Can Homosexual Equal Protection Claims Withstand the Implications of Bowers v. Hardwick?

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CAN HOMOSEXUAL EQUAL PROTECTION CLAIMS WITHSTAND THE IMPLICATIONS OF BOWERS V. HARDWICK?

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One constitutional triumph does not make a right to equality. Like other recent homosexual1 legal victories, the recent Baker v. Vermont2 decision failed to guarantee the full measure of equality that homosexuals seek. Instead of granting the same-sex plaintiffs in Baker the legal right to marry, the Vermont Supreme Court merely required the state legislature to extend benefits to homosexuals similar to those enjoyed by married heterosexuals.3 Thus, nearly fifteen years after Bowers v. Hardwick,4 homosexuals still possess neither a right to marry nor a federal right to sodomy.

In light of Baker's limited achievement, as well as the dim prospects for other progressive legal advances at the state level,

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1. We ascribe the term "homosexual" to both male and female individuals who retain erotic desires for persons of the same sex. JUDD MARMOR, Overview: The Multiple Roots of Homosexual Behavior, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRaisal 5 (Judd Marmor ed. 1980) (describing a homosexual or gay person as one "who is motivated in adult life by a definite preferential erotic attraction to members of the same sex and who usually [but not necessarily] engages in overt sexual relations with them") (emphasis omitted) (footnote omitted). Our society is sensitive to the permutations in nominal classifications of individuals attracted to persons of their own gender. See MARGARET CRUIKSHANK, THE GAY AND LESBIAN LIBERATION MOVEMENT 3 (1992) (distinguishing the term gay from homosexual as a political term associated with the gay movement). The term homosexual is preferred because it is the most gender-neutral ascription of the sexual character of both females and males with this erotic inclination.


3. Id. at 886 ("While some future case may attempt to establish that . . . the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today.").

homosexual rights proponents may be tempted to forego state challenges in favor of federal litigation. This Article examines the prospects for a substantive federal homosexual right to sodomy and to marriage. This Article also considers only equal protection claims because the United States Supreme Court is unlikely to expand due process rights given the stare decisis deference that it would accord Hardwick. Moreover, homosexual rights advocates almost universally predicate substantive homosexual rights claims on the Equal Protection Clause rather than the Due Process Clause.

In this Article, we argue that federal homosexual equal protection rights cannot be sustained until the United States Supreme Court rejects Bowers v. Hardwick root and branch. We contend that many scholars sympathetic to homosexual rights have overlooked Hardwick's considerable precedential impact on equal protection claims. Further, those who have probed Hardwick's impact have failed to uncouple its holding from homosexual equal protection claims. Although we discuss primarily a federal constitutional right, our discussion illuminates some of the salient claims offered by Vermont jurists in the Baker decision, and, therefore, where appropriate, we apply our analysis to this decision.

This Article is divided into three parts. Part I examines Hardwick's impact on three distinct equal protection claims that are grounded on rational review, strict scrutiny, and the right to

5. In this Article, Homosexual rights encompass only marriage and sodomy, unless otherwise specified.
7. See Cathy Harris, Outing Privacy Litigation: Toward a Contextual Strategy for Lesbian and Gay Rights, 65 GEO. WASH. L. REV. 248, 261-64 (1997) (summarizing relevant literature). There are reasons for appealing to equal protection rather than due process. One chief reason among them is the impoverished private/public dichotomy. Id. at 255-58.
8. Jonathan Pickhardt, Note, Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies, 73 N.Y.U. L. REV. 921, 958 (1998) ("Gay rights litigators must set their sights on the ultimate reversal of Bowers. As long as Bowers remains good law it will be a pernicious force working to defeat gay rights efforts at every turn.").
9. See id. for exceptions to the monolithic underestimation of Hardwick. See also Nan D. Hunter, Life After Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 531-32 (1992) ("Since Hardwick was decided, the threshold question in the litigation of lesbian and gay rights cases has become whether Hardwick only extinguishes the claim to a substantive due process privacy right, or whether it also predetermines challenges under the Equal Protection Clause.").
marry. Part II critiques two alternative equal protection theories in light of the shortcomings of the equal protection claims discussed in Part I. First, we explore Cass Sunstein's attempt to isolate due process precedents from the realm of equal protection. If successful, such an attempt would safeguard homosexual equal protection claims from Hardwick. Second, we explore Ronald Dworkin's theory that equal protection requires equal respect of all interests, including homosexuals. Finally, Part III exposes the inherent due process character of homosexual equal protection claims by analyzing the fundamental character of homosexual relationships. In conclusion, we find no federal constitutional support for a homosexual right to sodomy or marriage.

I. THE EQUAL PROTECTION CLAUSE AND HOMOSEXUAL RIGHTS

In this section, we highlight the challenge that Hardwick poses for federal homosexual equal protection claims. Parts A and B analyze conventional homosexual equal protection strategies that pertain to rational review and strict scrutiny. Part C critiques a federal right to homosexual marriage.

A. Rational Review of Homosexual Rights

The United States Supreme Court's decision in Romer v. Evans\(^{10}\) inspired many homosexual rights advocates. However, although the United States Supreme Court condemned the "animus" that motivated Colorado voters to exclude homosexuals as a class,\(^{11}\) the Justices failed to offer a rationale that either establishes a beach-head for future litigation or challenges the holding of Hardwick. This section exposes the vulnerability of homosexual rights to state interests under the more relaxed standard of rational review applied by the Supreme Court in Romer.

The Supreme Court protected homosexual rights in Romer by applying rational review\(^{12}\) to Colorado's Amendment Two,\(^{13}\) which

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11. Id. at 633-35 ("The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.").
12. See id. at 631-36. Rational review was first described in Vance v. Bradley, 440 U.S. 93 (1979). In Vance, the Court explained that courts "will not overturn... a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." Id. at 97.
denied protection to homosexuals because of their sexual preference. The Court did not apply strict\(^{14}\) or intermediate scrutiny,\(^{15}\) either by establishing the fundamental character of the right to homosexual conduct\(^{16}\) or affirming the politically exclusionary character of Amendment Two.\(^{17}\) Instead, the Court chose to apply the lowest level of constitutional scrutiny, rational review,\(^{18}\) which merely requires a state to relate its classification of citizens to a legitimate state interest.\(^{19}\)

The Court’s choice of rational review, rather than a stricter standard, threatens homosexual interests. First, this standard of review allows critics to castigate the Justices for invalidating a statute reasonably related to legitimate state interests that the Court did not directly dispute.\(^{20}\) Second, although the Court’s

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13. The statewide referendum known as "Amendment Two" added section 30b to Article II of the Colorado State Constitution. It provided, in part, that:

| Neither the State of Colorado, through any of its branches or departments, nor any of its agencies . . . shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status . . . .

COLO. CONST. art. II, § 30b.

14. The concept of strict scrutiny was born in *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938). Justice Stone’s renowned footnote stated that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny." *Id.*


16. See infra Part II.A (discussing Cass Sunstein’s influential argument for homosexual rights).

17. But see *Evans v. Romer*, 854 P.2d 1270, 1285 [Colo. 1993] (Amendment Two “fence[d] out . . . [a] class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process.”). The Colorado Supreme Court used the politically exclusionary nature of the amendment to justify the application of strict scrutiny. *Id.*


rationale—that Amendment Two was both "too narrow and too broad"—sufficiently protected some homosexual rights in Romer, it actually invites more carefully crafted anti-homosexual statutes, such as proscriptions against marriage, that do not deny homosexuals "protection across the board." Third, because the Court was unwilling either to articulate a cogent argument for homosexual rights or to reevaluate Hardwick, the Romer majority rejected Amendment Two under rational review by imputing "animus" as the motivation for the measure. Thus, the majority offered only the thinnest of jurisprudential reeds in its timid retreat into its tenuous justification.

Moreover, the Court further vitiated its languid justification of Romer by failing even to mention Hardwick. Instead of reconciling the two cases by perhaps casting some dubiety on the latter, the majority fell silent, as if the two decisions could logically co-exist. Jurists, ill-disposed to homosexual rights, have noted that if Hardwick allows states to criminalize an act

(arguing that the judiciary rejected conventional applications of rational review); see also Romer, 517 U.S. at 653 (Scalia, J., dissenting) (criticizing the majority's opinion as "an act, not of judicial judgment, but of political will").

22. Id.
23. The Court could have attempted to protect homosexual interests by acknowledging that statutes such as Amendment Two subvert homosexuals' ability to participate in the political process, a rationale the Colorado Supreme Court used in employing strict scrutiny. Cf. Evans v. Romer, 854 P.2d 1270, 1285 (Colo. 1993) (finding that the amendment bars an adequate voice in government).

But no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it . . . . That opinion [,United States v. O'Brien, 391 U.S. 367 (1968),] explained well the hazards of declaring a law unconstitutional because of the motivations of its sponsors. First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment . . . . If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

Id. (citation omitted); cf. Equality Foun. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 293 n.4 (6th Cir. 1997) ("Indeed, a reviewing court in this circuit may not even inquire into the electorate's possible actual motivations for adopting a measure via initiative or referendum. Instead, the court must consider all hypothetical justifications which potentially support the enactment.") (citation omitted).
so crucial to this class of citizens, then other less egregious anti-homosexual statutes can hardly be proscribed.\textsuperscript{26}

Notwithstanding \textit{Romer}, homosexuals can hardly hope to obtain federal constitutional rights to apply to acts such as sodomy under rational review. In his dissent, Justice Scalia attempted to preclude a higher level of review for homosexual claims by emphasizing that the \textit{Romer} majority employed rational review.\textsuperscript{27} Scalia realizes the untenability of vindicating substantial homosexual rights through rational review, and the majority’s application of this standard in \textit{Romer}, confirmed the minimal burden that states must overcome to justify anti-homosexual statutes. Thus, neither \textit{Romer} nor its standard of rational review is sufficiently potent to justify meaningful future homosexual rights. The prospect for using the more rigorous standard of strict scrutiny is the subject of the next section.

\textbf{B. Strict Scrutiny of Homosexual Rights}

This section considers the justification for strictly scrutinizing anti-homosexual statutes.\textsuperscript{28} This standard of review,\textsuperscript{29} which requires the state to show that its statute is necessary to serve a compelling state interest,\textsuperscript{30} would almost certainly vindicate

\begin{itemize}
\item \textsuperscript{26} See Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).
\item If the Court [in \textit{Hardwick}] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.
\item \textit{Id.}; see also High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990).
\item \textit{Romer}, 517 U.S. at 640 n.1 [Scalia, J., dissenting] ("The Court evidently agrees that ‘rational basis’—the normal test for compliance with the Equal Protection Clause—is the governing standard.").
\item \textsuperscript{29} See United States v. Carolene Prod. Co., 304 U.S.144, 152-53 n.4 (1938).
\item \textsuperscript{30} See Korematsu v. United States, 323 U.S. 214, 216 (1944) (asserting that racial classifications are "suspect" and demanding "rigid scrutiny" of their justifications); see also Loving v. Virginia, 388 U.S. 1, 9 (1967).
\end{itemize}
homosexual rights claims. However, homosexuals' social achievements have imperiled this strategy.

The Court's strict scrutiny doctrine, which has been marked by discrepant delineation rather than organic evolution, implicates several criteria that homosexual rights proponents would find difficult to fulfill. The Court formulated its first set of criteria in United States v. Carolene Products Co. by proscribing governmental action that is influenced by prejudice against "discrete and insular minorities" and prejudice that limits the operation of "political processes" which normally protect them.

However, homosexuals are not "discrete" in the readily identifiable sense that the Court ascribed to racial minorities in Carolene Products, and only an individual blinded by sexual stereotypes would think otherwise. Nor are homosexuals insular. Unlike African-Americans in the first-half of the 20th Century, homosexuals occupy a wide range of social, economic, and professional positions. Moreover, they continue to wield increasing influence in "political processes." Although homosexuals constitute only four percent of Colorado's electorate, they garnered the support of forty-six percent of the voting electorate against Amendment Two. Such success would have been improbable only two decades ago.

Proponents of homosexual rights also seek to trigger strict scrutiny by invoking the other criteria of suspectness. The two

31. For example, Professor Gerald Gunther's well-known formulation indicates that although this level of review is "strict" in theory, it is usually "fatal" in fact. Gerald Gunther, The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972).
33. 304 U.S. 144 (1938).
34. Id. at 152-53 n.4
35. Homosexuals are not physically identifiable like other suspect classes. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976) (describing aliens as "an identifiable class of persons").
36. See Tymkovich et al., supra note 20, at 294.
37. See Petitioner's Brief at 42 n.29, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039). The State of Colorado noted that homosexuals succeeded in repealing sodomy statutes in twenty-seven states and included sexual orientation in the federal hatecrimes statute. Id.
38. The Court first employed the term "suspect" in Korematsu v. United States, 323 U.S. 214, 216 (1944). The criteria of Carolene Products have been subsumed
characteristics of suspectness that homosexual equal protection proponents' invoke are "immutability" and a history of prejudice. Neither of these arguments is probative. When the Court specified immutability as characteristic of suspect classes, it spoke of "an immutable characteristic determined solely by the accident of birth." Unlike race, which is immutably determined by ancestry, the precise etiology of homosexuality eludes science. Hence, the failure of science to demonstrate the immutability of homosexuality imperils the argument for homosexual "suspectness."

under the category of "suspectness" even though the Court adjudicated this case six years before the Court used this term. See generally Carolene Prod. Co., 304 U.S. 144 (1938).


41. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (noting that among traditional indicia of suspectness includes being "subjected to... a history of purposeful unequal treatment").

42. See Pickhardt, supra note 8, at 948-51 (arguing cogently that many gay rights arguments threaten to undermine the broader gay rights movement).


44. Scientific studies have drawn ambiguous conclusions, at best, regarding the causes of homosexuality. For arguments hinting at a biological connection to homosexuality, see generally Simon LeVay, A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men, 253 SCIENCE 1034 (1991) and Michael Bailey & Richard Pillard, Are Some People Born Gay?, N.Y. TIMES, Dec. 17, 1991, at A21. But see TIMOTHY F. MURPHY, GAY SCIENCE: THE ETHICS OF SEXUAL ORIENTATION RESEARCH 47 (Lillian Faderman & Larry Gross eds., 1997) (stating that the initial excitement over these discoveries has been tempered by subsequent scrutiny).

45. The Court's circumscription of suspectness in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985), by mitigating the importance of immutability, further undermines this homosexual endeavor. If the large and amorphous class of the mentally retarded were deemed quasi-suspect... it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.
Even conceding that homosexuals have suffered a history of prejudice,\textsuperscript{46} this criteria of "suspectness" is insufficient by itself to trigger strict scrutiny.\textsuperscript{47} Given the inability of homosexuals to fulfill most of the criteria for "suspectness," the chances for attaining any degree of heightened scrutiny are remote.\textsuperscript{48}

The greater challenge in obtaining the suspect or semi-suspect classification for homosexuals is \textit{Hardwick}. \textit{Hardwick} seems to preclude heightened scrutiny by permitting states to criminalize the act that is integral to the very essence of their classification as homosexuals.\textsuperscript{49} Therefore, even if homosexuals were able to fulfill some of the criteria of a semi-suspect class, they must first reconcile equal protection and the holding in \textit{Hardwick}, which federal jurists have used to deny homosexuals heightened scrutiny.\textsuperscript{50} Thus, homosexual rights proponents must uncouple equal protection claims for suspectness or semi-suspectness from the due process jurisprudence of \textit{Hardwick}.\textsuperscript{51}

\textit{Id.} at 445-46.

\textsuperscript{46} See Miller, supra note 39, at 799-800; see also Bruce A. Ackerman, \textit{Beyond Carolene Products}, 98 HARV. L. REV. 713, 737 (1985) (stating a potential, albeit unintended, criticism of this view that "[o]ne person's 'prejudice' is, notoriously, another's 'principle'"); Laurence H. Tribe, \textit{The Puzzling Persistence of Process-Based Constitutional Theories}, 89 YALE L. J. 1063, 1073 (1980) (discussing the difficulty in distinguishing principled disapproval from prejudice).

\textsuperscript{47} See \textit{JOHN HART ELY}, \textit{DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW} 154 (1980) (stating that the law has historically and appropriately disadvantaged criminals). Thus, these authors posit that homosexual proponents cannot assert that homosexual criminal sanctions constitute prejudice without begging the question. They must first undermine the arguments against homosexuality before invoking this criterion.

\textsuperscript{48} The Court has not applied heightened scrutiny to the elderly who do fulfill most of the criteria. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312-14 (1976) (per curiam) (rejecting strict scrutiny as the proper test in upholding, on traditional rational basis grounds, a Massachusetts statute requiring retirement at age fifty for state uniformed police); Vance v. Bradley, 440 U.S. 93, 108-09 (1979) (finding the Foreign Service's mandatory retirement age of sixty is rationally related to the legislative objective). The Court also has not given heightened scrutiny to the mentally handicapped who also fulfill most of the criteria. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442-47 (1985) (holding mental retardation is not a quasi-suspect classification).

\textsuperscript{49} See, e.g., \textit{ARK. CODE ANN.} §§ 14-122 (Michie 2001); \textit{TEX. PENAL CODE ANN.} § 21.06 (Vernon 2000).

\textsuperscript{50} See High Tech Gays \textit{v.} Defense Indus. Sec. Clearance Officer, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom \textit{v.} Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989); Woodward \textit{v.} United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Padula \textit{v.} Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

\textsuperscript{51} See Pickhardt, supra note 8, at 956-60.
C. The Homosexual Right to Marry

The precedential influence of Hardwick has spurred scholars to develop alternative equal protection theories that circumvent anti-homosexual constitutional law. The right to homosexual marriage is among the most promising equal protection alternatives. Part C explores various forms of this equal protection claim, but focuses only on a federal right to marry.

Homosexual rights proponents analogize the constitutional claim of homosexuals seeking to wed with that of the interracial couple in Loving v. Virginia. Proponents' arguments assume one of two forms. The first form claims that the Supreme Court recognized the fundamental right to marry in several due process cases and that homosexuals retain the same fundamental right to marry as all other citizens. This equal protection claim putatively triggers strict scrutiny because it pertains to a fundamental right. The second form asserts that homosexual marriage does not differ from heterosexual or interracial marriages, and ceteris paribus, homosexuals retain the same right as these heterosexual or interracial couples.

The obvious strength of both claims is their circumvention of Hardwick's tolerance of anti-homosexual sodomy statutes. For example, scholars contend that Hardwick governs only unmarried homosexuals, and that married homosexuals, like their heterosexual counterparts, can exercise a right to


53. As discussed infra Part II, homosexual marriage is a state-based issue and, therefore, is insulated from many of the problems that vitiate the federal claim.

54. 388 U.S. 1, 12 (1967).

55. See Kantoz, supra note 52, at 450-51.

56. The fundamental rights arm of equal protection was first asserted in Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). The Court subjected apportionment statutes to strict scrutiny because “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” Id. at 562.

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sodomy.\(^{58}\) If the proponents succeeded in limiting the holding of \textit{Hardwick} to unmarried homosexuals, they would establish an explicit homosexual marriage right and an implicit federal right to sodomy for homosexual married couples.\(^{59}\)

These homosexual rights claims, though potent, are problematic. First, even legal scholars who are sympathetic to homosexual rights have acknowledged the authority of the state legislature to establish the legal provisions for marriage.\(^{60}\) In light of this point, the possibilities of establishing a federal right to either homosexual marriage or to wedded sodomy are dim.

Second, constitutional precedent undermines the claim that \textit{Hardwick} is limited to unmarried homosexuals. The Court analogized the sexual choices of the unmarried and the married under equal protection fourteen years prior to \textit{Hardwick};\(^{61}\) therefore, it is unlikely that the Court would coherently allow states to criminalize sodomy only for the unwed homosexual if it did not allow states to distinguish the sexual choices of the unmarried and married heterosexual. As such, \textit{Hardwick} applies to both married and single homosexuals or to neither. Until the Court rejects \textit{Hardwick}, the marital status of homosexual couples remains irrelevant.

Third, if the fundamental right to marriage is viewed as an unspecified general right that all persons possess, including homosexuals, then participants of any type of alternative lifestyle could assert the same right.\(^{62}\) In other words, the

\(^{58}\text{See Mark Strasser, Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests, 64 FORDHAM L. REV. 921, 975 (1995) ("Likewise, states can criminalize sodomy between unmarried homosexuals without implying that sodomy between married homosexuals is so precluded.").}\n
\(^{59}\text{Not all homosexual proponents seek the right to marriage. See William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. REV. 1419, 1488-95 (1993) (explicating the rationales of homosexual proponents who argue against the pursuit of a right to same-sex marriage).}\n
\(^{60}\text{Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1432 (2d ed. 1988) ("Marriage, unlike other manifestations of intimate association, is a contract controlled by the state—and like 'any other institution'—it is 'subject to the control of the legislature.'").}\n
\(^{61}\text{See Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (recognizing the right of the married and unmarried to purchase contraceptives).}\n
\(^{62}\text{Justice Scalia adumbrated the outlines of this response in Romer v. Evans, 517 U.S. 620, 648 (1996) [Scalia, J., dissenting] ("Polygamists, and those who have a polygamous 'orientation,' have been 'singled out' by these [state] provisions [that forever prohibit polygamy] for much more severe treatment than merely denial of favored status . . . ."). Justice Scalia noted that after \textit{Romer}, an argument could be}
deconstruction of marriage abrogates any normative boundaries. Homosexual advocates could steadfastly affirm that this right should be unlimited, but the federal judiciary is unlikely to jettison several federal precedents and laws in all fifty states by allowing every conceivable type of marriage. Currently, states do not recognize marriages involving bigamy, polygamy, incest, and mental incapacitation, even if these are loving, voluntary relationships.

And abrogation of traditional mores would still impose a moral judgment, as every prescription or proscription of marriage articulates a view of what ought to constitute this social institution and, therefore, dictates a normative view of the good. Thus, the jurists who opposed the right to homosexual marriage in *Baker v. Vermont* mistakenly stated that this question was entirely a legal issue rather than a moral. By rejecting a homosexual's right to marry because the concept differs from the popular definition of marriage, the jurists imposed a normative view of marriage that excludes homosexual couples. *Hardwick* exacerbates this threat to homosexual marriage because the Court asserted the right of citizens to ground laws, including those forbidding homosexual sodomy, on morality.

made that states, which have constitutionally outlawed polygamy, must now remove these provisions as unconstitutional. *Id.* (Scalia, J., dissenting).

63. *Cf.* *id.* (Scalia, J., dissenting) (citing the relevant constitutional precedents and state constitutions that proscribe polygamy).

64. *Cf.* *Reynolds v. United States*, 98 U.S. 145, 168 (1878) (upholding a federal statute proscribing bigamy); *Catalano v. Catalano*, 170 A.2d 726, 728-29 (Conn. 1961) (holding that a marriage between an uncle and his niece, which was valid in Italy, the country where it was originally recognized, contravened the public policy of Connecticut, thereby invalidating the marriage); *Johnson v. E.W.*, 658 N.Y.S.2d 780, 781 (1997) (holding that guardians could seek to annul a marriage contract entered into by incapacitated persons).

65. *See* *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999) ("The issue before the Court, moreover, does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.").

66. *Id.* at 868 ("Although it is not necessarily the only possible definition, there is no doubt that the plain and ordinary meaning of 'marriage' is the union of one man and one woman as husband and wife.").


Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale
This creates a formidable task for homosexual advocates, namely, vindicating their normative view of marriage at the expense of the status quo.

_Hardwick_ threatens conventional homosexual rights strategies based upon equal protection claims—grounded on rational review or strict scrutiny—as well as the more contemporary same-sex marriage claim.

II. THE SUBORDINATION OF HOMOSEXUAL EQUAL PROTECTION RIGHTS TO DUE PROCESS

In light of the inadequacies of standard homosexual equal protection claims, Part II examines two novel, but potent, equal protection theories. Part II.A critiques Cass Sunstein's attempt to isolate equal protection fundamental rights from due process precedents. Part II.B analyzes Ronald Dworkin's theory of equal respect.

A. Sunstein's Uncoupling of Equal Protection and Due Process

Before constitutional scholars can establish a homosexual equal protection claim, they must offer either a theory of equal protection that is immune to _Hardwick_ or a foundational argument for isolating equal protection claims from due process precedents. Part I exposed several problematic attempts to realize the former option; we now scrutinize an attempt at the latter.

The importance of _Hardwick_ for homosexual equal protection rights cannot be understated. In several important homosexual rights cases, federal jurists have subordinated a contested homosexual equal protection claim to the Supreme Court's decision in _Hardwick_. 68 Jurists who support homosexual rights

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68. See Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

If the Court [in _Hardwick_] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class
have acknowledged Hardwick's suasion.\textsuperscript{69} Therefore, to vindicate a homosexual's equal protection claim, homosexual rights proponents must isolate the claim from due process precedents.

Cass Sunstein articulates the most compelling attempt to isolate homosexual equal protection claims from due process precedents. Sunstein, in an influential argument for homosexual rights,\textsuperscript{70} distinguishes the two claims by arguing that the judiciary has interpreted the Due Process Clause, from its inception, as the conservator of traditional practices against novel departures brought by temporary majorities.\textsuperscript{71} Sunstein notes that the Court illustrated the tradition-based character of due process in Hardwick when it asserted that homosexual sodomy could be specified as a fundamental due process right if it was "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."\textsuperscript{72} Due process jurisprudence looks backward rather than forward.\textsuperscript{73}

The Equal Protection Clause, by contrast, is progressive; it self-consciously repudiates history and tradition as constitutional principles.\textsuperscript{74} Sunstein claims that the "fundamental rights" branch of equal protection prohibits states criminal.

\textit{Id.; see also} High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) ("The Supreme Court has ruled that homosexual activity is not a fundamental right protected by substantive due process and that the proper standard of review under the Fifth Amendment is rational basis review.").

\textsuperscript{69} See, e.g., Watkins v. United States Army, 847 F.2d 1329, 1357 (9th Cir. 1988) (Reinhardt, J., dissenting) ("When conduct that plays a central role in defining a group may be prohibited by the state, it cannot be asserted with any legitimacy that the group is specially protected by the Constitution."), \textit{reh'g granted en banc}, 847 F.2d 1362, (9th Cir. 1988).

\textsuperscript{70} Several authors cite Sunstein's article to justify isolating equal protection jurisprudence from due process. See Christensen, supra note 52, at 1705; Toni M. Massaro, \textit{Gay Rights, Thick and Thin}, 49 STAN. L. REV. 45, 45 & n.3 (1996); Teresa M. Bruce, \textit{Note}, \textit{Neither Liberty Nor Justice: Anti-Gay Initiatives, Political Participation, and the Rule of Law}, 5 CORNELL J.L. & PUB. POLY 431, 443 n.90 (1996).

\textsuperscript{71} Cass R. Sunstein, \textit{Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection}, 55 U. CHI. L. REV. 1161, 1163 (1988) ("From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures.").

\textsuperscript{72} \textit{Id.} at 1161 (citing \textit{Hardwick}).

\textsuperscript{73} \textit{See id.} at 1163, 1174.

\textsuperscript{74} \textit{Id.} at 1168 ("[T]he Equal Protection Clause is a self-conscious repudiation of history and tradition as defining constitutional principles.").
from classifying citizens with regard to rights unprotected by the Due Process Clause. Sunstein writes that the Court has barred states from discriminating among classes with regard to the right to marry, to procreate, and to use contraception, even if the Due Process Clause does not explicitly guarantee these rights. Thus, Sunstein concludes that Hardwick does not invalidate equal protection claims designed to protect homosexual interests.

But Sunstein’s historical interpretation of both the Due Process and Equal Protection Clause is problematic. First, other legal scholars, including many who are predisposed to granting homosexuals rights, offer discrepant interpretations of substantive due process. For example, some scholars suggest that the Due Process Clause contains an aspirational dimension that transcends tradition. Sunstein mitigates the cogency of his argument by admitting that the history of due process is ambiguous, and that tradition has not been the exclusive focus of due process jurisprudence.

A second deficiency in Sunstein’s account is that the rights he cites as equal protection fundamental rights are, or would be, considered due process rights. For example, the Court characterized both the right to marry and the right to use contraception as fundamental due process rights before certain classes mounted equal protection claims. Further, in Skinner v.

75. Id. at 1169 (citing Zablocki v. Redhail, 434 U.S. 374 (1978)).
76. Id. (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)).
77. Id. (discussing Eisenstadt v. Baird, 405 U.S. 438 (1972)).
78. Id. at 1168-69.
79. Id. at 1163.
80. See SOTIROS A. BARBER, ON WHAT THE CONSTITUTION MEANS 10 (1984); James E. Fleming, Securing Deliberative Autonomy, 48 STAN. L. REV. 1, 57 (1995) (asserting that “between Palko and [Hardwick], the Court took a flight from aspirational principles to historical practices” in determining what due process requires); Richard B. Saphire, Originalism and the Importance of Constitutional Aspirations, 24 HASTINGS CONST. L.Q. 599, 601 (1997).
81. Sunstein, supra note 71, at 1170-71.
82. Id. at 1169; see generally Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978) (finding a right to marry); Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (establishing that married and unmarried couples have a right to obtain contraceptives); Skinner v. Oklahoma, 316 U.S. 535 (1942) (identifying marriage and procreation as fundamental rights).
83. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (claiming that the rights “to marry, to establish a home and to bring up children” are central to the liberty protected by the Due Process Clause).
Oklahoma, 85 (the case that Sunstein cites to support an equal protection right to procreate), the Court acknowledged, but did not find it necessary to consider, the due process character of the underlying claim. 86 Subsequently, the Court recognized the due process right to procreate. 87 Thus, Sunstein's historical account of equal protection fundamental rights, which is crucial to his discussion, is problematic because the rights that he uses as examples were, in fact, previously recognized as due process fundamental rights. Moreover, contrary to Sunstein's proposal in the case of homosexual rights, those rights he identifies as fundamental were not rejected under due process before being upheld under equal protection. Therefore, Sunstein cannot analogize a homosexual fundamental equal protection claim to those claims relating to birth control, marriage, or procreation.

A third deficiency in Sunstein's theory is that he fails to formulate criteria that would distinguish among substantive equal protection claims. 88 If the Equal Protection Clause is progressive rather than tradition-based, then Sunstein must offer a non-tradition-bound method to distinguish those acts that merit equal protection deference. His failure to provide such a method diminishes the coherence of his argument.

Finally, Sunstein's theory is subverted by the Court's tethering of due process and equal protection in Bolling v. Sharpe, 89 which introduced the equal protection aspect of the Due Process Clause. 90 In Bolling, the Court struck down the District of

85. 316 U.S. 535 (1942).
86. Id. at 538.
87. Id. at 538.
88. Id. at 538.
89. Id. at 538.
90. Id. at 538.

It is argued that due process is lacking because, under this Act, unlike the Act upheld in Buck v. Bell, the defendant is given no opportunity to be heard on the issue as to whether he is the probable potential parent of socially undesirable offspring . . . . We pass [this] point[] without intimating an opinion on [it] . . . .

Id. (footnote & citations omitted). The Court acknowledged, however, that inflicting castration would forever deprive the individual of "a basic liberty." Id. at 541.
87. Eisenstadt, 405 U.S. at 453.
88. Even Supreme Court Justices have noted the difficulty in identifying fundamental equal protection rights. Shapiro v. Thompson, 394 U.S. 618, 662 (1969) (Harlan, J., dissenting) ("I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test.").
90. Id. at 500
Columbia's school segregation policy. In that case, the Court could not employ the Fourteenth Amendment's equal protection guarantee because it applies only to the states; instead, the majority employed the Fifth Amendment's guarantee of due process, which does govern the District of Columbia. The Court justified this substitution because these two amendments have a similar character. Sunstein neglects this important precedent in his attempt to distance equal protection from due process; thus, his theory is undermined by his narrow interpretation of equal protection. The history of constitutional jurisprudence belies Sunstein's attempt to untether equal protection from due process.

This critique of Sunstein's theory is instructive for those who endeavor to establish state-based homosexual equal protection claims. Two jurists, who disputed the rationale of the majority in the Baker v. Vermont decision, appealed to federal equal protection jurisprudence to ground same-sex rights. The majority, by contrast, relied solely on the terms in the Vermont Constitution. The latter approach is more tenable in light of the symbiotic relationship that persists between federal equal protection and due process jurisprudence—and especially given the precedent of Hardwick. State jurists who are amenable to homosexual rights must avoid implicating the federal Equal Protection Clause; instead, they must appeal to some other source to support those rights.

B. Equal Protection and Equal Respect

Another novel strategy to establish homosexual equal protection rights theorizes that the Equal Protection Clause constitutionally mandates states to treat all citizens with equal

91. Id.
92. Id. 498-99
93. See Baker v. Vermont, 744 A.2d 864, 892 (Vt. 1999) (Dooley, J., concurring) ("Because of the historical similarity, I find it useful to look to Oregon case law, and the United States Supreme Court decisions upon which it relies, in considering whether lesbians and gay men are a suspect classification under Article 7."); id. at 905 (Johnson, J., concurring in part and dissenting in part) (arguing that Vermont's common-benefits jurisprudence is coextensive with equal protection analysis under the Fourteenth Amendment).
94. Id. at 870 ("It is important to emphasize at the outset that it is the Common Benefits Clause of the Vermont Constitution we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.").
This influential concept of equality has been advanced by some of the most prominent political and legal scholars of the last three decades, including Ronald Dworkin, Charles Larmore, and John Ely. This section scrutinizes Ronald Dworkin's writings because he has articulated the most developed constitutional argument for equal respect and has applied it to homosexual rights.

Dworkin focuses his attention on equality because he denies the existence of a general right to liberty that might justify specific rights. Dworkin theorizes that the Equal Protection Clause bestows a right to treatment as an equal, which is not the right to equal distribution of a burden or benefit, but the right to be treated with the same respect as anyone else. The

95. See Thompson v. Mazo, 421 F.2d 1156, 1160 n.10 (D.C. Cir. 1970); see also Robert W. Bennett, Reflections on the Role of Motivation Under the Equal Protection Clause, 79 NW. U. L. REV. 1009, 1011 (1984) ("At the most general level, the equal protection clause is associated with a requirement that, in making governmental decisions, the decisionmaker respect equally all persons in the jurisdiction."); Ruth Colker, Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom, 77 CAL. L. REV. 1011, 1042 (1989) ("[O]ne can reasonably argue that the equal protection clause embodies the notion of equality as a right whose meaning ought to be discerned within a context of compassion, or respect.") (footnote omitted); Michael C. Harper & Ira C. Lupu, Fair Representation as Equal Protection, 98 HARV. L. REV. 1211, 1221 (1985).

96. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-78 (1978) [hereinafter DWORKIN, RGHTS].

97. CHARLES E. LARMORE, PATRERS OF MORAL COMPLEXITY 67 (1987) ("A commitment to treating others with equal respect forms the ultimate reason why in the face of disagreement we should keep the conversation going . . . .").

98. ELY, supra note 47, at 14-21, 82-87, 135-79.

99. DWORKIN, RGHTS, supra note 96, at 266-67.

100. Id. at 272-73. Dworkin reiterates his theory in Freedom's Law when he posits that the "defining aim of democracy is that collective decisions be made by political institutions whose structure, composition, and practices treat all
The gravamen of Dworkin's argument is that the equal respect encompassed by the Equal Protection Clause proscribes laws that impose a view of the good on citizens, and thereby undermines their self-respect.\textsuperscript{101}

Integral to self-respect is individual freedom or autonomy that the government can respect only by adopting a morally-neutral stance on an individual's choices.\textsuperscript{102} Hence, the state denies homosexuals equal concern and respect when it constrains their sexual liberty because the majority finds it distasteful or disapproves of homosexual culture.\textsuperscript{103} For Dworkin, only the harm principle can constrain autonomy without violating equal respect and the constitutional right to equal protection.\textsuperscript{104}

But Dworkin's theory of equal respect does not relevantly differ from the Court's recent interpretation of due process. Like Dworkin's theory, the Due Process Clause guarantees those liberties that are fundamental,\textsuperscript{105} among which includes those

\begin{footnotesize}
members of the community, as individuals, with equal concern and respect.” RONALD DWOR\textsuperscript{KIN}, FREEDOM'S LAW 17 (1995) [hereinafter DWOR\textsuperscript{KIN}, FREEDOM'S LAW].

101. RONALD DWOR\textsuperscript{KIN}, A MAT\textsuperscript{TER OF PRINCIPLE} 191 (1985) [hereinafter DWOR\textsuperscript{KIN}, PRINCIPLE] (“[E]quality supposes that political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life . . . . [T]he government does not treat [citizens] as equals if it prefers one conception to another . . . .”).

102. \textit{Id.} at 239, 205-06 (elevating self-respect to the summum bonum, and integral to self-respect is self-determination or autonomy).

In this essay I shall set out what I believe are the main principles of liberalism based on equality. This form of liberalism insists that government must treat people as equals in the following sense. It must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of his equal worth . . . no self-respecting person who believes that a particular way to live is most valuable for him can accept that this way of life is base or degrading.

\textit{Id.} (footnote ommitted).

103. DWOR\textsuperscript{KIN}, PRINCIPLE, supra note 101, at 68.

104. DWOR\textsuperscript{KIN}, RIGHTS, supra note 96, at 271-72. Dworkin entertains two other types of arguments, idealistic and utilitarian, that could theoretically limit liberty in the liberal conception of equality. However, he ultimately dismisses both of these alternatives. \textit{Id.} at 272-78.

105. See Roe v. Wade, 410 U.S. 113, 152 (1973) (recognizing that there is a right to personal privacy, in which fundamental rights are included); see also Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (establishing the right to use contraception as fundamental); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); (rejecting a state statute requiring sterilization of habitual criminals because it interfered with the fundamental right to procreate); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (listing those liberties guaranteed by the Fourteenth Amendment).
\end{footnotesize}
integral to autonomy. Due process and Dworkin's theory of equal respect safeguard autonomy by mandating state neutrality toward views of what is acceptable or good. The Court described due process autonomy in terms that resemble equal respect. Other constitutional scholars advanced variations of Dworkin's equal respect theory, cast in terms of equal citizenship or anti-caste imperatives to justify homosexual rights, but these are also reducible to due process fundamental rights.

If Dworkin's concept of equal respect as autonomy is indistinguishable from due process autonomy, then any homosexual right grounded on this principle is vulnerable to the due process precedents. Because the Court has employed privacy and autonomy synonymously, equal protection for homosexual autonomy is subverted by the Court's due process rejection of the privacy right to sodomy. Thus, the foundational theory of equal respect, like other homosexual equal protection

106. See Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) ("These matters [marriage, procreation, and family relationships], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy.").

107. Justice Stevens' opinion in Casey, predicated on the Due Process Clause, illustrates the neutrality requirement of due process. Planned Parenthood v. Casey, 505 U.S. 833, 916 (1992) (Stevens, J., concurring in part, dissenting in part) ("Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best.").

108. Id. at 920 (Stevens, J., concurring in part, dissenting in part) ("Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled.").

109. Kenneth L. Karst, Foreward: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 58 (1977) ("The focus of equal citizenship here is ... a right to take responsibility for choosing one's own future. Louis Henkin's use of the word 'autonomy' to describe the right in question is apt ... ") (footnote omitted); see also KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION 182 (1993).

110. See Note, The Constitutional Status of Sexual Orientation: Homosexuality As a Suspect Classification, 98 HARV. L. REV. 1285, 1299 (1985) ("This alternative vision [of suspectness] defines suspect classifications as those based on characteristics that are essential elements of personhood and yet focal points of discrimination.") (footnote omitted).

claims based on rational review, suspectness, or the right to marry, founders on the shoals of *Hardwick*.

**III. EQUAL PROTECTION ANALOGOUS REASONING**

A basic tenet of justice—treating like cases alike—animates both the Due Process and Equal Protection Clauses. In recognizing equal protection rights, the Court asserts that the state is treating two classes of similarly situated citizens differently. Conversely, the Court recognizes a new due process right when the claim resembles a redundant similar class of acts. Part III.A applies this distinction relevantly between classes of citizens and similar acts to homosexual equal protection claims, and Part III.B analogizes the legal position of homosexual rights proponents to those of assisted suicide.

**A. Equal Protection Homosexual Rights**

This section touches on the emotive character of homosexual relationships to underscore the burden that *Hardwick* places on substantial homosexual rights claims. Homosexual proponents often dismiss the equal protection import of *Hardwick* because they obscure the character of homosexual desiderata: what distinguishes homosexuals from heterosexuals is the *eros* for a person of the same sex. Therefore, homosexuals are not content to settle for rights that they already retain and that inhere in platonic relationships such as the freedom to live together, to share intimate thoughts, or to otherwise live as friends. The partners of nearly any male or female relationship already retain these rights.

To the contrary, the constitutional debate over homosexual rights primarily concerns sexual acts. This is the *telos* of homosexual *eros*. It is this relational dynamic of homosexual erotic love that serves as the matrix for homosexual equal protection claims both within and outside of marriage. Homosexual relationships, like heterosexual relationships, are

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113. See Hunter, *supra* note 9, at 531-32.
114. See *supra* note 1 and accompanying text (discussing the term “homosexual”). The homosexual relationships at the heart of constitutional scrutiny are not platonic; to think otherwise is, at the very least, misguided.
not wholly sexual, but encompass a vast array of interpersonal facets. Homosexual erotic love and its institutionalization in marriage, like its heterosexual analogue, aim at sexual union with another.

Some homosexual advocates obfuscate this relational dynamic when disputing anti-homosexual laws that exclude on the basis of homosexual orientation. For example, when contesting exclusionary military statutes, homosexual advocates attempt to isolate the orientation from the tendencies that emanate from it. Although pragmatic in the short-run, this approach heralds a retreat to the closet by timidly concealing the essence of homosexual love.

The reductivism of equal protection sexual autonomy claims to due process discussed in Part II adumbrates the problematic character of nearly any substantial homosexual equal protection right. The tenet underlying the Equal Protection Clause—to treat like persons alike—does not specify the criteria that distinguish similar or different classes of persons. However, the history of equal protection jurisprudence instructs that the classifications that courts have historically granted strict scrutiny cannot be reduced to the acts in dispute. For example, racial minorities, who constitute the paradigmatic class for equal protection jurisprudence, were not classified by the practices for which they sought constitutional protection, such as voting rights, desegregated educational facilities, or equitable judicial processes. Rather, racial minorities were classified by

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115. See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 293 (6th Cir. 1997) ("This court further observed that any attempted identification of homosexuals by non-behavioral attributes could have no meaning, because the law could not successfully categorize persons 'by subjective and unapparent characteristics such as innate desires, drives, and thoughts.'") (citation omitted); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573-74 (9th Cir. 1990) ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes. The behavior or conduct of such already recognized classes is irrelevant to their identification.") (citations omitted).

116. Tribe, supra note 60, at 1514 ("The words of the equal protection clause do not, by themselves, tell us as much as we might wish. The central concept of the clause, equality, requires the specification of substantive values before it has full meaning."); see also U.S. Const. amend. XIV § 1.


their race and denied rights to these constitutional practices, which other races already enjoyed.\textsuperscript{120} When African-Americans were constrained from performing the same acts as whites, they were legally distinguished not by the acts they sought to perform but by the color of their skin.\textsuperscript{121}

In contradistinction, homosexuals are classified by their eros, which seeks fulfillment with members of the same gender. The \textit{Hardwick} Court refused to invalidate state laws that criminalized the act central to this classification.\textsuperscript{122} Therefore, if homosexuals are classified by an act that the Court allows the state to criminalize, they cannot claim that they are aggrieved because they do not retain an equal protection right to this criminal act.\textsuperscript{123} It is \textit{Hardwick}, root and branch, which must be rejected before the Equal Protection Clause can be invoked.\textsuperscript{124} If the Court declines to recognize a right to homosexual sex by repudiating this due process precedent and continues to allow states to proscribe homosexual sodomy under due process, then it cannot coherently claim that states deny equal protection to homosexuals who desire to engage in this practice within or outside the confines of marriage.

\textbf{B. The Analogy Between Assisted-Suicide and Homosexual Rights}

The peril posed by \textit{Hardwick} for any substantive equal protection homosexual right is illuminated by the analogous jurisprudence of assisted suicide. Assisted suicide resembles homosexual rights in several respects. First, assisted suicide plaintiffs are classified by a particular act, namely, obtaining help to end their lives. Like homosexuals, they may share many characteristics, such as being terminally ill, attending the same

\textsuperscript{120} See Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

\textsuperscript{121} See Pickhardt, supra note 8, at 957 ("All of the Court's privacy cases, as opposed to its equality cases, have concerned rights of 'doing' as opposed to rights of 'being'.").


\textsuperscript{124} Of course, once due process is transformed, then appeals to equal protection would be unnecessary.
support groups, sharing intimate thoughts, or living in a hospice; however, what ultimately classifies them is the act they seek to practice.

Second, the equal protection jurisprudence of assisted suicide resembles that of homosexual rights claims because both recapitulate respective rationales that were rejected when asserted under the auspice of due process. A due process right to assisted suicide was initially recognized by the Ninth Circuit and predicated on the precedents of Planned Parenthood v. Casey\textsuperscript{125} and Cruzan v. Missouri Department of Health.\textsuperscript{126} From Casey, the court extracted a right to autonomy,\textsuperscript{127} which it claimed encompasses “the right to die.”\textsuperscript{128} Cruzan protects the individual’s due process right to refuse unwanted medical treatment, including life-sustaining measures.\textsuperscript{129} The Ninth Circuit Court denied any relevant distinctions between withdrawing life-sustaining therapy and administering lethal medicine,\textsuperscript{130} allowing the due process “right to die” from Casey to govern this putatively similar case.

The United States Supreme Court subsequently overturned the Ninth Circuit’s opinion by denying a due process right to assisted suicide in Washington v. Glucksberg.\textsuperscript{131} This unanimous decision was released simultaneously with the Court’s rejection of the Second Circuit’s recognition of an equal protection right to assisted suicide in Vacco v. Quill.\textsuperscript{132} Glucksberg amplifies the challenge that Hardwick presents.

The claim for the right to assisted suicide in Glucksberg rested on the due process rights to autonomy and to refuse life-sustaining therapy.\textsuperscript{133} In Vacco, the claim to assisted suicide

\begin{itemize}
\item \textsuperscript{125} 505 U.S. 833 (1992).
\item \textsuperscript{126} 497 U.S. 261, 278 (1990).
\item \textsuperscript{127} Casey, 505 U.S. at 851.
\item \textsuperscript{128} Compassion in Dying v. State of Washington, 79 F.3d 790, 816 (9th Cir. 1996) (“Casey and Cruzan provide persuasive evidence that the Constitution encompasses a due process liberty interest in controlling the time and manner of one’s death—that there is, in short, a constitutionally recognized ‘right to die.’”), rev’d sub nom, Washington v. Glucksberg, 521 U.S. 702 (1997).
\item \textsuperscript{129} See Cruzan, 497 U.S. at 277.
\item \textsuperscript{130} Compassion in Dying, 79 F.3d at 822 (“The distinctions [between acts of omission and commission] suggested by the state do not individually or collectively serve to distinguish the medical practices society currently accepts.”).
\item \textsuperscript{131} 521 U.S. 702 (1997).
\item \textsuperscript{132} 521 U.S. 793 (1997) (denying an equal protection right to assisted suicide).
\item \textsuperscript{133} Glucksberg, 521 U.S. at 703.
\end{itemize}
was premised on the equal protection right to be treated similarly to those seeking to forego life-sustaining therapy.\textsuperscript{134} The class of persons implicated in the equal protection claim—those seeking to forego therapy—is specified by the same act cited in the due process claim, the act of foregoing therapy. Therefore, once the Court rejected the due process claim, pursuing an equal protection claim became futile because it merely reformulated the due process claim in terms of the agents rather than the act in question. To wit, one can analogize assisted suicide to the refusal of treatment either in terms of the act, or in terms of the agents: the act of assisted suicide is analogous to the constitutionally recognized act of refusing treatment, or the right of those seeking assisted suicide is analogous to individuals who retain the right to refuse treatment.

In each case, citizens seek the same right to the identical act, only under different auspices. With regard to due process, the plaintiffs claim that their act is similar to the act of foregoing medical therapy. With respect to equal protection, the plaintiffs claim that they are situated similarly to those who seek to forego medical therapy. However, the claims are indistinguishable in all relevant respects; they differ only insofar as one is articulated in terms of the act, the other by the agents.

Therefore, once the Court circumscribed the \textit{Cruzan} autonomy holding in \textit{Glucksberg}, and dismissed the due process analogy between assisted suicide and letting-die, it undermined the equal protection claim by denying the analogous character of the respective agents' positions. If, for the purposes of constitutional jurisprudence, the acts are not analogous, then neither are the agents who participate in these acts. Once the Court denied a due process right to assisted suicide, it logically had to reject an equal protection claim predicated on the putatively analogous positions of the agents performing the acts.

Homosexual equal protection claims are similarly threatened by due process precedents. Homosexual proponents have resorted to two types of equal protection claims because the Court denied a due process right to homosexual sodomy. The first claim asserts the same sexual autonomy right that

\textsuperscript{134} Quill v. Vacco, 80 F.3d 716, 729 (2d Cir. 1996), \textit{rev'd}, 521 U.S. 793 (1997) (holding no valid Equal Protection difference between the so-called passive assistance and active assistance).
heterosexuals can exercise. The shortcoming of this claim is that the Court has used privacy synonymously with autonomy. Therefore, if due process autonomy does not encompass homosexual sodomy, then neither does equal protection autonomy. Recapitulating this claim in terms of agents rather than acts does not change its merits. *Hardwick* denied homosexuals the due process privacy right to sexual autonomy that heterosexuals enjoy; therefore, the agents of these respective acts are not similarly situated for constitutional purposes.

Similarly, the second type of equal protection claim, seeking the right to homosexual marriage, is also influenced by *Hardwick*. If the act of homosexual sodomy is so dissimilar to marriage and intimate heterosexual choices, and can be proscribed by the moral dictate of the state, as the Court claims, then the assertion of the suspect or semi-suspect status for the class defined by this act is untenable when the institution of homosexual marriage would automatically include homosexual *eros* and sodomy. If intimate homosexual choices are so dissimilar from those of heterosexuals under due process, and can be proscribed because of the dissimilarity, then the analogy of homosexual to heterosexual marriage is most tenuous.

The endeavor to recast homosexual rights claims in equal protection terms is nearly futile since the Court has denied the due process analogy between the act that classifies homosexuals and other constitutional intimate acts. Attempts to reformulate homosexual rights in terms of agents rather than acts cannot emancipate homosexual rights claims from the yoke of *Hardwick*.

**IV. CONCLUSION**

The reluctance of Vermont jurists in *Baker v. Vermont* to recognize a same-sex right to marry may spur scholars to appeal to the United States Constitution as a guarantor of substantial homosexual rights. Given the due process precedent of *Hardwick*, scholars will undoubtedly seek refuge in other parts of the Constitution, including the Equal Protection Clause.  

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135. See Bruce, supra note 70, at 442 (*Hardwick* forecloses the application of strict scrutiny in the substantive due process area, forcing pro-gay litigators to avoid privacy claims in challenges to anti-gay laws and to focus instead on the Equal Protection Clause.).
Neither conventional nor novel homosexual equal protection arguments can ground a federal constitutional right to homosexual sex or marriage in light of *Hardwick*. Few scholars have attempted and none have succeeded in uncoupling equal protection and due process jurisprudence. It is unlikely that scholars will ever coherently isolate *Hardwick* because homosexual equality claims seem inherently reductive to due process.

Therefore, constitutional scholars supportive of homosexual rights should examine the implications of *Hardwick* before impetuously embracing a federal equal protection strategy to achieve meaningful homosexual rights. The disappointments in Hawaii, Alaska, and Vermont should not induce homosexual rights proponents to seek refuge in the federal Equal Protection Clause as long as *Hardwick* remains good precedent. Only by subverting the rationale of *Hardwick*, or grounding the homosexual rights claim entirely on state constitutions, can proponents succeed in attaining legal recognition for substantive homosexual interests.
