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# THE JURISPRUDENTIAL REVOLUTION: UNLOCKING HUMAN POTENTIAL IN *GRUTTER* AND *LAWRENCE*

Wilson Huhn\*

## INTRODUCTION

The decisions of the Supreme Court in *Lawrence v. Texas*<sup>1</sup> and *Grutter v. Bollinger*,<sup>2</sup> stripped to their bare holdings, have little immediate effect on existing law. After *Grutter*, colleges and graduate schools will continue to take race into account in admitting students to enroll a diverse student body, just as they have done for the past quarter century in conformity with Justice Lewis Powell's opinion in *Regents of the University of California v. Bakke*.<sup>3</sup> After *Lawrence*, laws against gay sex may no longer be enforced, but only a handful of states still had these laws on the books at the time of the decision, and enforcement of those laws was practically nonexistent.<sup>4</sup>

However, the opinions of the Supreme Court in both *Lawrence* and *Grutter* work fundamental changes in the interpretation of our fundamental rights of liberty and equality. These legal changes both confirm and anticipate far-reaching changes in our society by recognizing certain aspects of human potential. This article

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<sup>1</sup> 123 S. Ct. 2472 (2003) (striking down a Texas statute making homosexual conduct a crime).

<sup>2</sup> 123 S. Ct. 2325 (2003) (upholding a race-based affirmative action program for admission to law school).

<sup>3</sup> 438 U.S. 265, 269–324 (1978) (striking down racial quota in admissions program to medical school, but upholding racial preferences in admissions to enhance diversity).

<sup>4</sup> See *Lawrence*, 123 S. Ct. at 2481. The Court found:

The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.

*Id.* (citing *State v. Morales*, 869 S.W.2d 941, 943 (1994)); see also *Bowers v. Hardwick*, 478 U.S. 186, 197–98 & n.2 (1986) (Powell, J., concurring) (“The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct.”).

describes the jurisprudential revolution that Justices Kennedy and O'Connor led in *Lawrence* and *Grutter*.

Justice Kennedy's opinion in the *Lawrence* case makes the following changes in the interpretation of the Due Process Clause:

1. The Right to Privacy is not defined by reference to specific American traditions, but rather by reference to society's "emerging awareness" of the effect of laws on people's private lives.<sup>5</sup>
2. The Right to Privacy includes "certain intimate conduct" not because the sexual act itself usually occurs in private, but because of the central importance of sexual relationships in people's lives.<sup>6</sup>
3. The Court will look to legal developments in other nations, in particular decisions of the European Court of Human Rights, in defining our fundamental rights.<sup>7</sup>
4. Morality, standing alone, is not a sufficient basis for prohibitory legislation. Instead, the state must explain how behavior is harmful before it can make it unlawful.<sup>8</sup>

Justice O'Connor's opinion in the *Grutter* case, as well as her concurring opinion and Justice Kennedy's majority opinion in *Lawrence*, make or confirm the following changes in the interpretation of the Equal Protection Clause:

1. The level of scrutiny that the Court applies in evaluating the constitutionality of laws under the Equal Protection Clause varies with the context. Neither strict scrutiny nor rational basis is applied the same in all cases.<sup>9</sup>
2. Laws that intentionally stigmatize groups are scrutinized more strictly than laws that do not.<sup>10</sup>
3. Laws that inhibit people's personal relationships are scrutinized more strictly than laws that do not.<sup>11</sup>
4. Moral disapproval of a group or its actions standing alone is not a sufficient reason for legislation that discriminates against the group.<sup>12</sup>
5. Race-based affirmative action in university admissions is constitutional because it is necessary to train leaders from all segments of society.<sup>13</sup>

Taken collectively, these developments represent a revolutionary shift in the interpretation of the Constitution of the United States. In both cases the Supreme Court embraced *consequentialist* reasoning, meaning that the Court focused on the

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<sup>5</sup> See discussion *infra* Part I.A.

<sup>6</sup> See discussion *infra* Part I.B.

<sup>7</sup> See discussion *infra* Part I.C.

<sup>8</sup> See discussion *infra* Part I.D.

<sup>9</sup> See discussion *infra* Part II.A.

<sup>10</sup> See discussion *infra* Part II.B.

<sup>11</sup> See discussion *infra* Part II.C.

<sup>12</sup> See discussion *infra* Part II.D.

<sup>13</sup> See discussion *infra* Part II.E.

effect that its decisions would have on society and on the lives of individuals.<sup>14</sup> In *Lawrence*, the Court was primarily concerned with the stigmatizing effect of the Texas statute on gays and lesbians.<sup>15</sup> The Court held that homosexuals must be treated with dignity and respect, and therefore, a law that brands all homosexuals as criminals is unconstitutional.<sup>16</sup> In *Grutter*, the Court was strongly influenced by amicus briefs that predicted a number of deleterious social consequences that would follow from outlawing affirmative action in education.<sup>17</sup> The Court upheld affirmative action in university admissions because our Nation has a compelling interest in training leaders from all segments of our society.<sup>18</sup>

Both cases turn upon fundamental beliefs about human potential. *Lawrence* is based upon the belief that homosexual relationships are valuable and are entitled to respect.<sup>19</sup> *Grutter* is based upon the belief that members of racial and ethnic minorities are not only capable of playing leadership roles, but that it is critical for the future of our Nation that our leaders be drawn from every race and every ethnic group.<sup>20</sup> The conclusions that the Court draws about human potential in *Lawrence* and *Grutter* are not determined by the myths of our ancestors, but rather arise from a careful and sensitive analysis of how people lead their lives. This approach to interpreting the Constitution promises to achieve a more universal understanding of liberty and equality and a more comprehensive embodiment of the principles expressed in the Declaration of Independence.<sup>21</sup>

Part I of this article describes the changes in the interpretation of our fundamental rights under the Due Process Clause that are contained in Justice Kennedy's opinion in *Lawrence*. Part II describes how the interpretation of the Equal Protection Clause is changed by Justice O'Connor's opinions in *Grutter* and *Lawrence*. The Conclusion explains the underlying jurisprudential shift that these changes represent.

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<sup>14</sup> Cf. STEPHEN E. GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* 57, 97 (2000) (criticizing the Supreme Court for failing to adopt a consequentialist approach to interpreting the Constitution); WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENTS* 53–63 (2002) (describing the history of consequentialist analysis in American jurisprudence).

<sup>15</sup> See *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003).

<sup>16</sup> *Lawrence*, 123 S. Ct. 2472.

<sup>17</sup> See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340–41 (2003).

<sup>18</sup> See *id.* at 2341, 2362–63.

<sup>19</sup> See *Lawrence*, 123 S. Ct. at 2482.

<sup>20</sup> See *Grutter*, 123 S. Ct. at 2341 (“[I]t is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”).

<sup>21</sup> See *Lawrence*, 123 S. Ct. at 2484 (“As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”).

# I. THE JURISPRUDENTIAL REVOLUTION IN THE INTERPRETATION OF THE RIGHT TO PRIVACY

*A. The right to privacy is not defined by reference to specific American traditions, but rather by reference to society's "emerging awareness" of the effect of laws on people's private lives.*

The decision of the Supreme Court in *Lawrence v. Texas* overrules its previous decision in *Bowers v. Hardwick*.<sup>22</sup> However, the jurisprudential revolution wrought by Justice Kennedy in *Lawrence* is best understood against the backdrop of *Roe v. Wade*.<sup>23</sup>

Justice Blackmun's opinion for the majority of the Court in *Roe* relied heavily on consequentialist analysis.<sup>24</sup> The heart of his opinion is the following passage, in which he describes the effects of unwanted pregnancy and childbirth on women's lives:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>25</sup>

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<sup>22</sup> *Lawrence*, 123 S. Ct. at 2484 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)) (upholding Georgia statute making "sodomy" a crime as applied to homosexuals).

<sup>23</sup> 410 U.S. 113 (1973) (striking down a Texas law prohibiting abortions based upon Due Process Clause analysis).

<sup>24</sup> *Id.* at 153.

<sup>25</sup> *Id.* (describing the consequences of prohibiting abortion). It was no accident that this became the focus of Justice Blackmun's opinion. Sarah Weddington, the attorney for *Roe*, had made this theme the central point of her oral argument before the Supreme Court. See MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955 344-45 (Peter Irons & Stephanie Guitton eds., 1993). Here is how she opened her argument in that historic case:

In Texas, the woman is the victim. The state cannot deny the effects that this law has on the women of Texas. Certainly there are problems regarding even the use of contraception. Abortion now for a woman is safer than childbirth. In the absence of abortion, or legal, medically safe abortions, women often result [sic] to the illegal abortion, which certainly carry [sic] risks of death, all the side

Justice Scalia has led the jurisprudential fight against *Roe*, and in 1989 he threw down the gauntlet in his famous “footnote 6” in *Michael H. v. Gerald D.*,<sup>26</sup> saying that “tradition” is the *only* legitimate source of our unenumerated rights.<sup>27</sup> That case involved the question whether a man, who had conceived a child with a woman married to another man, had the constitutional right to be legally considered the “father” of the child, despite a state law which did not allow him to challenge the presumption that the husband of the woman was the father.<sup>28</sup> Justice Scalia declared that the Constitution did not encompass this right because the specific tradition in America was that the law considered the husband and not the biological father to be the father of a child who was conceived and born during the marriage.<sup>29</sup> Decrying the indeterminacy of appeals to general traditions such as “parenthood,”<sup>30</sup>

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effects such as severe infection, permanent sterility, all the complications that result. And in fact, if the woman is unable to get either a legal abortion or an illegal abortion in our state, she can do a self-abortion, which is certainly, perhaps, by far the most dangerous. And that is no crime. . . .

If the pregnancy would result in the birth of a deformed or defective child, she has no relief. Regardless of the circumstances of conception, whether it was because of rape, incest, whether she is extremely immature, she has no relief. . . . I think it's without question that pregnancy to a woman can completely disrupt her life. It disrupts her body, it disrupts her education, it disrupts her employment, and it often disrupts her entire family life. And we feel that because of the impact on the woman, this certainly, insofar [sic] as there are any rights which are fundamental, is a matter which is of such fundamental and basic concern to the woman involved that she should be allowed to make the choice as to whether to continue or to terminate her pregnancy.

*Id.*

<sup>26</sup> 491 U.S. 110 (1989) (upholding a California statute which denied a biological father's right to establish paternity of child conceived with a married woman).

<sup>27</sup> See *id.* at 127–28 n.6 (“[A] rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.”).

<sup>28</sup> See *id.* at 113 (describing Section 621 of the California Evidence Code as providing that “a child born to a married woman living with her husband is presumed to be a child of the marriage” and that “[t]he presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances”) (CAL. EVID. CODE §621 (West Supp. 1989)).

<sup>29</sup> See *id.* at 124–27 (describing the history of the common law presumption of legitimacy).

<sup>30</sup> Justice Scalia stated:

We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon “parenthood.” Why should the relevant category not be even more general — perhaps “family relationships”; or “personal relationships”; or even “emotional attachments in general”? . . . The need, if arbitrary decision making is to be avoided, to adopt the most specific tradition as the point of reference — or at least to announce,

Justice Scalia stated that "a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."<sup>31</sup> Because unenumerated rights such as the "right to privacy" by definition are not determined by reference to text, under Justice Scalia's formula, the only source of unenumerated rights is tradition itself.

Justice O'Connor, joined by Justice Kennedy, concurred in the opinion of the majority in *Michael H.* except for footnote 6. The concurring opinion is four sentences long:

I concur in all but footnote 6 of Justice Scalia's opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.<sup>32</sup>

Justice O'Connor and Justice Kennedy thus placed themselves squarely in the center of the jurisprudential divide between those who believe that our constitutional "liberty" is limited to conduct that our ancestors engaged in without interference from the state, and those who believe that "liberty" is an evolving concept that encompasses more than traditional modes of behavior. In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>33</sup> these two justices signaled their choice.

When the Supreme Court granted certiorari in *Casey*, many people predicted that the Court, now dominated by Reagan and Bush appointees, would overrule *Roe v. Wade*.<sup>34</sup> But the Court, led by three of those appointees, confounded

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as Justice Brennan declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted — is well enough exemplified by the fact that in the present case Justice Brennan's opinion and Justice O'Connor's opinion . . . which disapproves this footnote, both appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

*Id.* at 127–28 n.6 (arguing that unenumerated rights ought to be defined by reference to tradition at the most specific level of generality) (citation omitted).

<sup>31</sup> *Id.* at 128 n.6.

<sup>32</sup> *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring) (citations omitted).

<sup>33</sup> 505 U.S. 833 (1992) (reaffirming *Roe*, but also upholding certain restrictions on abortion).

<sup>34</sup> See, e.g., Robert Whereatt, *Roe Lawyer Thinks Court Will Overturn Law in 1993*,

expectations.<sup>35</sup> Justices O'Connor, Kennedy, and Souter jointly authored a plurality opinion in which they reaffirmed *Roe*.<sup>36</sup> Their opinion expressed two reasons for the decision. First, they argued that the principle of *stare decisis* militated in favor of following *Roe*.<sup>37</sup> But the other portion of their opinion — the part that until now has drawn relatively less attention — acknowledged that people have a fundamental right to make certain “intimate and personal choices.”<sup>38</sup> At a critical passage in the opinion, the plurality stated:

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 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 compulsion of the State.<sup>39</sup>

Five years later, in 1997, Justice Scalia's effort to define the right to privacy solely by reference to “tradition” received support in *Washington v. Glucksberg*, where the Court unanimously declared that a Washington statute prohibiting assisted suicide was constitutional on its face.<sup>40</sup> Chief Justice Rehnquist, writing for himself and four other members of the Court, based his decision on the ground that assisted suicide is not deeply rooted in American traditions.<sup>41</sup> However, the

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STAR-TRIBUNE (MINNEAPOLIS-ST. PAUL), May 21, 1992, at 4B (quoting Sarah Weddington, attorney for *Roe*, predicting that Supreme Court would overrule *Roe*); see also James Bopp, Jr., Richard E. Coleson & Barry A. Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule Roe v. Wade?*, 1 SETON HALL CONST. L.J. 55, 57 (1990) (“[T]he Court has *sub silentio* overruled *Roe*.”); Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 24 (1992) (“If asked what a conservative Supreme Court would do with five seats and a clear chance, the person on the street would have predicted that it would gut the abortion right. . .”).

<sup>35</sup> See Sullivan, *supra* note 34, at 24–25 (“In *Planned Parenthood v. Casey*, the Court spectacularly failed to overrule *Roe v. Wade*.”).

<sup>36</sup> See *Casey*, 505 U.S. at 843–911 (plurality opinion).

<sup>37</sup> See *id.* at 854–69 (applying doctrine of *stare decisis* in reaffirming *Roe*).

<sup>38</sup> *Id.* at 851.

<sup>39</sup> *Id.*

<sup>40</sup> 521 U.S. 702 (1997) (upholding state statute banning physician assisted-suicide against facial attack).

<sup>41</sup> See *id.* at 728.

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted “right” to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.



authoritativeness of the reasoning of the majority opinion implicitly identifying "tradition" as the sole source of unenumerated rights was undercut by the concurring opinions of the other justices. Justice Souter and Justice Stevens, concurring separately, expressly invoked the standard announced in the plurality opinion in *Casey* and rejected the majority's exclusive reliance on "tradition" in determining whether the law infringed upon fundamental rights.<sup>42</sup> Furthermore, Justice O'Connor, who joined in Chief Justice Rehnquist's opinion for the Court, nevertheless wrote a brief, separate concurring opinion in which she declared that it was unnecessary for the Court to consider whether "a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."<sup>43</sup> Justice Ginsberg and Justice Breyer joined Justice O'Connor on this point.<sup>44</sup> These concurring opinions

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*Id.* The Chief Justice extensively described the history of laws against suicide and assisted suicide and used the word "tradition" seventeen times in the course of his opinion for the Court. *See id.* at 710–19 & 721–27.

<sup>42</sup> *See id.* at 765 (Souter, J., concurring). Justice Souter stated: "My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level." *Id.* (referring to *Casey*, 505 U.S. at 847–49; *Poe v. Ullman*, 367 U.S. 497 (1961); and *Glucksberg*, 521 U.S. at 745 (Stevens, J., concurring). "Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly '[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'" *Glucksberg*, 521 U.S. at 745 (quoting *Casey*, 505 U.S. at 851).

<sup>43</sup> *Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring). Justice O'Connor stated: I join the Court's opinions because I agree that there is no generalized right to "commit suicide." But respondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the New York and Washington laws at issue here. . . . The parties and *amici* agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death.

*Id.* at 736–37.

<sup>44</sup> *See id.* at 789 (Ginsberg, J., concurring) ("I concur in the Court's judgments in these cases substantially for the reasons stated by Justice O'Connor in her concurring opinion. . . .") (citation omitted); *id.* at 792 (Breyer, J., concurring). Justice Breyer stated:

Were the legal circumstances different — for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life — then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as Justice O'Connor suggests, the Court might have to revisit its conclusions in these cases.

*Id.*

deprived the Chief Justice of a majority on the question of how the fundamental right ought to be defined.

Accordingly, prior to *Lawrence*, one wing of the Supreme Court believed that the “right to privacy” is circumscribed by tradition, while the other recognized a general right to make “personal and intimate choices” that are “central to personal dignity and autonomy.”<sup>45</sup> In *Lawrence*, the Supreme Court made a definitive choice between these opposing viewpoints.

In *Lawrence*, Justice Kennedy invoked the foregoing passage from the plurality opinion in *Casey*<sup>46</sup> in support of the conclusion that the right to privacy encompasses the right of people to engage in homosexual conduct:

The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: “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 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 compulsion of the State.” Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.<sup>47</sup>

Like the decision of the Court in the *Michael H.* case, the Court’s decision in *Bowers v. Hardwick* rested mainly on “tradition.” In the opinion for the majority of the *Bowers* Court, Justice White stated, “[p]roscriptions against that conduct have ancient roots.”<sup>48</sup> After briefly summarizing the history of laws against sodomy in America from colonial times to the present, Justice White concluded: “Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”<sup>49</sup>

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<sup>45</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); see *supra* note 39 and accompanying text.

<sup>46</sup> *Id.*

<sup>47</sup> *Lawrence v. Texas*, 123 S. Ct. 2472, 2481–82 (2003) (citations omitted).

<sup>48</sup> *Bowers*, 478 U.S. at 192.

<sup>49</sup> *Id.* at 194.

Chief Justice Burger, in his concurring opinion in *Bowers*, also relied on tradition in rejecting a fundamental right to "sodomy":

Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards . . . . During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.<sup>50</sup>

In *Lawrence*, Justice Kennedy attacked the "tradition" argument in *Bowers* in three ways. First, he argued that the Court had misread the historical evidence, and that legal proscription of homosexual conduct was neither as consistent nor as universal as Justice White and Chief Justice Burger had described.<sup>51</sup> Second, he noted that while history and tradition are relevant to constitutional interpretation, standing alone, they are not determinative.<sup>52</sup> Third, he invoked a counterweight to tradition: the "emerging awareness" of society, in this case society's emerging awareness of the value of homosexual relationships.<sup>53</sup>

Justice Kennedy challenged the finding in *Bowers* that legal proscription of homosexual conduct has "ancient roots,"<sup>54</sup> stating that the Court should not have come to a "definitive conclusion"<sup>55</sup> on this point. After an extensive review of the historical evidence,<sup>56</sup> Justice Kennedy stated, "laws prohibiting sodomy do not seem

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<sup>50</sup> *Id.* at 196–97 (Burger, C.J., concurring) (citations omitted).

<sup>51</sup> *See Lawrence*, 123 S. Ct. at 2478–80.

<sup>52</sup> *See id.* at 2480.

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* at 2479 (quoting *Bowers*, 478 U.S. at 192).

<sup>55</sup> *Id.* at 2478.

<sup>56</sup> *See id.* at 2478–80. Justice Kennedy made three arguments disproving the point that proscription against homosexual behavior had "ancient roots." First, he stated that although there have long been laws against nonprocreative sex, laws targeting same-sex consenting adults were not enacted until the last third of the twentieth century. *Id.* at 2479–80. Second,

to have been enforced against consenting adults acting in private,"<sup>57</sup> and he concluded, "In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated."<sup>58</sup>

Concerning the *Bowers* Court's *exclusive* reliance on tradition, Justice Kennedy did not maintain that "tradition" is irrelevant to constitutional interpretation, but he did rule that, standing alone, tradition is not determinative. Quoting from his own concurring opinion in *County of Sacramento v. Lewis*,<sup>59</sup> Justice Kennedy stated that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."<sup>60</sup> In other words, tradition is a legitimate source of constitutional authority, but it is not the only source.<sup>61</sup>

Justice Kennedy completed his rejection of Justice Scalia's "specific tradition"<sup>62</sup> standard by stating that "we think that our laws and traditions in the past half century are of most relevance here."<sup>63</sup> He cited the recommendations of the American Law Institute to abolish laws against sodomy in the Model Penal Code,<sup>64</sup> actions in Great Britain and Europe to decriminalize homosexual conduct,<sup>65</sup> and the

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he found that sodomy laws were rarely if ever enforced against consenting adults acting in private, but rather were enforced in cases involving minors or the use of force. *Id.* at 2479. Third, he cited scholarship which "casts some doubt" upon Chief Justice Burger's sweeping conclusion that "Western civilization" and "Judeo-Christian values" condemned homosexual conduct and mandated state intervention. *Id.* at 2480–81.

<sup>57</sup> *Id.* at 2479.

<sup>58</sup> *Id.* at 2480.

<sup>59</sup> 523 U.S. 833 (1998) (holding that high speed police chases that are not intended to cause harm do not violate Due Process rights).

<sup>60</sup> *Lawrence*, 123 S. Ct. at 2480 (quoting *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring)).

<sup>61</sup> See Wilson Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 438 (2000–2001) (contrasting "foundational" jurisprudential approaches with "pluralistic" approaches).

Foundational theories attempt to explain or justify the law in terms of a single modality or interpretative device. Adherents of foundational theories contend that the law is legitimately based upon one method of interpretation. The advantage of such theories is that of increased predictability and determinism. However, the disadvantage of such theories is they accept only one conception of justice as valid. Pluralistic theories, on the other hand, recognize different, and often contradictory, conceptions of justice that are reflected in the different interpretative modalities.

*Id.*

<sup>62</sup> See *supra* note 40 and accompanying text.

<sup>63</sup> *Lawrence*, 123 S. Ct. at 2480.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2481.

fact that most American states have repealed their laws against sodomy<sup>66</sup> to support his conclusion that there is "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>67</sup>

The "emerging awareness" standard is based upon language from Justice John Harlan's dissenting opinion in *Poe v. Ullman*.<sup>68</sup> Justice Harlan was objecting to the failure of the Court to agree to review a law forbidding the use of contraceptive devices.<sup>69</sup> In the course of his opinion, Justice Harlan stated that Due Process is the result of a balance between "respect for the liberty of the individual" and "the demands of organized society."<sup>70</sup> He added, "[t]he balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."<sup>71</sup>

In both *Casey* and *Michael H.*, Justice Kennedy and Justice O'Connor prominently cited this passage from Justice Harlan's dissent in *Poe* in support of their understanding of Due Process.<sup>72</sup> The "living tradition" from Justice Harlan's opinion in *Poe* became the "emerging awareness" in Justice Kennedy's opinion in *Lawrence*.

In summary, in *Lawrence* the majority of the Supreme Court embraced an expansive definition of the "right to privacy," adopting the passage from the plurality opinion in *Casey* that people are free to make "intimate and personal choices" not because these choices are "traditional" rights, but because these choices are "central to personal dignity and autonomy."<sup>73</sup> Dissenting in *Lawrence*, Justice Scalia refused to acknowledge the importance of the passage from *Casey*. Instead, he characterized it as "dictum,"<sup>74</sup> belittled it as "the sweet-mystery-of-life passage,"<sup>75</sup> and derided it as "the passage that ate the rule of law."<sup>76</sup> But it has now

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2480.

<sup>68</sup> 367 U.S. 497 (1961) (dismissing case for lack of justiciability because the state's attorney had not threatened immediate prosecution); *id.* at 522–56 (Harlan, J., dissenting).

<sup>69</sup> See *id.* at 499 (describing the state statute prohibiting the use of contraceptives).

<sup>70</sup> *Id.* at 542 (Harlan, J., dissenting).

<sup>71</sup> *Id.* (Harlan, J., dissenting). Four years later, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court voted to strike down the Connecticut statute forbidding the use of contraceptives.

<sup>72</sup> See *Pennsylvania v. Casey*, 505 U.S. 833, 848–50 (1992) (plurality opinion); *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J., concurring).

<sup>73</sup> *Lawrence*, 123 S. Ct. at 2481.

<sup>74</sup> *Id.* at 2489 (Scalia, J., dissenting).

<sup>75</sup> *Id.* This is not the first time that Justice Scalia has sarcastically used a hyphenated phrase to express his contempt for the principle of liberty. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 574–75 (1991), he stated that "there is no basis for thinking that our society has ever shared that Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-

been accepted by six members of the Supreme Court as expressing their understanding of the right to privacy.<sup>77</sup> By focusing on the effect that the law has on a person's personal, intimate choices, this doctrinal shift legitimizes the consequentialist approach that Justice Blackmun employed in *Roe* in applying the right to privacy.

*B. The Right to Privacy includes "certain intimate conduct" not because the sexual act itself usually occurs in private, but because of the central importance of sexual relationships in people's lives.*

Justice Kennedy opened his opinion in *Lawrence* not with the facts of the case or its procedural history, but rather by expressing the idea that the constitutional right to privacy not only prohibits the government from invading private spaces in our homes, but that it also prevents the government from controlling our private lives.<sup>78</sup> He stated:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.<sup>79</sup>

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someone-else" beau ideal — much less for thinking that it was written into the Constitution." *Id.* (Scalia, J., concurring).

<sup>76</sup> *Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting).

<sup>77</sup> This passage was adopted by the five-member majority in *Lawrence*, 123 S. Ct. at 2484, as well as Justice O'Connor in *Casey*, 505 U.S. at 851.

<sup>78</sup> See *Lawrence*, 123 S. Ct. at 2475. The opening passage of *Lawrence* states the principal theme of the opinion, just like the opening sentence of the plurality opinion in *Casey*, where Justices Kennedy, O'Connor, and Souter summarized the principal thrust of their opinion reaffirming *Roe*, stating: "Liberty finds no refuge in a jurisprudence of doubt." *Casey*, 505 U.S. at 844. Another stylistic device that appears in both *Casey* and *Lawrence* is the resonance between the first and last words of each opinion. The first and the last word in the opinion of the plurality in *Casey* is "liberty." *Casey*, 505 U.S. at 844, 901 (plurality opinion). The first word of Kennedy's opinion in *Lawrence* is "liberty," and the last word is "freedom." *Lawrence*, 123 S. Ct. at 2475, 2484. Dante Alighieri used a similar construction in *The Divine Comedy*. The last word of each book of the trilogy is "stelle" (stars). See DANTE ALIGHIERI, *THE DIVINE COMEDY*, HELL 142, PURGATORY 140, PARADISE 136 (Louis Biancolli trans., 1966).

<sup>79</sup> *Lawrence*, 123 S. Ct. at 2475.

In the course of his opinion Justice Kennedy leads the Court, and by extension this Nation, to a deeper understanding of the right to privacy. In *Lawrence*, the concept of "privacy" evolves from an objective, concrete rule into a subjective, abstract principle.<sup>80</sup> The result is a constitutional right that has more in common with First Amendment principles of freedom of expression than it does to Fourth Amendment rules against unreasonable searches.

The same transformation occurred in the Court's understanding of Equal Protection between 1896 and 1954. In *Plessy v. Ferguson*, the Supreme Court examined the constitutionality of a Louisiana statute that required "equal but separate" accommodations for blacks and whites on railroad cars.<sup>81</sup> In subsequent decisions, the Court held that laws requiring separate facilities for African Americans were constitutional so long as the accommodations were "substantially equal."<sup>82</sup> However, beginning in 1938, the Court became increasingly skeptical that separate facilities could be made equal. In the "graduate school cases," the Court struck down a number of segregation schemes as it became increasingly aware of the fact that intangible factors made it impossible for racially segregated educational facilities to be equal.<sup>83</sup> In *Sweatt v. Painter* the Court held that a newly founded law school for African Americans was not equal to the established law school for whites at the University of Texas not only because of inequality of the physical facilities of the two schools, but more importantly, because of the intangible factors that make for greatness in a law school.<sup>84</sup> Furthermore, the Court

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<sup>80</sup> See generally Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 372-79 (2003) (explaining the evolution of rules and standards which occurs through judicial application).

<sup>81</sup> 163 U.S. 537 (1896) (upholding Louisiana statute requiring "equal but separate" accommodations for the races in railway cars).

<sup>82</sup> See, e.g., *Mitchell v. United States*, 313 U.S. 80, 96 (1941) ("It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers."); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 344 (1938) (noting that "the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students").

<sup>83</sup> See *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950) (holding that separation of students in classrooms and the library deprived him of an equal education); *Sweatt v. Painter*, 339 U.S. 629 (1950) (finding that the newly founded law school for blacks was not equal to the established law school for whites at the University of Texas); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (per curiam) (requiring state to admit qualified applicant to state law school); *Gaines*, 305 U.S. 337 (requiring state to admit black applicant to state law school rather than send applicant to out-of-state law school).

<sup>84</sup> See 339 U.S. 629, 633-34 (1950). The Court stated:

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for

ruled it was unconstitutional for the State of Texas to establish a separate law school for blacks because law is an "intensely practical" profession, and a legal education taken in isolation from racial groups numbering eighty-five percent of the population of the state was not "substantially equal" to the education that the applicant would receive at the University of Texas.<sup>85</sup> In *McLaurin v. Oklahoma State Regents*,<sup>86</sup> the Court held that it was unconstitutional to confine a black graduate student to separate areas in the classroom, library, and cafeteria,<sup>87</sup> because "[s]uch restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."<sup>88</sup> The Court observed that "[t]he removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure

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specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.

*Id.*

<sup>85</sup> *Id.* at 634. The Court stated:

The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

*Id.*

<sup>86</sup> 339 U.S. 637 (1950) (forbidding state university from separating graduate student from others on account of his race).

<sup>87</sup> *See id.* at 640.

[McLaurin] was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.

*Id.* Following trial, and during the pendency of the appeal, these conditions were modified:

He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.

*Id.*

<sup>88</sup> *Id.* at 641.



acceptance by his fellow students on his own merits.”<sup>89</sup> Finally, in *Brown v. Board of Education*,<sup>90</sup> the Court outlawed official segregation of public schools altogether because of the psychological impact of segregation on black children. The Court stated, “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>91</sup> In *Plessy*, the Court noted that, although some had argued that enforced segregation implied the inferiority of the black race, “[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>92</sup> In *Brown*, the Court overruled this finding from *Plessy*, stating, “Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [of harm from segregation] is amply supported by modern authority.”<sup>93</sup>

In *Brown* the Supreme Court held that “in the field of public education the doctrine of ‘separate but equal’ has no place,” because “[s]eparate educational facilities are inherently unequal.”<sup>94</sup> In subsequent cases, this principle was extended to all incidents of state-sponsored segregation.<sup>95</sup> Ultimately, the constitutional violation of segregation lay not in the physical inequality of the schools, parks, railroads, and beaches that were reserved for blacks, but in the psychological injury inflicted by the government policy that, as Justice Harlan had predicted in his dissenting opinion in *Plessy*, “puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of ‘equal’ accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.”<sup>96</sup>

In *Lawrence*, Justice Kennedy outlines a similar evolution in our understanding of the right to privacy. He returns repeatedly to the theme that he established in the opening paragraph of the opinion that the Fourteenth Amendment protects liberty “both in its spatial and more transcendent dimensions.”<sup>97</sup> Ultimately, what dooms

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<sup>89</sup> *Id.* at 641–42.

<sup>90</sup> 347 U.S. 483 (1954) (striking down the doctrine of separate but equal in the field of public education).

<sup>91</sup> *Id.* at 494.

<sup>92</sup> *Plessy*, 163 U.S. at 551.

<sup>93</sup> *Brown*, 347 U.S. at 494.

<sup>94</sup> *Id.* at 495.

<sup>95</sup> In a series of *per curiam* decisions, the Supreme Court struck down state-sponsored segregation of public beaches, golf courses, buses, etc., citing *Brown*, 347 U.S. 483. The *per curiam* decisions are listed in RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §18.9(b) (3d ed. 1999).

<sup>96</sup> *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

<sup>97</sup> *Lawrence*, 123 S. Ct. at 2475.

the Texas statute prohibiting homosexual intimacy is the fact that this law causes senseless psychological harm to many of our citizens.<sup>98</sup>

Justice Kennedy commenced his substantive due process analysis in *Lawrence* with *Griswold v. Connecticut*,<sup>99</sup> observing that “[t]he Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.”<sup>100</sup> He then noted that the Court expanded its definition of the right to privacy in *Eisenstadt v. Baird*,<sup>101</sup> where it extended its understanding of the right to privacy to include the right of the individual to decide “whether to bear or beget a child.”<sup>102</sup> Justice Kennedy stated that in *Roe* the Court had “cited cases that protect spatial freedom and cases that go well beyond it,”<sup>103</sup> and that “*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny.”<sup>104</sup> According to Justice Kennedy, *Eisenstadt*, *Roe*, and *Carey v. Population Services International*<sup>105</sup> established that the right to privacy extended beyond married adults.<sup>106</sup> Justice Kennedy observed that this was the state of the law when *Bowers* came before the Court in 1986.<sup>107</sup>

Justice Kennedy then turned his attention to an examination of the *Bowers* decision, and he took aim at the very heart of the Court’s analysis, contending that the majority in *Bowers* had misconstrued the issue that was before the Court.<sup>108</sup> Justice White had stated, “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . .”<sup>109</sup> As a rejoinder to this, Justice Kennedy maintained in *Lawrence* that Justice White’s statement of the issue was demeaning — demeaning to homosexuals, to

<sup>98</sup> *Id.* at 2482 (discussing the stigma that the sodomy law imposed upon homosexuals).

<sup>99</sup> 381 U.S. 479 (1965) (striking down a Connecticut statute that outlawed use of contraceptive devices).

<sup>100</sup> *Lawrence*, 123 S. Ct. at 2477 (describing the reasoning of *Griswold*).

<sup>101</sup> 405 U.S. 438 (1972) (striking down a law forbidding the distribution of contraceptive devices to unmarried persons).

<sup>102</sup> *Lawrence*, 123 S. Ct. at 2477 (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” (quoting *Eisenstadt*, 405 U.S. at 453)).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 431 U.S. 678 (1977) (striking down a law forbidding sale of contraceptive devices to persons under 16 years of age).

<sup>106</sup> *Lawrence*, 123 S. Ct. at 2477 (“Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults.”).

<sup>107</sup> *Id.* (“This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.”).

<sup>108</sup> *Id.* at 2477–78.

<sup>109</sup> *Bowers v. Hardwick*, 478 U.S. 187, 190 (1986).

heterosexuals, to married persons, to single persons, to anyone who has ever had a sexual relationship.<sup>110</sup> In a passage that will likely have a profound impact on the future development of the law, Justice Kennedy turns our attention from the performance of sexual conduct to the creation of intimate relationships. He stated:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.<sup>111</sup>

Justice Kennedy reiterated that the issue in *Bowers* and *Lawrence* is not simply about the right to engage in homosexual conduct, but the right to enter into intimate relationships with persons of the same sex, stating:

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>112</sup>

Speaking for the majority of the Court, Justice Kennedy says that homosexuals are entitled to respect for their personal lives:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their

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<sup>110</sup> *Lawrence*, 123 S. Ct. at 2478.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."<sup>113</sup>

Just as the Supreme Court in *Brown* overturned the psychological findings of *Plessy*, the Supreme Court in *Lawrence* dismissed the psychological assumptions of *Bowers*. In *Bowers*, the Court said:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. . . . The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.<sup>114</sup>

The *Lawrence* Court came to the conclusion that laws against same-sex sexual relations are not simply unwise or undesirable, but are unjust. Just as state-sponsored segregation stigmatized African American children, laws against "homosexual conduct" demean gays and lesbians, and, one might add, have done so for a very long time.<sup>115</sup> Because of that, these laws are unconstitutional.

*C. The Court will look to legal developments in other nations, in particular decisions of the European Court of Human Rights, in defining our fundamental rights.*

In support of its decision invalidating the Texas statute, the majority in *Lawrence* relied upon legal developments in Europe and elsewhere decriminalizing homosexual conduct. Justice Kennedy pointed out that a number of nations have taken this step:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as

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<sup>113</sup> *Id.* at 2484 (quoting *Casey*, 505 U.S. at 847).

<sup>114</sup> *Bowers*, 478 U.S. at 190.

<sup>115</sup> See generally WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) (describing legal oppression of homosexuals).

an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.<sup>116</sup>

Justice Kennedy specifically cited the decision of the British Parliament to repeal laws punishing homosexual conduct,<sup>117</sup> and stated that the decision of the European Court of Human Justice in *Dudgeon*, which is binding in forty-five European countries, was “of even more importance.”<sup>118</sup>

The Court’s citation to foreign authority was couched as a rebuttal to the arguments of Chief Justice Burger in *Bowers* that Judeo-Christian values condemned homosexual conduct and that Western civilization criminalized it.<sup>119</sup> But in a television interview following the decision in *Lawrence*, Justice Breyer indicated that when the Court invoked foreign precedent in *Lawrence* it was doing more than simply responding to Chief Justice Burger’s “sweeping references.”<sup>120</sup> Rather, the Court was acknowledging that defining fundamental human rights under the United States Constitution is not simply a matter of domestic concern, but will affect how we will live together with people from other nations:

Through commerce, through globalization, through the spread of democratic institutions, through immigration to America, it’s becoming more and more one world of many different kinds of people. . . . And how they’re going to live together across the world will be the challenge, and whether our Constitution and how it fits into the governing documents of other nations, I think will be a challenge for the next generations.<sup>121</sup>

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<sup>116</sup> *Lawrence*, 123 S. Ct. at 2483 (citations omitted).

<sup>117</sup> *Id.* at 2481 (“A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1.”).

*Id.*

<sup>118</sup> *Id.* (“Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.”).

<sup>119</sup> *Id.* (“The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.”).

<sup>120</sup> Interview with Breyer & O’Connor, JJ., on ABC, *This Week* (July 6, 2003).

<sup>121</sup> John H. Cushman Jr., *O’Connor Not Retiring: Justice Dispels Rumor of Her Leaving Court*, THE HOUS. CHRON., July 7, 2003 at 1A. Justice Breyer indicated that this was not solely his position, but that of Justice O’Connor and other justices as well, stating, “We see all the time, Justice O’Connor and I, and the others, how the world really — it’s trite but it’s true — is growing together.” *Id.*

Since the publication of Bruce Ackerman's 1997 article, *The Rise of World Constitutionalism*,<sup>122</sup> which called upon the American legal academy to examine constitutional developments in other nations,<sup>123</sup> there has been an explosion of scholarly research into comparative constitutional law.<sup>124</sup> A central question is whether and how the decisions of constitutional courts from other nations should be taken into account in the interpretation of the United States Constitution. Professor Peter Quint succinctly poses the question:

[A] great question for American jurists is whether we also can foresee a time in which international principles of human rights — as embodied in international agreements or in the general principles of international law, and elaborated through our examination of comparative doctrine — may have an effect on the internal definition of American constitutional rights.<sup>125</sup>

In an exhaustive and influential article, Professor Mark Tushnet concludes that "U.S. courts can sometimes gain insights into the appropriate interpretation of the U.S. Constitution by a cautious and careful analysis of constitutional experience elsewhere."<sup>126</sup>

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<sup>122</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

<sup>123</sup> See *id.* at 774 (addressing American law professors, stating, "We have a serious responsibility here.").

<sup>124</sup> See, e.g., Louis J. Blum, *Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication*, 39 SAN DIEGO L. REV. 157, 200 (2002) (arguing that American courts use foreign authority for certain limited purposes); Paolo G. Carozza, "My Friend Is a Stranger": *The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031 (2003) (arguing for a noninterventionist global recognition of human rights); Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 558–59 (2002) (applying discourse theory of Habermas to analyze legitimacy of use of foreign authority); Ute Krodeewagen, *Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court*, 19 ARIZ. J. INT'L & COMP. L. 679 (2002) (contrasting American and German decisions and rationales on flag desecration); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 730 (2002) (arguing that globalization will likely subject the United States to international norms).

<sup>125</sup> Peter E. Quint, *International Human Rights: The Convergence of Comparative and International Law*, 36 TEX. INT'L L.J. 605, 608 (2001) (arguing that comparative law and international law are converging, creating internationally shared legal norms).

<sup>126</sup> Mark V. Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228–29 (1999) (describing three methods of constitutional borrowing: functionalism, expressivism, and bricolage). But see Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640

In his dissent in *Lawrence*, Justice Scalia contended that precedent from other nations is irrelevant to determining our fundamental rights, noting that the only pertinent question in *Lawrence* was whether "the claimed right to sodomy" is "deeply rooted in *this Nation's* history and tradition."<sup>127</sup> He claimed that the Court's discussion of "foreign views" is not only "meaningless dicta," but is also "[d]angerous dicta" because the Court "should not impose foreign moods, fads, or fashions on Americans."<sup>128</sup> He also complained that the majority "ignor[es], of course, the many countries that have retained criminal prohibitions on sodomy."<sup>129</sup> However, Justice Scalia does not identify which nations of the world still criminalize homosexual conduct.<sup>130</sup>

The Court's citation to judicial precedent from a foreign nation in *Lawrence* is a consequence of its decision to expressly reject the "specific tradition" test favored by Justice Scalia in favor of reliance on the "emerging awareness" of society. The Court recently made a similar reference to foreign authority in *Atkins v. Virginia*<sup>131</sup> when it determined that "evolving standards of decency" prohibited the execution of the mentally retarded.<sup>132</sup> In *Atkins*, Justice Stevens observed that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."<sup>133</sup> In both *Atkins* and

(1999).

<sup>127</sup> *Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986)).

<sup>128</sup> *Id.* at 2495 (Scalia, J., dissenting) ("The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'") (quoting *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).

<sup>129</sup> *Id.*

<sup>130</sup> Justice Scalia might have cited Iran and Afghanistan under the Taliban as countries punishing homosexual acts. See *Afghanistan's Taliban Execute Three for Buggery*, AGENCE FRANCE-PRESSE, Feb. 26, 1998 (describing execution of three gay men by the Taliban); Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605, 620-21 (1993) (describing Iranian law prescribing death as penalty for third offenses of homosexuality). In *Lawrence*, Justice Scalia stated that there were four executions for homosexual conduct in colonial America as support of his argument that the right to engage in homosexual relations is not deeply rooted in American tradition. *Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting). He did not condemn the executions nor did he in any way qualify his reliance upon this practice. *Id.*

<sup>131</sup> 536 U.S. 304 (2002) (holding that the execution of mentally retarded prisoners violates the Eighth Amendment).

<sup>132</sup> *Id.* at 321 ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.") (quoting *Ford v. Wainwright*, 477 U.S. 399 (1986)).

<sup>133</sup> *Id.* at 316 n.21. Justice Stevens' reference to foreign practices, in effect, rejected the

in *Lawrence* the Court consulted the experience of other nations in the interpretation of the Constitution because in those cases the constitutionality of the laws under review was not determined solely by reference to specific American traditions, but rather by whether the laws were consistent with “evolving standards”<sup>134</sup> or “emerging awareness.”<sup>135</sup> This trend towards reference to foreign authority was also stimulated in *Lawrence* by the holding, explained in the following portion of this article, that traditional notions of morality standing alone are no longer sufficient to justify prohibitory laws. Instead, the state is obligated to explain how every law will prevent or deter specific harm.

Both of these factors — the importance of the activity in the life of the individual and the consequences of allowing people to engage in the activity — are exceedingly complex judgments requiring the most careful and thorough consideration. These are not judgments that may be lightly undertaken, nor are they judgments that are unique to American society.<sup>136</sup> As the majority observes: “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”<sup>137</sup>

As viewed by the majority, the central question in *Lawrence* was whether homosexual relationships are important and valuable and therefore entitled to respect. There is no good reason to limit the inquiry into this question to domestic sources. This is a question that is of universal application. It is a judgment concerning human potential, not a question of American tradition. Having adopted a “human rights” approach to defining our fundamental rights in place of Justice Scalia’s “specific tradition” test, the Court wisely draws upon the experience of other nations that share our commitment to liberty and equality.

The decision to cite the fundamental law of other nations reflects a sea change in the Court’s understanding of our fundamental rights. Does the Constitution create our fundamental rights, or does it merely acknowledge preexisting human rights? Do our fundamental rights originate in the adoption and ratification of the Constitution, or are they a birthright? Is the Constitution essentially a “contract”

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position taken by the Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989), where Justice Scalia, speaking for the majority, rejected reliance on the practice of other nations to not execute juveniles, stating, “it is American conceptions of decency that are dispositive.” *Id.* at 369 n.1.

<sup>134</sup> *Atkins*, 536 U.S. at 321.

<sup>135</sup> *Lawrence*, 123 S. Ct. at 2480 (“In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an *emerging awareness* that liberty give substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”) (emphasis added).

<sup>136</sup> *Id.* at 2483.

<sup>137</sup> *Id.*



between the people and the government, or is it instead a statement of fundamental truths about human nature?<sup>138</sup> The Declaration of Independence is definitely of the latter category, but it is not treated as “law,” rather merely as a statement of principles.<sup>139</sup> The language of the *Casey* plurality, adopted by a majority of the Court in *Lawrence*, implies a universal understanding of human dignity that would turn the Constitution from being a social contract with specific, determinative meanings into a statement of universal fundamental principles that are nevertheless binding upon our government.<sup>140</sup>

Justice Scalia is certainly correct in noting that the laws and customs of other nations may not be consonant with our traditional values.<sup>141</sup> Furthermore, it may be that globalization and immigration will result not in increased harmony of values, but rather will bring our Nation into collision with incompatible systems, perhaps even creating “irrepressible conflict”<sup>142</sup> as occurred between slavery and

<sup>138</sup> See generally Ronald R. Garet, *Creation and Commitment: Lincoln, Thomas, and the Declaration of Independence*, 65 S. CAL. L. REV. 1477 (1992). Professor Garet attributes the different fates of Robert Bork and Clarence Thomas to their views on this point:

What sank Judge Bork, however, was not so much his adherence to the intent of the Framers as his professed disbelief in natural rights. The final, fatal image of Judge Bork was of a man who, turning conservatism upside down, believed that we enjoy only those rights against government that the official legal texts expressly give us. By contrast, Clarence Thomas's celebration of the Declaration of Independence seems less legalistic in the bad sense, more supportive of natural rights that we enjoy just because we are human persons.

*Id.* at 1483.

<sup>139</sup> See Thomas B. McAfee, *Does the Federal Constitution Incorporate the Declaration of Independence?*, 1 NEV. L.J. 138, 144–45 (2001) (“The framers may have believed in inalienable rights, but one of those inalienable rights was the power of the people to make fundamental decisions about their government, including the limits that should be imposed on it.”). But see Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169, 187 (1990). Himmelfarb contends:

[T]he prevailing scholarly consensus misconceives the relevance of the Declaration. According to that consensus, the Declaration is a work of propaganda, an instrument of separation, or a lawyer's brief — anything, in short, but a statement of foundational principles designed to serve as a guide for the framers of a constitution of government. This view should not go unchallenged.

<sup>140</sup> *Lawrence*, 123 S. Ct. at 2481 (adopting *Planned Parenthood v. Casey*, 505 U.S. 833, 851) (“At the heart of liberty is the right to 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 compulsion of the State.”).

<sup>141</sup> See, e.g., Krodeewagen, *supra* note 124, at 681 (discussing the differences between American and German attitudes towards the national flag and towards toleration of dissent, and concluding, “While the American concept of democracy is based on the spirit of popular sovereignty, the German concept of democracy is based on the notion that a democratic state needs to defend its own foundations.”).

<sup>142</sup> In 1858, Governor William Seward delivered his famous “irrepressible conflict”

free labor economic and political systems in nineteenth-century America, or between communistic and capitalistic economic and political systems in the twentieth century.<sup>143</sup> Justice Scalia himself refers to the conflict that underlies the gay-rights cases as a "culture war."<sup>144</sup> If it be so, it is not a war that is confined to the United States of America. Our society will need to consider the experiences and values of all peoples in order to draw the judgments about human potential that the *Lawrence* ruling requires of us.

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speech, explaining why the slavery issue was coming to a head:

Our country is a theatre which exhibits in full operation two radically different political systems: the one resting on the basis of servile labor, the other on the basis of voluntary labor of free men. . . . Hitherto the two systems have existed in different States, but side by side within the American Union. This has happened because the Union is a confederation of States. But in another aspect the United States constitutes only one nation. Increase of population, which is filling the States out of their very borders, together with a new and extended network of railroads and other avenues, and an internal commerce which daily becomes more intimate, is rapidly bringing the States into a higher and more perfect social unity or consolidation. Thus, these antagonistic systems are continually coming into closer contact, and collision results.

Shall I tell you what this collision means? They who think it is accidental, unnecessary, the work of interested or fanatical agitators, and therefore ephemeral, mistake the case altogether. It is an *irrepressible conflict* between opposing and enduring forces, and it means that the United States must and will sooner or later become either entirely a slave-holding nation or entirely a free-labor nation.

William H. Seward, *An Irrepressible Conflict*, Address Delivered in Rochester, N.Y. (Oct. 25, 1858), in *THE CAUSES OF THE CIVIL WAR* 132 (Kenneth M. Stampp ed., 1959) (citing *THE WORKS OF WILLIAM H. SEWARD* 292 (George E. Baker ed., 1855)).

<sup>143</sup> See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 209–18 (1996) (examining the evolving conflict between Islam and the West). But see John Shattuck, *Religion, Rights, and Terrorism*, 16 HARV. HUM. RTS. J. 183, 188 (2003).

[T]he terrorism of September 11 was caused in large part by the hijacking of a religion and the suppression of human rights in the Islamic world. Islam was not a cause of the terrorism, it was a victim, and it is now in danger of becoming a scapegoat as well.

*Id.*

<sup>144</sup> *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting) ("It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."); see also *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite.").

*D. Morality, standing alone, is not a sufficient basis for prohibitory legislation. Instead, the state must explain how behavior is harmful before it can make it unlawful.*

Another stunning change in Fourteenth Amendment doctrine wrought by the Court in *Lawrence* was its decision to adopt the following simple proposition from Justice Stevens' dissent in *Bowers v. Hardwick*: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."<sup>145</sup>

Because the State of Texas had failed to identify any specific, identifiable harms resulting from homosexual conduct, the statute proscribing such conduct was ruled unconstitutional.<sup>146</sup> Justice Kennedy explained that the *Lawrence* case did not involve objective harms such as those resulting from sexual activity with children, sexual imposition on nonconsenting persons, public acts of indecency, or prostitution.<sup>147</sup> Nor was *Lawrence* concerned with defining or protecting the institution of marriage.<sup>148</sup> On the contrary, Kennedy stated:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>149</sup>

Justice Scalia vigorously disagreed with this holding. In his view, the reasoning of the majority spells "the end of all morals legislation,"<sup>150</sup> including laws against

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<sup>145</sup> *Lawrence*, 123 S. Ct. at 2483 (adopting Justice Stevens's reasoning from *Bowers*, 478 U.S. at 216, and stating, "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.").

<sup>146</sup> *Id.* at 2484 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

<sup>147</sup> *See id.*

<sup>148</sup> *See id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 2495 (Scalia, J., dissenting). Justice Scalia stated:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable" . . . *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) — the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the

“fornication, bigamy, adultery, adult incest, bestiality, and obscenity.”<sup>151</sup> The implication of Justice Scalia’s argument is that the majority strikes at the heart of moral decisionmaking because it disables the majority of the people from enacting their moral choices into law.<sup>152</sup> Justice Scalia expressed the view that the Court should not take sides in what is a “culture war”,<sup>153</sup> and that “it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”<sup>154</sup> The following passage is the fullest development of Justice Scalia’s vision of moral conflict and moral change:

Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts — or, for that matter, display *any* moral disapprobation of them — than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change.<sup>155</sup>

In my opinion, Justice Scalia’s understanding of “morality” is fundamentally different from that of the majority of the Court. Justice Scalia understands morality

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individual. . . .” The Court embraces instead Justice Stevens’ declaration in his *Bowers* dissent, that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . .” This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

*Id.* (citations omitted).

<sup>151</sup> *Id.*

<sup>152</sup> See *id.* at 2497 (Scalia, J., dissenting) (“What Texas has chosen to do is well within the range of traditional democratic action. . . .”).

<sup>153</sup> See *id.* (Scalia, J., dissenting) (“It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”); see also *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.”).

<sup>154</sup> *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

<sup>155</sup> *Id.*

to be obedience to a set of rules established by higher authority.<sup>156</sup> If one believes that morality constitutes an authoritative code of conduct, it is not only reasonable but imperative for the democratic majority to enact this code of conduct into law.<sup>157</sup>

The moral understanding of the majority is fundamentally different. Consider, once again, the central passage from *Casey* defining the right to privacy:

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 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 compulsion of the State.<sup>158</sup>

Consistent with this passage is the idea that "intimate and personal choices" constitute *moral* choices only if individuals are free to make those choices. The essence of morality is the power to choose right from wrong. When choice is taken away from the individual, it is no longer a question of morality, but a question of law. The decision of the majority in *Lawrence* distinguishes "essentially moral choices" from legal imperatives.<sup>159</sup>

Justice Scalia should listen to his own words: "[P]ersuading one's fellow citizens is one thing, and imposing one's views . . . is something else."<sup>160</sup> Moral suasion is fundamentally different from governmental coercion, just as wrestling

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<sup>156</sup> See Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998). Professor Cicchino states that the views of Justice Scalia are "fundamentally the same" as the natural law jurisprudence of John Finnis, which he characterizes as "theology" and "essentially the same, as that made by the Roman Catholic Church." *Id.* at 157, 162, 164 (contending that assertions of morality do not qualify as a legitimate governmental interest).

<sup>157</sup> See *Romer*, 517 U.S. at 653 (Scalia, J., dissenting) ("Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans.").

<sup>158</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

<sup>159</sup> Cf. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.").

<sup>160</sup> See text accompanying *supra* note 155.

with one's conscience is different from taking a calculated risk of being caught.<sup>161</sup> It is not a moral act to conform to the coercive legislation of the state, nor is it a moral act to enact such legislation in the absence of evidence that the behavior is harmful.

Despite Justice Scalia's fears, the decision of the Supreme Court in *Lawrence* does not diminish people's rights to make moral judgments against homosexuality. Under the First Amendment, people are free to condemn homosexual conduct, and until private discriminatory acts are made unlawful, they are also free to discriminate against homosexuals in all matters involving private conduct, including employment and housing.<sup>162</sup> Furthermore, even if homosexuals gain statutory protection against private acts of discrimination, as a matter of constitutional right, religious and expressive organizations will still be free to discriminate against homosexuals,<sup>163</sup> and individuals will continue to have a constitutional right to discriminate against homosexuals when making their own "intimate and personal choices" such as whom to associate with on a personal basis.<sup>164</sup> What people may not do under *Lawrence* is impose their views through legislation invoking the coercive power of the state, unless the behavior being prohibited is harmful in some way other than to people's moral sensibilities. The majority of the Court holds that while individuals have the power to develop and disseminate their own beliefs as to what is right and what is wrong, they do *not* have the right to enact their beliefs into law unless there is some reason other than morality that justifies the law. Morality is a matter of individual conscience, not compulsion.<sup>165</sup>

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<sup>161</sup> See 1 LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* 17-19 (1981) (distinguishing levels of moral development, in particular the preconventional stage of the "punishment and obedience orientation," and the postconventional stages of "social contract orientation" and the "universal ethical principle orientation").

<sup>162</sup> Under the "state action doctrine," private acts of discrimination are not violations of the Constitution. See *Civil Rights Cases*, 109 U.S. 3, 17 (1883).

The wrongful act of an individual, unsupported by any [state] authority is simply a private wrong, or a crime of that individual . . . but if not sanctioned in some way by the state, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.

*Id.*

<sup>163</sup> See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (upholding right of Boy Scouts to expel assistant scoutmaster who was homosexual).

<sup>164</sup> This right is preserved under the reasoning of *Lawrence*.

<sup>165</sup> See Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER SOC. POL'Y & L. 147, 150 (1996) ("[T]he unexamined premises in the legal building blocks of reproductive rights reflect an attitude of disrespect for and mistrust of women and of their moral capacity to make difficult decisions.").

## II. THE JURISPRUDENTIAL REVOLUTION IN THE INTERPRETATION OF THE EQUAL PROTECTION CLAUSE

The decisions of the Court in *Lawrence* and *Grutter* and the concurring opinion of Justice O'Connor in *Lawrence* work profound changes in the interpretation of the Equal Protection Clause. As it did with respect to the right of liberty, the Court adopts a contextual, consequentialist approach to defining the constitutional principle of equality. In particular, laws that stigmatize groups of people and laws that inhibit people's personal relationships are subjected to heightened levels of scrutiny under the Equal Protection Clause. In addition, in her concurring opinion in *Lawrence*, Justice O'Connor stated that "moral disapproval" of a group or its actions, standing alone, is an insufficient reason to justify laws that discriminate against the group.<sup>166</sup> This reinforces the ruling of the majority that moral disapproval of conduct is insufficient to support the constitutionality of legislation under the Due Process Clause.<sup>167</sup>

The principal jurisprudential shift that is signaled by Justice O'Connor's opinion in *Grutter*<sup>168</sup> is one that upsets the consistency of the standards of review established by the Court in previous cases.

*A. The level of scrutiny that the Court applies in evaluating the constitutionality of laws under the Equal Protection Clause varies with the context. Neither strict scrutiny nor rational basis is applied the same in all cases.*

In determining the constitutionality of race-based affirmative action in university admissions in *Grutter*, Justice O'Connor made the following statement: "Context matters when reviewing race-based governmental action under the Equal Protection Clause."<sup>169</sup> She explained that although "strict scrutiny" applies to all race-based classifications, "[n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."<sup>170</sup>

Justice O'Connor said that she was applying strict scrutiny, to evaluate the constitutionality of the law in *Grutter*,<sup>171</sup> but in fact she did not. At key points in her opinion she deferred to the judgment of college and graduate school admissions

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<sup>166</sup> *Lawrence v. Texas*, 123 S. Ct. 2472, 2486 (O'Connor, J., concurring).

<sup>167</sup> *Id.* at 2484.

<sup>168</sup> *Grutter*, 123 S. Ct. at 2325.

<sup>169</sup> *Id.* at 2338.

<sup>170</sup> *Id.*

<sup>171</sup> *See id.* at 2339 ("Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.").

officers. She stated, "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer,"<sup>172</sup> and "[o]ur holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."<sup>173</sup> This is a significant departure from the normal requirement of strict scrutiny which places the burden of proof on the state.<sup>174</sup> Justice O'Connor justified her deference to educational authorities on the ground that universities have a First Amendment interest in "educational autonomy," citing Justice Powell's opinion in *Bakke* in support of this proposition.<sup>175</sup>

Justice O'Connor's deferential version of strict scrutiny in *Grutter* stands in stark contrast to Justice Rehnquist's application of the doctrine in the companion case *Gratz v. Bollinger*,<sup>176</sup> striking down the race-based affirmative action admissions program in the undergraduate program of the University of Michigan.<sup>177</sup> Quoting from the Court's decision in *Adarand Constructors, Inc. v. Peña*<sup>178</sup> and *City of Richmond v. J.A. Croson Co.*,<sup>179</sup> Chief Justice Rehnquist emphasized that strict scrutiny places the burden of proof on the state to justify the law:

It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." This "standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification." Thus, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny."<sup>180</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See *infra* notes 176–82 and accompanying text.

<sup>175</sup> See *Grutter*, 123 S. Ct. at 2339. Justice O'Connor stated:

In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the *First Amendment*, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seeks to achieve a goal that is of paramount importance in the fulfillment of its mission."

*Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978)) (citation omitted).

<sup>176</sup> 123 S. Ct. 2411 (2003).

<sup>177</sup> *Id.*

<sup>178</sup> 515 U.S. 200 (1995) (striking down state law creating "set-aside" for minority business enterprises in public works programs).

<sup>179</sup> 488 U.S. 469 (1989).

<sup>180</sup> *Gratz v. Bollinger*, 123 S. Ct. 2411, 2427 (2003) (quoting *Adarand Constructors, Inc.*



In their dissenting opinions in *Grutter*, the Chief Justice, Justice Scalia, and Justice Kennedy all criticized the majority for deferring to educational authorities.<sup>181</sup> Like the Chief Justice, Justice Scalia and Justice Kennedy emphasized that strict scrutiny places the burden of proof upon the state to demonstrate the constitutionality of the affirmative action program, that is, to prove both that its policies are likely to achieve their purposes and that these policies are the least discriminatory means of achieving those purposes.<sup>182</sup>

Justice O'Connor's deferential model of strict scrutiny in *Grutter* is not the only modification that she makes to traditional standards of review. In her concurring opinion in *Lawrence*, Justice O'Connor stated that rational basis analysis is also contextual, noting that in certain cases the Court has applied "a more searching version of rational basis."<sup>183</sup> In particular, she reasoned that laws that exhibit a desire to harm politically unpopular groups, laws that express moral disapproval of particular groups, and laws that inhibit personal relationships are scrutinized more strictly than laws that do not. Furthermore, in explaining why the Texas law criminalizing homosexual conduct was unconstitutional, like the majority in *Lawrence*, Justice O'Connor placed great reliance on the fact that this law stigmatized gays and lesbians as criminals.<sup>184</sup>

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v. Pena, 515 U.S. 202, 224 (1995), and *Croson*, 488 U.S. 469, 494 (1989)) (citations omitted).

<sup>181</sup> See *Grutter*, 123 S. Ct. at 2356 (Scalia, J., concurring in part and dissenting in part) ("Under strict scrutiny, the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference, grounded in the First Amendment or anywhere else."); *id.* at 2366 (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 2371 (Kennedy, J., dissenting) ("In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued.").

<sup>182</sup> See *id.* at 2357 (Scalia, J., concurring in part and dissenting in part) ("The majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court."); *id.* at 2372 (Kennedy, J., dissenting) ("The Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way.").

<sup>183</sup> *Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003) (O'Connor, J., concurring). We have consistently held, however, that some objectives, such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests. . . . When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

*Id.* (citations omitted).

<sup>184</sup> *Id.* at 2486 (O'Connor, J., concurring).

The adoption of “higher order rational basis” and “lower order strict scrutiny” essentially signals acceptance of the “sliding scale” Equal Protection standard advocated by Justice John Paul Stevens in *Cleburne v. Cleburne Living Center*.<sup>185</sup> This point is examined in more detail below.<sup>186</sup>

*B. Laws that intentionally stigmatize people are scrutinized more strictly than laws that do not.*

In *Lawrence*, both Justice Kennedy and Justice O'Connor stated that “stigmatization” militates against the constitutionality of a law. Justice Kennedy stated that there was a “tenable argument” for striking down the Texas statute under the Equal Protection Clause because it punished homosexuals, but not heterosexuals, for engaging in certain sexual acts.<sup>187</sup> However, he proceeded to argue that invalidating the law under Equal Protection would be an inadequate remedy because the state could cure the unconstitutionality simply by extending the prohibition to heterosexual couples, leaving the holding of *Bowers v. Hardwick* intact. Leaving *Bowers* intact as precedent, said Justice Kennedy, would fail to erase the stigma that that case imposes upon homosexuals.<sup>188</sup> The *Bowers* decision, according to Justice Kennedy, “demeans the lives of homosexual persons.”<sup>189</sup> He stated:

If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and

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<sup>185</sup> 473 U.S. 432, 451–52 (1985).

<sup>186</sup> See *infra* text accompanying notes 226–28.

<sup>187</sup> *Lawrence*, 123 S. Ct. at 2482.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity.

*Id.*

<sup>188</sup> *Id.* (“Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”).

<sup>189</sup> *Id.*

it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.<sup>190</sup>

Justice Kennedy added, "The stigma this criminal statute imposes, moreover, is not trivial."<sup>191</sup> He outlined the legal and social consequences of being convicted for committing "homosexual conduct," including the fact that conviction for this offense would be placed upon the person's record,<sup>192</sup> persons convicted of this offense would have to register as "sex offenders" in four states,<sup>193</sup> and the conviction would have to be noted on job application forms.<sup>194</sup> For Justice Kennedy, "stigmatization" was the principal reason for overruling *Bowers v. Hardwick*.

Justice O'Connor concurred with this point by observing that conviction under the Texas statute carries negative consequences for defendants, including being barred from certain professions and having to register as a sex offenders.<sup>195</sup> However, Justice O'Connor added that the law stigmatized *all* homosexuals because it "brands all homosexuals as criminals," and thereby sanctions acts of discrimination against them.<sup>196</sup> She stated:

[T]he effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* ("The petitioners will bear on their record the history of their criminal convictions.").

<sup>193</sup> *Id.* at 2482 ("We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of a least four States were he or she to be subject to their jurisdiction.").

<sup>194</sup> *Id.* ("[T]he Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.").

<sup>195</sup> *Id.* at 2485-86 (O'Connor, J., concurring). Justice O'Connor stated:

As the Court notes . . . petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement.

*Id.* (citations omitted).

<sup>196</sup> *Id.* at 2486.

sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing."<sup>197</sup>

Justice O'Connor agreed with the majority that the Texas criminal statute proscribing homosexual conduct imposes a "lifelong penalty and stigma" upon gays and lesbians.<sup>198</sup> She stated:

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to "a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with" the Equal Protection Clause.<sup>199</sup>

Accordingly, both Justice Kennedy, writing for the majority in *Lawrence*, and Justice O'Connor, writing separately, identify stigmatization as a principal reason for overturning the Texas law against "homosexual conduct."

The question of stigmatization looms large in *Grutter* as well. Traditionally, those who favor affirmative action contend that strict scrutiny is inapplicable because affirmative action programs are not intended to stigmatize racial minorities, but are instead intended to expand opportunity.<sup>200</sup> Justice Thurgood Marshall, for

<sup>197</sup> *Id.* (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)).

<sup>198</sup> *Id.* at 2487.

<sup>199</sup> *Id.* (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J. concurring)).

<sup>200</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in part, concurring in judgment in part, and dissenting in part) (evaluating affirmative action admissions program under intermediate scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 535 (1989) (Marshall, J., dissenting) (evaluating minority business set-aside under intermediate scrutiny); see also Mark Strasser, Plessy, Brown, and HBCUS: *On the Imposition of Stigma and the Court's Mechanical Equal Protection Jurisprudence*, 40 WASHBURN L.J. 48, 69 (2000) (criticizing the Court's "mechanical jurisprudence" of applying strict scrutiny in reviewing affirmative action). Professor Strasser states:

Plessy upheld racial segregation in railway cars, refusing to recognize the stigmatization that such a law entailed. Brown took account of both the social meaning of segregation and empirical data suggesting that state-imposed segregation caused real and lasting harms. The current Court has adopted a mechanical approach to race-conscious remedies, which seems both to prevent the state from ameliorating the effects of past discrimination and also to allow if not encourage private actors to continue to discriminate.

*Id.*; see also Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397 (2000) (arguing in favor of a "subordination-focused approach" to interpreting the

example, dissenting in *Croson*, stated:

Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism.<sup>201</sup>

Accordingly, Justice Marshall and other justices argued that affirmative action programs ought to be evaluated under the lesser standard of "intermediate scrutiny."<sup>202</sup>

Stigmatization is also a central argument of the opponents of affirmative action. The commentator Larry Elder, for example, argues that "white condescension does more damage than good."<sup>203</sup> This is a principal theme of Justice Thomas' dissenting opinion in *Grutter*.<sup>204</sup> Justice Thomas contends that affirmative action stigmatizes blacks by underestimating their abilities<sup>205</sup> and diminishing their accomplishments.<sup>206</sup> Whether one favors or opposes affirmative action, the presence or absence of stigmatization is a principal factor determining its constitutionality.<sup>207</sup>

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Americans With Disabilities Act.).

<sup>201</sup> *Croson*, 488 U.S. at 551–52 (Marshall, J., dissenting).

<sup>202</sup> *Id.* at 535 (Marshall, J., dissenting) ("My view has long been that race-conscious classifications designed to further remedial goals 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand constitutional scrutiny.") (quoting *Bakke*, 438 U.S. at 359 (1978)).

<sup>203</sup> LARRY ELDER, *THE TEN THINGS YOU CAN'T SAY IN AMERICA* 68 (2000).

<sup>204</sup> See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2350–2365 (2003) (Thomas, J., concurring in part and dissenting in part). Justice Thomas commences his dissenting opinion with a quotation from Frederick Douglass answering "What the Black Man Wants," with the words, "All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury." *Id.* at 2350.

<sup>205</sup> See *id.* ("I believe blacks can achieve in every avenue of American life without the meddling of university administrators.").

<sup>206</sup> See *id.* at 2362 ("It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not?") (citation omitted).

<sup>207</sup> See generally Andrew F. Halaby & Stephen R. McAllister, *An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Action Cases*, 2 MICH. J. RACE & L. 235 (1997). Halaby and McAllister distinguish "inferiority-type self-stigma" which was condemned in *Brown* from "inferiority-type other stigma" that is the subject of later affirmative action cases such as *Adarand* and *Croson*. *Id.* at 281–82. The authors state:

There is a difference, however, between the stigmatization that was present in *Plessy* and *Brown* and the stigmatization that Justice Thomas and others perceive in affirmative action. The purpose of state-sponsored segregation was to humiliate racial minorities and to relegate them to second-class citizenship. Whatever the merits of affirmative action may be, it cannot be seriously maintained that this is its purpose. While it may be argued that the *effects* of affirmative action are debilitating for racial minorities, this is obviously not the *intent* of such programs. Justice O'Connor implicitly drew this distinction in her discussion of the "narrow tailoring" prong of strict scrutiny in *Grutter*, where she stated: "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen 'fit' . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'"<sup>208</sup>

In finding that the law school's admission policy was "narrowly tailored," the implicit conclusion of the Court in *Grutter* is that the university's policy was not intended to stigmatize racial or ethnic minority groups. Laws that are *intended* to stigmatize groups, such as the Texas law criminalizing homosexual conduct, apparently stand on a far different footing than laws that may or may not have the unintentional *effect* of stigmatizing a group.

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The Court's initial constitutional concept of "stigma," which originated in *Plessy v. Ferguson* and *Brown v. Board of Education*, focused upon the particular strain of inferiority-type self-stigma suffered by powerless nonbeneficiaries.

In the affirmative action cases of the past twenty years, however, the Court's concept of "stigma" has developed differently in two critical respects. First, the predominant view in the affirmative action cases . . . is that the constitutionally significant strain of stigma is inferiority-type other-stigma by powerless beneficiaries, *i.e.*, members of the preferred minority group. This strain differs from the *Plessy/Brown* strain in both the source of the underlying negative attribution — others besides the stigmatized group make the attribution, generally Whites — and the distributive posture of the stigmatized group — they are the beneficiaries of affirmative action rather than the nonbeneficiaries of, for example, state-enforced segregation. Second, the Court has conferred constitutional significance on an entirely new strain of stigma. This new "racism" strain is one in which inferiority is *not* the "mark" conferred upon the group at issue, but rather is one where the issue is perceived past *racism* of the powerful nonbeneficiary group (*i.e.*, Whites).

Each of these fundamental changes is subject to serious criticism. . . .

*Id.*

<sup>208</sup> *Grutter v. Bollinger*, 123 S. Ct. 2325, 2341 (2003) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

*C. Laws that inhibit people's personal relationships are scrutinized more strictly than laws that do not.*

In *Lawrence*, Justice O'Connor states: "We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships."<sup>209</sup> This simple proposition explains what until now has been a curious anomaly in constitutional law — the existence of two inconsistent standards of rational basis review in equal protection cases.

The competing rational basis tests were both expressed in an early case, *Railway Express Agency v. New York*.<sup>210</sup> In evaluating the constitutionality of a law that made it illegal to operate a vehicle for the purpose of selling advertising space on it, Justice William Douglas took an extremely deferential approach:

[T]he fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.<sup>211</sup>

In contrast, Justice Robert Jackson disagreed with Justice Douglas, questioning whether the municipality could permit some people to engage in certain activity and prohibit others from engaging in the same activity without a reason that explained the difference in treatment. Justice Jackson stated, "As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose."<sup>212</sup> Justice Jackson explained that he thought that the law was constitutional because there was a "real difference" between advertising one's own business on a vehicle used for business, and operating a vehicle for the purpose of advertising others' businesses.<sup>213</sup>

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<sup>209</sup> *Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003) (O'Connor, J., concurring).

<sup>210</sup> 336 U.S. 106 (1949) (upholding a municipal regulation prohibiting vehicles from displaying advertisements for other businesses).

<sup>211</sup> *Id.* at 110.

<sup>212</sup> *Id.* at 115 (Jackson, J., concurring).

<sup>213</sup> *Id.* at 115–16 (Jackson, J., concurring). Justice Jackson stated:

I think the answer has to be that the hireling may be put in a class by himself and may be dealt with differently than those who act on their own. But this is not merely because such a discrimination will enable the lawmaker to diminish the evil. That might be done by many classifications, which I should think wholly unsustainable. It is rather because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be

Over the years, in some Equal Protection cases, the Court has applied the extremely deferential rational basis test of Justice Douglas, while in others it has conducted a more searching review consistent with Justice Jackson's "real differences" test. For example, in *Minnesota v. Clover Leaf Creamery Co.*,<sup>214</sup> the Court upheld an environmental statute banning the sale of milk in plastic, nonreturnable containers against an equal protection challenge on the ground that the reasonableness of the distinction between plastic and cardboard containers was "at least debatable."<sup>215</sup> In contrast, however, in *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>216</sup> the Court applied the stricter rational-basis standard of Justice Jackson in striking down a law that required a special use permit for the operation of a group home for the mentally retarded but that did not require one for fraternities, rest homes, or hospitals.<sup>217</sup> The Court stated:

It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the

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promoted for a price.

*Id.*

<sup>214</sup> 449 U.S. 456 (1981) (upholding law forbidding the sale of milk in nonreturnable, plastic containers).

<sup>215</sup> *Id.* at 469 (quoting *United States v. Carolene Prod.*, 304 U.S. 144, 154 (1938)).

<sup>216</sup> 473 U.S. 432 (1985) (declaring the city's special-use permit requirement regarding a group home for the mentally retarded to be unconstitutional).

<sup>217</sup> *Id.* at 447-48. Justice White stated:

The constitutional issue is clearly posed. The city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feeble-minded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?

*Id.*



judgment below insofar as it holds the ordinance invalid as applied in this case.<sup>218</sup>

The Supreme Court used the rational basis test to strike down laws in a number of other cases as well. In *United States Department of Agriculture v. Moreno*, the Court invalidated a requirement of a federal food stamp program that denied eligibility to unrelated persons living together,<sup>219</sup> and in *Romer v. Evans*, the Court struck down a Colorado constitutional amendment that made it more difficult to enact legislation forbidding discrimination against homosexuals.<sup>220</sup> In *Lawrence*, Justice O'Connor acknowledged that a common rationale set forth in *Cleburne*, *Moreno*, and *Romer* was that in each case the law in question was invalidated because it was motivated by hostility towards the affected classes: hippies, homosexuals, and the mentally retarded.<sup>221</sup> However, Justice O'Connor offers another explanation for the results in those cases. In *Lawrence*, she stated that in each case, the government had sought to control the personal relationships of individuals.<sup>222</sup> In *Cleburne*, the city attempted to prevent the mentally retarded from living in the community in a group home.<sup>223</sup> In *Moreno*, the federal law was directed at communal living arrangements of "hippies."<sup>224</sup> And in *Romer*, the state constitutional amendment implied disapproval of homosexual relationships.<sup>225</sup> Where federal, state, and local officials seek to control the private living arrangements of individuals, Justice O'Connor indicates that the proffered justification of the law will be more closely examined.

The consequence of Justice O'Connor's adoption of "higher level rational basis" in *Lawrence* and "lower level strict scrutiny" in *Grutter* is to call into question the stability of the standards of review that have served the Court for over half a century.<sup>226</sup> Her reasoning in these cases is consistent with the position taken

<sup>218</sup> *Id.* at 448.

<sup>219</sup> 413 U.S. 528 (1973).

<sup>220</sup> 517 U.S. 620 (1996).

<sup>221</sup> See *Lawrence*, 123 S. Ct. at 2485 (citing *Moreno*, 413 U.S. at 534; *Cleburne*, 473 U.S. at 446-47; *Romer*, 517 U.S. at 632).

<sup>222</sup> *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).

<sup>223</sup> *Cleburne*, 473 U.S. at 455 (Stevens, J., concurring) ("The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in [the] home.").

<sup>224</sup> *Moreno*, 413 U.S. at 534 ("The legislative history . . . indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program.").

<sup>225</sup> *Romer*, 517 U.S. at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

<sup>226</sup> See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (originating the concept of "more exacting judicial scrutiny" for laws that infringe fundamental rights or discriminate against minority groups).

by Justice Stevens, who explained in his concurring opinion in *Cleburne* that he did not recognize separate and distinct standards of review such as strict scrutiny, intermediate scrutiny, and rational basis in equal protection cases, but rather a “continuum of judgmental responses” depending upon the legitimacy and the neutrality of the reasons offered in support of the law.<sup>227</sup> In her majority opinion in *Grutter* and her concurring opinion in *Lawrence*, Justice O’Connor essentially adopts the same approach, in which the standard of review is adjusted according to various factors such as whether or not the law intentionally stigmatizes people or affects private living arrangements.<sup>228</sup>

*D. Moral disapproval of a group or its actions standing alone is not a sufficient reason for legislation that discriminates against the group.*

As described above, Justice Kennedy’s opinion in *Lawrence* holds that “moral disapproval” of behavior is insufficient to justify a law under the Due Process Clause.<sup>229</sup> In her concurring opinion in *Lawrence*, Justice O’Connor extends that principle to Equal Protection cases, holding that moral disapproval of a group or its actions is insufficient to justify discriminatory legislation.<sup>230</sup>

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<sup>227</sup> *Cleburne*, 473 U.S. at 451 (Stevens, J., concurring). Justice Stevens stated: [O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from “strict scrutiny” at one extreme to “rational basis” at the other. I have never been persuaded that these so-called “standards” adequately explain the decisional process. Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, or — as in this case — mental retardation, do not fit well into sharply defined classifications.

“I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.” In my own approach to these cases, I have always asked myself whether I could find a “rational basis” for the classification at issue. The term “rational,” of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word “rational” — for me at least — includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign’s duty to govern impartially.

*Id.* at 451–52 (Stevens, J., concurring) (quoting *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (footnotes omitted)).

<sup>228</sup> See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2337–38 (2003); *Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003) (O’Connor, J., concurring).

<sup>229</sup> See discussion *supra* Part I.D.

<sup>230</sup> *Lawrence*, 123 S. Ct. at 2486 (O’Connor, J., concurring).

In *Romer v. Evans*, the Court ruled that the Colorado constitutional amendment making it harder to adopt laws and ordinances eliminating acts of discrimination against homosexuals was unconstitutional because it found that the amendment was motivated by an illegitimate purpose: a "bare . . . desire to harm" homosexuals.<sup>231</sup> Speaking for six Justices, Justice Kennedy stated:

[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>232</sup>

Justice Kennedy left no doubt on this point. Near the conclusion of his opinion, he stated: "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."<sup>233</sup>

Justice Scalia opened his dissenting opinion in *Romer* with the remark, "The Court has mistaken a Kulturkampf for a fit of spite,"<sup>234</sup> meaning that the Colorado law was adopted because the people of Colorado disapproved of homosexual conduct, not because they disliked homosexuals. Justice Scalia explained that there is a difference between "moral disapproval" and "hatred":

The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible — murder, for example, or polygamy, or cruelty to animals — and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.<sup>235</sup>

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<sup>231</sup> 517 U.S. 620, 634 (1996) (quoting *Moreno*, 413 U.S. at 534).

<sup>232</sup> *Id.* at 634 (quoting *Moreno*, 413 U.S. at 534).

<sup>233</sup> *Id.* at 635.

<sup>234</sup> *Id.* at 636 (Scalia, J., dissenting).

<sup>235</sup> *Id.* at 644 (Scalia, J., dissenting). Justice Scalia added that for the Court to suggest that the Colorado law was motivated by nothing more than a bare desire to harm homosexuals "is nothing short of insulting." *Id.* at 652.

Justice Scalia is certainly correct in stating that there is a difference between moral disapproval of someone's conduct and personal animosity towards that person. However, this does not answer the argument that moral disapproval, *in and of itself*, is insufficient to justify prohibitory legislation. In *Lawrence*, Justice O'Connor expressly rejects the *legal* distinction that Justice Scalia drew between "moral disapproval" and "malice." Instead, she concludes that moral disapproval, standing alone, is the legal equivalent of a bare desire to harm. In her separate concurring opinion she stated, "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."<sup>236</sup> This is, of course, consonant with the reasoning of the majority in *Lawrence* that moral disapproval is insufficient to satisfy rational basis review under the Due Process Clause.<sup>237</sup>

Furthermore, Justice O'Connor argued in *Lawrence* that moral disapproval of homosexual behavior is "closely correlated" with attitudes towards homosexuals: "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual."<sup>238</sup> Given the difficulties in prosecuting homosexual behavior, the law partakes more of a statement of opinion rather than a criminal prohibition: "[A]s applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior."<sup>239</sup> In the conclusion to her opinion, she reiterated that "moral disapproval" of a class of persons and the conduct associated with that class was inadequate to justify a criminal statute under the Constitution:

A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgment that Texas' sodomy law banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.<sup>240</sup>

Justice Scalia is absolutely right in distinguishing animosity towards persons from disapproval of their conduct; however, he is wrong in thinking that laws justified only by morality are constitutional. According to Scalia, hatred, animosity, or "a bare . . . desire to harm" a group of people is an illegitimate purpose, while

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<sup>236</sup> *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

<sup>237</sup> See *supra* notes 145–49 and accompanying text.

<sup>238</sup> *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 2488 (O'Connor, J., concurring).

moral disapproval of conduct is a legitimate governmental motivation. However, moral disapproval, standing alone, is insufficient to justify a law.<sup>241</sup> In order to successfully support the constitutionality of a prohibitory or discriminatory law, it is incumbent upon the majority to demonstrate *why* it disapproves of the individual's or the group's behavior.

*E. Affirmative action in university admissions is necessary to train leaders from all segments of society.*

There are two very surprising aspects of Justice O'Connor's opinion in *Grutter v. Bollinger*.<sup>242</sup> The first surprise is that Justice O'Connor recognized *any* nonremedial purpose as "compelling."<sup>243</sup> The second surprise is the strong emphasis that she placed on the impact of diversity in higher education for society in general, as opposed to its importance within the university.<sup>244</sup> These holdings are surprising because they contradict what she had written in *City of Richmond v. J.A. Croson Co.*<sup>245</sup>

At issue in *Croson* was the constitutionality of a city's affirmative action program that required prime contractors who were awarded contracts with the city to set aside thirty percent of the dollar amount of the subcontracts for minority business enterprises.<sup>246</sup> In the course of her opinion for the plurality in *Croson*, Justice O'Connor stated that only "remedial" purposes could justify a system of race-based preferences.<sup>247</sup> She said: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."<sup>248</sup>

In *Grutter*, Justice O'Connor reversed her position and held that race-based affirmative action may be justified by nonremedial purposes.<sup>249</sup> She implied that

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<sup>241</sup> *Id.* at 2486.

<sup>242</sup> 123 S. Ct. 2325 (2003).

<sup>243</sup> *Id.* at 2338–39.

<sup>244</sup> *Id.* at 2340–41.

<sup>245</sup> 488 U.S. 469 (1989) (striking down the city's affirmative action program for minority business enterprises).

<sup>246</sup> *Id.* at 477–78 (describing municipal set-aside program).

<sup>247</sup> *Id.* at 509–10 (discussing permissible justifications for racial classifications).

<sup>248</sup> *Id.*

<sup>249</sup> See *Grutter*, 123 S. Ct. at 2338–39. Justice O'Connor stated:

It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. [citing her opinion in *Croson*] But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School

her statement in *Croson* to the contrary was mere *obiter dictum* and stated that, in any event, the Court had not addressed the constitutionality of affirmative action in higher education since the *Bakke* case.<sup>250</sup> She ruled that “the Law School has a compelling interest in attaining a diverse student body.”<sup>251</sup>

The second surprising aspect of Justice O'Connor's opinion in *Grutter* was the rationale offered in support of diversity in higher education. In *Bakke*, the principal justification that Justice Powell recognized in support of race-based affirmative action for admission to medical school in university admissions was to protect the university's First Amendment right to create a diverse learning environment for its students, which would, in the opinion of the university, improve the educational experience on campus and in the classroom, and better prepare students for leadership roles in our diverse society.<sup>252</sup> In *Grutter*, the Supreme Court recognized those interests as valid but also identified another: the need to recruit and train effective leaders from all quarters of society.<sup>253</sup>

In *Grutter*, Justice O'Connor identified three overlapping goals that public universities are attempting to achieve by employing race-based admissions programs. First, affirmative action is intended to improve students' educational experience, both on campus and in the classroom.<sup>254</sup> Diversity promotes “cross-racial understanding” and makes classroom discussion “livelier, more spirited, and . . . more enlightening and interesting.”<sup>255</sup> Second, the university seeks to prepare

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has a compelling interest in attaining a diverse student body.

*Id.*

<sup>250</sup> See *id.*

<sup>251</sup> *Id.* at 2339.

<sup>252</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978). Justice Powell stated:

The atmosphere of “speculation, experiment and creation” — so essential to the quality of higher education — is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the “nation's future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples. Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the “robust exchange of ideas,” petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

*Id.* (footnote omitted) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>253</sup> See *infra* notes 258–63 and accompanying text (discussing the goals articulated by Justice O'Connor for the use of affirmative action in university admissions).

<sup>254</sup> *Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003).

<sup>255</sup> *Id.* at 2340. Justice O'Connor stated:

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes “cross-racial understanding,” helps to

students to live and work in a diverse society.<sup>256</sup> Living and studying with people in a diverse environment helps to prepare students to perform in an "increasingly diverse workforce."<sup>257</sup> And third, since universities "represent the training ground for a large number of our Nation's leaders," they must offer advanced education and training to a diverse student body in order to cultivate leaders from all segments of society.<sup>258</sup>

The first two goals mentioned above were the principal focus of Justice Powell's opinion in *Bakke*.<sup>259</sup> However, the third argument listed above is, in my opinion, the most passionate portion of Justice O'Connor's opinion, and it is the most persuasive argument in favor of affirmative action. Justice O'Connor stated:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.<sup>260</sup>

This passage indicates that affirmative action in university admissions is constitutional not solely because it improves the educational experience of students

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break down racial stereotypes, and "enables [students] to better understand persons of different races." App. to Pet. for Cert. 246a. These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

*Id.* at 2339-40 (citing *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001)).

<sup>256</sup> *Id.* at 2340.

<sup>257</sup> *Id.* ("In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'").

<sup>258</sup> *Id.* at 2341 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

<sup>259</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978).

<sup>260</sup> *Grutter*, 123 S. Ct. at 2341 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1949)) (citation omitted).

and certainly not because it is *remedial*. Instead, affirmative action is constitutional because it is vital to the future of our nation. The path to leadership must be open to all races and ethnicities because our leaders must be drawn from and responsive to all segments of society. Justice O'Connor repeatedly cited and quoted amicus briefs submitted by respected public figures and institutions contending that affirmative action at leading educational institutions is necessary for training our nation's leaders in politics,<sup>261</sup> industry,<sup>262</sup> and the military.<sup>263</sup>

This constitutes a fundamental change in the Court's analysis of race-based preferences. Justice O'Connor's rationale far surpasses that of Justice Powell in both scope and breadth of the reasons that may be offered in support of affirmative action, and potentially opens the door to recognizing other sociological arguments supporting interpretations of the Equal Protection Clause. *Grutter* recognizes the pluralistic nature of our country, and it gives our public officials and educators the power to open the doors of higher education to future leaders of all races.

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<sup>261</sup> *Id.* at 2341. Justice O'Connor stated:

Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. . . . The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.

*Id.* (citations omitted).

<sup>262</sup> *Id.* at 2340 ("[M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.").

<sup>263</sup> *Id.* Justice O'Connor stated:

[H]igh-ranking retired officers and civilian leaders of the United States military assert that, "based on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security. . . ." The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. . . . At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies. . . ." To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting. . . ." We agree that "it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."

*Id.* (citations omitted).



### III. CONCLUSION

The jurisprudential and doctrinal changes announced in *Lawrence* and *Grutter* amount to a revolution in the Court's approach to defining our fundamental rights of liberty and equality. In determining the constitutionality of laws, the Court will not confine itself to inquiring whether these laws are consistent with the specific traditions of our ancestors, but rather it will carefully evaluate the effects of these laws on our lives and on our society. In making these determinations, the Court will also look to the experiences and beliefs of other nations that are committed to freedom. Popular notions of morality, standing alone, are insufficient to support prohibitory or discriminatory legislation. Standards of review such as strict scrutiny and rational basis are not static but are sensitive to context. Laws that intentionally stigmatize people or that interfere with personal relationships are scrutinized more strictly than laws that do not. Similarly, narrowly-tailored racial distinctions that are designed not to stigmatize but to more fully integrate our society may be upheld.

In *Lawrence* and *Grutter*, the Supreme Court rejected tradition and embraced a consequentialist approach to defining our fundamental rights to liberty and equality. In doing so, the Court has undertaken a monumental task. In *Lawrence* and *Grutter*, the Supreme Court assumed responsibility for determining the extent to which people have the capacity to love and the capability for leadership. It is a jurisprudence that promises to unlock human potential by removing purposeless restraints and by allowing public officials to dismantle historical barriers to advancement.

The decision of the Supreme Court to cut loose from tradition and embark upon a voyage of discovering human potential is itself a peculiarly American decision. We are, as John F. Kennedy said, "a nation of immigrants."<sup>264</sup> Our forefathers and foremothers left their villages and their families, their familiar customs and their language, to come to our "sea-washed, sunset"<sup>265</sup> shores in search of opportunity and freedom. Our ancestors' hopes and dreams were shaped by the frontier,<sup>266</sup> and even today, Americans travel and relocate freely within this continental nation.

The founders of our nation would not have approved of an approach to interpreting the Constitution that confined itself to "particular, identifiable

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<sup>264</sup> JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1964).

<sup>265</sup> EMMA LAZARUS, *The New Colossus*, 1 in THE POEMS OF EMMA LAZARUS 2 (1889) available at <http://etext.virginia.edu> ("Here at our sea-washed, sunset gates shall stand / A mighty woman with a torch, whose flame / Is the imprisoned lightning, and her name / Mother of Exiles.").

<sup>266</sup> See PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 99–100 (1965) (describing the importance of James Fennimore Cooper's *The Leatherstocking Tales*, in shaping American attitudes towards law); see generally FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (1967) (discussing the significance of the advancing of frontier settlement in American History).

traditions.”<sup>267</sup> The Framers did not consider themselves bound to familiar patterns of society. The men who pledged “our lives, our fortunes, and our sacred honor”<sup>268</sup> to each other during the War of Independence were not afraid of change.

Nor would the Framers have been surprised by the thought that Americans have fundamental rights that are not enumerated in the Constitution. This is, after all, the point of the Ninth Amendment.<sup>269</sup> Here is what Alexander Hamilton thought about the source of our fundamental rights: “the sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself and can never be erased or obscured by mortal power.”<sup>270</sup>

Furthermore, Americans have long known that “equality” is an evolving concept. Abraham Lincoln understood that the idea of “equality” is not a static notion, but rather imposes upon us a continuing obligation. In the debates with Stephen Douglas, Lincoln said that when the Framers wrote the phrase “all men are created equal” in 1787 it was an “obvious untruth” as to the then-existing state of affairs,<sup>271</sup> but:

They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.<sup>272</sup>

Like the phrase “all men are created equal,” the Equal Protection Clause is also an evolving concept because a state of perfect equality did not exist among us in

<sup>267</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6; *See supra* notes 26–31 and accompanying text.

<sup>268</sup> DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>269</sup> *See* U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

<sup>270</sup> Douglas W. Kmiec, *America’s “Culture War” — The Sinister Denial of Virtue and the Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183, 188 (1993) (quoting Manion, *Philosophy of Founding Fathers*, in 1 UNIV. OF NOTRE DAME NAT’L LAW INST. PROCEEDINGS 23–24 (Alfred L. Scanlan ed., 1947) (quoting Hamilton’s defense of the legality of the Continental Congress)); *see also* Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 108–09 (2000) (describing the Framers’ beliefs in the Lockean theory of natural rights).

<sup>271</sup> Abraham Lincoln, Speech at Springfield, Illinois, in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 398, 406 (Roy P. Basler ed., 1953).

<sup>272</sup> *Id.*

1868 when the Equal Protection Clause was adopted. As Professor Cass Sunstein noted:

[T]he Equal Protection Clause is not rooted in common law or status quo baselines, or in Anglo-American conventions. The baseline is instead a principle of equality that operates as a criticism of existing practice. The clause does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted.<sup>273</sup>

Finally, the consequentialist approach that is embraced by the Court in *Lawrence* and *Grutter* is a reflection of the American spirit. The quintessential American philosophy is “pragmatism,” a consequentialist approach to solving social, moral, and legal problems. It was developed by the Americans Charles Sanders Pierce, William James, and John Dewey, and it was incorporated into our law by the Americans Oliver Wendell Holmes, Louis Brandeis, Benjamin Cardozo, and Learned Hand.<sup>274</sup> As Cardozo said:

The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence . . . Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all.<sup>275</sup>

The end that the Constitution serves is to “secure the Blessings of Liberty to ourselves and our Posterity.”<sup>276</sup> To accomplish this goal, it is necessary for the Supreme Court to be sensitive to “how people *do* live,” as Professor Lynn Henderson said.<sup>277</sup> The inescapable truth is that homosexual relationships are

<sup>273</sup> Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988).

<sup>274</sup> See generally WILSON HUH, THE FIVE TYPES OF LEGAL ARGUMENTS 13–68 (2002) (discussing how legal arguments arise and how they are used as rules of law in society).

<sup>275</sup> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).

<sup>276</sup> U.S. CONST. pmbl.

<sup>277</sup> Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575 (1987). Professor Henderson opened this influential article with a quotation from Thurgood Marshall: “It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.” *Id.* at 1574 (quoting *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting)). In *Kras*, Marshall presented the following consequentialist analysis:

It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden

valuable and deserving of respect and that members of previously subjugated minority groups will assume positions of leadership tomorrow only if they attend our nation's universities and graduate schools today. The Supreme Court is to be commended for acknowledging these facts and for interpreting the Constitution accordingly.

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illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have — like attempting to provide some comforts for a gravely ill child, as *Kras* must do.

*Kras*, 409 U.S. at 406 (Marshall, J., dissenting).