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Due Process Right to Privacy: The Supreme Court's Ultimate Trump Card

*Lawrence v. Texas*¹

I. INTRODUCTION

The best method for creeping up on a person is taking baby steps toward him, gradually getting closer, until suddenly you are next to him and he did not even realize you were coming. This is also the best way to change policy and law. This method is called incrementalism and instead of creeping toward a person, legislatures sneak towards new policies and courts inch towards expansions of law. Legal incrementalism becomes a problem when the courts, rather than the legislatures, sneak towards new policy instead of expansions of law. Such unauthorized policy shifting is what *Lawrence v. Texas* is all about.

II. FACTS AND HOLDING

One evening, the Harris County Police Department of Houston, Texas dispatched officers to the private residence of John Geddes Lawrence (“Lawrence”) to investigate a reported weapons disturbance.² Upon entering the apartment,³ the officers discovered Lawrence and Tyron Garner (“Garner”), both adult men, engaging in sexual relations.⁴ Pursuant to the Texas Penal Code,⁵ the men were arrested, charged and convicted of “deviate sexual intercourse . . . with a member of the same sex.”⁶

Lawrence and Garner challenged the constitutionality of the Texas statute, alleging violation of the Equal Protection clauses of the United States⁷ Constitution and the Texas⁸ Constitution.⁹ The Texas trial court rejected both arguments.¹⁰ Lawrence and Garner then pleaded *nolo contendere*, and the Court fined each man \$200 and assessed court costs at \$141.25.¹¹

1. 123 S. Ct. 2472 (2003).

2. *Id.* at 2475. It appears from the facts that the reported weapons disturbance was a pretense to expose Lawrence and Garner as homosexuals since they were not actually charged with any weapons-related crimes.

3. “The right of the police to enter does not seem to have been questioned.” *Id.*

4. *Id.* at 2475-76.

5. TEX. PENAL CODE ANN. § 21.06 (Vernon 2003).

6. *Lawrence*, 123 S. Ct. at 2476.

7. U.S. CONST. amend. XIV, § 1.

8. TEX. CONST., art. 1, § 3a.

9. *Lawrence*, 123 S. Ct. at 2476.

10. *Id.*

11. *Id.*

The men then appealed the case to the Texas Court of Appeals. On this appeal, the court considered arguments under the Fourteenth Amendment's Equal Protection and Due Process Clauses.¹² In a divided opinion, the appellate court rejected the constitutional attacks and affirmed the convictions.¹³ The United States Supreme Court granted certiorari to determine whether the Texas statute violated the Equal Protection Clause or the petitioners' liberty and privacy interests under the Due Process Clause of the Fourteenth Amendment.¹⁴

The Supreme Court reversed and remanded the case and held that the substantive due process guaranteed by the Fourteenth Amendment protects the liberty and privacy interests of consenting adults to freely engage in private intimate conduct.¹⁵ In so holding, the Court overruled *Bowers v. Hardwick*.¹⁶

III. LEGAL BACKGROUND

A. Role of State Legislatures

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁷ The Tenth Amendment effectively guarantees state police power. Interpreting the limits of this power, the Supreme Court has stated that "[t]he traditional police power of the States is defined as the authority to provide for the public health, safety, and morals."¹⁸ The Court has also noted that "the police power is not confined to a narrow category; it extends . . . to all the great public needs."¹⁹ As the creators of state law, legislatures are responsible for defining the police powers applicable to their respective states. In *Furman v. Georgia*,²⁰ Justice Burger stated:

in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people . . . [because] it is the legislature, not the Court, which responds to

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. 478 U.S. 186 (1986), *overruled by Lawrence*, 123 S. Ct. 2472.

17. U.S. CONST. amend. X.

18. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

19. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424 (1952).

20. 408 U.S. 238 (1972)

public opinion and immediately reflects the society's standards of decency.²¹

Thus, the Supreme Court has established that the Constitution guarantees certain police power to the States including the regulation of public health, safety, and morals as defined by the state legislatures, the primary group responsible for reflecting that state's beliefs.

B. Role of the Courts

In 1803, the United States Supreme Court first addressed the role of courts regarding application of the law in *Marbury v. Madison*.²² There, the Court declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."²³ Thus, judicial review was born. In *Washington v. Glucksberg*,²⁴ Justice Souter outlined his understanding of judicial review. He opined

the basic concept of judicial review with its possible displacement of legislative judgment bars any finding that a legislature has acted arbitrarily when the following conditions are met: [1] there is a serious factual controversy over the feasibility of recognizing the claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power; [2] facts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation.²⁵

As Justice Souter pointed out, the nature of judicial review is that it is in continual conflict with legislative judgment. In addressing this conflict, the Supreme Court has repeatedly expressed that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."²⁶ The doctrine of separation of powers prohibits the judiciary from substituting its own judgment for that of the legislature.²⁷

21. *Id.* at 383 (Burger, C.J., dissenting).

22. 5 U.S. 137 (1803).

23. *Id.* at 177.

24. 521 U.S. 702 (1997).

25. *Id.* at 786-87 (Souter, J., concurring) (numbers added for clarity).

26. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("States are not required to convince the courts of the correctness of their legislative judgments."); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to deter-

C. Right to Privacy

The right to privacy has been a much debated topic with many varied definitions. In *Poe v. Ullman*,²⁸ a case involving a Connecticut law prohibiting the use of contraceptives,²⁹ Justice Harlan dissented from the majority's dismissal because he felt a constitutional question was at hand. He declared:

This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints³⁰

Justice Harlan advocated a strict scrutiny analysis rather than rational basis review for those instances where the state invades the privacy of the home due to its character as "a most fundamental aspect of 'liberty.'"³¹ He further claimed that "it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."³²

Four years later, the Supreme Court had occasion to review *Poe* in *Griswold v. Connecticut*,³³ a case with facts substantially similar to *Poe*. After finding that the right to privacy denied in *Poe* indeed exists and is implied in the penumbras of various Constitutional amendments,³⁴ the Court posed the question, "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The

mine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); *Dennis v. United States*, 341 U.S. 494, 526 (1951) ("[T]his Court's power of judicial review is not 'an exercise of the powers of a super-Legislature.'" (quoting *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting))).

27. See U.S. CONST. art. I, II, III.

28. 367 U.S. 497 (1961).

29. This case laid the foundation for *Griswold v. Connecticut*, 381 U.S. 479 (1965); however, *Poe* refused to rule on the constitutionality of the statute, holding this to be a non-justiciable controversy due to plaintiffs' failure to show that they would suffer harm through enforcement of the statute. *Poe*, 367 U.S. at 508-09.

30. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

31. *Id.* at 548 (Harlan, J., dissenting).

32. *Id.* at 552 (Harlan, J., dissenting).

33. 381 U.S. 479 (1965).

34. *Id.* at 483 (citing *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)). The court found the right to privacy in the First, Third, Fourth, Fifth, and Ninth Amendments. *Id.* at 484-85.

very idea is repulsive to the notions of privacy surrounding the marriage relationship.”³⁵ Consequently, the Court struck down the Connecticut statute as unconstitutional³⁶ but failed to mention the applicable standard of review.

In a concurring opinion, Justice Goldberg claimed that “the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights . . . [and] it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution.”³⁷ He then identified the method for determining which rights are to be deemed fundamental, by stating that “judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the ‘traditions and (collective) conscience of our people’ to determine whether a principle is ‘so rooted (there) . . . as to be ranked as fundamental.’”³⁸

Justice Black dissented on the grounds that protections of privacy were applicable only “at certain times and places with respect to certain activities.”³⁹ Black criticized the ambiguity of a general right and cautioned that finding power in the Due Process Clause “to measure constitutionality by [the court’s] belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to [the court’s] own notions of ‘civilized standards of conduct’ . . . is an attribute of the power to make laws, not of the power to interpret them.”⁴⁰ He claimed that this standard of review “would make . . . this Court’s members a day-to-day constitutional convention.”⁴¹

Following the *Griswold* decision, the Court invalidated a similar statute in Massachusetts on Equal Protection grounds in *Eisenstadt v. Baird*⁴² because it differentiated between married and unmarried people. Although *Eisenstadt* largely skirted the privacy issue, it did find that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁴³ The Court appeared to apply rational basis review and rejected the State’s

35. *Id.* at 485-86.

36. *Id.* at 485.

37. *Id.* at 486 (Goldberg, J., concurring).

38. *Id.* at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964)) (alteration in original).

39. *Id.* at 508 (Black, J., dissenting).

40. *Id.* at 513 (Black, J., dissenting) (footnote omitted).

41. *Id.* at 520 (Black, J., dissenting).

42. 405 U.S. 438 (1972).

43. *Id.* at 453. This sentence has been cited for the proposition that the right to privacy in *Griswold* is available on an individual level. See, e.g., *Roe v. Wade*, 410 U.S. 113, 170 (1973) (Stewart, J., concurring).

proffered arguments because the statute was a poor “fit” for its purported goal.⁴⁴

Following *Eisenstadt* was *Roe v. Wade*,⁴⁵ a case denying states the power to criminalize abortions prior to viability of a fetus. The Court found the statute unconstitutional under strict scrutiny and declared that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.”⁴⁶ The Court recognized that privacy “has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.”⁴⁷ The Court then boldly asserted that the right to privacy encompassed “a woman’s decision whether or not to terminate her pregnancy.”⁴⁸ However, the Court repeatedly cautioned that “[t]he privacy right involved . . . cannot be said to be absolute.”⁴⁹

Justice Rehnquist dissented on the grounds that the privacy the Court spoke of was a far cry from that found in the protections of the Bill of Rights. He also cautioned that “the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of . . . whether a particular state interest put forward may or may not be ‘compelling.’”⁵⁰

After *Roe*, the Court heard *Carey v. Populations Services International*,⁵¹ another contraceptive controversy regarding the prohibited distribution of contraceptives to people under the age of sixteen.⁵² Following *Roe*, *Griswold* and *Eisenstadt*, the *Carey* Court, applying strict scrutiny, found a “constitutionally protected right of decision in matters of childbearing,”⁵³ which “extends to minors as well as to adults.”⁵⁴

44. *Id.* at 448-50.

45. 410 U.S. 113 (1973).

46. *Id.* at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (citation omitted). This assertion was made based on a variety of decisions recognizing a right to privacy under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965); and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

47. *Roe*, 410 U.S. at 152-53 (citing *Eisenstadt*, 405 U.S. at 453-54; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); and *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

48. *Id.* at 153.

49. *Id.* at 154-55.

50. *Id.* at 174 (Rehnquist, J., dissenting).

51. 431 U.S. 678 (1977).

52. *Id.* at 681.

53. *Id.* at 688.

54. *Id.* at 693.

In a concurring opinion, Justice White determined that the Court should be more hesitant to use a compelling state interest standard.⁵⁵ He argued that, historically, nothing required legislation to meet a compelling state interest merely because it implicated sexual freedom and that such a test “should be imposed by courts with deliberate restraint in view of the respect that properly should be accorded legislative judgments.”⁵⁶

Justice Rehnquist dissented, again finding that the Court was encroaching upon the legislative power of the state government. He argued that not allowing New York to use its police powers to legislate morality was a “departure from a wise and heretofore settled course of adjudication to the contrary.”⁵⁷

With an expanding definition of privacy under the Due Process Clause, the decision in *Bowers v. Hardwick*⁵⁸ provided a surprising backtrack. The *Bowers* Court held that there was no fundamental right to homosexual sodomy, despite its obvious privacy implications. At the outset of the opinion, the Court stated that “any claim that [prior] cases . . . stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.”⁵⁹

The Court determined that homosexual sodomy was not a fundamental right because it was not “‘deeply rooted in this Nation’s history and tradition.’”⁶⁰ After examining statutes from thirty-six states as well as the common law, the Court found that no such right existed in the nation’s history and tradition; in fact, the nation’s history and tradition spoke *against* such a right.⁶¹ The Court refused to invalidate morality as a rational basis for such a prohibition, saying that “[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”⁶² In a concurring opinion, Chief Justice Burger noted, “[t]his is essentially not a question of personal ‘preferences’ but rather of the legislative authority of the State.”⁶³

Justice Blackmun’s dissent argued that there exists in all individuals a “fundamental interest . . . in controlling the nature of their intimate associations with others.”⁶⁴ “Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the

55. *Id.* at 705 (White, J., concurring).

56. *Id.* (White, J., concurring).

57. *Id.* at 719 (Rehnquist, J., dissenting).

58. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

59. *Id.* at 191.

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

61. *Id.* at 194.

62. *Id.* at 196.

63. *Id.* at 197 (Burger, C.J., concurring).

64. *Id.* at 206 (Blackmun, J., dissenting).

heart of the Constitution's protection of privacy."⁶⁵ Justice Blackmun asserted that the state failed to establish a legitimate state interest because "mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest."⁶⁶

Justice Stevens also authored a dissent indicating that morality was an insufficient basis for upholding a statute. "[T]he 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"⁶⁷ Justice Stevens further asserted that *Griswold*, *Eisenstadt* and *Carey* stood for a "right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral."⁶⁸

IV. THE INSTANT DECISION

A. *The Majority Opinion*

Justice Kennedy delivered the majority opinion, joined by Justices Stevens, Souter, Ginsburg and Breyer. The Court deemed review of *Bowers v. Hardwick*⁶⁹ necessary to determine the outcome of the instant case.⁷⁰ In re-examining *Bowers*' holding that the Constitution did not contemplate homosexual sodomy as a fundamental right, the Court reviewed the prior cases finding a right to privacy in intimate relationships. Beginning with their decision in *Griswold v. Connecticut*,⁷¹ the Court noted that the Due Process Clause protected a right to privacy in the marital relationship and the option to use contraceptives.⁷² Then, the Court examined its decision in *Eisenstadt v. Baird*,⁷³ where, through the Equal Protection Clause,⁷⁴ it expanded "the right to make certain decisions regarding sexual conduct . . . beyond the marital relationship."⁷⁵

The Court went on to show that *Griswold* and *Eisenstadt* formed the backbone for the decision in *Roe v. Wade*.⁷⁶ In showing *Roe* to have recognized that substantive due process has "fundamental significance in defining

65. *Id.* at 208 (Blackmun, J., dissenting).

66. *Id.* at 213 (Blackmun, J., dissenting).

67. *Id.* at 216 (Stevens, J., dissenting).

68. *Id.* at 218 (Stevens, J., dissenting).

69. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

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

71. 381 U.S. 479 (1965).

72. *Lawrence*, 123 S. Ct. at 2477.

73. 405 U.S. 438 (1972).

74. U.S. CONST. amend. XIV, § 1.

75. *Lawrence*, 123 S. Ct. at 2477.

76. *Id.*

the rights of the person,"⁷⁷ the Court once again noted the broad scope of the right to privacy.⁷⁸

Following a comparison of its prior right to privacy decisions, the Court began a factual comparison between *Bowers* and *Lawrence*.⁷⁹ The Court first noted a difference between the statutes.⁸⁰ The *Bowers* statute prohibited consensual sodomy regardless of the participants' genders, whereas the *Lawrence* statute prohibited consensual sodomy only between participants of the same gender.⁸¹ Next, the defendants in *Lawrence* were prosecuted, unlike the defendant in *Bowers*.⁸² The Court then condemned its own characterization of the issue in *Bowers*,⁸³ saying that it demeaned homosexuals by implying that a homosexual relationship was only about engaging in sodomy.⁸⁴ The Court also scolded the underlying statutes as "seek[ing] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."⁸⁵ The Court concluded that the *Bowers* decision "misapprehended the claim of liberty there presented to it."⁸⁶

The Court noted that the *Bowers* Court relied heavily on "ancient roots" prohibiting the same or similar conduct.⁸⁷ Then, the Court analyzed society's historical disapproval of homosexual conduct, citing that laws typically prohibited the conduct, regardless of participants' genders, because of its non-procreative nature.⁸⁸ The Court then evaluated enforcement of the conduct under the laws and noted that it did not seem that the laws were "enforced against consenting adults acting in private;" rather, the convictions noted were most often for predatory acts lacking consent.⁸⁹ Drawing from this analysis, the Court found that "one purpose for the prohibitions was to ensure

77. *Id.*

78. *Id.* The Court also makes brief mention of *Carey v. Population Services International*, 431 U.S. 678 (1977), where it invalidated a New York law that forbid the "sale or distribution of contraceptive devices to persons under 16 years of age"; however, they included no analysis of the decision. *Lawrence*, 123 S. Ct. at 2477.

79. *Lawrence*, 123 S. Ct. at 2477.

80. *Id.*

81. *Id.*

82. *Id.*

83. The characterization of the issue in *Bowers* stated: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by Lawrence*, 123 S. Ct. at 2472.

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

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 2478-79.

89. *Id.* at 2479. The Court suggests that rules of evidence may be the reason for this disparity of enforcement because the consenting partner was considered an accomplice and therefore incompetent to testify. *Id.*

there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law.”⁹⁰ In analyzing the historical roots of the prohibition, the Court found that laws specifically targeting same-sex couples and criminalizing their sexual conduct did not emerge in the United States until the 1970’s.⁹¹ Even then, only nine states adopted such prohibitions.⁹² The Court pointed out that in recent decades, those nine states have taken steps toward abolishing their same-sex prohibitions.⁹³ Summarizing the findings of the *Bowers* Court, the *Lawrence* Court stated that the “historical premises [set forth in *Bowers*] are not without doubt and, at the very least, are overstated.”⁹⁴

The Court went on to address the fact that “for centuries, there have been powerful voices to condemn homosexual conduct as immoral.”⁹⁵ The Court pointed to Judeo-Christian morality and ethics as guiding the anti-homosexual sentiment.⁹⁶ Contrary to the *Bowers* Court, the *Lawrence* Court characterized the issue as questioning “whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”⁹⁷

The Court noted that while some authority embraced anti-homosexual sentiments, the Model Penal Code “did not recommend or provide for ‘criminal penalties for consensual sexual relations conducted in private.’”⁹⁸ Justice Powell observed that historical non-enforcement of these prohibitions was further evidence that their existence had outlasted their utility.⁹⁹ In contrast to Justice Burger’s emphasis in *Bowers* on Western civilization and Judeo-Christian moral and ethical standards, the *Lawrence* Court pointed to British Parliament’s abrogating laws penalizing homosexual conduct.¹⁰⁰ A parallel case from the European Court of Human Rights even found a law penalizing

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 2480.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (quoting MODEL PENAL CODE § 213.2 cmt. 2 at 372 (1980)). The American Law Institute gave three reasons for not prohibiting private consensual sexual relations:

(1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.

Id. (citing MODEL PENAL CODE cmt. 277-280 (Tentative Draft No. 4, 1955)).

99. *Id.* at 2481.

100. *Id.*

homosexual conduct invalid.¹⁰¹ The Court noted that of the twenty-five states originally prohibiting sodomy, only thirteen continue to prohibit sodomy, with only four enforcing the laws exclusively against homosexual individuals.¹⁰² Within those thirteen states, the Court found a “pattern of non-enforcement with respect to consenting adults acting in private.”¹⁰³ The Court then addressed recent decisions following *Bowers* that confirmed that the right to privacy extended to decisions regarding marriage, procreation, contraception, family relationships, child rearing and education.¹⁰⁴

The Court passed over the Petitioners’ equal protection argument, saying: “Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”¹⁰⁵ The Court felt that a decision based on due process would better serve the appellants’ interests and eliminate the stigma derived from the criminalization of homosexual conduct.¹⁰⁶

Embracing Justice Stevens’ dissent in *Bowers*, the Court found that “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.”¹⁰⁷ The Court then overruled *Bowers*¹⁰⁸ and emphasized that the conduct at issue in *Lawrence* was private, consensual and between adults.¹⁰⁹ Thus, “[t]heir right to liberty under the Due Process Clause g[ave] them the full right to engage in their conduct without intervention of the government.”¹¹⁰

The Court briefly explained the Framers’ inability to forecast and account for all possible scenarios.¹¹¹ The Court stated that the Framers “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”¹¹²

In a final vote of 6-3, the Court found that the statute failed to promote a legitimate state interest, therefore violating the right to privacy, and held the statute unconstitutional under the Due Process Clause of the Fourteenth

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 2481-82 (citing *Romer v. Evans*, 517 U.S. 620 (1996); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)).

105. *Id.* at 2482.

106. *Id.*

107. *Id.* at 2483.

108. *Id.* at 2484.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

Amendment. The Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings.¹¹³

B. *The Concurrence*

While agreeing that the Texas statute banning same-sex sodomy was unconstitutional, Justice O'Connor based her concurring opinion on the Equal Protection Clause as opposed to due process.¹¹⁴ She found that the statute protected no legitimate state interest in that it only exhibited a desire to harm a "politically unpopular group."¹¹⁵ Justice O'Connor pointed to the fact that the Texas statute criminalized sodomy only for same-sex couples and said nothing about heterosexual couples.¹¹⁶ She declared that, in effect, the statute "brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."¹¹⁷ The State argued promotion of morality as its legitimate interest; however, Justice O'Connor rejected this argument stating that "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."¹¹⁸ She found the State's moral disapproval of homosexual sodomy to be a restatement of its desire to exhibit animosity towards homosexuals.¹¹⁹

The State argued that its statute was not directed at persons, but rather at conduct.¹²⁰ Justice O'Connor countered this argument by claiming that such conduct was so "closely correlated with being homosexual" that it made "the conduct that defines the class criminal."¹²¹ For these reasons, she found the statute in violation of the Equal Protection Clause.¹²²

113. *Id.*

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

115. *Id.* at 2485 (O'Connor, J., concurring) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

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

117. *Id.* at 2486 (O'Connor, J., concurring).

118. *Id.* (O'Connor, J., concurring). Later, O'Connor seems to suggest that preserving the traditional institution of marriage would be considered a legitimate state interest and withstand Constitutional review. *Id.* at 2487-88 (O'Connor, J., concurring).

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

120. *Id.* at 2486 (O'Connor, J., concurring).

121. *Id.* at 2486-87 (O'Connor, J., concurring) (quoting *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting)).

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

C. *The Dissent*

Justice Scalia authored the dissent and Chief Justice Rehnquist and Justice Thomas joined in the opinion.¹²³ Scalia first attacked the Court's disregard for precedent in overruling *Bowers*.¹²⁴ Then, he pointed out that the Court did not even truly address the central issue in *Bowers* by failing to "declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor [did] it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'"¹²⁵

Scalia attacked the Court's willingness to overrule precedent due to widespread criticism of *Bowers*, noting that *Roe v. Wade* also received widespread criticism, but there the Court used that criticism to justify its holding.¹²⁶ Scalia outlined his perception of the Court's determinative test for overruling precedent, requiring that: "(1) its foundations have been 'eroded' by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning."¹²⁷ He then noted that *Roe* satisfied all the requisite conditions, yet has consistently been affirmed rather than overruled.¹²⁸

While Scalia agreed that the first two prongs counseled toward overturning *Bowers*, he strongly disagreed with the third prong, finding that society has greatly relied upon *Bowers*' holding that morality is a legitimate basis for state law.¹²⁹ He noted that "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices."¹³⁰

After attacking the Court's dismissal of morality as a legitimate state interest, Scalia challenged the Court's failure to recognize any fundamental

123. *Id.* (Scalia, J., dissenting). Justice Thomas authored his own dissent wherein he joined Justice Scalia; however, he makes a point of quoting Justice Stewart in saying "I 'can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy.'" *Id.* at 2498 (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting)) (alteration in original).

124. *Id.* at 2488 (Scalia, J., dissenting).

125. *Id.* (Scalia, J., dissenting).

126. *Id.* (Scalia, J., dissenting). "[T]o overrule under fire in the absence of the most compelling reason . . . would subvert the Court's legitimacy beyond any serious question." *Id.* at 2488-89 (Scalia, J., dissenting) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 866-67 (1992)).

127. *Id.* at 2489 (Scalia, J., dissenting) (citation omitted).

128. *Id.* (Scalia, J., dissenting).

129. *Id.* at 2490 (Scalia, J., dissenting).

130. *Id.* (Scalia, J., dissenting).

right requiring strict scrutiny.¹³¹ Scalia claimed that the Court lacked the “boldness to reverse” *Bowers*’ conclusion that homosexual sodomy is not a fundamental right.¹³²

Further, Scalia rebutted the Court’s assertion “that there is no rational basis for the law . . . under attack.”¹³³ He asserted that the Court’s rejection of morality regulation as a legitimate interest “effectively decrees the end of all morals legislation.”¹³⁴

He then turned to Justice O’Connor’s concurrence and argued that there was no Equal Protection issue because the statute treated men the same as it treated women; the only material issue was the sex of the accused’s partner.¹³⁵ He also criticized the connection drawn by Justice O’Connor between conduct and the sexual proclivity of the defendant by stating that “the same could be said of any law. A law against public nudity targets ‘the conduct that is closely correlated with being a nudist,’ and hence ‘is targeted at more than conduct’; it is ‘directed toward nudists as a class.’”¹³⁶ Nevertheless, Scalia proclaimed that even discrimination against homosexuals as a class was still only subject to rational-basis review, not strict scrutiny.¹³⁷

Finally, Scalia attacked the Court as “sign[ing] on to the so-called homosexual agenda . . . directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”¹³⁸ Scalia viewed the Court as acting in a dictatorial fashion and noted that “persuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else.”¹³⁹

Justice Thomas joined Scalia’s dissent and embraced Scalia’s view of the Court as dictatorial by adding: “I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated.”¹⁴⁰

V. COMMENT

Oliver Wendall Holmes once said:

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the

131. *Id.* at 2491-92 (Scalia, J., dissenting).

132. *Id.* at 2492 (Scalia, J., dissenting).

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

134. *Id.* (Scalia, J., dissenting).

135. *Id.* (Scalia, J., dissenting).

136. *Id.* at 2496 (Scalia, J., dissenting).

137. *Id.* (Scalia, J., dissenting).

138. *Id.* (Scalia, J., dissenting).

139. *Id.* at 2497 (Scalia, J., dissenting).

140. *Id.* at 2498 (Thomas, J., dissenting).

law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.¹⁴¹

The instant case is a great victory for supporters of a broad right to privacy and homosexual rights, yet it bends well grounded principles of law by encroaching on the power of the state legislatures and imposing the Court's political views on the nation.

"One precedent creates another. They soon accumulate and constitute law. What yesterday was fact, today is doctrine."¹⁴² This is the history of the so-called right to privacy. As Justice Black warned, "'[p]rivacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures."¹⁴³

Many commentators have acknowledged the nebulous origin of the right to privacy.¹⁴⁴ So, from where did this right emerge? The Court found this right implicit in the penumbras of the First (freedom of association and freedom from disclosure of associational ties), Third (freedom from being forced to quarter soldiers in the home), Fourth (freedom from unreasonable searches and seizures), Fifth (freedom from disclosing self-incriminating statements), Ninth (those rights not enumerated are still held in the people), and Fourteenth (right to life, liberty and due process of law) Amendments to the United States Constitution.¹⁴⁵

"There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities;"¹⁴⁶ however, none of them guarantees an all-encompassing right to privacy. This right, drawn from the penumbras of the Bill of Rights, has grown into an unruly beast which is a far cry from its innocent birth. In *Griswold*, it seemed natural for a married couple, not the government, to regulate the size of their own family. The Court specifically

141. *N. Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

142. Junius, *Letters*, in *THE LAWYER'S QUOTATION BOOK: A LEGAL COMPANION* 36 (John Reay-Smith ed., 1991).

143. *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

144. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977) (quoting *Roe's* acknowledgment of Constitutional silence on the issue); *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[t]he Constitution does not explicitly mention any right of privacy"); *Griswold*, 381 U.S. at 482-83 (certain protections are not specifically listed in the First Amendment, but are nevertheless found in its penumbras).

145. *See supra* note 46.

146. *Griswold*, 381 U.S. at 508 (Black, J., dissenting).

referred to this right as stemming from the *marriage relationship* as a type of *marital privacy*.¹⁴⁷ Subsequently, in *Eisenstadt*, unmarried people became entitled to receive the same treatment as married people under the Equal Protection clause.¹⁴⁸ The decision in *Eisenstadt* has been interpreted as bestowing a right upon the *individual* to choose whether to bear children, even in the realm of abortion.¹⁴⁹ What began as the right to prevent conception has become the right to terminate pregnancy. In *Carey*, the Court re-characterized *Griswold's* holding as enunciating a constitutional protection of "individual decisions in matters of childbearing from unjustified intrusion by the State."¹⁵⁰ Again, the Court transformed prevention into termination.

Bowers halted the developing creation of privacy. It would have been easy for the *Bowers* Court to bridge the gap from "decisions in matters of childbearing" to decisions in matters of sexual relations, but the *Bowers* Court refused to take that step. Instead, the Court claimed that in order to be fully protected, a right must be fundamental, meaning it must be "deeply rooted in this Nation's history and tradition."¹⁵¹ In a search of the Nation's "history and tradition," the *Bowers* Court found that sodomy was generally criminalized, with the cornerstone of morality at its foundation.¹⁵² Finding morality to be a sufficient basis for criminalizing conduct, the Court upheld the Georgia statute.¹⁵³ This was the first collision of the right to privacy and a law based on morality where morality prevailed. *Lawrence*, however, unleashed the right to privacy from its *Bowers* bonds and found that morality was no longer enough to keep such statutes alive. The *Lawrence* Court held that "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" ¹⁵⁴

Lawrence could have easily been decided on equal protection grounds, but the majority passed on that in favor of substantive due process in order to establish that the right to privacy covered intimate sexual contact between consenting adults in the privacy of their own home. By deciding the issue on due process instead of on equal protection grounds, the Court expanded the right to privacy. In striking down the statute, the Court employed rational basis review and found that the State's asserted interest in promoting morality

147. *Id.* at 486.

148. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

149. *Roe*, 410 U.S. at 169-70 (Stewart, J., concurring).

150. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977).

151. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

152. *Id.* at 192-93.

153. *Id.* at 196.

154. *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

was insufficient to overcome the constitutional challenge. This decision begs the question of when morality ceased to be a legitimate state interest.

It has been said that “[t]ime is the great legalizer, even in the field of morals.”¹⁵⁵ It is true that as times change, our notions of morality change. What was once repugnant is now accepted and sometimes even celebrated. Often that which is considered repugnant also bears the stigma of illegality. To account for shifting notions of morality, our society must be flexible enough to gauge society’s current mores.

Such flexibility is usually accomplished through use of the state police power. In recognizing this, the Court has previously held that “the domain of sexual morality is pre-eminently a matter of state concern.”¹⁵⁶ The reason this issue has historically been left to the legislatures is because the best way to reflect society’s morals is to allow representatives, elected to speak for the people, to make the laws. As Chief Justice Burger stated in *Furman v. Georgia*,¹⁵⁷ “[t]he paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that in this country legislatures have in fact been responsive—albeit belatedly at times—to changes in social attitudes and moral values.”¹⁵⁸

Problems arise, however, when the legislature passes a law, presumably reflecting societal notions of morality that infringes on the individual liberty guaranteed by the Due Process Clause. This is especially true when the underlying morality appears to be in a state of imminent change. *Lawrence* is a prime example of this collision of morality and liberty. Not only is the sole justification for the Texas statute based upon the State’s morality, but the underlying morality is the disapproval of homosexual relationships. Societal views on homosexuality have been in a constant state of change, gradually gaining acceptance since the gay rights movements of the 1980s. The Court found itself faced with the question of “whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”¹⁵⁹

Ordinarily, when faced with a question regarding substantive due process, the default standard of review is rational basis; however, the standard changes to strict scrutiny whenever the issue involves protected conduct or a protected class.¹⁶⁰ The pre-*Bowers* cases on right to privacy were judged on the basis of strict scrutiny because the Court found that the underlying conduct was a constitutionally protected exercise of liberty.¹⁶¹ In *Bowers*, the Court was asked to expand the right to privacy to encompass consensual sex-

155. H.L. Mencken.

156. *Roth v. United States*, 354 U.S. 476, 502 (1957) (Harlan, J., concurring).

157. 408 U.S. 238 (1972) (Burger, C.J., dissenting).

158. *Id.* at 384.

159. *Lawrence*, 123 S. Ct. at 2480.

160. 16B AM. JUR. 2d *Constitutional Law* §§ 912-13 (2004).

161. *See, e.g., Carey v. Population Servs., Int’l*, 438 U.S. 678, 686-87 (1977); *Roe v. Wade*, 410 U.S. 113 (1973).

ual conduct between two adult males in the privacy of the home.¹⁶² Before it could do so, the Court found it necessary to determine whether consensual sodomy was a fundamental right.¹⁶³ Drawing on the traditional definition of a fundamental right, the Court examined whether the conduct was “‘deeply rooted in our Nation’s history and tradition.’”¹⁶⁴ Upon a finding that it was not, the Court properly refused to include it under the umbrella of privacy.¹⁶⁵ As a result, the Court reviewed the statute under a rational basis standard and held that the State’s interest in promoting morality was legitimate and upheld the statute.¹⁶⁶ Then *Lawrence* overruled *Bowers*.¹⁶⁷

The puzzling fact in *Lawrence*’s overruling of *Bowers* is that the Court never proclaimed a fundamental right to homosexual sodomy. In overruling the *Bowers* holding that there is *no* fundamental right, the Court should have declared that there now *is* a fundamental right. Due to the absence of such a statement establishing a fundamental right, it appears that the true issue in *Bowers* to suffer defeat was the proposition that morality is a legitimate state interest. Thus, the question arises of how the court can strike down a statute enacted pursuant to the constitutionally protected police power of the Tenth Amendment.

In examining Justice Souter’s proposition of judicial review,¹⁶⁸ the first factor to consider is whether “‘there is a serious factual controversy over the feasibility of recognizing the claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power.’”¹⁶⁹ In *Lawrence*, the controversy lies in the Appellant’s constitutional guarantees of liberty and due process pinned against the legislature’s ability to reflect its constituents’ moral values. The second factor to consider is whether “‘facts necessary to resolve the controversy are not readily ascertainable through the judicial process[,] but . . . are more readily subject to discovery through legislative factfinding and experimentation.’”¹⁷⁰ In *Lawrence*, the fact necessary to resolve the controversy is establishing the true view of the moral majority in the state of Texas. This is best accomplished by allowing Texas residents to elect those people who best represent their moral values. Souter concluded that when these two conditions are met, “‘judicial review . . . bars any finding that a legislature has acted arbitrarily.’”¹⁷¹

162. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

163. *Id.* at 190.

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

165. *Id.* at 190-91.

166. *Id.* at 196.

167. *Lawrence*, 123 S. Ct. at 2472.

168. *See supra* note 25.

169. *Washington v. Glucksberg*, 521 U.S. 702, 786 (1997) (Souter, J., concurring).

170. *Id.* at 786-87.

171. *Id.* at 786.

From this analysis, it appears that the *Lawrence* Court blatantly overstepped its bounds in striking down the Texas statute. However, even with morality being a part of the police power, states do not possess a monopoly on moral judgment. States are still subject to the majority of the Bill of Rights and their laws may not infringe upon constitutionally protected conduct. On the other hand, mainstream morality-based restrictions on freedom are considered sufficient to satisfy both the Due Process clause and the Equal Protection clause. This is shown in the continued existence of laws against adultery, bestiality, adult incest, and pornography.¹⁷² At this point, mainstream morality has supported same-sex marriage bans as well. Why then was Texas' justification insufficient? The reason is that the Court considered the statute's underlying moral judgment to be outdated. In interpreting the Due Process clause, the Court anticipated a change in moral standards and found that the Texas statute did not comport with the changing ideal of accepting homosexual relationships. To show this changing ideal, the Court reached around the globe to cite a European Court of Human Rights decision rejecting a similar statute.¹⁷³ Additionally, the Court asserted that other nations have followed suit, and it demonstrated that a number of states have already repealed similar laws or choose not to enforce them.¹⁷⁴

The *Lawrence* analysis is bothersome at best. Laws should *respond* to moral change, not anticipate it. By anticipating a moral shift and then treating the laws as though the shift has already occurred, the Court is essentially displacing the legislature's ability to respond to its constituency.¹⁷⁵ This is a clear violation of the doctrine of Separation of Powers. The judiciary's responsibility is to interpret the *laws*, not the views of society. In utilizing this form of analysis, the Court is able to push society in the direction it feels society should go. The Court is able to accomplish this because a liberty interest always trumps a morality interest. Thus, whenever an issue reaches the highest court in the land and the Court decides the state is enacting laws contrary to the Court's notions of morality, the Court may simply encompass the right at issue within the protection of the amorphous right to privacy. Then, the Court proclaims the right to be fundamental, subjects any laws limiting it to strict scrutiny, and consequently changes the morals of the nation.

In loosening the reins on privacy, the Court makes an effort to limit the length it can run. For example, in *Griswold*, the Court focused on the fact that the privacy involved was confined to the marriage relationship and the intimacies of a husband and wife.¹⁷⁶ Then *Eisenstadt* evaluated a similar statute on Equal Protection grounds and found that "outlaw[ing] distribution

172. See *Lawrence*, 123 S. Ct. at 2472 (Scalia, J., dissenting).

173. *Id.* at 2483.

174. *Id.* at 2481-83.

175. This author finds this sort of logic akin to seeing a person on a fifty foot ledge holding a suicide note, and then pre-empting their action and pushing them off.

176. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

to unmarried but not to married persons” was invidious discrimination.¹⁷⁷ Thus, the “marital” privacy found in *Griswold* morphed into an individual privacy interest in making a decision affecting “whether to bear or beget a child.”¹⁷⁸

Roe further extended the individual privacy right regarding the decision “whether to bear or beget a child” to create a woman’s right to decide “whether or not to terminate her pregnancy.”¹⁷⁹ The *Roe* Court also attempted to limit the rapid development of privacy rights by stating four situations where the right to privacy is not absolute and is subject to state limitation.¹⁸⁰ However, the limiting language did not last. While it was not a great leap, *Carey* again extended privacy’s reach by proclaiming that “the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.”¹⁸¹ Though *Carey* was decided on substantive due process grounds, its rationale is more akin to an equal protection argument—if adults are allowed to purchase and use contraceptives, minors ought to be able to as well. The *Lawrence* Court made the same restraining effort, but it has already failed. Justice O’Connor’s concurrence implied that the *Lawrence* holding would not affect same-sex marriage bans:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage.¹⁸²

However, a recent Massachusetts case relied on *Lawrence* and *Loving v. Virginia*¹⁸³ to find that “the right to marry means little if it does not include the right to marry the person of one’s choice.”¹⁸⁴ It then invalidated a statute banning same-sex marriages.¹⁸⁵

Justice O’Connor’s asserted limitation becomes even more questionable in light of the fact that the Court has previously held marriage to be a fundamental right, without qualifying that it must be between a man and a

177. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

178. *Id.* at 453.

179. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

180. *Id.* at 154-55.

181. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693 (1977).

182. *Lawrence v. Texas*, 123 S. Ct. 2472, 2487-88 (2003) (O’Connor, J., concurring).

183. 388 U.S. 1 (1967).

184. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003).

185. *Id.* at 968-69.

woman.¹⁸⁶ The fundamental right of marriage coupled with *Lawrence's* embrace of changing notions of morality all but destroys the limitation Justice O'Connor attempted to impose.¹⁸⁷

So, while the Court attempts to limit itself, its own standards of interpretation have turned it into a runaway train and the only way to stop it is to disallow constitutional interpretation based on emerging contemporary values. Because there is no check on a court's perception of emerging social values, the judiciary branch should refrain from this style of interpretation. An interpretation must be either retrospective or focused solely on the present and not on potential trends. The legislature should enact and the judiciary should react.

VI. CONCLUSION

In each case expanding the right to privacy, dissenters beseeched the Court not to apply a strict scrutiny analysis for fear that it would ultimately lead to the judiciary second-guessing legislative wisdom and returning to the era of *Lochner v. New York*¹⁸⁸ where the "Court's members [were] a day-to-day constitutional convention."¹⁸⁹ It appears that the dissenting fears were well grounded. Justice Souter put it best in saying

An unenumerated right should not therefore be recognized, with the effect of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived. To recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions.¹⁹⁰

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186. See *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978).

187. Not all courts are striking down same-sex marriage bans, though. The Arizona Court of Appeals recently heard a case asserting same-sex marriage rights. *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003). Despite the plaintiffs' reliance on *Lawrence*, the court utilized the same rationale as *Bowers* in proclaiming that same-sex marriages "are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." *Id.* at 459 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1977)).

188. 198 U.S. 45 (1905), *overruled in part by Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952).

189. *Griswold v. Connecticut*, 381 U.S. 479, 520 (1965) (Black, J., dissenting).

190. *Glucksberg*, 521 U.S. at 788-89 (Souter, J., concurring).

