Reversed and Rendered and Majority and Dissenting Opinions filed June 8, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00109-CR
NO. 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER, Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause No. 98-48530 and 98-48531

M A J O R I T Y O P I N I O N

Appellants, John Geddes Lawrence (Lawrence) and Tyron Garner (Garner), were charged with violating section 21.06 of the Texas Penal Code. Appellants pleaded *nolo contendere* and were fined $200 each. Lawrence and Garner bring this appeal, arguing their convictions should be reversed on both federal and state constitutional grounds. We reverse the judgments of the trial court, dismiss the complaints, and render judgments of acquittal.

I.
Factual and Procedural Background

Responding to a report of an armed intruder, police officers entered Lawrence's home, and found Lawrence and Garner engaged in sodomy. Because both participants were of the same sex, the officers arrested the two men for violating section 21.06 of the Texas Penal Code. Initially, Lawrence and Garner were charged by complaints in Harris County Justice Court and were convicted of engaging in homosexual conduct, and each was fined $125. They immediately appealed their case to the Harris County Criminal Court at Law, Number 10, a court of record, where the court denied their motions to quash their complaints on due process and equal protection grounds. After accepting their plea of *nolo contendere*, the trial court fined them $200 each.

On appeal, Lawrence and Garner challenge the constitutionality of section 21.06 in four issues: (1) whether the statute violates the right to federal constitutional equal protection as applied and on its face; (2) whether the statute violates the right to state constitutional equal protection as applied and on its face; (3) whether the statute violates the appellants' right to privacy under the Texas Constitution, and (4) whether the statute violates the appellants' right to privacy under the United States Constitution.

II.
Scope of Review

We have considered all of appellants' points of error challenging section 21.06 and have concluded that their argument under the Texas Equal Rights Amendment is dispositive of this appeal. Therefore, we will not address appellants' federal right to privacy arguments. *See* TEX. R. APP. P. 47.1 (opinion must be as brief as practicable but address every issue necessary to final disposition of appeal); *see also Davenport v. Garcia*, 834 S.W.2d 4, 14 n.28 (Tex. 1992) (noting that where the court finds a statute to be unconstitutional under the Texas Constitution, consideration of the federal constitutional question is unnecessary). Moreover, because the Texas Equal Rights Amendment is more extensive and provides more specific protection than the United States equal protection guarantee, we will not address

appellants' federal equal protection argument. *See In Re Unnamed Baby McLean*, 725 S.W.2d 696, 698 (Tex. 1987). Finally, because, as noted in part III below, another Texas appellate court has addressed the conflict between section 21.06 and the right of privacy in the Texas Bill of Rights, we will not reexamine that issue.

III.

Texas' Equal Protection

We begin by noting another Texas appellate court has twice declared this statute unconstitutional. *See City of Dallas v. England*, 846 S.W.2d 957 (Tex. App.—Austin 1993, writ dism'd w.o.j.); *see also State v. Morales*, 826 S.W.2d 201 (Tex. App.—Austin 1992, *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994). The *Morales* court found the statute violated the appellees' right of privacy guaranteed by the Texas Constitution, and that court subsequently applied the holding in *Morales* to again invalidate the statute. *See England*, 846 S.W.2d at 958.[1] However, the Texas Supreme Court may have significantly undermined the privacy right announced in *Morales* and *England*. Three years after *England*, the Texas Supreme Court, borrowing heavily from *Bowers v. Hardwick*, 478 U.S. 186 (1986), denied the existence of an asserted privacy right by insisting that the appellant's conduct was "not a right implicit in the concept of liberty in Texas or deeply rooted in this state's history and tradition." *See Henry v. City of Sherman*, 928 S.W.2d 464, 470 (1996). Although the Supreme Court never mentioned *Morales* or *England*, its holding clearly implicated the analysis in both cases. For this reason, we limit our analysis to the Texas Equal Rights Amendment.

A. The Arguments

The Texas Equal Rights Amendment (ERA) provides that, "[e]quality under the law shall not be

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[1] Other states that have recently struck down their own homosexual or heterosexual sodomy statutes have done so for the same reason given by the *Morales* court, the right to privacy as protected under each state constitution. *See Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App.—Nashville 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (striking statute on both privacy and equal protection grounds). We look to sibling state jurisprudence as persuasive, but not controlling, authority in our constitutional analysis following the dictates of *Autran v. State*, 887 S.W.2d 31, 37 n.6 (Tex. Crim. App. 1994).

denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST. Art. I, § 3a. Lawrence and Garner assert that section 21.06 of the Penal Code violates the Texas ERA because it proscribes otherwise lawful behavior solely on the basis of the sex of the participants. The challenged statute, bearing the heading "Homosexual Conduct," states: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. [and] (b) An offense under this statute is a Class C misdemeanor." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). "Deviate sexual intercourse" is defined as: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object. *See* TEX. PEN. CODE ANN. § 21.01 (Vernon 1994).[2]

Appellants argue this statute violates the Texas ERA because the same behavior, sodomy, is legal when performed by members of the opposite sex, but illegal when performed by members of the same sex. Thus, the statute criminalizes the conduct solely on the basis of the sex of the participants, thereby violating the Texas ERA prohibition against denying equality under the law on the basis of sex. *See* TEX. CONST. Art. I, § 3a. The State counters this argument first by arguing the State has a legitimate interest in regulating this behavior, and second, that the statute does not discriminate on the basis of gender because the statute is applicable to both men and women.

B. Standard of Review

When a court reviews the constitutionality of a statute, it presumes that the statute is valid. *See HL Farm Corp. v. Self*, 877 S.W.2d 288, 290 (Tex. 1994). If interests other than fundamental rights or a suspect classification are affected, the classification must be rationally related to a legitimate state interest. *See id*. However, "our reading of the Equal Rights Amendment elevates sex to a suspect classification. Sex is clearly listed in the amendment along with other classifications afforded maximum constitutional protection." *McLean*, 725 S.W.2d at 698. Therefore, any classification based upon sex is a suspect classification, and any law or regulation that classifies persons for different treatment on the basis of their

[2] In this opinion, we refer to "deviate sexual intercourse" as sodomy. "Sodomy" while variously defined in state criminal statutes, is generally oral or anal copulation between humans. *See* BLACK'S LAW DICTIONARY 1391 (6th ed. 1990).

sex is subject to strict judicial scrutiny. *See Mercer v. Board of Trustees, North Forest Indep. Sch. Dist.*, 538 S.W.2d 201, 206 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). Thus, "any such classification must fall unless the party defending it can show that it is required by (1) physical characteristics, (2) other constitutionally protected rights such as the right of privacy, or (3) other 'compelling reasons.'" *Id.*[3]

C. Analysis

"The first step in a case invoking [the Texas ERA] is to determine whether equality under the law has been denied." *McLean*, 725 S.W.2d at 697.[4] Our next inquiry is whether equality was denied *because of* a person's membership in a protected class of sex, race, color, creed, or national origin. *See id.* Thus, our task becomes an examination of the relevant provisions of the penal code to determine whether Lawrence and Garner are treated differently from others who engage in this activity, solely on the basis of their sex.

Here, the first inquiry is relatively simple. The denial of equality is clearly "under the law" because Lawrence and Garner were prosecuted pursuant to section 21.06 of the Texas Penal Code. *See McLean*, 725 S.W.2d at 697 (noting disparate treatment of illegitimate child's father and mother was required by statute contained in Texas' Family Code, thus the denial of equality was "under the law.").

The second inquiry, however, is more complex. As presently constituted, the penal code proscribes sodomy only when performed between individuals of the same sex. *See* TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). This, however, was not always the case. Until 1974, the penal code

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[3] We do not address the first *Mercer* prong because, here, the State never offered any evidence of differing specific physical characteristics of females and males that would serve to vindicate the challenged classification. *See Mercer*, 538 S.W.2d at 206. Neither do we address the second inasmuch as the State does not contend that enforcement of the protection afforded by the ERA would conflict with other fundamental constitutional protections. Therefore, our analysis is limited to the third prong, requiring the State to demonstrate "compelling reasons" for its sex-based classification. *See id.*

[4] *McLean* is the leading case addressing the ERA. The dissent fails to advert to the analysis used there by the Supreme Court. However, *McLean* does not address, as the dissent does, the intent of the ratifiers of the ERA.

prohibited oral or anal copulation "with another human being."[5] Thus, the statute prohibited all acts of sodomy, whether performed by members of the opposite or the same sex. *See Pruett v. State*, 463 S.W.2d 191, 193 (Tex. Crim. App. 1970). In 1974, a new penal code was enacted, and as part of a comprehensive reform, many laws concerning sexual behavior were either revised or dropped from the code altogether. *See Baker v. Wade*, 553 F.Supp.1121, 1151 app. A (N.D. Texas 1982). Thus, prohibitions against adultery, fornication, and seduction on promise of marriage no longer existed. *See id*. More importantly for our purposes, although sodomy performed by members of the same sex continued to be proscribed, the same act performed by members of the opposite sex became, for the first time in 114 years, legal. *See id*. at 1148-50.

Therefore, in 1973[6], the Texas Legislature created two standards, demarcated by the sex of the actors: oral and anal intercourse when performed by a man and a woman would henceforth be legal, but oral and anal intercourse performed by two men or two women would remain illegal. Thus, after 1974, the distinction between legal and illegal conduct was not the act, but rather the sex of one of the participants. Accordingly, we must respond to our second inquiry in the affirmative: Lawrence and Garner are treated differently from others who engage in this activity, solely on the basis of their sex.

Having reached the conclusion that section 21.06 discriminates on the basis of gender, we next focus on whether the discrimination is prohibited by the ERA. *See McLean*, 725 S.W.2d at 697. Because not all gender-based distinctions are prohibited by the ERA, a *per se* standard invalidating all

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[5] Article 524 provided as follows:

> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.

Acts 1943, 48th Leg., ch. 112, § 1, *repealed by* Acts 1973, 63rd Leg., ch. 399, §1, 1973 Tex. Gen. Laws 917.

[6] Convening in 1973, the 63rd Legislature, passed the revised Penal Code which was enacted in 1974. Acts 1973, 63rd Leg., ch. 399, §1, 1973 Tex. Gen. Laws 917.

such distinctions is inappropriate. *See id*. at 698. Rather, the standard is one recognizing the ERA does not yield except to compelling state interests. *See id*. Thus, sex-based discrimination is allowed only when the proponent of the discrimination can prove there is no other manner to protect the state's compelling interest. *See id*. Surprisingly, counsel for the State conceded at oral argument that he could not "even see how he could begin to frame an argument that there was a compelling State interest," much less demonstrate that interest for this Court. The State did offer, however, what it characterized as *legitimate* purposes for the statute: enforcement of principles of morality and promotion of family values.[7] Moreover, the State asserts the strict scrutiny we have applied is unwarranted because the statute does not discriminate on the basis of gender since it applies to men and women equally.

The United States Supreme Court discussed the logic of an argument analogous to the State's argument here in *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817,18 L.Ed.2d 1010 (1967). There, the State of Virginia argued that Virginia's miscegenation statutes do not constitute invidious racial discrimination because the statutes apply equally to whites and blacks. *See Loving*, 388 U.S. at 8. The miscegenation statutes, the State contended, penalized both whites who intermarried and blacks who intermarried equally; therefore, the 'equal application' of the statutes rendered them acceptable under the Fourteenth Amendment using a rational basis standard. *See id*. Rejecting this sophistry, the Court responded that the mere equal application of a statute containing racial classifications does not remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations. *See id*. at 8. By using the race of an individual as the sole determinant of the criminality of his conduct the State created and perpetuated an invidious racial classification in violation of the Fourteenth Amendment. *See id*. at 11. Accordingly, the Court reaffirmed the propriety of strict scrutiny and struck the Virginia statutes as unconstitutional. *See id*. at 12.

We also reject the equal application argument offered here. Merely punishing men who engage in sodomy with other men and women who engage in sodomy with other women equally, does not salvage

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[7] It is not enough for the State to say it has an important interest furthered by the discriminatory law because even the loftiest goal does not justify sex-based discrimination in light of the ERA's clear prohibition. *See McLean*, 725 S.W.2d at 698.

the discriminatory classification contained in this statute. The simple fact is, the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior. In other words, the sex of the individual is the sole determinant of the criminality of the conduct. Applying strict scrutiny to this sex-based classification, and in the absence of any showing by the State of a compelling interest justifying the sex-based discrimination, we hold that section 21.06 of the Texas Penal Code violates the Texas Equal Rights Amendment's guarantee of equality under the law.[8]

Federal precedent is not controlling when courts consider a case under the Texas Equal Rights Amendment. *See McLean*, 725 S.W.2d at 697. Indeed, it is fundamental that state courts be left free and unfettered by the United States Supreme Court in interpreting their state Constitutions. *See Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940). Our decision is based on adequate and independent state grounds, and any federal cases are used for guidance only and do not themselves compel the result this court has reached. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). As set forth

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[8] The dissent disagrees with this holding; therefore, we will briefly respond. First, the dissent contends the history of the Texas ERA "suggests the people of this state intended to grant to women the same rights as those already enjoyed by men, not to abolish criminal sanctions imposed for homosexual conduct." The dissent's reliance on the intent of the ratifiers is misguided for one simple reason: "homosexual conduct" was not criminalized at the time of the ERA's ratification in 1972 because in 1972 the prohibition against sodomy applied to all individuals, regardless of their sex. Therefore, the equality mandated by the ERA was not contravened by the then-existing sodomy statute, and whether today's reading of the ERA was foreseen and rejected by Texas voters at the time of its ratification is raw conjecture. *Cf. Meraz v. State*, 785 S.W.2d 146, 153 (Tex. Crim. App. 1990) (noting the effect of voter approval of a 1978 amendment to Article V, section 6 of the Texas Constitution confirmed authority of court of appeals to determine if a jury finding is against the great weight and preponderance of the evidence, *whether the public knew it or not*). Second, the Texas Supreme Court has repeatedly explained that when interpreting the Constitution, "[w]e seek its meaning with the understanding that the Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time." *Davenport*, 834 S.W.2d at 19. For that reason, when interpreting our state Constitution, we rely heavily on its literal texts, and are to give effect to its plain language. *See The Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89 (1997). Today, we interpret the ERA's plain language to strike down the codified discrimination explicit in the penal code's proscription of "deviate sexual intercourse," the "sex act" at issue, based solely upon the gender of one's sexual partner. Finally, we believe it is not the judiciary's prerogative to condone or condemn a particular lifestyle and the behaviors associated therewith upon the basis of our moral belief. Moreover, it does not follow that simply because the Texas Legislature has enacted as law what may be a moral choice of the majority, the courts are, thereafter, bound to simply acquiesce. *See Gryczan*, 942 P.2d at 125. Our Constitution does *not* protect morality; it does, however, guarantee equality to all persons under the law. *See* TEX. CONST. Art. I, § 3a.

above, our holding regarding the unconstitutionality of Penal Code section 21.06 is based solely on the Texas Equal Rights Amendment.[9]

We reverse the judgments of the trial court, dismiss the complaints, and render judgments of acquittal.

/s/ John S. Anderson
Justice

Judgment rendered and Majority and Dissenting Opinions filed June 8, 2000.

Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.

Publish — TEX. R. APP. P. 47.3(b).

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[9] The dissent relies upon the opinion in *Boutwell v. State*, 719 S.W.2d 164, 169 (Tex. Crim. App. 1985) as precedent for its argument that section 21.06 does not constitute sex-based discrimination. We disagree that *Boutwell* affects in any way our disposition of this appeal for three reasons. First, *Boutwell* was concerned not with the statute at issue here, but rather with another, repealed, statute containing a sex-based classification. That statute related to the defense of promiscuity which was available only to those defendants who sexually assaulted a child of the opposite sex. However, because the Legislature repealed the statute at issue in *Boutwell* and the Court of Criminal Appeals has since disavowed *Boutwell*, we do not consider it to have significant precedential value today. *See Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992). Second, *Boutwell* mentioned section 21.06 in dicta as support for its rejection of Boutwell's argument that he was denied equal protection of the law by the unavailability of the promiscuity defense because he had assaulted a male child. The majority merely mentioned section 21.06 to demonstrate that the State had made homosexual conduct a crime, thus Boutwell's "sex act" was not a protected activity under the ERA. While this observation is interesting, it is of no moment here because the question at bar today is not whether the ERA protects homosexual conduct, but whether the criminalization of sodomy by same sex partners only can withstand scrutiny under the ERA. As discussed more fully above, we hold it can not. Third, in *Boutwell*, Judge Clinton effectively neutralized any value the opinion might have had regarding the constitutionality of section 21.06 by indicating that any constitutional infirmities infecting that statute were not considered by the court because they were not advanced by Boutwell in his appeal. *See id.* This is not the case here. Appellants Lawrence and Garner have effectively advanced both logic and authority for their constitutional attack on section 21.06. Based on these core distinctions, we will not, as the dissent has, apply the analysis in *Boutwell*.

Reversed and Rendered and Majority and Dissenting Opinions filed June 8, 2000.

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D I S S E N T I N G O P I N I O N

Because I do not believe the people of this state intended to decriminalize homosexual conduct when they approved the Texas Equal Rights Amendment, I respectfully dissent.[1]

The State of Texas contends that Section 21.06 of the Penal Code does not discriminate on the basis of gender because it applies equally to men and women, i.e., it is just as unlawful for men to engage in homosexual conduct as it is for women. The majority rejects the State's contention because a similar argument was rejected by the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967).

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[1] The amendment provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST. art. I, § 3a.

In *Loving*, the issue before the court was the constitutionality of Virginia's miscegenation statute which imposed severe criminal penalties for interracial marriage. The State of Virginia argued the statute did not discriminate on the basis of race because it applied with equal force to both whites and blacks, i.e., it was just as unlawful for a white person to marry a black person as it was for a black person to marry a white person. The court rejected the argument because it concluded the Equal Protection Clause of the Fourteenth Amendment was specifically intended to eliminate the type of racial discrimination inherent in Virginia's miscegenation statute. However, because the Texas Equal Rights Amendment was never intended to decriminalize homosexual conduct, *Loving* is distinguishable.

The Fourteenth Amendment was part of a series of proclamations, statutes, and amendments designed to eradicate slavery and any collateral discrimination incident thereto. In 1863, while the outcome of the civil war remained very much in doubt, President Lincoln issued his Emancipation Proclamation purporting to free slaves found within the confederate states. In 1865, just months after General Lee surrendered his forces at Appomattox, the Thirteenth Amendment was adopted; it declared that "neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." But while the abolition of slavery had been constitutionally mandated, former slaves were still subjected to serious abuses. Individual southern states began enacting the so-called Black Codes which were designed to repress their black citizens and very nearly resurrect the institution of slavery. *See City of Memphis v. Greene*, 451 U.S. 100, 132 (1981) (White, J., concurring).

In response to these events, the Republican Congress passed the Civil Rights Act of 1866 in an attempt to ensure equal rights for former slaves. *See General Bldgs. Contrs. Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982). In 1868, the Fourteenth Amendment was adopted and its Equal Protection Clause enjoined the states from denying to any person the equal protection of the laws. Finally, in 1870, the Fifteenth Amendment declared that the right of citizens to vote could not be denied or abridged on "the account of race, color, or previous condition of servitude.

Thus, the Fourteenth Amendment was part of a concerted effort to eliminate the lingering vestiges of slavery. In *Loving*, the Supreme Court traced the origins of Virginia's miscegenation statute and concluded that "[p]enalties for miscegenation arose as an incident to slavery." *Loving*, 388 U.S. at 6.

Because the clear and central purpose of the Fourteenth Amendment was "to eliminate all official state sources of invidious racial discrimination," the court determined the statute was unconstitutional. *Id*., at 10.

But while the original intendment of the Fourteenth Amendment validates its application to Virginia's miscegenation statute, appellants have produced no evidence to show the Texas Equal Rights Amendment was ever intended to decriminalize homosexual conduct. Rather, appellants contend we should blindly adhere to the bare words of the amendment, giving them absolute effect. The irony, of course, is that this is the very argument employed by those who sought to defeat the amendment almost thirty years ago. Opponents of the amendment, for example, theorized it would mandate the construction of unisex restrooms in schools and government buildings, prohibit the segregation of male and female prisoners, decriminalize homosexual conduct, and legalize same-sex marriages. Most supporters of the amendment not only rejected this construction, they ridiculed it.[2] Now, however, after time has begun to obscure the original intent of the amendment, what was considered a highly unlikely, if not farcical interpretation, has been embraced by the majority.

The Texas Constitution derives its force from the people of Texas. *See Edgewood Independent School Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989). Thus, the "preeminent goal of constitutional interpretation is to give effect to the intent of the people who adopted the constitution." *In the Interest of J.W.T.*, 872 S.W.2d 189, 205 (Tex. 1994).[3] In determining the meaning, intent and

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[2] A full decade after the amendment was adopted, one writer humorously observed:

> Despite predictions to the contrary, the sex equality provision of the Texas Equal Rights Amendment (Texas ERA) has not established unisex bathrooms, has not approved marriage between persons of the same sex, has not invalidated sex offenses, has not relieved husbands and fathers of support obligations to their wives and children, has not forced homemakers into the labor force, has not rendered Texans sexless, and has not destroyed the social fabric of the state. The Alamo still stands in San Antonio.

Rodric B. Schoen, *The Texas Equal Rights Amendment After the First Decade: Judicial Developments 1978-1982*, 20 HOUS. L. REV. 1321 (1982).

[3] "[T]he intention of the framers of a constitution is of but little importance–the real question being, what did the people intend by adopting [the constitutional] language submitted to them?" *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 585 (Tex. Crim. App. 1993) (quoting *Smissen v. State*, 71 Tex. 222, 9 S.W. 112, 116 (1888).

purpose of a constitutional provision, "the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished, are proper subjects of inquiry." *Markowsky v. Newman*, 136 S.W.2d 808, 813 (Tex. 1940). I believe the history and manifest purpose of the Texas Equal Rights Amendment compel a different result.

After a lengthy struggle for suffrage, women obtained the right to vote in 1920 with the ratification of the Nineteenth Amendment to the federal constitution.[4] Although this was an important milestone, women still did not enjoy all the legal rights afforded to men. Building upon their success, women sought to rectify these inequities as early as 1923 by way of an "equal rights amendment" to the federal constitution.[5] Although initial efforts were unsuccessful, Congress finally proposed such an amendment on March 22, 1972.[6] Needing the approval of 38 states for ratification, the passage of the federal equal rights amendment was, from the outset, uncertain. Undaunted, and proceeding simultaneously on "two fronts," efforts were made to add similar amendments to the state constitutions.

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[4] The amendment provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIX.

[5] Barbara Karkabi, *Equal Rights Amendment backers renew efforts,* HOUS. CHRON., Feb. 22, 1989, Houston Section, at 1.

[6] The proposed amendment stated:

> 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

John J. Sampson, *The Texas Equal Rights Amendment and the Family Code: Litigation Ahead,* 5 TEX. TECH L. REV. 631, 632 n.5 (1974)

In Texas, the 62nd Legislature proposed, by joint resolution, an equal rights amendment to the Texas Constitution and ordered that the proposition be placed on the ballot.[7] Although inclusion of the terms "race, color, creed, or national origin," in addition to "sex" made the proposed amendment broader than its federal counterpart, its fundamental purpose was identical to the federal equal rights amendment.[8] Stated simply, the goal of the federal equal rights amendment was to guarantee that "[m]en and women shall have equal rights under the law in the United States."[9] Thus, shortly before the election, the Houston Post referred to the Texas proposition as "the so-called women's rights amendment," and said the "amendment is designed to supplement the federal guarantees of equal treatment in the 14th Amendment and the Civil Rights Act."[10] The Dallas Morning News reported that the stated aim of both the state and federal equal rights amendments was "to prove that it is legitimate for women to try to do whatever they want" and put a stop to "men who have tried to keep women down."[11] Thus, when on November 7, 1972, the people of this state overwhelmingly approved the Texas Equal Rights Amendment, it was with the intent of promoting *equality* under the law as between men and women.

Although appellants have attempted to frame their challenge to Section 21.06 of the Penal Code in terms of gender discrimination, their true ground for complaint is that the statute criminalizes certain homosexual conduct that, in a heterosexual setting, would be perfectly legal. However, homosexual conduct is not a constitutionally protected liberty interest, nor do homosexuals constitute a suspect or quasi-suspect class. *See Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985). More importantly, the

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[7] The ballot proposal stated:

> The constitutional amendment to provide that equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.

Tex. S.J. Res. 16, 62nd Leg., R.S., 1971 Tex. Gen. Laws 4129.

[8] Sampson, at 633.

[9] Karkabi, at 1.

[10] *Post/Commentary*, HOUS. POST, Nov. 4, 1972, at 6/B.

[11] Kay Crosby Ellis, *Stamp of legitimacy for women necessary*, DALLAS MORNING NEWS, Nov. 4, 1972, at 4/C.

history of the Texas Equal Rights Amendment suggests the people of this state intended to grant to women the same rights as those already enjoyed by men, not to abolish criminal sanctions imposed for homosexual conduct.

Accordingly, I believe the State's argument has merit; the so-called sodomy statute does not violate the Texas Equal Rights Amendment because it does not discriminate on account of gender. Moreover, the State's position cannot be rejected simply because a similar argument was, in a different context, rejected in by the Supreme Court in *Loving v. Virginia*. In fact, long after the decision in *Loving*, the Texas Court of Criminal Appeals adopted the same argument advanced here. *See Boutwell v. State*, 719 S.W.2d 164, 169 (Tex. Crim. App. 1985).

In *Boutwell*, the Court of Criminal Appeals considered the applicability of the Texas Equal Rights Amendment to Section 21.10 of the Penal Code. Until its repeal in 1983, the statute provided legal defenses to certain heterosexual acts that were specifically denied in the context of homosexual acts. The statute provided:

> A person commits an offense if, with the intent to arouse or gratify the sexual desire of any person, he engages in deviate sexual intercourse with a child, not his spouse, whether the child is of the same or opposite sex, and the child is younger than 17 years.
>
> It is a defense to prosecution under this section that *the child was of the opposite sex*, was at the time of the alleged offense 14 years or older, and had, prior to the alleged offense, engaged promiscuously in sexual intercourse or deviate sexual intercourse.
>
> It is an affirmative defense to prosecution under this section that *the actor was of the opposite sex* and was not more than two years older than the victim.

Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 21.10, 1973 Tex. Gen. Laws 918. (Emphasis added). When Lester Boutwell was charged with sexual abuse of several boys, he argued the above statute was unconstitutional under the Texas Equal Rights Amendment because it discriminated against him on the basis of sex. *See Boutwell*, 719 S.W.2d at 167. The Court of Criminal Appeals rejected the contention, stating:

> But clearly, a female defendant situated similarly to appellant—that is, a female who had engaged in deviate sexual intercourse with a child 14

> years or older who was of the same sex—would likewise be denied the "promiscuity" defense under § 21.10. Thus, appellant's reasoning proceeds upon a fallacy of amphiboly: his complaint is not that he is discriminated against on the basis of "sex" in the sense of "gender;" but rather, that his "sex" *act* is entitled to protection equal to that given heterosexual conduct under the law as stated in § 21.10(b).

Id. at 169; *see also Boulding v. State*, 719 S.W.2d 333 (Tex. Crim. App. 1986).[12]

In a slightly different context, appellants' argument has also been rejected by the Washington Court of Appeals. *See Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974, pet. denied). When two men were denied a marriage license in the State of Washington, they challenged the constitutionality of the prohibition on the basis that such prohibition violated the Washington Equal Rights Amendment. *Id*. Like the Texas Constitution, the Washington amendment provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." *Id*. at 1190.[13]

The Washington court rejected the contention on the theory that the approval of the ERA by the people of Washington did not reflect any intention on their part to offer homosexual couples the protection of marriage laws. *Id*. at 1193-94. Rather, the court held that "the purpose of the ERA is to provide the legal protection, as between men and women, that apparently is missing from the state and federal Bills of Rights, and it is in light of that purpose that the language of the ERA must be construed." *Id*. at 1194. Holding that the primary purpose of the ERA is to overcome discriminatory legal treatment as between men and women on account of sex, the court wrote:

> To accept the appellants' contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages would be to subvert the purpose for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment.

Id.

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[12] *Boutwell* has been severely criticized, but on different grounds than those at issue here. *See McGlothlin v. State*, 848 S.W.2d 139, 138 (Tex. Crim. App. 1992); *Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992).

[13] The same argument advanced by appellants applies equally well against this state's prohibition of same-sex marriages. *See* TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998).

I have no quarrel with the majority's conclusion that gender is a "suspect classification" under the Texas Equal Rights Amendment. *See Barber v. Colorado I.S.D.*, 901 S.W.2d 447, 452 (Tex. 1995). However, I do not believe Section 21.06 of the Penal Code discriminates on the basis of gender, but only on the basis of sex acts that the people of this state did not intend to include within the ambit of the amendment. To the extent the statute discriminates against homosexuals, the statute is valid if the State can show it is rationally related to any legitimate state interest.

One fundamental purpose of government is "to conserve the moral forces of society." *See Grigsby v. State*, 105 Tex. 597, 153 S.W. 1124, 1129 (Tex. 1913). Thus, the state is charged with the responsibility of protecting virtue and restraining evil. While the morality of homosexual conduct is much debated, the Legislature has considered the issue and deemed the conduct to be iniquitous. This determination rests with the Legislature alone—the courts may intervene only if the decision is clearly arbitrary or unreasonable. Here, the Legislature's decision, far from being arbitrary, is bolstered by considerable historical precedent.

In his sixteenth-century magnum opus on the essence of law, Montesquieu observes that "the crime against nature" is a "crime, which religion, morality, and civil government equally condemn."[14] Certainly, sodomy is severely denounced in the orthodox doctrines of both Judaism and Christianity.[15] Likewise, governments have long attempted to repress homosexual behavior. Under Roman law, Justinian states that the lex Iulia imposed severe criminal penalties against "those who indulge in criminal intercourse with those of their own sex."[16] Blackstone states that the "infamous crime against nature, committed either with man

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[14] 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 231 (Dublin 1751).

[15] After condemning incest and adultery, the Book of Leviticus states: "Do not lie with a man as one lies with a woman; that is detestable." *Leviticus* 18:22 (New International). Similar condemnations are found in the New Testament, as well. *See* 1 *Corinthians* 6:10.

[16] *See* FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN 205 (J. B. Moyle trans., 5th ed., Oxford 1913).

or beast" was a grave offense among the ancient Goths and that it continued to be so under English common law at the time of his writing.[17]

In America, homosexual conduct was classified as a felony offense from the time of early colonization.[18] Further, in Texas, homosexual conduct has been a criminal offense for well over a century.[19] In fact, there was such unanimity of condemnation that sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia. *See Bowers v. Hardwick*, 478 U.S. 186, 193 (1986).

Historical abhorrence of homosexual conduct is not, of course, necessarily derived from, nor does it constitute proof of, the moral or immoral character of the activity. If good and evil are to be anything other than relative, highly mutable concepts, they must rest upon divinely instituted principles. Thus, secular laws based upon moral rectitude can rarely, if ever, be justified by physical proofs which no one can dispute; what some hold as moral insight will always be dismissed by others as mere prejudice. Nevertheless, most, if not all, of our law is "based on notions of morality." *See Bowers*, 478 U.S. at 196. The legislature has outlawed behavior ranging from murder to prostitution precisely because it deemed these activities to be moral transgressions. Even our civil law is based on concepts of fairness derived from a moral understanding of right and wrong. While it is by no means infallible in its ethical judgments, the Legislature is charged with the responsibility of preserving the morals of a civil society. Thus, the police power of a state may be legitimately exerted in the form of legislation where such statute bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. *See Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111-12 (1928).

The modern trend in the law has been to decriminalize all forms of consensual sexual conduct even though such behavior may be widely and justifiably perceived as immoral. Whether this trend will ultimately encompass homosexual conduct remains to be seen. Like former criminal prohibitions against adultery and

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[17] 4 WILLIAM BLACKSTONE, COMMENTARIES *215-16.

[18] *See* LAWS AND LIBERTIES 5 (Cambridge 1648) (collection of the general laws of the Massachusetts Bay Colony).

[19] *See* Tex. Penal Code art. 342 (1879); Tex. Penal Code art. 364 (1895); Tex. Penal Code art. 507 (1911); and Tex. Penal Code art. 524 (1925).

fornication, the Legislature may ultimately choose to repeal the criminal sanctions now imposed against homosexual conduct. On the other hand, to preserve fundamental morals, the Legislature may choose to not only retain the sanctions against homosexual conduct, but also reinstate penalties for other forms of consensual sexual conduct that are currently permissible under the law. In other words, such decisions are the prerogative of the Legislature alone—they should not be imposed by judicial fiat. As a court, we must presume the legislature has correctly assessed the moral repugnance of activities it has chosen to penalize with criminal sanctions. Accordingly, we must assume for the purposes of our analysis that homosexual conduct is morally reprehensible.

I believe the State of Texas has demonstrated it has a legitimate state interest in criminalizing homosexual conduct because (1) it is charged with the responsibility of preserving the public morals, and (2) homosexual conduct represents a gross deviation from historical perceptions of morality. Therefore, I must respectfully dissent.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed June 8, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Publish — TEX. R. APP. P. 47.3(b).