

BOWERS v. HARDWICK (1986)

BACKGROUND

In 1982, there was a century-old Georgia Statute criminalizing sodomy:

“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.”

“A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.”

Michael Hardwick was arrested at home in his bedroom after an unknowing houseguest of his allowed a police officer on the premises, an officer who caught Hardwick and his (male) partner in the act.

After a preliminary hearing, the local D.A. dropped the case. But Hardwick brought suit in Federal District Court, alleging that the GA Statute violated his rights under the DP Clause.

The Federal District Court dismissed the suit for failure to state a claim. The Eleventh Circuit Court of Appeals reversed, holding that the GA anti-sodomy Statute violated Hardwick’s right to personal privacy protected by the DP Clause. Since this decision contradicted other Appeals Court decisions in similar cases, the U.S. Supreme Court agreed to hear the case.

THE DECISION

The Court, in a 5-4 decision, upheld GA’s anti-sodomy Statute.

Majority: White, Burger, Powell, Rehnquist, O’Connor

Minority: Blackmun, Brennan, Marshall, Stevens

WHITE’S OPINION

The issue is whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”.

Answer: There is no “fundamental right to engage in homosexual sodomy”

Result: The Rational Basis Test applies, and the GA Statute passes this Test.

Precedent

There is a fundamental right of personal privacy in matters relating to child rearing and education, family relationships, procreation (*Skinner*), marriage (*Loving*), contraception (*Griswold*), and abortion (*Roe*).

But “none of [these rights] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy”, for there is “no connection between family, marriage, or procreation...and homosexual activity”.

Principle

The Court has proposed two different criteria of fundamentality:

Palko: Rights that are “implicit in the concept of ordered liberty”, and “such that neither liberty nor justice would exist if they were sacrificed”.

Moore: Rights that are “deeply rooted in this Nation’s history and tradition”.
[See also *Snyder*: Rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental”.]

Neither criterion supports the claim that there is a fundamental right to engage in homosexual sodomy.

History & Tradition

In 1791, sodomy was illegal in all 13 States.
In 1868, sodomy was illegal in 32 of 37 States.
Until 1961, sodomy was illegal in all 50 States.
In 1986, sodomy is illegal in 24 States and in D.C.

Ordered Liberty??? [Conscience???

Given the Legislative Record, “to claim that a right to engage in [sodomy] is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious”.

Thus, neither the *Palko* nor the *Moore* criterion gives us reason to suppose that the relevant right is fundamental.

The Specter of Judicial Activism

The Court should resist extending judicial protection to rights that have “little or no cognizable roots in the language or design of the Constitution”. [See *Lochner*]. For “otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority”.

The Specter of Decriminalization

If the Constitution protects the right of consenting adult homosexuals to engage in sodomy, then it also protects the right to engage in “adultery, incest, and other sexual crimes”. But the Court is “unwilling to start down that road”.

WHITE’S CONCLUSION

Since the right to engage in homosexual sodomy is not fundamental, the Rational Basis Test applies.

And since the Statute is a rational means of expressing society’s arguably legitimate moral disapproval of homosexual sodomy, it passes the Test and must be upheld.

BURGER’S CONCURRENCE

Burger endorsed White’s historical approach

“To hold that *the act of homosexual sodomy* is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”

Objection: For the italicized phrase, substitute the following:

“Blacks and whites have equal moral status”

“Men and women have equal moral status”

“Blacks and whites should be allowed to marry”

POWELL’S CONCURRENCE

Powell, representing the crucial “swing” vote (as often happened during his tenure—see *Bakke*), agreed with White and Burger, but suggested that the maximum penalty for violating GA’s anti-sodomy (20 years in prison) would violate the 8th Amendment’s proscription of “cruel and unusual” punishments.

BLACKMUN'S DISSENT

Constitution of Principle v. Constitution of Detail

“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’. I believe we must analyze respondent Hardwick’s claim in the light of the values that underlie the constitutional right to privacy.”

BLACKMUN'S CENTRAL ARGUMENT

1. There is a fundamental right of personal privacy that is protected against State intrusion by the DP Clause. [See *Skinner, Loving, Griswold, Roe*]

2. This right of personal privacy has two aspects:

It concerns “decisions that are properly for the individual to make”.

It “has reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged”.

3. The right of personal decisional privacy is protected because it is an instance of the fundamental right to define one’s own identity.

“We protect [those rights that fall under the right of personal decisional privacy] not because they contribute...to the general public welfare, but because they form so central a part of an individual’s life”.

Rights Theory v. Utilitarianism

4. Self-definition is created in part by participation in a chosen form of sexual intimacy.

“Individuals define themselves in a significant way through their intimate sexual relationships with others.”

5. SO: The fundamental right of personal privacy protected against State intrusion by the DP Clause includes the right to choose to engage in the form of sexual intimacy that is partly definitive of one’s identity.

BLACKMUN'S CONCLUSION

Under the DP Clause, Hardwick has a fundamental right to choose to engage in sodomy.

The proper test for evaluating the constitutionality of laws that infringe fundamental rights is Strict Scrutiny.

To pass the test, GA must show that its anti-sodomy Statute is necessary to achieve a compelling state purpose.

BLACKMUN APPLIES STRICT SCRUTINY

GA claims two compelling interests:

Protecting the public health and welfare (by limiting the spread of communicable diseases and discouraging criminal activity).

Maintenance of a morally decent society.

PUBLIC HEALTH AND WELFARE

The interest in public health and welfare is compelling. But GA has provided no reason for thinking that sodomy is inherently “physically dangerous, either to the persons engaged in it or to others”. Thus GA’s Statute isn’t even so much as rational relative to this interest.

It is possible to distinguish between sodomy and both adultery and incest.

Adultery involves breach of civil contract and can injure third persons (children).

In the case of incest, true consent is “problematical”.

MORAL DECENCY

The only reason for thinking that sodomy is immoral derives from religious values. But “the legitimacy of secular legislation depends...on whether the State can advance some justification for its law beyond its conformity to religious doctrine”.

The interest in the maintenance of “moral decency” is either religious or secular. If it is religious, then it is illegitimate (and hence not compelling). If it is not religious, then anti-sodomy laws are irrational. Either way, the law fails the Strict Scrutiny Test, and should be struck down.

POWELL CHANGES HIS MIND

In 1990, three years after retirement, answering a question from the audience after a talk at NYU Law School, Powell said this:

“I think I probably made a mistake in the *Hardwick* case...I do think it was inconsistent in a general way with *Roe*. When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments.”