

Findings



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Supreme Judicial Activism

Analyzing the Supreme Court's "Lawrence" Ruling

By Gena Walling McCray



In Houston, Texas, police officers responded to an anonymous tip that someone had fired a weapon in a private residence. The officers entered the apartment of John Lawrence where they found Lawrence and another man, Tyron Garner, engaging in a sexual act. The two men were arrested and charged with the misdemeanor of engaging in "deviant sexual intercourse." The two men there challenged the Texas statute prohibiting homosexual sodomy as a violation of the U.S. Constitution and the Texas Constitution. The lower court rejected their arguments and the men were each fined \$200 and had to pay court costs of \$141.25. After a series of appeals in the Texas courts, the men appealed the case to the United States Supreme Court.¹

On June 26, 2003, the U.S. Supreme Court ruled in a 6 to 3 decision that Lawrence and Garner's Constitutional rights had been violated and overturned their convictions. It held that Texas could no longer prohibit sex acts between consenting adults in the privacy of the home.

Only 17 years earlier, in 1986, the Court made the very opposite decision in *Bowers v. Hardwick*.² Just as in *Lawrence*, the *Bowers* case involved two men who were caught by police officers in a sex act in a private residence. In *Bowers*, the Court held that States could prohibit certain private sexual behavior. The Court stated that acts of homosexuality had been prohibited since ancient times, and the Court had no constitutional reason to change. However, *Bowers* was a close 5-4 decision, and it was heavily criticized by homosexual activists.

Groups supporting those in the homosexual lifestyle worked strategi-

cally for years to weaken *Bowers*. They consistently framed the argument as one of personal liberty: the freedom to choose one's own moral code. They have labored within legislatures to repeal sodomy laws and have tried cases in courts across the country. Their message is that government should have no power to regulate personal private behavior. This effort produced a win for them in *Lawrence v. Texas*. The Court expanded the definition of liberty and ruled that government has no power to prohibit private consensual sexual behavior between adults in the privacy of their own home.

"It is clear from this [decision] that the Court has taken sides in the culture war, departing from its role of assuring, as a neutral observer, that the democratic rules of engagement are observed."

Justice Antonin Scalia

The Court's decision in *Lawrence v. Texas* should deeply concern the American people. Because the Court expanded the definition of liberty yet used no principled approach in making its decision, this case may lay the groundwork to strike down laws prohibiting fornication, bigamy, adultery, adult incest, and obscenity. In addition, it is a significant step toward forcing States to recognize same sex marriages.

For example, Arizona and New Jersey courts were asked to consider requests for marriage licenses for same sex couples in light of *Lawrence*. Both States decided

that *Lawrence* did not justify the recognition of same sex marriages.³ However, the Massachusetts Supreme Court, using reasoning from *Lawrence*, has ruled that under its constitution, the State cannot withhold marriage licenses to same sex couples.⁴ Cases are pending in other states.⁵

Equal Protection and Due Process

Lawrence and Garner argued that the Texas law violated their rights under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. These two clauses read, "[No State shall] deprive any person of life, liberty, or property, without the *due process* of law; nor deny to any person within its jurisdiction the *equal protection* of the laws."⁶

"Equal Protection" means that all people must be treated equally under the law; a law must apply to all people in the same way. Lawrence and Garner argued that the Texas statute violated the Equal Protection Clause because the law prohibited certain acts between two men but did not prohibit those same acts between a man and a woman. The Court could have decided the case under the Equal Protection Clause, but it instead decided the case under the Due Process Clause.

"Due Process" means that the government must follow a process before depriving a citizen of "life, liberty, or property." The "process" is known as "notice and opportunity to be heard." The government must give the citizen notice that the action is being taken and must give him an opportunity to be heard before the action is taken.

Over the years, the U.S. Supreme Court has developed a "substantive branch" of the Due Process Clause, which focuses on the word "liberty" in the clause. "Liberty" traditionally included those rights found in the Bill of Rights.

But the Court has expanded the definition of “liberty” to include a number of additional protected rights. Rights protected by the Constitution have varying degrees of importance. The most important of these rights are known as “fundamental rights,” such as those found in the Bill of Rights. Fundamental rights are the most protected. Mr. Lawrence argued that he had a fundamental right of privacy under the Due Process Clause to have a sexual relationship with a member of the same sex in the privacy of his home. This is the argument that the Court considered in *Lawrence*.

The U.S. Supreme Court has twice addressed the issue of whether a right to engage in homosexual acts exists under the Constitution, in *Bowers*⁷ and in *Lawrence*.⁸ In *Bowers*, the Court declared there was no right to sodomy and that the States could pass laws prohibiting the behavior on moral grounds. In *Lawrence*, the Court determined that *Bowers* had been decided incorrectly.

Defining a Fundamental Right

Groups such as the ACLU have consistently argued that the “right to privacy” as defined by the Supreme Court includes the right from governmental interference in an individual’s private consensual sexual conduct, specifically those involving same sex relationships. The foundation for their argument rests on previous U.S. Supreme Court cases addressing what they call “sexual privacy.”⁹

If a right is declared a fundamental right, then any law prohibiting or burdening that right is presumed *invalid*. The *State* must prove that it has a “compelling State interest” and that the law is “narrowly tailored” to meet that interest.¹⁰ This is called the “strict scrutiny” test. Most laws challenged under strict scrutiny have failed to stand, which is why those in same sex relationships want to establish that they have a fundamental right to be in those relationships. Under this test, laws prohibiting same sex marriages will be presumed invalid unless the State proves otherwise.

The Court has defined fundamental rights as those found in the Bill of Rights and those “deeply rooted in this Nation’s history and tradition.”¹¹ Thus far, the following have been deemed rooted in our Nation’s history and tradition: the rights to marry, have children, direct the education and upbringing of one’s children, marital privacy, use contraception, bodily integrity, and abortion.¹²

If the right is not a fundamental right,

then the law is presumed *valid*. The persons challenging the law must prove that the State has no “rational basis” for the law. This is called the “rational basis” test. Under the rational basis test the Court is supposed to give deference to a law passed by the people of the State when the law reflects a policy of the State. If the law addresses the health, safety, and welfare of the State’s citizens, then the law has a rational basis. Traditionally, and under *Bowers*, a moral consensus could constitute a rational basis for laws passed by the States. Most laws survive the rational basis test and are upheld because any rational basis is enough.¹³ But, in *Lawrence* the rational basis test was applied and the Texas statute was struck down.

What Right Was Declared?

The Court concluded in *Lawrence* that their *Bowers* ruling failed “to appreciate the extent of liberty at stake...” and that “[a personal relationship] is within the liberty of persons to choose without being punished as criminals.”¹⁴

The Court used one of the most disturbing passages in Supreme Court jurisprudence, quoting *Planned Parenthood v. Casey* (the case upholding *Roe v. Wade*):

“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and the mystery of human life.”

This concept of liberty is the basis of the argument and the conclusion that it is not government’s place to dictate moral behavior of the individual. In fact, the Court declared that “absent injury to a person or abuse of an institution the law protects” the State cannot define the meaning of a relationship (by calling it criminal) or set boundaries around the relationship.¹⁵

Despite its lengthy discussion regarding the liberty involved in the relationship between those of the same sex, the Court applied the lowest test—the rational basis test. It held, “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”¹⁶ It rejected the *Bowers* conclusion that promoting moral behavior was a rational reason for the State law. The Court stated, “The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for up-

holding a law prohibiting the practice.”¹⁷

However, the Court stopped short of declaring it a fundamental right. Justice Antonin Scalia pointed out in his dissent that had the Court declared this to be a fundamental right, it would have applied the “strict scrutiny” test rather than the “rational basis” test.¹⁸ The Court’s reasoning is vague enough to invite a future decision to clarify what right exists. Currently, many debates and court battles are over whether the Court really meant to establish a fundamental right.

The expanded definition of liberty and the Court’s ruling are not the only reasons to be alarmed by this decision. The Court woefully failed to follow its own two-hundred year old principles in making this decision.

The Court's Unprincipled Approach

Throughout the Court’s history there have been principles the Court has consistently followed when making decisions. These principles serve as a guide to the Court and serve to maintain the balance of power between the three branches of government. When the Court fails to follow these rules, its rulings stand on shaky ground and threaten the whole system of government. Some of those principles are: to consider this Country’s history and tradition for guidance; to uphold previous decisions, which provides stability in the law; and to decide cases on the narrowest grounds to help prevent the Court from making mistakes. The *Lawrence* majority failed to follow any of these principles in its decision. Consider the following about the *Lawrence* decision:

The majority focused on the last fifty years rather than “ancient roots”: In *Bowers*, the Court followed the principle of searching history and tradition in making its decision and wrote that laws prohibiting sodomy have ancient roots and have been a part of this country’s laws since its inception. In *Lawrence*, the Court countered that *Bowers* had overstated the historical premise that sodomy had been prohibited since ancient times. Justice Anthony Kennedy acknowledged that condemnation of these sexual practices is firmly rooted in Judeo-Christian moral and ethical standards, but that the laws and traditions of the past fifty years are more relevant. He argued that in the last fifty years, Americans have an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. History and tradition are the starting point but not in all cases the ending point

of the substantive due process inquiry.”¹⁹

The Court stated, “The condemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.... These considerations do not answer the question before us.... Our obligation is to define the liberty of all, not to mandate our own moral code.”²⁰

In *Lawrence*, the Court argued that laws prohibiting sodomy had never been directed toward “homosexual conduct as a distinct matter.” It argued that traditionally sodomy laws had applied to the acts, regardless of the situation and that “the concept of the homosexual as a distinct category of person did not emerge until the late 19th Century.”²¹ It stated further that only recently were these sodomy laws used to prosecute those in homosexual situations in the privacy of the home, and this was a result of rising animosity toward homosexuals as a class.

If that was a significant consideration in the *Lawrence* decision, then it would have been most appropriate to address the Equal Protection argument, demanding that States treat everyone the same under the law, but the Court did not do that.

The Court failed to rule on the narrowest grounds: The principle that cases should be decided on the narrowest grounds dictated that the Court should have ruled on the Equal Protection grounds rather than the Due Process grounds. The Court felt so compelled to invalidate *Bowers v. Hardwick* once and for all that it spent little time discussing the Equal Protection argument. In its reasoning for not addressing the Equal Protection argument, the Court blurred the lines between Equal Protection cases and Due Process cases.²² Overall, the failure to decide the case on the more narrow grounds of Equal Protection further demonstrates the Court’s determination to decide cases however it sees fit without any standard of interpretation. This only adds to the power of the Supreme Court over the other branches of government.

The Court used international law to justify its decision: In an attempt to further justify its reason for rejecting *Bowers*, the Court considered international law. The Court wrote, “To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.” The Court looked at the European Court of Human Rights and other nations that have taken action to protect the right of “homosexual adults to engage in intimate, consensual

conduct.”²³ The Court shockingly concluded that “There has been no showing that in this country the governmental interest in circumscribing personal choice is somewhat more legitimate or urgent.” It is an understatement to say that this conclusion sets a dangerous precedent by inviting the use of jurisprudence outside of the United States to justify decisions, especially when courts in other nations do not have any authority in the United States and nowhere in the U.S. Constitution is a provision made for this. The Court should never have considered these laws in making its decision. Yet, even if one believed that international law should influence the laws of this country, the Court violated even this notion by failing to consider the other countries that still prohibit sodomy.

The Court undermined the doctrine of *stare decisis* in its reasoning: The doctrine of *stare decisis* is the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.²⁴ In *Lawrence*, the Court wrote, “The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”²⁵ The Court went on to declare that the holding in *Bowers* had not induced detrimental reliance—neither by individual nor by society—that would counsel against overturning its holding.²⁶ Justice Scalia points out in his dissent in *Lawrence* that this conclusion is inaccurate, and that the argument laid out by the Court for overturning *Bowers* could just as well be made to overturn *Roe v. Wade*.

Taken as a whole, the Court is disingenuous in its reasoning and is wholly arbitrary in its approach to making this decision. It is clear from the Court’s language that its agenda was to invalidate *Bowers* and establish a right in the homosexual relationship. It chose to ignore its own principles and reject morality to do it. This decision serves to impose the morality of the Court on the citizens of those States who want to uphold laws based on a moral consensus. As Justice Scalia stated in his dissent, “It is clear from this [decision] that the Court has taken sides in the culture war, departing from its role of assuring, as a neutral observer, that the democratic rules of engagement are observed.”²⁷

The Future of *Lawrence v. Texas*

The Court will most likely be asked to clarify the right involved in the near future because a debate has already emerged over

whether the Court established a fundamental right or some other right. The case will likely arise over the issue of same sex marriages, because groups like the ACLU, Human Rights Campaign, and Lambda Legal Defense are diligently working toward this end, and are the source of the litigation in Arizona, New Jersey and Massachusetts.

In making the claim that a fundamental right exists, it cannot rightly be argued that acts of sodomy are deeply rooted in our history and tradition. However, liberty is such a fundamental right. This is an important argument for those engaged in homosexual conduct, and the Supreme Court has provided the reasoning for future decisions. Right now, the Court could go in either direction.

If the Court declares that those engaged in same sex relationships have a fundamental right to these relationships or to “private consensual sexual acts,” then States will be forced to give legitimacy to same sex relationships—unless the State can show that it has a compelling State interest to prohibit the behavior and that the prohibition is narrowly tailored to meet that interest.

Health Risks are Still a Concern

Remarkably, one of the issues that the *Lawrence* Court failed to address was the health risks involved in the acts of sodomy. A law that protects the health and safety of its citizens would undoubtedly meet the “rational basis” test, but this was not even discussed in the opinion.

The Court may have left a significant loophole in its decision. The Court wrote:

*“The [criminal] statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set boundaries absent injury to a person or abuse of an institution the law protects.”*²⁸

A strong argument can be made that acts of sodomy injure persons and institutions the law protects, such as marriage.²⁹

North Carolina’s Law

Some have argued that *Lawrence* has invalidated North Carolina’s “Crime Against Nature” statute, G.S. 14-177, but *Lawrence* has only restricted the statute from applying to consenting adults in the privacy of the home. The other acts prohibited by the statute still stand.

The current statute is broadly worded, "If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon."³⁰ Under this law, crimes against nature are defined as sexual intercourse contrary to the order of nature. It includes acts with animals and anal and oral sex.³¹ North Carolina courts have determined that the law does not generally apply to married couples.³² *Lawrence* has merely limited the application of this law. No longer can the State convict an adult engaged in these acts with another consenting adult in the privacy of the home. However, acts committed with animals are still prohibited, and law enforcement officials are still using this statute to arrest individuals for same sex prostitution or opposite sex prostitution involving oral sex. North Carolina's law on prostitution does not cover these acts.³³ Some individuals may want to repeal this statute or amend it in an attempt to reflect the Supreme Court ruling in *Lawrence*, but that is not only unnecessary, it would not be wise considering the other laws that would be impacted by its removal.

If the Court's conclusion that morality alone cannot support a law infringing on the sexual privacy of consenting adults, then the following North Carolina laws could face constitutional challenges in the future: Fornication and Adultery,³⁴ Prostitution and Assignment,³⁵ Bigamy,³⁶ and the various incest laws.³⁷ The key argument of those who may want to challenge these laws is that under *Lawrence v. Texas*, States cannot prohibit any sexual acts within the home between consenting adults.

Conclusion

All laws, regardless of what the Court may state, have moral underpinnings. To say that laws do not (or should not) impose a moral code is nonsensical—laws by nature are a moral code. The legislative process is the appropriate venue to establish the guidelines for the health, safety, and welfare of the community. It has been firmly established that the act of sodomy causes serious health risks. In *Lawrence*, the Court made law rather than interpreting the law, and the Court stripped from

the people the power to govern themselves. The Court overstepped its bounds, because the battle for the culture should be in the hands of the people and not the courts. The balance of power must be restored, and citizens joined together have the power and voice to do that.

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Endnotes

1. These are the facts as described in *Lawrence v. Texas*, 539 U.S. ____ (2003).
 2. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
 3. *Standhardt v. Superior Court*; Arizona Court of Appeals No. 1 CA-SA 03-150 (October 3, 2003); *Lewis v. Harris*, New Jersey Superior Court No. MER-L-15-03.
 4. See *Goodridge, et. al. v. Department of Public Health*, slip opinion of the Supreme Judicial Court of Massachusetts, SJC-08860.
 5. In *Morrison v. Sadler*, the Indiana chapter of the ACLU filed suit on behalf of three homosexual couples seeking marriage licenses or recognition of their Vermont civil union licenses. A superior court judge dismissed the case in May. It is on appeal in the state court of appeals.
 6. U.S. Constitution, Fourteenth Amendment, adopted July 21, 1868.
 7. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
 8. *Lawrence v. Texas*, 539 U.S. ____ (2003).
 9. **Before Bowers:** *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a law prohibiting married couples from obtaining contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a law prohibiting unmarried persons from obtaining contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating a law prohibiting abortions); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (invalidating a law prohibiting those under 16 from obtaining contraceptives).
- After Bowers:** *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming *Roe v. Wade*); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a State constitutional amendment that prohibited antidiscrimination laws to include those engaged in homosexual relationships.)

10. See *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965).
11. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).
12. *Id.*
13. There is a third constitutional test which was not argued in this case; therefore it was not mentioned here.
14. *Lawrence* majority at 6.
15. *Id.*
16. *Id.* at 18.
17. *Id.* at 17.
18. *Lawrence*, Scalia dissent at 1-2.
19. *Lawrence* majority at 12.
20. *Id.* at 10.
21. *Id.* at 7.
22. In addressing the Equal Protection case of *Romer v. Evans*, 517 U.S. 620 (1996), the Court blurred the distinction between Equal Protection cases and Due Process cases when it wrote, "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests....[because] [w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual person to discrimination both in the public and in the private spheres....[Bowers] continuance as precedent demeans the lives of homosexual persons."
23. *Lawrence* majority at 16.
24. Black's Law Dictionary, Seventh Edition, p. 1414.
25. *Lawrence* majority at 16.
26. *Id.* at 17.
27. *Lawrence*, Scalia dissent at 18.
28. *Lawrence*, majority at 6.
29. ElHage, Alysse. "The Health Risks of Sodomy." *Findings*. North Carolina Family Policy Council. January 2000.
30. North Carolina General Statute 14-177, "Crime against nature."
31. See *id.* and *State v. Poe*, 40 N.C. App. 385 (1979); *State v. Chance*, 3 N.C. App. 459 (1969); *State v. Harward*, 264 N.C. 746 (1965).
32. *State v. Poe*, 40 N.C. App. 385 (1979).
33. Headrick, Christina. "Sodomy law still enforced." *Raleigh News and Observer*, 08/25/2003.
34. N.C.G.S. § 14-184.
35. N.C.G.S. § 14-203 et. al.
36. N.C.G.S. § 14-183.
37. N.C.G.S. § 14-178; N.C.G.S. § 14-179.

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