JOHN GEDDES LAWRENCE and TYRON GARNER, Appellants v. THE STATE OF TEXAS, Appellee

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON
41 S.W.3d 349

March 15, 2001, Substituted Majority, Concurring, and Dissenting Opinions Filed

Writ of certiorari granted, Motion granted by: Lawrence v. Texas, 2002 U.S. LEXIS 8680 (U.S. Dec. 2, 2002).

J. Harvey Hudson, Justice. Justices Yates, Fowler, Edelman, Wittig, Frost, and Amidei join this opinion; Justice Yates also filed a concurring opinion in which Justices Hudson, Fowler, Edelman, and Frost join; Justice Fowler also filed a concurring opinion in which Justices Yates, Edelman, Frost, and Amidei join. Justice Anderson filed a dissenting opinion in which Senior Chief Justice Murphy joins. *

* Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.

J. Harvey Hudson

Appellants, John Geddes Lawrence and Tyron Garner, were convicted of engaging in homosexual conduct. They were each assessed a fine of two hundred dollars. On appeal, appellants challenge the constitutionality of Section 21.06 of the Texas Penal Code, contending it offends the equal protection and privacy guarantees assured by both the state and federal constitutions. For the reasons set forth below, we find no constitutional infringement.

While investigating a reported "weapons disturbance," police entered a residence where they observed appellants engaged in deviate sexual intercourse. ("Deviate sexual intercourse" is defined in Texas as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." It is a Class C misdemeanor in the State of Texas for a person to engage "in deviate sexual intercourse with another individual of the same sex." However, because appellants subsequently entered pleas of *nolo contendere*, the facts and circumstances of the offense are not in the record. Accordingly, appellants did not challenge at trial, and do not contest on appeal, the propriety of the police conduct leading to their discovery and arrest. Thus, the narrow issue presented here is whether Section 21.06 is facially unconstitutional.

EQUAL PROTECTION

In their first point of error, appellants contend Section 21.06 violates federal and state equal protection guarantees by discriminating both in regard to sexual orientation and gender.

The central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." While the guarantees of "equal protection" and "due process of law" may overlap, the spheres of protection they offer are not coterminous. Rather, the right to "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law.'" It is aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It was not intended, however, "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people...."

All of the aforementioned state and federal guarantees of equal protection are tempered somewhat by the practical reality that the mere act of governing often requires discrimination between groups and classes of individuals. A state simply cannot function without classifying its citizens for various purposes and treating some differently than others.

The conflict between the hypothetical ideal of equal protection and the practical necessity of governmental classifications has spawned a series of judicial tests for determining when classifications are and are not permissible. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. The general rule gives way, however, when a statute classifies persons by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws separating persons according to these "suspect classifications" are subject to strict scrutiny. Accordingly, laws directed against a "suspect class," or which infringe upon a "fundamental right," will be sustained only if they are suitably tailored to serve a compelling state interest.

Sexual Orientation

Relying on the Fourteenth Amendment of the United States Constitution, Article I, § 3 of the Texas Constitution, and the Texas Equal Rights Amendment, appellants contend that Section 21.06 of the Texas Penal Code unconstitutionally discriminates against homosexuals. In other words, the statute improperly punishes persons on the basis of their sexual orientation.

The threshold issue we must decide is whether Section 21.06 distinguishes persons by sexual orientation. On its face, the statute makes no classification on the basis of sexual orientation; rather, the statute is expressly directed at conduct. While homosexuals may be disproportionately affected by the statute, we cannot assume homosexual conduct is limited only to those possessing a homosexual "orientation." (In his study of human sexuality, Dr. Alfred C. Kinsey classified the "sexual orientation" of his subjects on a

seven point continuum: (1) exclusively heterosexual; (2) predominantly heterosexual, only incidentally homosexual; (3) heterosexual, but more than incidentally homosexual; (4) equally heterosexual and homosexual; (5) predominantly homosexual, but more than incidentally heterosexual; (6) predominantly homosexual, but incidentally heterosexual; and (7) exclusively homosexual. Kinsey estimated that approximately 50 per cent of the population is exclusively heterosexual; 4 per cent is exclusively homosexual.) Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct. Thus, the statute's proscription applies, facially at least, without respect to a defendant's sexual orientation.

However, a facially neutral statute may support an equal protection claim where it is motivated by discriminatory animus and its application results in a discriminatory effect. Appellants contend this discriminatory intent is evident in the evolution of Section 21.06. For most of its history, Texas has deemed deviate sexual intercourse, i.e., sodomy, to be unlawful whether performed by persons of the same or different sex. In 1973, however, the Legislature repealed its prohibition of sodomy generally, except when performed by persons of the same sex. Because "homosexual sodomy" is unlawful, while "heterosexual sodomy" is not, appellants contend the statute evidences a hostility toward homosexuals, not shared by heterosexuals.

While we find this distinction may be sufficient to support an equal protection claim, neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a "suspect class." Thus, the prohibition of homosexual sodomy is permissible if it is rationally related to a legitimate state interest.

The State contends the statute advances a legitimate state interest, namely, preserving public morals. One fundamental purpose of government is "to conserve the moral forces of society." In fact, the Legislature has outlawed behavior ranging from murder to prostitution precisely because it has deemed these activities to be immoral. Even our civil law rests on concepts of fairness derived from a moral understanding of right and wrong. The State's power to preserve and protect morality has been the basis for upholding such diverse statutes as requiring parents to provide medical care to their children, prohibiting the sale of obscene devices, forbidding nude dancing where liquor is sold, criminalizing child endangerment, regulating the sale of liquor, and punishing incest. Most, if not all, of our law is "based on notions of morality."

Appellants claim the concept of "morality" is simply "the singling out [of] groups of people based on popular dislike or disapproval." Contending this practice was specifically condemned in *Romer v. Evans*, appellants argue that classifications based on sexual orientation can no longer be rationally justified by the State's interest in protecting morality. We find, however, that appellant's broad interpretation of *Romer* is not supported by the text or rationale of the Court's opinion.

In *Romer*, the Supreme Court considered the constitutionality of Colorado's universal prohibition of any statute, regulation, ordinance, or policy making homosexual

orientation the basis of any claim of minority status, quota preferences, protected status, or claim of discrimination. Justice Kennedy, writing for the majority, first observed that the Fourteenth Amendment does not give Congress a general power to prohibit discrimination in public accommodations. Thus, discrimination in employment, accommodations, and other commercial activities has historically been rectified by the enactment of detailed statutory schemes. The Court cited, for illustration, several municipal codes in Colorado that prohibited discrimination on the basis of age, military status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability, or sexual orientation. To the extent these codes protected homosexuals, however, they were rendered invalid by Colorado's constitutional amendment.

In striking down the amendment, the Supreme Court declared that all citizens have the right to petition and seek legislative protection from their government. "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." "A State cannot . . . deem a class of persons a stranger to its laws." Thus, while no individual, class, or group is guaranteed success, all persons have the right to *seek* legislation favoring their interests.

Here, appellants do not suggest that Section 21.06 unconstitutionally encumbers their right to seek legislative protection from discriminatory practices. Hence, *Romer* provides no support for appellants' position. *Romer*, for example, does not disavow the Court's previous holding in *Bowers*; it does not elevate homosexuals to a suspect class; it does not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause; and it does not challenge the concept that the preservation and protection of morality is a legitimate state interest.

Moreover, while appellants may deem the statute to be based on prejudice, rather than moral insight, our power to review the moral justification for a legislative act is extremely limited. The constitution has vested the legislature, not the judiciary, with the authority to make law. In so doing, the people have granted the legislature the exclusive right to determine issues of public morality. If a court could overturn a statute because it perceived nothing wrong with the prohibited conduct, the judiciary would at once become the rule making authority for society--this the people have strictly forbidden. Accordingly, we must assume for the purposes of our analysis that the Legislature has found homosexual sodomy to be immoral.

The State also contends the legislature could have rationally concluded that "homosexual sodomy" is a different, and more reprehensible, offense than "heterosexual sodomy." This proposition is difficult to confirm because in American jurisprudence courts and legislatures have historically discussed the topic only in terms of vague euphemisms. In fact, statutes often made sodomy a criminal offense without ever defining the conduct.

In its broadest common law form, the offense "consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman; or by man or woman, in any manner, with beast." More restrictive definitions of

sodomy, however, were commonly recognized. In many instances, for example, sodomy was restricted to carnal copulation between two human beings--sometimes further restricted to males (perhaps because it was difficult to "imagine that such an offense would ever be committed between a man and a woman"). In any event, only homosexual conduct between *two men* was included among the early capital crimes of the Massachusetts Bay Colony. Moreover, in some jurisdictions, including Texas, sodomy did not include oral sex. Again, it is difficult to know whether this more narrow definition arose deliberately or was simply the product of legislative ignorance and/or judicial innocence. Conceivably, oral sex was "so unusual and unthinkable as perhaps not to have been even contemplated in the earlier stages of the law."

Regardless of how these differing definitions of sodomy arose, we agree with the State's general contention that it has always been the legislature's prerogative to deem some acts more egregious than others. Accordingly, we find the legislature could have concluded that deviant sexual intercourse, when performed by members of the same sex, is an act different from or more offensive than any such conduct performed by members of the opposite sex.

Because (1) there is no fundamental right to engage in sodomy, (2) homosexuals do not constitute a "suspect class," and (3) the prohibition of homosexual conduct advances a legitimate state interest and is rationally related thereto, namely, preserving public morals, appellant's first contention is overruled.

Gender

Appellants also contend Section 21.06 unconstitutionally discriminates on the basis of gender. In Texas, gender is recognized as a "suspect class." In light of the Texas Equal Rights Amendment, classifications by gender are subject to "strict scrutiny" and will be upheld only if the State can show such classifications have been suitably tailored to serve a compelling state interest.

Appellants claim Section 21.06 discriminates on the basis of sex because criminal conduct is determined to some degree by the gender of the actors. For example, deviate sexual intercourse is not unlawful *per se* in Texas. While the physical act is not unlawful as between a man and woman, it is unlawful when performed between two men or two women. Appellants contend that because criminality under the statute is, in some respects, gender-dependent, Section 21.06 runs afoul of state and federal equal protection guarantees.

The State asserts the statute applies equally to men and women, i.e., two men engaged in homosexual conduct face the same sanctions as two women. Thus, the State maintains the statute does not discriminate on the basis of gender. Appellants respond by observing that a similar rationale was expressly rejected in the context of racial discrimination.

In *Loving*, the State of Virginia attempted to uphold its miscegenation statute in the face of an equal protection challenge by arguing that the statute did not discriminate on the

basis of race because it applied equally to whites and blacks. The Supreme Court traced the origins of Virginia's miscegenation statute and concluded that "penalties for miscegenation arose as an incident to slavery." Because the clear and central purpose of the Fourteenth Amendment was "to eliminate all official state sources of invidious racial discrimination," the court determined the statute was unconstitutional.

Here, the State of Texas employs a comparable argument, namely, Section 21.06 does not discriminate on the basis of gender because it applies equally to men and women. Appellants' contend the argument was discredited by *Loving* and should not be followed here. But while the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct. In other words, we find nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender. Thus, we find appellants' reliance on *Loving* unpersuasive....

PRIVACY

In their second point of error, appellants contend Section 21.06 violates the right to privacy guaranteed by both the state and federal constitutions. Appellants claim the intimate nature of the conduct at issue, when engaged in by consenting adults in private, is beyond the scope of governmental interference....

Appellants do not specifically identify the constitutional provision which they claim creates a zone of privacy protecting consensual sexual behavior from state interference. However, we find there are but two provisions of the federal constitution which could arguably be construed to apply here--the Fourth and Ninth Amendments.

The Fourth Amendment is not applicable because appellants do not contest, and have never contested, the entry by police into the residence where they were discovered. Thus, we must assume the police conduct was both reasonable and lawful under the Fourth Amendment.

The Ninth Amendment also offers no support. In *Bowers v. Hardwick*, the defendants were convicted of violating the Georgia sodomy statute. Relying upon *Griswold v. Connecticut* and other decisions recognizing "reproductive rights," the defendants argued that the Ninth Amendment creates a zone of privacy regarding consensual sexual activity that encompasses homosexual sodomy. The court rejected the argument and said "the position that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."

We find homosexual conduct is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." In America, homosexual conduct was classified as a felony offense from the time of early colonization. In fact,

there was such unanimity of condemnation that sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia....

Nevertheless, appellants contend that Texas should join several of our sister states who have legalized homosexual conduct. Certainly, the modern national trend has been to decriminalize many forms of consensual sexual conduct even when such behavior is widely perceived to be destructive and immoral, e.g., seduction, fornication, adultery, bestiality, etc. Our concern, however, cannot be with cultural trends and political movements because these can have no place in our decision without usurping the role of the Legislature. While the Legislature is not infallible in its moral and ethical judgments, it alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good.

The judgment of the trial court is affirmed.

ON MOTION FOR REHEARING EN BANC
John S. Anderson, dissenting

I respectfully dissent to the majority's Herculean effort to justify the discriminatory classification of section 21.06 of the Penal Code despite the clear prohibitions on such discrimination contained in the Equal Protection Clause of the United States Constitution and the Texas Equal Rights Amendment in the Bill of Rights of the Texas Constitution....

I believe appellants' federal right to privacy challenge is controlled by the Supreme Court's determination in *Bowers v. Hardwick.* The Due Process Clause of the Federal Constitution does not confer a fundamental right upon homosexuals to engage in sodomy....Accordingly, I concur in the result reached by the majority on appellants' third and fourth issues, but for the reasons set forth below, strongly disagree with the majority's treatment of appellants' state and federal equal protection arguments.

I.

Application of Equal Protection to

Section 21.06: An Overview

Appellants contend section 21.06 violates their rights of equal protection under the United States and Texas Constitutions. Under the Fourteenth Amendment, the statute must fail because even applying the most deferential standard, the rational basis standard, the statute cannot be justified on the majority's sole asserted basis of preserving public morality, where the same conduct, defined as "deviate sexual intercourse" is criminalized for same sex participants but not for heterosexuals. The contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislatures' unconstitutional edict. The statute must also fail because statutory classifications that are not gender neutral are analyzed under the heightened scrutiny standard of review, and there is no showing by the State either that there is an

exceedingly persuasive justification for the classification, or that there is a direct, substantial relationship between the classification and the important government objectives it purports to serve.....

In its analysis of appellants' gender discrimination contention, the majority attempts to transfer the burden of proof to appellants to show the statute has had an adverse effect upon one gender, and that such disproportionate impact can be traced to a discriminatory purpose. This transfer is based on the naked assertion that section 21.06 is gender-neutral because it does not impose burdens on one gender not shared by the other. That 21.06 is not gender neutral is manifest based on application of the statute to the following events:

There are three people in a room: Alice, Bob, and Cathy. Bob approaches Alice, and with her consent, engages with her in several varieties of "deviate sexual intercourse," the conduct at issue here. Bob then leaves the room. Cathy approaches Alice, and with her consent, engages with her in several kinds of "deviate sexual intercourse." Cathy is promptly arrested for violating section 21.06.

I have indulged in this tableau to demonstrate one important point: one person simply committed a sex act while another committed a crime. While the acts were exactly the same, the gender of the actors was different, and it was this difference alone that determined the criminal nature of the conduct. In other words, because he is a man, Bob committed no crime and may freely indulge his predilection for "deviate sexual intercourse," but because she is a woman, Cathy is a criminal. Thus, women are treated differently in this scenario, and therefore, are discriminated against by the explicit gender-based prohibition of section 21.06, and to suggest otherwise is disingenuous at best.....

I firmly believe 21.06 establishes a gender-based classification, on its face and as applied, in the Penal Code of the State of Texas that will not withstand middle tier scrutiny mandated for the analysis of such classifications under the Equal Protection Clause of the Fourteenth Amendment. Appellants, however, also challenge the statute because it unconstitutionally discriminates against homosexuals, thus imposing an unequal burden on them based on their sexual orientation because heterosexuals are not targeted by 21.06 when engaging in the same conduct. Here, the rational basis test, much preferred by the State, *is* applicable, but the result of a correct analysis applying federal precedent is contrary to the outcome sought by the State.

The case that controls the disposition of appellants' contention that section 21.06 discriminates against a class based on sexual orientation is *Romer v. Evans.... .*

The statute at issue here, much like Amendment 2, draws a classification for the purpose of disadvantaging the group burdened by the law. In fact, Justice Scalia, in his dissent to *Romer* readily agreed that, "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." I agree with Justice Scalia that the statute at issue here, by proscribing "deviate sexual intercourse" only when engaged in with members of one's own sex, does discriminate against homosexuals.

However, following *Romer*, I view the justifications proffered by the State, enforcement of traditional norms of morality and family values, as nothing more than politically-charged, thinly-veiled, animus-driven cliches. Although a state's police powers are broad and comprehensive, the constitution, both state and federal, "forbids its exercise when the result would be the destruction of the rights, guarantees, privileges, and restraints excepted from the powers of government by the Bill of Rights....."