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Sodomy Statutes, the Ninth Amendment, and the Aftermath of Bowers v. Hardwick

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INTRODUCTION

On June 30, 1986, the United States Supreme Court decided *Bowers v Hardwick*,[1] which upheld the constitutionality of the Georgia sodomy statute[2] as applied to consensual sexual acts between gay persons.[3] The five-to-four decision bitterly divided the Court. The statute was attacked under the due process clause of the fourteenth amendment.[4] *Hardwick* was the first case[5] in which the Court agreed to consider whether

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[1] Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

[2] The statute at issue, GA. CODE ANN. § 16-6-2 (1984), provides, in pertinent part, that:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of any 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.

See infra note 21.

[3] *Hardwick*, 106 S. Ct. at 2843. A word or two about terminology is appropriate at this point. Despite the fact that the word "gay" is sometimes used to refer exclusively to male homosexuals (with the term "lesbian" applied to female homosexuals), this Comment uses "gay" to refer to homosexuals of both genders. Moreover, the terms "gay" and "homosexual" are used interchangeably. *See* Adamany, *The Supreme Court at the Frontier of Politics: The Issue of Gay Rights*, 4 HAMLINE L. REV 185, 185 n.1 (1981).

Phrases such as "consensual sexual acts," "intimate association" and "homosexual acts" are used interchangeably and refer to sexual acts involving consenting adults that take place in private. Unless otherwise indicated, these sexual acts would constitute a violation of the Georgia sodomy statute. *See supra* note 2; *cf.* Pennsylvania v. Bonadio, 415 A.2d 47, 49 (Pa. 1980) (A difference exists between sexual acts involving consenting adults taking place in private and acts that are public or in which there is a non-consenting participant.).

[4] "No State shall deprive any person of life, liberty, or property, without due process of law. " U.S. CONST. amend. XIV, § 1.

In this Comment, any reference to the due process clause indicates the one contained in the fourteenth amendment.

[5] Prior to *Hardwick*, the closest the Court had come to deciding this issue was in 1976, when the Court summarily affirmed a district court decision upholding the constitutionality of the Virginia sodomy statute. Doe v. Commonwealth's Attorney, 403

the "right to privacy" protected by the due process clause[6] encompassed a right to be free from governmental intrusion in the area of consensual sexual relations between gay persons.[7] The Court resolved this issue in favor of the state restrictions on consensual sexual acts.[8]

Nevertheless, the constitutional status of sodomy statutes such as the one at issue in *Hardwick*[9] is far from firmly established,[10] and *Hardwick* certainly is not dispositive of the issue.[11] What *is* now established is that there is no right to engage in homosexual activity protected by the right to privacy inherent in the fourteenth amendment's due process clause.[12] However, the *Hardwick* Court specifically declined[13] to consider whether the statute in question violated the ninth amendment,[14] the eighth amendment,[15] or the equal protection clause of the fourteenth amendment.[16] In light of the majority's refusal to decide these issues,[17] a concurring opinion by Justice Powell[18] practically inviting a challenge on different constitu-

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F Supp. 1199, 1203 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). In 1984, the Court granted certiorari to a case in which a New York law dealing with "deviate sexual conduct" had been declared unconstitutional. The Court later dismissed the writ as improvidently granted. New York v. Uplinger, 464 U.S. 812 (1983). The precedential value of *Doe* had diminished in recent years. *See, e.g.*, Hardwick v. Bowers, 760 F.2d 1202, 1207-10 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986). *See generally* Mandel v. Bradley, 432 U.S. 173 (1977); Fusari v. Steinberg, 419 U.S. 379 (1975) (concerning the precedential value of summary affirmances).

[6] *See infra* notes 93-100 and accompanying text.

[7] *Hardwick*, 106 S. Ct. at 2843.

[8] *Id.* at 2843-44. The Court expressed no view on the validity of the restriction as it applies to heterosexual acts. *Id.* The Georgia statute, however, clearly encompasses single and married heterosexuals within its prohibition. *See supra* note 2.

[9] *See supra* note 2 for the text of the statute; *see also infra* note 21.

[10] *See infra* notes 27-28 and sources cited therein.

[11] *Hardwick* was concerned solely with the constitutionality of sodomy statutes under the due process clause. The constitutionality of these statutes under other provisions of the Constitution is still undecided. *See infra* notes 13-20.

[12] *Hardwick*, 106 S. Ct. at 2843-44.

[13] *Id.* at 2846 n.8.

[14] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

[15] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[16] "No State shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[17] *Hardwick*, 106 S. Ct. at 2846 n.8.

[18] *Id.* at 2847 (Powell, J., concurring).

tional grounds,[19] and the vehement nature of the dissents,[20] the question whether sodomy statutes violate the ninth amendment remains unresolved.

An evaluation of the constitutional status of sodomy statutes[21] under the ninth amendment,[22] the eighth amendment,[23] the first amendment,[24] the equal protection clause,[25] and the supremacy clause,[26] is beyond the scope of this Comment.[27] This Comment is limited to examining the constitu-

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[19] "I agree with the Court that there is no substantive right under the Due Process Clause—such as that claimed by respondent. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution." *Id.*

[20] Both Justice Blackmun and Justice Stevens submitted forceful dissents. *Id.* at 2848 (Blackmun, J., dissenting), 2856 (Stevens, J., dissenting). Justices Brennan and Marshall joined both of these dissenting opinions.

[21] Twenty-four states and the District of Columbia still have sodomy statutes. *See* ALA. CODE § 13A-6-63-64 (1982); ARIZ. REV STAT. ANN. § 13-1411 (1978 & Supp. 1984-85); ARK. STAT. ANN. § 41-1813 (1977); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 16-6-2 (1984); IDAHO CODE § 18-6605 (1979); KAN. STAT. ANN. § 21-3505 (1981); KY. REV STAT. ANN. § 510.100 (Baldwin 1978); LA. REV STAT. ANN. § 14:89.1 (West 1974 & Supp. 1985); MD. ANN. CODE art. 27, §§ 553-554 (1982 & Supp. 1984); MICH. COMP. LAWS ANN. §§ 750.158, 750.338-.338a (West 1968); MINN. STAT. ANN. § 609.293 (West Supp. 1984); MISS. CODE ANN. § 97-29-59 (1973); MO. ANN. STAT. § 566.090 (Vernon 1979); MONT. CODE ANN. § 45-5-505 (1983); NEV. REV. STAT. § 201.190 (1979); N.C. GEN. STAT. § 14-177 (1981); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1977); TENN. CODE ANN. § 39-2-612 (1982); TEX. [PENAL] CODE ANN. 21.06 (Vernon 1974); UTAH CODE ANN. § 76-5-403 (1978 & Supp. 1983); VA. CODE ANN. § 18.12-361 (1982).

Whereas most of these statutes proscribe oral or anal sex between heterosexuals as well as homosexuals, the following states limit their restriction to homosexual acts: Arkansas, Kansas, Kentucky, Montana, Nevada and Texas.

[22] *See supra* note 14.

[23] *See supra* note 15.

[24] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I; *see infra* note 28.

[25] *See supra* note 16.

[26] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2; *see infra* note 28.

[27] This Comment adopts a narrower approach. For summaries of the possible

tional validity of sodomy statutes under the ninth amendment.[28] Part I provides a brief overview of the ninth amendment.[29] Part II outlines the four most commonly proposed interpretations of the ninth amendment.[30] Parts III,[31] IV,[32] and V[33] examine whether sodomy statutes would be unconstitutional under each of these four possible interpretations of the ninth amendment.

I. OVERVIEW OF THE NINTH AMENDMENT

The Court in *Hardwick*[34] declined to consider whether sodomy statutes violate the ninth amendment[35] despite the fact that in the lower court, Michael Hardwick challenged the Georgia sodomy statute on ninth amendment grounds.[36]

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constitutional means of attack on sodomy statutes, see Lasson, *Civil Liberties For Homosexuals: The Law in Limbo*, 10 U. DAYTON L. REV 645, 650-64 (1985); Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 TOL. L. REV. 811, 814-18 (1984).

[28] It may be objected that this Comment should have been devoted to a more viable means of constitutional attack, such as the equal protection clause. There are at least two responses to this objection. First, if any provision of the Constitution *needs* clarification and suggested means of interpretation, it certainly would be the ninth amendment. *See generally* Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV 814 (1966). Second, and similarly, the questions of how sodomy statutes fare under *other* constitutional provisions have been treated extensively elsewhere (with the exception of the "last-ditch" argument based on the supremacy clause). *See, e.g.*, Note, *An Argument For the Application of Equal Protection Heightened Scrutiny to Classification Based on Homosexuality*, 57 S.CAL. L. REV 797 (1983-84) (equal protection); Lasson, *supra* note 27, at 658-67 (first and eighth amendments); *cf.* Solem v. Helm, 463 U.S. 277, 290 (1983) (disproportionate penalty can invalidate an otherwise constitutional statute under eighth amendment); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982) (equal protection); Robinson v. California, 370 U.S. 660, 666-67 (1962) (eighth amendment prohibits punishment of a "status"); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958) (first amendment "freedom of association"); Dudgeon v. United Kingdom, 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS (Eur. Comm'n on Human Rights) (judgment) (treaty provision invalidates domestic sodomy statute); Comment, *Human Rights in an International Context: Recognizing the Right of Intimate Association*, 43 OHIO ST. L.J. 143, 155-62 (1982).

[29] *See infra* notes 34-51 and accompanying text.

[30] *See infra* notes 52-81 and accompanying text.

[31] *See infra* notes 82-105 and accompanying text.

[32] *See infra* notes 106-18 and accompanying text.

[33] *See infra* notes 119-207 and accompanying text.

[34] *Hardwick*, 106 S. Ct. 2841, 2846 n.8 (1986).

[35] *See supra* note 14 for the text of the ninth amendment.

[36] Hardwick v. Bowers, 760 F.2d 1202, 1212 (1985), *rev'd*, 106 S. Ct. 2841 (1986).

The ninth amendment is often advanced in constitutional litigation as a basis for attacking a particular governmental practice,[37] but it is seldom, if ever, the sole basis on which a court relies to declare such practice unconstitutional.[38] In fact, a majority of the Supreme Court has *never* based a decision exclusively on the ninth amendment.[39] This curiosity is not surprising particularly because "[n]o one knows what [the ninth amendment] means."[40] Even Justice Robert Jackson, one of the most renowned jurists ever to sit on the Supreme Court,[41] described the ninth amendment as a "mystery "[42]

It is not clear that the ninth amendment places, or was intended to place, any restrictions on the powers that may be exercised by individual states.[43] Furthermore, it is open to question whether the ninth amendment contains any "substance" at all, or is instead merely a redundancy adding "nothing to the rest of the Constitution."[44] As Justice Stewart explained:

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[37] *See, e.g.,* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (ninth amendment used to challenge the union shop requirement of the Railway Labor Act); Davis v. Lindsay, 321 F Supp. 1134 (S.D.N.Y. 1970) (ninth amendment used to challenge solitary confinement in a prison); *see also* Ringold, *The History of the Enactment of the Ninth Amendment and its Recent Development*, 8 TULSA L.J. 1, 55-57 (1972) (Table of Cases).

[38] *See, e.g., supra* note 37 and the cases cited therein; *see also* Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 320 (1936). *But see* Stradley v. Anderson, 349 F Supp. 1120, 1122 (D. Neb. 1972), *aff'd,* 478 F.2d 188 (8th Cir. 1973) (ninth amendment used to challenge the hair style and length regulations for government employees).

[39] The closest the Court has come to relying exclusively on the ninth amendment was in Griswold v. Connecticut, 381 U.S. 479 (1965), where Justice Goldberg (joined by Chief Justice Warren and Justice Brennan) concurred in the Court's opinion based on the ninth amendment. This concurrence, however, also involved the fourteenth amendment. *Id.* at 487-93 (Goldberg, J., concurring); *see infra* notes 86-105 and accompanying text.

[40] M. GOODMAN, THE NINTH AMENDMENT: HISTORY, INTERPRETATION AND MEANING 1 (1981).

[41] Siegel & Rocco, *Rating the Justices,* in THE FIRST ONE HUNDRED JUSTICES 32-51 (A. Blaustein ed. 1978).

[42] M. GOODMAN, *supra* note 40, at 59.

[43] *See* Griswold, 381 U.S. at 519-20 (Black, J., dissenting); *see also* Redlich, *Are There "Certain Rights Retained By the People"?*, 37 N.Y.U. L. REV 787, 805-06 (1962). *See generally* M. GOODMAN, *supra* note 40.

[44] E. DUMBAULD, THE BILL OF RIGHTS 65 (1957).

> The Ninth Amendment, like its companion, the Tenth,[45] which this Court held "states but a truism that all is retained which has not been surrendered" was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it was retained by the people and the individual States.[46]

It is clear that the ninth amendment could not be used as an independent basis for striking down sodomy statutes if it had been firmly established that the ninth amendment did not apply to the states[47] or that it is a mere truism.[48] The Supreme Court has never so held;[49] thus, the question is still technically open.[50] Apart from characterizing it as a truism, there are four alternative interpretations of the ninth amendment that remain available.[51]

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[45] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[46] *Griswold*, 381 U.S. at 529-30 (Stewart, J., dissenting) (quoting United States v. Darby, 312 U.S. 100, 124 (1941)) (emphasis in original). For a persuasive refutation of Stewart's position, see J. ELY, DEMOCRACY AND DISTRUST 34-36 (1980) and sources cited therein.

[47] *Griswold*, 381 U.S. at 539.

[48] In the most definitive ruling to date on the tenth amendment, Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (1985), the Court noted the truistic nature of the tenth amendment, and upheld a statute against a tenth amendment challenge. *Id.* at 554. The Court stated that the federalism concerns that are the subject matter of the tenth amendment are best left to the political process for resolution. *Id.* at 552. Despite its holding the Court left reason to believe that the tenth amendment is not a "true" truism when it intimated that there might still be Congressional actions—purportedly based on the commerce clause—that would infringe upon state authority. *See id.* at 556.

[49] *See* B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 34 (1955); *see also* Ringold, *supra* note 37, at 54.

[50] *See* B. PATTERSON, *supra* note 49, at 35.

[51] There are, of course, other conceivable interpretations. However, the four that are discussed in this Comment have been utilized in some manner by the courts or received support from commentators. There is a fifth approach that is not discussed: that the ninth amendment was "intended to make clear that despite the Bill of Rights Congress could create further rights, or that state legislatures (or common law courts) could do so, or that a state could do so in its own constitution." J. ELY, *supra* note 46, at 37. Like the view that the ninth amendment is a truism, this approach denies any substantive content to the ninth amendment, and therefore could provide no basis for attacking a sodomy statute. In any event, the view seems to be erroneous. *See id.* at 36-38.

II. FOUR ALTERNATIVE INTERPRETATIONS OF THE NINTH AMENDMENT

A. *Ninth Amendment Applicable to States by Analogy*

The first approach[52] to the ninth amendment is that it is directly applicable to only the federal government, yet it indirectly circumscribes state power by providing a standard against which state action is judged by analogy [53] Proponents of this view[54] argue that the ninth amendment, while neither directly applicable to the states nor an independent source of protected rights, nevertheless "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."[55] The ninth amendment protects against encroachment upon these fundamental rights by the federal government.[56] By analogy, the "liberty"[57] protected by the due process clause of the fourteenth amendment[58] protects the same fundamental rights from state encroachment.[59]

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[52] This approach will hereinafter be referred to as either "the first interpretation" or the "analogy approach."

[53] *See supra* notes 43-48 and accompanying text.

[54] The most notable proponent of this view was Justice Goldberg, as evidenced by his concurrence in Griswold v. Connecticut, 381 U.S. 479, 487-93 (1965).

[55] *Id.* at 492 (Goldberg, J., concurring).

[56] *Id.*

[57] A distinction should be made between the liberty interests textually protected by the due process clause and the much broader conception of liberty that is protected by the entire Bill of Rights. The reference here is, of course, to the former.

[58] *See supra* note 4 for the text of the due process clause.

[59] *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring). Justice Goldberg gave several tests by which one could ascertain whether an asserted right is "fundamental." One is to "look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] as to be ranked as fundamental.' " *Id.* at 493 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). A second "is whether a right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' " *Id.* at 493 (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)). A third test looks to "liberty [as it] 'gains content from the emanations of specific [constitutional] guarantees' and 'from experience with the requirements of a free society.' " *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting)).

B. Penumbra Theory as Providing a Basis for the Right to Privacy

The second approach[60] to the ninth amendment is much more familiar, since it has been utilized by the Supreme Court.[61] This interpretation views the ninth amendment as a provision which, although not necessarily incorporated directly into the due process clause of the fourteenth amendment,[62] contains a penumbra of rights which, when considered in conjunction with the penumbras of the first,[63] third,[64] fourth,[65] and fifth[66] amendments provide a constitutional basis for a right to privacy.[67] The fourteenth amendment's due process clause[68] provides the mechanism whereby this right is protected from infringement by the states.[69]

C. Incorporation of Ninth Amendment into Due Process Clause

The third approach[70] concedes that the ninth amendment originally applied to only the federal government, but neverthe-

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[60] This approach will hereinafter be referred to as "the second interpretation" or "the penumbra approach."

[61] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 147-64 (1973) (state statute prohibiting almost all abortions struck down as a violation of the right of privacy); Griswold, 381 U.S. at 484 (state statute prohibiting the use of contraceptives by married couples struck down as violating the right of privacy); *see also* Eisenstadt v. Baird, 405 U.S. 438, 452-55 (1972) (state statute prohibiting the distribution of contraceptives to unmarried persons struck down as a violation of equal protection); Stanley v. Georgia, 394 U.S. 557, 564-66 (1969) (state statute prohibiting the mere possession of obscene material in one's home struck down as violating the right of privacy).

[62] *See supra* note 4 for the text of the due process clause.

[63] *See supra* note 24 for the text of the first amendment.

[64] "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

[65] The penumbra embracing a zone of privacy is implied from the affirmation of "[t]he right of the people to be secure in their personal houses, papers, and effects, against unreasonable searches and seizures. " U.S. CONST. amend. IV; *see* Griswold, 381 U.S. at 484.

[66] The penumbra embracing a zone of privacy is created by the self-incrimination clause: "[n]o person shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V; *see* Griswold, 381 U.S. at 484.

[67] *See* Griswold, 381 U.S. at 484; *see also* Bowers v. Hardwick, 106 S. Ct. 2841, 2843-44 (1986); *supra* note 61 and cases cited therein.

[68] *See supra* note 4 for the text of the due process clause.

[69] *See* Griswold, 381 U.S. at 481.

[70] This approach will hereinafter be referred to as "the third interpretation" or "the incorporation approach."

less argues that the due process clause[71] incorporated the ninth amendment and thereby made it directly applicable to the states.[72] Proponents of this view argue that the criterion for determining whether an asserted right is one that falls within the protection of the ninth amendment is whether the asserted right is "an essential ingredient of the free society established by our Constitution."[73] This is ascertained by examining whether the asserted right is:

> adjacent to, or analogous to, the pattern of rights which we find [enumerated] in the Constitution. [The ninth amendment] should not be used as a substitute for a vigorous application of those rights which are specified in the Constitution, or for the adoption of rights which bear no connection to our constitutional scheme. To define the rights "retained by the people," judges must, of course make personal judgements.[74]

If the asserted right falls within that category, a statute infringing upon it would be unconstitutional unless the state can show "overwhelming proof of necessity and the chance of no other and less burdensome means to achieve [its] objectives."[75]

D Ninth Amendment Originally Directly Applicable to the States

The fourth approach[76] to the ninth amendment maintains that from its inception, it has been, and was intended to be, directly applicable to the states, and serves as both a restriction on the states' powers and an independent source of individual rights.[77] Proponents of this view argue that a right that falls

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[71] *See supra* note 4 for the text of the due process clause.

[72] *See* Redlich, *supra* note 43, at 805-06.

[73] *Id.* at 812.

[74] *Id.*

[75] *Id.*

[76] This approach will hereinafter be referred to as "the fourth interpretation" or "the direct application approach."

[77] An elaboration of the basis of this argument, with its necessary reliance on historical rewards, is beyond the scope of this Comment. For a detailed analysis that concludes that the ninth amendment was intended to restrict both the federal government *and* the governments of the individual states, see B. PATTERSON, *supra* note 49, at 19-26, 36-43.

within the protection of the ninth amendment is one that is an "inherent human right and is one of the bases required for the existence of a free people."[78] These rights, moreover, are not limited to what may have been considered "inherent human rights" at the time the ninth amendment was adopted.[79] It applies equally to those rights that "will be revealed and become apparent in the future."[80] State restrictions on such rights must survive heightened scrutiny by the courts.[81]

III. THE CONSTITUTIONALITY OF SODOMY STATUTES UNDER EITHER THE "ANALOGY" OR "PENUMBRA" APPROACHES TO THE NINTH AMENDMENT

The "analogy"[82] and "penumbra"[83] interpretations of the ninth amendment differ only slightly [84] One could argue that these are mere differences in semantics;[85] therefore, they are discussed together

The problem that would result from using the ninth amendment as the basis for a constitutional attack under either of these approaches surfaces immediately Both implicate the due process clause,[86] and the only substantive right relevant to this issue that has ever been protected under either of these approaches is the right to privacy [87] A challenge to sodomy

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[78] *Id.* at 51.

[79] *Id.* The ninth amendment was drafted by James Madison in the First Congress. 1 ANNALS OF CONGRESS 452 (J. Goales & Seaton eds. 1834).

[80] B. PATTERSON, *supra* note 49, at 55.

[81] *Id.* at 51-56.

[82] *See supra* notes 52-59 and accompanying text.

[83] *See supra* notes 60-69 and accompanying text.

[84] Both approaches have been limited generally to cases involving the right to privacy, and it is difficult to conceive of a situation where the two approaches could reach different conclusions. *Compare* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (majority opinion) (second approach) *with id.* at 487-93 (Goldberg, J., concurring) (first approach).

[85] *See, e.g.,* Doe v. Commonwealth's Attorney, 403 F Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting), *aff'd*, 425 U.S. 901 (1976).

[86] *See supra* note 4 for the text of the due process clause.

[87] Some lower courts have found a few rights that are protected by the ninth amendment that arguably do not fall within the right to privacy. None of these rights are relevant to this discussion. *See, e.g.,* Dewees v. Palm Beach, 812 F.2d 1365 (11th Cir. 1987) (right "to dress and foster health through athletic expression"); Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971) (right to govern one's personal appearance while attending high school). *But cf.* United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947).

statutes under either approach would necessitate an assertion that the right to privacy, as protected by the due process clause[88] and/or the penumbras of the Bill of Rights,[89] extends to consensual homosexual acts.[90] However, this was precisely the contention that the Court rejected in *Hardwick*.[91]

The *Hardwick* Court limited the right of privacy[92] to only those situations involving child rearing,[93] education,[94] procreation,[95] family relationships,[96] marriage,[97] contraception,[98] and abortion.[99] Justice White stated that he disagreed with the assertion that "the Court's prior cases have construed the Constitution to confer a right to privacy that extends to homosexual sodomy "[100]

Thus, *Hardwick* has definitively[101] established that sodomy statutes do survive constitutional muster under either of the

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[88] *See, e.g., infra* notes 93-100 and cases cited therein.

[89] *See, e.g., Griswold*, 381 U.S. at 484.

[90] Prior to *Hardwick*, this seemed to be the most viable constitutional argument against sodomy statutes. *See generally* Ludd, *The Aftermath of Doe v. Commonwealth's Attorney: In Search of the Right to be Let Alone*, 10 U. DAYTON L. REV 705 (1985).

[91] Bowers v. Hardwick, 106 S. Ct. 2841, 2843 (1986).

[92] *Id.* at 2843-44; *see* Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1977) (Court lists decisions defining areas to which the right to privacy applies).

[93] Meyer v. Nebraska, 262 U.S. 390, 401-03 (1923).

[94] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

[95] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 537 (1942).

[96] Prince v. Massachusetts, 321 U.S. 158, 167 (1944).

[97] Loving v. Virginia, 388 U.S. 1, 10-12 (1967).

[98] Eisenstadt v. Baird, 405 U.S. 438, 452-55 (1972); *Griswold*, 381 U.S. at 484.

[99] Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2180-83 (1986); Roe v. Wade, 410 U.S. 113, 147-64 (1973).

[100] *Hardwick*, 106 S. Ct. at 2843.

[101] The use of the word "definitively" is, of course, a bit misleading, since the Court always retains the option of overruling *Hardwick* in the future. *Stare decisis* notwithstanding, Justice Blackmun, in his dissent, candidly points out that the Court, on at least one occasion, has overruled a decision only three years after it was rendered in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (overruling Minerville School Dist. v. Gobites, 310 U.S. 586 (1940)). Justice Blackmun stated:

> I can only hope that here, too, the Court soon will consider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our nation's history than tolerance of nonconformity could ever do I think the Court today betrays those values.

Hardwick, 106 S. Ct. at 2856 (Blackmun, J., dissenting).

first two approaches to the ninth amendment.[102] The Court has discussed only these two approaches in its prior decisions.[103] For this reason, the Court's statement that it was expressing no opinion on the constitutionality of sodomy statutes under the ninth amendment[104] was misleading, at the very least, unless the Court would be receptive to a different interpretation of the ninth amendment.[105]

IV THE CONSTITUTIONALITY OF SODOMY STATUTES UNDER THE INCORPORATION APPROACH TO THE NINTH AMENDMENT

The "incorporation" approach[106] to the ninth amendment encounters many of the same problems as do the first two approaches.[107] This is because this view *also* implicates the due process clause.[108] Moreover, the incorporation of the ninth amendment into the due process clause might arguably add nothing to the due process clause that is relevant to this issue[109] except the right of privacy This right has *already* been held to be encompassed within the fourteenth amendment.[110] Therefore, *Hardwick* would preclude a successful ninth amendment attack on sodomy statutes under the "incorporation approach."[111] The *Hardwick* Court's decision under the due process clause would also necessarily have decided the issue under

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[102] Under these approaches the standards for the due process clause and the ninth amendment are identical.

[103] *See supra* notes 37-42 and accompanying text.

[104] *Hardwick*, 106 S. Ct. at 2846.

[105] *See infra* notes 120-71 and accompanying text.

[106] *See supra* notes 72-75 and accompanying text.

[107] *See supra* notes 82-105 and accompanying text.

[108] *See supra* note 4 for the text of the due process clause.

[109] *See supra* note 87.

[110] Arguably, such incorporation would encompass even *less* than the full right to privacy, because proponents of this interpretation have argued that the rights protected by the ninth amendment should be limited to only those rights that are "analogous" to the enumerated rights. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 168 (1973) (Rehnquist, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting). *See generally* Ely, Foreword: *On Discovering Fundamental Values*, 92 HARV L. REV 5 (1978).

[111] Attacks under this approach would fail for the same reasons that attacks under either the first or second approaches would fail. *See supra* notes 82-105 and accompanying text.

the Ninth Amendment,[112] despite the Court's assertion to the contrary [113] Once again, this *may* signify that the Court would be receptive to a different interpretation of the ninth amendment.[114]

However, it is possible that the incorporation of the ninth amendment into the fourteenth amendment carries with it rights broader than, or in addition to, the right to privacy [115] This works against the adoption of this approach to the ninth amendment, for such an interpretation would necessitate a complete overhaul of constitutional law under the due process clause,[116] and while those "additional rights"[117] *may* be relevant to the constitutionality of sodomy statutes, it appears extremely unlikely that the Court would be willing to broaden the scope of the due process clause through the incorporation of the ninth amendment.[118]

V THE CONSTITUTIONALITY OF SODOMY STATUTES UNDER THE "DIRECT APPLICATION" APPROACH TO THE NINTH AMENDMENT

Only the "direct application"[119] approach remains to be examined. Of the four possible interpretations,[120] this approach

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[112] As under the first and second approach, there would be an identity between the due process clause and the ninth amendment.

[113] Bowers v. Hardwick, 106 S. Ct. 2841, 2846 n.8 (1986).

[114] *See infra* notes 119-42 and accompanying text.

[115] An attempted enumeration of what these additional rights might be is both beyond the scope of this Comment and antithetical to the purpose underlying the ninth amendment. *See infra* notes 128-41 and accompanying text.

[116] This point can be made with but one example: suppose the Court had held earlier that one did not have a right under the due process clause to indulge in intoxicating substances. However, were the Court to incorporate the ninth amendment into the due process clause and carry with it additional rights beyond those already present in the right to privacy, a litigant legitimately could ask whether he or she *now* had the right to indulge in intoxicating substances under the due process clause. All decisions in which it has been held that a right was not protected by the due process clause once again would become open questions.

[117] Additional rights potentially *can* gain constitutional protection *without* involving the due process clause. *See infra* notes 167-71 and accompanying text.

[118] It is worth pointing out that Justice Black, the most famous proponent of the "total incorporation theory," did not consider the ninth amendment to have been incorporated into the fourteenth amendment by the due process clause. *See Griswold*, 381 U.S. at 519-20 (1965) (Black, J., dissenting).

[119] For a list of possible ways to challenge sodomy statutes see *supra* notes 27-28 and accompanying text.

[120] *See supra* note 51.

is the most likely to provide a means by which sodomy statutes could be challenged successfully under the ninth amendment.[121] Holding that the ninth amendment has *always* been applicable directly to the states would remove the necessity of implicating the due process clause.[122] Furthermore, the basis of constitutional attack would not be limited to the right of privacy [123]

In addition, there would be no need to delve into the speculative realm of "original intent,"[124] because the words of the ninth amendment itself[125] presuppose that determination of "rights retained by the people" will depend on judicial decision-making on a case-by-case basis according to the present state of society [126] Insistence that the Court remain loyal to "original intent" when construing the Constitution[127] would pose no problem. The "original intent" behind the ninth amendment was to provide a constitutional basis for the proposition that "the exceptions in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution."[128] Attempting to ascertain what the framers considered to be reserved rights actually runs *counter* to their intent.[129] Their intent was that *no* enumeration of protected rights—in the Constitution, in their own minds,[130] or contemplated by

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[121] *See infra* notes 172-207 and accompanying text.

[122] *See supra* note 4 for the text of the due process clause.

[123] *See infra* notes 167-184 and accompanying text.

[124] Justices, of course, vary greatly on how much emphasis they, as individuals, place on "original intent." A discussion of the advantages and disadvantages of the "interpretivist" (as opposed to "noninterpretivist") school of constitutional interpretation is beyond the scope of this Comment. The question of "original intent" is discussed, but the author should not be construed to be endorsing the "interpretivist" school. *See generally* J. ELY, *supra* note 46, at 1-72; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV 703 (1975); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972); Wellington, *History and Morals in Constitutional Adjudication*, 97 HARV. L. REV 326 (1983).

[125] *See supra* note 14 for the text of the ninth amendment.

[126] *See supra,* B. PATTERSON note 49, at 54-56.

[127] *See supra* note 124 and sources cited therein.

[128] *See* ANNALS OF CONGRESS, *supra* note 79, at 452. This was a portion of Madison's original draft of the ninth amendment.

[129] *See id.*

[130] *See infra* note 136.

the society of 1789[131]—would be utilized as a means to *restrict* or *limit* unenumerated rights. It is irrelevant whether an omission was due to oversight,[132] a need for conciseness,[133] the frailty and finite nature of the human mind,[134] ignorance,[135] impossibility,[136] or even a contrary belief prevalent at the time the ninth amendment was drafted.[137] One may reasonably and accurately state that the intent of the framers was that their intent *not* be considered in determining what rights are protected by the ninth amendment.[138]

Equally significant to the foregoing consideration is the fact that utilization of the ninth amendment under this inter-

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[131] [T]he natural rights of Americans should not be static and fixed as of the date of the adoption of the Constitution and the Bill of Rights. To interpret the Ninth Amendment in this manner would take it out of its clearly intended meaning. Such an interpretation would mean that there was a cutoff date at the time of the adoption of the Bill of Rights; that prior to that date rights of natural endowment were recognized, but after said date only such rights as were enumerated or known to exist would be protected. This interpretation destroys the distinction between "enumerated" and "unenumerated", and restricts its meaning to be read as "such enumerated rights as are now known to exist."

B. PATTERSON, *supra* note 49, at 53.

[132] The framers were aware that they were neither omniscient nor omnipotent. Their refusal to use a code-like format and the various ambiguities they placed within the Constitution manifest this awareness. The interpretation and application of the ambiguities to particular factual contexts were left to those who actually would confront those factual realities in the future. *See id.* at 57-65.

[133] The Constitution was relatively short in comparison to state constitutions. This was intentional, as the framers were creating a Constitution that they intended to endure for ages. They, therefore, avoided the rigidity and length of a code-like format. *See* M. GOODMAN, *supra* note 40, at 53-55.

[134] *See supra* note 132.

[135] *Id.*

[136] For example, the framers had *no* intent with respect to whether one had a right to federal funds for use in performing open-heart surgery; such a phenomenon was medically impossible at that time. *See* Brown v. Board of Educ., 347 U.S. 483, 489-90 (1954) (framers had no intent with respect to public education because the institution was not yet in existence in most states).

[137] *See supra* note 131.

[138] *Id.* "[T]here is no indication that [the framers] expected or intended future interpreters to refer to any extratextual intention revealed in the convention's secretly conducted debates." Powell, *The Original Understanding of Original Intent*, 98 HARV L. REV. 885 (1985). "It is commonly assumed that the 'interpretive intention' of the Constitutional framers was that the Constitution would be construed in accordance with what future interpreters could gather of the framers' own purposes, expectations, and intentions. Inquiry shows that assumption to be incorrect." *Id.* at 948.

pretation is in no way inconsistent with judicial precedent,[139] and would not entail a need to overrule or even distinguish prior cases.[140] Nor would such a utilization alter—either by broadening or circumscribing—existing constitutional doctrine under any of the Constitution's other provisions.[141] Indeed, the fact that the ninth amendment remains virtually uninterpreted (perhaps more so than any other constitutional provision that concerns individual rights)[142] dictates in *favor* of adopting this approach to the ninth amendment.[143] The Justices of the Supreme Court essentially have the constitutional equivalent of a *tabula rasa* upon which they are authorized—even commanded—to inscribe constitutional protection to unenumerated rights as the opportunities are presented.[144]

Several questions remain concerning the interpretation of the ninth amendment under this approach.[145] Perhaps the most important question is the standard by which the Court should ascertain which rights are protected by the ninth amendment.[146] What restraints does the ninth amendment impose upon judges to prevent them from substituting pure value judgments for constitutional protections, thereby functioning as "Platonic guardians?"[147] What prevents the Court from becoming a "superlegislature?"[148] The answer to these questions undoubtedly will be unsatisfactory to many[149] There is a necessary

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[139] *See supra* notes 37-42 and accompanying text.

[140] *Id.*

[141] Utilization of the ninth amendment *alone* obviously does not entail the use of any other constitutional provisions. *But see supra* notes 86-112 and accompanying text.

[142] Arguably, the sole exception to this assertion is the third amendment, which also has remained virtually uninterpreted. *See supra* note 64 for the text of the third amendment.

[143] *See supra* notes 139-40, 37-42 and accompanying text.

[144] *See* B. PATTERSON, *supra* note 49, at 52-54.

[145] This Comment does not purport to deal with *all* the ramifications resulting from the utilization of the ninth amendment under the fourth interpretation. *See generally* B. PATTERSON, *supra* note 49; Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV 231 (1975).

[146] *See infra* notes 167-71 and accompanying text.

[147] L. HAND, THE BILL OF RIGHTS 70 (1958).

[148] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

[149] The concept of allowing Justices to pronounce constitutional doctrine without being confined to strict and specific constitutional provisions has alarmed and aroused some of our most renowned jurists. *See, e.g.*, Rochin v. California, 342 U.S. 165, 175

antagonism between authorizing the judiciary to provide constitutional protection to rights not enumerated specifically in the Constitution and mandating that members of the judiciary act as judges and not as legislators. The former is commanded by the ninth amendment,[150] while the latter is required by the principles underlying the doctrine of separation of powers[151] and inherent in the concept of democratic government.[152] To some extent, this conflict is irreconcilable. There are at least six considerations[153] that should remove or reduce public anxiety if this approach to the ninth amendment were to be adopted by the Court.[154]

First, a certain degree of inconsistency or fundamental conflict in the mandates of the Constitution is permissible—even desirable.[155] There should be no fear that one will override or swallow the other; indeed, each serves to provide a healthy check on the other [156] Second, it is a well-established principle in free societies that situations involving either the protection of an asserted individual right or suppression of such a right generally should be resolved in favor of the individual.[157]

Third, the framers of the Constitution entrusted a great deal of discretion to the judiciary, and also entrusted the courts to exercise this discretion reasonably and responsibly [158] More-

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(1952) (Black, J., concurring); Tyson & Bro. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting); *see also* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 943-49 (1973).

[150] *See supra* note 14.

[151] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); U.S. CONST. art. I, §§ 3, 7, 8; art. II, §§ 2-4; art. III, §§ 1-2.

[152] *See generally*, J. ELY, *supra* note 46.

[153] *See infra* notes 155-71 and accompanying text.

[154] As stated before, there is no judicial impediment to the Court's adoption of this approach. *See supra* notes 139-44 and accompanying text.

[155] For example, there is a fundamental conflict between the "establishment" and "free exercise" clauses in the first amendment. *See* Engel v. Vitale, 370 U.S. 421 (1962); *see also supra* note 24 for the text of the first amendment.

[156] The fact that a system of "checks and balances" is built into the Constitution provides support for the proposition that the framers perceived such checks as healthy. *See supra* note 151.

[157] "Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest." MILL, ON LIBERTY 17 (1976) (J. Gray ed.).

[158] Two obvious examples of a *tremendous* exercise of discretion by the Court are

over, the process whereby one becomes a member of the judiciary[159] presumably insures that only those individuals who can exercise their power responsibly will actually be appointed. History provides some additional reassurance in that the Court, by and large, has not exercised its discretion in an egregious manner [160] Fourth, if the judiciary oversteps its authority, the people have a significant check on the judiciary in the power of constitutional amendment,[161] and, in extreme cases, the power of impeachment.[162]

Fifth, the framers intended, and the people have a right to expect that every provision in the Constitution have some purpose and meaning.[163] If the ninth amendment were reduced to a truism[164] or relegated to a position of merely protecting a right to privacy protected elsewhere in the Constitution,[165] the ninth amendment would be surplusage.[166]

Sixth, there *are* standards by which the ninth amendment may be interpreted under this approach that provide both a framework for its utilization and circumscribe the ability of the judiciary to manipulate the Constitution to accomodate their personal policy preferences.[167] This country was founded upon and owes its existence to the premises that "all men are created equal, that they are endowed . with certain [i]nalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights, Govern-

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Swan v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28-32 (1971) (Court ordered busing of children to achieve integration in public schools) and Roe v. Wade, 410 U.S. 113, 162-69 (1972) (Court fashioned constitutional guidelines for abortions around the trimesters of a pregnancy).

[159] *See* U.S. CONST. art. II, § 2.

[160] There have been, of course, individual decisions with which large numbers of people have disagreed or have been outraged (most notably Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) and, in recent times, *Roe*, 410 U.S. at 113); however, the writer feels that few can say honestly that the Court oversteps its authority often.

[161] *See* U.S. CONST. art. V

[162] *See* U.S. CONST. art. I, § 3, cl. 6-7

[163] *See* Kelsey, *supra* note 38, at 320.

[164] *See* Griswold v. Connecticut, 381 U.S. 479, 529-30 (1965) (Stewart, J., dissenting) (stating that the ninth amendment is no more potent than the tenth amendment).

[165] *See supra* notes 82-118 and accompanying text.

[166] *See id.*

[167] *See infra* text accompanying notes 168-71.

ments are instituted among Men. "[168] Given these premises, the unenumerated rights protected by the ninth amendment must be those which follow logically from these basic and fundamental principles in the context of the present state of society [169] Because of the quasi-fundamental nature of such rights,[170] restrictions on them must be subjected to some level of heightened scrutiny by the courts.[171]

The only determination remaining is whether sodomy statutes impermissibly infringe upon the unenumerated rights protected by the ninth amendment as interpreted under this approach.

That gay persons constitute a significant percentage of society is unquestionable.[172] Equally clear is the proposition that absent a special factor such as lack of majority,[173] criminal conviction,[174] or military service,[175] all members of society are afforded the protections and guarantees of the Constitution.[176] These protections include the ninth amendment's protection of certain unenumerated rights, as ascertained under proper standards. Therefore, if the asserted right of intimate association for gay persons is protected by the ninth amendment, such a right must follow logically and necessarily from the initial premises that form the framework for analysis under the ninth amendment.[177]

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[168] The Declaration of Independence para. 2 (U.S. 1776).

[169] *See* B. PATTERSON, *supra* note 49, at 52-54. Patterson describes the ninth amendment as a "growing philosophy." *Id.*

[170] *See id.*

[171] *See id.* at 55.

[172] Gay persons constitute anywhere from 8% to 15% of the population. *See* A. KINSEY, W POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 650-51 (1948); A. KINSEY, W POMEROY, C. MARTIN & E. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 473-74 (1953).

[173] *See, e.g.,* Prince v. Massachusetts, 321 U.S. 158, 169-70 (1944).

[174] *See, e.g.,* Rhodes v. Chapman, 452 U.S. 337, 345-47 (1981) (holding that harsh prison conditions "are part of the penalty that criminal offenders pay for their offenses against society").

[175] *See, e.g.,* Dronenburg v. Zech, 741 F.2d 1388, 1392 (D.C. Cir. 1984) (stating that the military need for discipline "justifying restrictions that go beyond the needs of civilian society has repeatedly been made clear by the Supreme Court").

[176] *See* U.S. CONST. amend. XIV, § 1.

[177] *See supra* notes 167-71 and accompanying text.

The fact that homosexuals, like heterosexuals, regard their choice of sexual partners as clearly personal and important cannot be disputed.[178] Both homosexuals and heterosexuals find it essential to their "happiness" and well-being to be free to choose their partner for consensual sexual relations.[179] A state-imposed deprivation of that choice amounts to a restriction on one's right to "the pursuit of happiness" protected by the ninth amendment.[180] Sodomy statutes represent precisely such a deprivation. By this proscription, the state prohibits one from pursuing lifestyles and relationships that seem natural[181] to him or her and that are essential to one's sense of self-worth and fulfillment as a human being.[182] It is obvious

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[178] It has even been argued that homosexual relationships are potentially superior to heterosexual relationships. *See* S. KERN, ANATOMY AND DESTINY: A CULTURAL HISTORY OF THE HUMAN BODY 149-52 (1975) (detailing arguments various commentators have advanced for the superiority of homosexuality).

The author of this Comment wishes to note that he disagrees with this assertion. Arguments for the "superiority" of a particular sexual orientation are, in the author's opinion, doomed from the start—premised, as they inevitably are, on overbroad generalization, stereotyping, and inescapable subjectivity. My point is that, wholly apart from the validity or invalidity of sanctions against a particular sexual practice, it is clear nonetheless that a person's decision whether and with whom he or she engages in sexual relations (or desires to do so) is inherently intensely personal.

[179] The emotional, psychological, and even physiological damages that flow as a consequence of sexual repression—whether induced by external or internal forces—has been studied extensively and is well-documented. For discussion of this issue and/or brief summaries of some of these studies see M. CALDERONE & E. JOHNSON, THE FAMILY BOOK ABOUT SEXUALITY 112-20 (1981); H. COLTON, OUR SEXUAL REVOLUTION 23-43 (1971); S. KERN, supra note 178, at 56-66, 169-220.

[180] *See supra* notes 167-71 and accompanying text.

[181] The word "natural" is used here in what has been called the "realistic" sense of "nature": what is "natural" to a particular individual is what is characteristic of him or her. In this context, to act "unnaturally" is to act uncharacteristically. *See* J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 11 (1980). The use of the word may perhaps reflect poor judgment. In statements regarding homosexuality, the meanings of "natural" and "unnatural" vary widely according to the concept of "nature" to which they are related. Often the pertinent "concept of nature" can not be ascertained, and "natural" and "unnatural" then become virtually meaningless—all too often functioning as self-serving bases for physiological and/or theological attacks upon (or defenses of) homosexuality. *See generally id.* at 11-15. No conclusion can be drawn yet on the question of whether homosexuality is "physiologically natural." *See* Birke, *Is Homosexuality Hormonally Determined?*, in PHILOSOPHY AND HOMOSEXUALITY 35-47 (N. Koertge ed. 1985); Ruse, *Are There Gay Genes? Sociobiology and Homosexuality*, in PHILOSOPHY AND HOMOSEXUALITY 5-32 (N. Koertge ed. 1985). For a suggestion that homosexuality is "ecologically natural," see H. COLTEN, *supra* note 179, at 54.

[182] *See supra* note 179 and sources cited therein.

that state action of this nature infringes upon one's fundamental right[183] to pursue happiness according to his or her own nature and would be unconstitutional under this interpretation of the ninth amendment, unless such a restriction could withstand heightened scrutiny by the courts.[184]

Sodomy statutes, like all statutes, restrict "liberty" in some manner [185] Therefore, it is useful to examine when "liberty" may be restricted legitimately by the government. John Stuart Mill, in his eminent and apposite work, *On Liberty*,[186] asserted that liberty could be restricted only if such restriction is necessary to prevent harm to others.[187] Similarly, the Supreme Court requires a greater showing of interest from state governments when the liberty interests being infringed upon are fundamental rights, and employs a "strict scrutiny" approach[188] or an "intermediate" approach.[189] Under the strict scrutiny approach, the state action will not be sustained unless the government can show that it is pursuing a "compelling" or "overriding" end, and the statute is "necessary" to promote those interests.[190] The lesser, "intermediate" standard requires that statutes have a "substantial relationship to an important governmental objective."[191]

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[183] *See supra* notes 167-71 and accompanying text.

[184] *See infra* notes 188-207 and accompanying text.

[185] The exceptions to this assertion are statutes that merely make "pronouncements." An example is a statute declaring November 13 to be "Pumpkin Day."

[186] Mill's ideas concerning liberty are respected widely in the free world. His philosophy has influenced many groups that work for the advancement of Civil Liberties. *See* POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION 18-21 (1985).

[187] As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like. In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.

J. MILL, *supra* note 157, at 92.

[188] The strict scrutiny approach had its origin in cases involving racial discrimination. *See* Loving v. Virginia, 388 U.S. 1, 10-12 (1967).

[189] The intermediate approach had its origin in cases involving gender discrimination. *See* Craig v. Boren, 429 U.S. 190, 197-99 (1976).

[190] *See Loving*, 388 U.S. at 10-12.

[191] *Craig*, 429 U.S. at 197.

Because the right of intimate association encompassed within the right to the pursuit of happiness as protected by the ninth amendment[192] could be deemed fundamental,[193] and because restrictions on fundamental rights generally are reviewed by the Court under the strict scrutiny standard when challenged under the equal protection clause,[194] the strict scrutiny standard should be employed to measure a restriction on a fundamental right when challenged under the ninth amendment.[195] However, assuming *arguendo* that the application of the strict scrutiny standard would be inappropriate,[196] the intermediate standard will be employed here to determine whether sodomy statutes are constitutional under this interpretation of the ninth amendment.[197]

Various justifications have been advanced to identify the state's interests served by sodomy statutes. Among these alleged justifications are "the preservation of the family,"[198] the preservation of the institution of marriage,[199] the protection of children from child molestation,[200] the protection of morality,[201] respect for the moral teachings of history,[202] and/or the protection of the public against harm.[203] All of these are arguably "important," perhaps even "compelling," state inter-

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[192] *See supra* notes 167-71 and accompanying text.

[193] B. PATTERSON, *supra* note 49, at 52-54.

[194] *See supra* note 16 for the text of the equal protection clause.

[195] The interests of an individual in his or her own fundamental rights should not depend on which constitutional provision is relied upon. *See* Bowers v. Hardwick, 106 S. Ct. 2841, 2848-50 (1986) (Blackmun, J., dissenting).

[196] *But see supra* note 195.

[197] Of course, if such statutes fail to pass muster under the intermediate approach, they necessarily would fail under the strict scrutiny approach.

[198] *See* Delgado, *Fact, Norm, and Standard of Review—The Case of Homosexuality*, 10 U. DAYTON L. REV 575, 585-88 (1985).

[199] *See* Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 993-995 (1979).

[200] *See supra* note 198.

[201] *See* Delgado, *supra* note 198, at 590-91.

[202] *See Hardwick*, 106 S. Ct. at 2847 (Burger, J., concurring).

[203] *See* People v. Onofore, 415 N.E.2d 936, 943 (1980) (holding that penal law which criminalizes consensual sodomy violates constitutional rights of privacy and equal protection "because it permits the same conduct between persons married to each other. ").

ests,[204] yet it is highly unlikely that these interests will be substantially furthered[205] by the proscription of consensual sexual acts between gay persons.[206] The proscription of private consensual sexual acts cannot reasonably be said to be "substantially related" (and certainly not "necessary") to the advancement of these interests.[207] Therefore, failing to meet the requisite standard, sodomy statutes would be unconstitutional under the ninth amendment as interpreted under this approach.

CONCLUSION

In *Bowers v Hardwick*,[208] the Supreme Court held that sodomy statutes are not unconstitutional under the due process

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[204] *See supra* notes 201-03. A question exists as to whether all of these rise to the level of being "important" governmental objectives, as opposed to being merely "permissible." The protection of morality and maintaining respect for the moral teachings of history are the least likely to rise to this level. *Cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (if "statutory objective reflects archaic and stereotypic notions" it is likely that "the statutory objective itself is illegitimate"); Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 541-43 (Cal. 1971) (justification based on protection of morality insufficient to sustain statute).

[205] Depending on the justification for the statute put forward by the state, sodomy statutes might well fail to pass the rational basis test—the most deferential standard of judicial review. For example, prohibiting consensual sexual acts between gay persons can hardly be said to be "rationally related" to protecting children against sexual molestation.

[206] Of the proffered justifications, the only ones that could possibly be "substantially furthered" by sodomy statutes are respect for the teachings of history and, arguably, the protection of morality. *See supra* note 204. As to the other alleged justification, the very fact that homosexuals are unlikely to marry and that even those who do marry are not automatically converted into heterosexuals refutes any assertion that sodomy statutes are substantially related to preserving marriage and the family. With regard to "protecting the public" as a justification, there is no evidence that prohibiting consensual sexual relations between gay persons reduces the amount of tangible harm to society. Finally, because child molestation is, by operation of law, involuntary on the part of the child, prohibiting *consensual* sexual acts has *no* relationship to this objective. Therefore, the substantial relationship prong of the test is not met for *any* of the proferred justifications for sodomy statutes.

[207] *See* Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317, 1329-33 (5th Cir. 1984) (holding that state university's refusal to recognize officially gay student's group was not supported by a "compelling interest"); Baker v. Wade, 553 F Supp. 1121, 1143 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (holding that § 21.06 of Texas statutes prohibiting homosexual conduct between consenting adults "is not justified by any 'compelling state interest' "); Gay Students Org. of the Univ. of New Hampshire v. Bonner, 367 F Supp. 1088, 1096-1101 (D.N.H. 1974) (holding that "[a]bsent the attendance of well-defined circumstances, a university must recognize any bona fide student organization"); *Onofore*, 415 N.E.2d at 943; *see also* Delgado, *supra* note 198, at 585-91.

[208] 106 S. Ct. 2841 (1986).

clause of the fourteenth amendment.[209] The Court left open the question of whether such statutes were valid under the ninth amendment.[210] The scope of the ninth amendment with respect to state action has yet to be defined by the Supreme Court.[211] However, there have been at least four approaches to interpreting the ninth amendment.[212] The first applies the ninth amendment by analogy to state action through the due process clause.[213] The second views the ninth amendment as containing a penumbra that, in conjunction with the penumbras of other constitutional provisions, and applied to the states through the due process clause, helps to create a constitutionally protected right to privacy.[214] The third views the ninth amendment as being directly applicable to the states through its incorporation into the fourteenth amendment.[215] The fourth approach views the ninth amendment as having been directly applicable to the states from its inception.[216] Under the first three interpretations of the ninth amendment, it is highly unlikely that sodomy statutes violate the ninth amendment.[217] Under the fourth interpretation, sodomy statutes, as applied to consensual sexual activity, are an unconstitutional violation of the individual rights protected by the ninth amendment.[218]

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[209] *Id.* at 2843.
[210] *Id.* at 2846 n.8.
[211] *See supra* notes 34-42 and accompanying text.
[212] *See supra* notes 47-51 and accompanying text.
[213] *See supra* notes 52-59 and accompanying text.
[214] *See supra* notes 60-69 and accompanying text.
[215] *See supra* notes 70-75 and accompanying text.
[216] *See supra* notes 76-81 and accompanying text.
[217] *See supra* notes 82-118 and accompanying text.
[218] *See supra* notes 119-207 and accompanying text.