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FOREWORD: POLITICS, PRAGMATISM AND THE COURTS

ANTHONY E. VARONA*

Few would question that the year 2000 was a big one for the history books. Federal and state courts decided an array of groundbreaking cases in the areas of gender, sexuality and sexual orientation law. These cases are expertly chronicled in this *Second Annual Review of Gender and Sexuality Law*, which is sure to become a uniquely valued reference book for practitioners, judges, legislators and scholars.

The most enlightening recent case for civil rights lawyers, however, did not involve gender or sexuality law directly, but provided us nevertheless with an important reminder about the true nature of the American judiciary. The Supreme Court's *Bush v. Gore*¹ decision was a blockbuster not only insofar as it dictated which candidate ascended to the presidency, but also because it demonstrated (once again) that the Supreme Court is a political and often partisan institution.

We place our judges and courts atop pedestals far above the political fray. As schoolchildren, Americans are taught that the genius of our federal system lies in the checks and balances created by the separation of our three branches of government, with the judicial branch governing by reason alone. As lawyers, most of us persist in idealizing our judges and courts as neutral entities whose primary motivation is the objective application of legal reasoning, with little regard for political sentiment or partisan allegiances. Judges not only embrace, but also promote, this politically agnostic image. Speaking to a class of high school students late last year, Justice Clarence Thomas warned against applying the rules of the political world to the Supreme Court, claiming that they are "entirely different worlds" and that "[t]he last political act we engage in is confirmation."²

Legal and political organizations within the American civil rights community

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1. 531 U.S. 98 (2000).

2. See Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000, at 46. Judicial pretense notwithstanding, early observers of the American judicial system took note of the political power of judges. French writer Alexis de Tocqueville, for example, wrote "[An American judge's] position is . . . invested with immense political power Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives him immense political influence." Alexis de Tocqueville, *Judicial Power in the United States*, DEMOCRACY IN AMERICA (1835), reprinted in COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 44 (Walter F. Murphy & C. Herman Pritchett eds., McGraw-Hill, 1986).

have clung to this idealized view of the courts, and have organized themselves to deal with courts and politics as two separate entities. We have one set of advocates and organizations focused almost exclusively on bringing test case litigation, and another set dedicated to advancing equitable legislation in Congress and in the state legislatures. These advocates and organizations work in their respective areas independently, rarely regarding courts as political entities.

Bush v. Gore was our reality check. It unmasked, once and for all, the political and partisan motivations of the Supreme Court and by implication, other federal courts. The five-member conservative majority, all appointed by Republicans, shut down the hand recounting of Florida ballots, ignoring that the election was plagued by voting irregularities and that the Florida Supreme Court had earlier ordered the hand recounts to continue.³ In so doing, members of the *Bush v. Gore* majority acted openly as partisans. Justice Scalia, for example, applied blatantly partisan and circular logic in concurring with the majority's decision to stop the recounts. He claimed that the Court had no choice but to stop the recount in order to preserve the legitimacy of a Bush presidency, stating "the counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner [Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election."⁴

Without articulating any coherent legal justification, the *Bush* Court overruled the decision of the Florida Supreme Court interpreting the state's law governing the administration of elections, an area historically left to the purview of the states.⁵ This invasion of state authority by the Court was a striking about-face from the Court's decade-long insistence on state sovereignty and in some instances, supremacy, over Federal authority.⁶ This was the same conservative

3. 531 U.S. 98 (2000).

4. See *Bush v. Gore*, 121 S. Ct. 512, 512 (2000) (Scalia, J., concurring). But see *id.* at 512-13 (Stevens, J. dissenting) ("preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election"). Another clearly partisan outburst from a Supreme Court Justice allegedly took place at an election night party on November 7, at which, following the first news report that Gore had won Florida, Justice Sandra Day O'Connor exclaimed "this is terrible," leaving it to her husband to explain that O'Connor wanted to retire and that if Gore won, she would have to wait an additional four years. See Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000, at 46.

5. See *Bush v. Gore*, 121 S. Ct. 512, 555-58 (2000) (Breyer, J., dissenting).

6. See, e.g., *Kimel v. Fla. Bd. of Regents*, 582 U.S. 62 (2000) (Congress did not act appropriately in abrogating state sovereign immunity when it authorized suits under the Age Discrimination in Employment Act against states in federal courts); *Alden v. Maine*, 527 U.S. 706 (1999) (Congress had no power to force state courts to entertain federally created claims for damages against state defendants); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (abrogation provisions of Trademark Remedy Clarification Act invalidated); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (abrogation provisions of Patent and Plant Variety Protection Remedy Clarification Act invalidated); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act invalidated as applied to states and localities); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (abrogation of state sovereign immunity under the Indian Gaming Regulatory Act invalidated); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (Age Discrimination in Employment Act invalidated as applied to state judges).

majority that had set aside nearly seventy years of federalism precedent in favor of a devolution of federal power to the states, deciding a long string of cases carving out new and strictured interpretations of the Commerce Clause and the Fourteenth Amendment, and an expanded reading of the Eleventh Amendment, all to bolster state authority over state concerns.⁷ Against this backdrop, *Bush v. Gore* was a stark reversal with boldly political and partisan purposes.

Although blatant, the political subtext of the *Bush v. Gore* majority decision was not a complete surprise to those of us working in support of equality for women, gay men, lesbians, bisexuals and transgender Americans. In fact, *Bush v. Gore* was one of a series of Supreme Court decisions in 2000 where the Court evaded precedent in order to achieve politically charged objectives.

One of the most halting Supreme Court decisions with broad implications for civil rights law was *United States v. Morrison*.⁸ In *Morrison*, the Supreme Court continued its “states’ rights” charge by invalidating the civil rights remedy of the 1994 Violence Against Women Act (VAWA).⁹ The civil rights remedy enabled victims of gender-motivated violence to sue their assailants in federal or state court for compensatory or punitive damages, declaratory or injunctive relief and attorneys fees.¹⁰ Congress enacted VAWA, including its civil rights remedy, with extensive documentation of the effect of violence against women on interstate commerce and the unequal treatment states give victims of gender-motivated violence.¹¹

In invalidating the civil rights remedy, the Supreme Court ruled that the remedy was not a valid exercise of Congress’ authority to regulate activity that substantially affects interstate commerce.¹² The Court characterized the congres-

7. See, e.g., *Kimel v. Fla. Bd. of Regents*, 582 U.S. 62 (2000) (Congress did not act appropriately in abrogating state sovereign immunity when it authorized suits under the Age Discrimination in Employment Act against states in federal courts); *Alden v. Maine*, 527 U.S. 706 (1999) (Congress had no power to force state courts to entertain federally created claims for damages against state defendants); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (abrogation provisions of Trademark Remedy Clarification Act invalidated); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (abrogation provisions of Patent and Plant Variety Protection Remedy Clarification Act invalidated); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act invalidated as applied to states and localities); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (abrogation of state sovereign immunity under the Indian Gaming Regulatory Act invalidated); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (Age Discrimination in Employment Act invalidated as applied to state judges); see also *United States v. Lopez*, 514 U.S. 549 (1995) (Gun Free School Zone Act was an unconstitutional use of Commerce Clause power by Congress); *United States v. Morrison*, 529 U.S. 598 (2000) (Congress lacked the constitutional authority to enact the civil rights remedy of the 1994 Violence Against Women Act). For a more recent example of the Court’s expanded view of the Eleventh Amendment, see *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Eleventh Amendment barred claims against state defendants under the Americans with Disabilities Act of 1990).

8. 529 U.S. 598 (2000).

9. 42 U.S.C.A. § 13981 (2000), *overruled by* *United States v. Morrison*, 529 US 598 (2000).

10. See *United States v. Morrison*, 529 U.S. 598, 605-06 (2000).

11. See *id.* at 631-34.

12. See *id.* at 617.

sional findings of the substantial effect of gender-motivated violence on interstate commerce as “attenuated,”¹³ and thus insufficient to justify congressional action under the Commerce Clause.¹⁴ The Court also rejected Congress’s invocation of Section 5 of the Fourteenth Amendment as authority for enacting the civil rights remedy.¹⁵ Section 5 enables Congress to enforce the constitutional guarantees found within the Fourteenth Amendment.¹⁶ The Court refused to acknowledge that state inaction to remedy identified instances of gender-motivated violence qualified as state inaction for purposes of the Fourteenth Amendment.¹⁷

The immediate effects of *Morrison* are clear. Women no longer have a civil right of action against gender-motivated violence in federal court, and must instead rely on state criminal and tort laws for relief—laws that a bipartisan Congress deemed inadequate to remedy the problem of gender-motivated violence. Even more damaging, however, are *Morrison*’s implications for civil rights legislation generally, insofar as it places onerous evidentiary burdens on Congress’ ability to determine what is an important national interest and enact responsive legislation.¹⁸

In *Boy Scouts of America v. Dale*, the same narrow, conservative Supreme Court majority in *Morrison* and *Bush* glossed over well-established First Amendment precedent in favor of holding that the mere presence of gay men and boys in the Boy Scouts of America (BSA) membership would interfere with the organization’s right of expressive association.¹⁹ The BSA had appealed a decision by the New Jersey Supreme Court, upholding the application of a state

13. *See id.* at 599.

14. *See id.* at 614 (“The existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”). *But see id.* at 631-34 (Souter, J., dissenting) (“mountain of data” assembled by Congress demonstrating the very real effects gender motivated violence has on interstate commerce was more than sufficient justification for Congress to enact the civil rights remedy).

15. *See id.* at 627.

16. Namely, the guarantee that no state shall deprive any person of life, liberty or property without due process of laws, nor deny any person equal protection of the laws. Section 5 allows Congress to enact legislation that prohibits conduct that is not itself unconstitutional. *See* U.S. CONST. amend. XIV, § 5.

17. *See* *United States v. Morrison*, 529 U.S. 598, 619-27 (2000).

18. Fortunately, the *Morrison* Court left open possibilities for future legislation that would address gender motivated violence and satisfy the Court’s intensified evidentiary requirement of a “substantial effect” on “economic activity.” For example, Congress should immediately pass the Federal hate crimes bill, now named the Local Law Enforcement Enhancement Act (LLEEA). S. 625, 107th Cong. (2001). H.R. 1343, 107th Cong. (2001). LLEEA would expand existing law to allow federal prosecutions of hate crimes committed on the basis of sexual orientation, gender and disability. In the 106th Congress, the Senate passed the bill by a vote of fifty-seven to forty-two, with support from thirteen Republican Senators. The House of Representatives voted 232 to 192 to support inclusion of the LLEEA in the Department of Defense Authorization bill on September 13, 2000. The vote was a non-binding motion instructing the House members of the Joint House-Senate Conference Committee on the Department of Defense Authorization bill to accept the Senate-passed language of LLEEA although the House had never voted upon the hate crimes bill. Despite majority support of LLEEA in both chambers of Congress, the Republican Congressional leadership removed the bill in the waning days of conference committee. *See* H.R. CONF. REP. NO. 106-945, at 9493 (2000).

19. 530 U.S. 640 (2000).

statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation.²⁰

Under well-established principles of First Amendment expressive association,²¹ the Court was required to determine whether the BSA had an articulated and coherent anti-gay message and whether that message would be substantially altered by the mere presence of gay members. The *Dale* majority ignored this test and merely accepted the BSA's argument, at face value, that its message had always been anti-gay despite the fact that the organization provided little if any support for that position.²² The majority not only failed to scrutinize the BSA's claims as it had in prior expressive association cases, but also failed to address the overwhelming evidence that the BSA had never had anti-gay positions as part of its core values and message, nor had discharged heterosexual members who disagreed with that position.²³

In essence, the *Dale* case represented the first time that the Supreme Court allowed organizations to discriminate against a class of people just because of who they are, only by declaring, even if just in pleadings, that they do not like them. No doubt influenced by the BSA's quintessentially American "mom and apple pie" image, the Supreme Court seemed to balk at the prospect of requiring the organization to admit members who did not fit the 1950s stereotype of an "All-American boy." In *Dale*, the political power of the BSA as a venerated American institution trumped the neutral application of a state nondiscrimination statute and long-settled constitutional law.

Although advocates working in support of civil rights for women, gay and transgender people have weathered a number of setbacks in the last year, we also have enjoyed significant successes. The implementation of the Vermont Civil Unions law was one of them. On December 20, 1999, the Vermont Supreme Court ruled that the state constitution's Common Benefits Clause prohibited the discrimination against same-sex couples in the provision of statutory benefits and protections of marriage.²⁴ The court directed the Vermont legislature to remedy the discrimination, which it did in April 2000, by enacting the "Act Relating to

20. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999).

21. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), (state law requiring the Jaycees to admit women as members upheld). The Jaycees, like the Boy Scouts of American in *Dale*, argued that forcing the organization to admit women into its membership would interfere with its expressive association rights by, *inter alia*, altering the organization's message. The Court reasoned that the presence of women in the Jaycees would have no effect on its message. See *id.*

22. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 ("We cannot doubt that the Boy Scouts sincerely holds this [anti-gay] view."). But see *id.* at 667 (Stevens, J., dissenting) (because anti-gay bigotry has never been a part of the BSA's mission or purpose, the presence of gay members in the organization would have no effect whatsoever on its expression, citing the Scoutmasters Handbook, which directs Scoutmasters to steer clear of discussing sexuality with Scouts and instead refers them to their parents, physician or teachers).

23. See *id.* at 655.

24. See *Baker v. State*, 744 A.2d 864 (Vt. 1999).

Civil Union.”²⁵ The law extends to same-sex couples the effect of every state law, regulation and court precedent that applies to married couples.²⁶ Although either branch of Vermont state government that addressed the issue should have fully authorized same-sex marriage, the creation of civil unions was a significant step in the right direction, recognizing the committed relationships of same-sex couples as the legal equivalent of married couples.²⁷

The last year also brought a narrow Supreme Court defense of a woman’s right to choose. Over the past several years, thirty-one states have enacted bans on so-called “partial-birth” abortions. Richard A. Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit, and a Reagan appointee, noted in the *Hope Clinic v. Ryan* that this rush to pass state late term abortion bans did not “exhibit the legislative process at its best” and instead “produce[d] a set of laws that can fairly be described as irrational . . . [and] concerned with making a statement . . . that fetal life is more valuable than women’s health.”²⁸

On June 28, 2000, the Supreme Court in *Stenberg v. Carhart* upheld the Eighth Circuit’s decision five to four, striking down a Nebraska ban on partial-birth abortion as unconstitutional because it excluded an exception for the preservation of the health of the mother and because the statute unduly burdened the right of women to choose abortion.²⁹ Although *Stenberg* was a victory for women’s rights advocates and their allies, the fact that the Court was one Justice away from constitutionally validating significant state limitations on abortion procedures is deeply troubling. Also of concern were the often conflicting viewpoints articulated by the justices in one majority opinion, three concurring opinions and four dissenting opinions,³⁰ with Justice Scalia in his dissent equating the majority’s decision to the Supreme Court’s infamous *Korematsu* and *Dred Scott* decisions.³¹

25. See 15 VT. STAT. ANN. tit. 15, § 1201 *et seq.* (1999). See also Richard Higgins, *Vermont Licenses First Two Civil Unions*, BOSTON GLOBE, July 2, 2000, at B1.

26. See 15 VT. STAT. ANN. tit. 15, § 1201 *et seq.* (1999).

27. There are, however, a few significant exceptions caused by the legal contusions of the “separate but equal” objective of the Civil Unions statute. Most importantly, a civilly united same-sex couple in Vermont is not currently able to have its civil union recognized by any of the other forty-nine states, whereas couples married in Vermont have their marriages recognized everywhere else.

28. *Hope Clinic v. Ryan*, 195 F.3d 857, 880-81 (7th Cir. 1999) (Posner, J., dissenting).

29. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

30. Justice Breyer authored the majority opinion, with Stevens, Ginsburg and O’Connor each filing a separate concurrence. Each of the dissenters, Justices Rehnquist, Scalia, Kennedy and Thomas, filed dissenting opinions of their own.

31. *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (“I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court’s jurisprudence beside *Korematsu* and *Dred Scott*.”). In *Dred Scott*, the Supreme Court held that the Constitution conferred no rights on African Americans as citizens and disempowered Congress from prohibiting the practice of slavery. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856). In *Korematsu*, the Supreme Court, deferring to military judgment and applying strict scrutiny, affirmed the constitutionality of the internment of U.S. citizens of Japanese ancestry during World War II. See *Korematsu v. United States*, 323 U.S. 214 (1944).

Although *Stenberg* reached the right result, it exposed an increasingly splintered and fragile pro-choice majority on the Court.

The last year also brought us progress in the battle against sodomy laws. Most notably, an Arkansas court ruled on March 23, 2001, that the state statute banning consensual same-sex sodomy³² was invalid under the state constitution. Pulaski County Circuit Court Judge David B. Bogard held that an adult's right to engage in "consensual and noncommercial" sexual activity in that adult's home "is a matter of intimate personal concern which is at the heart of the right to privacy in Arkansas" and that such a right "should not be diminished or afforded less constitutional protection when the adults in that private activity are of the same gender."³³ Also, Arizona became the twenty-sixth state to repeal its sodomy law on May 8, 2001.³⁴ As of May 2001, only four states—Kansas, Missouri, Oklahoma and Texas—had sodomy laws that apply only to same-sex couples (assuming the Arkansas case is not overturned).³⁵ These laws stigmatize gay people and promote anti-gay violence³⁶ and police harassment,³⁷ undermine support for civil rights and hate crimes legislation,³⁸ and justify discrimination against gay people in employment³⁹ and parental custody and visitation proceedings.⁴⁰ Twelve other

32. ARK. CODE ANN. § 5-14-122 (2001).

33. *Picado v. Jegley*, No. CV 99-7048, slip op. (Pulaski County Cir. Ct. Mar. 23, 2001); see also "Same-Sex Sodomy Law Deemed Unconstitutional," ARKANSAS DEMOCRAT-GAZETTE, Mar. 24, 2001, at A1.

34. See Will O'Bryan, *Ariz. Lifts Sodomy Ban*, WASH. BLADE, May 11, 2001, at 1.

35. KAN. STAT. ANN. § 21-3505 (2000); MO. ANN. STAT. § 566.090 (2000); OKLA. STAT. ANN. tit. 21, § 886 (2001); TEX. PENAL CODE ANN. § 21.06 (West, WESTLAW through 1999 Reg. Sess.).

36. See Timothy W. Reinig, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 898 (1990) ("Sodomy legislation has the effect of reinforcing and perpetuating this stigmatization of gay people and, consequently, the prejudices and hatred of homophobes and queer-bashers."); see also Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000) (documents how sodomy laws legitimize police harassment of gay people by entrapping and arresting gay men for solicitation to commit private, consensual sodomy).

37. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 127-29 (documents how sodomy laws legitimize police harassment of gay people by entrapping and arresting gay men for solicitation to commit private, consensual sodomy).

38. See, e.g., Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 232 (1994) (provides several examples of how in states that maintain sodomy statutes, "legislators invoke the sodomy law in debate as justification for denying legal protections to homosexuals, who get represented as immoral criminals deserving of punishment").

39. See, e.g., *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (termination of a lesbian staff attorney in Georgia Attorney General's office upheld, invoking the then existing Georgia sodomy law as justification); see also Evan Wolfson & Robert Mower, *When the Police Are In Our Bedrooms, Shouldn't the Courts Go In After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 FORDHAM URB. L.J. 997, 1035, n.39 (1994) (discusses *Woodward v. Gallagher*, No. 89-5776 (Orange County, Fla. Cir. Ct., filed June 9, 1992), where county sheriff relied on state's sodomy law to terminate gay deputy when sexual orientation was discovered).

40. See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (Sharon Bottoms' son should be taken away from her because "conduct inherent in lesbianism is punishable as a . . . felony in the Commonwealth . . . [and] thus, that conduct is another important consideration in determining custody.").

states and Puerto Rico still criminalize sex acts between gay and non-gay consenting adults.⁴¹

We also saw progress in the state legislatures concerning anti-discrimination legislation. Maryland became the twelfth state in the nation to ban discrimination on the basis of sexual orientation.⁴² The Maryland Anti-Discrimination Act of 2001 covers employment, housing, and public accommodations, and will become effective October 1, 2001. Laws banning employment discrimination against transgender workers are also on the upswing, with thirty-three state and local governments providing protection for transgender individuals. Minnesota, the District of Columbia and thirty-one municipalities (including Decatur, Georgia and Louisville, Kentucky) protect transgender people either through legislation or executive order.⁴³

The last year also brought us great progress in persuading corporate America to

41. ALA. CODE §§ 13A-6-63, 64 (2001); FLA. STAT. ANN. § 800.02 (2001); IDAHO CODE § 18-6605 (2001); LA. REV. STAT. ANN. § 14.89 (2001); MASS. GEN. LAWS ANN. ch. 272, §§ 34, -35 (2001); MICH. COMP. LAWS ANN. § 750.158 (2001); MINN. STAT. ANN. § 609.293 (2001); MISS. CODE ANN. § 97-29-59 (2001); N.C. GEN. STAT. § 14-177 (2001); S.C. CODE ANN. § 16-15-120 (2001); UTAH CODE ANN. § 76-5-403 (2001); VA. CODE ANN. § 18.2-361 (2001); 33 P.R. LAWS ANN. § 4065 (1990). *But see* Picado v. Jegley, No. CV 99-7048, slip op. (Pulaski County Cir. Ct. Mar. 23, 2001) (Arkansas sodomy statute struck down and awaits appeal); Commonwealth v. Balthazar, 318 N.E.2d 478 ("we conclude that [the unnatural and lascivious acts law] must be construed to be inapplicable to private, consensual conduct of adults."). It has been suggested that this ruling would apply to Massachusetts' crime against nature statute as well. *See Sodomy Laws*, at <http://www.queerpress.com/sodomy.html> (October 1998); *State Restrictions on Sodomy*, at <http://www.rand.org/publications/MR/MR323/mr323.appi.pdf> (last visited, May 20, 2001); Mich. Org. for Human Rights v. Kelley, No. 88-815820 CZ (Wayne County Cir. Ct. July 9, 1990) (Michigan's sodomy law unconstitutional under the state constitution). As the state Attorney General didn't appeal this ruling, the broader precedential value of the ruling is in question, and the ruling may only apply to Wayne County where it was issued; The Data Lounge, *Puerto Rico High Court to Review Sodomy Law*, at <http://www.dataounge.com/dataounge/news/record.html?record=9333> (August 11, 2000) (Puerto Rico Supreme Court heard arguments to determine whether the sodomy law violates its constitution in *Sanchez et al. v. Commonwealth*).

42. *See* Deb Price, *Glendening Paves Way to Protect Gays*, DETROIT NEWS, Apr. 16, 2001, at 9 (Maryland passes sexual orientation nondiscrimination act). Maryland joins California, Connecticut, the District of Columbia, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin. *See* CAL. LAB. CODE § 1102.1 (West 1997); CONN. GEN. STAT. ANN. § 46a-81(c) (West 1995); D.C. CODE ANN. §§ 1-2501 to 1-2557 (1997); HAW. REV. STAT. ANN. § 378-2 (Michie 1996); MASS. GEN. LAWS ANN. ch. 151B, § 4 (1996); MINN. STAT. ANN. § 363.03 (West 1997); 1997 N.H. LAWS 108; NEV. REV. STAT. ANN. § 613.330 (Michie 2001); N.J. STAT. ANN. § 10:5-12 (West 1992); R.I. GEN. LAWS §§ 11-24-2 to 11-24-2.2, 28-5-3, 28-5-5, 28-5-7 (1996); VT. STAT. ANN. tit. 21, § 495 (1997); WIS. STAT. ANN. § 111.36 (West 1997). All twelve jurisdictions prohibit discrimination on the basis of sexual orientation in employment and all but California extend this protection to public and/or private housing. Minnesota and Wisconsin also outlaw sexual orientation discrimination in public and private education. *See* MINN. STAT. ANN. § 363.12 (West 1999); WIS. STAT. ANN. §§ 36.12, 38.23 (West 1999).

43. *See* Human Rights Campaign Foundation, *Human Rights Campaign Foundation WorkNet*, at www.hrc.org/worknet (last visited Apr. 27, 2001). Note that in December 2000, a Polk County (IA) district judge invalidated a December 1999 executive order issued by Iowa Governor Tom Vilsack which prohibited discrimination in state employment based on sexual orientation and gender identity. Responding to a court challenge by Republican legislators, the judge ruled that Vilsack's order intruded on the lawmaking authority of the Iowa legislature. *See* Jonathan Roos, *Vilsack Bias Ban Shakes Up GOP*, DES MOINES REGISTER, Mar. 30, 2001, at 6.

voluntarily extend nondiscrimination protections and domestic partner benefits to lesbian and gay employees. As of April 2001, the Human Rights Campaign (HRC) Foundation had identified 3691 private companies, colleges and universities and state and local governments that offer domestic partner health insurance benefits to their employees. Since 1999, the number of Fortune 500 companies that offer the benefits has risen from seventy to 122, an increase of sixty percent.⁴⁴ HRC Foundation also reported that seventy-seven of the Fortune 100 include sexual orientation in their non-discrimination policies.⁴⁵

In light of the Supreme Court's bold conservative activism in *Bush v. Gore*, and our narrow successes and failures at the Supreme Court and lower courts over the last year, we must start to view federal judges and courts as the intrinsically political beings that they are.⁴⁶ We must, accordingly, devote much more vigilance and resources to the federal judicial confirmation process. We need to ensure that those nominees who are confirmed for Supreme Court and other federal court benches have the judicial temperament, commitment to civil rights and individual liberty and privacy, and sense of fairness befitting a lifetime judicial appointee.

Although we should always be active advocates in the judicial nomination process, the next two years promise to be the most formative ones in American judicial history. It is not an overstatement to say that the men and women that President Bush appoints to the federal judiciary will define American constitutional jurisprudence—and our lives as women, men, straight, gay, bisexual and transgender Americans—for the twenty-first century. President Bush has a broad canvas upon which to paint his vision of a conservative judiciary. As of April 1, 2001, there were ninety-seven vacancies of 859 existing seats on the Federal appellate bench, with at least two Supreme Court vacancies anticipated in the near future.

Our vigilance in judicial selection is especially important given that the Supreme Court's conservative majority in *Bush v. Gore* virtually appointed and confirmed its own successors by handing the election to President Bush. And indications are clear that President Bush is politicizing the Supreme Court and lower federal courts even more. President Bush publicly announced that he would strip the American Bar Association of its longstanding role of reviewing and rating prospective judicial nominees before their names are submitted for Senate confirmation.⁴⁷ In place of the ABA, White House sources report that membership in—or an endorsement from—the Federalist Society, a hard-right

44. HUMAN RIGHTS CAMPAIGN FOUNDATION, *THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDERED AMERICANS 2000*, at 6, available at <http://www.hrc.org/worknet>.

45. *See id.*

46. Of course, we should be vigilant with state judge appointments or elections as well, considering the impact state courts have on our lives, especially in the context of family law, sodomy, and other areas traditionally under state control.

47. *See* Amy Goldstein, *Bush Curtails ABA Role in Selecting U.S. Judges*, WASH. POST, Mar. 23, 2001, at A1.

conservative legal organization known for its hostility to civil rights laws and promotion of a weakened federal government, will be considered an important credential for prospective nominees.⁴⁸

All of these factors, combined with President Bush's failure to win the popular vote and the widely disputed legitimacy of his presidency, mean that the civil rights community has no choice but to closely scrutinize President Bush's judicial nominations. We must refuse to allow the confirmation of judges who will turn back the clock on civil rights for women, gay, lesbian, bisexual and transgender Americans, and other minorities.

We also must learn to better work together as advocates in support of equality for women, gay, lesbian, bisexual and transgender people. Litigators, legislative lawyers and academics need to find new ways to strategize and work collaboratively and approach what we do.

James Madison in the *Federalist Papers* wrote, "the accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."⁴⁹ The fact that conservative Republicans control all three branches of Federal government certainly calls for the increased cooperation among litigators, legislative lawyers and scholars working toward equality for straight and lesbian women, gay, bisexual and transgender Americans. The agenda of the conservative leadership in Washington D.C. is relatively cohesive, and incorporates judicial, legislative and regulatory initiatives. Ours should be just as comprehensive, synthesizing litigation and legislative initiatives while also recognizing the intersections that pervade gender, sexuality, and sexual orientation law and policy.

The *Second Annual Review* helps us do just that. It is a necessary resource for all of us who study or work in support of equality for straight and lesbian women, gay, bisexual and transgender Americans. Its broad, yet detailed, coverage of constitutional and legal developments across important areas of gender and sexuality law provides a one-of-a-kind, comprehensive research tool to practitioners, academics and others. In order to most effectively build the future, we must know where we have been and where we stand today. The *Second Annual Review* gives us that crucial perspective in our journey toward equality.

48. See Marianne Means, *ABA's Ouster Opens Courts to Right-Wing Idealists*, HOUSTON CHRON., Apr. 1, 2001, at 3; Thomas B. Edsall, *Federalist Society Becomes a Force in Washington*, WASH. POST, Apr. 18, 2001, at A4.

49. THE FEDERALIST NO. 47 (James Madison).