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# A Closer Look at *Bowers v. Hardwick*: State and Federal Decisions Concerning Sexual Privacy and Equal Protection

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# A Closer Look at Bowers v. Hardwick: State and Federal Decisions Concerning Sexual Privacy and Equal Protection

**Cover Page Footnote**

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# A CLOSER LOOK AT *BOWERS v. HARDWICK*: STATE AND FEDERAL DECISIONS CONCERNING SEXUAL PRIVACY AND EQUAL PROTECTION

*Jonathan Tatun*<sup>1</sup>

## I. INTRODUCTION

Although the United States Supreme Court was “quite unwilling”<sup>2</sup> to announce a fundamental right to engage in homosexual sodomy in 1986, the Court specifically left the question of whether criminal sodomy laws should be repealed or invalidated for the state legislatures and state courts to decide.<sup>3</sup> However, the Court did not entirely exclude the possibility that it might review similar issues in the future. In fact, at the time of this publishing,<sup>4</sup> the Supreme Court is deliberating on a case from Texas that challenges the constitutionality of a criminal statute which prohibits consensual homosexual activity.<sup>5</sup>

In *Bowers v. Hardwick*, the Supreme Court reversed the Eleventh Circuit’s holding that the Georgia anti-sodomy statute at issue violated a federal fundamental right to “private and intimate association” found in the Ninth Amendment<sup>6</sup> and the Due Process Clause<sup>7</sup> of the Fourteenth Amendment.<sup>8</sup> The majority found that

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<sup>2</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

<sup>3</sup> *Id.* at 190; *see also* *Roe v. Wade*, 410 U.S. 113, 167 n.2 (1973) (Stewart J. concurring) (“[T]he protection of a person’s general right to privacy - his right to be let alone by other people - is . . . left largely to the law of the individual States.”) (quoting *Katz v. United States*, 389 U.S. 347, 350-51 (1967)).

<sup>4</sup> Spring, 2003.

<sup>5</sup> *Lawrence v. State*, 41 S.W.3d 349 (Tx. App. 2001), *cert. granted*, 123 S. Ct. 661 (Dec 2, 2002). The Supreme Court heard argument in the case on March 26, 2003.

<sup>6</sup> U.S. CONST. amend. IX, which states “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

<sup>7</sup> U.S. CONST. amend. XIV, § 1, which states in pertinent part “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”

the federal constitutional line of privacy cases did not go so far as to protect individuals from the states proscribing private sexual conduct between consenting adults.<sup>9</sup> Ten years later, when the issue was again before the Georgia Supreme Court, it deferred to the state legislature and upheld the same statute at issue in *Bowers*.<sup>10</sup> Just two years later, the same Georgia Supreme Court reversed itself and held that the statute violated the privacy guarantees of the Georgia Constitution.<sup>11</sup>

Until 1961, all fifty states outlawed sodomy.<sup>12</sup> By the time of the *Bowers* decision, in 1986, twenty-four states, as well as the District of Columbia, still criminalized private consensual sodomy.<sup>13</sup> Today, only eleven states<sup>14</sup> (plus Puerto Rico) continue to criminalize sodomy in general, and another four<sup>15</sup> specifically criminalize same-sex sodomy.<sup>16</sup> There are now twenty-six states and the District of Columbia that have legislatively repealed

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<sup>8</sup> *Bowers*, 478 U.S. at 189. See also *Roe*, 410 U.S. at 153 (finding a right of privacy, “whether it be in the Fourteenth Amendment’s concept of personal liberty and restrictions on state action . . . or in the Ninth Amendment’s reservation of rights to the people . . .,” broad enough to encompass a woman’s right to choose).

<sup>9</sup> *Bowers*, 478 U.S. at 195.

<sup>10</sup> *Christensen v. State*, 468 S.E.2d 188 (Ga. 1996).

<sup>11</sup> See *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (finding that male appellant could not be convicted for performing an unforced act of sexual intimacy with another man legally capable of consenting thereto in the privacy of his home).

<sup>12</sup> *Bowers*, 478 U.S. at 193. Although definitions have varied from time to time and state to state, sodomy laws for the general purposes of this article refer to the conduct of oral or anal sex between a man and a woman and/or between a man and a man.

<sup>13</sup> *Id.*

<sup>14</sup> Alabama, Florida, Idaho, Louisiana, Massachusetts, Michigan, Mississippi, North Carolina, South Carolina, Utah, and Virginia.

<sup>15</sup> Kansas, Missouri, Oklahoma, and Texas.

<sup>16</sup> American Civil Liberties Union, *Crime and Punishment in America: State by State Breakdown of Existing Laws and Repeals*, available at <http://www.aclu.org/lesbiangayrights/lesbiangayrights.cfm?id=5028&c=41> [hereinafter *Crime and Punishment*] (last visited April 29, 2003).

sodomy laws and another nine<sup>17</sup> states where laws have been struck down by the courts.<sup>18</sup>

Federal and state challenges to laws that target or affect same-sex conduct and relationships take a variety of forms. Such laws are claimed to violate not only the Due Process Clause and the Ninth Amendment, but also the Equal Protection Clause of the Fourteenth Amendment,<sup>19</sup> the Establishment and Free Speech Clauses of the First Amendment,<sup>20</sup> the Eighth Amendment,<sup>21</sup> and a host of other federal and state constitutional provisions such as the Privileges and Immunities Clause<sup>22</sup> and even the fundamental right to participate in the political process.<sup>23</sup>

The *Bowers* decision essentially invited a range of litigation - and not just on the state level. The Court rejected the respondent's argument that moral beliefs provided no rational basis for the law and refused to find a fundamental right that includes engaging in homosexual sodomy.<sup>24</sup> However, the Court's decision

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<sup>17</sup> Arkansas (2001), Georgia (1998), Kentucky (1992), Maryland (1999), Minnesota (2001), Montana (1997), New York (1980), Pennsylvania (1980), and Tennessee (1996).

<sup>18</sup> See *Crime and Punishment*, *supra* note 16.

<sup>19</sup> U.S. CONST. amend. XIV, § 1, which states in pertinent part "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (finding the state constitutional amendment at issue unconstitutional on federal equal protection grounds).

<sup>20</sup> U.S. CONST. amend. I, which states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ." See, e.g., *Stewart v. U.S.*, 364 A.2d 1205, 1208-09 (D.C. 1976) (arguing that the sodomy statute at issue violates the Establishment Clause).

<sup>21</sup> U.S. CONST. amend VIII, which states in pertinent part "cruel and unusual punishments [shall not] be inflicted." See, e.g. *State v. Smith*, 766 So. 2d. 501, 513-17 (La. 2000).

<sup>22</sup> U.S. CONST. Amend. XI, which states in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." See, e.g., *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 448 (Or. 1998) (denying benefits to same-sex couple violated state privileges and immunities clause).

<sup>23</sup> *Romer v. Evans*, 517 U.S. 620, 625 (1996) (rejecting the theory of infringement of a fundamental right but affirming the state court decision on equal protection grounds).

<sup>24</sup> *Bowers*, 478 U.S. at 196. In its holding, the Court stated that "[the respondent] insists that majority sentiments about the morality of homosexuality

was limited to the Fourteenth Amendment.<sup>25</sup> The Court implied that the issue may be heard again in the future under the Equal Protection Clause and under the Eighth and Ninth Amendments.<sup>26</sup>

The legal landscape regarding sexual conduct is changing, and the trend is towards protecting adult intimate conduct that is private, non-commercial and consensual.<sup>27</sup> However, the issues are easily confounded with politics,<sup>28</sup> religion,<sup>29</sup> and morality,<sup>30</sup> but they need not be. If there is *any* right of privacy, it should certainly cover an individual's most private and intimate activities, including the means of sexual gratification in his or her own home.<sup>31</sup> If such a right exists at all, under state *and* federal equal protection guarantees, it must apply to all such intimate activities, including engaging in private consensual homosexual conduct.

Historically, the Supreme Court has developed an extreme privacy philosophy, based on the Fourth Amendment,<sup>32</sup> to protect individuals from unreasonable searches by the government. Recent

should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis." *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 196 n.8. In a final footnote, the Court pointed out that "[r]espondent d[id] not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment." *Id.*

<sup>27</sup> See *supra* text accompanying notes 11-18. But see *Lawrence*, 41 S.W.3d at 362 (stating that the Texas Court is not persuaded by such 'cultural trends' or 'political movements').

<sup>28</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992) (discussing the court's legitimacy in face of political pressures and the importance of principled justification in decision making).

<sup>29</sup> See, e.g., *Stewart*, 364 A.2d at 1208-09 (discussing the relation of religious doctrine and legislative action).

<sup>30</sup> Compare *Poe v. Ullman*, 367 U.S. 497, 545-6 (1961) (finding moral soundness is a traditional state concern) with *People of the State of New York v. Onofre*, 51 N.Y.2d 476, 489 n.3, 415 N.E.2d 936, 951 n.3 (1980) (discussing why penal law is not a medium for moral or theological views).

<sup>31</sup> See, e.g., *Baker v. Wade*, 769 F.2d 289, 293 (5th Cir. 1985). (Goldberg, J. dissenting) (discussing the "blatant" constitutional violation of intruding into the private sex lives of fully consenting adults); *Stewart*, 364 A.2d at 1207 (arguing that the sodomy statute deprives the class of its "primary avenue of sexual gratification"); *Onofre*, 51 N.Y.2d at 487, 415 N.E.2d at 939-40 (discussing how the right of privacy has been applied to individuals in their own homes).

<sup>32</sup> U.S. CONST. amend. IV, which states in pertinent part "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

decisions refer back to and reaffirm centuries-old strictures against “invasions on the part of the government and its employe[e]s of the sanctity of a man’s home and the privacies of life.”<sup>33</sup> “ ‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’ ”<sup>34</sup> Dissenting in a case where the Court upheld the practice of wire-tapping private telephone conversations by federal agents, Justice Brandeis quoted Justice Field from 100 years before *Bowers*:

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his *private affairs*, books, and papers from the inspection and scrutiny of others. Without enjoyment of this right, all other rights would lose half their value.<sup>35</sup>

In *Stanley v. Georgia*,<sup>36</sup> the court decided that a state generally could not prevent an individual from possessing and viewing obscene material in his own home. The case was decided on First Amendment grounds, but the appellant’s asserted right could also be claimed under the privacy rights found in the Fourteenth Amendment Due Process Clause.<sup>37</sup> In *Planned Parenthood v. Casey*, the Court discussed liberty and privacy in relation to the Fourteenth Amendment:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to

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<sup>33</sup> *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *Boyd v. U.S.*, 116 U.S. 616, 630 (1886)).

<sup>34</sup> *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. U.S.*, 365 U.S. 505, 511 (1961)).

<sup>35</sup> *Olmstead v. United States*, 277 U.S. 438, 475 n.3 (1928) (quoting *In re Pacific Ry. Comm’n*, 32 F. 241, 250 (1887) (emphasis added)).

<sup>36</sup> 394 U.S. 577, 559 (1969).

<sup>37</sup> *Id.* at 565 (“[Appellant] is asserting the right to satisfy his intellectual and emotional needs in the privacy of his own home.”).

define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.<sup>38</sup>

## II. THE BATTLE OF THE BRANCHES: THE JUDICIAL v. THE LEGISLATIVE

Since the issue of proscribing and controlling same-sex intimate conduct and relations has been left to the states, a wide range of government acts and decisions resulted. Many courts have deferred to the legislature where sodomy statutes or extending rights in the same-sex context are concerned. Prior to the *Bowers* decision, the D.C. Circuit Court of Appeals discussed the role of the courts and the legislature in terms of changing views on sexuality: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court."<sup>39</sup> In a Louisiana Supreme Court case,<sup>40</sup> the criminal sodomy statute was upheld as the court deferred to the legislature:

[O]ur constitution is not to be subject to judicial amendment to express whatever a majority of this court happens to conclude at any given time is the more enlightened viewpoint on a particular controversial issue. . . . [T]his court would not be alone in interpreting a state constitutional right to privacy so broad as to include engaging in oral and anal sex. What this fails to acknowledge, however, is that most states in which consensual sodomy is no longer a crime achieved that result "by

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<sup>38</sup> *Casey*, 505 U.S. at 851 (discussing, in relation to abortion, the "conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other.").

<sup>39</sup> *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (holding that there was no violation of privacy or equal protection in the Navy's policy of mandatory dismissal of homosexuals from service).

<sup>40</sup> *Smith*, 766 So. 2d. 501.



legislative repeal of their laws criminalizing sodomy.”<sup>41</sup>

In *Romer v. Evans*, where the Equal Protection Clause was found to prevent Colorado from banning legislation to protect rights based on sexual orientation, Justice Scalia, in his dissent, spoke of the successful efforts of “a politically powerful minority to revise [traditional sexual] mores through the use of the laws.”<sup>42</sup> He went on to say, “[t]his Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that ‘animosity’ toward homosexuality . . . is evil.”<sup>43</sup> However, it is the business of the judicial branch - the Supreme Court in particular - to determine what the law is, and whether laws or legislative acts are constitutional or invalid.<sup>44</sup> Judgments striking down laws can certainly continue in the traditional way, based on reason and fairness and precedent, without unjustly imposing judges’ “elite” values. “When it becomes clear that a prior constitutional

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<sup>41</sup> *Id.* at 510-11 (quoting *Christensen*, 468 S.E.2d. at 190).

<sup>42</sup> *Romer*, 517 U.S. at 636 (Scalia, J. dissenting).

<sup>43</sup> *Id.*

<sup>44</sup> *See, e.g., Marbury v. Madison*, 5 U.S. 137 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *Smith*, 766 So. 2d. at 519 (Calogero, J., dissenting). This judge articulated the legislative / judicial province argument as follows:

I am not oblivious to the majority’s argument that is it not the province of this Court to legislate social policy or to determine whether the criminal laws enacted by the Legislature are wise or desirable. And surely our legislature is authorized to make public policy determinations and to enact laws to further those policies. However, the legislature cannot validly enact a law that impermissibly infringes upon a constitutional guarantee. Indeed the very reason for elevating certain protections to the level of a constitutional guarantee is to ensure that the state does not infringe upon those protections. And when there is doubt as to the scope of protection afforded by a constitutional guarantee, it is the province, and in fact, the duty of this Court, to interpret the law.

*Id.*

interpretation is unsound [the judiciary is] obliged to reexamine the question."<sup>45</sup>

Justice Blackmun discussed the relevance of justices' values in *Roe v. Wade* by quoting Justice Holmes' dissent in *Lochner v. New York*.<sup>46</sup> "The Constitution is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."<sup>47</sup> In *Powell v. State*, the Georgia case that struck down the criminal sodomy law, the court was willing to overturn a legislative act that "carries with it a presumption of constitutionality that is overturned only when it is established that the legislation manifestly infringes upon a constitutional provision or violates the rights of the people."<sup>48</sup> Although the judiciary sometimes must, and sometimes just does defer to the state legislature on controversial social issues, progressive state courts are willing to examine and strike down legislation if there is evidence of discriminatory classifications or other violations of rights said to be held by the people.<sup>49</sup>

Differences in views and conflicts in law between different states are predictable in our system of federalism, but the law becomes more puzzling when the conflict of views is within the same state. In Hawaii, for instance, the Supreme Court subjected a marriage provision barring same sex marriages to strict scrutiny.<sup>50</sup> That would have made Hawaii one of the first states to legalize same sex marriages, but the holding was overturned by a constitutional amendment.<sup>51</sup>

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<sup>45</sup> *Casey*, 505 U.S. at 955 (citing *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (overruling precedent that is only two years old, *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)).

<sup>46</sup> *Roe*, 410 U.S. at 117 (citing *Lochner v. New York*, 198 U.S. 45, 76 (1905)).

<sup>47</sup> *Id.*

<sup>48</sup> *Powell*, 510 S.E.2d at 21 (quoting *Miller v. State*, 472 S.E.2d 74, 77 (Ga. 1996)).

<sup>49</sup> See *Onofre*, 51 N.Y.2d at 494, 415 N.E.2d at 943-44 (striking down criminal sodomy laws six years before the *Bowers* decision).

<sup>50</sup> *Baer v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

<sup>51</sup> HAW. CONST. art I. §23 (amended 1997), which states "The legislature shall have the power to reserve marriage to opposite-sex couples."

The opposite result was achieved in Vermont as the legislature there created “civil unions”<sup>52</sup> for same-sex couples after the state’s Supreme Court found that the exclusion of same-sex couples from the benefits and protections of marriage violated the “common benefits” clause, the Vermont version of equal protection.<sup>53</sup> This now raises the question of the Full Faith and Credit Clause of the federal Constitution,<sup>54</sup> and whether other states should or will recognize same-sex marriages from states like Vermont. This question seems to have been answered for now, by the Defense of Marriage Act, which allows states to limit recognition of marriages to those between a man and a woman.<sup>55</sup> This federal legislative action seems to be in direct conflict with the Full Faith and Credit Clause, and its constitutionality is therefore suspect.

### III. POLICE POWER, MORALITY, AND THE BILL OF RIGHTS

There is no question that states can criminalize and regulate conduct that directly affects other citizens’ physical safety or right to privacy<sup>56</sup> and there is no question that morality has often been at the heart of state legislation and enforcement.<sup>57</sup> The question is:

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<sup>52</sup> VT. STAT. ANN. Tit. 15 § 1202 (2002) which states in pertinent part, “For a civil union to be established in Vermont, it shall be necessary that the parties . . . be of the same sex and therefore excluded from the marriage laws of this state.”

<sup>53</sup> *Baker v. State*, 744 A.2d. 864 (Vt. 1999).

<sup>54</sup> U.S. CONST. art. IV § 1 which states “all states must recognize the public acts, records, and judicial proceedings of every other state.”

<sup>55</sup> See 28 U.S.C. § 1738c (2000), which states in pertinent part, “No State . . . shall be required to give effect to any public act, record or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . .”

<sup>56</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (stating “[t]hat the state may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally and morally is clear; but the individual has certain fundamental rights which must be respected.”).

<sup>57</sup> See *Bowers*, 478 U.S. at 196 (stating that “[t]he law . . . is constantly based on notions of morality.”); see also, *Stewart*, 364 A.2d at 1208-09 (discussing the religious basis of sodomy laws, and how religious tenets become “part of the general welfare of society wholly apart from religious considerations”).

when is morality a justifiable basis for such state action?<sup>58</sup> The history and tradition of proscription are often cited as reasons for continuing enforcement of sodomy statutes even if the reasons for the original proscription are no longer applicable. Although the Georgia Supreme Court struck down the sodomy statute at issue in *Bowers* with the 1998 *Powell* decision, the court had upheld it only two years earlier in the 1996 *Christensen* decision. The majority in *Christensen* disagreed with dissenting Justice Sears' argument that outdated historical and religious notions of morality should not control today's decision making:

The sole basis asserted by the State in support of its sodomy statutes is its moral interest in condemning acts of homosexual sodomy. In support of this argument, the State asserts that such acts are proscribed by Judeo-Christian values, and were punishable during the Middle Ages and Reformation. Succinctly stated, the State's position is that the majority has the right to criminalize sexual activity that it finds immoral, without regard to whether the activity is conducted in private between consenting adults and is not, in and of itself, harmful to others or the participants.<sup>59</sup>

"Police power is the governing authority's ability to legislate for the protection of the citizens' lives, health, and property, and to preserve good order and public morals."<sup>60</sup> Morality is often based on tradition or religious beliefs and the states have offered a multitude of reasons for defending laws against sodomy and homosexual relations. The protection of marriage and public morality as well as protection against physical harm of the participants was invoked by New York State but held insufficient to justify the sodomy statute in *Onofre*.<sup>61</sup> The dissent

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<sup>58</sup> See *Poe*, 367 U.S. at 550 ("The security of one's privacy against arbitrary intrusion by the police, which is at the core of the Fourth Amendment, is basic to a free society.") (quoting *Wolf v. People of State of Colorado*, 338 U.S. 25, 27 (1949)).

<sup>59</sup> *Christensen*, 468 S.E.2d at 195 (Sears, J., dissenting).

<sup>60</sup> *Powell*, 510 S.E.2d at 18 at 25 (citing *Hayes v. Howell*, 308 S.E.2d 170, 176 (Ga. 1983)).

<sup>61</sup> *Onofre*, 51 N.Y.2d at 488-89, 415 N.E.2d at 940-41.

in the Texas Courts of Appeals decision now under review by the U.S. Supreme Court questioned whether “the discouragement of behavior historically perceived to be immoral, and the promotion of family values,” are legitimate state purposes rationally related to the criminalization of same-sex sodomy.<sup>62</sup> Although rejected by the U.S. Supreme Court, the “primary rationale” offered by Colorado in *Romer* was “respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”<sup>63</sup> In Louisiana, the legislature was held to be within its constitutional authority to proscribe consensual and private oral and anal sex, even between opposite sexes, because it is “legislatively determined to be morally reprehensible.”<sup>64</sup>

As we can see, morality as a basis for legislation will not always be upheld. Even when legislation is deemed invalid by the courts or repealed by the legislature, that does not mean that the conduct in question becomes any more moral or socially acceptable. As pointed out by Justice Scalia in his dissent in *Romer*, “The society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens.”<sup>65</sup> The dissent in the *Christensen* case pointed out: “To say that an act is entitled to constitutional protection in no way condones the act itself. Indeed, a great deal of behavior many find intolerable and even immoral is not subject to criminal prohibition under our constitutional system.”<sup>66</sup> The dissent goes on to quote John Stuart Mill: “Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each other as seems good to the rest.”<sup>67</sup>

It may be that the law can more precisely define the bounds of privacy as it recognizes an individual’s personal and intimate

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<sup>62</sup> *Lawrence*, 41 S.W.3d at 372. (Anderson, J., dissenting).

<sup>63</sup> *Romer*, 517 U.S. at 635.

<sup>64</sup> *Smith*, 766 So. 2d at 508.

<sup>65</sup> *Romer*, 517 U.S. at 645 (Scalia J., dissenting).

<sup>66</sup> *Christensen*, 468 S.E.2d at 192 (Sears, J., dissenting).

<sup>67</sup> *Id.* (quoting *On Liberty* (1859)).

rights. Such personal sovereignty is guaranteed by the Constitution when it refers to the *people*, as opposed to the States and the United States. Freedom, liberty, and morality may take different shape through successive generations based on the cumulative and contemporaneous experiences of the society. An important purpose of the Constitution is its ability to offer minorities an avenue to live their lives - without hardship stemming from undue prejudice - and to have a say in the political decisions that may affect them.

The Bill of Rights largely protects minorities from being unjustly controlled by the personally held viewpoints of the governing or popular majority.<sup>68</sup> “The existence of moral disapproval for certain types of behavior is the very fact that disables government from regulating it.”<sup>69</sup> “Majority opinion should never dictate a free society’s willingness to battle for the protection of its citizen’s liberties. To allow such a thing would, in and of itself, be an immoral and insulting affront to our constitutional democracy.”<sup>70</sup> When analyzing the rights of homosexuals, courts must determine the limits of morality’s legitimacy in the law and whether the laws enacted violate one’s personal liberties or rights of equal protection.<sup>71</sup>

#### IV. LIBERTY, PRIVACY, AND EQUAL PROTECTION

*Bowers* resulted from a Georgia sodomy statute that criminalized the private conduct at issue. Although the state did not reject this statute until 1993, Georgia boasts of its rich and

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<sup>68</sup> See *Christensen*, 468 S.E.2d at 196 n.29 (“The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . .”) (quoting *Barnette*, 319 U.S. at 637-38).

<sup>69</sup> *Dronenburg*, 741 F.2d at 1397. Although this argument did not help the appellant, a U.S. Navy officer discharged due to homosexual conduct, convince the government that this was reason enough to allow homosexuals in the military, it does soundly reflect the theory that the Bill of Rights protects the minority from the majority.

<sup>70</sup> *Powell*, 510 S.E.2d at 27 (Sears, J., concurring).

<sup>71</sup> See *Lawrence*, 41 S.W.3d. at 362 n.38 (explaining how other “immoral” private conduct and “victimless crimes” legitimately remain targets of state proscription).

progressive history of appellate privacy jurisprudence.<sup>72</sup> The state line of cases began in 1905 with *Pavesich v. New England Life*,<sup>73</sup> where the court held that the right of personal liberty embraces the right “to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law . . .”<sup>74</sup>. The Georgia privacy right has been described as:

[P]rotection for the individual from unnecessary public scrutiny;<sup>75</sup> to be free from . . . the publicizing of one’s private affairs with which the public has no legitimate concern;<sup>76</sup> the right to define one’s circle of intimacy;<sup>77</sup> and to be protected from any wrongful intrusion into an individual’s private life which would outrage . . . a person of ordinary sensibilities.<sup>78</sup>

The Georgia right of privacy is recognized as a fundamental constitutional right, “having a value so essential to individual liberty in our society that [its] infringement merits careful scrutiny by the courts.”<sup>79</sup>

In *Bowers*, the Court described the nature of rights qualifying for heightened judicial protection: rights that are “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [they] were sacrificed,”<sup>80</sup> or those liberties that are “deeply rooted in this Nation’s history and tradition.”<sup>81</sup> It is clear which definition the Court leaned more towards: it is doubtful that a convincing argument can be made to

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<sup>72</sup> *Powell*, 510 S.E.2d at 21.

<sup>73</sup> *Pavesich v. New England Life Ins.*, 50 S.E. 68 (Ga. 1905).

<sup>74</sup> *Powell*, 510 S.E.2d at 22 (quoting *Pavesich*, 50 S.E. at 70).

<sup>75</sup> *Id.* (citing *Athens Observer v. Anderson*, 263 S.E.2d 128 (Ga. 1980)).

<sup>76</sup> *Id.* (citing *Gouldman-Taber Pontiac v. Zerbst*, 100 S.E.2d 881 (Ga. 1957)).

<sup>77</sup> *Id.* (citing *Macon-Bibb County Water & Sewerage Auth. v. Reynolds*, 299 S.E.2d 594 (Ga. App. 1983)).

<sup>78</sup> *Id.* (citing *Georgia Power Co. v. Busbin*, 254 S.E.2d 146 (Ga. Ct. App. 1979)).

<sup>79</sup> *Powell*, 510 S.E.2d at 21-22 (citing *Ambles v. State*, 383 S.E.2d 585 (Ga. Ct. App. 1989)).

<sup>80</sup> *Bowers*, 478 U.S. at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

<sup>81</sup> *Id.* at 192.

declare homosexual sodomy “deeply rooted in this Nation’s history and tradition.” It is, however more plausible that such conduct could be covered under a fundamental right to intimate privacy, if such privacy is determined to be “implicit in the concept of ordered liberty.” So far, fundamental rights have been extended to “personal decisions ‘relating to marriage, procreation, contraception, family relationships ... child rearing, and education.’”<sup>82</sup>

It is possible that some sort of sexual privacy is developing in state and federal jurisprudence. Perhaps a federal privacy right to intimate association could fall under the category of “family” which is already protected by the Federal Constitution. Consider two people who love each other and live together as a family; they may in fact be married, raising children, working together, buying property, and going on vacation together. How can the law withdraw certain benefits and protections if these two people are of the same sex?

The *Bowers* decision may seem to have limited federal protection for homosexual sodomy, but the Supreme Court may have opened up a promising gateway to protection for homosexuals when it decided *Romer v. Evans* on equal protection grounds.<sup>83</sup> The Court in *Romer* did not consider homosexuals to be a suspect class for whom a heightened level of scrutiny would be applied under an equal protection challenge, but the legislation failed the rational basis test, the court’s lowest and most deferential level of scrutiny.<sup>84</sup> The Court found no reason, let alone a rational reason, as to how the challenged legislation could possibly be rationally related to a legitimate government objective.<sup>85</sup> The Court concluded the only apparent motivation for the legislation was a biased “animus”<sup>86</sup> based on stereotypical traits of a class defined not only by one’s conduct but possibly even by one’s thoughts, tendencies, inclination and curiosity.<sup>87</sup> The disadvantage imposed was found to have been “born of animosity toward the

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<sup>82</sup> *Casey*, 505 U.S. at 859 (citing *Carey*, 431 U.S. at 684-85).

<sup>83</sup> *Romer*, 517 U.S. at 632.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 627.



class of persons affected” and for that reason was found to be invalid.<sup>88</sup>

Even though homosexuals did not comprise a suspect class in *Romer*, they were determined to be classified and discriminated against, which sounds like a construction of a class that merits at least heightened scrutiny in challenges to legislation that affects the class. The federal definition of a suspect class is a discrete and insular group that has immutable characteristics, that is powerless in the political process, and that has a history of discrimination.<sup>89</sup> The federal suspect classification has basically only applied to race, alienage, and natural origin.<sup>90</sup> The states are free to extend rights beyond the requirements of the constitution or the federal judiciary. For instance, in Oregon, suspect classes have been defined as “socially recognized groups that have been the subject of adverse social or political stereotyping or prejudice.”<sup>91</sup>

Sex and gender classifications under the U.S. Constitution receive a heightened, (although not strict) level of scrutiny.<sup>92</sup> Review of sex and gender classifications seems obvious at first glance; it often applies to legislation that classifies males and females as two separate groups. However, the classification is not clearly defined when applied to same-sex issues. The dissent in the *Lawrence* case pointed out this disparity while discussing the Texas statute which criminalizes same-sex sodomy only:

The simple fact is, the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior. In other words, the sex of the individual, not the conduct, is the sole determinant of the criminality of the conduct.<sup>93</sup>

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<sup>88</sup> *Romer*, 517 U.S. at 624.

<sup>89</sup> *See, e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (discussing the need for a “more searching judicial inquiry” into legislation that classifies certain groups that have traditionally been victims of prejudice).

<sup>90</sup> *Lawrence*, 41 S.W.3d at 367-68.

<sup>91</sup> *Tanner*, 971 P.2d at 446.

<sup>92</sup> *See, e.g.*, *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 74 (2001) (O’Connor, J. dissenting) (stating that “for nearly three decades, [the] Court has applied heightened scrutiny to legislative classifications based on sex.”).

<sup>93</sup> *Lawrence*, 41 S.W.3d at 370.

The Equal Protection Clause requires similar treatment for persons similarly situated.<sup>94</sup> If women who want to marry women can be seen as similarly situated with men who want to marry women, then a challenge to a ban on same-sex marriages under equal protection should receive heightened scrutiny and the state will have to show more than just a rational relationship between the legislation and a legitimate state objective. If there is an argument to be made that laws proscribing same-sex marriages are not even rationally related to a legitimate state objective,<sup>95</sup> there seems a good chance that under heightened scrutiny, the Supreme Court and state courts would have a harder time justifying or rationalizing a proscription against same-sex marriage. The *Bowers* decision notwithstanding, the result would be protection of homosexual conduct through the Equal Protection Clause and through the fundamental right of privacy in marriage found within the concept of ‘liberty’ of the Due Process Clause of the Fourteenth Amendment.<sup>96</sup>

## V. CONCLUSION

The states’ power to proscribe conduct, even some sexual conduct, can not seriously be questioned.<sup>97</sup> The question is: does the state or legislative act infringe upon rights retained or reserved by the people through the Bill of Rights and the Fourteenth Amendment? While jurisprudence in this area of law continues to unfold, it is clear that people have the right to and a need for definitive justice. There is a trend towards an acceptance of sexual privacy, both socially and legally. “Homosexuality is no longer viewed by mental health professionals as a “disease” or disorder.”<sup>98</sup> However, to homosexuals who fear criminal prosecution in Texas and Louisiana, and to same-sex couples who

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<sup>94</sup> See, e.g., *Eisenstadt v. Baird*, 405 United States 438, 454 (1972).

<sup>95</sup> See *Bowers*, 478 U.S. at 196 (appellant arguing that moral beliefs, relative to consensual same-sex conduct, do not comprise a rational basis).

<sup>96</sup> See, e.g., *Powell*, 510 S.E.2d 18; *Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936.

<sup>97</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 498-99 (referring to a State’s proper regulation of sexual promiscuity or misconduct).

<sup>98</sup> *Bowers*, 478 U.S. at 203 n.2 (Blackmun, J., dissenting) (citing Amici Curiae Brief for American Psychological Association and American Public Health Association).

want to marry outside of Vermont, the law not only fails to keep up with the times, but reinforces the stereotype that there is something wrong with same-sex conduct.

Whether same-sex relationships and conduct will continue to be validated by more states or even the federal government remains to be seen. However, not to do so deprives a class of citizens of basic rights and liberty enjoyed by their families and neighbors. “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>99</sup> “Only the most willful blindness could obscure the fact that sexual intimacy is ‘a sensitive key relationship of human existence, central to family life, community welfare, and the development of human personality.’”<sup>100</sup>

The *Roe* Court spoke of how one’s thinking and conclusions are colored by one’s life and its relevance when analyzing relevant issues: “One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes towards life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking . . . .”<sup>101</sup>

Laws that affect a person’s privacy must be carefully considered. The potential effects can be more far-reaching and disastrous than oppressing an unpopular class of people. Our governmental system and law itself are undermined. Our government is in place to protect freedom, equality, and liberty. This means giving all persons a chance to be liberated from the constraints of ignorance, oppression, and prejudice. This also means being free from undue prying or control by the authorities. Certainly, where the government does not or can not achieve these objectives, it should not be fostering these negative concepts. If the aim is protecting liberty, the government can not define or rely too heavily on morality in its lawmaking. A democratic government that does so deserves the people:

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<sup>99</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>100</sup> *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1974)).

<sup>101</sup> *Roe*, 410 U.S. at 116.

Criminal statutes . . . which are defined based upon the body parts involved during private consensual sex, which are ignored and ridiculed by the populace, and which are enforced with discriminatory selectivity, can only breed contempt and foster disdain and disrespect for the law, the State, and the law enforcement community.<sup>102</sup>

*Lawrence v. Texas*, the Texas Court of Appeals decision that is now under review by the Supreme Court, followed the federal *Bowers* decision and upheld the conviction of two men found to be engaged in “deviate sexual intercourse” as the police entered a residence investigating a “weapons disturbance.”<sup>103</sup> It remains to be seen whether the Court’s decision will be narrowed to a Fourth Amendment illegal search and seizure issue or whether it will be broad enough to actually advance jurisprudence in this area of law by encompassing and protecting privacy, equal protection, and other important rights of the people that are implicated by this case.

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<sup>102</sup> *Christensen*, 467 S.E.2d at 528.

<sup>103</sup> *Lawrence*, 41 S.W.3d at 350.