

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 02–102

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

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

[June 26, 2003]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

“Liberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 844 (1992). That was the Court’s sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade*, 410 U. S. 113 (1973). The Court’s response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick*, 478 U. S. 186 (1986), is very different. The need for stability and certainty presents no barrier.

Most of the rest of today’s opinion has no relevance to its actual holding—that the Texas statute “furthers no legitimate state interest which can justify” its application to petitioners under rational-basis review. *Ante*, at 18 (overruling *Bowers* to the extent it sustained Georgia’s anti-sodomy statute under the rational-basis test). Though there is discussion of “fundamental proposition[s],” *ante*, at 4, and “fundamental decisions,” *ibid.* nowhere does the Court’s opinion declare that homosexual sodomy is a “fundamental right” under the Due Process Clause; nor does it subject the Texas law to the standard of review

SCALIA, J., dissenting

that would be appropriate (strict scrutiny) if homosexual sodomy *were* a “fundamental right.” Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: “[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.” 478 U. S., at 191. Instead the Court simply describes petitioners’ conduct as “an exercise of their liberty”—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. *Ante*, at 3.

I

I begin with the Court’s surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*. I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today’s opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paeon to *stare decisis* coauthored by three Members of today’s majority in *Planned Parenthood v. Casey*. There, when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *reaffirm* it:

“Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*[.] . . . its decision has a dimension that the resolution of the normal case does not carry. . . . [T]o overrule under fire in the absence of the most compelling reason . . . would subvert the Court’s legitimacy beyond any serious question.” 505 U. S., at 866–867.

Today, however, the widespread opposition to *Bowers*, a decision resolving an issue as “intensely divisive” as the

SCALIA, J., dissenting

issue in *Roe*, is offered as a reason in favor of *overruling* it. See *ante*, at 15–16. Gone, too, is any “enquiry” (of the sort conducted in *Casey*) into whether the decision sought to be overruled has “proven ‘unworkable,’” *Casey, supra*, at 855.

Today’s approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an “intensely divisive” decision) *if*: (1) its foundations have been “eroded” by subsequent decisions, *ante*, at 15; (2) it has been subject to “substantial and continuing” criticism, *ibid.*; and (3) it has not induced “individual or societal reliance” that counsels against overturning, *ante*, at 16. The problem is that *Roe* itself—which today’s majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as *Bowers*.

(1) A preliminary digressive observation with regard to the first factor: The Court’s claim that *Planned Parenthood v. Casey, supra*, “casts some doubt” upon the holding in *Bowers* (or any other case, for that matter) does not withstand analysis. *Ante*, at 10. As far as its holding is concerned, *Casey* provided a *less* expansive right to abortion than did *Roe, which was already on the books when Bowers was decided*. And if the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage, *ante*, at 13 (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”): That “casts some doubt” upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one’s “right to define” certain concepts; and if the passage calls into question the government’s power to regulate *actions based on* one’s self-defined “concept of existence, etc.,” it is the passage that ate the rule of law.

I do not quarrel with the Court’s claim that *Romer v. Evans*, 517 U. S. 620 (1996), “eroded” the “foundations” of *Bowers*’ rational-basis holding. See *Romer, supra*, at 640–

SCALIA, J., dissenting

643 (SCALIA, J., dissenting).) But *Roe* and *Casey* have been equally “eroded” by *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997), which held that *only* fundamental rights which are “deeply rooted in this Nation’s history and tradition” qualify for anything other than rational basis scrutiny under the doctrine of “substantive due process.” *Roe* and *Casey*, of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort *was* rooted in this Nation’s tradition.

(2) *Bowers*, the Court says, has been subject to “substantial and continuing [criticism], disapproving of its reasoning in all respects, not just as to its historical assumptions.” *Ante*, at 15. Exactly what those nonhistorical criticisms are, and whether the Court even agrees with them, are left unsaid, although the Court does cite two books. See *ibid.* (citing C. Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 81–84 (1991); R. Posner, *Sex and Reason* 341–350 (1992)).¹ Of course, *Roe* too (and by extension *Casey*) had been (and still is) subject to unrelenting criticism, including criticism from the two commentators cited by the Court today. See Fried, *supra*, at 75 (“*Roe* was a prime example of twisted judging”); Posner, *supra*, at 337 (“[The Court’s] opinion in *Roe* . . . fails to measure up to professional expectations regarding judicial opinions”); Posner, *Judicial Opinion Writing*, 62 U. Chi. L. Rev. 1421, 1434 (1995) (describing the opinion in *Roe* as an “embarrassing performanc[e]”).

(3) That leaves, to distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrulable *Bowers*, only the third factor. “[T]here has been,” the Court

¹This last-cited critic of *Bowers* actually writes: “[*Bowers*] is correct nevertheless that the right to engage in homosexual acts is not deeply rooted in America’s history and tradition.” Posner, *Sex and Reason*, at 343.

SCALIA, J., dissenting

says, “no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding” *Ante*, at 16. It seems to me that the “societal reliance” on the principles confirmed in *Bowers* and discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is “immoral and unacceptable” constitutes a rational basis for regulation. See, e.g., *Williams v. Pryor*, 240 F. 3d 944, 949 (CA11 2001) (citing *Bowers* in upholding Alabama’s prohibition on the sale of sex toys on the ground that “[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate government interest under rational basis scrutiny”); *Milner v. Apfel*, 148 F. 3d 812, 814 (CA7 1998) (citing *Bowers* for the proposition that “[l]egislatures are permitted to legislate with regard to morality . . . rather than confined to preventing demonstrable harms”); *Holmes v. California Army National Guard* 124 F. 3d 1126, 1136 (CA9 1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); *Owens v. State*, 352 Md. 663, 683, 724 A. 2d 43, 53 (1999) (relying on *Bowers* in holding that “a person has no constitutional right to engage in sexual intercourse, at least outside of marriage”); *Sherman v. Henry*, 928 S. W. 2d 464, 469–473 (Tex. 1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery). We ourselves relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.*, 501 U. S. 560, 569 (1991), that Indiana’s public indecency statute furthered “a substantial government interest in protecting order and morality,” *ibid.*, (plurality opinion); see also *id.*, at 575 (SCALIA, J., concurring in judgment). State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in

SCALIA, J., dissenting

light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See *ante*, at 11 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*" (emphasis added)). The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U. S., at 196.²

²While the Court does not overrule *Bowers*' holding that homosexual sodomy is not a "fundamental right," it is worth noting that the "societal reliance" upon that aspect of the decision has been substantial as well. See 10 U. S. C. §654(b)(1) ("A member of the armed forces shall be separated from the armed forces . . . if . . . the member has engaged in . . . a homosexual act or acts"); *Marcum v. McWhorter*, 308 F. 3d 635, 640–642 (CA6 2002) (relying on *Bowers* in rejecting a claimed fundamental right to commit adultery); *Mullins v. Oregon*, 57 F. 3d 789, 793–794 (CA9 1995) (relying on *Bowers* in rejecting a grandparent's claimed "fundamental liberty interes[t]" in the adoption of her grandchildren); *Doe v. Wigginton*, 21 F. 3d 733, 739–740 (CA6 1994) (relying on *Bowers* in rejecting a prisoner's claimed "fundamental right" to on-demand HIV testing); *Schowengerdt v. United States*, 944 F. 2d 483, 490 (CA9 1991) (relying on *Bowers* in upholding a bisexual's discharge from the armed services); *Charles v. Baesler*, 910 F. 2d 1349, 1353 (CA6 1990) (relying on *Bowers* in rejecting fire department captain's claimed "fundamental" interest in a promotion); *Henne v. Wright*, 904 F. 2d 1208, 1214–1215 (CA8 1990) (relying on *Bowers* in rejecting a claim that state law restricting surnames that could be given to children at birth implicates a "fundamental right"); *Walls v. Petersburg*, 895 F. 2d 188, 193 (CA4 1990) (relying on *Bowers* in rejecting substantive-due-process challenge to a police department questionnaire that asked prospective employees about homosexual activity); *High Tech Gays v. Defense Industrial*

SCALIA, J., dissenting

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe*, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State. *Casey*, however, chose to base its *stare decisis* determination on a different “sort” of reliance. “[P]eople,” it said, “have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.” 505 U. S., at 856. This falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have *permitted* the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired). Even for persons in States other than these, the choice would not have been between abortion and childbirth, but between abortion nearby and abortion in a neighboring State.

To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*’s extraordinary deference to precedent for the result-oriented expedient that it is.

Security Clearance Office, 895 F. 2d 563, 570–571 (CA9 1988) (relying on *Bowers*’ holding that homosexual activity is not a fundamental right in rejecting—on the basis of the rational-basis standard—an equal-protection challenge to the Defense Department’s policy of conducting expanded investigations into backgrounds of gay and lesbian applicants for secret and top-secret security clearance).

SCALIA, J., dissenting

II

Having decided that it need not adhere to *stare decisis*, the Court still must establish that *Bowers* was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional.

Texas Penal Code Ann. §21.06(a) (2003) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to “liberty” under the Due Process Clause, though today’s opinion repeatedly makes that claim. *Ante*, at 6 (“The liberty protected by the Constitution allows homosexual persons the right to make this choice”); *ante*, at 13 (“These matters . . . are central to the liberty protected by the Fourteenth Amendment”); *ante*, at 17 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government”). The Fourteenth Amendment *expressly allows* States to deprive their citizens of “liberty,” *so long as “due process of law” is provided*:

“No state shall . . . deprive any person of life, liberty, or property, *without due process of law.*” Amdt. 14 (emphasis added).

Our opinions applying the doctrine known as “substantive due process” hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U. S., at 721. We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called “heightened scrutiny” protection—that is, rights which are “deeply rooted in this Nation’s history and tradition,” *ibid.* See *Reno v. Flores*, 507 U. S. 292, 303 (1993) (fundamental liberty interests must be “so rooted in the traditions and con-

SCALIA, J., dissenting

science of our people as to be ranked as fundamental” (internal quotation marks and citations omitted); *United States v. Salerno*, 481 U. S. 739, 751 (1987) (same). See also *Michael H. v. Gerald D.*, 491 U. S. 110, 122 (1989) (“[W]e have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ . . . but also that it be an interest traditionally protected by our society”); *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923) (Fourteenth Amendment protects “those privileges *long recognized at common law* as essential to the orderly pursuit of happiness by free men” (emphasis added)).³ All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

Bowers held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a “fundamental right” under the Due Process Clause, 478 U. S., at 191–194. Noting that “[p]roscriptions against that conduct have ancient roots,” *id.*, at 192, that “[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights,” *ibid.*, and that many States had retained their bans on sodomy, *id.*,

³ The Court is quite right that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,” *ante*, at 11. An asserted “fundamental liberty interest” must not only be “deeply rooted in this Nation’s history and tradition,” *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997), but it must *also* be “implicit in the concept of ordered liberty,” so that “neither liberty nor justice would exist if [it] were sacrificed,” *ibid.* Moreover, liberty interests unsupported by history and tradition, though not deserving of “heightened scrutiny,” are *still* protected from state laws that are not rationally related to any legitimate state interest. *Id.*, at 722. As I proceed to discuss, it is this latter principle that the Court applies in the present case.

SCALIA, J., dissenting

at 193, *Bowers* concluded that a right to engage in homosexual sodomy was not “‘deeply rooted in this Nation’s history and tradition,’” *id.*, at 192.

The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a “fundamental right” or a “fundamental liberty interest,” nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is “‘deeply rooted in this Nation’s history and tradition,’” the Court concludes that the application of Texas’s statute to petitioners’ conduct fails the rational-basis test, and overrules *Bowers*’ holding to the contrary, see *id.*, at 196. “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Ante*, at 18.

I shall address that rational-basis holding presently. First, however, I address some aspersions that the Court casts upon *Bowers*’ conclusion that homosexual sodomy is not a “fundamental right”—even though, as I have said, the Court does not have the boldness to reverse that conclusion.

III

The Court’s description of “the state of the law” at the time of *Bowers* only confirms that *Bowers* was right. *Ante*, at 5. The Court points to *Griswold v. Connecticut*, 381 U. S. 479, 481–482 (1965). But that case *expressly disclaimed* any reliance on the doctrine of “substantive due process,” and grounded the so-called “right to privacy” in penumbras of constitutional provisions *other than* the Due Process Clause. *Eisenstadt v. Baird*, 405 U. S. 438 (1972), likewise had nothing to do with “substantive due process”; it invalidated a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons solely on the basis of the Equal Protection Clause. Of course *Eisenstadt* contains well known dictum relating to the “right to

SCALIA, J., dissenting

privacy,” but this referred to the right recognized in *Griswold*—a right penumbral to the *specific* guarantees in the Bill of Rights, and not a “substantive due process” right.

Roe v. Wade recognized that the right to abort an unborn child was a “fundamental right” protected by the Due Process Clause. 410 U. S., at 155. The *Roe* Court, however, made no attempt to establish that this right was “deeply rooted in this Nation’s history and tradition”; instead, it based its conclusion that “the Fourteenth Amendment’s concept of personal liberty . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” on its own normative judgment that anti-abortion laws were undesirable. See *id.*, at 153. We have since rejected *Roe*’s holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see *Planned Parenthood v. Casey*, 505 U. S., at 876 (joint opinion of O’CONNOR, KENNEDY, and SOUTER, JJ.); *id.*, at 951–953 (REHNQUIST, C. J., concurring in judgment in part and dissenting in part)—and thus, by logical implication, *Roe*’s holding that the right to abort an unborn child is a “fundamental right.” See 505 U. S., at 843–912 (joint opinion of O’CONNOR, KENNEDY, and SOUTER, JJ.) (not once describing abortion as a “fundamental right” or a “fundamental liberty interest”).

After discussing the history of antisodomy laws, *ante*, at 7–10, the Court proclaims that, “it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter,” *ante*, at 7. This observation in no way casts into doubt the “definitive [historical] conclusion,” *id.*, on which *Bowers* relied: that our Nation has a longstanding history of laws prohibiting *sodomy in general*—regardless of whether it was performed by same-sex or opposite-sex couples:

“It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to

SCALIA, J., dissenting

engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. *Sodomy* was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had *criminal sodomy laws*. In fact, until 1961, all 50 States outlawed *sodomy*, and today, 24 States and the District of Columbia continue to provide criminal penalties for *sodomy* performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.” 478 U. S., at 192–194 (citations and footnotes omitted; emphasis added).

It is (as *Bowers* recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were “directed at homosexual conduct as a distinct matter.” *Ante*, at 7. Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it *was* criminalized—which suffices to establish that homosexual sodomy is not a right “deeply rooted in our Nation’s history and tradition.” The Court today agrees that homosexual sodomy was criminalized and thus does not dispute the facts on which *Bowers* *actually* relied.

Next the Court makes the claim, again unsupported by any citations, that “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.” *Ante*, at 8. The key qualifier here is “acting in private”—since the Court admits that sodomy laws *were* enforced against consenting adults (although the Court contends that prosecutions were “infrequent,” *ante*, at 9).

SCALIA, J., dissenting

I do not know what “acting in private” means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by “acting in private” is “on private premises, with the doors closed and windows covered,” it is entirely unsurprising that evidence of enforcement would be hard to come by. (Imagine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring.) Surely that lack of evidence would not sustain the proposition that consensual sodomy on private premises with the doors closed and windows covered was regarded as a “fundamental right,” even though all other consensual sodomy was criminalized. There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880–1995. See W. Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* 375 (1999) (hereinafter *Gaylaw*). There are also records of 20 sodomy prosecutions and 4 executions during the colonial period. J. Katz, *Gay/Lesbian Almanac* 29, 58, 663 (1983). *Bowers*’ conclusion that homosexual sodomy is not a fundamental right “deeply rooted in this Nation’s history and tradition” is utterly unassailable.

Realizing that fact, the Court instead says: “[W]e think that our laws and traditions in the past half century are of most relevance here. These references show *an emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*.” *Ante*, at 11 (emphasis added). Apart from the fact that such an “emerging awareness” does not establish a “fundamental right,” the statement is factually false. States continue to prosecute all sorts of crimes by adults “in matters pertaining to sex”: prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced “in

SCALIA, J., dissenting

the past half century,” in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. Gaylaw 375. In relying, for evidence of an “emerging recognition,” upon the American Law Institute’s 1955 recommendation not to criminalize “‘consensual sexual relations conducted in private,’” *ante*, at 11, the Court ignores the fact that this recommendation was “a point of resistance in most of the states that considered adopting the Model Penal Code.” Gaylaw 159.

In any event, an “emerging awareness” is by definition not “deeply rooted in this Nation’s history and tradition[s],” as we have said “fundamental right” status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on “values we share with a wider civilization,” *ante*, at 16, but rather rejected the claimed right to sodomy on the ground that such a right was not “‘deeply rooted in *this Nation’s* history and tradition,” 478 U. S., at 193–194 (emphasis added). *Bowers’* rational-basis holding is likewise devoid of any reliance on the views of a “wider civilization,” see *id.*, at 196. The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.” *Foster v. Florida*, 537 U. S. 990, n. (2002) (THOMAS, J., concurring in denial of certiorari).

IV

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so

SCALIA, J., dissenting

out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable,” *Bowers, supra*, at 196—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, “furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual,” *ante*, at 18 (emphasis added). The Court embraces instead JUSTICE STEVENS’ declaration in his *Bowers* dissent, that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,” *ante*, at 17. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

V

Finally, I turn to petitioners’ equal-protection challenge, which no Member of the Court save JUSTICE O’CONNOR, *ante*, at 1 (opinion concurring in judgment), embraces: On its face §21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, §21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protec-

SCALIA, J., dissenting

tion, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

The objection is made, however, that the antimiscegenation laws invalidated in *Loving v. Virginia*, 388 U. S. 1, 8 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the *partner* was concerned. In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was “designed to maintain White Supremacy.” *Id.*, at 6, 11. A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. See *Washington v. Davis*, 426 U. S. 229, 241–242 (1976). No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society’s belief that certain forms of sexual behavior are “immoral and unacceptable,” 478 U. S., at 196. This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.

JUSTICE O’CONNOR argues that the discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor.

“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas’ sodomy law is targeted at more

SCALIA, J., dissenting

than conduct. It is instead directed toward gay persons as a class.” *Ante*, at 5.

Of course the same could be said of any law. A law against public nudity targets “the conduct that is closely correlated with being a nudist,” and hence “is targeted at more than conduct”; it is “directed toward nudists as a class.” But be that as it may. Even if the Texas law *does* deny equal protection to “homosexuals as a class,” that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.

JUSTICE O’CONNOR simply decrees application of “a more searching form of rational basis review” to the Texas statute. *Ante*, at 2. The cases she cites do not recognize such a standard, and reach their conclusions only after finding, as required by conventional rational-basis analysis, that no conceivable legitimate state interest supports the classification at issue. See *Romer v. Evans*, 517 U. S., at 635; *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 448–450 (1985); *Department of Agriculture v. Moreno*, 413 U. S. 528, 534–538 (1973). Nor does JUSTICE O’CONNOR explain precisely what her “more searching form” of rational-basis review consists of. It must at least mean, however, that laws exhibiting “a . . . desire to harm a politically unpopular group,” *ante*, at 2, are invalid *even though* there may be a conceivable rational basis to support them.

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. JUSTICE O’CONNOR seeks to preserve them by the conclusory statement that “preserving the traditional institution of marriage” is a legitimate state interest. *Ante*, at 7. But “preserving the traditional institution of marriage” is just a kinder way of describing the State’s *moral disapproval* of same-sex couples. Texas’s interest in §21.06 could be

SCALIA, J., dissenting

recast in similarly euphemistic terms: “preserving the traditional sexual mores of our society.” In the jurisprudence JUSTICE O’CONNOR has seemingly created, judges can validate laws by characterizing them as “preserving the traditions of society” (good); or invalidate them by characterizing them as “expressing moral disapproval” (bad).

* * *

Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See *Romer, supra*, at 653.

One of the most revealing statements in today’s opinion is the Court’s grim warning that the criminalization of homosexual conduct is “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” *Ante*, at 14. It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it

SCALIA, J., dissenting

as “discrimination” which it is the function of our judgments to deter. So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream”; that in most States what the Court calls “discrimination” against those who engage in homosexual acts is perfectly legal; that proposals to ban such “discrimination” under Title VII have repeatedly been rejected by Congress, see Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H. R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such “discrimination” is *mandated* by federal statute, see 10 U. S. C. §654(b)(1) (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such “discrimination” is a constitutional right, see *Boy Scouts of America v. Dale*, 530 U. S. 640 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic

SCALIA, J., dissenting

change. It is indeed true that “later generations can see that laws once thought necessary and proper in fact serve only to oppress,” *ante*, at 18; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See *Halpern v. Toronto*, 2003 WL 34950 (Ontario Ct. App.); Cohen, *Dozens in Canada Follow Gay Couple’s Lead*, *Washington Post*, June 12, 2003, p. A25. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Ante*, at 17. Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court’s opinion, which notes the constitutional protections afforded to “personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,” and then declares that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” *Ante*, at 13 (emphasis added). Today’s opinion dismantles the structure of constitutional law that

SCALIA, J., dissenting

has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, *ante*, at 18; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen 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,” *ante*, at 6; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution,” *ibid.*? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

The matters appropriate for this Court’s resolution are only three: Texas’s prohibition of sodomy neither infringes a “fundamental right” (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.