

O'CONNOR, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 02-102

**JOHN GEDDES LAWRENCE AND TYRON GARNER,
PETITIONERS v. TEXAS**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
TEXAS, FOURTEENTH DISTRICT**

[June 26, 2003]

JUSTICE O'CONNOR, concurring in the judgment.

The Court today overrules *Bowers v. Hardwick*, 478 U. S. 186 (1986). I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. See Tex. Penal Code Ann. §21.06 (2003). Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 439 (1985); see also *Plyler v. Doe*, 457 U. S. 202, 216 (1982). Under our rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, supra*, at 440; see also *Department of Agriculture v. Moreno*, 413 U. S. 528, 534 (1973); *Romer v. Evans*, 517 U. S. 620, 632-633 (1996); *Nordlinger v. Hahn*, 505 U. S. 1, 11-12 (1992).

Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that

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even improvident decisions will eventually be rectified by the democratic processes.” *Cleburne v. Cleburne Living Center, supra*, at 440; see also *Fitzgerald v. Racing Assn. of Central Iowa, ante*, p. ___; *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955). We have consistently held, however, that some objectives, such as “a bare . . . desire to harm a politically unpopular group,” are not legitimate state interests. *Department of Agriculture v. Moreno, supra*, at 534. See also *Cleburne v. Cleburne Living Center, supra*, at 446–447; *Romer v. Evans, supra*, at 632. 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.

We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships. In *Department of Agriculture v. Moreno*, for example, we held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection because the purpose of the law was to “discriminate against hippies.” 413 U. S., at 534. The asserted governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. *Id.*, at 535–538. In *Eisenstadt v. Baird*, 405 U. S. 438, 447–455 (1972), we refused to sanction a law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to single persons. Likewise, in *Cleburne v. Cleburne Living Center, supra*, we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences—like fraternity houses and apartment buildings—did not have to obtain such a permit. And in *Romer v. Evans*, we disallowed a state statute that “impos[ed] a broad and undifferentiated

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disability on a single named group”—specifically, homosexuals. 517 U. S., at 632. The dissent apparently agrees that if these cases have *stare decisis* effect, Texas' sodomy law would not pass scrutiny under the Equal Protection Clause, regardless of the type of rational basis review that we apply. See *post*, at 17–18 (opinion of SCALIA, J.).

The statute at issue here makes sodomy a crime only if a person “engages in deviate sexual intercourse with another individual of the same sex.” Tex. Penal Code Ann. §21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by §21.06.

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. It appears that prosecutions under Texas' sodomy law are rare. See *State v. Morales*, 869 S. W. 2d 941, 943 (Tex. 1994) (noting in 1994 that §21.06 “has not been, and in all probability will not be, enforced against private consensual conduct between adults”). This case shows, however, that prosecutions under §21.06 *do* occur. And while the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not. As the Court notes, see *ante*, at 15, petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. See, e.g., Tex. Occ. Code Ann. §164.051(a)(2)(B) (2003 Pamphlet) (physician); §451.251(a)(1) (athletic trainer); §1053.252(2) (interior designer). Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement. See, e.g., Idaho Code §18–8304 (Cum. Supp. 2002); La. Stat. Ann. §15:542 (West

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Cum. Supp. 2003); Miss. Code Ann. §45-33-25 (West 2003); S. C. Code Ann. §23-3-430 (West Cum. Supp. 2002); cf. *ante*, at 15.

And the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing." *State v. Morales*, 826 S. W. 2d 201, 203 (Tex. App. 1992).

Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality. 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. 478 U. S., at 196. 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. *Id.*, at 188, n. 2. *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.

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire

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to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. See, e.g., *Department of Agriculture v. Moreno*, *supra*, at 534; *Romer v. Evans*, 517 U. S., at 634–635. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.” *Id.*, at 633. Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating “a classification of persons undertaken for its own sake.” *Id.*, at 635. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law “raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.” *Id.*, at 634.

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas’ sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. “After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” *Id.*, at 641 (SCALIA, J., dissenting) (internal quotation marks omit-

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ted). When a State makes homosexual conduct criminal, and not "deviate sexual intercourse" committed by persons of different sexes, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante*, at 14.

Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander *per se* because the word "homosexual" "impute[s] the commission of a crime." *Plumley v. Landmark Chevrolet, Inc.*, 122 F. 3d 308, 310 (CA5 1997) (applying Texas law); see also *Head v. Newton*, 596 S. W. 2d 209, 210 (Tex. App. 1980). The State has admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal. See *State v. Morales*, 826 S. W. 2d, at 202–203 ("[T]he statute brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law"). Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law. See *ibid.* In *Romer v. Evans*, we refused to sanction a law that singled out homosexuals "for disfavored legal status." 517 U. S., at 633. The same is true here. The Equal Protection Clause "neither knows nor tolerates classes among citizens." *Id.*, at 623 (quoting *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J. dissenting)).

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to "a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with" the Equal Protection Clause. *Plyler v. Doe*, 457 U. S., at 239 (Powell, J., concurring).

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Whether a sodomy law that is neutral both in effect and application, see *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society. In the words of Justice Jackson:

“The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.” *Railway Express Agency, Inc. v. New York*, 336 U. S. 106, 112–113 (1949) (concurring opinion).

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and

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the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgment that Texas' sodomy law banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.