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Does the Texas Homosexual Conduct Law Violate the Fourteenth Amendment

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Does the Texas Homosexual Conduct Law Violate the Fourteenth Amendment?

by Dale Carpenter

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This case raises once again the issue of the rights and status of gay men and women in our society. Specifically, it involves a constitutional challenge to a state "sodomy" law, a matter last considered by the Supreme Court 17 years ago in *Bowers v. Hardwick*. In *Bowers*, the Court rejected an argument that a Georgia sodomy law (as applied to same-sex conduct) violated the constitutional right of privacy. In addition to asking the Court to overrule its privacy holding in *Bowers*, the two men convicted for having sex with each other in this case argue that the Texas law unconstitutionally discriminates against them in violation of the Fourteenth Amendment's guarantee to every citizen "the equal protection of the laws."

Issues

Did petitioners' criminal convictions under Section 21.06 of the Texas Penal Code (the Homosexual Conduct law) violated their constitutional rights to liberty and privacy, as protected by the Due Process Clause of the Fourteenth Amendment?

Did petitioners' criminal convictions under the Homosexual Conduct law violate the Fourteenth Amendment guarantee of equal protection of the law?

Should *Bowers v. Hardwick*, 478 U.S. 186 (1986), be overruled?

Facts

Late in the evening of September 17, 1998, responding to a false report from a citizen that a man armed with a gun was "going crazy" in the Houston apartment of John Lawrence, sheriff's officers from Harris County, Texas, entered Lawrence's apartment. (The person who called in the report to the

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Lawrence et al. v. Texas
Docket No. 02-102

Argument Date:
March 26, 2003
From: Texas Court of Appeals, 14th District

Case at a Glance

This case raises the issue of the rights and status of gay men and women in our society. In addition to asking the Court to overrule its privacy holding in *Bowers v. Hardwick*, the two men convicted for having sex with each other in this case argue that the Texas "sodomy" law unconstitutionally discriminates against them in violation of the Fourteenth Amendment's guarantee to every citizen "the equal protection of the laws."

police later admitted his allegations were untrue and was subsequently convicted of filing a false report.) Once inside the apartment, according to the police report, the officers saw Lawrence and Tyron Garner having anal sex in violation of the Homosexual Conduct law, which criminalizes "deviate sexual intercourse" between persons of the same sex. "Deviate sexual intercourse," under Texas law, is defined as "any contact between any part of the genitals of one person and the mouth of or anus of another person," or "the penetration of the genitals or anus of another person with an object." Violation is punishable by a fine of up to $500.

The officers arrested Lawrence and Garner (the petitioners), put them in jail, and released them the next day. Petitioners were each charged in a Harris County Justice of the Peace court under the Homosexual Conduct law.

Petitioners were convicted and fined. They then appealed to the Harris County Criminal Court and moved to quash the complaints against them on the grounds that the Homosexual Conduct law violates the Fourteenth Amendment's guarantees of equal protection and the right of privacy, both on its face and as applied to their "consensual, adult, private sexual relations with another person of the same sex." On December 22, 1998, the criminal court denied their motions. The court found them guilty, fined them each $200, and ordered them to pay court costs of $141.25.

Petitioners next appealed to the Court of Appeals for the Fourteenth District of Texas, based in Houston. They again argued that the Homosexual Conduct law impermissibly discriminates between citizens and invades the right of privacy protected by the federal constitution. At oral argument before the court of appeals, counsel for the state conceded that there is no "compelling state interest" justifying the law. On June 8, 2000, by a 2-1 vote, a panel of the court of appeals reversed petitioners' convictions under the Texas Equal Rights Amendment, which prohibits governmental discrimination on the basis of sex.

On March 15, 2001, after rehearing *en banc,* the court of appeals reinstated petitioners' convictions by a vote of 7-2. First, relying on the Supreme Court's decision in *Bowers,* the court of appeals rejected petitioners' privacy claim. Second, the court rejected petitioners' equal protection claim by holding that the statute "advances a legitimate state interest, namely, preserving public morals." The court further held that, on the basis of this moral justification, the state could rationally distinguish between identical acts performed by persons of the opposite sex and persons of the same sex. Finally, the court of appeals held that the Homosexual Conduct law does not violate the Texas Equal Rights Amendment because the statute applies equally to men and women and thus does not discriminate on the basis of sex. Two dissenters argued that "[t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict."

On April 17, 2002, the Texas Court of Criminal Appeals, the state's highest court handling criminal matters, denied petitioners' appeal without a written opinion. On December 2, 2002, the Supreme Court granted their petition for a writ of certiorari.

Case Analysis

Adopted in 1973, Texas's Homosexual Conduct law is barely 30 years old. Its predecessor statute, adopted in 1943, forbade oral and anal sex for *both* opposite- and same-sex couples. Before 1943, a Texas law (originally adopted in 1860) had criminalized "the abominable and detestable crime against nature," a phrase understood to prohibit anal (but not oral) sex for both opposite- and same-sex couples.

Also in 1973, the Texas legislature generally liberalized its sex laws, decriminalizing adultery, fornication, and even bestiality. And while opposite-sex couples are now free to engage in "deviate sexual intercourse," same-sex couples are not.

Thus, the 1973 Texas Homosexual Conduct law represents an *expansion* of the types of acts historically prohibited (both anal and oral sex are now covered, though only anal sex was covered before 1943) and a *narrowing* of the class of people historically covered (same-sex, but not opposite-sex, couples are now covered). While nine states now have sodomy laws that apply to both opposite- and same-sex conduct, only four states (including Texas) have sodomy laws that target same-sex conduct alone.

Petitioners make two basic arguments that the Homosexual Conduct law is unconstitutional: (1) it violates their liberty and privacy interests protected by the Due Process Clause of the Fourteenth Amendment; and (2) it discriminates without any legitimate justification or rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment.

Under their Due Process Clause argument, petitioners contend that all adults have a fundamental liberty and privacy interest in making their

own choices about private, noncommercial, consensual sexual relations, free from intrusion by the state. "This fundamental protection," argue petitioners, "is rooted in three well-recognized aspects of personal liberty—in intimate relationships, in bodily integrity, and in the privacy of the home."

Texas emphasizes a different framework for understanding the substantive rights protected by the Due Process Clause. First, in several cases the Court has made clear it will protect under its "substantive due process" doctrine only those liberty interests "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Second, the Court has required a "careful description" of the fundamental liberty interest claimed.

A key disagreement between petitioners and the state is over how broadly to characterize the liberty and/or privacy interest at stake in the case. Petitioners contend the interest at issue is a broad right of individuals to make their own choices about private, consensual sexual relations. Texas, by contrast, characterizes the interest at issue as only a much more specific "right to engage in sodomy," "a right to engage in homosexual anal intercourse," or "a right to engage in deviate sexual intercourse."

As between characterizing the issue broadly and characterizing it narrowly, Texas acknowledges "the level of specificity at which the nation's traditions are to be analyzed ... does not seem to have been definitively resolved at this time." But, argues Texas, that does not matter because petitioners "cannot establish a tradition of exalting and protecting the conduct for which they were prosecuted at any level of specificity."

Applying petitioners' broad characterization of the liberty interest at stake yields some support for the view that it has been protected in American law. To support their view that the Constitution protects adult choices to enter and maintain "intimate relationships," petitioners cite the Court's decisions protecting a married couple's right to use contraceptives, *Griswold v. Connecticut,* 381 U.S. 479 (1965), its extension of that principle to unmarried people, *Eisenstadt v. Baird,* 405 U.S. 438 (1972), and its continuing protection of a woman's right to decide whether to have an abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992). The Homosexual Conduct law, petitioners contend, "destroys that freedom by forbidding most sexual behavior for all same-sex couples, whether they are in a committed, long-standing relationship, a growing one, or a new one."

Texas counters that the right to intimate association, whatever else it protects, has never been understood to "protect any and all sexual conduct in which [persons] might engage in the context of [a] relationship." Texas argues that the Court's due process cases protect only "marriage, procreation and childrearing." Homosexual sodomy, argues Texas, "has nothing to do with marriage or conception or parenthood and it is not on a par with those sacred choices." Texas urges the Court to draw the line of constitutional protection for sexual intimacy "at the threshold of the marital bedroom." Texas does not explain how that position fits with the Court's decision in *Eisenstadt,* which extended to *unmarried* people the right to obtain and use contraceptives.

Petitioners argue the Texas law also invades a person's right to "bodily integrity" by "dictating that citizens may not share sexual intimacy unless they perform acts approved by the legislature, and by attempting to coerce them to select a sexual partner of the opposite sex."

Texas responds that the Court's decisions regarding the importance of "bodily integrity" should be understood more narrowly to protect against unwarranted government *invasion* of an individual's body (as in forcing unwanted medical procedures on a person).

Further, petitioners argue, the law's intrusions on the individual's interest in forming intimate relationships and in bodily integrity can be accomplished only by invading the sanctity of the home—long a constitutionally protected domain. The methods police would use to gather evidence of violations of the law would include obtaining warrants to search for evidence of illegal sexual activity, interrogating people about details of their intimate personal lives, surveillance, wiretaps, confidential informants, and questioning neighbors. These common investigatory techniques, argue petitioners, are "repugnant and unthinkable in the context of adult consensual sexual relations" in a way that they would not be for "ordinary criminal conduct that happens to occur in the home."

Texas responds that constitutional regard for the home takes the form of *procedural* protections against unreasonable police entry and search. But, Texas adds, such procedural rights have never been understood as a *substantive* shield to otherwise criminal activity merely because it takes place in the home.

Petitioners argue generally that there should be no "gay exception" to fundamental liberty and privacy

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interests. They argue that homosexuality is a "normal and natural manifestation of human sexuality," a conclusion supported by mental-health professionals and social-science researchers who have found no significant differences between gay and straight people in the need for love and intimacy or in the ability to form durable relationships. Texas does not dispute these empirical claims, although several of its supporting *amici* do.

Tradition and history have undoubtedly influenced the Court's substantive due process doctrine. Capitalizing on this fact, Texas argues that all of the original 13 states had sodomy laws, as did 32 of the 37 states at the time of ratification of the Fourteenth Amendment. Until 1961, all 50 states had sodomy laws.

Even on this question of the historical significance of general sodomy laws, however, there is disagreement. Petitioners dispute the idea that the Homosexual Conduct law partakes of a long-standing national tradition. Despite the oft-repeated claim that "sodomy" laws have "ancient roots," petitioners note that historically these proscriptions applied to *both* opposite- and same-sex conduct. At the time of the ratification of the Fourteenth Amendment, 29 of the 32 states with sodomy laws applied them to *both* opposite- and same-sex acts. The remaining three state sodomy laws were possibly limited to proscribing anal sex between men (though even this is debatable), but none were aimed generally at "same-sex" acts. Not until 1969 did a state limit its sodomy law to same-sex conduct as a category unto itself. Texas makes no response to these distinctions in the historical coverage of sodomy laws.

Further, petitioners add, the nation has steadily moved away from such laws: from 1961, when all 50 states criminalized sodomy; to 1986 (the year the Court decided *Bowers*), when 24 states did so; to today, when only 13 states still have such prohibitions. Texas counters that a recent trend toward decriminalization does not establish a deeply rooted tradition of protecting a right to engage in sodomy. "The petitioners mistake new growth for deep roots," Texas contends.

Against a fundamental liberty interest in sexual autonomy and privacy, argue petitioners, the state asserts only a desire to protect prevailing moral principles. To petitioners, this amounts to an assertion that the government may intrude on individuals' fundamental rights whenever a majority wants to do so. Yet, petitioners note, the very point of protecting fundamental rights in a Constitution is to insulate them from the majority's preferences.

Texas, quoting at length from a famous concurring opinion of Justice Harlan 40 years ago, responds that "society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well." To immunize consensual, private sexual behavior from criminal law, Harlan wrote, "would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal." Among these oft-regulated subjects, Harlan noted, are "homosexual practices."

Recognizing that *Bowers* stands in the way of their substantive due process argument, petitioners urge the Court to overrule it. Changing times and greater understanding of facts about gays have undercut *Bowers,* contend petitioners. Since *Bowers,* the country has "steadily moved toward rejecting second-class-citizen status" for gays by eliminating sodomy laws, adopting antidiscrimination laws in 13 states and numerous municipalities, enhancing penalties for hate crimes, and legally recognizing the rights of gay couples and parents.

Texas urges the Court to stand by *Bowers.* Arguing that 17 years is "a very brief period indeed," Texas contends that recent trends should not affect the analysis of what constitutes a right deeply rooted in the nation's history and tradition. Under a federal system in which states serve as laboratories for different social policies, argues Texas, a state should be as free to resist a trend as to join it. "All change is not for the better," observes Texas, "and the right [of a state] to be first [to adopt a public policy] should be accompanied by a right to be last to accept a change of debatable social value."

The second argument for petitioners rests on the Equal Protection Clause. In order to pass minimal constitutional muster, a law must bear at least (1) a rational relationship (2) to an independent and legitimate governmental purpose. The Court thus looks at both the means ("rational relationship") and the ends ("legitimate governmental purpose") embodied in a law.

Petitioners attack the Homosexual Conduct law as lacking a legitimate governmental purpose. According to petitioners, the state's morality justification has three flaws. First, it simply "restates that Texas believes in and wants to have this criminal law." This defense of the law is "circular" and would give "carte blanche" to majority sentiment, leaving any targeted group (here, gays) unprotected.

Second, petitioners argue, the state's morality justification reflects "mere negative attitudes about the disfavored group." This is an impermissible basis for discrimination under the Court's opinions in many cases, including its decision seven years ago in *Romer v. Evans*, 517 U.S. 620 (1996), which invalidated a state constitutional amendment that stripped gays alone of all civil-rights protections. The flaw in the Texas law is not that it promotes a moral code, contend petitioners, but that it imposes a "*discriminatory* moral code."

Finally, petitioners argue, there is no other justification for the law, such as a legitimate concern about forced sex, commercial sex, or public sex, which are properly criminalized under Texas law regardless of the sex of those involved in them.

Texas responds that the law promotes "the longstanding moral traditions of the State against homosexual conduct." This counts as a legitimate state interest for equal protection purposes, Texas argues, and is supported by the Court's holding in *Bowers*, which "stands alone as the only modern case in which this Court has approved moral tradition as a submitted rational basis for legislation."

Texas argues its law is not aimed at gays as a group and so does not run afoul of the Court's opinion in *Romer*. The Homosexual Conduct law "does not expressly classify its offenders on the basis of their sexual orientation," as did the state constitutional amendment invalidated in *Romer*, but only on the basis of "homosexual conduct." Under this view, both heterosexuals and homosexuals who engage in prohibited same-sex conduct are equally punished under the law.

One of petitioners' supporting *amici* compares this defense of the Texas law to the claim that the law prohibits rich and poor alike from sleeping under bridges: everyone may be formally "equal" under the state's classification prohibiting "homosexual conduct," but some people (heterosexuals) are obviously more equal than others.

Further, according to petitioners, the Homosexual Conduct law serves to legitimize discrimination against gays in areas of life beyond sexual intimacy. Sodomy laws are often invoked to deny or restrict gay parents' custody of or visitation with their own children, to prevent gays from serving as foster parents, to deny public employment to gay people, to oppose civil-rights ordinances protecting people from discrimination on the basis of sexual orientation in private employment, housing, and public accommodations, and to block protection of gay citizens under hate-crime legislation. Finally, the equal protection problem should be analyzed, argue petitioners, in the context of "the persistent and destructive American history of anti-gay discrimination." Texas makes no response to petitioners' claims about the secondary effects of its law.

In its brief, Texas now offers a second legitimate purpose for the classification in its Homosexual Conduct law: avoiding litigation over, and possible invalidation of, the more comprehensive predecessor sodomy statute that reached even the sexual conduct of married couples. After the Court's decision in *Griswold* protecting marital privacy, Texas argues that it was reasonable for the state legislature in 1973 to think it needed to narrow the reach of its sodomy law so that it would not criminalize some forms of marital sex. Given that asserted concern, Texas does not explain why the 1973 revision of the state's sodomy law protected all opposite-sex couples, whether married or not—leaving only same-sex couples criminalized.

Texas conspicuously does not rely on a public-health justification for its law, as several of its supporting *amici* do. Although protecting public health is surely a legitimate governmental purpose, Texas's supporting *amici* do not show how this justification is rationally related to a law criminalizing same-sex conduct. They offer no argument or evidence that sodomy statutes in general, or the Texas law in particular, have had any effect on rates of sexually transmitted diseases, including HIV.

In its brief, Texas concedes that "the statute is unlikely to deter many individuals with an exclusively homosexual orientation" but may "to some degree" deter "the remaining population ... from detrimentally experimenting in homosexual conduct." Texas does not assert, and offers no argument or evidence, that its law has affected rates of STD or HIV infection in the state. Given this, and given Texas's acknowledgment that its law is unlikely to deter much actual sexual activity (and none among gays), the law appears to have no connection to public-health concerns.

In a footnote, petitioners briefly suggest that the Court should apply heightened equal protection scrutiny to laws, such as the Homosexual Conduct law, that (1) "use a sexual-orientation-based classification" or that (2) "employ[] a gender-based classification to discriminate against gay people." Petitioners do not brief either issue, although some of their supporting *amici* do.

Texas counters that federal courts have never adopted heightened

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scrutiny for sexual-orientation discrimination. It also argues that this is not a case of sex discrimination because the law "indulges in no stereotypes about the respective capabilities of men and women, and it does not penalize one gender at the expense of the other." Some of Texas's supporting *amici* offer additional arguments on these points.

Finally, Texas and several of its *amici* urge the Court to dismiss the petition as improvidently granted—meaning, basically, the Court made a mistake in taking the case at all. As to petitioners' substantive due process argument, Texas reasons that while petitioners claim a right of adults to engage in private, noncommercial, consensual sexual intimacy with an unrelated adult of the same sex, the factual record does not support that petitioners actually fit these criteria. The record, according to Texas, does not show that petitioners' act was noncommercial, consensual, or private, or that they are unrelated to each other. (At the same time, however, neither petitioner was charged with prostitution, rape, public lewdness, or incest.) Thus, the state concludes, the petitioners "should not be permitted to argue that a protected liberty interest exists under some set of circumstances without showing that those circumstances actually exist."

Similarly, as to petitioners' equal protection claim, Texas argues they have not shown they belong to any group of persons classified and disadvantaged by the law. They have not shown, for example, that they are gay.

Petitioners, however, have launched a facial challenge to the Homosexual Conduct law under which they argue that the law is unconstitutional in *all* its applications, regardless of the particular facts in a given case to which the law is applied. As to the equal protection claim, they may argue that (1) the law classifies people based on whether or not they engage in defined "homosexual conduct" and that (2) the record shows they engaged in it. This in itself shows membership in a group classified and disadvantaged by the law, regardless of whether petitioners have established that they are "gay."

SIGNIFICANCE

This case has potentially enormous significance both specifically for the Court's Fourteenth Amendment jurisprudence and generally for the legal, political, and cultural status of gay Americans.

Start with the possible implications of the case for the Court's Fourteenth Amendment jurisprudence—both the Due Process Clause and the Equal Protection Clause. The potential implications for the Court's substantive due process doctrine depend on who wins and under what reasoning.

If the Court agrees with Texas that the Due Process Clause does not prohibit state sodomy laws, it will reinforce its decision in *Bowers*. More importantly for future cases, it may also affirm that its substantive due process methodology involves both (1) relying on longstanding legal traditions in recognizing substantive rights and (2) defining claimed liberty interests at a very specific level of generality. Together, these requirements have led the Court to shut off the Due Process Clause as a fount for substantive rights protected by the judiciary.

If the Court sides with petitioners on the Due Process Clause claim, there will be both immediate and potential long-term effects. The immediate effect would be to invalidate the Texas sodomy law and, likely, the sodomy laws of the other 12 states that still have them.

The long-term significance of a due process victory for petitioners depends on how the Court resolves the many difficult issues raised. For example, how will the Court characterize the right being asserted by the petitioners? If the right is characterized broadly, as petitioners suggest it should be, the Court's decision could well signal a rebirth in judicial scrutiny of state legislation affecting personal liberties—especially sexual liberty.

Much would then depend on how the Court drew the line on what is protected and what is not. The Court might eventually have to offer some guidance on what sexual activities states could continue to regulate and why. Prostitution? Adultery? Fornication? Adult incest? Other activities traditionally prohibited by states and indulged in by adults in the home, such as illicit drug use or suicide, might also need to be distinguished. While distinguishing some of these activities might be easy based on the special harms they are thought to cause or a lack of true consent, others (such as fornication) would be more difficult.

Next, consider the potential implications for equal protection doctrine. If Texas wins on the equal protection issue, the implications may be small in one sense but very large in another. On the one hand, the Court's opinion could simply recite that Texas has a legitimate moral (or litigation-avoidance) justification and that its law is rationally tailored to support that justification. Such a holding might break little new ground. On the other hand, as the first significant post-*Romer* decision on how much the Equal Protection

Clause really protects targeted groups from bare majoritarian preferences unaccompanied by a testable means-ends fit, it might signal a retreat from the Court's stated commitment to the principle that the Constitution "neither knows nor tolerates classes among its citizens."

If the Court sides with petitioners on the equal protection claim, there will be both immediate and potential long-term implications. The immediate consequence will be the invalidation of the Texas law and likely the laws of the three other states that also criminalize only same-sex conduct. This consequence would be smaller than the immediate consequence of a due process victory for petitioners, which would invalidate the sodomy laws of all 13 states that still have them. However, gay-equality advocates might ultimately be able to use an equal protection victory against Texas as a basis for challenging sodomy laws in the remaining nine states by arguing that these laws—though facially applicable to everyone—in fact disparately impact gay people.

The long-term consequences of an equal protection victory for petitioners depend, again, on how the Court resolves the many difficult issues raised. This is a rare case in which a state offers, as virtually its only justification for a classification, a desire to promote public morality. It raises an issue the Court avoided addressing in *Romer:* the strength, extent, and nature of the power of the states to legislate in the interest of promoting morality.

If the Court sides with petitioners on the equal protection claim, how will it deal with the state's asserted morality justification? Consider three possibilities. One possibility is that the Court could hold that morality *alone* is never a legitimate state interest on rational-basis review of a state's classification. Under this approach the state would have to offer some additional justification, presumably a harm-based justification, beyond morality. It would be a departure from the Court's prior indications that a state may regulate in the interest of public morality and, indeed, from its statement in *Bowers* that much law reflects essentially moral views. It may also involve the Court in defining what counts as a "harm-based justification," in other words, requiring the articulation of a constitutional harm principle that gives states guidance on what harms will count as constitutionally *regulable* harm.

A second possibility is that the Court could hold that while morality alone can be a legitimate basis for legislation, the state's asserted moral interest in this case—moral opposition to homosexual conduct—is an *impermissible* moral justification. The Court might conclude, for example, that the moral justification here amounts to nothing more than a bare desire to harm an unpopular group (animus). This approach is suggested, though never explicitly urged, by petitioners. If the Court adopted this approach, it would signal a general suspicion of laws that target gays since many such laws embody a moral judgment about homosexuality (though these other laws, like the ban on gays in the military, could well have justifications beyond simply expressing moral disapproval of homosexual acts). It would also seem to involve the Court in distinguishing constitutionally permissible moral views from constitutionally impermissible moral views as justifications for legislation—and in finding a constitutional basis for doing so.

A third possibility is that the Court could hold that while morality alone can be a legitimate basis for legislation, when coupled with strong indications that animus *also* motivated the particular classification challenged, the state must adduce some additional harm-based justification in order to survive rationality review. This is an approach suggested by an *amicus* brief supporting petitioners, a brief that finds ample indicia of animus in the text, context, history, and structure of the Texas law. This may well be the least aggressive equal protection option for the Court, since it would be more deferential to state morals regulation than the other two options. As with the first possibility, however, this approach may involve the Court in defining what counts as a harm-based justification for purposes of the Constitution.

The Court could avoid these rational-basis equal protection issues by deciding that some form of heightened scrutiny should apply to the Texas law. The Court might decide, as one of petitioners' supporting *amici* urges, that the Texas law effectively discriminates on the basis of sexual orientation and that such discrimination should be subject to heightened scrutiny. Since Texas has conceded it has no compelling interest in the law, it would likely be unconstitutional under this approach. Such a rationale would call into question all laws that classify or disadvantage gays, from the ban on gays in the military to laws that limit marriage to opposite-sex couples. (The military's gay ban might survive even heightened scrutiny, however, due to courts' traditional deference to the judgments of military authorities about their special needs.)

Application of heightened scrutiny to sexual-orientation discrimination might also have collateral consequences for federal civil rights laws,

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specifically with respect to the ability of gay people to seek redress for governmental discrimination under 42 U.S.C. § 1983.

The Court could also decide, as another of the petitioners' supporting *amici* urges, that the Texas law is a form of sex discrimination because it classifies, on the basis of sex, who may engage in the prohibited conduct with whom. If the Court accepts this argument, the Texas law would be subject to intermediate scrutiny and would likely be held unconstitutional. Such a rationale might call into question, among other things, laws banning same-sex marriage.

Of course, the Court could also entirely avoid—for now at least—the substantive constitutional issues by dismissing the petition on the grounds offered by Texas and its *amici.*

Now consider the significance of the case for the general legal, political, and cultural status of gay Americans. Though the petitioners understandably highlight the privacy and liberty interests into which the Texas law intrudes, the practical impact of the law has little to do with intimacy, bodily integrity, or the sanctity of the home. Because laws like that at issue in this case are rarely enforced, these interests are implicated more theoretically than actually. Sodomy laws most deeply affect gays by allowing others to brand them as criminals, as petitioners point out. Gays' presumptive criminal status, in turn, is used legally to justify outright discrimination against them, as in the child custody and adoption context, in which courts have pointed to the existence of sodomy laws as a reason to restrict parenting by gays. This presumptive criminal status is also used politically to deny gays legislative protection from private discrimination in employment, public accommodations, and housing. It is this secondary, though profound and debilitating, practical function of sodomy laws that most affects gays.

Though Texas understandably argues the case as implicating the power of the states in our federal system to regulate on the basis of public morality, and the need for judicial restraint in defining rights, social conservatives see a much more fundamental issue. For them, holding the line against advances in gay equality is needed to preserve traditional sexual morality and to secure the preeminent place of traditional nuclear families as a bedrock of social stability. Invalidating sodomy laws, in their view, would be another incremental legal step on the road to allowing same-sex marriage, an end they view as very undesirable. This "slippery slope" is emphasized by many of Texas's supporting *amici,* though not mentioned by Texas itself.

For these reasons, both sides in the ongoing culture war over the place of gays in American life view the continued validity of sodomy laws as precious ground to be defended (in the case of social conservatives) or captured (in the case of gay-equality advocates) at all costs.

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Amicus Briefs

In Support of John G. Lawrence et al.

Alliance of Baptists et al. (Robert A. Long Jr. (202) 662-6000)

American Bar Association (Alfred P. Carlton Jr. (312) 988-5215)

American Civil Liberties Union and ACLU of Texas (Laurence H. Tribe (617) 495-4621)

American Psychological Association et al. (David W. Ogden (202) 663-6000)

American Public Health Association et al. (Jeffrey S. Trachtman (212) 715-9100)

Cato Institute (Robert A. Levy (202) 842-0200)

Constitutional Law Professors, Bruce Ackerman et al. (Pamela Karlan (650) 725-4581)

Human Rights Campaign et al. (Walter Dellinger (202) 383-5300)

Institute for Justice (Dana Berliner (202) 955-1300)

Log Cabin Republicans and Liberty Education Reform (C. Martin Meekins (213) 620-7700)

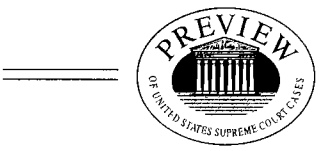
Mary Robinson et al. (Harold Hongju Koh (203) 432-4932)

National Lesbian and Gay Law Association, et al. (Chai R. Feldblum (202) 662-9595)

NOW Legal Defense and Education Fund (David C. Codell (310) 277-1010)

Professors of History, George Chauncey et al. (Roy T. Englert Jr. (202) 775-4500)

Republican Unity Coalition and Alan K. Simpson (Erik S. Jaffe (202) 237-8165)



In Support of the State of Texas

Agudath Israel of America (David Zwiebel (212) 797-9000)

Alabama, South Carolina, and Utah (Nathan A. Forrester (334) 242-7401)

American Center for Law and Justice (Jay Alan Sekulow (202) 546-8890)

American Family Association, Inc. et al. (Stephen M. Crampton (662) 680-3886)

Center for Arizona Policy and Pro-Family Network (Len L. Munsil (480) 922-3101)

Center for Law and Justice International (Thomas Patrick Monaghan (502) 549-5454)

Center for Marriage Law (Vincent P. McCarthy (860) 355-1902)

Center for the Original Intent of the Constitution (Michael P. Farris (540) 338-1776)

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