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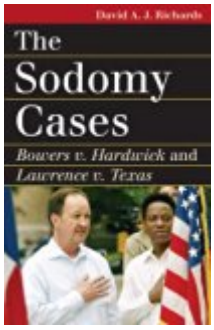
David A. J. Richards. *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas.* Lawrence: University Press of Kansas, 2009. xiii + 214 pp. $35.00 (cloth), ISBN 978-0-7006-1636-7; $16.95 (paper), ISBN 978-0-7006-1637-4.



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From the Bedroom to the Supreme Court

David A. J. Richards has extraordinary timing, although he could never have predicted how well his excellent book, *The Sodomy Cases*, would dovetail with federal district Judge Vaughn Walker's August 4 decision declaring California's 2008 antigay marriage Proposition 8 unconstitutional. Walker based his decision on the same grounds–Fourteenth Amendment due process guarantees and lack of compelling state interest–that Supreme Court Associate Justice Anthony Kennedy cited in his 2003 ruling in *Lawrence v. Texas.* That decision decriminalized sodomy in the United States. Walker's ruling may yet wind up at the U.S. Supreme Court where, as Richards points out, Kennedy provided the fifth and deciding vote–in two separate cases–in favor of gay rights.

How gays and lesbians got to a place where they could garner support from the U.S. justice system is the focus of Richards's book, which is divided into two parts. The first examines the evolving historical climate for homosexuality in the United States. The second traces U.S. Supreme Court decisions relating to gay rights. Richards's most important contribution lies in his meticulously detailed exploration of how generations of social activists created historical movements that shaped judicial debates and ultimately formed the foundation of justices' right-to-privacy rulings in sex-related cases.

Richards, a professor of law at New York University, reaches back into antiquity to explain how homosexuals came to be reviled in Western society. But his story really begins with British jurist William Blackstone's description of homosexuality as "a disgrace to human nature" and "a crime not fit to be named" (p. 1). It continues with European conquest of North America, when colonists discovered that Amerindians had a nonjudgmental view of sexuality, including homosexuality and cross-dressing. Quickly branded "deviant," these practices–along with the powerful roles played by tribal women–served to rationalize Europeans' brutal eradication of native culture.

Circumstances changed little over the next nearly two centuries, Richards argues, although the growth of urban culture in the United States covered gays and lesbians with a protective cloak of anonymity. Stepping out of the closet, however, could lead to prosecution under draconian sodomy laws prevalent throughout much of America. Gay men got the worst of the bargain, Richards reveals, since they so thoroughly threatened the deeply entrenched ideology that presented men as unyieldingly hypermasculine, competitive, and pugilistic.

Not until the post-World War II period did life begin to improve for gays and lesbians. Richards attributes many of the changes to emerging mass political movements in which a variety of groups challenged longstanding oppression and began to view the judiciary as the means to attain equality. In the process of proclaiming the personal as political, activists opened the door to Court rulings that enshrined the right to privacy as a constitutional guarantee. Gay activists clam-

bered aboard this activist bandwagon, but were not initially embraced by other groups–particularly heterosexual feminists–who were all too cognizant of the tendency of opponents to brand them as man-hating lesbians.

Nonetheless, Supreme Court decisions that began to reshape the political and cultural landscape for people of color and women by the 1960s eventually came to affect homosexuals as well. Beginning in 1965, justices began to strike down laws barring a number of practices related to sex. It seems remarkable that, only forty-five years ago, married couples could be prosecuted for buying birth control devices, but such was the case until the Court, in *Griswold v. Connecticut*, struck down a law criminalizing the sale of contraceptives.

Justices in *Griswold* agreed that they needed to overturn the rarely used law, but pondered exactly where in the Constitution they might find precedent for such an action. In their unstinting efforts to legalize birth control early in the twentieth century, Margaret Sanger and Emma Goldman had argued that people had the "basic human right to intimate life" free from government intervention (p. 39). That seemed to be a starting point. The First Amendment guaranteed each individual the right to his or her own "conscience." The Ninth Amendment mentioned "unenumerated rights." The Fourteenth Amendment seemed most promising because it had been added to the Constitution in 1868 in order to redress the horrors of slavery, including the inability of slaves to have intimate lives. Justices took note of all these constitutional provisions in the seven-to-two ruling.

Successive cases relating to sexual matters enshrined the Fourteenth Amendment as the focus of right-to-privacy rulings. In 1972, in *Eisenstadt v. Baird*, the Court cited due process in its ruling extending the right to contraceptives to unmarried heterosexuals. *Roe v. Wade* remains the most controversial of the right to privacy cases. The 1973 decision giving women the right to terminate their pregnancies overturned abortion laws in forty-six states and shifted the terms of debate. Earlier privacy decisions covered both genders. *Roe* conferred the right of privacy to women, in the process challenging men's control over women's bodies and lives. *Roe* fueled the rise of the religious Right. Judges, conservatives complained, were twisting the Constitution to achieve unacceptable social and political ends.

Conservatives were still spoiling for a fight over the privacy issue thirteen years after *Roe* when the high Court heard its first significant sodomy case, *Bowers v. Hardwick*. The case involved two men arrested, but not prosecuted, for having consensual sex in a private Georgia home. One of the best parts of Richards's book details the process by which justices came to decide *Bowers* on a five-to-four vote. Justice Lewis Powell agonized over his decision, but ultimately cast the fifth and deciding vote upholding the law. He declared at one point during conference debate that "I don't believe I've ever met a homosexual" (p. 104). In fact, he had. One of his four Court clerks was a closeted gay man. Another, however, was a Mormon opposed to homosexuality as a general principle, and he won the day. Justice Bryon White wrote the majority decision, which used *Roe* to question whether the Constitution protected the right to privacy. White ultimately concluded that it did, just not for gays and lesbians. Powell later admitted regret over his decision in *Bowers*.

By the time the Court decided to hear *Lawrence v. Texas* in 2003, the climate for homosexuals had improved significantly. Most states had abolished sodomy laws. The military utilized "Don't Ask, Don't Tell." Though seriously flawed, it suggested at least a grudging acceptance of homosexuality. And, in *Romer v. Evans*, the Court, in 1996, overturned a Colorado law that singled out gays for discrimination. By the mid-nineties, most of the justices who decided *Bowers* had retired. Congress, along with a majority of the high Court, seemed to view the right to privacy as sacrosanct. When President Ronald Reagan tapped Robert Bork to replace Powell in 1987, Bork's opinion that the Constitution conferred no right to privacy, among other issues, led the Senate to deny him confirmation. Reagan ultimately nominated Kennedy, who wrote the majority decision in *Romer*. It was Reagan's second miscalculation in a judicial appointment. As governor of California in the early 1970s, Reagan appointed Donald Wright to the state supreme court, believing Wright to be a firm supporter of capital punishment. In February 1972, Wright wrote the decision abolishing the death penalty in California.

Lawrence, like *Bowers*, centered on two gay men who were arrested, though not prosecuted, for engaging in sodomy in a private residence. Unlike *Bowers*, it was clear almost from the beginning that the Court majority intended to find for the plaintiffs and to overturn *Bowers*. Justice Paul Stevens, the Court's senior member, assigned Kennedy to write the majority decision, which made it clear that adult consensual practices–no matter how offensive some people found them–came under the Fourteenth Amendment's due process protection. Justice Sandra Day O'Connor concurred in the ruling, but argued that the amendment's equal protection clause was more

applicable. Setting the decision in a historical context, Kennedy noted that "later generations can see that laws once thought necessary and proper in fact serve only to oppress" (p. 151).

Whether Kennedy chooses to apply the same line of reasoning to gay marriage, should Judge Walker's Proposition 8 decision reach the Supreme Court, remains to be seen. Richards clearly believes that he should do so. The lack of legal recognition of same sex partnerships, he argues, represents an undue burden on gay men and women who possess the same constitutional right to intimate life enjoyed by heterosexual couples. Though the law, like politics, is a game of inches, time, and history, it finally seems to be on his side.