the Texas anti-sodomy statute unconstitutional and would have had the opportunity to reconsider and narrowly reverse its decision in *Bowers.*

1. A Decision Based on Equal Protection Follows the Principle of Stare

---

[45] *Id*. at 2476; Br. of Petr. at 4, *Lawrence*, 123 S. Ct. 2472.

[46] Br. of Petr. at 4, *Lawrence*, 123 S. Ct. 2472.

[47] *Lawrence*, 123 U.S. at 2487-88 (O'Connor, J., concurring).

[48] *Id*. at 2487.

[49] *Id*. at 2482.

Decisis

The principle of stare decisis is the obligation for courts to make current decisions consistent with prior ones.[50] While stare decisis "is not an inexorable command,"[51] it should be followed wherever possible and prudent.[52] The principle of stare decisis grew out of necessity.[53] As Justice O'Connor wrote in *Planned Parenthood of S.E. Pa. v. Casey*, a judicial system could not possibly do society's work if it freshly decided every case without any reference to prior decisions.[54] Stare decisis, therefore, transcends beyond mere judicial efficiency as it also keeps a promise of faith with the people who expect constancy in judicial matters.[55] Justice O'Connor warns that the Court should bypass stare decisis only when "the most convincing justification . . . could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance."[56] To unnecessarily overrule a prior decision would put into question the Court's fundamental legitimacy.[57] Justice O'Connor's majority opinion in *Casey* also lists a set of prudent and pragmatic "considerations" to be used when deciding whether to bypass stare decisis and overrule a prior decision.[58] Her list includes a determination of:

> 1) whether the rule has proven to be intolerable simply in defying practical workability; 2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; 3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or 4) whether facts have so changed, or come to be seen so differently, as

---

[50] *Casey*, 505 U.S. at 854.

[51] *Id.* (citing *Payne v. Tenn.*, 501 U.S. 808, 842 (1991)). Writing for the *Casey* majority, Justice O'Connor reinforced the importance of following the principle of stare decisis and outlined factors that a reviewing court should use to assess a set of current facts, coupled with social and legal developments that have occurred since a prior case was decided, to balance whether or not it is still appropriate to follow the decision made in the prior case.

[52] S*ee generally Casey*, 505 U.S. at 855. *See infra* nn. 58-59 and accompanying text for criteria.

[53] *Casey*, 505 U.S. at 854.

[54] *Id*.

[55] *Id*. at 868.

[56] *Id*. at 867.

[57] *Id*.

[58] *Id*. at 855.

> to have robbed the old rule of significant application or justification.[59]

Since the Court's decision in *Lawrence* could have and should have been decided exclusively on an equal protection basis, it was unnecessary for the Court to violate the principle of stare decisis by broadly overturning its decision in *Bowers*. This Note has little quarrel with the Court's determination that there are numerous problems with its decision in *Bowers*. In fact, as described later in this Note, *Bowers* should be narrowly reinterpreted and reconsidered on an equal protection basis to alter the Court's decision. However, the broad manner in which the Court overturned *Bowers* was unnecessarily expansive and ignored Justice O'Connor's second stare decisis consideration: whether there had been "reliance" on a prior decided point of law.

The majority opinion in *Bowers* advanced the principle that state legislatures, fulfilling their constitutional role, have the duty and right to develop laws based on common and fundamental morality, as understood by the majorities they represent.[60] State legislatures have relied on this principle since the founding of the republic and have enacted countless state laws based on fundamental and common morality that are rationally related to a legitimate state interest.[61]

The Court in *Lawrence*, adopting language offered by Justice Stevens in his dissenting opinion in *Bowers*, states "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice."[62] Almost as an afterthought, the Court then adds that its decision in *Lawrence* does not rule on numerous other activities related to sexual conduct practiced by consenting adults in privacy.[63] As the dissent correctly points out, however, the unnecessarily expansive language used by the majority puts into question countless state laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.[64]

In his dissenting opinion, Justice Scalia warns that the majority's failure to follow stare decisis as evidenced by its broad reversal of *Bowers* will lead to "a massive disruption of the current social order."[65] The national

---

[59] *Id*. at 854-55 (internal citations omitted and enumerations added).

[60] *See Bowers*, 478 U.S. at 194-96.

[61] *Id*. at 196.

[62] *Lawrence*, 123 S. Ct. at 2483.

[63] *Id*. at 2484.

[64] *Id*. at 2490 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).

[65] *Id*. at 2491.

reliance on the underlying principle of *Bowers*, that state legislatures do have the constitutional right to enact laws based on morality that pass rational basis scrutiny, is an adequate reason to follow stare decisis and not broadly overturn it.[66] In its zeal to overturn *Bowers*, the Court does not adequately consider all of its options and goes farther than necessary in its decision.

The Court had two viable options to decide *Lawrence* that would not have violated stare decisis. First, it could have followed Justice O'Connor's lead and decided *Lawrence* under equal protection jurisprudence based solely on its facts, and without attempting to reinterpret or overrule *Bowers*.[67] Second, the Court could have reinterpreted or overruled *Bowers* narrowly on equal protection grounds, because Georgia selectively and unconstitutionally applied its facially neutral law exclusively against homosexuals. Upon overruling *Bowers*, the Court could then have decided *Lawrence* on equal protection grounds, because the non-neutral Texas law was authored exclusively for and selectively applied against homosexuals. Given these two viable options to decide *Lawrence* on equal protection grounds without violating the principle of stare decisis, the Court incorrectly and unfortunately chose the due process path and doomed stare decisis to a mere afterthought. It was an unnecessary step which could lead to countless lawsuits intended to reaffirm the role of the legislature in making law and reaffirm a state's constitutional authority to enact laws based on morality that are rationally related to a legitimate state interest.

2. The Equal Protection Clause Renders Texas's Anti-Sodomy Statute Unconstitutional

"The universal application of law to all citizens has been a tenet of English common law since at least the Magna Carta, and our whole system of law is predicated on this fundamental principle."[68] The Equal Protection Clause's inherent aspiration requires that all people, regardless of station, circumstances, or conditions, must be treated alike under the law, receiving equal privileges and liabilities.[69] Under the Equal Protection Clause, a law

---

[66] *Id*. at 2490.

[67] *Id*. at 2484 (O'Connor, J., concurring).

[68] *Lawrence*, 41 S.W.3d at 351 (citing *Truax v. Corrigan*, 257 U.S. 312, 332 (1921)); *see also Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (noting "[t]he framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally"). *Eisenstadt* is cited in Justice Kennedy's majority opinion, Justice O'Connor's concurring opinion, and Justice Scalia's dissenting opinion.

[69] *Truax*, 257 U.S. at 333.

is unconstitutional if it provides advantages or privileges, to either individuals or classes, on one hand, and hostility, discrimination, or oppression on the other.[70] The practical reality of legislation, however, is that most laws classify people for one purpose or another, which results in some disadvantage to various groups.[71] Consequently, the Court has also held that it will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end.[72]

Texas's anti-sodomy statute is unconstitutional under two theories of equal protection jurisprudence. First, under *Romer v. Evans*, a statute is unconstitutional if it is inherently "born of animosity toward the class of persons affected" because the "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[73] Second, as established in *Eisenstadt v. Baird*, under the Equal Protection Clause there is no rational legislative interest for a state to criminalize sexual activities when performed by consenting unmarried adults, which are legal when practiced by married couples.[74] The Texas anti-sodomy statute violates both equal protection theories and is therefore unconstitutional.

a. Texas's Anti-Sodomy Statute is Born of Animosity Toward the Class of Persons Affected

If a statute is "born of animosity toward the class of persons affected," then the inherent desire within it to "harm a politically unpopular group cannot constitute a *legitimate* governmental interest," and therefore, it is unconstitutional.[75] In 1973, the Texas legislature changed its anti-sodomy

---

[70] *Id*.

[71] *Romer v. Evans*, 517 U.S. 620, 631 (1996). *Romer* is cited in Justice Kennedy's majority opinion, Justice O'Connor's concurring opinion, and Justice Scalia's dissenting opinion.

[72] *Id.*

[73] *Id*. at 634 (emphasis in original). When Colorado municipalities passed local ordinances barring discrimination based on sexual orientation, a statewide referendum was passed by Colorado voters precluding any legislative, judicial, or executive action designed to protect the rights of individuals based on homosexual, lesbian, or bisexual status. *Id*. at 623. The Colorado Supreme Court affirmed a trial court's holding that the subject amendment did not pass strict scrutiny and was unconstitutional under the Equal Protection Clause. *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993). The U.S. Supreme Court affirmed the Colorado Supreme Court holding that Colorado's amendment violated equal protection because it singled out homosexuals to deny them safeguards to act in ways that others enjoy or may seek without constraint. *Romer*, 517 U.S. at 635-36. Also, the amendment was surely born out of animosity to the class of individuals that it affected and such animus cannot be a legitimate state interest. *Id*. at 634.

[74] 405 U.S. at 454.

[75] *Romer*, 517 U.S. at 634 (emphasis in original).

law from one that banned sodomy, regardless of the status of the participants, to one that only banned sodomy when practiced by same-sex partners.[76] The Texas legislature recognized that under emerging due process jurisprudence it could no longer dictate what married couples did in private.[77] However, in changing its anti-sodomy law, Texas had a choice to repeal it for everyone, but chose to retain it only for same-sex partners.[78] There can be no rational reason for the Texas legislature to have taken this approach except to apply the law discriminately against homosexual couples as a minority class. Also, there can be no rational reason for this action other than a negative animus against homosexuals and homosexual conduct. Therefore, the Texas anti-sodomy statute cannot pass rational review under equal protection jurisprudence. It is facially written and applied only to same-sex partners, banning conduct that is inherent to the essence of being a homosexual, and there is legislative history to establish that it was retained due to an animus towards homosexuals as a minority class.[79]

b. Consensual Sodomy is Legal for Married Heterosexual Couples Under Texas Law and Must also be Legal When Practiced by Unmarried Couples, Based on Equal Protection

In *Eisenstadt*, the Court established the legal principle that rules cannot be facially written for or applied differently to married and single people.[80] *Eisenstadt* involved laws that allowed married people to use contraceptives but banned their use by single people.[81] It followed an earlier case, *Griswold v. Connecticut*, where the Supreme Court employed the Due Process Clause ruling that privacy is a fundamental right and establishing that the state has no legitimacy in dictating what married people choose to do concerning things so private as the choice to have children or not.[82] In *Eisenstadt*, the Court held that under the Equal Protection Clause, unmarried people enjoy the same fundamental right to privacy as married

---

[76] *Baker v. Wade*, 553 F. Supp. 1121, 1148-53 (1982). Between 1943 and 1974, oral and anal sex was illegal in Texas regardless of the sexual orientation of the participants.

[77] *Id*. (noting the change in Texas Courts' interpretation and enforcement of its anti-sodomy statute following the Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (guaranteeing a married couple's fundamental right to privacy)).

[78] *Id*. at 1150.

[79] *Lawrence*, 123 S. Ct. at 2486-87 (O'Connor, J., concurring).

[80] 405 U.S. at 454.

[81] *Id*.

[82] 381 U.S. at 485.

people.[83] Following this logic, if Texas does not and presumably cannot ban sodomy for married couples,[84] then it is unconstitutional for the state to ban sodomy for unmarried couples, whether heterosexual or homosexual.

Texas's anti-sodomy statute is unconstitutional under either strand of equal protection jurisprudence. The Supreme Court should have narrowly based its opinion in *Lawrence* on the Equal Protection Clause to reverse Lawrence's conviction.[85]

3. Reinterpreting *Bowers* Under Equal Protection Would Reverse It Narrowly

The majority opinion in *Lawrence* makes it clear that an integral part of its decision included an evaluation of whether its prior decision in *Bowers* should be overruled.[86]

Although the facts of *Bowers* are similar, they are significantly different from those in *Lawrence*. The similarity begins and ends with the fact that both cases involve statutes that ban sodomy.[87] Unlike in *Lawrence*, the Court in *Bowers* was presented with a Georgia statute that was facially neutral in banning sodomy, regardless of the status of the participants.[88] The primary decision rendered in *Bowers* determined whether a state could enact a facially neutral law to make sodomy illegal or "whether the Federal Constitution confers a fundamental right[89] upon homosexuals to engage in sodomy . . . ."[90] The Court further defined the issue before it adding that if such a fundamental right were found to exist, then under the Due Process Clauses of the Fifth and Fourteenth Amendments, Georgia's statute would only be valid if it passed heightened scrutiny.[91] The Court in *Bowers* opined that based on the principle of judicial restraint the judiciary should be

---

[83] 405 U.S. at 454.

[84] *Bowers*, 478 U.S. at 216-18 (Stevens, Brennan & Marshall, J.J., dissenting).

[85] *Lawrence*, 123 S. Ct. at 2484 (O'Connor, J., concurring). Justice O'Connor states her belief that Equal Protection should be the basis of the decision in the opening paragraph of her concurring opinion. *Id*.

[86] *Id*. at 2476.

[87] *Id*. at 2475; *Bowers*, 478 U.S. at 187.

[88] *Bowers*, 478 U.S. at 188.

[89] *Id*. at 189. The Court was specifically responding to a decision by the Eleventh Circuit that held that Bowers did enjoy a "fundamental right" to homosexual sodomy. *Id*. It is arguable that seeing the specific words in the opinion that created a new fundamental right under the Due Process Clause may have caused the Court to make a less thorough determination of the equal protection issues inherent in the case.

[90] *Id*. at 190.

[91] *Id*. at 191.

extremely careful not to exceed its constitutional role to create new fundamental rights under the Due Process Clauses.[92]

The majority opinion in *Bowers* held that homosexuals do not have a fundamental right under the Constitution to engage in homosexual sodomy, and the various states have retained the right to enact laws based on fundamental moral beliefs held by the majority that are rationally related to a legitimate state interest.[93] Finally, the Court added that since the law is "constantly based on notions of morality,"[94] upholding morality is a legitimate state interest to establish the constitutionality of Georgia's statute.

In his dissenting opinion, Justice Blackmun stated that the majority missed the key issue in *Bowers*, and somehow found itself on a tangent deciding whether homosexual sodomy was a constitutionally guaranteed fundamental right.[95] Both Justice Blackmun's and Justice Stevens' dissents indicate a strong belief that the real issue in *Bowers* was whether, under due process jurisprudence, an individual's fundamental right of privacy transcends the state's ability to criminalize private consensual sexual acts between adults. While they concluded that the case should have been decided on fundamental privacy rights, they also both added an important consideration that *Bowers* could also have been decided differently under equal protection jurisprudence.[96] Justice Blackmun pointed out that while its statute is facially neutral, Georgia is apparently willing "to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals."[97] If, as Justice Blackmun suspected, the Georgia statute were only applied selectively to a minority group of people, it would violate the Equal Protection Clause.[98] Justice Stevens included in his dissent the similar belief that "selective application" of a facially neutral law is unconstitutional.[99]

Given the rather apparent equal protection violation found in the selective application of the Georgia statute in *Bowers*, it would seem that the Supreme Court missed an opportunity to build a much stronger

---

[92] *Id*. at 194 (adding that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution").

[93] *Id*. at 196.

[94] *Id*.

[95] *Id*. at 200 (Blackmun, Brennan, Marshall & Stevens, JJ., dissenting).

[96] *Id*. at 214, 218.

[97] *Id*. at 201.

[98] *Id*. at 203; *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). A facially neutral law may not be applied differently to different classes of people.

[99] *Bowers*, 478 U.S. at 219 (Stevens, Brennan & Marshall, JJ., dissenting).

consensus opinion to find the statute unconstitutional on a more limited equal protection basis. The majority's unfortunate tangent, to categorically reject the Eleventh Circuit's apparent creation of a new fundamental right of homosexual sodomy, was arguably a tangent they felt compelled to take.[100] However, the majority could have found that there is no due process extension guaranteeing a fundamental right to homosexual sodomy and still held the statute unconstitutional as selectively applied by Georgia under the Equal Protection Clause. This result would have been a much narrower decision, and if the *Lawrence* decision would have followed this line of jurisprudence and overruled *Bowers* under the Equal Protection Clause, all the anticipated problems with the Court's decision, predicted by Justice Scalia in his dissent, could have been avoided.[101] In its decision in *Lawrence*, the majority missed an excellent opportunity to choose a narrow path to reconsider and overrule *Bowers* on equal protection jurisprudence.

C. An Equal Protection Analysis Demonstrates Judicial Restraint and Does Not Encroach on the Legislature, nor Undermine Countless State Laws Based on the Moral Beliefs of the Majority

The principle of judicial restraint is an inherent part of the American system of government. Within our government structure there are three independent branches: executive, legislative, and the judiciary.[102] The Constitution delegates separate powers into the three branches, mandating that each branch must respect the other's domain.[103] The respective roles of the legislature and judiciary are clear; the legislature makes the laws, and the judiciary interprets those laws and applies them to legal disputes.[104] "The judiciary is not supposed to 'make law,' at least not in those areas in which the legislature has acted."[105] Therefore, judicial restraint calls upon the judiciary to self-regulate to ensure that on the one hand it interprets legislation to enforce the will of the legislature, while at the same time determining if the legislature's will is in conformance with the

---

[100] *Id.* at 191. When Georgia decided to not prosecute Michael Hardwick following his arrest on the criminal charge of homosexual sodomy, he filed suit in Federal District Court to challenge the constitutionality of the underlying statute, eventually leading to his appeal to the Eleventh Circuit and subsequent appeal to the Supreme Court.

[101] *See supra* n. 65 and accompanying text.

[102] Scott Fruehwald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 Marq. L. Rev. 435, 442 (1999).

[103] *Id*.

[104] *Id*.; *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[105] Fruehwald, *supra* n. 102, at 442.

Constitution's limits of the legislature's power and authority.[106]

Judicial restraint, while limiting the power of the judiciary, is also essential to ensuring its legitimacy.[107] "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[108] Preserving the Court's legitimacy is of paramount importance because if the people were to ever lose faith in the Court, it would undermine their fundamental belief in our constitutional ideals and the rule of law.[109]

The principle of judicial restraint is so deeply rooted in our system of government, with its separation of powers, that even if the Court believes that the political branch has acted unwisely, it must follow the constitutional presumption that "improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted . . . ."[110]

To uphold the principle of judicial restraint and to avoid claims of political activism from intended or inadvertent encroachment on the roles of the executive or legislative branches, the Court follows "two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[111] As described earlier in this Note, the Court should have decided *Lawrence* based on equal protection jurisprudence, resulting in a far narrower enforcement of constitutional principles and finding Texas's anti-sodomy statute facially unconstitutional.[112] However, in deciding to leap over the narrower Equal Protection Clause interpretation to embrace and utilize the broader Due Process Clause interpretation, the majority anticipated a future question not currently before it and moved to

---

[106] *Id*.

[107] *Bowers*, 478 U.S. at 194.

[108] *Id*.

[109] *Casey*, 505 U.S. at 868.

[110] *Vance v. Bradley*, 440 U.S. 93, 97 (1997). In *Vance*, the Court addressed an administrative policy that required certain Foreign Service personnel to retire at age 60, while other civil servants were permitted to retire later. *Id*. at 94-95. While the Court did not necessarily agree with the policy, it noted that Congress was within its constitutional rights to establish a policy that was rational, and judicial intervention was unwarranted because the Court must trust the democratic process to rectify even improvident decisions. *Id*. at 109.

[111] *Liverpool*, 113 U.S. at 39. *See also Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting) (stating "On questions whose resolution is committed at least in large measure to another branch of the Federal Government, we [the Supreme Court] have construed our own jurisdiction narrowly and exercised it cautiously."); Kloppenberg, *supra* n. 41.

[112] *Lawrence*, 123 S. Ct. at 2482.

proactively forestall a legislative act by the elected representatives of the people to enact a facially neutral law.[113] Also, in its opinion, the Court used language that was broader than necessary when it wrote, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[114] This choice of phrasing, borrowed in whole from an earlier dissent by Justice Stevens in *Bowers*,[115] has put into jeopardy every other law enacted by the elected representatives of the people that is based on the moral beliefs of the majority of the electorate.[116] Justices Scalia and Thomas, joined by Chief Justice Rehnquist, state in their dissenting opinion that every state's laws concerning sexually related criminal offenses are called into question by the majority's decision in what they describe as a "massive disruption of the current social order."[117]

More importantly, it is not the right or duty of the Court to proactively forestall legislation on the one hand, nor unintentionally put into question an entire body of law on the other, by painting with an unnecessarily broad brush. In doing so, the Court violated its own internal rules of judicial restraint, encroached on the role of the legislature, and opened itself up to claims of political activism. These issues could have been avoided by finding the Texas anti-sodomy statute unconstitutional under equal protection jurisprudence.

IV. CONCLUSION

Judicial action to end discrimination against homosexuals as a class of people is a just and righteous endeavor. This Note agrees that both Georgia's and Texas's anti-sodomy statutes are unconstitutional. However, the correct judicial analysis, in finding them unconstitutional, should have been under the Equal Protection Clause.

Using equal protection jurisprudence as its basis, the Court could have found that the Texas anti-sodomy statute was facially unconstitutional as written, and also unconstitutional as applied. Since it permitted heterosexual sodomy and prohibited same-sex sodomy, reasonable minds could not differ that it was written with an animus against homosexuals as a class. Also, there is no viable and legitimate state interest adequate to

---

[113] *Id*.

[114] *Id*. at 2483.

[115] *Bowers*, 478 U.S. at 216 (Stevens, Brennan & Marshall, JJ., dissenting).

[116] *Lawrence*, 123 S. Ct. at 2490 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

[117] *Id*. at 2490, 2491; *see supra* n. 64 and accompanying text (listing sexually related criminal offenses put into question by the majority opinion).

permit the criminalization of conduct, inherent to the essence of being a homosexual that does not criminalize it for heterosexuals. On the other hand, Georgia's facially neutral statute in *Bowers* could have been found unconstitutional under the Equal Protection Clause, as Georgia only applied it against homosexual couples. *Bowers* should have been reinterpreted and overruled on that basis.

If the Supreme Court's majority followed the equal protection path, it would have properly decided *Lawrence*; overruled and properly decided *Bowers*; maintained its principles of stare decisis and judicial restraint; reinforced the constitutional role of the legislature; and avoided unnecessary legal challenges to a plethora of state laws that are based on the moral beliefs of the majority of the citizenry, as enacted by their representatives. The Supreme Court should have adopted Justice O'Connor's opinion as the majority opinion.