

Week 9

**SEXUAL ORIENTATION  
UNDER DUE PROCESS AND  
EQUAL PROTECTION**

Section B  
(Mar 3, 2008)

# LAWRENCE V. TEXAS

## No. 02-102 (June 26, 2003)

- **Facts**

- Texas law makes it a crime if a person “engages in deviate sexual intercourse with another individual of the same sex.”
- Lawrence and Garner were arrested and convicted of deviate sexual intercourse in violation of the Texas anti-sodomy statute.
- Petitioners challenged the Texas law claiming that it violated their liberty to engage in private conduct under the Due Process Clause and the Equal Protection Clause.
- The Texas Court of Appeals affirmed the conviction by relying on Bowers v. Hardwick, 478 U.S. 186 (1986).

- **Question before the Court**

- Whether the Texas anti-sodomy law criminalizing same-sex couples, but not heterosexual couples, violates the Equal Protection Clause;
- Whether the Texas law criminalizing adult consensual sexual intimacy in the home violates their vital interest in liberty and privacy protected by the Due Process Clause;
- Whether Bowers v. Hardwick (1986) should be overruled.

# **BOWERS V. HARDWICK**

## **478 U.S. 186 (1986)**

- **Facts**

- The Georgia statute criminalizes homosexual sodomy
- Hardwick was charged with violating the Georgia statute by committing a consensual sexual act with another adult male in his home.
- Hardwick challenged the statute claiming that it violated his right of privacy under the Due Process Clause.
- The Court of Appeals for the Eleventh Circuit, relying on Griswold v. Connecticut (1965), held that the Georgia statute violated Hardwick's right of a private and intimate association, which was fundamental and beyond the reach of state regulation.

- **Question before the Court**

- Whether the Due Process Clause confers a fundamental right upon homosexuals to engage in sodomy;
- Whether the right to engage in homosexual sodomy is implicit in the “ordered liberty” under the Due Process Clause

- **Opinion of the Court**

- Justice White delivered the 5-4 majority opinion of the Court, holding that the Due Process Clause does not extend to homosexual sodomy.

- **Rationale**

- HS is not part of “ordered liberty”; it is different from the rights of marriage, family relations, procreation, child rearing and education, contraception, and abortion.
- This right is not “deeply rooted” in this Nation’s history and tradition; proscriptions against that conduct has ancient roots.

# Readings for Next Class

- Lawrence v. Texas
  - The Opinion of the Court
  - Justice O'Connor's Concurring Opinion
  - Justice Scalia's Dissenting View
- Pay attention to how the Due Process Clause and the Equal Protection Clause apply to this case, respectively.
- Food for thought: Should the state legislate its moral code and civic virtue?
  - Premarital sex
  - Use of sex toys
  - Adultery
  - Heterosexual sodomy
  - Homosexual sodomy