MIT OpenCourseWare
http://ocw.mit.edu

17.245 The Supreme Court, Civil Liberties, and Civil Rights
Fall 2006

For information about citing these materials or our Terms of Use, visit: http://ocw.mit.edu/terms.

Discussion 23: Sexual Orientation

Discussion of Bowers v. Hardwick, 1986

This is the beginning of the battle between Justice Kennedy and Justice Scalia on the issue of sexual orientation. Case was argued for the plaintiff by Laurence Tribe, with the cooperation of Kathleen Sullivan.

The law under review was a Georgia statute banning all forms of sodomy. Hardwick, a gay man, is caught and charged with committing sodomy, but was not prosecuted. He challenges the law and establishes standing on the basis of a prospective liability to prosecution.

Because he was not prosecuted or convicted, his standing argument rests on 2 arguments:

- The law creates "a chilling effect," preventing him from acting in way he should be constitutionally allowed to act
- Additionally, he was actually charged with sodomy, despite not being punished, which bolsters his previous argument.

The District Court grants the state's motion to dismiss for failure of Hardwick to state a claim. The case is then appealed to the 11th Circuit Court of Appeals, which rules on the bases of Griswold, Roe, and Stanley v. Georgia that Hardwick has a constitutional right to engage in homosexual consensual adult sodomy. The Supreme Court grants certiorari.

The Supreme Court formulates the question as a subset of the possible challenges to the Georgia statute, deciding whether there is a fundamental right for gays and lesbians to engage in homosexual sodomy.

"*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." (White, majority opinion in Bowers v. Hardwick, www.findlaw.com)*

Another way of framing this question is: does the state have the authority to regulate sexual relations undertaken in the privacy of one's own home?

The reason the court used the former question rather than the latter is that by using the former question, it only has to determine whether there is a fundamental right to homosexual sodomy. In determining whether there is a fundamental right, the Court looks at 2 things:

- Whether there is a textual basis for protecting such a right
- Whether there is a history in our Constitutional tradition of protecting that right

By framing the question is this way, the Court can use history as a reference point for evaluating the arguments.

The majority accepts the fundamental rights holdings of Griswold and Roe, but only as they apply to pro-creative activity. The Court says that Stanley v. Georgia relies on the right to free speech, which is implicit in the concept of "ordered liberty." It then cites Lochner, saying that the Court cannot use the liberty provision of the due process clause to invent new rights not intended by the framers of the Constitution.

These notes were taken by an MIT undergraduate student enrolled in 17.245. They have been reviewed but only lightly edited by the instructor. The notes reflect a combination of teacher and student comments and questions, and are not a transcript or verbatim rendering of class discussions.

After establishing that there is no fundamental right to homosexual sodomy, the Court requires only a rational basis to justify the law, which is found in the state's desire to protect morality.

Justice Blackmun writes in dissent: *"This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, ante, at 191, than Stanley v. Georgia, [394 U.S. 557](394 U.S. 557) (1969), was about a fundamental right to watch obscene movies, or Katz v. United States, [389 U.S. 347](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](277 U.S. 438, 478) (1928) (Brandeis, J., dissenting)." (Blackmun dissent in Bowers v. Hardwick, www.findlaw.com)*

Blackmun's main argument is that the broad language of the statute requires that the Court extend the reasoning of other cases such as Roe, etc. in order to protect citizens' right to be left alone from governmental intrusion into their private lives.

Stevens also writes a dissent. He first argues against the idea of using history and tradition to determine whether current laws are valid.
"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." (Stevens, dissenting in Bowers v. Hardwick, www.findlaw.com)

The use of history in constitutional analysis involves much ambiguity. What history, whose history, how far back? This can make constitutional decision-making seem quite arbitrary.

Discussion of Romer v. Evans, 1996
Voters in Colorado pass Amendment 2 to the state Constitution, which reverses and bans all statutes that afford gays, lesbians, and bisexuals protection from discrimination. The amendment was intended to reverse the recent anti-discrimination laws many cities had passed.

The opinion is based on equal protection grounds because the law invokes a classification.

Equal protection analysis by Kennedy:

- The amendment inherently violates the rights of gay persons because it makes it impossible for them to attain equal protection under the law—this relates to Footnote 4 of Carolene Products where the Court says it will give strict scrutiny to cases where states enact statutes inhibiting minority groups from seeking the protection of the political process.
- It does not meet rational basis review—the Amendment does not advance a legitimate state interest
    - The state interest of preventing equal protection for homosexuals is not a legitimate interest

The majority opinion describes the amendment as truly unprecedented, and so highly suspect:
"Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across

These notes were taken by an MIT undergraduate student enrolled in 17.245. They have been reviewed but only lightly edited by the instructor. The notes reflect a combination of teacher and student comments and questions, and are not a transcript or verbatim rendering of class discussions.

the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law [ROMER v. EVANS, ___ U.S. ___ (1996) , 11] is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928).

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "`Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'" Sweatt v. Painter, 339 U.S. 629, 635 (1950) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of `equal protection of the laws is a pledge of the protection of equal laws.'" Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886))." (Kennedy, majority opinion in Romer v. Evans, www.findlaw.com)

Discussion of Lawrence v. Texas, 2003

Lawrence and partner are prosecuted and convicted of violating a Texas law prohibiting homosexual sodomy. Lawrence challenges the law and the precedent created by the Court in Bowers v. Hardwick. The Court, led by a majority of consisting of Kennedy, Ginsburg, Souter, Stevens, and Breyer, reverses Bowers.

In the majority opinion, Kennedy extends the logic of Griswold to strike down the Texas law on Due Process grounds. O'Connor's concurring opinion would invalidate the law on equal protection grounds. According to her logic, the law singles out homosexuals, who are a discrete and insular minority. She thus applies a heightened standard of review and finds that there is no compelling interest advanced by the state that justifies the classification.

The dissenters believe that the state must be able to regulate sexual activity it believes is immoral, otherwise laws banning incest and other undesirable or inappropriate behaviors become vulnerable. Kennedy responds to these slippery slope arguments in the majority opinion:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." (Kennedy, majority opinion in Lawrence v. Texas, www.findlaw.com)

Strict scrutiny analysis uses terms like fundamental right, narrowly tailored, least restrictive means. Rational basis review uses terms like legitimate interest. Kennedy invokes the language of rational basis review in the last part of the opinion:

These notes were taken by an MIT undergraduate student enrolled in 17.245. They have been reviewed but only lightly edited by the instructor. The notes reflect a combination of teacher and student comments and questions, and are not a transcript or verbatim rendering of class discussions.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Casey*,* supra*, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."*

Scalia seizes on this last sentence's invocation of rational basis review to point out inconsistencies in the majority opinion's logic. He claims that either there must be a fundamental right to engage in homosexual sodomy, which would contradict Bowers v. Hardwick, or the majority must be using rational basis review. In the case of rational basis review, the state must almost certainly win.

This case is likely to be at the heart of the legal analysis to be used if and when the Supreme Court decides to take up the gay marriage issue.

Brandt Goldstein—Storming the Court
A group of Yale law students representing Haitian refugee/detainees win at trial, granting the refugees access to counsel during their asylum hearings at Guantanamo. The government bargains with the plaintiffs, offering to give them medical care in the US in exchange for agreeing to vacate the opinion so that the government will not be bound by it in the future. This leaves presidential power unmitigated for the future use of Guantanamo Bay.

Procedural information on constitutional challenges:
There are several types of challenges:

- As applied: The law effectively only targets a specific group
- Facial challenge: a legal challenge to an entire law
- Selective Prosecution: a legal argument used to show one is similarly situated relative to others who are not being prosecuted and the state is using the law to selectively target a certain individual, for invidious reasons. A difficult standard to meet.

These notes were taken by an MIT undergraduate student enrolled in 17.245. They have been reviewed but only lightly edited by the instructor. The notes reflect a combination of teacher and student comments and questions, and are not a transcript or verbatim rendering of class discussions.