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Susan Austin Blazier

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NOTE

THE IRRATIONAL USE OF RATIONAL BASIS REVIEW IN LAWRENCE V. TEXAS: IMPLICATIONS FOR OUR SOCIETY

Would you choose to live in a town where billboards advertise animals that people can use for their sexual gratification, grandfathers have sex with their adult granddaughters, prostitutes are able to work without fear of arrest, and people are free to expose their genitals to one another in public? This town doesn't exist in North Carolina because we have laws against such behavior. However, if you wouldn't want to live in a place like this, don't breathe a sigh of relief quite yet. The Supreme Court recently released an opinion, in Lawrence v. Texas, that may enable your town to look a lot like the one just mentioned.

The actual holding in the case is not as alarming as the rationale the Court used to arrive at its decision. The Court struck down a Texas law that criminalized homosexual sodomy. However, the path it took to arrive at this decision is different than it has taken before. If the Court continues to follow the reasoning it used in Lawrence, the field of constitutional law is in for some dramatic changes.

2. N.C. GEN. STAT. § 14-177 (2003) (making sex with an animal a Class I felony); N.C. GEN. STAT. § 14-178 (2003) (defining sex between a grandfather and his adult granddaughter as incest, punishable as a Class F felony); N.C. GEN. STAT. § 14-203 (2003) (criminalizing prostitution); N.C. GEN. STAT. § 14-190.9(a) (2003) ("Any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex, . . . shall be guilty of a Class 2 misdemeanor.").
4. Id. at 2495 (Scalia, J., dissenting). Justice Scalia explains that the Texas statute in question was created to promote the belief that some forms of sexual behavior are immoral, as are laws that forbid, inter alia, incest, bestiality, and obscenity. He goes on to say, "[i]f, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review."
5. Id. at 2472.
This article seeks to explore both the reasoning and implications of this new rationale by the Court. It will begin by relaying the facts and background of the Lawrence case. Next, it will discuss the Court's decision in Bowers v. Hardwick and explore the constitutional law foundations for the Court's traditional reasoning as displayed in Bowers. The article will then turn to the Court's analysis of Lawrence. Finally, it will address the potential far-reaching implications of the Lawrence decision in the realm of constitutional law.

BACKGROUND OF LAWRENCE

Police officers in Houston, Texas were sent to a house to investigate a call about a weapons disturbance. Once inside the home, the officers found two men (Lawrence and Tyson) engaged in anal sex. The men were arrested under a Texas statute which makes sodomy a misdemeanor offense. They were convicted by a Justice of the Peace, and these convictions were affirmed by the Court of Appeals for the Texas Fourteenth District. The Court of Appeals relied on the Supreme Court decision in Bowers v. Hardwick to affirm the conviction. The Supreme Court granted certiorari to decide whether the convictions violated the men's Fourteenth Amendment rights to equal protection and due process, and whether Bowers should be overruled.

On appeal, the burden is on the petitioners in a facial challenge to a statute to show that under every conceivable circumstance the statute is invalid. This cannot be accomplished in Lawrence because it would not be valid to protect against minors engaging in sodomy,

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7. Lawrence, 123 S. Ct. at 2475.
8. Id. at 2476.
9. Id.; See TEX PENAL CODE ANN. § 21.06(A) (2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."); §21.01 (1) ("Deviate sexual intercourse" is defined 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.").
forced sodomy, or publicly engaging in sodomy.\textsuperscript{16} The analysis by the Court should have ended there, however this point was never mentioned in the opinion. Instead, the Court decided the case on substantive due process grounds and found the Texas statute to have failed rational basis review, thus invalidating it.\textsuperscript{17} The Court also overruled \textit{Bowers}.\textsuperscript{18}

\textbf{Bowers v. Hardwick}

Before examining the Court’s rationale in \textit{Lawrence}, it is important to understand its rationale in \textit{Bowers}. The Court’s reasoning in \textit{Bowers} represents the analysis generally applied to Constitutional matters prior to \textit{Lawrence}. In 1982, Michael Hardwick was charged with violating a Georgia statute against sodomy.\textsuperscript{19} The Georgia statute differs from the Texas statute at issue in \textit{Lawrence} in that it prohibits sodomy between heterosexuals as well as homosexuals.\textsuperscript{20} The issue before the \textit{Bowers} Court was whether homosexuals have a fundamental right to engage in sodomy.\textsuperscript{21} Justice White, writing for the majority, looked to two categories to determine whether this was a fundamental right warranting strict scrutiny: “liberties that are implicit in the concept of ordered liberty” as well as liberties “deeply rooted in this Nation’s history and tradition.”\textsuperscript{22} He found in our country’s history a legacy of criminalizing sodomy.\textsuperscript{23} Deciding that sodomy was not a fundamental right, he proceeded to use rational basis review and sustained the law as a rational way for Georgia to promote its legitimate goal of encouraging public morality.\textsuperscript{24} The reasoning used by the \textit{Bowers} Court was in line with other opinions of the Court that have decided cases based on substantive due process grounds.

\begin{footnotesize}
\begin{itemize}
  \item 16. Brief of Amici Curiae American Center for Law and Justice at 10, \textit{Lawrence} (No. 02-102).
  \item 17. \textit{Lawrence}, 123 S. Ct. at 2484. The majority declined to use an equal protection analysis, although Justice O’Connor relied on equal protection grounds for her concurrence.
  \item 18. \textit{Id}.
  \item 20. GA. CODE ANN. § 16-6-2a (2002) (“A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.”).
  \item 21. \textit{Bowers}, 478 U.S. at 190.
  \item 22. \textit{Id} at 191-92 (citations omitted).
  \item 23. \textit{Id} at 192.
  \item 24. \textit{Id} at 196 (“The law, however, 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.”).
\end{itemize}
\end{footnotesize}
A Review Of Substantive Due Process

In the early 1930s, state laws exercising the use of police powers were given great deference by the Court. A change came in United States v. Carolene Products Co., when the Court gave itself room to increase its scrutiny of a law that "appears on its face to be within a specific prohibition of the Constitution . . . ." For almost thirty years, the Court gave heightened scrutiny to laws restricting the enumerated rights in the Bill of Rights, while giving deference to the rest. Over the years, more cases have shown the Court is also willing to increase the scrutiny given to the restriction of unenumerated rights.

In order to establish boundaries for itself and to promote judicial restraint, the Court has decided to protect rights that are well established in our history and tradition or that are vital to our concept of liberty. Laws restricting these so called fundamental rights (whether enumerated in the Constitution or not) must be supported by a compelling state interest and must be a narrowly tailored means of achieving those interests in order to be upheld. Most other rights are subject to rational review, which need only be supported by a legitimate government interest and rational means of accomplishing that interest.

The debate continues about what level of generality one should apply in order to find these rights. After all, the level of generality used determines whether that right will be found in tradition. Is it a right to life or right to privacy? Is it a right of parenthood or right of an

26. 304 U.S. 144, 153 n.4 (1938) (suggesting heightened scrutiny for laws that interfere with the political process, laws directed at discrete and insular minorities, and laws within a prohibition of the Constitution).
31. 123 S. Ct. at 2492 (Scalia, J., dissenting).
adulterous father to a child born out of wedlock? Is it a right to personal autonomy or the right to engage in sodomy? If a right is construed too generally, it becomes problematic to define what is included in that broad right. The liberty and personal autonomy found by Justice Kennedy could include any number of rights that have never been recognized before. Looking to the most specific level of generality in tradition judges subjectively make important determinations rather than relying on our history or Constitution. There needs to be some kind of criteria for judges to use to choose the relevant tradition in order to keep uniformity and cohesion in the Court’s decisions.

**ANALYSIS OF LAWRENCE**

**A Liberty Right In The Constitution**

The most striking aspect of this opinion is that Justice Kennedy has strayed from the Court’s well established substantive due process jurisprudence. He never declares homosexual sodomy to be a fundamental right worthy of strict scrutiny. Rather, he uses the term “liberty” as opposed to “fundamental rights.”

The issue in the opinion is stated, “whether the petitioners were free as adults to engage in [sodomy] in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.” In fact, one of the problems Justice Kennedy has with the Bowers decision is that the Court framed the issue as a right to engage in sodomy rather than as a liberty right. He mentions this liberty right, which is ensured by the Constitution, several times in his

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34. See Lawrence, 123 S. Ct. 2472.
35. Michael H., 491 U.S. at 127 n.6 (“Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society’s views.”). Interestingly, this footnote was the only part of the opinion Justice Kennedy did not join.
36. Id. (“[A] rule of law that bids neither by text nor by any particular, identifiable tradition is no rule of law at all.”).
37. Barnett, supra note 27, at 13 (“In the majority’s opinion there is not even a pretense of a ‘fundamental right’ rebutting the ‘presumption of constitutionality’. Justice Kennedy never mentions any presumption to be accorded the Texas legislature.”).
38. Lawrence, 123 S. Ct. at 2488 (Scalia, J., dissenting).
40. 123 S. Ct. at 2476 (emphasis added).
41. Id. at 2478 (“Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in
opinion. Despite all of his focus on liberty rights, it is important to note, as Justice Scalia astutely points out in his dissent, "there is no right to liberty under the Due Process Clause, although today's opinion repeatedly makes that claim." Concerns have been voiced that grounding their decisions in nothing more than "liberty" would open the door to find liberty anywhere a particular Justice wanted to find it. That fear has been realized in Lawrence. The opinion by Justice Kennedy rests on the liberty we are afforded by the Constitution, although he never attaches that liberty to any kind of historical or enumerated right.

The only time in his opinion Justice Kennedy discusses "rights deeply rooted" in our history is to say that the historical analysis undertaken in Bowers might not have been accurate. He eventually says it is not important to look too closely at history. How can it not be important to look at the history of the treatment of sodomy by our courts and legislature when trying to decide whether there is a fundamental right involved? The reason history is not important to Justice Kennedy's decision is because he is not trying to establish the right to engage in sodomy as a fundamental right. Instead, he says, "[their] right to liberty under the Due Process Clause gives [homosexuals] the full right to engage in their conduct without intervention of the government."

Not too long ago Justice Kennedy wrote, "courts must use considerable restraint, including careful adherence to the incremental instruc-
tion given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.”48 He was giving caution to how parental rights, which come from concepts of liberty grounded in the 14th amendment, were defined.49 Unfortunately, Justice Kennedy does not heed his own advice in Lawrence. In the past, the Court has recognized rights rooted in marriage, having children, and raising children, but it has never recognized a right to have sex outside of marriage.50 Instead of carefully examining our history and traditions and from those traditions asserting a right we have long recognized, the Court declares, with a stroke of a pen, that people have a constitutional liberty to engage in same-sex sodomy. Justice Kennedy does so using neither “considerable restraint” nor a “precise definition to the right.”51

In order to justify this liberty, the majority asserted the fact that many states have recently repealed their laws against sodomy.52 The Court also discusses how other countries deal with this issue.53 If these are the new standards for determining what the Constitution means, we should start preparing now for numerous changes in our laws and society. Analyzing current trends, instead of history, means the Court must become a “micro-managing super-legislature, continually assessing current legislative trends to determine the current extent of protection under the Fourteenth Amendment . . . .”54 Constitutionally protected liberties will be found from any number of trends and passions of the current era, only to be repealed in a few years by the next mood swing of the general public.

Surprisingly, the majority places a great deal of importance on what European countries think about the right to engage in homosexual sodomy.55 When did we start interpreting our Constitution by examining what other countries think? The question before the Court was not whether the Texas law was a good law, but rather whether it offended the United States Constitution. The way in which other countries deal with the issue of homosexual sodomy may be relevant in forming our public policy, however it is not relevant to what rights

49. See id.
50. Respondent’s Brief at 20-21, Lawrence (No. 02-102).
51. See Lawrence, 123 S. Ct. 2472.
52. See id. at 2481.
53. Id.
54. Respondent’s Brief at 16, Lawrence (No. 02-102).
55. See Lawrence, 123 S. Ct. at 2481 (“Of even more importance . . . the European Court of Human Rights considered a case with parallels to Bowers and to today’s case.”).
our Constitution says states are allowed to restrict. If the Court is deciding questions about our laws by evaluating how other countries deal with political issues, rather than by analyzing and applying our Constitution, why is the Supreme Court necessary? Political polls and surveys of other countries may be taken without the aid of the Justices.

Justice Breyer has stated publicly that he questions whether the Constitution will remain relevant as our world continues to become smaller through globalization. For a Supreme Court Justice to make this statement is revolutionary. This comment sheds light on the ways in which he makes decisions. Justice Breyer's remarks suggest the United States Constitution is not the only consideration in the Justices' conference room. The public needs to be more informed about what is motivating the decisions the Court makes. Are the justices interpreting the Constitution or are they creating social policy out of their own biases?

THE COURT AS LEGISLATOR

The Court is making public policy with this very political decision. The Court took it upon itself to rectify a Texas law that the majority of the Court thought was antiquated and irresponsible, even though that is not the job of the Court. The job of repealing laws belongs to the Texas legislature. Justice Kennedy justifies invalidating the Texas law, which does not infringe any fundamental right or affect any suspect class, by saying, "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." While it is true that an antiquated law can and should be repealed, it is the responsibility of the

56. See Foster v. Florida, 537 U.S. 990, 990 n.1 (2002) (Thomas, J., concurring in denial of certiorari) ("While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court's [constitutional] jurisprudence should not impose foreign moods, fads, or fashions on Americans.").
57. This Week with George Stephanopoulos (ABC News broadcast, July 6, 2003) ("Whether our Constitution and how it fits into the governing documents of other nations, I think will be a challenge for the next generations.").
58. See Vance v. Bradley, 440 U.S. 93, 97 (1979) ("Judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").
59. See Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al. at 17-25, Lawrence (No. 02-102) ("Determining for all States such a controversial public policy issue found nowhere in the Constitution would be a mistake. This core area of marriage, the family, and appropriate sexual behavior should be left to the States.").
60. Lawrence, 123 S. Ct. at 2484.
legislative branch to make such determinations.61 The Court itself has said it must be careful in extending protection to an asserted liberty right, because by doing so the matter is taken out of the hands of the public and into the hands of the members of the Court and their own preferences.62 Again, in Lawrence, the Court did not heed its own advice. Rather, the majority decided an issue based on its own preferences and took the issue away from the legislature to decide.

The fact that many states have repealed their sodomy laws in recent years reveals people who were opposed to the Bowers ruling have successfully lobbied their respective legislators for a change in the laws, indicating the way in which democracy is supposed to work.63 Courts should not invalidate laws based on the premise they are unwise or unpopular because citizens, through their votes, are empowered with that authority.64 The legislature is responsible for changing standards of morality in keeping with public opinion, but, "any lag in legislative response to a mere change of public opinion . . . cannot and must not constitute the basis for a finding that the legislature's original enactment exceeded its constitutional authority."65

The Bowers Court said there was no fundamental right to sodomy only seventeen years ago.66 What has happened in the last seventeen years to overturn its precedent? One reason the Court gave for overruling Bowers was the amount of controversy surrounding the case.67 If controversy is the barometer, the Court will soon become the rubber stamp for whatever is popular thought at the time, instead of protectors of the Constitution. Inevitably, the opinions of the Court will

61. Id. at 2497 (Scalia, J., dissenting) ("But it is the premise of our system that those judgments [to repeal laws] are to be made by the people, and not imposed by a governing caste that knows best."); United States v. Henderson, 34 M.J. 174, 178 (C. M. A. 1992) ("The Legislative Branch, of course, is free to modify its statute if it chooses, and the Executive could limit prosecution. As a court, however, we are not involved in the merits of the policy. We interpret statutes; and we can strike them down only when they violate the Constitution.").

62. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.").

63. Brief Amicus Curiae of the Center for the Original Intent of the Constitution at 28, Lawrence (No. 02-102).

64. New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (explaining it is not for the courts, "to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.").

65. Respondent's Brief at 49, Lawrence (No. 02-102).

66. See Bowers, 478 U.S. 186.

67. Lawrence, 123 S. Ct. at 2483.
change as the political tides of the country change. If the Court makes decisions based on public opinion rather than following substantive due process jurisprudence, the Justices will be interpreting political polls instead of our Constitution.

THE EQUAL PROTECTION ARGUMENT

Although not addressed by the majority, Justice O'Connor relied on her analysis of the Equal Protection claim in her concurring opinion. The state argued the law in question regulates conduct, not a class of people, but Justice O'Connor insisted the law is aimed at homosexuals as a class because it is aimed at something so central to whom they are. Whether homosexuals are discriminated against as a class or not, the law should still be examined under rational basis review because homosexuals are not a suspect class which warrants heightened scrutiny. Because this law does not facially distinguish between homosexuals and heterosexuals (only homosexual conduct performed by homosexuals, heterosexuals, or bisexuals), the Court must find the intent to discriminate in order to use heightened scrutiny.

There is no evidence of animus toward homosexuals on the part of the legislators who created the law. The fact that the Texas legislature repealed the part of the law that pertained to heterosexual sodomy could be an example of the fact that it is taking systematic steps to harmonize its laws with decisions the Court has made regarding the fundamental rights of the married. Within the context of rational review, it is permitted for the state action to be underinclusive in its approach to solving a problem. The legislature may make laws to deal with one part of the problem without addressing other parts of the same problem and still satisfy rational review.

68. Id. at 2484 (O'Connor, J., concurring).
69. Id. at 2486-87 (O'Connor, J., concurring).
71. United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred.").
73. Respondent's Brief at 26, Lawrence (No. 02-102).
75. Id.
RATIONAL BASIS REVIEW

Finding no fundamental right or suspect class, the Court (both the majority and concurring opinions) used rational review to decide the case.\footnote{See Lawrence, 123 S. Ct. at 2488 (Scalia, J., dissenting).} Usually, all that is required to satisfy rational review is any conceivable legitimate interest on the part of the state for the law in question and that the law was a rational means of accomplishing that interest.\footnote{See Fritz, 449 U.S. at 181 (Stevens, concurring).} Despite such a low bar, in this case, the Court found no legitimate interest.\footnote{See Lawrence, 123 S. Ct. at 2484.}

The state asserted its interest in promoting public morality as its reason for creating a sodomy law.\footnote{Respondent's Brief at 27, Lawrence (No. 02-102).} The Court said the promotion of morality is not a legitimate state interest.\footnote{Lawrence, 123 S. Ct. at 2484.} This is contrary to what the Court has said in the past.\footnote{Id. at 2490 (Scalia, J., dissenting).} The Lawrence Court proceeded to overrule Bowers, which said the state’s interest in promoting morality was enough to satisfy rational basis review.\footnote{Lawrence, 123 S. Ct. at 2483-84.} There are a number of court decisions that have relied on Bowers in finding that morality is enough to sustain a law under rational review.\footnote{Id. at 2490 (Scalia, J., dissenting).} “[C]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”\footnote{Id. (Scalia, J., dissenting) (including, inter alia, Alabama’s prohibition on the sale of sex toys in order to safeguard public morality, federal statute and regulations banning from military service those who engage in homosexual conduct, and the rejection of a claimed constitutional right to commit adultery) (citations omitted).} Are all of these laws to be overturned now that Bowers has
been overruled? 85 There are countless other laws based on morality in this country. 86 The majority mistakenly gives no weight to this once established basis in its decision. With this part of the decision, the Court has again departed from what it has said in the past.

Besides the asserted reason given by the state, the Court also read a number of amicus briefs which laid out conceivable legitimate reasons for the law. 87 Justice Kennedy does not address or even mention any of them in his opinion. For example, is it not legitimate for the state of Texas to want to protect its citizens from disease? Over half of the men in Texas who are infected with AIDS contracted it by homosexual contact, while only five percent of the men contracted it through heterosexual contact. 88 It seems rational to forbid homosexual sex as a step in eliminating the problem. After all, it is only necessary for the law to be rationally related to the goal, it does not have to be the perfect way to go about solving the problem. 89

Justice O'Connor said in her concurrence, "Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage." 90 In fact, the promotion of the institution of marriage was asserted by several interested parties to this case. 91 A brief by Texas legislators explained that this law is but one in a series of laws designed to promote marriage and discourage sex outside of marriage. 92 Texas penalizes, and in some cases criminalizes, extra-marital sexual conduct. 93 The law against homosexual sodomy could be one more way to encourage people not to have

85. Id. at 2495 (Scalia, J., dissenting) ("This effectively decrees the end of all morals legislation.").
86. Brief of Amici Curiae American Center for Law and Justice at 18, Lawrence (No. 02-102). Bans on race discrimination, obscenity, pornography, corruption of minors, fraud, ethical breaches in the legal profession, and gambling are just a few examples.
87. Namely, public health and promotion of marriage, both addressed below.
89. Williamson, 348 U.S. at 487.
90. Lawrence, 123 S. Ct. at 2487-88.
91. Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al. at 17-25, Lawrence (No. 02-102); Brief Amicus Curiae of the Family Research Council, Inc. and Focus on the Family at 20-26, Lawrence (No.02-102); Brief of Amici Curiae Center for Marriage Law, Lawrence (No. 02-102).
93. Id. at 23.
sex outside of marriage.\(^9\) Why was this given no consideration by the Court? Perhaps the reason is that it didn't fit into the Court's agenda.

In Justice O'Connor's use of rational review in her Equal Protection analysis, she suggested a "more searching form of rational basis review" be used when a "law exhibits a desire to harm a politically unpopular group."\(^9\) Evidence shows that homosexuals are not a "discrete and insular minority" in need of extra protection. There are already sixteen states and countless cities that provide government employees some benefits or recognition to domestic partners of homosexuals.\(^7\) Across the country there are countless elected officials who are openly homosexual, ranging from U.S. Congressmen to city school board members.\(^7\) The homosexual cause is spearheaded by Lambda Legal, an organization with a carefully drawn and successful plan, to have courts change public policy in the area of homosexual issues.\(^8\) This is not a group without power in our political system. This is not a group that warrants anything more than rational basis review.

**Implications for the Future**

*Constitutional Right To Same-Sex Marriage*

The implications of this decision, and more importantly how it was justified, are only beginning to be seen, but will no doubt be felt by generations to come. Most of the speculation centers around the effect it will have on same-sex marriages. Nowhere in the opinion does the Court say it supports same-sex marriages, but if one reads between the lines this support is evident.\(^9\) Specifically, the support is hinted at

\(^9\) Id.

\(^9\) *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).


\(^9\) See http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1207 (last modified Feb. 5, 2000) ("Nothing illustrates the strength of our strategies more than our current U.S. Supreme Court challenge to Texas's sodomy law. The case represents the culmination of our carefully laid plan to use the state courts to get rid of many of these horrible [sodomy] laws, while simultaneously developing the best case to take to the nation's highest court and try to eliminate these laws once and for all."). This is Lambda Legal's website, which explains its many successes and plans for the future.

\(^9\) *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting).
between these lines: "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." There seems to be little question Justice Kennedy believes same-sex marriage to be in the same realm of personal autonomy and liberty that he defends in Lawrence. If Lawrence shows us nothing else, it shows us that the political views of Supreme Court Justices carry a lot of weight. Is the constitutionally protected right to same-sex marriages that far off? Justice Kennedy's opinion must have been understood by the public to be opening the door for same-sex marriage. Why else would the Dallas Morning News start running ads for same sex unions on its wedding announcement pages less than a month after the Lawrence decision? This is yet another example of the fact that the Court was too active in setting public policy.

The Equal Protection argument, raised by the petitioners in Lawrence, is another door for same-sex marriage advocates to try to walk through. Justice O'Connor's Equal Protection analysis centers on the fact that men can violate this statute only by having sex with other men. It is the gender of the person the man has sex with that makes the action legal or not. Justice Scalia points out the same argument can be made for laws regarding same-sex marriage. Only Justice O'Connor examined the Equal Protection claim in Lawrence, so it will remain to be seen what the other Justices will do if such an argument is brought before them.

There is a federal law that says states do not have to recognize same-sex marriages which are recognized in other states. Once one

100. Id. at 2481-82.
102. See 123 S. Ct. at 2495 (Scalia, J., dissenting).
103. Id.
104. Id.
105. Id.
106. Id.
107. See 28 U.S.C. § 1738C (2000) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").
of the states decides to recognize same-sex marriages this law will probably be challenged under the Full Faith and Credit clause of the Constitution.\textsuperscript{108} If the law is struck down by the Full Faith and Credit Clause, all states will be forced to recognize same-sex marriages whether or not same-sex marriages are actually legal in that state.\textsuperscript{109} This would not be the result of people voting to legalize same-sex marriages. Rather, it would be the indirect result of the Supreme Court decision in \textit{Lawrence}.

\textbf{OPENING THE DOOR TO NEW RIGHTS}

The \textit{Lawrence} decision also opens the door to finding new constitutionally protected rights. Justice Kennedy concluded his opinion by saying, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."\textsuperscript{110} Imagine the number of times this sentence will be quoted in court decisions in the coming years either as a justification for a new right that court has found or as a plea from citizens looking for justification for their actions. In fact, it has already been quoted.\textsuperscript{111} This statement appears to be a free pass for judges to find "fundamental rights" or "liberty interests" wherever they want to find them. This is one more example of the Court exerting legislative power instead of judicial review.

\textbf{A CONSTITUTIONAL RIGHT TO DIE}

Petitioners argue that when the fundamental rights to intimate relationships, bodily integrity, and the sanctity of the home are combined, one can find the liberty to engage in consensual, adult, noncommercial homosexual sex.\textsuperscript{112} If the Court is convinced by this, as it appears Justice Kennedy is, there are implications for laws against committing or helping someone commit suicide because assisted sui-

\textsuperscript{108} Evan P. Schultz, \textit{A More Perfect Union: The Supreme Court's road to upholding gay marriage is not exactly a straight one}, LEGAL TIMES, July 21, 2003.

\textsuperscript{109} See U.S. \textsuperscript{Const.} art. IV, § 1. ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").


\textsuperscript{112} Petitioners Brief at 9, \textit{Lawrence} (No. 02-102).
Suicide also involves rights of bodily integrity, intimate relationships, and sanctity of the home.

In Washington v. Glucksberg, the Court grappled with the issue as to whether a person had the right to assisted suicide.\footnote{Id. at 702 (1997).} The Court explained that even though, "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy [this] does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ."\footnote{Id. at 727-28 (citations omitted).} Justice Kennedy joined in that opinion.\footnote{Id. at 704.} The Lawrence opinion suggests he has changed his mind. He now seems to be saying that all intimate and personal decisions are protected. How many of the other Justices have changed their minds as well?

In Cruzan v. Director, Missouri Dep't of Health, the Court suggested there is a fundamental right to refuse unwanted medical treatment.\footnote{497 U.S. 261, 278-79 (1990).} The Court of Appeals in Washington relied on the holding in Cruzan to declare there is a right to die.\footnote{Id. at 725.} When the Supreme Court overruled the Court of Appeals it made sure to explain, "[t]he right assumed in Cruzan . . . was not simply deduced from abstract concepts of personal autonomy."\footnote{Id. at 727-28 (citations omitted).} Again, it seems the Court has not heeded its own advice and has done in Lawrence exactly what it cautioned against in Washington. It found a protected liberty right to engage in homosexual sodomy in the abstract concept of personal autonomy and liberty of the Fourteenth Amendment.\footnote{See Lawrence, 123 S. Ct. 2472.} The next time a right to die case comes before the Court, you can be sure the petitioner will be in "search for greater freedom" because of Lawrence.

LEGALIZATION OF VICTIMLESS CRIMES

The Lawrence Court seems to imply that as long as the action involved is consensual and private, the government should not interfere.\footnote{Id. at 2482 ("The case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.").} What does that mean for the laws we have against private consensual acts such as drugs, prostitution, adult incest, polygamy, pornography, gambling, and suicide? Many of these laws are based on
the state interest in promoting morality, which, as we have seen above, the Court no longer finds legitimate for restricting freedom. To many people these come as welcome words. We are a society that values freedom above all else. We are an "it's all about you"\textsuperscript{121} and "do what feels good"\textsuperscript{122} society. Why should the government be able to tell us what we can and cannot do in our own homes? Whose morality must we be forced to live by?

Initially, the idea of unlimited freedom, unless someone is going to be injured, sounds appealing. The major problem with this concept is that we do not live in isolation. The things we do in private have ramifications on the society in which we live. We deny reality when we think because an act is in private it has no effect on the one doing it or on others. The Clinton scandal reminded us all of that fact. When it was discovered what President Clinton had been doing in private, the nation reconsidered its choice of him as President.\textsuperscript{123}

The word "morality" means "conformity with recognized rules of correct conduct."\textsuperscript{124} Some kind of standard of what is right and what is wrong must be established in any society for people to know how to interact with one another. The well known book, \textit{The Lord of the Flies}, explores this idea.\textsuperscript{125} The story is about a group of boys who are living on a deserted island after their plane was shot down during a war.\textsuperscript{126} The story suggests that if we were left to our own desires, without any rules or morals to guide us, we would deteriorate into a society of savages.\textsuperscript{127} This is just a fictional story, but it communicates real concerns people have about a society where anything goes. It is precisely because of this fact we give up some of our freedoms when we join a society. The Supreme Court recognized over a century ago that this power to restrict our freedoms for the common good "must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace

\textsuperscript{121} This is the slogan for Day-Timer, Inc. \textit{See} http://www.daytimer.com (last visited Sept. 30, 2003).

\textsuperscript{122} This is the slogan for Diet Coke. \textit{See} http://www.dietcoke.com (last visited September 27, 2003).

\textsuperscript{123} It is interesting to note, if President Clinton had lived in Georgia, he could have been convicted under the statute in \textit{Bowers} because it applied to heterosexual sodomy as well homosexual acts. His actions in private and lying to cover it up led to impeachment hearings.

\textsuperscript{124} \textit{BLACK'S LAW DICTIONARY} 456 (Second Pocket ed. 2001).

\textsuperscript{125} \textit{See generally} \textit{WILLIAM GOLDING, LORD OF THE FLIES} (Berkley Publishing Group 1954).

\textsuperscript{126} \textit{Ibid.}

\textsuperscript{127} \textit{Ibid.}
and security of the many, provided only they are permitted to do as they please." 128 The Court went on to say that it is the role of the legislative branch to "exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." 129

The police powers given to the states do not mean the state is free to trample on our freedoms. It means the state has power to require its citizens to abide by standards of right and wrong in the way they deal with each other. What the majority of the public thinks is moral will inevitably change over time, "but what has not changed is the understanding that government may require adherence to certain widely accepted moral standards and sanction deviation from those standards, so long as it does not interfere with constitutionally protected liberties." 130 The majority in Lawrence did not say moral standards were interfering with constitutionally protected liberties. The Court took it a step further and declared that moral standards are not even a legitimate state interest. 131

Interestingly, in making its decision, the Lawrence Court speaks in terms of "demeaning the existence" of homosexuals by having laws that restrict their ability to have personal relationships of their choosing. 132 The Court must think it would be immoral to demean their existence. A prostitute could easily make the argument that her existence has been demeaned by laws that restrict her choice to have consensual sex with whomever will pay her. However, all states other than Nevada have decided to make prostitution illegal. The reason for criminalizing it is an effort to protect public order and morality. 133 When all is said and done, the real issue for the Court in this case does not seem to be whether morality plays a proper role in legislation. The real issue for the Court seems to be its disagreement with the particular morals chosen by Texas.

129. Id.
130. Respondent's Brief at 49, Lawrence (No. 02-102).
131. See 123 S. Ct. at 2484.
132. Id. ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").
133. For example, in North Carolina the statute that criminalizes prostitution comes under the subchapter heading "Offenses against Public Morality and Decency." See N.C. GEN. STAT. § 14-204 (2003).
CONCLUSION

The Court’s rationale in Lawrence is unlike any rationale it has used before. It has abandoned traditional substantive due process analysis and opened the door for itself to take a more active role in settling public debates, rather than letting the people cast votes to accomplish the same outcome. Nine men and women, who have not been elected to office, are making decisions which have implications on political issues with much public debate surrounding them. This reality should not go on without being noticed and addressed. People may agree with the outcome of Lawrence, but when the next case comes before the Court and the issue is another hotly debated topic, they may not like the way the Court decides that issue. One never knows what side of the issue the current panel of Justices will end up favoring at any given time. Predicting how the Court will rule will become more and more difficult as it strays further and further from established constitutional analysis.

Think back to the description of the town given at the beginning of this article. It is a town where anything goes. It is a town where government does not legislate morality. It is a town where people are able to “search for greater freedom” for themselves. After Lawrence, this town could soon be a reality. This is not a cause for celebration. It is a cause for alarm. In a town where anything goes, one never knows what will go next.

Susan Austin Blazier