

Sodomy Ruling Could Bolster Gay Marriage Suits

By Tony Wright

The U.S. Supreme Court's decision last month striking down a Texas statute making homosexual sex between consenting adults a crime could bolster efforts across the nation to get state courts to recognize a right to same-sex marriage, experts tell Lawyers Weekly USA.

In overturning the controversial 1986 decision *Bowers v. Hardwick* (478 U.S. 186), Justice Anthony M. Kennedy said the holding in no way "involve[s] whether the government must give formal recognition to any relationship that homosexual persons seek to enter."

But Justice Antonin Scalia, in a blistering dissent, disagreed.

"State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are like-

wise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the court makes no effort to cabin the scope of its decision to exclude them from its holding," Scalia said.

Opponents of same-sex marriage agreed with Scalia's analysis.

"The primary reason same-sex marriage has been rejected was because what same-sex partners did in the bedroom was illegal. It is no longer," said Vincent P. McCarthy of Washington, D.C., director for the Center for Marriage Law, which filed an amicus brief urging that the Texas law be upheld. He said the decision was "not a legal one, but political. ... These judges aren't elected by anybody, and have been making law for the last 10 years."

Gay-rights advocates did not endorse the harshness of Scalia's words but seemed to



Tyron Garner, left, and John Geddes Lawrence celebrate the U.S. Supreme Court's decision that Texas' sodomy law is unconstitutional. Garner and Lawrence were convicted in 1998 of violating this law.

agree with his conclusion that extending Due Process protection to homosexual conduct lends support to efforts to gain legal recognition of same-sex marriage.

Chai Feldblum, a law professor at Georgetown University Law Center who filed an amicus brief on behalf of the National Lesbian and Gay Law Association and other organizations, said Due Process "has come to stand for restrictions on government to intrude into people's intimate activities."

Feldblum acknowledged that the public "is not completely comfortable with gay sex" but said "people just don't believe it is the same as having sex with animals. That's because there are two gay guys living down the street from them for [the last] 12 years in a committed, loving relationship."

Dale Carpenter, associate professor at the University of Minnesota Law School, said that while the court's ruling in the Texas case "doesn't have a direct controlling effect" on the gay marriage cases pending in state courts, it will nevertheless be persuasive.

"I think a reasonable judge in state court could say ... this decision lends support to other issues," he said.

But Washington D.C., attorney Pamela Harrison, who contributed to an amicus brief opposing the Texas statute, suggested that the answer to the gay marriage question would be clearer if the court decided the case under an Equal Protection analysis — an approach taken by Justice Sandra Day O'Connor in her concurrence.

"Once you say classifications based on whether someone is gay need to be justified with more than 'We just don't like them,' then it is very difficult to explain why classifications under marriage licenses could exist," Harrison said.

Currently, constitutional challenges to prohibitions on same-sex marriage are pending in a number of states. A decision from the highest court in Massachusetts is expected in the near future.

1998 Incident

The case before the justices stemmed from a 1998 incident in which Houston police responded to a call from a citizen who claimed that a man armed with a gun was "going crazy" in the nearby apartment occupied by John Lawrence.

Police arrived at the scene and entered the apartment, where they found Lawrence and another man, Tyron Garner, engaged in sex, in violation of the state's Homosexual Conduct law, which criminalizes "deviate sexual intercourse."

The statute originally applied to both same-sex and opposite-sex couples. But in 1973 the Texas Legislature decriminalized "deviate sexual intercourse" between same-sex couples, while retaining the portion of the statute that applied to same-sex couples.

The Texas statute defines "deviate sexu-

al intercourse" as "any conduct between any part of the genitals of one person and the mouth of or anus of another person" or "the penetration of the genitals or anus of another person with an object."

Lawrence and Garner were arrested, jailed overnight, convicted and fined \$200 each, plus court costs. Meanwhile, the caller who tipped off the police ultimately admitted that the allegations weren't true and was convicted of filing a false report.

The case against Lawrence and Garner made its way through the Texas courts until the state's highest criminal court, without a written opinion, denied their appeal.

Due Process

At oral argument before the U.S. Supreme Court, Paul Smith of Chicago argued that the Texas statute treated gay people as second-class citizens because it criminalized same-sex couples for engaging in activities that were legal for heterosexual couples.

The court agreed, but went even further, reexamining under the 14th Amendment's Due Process clause how far the government can intrude into the bedrooms of Americans and their personal, intimate activities.

"Were we to hold the statute invalid under the Equal Protection clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants," wrote Justice Kennedy.

"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," Kennedy said.

This case, said Kennedy, involves "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."

The *Bowers* precedent, said Kennedy, "demeans the lives of homosexual persons."

Justice O'Connor concurred in the judgment, but argued that the statute should have been struck down on equal protection grounds.

"A law branding one class of persons as criminal solely based on the state's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection clause," said O'Connor, who had been in the five-justice *Bowers* majority in 1986.

In addition to the law in Texas, the court's decision strikes down laws in Kansas, Missouri and Oklahoma that prohibit oral and anal sex between same-sex couples. The ruling also nullifies statutes in Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah and Virginia that prohibit sodomy for both same-sex and opposite-sex couples.

U.S. Supreme Court. *Lawrence v. Texas*, No. 02-102. June 26, 2003. Lawyers Weekly USA No. 9926030. To link to the full text of this opinion, go to:

www.lawyersweeklyusa.com/opinions