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Introduction

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SYMPOSIUM: 2002-2003 SUPREME COURT REVIEW

INTRODUCTION

The Honorable Sven Erik Holmes*

Today marks the ninth year of the Supreme Court Review here at the University of Tulsa College of Law. Each year the recent term of the United States Supreme Court is subjected to critical analysis by scholars and practitioners from here in Tulsa and elsewhere.

The October 2002 Term returned the Supreme Court to the forefront on social issues—and simultaneously to a position of national celebrity—which was the hallmark of the 2000 Term. When the Court undertakes to address controversial social, political, and moral questions, whatever the outcome, there will be significant public attention and debate. So it was during the 2002 Term, when Court opinions dealt with affirmative action in *Grutter v. Bollinger*¹ and *Gratz v. Bollinger*,² federalism in *Nevada Department of Human Resources v. Hibbs*,³ and homosexuality in *Lawrence v. Texas*.⁴

In addition, you will hear later today about many other important cases decided by the Court this term, including *State Farm Mutual Automobile Insurance Company v. Campbell*,⁵ in which the Court set limits on punitive damage awards; *Eldred v. Ashcroft*,⁶ sustaining twenty year extensions of existing copyrights; *Wiggins v. Smith*,⁷ establishing more stringent requirements for an

* United States Chief District Judge for the Northern District of Oklahoma. I would like to express sincere appreciation to Erin Bender for her assistance in the preparation of this introduction.

1. 123 S. Ct. 2325 (2003).

2. 123 S. Ct. 2411 (2003). For a detailed discussion of *Grutter* and *Gratz*, see Martin H. Belsky, *Accentuate the Positive, Eliminate the Negative, Latch on to the Affirmative [Action], Do Mess with Mr. In-Between*, 39 Tulsa L. Rev. 27 (2003).

3. 123 S. Ct. 1972 (2003).

4. 123 S. Ct. 2472 (2003).

5. 123 S. Ct. 1513 (2003); see Barbara K. Bucholtz, *Father Knows Best: The Court's Result-Oriented Activism Continues Apace: Selected Business-Related Decisions from the 2002-2003 Term*, 39 Tulsa L. Rev. 75, 81-82 (2003).

6. 537 U.S. 186 (2003).

7. 123 S. Ct. 2527 (2003); see Lyn Entzeroth, *Federal Habeas Review of Death Sentences, Where Are We Now?: A Review of Wiggins v. Smith and Miller-El v. Cockrell*, 39 Tulsa L. Rev. 49 (2003).

attorney to investigate and present background information about a defendant during the sentencing stage of a capital case; *Ewing v. California*⁸ and *Lockyer v. Andrade*,⁹ upholding long prison sentences for even a minor third offense under a “three strikes you’re out” regimen; and *Demore v. Kim*,¹⁰ granting the Government the authority to imprison immigrants it desires to deport without providing individual hearings.

Today, I intend to focus on what I believe to be a consequence of the Court not changing membership in almost ten years. Stephen Breyer, the junior Justice, joined the Court in 1994. As noted last year, the current period without change on the Court is longer than any time since 1812 through 1823.

There now appears to be a legitimate basis for concern that the Court’s static composition contributes to justices writing opinions for each other, rather than for the proper consumers of their work—practitioners, public officials, and lower court judges. In my judgment, opinions are becoming increasingly more difficult to follow and less capable of providing guidance for future decisions by lower courts. The extensive commentary contained in the majority opinion in *Lawrence*, which will be the subject of my remarks today, is a case in point. But more on this later.

I

Before turning to the central topic, permit me to present the October 2002 Term by the numbers. First, during the Term, the Supreme Court issued seventy-one signed opinions, compared with seventy-five in the previous Term and seventy-nine in the October 2000 Term. The Court also issued twelve per curiam decisions and five writ dismissals. This year, more than half of the cases came to the Court from state supreme courts and the Ninth Circuit Court of Appeals.

Second, seventy-four percent of the cases decided during the 2002 Term reversed or vacated in whole or in part a decision of a lower court, approximately the same number as the previous Term. This fact underscores the principle that the Supreme Court, in discharging its responsibility to announce principles of law, prefers the vehicle of reversal rather than that of affirmance.

Third, the Court decided thirty cases unanimously, compared to twenty-seven in the previous Term. Thirty-nine cases were decided unanimously in the 2000 Term.

Fourth, the Court split five-to-four in fifteen cases. Of these splits, Justice O’Connor voted with the majority in thirteen cases. As has been discussed at great length in prior years, Justice O’Connor continues to be the controlling influence on the current Court.

Finally, Chief Justice Rehnquist agreed with Justice Kennedy in more cases than with any other Justice on the Court, ninety-two percent. By contrast, Chief

8. 123 S. Ct. 1179 (2003).

9. 123 S. Ct. 1166 (2003).

10. 123 S. Ct. 1708 (2003).

Justice Rehnquist agreed with Justice Stevens in the least number of cases, sixty-eight percent. The relationship between the voting patterns of Chief Justice Rehnquist and Justice Kennedy has been a notable trend in recent years.

II

The Supreme Court has a very serious and significant responsibility to “say what the law is.”¹¹ This requires the articulation of legal principles that are both clear and enduring, such that lower courts and practitioners alike can understand and follow their dictates. It should be emphasized that “enduring” does not mean unchangeable, although the doctrine of *stare decisis* certainly contemplates that the reversal of a prior decision will be the exception and not the rule. But even when the law is tangibly changed, and a prior decision of the Court is reversed, the substance and style of that change should be presented so that the ordinary citizen is able to understand the change, as well as its legal, political, and philosophical underpinnings. Only in this way will public confidence in our legal system be enhanced.

In one of the most publicized cases of the 2002 Term, the Court, in *Lawrence*, reversed its 1986 decision of *Bowers v. Hardwick*.¹² The opinion reflects a change in the Court’s view as to whether homosexual conduct in the home may be prohibited by state legislation. My purpose today is not to take issue with the Court’s holding in *Lawrence*. Indeed, the holding has absolutely nothing to do with what I intend to discuss.¹³ Rather, my focus will be on the language and structure of the opinion, which systematically attacks both the factual and legal basis of *Bowers*, and the assertions that the opinion makes about established constitutional jurisprudence. Recent cases compel the conclusion that the Rehnquist Court simply does not believe much of what the majority opinion in *Lawrence* represented to be the law, including its description of a constitutional guarantee of privacy. In my judgment, the Court simply will not abide by the legal principles announced in this case in the future. And, the fact that the Court will not follow its own opinion is particularly troubling in light of its responsibility to say what the law is, and to direct other courts on what law to follow.

A.

In my constitutional law class, students are encouraged to examine critically citations by the Court to prior opinions. The Court claims to be a creature of established law and therefore, as a matter of style, tends to cite a prior case for virtually every proposition. Unfortunately, not every citation supports the proposition in question. More importantly, when the Court clearly misstates authority, or ignores clear Supreme Court precedent to the contrary, as in

11. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

12. *Lawrence*, 123 S. Ct. at 2484; see *Bowers v. Hardwick*, 478 U.S. 186 (1986).

13. For a discussion of the Court’s holding, see Professor Gary Allison’s contribution to this symposium. Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 *Tulsa L. Rev.* 95, 150-53 (2003).

Lawrence, public confidence in our legal system surely will suffer. When citizens believe a judge or Justice is simply expressing a personal opinion and presenting it as established legal doctrine, things are bad enough; but when prior cases are cited to support substantively such expressions, and such cases in fact provide no such support, the result is far worse.

For my constitutional law students, a favorite citation is *Meyer v. Nebraska*.¹⁴ In *Meyer*, the Court overturned the conviction of a high school instructor for violating a state law by teaching a language other than English, finding that parents are protected by a constitutional “liberty” interest to determine how best to rear their children.¹⁵ The mystery of a third party validly interposing the parents’ “liberty” interest as a personal protection against the state’s criminal statute has never been solved. What is more important for immediate purposes, however, is the following statement:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁶

The first citation in support of this proposition is the *Slaughter-House Cases*.¹⁷ In that case, butchers in New Orleans claimed, among other things, that the legislature violated their constitutional due process rights when it placed severe restrictions on their trade. Remarkably, even a casual reading of the *Slaughter-House Cases* reveals the following disclaimer:

The argument has not been much pressed in these cases that the defendant’s charter deprives the plaintiffs of their property without due process of law . . . [The Due Process Clause] has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. . . .

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.¹⁸

14. 262 U.S. 390 (1923).

15. *Id.* at 400-01.

16. *Id.* at 399.

17. 83 U.S. 36 (1873).

18. *Id.* at 80-81.

As the reach of the Due Process Clause is diminished, not enhanced, by the *Slaughter-House Cases*, the case lends no support for the conclusion reached in *Meyer*. Clearly, then, it is not unheard of for the Court to rely upon as “precedent” authorities that are at best neutral, if not contrary to the proposition asserted. But the scale of such misplaced reliance is dwarfed by *Lawrence*, as the following discussion reflects.

B.

First, the opinion in *Lawrence* asserts that *Griswold v. Connecticut*¹⁹ is once again the foundation of any analysis of privacy issues under the Constitution, stating, “[T]he most pertinent beginning point is our decision in *Griswold v. Connecticut*.”²⁰ The opinion continues, “[T]he Court [in *Griswold*] described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protective space of the marital bedroom.”²¹ In fact, since *Griswold*, individual justices have repeatedly questioned this proposition and have mocked the case’s due process jurisprudence for its reliance on so-called “penumbras, formed by emanations from [constitutional] guarantees”²² Indeed, the Court has indicated many times that *Griswold* is unworkable and has rejected its vitality. Thus, the question we must ask ourselves is whether the Court intends to resurrect *Griswold*, or whether a lower court is better counseled to follow what the Court has said to the contrary many times since.

Second, the *Lawrence* Court cites to *Roe v. Wade*,²³ stating:

The Court [in *Roe*] cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.²⁴

In fact, in what is probably the Court’s single most explicit and sweeping declaration of the constitutional right of privacy, *Roe* states:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, the Court has recognized that a right of personal privacy, or a guarantee of certain

19. 381 U.S. 479 (1965).

20. *Lawrence*, 123 S. Ct. at 2476 (citation omitted).

21. *Id.* at 2477 (citing *Griswold*, 381 U.S. at 485).

22. *Griswold*, 381 U.S. at 484; see e.g. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 665 (1999) (Stevens, Souter, Ginsberg & Breyer, JJ., dissenting) (criticizing the majority for basing its states’ rights argument on its “perception of constitutional penumbras rather than constitutional text”); *Jaffee v. Redmond*, 518 U.S. 1, 26 n. 1 (1996) (Scalia, J., dissenting) (disapproving of the majority’s finding an evidentiary privilege for psychologists in, *inter alia*, “penumbras of the various guarantees of the Bill of Rights” (quoting *In re “B”*, 394 A.2d 419, 425 (Pa. 1978)) (internal quotations omitted)); *Burnham v. Super. Ct.*, 495 U.S. 604, 627 n. 5 (1990) (plurality) (“The notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a Platonic check upon the society’s greedy adherence to its traditions can only be described as imperious.”).

23. 410 U.S. 113 (1973).

24. *Lawrence*, 123 S. Ct. at 2477.

areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty” are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education.

This right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.²⁵

Since *Roe*, however, the Court has systematically limited this broad grant of privacy rights. Most notably, in *Washington v. Glucksberg*,²⁶ the Court expressly limited the liberty interests protected by the Due Process Clause by claiming that it has only granted due process in certain specific cases,²⁷ and proceeded to identify those cases and the right articulated in each case.²⁸ Moreover, the Court rejected the existence of any broad privacy right, stating:

But we “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” *Collins*, 503 U.S., at 125. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” *ibid.*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, *Moore*, 431 U.S., at 502 (plurality opinion).²⁹

The Court went on to set forth the appropriate Due Process analysis:

First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this

25. 410 U.S. at 152-53 (citations omitted).

26. 521 U.S. 702 (1997).

27. *See id.* at 719-20.

28. The Court stated:

The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); *Casey*, 505 U.S. at 851. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the “liberty” specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williams*, 316 U.S. 535 (1942); to direct the education and upbringing of one’s children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey, supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278-279.

Glucksberg, 521 U.S. at 720.

29. *Id.*

Nation's history and tradition," [*Moore*, 431 U.S.] at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *Flores*, [507 U.S.] at 302; *Collins*, [503 U.S.] at 125; *Cruzan*, [497 U.S.] at 277-278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins, supra*, at 125, that direct and restrain our exposition of the Due Process Clause.³⁰

Thus, the question we must ask ourselves is whether the Court believes the Constitution grants an expansive right of privacy, or whether the express curtailment of such a right subsequently effected by *Glucksberg* will continue to be good law.

Third, the majority opinion attacks the veracity of the history described by the majority opinion in *Bowers*, concluding, "[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated."³¹ I have no idea whether that statement is true. Indeed, I have never reviewed the historical authorities cited by the Court in *Bowers*. I do know, however, that the Supreme Court has just informed the public that a previous majority opinion of the Court represented falsely the history and the law in America pertaining to homosexual conduct, presumably in an effort to lend support for its decision upholding the criminal statute at issue. Thus, the question we must ask ourselves is whether the public can maintain confidence in an institution that declares that it has previously misstated the facts in an effort to advance a certain conclusion of law. Surely, the credibility of the Court has been placed at risk.

Fourth, the Court declares a position in one of the most significant doctrinal debates in all of constitutional law—whether the constitution is a living, evolving document, or whether the intent of the framers controls in all cases—stating:

In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."³²

This statement is wholly unsupported by precedent. In *Glucksberg*, the Court recited the well-established starting point for any substantive due process inquiry, stating, "We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."³³ The Court first elaborated on

30. *Id.* at 720-21.

31. *Lawrence*, 123 S. Ct. at 2480.

32. *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

33. *Glucksberg*, 521 U.S. at 710.

this principle in *Palko v. Connecticut*,³⁴ declaring that a right is fundamental for due process purposes only if it lies at “the very essence of a scheme of ordered liberty,”³⁵ that is, if the abolition of that right would violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³⁶ Moreover, any judge who believes the Court will, in the next case, look to current events without extolling the virtues of the framers is simply unfamiliar with the opinions of the Rehnquist Court. Thus, the question we must ask ourselves is whether the Court has abandoned its adherence to the intent of the framers, or whether its newly declared position in *Lawrence* will simply be ignored in future cases.

Fifth, the Court cites *Planned Parenthood of Southeastern Pennsylvania v. Casey*³⁷ and *Romer v. Evans*³⁸ as precedent. However, neither case provides tangible support for the holding in *Lawrence*. *Casey* does not assert in any way broad rights under the Due Process Clause, opting instead to curtail the reach of *Roe*.³⁹ Similarly, *Romer* relies on the Equal Protection Clause, rather than the Due Process Clause, in reaching its central holding.⁴⁰ Yet, the Court cites *Romer* for support of its holding that *Lawrence* had a constitutional right to engage in consensual sodomy in his home.⁴¹ Thus, the questions we must ask ourselves are whether and under what circumstances the Court will rely on either *Casey* or *Romer* and whether we are justified in concluding that any such reliance will depend solely on the desired outcome in that particular case.⁴²

Sixth, the Court articulates a new test for stare decisis and explains why the facts presented here fail that test, stating that stare decisis is not “an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision. . . .”⁴³ The Court then proceeds to discuss changes in societal attitudes and a lack of reliance on the *Bowers* decision as reasons for not following stare decisis in this case. As Justice Scalia notes in his dissent, however, this new test as articulated would clearly cause other issues, including abortion, to be reconsidered.⁴⁴ Indeed, Justice Kennedy was an author of the *Casey* decision that offered stare decisis as a controlling reason to uphold

34. 302 U.S. 319 (1937).

35. *Id.* at 325.

36. *Id.* (quoting *Snyder v. Mass.*, 291 U.S. 97, 105 (1934)) (internal quotations omitted).

37. 505 U.S. 833 (1992).

38. 517 U.S. 620 (1996).

39. See *Casey*, 505 U.S. at 859-60 (“*Roe*’s scope is confined by the fact of its concern with postconception potential life. . . . [V]iability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”).

40. 517 U.S. at 623.

41. *Lawrence*, 123 S. Ct. at 2482.

42. In fact, the Court declined to apply *Romer* when it denied certiorari in a case involving a city ordinance that was substantively identical to the state law at issue in *Romer*. See *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert denied*, 525 U.S. 943 (1998).

43. *Lawrence*, 123 S. Ct. at 2483 (quoting *Payne v. Tenn.*, 501 U.S. 808, 828 (1991)) (internal quotations omitted).

44. *Id.* at 2488-91 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

Roe. There, he stated, “Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”⁴⁵ Thus, the question we must ask ourselves is whether the Court expects lower courts to apply *Lawrence*’s new stare decisis test to other social issues, or whether a judge facing such a situation follows the stare decisis formulation in *Lawrence* at her or his own peril.

Seventh, the Court gives weight to a decision by the European Court of Human Rights and the values of “Western civilization” as authority for the proposition that *Bowers* should be overruled. The court takes issue with Chief Justice Burger’s “sweeping references . . . to the history of Western civilization and to Judeo-Christian moral and ethical standards,”⁴⁶ and cites developments in Europe to contravert his assertions.⁴⁷ The Court even goes so far as to cite a case decided by the European Court of Human Rights with facts that parallel *Bowers* as authority for the proposition that *Bowers* was wrongly decided.⁴⁸

In the past, the Court has resisted citations to foreign law as authority for the Court. In *Stanford v. Kentucky*,⁴⁹ Justice Scalia, writing for a plurality, stated, “We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant.”⁵⁰ Similarly, in *Atkins v. Virginia*,⁵¹ Justice Scalia, joined by the Chief Justice and Justice Thomas, admonished the Court for looking to foreign law to justify its decisions, stating:

But the Prize for the Court’s Most Feeble Effort to fabricate “national consensus” must go to its appeal (deservedly relegated to a footnote) to the views of . . . members of the so-called “world community,” . . . whose notions of justice are (thankfully) not always those of our people. “We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”⁵²

Thus, the question we must ask ourselves is whether the Court will, in the future, accept decisions by foreign courts as authority, or whether this reference was make-weight in an already heavily freighted opinion.

Finally, the Court itself does not even know what decision it reached in *Lawrence*. According to Justice O’Connor, concurring in the majority opinion, “I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that

45. 505 U.S. at 854.

46. *Lawrence*, 123 S. Ct. at 2481.

47. *Id.* For further discussion of this aspect of *Lawrence*, see Janet Koven Levit, *Going Public with Transnational Law: The 2002-2003 Supreme Court Term*, 39 *Tulsa L. Rev.* 155, 158-60 (2003).

48. *Lawrence*, 123 S. Ct. at 2481 (citing *Dudgeon v. United Kingdom*, 45 *Eur. Ct. H. R.* (1981), in which an adult citizen of Northern Ireland successfully challenged a law that forbade consensual adult homosexual conduct).

49. 492 U.S. 361 (1989) (plurality).

50. *Id.* at 369 n. 1.

51. 536 U.S. 304 (2002).

52. *Id.* at 347-48 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting) (quoting *Thompson v. Okla.*, 487 U.S. 815, 868-69 n. 4 (1988)).

Texas' statute banning same-sex sodomy is unconstitutional."⁵³ Of course, that is not what the majority held, although I am sure they were grateful for her support. The majority overturned the conviction of Mr. Lawrence based on the fact that the statute, as applied to his conduct in his own home, was unconstitutional. This is a significant distinction from overturning the statute on its face. One must ask: if the conduct had occurred in a car parked on a public street, would the Court have held that the defendant was protected by the right of privacy first announced in *Griswold*?

Moreover, Justice O'Connor based her concurring opinion entirely on an equal protection argument. However, there is no such basis for Justice O'Connor's reference to equal protection here, since the Court found no such right in *Romer* and, as noted earlier, refused to apply *Romer* to the *City of Cincinnati* case which was decided directly to the contrary by the Sixth Circuit.⁵⁴

A final point about Justice O'Connor's concurrence is compelled. She states, "When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."⁵⁵ Not surprisingly, she cites no authority for this proposition, since there is simply no case that has ever explicitly established yet another level of judicial review for an equal protection claim, somewhere between rational basis and intermediate scrutiny.⁵⁶

III

The purpose of this review is not to criticize, or even address, the substance of the Court's holding in *Lawrence*. Rather, it is to underscore the difficulty the legal system will have when justices of the Supreme Court undertake to write for each other—and not for practitioners, public officials, and lower court judges.

The purpose of the law is to provide certainty. The highest responsibility of a judge is to promote confidence in our legal system. When an opinion ignores recent authority in declaring a broad constitutional right, attacks the veracity of prior judicial opinions, and cites inapposite precedent in order to achieve a specific outcome, public confidence in the rule of law will suffer. The Court could have avoided this in *Lawrence* by limiting its holding and analysis, and merely reversing *Bowers* as unsupported by law. Instead, the majority embarked upon a systematic effort to discredit the prior case, and in the final analysis discredited itself. In so doing, the Court provided no usable guidelines on the issue, and confidence in the Court most certainly will be eroded. Both results are very troubling.

53. *Lawrence*, 123 S. Ct. at 2484 (O'Connor, J., concurring in the judgment).

54. *Supra* n. 42.

55. *Lawrence*, 123 S. Ct. at 2485.

56. See *Craig v. Boren*, 429 U.S. 190 (1976) (establishing an intermediate level of scrutiny for classifications resolving gender discrimination). Justice Marshall, in a dissenting opinion joined only by Justices Brennan and Blackmun, once suggested that there may be a "second order" rational basis review that falls somewhere between rational basis and intermediate scrutiny, but that suggestion has never been mentioned (much less followed) since. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 458 (1985) (Marshall, Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part).