

What *Lawrence v. Texas* Says About the History and Future Of Reproductive Rights

By Cynthia Dailard

On the final day of its term this June, the U.S. Supreme Court handed down its long-awaited decision in *Lawrence v. Texas*, striking down by a vote of 6–3 a Texas law criminalizing consensual sex between gay adults. Writing for the Court, Justice Anthony M. Kennedy invalidated the law on the grounds that the Constitution’s guarantee of “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex” and that this liberty extends to gays and lesbians.

For reproductive rights advocates, *Lawrence* is notable because it is grounded in cases dating back to the 1960s that protect the right to use contraception and the right to choose to have an abortion. As a result, it implicitly reaffirms a line of cases—at the heart of which is *Roe v. Wade*—that has been consistently called into question. However, in reaching its decision, the Court explicitly overturned an earlier decision allowing states to criminalize gay sex, and its discussion about when judges should adhere to or abandon legal precedent could be used by reproductive rights opponents to argue for a reversal of *Roe*. Finally, with the future composition of the Court in question, the case is noteworthy for what it says—or does not say—about what key justices may think about personal autonomy, the interest that lies at the heart of reproductive rights.

Right to Personal Autonomy

The Court’s decision to strike down a state law criminalizing gay sex

between consenting adults is grounded squarely in the jurisprudence of reproductive rights. The majority opinion is a virtual primer on almost all the major reproductive rights cases of the past four decades. As the Court notes, “the most pertinent beginning point [for our discussion in *Lawrence*] is our decision in *Griswold v. Connecticut*,” a 1965 case striking down a state law prohibiting the use of contraceptives by married couples. Finding the law unconstitutional, the Court in *Griswold* held that although the law did not directly implicate any right explicitly spelled out in the Constitution, various “penumbras, formed by emanations” from specific guarantees in the Bill of Rights create “zones of privacy” into which the government cannot intrude. In *Griswold*, the Court was referring to a right of privacy surrounding the marital relationship.

As the Court in *Lawrence* notes, this right was extended to unmarried people several years later in *Eisenstadt v. Baird*. This 1972 case involved a challenge to a Massachusetts law prohibiting the distribution of contraceptives to unmarried people. While the Court decided the case on equal protection grounds, *Eisenstadt* further explicates the right to privacy: “The married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into

matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

These cases, as *Lawrence* explains, formed the basis for the 1973 landmark decision, *Roe v. Wade*, which struck down state laws prohibiting abortion and upheld a woman’s constitutional right to choose an abortion. *Roe* grounded the right to privacy in the protection of personal liberty guaranteed by the Due Process Clause of the Fourteenth Amendment, and it recognized a notion of liberty that includes a woman’s right to make fundamental decisions affecting her destiny, such as whether or not to terminate a pregnancy. In its 1977 case, *Carey v. Population Services International*, the Court subsequently struck down a law prohibiting the sale of nonprescription contraceptives to minors younger than 16; *Carey*, as did *Eisenstadt*, held that the privacy right found in *Griswold* was not limited to married adults.

Finally, the Court in *Lawrence* arrives at *Planned Parenthood of Southeastern Pennsylvania v. Casey*, its 1992 decision reaffirming what it deemed the central holding of *Roe*—that a state may not prohibit abortion prior to fetal viability. (At the same time, *Casey* elevated the state’s interest in protecting fetal life, and thus upheld some restrictions on women’s access to abortion contained in the Pennsylvania statute.) But most important for the Court in *Lawrence*, Justice Sandra Day O’Connor’s decision in *Casey* articulated the most expansive notion of liberty to date, reaffirming that the Due Process Clause protects personal decisions regarding family relationships: “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

An Expert on Gay Rights Talks about *Lawrence*

In August, I spoke with Matt Coles, director of the Lesbian and Gay Rights Project at the American Civil Liberties Union, about Lawrence v. Texas and its implications for reproductive rights.—CD

CD: Why is *Texas v. Lawrence*, a case about gay rights, important for reproductive rights?

MC: The *Lawrence* opinion is a ringing affirmation of the reproductive rights cases, something we haven't had in a long time.

CD: How does the jurisprudence of reproductive rights lead to the result in *Lawrence*?

MC: To explain its decision, the Court in *Lawrence* walks you through the line of major reproductive rights cases. The original decision about personal privacy—or, to use the better term the *Lawrence* opinion uses, “personal autonomy”—is the great contraceptive case, *Griswold v. Connecticut*. *Griswold* is typically said to be about decisions about whether or not to have children, but it's really about deciding whether or not to have sex. Connecticut's law against contraception said, in effect, if you want to have sex then the “penalty” is the risk of childbearing. *Griswold* said the state couldn't do that, that married couples have a right to non-procreative sex. People don't like to talk about it this way because, I suppose, they're still uncomfortable with the notion of a constitutional right to sex.

Lawrence then moves on to two contraceptive cases, *Eisenstadt v. Baird* and *Carey v. Population Services International*, which did not involve married couples and which made it clear that this autonomy right also applies to people who are not married.

Finally, *Lawrence* comes to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a case about a whole series of restrictions on abortion. *Casey* could have focused solely on the right to make decisions about childbearing, as *Roe v. Wade* did. Instead, *Casey*

really takes *Griswold* and the whole line further by saying all these cases are ultimately about the right to define your personality. The expansive view of autonomy found in *Casey* is the basis for *Lawrence*.

Lawrence is the first case to take *Casey*'s words about personality seriously (probably more seriously than *Casey* itself took them), and it is this language that *Lawrence* says establishes for everyone a right to private sexual behavior and to structure your personal intimate relationships.

CD: Legally, how does *Lawrence* shore up the jurisprudence of reproductive rights?

MC: By grounding its decision in *Lawrence* on the line of reproductive rights cases, the Court is saying in a meaningful way that it stands by these decisions.

Lawrence also says something very important about how you interpret the Fourteenth Amendment. The Fourteenth Amendment says that a state cannot deprive individuals of liberty without “due process”—without being able to show that it has no choice but to limit liberty in order to achieve something truly important. Forty years ago, the Court said that liberty includes some aspects of individual personality, not just the liberties set out in the Bill of Rights. The conservative wing of the Court has argued that for something to be considered a fundamental liberty, society historically had to have agreed it was pretty much beyond the power of government to regulate. It looked as though the Court was going in this direction in recent cases in other contexts, which would be very threatening to reproductive rights. But in *Lawrence*, the Court rejects that line of argument. It says instead that courts must consider history but must also understand historic ideas in a modern context, much as we understand TV and radio to be covered by freedom of press. This is a tremendous shot in the arm for reproductive rights cases.

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.” Moreover, she wrote, “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”

This line of cases, however, has been controversial from its inception. Conservative judges, scholars and politicians contend that the right to privacy (or, at the very least, a right to choose abortion) is a Court-invented one that cannot fairly be said to be found in the general language of the Constitution. Judges who find otherwise, they argue, are

imposing their own personal, normative beliefs about sensitive issues on American society—acting more as legislators than jurists.

But the Court in *Lawrence* does not retreat from the expansive notion of liberty articulated in *Casey*. Instead, it further broadens that right,

explaining what liberty means in its “more transcendent dimensions”: “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct....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 Role of Precedent

By reaffirming and validating this expansive notion of personal autonomy, *Lawrence* helps to rehabilitate its long-criticized lineage of reproductive rights cases, placing them on a firmer legal footing than ever before. At the same time, however, the Court in arriving at its result explicitly overruled its 1986 decision in *Bowers v. Hardwick*, in which it held that there is no constitutional right to homosexual sodomy. Justice Antonin Scalia’s dissenting opinion largely focuses on what he characterizes as the Court’s “surprising readiness” to reject its relatively recent *Bowers* decision. He attempts to use the majority’s logic against itself, arguing that that *Lawrence* articulates a standard for overturning precedent that, if consistently applied, demands the overthrow of *Roe v. Wade*.

According to Scalia, *Lawrence* spells out a three-part test under which it would be appropriate to take the unusual step of abandoning precedent: when a previous decision’s foundations have been eroded by subsequent decisions, when it has been the subject of substantial and continuing criticism and when it has not induced individual or societal reliance that counsels against its reversal. Scalia forcefully argues that *Roe* meets the three prongs of this test.

While it is undeniable that *Roe* has been and continues to be the subject of substantial criticism, whether it meets the other two prongs is at least questionable, and the third of these prongs deserves particular attention. Scalia argues that because overturning *Roe* would not outlaw abortions outright but leave that decision in the hands of individual states, women who lived in a state that proscribed abortions could simply travel to another; accordingly, he contends, there is no “detrimental reliance” that counsels against its overturn. That would appear to put him in direct conflict with Justice O’Connor, whose 1992 opinion in *Casey* squarely addresses the extent to which *Roe* had already become part of the fabric of American society: “For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”

The Court’s Composition

Whatever its legal merits, Scalia’s dissent suggests a roadmap for overturning *Roe* should the composition of the Court change. In that regard, there are a few things to take away from *Lawrence* in terms of what it says—or does not say—about the thinking of those sitting justices with whom *Roe*’s fate appears to hang in the balance. For example, O’Connor, often cited as the swing vote should the Court reconsider *Roe*, wrote her own concurring opinion in *Lawrence*, expressing an entirely different rationale for striking down the Texas law. She does not ground her decision in the jurisprudence of reproductive rights and says nothing about her current thinking on that

front. Instead, she finds the law unconstitutional under the Constitution’s Equal Protection Clause because, in her view, moral disapproval of a group is an inadequate justification for treating individuals who have same-sex partners differently than those who have opposite-sex partners. But despite O’Connor’s failure to embrace the reproductive rights line of cases in her *Lawrence* opinion, she is regarded as unlikely to supply a vote to directly overturn *Roe*, given her strong statements in *Casey* on autonomy and precedent.

What is perhaps more surprising is Justice Kennedy’s position in *Lawrence*. Reproductive rights advocates may find some comfort in the reassuring tone and substance of Kennedy’s opinion, particularly in light of his vociferous dissent in *Stenberg v. Carhart*. In that 2000 case, Kennedy disagreed strongly with the majority’s decision to strike down a Nebraska law banning “partial-birth” abortion because the law was overly broad and did not include an exception to protect a woman’s health (“High Court Strikes Down ‘Partial-Birth’ Ban, Upholds Protections for Clinic Clients,” *TGR*, August 2000, page 12). Kennedy argued that the liberty to choose an abortion is not absolute and that the state’s interest in protecting fetal life deserved greater deference. And because the ban might criminalize procedures considered by a physician to be the safest for a pregnant woman in a specific circumstance, he also appeared to be turning his back on the long-standing principle that states may not restrict abortion in a way that endangers women’s health—a key tenet of *Roe* and its progeny. To many, this signaled Kennedy’s possible retreat from his position in *Casey*, in which he cast a decisive vote for the majority. But his heavy reliance on *Casey* and other reproductive rights cases in the *Lawrence* opinion makes it clear
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that he still supports their legal underpinnings and, therefore, suggests that he would be unlikely to vote to criminalize all abortions.

Only time, however, will tell the extent to which *Lawrence* has a practical impact on the jurisprudence of reproductive rights and on abortion rights in particular. Ultimately, whether *Roe* is to stand or fall will

depend on the Court's composition at such time that question may be presented to it. But one thing is clear: The retirement of Justices O'Connor or Kennedy, or of any of the remaining four justices who support a woman's right to choose, would provide the antichoice Bush administration with the opportunity it is seeking to appoint a like-minded justice, making the scenario that Justice Scalia predicted—namely, *Roe*'s demise—more likely than ever before. ☹