Winter 2004

Supreme Court Watch

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SUPREME COURT WATCH

By Reginald C. Oh

On June 26, 2003, the U.S. Supreme Court handed down *Lawrence v. Texas,* 123 S. Ct. 2472 (2003), a landmark Fourteenth Amendment substantive due process decision. By a 6–3 vote, the Court overruled its ruling in *Bowers v. Hardwick,* 478 U.S. 186 (1986), and declared unconstitutional a Texas anti-sodomy statute criminalizing consensual sexual conduct between persons of the same sex.

In *Lawrence,* Houston, Texas police officers were dispatched to a private residence in response to a reported disturbance. Upon entering the apartment, the police officers observed petitioners John Geddes Lawrence and Tyron Garner engaging in a sexual act. The officers arrested the two petitioners, held them in custody overnight, and then charged them with violating Texas Penal Code § 21.06(a), which provided: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defined "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person. . . ." At trial, the trial court rejected the petitioners challenge to the constitutionality of the statute. Petitioners entered a plea of *nolo contendere,* were fined $200, and assessed court costs of $141.25.

Petitioners appealed their convictions, contending that their convictions under the Texas anti-sodomy statute violated their federal equal protection and due process rights. The Texas Criminal Court of Appeals rejected the constitutional arguments and affirmed their convictions. Petitioners appealed the state court ruling to the U.S. Supreme Court, which granted certiorari in the case.

Justice Anthony Kennedy, writing for the majority, held that the Texas anti-sodomy statute, by criminalizing adult consensual sexual conduct, violated the petitioners' vital interests in liberty and privacy as protected by the substantive due process doctrine under the Fourteenth Amendment. Justice O'Connor concurred in the judgment, writing separately to contend that the statute violated equal protection rather than substantive due process. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, wrote the dissenting opinion.

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In reaching its holding, the Court took pains to explicitly overrule *Bowers v. Hardwick,* a 1986 decision in which the Court had upheld a Georgia anti-sodomy statute. In that case, the Court rejected the argument that the statute violated substantive due process, reasoning that there was no "fundamental right upon homosexuals to engage in sodomy." Accordingly, the *Bowers* Court declared that since the Georgia anti-sodomy law did not infringe upon a fundamental right or liberty interest, the statute needed only to be subject to minimal judicial scrutiny, and the Court upheld the statute as rationally related to advancing a legitimate state interest.

In *Lawrence,* however, in striking down the Texas anti-sodomy statute, the Court asserted, "*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." 123 S. Ct. at 2484. Although the Court clearly overruled *Bowers,* what is not clear is exactly *how* the Court overruled *Bowers.* Did the *Lawrence* Court, for example, declare the "right to engage in homosexual sodomy" a fundamental right? In dissent, Justice Scalia noted, "[W]hile overruling the *outcome* of *Bowers,* the Court leaves strangely untouched its central legal conclusion: 'Respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are not willing to do.'" *Id.* at 2488.

Justice Scalia is partially correct. He is right because the Court explicitly refused to recognize the "right to engage in homosexual sodomy" as a fundamental right. In fact, Kennedy refused to frame the issue in *Lawrence* as whether there is a "fundamental right upon homosexuals to engage in sodomy," asserting that "[t]o 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." *Id.* at 2478.

Instead, the Court recognized that a fundamental liberty interest was at stake, but it formulated that liberty interest at a higher level of generality. For the majority, the doctrine of substantive due process protects the liberty interest of persons in being able to decide, free from government intrusion, "how to conduct their private lives in matters pertaining to sex." *Id.* at 2480.

For the majority, the Texas anti-sodomy statute was more than just an attempt to regulate sexual activity, but instead it was an attempt "to control a personal relationship" in which sexual contact between persons is but "one element in a personal bond that is . . . enduring." Substantive due process protects the fundamental liberty interest of all persons, heterosexual or homosexual, to be able to freely make the choice to enter into a personal relationship in which intimate sexual conduct is one part of that relationship.

Thus, the *Lawrence* majority recognized that the liberty in-

terest protected in earlier substantive due process cases is the freedom to make *decisions and choices* in matters affecting a person's autonomy and selfhood. In other words, what is constitutionally impermissible about anti-sodomy laws is not that it criminalizes certain conduct, but that it criminalizes a person's *decision* or *choice* to engage in that conduct.

The distinction between criminalizing the choice to engage in certain conduct as opposed to criminalizing the conduct itself is not just a semantic distinction. Rather, the distinction helps to understand what interests and rights are really at stake in substantive due process cases. For example, imagine a state passes a law that prohibits voters from voting for any Democratic candidate. Now, if we use the *Bowers* line of reasoning, if a person challenged the law as violation of substantive due process, the issue would be framed as, "Is there a fundamental right to vote for a Democrat?" It should be clear that to frame the issue this way is absurd. The problem here is not about the right to vote for a Democrat. The problem with such a law is that it interferes with the freedom to vote for any candidate of a person's choosing without interference from the state. Such a law infringes on a person's choices and decisions in such a way as to restrict that person's choices and decisions in such an important decision as how to exercise the right to vote. The right at stake, therefore, is the right to freely exercise choice when exercising the right to vote.

Similarly, in *Lawrence,* the right at stake was not the "right to engage in homosexual sodomy." Rather, the right at stake was the fundamental right to freely exercise choice when deciding to enter into personal relationships in which intimate sexual activity is an integral part of such relationships. Whether that choice involves entering into a relationship with a person of the same sex or opposite sex, the Court in *Lawrence* has concluded that that decision is one that ought to be made by adult individuals without morally based state-imposed limitations on that choice.

A question raised by Justice Scalia, however, is that if in fact the majority has articulated a fundamental liberty interest "in deciding how to conduct their private lives in matters pertaining to sex," does the *Lawrence* decision now mean that laws based upon the identity of the partner—laws against adultery, fornication, and adult incest—are also unconstitutional?

Arguably, there is a strong argument to be made that laws against fornication in particular are unconstitutional under *Lawrence,* since such laws do regulate the personal decisions to enter into personal relationships involving intimate sexual conduct. The holding in *Lawrence,* however, could be read to implicate a fundamental liberty interest only or especially when the law regulates choices regarding personal relationships in which such choices reflect back upon the identity of the person making such choices. In other words, the choice in *Lawrence* to enter into a same-sex personal relationship is intimately tied to the identity and selfhood of gays and lesbians, is intimately tied to the human process of self-definition. By contrast, the choice to engage in personal, intimate relations with an unmarried person is not intimately tied to the person's identity and selfhood.

Of course, the biggest issue raised by *Lawrence* is the status of marriage laws that prohibit same-sex marriages. Justice Scalia contends that the Court's reasoning in *Lawrence* makes it inevitable that laws prohibiting same-sex marriages will be struck down on substantive due process grounds. Justice Kennedy, however, explicitly stated that its holding in *Lawrence* does not involve or implicate the question of whether "the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 2484.

Who is right? Does *Lawrence* pave the way for the eventual constitutional protection of same-sex marriages? In brief, the Court could easily limit the reach of *Lawrence* by reasoning that anti-sodomy statutes involve the unconstitutional government intrusion into the realm of private decision-making, whereas a ban on same-sex marriages does not involve unjustifiable government intrusion into "a realm of private liberty," but instead, involves an entirely different question about the government's constitutional authority to formally recognize only certain types of unions.

However, legal advocates could use *Lawrence's* holding under the substantive due process prong of the Fourteenth Amendment to craft an *equal protection* argument that denying gays and lesbians the right to marry discriminates on the basis of a fundamental liberty interest, and therefore laws banning same-sex marriage ought to be subject to strict scrutiny, and presumably, under such rigorous scrutiny, must be struck down.

In any event, *Lawrence* will provide a new doctrinal weapon that legal advocates for gay and lesbian rights will use to expand rights for gays and lesbians and it will be interesting to see how the courts grapple with the ambiguous but potentially far-reaching implications of the *Lawrence* decision.

Chair's Message

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member showing up to a meeting only once and not coming back again because the meeting didn't meet expectations. Warning: Once you show up in person, it will be hard to leave without receiving an opportunity to continue to contribute your time and talents to the Section.

Special thanks, as always, to our outstanding Section staff—Jackie Baker and Alice Bare—who make everything that the Section leadership touches look good! Linda Castilla and Lori Nicoll, meeting staff at the New York State Bar Association, deserve our admiration and thanks for a wonderful joint Fall Meeting with the Municipal Law Section of the New York State Bar Association. Thanks also to the NYS Bar's Committee on Attorneys in Public Service who hosted an outstanding reception for us at the Governor's Mansion.

As always, the volunteer leadership of the State and Local Government Law Section remains committed to keeping our Section relevant and to providing value to all of our members. Your ideas, suggestions, and advice are always welcome.

Best wishes for a happy and healthy new year!