US Supreme Court

Case: *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).
Date: June 30, 1986 **Votes:** 5-4 for Bowers (GA's AG)

Opinion: White **Concurrences:** C.J. Burger, Powell
Dissents: Blackmun (with Brennan, Marshall, Stevens); Stevens

Tags: Homosexuality, sodomy, criminal law, Georgia, intimate association, Due Process Clause, privacy

Question(s) Presented: "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." 190

Holdings: Reversal of Eleventh Circuit. This intimate association is not beyond state regulation.

Rationale: The law is based on notions of morality (196), and there is nothing in precedent (190-91), history or tradition (191ff.) that supports the notion that consensual homosexual sex between adults is a constitutionally protected right.

Facts: Law enforcement discovered Hardwick engaged in consensual homosexual sex with another man in his bedroom. This was a criminal act in Georgia. Charges were dropped, but Hardwick took the constitutional question to court.

Legal History, Prior Appeals & Trial Court Input:

- **1982 Preliminary Criminal Hearing:** DA opted not to present to grand jury.
- **Federal District Court:** Challenge to statute's constitutionality.
  - "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." 188
  - Rule 12(b)(6) dismissal
- **1985 Eleventh Circuit Panel:** reversed dismissal—found a violation of constitutional rights per *Griswold v. CT*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Roe v. Wade*, 410 U.S. 113 (1973). 189
  - **Private and intimate association beyond reach of state regulation:** 9th Am, DPC/14th Am.
  - Remanded for trial: standard for State was compelling interest & narrow means
- **Circuit Split → Certiorari**

Attorneys' Arguments:

- **For Hardwick:**
  - Precedent protects right of intimate association regarding reproduction as a fundamental liberty under the DPC of the 14th Am 190-195

- Precedent protects First Amendment rights in home (*Stanley v. Georgia*) 195-196
- There must be a rational basis for the law, and there is nothing "other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.196

Appeals to Statute & Precedent:

- ***Carey v. Population Services International*, 431 U.S. 678 (1977)**
- ***Pierce v. Society of Sisters*, 268 U.S. 510 (1925):** child rearing and education
- ***Meyer v. Nebraska*, 262 U.S. 390 (1923):** child rearing and education
- ***Prince v. Massachusetts*, 321 U.S. 158 (1944):** family relationships
- ***Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942):** procreation
- ***Loving v. Virginia*, 388 U.S. 1 (1967):** marriage
- ***Griswold v. CT*, 381 U.S. 479 (1965):** contraception; Due Process Clause & right to conceive
- ***Eisenstadt v. Baird*, 405 U.S. 438 (1972):** contraception; Due Process Clause & right to conceive
- ***Roe v. Wade*, 410 U.S. 113 (1973):** abortion; Due Process Clause & right to conceive
- ***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." 195

Relevant U.S. History:

- Practice of sodomy was illegal in all 50 states till 1961; in 1986, over half still criminalized it.

Discussion:

- Disagree with Eleventh Circuit 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." 190
  - "we think it evident that none of the rights announced in those cases bears any resemblance to the [191] claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." 190-191
  - "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." 191
- "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." 191
- What rights qualify for heightened judicial protection? 191
  - Fundamental liberties = "implicit in the concept of ordered liberty" (*Palko v. CT*, 302 U.S. 319, 325 (1937))
  - "deeply rooted in this Nation's history and tradition" (*Moore v. East Cleveland*, 431 U.S. 494, 503 (1977))
  - "It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy." 192
  - History & Tradition: ancient roots of prohibition; all 50 states through 1961; to date, 25 states criminalized "sodomy performed in private and between consenting adults" 194

  - "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." 194
- "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." 194
- *Stanley v. GA*: obscene material in privacy of home
  - First Amendment protection to read/watch films—but this is different.
  - "Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home." 195
  - "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 [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." 195-96
- Re. rational basis for law other than notions of morality:
  - "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." 196

Concurrence: C.J. Burger 196-97

- "I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy." 196
- History: "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 Judeao-Christian [*sic*] moral and ethical standards." 197 (Ancient Rome & etc.!)
- "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." 197
- **"To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to case aside millennia of moral teaching."** 197
- "This is essentially not a question of personal 'preferences' but rather of the legislative authority of the State." 197

Concurrence: Powell 197-98

- No fundamental substantive right under DPC
- However, there may be an 8th Am issue here—"The Georgia statute at issue in this case . . . authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue." 197 (cf. sentences for aggravated battery, 1st degree arson, robbery)
- But not raised here because there was never a trial, only an arrest.

Dissent: Blackmun (with Brennan, Marshall, Stevens) 199-214

- Links this to **privacy right**—"this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.' *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)." 199

- **"the fact that 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*, 410 U.S. 113, 117 (1973), quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)."** 199 (internal quotation marks omitted)
- Holmes: "It 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." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1887). Quoted here 199
- Right to privacy: "If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate [200] 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.' *Herring v. State*, 119 Ga. 709, 721 (1904)." 199-200
- Analysis of GA law:
  - The court seems to obsess over homosexual activity, but the law is worded in such a way as to criminalize oral or anal sex of heterosexual *or* homosexual persons.
  - "The sex or status of the persons who engage in the act is irrelevant as a matter of state law." 200
  - "Michael Hardwick's standing may rest in significant part on Georgia's apparent unwillingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals." 201
  - "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." 201
- 8th, 9th, & 14th Amendments in view here:
  - *Griswold* based strongly on 9th Am & rights retained by the people (privacy in intimate affairs)
  - Failure to state a claim: still based on *Conley*! Lower court should not have dismissed if there was ANY legal claim available. 201-202
- "The Court's cramped reading of the [203] issue before it makes for a short opinion, but it does little to make for a persuasive one." 202-203
- Right to privacy:
  - WRT "certain *decisions* that are properly for the individual to make" 204 (e.g., abortion, contraception, child-rearing)
  - WRT "certain *places* without regard for the particular activities in which the individuals who occupy them are engaged" 204 (e.g. tracking device in container, warrantless arrests and searches, receiving packages of narcotics)
  - **"The case before us implicates both the decisional and special aspects of the right to privacy."** 204
- Protecting privacy rights associated with the family:
  - **"We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."** 204
  - See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)

- "We protect the decision whether to [205] marry precisely because marriage 'is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.' *Griswold v. CT*, 381 U.S. at 486." 204-205
- "We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply." 205
- "And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households." 205
- So, too, we should protect individuals' right to decide how to experience sexual intimacy.
- **"The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate association with others."** 206

- Protecting privacy rights associated with the home:
  - *Stanley* wasn't exclusively about FIRST Amendment protection: it "anchored its holding in the Fourth Amendment's special protection for the individual in his home[.]" 207
    - *Olmstead* is given central space (Brandeis's dissent), but it raises NO 1st Am claims.
  - **"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."** 208
- State's Justifications for Georgia's law:
  - "First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for 'the general public health and welfare,' such as spreading communicable diseases or fostering other criminal activity. Brief for Petitioner 37" 208
    - **Response:** no need to equate sexual activity with possession of drugs, guns, contraband
  - "The core of petitioner's defense of § 16-6-2, however, is that respondent and others who engage in the conduct prohibited by § 16-6-2 interfere with Georgia's exercise of the 'right of the Nation and of the States to maintain a decent society,' *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)." 210 (IOW, it's an ancient prohibition)
    - **Response:** "I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny." (citing Roe, Loving, Brown)
- **"It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority."** 211
- "The assertion that 'traditional Judeo-Christian values proscribe' the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for § 16-6-2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry." 211
- "The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine." 211
- **"Far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16-6-2 represents a legitimate use of secular coercive power."** 211

- **"A State can no more punish private behavior because [212] of religious intolerance than it can punish such behavior because of racial animus."** 211-12
- **"No matter how uncomfortable a certain group may make the majority of this Court, we have held that '[mere] public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.' *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)."** 212
- **"Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality."** 212
    - **"the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places."** 213
- **"This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest . . . let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently."** 213

Dissent: Stevens (with Brennan and Marshall) 214-20

- Is this a law about homosexual conduct, or conduct regardless of sexual orientation? 214-15
- **"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."** 216
- Intimate practices protected for married as well as unmarried heterosexual couples under DPC (*Griswold, Carey v. Population Services; Eisenstadt*) 217-18
    - Therefore GA's law can't prohibit what it intends.
- So can GA justify a "selective application of its law"? 218
    - "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." 218
    - "The first possibility is plainly unacceptable. **Although the meaning of the principle that 'all men are created equal' is not always clear, it surely must mean that every free citizen has the same interest in 'liberty' that the members of the majority share.**" 218
    - No difference between homosexual & heterosexual: **"State intrusion into the private conduct of either is equally burdensome."** 219
    - And GA can't justify the selective application of this law in any other way- **"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."** 219
    - Also: this statute has not been enforced for decades. 219
- **"The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's *post hoc* explanations for selective application are belied by the State's own actions. At the very lest, I think it clear at this stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss."** 220