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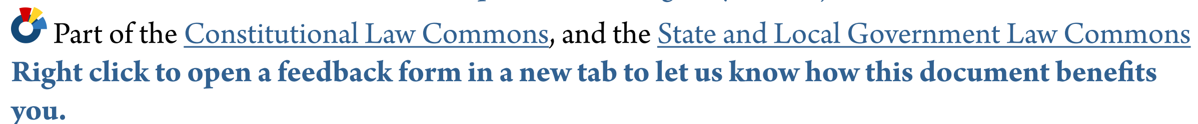
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Part of the Moving Stream: State Constitutional Law, Sodomy, and Beyond

BY SHIRLEY A. WIEGAND*
AND SARA FARR**

Over the course of several evenings in 1985, police officers in Lexington, Kentucky, donned body microphones, assembled support personnel, and set out to enforce the state's sodomy statute. They frequented a popular downtown gathering place for gay men, where each police officer engaged his targeted man in suggestive conversation. The conversations lasted up to twenty-five minutes or until, encouraged by the officer, the individual described the type of activity that would take place if the other man accompanied him. At that point, the police officer arrested the man on charges of solicitation to commit sodomy. One of the men charged decided to challenge the state's sodomy law and, after seven years of litigation,[1] prevailed when the Kentucky Supreme Court struck down the sodomy statute as violating the Kentucky Constitution in *Commonwealth v. Wasson*.[2]

An examination of this case demonstrates clearly the value of increased reliance on state constitutional law when federal constitutional

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Professor Wiegand served as co-counsel for Jeffrey Wasson in his hearing before the Fayette District Court and the Fayette Circuit Court. Several Lexington, Kentucky, attorneys also cooperated in Mr. Wasson's defense, including Dean W. Bucalos, Pam Goldman, Ernesto Scorsone, and Professor Carolyn Bratt of the University of Kentucky College of Law. The trial preparation, research, and brief-writing were a collective effort.

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[1] The case took seven years for several reasons. First, the trial court delayed the trial until after the U.S. Supreme Court had decided the constitutionality of Georgia's sodomy statute in Bowers v. Hardwick, 478 U.S. 186 (1986). Then, after the Kentucky statute was declared unconstitutional at the trial court level, Commonwealth v. Wasson, No. 86-M-859 (Fayette Dist. Ct. Oct. 3, 1986), the Commonwealth appealed to the circuit court. Commonwealth v. Wasson, No. 86-X-48 (Fayette Cir. Ct. Oct. 13, 1987). That court dismissed the appeal on procedural grounds; the Commonwealth appealed, and the Kentucky Court of Appeals reversed and remanded to the circuit court for consideration of the case on its merits. Commonwealth v. Wasson, 785 S.W.2d 67 (Ky. Ct. App. 1990). After the circuit court ruled in favor of the defendant on the merits, Commonwealth v. Wasson, No. 86-X-48 (Fayette Cir. Ct. June 8, 1990), the Kentucky Supreme Court granted transfer of the case, bypassing further consideration by the court of appeals. Oral arguments were held in the spring of 1992 and the opinion was handed down in September, 1992. Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

[2] 842 S.W.2d 487 (Ky. 1992).

law fails. This Article focuses primarily on the Kentucky sodomy case, but it also examines recent cases in other jurisdictions in which state constitutions have been employed in novel ways. The Kentucky case is not an aberration; rather it is part of a "moving stream."[3] The utilization of state constitutional law in areas that historically have relied upon the U.S. Constitution should encourage an increased examination of state constitutions. In some areas, these state charters represent the frontier of undiscovered legal terrain.

I. INTRODUCTION TO STATE CONSTITUTIONAL LAW

A revolution is taking place among those who seek social change through litigation. Rather than continuing to look to the U.S. Constitution for protection of established rights, as well as the expansion of these rights, lawyers are searching their state constitutions for such protection and expansion. Although some commentators claim that judges who rely upon state constitutions are engaging in the "invention" of new rights,[4] their fears are unfounded. State constitutions are often used because they specifically enumerate rights that the U.S. Constitution grants only by implication, if it provides for them at all.[5] Therefore, commentators who fault state judges for recognizing greater protection than that guaranteed by the U.S. Constitution should devote their energies to the pursuit of legislative change, rather than making naked assertions of the perceived dangers of judicial activism.

This section does not focus on the use of any particular state's constitution, but instead explores the benefits that can be derived from the use of state constitutions generally. It is first helpful to analyze the relationship between state constitutions and the U.S. Constitution. While the U.S. Constitution has

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[3] The *Wasson* court notes: "Thus our decision, rather than being the leading edge of change, is but a part of the moving stream." *Id.* at 498.

[4] *See* Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 ARIZ. ST. L.J. 1005 (1989).

[5] For example, the U.S. Constitution prohibits Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The Kentucky Constitution, on the other hand, provides that all citizens have the "right of worshipping Almighty God according to the dictates of their consciences." KY. CONST. § 1. The Kentucky Constitution further provides:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights . . . of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

KY. CONST. § 5.

long been viewed as the most successful weapon in many battles waged to protect individual rights, it is important to remember that many state constitutions predate the Bill of Rights, the Fourteenth Amendment, and the incorporation doctrine.[6] Additionally, many state constitutions are copied from other states' constitutions, rather than from the federal model.[7]

The only limitation that the U.S. Constitution places on the rights granted by state constitutions is that a state constitution cannot afford less protection than is guaranteed by the U.S. Constitution.[8] In the more typical situation, a state court judge, faced with interpreting his or her state constitution, either marches in lockstep with federal constitutional interpretation or interprets the state constitution as providing greater rights than the U.S. Constitution.[9] Although the U.S. Constitution limits the powers of the federal government to a specifically delegated list, reserving all other powers to the states,[10] states are not as limited by federalism concerns. Therefore, state constitutions are often longer, more detailed, and deal with a much broader range of subjects than the U.S. Constitution.[11]

The use of state constitutions to protect individual liberties is recognized and encouraged by some federal judges. Justice Brennan noted in 1977 that "[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[12] Even if litigants are not encouraged to look to their state constitutions for protection, they are often

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[6] *See* Phylis Skloot Bamberger, *Boosting Your Case with Your State Constitution*, A.B.A. J., Mar. 1, 1986, at 49.

[7] *Id.*

[8] *See* John C. Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 STETSON L. REV. 241, 244 (1989).

[9] *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (affirming the authority of states to provide for more expansive individual rights in their constitutions than those conferred by the U.S. Constitution).

[10] U.S. CONST. amend. X.

[11] Ten state constitutions, for example, contain an express constitutional privacy right. *See* ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1 ("All people . . . have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."); HAW. CONST. art. I, §§ 6-7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against . . . invasions of privacy."); MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7. For other examples of state constitutions that expressly grant more expansive rights or deal with a wider range of subjects than the U.S. Constitution, particularly in the areas of equal protection, religion, free speech and access to the courts, see JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES app. 3A, 4A, 5A, 6A (1992).

[12] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

forced by necessity to do so when they learn that the federal courts will not provide them with the constitutional protection they seek. This was the situation in which those challenging sodomy laws found themselves after *Bowers v. Hardwick*,[13] in which the U.S. Supreme Court refused to extend the federal right of privacy to gay persons[14] engaging in acts of sodomy.

While some portions of state constitutions are identical to the U.S. Constitution, other parts of state constitutions vary enough from the U.S. Constitution so as to provide greater rights. Some of these differences may appear slight indeed, yet produce vastly different results for litigants. For example, the Michigan Supreme Court held in *Michigan v. Bullock*[15] that a state statute[16] providing a mandatory punishment of life imprisonment without the possibility of parole for possession of over 650 grams of cocaine violated the Michigan Constitution's prohibition against cruel and unusual punishment.[17] While the Michigan Constitution's prohibition is nearly identical to that of the U.S. Constitution, the two have textual variations that lead to opposite results in determining the constitutionality of the same statute under state and federal law.[18] Even when the wording of a state constitution repeats that of the federal document, states may interpret their constitutions unfettered by federal jurisprudence.[19]

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[13] 478 U.S. 186 (1986).

[14] We use the words "gay persons" or "gays" or "lesbians" to refer to those persons who identify themselves by their sexual orientation. We use the word "homosexual" to refer to sexual acts between persons of the same gender, regardless of whether the persons engaging in the acts identify themselves as gay. Many legal opinions do not make this distinction, regularly referring to gays as homosexuals. See Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988), for further discussion of this issue.

Furthermore, we use the term "sexual orientation" rather than "sexual preference." Although much debate surrounds this nomenclature, the expert witnesses in *Commonwealth v. Wasson* testified that gay persons do not choose intimate partners on the basis of personal preference; choice plays very little, if any, role in such decisions. One's orientation toward a same-sex partner is instead something over which one has as little control as another has over his or her orientation toward a partner of the opposite gender.

[15] 485 N.W.2d 866 (Mich. 1992).

[16] MICH. COMP. LAWS § 333.7403(2)(a)(1) (1988).

[17] MICH. CONST. art. 1, § 16.

[18] *Compare* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted.") (emphasis added) *with* MICH. CONST. art. I, § 16 ("Excessive bail shall not be required; excessive fines shall not be imposed; cruel *or* unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.") (emphasis added). Under the federal provision, Michigan's statute was found constitutional. Harmelin v. Michigan, 111 S. Ct. 2680 (1991). However, the same statute was found to violate the Michigan Constitution. Michigan v. Bullock, 485 N.W.2d 866 (Mich. 1992). Essentially, the U.S. Supreme Court, per Scalia, would require a punishment to be both cruel *and* unusual before finding an Eighth Amendment violation. *Harmelin*, 111 S. Ct. at 2691. Michigan forbids either type of punishment. *Bullock*, 485 N.W.2d at 872.

[19] *See* Brennan, *supra* note 12, at 491.

Although the use of state constitutions is gaining acceptance among the judiciary, lawyers may be slow to accept the challenge. In their effort to provide a broad legal education, law schools rarely focus on the laws of the state in which they are located, much less on that state's constitution. Perhaps as a result, it is difficult for many attorneys to suddenly shift focus from the U.S. Constitution, with which they are familiar, to a state constitution, with which they may have had little experience. Likewise, state courts are often hesitant to base decisions on state constitutional grounds, perhaps because they are unfamiliar with their constitution or because so little state constitutional jurisprudence has been created.[20] They are, in effect, being asked to plow new ground.

While attorneys and the judiciary are beginning to familiarize themselves with state constitutional law, others are not as comfortable with its use. In both California and Florida, movements to restrain an "activist" judiciary resulted in the amendment of the state constitutions to prevent state courts from interpreting their constitution in such a way as to give litigants protections greater than those found in the U.S. Constitution.[21] Although California's action was later

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[20] As one scholar notes: "Even though a large number of states have equal protection clauses and equal rights provisions in their constitutions, few courts in states that maintain sodomy statutes have developed an equal protection jurisprudence distinct from federal law." Juli A. Morris, *Challenging Sodomy Statutes: State Constitutional Protections for Sexual Privacy*, 66 IND. L.J. 609, 621 (1991).

[21] The California Constitution was amended to provide:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel and unusual punishment, *shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States,* nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal cases than those afforded by the Constitution of the United States.

CAL. CONST. art. I, § 24 (as amended by Proposition 115 in 1990) (emphasis added). This amendment was found unconstitutional in Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990). *See infra* note 22.

The Florida Constitution, as amended in 1982, provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be intercepted, and the nature of the evidence to be obtained. *This right shall be construed in conformity with the 4th amendment to the United States Constitution, as interpreted by the United States Supreme Court.* Articles or information obtained in violation of this right shall not be admissible in evidence *if such articles or information would be inadmissible under the decisions of the United States Supreme Court construing the 4th amendment to the United States Constitution.*

FLA. CONST. art. I, § 12 (emphasis added).

declared invalid,[22] the Florida amendment remains in place. Such constitutional tinkering demonstrates the concern over increasing reliance upon the heretofore undiscovered power of state constitutional law. The actions taken in Florida and California represent attempts to stem the current that flows more and more toward state constitutional jurisprudence.

Tactically, several points must be considered when raising a state constitutional claim. First, presentation of the state claim should be made at every step in the litigation and should be distinct from any federal claim.[23] Second, cases should be cited that show how the interpretation of state constitutional law developed.[24] Third, because a litigant will be attempting to persuade a state court that the state constitution provides more expansive rights than does the U.S. Constitution, it is important for litigants to avoid citing federal case law to support their interpretation of state law.[25] If a decision is not clearly based on a state court's interpretation of state law or the state constitution, the decision could be subject to federal review.[26] Clearly, this is not the desired result.

The use of state constitutional law has met with success in numerous cases. Following are just a few examples.

In *South Dakota v. Opperman*,[27] the South Dakota Supreme Court held that the inventory search of a car that was towed for illegal parking violated the South Dakota Constitution. This decision clearly contradicted the U.S. Supreme Court's decision that the search of Opperman's car was reasonable and did not violate the U.S. Constitution.[28] The South Dakota court even recognized that while the provision of the South Dakota Constitution that had been violated was almost identical to the Fourth Amendment, which the U.S. Supreme Court held had *not* been violated, the Supreme Court of South Dakota was the proper court to determine interpretation of its state constitution.[29]

A recent New York Court of Appeals decision demonstrates that court's willingness to apply its state constitution so as to grant criminal

[22] The California Supreme Court held that the amendment to California Constitution article I, § 24, was an invalid revision of the constitution because it unduly restricted judicial power and did so in a way that severely limited the independent force and effect of the constitution. Raven v. Deukmejian, 801 P.2d 1077, 1087-89 (Cal. 1990).

[23] Bamberger, *supra* note 6, at 50.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] 247 N.W.2d 673 (S.D. 1976).

[28] South Dakota v. Opperman, 428 U.S. 364 (1975).

[29] South Dakota v. Opperman, 247 N.W.2d at 674-75. *See also* New Hampshire v. Hogg, 385 A.2d 844 (N.H. 1978) (holding that although the U.S. Supreme Court has interpreted Double Jeopardy Clause of U.S. Constitution as not barring dual state and federal prosecutions based upon the same conduct, state Double Jeopardy Clause precluded prosecution of defendants for bank robbery following acquittal in federal court on charges of robbing the same federally insured bank).

defendants more rights than are granted by the U.S. Constitution. In *New York v. Scott*,[30] the court declined to adopt the U.S. Supreme Court's categorical ruling in *Oliver v. United States*[31] that the Fourth Amendment protects people only in their persons, houses, papers, and effects, and not in places outside their curtilage.[32] The *Scott* court found that the *Oliver* majority's literal interpretation of the Fourth Amendment was of little relevance to the *Scott* court's interpretation of the New York Constitution's prohibition against unreasonable searches and seizures.[33] The New York constitutional provision, which differs textually from the Fourth Amendment,[34] had a history and jurisprudence quite distinct from those of the Fourth Amendment.[35] The *Scott* court was thus able to conclude that a landowner who fences private property or posts "no trespassing" signs has a reasonable expectation of privacy and thus law enforcement officers may not lawfully invade without a warrant.[36]

The same New York Court of Appeals held in *New York v. Keta*[37] that a New York statute authorizing warrantless administrative searches of vehicle-dismantling businesses ("chop shops") violated the state constitutional guarantee against unreasonable searches and seizures. The *Keta* court thus refused to apply the U.S. Supreme Court decision in *New York v. Burger*,[38] where the Court found that the same statute did not violate the Fourth Amendment of the U.S. Constitution. The *Keta* court noted: "While State and Federal uniformity is a worthwhile goal in constitutional decision-making, that goal 'must yield to [the need for] a predictable, structured analysis,' lest rules governing official intrusions on individuals' privacy become muddied and the guarantees of Article 1, Section 12 diluted."[39] The concurring opinion suggested: "Dual sovereignty has in fact proved itself not a weakness but a strength of our system of government. States, for example, by recognizing greater constitutional safeguards as a matter of State law, can serve as 'laboratories' for national law."[40]

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[30] 593 N.E.2d 1328 (N.Y. 1992).

[31] 466 U.S. 170 (1984).

[32] *Id.* at 177.

[33] *Scott*, 593 N.E.2d at 1338 (interpreting N.Y. CONST. art. I, § 12).

[34] The New York version adds a clause providing protection against interception of telephone and telegraph communications. N.Y. CONST. art. I, § 12.

[35] *Scott*, 593 N.E.2d at 1336-38.

[36] *Id.* at 1338.

[37] 593 N.E.2d 1328, 1339 (N.Y. 1992). Although *New York v. Keta* was consolidated with *Scott* on appeal and thus should also properly be referred to as *New York v. Scott*, it is addressed separately in this Article, as it is in the consolidated case.

[38] 482 U.S. 691 (1987).

[39] *Keta*, 593 N.E.2d at 1342 (quoting People v. Johnson, 488 N.E.2d 439 (1985)).

[40] *Id.* at 1348 (Kaye, J., concurring) (alluding to the dissenting opinion of Justice Brandeis in

In light of these and numerous other examples in which litigants have benefited from using state constitutions, the use of these sources of law should be considered by lawyers when preparing to try a case, as well as by law professors when teaching their students about the "law," heretofore usually federal constitutional law, and by law students as they prepare to become lawyers, law professors, judges, and legislators. An examination of the recent Kentucky sodomy case demonstrates the effective use of state constitutional law.

II. *COMMONWEALTH OF KENTUCKY V WASSON*

A. Setting the Stage

The criminal prosecution of Jeffrey Wasson began some months before the momentous decision in *Bowers v. Hardwick*,[41] in which the U.S. Supreme Court affirmed the constitutionality of the Georgia sodomy statute.[42] In fact, anticipating that the *Bowers* case would be resolved in a manner favorable to Wasson, his attorneys asked the district court to delay proceedings until after the U.S. Supreme Court had ruled. When the Court held instead that the U.S. Constitution does not guarantee a "fundamental right to homosexuals to engage in acts of consensual sodomy,"[43] the defense attorneys were forced to reexamine the strength of their challenge to Kentucky's sodomy statute. They found the necessary strength not in the U.S. Constitution, but in their state constitution.

Jeffrey Wasson was prosecuted for solicitation to commit sodomy in violation of the state's sodomy statute, Kentucky Revised Statutes section 510.100: "A person is guilty of sodomy in the fourth degree when he engages in deviate sexual intercourse with another person of the same sex."[44] Deviate sexual intercourse means "any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another."[45]

The Fayette County District Court[46] held a hearing on the constitutionality of the statute at which seven experts testified for the defendant.[47] A cultural anthropologist demonstrated that gay persons have

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New York Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)).

[41] 478 U.S. 186 (1986).

[42] *Id.* at 192.

[43] *Id.*

[44] KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990).

[45] *Id.* § 510.010.

[46] District courts in Kentucky hear civil cases with values under $4,000.00, probate matters, and criminal misdemeanor and violation cases. KY. REV. STAT. ANN. §§ 24A.110, .120 (Michie/Bobbs-Merrill 1992).

[47] These experts were: Dr. Susan Abbot, cultural anthropologist at the University of Kentucky; Dr. Nancy Dye, social historian at the University of Kentucky; the Rev. George Edwards,

existed in many cultures and have been treated in a variety of ways by those cultures, ranging from intolerance to tolerance to legitimation as an integral segment of the culture's society. A theologian testified about various interpretations of Biblical passages concerning sodomy and stated that he, along with many other theologians, now believe that sodomy as defined in criminal statutes was not the act condemned in the Bible. For example, he stated that the evils condemned in the well-known Sodom and Gomorrah story are those of inhospitality and aggression against strangers.[48]

Three other witnesses–a social historian, a psychologist, and a therapist–also testified about society's treatment of homosexuality. Dr. Martin Weinberg, a well-known and widely published sociologist and sex researcher, and coauthor of the *Kinsey Report on Homosexuals*, testified about his work with gay persons and demonstrated that many widely held beliefs about gays have no basis in fact.[49] Finally, although the topic of AIDS was fairly new when the hearing was held in 1986, an expert in infectious diseases testified about the criminal statute's effect on transmission of the disease.[50] He testified that criminalizing anal sex between gays interfered with the fight against AIDS by discouraging gays from presenting accurate medical histories out of fear of prosecution.[51] Although the defense attorneys advised the Fayette County Attorney's Office of the defendant's intention to offer expert testimony at the hearing, no evidence was presented for the Commonwealth.[52]

Presbyterian minister and Professor Emeritus of the New Testament at the Presbyterian Theological Seminary in Louisville, Kentucky; Mr. Edwin Hackney, therapist at Comprehensive Care in Lexington, Kentucky; Dr. Martin J. Raff, Professor of Medicine at the University of Louisville and Chief of the Section of Infectious Diseases; Dr. Rory Remer, psychologist in Lexington, Kentucky; and Dr. Martin Weinberg, sociologist and sex researcher, Indiana University. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 490 n.1 (Ky. 1992).

[48] Brief for Appellee at 2, *Wasson*, 842 S.W.2d 487 (Ky. 1992). According to the story of Sodom and Gomorrah, after Lot had given shelter to two angels dressed as men, the townsmen came to his home and asked Lot to "[b]ring them out to us that we may have intimacies with them." Instead, Lot replied, "I beg you my brothers, not to do this wicked thing. I have two daughters who have never had intercourse with men. Let me bring them out to you, and you may do to them as you please. But don't do anything to these men, for you know they have come under the shelter of my roof." *Genesis* 19:5-8 (New Am. Bible for Catholics).

[49] Weinberg testified that homosexuality is not a choice or "preference," homosexual role models do not produce homosexuals, having a dominant mother or weak father does not "create" a gay person, gays are just as likely as heterosexuals to have a stable and loving relationship with another, that both gays and heterosexuals prefer monogamy, and that repeal of sodomy laws does not increase the incidence of homosexuality. *Wasson*, 842 S.W.2d at 489.

[50] *Id.* at 489-90.

[51] *Id.* at 490.

[52] At the end of the hearing, the County Attorney attempted to introduce into evidence some books he had brought with him. However, he failed to lay any foundation at all for the introduction and the court ruled the books inadmissible. It is difficult to determine why the prosecution made no attempt to offer any evidence, but that failure certainly may have played a role in the decision of the Kentucky Supreme Court to overturn the sodomy statute. *See id.* ("The Commonwealth . . . presented

The Fayette County District Court ruled that the state's sodomy statute violated the defendant's right to privacy as protected under the Kentucky Constitution.[53] This decision was affirmed by the Fayette County Circuit Court, which also found that the statute violated the state's equal protection guarantee.[54] A third ground, violation of state and federal protections against cruel and unusual punishment, was not successful at the district court level,[55] and neither the circuit court nor the supreme court directly addressed it.[56] The circuit court stated unequivocally that the sodomy statute was "being held unconstitutional not under the U.S. Constitution, but under our State Constitution."[57] The court also cautioned: "In the past, the courts and attorneys in Kentucky may have neglected our State Constitution and have forgotten the importance of that document in assuring Kentuckians certain inherent and inalienable rights. To maintain these rights requires a constant vigil by Kentucky citizens, attorneys and Courts."[58]

As noted by the circuit court, neglect of state constitutions is manifest in arguments and briefs. But the litigants in *Wasson* quickly discovered that state constitutions often yield a rich history of individualism or populism and invite interpretations that vary from those of the federal document. Such is the case in Kentucky, particularly in the area of privacy rights.

B. State Right to Privacy

Alcohol and tobacco use–two controversial subjects in Kentucky history–provided an abundant source of right to privacy jurisprudence in the litigation of *Commonwealth v. Wasson.* Sections 1 and 2 of the state constitution served as the framework:

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no witnesses and offers no scientific evidence or social science data.").

[53] Commonwealth v. Wasson, No. 86-M-859 (Fayette Dist. Ct. Oct. 3, 1986).

[54] Commonwealth v. Wasson, No. 86-X-48 (Fayette Cir. Ct. June 8, 1990).

[55] *Wasson*, No. 86-M-859, at 2.

[56] In fact, this argument might meet with more success in other states. Unlike Kentucky, where a sodomy conviction could result in a jail sentence of no more than one year, other states penalize sodomy with significantly longer sentences. In Oklahoma, for example, sodomy may result in a ten-year prison sentence, while in Georgia, the maximum is twenty years. *See* GA. CODE ANN. § 16-6-2 (Michie 1992); KY. REV. STAT. ANN. §§ 510.100, 532.090 (Michie/Bobbs-Merrill 1990); OKLA. STAT. tit. 21, § 886 (1991).

Although the Oklahoma Supreme Court has held that the sodomy statute is unconstitutional when applied to consenting heterosexual adults, Post v. State, 715 P.2d 1105 (Okla. 1986), the court refused to address the question of homosexuality in that case. *Id.* at 1109-10. In Bowers v. Hardwick, 478 U.S. 186 (1986), the Court did not consider an Eighth Amendment challenge, but Justice Powell noted that had the defendant raised such a challenge, a long sentence "would create a serious Eighth Amendment issue." *Id.* at 197 (Powell, J., concurring). Of course, Harmelin v. Michigan, 111 S.Ct. 2680 (1991), discussed *supra* note 18, presents a major obstacle to any Eighth Amendment challenge.

[57] *Wasson*, No. 86-X-48, at 14.

[58] *Id.* at 14-15.

> Section 1: All men are, by nature, free and equal and have certain inherent and unalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties [and] the right of seeking and pursuing their safety and happiness.
> Section 2: Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.[59]

Tobacco and alcohol cases gave these sections substance.

Commonwealth v. Campbell,[60] a case involving the consumption of alcohol in private, was the cornerstone of the defendant's argument in *Wasson* and was accepted as such by the Kentucky Supreme Court.[61] In this 1909 case, the state's highest court relied on Kentucky's 1891 constitution to find a right of privacy protecting such conduct. Commenting on a citizen's possession of alcoholic beverages for his own use, the *Campbell* court stated:

> [I]t never has been within the competency of the Legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present Constitution. The Bill of Rights would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. Man in his natural state has a right to do whatever he chooses and has the power to do. When he becomes a member of organized society, under governmental regulation, he surrenders, of necessity, all of his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires.[62]

Like the *Campbell* court, Wasson's attorneys, and later the Kentucky Supreme Court, looked to the writings of Blackstone and John Stuart Mill for support. The *Campbell* court had quoted Blackstone's *Commentaries on the Laws of England*: "Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws."[63] John Stuart Mill warranted even greater attention by

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[59] KY. CONST. §§ 1, 2.
[60] 117 S.W. 383 (Ky. 1909).
[61] *See* Commonwealth v. Wasson, 842 S.W.2d 487, 494 (Ky. 1992).
[62] *Campbell*, 117 S.W. at 385.
[63] *Id.* at 386 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *124 (1890)).

the *Campbell* court, which quoted at length from what it referred to as his "great work," *On Liberty*:

> "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute . . . .[T]he principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."[64]

In holding that the right to use alcohol is a "natural and inalienable" right, the *Campbell* court stated:

> The theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or as it has been otherwise expressed, that government is best which governs the least. Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent and to make them conform to a standard not of their own choosing, but the choosing of the lawgiver . . . .[65]

Other Kentucky cases relied on by the defendant and the Kentucky Supreme Court also embraced the Millsian underpinnings of state constitutional interpretation. In *Commonwealth v. Smith*,[66] the court held unconstitutional a statute that mandated that liquor could be stored only in one's private residence. Smith was arrested for drinking beer in the back room of an office. The court stated:

> The power of the state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weaknesses, which he keeps to himself, and which do not operate to the detriment of others, the state as such has no concern.[67]

Protection of private drinking practices continued to warrant the attention of Kentucky's highest court after *Smith*. In *Lewis v. Common-*

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[64] JOHN STUART MILL, ON LIBERTY 22-23, 28 (Univ. Mich. 1978), *earlier edition cited in Campbell*, 117 S.W. at 386.

[65] *Campbell*, 117 S.W. at 387.

[66] 173 S.W. 340 (Ky. 1915).

[67] *Id.* at 343.

wealth,[68] the court held that drinking in a private hotel room does not constitute public intoxication,[69] while in *Commonwealth v. Vincent,*[70] the court protected the act of becoming drunk in a private dwelling.[71]

The vice of tobacco smoking had also generated controversy in the state's highest court, with resolution in favor of state constitutional privacy rights. In *Hershberg v. City of Barbourville,*[72] the court, citing *Campbell,* struck down an ordinance that prohibited smoking in private residences: "To prohibit the smoking of cigarettes in the citizen's own home is an invasion of his right to control his own personal indulgences ."[73] The ordinance "unreasonably interfere[s] with the right of the citizen to determine for himself such personal matters."[74]

These earlier cases presaged the emergence of the recognized right to privacy in Kentucky. Although it is unclear when, or if, a federal constitutional right to privacy emerged, it first received widespread attention in 1890 in a *Harvard Law Review* article entitled *The Right to Privacy,* written by Samuel D. Warren and Louis D. Brandeis.[75] Thirty-eight years later, as a U.S. Supreme Court Justice, Brandeis wrote a dissenting opinion in *Olmstead v. United States*[76] in which he defined the right to privacy as "the right to be let alone–the most comprehensive of rights and the right most valued by civilized men."[77] But it was not until the 1960s that the privacy right was recognized by a majority of the Supreme Court in *Griswold v. Connecticut.*[78]

In contrast, in the state of Kentucky, the privacy rights of citizens were respected by the courts as early as 1909. In that year, not only was *Campbell* decided, but the state's highest court also recognized invasion of privacy as a tort in *Foster-Milburn Company v. Chinn.*[79] In 1927, the

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[68] 247 S.W. 749 (Ky. 1923).

[69] *Id.* at 751.

[70] 137 S.W.2d 1091 (Ky. 1940).

[71] *Id.* at 1092.

[72] 133 S.W. 985 (Ky. 1911).

[73] *Id.* at 986.

[74] *Id.*

[75] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

[76] 277 U.S. 438 (1928), *overruled by* Berger v. New York, 388 U.S. 41 (1967).

[77] *Id.* at 478 (Brandeis, J., dissenting).

[78] 381 U.S. 479 (1965). Of course, "privacy" rights involve many differing interests, ranging from "informational" or "access" privacy rights, which have been recognized for many decades, to the more recent type of privacy interest–the right to live one's personal life free of governmental interference. *See* Kevin W. Saunders, *Privacy and Social Contract: A Defense of Judicial Activism in Privacy Cases,* 33 ARIZ. L. REV. 811, 814-16 (1991) (noting that courts have on occasion confused the two).

[79] 120 S.W. 364 (Ky. 1909). Both *Commonwealth v. Campbell* and *Foster-Milburn Company v. Chinn* involved what is generally referred to as the right of privacy. But *Campbell* involved the right to live one's personal life free of governmental interference, whereas *Foster-Milburn* involved informational privacy. In *Foster-Milburn,* the court held that publishing a photograph of an individual without his consent violates his right to privacy. 120 S.W. at 366. *See supra* note 78.

court defined the right to privacy as "the right to be left alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned."[80] This rich history of state privacy rights provides fertile ground for privacy claims that might fail under the U.S. Constitution. In *Commonwealth of Kentucky v. Wasson*, it gave the Kentucky Supreme Court a basis for its decision.

C. State Equal Protection

In addition to the state right of privacy, state equal protection analysis served as another basis for the Kentucky Supreme Court's *Wasson* decision. Under the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution,[81] courts must examine certain classifications of persons by governmental actors to determine whether the classification at issue serves a sufficiently legitimate purpose. The level of scrutiny applied to any challenged classification varies with the parameters of the classified group.

If a group is classified by race, nationality, or alienage, the group is a "suspect class," and the law creating this class will be examined at the highest level, "strict scrutiny."[82] Determining whether a group is a suspect class involves the analysis of several factors: whether the group has suffered a history of purposeful discrimination, whether the discrimination has been invidious, and whether the group lacks the political power to seek redress from the political branches of government. Invidiousness is generally defined by considering several additional questions: whether the trait that defines the class bears any relation to ability to perform or contribute to society, whether the class has suffered unique disabilities because of inaccurate stereotypes, and whether the trait that defines the class is immutable.[83] Any suspect classification must be necessary, or narrowly tailored, to serve a "compelling" state interest. The same elevated scrutiny is applied when the classification impinges on "personal rights protected by the Constitution," i.e., fundamental rights.[84]

If a group is classified by gender or by the status of illegitimacy, the group is a "quasi-suspect" class, and the law creating the classification will be examined with a heightened degree of scrutiny, although not as rigorously

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[80] Brents v. Morgan, 299 S.W. 967, 969-70 (Ky. 1927).

[81] The Fifth Amendment is implicated when the federal government's action is alleged to be unconstitutionally discriminatory, the Fourteenth Amendment when the actor is state government.

[82] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

[83] *See, e.g.*, Watkins v. United States Army, 875 F.2d 699, 724-27 (9th Cir. 1989) (Norris, J., concurring); *see also Cleburne*, 473 U.S. at 440-42 (discussing legislative classifications based on gender, illegitimacy, age, and mental retardation).

[84] *See Cleburne*, 473 U.S. at 440.

as if the group were "suspect." The standard for discrimination against such a group is that the classification must be substantially related to an important state interest.[85]

Other group classifications warrant only the lowest level of scrutiny—"rational basis" review—and will be presumed valid and will be sustained if the classification is rationally related to a legitimate governmental interest.[86] Particularly when social or economic legislation is the basis of the classification, the states are allowed substantial latitude in their classification scheme.[87]

Classifications based on sexual orientation have been challenged in a number of cases, often in the context of the military's treatment of gay soldiers. Although *Bowers v. Hardwick*[88] involved neither the Equal Protection Clause nor any analogous state constitutional provision,[89] many courts have relied upon that case to reject federal equal protection challenges to statutes that discriminate against gays. For example, in *High Tech Gays v. Defense Industrial Security Clearance Office*,[90] the Ninth Circuit Court of Appeals rejected a Fifth Amendment equal protection challenge to the Department of Defense's policy of denying high-security clearances to gay applicants. The court noted that *Hardwick* stood for the proposition that "homosexual activity is not a fundamental right protected by substantive due process and that the proper standard of review under the Fifth Amendment is rational basis review."[91] Furthermore, the court noted that "it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment."[92] The court reasoned that "because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes."[93] Several other circuits have reached similar conclusions, citing *Hardwick*.[94]

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[85] *See id.* at 440-41.

[86] *See id.* at 440.

[87] *See id.*

[88] 478 U.S. 186 (1986).

[89] The opinion states in a footnote that the defendant did not raise equal protection as a basis for his argument, *id.* at 196 n.8, perhaps because the Georgia sodomy statute penalizes the acts of both homosexuals and heterosexuals. However, in his dissent Justice Blackmun suggests that a claim of discriminatory enforcement of the law might be made under the Equal Protection Clause of the U.S. Constitution. *Id.* at 202 n.2 (Blackmun, J., dissenting).

[90] 895 F.2d 563 (9th Cir. 1990).

[91] *Id.* at 571.

[92] *Id.*

[93] *Id.*

[94] *See* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).

A Ninth Circuit Court of Appeals panel rejected these arguments in *Watkins v. United States Army*, holding that gays constitute a suspect class subject to strict scrutiny. However, the court sitting en banc subsequently withdrew the opinion and ruled in favor of the soldier on estoppel grounds, finding it unnecessary to reach the constitutional issues.[95]

A significant distinction between *Hardwick* and the military cases is that the statute in *Hardwick* prohibited sodomous acts[96] whether engaged in by heterosexuals or homosexuals.[97] In contrast, the military explicitly classifies gay men and lesbians as a separate class,[98] as does the sodomy statute in Kentucky, which penalizes sodomous acts only when performed by members of the same gender.[99] This distinction was not persuasive in the cases discussed above.[100] Federal equal protection arguments have not met with success in cases involving gay persons, and in recent years, federal courts generally have not been willing to extend equal protection coverage to any other groups.[101]

Commonwealth v. Wasson[102] demonstrates that state equal protection arguments may fill the gap left by restrictive applications of federal law. The source of equal protection in Kentucky is found in sections 2 and 3 of its state constitution:

> Section 2: Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.
> Section 3: All men, when they form a social compact, are equal . . . .[103]

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[95] Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988) (2-1 decision), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) (en banc). In the earlier decision, the appellate panel explained that *Bowers v. Hardwick* did not apply to this case because *Hardwick* dealt with homosexual acts, whereas this case dealt with sexual orientation. Furthermore, concerning *Hardwick*, the panel stated: "The parties did not argue and the Court explicitly did not decide the question whether the Georgia sodomy statute might violate the equal protection clause." 847 F.2d at 1339-40. "[N]othing in *Hardwick* actually holds that the state may make invidious distinctions when regulating sexual conduct," *id.* at 1340, and "substantive due process and specifically the right to privacy . . . have little relevance to equal protection doctrine." *Id.* at 1341.

[96] The sodomous acts prohibited in the Georgia statute are oral and anal intercourse. *Hardwick*, 478 U.S. at 188 n.1.

[97] *Id.* at 188.

[98] In fact, when a self-identified heterosexual engages in an isolated homosexual act, the military is willing to forgive and forget. It will not, however, be so forgiving to one who identifies himself or herself as a gay man or lesbian. *See* Steffan v. Cheney, 780 F. Supp. 1, 10-11 (D.D.C. 1991).

[99] *See supra* note 44 and accompanying text.

[100] *See supra* notes 88-95 and accompanying text.

[101] *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991). Although the U.S. Supreme Court rejected a heightened level of scrutiny for the mentally retarded in *Cleburne*, some commentators have argued that the rational basis test applied in that case "departs from the traditional use of the rational basis test" and was, in fact, "rational basis with a bite." *See* Nancy M. Reininger, City of Cleburne v. Cleburne Living Center: *Rational Basis With a Bite?*, 20 U.S.F. L. REV. 927, 945 (1986).

[102] 842 S.W.2d 487 (Ky. 1992).

[103] KY. CONST. §§ 2, 3.

These sections are augmented by sections 59 and 60 of the state constitution, which prohibit the state legislature from passing "local or special" legislation.[104]

Kentucky's history demonstrates a commitment to equal treatment under the law. The constitution forbids "whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people ...."[105] In 1938, the state's highest court relied upon both the state constitution and the Fourteenth Amendment to the United States Constitution in a case involving the unequal application of truck licensing fees.[106] The court stated that the purpose of these constitutional protections was "to place all persons similarly situated upon a plane of equality under the law, and to fix it so that it would be impossible for any class to obtain preferred treatment ...."[107] Although classifications based on "reasonable and natural distinctions" are not prohibited, they must not be "manifestly so arbitrary and unreasonable as to impose a burden upon, or exclude one or more of a class without reasonable basis in fact."[108]

An argument advanced in the *Wasson* briefs[109] but ignored by the Kentucky Supreme Court concerned the standard for gender discrimination under the state constitution's equal protection clause.[110] In *Commonwealth v. Burke*,[111] the court struck down statutes that prohibited women who were not tavern licensees from serving as bartenders and prohibited women from consuming alcoholic beverages at a bar.[112] In doing so, the court relied upon both federal and state grounds, but imposed a strict standard of scrutiny upon the state grounds.[113] The court noted that "the state does not attempt to demonstrate any compelling interest to be served [by the gender discrimination]. Therefore, in these aspects the statutes are arbitrary and violate Section 2 of the Constitution."[114]

Even when applying the lowest level of scrutiny, rational basis, state courts have provided their own interpretations of the equal protection standard. In 1986, the Kentucky Supreme Court struck down a statute creating a so-called special statute of limitations for the construction industry.[115] The court relied on sections 2 and 3 of the state constitu-

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[104] *Id.* §§ 59, 60.
[105] Sanitation Dist. No. 1 v. City of Louisville, 213 S.W.2d 995, 1000 (Ky. 1948).
[106] Fischer v. Grieb, 113 S.W.2d 1139 (Ky. 1938).
[107] *Id.* at 1140.
[108] *Id.*
[109] Brief for Appellee at 21-23, *Wasson*, 842 S.W.2d 487 (Ky. 1992).
[110] KY. CONST. § 3.
[111] 481 S.W.2d 52 (Ky. 1972).
[112] *Id.* at 54.
[113] *Id.*, *see supra* note 103 and accompanying text.
[114] *Burke*, 481 S.W.2d at 54.
[115] Tabler v. Wallace, 704 S.W.2d 179, 188 (Ky. 1986).

tion, along with section 59, which forbids local or special legislation. In his 1986 opinion, Judge Leibson, author of the *Wasson* opinion, wrote: "[T]he Kentucky Constitution . is much more detailed and specific than the equal protection clause of the Federal Constitution."[116] He examined the record of debates surrounding the Kentucky Constitutional Convention to demonstrate the drafters' aversion to legislation favoring or discriminating against one group over another.[117] In a later case involving a similar statute, the court noted:

> Many [states] have general protection against "arbitrary power" as we have in Kentucky Constitution § 2, and guarantees of "equal" rights and protection against "grant" of "separate privileges" as we have in Kentucky Constitution § 3. But few have additional protection against local and special legislation as we have in Kentucky Constitution § 59. So far as we can determine, none has anything like the combination of broad constitutional protection of individual rights against legislative interference vouchsafed by our 1891 Kentucky Constitution.[118]

Although, like most states,[119] Kentucky has not developed equal protection jurisprudence to the same extent as privacy jurisprudence, on those occasions when it has considered the issue, its interpretation has been expansive.

Drawing upon this limited development of state equal protection doctrine, Wasson's attorneys[120] argued that a classification based on sexual orientation is inherently suspect and deserves strict scrutiny They relied heavily on the reasoning and analysis of the concurring opinion in *Watkins v. United States Army*,[121] in which Judge Norris rejected the estoppel theory on which the majority opinion relied and argued instead that the Army denied Watkins equal protection of the law [122] Combining the uncontroverted evidence at Wasson's trial with the arguments in *Watkins*, Wasson argued that the more expansive state interpretation of equal protection mandated a finding that the sodomy law is unconstitutional.[123]

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[116] *Id.* at 183.

[117] *Id.*

[118] Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 818 (Ky. 1991). Sections 59 and 60 of the state constitution were not raised in Wasson's appellate brief.

[119] *See* Morris, *supra* note 20, at 621.

[120] The three attorneys of record for defendant Wasson's brief before the Kentucky Supreme Court were Ernesto Scorsone, Pam Goldman, and Dean W. Bucalos.

[121] Brief for Appellee at 24-25, Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (citing Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989)). For a discussion of the *Watkins* case, see *supra* note 95 and accompanying text.

[122] *Watkins*, 875 F.2d at 711 (Norris, J., concurring).

[123] Brief for Appellee at 26, *Wasson*, 842 S.W.2d 487.

At Wasson's hearing, the defense had offered evidence that gays qualify as a "suspect" class: they have suffered a history of purposeful discrimination, the discrimination has been invidious because one's sexual orientation is immutable, and gays lack political power to seek redress.[124] A social historian offered extensive evidence that gay persons have suffered a history of purposeful discrimination.[125] Sex experts testified that changing one's sexual orientation can be just as difficult as changing one's race or gender and is therefore just as immutable.[126] This is not to say that these traits can never be changed. For example, one can have a sex change operation or change one's racial appearance with pigment injections.[127]

> At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity. "[I]mmutability" may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.[128]

The final factor that defines a class as "suspect" involves a finding that the class members lack sufficient political power to obtain a remedy from the political branches of government. This factor has proven to be a stumbling block in other cases involving gays. For example, in *Steffan v. Cheney*,[129] the district court stated:

> [I]t is still very clear that homosexuals as a class enjoy a good deal of political power in our society. It is beyond doubt that the homosexual community has been able to reach out and gain the attention of politicians of all sorts. One need only remember St. Patrick's Day 1991 in New York City to see Mayor David Dinkins marching in the traditionally Irish-Catholic parade with homosexual groups and activists who were important supporters during his tough mayoral campaign.[130]

The court also noted the significant attention the gay community has received lately in response to the AIDS epidemic and the fact that a few members of Congress are openly gay.[131] But if one argues that equal

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[124] *See Wasson*, 842 S.W.2d at 489-90.

[125] *See* Brief for Appellee at 24, *Wasson*, 842 S.W.2d 487.

[126] *See Wasson*, 842 S.W.2d at 489.

[127] *See Watkins*, 875 F.2d at 726.

[128] *Id.*

[129] 780 F. Supp. 1 (D.D.C. 1991).

[130] *Id.* at 7-8 (footnotes omitted).

[131] *Id.* at 8-9.

protection under the *state* constitution is the applicable law, then it makes sense to look at the political power gays have within their *state* borders. Their power may be greater in some states than in others. If gay persons have sufficient political power to obtain political redress, why do sodomy laws that penalize their sexual conduct retain their viability in some states?[132] As Judge Norris stated in *Watkins*: "It cannot be seriously disputed . that homosexuals as a group cannot protect their right to be free from invidious discrimination by appealing to the political branches."[133]

In addition to arguing that the law's classification demands strict scrutiny, Wasson asserted that the law was not narrowly tailored to achieve its own announced purposes. Based on state equal protection jurisprudence, the applicable standard in Kentucky differs from the federal standard:

> The United States Supreme Court evaluates the constitutionality of economic and social welfare legislation by determining if the legislature had a permissible purpose in mind when it adopted the law and if the classification used was reasonably related to the accomplishment of its purpose. The Kentucky courts evaluate the constitutionality of economic and social welfare legislation under the state's constitutional guarantees of equality by *closely scrutinizing* the importance of the purpose and the "fit" between the classes created and the accomplishment of that purpose.[134]

Although the purported purposes of the law were not raised at trial, on appeal the Commonwealth alleged that these purposes were to "enhance morality," to deter gays from engaging in sodomy, and to inhibit the spread of AIDS.[135] Concerning the morality issue, the defendant noted that a recent poll of Kentuckians found that 62.2% did not believe the state should regulate in-home sexual activity of adults of the same gender.[136] Furthermore, in Kentucky, the police power allows only *public* morality to be enforced by the criminal law in order to prevent harm to others. The sodomy law governs private acts.[137]

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[132] In fact, the *Wasson* case demonstrates the powerlessness of gay persons in a state like Kentucky. The law penalizes only homosexual sodomy, *see supra* note 44, it was vigorously enforced by law enforcement agencies, *see supra* note 1 and accompanying text, and when the news media reported Wasson's challenge to the law, Wasson was fired from his job. Brief for Appellee at 25, *Wasson*, 842 S.W.2d 487 (Ky. 1992).

[133] Watkins v. United States Army, 875 F.2d at 727 (Norris, J., concurring).

[134] Brief for Appellee at 27, *Wasson*, 842 S.W.2d 487 (emphasis in original) (citing Sanitation Dist. No. 1 v. City of Louisville, 213 S.W.2d 995 (Ky. 1948); City of Jackson v. Murray-Reed-Slone & Co., 178 S.W.2d 847 (Ky. 1944); City of Louisville v. Kuhn, 145 S.W.2d 851 (Ky. 1940)).

[135] *Id.* at 29.

[136] *Id.* at 16 (citing *UK Poll Finds Most Kentuckians Want Government Out of the Bedroom*, LEXINGTON HERALD-LEADER, July 19, 1991, at A1).

[137] *Id.* at 10-12. The court accepted this argument in its opinion: "The clear implication is that immorality in private which does 'not operate to the detriment of others,' is placed beyond the reach of state action " *Wasson*, 842 S.W.2d at 496 (quoting Commonwealth v. Smith, 173 S.W. 340,

As for the deterrent effects of the law, uncontroverted testimony at trial from a psychologist and a therapist demonstrated that sexual orientation is not a matter of choice. They testified that making the sexual acts of gay persons criminal would result in significant harm to them and perhaps to others.[138]

Finally, concerning the AIDS argument, no evidence was presented at trial that the statute prevented the spread of this disease. In fact, a number of witnesses, including the state's chief of contagious diseases, testified that the statute had the opposite effect by discouraging gays from presenting an accurate medical history.[139] Additional AIDS education was provided by several of the defendant's experts to demonstrate that even if this justification for the statute were accepted, the statute is not tailored narrowly to accomplish such a purpose.[140] For example, the statute penalizes sexual activity of lesbians, who are in one of the least likely groups to contract AIDS,[141] but does not penalize anal sex between heterosexuals, which poses a much greater risk. The defendant's experts stated that the most effective method for slowing the spread of AIDS was education and counseling, yet the statute posed a significant obstacle to those who might be assisted by these means.[142] Rather than improve the public health, the statute actually accomplished the opposite. This testimony, combined with the jurisprudence developed under the state constitution's equal protection clause, served as the basis for the Kentucky Supreme Court's equal protection holding.[143]

D. *The Opinion of the Kentucky Supreme Court*

The Kentucky Supreme Court rendered its opinion in *Commonwealth v. Wasson* on September 24, 1992, striking down the state's sodomy statute as unconstitutional.[144] The 4-3 decision was accompanied by two stinging dissenting opinions. In order to head off any further appeals in this seven-year-old case, the court made it clear that its decision rested solely on state constitutional grounds. It added: "We discuss *Bowers* in particular, and federal cases in general, not in the process of construing

343 (1915)).

[138] Brief for Appellee at 29-30, *Wasson*, 842 S.W.2d 487.

[139] *Id.* at 30.

[140] *Id.* at 30-31.

[141] *Id.* at 31. Of all the adult cases of AIDS in the United States through April 1991, 59% involved homosexual or bisexual men who did not use intravenous drugs, 22% involved females and heterosexual males who used intravenous drugs, 7% involved homosexual or bisexual males who also used intravenous drugs, and 3% involved persons who contracted AIDS through the receipt of blood products. AIDS AND THE LAW 5 (Wiley Law Publications Editorial Staff ed., 2d ed. 1992).

[142] Brief for Appellee at 30.

[143] *See Wasson*, 842 S.W.2d at 499.

[144] *Id.* at 502.

the United States Constitution or federal law, but only where their reasoning is relevant to discussing questions of state law."[145]

Before the court discussed the two state constitutional grounds upon which it based its decision, it corrected a misconception that had permeated the Commonwealth's argument: that sodomy as defined in the Kentucky statute had been a crime when the state constitution was adopted. The court pointed out that sodomy as defined at common law penalized only anal intercourse between men and did not penalize many of the acts prohibited in the current statute, such as oral intercourse or sexual acts between women.[146] The court stated that "the statute in question here punishes conduct which has been historically and traditionally viewed as immoral, but much of which has never been punished as criminal."[147]

The court also addressed the effect of *Bowers v. Hardwick* on the equal protection argument in this case. It has been noted above that several circuit courts of appeal have relied on *Hardwick* to rebuff federal equal protection arguments.[148] The Kentucky court rejected that approach, basing its stance on the fact that the statute at issue in *Bowers v. Hardwick* penalized both heterosexual and homosexual conduct, while the Kentucky statute penalized only homosexual conduct.[149] Having thus cleared the way for consideration of the merits of the case, the court addressed the state right of privacy.

1. *Privacy*

The court justified its departure from *Hardwick* by relying upon *difference*: difference in the texts of the federal and state constitution; difference in the traditions of the federal and state governments, particularly as to constitutional intent and common law; and difference in the application of federal and state law in other areas.

a. *Textual Differences*

The court first noted that the state constitution was not drafted as an imitation of the U.S. Constitution. In fact, some state constitutions had been developed before 1791, when the U.S. Constitution was adopted. "State constitutional law documents and the writings on liberty were more

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[145] *Id.* at 489.

[146] *Id.* at 491 (citing Commonwealth v. Poindexter, 118 S.W. 943 (Ky. 1909); United States v. Milby, 400 F.2d 702 (6th Cir. 1968) (applying the holding in *Poindexter*)).

[147] *Id.* at 491.

[148] *See supra* notes 88-101 and accompanying text.

[149] *Wasson*, 842 S.W.2d at 491.

the source of federal law than the child of federal law."[150] Kentucky's original Bill of Rights appears to have been fashioned after the constitution of Pennsylvania, which was adopted two years before Kentucky's Bill of Rights.[151] In fact, the "'original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution of 1790.'"[152]

A comparison of the language of the U.S. Constitution with that of the state constitution demonstrates the differences. The federal right of privacy arises, if at all, from "so-called 'emanations' and 'penumbras' of the First, Third, Fourth and Fifth Amendments using the Due Process Clauses in the Fifth and Fourteenth Amendments, to create a so-called zone of privacy . . . ."[153] In addition to this language, the court noted that the Preamble to the U.S. Constitution includes the "only reference to individual liberties in the Federal Constitution": the Preamble provides that the Constitution is established to "secure the Blessings of Liberty to ourselves and our Posterity."[154]

On the other hand, the Kentucky Constitution, in addition to "invoking the continuance of [God's] blessings" in its own Preamble,[155] includes a Bill of Rights that provides:

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
> First: The right of enjoying and defending their lives and liberties.
>
> Third: The right of seeking and pursuing their safety and happiness.
>
> Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.[156]

b. Differing Traditions

The court compared the federal and state privacy guarantees by examining documents surrounding the creation of the state constitution and comparing the federal and state common law interpretations of the right of privacy. The court concluded: "[W]hile we respect the decisions of the United States Supreme Court on protection of individual liberty, and on occasion we have deferred to its reasoning, certainly we are not

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[150] *Id.* at 492.
[151] *Id.*
[152] *Id.* (quoting Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 KY. L.J. 1 (1991-92)).
[153] *Id.* at 493.
[154] *Id.* (quoting U.S. CONST. pmbl.).
[155] KY. CONST. pmbl.
[156] *Wasson*, 842 S.W.2d at 494 (quoting KY. CONST. §§ 1, 2).

bound to do so, and we should not do so when valid reasons lead to a different conclusion."[157]

In addition to noting that the Kentucky Bill of Rights[158] resembles the Pennsylvania Constitution more closely than it does the U.S. Constitution, the court referred to the debates surrounding the Kentucky Constitutional Convention of 1890[159] and cases decided during that historic period that reflected an early interest in privacy rights.[160] In particular, the debates, although not using the "right of privacy" terminology developed later, focused on the individual rights held by citizens, including those in a minority, so long as their conduct did not harm anyone else.[161] Although the constitution's drafters might not have had protection of sodomous acts in mind, the court found that such conduct should be given the same protection as the acts that the drafters might have considered.[162] The court boldly stated that the Supreme Court's *Hardwick* decision was a "misdirected application of the theory of original intent."[163] To illustrate, the court noted that although the founding fathers did not have in mind the protection of persons who engage in interracial sex, the U.S. Supreme Court nevertheless recognized in *Loving v. Virginia* that "a contemporary, enlightened interpretation of the liberty interest involved in the sexual act made its punishment constitutionally impermissible."[164] In the same way, a grudging insistence on following the drafters' "original intent" in this case would be misdirected.

The court then moved to the early twentieth century liquor cases to demonstrate the long tradition of privacy rights in Kentucky. It relied primarily on *Commonwealth v. Campbell*,[165] which it quoted extensively as "overwhelming affirmation" that "[t]he right of privacy has been recognized as an integral part of the guarantee of liberty in our Constitution since its inception."[166] The cases clearly implied "that immorality in private which does 'not operate to the detriment of others' is placed beyond the reach of

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[157] *Id.* at 492.

[158] KY. CONST. §§ 1-26.

[159] 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE 1890 CONVENTION (E. Polk Johnson ed., n.d.) [hereinafter DEBATES].

[160] *Wasson*, 842 S.W.2d at 494-97.

[161] *Id.* at 494 (citing 1 DEBATES, *supra* note 159, at 614-18 (remarks of Delegate J.A. Brents of Clinton County), 718 (remarks of J. Proctor Knott of Marion County)).

[162] *Id.*

[163] *Id.* at 497.

[164] *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967)). *See also* Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988) (concluding that "sodomy and miscegenation statutes violate the equal protection clause for the same reason: Beyond the immediate harm they inflict upon their victims, their purpose is to support a regime of caste that locks some people into inferior social positions at birth.").

[165] 117 S.W. 383 (Ky. 1909).

[166] *Wasson*, 842 S.W.2d at 495.

state action by the guarantees of liberty in the Kentucky Constitution."[167] The court recognized the Millsian underpinnings of prior state constitutional interpretation, drawing from Mill's philosophy several principles: 1) that "criminal sanctions should not be used as a means to improve the citizen"; 2) that "[t]he majority has no moral right to dictate how everyone else should live"; and 3) that "[p]ublic indignation, while given due weight, should be subject to the overriding test of rational and critical analysis, drawing the line at harmful consequences to others."[168] The court noted that "enlightened paternalism" has added a restriction to Mill's philosophy, allowing for intervention "to stop self-inflicted harm such as the result of drug taking, or failure to use seat belts or crash helmets" only because the victim burdens society, not because majority morality so dictates.[169]

c. *Application of State Constitutional Law in Other Areas*

The court next demonstrated its willingness to depart from federal constitutional interpretation by citing recent opinions in which Kentucky's state constitutional jurisprudence differed from that of federal courts under the U.S. Constitution.[170] Those examples involved the protection against double jeopardy,[171] the right of confrontation,[172] and two public school cases.[173]

The court pointed to four other states which, like Kentucky, have relied on their own constitutions to strike down state sodomy statutes.[174] These cases demonstrated that Kentucky was not engaging in "leading edge" law, but was simply "part of the moving stream."[175] The court pointed out that

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[167] *Id.* at 496 (quoting Commonwealth v. Smith, 173 S.W. 340, 343 (Ky. 1915)).

[168] *Id.* at 496.

[169] *Id.* at 496-97.

[170] *Id.* at 497.

[171] *Id.* (citing Ingram v. Commonwealth, 801 S.W.2d 321 (Ky. 1990)).

[172] *Id.* (citing Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989)).

[173] *Id.* The two school cases are Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989), and Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983). *Rose* held that children from poorer school districts had a fundamental right to an education comparable to those in wealthier districts, 790 S.W.2d at 189, although the U.S. Supreme Court had ruled in 1973 that there is no such constitutional right. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). *Fannin* held that a statute that allowed a public librarian to supply books to children in private schools was unconstitutional, 655 S.W.2d at 484, although the Supreme Court had held that such a law was constitutional in Board of Educ. v. Allen, 392 U.S. 236 (1968).

[174] These states are New York, People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (striking down sodomy statute as violating rights of privacy and equal protection); Pennsylvania, Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (holding sodomy statute unconstitutional under equal protection clauses of both state and federal constitutions); Michigan, Michigan Org. for Human Rights v. Kelly, No. 88-815820 (CZ) (Wayne Co. Cir. Ct., July 9, 1990) (same); and Texas, State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992) (finding Texas constitutional protections broader than those of U.S. Constitution).

[175] *Wasson*, 842 S.W.2d at 498.

Pennsylvania, whose constitution served as the basis for Kentucky's Bill of Rights, had declared its sodomy law unconstitutional, relying on the same Millsian underpinnings used by the Kentucky court in *Commonwealth v. Campbell.*[176]

2. *Equal Protection*

The Kentucky Supreme Court immediately dispensed with the argument that *Bowers v. Hardwick* in any way concerned equal protection by noting that unlike the Kentucky sodomy statute, the Georgia statute penalized both heterosexual and homosexual acts, and thus "the Equal Protection Clause was not implicated."[177] The court also rejected the argument that traditional majority morality played a role in equal protection analysis: "'The Equal Protection Clause . . . protects minorities from discriminatory treatment at the hands of the majority. Its purpose is not to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities . . . .'"[178] If "traditional morality" were the determinant of criminality, the court stated, all nonmarital sex would be criminal, because it has traditionally been viewed as immoral: "The issue here is not whether sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished solely on the basis of sexual preference."[179]

The court did not fashion its analysis into a federal equal protection mold, nor did it employ federal designations for the various classifications. Rather, it looked to the state constitution for the proposition that "no class of persons can be discriminated against under the Kentucky Constitution. All are entitled to equal treatment, unless there is a *substantial* governmental interest, a rational basis, for different treatment."[180]

The court clearly believed that gay persons are entitled to the heightened scrutiny standard[181] and implied that they constitute a suspect class, although that terminology never received explicit articulation. The court noted that the testimony at trial, along with briefs filed by amici curiae,[182]

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[176] *Id.* at 498. In fact, as the court noted, the Pennsylvania court utilized the same Mill quotations in striking down its sodomy law as did the court in *Campbell.*

[177] *Id.* The court ignored other cases that had held that *Hardwick* precludes a federal equal protection analysis. *See, e.g.*, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).

[178] *Wasson*, 842 S.W.2d at 499 (quoting Watkins v. United States Army, 875 F.2d 699, 718 (9th Cir. 1989) (Norris, J., concurring)).

[179] *Id.*

[180] *Id.* at 500 (emphasis added). Obviously, "rational basis" has one meaning in federal equal protection analysis and another in state analysis. *See supra* notes 85-87 and accompanying text.

[181] *See supra* note 85 and accompanying text.

[182] Among the briefs filed on behalf of Jeffrey Wasson were those of: 1) the Presbyterian Church

demonstrated that although the sodomy law punishes only the specified sexual acts, its effect is to punish the sexual orientation of certain citizens. These citizens, therefore, constitute "a separate and identifiable class" entitled to equal treatment, unless the government can produce a substantial interest protected by the classification.[183]

The interests asserted by the government, however, failed to satisfy the court; many of them were found to be "simply outrageous."[184] The only one that merited the court's attention was the assertion that anal intercourse facilitates the spread of AIDS.[185] However, the statute is not tailored to address this concern; it is, in fact, underinclusive because it does not penalize anal intercourse among any group other than gay persons, even though a growing number of heterosexual women contract AIDS from a male partner.[186] Although the court does not address the overinclusiveness of the statute, that argument was also made during the trial. Lesbians are less likely to contract AIDS from sexual acts than are heterosexuals,[187] yet the statute penalizes lesbian and not heterosexual conduct. "In the final analysis," the court stated, "we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment" even though heterosexuals engage in the same conduct.[188] Kentucky's constitution does not allow for such differentiation.

E. Concurrence and Dissents: A Philosophical Divide

The concurring opinion[189] by Justice Combs cited no cases, constitutional provision, or any other source. Rather, its philosophical exegesis lays bare the great divide between the competing views of

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(U.S.A.) and the United Methodist Church; 2) the American Public Health Association; Community Health Trust, Inc.; Heart to Heart, Inc., St. Jude Guild, Inc.; and AIDS Education Coalition, Inc.; 3) American Friends Service Committee; American Jewish Committee; Central Presbyterian Church of Louisville; Lexington Friends Meeting, Religious Society of Friends (Quakers); Office of Church in Society of the United Church of Christ; Telos, Louisville; The Temple (Congregation Adath Israel Brith Sholom), Louisville; Union of American Hebrew Congregations; Unitarian Universalist Association; Unitarian Universalist Church of Lexington; Central Kentucky Council for Peace and Justice; Fellowship of Reconciliation, Central Kentucky and Louisville Chapters; 4) American Psychological Association; Kentucky Psychological Association; Kentucky Psychiatric Association; Kentucky Chapter of the National Association of Social Workers; Kentucky Society for Clinical Social Workers; and 5) Kentucky Association of Criminal Defense Lawyers. *Wasson*, 842 S.W.2d at 490 n.1.

[183] *Wasson*, 842 S.W.2d at 500.

[184] *Id.* at 501.

[185] *Id.*; *see* AIDS AND THE LAW, *supra* note 141, at 4.

[186] *See* AIDS AND THE LAW, *supra* note 141, at 5.

[187] *Id.* at 6.

[188] *Wasson*, 842 S.W.2d at 501.

[189] *Id.* at 502 (Combs, J., concurring). Chief Justice Stephens joined the concurring opinion.

the majority and dissenting justices. Justice Combs had no reservations about the majority opinion: "By writing separately, I intend to detract nothing from this historic monument to freedom, liberty, and equality—the birthright of every citizen of Kentucky. In form and substance, the majority opinion is of a stature entirely commensurate with its noble purpose."[190]

Justice Combs wrote separately only to articulate his view of constitutional law, one with which the majority presumably would agree: a constitution does not create rights for citizens; it "merely recognizes their primordial rights, and constructs a government as a means of protecting and preserving them."[191] The role of a government created by constitution is to "protect individual liberties, not to take them away."[192] He asserted that one's morality is a private matter, not to be governed by the constitution nor the majority of citizens. The government's "authority to interfere with one's liberty derives solely from its duty to preserve the liberty of another."[193] Furthermore, the fact that the right of privacy is not specifically mentioned does not matter, if one accepts Justice Combs' philosophy. As he pointed out, the constitution does not specifically provide that one has the right to "play checkers, to smile or frown, to rise or rest, to eat or fast, to look at a king," yet no one doubts that such rights exist. If one assumes that individual citizens have the right to act in any way they desire, so long as another is not harmed, then "the appropriate question is not 'Whence comes the right to privacy?' but rather, 'Whence comes the right to deny it?'"[194] Justice Combs, in his brief concurring opinion, set forth the Millsian philosophy that served as the foundation for interpreting the state constitution in prior cases and for the opinion in *Commonwealth v. Wasson.*[195]

The two dissenting opinions represent an entirely different political philosophy, one that asserts that laws are properly based on the morality of the majority. It is of no consequence, in this view, that one's evil acts

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[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.* at 503.

[195] It also represents the approach to constitutional law articulated by the dissent in *Bowers v. Hardwick. See* Goldstein, *supra* note 14, at 1093-98. Professor Goldstein asserts that the opinions in *Hardwick* reflect the difference between the political philosophies of the majority and dissent. The majority opinion embraces the philosophy of Lord Patrick Devlin, who believed that the majority (through judges and the legislature) has a right to determine the morality of citizens regardless of whether anyone else is harmed by the conduct in question. The dissent embraces the philosophy of Professor H.L.A. Hart, who believed that government could penalize private behavior only when another would be harmed by it. Professor Goldstein draws her arguments from the famous Hart-Devlin debates. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY (1963); Hart, *Immorality and Treason*, THE LISTENER, July 30, 1959, at 162, *reprinted in* THE LAW AS LITERATURE (L. Blom-Cooper ed. 1961); LORD PATRICK DEVLIN, THE ENFORCEMENT OF MORALS vi-viii (1965).

harm no one else. As one of the dissenting justices noted, "'[n]o man is an island.'"[196]

The dissenting opinion written by Justice Lambert[197] accused the court of making social policy. In attacking the privacy argument of the majority, Justice Lambert relied on the reasoning of the majority in *Hardwick*, particularly on the argument that sodomy has historically been condemned.[198] He reiterated the well-worn "original intent" doctrine to demonstrate that the state constitution's drafters did not intend to protect homosexual sodomy.[199]

Justice Lambert also attacked the equal protection argument, primarily by insisting that federal equal protection interpretation is the proper standard for the state court to follow.[200] He insisted that the sodomy statute did not create a class of homosexual persons; rather, it penalized sexual activity between persons of the same gender, whether they identified themselves as "homosexual" or not.[201] He thus differentiated the sexual acts, which the statute penalized, from the status of being a gay person, which the statute did not penalize.

His justification for employing the federal standard for equal protection analysis involved reliance upon taxation cases that analyze classifications under the state's equal protection clause. Here, Justice Lambert performed a sleight of hand, an obfuscation of sorts. He dismissed the *state* equal protection clause by asserting that "this Court held in *Delta Air Lines*[202] that the standards are the same under the Kentucky Constitution and the Fourteenth Amendment to the United States Constitution."[203] He then quoted from the same opinion: "'The Legislature has a great freedom of classification and the presumption of validity can be overcome only by the most explicit demonstration that it is hostile and oppressive against particular persons and classes.'"[204]

What Justice Lambert did not explain was that *Delta Air Lines* was a tax case that involved a legislative tax classification. The court also stated in that case, immediately after the quoted language, that "[a] single standard can be applied to both the State and Federal constitutions *in*

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[196] *Wasson*, 842 S.W.2d at 512 (Wintersheimer, J., dissenting) (quoting JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS 107, 108 (Univ. Mich. 1965)).

[197] *Id.* at 503 (Lambert, J., dissenting). Justice Reynolds joined in this dissent.

[198] *Id.* at 503. In his dissent, Justice Lambert cites the Bible to demonstrate that sodomy was severely punished in Biblical times. The book of Leviticus, cited by this Justice, indeed imposes the death penalty upon men who engage in sexual intercourse together, but it also imposes the death penalty upon those who commit adultery. *Leviticus* 20:10, 20:13 (New Am. Bible for Catholics).

[199] *Wasson*, 842 S.W.2d at 504, 507 (Lambert, J., dissenting).

[200] *Id.* at 507-08.

[201] *Id.* at 507.

[202] Delta Air Lines v. Commonwealth Revenue Cabinet, 689 S.W.2d 14 (Ky. 1985).

[203] *Wasson*, 842 S.W.2d at 508 (Lambert, J., dissenting) (citation omitted).

[204] *Id.* (quoting *Delta Air Lines*, 689 S.W.2d at 18).

regard to classification for sales tax exemptions."[205] As for the legislature's "freedom of classification," the court in *Delta Air Lines* relied upon a U.S. Supreme Court case that stated: "The broad discretion as to classification possessed by a legislature *in the field of taxation* has long been recognized."[206] This large area of discretion "is needed by a legislature in formulating sound tax policies" and "in taxation, even more than other fields, legislatures possess the greatest freedom in classification."[207] Thus, Justice Lambert equated classifications based on tax status, which deserve a presumption of validity, with classifications based on sexual orientation, which by their very nature deserve no such presumption, unless the legislature is presumed to have special expertise and interest in that most intimate of areas.

Once he determined that the proper standard to apply for equal protection analysis is a federal standard, Justice Lambert had no difficulty finding that the defendant's analysis must fail. He asserted that the "[p]rotection of public 'health, safety and morality'" is a legitimate state interest.[208] He then asserted that the AIDS epidemic "indisputably originated in this country in the homosexual community" and that *Hardwick* "forthrightly [held] that the rational basis standard was satisfied by majority sentiments as to the immorality of homosexuality."[209] Justice Lambert thereby incorporated the *federal* interpretation of the *Due Process Clause* into the *state* interpretation of its own *equal protection clause*. By that analysis, the challenge to the Kentucky sodomy law must, of course, fail.

Justice Wintersheimer's dissent was long, emotional, and virulent. Not surprisingly, only one other justice associated himself with Wintersheimer's dissent and then by concurring only in the result.[210] The opinion includes the following incendiary language: The majority opinion "totally misstates the case";[211] "in the rambling rhetoric of over 9,000 words, the majority opinion blithely tramples on the rights of the majority of the public";[212] "'[e]manations and penumbras' are more suited to a seance or a psychic experience rather than to a judicial opinion";[213] the philosophy of John Stuart Mill is "discredited and irresponsible";[214]

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[205] *Delta Air Lines*, 689 S.W.2d at 18 (emphasis added).

[206] Madden v. Kentucky, 309 U.S. 83, 87-88 (1940) (emphasis added), *cited in Delta Air Lines*, 689 S.W.2d at 18.

[207] *Id.* at 88.

[208] *Wasson*, 842 S.W.2d at 508 (Lambert, J., dissenting) (quoting Bosworth v. City of Lexington, 125 S.W.2d 995, 1000 (Ky. 1930)).

[209] *Id.* at 509 (Lambert, J., dissenting).

[210] *Id.* (Wintersheimer, J., dissenting). Justice Reynolds concurred in the result only.

[211] *Id.*

[212] *Id.* at 510.

[213] *Id.* at 512.

[214] *Id.* at 519.

"[t]he average person must wonder if the majority opinion means that telemarketers can now invade Kentucky with legal telephone calls to solicit consensual sodomy? What is to prevent it?"[215] He ended his dissent by suggesting a constitutional amendment to make sodomy a crime as a matter of constitutional law.[216]

Justice Wintersheimer launched a buckshot attack on the majority opinion, taking aim at nearly every aspect of every argument advanced by the majority. He initially asserted that the court had no need to address the issue of privacy because the act with which the defendant was charged was *solicitation* to commit sodomy, a "public" act involving the proposition of a stranger on a public street.[217]

The Justice then asserted that gay persons were not a protected class under *federal* constitutional law,[218] that the act punished conduct rather than a class of people,[219] that gays were more promiscuous than heterosexuals,[220] that anal sodomy (presumably engaged in by gays only) spread AIDS,[221] that no right of privacy can be found in the original intent of the state constitution's drafters,[222] and that the morality of the majority can legally control the morality of the minority.[223] He turned the privacy argument on its head by referring numerous times to the privacy rights of *citizens* who might be accosted on the streets by gay persons soliciting sex.[224] He stated that "anyone who approaches this subject with an intelligent attitude of open-mindedness" would agree with the views of the U.S. Supreme Court on the issue of privacy,[225] then noted: "Of course [sodomy] has been considered morally wrong since the beginning of time, but this is a secular legal question here. The very word 'sodomy' is derived from the biblical name of the city of Sodom which was destroyed by God for its perverse behavior."[226]

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[215] *Id.*

[216] *Id.*

[217] *Id.* at 510. Justice Wintersheimer noted that the crime with which Wasson was charged was solicitation, not sodomy itself, and that the solicitation took place on a public street. As the district court opinion succinctly notes, "[i]f the statute outlawing the conduct he allegedly solicited is invalid, then he cannot be convicted of an offense for soliciting that conduct." Commonwealth v. Wasson, No. 86-M-859 (Fayette Dist. Ct. Oct. 3, 1986), slip op. at 1. The solicitation occurred on the instigation of an undercover police officer who engaged the defendant in suggestive conversation for nearly twenty-five minutes before the defendant finally committed the act necessary to charge him–inviting the police officer to his home to engage in sexual activity.

[218] *Wasson*, 842 S.W.2d at 511.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.* at 518-19; *see supra* note 217.

[225] *Id.* at 510.

[226] *Id.* at 511; *see supra* note 48 and accompanying text. Lot's counteroffer to the townsmen to rape his virgin daughters is apparently not as disturbing as the possibility of homosexual sex; at least,

In any event, Justice Wintersheimer vehemently disagreed with the majority opinion and believed that the judiciary had overstepped its bounds and violated the separation of powers doctrine: "Any change in the Kentucky sodomy statute must be made [by] the legislature . . . ,"[227] a change he clearly would not welcome. This became clear when, at the end of his opinion, he implicitly invited a move to amend the state constitution to criminalize sodomy as a matter of constitutional law.[228]

III. AND BEYOND

Although Justice Wintersheimer's suggestion for a constitutional amendment may appear extreme, two states have already considered similar proposals. In November 1992, Oregon and Colorado voters cast ballots to amend their constitutions either to prevent legislation protective of gay rights or to classify homosexuality as "abnormal, wrong, unnatural or perverse."[229] Thus it appears that gays will be engaged in an uphill battle in the future to preserve their hard-fought gains, and state constitutional law may be the only way to do so.

Even if the sodomy laws are not currently being enforced in some states, "unenforced sodomy laws are the chief systematic way that society as a whole tells gays they are scum."[230] Furthermore, the fact that homosexual sex is outlawed serves as a sword of Damocles over the heads of gay men and lesbians, constantly reminding them that it could fall without notice. Additionally, "[b]y branding all gays as criminals, the sodomy prohibition provides a justification for other forms of discrimination . . . in such areas as employment, professional licensing, free speech, immigration, adoption, and child custody."[231]

Sodomy laws have been undergoing transition for the past thirty years, first legislatively and more recently, judicially. From 1961, when Illinois decriminalized sodomy, until the 1980s, the trend moved toward

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that part of the story seems not to have received as much attention.

[227] *Wasson*, 842 S.W.2d at 515.

[228] *Id.* at 519.

[229] Timothy Egan, *Anti-Gay Backlashes Are on 3 States' Ballots*, N.Y. TIMES, Oct. 4, 1992, at E4. Oregon's rejected amendment, Ballot Measure 9, would not only have classified homosexuality as wrong or perverse, but would also have made it "the government's job to actively discourage homosexuality at all levels of state authority." *Id.* In Portland, Maine, voters also defeated an initiative that would have repealed a recently enacted ordinance that prohibited discrimination based on sexual preference. *See* Andrew Blum, *Jurists, Initiatives on Ballot*, NAT'L LAW J., Nov. 16, 1992, at 1, 31. However, Colorado voters approved a proposal that "blocked the state or any political entity from adopting or enforcing gay rights protections, thereby rescinding laws in Denver and Aspen." *Id.*

[230] Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 53 (1986-87).

[231] Koppelman, *supra* note 164, at 145.

legislative repeal of sodomy statutes.[232] At the same time, some states narrowed the reach of their sodomy statutes, limiting them to homosexual acts. "Since 1973, eight states have amended their laws to specify that oral or anal sex is prohibited only between persons of the same sex."[233] In 1993, twenty-four states and the District of Columbia still criminalize sodomy between consenting adults.[234]

In the past fifteen years, the movement toward legislative repeal or modification appears to have stopped, and the battle has instead moved into the courts.[235] *Bowers v. Hardwick* did much to stem that tide, at least in terms of attacking sodomy statutes on federal constitutional grounds. And, perhaps as a side effect of that case, efforts such as those in Oregon and Colorado are under way to turn back decisions that some have perceived as granting gays too much protection. The most vocal advocates of these efforts no doubt embrace the political philosophy that allows the morality of the majority to govern the morality of the minority. As a result, it does not seem likely that state legislatures will serve as champions of gay rights. State constitutional law may represent the only means by which gays may seek redress, either through the use of state privacy doctrine or through equal protection analysis.[236]

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[232] *See* Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 538 (1992); Juli A. Morris, *supra* note 20, at 610. Wisconsin, the last state to repeal a sodomy law, did so in 1983. Hunter, *supra*, at 538.

[233] Hunter, *supra* note 232, at 538. Those states are Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, Tennessee, and Texas. *Id.* at 538 n.30. But courts in two of those eight states, Kentucky and Texas, have now declared the statutes unconstitutional. *See* Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992). The Texas decision was based solely on the state right of privacy. Oklahoma has interpreted its gender-neutral sodomy law to be unconstitutional as it relates to heterosexuals, but it has refused to interpret the statute as it relates to gays. *See* Post v. State, 715 P.2d 1105 (Okla. 1986).

[234] ALA. CODE § 13A-6-65(a)(3) (1982); ARIZ. REV. STAT. ANN. §§ 13-1411, -1412 (1989); ARK. CODE ANN. § 5-14-122(b) (Michie 1987); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. ANN. § 800.02 (West 1992); GA. CODE ANN. § 16-6-2 (Michie 1992); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (1988); LA. REV. STAT. ANN. § 14:89 (West 1986); MASS. ANN. LAWS ch. 272 § 34 (Law. Co-op 1992); MD. CODE ANN., CRIM. LAW §§ 553-54 (1992); MICH. COMP. LAWS ANN. § 750.158, .338, .338(a)-(b) (West 1991); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1972); MO. REV. STAT. § 566.090 (1991); MONT. CODE ANN. § 45-5-505 (1991); NEV. REV. STAT. ANN. § 201.190 (1991); N.C. GEN. STAT. § 14-177 (1991); 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. 1985); TENN. CODE ANN. § 39-13-510 (1991); TEX. PENAL CODE ANN. § 21.06 (West 1988); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN § 18.2-361 (Michie 1992).

[235] *See, e.g.*, State v. Ciuffini, 395 A.2d 904 (N.J. Super. Ct. 1978) (instructing that consent is available as defense); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (striking down sodomy statute); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (declaring sodomy statute unconstitutional).

[236] Although only a handful of states (ARK. CODE ANN. § 5-14-122(a)(2) (Michie 1987); KAN. STAT. ANN. § 21-3505 (1988); MO. REV. STAT. § 566.090 (1991); MONT. CODE ANN. § 45-5-505 (1991); NEV. REV. STAT. § 201.190 (1991); TENN. CODE ANN. § 39-13-510 (1991) and Oklahoma by interpretation, Post v. State, 715 P.2d 1105 (Okla. 1986)) limit their sodomy law to those of the same gender, equal protection analysis may also apply if the gender-neutral sodomy law is discriminatorily enforced. *See Bowers v. Hardwick*, 478 U.S. 186, 202 n.2 (1986) (Blackmun, J.,

If the mood of the country is changing in the area of gay rights, reflecting what some gay rights advocates call a "backlash"[237] or what others might call a judicial change from classical liberalism to classical conservatism,[238] then it becomes imperative to examine state constitutional law to determine whether it can serve where federal constitutional law or state and federal legislative action fail.

In other areas as well, state constitutional law may provide the only available means to protect the rights of individuals. Those who traditionally depended upon the U.S. Constitution for such protection–in the area of abortion rights, the right to die, or in other areas where one's private decision making should be protected from majority morality–would do well to examine instead their own state's history of providing for the autonomy of its citizens, both through its common law and through the creation of its own constitution.

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dissenting).

[237] Egan, *supra* note 229.

[238] *See* Goldstein, *supra* note 14, at 1099. Professor Goldstein discusses the differences between these two political philosophies by comparing the majority and dissenting opinions in Bowers v. Hardwick, 478 U.S. 186 (1986), with the famous Hart-Devlin debates. *See supra* note 195. In both instances, she argues, the battle was "between two incommensurable and incompatible systems of fundamental values: classical liberalism and classical conservatism." Goldstein, *supra*, at 1099. She defines the values embodied in philosophies: "Individual freedom is of paramount value for classical liberalism, and the continued existence of society in its present form is of paramount value for classical conservatism." *Id.*