

BOWERS V. HARDWICK (1986)

United States Supreme Court--opinion delivered by Justice White.

In August, 1982, respondent was charged with violating the Georgia statute criminalizing sodomy¹ by committing that act with another adult male in the bedroom of respondent's home. Respondent brought suit challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. He asserted that he was a practicing homosexual and that the Georgia sodomy statute violates the Federal Constitution.

The state court upheld the constitutionality of the Georgia statute. The Eleventh Circuit Court of Appeals reversed and held that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the realm of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. We agree with the State that the Court of Appeals erred, and hence reverse its judgment.

The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many states that still make such conduct illegal.

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. Although this Court has construed 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, the same privilege does not extend to homosexuals to engage in acts of sodomy. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.

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. Proscription against homosexual sodomy has ancient roots. 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. Today 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.

Respondent asserts that he should be allowed to perform homosexual acts within the privacy of his own home. But victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. We do not agree and are unpersuaded that the sodomy laws of 25 states should be invalidated.

[Reversed]

¹Ga. Code Ann §16-6-2 (1984) provides, in pertinent part, as follows:

"(a) 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. . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years."

Chief Justice Burger, concurring.

I join the Court's opinion, but I write separately to underscore my feeling that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

Justice Powell, concurring.

I agree with the Court that there is no fundamental right to engage in consensual homosexual sodomy, but I find Georgia's statute in violation of the Eighth Amendment of the Constitution. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, first degree arson, and robbery.

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

This case is not about a fundamental right to engage in homosexual sodomy, but rather it is a case 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., Justice Brandeis dissenting).

Like the statute that is challenged in this case, 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.

The Due Process Clause of the Fourteenth Amendment protects the right of married and unmarried couples to make decisions concerning the intimacies of their physical relationship even when not intended to produce offspring.