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I. INTRODUCTION

Since deciding *Romer v. Evans* in 1996,[1] the United States Supreme Court has been on a collision course with itself over the issue of constitutional protection from discrimination for lesbians and gay men. In 1986, in *Bowers v. Hardwick*,[2] the Court dismissed the argument that laws prohibiting sodomy violated the due process privacy rights of gay men.[3] In *Romer*, however, the Court determined that a state could not, consistent with the Equal Protection Clause, treat lesbians and gay men differently from other citizens based merely on public disapproval.[4] The absence of any protection under the Due Process Clause on the one hand, and a fairly stringent restriction of state action against lesbians and gay men based on equal protection on the other, created a tension in constitutional doctrine. That tension reached a breaking point in *Lawrence v. Texas*.[5]

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1. 517 U.S. 620 (1996).
2. 478 U.S. 186 (1986).
3. *See id.* at 192-96.
4. *See Romer*, 517 U.S. at 634-36.
5. 123 S. Ct. 2472 (2003).

In *Lawrence*, the constitutionality of the Texas anti-sodomy law, known as the Homosexual Conduct Act (the Act), was challenged on the bases of both the Due Process and Equal Protection Clauses.[6] The Act criminalized deviate sexual intercourse between individuals of the same sex.[7] According to Texas law, deviate sexual intercourse was defined as:

> (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.[8]

John Lawrence and his partner Tyron Garner were arrested and convicted for violating the Act when police entered Lawrence's apartment on a false report of a weapons disturbance.[9] The constitutionality of the Act was challenged in a Texas county criminal court; that challenge failed.[10] The Court of Appeals for the Texas Fourteenth Division also rejected the constitutional claims of the defendants.[11] The United States Supreme Court granted certiorari and issued a decision on June 26, 2003.[12]

In a dramatic and somewhat unexpected decision, Justice Kennedy, writing for a five justice majority, declared that the Homosexual Conduct Act violated the Due Process Clause and overruled *Bowers*.[13] In her concurring opinion, Justice O'Connor, while disagreeing with the overruling of *Bowers,* argued that the Texas Act was unconstitutional because it violated the Equal Protection Clause.[14] In merely seventeen years, the Court had moved from a dismissive rejection of the argument that anti-sodomy laws violated due process privacy rights, to an expansive protection of the right of lesbians and gay men to conduct their sexual lives as they wish without governmental intrusion.[15] In this essay, I describe the Court's journey from *Bowers* to *Lawrence* and briefly

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6. *Id.* at 2476.
7. *See* TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).
8. *Id.* § 21.01(1)(A)-(B).
9. *Lawrence*, 123 S. Ct. at 2475.
10. *Id.* at 2476.
11. *Id.*
12. *Id.*
13. *Id.* at 2484.
14. *Id.*
15. *Compare Bowers,* 478 U.S. at 191, *with Lawrence*, 123 S. Ct. at 2484.

suggest some reasons for this significant change in constitutional doctrine.

II. THE TENSION BETWEEN *BOWERS* AND *ROMER*

Relying on the privacy rights established in *Griswold v. Connecticut*,[16] *Eisenstadt v. Baird*[17] and *Roe v. Wade*,[18] the petitioners in *Bowers v. Hardwick* argued that the Georgia statute criminalizing sodomy encroached upon a private and intimate association that was protected from state intrusion by the Due Process Clause.[19] This argument was rejected by a five justice majority,[20] who declared that there was no "fundamental right to engage in homosexual sodomy."[21] The zone of privacy created by the Due Process Clause was limited to "family, marriage, and procreation,"[22] and thus had no bearing on the right of gay couples to engage in sodomy.[23] The Court found the proposition that the Due Process Clause shielded "any kind of private sexual conduct between consenting adults" from state intrusion, "unsupportable."[24]

The Court's opinion also turned on its conclusion that the right to engage in sodomy was not "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[25] The fundamental rights protected by the Due Process Clause, reasoned the Court, did not extend to freedom to engage in same-sex sodomy since that freedom did not have a long history of protection from government intrusion.[26] The Court reviewed the history of state laws criminalizing sodomy and found an extensive

16. 381 U.S. 479 (1965).
17. 405 U.S. 438 (1972).
18. 410 U.S. 113 (1973).
19. *Bowers*, 478 U.S. at 189.
20. Justice White wrote the opinion of the Court and was joined by Chief Justice Burger and Justices Rehnquist, Powell and O'Connor. Justices Blackmun, Brennan, Marshall, and Stevens dissented. *Id.* at 187.
21. *Bowers*, 478 U.S. at 190-91. The Georgia statute at issue in *Bowers* criminalized both same-sex and different-sex sodomy. *Id* at 188 n.1. The defendant was a man charged with committing sodomy with another man. *Id.* at 187-88. The *Bowers* Court chose to frame the issue before it as limited to the constitutionality of criminalizing same-sex sodomy. *Id* at 190.
22. *Id.* at 191.
23. *Id.*
24. *Id.*
25. *Id.* at 191-92, 194.
26. *Id.* at 192-94.

history of criminal penalties for sodomy.[27] At the time of the *Bowers* decision, twenty-five states had criminal laws against sodomy.[28] Finding that the proscription against sodomy had "ancient roots," the Court proceeded to review colonial and early American criminal sodomy laws, arriving at a similar conclusion.[29]

The Court made short work of the petitioner's argument that moral approbation was not a sufficient basis to support Georgia's anti-sodomy law.[30] Stating that law "is constantly based on notions of morality," the Court upheld Georgia's ability to express is disapproval of homosexuality through its sodomy laws.[31]

In a sharply worded dissent, written by Justice Blackmun, four of the justices criticized the majority's narrow framing of the issue and declared the case was about "the right to be let alone."[32] The constitutional right to privacy, the dissent asserted, "means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.'"[33] They believed that the Georgia statute violated the fundamental privacy interest protecting an individual's intimate associations with others.[34] The dissenting justices concluded that in light of the fundamental liberty interest, Georgia's justifications for the anti-sodomy statute were inadequate.[35] In an analogy to *Loving v. Virginia*,[36] the dis-

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27. *Id.*

28. *Id.* at 196. The Court also rejected the argument that conduct that occurs in the privacy of the home should be entitled to additional protection. *Id.* at 195-96.

29. *Id.* at 192-93.

30. *Id.* at 196.

31. *Id.*

32. *Id.* at 199-200 (quoting Herring v. State, 46 S.E. 876, 882 (Ga. 1904)).

33. *Id.* (quoting *Herring*, 46 S.E. at 882).

34. *Id.* at 206. The privacy right described by the dissent flowed from previous due process cases such as, *Roe v. Wade*, 410 U.S. 113 (1973), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965). The right described in those cases as inherent in the due process guarantee is the promise that "a certain private sphere of individual liberty will be kept largely beyond the reach of the government." *Bowers*, 478 U.S. at 203 (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)).

35. *Bowers*, 478 U.S. at 208 (Blackmun, J., dissenting).

36. 388 U.S. 1 (1967) (holding that state miscegenation laws violate equal protection and due process rights).

sent argued that moral or social disapproval alone is not sufficient justification to overcome a fundamental liberty interest; some secular justification, beyond moral approbation, would be necessary for the anti-sodomy statute to survive. [37] As the justices explained, "the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently."[38]

Eleven years later, in *Romer v. Evans*, the Court was faced with the issue of whether a Colorado constitutional amendment that repealed state and local anti-discrimination law based on sexual orientation and prohibited any government action protecting lesbians and gay men from discrimination was constitutional.[39] The Court invalidated the amendment as a violation of the Equal Protection Clause.[40] Quoting from Justice Harlen's dissent in the infamous *Plessy v. Ferguson*, Justice Kennedy announced that the Constitution "neither knows nor tolerates classes among its citizens."[41] In stirring language, Justice Kennedy re-

37. *Bowers*, 478 U.S. at 210-11 (Blackmun, J., dissenting).

38. *Id.* at 213 (Blackmun, J., dissenting). In a separate dissent, joined by Justices Brennan and Marshall, Justice Stevens analyzed the Georgia law as applying to both gay and straight sexual partners based on the immorality of the sexual act of sodomy and concluded that "the fact that a 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." *Id.* at 216 (Stevens, J., dissenting). Justice Stevens also concluded that selective enforcement of the sodomy law against only same-sex couples could not be justified. *Id.* at 218-19 (Stevens, J., dissenting).

39. 517 U.S. 620, 624 (1996). The Colorado constitutional amendment provided that:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. . . .

Id. (quoting COLO. CONST. art. II, 30(b)).

40. *Romer*, 517 U.S. at 623. The majority opinion, authored by Justice Kennedy, was joined by Justices Stevens, O'Connor, Souter, Ginsberg, and Breyer. Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

41. *Id.* (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

nounced the Colorado amendment as antithetical to our country's constitutional tradition and a "denial of equal protection of the laws in the most literal sense."[42]

Equal protection, at a minimum, requires that a governmental decision to treat one group differently from another bear a rational relationship to a legitimate end.[43] The Court found that the Colorado amendment failed this requirement because its goals were insufficiently related to the broad sweep of the amendment,[44] and because the goal of politically disadvantaging a group - gay men and lesbians - was not a legitimate basis for governmental action.[45] Because the fit between the goals of the amendment and the means employed to accomplish them was so loose, the Court concluded that the real motivation behind the amendment was a desire to harm lesbians and gay men.[46] The Amendment "classifie[d] homosexuals[,] not to further a proper legislative end[,] but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."[47]

The Court in *Romer* pointedly failed to discuss *Bowers* and the conflict created by the two decisions. This omission and the contradiction between *Bowers* and *Romer* was a central point of the dissenting opinion.[48] As Justice Scalia pointed out, "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[49] A state's ability to criminalize gay sodomy, established in *Bowers,* provided the rational basis to justify the Colorado amendment.[50]

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42. *Id.* at 633.
43. *Id.* at 631.
44. The stated goals of the amendment were to protect citizens' freedom of association by not requiring those who found homosexuality offensive to rent or sell homes to, or employ lesbians and gay men. Another justification for the amendment was to preserve state and local anti-discrimination resources for the benefit of other minorities. *Id.* at 635.
45. *Id.* at 632.
46. "The sheer breadth [of the amendment] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 632.
47. *Id.* at 635.
48. *Id.* at 636 (Scalia, J., dissenting).
49. *Id.* at 641 (Scalia, J., dissenting).
50. *Id.* at 641-42 (Scalia, J., dissenting).

Concluding that the Court majority, in finding the constitutional amendment invalid, had taken sides in the culture wars, Justice Scalia stated that the Court "employ[ed] a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values."[51]

III. UNEXPECTED RESOLUTION: *LAWRENCE V. TEXAS*

In a bold move, the Court in *Lawrence* resolved the tension between *Romer* and *Bowers* by overruling *Bowers*.[52] Finding the right asserted by the petitioners to fall squarely into the liberty and privacy interests guaranteed by the Due Process Clause, the Court stated that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[53] Finding that *Bowers* defined the scope of liberty protected by the Constitution too narrowly, the Court concluded that homosexuals have the right to choose to enter into a personal relationship, involving sexual intimacy "without being punished as criminals."[54]

The Court stated that *Bowers* was wrong in 1986 and was wrong in 2003.[55] The flaw in *Bowers* was, in part, its too narrow conception of the liberty interest protected by the Due Process Clause, in addition to the majority's inaccurate reading of the historical record concerning sodomy prosecution. The long history of condemnation of homosexual sodomy, relied upon in *Bowers,* was more complex and ambiguous than the Court had suggested.[56] Additionally, the Court failed to reference the recent trend, both in the United States and abroad, in the last half-century toward the

51. *Id.* at 651 (Scalia, J., dissenting).

52. Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).

53. *Id.* at 2475. In describing the scope of the liberty interest protected by the Due Process Clause, the Court relied on *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*. *Id.* at 2476-77. In *Bowers,* these cases had been distinguished as concerning only marriage and reproduction. 478 U.S. at 190-91.

54. *Lawrence*, 123 S. Ct. at 2478.

55. *Id.* at 2484.

56. *Id.* at 2480. For example, the *Bowers* Court had failed to note the significance of the ALI Model Penal Code promulgated in 1955, which did not recommend any sanctions for consensual sexual relations. *Id.* Nor did the *Bowers* Court take into account the decision of the European Court of Human Rights that found laws criminalizing gay consensual sex a violation of the European Convention on Human Rights. *Id.* at 2481.

liberalization of laws regarding sexual practices.[57] The *Lawrence* Court also pointed to developments since the *Bowers* decision calling into question its conclusions about the broad condemnation of sodomy.[58] Of the twenty-five states that outlawed sodomy in 1986, only thirteen continued to do so in June 2003 and only four of those maintained laws applying only to same-sex sodomy.[59]

Of significant concern to the *Lawrence* Court was the stigma the Texas sodomy statute imposed on lesbians and gay men, despite the very few criminal prosecutions for violation of the statute.[60] As I have discussed in an earlier work, the most significant harm caused by anti-sodomy statutes is not actual criminal prosecution, but rather the use of the laws in other legal contexts.[61] The Court in *Lawrence* noted that "[w]hen 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."[62] The fact that a lesbian or gay man can be regarded as a law-breaker in states that outlaw sodomy works to disadvantage lesbians and gay men in employment, child custody, and other significant civil legal contexts.

Concluding that Justice Stevens's dissent in *Bowers* should have been followed, the Court stated, "The petitioners [were] 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."[63] While explicitly attempting to prevent expansion of the holding to same-sex marriage or to sexual acts involving minors or those who may be intimidated into consent, prostitution or public conduct,[64] the *Lawrence* Court expanded the

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57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 2482.
61. *See* Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813 (2001).
62. *Lawrence*, 123 S. Ct. at 2482.
63. *Id.* at 2484.
64. *Id.* In his dissenting opinion, Justice Scalia questions the limits to the reach of the opinion set forth by Justice Kennedy:

> 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 "no legiti-

zone of privacy protected by the Due Process Clause to cover consensual sexual acts by adults, both gay and straight.

While declaring that an equal protection challenge to the Texas statute was "tenable,"[65] the majority opinion rested its conclusions on due process doctrine.[66] In her concurrence, however, Justice O'Connor concluded that she would have struck down the statute as a violation of the Equal Protection Clause.[67] Declining to overrule *Bowers,* Justice O'Connor nonetheless concluded that treating same sex and different sex couples differently could not satisfy the rational basis requirement of the Equal Protection Clause.[68] Following *Romer*, Justice O'Connor argued that the Texas law was invalid because it was based solely on moral disapproval and, "like a bare desire to harm the group, [moral disapproval] is an interest that is insufficient to satisfy the rational basis review under the Equal Protection Clause."[69]

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mate state interest" for purposes of proscribing that conduct, and if, as the Court coos . . . , "[w]hen 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," what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"?

Id. at 2498 (Scalia, J., dissenting) (citations omitted).

65. *Id.* at 2482.

66. *Id.* at 2476, 2484.

67. *Id.* at 2486.

68. Justice O'Connor joined the majority opinion in *Bowers* and in her concurrence found a way to reconcile *Bowers* with her determination that the Texas Act was unconstitutional:

> In *Bowers*, we held that a state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality. The only question in front of the Court in *Bowers* was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. *Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.

Id. (O'Connor, J., concurring) (citations omitted).

69. *Id.*

IV. WHAT HAPPENED?

On the most basic level, part of the explanation for the turn around in due process doctrine represented by *Lawrence* was a change in Court personnel. In 2003, the only Justices in the majority in *Bowers* remaining on the Court were Justices Rehnquist and O'Connor. Furthermore, one of the Justices in the majority, Justice Powell, had publicly questioned the correctness of the decision in *Bowers.*[70] But perhaps the most significant personnel change for the evolution of due process doctrine in this area was the arrival of Justice Kennedy in 1988. Justice Kennedy and Justice O'Connor were the key votes in determining the outcome in *Lawrence.* Justice O'Connor was willing to distinguish the holding in *Bowers.* And, as the author of the *Romer* opinion, Justice Kennedy had already made clear his willingness to interpret constitutional rights broadly to protect the interests of lesbians and gay men. Perhaps he argued for the overruling of *Bowers* at that point, but, lacking sufficient support, instead pursued an equal protection analysis without reference to *Bowers.*[71] The same six Justices in the *Romer* majority held the Texas statute unconstitutional in *Lawrence,* and perhaps Justice Kennedy's leadership on this issue partly explains the six person support for striking down the Texas law.[72]

Perhaps another explanation for the change in the Court's view on anti-sodomy law has been the increasing social and culture acceptance and integration of lesbians and gay men since 1986. The repeal of many states' sodomy laws in the past seventeen years may also reflect a strengthening of the view that the

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70. Marc S. Spindelman, *Reorienting* Bowers v. Hardwick, 79 N.C. L. REV. 359, 417 (2001).

71. The Justices on the Court when *Romer* and *Lawrence* were decided were the same.

72. Justice Kennedy, a Reagan appointee, has authored several "liberal" opinions. He has been willing to break ranks with the more conservative Reagan and Bush appointees. Richard Brust, *The Man in the Middle: Justice Kennedy's Opinion in the Gay Rights Case Underlines His Growing Influence,* A.B.A. J., October 2003, at 24. Laurence Tribe suggests that even at the time of his appointment to the Court, it was clear that "with someone like Kennedy on the Court, the eventual overruling of *Bowers v. Hardwick* was nearly a foregone conclusion . . . ." Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name,* 117 HARV. L. REV. 1893, 1954 (2004).

government should not interfere with consensual adult sex acts.[73] If the Due Process Clause is the repository of our shared cultural sense of justice and liberty, an evolution in shared views of sexual morality may well influence the Court's decisions. This social change since *Bowers* was noted by the *Lawrence* Court as being part of the basis for its conclusion that the liberty interests created by the Due Process Clause included the formation of gay and lesbian sexual relationships.[74]

Jeffrey Rosen has argued that the Court's decision in *Lawrence* may well result in a backlash against lesbian and gay rights, particularly in the area of gay marriage, thus slowing or even reversing the advance of lesbian and gay equality.[75] Whether *Lawrence* is the harbinger of a more tolerant era or becomes a symbol of resistance depends in large part on courts' use of *Lawrence* in cases involving same-sex marriage, prostitution, bigamy, adultery and other currently outlawed or unrecognized sexual relationships. The doctrinal shift from *Romer's* equal protection analysis to *Lawrence's* prohibition of anti-sodomy laws on the basis of due process is not hard to trace. What is more difficult to see is where the limits of *Lawrence* will be drawn.

V. *LAWRENCE* AND SAME-SEX MARRIAGE

Less than six months after the *Lawrence* decision, the Supreme Judicial Court of Massachusetts determined that the prohibition of same-sex marriage violated the state's constitutional liberty and equality protections.[76] While observing that the Mas-

73. One author has suggested that Independent Counsel Kenneth Starr's report on the President Clinton and Monica Lewinsky sexual relationship has helped foster discussion and acceptance of non-traditional sex acts. Debbie Nathan, *Sodomy for the Masses*, THE NATION, Apr. 19, 1999, at 21-22.

74. *Lawrence*, 123 S. Ct. at 2481, 2482. Since *Bowers*, twelve of the twenty-five states that outlawed sodomy have repealed their laws, and in those states where the laws remain, they are generally not enforced. *Id.* at 2481. In addition, criticism of *Bowers* has been extensive, and other countries have recognized the right of gay men and lesbians to engage in intimate sexual conduct. *Id.* at 2483.

75. Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES MAG., Sept. 7, 2003, at 49. Rosen argues that, as with the abortion issue in *Roe*, the Court's insertion of itself into the culture wars actually creates resistance to the rights the Court is attempting to protect. *Id.*

76. Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 969 (Mass. 2003).

sachusetts' constitutional protections for individual liberty were more extensive than those in the U.S. Constitution, the court nonetheless referred to the reasoning in *Lawrence* when it concluded that the discrimination faced by lesbians and gay men who are denied the right to marry because of their sexual orientation violates liberty and due process rights.[77] The court observed, "Recently the United States Supreme Court has reaffirmed that the Constitution prohibits a State from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity, even though that statutory discrimination may enjoy broad public support."[78] Despite Justice Kennedy's assertion that the *Lawrence* decision "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,"[79] it is clear from *Goodridge* that *Lawrence* has been and will be used to advance the argument that banning same-sex marriage violates due process and equal protection rights.[80]

In *Goodridge*, the court reasoned that the state lacked a legitimate reason for excluding same-sex couples from the benefits of civil marriage and that without such a legitimate basis, the exclusion violated both equal protection and due process rights.[81] The bases asserted by the state for excluding same-sex couples from civil marriage – "providing a favorable setting for procreation; ensuring the optimal setting for child rearing . . . and preserving scarce State and private financial resources," – failed to provide a rational basis for the state's action.[82] The court concluded that in the absence of any rational basis for the exclusion of same-sex couples, the bar seemed to be based on "persistent

77. *Id.* at 958-59. In contrast to the *Goodridge* decision, the Court of Appeals of Arizona in *Standhart v. Superior Court* concluded that, notwithstanding the *Lawrence* decision, same sex marriage was not a fundamental right under either the federal or Arizona constitutions. 77 F.3d 451 (2003).

78. *Id.* at 958 n.17.

79. *Lawrence*, 123 S. Ct. at 2484.

80. Laurence Tribe argues in his recent essay that the Court's reasoning in *Lawrence* will inevitably lead to a determination that banning same-sex marriage violates the Due Process and Equal Protection Clauses. Tribe, *supra* note 72, at 1945-46.

81. 798 N.E.2d at 961.

82. *Id.* The court also rejected the assertions that including same-sex couples in civil marriage would "trivialize or destroy the institution of marriage." *Id.* at 965.

prejudices against persons who are . . . homosexual."[83] Such disapproval or prejudice was not an adequate basis for denying lesbians and gay men the right to marry.[84] The Massachusetts court's reasoning echoes the assertion in *Lawrence* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice."[85] If disapproval of homosexuality is not a constitutionally permissible basis for a state to condemn same sex sodomy, it seems unlikely that the same disapproval could sustain a ban against same-sex marriage.[86]

VI. CONCLUSION

Fundamental change in due process and equal protection doctrine is revealed in the changes in the Court's analysis from *Bowers*, to *Romer,* and concluding in *Lawrence.* In these three cases, we can see the effect of changing social values, the result of supreme court appointments and resignations, and the different insights revealed by a different framing of the issues. The full ramifications of *Lawrence* remain unclear, but in addition to the new privacy protections it may provide, the decision stands as a compelling example of how constitutional doctrine evolves and how the Supreme Court struggles with and attempts to resolve critical issues of individual rights.

83. *Id.* at 968.

84. *Id.*

85. 123 S. Ct. 2472, 2483 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

86. Lawrence Tribe suggests that while the *Lawrence* reasoning must inevitably lead to the demise of bans on same-sex marriage, the process of the Court reaching that conclusion may well take many years. Tribe, *supra* note 72, at 1947.