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# Bowers v. Hardwick

478 U.S. 186 (1986)

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**White, Justice.**

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In August 1982, Hardwick (hereafter respondent) was charged with violating the Georgia statute criminalizing sodomy (footnote omitted) 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.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. (footnote omitted) He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), which this Court summarily affirmed, 425 U.S. 901 (1976).

A divided panel of the Court of Appeals for the Eleventh Circuit reversed. (citations omitted) The court first held that, because *Doe* was distinguishable and in any event had been undermined by later decisions, our summary affirmance in that case did not require affirmance of the District Court. Relying on [*Roe v. Wade* and other right to privacy decisions], the court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth

Amendment and the Due Process Clause of the Fourteenth Amendment. The case was remanded for trial, at which, to prevail, the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.

. . . We agree with Petitioner [the State] that the Court of Appeals erred, and hence reverse its judgment. (footnote omitted)

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. . . .

. . . [W]e think it evident that none of the rights announced in [previous] cases bears any resemblance to the 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 unsupported. . . .

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. . . .

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. . . . [I]t was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland* (citation omitted) where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." (citations omitted)

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. (citation omitted) Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. (footnote omitted) In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. (footnote omitted) In fact, until 1961, (footnote omitted) all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide

criminal penalties for sodomy performed in private and between consenting adults. (citation omitted) 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 of much of the substantive gloss that the Court had placed on the Due Process Clause 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 his 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." (citation omitted)

*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. (citation omitted) 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 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. (footnote omitted)

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**Justice Blackmun, with whom Justice Brennan, Justice Marshall, and Justice Stevens join, dissenting.**

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, (citation omitted) than *Stanley v. Georgia* (citation omitted) was about a fundamental right to watch obscene movies, or *Katz v. United States* (citation omitted) was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." (citation omitted)

The statute at issue, Ga. Code Ann. § 16-6-2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that § 16-6-2 is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." (citation omitted) But the fact that the moral judgments expressed by statutes like § 16-6-2 may be "natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Roe v. Wade*, (citation omitted) quoting *Lochner v. New York*, (citation omitted) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." (citation omitted) I believe we must analyze respondent's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "abominable crime not fit to be named among Christians." (citation omitted)

#### I.

. . . [T]he Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. (citation omitted) Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." (citation omitted) The sex or

status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of § 16-6-2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity. (footnote omitted) I therefore see no basis for the Court's decision to treat this case as an "as applied" challenge . . . or for Georgia's attempt, both in its brief and at oral argument, to defend § 16-6-2 solely on the grounds that it prohibits homosexual activity. Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. (citation omitted) But his claim that § 16-6-2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

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## II.

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### B.

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a 'place,'" (citation omitted) "the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'" (citation omitted)

The Court's interpretation of the pivotal case of *Stanley v. Georgia*, 394 U.S. 557 (1969), is entirely unconvincing. *Stanley* held that Georgia's undoubted power to

punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, *Stanley* relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. (citation omitted) But that is not what *Stanley* said. Rather, the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

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These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. (citation omitted)

The central place that *Stanley* gives Justice Brandeis' dissent in *Olmstead*, a case raising no First Amendment claim, shows that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in *Paris Adult Theatre I v. Slaton* (citation omitted) the Court suggested that reliance on the Fourth Amendment not only supported the Court's outcome in *Stanley* but actually was necessary to it: "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that 'a man's home is his castle.'" (citation omitted) "The right of the people to be secure in their . . . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right

pressed upon us here has no . . . support in the text of the Constitution.” (citation omitted) Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution’s protection of privacy.

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#### IV.

It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobitis* (citation omitted) and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. (citation omitted) I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

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#### **Justice Stevens, with whom Justice Brennan and Justice Marshall join, dissenting.**

Like the statute that is challenged in this case, (footnote omitted) the rationale of the Court’s opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes. (footnote omitted) Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law. (footnote omitted) That condemnation was equally damning for heterosexual and homosexual sodomy. (footnote omitted) Moreover, it provided no special exemption for married couples. (footnote omitted) The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a “crime against nature.”

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy. (footnote omitted) Indeed, at one point in the 20<sup>th</sup> century, Georgia’s law

was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited between heterosexuals. . . .

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

#### I.

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. (footnote omitted) Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. *Griswold v. Connecticut*. (citation omitted) Moreover, this protection extends to intimate choices by unmarried as well as married persons. *Carey v. Population Services International*. (citations omitted)

In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

These cases do not deal with the individual’s interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny. The Court has referred to such decisions as implicating “basic values,” as being “fundamental,” and as being dignified by history and tradition. The character of the Court’s language in these

cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable. . . .

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the State—to decide. (footnote omitted) The essential “liberty” that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within “the sacred precincts of marital bedrooms,” (citation omitted) or, indeed, between unmarried heterosexual adults. (citation omitted) In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16-6-2 of the Georgia Criminal Code.

## II.

If the Georgia statute cannot be enforced as it is written—if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia’s citizens—the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in “liberty” that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. . . . From the standpoint of the individual, the homosexual

and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.” (citation omitted) But the Georgia electorate has expressed no such belief—instead, its representatives enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does the Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to process criminal charges against him. As Justice Powell points out, moreover, Georgia’s prohibition on private, consensual sodomy has not been enforced for decades. (footnote omitted) The record of nonenforcement, in this case and in the last several decades, belies the Attorney General’s representations about the importance of the State’s selective application of its generally applicable law. (footnote omitted)

Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, *simpliciter*, is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met.

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