H-Net Reviews
in the Humanities & Social Sciences

Marc Stein. *Sexual Injustice: Supreme Court Decisions from Griswold to Roe.* Chapel Hill: University of North Carolina Press, 2010. xiii + 364 pp. $39.95 (cloth), ISBN 978-0-8078-3412-1.

Reviewed by Meredith Clark-Wiltz (Ohio State University)
Published on H-Law (February, 2011)
Commissioned by Christopher R. Waldrep

Limits of the Revolution: The Often Romanticized Sexual Privacy Rulings from *Griswold* to *Roe*

In 2003, the Supreme Court handed down a landmark ruling in the extension of sexual privacy rights for same-sex couples. *Lawrence v. Texas* held that state sodomy laws were unconstitutional. While many might be quick to place this decision in the long line of late-twentieth-century Court decisions that have liberalized sex, Marc Stein cautions against romanticizing the implications of those earlier decisions. In his monograph, *Sexual Injustice: The Supreme Court Decisions from Griswold to Roe,* Stein challenges us to reconsider the implications of five court cases between 1965 and 1973 that have been traditionally recognized for their liberalizing interpretation of sexual privacy rights. He also contrasts his close reading of *Griswold* (1965), *Fanny Hill* (1966), *Loving* (1967), *Eisenstadt* (1972), and *Roe* (1973), with an oft-forgotten, conservative decision in *Boutilier v. INS* (1967)–a case in which the Court endorsed immigration registrations that excluded people "afflicted with psychopathic personality," which it interpreted to include homosexuality, as unfit for entry. Doing so, he reveals the constraints on activists to support sexual freedom by employing particular types of arguments and the underlying assumptions of "heteronormative supremacy" apparent in the Supreme Court's rulings. Stein powerfully demonstrates that the Court, in *Boutilier* and even in its typically lauded, more liberal rulings on abortion, contraception, interracial marriage, and obscenity during the 1960s sexual revolution, promoted a conservative understanding of privacy rights that privileged heterosexuality and marriage. Stein demonstrates that "*Lawrence* transformed the conservative vision of sexual freedom, equality, and citizenship that had guided the Court since the 1960s" (p. 3).

Organizing his work into three parts, Stein supports three primary claims. In part 1, he analyzes the five notable cases remembered for liberalizing sex in the 1960s and 1970s, and compares them with the 1967 *Boutilier* decision to demonstrate that the Court constructed a "sexual rights doctrine" that "affirmed the supremacy of adult, heterosexual, marital, monogamous, private, and procreative forms of sexual expression"(p. 3). Stein is not the first scholar to recognize the limits of some of these decisions. David Garrow, in *Liberty and Sexuality* (1998), discussed the contemporary and subsequent debate sparked by the narrowness of *Roe*'s ruling on privacy rights rather than women's rights. On the other hand, Stein provides a truly innovative examination of the hardly criticized case of *Loving v. Virginia* that deemed anti-miscegenation laws unconstitutional.[1] Moreover, the whole of his discussion–comparing all of these cases about sexuality at once–offers a sophisticated understanding of the narrow outlook of the Court on issues of sexual rights.

In the second section of his book, Stein examines the activism and advocacy for sexual freedom that underpinned these cases. He devotes more space to the discussion of Clive Michael Boutilier's defense, noting the important role of the early homophile movement in it. Highlighting the work of the Homosexual Law Reform Society, this section challenges some literature that dates the formation of a gay, lesbian, and bisexual movement for equality to the 1970s. In this section, Stein contributes to a burgeoning field in sexuality studies that attempts to reconsider gay and lesbian activism, organization, and citizenship. Here, he does not simply revere or admire activists pressing the Court to liberalize its position on sex restrictions. Instead, Stein indicates that he "criticizes" these activists for not wholly supporting sexual freedom and equality in their arguments. Yet, he makes clear that he understands that if they would have taken more liberal stances it might have undermined their ability to win victories in these significant cases. His analysis reveals the unintended consequences of reformers using strategically conducive arguments rather than principled

claims to press for change.

In the final section, "Readings and Readers," Stein contends that the readers of these Court decisions became authors themselves by interpreting and understanding them as more liberal than they actually were. He notes that the media became the prime example of this transformation in meaning. Stein claimed that because of the misreading of these decisions, liberals celebrated them; conservatives abhorred them; and the Court eventually reconceived of them as more expansive than they originally were. Stein examines the interpretations of the gay and lesbian press; the legal community; and the more mainstream press, finding similarities across the different venues. Not only were many of them willing to laud decisions like *Roe* and *Loving*, they were likely to forget *Boutilier*. In this section, Stein developed further analysis on the reactions to these landmark rulings, and while others have noted the disappointment among contemporaries who recognized the limits of decisions like *Roe*, he examines the reactions in relation to one another in a way that demonstrates the impression left on the public of a truly transformative moment in American history. Perhaps, Stein underplays the implications of these decisions for *some* Americans in order to highlight the constraints they placed on certain segments of society. Nonetheless, his work does reveal a genuine continuity of a sexual imagination that privileges heterosexuality and links sex with values of marriage and reproduction.

Stein's work complicates and complements several historiographies, making it an important contribution to the history of law, sexuality, immigration, and citizenship. Like John D'Emilio, David K. Johnson, and Margot Canaday, Stein pushes the period of the rise of gay and lesbian activism closer to the mid-twentieth century and analyzes the role of the state in supporting policies privileging heterosexuality and casting other sexual relationships as deviant. He also reveals the importance of sexuality to immigration and citizenship debates, demonstrating how civic membership has historically hinged not only on race, nationality, gender, and ability but also on sexuality. His emphasis on a conservative continuity in Court ruling on sexuality between the 1960s and 1980s should help recast how scholars conceive of the rights revolution of the late twentieth century and its exclusiveness. Finally, Stein's work questions the ability of the Court to exact liberal social change, leaving legal scholars to grapple with the limitations and implications of Court-centered social activism.

In addition to his brilliant interpretation of these cases, Stein also presents a beautiful discussion of his approach and methodology as well as a remarkable transparency in his use of potentially difficult sources. His forthright personal narrative offers a remarkable model and a useful example for all historians to be as candid in analyzing their own work. Furthermore, Stein does not shy away from using his personal correspondence with Boutilier's niece, offering a very clear picture of the limits of his ability to obtain sources about Boutilier's perspective. The inclusion of this discussion does not simply provide a better sense of the person behind the case, but also reveals the implications of Supreme Court rulings on the lived experiences of individuals. In these aspects of his work, Stein excels.

Sexual Injustice will no doubt require many to reconsider their own ideas about the traditional narrative of liberalism, the implications of the 1960s and 1970s rights revolution, and the role of the Court in producing social change. Stein's work calls for scholars to look for continuity in periods of social and legal change and to think critically about the variety of consequences in relying on expedient arguments for social change.

Note

[1]. Peggy Pascoe does highlight the NAACP's concern that this case might harm some of its efforts toward eliminating segregation. See Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York:Oxford University Press, 2009); Stein, *Sexual Injustice*, 109.

If there is additional discussion of this review, you may access it through the list discussion logs at:
http://h-net.msu.edu/cgi-bin/logbrowse.pl.

Citation: Meredith Clark-Wiltz. Review of Stein, Marc, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe*. H-Law, H-Net Reviews. February, 2011.
URL: http://www.h-net.org/reviews/showrev.php?id=31495

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.