

Gay Law and the Future of Civil Rights

The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations [that would justify a denial of constitutional rights]. . . . We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

U. S. Supreme Court
Palmore v. Sidoti, 1984

We oppose efforts by the Democrat Party to include sexual preference as a protected minority receiving preferential status under civil rights statutes at the federal, State and local level.

Republican Party platform
Houston convention, 1992

In 1986, the Supreme Court held in *Bowers v. Hardwick* that lesbian and gay sex (what the Court dubbed "homosexual sodomy") was not constitutionally protected under the Court's evolving privacy doctrine. A line of decisions recognizing privacy rights had been launched with the 1965 marital contraception case *Griswold v. Connecticut*; but the Court said that these earlier rulings protected only procreation, child rearing, education, and family relationships, and had not established a general right to privacy that would shield all private sexual conduct between consenting adults from state proscriptions. As a result, the Court upheld against constitutional challenge a Georgia law providing ten-year prison terms for gay sex. Central to *Bowers* is the contention that the state has a legitimate interest in promoting "majority sentiments about . . . morality," and that the courts may deny the existence of an asserted fundamental right if they find that the dominant culture has not traditionally affirmed it. Thus, in its justification for a ruling hostile to gays, the Court relied upon arguments that could also be used to rake in civil liberties more generally.

The next year, in *San Francisco Arts and Athletics v. U. S. Olympic Committee*, the Supreme Court ruled that the Gay Olympics could not continue calling itself the "Gay Olympics." The adoption of the title

"Olympics" was held to be a constitutionally unprotected trademark violation: the Court treated the term's use by gays as mere commercial speech, and so refused to grant it the same First Amendment protections accorded to political speech. In doing this, the Court more or less terminated a line of cases starting in the mid-1970s that were beginning to give commercial speech the same high standard of protection that political speech receives. At the same time, the Court rejected the possibility that gays might have any serious political message to convey. Only two Justices saw that the federal government's bar to gays' use of the term "Olympics" denied gays an important political means to an important political goal: dispelling the stereotype that gays, especially gay men, are limp-wristed wimps incapable of prowess or anything noble.

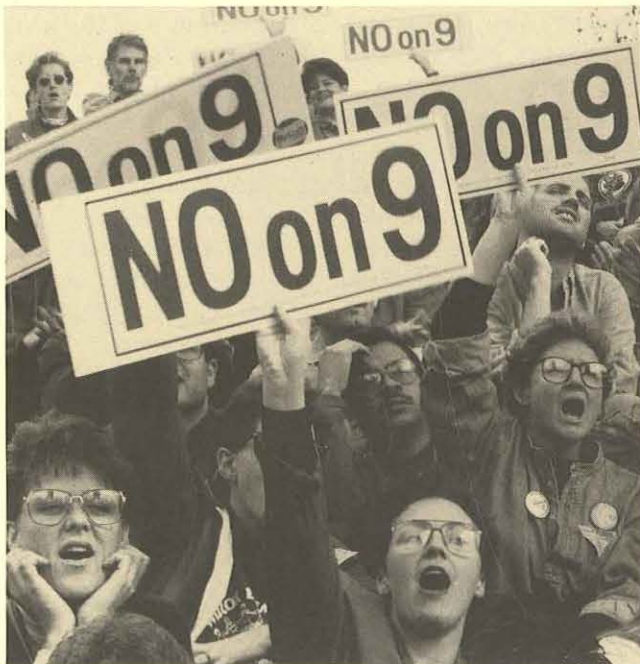
A further argument against the Gay Olympics decision turns on the Fifth Amendment. The U. S. Olympic Committee (USOC) holds a special trademark granted to it directly by Congress, and for that reason the Gay Olympics case raised the question: Did the possession of this trademark turn a discriminatory act of the USOC against gays into a "state action," and so make it subject to the constitutional restraints of the equal protection clause? Twenty-six years earlier, in *Burton v. Wilmington Parking Authority* (1961), the Court found that a privately owned restaurant located in a government-owned parking structure could not discriminate against blacks. That case established the constitutional doctrine that "symbiotic relations" between the state and the private sector generate state actions. But in the Gay Olympics opinion, only four Justices thought that the relation between the federal government and the USOC made the case relevantly similar to *Burton*. As a result, the majority succeeded in using a gay case to undermine a principle articulated in a black case.

There is a pattern here. Gay cases, I wish to argue, have provided the Court the instruments by which the recognition of constitutional rights, and the development of civil rights law generally, may be reversed. Indeed, recent setbacks to affirmative action, to job

protections for blacks, and to school integration may indicate that this general trend driven by gay cases has already begun. Within the peculiarities of gay law, the courts have discovered the levers and fulcras, the legal "principles" and the will, with which they are able to overturn the civil rights era. In several areas of civil liberties, reversals and restrictions of rights have already occurred as the result of the pivot provided by the legal treatment of gays.

What is at stake in gay law is not a set of special rights, but the very concept of rights.

During this election year, in which anti-gay referenda appeared on state ballots in Oregon and Colorado, and on local ballots in Portland, Me., and Tampa, Fla., the relation between gay law and civil rights in general has become unmistakably clear. Anti-gay organizations have tried to win votes by referring to the "special rights" that gays are allegedly seeking. With this strategy, they obscure the fact that what is at stake in gay law is not a set of special rights, but the very *concept* of rights, understood as the immunity claims that minorities have against majorities. At stake, too, is the nation's right to view itself as operating in a principled manner and in accordance with ideals, rather than as being guided merely by popular whim and the dictates of power.



*Protesting Oregon's anti-gay proposal
Chiaki Kawajiri/The Oregonian*

Black and White and Principles

Palmore and Sidoti are white. They had a child — then a divorce. The mother was given custody. Then she married a black man. In light of this change of circumstance alone, Florida's courts in 1981 transferred custody to the natural father, accepting his claim that the social recriminations against a mixed-race marriage would be damaging to the child. On appeal, in 1984 a unanimous Supreme Court reversed.

To some extent, the lower courts had acted upon a plausible understanding of the state's duty in this case. The Supreme Court has repeatedly affirmed that the promotion of the welfare of children is a compelling state interest, and the determiner of the legally relevant facts had held that the harm coming to the child was "inevitable." On those grounds, the Court might easily have agreed that a change in custody was a necessary means to a compelling end. But instead, the Justices framed an entirely different question: a question about whether there are not some means that, even if necessary to compelling ends, are nevertheless themselves beyond the pale of acceptance. Their answer, correctly, was yes:

The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations . . . We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, *directly or indirectly*, give them effect. [emphasis added]

In a footnote to its opinion, the *Palmore* Court invoked *Watson v. Memphis* (1963), a case in which city officials had tried to delay desegregating municipal parks out of a professed fear of "community confusion and turmoil"; in that instance, the Court had held that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Palmore* affirmed this neutral interpretive principle in constitutional law. Simply citing the current existence of prejudice, bigotry or discrimination in a society against some group, or the *obvious consequences* of such prejudice, bigotry or discrimination, can never constitute a valid reason for an act of discrimination against that group. The perpetuation of stigmas is not morally or constitutionally acceptable even as a means for the state to pursue its legitimate interests.

It was this principle that the Supreme Court violated in the *Bowers* decision, by allowing the state of Georgia to give *direct* effect to biases against gays. For although it was an issue of racial bias that launched the *Palmore* principle into constitutional

orbit, the principle applies equally well to all cases where government instrumentalities enhance or perpetuate social stigmas. Indeed, one year after *Palmore*, the Court itself took the principle out of its original context and applied it to discrimination against the handicapped. In 1985, the Court in *City of Cleburne v. Cleburne Living Center*, quoting *Palmore*, struck down zoning laws that gave voice to mere "negative attitudes" toward or "fears of elderly residents" over having a group home for the mentally challenged nearby. Even though the mentally challenged had no claim to special consideration under the equal protection clause, the Court ruled that the *Palmore* principle was sufficient to bar the zoning restrictions at issue in the case. Negative attitudes and fears "are not permissible bases" for distinguishing the treatment of one group from another.

Not surprisingly, in the six years since the Court diluted the *Palmore* principle, there has been a weakening of the protections afforded to politically disfavored groups. In 1973, thirteen years before *Bowers*, the Court had struck down a federal law barring food stamps to households of unrelated people — that is, to "hippies," whose way of life clearly offended majority sentiments. But soon after *Bowers*, the Court could uphold in 1988 a ban on food stamps going to households that had a member on strike, even

though this legislation also targeted a politically disfavored group — strikers.

Giving Private Biases Indirect Effect

If the Supreme Court is now unwilling to block the state from giving private biases *direct* effect, then one cannot hold out too much hope that the Court and other courts will apply the *Palmore* principle in cases where the state, though claiming not to be motivated by discriminatory intent, yields to social prejudices and thereby gives them *indirect* effect. The military, for example, justifies its exclusion of gays by pointing to anti-gay sentiment among service personnel and potential recruits, in society at large, and even in other societies where its forces might be stationed. Such illegitimate indirect effects of private bias are the very ones that the Court so perceptively noted and voided in *Palmore*. And yet, out of dozens upon dozens of gay cases where *Palmore* should have been dispositive, the courts have only rarely noted its relevance.

Finally, even in cases where the state has given indirect effect to amassed *racial* biases, the *Palmore* principle no longer appears to be in force. In 1991, in *Board of Education v. Dowell*, the Supreme Court was asked to define the conditions under which courts can dissolve judicial decrees requiring busing as a remedy for proved past school and housing segregation. In the school district in question, the schools — after busing ceased — had become totally segregated because housing was totally segregated. The federal district court, as the relevant determiner of the facts in the case, had held that this "residential segregation was the result of private decision making and economics," not of government actions. The district court, in consequence, held that the school segregation and its likely attendant stigmatizing of those at the numerous all-black schools were "simply" the indirect results of amassed private prejudices, not discrimination mandated by the state. And so, the district court concluded that the school segregation was okay, was constitutionally acceptable.

The Supreme Court agreed. The majority held that it is all right for the courts to give indirect voice to an amassed prejudice in housing by allowing its manifestation in totally segregated state-run schools, where segregation is the consequence of the seemingly neutral rule that makes no explicit mention of race: "Let there be local schools." But this permission to allow prejudice to operate indirectly through court enforcement of neutral rules was exactly what the *Palmore* opinion had forbidden when it held that the seemingly neutral rule that custody is to be determined by reference to the best interest of the child

Richard D. Mohr

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could not be used by the courts if the rule indirectly registered amassed private prejudices. We no longer hear the Court saying: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." It appears that *Palmore* has been reversed *sub silentio*.

Fundamental Rights and State Interests

In the *Bowers* opinion, the Supreme Court relied upon a tradition-and-consensus test as a way of determining whether a claim to immunity from state coercion was a fundamental right. In the past, there have been two standards for determining the constitutional validity of such immunity claims. One standard holds that an asserted right is an actual right if it is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if it were sacrificed." This standard calls for reasoned argument about liberty and justice.

The second standard for fundamental rights is the tradition-and-consensus test formulated in *Moore v. City of East Cleveland* (1977), which *de facto* acknowledged the privacy rights of extended black families. *Moore* holds that an asserted right will be an actual right only if it is "deeply rooted in this Nation's history and tradition." Such a standard calls not for reasoned argument about ordered liberty, fair play and substantial justice, but rather merely for historical survey, a project that itself is neither clear nor objective.

The *Bowers* Court, in effect, fused these two tests. That is, it treated the "ordered liberty" test as though it were simply a restatement of the tradition-and-consensus test, and in this way cast reason out from determinations of fundamental fairness. The impact of the Court's action was to undermine the whole understanding of rights that lies behind the Bill of Rights: that is, a justified belief that the country's constitutional scheme warrantably protects the individual from entrenched majorities. The grounds for such protections are rational arguments presented in the courts viewed as forums for rights. By reducing the determination of fundamental rights to a process of historical assay, the Court left the specific guarantees of the Bill of Rights standing simply as an arbitrary list, a historical quirk, devoid of any unifying understanding of what rights are.

In the area of privacy rights, *Bowers* has already been used in the lower courts to restrict individual liberty in a wide range of cases. The Alliance for Justice, a liberal legal policy group, reports that *Bowers* has been cited in more than 100 state and federal court decisions as authority for refusing to find a right to privacy. Challenges to drug testing, seat belt

requirements, and state laws governing the naming of children have all been turned back as a result.

Moreover, the *Bowers* opinion, by denying a general right to privacy that includes bodily integrity, and by privileging state interests over a claim to individual rights, effectively left the idea of fundamental rights without meaning or force. This is one of the lessons of the well-known "right to die" case *Cruzan v. Director, Missouri Department of Health* (1990).

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The question before the Court was whether the irreversibly comatose Cruzan, as represented by her parents, had a fundamental right to prevent the state from barring removal of a feeding tube that was necessary to sustain her biological existence. The Court answered: in theory, yes; in practice, no. The Cruzans lost the case. The Court held that there is a right to refuse medical treatment but that the right's strength is so weak that it is overridden by virtually any state interests, even paternalistic ones.

Why should a right so apparently fundamental have so little force? If the Court had recognized the right to die as one aspect of a general right to privacy, then that right would have trumped virtually any interest the state may have in protecting life. But the Court, citing *Bowers*, denied that the right to refuse treatment had any such foundation. Instead, the Justices simply plucked such a right out of thin air, rawly asserting that the right to refuse treatment is a "constitutionally protected liberty interest," but giving no analytic suggesting which of all possible free human actions do invoke constitutionally relevant liberties and which do not. By proceeding in this way, the Justices were undermining the asserted right even as they proclaimed it. For once any and all personal actions may potentially invoke fundamental liberty rights — as they may when there is no analytic given for what fundamental rights are — then invariably the rights must be weak and deferential to state interests, lest the state be universally hamstrung. But then further it would seem that if *fundamental* rights must give way to state interests, all rights must.

The Bill of Rights

The weakness of the Court's current fundamental rights holdings draws into doubt even the strength of the specific and explicit rights of the Bill of Rights. For example, in a series of cases in 1989, the Court upheld drug searches, even those entailing bodily invasions, as a condition of employment for railway workers after accidents and for customs officials seeking promotions, against challenges based on the Fourth Amendment's protections against both warrantless searches and unreasonable seizures. The Court upheld these invasions of privacy even in the absence of any individualized suspicion of abuse on the part of the workers. The customs case, in particular, opens an unobstructed path to random drug testing of all government workers, since the state interests that the Court accepted as controlling are such weak and pervasive interests as avoiding the diversion of valuable agency resources—mere administrative convenience—and the promotion of physical fitness, integrity, and judgment. Such interests in drug testing would apply to any government job.

Although this result perhaps comes as a shock, it should, after *Bowers*, not come as a surprise. For once the government may invade your bedroom to control your body there, the next logical site of invasion for the ever more ramifying state is your body itself.

Even the First Amendment is under attack from *Bowers*. In the Court's 1990 political patronage case, Justice Scalia came within one vote of successfully using the *Bowers* tradition-and-consensus test to determine what rights to free speech there are beyond the rather strict right against regulations of speech based on its content. Scalia would have held that, since political patronage laws have had a long history in this country, they cannot be declared unconstitutional restrictions of First Amendment rights to political association and political participation.

Gay Law and Affirmative Action

I wish to suggest, finally, that it was really *Bowers* that stood behind the Court's decision in the 1989 affirmative action case *City of Richmond v. Croson*. In that case, the Court held that state and municipal minority set-aside programs are unconstitutional under the equal protection clause because classifications made with respect to white people are as "suspect" as those made with respect to blacks, and are subject to the same high level of judicial scrutiny.

Yet the equal protection analytic that the Court has developed since the mid-1930s does not call for a single standard of judicial review in cases affecting different groups. At the highest tier of scrutiny, laws that discriminate against certain groups (to date, racial groups, ethnic groups, and legal aliens) are

held to be "suspect classifications" and, in order to be constitutional, must be drawn as narrowly as possible to achieve governmental objectives that are themselves compelling. At the middle tier, laws that discriminate against certain other groups (to date, women, illegitimate children, and illegal immigrant children) are held to be "quasi-suspect" and, to pass constitutional muster, must be found to be substantially related to an important state interest. At the lowest tier—unenanced or "weak" equal protection—all laws must be found to be rationally related to some legitimate state interest in order to be constitutional. In the past, the Court has extended enhanced equal protection rights to groups that have been politically disenfranchised or socially degraded. But the *Richmond* Court granted such rights to white people even though they do not meet either of these criteria.

The phony legal formalism of *City of Richmond's* affirmative action opinion is so sheer, then, as to be transparent. Justice O'Connor, writing for the majority, suggested that the Court was acting to defend "the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity." But in granting enhanced equal protection rights to whites, the Court was surely self-deceived about the justifications for its results: the true basis for its opinion lay in the convolutions of gay law. For if, as per *Bowers*, those actions that are by tradition socially averred are the actions performed by right, it follows that the people whose privileges are by tradition socially averred have those privileges as a matter of right. In effect, the deference to tradition that was invoked in order to deny rights to lesbians and gay men has been extended to restrict legal protections afforded to other minorities and to enhance majority privilege. Such reasoning explains the Court's 1989 gutting of every dimension of federal civil rights statutes—restricting to ineffectiveness the who, what, when, where, and how much of civil rights remedies.

In this light, there is something disingenuous in the Republican Party's platform statement opposing the inclusion of gays "as a protected minority . . . under civil rights statutes at the federal, State and local level." For the way of thinking that justifies the denial of gay rights has already become a means of undermining the statutes themselves, as well as the Constitutional values to which they help give life.

— Richard D. Mohr

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