

■ *Lawrence v. Texas*

Date: June 26, 2003

Author(s): Justice Anthony Kennedy, opinion; Justice Sandra Day O'Connor, concurrence; Justice Antonin Scalia, dissent

Genre: court opinion

Summary Overview

Lawrence v. Texas was a landmark decision by the US Supreme Court in 2003 that overturned precedent in *Bowers v. Hardwick*, a 1986 case that upheld the constitutionality of a Georgia law that prohibited sodomy between same-sex couples. In 1998, Texas police responded to an erroneous report about a disturbance at the home of John Geddes Lawrence. When police entered Lawrence's apartment, however, instead of finding an intruder, they found Lawrence in bed with Tyron Garner. The police accused the two men of anal copulation, which violated Texas State's "Homosexual Conduct" law. After numerous appeals at the state level, the case was granted a writ of certiorari—or review—and seen by the Supreme Court. The case directly challenged the prior the Court's prior decision on the constitutionality of state sodomy regulations in *Bowers*. Seventeen years after that decision, Anthony Kennedy, writing for the majority, stated that the states held no rational basis to regulate sexual activity between two consenting adults. Writing for the minority, Antonin Scalia claimed that the Court disregarded long-standing cultural disapproval for same-sex relationships. Kennedy's opinion, however, refuted Scalia by stating that history showed that states recently began to prosecute same-sex relationships under sodomy provisions, many as late as the 1970s. *Lawrence v. Texas* focused on whether Texas violated Lawrence's and Garner's liberty and right to privacy as it pertained to their freedom to consent to sex as adults.

Defining Moment

When *Lawrence v. Texas* was decided, the United States experienced a continuing debate about the "culture war" which pitted advocates of sexual freedom, civil rights, and gender equality against reactionary forces. By the time the *Lawrence* case arrived, most constitutional experts predicted that the law would be chal-

lenged on the question of whether the state unequally applied the law against gays and lesbians. Instead, the Court delivered an opinion that overturned *Bowers* and did so by explaining how the precedent violated individual privacy and liberty.

Lawrence v. Texas abolished laws in states that also targeted the enforcement of anti-sodomy statutes against same-sex couples. *Lawrence* was a legal victory for gay rights advocates who contested conservative organizations like the Alliance for Marriage which proposed a Federal Marriage Amendment (FMA) to the Constitution in 2002. The FMA called for all marriages to be defined as a union of one man and one woman.

Still, *Lawrence* might also be read within a larger context. The case forced the Court to answer whether the law provided due process and equal protection before the law. In many ways, the fight for equality encompassed these two central constitutional questions. It stretched back to the homophile movement of the 1950s that demanded visibility and respect, and it continued with the push for legal equality by the gay liberation and women's movements of the 1960s and 1970s. It persisted during the profound governmental and societal neglect of HIV and AIDS in the 1980s. In these decades, gay rights activists made headway in changing cultural and social attitudes towards same-sex couples. On the foreground of battles in the states over the legal state of state recognition of same-sex unions, *Lawrence* acknowledged a broader point: that anti-sodomy laws interfered in the private activities of consenting adults and that this intrusion violated individual liberty.

The minority opinion wondered whether *Lawrence* implied a right to marriage between same-sex couples and Kennedy stated that this case involved more elemental principles like liberty and privacy. Ultimately, *Lawrence v. Texas* elevated consensual sex between adults as a protected Fourteenth Amendment right.

While the opinion did not decisively consider whether same-sex couples had a right to marriage, it gave gay rights groups hope for further legal protections. Indeed, some anticipated that the majority's unexpectedly broad ruling on consent, liberty, and privacy signaled future changes, like a right to marriage between two consenting adults.

Author Biography

Anthony Kennedy was born and raised in Sacramento, California. He attended Stanford University and graduated from Harvard Law School in 1961. His nomination to the Supreme Court was confirmed on February 3, 1988.

Sandra Day O'Connor was born in El Paso, Texas, and was raised on a cattle ranch near Duncan, Arizona. She attended Stanford University and received a BA in economics in 1950. She graduated from Stanford Law School in 1952. Her nomination to the Supreme Court was confirmed on September 21, 1981.

Antonin Scalia was born in Trenton, New Jersey, and raised in Elmhurst, Queens, in New York City. He attended Georgetown University and graduated *summa cum laude* as valedictorian with a BA in history in 1957. He graduated from Harvard Law School in 1960. His nomination to the Supreme Court was confirmed on August 22, 1974.

HISTORICAL DOCUMENT

SUPREME COURT OF THE UNITED STATES
JOHN GEDDES LAWRENCE and TYRON GARNER,
PETITIONERS v. TEXAS
ON WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF TEXAS, FOURTEENTH DISTRICT
June 26, 2003

Justice Kennedy delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned.

The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).” The applicable state law is Tex. Penal Code Ann. §21.06(a) (2003). It provides: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. . . .”

The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere*, were each fined \$200. . . .

We granted certiorari to consider three questions:

“1. Whether Petitioners’ criminal convictions under the Texas “Homosexual Conduct” law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?

“2. Whether Petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?”

“3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?”

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court’s holding in *Bowers*...

The Court began its substantive discussion in *Bowers* as follows: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.” That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The 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 its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice....

The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character...It was not until the 1970’s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. . . . In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: “Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.” As with Justice White’s assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. . . .

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian

moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. Parliament enacted the substance of those recommendations 10 years later. Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private....

In *Planned Parenthood of Southeastern Pa. v. Casey*, the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

“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 of the

mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right. . . .

The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons. . . .

The rationale of *Bowers* does not withstand careful analysis. . . *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. . . .

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. . . .

Justice O'Connor, concurring in the judgment. The Court today overrules *Bowers v. Hardwick*. I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause. . . .

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

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

II

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

Bowers' conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.

Realizing that fact, the Court instead says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. . . .

The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."

IV

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational

basis for the law here under attack. This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of any society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable"—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review. . . .

V

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . .

One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress.

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. . . . But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts—or, for that matter, display any moral disapprobation of them—than I would forbid it to do so. . . .

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Do not believe it.

More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” and then declares that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct; and if, as the Court says (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”? This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so. . . .

GLOSSARY

certiorari : an order whereby a higher court reviews a lower court's decision

de novo : starting from the beginning

due process clause : the Fifth Amendment states that no one shall be “deprived of life, liberty or property without due process of law” by the federal government; the Fourteenth Amendment, ratified in 1868, applies the same language to all states

nolo contendere : a plea that a defendant in a criminal trial accepts as though guilty without admitting guilt

rational-basis review : a test used to determine a law's constitutionality that requires the challenged law to be rationally related to a legitimate government interest

sodomy : anal or oral sexual intercourse

stare decisis : the legal principle of determining points in litigation according to precedent

Document Analysis

The Court considered three major questions. First, whether the state of Texas' "Homosexual Conduct" Act violated the Fourteenth Amendment's guarantee of equal protection of laws. Second, whether criminal convictions violated "their vital interests in liberty and privacy" under the Due Process Clause of the Fourteenth Amendment. Third, whether *Bowers v. Hardwick*, the 1986 Supreme Court decision upholding Georgia's law prohibiting sodomy between same-sex couples should be overruled.

Kennedy argued that no rational basis existed for the law to regulate sodomy—which referred to anal or oral sex—between two consenting adults. Kennedy further argued that the statute violated an individual's right to privacy and liberty. In the 1986 *Bowers v. Hardwick* case, the Court asked whether the Constitution "confers a fundamental rights upon homosexual to engage in sodomy." Kennedy countered that to begin so would be to demean marriage as merely a sexual act. Kennedy acknowledged that the sodomy laws applied to a specific sexual act, but doubted whether they were applied in ways that preserved a consenting adult's liberty, but particularly, their privacy.

The majority acknowledged that the Court in *Bowers* made a larger point that centuries-long prohibitions against homosexual conduct have existed "shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." Kennedy deferred that a right to or prohibition of "homosexual sodomy" did not mean "the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." Instead Kennedy evoked the Court's decision in another landmark privacy case *Planned Parenthood of Southeastern Pennsylvania v. Casey* that "Our obligation is to define the liberty of all, not to mandate our own moral code."

Kennedy questioned the Court's finding in *Bowers* that the principles expressed in Georgia's law were seen "throughout the history of Western civilization" and "rooted in Judeo-Christian moral and ethical standards." He cited that scholarship questioned this assumption and pointed to the prior half century for the most relevant examples about opprobrium for same-sex relationships. British Parliament, for example, recommended in 1957 and Parliament repealed, between 1967 and 1982, laws criminalizing same-sex acts.

Citing the abortion rights and privacy decision in *Casey*, Kennedy wrote that *Bowers* denied and restricted consenting adults' right to liberty and to make autonomous decisions about sex. Kennedy reasoned the framers of the Fifth and Fourteenth Amendment's Due Process Clauses did not enumerate specific liberties and could not have known "the components of liberty in its manifold possibilities."

Sandra Day O'Connor concurred with Kennedy's opinion, but based judgment in the Fourteenth Amendment's Equal Protection Clause; the clause that many gay rights groups and constitutional scholars expected the Court to rule on.

Antonin Scalia in the three-person minority disagreed with the Court's judgment on two major points: that the Court erred in assuming that "emerging awareness" about how consenting adults had sex did not equal a "fundamental right" and that foreign cases that ignored other countries that criminally prohibited sodomy were "meaningless dicta." In sum, Scalia felt that the Court contravened democratic decisions in the states that sought to promote "majoritarian sexual morality" and that they had a rational interest to do so.

Scalia accused the Court of succumbing to "a law-profession culture, that has largely signed on to the so-called homosexual agenda" aimed at "eliminating the moral opprobrium that has traditionally attached to homosexual conduct." Scalia argued that the Court should neutrally observe the democratic debate about the status of people who have sex with people of the same sex. Scalia felt that the democratic process encompassed a range whereby some states might decide to define marriage as strictly between different-sex couples, but leave "private homosexual acts" alone.

Scalia did not believe that the Court did not see in *Lawrence* a decision that the State must recognize same-sex relationships. The "principle and logic" of the *Lawrence* decision, in Scalia's eyes, suggested that the Court would have to inevitably answer the question about whether the State would recognize same-sex relationships as marriages. In Scalia's estimation, that question ought to be left to the democratic processes of the state. Kennedy and the majority, however, disagreed. The majority felt that when the state impinged on an individual's private life as it pertained to sex, it constricted rather than expanded liberty.

Essential Themes

The Court's ruling marked the first decisive shift on the question of legal equality for gays and lesbians since *Bowers* and another landmark 1996 case *Romer v. Evans* that decided a Colorado law barring recognition of homosexuality or bisexuality violated equal protection. *Lawrence* only continued *Romer's* conclusions that individual liberty and privacy were violated by the state's regulation of sexual activity between consenting adults. Anthony Kennedy authored both decisions, in addition to *United States v. Windsor* in 2013, which set the federal definition of marriage as a union of one man and one woman, and *Obergefell v. Hodges* in 2015, which guaranteed a fundamental right to marriage to same-sex couples. Anthony Kennedy authored all four decisions, and they represented the application of due process and equal protection clauses as vehicles for the legal recognition and equal protection of gays and lesbians under the law.

—George Aumoithe, M.A.

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