

Sodomy^V law struck down

Decision sparks marriage worries

By Frank J. Murray
THE WASHINGTON TIMES

The Supreme Court yesterday ruled that states may not outlaw "sexual practices common to a homosexual lifestyle" in a landmark 6-3 decision so sweeping that justices debated whether it will require recognition of same-sex "marriage."

"The [sodomy] 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," Justice Anthony M. Kennedy said in his opinion for the court.

Besides Justice Kennedy, Justices John Paul Stevens, Sandra Day O'Connor, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer also voted to strike down the Texas law outlawing homosexual sodomy.

While anti-sodomy laws prohibit only particular acts, "their penalties and purposes . . . touch upon the most private human conduct, sexual behavior, and in the most private of places, the home," the majority said in a decision that wiped out all 13 remaining anti-sodomy laws, including Virginia's.

Justice Antonin Scalia, in a dissent joined by Chief Justice William H. Rehnquist and Justice Clarence Thomas, said the decision "effectively decrees the end of all morals

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legislation [and] leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."

"It is clear from this that the court has taken sides in the culture war," Justice Scalia said from the bench during a lengthy recitation.

He said the majority rationale applies equally to laws governing bigamy, homosexual "marriage," adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity.

Justice O'Connor issued a separate opinion, saying the decision did not automatically dismantle other laws distinguishing between heterosexuals and homosexuals, and that states retain an interest in preserving traditional marriage.

In reaching the decision, the court also overruled its 1986 *Bowers v. Hardwick* ruling upholding a Georgia law of general application that prohibited certain defined acts regardless of the sex of the persons involved.

Besides Texas, Kansas, Oklahoma and Missouri also confined their anti-sodomy law to acts between persons of the same sex.

The decision in *Lawrence v. Texas* was one of five announced on the last regular day of the 2002-03 court term. The justices recessed until an extraordinary Sept. 8 hearing at which they will consider complex new McCain-Feingold campaign-finance restrictions.

Reaction to the sodomy ruling was swift. Even before the justices had left the bench, Sen. Edward M. Kennedy, Massachusetts Democrat, said that the ruling might "nudge" Congress to pass pending bills "to protect gays and lesbians from discrimination in the workplace and prohibit hate crimes based on this bigotry."

Response came from advocacy groups on all sides, with major protests voiced by traditional-family organizations, while homosexual activists scheduled at least 37 big-city celebrations for last night, including one at Dupont Circle in Washington and another in Houston, where the case originated.

"It opens the door for gay people all over the country to be treated equally," said John Lawrence, whose September 1998 liaison with Tyron Garner in a Houston apartment sparked the case. "We never chose to be public figures or to take on this fight."

The decision also was supported by the libertarian Cato Institute and the Institute for Justice, which often is seen as conservative because it supports school vouchers.

"Texas tried to redefine as public what was obviously private. Thankfully, the Court held that sodomy laws exceed the legitimate power of government," said Dana Berliner, a lawyer with the Institute for Justice who wrote the group's brief in the case.

"The state of Texas argued that its inherent police power authorized it to police morals. But the state has no such authority," said Roger Pilon, Cato vice president for legal affairs.

Ruth Harlow, director of Lambda Legal Defense and lead attorney in the case, avoided explicitly linking the decision yesterday to homosexual "marriage" but said it could help end use of homosexual relationships as negative factors in child custody and adoption decisions.









The opinion's recognition of a constitutional right to engage in homosexual conduct did not clarify how that affects military law that criminalizes such acts and requires the discharge of those who engage in them, or the court's recent recognition of the Boy Scouts of America's right to exclude homosexuals from leadership roles.

The court formally recognized a liberty interest for homosexuals under the legal rationale that regulates criminal prosecutions and bars governments from depriving a person of "liberty ... without due process of law."

Ms. Harlow said Justice Scalia's statement that the ruling smooths

HOW THEY VOTED

The Supreme Court yesterday handed its last decisions before the summer recess. Here's how the nine justices voted in the biggest cases.

								
Stevens	Kennedy	O'Connor	Souter	Ginsburg	Breyer	Thomas	Rehnquist	Scalia
To overturn Texas anti-sodomy law								
YES	YES	YES	YES	YES	YES	NO	NO	NO
Reverse Kevin Wiggins' Maryland death sentence								
YES	YES	YES	YES	YES	YES	NO	YES	NO
Ban ex post facto prosecutions of 1955-73 sex crimes								
YES	NO	YES	YES	YES	YES	NO	NO	NO
Throw out new state Senate redistricting in Georgia								
NO	YES	YES	NO	NO	NO	YES	YES	YES
Dismiss Nike case on corporate free speech								
YES	NO	NO	YES	YES	NO	YES	YES	YES

The Washington Times

'State is not omnipresent in the home'

Excerpts from the Supreme Court's decision yesterday to strike down a Texas law banning homosexual sex.

JUSTICE ANTHONY M. KENNEDY, writing for the majority:

"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. ...

"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. ...

"When homosexual conduct is made criminal by the law of the

State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. ...

"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."

JUSTICE ANTONIN SCALIA, writing in dissent:

"Texas [sodomy law] undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to liberty under the Due Process Clause, though today's opinion repeatedly makes that claim. ...

"States continue to prosecute all sorts of crimes by adults 'in matters pertaining to sex: prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy

laws, too, have been enforced in the past half century,' in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. ...

"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. ... The Court today reaches the opposite conclusion. ...

"This effectively decrees the end of all morals legislation. 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. ...

"This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'Connor seeks to preserve them by the conclusory statement that preserving the traditional institution of marriage is a legitimate state interest. But preserving the traditional institution of marriage is just a kinder way of describing the State's moral disapproval of same-sex couples."

the way for same-sex "marriage" was an expression of frustration.

"I think he's whistling in the wind. I think he's very much the voice of a small, small minority. The most telling thing about his opinion is that it is the minority, that it did not carry the day," she said.

Overturning the law may have effects on other lifestyle crimes, such as those involving drugs, said William J. Delmore III, of the Harris County District Attorney's office, who unsuccessfully defended Texas' law against the challenge.

He pointed to the court's adoption of the principle that a state view that a practice is immoral "is not a sufficient reason for upholding a law prohibiting the practice," and said that may complicate prosecutions.

"Under *Lawrence v. Texas*, we may have to show harmful physical effects before we can criminalize conduct such as possession of small amounts of marijuana, based strictly on morality," Mr. Delmore said.

"I'm very much surprised at the basis of the court's ruling ... and I'm surprised at the scope of it. It certainly shows my drawbacks as a fortuneteller because I didn't see this coming at all," he said yesterday.

Mr. Delmore also refused to comment directly on how this decision may fit into the homosexual "marriage" issues, but said "any government is going to have to make a pretty substantial showing of need for any statute that is based on morals."

Evan Wolfson, executive director of Freedom to Marry, said the *Lawrence* case will be a powerful tool in furthering the homosexual



John Lawrence's September 1998 liaison with Tyron Garner (left) in a Houston apartment sparked the *Lawrence v. Texas* case.

"marriage" cause.

"I certainly hate to agree with Justice Scalia on a wonderful day like today, but I think the court decision reflects the fact that fair-minded Americans have reached a tipping point in support of gay people's equality," Mr. Wolfson said.

"The court today recognized that gay people share every other American's aspiration for love, intimacy, commitment and family. There is no good reason for excluding committed same-sex couples from civil marriages," he said, using words similar to those of Justice Scalia's.