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Introduction

Symposium: Gay Rights After *Lawrence v. Texas*

David B. Zucco*

As I write, hundreds of same-sex couples from around the country are lining up for marriage licenses in San Francisco. State recognition of gay and lesbian commitment in this way would have been unthinkable this time last year. But the gay rights movement made immeasurable progress in 2003, and the year will surely be remembered as the time when homosexuality rocketed to the forefront of American consciousness. In that twelve-month period, the Episcopal Church ordained an openly gay bishop, and the Canadian Prime Minister and Massachusetts Supreme Judicial Court created controversy by concluding that their respective constitutions mandated same-sex marriage. Most important for gay rights, however, was the death of *Bowers v. Hardwick*, the infamous United States Supreme Court decision that had upheld a Georgia antisodomy statute.

On the last day of its 2002–03 Term, the Court overruled *Hardwick* in *Lawrence v. Texas*, a case involving the Texas Homosexual Conduct Law. In 1998, Texas police responded to a report that a suspicious man was entering a Houston apartment. Upon arrival, the police did not discover an act of burglary. Instead, they found the “suspicious” man, Tyron Garner, engaging in consensual anal sex with the apartment’s resident, John Geddes Lawrence. Under Texas law, this activity was prohibited, and thus the officers arrested the two men and jailed them for twenty-four hours. The couple decided to fight their conviction, and with the help of the Lambda Legal Education and Defense Fund, took their constitutional challenge to

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Washington.

By declaring that gays “are entitled to respect for their private lives,” the Supreme Court dramatically shifted the direction of the gay rights debate. Now that antisodomy laws have been pronounced unconstitutional, those opposed to gay rights can no longer proceed from the premise that the organizing principle of gay relationships—gay sex—is illegal.

Today, *Lawrence*’s status as a landmark Supreme Court decision is certain. But back in the summer of 2003 when I began planning this symposium, many questioned whether the case would actually make waves. Would the Court skirt the real issue? Speak in uncertain terms? Would there be *anything* to write about? Thanks to the high level of risk tolerance in the articles department, we decided to organize a symposium around *Lawrence*, and this early action enabled us to attract academia’s *crème de la crème* before other journals got the same idea: Professors Carlos Ball, William Eskridge, Chai Feldblum, Suzanne Goldberg, Nan Hunter, and Andrew Koppelman, in addition to Minnesota’s own Dale Carpenter and Miranda McGowan, all enthusiastically agreed to participate. We were also fortunate to have author and commentator Jonathan Rauch agree to give a keynote address.

The symposium took place on November 22, 2003, in Lockhart Hall at the University of Minnesota Law School. The timing could not have been better—Massachusetts’s same-sex marriage decision was handed down just four days earlier. Individual presentations took place in the morning, and Minnesota Public Radio’s legal affairs correspondent, Elizabeth Stawicki, moderated a panel discussion with all of the participants in the afternoon. For many, Jonathan Rauch’s keynote address, presented early in the afternoon, was the event’s highlight. Mr. Rauch presented a powerful case for same-sex marriage and, very much tapping into the energy from the week’s events, drew both enthusiastic praise and animated criticism. The day concluded, despite winter storm warnings, with dinner, drinks, and music at the Kitty Cat Klub, a venue described by one participant as “kinky.”

Because *Lawrence*’s substance was not known last summer when preparation for the symposium began, the participants were not given any true parameters for their papers. Each was invited to simply react to the decision. In his paper, Professor Eskridge addresses several questions raised by *Lawrence*’s holding and reasoning, including whether the decision reflects

a new approach to substantive due process protection, why the Court went out of its way to overrule a leading constitutional precedent when a narrower ground was available, and whether *Lawrence* was lawless and undemocratic. He particularly addresses whether *Lawrence* signals, as Justice Scalia's dissent maintains, the end of morals legislation and adoption of complete homo equality. Professor Eskridge ultimately concludes that *Lawrence* is the embodiment of a new jurisprudence of tolerance, a conservative judicial strategy that seeks to lower the stakes of identity politics by preventing groups from deploying the state apparatus to hurt an opposition group in deeply fundamental ways.

Professor Hunter examines *Lawrence* as both a legal opinion and a cultural document. She argues that, as a legal opinion, the decision marks the beginning of a new approach to both substantive due process and equal protection analysis, in which flexible standards of review replace rigid definitions of fundamental rights and suspect classifications. As a cultural document, Professor Hunter concludes that *Lawrence* illustrates a new principle of "equal liberty" and a neoliberal vision of civil rights.

Professor Carpenter asks whether *Lawrence* is a libertarian decision. Drawing on arguments made in Justice Scalia's *Lawrence* dissent and on commentary from Professor Randy Barnett, Professor Carpenter concludes that the decision should not be read as a broadly libertarian decision, but rather as one linked to the Court's past recognition of fundamental privacy rights and made possible by the Court's recognition of the humanity and dignity of gay people.

In his paper, Professor Koppelman considers the impact of *Lawrence* on a Kansas statute punishing sodomy with a minor more severely for same-sex couples compared to opposite-sex couples. Professor Koppelman suggests that *Lawrence* yields one clear rule: If a state singles out gays for unprecedentedly harsh treatment, the Court will presume that what is going on is a bare desire to harm, rather than moral disapproval. He concludes that this unwritten rule places all antigay laws under suspicion and may render the severest of them unconstitutional.

Professor Ball discusses *Lawrence*'s impact on substantive due process arguments asserting that same-sex couples have a fundamental right to marry. He primarily explores the distinction often made in constitutional law between state *interference*

with and state recognition of intimate relationships. Professor Ball ultimately concludes that the Supreme Court's right-to-marry jurisprudence imposes a positive, or affirmative, obligation on the state to recognize at least some relationships as marital.

Professor Goldberg focuses on the statement by the *Lawrence* Court that state concern for morality fails to amount to even a legitimate interest. She examines the supposedly extensive history of judicial support for justifications of government action based solely on morality and concludes that such a tradition does not actually exist. She explains that judicial reluctance to rely on moral rationales is rooted in a desire to avoid both the dangers inherent in presuming the legitimacy of majoritarian moral sentiment and the countermajoritarian dangers of substituting the moral code of individual judges over that of the majority. Professor Goldberg concludes with a proposal to permit morality-based government action when it is also supported by empirical or otherwise demonstrable harms.

Finally, Professor McGowan discusses, first, why it is wrong to cast *Lawrence* as libertarian, and, second, how the Supreme Court distinguishes between groups and classifications. What is the difference between laws that restrict and stigmatize some class of activities (e.g., nude dancing) and those laws that restrict and stigmatize a group's activities (e.g., gay sodomy)? Professor McGowan concludes that the Court, in step with Professor Eskridge's notion of identity-based social movements, makes normative judgments to grant constitutional protection to socially salient groups whose common conduct it deems worth protecting.

As election-year debates continue and as the country begins to ponder an anti-gay marriage amendment to the United States Constitution, the papers presented in this symposium have only become more timely and more relevant. The pieces published here address a wide variety of incredibly difficult issues. It is the hope of the *Minnesota Law Review* that these pieces engage those on both sides of the ongoing "culture war" and promote a positive, constructive dialogue.