

U.S. Supreme Court BOWERS v. HARDWICK, 478 U.S. 186 (1986) BOWERS,  
ATTORNEY GENERAL OF GEORGIA v. HARDWICK ET AL.

Decided June 30, 1986

JUSTICE WHITE delivered the opinion of the Court. In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute criminalizing [478 U.S. 186, 188] sodomy 1 by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

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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. The reach of this line of cases was sketched in *Carey v. Population Services International*, 431 U.S. 678, 685 (1977). *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were described as dealing with child rearing and education; *Prince v. Massachusetts*, 321 U.S. 158 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with procreation; *Loving v. Virginia*, 388 U.S. 1 (1967), with marriage; *Griswold v. Connecticut*, *supra*, and *Eisenstadt v. Baird*, *supra*, with contraception; and *Roe v. Wade*, 410 U.S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey v. Population Services International*, *supra*, at 688-689.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the [478 U.S. 186, 191] claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in 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. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U.S., at 688 , n. 5, 694, n. 17.

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. Meyer, Prince, and Pierce fall in this category, as do the privacy cases from Griswold to Carey.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither [478 U.S. 186, 192] liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (POWELL, J.). See also *Griswold v. Connecticut*, 381 U.S., at 506 .

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against

that conduct have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). 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. 5 In 1868, when the Fourteenth Amendment was [478 U.S. 186, 193] ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. 6 In fact, until 1961, 7 all 50 States outlawed sodomy, and today, 24 States and the District of Columbia [478 U.S. 186, 194] continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U. Miami L. Rev., supra, at 524, n. 9. 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. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation [478 U.S. 186, 195] of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express

constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on *Stanley v. Georgia*, 394 U.S. 557 (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." *Id.*, at 565.

*Stanley* did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. 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. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. *Id.*, at 568, n. 11. 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 [478 U.S. 186, 196] 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. Accordingly, the judgment of the Court of Appeals is Reversed.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy. As the Court notes, ante, at 192, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code

Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality [478 U.S. 186, 197] and the Western Christian Tradition 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries \*215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching. This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.