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Lawrence v Texas

Democracy, The Supreme Court, and Freedom

Introducing the Debate Over Judicial Review

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HE LANDMARK 2003 SUPREME COURT CASE *LAWRENCE V Texas* declared unconstitutional Texas Penal Code § 21.06, which had made it a class C misdemeanor to “[engage] in deviate sexual intercourse with another individual of the same sex.”[[1]](#endnote-1) It was the first Supreme Court case to deal with the constitutionality of a sodomy law that targeted homosexual sex and discriminated directly against gays.[[2]](#endnote-2) In *Lawrence,* two men were charged for having anal sex in one of the men’s homes. Justice Anthony Kennedy wrote the majority opinion, arguing the sodomy law had violated the individuals’ “exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”[[3]](#endnote-3) In this ruling, the court overturned the majority in the state of Texas. Justice Antonin Scalia, in his dissenting opinion, disagreed with his fellow judges in this decision to overrule the majority, contributing the following:

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 change … 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.[[4]](#endnote-4)

Scalia’s position here is fairly straightforward: imposing a view against the majority’s will is, at its heart, antagonistic to the democratic system. Scalia suggests the Court’s decision goes against our democratic values and is therefore unjustified. This view is in direct opposition to Kennedy’s opinion that because the law was in violation of individual liberty, it is in fact the Court’s responsibility to overturn it. It would seem, then, that the debate inherent in *Lawrence v Texas* goes beyond the immediate issue of homosexuality. Indeed, the debate between Justices Kennedy and Scalia in this case introduces a larger question: is judicial review, the kind regularly exercised by both the Court of Appeals and the Supreme Court, ultimately democratic? In other words, does a committee of nine justices adjudicating the political decisions of the country’s majority enhance or diminish our democratic system?

This question is relevant to modern-day scholars of political philosophy since it regards the very legitimacy of judicial review itself, especially as it is defined within a democratic system like our own. Two thinkers at the forefront of this academic debate encapsulate the opposing viewpoints of that larger question: on the one hand we have Jeremy Waldron, who holds that courts should not overrule the views of the majority; and on the other hand we have Ronald Dworkin, who believes that the courts must assess the constitutionality of the majority. Waldron’s view is therefore similar to that expressed by Justice Scalia. That is, Waldron understands judicial review as inherently undemocratic when it goes against the opinion of the majority. In Waldron’s words, “there is something lost, from a democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires.”[[5]](#endnote-5) Dworkin, however, believes that judicial review has a rightful place within a democracy. He calls Waldron’s view of democracy the “majoritarian” conception of democracy, because it is based purely on the idea that “the decision reached is the decision that a majority or plurality of citizens favors.”[[6]](#endnote-6) Therefore, under this conception of democracy, any decision the Supreme Court reaches constitutes an undemocratic position, since it was not decided upon by a majority of citizens. Dworkin’s own view of democracy might be understood as “constitutional,” meaning a democracy must meet certain constitutional conditions that preserve equal concern for all individuals.[[7]](#endnote-7) Under this conception, judicial review is democratic because it ensures that these democratic conditions are met. For Dworkin, judicial review actually *enhances* democracy.

 The *Lawrence* case therefore provides an interesting case study for this debate. Not only does it provide a case in which the Supreme Court ruled against the majority, but it also makes a unique contribution to the debate between Waldron and Dworkin. In this essay, I will argue that Dworkin’s belief in judicial review as a democratic institution is more justified than Waldron’s majoritarian conception. However, I will also argue that Dworkin’s views should not be our only model as we answer the question of democratic rule and judicial review. One potential problem with Dworkin’s constitutional view is a problem of interpretation: a particular reading of Texas Penal Code § 21.06 could actually meet Dworkin’s definition of “democratic conditions.” *Lawrence*, in other words,potentially proves that his definition of democracy needs revision, particularly when it comes to a provision for individual autonomy. To support these claims, I will first refute Waldron’s majoritarian position by arguing that the Supreme Court does not damage democracy, and that it in fact almost always enhances it.[[8]](#endnote-8) As we will see, the cases in which the Supreme Court does act undemocratically are those in which it sides with the majoritarian premise. Then, I will explain how judicial review actually enhances democracy by introducing the specific conditions of Dworkin’s constitutional conception. Finally, I will apply Texas Penal Code § 21.06 to these conditions in order to show that because the law could be considered democratic under these criteria, Dworkin’s position needs revision. In the end, I will argue that we need to introduce a standard of individual autonomy to shore up Dworkin’s constitutional conception of democracy. Judicial review, as we will see, is ultimately democratic when it meets these revised criteria for democracy.

The Problem with the “Majoritarian Premise”

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erhaps the most basic definition of democracy is a government whose power is vested in the majority. Indeed, the very definition of “democracy” in Ancient Greece meant “mob rule.” Our understanding of this basic definition of democracy would hinge, then, on our understanding of “majority.” Simply put: a majority of what? A government made by the majority of its citizens, and that operates with the approval of that majority, may be best understood as the “majoritarian premise.” Waldron, in his *Judicial Review and the Conditions of Democracy,* argues for this majoritarian premise and thus avidly opposes judicial review, believing that the authority of a few to refute the will of the majority is at odds with democratic principles. But this conception of democracy is innately flawed. To see this, let us take a longer look at Waldron’s argument. He writes:

There is something lost, from a democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires. If it makes the right decision, then – sure – there is something democratic to set against that loss; but that is not the same as there being no loss in the first place. On the other hand, if an institution which is elected and accountable makes the wrong decision about what democracy requires, then although there is a loss to democracy in the substance of the decision…at least [citizens] made their *own* mistake about democracy rather than having someone else’s mistake foisted upon them.[[9]](#endnote-9)

Waldron’s argument is unsatisfactory. Firstly, the Supreme Court does not take something away from democracy when it makes the “right” decision. (It is important to note here that when both Waldron and I use the terms “right” or “wrong,” we are describing decisions that are democratic as “right” and those that are not as “wrong”; the specific criteria for categorizing decisions as democratic or undemocratic will be defined later in the essay under Dworkin’s constitutional conception.) For now, we can consider a hypothetical: that the majority votes to disenfranchise a certain class of citizens. Perhaps the most relevant example here is the example Dworkin himself uses: the persecution of Jews under Nazi Germany. It is fair to assume that most would see what happened in Nazi Germany as patently undemocratic. But Waldron’s position would argue that the Supreme Court, if it had the ability to overrule the majority of Nazis, would “take something away” from democracy because the majority played no role in the court’s decision. Clearly there are circumstances, however extreme, that would reveal the problems inherent in the “majoritarian premise.”

The majoritarian premise, in other words, is flawed. To see this, consider both hypothetical possible situations if a Supreme Court overruled the Nazi majority: 1) the Supreme Court rules against the disenfranchisement of German Jews, but the Nazis, perhaps seeing the injustice of their practices after legal review, ultimately agree with the Court’s decision; or 2) the Supreme Court overrules the Nazis, and the Nazis disagree with the decision. In the first scenario, nothing can be lost from democracy since the majority would have agreed ultimately with the ruling, giving the court the proper authority. Waldron may argue that the statement “giving the court the proper authority” proves his point because the majority did *not* have a direct say. But consider the second scenario. Here, democracy is actually improved because the Supreme Court ruled against an injustice involving disenfranchisement. The majority might well disagree with this ruling, but the majority also would have damaged democracy through the practice of holocaust. Our rights, in other words, should not be up to majority review.

The majoritarian conception argues that only decisions reached by a majority are democratic. But surely it is more democratic for the Supreme Court to rule against the Holocaust and make a decision that preserves democracy than for the Nazi majority to have its way. Waldron would not disagree with this claim outright, but he would argue that *something* islost in this scenario. That much might be true under some circumstances, but we would also need to compare the magnitude of loss. Here is where Waldron’s conceptualization of democratic institutions is flawed: he assumes that democracy loses if a court overrules a majority’s undemocratic behavior. However, democracy loses nothing when a majority that would behave undemocratically is overruled, because that which preserves democracy must be more democratic than that which damages it. Put another way: the majority can be undemocratic. While these positions do not necessarily prove that judicial review enhances democracy, they at least refute Waldron’s claim that under judicial review there must be a loss to democracy.

Of course, this discussion of judicial review relies on the assumption that the Supreme Court makes the right decision. We could argue the Supreme Court is undemocratic when it rules both wrongly and against the majority. Only under this specific circumstance, when the Supreme Court acts against a majority that is otherwise in accordance with democratic principles, could we call judicial review undemocratic. However, this specific circumstance is not enough to condemn the Supreme Court wholly undemocratic. Why? The simple answer is because such rulings do not often occur. For the Supreme Court both to go against the majority and to be wrong, it must overrule a law it should have upheld. But in the history of this nation’s judicial review, this seldom occurs. In fact, to find an example of a Supreme Court case where a law was overturned that should have been upheld is a daunting task. On the contrary, when the Supreme Court has historically made mistakes, it has often been by siding too far with the majoritarian premise. That is, when the Supreme Court makes mistakes, it is more often by allowing a majority opinion to prevail that actually inhibits democracy.

Cases like *Plessy v Ferguson* provide a strong example: the Supreme Court clearly sided too far with the majoritarian premise, upholding racially discriminatory laws and establishing the now infamous practice of “separate but equal.”[[10]](#endnote-10) Perhaps Ronald Dworkin expressed this position best: “the most serious mistakes the Supreme Court has made, over its history, have been not in striking down laws it ought to have upheld, but in upholding laws it ought to have struck down.”[[11]](#endnote-11) Another example of this scenario, perhaps more relevant to the *Lawrence v Texas* argument at hand*,* would be the 1986 Supreme Court case *Bowers v Hardwick*, the precedent for *Lawrence,* in which the court upheld an undemocratic sodomy law.[[12]](#endnote-12) This precedent was later overruled by the *Lawrence v Texas* decision in 2003*.* Therefore, this example further proves that the Supreme Court almost always enhances democracy because cases in which it does not are those in which it actually sides too far with the majority. Indeed, in *Bowers v Hardwick,* the Supreme Court upheld the majority and supported a discriminatory law. Not until *Lawrence v Texas,* when the Supreme Court ruled against the majority, was this type of undemocratic law overturned.Therefore, the circumstance of the Supreme Court wrongly overturning the majority is much too rare to condemn wholesale judicial review.

Dworkin’s “Constitutional” Democracy

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ntil this point, we have been discussing both the Supreme Court and the majority holding either “right” or “wrong” points of view, which I described to mean either democratic or undemocratic points of view. The sodomy laws in *Bowers v Hardwick* and *Lawrence v Texas*, for instance, were described as “undemocratic.” We did this because we did not yet have specific criteria for the definition of democracy, so we simply accepted that they were “undemocratic.” But as the argument rests on this assumption, it is now appropriate to define why these laws are undemocratic. After all, they must have been supported by a majority at some point to have passed through the political system. We may ask the following question: why does democracy not simply mean what Waldron says it means? Why can’t a pure majority make law?

To answer these questions, we need to understand competing definitions of democracy, such as that Dworkin offers in his book *Freedom’s Law: The Moral Reading of the American Constitution*. Dworkinrefuses to accept the majoritarian conception of democracy, arguing instead that there are many aspects of democratic government that cannot be defined by the sum of a majority. He believes instead that a democracy is a government comprised of individuals with equal status, calling this conception the “constitutional conception” of democracy. He writes that “the constitutional conception of democracy … means government subject to certain conditions – we might call these the ‘democratic’ conditions – of equal status for all citizens.”[[13]](#endnote-13) He then goes on to define this “equal status for all citizens” as “moral membership in a political community.”[[14]](#endnote-14) He sees three conditions for equal moral membership in a democracy: 1) “each person must have an opportunity to make a difference in the collective decisions”; 2) the society may not show “contempt for the needs and prospects of some minority”; and 3) the government must not “dictate what its citizens think about matters of political or moral or ethical judgment” through its decision making.[[15]](#endnote-15) In plain terms, Dworkin believes that for a government to be democratic, it must provide *all* of its citizens, and not simply most of its citizens, with “moral membership.” This “moral membership” is subject to the three conditions outlined above. If a government violates any of these conditions, it is not acting in accordance with democracy.

Dworkin’s constitutional conception of democracy supports the claim that judicial review does not damage democracy; in fact, we can argue that his “constitutional conception” actually enhances democracy. Furthermore, Dworkin’s claims here provide specific criteria for what is democratic and undemocratic in the three conditions for moral membership in society. Any law that violates one of the three conditions is undemocratic. The Supreme Court going against the majority and striking down an undemocratic law therefore enhances democracy. It might helpful here to return to the previous hypothetical of Nazi Germany. While the decisions of the Nazi majority were assumed to be undemocratic previously, Dworkin’s criteria now provide specific justifications for this claim. In Dworkin’s words: “German Jews were not moral members of the political community that tried to exterminate them, though they had votes in the elections that led to Hitler’s Chancellorship, and the Holocaust was therefore not part of their self-government, even if a majority of Germans would have approved it.”[[16]](#endnote-16) As Dworkin states, German Jews had the right to vote in Hitler’s election. Therefore, the first criterion of moral membership would be met. The second, however, would be violated: the extermination of Jews clearly violates their “needs and prospects.” But the third criteria would also be violated because Hitler’s policies made an ethical judgment that German Jews were inferior. Nazi Germany was therefore undemocratic. Judicial review that would have opposed Nazi policies would have been democratically justified. This holds true under circumstances far less extreme than Nazi Germany’s intent to persecute and kill certain members under its rule. The rights of the minority cannot be struck down by the carelessness of the majority.

IV. The Limits of the “Constitutional Conception”

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hough Dworkin’s constitutional conception of democracy clearly holds more water than the majoritarian premise, it does possess some limitations. First of all, Dworkin’s third criterion cannot be justly applied to any law and therefore does not work. It requires that governments resist from making “moral or ethical judgment” in its decision-making. It is important to understand that for Dworkin, this third criterion against moral or ethical judgment ensures that each individual in the community is an “independent moral agent” who “arrive[s] at beliefs…through their own reflective and finally individual conviction.”[[17]](#endnote-17) Applying the Texas law to this criterion, Dworkin would say that Texas is making a normative value judgment on homosexuality, and the law is therefore undemocratic. However, the entire premise of this criterion is flawed. Just as *Texas* makes a normative value judgment on homosexuality, so too does it make a normative value judgment on murder, theft, and the like. It is impossible for governments to distinguish their laws and decisions from a normative value judgment, as laws are reflections of the dichotomy between right and wrong. Under this criterion, we would find almost any law to be in violation of democratic principles. It is therefore unfair to apply any single law to this standard, and it fails to hold in practice.

The first and second criteria, on the other hand, are useful in their applications towards issues of democracy, but even they still cannot answer the question posed in the previous example: why are sodomy laws undemocratic? Recall that Texas Penal Code § 21.06 made it illegal to “[engage] in deviate sexual intercourse with another individual of the same sex.”[[18]](#endnote-18) This law could actually meet Dworkin’s democratic conditions under certain circumstances. In this way, *Lawrence* illustrates the imperfection of Dworkin’s conception. To see this, let us apply the sodomy law to the first two criteria of constitutional democracy. First, homosexuals have as much “opportunity to make a difference in the collective decisions” of the Texan government as heterosexuals, and so the first criteria is met.[[19]](#endnote-19) Second, recall that the second criteria only requires that a majority not infringe upon the “needs and prospects” of a minority.[[20]](#endnote-20) We could say that the Texas sodomy law does not infringe upon the “needs” of homosexuals because they are not killed or denied the necessities of life, as were the German Jews in the undemocratic example of Nazi Germany. Neither are their “prospects” denied, as they are not prevented from jobs or any amount of their wealth or assets. Texas Penal Code § 21.06, we could argue, meets Dworkin’s democratic conditions. This indicates the possible imperfections of Dworkin’s criteria. Texas Penal Code § 21.06, in other words, could pass Dworkin’s criteria for the constitutional conception of democracy even though the Supreme Court struck it down*.* Either the Supreme Court wrongly ruled against the majority or Dworkin’s criteria are insufficient. I would argue the latter. A law that prohibits a minority from intimacy cannot be democratic, and therefore we need to expand Dworkin’s criteria.

It is important to consider here three main counter-arguments. First, opponents could argue that the sodomy law does not deny the “needs” of homosexuals. However, the very definition of homosexuality is an inclination towards romantic relationships with members of the same sex; without this intimate relationship, homosexuality would be moot, and the sodomy law therefore outlawed homosexuality itself. We could even argue that the sodomy law outlawed a person’s right to identity. Second, opponents may argue that sexual intercourse among homosexuals cannot be considered “necessary” since it is not needed for procreation, but this would do little to address the fact that opposite sex relationships frequently engage in sexual intercourse that is not meant to be procreative; indeed, straight couples often go to great lengths to ensure *contraception*. And third, opponents might argue that sexual intercourse is not a “necessity of life.” While such a sentiment might be true in the strictest sense, forced abstinence denies someone the basic human need for intimacy. Besides, our rights are never defined as merely the narrowest of needs for survival; in fact, they more often target choices that also are not necessities of life in the strictest sense, like the freedom of speech and the freedom to worship as we choose. So, while I argue that the sodomy law denied homosexuals their basic human rights, these potential counter-arguments indicate that we should consider addition criteria for the constitutional conception of democracy.

But what, exactly, is missing from the democratic criteria? Even if sexual intercourse conducted in private is neither a need nor a prospect, why should it be protected under a democracy? Adil Ahmad Haque of the Harvard Civil Rights-Civil Liberties Law Review, in *Lawrence v Texas and the Limits of the Criminal Law,* reviews both the *Lawrence* case at hand and criminal law in its most general sense.He concludes that one way criminal law can be unjust is if its prohibitions extend too far, which he believes clearly applies to the *Lawrence* case.[[21]](#endnote-21) In direct reference to *Lawrence,* he presents the following perspective: “sexual activity is an expression of individual autonomy, and the value of such activity to its participants does not turn on the sex of those involved.”[[22]](#endnote-22)

Haque’s perspective helps us see why it is hard to accept as democratic a law that prohibits a minority from intimacy: a government that infringes upon “individual autonomy” is not a democratic government. The very idea of democracy is self-governance, and so it is democratically unjust for the government to take away any portion of that autonomy that does not infringe upon another’s rights. Homosexual sex conducted in private, as was the case for those involved in *Lawrence,* is a portion of individual autonomy that does not infringe upon the rights of others.[[23]](#endnote-23) The Texas sodomy law is therefore an unnecessary infringement on individual autonomy that cannot be considered democratic. This is why Justice Kennedy cited the “exercise of liberty” in his majority opinion.[[24]](#endnote-24) The Supreme Court, in striking down the Texas sodomy law, preserved and enhanced democracy because the law it struck down was undemocratic. As such, *Lawrence* points out that Dworkin misses the criterion of individual autonomy. Recall Dworkin’s three criteria for conditions of “moral membership”: 1) “each person must have an opportunity to make a difference in the collective decisions,” 2) the society may not show “contempt for the needs and prospects of some minority,” and 3) the government must not “dictate what its citizens think about matters of political or moral or ethical judgment”[[25]](#endnote-25) through its decision making. Clearly, Dworkin does not mention this idea of individual autonomy as a basis of democratic government. Therefore, I suggest that it be added in place of his third criteria, which we earlier found to be problematic, to improve his constitutional conception of democracy and further support the validity of judicial review.

V. Concluding Judicial Review

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ustice Kennedy authored the majority opinion in the conclusion of *Lawrence v Texas.* In his commentary, he clearly stresses that the idea of individual liberty was central to the debate, that the law was unjust because it denied homosexuals their due liberty. But Justice Kennedy does more than simply offer justification for the Court’s decision; he also provides a unique contribution to the Waldron-Dworkin debate by indicating the higher implications this individual liberty has within a democracy. Justice Kennedy writes:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom....[[26]](#endnote-26)

Justice Kennedy’s quote can be applied not only to *Lawrence v Texas,* but also to every instance of judicial review in our nation’s history. It reminds that us that judicial review continues to enhance the democratic principles that have always governed this nation. These principles are eloquently defined in our founding document, the Declaration of Independence, to be “life, liberty, and the pursuit of happiness.” In our discussion, one could relate these principles to those we have used to define democracy: “life” is the “needs,” the “pursuit of happiness” is the “prospects,” and “liberty” is what has been defined as “individual autonomy.” Therefore, it is not the majoritarian premise of democracy that we should accept but the constitutional conception, clarified to include individual autonomy. It is through the preservation of this principle that judicial review will continue to enhance our democracy and provide greater freedoms to those like John Lawrence.

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Texas Penal Code § 21.06

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Endnotes

1. Texas Penal Code § 21.06 [↑](#endnote-ref-1)
2. David A. J. Richards, *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas* (Lawrence: University Press of Kansas, 2009), 1.  [↑](#endnote-ref-2)
3. *Lawrence v. Texas,* 539 U.S. 558 (2003). [↑](#endnote-ref-3)
4. *Lawrence v. Texas,* 539 U.S. 558 (2003). [↑](#endnote-ref-4)
5. Jeremy Waldron, *Judicial Review and the Conditions of Democracy (*Oxford: Blackwell Publishers, 1998), 346. [↑](#endnote-ref-5)
6. Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), 16. [↑](#endnote-ref-6)
7. Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), 17. [↑](#endnote-ref-7)
8. I am thankful to my classmate Anand Gupta for his helpful input here [↑](#endnote-ref-8)
9. Jeremy Waldron, *Judicial Review and the Conditions of Democracy (*Oxford: Blackwell Publishers, 1998), 346. [↑](#endnote-ref-9)
10. *Plessy v Ferguson,* 163 U.S. 537 (1896). [↑](#endnote-ref-10)
11. Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution.* Excerpted in Jeremy Waldron, *Judicial Review and the Conditions of Democracy (*Oxford: Blackwell Publishers, 1998), 338. [↑](#endnote-ref-11)
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13. Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), 17. [↑](#endnote-ref-13)
14. Ronald Dworkin, 24. [↑](#endnote-ref-14)
15. Ronald Dworkin, 24-26. [↑](#endnote-ref-15)
16. Ronald Dworkin, *23*. [↑](#endnote-ref-16)
17. Ronald Dworkin, 26. [↑](#endnote-ref-17)
18. Texas Penal Code § 21.06 [↑](#endnote-ref-18)
19. Ronald Dworkin, 24. [↑](#endnote-ref-19)
20. Ronald Dworkin, 25. [↑](#endnote-ref-20)
21. Adil Ahmad Haque. “*Lawrence v. Texas* and the Limits of the Criminal Law.” *Harvard Civil Rights-Civil Liberties Law Review.* 42 (2004) 1. [↑](#endnote-ref-21)
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23. David A. J. Richards, *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas* (Lawrence: University Press of Kansas, 2009), 1.  [↑](#endnote-ref-23)
24. *Lawrence v. Texas,* 539 U.S. 558 (2003). [↑](#endnote-ref-24)
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