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The Supreme Court Refused to Expand the Right of Privacy to Include Homosexual Sodomy in Bowers v. Hardwick

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I. INTRODUCTION

The constitutional right of privacy is a judicially created doctrine that is said to emanate from the "penumbra"[1] of the Bill of Rights.[2] This right of privacy has been recognized in specific areas of individual rights such as freedom of choice in marital, family and procreative matters.[3] The right of privacy has also evolved into individual

1. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold*, Justice Douglas found a Connecticut statute forbidding the use of contraceptives repugnant to the marital right "of privacy created by several fundamental constitutional guarantees." *Id.* at 485. He stated that marriage is "a right of privacy older than the Bill of Rights." *Id.* at 486. Justice Douglas stated for the first time that the "specific guarantees in the Bill of Rights have penumbras . . . that help give them life and substance." *Id.* at 484. His theory was that citizens have certain "fundamental constitutional rights [even absent specific enumeration in the Bill of Rights] . . . which have a value . . . essential to individual liberty." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 457 (2d ed. 1983) [hereinafter J. NOWAK].

2. The Bill of Rights was made applicable to the states via the Court's "incorporation" of these provisions into the fourteenth amendment. J. NOWAK, *supra* note 1, at 455. The due process clause of the fourteenth amendment was increasingly invoked by litigants claiming protection against state action. "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The ability of the Court to enforce the guarantees enumerated in the Bill of Rights on the states created conflict among legal scholars. It is generally agreed that "[t]oday virtually all of the Bill of Rights have been incorporated into the fourteenth amendment and made applicable to the states." J. NOWAK, *supra* note 1, at 455. For an excellent treatment of the historical interpretation of the fourteenth amendment, see Fairman, *Does The Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

3. In Loving v. Virginia, 388 U.S. 1 (1967), the Court struck down a statute which prohibited interracial marriage because it deprived individuals of the freedom to choose whom to marry. In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court held unconstitutional a statute that limited the occupancy of a dwelling unit to members of a "nuclear" family. Justice Powell, in writing for the majority, noted that "certain rights associated with the family [had] been accorded shelter under the Fourteenth Amendment's Due Process Clause," and that "the family choice involved in this case . . . [should be accorded] the force and rationale of these precedents." *Id.* at 501. In Roe v. Wade, 410 U.S. 113 (1973), the Court struck down a Texas statute which proscribed abortions except to save the life of the mother. The majority held the statute violated the "right of personal privacy [which] included the abortion decision" and it violated the due process clause of the fourteenth amendment. *Id.* at 154.

More recently, in Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169

freedom of choice in certain other highly personal activities. However, the confines of this right remain undefined.[4] The Court has not recognized an individual's constitutional right to engage in private consensual sex.[5]

The Supreme Court had the opportunity to recognize such a right in *Bowers v. Hardwick*.[6] Michael Hardwick, a homosexual, challenged the constitutionality of the Georgia statute criminalizing sodomy.[7] Hardwick claimed that he had a constitutionally protected right of privacy to engage in "nonprocreative sex."[8] The issue presented was whether the Constitution granted a "fundamental right to homosexuals to engage in sodomy."[9] Much to the consternation of Hardwick and homosexuals alike,[10] the Court refused to extend the right of privacy, holding "that none of the rights [previously recognized] . . . bears any resemblance to the claimed constitutional

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(1986), the Court struck down a statute that required "too" much information about the woman and the circumstances under which she had an abortion. The Court felt that a "woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly," thereby, "chill[ing] the exercise of constitutional rights." *Id.* at 2182. The Court continued to protect the freedom of choice related to procreative matters. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965).

4. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 886 (1978) [hereinafter L. TRIBE]. Professor Tribe believes that definitional attempts to classify the right of privacy and personhood are unsuccessful because they "leave essentially unspecified the substance of what is being protected, telling us neither the character of the choices or the information we are to classify as special." *Id.* at 887.

5. Bowers v. Hardwick, 106 S. Ct. 2841 (1986). Justice White, writing for the majority, stated that "any claim that these [privacy] cases nevertheless stand for the proposition that any kind of private sexual conduct . . . is constitutionally insulated from state proscription is unsupportable." *Id.* at 2844. *See* Post v. Oklahoma, 715 P.2d 1105, *cert. denied*, 107 S. Ct. 290 (1986). In *Post*, a heterosexual couple engaged in oral and anal sex and the male was charged under section 886 of title 21. *Post*, 715 P.2d at 1106. *See* OKLA. STAT. tit. 21, § 886 (1983). The Court of Criminal Appeals of Oklahoma found that the male did not violate the statute as his "right of privacy . . . includes the right to select consensual adult partners." *Id.* at 1109. *See also* J. NOWAK, *supra* note 1, at 735.

6. 106 S. Ct. 2841 (1986).

7. The code reads in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .

GA. CODE ANN. § 16-6-2 (1984).

8. Brief for Respondent at 12, Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (No. 85-140). Hardwick believed that the Court's holding in previous right of privacy cases mandated "heightened scrutiny . . . of state restrictions on non-procreative sex . . . whether between married persons or unmarried individuals." *Id.*

9. *Hardwick*, 106 S. Ct. at 2843.

10. Freiberg, *Supreme Court Decision Sparks Protest*, THE ADVOC., Aug. 5, 1986, at 12. Freiberg lists the gay demonstrations that took place as a result of the Court's holding in *Hardwick*.

right."[11] Justice White's majority opinion in *Hardwick* signaled the continued reluctance of the Court to recognize an individual's right to engage in sex,[12] and slowed the previous trend of its expansion of the right of privacy.[13]

In examining the Court's exercise of judicial restraint, this note begins by briefly discussing the development of the fundamental right of privacy. It will trace the expansion of this protected right as it pertains to the range of privacy interests held sacrosanct by the Court. In addition, this note will examine the majority and concurring opinions and their rationales for exercising judicial restraint and set forth the arguments made by the dissenting opinions. This note will conclude with an analysis of the impact of the decision in *Hardwick* on society in general and homosexual rights in particular.

II. HISTORICAL BACKGROUND

The specific right of "privacy" was derived from the more general doctrine of "fundamental rights."[14] It was not until the 1937[15] case of

11. *Hardwick*, 106 S. Ct. at 2844.

12. *Id. See also* J. NOWAK, *supra* note 1, at 758. Nowak discusses the Court's rationale regarding the right of privacy as it relates to sexual activity.

13. *See supra* note 3 for an analysis of the Court's cases expanding the right of privacy. *Hardwick* signaled a change in the Court's previous trend of expansion.

14. The contextual history of "fundamental rights" is bifurcated. Professor Tribe refers to the first era as the "Lochner era, 1897-1937." L. TRIBE, *supra* note 4, at 435. He believes that prior to 1937, the Court was more willing to invalidate economic legislation as a violation of the due process clause of the fourteenth amendment. It was during this period that the Court scrutinized a state's economic legislation pursuant to the due process clause of the fourteenth amendment. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897), where the Court invalidated a statute which prohibited insurance contracts unless the insurance company was licensed to do business in Louisiana. The Court stated the statute was unconstitutional because it "deprive[d] the citizen of [the right to contract] . . . without due process of law." *Id.* at 591.

In Lochner v. New York, 198 U.S. 45 (1905), the Court invalidated a state law that limited the number of hours a baker could work. The Court held that "the right to purchase or sell labor is part of the liberty protected by [the fourteenth] amendment" and therefore held the law unconstitutional. *Id.* at 53. According to Professor Nowak, the *Lochner* decision exemplified the Court's willingness to use the substantive due process doctrine "to protect the free enterprise system as it was embodied in the concept of laissez faire" during the period of 1897-1937. J. NOWAK, *supra* note 1, at 438.

The second era began with the Court's 1937 decision in Palko v. Connecticut, 302 U.S. 319 (1937). In *Palko*, the Court held that citizens have certain fundamental rights not specifically enumerated in the Bill of Rights which are "implicit in the concept of ordered liberty." *Id.* at 325.

15. *See* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965) (analysis of the historical setting prior to the *Palko* decision).

Palko v. Connecticut[16] that the Court first held that citizens have fundamental rights "brought within the Fourteenth Amendment by a process of absorption."[17] In the majority opinion, Justice Cardozo discerned these substantive fundamental rights "to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, [become] valid as against the states."[18] As a result of the findings in *Palko*, the Court began to recognize certain fundamental rights not specifically enumerated in the Bill of Rights.[19] Subsequently, one of the fundamental rights recognized was the right of privacy.

A. The Fundamental Right of Privacy

The right of privacy was born in Justice Harlan's[20] dissenting opinion in *Poe v. Ullman*.[21] In *Poe*, the majority declined to adjudicate the constitutional issue presented by a Connecticut statute criminalizing the use of contraceptives by married couples, resting its holding on the lack of a justifiable controversy.[22] In his dissent, however, Justice Harlan stated that the statute violated the fourteenth amendment and was an "intolerable and unjustified invasion of *privacy* in the conduct of the most intimate concerns of an individual's personal life."[23]

It was not until four years later, in *Griswold v. Connecticut*,[24] that the Court formally recognized that individuals have certain constitutional rights of privacy.[25] In *Griswold*, the same Connecticut statute challenged in *Poe* was deemed unconstitutional.[26] Justice Douglas, writing for the majority, espoused for the first time the Court's view

16. 302 U.S. 319 (1937).
17. *Id.* at 326.
18. *Id.* at 325.
19. Kauper, *supra* note 15, at 237.
20. This may be misleading. The concept was originally stated in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). However, their theory of privacy rested in the area of tort law and the "freedom from intrusion . . . [and] from disclosures of information about the individual's private life." *Id.* Justice Harlan's application was the first to be centered on constitutional principles.
21. 367 U.S. 497 (1961).
22. *Id.* at 509.
23. *Id.* at 539 (emphasis added).
24. 381 U.S. 479 (1965). *See also supra* note 1.
25. 381 U.S. at 482-84.
26. The Court's seemingly paradoxical conclusions in *Poe* and *Griswold* reflected a change in the composition of the Court. In *Poe*, 367 U.S. at 498, two of the five Justices who voted to uphold the statute were Justice Frankfurter and Justice Whittaker. Justice Frankfurter retired on August 28, 1962, and President John F. Kennedy appointed Justice Goldberg. *See* Letter from John F. Kennedy to the United States (Sept. 28, 1962) (discussing Mr. Justice Goldberg's nomination). Justice Whittaker retired on April 1, 1962, and President John F. Kennedy appointed Justice White. *See* Letter from John F. Kennedy to the United States (April 12, 1962) (discussing appointment of Mr. Justice White). In *Griswold*, the two new Justices voted to hold the statute uncon-

that the "specific guarantees in the Bill of Rights have penumbras . . . that help give them life and substance."[27] He stated that marriage is a "right . . . older than the Bill of Rights,"[28] and held that the statute violated this sense of privacy in marriage. Therefore, the statute was unconstitutional. Thus, the "constitutional . . . right of privacy [formally] emerged out of the background of the Constitution and Bill of Rights."[29] *Griswold*, however, opened the doors for subsequent judicial definition of the implied right of privacy.

B. The Right of Privacy Concerning Marriage, Family and Procreation

Generally, *Griswold* is construed as the beginning[30] of the Court's recognition of the right of privacy. Its progeny expand and define protection for a range of individual privacy interests.[31] The following cases exemplify the Court's restrictive, although activist, interpretation of the right of privacy.

In *Loving v. Virginia*,[32] the Court struck down a statute which barred interracial marriage. Justice Stewart, writing for the majority, stated that "[t]he Fourteenth Amendment requires that the *freedom of choice to marry* not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and

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stitutional. *Griswold*, 381 U.S. at 486, 502 (Goldberg, J., concurring) (White, J., concurring).

More importantly, Justice Goldberg's concurring opinion influenced how Justice Brennan and Chief Justice Warren voted. However, his opinion did not represent the recognition of individual privacy rights through the fourteenth amendment. *Griswold*, 381 U.S. at 486. Rather, Justice Goldberg believed that "Connecticut's birth-control law unconstitutionally intrude[d] upon the right of marital privacy . . . [not via the due process clause of the fourteenth amendment but via] the language and history of the ninth amendment." *Id.* at 486-87. *See also* Kauper, *supra* note 15, at 244-46, for an analysis of Justice Goldberg's concurring opinion.

27. 381 U.S. at 484. *See also supra* note 1.

28. 381 U.S. at 486.

29. D. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY 178 (1979) [hereinafter D. O'BRIEN].

30. *Griswold* was decided in 1965. The Court in the 1923 decision of Meyer v. Nebraska, 262 U.S. 390 (1923), invalidated a statute which prohibited all grade schools from teaching subjects in any language other than English. However, the holding did not represent the recognition of individual privacy rights. The Court's decision "may only have reflected the attitude of the Court towards government regulation during the apex of 'substantive due process.'" J. NOWAK, *supra* note 1, at 735. *See also supra* note 13.

31. D. O'BRIEN, *supra* note 29, at 191-94.

32. 388 U.S. 1 (1967). *See also supra* note 3.

cannot be infringed by the State."[33]

The watershed case for the protection of family interests is *Moore v. City of East Cleveland*.[34] In *Moore*, the city's statute "limit[ed] occupancy of a dwelling unit to members of a single family."[35] This limitation on the definition of a family was held unconstitutional. Justice Powell, writing for the majority, argued that the statute's exclusion of extended families "slic[ed] deeply into the family itself."[36] " '[The] Court has long recognized . . . *freedom* of *personal choice* in matters of . . . *family life* [as] one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' "[37]

Seven years after *Griswold*,[38] the Court again confronted the right of privacy as it pertained to procreation in *Eisenstadt v. Baird*.[39] The majority held that *individuals*, whether married or single, have the right to use contraceptives.[40] Justice Brennan, writing for the majority, expressed the belief that "[i]f the right of privacy means anything, it is the right of the *individual* . . . to be free from governmental intrusions into matters so fundamentally affecting persons as the decision whether to bear or beget [a] child."[41] In *Carey v. Population Services International*,[42] the Court further expanded the right when it held that minors had the right to receive contraceptives without parental consent.[43] In *Carey*, Justice Brennan held that "access [for all persons] is essential to exercise of the constitutionally protected right of decision in matters of childbearing."[44]

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33. 388 U.S. at 12 (emphasis added).

34. 431 U.S. 494 (1977). *See supra* note 3. *See also* Comment, *Moore v. City of East Cleveland, Ohio: The Emergence of the Right of Family Choice in Zoning*, 5 PEPPERDINE L. REV. 547 (1978) (interpretation of the Court's decision as it related to the constitutional right of privacy concerning the family).

35. 431 U.S. at 495-96. The statute defined the single family as the individual members of a single housekeeping unit, limited to the nominal head of household, his or her spouse, and the children and parents of either or both. *Id.* at 496 n.2.

36. *Id.* at 498.

37. *Id.* at 499 (emphasis added) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974). The other personal choices the Court has "long recognized" include the following: Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the parent's due process right to send their children to private schools); and Meyer v. Nebraska, 262 U.S. 390 (1923) (the parent's due process right to have their children taught a foreign language). *See supra* note 13 regarding individual due process rights during the *Lochner* era.

38. 381 U.S. 479 (1965).

39. 405 U.S. 438 (1972).

40. *Id.* The Court found no rational basis for the statute to distinguish between married and unmarried persons. *See generally* J. NOWAK, *supra* note 1, at 590-99 which describes the standards of review for determining the rationality behind a statute.

41. D. O'BRIEN, *supra* note 29, at 188 (footnote omitted) (emphasis in original).

42. 431 U.S. 678 (1977).

43. *Id.* The Court determined no legitimate state interest existed justifying a state requirement of parental consent. *Id.* at 694.

44. *Id.* at 688-89.

It was precisely Justice Brennan's rationale in *Carey* that led to the Court's decision in the 1973 case of *Roe v. Wade*.[45] The Court discerned that a new "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[46] There are many critics of the Court's 1973 decision in *Roe v. Wade*.[47] Some believe that the decision was "posited" on a theory that " 'the individual is sovereign . . . [and] his independence absolute.' "[48]

Others feel that the Court was clearly "prepared to adopt a very broad view of its own constitutional powers."[49] Nonetheless, the Court's holding further expanded the coverage afforded by the right of privacy.

The right of privacy as expanded by the Court now encompasses the following: the freedom to marry anyone;[50] the freedom for married,[51] single,[52] and minor[53] women to use contraceptives; the freedom to live with extended family relations;[54] and the freedom for a woman (single or married) to decide whether or not to have an abortion.[55] While the outer limits of privacy have not been reached by

45. 410 U.S. 113 (1973).

46. *Id.* at 153.

47. *See, e.g.,* Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (critical analysis of the Court's standing and mootness in abortion cases); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (critical analysis of the Court's use of substantive due process power to expand the right of privacy).

48. Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 N.C.L. REV. 1, 99 (1976) (quoting John Stuart Mill, ON LIBERTY 21-22 (3d ed. 1864).

49. Epstein, *supra* note 47, at 159. Also, Professor Tribe adroitly stated the following:

> The Court intervened in areas at least partially frozen by institutional constraints. In *Roe* . . . the entanglement of religious issues . . . created unusual legislative rigidity . . . . [This] was exacerbated by the relatively lax enforcement of abortion laws . . . . [A]t [this] juncture, abortion was . . . available to the relatively wealthy; this legislatively influential group . . . ha[d] less interest in exerting pressure for in-state reform. All would have depended, therefore, upon the purely ideological clash between the advocates of female liberation and the advocates of fetal rights.

Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 317-18 (1975).

50. Loving v. Virginia, 388 U.S. 1 (1967). *See supra* note 3.

51. Griswold v. Connecticut, 381 U.S. 479 (1965). *See supra* notes 1 and 3.

52. Eisenstadt v. Baird, 405 U.S. 438 (1972). *See supra* text accomnpanying note 40.

53. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). *See supra* text accompanying note 42.

54. Moore v. City of E. Cleveland, 431 U.S. 494 (1977). *See supra* note 3.

55. Roe v. Wade, 410 U.S. 113 (1973). *See supra* note 3.

the Court,[56] "the decisions that individuals may make without unjustified government interference are personal decisions [limited] to marriage, procreation, [and] family relations."[57]

C. *The Right of Privacy for Sexual Relations*

The emerging issue is whether a constitutional right exists, in the "penumbra"[58] of the Bill of Rights, to engage in private, sexual practices outside the realm of the traditional marriage or procreative relationships. Although the Court has recognized as sacrosanct some rights of privacy, it has refused to recognize an individual's constitutional right to engage in private consensual sex.[59] Most of the statutes that regulate private sexual practices criminalize "unnatural" sex[60] and are premised on the general belief that the conduct is immoral.[61] The sexual conduct that has created the most vociferous controversy is homosexual sodomy.[62] Justice Harlan succinctly stated the present position of the Court, even though spoken twenty-five years earlier, when he stated[63] "I would not suggest that . . . homosexuality . . . [is] immune from criminal inquiry, however privately practiced."[64]

The Court had never before given plenary consideration to whether a homosexual had a constitutional right of privacy to engage in homosexual activity until *Hardwick*. Prior to *Hardwick*, the Court had refused to review a lower court's conviction of an individual engaged in private, consensual homosexual sodomy.[65] In another decision, the Court summarily affirmed[66] a lower court's holding that

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56. D. O'BRIEN, *supra* note 29, at 191.

57. *Id.*

58. *See supra* note 1.

59. *See* Will, *What Right To Be Let Alone?*, Wash. Post, July 3, 1986, at A23, col. 6. Although George Will supported the decision, he criticized the Court's opinion in *Hardwick*, not for failure to recognize sexual autonomy per se, but for couching its rationale in the finding that the Constitution's language and design prohibited recognition of the right to engage in homosexual sodomy. George Will believed the Court really "has been skiing down a slippery slope of judicial legislation, manufacturing privacy rights lickety-split. Now White and four others want to stop." *Id.* George Will apparently believed that if the Court is manufacturing rights of privacy, there is no logical reason to stop at homosexual sodomy.

60. Bowers v. Hardwick, 106 S. Ct. at 2844-45 n.5, 6 (1986).

61. *Id.* at 2846. *But see infra* note 175, for a discussion of a current American poll supporting the view that oral sexual acts are within normal societal standards.

62. Stengal, *Sex Busters*, TIME, July 21, 1986, at 12. He believed that the sodomy statutes are a manifestation of a new moral militancy evident in communities around the country.

63. Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

64. *Id.* at 552.

65. Enslin v. Wallford, 565 F.2d 156 (4th Cir.), *cert. denied sub nom.*, Enslin v. Bean, 436 U.S. 912 (1977).

66. Since the Court has obligatory jurisdiction over appeals, orders *summarily affirming* or dismissing for want of a substantial federal question are decisions on the

"[t]he Constitution condemns state legislation . . . [regulating personal sexual conduct when it] trespasses upon the privacy of the incidents of marriage . . . home or . . . family life."[67] By virtue of these two rulings, the Court confined permissible sexual conduct to the traditional contexts of marriage, procreation, and family, and demonstrated no recognition of permissible homosexual privacy.

III. STATEMENT OF THE CASE

Michael Hardwick was arrested and charged by the Atlanta police in August of 1982 for committing the crime of sodomy[68] in the bedroom of his apartment.[69] After a hearing in municipal court, Hardwick's case was bound over to the superior court.[70] The district attorney, however, decided not to present the case to the grand jury unless further evidence developed.[71]

Hardwick then filed a complaint[72] in federal district court asking that the Georgia sodomy statute be declared unconstitutional.[73] The defendants filed a motion to dismiss[74] for failure to state a claim upon which relief could be granted. The district court granted the motion,[75] ruling that Hardwick was the only plaintiff who had standing to sue,[76] and that the Supreme Court's summary affirmance in

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merits and binding on lower courts. *See* Note, *The Precedential Effect of Summarily Affirmances and Dismissals For Want of Federal Question by the Supreme Court after Hicks v. Miranda and Mandel v. Bradley*, 64 VA. L. REV. 117 (1978) (summarily affirming a lower court's decision for want of a substantial federal question constitutes a decision on the merits and binding on lower courts).

67. Doe v. Commonwealth's Attorney of Richmond, 403 F. Supp. 1199, 1200 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). *See* Fuller, *Hardwick v. Bowers: An Attempt to Pull the Meaning of Doe v. Commonwealth's Attorney Out of the Closet*, 39 U. MIAMI L. REV. 973 (1985).

68. Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985).

69. Press, *A Government in the Bedroom*, NEWSWEEK, July 14, 1986, at 36. The police officer found Hardwick and another man engaged in oral sex.

70. *Hardwick*, 760 F.2d at 1204.

71. *Id.*

72. The complaint named the following as defendants: Michael Bowers, Attorney General of Georgia; Lewis Slaton, District Attorney for Fulton County; and George Napper, Public Safety Commissioner of Atlanta. *Id.*

73. *Id.*

74. The motion to dismiss is included in the Writ of Certiorari.

75. 760 F.2d at 1204.

76. In addition, John and Mary Doe were named as plaintiffs. They alleged that they were lawfully married and "have [an] ambition to engage in activities proscribed by the Georgia Sodomy statute." Brief for Petitioner at 3, Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (No. 85-140). The Does were never arrested nor threatened with arrest for violating the statute. Therefore, the Court ruled that the Does did not have standing to sue. 760 F.2d at 1204-07.

Doe v. Commonwealth's Attorney[77] foreclosed his constitutional challenge to the statute.[78]

Subsequently, Hardwick appealed to the Court of Appeals for the Eleventh Circuit. The appellate court agreed that only Hardwick had standing to sue.[79] As to the precedential value of *Doe*, the court held that it was not dispositive of the constitutional issues because the Supreme Court could have based its summary affirmance on *Doe's* lack of standing.[80] In addition, the appellate court believed that doctrinal developments after *Doe* stripped it of any precedential value.[81] More importantly, the court, relying on previous Supreme Court cases on right of privacy, held that the sodomy statute contravened Hardwick's fundamental right of privacy.[82] The appellate court concluded that the "activity he hopes to engage in is quintessentially private and . . . [is] beyond the proper reach of state regulation."[83] It found that this fundamental right was protected by the ninth amendment and the "notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment."[84] The appellate court held that the state must show both a compelling interest in regulating such behavior and that the statute was narrowly drawn to serve that interest in order to prevail.[85] The appellate court then remanded the case to district court for trial.

Defendants filed for a rehearing and for a rehearing en banc,[86] both of which were denied.[87] The Supreme Court granted certiorari because of conflicting judgments in other circuits to that of the Court of Appeals for the Eleventh Circuit.[88]

The opinion of the eleventh circuit was reversed by the Supreme Court's ultimate holding that Hardwick did not have a fundamental right to engage in homosexual activity—in private or otherwise. Therefore, it could not be protected by the Constitution.[89]

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77. 425 U.S. 901 (1976). Justices Brennan, Marshall, and Stevens would have set the case for oral argument. *Id.*

78. 760 F.2d at 1204.

79. *Id.* at 1204-07. The Does did not have standing to sue because they were never arrested under the statute. *Id.* *See supra* note 76.

80. *Id.* at 1207-08.

81. *Id.* at 1208-10.

82. *Id.* at 1212.

83. *Id.*

84. *Id.*

85. *Id.* at 1213.

86. *Id.*

87. Hardwick v. Bowers, 765 F.2d 1123 (11th Cir. 1985).

88. Bowers v. Hardwick, 106 S. Ct. 2841, 2843 (1986).

89. *Id.* at 2843-47.

IV. ANALYSIS

A. Majority and Concurring Opinions

1. The Majority Opinion

Justice White[90] began by stating that the major issue before the Court[91] was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ."[92] The majority disagreed with the lower court's finding[93] that homosexuals have a fundamental right to engage in sodomy. It thereby exercised judicial restraint and narrowed its definition of the right of privacy.

Justice White also disagreed with the lower court's analysis of the right of privacy cases.[94] The Court's previous right of privacy cases, Justice White explained, fell into three areas: family,[95] marriage,[96] and procreation.[97] He noted that "[there is] [n]o connection between family, marriage, procreation . . . and homosexual activity."[98] Indeed, prior decisions have not stood for "the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated."[99] He further concluded that these decisions specifically stated that the Constitution did not afford protection in the area of

90. Justice White's opinion was joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. *Id.* at 2842.

91. *Id.* at 2843. Justice White also stated that the Court will not discuss whether laws against "sodomy . . . are wise or desirable . . . [or whether the states have a right] to repeal their laws . . . or of state court decisions invalidating laws on state constitutional grounds." *Id.* Also, the Court dispensed with review of the court of appeals' decision not to follow its summary affirmance in *Doe v. Commonwealth's Attorney* by giving plenary consideration to *Hardwick*. *Id.* at 2843 n.4.

92. *Id.* at 2843. In the Respondent's Brief, the issue before the Court was stated differently. Hardwick stated that the issue was "whether a state must have a substantial justification [for the statute] when it reaches that far into so private a realm." Respondent's Brief at 5, Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (No. 85-140).

93. Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985). The lower court stated that Hardwick had a right because the "activity he hope[d] to engage in was quintessentially private." *Id.*

94. *Hardwick*, 106 S. Ct. at 2843.

95. *See supra* note 34-37 and accompanying text. *See also* Prince v. Massachusetts, 321 U.S. 158 (1944) (a state's right to enforce child labor laws upon the parents).

96. For a case dealing with marriage see Loving v. Virginia, 388 U.S. 1 (1967). *See also supra* notes 3 and 32.

97. *See* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (sterilization of criminals prohibited). *See also supra* notes 1, 3, and 40.

98. *Hardwick*, 106 S. Ct. at 2844.

99. *Id.*

private sexual relations.[100]

The Court avoided creating a new fundamental right by identifying two areas endemic to those rights.[101] Rights that fall within either of these two categories qualify for constitutional protection.[102] Only those "rights that are implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed . . .[103] [or those rights] deeply rooted in this Nation's history and tradition"[104] are considered fundamental. According to the majority, homosexual sodomy does not fit into either category.[105] The rationale was that "[p]roscriptions against [such] conduct have ancient roots,"[106] and even today twenty-four states and the District of Columbia outlaw sodomy.[107] Consequently, the Court refused to recognize homosexual sodomy as a new right worthy of receiving protection under the Constitution.

The majority was also unwilling to create a new fundamental right within the penumbra[108] of the Bill of Rights, thus avoiding a "Lochner Era"[109] type holding. Therefore, the only way sodomy could be accepted as a fundamental right would be for the Court to redefine the aforementioned categories.[110] A decision of that nature, Justice White argued, would essentially turn the Court into a nine-person legislature.[111]

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100. *Id.* (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5, 694 n.17 (1977)). This statement by Justice White was conclusionary. The footnote in *Carey* actually states the following: "As we observe below, 'the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults' . . . and we do not purport to answer that question now." *Carey*, 431 U.S. at 688 n.5. The Court had not decided the issue at that time.

101. *Hardwick*, 106 S. Ct. at 2844.

102. *Id.*

103. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)). *See also* D. O'BRIEN, *supra* note 29, at 181. O'Brien stated that after *Griswold*, the Court expanded the right of privacy but substituted "privacy" for "liberty" and therefore narrowly construed the range of protected privacy claims. He claimed that the Court failed to heed Justice Black's warning in *Griswold* that " 'one of the most effective ways of diluting . . . a constitutionally guaranteed right is to substitute for the crucial word . . . another word . . . less flexible and more . . . restricted in meaning.' " D. O'BRIEN, *supra* note 29, at 181 (quoting Griswold v. Connecticut, 381 U.S. 479, 508 (1965) (Black, J., dissenting)).

104. *Hardwick*, 106 S. Ct. at 2844. (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).

105. *Id.*

106. *Id.*

107. *Id.* at 2845-46 (quoting *Survey on the Constitutional Right of Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526 (1986)).

108. *Id.* at 2846. *See also supra* note 1.

109. *Hardwick*, 106 S. Ct. at 2846. *See also supra* note 14 and accompanying text.

110. *Hardwick*, 106 S. Ct. at 2846.

111. *Id.* "This decision was just another vote [from] the Court sitting as a nine-person legislature." Will, *What Right to be Let Alone?*, Wash. Post, July 3, 1986, at A23,

Next, the Court examined Hardwick's assertion that homosexual conduct occurring in the home should be accorded special constitutional protection.[112] Although sodomy may not be protected outside the home, Hardwick argued that the home should insulate his conduct from state scrutiny.[113] Hardwick relied principally on *Stanley v. Georgia*[114] which held that the "First and Fourteenth Amendments prohibit [the state from] making mere private possession of obscene material a crime . . . by [an] individual in the privacy of his own home."[115] The majority refused to accept this argument for two reasons. First, the Court believed that *Stanley* was firmly entrenched within the first amendment's freedom of speech protection.[116] Second, Hardwick's claim that the home would insulate his conduct from state scrutiny, by contrast, had no similar support in the Constitution.[117] The Court, fearful of using the home as a shield to protect "otherwise illegal conduct"[118] from the arm of the law, was "unwilling to start down that road."[119]

Lastly, the majority rejected Hardwick's contention that morality was an insufficient rational basis[120] for the statute.[121] Justice White stated that the law is "constantly based on notions of morality,"[122] and the promotion of morality is a legitimate state interest.[123] Further, in keeping within the Court's policy of not invading the territory of the state legislature, the Court was unwilling to invalidate the

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col. 6. According to George Will, the Court always sits as a nine-person legislature. *See also supra* note 59.

112. *Hardwick*, 106 S. Ct. at 2846.

113. Brief for Respondent at 14-16, Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (No. 85-140).

114. 394 U.S. 557 (1969).

115. *Id.* at 568.

116. *Hardwick*, 106 S. Ct. at 2846. However, the opinion in *Stanley* makes reference to privacy rights. *Stanley*, 394 U.S. at 564. The Court in Roe v. Wade, 410 U.S. 113, 152 (1973) and Whalen v. Roe, 429 U.S. 589, 609 (1977), noted that *Stanley* is rooted in first amendment concerns but discussed this in the context of the right of privacy. *See also The Supreme Court, 1968 Term*, 83 HARV. L. REV. 147 (1969) (a discussion of the *Stanley* decision and its implication on the right of privacy); J. NOWAK, *supra* note 1, at 843.

117. *Hardwick*, 106 S. Ct. at 2846.

118. *Id.* This refers to victimless crimes and sexual crimes such as adultery and incest.

119. *Id.*

120. An in-depth analysis of standards of review is outside the scope of this note. Briefly, rational basis review is the lowest level of judicial scrutiny employed by the courts. It requires only that legislation be rationally related to legitimate state interests. *See generally* J. NOWAK, *supra* note 1, at 591.

121. *Hardwick*, 106 S. Ct. at 2846.

122. *Id.*

123. *Id.*

laws in "some 25 states"[124] put forth by elected state officials.

2. Concurring Opinions

Chief Justice Burger's concurring opinion reiterated the majority's holding that homosexual sodomy received no protection under the Constitution.[125] He premised his opinion on the fact that "proscriptions against sodomy have ancient roots"[126] and, therefore, the Court should leave such regulation to the states.[127]

Justice Powell's concurring opinion also agreed with the majority's view that the due process clause of the fourteenth amendment does not afford protection to homosexual sodomy.[128] He indicated that he would have voted[129] with the minority on eighth amendment[130] grounds if they had been applicable. Justice Powell stated that a possible prison sentence of one to twenty years for a single act of sodomy "would create a serious Eighth Amendment issue."[131] The possible sentence for a conviction of sodomy is the same as for the violent felonies of robbery[132] and first degree arson.[133] Since Hardwick was neither charged nor convicted[134] and had failed to raise an eighth amendment issue in the lower courts, Justice Powell noted that this constitutional issue was not before the Court, and voted with the majority in upholding the statute.[135]

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124. *Id.* at 2847 n.1. (the Court listed the appropriate statutes in each state).

125. *Id.* at 2847.

126. *Id.*

127. *Id.*

128. *Id.*

129. For a discussion of Justice Powell's "swing vote," see Kamen, *Powell Changed Vote in Sodomy Case*, Wash. Post, July 13, 1986, at A1, col. 4. Justice Powell allegedly voted with the minority because the penalty for sodomy was the same as for more serious felonies. He felt that this violated the eighth amendment's cruel and unusual punishment clause. He subsequently changed his mind because Hardwick was never charged or convicted. *Id.*

130. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. *See* Downing v. Perini, 518 F.2d 1288 (6th Cir. 1975), where the court noted, "[t]he Supreme Court has never held a sentence of imprisonment to constitute cruel and unusual punishment solely because of length." *Id.* at 1290. The court went on to state "that a sentence which is disproportionate to the crime for which it is administered may be held to violate the Eighth Amendment solely because of the length of imprisonment imposed." *Id.*

131. *Hardwick*, 106 S. Ct. at 2847.

132. The statute states in pertinent part: "(b) A person convicted of the offense of robbery shall be punished by imprisonment for not less than one or more than 20 years." GA. CODE ANN. § 16-8-40 (1984). *Compare supra* note 7.

133. The statute states in pertinent part: "(b) A person convicted of . . . arson . . . shall be punished by . . . imprisonment for not less than one or more than 20 years . . . ." GA. CODE ANN. § 16-7-60 (1968). *Compare supra* note 7.

134. *Hardwick*, 106 S. Ct. at 2848.

135. *Id.*

B. The Dissenting Opinions

1. Justice Blackmun's Dissenting Opinion

Justice Blackmun began his dissent[136] by disagreeing with the majority's view that this case concerned a fundamental right to commit homosexual sodomy. Rather, he believed the case was about the most "comprehensive of rights . . . namely, the right to be let alone."[137] Justice Blackmun criticized the majority's rationalization that the historical condemnation of sodomy should be dispositive in deciding the constitutional issue before the Court.[138]

First, since the statute on its face, applied to both homosexual and heterosexual sodomy,[139] Justice Blackmun attacked the majority's obsessive focus on homosexual activity. He believed that Georgia was only willing to enforce the statute against homosexuals and not against heterosexuals.[140] Even if that were the case, he argued, the claimed right of privacy in *Hardwick* is that of intimate association,[141] whether it be homosexual or heterosexual.

Second, he attacked the majority's failure to consider possible procedural errors surrounding the dismissal of Hardwick's complaint under the Federal Rules[142] for failure to state a claim.[143] Justice Blackmun contended that if the Court could provide relief on any possible theory, the district court's motion to dismiss would not be controlling.[144] Therefore, even if Hardwick did not state all possible

136. *Id.* Justice Blackmun was joined in his dissent by Justices Brennan, Marshall, and Stevens.

137. *Id.* (quoting Olmstead v. United States, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). The statement, "the right to be let alone," is not a constitutional right; rather, it is more a rhetorical flourish of words that enlivens his dissent. The statement was authored in Brandeis & Warren, *Right to Privacy*, 4 HARV. L. REV. 193 (1890). The concept of privacy in that article was based on tort principles.

138. *Hardwick*, 106 S. Ct. at 2848.

139. *Id. See* statute cited *supra* note 7.

140. The Georgia Attorney General conceded that the statute would be unenforceable if applied to a *married couple*. *Hardwick*, 106 S. Ct. at 2858 n.10.

141. *Id.* at 2849. *See supra* note 3, for the areas protected under the right of privacy. They do not include the right of intimate association. Justice Blackmun essentially advocated a new right of privacy.

142. FED. R. CIV. P. 12(b)(6).

143. *Hardwick*, 106 S. Ct. at 2849-50.

144. *Id.* An in-depth analysis of the Federal Rules of Civil Procedure is outside of the scope of this note. Some jurisdictions follow the principle that if a court could provide any possible relief on any possible theory, a motion to dismiss should be denied. *See* Lada v. Wilkie, 250 F.2d 211 (8th Cir. 1957); *see generally* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1357, 1216 (1969) (a motion to dismiss should not be granted unless the plaintiff would be entitled to no relief under the facts of the claim).

causes of action, other constitutional provisions, although not plead, that could have provided him relief should have been considered. Justice Blackmun failed to pursue this issue. Instead, he attacked the majority's opinion on the grounds that the statute violated Hardwick's right of privacy and freedom of intimate association.[145]

Justice Blackmun stated his belief that the right of privacy is a bifurcated concept and that each element supported a finding of a violation of Hardwick's fundamental right.[146] The first element he identified was the right to make certain decisions.[147] These decisions, though centered around the family, were in actuality protected rights because "they form[ed] so central a part of an individual's life."[148] He argued that the cases dealing with the right to have a child invoked constitutional protection because the decision of parenthood "alters so dramatically an individual's self-definition."[149] The cases protecting the decision whether to marry were based upon the concept that marriage is a partnership that " 'promotes a way of life, not causes [a way of life].' "[150] Since the individual was central to all of these protected rights, and sexual intimacy is an integral part of the development of the individual, it should be included in these protected rights.[151] Justice Blackmun argued that in a nation as diverse as ours, the majority erred in holding that homosexual sodomy should go unprotected because it is a "wrong" way of life. He believed that a way of life that is different but "interferes with no rights or interest of others"[152] should be protected by the Constitution.

Justice Blackmun felt that the second element comprising the concept of privacy is the protection of the physical integrity of the home under the fourth amendment.[153] He disagreed with the majority's interpretation of *Stanley*.[154] He argued that *Stanley* stood for the pro-

145. *Hardwick*, 106 S. Ct. at 2849-50. *See generally* Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 WIS. L. REV. 343 (examining the limited power of review by the Court on a writ of certiorari).

146. *Hardwick*, 106 S. Ct. at 2850-51.

147. *Id.* at 2850. *See supra* note 3.

148. *Hardwick*, 106 S. Ct. at 2851.

149. *Id. Cf.* Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169, 2187 n.6 (1986).

150. *Hardwick*, 106 S. Ct. at 2851 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

151. *Id.* (citing Paris Adult Theater I v. Slaton, 413 U.S. 49, 63 (1973)).

152. *Id.* at 2852.

153. "The right of the people to be secure in their . . . houses . . . against unreasonable search and seizures . . . ." U.S. CONST. amend. IV. *See generally* Katz v. United States, 389 U.S. 347 (1967) (an analysis of fourth amendment protections against unreasonable searches and seizures); Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203, 205 (fourth amendment right of privacy extended as a privacy right).

154. *Hardwick*, 106 S. Ct. at 2852-53. *See supra* note 116 and accompanying text.

tection of the right to read obscene material and the right to satisfy a man's intellect in the privacy of his own home.[155] These elements in combination provided Hardwick with the fundamental right to conduct sexual relationships in the privacy of his own home. To Justice Blackmun, this was the mainstay of the right of privacy under our constitution.[156]

The majority believed *Stanley's* protection was limited to the first amendment because of its fear of protecting otherwise illegal conduct in the home.[157] Justice Blackmun found that the majority's comparison of homosexual sodomy done in the privacy of the home, to victimless crimes such as possession of drugs, firearms, and stolen goods, was lacking in merit. These crimes, he argued, are not truly victimless and have a more pernicious affect on society than homosexual sodomy. More importantly, the majority's conclusions were unsupported since there was no evidence presented in the lower court on this issue, due to the dismissal of Hardwick's claim.[158]

Justice Blackmun concluded by stating that the Court should not deprive a person of liberty merely because the conduct has ancient proscriptions, contravenes existing order, or is contrary to a millennium of religious teachings.[159] Justice Blackmun argued that the case was not about public sexual activity or interference with any rights of others. Rather, it was about "invading the house, hearts, and minds of citizens who choose to live their lives differently."[160]

2. Justice Stevens' Dissenting Opinion

Justice Stevens focused his dissent[161] on two questions: 1) whether a state may prohibit all classifications of sodomy by applying a neutral law to all citizens in its jurisdiction; and 2) if not, whether the state can save the statute by stating that it applies only to homosexual sodomy.[162]

In addressing the first question, he believed the prior cases decided by the Court supported the conclusion that the statute could not be

155. *Hardwick*, 106 S. Ct. at 2852.
156. *Id.* at 2853.
157. *Id.* at 2846. *See supra* note 118 and accompanying text.
158. *Id.* at 2853.
159. *Id.* at 2854-55.
160. *Id.* at 2856.
161. Justice Stevens was joined in his dissent by Justices Brennan and Marshall.
162. *Hardwick*, 106 S. Ct. at 2857.

enforced against a married couple.[163] The Court deemed that the "intimacies of [a married person's] physical relationship, even when not intended to produce offspring, are . . . protected by the Due Process Clause of the Fourteenth Amendment."[164] This rationale has also been extended to unmarried individuals as well.[165] He noted that even though history and tradition have viewed sodomy as immoral, this Court has established the bedroom as sacrosanct, whether it contains married or unmarried heterosexual adults.[166] Thus, the state could not prohibit all classifications of sodomy by applying the neutral law.

Since a state could not constitutionally prohibit all sodomy, Justice Stevens attacked the enforcement of the statute against only homosexuals. He disputed the majority's opinion that Georgia properly justified the selective application of the statute to only homosexual sodomy.[167] The majority justified this selective application on the belief that the majority of the citizens of Georgia found homosexual sodomy immoral. This selective application, Justice Stevens argued, "must be supported by a neutral and legitimate [state] interest — something more substantial than a habitual dislike for or . . . disfavor [of a] group."[168] More importantly, he concluded, even though Hardwick admitted he would continue such conduct, he was never charged.[169] The failure of the state to prosecute Hardwick undermined its stated rationale that selective application promotes morality among the general public.[170] In conclusion, Justice Stevens felt that Hardwick's complaint alleged a constitutional claim and should have withstood the motion to dismiss.[171]

V. THE IMPACT

The decision by the Court exemplified judicial restraint. For the past sixty years, an activist Court recognized, as fundamental, rights not specifically enumerated in the Bill of Rights. These rights, how-

163. *Id.* (citing Carey v. Population Servs. Int'l., 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

164. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

165. *Id.* (citing Carey v. Population Servs. Int'l., 431 U.S. 678 (1977)).

166. *Id.* at 2858. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

167. *Hardwick*, 106 S. Ct. at 2846, 2858-59. A discussion of the equal protection clause of the fourteenth amendment is beyond the scope of this note. For a more complete discussion, see Note, *Doe and Dronenburg: Sodomy Statutes are Constitutional*, 26 WM. & MARY L. REV. 645, 675-80 (1985) (the equal protection analysis as it relates to sodomy statutes applied to homosexuals); Note, *Presumption Doctrine: Equal Protection or Due Protection?*, 72 MICH. L. REV. 800 (1974) (in-depth analysis of equal protection relating to the right of privacy).

168. *Hardwick*, 106 S. Ct. at 2858-59.

169. *See supra* text accompanying note 71.

170. *Hardwick*, 106 S. Ct. at 2859.

171. *Id. See supra* notes 142-44 and accompanying text.

ever, never included the right to engage in any sexual conduct. The holding in *Hardwick* specifically stated there has never been a constitutional right to engage in homosexual sodomy. However, the opinion hinted that the Constitution does not protect any sexual conduct between unmarried heterosexuals. Is this opinion a harbinger of a dangerous new trend of the Court? Does it signal the beginning of limiting the previous rights of privacy granted by the Court? To examine these questions, a closer look at each of the societal segments affected must be taken.

A. The Heterosexual Community

The Court previously recognized new rights of privacy by striking down old laws.[172] The majority in *Hardwick* held that the Constitution failed to protect homosexual sodomy largely because the laws prohibiting it are based in an ancient historical context. This holding departs radically from previous interpretations of the right of privacy under the Constitution.[173] The Court rationalized its decision in *Hardwick* based on the criminality of sodomy dating back to colonial times. Statutes prohibiting miscegenation, like criminal sodomy statutes, were also commonly promulgated during colonial times. However, the Court struck down those statutes and held that individuals had the freedom of choice to marry whomever they chose.[174] The Court's prior decision on miscegenation recognized modern society as being substantially different from the one that existed two hundred years ago and interpreted the Constitution to coincide with a "changing society." In *Hardwick*, the Court failed to do so.

If the current Court continues to interpret the Constitution based upon historical precedents reflected in old statutes, the efficacy could chill the recognition of new rights for heterosexuals. In the 1980's, as many as eighty percent of all Americans consider oral sex to be a normal sexual activity.[175] Heterosexual couples, married or unmarried, believe that the prohibited conduct can play an important role in the development of their intimate relationships.[176] The majority

172. *See supra* note 3.

173. Lorence & Ogden, *Does Sodomy Decision Give History Its Due . . . Or Does It Try To Fossilize The Constitution?*, Legal Times, July 21, 1986, at 5, col. 1 [hereinafter Lorence & Ogden].

174. *See* Loving v. Virginia, 388 U.S. 1 (1967). *See also supra* notes 3 and 32.

175. Lorence & Ogden, *supra* note 173, at 12 (referring to amicus brief filed by the American Psychological Association and the American Public Health Association).

176. Lorence & Ogden, *supra* note 173, at 5 (referring to amicus brief filed by the American Psychological Association and the American Public Health Association).

failed to consider that sodomy may have a different social context and psychological significance today than two hundred years ago. Justice Brennan properly stated the belief that constitutional interpretation should reflect a changing society: "[T]he genius of the Constitution rests not in any static meaning . . . but in the adaptability of its great principles to cope with current problems and current needs."[177] The holding in *Hardwick* may have a broad impact on the future recognition of new rights of privacy for heterosexuals.

However, the impact on the heterosexual community may be limited. The Attorney General for the State of Georgia in *Hardwick* stated that the statute would not have been constitutional if applied to married couples.[178] It is arguable that all sexual conduct between unmarried heterosexuals would fall within the procreative category of the right of privacy and would be protected by the Constitution. If this argument is accepted, the holding in *Hardwick* may have an extremely limited direct legal impact on either married or unmarried heterosexuals.

B. The Homosexual Community

1. The Direct Legal Impact

There is no doubt that homosexuals suffered the most from the decision in *Hardwick*. However, since sodomy laws are generally useless and unenforceable, they need not fear bedroom raids. While homosexuals suffered in the courtroom, they may have won in the eyes of the general public. One opinion poll showed fifty-seven percent of the people polled believed the state should not have the right to prohibit sexual conduct between consenting adults.[179] Forty-seven percent of those polled disapproved of the holding in *Hardwick*.[180] One commentator felt that *Hardwick* will affect homosexuals the way the *Dred Scott v. Sandford*[181] decision affected blacks.[182] Conversely, conservatives have applauded the *Hardwick* decision as a signal that "immoral conduct" is not accepted in this country.

The homosexual community believed that the decision would result in nationwide discrimination and violence directed toward gays. In addition, the decision may permeate other aspects of homosexuals'

177. Lorence & Ogden, *supra* note 173, at 5 (quoting a speech by Justice Brennan at Georgetown University).

178. *Hardwick*, 106 S. Ct. at 2858 n.10.

179. Chase, *A Government in the Bedroom*, NEWSWEEK, July 14, 1986, at 38. The Gallup Poll organization conducted this survey.

180. *Id.*

181. 60 U.S. 393 (1857). The Court held that blacks were not citizens of the United States and therefore did not have constitutional rights. *Id.*

182. Staff, *A Giant Step Backward*, THE BODY POL., Aug. 1986 at 18. THE BODY POLITIC is a periodical that caters to gay and lesbians.

lives. One gay magazine reported that contracts between gay lovers may become void based on the principal of illegality.[183] Employers who are anti-gay may use the decision to have homosexuals fired from their present jobs. Furthermore, the decision could be used against homosexuals seeking custody of their children.[184] The possible argument is that homosexuals are habitually in violation of the law.

Moreover, the decision may fuel bias against homosexuals in future legislation and effect their efforts to overturn remaining sodomy statutes. In light of this, politically active homosexuals have focused their efforts on appointing liberal judges and supporting the election of senators who advocate and support homosexual rights.[185] Also, gay task forces have been established in states that still enforce sodomy laws.[186] The gay community has used the decision in *Hardwick* to solidify its movement to gain recognition of their rights.

The Supreme Court, one of the most powerful and venerable institutions in America, may have put a stamp of legitimacy on homosexual bias. There is little doubt that homosexuality is widely practiced in this country. The Court failed to consider that homosexuals will never be protected by the right of privacy because their lifestyle and sexual activities do not fit within the traditional categories of marriage, family, and procreation.

2. The Rehnquist Court

Justice Rehnquist, who replaced Chief Justice Burger as Chief Justice,[187] voted with the majority in *Hardwick*. Although he did not write an opinion, his support of the decision gives homosexuals an indication of his position regarding homosexual issues.

In addition, Antonio Scalia has replaced Justice Rehnquist as an Associate Justice. Prior to his appointment to the Court, Scalia was a judge in the United States Court of Appeals, District of Columbia Circuit. The most recent case before that court that dealt with homo-

183. *Id.* at 17. For a discussion of illegality in contracts, see generally 17 AM. JUR. 2D *Contracts* §§ 216-239 (1964).

184. Walter, *High Court Upholds Sodomy Law*, THE ADVOC., Aug. 5, 1986, at 11. THE ADVOCATE is a periodical that caters to gays and lesbians.

185. *Id.* (comment from Jeff Levi, Executive Director for National Gay and Lesbian Task Force).

186. *Id.*

187. Justice Rehnquist was confirmed as Chief Justice by the Senate on September 17, 1986.

sexual issues was *Dronenburg v. Zech*.[188] The court held that the Navy's policy of mandatory discharge for homosexual conduct did not violate any constitutional right of privacy.[189] Scalia voted with the majority. The majority opinion emphasized that homosexual sodomy was not a right protected under any previous Supreme Court ruling.[190] It seems consistent with these facts to infer from the previous voting records of Chief Justice Rehnquist and Justice Scalia that they share a similar belief that homosexuals do not have a constitutional right to engage in sodomy. Homosexuals have had an uphill battle with the restrictive Burger Court and will now discover the Rehnquist Court is equally willing to exercise judicial restraint when deciding homosexual issues.

3. Sodomy Statutes and the Eighth Amendment

The ability of the homosexual community to overturn the remaining sodomy statutes may rest on eighth amendment grounds. The eighth amendment prohibits penalties excessively cruel or unusual in relation to the crime involved.[191] In Georgia, sodomy carries the same penalty as violent crimes such as robbery.[192] Justice Powell, in his concurring opinion, indicated that a conviction of one to twenty years for sodomy created serious eighth amendment issues.[193] Therefore, the penalties for sodomy may violate the eighth amendment's cruel and unusual punishment clause and statutes may be held unconstitutional on those grounds.

VI. CONCLUSION

It is unclear whether the judicial restraint exercised in *Hardwick* is a signal of a dangerous new trend by the Court in the area of the right of privacy. The decision can be interpreted narrowly. The zone of privacy previously recognized by the Court never included homosexual sodomy. Therefore, the *Hardwick* decision may signal a continued trend that does not recognize "sexual activities" as falling within the gambit of a constitutionally protected right.

The decision, however, can also be interpreted broadly. If the Court continues to uphold laws based on notions of "venerable birth," it threatens to fossilize the Constitution. The Court could then refuse to examine the issues in today's social and psychological

188. 741 F.2d 1388 (D.C. Cir. 1984), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984).
189. 741 F.2d at 1398.
190. *Id.* at 1395.
191. *See supra* note 130.
192. *Id. See* statute cited *supra* note 132 and accompanying text.
193. *Hardwick*, 106 S. Ct. at 2847. *See also supra* notes 129-34 and accompanying text.

context. The result could be a narrowing of the protected right of privacy for everyone.

RICHARD J. WITTBRODT