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The Right to Be Left Alone

AT A 2003 legislative hearing on a bill to limit eminent domain abuse, Arizona State Senator Ken Cheuvront quipped that he wished that his colleagues who cared so much about the sanctity of private-property rights would extend such protections to the bedroom. He was exactly right. Too few policymakers who believe that government's power to take or regulate private property must be kept in check apply the same logic to protecting certain consensual activities inside the home. Unfortunately, on the flip side, too few policymakers who believe in the sanctity of the bedroom seem to extend the

sanctuary to protection of the home itself.* That is why we have the Constitution and the Bill of Rights: to establish a higher authority, a rule of law, to objectify the boundaries of permissible government interference with personal autonomy.[1]

Individualism is both an American persona and an American ideal. Our nation was founded by people escaping religious persecution and seeking opportunity. Because of the belief that people should when possible stand on their own feet, our social welfare system is much smaller than that of other modern societies. As a collective matter, we generally want from our government only what we cannot provide to ourselves (though just as James Madison predicted, special-interest groups constantly seek special benefits for themselves). Conversely, the thing most of us want from government—when we don't need it for some particular purpose—is to leave us alone.

That, of course, is more easily desired than achieved. Whether on the basis of competing moral beliefs or a mere desire to control other people's lives, government is constantly meddling in the intimate affairs of people's lives, often legislating to the lowest common denominator and restricting liberty in the process.

Often those intrusions conflict with vital constitutional traditions, such as freedom of association and the right to privacy. Neither of those rights expressly appears in the Constitution; and yet most Americans treasure them even as they often take them for granted. Government often defends its restrictions by noting that those freedoms do not appear in the constitutional text, and therefore are not judicially enforceable. Yet they flow logically from a confluence of

*True to liberal form, Cheuvront voted against the bill.

expressly stated rights, such as freedom of speech, private-property rights, due process, equal protection, and in some instances freedom of religion. Moreover, the argument that privacy and freedom of association do not exist requires reading the Ninth and Fourteenth Amendments—and their protection of unenumerated rights and the privileges or immunities of citizens—out of the Constitution;[2] and viewing the Constitution as a charter of rights rather than as a restriction on the power of government. Plainly, our system of government, grounded in common law and the principle of individual sovereignty, creates a zone of personal autonomy into which the government may not permissibly intrude except with compelling justification. A proper view of the Constitution provides substantial protection for the right to be left alone.

Yet another reason why this generic right has eroded is that, once again, too few Americans are willing to honor it if they are offended by the way that other people exercise it. If a right is respected not absolutely, but depending only upon whose ox is being gored, it will fade away.

All of these themes are illustrated by a pair of recent Supreme Court rulings that protected the right to be left alone. Both involved people engaged in private, consensual activities into which the government intervened because the activity offended the moral beliefs of a political majority. Both touched upon the community's attitudes toward homosexuality. In both cases, the Court vindicated the liberty of the individuals involved to control their own destinies. The decisions invoked essentially the same principles. Yet, ironically, very few people—including the justices themselves—agreed with both decisions.[3] Instead, most of the justices as well as most Americans agreed with one outcome but not the other, indulging their own moral preferences rather than supporting

consistently the right to be left alone that most Americans cherish. As with all rights, the right to be left alone cannot endure if we honor it only when it suits our personal predilections. It is in this climate of constitutional relativism that grassroots tyranny flourishes.

The more recent of the two cases was decided in 2003. It started when police in Houston, Texas, responded to a complaint about a disturbance involving weapons. When they arrived at the private residence in question, inside they found two occupants, John Lawrence and Tyron Garner, engaged in a consensual sexual act. The police arrested the two men and charged them with the crime of engaging in "deviate sexual intercourse with another individual of the same sex." The Texas statute defines deviate sexual intercourse as homosexual sodomy or oral sex.[4]

Seventeen years earlier, in a similar case entitled *Bowers v. Hardwick*, the Court by a 5-4 majority upheld a similar Georgia anti-sodomy statute, finding that the Constitution does not confer "a fundamental right upon homosexuals to engage in sodomy."[5] Of course it doesn't. Nor does it expressly state a right to privacy, freedom of association, freedom of enterprise, or other important vital restraints on the power of government. All of those rights were intended to be protected by broadly worded constitutional provisions that protect a wide range of individual liberties. But that is beside the point. Rather, the relevant constitutional inquiry should entail whether government *possesses the power* to forbid or restrict the conduct at issue. And it was in that fashion that the Court revisited *Bowers* and confronted the case of Lawrence and Garner.

By a 6-3 vote, the Court struck down the discriminatory

Texas anti-sodomy law,* with five justices voting to overturn *Bowers v. Hardwick*. Writing for the majority, Justice Anthony Kennedy framed the case in these terms: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."[6] By placing the case in terms of broad liberty and by invoking private-property rights, Kennedy took the issue out of the realm of a narrow "right" to homosexual sodomy and placed it within a more universal framework of freedom from governmental intrusion that pervades our Constitution.

Noting that the Court had protected liberties such as the right of privacy and the right of parents to direct the upbringing of their children under the liberty provision of the 14th Amendment's due process clause, Kennedy determined this issue should be decided under the same analysis. While the anti-sodomy statutes only purported to forbid certain sexual practices, he observed, "[t]heir penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."[7] Acknowledging that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," the Court nonetheless recognized that "[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[8]

Given that the conduct was private, intimate, and not harmful, the Court concluded the answer was no. The Court cited a proposition from an earlier case that set down a bed-

*The law was discriminatory because it prohibited homosexual sodomy but allowed heterosexual sodomy. The Georgia law upheld in *Bowers*, by contrast, outlawed all sodomy.

rock principle of a free society: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[9] Applying that principle, the Court concluded, "[this] 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."*

In dissent, Justice Antonin Scalia saw nothing transcendent about the principles involved in the case. "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda," he declared, "by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[10] He noted that "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home."[11]

But the decision does not force individuals to interact in their daily social or business lives with homosexuals. Indeed, it should stand for exactly the opposite premise: that just as homosexuals should be free to engage in intimate social contact, particularly in the privacy of their own homes, so too should people be free not to interact. Moreover, conservative justices like Scalia ordinarily would never countenance police intrusion into the home absent harmful activity. Why would they deny the same sanctuary to individuals just because they happen to be gay?

*Justice Kennedy was joined in his opinion by Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. Justice Sandra Day O'Connor concurred in the result, but would have decided the case on equal-protection grounds and would not have overruled *Bowers*.

Ultimately, Scalia resorted to majoritarianism, declaring "it is the premise of our system that those judgments are going to be made by the people, and not imposed by a governing caste that knows best."[12] Likewise, though Justice Clarence Thomas found the law "'uncommonly silly'," he voted to uphold it because he could find neither a right to privacy nor a right to liberty of the person in the Constitution.[13]

Yet when those same conservative justices saw the tables turned—that is when democratic processes acted to *protect* homosexuals—they found that a right that does not expressly appear in the Constitution—the right to expressive association—*should* override that majoritarian preference. At the same time, four of the liberal justices retreated behind the rubric of federalism to repudiate the very freedom of association they found so important in *Lawrence*.

That earlier case involved that most nostalgic of all American institutions, the Boy Scouts. The Scouts seek to instill a certain set of moral values, based upon a belief in God. Whether right or wrong, they deeply believe that homosexuality is incompatible with their mission.

But the state of New Jersey believed otherwise. The case involved James Dale, a former Eagle Scout who as an adult served as an assistant scoutmaster. When the Scouts learned that Dale was an avowed homosexual and a gay-rights activist, they decided he was not a proper role model for the boys and revoked his adult membership. But the state invoked its civil-rights law, which forbade discrimination on the basis of sexual orientation in public accommodations. Finding that the Scouts fit the definition of "public accommodation," the New Jersey courts ruled that they would have to reinstate Dale.

Whether or not one finds discrimination against homosexuals appealing or abhorrent, it seems difficult to rationalize denying individuals or social groups the autonomy to decide

whether to privately socialize with people whose lifestyles they deem morally—sometimes even religiously—offensive. Imagine the reaction of the New Jersey courts if a gay fraternity were forced under notions of nondiscrimination to admit gay-bashers into their midst; or a black sorority to admit avowed members of the Ku Klux Klan. All such government compulsion should offend the sensibilities of anyone who believes in freedom of association. And indeed, even though freedom of association is not written into the Constitution, exceptions to the principle have traditionally been tolerated only for the most compelling of reasons—such as to remedy past government-sanctioned discrimination in the Civil Rights Act of 1964.

Yet the Supreme Court divided 5-4 in reversing the decision of the New Jersey courts under the federal constitution and upholding the Boy Scouts' freedom of association. Chief Justice William Rehnquist and Justices Scalia and Thomas, who would later vote to deny freedom of intimate association in *Lawrence*, voted for the Boy Scouts in the *Dale* case; while Justices Stevens, Souter, Ginsburg, and Breyer pulled the opposite flip-flop. Only Justices O'Connor and Kennedy sided with freedom of association in both cases. The justices' situational constitutionalism reflected the positions of advocacy groups who submitted briefs. Few supported both the right of homosexuals to associate freely and the freedom of the Boy Scouts not to associate with them.* Fortunately, the

*The Institute for Justice, representing Gays and Lesbians for Individual Liberty (GLIL), submitted briefs on the winning side in both cases. In *Dale*, GLIL and the Boy Scouts made interesting bedfellows, so to speak. However repugnant the Boy Scouts' stance toward homosexuals, GLIL reasoned that if there is one group in America that needs to stand up for freedom of association more than any other, it is homosexuals. Their fidelity to principle was vindicated three years later in *Lawrence*.

swing justices led the Court as a whole to uphold the principle in both cases.

Ironically, the right asserted by the Boy Scouts in their brief could have been taken word for word by the gay couple in *Lawrence*: the right, under the federal constitution, "to enter into and maintain . . . intimate or private relationships."[14] The New Jersey courts had rejected that claim, finding that the Boy Scouts were not "'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association."[15]

But the Court, in a decision by Chief Justice Rehnquist, disagreed. "'[I]mplicit in the right to engage in activities protected by the First Amendment'," he declared, "is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends'." Moreover, "'freedom of association . . . plainly presupposes a freedom not to associate.'"[16] The Court majority found that a major purpose of the Boy Scouts was to instill a certain set of values in its members; and that the Scouts sincerely believed that homosexuality was inconsistent with those values. Ultimately, the Court decided the case on a rule of law vital to a free society: "We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message."[17]

While the Court majority's views in *Dale* certainly are consistent with our constitutional democracy, in which the government is invested with strictly limited powers with the residuum of liberty remaining with the people, the views of three of the justices comprising the *Dale* majority were plainly

at odds with their views subsequently expressed in *Lawrence*. In *Dale*, those justices found the public majority's disapproval of discrimination against homosexuality, expressed through democratic processes and interpreted by the state judiciary, to violate the unwritten constitutional protection of expressive association. In *Lawrence*, those same justices found the public majority's disapproval of homosexuality, expressed through democratic processes, to not violate the unwritten constitutional protection of privacy. It is difficult to square their divergent views in the two cases with adherence to a set of consistent constitutional principles, either a presumption in favor of liberty or deference to state sovereignty and democratic processes.

The four liberal dissenters certainly acquitted themselves no better. Despite proclaiming in *Lawrence* that a state's judgments regarding homosexual behavior must yield to the federal constitutional protection of privacy, in *Dale* they found exactly the converse: that the federal constitutional protection of freedom of association must yield to—you guessed it—"the States' right to experiment with 'things social'." By striking down the state's application of the public accommodations law, the dissenters charged, "the Court does not accord this 'courageous State'* the respect that is its due."[18] After all, the dissenters pointed out, "the right to associate for expressive purposes is not . . . absolute."[19] Fortunately for John Lawrence and Tyron Garner, three years later those same justices rediscovered the right to associate, even in a context that some might not find to be "expressive." And fortunately both for the gay couple and the Boy Scouts, Justices O'Connor and Kennedy were prepared to set aside whatever moral proclivi-

*As a native New Jerseyan, I've heard a lot of adjectives ascribed to my home state, but not this one.

ties they might have to uphold freedom of association in both cases.

But seven of the nine justices split over the outcome in the two cases, placing the right to be left alone on the shakiest of jurisprudential ground. For the liberal justices, states are free to experiment with social legislation, except when they aren't; free to protect freedom of association for gays, but not for those who choose not to associate with them. For the conservatives, states are free to enact discriminatory morals legislation that intrudes into the sanctity of the home and intimate association, but not to apply antidiscrimination legislation against private organizations. Neither line is philosophically satisfying or consistent.

And, of course, such constitutional zigzagging eviscerates the underlying right, leaving a large swath of individual autonomy susceptible to government intrusion. Never mind the Patriot Act: State and especially local governments, as Madison pointed out more than two centuries ago, are much more inclined to disturb the right of citizens to be left alone. Whether through censorship of books in the public libraries (from either the right or left), through suppression of controversial art exhibits, through meddling social workers intruding upon individual religious beliefs, or through the types of invasions of freedom of association described in this chapter, local governments acting upon the morally inflamed passions of some of its citizens too often act to suppress the right of individuals to pursue happiness as they see fit, even in the most peaceful, private, and intimate ways. And if we abide such intrusions in some instances, we weaken the constraints on government that are designed to protect all of us.

Surely government rightly possesses the power to safeguard the safety and well-being of the community. The balance between individual autonomy and public morality is a

delicate one. The more private and nonharmful the conduct, the more protection it deserves. But by allowing the boundaries of government power to be defined not by objective principles informed by a presumption of liberty but by the subjective moral preferences of judges and policymakers, we are in danger of losing our right to be left alone. However nebulous and difficult to define in individual circumstances, that right may be the one Americans truly treasure above all.