

Abortion proponents have targeted the LGBT community with a position paper to the effect that our rights are dependent on the judicially created “right to privacy” which is the foundation upon which *Roe v. Wade*, and hence abortion, is based. The parallel analysis of changes in abortion rights with changes in gay rights shows how specious this argument is.

Since the *Roe v. Wade* decision of 1973, there has been a slow and consistent erosion of abortion-on-demand with the imposition of mandatory counseling, waiting periods, and parental notification. Prohibitions against the expenditure of federal funds as well as state funds have been found constitutional. International family agencies receiving U.S. aid have been prevented from counseling for abortion. *Casey v. Planned Parenthood* replaced *Roe v. Wade* as the law of the land on abortion; it replaced the “strict scrutiny” test of state anti-abortion laws with a much weaker “undue burden” test, with four of the nine justices calling for an outright reversal of *Roe*. Thirty-two states now require parental notification and 18 states require waiting periods and counseling as to risks and fetal development. Both houses of Congress have voted to ban “partial birth” abortions. And the number of abortions has been steadily declining for at least a decade.

As abortion rights have been undergoing a consistent cutback, there has been a simultaneous expansion of gay rights. In 1961, all states and the District of Columbia had anti-sodomy laws. By the time of the infamous *Bowers v. Hardwick* decision in 1976, fully 50% of the states had already decriminalized sodomy. *Bowers* held anti-sodomy laws constitutional and stated that the fact that homosexual conduct occurs in the privacy of the home does not affect the result. *Bowers* was decided fully three years after *Roe v. Wade*, giving lie to the argument that the “right to privacy” had any application to the LGBT community:

“Respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.” This is the same court, which by a 7 to 2 holding, found a fundamental right in the abortion process.

When *Bowers* was specifically overruled by *Lawrence v. Texas* in 2003, the 25 states that had outlawed sodomy in *Bowers* had been reduced to only 13, of which only 4 enforced their laws against homosexual conduct. In dissent, Justice Scalia noted that the LGBT community had had considerable success in promoting their agenda to decriminalize sodomy through democratic means. To be sure, there is plenty of language in *Lawrence* as to “privacy,” but it has little, if any, relevancy to the actual holding based on the due process clause of the 14th Amendment.

Gay marriage (civil unions, domestic partnerships) is currently a hot *public policy* issue, but it is the very antithesis of a privacy right because it *seeks* state action for the approval and sanction of LGBT relationships. Because the marriage contract is a three-party contract (the state is the third party) there can be no meaningful talk of a “right to privacy.” The issue of marital equality is one which has just started, with a few states taking positive steps and several states taking negative ones. The LGBT community need not fear the competition in the marketplace of ideas.

Other than gay marriage (which does not concern the right to privacy) and sodomy (which has been won largely by the democratic process and not litigation) the Supreme Court’s only other gay decision, *Romer v. Evans*, is based on equal protection of the laws and not the right to privacy. *Romer* disallowed a Colorado constitutional amendment which would have denied gays the protection of anti-discrimination laws.

The argument for the right to privacy (“get out of my bedroom”) is an appealing one for the LGBT community but it has nothing to do with the advancement of gay rights since the movement began with the Stonewall Riots of 1964. The long fight to decriminalize gay sexual behavior was won state by state through the democratic process. The success was so absolute prior to the *Lawrence* decision that homosexual sodomy was outlawed in only 4 of the 50 states, and even in those states it was not enforced, leading Justice Thomas to call it an “uncommonly silly” law. The fight for marriage equality is a public policy issue outside any privacy concerns. Any other gay court decision has addressed equal protection of the laws, once again not sounding in any “right to privacy.”

The position paper put forth by abortion advocates is a thinly veiled attempt to shore up rapidly fading support for abortion-on-demand. Gay Americans, much like their counterparts in straight America, have differing philosophical, religious, moral, ethical, and pragmatic attitudes toward abortion. This appeal to our self-interest will fail as will the attempt to divide and conquer. Abortion advocates have attempted to divide men from women, rich from poor, white from black, religious from secular but it appears all this hard work will come to naught.

Abortion rights will fail because, unlike gay rights, they are not the result of a democratic process but rather a brand new “constitutional right” created by a court impatient with democratic change.

TIME LINE OF CHANGES

Abortion Rights

Roe v Wade 1973
legalizes abortion in all 50
states based on *right to privacy*

Hyde Amendment 1976
prevents expenditure of federal
funds for abortion

Ronald Reagan imposes 1984
"gag rule"

Webster permits states 1989
to forbid abortion at publicly
funded facilities

Hudgson upholds 1990
parental notification

Casey replaces Roe 1992
Upholds 24 hour waiting
period, counseling, an parental
consent. Replaces Roe's
"strict scrutiny" test with
weaker "undue burden" test.

George Bush 2001
reinstates gag rule

32 states require 2003
parental notification 18 states
require waiting periods and
counseling

Gay Rights

1961 All 50 States and
District of Columbia
outlaw sodomy

1962 Illinois becomes 1st
state to decriminalize
sodomy

1964 Stonewall Riots
begin modern gay rights
movement

1973 American Psychiatric
Association removes
homosexuality as "illness"

1976 Bowers v Hardwick
upholds anti-sodomy laws
fully 3 years after Roe v
Wade. Only 24 states and DC
have sodomy laws as of 1976.

1993 "Don't Ask, Don't Tell"
permits gays to serve in the
military.

1996 Romer strikes down
Colorado amendment denying
gays protection against
discrimination

2000 Vermont recognizes
civil unions

2003 Lawrence declares
remaining anti-sodomy laws
unconstitutional. Only 13
states remain with such laws.

2004 Massachusetts legalizes
same sex marriage

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GAY RIGHTS AND THE RIGHT TO PRIVACY



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