

# The Constitutionality of Sodomy Statutes as Applied to Homosexual Behavior: *Bowers v. Hardwick*

Roger D. Strode Jr.

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Roger D. Strode Jr., *The Constitutionality of Sodomy Statutes as Applied to Homosexual Behavior: Bowers v. Hardwick*, 70 Marq. L. Rev. 599 (1987).

Available at: <http://scholarship.law.marquette.edu/mulr/vol70/iss3/13>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

## NOTE

**CONSTITUTION—The Constitutionality of Sodomy Statutes as Applied to Homosexual Behavior.** *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986).

Homosexuality and the rights of homosexuals are often a matter of heated debate. This debate recently found its way to the Supreme Court in *Bowers v. Hardwick*,<sup>1</sup> where a practicing homosexual challenged the constitutionality of a Georgia statute which criminalized consensual sodomy.<sup>2</sup> In a bare majority, the Court upheld the statute stating that the federal Constitution does not protect private, consensual homosexual behavior from state proscription.<sup>3</sup> The decision paints a bleak picture for those concerned with the rights of homosexuals, as it is already being used as precedent in jurisdictions anxious to enforce statutes similar to that of Georgia.<sup>4</sup>

This article will trace the history of the constitutional right of privacy as applied to state sodomy statutes and then analyze and critique the Court's rationale and holding in *Bowers*. The *Bowers* holding will then be analyzed as to the effect of the decision on future similar litigation.

---

1. 106 S. Ct. 2841 (1986).

2. (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. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one or more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

GA. CODE ANN. § 16-6-2 (1984).

3. The statute was upheld as applied to homosexual conduct. The Court expressed no opinion regarding the constitutionality of the statute as it applied to other acts of sodomy. *Bowers*, 106 S. Ct. at 2842 n.2.

4. The Missouri Supreme Court relied on the decision in *State v. Walsh*, 713 S.W.2d 508 (Mo. 1986). The *Walsh* case represents the first defeat of challenges to the state sodomy statutes since *Bowers*. The American Civil Liberties Union reports that three such challenges are pending in federal courts. They expect dismissals in all three. Reidinger, *Missouri Vice*, 72 A.B.A. J. 78, 78 (1986).

## I. STATEMENT OF THE CASE

On August 3, 1982, the Atlanta Police arrested Michael Hardwick for the commission of the crime of sodomy with a consenting male adult in the bedroom of Hardwick's home. After charges were brought against Mr. Hardwick, the District Attorney's office declined to present the case to the grand jury unless further evidence developed.

Hardwick then filed suit in federal district court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. Hardwick was joined in the action by John and Mary Doe, a married couple with whom he was acquainted.<sup>5</sup> The district court granted the defendant's motion to dismiss for failure to state a claim.

The Court of Appeals for the Eleventh Circuit reversed.<sup>6</sup> Relying on previous Supreme Court decisions,<sup>7</sup> the court held that homosexual activity is a private and intimate association and as such is a fundamental right protected by the due process clause of the fourteenth amendment.<sup>8</sup> The case was reversed and remanded as to the "privacy claim."<sup>9</sup> Subsequently, the State of Georgia filed a petition for certiorari.

Due to the fact that other courts of appeal had arrived at judgments contrary to that of the Eleventh Circuit, the Supreme Court granted the petition for certiorari.<sup>10</sup> The

---

5. The Does claimed that they desired to engage in sexual activity proscribed by the statute but that they had been "chilled and deterred" by the existence of the statute and Hardwick's arrest. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985).

The district court ruled that the Does did not have standing to bring suit as they had neither sustained nor were likely to sustain any direct injury from enforcement of the statute. Accordingly, their claim was dismissed. *Id.* at 1206-07.

6. *Id.* at 1202.

7. *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. *Hardwick*, 760 F.2d at 1212-13.

9. *Id.* at 1213. "In order to prevail, the state, on remand must prove both a compelling interest to regulate such behavior and that the statute was narrowly drawn to serve that interest." Note, *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, 975-76 (1985) (citing *Hardwick*, 760 F.2d at 1202).

10. *Bowers v. Hardwick*, 106 S. Ct. 392 (1985).

Supreme Court reversed the judgment of the Court of Appeals, thereby affirming the constitutionality of the statute.<sup>11</sup>

## II. BACKGROUND

Most challenges to state sodomy statutes have asserted the constitutional right of privacy<sup>12</sup> recognized by the Supreme Court in *Griswold v. Connecticut*.<sup>13</sup> Therefore, this section will commence with a discussion of the development of this right of privacy before addressing its application to sodomy statutes.

### A. *The Constitutional Right of Privacy*

The origins of the constitutional right of privacy were established by the Supreme Court in *Griswold*, which held that a Connecticut statute prohibiting all persons from using contraceptives was unconstitutional. The Court found the statute and its enforcement to be violative of a married couple's right of privacy.<sup>14</sup>

Justice Douglas, writing for the majority, conceded that such a right could not be found on the face of the Constitution. However, he stated that the right was created from "penumbras" of the Bill of Rights, "by emanations from those guarantees that help give them life and substance."<sup>15</sup>

After *Griswold*, the Court had little trouble extending this right of privacy to protect an interracial couple's decision to marry;<sup>16</sup> a person's right to view obscene material in the privacy of his home;<sup>17</sup> or a woman's decision of whether to abort

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

12. The statutes have also been attacked on the basis of the equal protection clause of the fourteenth amendment, the protection against cruel and unusual punishment found in the eighth amendment, and the ninth amendment. However, the scope and length of this article do not allow for these areas to be addressed. See Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811, 845-65 (1984) for a discussion of the various alternative challenges.

13. 381 U.S. 479 (1965).

14. *Id.* at 485-86.

15. *Id.* at 484. The Court claimed that the Bill of Rights by its explicit protections of the freedoms of speech, association, freedom from unreasonable search and seizure, etc., has "emanations" which create a "penumbra" which protect certain freedoms not mentioned explicitly in the text of the Constitution. Such a freedom is the right of privacy. *Id.* at 484-86.

16. *Loving v. Virginia*, 388 U.S. 1 (1967).

17. *Stanley v. Georgia*, 394 U.S. 557 (1969).

a pregnancy.<sup>18</sup> In doing so, the Court employed a "substantive due process analysis" rather than the *Griswold* "penumbral" rationale.<sup>19</sup> Nevertheless, these decisions, coupled with the *Griswold* holding, created a sphere of personal autonomy relating to certain personal decisions.<sup>20</sup>

It should be noted that there has been criticism of the methodology employed by the Court in the establishment and extension of the constitutional right of privacy. This methodology has been attacked as judicial legislation and as an expression of judicial ideology.<sup>21</sup> Regardless, the Court appears committed to the idea that a right of privacy exists as a product of the Constitution. The Court reiterated this idea in *Roe v. Wade*,<sup>22</sup> when it stated: "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy."<sup>23</sup>

### B. *The Constitutional Right of Privacy and Sodomy Statutes*

Once recognized, the constitutional right of privacy developed in *Griswold* and its progeny was used as a basis for attacking the constitutionality of state sodomy statutes. However, courts were uncertain as to the extent to which this

---

18. *Roe v. Wade*, 410 U.S. 113 (1973). Later in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the right was extended to minors when the Court held unconstitutional the provisions of a state statute requiring parental consent for an abortion by an unmarried woman under the age of eighteen during the first twelve weeks of pregnancy.

19. A "substantive due process analysis" is based upon the idea that the due process clause of the fourteenth amendment protects certain "fundamental rights." *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). The Court seems firmly committed to the use of substantive due process. See Comment, *supra* note 12, at 835.

20. Note, *Dronenburg v. Zech: The Right of Privacy And Its Future*, 14 CAP. U.L. REV. 313, 319 (1985) (citing Note, *Consent, Not Morality, As the Proper Limitation on Sexual Privacy*, 4 HASTINGS CONST. L.Q. 637, 654 (1977), which asserted that the Court, through prior decisions, has impliedly protected the "underlying decision regarding sexual behavior").

21. A discussion of the various criticisms of *Griswold*, 381 U.S. 479 (1965), and its progeny is beyond the scope of this article. However, see Comment, *supra* note 12, at 823-34, for just such a discussion.

22. 410 U.S. 113 (1973).

23. *Id.* at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The personal intimacies of marriage, the home, procreation and the family are the "fundamental rights" alluded to in *Roe*. *Roe*, 410 U.S. at 152-53.

constitutional right of privacy should be applied to protect consensual sexual activity.<sup>24</sup>

Utilizing the right of privacy rationale, federal and state courts have had little trouble striking down state sodomy statutes as applied to consensual heterosexual activity.<sup>25</sup> However, as will be seen, these same courts have been hesitant to extend the same protection to homosexual activity.

In one of the first successful challenges by a homosexual to discriminatory practices the Federal District Court of Maryland, in *Acanfora v. Board of Education*,<sup>26</sup> declared the right to engage in homosexual activity to be a fundamental right.<sup>27</sup> This successful attack appeared to lay the groundwork for further inroads toward the abolition of discriminatory application of state sodomy statutes. However, in 1976 the Supreme Court's summary affirmance of *Doe v. Commonwealth*<sup>28</sup> impeded this progress.

In *Doe*, two homosexual men sought a declaratory judgment and injunctive relief to bar the enforcement of a Virginia sodomy statute as applied to acts between consenting adults. Their claim was based, among other things, on the due process clauses of the fifth and fourteenth amendments.<sup>29</sup> Nevertheless, the District Court for the Eastern District of Virginia

24. Comment, *supra* note 12, at 844-45.

25. In *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968), the Seventh Circuit held that an Indiana statute could not constitutionally regulate the private consensual behavior of married persons and be consistent with *Griswold*. In *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.) (en banc), *cert. denied*, 429 U.S. 977 (1976), marital intimacies, including the right to engage in sodomy, were held to be protected by the constitutional right of privacy. Similarly, in *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976), the Iowa Supreme Court held that sodomy statutes cannot regulate the private consensual activity between members of the opposite sex. This protection, however, was not extended to homosexual activity. *But see State v. Bateman*, 113 Ariz. 107, 547 P.2d 6 (1976), *cert. denied*, 429 U.S. 864 (1977).

26. 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974).

27. *Acanfora* was not charged with violation of a state sodomy statute but was contesting his transfer from a classroom teaching position to a non-teaching position due to his admission of homosexuality. In addition, the actions of the Board of Education were attacked on equal protection grounds. *Id.* at 844.

28. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901, *reh'g denied*, 425 U.S. 985 (1976).

29. Their claim was also based upon the first amendment guarantee of freedom of expression, the first and ninth amendments guarantee of the right of privacy, and the eighth amendment protection against cruel and unusual punishment. *Id.* at 1200.

held that none of these claims were a bar to prosecution of private homosexual behavior.<sup>30</sup> The district court acknowledged the right of sexual privacy but only in the area of decisions relating to the home, marriage and the family.<sup>31</sup> In 1976 the Supreme Court summarily affirmed the *Doe* decision.<sup>32</sup>

While the majority of the district court in *Doe* appeared firm in its denial of the right of privacy to homosexuals, the precedential significance of the Supreme Court's summary affirmation is limited due to the fact that the Court failed to explain exactly what it was affirming.<sup>33</sup> This opened the door to speculation on the part of courts and commentators alike. There has been widescale disagreement as to whether the affirmation was based upon the plaintiff's lack of standing or the privacy issue.<sup>34</sup> Subsequent decisions highlight this problem.

In *People v. Onofre*,<sup>35</sup> the New York Court of Appeals, in a holding which extended protection to homosexual activity, found a state sodomy statute directed only toward unmarried persons to be violative of the constitutional right of privacy. Contrary to the holding in *Doe*, the *Onofre* Court defined privacy as the freedom to make choices about one's intimate affairs regardless of sexual orientation.<sup>36</sup>

30. The central theme of the decision was that the existence of similar statutes in other states, and biblical prohibitions against the conduct in question, support the existence of the statute. *Id.* at 1202-03. See also Comment, *supra* note 12, at 838.

31. *Doe*, 403 F. Supp. at 1202-03.

32. 425 U.S. 901, *reh'g denied*, 425 U.S. 985 (1976).

33. Because the Court has obligatory jurisdiction over appeals, orders summarily affirming or dismissing are decisions on the merits and binding on lower courts. Most often, these lower courts are faced with the task of determining what the Supreme Court decided, without the aid of a written opinion. See 12 J. MOORE, H. BENDIX & B. RINGLE, *MOORE'S FEDERAL PRACTICE* ¶ 400.05-1 (2d ed. 1982).

34. See Note, *supra* note 9, at 977.

35. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

36. *Id.* at \_\_\_, 415 N.E.2d 936-42, 434 N.Y.S.2d at 949-53. See Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 590 (1977). In addition, a year after *Doe*, the Court in a decision which did not implicate sodomy concerns observed: "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Carey v. Populaton Servs. Int'l*, 431 U.S. 678, 688 (1977).

Conversely, in *Dronenburg v. Zech*,<sup>37</sup> the *Doe* decision was cited as one of the cases which expressly denied an extension of the right of privacy to homosexual conduct.<sup>38</sup> Later, in *Baker v. Wade*,<sup>39</sup> the Court of Appeals for the Fifth Circuit stated: “[t]here can be no question but that the decision of the Supreme Court in *Doe* was on the merits of the case, not on the standing of the plaintiffs to bring the suit.”<sup>40</sup>

As the aforementioned discussion illustrates, decisions regarding sodomy statutes prior to *Bowers v. Hardwick*<sup>41</sup> were characterized by uncertainty. The confusion generated by the summary affirmance in *Doe* contributed greatly to the lack of pattern in those cases. After the Court granted the petition for certiorari in *Bowers*, many commentators felt that the unanswered questions relating to the privacy rights of homosexuals would finally be resolved.<sup>42</sup>

### III. THE DECISION

#### A. *White's Majority Opinion*

Writing for the majority, Justice White refused to accept the proposition that the Court's prior decisions have construed the Constitution to confer a right of privacy that extends to homosexual sodomy:<sup>43</sup>

[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated . . . .<sup>44</sup>

37. 741 F.2d 1388 (D.C. Cir.), *reh'g denied* (en banc), 746 F.2d 1579 (D.C. Cir. 1984). Dronenburg, a naval petty officer, was discharged after he admitted that he was a homosexual and had engaged in homosexual acts in violation of Navy regulations. *Id.* See also Note, *supra* note 20, at 314. While this Navy regulation is not a sodomy statute per se, it parallels those statutes discussed in this article.

38. *Dronenburg*, 741 F.2d at 1391-92.

39. 769 F.2d 289 (5th Cir.) *reh'g denied* (en banc), 774 F.2d 1285 (5th Cir. 1985).

40. *Id.* at 292.

41. 106 S. Ct. 2841 (1986).

42. Note, *supra* note 9, at 994.

43. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2843-44 (1986) (citing *Roe v. Wade*, 410 U.S. 113 (1973)); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

44. *Bowers*, 106 S. Ct. at 2844.

Applying a substantive due process analysis, the Court held that the right to engage in acts of homosexual sodomy was not a fundamental right protected by the due process clause of the fourteenth amendment.<sup>45</sup> Justice White stated that only those rights “ ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were sacrificed,’ ”<sup>46</sup> and those “ ‘deeply rooted in the Nation’s history and tradition’ ”<sup>47</sup> would qualify as “fundamental” rights.

Neither of these descriptions, asserted Justice White, extends a fundamental right to homosexuals to engage in sodomous acts. The ancient roots and long standing traditions surrounding sodomous conduct was offered as justification for this conclusion.<sup>48</sup> In this context, a claim that a right to engage in homosexual sodomy is “deeply rooted in this Nation’s history and tradition” was held to be absurd.<sup>49</sup> The Court went on to note that the lack of textual support in the Constitution reinforced its hesitancy to expand the substantive reach of the due process clauses to include the right to engage in homosexual sodomy.<sup>50</sup>

Lastly, relying on *Stanley v. Georgia*,<sup>51</sup> Hardwick argued that his conduct should be protected due to the fact that it occurred in the privacy of his home. The Court refused to accept this position stating that the *Stanley* decision was “firmly grounded in the First Amendment,”<sup>52</sup> and therefore is inapplicable as this case does not deal with printed material.<sup>53</sup>

---

45. *Id.*

46. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

47. *Id.* (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

48. Sodomy statutes date back to Henry III and still exist in 24 states and the District of Columbia. *Id.* at 2844-45 nn.5-7 (citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 n.9 (1986)). See also *Bowers*, 106 S. Ct. at 2847 n.1.

49. *Bowers*, 106 S. Ct. at 2846.

50. *Id.* Justice White stated: “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Id.*

51. 394 U.S. 557 (1969).

52. *Bowers*, 106 S. Ct. at 2846. As will be discussed later in this article, the majority appears to misinterpret the holding of *Stanley*.

53. *Id.* The majority goes on to state that should they decide to employ the “privacy of the home” rationale it would open up some sort of “Pandora’s Box” in which the Court might have to legitimize acts such as adultery and incest that occur in the privacy of the home. *Id.*

The Court concluded by stating that the law bore a rational relation to a permissible state goal — the enforcement of morality.<sup>54</sup>

### B. *Blackmun's Dissenting Opinion*

The issue at hand, urged Justice Blackmun, was not the narrow idea that homosexuals have a right to privacy relating to their sexual conduct, but that they like everyone, have a "right to be let alone."<sup>55</sup> This right was created by the Court's previous privacy decisions, and had two facets: the right to decisional privacy<sup>56</sup> and the right to spatial privacy.<sup>57</sup> This case implicated both those concerns.<sup>58</sup>

Unlike the majority, Justice Blackmun felt that the Court's previous decisions regarding marriage,<sup>59</sup> procreation<sup>60</sup> and the family<sup>61</sup> recognized a right of decisional privacy or personal autonomy. This decisional privacy encompassed the right to choose one's own sexual partners. This is because the right of consensual, intimate relations, like the other aforementioned rights, "[f]orms so central a part of an individual's

54. The two concurring opinions by former Chief Justice Burger and Justice Powell add little to the discussion. Former Chief Justice Burger's opinion merely underscores the majority sentiment that there is no such thing as a fundamental right to commit homosexual sodomy. The former Chief Justice reinforces this by reiterating the idea that homosexuality has been considered a "disgrace to human nature for centuries" and that sodomy laws have "ancient roots." *Bowers v. Hardwick*, 106 S. Ct. 2841, 2847 (1986) (Burger, C. J., concurring).

Justice Powell also agrees that there is no fundamental right to engage in homosexual sodomy. However, he does point out that *Hardwick* may be protected by the eighth amendment's safeguards from cruel and unusual punishment. But, since *Hardwick* was neither tried nor convicted and, in fact, had not raised the issue below, Justice Powell concluded that the issue was not properly before the Court. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2847-48 (1986) (Powell, J., concurring).

55. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2848 (1986) (Blackmun, J., dissenting). The "right to be let alone" is considered to be "the most comprehensive of rights and the right most valued by civilized men." *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

56. *Id.* at 2850-51 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

57. *Id.* at 2851 (citing *United States v. Karo* 468 U.S. 705 (1984)).

58. *Id.* at 2850. Blackmun stated that privacy grounds are not the only ones on which *Hardwick* may be entitled to relief: "[N]either the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either provision should be preemptorily dismissed." *Id.* at 2849-50.

59. See *Loving v. Virginia*, 388 U.S. 1 (1967).

60. See *Griswold v. Connecticut*, 318 U.S. 479 (1965); *Roe*, 410 U.S. 113.

61. See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

life.”<sup>62</sup> The fact that an individual chooses a homosexual lifestyle should not detract from this right. “A way of life that is odd . . . but interferes with no rights or interests of others is not to be condemned because it is different.”<sup>63</sup>

Justice Blackmun further contended that the language of the fourth amendment provided protection for Hardwick’s behavior since it occurred in the privacy of his home.<sup>64</sup> He stated that the majority’s treatment of this aspect of the case and its reading of *Stanley* were erroneous.<sup>65</sup>

Justice Blackmun held that the major thrust of *Stanley* was that the fourth amendment provided special protection from the breach of “the right to satisfy [one’s] intellectual and emotional needs in the privacy of [one’s] own home.”<sup>66</sup> Consensual acts of homosexual sodomy fall within this sphere of influence. Therefore, as long as these acts are carried on in the privacy of the home, protection is warranted.<sup>67</sup>

In a lengthy conclusion, Justice Blackmun discussed the majority’s failure to address whether the State of Georgia properly justified the infringement of the aforementioned rights. The Justice stated that no such justification existed. Specifically, Justice Blackmun observed that the acts in question posed no threat to the public’s safety or welfare. In addition, he felt that the law did nothing more than enforce a system of private morality, and as such, was an unacceptable intrusion into an individual’s intimate affairs.<sup>68</sup>

---

62. *Bowers*, 106 S. Ct. at 2851.

63. *Id.* at 2852 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972)).

64. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” U.S. CONST. amend. IV.

65. *Bowers*, 106 S. Ct. at 2852. Recall that according to the majority, *Stanley* relied entirely on the first amendment, and thus, it claimed, shed no light on cases not involving printed materials.

66. *Id.* (quoting *Stanley*, 394 U.S. at 564-65). In addition, in *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66 (1973), the Court suggested that “‘reliance on the fourth amendment not only supported the Court’s outcome in *Stanley* but was actually necessary to it.’” *Id.* at 2853 (emphasis added in *Bowers*).

67. “Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution’s protection of privacy.” *Bowers*, 106 S. Ct. at 2853.

68. *Id.*

### C. *Stevens' Dissenting Opinion*

Justice Stevens, in his dissent, took a broad, literal reading of the statute involved,<sup>69</sup> noting that it applied to sodomous activity regardless of who is involved.<sup>70</sup> He went on to state that a proper analysis of the constitutional question first required a determination of whether the statute may constitutionally proscribe all sodomous behavior. If it does not, the Court should address whether the statute may be saved by enforcement only against homosexuals.<sup>71</sup> In response to the first question, Justice Stevens followed traditional notions that the *Griswold* line of cases protected society's right to engage in conduct proscribed by the Georgia statute.<sup>72</sup>

Since the Georgia statute is not enforced as written, Justice Stevens asserted that the state must justify its selective enforcement of the law against homosexuals.<sup>73</sup> This, the Justice contended, it could not do. Homosexuals are to be accorded the same liberty interests as members of the heterosexual population. Those interests include the right of voluntary association both publicly and privately. Secondly, the state can show no compelling interest for the infringement of the fundamental rights of homosexuals. The mere dislike or unacceptance of a certain lifestyle was not sufficient.<sup>74</sup>

## IV. ANALYSIS

### A. *Critique*

Justice Blackmun characterized the majority opinion as an "overall refusal to consider the broad principles that have informed [the Court's] treatment of privacy in specific cases."<sup>75</sup> The majority's inflexibility was further exposed when it refused to announce a fundamental right to engage in homosexual sodomy protected by the fourteenth amendment's due process clause. The Court cited the ancient roots of sodomy laws and the lack of textual support in the body of the Consti-

---

69. GA. CODE ANN. § 16-6-2 (1984). See also *supra* note 2 and accompanying text.

70. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2856-57 (Stevens, J., dissenting).

71. *Id.* at 2857.

72. *Id.* at 2858.

73. *Id.*

74. *Id.* at 2858-59.

75. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2852 (Blackmun, J., dissenting).

tution as justification for this refusal. Neither of these bases seem adequate in today's progressive society.

The Court was unwilling to apply its previous right of privacy decisions any further than the narrow factual situations they encompass. While it was true that the decisions center around the family, marriage and procreation, they had in effect created a sphere of privacy, the boundaries of which extend beyond their facts. "We protect those rights not because they contribute . . . to the general public welfare, but because they form so central a part of an individual's life."<sup>76</sup> The right to make decisions regarding one's intimate affairs is most certainly "central" to each individual's life. As such, this right warrants protection. The fact that an individual chooses a homosexual lifestyle should not detract from this right. Other than a mere denial of this proposition, the majority can cite no reason why this should not be.

Societal values have seen a great deal of change since the signing of the Constitution. Homosexuality is no longer considered an illness or disease. Rather, it is viewed as an alternative lifestyle, different, yet accepted. The idea that a homosexual's right to engage in private consensual sexual activity should be legislatively proscribed is repugnant to a modern value system. As Justice Holmes once stated:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>77</sup>

The majority refuses to expand the substantive reach of the due process clause if it means a redefinition of the category of rights deemed to be fundamental. The fear of being labeled judicial legislators is the main reason for this refusal.<sup>78</sup>

Without a doubt, the same concerns surrounded the Court during the decade in which the *Griswold* line of cases was being decided. Yet the holdings in those cases established powerful precedent which survives today. Dealing with highly controversial areas, the Court viewed the Constitution as a

---

76. *Id.* at 2851.

77. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

78. *Bowers*, 106 S. Ct. at 2846.

document for all ages designed to protect the citizenry from unwarranted intrusions upon their personal lives, knowing that the framers did not contemplate its extension to protect abortion, procreation or interracial marriage. That same flexibility is needed here.

Fundamental rights have been defined as those rights in which "neither liberty or justice would exist if [they] were sacrificed."<sup>79</sup> Against this backdrop, can it be said that the denial of a segment of our society of those rights surrounding the most intimate aspects of their lives is in keeping with the concepts of liberty and justice? "[T]he time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests. Intolerance of the unconventional halts the growth of liberty."<sup>80</sup>

### *B. The Decision's Impact on Future Cases*

The uncertainty surrounding sodomy statutes and the constitutional right of privacy has made for a series of relatively unpatterned decisions in state and federal courts. The decision in *Bowers* attempted to clear up some of this confusion by refusing to protect private, consensual homosexual behavior from state proscription. Courts looking for a "hook to hang their hats on" will most likely follow the precedent set by the decision. However, this does not mean that there is no hope for those concerned with the rights of homosexuals. For these people, the state legislatures appear to be the arenas offering the most promise and hope.

ROGER D. STRODE, JR.

---

79. *Id.* at 2844 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

80. *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 851 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974).

