



## **Lawrence v. Texas: Notes for Teachers and Facilitator**

### **Key Points:**

- The Supreme Court explicitly overruled *Bowers v. Hardwick*, so there will need to be discussion about *stare decisis*.
- The Court did not speak of private sexual activity as a fundamental right that might require the highest "strict scrutiny" standard of judicial review. Instead, it focused on why the Court's decision in *Bowers v. Hardwick* was wrong.
- The case was decided 6-3, with 5 justices deciding the case under the Due Process Clause and Justice O'Connor deciding it under the Equal Protection Clause.

### **Additional Resources:**

- [Oyez: Lawrence v. Texas](#)
- [Wikipedia: Lawrence v. Texas](#)

### **Instructions for the Students:**

Start with the BRAINSTORMING SHEET & ARGUMENT SHEET. Review the case, then work through the SHEETS which will help the group prepare their arguments. During the discussion period you will need to select representatives (2-4) who will act as the advocates during the moot court. Students (Advocates) from each side will present a brief argument that reflects their group's strongest points for an affirmative or negative response to the question posed. Afterwards the mock Supreme Court will decide the outcome of the case. Students will be instructed that all students on each side can raise their hand to answer questions posed by the Justices of the Court if their advocates need assistance or do not have a satisfactory answer. Advocates will only have 15 minutes to present their arguments to the Supreme Court. The government may reserve up to five (5) minutes for rebuttal which must be done at the start of their oral argument (kindly remind the government to reserve time if he or she forgets as a rebuttal is a powerful tool during oral arguments). The rebuttal should focus on responding to issues that Lawrence raised during their oral argument. You will also need to craft responses to any questions the Supreme Court might ask. The ARGUMENT SHEET is an excellent way to organize your group's thoughts.

## BRAINSTORMING SHEET

Which side do you represent?

Your Group's Arguments (Rank from best to worst):

Opposition's Arguments (Rank from best to worst):

Counter-Arguments To Opposition's Arguments:

Possible Supreme Court Questions:

Responses To Supreme Court Questions:



## **Background and Facts**

This moot court concerns the case of *Lawrence v. Texas* in which the Supreme Court held that laws prohibiting private homosexual activity between consenting adults are unconstitutional under the Fourteenth Amendment.

### **Background:**

In 1960, every state in America had an anti-sodomy law. Legal punishments for violating these laws included heavy fines, prison sentences, or both.

In *Griswold v. Connecticut* (1965), the Supreme Court struck down a law that prohibited the use of contraceptives by married couples. The Supreme Court recognized, for the first time, that a married couple had a right to privacy. The Opinion of the Court found this right in the “penumbras” that emanated from various of the specific guarantees of the Bill of Rights. A concurring opinion saw the law as an infringement on the right to liberty found in the due process clause of the Fourteenth Amendment. *Eisenstadt v. Baird* (1972) expanded this scope of sexual privacy rights to unmarried persons. And in 1973, the Court held that Constitution protects the right to have an abortion in *Roe v. Wade*.

In *Bowers v. Hardwick* (1986), the Supreme Court upheld a Georgia anti-sodomy emphasizing that its past privacy decisions, like *Eisenstadt* and *Roe*, only recognized a right to engage in procreative sexual activity. Furthermore, it found that the long-standing moral disapproval toward homosexual activity was enough to argue against the notion of a right to sodomy.

By the time of *Lawrence v. Texas*, 10 states still banned consensual sodomy regardless of the sex of those involved, and 4 states prohibited same-sex couples from engaging in consensual sodomy.

### **Facts of the Case**

In 1988, Houston police responded to a call for a weapons disturbance at John Lawrence’s apartment. They entered the unlocked apartment and witnessed Lawrence engaging in a private, consensual sexual act with another adult man. Both were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct.

## **Procedure**

Lawrence pled no contest to the charges and waived his right to trial was found guilty and fined. Assisted by *Lambda Legal*, a gay rights advocacy group, Lawrence filed an appeal. Rebuffed by the state courts, Lawrence appealed to the Supreme Court of the United States, which agreed to hear the case.

## **Fourteenth Amendment: Due Process Clause**

Five Supreme Court justices held that the Texas statute violated the Fourteenth Amendment's Guarantee that "No State shall. . . deprive any person of life, liberty, or property, without due process of law." According to Justice Anthony Kennedy, in the years since *Bowers* both attitudes about homosexuality had changed and that the Court's understanding of the right of privacy had been expanded.

## **Stare Decisis**

*Stare decisis* is a legal doctrine that obligates courts to follow historical cases when making a ruling on a similar case. *Stare decisis* ensures that cases with similar scenarios and facts are approached in the same way. Simply put, it binds courts to follow legal precedents set by previous decisions. However, the Supreme Court may overturn precedent. Usually, before a precedent is overturned explicitly, a series of previous decisions have served to erode its holding.

## **Key Issue**

Does the Constitution protect the right for consenting adults to engage in certain private sexual activities?

### **Are we ready to form arguments?**

Before you do make sure that you understand:

- Other than the specific guarantees of the Bill of Rights, what liberties are protected by the Constitution?
- How has the court's stance "right to privacy in the home" evolved over the years?



## Our Mission in this Moot Court

Our moot court begins at the point that the United States Supreme Court has agreed to resolve the issue of whether the Texas statute criminalizing sodomy is unconstitutional.

### **Brainstorming**

Break into three groups:

Group 1: Attorneys representing Lawrence

Group 2: Attorneys representing Texas

Group 3: Justices who will ask probing questions and decide the case.

Each side will have 15 minutes to present its arguments. Those representing Lawrence will go first and may reserve 5 minutes for rebuttal. Justices who will hear the case will have engaged in brainstorming and will interrupt the arguments with questions.

**Hints for attorneys representing Lawrence:** You must argue that the Texas statute is unconstitutional and violates the Fourteenth Amendment. You must argue why the Court should overturn *Bowers*, which is the current precedent and goes against your favor. Use past case law to establish the Court's stance on the right to privacy. What does it mean for adults to have the right to have certain sexual relations with whomever they want? You must argue that even though most states legalize sodomy, the Supreme Court must step in and strike down the Texas statute, and thus the remaining anti-sodomy laws.

**Hints for attorneys representing Texas:** You must argue that there is no fundamental right protected by the Constitution to these sexual acts. While you may not agree or may believe people should be able to have sex with whoever they please, the question is should the Supreme Court strike down the law, or should the issue be left to the states and the voters? You should argue the latter. Consider precedent and use *Bowers* to support your argument. Explain why a ruling in favor of Lawrence does not follow from the Court's previous cases on privacy.

**Hints for Justices:** Your job is to think about both sides of the case and develop questions for each side. Good questions will dig deeper into the arguments made and help clarify both sides.

### **Summary of tasks:**

1. Engage in general brainstorming of arguments for your side or if you are a justice of questions to ask.
2. As part of that brainstorming, review and consider the arguments on the Argument Sheet. Also consider arguments you thought of yourself.
3. Attorneys: Write out a bullet point list of the arguments you want to make and begin with the most persuasive. Use the Attorney Worksheet.
4. Attorneys: Think of counters to those arguments and develop answers. Do the same with the arguments you think the other side will develop.
5. Justices: Fill out the Justice worksheet
6. Attorneys: Designate the person to make the argument (but all attorneys can answer questions posed by the Justices)
7. Attorneys for Lawrence: Remember to reserve 5 minutes for rebuttal if you wish.

Attorneys making the argument: Introduce yourself by saying, "May it please the Court, my name is \_\_\_\_\_ and I represent \_\_\_\_\_ in this matter."



## Arguments

Look over these arguments. Note whether they help Lawrence, Texas, both sides, or neither side. Or can our case be distinguished or aligned in some other way?

1. \_\_\_\_\_ The Court should only protect and treat rights as fundamental if they are supported by the Constitution's text, the framers' intent, or through tradition. Consensual homosexual sex falls under none of these categories, and thus the Court has no place to step in and invalidate the state law.
2. \_\_\_\_\_ Liberty protects a person from unwarranted government intrusions into a private place. The liberty protected by the Constitution allows homosexual persons to make the choice to engage in such intimate, personal, and consensual conduct.
3. \_\_\_\_\_ The Texas statute only prohibited a certain sexual act when performed by persons of the same sex.
4. \_\_\_\_\_ Even though there is no enumerated or explicit right to privacy in the Constitution, the Court has safeguarded privacy for almost a century in cases involving family autonomy, contraception, and abortion.
5. \_\_\_\_\_ Federalism is an essential component of our government. States should have the right to enact their own laws governing their people, as long as there is no conflict with an explicit provision of the federal Constitution. The federal government should allow states to make their own moral judgments.
6. \_\_\_\_\_ In *Eisenstadt v. Baird* (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights.
7. \_\_\_\_\_ In *Roe v. Wade* (1973), the Court held while the woman's rights were not absolute, her right to elect an abortion must be protected as an exercise of her liberty under the Due Process Clause.
8. \_\_\_\_\_ In *Bowers v. Hardwick* (1986), the Supreme Court found that there was no constitutional protection for acts of sodomy, and that states could outlaw those practices.



9. \_\_\_\_\_ By criminalizing homosexual conduct, the state is discriminating against homosexual persons and encouraging further discrimination by society at large..

10. \_\_\_\_\_ The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law.

11. \_\_\_\_\_ *Stare decisis* is not an inexorable command. Rather, it is a principle of policy and not a mechanical formula. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be is overruled.

12. \_\_\_\_\_ Laws relating to bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity will be called into question if *Bowers* is overruled.

13. \_\_\_\_\_ 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. Instead of the Supreme Court striking down this law, activists may persuade their fellow citizens to change laws through normal democratic means (i.e., voting and elections).



## **Attorney Worksheet**

Remember that you will begin by stating: “May it please the Court. My name is \_\_\_\_\_. I represent \_\_\_\_\_.” If you are representing Lawrence and wish to reserve five minutes for rebuttal, state that now.

List your key arguments below so you can rely on this sheet in arguing to the Court.

What will the other side argue? What are your counters to those arguments?



## Justice Worksheet

You are a Supreme Court Justice hearing *Lawrence v. Texas*. Please answer the following questions. Be sure to reference the facts and the relevant cases on the argument sheet.

1. Pretend that you are listening to the oral arguments of the attorneys representing Lawrence. What two questions would you ask?
  - A.
  - B.
2. Pretend that you are listening to the oral arguments of the attorneys representing Texas. What two questions would you ask?
  - A.
  - B.

1. At the conclusion of hearing the case, you have to write a court opinion ruling either in favor of Lawrence or Texas. Remember that you need to decide if the Constitution specifically invalidates this Texas law. If you are ruling in favor of Lawrence, you are striking down every anti-sodomy law in the country and allowing all people to engage in certain homosexual acts. If you are ruling in favor of Texas, you are upholding the Texas anti-sodomy law and allowing states to illegalize these sexual acts.

\_\_\_\_\_ Lawrence

\_\_\_\_\_ Texas

4. Prepare a bullet point list of your reasons. Include why you rejected the losing side's arguments.



### **Supreme Court Decision: *Lawrence v. Texas*, 539 U.S. 558 (2003)**

Justice Anthony Kennedy issued the opinion of the Court which was joined by four of his colleagues. It rested on the conclusion that the Texas law violated a substantive liberty protected by the due process clause of the Fourteenth Amendment. Justice Sandra Day O'Connor concurred, but based her opinion on the equal protection clause, finding that the law's restriction only on same sex behavior was irrational. O'Connor and the three dissenting justices would not have overturned *Bowers*. Justice Antonin Scalia wrote the dissenting opinion that argued, among other things, that the *Lawrence* holding called into question the power of any government to proscribe conduct that it believed to be immoral.