AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Personal Freedom and Public Morality

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State of Texas v. Acosta, No. 08-04-00312-CR (TX, 2005)

In 2003, Ignacio Acosta was working at Trixx Adult Bookstore in El Paso, Texas. Two undercover police officers asked Acosta about a vibrator on display in the store, and he explained how it could be used to sexually gratify the female officer. He was arrested for promoting an obscene device. He moved to have the criminal complaint dismissed as violating his constitutional right to sexual privacy, which the trial judge did. On appeal to the Texas Court of Appeals, that order was reversed.

CHIEF JUSTICE BARAJAS.

. . .

Appellant contends that the right to privacy is not fundamental, and the right to privacy does not guarantee a fundamental right to sexual privacy or a right to use, sell, or purchase obscene devices outside the home. Secondly, Appellant asserts that the statute proscribing the promotion bears a rational relationship to a legitimate government interest such that it survives judicial scrutiny. . . .

There is a recognized and constitutionally protected zone of privacy under both the United States and Texas constitutions. The Supreme Court of the United States has held that the only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the guarantee of personal privacy. The right to privacy protects activities relating to marriage, procreation, contraception, motherhood, family relationships, and child rearing and education. *Roe v. Wade* (1973). . . .

. . .

Appellee argues that if there is a constitutional right to sell contraceptives, there must be a constitutional right to sell dildos. See *Eisenstadt v. Baird* (1972). . . . Statutes restricting promotion or sale of contraceptives infringe on a recognized fundamental right, namely, the decision to bear a child. In *Yorko v. State of Texas*, 690 S.W. 2d 260 (Tex. Crim. App., 1985), the court found no fundamental right to stimulate human genital organs with an obscene device; therefore, restricting the promotion of such devices does not infringe on any recognized fundamental right. . . .

Appellee further asserts that one's right to engage in sexual behavior privately at home is infringed upon by the statute. We disagree. First, the right to use obscene devices is not prohibited by the statute, and the prohibition against promotion has been held not to infringe on any right that might exist to use obscene devices at home. Second, the Supreme Court expressly noted that it has never held that a fundamental right to sexual privacy exists under the constitution. *Carey v. Population Services International* (1977).

However, Appellee urges that society's perception of and attitudes toward sexuality have become more tolerant, the liberties guaranteed by substantive due process have moved out of the marital bedroom and into the public sphere of commercial interactions and private interactions between consenting adults. . . . In *Lawrence v. Texas* (2003), the Supreme Court decided if sex between two members of the same sex can be denied by law when practiced in the privacy of their apartment. While

the Supreme Court struck down the sodomy law in Texas, we note the Supreme Court specifically excluded from its analysis any aspect of public conduct or prostitution, rather, the holding applied to private sexual conduct. Therefore, we do not perceive that the *Lawrence* holding that the Texas sodomy statute furthered no legitimate interest implies that commercial promotion of sexual devices is constitutionally sanctioned.

. . . It is appropriate for the State to act to protect the social interest or order, morality, and decency by restraining commercial dealing in non-communicative objects designed or marketed for use primarily for the stimulation of human genital organs. . . .

Reversed.