

Gay Rights: The Struggle Continues

Introduction: A Scaffolded Class Discussion

Critical Engagement Question:

Does the United States Constitution protect gay rights?

Overview:

In recent decades, the subject of gay rights has stood at the intersection of the nation's culture wars. The push to broaden the scope of civil rights to protect gay rights has coincided with a movement to restore age-old institutions that some perceive as deteriorating. Of these, marriage stands front and center, but is only one of the many rights and privileges not extended to homosexual couples in the United States. At issue is the extent of an individual's right to privacy, the intersection of the U.S. Constitution and state laws, past precedents set by the U.S. Supreme Court, and the role that moral codes—often rooted in religion—play in shaping our laws.

Objectives:

- To engage students with primary documents (Supreme Court opinions) and explore the evolution of law across time.
- To unpack a current, controversial issue and examine the underlying sources of contention.
- To seek understanding of an individual right to privacy, its constitutional source, and its relevance in the gay rights debate.
- To examine the interplay of federal and state law, along with the intimate association between moral codes, religion and the law.
- To enable students to participate in a civil discussion of an issue that has, in part, defined contemporary culture wars.

Standards:

NCHS: Era 10, Standard 2E

NCSS: Strands 5, 6, and 10

Illinois: Goal 14, Learning Standards A, D, and F; Goal 16, Learning Standards A and B; Goal 18, Learning Standard A

Student Materials:

Item A: *Bowers v. Hardwick* (1986) Majority Opinion

Item B: *Romer v. Evans* (1996) Majority Opinion

Item C: *Lawrence v. Texas* (2003) Majority Opinion

Item D: *Supreme Court Case Briefs*

Item E: *Class Discussion Questions*

Time and Grade Level:

One 90-minute or two 45-minute high school class periods with post-activity homework.

Warm-Up:

1. Provide an overview of the role of the U.S. Supreme Court in the evolution of law at the state and federal level. Address the power of judicial review, the development of and adherence to precedent, and the competing philosophies of jurisprudence, namely "original intent" juxtaposed with a "living constitution."
2. Highlight some of the civil rights breakthroughs the Supreme Court has established in decisions over the course of the last half-century, including school desegregation, the right to remain silent upon arrest, the required provision of an attorney in criminal cases if one is indigent, an individual right to privacy, and perhaps most controversially, abortion rights.
3. Ask students to brainstorm some of the rights and privileges associated with heterosexual marriage. Responses might include inheritance, health care, tax benefits, the right to visit one's spouse in the hospital, and also to make life-ending decisions for him/her. Follow up by inquiring whether these rights are currently extended to homosexual couples.

Activity, Day 1:

1. Distribute one copy of the *Supreme Court Case Briefs* (Item D) to each student. This worksheet will facilitate the balance of the day's activities.
2. Divide the class into study groups of three. Each group will examine the majority opinions in *Bowers v. Hardwick* (1986), *Romer v. Evans* (1996), and *Lawrence v. Texas* (2003).
3. Distribute sets of the three primary source documents to each study group (Items A, B, and C). Assign one document to each group member.
4. Ask students to first work independently in reviewing their assigned document and completing the corresponding section of the graphic organizer included in the *Supreme Court Case Briefs* (Item D). Upon completing this task, students should share individual findings with their study group, so that each group member completes the graphic organizer in its entirety.

Homework:

As groups complete their *Supreme Court Case Briefs* (Item D), distribute one copy of the *Class Discussion Questions* (Item E) to each member. Ask students to complete this assignment individually before the beginning of class the following day. Encourage them to reference the three Supreme Court opinions they briefed, along with the completed graphic organizer. Inform them that these questions will form the basis of a class discussion, and that this assignment must be finished in order to participate.

Activity, Day 2:

1. Instruct students to reconvene in their previously assigned groups to compare answers on the *Class Discussion Questions* (Item E).
2. Next, ask students to set themselves in a manner where the entire class faces one another. A circular or rectangular arrangement of desks or tables typically works best.
3. Lead a class discussion based on the eight items listed within the *Class Discussion Questions* (Item E). Encourage universal participation, student recognition of the responses of their classmates, and most of all, civil discourse. Provide clarification when confusion reigns, and interject contrasting claims when consensus predominates.

Extensions:

1. **Self-Assessment:** Ask students to assess their individual participation in the class discussion, along with the performance of the class as a whole.
2. **Dissenting Opinions:** Encourage students to read and analyze one or more dissenting opinions from the three cases considered in this assignment. Ask them to compare and contrast the Justices' central arguments, use of past precedent, and the relative strength of each. They should state which opinion they find most compelling and explain why.
3. **Class Presentation:** Instruct students to research local and state laws that apply to homosexuals and their partners. Ask them to account for any variance, and to propose a model, uniform public policy in the realm of gay rights.
4. **Seen & Heard Contest Entry:** Encourage high school students to make their voices heard on this subject by entering the Freedom Project's annual *Seen & Heard: National Student Expression Contest*. Visit FreedomProject.US/SeenandHeard to learn more.

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A Scaffolded Class Discussion

Name _____

Bowers v. Hardwick (1986) Majority Opinion Written by Justice Byron White

(EXCERPTS)

Case Synopsis:

In August, 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent's home.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution.

Ruling:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy, and hence invalidates the laws of the many States that still make such conduct illegal, and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and, for all intents and purposes, have decided this case.

No connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other, has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that, despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language.

It is obvious to us that neither of these formulations would extend a fundamental right to engage in acts of consensual sodomy. Proscriptions against (homosexuals engaging in acts of consensual sodomy) have ancient roots. Sodomy was a criminal offense at common law, and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law, and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

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A Scaffolded Class Discussion

Name _____

Romer v. Evans (1996) Majority Opinion Written by Justice Anthony Kennedy

(EXCERPTS)

Case Synopsis:

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as “Amendment 2,” its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances...passed in various Colorado municipalities. For example, cities...enacted ordinances which banned discrimination in...housing, employment, education, public accommodations, and health and welfare services. What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect...homosexual persons...The amendment reads:

“No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self executing.”

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced... Among the plaintiffs were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation.

Ruling:

The State’s principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment’s language is implausible.

Sweeping and comprehensive is the change in legal status effected by this law. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. (It repealed) Colorado Executive Order D0035 (1990) (which forbade) employment discrimination against “all state employees, classified and exempt on the basis of sexual orientation.” Also repealed, and now forbidden, are “various provisions prohibiting discrimination based on sexual orientation at state colleges.”

Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury.

The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must co exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and...invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

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A Scaffolded Class Discussion

Name _____

Lawrence v. Texas (2003) Majority Opinion Written by Justice Anthony Kennedy

(EXCERPTS)

Case Synopsis:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. 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 question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers...were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested... and charged and convicted before a Justice of the Peace.

The petitioners...challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment....

Ruling:

We...consider three questions:

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?
2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?
3. Whether *Bowers v. Hardwick* (1986) should be overruled? The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.

The facts in *Bowers* had some similarities to the instant case. One difference...is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute... applies only to participants of the same sex.

The statutes do 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.

This...should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. (We) acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault.

American laws targeting same-sex couples did not develop until the last third of the 20th century. It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.

When homosexual conduct is made criminal by the law of the State, that declaration...is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case...Its continuance as precedent demeans the lives of homosexual persons.

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.

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 and now is overruled.

The present case...does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. (It) does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

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Supreme Court Case Briefs

Name

Directions:

After convening in your assigned study group, please follow the steps listed below. Afterward, use your findings to respond to the *Class Discussion Questions* (Item E).

A. Read your assigned Supreme Court opinion. Use the graphic organizer below to record the facts of the case, the key questions considered, and the decision itself.

Case	Facts of the Case	Key Questions	Decision
<i>Bowers v. Hardwick</i> (1986)	1. 2. 3. 4. 5.	1. 2. 3.	
<i>Romer v. Evans</i> (1996)	1. 2. 3. 4. 5.	1. 2. 3.	
<i>Lawrence v. Texas</i> (2003)	1. 2. 3. 4. 5.	1. 2. 3.	

B. Share your findings with the rest of your study group. Take notes in the graphic organizer above as other group members present their Supreme Court cases.

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Class Discussion Questions

Name

Directions:

Referencing your completed *Supreme Court Case Briefs* (Item D), please answer the questions below in preparation for a class discussion.

1. Does an individual have a right to privacy in the United States? Explain.
2. Section I of the Fourteenth Amendment to the U.S. Constitution reads as follows: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

Could the Due Process Clause (in bold type above) create an individual right to privacy? Explain.

3. How might gay rights be associated with an individual right to privacy?
4. What is the balance between the U.S. Constitution and state laws regulating criminal behavior? How does this balance impact gay rights?
5. *Stare decisis* is Latin for “to stand by things decided.” *Stare decisis* is essentially the doctrine of precedent. When an issue has already been brought to the court and ruled upon, courts hearing similar, new cases will generally adhere to the previous ruling.

Describe the impact of *stare decisis* on the three Supreme Court cases examined.
6. Some Supreme Court Justices believe that it is their duty to seek the original meaning of the U.S. Constitution and apply it to contemporary laws. Other Justices contend the document is instead living, and must be adapted to meet new challenges that arise across time. What approach(es) is(are) in play in each of these three cases? Which do you find most compelling?

7. Opposition to homosexuality and gay rights often centers on moral arguments rooted in religion. To what degree should morality and/or religion be reflected in the law?

8. On November 4, 2008, California voters approved the following change, labeled Proposition 8, to their state constitution: “Only marriage between a man and a woman is valid or recognized in California.” This language overturned a state supreme court decision legalizing gay marriage. The court subsequently upheld Proposition 8, and its opponents are seeking review from the United States Supreme Court.

If you were a Supreme Court Justice, applying past precedents and accounting for recent developments, would you uphold Proposition 8 on the grounds that it does not violate the United States Constitution? Support your reasoning with specific references to the *Romer v. Evans* and *Lawrence v. Texas* cases.