The Burger Court Opinion Writing Database

Bowers v. Hardwick

478 U.S. 186 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 24, 1985

Re: No. 85-140 - Bowers v. Hardwick

MEMORANDUM TO THE CONFERENCE:

I, too, have taken a second look and my tentative "join 3" is now a grant.

Regards,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 3, 1986

PERSONAL

RE: Bowers v. Hardwick, No. 85-140

Dear Lewis:

I have some further thoughts on your suggestion at Conference that Hardwick cannot be punished because of his "status" as a homosexual.

I suggest to you that this argument is not before us. Hardwick's complaint seeking a declaratory judgment contains no such claim. The argument was certainly not pressed at all by Hardwick's counsel in his brief or at oral argument. Hardwick's brief does not even cite either the Eighth Amendment or Robinson v. California, 370 U.S. 660 (1962). There are only two citations to Robinson in the sixteen briefs that have been filed. The Amicus Brief of the Lambda Legal Defense Fund, at 20, cites Robinson merely in passing. The Amicus Brief for the Lesbian Rights Project, at 25 n.46, cites Robinson in a footnote, but even that group concedes that there is "an interesting debate", yet to be resolved, about whether homosexuality is "a matter of genes ... or of personal choice." Id., at 24-25.

You will remember my "degree" in Psychiatry, which led me to be very skeptical about that breed of M.D.'s. I have never heard of any responsible member (or even an "avant-garde" member) of the A.P.A. who recognized homosexuality as an "addiction" in the sense of drug addiction. It is simply without any basis in medicine, science, or common human experience. In fact these homosexuals themselves proclaim this is a matter of sexual "preference." Moreover, even if homosexuality is somehow conditioned, the decision to commit an act of sodomy is a choice, pure and simple -- maybe not so pure!

We can only speculate as to why Hardwick did not make this particular argument that you advance. Maybe Hardwick did not want to become subject to "compulsory treatment programs," Robinson, supra, at 665, that are prescribed for "helpless" people like narcotics addicts. But whatever the reason, are we really to ignore the theory of Hardwick's lawsuit and render an opinion on entirely different grounds without the guidance of any briefing or argument or even history?

File

There is both sense & non-sense in this letter — mostly the latter. I have changed my vote to Reverse, but I adhere to my 8th Amend position. See my letter (memo) of 4/8

Even if I thought that the Eighth Amendment issue were before us, I would reject it for the same reason that I reject the Fourteenth Amendment argument actually made by Hardwick. Both arguments are extremely dangerous because they prove far too much. The Fourteenth Amendment argument goes too far because there is no limiting principle that would allow the states to criminalize incest, prostitution or any other "consensual" sexual activity. Moreover, it would forbid the states from adopting any sort of policy that would exclude homosexuals from class rooms or state-sponsored boys' clubs and Boy Scout adult leadership.

The Eighth Amendment argument, while it avoids (at least for the present) the "slippery slope" of the Fourteenth Amendment argument, creates a potentially greater mischief. Georgia here criminalizes only the act of sodomy. If the act of sodomy is a "status," then what about the acts of incest, exhibitionism, rape, and drug possession. A drug addict must necessarily "possess" drug and can be convicted -- at least up to now -- for possession. In short, your argument would swallow up centuries of criminal law since anyone who could has a psychological dependency would be entitled to carry out (at least in private or with a consenting partner) whatever is necessary to satisfy his cravings.

Exactly what are Hardwick's defenses

There is no evidence that Hardwick is a "compulsive" homosexual so as to have even a colorable Eighth Amendment claim. See Powell v. Texas, 392 U.S. 514, 552 n.4 (1968) (WHITE, J., concurring). Homosexuality is obviously not the same as addiction to narcotics. By definition, one has the "status" of a narcotics addict only if one is physically compelled to take narcotics, but even that's controllable. But surely homosexuals are not "sex crazed" automatons who are "compelled" by their "status" to gratify their sexual appetites only by committing sodomy. Heterosexuals, after all, manage to live in a society where sexual activities are often proscribed except within the bonds of marriage.

The record simply does not remotely support a conclusion that sodomy is compulsive. Moreover, I seriously doubt whether medical evidence would support this notion for all or even many homosexuals. It is extremely unlikely that what Western Civilization has for centuries viewed as a volitional, reprehensible act is, in reality, merely a conditioned response to which moral blame may not attach. Are those with an "orientation" towards rape to be let off merely because they allege that the act of rape is "irresistible" to them? Are we to excuse every "Jack the Ripper?"

Hardwick merely wishes to seek his own form of sexual gratification. Undoubtedly there are also those in society who wish seek gratification through incest, drug use, gambling, exhibitionism, prostitu-

Irrelevant — The C.J. should know this.

tion, rape, and what not; such persons may even file complaints in federal court avering that they "regularly engage" in the prohibited acts and "will do so in the future." Complaint, in J.A., at 3. But that hardly establishes a basis for upholding a facial challenge to an otherwise valid statute. As Justice Holmes put it, "pretty much all law consists in forbidding men to do some things that they want to do ...." Adkins v. Children's Hospital, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

April 13, an unlucky day, will mark my 30th year on the Bench. This case presents for me the most far reaching issue of those 30 years. I hope you will excuse the energy with which I have stated my views, and I hope you will give them earnest consideration.

Regards,

WEB

Justice Powell

Incredible statement!

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 9, 1986

85-140 - Bowers v. Hardwick

Dear Byron:

In light of Lewis' memo of April 8th, this will serve as an assignment to you of the above case. A revised list will be along soon.

Regards,

Warren

Justice Byron White

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: JUN 22 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

CHIEF JUSTICE BURGER, concurring.

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

As the Court notes, *ante* at 5, 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 Judeao-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 in 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, c. 6. Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, an heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." Blackstone's 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

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1986

Re: 85-140 - Bowers v. Hardwick and John and Mary Doe

Dear Byron:

You have a concurring opinion. I join you as well.

Regards,

WEB

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 17, 1985

No. 85-140

Bowers v. Hardwick, et al.

Dear Byron,

Please join me.

Sincerely,

Bill

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 23, 1985

MEMORANDUM TO THE CONFERENCE

No. 85-140

Bowers v. Hardwick

I was one of those voting at our October 18 Conference to grant cert in the above case. I have since relisted the case for a "second look." I have decided to change my vote. I vote to deny.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 24, 1986

No. 85-140

Bowers v. Hardwick

Dear Harry,

Please join me in your dissent in the above.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 28, 1986

No. 85-140 Bowers v. Hardwick

Dear John

Please join me in your dissent in the above.

Sincerely,

Bill

Justice Stevens
Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: OCT 17 1985

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–140. Decided October ——, 1985

JUSTICE WHITE, dissenting.

On August 3, 1982, respondent Michael Hardwick was arrested for committing the crime of sodomy with a consenting male adult within his home in violation of Georgia law. See O. C. G. A. §16–6–2 (1984).* Charges were brought, and Hardwick was bound over to the Superior Court. At that point, however, the Atlanta District Attorney's office determined that it would not present the case to the grand jury unless further evidence was developed.

Hardwick, along with the married couple of John and Mary Doe, then filed this suit in the U. S. District Court for the Northern District of Georgia, asking that the Georgia sodomy statute be declared unconstitutional. The defendants in the suit were various Georgia officials, who are the petitioners here. Hardwick alleged that he was a practicing homosexual, that he regularly engaged in homosexual acts, and that he intended to continue to do so in the future. The Does

*Section 16–6–2 provides 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. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

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

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent was charged with violating the Georgia statute criminalizing 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.

Respondent then brought suit in the federal district court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[2] He asserted that he was a

[1] Ga. Code Ann. § 16-6-2(1984) provides:

(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. . . .

[2] John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by § 16-6-2 in the privacy of their home, App. 3, and that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and Hardwick's arrest. *Id.*, at 5. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. *Id.*, at 18. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Footnotes renumbered;
new footnotes 5 & 6

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent was charged with violating the Georgia statute criminalizing 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.

Respondent then brought suit in the federal district court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[2] He asserted that he was a

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Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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MAY 20 1986

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1.9

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent was charged with violating the Georgia statute criminalizing 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.

Respondent then brought suit in the federal district court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[2] He asserted that he was a

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

From: **Justice White**

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent was charged with violating the Georgia statute criminalizing 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.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[2] He asserted that he

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 25, 1986

MEMORANDUM TO THE CONFERENCE

Holds for Bowers v. Hardwick, No. 85-140:

Baker v. Wade, No. 85-1225)
Hill v. Baker, No. 85-1512)
Texas v. Hill, No. 85-1251)
Hill v. Texas, No. 85-1412)

Texas Penal Code §21.06 makes it illegal for persons of the same sex to engage in "deviate sexual intercourse," defined as "any contact between any part of the genitals of one person and the mouth or anus of another person." Petr Baker filed a §1983 action in federal court, seeking a declaration that §21.06 is unconstitutional. Baker alleged that he was a practicing homosexual residing in Dallas County, that he had violated the statute before, that he planned to do so again in the future, that he feared prosecution under the statute, and that the statute stigmatized him and other homosexuals. Baker named as defendants resp Wade, DA of Dallas County, and resp Holt, City Attorney of Dallas. Holt moved to have the case certified to the Texas AG pursuant to 28 U.S.C. §2403(b). The court granted Holt's motion, and the Texas AG intervened. The court also granted Baker's motion to certify a defendant class consisting of all City, District, and County Attorneys in Texas responsible for the enforcement of §21.06. Prior to the class certification hearing, Holt informed the potential class members that should they desire to intervene, they should do so in advance of the hearing; none of the class members elected to intervene.

The district court determined that Baker had standing to attack the statute, and that §21.06 is unconstitutional. On the standing question, the court held that the threat of prosecution is credible and real, and under Babbit v. United Farm Workers, 442 U.S. 289 (1979) and Steffel v. Thompson, 415 U.S. 452 (1974), Baker need not expose himself to actual arrest and prosecution in order to challenge the statute. On the merits, the court held that homosexual conduct in private between consenting adults is protected by a fundamental right of privacy, and that §21.06

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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STYLISTIC CHANGES THROUGHOUT
SEE PAGES: 4

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 30, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent was charged with violating the Georgia statute criminalizing 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.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[2] He asserted that he

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

[2] John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by § 16-6-2 in the privacy of their home, App. 3, and that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and Hardwick's arrest. *Id.*, at 5. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. *Id.*, at 18. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 22, 1986

Re: No. 85-140-Bowers v. Hardwick

Dear Byron:

I await the dissent.

Sincerely,

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 24, 1986

Re: No. 85-140-Bowers v. Hardwick

Dear John:

Please join me in your dissent.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

85-0140

Supreme Court of the United States
Memorandum

6-30, 1961

"AB":

"You was great"

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 21, 1986

Re: No. 85-140, Bowers v. Hardwick

Dear Byron:

In due course, I shall try my hand at a dissent in this case.

Sincerely,

HAB.

Justice White

cc: The Conference

Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: JUN 23 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE BLACKMUN, dissenting.

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, *ante*, at 4, than *Stanley* v. *Georgia*, 394 U. S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz* v. *United States*, 389 U. S. 347 (1967), 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." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. § 16–6–2, 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." *Ante*, at 3. 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*, 410 U. S. 113, 117 (1973), quoting *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is re-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 24, 1986

Dear Chief:

May I ask that No. 85-140, Bowers v. Hardwick go over from Friday to Monday? I shall be ready by then.

Sincerely,

HAB

The Chief Justice

cc: The Conference

Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: _____

Recirculated: JUN 26 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

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, *ante*, at 4, than *Stanley* v. *Georgia*, 394 U. S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz* v. *United States*, 389 U. S. 347 (1967), 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." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. § 16–6–2, 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." *Ante*, at 3. 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*, 410 U. S. 113, 117 (1973), quoting *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J.,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 8, 1986

85-140 Bowers v. Hardwick

MEMORANDUM TO THE CONFERENCE:

At Conference last week, I expressed the view that in some cases it would violate the Eighth Amendment to imprison a person for a private act of homosexual sodomy. I continue to think that in such cases imprisonment would constitute cruel and unusual punishment. I relied primarily on Robinson v. California.

At Conference, given my view as to the Eighth Amendment, my vote was to affirm but on this ground rather than the view of four other Justices that there was a violation of a fundamental substantive constitutional right - as CAll held. I did not agree that there is a substantive due process right to engage in conduct that for centuries has been recognized as deviant, and not in the best interest of preserving humanity. I may say generally, that I also hesitate to create another substantive due process right.

I write this memorandum today because upon further study as to exactly what is before us, I conclude that my "bottom line" should be to reverse rather than affirm. The only question presented by the parties is the substantive due process issue, and - as several of you noted at Conference - my Eighth Amendment view was not addressed by the court below or by the parties.

In sum, my more carefully considered view is that I will vote to reverse but will write separately to explain my view of this case generally. I will not know, until I see the writing, whether I can join an opinion finding no substantive due process right or simply join the judgment.

cc [illegible] L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 22, 1986

85-140 Bowers v. Hardwick

Dear Byron:

I will join the judgment but will probably write separately.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: JUN 18 198

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE POWELL, concurring.

I agree with the Court that there is no fundamental right—*i. e.*, no substantive right under the Due Process Clause—such as that claimed by respondent, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga. Code Ann. § 16-6-2, 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. 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, § 16-5-24, first degree arson, § 16-7-60 and robbery, § 16-8-40.[1]

[1] Among those States that continue to make sodomy a crime, Georgia authorizes one of the longest possible sentences. See Ala. Code § 13A-6-65(a)(3) (1982) (1-year maximum); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (West Supp. 1985) (30 days); Ark. Stat. Ann. § 41-1813 (1977) (1-year maximum); D. C. Code § 22-3502 (1981) (10-year maximum); Fla. Stat. § 800.02 (1985) (60-day maximum); Ga. Code § 16-6-2 (1984) (1 to 20 years); Idaho Code § 18-6605 (1979) (5-year minimum); Kan. Stat. Ann. § 21-3505 (Supp. 1985) (6-month maximum); Ky. Rev. Stat. § 510.100

06/20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE POWELL, concurring.

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Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

p. 1

From: **Justice Powell**

Circulated:

Recirculated: JUN 25 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE POWELL, concurring.

I join the opinion of the Court. I agree with the Court that there is no fundamental right—*i. e.*, no substantive right under the Due Process Clause—such as that claimed by respondent, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga. Code Ann. § 16-6-2, 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. 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, § 16-5-24, first degree arson, § 16-7-60 and robbery, § 16-8-40.[1]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 17, 1985

Re: No. 85-140 Michael J. Bowers, Attorney General of Georgia v. Hardwick

Dear Byron,

Please join me in your dissent from denial of certiorari. I anticipate writing a little something myself in this case.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 23, 1986

Re: NO. 85-140 Bowers v. Harwick

Dear Byron,

Please join me.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 8, 1986

Re: 85-140 - Bowers v. Hardwick

Dear Lewis:

Your letter, which expresses some uncertainty as to whether your final vote would be one to reverse or to affirm brings to mind the disposition of the Court in Coleman v. Miller, 307 U.S. 433, 446-447, where the Court, with all nine Justices participating, disposed of the question whether the Lieutenant Governor of Kansas was part of the state legislature, by stating that the Court was "equally divided" on the issue.

Maybe we should follow a similar course in this case.

Respectfully,

John

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 23, 1986

Re: 85-140 - Bowers v. Hardwick

Dear Harry:

Please join me in your dissenting opinion.

I have also written a few additional paragraphs which I expect to circulate tomorrow morning.

Respectfully,

JPS

Justice Blackmun

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JUN 24 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE STEVENS, dissenting.

Like the statute that is challenged in this case,[1] 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.[2] Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law.[3]

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[1] See Ga. Code Ann. § 16-6-2(a) (1984) ("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").

[2] The Court states that 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." *Ante*, at 3. In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present "for a very long time." See nn. 3, 4, and 5, *infra*. Moreover, the reasoning the Court employs would provide the same support for the statute as it is written as it does for the statute as it is narrowly construed by the Court.

[3] See, *e. g.*, Hawkins' Pleas of the Crown 9 (1797) ("All unnatural copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the ancient common law, and punished, according to some authors with burning; according to others, with burying alive"); W. Blackstone, Commentaries 216 (discussing "the infamous *crime against nature*, committed either with man or beast; a crime which ought

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT

From: **Justice Stevens**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–140

MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, PETITIONER *v.* MICHAEL HARDWICK, AND JOHN AND MARY DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1986]

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Like the statute that is challenged in this case,[1] 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.[2] Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law.[3]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 19, 1986

No. 85-140 Bowers v. Hardwick

Dear Byron,

Please join me.

Sincerely,

Sandra

Justice White

Copies to the Conference