# RECONSIDERING HOMOSEXUAL RIGHTS IN LIGHT OF THE REEMERGENCE OF SOUTHERN STATES' RIGHTS

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In *Bowers v. Hardwick*,[1] the United States Supreme Court protected the power of the State of Georgia to criminalize sexual behavior unrelated to procreation.[2] The *Bowers* Court further empowered Georgia and all other states by allowing the prohibition of sexual behavior involving homosexual acts.[3] *Bowers* guarded state legislative discretion by defining what sexual behaviors are largely acceptable.[4] Consequently, *Bowers* delivered homosexuality to the mercies of state legislative majorities,[5] increasing the likelihood of risked legal and social discrimination against homosexuals.[6] Some scholars have categorized *Bowers*[7]

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[1] 478 U.S. 186 (1986).

[2] *See id.* at 192-94.

[3] *See id.* at 196.

[4] *See id.* at 193-96.

[5] *See id.* at 196.

[6] *See, e.g.*, Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990s USA: The Continuing Toll of* Bowers v. Hardwick, 24 GOLDEN GATE U. L. REV. 1 (1994); John Charles Hayes, Note, *The Tradition of Prejudice Versus the Principle Equality: Homosexuals and Heightened Equal Protection Scrutiny After* Bowers v. Hardwick, 31 B.C. L. REV. 375 (1990); and Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987).

[7] *See* Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the* Bowers v. Hardwick *Dissent*, 25 WAKE FOREST L. REV. 501, 534-5 (1990); Daniel R. Gordon, *The Ugly Mirror: Bowers, Plessy and the Reemergence of the Constitutionalism of Social Stratification and Historical Reinforcement*, 19 J. CONTEMP. L. 21 (1993); Mitchell Lloyd Pearl, Note, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y. U. L. REV. 154, 158 n.23 (1988).

as a modern *Plessy v. Ferguson*.[8] Since 1986,[9] *Bowers* has remained a souce of state power for Georgia, as well as any other state dedicated to restricting consensual, adult sexual behavior.

In December 1998, the Georgia Supreme Court repudiated the United States Supreme Court by restricting the Georgia legislature's power to control and regulate consensual adult, sexual behavior.[10] In *Powell v. State*,[11] the Georgia Supreme Court held that the Georgia statute,[12] previously ratified by the United

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[8] 163 U.S. 537 (1896). In *Plessy*, the Court upheld a Louisiana law which called for separate but equal accommodations for white and black railroad passengers. *See id.* at 551. The Court held that this separate but equal treatment did not violate the Fourteenth Amendment. *See id.* at 550-51. However, this ruling was subsequently overruled by the Court in *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954). In *Brown*, the Court opined,

> [w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

*Id.* at 495.

[9] *See Bowers*, 478 U.S. at 186. *Bowers* was decided on June 30, 1986. *See id.*

[10] *See* Powell v. State, 510 S.E.2d 18 (1998).

[11] *See id.*

[12] G.A. CODE ANN. § 16-6-2 (1984). This statute states in pertinent part:

> (a) A person commits the offense of sodomy when he or she 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 or she commits sodomy with force and against the will of the other person. The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy.
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> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor 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 ten nor more than 20 years. Any person convicted under this Code section of the offense of aggravated sodomy shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

States Supreme Court in *Bowers*, was unconstitutional.[13] In rendering its decision, the Georgia Supreme Court represented a shift in the balance of power between the federal and state judiciaries' authority to protect basic human rights. *Powell* stands for more than just sexual and homosexual freedom. *Powell* has implications involving basic human rights and federalism. This article will examine the ramifications of power on federalism policies. First, the article reviews the doctrine and results in both *Bowers* and *Powell*.[14] Then, the article examines the federalism basis for the *Powell* court's rationale.[15] Last, the article discusses the Georgia Supreme Court's style of repudiating not only the homophobic results of *Bowers*, but more importantly, the cramped approach to human rights taken by the United States Supreme Court in *Bowers*.[16]

## I. TWO CASES AND TWO RESULTS: FEDERAL AND STATE

The Georgia statute[17] overturned by the *Powell* court,[18] was first constitutionally challenged in the early 1980s in *Hardwick v. Bowers*.[19] Georgia police arrested Michael Hardwick for participating in an act of sodomy[20] with a consent-

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(c) When evidence relating to an allegation of aggravated sodomy is collected in the course of a medical examination of the person who is the victim of the alleged crime, the law enforcement agency investigating the alleged crime shall be financially responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence.

*Id.*

[13] *See Powell*, 510 S.E.2d. at 26.

[14] *See* notes 17 to 112 *infra* and accompanying text.

[15] *See* notes 113 to 145 *infra* and accompanying text.

[16] *See* notes 146 to 204 *infra* and accompanying text.

[17] G.A. CODE ANN. § 16-6-2 (1984).

[18] 510 S.E.2d 18 (1998).

[19] 760 F.2d 1202 (11th Cir. 1985).

[20] Sodomy has been defined as "any sexual intercourse held to be abnormal, esp. bestiality or anal intercourse between two male persons." WEBSTER'S NEW WORLD DICTIONARY 1274 (3d ed. 1994). However, "[w]hile variously defined in state criminal statutes, [sodomy] is generally oral or anal copulation between humans, or between humans and animals." BLACK'S LAW DICTIONARY 1391 (6th ed. 1990).

ing adult in the bedroom of Hardwick's home.[21] Although a Georgia district attorney brought charges against Hardwick, who was bound over to Georgia Superior Court, the district attorney avoided presenting evidence to a grand jury until further evidence developed.[22] Hardwick faced the possibility of prosecution for four years.[23]

### A. THE FEDERAL CHALLENGE

Instead of waiting to face criminal liability, Hardwick brought a declaratory judgment action in the United States District Court for the Northern District of Georgia alleging that the Georgia sodomy statute was unconstitutional in the context of private sexual conduct involving consenting adults.[24] Hardwick's complaint named as defendants, the Georgia Attorney General, the Fulton County District Attorney and the Atlanta Public Safety Commissioner,[25] who each filed separate motions to dismiss for failure to state a claim upon which relief could be granted.[26] In granting the defendants' motions,[27] the district court disposed of Hardwick's constitutional claims while citing the United States Supreme Court's summary affirmance[28] in *Doe v. Commonwealth's Attorney*.[29]

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Georgia Code Annotated § 16-6-2 (1984) describes sodomy as "the peformance of or submission to any sexual act involving the sex organs of one person and the mouth or anus of another." G.A CODE ANN. § 16-6-2(a) (1984).

[21] *See Hardwick*, 760 F.2d at 1204.

[22] *See id.*

[23] *See* Brief for Respondent at 2, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) *reprinted in* 164 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, at 412 (Philip B. Kurland and Gerhard Casper eds. 1985). Laurence H. Tribe argued the cause for the Respondent Hardwick. *See id.* at 404. Joining Mr. Tribe on the brief were Kathleen M. Sullivan, Brian Koukoutchos and Kathleen L. Wilde. *See id.* (Laurence H. Tribe is the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard University, an author and leading authority on American Constitutional Law.) *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW i (2d ed. 1988). (Georgia provided a four year statute of limitations for the felony of sodomy); GA. Code Ann. § 17-3-1(c)(1984).

[24] *See Hardwick*, 760 F.2d at 1204.

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] *See* Brief for Respondent, *supra* note 23, at 412.

Hardwick subsequently appealed the district court's order of dismissal.[30] The Court of Appeals for the Eleventh Circuit agreed with the district court's determination that Hardwick possessed the standing to challenge the Georgia criminal sodomy statute.[31] Past enforcement of the statute against Hardwick, combined with the Atlanta Police Department's willingness to enforce the statute against homosexuals, indicated that Hardwick reasonably feared being prosecuted in the future for behavior that he intended to continue on a regular basis.[32] In considering Hardwick's substantive constitutional objection to the sodomy statute,[33] the appellate court overlooked the binding precedential value of *Doe v. Commonwealth's Attorney* by focusing on the narrow precedential effect of a summary affirmance by the Supreme Court.[34] The court of appeals found that "[w]here, as in the *Doe* case, the facts of the case plainly reveal a basis for the lower court's decision more narrow than the issues listed in the jurisdictional statement, a lower court should presume that the Supreme Court decided the case on that narrow ground."[35] The court of appeals construed the Supreme Court's affirmance in *Doe* as based solely on the petitioner's lack of standing.[36] Therefore, the court held that the *Doe* holding was not controlling in *Bowers*, where it had already been determined that standing existed.[37] In addition, the appeals court found that doctrinal developments subsequent to the decision in *Doe* indicated that the Supreme Court would fail to accord it binding precedential value.[38] Thus, the court of appeals found that the constitutional issues presented in *Bowers* remained open for judicial consideration.[39]

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[29] 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976).

[30] *See Hardwick*, 760 F.2d at 1204.

[31] *See id.* at 1206.

[32] *See id.* at 1205.

[33] *See id.* at 1210-13.

[34] *See id.* at 1207-8.

[35] *Hardwick*, 760 F.2d at 1208.

[36] *See id.*

[37] *See id.*

[38] *See id.* at 1208-10.

[39] *See id.* at 1210.

The majority based its constitutional analysis of the Georgia criminal sodomy statute on the federal constitutional right of privacy.[40] The court further noted that the right of privacy implicated protection for procreation, marital relations, and familial ties.[41] Although homosexuality occurred outside the confines of traditional notions concerning marriage, the court reasoned that "[f]or some, the sexual activity in question serves the same purpose as the intimacy of marriage."[42] Hence, the right of intimate association, protected by the federal constitution, goes beyond behaviors involved with procreative purposes.[43] In addition, Hardwick's behavior received added constitutional protection because he acted within the confines of his home.[44] The court of appeals found that Hardwick possessed a right of intimate association, protected from intereference by the State of Georgia.[45] The court of appeals remanded to the district court, requiring the State of Georgia to demonstrate a compelling state interest[46] in re-

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[40] The United States Supreme Court has stated that:

> [v]arious guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Griswold v. Connecticut, 381 U.S. 479, 483 (1965). For more about the Court's holding in *Griswold*, *see infra* note 46 and accompanying text.

[41] *See Hardwick*, 760 F.2d at 1208.

[42] *Id.* at 1212.

[43] *See id.* at 1211.

[44] *See id.* at 1212.

[45] *See id.* at 1211-12.

[46] The appellate court stated that, "the Supreme Court's analysis of the right to privacy in *Griswold v. Connecticut*, *Eisendstadt v. Baird*, and *Stanley v. Georgia*, leads us to conclude that the Georgia sodomy statute implicates a fundamental right of Michael Hardwick. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation." *Id.* at 1212 (*citing* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird 405 U.S. 438 (1972); Stanley v. Georgia,

stricting Hardwick's right to intimate association, and to further show that the criminal sodomy statute constituted a restrictive means of safeguarding that compelling state interest.[47]

The State of Georgia petitioned the United States Supreme Court for a writ of certiorari,[48] which was granted by the Court.[49] Although the court of appeals based its analysis on a broad and generalized right of intimate association,[50] the petitioner conceptualized the court of appeals' rulings as "judicially creating a fundamental right of privacy to engage in homosexual sodomy."[51] The State of Georgia further argued that homosexuality fell beyond the limits of any zone of privacy previously recognized by the Supreme Court as implicit in ordered liberty.[52] Georgia relied on a historical defense of the unpopularity of homosexuality.[53] According to Georgia, homosexuality remained morally condemned for

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394 U.S. 557 (1969)).

In *Griswold*, the defendants were convicted of violating Connecticut's birth control law. *See Griswold*, 381 U.S. 479, 480 (1965). The United States Supreme Court held that the law forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy. *See id.* at 494-95.

In *Eisenstadt*, the United States Supreme Court held that a Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancies, but prohibiting the distribution of contraceptives to single persons violated the equal protection clause of the Fourteenth Amendment. *See Eisenstadt*, 405 U.S. at 452-55.

[47] *See Hardwick*, 760 F.2d at 1211.

[48] *See* Brief for Petitioner, Michael J. Bowers at 2, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) *reprinted in* 164 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, at 367 (Philip B. Kurland and Gerhard Casper eds. 1985). Michael E. Hobbs, Senior Assistant Attorney General of Georgia argued the cause for the Petitioner. *See id.* at 354. In addition to Michael E. Hobbs, Michael J. Bowers, Attorney General, Marion O. Gordon, First Assistant Attorney General, and Daryl A. Robinson, Senior Assistant Attorney General argued on the briefs. *See id.*

[49] *See* Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

[50] *See* Hardwick v. Bowers, 760 F.2d 1202, 1211-12 (11th Cir. 1985).

[51] *See* Brief for Petitioner, *supra* note 48, at 382.

[52] *See* Brief for Petitioner, *supra* note 48, at 382-89.

[53] *See* Brief for Petitioner, *supra* note 48, at 382.

thousands of years.[54]

Asserting that universal morality and Judeo-Christian values proscribed homosexuality, the State of Georgia noted that philosophers such as Plato, Aristotle, or Kant either failed to validate the behavior or found the behavior unnatural.[55] Sodomy remained condemned by the Old Testament, New Testament, Aquinas, Middle Age Ecclesiastical Courts and the more modern King's Courts in England.[56] Lord Coke and Blackstone expounded upon the dark criminal nature of homosexual sodomy.[57] In fact, Lord Coke served as a bridge for anti-homosexual legal regulation between England and the American colonies.[58] Georgia adopted traditional English common law early, thereby making sodomy punishable by life imprisonment and hard labor early in its history.[59]

Georgia's use of anti-homosexual history served as the basis for the petitioner's constitutional arguments. First, Georgia argued that the federal constitutional right to privacy as a fundamental right found its basis in tradition.[60] The anti-homosexual history provided evidence that "neither the legal nor moral traditions of the nation can provide the necessary support for the recognition of consensual sodomy as falling within that class of rights deemed fundamental."[61] Second, history demonstrated that no national consensus contradicted the Georgia legislature's judgment that homosexual sexuality needed to be criminally sanctioned.[62] Last, national tradition provided a generalized back drop for Georgia's assertion that the inclusion of homosexual sodomy in a constitutionally-protected zone of privacy would lower "the estate of marriage, which has traditionally been held an institution worthy of the protection and nurture of the State."[63] For the State of Georgia, Michael Hardwick's challenge of the Georgia

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[54] *See* Brief for Petitioner, *supra* note 48, at 383.

[55] *See* Brief for Petitioner, *supra* note 48, at 384.

[56] *See id.*

[57] *See* Brief for Petitioner, *supra* note 48, at 385.

[58] *See* Brief for Petitioner, *supra* note 48, at 385-86.

[59] *See* Brief for Petitioner, *supra* note 48, at 384.

[60] *See* Brief for Petitioner, *supra* note 48, at 386.

[61] Brief for Petitioner, *supra* note 48, at 388.

[62] Brief for Respondent, *supra* note 23, at 415.

[63] Brief for Petitioner, *supra* note 48, at 388.

sodomy statute represented an assertion of fundamentally constitutional homosexual rights, which would threaten the traditional marital family values.

Though the State of Georgia characterized the case as one involving homosexual behavior and rights, Michael Hardwick characterized the case in broader sexual rights terms. Hardwick described his challenge of the Georgia sodomy statute as the criminalization of "[w]holly consensual, noncommercial sexual relations between willing adults" in private bedrooms.[64] The challenged statute interfered with sexual choices of willing married, unmarried, heterosexual and homosexual adults made behind closed doors.[65] Private intimacies have become converted by the sodomy statute into a public display, while the bedroom in a home has become part of the stream of commerce.[66] Hardwick discussed homosexual behavior only in response to assertions made within the State of Georgia's brief regarding homosexual behavior and rights.[67] Hardwick's brief generally mentioned intimacy[68] and associational intimacies,[69] however the respondent seemed to be arguing narrowly for the rights of adults to engage in consensual, noncommercial sex in a non-public context such as the home. For example, Hardwick pointed to the Supreme Court's vindication of sexual intimacy in the context of contraception usage.[70]

The United States Supreme Court faced three alternatives. First, the Court could have viewed Hardwick's challenge to the sodomy statute as a blatant assertion of homosexual rights.[71] Second, the Court could have accepted the court of appeals' utilization of a broader right of intimate association.[72] Finally, the Supreme Court could have adopted a narrow right to sexual privacy in the consensual, noncommercial context for willing adults where such sex occurs in the

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[64] *See* Brief for Respondent, *supra* note 23, at 415.

[65] *See id.* at 415.

[66] *See* Brief for Respondent, *supra* note 23, at 416.

[67] *See id.* at 13. *See also* Brief for Respondent, *supra* note 23, at 438.

[68] *See* Brief for Respondent, *supra* note 23, at 414.

[69] *See* Brief for Respondent, *supra* note 23, at 417, 419.

[70] *See* Brief for Respondent, *supra* note 23, at 420.

[71] *See supra* notes 45 to 57 and accompanying text.

[72] *See supra* notes 38 to 41 and accompanying text.

privacy of one's own bedroom.[73]

The Supreme Court chose Georgia's anti-homosexual, historical analysis in fashioning its decision. Conceiving the issue in *Bowers* as "[w]hether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . . ,"[74] the Court accused Hardwick of asking the judiciary to "announce . . . a fundamental right to engage in homosexual sodomy."[75] The Court overlooked Hardwick's arguments regarding the neutral breadth of the Georgia sodomy statute.[76] The Court's analysis quickly became based in history as the Court sought to define the parameters of constitutional fundamental rights by identifying liberties embedded in the history and traditions of the United States.[77] The Court determined that homosexuality lacked such a historical status in the United States.[78] Extending its analysis beyond the recent American historical context, the Court acknowledged that proscriptions against homosexual sodomy possess "ancient roots."[79] When the original states[80] ratified the United States Constitution, sodomy remained a common law criminal offense, forbidden by the laws of each of the original states.[81]

Demonstrating a majoritarian element, the Supreme Court not only viewed homosexual sodomy as illegal at the start of the nation, but in 1868 at the ratification of the Fourteenth Amendment, thirty-two of thirty-seven states outlawed sodomy.[82] By 1961, the majority of states outlawed homosexual sodomy.[83]

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[73] *See supra* notes 58 to 64 and accompanying text.

[74] Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

[75] *Id.* at 191.

[76] *See* Brief for Respondent, *supra* note 23 at 2, 4, 5.

[77] *See Bowers*, 478 U.S. at 192.

[78] *See id.* at 192-94.

[79] *Id.* at 192.

[80] The original states were: Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina and Virginia. Each of these states had criminal sodomy laws in effect in 1791. *See id.*

[81] *See Bowers,* 478 U.S. at 192.

[82] *See id.* at 192-93.

[83] *See id.* at 193.

However, by 1986, the majority proscription against such sexual conduct equalized with only twenty-four states and the District of Columbia continuing to criminalize the activity.[84] According to the Court, this large number of states with criminal statutes prohibiting homosexual sodomy seemed to evidence a lack of tradition protecting adult consensual sexuality. [85] In fact, the Supreme Court listed the various state criminal sodomy statutes in 1791 and 1868.[86]

The Court highlighted the majoritarian nature of anti-homosexual statutes by emphasizing the democratic nature of law-making in the United States.[87] The Court cautioned against judicial development of fundamental rights where majorities oppose such fundamental rights and no historical basis exists for those rights. The Court further warned against a repeat of the substantive due process activism of the 1930s Supreme Court.[88] Therefore, Justice Scalia asserted that the judiciary must remain cautious about assuming the role of governing the country.[89] The Court further implied that the state legislatures, as democratic institutions, must be allowed to govern. Although the laws that banned homosexual sodomy represented moral choices, the ethical impact failed to undermine the respected democratic nature of those laws because democratically based law is necessarily derived from a moral basis.[90] The Supreme Court ultimately reversed the court of appeals' decision to uphold the constitutionality of the Georgia sodomy statute and the lower court's application of that statute to homosexual behavior.[91]

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[84] *See id.* at 193-94.

[85] *See id.* at 193.

[86] *See id.* at 193 n.6.

[87] *See Bowers*, 478 U.S. at 194-96.

[88] *See id.* at 194. This judicial activism of the 1930's is often referred to as the *Lochner* Era. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 568 (2d ed. 1988); *See also* Lochner v. New York, 198 U.S. 45 (1905). In *Lochner*, the United States Supreme Court struck down a state law requiring 10-hour daily maximum and 60-hour weekly maximum hours worked by bakers. *See id.* at 64. Professor Tribe has written that although "the Supreme Court invalidated much state and federal legislation between 1897 and 1937, more statutes in fact withstood due process attack in this period than succumbed to it." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 567 (2d ed. 1988).

[89] *See id.* at 195.

[90] *See id.* at 196.

[91] *See id.* at 189.

### B. THE STATE CHALLENGE

The circumstances of *Bowers* are dramatically different from the subsequent state challenge to the Georgia sodomy statute. In *Powell v. State*,[92] an adult male engaged in sodomy with his wife's seventeen year-old niece and was charged with rape and aggravated sodomy.[93] While a jury acquitted him of both charges, it found him guilty of violating the same Georgia sodomy statute that posed a prosecutorial threat to Michael Hardwick.[94] The convicted adult male in *Powell* brought an appeal to the Georgia Supreme Court contending that the sodomy statute intruded on his right to privacy under the Georgia Constitution.[95] The Georgia Supreme Court agreed with him, thereby reversing his conviction.[96]

The *Powell* court based its decision on a provision of the Georgia Constitution which guaranteed that no person be deprived of liberty except by due process of law.[97] Accordingly, the Supreme Court of Georgia found that the due process clause provided a liberty of privacy.[98] The court viewed the issue as involving governmental interference in "a non-commercial sexual act that occurs without force in a private home between persons legally capable of consenting to the act."[99] In deciding what particular sexual behavior was protected as constitutionally private activity, the Supreme Court of Georgia relied upon a reasonable person standard found in its state's constitution.[100] Under such a standard, the court recognized the privacy of consensual, adult, sexual behavior conducted in the home of the participant whose "intellect is in a normal condition."[101] The

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[92] Powell v. State, 510 S.E.2d 18 (Ga. 1998).

[93] *See id.* at 20.

[94] *See id.*

[95] *See id.*

[96] *See id.* at 26.

[97] G.A. CONST. art. 1, § 1, cl. 1 (1998). The text of article I states that "[n]o person shall be deprived of life, liberty, or property except by due process of law." *See id.*

[98] *See Powell*, 510 S.E.2d at 21.

[99] *Id.* at 23-24.

[100] *See id.*

[101] *Id.* at 24 (*citing* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905)).

court further said "[w]e cannot think of any other activity that reasonable persons would rank as more private . . . than adult sexual activity."[102]

The Supreme Court of Georgia concluded that the right to privacy constituted a fundamental right requiring the existence of a compelling state interest and the mandate that any limitation on privacy be narrowly tailored.[103] The court contrasted the sodomy criminal statute with a number of other statutes that shielded the public from unwanted sexual acts, protected the weak from sexual abuse, and prevented people from being forced to submit to sexual activity.[104] The court

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[102] *Id.*

[103] *See id.*

[104] *See id. See e.g.*, G.A. CODE ANN. § 16-6-1. This statute prohibits rape and states, in pertinent part:

> (a) A person commits the offense of rape when he has carnal knowledge of:
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> (1) A female forcibly and against her will; or
>
> (2) A female who is less than ten years of age.
>
> Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.
>
> (b) A person convicted of the offense of rape shall be punished by death, by imprisonment for life without parole, by imprisonment for life, or by imprisonment for not less than ten nor more than 20 years. Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.
>
> (c) When evidence relating to an allegation of rape is collected in the course of a medical examination of the person who is the victim of the alleged crime, the law enforcement agency investigating the alleged crime shall be responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence.

G.A. STAT. ANN. § 16-6-1.

G.A. CODE ANN § 16-6-4 prohibits child molestation and states, in pertinent part,:

found that the sodomy statute served none of those purposes and existed only to regulate private conduct by consenting adults.[105]

The *Powell* court viewed the role of the judiciary as a guardian against statutes which impinge upon constitutionally protected freedoms.[106] Consequently, the Georgia legislature could act only to effectuate a public purpose in a manner guaranteed not to unduly oppress the people regulated by the legislative enact-

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(a) A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.

(b) A person convicted of a first offense of child molestation shall be punished by imprisonment for not less than five nor more than 20 years. Upon such first conviction of the offense of child molestation, the judge may probate the sentence; and such probation may be upon the special condition that the defendant undergo a mandatory period of counseling administered by a licensed psychiatrist or a licensed psychologist. However, if the judge finds that such probation should not be imposed, he or she shall sentence the defendant to imprisonment; provided, further, that upon a defendant's being incarcerated on a conviction for such first offense, the Department of Corrections shall provide counseling to such defendant. Upon a second or subsequent conviction of an offense of child molestation, the defendant shall be punished by imprisonment for not less than ten years nor more than 30 years or by imprisonment for life; provided, however, that prior to trial, a defendant shall be given notice, in writing, that the state intends to seek a punishment of life imprisonment. Adjudication of guilt or imposition of sentence for a conviction of a second or subsequent offense of child molestation, including a plea of nolo contendere, shall not be suspended, probated, deferred, or withheld.

(c) A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy.

(d) A person convicted of the offense of aggravated child molestation shall be punished by imprisonment for not less than ten or more than 30 years. Any person convicted under this Code section of the offense of aggravated child molestation shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

G.A. CODE ANN § 16-6-4.

[105] *See* Powell v. State, 510 S.E.2d 18, 24-25 (Ga. 1988).

[106] *See id.* at 25.

ment.[107] Therefore, the court possessed a duty to review legislative enactments to ensure that those enactments benefitted the general public without oppressing the individual.[108] The Georgia judiciary's duty to review law was not weakened by the majority of Georgians who commanded, through their elected representatives, this legislative determination about social morality.[109] Despite the sentiment of the majority of Georgians, the court found that the decision by the Georgia legislature, categorizing sodomy as morally reprehensible behavior, failed to create a compelling state interest. To that end, the *Powell* court's main concern was whether sexual behavior implicated the right to be let alone "so long as [one] was . . . not interfering with the rights of other individuals or of the public."[110]

*Bowers* and *Powell* produced very different results, one case upheld the Georgia sodomy statute[111] while the other case struck it down.[112] Furthermore, the analytical reasoning of both cases differed markedly. For example, in defining what is protected as private, *Bowers* focused primarily on historical notions of liberty and privacy, while *Powell* based its holding on notions of reasonableness. By accomplishing what *Bowers* failed to do, the *Powell* court made an effort to protect individual rights, even the rights of those who might be found "morally reprehensible."[113] The *Powell* case also accomplished more than simply contributing to human rights and jurisprudence. The court's decision in *Powell* signaled a shift in Georgia, and hopefully, throughout the United States, regarding the method of protecting human rights.

## II. SEXUAL FREEDOM AND STATE CONSTITUTIONAL LAW BASES.

The *Powell* court protected consensual adult sexual behavior occuring in the confines of the participants' homes.[114] However, *Powell* is more than a case im-

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[107] *See id.*

[108] *See id.*

[109] *See id.*

[110] *Id.* at 23 (quoting Pavesich v. New England Life Ins. Co., 50 S.E. 68, 71 (Ga. 1905)).

[111] *See Powell* at 26.

[112] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

[113] *Powell,* 510 S.E.2d at 26.

[114] *See id.*

plicating human rights, which involve sexual choices and identity. Implicating American federalism principles,[115] *Powell* evidences the power of American state constitutionalism, specifically Georgia state constitutionalism. The Supreme Court of Georgia decided the case[116] on the basis of the Georgia constitutional due process provision that states, "[n]o person shall be deprived of life, liberty, or property except by due process of law."[117] Although the Supreme Court of Georgia never explained the methodology for interpreting and applying the Georgia Constitution in the textual body of the case, the court implied its view of the individual protective nature of the Georgia Constitution.[118]

The Supreme Court of Georgia further expounded upon basic American constitutional federalism. Contrasting the United States Constitution with individual state constitutions, the court explained that a state constitution might never afford less protection than a parallel provision of the federal constitution.[119] However, state constitutions may provide greater protection than the federal constitution.[120] The court further noted that the Georgia Constitution provided greater individual protections than the United States Constitution in a number of issues.[121]

Extolling the protective nature of human rights under the Georgia Constitution, the court further contrasted the enhanced protections of the Georgia Constitution with the weaker protections of the United States Constitution.[122] The *Powell* court implicated that a right to privacy was embedded in the Georgia constitutional due process clause.[123] The court noted that the right to privacy

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[115] Federalism is a "[t]erm which includes interrelationships among the states and relationship between the states and the federal government." BLACK'S LAW DICTIONARY 612 (6th ed. 1990).

[116] *See Powell*, 510 S.E.2d at 26.

[117] G.A. CONST. art. I, § 1, Cl. 1 (1998).

[118] *See Powell*, 510 S.E.2d at 22 n.3.

[119] *See id.*

[120] *See id.*

[121] *See id.* The court described issues which are afforded heightened protection by the Georgia Constitution, such as free speech, right against self incrimination, cruel and unusual punishment, excessive fines, right to a free education, equal protection and privacy. *See id.*

[122] *See id.* at 22.

[123] *See id.* at 21.

under the Georgia Constitution remains "far more extensive" than the right to privacy protected by the United States Constitution.[124] The Supreme Court of Georgia described the minimized scope of privacy under the federal constitution as protecting privacy only for matters deeply rooted in American history and tradition, or matters implicit in the concept of ordered liberty.[125] While developing the contrast, the Supreme Court of Georgia cited *Bowers v. Hardwick*,[126] and specifically contrasted *Powell* with *Bowers*.[127] In fact, the court explicitly stated that "[n]ot applicable to this discussion [is] *Bowers v. Hardwick*. . ."[128] In a footnote, the court clearly noted that privacy rights found in the United States Constitution were not at issue in *Powell*.[129] In addition to contrasting *Powell* with *Bowers*, the court also contrasted *Powell* with other federal constitutional cases.[130]

The Georgia Supreme Court's protestations regarding the distinction between *Powell* and *Bowers* and other federal constitutional cases reflected the court's effort to protect *Powell*, as well as other decisions based on the Georgia Constitution, from oversight and second guessing by the United States Supreme Court. The Georgia Supreme Court probably responded to the United States Supreme Court decision in *Michigan v. Long*.[131] In *Long*, the Court found that when a state court decision relied primarily on federal law or became interwoven with federal law and when the adequacy and independence of state law remained unclear on the face of the opinion, the United States Supreme Court would analyze the case pursuant to the federal Constitution.[132] If a state court relied on federal

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[124] *See id.* at 22 n. 3.

[125] *See Powell*, 510 S.E.2d at 22 (quoting Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986)).

[126] *See id.* (citing *Bowers*, 478 U.S. at 191-92).

[127] *See id.*

[128] *Id.* at 21 n.1.

[129] *See id.*

[130] *See id.* The court mentioned *Katz v. United States*, 389 U.S. 349, 350-51(1976), and *King v. State*, 265 Ga. 440, 458 S.E.2d 98 (1995). In the *King* case, the Georgia Supreme court analogized an assertion of the federal right of privacy with respect to the right to be left alone, as predominantly a state right. *See id.*

[131] *See* Michigan v. Long, 463 U.S. 1032 (1983).

[132] *See id.* at 1040.

precedents as purely advisory, the state court needed to make clear, by plain statement, the advisory use of federal case law.[133] The Supreme Court assured state courts, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, [we] . . . will not undertake to review the decision."[134] The *Powell* court assured the United States Supreme Court that separate, adequate, and independent Georgia state constitutional grounds existed to justify the decision in *Powell*. Furthermore, the Georgia Supreme Court opined that federal privacy law, especially as reflected by the United States Supreme Court's decision in *Bowers*, failed to create a basis for the decision in *Powell*.[135] Although the *Powell* court failed to be explicit in referring directly to *Long*, the court clearly articulated the state constitutional basis for *Powell*.

The *Powell* court's protection of its holding from federal oversight and the court's strong hints about the strength of the Georgia Constitution implicated a broader vision of the Georgia Constitution's role in protecting individual privacy rights. Georgia possesses a strong history of constitutionalism, independent from that of the federal Constitution. The first Georgia Constitution, adopted in 1776 and 1777, predated the United States Constitution by more than a decade.[136] The early Georgia Constitutions of 1776, 1777, 1789, and 1798[137] provided few enumerated individual rights and liberties.[138] A Bill of Rights, known as the Georgia Declaration of Fundamental Rights, became incorporated into the Georgia Constitution in 1861.[139] This belated inclusion of a Bill of Rights might indicate that the United States Constitution and its Bill of Rights influenced Georgia's guarantee of individual rights. In fact, the federal Bill of Rights predated the Georgia Bill of Rights by about seventy years.[140]

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[133] *See id.* at 1041.

[134] *Id.* at 1033.

[135] *See id.*

[136] *See* Dorothy Toth Beasley, *Federalism and the Protection of Individual Rights: The American State Constitutional Perspective*, 11 GA. ST. U. L. REV. 681, 682 (1995).

[137] *See* MELVIN B. HILL, JR. THE GEORGIA STATE CONSTITUTION, A REFERENCE GUIDE 3-4 (1994).

[138] *See id.* at 2-6.

[139] *See id.* at 6.

[140] *See id.*

The historical context of the creation of the Georgia Declaration of Fundamental Rights reflected a strong interpretive independence from the federal Bill of Rights because the 1861 Georgia Constitution resulted from the secession of Georgia and the other southern states from the Union.[141] Although the 1861 Georgia Bill of Rights included rights existing in the United States Constitution, those rights, and presumably the other rights in the Georgia Constitution, remained disconnected from the federal constitution because it no longer applied to the confederate states, including Georgia.[142] Therefore, from its inception, the Georgia state constitutional guarantee of individual rights stood separate and apart from similar, federal constitutional guarantees.

The *Powell* court's reliance on the Georgia Constitution to protect sexual rights, even those covering homosexual rights unrecognized by the ordered liberty of the federal constitution,[143] reflected a longstanding state constitutional independence in Georgia. The *Powell* holding further reflected Georgia's participation in a broader national movement to utilize state constitutions as a means to protect individual rights.[144] The Supreme Court of Georgia, however, failed to be as explicit as other American state courts with regard to the role of state constitutional protections in modern federalism. Although the *Powell* court discussed the enhanced protective relationship of the Georgia Constitution in contrast to the federal constitution,[145] the court failed to be as clear about state constitutional methodology as other state courts. For example, the Supreme Court of Florida has explicitly stated that "Florida's state courts are bound under federalist principles to give primacy to our state constitution and to give independent legal import to every phrase and clause . . . ."[146] The Florida Court developed a

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[141] *See id.* The 1861 Convention also adopted the Ordinance of Secession. *See id.*

[142] *See* Beasley, *supra* note 133 at 682.

[143] *See supra* notes 70 - 72 and accompanying text.

[144] *See* Beasley, *supra* note 136 at 696-97. *See also* Charles G. Douglas, III, *Federalism and State Constitutions,* 13 VT. L. REV. 127 (1988); James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741 (1992); Professor Gardner: *Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1 (1995); James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L. J. 399 (1993); Jack Nordby, *Thirty-Two Reflections on the Birth, Slumber and Reawakening of the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 245 (1994); Jerry J. Phillips, *State Constitutional Law: The Choice of Course*, 61 TENN. L. REV. 441 (1994); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence,* 30 VAL. U. L. REV. 421 (1996); Robert F. Williams, *The Stories of State Constitutional Law*, 18 NOVA L. REV. 715 (1994).

[145] *See* Powell v. State, 510 S.E.2d 18, 21-22 nn. 1, 3. (Ga. 1998).

[146] Traylor v. State, 596 So.2d 957, 962 (Fla. 1992).

distinct philosophy of Florida constitutionalism,[147] including suggested interpretive and analytical factors.[148] The *Powell* court's approach remained subtler and more subdued than that of the Florida Court. However, *Powell* evidenced a strong commitment to state constitutionalism in the context of individual rights. As one Georgia Supreme Court justice stated, "I think there is a group on the court . . . that believes that the Georgia Supreme Court could interpret the state constitution more expansively than the federal constitution in several areas. That automatically means giving more rights to the citizens of Georgia."[149]

## III. DUE PROCESS AND DUE PROCESS, HISTORY AND HISTORY, MAJORITY AND MAJORITY, AND MORALITY AND MORALITY

Although *Powell* was decided on separate and independent state constitutional grounds, both *Powell* and *Bowers* remained based in due process doctrine and analysis. The *Powell* court referred directly to the Georgia due process provision,[150] while the *Bowers* Court's constitutional analysis referred to the Due Process Clauses of both the Fifth and Fourteenth Amendments.[151] The due process clauses of both the Georgia and United States constitutions possess similar language, as both protect life, liberty, and property. Moreover, both provisions guard against the deprivation of due process.[152] The only tangible difference relates to the specific due process guarantee. The United States Constitution provides "without due process of law,"[153] while the Georgia Constitution provides "except by due process of law."[154] The linguistic tracking of both provisions indicates and implies a similar interpretation for both documents, especially since the Georgia constitutional provision first appeared in 1861, long after the Fifth

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[147] *See id.* at 961-64.

[148] *See id.* at 962.

[149] HILL, GEORGIA STATE CONSTITUTION, A REFERENCE GUIDE, *supra* note 137 at 29.

[150] *See Powell*, 510 S.E.2d at 21.

[151] *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV; Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986).

[152] *Compare* U.S. CONST. amend. XIV *with* GA. CONST. art. 1,§ 1, cl. 1.

[153] U.S. CONST., amend. XIV.

[154] GA. CONST. art. 1, § 1, cl. 1.

Amendment came into existence.[155] However, the Georgia due process clause became part of the Georgia Constitution during the Confederacy, when Georgia claimed independence from the United States Constitution.[156] Certainly in 1998, the Georgia Supreme Court recognized an interpretive independence from not only the United States Constitution but also the United States Supreme Court when the *Powell* court stated that "[t]he right of privacy appellate jurisprudence . . . guaranteed by the Georgia Constitution is far more extensive then the right of privacy protected by the U.S. Constitution . . . ."[157]

Although *Bowers* and *Powell* were grounded in constitutional provisions with similar wording, both cases are dramatically different in terms of both results and analytical approaches. The United States Supreme Court was split in *Bowers* with a close, five to four decision.[158] In *Powell*, all but one of the Georgia Supreme Court justices joined the majority opinion, thereby upholding sexual privacy rights.[159] More important, the analysis of both courts differed radically. Although both courts discussed history, majoritarianism, the roles of the judiciary, and social morality, not surprisingly, the content of these discussions varied. The United States Supreme Court in *Bowers* began with the premise that federal constitutional privacy rights remained very narrow, protecting family, marriage, procreation and the right to choose whether to beget children.[160] Conversely, in *Powell*, the Georgia Supreme Court viewed the privacy rights under the Georgia Constitution as more expansive. For the *Powell* majority, the right to be left alone existed as long as the individual avoided interference with the rights of other individuals and the general public.[161] Emerging from the two contrasting judicial visions came two analyses that tracked each other, yet proved to be oppositional mirror images.

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[155] *See* HILL, GEORGIA STATE CONSTITUTION, A REFERENCE GUIDE, *supra* note 137 at 30.

[156] *See id.* at 6.

[157] Powell v. State, 510 S.E.2d 18, 22 (Ga. 1998).

[158] *See* Bowers v. Hardwick, 478 U.S. 186, 187 (1986). Justice White delivered the opinion of the Supreme Court and was joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justices Blackman, Brennan, Marshall, and Stevens dissented. *See id.*

[159] *See Powell*, 510 S.E.2d at 26. Justice Sears issued a concurring opinion. *See id.* at 26 (Sears, J., concurring). Justice Carley filed a dissenting opinion. *See id.* at 27 (Carley, J., dissenting).

[160] *See Bowers*, 478 U.S. at 190-91.

[161] *See Powell*, 510 S.E.2d at 22.

### A. HISTORICAL BASIS

Historical analysis played important roles for both the *Powell* and *Bowers* Courts. For the *Bowers* Court, history and tradition created the foundation for a federal constitutional analysis of fundamental rights. Importantly, sexual privacy possessed no textual support in the United States Constitution. Therefore, the United States Supreme Court gained the task of assuring the public that fundamental rights served as more than just subjective, judicial value choices.[162] Faced with the duty to breathe tangible life into what constitutes a fundamental value, the Court did so by characterizing fundamental liberty as those liberties deeply rooted in American history and tradition.[163] Historical human behavior, in the context of legal practice, provided the most tangible evidence of what constitutes fundamental rights. For the Supreme Court, homosexuality was tainted by a legally damning history.[164] Homosexuality constituted proscribed behavior, and the proscription had ancient roots.[165] The majority view of the ancient opposition to homosexual behavior received support in a concurring opinion asserting that homosexual conduct received condemnation not only under Judeo-Christian moral standards, but also under Roman law.[166] According to the United States Supreme Court, homosexuality represented a historically recognized evil and the opposite of what constituted a fundamental right.

In *Powell*, the Georgia Supreme Court also focused on history, including ancient history. The court began its analysis of privacy protection under the due process clause with a review of privacy law in Georgia and the world. The court opened its due process discussion with the assertion that "[t]he right of privacy has a long and distinguished history in Georgia."[167] Relying on a 1905 Georgia case,[168] the court expressed pride in Georgia's legal and constitutional history. Specifically, the court noted that the 1905 case marked the first time any court of

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[162] *See Bowers*, 478 U.S. at 191.

[163] *See id.* at 192.

[164] *See id.* at 192-93.

[165] *See id.*

[166] *See id.* at 196 (Burger, C.J., concurring).

[167] *See Powell*, 510 S.E.2d at 21.

[168] Pavesich v. New England Life Ins. Co., 50 S.E. 68 (1905). The *Pavesich* court found that the right to privacy existed in ancient law with "its foundation in the instincts of nature." *Id.* at 194.

last resort in the United States recognized the right of privacy, thereby making the Georgia Supreme Court a pioneer in privacy law.[169] The Georgia Supreme Court's style in *Powell* seemed to parody the United States Supreme Court in *Bowers*.[170] The *Powell* court seemed to emphasize the late entrance of the United States Supreme Court into the realm of privacy protection and jurisprudence by stating, "the Georgia courts have developed a rich appellate jurisprudence in the right of privacy . . . by the time the United States Supreme Court recognized the right of privacy."[171] The Georgia Supreme Court then seemed to establish an implicit, oppositional mirror image to the historical analysis in *Bowers*. Similiar to the *Bowers* Court, the *Powell* court focused on ancient law and roots. However, instead of focusing on the historical basis for negative attitudes toward homosexuality, the Georgia Supreme Court held that the foundation of the right of privacy began with the instincts of nature, and therefore, was "endowed by his Creator."[172] Where the *Bowers* Court implicitly found the basis for antagonism toward homosexual conduct in the Judeo-Christian tradition, the *Powell* court found protection for homosexual conduct in the same religious tradition. In 1998, the *Powell* court seemed to be reading the same ancient history and roots discussed by the *Bowers* Court in 1986, but with very different historical stories and results.

### B. MAJORITARIAN

Notions concerning the majoritarian nature of American law underlie the *Bowers* and *Powell* opinions. The *Bowers* Court expressed great respect for democracy and legislature that reflects the will of the majority.[173] The United States Supreme Court found that the will of an elected majority, even when based on the notions of morality, provided a sufficient rational basis for the Georgia sodomy act. Majority sentiments provided an adequate basis for the statute.[174] The Court indirectly alluded to the need to prevent modern due process jurisprudence from creating a conflict between an unelected Supreme Court and an elected President, similiar to the confrontation that occurred in the

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[169] *See id.*

[170] The author read a parody style into the opinion. There is no indication in the opinion that the Georgia Supreme Court intended to parody *Bowers*.

[171] *Powell*, 510 S.E.2d at 21.

[172] *See id.*

[173] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

[174] *See id.*

1930s.[175] Accordingly, the Supreme Court advocated deference to the popularly elected representatives of the American people.

In addition, the *Bowers* Court evidenced a subtle devotion to numerical strength in determining the content of fundamental rights. Emphasizing that a number of states criminalized sodomy throughout American history, the Court provided listings of states that did so.[176] The numerical story told by the Court seemed clear. The original thirteen states prohibited sodomy, while thirty-two of thirty-seven states forbade sodomy at the ratification of the Fourteenth Amendment.[177] Until 1961, sodomy was forbidden by every state,[178] and even in 1986, twenty-four states and the District of Columbia prohibited sodomy.[179] The Supreme Court found that majority opposition to homosexuality provided constitutional cover and legitimacy to laws that criminalized consensual, private acts of a minority. Fundamental rights could not exist where either contemporary majorities disapproved, or equally as important, historical majorities disapproved. In *Bowers*, the Supreme Court established a high bar for future minorities to overcome when seeking to assert novel, constitutional rights, especially fundamental rights implicating minority-based behavior. The minority inherently lacked the majoritarian indicator of an existing fundamental right.

The Georgia Supreme Court also focused on the majoritarian bases of law in Georgia. In analyzing the sodomy statute, the court immediately stated, "[W]e are mindful that a solemn act of the General Assembly carries with it a presumption of constitutionality . . . ."[180] The *Powell* court further conceded that Georgia legislative, public policy enactments often reflect the will of the majority.[181] However, the court also showed devotion to the individual, considering whether legislative policy and enactment benefitted the general public without oppressing the individual.[182]

The *Powell* court's approach to the majoritarian nature of law-making pos-

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[175] *See id.* at 194-95.

[176] *See id.* at 192-93, nn.5-6.

[177] *See id.* at 193.

[178] *See id.*

[179] *See Bowers*, 478 U.S. at 193-94.

[180] Powell v. State, 510 S.E.2d 18, 21 (Ga. 1998).

[181] *See id.* at 25.

[182] *See id* at 26.

sessed a greater balance than that of the United States Supreme Court in *Bowers*. The Georgia Supreme Court recognized, along with the *Bowers* Court, the respect accorded to popularly supported law. However, unlike the Supreme Court, the *Powell* court recognized a more complex law-making model in which the individual's privacy interests became measured along with the majority's democratic interests. Although the Supreme Court of Georgia shied away from a majority-implied minority dichotomy, the *Bowers* Court utilized a majority-homosexual rights and group dichotomy. For example, the Supreme Court stated, "[w]e granted . . . petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals."[183] *Powell* avoided a group rights analysis, instead focusing on a society-individual dichotomy. The Georgia Supreme Court interpreted the Georgia constitutional privacy right to be left alone as ". . . not interfering with the rights of other individuals of the public."[184] Therefore, *Bowers* utilized a majority-minority construct, while *Powell* utilized a majority-individual construct.

The *Powell* court's opinion about majoritarian influence on law-making in Georgia indicated a subtle view of majority interests. Opposed to the *Bowers* Court,[185] the *Powell* court avoided a numerical approach to validating and legitimating law. Instead, the *Powell* court focused on the majority's tendency to determine the content of protected, private behavior. Moreover, the Supreme Court of Georgia looked toward the typicality of the majority to define protected, private behavior. Instead of utilizing vast numbers, the *Powell* court employed an implied statistical mean or median. Privacy protection extends to behavior recognized as private by "[a]ny person whose intellect is in a normal condition."[186] The court utilized the mean or median of Georgians, the reasonable person, as the benchmark standard.[187] In other words, the court visualized its analytical mean or median as "a person of ordinary sensibilities."[188] For the *Bowers* Court, the majority, represented by a majority of typical Americans, served as the justification for the criminalization of homosexual conduct.[189]

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[183] *Bowers*, 478 U.S. at 189.

[184] *See Powell*, 510 S.E.2d at 23 (quoting Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905)).

[185] *See supra* notes 158-166 and accompanying text.

[186] *Powell*, 510 S.E.2d at 23 (quoting *Pavesich*, 50 S.E. at 69).

[187] *See id.* at 22.

[188] *Id.* (*quoting* Georgia Power Co. v. Busbin, 254 S.E. 2d 146 (1979)).

[189] *See supra* notes 158-166 and accompanying text.

Conversely, the *Powell* court's view of majoritarian sentiment, represented by the reasonable person of ordinary sensibilities and normal intellect, served as the defining basis for the privacy protection of adult consensual, sexual behavior including homosexual acts.

### C. SOCIAL MORALITY

The *Bowers* and *Powell* Courts shared concerns about social morality, but the resultant messages of social morality diverged strongly. Both courts recognized the social morality basis for the Georgia sodomy statute. The United States Supreme Court discussed the social morality basis for the anti-sodomy statute when analyzing whether a rational basis existed for the law.[190] The Georgia Supreme Court focused on social morality in response to the State of Georgia's assertion that social morality, as a reflection of the collective will of Georgians, served as a constitutional basis for the sodomy statute.[191] Both courts were compelled to focus on social morality in the human behavioral contexts of both cases, which involved voluntary sexual conduct among consenting adults. In *Bowers*, the Court implicitly recognized Hardwick's behavior as "voluntary sexual conduct between consenting adults."[192] However, the Court also emphasized the existence of "victimless crimes."[193] Conversely, the Supreme Court of Georgia summarized the context of *Powell* as "a non-commercial sexual act that occurs without force in a private home between persons legally capable of consenting to the act."[194]

Faced with the same problem, both courts had to analyze a criminal statute, which prohibited acts lacking compulsion and force and left no injured individual victim.[195] At most, society became indirectly victimized and even that generalized victimization became difficult to identify, especially due to the fact that not everyone in society recognized the existence of such a generalized victimization. Even the United States Supreme Court conceded that half of the American states failed to categorize voluntary acts of sodomy as criminal.[196] People

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[190] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

[191] *See Powell*, 510 S.E.2d at 25.

[192] *Bowers*, 478 U.S. at 195.

[193] *Id.*

[194] *Powell*, 510 S.E.2d at 23-24.

[195] *See generally* GA. CODE ANN. § 16-6-2(a) (1998).

[196] *See Bowers*, 478 U.S. at 193-94.

could be sent to jail for an extended period of time under the Georgia statute for these "victimless" acts.[197] For some reason, the Georgian public experienced an injury not experienced in many other states. Accordingly, the rationale for such a victimless criminal statute necessarily became some general and vague notion of social morality.

The United States Supreme Court affirmed the validity of sanctions for a victimless crime, which was not universally recognized as harmful to the general society. Finding that the law is constantly based on notions of social morality, the Court rationalized that majority opinions, regarding the morality of homosexuality, should be declared adequate as a rational basis for the sodomy statute.[198] The Georgia Supreme Court also recognized that public policy and legislation were derived from majority notions of morality.[199] However, the Supreme Court of Georgia refused to acknowledge that social notions of morality alone created a rational basis for law. Accordingly, a court in Georgia need not simply acquiese to the majority's notions of morality simply because such notions formed the basis for a criminal statute.[200] Hence, social morality unto itself failed to serve as an adequate basis for the criminalization of behavior. Social morality might serve as only a portion of a legitimate basis for criminal law, but more must exist. The court found that "[w]hile many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible, this repugnance alone does not create a compelling justification for state regulation of the activity."[201]

### D. THE ROLE OF THE JUDICIARY

The *Powell* and *Bowers* Courts remained sensitive to the role of the judiciary in reviewing socially-popular criminal law that limited individual behavior, especially when the majority disapproved of victimless social acts. At the start of its analysis, the United States Supreme Court stated, "[t]he case . . . calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate."[202] The Court proceeded to limit its role in fashioning funda-

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[197] *See id.* at 197 (Powell, J., concurring). The Georgia sodomy statute provided for imprisonment up to twenty years for one consensual act of sodomy. *See id.*

[198] *See id.* at 196.

[199] *See Powell*, 510 S.E.2d at 25.

[200] *See id.* at 26.

[201] *Id.*

[202] *Bowers*, 478 U.S. at 190.

mental rights protections in the context of individual, social behavior. The privacy right proposed, which allowed an individual to choose to engage in a consensual, adult sex act, found no explicit textual support in the United States Constitution. Consequently, the Supreme Court utilized a particularly cautious analytical style in which it identified the nature of rights qualifying for judicial protection.[203] The Court was weary that any other approach would result in popular dissatisfaction with the judiciary. The Supreme Court further feared that the American public might believe that the Justices were engrafting their own value choices on the Constitution.[204] In fact, the Supreme Court went so far as to allude to the struggle between the Supreme Court and President Franklin Roosevelt during the 1930s.[205]

If the Court failed to be cautious in fashioning individual rights, especially fundamental rights, the Court could usurp the authority to govern the United States.[206] Moreover, if the Supreme Court limited individual rights to guard against legislation based on contemporary social morality, the Court would invite a large amount of litigation.[207] Fashioning for itself a limited role in reviewing popular social regulation, the Supreme Court acceded to the democratic popular will. For the Court, fear and disapproval of homosexual behavior represented a respectable basis for democratic law-making. The Court avoided a confrontation with the democratic will even where an individual sought to behave in a fashion that hurt no one and, arguably at best, hurt society in only a vague and generalized moral fashion. Defending the individual could only hurt the public's opinion of the Court.

Although the Georgia Constitution failed to provide explicit textual support for a right to privacy, the Georgia Supreme Court adopted a very different role from the *Bowers* Court. The Supreme Court of Georgia utilized the due process clause of the state constitution as the basis of its privacy doctrine because privacy was conceived as a liberty interest.[208] The Georgia Constitution declared

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[203] *See id.* at 191

[204] *See id.*

[205] *See id.* at 194-95. The struggle between the United States Supreme Court and Franklin Roosevelt "resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments." *See id.*

[206] *See id.* at 195.

[207] *See Bowers*, 478 U.S. at 196.

[208] *See* Powell v. State, 510 S.E.2d 18, 21 (Ga. 1998).

that "[n]o person shall be deprived of liberty except by due process of law."[209] The lack of explicit textual support failed to prevent the court from finding that "the judiciary is charged with the task of examining a legislative enactment when it is alleged to impinge on the freedoms and guarantees contained in the Georgia Bill of Rights . . . ."[210] The Georgia judiciary possessed no duty to acquiesce to the majority's notion of morality.[211] Oddly, the Supreme Court of Georgia further noted that judges must avoid deciding cases on personal notions and values.[212] Similiar to the United States Supreme Court, the *Powell* court wanted to keep personal ideals out of constitutional law-making. However, in *Powell*, the court opined that personal values condemning sexual conduct might undermine the protection of individual rights in Georgia. Conversely, the United States Supreme Court in *Bowers* implied that personal values, sympathetic to individual rights and the innocence of sexual behavior, would undermine the legitimacy of the Supreme Court in the public mind. Interestingly, the Supreme Court of Georgia seemed sympathetic to the general Georgian notion of morality condemning sodomy, but the court avoided pandering to those majority beliefs. Instead, the court found that it had a responsibility to protect minority rights even though the decision would raise the wrath of the democratic majority.[213]

## IV. CONCLUSION: DIXIE RISES AND STATE HUMAN RIGHTS MATURE

The *Powell* court utilized the Georgia Constitution to protect individual, sexual behavioral choices from criminal sanctions imposed in response to traditional, majority morality. By protecting this choice, the *Powell* court also protected homosexual acts from a law which reflected a tradition of anti-homosexual moral bias. Although *Bowers* and *Powell* involved the same Georgian, anti-sodomy statute, there emerged two radically different responses to that statute. The United States Supreme Court respected the anti-homosexual majoritarian tradition represented by the statute,[214] while the Georgia Supreme Court showed a preference for a human rights privacy tradition that reflected a

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[209] GA. CONST. art. I,§ 1, ¶ 1.

[210] *Powell*, 510 S.E.2d at 26.

[211] *See id.* at 25.

[212] *See id.*

[213] *See id.* at 26-27 (Sears, J., concurring).

[214] *See supra* notes 158-166 and accompanying text.

majoritarian sense of what the reasonable person, the average Georgian, would consider private.[215] In a sense, the Georgia Supreme Court rebuffed the United States Supreme Court, which took an implicit moral stand by respecting and empowering what it viewed as the moral values of a majority.[216] Instead, the Georgia Supreme Court focused on the rights of the individual, regardless of the unpopular reaction by the public.[217] In *Bowers*, the Supreme Court empowered the states to choose their own moral stand on homosexuality. Instead of taking a moral stand on sexuality, heterosexual or homosexual,[218] the *Powell* court took a stand on the value of individual autonomy.

*Powell* imbued the Georgia Constitution with a protective role for unpopular individual behavior that failed to hurt other individuals and Georgia society. The Georgia Constitution became strengthened as a human rights document. This is noteworthy because earlier Georgia Constitutions included provisions that limited human rights, and the State of Georgia took great pains to limit human rights for much of the Nineteenth and Twentieth Centuries. Both the 1877 and 1945 constitutions included provisions that required separate schools for children of white and black races.[219] In a broader sense, Georgia devoted itself to racial segregation and repression. In fact, Georgia enacted the first law, which required racial segregation in parks.[220] In addition, the Georgia legislature required racial

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[215] *See supra* notes 167-171 and accompanying text.

[216] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

[217] *See Powell*, 510 S.E.2d at 26.

[218] The Georgia Supreme Court stated:

> [i]n undertaking the judiciary's constitutional duty, it is not the prerogative of members of the judiciary to base decisions on their personal notion of morality. Indeed, if we were called upon to pass upon the propriety of the conduct herein involved, we would not condone it. Rather, the judiciary is charged with the task of examining a legislative enactment when it is alleged to impinge upon the freedoms and guarantees contained in the Georgia Bill of Rights . . . .

*Powell*, 510 S.E.2d at 25-26.

[219] *See* SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES: A SURVEY OF STATE SEGREGATION LAWS 1865-1953, Prepared for United States Supreme Court *in re Brown vs. Board of Education of Topeka* 116 (1975).

[220] *See* Richard Kluger, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 683-85 (1976).

segregation in transportation,[221] marriage,[222] and state institutions.[223] Ironically, Georgia and the rest of the American southern states depended on federal law to reverse this record of human rights abuses.[224] In response to *Brown v. Board of Education*,[225] Georgia state officials resisted desegregation of the public schools in Georgia.[226] Once again, federal judges took the lead in changing state law and public policy.[227]

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[221] *See* SEGREGATION AND THE FOURTEENTH AMENDMENT, *supra* note 219, at 117. The segregation laws of Georgia in 1890-1891 required:

> [r]ailroad companies doing business in this State shall furnish equal accommodations, in spearate cars or compartments of cars, for white and colored passengers, and when a car is divided into compartments, the space set apart for white and colored passengers respectively may be proportioned according to the proportion of ususual and ordinary travel by each on the railroad or line on which the cars are used. Such companies shall furnish to the passengers comfortable seats and shall have the cars well and sufficiently lighted and ventilated. Officers or employees having charge of railroad cars shall not allow white and colored passengers to occupy the same car or component.

*Id.* (citing 1890-1 Ga. Laws 157).

[222] *See id.* at 120. The Georgia laws in 1865-1866 stated in pertinent part: "If any officer shall knowingly issue a marriage license to persons either of whom is of African descent and the other a white person, or if any officer or minister of the gospel shall join such persons in marriage, he shall be guilty of a misdemeanor." *Id.* (citing 1865-6 Ga. Laws 241).

[223] *See id.* at 121. The Georgia laws in 1908 required segregation of penal institutions, stating in pertinent part:

> [i]n exercising their discretion as to what convicts shall be employed upon the State farm or farms, . . . it shall be the duty of the Prison Commission, where practicable, to employ whites and negroes in separate institutions and locations, and they shall be provided with separate eating and sleeping apartments . . . .

*Id.* (citing 1908 Ga. Laws 1119, 1123).

[224] *See* James C. Cobb, *Segregating the New South: The Origins and Legacy of* Plessy v. Ferguson, 12 Ga. ST. U. L. REV. 1017 (1996).

[225] 347 U.S. 483 (1954).

[226] *See* HARRELL R. ROGERS, JR., & CHARLES S. BULLOCK, III, COERCION TO COMPLIANCE 13-15 (1976).

[227] *See* J.W. Peltason, FIFTY-EIGHT LONELY MEN, SOUTHERN JUDGES AND SCHOOL DESEGREGATION 129-31 (1971).

The *Powell* decision represents an about-face in the development of human rights, which began with the political leadership in Atlanta in the early 1960s.[228] *Powell* also evidenced a maturation of state constitutionalism and state judicial sensitivity that has progressed nationally during approximately the past quarter of a century.[229] Rebuffing the majoritarian moralism of the United States Supreme Court, the *Powell* court developed an individual human rights doctrine and developed its own theory of human rights based on its view of Georgian and global history.[230] The court dared to defy popular sentiment in Georgia,[231] thereby assuring that individuals in Georgia possess a right to be free from unnecessary state interference with their lives.

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[228] *See* James C. Cobb, *supra* note 224, at 1033-34.

[229] *See e.g.*, William Brennan, Jr., *State Constitutions and the Protection of Human Rights*, 90 HARV. L. REV. 489 (1977); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

[230] *See* Powell v. State, 510 S.E.2d 18, 28 (Ga. 1998) (Sears, J., dissenting).

[231] *See id.* at 25-26.