# Fourth Session Readings

## I. Lawrence v. Texas (Sup. Ct. 2003)

In this case, the Supreme Court invalidated a Texas statute prohibiting "deviate sexual intercourse with another person of the same sex." The Court concluded that the statute violates the right to "liberty" under the Due Process Clause of the 14th Amendment. The Court overruled a 1986 decision (Bowers v. Hardwick) that had sustained a Georgia anti-sodomy statute.

The Court relied heavily on its 1965 decision invalidating a Connecticut statute prohibiting distribution of contraceptives to married persons. (Griswold v. Connecticut). That case extended constitutional protection to "the marriage relation and the protected space of the marital bedroom." A subsequent decision invalidated a state statute forbidding sale of contraceptives to unmarried persons. Eisenstadt v. Baird (1972). In that case, the Court stated that "the right to make certain decisions regarding sexual conduct extends beyond the marital relation."

In Lawrence v. Texas, the Court stated broadly that "our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . 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

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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."

The Court conceded that "for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code."

The Court also stated that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." The Court

referred to its 1967 decision in Loving v. Virginia, which invalidated a state statute prohibiting miscegenation.

The Court, however, stated that its decision "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."

## II. Concurring Opinion

The Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This so-called "Equal Protection Clause" is the basis for cases such as Brown v. Board of Education (1954), holding that States may not discriminate against persons on the basis of race.

Justice O'Connor's concurrence in Lawrence v. Texas argues that the Texas anti-sodomy law violated the Equal Protection Clause, because the law distinguished between same-sex and different sex couples. "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, under any standard of review."

## III. Dissent

Justice Scalia (joined by Justices Thomas and Rehnquist) wrote a dissent.

Justice Scalia argued the only rights that "substantive due process" protects are "rights which are deeply rooted in this Nation's history and tradition." Only then are laws affecting these rights subject to strict judicial scrutiny. Homosexual sodomy has traditionally been criminalized, and clearly is not "deeply rooted in this Nation's history and tradition."

All other restrictions on liberty are legitimate if "rationally related to a legitimate state interest." Just because a law restricts liberty does not mean it is invalid. After all, restrictions on liberty are imposed by "laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery."

'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 [states that] 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.' 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."

"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 promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream.'"

"Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best.

That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining state that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of a democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts – or for that matter, display *any* moral disapprobation of them – than I would *forbid* it do so. What Texas has chosen to do is well within the range of traditional democratic action and its hand should no more be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that 'later generations can see that laws once thought necessary and proper in fact serve only to oppress' {quoting majority opinion]., and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best."

"One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts – and may legislate accordingly. The Court today pretends that it posses a similar freedom of action, so that we

need not fear judicial imposition of homosexual marriage. . . . Do not believe it. . . . If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct [citing majority opinion], what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution.' ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."