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Decriminalizing Sexual Conduct: The Supreme Court Ruling in Lawrence v. Texas.

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RECENT DEVELOPMENT

DECRIMINALIZING SEXUAL CONDUCT: THE SUPREME COURT RULING IN *LAWRENCE v. TEXAS*

JESSICA A. GONZALEZ

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[The] penalties and purposes [of sodomy statutes] . . . have . . . far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes . . . seek to control a personal relationship that . . . is

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within the liberty of persons to choose without being punished as criminals.[1]

I. INTRODUCTION

Last summer the United States Supreme Court, in an unprecedented ruling, invalidated Texas's anti-sodomy law,[2] which criminalized homosexual behavior.[3] Prior to this decision, the Court used the Due Process Clause and the Bill of Rights of the United States Constitution to protect a "zone of privacy," allowing individuals to make personal decisions without governmental involvement.[4] But when gay and lesbian activists petitioned the judicial branch to extend this right of privacy to homosexuals, the Court turned a deaf ear.[5] With *Lawrence v. Texas*,[6] the Supreme Court changed the way the Court considered homosexuals and expanded the liberty interests contained in the U.S. Constitution.[7] With *Lawrence*, the Supreme Court moved the judiciary branch into the twenty-first century.[8]

The *Lawrence* decision acknowledged a seventeen-year-old legal quandary in America—while the Court protected a right of privacy for private,

1. Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003).

2. *See* TEX. PEN. CODE ANN. § 21.06 (Vernon 2003) (providing that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex").

3. *See Lawrence*, 123 S. Ct. at 2484 (holding that the Texas anti-sodomy statute violated the Due Process Clause of the Fourteenth Amendment).

4. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846-51 (1992) (reaffirming the privacy rights protected by the Fourteenth Amendment Due Process Clause); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 691-99 (1977) (expanding the interpretation of privacy rights set out in previous cases to include the right of a minor to receive contraceptive devices); Roe v. Wade, 410 U.S. 113, 154 (1973) (defending a woman's right to obtain an abortion as a protected liberty interest); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending the *Griswold* right of privacy to unmarried persons); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (establishing the right of privacy found in the Bill of Rights).

5. *See* Bowers v. Hardwick, 478 U.S. 186, 190-92 (1986) (refusing to protect the right to engage in sodomy as a privacy right).

6. 123 S. Ct. 2472 (2003).

7. *See Lawrence*, 123 S. Ct. at 2478, 2480-81 (criticizing states for criminalizing private sexual behavior and extending privacy rights to homosexuals); Linda Greenhouse, *The Supreme Court: Homosexual Rights; Justice, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES, June 27, 2003, at A1 (stating that the ruling carves out protection for private sexual behavior); *see also* Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221(C.D. Cal. 2003) (listing that the rights of privacy protected by the Constitution now include the right to engage in private, consensual homosexual conduct).

8. *Cf.* Bernard James, *Privacy and Education*, NAT'L L.J., Aug. 4, 2003, at 58 (discussing how the *Lawrence* decision reshaped the constitutional landscape).

personal decisions, the Court also permitted states to punish homosexuals for their personal decisions and sexual behaviors.[9] For almost a century, the Supreme Court defined the right of privacy "as a component of the Constitution which concern[ed] a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[10] In 1986, this "zone of privacy" collided with a brick wall when the Supreme Court permitted states to silence homosexuals by criminalizing their choices and actions.[11] With *Lawrence*, the Supreme Court destroyed this wall and prohibited the government from branding homosexuals as criminals because of their private, consensual decisions.

Before discussing the *Lawrence* decision, Part II of this Recent Development summarizes the status of the law concerning homosexual behavior prior to 2003. This discussion includes the ruling in *Bowers v. Hardwick*[12] and Texas decisions sustaining the statute criminalizing sodomy.[13] Part III then reviews the factual background leading to the Supreme Court decision in *Lawrence* and examines the *Lawrence* opinions, including the majority decision penned by Justice Kennedy, Justice O'Connor's concurring opinion, and the dissenting opinion authored by Justice Scalia. Finally, Part IV concludes by predicting which direction the Court may head and what future goals the homosexual legal agenda may contain.

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9. *Compare Casey*, 505 U.S. at 846-51 (reaffirming the privacy liberties protected by the Fourteenth Amendment), *Carey*, 431 U.S. at 691-99 (expanding the privacy rights of the previous cases to include the right of a minor to receive contraceptive devices), *Roe*, 410 U.S. at 154 (defending a woman's right to choose abortion as a protected liberty interest), *Eisenstadt*, 405 U.S. at 453 (extending the *Griswold* right of privacy to unmarried persons), *and Griswold*, 381 U.S. at 486 (establishing the right of privacy found in the Bill of Rights), *with Bowers*, 478 U.S. at 190-92 (refusing to protect a homosexual's right to privacy).

10. *Griswold*, 381 U.S. at 485.

11. *See Bowers*, 478 U.S. at 196 (approving the constitutionality of an anti-sodomy statute). The previously decided cases recognized issues falling within the realm of privacy protected by the Constitution, yet the *Bowers* court retreated when asked to recognize similar rights for homosexuals. *Id.* at 195-96.

12. 478 U.S. 186 (1986).

13. *See* Baker v. Wade, 774 F.2d 1285, 1286-87 (5th Cir. 1985) (reaffirming the previous decision and denying the motion for rehearing en banc); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (holding that the statute did not violate the Constitution); City of Dallas v. England, 846 S.W.2d 957, 959 (Tex. App.—Austin 1993, writ dism'd w.o.j.) (reaffirming *Morales* in that the Texas anti-sodomy statute creates an irreparable injury); State v. Morales, 826 S.W.2d 201, 205 (Tex. App.—Austin 1992, writ granted) (holding that the statute violates a homosexual's right to privacy).

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II. THE STATE OF LAW CONCERNING SODOMY STATUTES PRIOR TO *LAWRENCE V. TEXAS*

In trying to validate his rights as a citizen, John Geddes Lawrence faced an uphill battle that many before him failed to overcome.[14] Throughout America, homosexual men and women have fought for the protection of their constitutional rights; gay men, lesbian women, and bisexuals have petitioned the government for marital rights, adoption privileges, and recognition in the armed forces.[15] While American culture has changed to include homosexuals in its daily life,[16] the judicial branch has been hesitant in accepting gay culture within the legal system.[17]

In 1986, *Bowers* set the tone for judicial decisions concerning homosexual issues.[18] In *Bowers*, the State of Georgia asked the Court to validate an anti-sodomy statute. The State questioned a lower court's ruling, which held that the statute violated homosexuals' fundamental rights, and the Court agreed that the lower court erred in its decision.[19] In this opinion, the Supreme Court upheld the Georgia sodomy statute, which punished individuals engaging in acts of sodomy, and dismissed homosexuals' claims to privacy.[20] In trying to protect his constitutional rights, Lawrence had to persuade the Court that this seventeen-year-old decision was incorrect and needed renovation.[21]

Previous Texas decisions interpreting the anti-sodomy statute also worked against Lawrence in trying to assert his constitutional rights.[22] In

14. *Cf.*, *Baker*, 774 F.2d at 1286-87 (refusing to declare the Texas anti-sodomy statute unconstitutional).

15. *See* Evan Thomas, *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 43 (discussing the battles homosexuals have endured over the past twenty years).

16. *See* Vicky Hallett, *Who Do You Love?*, U.S. NEWS & WORLD REP., July 14, 2003, at 38 (discussing the acceptance of gay culture in mainstream America).

17. *See* Pam Belluck, *Massachusetts Gives New Push to Gay Marriage*, N.Y. TIMES, Feb. 5, 2004, at A1 (discussing the ruling by the Massachusetts Supreme Court that only full-fledged marriage would allow homosexuals to avoid being assigned "to second-class status").

18. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (validating the constitutionality of an anti-sodomy statute).

19. *Id.* at 189.

20. *Id.* at 196. The Court disagreed with the notion that the Constitution confers a right of privacy to homosexuals to engage in sodomy, refused to classify sodomy as a fundamental right, and declined to invalidate a law that was supported by morality interests. *Id.* at 190-96.

21. *Cf.* Jerry Elmer, *A Victory for Gay Rights in* Lawrence v. Texas, R.I. B.J., Nov./Dec. 2003, at 5 (discussing the background and arguments available to Lawrence when appealing his conviction).

22. While some opinions from state judges invalidated the anti-sodomy statute, the federal court of appeals in *Baker v. Wade* declared the statute constitutional and then reaffirmed the constitutionality of the decision in a motion for rehearing. *Compare* City of

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1985, the United States Court of Appeals for the Fifth Circuit refused to invalidate the Texas anti-sodomy statute.[23] The court held that because it was bound by the decisions of the Supreme Court, it could not invalidate the statute for violating the privacy rights of homosexuals.[24] Furthermore, the court held that the statute was rationally related to a legitimate governmental interest.[25] Therefore, the court explained, the statute neither denied homosexuals equal protection of the law nor violated a right to privacy.[26] On rehearing, the court stated that the job of the court was not to determine the "morality of sexual conduct for the people of the [S]tate of Texas."[27] The court stated further that until the Supreme Court declared otherwise, the court would follow the direction of the Supreme Court and would not invalidate anti-sodomy laws.[28]

While American courts remained reluctant to invalidate anti-sodomy statutes, *Lawrence* pushed homosexual issues to the forefront. Gay activists demanded that the courts recognize homosexuals as persons deserving of constitutional protections.[29] In doing so, *Lawrence* forced the legal system to reconsider its views toward homosexuals and to face the changes in morality and society.

III. *LAWRENCE V. TEXAS*

The *Lawrence* holding created a new playing field for homosexuals. Prior to this decision, the Supreme Court and lower state and federal courts suggested that homosexuals might never enjoy the rights to affirm their relationship in a sexual way without facing criminal prosecutions.[30]

Dallas v. England, 846 S.W.2d 957, 959 (Tex. App.—Austin 1993, writ dism'd w.o.j.) (reaffirming *Morales* in that the statute criminalizing sodomy creates an irreparable injury), *and* State v. Morales, 826 S.W.2d 201, 205 (Tex. App.—Austin 1992, writ granted) (sustaining the district court's ruling that the statute violates a homosexual's right to privacy), *with* Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (reversing the district court's ruling that the statute violated a constitutional right to privacy and violated equal protection of the law), *and* Baker v. Wade, 774 F.2d 1285, 1286-87 (5th Cir. 1985) (reaffirming the previous decision and denying the motion for rehearing en banc).

23. *See Baker*, 769 F.2d at 293 (upholding the Texas sodomy statute).

24. *Id.* at 292.

25. *Id.*

26. *Id.*

27. *Baker*, 774 F.2d at 1286-87.

28. *Id.* at 1287.

29. *See* Jerry Elmer, *A Victory for Gay Rights in* Lawrence v. Texas, R.I. B.J., Nov./Dec. 2003, at 5 (discussing the many amicus curiae briefs filed on behalf of gay activists, including briefs filed by the gay and lesbian activist groups, medical groups, and the American Civil Liberties Union).

30. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (declining to protect homosexuals' constitutional rights); *Baker*, 769 F.2d at 292 (refusing homosexuals' claims to privacy and equal protection).

Justice Kennedy, speaking for the majority, altered this notion.[31] In a 6-3 decision, *Lawrence* invalidated a Texas anti-sodomy law and protected the privacy rights of homosexuals.[32]

A. *Lawrence's Arrest, Convictions, and Appeals*

On September 17, 1998, Houston sheriff's officers entered the home of John Geddes Lawrence while investigating a report of a weapons disturbance.[33] Upon entering his private residence, the officers observed Lawrence and another man, Tyron Garner, engaged in a sexual act.[34] The officers promptly arrested the two men, who were then charged and convicted of "engaging in homosexual conduct."[35] The State described the transgression as a violation of Section 21.06 of the Texas Penal Code.[36]

After convictions in the Justice of the Peace Court, both Lawrence and Garner appealed to the Harris County Criminal Court for a trial de novo.[37] In a motion to quash the charges, Lawrence and Garner argued that the law was unconstitutional as violating the Equal Protection Clause by sanctioning discrimination based on sexual orientation and as violating the federal constitutional rights of privacy and due process provided for in the Fourteenth Amendment.[38] The court denied the motion, found both men guilty of the offense, and imposed monetary punishment.[39] Lawrence and Garner consolidated their cases and continued appealing their convictions.[40]

In the Texas Court of Appeals, Lawrence and Garner continued to argue that the statute violated their constitutional rights.[41] Specifically,

31. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) (overruling *Bowers* and affirming homosexuals' privacy rights).

32. *Id.*

33. Appellant's Petition for Writ of Certiorari at 5, Lawrence v. Texas, 41 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2001) (No. 02-102).

34. *Id.*

35. *Id.*

36. *Id.* Texas Penal Code Section 21.06, dubbed the Homosexual Conduct Law, states that "a person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). The facts asserted by the State in its complaint stated that Lawrence and Garner "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." Appellant's Petition for Writ of Certiorari at 5, Lawrence v. Texas, 41 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2001) (No. 02-102).

37. Appellant's Petition for Writ of Certiorari at 5, Lawrence v. Texas, 41 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2001) (No. 02-102).

38. *Id.* at 6.

39. *Id.*

40. *Id.*

41. *Id.* at 6-7.

Lawrence and Garner argued that the criminal statute "discriminates on the basis of sexual orientation without a sufficient justification," and infringes upon their right to privacy by allowing the government to criminalize their private sexual conduct.[42] In asserting their equal protection and due process rights, Lawrence and Garner asked the court to agree that *Bowers* was incorrect.[43]

In oral arguments for this appeal, the State agreed there was no compelling government interest to justify the statute; the State instead justified it as promoting family values and principles of morality.[44] In the summer of 2000, a panel of the Texas Court of Appeals reversed the sodomy convictions and held that the statute discriminated on the basis of gender.[45] After the reversal of the convictions, the State moved for rehearing, and the Texas Court of Appeals reheard the matter en banc and reinstated the convictions.[46]

Upon rehearing, the court of appeals refused to recognize any constitutional infringements.[47] The court agreed that the United States Constitution and the Texas Constitution guaranteed the "equality of rights to all persons" and prohibited the state "from purposefully discriminating between individuals . . . ."[48] After discussing the applicable equal protection tests and the arguments from both sides, the court resolved that homosexuals are not defined as a suspect class, sodomy is not considered a fundamental right, and prohibition of sodomy is rationally related to a legitimate governmental interest.[49] Thus, the court held, the statute did not violate Lawrence's and Garner's equal protection rights.[50]

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42. Appellant's Petition for Writ of Certiorari at 6-7, Lawrence v. Texas, 41 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2001) (No. 02-102).

43. *Id.* at 7.

44. *Id.* (indicating that the counsel for the State lacked the ability to invent a compelling state interest).

45. *Id.*

46. *Id.*

47. Lawrence v. State, 41 S.W.3d 349, 353, 359-62 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

48. *Id.* at 351-52. The court also mentioned the Texas Equal Rights Amendment. *Id.* at 352. The court stated that this amendment had no federal counterpart, and since both constitutions already guaranteed equal protection and due process rights, the Texas Equal Rights Amendment merely provided greater specific protection for these rights. *Id.*

49. *See id.* at 352-57 (discussing the rational relation test, suspect classifications, the strict scrutiny test, the classification of sexual orientation, the facially neutral statute test, the legitimate morality state interests saving the statute, and the legislative prerogative to regard some acts more heinous than others). As the court walked through each of these steps, the majority agreed with the State's arguments that the statute preserved public morals, and the legislature could conclude that homosexual sodomy is more reprehensible than heterosexual sodomy. *Id.* at 354, 356.

50. *Id.* at 357.

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The court also dismissed Lawrence's argument that the law violated the right of privacy protected by the federal and state constitutions.[51] The court asserted that while neither contained an explicit right of privacy, both constitutions created limits around zones of privacy, which the government may not surpass without satisfactory justification.[52] The court reiterated that there are zones of privacy found in the U.S. Constitution and the Texas Constitution, including the right of association, the right to be secure in the home and papers, the freedom of worship, and guarantees for due process of law.[53] Ultimately, the court refused to hold that the constitutional zones of privacy shield homosexual conduct from criminal prosecutions.[54]

In April of 2001, Lawrence and Garner filed a petition to the Texas Court of Criminal Appeals, and the court refused the petition.[55] Thereafter, Lawrence and Garner timely filed their petition for writ of certiorari, imploring the United States Supreme Court to conclusively determine whether the Texas anti-sodomy statute violated homosexuals' constitutional rights of privacy, due process, and equal protection of the law.[56] The Supreme Court granted certiorari in 2002 to consider the constitutional questions asked in Lawrence's appeals and petition.[57] Finally, on June 26, 2003, the Supreme Court, through Justice Kennedy, answered these questions.[58]

B. *Majority Decision in* Lawrence v. Texas

Speaking for the Court, Justice Kennedy stated that the case should be decided by determining whether Lawrence and Garner were free, as consenting adults, to engage in private conduct protected by the Due Process Clause of the Fourteenth Amendment.[59] Before answering this question,

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51. *Id.* at 362.
52. *Lawrence*, 41 S.W.3d at 359-60.
53. *Id.*
54. *Id.* at 362.
55. Appellant's Petition for Writ of Certiorari at 8, Lawrence v. Texas, 41 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2001) (No. 02-102).
56. *Id.* at 10-11.
57. Lawrence v. Texas, 41 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2001), *cert. granted*, 537 U.S. 1044 (U.S. Dec. 2, 2002) (No. 02-102). The Supreme Court granted certiorari on three issues presented. Lawrence v. Texas, 123 S. Ct. 2472, 2476 (2003). First, whether the Texas Homosexual Conduct Law violated the Fourteenth Amendment's guarantee of equal protection of the law. *Id.* Second, whether the criminal convictions violated an interest of liberty and privacy protected by the Fourteenth Amendment's Due Process Clause. *Id.* And finally, whether the previous decision of *Bowers v. Hardwick* should be overturned. *Id.*
58. *Lawrence*, 123 S. Ct. at 2472-84.
59. *Id.* at 2476.

the Court agreed that it was necessary to reconsider the decision in *Bowers*.[60] After examining several court holdings relating to the "substantive reach of liberty under the Due Process Clause" and after reconsidering the opinions reached in *Bowers*,[61] the Court answered the much anticipated question of whether homosexuals have the right to engage in private, sexual conduct without facing criminal prosecution.

1. Case Law Defining the Liberty Interest Protected by the Due Process Clause

Justice Kennedy stated that the decisions concerning this liberty interest reached as far back as the early 1900s, but *Griswold v. Connecticut*[62] was the most important starting point pertinent to this case.[63] In *Griswold*, the Supreme Court invalidated a state law that prohibited the use of drugs or devices of contraception; the Court described the protected interest as a liberty interest that falls "within the zone of privacy created by several fundamental constitutional guarantees."[64] Justice Kennedy discussed the subsequent cases that protected and expanded *Griswold*'s notion of a right to make certain decisions concerning sexual conduct,[65] including *Eisenstadt v. Baird*,[66] *Roe v. Wade*,[67] and *Carey v. Population Services International*.[68] At the time the Supreme Court decided *Bowers*, the majority of the Court believed that the Bill of Rights and the Fourteenth Amendment contained a right to privacy with regard to personal decisions concerning the marital relationship and sex.[69]

With *Bowers*, the Supreme Court took one huge step back in the progression of privacy rights protected by the Bill of Rights and the Due Process Clause of the Fourteenth Amendment. The questions presented in *Bowers* concerned a Georgia statute that criminalized sodomy between two individuals.[70] In *Bowers*, the Court determined that the U.S. Consti-

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60. *Id.*

61. *Id.* at 2476-84

62. *Id.* at 2476.

63. 381 U.S. 479 (1965).

64. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

65. *Lawrence*, 123 S. Ct. at 2476-77.

66. *See* Eisenstadt v. Baird, 405 U.S. 438, 452 (1972) (extending the *Griswold* right of privacy to unmarried persons).

67. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (recognizing that the protection of liberty in the Due Process Clause includes the right of a woman to have an abortion).

68. *See generally* Carey v. Population Servs. Int'l, 431 U.S. 678, 697-99 (1977) (extending the rights in *Griswold*, *Eisenstadt*, and *Roe* to include the right of a minor to receive contraceptive devices).

69. *See Lawrence*, 123 S. Ct. at 2477 (asserting that these opinions defined the state of the law when the Court decided *Bowers v. Hardwick*).

70. Bowers v. Hardwick, 478 U.S. 186, 188 n.1 (1986).

tution did not confer a right of privacy for homosexuals to engage in sodomy and declined to include sodomy as a fundamental right protected by the Due Process Clause.[71] After recognizing the one difference between the two cases,[72] Justice Kennedy proceeded to dismantle the *Bowers* decision.

2. Dismantling *Bowers v. Hardwick*

After tracking the progression of this protected interest in a right of privacy, Justice Kennedy attacked the retreat that the Court made in *Bowers*, which failed to continue to protect this "zone of privacy."[73] Throughout his opinion, Justice Kennedy noted several flaws in Justice White's analysis, and corrected Justice White's mistakes by re-stating the issue presented and referring to missing facts.[74] After deconstructing the *Bowers* decision, Justice Kennedy declared a new state of law with respect to the Due Process Clause and homosexuals.[75]

a. Correcting the Issue Before the Court

Justice White began the *Bowers* opinion by stating that the issue at hand concerned "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[76] Justice Kennedy immediately recognized the failure of the *Bowers* Court to appreciate the real issue at hand.[77] Justice Kennedy declared, "That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward . . . ."[78] Justice Kennedy then looked beyond the asserted rationales of sodomy statutes, and he recognized that the purposes and penalties of such statutes are to affect private human conduct taking place in the home.[79] Justice Kennedy asserted that Texas sought to control decisions affecting a personal relationship, and that these decisions are choices a person should be able to make without being punished as a

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71. *Id.* at 190-95.

72. *Lawrence*, 123 S. Ct. at 2477 (acknowledging that the Georgia statute differed from the Texas statute in that the Georgia statute prohibited sodomy regardless of the sex of the participants of the conduct).

73. *See id.* at 2478-80 (discussing the flaws contained in the *Bowers* opinion including the misstated issue and the incorrect analysis).

74. *Id.*

75. *Lawrence*, 123 S. Ct. at 2484.

76. *Bowers*, 478 U.S. at 190.

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

78. *Id.*

79. *Id.*

criminal.[80] Justice Kennedy concluded that the liberty protected by the Bill of Rights and the Due Process Clause grants homosexual persons the freedom to control their personal affairs.[81]

b. Correcting the History of Sodomy Laws and Prosecutions

In addition to mislabeling the liberty at stake, the *Bowers* Court misunderstood the reason Hardwick fought for his rights and liberties all the way to the Supreme Court.[82] Justice White explained that by protecting the rights of homosexuals, the Court would have to define sodomy as a fundamental right.[83] As Justice White correctly recognized, the rights qualifying for heightened protection involve rights that are either implicit in the idea of liberty, or deeply rooted in American nature.[84] But as Justice White continued, he incorrectly stated that "[p]roscriptions against [sodomy] have ancient roots."[85] Justice Kennedy highlighted this error and corrected Justice White's mistake.[86]

While he stated that he did not want to engage in a debate of the history of homosexual conduct, Justice Kennedy pointed out the historical facts that Justice White neglected to include in his opinion.[87] While Justice White argued that anti-sodomy statutes have existed since the beginning of America, Justice Kennedy clarified that the colonial laws concerning sodomy included interactions between men and women, as well as the conduct between persons of the same sex.[88] Therefore, Justice Kennedy stated, the early laws were not directed at a class of persons, namely homosexuals, but at a nonprocreative conduct generally.[89] Justice Kennedy also observed that only nine states introduced statutes to

80. *Id.*

81. *Id.*

82. *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (refusing to classify sodomy as a fundamental right and neglecting to discuss whether homosexuals deserve more protection as a class of persons politically disfavored). The *Bowers* Court felt that the respondent, Hardwick, wanted a proclamation protecting anal sex as a fundamental right. *Id.* at 191. The *Bowers* Court grossly misstated the purpose and goals of Bowers's fight to the Court; Hardwick and other homosexuals fought for recognition of their privacy rights and equality in the eyes of the law. *See generally Lawrence*, 123 S. Ct. at 2472 (stating that the *Bowers* Court demeaned the existence of homosexuals and their personal choices).

83. *Bowers*, 478 U.S. at 191.

84. *Id.* at 191-92.

85. *Id.* at 192.

86. *Lawrence*, 123 S. Ct. at 2478-80.

87. *Id.* at 2478-81.

88. *Id.* at 2478.

89. *Id.* at 2479. Kennedy also noted that these laws were not enforced against consenting men and women acting in private. *Id.*

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prosecute same-sex conduct.[90] But even then, Justice Kennedy stated, some of the states did not prosecute the offenders of the sodomy statutes.[91] Furthermore, these states have taken steps to abolish their outdated prohibitions.[92]

Justice Kennedy then attacked the *Bowers* Court's attempt to impose the belief that homosexual conduct is sinful.[93] Justice Kennedy stated, "It must be acknowledged . . . that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral."[94] Justice Kennedy acknowledged the influence that religious beliefs, respect for a traditional family, and ideas of acceptable behavior have played in shaping the condemnation of homosexuality.[95] Justice Kennedy borrowed from *Planned Parenthood of Southeastern Pennsylvania v. Casey*[96] and re-stated that the role of the Court is to "define the liberty of all, not to mandate our own moral code."[97] Thus, Justice Kennedy refused to condemn the private, personal decisions of homosexuals, but chose instead to define the liberty of all persons.[98]

Finally, Justice Kennedy criticized Chief Justice Burger's rationale in *Bowers* that "homosexual conduct [has] been subject to state intervention throughout the history of Western civilization."[99] Justice Kennedy pointed out that only current beliefs and laws are relevant to the inquiry of the constitutionality of sodomy laws.[100] Throughout the last half century, a protection of liberty concerning an adult person's private decisions has emerged in American society.[101] Furthermore, Justice Kennedy commented, the *Bowers* Court should have realized this protection of privacy.[102] The American Law Institute, in its 1955 Model Penal Code, clarified that it did not recommend criminal penalties for private, consen-

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90. *Id.* at 2479-80.

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

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. 505 U.S. 833 (1992).

97. *See Lawrence*, 123 S. Ct. at 2480 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)).

98. *See id.* (stating the issue in terms of whether the majority may use state powers to enforce religious and moral views on society as a whole).

99. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, J., concurring); *see also* Lawrence v. Texas, 123 S. Ct. 2472, 2480 (2003) (criticizing Chief Justice Burger's analysis and holding in *Bowers*).

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

101. *Id.*

102. *Id.*

sual sexual activity.[103] Eventually, Justice Kennedy remarked, the states either ignored the statutes by not prosecuting offenders or by repealing the sodomy prohibitions.[104] Justice Kennedy noted the sources and facts the *Bowers* Court failed to appreciate, and in doing so, Justice Kennedy changed the perception of homosexuals and the law.

3. Cases Following *Bowers v. Hardwick*

After he addressed the *Bowers* holding, Justice Kennedy paid respect to the decisions following thereafter. In 1992, the Court returned to protecting the liberty found in the Due Process Clause.[105] In *Casey*, the Court explained that the Constitution demanded autonomy for a person making decisions concerning procreation, contraception, marriage, family relationships, education, and child rearing.[106] In *Lawrence*, the Court, through the words of Justice Kennedy, extended this autonomy to homosexuals.[107]

Justice Kennedy also recognized the decision in *Romer v. Evans* and distinguished the issues in that case from the issues presented in *Lawrence*.[108] In *Romer*, the Court invalidated an amendment to the Colorado Constitution which named homosexuals, lesbians, and bisexuals as a class of persons.[109] The *Romer* Court concluded that the classification bore no rational relation to any legitimate governmental purpose.[110] Therefore, the amendment violated the Equal Protection Clause.[111] Justice Kennedy acknowledged Lawrence's argument that the Texas sodomy statute violated the Equal Protection Clause of the Fourteenth Amendment.[112] However, the majority of the Court felt it was better to invalidate the statute based on a due process argument rather than an equal protection violation.[113] The Court feared a stigma might remain if the states still prohibited the conduct under a reworded statute, and this kind of holding would invite states to inflict additional discrimination and prosecution on homosexuals through *Bowers*-type statutes.[114]

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103. *Id.* (referencing the American Law Institute's Model Penal Code).

104. *Id.* at 2481.

105. *See generally* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming constitutional protection for personal decisions).

106. *Id.* at 851.

107. *See Lawrence*, 123 S. Ct. at 2484 (declaring that this right extends to homosexuals).

108. *Id.* at 2482.

109. Romer v. Evans, 517 U.S. 620, 624 (1996).

110. *Id.* at 635.

111. *Id.*

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

113. *Id.*

114. *Id.*

From this statement, Justice Kennedy proceeded to discuss the stigma that attached to persons convicted under sodomy statutes.[115] While some may argue that a conviction under this statute appears trivial, Justice Kennedy asserted that this conviction means much more.[116] Under sodomy statutes, a homosexual will forever carry the marking of a criminal merely for expressing a relationship with another person.[117] This conviction would require a person to give notice of the offense on job and school applications and to register as a sex offender in a number of states.[118] These consequences of a sodomy conviction underscore the consequences of state-sponsored condemnation attributed to criminal convictions.[119]

4. Overruling *Bowers v. Hardwick*

The foundation of *Bowers* suffered serious erosion from the *Casey* and *Romer* decisions and sustained fatal attacks from Justice Kennedy in *Lawrence v. Texas*.[120] Furthermore, the public has criticized the opinion not just for the historical inaccuracies, but also for the flawed reasoning.[121] Despite the clarity brought to the status of *Bowers*, Justice Kennedy unmistakably pronounced that *Bowers* was no longer good law.[122] He stated, "*Bowers* was not correct when it was decided, and it is not correct today. . . . *Bowers v. Hardwick* should be and now is overruled."[123] Justice Kennedy declared that a state could no longer demean a homosexual's existence or control a homosexual's destiny "by making their private sexual conduct a crime."[124] In conclusion, Justice Kennedy wrote:

> Had those who drew and ratified the Due Process Clauses . . . known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They 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. As the Constitution endures, persons in every gen-

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115. *Id.*
116. *Id.*
117. *Lawrence*, 123 S. Ct. at 2482.
118. *Id.*
119. *Id.*
120. *Id.* at 2483.
121. *Id.*. Justice Kennedy mentions the lack of support from various states and their refusal to follow the *Bowers* decision in interpreting their own constitutions. *Id.* Kennedy also discussed the rejection of *Bowers* in the European courts. *Id.*
122. *Lawrence*, 123 S. Ct. at 2483-84.
123. *Id.* at 2484.
124. *Id.*

> eration can invoke its principles in their own search for greater freedom.[125]

And with that, Justice Kennedy and the Supreme Court redesigned the way the law considered homosexuals and redefined the meaning of privacy found in the Due Process Clause.

C. *Concurring and Dissenting Opinions*

As in other controversial issues, *Lawrence* contained differing opinions held by the remaining members of the Court.[126] Justice O'Connor filed a separate concurring opinion; she too felt the statute violated the Constitution, but that it violated the Equal Protection Clause rather than the Due Process Clause.[127] Furthermore, Justice Scalia filed a dissenting opinion, which Chief Justice Rehnquist and Justice Thomas joined. The three dissenting Justices disagreed with the majority in that *Bowers v. Harwick* should remain good law and that no violation of the Constitution had occurred.[128]

Justice O'Connor concurred with the majority's holding in that the Texas anti-sodomy statute violated the Constitution, however, O'Connor opposed the majority's decision to overrule *Bowers*.[129] Rather than relying on the Due Process Clause, Justice O'Connor felt the Equal Protection Clause of the Constitution solved the constitutional problem at hand.[130] The Equal Protection Clause states that similarly situated persons should be treated the same.[131] After a discussion concerning Texas's treatment of homosexuals as compared to heterosexuals and Texas's insufficient attempts to justify this inequality with morality concerns, Justice O'Connor concluded that the Texas sodomy statute violated the Constitution and the Equal Protection Clause.[132] While O'Connor agreed with the majority on some points, Justice Scalia, on the other hand, disputed the entire majority opinion.[133]

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125. *Id.*

126. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 911-1002 (1992) (containing separate concurring and dissenting opinions filed by Justices White, Stevens, Blackmun, Rehnquist, and Scalia).

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

128. *Id.* at 2488-98 (Scalia, J., dissenting) (discussing his disagreement with the majority opinion).

129. *Id.* at 2484 (O'Connor, J., concurring).

130. *Id.*

131. *Id.*

132. *Lawrence*, 123 S. Ct. at 2484-88 (O'Connor, J concurring).

133. *See* Evan Thomas, *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 42 (commenting on Justice Scalia's disgust for the majority opinion as he read his dissent from the bench).

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In his dissenting opinion, Justice Scalia harshly criticized the majority in *Lawrence* on several grounds.[134] First, Justice Scalia condemned the Court for failing to follow the doctrine of stare decisis.[135] Justice Scalia admitted to the flexibility of the doctrine, but he felt that the majority inconsistently chose when to utilize the doctrine.[136] Furthermore, Justice Scalia pointed out that too many laws in today's society relied upon the propositions asserted in *Bowers*, and these laws will now be subjected to constitutional question following the *Lawrence* holding.[137] Justice Scalia also criticized the majority for dodging the issue of whether homosexual conduct is a fundamental right and for failing to correctly apply a constitutional test.[138]

Finally, Justice Scalia rejected Justice O'Connor's claim that the Texas sodomy statute violated the Equal Protection Clause. Justice Scalia argued that the statute applied equally to men and women and reasoned that the law was adequately justified by morality concerns.[139] In all, Justice Scalia believed this decision belonged to the individual states and that the proper forum for disagreements concerning sexual issues belonged in the legislative branch.[140]

IV. What Is Next for Homosexuals in America?

As great and radical as the opinion may be, *Lawrence* left several doors open. The majority opinion only decided that homosexuals may engage in sexual relations with members of the same sex without being prosecuted as criminals.[141] The majority clearly stated that this opinion did not require the government to give formal recognition to homosexual relationships.[142] However, Justice Scalia argued that this opinion was "the

134. *See Lawrence*, 123 S. Ct. at 2488-98 (Scalia, J., dissenting) (condemning the majority and Justice O'Connor's opinions).

135. *Id.* at 2488-89.

136. *Id.* Justice Scalia stated that the majority whimsically overruled a previous decision because the holding had been eroded by previous decisions, had been subjected to criticism, and had not been socially relied upon. *Id.* at 2489. Scalia argued that if this is the new standard, other decisions, including *Roe v. Wade*, should also be discarded. *Id.*

137. *Id.* at 2490 (noting that state laws prohibiting bigamy, adult incest, masturbation, prostitution, and adultery all are based upon moral choices). Justice Scalia feels that since the Court did not limit the scope of this holding, citizens may challenge these laws using the *Lawrence* decision as support. *Id.*

138. *See id.* at 2492 (discussing the lack of courage of the Court to confront the issue of whether this right of homosexuals is a fundamental right and characterizing the morality issues as legitimate state interests ample enough to sustain the due process arguments).

139. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

140. *Id.* at 2497.

141. *Id.* at 2484 (Kennedy, J.).

142. *Id.*

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product of a Court . . . that has largely signed on to the so-called homosexual agenda . . . mean[ing] the agenda . . . directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[143] So where do homosexuals go from here?

A. *How Far Will* Lawrence v. Texas *Progress?*

As America shifts from a homophobic nation to a "'post-gay' America," the question remains: How far will America go?[144] As the Supreme Court handed down *Lawrence*, questions emerged as to the limitations of the holding. Will the Court validate gay marriage?[145] Can gays serve openly in the military?[146] May same-sex couples adopt children?[147] As *Lawrence* validated a homosexual's right to privacy, the next logical step would be to extend the *Lawrence* principles to these other issues.

Since the Supreme Court announced its holding in *Lawrence v. Texas* last summer, numerous opinions have mentioned, discussed, or disagreed with the *Lawrence* decision.[148] While the cases concerned varying issues,

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143. *Compare id.* (expressing what the opinion applies to and what it does not apply to), *with id.* at 2496-97 (Scalia, J., dissenting) (showing his disapproval of the majority).

144. *See* Vicky Hallett, *Who Do You Love?*, U.S. NEWS & WORLD REP., July 14, 2003, at 38 (discussing the acceptance of gay culture in mainstream America).

145. *See* Evan Thomas, *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 43 (outlining the states that currently recognize some form of same-sex marriage).

146. *Contra id.* at 42 (stating that national security protects the infamous "don't ask, don't tell" policy).

147. *See id.* at 44 (admitting that while some states allow single homosexuals to adopt children, only eleven states permit same-sex couples to legally adopt a child); *see also* Lofton v. Sec. of Dep't of Children & Family Serv., 358 F.3d 804, 813-15 (11th Cir. 2004) (holding that the Florida adoption statute which prohibited homosexuals from adopting children did not violate homosexuals' constitutional rights). In early 2004, the United States Court of Appeals published this decision relating to a Florida adoption statute prohibiting homosexuals from adopting children. *Id.* In this opinion, the court of appeals held that because adoption is a statutory privilege and not a fundamental right, the state may make a classification that would be unconstitutional in other contexts. *Id.* at 809. Furthermore, the court stated that the statute did not violate the equal protection rights of homosexuals. *See id.* at 818-19 (holding that the state has a legitimate interest in promoting a heterosexual family structure, and therefore the statute is constitutional). Finally, the court refused to engage in the role of "super legislature" and promote legislative policies. *Id.* at 827 (stating that the legislature is the appropriate forum to debate this issue).

148. These cases range from state courts to federal courts of appeals, and present different issues, to which the *Lawrence* principles are applied or are rejected accordingly. *See, e.g.*, Hensala v. Dep't of the Air Force, 343 F.3d 951, 957-58 (9th Cir. 2003) (questioning whether *Lawrence v. Texas* overruled the military's "don't ask, don't tell" policy); Doe v. Pryor, 344 F.3d 1282, 1283 (11th Cir. 2003) (refusing standing to petitioners who requested that the court declare Alabama's anti-sodomy statute unconstitutional); United States v. Peterson, 294 F. Supp. 2d 797, 801-02 (D.S.C. 2003) (declining the defendant's

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homosexuals are clearly moving their concerns to the forefront.[149] Three cases concerning how far to extend this level of privacy for homosexuals were announced within four months of the *Lawrence* decision, and interestingly, all cases arrived at different decisions.[150]

While Arizona and New Jersey derailed homosexual efforts to gain marital rights,[151] homosexuals celebrated with the decision of *Goodridge v. Department of Public Health*,[152] where the Massachusetts Supreme Court bridged the gap between heterosexual marital rights and same-sex marriages.[153] The court boldly declared that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[154] While this decision is only an opinion from a state

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argument that *Lawrence v. Texas* renders the Child Pornography Prevention Act of 1996 unconstitutional); Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003) (listing the rights of privacy protected by the Constitution, including the right to engage in private, consensual homosexual conduct); Standhardt v. Superior Court, 77 P.3d 451, 453 (Ariz. Ct. App. 2003) (applying a rational basis test to determine that a statute granting marriage licenses to only heterosexual couples is constitutional); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003) (stating that the decision of whom to marry, whether to start a family, and how to show sexual intimacy are encompassed in the liberties and rights of due process); State v. Clark, 588 S.E.2d 66, 68-69 (N.C. 2003) (refusing to apply the privacy principles of *Lawrence* to an appeal from a statutory rape conviction); State v. Freeman, 801 N.E.2d 906, 909 (Ohio Ct. App. 2003) (dismissing the defendant's contention that *Lawrence v. Texas* granted the defendant privacy to commit sexual battery).

149. *Compare Peterson*, 294 F. Supp. 2d at 803 (refusing to extend the "right to privacy in certain sexual activities" in the home, recognized in *Lawrence*, to include a right to view child pornography in the home), *and Freeman*, 801 N.E.2d at 909 (dismissing the defendant's contention that *Lawrence* provided privacy for nonconsensual, sexual acts), *with Hensala*, 343 F.3d at 957-58 (questioning whether *Lawrence v. Texas* overruled the military's "don't ask, don't tell" policy), *and Goodridge*, 798 N.E.2d at 959 (stating that the liberties and rights of due process protect the privacy of a person to decide personal issues without interference of the government).

150. *Compare Goodridge*, 798 N.E.2d at 957 (interpreting the Massachusetts marriage licensing statute as allowing for same-sex marriages), *with* Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 at *3 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (holding that the New Jersey marriage statutes do not permit same-sex marriages), *and Standhardt*, 77 P.3d at 465 (concluding that Arizona could deny same-sex marriages without violating constitutional rights).

151. *See Standhardt*, 77 P.3d at 465 (holding that it is not a violation of constitutional rights for the State of Arizona to forbid same-sex marriages); *Lewis*, 2003 WL 23191114 at *3 (determining that the state's legislature did not intend to accept same-sex marriages, even though it did not expressly define marriage as union between a woman and a man).

152. 798 N.E.2d 941 (Mass. 2003).

153. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (construing "civil marriage to mean the voluntary union of two person as spouses, to the exclusion of all others").

154. *Id.*

supreme court, the Massachusetts court created shock waves throughout America.[155]

Since the Massachusetts decision, legislatures and political figures across the country, including the President of the United States, senators, governors, and presidential candidates, have shared their opinions and goals relating to same-sex marriages.[156] After *Goodridge*, the Massachusetts governor argued that the state could approve civil unions and conform to the decision, then continue to work toward a constitutional amendment banning same-sex marriages.[157] Furthermore, in the State of the Union address delivered on January 20, 2004, President George W. Bush stated that America must protect the sanctity of marriage.[158] While at the time President Bush did not expressly demand a constitutional amendment, he hinted that if the courts follow this direction, the people would be forced to turn to the constitutional process.[159] Some other political candidates, on the other hand, are still debating their positions on same-sex marriages and civil unions.[160] While most potential candidates do not support gay marriage, they agree the states have the right to make the decision of whether to allow same-sex marriages and that state legislatures need to take action to protect the rights of gay couples.[161] So, who will make these decisions?

155. Pam Belluck, *Massachusetts Gives New Push to Gay Marriage*, N.Y. TIMES, Feb. 5, 2004, at A1 (noting reactions to this decision).

156. *See* Mike Allen, *Gay Marriage Looms As Issue; GOP Push for Amendment is Dilemma for Bush*, WASH. POST, Oct. 25, 2003, at A1 (discussing President Bush and Senator Bill Frist's opinions on same-sex marriages); Pam Belluck, *Massachusetts Gives New Push to Gay Marriage*, N.Y. TIMES, Feb. 5, 2004, at A1 (discussing the reaction of Massachusetts lawmakers to the decision).

157. Frank Phillips & Raphael Lewis, *Civil Union Law Sought; Romney Says More Would Satisfy the SJC*, BOSTON GLOBE, Nov. 20, 2003, at A1.

158. Greg Hitt, *Bush Shifts Focus to the Home Front*, WALL ST. J., Jan. 21, 2004, at A3.

159. Mike Allen, *Gay Marriage Looms As Issue; GOP Push for Amendment is Dilemma for Bush*, WASH. POST, Oct. 25, 2003, at A1. Included in the supporters of a constitutional amendment banning same-sex marriages is Senate Majority Leader Bill Frist. Senator Frist supports the constitutional amendment that requires marriage to be limited to those between a man and a woman. *Id.* At the time, President Bush did not specifically lend his support to a constitutional amendment. *Id.*

160. *See generally Gay Marriage Ruling Has '04 Democrats Walking Fine Line*, CNN, Jan. 13, 2004, *at* http://cnn.com/2003/ALLPOLITICS/11/19/elec04.prez.dems.gay.marriage/index.html (discussing the opinions of several Democrats seeking the party's nomination in the upcoming presidential election regarding the gay marriage issue) (on file with the *St. Mary's Law Journal*).

161. *See id.* (quoting Senator Joe Liberman and Senator John Kerry).

B. *Where Should the Progression Occur and Who Will Initiate the Changes?*

Clearly, homosexual activists have an uphill road before them. Although the Supreme Court ruled in favor of homosexuals' right to privacy, and America is changing its homosexual fears, the battle has just begun. Despite the fact that gays have enjoyed successes in the judicial system, the courts may not be the best place to answer these questions.

The role of the judicial branch is to oversee the decisions of the executive and legislative branches.[162] Its main purpose is to interpret the laws of the country and to protect the rights of individuals when the government infringes upon them.[163] As asserted by Justice Scalia, "it is the premise of our system that [these] judgments are to be made by the people, and not imposed by a governing caste that knows best."[164] The first step homosexual activists should take in reaffirming their rights should be through the legislative branch and through the individual states. As expressed in the Preamble to the Constitution, the Framers created the United States government to serve the people, to protect the people, and to establish justice for the people.[165] As American attitudes shift to accept openly gay individuals,[166] homosexual activists need to convince the elected representatives to catch up to the changes in society. Few representatives can deny that a state has the power to make laws for the betterment of its communities, and if the national government does try to take away this right, the masses can resist.[167]

The changes moving through legislative bodies have already begun.[168] After the Massachusetts decision in *Goodridge*, the Massachusetts Legislature set out to amend the state marriage statute and to allow civil unions, but forbid civil marriages.[169] In an advisory opinion issued on

162. *Cf.* United States v. Butler, 297 U.S. 1. 62-63 (1936) (discussing the Court's role in reviewing legislation).

163. *See id.* at 63 (emphasizing that the one duty of the judiciary is to ensure that legislation "squares" with the Constitution).

164. Lawrence v. Texas, 123 S. Ct. 2472, 2497 (2003) (Scalia, J., dissenting).

165. *See* U.S. CONST. pmbl. (creating this government to "form a more perfect Union," provide for defense, ensure domestic tranquility, and establish justice).

166. *See* Vicky Hallett, *Who Do You Love?*, U.S. NEWS & WORLD REP., July 14, 2003, at 38 (commenting on the acceptance of gays in American culture).

167. *See* U.S. CONST. amend. IX, X (stating that the rights not detailed in the Constitution belong to the states and to the people).

168. *See* Jennifer Peter, *Gay Marriage Lobbying Heats Up*, S. FLA. SUN-SENTINEL, Feb. 11, 2004, at 2A, *available at* 2004 WL 67632550 (describing the spectators at the Massachusetts Constitutional Convention, where lawmakers proposed a constitutional amendment banning gay marriages).

169. *See id.* (discussing a compromise amendment allowing civil unions but banning same-sex marriages).

February 3, 2004, the Massachusetts Supreme Court pronounced that "[o]nly full-fledged gay marriage would pass constitutional muster."[170] In response to this advisory opinion, the Massachusetts Legislature prepared to amend the state constitution to define marriage as a union between a man and a woman.[171] In response to the state's attempts to circumvent the *Goodridge* decision, activists flooded the Massachusetts statehouse to support and to oppose the proposed constitutional amendment.[172] Despite the lawmakers' best efforts, the Massachusetts Constitutional Convention recessed after two days of fiery debates and behind-the-scenes negotiating without a constitutional amendment banning gay marriages.[173]

Contributing to this hotly debated issue, the Mayor of San Francisco directed the county clerk of the city to issue marriage licenses to gay couples.[174] By the end of the day, the office issued ninety-five marriage licenses to gay couples, and eighty-seven partners took marriage vows in the office.[175] In an effort to invalidate the marriages performed in San Francisco, a conservative family values group planned to file a lawsuit to challenge the same-sex marriage licenses.[176] In addition, in the aftermath of the decision by the Massachusetts Supreme Court and by the Mayor of San Francisco, President Bush explicitly endorsed a constitutional amend-

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170. *Id.*

171. *See* Elizabeth Mehren, *Mass. Session Ends with No Gay Marriage Decision; Third Bill to Reverse Ruling That Legalized Same-Sex Union Fails*, L.A. TIMES, Feb. 13, 2004, at A14, *available at* 2004 WL 55892687 (reviewing the failed amendments, which defined marriage as a union between a woman and a man). The earliest the legislative could reconvene was March 11, 2004, and even if the current legislature did approve an amendment banning same-sex marriage, it would not be presented to voters until November 2006. *Id.*

172. *See* Jennifer Peter, *Gay Marriage Lobbying Heats Up*, S. FLA. SUN-SENTINEL, Feb. 11, 2004, at 2A, *available at* 2004 WL 67632550 (stating that Christian conservatives arrived armed with petitions to support the amendment, and children of gay couples came to plead their cases to lawmakers).

173. *See* Elizabeth Mehren, *Mass. Session Ends with No Gay Marriage Decision; Third Bill to Reverse Ruling That Legalized Same-Sex Union Fails*, L.A. TIMES, Feb. 13, 2004, at A14, *available at* 2004 WL 55892687 (describing the adjournment of the Massachusetts Constitutional Convention).

174. *San Francisco Plans to Marry More Same-Sex Couples*, DOW JONES INT'L NEWS, Feb. 13, 2004, *available at* WESTLAW 2/13/04 DJINS 18:02:00.

175. *Id.* Furthermore, same-sex couples applied for marriage licenses at the Travis County clerk's office on Friday, February 13, knowing the licenses would be denied, but wanting to make a point. Peggy Fikac, *Texas Seek Same-Sex Marriages; Although They Knew Travis County Would Reject Them, the Couples Were Making a Point*, S.A. EXPRESS-NEWS, Feb. 14, 2004, at 6A. A 2003 Texas law declared that Texas bans same-sex marriages and refuses to recognize same-sex marriages or civil unions from any other state. *Id.*

176. *San Francisco Plans to Marry More Same-Sex Couples*, DOW JONES INT'L NEWS, Feb. 13, 2004, *available at* WESTLAW 2/13/04 DJINS 18:02:00.

ment banning gay marriage.[177] Due to the efforts of gay activists, family values groups, lawmakers, and politicians, homosexual issues have found a place in the American limelight and continue advancing each day. Only time will tell how far the changes will go.

As society alters its opinions of homosexuality, the government will catch up—the Court cannot be impatient with democratic change.[178] However, if the government fails to amend its old beliefs, either the people can change their representatives, or the courts can step in to protect the constitutional rights of all men and women as seen currently across the country.[179] Homosexual activists should first plead their cases to the legislative branch, and as last resort, to the courts. Accomplishing these goals will take time, but the revolution is coming.

V. Conclusion

In conclusion, change is inevitable—societies either change or perish. Last summer, the Supreme Court recognized a major change in both American society and in principles of morality. The Court declared that the government could no longer punish homosexuals as criminals,[180] and in doing so, *Lawrence* revolutionized the way homosexuals live in America. While homosexuality was once considered immoral and criminal, *Lawrence* protects homosexuals' rights to make their own decisions concerning their existence, their sexuality, and their lives.[181] The scope of *Lawrence* is uncertain now, and only time will tell how far this decision will reach. Total acceptance by communities may take time, but thankfully homosexuals can no longer be branded as criminals for expressing their sexuality in the privacy of their homes.

177. *Bush Proposes Constitutional Ban on Gay Marriage*, WASH. POST, Feb. 29, 2004 at A3.

178. Lawrence v. Texas, 123 S. Ct. 2472, 2497 (2003) (Scalia, J., dissenting).

179. *See San Francisco Plans to Marry More Same-Sex Couples*, DOW JONES INT'L NEWS, Feb. 13, 2004, *available at* WESTLAW 2/13/04 DJINS 18:02:00 (discussing how a family values group petitioned the court to issue a restraining order enjoining the clerk from issuing marriage licenses); *see also* Jennifer Peter, *Gay Marriage Lobbying Heats Up*, S. FLA. SUN-SENTINEL, Feb. 11, 2004, at 2A *available at* 2004 WL 67632550 (describing the masses of people who protested at the Massachusetts Constitutional Convention).

180. *See Lawrence*, 123 S. Ct. at 2484 (pronouncing that a state can no longer demean homosexuals' existence by criminalizing their private sexual conduct).

181. *See id.* (stating that "petitioners are entitled to respect for their private lives").