Articles

Moralism, the Fear of Social Chaos: The Dissent in *Lawrence* and the Antidotes of Vermont and *Brown*

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I. INTRODUCTION

In *Lawrence v. Texas*, the United States Supreme Court held that the Due Process Clause forbade Texas from criminalizing adult, consensual homosexual sodomy,[1] thereby overruling *Bowers v. Hardwick*.[2] In his *Lawrence* dissent, Justice Scalia accused the Supreme Court majority of decreeing the "end of all morals litigation"[3] and creating a massive disruption of the current social order by overruling *Bowers*.[4] He further accused the majority of pretending to avoid constitutionalizing homosexual marriage, while utilizing a logic that necessarily resulted in homosexual marriages being legalized.[5] Scalia ended his dissent with a dire warning against this implicit legitimization of homosexual marriage.[6]

Justice Scalia's approach was one of fear. He deemed homosexual marriage a threat to American society and feared that the Supreme Court in *Lawrence* had opened wide the legal doors to homosexual marriage. In general, Justice Scalia's tone was negative toward homosexuals. Although, at one point, Justice Scalia wrote, "Let me be clear that I have nothing against homosexuals,"[7] what he really said was that he had nothing against homosexuals politically militating. Scalia's asserted support for homosexual political rights has to be read in the context of his opposition to localized political rights for homosexuals in his dissent in *Romer v. Evans*.[8] For Scalia, history, democracy, and morality

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1. 123 S. Ct. 2472 (2003).
2. 478 U.S. 186 (1986).
3. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).
4. *Id.* at 2491 (Scalia, J., dissenting).
5. *Id.* at 2498 (Scalia, J., dissenting).
6. *Id.* (Scalia, J., dissenting).
7. *Id.* at 2497 (Scalia, J., dissenting).
8. *See* 517 U.S. 620, 636-53 (1996).

militated against the right of homosexuals to be treated equally by the law, including the denial of a right to create permanent social unions. However, Scalia's negativism lacked any basis in social fact. The recognition of homosexual unions by the Supreme Court of the State of Vermont offers one example of the weakness of Scalia's assertions.[9]

This article will review the majority and concurring opinions in *Lawrence*. Then, the article will discuss the doctrinal problems identified by Justice Scalia in his dissent, analyzing the ideological bases of Scalia's critique. Next, the article will discuss Scalia's implicit view of homosexuals as threats to American society and will demonstrate that Scalia's vision of homosexuality as a societal threat possesses no basis in social fact. Lastly, the article will discuss why the Supreme Court must develop a jurisprudence based not on vague moralisms but on actual social fact. Such jurisprudence is not radical and finds its roots fifty years ago in *Brown v. Board of Education*.[10]

II. *LAWRENCE*: MAJORITY AND CONCURRING OPINIONS

One evening in 1998, Texas police responded to a report of a weapons disturbance at a private residence.[11] The police entered the residence and observed two men engaged in anal sexual intercourse.[12] The two men were arrested and held in custody overnight.[13] The Texas criminal statute they were charged under prohibited deviate sexual intercourse involving contact between any part of the genitals of one person and the mouth and anus of another person.[14] This statute applied to such sexual behavior only when it involved members of the same sex.[15]

The defendants were convicted before a Texas Justice of the Peace, but opted to be tried *de novo* before a Texas county criminal court as well.[16] Following conviction in the county court the men appealed to the Court of Appeals for the Fourteenth District of Texas, which affirmed their convictions.[17] In the county court, the defendants argued that the Texas homosexual sodomy statute violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and an equal protection provision of the Texas Constitution. At the appellate level, the court addressed only the federal equal protection and due process

9. *See* Baker v. Vermont, 744 A.2d 864 (Vt. 1999).
10. *See* 347 U.S. 483 (1954).
11. *See* Sodomy Laws, *at* http://www.sodomylaws.org/lawrence/lawrence.htm (last edited Dec. 14, 2003).
12. *Lawrence*, 123 S. Ct. at 2475.
13. *Id.* at 2476.
14. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).
15. *Id.*
16. *Lawrence*, 123 S. Ct. at 2476.
17. Lawrence v. Texas, 41 S.W.3d 349 (Tex. App. 2001), *rev'd* 123 S. Ct. 2472 (2003).

arguments.[18] The defendants petitioned for and were granted certiorari by the U.S. Supreme Court.[19]

A. *LAWRENCE*: THE MAJORITY OPINION

The *Lawrence* majority overruled longstanding sodomy law precedent established in *Bowers v. Hardwick*.[20] *Bowers* held that no fundamental constitutional right exists for homosexuals to engage in acts of consensual sodomy.[21] The Court found that the Texas statute challenged in *Lawrence* "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[22] Utilizing the substantive reach of liberty under the Due Process Clause,[23] the Court held that adults with full and mutual consent from each other possess the right to engage in homosexual practices without interference by the government where such sexual acts occur in private and do not implicate prostitution.[24] The Court used a set of privacy precedents as the doctrinal basis for its substantive due process analysis.[25] Though the Court acknowledged early due process cases *Pierce v. Society of Sisters*[26] and *Meyer v. Nebraska*,[27] it began the analysis in *Lawrence* with *Griswold v. Connecticut*.[28] The *Lawrence* majority first read *Griswold* as recognizing a right to privacy within a marriage in the protected space of the marital bedroom,[29] and they then went on to interpret *Eisenstadt* and *Carey* as extending the fundamental right to make decisions regarding contraception, and impliedly, sexual conduct to unmarried people and minors.[30] The Court next read *Roe* as recognizing the right of women to make fundamental decisions affecting their destinies.[31] Finally, to support their substantive due process analysis the *Lawrence* Court cited

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18. *Lawrence*, 123 S. Ct. at 2476.
19. Lawrence v. Texas, 537 U.S. 1044 (2002).
20. 478 U.S. 186 (1986).
21. *See id.*
22. 123 S. Ct. at 2484.
23. *Id.* at 2476.
24. *Id.* at 2484.
25. *See id.* at 2476-77, 2481-82 (citing Griswold v. Connecticut, 381 U.S. 479 (1965) (affirming the right to use contraception); Eisenstadt v. Baird, 465 U.S. 438 (1972) (extending the right to use contraceptives to unmarried couples); Roe v. Wade, 410 U.S. 113 (1973) (finding that the right of privacy encompasses a woman's right to choose to abort a fetus); Carey v. Population Svcs. Int'l, 431 U.S. 678 (1977) (holding that underage persons possess the right to obtain contraceptives); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming the right to choose to abort a fetus)).
26. 268 U.S. 510 (1925) (holding that parents may choose to educate children in a private religious school).
27. 262 U.S. 390 (1923) (holding that parents may choose to have students taught a private language).
28. *Lawrence*, 123 S. Ct. at 2476.
29. *Id.* at 2476-77.
30. *Id.*
31. *Id.* at 2477.

Casey's finding "that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[32]

From these understandings, the *Lawrence* Court created a conceptual progression of substantive due process privacy doctrine. The due process right of privacy expanded over time, starting with married couples in their bedrooms, extending to the unmarried, to minors, and finally to all women. As well, the scope of protection began with the narrow coverage of activity in the marital bedroom and culminated in protection involving a wide range of sexual and familial choices. The Court took the right of substantive due process privacy one step further, finding that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexuals persons do."[33] The words "these purposes" refers to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[34] Ironically, the Court avoided an equal protection analysis for the Texas statute challenged in *Lawrence*, instead utilizing a substantive due process privacy analysis to equalize the privacy protections accorded to homosexuals and heterosexuals.

The *Lawrence* Court found that *Bowers* conflicted with the conceptual progression of substantive due process privacy doctrine they had identified. The majority wrote, "*Bowers* was not correct when it was decided, and it is not correct today."[35] The Court disagreed with how the *Bowers* Court defined the issue facing the Court.[36] The *Bowers* Court wrote, "[T]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . ."[37] The *Lawrence* Court observed that this "statement . . . discloses the Court's own failure to appreciate the extent of the liberty at stake" and took a much broader view of the constitutional issue.[38] The majority agreed with Justice Stevens' dissent in *Bowers*, focusing on whether homosexuals possess the same liberty of intimacy in physical relationships as heterosexuals.[39]

The *Lawrence* Court distinguished between sexual acts and conduct that is central to personal relationships. Where the *Bowers* Court focused on whether states possess the power to regulate and

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32. *Id.* at 2481.

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

34. *Id.* at 2481 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

35. *Id.* at 2484.

36. *Id.* at 2478.

37. Bowers v. Hardwick, 478 U.S. 186, 190 (1986), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

38. 123 S. Ct. at 2478.

39. *Id.* at 2483 (citing Bowers v. Hardwick, 478 U.S. 186, 214-20 (1986) (Stevens, J., dissenting)).

prohibit sexual acts,[40] the *Lawrence* Court focused on whether the states possess the power to regulate personal relationships.[41] For the *Lawrence* Court, the sexual act of sodomy constituted one inherent component in a broader definition of relationship.[42] The Court noted, "When 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."[43] Once the sexual act is accepted as one component of a broader intimate relationship, substantive due process privacy protects the sexual act as a measure of the personal, private relationship. A state cannot demean homosexuals' existence or control their destinies by making private sexual conduct a crime.[44] The liberty implicated in substantive due process privacy protections allows homosexuals to express sexuality in whatever way they choose as part of an intimate relationship.[45]

The *Lawrence* Court also recognized that one issue facing the Supreme Court concerned whether a democratic majority may utilize the law-making power of the American government to regulate the social behavior and conduct of a minority, forcing majority views and mores on all members of American society. In focusing on this issue, the Court noted that a large segment of American society condemned homosexual conduct as immoral and considered it a threat to respect for traditional values.[46] The Court, however, again looked to Justice Stevens' dissent in *Bowers*.[47] The fact that a governing majority in a state traditionally viewed a particular minority practice as immoral failed to be a sufficient reason for upholding laws that prohibit such a practice.[48]

Relying on substantive due process privacy rights that first narrowly protected married couples in their sexuality but later more expansively protected unmarried heterosexual couples and women in their sexuality, the *Lawrence* Court protected homosexual sexual conduct from interference by state authorities.[49] The right to liberty under the Due Process Clause provides homosexuals the full right to engage in sexual conduct without intervention by the government.[50] In protecting the sexual liberty of homosexuals, the Supreme Court widened the scope of liberty to protect all Americans, both homosexual and heterosexual. Not only does liberty, in a practical dimension, protect individuals inside their homes, but liberty also extends beyond physical bounds into the

40. *Bowers*, 478 U.S. at 190.
41. *Lawrence*, 123 S. Ct. at 2478.
42. *Id.*
43. *Id.* at 2478.
44. *Id.* at 2484.
45. *Id.* at 2478.
46. *Lawrence*, 123 S. Ct. at 2480.
47. *See* 478 U.S. 186, 214-220 (1986) (Stevens, J., dissenting).
48. *Lawrence*, 123 S. Ct. at 2483.
49. *See id.*
50. *Id.* at 2484.

more vague, transcendent dimension of intimate relationships between consenting adults.[51]

B. *LAWRENCE*: THE CONCURRENCE

Justice O'Connor authored a concurring opinion in *Lawrence* joined by no other justice.[52] She refused to join the *Lawrence* majority in overruling *Bowers*, recognizing a distinction between due process and equal protection in the context of homosexual behavior.[53] In O'Connor's analysis, *Bowers* remained correct in refusing to recognize a fundamental right to engage in homosexual sodomy, but due process doctrine did not suggest that the Equal Protection Clause tolerated the criminalization of homosexual sodomy while heterosexual sodomy remained legal.[54] As a result, O'Connor found the Texas homosexual anti-sodomy statute in violation of the Equal Protection Clause of the U.S. Constitution.[55] In her analysis under equal protection, O'Connor went beyond a rational basis standard of review, and utilized what she characterized as a "more searching form of rational basis review."[56]

Justice O'Connor's more searching, or heightened rational basis review, is triggered when a legal classification is drawn for the purpose of disadvantaging a particular burdened group.[57] Such disadvantaging occurs when a law results in harm to a politically unpopular group. One manifestation of the desire to harm a politically unpopular group occurs when legislation inhibits personal relationships among members of that group.[58] Although the *Lawrence* majority also focused on personal relationships for the purpose of protecting the liberty to enter and engage in the relationship, O'Connor focused on personal relationships for an additional, much narrower purpose.[59] For O'Connor, personal relationships are one component of a broader category in need of constitutional protection, the unpopular group.[60] The Texas sodomy statute specifically targeted homosexuals as a group.[61] Like the *Lawrence* majority, O'Connor viewed the regulation of homosexual sexual conduct as one component of a larger type of regulation. For her, homosexual sodomy remained closely connected with the nature of homosexuality and being part of a homosexual class.[62]

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51. *Id.* at 2475.
52. *Id.* at 2484 (O'Connor, J., concurring).
53. *Lawrence*, 123 S. Ct. at 2484 (O'Connor, J., concurring).
54. *Id.* at 2486 (O'Connor, J., concurring).
55. *Id.* at 2487 (O'Connor, J., concurring).
56. *Id.* at 2484–85 (O'Connor, J., concurring).
57. *Id.* at 2486 (O'Connor, J., concurring).
58. *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).
59. *See supra* text accompanying notes 39-44.
60. *Lawrence*, 123 S. Ct. at 2485-86 (O'Connor, J., concurring).
61. *Id.* at 2487 (O'Connor, J., concurring).
62. *Id.* at 2486 (O'Connor, J., concurring).

Also like the *Lawrence* majority, Justice O'Connor recognized that the Texas statute was based on moral disapproval of homosexuals by the citizens of Texas.[63] O'Connor noted that Texas case law branded homosexuals as criminals, thereby sanctioning widespread discrimination against them.[64] O'Connor further found that moral disapproval of a group alone failed to serve as a rationale under the Equal Protection Clause to justify a law that discriminates among groups.[65] A state may not, under the Equal Protection Clause, single out one identifiable group of citizens for punishment that does not apply to all citizens.[66] O'Connor conceptualized the Texas statute as a symbolic statement of dislike and disapproval of homosexuals, as the statute was rarely enforced.[67] This stigma created an underclass, and the Equal Protection Clause does not tolerate the creation of classes and underclasses among American citizens.[68]

The *Lawrence* majority viewed with great suspicion the democratic majority's use of the state to control a disliked minority.[69] O'Connor viewed the democratic process more benignly. Though the majority could not utilize the law solely to stigmatize a discrete minority group, majoritarian democracy remained as a protection for minorities where all citizens are treated *equally* under the law.[70] O'Connor remained unconcerned about sodomy laws that prohibited heterosexuals and homosexuals equally from engaging in sodomy.[71] So long as a law is applied generally and across the board to everyone, liberty remains protected because an onerous law will invite political retribution by the polity as a whole.[72]

III. JUSTICE SCALIA'S DISSENT: THE THREAT OF HOMOSEXUALITY AND HOMOSEXUALS

Justice Scalia dissented in *Lawrence*, with Chief Justice Rehnquist and Justice Thomas joining in the dissent.[73] Scalia concluded that the Texas homosexual anti-sodomy statute infringed no fundamental right, remained supported by a rational relation to a legitimate state interest, and did not deny equal protection of the laws.[74] In addition to criticizing

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63. *Id.* at 2486 (O'Connor, J., concurring).
64. *Id.* at 2487 (O'Connor, J., concurring) (citing Texas v. Morales, 826 S.W.2d 201 (Tex. App. 1992)).
65. *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).
66. *Id.* at 2487 (O'Connor, J., concurring).
67. *Id.* at 2486 (O'Connor, J., concurring).
68. *Id.* at 2487 (O'Connor, J., concurring).
69. *Id.* at 2480 (O'Connor, J., concurring).
70. *Lawrence*, 123 S. Ct. at 2486-87 (O'Connor, J., concurring).
71. *Id.*
72. *Id.* at 2487 (O'Connor, J., concurring).
73. *Id.* at 2488 (Scalia, J., dissenting).
74. *Id.* at 2498 (Scalia, J., dissenting).

the majority opinion, he critiqued Justice O'Connor's concurring opinion.[75]

A. DOCTRINAL DISAGREEMENTS

Justice Scalia's dissent evidenced a number of doctrinal disagreements with the majority and concurring opinions. First, Scalia took the *Lawrence* majority to task for the analysis used in further developing and relying on the substantive due process privacy doctrine that protected homosexual sodomy from state interference. Scalia noted that Supreme Court precedent using a substantive due process approach requires the existence of a fundamental liberty interest, or fundamental right, unless the law leading to the infringement of liberty is narrowly tailored to serve a compelling state interest.[76] Fundamental interests or rights qualify for heightened scrutiny protections, but to reach the level of "fundamental," they must be deeply rooted in American history and tradition.[77] Further, they must be implicit in the concept of ordered liberty so that neither liberty nor justice would exist if the liberty interest were sacrificed.[78]

Justice Scalia criticized the *Lawrence* majority for not using a fundamental interest based, heightened scrutiny analysis. Scalia noted that the *Bowers* Court had held that criminal prohibitions of homosexual sodomy failed to qualify for heightened scrutiny because fundamental interests or rights were not implicated by such prohibitions. Scalia scolded the majority for failing to explicitly overrule *Bowers* on this matter, noting that not once did the majority describe homosexual sodomy as a fundamental right or interest.[79] Scalia implicitly accused the majority of misrepresenting the nature of the right implicated by the Texas statute, observing that the majority used euphemisms such as "fundamental propositions" and "fundamental decisions" instead of plainly addressing fundamental rights or interests.[80] Scalia explicitly accused the majority of lacking the boldness to actually reverse the *Bowers* holding.[81]

From Scalia's perspective, the *Lawrence* majority not only lacked the courage to reverse the *Bowers* fundamental rights heightened scrutiny test, it also utilized an inexplicable rational basis test, as did Justice O'Connor in her concurring opinion. He observed that the majority "proceed[ed] to apply an unheard-of form of rational basis review that

75. *Lawrence*, 123 S. Ct. at 2495-96.
76. *Id.* at 2491 (Scalia, J., dissenting).
77. *Id.* at 2492 (Scalia, J., dissenting).
78. *Id.* at 2492 n.3 (Scalia, J., dissenting).
79. *Id.* (Scalia, J., dissenting).
80. *Lawrence*, 123 S. Ct. at 2488.
81. *Id.* at 2492 (Scalia, J., dissenting).

will have far reaching implications beyond this case."[82] Scalia described O'Connor's basis of review as a more searching form of rational basis review lacking precise content.[83] While noting that the majority could find no rational basis for the challenged statute, Scalia maintained a dismissive attitude toward the majority's rational basis analysis. According to Scalia, the majority's conclusion was out of accord with American jurisprudence as well as any known jurisprudence in other societies.[84] For Scalia, the Texas statute possessed a simple and straightforward rational basis, the furtherance of morality. The Texas statute protected the belief of Texas citizens that homosexual sodomy was immoral and unacceptable. By not recognizing this simple and obvious proposition, Scalia suggested, the *Lawrence* majority decreed the end of all morals legislation by prohibiting the promotion of majoritarian sexual morality.[85]

Not only did Justice Scalia criticize the majority for avoiding a fundamental rights analysis and incorrectly applying a rational basis analysis to strike down the Texas statute, he also accused the majority of utilizing an approach inconsistent with *stare decisis*. Scalia contrasted *Bowers* with *Roe v. Wade*,[86] the abortion rights case, in order to demonstrate the majority's disregard for principles of *stare decisis*.[87] Scalia characterized the majority's treatment of *stare decisis* as consisting of three considerations: first, precedent becomes overruled when it has been eroded by subsequent decisions; second, precedent is ready to be overruled when it has been subjected to substantial and continuing criticism; finally, precedent is ready to be overruled when it has not induced individual or societal reliance.[88] Following this depiction, Scalia noted that none of these conditions were met with regard to *Bowers* and fundamental rights analysis.[89] Criticism of *Bowers* existed but not any more than criticism of *Roe*, and *Roe* had continued as good law.[90] Scalia also pointed to continued legal reliance on the *Bowers* holding, especially where courts have used morality as a means of

82. *Id.* at 2488 (Scalia, J., dissenting).
83. *Id.* at 2496 (Scalia, J., dissenting).
84. *Id.* at 2495 (Scalia, J., dissenting).
85. *Lawrence*, 123 S. Ct. at 2495.
86. 410 U.S. 113 (1973).
87. *See Lawrence*, 123 S. Ct. at 2488-98 (Scalia, J., dissenting).
88. *Id.* at 2489.
89. *Id.*
90. *Id.* at 2489-90.

finding a rational basis,[91] and where courts have relied on the rejection of homosexuality as a fundamental right.[92]

B. IDEOLOGICAL UNDERPINNINGS

Justice Scalia suggested two ideological bases for his conclusion that the Due Process and Equal Protection clauses fail to protect homosexual sexuality from state interference. First, Scalia relied on a strong respect for history and tradition in his conception of what should constitute substantive due process. For Scalia, fundamental rights under the Due Process Clause are only those rights that are deeply rooted in American history and tradition.[93] As a result, he agreed with the historical views of the *Bowers* majority,[94] which examined the history of American sodomy laws in depth to conclude that sodomy remained illegal from the start of the nation and throughout its history.[95] Scalia relied extensively on the historical portions of *Bowers* to conclude that "our nation has a long standing history of laws prohibiting *sodomy in general* . . . ."[96]

Justice Scalia's devotion to history and tradition may be interpreted as neutral, examining only whether homosexual sexuality constitutes a fundamental right. He found that the criminal history of sodomy, both heterosexual and homosexual, proved that homosexual sodomy failed to constitute a right deeply rooted in American history and tradition.[97] However, the historical underpinnings of Scalia's dissent evidenced a strong animus toward homosexuals. History does not only establish that homosexual sexuality was not deeply rooted in American tradition, but it also reflects a longstanding dislike of homosexual conduct. Scalia condemned modern homosexual activists for an agenda "directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[98] Scalia's reliance on traditional moralism possessed shades of Chief Justice Burger's concurring opinion

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91. *Id.* at 2488-90; *see, e.g.*, Williams v. Pryor, 240 F.3d 944 (11th Cir. 2001) (holding that public morality supports prohibiting the sale of sex toys); Milner v. Apfel, 148 F.3d 812 (7th Cir. 1998) (finding that morality supports legislation as a rational basis); Holmes v. California Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997) (banning those engaging in homosexual conduct from the military).

92. *See, e.g.*, *Lawrence*, 123 S. Ct. at 2490 n.2; Marcum v. McWhorter, 308 F.3d 635 (6th Cir. 2002) (finding no fundamental right to commit adultery); Mullins v. Oregon, 57 F.3d 789 (9th Cir. 1995) (finding no fundamental right to adopt a grandchild); Doe v. Wigginton, 21 F.3d 733 (6th Cir. 1994) (finding no fundamental right for prisoners to demand HIV testing); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1988) (affirming that homosexuality is not a fundamental right).

93. *Id.* at 2491-92 (Scalia, J., dissenting).

94. *Id.* at 2493 (Scalia, J., dissenting).

95. *Bowers*, 478 U.S. at 191-94.

96. *Lawrence*, 123 S. Ct. at 2493 (Scalia, J., dissenting).

97. *Id.* (Scalia, J., dissenting).

98. *Id.* at 2496 (Scalia, J., dissenting).

in *Bowers*, where Burger observed that "condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."[99] Scalia noted in his *Lawrence* dissent that sodomy existed as a capital offense in the American colonies,[100] just as Burger had noted in his *Bowers* concurrence that "[h]omosexual sodomy was an accepted crime under Roman law."[101]

In addition to a devotion to history and tradition, Justice Scalia's dissent also reflected an ideological commitment to popular democracy. When Scalia accused the *Lawrence* majority of effectively decreeing the end of all morals legislation, he was not merely concerned about American morality, but also voiced concern about the Supreme Court erecting limits on American popular democracy.[102] The *Lawrence* majority's due process limitations on legislative action so disturbed Scalia that he accused the Supreme Court of "departing from its role of assuring as a neutral observer that the democratic rules of engagement are observed."[103] According to Scalia, the Supreme Court has assumed an elitist, pro-homosexual position for the law profession.[104] Such a judicial position thwarts the good sense of the popular will, which can bring about political compromises, and allows homosexuals to impose their views on American society in the absence of a democratic majority.[105] The Texas homosexual anti-sodomy statute existed within a reasonable range of traditional democratic action, Scalia argued, and the solution for homosexuals who opposed the law was to promote their agenda through "normal democratic means."[106]

For Justice Scalia, however, such normal democratic means for homosexuals implied something different from democratic means for non-homosexual voters. In his dissent in *Romer v. Evans*,[107] Scalia justified the requirement that gays must convince a majority of the statewide electorate before gays can obtain a change in the law that would favor them.[108] In *Romer*, the U.S. Supreme Court held that a state's constitutional amendment, forbidding all state and local governmental entities from adopting measures that barred discrimination based on sexual orientation, violated the Equal Protection Clause.[109] Scalia criticized the *Romer* majority for rejecting the concept of making it harder for a discrete interest group, such as homosexuals, gaining electoral support for legal change by requiring them to withstand the

99. 478 U.S. at 196 (Burger, C.J., concurring).
100. 123 S. Ct. at 2494 (Scalia, J., dissenting).
101. 478 U.S. at 196 (Burger, C.J., concurring).
102. 123 S. Ct. at 2495 (Scalia, J., dissenting).
103. *Id.* at 2497 (Scalia, J., dissenting).
104. *Id.* at 2496 (Scalia, J., dissenting).
105. *Id.* at 2497 (Scalia, J., dissenting).
106. *Id.* (Scalia, J., dissenting).
107. 517 U.S. 620 (1996).
108. *See id.* at 636-53 (Scalia, J., dissenting).
109. *Id.* at 635-36. (Scalia, J., dissenting).

rigor of a more difficult level of political decision-making.[110] For homosexuals, electoral success at the local level could be thwarted by a requirement that they convince a statewide electorate that they deserve equal protection under the law.[111]

If these requirements had been approved, homosexuals would have had to tangle with diverse statewide moralities, even if certain locales favored or accepted their sexual behaviors. Scalia created his statewide, majoritarian approval process to combat homosexual activism, because he viewed homosexual activism as particularly sinister. Scalia perceived homosexuals as congregating in certain urban centers, using their political savvy to dominate their local political establishments and overcome traditional animus toward homosexuals.[112] According to Scalia, "[h]omosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures . . . "[113]

Overall, Justice Scalia created a model of sexuality and morality that strongly disfavored homosexuals. Although Scalia, in his *Lawrence* dissent, noted, "[E]very group has the right to persuade its fellow citizens that its view of such matters is the best[,]"[114] it seems homosexuals must still climb a tall political mountain to change the law in America. Homosexuals must cope with two interrelated obstacles that heterosexuals do not face. The majority view of the sexual immorality of homosexuals has been longstanding and deep, therefore, homosexuals must first change the moral views of the broadest majority possible in any given state, then convince an electoral majority of the quality of the law at issue. Scalia remained true to form when he agreed with the *Lawrence* majority's proposition that later generations can see that laws once thought just and necessary serve to oppress and to bring about injustice, but added, ". . . when that happens later generations can repeal those laws."[115] Under Scalia's model of change regarding majority attitudes toward homosexuality, many generations would have to pass before homosexuals would be able to persuade deeply traditionalist majorities in each state to shift their moral values away from animus.

110. *Id.* at 639 (Scalia, J., dissenting).
111. *Id.* at 639-40 (Scalia, J., dissenting).
112. *Romer*, 517 U.S. at 645-46 (Scalia, J., dissenting).
113. *Id.* at 646 (Scalia, J., dissenting).
114. *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).
115. *Id.*

IV. JUSTICE SCALIA AND THE THREAT OF HOMOSEXUALS: SOCIAL CHAOS

In his *Lawrence* dissent, Justice Scalia labeled homosexuals as deserving of longstanding moral opprobrium and of democratic roadblocks to changing laws and public attitudes. For Scalia, homosexuals represented a special threat to social order. In fact, in charging the *Lawrence* majority with failure to adhere to consistent principles of *stare decisis*, Scalia observed the overruling of *Bowers* to entail "a massive disruption of the current social order."[116] He believed the majority opinion reflected attitudes and values outside of the American mainstream.[117] Homosexuals were not welcomed as boarders in many American—presumably mainstream—homes, while many Americans, also presumably mainstream, do not want those who openly engage in homosexuality as partners in their businesses, as scoutmasters, or as teachers to their mainstream children. Citing a recent Supreme Court decision, Scalia observed that discrimination against homosexuals is not only legal in mainstream America, but in some circumstances it is also constitutional.[118]

Justice Scalia evidenced the social chaos that he believes homosexuality creates by equating homosexuality with lists of social threats and evils, repeated in many different contexts throughout his opinion.[119] He grouped state laws forbidding homosexual sodomy with those forbidding bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, obscenity, the recreational use of heroin, working more than sixty hours a week, and child pornography.[120] Scalia noted, "The impossibility of distinguishing homosexuality from other traditional 'morals' offenses is precisely why *Bowers* rejected the rational-basis challenge."[121] What is noteworthy is the wide spectrum of negative behavior that Scalia equated with homosexual sexuality. The gamut of behaviors included both private and public sexuality, such as masturbation and prostitution. Acts that injured individuals, such as adultery, were included with generalized behavior such as fornication. Sexual crimes involving both adults and children were also included. Not all of the behaviors listed included sex, such as recreational use of heroin and long work weeks. The breadth of Scalia's social problem classification implied that homosexuality contributes to a generalized weakening of modern American society. Heroin, homosexuality, long work weeks, and child pornography stand as threats

116. *Id.* at 2491 (Scalia, J., dissenting).

117. *Id.* at 2497 (Scalia, J., dissenting).

118. *Id.* (citing Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (holding that the Boy Scouts may exclude scoutmasters based on their homosexuality as right of association)).

119. *See Lawrence*, 123 S. Ct. at 2488-96 (Scalia, J., dissenting).

120. *Id.* at 2490-91, 2494 (Scalia, J., dissenting).

121. *Id.* at 2490 (Scalia, J., dissenting).

to mainstream America. Implicitly Scalia argued America possesses the right to protect itself against these social threats in order to prevent chaos from overcoming the norms of mainstream America.

The implicit picture of social threat and social chaos painted by Scalia was supported with a list of precedents threatened by the *Lawrence* majority's unwillingness to follow *Bowers*. Threatened precedents included cases upholding prohibition on the sale of sex toys, sexual intercourse outside of marriage, and public decency statutes.[122] Another set of threatened precedents included the authority of military branches, police agencies, and security organizations to protect themselves from homosexuals.[123] Scalia's vision of America depicts a landscape where homosexuals threaten not only public decency and America's families, but also American national security and public safety. Homosexuals in this portrait put America at risk for social chaos.

V. A SOCIAL REALITY CHECK

Justice Scalia portrayed homosexuals as a threat to the social stability of American society. The Texas anti-sodomy statute reflected a rational social democratic tradition, which reflected centuries of criminalization and a strong tradition of moral opprobrium.[124] Against this background, Scalia posited, Texans acted rationally to prevent one of many social ills that would result in social chaos. Scalia faces one not so minor problem with such an attitude toward homosexuals and their impact on America, a social reality that fails to support his views. Vermont creates a large problem for Scalia's argument, as do Texas and three other states.

The Vermont Supreme Court in *Baker v. Vermont*,[125] a 1999 case, concluded that the Common Benefits Clause of the Vermont Constitution requires the State to extend to same-sex couples the benefits and protections flowing from marriage under Vermont law given to heterosexual couples.[126] The Court deferred to the State Legislature to decide whether to include same-sex couples within the marriage laws or to create some type of domestic partner equivalent. The court mandated that the legislature choose a system that would afford all Vermont residents the common benefit, protection and security of the law.[127] *Baker* reflects only one of the several steps that Vermont took to welcome homosexuals as equal members of the Vermont community. In 1992, Vermont enacted statewide legislation prohibiting discrimination

122. *See id.* (Scalia, J., dissenting).
123. *See id.* at 44 & n.2.
124. *Lawrence*, 123 S. Ct. at 2490, 2493, 2497 (Scalia, J., dissenting).
125. 744 A.2d 864 (Vt. 1999).
126. *See id.*
127. *Id.* at 867.

in housing employment and other services based on sexual orientation.[128] Vermont has also included sexual orientation as a hate crime category and has allowed same sex partners to adopt children.[129] Vermont exists as a sharp contrast to Texas, which not only criminalized homosexual sodomy, but considered homosexuality presumptively criminal, allowing discrimination against homosexuals in a variety of areas.[130]

In addition to Texas, three other states criminalize homosexual sodomy: Kansas,[131] Missouri,[132] and Oklahoma.[133] As far as measuring the possible social impacts of restricting or allowing homosexual behavior on a state's social system, there exists evidence that homosexuals do not create social chaos and that restricting homosexual activity fails to improve social conditions. One measure of American social conditions is "The Social Health of the States," a report published by the Fordham Institute for Innovation in Social Policy.[134] The 2001 edition indicates that Vermont is not about to plunge into social chaos as it integrates homosexuals as equal partners into its social community.[135] To the contrary, the report implies that Texas may be heading for social collapse despite all its efforts to restrict and discriminate against homosexuals.[136]

TABLE I

State	Social Health Rank[137]	Category[138]	Score[139]	Youth Composite[140]
Vermont[141]	10	Excellent	61	77
Texas[142]	45	Poor	33.8	85
Kansas[143]	23	Average	53.6	66
Missouri[144]	19	Above Average	55.1	45
Oklahoma[145]	39	Below Average	36.5	88

128. *Id.* at 885.
129. *Id.* at 885-86.
130. Lawrence v. Texas, 123 S. Ct. 2472, 2487 (2003) (O'Connor, J., concurring).
131. KAN. STAT. ANN. § 21-3505 (West 1983).
132. MO. STAT. ANN. § 566.060 (West 1977).
133. Post v. Oklahoma, 715 P.2d 1105, 1109 (Okla. 1986) (finding the act of anal intercourse between consenting heterosexuals constitutionally protected).
134. MARC MIRINGOFF ET AL., FORDHAM INSTITUTE FOR INNOVATION IN SOCIAL POLICY, THE SOCIAL HEALTH OF THE STATES (2001).
135. *Id.* at 49.
136. *Id.* at 48.
137. *Id.* at 14.
138. *Id.*
139. MIRINGOFF ET AL., *supra* note 134, at 14.
140. The youth composite is a factor that the author of this law review article created by adding the rankings of the youth social indicators of the report, teenage suicide, teenage drug abuse, and high school completion, to create a score for each state.
141. MIRINGOFF ET AL., *supra* note 134, at 49.
142. *Id.* at 48.
143. *Id.* at 34.
144. *Id.* at 39.

"The Social Health of the States" relies on an annual index of social health that monitors social conditions in each of the fifty states.[146] The study utilizes a set of social indicators that evidence the strengths or weaknesses of each state's social institutions.[147] To derive the index, the states are ranked and graded for each separate social indicator.[148] Based on the cumulative scores for the social indicators, each state is assigned a score from 1-100. For 1999, the range of scores for all fifty states spanned from a low score of 21.4 for New Mexico to a high score of 73 for Iowa.[149] When comparing Texas with Vermont, the results are dramatic. Texas guarded itself against homosexuals not only with an anti-sodomy statute directed solely at homosexuals, but also with a general legal doctrine that defined homosexuality to constitute criminal behavior.[150] Vermont, on the other hand, took steps to equalize homosexuals with heterosexuals.[151]

Table I above demonstrates that Vermont possesses far better social health than Texas and, for that matter, the other three states that criminalize homosexual sexuality. Vermont ranks tenth among the fifty states, and is rated in the excellent performance category. Texas, however, ranks forty-fifth among the fifty states and is classified in the poor performance category.[152] In fact, Texas became tagged as one of eight states "in a condition of social recession."[153] Kansas, Missouri, and Oklahoma fare better than Texas, but each fall below Vermont in the quality of social institutions and, presumably, also of social life. Oklahoma ranks thirty-ninth, not far from Texas, while Kansas and Missouri rank twenty-third and nineteenth, respectively. Missouri is the only one of the three classified among the above-average states.

The author of this article developed a composite ranking score for youth social health[154] in order to test Scalia's implicit assertions that mainstream American families possess a strong need to protect themselves against homosexuals and a homosexual lifestyle. Scalia wrote, "Many Americans do not want persons who openly engage in homosexual conduct as . . . scoutmasters for their children, [or] as teachers in their children's schools . . . . They view this as protecting . . . their families."[155]

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145. *Id.* at 44.

146. MIRINGOFF ET AL., *supra* note 134, at 13.

147. *Id.* The social indicators are infant mortality, child abuse, children in poverty, teenage suicide, teenage drug abuse, high school completion, unemployment, average weekly wages, health insurance coverage, poverty among those over 65, suicide among those over 65, homicides, alcohol-related traffic deaths, food stamp coverage, income inequality, and housing cost burden. *Id.*

148. *Id.* at 16.

149. *Id.* at 14.

150. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2487 (2003) (O'Connor, J., concurring).

151. *See* Baker v. Vermont, 744 A.2d 864, 885-86 (Vt. 1999).

152. MIRINGOFF ET AL., *supra* note 134, at 14.

153. *Id.* at 18.

154. *See* text *supra* note 140.

155. *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

The author posits that the three youth social indicators in the Social Health report, teenage suicide, teenage drug abuse, and high school completion, when added to create the youth composite, reflect the general health of family life in each of the states.[156] The author assumes that healthy families tend to have fewer teenage suicides and less teenage drug abuse, while children who complete high school tend to possess a supportive family context.[157] Table I indicates that the composite ranking for Vermont is low, but also that the composite youth index rankings for Texas and Oklahoma are even lower. Kansas and Missouri have higher composite rankings. These results may indicate that legal protection, or the lack thereof, for homosexuality as public policy has no impact on the health of family life and children. That homosexuals could live as equal citizens in Vermont but be criminalized in Texas seems to have no gross impact on the measures of success in family life.

Justice Scalia's moralistic fears about the impact of homosexuals and homosexuality on American social life do not appear to have much support in social reality, at least according to the Social Health report. Under Scalia's sexual majoritarianism homosexuals would be relegated to a legal underclass on no greater jurisprudential basis than traditional unsubstantiated fears of homosexuality.[158] Luckily, the *Lawrence* majority avoided using traditional majoritarian, or mainstream, fear as a basis for its constitutional jurisprudence.[159]

VI. THE NEED FOR A MORE EXACTING RATIONAL BASIS STANDARD

Justice Scalia's vague, traditionalist, democratic, mainstream-based moralism demonstrates why the U.S. Supreme Court needs to develop a more exacting rational basis standard. According to his *Lawrence* analysis, a law meets constitutional muster so long as a majority of Americans agree that it does. This applies even if it relegates a group of Americans to a legal underclass. Scalia accepts the traditionally backed assumptions of a so-called mainstream majority as the basis for justifying a legal underclass. The rational basis for the Texas homosexual anti-sodomy law appeared so obvious to Scalia that the majority's finding of no rational basis in clear contradiction to Supreme Court jurisprudence merited little discussion.[160] By his standards, vague moralism without an investigation of the origins and the modern relevance of that moralism would serve as a legitimate rational basis for any law.

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156. MIRINGOFF ET AL., *supra* note 134, at 6.

157. The author believes that such assumptions are logical and sensible, but also understands that exceptions no doubt exist. As a result, the author utilizes the word tends.

158. *See supra* Part III.B.

159. *See supra* Part II.A.

160. *Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting).

Demanding a more exacting rational basis test would raise American constitutional jurisprudence above unexamined traditional morals that include the unsubstantiated fear of a minority group on the part of a majority. A problem exists with the rational basis analyses of the *Lawrence* majority and O'Connor's concurring opinion; they are as vague in their application as Scalia's rational basis moralism. The *Lawrence* majority never explicitly discussed the nature of its rational basis test. Instead, the majority rejected morality as a legitimate basis for the Texas homosexual sodomy prohibition.[161] In addition, the majority examined the *actual impact* of the Texas law on homosexuals, focusing on how it undermined personal relationships[162] and stigmatized homosexuals,[163] but never addressed the purported moral protection basis.

Justice O'Connor utilized a rational basis test in a more explicit fashion, observing that "[w]hen a law exhibits such a desire to harm a politically unpopular group we have applied a more searching form of rational basis review . . . ."[164] However, O'Connor was no clearer than the *Lawrence* majority in applying her more searching review. She noted that Texas possessed no justification other than moral disapproval for singling out homosexuals for sexual regulation, and like the majority, she recognized that Texas used the law to stigmatize minority groups.[165] O'Connor nonetheless made a good start in laying out a more exacting standard. She called for the use of such a standard when a law exhibits intent to harm, burden, or disadvantage a politically unpopular group, but never revealed the actual content of the standard.[166]

Neither the majority nor Justice O'Connor referred to the already existing analytical approach used in *Brown v. Board of Education*.[167] The analysis in *Brown* suggests a more complete structure for a rational basis review. Though Justice Scalia noted in his *Lawrence* dissent that racial bias implicates heightened scrutiny,[168] the *Brown* Court never defined the level of review it applied.[169] *Brown*, however, clearly failed to use a heightened scrutiny, or compelling state interest, approach.[170] Instead, the *Brown* Court implied that no state possessed a rational basis for continued racial segregation in schools, noting that "in the field of public education the doctrine of 'separate but equal' has no place.

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161. *Id.* at 2483 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

162. *Id.* at 2478 (O'Connor, J., concurring).

163. *Id.* at 2482 (O'Connor, J., concurring).

164. *Id.* at 2485 (O'Connor, J., concurring).

165. *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

166. *Id.* at 2485-86 (O'Connor, J., concurring).

167. 347 U.S. 483 (1954) (finding that school segregation constitutes a denial of equal protection).

168. 123 S. Ct. at 2495 (Scalia, J., dissenting).

169. *Id.* at 2493-95.

170. *Id.*

Separate educational facilities are inherently unequal."[171] A compelling state interest was not necessary because not even a rational basis could exist to justify segregation in schools. To reach its conclusion, the *Brown* Court utilized an exacting analytical methodology. Like the majority and concurring opinions in *Lawrence*, the *Brown* Court fifty years prior focused on the stigma caused by racial segregation in the educational setting.[172] Unlike the *Lawrence* majority and concurrence, the *Brown* Court used evidentiary data to demonstrate the negative impact of segregation, and bolstered its conclusions by pointing to psychological and sociological studies.[173] *Brown* positioned the psychological and sociological studies in a broad societal context. The *Brown* Court wrote, "We must consider public education in the light of its full development and its present place in American life throughout the Nation."[174]

The *Brown* Court re-established an analytical model in which public policy was tested against data reflecting social reality at the time.[175] The "separate but equal" doctrine created by *Plessy v. Ferguson*[176] found that equality of treatment existed where separate races were provided substantially the same facilities.[177] The *Brown* Court decided that empirical evidence rendered this concept of equal protection fallacious.[178] The modern Supreme Court would do well to adopt the *Brown* approach when asked to judge the constitutionality of laws that impact those whom O'Connor described as "a politically unpopular group."[179] Such an approach improves markedly on the vague moralism of group fear represented by Justice Scalia's approach to a traditionally disliked minority.[180]

An empirical approach provides some support to speculative fears about the negative impacts of a discreet group on American society. For example, the State of Vermont in *Baker v. Vermont* asserted some of the same negative concerns as Scalia about homosexuals.[181] When posed with concerns about homosexuals as parents, the Vermont Supreme Court responded that child development experts lack agreement and certainty on the issue.[182] Other concerns about homosexual marriages asserted by the state were answered by the Court in writing, "[t]he State's conjectures are not, in any event, susceptible to empirical proof

171. *Id.* at 2495.
172. 347 U.S. at 494 (quoting from factual findings of the trial court in the Kansas case).
173. *Id.* at 494 n.11.
174. *Id.* at 492-93.
175. *Id.* at 493-94.
176. 163 U.S. 537 (1896).
177. *See id.*
178. 347 U.S. at 493-95.
179. Lawrence v. Texas, 123 S. Ct. 2472, 2485 (2003).
180. *See supra* Part III.A.
181. 744 A.2d at 884-85.
182. *Id.* at 884.

before they occur."[183] The U.S. Supreme Court could be simultaneously more protective of individual rights and more sensitive to the impact of individual behavior on American society if it adopted Justice O'Connor's more searching form of rational basis when reviewing the impact of a law on a traditionally unpopular group. The Court would be more precise in its analysis if it infused O'Connor's rational basis review with a substantial empirical component that measured states' assertions about negative impacts of group behavior on society.

Homosexual marriage provides a good example of an issue where such an analysis would assure something more than moralistic assumptions as a basis for a constitutional decision. The U.S. Supreme Court may have already signaled its decision in forthcoming equal protection, substantive due process challenges to limited, heterosexual marriage laws in the language of the *Lawrence* opinions. Justice O'Connor wrote in her concurring opinion, "Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage . . . . [O]ther reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[184] The *Lawrence* majority distinguished the Texas statute by writing, "[i]t does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[185] Hopefully, the U.S. Supreme Court will not only openly review the impact of heterosexually exclusive marriage laws on homosexuals and American society, but also rigorously test whatever assertions of state interests are put forth on behalf of those laws.

VII. CONCLUSION

In *Lawrence*, Justice Scalia drew a dangerously negative picture of homosexuals and the impact of their sexual activities on American society. Scalia utilized a mainstream, tradition-based, moralistic democratic model to justify criminalizing homosexual behavior.[186] The *Lawrence* majority avoided such an approach. Instead, the majority used a rational basis analysis that focused on the impact of the Texas homosexual anti-sodomy law on the right of homosexuals to develop personal relationships.[187] Justice O'Connor used a more searching rational basis analysis to gauge the impact of the Texas law on homosexuals as a class.[188] O'Connor's heightened rationality test served to protect individual rights as did the majority's rational basis test.

183. *Id.* at 885.
184. *Lawrence*, 123 S. Ct. at 2487-88 (O'Connor, J., concurring).
185. *Id.* at 2484.
186. *See supra* Part III.A.
187. *See supra* Part II.A.
188. *See supra* Part II.B.

However, neither test included an empirical element that challenged negative and unsubstantiated assertions about the societal impact of a politically unpopular group. The U.S. Supreme Court would do well to inject a substantial empirical component into any rational basis test used to test a law that negatively impacts an unpopular minority. Such an empirically based test would be helpful in any future review of heterosexually exclusive marriage laws.