Analysis: Sodomy ruling's ripple effect

By Michael Kirkland
UPI Legal Affairs Correspondent

WASHINGTON, June 26 (UPI) -- The Supreme Court of the United States did much more than strike down the Texas ban against homosexual sodomy Thursday.

In the opinion outlawing the Texas statute, handed down in an electrified courtroom, the majority of justices ruled so broadly that the decision will keep government out of the bedrooms of all Americans.

Justice Anthony Kennedy wrote the majority opinion in the broadest possible terms. He was joined in full by the court's four liberals -- Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer.

Justice Sandra Day O'Connor, a moderate conservative, wrote a separate opinion concurring in the judgment, but on less sweeping grounds.

Where Kennedy ruled that the "due process" -- or fair treatment -- clause of the Constitution gives consenting adults the right to private sexual conduct, O'Connor said she voted with the majority solely on equal protection grounds.

The 14th Amendment guarantees Americans equal protection under the law.

The decision drew a blistering dissent from Justice Antonin Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas. Thomas also wrote a separate dissent.

Texas, Missouri, Oklahoma and Kansas ban homosexual sodomy. Nine other states ban sodomy for unmarried heterosexuals. All of those

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laws would be affected by Thursday's decision.

One reporter, sitting in the Supreme Court when Kennedy read from his opinion, joked, "I felt the building shake."

"Liberty protects the person from unwarranted government intrusions into a dwelling or other private places," Kennedy said at the beginning of his opinion. "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. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."

The Supreme Court previously ruled on homosexual sodomy in 1986's Bowers vs. Hardwick, which upheld Georgia's ban with a 5-4 decision. Thursday's ruling reverses Bowers.

Kennedy said the Bowers court majority "misapprehended" the claim of liberty being presented to it, and therefore reached an erroneous conclusion.

Laws against homosexual conduct do not have "roots deep in history," as the Bowers court believed, Kennedy said. Some scholars even believe that "the concept of the homosexual as a distinct category of person did not emerge until the late 19th century."

"Laws against sodomy do not seem to have been enforced against consenting adults acting in private," Kennedy said. He added that it was not until the 1970s that any state singled out "same-sex relations for criminal prosecution."

Kennedy linked the liberty interest inherent in the due process clause to two Supreme Court precedents: 1992's Planned Parenthood vs. Casey, in which Kennedy joined the majority in affirming the right to an abortion in 1973's Roe vs. Wade; and 1996's Romer vs. Evans.

Kennedy wrote the majority opinion in Romer, striking down a Colorado referendum that said homosexuals could not be singled out for protection under municipal laws.

The justices split 6-3 in Thursday's Texas decision, and the same division, with the same justices, occurred in Romer.

In Thursday's majority opinion, Kennedy issued a ringing endorsement for the living Constitution that mirrors the evolution of freedom.

"Had those who drew and ratified the due process clauses of the Fifth Amendment or the 14th Amendment known the components of liberty in its manifold possibilities," Kennedy said, "they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

Scalia, his face tense with emotion, read parts of his blistering dissent from the bench.

Most of Kennedy's opinion "has no relevance to its actual holding -- that the Texas statute 'furthers no legitimate state interest which can justify' its application to (the challengers) under rational-review basis," Scalia wrote.

"Nowhere does the (court majority's) opinion declare that homosexual sodomy is a 'fundamental right' under the due process clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right,'" Scalia said.

Thursday's overruling of Bowers entails "a massive disruption of the current social order," he argued, unlike a putative overruling of Roe, "which would simply have restored the regime that existed for centuries before 1973."

He was scornful of the court majority's analysis and its motives, which he called "result-oriented."

"Today's opinion is the product of a court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda," Scalia said, "by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."

What many don't understand, Scalia said, is that those opposed to homosexual conduct are trying to defend their homes, their schools and their families from what they consider a destructive life style.

"What Texas has chosen to do is well within the range of traditional democratic action," he said, "and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a (Supreme) Court that is impatient of democratic change."

Scalia noted that Kennedy went out of his way to say that the Texas case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter" -- in other words, the case should have no effect on whether states are required to recognize homosexual marriage.

"Don't you believe it," Scalia warned from the bench. "Today's opinion dismantles the structure of constitutional law that discriminates between homosexual and heterosexual unions."

The underlying case that resulted in Thursday's decision was brought by two Texas men convicted of having same-sex intercourse.

Specifically, the Texas men asked the high court to decide whether their convictions under Texas's "Homosexual Conduct" law -- "which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples -- violate the 14th Amendment guarantee of equal protection under the laws."

They also challenged whether their convictions violate their constitutional privacy rights.

The Texas law banning same-sex intercourse is unlike the laws against "sodomy" -- usually defined to include anal and oral sex, whatever the gender of the practitioners.

Instead, the Texas law singles out homosexual couples but does not target heterosexuals, the men told the Supreme Court.

Sheriff's deputies entered John Lawrence's home late in the evening of Sept. 17, 1998, to investigate what turned out to be a false report of a "weapon disturbance."

"There, they intruded on Lawrence and (Tyron) Garner having sex," the men's petition said.

After being convicted in a justice of the peace court, the men filed motions to suppress the charges on the grounds that the law is unconstitutional. When those motions failed, the men pleaded no contest, were found guilty and paid $200 fines, plus court costs.

Though a three-judge panel of the state Court of Appeals reversed the men's convictions under the Texas Equal Rights Amendment, the full state appeals court reversed.

In unsuccessfully asking the Supreme Court not to review the case, Harris County District Attorney Charles Rosenthal Jr. told the justices in a brief that there was no violation of a "fundamental right."

Rosenthal pointed out that the Supreme Court itself said there was no such right when it ruled in Bowers in 1986.

"In light of the fact that homosexual anal sodomy was viewed as criminal behavior under state law and the common law for a period of centuries," Rosenthal said, "that conduct could not conceivably have achieved the status of a 'fundamental right' in the brief period of 16 years since Bowers was decided."

Thursday's Supreme Court opinion reverses the Texas appeals court, and sends the case back for a rehearing and a result based on the high court ruling.

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(No. 02-102, Lawrence and Garner vs. the State of Texas.)

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