**Chicago Tribune**
**June** 27, 2003 Friday

# Sodomy Case Has Far-Reaching Significance

By **David J. Garrow. David J. Garrow** is the author of "Liberty and Sexuality: The Right to Privacy and the Making of Roe vs. Wade."

COMMENTARY; Pg. 27
**LENGTH:** 813 words

Thursday's remarkable and historic U.S. Supreme Court decision in Lawrence vs. Texas is undoubtedly the greatest legal triumph for gay Americans in all of U.S. history.

But Justice Anthony M. Kennedy's majority opinion voiding anti-sodomy statutes as unconstitutional violations of individual liberty does much more than allow gays to celebrate a huge victory with the overturning of the court's infamously homophobic 1986 decision in Bowers vs. Hardwick. Kennedy's momentous opinion also (A) further strengthens the Supreme Court's firm commitment to protecting women's legal access to abortion; (B) calls into question the court's 1997 refusal to extend constitutional protection to a terminally ill person's desire to choose a more dignified and sometimes hastened death; and (C) dramatically advances the likelihood that one day the Constitution's guarantees will be extended to allow all Americans the right to marry the partner of their choice.

"Revolutionary" is thus not too strong a label to attach to what Kennedy and fellow Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer have wrought. (Justice Sandra Day O'Connor concurred on separate grounds.) Most court watchers were expecting the justices to void Texas' gays-only criminal statute, but the scope and strength of Kennedy's opinion is breathtaking.

Rare indeed is it for the court to jettison one of its own constitutional precedents, but the manner in which the Kennedy majority voided Bowers was an out-and-out legal trashing, with Kennedy expressly declaring that Bowers was wrong the day it was decided.

Most observers anticipated that a Kennedy opinion in Lawrence would track his decision in a 1996 Colorado case, Romer vs. Evans, which relied upon the Constitution's equal protection clause. But Thursday Kennedy instead grounded Lawrence in the Constitution's due process clause protection of individual liberty, and in the articulation of that liberty guarantee that Kennedy, O'Connor and Souter jointly penned in Planned Parenthood vs. Casey in 1992 when they resoundingly reaffirmed the court's commitment to Roe vs. Wade. The manner in which the Lawrence majority relies so extensively and explicitly upon Casey's liberty analysis conspicuously strengthens Casey's strength as an increasingly impregnable bulwark for women's right to choose.

Less dramatic is the manner in which Kennedy's opinion implicitly weakens the court's 1997 refusal to acknowledge that constitutional liberty protections are violated by laws that prohibit hastened deaths even for terminally ill patients who experience agonizingly intractable pain. A visible tension has always existed between Casey's expansive discussion of individual liberty and

Washington vs. Glucksberg's narrow avoidance of whether so-called "assisted suicide" presents a constitutionally significant individual autonomy claim. In 1997 several justices suggested that a future case, involving a severely suffering terminal patient, would someday force them to revisit the issue in greater depth. Kennedy's dramatic reaffirmation and expansion of Casey's liberty holding makes such a reconsideration all the more certain.

Lawrence vs. Texas also undeniably opens wide the door for a constitutional argument that gay Americans can no longer be denied the fundamental right to marry. One sentence in Kennedy's opinion notes how Lawrence "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."

But equally if not more significant is an earlier sentence in which Kennedy observes how anti-sodomy statutes "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."

"Whether or not" is an expressly suggestive phrase, and one that Kennedy and his four colleagues must have read and pondered most carefully. If not an open invitation for a gay marriage case, it undeniably signals that those justices appreciate how such a constitutional claim looms not that far in our future, especially now that Canada just this month has legalized gay marriage. In dissent, Justice Antonin Scalia decried how the majority was indeed opening the door to gay marriage. Oftentimes Scalia is guilty of crying "wolf," but in Lawrence he may have gotten it exactly right: "Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."

Lawrence vs. Texas is thus as momentous a decision as any that the Supreme Court has handed down in over a decade. Its consequences--for gay equality, for abortion, for assisted suicide and for marriage--will be a landmark ingredient in American laws for many years to come.

PHOTO: The U.S. Supreme Court handed down two momentous decisions on sodomy and affirmative action earlier this week. Tribune photo by Pete Souza.