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Josh Nolet, President

Westboro Baptist Church: Hate Speech or Free Speech?

By Rebekah Hallisey, Junior, Art and Design

With signs like “God Hates Fags,” “Thank God for Dead Soldiers,” and “The World is Doomed,” it is no wonder that Westboro Baptist Church (WBC) is making headlines. Established in 1955 by Pastor Fred Phelps, the WBC has conducted over 44,500 pickets and protested at over 400 military funerals. Its members openly and aggressively voice their disapproval of topics, such as homosexuality, abortion, and stem cell research, adopting a harsh and hateful attack plan. These radicals claim they are commanded to “preach the unvarnished word,” because they do not “beat around the bush when it comes to someone’s eternal soul.” While everything they do and say disturbs me, they have every constitutional right to continue voicing their opinions.

Westboro Baptist Church followers adhere to a horribly skewed view of the Bible and believe in teaching and expounding the doctrines of grace according to John Calvin’s five points of Calvinism. These points include total depravity, unconditional election, limited atonement, irresistible grace, and the perseverance of the saints. Calvinism asserts that “God is able to save every person upon whom he has mercy and that his efforts are not frustrated by the unrighteousness or the inability of humans.”

Total depravity means that everyone is born into original sin and not inclined to follow God, but one’s own interests. Unconditional election teaches that God chooses who will reach eternal salvation. Deliverance is not based on an individual’s virtue, merit, or faith. Calvinists also believe in limited atonement, meaning that Jesus died for the sins of the Elect Few. Therefore, atonement is limited and inapplicable to all. Irresistible grace means that all who are chosen will be saved through the Holy Spirit, which cannot be resisted. Those chosen are known as saints in that they were set apart by God. The saints will continue in the faith until the end of time, while others who fall away never had true faith. For Calvinists, Jesus died as a substitute for the Elect’s penalty under sin.

Westboro Baptist Church members function under these basic Calvinist beliefs, which on the surface do not appear extreme or radical. However, they twist these beliefs to justify their behavior. For example, they disapprove of homosexuality, picketing with signs that usually say “fag.” The word “fag” means kindling, or something that fuels fire. Westboro Baptist Church cites the word in the Bible, where it is used as a metaphor, where sodomy angers God. Westboro also pickets against abortion and stem cell research. One particularly disturbing sign refers to aborted fetuses as “bitch burgers,” claiming America will “eat their children.” Furthermore, their slogan reads, “Bitch burgers, Obama fries, both these dripping with your bloody catsup, and Slut shakes, all going to make up your Stem Cell Supper!”

The WBC is probably best known for staging protests at soldiers’ funerals. According to their spokesmen, soldiers are “lazy, incompetent idiots looking for jobs because they’re not qualified for honest work.” These soldiers were “raised on a diet of fag propaganda,” based on two lies: that it is okay to be gay and anyone who says otherwise is wrong. Then, these soldiers “joined a fag-infested army to fight for a fag-run country.” Their slogan states, “They turned America over to fags; They’re coming home in body bags.” These beliefs led the WBC to protest at hundreds of funerals for fallen soldiers across the country.

Most agree Westboro Baptist Church’s views and slogans are radical and hateful. However, the WBC would argue that the truth is harsh and it is necessary to be forceful when it comes to an individual’s eternal salvation. It is their duty to spread the “truth” to make a difference. They even fly the American flag upside down, which is the international sign for distress. September 11, 2001, was the beginning of God’s wrath against a perverse country, they claim. Therefore, they believe we are all in mortal danger and they justify their behavior by saying it would be more hateful to not warn everyone.

As heinous as these acts may seem, Westboro members have the right of free speech and peaceable assembly, just like any other American citizen. The First Amendment of the Bill of Rights of the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” This gives us the right to our opinions without any governmental restrictions on the content and to assemble peacefully to express them. While this protects the right of the individual, it is not absolute.

When a case of freedom of speech and assembly is in question, judges base their decision on time, place, and manner. These restrictions are meant to accommodate public convenience and promote order. The First Amendment also protects the right to a freedom of expression. This is usually interpreted quite broadly and is based on two fundamental principles. The first principle is content neutrality, which means that the government cannot limit expression because someone is offended by the content. The second principle states that restrictions may be put on expression only if it will cause

direct and imminent harm. For example, a person may be silenced for falsely yelling fire in a crowded room.

In his 1919 *Schenck* decision, Oliver Wendell Holmes introduced the “clear and present danger” test, which justifies restrictions if the speech poses a risk or threat to safety, especially during wartime. Some radical beliefs, such as those of Westboro Baptist Church, make the majority uncomfortable. However, based on the Constitution and constitutional law, the policy of American democracy is to protect such speech, no matter how unpopular it is. Therefore, Westboro is more than welcome to state its opinions, as it is doing. Holmes said, “The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Therefore, it is obviously easy to create a standard for free speech. However, it is hard to decide when and where to apply it, as in such cases like Westboro Baptist Church.

I am not very concerned with political correctness. However, there are a few issues that strike me on a personal level. Westboro Baptist Church’s aggressive stance on homosexuality, abortion, and stem cell research is one of these issues. I am deeply offended that the WBC protests at fallen soldier’s funerals. I was raised in a military family. My father and my brother are both in the U.S. Army. In fact, my brother is in Afghanistan right now. Therefore, it hits home when people protest at military funerals. The WBC even planned to protest at the funeral of an Army Chaplain in Colorado. This was the first Army chaplain to be killed in action since 1970. He was stationed at the same base in Colorado as my brother. They have also protested at funerals in Maryland, close to where I live.

Initially, most people are offended by what Westboro does. Most people do not find it reasonable or politically correct. While this is true, the WBC has every right to do what they do and voice their opinions. Just because we disagree with what they preach does not mean that we have to right to outlaw their speech. After all, as Justice John Marshall Harlan said in *Cohen v. California* in 1971, “One man’s vulgarity is another’s lyric.” Some people may disagree on the basis of taste. However, the WBC truly believes in what they say and do. They act the way they do for a reason, to gain attention and awareness. We cannot censor their speech simply because we disagree with it. If start to impose such restrictions and censorship, we no longer have free speech. Therefore, as Holmes said, no matter how loathed we are to do so, we must protect the speech that we hate.

Hands on Health Care: Can They Do That Or a Right to Life?

By Alicia Huber, Sophomore, Biology

Health care and its reform has been a hot-button political issue in the United States since Theodore Roosevelt first proposed universal health insurance while campaigning in 1912. Until recently, the United States was one of the only, if not the single, developed nation in the world without guaranteed health care coverage for all

citizens and is also the only wealthy nation where people were going bankrupt because of medical expenses. This may be due to federalism at work, since many issues, traditionally including health care, are left to the individual state governments to handle, but American mentality and the “free” market also play a huge role. As a whole, Americans are individualists, wanting the government to keep its hands off the free market and out of their lives. They believe everyone has the same chances to be successful with a free market system and that success or failure is the work of individuals; efforts to help those in less fortunate situations are often deemed to be “socialism” and an attempt of the government to interfere and take over the lives of the citizens. Stemming from these factors and dividing people at the root of the health care debate are some basic but important questions: do Americans have a “right to health care,” is buying insurance part of responsible citizenship, and can the government constitutionally force everyone to buy health insurance? The answers to these questions are essential to defending the constitutionality of the health care reform laws passed in March 2010, collectively termed the Affordable Care Act.

Is making sure that every citizen has health insurance the responsibility of the government? People who say “yes” argue that Americans have a right to health care that should be protected like any other right. Others believe that health care is a personal responsibility with which the government should not interfere. While health insurance itself may not be something everyone is implicitly entitled to, everyone does have a right to health, or to be able to pursue a healthy life as free of illness and injury as possible.

In the Declaration of Independence, the rights to “Life, Liberty, and the pursuit of Happiness” are declared as unalienable rights, so innate that even though they appear nowhere in the Bill of Rights, almost everyone understands that these rights are inherent in humans and should be protected by the government. According to the Supreme Court ruling in *Griswold v. Connecticut* (1965), many of the rights listed in the Constitution have penumbras around them protecting rights that go beyond what is literally written and the Court has recognized and upheld several unenumerated rights, such as the right to privacy and the right to association, using this idea and the Ninth Amendment. The rights to life, liberty, and happiness themselves appear nowhere in the Constitution, but are still as legitimate as the right to choose a religion.

The right to life has its own penumbra, extending further than just the right to exist. Everyone has the right to a good *quality* of life, or to be able to pursue good health as well as happiness, and the government is responsible for helping people strive for healthy lives. One of the purposes of our government, according to the preamble of the Constitution, is to “promote the general welfare.” *Promote* can be defined as “to help or encourage to exist or flourish,” a verb requiring there be some action to advance whatever is being promoted (in this case welfare), instead of passively allowing welfare to improve on its own. *Welfare* is the well-being, good fortune, *health*, happiness, or prosperity of the people. The government was created to *do* something to help improve people’s well-being and health. Everyone should be able to breathe clean air, drink clean water, and eat safe, uncontaminated food and the government should protect these rights. Assuring that everyone has health care, which is necessary for the preservation of life and

also promoting health and quality life, undeniably advances the well-being and health of the people.

While the Declaration does say that people have the right to *pursue* happiness, not necessarily *be* happy, and people have the right to *pursue* health, for the government cannot possibly guarantee that everyone will be healthy, health care is the method of pursuing a healthy life, not a guaranteed means of obtaining good health. So necessary is the right to pursue health and have access to the care necessary for quality living that every other developed country in the world guarantees health care for every citizen in one way or another. In today's society, health insurance is often the only way for people to access affordable health care that does not cause them to go broke in the process of getting treatment. No one should have to suffer from treatable ailments or go bankrupt from medical bills, which happens frequently in the United States but not in other developed countries. People have the right to life, the right to a good quality life and the right to pursue a healthy life. To achieve this, the government has a responsibility to assure that everyone has, by some means, access to health care, today meaning in some form of health insurance, in order to promote the welfare of the people.

Although the government's duty is to ensure universal access to health care and insurance, the people's responsibility is to insure themselves like they would any other valuable, such as a car. Americans love using the word *right*, applying this term to anything and everything they think they should be allowed to do without the government interfering, including saying whatever they want, being left alone, and even smoking (whatever and wherever they want).

On the other hand, Americans underuse the word responsibility. But with rights comes responsibilities. The Affordable Care Act was formed to "promote individual responsibility" by requiring people who can afford insurance to have basic coverage or else pay a fee "to help offset the costs of caring for uninsured Americans." Many people object to this mandate on the grounds that people will be punished (in the form of a fine) for inaction, not buying insurance, instead of for actually *doing* something to warrant punishment. However, everyone who participates in the health care system, and can afford to do so, has the responsibility to contribute.

Being uninsured is "risky and irresponsible" and costs the public money in the long run. Some people are not happy about the thought of being forced to buy insurance that they think they will never need, but almost everyone needs health care at one point or another, whether planned or due to an unforeseen event. The care of the uninsured is often paid by those who do have insurance, as a "hidden tax," or by the government using people's tax dollars, so and expecting the uninsured to make up for the costs of their care with a fine is fair and reasonable. While health insurance is very valuable to the consumer, being insured also benefits the public as a whole. State governments can require people to carry car insurance, for the benefit of other drivers and their insurance companies, as part of being a responsible driver on public roads. Though the consumer does have the choice to not purchase insurance and then not legally drive the vehicle, people often cannot opt out of using public health care. For proper functioning of the

health care system, everyone who participates needs to have insurance to help cover the high costs, just like everyone driving on the roads should have car insurance in case someone causes or is involved in an accident, so that the insured are not left to pay the bills of those without insurance.

Not only do citizens have a responsibility to insure themselves with health coverage, but regulation of insurance also falls well within Congress's legislative powers. Article I, section 8, of the Constitution establishes that Congress has the power "to regulate commerce among the several States," meaning that Congress can pass laws controlling the exchange or buying and selling of commodities involving multiple states. This clause has been applied very broadly to justify very diverse legislation and the Supreme Court has struck down several laws in the past as overextensions of Congress's interstate commerce power.

One such law was the Gun-Free School Zones Act of 1990 (*United States v. Lopez*, 1995), declared unconstitutional because the act of having a gun in a school did not relate directly enough to economic activity. Regulation of health care, however, does not fall into this category. Unlike the indirect economic effects of having guns in schools, health insurance has a direct impact on the economy. In *United States v. South-Eastern Underwriters* (1944), the Supreme Court ruled that Congress could regulate insurance as interstate commerce under the Commerce Clause and health care, being extremely useful and valuable, is certainly a commodity. Purchasing health insurance is literally an economic activity in and of itself, not even considering the other economic impacts but the Affordable Care Act is also expected to save billions of dollars in Medicare over the next years, create hundreds of thousands of jobs per year, protect people from going bankrupt over medical cost, reduce the "hidden tax" that insured people pay for the costs of the uninsured, and reduce the federal deficit.

In addition to the power to regulate insurance companies, Congress also has the ability to mandate that the people have health insurance. The government has power, legally and traditionally, to make the people do certain things that they would often rather not, especially in exercise of the Commerce Clause. Congress has the power, according to Article I, section 8 of the Constitution, "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," meaning that Congress can legally collect money from the people to use for its purposes of protecting the security and welfare of the nation.

In return for this money, the government provides the people services such as protection, educational facilities, roads, and programs including Medicare and Medicaid. Requiring people to buy health insurance is not exactly the same as a tax but both do involve the government requiring the people to spend their money, like a "fee," which people also argue about whether or not is a tax. State governments require everyone who wants to legally drive on the public roads to purchase car insurance and attendance in school is mandatory up to a certain age. The federal government can also force people to go to school or to work with people they do not like by outlawing segregation and discrimination based on race, gender, and ethnicity.

The provision of the Affordable Care Act requiring almost everyone to have health insurance has sound basis in the Constitution and is not one of the common overstretchers of the interstate commerce power. Guaranteeing that all citizens have access to health care, today meaning in the form of health insurance, is part of the government's duty to promote public welfare. Purchasing insurance involves interstate commerce and also has an extensive impact on the economy. The Affordable Care Act is not the beginning of government takeover of the health care system, but was designed, according to the White House, to put "people, not health insurance companies or government, in charge of health care." Instead of establishing a single-payer program where the government provides one option of health insurance to all citizens, the existing employer-based health insurance market is strengthened while being made fairer for consumers with regulations. The goal is cost effectiveness and guaranteed insurance for everyone to improve the quality of health and health care in the United States, which would not be possible with a completely "free" market where insurance companies are held accountable to no one but their own bank accounts. The United States of America is supposed to have, as Abraham Lincoln said in his Gettysburg Address (1863), a "government of the people, by the people, for the people," which protects and promotes the welfare of the people. Insuring that every citizen has access to the care necessary for a healthy life is one of the most basic requirements of promoting public health and welfare and protecting the right to life.

The Supreme Court: Defending the Vote

By Ermengarde Jabir, Senior, Economics

As a foundation of our republic, equality is based on the idea that everyone who is over eighteen years old has the right and opportunity to have a voice. Not only can people vote, but each opinion cast at the polls has equal weight. Or does it? Geographic location plays a huge role in how much a vote counts and what subset of the population makes it to the polls on Election Day. To aid the determination of voting districts, the census tracks population shifts in addition to determining funding for each region of the country.

Baker v. Carr (1962) is one on the landmark Supreme Court cases that dealt with voting. The Fourteenth Amendment of the United States Constitution guarantees equal protection for all Americans. According to the Court's actions, this also includes voter equality. This particular case arose in Tennessee where Charles Baker and a group of other citizens claimed that their votes were not as powerful as those of others due to Tennessee's disproportionate electoral districts. As the country became more industrialized and people left the agricultural country life behind, urban centers became more populated, and Tennessee was no different.

However, although most states have laws to redistribute seats in state legislatures, the southern state did not seem to want to change district lines as its population realigned itself. Reapportionment bills were unpopular in the state's legislature and never passed. While the federal district court in which the suit was filed agreed that the citizens had a just cause of action, drawing district lines, the Court decided, was a political issue and should be left to the state's legislative or executive body. As the case made its way to the

Supreme Court, Baker and his supporters were in luck as Chief Justice Warren, a progressive judge, declared that the Court does have jurisdiction over “political” matters and that, moreover, Tennessee was in violation of the Fourteenth Amendment. The Supreme Court’s decision set a precedent by ruling “that the litigants had ‘standing to sue,’ that is, they had sustained a personal and direct injury when the state declined to redraw its electoral districts over a period of 60 years.”

This ruling greatly enhanced the power of the Court as it declared districting to be a judicial issue, allowing for further activist rulings on voting rights. Many people argue against a heavily activist court; in a way, an activist court is like big government meddling where it is not wanted. Nonetheless, the Supreme Court served as a check and balance on the legislative and executive branches reluctant to redraw the lines and ensure that everyone has an equal vote. In this instance, interference helped guarantee equality. If the Supreme Court had not voted “that the court possessed jurisdiction of the subject matter,” each state would freely possess the power to manipulate voting for a particular candidate, party, or ideal.

The voting demographics also affect representation. Despite the Nineteenth Amendment’s grant of the vote to women in 1920, which followed, a half a century later, the Fifteenth Amendment granting black men the vote, people were still not equally represented by gender, race, or socioeconomic status at the polls. As late as the 1960s, people were still prohibited from voting and were often beaten when they tried. The Voting Rights Act of 1965 intended to eliminate the fear of violence at the polls among minorities. While effective at making voter intimidation illegal, this act cannot actually force people to cast their votes.

Then, of course, there is voter apathy. Unfortunately, the percentage of people who vote on a regular basis is very small. People only seem to care about who is in office and what policies are being implemented in times of crisis. Young people typically only feel the need to have their voices heard if the country is going in a direction perceived as negative. Voter apathy is the only reason a true “one person, one vote” system does not exist. If everyone voted, elected officials would know they could not get away with gerrymandering as they would be swiftly voted out of office. If voting is regarded from an economic perspective, one would say that only the marginal vote counts. So why vote if it is only the margin that matters? Every vote must be heard because politicians might be more attentive to social issues if they actually felt accountable to the entire populace due to overwhelming voter turnout during election seasons. But this does not happen. People do not vote so their voices are not heard, leading to political action that benefits the few that do vote and therefore hold all the power.

Each American citizen over the age of eighteen has a civic duty to vote. Voter registration drives should be unnecessary because everyone ought to be motivated to vote and not just sign up because of the convenience. Nonetheless, registration means nothing if the registered voters do not show up on Election Day. Statistics show that more people voted for the winner of American Idol than for the President of the United States, which is disheartening at best, and reveal the urgency to vote. People talk about patriotism, and

there is nothing more patriotic than voting whether it be at the county level or the national level.

In 1964, the Court continued to solidify its opinion that voting is a judicial issue when it ruled in *Reynolds v. Sims* that state legislature districts had to be roughly equal in size. At this point, it could be said that the Supreme Court was legislating from the bench. Chief Justice Warren wrote in his opinion that “legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.” Warren and his supporters clearly believed that the Constitution was a living document that needed to be updated with the times through Supreme Court rulings. Justice Harlan dissented, claiming that the Fourteenth Amendment’s Equal Protection Clause was not originally intended for the protection of voting rights. He also argued that the Court was forcing its ideals of government on the states.

Georgia also suffered from similar districting problems, which eventually made their way to the Supreme Court in *Wesberry v. Sanders* (1964). The Court ruled that Georgia’s ill-proportioned congressional districts violated the Constitution. By the end of the decade, the state’s rural areas were no longer overrepresented in the House of Representatives. The opinion of the Court stated that Article I, Section 2, of the Constitution provided for representatives chosen “by the People of the several States” to be “apportioned among the several States...according to their respective Numbers...” The Court’s interpretation of the stipulations in the Constitution meant that “as nearly as practicable one man’s vote in a congressional election is to be worth as much as another’s.” The Court concluded that, in theory at least, one person deserves one vote and that each person’s vote is just as important as the next person’s. This decision greatly influenced the demographic landscape of the House of Representatives and therefore the public policy that Congress was considering.

Unfortunately, this ruling did not eliminate the possibility of gerrymandering electoral lines. There is nothing to stop legislatures from creating districts that only represent one facet of the population based on political affiliation or demographic representation. Elected officials are also willing to manipulate district lines and accommodate the vote if it means being re-elected. Every voter wants a governing body whose goals closely align with his or hers and some may think that their vote should carry more weight because they own more land or have a higher net worth and therefore somehow feel the effects of legislation more acutely.

Regardless of redistricting and redrawing the lines people constantly move, die, and come of age. In general, ten years is too long of a time frame to keep voting districts. However, the economic burden of constantly keeping up with population shifts for each election cycle would become a logistical burden to the states and as such, is not a viable solution for ensuring a “one person, one vote” environment.

The Right to Privacy: Gay Rights and Due Process

By Leah Mitchel, Sophomore, Biology

Section One of the Fourteenth Amendment forbids States from making laws that “deprive any person of life, liberty, or property, without due process of law.” The Due Process Clause is thought of as protecting procedural rights, applying only to the process of arresting, trying, and sentencing. However, in several cases, the Court’s opinion has been that the “liberty” protected by the Fourteenth Amendment also covers substantive rights, such as the right to privacy. In cases like *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973), the Court decided that birth control and abortion are private enough that they are also protected by the Due Process Clause’s promise of liberty. In the Court’s opinion in *Planned Parenthood v. Casey* (1992), Justices O’Connor, Kennedy, and Souter wrote that the issues “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” Eleven years later, this would help the Court reach the decision that homosexuality and homosexual relationships are also part of the privacy protected by the Due Process Clause of the Fourteenth Amendment, in the landmark gay rights case, *Lawrence v. Texas* (2003).

The topic of homosexual conduct as an issue of privacy under the Fourteenth Amendment first appeared in the 1986 case *Bowers v. Hardwick*, dealing with a Georgia law that banned sodomy. A homosexual man who was arrested for violating this law, despite the fact that he was in the privacy of his own home, with a partner who was another consenting adult, challenged this law on the basis that it infringed on his fundamental right to privacy. The Court ruled that this law was not in violation of the Constitution. Part of their reasoning, as written by Chief Justice Burger in his concurring opinion, was that the procedure of banning “homosexual conduct . . . is firmly rooted in Judeo-Christian moral and ethical standards.” Justice White, delivering the Court’s majority opinion, scoffed at the notion that the Due Process Clause can be “interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription.” This, he felt, was merely “the imposition of the Justices’ own choice of values on the States and the Federal Government.” For these reasons, the justices were “unwilling” to “announce . . . a fundamental right to engage in homosexual sodomy.”

In 2003, the Court decided the case *Lawrence v. Texas*, involving a parallel anti-sodomy law in Texas that was challenged under similar circumstances, but with very different results. The Court struck down the Texas law, and reversed the Court’s previous decision in the *Bowers* case. Justice Kennedy delivered the Court’s opinion, writing that the precedent set by *Bowers* should not be followed because the case had been “wrongly decided.” In an unusual move, Kennedy used current international law to strengthen his argument, showing flaws in “the premise in *Bowers* that the claim put forward was insubstantial to our Western civilization.” Kennedy wrote, “almost five years before *Bowers* was decided the European Court of Human Rights . . . held that the laws prescribing [homosexual] conduct were invalid under the European convention on Human Rights. . . . [T]he decision is at odds with” the argument made by Chief Justice

Burger. Kennedy also criticized the “Court’s own failure to appreciate the extent of the liberty at stake” in *Bowers* by focusing too much on the specific activity banned by the law in question, and not on the larger issue of the right to privacy. Kennedy elaborated, “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse.” Kennedy cited the more recent *Casey* decision as having “reaffirmed the substantive force of the liberty protected by the Due Process Clause,” allowing him to conclude that, because laws criminalizing homosexual conduct “seek to control a personal relationship that, whether or not entitled to formal recognition of the law, is within the liberty of persons to choose without being punished as criminals,” they are indeed in violation of the Due Process Clause.

Justice O’Connor concurred with the decision that the Texas law was unconstitutional, but disagreed on the reasoning, taking issue with the fact that the law only criminalized sodomy between members of the same sex. In her concurrence, Connor stated, “Rather than relying on the substantive component of the Due Process Clause, as the Court does, I base my decision on the Fourteenth Amendment’s Equal Protection Clause.” This line of thinking goes back to the 1996 case *Romer v. Evans*, which struck down a referendum to ban laws protecting gay rights, finding it to be in violation of the Equal Protection Clause. Kennedy himself had delivered the Court’s opinion in *Romer*. In *Lawrence*, Kennedy acknowledged this point of view as an “alternative argument,” but worried that, if the Texas law was found unconstitutional only because it violated the Equal Protection Clause, then “some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex couples.” Clearly, if everyone’s rights were violated, the problem of inequality would be solved. Unfortunately, a much larger problem would now exist. Arguing the Due Process Clause instead of the Equal Protection Clause would avoid the possibility of this situation occurring, while still ensuring that all people have the rights that they deserve.

Justice Scalia, who dissented in *Lawrence*, claimed that the justices could not logically reverse the *Bowers* decision, nor strike down the Texas law, without declaring sodomy to be a “fundamental right,” and that Kennedy had failed to do so (*Lawrence*). However, as Kennedy argued, this point of view is too narrow, and continuing to focus simply on the aspect of sodomy in these cases would be wrong. The real issue should be the fundamental right to privacy, which should encompass the rights of homosexuals to go about their lives – including, but (quite obviously) not limited to, engaging in consensual, private sodomy between adults – without government intrusion.

As is often the case, the topic of gay rights remains controversial. Justice Scalia referred to the issue as part of a “culture war” that should be resolved through democratic vote, not intervention by the Supreme Court. Nevertheless, the *Lawrence* decision stands as an important factor in ensuring that, with respect to homosexuality, the fundamental, substantive right to privacy guaranteed by the Due Process Clause of the Fourteenth Amendment is not violated.

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Department of Political Science
Linthicum 118B, x 43350
jfruchtman@towson.edu

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