Order Code RL31681

CRS Report for Congress
Received through the CRS Web

# Homosexuality and the Constitution: A Legal Analysis of the Supreme Court Ruling in *Lawrence v. Texas*

**Updated May 26, 2005**

name redacted
Legislative Attorney
American Law Division

# Homosexuality and the Constitution: A Legal Analysis of the Supreme Court Ruling in *Lawrence v. Texas*


## Summary

In a sweeping decision issued on June 26, 2003, the Supreme Court struck down a Texas state statute that made it a crime for homosexuals to engage in certain private sex acts. Specifically, the Court's ruling in *Lawrence v. Texas* held that the due process privacy guarantee of the Fourteenth Amendment extends to protect consensual gay sex. Although the Court also considered whether the Texas state statute violated the constitutional right to equal protection, the Court ultimately based its ruling on broader privacy grounds. In addition, the Court also overturned its 1986 decision in *Bowers v. Hardwick*, a controversial case in which the Court ruled that there was no constitutional right to privacy that protects homosexual sodomy. This report provides an overview of the Supreme Court's opinion in *Lawrence v. Texas*, coupled with a discussion of its implications for future cases involving gay rights in general and same-sex marriage in particular. For a more detailed discussion of current developments regarding gay marriage, see CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by (name redacted).

## Contents

I. Introduction . . . . . 1
Background in *Lawrence v. Texas* . . . . . 1
Sodomy Laws in Other States . . . . . 2
Past Supreme Court Decisions in Gay Rights Cases: *Bowers v. Hardwick* and *Romer v. Evans* . . . . . 2

II. Supreme Court Review . . . . . 4
*Bowers v. Hardwick* and the Right to Privacy . . . . . 4
Equal Protection . . . . . 7

III. Conclusion . . . . . 8
Immediate Consequences . . . . . 8
Implications for Future Cases Involving Gay Rights . . . . . 9

# Homosexuality and the Constitution: A Legal Analysis of the Supreme Court Ruling in *Lawrence v. Texas*

## I. Introduction

In a sweeping decision issued on June 26, 2003, the Supreme Court struck down a Texas state statute that made it a crime for homosexuals to engage in certain private sex acts. Specifically, the Court's ruling in *Lawrence v. Texas* held that the due process privacy guarantee of the Fourteenth Amendment extends to protect consensual gay sex.[1] Although the Court also considered whether the Texas state statute violated the constitutional right to equal protection, the Court ultimately based its ruling on broader privacy grounds. In addition, the Court also overturned its 1986 decision in *Bowers v. Hardwick*, a controversial case in which the Court ruled that there was no constitutional right to privacy that protects homosexual sodomy. This report provides an overview of the Supreme Court's opinion in *Lawrence v. Texas*, coupled with a discussion of its implications for future cases involving gay rights in general and same-sex marriage in particular. For a more detailed discussion of current developments regarding gay marriage, see CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by (name redacted).

### Background in *Lawrence v. Texas*

In 1998, sheriff's officers, responding to a false report of a weapons disturbance, entered the private residence of John Geddes Lawrence, found Lawrence and Tyron Garner engaged in consensual sex, and arrested the two men for violating a Texas statute that prohibits homosexual sodomy.[2] Under the Texas penal code, "a person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex;"[3] "deviate sexual intercourse" is defined to include oral or anal sex.[4]

Following their convictions, Lawrence and Garner challenged the statute on constitutional equal protection and due process privacy grounds. Although a panel of the Court of Appeals of Texas ruled in their favor, the full Court of Appeals,

---

[1] 539 U.S. 558 (2003).

[2] Petition for Writ of Certiorari at 5, Lawrence v. Texas, 41 S.W.3d 349 (Tex. App. 2001) (No. 02-102) (hereinafter Petition for Writ of Certiorari).

[3] Tex. Penal Code § 21.06.

[4] Tex. Penal Code § 21.01(1).

sitting *en banc,* reversed, thereby reaffirming the original convictions.[5] When the Texas Court of Criminal Appeals refused to review the case, Lawrence and Garner appealed to the U.S. Supreme Court.[6] The Supreme Court granted certiorari,[7] and ultimately struck down the state statute, thereby reversing the Court of Appeals of Texas.[8]

## Sodomy Laws in Other States

At the time of the Lawrence decision, twelve other states, in addition to Texas, had anti-sodomy laws on their books. However, of the thirteen states with anti-sodomy laws, only four states, including Texas, had laws that criminalized sodomy between same-sex couples but not between heterosexual partners.[9] The remaining states with anti-sodomy laws criminalized sodomy for all couples, regardless of whether they consisted of same-sex or opposite-sex partners.

Notably, the number of states with anti-sodomy laws had declined significantly in the nearly two decades since the landmark *Bowers v. Hardwick* case upheld a Georgia law that outlawed homosexual sodomy in 1986. At that time, 24 states and the District of Columbia had anti-sodomy laws on the books, but half of those states, including Georgia, subsequently legislatively repealed or judicially overturned their respective anti-sodomy statutes.[10] By overturning *Bowers* and by deciding *Lawrence* on privacy grounds, the Supreme Court simultaneously overturned all state anti-sodomy laws, including statutes that do not distinguish between heterosexual and homosexual couples.

## Past Supreme Court Decisions in Gay Rights Cases: *Bowers v. Hardwick* and *Romer v. Evans*

The Supreme Court's decision in *Lawrence v. Texas* marks one of the few instances in which the Court has agreed to participate in a wider legal debate surrounding "gay rights." Indeed, over the past two decades, the Supreme Court has heard relatively few cases involving such issues.[11] Of the gay rights cases that the

---

[5] Lawrence v. Texas, 41 S.W.3d 349 (Tex. App. 2001) (en banc); *cert. granted* 537 U.S. 1044 (2002).

[6] Petition for Writ of Certiorari at 5-8.

[7] Lawrence v. Texas, 537 U.S. 1044 (2002).

[8] Lawrence v. Texas, 539 U.S. 558 (2003).

[9] The four states that criminalize same-sex sodomy only were Texas, Kansas, Missouri, and Oklahoma. The nine states that criminalize sodomy regardless of the sexual orientation of the partners were Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia. *Id.*

[10] Petition for Writ of Certiorari at 24-25.

[11] *See, e.g.*, Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Romer v. Evans, 517 U.S. 620 (1996); Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995); Bowers v. Hardwick, 478 U.S. 186 (1986); Rowland v. Mad River Local School Dist., 470

(continued...)

Court has heard, two cases, namely *Bowers v. Hardwick*[12] and *Romer v. Evans*,[13] are of particular significance to the outcome in *Lawrence* and are therefore discussed in greater detail in this section.[14]

In *Bowers v. Hardwick*, the Supreme Court considered a challenge to a Georgia statute that criminalized both homosexual and heterosexual sodomy. Ruling that the Due Process clause of the Fourteenth Amendment did not provide a fundamental right to engage in consensual homosexual sodomy, even in the privacy of one's own home, the Court upheld the Georgia statute.[15] Although other Supreme Court rulings have recognized a due process right of privacy that protects personal decisions regarding activities such as marriage, contraception, and procreation from government interference,[16] the *Bowers* decision essentially refused to recognize a similar right of privacy to protect individuals engaged in homosexual sodomy.

The other Supreme Court case shaping the Court's decision in *Lawrence* is *Romer v. Evans*. Decided in 1996, *Romer* held that Amendment 2 of the Colorado Constitution, which barred localities from enacting civil rights protections on the basis of sexual orientation, violated the Equal Protection Clause of the Fourteenth Amendment.[17] Although classifications based on sexual orientation do not receive the heightened constitutional scrutiny normally reserved for review of suspect classifications such as race or gender, the Court in this case nevertheless determined that the Colorado amendment violated the guarantee of equal protection because the law was motivated strictly by animus for homosexuals and because there was otherwise no rational basis for enacting such a sweeping restriction on the legal rights of gays and lesbians. According to the Court:

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause.[18]

---

[11] (...continued)
U.S. 1009 (1985).

[12] 478 U.S. 186 (1986).

[13] 517 U.S. 620 (1996).

[14] For additional discussion of these two cases, see CRS Report 96-575, "Homosexuality and the Federal Constitution: A Legal Analysis of the U.S. Supreme Court Ruling in *Romer v. Evans*" by (name redacted). For a detailed discussion of a wide range of legal issues regarding sexuality, see William N. Eskridge, Jr. & Nan D. Hunter, SEXUALITY, GENDER, AND THE LAW (1997).

[15] Hardwick, 478 U.S. at 191-92.

[16] *See, e.g.*, Carey v. Population Services International, 431 U.S. 678 (1977); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

[17] 517 U.S. 620, 635 (1996).

[18] *Id.*

Despite the fact that *Bowers* and *Romer* were decided on different constitutional grounds, both of the cases involved issues that were raised in the *Lawrence* case. Ultimately, the Supreme Court overruled its decision in *Bowers*, holding that the due process right to privacy extends to protect private, consensual sexual activity. Although Justice Sandra Day O'Connor, who originally voted with the majority to uphold the Georgia statute at issue in *Bowers*, did not join in the 5-4 decision to overrule that case, she did agree with the majority's decision to strike down the Texas statute for different reasons. In a separate opinion reminiscent of the Court's ruling in *Romer*, O'Connor indicated that she was voting to strike down the Texas sodomy law as a violation of the constitutional guarantee of equal protection[19]. The Court's opinion, O'Connor's concurrence, and the dissent's argument are detailed in the following section.

# II. Supreme Court Review

In their petition seeking Supreme Court review, attorneys for Lawrence and Garner posed three questions to the Court: (1) did the Texas statute violate the Equal Protection Clause of the Fourteenth Amendment; (2) did the Texas statute violate the right to privacy embedded in the Due Process Clause of the Fourteenth Amendment; and (3) should *Bowers* be overruled?[20] The Court's consideration of these and other issues is discussed in the following section.

## *Bowers v. Hardwick* and the Right to Privacy

Under the second question presented in *Lawrence* – which formed the basis for the Court's eventual ruling – the Supreme Court was faced with the question of whether or not the homosexual sodomy statute violates the right to privacy embedded in the Due Process Clause of the Fourteenth Amendment. Because the *Bowers v. Hardwick* case specifically considered the same issue, the Court's decision on the privacy question likewise affected the Court's decision on the third and final question – whether or not to overrule *Bowers*. The Court ultimately overruled *Bowers* and held that government interference with a private and intimate consensual adult activity is a violation of the due process right to privacy. This section describes the Court's reasoning and discusses the dissent's response.

The Court began its analysis in *Lawrence* by summarizing its substantive due process privacy doctrine. Under the Supreme Court's privacy jurisprudence, the Court has recognized a constitutional right to privacy despite the fact that this right is not specifically enumerated in the Constitution. In *Bowers*, for example, the Court noted that the Due Process right to privacy protects from government interference a wide range of personal decisions regarding issues such as child rearing, family relationships, procreation, marriage, contraception, and abortion.[21] This right to privacy is grounded in the notion that certain freedoms are so "fundamental" or

---

[19] Lawrence v. Texas, 539 U.S. 558, 579 (2003).

[20] Petition for Writ of Certiorari at i.

[21] Bowers v. Hardwick, 478 U.S. 186, 190-191 (1996). *See also*, Lawrence v. Texas, 539 U.S. at 573-74.

"implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed."[22] Alternatively, certain liberties may be deemed fundamental because they are "deeply rooted in this Nation's history and tradition."[23] Because these two tests do not always articulate clear standards for determining when a liberty is so "fundamental" that it deserves constitutional protection under the Due Process Clause, extending the right to privacy to liberties that have not previously been deemed fundamental by the Court, such as a right to engage in consensual homosexual sodomy, can sometimes prove controversial.

After outlining its privacy jurisprudence, the Court set forth its reasons for reconsidering its decision in *Bowers*. Of primary importance to the Court was the idea that the *Bowers* Court had "misapprehended the claim of liberty there presented to it."[24] In the *Lawrence* Court's view, the issue in *Bowers* was about more than a fundamental right to engage in homosexual sodomy. Rather, the case was about whether or not individuals have the right to make personal choices regarding their intimate relationships free of government interference.[25] Although the *Lawrence* Court did not explicitly deem homosexual sodomy to be a fundamental right, the Court nonetheless concluded that the *Bowers* Court had failed to properly define the liberty interests at stake when individuals make private, consensual choices about their sexual conduct.

The Court criticized the *Bowers* decision on several additional grounds. First, the Court noted that *Bowers* had relied in part on a history of condemnation of homosexuality, but the Court countered that argument by citing several legal and historical sources demonstrating that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[26] Second, although many believe homosexuality to be immoral, the Court noted that public perceptions on this issue have shifted over time. The Court pointed to changing trends in state law and international law as evidence of an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[27] Indeed, half the states with anti-sodomy laws have legislatively repealed or judicially overruled such statutes over the last two decades, including Georgia, the state whose anti-sodomy statute was upheld by the Court in *Bowers*, and a number of Western democracies have recognized the right to sexual privacy.[28] Finally, the Court noted that its own constitutional doctrine has evolved over the years that have elapsed since the *Bowers* decision was handed down, specifically citing its decisions in *Romer* and in *Planned Parenthood of Southeastern*

---

[22] Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

[23] Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

[24] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[25] *Id.* at 564-67.

[26] *Id.* at 568.

[27] *Id.* at 572.

[28] *Id.* at 573.

*Pa. v. Casey*, a privacy case involving abortion rights.[29] In addition to these criticisms of the *Bowers* decision, the Court also took special note of the stigma imposed by state laws that criminalize sodomy.[30]

After finishing this critique of *Bowers*, the Court next considered whether or not to overturn the case. In determining whether or not to overrule precedent, the Supreme Court typically considers four factors: (1) whether the precedent establishes a workable rule, (2) whether the public has relied on the rule, (3) whether legal doctrine has changed, and (4) whether facts in the case or public perception of such facts has changed.[31] Although the Court, which recognizes a need for continuity and respect for the rule of law, does not lightly overrule precedent, neither is the Court willing to refrain from doing so when it determines that a previous case has been incorrectly decided.[32] In *Lawrence*, the Court determined that:

> [T]here has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding. 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.[33]

After noting that the *Lawrence* case involved a consensual relationship and did not involve minors, public conduct, prostitution, or other legitimate state concerns, the majority concluded its opinion with the following strongly worded statement in support of its holding:

> 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.[34]

In an equally strongly worded dissent, Justice Antonin Scalia criticized the majority's decision in *Lawrence*. He accused the majority of being inconsistent for failing to adhere to the precedent established in *Bowers* after some of the same Justices had insisted on strong adherence to the rules of precedent in the 1992 *Casey* decision, in which the Court upheld abortion rights and refused to overturn *Roe v.*

---

[29] Id. at 573-74.

[30] *Id.* at 575-76.

[31] Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992).

[32] *Id.*

[33] Lawrence v. Texas, 539 U.S. 558, 577 (2003).

[34] *Id.* at 578 (citing *Casey*).

*Wade*.[35] He also accused the majority of misapplying the Court's substantive due process doctrine, asserting that homosexual sodomy has not achieved the status of a fundamental constitutional right in the years since *Bowers* was decided, [36] and he warned that the majority's opinion signaled "the end of all morals legislation."[37] Arguing that the Court "has taken sides in the culture war," the dissent concluded by arguing that the majority's opinion opens the door to legal challenges against an array of laws that regulate sexual activity and personal relationships, including laws that prohibit same-sex marriage.[38]

## Equal Protection

Although Justice O'Connor did agree that the Texas statute was unconstitutional, she did not agree with the majority's reasoning. Rather than ruling on due process privacy grounds, O'Connor based her concurring opinion on the Equal Protection Clause of the Fourteenth Amendment.[39]

Under the Supreme Court's equal protection jurisprudence, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[40] Laws based on suspect classifications such as race or gender, however, typically receive heightened scrutiny and require a stronger, if not compelling, state interest to justify the classification.[41] Because sexual orientation is not considered to be a suspect category, a state need only advance a rational reason for enacting a statute that treats individuals differently depending on their sexual orientation.[42]

Since *Lawrence* involved a statute that criminalized sodomy when engaged in by same-sex couples but not identical conduct by different-sex couples, O'Connor's concurring opinion relied on the rational basis standard of review. Acknowledging that most laws that are reviewed under the rational basis standard survive constitutional scrutiny, O'Connor nevertheless noted that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[43] Citing *Romer*, O'Connor extended this argument further, contending that "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. . . . The Texas sodomy law raises the inevitable inference that the disadvantage

---

[35] *Id.* at 586-592.

[36] *Id.* at 592-98.

[37] *Id.* at 599.

[38] *Id.* at *599-605.

[39] *Id.* at 579.

[40] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

[41] *Id.*

[42] Romer v. Evans, 517 U.S. 620, 642 at n1 (1996) (Scalia, J., dissenting).

[43] Lawrence v. Texas, 539 U.S. 558, 580 (2003).

imposed is born of animosity toward the class of persons affected."[44] As with the Colorado constitutional amendment at issue in *Romer*, therefore, O'Connor concluded that the Texas statute violated the Equal Protection Clause. Despite this conclusion, O'Connor was careful to note that not all laws that distinguish between heterosexuals and homosexuals would violate equal protection, specifically noting that an interest in preserving national security or the traditional institution of marriage could constitute a legitimate governmental interest.[45]

Although no other member of the Court signed on to O'Connor's concurring opinion, the majority opinion, which found the equal protection argument "tenable," appeared to favor the privacy approach because of its broader effect.[46] The dissent, however, disagreed with O'Connor's equal protection analysis, arguing that the Texas statute does not discriminate because it applies equally to men and women, as well as to heterosexuals and homosexuals, all of whom are subject to the same prohibition against engaging in same-sex sodomy.[47]

# III. Conclusion

Because many observers had expected the Court to issue a ruling on the more narrow equal protection grounds favored by O'Connor, the Court's privacy ruling was more sweeping than predicted.[48] The broad decision in *Lawrence* is sure to have lasting consequences for other cases involving, among other issues, sexual privacy and gay rights. Some of these potential consequences are highlighted below.

## Immediate Consequences

One immediate effect of the Court's ruling in *Lawrence* was to invalidate all thirteen of the existing state anti-sodomy laws, regardless of whether they applied to homosexual couples only or to all couples both heterosexual and homosexual. Had the Court issued its ruling on the more narrow equal protection grounds favored by O'Connor, the effect of the decision would have been to invalidate only those state statutes that discriminated against gays by prohibiting homosexual sodomy exclusively. Since the Court issued a broader ruling that the government cannot criminalize private, consensual, adult sexual behavior, the *Lawrence* case appears to create a more expansive right to sexual privacy that prohibits the states from making sodomy a crime for anyone, homosexual or heterosexual.

In another development, the Court also vacated the Kansas Court of Appeals' ruling in *Limon v. Kansas*, a similar case involving an equal protection challenge to

---

[44] *Id.* at 582-83.

[45] *Id.* at 585.

[46] *Id.* at 574-75.

[47] *Id.* at 599-600.

[48] Linda Greenhouse, *Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. Times, June 27, 2003, at A1.

a state law that treats homosexuals and heterosexuals differently.[49] Under Kansas law, sodomy with a child between the ages of 14 and 16 is punishable with probation if the partner is an older teenager of the opposite sex, but the same act is punishable with a prison sentence if the partner is an older teenager of the same sex. As a result of the Kansas statute, 18-year old Matthew Limon received a 17-year sentence for engaging in consensual gay sex with a 14-year old boy, despite the fact that he would have received a far lighter sentence for engaging in similar conduct with a youth of the opposite sex. The Supreme Court ordered the Kansas court to reconsider the case in light of the *Lawrence* ruling,[50] but the Court of Appeals of Kansas distinguished the *Lawrence* case and upheld the sentence, ruling that the state's interest in protecting children provided a rational basis for criminalizing homosexual sodomy more severely than heterosexual sodomy.[51] The Kansas Supreme Court subsequently issued a petition to review the lower court's decision, but has not yet ruled in the case.[52]

## Implications for Future Cases Involving Gay Rights

The Court's broad decision in *Lawrence* is likely to prompt a series of challenges to an array of governmental policies involving privacy interests and/or gay rights. Indeed, the case, which appears to greatly expand constitutional protection for sexual privacy, may give rise to challenges against statutes that prohibit same-sex marriage, gay adoption, gays in the military, or similar issues. How the courts will resolve these controversies, however, remains unclear.

On the one hand, the Court's ruling emphasized that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and that "persons in a homosexual relationship may seek autonomy for these purposes."[53] If *Lawrence* is viewed as establishing a broad constitutional right to sexual privacy, then the Court's decision may be interpreted as supporting challenges to laws that prohibit activities such as same-sex marriage or gay adoption.

On the other hand, the Court also distinguished the *Lawrence* decision from cases involving minors or prostitution, and it noted that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[54] Indeed, the courts may point to other government interests, such as an interest in preserving marriage or national security for example, to distinguish the private sexual conduct involved in *Lawrence* from the issues at stake in cases involving gay marriage or gays in the military.

---

[49] Limon v. Kansas, 539 U.S. 955 (2003).

[50] Charles Lane, *Gay Rights Ruling Affects Kansas Case*, Wash. Post (June 28, 2003), at A8.

[51] State v. Limon, 32 Kan. App. 2d 369.

[52] State v. Limon, NO. 00-85898-AS, 2004 Kan. LEXIS 284 (Kan. May 25, 2004).

[53] Lawrence v. Texas, 539 U.S. 558, 574 (2003).

[54] *Id.* at 578.

Like the courts, Congress may also respond to the *Lawrence* decision. For example, several legislators in the 108th Congress introduced proposals to amend the Constitution to prevent same-sex marriage, and similar proposed constitutional amendments have been introduced during the 109th Congress.[55]

[55] *See, e.g.*, H.J.Res. 39, H.R. 1100, S.J.Res 1, and S.J.Res. 13.