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## Homosexuality and the High Court: A Review of Courting Justice: Gay Men and Lesbians v. the Supreme Court

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## BOOK REVIEW

### HOMOSEXUALITY AND THE HIGH COURT

COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT. By Joyce Murdoch and Deb Price. Basic Books, New York, 2001. viii and 582 pages. Hard back \$32.50

*Reviewed by Donald H.J. Hermann\**

One image that captures the approach of the Justices of the United States Supreme Court to homosexuals<sup>1</sup> is that of the three monkeys who each respectively clasp their hands over their eyes, ears, and mouth, thus neither seeing, hearing, nor saying something evil or forbidden. Only reluctantly has the Court confronted “the love that dare not speak its name”<sup>2</sup> by taking up cases that deal with gay and lesbian individuals “saying,” “doing,” and “being.”

The earliest, as well as the most recent, cases in which the Supreme Court has addressed the issues of gay rights involve the issue of “saying” or First Amendment rights of free speech and association. In 1958, the Court decided *One Inc. v. Olesen*, upholding the right of *One*, which was produced in Los Angeles and subtitled “The Homosexual Magazine,” to use the United States Postal Service in defiance of a law that banned the mailing of any obscene, lewd, lascivious, or filthy publication.<sup>3</sup> The Court, without hearing arguments, reversed the Ninth Circuit, which had found the publication “morally deprav-

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1. “Homosexual” is used in this article to include gay men, lesbians, bisexuals and transgendered persons. No Justice of the United States Supreme Court is reported to have used the terms “gay” or “lesbian” in any oral argument or opinion until the 1996 decision in *Romer v. Evans*, 517 U.S. 620 (1996). See JOYCE MURDOCH AND DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 473 (2001) [hereinafter *COURTING JUSTICE*] (reporting on the oral argument in *Romer* “that the justices had seemed at ease saying ‘gay’ and ‘lesbian’—words that no one uttered during *Hardwick’s* oral argument.”).

2. Lord Alfred Douglas, *Two Loves* (1896), quoted in *THE OXFORD DICTIONARY OF QUOTATIONS* 255 (Angela Partington ed., 4th ed. 1992).

3. 355 U.S. 371 (1958).

ing and debasing” and, thus, obscene and unmailable.<sup>4</sup> Implicitly, the Court’s ruling rejected equating homosexuality with obscenity.

More recently, however, the Supreme Court has found that the First Amendment can support exclusion of gay men’s membership in the Boy Scouts. In 2000, the Court decided *Boy Scouts of America v. Dale*, finding that enforcement of a state anti-discrimination statute compelling the Boy Scouts of America to admit an avowed homosexual would violate the organization’s First Amendment right of expressive association.<sup>5</sup> A dissenting justice suggested that the majority’s opinion implied that a homosexual communicates a message by his mere open existence.<sup>6</sup>

On the issue of “doing,” the Court has maintained an unwavering position that the Constitution provides no barrier to a state criminally prosecuting homosexual acts of sodomy. The Court did not directly confront the question of the constitutionality of state sodomy laws until 1976. In *Doe v. Commonwealth’s Attorney for the City of Richmond*, the Court rejected the arguments put forward by active homosexuals who claimed that Virginia’s sodomy statute denied them a right to private and consensual sexual gratification in violation of their First Amendment rights to freedom of expression and association and the statute violated the equal protection clause of the Fourteenth Amendment to the extent that married couples were permitted to engage in similar sexual activity.<sup>7</sup> The Court affirmed, without explanation, the lower court’s finding that the state sodomy statute was constitutional.

In 1986, the Supreme Court decided *Bowers v. Hardwick*, overturning the United States District Court of Appeals for the Eleventh Circuit’s decision finding that Georgia’s sodomy law infringed fundamental constitutional rights by criminalizing private sexual acts between consenting adults.<sup>8</sup> A majority of the Court found that the federal Constitution does not confer upon homosexuals a fundamental right to engage in sodomy; therefore, there was no basis for declaring unconstitutional state laws making such conduct illegal.<sup>9</sup>

On the issue of “being” a gay or lesbian, the Court has evidenced a progressive shift from condemnation of homosexuals, by justifying denial of rights based on a person’s homosexuality, to recognition of le-

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4. *One Inc. v. Otto K. Oleson*, 241 F.2d 772, 778-79 (9th Cir., 1957), *rev’d per curiam*, 355 U.S. 371 (1958).

5. 530 U.S. 640 (2000).

6. *Id.* at 692 (Stevens, J., dissenting)

7. 403 F. Supp. 1199 (D.C. E.D. Va. 1975), *aff’d*, 425 U.S. 901 (1976).

8. 478 U.S. 186 (1986).

9. *Id.* at 190-91.

gal rights of gays and lesbians in civil society. The Court has moved to recognition of legitimate claims of gays and lesbians to rights of protection from discrimination and to the right to participate in governmental processes. The earlier position is illustrated by the Supreme Court's decision in *Boutilier v. Immigration & Naturalization Services* in which the Court decided that a person could be denied citizenship and deported for his status as a homosexual by finding that such a condition constituted a "psychopathic personality."<sup>10</sup> According to the Court's opinion in *Boutilier*, "Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts."<sup>11</sup>

While the exclusion of persons on the basis of homosexuality has been reversed by agency policy and subsequent congressional action,<sup>12</sup> in other contexts the Court itself has changed its view of the legal significance of the personal status of homosexuals. In 1995, the Court decided *Romer v. Evans*, striking down a Colorado law prohibiting the state or any of its subdivisions or agencies from adopting or enforcing a law or policy that made homosexual conduct, practice, or relationship a basis for any claim of discrimination or protected status.<sup>13</sup> The Court found that the Colorado law identified persons by the single trait of their sexual orientation and then denied them legal protection across the board.<sup>14</sup> The Court concluded that the Colorado law classified "homosexuals not to further a proper legislative end but to make them unequal to everyone else;" the Court reasoned that Colorado could not do this because "[a] state cannot so deem a class of persons as stranger to its laws."<sup>15</sup> Thus, the Court found that a person's status as a homosexual alone cannot justify denial of equal protection of the law.

The squeamish quality of the Supreme Court's handling of cases involving homosexuals provides the major theme of *Courting Justice: Gay Men and Lesbians v. the Supreme Court* by Joyce Murdoch, a managing editor of *The National Journal* and former editor at *The Washington Post*, and Deb Price, a reporter for *The Detroit News* and a former *Washington Post* editor.

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10. 387 U.S. 118 (1967).

11. *Id.* at 122.

12. *See, e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (1990) (eliminating the deviate/psychopathic exclusion). *See also* CONG. REC. S8564 (daily ed. May 9, 1989) (statement of Sen. Alan Simpson) (statement of sponsoring senator that the revisions of the immigration statute were meant to override the United States Supreme Court ruling in *Boutilier* and to revise the policy of excluding persons on the basis of their homosexuality).

13. 517 U.S. 620 (1996).

14. *Id.*

15. *Id.* at 635.

*Courting Justice* not only reviews every major opinion dealing with gay and lesbian rights with the exception of AIDS/HIV-related cases, it also analyzes every major denial of certiorari by the Court in gay-related cases. While the authors ignore possible non-gay influences on such denials, the pattern described in the book sufficiently establishes a significant history of the Court's avoidance of issues involving homosexuals, including gays and the military,<sup>16</sup> same-gender marriage,<sup>17</sup> and employment discrimination in the public sector.<sup>18</sup> Several of the Justices themselves from time to time have criticized the Court for its reluctance to grant certiorari in cases involving significant issues of gay and lesbian rights. In 1978, Chief Justice William Rehnquist objected to the denial of certiorari in *Ratchford v. Gay Lib*, accusing the Court of retreating into "a sort of judicial storm cellar" to avoid deciding whether a university gay student group could be banned by a regulation that the Chief Justice approvingly compared to a quarantine measure directed at a contagious disease like the measles.<sup>19</sup> Justices who are more sympathetic to claims of gay and lesbian rights have also denounced the Court's reluctance to address these issues in cases like the 1985 rejection of certiorari in *Rowland v. Mad River Local School District, Montgomery County, Ohio*.<sup>20</sup> *Rowland* involved a high school guidance counselor's claims of a constitutional rights violation based upon the termination of her employment after she confided to a co-employee that she was bisexual.<sup>21</sup> Justice William Brennan viewed the dismissal as based on the individual's bisexual status; according to Justice Brennan, the Court was ignoring the following claim: "The Equal Protection Clause protects against arbitrary and irrational classifications and against invidious discrimination stemming from prejudice and hostility." Under this rubric, discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis."<sup>22</sup>

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16. See, e.g., *Watkins v. United States Army*, 847 F. 2d 1329 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

17. See, e.g., *Adams v. Howertown*, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

18. See, e.g., *Rowland v. Mad River Local School District, Montgomery County, Ohio*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

19. *Ratchford v. Gay Lib*, 434 U.S. 1080, 1081 (1978) (Rehnquist, J., dissenting). See also *COURTING JUSTICE*, *supra* note 1, at 203-4.

20. 470 U.S. 1009 (1985).

21. *Rowland*, 470 U.S. at 1009 (Brennan, J., dissenting). See *COURTING JUSTICE*, *supra* note 1, at 246-51.

22. *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of certiorari) (quoting *Plyler v. Doe*, 457 U.S. 202, 245 (1982) (Burger, C.J., dissenting)).

*Courting Justice* lacks a theoretical structure or integrating jurisprudential view; rather, it is a chronological history of a half century of Supreme Court decisions, detailing approximately seventy cases submitted to the Court, including twelve fully briefed and argued cases, six summarily dismissed cases, and approximately fifty other petitions that the Court refused to hear.

The authors developed their account using opinions and other court documents, news reports, transcripts of oral arguments, written briefs, interviews with litigants and their attorneys, and, most significantly, interviews with court clerks. The authors examined the available papers of twelve former Justices, and the authors interviewed 103 former clerks of United States Supreme Court Justices sitting during the period of time covered by the book, finding twenty-two to be homosexual (eighteen gay men and four lesbians). No sitting Justice submitted to an interview.

In addition to providing an account of the factual background and legal issues in all the significant legal cases involving gay and lesbian issues, the authors provide informative biographical information about the Supreme Court Justices and litigants. For instance, the authors report evidence and speculate that Justice Frank Murphy, who served on the Court from 1940-1949, was possibly a homosexual.<sup>23</sup> According to the authors, Murphy, who was never married, although twice engaged to women, “found creative ways” to work and cohabit with longtime male friend Edmond Kemp.<sup>24</sup> In anticipation of a marriage that was foreclosed by Murphy’s untimely death, the authors report that “Murphy instructed the secretary to find a Washington house where she, Murphy, Murphy’s bride and Kemp could live together after the wedding.”<sup>25</sup>

By contrast, the authors discuss the possible significance of Justice Lewis F. Powell’s assertion to fellow Justices and one of his clerks: “I don’t believe I’ve ever met a homosexual.”<sup>26</sup> According to the authors, Justice Powell was originally a member of a five Justice majority to sustain a finding in *Bowers v. Hardwick* that a state sodomy statute was unconstitutional; possibly pressured by Chief Justice Warren Burger, Justice Powell switched his vote, resulting in a majority finding the Georgia state sodomy statute constitutional.<sup>27</sup> The authors report that Justice Powell joined the anti-gay majority opinion despite the fact that he had a propensity for appointing gay clerks and that he, in fact,

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23. *COURTING JUSTICE*, *supra* note 1, at 18-21.

24. *Id.* at 19.

25. *Id.* at 21.

26. *Id.* at 273.

27. *Id.* at 311-13.

had a gay clerk at the time *Bowers* was decided.<sup>28</sup> Justice Powell was reportedly so touchy about the subject of homosexuality that he apologized to clerks to whom he assigned gay-related cases.

*Courting Justice* includes biographical material on litigants such as Michael Hardwick, a litigant in the Court's landmark sodomy case, *Bowers v. Hardwick*. Hardwick was a twenty-eight-year-old bartender in a gay club in Atlanta, Georgia when a police officer entered his home without Hardwick's knowledge and found Hardwick and a guest engaged in mutual fellatio.<sup>29</sup> The authors also report on the struggle of Olympic decathlon athlete Tom Waddell to establish an international gay athletic competition, the "Gay Olympic Games."<sup>30</sup> Waddell faced ultimate defeat in 1987 when the Court ruled in *San Francisco Arts & Athletics, Inc. & Thomas F. Waddell, M.D., v. United States Olympic Committee & International Olympic Committee* that a law restricting the term "Olympic" by the USOC was constitutional and authorized the United States Olympic Committee & International Olympic Committee (USOC) to prevent a gay group from titling its sports competition an "Olympics".<sup>31</sup>

The book even includes accounts of interesting litigants whose cases were denied a hearing by the Supreme Court. For example, the authors discuss the career of Frank Kameny, a government astronomer who was denied a Civil Service job with the Army Map Service on the basis of his arrest for homosexual activity in a public restroom.<sup>32</sup> Kameny challenged his firing, ultimately petitioning the Supreme Court, which denied certiorari in 1961 in *Kameny v. Brucker*.<sup>33</sup> Kameny became a gay rights activist, cofounding the District of Columbia chapter of a pioneer gay rights organization, the Mattachine Society, and a chapter of the American Civil Liberties Union that Kameny persuaded to pursue gay rights.<sup>34</sup> Kameny spent much of his life advising homosexuals about their employment rights within the Civil Service and counseling individuals about military and security clearances.

*Courting Justice* is significant as an example of Realist Jurisprudence. According to one commentator, "In American jurisprudence, the term 'realism' is used primarily . . . as designating scepticism against legal concepts and rules and the part they play in the adminis-

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28. *COURTING JUSTICE*, *supra* note 1, at 275, 335-37.

29. *Id.* at 277-79.

30. *Id.* at 364-66.

31. 483 U.S. 522 (1987).

32. *COURTING JUSTICE*, *supra* note 1, at 55-64.

33. 282 F.2d 823 (App. D.C. 1960), *cert. denied*, 365 U.S. 843 (1961).

34. *COURTING JUSTICE*, *supra* note 1, at 61-63.

tration of justice"; instead, American realism looks to psychological, social, and contextual influences as the explanation for legal judicial decisions.<sup>35</sup> The authors of *Courting Justice* suggest their own adherence to this approach to constitutional decision making when they quote at length a story of Justice William O. Douglas who reported that:

[Chief Justice Charles Evans Hughes] made a statement to me which at the time was shattering but which over the years turned out to be true: "Justice Douglas, you must remember one thing. At the constitutional level where we work, [ninety] percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections."<sup>36</sup>

At some length, the author's attempt to establish that Justice Powell's extreme discomfort with homosexuality led to his ultimate vote to uphold the constitutionality of sodomy statutes in *Bowers v. Hardwick*.<sup>37</sup> Similarly, the authors suggest that a deep seated loathing of homosexuality on the part of Justice Antonin Scalia led him to his dissent in *Romer v. Evans* by which he declared a "moral disapproval of homosexual conduct."<sup>38</sup>

On the other hand, the authors attribute great importance to gay and lesbian clerks, revealing their own homosexuality to the Justices whom they serve. The authors regard it as significant that Justice William O. Douglas had two lesbian neighbor friends who lived next door to his summer home.<sup>39</sup> The authors relate that Justice Harry Blackmun acknowledged continuing affection for a law clerk following her disclosure to the Justice that she was a lesbian.<sup>40</sup> Also noted in the book is Justice Ruth Bader Ginsburg's gift to a lesbian former clerk on the occasion of her former clerk's commitment ceremony.<sup>41</sup> Similarly, the authors of *Courting Justice* report on Justice Sandra Day O'Connor's note of sympathy to a gay court employee upon the death of his partner.<sup>42</sup> While the authors decry the United States Supreme Court's willful blindness and active hostility toward hearing the cases involving claims of rights by gays and lesbians, the authors of *Courting Justice* offer some optimism that as Justices emerge from an institutional isolationism in which homosexuals seem absent to a real world

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35. Alf ROSS, ON LAW AND JUSTICE § 13 (English ed. 1958), reprinted in part in MARK MACGUIGAN, JURISPRUDENCE: READINGS AND CASES 234 (University of Toronto Press 1966).

36. COURTING JUSTICE, *supra* note 1, at 12-13.

37. *Id.* at 334-37.

38. *Id.* at 478-79 (quoting 517 U.S. at 644 (Scalia, J., dissenting)).

39. *Id.* at 128-31.

40. *Id.* at 415-16.

41. *Id.* at 421.

42. COURTING JUSTICE, *supra* note 1, at 418.



involving gays and lesbians in every sphere of activity, the Court will become more accommodating to assertion of gay and lesbian rights.<sup>43</sup>

*Courting Justice* also adopts a longstanding claim that well-reasoned dissenting opinions advance claims of social justice and minority rights by providing a foundation for future recognition of such rights. The authors discuss Justice Brennan's view that dissents are a valuable means of laying the foundation for subsequent legal breakthroughs and provide a basis for later landmark Supreme Court rulings.<sup>44</sup> While there has always been a view that dissenting opinions undercut the authority of judicial rulings, since the 1940s there has been countering strong support for dissenting opinions as reflections of strong divisions among Justices and for the writing of dissents as a practice rooted in Jeffersonian democracy.<sup>45</sup> As the views in dissenting opinions of a number of Justices including Justices Louis Brandeis, Hughes, and Harlan F. Stone were later accepted by court majorities, the importance of the well-reasoned and socially just dissenting opinions came to be recognized.<sup>46</sup> Justice Douglas captured this position

43. Joyce Murdoch and Deb Price, *A Sorry History of Anti-Gay Bias*, THE NAT'L L.J., July 9, 2001, at A24.

44. COURTING JUSTICE, *supra* note 1, at 246.

45. See Jack R. Schmidhauser, *The Judiciary*, in 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM 611-12 (Robert J. Janosik ed., 1987).

46. The Flag salute cases provide a classic example of a dissenting opinion providing the basis for a later majority holding recognizing a claim of constitutional right. For more, see WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 352 (1954), in which Justice Douglas mentions a line of cases involving the refusal of Jehovah witnesses to salute the flag. Justice Douglas writes: "The first decision was rendered June 3, 1940. Harlan F. Stone was the sole dissenter. But his dissent—that no government can compel a person 'to bear false witnesses to his religion' was soon to win a majority of the court." *Id.*

In the first case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), a father of a student sought to enjoin the school district from prohibiting his children's attendance at school after they refused to salute the flag. Justice Felix Frankfurter, writing for an 8-1 majority, found that the flag salute requirement was constitutional so long as students have the "right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are fully respected." *Id.* at 600.

In his dissent, Justice Stone argued,

Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern. In such circumstances careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief is especially needful if civil rights are to receive any protection. Tested by this standard, I am not preposed to say that the right of this small and helpless minority, including children having a strong religious conviction, whether they understand its nature or not, to refrain from an expression obnoxious to their religion is to be overborne by the interest of the state in maintaining discipline in the schools.

*Id.* at 310 U.S. 606 (Stone, J., dissenting).

Three years after its initial decision, the Supreme Court reversed its position in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), holding that a school board could not

when he wrote the following: “[D]issents or concurring opinions may salvage for tomorrow the principle that was sacrificed or forgotten today.”<sup>47</sup>

*Courting Justice* suggests that Justice Blackmun’s dissenting opinion in *Bowers v. Hardwick*,<sup>48</sup> and Justice Stevens’ dissenting opinion in *Boy Scouts of America v. Dale*<sup>49</sup> may provide a basis for future Justices to recognize the just claims of gays and lesbians to constitutional protection from discrimination and to recognition of gays and lesbians as full citizens under the Constitution. In his dissent in *Bowers v. Hardwick*, Justice Blackmun chastised the Court for its prejudice against homosexuals by failing to recognize the fundamental right of homosexuals to sexual privacy, which he found violated by Georgia’s criminal sodomy statute.<sup>50</sup> Blackmun wrote, “[I]t is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>51</sup>

Justice Stevens’ dissent in *Boy Scouts of America v. Dale* similarly provides prospective guidance for justices who would abandon an apparent gay exception for constitutional protection.<sup>52</sup> Justice Stevens wrote,

The only apparent explanation for the majority’s holding . . . is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual’s—should be singled out for special First Amendment treatment. Under the majority’s reasoning, an openly gay male is irreversibly affixed with the label ‘homosexual.’ That label even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though

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require public school teachers and students to salute the flag. The Court applied the type of scrutiny urged by Justice Stone and concluded that First Amendment freedom can be restricted “only to prevent grave and immediate danger to interests which the state may lawfully protect.” *Id.* at 639.

In a companion case, *Taylor v. Mississippi*, 319 U.S. 583 (1943), the Court overturned criminal conviction of two defendants found guilty of violating a state statute prohibiting the dissemination of information advocating refusal to salute, honor, or respect the flag. The Court found that the criminal statute infringed both First Amendment freedom of speech and press. *Id.* at 589-90.

47. William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. OF THE AM. JUDICATURE SOC’Y 104, 107 (1948).

48. 478 U.S. at 199-214 (Blackmun, J., dissenting).

49. 530 U.S. at 663-70 (Stevens, J., dissenting).

50. 478 U.S. at 199 (Blackmun, J., dissenting).

51. *Id.*

52. 530 U.S. at 663 (Stevens, J., dissenting).

unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.<sup>53</sup>

Justice Stevens urged that the Constitution should not be a barrier to a state's antidiscrimination law that would prohibit exclusion of homosexuals from groups such as the Boy Scouts of America.

The authors of *Courting Justice* correctly fault the Supreme Court for lagging behind American society in acceptance of homosexuals to full social participation. However, because the focus of their work is on the activity of the United States Supreme Court, the authors effectively undervalue the significance of legal developments in Congress and, more particularly, at the state and local level. While the Court upheld the exclusion of homosexuals upon a finding that they were "psychopaths" in *Boutilier*,<sup>54</sup> Congress enacted an immigration law that no longer bars the immigration of homosexuals.<sup>55</sup> At the time of the Court's decision in *ONE Inc.* in 1958, every state's criminal statutes included a provision authorizing prosecution for commission of sodomy. Today, as a result of judicial decision or legislative enactment, only sixteen states have criminal sodomy statutes.<sup>56</sup> In 1958, no person in the United States had any job protection from discrimination based on the person's sexual orientation. Today, eleven states have statutes providing employment protection from discrimination based on sexual orientation, and more than one hundred municipalities prohibit job discrimination against homosexuals.<sup>57</sup>

*Courting Justice* provides a valuable history of the approximate half century in which the United States Supreme Court has explicitly dealt with cases involving issues of gay and lesbian rights. The contextual material and biographical details of Justices and litigants provides the basis for a fuller appreciation of the history of the constitutional law aspects of gay and lesbian American history.<sup>58</sup> It seems likely that in the not so distant future, the Court will be confronted by gays and lesbians claiming the right to marriage, the right to protection from discrimination in employment, and the right to full participation in civil society, including the right to military service.

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53. *Id.* at 696.

54. 387 U.S. at 118.

55. *See supra* note 12.

56. *See* WILLIAM ESKRIDGE & NAN HUNTER, *SEXUALITY, GENDER AND THE LAW: 2001 SUPPLEMENT 7* (2001).

57. *See* WILLIAM RUBENSTEIN, *SEXUAL ORIENTATION AND THE LAW: 1999 SUPPLEMENT TO CASES AND MATERIALS 40* (2d ed. 1999).

58. The historical background for the Supreme Court's activity involving gay and lesbian claims to constitutional and legal protection is provided in John D'Emilio's *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (2d ed. 1998) and John Gallagher & Chris Bull's, *Perfect Enemies: The Battle Between the Religious Right and the Gay Movement* (1996).