U.S. SODOMY LAWS UNCONSTITUTIONAL

JOHN GEDDES LAWRENCE and TYRON GARNER, Petitioners v. TEXAS

No. 02-102

SUPREME COURT OF THE UNITED STATES

123 S. Ct. 2472; 156 L. Ed. 2d 508; 2003 U.S. LEXIS 5013; 71 U.S.L.W. 4574; 2003 Cal. Daily Op. Service 5559; 2003 Daily Journal DAR 7036; 16 Fla. L. Weekly Fed. S 427

March 26, 2003, Argued
June 26, 2003, Decided

LEXSEE 123 S.CT. 2472

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NOTICE: [***1] The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT. *Lawrence v. State, 41 S.W.3d 349, 2001 Tex. App. LEXIS 1776 (Tex. App. Houston 14th Dist., 2001)*

DISPOSITION: *41 S. W. 3d 349*, reversed and remanded.

COUNSEL:

Paul M. Smith argued the cause for petitioners.

Charles A. Rosenthal, Jr. argued the cause for respondent.

JUDGES: Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined. Thomas, J., filed a dissenting opinion.

OPINIONBY: KENNEDY

OPINION: [*2475] Justice **Kennedy** delivered the opinion of the Court.

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, [***9] belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another [*2476] man, Tyron Garner, engaging in a sexual act. [**516] The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is *Tex. Penal Code Ann. § 21.06(a)* (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The [***10] statute defines "deviate sexual intercourse" as follows:

> "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or
>
> "(B) the penetration of the genitals or the anus of another person with an object." *§ 21.01(1)*.

The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the *Equal Protection Clause of the Fourteenth Amendment* and of a like provision of the Texas Constitution. *Tex. Const., Art. 1, § 3a*. Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere*, were each fined $ 200 and assessed court costs of $ 141.25. App. to Pet. for Cert. 107a-110a.

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the *Fourteenth Amendment.* After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. *41 S. W. 3d 349 (Tex. App. 2001)*. The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986),* [***11] to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.

We granted certiorari, *537 U.S. 1044, 154 L. Ed. 2d 514, 123 S. Ct. 661 (2002)*, to consider three questions:

> "1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law--which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples--violate the *Fourteenth Amendment* guarantee of equal protection of laws?
>
> "2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the *Fourteenth Amendment*?
>
> "3. Whether *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986)*, should be overruled?" Pet. for Cert. i.

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the *Fourteenth Amendment to the Constitution*. For this inquiry we deem it necessary [***12] [**517] to reconsider the Court's holding in *Bowers*.

There are broad statements of the substantive reach of liberty under the *Due Process Clause in* earlier cases, including *Pierce v. Society of Sisters, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925)*, and *Meyer v. Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923)*; but the most pertinent beginning point is our decision in *Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965)*.

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or [*2477] aiding and abetting the use of contraceptives. The 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. *Id., at 485, 14 L Ed 2d 510, 85 S Ct 1678*.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972)*, the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the *Equal Protection Clause*, *id., at 454, 31 L Ed 2d 349, 92 S Ct 1029*; but with respect [***13] to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, *ibid.* It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. . . . 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." *Id., at 453, 31 L Ed 2d 349, 92 S Ct 1029*.

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)*. As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did

have real and substantial protection as an exercise of her liberty under the *Due Process Clause*. The Court [***14] cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the *Due Process Clause* has a substantive dimension of fundamental significance in defining the rights of the person.

In *Carey v. Population Services Int'l, 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977)*, the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the [**518] reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers* v *Hardwick.*

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another [***15] adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. *478 US, at 199, 92 L Ed 2d 140, 106 S Ct 2841* (opinion of Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.); *id., at 214, 92 L Ed 2d 140, 106 S Ct 2841* [*2478] (opinion of Stevens, J., joined by Brennan and Marshall, JJ.).

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates [***16] the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id., at 190, 92 L Ed 2d 140, 106 S Ct 2841*. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, 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.

* * * *

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, *e.g., King v Wiseman, 92 Eng. Rep. 774, 775 (K. B. 1718)* (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. See, *e.g.,* 2 J. Bishop, Criminal Law § 1028 (1858); 2 J. Chitty, Criminal Law 47-50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law [***19] of Crimes § 203 (2d ed. 1893). The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of [*2479] person did not emerge until the late 19th century. See, *e.g.,* J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

* * * *

But far from possessing "ancient roots," [***22] *Bowers, 478 U.S., at 192, 92 L Ed 2d 140, 106 S Ct 2841*, American laws targeting same-sex couples did not develop until the last third of the 20th century. The

reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 14-15, and n 18.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p 652; 1974 Ky. [*2480] Acts p 847; 1977 Mo. Laws p 687; 1973 Mont. Laws p 1339; 1977 Nev. Stats. p 1632; *1989 Tenn. Pub. Acts ch. 591*; *1973 Tex. Gen. Laws ch. 399*; see also *Post v. State, 1986 OK CR 30, 715 P.2d 1105 (Okla. Crim. App. 1986)* (sodomy law invalidated as applied to different-sex couples). Post-*Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, *e.g., Jegley v.* [**521] *Picado, 349 Ark. 600, 80 S. W. 3d 332 (2002)*; [***23] *Gryczan v. State, 283 Mont. 433, 942 P.2d 112 (1997)*; *Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996)*; *Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992)*; see also 1993 Nev. Stats. p 518 (repealing *Nev. Rev. Stat. § 201.193*).

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.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of [***24] the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*.

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: "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 Judeao-Christian moral and ethical standards." *478 US, at 196, 92 L Ed 2d 140, 106 S Ct 2841*. As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, *e.g.,* Eskridge, Hardwick and Historiography, *1999 U. Ill. L. Rev. 631, 656*. 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 gives substantial protection to adult persons in deciding how [***25] to conduct their private lives in matters pertaining to sex. "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis, 523 U.S. 833, 857, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)* (Kennedy, J., concurring).

This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code § 213.2, Comment 2, p 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily [**522] enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. [*2481] Other States soon followed. Brief for Cato Institute as *Amicus Curiae* 15-16.

In *Bowers* the Court referred to the fact that before [***26] 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. *478 U.S., at 192-193, 92 L Ed 2d 140, 106 S Ct 2841*. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. *Id., at 197-198, n. 2, 92 L Ed 2d 140, 106 S Ct 2841* ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

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. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those

recommendations 10 years later. Sexual Offences Act 1967, § 1.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's [***27] case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon* v *United Kingdom*, 45 Eur. Ct. H. R. (1981) P 52. 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.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. 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 [***28] in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. *State v. Morales, 869 S.W.2d 941, 943, 37 Tex. Sup. Ct. J. 390*.

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*, the Court reaffirmed the substantive force of the liberty protected by the *Due Process Clause.* The *Casey* decision again confirmed that our laws and tradition afford constitutional [**523] protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id., at 851, 120 L Ed 2d 674, 112 S Ct 2791*. 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. [***29] Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Ibid.*

[*2482] 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.

The second post-*Bowers* case of principal relevance is *Romer v. Evans, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996)*. There the Court struck down class-based legislation directed at homosexuals as a violation of the *Equal Protection Clause*. *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," *id., at 624, 134 L Ed 2d 855, 116 S Ct 1620* (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. *Id., at 634, 134 L Ed 2d 855, 116 S Ct 1620.*.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides [***30] 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. 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.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. 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 it should be addressed. [***31] Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute [**524] imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal

system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. *Smith v. Doe, 538 U.S. __, 155 L. Ed. 2d 164, 123 S. Ct. 1140 (2003)*; *Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 155 L. Ed. 2d 98, 123 S. Ct. 1160 (2003)*. 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 at least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n 12 (citing *Idaho Code § § 18-8301 to 18-8326* (Cum. Supp. 2002); *La. Code Crim. Proc. Ann., § § 15:540-15:549* (West 2003); *Miss. Code Ann. § § 45-33-21 to 45-33-57* (Lexis 2003); *S. C. Code Ann. § § 23-3-400 to 23-3-490* (West 2002)). This underscores the consequential [***32] nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the 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.

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance. [*2483] In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, *e.g.,* C. Fried, Order and Law: Arguing the Reagan Revolution--A Firsthand Account 81-84 (1991); R. Posner, Sex and Reason 341-350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the *Fourteenth Amendment*, see *Jegley v. Picado, 349 Ark. 600, 80 S. W. 3d 332 (2002)*; *Powell v. State , 270 Ga. 327, 510 S. E. 2d 18, 24 (1998)*; *Gryczan v. State , 283 Mont. 433, 942 P.2d 112 (1997)*; [***33] *Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996)*; *Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992)*.

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*. See *P. G. & J. H.* v *United Kingdom*, App. No. 00044787/98, P 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos* v *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v *Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11-12. 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.

[**525]The doctrine of *stare decisis* is essential to the [***34] respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne v. Tennessee, 501 U.S. 808, 828, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)* ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'") (quoting *Helvering v. Hallock, 309 U.S. 106, 119, 84 L. Ed. 604, 60 S. Ct. 444 (1940))*. In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. *505 U.S., at 855-856, 120 L Ed 2d 674, 112 S Ct 2791*; see also *id., at 844, 120 L Ed 2d 674, 112 S Ct 2791* ("Liberty finds no refuge in a jurisprudence of doubt"). The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after [***35] its issuance contradict its central holding.

The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice Stevens came to these conclusions:

> "Our prior cases make two propositions abundantly clear. First, 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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the *Fourteenth Amendment.* Moreover, this protection extends to intimate choices by unmarried as well as married persons." *478 US, at 216, 92 L Ed 2d 140, 106 S Ct 2841* (footnotes and citations omitted).

[*2484] Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should [***36] be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. 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* [**526] *Clause* gives them the full right to engage in their 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." *Casey, supra, at 847, 120 L Ed 2d 674, 112 S Ct 2791*. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses [***37] of the *Fifth Amendment* or the *Fourteenth Amendment* known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

* * * *

DISSENT BY: SCALIA; THOMAS

DISSENT: Justice **Scalia,** with whom the **Chief Justice** and Justice **Thomas** join, dissenting.

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*. That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)*. The Court's response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986),* [***50] is very [**531] different. The need for stability and certainty presents no barrier.

Most of the rest of today's opinion has no relevance to its actual holding--that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. *Ante, at 156 L Ed 2d, at 526* (overruling *Bowers* to the extent it sustained Georgia's anti-sodomy statute under the rational-basis test). Though there is discussion of "fundamental propositions," *ante, at 156 L Ed 2d, at 517*, and "fundamental decisions," *ibid.* nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the *Due Process Clause*; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: "Respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." *478 US, at 191, 92 L Ed 2d 140, 106 S Ct 2841*. Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"--which it undoubtedly [***51] is--and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. *Ante, at 156 L Ed 2d, at 516*.

I

I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers* v *Hardwick*. I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today's opinions in support of reversal do not bother to distinguish--or indeed, even bother to mention--the paean to *stare decisis* coauthored by three Members of today's majority in *Planned Parenthood* v *Casey*. There, when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *reaffirm* it:

> "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*[,] . . . its decision has a dimension that

> the resolution of the normal case does not carry. . . . To overrule under fire in the absence of the most compelling reason . [***52] . . would subvert the Court's legitimacy beyond any serious [*2489] question." *505 U.S., at 866-867, 120 L Ed 2d 674, 112 S Ct 2791*.

Today, however, the widespread opposition to *Bowers*, a decision resolving an issue as "intensely divisive" as the issue in *Roe*, is offered as a reason in favor of *overruling* it. See *ante*, at *156 L Ed 2d, at 524*. Gone, too, is any "enquiry" (of the sort conducted in *Casey*) into whether the decision sought to be overruled has "proven 'unworkable,'" *Casey, supra, at 855, 120 L Ed 2d 674, 112 S Ct 2791*.

Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) *if:* (1) its foundations have been "eroded" by subsequent decisions, *ante, at 156 L Ed 2d, at 524*; (2) it has been subject to "substantial and continuing" [**532] criticism, *ibid.*; and (3) it has not induced "individual or societal reliance" that counsels against overturning, *ante, at 156 L Ed 2d, at 524*. The problem is that *Roe* itself--which today's majority surely has no disposition to overrule--satisfies these conditions to at least the same degree as *Bowers.*

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Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See *Romer, supra, at 653, 134 L Ed 2d 855, 116 S Ct 1620*.

One of the most revealing statements in today's opinion is the Court's grim warning [*2497] that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante, at 156 L Ed 2d, at 523*. 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. [***78] Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress, see Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H. R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such "discrimination" is *mandated* by federal statute, see *10 U.S.C. § 654(b)(1)* [*10 USCS § 654*(b)(1)] (mandating discharge from the armed forces of any service member who engages in or intends to [***79] engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see *Boy Scouts of America v. Dale, 530 U.S. 640,* [**542] *147 L Ed 2d 554, 120 S Ct 2446 (2000)*.

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. 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 [***80] change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," *ante, at 156 L Ed 2d, at 526*; and when that happens, later generations can repeal those laws. But 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.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough

to criminalize private homosexual acts--and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See *Halpern v Toronto, 2003 WL 34950* (Ontario Ct. App.); Cohen, Dozens in Canada Follow Gay Couple's Lead, Washington Post, June 12, 2003, p A25. At the end of its opinion [***81] --after having laid waste the foundations of our rational-basis jurisprudence--the Court says that the present [*2498] case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Ante, at 156 L Ed 2d, at 525*. Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and then declares that "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Ante, at 156 L Ed 2d, at 523* (emphasis added). Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is [**543] "no legitimate state interest" for purposes of proscribing that conduct, *ante, at 156 L Ed 2d, at 526*; and if, as the Court coos (casting aside all pretense of neutrality), "when [***82] 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," *ante, at 156 L Ed 2d, at 518*; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution," *ibid.*? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

The matters appropriate for this Court's resolution are only three: Texas's prohibition of sodomy neither infringes a "fundamental right" (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.

Justice **Thomas,** dissenting.

I join Justice Scalia's dissenting opinion. I write separately to note that the law before the Court today "is . . . uncommonly silly." *Griswold v. Connecticut, 381 U.S. 479, 527, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965)* [***83] (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" *Id., at 530, 14 L Ed 2d 510, 85 S Ct 1678*. And, just like Justice Stewart, I "can find [neither in the *Bill of Rights* nor any other part of the Constitution a] general right of privacy," *ibid.*, or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions," *ante, at 156 L Ed 2d, at 515*.